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### The Abu Ghraib Story

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#### Recommended Citation

Jeffrey F. Addicott, *The Abu Ghraib Story*, 2 *Israeli Defense Forces L. Rev.* 35 (2006).

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# The Abu Ghraib Story

*Jeffrey F. Addicott\**

*The purpose of this Article is to examine the facts associated with the prison abuse at Abu Ghraib and to discuss the applicable legal and policy lessons learned as a result of the scandal. Was the prison abuse a reflection of a systemic policy—either de jure or de facto—on the part of the United States to illegally extract information from detainees or was the abuse simply isolated acts of criminal behavior on the part of a handful of soldiers amplified by an incompetent tactical chain of command at the prison facility?*

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## I. INTRODUCTION

*I failed to identify the catastrophic damage that the allegations of abuse could do to our operations in the theater, to the safety of our troops in the field, to the cause to which we are committed.*<sup>1</sup>

*Donald Rumsfeld*

There is no such thing as a “clean” war. As the War on Terror continues into its third year,<sup>2</sup> America has suffered a significant number of tactical errors in the use of its military ranging from friendly fire incidents that have killed American soldiers<sup>3</sup> and the soldiers of its coalition partners,<sup>4</sup> to the unintended deaths of non-combatants by coalition military fire power.<sup>5</sup> While these tragedies

<sup>1</sup> See Johanna McGeary, *The Scandal's Growing Stain*, TIME, May 17, 2004, at 28 (quoting Rumsfeld's remarks to Congress).

<sup>2</sup> See generally JEFFREY F. ADDICOTT, WINNING THE WAR ON TERROR: LEGAL AND POLICY LESSONS FROM THE PAST 20-32 (2003) (describing the use of the term “war on terror” and the pronouncements of the executive, legislative, and judicial bodies of government concerning the use of force as well as the nature and structure of the al-Qa’eda virtual State) [hereinafter WINNING THE WAR ON TERROR]; See, e.g., Authorization for Use of Military Force Joint Resolution, Public Law 107-40, 115 Stat. 224 (Congressional authorization for the use of force against the Taliban regime); Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub L. No. 107-243, 116 Stat. 1498 (Congressional authorization for the use of force against Iraq); Prize Cases, 67 U.S. (2 Black) 635, 17 L.Ed. 459 (1862) (rejecting a challenge to President Lincoln’s authority to blockade secessionist Southern States without a Congressional declaration of war).

<sup>3</sup> See Josh White, *Tillman Killed By ‘Friendly Fire’; Probe Cites Error Platoon Mates*, WASH. POST, May 30, 2004, at A1.

<sup>4</sup> See Jonathan Weisman, *Rumsfeld Admits Allies Were Killed*, USA TODAY, Feb. 22, 2002, at A4 (discussing deaths of Canadian forces in Afghanistan in friendly fire incidents).

<sup>5</sup> See Barry Bearak, Eric Schmitt, & Craig S. Smith, *Unknown Toll in the Fog of War: Civilian Deaths in Afghanistan*, N.Y. TIMES, Feb. 10, 2002, at A1 (discussing the issue of collateral damage to civilians and civilian property caused by U.S. air strikes in Afghanistan. The average estimate ranges between 1,000 to 1,300 civilian deaths); see also Matthew Schofield, Nancy A. Youssef, & Juan O. Tamayo, *Civilian Death Toll in Battle For Baghdad At Least 1,100*, MAY 4, 2003, PITTSBURGH POST-GAZETTE, at A11 (reporting at least 1,100 Iraqi civilian dead and 6,800 wounded as of May 2003).

have been leveraged by some to criticize the legitimacy of the American led effort to employ force against its enemies on the battlefield,<sup>6</sup> all such attempts to denigrate the war polices and credibility of the United States pale in the wake of the prisoner abuse scandal at Abu Ghraib.<sup>7</sup> Not only did the photographs of American soldiers abusing Iraqi detainees at the Abu Ghraib prison in Iraq<sup>8</sup> create a firestorm of allegations concerning illegal interrogation practices,<sup>9</sup> but it provided terrorist groups a “propaganda bonanza”<sup>10</sup> that threatened to derail fundamental legal and policy pillars upon which America conducts the War on Terror.<sup>11</sup>

Now that all of the individuals directly responsible for the actual abuse have been prosecuted, the purpose of this Article is to examine the facts associated with the prison abuse at Abu Ghraib and to discuss the applicable legal and policy lessons learned as a result of the scandal. Was the prison abuse a reflection of a systemic policy—either *de jure* or *de facto*—on the part of the United States to illegally

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<sup>6</sup> See, e.g., Philip G. Zimbardo, *Power Turns Good Soldiers into ‘Bad Apples,’* BOSTON GLOBE, May 9, 2004, at D11. “It is time for all Americans to reflect on the justification for continuing the war in Iraq that is killing, maiming, and demeaning our young men and women who have been put in harm’s way for spurious reasons.” *Id.*

<sup>7</sup> See *infra* Part III.

<sup>8</sup> For an excellent chronological overview see Dave Moniz, *Timeline*, USA TODAY, Aug. 26, 2004, at A4 [hereinafter *Timeline*].

<sup>9</sup> See, e.g., *Rumsfeld Vindication*, WALL ST. J., Aug. 26, 2004, at A12 (listing a variety of politicians and others who allege that the Pentagon was sanctioning war crimes and quoting Mr. James Schlesinger who criticized Senator Ted Kennedy for alleging that the Abu Ghraib photos demonstrated that the U.S. was using torture to get information) [hereinafter *Rumsfeld Vindication*].

<sup>10</sup> See MSNBC interview of Jeffrey Addicott by Chris Jansing, May 23, 2004 (Addicott argued that the Abu Ghraib abuse story was a propaganda bonanza for the terrorists and a political piñata for those opposed to the Bush administration’s handling of the war in Iraq).

<sup>11</sup> Michael Rubin, *Mistakes Musn’t Halt March*, BALTIMORE SUN, May 7, 2004, at A19 (quoting Iranian Foreign Minister Kamal Kharrazi, “the incident was proof that the United States had a “systematic plan to torture Iraqis, to kill them, to rape them”); David S. Cloud & Farnaz Fassihi, *Red Cross Told Powell of Abuse Of Iraqi Prisoners in January*, WALL ST. J., May 11, 2004, at A2 (stating Mr. Jakob Kellenberger, president of the International Committee of the Red Cross (ICRC) warned about “systematic and excessive” abuses of Iraqi prisoners by U.S. guards long before the Abu Ghraib story broke).

extract information from detainees or was the abuse simply isolated acts of criminal behavior on the part of a handful of soldiers amplified by an incompetent tactical chain of command at the prison facility?

## **II. THE IRAQ WAR AND THE STATUS OF THE DETAINEES**

*We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well.*<sup>12</sup>

Robert Jackson, Chief US Prosecutor at Nuremberg

The Iraqi War<sup>13</sup> began on March 19, 2003,<sup>14</sup> with a coordinated air attack by coalition forces against Iraqi military targets in Baghdad. Forming a “coalition of the willing” made up of like minded democracies,<sup>15</sup> President Bush acted under his Article II authority as the Commander in Chief<sup>16</sup> and a Congressional use of force resolution passed by an unprecedented majority of both houses of the Congress.<sup>17</sup>

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<sup>12</sup> See Thomas B. Wilner, *Law-Free Zone*, WALL ST. J., May 13, 2004, at A12 (recognizing that even the most notorious of war criminals are entitled to due process of law).

<sup>13</sup> The campaign is also known as “Operation Iraqi Freedom” see Rebecca Blumenstein & Matthew Rose, *Name That Op: How U.S. Coins Phrases of War*, WALL ST. J., March 24, 2003, at B1.

<sup>14</sup> *Seeds of the Showdown*, THE STAR-LEDGER (Newark, NJ), April 20, 2004, at 3.

<sup>15</sup> For an up to date list of coalition partners, available at <http://www.whitehouse.gov/infocus/iraq/news/20030327-10.html> (released 27-3-03) (last visited May 22, 2006) (declaring 49 member nations are publicly committed to the coalition). See Donald H. Rumsfeld, *Core Principles for a Free Iraq*, WALL ST. J., May 27, 2004, at A14 (stating as of May 2004, 39 nations have offered stabilization forces or other needed assistance with Operation Iraqi Freedom).

<sup>16</sup> U.S. Constitution Article II, § 2, cl. 1. Authority derived from Article II of the Constitution provides that the President “shall be the Commander in Chief of the Army and Navy of the United States.”

<sup>17</sup> Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub L. No. 107-243, 116 Stat. 1498. Congress specifically found that Iraq supported international terrorist groups and was in development of weapons of mass destruction.

Although the war occurred without specific approval<sup>18</sup> for the “use of force”<sup>19</sup> from the United Nations Security Council,<sup>20</sup> the Security Council did pass Resolution 1441<sup>21</sup> just prior to the Iraqi War which warned Saddam Hussein’s regime of “serious consequences”<sup>22</sup> if Iraq failed to comply with full inspections by United Nations personnel regarding the regime’s suspected possession of illegal biological and chemical weapons in violation of U.N. Security Council Resolution 687.<sup>23</sup>

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Whereas the United States is determined to prosecute the *war on terrorism* and Iraq’s ongoing *support for international terrorist groups* combined with its *development of weapons of mass destruction* in direct violation of its obligations under the 1991 cease-fire and other United Nations Security Council resolutions make clear that it is in the national security interests of the United States and in furtherance of the *war on terrorism* ... (emphasis added J.A.). *Id.*

<sup>18</sup> Peter S. Canellos, & Anne E. Kornblut, *Law Specialists Heartened By US Move to Justify Force*, BOSTON GLOBE, March, 19, 2003, at A17.

<sup>19</sup> The last time that the employment of armed force was specifically authorized by the Security Council was to expel Saddam Hussein from Kuwait in the 1991 Gulf War; see S.C. Res. 678, U.N. SCOR, 45<sup>th</sup> Sess., 2963d mtg., U.N. Doc. S/RES/678 (1990). Resolution 678 reads in relevant part:

The Security Council ...

