

## Getting Away with Torture?

### Command Responsibility for the U.S. Abuse of Detainees

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## Executive Summary

It has now been one year since the appearance of the first pictures of U.S. soldiers humiliating and torturing detainees at Abu Ghraib prison in Iraq. Shortly after the photos came out, President George W. Bush vowed that the “wrongdoers will be brought to justice.”

In the intervening months, it has become clear that torture and abuse have taken place not solely at Abu Ghraib but rather in dozens of U.S. detention facilities worldwide, that in many cases the abuse resulted in death or severe trauma, and that a good number of the victims were civilians with no connection to al-Qaeda or terrorism. There is also evidence of abuse at U.S.-controlled “secret locations” abroad and of U.S. authorities sending suspects to third-country dungeons around the world where torture was likely to occur.

To date, however, the only wrongdoers being brought to justice are those at the bottom of the chain-of-command. The evidence demands more. Yet a wall of impunity surrounds the architects of the policies responsible for the larger pattern of abuses.

As this report shows, evidence is mounting that high-ranking U.S. civilian and military leaders — including Secretary of Defense Donald Rumsfeld, former CIA Director George Tenet, Lieutenant General Ricardo Sanchez, formerly the top U.S. commander in Iraq, and Major General Geoffrey Miller, the former commander of the prison camp at Guantánamo Bay, Cuba — made decisions and issued policies that facilitated serious and widespread violations of the law. The circumstances strongly suggest that they either knew or should have known that such violations took place as a result of their actions. There is also mounting data that, when presented with evidence that abuse was in fact taking place, they failed to act to stem the abuse.

The coercive methods approved by senior U.S. officials and widely employed over the last three years include tactics that the United States has repeatedly condemned as barbarity and torture when practiced by others. Even the U.S. Army field manual condemns some of these methods as torture.

Although much relevant evidence remains secret, a series of revelations over the past twelve months, brought together here, already makes a compelling case for a thorough, genuinely independent investigation of what top officials did, what they knew, and how they responded when they became aware of the widespread nature of the abuses.

We know, for example, that the coercive interrogation methods approved by Secretary of Defense Donald Rumsfeld for use on prisoners at Guantánamo — including the use of guard dogs to induce fear in prisoners, “stress” techniques such as forced standing and shackling in

painful positions, and removing their clothes — “migrated to Afghanistan and Iraq, where they were neither limited nor safeguarded,” and contributed to the widespread and systematic torture and abuse at U.S. detention centers there. Inquiries established by the U.S. Department of Defense itself have shown as much, though they did not explicitly say so.

We know that some detainees in the “global war on terror” have even been “disappeared” after entering U.S. custody: the U.S. Central Intelligence Agency (CIA) continues to hold al-Qaeda suspects in prolonged *incommunicado* detention in “secret locations,” reportedly outside the United States, with no notification to their families, no access to the International Committee of the Red Cross (ICRC) or oversight of any sort of their treatment, and in some cases no acknowledgement that they are even being held. It is widely reported that some of these “disappeared detainees” have been tortured through techniques such as “waterboarding,” in which the prisoner’s head is submerged into water or covered with a wet cloth until he believes that he is drowning.

We also know that some 100-150 detainees have been “rendered” by the United States for detention and interrogation by governments in the Middle East such as Syria and Egypt, which, according to the U.S. State Department, practice torture routinely. Such rendition is, again, a violation of U.S. and international law. In an increasing number of cases, there is now credible evidence that rendered detainees have in fact been tortured.

Despite these revelations and findings, the United States has not engaged in a serious process of accountability. Officials have denounced the most egregious abuses, rhetorically reaffirmed the U.S. commitment to uphold the law and respect human rights, and belatedly opened a number of prosecutions for crimes committed against detainees in Afghanistan and Iraq. To date, however, with the exception of one major person implicated in abuse, only low-ranking soldiers — privates and sergeants — have been called to account.

While there are obviously steep political obstacles in the way of investigating a sitting defense secretary and other high-ranking officials, the nature of crimes is so serious, and mounting evidence of wrongdoing is now so voluminous, that it would be an abdication of responsibility for the United States not to push this to the next level.

## *The Price of Impunity*

Unless those who designed or authorized the illegal policies are held to account, all the protestations of “disgust” at the Abu Ghraib photos by President George W. Bush<sup>1</sup> and others will be meaningless. If there is no real accountability for these crimes, for years to come the perpetrators of atrocities around the world will point to the U.S.’s treatment of prisoners to deflect criticism of their own conduct.

Indeed, when a government as dominant and influential as the United States openly defies laws against torture, it virtually invites others to do the same. Washington’s much-needed credibility as a proponent of human rights was damaged by the torture revelations and will be further damaged if torture continues to be followed by complete impunity for the policy-makers.

Torture, unfortunately, can occur anywhere. What matters, and what determines whether torture is a mere aberration or state policy, is how a government responds. Secretary Rumsfeld recognized this when, shortly after the first public revelations, he “[said] to the world: Judge us by our actions. Watch how Americans, watch how a democracy deals with wrongdoing and scandal and the pain of acknowledging and correcting our own mistakes and weaknesses.”<sup>2</sup> Then-Secretary of State Colin Powell recognized this, too, when he told foreign leaders: “Watch America. Watch how we deal with this. Watch how America will do the right thing.”<sup>3</sup>

Regrettably, however, the United States is not doing the right thing. Rather, it is doing what dictatorships do the world over when their abuses are discovered — loudly proclaiming its respect for human rights while covering up and shifting blame downwards to low-ranking officials and “rogue actors.”

## *Official Responses to Date*

To the extent that officials have addressed the issue of accountability for the pattern of abuse, they have either argued that the military justice system must be given time to run its course, or they have pointed to the many Department of Defense and related investigations that have been undertaken.<sup>4</sup>

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<sup>1</sup> Thom Shanker and Jacques Steinberg, “Bush Voices ‘Disgust’ at Abuse of Iraqi Prisoners,” *The New York Times*, May 1, 2004.

<sup>2</sup> Donald Rumsfeld, “Congressional Testimony of Secretary of Defense Donald Rumsfeld,” Hearing of the Senate Armed Services Committee on Mistreatment of Iraqi Prisoners, Federal News Service, May 7, 2004.

<sup>3</sup> “Abuse Scandal ‘Terrible’ for U.S., Powell Concedes,” *MSNBC*, May 17, 2004 [online], <http://www.msnbc.msn.com/id/4855930/>.

<sup>4</sup> On March 29, 2005, Secretary Rumsfeld was asked on *National Public Radio* (NPR) “whether it’s right or wrong ... that no senior military official has been disciplined, fired or prosecuted for the allegations of abuse and torture in Iraq and elsewhere?” The interview continued:

While it is true that the Pentagon established no fewer than seven investigations in the wake of Abu Ghraib, not one has had the independence or the breadth to get to the bottom of the prisoner-abuse issue. All but one involved the military investigating itself, and was focused on only one aspect or another of the treatment of detainees. None took on the task of examining the role of civilian leaders who might have had ultimate authority over detainee treatment policy. None looked at the issue of renditions. The CIA has reportedly also initiated a number of self-investigations, but no details have been made public.

What is more, these investigations effectively defined detainee abuse as any treatment *not approved* by higher authorities. To the Pentagon's investigators, treatment that followed approved policies and techniques could not, by definition, have been torture. With this logical sleight of hand, they thus rendered themselves incapable of finding any connections between policies approved by senior officials and acts of abuse in the field. But that does not mean such connections did not exist.

### ***Grounds for Investigation***

This report provides a new look at the evidence made public to date about the role played by senior leaders most responsible for setting U.S. interrogation policies, including Secretary Rumsfeld, CIA Director Tenet, Gen. Sanchez, and Gen. Miller. Human Rights Watch expresses no opinion about the ultimate guilt or innocence of these or other officials, particularly because so much evidence has been withheld and so many questions remain unanswered. We also do not

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*Rumsfeld:* I mean I think the fact that the United States has had over nine or ten or eleven different investigations, there have been over 300 investigations or prosecutions, in some cases convictions. Not 300 convictions. But there have been people of varying ranks that have been punished for wrongdoing.

*NPR:* Mostly lower ranks.

*Rumsfeld:* The Inspector General of the Army still has the obligation of looking at the people in the more senior ranks and making a judgment and recommendation or not recommendation to his superiors and that process is yet to play out.

(“Secretary Rumsfeld Interview with *National Public Radio*’s Steve Inskeep for ‘Morning Edition,’” news transcript, U.S. Department of Defense, March 29, 2005 [online], <http://www.defenselink.mil/transcripts/2005/tr20050329-secdef2401.html>.)

Secretary Rumsfeld had a similar exchange on *NBC*’s “Meet the Press” the previous month:

*NBC:* Did you think you had done something wrong?

*Rumsfeld:* No. Obviously the country has to be deeply concerned that people were not treated right. And I was secretary of defense when that happened. And we’ve had eight or 10 investigations. We have had dozens of criminal trials, and people have pled guilty to doing things they shouldn’t do. And obviously you just feel terrible about that. That is not the way our country behaves. And it was a most unfortunate thing that it happened. And I was secretary of Defense [sic].

(“Secretary Rumsfeld Interview with *NBC*, Meet the Press,” news transcript, U.S. Department of Defense, February 6, 2005 [online], <http://www.defenselink.mil/transcripts/2005/tr20050206-secdef2102.html>.)

purport to offer a comprehensive account of the possible culpability of these men, let alone a legal brief. More evidence is needed for that. What we do conclude, a conclusion that we believe is compelled by the evidence, is that a criminal investigation is warranted with respect to each.

Secretary Rumsfeld may bear legal liability for war crimes and torture by U.S. troops in Afghanistan, Iraq, and Guantánamo under the doctrine of “command responsibility” — the legal principle that holds a superior responsible for crimes committed by his subordinates when he knew or should have known that they were being committed but fails to take reasonable measures to stop them. Having created the conditions for U.S. troops to commit war crimes and torture by sidelining and disparaging the Geneva Conventions, approving interrogation techniques for Guantánamo that violated the Geneva Conventions and the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Convention against Torture”), and hiding detainees from the ICRC, Secretary Rumsfeld should have been alert to the possibility that troops would commit these crimes.

Indeed, from the early days of the war in Afghanistan, Secretary Rumsfeld must have been on notice through briefings, ICRC reports, human rights reporting, and press accounts that some U.S. troops were committing war crimes and acts of torture. Nevertheless, there is no indication that at any time over a three-year period of mounting evidence of abuse did he exert his authority and warn those under his command that the mistreatment of prisoners must stop. Had he done so, many of the crimes committed by U.S. forces certainly could have been avoided.

Secretary Rumsfeld might also, in addition to command responsibility, bear direct legal liability as the instigator of crimes against detainees if the illegal interrogation techniques that he approved for Guantánamo were actually used to inflict inhumane treatment on detainees there before he rescinded his blanket approval and required that he be consulted before the techniques were used. Similarly, if Secretary Rumsfeld approved a secret program that encouraged physical coercion and sexual humiliation of Iraqi prisoners, as alleged by the journalist Seymour Hersh, Secretary Rumsfeld would bear direct legal liability.

Under George Tenet’s direction, and reportedly with his specific authorization, the CIA is said to have tortured detainees using waterboarding and by withholding medicine. Other tactics reportedly used include feigning suffocation, “stress positions,” light and noise bombardment, sleep deprivation, and making a detainee believe that he was being interrogated by a government known to practice torture. Under Director Tenet’s direction, the CIA also: “disappeared” detainees, holding them in long-term *incommunicado* detention in secret locations without informing or letting anybody know about their fate or whereabouts; “rendered” detainees to countries in which they were apparently tortured; hid detainees from the ICRC; and transferred detainees out of Iraq for interrogation in violation of the Geneva Conventions.

Lt. Gen. Ricardo Sanchez, the top U.S. commander in Iraq with command responsibility for Abu Ghraib and other detention centers in Iraq, approved illegal interrogation methods — again including the use of guard dogs to frighten prisoners — which were then applied by soldiers at Abu Ghraib. As reports of abuse mounted, Gen. Sanchez failed to intervene to stop soldiers under his direct command from commissioning war crimes and torture. This potentially exposes him to liability under the command responsibility doctrine.

Gen. Geoffrey Miller, as commander at Guantánamo Bay, may bear responsibility for the war crimes and acts of torture and other inhuman treatment of detainees that took place there, particularly since the tightly-controlled nature of that prison camp made it likely that the commander was acutely aware of what his troops were doing.

There is also evidence that other officers may have been complicit in the crimes. For the crimes at Abu Ghraib alone, such individuals include Major General Walter Wojdakowski, Brigadier General Janis Karpinski, Major General Barbara Fast, Colonel Marc Warren, Colonel Stephen Boltz, Colonel Thomas Pappas, and Lieutenant Colonel Stephen L. Jordan. This list is not intended to be exhaustive.

The material compiled in this report is drawn from publicly available evidence including the official inquiries described above, Human Rights Watch's own field reports, press accounts, and documents declassified by the government or released pursuant to litigation under the Freedom of Information Act (FOIA).



## Recommendations

### *Recommendation to the U.S. Attorney General*

**Appoint a special counsel to investigate any U.S. officials — no matter their rank or position — who participated in, ordered, or had command responsibility for war crimes or torture, or other prohibited ill-treatment against detainees in U.S. custody.** The special counsel should have, in accordance with U.S. regulations, full power and resources, and independent authority to exercise all investigative and prosecutorial functions necessary for the completion of the task. He or she should be a lawyer with no current connection to the U.S. government, a reputation for integrity and impartiality, and experience sufficient to ensure that the investigation will be conducted ably.

A special counsel is necessary because the prospect for accountability through ordinary avenues is severely compromised. U.S. Attorney General Alberto Gonzales who, as head of the Department of Justice, sits atop the prosecutorial machinery, was himself deeply involved in the policies leading to these alleged crimes, and thus may not only have a conflict of interest but also he, himself, may have a degree of complicity in those abuses. Similarly, Secretary Rumsfeld sits atop the military justice system, thus all but ruling out accountability through that channel for policies he set in motion. U.S. Department of Justice regulations call for the appointment of a “special counsel” when a conflict exists and the public interest warrants a prosecutor from outside the government.

To allow the special prosecutor to have full authority to investigate and prosecute both federal law and Uniform Code of Military Justice violations, **the Secretary of Defense should appoint a consolidated convening authority** for all armed services, to cooperate with the appointed civilian special prosecutor.

### *Recommendation to the U.S. Congress*

**Create a special commission, along the lines of the 9/11 commission, to investigate the issue of prisoner abuse,** including all the issues described above. Such a commission would hold hearings, have full subpoena power, and be empowered to recommend the creation of a special prosecutor to investigate possible criminal offenses, if the Attorney General had not yet named one. A special commission could also compel evidence that the government has continued to conceal, including President Bush’s reported authorization for the CIA to set up secret detention facilities and to “render” suspects to other countries, and details on Secretary Rumsfeld’s role in the chain of events leading to the worst period of abuses at Abu Ghraib.

## I. Official Sanction of Crimes against Detainees

On April 28, 2004, the first pictures were broadcast of U.S. soldiers humiliating and torturing detainees at Abu Ghraib prison in Iraq. The pictures have since taken on iconic status: an Iraqi detainee standing on a box draped in a hood and poncho, his arms outstretched with wires attached to his extremities and genitals; a bored-looking female American soldier holding a naked, Iraqi detainee on the floor at the end of a leash; naked, and even dead, Iraqi detainees in a variety of positions with American soldiers laughing and flashing thumbs up.

When the pictures first appeared, the United States government sought to portray the abuse as an isolated incident, the work of a few “bad apples” acting without orders. On May 4, 2004, U.S. Secretary of Defense Donald H. Rumsfeld, in a formulation that would be used over and over again by U.S. officials, described the abuses at Abu Ghraib as “an exceptional, isolated” case. In a nationally televised address on May 24, 2004, President Bush spoke of “disgraceful conduct by a few American troops who dishonored our country and disregarded our values.”

While some of the acts portrayed in the pictures may be attributed to individual or group sadism, the widening record reveals that the only truly exceptional aspect of the horrors at Abu Ghraib was that they were photographed. Abu Ghraib was, in fact, only the tip of the iceberg. Detainees in U.S. custody in Afghanistan had experienced beatings, prolonged sleep and sensory deprivation, forced nakedness and humiliation as early as 2001. Comparable — and, indeed, more extreme — cases of torture and inhuman treatment had been extensively documented by the International Committee of the Red Cross and by journalists at numerous locations in Iraq outside Abu Ghraib. In other parts of the world, detainees in U.S. custody have been “disappeared” or “rendered” to countries where torture is routine.

As became increasingly obvious in the months after the photos came to public light, this pattern of abuse did not result from the acts of individual soldiers who broke the rules. It resulted from decisions made by the Bush administration to bend, ignore, or cast rules aside. Administration policies created the climate for Abu Ghraib and for abuse against detainees worldwide in a number of ways.<sup>5</sup>

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<sup>5</sup> See Human Rights Watch, “The Road to Abu Ghraib,” *A Human Rights Watch Report*, June 2004 [online], <http://www.hrw.org/reports/2004/usa0604/>.

## *Changing the paradigm*

First, in the aftermath of the September 11, 2001 attacks on the United States, the Bush administration determined that winning the war on terror required that the United States circumvent fundamental principles of human rights and humanitarian law.

On September 16, 2001, Vice President Dick Cheney said in a television interview on NBC's "Meet the Press":

We also have to work, though, sort of the dark side, if you will. We've got to spend time in the shadows in the intelligence world. A lot of what needs to be done here will have to be done quietly, without any discussion, using sources and methods that are available to our intelligence agencies, if we're going to be successful. That's the world these folks operate in, and so it's going to be vital for us to use any means at our disposal, basically, to achieve our objective.

In prepared testimony to Congress in 2002, Cofer Black, former director of the CIA's counterterrorist unit, said, "There was a before-9/11 and an after-9/11. After 9/11 the gloves came off."<sup>6</sup>

Senior administration lawyers, led by then-White House Counsel, and current Attorney General, Alberto Gonzales, in a series of legal memoranda written in late 2001 and early 2002 helped build the framework for circumventing international law restraints on prisoner interrogation.

In particular, these memos argued that the Geneva Conventions did not apply to detainees from the Afghanistan war. Mr. Gonzales urged the president to declare the Taliban forces in Afghanistan as well as al-Qaeda outside the coverage of the Geneva Conventions. This, he said in a memo dated January 25, 2002, would preserve the U.S.'s "flexibility" in the war against terrorism. Mr. Gonzales wrote that the war against terrorism, "in my judgment renders obsolete Geneva's strict limitations on questioning of enemy prisoners." Gonzales also warned that U.S. officials involved in harsh interrogation techniques could potentially be prosecuted for war crimes under U.S. law if the Conventions applied.<sup>7</sup> Gonzales said that "it was difficult to predict with confidence" how U.S. prosecutors might apply the Geneva Conventions' strictures against "outrages against personal dignity" and "inhuman treatment" in the future, and argued that declaring that Taliban and al-Qaeda fighters did not have Geneva Convention protections "substantially reduces the threat of domestic criminal prosecution." Gonzales did convey to

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<sup>6</sup> Cofer Black, testimony, Hearing before the U.S. House and Senate Intelligence Committees on Pre-9/11 Intelligence Failures, 107th Congress, p. 6 (2002).

<sup>7</sup> Gonzales was referring to prosecution under the War Crimes Act of 1996 (18 U.S.C. Section 2441), which punishes the commission of a war crimes and other serious violations of the laws of war, including torture and humiliating or degrading treatment, by or against a U.S. national, including members of the armed forces.

President Bush the worries of military leaders that these policies might “undermine U.S. military culture which emphasizes maintaining the highest standards of conduct in combat and could introduce an element of uncertainty in the status of adversaries.” Those warnings were ignored, but proved justified.

The Gonzales memorandum drew a strong objection the next day from Secretary of State Colin L. Powell. Secretary Powell argued that declaring the conventions inapplicable would “reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and undermine the protections of the law of war for our troops, both in this specific conflict and in general.”<sup>8</sup>

On February 7, 2002, President Bush announced that while the U.S. government would apply the “principles of the Third Geneva Convention” to captured members of the Taliban, it would not consider any of them to be prisoners of war (POWs) because, in the U.S. view, they did not meet the requirements of an armed force under that Convention. As for captured members of al-Qaeda, he said that the U.S. government considered the Geneva Conventions inapplicable but would nonetheless treat the detainees “humanely.”<sup>9</sup>

These decisions essentially reinterpreted the Geneva Conventions to suit the administration’s purposes. Belligerents captured in the conflict in Afghanistan should have been treated as POWs unless and until a competent tribunal individually determined that they were not eligible for POW status. Taliban soldiers should have been accorded POW status because they openly fought for the armed forces of a state party to the Convention. Al-Qaeda detainees would likely not be accorded POW status but the Conventions and customary law still provide explicit protections to all persons held in an armed conflict, even if they are not entitled to POW status. Even persons who are not entitled to the protections of the 1949 Geneva Conventions are protected by the “fundamental guarantees” described in article 75 of Protocol I of 1977 to the Geneva Conventions. The United States has long considered article 75 to be part of customary international law (a widely supported state practice accepted as law). Article 75 prohibits murder, “torture of all kinds, whether physical or mental,” “corporal punishment,” and “outrages upon personal dignity, in particular humiliating and degrading treatment, ... and any form of indecent assault.”<sup>10</sup>

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<sup>8</sup> From Colin L. Powell to Counsel to the President, “Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan,” memorandum, January 26, 2002. The memorandum can be found in Karen J. Greenberg and Joshua L. Dratel, ed., *The Torture Papers: The Road to Abu Ghraib* (Cambridge: University of Cambridge Press, 2005), p. 122.

<sup>9</sup> President George W. Bush to the Vice President, Secretary of State, Secretary of Defense, Attorney General, Chief of Staff to the President, Director of Central Intelligence, Assistant to the President for National Security Affairs and Chairman of the Joint Chiefs of Staff, memorandum, “Humane Treatment of al Qaeda and Taliban Detainees,” February 7, 2002. The memorandum can be found in Karen J. Greenberg and Joshua L. Dratel, ed., *The Torture Papers: The Road to Abu Ghraib* (Cambridge: University of Cambridge Press, 2005), p. 134.

<sup>10</sup> See Human Rights Watch, “Summary of International and U.S. Law Prohibiting Torture and Other Ill-treatment of Persons in Custody,” *A Human Rights Watch Backgrounder*, May 24, 2004 [online],

## ***Approval of Mistreatment and Torture***

Second, senior officials approved illegal coercive methods of interrogation.

*Army Field Manual 34-52* (“FM 34-52”) on intelligence interrogation has long served as the reference for the types of interrogation techniques considered permissible and effective, in accordance with the Geneva Conventions. As the first detainees were being captured, however, the CIA sought the opinion of the Department of Justice Office of the Legal Counsel (OLC) as to what additional interrogation techniques would be allowable.<sup>11</sup>

The OLC — in a now-infamous memo prepared by Assistant Attorney General Jay S. Bybee (now a federal appeals court judge) — replied on August 1, 2002 that torturing al-Qaeda detainees in captivity abroad “may be justified,” and that international laws against torture “may be unconstitutional if applied to interrogations” conducted in the war on terrorism. The memo added that the doctrines of “necessity and self-defense could provide justifications that would eliminate any criminal liability” on the part of officials who tortured al-Qaeda detainees. The memo also took an extremely narrow view of which acts might constitute torture. It referred to seven practices that U.S. courts have ruled to constitute torture: severe beatings with truncheons and clubs, threats of imminent death, burning with cigarettes, electric shocks to genitalia, rape or sexual assault, and forcing a prisoner to watch the torture of another person. It then advised that “interrogation techniques would have to be similar to these in their extreme nature and in the type of harm caused to violate law.” The memo asserted that “physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.” The memo also suggested that

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<http://www.hrw.org/english/docs/2004/05/24/usint8614.htm>. This view is shared by the ICRC and other international observers. See, e.g., International Committee of the Red Cross (ICRC), “Geneva Convention on Prisoners of War,” February 9, 2002 [online], <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/26D99836026EA80DC1256B6600610C90> (“International Humanitarian Law foresees that the members of armed forces as well as militias associated to them which are captured by the adversary in an international armed conflict are protected by the Third Geneva Convention. There are divergent views between the United States and the ICRC on the procedures which apply on how to determine that the persons detained are not entitled to prisoner of war status.”); See also High Commissioner Mary Robinson, “Statement of High Commissioner for Human Rights on Detention of Taliban and Al Qaida Prisoners at US Base in Guantánamo Bay,” January 16, 2002 [online], <http://www.unhchr.ch/hurricane/hurricane.nsf/0/C537C6D4657C7928C1256B43003E7D0B?opendocument> (“All persons detained in this context are entitled to the protection of international human rights law and humanitarian law, in particular the relevant provisions of the International Covenant on Civil and Political Rights (ICCPR) and the Geneva Conventions of 1949.”); International Commission of Jurists (ICJ), “Rule of Law Must Be Respected in Relation to Detainees in Guantánamo Bay,” January 17, 2002 [online], [http://www.icj.org./news.php?id\\_article=2612&lang=en](http://www.icj.org./news.php?id_article=2612&lang=en); Secretary Rumsfeld dismissed the criticism of President Bush’s decision as “isolated pockets of international hyperventilation” (“High Taliban Official in U.S. Custody,” Associated Press, February 9, 2002).

<sup>11</sup> The Honorable James R. Schlesinger, Hon. Harold Brown, Hon. Tillie K. Fowler, Gen. Charles A. Homer, and Dr. James A. Blackwell, Jr., *Final Report of the Independent Panel to Review DoD Detention Operations* (“Schlesinger report”), August 2004, pp. 6-7.

“mental torture” only included acts that resulted in “significant psychological harm of significant duration, e.g., lasting for months or even years.”<sup>12</sup>

A few months later, in October 2002, the Guantánamo authorities sent a letter to Secretary Rumsfeld requesting permission to employ harsher interrogation techniques on prisoners. The requested techniques were reviewed by Department of Defense General Counsel William J. Haynes, who recommended that Secretary Rumsfeld approve 16 of the requested techniques for use in interrogations at Guantánamo. On December 2, 2002, Secretary Rumsfeld approved this recommended list, which included such techniques as hooding, stress positions, isolation, stripping, deprivation of light, removal of religious items, forced grooming, and use of dogs.<sup>13</sup> As described below, these techniques, which violate not only the Geneva Conventions but the laws against torture and other prohibited ill-treatment, later “migrated” to Iraq and Afghanistan where they were regularly applied to detainees.

On January 15, 2003, following criticism from the Navy general counsel, Secretary Rumsfeld rescinded the December 2 guidelines, stating that harsher techniques in those guidelines could be used only with his approval.<sup>14</sup> Secretary Rumsfeld then ordered the establishment of a working group to examine which interrogation techniques should be allowed for prisoners in Guantánamo.<sup>15</sup> The portions of the working group’s report that have been made available make clear that in reviewing interrogation techniques, they relied heavily on the logic of the president’s February 7, 2002 memo regarding the applicability of the Geneva Conventions to al-Qaeda and Taliban prisoners, as well as the August 1, 2002 OLC memo on evading sanction for interrogation techniques that might be deemed illegal under treaty obligations and U.S. law.<sup>16</sup> The results of this study led to Secretary Rumsfeld’s promulgation, on April 16 2003, of a memo outlining techniques that could only be applied to interrogations of “unlawful combatants” held at Guantánamo.<sup>17</sup>

In addition, the Justice Department and the White House apparently gave the CIA the authority to use additional techniques, such as “waterboarding,” in which the detainee is strapped down,

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<sup>12</sup> Jay S. Bybee to Alberto R. Gonzales, Counsel to the President, memorandum, “Standards for Conduct of Interrogation under 18 U.S.C. Sections 2340-2340A,” August 1, 2002 [online], <http://news.findlaw.com/wp/docs/doj/bybee80102mem.pdf> (This memorandum has since been repudiated by the administration).

<sup>13</sup> William J. Haynes II to the Secretary of Defense, memorandum, “Counter-Resistance Techniques,” November 27, 2002.

<sup>14</sup> Schlesinger report, p. 7.

<sup>15</sup> *Ibid.*, p. 8.

<sup>16</sup> “Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations,” U.S. Department of Defense, Center for Defense Information: International Security Law Project, March 6, 2003 [online], <http://www.cdi.org/news/law/pentagon-torture-memo.pdf>.

<sup>17</sup> Schlesinger report, p. 8. (The memo no longer authorized stress positions, stripping and the use of dogs. It did allow isolation, removing privileges from detainees, and “attacking or insulting the ego of a detainee.”)

forcibly pushed under water, and made to believe he might drown.<sup>18</sup> The president also apparently authorized the CIA to “disappear” certain prisoners, placing leading al-Qaeda suspects in long-term secret *incommunicado* detention in “undisclosed locations.”<sup>19</sup>

After the Abu Ghraib photos were made public, the United States repudiated the August 1, 2002 OLC memo and later replaced it with a revised memo.<sup>20</sup> In January 2005, however, Attorney General-designate Alberto Gonzales claimed in a written response during his confirmation hearings that CAT’s prohibition on cruel, inhuman or degrading (CID) treatment does not apply to U.S. personnel in the treatment of non-citizens abroad, indicating that no law would prohibit the CIA from engaging in CID treatment when it interrogates non-Americans outside the United States.<sup>21</sup>

## II. A World of Abuse

As a consequence of these policies, which were approved at least by cabinet-level officials of the U.S. government, the United States has been implicated in crimes against detainees across the world — in Afghanistan, Iraq, Guantánamo Bay, Cuba, and in secret detention centers, as well as in countries to which suspects have been rendered. At least 26 prisoners are said to have died in American custody in Iraq and Afghanistan since 2002 in what Army and Navy investigators have concluded or suspected were acts of criminal homicide.<sup>22</sup> Overall, according to a compilation by the Associated Press, at least 108 people have died in U.S. custody in Afghanistan and Iraq.<sup>23</sup>

What follows is a brief summary of what is now known:

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<sup>18</sup> Dana Priest, “CIA Puts Harsh Tactics on Hold,” *The Washington Post*, June 27, 2004; James Risen, David Johnston and Neil A. Lewis, “Harsh CIA Methods Cited in Top Qaeda Interrogations,” *The New York Times*, May 13, 2004.

<sup>19</sup> John Barry, Michael Hirsh and Michael Isikoff, “The Roots of Torture,” *Newsweek*, May 24, 2004 [online], <http://msnbc.msn.com/id/4989422/site/newsweek/> (“According to knowledgeable sources, the president’s directive authorized the CIA to set up a series of secret detention facilities outside the United States, and to question those held in them with unprecedented harshness.”)

<sup>20</sup> Daniel Levin, Acting Assistant Attorney General, to James B. Comey, Deputy Attorney General, memorandum, “Legal Standards Applicable under 18 U.S.C. §§ 2340-2340A,” December 30, 2004 [online], <http://www.usdoj.gov/olc/dagmemo.pdf>.

<sup>21</sup> Eric Lichtblau, “Gonzales Says Humane-Policy Order Doesn’t Bind C.I.A.,” *The New York Times*, January 19, 2005, p. A17.

<sup>22</sup> Douglas Jehl and Eric Schmitt, “The Conflict in Iraq: Detainees; U.S. Military Says 26 Inmate Deaths May Be Homicide,” *The New York Times*, March 16, 2005, p. A1.

<sup>23</sup> “US Detainee Death Toll ‘Hits 108’” *BBC News World Edition*, March 16, 2005 [online], <http://news.bbc.co.uk/2/hi/americas/4355779.stm>.

## ***Afghanistan***

Nine detainees are now known to have died in U.S. custody in Afghanistan — including four cases already determined by Army investigators to be murder or manslaughter. Former detainees have made scores of other claims of torture and other mistreatment.

In March 2004, prior to the publication of the Abu Ghraib photos, Human Rights Watch released an extensive report documenting cases of U.S. military personnel arbitrarily detaining Afghan civilians, using excessive force during arrests of non-combatants, and mistreating detainees. Detainees held at military bases in 2002 and 2003 described to Human Rights Watch being beaten severely by both guards and interrogators, deprived of sleep for extended periods, and intentionally exposed to extreme cold, as well as other inhumane and degrading treatment.<sup>24</sup> In December 2004, Human Rights Watch raised additional concerns about detainee deaths, including one alleged to have occurred as late as September 2004.<sup>25</sup> In March 2005, *The Washington Post* uncovered another death that occurred in CIA custody, noting that the case was under investigation but that the CIA officer implicated had been promoted.<sup>26</sup>

## ***Guantánamo Bay, Cuba***

There is growing evidence that detainees at Guantánamo have suffered torture and other cruel, inhuman, or degrading treatment. Reports by FBI agents who witnessed detainee abuse — including the forcing of chained detainees to sit in their own excrement — have recently emerged, adding to the statements of former detainees describing the use of painful stress positions, extended solitary confinement, use of military dogs to threaten them, threats of torture and death, and prolonged exposure to extremes of heat, cold and noise.<sup>27</sup> Videotapes of riot squads subduing suspects reportedly show the guards punching some detainees, tying one to a gurney for questioning and forcing a dozen to strip from the waist down.<sup>28</sup> Ex-detainees said they had been subjected to weeks and even months in solitary confinement — which was at times either suffocatingly hot or cold from excessive air conditioning — as punishment for failure to cooperate during interrogations or for violations of prison rules.<sup>29</sup>

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<sup>24</sup> See Human Rights Watch, “Enduring Freedom: Abuses by U.S. Forces in Afghanistan,” *A Human Rights Watch Report*, March 2004 [online], <http://hrw.org/reports/2004/afghanistan0304/>.

<sup>25</sup> Human Rights Watch to Secretary of Defense Donald Rumsfeld, open letter, December 13, 2004 [online], <http://hrw.org/english/docs/2004/12/10/afghan9838.htm>.

<sup>26</sup> Dana Priest, “CIA Avoids Scrutiny of Detainee Treatment; Afghan’s Death Took Two Years to Come to Light,” *The Washington Post*, March 3, 2005.

<sup>27</sup> See Human Rights Watch, “Guantánamo: Detainee Accounts,” *A Human Rights Watch Backgrounder*, October 2004 [online], <http://www.hrw.org/backgrounder/usa/gitmo1004/>; Center for Constitutional Rights, “Composite Statement: Detention in Afghanistan and Guantanamo Bay; Shafiq Rasul, Asif Iqbal and Ruhel Ahmed,” August 4, 2004 [online], <http://www.ccr-ny.org/v2/reports/docs/Gitmo-compositestatementFINAL23july04.pdf>.

<sup>28</sup> Paisley Dodds, “Guantánamo Tapes Show Teams Punching, Stripping Prisoners,” Associated Press, February 1, 2005.

<sup>29</sup> See Human Rights Watch, “Guantánamo: Detainee Accounts,” *A Human Rights Watch Backgrounder*, October 2004 [online], <http://www.hrw.org/backgrounder/usa/gitmo1004/>; Center for Constitutional Rights, “Composite Statement: Detention in Afghanistan and Guantanamo Bay; Shafiq Rasul, Asif Iqbal and Ruhel Ahmed,” August 4, 2004 [online], <http://www.ccr-ny.org/v2/reports/docs/Gitmo-compositestatementFINAL23july04.pdf>.



According to press reports in November 2004, the International Committee of the Red Cross told the U.S. government in confidential reports that its treatment of detainees has involved psychological and physical coercion that is “tantamount to torture.”<sup>30</sup>

### *Iraq*

Harsh and coercive interrogation techniques such as subjecting detainees to painful stress positions and extensive sleep deprivation have been routinely used in detention centers throughout Iraq. A panel appointed by the Secretary of Defense noted 55 substantiated cases of detainee abuse in Iraq, plus twenty instances of detainee deaths still under investigation.<sup>31</sup> The earlier investigative report of Maj. Gen. Antonio Taguba found “numerous incidents of sadistic, blatant, and wanton criminal abuses” constituting “systematic and illegal abuse of detainees” at Abu Ghraib.<sup>32</sup> Another Pentagon report documented 44 allegations of such war crimes at Abu Ghraib.<sup>33</sup> An ICRC report concluded that in military intelligence sections of Abu Ghraib, “methods of physical and psychological coercion used by the interrogators appeared to be part of the standard operating procedures by military intelligence personnel to obtain confessions and extract information.”<sup>34</sup>

### *CIA “Disappearances” and Torture*

At least eleven al-Qaeda suspects, and most likely many more, have “disappeared” in U.S. custody. The CIA is holding the detainees in undisclosed locations, with no notification to their families, no access to the International Committee of the Red Cross or oversight of any sort of their treatment, and in some cases, no acknowledgement that they are even being held,<sup>35</sup> effectively placing them beyond the protection of the law. One detainee, Khalid Shaikh Muhammed (a presumed architect of the 9/11 attacks), was reportedly subjected to waterboarding. It was also reported that U.S. officials initially withheld painkillers from detainee Abu Zubayda, who was shot during his capture, as an interrogation device.<sup>36</sup>

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<sup>30</sup> Neil A. Lewis, “Red Cross Finds Detainee Abuse in Guantánamo,” *The New York Times*, November 30, 2004, p. A1.

<sup>31</sup> Schlesinger report, pp. 12-13.

<sup>32</sup> Major General Antonio M. Taguba, *Article 15-6 Investigation of the 800th Military Police Brigade* (“Taguba report”), p. 16.

<sup>33</sup> Major George R. Fay, *Article 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade* (“Fay report”), p. 7.

<sup>34</sup> ICRC, *Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq during Arrest, Internment and Interrogation*, February 2004, para. 24. A copy of the report, whose existence was first disclosed by *The Wall Street Journal* on May 7, 2004, can be found at <http://www.health-now.org/mediafiles/mediafile50.pdf>.