2. Authorizes member states cooperating with the government of Kuwait, unless Iraq on or before January 15, 1991 fully implements ... the foregoing Resolutions, to use all necessary means to uphold and implement the Security Council Resolution 660 and all subsequent relevant Resolutions and to restore international peace and security in the area ....

<sup>20</sup> See JOHN NORTON MOORE, SOLVING THE WAR PUZZLE 76-78 (2005) (arguing that the actions of the United States were justified as self defense under Article 51 of the U.N. Charter because the thousands of hostile actions by Saddam Hussein against coalition aircraft patrolling the no-fly zones established by the U.N. Security Council following the 1991 Gulf War served as the “functional equivalent of an ongoing war”).

<sup>21</sup> S.C. Res. 1441, U.N. SCOR, 57<sup>th</sup> Sess., 4644<sup>th</sup> mtg., U.N. Doc. S/RES/1441 (2002).

<sup>22</sup> *Id.*

<sup>23</sup> S.C. Res. 867, U.N. SCOR, 46<sup>th</sup> Sess., 2981<sup>st</sup> mtg., U.N. Doc. S/RES/867 (1991).

In three months the Iraqi military was defeated *in toto*. Interestingly although the U.N. did not pass a use of force resolution, the United Nations Security Council voted unanonomously (14-0) in May of 2003 to grant the United States and the United Kingdom effective legal control over all aspects of the Iraqi economy and political process pending the creation of an internationally recognized interim government.<sup>24</sup> Similarly, in June 2004, the Security Council again voted unanimously (14-0) to fully recognize the legitimacy of new interim Iraqi government which took power on June 28, 2004.<sup>25</sup>

While the end to major combat operations was declared by President Bush on May 1, 2003,<sup>26</sup> a new and deadly chapter in the Iraqi War quickly took hold—coalition forces and Iraqi civilians were now targeted for murder by various groups of guerrilla fighters, common criminals, and terrorists.<sup>27</sup> Even the capture of the dictator, Saddam Hussein<sup>28</sup> on December 15, 2003<sup>29</sup> did not stem the growing volume of terrorist attacks.

The continued fighting and terrorist attacks in Iraq required the United States to alter its occupation/exit strategy. Instead of reducing the number of troops on the ground in Iraq as was hoped for in the occupation phase of the campaign, the United States was obliged to keep about 150,000 military personnel and perhaps as many as 100,000 civilian contractors in Iraqi (as of 2006, these numbers remain fairly accurate). Clearly, the United States had underestimated the

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<sup>24</sup> S.C. Res. 1483, U.N. SCOR, 58<sup>th</sup> Sess., 4761<sup>st</sup> mtg., U.N. Doc. S/RES/1483 (2003).

<sup>25</sup> S.C. Res. 1546, U.N. SCOR, 59<sup>th</sup> Sess., 4987<sup>th</sup> mtg., U.N. Doc. S/RES/1546 (2004).

<sup>26</sup> Dana Milbank & Bradley Graham, *Bush Revises Views On 'Combat' in Iraq; 'Major Operations' Over, President Says*, WASH POST, Aug. 19, 2003, at A15.

<sup>27</sup> See WINNING THE WAR ON TERROR, *supra* note 2, at 4 (arguing that the term terrorist has no universal meaning but should be viewed as the use of illegal violence against civilian targets to instill a climate of fear).

<sup>28</sup> See MOORE, *supra* note 20, at 73 (arguing that Saddam Hussein's regime was a brutal totalitarian regime with an undisputed record of wholesale violations of human rights to include the murder of his own people and the instigation of aggression against other nations to include Iran, Kuwait, Saudi Arabia, Israel, Britain, and the United States).

<sup>29</sup> David R. Guarino, *Saddam Captured; US Finds Ace in Hole*, BOSTON HERALD, Dec. 15, 2003, at 2.

presence of foreign and host nation terrorists, Iraqi Republican guard fighters, “and on down the list.”<sup>30</sup> In turn, because of the associated strain on its active duty military forces, the United States was forced to utilize a large number of its military reserve personnel to maintain proper troop strength.

The rising intensity of the insurgency in mid 2003 also mandated that the large number of detainees that were being apprehended had to be categorized and housed. Accordingly, the United States grouped the detainees into one of three categories: (1) Iraqi soldiers who qualified as prisoners of war (POW) under the Geneva Conventions;<sup>31</sup> (2) those suspected of having links to a variety of terrorist groups (to include Saddam loyalists and radical Islamic fundamentalists), called “security detainees;”<sup>32</sup> and (3) common criminals.

Those in the first category were mostly captured in the wake of the major combat phase of the Iraqi War and were quickly processed and

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<sup>30</sup> See Patrick J. McDonnell, *500 Iraqi Detainees to be Freed; Coalition Will Release Nonviolent Prisoners Not Considered Threats. Bounties will be Offered for Information on Key Guerrilla Suspects*, LA TIMES, Jan, 7, 2004, at A4 (reporting despite capture of Saddam Hussein attacks against coalition forces in Iraq have remained steady).

<sup>31</sup> The current corpus of the law of war consists of all of those laws, by treaty and customary principles that are applicable to warfare. The 1949 Geneva Conventions serve as the primary source for the law of war and cover four categories. All four of the Geneva Conventions come into effect in the event of an international armed conflict regardless of how that conflict is characterized by domestic law: (I) Geneva Convention of August 12, 1949, for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; (II) Geneva Convention of August 12, 1949 for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; (III) Geneva Convention of August 12, 1949, Relative to the Treatment of Prisoners of War 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; and (IV) Geneva Convention of August 12, 1949, Relative to the Protections of Civilian Persons in Time of War, 6 U.S.T. 3316, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

<sup>32</sup> Ian Fisher, *Six Claim They're Americans*, SAN ANTONIO EXPRESS NEWS, Sept. 17, 2003, at A5 (indicating that as of September 2003 that many as 4,400 people are being held as “security detainees”); *but see* John Hendren, *Pentagon Labels Hussein a POW, Conferring Him Special Rights*, L.A. TIMES, Jan. 10, 2003, at A1 (pointing out that Saddam Hussein was captured on December 13, 2003, but was not designated as a prisoner of war until January 9, 2004).



released back into Iraqi society within a few months.<sup>33</sup> While most of the prisoners were treated in accordance with the protections of the Geneva Conventions,<sup>34</sup> the U.S. military reported numerous incidents of physical abuse by American guards.<sup>35</sup> The most common type of abuse seemed to occur at or near the point of capture and included physical assaults and petty larceny.<sup>36</sup> In general terms, however, the vast majority of POWs were treated in accordance with international law protections. Most importantly, as prisoners of war these particular class of detainees were not required to give any further information upon additional questioning by American forces.<sup>37</sup> To ensure that all parties to the conflict understood this fact, Article 17 of the Geneva Conventions<sup>38</sup> provides the following:

No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be *threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind* (emphasis added J.A.).<sup>39</sup>

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<sup>33</sup> John Hendren, *After The War/Reestablishing Order: Sorting Iraqi POWs U.S. Says it Plans to Hold Some of the 7,000 Remaining Prisoners for Many Months*, LOS ANGELES TIMES, April 19, 2003 at A6 (reporting 887 Iraqi POW's were released by mid April 2003, almost a month from the March 19<sup>th</sup> initiation of Operation Iraqi Freedom ).

<sup>34</sup> The basic goal of the law of war is to limit the impact of the inevitable evils of war by: "(1) protecting both combatants and noncombatants from unnecessary suffering; (2) safeguarding certain fundamental human rights of persons who fall into the hands of the enemy, particularly prisoners of war, the wounded and sick, and civilians; and (3) facilitating the restoration of peace." See FM 27-10, *infra* note 164, at para. 2.

<sup>35</sup> See Jane McHugh, *Disgraced and Out*, ARMY TIMES, Jan. 19, 2004, at 1, 14 (describing the judicial punishment of four military police officers of the 320th Military Police Battalion for abusing detainees at Camp Bucca in southern Iraq). *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* ("Every prisoner of war, when questioned on the subject, is bound to give only his ....").

<sup>38</sup> Geneva Convention of August 12, 1949, Relative to the Treatment of Prisoners of War, *supra* note 31.

<sup>39</sup> *Id.*

Those in the second category were held for indefinite periods of time pending interrogation and eventual transfer to the nascent Iraqi judicial system. The reason that these security detainees were not given the protections of the Third Geneva Convention is because they failed to qualify as lawful enemy combatants.<sup>40</sup> In short, prisoner of war status is conferred only on those persons who are “[m]embers of armed forces of a Party to the conflict”<sup>41</sup> or members of militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party ... provided that such ... fulfill[s]”<sup>42</sup> four specific conditions:

- i) That of being commanded by a person responsible for his subordinates;
- ii) That of having a fixed distinctive sign recognizable at a distance;
- iii) That of carrying arms openly; and
- iv) That of conducting their operations in accordance with the laws and customs of war.<sup>43</sup>

Accordingly, unless a detainee in the post major combat phase of the Iraqi War met these requirements he was not entitled to the status of prisoner of war but was rather a security detainee. At most such an individual would be protected only by the Fourth Geneva Convention covering civilians held during the occupation<sup>44</sup> and the humanitarian protections provided by common Article 3 of the Geneva

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<sup>40</sup> The Bush administration early on determined that al-Qa’eda and Taliban fighters were not covered by the Geneva Conventions. The al-Qa’eda are not covered because they were not combatants on behalf of a State that is a party to the Geneva Conventions and the Taliban are not covered because they did not wear uniforms that distinguished them from the civilian population. See *Winning the War on Terror*, *supra* note 2, at 62-64.

<sup>41</sup> Geneva Convention of August 12, 1949, Relative to the Treatment of Prisoners of War, *supra* note 31, at Article 4 A.

<sup>42</sup> *Id.* at Article 4 A 2.

<sup>43</sup> *Id.*

<sup>44</sup> Geneva Convention of August 12, 1949, Relative to the Protections of Civilian Persons in Time of War, *supra* note 31.

Conventions.<sup>45</sup> Common Article 3 protects all unlawful combatants taken captive from “(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment ....”<sup>46</sup> Essentially, the detainee must be treated humanely, but can be questioned to gain information.