<sup>35</sup> See Human Rights Watch, “The United States’ ‘Disappeared’: The CIA’s Long-term ‘Ghost Detainees,’” *A Human Rights Watch Briefing Paper*, October 2004 [online], <http://www.hrw.org/backgrounder/usa/us1004/>; The Israeli newspaper *Haaretz* reported that the detainees are being held in a top-secret interrogation facility in Jordan (Yossi Melman, “CIA Holding Al-Qaida Suspects in Secret Jordanian Lockup,” *Haaretz*, October 13, 2004).

<sup>36</sup> See Human Rights Watch, “The United States’ ‘Disappeared’: The CIA’s Long-term ‘Ghost Detainees,’” *A Human Rights Watch Briefing Paper*, October 2004 [online], <http://www.hrw.org/backgrounder/usa/us1004/>.

### ***“Extraordinary Renditions”***

The CIA has regularly transferred detainees to countries in the Middle East, including Egypt and Syria, known to practice torture routinely. There are reportedly 100 to 150 cases of such “extraordinary renditions.”<sup>37</sup> In one case, Maher Arar, a Syrian-born Canadian in transit in New York, was detained by U.S. authorities and sent to Syria. He was released without charge from Syrian custody ten months later and has described repeated torture, often with cables and electrical cords. In another case, a U.S. government-leased airplane transported two Egyptian suspects who were blindfolded, hooded, drugged, and diapered by hooded operatives, from Sweden to Egypt. There the two men were held *incommunicado* for five weeks and have given detailed accounts of the torture they suffered (e.g. electric shocks), including in Cairo’s notorious Tora prison.<sup>38</sup> In a third case, Mamdouh Habib, an Egyptian-born Australian in American custody, was transported from Pakistan to Afghanistan to Egypt to Guantánamo Bay. Now back home in Australia, Habib alleges that he was tortured during his six months in Egypt with beatings and electric shocks, and hung from the walls by hooks.<sup>39</sup>

### ***“Reverse Renditions”***

Detainees arrested by foreign authorities in non-combat and non-battlefield situations have been transferred to the United States without basic protections afforded to criminal suspects. `Abd al-Salam `Ali al-Hila, a Yemeni businessman captured in Egypt, for instance, was handed over to U.S. authorities and “disappeared” for more than a year-and-a-half before being sent to Guantánamo Bay Naval Base in Cuba.<sup>40</sup> Six Algerians held in Bosnia were transferred to U.S. officials in January 2002 (despite a Bosnian high court order to release them) and were sent to Guantánamo.

## **III. Getting Away with Torture**

From the earliest days of the war in Afghanistan and the occupation of Iraq, top U.S. government officials have been aware of allegations of abuse. Yet, until the publication of the Abu Ghraib photographs forced action, many Bush administration officials took at best a “see

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<sup>37</sup> Douglas Jehl and David Johnston, “Rule Change Lets C.I.A. Freely Send Suspects Abroad to Jails,” *The New York Times*, March 6, 2005 (late edition), Section 1, p. 1.

<sup>38</sup> “The Broken Promise,” *Kalla Fakta Program*, Swedish TV4, May 17, 2004 [English transcript online], <http://hrw.org/english/docs/2004/05/17/sweden8620.htm>; Craig Whitlock, “A Secret Deportation of Terror Suspects: 2 Men Reportedly Tortured in Egypt,” *The Washington Post*, July 25, 2004 (These cases and nine others are compiled from news reports in Association of the Bar of the City of New York and Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions”* (New York: ABCNY & NYU School of Law, 2004)).

<sup>39</sup> Raymond Bonner, “Australian’s Long Path in the U.S Antiterrorism Maze,” *The New York Times*, January 29, 2005 (late edition), p. A4.

<sup>40</sup> Human Rights Watch, “Cairo to Kabul to Guantánamo,” *A Human Rights Watch Backgrounder*, March 2005 [online], <http://hrw.org/english/docs/2005/03/28/usint10379.htm>.

no evil, hear no evil” approach to all reports of detainee mistreatment, including those described above, while others were ordering or acquiescing in the abuses.

While reports of abuse had already been coming in for a year, it was a seminal article in *The Washington Post* on December 26, 2002 that provided a wake-up call on U.S. tactics in the “global war on terror.”<sup>41</sup> Citing unnamed U.S. officials, it reported that detainees in Afghanistan were subject to “awkward, painful positions and deprived of sleep with a 24-hour bombardment of lights — subject to what are known as ‘stress and duress’ techniques.” The *Post* also reported being told by U.S. officials that “[t]housands have been arrested and held with U.S. assistance in countries known for brutal treatment of prisoners” and described the rendition of captured al-Qaeda suspects from U.S. custody to other countries where they are tortured or otherwise mistreated. One official was quoted as saying, “We don’t kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them.”<sup>42</sup>

As Human Rights Watch Executive Director Kenneth Roth noted in releasing a letter to President Bush the next day:

The allegations made by *The Washington Post* put the United States on notice that acts of torture may be taking place with U.S. participation or complicity. That places a heightened duty on senior Bush administration officials to take preventive steps immediately.<sup>43</sup>

Human Rights Watch pointed out that “should senior U.S. officials become aware of acts of torture by their subordinates and fail to take immediate and effective steps to end such practices, they would be criminally liable under international law for ‘command responsibility.’”

Yet no action was taken then, nor was any action taken during two more years of mounting allegations of detainee abuse. At no time did President Bush, Secretary Rumsfeld, Director Tenet, or any other senior leader exert his authority and warn that the mistreatment of prisoners must stop. Instead, until the Abu Ghraib pictures were revealed, investigations of deaths in custody and other abuse languished. Soldiers and intelligence personnel accused of crimes, including all cases involving the killing of detainees in Afghanistan and Iraq, escaped judicial punishment.

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<sup>41</sup> Dana Priest and Barton Gellman, “U.S. Decries Abuse but Defends Interrogations: ‘Stress and Duress’ Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities,” *The Washington Post*, December 26, 2002, p. A1.

<sup>42</sup> Dana Priest and Barton Gellman, “U.S. Decries Abuse but Defends Interrogations,” *The Washington Post*, December 25, 2002, p. A1.

<sup>43</sup> Human Rights Watch to President George W. Bush, open letter, December 27, 2002 [online], [http://www.hrw.org/english/docs/2002/12/27/usint9381\\_txt.htm](http://www.hrw.org/english/docs/2002/12/27/usint9381_txt.htm).

Even *after* the Abu Ghraib photos, however, the United States' reaction has been fundamentally one of damage control rather than a search for truth and accountability. This stands in marked contrast to the high-minded promises made by top U.S. officials in the wake of the revelations.

Secretary Rumsfeld, for instance, told a Congressional hearing on May 7, 2004:

Mr. Chairman, I know you join me today in saying to the world: Judge us by our actions. Watch how Americans, watch how a democracy deals with wrongdoing and scandal and the pain of acknowledging and correcting our own mistakes and weaknesses. And then after they have seen America in action — then ask those who preach resentment and hatred of America if our behavior doesn't give the lie to the falsehood and slander they speak about our people and way of life. Ask them if the resolve of Americans in crisis and difficulty — and, yes, the heartache of acknowledging the evil in our midst — doesn't have meaning far beyond their code of hatred.<sup>44</sup>

In a similar vein, then-Secretary of State Colin Powell said that he told foreign leaders: "Watch America. Watch how we deal with this. Watch how America will do the right thing."<sup>45</sup>

But America is not doing the right thing. Rather than rigorously prosecuting those responsible for the policies that resulted in torture, U.S. authorities have shielded them. They have done this in two ways:

- By refusing to allow an independent inquiry of prisoner abuse. Instead, the Department of Defense has established a plethora of investigations, all but one in-house, looking *down* the chain of command at one aspect or another of the treatment of detainees. No investigation had the independence or the breadth to get to the policies at the heart of the prisoner abuse.
- By failing to undertake criminal investigations against those leaders who by commission or omission allowed the widespread criminal abuse of detainees to develop and persist. Prosecutions have commenced only against low-level soldiers and contractors. Only one officer higher than the rank of sergeant — a major personally implicated in abuse — has

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<sup>44</sup> Donald Rumsfeld, "Testimony of Secretary of Defense Donald H. Rumsfeld before the Senate and House Armed Services Committees," U.S. Senate Armed Services Committee, May 7, 2004 [online], <http://armed-services.senate.gov/statemnt/2004/May/Rumsfeld.pdf>.

<sup>45</sup> "Abuse Scandal 'Terrible' for U.S., Powell Concedes," *MSNBC*, May 17, 2004 [online], <http://www.msnbc.msn.com/id/4855930/>.

been charged with a crime. No civilian leader at the Pentagon, the CIA or elsewhere in the government has been charged with a crime.

### ***In-house Investigations down the Chain of Command***

In the wake of the Abu Ghraib abuses, the Pentagon established no fewer than seven investigations, summarized below.<sup>46</sup> Almost all of them involved the military investigating itself. None of the military probes was aimed higher up the chain of command than Gen. Sanchez, the top U.S. soldier in Iraq. None of the investigations had the task of examining the role of the CIA or of civilian authorities.<sup>47</sup>

After the abuses at Abu Ghraib were reported to the chain of command, but before the photos entered the public domain, **Major General Antonio M. Taguba** was appointed by General John Abizaid, commander of United States Central Command (CENTCOM), at the request of Gen. Sanchez, commander of the Coalition Joint Task Force Seven (CJTF-7), to investigate the performance of the 800<sup>th</sup> Military Police (MP) Brigade,<sup>48</sup> a portion of the personnel who staffed Abu Ghraib.<sup>49</sup> Despite Gen. Taguba's limited mandate, his findings were nevertheless very important in placing the acts captured on camera, as well as others, in their local context.<sup>50</sup>

Gen. Taguba reported that “numerous incidents of sadistic, blatant, and wanton criminal abuses” were inflicted on several detainees. The Taguba report described these abuses as “systemic.”<sup>51</sup> Gen. Taguba traced the abuses in part to the recommendation of Gen. Miller on a visit from Guantánamo that detention be used as “an enabler for interrogation,” and that “the guard force be actively engaged in setting the condition for the successful exploitation of internees.”<sup>52</sup> As a result, according to Gen. Taguba, “interrogators actively requested that MP guards set physical and mental conditions for favorable interrogation of witnesses... [The] MP Brigade [was] directed to change facility procedures to ‘set the conditions’ for MI [military intelligence] interrogations.” The report also cited the presence of other government agencies (“OGAs”) — typically used, as here, to refer to the CIA without explicitly naming it — in the detention

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<sup>46</sup> See Human Rights Watch, “Military Investigations into Treatment of Detainees in U.S. Custody,” *A Human Rights Watch Backgrounder*, July 16, 2004 [online], <http://www.hrw.org/campaigns/torture/investigations.htm>.

<sup>47</sup> For another critique of these probes, see Human Rights First, “Getting to Ground Truth: Investigating U.S. Abuses in the ‘War on Terror,’” September 2004 [online], [http://www.humanrightsfirst.org/us\\_law/PDF/detainees/Getting\\_to\\_Ground\\_Truth\\_090804.pdf](http://www.humanrightsfirst.org/us_law/PDF/detainees/Getting_to_Ground_Truth_090804.pdf).

<sup>48</sup> Taguba report, p. 6.

<sup>49</sup> *Ibid.*, pp. 12-13.

<sup>50</sup> General Taguba's confidential findings were first reported by journalist Seymour Hersh the day after the Abu Ghraib photographs were aired on CBS-TV's “Sixty Minutes II.”

<sup>51</sup> Taguba report, p. 16.

<sup>52</sup> Taguba noted that this was “in conflict with” the recommendations of the Ryder report, a previous review of Iraqi prisons, which stated that the engagement of military police in military interrogations to “actively set the favorable conditions for subsequent interviews runs counter to the smooth operation of a detention facility.”

facilities as a factor contributing to the abuses, and first raised the issue of “ghost detainees” kept hidden from the ICRC.<sup>53</sup>

**Lt. Gen. Paul T. Mikolashek, Army Inspector General**, was asked to examine Army doctrine, training, and prison procedures throughout the Central Command area of operation in February 2004. After reviewing 94 confirmed cases of detainee abuse in Afghanistan and Iraq, Gen. Mikolashek somehow concluded that the abuses did not result from any policy and were not the fault of senior officers but rather were “unauthorized actions taken by a few individuals.”<sup>54</sup> The report’s summary and conclusions blame only low-ranking soldiers for the abuses, even though its text identifies numerous problems that were obviously rooted in decisions made by senior commanders and officials. The inspector general apparently made no effort to investigate actions taken high in the chain of command, or to consider sources of information outside the military. Among the problems identified in the report were:

- Troops received “ambiguous guidance from command on the treatment of detainees”;
- Established interrogation policies were “not clear and contained ambiguity”;
- Commanders in Iraq and Afghanistan approved interrogation techniques that went beyond Army doctrine, based in part on guidelines approved by the Secretary of Defense for use in Guantánamo;
- The decision by senior commanders to rely on the Guantánamo guidelines “appears to contradict” the terms of Rumsfeld’s decision, which explicitly stated that the guidelines were applicable only to interrogations at Guantánamo; and
- This led to the use of “high risk” interrogation techniques that “left considerable room for misapplication, particularly under high-stress combat conditions.”

The next two reports, the “Final Report of the Independent Panel to Review DoD [Department of Defense] Detention Operations” (“**The Schlesinger report**”) and the “AR 15-6 Investigation of the Abu Ghraib Prison and 205<sup>th</sup> Military Intelligence Brigade” and “AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205<sup>th</sup> Military Intelligence Brigade” (jointly, “**The Fay/Jones report**,”) were released almost simultaneously in late August.

The reports contained important and disturbing information on the torture and mistreatment of prisoners at Abu Ghraib, and to a lesser extent elsewhere in Iraq and in Afghanistan. Yet both

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<sup>53</sup> Taguba report, p. 27.

<sup>54</sup> Lt. Gen. Paul T. Mikolashek, “The Mikolashek Report,” Department of the Army, July 21, 2004. The report can be found in Karen J. Greenberg and Joshua L. Dratel, ed., *The Torture Papers: The Road to Abu Ghraib* (Cambridge: University of Cambridge Press, 2005), pp. 630-907.

reports shied away from the logical conclusion that high-level military and civilian officials should be investigated for their role in the crimes committed at Abu Ghraib and elsewhere

The Fay/Jones inquiry was charged with examining the alleged misconduct of personnel assigned to or attached to the 205<sup>th</sup> Military Intelligence Brigade, which was in charge of the Abu Ghraib prison. Investigations began in April 2004 with Gen. George R. Fay, deputy chief of staff of the Army intelligence, as chief investigator. Fay, an insurance company executive who had been on active duty for five years, was a contributor to Republican campaigns.<sup>55</sup> On June 17, Army Gen. Paul J. Kern, Army Materiel Command, was given oversight responsibility for the investigation, and, at his request, Acting Army Secretary Les Brownlee subsequently announced that Gen. Anthony R. Jones would be brought into the investigation to question Gen. Sanchez.<sup>56</sup>

Like the Taguba report, and earlier reports, the Fay/Jones report was specific to Abu Ghraib. But it finally put to rest the Bush administration claim that the abuse was the work of a few “bad apples.” The report found that military intelligence officers — not solely military police guards — played a major role in directing and carrying out the abuses at Abu Ghraib. The report listed those abuses in detail — the use of unmuzzled dogs in a “game” of making detainees urinate and defecate in fear, forced participation in group masturbation, stripping detainees of their clothes, and beatings.

The report also made clear that the illegal techniques were not limited to Iraq. “The techniques employed in [Guantánamo] included the use of stress positions, isolation for up to thirty days, removal of clothing and the use of detainees’ phobias (such as the use of dogs). [...] From December 2002, interrogators in Afghanistan were removing clothing, isolating people for long

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<sup>55</sup> Walter Pincus, “Prison Investigator’s Army Experience Questioned,” *The Washington Post*, May 26, 2004, p. A18.

<sup>56</sup> A lead investigator was needed who was at least equal in rank to the Sanchez, a three-star general. Fay is a two-star general. Jones technically is senior to Sanchez because he has held his three-star rank slightly longer. According to Scott Horton, chair of the Committee on International Law of the Association of the Bar of the City of New York, who is a critic of the interrogation policies but has spoken directly with soldiers interviewed by Fay, Fay’s draft report to General Sanchez in May 2004 “was such a whitewash on the role of military personnel that it stood no chance of gaining acceptance.” The report, he says, was then “broadly re-written.” Nevertheless, Horton alleges,

As noted to me by senior officers, certain senior figures whose conduct in this affair bears close scrutiny, were explicitly “protected” or “shielded” by withholding information from investigators or by providing security classifications which made such investigations possible. The individuals “shielded,” I was informed, included MG Geoffrey Miller, MG Barbara Fast, COL Marc Warren, COL Steven Bolz, LTG Sanchez and LTG William (“Jerry”) Boykin. In each case, the fact that these individuals possessed information on Rumsfeld’s involvement was essential to the decision to “shield” them.

(Scott Horton, “Expert Report” (“Scott Horton report”), Center for Constitutional Rights, January 31, 2005 [online], [http://www.ccr-ny.org/v2/legal/september\\_11th/docs/ScottHortonGermany013105.pdf](http://www.ccr-ny.org/v2/legal/september_11th/docs/ScottHortonGermany013105.pdf), paras. 14-15).

periods of time, using stress positions, exploiting fear of dogs and implementing sleep and light deprivation.”<sup>57</sup>

The generals recommended punishments for the top two military intelligence officers at the prison, Col. Thomas M. Pappas and Lt. Col. Steven L. Jordan, as well as three other intelligence officers, and implicated 29 other military intelligence soldiers in at least 44 cases of abuse. The report found that Gen. Sanchez was not “directly involved” in the abuse, but faulted him and his deputy, Gen. Walter Wojdakowski, for failing “to ensure proper staff oversight of detention and interrogation operations.”<sup>58</sup> It criticized Sanchez for his “inconsistent” and “confusing” guidelines on interrogations and said that his orders led interrogators to think that they could use guard dogs on prisoners, which they subsequently did in ways that violated the Geneva Conventions.<sup>59</sup> But the reports failed to take the obvious but politically dangerous step of stating plainly that Gen. Sanchez and other commanders were responsible for what happened. “We did not find General Sanchez culpable but we found him responsible for the things that did or did not happen,” Gen. Paul J. Kern, who oversaw the report, told reporters.<sup>60</sup>

The Schlesinger panel was chosen by Secretary Rumsfeld on May 7, 2004 and included: former Defense Secretary James Schlesinger (Chair); Tillie Fowler, former representative from Florida; retired Air Force Gen. Charles Horner; and Harold Brown, former Secretary of Defense. The panel was asked to review Department of Defense detention operations and to advise the Secretary of Defense on the “cause of the problems and what should be done to fix them.” Issues to be examined included:

force structure, training of regular and reserve personnel, use of contractors, organization, detention policy and procedures, interrogation policy and procedures, the relationship between detention and interrogation, compliance with the Geneva Conventions, relationship with the International Committee of the Red Cross, command relationships, and operational practices.

According to Secretary Rumsfeld, the team was to “examine the pace, the breadth, the thoroughness of the existing investigations and to determine whether additional investigations or studies need to be initiated.” Rumsfeld also noted that “Issues of personal accountability will be resolved through established military justice procedures,” although he would “welcome” any information the panel developed. The panel’s unpaid executive director, James Blackwell, had reportedly done Pentagon consulting as an employee of Science Applications International

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<sup>57</sup> Fay report, p. 29.

<sup>58</sup> LTG Anthony R. Jones, *Article 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade* (“Jones report”), p. 24.

<sup>59</sup> *Ibid.*, p. 4.

<sup>60</sup> Eric Schmitt, “Abuses at Prison Tied to Officers in Intelligence,” *The New York Times*, August 26, 2004.



Corporation of San Diego, the seventh-largest recipient of defense contract awards in fiscal 2002, with \$2.1 billion.<sup>61</sup>

The Schlesinger panel — alone among the probes — interviewed top military and Pentagon officials, but otherwise conducted no independent research.

The Schlesinger panel found that the techniques that Secretary Rumsfeld had put into play “migrated” from Guantánamo to Afghanistan and Iraq. As the report put it, “Law of war policy and decisions germane to [Operation Enduring Freedom] migrated, often quite innocently, into decision matrices for [Operation Iraqi Freedom].”<sup>62</sup> In particular, when Gen. Geoffrey Miller, who oversaw the interrogation efforts at the U.S. military base at Guantánamo Bay, Cuba, went to Iraq in order to step up the hunt for “actionable intelligence,” he “brought to Iraq the secretary of defense’s policy guidelines for Guantánamo” “as a potential model” which he gave to Gen. Sanchez.<sup>63</sup> These techniques formed the basis for the subsequent contradictory policy memos signed by Sanchez that contributed to detainee abuse.<sup>64</sup> In addition, the Schlesinger report noted, when on September 14 “Sanchez signed a memorandum authorizing a dozen interrogation techniques beyond” the standard Army practice under the Geneva Conventions, including “five beyond those approved for Guantánamo,” he did so “using reasoning from the President’s Memorandum of February 7, 2002,” which he believed justified “additional, tougher measures.”<sup>65</sup>

Secretary Schlesinger, in his oral remarks upon releasing the report, regrettably focused on the particular bizarre acts pictured at Abu Ghraib, rather than the context that gave rise to them, speaking of “freelance activities on the part of the night shift,” and describing the situation as “a kind of ‘Animal House.’”<sup>66</sup> He later said that the abuses were due to “just pure sadism.”<sup>67</sup> In addition, Schlesinger stated, “if hypothetically somebody had suggested these kinds of abuses, the last thing that would have been ordered would be that there be photographic evidence of it.”<sup>68</sup> Schlesinger also suggested his own bias by stating that Rumsfeld’s resignation “would be a boon to all America’s enemies.”

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<sup>61</sup> Craig Gordon, “Prison Abuse Investigations: Critics Say Scope Too Narrow,” *Newsday*, June 6, 2004

<sup>62</sup> Schlesinger report, p. 82.

<sup>63</sup> *Ibid.*, p. 37.

<sup>64</sup> *Ibid.*, p. 37.

<sup>65</sup> *Ibid.*, p. 10.

<sup>66</sup> Bradley Graham and Josh White, “Top Pentagon Leaders Faulted in Prison Abuse,” *The Washington Post*, August 25, 2004.

<sup>67</sup> The Hon. James R. Schlesinger, Testimony before Senate Armed Services Committee, September 9, 2004, p. 13.

<sup>68</sup> *Ibid.*, p. 28. There was speculation, however, that photographing detainees in situations thought to be especially humiliating in Arab culture might have been part of a deliberate strategy to get detainees to talk to interrogators for fear of having the photos released. See, e.g., Seymour M. Hersh, “The Gray Zone: How a Secret Pentagon Program Came to Abu Ghraib,” *The New Yorker*, May 24, 2004; “The Pictures: Lynndie England,” *CBSNews.com*, May 12, 2004; Edward Epstein, “Senators Suspect Higher-ups Directed Abuses at Abu Ghraib: They Query General Who Investigated,” *The San*

The Schlesinger report talked about management failures when it should have been more forthright about policy failures. Indeed, it seemed to go out of its way not to find any relationship between Secretary Rumsfeld's approval of interrogation techniques designed to inflict pain and humiliation and the widespread mistreatment and torture of detainees in Iraq, Afghanistan, and Guantánamo.

**Vice Adm. Albert T. Church, Navy Inspector General** was ordered by Secretary Rumsfeld to investigate prisoner operations and intelligence gathering practices. When initiated in early May 2004, the investigation was limited to activities in Guantánamo Bay and the Naval Consolidated Brig in Charleston, South Carolina. Rumsfeld then widened the scope of the inquiry on May 25 to include prison operations in Iraq and Afghanistan. The report was completed in late 2004, but it was only in March 2005 that an unclassified 21-page executive summary was released,<sup>69</sup> and a classified 400-page report was given to the Senate Armed Services Committee.

The Church report was supposed to be the definitive report on the development of interrogation techniques and detainee abuse in the “global war on terror” but the unclassified summary suggests a careful attempt — months after the Schlesinger and Fay/Jones report put the Pentagon on the defensive — to present a version of the facts that would not cause any trouble for the hierarchy. Time and again, the summary goes out of its way to rebut any inference that government policy was to blame, to the point of straining credibility and flatly contradicting the earlier reports. The report concluded that there was “no single, overarching explanation” for the “few” cases in which detainees had not been treated humanely.

Although Secretary Rumsfeld and General Sanchez both approved the use of guard dogs to strike fear in detainees, and although guard dogs were featured prominently in the Abu Ghraib photos, the Church executive summary states that “it is clear that none of the pictured abuses at Abu Ghraib bear any resemblance to approved policies at any level, in any theater.” Indeed, the *only* mention of dogs in the entire summary is the patently false statement that in Afghanistan and Iraq “interrogators clearly understood that abusive practices and techniques — such as ... terrorizing detainees with unmuzzled dogs ... — were at all times prohibited.”

Adm. Church told a congressional hearing that it was “not in my charter” to determine individual responsibility because the Schlesinger panel had such a mandate — even though, as noted above, “issues of personal accountability” were specifically excluded from that panel's

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*Francisco Chronicle*, May 12, 2004; “Hardball with Chris Mathews,” *MSNBC.com*, May 13, 2004 [online], <http://www.msnbc.msn.com/id/4979082/>; Robin Cook, “George Bush's Contempt for International Law Damages Both America and Britain,” *The Independent (UK)*, June 26, 2004; and Eli Lake, “CIA Gets Its Turn in the Hot Seat on Hill,” *The New York Sun*, May 14, 2004.

<sup>69</sup> “Executive Summary,” U.S. Department of Defense, available to the public since March 2005 [online], <http://www.defenselink.mil/news/Mar2005/d20050310exe.pdf> (“Church report”).

remit. Speaking to journalists, Adm. Church added “I don’t think you can hold anyone accountable for a situation that maybe if you had done something different, maybe something would have occurred differently.”

In addition to these probes, there are a number of investigations which are still underway or have been completed but not yet made public:

**Brig. Gen. Charles Jacoby:** This inquiry was ordered in mid-May 2004 by Lt.-Gen. David Barno, the commander of U.S. forces in Afghanistan, to investigate the conditions at around 20 U.S. jails in Afghanistan, including the main facility at Bagram. Jacoby’s job in Afghanistan was “to ensure internationally accepted standards of handling detainees are being met.”<sup>70</sup> Jacoby’s report was reportedly completed in July 2004, but has yet to be released. According to *The Washington Post*, the report found a wide range of shortcomings in the military’s handling of prisoners in Afghanistan.<sup>71</sup> In February 2005, a U.S. military spokesman said that “The report is still under review and once the review is complete it will be released.”<sup>72</sup> Gen. Jacoby refused to meet with Human Rights Watch, even though the organization had conducted some of the only independent investigations of detainee abuses in Afghanistan.

**Furlow/Schmidt:** On January 5, 2005, following the release of the FBI e-mails relating to detainees treatment at Guantánamo, U.S. Southern Command headquarters appointed Army Brigadier General John Furlow to direct “an internal investigation into recently disclosed allegations by members of the Federal Bureau of Investigation of detainee abuse” at Guantánamo. On February 28, 2005, after criticism that the one-star Furlow would be unable to question senior officers such as Gen. Miller, Air Force Lieutenant General Randall M. Schmidt took over the investigation. Schmidt was directed to complete the investigation by March 31.<sup>73</sup>

**Brig. Gen. Richard P. Formica** is heading an inquiry into the detention activities of Special Operations forces. That report has not yet been released.

**Central Intelligence Agency inspector general:** The CIA’s inspector general is also reportedly conducting a half-dozen inquiries into possible misconduct within the agency involving the detention, interrogation, and rendition of suspected terrorists.<sup>74</sup> No details have been made public.

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<sup>70</sup> “U.S. to Review Afghan Prisons,” Associated Press, May 22, 2004.

<sup>71</sup> R. Jeffrey Smith, “General Cites Problems at U.S. Jails in Afghanistan,” *The Washington Post*, December 3, 2004.

<sup>72</sup> “U.S. Rejects U.N. Expert’s Afghan Rights Concerns,” Reuters, February 12, 2005.

<sup>73</sup> “Three-Star General Appointed to Lead Investigation,” A US Southern Command News Release, February 28, 2005 [online], <http://www.southcom.mil/pa/Media/Releases/PR050228.pdf>.

<sup>74</sup> Douglas Jehl and David Johnston, “Rule Change Lets C.I.A. Freely Send Suspects Abroad,” *The New York Times*, March 6, 2005.

## ***Prosecuting Some Soldiers, Belatedly***

Until the publication of the Abu Ghraib photographs forced action, almost all military investigations into deaths and mistreatment in custody were languishing. No one implicated in the abuse of persons in custody in Afghanistan, Iraq or elsewhere, including in the killing of detainees, had been criminally prosecuted. Many personnel appear to have had their cases shelved or have been given inappropriate administrative reprimands, instead of facing criminal prosecution.

In the aftermath of the Abu Ghraib pictures, the United States initiated the prosecution of a number of soldiers and contactors for alleged crimes committed in Iraq (particularly Abu Ghraib)<sup>75</sup> and Afghanistan. Pentagon officials told Human Rights Watch in March 2005 that out of 300 investigations initiated into abuse allegations, only 14 persons have been convicted by court-martial. And although 33 additional soldiers have been referred to trial by court-martial, 70 have received only “non-judicial punishments,” such as reprimands, rank reductions, or discharge from the military, though many of the alleged abuse cases involved serious abuses and homicides.<sup>76</sup> Earlier, in December 2004, the Pentagon told journalists that 130 American troops had been punished or charged for abuse of prisoners, a figure which apparently includes non-judicial punishments.<sup>77</sup>

Homicide investigations have been extremely slow. As of February 2005, Army criminal investigators were reported to have conducted 68 detainee death investigations with 79 possible victims.<sup>78</sup> Yet only two homicide cases have resulted in recommended courts martial for homicide; one has been postponed and in another, most of the implicated personnel were brought before non-judicial administrative hearings instead of court-martial, and most received only administrative punishments. Many cases involving detainee deaths in Afghanistan in 2002, over two-and-a-half years ago, have gone unresolved. In one case from Afghanistan, it appears that an army captain who “murdered” a detainee was simply discharged from the military, and his case was closed.<sup>79</sup>

Meanwhile, no criminal investigations appear to have been commenced for abuses committed at Guantánamo Bay, at US-run “secret locations” around the world or in connection with the

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<sup>75</sup> The Fay/Jones report implicated 31 military intelligence soldiers in the abuse of Iraqi prisoners at Abu Ghraib. The Taguba report listed military police implicated in the abuses at Abu Ghraib. Thus far, however, only seven U.S. army soldiers have been charged and only two convicted and sentenced.

<sup>76</sup> E-mail from Lt. Col. John Skinner, Pentagon spokesperson, to Human Rights Watch researcher, April 8, 2005.

<sup>77</sup> “Pentagon: 130 Troops Punished for Abuse,” *USA Today*, December 15, 2004.

<sup>78</sup> Douglas Jehl and Eric Schmitt, U.S. Military Says 26 Inmate Deaths May Be Homicide,” *The New York Times*, March 16, 2005.

<sup>79</sup> Human Rights Watch to Secretary of Defense Donald Rumsfeld, open letter, December 13, 2004 [online], <http://hrw.org/english/docs/2004/12/10/afghan9838.htm>; R. Jeffrey Smith, “Army Reprimand Reported in Slaying; Officers Allegedly Killed Afghan in ‘02,” *The Washington Post*, December 14, 2004.

rendition of persons to third countries where they were likely to be tortured. With respect to CIA abuses, Porter J. Goss, who replaced George Tenet as director of Central Intelligence, told the Senate Intelligence Committee in February 2005 that “a bunch of other cases” were now under review by the CIA’s inspector general. No CIA officers have been charged in relation to alleged mistreatment, with the single exception of a CIA contractor charged in the death of detainee in Afghanistan in 2003.

#### **IV. Impunity for the Architects of Illegal Policy**

To date, with the exception of one major directly implicated in abuse, only low-ranking soldiers — privates and sergeants have been prosecuted. No officer has been charged in connection with detainee abuse by people under his command. No civilian leader at the Pentagon or the CIA has been investigated.

Commanders and superiors can be held criminally liable if they order, induce, instigate, aid, or abet in the commission of a crime. This is a principle recognized both in U.S. law<sup>80</sup> and international law.<sup>81</sup>

In addition, the doctrine of “command responsibility” or “superior responsibility” holds that individuals who are in civilian or military authority may under certain circumstances be criminally liable not for their actions, but rather for the crimes of those under their command. As explained in the annex to this report, three elements are needed to establish such liability:

1. There must be a superior-subordinate relationship;
2. The superior must have known or had reason to know that the subordinate was about to commit a crime or had committed a crime; and
3. The superior failed to take necessary and reasonable measures to prevent the crime or to punish the perpetrator.

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<sup>80</sup> See, e.g., 18 U.S.C. § 2 (“(a) Whoever commits an offense against the United States or aids, counsels, commands, induces or procures its commission, is punishable as a principal. (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.”)

<sup>81</sup> The Rome statute of the International Criminal Court provides in article 25 that “a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible; (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted; (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission; [etc]”; See also Geneva I, art 49, Geneva II, art. 50; Geneva III, art. 129; Geneva IV, art. 146. (“The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, ... the grave breaches.” Emphasis added.)

The crimes discussed below — war crimes and torture — are punished respectively by the War Crimes Act of 1996, 18 U.S.C. § 2441, and the Anti-Torture Act of 1996, 18 U.S.C. § 2340.

The War Crimes Act provides criminal punishment for whomever, inside or outside the United States, commits a war crime, if either the perpetrator or the victim is a member of the U.S. Armed Forces or a national of the United States. A “war crime” is defined as any “grave breach” of the Geneva Conventions or acts which violate common Article 3 of those pacts.<sup>82</sup> “Grave breaches” include “willful killing, torture or inhuman treatment” of prisoners of war (POWs) and of civilians qualified as “protected persons.” Common Article 3 prohibits, *inter alia*, murder, mutilation, cruel treatment and torture, and “outrages upon personal dignity, in particular humiliating and degrading treatment.”

The Anti-Torture Act criminalizes acts of torture — including attempts to commit torture and conspiracy to commit an act of torture — occurring *outside* the United States’ territorial jurisdiction regardless of the citizenship of the perpetrator or victim.<sup>83</sup> In the case of torture committed *within* the United States, as for instance at Guantánamo, prosecution would be possible under several federal statutes, among them the civil rights laws, which bar government employees from using excessive force, and laws against homicide, battery, and the like.<sup>84</sup> Similarly, state criminal laws could be invoked for any abuse taking place within particular states.

The USA Patriot Act expanded U.S. federal criminal jurisdiction to, among other things, U.S. military bases and U.S. government properties abroad. This is the jurisdictional basis for the criminal case against a CIA contractor.

In addition, the Uniform Code of Military Justice (UCMJ),<sup>85</sup> which provides procedures for courts martial, applies to the conduct of all persons serving in the U.S. Armed Forces,<sup>86</sup>

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<sup>82</sup> 18 U.S.C. §§ 2401, 2441.

<sup>83</sup> 18 U.S.C. § 2340 A (a). Section 2340(3) defined the “United States” as including “all areas under the jurisdiction of the United States including any of the places described in sections 5 and 7 of this title and section 46501(2) of title 49.” The USA Patriot Act broadened the scope of section 7, extending jurisdiction under that section to foreign diplomatic, military and other facilities. The Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 amends section 2340(3) to define the “United States” as “the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States” (H.R.4200, 108th Cong. §1089 (2004)).

<sup>84</sup> The United States reported to the U.N. Committee against Torture that “Where acts constituting torture under the Convention are subject to federal jurisdiction, they fall within the scope of such criminal offences as assault, maiming, murder, manslaughter, attempt to commit murder or manslaughter, or rape. See 18 U.S.C. §§ 113, 114, 1111, 1113, 2031. Conspiracy to commit these crimes, and being an accessory after the fact, are also crimes. See 18 U.S.C. §§ 3, 371 and 1117” (U.N. Committee against Torture, “Consideration of Reports Submitted by State Parties under Article 19 of the Convention: Initial Reports of State Parties due in 1995; Addendum; United States of America” (Geneva: United Nations, 2000), CAT/C/28/Add.5, para. 178).

<sup>85</sup> 10 U.S.C. §§801-941 (1994 and Supp. IV, 1999).

including the officers identified below. (These officers are thus potentially subject to the concurrent jurisdiction of civilian courts and the UCMJ.) The UCMJ applies worldwide.<sup>87</sup> It comprises a set of criminal laws, which include many crimes punished under civilian law (e.g., assault, manslaughter, murder, rape, etc.), as well as offenses such as cruelty and maltreatment<sup>88</sup> and dereliction of duty<sup>89</sup> (these are separate offenses under 10 U.S.C. §892). In addition, a service member whose conduct is alleged to violate a federal criminal law, such as the Anti-Torture Statute, could be prosecuted under Article 134 of the UCMJ.

Human Rights Watch expresses no opinion about the ultimate guilt or innocence of the four officials listed below, or of any other officials, particularly because so much evidence has been withheld and so many questions remain unanswered, but does believe that a *prima facie* case exists that warrants the opening of a criminal investigation with respect to each.

### **Secretary of Defense Donald Rumsfeld**

“These events occurred on my watch. As Secretary of Defense I am accountable for them. I take full responsibility.”