Those in the last category consisted of common felons who were held until such time as the reformed Iraqi judicial system could accommodate them. Although determinations were often hard to make between a security detainee and a common criminal, the Bush administration repeatedly made it clear that all detainees were to be treated in accordance with the humanitarian concerns set out in the Geneva Conventions.<sup>47</sup> Accordingly, all detention facilities received regular visits by the International Committee of the Red Cross (Red Cross).<sup>48</sup> In fact, the Red Cross served a valuable function in Iraq by alerting the United States to a number of abuse allegations.<sup>49</sup> The Red Cross had even provided U.S. officials with a report in November 2003 complaining of abusive practices at Abu Ghraib, to include forcing prisoners to wear women’s underwear and making prisoners disrobe.<sup>50</sup>

The establishment of detention facilities to house the detainees was aggravated by the sheer number of detainees. This required the coalition to utilize prison structures that had been used in the Saddam era to include the infamous prison at Abu Ghraib, located about 20 miles west of Baghdad.<sup>51</sup> Abu Ghraib was the largest U.S. run

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<sup>45</sup> Geneva Conventions for the Protection of Victims of Armed Conflict, 75 U.N.T.S. 31, 85, 135, 287, Common Article 3, entered into force Oct. 21, 1950.

<sup>46</sup> *Id.*

<sup>47</sup> WINNING WAR ON TERROR, *supra* note 2, at 63.

<sup>48</sup> Rajiv Chandrasekaran, *Hussein Gets Two Visitors from Red Cross*, Feb 22, 2004, SOUTH FLORIDA SUN- SENTINEL, at A1 (reporting Red Cross workers met with more than 10,000 people in U.S. custody in Iraq between March and December 2003).

<sup>49</sup> *See, e.g.*, Farnaz Fassihi & Steve Stecklow, *Behind Bars: Finding U.S. Abuse in Iraq Left Red Cross Team in A Quandary*, WALL ST. J., May 21, 2004 at A1.

<sup>50</sup> Greg Jaffe & David S. Cloud, *Officials in Iraq Knew Last Fall of Prison Abuse*, WALL ST. J., May 19, 2004 at A1 (describing the Red Cross report of improper conduct at Abu Ghraib and the military’s reluctance to response).

<sup>51</sup> *See, e.g.*, note 48 and accompanying text.

detention facility and, at a high point in the tempo of operations, housed up to 7,000 detainees in October 2003.<sup>52</sup> It is a vast complex of six separate compounds on a 280 acre site circled by over 2 miles of fences and 24 guard towers.<sup>53</sup> The Red Cross reported that they made regularly scheduled visits to a total of 14 U.S. run facilities<sup>54</sup> to include the infamous Tier 1 (cellblock 1a), “a darkened, two-story isolation wing used for interrogations”<sup>55</sup> and the cite of the prisoner abuse, at Abu Ghraib. During the visit to Tier 1 at Abu Ghraib, they reported that they did not notice anything “as bad as the abuses portrayed in the ... photos.”<sup>56</sup> About thirty-five people were held in Tier 1 during the Red Cross visit.<sup>57</sup>

### **III. The Abuses at Abu Ghraib**

*I want to tell the people of the Middle East that the practices that took place in that prison are abhorrent. And they don't represent America. They represent the actions of a few people.*<sup>58</sup>

George W. Bush

The public was first shown the infamous photographs taken inside of the U.S. military run prison at Abu Ghraib in a CBS show called *60 Minutes II* aired on April 28, 2004.<sup>59</sup> The widely circulated photos showed a handful of U.S. military police soldiers engaged in a variety of abusive and sexually sadistic acts against mostly blindfolded Iraqi detainees. Among other things, the photos showed naked prisoners stacked in pyramids, connected by wires, on a dog leash, and

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<sup>52</sup> Schlesinger Report, *infra* note 78, at 11.

<sup>53</sup> See Donna Leinwand, *Chaotic Prison Always on the Brink*, USA TODAY, Aug. 26, 2004, at A4.

<sup>54</sup> *But see* Schlesinger Report, *infra* note 78, at 11 (listing approximately 17 sites in Iraq).

<sup>55</sup> Fassihi & Stecklow, *supra* note 49.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> President George W. Bush address to Arab TV originally aired May 5, 2004.

<sup>59</sup> See Timeline, *supra* note 8.

threatened by dogs.<sup>60</sup> In addition, a handful of U.S. military police charged in the abuse scandal had forced naked prisoners to simulate sex acts.<sup>61</sup>

The chronology of how the Abu Ghraib abuse story was revealed began on January 13, 2004, when Army Specialist Joseph Darby, a military policeman at Abu Ghraib, gave a computer disc containing the abuse photos to a military investigator.<sup>62</sup> On January 14, 2004, the Army immediately initiated a criminal investigation and the United States Central Command (the four-star combatant command located in Florida) informed the media in a press release on January 16, 2004, that it was investigating detainee abuse at an unspecified U.S. prison in Iraq.<sup>63</sup> On February 23, 2004, the military informed the U.S. press that 17 Army personnel had been suspended of duty pending further criminal investigations about the detainee abuse.<sup>64</sup> Then, on March 20, 2004, the military reported to the media that it had charged six soldiers with detainee abuse to include criminal charges of assault, cruelty, indecent acts, and mistreatment.<sup>65</sup> Interestingly, however, the press did not fully respond to the growing story as the mere fact that soldiers were going to be punished for misconduct did not constitute news that was out of the ordinary—the military regularly punishes soldiers who violate the law. In fact, the media only became energized on April 28, 2004, when *60 Minutes II* aired the photos.<sup>66</sup>

Pursuant to evidence of criminal misconduct contained in a U.S. Army Criminal Investigation Division (CID) Report,<sup>67</sup> nine enlisted reserve soldiers, all from the 372<sup>nd</sup> Military Police Company, 320<sup>th</sup> Military Police Battalion, 800<sup>th</sup> Military Police Brigade from

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<sup>60</sup> *Id.*

<sup>61</sup> See Nadia Abou El-Magd, *Photos of Naked Iraqi Prisoners Outrage Arabs; Bush Condemns the Conduct, Which is Expected to Fuel Anti-American Sentiment in the Mideast. Six U.S. Soldiers to Face Charges*, LA TIMES, May 2, 2004, at A8; Kathy Kiely & William M. Welch, *Abu Ghraib Photos Cause Gasps in Congress*, USA TODAY, May 13, 2004, at A4 (describing the disgust from members of Congress who viewed other photographs from the Abu Ghraib prison scandal).

<sup>62</sup> See Timeline, *supra* note 8.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Schlesinger Report, *infra* note 78, at 13.

Cresaptown, Maryland, were charged with an assortment of violations of provisions of the Uniformed Code of Military Justice.<sup>68</sup> The central figure in the scandal was reservist Private First Class (PFC) Lynndie England,<sup>69</sup> who is known for poses in which “she pointed at the genitals of a naked detainee while a cigarette dangled from her lips”<sup>70</sup> and “holding a [dog] leash around a naked prisoner’s neck.”<sup>71</sup> By September 2005 all nine had been convicted (seven of the accused pled guilty) and sentenced by courts martial. Specialist Charles Graner, the father of England’s baby, received the harshest sentence, ten years confinement. Others included, Staff Sergeant Ivan Frederick (sentenced to eight years), Sergeant Javal Davis, Specialist Jeremy Sivits, Specialist Sabrina Harman, and Specialist Megan Ambuhl.<sup>72</sup> All of those charged were reservists and all worked the night shift at Tier 1 in Abu Ghraib, where the abuses took place in the last months of 2003.<sup>73</sup>

The particulars relating to the Abu Ghraib abuse story are now well settled thanks to the CID’s criminal investigation and a number of

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<sup>68</sup> See Mike Williams, *GI Given Maximum Sentence MP Gets One Year in Prison for Role in Iraqi Prison Abuse*, THE ATLANTA JOURNAL, May 20, 2004, at A1 (reporting the first trial held was that of PFC Sivits who plead guilty and sentenced to one year in confinement and a dishonorable discharge from the Army); *Abuse Plea Is Guilty; Soldier From Virginia Convicted Of Failing To Prevent Mistreatment*, RICHMOND TIMES-DISPATCH, Nov. 3, 2004, at A12 (reporting Staff Sgt. Ivan L. “Chip” Frederick II pleaded guilty to eight counts and was sentenced to eight years in prison on October 21, 2004, Spc. Megan Ambuhl pleaded guilty and was demoted and docked a half-month’s pay on November 2, 2004, and proceedings have not been scheduled for the four remaining soldiers charged in the incident).

<sup>69</sup> Laura Parker, *Ex-comrade: England Tormented Iraqis*, USA TODAY August 31, 2004, at A13.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> See generally Dave Moniz & Donna Leinwand, *Report: Poor Planning Set Context for Abuse*, USA TODAY, August 25, 2004, at 8a (discussing the findings of the Schlesinger Report released on August 24, 2004).

<sup>73</sup> See Sig Christenson, *Trial Looms for “Poster Child” of the Abu Ghraib Prison Scandal*, SAN ANTONIO EXPRESS NEWS, September 15, 2005, at 5a (discussing the trial of England).

collateral administrative investigations.<sup>74</sup> In chronological order they are: (1) the April 2004 Taguba Report,<sup>75</sup> prepared by Major General Antonio Taguba; (2) the July 2004 Army Inspector General Report,<sup>76</sup> prepared under Lieutenant General Paul Mikolashek; (3) the August 2004 Fay Report,<sup>77</sup> prepared by Major General George Fay; and (4) the August 2004 Schlesinger Report,<sup>78</sup> headed by the former Secretary of Defense in the Nixon administration, James Schlesinger. In addition, there are four other related examinations that have yet to be completed as of this writing. They include: (1) Vice Admiral Albert Church, Navy Inspector General, looking into interrogation and detention rules in Iraq, Afghanistan and elsewhere; (2) Secretary of Defense Donald Rumsfeld, looking into all prisoner operations and interrogation procedures; (3) CID investigation, looking into prisoner deaths in Iraq and Afghanistan; and (4) Lieutenant General James Helmly, Chief of the Army Reserve, looking into Army Reserve training procedures with special attention to military police and military intelligence.<sup>79</sup>

The overriding question regarding the prisoner abuse echoes the thoughts of Senator Lindsey Graham (R-S.C.), a member of the Armed Services Committee: “How could we let this prison melt down and become the worst excuse for a military organization I’ve seen in my life?”<sup>80</sup> To date, none of the Reports have found that there was an

<sup>74</sup> *But see* Abu Ghraib Whitewash, HERALD INT. TRIBUNE, July 27, 2004, at 6 (arguing that the military investigations are whitewashes and that a congressional inquiry is needed to learn why the abuse occurred).

<sup>75</sup> Article 15-6 Investigation of the 800<sup>th</sup> Military Police Brigade, May 2, 2004 [hereinafter Taguba Report].

<sup>76</sup> Department of the Army Inspector General Detainee Operations Inspection, July 21, 2004 [hereinafter Army IG Report].

<sup>77</sup> Executive Summary of Intelligence Activities at Abu Ghraib & Article 15-6 Investigation of the Abu Ghraib Prison and 205<sup>th</sup> Military Intelligence Brigade, August 25, 2004 [hereinafter Fay Report].

<sup>78</sup> Final Report of the Independent Panel to Review DoD Detention Operations, Aug. 24, 2004 [hereinafter Schlesinger Report].

<sup>79</sup> *See generally* Dave Moniz & Donna Leinwand, *Report: Poor Planning Set Context for Abuse*, USA TODAY August 25, 2004 at A8.

<sup>80</sup> Mark Mazzetti, Julian E. Barnes, Edward T. Pound, David E. Kaplan & Linda Robinson, *Inside the Iraq Prison Scandal*, US NEWS & WORLD REPORT, May 24, 2004, at 27.

official policy—either written or oral—to torture or abuse prisoners.<sup>81</sup> According to the Schlesinger Report, the most far reaching investigation to date and the one which the *Wall Street Journal* deemed the “definitive assessment of what went wrong,”<sup>82</sup> “no approved procedures called for or allowed the kinds of abuse that in fact occurred.”<sup>83</sup> In fact, the Schlesinger Report found: “There is no evidence of a policy of abuse promulgated by senior officials or military authorities.”<sup>84</sup> In addition, none of the Reports cite any direct abuse of prisoners by officers or by superiors ordering subordinates to commit the abuses.<sup>85</sup> In short, the Schlesinger Report concurs with all the Reports to date in finding that the individuals that conducted the sadistic abuse are personally responsible for their acts.<sup>86</sup>

Nevertheless, taking a broader examination of what happened at Abu Ghraib, the Schlesinger Report did find fault with the senior levels of command; there were “fundamental failures throughout all levels of command, from the soldiers on the ground to [the United States] Central Command and to the Pentagon”<sup>87</sup> that set the stage for the abuses.

The Schlesinger Report agreed with the calls for disciplinary action in the Fay Report for a number of officers in the immediate tactical chain of command who knew, or should have known, about

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<sup>81</sup> See, e.g., Greg Jaffe & David S. Cloud, *U.S. Takes Criticism for Handling of Prisoners*, WALL ST. J., Aug. 26, 2004, at A3 (finding that even the Fay Report, which called for possible disciplinary action for poor leadership at the prison by Colonel Thomas Pappas, did not hold that Pappas was directly involved with the abuse).

<sup>82</sup> Rumsfeld Vindication, *supra* note 9.

<sup>83</sup> See Schlesinger Report, *supra* note 78, at 5.

<sup>84</sup> *Id.*

<sup>85</sup> See, e.g., Jaffe & Cloud, *supra* note 81; Editorial, *Responsibility Runs High at Abu Ghraib*, SAN ANTONIO EXPRESS-NEW, Aug. 30, 2004, at B4 (arguing that a judgment on the political leadership will be heard at the presidential election on November 2, 2004).

<sup>86</sup> Rumsfeld Vindication, *supra* note 9.

<sup>87</sup> See Dave Moniz & Donna Leinwand, *Report: Poor Planning Set Context for Abuse*, USA TODAY, August 25, 2004, at A8 (quoting Tillie Fowler, a member of the panel).



the abuses at Abu Ghraib.<sup>88</sup> “The commanders of both brigades—800<sup>th</sup> Military Police Brigade Commander Janis Karpinski and Military Intelligence Brigade Commander Thomas Pappas—either knew, or should have known, abuses were taking place and taken measures to prevent them.”<sup>89</sup> Certainly, however, this would include not only Brigadier General Janis Karpinski and Colonel Thomas Pappas, but those subordinate commanders and on down the chain of command to the battalion, company and platoon level.<sup>90</sup> The chaotic environment at the prison existed in large part due to the dereliction of tactical commanders on the ground at Abu Ghraib.<sup>91</sup>

The Schlesinger Report and all other investigations find that the culpability of commanders rests at the tactical level. The Schlesinger Report found “no evidence that organizations above 800<sup>th</sup> MP Brigade—or the 205 MI Brigade—level were directly involved in the incidents at Abu Ghraib.”<sup>92</sup>

While all the Reports talked about a number of factors that contributed to an atmosphere that allowed the abuses at Abu Ghraib to occur, the Schlesinger Report did the best job at providing a clear summation.<sup>93</sup> These factors included:

- i. A lack of planning for detainee operations—from the Pentagon to the commanders on the ground in Iraq—and an inability to react to the marked spike in the insurgency that occurred in the summer of 2003.<sup>94</sup>

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<sup>88</sup> Schlesinger Report *supra* note 78, at 43, 15. “The Panel expects disciplinary action may be forthcoming.” *Id.*, at 43. “The Panel anticipates that the Chain of Command will take additional disciplinary action as a result of the referrals of the Jones/Fay investigation.” *Id.*, at 15.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> See, e.g., Laura Parker, *Chaotic Picture of Abu Ghraib Emerges*, USA TODAY, August 9, 2004, at A6 (describing the chaotic conditions at Abu Ghraib).

<sup>92</sup> Schlesinger Report, *supra* note 78, at 43.

<sup>93</sup> See, e.g., Donna Leinwand, *Chaotic Prison Always on the Brink*, USA TODAY, August 26, 2004, at A4 (describing conditions at the site as going from one logistical crisis to another).

<sup>94</sup> Schlesinger Report *supra* note 78, at 10-11.

- ii. A confusing chain of command at Abu Ghraib where a military intelligence officer, Colonel Pappas, was placed in command of military police units.<sup>95</sup>
- iii. Lack of equipment and troops at Abu Ghraib.<sup>96</sup>
- iv. A failure of the immediate chain of command to supervise and train soldiers under their command.<sup>97</sup>

Finally, the Schlesinger Report did an excellent job of placing the problem of detainee abuse in a wider “real world” perspective. Noting that the U.S. military has handled about 50,000 detainees from all theaters of conflict since the start of combat operations in Afghanistan in 2001,<sup>98</sup> the Schlesinger Report then compared that figure with the number of reported allegations of abuse, including some deaths. With around 300 cases of abuse reported, the Schlesinger Report noted that about one-third of the allegations occurred at the “point of capture or [at a] tactical collection point.”<sup>99</sup> As of August 2004, about half of the 300 cases had been investigated with 66 substantiated cases.<sup>100</sup>

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<sup>95</sup> *Id.*, at 17. “[T]he already cited leadership problems in the 800<sup>th</sup> MP Brigade, ...were a series of tangled command relationships.” *Id.*

<sup>96</sup> *Id.*, at 11. “Abu Ghraib was seriously overcrowded, under-resourced, and under continual attack.” *Id.*

<sup>97</sup> *Id.*, at 12, 17, 45. “Although its readiness was certified by the U.S. Army Forces Command, actual deployment of the 800<sup>th</sup> Brigade to Iraq was chaotic.” *Id.* at 12. “The failure to react appropriately to the October 2003 ICRC report, following its two visits to Abu Ghraib, is indicative of the weakness of the leadership at Abu Ghraib.” *Id.*, at 17. “The Panel finds that the weak and ineffectual leadership of the Commanding General of the 800<sup>th</sup> MP Brigade and the Commanding Officer of the 205<sup>th</sup> MI Brigade allowed the abuses at Abu Ghraib.” *Id.*, at 45.

<sup>98</sup> *Id.*, at 5.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

## **IV. Interrogation Practices**

*We must and shall, consistent with applicable U.S. law, collect intelligence that allows us to protect American citizens from further terrorist attacks.*<sup>101</sup>

Alberto R. Gonzales

Since the security detainees were not entitled to prisoner of war status, American interrogators were free to conduct interrogations so long as such questioning was done under the parameters of international law. In short, this meant that American interrogators could not employ torture<sup>102</sup> or other acts of “cruel, inhuman, or degrading treatment or punishment,”<sup>103</sup> i.e., “ill-treatment” when questioning detainees. They could, however, employ other lawful interrogation tactics.<sup>104</sup>

The primary responsibility for intelligence gathering in the Iraqi War rests with the Department of Defense (DOD). DOD relies chiefly on The Defense Intelligence Agency (DIA), a DOD support agency with over 7,000 military and civilian employees stationed throughout the world.<sup>105</sup> The field manual for military interrogators is known as Army Field Manual 34-52, Intelligence Interrogation (FM 34-52).<sup>106</sup> In listing the 17 authorized interrogation methods, FM 34-52 clearly

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<sup>101</sup> Alberto R. Gonzales, *Terrorists Are Different*, USA TODAY, June 10, 2004, at A 14.

<sup>102</sup> *United Nations Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, U.N. FAOR, 39<sup>th</sup> Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984). [hereinafter Torture Convention].

<sup>103</sup> *Id.*, at Article 16.

<sup>104</sup> See Richard Willing & John Diamond, *U.S. Interrogators Face ‘Gray Areas’ With Prisoners*, USA TODAY, May 13, 2004, at A10.

<sup>105</sup> See Richard A. Serrano & Greg Miller, *Many Attacks Foiled, U.S. Says*, ORLANDO SENTINEL, Jan. 11, 2003, at A3 (addressing the nine-page affidavit filed by Vice Admiral Lowell E. Jacoby which disclosed more than 100 foiled attacks against the United States).