- Donald Rumsfeld<sup>90</sup>

*Secretary Rumsfeld should be investigated for war crimes and torture by US troops in Afghanistan, Iraq, and Guantánamo under the doctrine of “command responsibility.” Secretary Rumsfeld created the conditions for U.S. troops to commit war crimes and torture by sidelining and disparaging the Geneva Conventions, by approving interrogation techniques that violated the Geneva Conventions as well as the Convention against Torture, and by approving the hiding of detainees from the International Committee of the Red Cross. From the earliest days of the war in Afghanistan, Secretary Rumsfeld was on notice through briefings, ICRC reports, human rights reports, and press accounts that U.S. troops were committing war crimes, including acts of torture. However, there is no evidence that he ever exerted his authority and warned that the mistreatment of prisoners must stop. Had he done so, many of the crimes committed by U.S. forces could have been avoided.*

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<sup>86</sup> 10 U.S.C. §802 (1994). The term “armed forces” is defined in section 101(a)(4) to mean the “Army, Navy, Air Force, Marine Corps, and Coast Guard” (10 U.S.C. §101(a)(4) (1994)). The UCMJ applies to civilians accompanying the armed forces only during a congressionally declared war.

<sup>87</sup> 10 U.S.C. §805.

<sup>88</sup> 10 U.S.C. §893

<sup>89</sup> 10 U.S.C. §892. This offense, which applies to personnel who know of offenses by others and fail to report them, as well as failure to obey orders, has been frequently used against soldiers involved in recent prisoner abuse.

<sup>90</sup> Donald Rumsfeld, “Testimony of Secretary of Defense Donald H. Rumsfeld before the Senate and House Armed Services Committees,” U.S. Senate Armed Services Committee, May 7, 2004 [online], <http://armed-services.senate.gov/statemnt/2004/May/Rumsfeld.pdf>.

*An investigation would also determine whether the illegal interrogation techniques that Secretary Rumsfeld approved for Guantánamo were actually used to inflict inhuman treatment on detainees there before he rescinded his approval to use them without requesting his permission. It would also examine whether Secretary Rumsfeld approved a secret program that encouraged physical coercion and sexual humiliation of Iraqi prisoners, as alleged by the journalist Seymour Hersh. If either were true, Secretary Rumsfeld might also, in addition to command responsibility, incur liability as the instigator of crimes against detainees.*

Secretary Rumsfeld is the top civilian official in the Pentagon. By law and in fact, he has command authority over all geographic and functional military commands.<sup>91</sup>

***Secretary Rumsfeld created the conditions for U.S. troops to commit war crimes and torture and thus should have known that crimes were likely to occur***

### **Secretary Rumsfeld denigrated the Geneva Conventions**

Secretary Rumsfeld has been central to the Bush Administration's effort to redefine and minimize the protections due to prisoners captured in the "global war on terror." Ignoring the deeply rooted U.S. military practice of applying the Geneva Conventions broadly, Secretary Rumsfeld labeled the first detainees to arrive at Guantánamo from Afghanistan on January 11, 2002 as "unlawful combatants," denying them possible status as POWs. "Unlawful combatants do not have any rights under the Geneva Convention," Secretary Rumsfeld said,<sup>92</sup> overlooking that the Geneva Conventions provide explicit protections to all persons captured in an international armed conflict, even if they are not entitled to POW status. Secretary Rumsfeld signaled a casual approach to U.S. compliance with international law by saying that the government would "for the most part, treat them in a manner that is reasonably consistent with the Geneva Conventions, to the extent they are appropriate."<sup>93</sup> On January 27, Secretary Rumsfeld visited Guantánamo and said that the detainees there were not POWs.<sup>94</sup>

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<sup>91</sup> "Unless otherwise directed by the President, the chain of command to a unified or specified combatant command runs — (1) from the President to the Secretary of Defense; and (2) from the Secretary of Defense to the commander of the combatant command" (10 U.S.C. § 162(b)). For charts and organigrams, see "Chapter 24: National Security Structure and Strategy," The Judge Advocate General's Corps, U.S. Army, [online], [https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf/0/1af4860452f962c085256a490049856f/\\$FILE/Chapter%2024%20-%20National%20Security%20Structure.htm](https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf/0/1af4860452f962c085256a490049856f/$FILE/Chapter%2024%20-%20National%20Security%20Structure.htm). As Secretary Rumsfeld himself noted, "I am in the chain of command" ("Secretary Rumsfeld on ABC's Today Show with Diane Sawyer," news transcript, U.S. Department of Defense, May 5, 2004 [online], <http://www.defenselink.mil/transcripts/2004/tr20040505-secdef0703.html>).

<sup>92</sup> Katharine Q. Seelye, "A Nation Challenged: The Prisoners; First 'Unlawful Combatants' Seized in Afghanistan Arrive at U.S. Base in Cuba," *The New York Times*, January 12, 2002, p. A7.

<sup>93</sup> "Geneva Convention Doesn't Cover Detainees," Reuters, January 11, 2002.

<sup>94</sup> "Rumsfeld Visits Camp X-Ray," *CNN*, January 27, 2002 [online], <http://transcripts.cnn.com/TRANSCRIPTS/0201/27/sun.09.html>.



On February 7, 2002, Secretary Rumsfeld questioned the relevance of the Geneva Conventions to current U.S. military operations: “The reality is the set of facts that exist today with the al-Qaeda and the Taliban were not necessarily the set of facts that were considered when the Geneva Convention was fashioned.”<sup>95</sup>

Even after the Abu Ghraib scandal broke, Secretary Rumsfeld continued to take a loose view of the applicability of the Geneva Conventions. On May 5, 2004, he told a television interviewer that the Geneva Conventions “did not apply precisely” in Iraq but were “basic rules” for handling prisoners.<sup>96</sup> Visiting Abu Ghraib prison on May 14, Rumsfeld remarked, “Geneva doesn’t say what you do when you get up in the morning.”

Secretary Rumsfeld’s belittling of the Geneva Conventions created a climate in which respect for legal norms by U.S. troops may have been loosened. In May 2004, for instance, a member of the 377<sup>th</sup> Military Police Company told *The New York Times* that the labeling of prisoners in Afghanistan as “enemy combatants” not subject to the Geneva Conventions contributed to their abuse. “We were pretty much told that they were nobodies, that they were just enemy combatants,” he said. “I think that giving them the distinction of soldier would have changed our attitudes toward them.”<sup>97</sup>

Similarly, speaking of the decision to apply Geneva Convention rules only where this was “appropriate” and “consistent with military necessity,” William H. Taft IV, who until recently served as the State Department’s top legal adviser said it:

unhinged those responsible for the treatment of the detainees in Guantánamo from the legal guidelines for interrogation of detainees reflected in the Conventions and embodied in the Army field manual for decades. Set adrift in uncharted waters and under pressure from their leaders to develop information on the plans and practices of al Qaeda, it was predictable that those managing the interrogation would eventually go too far<sup>98</sup>

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<sup>95</sup> See Jim Garamone, “Geneva Convention Applies to Taliban, Not Al-Qaeda,” *DefenseLink News* (US Military), American Forces Press Service, February 7, 2002; “Redefining Torture: Did the U.S. Go Too Far in Changing the Rules, or Did It Apply the New Rules to the Wrong People?” *Time Magazine*, June 21, 2004.

<sup>96</sup> Secretary Rumsfeld, “Today,” Interview by Matt Lauer, *NBC*, news transcript, U.S. Department of Defense, May 5, 2004 [online], <http://www.dod.gov/transcripts/2004/tr20040505-secdef1425.html>.

<sup>97</sup> Douglas Jehl and Andrea Elliott, “The Reach of War: GI Instructors; Cuba Base Sent its Interrogators to Iraqi Prison,” *The New York Times*, May 29, 2004, p. A1.

<sup>98</sup> William H. Taft IV, “Keynote Remarks,” The Geneva Convention and the Rules of War in the Post 9-11 and Iraq World, conference, Washington College of Law American University, March 24, 2005. On file with Human Rights Watch.

One of the earliest indications of Secretary Rumsfeld's approach to interrogations came with the capture in Afghanistan of John Walker Lindh, the so-called "American Taliban." Photos presented by Lindh's lawyers on April 2, 2002 showed Lindh stripped naked, blindfolded, with plastic cuffs on his wrists, and bound to a stretcher with duct tape.<sup>99</sup> According to a motion filed in federal court by Lindh's attorneys, Lindh was left for days on this gurney in an unheated and unlit metal shipping container, removed from the container only during interrogations. A group of armed American soldiers allegedly "blindfolded Mr. Lindh, and took several pictures of Mr. Lindh and themselves with Mr. Lindh. In one, the soldiers scrawled 'shithead' across Mr. Lindh's blindfold and posed with him. ... Another told Mr. Lindh that he was 'going to hang' for his actions and that after he was dead, the soldiers would sell the photographs and give the money to a Christian organization." Mr. Lindh still had a bullet in his thigh, which was said by a U.S. physician to be "seeping and malodorous." He was also said to be suffering from hypothermia, malnourishment, and exposure.<sup>100</sup> According to the motion, "A Navy physician... recounted that the lead military interrogator in charge of Mr. Lindh's initial questioning told the physician 'that sleep deprivation, cold and hunger might be employed' during Mr. Lindh's interrogations." According to documents examined by the *Los Angeles Times*, Rumsfeld's legal counsel instructed military intelligence officers to "take the gloves off" when interrogating Lindh.<sup>101</sup> In the early stages of Lindh's interrogation, his responses were reportedly cabled to Washington hourly.<sup>102</sup>

In addition, as the Schlesinger report found, Secretary Rumsfeld's multiple policy changes regarding acceptable interrogation techniques at Guantánamo "contribut[ed] to uncertainties in the field as to which techniques were authorized."<sup>103</sup>

## Secretary Rumsfeld approved interrogation methods that violated the Geneva Conventions and the Convention against Torture

Secretary Rumsfeld was intimately involved in the minutiae of interrogation techniques for detainees at Guantánamo Bay, Cuba, for whom the U.S. government had announced that POW protections would not apply. On December 2, 2002, responding to a request from officers at Guantánamo, Secretary Rumsfeld authorized a list of techniques for interrogation of prisoners in

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<sup>99</sup> See "Setback for 'US Taleban' Defence," *BBC News*, April 1, 2002 [online], <http://news.bbc.co.uk/1/hi/world/americas/1905647.stm>.

<sup>100</sup> United States of America v. John Philip Walker Lindh, U.S. District Court, E.D. Va., Crim. No. 02-37-A, Proffer of facts in Support of Defendant's Motion to Suppress, June 13, 2002 [online], [http://www.lindhdefense.info/20020613\\_FactsSuppSuppress.pdf](http://www.lindhdefense.info/20020613_FactsSuppSuppress.pdf).

<sup>101</sup> Richard A. Serrano, "Prison Interrogators' Gloves Came off before Abu Ghraib," *Los Angeles Times*, June 9, 2004.

<sup>102</sup> *Ibid.* On the eve of a court hearing on his motion to suppress his confession, at which he likely would have testified to his treatment in Afghanistan, Lindh agreed to plead guilty to lesser charges than those for which he was indicted. As part of the arrangement Lindh — reportedly at the request of the Department of Defense — agreed to the following statement: "The defendant agrees that this agreement puts to rest his claims of mistreatment by the United States military, and all claims of mistreatment are withdrawn. The defendant acknowledges that he was not intentionally mistreated by the U.S. military." See Dave Lindorff, "A First Glimpse at Bush's Torture Show," *Counterpunch*, June 5-6, 2004; Dave Lindorff, "Chertoff and Torture," *The Nation*, February 14, 2005.

<sup>103</sup> Schlesinger report, p. 14.

Guantánamo that was an unprecedented expansion of army doctrine.<sup>104</sup> The techniques approved by Rumsfeld included:

- “The use of stress positions (like standing) for a maximum of four hours”;
- Isolation up to 30 days;
- “The detainee may also have a hood placed over his head during transportation and questioning”;
- “Deprivation of light and auditory stimuli”;
- “Removal of all comfort items (including religious items)”;
- “Forced grooming (shaving of facial hair, etc)”;
- “Removal of clothing”;
- “Using detainees’ individual phobias (such as fear of dogs) to induce stress.”<sup>105</sup>

These methods violate the protections afforded to POWs, the presumptive classification of many of the Guantánamo detainees.<sup>106</sup> Depending on how they are used, these methods also likely violate the Geneva Conventions’ prohibition on torture or inhuman treatment of prisoners, regardless of whether the prisoners are entitled to POW protections.<sup>107</sup> Their use on prisoners would thus constitute a war crime.

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<sup>104</sup> That doctrine is embodied in Department of the Army *Field Manual 34-52: Intelligence Interrogation*, which stresses cooperation as the basis for successful interrogation. It specifically prohibits torture or coercion. The field manual also lists relevant sections of the Geneva Conventions, including the prohibition against, “subjecting the individual to humiliating or degrading treatment, implying harm to the individual or his property or implying a deprivation of rights guaranteed under international law because of failure to cooperate” (*Field Manual 34-52: Intelligence Interrogation*, U.S. Department of the Army, September 1992). As the working group on interrogation techniques established by Secretary Rumsfeld pointed out, “Army interrogation experts view the use of force as an inferior technique that yields information of questionable quality” (“Working Group Report on Detainee Interrogations on the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations,” April 4, 2003 [online], <http://www.washingtonpost.com/wp-srv/nation/documents/040403dod.pdf>, p. 53).

<sup>105</sup> Jerald Phifer to Commander of Joint Task Force 170, memorandum, “Request for Approval of Counter-resistance Techniques,” October 11, 2002, which was attached to William J. Haynes II to Secretary of Defense, memorandum, “Counter-resistance Techniques,” November 27, 2002, and approved by Secretary Rumsfeld on December 2, 2002 [online], <http://www.washingtonpost.com/wp-srv/nation/documents/dodmemos.pdf>, p. 1 Rumsfeld appended a handwritten note to his authorization of these techniques: “However, I stand for 8-10 hours a day. Why is standing limited to 4 hours?”

<sup>106</sup> Article 5 of the Geneva Convention relative to the Treatment of Prisoners of War (1949) states:

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

<sup>107</sup> Article 31 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV, 1949) prohibits, “physical or moral coercion” against protected persons (i.e. non-POW prisoners), while Article 27 states that such civilian prisoners must “at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.” Article 17 of the Geneva Convention relative to the

Additionally, Army *Field Manual 34-52* cites “forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time” as an example of torture. Mental torture includes “abnormal sleep deprivation,” which may or may not have resulted from the authorization of light control and loud music. The field manual also prohibits forms of coercion including threats. Perhaps most importantly, the field manual instructs soldiers, when in doubt, to ask themselves: “If your contemplated actions were perpetrated by the enemy against U.S. POWs, you would believe such actions violate international or U.S. law.”<sup>108</sup>

As the U.N.’s Special Rapporteur on Torture made clear in his 2004 report to the U.N. General Assembly, the techniques also violate the prohibitions of the Convention against Torture<sup>109</sup>:

The Special Rapporteur has recently received information on certain methods that have been condoned and used to secure information from suspected terrorists. They notably include holding detainees in painful and/or stressful positions, depriving them of sleep and light for prolonged periods, exposing them to extremes of heat, cold, noise and light, hooding, depriving them of clothing, stripping detainees naked and threatening them with dogs. The jurisprudence of both international and regional human rights mechanisms is unanimous in stating that such methods violate the prohibition of torture and ill-treatment.<sup>110</sup>

Indeed, the United States has denounced as torture these same methods when practiced by other countries, including Burma (being forced to squat or remain in uncomfortable periods for long periods of time), Egypt (stripping and blindfolding of prisoners), Eritrea (tying of hands and feet for extended periods of time), Iran (sleep deprivation and “suspension for long periods in

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Treatment of Prisoners of War (Geneva Convention III, 1949) states, “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 unpleasant or disadvantageous treatment of any kind.”

<sup>108</sup> *Field Manual 34-52: Intelligence Interrogation*, U.S. Department of the Army, September 1992, pp. 1-9.

<sup>109</sup> The U.N. Committee against Torture, in its consideration of the report of Israel, for example, noted that methods allegedly included: “(1) restraining in very painful conditions, (2) hooding under special conditions, (3) sounding of loud music for prolonged periods, (4) sleep deprivation for prolonged periods, (5) threats, including death threats, (6) violent shaking, and (7) using cold air to chill, and are, in the Committee’s view, breaches of article 16 and also constitute torture as defined in article 1 of the Convention. This conclusion is particularly evident where such methods of interrogation are used in combination, which appears to be the standard case” (U.N. Committee against Torture (CAT), “Concluding Observations concerning Israel” (United Nations, Geneva, 1997), A/52/44, para. 257, emphasis added). See also CAT, “Concluding Observations concerning Republic of Korea” (United Nations, Geneva, 1996), A/52/44, para. 56 (severe sleep deprivation constitutes torture); CAT, “Concluding Observations concerning New Zealand” (United Nations, Geneva, 1993), A/48/44, para. 148 (threat of torture constitutes torture). The U.N. Special Rapporteur on Torture has condemned many of these practices, pointing out that while cruel, inhuman or degrading treatment may be subject to different rules than torture under the Convention against Torture and Other Cruel, Human or Degrading Treatment or Punishment (CAT), its prohibition is nonetheless “non-derogable” (absolute at all times) under Article 4 of the ICCPR. See “Interim Report of the Special Rapporteur of the Commission on Human Rights on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” (United Nations, Geneva, 2004), A/59/324.

<sup>110</sup> “Interim Report of the Special Rapporteur of the Commission on Human Rights on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” (United Nations, Geneva, 2004), A/59/324, para 17.

contorted positions”), Iraq (food and water deprivation), Jordan (sleep deprivation and solitary confinement), Pakistan (prolonged isolation and denial of food or sleep), Saudi Arabia (sleep deprivation), Tunisia (food and sleep deprivation), and Turkey (prolonged standing, isolation).<sup>111</sup> In the most recent report covering the use of torture in 2004, the State Department criticized: Egypt for stripping and blindfolding detainees and pouring cold water on them; Tunisia, Iran, and Libya for using sleep deprivation; Libya for threatening chained detainees with dogs; and North Korea for forcing detainees to stand up and sit down to the point of collapse.<sup>112</sup>

Of Secretary Rumsfeld’s methods, “fear of dogs...to induce stress” deserves special attention. Threatening a prisoner with torture to make him talk is considered to be a form of torture or cruel, inhuman or degrading treatment.<sup>113</sup> Threatening a prisoner with a ferocious guard dog is no different as a matter of law from pointing a gun at a prisoner’s head. And, of course, many of the pictures from Abu Ghraib show unmuzzled dogs being used to intimidate detainees, sometimes while they are cowering, naked. As General Fay noted, “When dogs are used to threaten and terrify detainees, there is a clear violation of applicable laws and regulations.”<sup>114</sup>

After objections from the Navy’s general counsel, Secretary Rumsfeld rescinded his blanket approval of the harsh techniques listed above on January 15, 2003.

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<sup>111</sup> See Human Rights Watch, “U.S. State Department Criticism of ‘Stress and Duress’ Interrogation Around the World,” A Human Rights Watch Backgrounder, April 2003 [online], <http://www.hrw.org/press/2003/04/stressnduress.htm>.

<sup>112</sup> *Country Reports on Human Rights Practices: 2004*, U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, February 28, 2005.