<sup>106</sup> DEPARTMENT OF THE ARMY FIELD MANUEL 34-52, INTELLIGENCE INTERROGATION (1992) [hereinafter FM 34-52].

prohibits the use of torture or physical stress techniques (ill-treatment) in conducting interrogations.<sup>107</sup>

The official position of the United States on the question of torture and ill-treatment has always remained constant—the United States does not engage in torture or other ill-treatment in questioning detainees.<sup>108</sup>

### *a) Torture and Ill-treatment*

The United Nations Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention) is the principle international agreement governing torture and ill-treatment.<sup>109</sup> The Torture Convention defines torture as follows:

[A]ny 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

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<sup>107</sup> Jess Bravin, *Interrogation School Tells Army Recruits How Grilling Works: 30 Techniques in 16 Weeks, Just Short of Torture; Do They Yield Much?*, WALL ST. J., April 26, 2002, at A1 (examining some of the interrogation methods taught to students, the story covered the training given to Army interrogators at the United States Army's interrogation school located in Fort Huachuca, Arizona).

Interrogators—the Pentagon renamed them “human intelligence collectors” last year—are authorized not just to lie, but to prey on a prisoner's ethnic stereotypes, sexual urges and religious prejudices, his fear for his family's safety, or his resentment of his fellows. They'll [Army interrogators] do just about anything short of torture, which officials say is not taught here, to make their prisoners spill information that could save American lives. *Id.*

<sup>108</sup> Memorandum for Commander USSOUTHCOM, Subject: Counter-Resistance Techniques, Jan. 15, 2003, signed by Secretary of Defense Donald H. Rumsfeld.

<sup>109</sup> Torture Convention, *supra* note 102.

suffering is inflicted by or at the instigation of ... a public official or other person acting in a public capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>110</sup>

Thus, a detainee claiming that he was tortured during an interrogation would have to show four things:<sup>111</sup> (1) the interrogator was an agent of a State, (2) the acts of the interrogator were intentional in nature, (3) the acts of the interrogator caused severe pain or suffering to body or mind, and (4) the acts of the interrogator were accomplished with the intent to gain information or a confession.

Article 2 expressly excludes the notion of exceptional circumstances to serve as a justification for torture.<sup>112</sup> Equally as important, Article 2 also recognizes that the defense of superior orders is not a valid justification under any circumstances: "An order from a

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<sup>110</sup> *Id.*, at Article 1.

<sup>111</sup> The United States added some minor reservations regarding specific intent and sharpening the concept of mental suffering. See U.S. Reservations, Declarations, and Understandings and Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment II.(1)(a), 136 Cong. Rec. S 17491-92 (1994).

[T]he United States understands that, in order to constitute torture, and act must be specifically intended to inflict severe or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the sense or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subject to death, or severe physical pain or suffering, or the administration or application of mind altering substances calculated to disrupt profoundly the senses or personality.

<sup>112</sup> *Id.*, at Article 2(2), "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture." *Id.*

superior officer or a public authority may not be invoked as a justification for torture.”<sup>113</sup>

If the concept of torture is clear, the concept of ill-treatment is not. Unfortunately, the Torture Convention does not define ill-treatment and provides only the most elementary sanction to the practice which obviously attempts to address all those illegal interrogation practices that fall below the threshold of torture.<sup>114</sup> Guidance for what constitutes ill-treatment can be found in a 1984 decision by the European Court of Human Rights<sup>115</sup> entitled, *Ireland v. United Kingdom*.<sup>116</sup> The *Ireland* court made factual determinations that suspected terrorists from Northern Ireland were subjected to ill-treatment and not torture under the European Convention on Human Rights.<sup>117</sup> *Ireland* held that the difference between torture and ill-treatment “derives principally from a difference in the intensity of the suffering inflicted.”<sup>118</sup> The *Ireland* Court weighed the use of the so-called “five techniques”<sup>119</sup> which were utilized by British authorities

<sup>113</sup> *Id.*, at Article 2(3).

<sup>114</sup> *Id.*, at Article 16.

<sup>115</sup> Check in the case history in the European Court of Human Rights was founded on November 1, 1998. It’s charter is to enforce the Convention for the Protection of Human Rights and Fundamental Freedoms, ratified in 1953; See European Court of Human Rights homepage, available at <http://www.echr.coe.int> (last visited May 22, 2006) [hereinafter European Convention on Human Rights].

<sup>116</sup> *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978).

<sup>117</sup> See European Convention on Human Rights, *supra* note 115.

<sup>118</sup> *Ireland v. United Kingdom*, *supra* note 116, (of the seventeen judges on the panel, thirteen held that the five techniques did not constitute torture. Sixteen of the judges held that the five techniques were “ill-treatment”).

<sup>119</sup> *Id.*

(1) Wall-standing: Forcing detainees to stand for some period of hours in a stress position described as “spreadeagled against the wall, with their fingers put high above their head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers.” *Id.*

(2) Hooding: Placing a dark hood over the head of the detainee and keeping it on for prolonged periods of time except during interrogation.

(3) Subjection to Noise: Holding detainees in rooms with continuous loud and hissing noise.

during or pending interrogation sessions and found that the practices caused intense physical pain and mental suffering<sup>120</sup> but not of the intensity and cruelty implied by torture—not severe pain.<sup>121</sup>

Another primary legal source to distinguish a lawful interrogation from one that violates international law is found in the 1999 Israeli High Court decision entitled *Public Committee Against Torture v. State of Israel (Public Committee)*.<sup>122</sup> Apart from ruling that there existed an absolute prohibition<sup>123</sup> on torture and physical abuse,<sup>124</sup> the High Court determined how otherwise reasonable interrogation practices could become illegal if taken to an extreme point of intensity.<sup>125</sup> For example, depriving the subject of sleep during a lengthy interrogation process may be appropriate, but depending on

(4) Deprivation of Sleep: Depriving detainees of sleep for prolonged periods of time.

(5) Deprivation of Food and Drink: Reducing the food and drink to suspects pending interrogations.

<sup>120</sup> *Id.*, at 79-80.

<sup>121</sup> *Id.*, at 80.

<sup>122</sup> H.C.J. 5100/94, *The Public Committee Against Torture v. State of Israel*, P.D. 53(4) 817 [hereinafter *Public Committee*]. *Also see* 38 I.L.M. 1471 (1999) for an English text of the decision. The Court consolidated the complaints of seven plaintiffs who alleged that the techniques employed by the GSS were illegal; For an excellent overview of the case *see* Melissa L. Clark, *Israel's High Court of Justice Ruling on the General Security Service Use of "Moderate Physical Pressure": An End of The Sanctioned Use of Torture?*, 11 IND. INT'L & COMP. L. REV. 145, at 164 (2000).

<sup>123</sup> *Id.*, *The Public Committee Against Torture v. The State of Israel*, at 1476.

<sup>124</sup> *Id.* at 1482-1485.

[S]haking is a prohibited investigation method. It harms the suspect's body. It violates his dignity. It is a violent method which does not form part of a legal investigation. The Shabach method ... is not encompassed by the general power to interrogate there is no inherent investigative need for seating the suspect on a chair so low and tilted forward towards the ground, in a manner that causes him real pain and suffering. These methods ... impinge upon the suspect's dignity, his bodily integrity, and his basic rights in an excessive manner. They are not to be deemed as included within the general power to conduct interrogations.

<sup>125</sup> *Id.*

the extent of sleep deprivation could also constitute ill-treatment or torture.<sup>126</sup>

Apart from being bound by international law, the United States defines torture at 18 U.S.C. § 2340 as:

[A]n act committed by a person acting under the color of the 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.<sup>127</sup>

Title 18 U.S.C. § 2340A makes it a federal offense for an American national to either commit or attempt to commit torture outside the United States.<sup>128</sup> Furthermore, the Torture Victim Protection Act of 1991 now opens United States courts to civil law damage suits by any individual “who, under actual or apparent authority, or color of law, of any foreign nation,” violates international

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<sup>126</sup> *Id.* at 1484-1485. The Court recognized that interrogation for a prolonged period of time is necessarily exhausting and an inevitable part of a normal interrogation process. Nevertheless, the Court understood that sleep deprivation could be the basis for complaint.

This [questioning the suspect for a prolonged period of time] is part of the “discomfort” inherent to an interrogation. This being the case, depriving the suspect of sleep is, in our opinion, included in the general authority of the investigator.... The above described situation is different from those in which sleep deprivation shifts from being a “side effect” inherent to the interrogation, to an end in itself. If the suspect is internationally deprived of sleep for a prolonged period of time, for the purpose of tiring him out or “breaking” him—it shall not fall within the scope of a fair and reasonable investigation.

<sup>127</sup> 18 U.S.C.A. §2340 (2003).

<sup>128</sup> 18 U.S.C.A. §2340A (2003). The statute states in part:

[W]hoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death, or imprisoned for any term of years or for life.



law regarding torture.<sup>129</sup> All American military personnel who engage in either torture or ill-treatment are subject to prosecution under applicable punitive articles set out in the military's Uniform Code of Military Justice (UCMJ).<sup>130</sup>

Contrary to well placed concern about the meaning of the so-called "torture memos" released by the Justice department's Office of Legal Council to the White House, the Bush administration has never attempted to place itself above the prohibition on torture regardless of the status of any particular detainee.<sup>131</sup> Unfortunately, the subject memorandums, titled "Application of Treaties and Law to al-Qaeda and Taliban Detainees" and "Standards of Conduct for Interrogation," attempted to take a narrow view of the absolute prohibition on torture.<sup>132</sup> As stated, there is no exception to the absolute prohibition on torture. The United States has ratified the Torture Convention and even passed a criminal statute to prohibit torture regardless of the circumstances.

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<sup>129</sup> Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 Section 2 (2003), Pub. L. 102-256, 106 Stat. 73. Section 3 of the Act defines torture as follows:

[A]ny act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind ....

<sup>130</sup> Uniform Code of Military Justice, 10 U.S.C. § 831 (1988) [hereinafter UCMJ].