<sup>113</sup> See *Field Manual 34-52*, Department of Army, 1992, Chapter 1 (“The use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind is prohibited by law and is neither authorized nor condoned by the US Government”). Under 18 U.S.C. § 2340(1), torture is defined to include an act specifically intended to inflict severe mental pain or suffering. Section 2340 (2) defines “severe mental pain or suffering” to mean: “the prolonged mental harm caused by or resulting from (A) the intentional infliction or threatened infliction of severe physical pain or suffering; or... (C) the threat of imminent death.” According to the U.N. Special Rapporteur on Torture,

A number of decisions by human rights monitoring mechanisms have referred to the notion of mental pain or suffering, including suffering through intimidation and threats, as a violation of the prohibition of torture and other forms of ill-treatment. Similarly, international humanitarian law prohibits at any time and any place whatsoever any threats to commit violence to the life, health and physical or mental well-being of persons. It is my opinion that serious and credible threats, including death threats, to the physical integrity of the victim or a third person can amount to cruel, inhuman or degrading treatment or even torture, especially when the victim remains in the hands of law enforcement officials.

(“Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 2001/62,” (United Nations, Geneva, 2001), E/CN.4/2002/76, Annex III.) See also Commission on Human Rights resolution 2003/38, “Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” which states, “intimidation and coercion, as described in article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, including serious and credible threats, as well as death threats, to the physical integrity of the victim or of a third person, can amount to cruel, inhuman or degrading treatment or to torture” (United Nations, Geneva, 2002), E/CN.4/RES/2002/38, emphasis added; In Brazil, for example, the U.N. Special Rapporteur on Torture stated that: “the most common forms of torture were electric shocks, beatings, and threats.”

<sup>114</sup> Fay report, p. 68.

## Direct responsibility for abuses at Guantánamo?

An investigation could reveal whether any of the illegal tactics Secretary Rumsfeld authorized on December 2, 2002 were then used in the interrogation of prisoners at Guantánamo before his authorization to use them without requesting his permission was rescinded. There is some evidence suggesting that they may have been. In that case, Secretary Rumsfeld could potentially bear direct criminal responsibility, as opposed to command responsibility.

According to the classified sections of the Church report as described by U.S. Senator Carl Levin, Dr. Michael Gelles, the chief psychologist of the Navy Criminal Investigative Service, completed a study of Guantánamo interrogations in December 2002 (when the harsh Rumsfeld-approved techniques were in effect) that included extracts of interrogation logs. Gelles reported to the service director, David Brant, that interrogators were using "abusive techniques and coercive psychological procedures." According to Levin, Gelles' report prompted Brant to argue that if those aggressive practices continued, the Navy would have to "consider whether to remain" at Guantánamo. At the same time, Alberto J. Mora, the Navy's general counsel, said that the techniques were "unlawful and unworthy of the military services," according to Levin's account.<sup>115</sup>

Since most public accounts of abuse at Guantánamo come from released detainees and since the nature of their confinement renders detainees generally unable to specify dates,<sup>116</sup> it is difficult to say with precision whether the abusive techniques approved by Secretary Rumsfeld were employed before blanket approval was rescinded.

According to the Department of Defense, some of the more severe techniques — including "inducing stress (use of female interrogator)," and "up to 20 hour interrogations," but not the use of dogs — were used on Guantánamo detainees in the interim.<sup>117</sup> The Church report summary states that:

"[D]uring the course of interrogation operations at GTMO, the Secretary of Defense approved specific interrogation plans for two "high-value" detainees who had resisted interrogation for many months, and who were believed to possess actionable intelligence that could be used to prevent attacks against the United States. Both plans employed several of the counter resistance techniques found in the December 2, 2002 GTMO policy, and both successfully neutralized the two detainees' resistance training and yielded valuable intelligence. We note, however, that these interrogations were sufficiently aggressive that they highlighted the difficult question of precisely defining the boundaries of humane treatment of detainees."<sup>118</sup>

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<sup>115</sup> "U.S. Senate Armed Services Committee Holds a Hearing on Military Strategy and Operational Requirements for Combatant Commanders in Review of the Fiscal Year 2006 Defense Authorization Request," March 15, 2005; Charlie Savage, "Abuse Led Navy to Consider Pulling Cuba Interrogators," *The Boston Globe*, March 16, 2005 [online], [http://www.boston.com/news/nation/washington/articles/2005/03/16/abuse\\_led\\_navy\\_to\\_consider\\_pulling\\_cuba\\_interrogators/](http://www.boston.com/news/nation/washington/articles/2005/03/16/abuse_led_navy_to_consider_pulling_cuba_interrogators/).

<sup>116</sup> In addition, there are now e-mail accounts from FBI agents released as a result of FOIA litigation. These accounts do also not specify the dates of the observations contained.

<sup>117</sup> "GTMO Interrogation Techniques," (a one-page summary issued to reporters by Bush aides, listing which specific techniques were approved and/or used), June 22, 2004, as published in Karen J. Greenberg and Joshua L. Dratel, ed., *The Torture Papers: The Road to Abu Ghraib* (Cambridge: University of Cambridge Press, 2005), Appendix A. See also Josh White, "Methods Used on 2 at Guantánamo," *The Washington Post*, June 4, 2004.

<sup>118</sup> Church report, p. 10.

Rather than discard the techniques entirely, however, Secretary Rumsfeld ordered that any use of the harsher categories of techniques be approved by him personally, thus suggesting that he continued to consider them legitimate:

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 use of such techniques.<sup>119</sup>

Also on January 15, 2003, Secretary Rumsfeld ordered the establishment of a working group to consider the legal permissibility of interrogation techniques in the “war on terror.” The working group played a significant role in relaxing the definition of torture.<sup>120</sup> Based on the recommendations of this group, Secretary Rumsfeld issued a final interrogation policy for Guantánamo on April 16, 2003. These guidelines, while more restrictive than the December 2002 rules, still allowed techniques that go beyond what the Geneva Conventions permitted for POWs.<sup>121</sup> Indeed, the Secretary’s memo itself states in relation to several techniques — including isolation and removing privileges from detainees — that “those nations that believe detainees are subject to POW protections” may find that technique to violate those protections.

The Schlesinger report found that “the augmented techniques [approved by Secretary Rumsfeld] for Guantánamo migrated to Afghanistan and Iraq where they were neither limited nor safeguarded.”

Contrary to the attention given to interrogation techniques at Guantánamo, there was no prescribed interrogation regime for prisoners held in Afghanistan. According to the Church report, the U.S. military command in Afghanistan in January 2003 submitted, as requested, a list of interrogation techniques to the military’s Joint Staff and Central Command. The list included

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<sup>119</sup> Donald Rumsfeld to Commander USSOUTHCOM, “Counter-Resistance Techniques,” memorandum, January 15, 2003 [online], [www.washingtonpost.com/wp-srv/nation/documents/011503rumsfeld.pdf](http://www.washingtonpost.com/wp-srv/nation/documents/011503rumsfeld.pdf).

<sup>120</sup> Its recommendations echoed arguments put forth by then-Assistant Attorney General Jay S. Bybee detailing ways in which interrogation techniques could be made more severe without exposing U.S. soldiers or officials to legal liability. The findings of the working group acknowledge and then ignore the Army’s opinion that cooperation is the most effective way to obtain intelligence from interrogations. Like the Bybee memo, the working group sought to exploit the distinction between “torture” and “cruel, inhuman or degrading treatment” in the language of the U.N. Convention against Torture and Other Cruel, Human or Degrading Treatment or Punishment. The working group also explored the possibility of defenses (such as necessity and self-defense) that could excuse the use of torture during interrogation. (“Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations,” Department of Defense, April 4, 2003. A copy of the report can be found in Karen J. Greenberg and Joshua L. Dratel, ed., *The Torture Papers: The Road to Abu Ghraib* (Cambridge: University of Cambridge Press, 2005), pp. 286-359.)

<sup>121</sup> Donald Rumsfeld, Secretary of Defense, to James T. Hill, Commander, U.S. Southern Command, “Counter-Resistance Techniques in the War on Terrorism,” memorandum, April 16, 2003. The memorandum can be found in Karen J. Greenberg and Joshua L. Dratel, ed., *The Torture Papers: The Road to Abu Ghraib* (Cambridge: University of Cambridge Press, 2005), p. 360.

techniques “very similar” to those approved by Secretary Rumsfeld for Guantánamo, but were said by Church to have been arrived at locally. When the command in Afghanistan never heard any complaints, it “interpreted this silence to mean that the techniques ...were unobjectionable to higher headquarters, and therefore could be considered approved policy.”<sup>122</sup> According to the Church report, in Iraq as well, the Pentagon offered no help to Central Command in Baghdad in developing its interrogation procedures. The report noted that by September 2003, Baghdad headquarters “was left to struggle with these issues on its own in the midst of fighting an insurgency.”<sup>123</sup>

In both theaters, illegal interrogation methods first approved by Secretary Rumsfeld were, in fact, used. The Schlesinger report found that in Afghanistan, “techniques included removal of clothing, isolating people for long periods of time, use of stress positions, exploiting fear of dogs, and sleep and light deprivation. Interrogators in Iraq, already familiar with some of these ideas, implemented them even prior to any policy guidance from CJTF-7 [the command in Iraq].”<sup>124</sup> At Abu Ghraib, of course, the techniques put into play by Secretary Rumsfeld, such as the use of dogs, figured prominently in the war crimes committed against detainees.

### A secret access program?

Citing “several past and present American intelligence officials,” journalist Seymour Hersh alleged that Secretary Rumsfeld “authorized the establishment of a highly secret program that was given blanket advance approval to kill or capture and, if possible, interrogate “high value” targets” in the war on terror. This “secret access program,” or SAP, “carried out instant interrogations — using force if necessary — at secret CIA detention centers scattered around the world.” Frustrated by a failure to stem the Insurgency in Iraq, Secretary Rumsfeld reportedly decided to “get tough with those Iraqis in the Army prison system who were suspected of being insurgents” and expanded the SAP to Abu Ghraib. “The commandos were to operate in Iraq as they had in Afghanistan. The male prisoners could be treated roughly, and exposed to sexual humiliation.”<sup>125</sup>

If Secretary Rumsfeld did in fact approve such a program, he would bear direct liability, as opposed to command responsibility, for war crimes and torture committed by the SAP.

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<sup>122</sup> Church report, p.7

<sup>123</sup> Eric Schmitt, “Prison Abuse Inquiry Says Officials Had Little Oversight,” *The New York Times*, December 4, 2004.

<sup>124</sup> Schlesinger report, p. 68.

<sup>125</sup> Seymour Hersh, *Chain of Command: The Road from 9/11 to Abu Ghraib* (New York: HarperCollins, 2004).



## Secretary Rumsfeld approved hiding detainees from the ICRC

Secretary Rumsfeld has publicly admitted that, acting upon a request by George Tenet, then-director of the CIA, he ordered an Iraqi national held in Camp Cropper, a high security detention center in Iraq, to be kept off the prison's rolls and not presented to the International Committee of the Red Cross.<sup>126</sup> The prisoner, referred to as "Triple X" and later identified as Hiwa Abdul Rahman Rashul, was reportedly a senior member of Ansar al-Islam, an al-Qaeda-linked organization apparently responsible for several attacks in Iraq.<sup>127</sup> Rumsfeld also admitted that there have been other cases in which detainees have been held secretly.<sup>128</sup>

The Third Geneva Convention in article 126 (concerning prisoners of war) and the Fourth Geneva Convention in article 143 (concerning detained civilians) requires the ICRC to have access to all detainees and places of detention. Visits may only be prohibited for "reasons of imperative military necessity" and then only as "an exceptional and temporary measure."<sup>129</sup>

## Secretary Rumsfeld reportedly initiated pressure on troops at Abu Ghraib to obtain "actionable intelligence"

The severest abuses at Abu Ghraib occurred after U.S. forces there were placed under pressure to produce "actionable intelligence" among Iraqi prisoners. Secretary Rumsfeld's role in that pressure remains to be elucidated.

The Schlesinger panel found that "pressure for additional intelligence and the more aggressive methods sanctioned by the Secretary of Defense memorandum resulted in stronger interrogation techniques. They did contribute to a belief that stronger interrogation methods were needed and appropriate in their treatment of detainees."<sup>130</sup>

In August 2003, with American troops facing a growing insurgency in Iraq, and frustration rising over the failure to uncover "weapons of mass destruction" or to capture deposed Iraqi President Saddam Hussein, Maj. Gen. Geoffrey D. Miller, who oversaw the interrogation efforts at the

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<sup>126</sup> "Defense Department Regular Briefing," U.S. Department of Defense, news transcript, June 17, 2004 [online], <http://www.defenselink.mil/transcripts/2004/tr20040617-secdef0881.html>.

<sup>127</sup> Secretary Rumsfeld's order led to a detention of seven months, during which the detainee was interrogated only once. See Eric Schmitt and Thom Shanker, "Rumsfeld Issued an Order to Hide Detainee in Iraq," *The New York Times*, June 17, 2004. See also Thom Shanker, "Rumsfeld Admits He Told Jailers to Keep Detainee in Iraq out of Red Cross View," *The New York Times*, June 17, 2004.

<sup>128</sup> "There are instances where that occurs," Rumsfeld said. "And a request was made to do that and we did" (Josh White, "Rumsfeld Authorized Secret Detention of Prisoner," *The Washington Post*, June 18, 2004).

<sup>129</sup> Flowing from the Geneva Convention obligations, DoD regulations carry the duty to disclose details of any person in custody. The protection is limited not only to those who have been recognized as prisoners of war but applies to any detainee. Along with the duty of disclosure is the duty to report to Joint Chief of Staffs, Congress of the United States, the International Committee of Red Cross and other Governmental Agencies.

<sup>130</sup> Schlesinger, p. 36.

U.S. military base at Guantánamo Bay, Cuba, was sent to Iraq. In the words of Maj. Gen. Taguba, Gen. Miller's task was to "review current Iraqi Theater ability to rapidly exploit internees for actionable intelligence."<sup>131</sup> As the Schlesinger report noted, Gen Miller brought with him the secretary of defense's April 16<sup>th</sup> memo (the final of three memos) outlining Guantánamo interrogation techniques and presented it as a possible model for interrogations in Iraq.<sup>132</sup> As Gen. Taguba highlighted and criticized in his report, Gen. Miller recommended that "the guard force be actively engaged in setting the conditions for successful exploitation of the internees."<sup>133</sup>

Secretary Rumsfeld's exact role in Gen. Miller's mission has not been fully explored, and there is broad speculation that his role has in fact been deliberately obscured. According to one critic, Scott Horton, chair of the Committee on International Law of the Association of the Bar of the City of New York, citing a "senior uniformed officer present at the briefing"<sup>134</sup>:

At an intelligence briefing conducted in the summer of 2003 in the Pentagon for the benefit of Rumsfeld, and with the attendance of Cambone, Boykin and other senior officers, Rumsfeld complained loudly about the quality of the intelligence which was being gathered from detainees in Iraq. He contrasted it with the intelligence which was being produced from detainees at Guantánamo following the institution there of new "extreme" interrogation practices. Expressing anger and frustration over the application of Geneva Convention rules in Iraq, *Rumsfeld gave an oral order to dispatch MG Miller to Iraq to "Gitmoize" the intelligence gathering operations there.* Cambone and Boykin were directed to oversee this process.<sup>135</sup>

*Newsweek* also reported that it was Secretary Rumsfeld who instigated the trip by Gen. Miller:

While the interrogators at Gitmo were refining their techniques, by the summer of 2003 the "postwar" insurgency in Iraq was raging. And Rumsfeld was getting

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<sup>131</sup> Taguba later decried Miller's idea of transporting interrogation techniques from Guantánamo to Iraq, noting that there were major differences between the status of the detainees in the two locations.

<sup>132</sup> Schlesinger report, p. 8.

<sup>133</sup> Taguba took issue with this proposal, and noted that it would be "in conflict with" the recommendations of the Ryder report, a previous review Iraqi prisons that stated that the engagement of military police in military interrogations to "actively set the favorable conditions for subsequent interviews runs counter to the smooth operation of a detention facility" ("Abu Ghurayb Prison Investigations: The Taguba report," *GlobalSecurity.org*, March 23, 2005 [online], <http://www.globalsecurity.org/intell/world/iraq/abu-ghurayb-prison-investigation.htm>).

<sup>134</sup> E-mail from Scott Horton to Human Rights Watch, April 5, 2005.

<sup>135</sup> Scott Horton report, p. 5. Emphasis added. None of this information appears in the official investigations listed above. According to Horton, this was part of a conscious effort to shield Rumsfeld. "[T]his simple fact [Rumsfeld's oral order], well known to many senior officers involved in the process, is consciously suppressed in all accounts. Instead the Fay/Jones account states that the visit of MG Miller was requested by CJTF-7, a statement which is technically correct and consciously misleading" (Ibid).

impatient about the poor quality of the intelligence coming out of there. He wanted to know: Where was Saddam? Where were the WMD? Most immediately: Why weren't U.S. troops catching or forestalling the gangs planting improvised explosive devices by the roads? Rumsfeld pointed out that Gitmo was producing good intel. So he directed Steve Cambone, his under secretary for intelligence, to send Gitmo commandant Miller to Iraq to improve what they were doing out there. Cambone in turn dispatched his deputy, Lt. Gen. William (Jerry) Boykin — later to gain notoriety for his harsh comments about Islam — down to Gitmo to talk with Miller and organize the trip.<sup>136</sup>

The record of what orders, if any, Secretary Rumsfeld gave to Gen. Miller is confused. Undersecretary of Defense for Intelligence Stephen A. Cambone, Secretary Rumsfeld's top intelligence aide, testified that Gen. Miller went to Iraq "with my encouragement,"<sup>137</sup> but Gen. Miller testified that he had no conversations with Undersecretary Cambone either before or after his Iraq visit.<sup>138</sup> Col. Thomas Pappas, who commanded the 205<sup>th</sup> Military Intelligence Brigade at Abu Ghraib, said that Gen. Miller sent a draft report of his findings during his visit to Secretary Rumsfeld,<sup>139</sup> but both Rumsfeld and Cambone denied having seen any instruction that MP's be used for "enabling interrogation."<sup>140</sup>

The interplay between Secretary Rumsfeld and Gen. Miller is critical to determining Secretary Rumsfeld's causal link with the Abu Ghraib abuses (although it does not determine any command responsibility). The questions posed at a congressional hearing by Senator Hillary Clinton to Gen. Taguba remain largely unanswered:

If, indeed, General Miller was sent from Guantánamo to Iraq for the purpose of acquiring more actionable intelligence from detainees, then it is fair to conclude that the actions that are at point here in your report are in some way connected to General Miller's arrival and his specific orders, however they were interpreted, by those MPs and the military intelligence that were involved. . . . Therefore, I for one don't believe I yet have adequate information from Mr. Cambone and

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<sup>136</sup> John Barry, Michael Hirsh & Michael Isikoff, "The Roots of Torture," *Newsweek* (international edition), May 24, 2004 [online], <http://msnbc.msn.com/id/4989481/>.