<sup>131</sup> See, e.g., Jess Bravin, *Pentagon Report Set Framework for Use of Torture*, WALL ST. J., June 7, 2004, at A1 (discussing the possibility that the Pentagon was entertaining the use of torture); Christopher Cooper & Jess Bravin, *White House, Answering Critics, Releases Interrogation Records*, WALL ST. J., June 23, 2004, at A3 (discussing the release of internal documents concerning interrogation techniques).

<sup>132</sup> Ruth Wedgwood & R. James Woolsey, *Law and Torture*, WALL ST. J., June 28, 2004, at A10 (discussing the need for wise counsel to the president on the legal issues associated with interrogation and torture).

### *b) Protocol I to the Geneva Conventions*

Throughout the War on Terror, the Red Cross has regularly criticized the United States for alleged violations of international law by conducting interrogations of non-uniformed combatants and terrorists taken into custody.<sup>133</sup> The legal basis that the Red Cross asserts is Additional Protocol I to the Geneva Conventions of 12 August 1949,<sup>134</sup> which would accord prisoner of war status to these people.<sup>135</sup> The problem with this charge is that the United States has never ratified Protocol I.<sup>136</sup> On the contrary, the United States specifically rejected Protocol I for the very reason that it bestowed a legal status on non-uniformed combatants.<sup>137</sup> Thus, the idea that Protocol I is binding on the United States as a principal of “customary international law,”<sup>138</sup> is correct only in part.<sup>139</sup> The United States is

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<sup>133</sup> See Schlesinger Report, *supra* note 78, at 86. “[T]he ICRC sent a report to the State Department and the Coalition Provisional Authority in February 2003 citing lack of compliance with Protocol I.”

<sup>134</sup> Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 reprinted in 16 I.L.M. 1391 (1977). Commonly known as Protocol I, this instrument seeks to extend coverage of non-international conflicts in which “persons are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their rights to self-determination.”

<sup>135</sup> *Id.*

<sup>136</sup> See Abraham Sofaer, *Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims (Cont.)*, 82 A.J.I.L. 784 (1988).

<sup>137</sup> *Id.*

<sup>138</sup> A State may express its consent to be bound to a particular treaty in a number of fashions. Even absent consent, however, a State may be bound to a treaty under the concept of customary international law—when a standard of law has achieved widespread acceptance in the international community. The derivation of customary principles of international law comes from observing past uniformities among nations. Evidence of customary international law may be found in judicial decisions, the writings of noted jurists, and other documentary material related to the practice of States.

<sup>139</sup> See Nathan A. Canestaro, *Legal and Policy Constraints on the Conduct of Aerial Precision Warfare*, 37 VAND. J. TRANSNAT’L L. 431, 458 (2004) (Stating “Protocol I, although never ratified by the United States, contains several provisions . . . that have been generally adopted by the U.S. military as non-binding acceptable practice.”)

not bound by Protocol I in this regard and is perfectly within its legal rights to interrogate non-uniformed combatants or terrorists; these individuals are not entitled to the protections given to prisoners of war. The Red Cross is unquestionably a valuable early warning system for any democracy that wants to respect the rule of law, but its credibility is weakened each time it uses the guise of Protocol I to criticize the United States.

### *c) Stress and Duress*

One outcome of the Abu Ghraib abuse story was the June 2004 release of a “10-centimetre pile of [classified] internal memos and documents”<sup>140</sup> from senior policy makers in the Bush administration detailing the approved interrogation tactics for conducting interrogations of uncooperative detainees.<sup>141</sup> As early as 2002, the most extreme application of the supposed techniques had come to be called “stress and duress”<sup>142</sup> and prior to the June 2004 release of the memorandums, the public was left to wonder whether the techniques were lawful or actually involved torture or illegal abuse.

The reluctance to release the exact interrogation techniques centered on the fear that the release of such information would allow enemy forces to develop counter-intelligence techniques to frustrate efforts to get meaningful intelligence. Consequently, U.S. officials remained silent about the techniques, telling the public that its agents were employing the full range of robust interrogation tactics to include offering various incentives such as money, or engaging in trickery.<sup>143</sup>

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<sup>140</sup> Paul Koring, *U.S. Scrambles to Douse Fire Over Treatment of Prisoners*, GLOBE AND MAIL, June 24 2004, at A17.

<sup>141</sup> *Id.*

<sup>142</sup> See Barton Gellman & Dana Priest, *U.S. Decries Abuse But Defends Interrogations; ‘Stress and Duress’ Tactics Used On Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A1. (Stress and duress is described as an interrogational technique which include keeping prisoners standing or kneeling for hours while hooded or wearing spray-painted goggles, holding them in “awkward, painful positions” and depriving them of sleep with a 24-hour bombardment of lights).

<sup>143</sup> See Declaration of Vice Admiral Lowell E. Jacoby (USN), Director of the Defense Intelligence Agency, submitted in the matter of *Padilla v. Bush* 233 F.Supp.2d 564 (2002) [hereinafter Jacoby Declaration].

With the release of the June 2004 memorandums, it is now clear—at least on paper—that the United States did not engage in a systemic command directed interrogation regime that violates international law. In tandem with the June 2004 document release, President Bush declared: “Look, let me make very clear the position of my government and our country. We do not condone torture. I have never ordered torture. The values of this country are such that torture is not a part of our soul and being.”<sup>144</sup> A review of the memorandums show that the most severe technique that was approved by Secretary of Defense Donald Rumsfeld was the use of “mild, non-injurious physical contact—poking, grabbing, lightly shoving” against selected high-value detainees, like one Guantanamo detainee named al-Khatani.<sup>145</sup>

The memorandums show that on December 2, 2002, Rumsfeld authorized a series of interrogation techniques that could be used on detainees at Guantanamo Bay only, known as Category I, Category II, and Category III.<sup>146</sup> Category I techniques allowed for interrogators to do such things as lie to detainees about their surroundings as well as other facts and to yell at them during questioning sessions. Category II included more stress related techniques which included holding them in isolation cells for up to thirty days, taking away comfort items (toothpaste, reading materials, etc.), making the detainee shave their beards, playing on a detainee’s phobia (e.g., the use of barking dogs), and forcing a detainee to stand for four hours at a time. Category III approval was for only one technique which allowed interrogators to employ “mild, noninjurious physical contact” (grabbing or pushing).<sup>147</sup>

Six weeks later, on January 15, 2003, Rumsfeld rescinded the approval of the use of all Category II techniques and the one Category

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<sup>144</sup> Mike Allen & Susan Schmidt, *Memo on Interrogation Tactics Is Disavowed; Justice Document Had Said Torture May Be Defensible*, WASH. POST, June 23, 2004, at A1.

<sup>145</sup> Koring, *supra* note 140.

<sup>146</sup> For an excellent synopsis of the memorandums see Richard A. Serrano & Richard B. Schmitt, *Files Show Bush Team Torn Over POW Rules*, L.A. TIMES, June 23, 2004, at A1.

<sup>147</sup> *Id.*

III technique.<sup>148</sup> In doing so, Rumsfeld ordered: “In all interrogations, you should continue the humane treatment of detainees, regardless of the type of interrogation technique employed.”<sup>149</sup> In April 2003, Rumsfeld issued a new set of directives that applied only to the detainees in Guantanamo Bay, Cuba.<sup>150</sup> This memorandum sets out dozens of interrogation techniques that essentially track FM 34-52 guidelines.<sup>151</sup>

In the Iraqi campaign, the administration has consistently held the position that the Geneva Conventions will apply to the detainees. As Daniel J. Bell’Orto, the principal deputy Defense general counsel related—it is “all Geneva, all the time.”<sup>152</sup> In Iraq, the then head of U.S. forces, Lieutenant General Ricardo Sanchez, issued a one-page directive in October 2003, titled “Interrogation Rules of Engagement,” which would be applicable to non-POWs.<sup>153</sup> This directive allowed for practices, vetted by Army lawyers as lawful under the Fourth Geneva Convention and Common Article 3 that included silence, repetition of questioning, emotional love/hate techniques, and the use of fear (where the interrogator behaves in a heavy overpowering manner by yelling or throwing things).<sup>154</sup>

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<sup>148</sup> Memorandum for Commander USSOUTHCOM, *supra* note 108.

My December 2, 2002 approval of the use of all Category II techniques and one Category III technique during interrogations at Guantanamo is hereby rescinded. Should you determine that particular techniques in either of these categories are warranted in an individual case, you should forward that request to me. Such a request should include a thorough justification for the employment of those techniques and a detailed plan for the use of such techniques. *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> Memorandum for Commander USSOUTHCOM, Subject: Counter-Resistance Techniques in the War on Terrorism, Apr. 16, 2003, signed by Secretary of Defense Donald H. Rumsfeld.

<sup>151</sup> *See supra* note 106.

<sup>152</sup> Richard A. Serrano & Richard B. Schmitt, *Files Show Bush Team Torn Over POW Rules*, L.A. TIMES, June 23, 2004, at A1.

<sup>153</sup> For an excellent synopsis of the memorandum *see* Carla Anne Robbins, Greg Jaffe, & David S. Cloud, *Interrogation Rules Were Issued before Iraq Abuses*, WALL ST. J., May 13, 2004, at A1.

<sup>154</sup> *Id.*

## V. I Was Only Following Orders

*I don't know how the hell these people got into our Army.*<sup>155</sup>

Senator Ben Nighthorse Campbell

With the conviction of PFC England in September 2005, the ninth and last member of the 372<sup>nd</sup> Army Reserve Company, all those accused in the prisoner abuse cases have been punished. In the early period of the cases, however, an often heard contention by some of the defense counsels was that their clients were “only following orders”<sup>156</sup> from superiors and were therefore not criminally responsible for the individual acts of abuse. The government consistently rejected this argument, arguing instead that the behavior was the work of a “band of rogue soldiers who on their own perpetrated the abuse.”<sup>157</sup> In the end, only England and Graner plead not guilty and raised the defense of superior orders. The defense was rejected by the panel and both were convicted.