<sup>137</sup> Dr. Steve Cambone, "Testimony of Dr. Steve Cambone," Senate Armed Services Committee, Hearing on Treatment of Iraqi Prisoners, May 7, 2004, p. 24.

<sup>138</sup> Major General Geoffrey Miller, "Testimony of Major General Geoffrey Miller," Senate Armed Services Committee, Hearing on Iraq Prisoner Abuse, May 19, 2004, p. 25.

<sup>139</sup> Sworn Statement of Colonel Thomas M. Pappas, Victory Base, Iraq, February 11, 2004.

<sup>140</sup> Senate Armed Services Committee, Hearing on Treatment of Iraqi Prisoners, May 7, 2004. On page 24 of the hearing transcript, Rumsfeld responds to the question "Did you ever see, approve or encourage this policy of enabling for interrogation?" by saying, "I don't recall that that policy came to me for approval." On page 25, Cambone responds to the question "...[W]ere you aware that a specific recommendation was to use military police to enable in the interrogation process?" by saying, "In that precise language, no."

the Defense Department as to exactly what General Miller's orders were, what kind of reports came back up the chain of command as to how he carried out those orders, and the connection between his arrival in the fall of '03 and the intensity of the abuses that occurred afterward.<sup>141</sup>

On September 14, 2003, the top U.S. commander in Iraq, Lt. Gen. Ricardo Sanchez, implemented Gen. Miller's proposals by adopting a policy that brought back into play the techniques which Secretary Rumsfeld had approved in December 2002 for use at Guantánamo. Gen. Sanchez's memo authorized 29 interrogation techniques, including the "presence of military working dog: Exploits Arab fear of dogs while maintaining security during interrogations," and sleep deprivation,<sup>142</sup> both approved by Secretary Rumsfeld for Guantánamo. The memo also authorized techniques to alter the environment of prisoners, such as adjusting temperatures or introducing unpleasant smells, while recognizing that "some nations may view application of this technique in certain circumstances to be inhumane." Yelling, loud music, and light control were also approved "to create fear, disorientate [the] detainee and prolong capture shock."<sup>143</sup>

Between three and five interrogation teams were sent in October from Guantánamo to the American command in Iraq "for use in the interrogation effort" at Abu Ghraib.<sup>144</sup>

Beyond this, the Schlesinger report noted that "senior leaders expressed, forcibly at times, their needs for better intelligence." It also concluded that a number of high-level visits to Abu Ghraib contributed to this pressure, including those by Gen. Miller and "a senior member of the National Security Council Staff."<sup>145</sup> This second visit, focused primarily on intelligence collection,<sup>146</sup> led "some personnel at the facility to conclude, perhaps incorrectly, that even the White House was interested in the intelligence gleaned from their interrogation reports."<sup>147</sup> Lieutenant Colonel Stephen L. Jordan, who served as Chief of the Joint Interrogation Debriefing

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<sup>141</sup> Senator Hillary Clinton, question to General Taguba, Senate Armed Services Committee Testimony, Hearing on Allegations of Mistreatment of Iraqi Prisoners, May 11, 2004 [online], <http://www.washingtonpost.com/wp-dyn/articles/A17812-2004May11.html>.

<sup>142</sup> Ricardo S. Sanchez, Lieutenant General, to Combined Joint Staff Force Seven, Baghdad, Iraq, and Commander, 205th Military Intelligence Brigade, Baghdad, Iraq, "CJTF-7 Interrogation and Counter-Resistance Policy," memorandum, September 14, 2003 [online], <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=17851&c=206>.

<sup>143</sup> *Ibid.*

<sup>144</sup> Douglas Jehl and Andrea Elliott, "Cuba Base Sent Its Interrogators to Iraqi Prison," *The New York Times*, May 29, 2004.

<sup>145</sup> This was a reference to a visit by Ms. Frances Fragos Townsend, deputy assistant to the president and deputy national security advisor for combating terrorism. See Blake Morrison and John Diamond, "Pressure at Iraqi Prison Detailed," *USA Today*, June 18, 2004.

<sup>146</sup> James Schlesinger, "Testimony of James Schlesinger," Senate Armed Services Committee, Hearing on DoD Detention Operations, September 9, 2004, p. 34.

<sup>147</sup> Schlesinger report, pp. 65-66.

Center at Abu Ghraib, told Gen. Taguba that he “spent more time running around, being an aide-de-camp ... [for] general officers and folks from the White House ... than I can shake a stick at.”<sup>148</sup> He added, “Sir, I was just told a couple times by Colonel Pappas that some of the reporting was getting read by Rumsfeld, folks out at Langley, some very senior folks...So, I would say it is a true statement sir, that Colonel Pappas was under a lot of pressure to produce, sir, and to produce quality reporting.”<sup>149</sup>

Thus, at a time when (as will be shown below) reports of detainee abuse by U.S. troops were mounting, these troops were placed under added pressure to extract intelligence from detainees, and illegal interrogation methods were re-introduced.

### ***Secretary Rumsfeld knew or should have known that soldiers in Afghanistan and Iraq were committing torture and war crimes***

#### **Secretary Rumsfeld was personally warned about the abuse of detainees**

Throughout the period in question, Secretary Rumsfeld was personally notified about the mistreatment of detainees:

- Journalists raised questions about abuse allegations in Afghanistan during press conferences with Secretary Rumsfeld in January and February of 2002.<sup>150</sup>
- Officials in Afghan President Hamid Karzai’s government reportedly raised concerns about detainee abuse allegations with Secretary Rumsfeld during his visits to Afghanistan in 2002.<sup>151</sup>
- Secretary of State Colin Powell reportedly raised the issue of detainee abuse frequently in meetings with Rumsfeld and others.<sup>152</sup>
- According to *The Washington Post*, citing U.S. officials familiar with the discussions, as of August 2003, U.S. Administrator in Iraq L. Paul Bremer “pressed the military to improve

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<sup>148</sup> Lieutenant Colonel Stephen L. Jordan, *AR 15-6 Investigation Interview*, February 24, 2004, [online] <http://www.aclu.org/torturefoia/released/a53.pdf>, p. 96.

<sup>149</sup> *Ibid.*, p. 111.

<sup>150</sup> See e.g., Press Conference with Secretary of Defense Donald Rumsfeld, the Pentagon, January 22, 2002 (dismissing claims about mistreatment of detainees captured in Afghanistan as “utter nonsense”); Press Conference with Secretary of Defense Donald Rumsfeld, the Pentagon, February 12, 2002.

<sup>151</sup> Human Rights Watch interviews with Afghan officials, Kabul, September 2002.

<sup>152</sup> Peter Slevin and Robin Wright, “Pentagon Was Warned of Abuse Months Ago,” *The Washington Post*, May 8, 2004, p. A12; Mark Matthews, “Powell: Bush Told of Red Cross Reports,” *The Baltimore Sun*, May 12, 2004.

conditions and later made the issue a regular talking point in discussions with Rumsfeld, Vice President Cheney and national security adviser Condoleezza Rice.”<sup>153</sup>

## The Defense Department was warned about the abuse of detainees

The ICRC delivered repeated warnings during the same period. The organization paid 29 visits to 14 detention centers in Iraq, delivering oral and written reports to U.S. officials in Iraq after each visit.<sup>154</sup>

According to the ICRC:

In May 2003, the ICRC sent to the CF [Coalition Forces] a memorandum based on over 200 allegations of ill-treatment of prisoners of war during capture and interrogation at collecting points, battle group stations and temporary holding areas. The allegations were consistent with marks on bodies observed by the medical delegate. The memorandum was handed over to [redacted portion] US Central Command in Doha, State of Qatar.

In early July [2003] the ICRC sent the CF a working paper detailing approximately 50 allegations of ill-treatment in the military intelligence section of Camp Cropper, at Baghdad International Airport. They included a combination of petty and deliberate acts of violence aimed at securing the cooperation of the persons deprived of their liberty with their interrogators; threats (to intern individuals indefinitely, to arrest other family members, to transfer individuals to Guantánamo) against persons deprived of their liberty or against members of their families (in particular wives and daughters); hooding; handcuffing; use of stress positions (kneeling, squatting, standing with arms raised over the head) for three or four hours; taking aim at individuals with rifles, striking them with rifle butts, slaps, punches, prolonged exposure to the sun, and isolation in dark cells. ICRC delegates witnessed marks on the bodies of several persons deprived of their liberty consistent with their allegations ...<sup>155</sup>

ICRC President Jakob Kellenberger has confirmed that ICRC officials made “repeated requests” to the U.S.-led occupation authority to correct abuses. He said officials presented “serious

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<sup>153</sup> Peter Slevin and Robin Wright, “Pentagon Was Warned of Abuse Months Ago,” *The Washington Post*, May 8, 2004, p. A12.

<sup>154</sup> *Ibid.*, p. A12.

<sup>155</sup> ICRC, *Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq during Arrest, Internment and Interrogation*, February 2004, paras. 33-34.

concerns” to occupation authorities, reminding them of obligations under the Geneva Conventions and international treaties.<sup>156</sup>

When, in the midst of the worst abuses at Abu Ghraib, the ICRC complained to Coalition forces, Army officials apparently responded by trying to curtail the ICRC’s access.<sup>157</sup>

The Army provost marshal, Maj. Gen. Donald Ryder, investigated U.S.-run prisons in Iraq. His report on the treatment of Iraqi detainees, delivered to Gen. Sanchez, on Nov. 6, 2003, found “potential human rights training and manpower issues system-wide that needed immediate attention.”<sup>158</sup>

In December 2003, retired Col. Stuart A. Herrington presented a confidential report that warned of detainee abuse throughout Iraq. Herrington’s findings were reportedly passed on by Gen. Sanchez to officials at U.S. Central Command.<sup>159</sup>

Iraq’s former human rights minister Abdel Bassat Turki told the British *Guardian* that he had “informed Mr. Bremer last November and again in December of the rampant abuse in US military prisons.” Turki said that he had asked Bremer for permission to visit Abu Ghraib to investigate abuse allegations but was turned down.<sup>160</sup>

## There was substantial public information about abuses against detainees

Well before the Abu Ghraib investigation began, Secretary Rumsfeld had access to abundant public information and reports from NGOs that U.S. officials in Afghanistan and Iraq were committing torture and war crimes:

- In **April 2002**, images were released of American John Walker Lindh being held naked and bound by duct tape to a stretcher in Afghanistan.

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<sup>156</sup> Peter Slevin and Robin Wright, “Pentagon Was Warned of Abuse Months Ago,” *The Washington Post*, May 8, 2004, p. A12.

<sup>157</sup> Douglas Jehl and Eric Schmitt, “Army Tried to Limit Abu Ghraib Access,” *The New York Times*, May 20, 2004. This pattern continued even after the Abu Ghraib disclosures. In June 2004, DIA Director, Vice Adm. Lowell Jacoby, complained in a letter to Undersecretary for Intelligence Stephen Cambone, that two DIA agents had witnessed special forces in Baghdad beating a prisoner in the face severely enough to require medical attention. When they protested, Jacoby told Cambone, the DIA officers were threatened and their photos of the injuries confiscated.

<sup>158</sup> “Report on Detention and Corrections Operations in Iraq,” Office of the Provost Marshal General of the Army, November 5, 2003 [online], <http://www.aclu.org/torturefoia/released/18TF.pdf>; “Chronology: Early Warnings Missed; A Prison-Abuse Timeline,” *Los Angeles Times*, May 16, 2004.

<sup>159</sup> Josh White, “U.S. Generals in Iraq Were Told of Abuse Early, Inquiry Finds,” *The Washington Post*, December 1, 2004.

<sup>160</sup> Luke Harding, “Bremer Knew, Minister Claims,” *The Guardian*, May 10, 2004.

- On **April 15, 2002**, Amnesty International sent a letter and 61-page “Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay” to President Bush, with a copy to Secretary Rumsfeld, expressing concerns over the conditions of transfer to Guantánamo, the killing and ill-treatment of detainees in Afghanistan and inadequate investigations into these abuses, interrogations without access to counsel, and transfers to third countries for possible torture.<sup>161</sup> Secretary Rumsfeld was asked about the Amnesty report at a press conference, and said that he had not read it.<sup>162</sup>
- On **December 26, 2002**, *The Washington Post* reported that detainees at Bagram Airbase, “are sometimes kept standing or kneeling for hours in black hoods or spray-painted goggles.... At times they are held in awkward, painful positions and deprived of sleep with a 24-hour bombardment of lights — subject to what are known as ‘stress and duress’ techniques....”
- On **December 27, 2002**, Human Rights Watch wrote to President Bush (and U.K. Prime Minister Tony Blair) about allegations of torture reported in *The Washington Post*, asking that the allegations be investigated immediately.
- Executive directors of leading human rights groups wrote on **January 14, 2003** to Deputy Secretary of Defense Paul Wolfowitz urging, without referring to actual cases, that the administration publicly state that torture in any form or matter would not be tolerated and that the U.S. would not seek intelligence obtained through torture in a third country. The letter also urged the administration to give clear guidelines to U.S. forces. On January 31, the directors wrote to President Bush demanding “unequivocal statements by [Bush] and [his] Cabinet officers that torture in any form or matter will not be tolerated...[and] that any U.S. official found to have used or condoned torture will be held accountable.” The directors also called for “clear written guidance applicable to everyone engaged in the interrogation and rendition of prisoners.” On **February 5, 2003**, the groups met with Department of Defense General Counsel Haynes to urge the administration to develop clear standards to prevent the mistreatment of detainees.
- *The New York Times* reported on **March 4, 2003** that “The United States military has begun a criminal investigation into the death of an Afghan man in American custody in December, a death described as a ‘homicide’ by an American pathologist....Two former prisoners...said the conditions to which they themselves were subjected at the time

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<sup>161</sup> Amnesty International to the U.S. Government, “Memorandum to the US Government on the Rights of People in US Custody in Afghanistan and Guantánamo Bay,” memorandum, April 15, 2002 [online], <http://web.amnesty.org/library/Index/ENGAMR510532002>.

<sup>162</sup> “DoD News Briefing - Secretary Rumsfeld and Gen. Myers,” news transcript, U.S. Department of Defense, April 15, 2002 [online], [http://www.defenselink.mil/transcripts/2002/t04152002\\_t0415sd.html](http://www.defenselink.mil/transcripts/2002/t04152002_t0415sd.html). Military justice authority A.P.V. Rogers, writing about Command Responsibility, has noted that if a commander “is told that a report deals with, say, the massacre of civilians by troops under his command, he is put under a duty to do something about it. He cannot simply turn a blind eye to it” (Major General (Retired) A. P. V. Rogers, “Command Responsibility under the Law of War,” [online], [http://lciil.law.cam.ac.uk/lectures/lecture\\_papers.php](http://lciil.law.cam.ac.uk/lectures/lecture_papers.php)).



- included standing naked, hooded and shackled, being kept immobile for long periods and being deprived of sleep for days on end.”<sup>163</sup>
- On **March 15, 2003**, Amnesty International held a news conference in Baghdad to call attention to cases of detainee mistreatment.<sup>164</sup>
  - On **June 26, 2003**, Amnesty International wrote Bremer after interviewing former detainees to criticize methods that “appear to facilitate cruel, inhuman or degrading treatment.”<sup>165</sup>
  - On **July 26, 2003**, Amnesty International released “Iraq: Memorandum on Concerns Relating to Law and Order,” which details cases of ill-treatment of detainees in Iraq, including Abu Ghraib.<sup>166</sup> According to Amnesty, a high-level Amnesty mission to Baghdad (date unclear) met with Coalition Provisional Authority (CPA) officials including: Ambassador John Sawers (UK); Ambassador Macmanway; Lieutenant Colonel Warner, CJTF 7; and Colonel Michael Kelly, Office of Legal Counsel CPA.<sup>167</sup>
  - On **October 19, 2003**, the Associated Press reported that “[e]ight marine reservists face charges ranging from negligent homicide to making false statements in connection with the mistreatment of prisoners of war in Iraq.”<sup>168</sup>
  - On **December 17, 2003**, the Associated Press reported “Marine reservists running a detention facility in Iraq ordered prisoners of war to remain standing for hours until interrogators could question them, according to testimony at a military court hearing.”<sup>169</sup>
  - On **January 6, 2004**, the Associated Press reported “The U.S. Army discharged three reservists and ordered them to forfeit two months’ salary for abusing prisoners at a detention center in Iraq.”<sup>170</sup>
  - On **January 12, 2004**, Human Rights Watch wrote to Secretary Rumsfeld to express concern about incidents in which U.S. forces stationed in Iraq detained relatives of wanted suspects in order to compel the suspects to surrender, which amounts to hostage-taking, classified as a war crime under the Geneva Conventions.

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<sup>163</sup> Carlotta Gall, “U.S. Military Investigating Death of Afghan in Custody,” *The New York Times*, March 4, 2003.

<sup>164</sup> Amnesty International, “USA — Chronology of Correspondence and Action,” [online], <http://news.amnesty.org/pages/USChronology3>.

<sup>165</sup> Peter Slevin and Robin Wright, “Pentagon Was Warned of Abuse Months Ago,” *The Washington Post*, May 8, 2004.

<sup>166</sup> Amnesty International, “Iraq: Memorandum on Concerns Relating to Law and Order,” July 23, 2003 [online], <http://web.amnesty.org/library/Index/ENGMDE141572003>.

<sup>167</sup> See Amnesty International, “USA — Chronology of Correspondence and Action,” [online], <http://news.amnesty.org/pages/USChronology3>.

<sup>168</sup> Greg Risling, “Eight California Marine Reservists under Investigation for Death of Iraqi Prisoner-of-War,” Associated Press, October 19, 2003.

<sup>169</sup> “Top Story,” *Ventura County Star*, December 18, 2003.

<sup>170</sup> Diana Elias, “3 Reservists Discharged from Army after Abuse,” Associated Press, January 6, 2004.

- On **January 13, 2004**, the press reported that a suspect detained by U.S. forces in Iraq claimed that “he was ordered to stand upright until he collapsed after 13 hours,” and that interrogators “burned his arm with a cigarette.”<sup>171</sup>

### **Given the widespread nature of crimes against detainees, Secretary Rumsfeld should have known of them**

The Schlesinger report counted about 300 allegations of prisoner mistreatment in Iraq, Afghanistan, and Guantánamo, beginning almost immediately after the invasion of Afghanistan in 2001.<sup>172</sup>

The widespread nature of the abuses across three countries suggests that the Secretary of Defense should have been aware, through internal channels, that his subordinates were committing crimes.

### ***Secretary Rumsfeld failed to intervene to prevent the commission of war crimes and torture by soldiers and officers under his command in Afghanistan and Iraq***

During the entire period listed above Secretary Rumsfeld failed to intervene to prevent further commission of crimes. Even as he was being personally warned about abuses, even as the press and human rights groups were publicly denouncing abuses, even as the ICRC was complaining, Secretary Rumsfeld apparently never issued specific orders or guidelines to forbid coercive methods of interrogation, other than withdrawing his blanket approval for certain methods at Guantánamo in January 2003. Indeed, as described above, in mid-2003 pressure on interrogators in Iraq to use more aggressive methods of questioning detainees was actually increased.