The question of “why” Abu Ghraib happened has been explored in some detail in the subsequent Reports *inter ail*. The deficiencies addressed, particularly in the Schlesinger Report, ranged from a lack of training provided to the soldiers to a lack of supervision by the chain of command.<sup>158</sup> Such deficiencies may excuse minor or technical breaches of the law, but not the types of *malum in se* sadism that was committed by the nine reservists. Echoing the Peers

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<sup>155</sup> *Id.*

<sup>156</sup> See, e.g., Farnaz Fassihi, *Top U.S. Officers Must Testify in Abuse Trial*, WALL ST. J., June 22, 2004, at A17 (defense lawyers have argued that their clients were “following daily orders from military intelligence to ‘soften up and loosen up’ the detainees”); Noelle Knox, *Higher-ups at Abu Ghraib Could Face Abuse Charges*, USA TODAY, Aug. 25, 2004, at A8 (defense attorney’s want to show that the military police were acting under orders); Dave Moniz & Dennis Cauchon, *Accused GIs Build Defense*, USA TODAY, May 13, 2004 at 1A (lawyers for two of the accused contend that their clients were ordered to take the photographs by unidentified intelligence personnel).

<sup>157</sup> Laura Parker, *Ex-comrade: England Tormented Iraqis*, USA TODAY, August 31, 2004, at A13.

<sup>158</sup> See *supra* Part III.

Commission,<sup>159</sup> which investigated the causes for the My Lai massacre in the Viet Nam War where U.S. troops murdered over 300 civilians,<sup>160</sup> the Schlesinger Report found that the actions of the seven reservists involved behavior that was “aberrant,”<sup>161</sup> and “fostered by the predilections of the noncommissioned officers in charge” on the night shift at Cell Block 1 (where most of the abuse took place).” Although the Schlesinger Report stressed also that the abuses could “have been avoided with proper training, leadership, and oversight.”<sup>162</sup> “Had the noncommissioned officers behaved more like those on the day shift, these acts, which one participant described as ‘just for the fun of it,’ would not have taken place.”<sup>163</sup> Indeed, the photographs reflect a depravity that certainly dwells independently of any of the noted deficiencies any of the Reports. In short, it is patently obvious that these reservists found themselves operating in an environment where there was little if any supervision and hence no deterrence to the overt expression of their criminal propensities.

Regardless if the crime that a soldier is accused of is classified as a “war crime”<sup>164</sup> or not, it is the policy of the United States that all soldiers are prosecuted for such crimes under the substantive provisions of the UCMJ. According to the Army’s field manual on the law of land warfare, FM 27-10, “the term ‘war crime’ is the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime.”<sup>165</sup> In addition, the acts of abuse at Abu Ghraib may even

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<sup>159</sup> WILLIAM R. PEERS, *THE MY LAI INQUIRY* (1979). The Secretary of the Army and the Chief of Staff of the Army issued a joint directive to Lieutenant General William R. Peers to explore the original Army investigations into what had occurred on March 16, 1968, in Son My Village, Quang Ngai Province, Republic of Vietnam.

<sup>160</sup> *Id.*, at 230. The Peers Commission noted that “there were some things a soldier did not have to be told were wrong—such as rounding up women and children and then mowing them down, shooting babies out of mother’s arms, and raping.” *Id.*

<sup>161</sup> Schlesinger Report *supra* note 78, at 13.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> DEPARTMENT OF ARMY, FIELD MANUAL 27-10, *THE LAW OF LAND WARFARE*, para. 499 (July 1956) [hereinafter FM 27-10].

<sup>165</sup> *Id.*

constitute “grave breaches”<sup>166</sup> of the Geneva Conventions (as opposed to “simple breaches”<sup>167</sup>) if the abuse is deemed to be an act of willful “torture or inhuman treatment”<sup>168</sup> against persons protected by the Geneva Conventions.

The hard issue is not in how to deal with those who violate the law in their individual capacities—these individuals are punished by courts martial under the UCMJ. The real difficulty is presented when a subordinate claims that they were following the orders of a superior. Does such a claim offer a valid defense?

To analyze this matter one must begin with the premise that all soldiers are expected to obey “lawful orders”<sup>169</sup> and can be punished under the UCMJ if they do not.<sup>170</sup> This is as true in peace time as in time of war, although FM 27-10<sup>171</sup> does recognize that “in conditions of war discipline,”<sup>172</sup> that soldiers cannot be expected to “weigh scrupulously the legal merits of the orders received.”<sup>173</sup> Article 92 of the UCMJ states that:

Any person subject to this chapter who—(1) violates or fails to obey any *lawful* general *order* or regulation; (2) having knowledge of any other *lawful order* issued by a member of the armed forces, which it is his duty to object, fails to obey that order; or (3) is derelict in the performance of his duties shall be punished as a court-martial may direct (emphasis added J.A.).<sup>174</sup>

The Manual for Courts-Martial (MCM) does recognize that an act performed in obedience to a lawful order is justified and serves as a

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<sup>166</sup> *Id.* at para. 502.

<sup>167</sup> *Id.* at para. 504.

<sup>168</sup> *Id.*

<sup>169</sup> MANUAL FOR COURTS-MARTIAL UNITED STATES (1998), PART II, RULES FOR COURTS-MARTIAL, 916(c) (discussing justification and unlawful orders) [hereinafter RCM].

<sup>170</sup> UCMJ, *supra* note 130, at Article 92.

<sup>171</sup> FM 27-10, *supra* note 164.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> UCMJ, *supra* note 130, at Article 92.



valid defense to any charges associated with that conduct.<sup>175</sup> “A death, injury, or other act caused or done in the proper performance of a legal duty is justified and not unlawful.”<sup>176</sup> In turn, an act performed in obedience to an unlawful order may be excused under certain conditions.<sup>177</sup> Those conditions are set out in two parts. The first prong is a subjective analysis of what the accused knew about the order. If the accused knew the order to be unlawful he may not assert the defense that he was following orders. If the accused did not know that the order was unlawful, then the second part of the analysis turns on an objective test—“person of ordinary sense and understanding would have known it to be unlawful.”<sup>178</sup> In a rather short statement the MCM provides the following: “It is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful.”<sup>179</sup>

FM 27-10 provides additional guidance on the question of whether a superior order can serve as a defense to a crime.<sup>180</sup> The fact that a crime has been committed “pursuant to an order of a superior authority, whether military or civilian, does not ... constitute a defense ... unless he [the accused] did not know and could not reasonably have been expected to know that the act ordered was unlawful.”<sup>181</sup>

In considering the question whether a superior order constitutes a valid defense, the court shall take into consideration the fact that obedience to lawful military orders is the duty of every member of the armed forces; that the latter cannot be expected, in conditions of war discipline, to weigh scrupulously the legal merits of the orders received; that certain rules of warfare may be controversial; or that an act otherwise amounting to a war crime may be done in obedience to orders

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<sup>175</sup> RCM 916(d), *supra* note 169.

<sup>176</sup> *Id.*, at 916(c).

<sup>177</sup> *Id.*, at 916(d).

<sup>178</sup> *Id.*, at 916(d) (this remark is under the Discussion section).

<sup>179</sup> *Id.*, at 916(d).

<sup>180</sup> FM 27-10, *supra* note 164, at para. 509.

<sup>181</sup> *Id.*, at para. 509(a).

conceived as a measure of reprisal. At the same time it must be borne in mind that members of the armed forces are bound to obey only lawful orders.<sup>182</sup>

The effort to raise the defense of superior orders for those charged with the Abu Ghraib abuses will invariably prove futile under the facts of the case. Even if a defendant can identify a superior who gave them the order to conduct the abuses, which no one has yet to do,<sup>183</sup> the accused would have to pass the two-tier test set out above. Not only would the accused have to show that he or she subjectively thought that the order was lawful but that a reasonable person would have believed the order to be lawful. If the court finds that the accused did not subjectively believe that the order was unlawful, then the inquiry would shift to what a reasonable person would have thought. Although the objective tier of the test draws on the reasonable man standard, FM 27-10 views the matter as a reasonable man under the stresses present in that particular war time environment.<sup>184</sup>

For the Abu Ghraib defendants, the acts depicted in the photographs were so offensive that the defense of superior orders offered nothing but an empty well. According to the Schlesinger Report: “The pictured abuses, unacceptable even in wartime, were not part of authorized interrogations nor were they even directed at intelligence targets.”<sup>185</sup> “They represent deviant behavior ....”<sup>186</sup> They were “acts of brutality and purposeless sadism.”<sup>187</sup> In fact, Schlesinger related in a news conference that the “sadism on the night shift ... was kind of ‘Animal House’ on the night shift.”<sup>188</sup>

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<sup>182</sup> *Id.*, at para. 509(b).

<sup>183</sup> See MSNBC interview of Jeffrey Addicott by Randy Myer, Aug. 3, 2004 (Addicott responded to the contention that PFC England asserted that a superior had given her orders to conduct the abuse by saying that the superior who gave those orders should be prosecuted along with PFC England).

<sup>184</sup> FM 27-10, *supra* note 165, at para. 509(b).

<sup>185</sup> See Schlesinger Report, *supra* note 78, at 5.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *CNN Report: Abu Ghraib was ‘Animal House’ at Night*, aired 25-8-04) available at <http://www.cnn.com> (last viewed May 22, 2006).

## VI. Failure of Leadership

*The aberrant behavior on the night shift in Cell Block 1 at Abu Ghraib would have been avoided with proper training, leadership and oversight.*<sup>189</sup>

### Schlesinger Report

Apart from the issue of individual responsibility the factor that weighed the heaviest in explaining the abuses at Abu Ghraib was clearly the total break down in the immediate chain of command. While the Schlesinger Report provides some blame to all levels of command, it is certain that a key causative factor was the failure at the Brigade—both the military police brigade and the military intelligence brigade. This dereliction in leadership extended to the subordinate officers in the command and the senior non-commissioned officers as well. These individuals are certainly responsible for what occurred in the light of culpability by omission; at a minimum, they were guilty of dereliction of duty.<sup>190</sup> The primary responsibility for ensuring adherence to the law rests in the officer corps. As noted, the Schlesinger Report followed suit with all the Reports and found that there was a “failure of military leadership and discipline.”<sup>191</sup>

Understanding the stresses of combat and the fact that the soldiers involved in the abuse at Abu Ghraib were untested reservists, the leadership should have taken greater precautions to ensure that a strong and dedicated chain of command was in charge to “inspect what was expected.” Accordingly, the officer corps must be filled with only the finest available men and women; only officers of the highest moral caliber and military skill should be assigned the responsibility of command. In commenting on leadership skills for combat officers, World War II General George S. Patton, Jr. correctly stated: “If you do

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<sup>189</sup> Schlesinger Report, *supra* note 78, at 13.

<sup>190</sup> UCMJ, *supra* note 130, at art. 92.

<sup>191</sup> See Schlesinger Report, *supra* note 78, at 5.

not enforce and maintain discipline, you [officers] are potential murderers.”<sup>192</sup>

In particular, it is well known that without proper supervision, the stresses associated with guarding prisoners may have a tendency to promote unlawful behavior amongst the guards.<sup>193</sup> In the Abu Ghraib incident it is apparent that the immediate chain of command was totally inept and provided the atmosphere for the criminal conduct<sup>194</sup> to occur on the night shift at Tier 1. But can these commanders bear a greater culpability than dereliction of duty? Might they not be charged with the criminal conduct of their soldiers?

Under the concept of command responsibility, a commander can be charged with the illegal acts committed by a subordinate if the commander ordered the crimes committed.<sup>195</sup> This occurs when the “acts in question have been committed in pursuance of an order of the commander concerned.”<sup>196</sup> In addition, a commander is also responsible if he has direct knowledge that a soldier is committing a crime and he fails to “take the necessary and reasonable steps to insure

<sup>192</sup> PETER PETER B. WILLIAMSON, *PATTON’S PRINCIPLES: A HANDBOOK FOR MANAGERS WHO MEAN IT* 35 (1979).

<sup>193</sup> See, e.g., Phillip G. Zimbardo, *Power Turns Good Soldiers Into Bad Apples*, *BOSTON GLOBE*, May 9, 2004, at D11; Rick Hampson, *Abuse Less Shocking in Light of History*, *USA TODAY*, May 13, at A1 (both articles discuss Professor Zimbardo’s psychological study where students who were playing unsupervised guards in a prison would abuse the detainees).

<sup>194</sup> Behavior is primarily controlled by the individual’s volition. In turn, the act of choosing to commit a crime is often related to a crude cost benefit analysis. Obviously, crime is more likely to occur in an environment where the likelihood of punishment is minimal. For an excellent discussion on how the criminal mind functions, see DR. STANTON E. SAMENOW, JR., *INSIDE THE CRIMINAL MIND* 6 (1984).

Criminals cause crime—not bad neighborhoods, inadequate parents, television, schools, drugs, or unemployment. Crime resides in the minds of human beings and is not caused by social conditions. Once we as a society recognize this simple fact, we shall take measures radically different from current ones. To be sure, we shall continue to remedy intolerable social conditions for this is worthwhile in and of itself. But we shall not expect criminals to change because of such efforts. *Id.*

<sup>195</sup> FM 27-10, *supra* note 165, at para. 501.

<sup>196</sup> *Id.*

[sic] compliance with the law ... or to punish violators thereof.”<sup>197</sup> In the United States, this standard of command responsibility is called the Medina Standard, so named for Captain Ernest Medina who was charged with murder under the concept of command responsibility for the massacre of civilians at My Lai, but was acquitted of criminal charges.<sup>198</sup>

A second standard for command responsibility, that was first recognized by the United States, is the so-called Yamashita Standard, or the “should have known” standard.<sup>199</sup> The Yamashita Standard is named for the World War II Japanese general, Tomoyuki Yamashita, who was tried before a post-war military commission for war crimes committed by Japanese sailors under his command. The primary charge against Yamashita revolved around the 20,000 Japanese sailors who went on a murder and rape rampage in Manila near the end of the war. Although the U.S. military prosecutors were unable to prove that Yamashita directly ordered the crimes, or even knew about them, he was convicted under a “should have known standard.”

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<sup>197</sup> *Id.*

<sup>198</sup> See generally Jeffrey F. Addicott & William A. Hudson, Jr., *The Twenty-Fifth Anniversary of My Lai: A Time to Inculcate the Lessons*, 139 MIL. L. REV. 153 (1993).

<sup>199</sup> See LAWRENCE TAYLOR, A TRIAL OF GENERALS 165-67 (1981); See also Rome Statute of the International Criminal Court, A/CONF.183/9 [hereinafter Rome Statute], available at <http://www.un.org/law/icc/statute/romefra.htm> (last visited May 22, 2006). See also 37 I.L.M. 999, 1017, Article 28:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew *or, owing to the circumstances at the time, should have known* that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution. (emphasis added J.A.).

This far reaching standard of indirect responsibility is spelled out in FM 27-10: “The commander is also responsible if he has actual knowledge, or *should have knowledge*, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails (emphasis added)”<sup>200</sup> to stop them. Accordingly, if, through normal events, the commander should have known of the crimes and did nothing to stop them, he is guilty of the actions of his soldiers. Following the pattern of the Yamashita case the *should have known* standard applies only when the crimes are associated with a widespread pattern of abuse over a prolonged period of time. In such a scenario, the commander is presumed to either have knowledge of the crime or to have abandoned his command.<sup>201</sup>

If the tactical chain of command at Abu Ghraib is charged with the crimes of the seven reserve enlisted personnel, the government would have to argue the Yamashita Standard—no review of the abuse scandal has found evidence of Medina Standard activity. This may prove somewhat difficult to do since the pattern of abuse seemed to be limited to events that took place primarily during the nightshift at Tier I of the prison during the period of October to December 2003.<sup>202</sup> Nevertheless, it is clearly not enough to issue administrative reprimands to the many officers and senior enlisted personnel in the tactical chain of command who directly contributed to the devastating institutional failures that allowed the abuses to occur.

## **VII. Conclusion**

*The vast majority of detainees in Guantanamo, Afghanistan and Iraq were treated appropriately, and the great bulk of detention operations were conducted in compliance with U.S. policy and directives.*<sup>203</sup>

Schlesinger Report

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<sup>200</sup> FM 27-10, *supra* note 165, at 501.

<sup>201</sup> See Taylor, *supra* note 199.

<sup>202</sup> See Schlesinger Report, *supra* note 78, at 5.

<sup>203</sup> *Id.*, at 18.

At the end of the day, it seems improbable that the United States military engaged in command directed torture or ill-treatment at Abu Ghraib, particularly when it was the military that self-reported to the media the fact that individual soldiers were being investigated and punished in accordance with the rule of law for wartime abuses at the prison. Clearly, the best indicator that the senior leadership is not culpable is found in its continuing commitment to criminally investigate and prosecute those soldiers accused of committing detainee abuses. Numerous soldiers have already been prosecuted and sentenced for their crimes, and criminal trials will continue for others.

When one considers that the number of detainees in the War on Terror—including Afghanistan, Iraq and other operations—is about 50,000,<sup>204</sup> it is unrealistic to expect that abuses will not occur. Violations of rules occur in every human endeavor, to include war. In an interview with the *Wall Street Journal*, Mr. James Schlesinger correctly noted that the “behavior of our troops is so much better than it was in World War II.”<sup>205</sup> The so-called “bad apple” syndrome<sup>206</sup> is in fact the primary causative issue at Abu Ghraib—a handful of closely knit reserve personnel engaged in acts of sadism as they worked the night shift from October to December of 2003.

It is equally true that the Abu Ghraib story has been devastating to the United States. While each and every case of abuse is repulsive to American standards of decency and justice, the terrorists have certainly become “media-savvy” in their quest to parlay these individual cases into marketable propaganda.<sup>207</sup> For example, many nations that are opposed to the United States are quick to exploit the individual cases of abuse at Abu Ghraib by painting the entire conduct of all American soldiers as immoral and illegal.<sup>208</sup>

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<sup>204</sup> *Id.* at 5.

<sup>205</sup> Rumsfeld Vindication, *supra* note 9.

<sup>206</sup> See, e.g., *How Innocent Iraqis Came to be Abused as Terrorists*, USA TODAY, June 10, 2004, at A14 (the editorial doubts the White House contention that the abuse was primarily the result of a few bad apples).

<sup>207</sup> Brian Michael Jenkins, *World Becomes the Hostage of Media-Savvy Terrorists*, USA TODAY August 23, 2004, at A11 (describing how terrorists use the media to attack attention).

<sup>208</sup> See *supra* note 6 and accompanying text.

Of course, Americans do not need to be told that the abuses are beyond the pale of conduct expected of its military. A CNN Gallup poll taken in May 2004, showed that three in four Americans agreed that the abuses at Abu Ghraib could not be justified.<sup>209</sup>

The Investigative Reports have done a great service to the American people and the world by dispelling the shrill cries of those who blame a secret Pentagon “culture of permissiveness,”<sup>210</sup> for the abuses at Abu Ghraib. While the Schlesinger Report found institutional and even personal responsibility in the tactical chain of command for allowing conditions for abuse to occur at Abu Ghraib, the Report specifically found that “[n]o approved procedures called for or allowed the kinds of abuse that in fact occurred. There is no evidence of a policy of abuse promulgated by senior officials or military authorities.”<sup>211</sup> The Reports exonerate the military from any charges of a systemic use of abuse to gain intelligence, although it is certain that some military intelligence soldiers will face charges for their own acts of abuse at Abu Ghraib.

The abuses at Abu Ghraib should not have happened. The damage to American credibility and the War on Terror is incalculable and the world is now watching to see how the United States deals with the matter. In the long run, the manner that the military deals with Abu Ghraib will speak volumes to the world about the true character of the United States and its military. To its great credit the senior military leadership certainly learned the lessons of My Lai. Understanding that the best approach to dealing with war crimes is to act with alacrity and transparency, the tragedy at Abu Ghraib by a few has been thoroughly investigated and justice is being handed out to the perpetrators and, as the process moves forward, it is hopeful that the sword of justice will turn to those in the tactical chain of command.

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<sup>209</sup> Jill Lawrence, *Abu Ghraib Probes Shift Public Focus*, USA TODAY, August 25, 2004, at A7.

<sup>210</sup> Rumsfeld Vindication, *supra* note 9.

<sup>211</sup> See Schlesinger Report, *supra* note 78, at 5.



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