The documents that were released by the Department of Defense in June 2004, as well as those released more recently in response to a lawsuit by the Center for Constitutional Rights and the American Civil Liberties Union are as telling for what is missing as for the indignities they narrate: to date, there is no evidence that Secretary Rumsfeld (or any other senior leader) exerted his authority as the civilian official in charge of the armed forces and warned that the mistreatment of prisoners must stop. Had he done so, many of the crimes committed by U.S. forces could have been avoided.<sup>173</sup>

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<sup>171</sup> “Iraqi Detainee Details Mistreatment by US Forces,” *The Bulletin’s Frontrunner*, January 13, 2004.

<sup>172</sup> In addition, there may be as many as 100 “ghost detainees” kept hidden from the ICRC (“Rumsfeld Defends Pentagon in Abuse Scandal,” Associated Press, September 10, 2004).

<sup>173</sup> The Department of Defense has reported that abuses against detainees fell sharply after the Abu Ghraib revelations (Josh White, “Reported Abuse Cases Fell after Abu Ghraib,” *The Washington Post*, March 17, 2005, p. A17). This suggests that attention to proper treatment of detainees can have a salutary effect.

## **Former CIA Director George Tenet**

*Under George Tenet's direction, and reportedly with his specific authorization, the Central Intelligence Agency (CIA) is said to have tortured detainees through waterboarding and withholding medicine. Other tactics reportedly used by the CIA include feigning suffocation, "stress positions," light and noise bombardment, sleep deprivation, and making detainees believe they were in the hands of governments that routinely torture. Under Director Tenet, the CIA "rendered" detainees to other governments which tortured the detainees. Under Director Tenet's direction, the CIA also put detainees beyond the protection of the law, in secret locations in which they were rendered completely defenseless, with no resource or remedy whatsoever, with no contact with the outside world, and completely at the mercy of their captors. These detainees, in long-term incommunicado detention, have effectively been "disappeared."*

George Tenet was the director of central intelligence (DCI) until his resignation in June 2004. As such, he served as head of the Central Intelligence Agency.<sup>174</sup>

Because the CIA has refused to cooperate with any of the probes listed above<sup>175</sup> or to provide information pursuant to a Freedom of Information Act (FOIA) request,<sup>176</sup> the record is less developed with regard to the CIA's and Director Tenet's potential involvement in criminal activity. No findings of the internal CIA probes that have been conducted have been released.

According to the Schlesinger panel, "the CIA was allowed to operate under different rules."<sup>177</sup> The Fay/Jones report into intelligence activities at Abu Ghraib found that "the perception that non-DoD agencies [i.e., the CIA] had different rules regarding interrogation and detention operations was evident."<sup>178</sup> The investigators complained that "The lack of OGA [here, a way of referring to the CIA without mentioning it by name] adherence to the practices and procedures established for accounting for detainees eroded the necessity in the minds of soldiers and civilians for them to follow Army rules."<sup>179</sup> They concluded that "CIA detention and interrogation practices led to a loss of accountability, abuse, reduced interagency cooperation and an unhealthy mystique that further poisoned the atmosphere at Abu Ghraib."

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<sup>174</sup> 50 U.S.C. § 403 (a) (3).

<sup>175</sup> The Fay/Jones and Schlesinger investigations requested documentation from the CIA in vain. See Senate Armed Services Committee Hearing, September 9, 2004, pp. 11, 13, 14; see also Schlesinger report, pp. 6, 70, 87. ("The Panel did not have full access to information involving the role of the Central Intelligence Agency in detention operations..." and could not make any determinations about ghost detainees). The CIA provided information to the Church inquiry about Iraq only.

<sup>176</sup> In October 2003, the Center for Constitutional Rights, the American Civil Liberties Union and other organizations filed a FOIA request seeking documents pertaining to the torture or abuse of detainees held by the United States. The organizations then went to court to enforce their request. In response to a judge's order, the FBI, Justice Department, and State Department have produced more than 23,000 pages of documents, but the CIA refused to search its files. On February 2, 2005, a federal judge ordered the CIA to process and release those documents.

<sup>177</sup> Schlesinger report, p. 70.

<sup>178</sup> Jones report, p. 6.

<sup>179</sup> Fay report, pp. 44-45.

The CIA's "different rules" in the "global war on terror" can be traced in part to a secret but now-infamous August 1, 2002 Justice Department memorandum to Alberto Gonzales, then White House Counsel, in response to a CIA request for guidance.<sup>180</sup> The memo said that torturing al-Qaeda detainees in captivity abroad "may be justified" and that international laws against torture "may be unconstitutional if applied to interrogations" conducted in the war on terrorism. The memo added that the doctrines of "necessity and self-defense could provide justifications that would eliminate any criminal liability" on the part of officials who tortured al-Qaeda detainees. The memo also took an extremely narrow view of which acts might constitute torture.

The August 2002 memo was reportedly prepared after a debate within the government about the methods used to interrogate alleged al-Qaeda leader Abu Zubaydah after his capture in April 2002.<sup>181</sup> Reports suggest that CIA interrogation methods were authorized by a still-secret set of rules that were endorsed in August 2002 by the U.S. Justice Department and the White House. These were said to include waterboarding and refusal of pain medication for injuries.<sup>182</sup> Indeed, according to *The New York Times*:

The methods employed by the CIA are so severe that senior officials of the Federal Bureau of Investigation have directed its agents to stay out of many of the interviews of the high-level detainees, counterterrorism officials said. The F.B.I. officials have advised the bureau's director, Robert S. Mueller III that the interrogation techniques, which would be prohibited in criminal cases, could compromise their agents in future criminal cases, the counterterrorism officials said.<sup>183</sup>

Under Director Tenet, the CIA also developed the widespread practice of using "ghost detainees."

The CIA kept a number of detainees off the books at Abu Ghraib, hiding them from the ICRC. The Fay/Jones report spoke of eight such "ghost" detainees at Abu Ghraib, kept off the prison's

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<sup>180</sup> Jay S. Bybee to Alberto R. Gonzales, Counsel to the President, memorandum, "Standards for Conduct of Interrogation under 18 U.S.C. Sections 2340-2340A," August 1, 2002 [online], <http://news.findlaw.com/wp/docs/doj/bybee80102mem.pdf>. (This memorandum has since been repudiated by the administration.)

<sup>181</sup> David Johnston and James Risen, "Aides Say Memo Backed Coercion for Qaeda Cases," *The New York Times*, June 27, 2004.

<sup>182</sup> See Toni Locy and John Diamond, "Memo Lists Acceptable 'Aggressive' Interrogation Methods: Justice Dept. Gave Guidance to CIA," *USA Today*, June 28, 2004; Dana Priest, "CIA Puts Harsh Tactics on Hold," *The Washington Post*, June 27, 2004.

<sup>183</sup> James Risen, David Johnston and Neil A. Lewis, "Harsh C.I.A. Methods Cited In Top Qaeda Interrogations," *The New York Times*, May 13, 2004.

roster at the CIA's request. In one of those cases, in November 2003, a detainee brought to the prison by CIA employees but never formally registered with military guards died at the site, and his body was removed after being wrapped in plastic and packed in ice.<sup>184</sup>

In later congressional testimony, General Paul Kern, the senior officer who oversaw the Fay/Jones inquiry, told the Senate Armed Services Committee, "The number [of ghost detainees] is in the dozens, perhaps up to 100." Gen. Fay put the figure at "two dozen or so." Both officers said they could not give a precise number because no records were kept and because the CIA refused to provide information to the investigators.<sup>185</sup> The Church report put the number at 30.<sup>186</sup> Logbooks showed that there were consistently three to ten ghost detainees at Abu Ghraib from mid-October 2003 to January 2004.<sup>187</sup> Some "ghost detainees" at Abu Ghraib were put in disruptive sleep programs and interrogated in shower rooms and stairwells.<sup>188</sup>

In the case of Hiwa Abdul Rahman Rashul, Barry Whitman, Pentagon spokesperson, confirmed that Tenet had specifically asked for the detainee to be hidden "without notification."<sup>189</sup>

Earlier, Maj. Gen. Antonio Taguba sharply criticized this practice of keeping "ghost detainees," correctly saying that "This maneuver was deceptive, contrary to Army Doctrine, and in violation of international law."<sup>190</sup>

The CIA also reportedly transported as many as a dozen non-Iraqi detainees out of Iraq between April 2003 and March 2004. The transfers were apparently authorized by a draft Department of Justice memo dated March 19, 2004. The CIA has not released the detainees' names or nationalities, and it is unclear whether the detainees were handed over to "friendly" governments or kept in secret American-run sites.<sup>191</sup>

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<sup>184</sup> MG George R. Fay, *AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade*, 2004 [online], <http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf>, pp. 53-54.

<sup>185</sup> Senate Armed Services Committee, *Investigation of the 205th Military Intelligence Brigade at Abu Ghraib Prison, Iraq*, September 9, 2004. According to General Kern, "A ghost detainee, by our definition, is a person who has been detained in a U.S. facility and has not been recorded."

<sup>186</sup> Church report, p. 18.

<sup>187</sup> Josh White, "Abu Ghraib Guards Kept a Log of Prison Conditions, Practices," *The Washington Post*, October 25, 2004.

<sup>188</sup> *Ibid.*

<sup>189</sup> Charles Aldinger, "Military Hid Prisoner from Red Cross," *CommonDreams News Center*, July 17, 2004 [online], <http://www.commondreams.org/headlines04/0617-04.htm>.

<sup>190</sup> Maj. Gen. Antonio M. Taguba, *Article 15-6 Investigation of the 800th Military Police Brigade*, (an investigative report, on alleged abuses at U.S. military prisons in Abu Ghraib and Camp Bucca, Iraq), para. 33, emphasis added.

<sup>191</sup> Douglas Jehl, "Prisoners: U.S. Action Bars Right of Some Captured in Iraq," *The New York Times*, October 26, 2004; Dana Priest, "Memo Lets CIA Take Detainees out of Iraq," *The Washington Post*, October 24, 2004.

## *Under Director Tenet, the CIA "disappeared" detainees*

Under Director Tenet, prisoners have “disappeared” in CIA custody in that they have been detained in undisclosed locations with no access to the ICRC, no oversight of their treatment, no notification to their families, and in many cases, no acknowledgement that they are even being held.<sup>192</sup> Human Rights Watch has pieced together information on eleven such detainees who have “disappeared” in U.S. custody, though there may be more. They are:

1. Ibn al-Shaikh al-Libi (Libya)
2. Abu Zubayda, a.k.a. Zubeida, Zain al-`Abidin Muhammad Husain, `Abd al-Hadi al-Wahab (Palestinian)
3. Omar al-Faruq (Kuwait)
4. Abu Zubair al-Haili, a.k.a. Fawzi Saad al-`Obaydi (Saudi Arabia)
5. Ramzi bin al-Shibh (Yemen)
6. Abd al-Rahim al-Nashiri, a.k.a. Abu Bilal al-Makki, Abdul Rahman Husain al-Nashari, formerly Muhammad Omar al-Harazi (Born in Mecca, Saudi Arabia)
7. Mustafa al-Hawsawi (Saudi Arabia)
8. Khalid Shaikh Muhammad, a.k.a. Shaikh Muhammad, Ashraf Ref at Nabith Henin, Khalid `Abd al-Wadud, Salem `Ali, Fahd bin Abdullah bin Khalid (Kuwait)
9. Waleed Muhammad bin Attash, a.k.a. Tawfiq ibn Attash, Tawfiq Attash Khallad (Yemen)
10. Adil al-Jazeeri (Algeria)
11. Hambali, a.k.a. Riduan Isamuddin (Indonesia)<sup>193</sup>

The CIA has consistently refused to provide information on the fate or the whereabouts of these detainees. For instance, Human Rights Watch has made repeated requests for information on Hambali’s location, legal status, and conditions of detention — none of which has been answered.<sup>194</sup> The news media has had no more success, as evidenced by a report on *ABC*’s

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<sup>192</sup> “Enforced disappearance,” the systematic practice of which can be a crime against humanity, is defined by the Article 7 (2) (1) of the Rome Statute of the International Criminal Court as the

arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

<sup>193</sup> See Human Rights Watch, “The United States’ ‘Disappeared’: The CIA’s Long-Term ‘Ghost Detainees,’” *A Human Rights Watch Briefing Paper*, October 2004 [online], <http://www.hrw.org/backgrounders/usa/us1004/>.

<sup>194</sup> Human Rights Watch, “In the Name of Security: Counterterrorism and Human Rights Abuses under Malaysia’s Internal Security Act,” *A Human Rights Watch Report*, May 2004 [online], <http://www.hrw.org/reports/2004/malaysia0504/>.

“Nightline”: “As for the details of where they are being held, exactly how they are being treated, and what the US plans to do with them, that is all a secret. When asked why, an official from the CIA explained, that’s a secret, too.”<sup>195</sup>

The International Committee of the Red Cross has also repeatedly sought information on the detainees. In a March 2004 public statement, it noted:

Beyond Bagram and Guantánamo Bay, the ICRC is increasingly concerned about the fate of an unknown number of people captured as part of the so-called global war on terror and held in undisclosed locations. For the ICRC, obtaining information on these detainees and access to them is an important humanitarian priority and a logical continuation of its current detention work in Bagram and Guantánamo Bay.<sup>196</sup>

In June, Erof Bosisio of the ICRC complained:

We are more and more concerned about the lot of the unknown number of people captured in the context of what we would call “the war against terror” and detained in secret places... We have asked for information on these people and access to them. Until now we have received no response from the Americans.<sup>197</sup>

According to *The New York Times*, “the agency has refused to grant any independent observer or human rights group access to the high-level detainees, who have been held in strict secrecy. Their whereabouts are such closely guarded secrets that one official said he had been told that Mr. Bush had informed the CIA that he did not want to know where they were.”<sup>198</sup>

It is not clear what the authority is under U.S. law for holding these suspects under these conditions of clandestinity. In June 2004, the U.S. Supreme Court ruled that the Authorization for Use of Military Force Act, which Congress passed after September 11, 2001, authorizing the president to pursue al-Qaeda and its supporters, gave him the power to detain enemy forces captured in battle. Speaking for the plurality of the court, however, Justice Sandra Day

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<sup>195</sup> John McWethy, “Nightline,” *ABC News*, May 13, 2004.

<sup>196</sup> International Committee of the Red Cross, “United States: ICRC President Urges Progress on Detention-Related Issues,” March 4, 2004 [online], <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwplList74/774F1B35A7E20CC9C1256E1D007741C1>.

<sup>197</sup> “Rights Groups Raise Concerns over Secret U.S.-run Prisons in Afghanistan,” *Agence France Presse*, June 19, 2004.

<sup>198</sup> James Risen, David Johnston, and Neil A. Lewis, “Harsh C.I.A. Methods Cited In Top Qaeda Interrogations,” *The New York Times*, May 13, 2004.

O'Connor said, "Certainly, we agree that indefinite detention for the purposes of interrogation is not authorized."<sup>199</sup> U.S. law considers both "prolonged detention without charges and trial," and "causing the disappearance of persons by the abduction and clandestine detention of those persons" to constitute "gross violations of internationally recognized human rights."<sup>200</sup>

Although "disappearances" as such are not defined and punished under U.S. law, prolonged *incommunicado* detention itself is inhuman treatment in contravention of both CAT and the Geneva Conventions, and therefore subject to prosecution under the War Crimes Act and the Anti-Torture Statute. The U.N. Commission on Human Rights has noted that "prolonged incommunicado detention ... can *in itself* constitute a form of cruel, inhuman or degrading treatment."<sup>201</sup> Likewise, the U.N. Human Rights Committee found "prolonged incommunicado detention in an unknown location" to be "torture and cruel, inhuman treatment."<sup>202</sup>

### ***Under Director Tenet, and reportedly with his authorization, the CIA has allegedly tortured detainees***

Some of the detainees listed above have reportedly been tortured by the CIA. According to *The New York Times*:

In the case of Khalid Shaikh Mohammed, a high-level detainee who is believed to have helped plan the attacks of Sept. 11, 2001, CIA interrogators used graduated levels of force, including a technique known as "water boarding," in

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<sup>199</sup> Hamdi et al. v. Rumsfeld, Secretary of Defense, et al., No. 03-6696, (2004), 2004 U.S. LEXIS 4761, p. 13.

<sup>200</sup> 22 U.S.C. § 2304 (d) (1).

<sup>201</sup> Commission on Human Rights, (United Nations: Geneva, 2004), Resolution 2004/41, emphasis added. See also "ICCPR General Comment 20 (Forty-fourth Session, 1992): Article 7: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment," A/47/40 (1992) 193, para 6 ("prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7").

<sup>202</sup> El-Megreisi v. Libyan Arab Jamahiriya, Communication No. 440/1990, (United Nations: 1994), CCPR/C/50/D/440/1990. The Inter-American Court on Human Rights has also held that "prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment." Inter-Am. Ct. H. R., Velasquez-Rodriguez case, Judgment of 29 July 1988, Series C, No. 4, para. 156. ("prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being. Such treatment, therefore, violates Article 5 of the [American] Convention on Human Rights [prohibition against torture etc.].") As noted above, the Third Geneva Convention in article 126 (concerning prisoners of war) and the Fourth Geneva Convention in article 143 (concerning detained civilians) requires the ICRC to have access to all detainees and places of detention. Visits may only be prohibited for "reasons of imperative military necessity" and then only as "an exceptional and temporary measure." These provisions also require that prisoners be documented, and that their whereabouts be made available to their family and governments.



which a prisoner is strapped down, forcibly pushed under water and made to believe he might drown.<sup>203</sup>

Waterboarding is a technique reportedly approved by the Department of Justice.<sup>204</sup> The current director of U.S. central intelligence, Porter Goss, seemed to suggest that the CIA was indeed using waterboarding when he defined it in Senate testimony as “an area of what I will call professional interrogation techniques.”<sup>205</sup> Waterboarding, however, is a notorious form of torture that was practiced by the military dictatorships in Latin America in the 1970s and 1980s, where it became known as the “*submarino*.”<sup>206</sup> It has been denounced as a torture method by the U.S. State Department<sup>207</sup> and the U.N. Special Rapporteur on Torture.<sup>208</sup>

It is also reported that U.S. officials initially withheld painkillers from Abu Zubaydah, who was shot during his capture, as an interrogation device.<sup>209</sup> To the extent that this action brought about unnecessary but deliberate additional severe pain or suffering, it would constitute torture.<sup>210</sup> Other tactics used by the CIA, according to *The Washington Post*, include “feigning

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<sup>203</sup> James Risen, David Johnston, and Neil A. Lewis, “Harsh C.I.A. Methods Cited In Top Qaeda Interrogations,” *The New York Times*, May 13, 2004; Waterboarding may also include “pouring water on a detainee’s towed face to induce the misperception of suffocation” (Church report, p. 5).

<sup>204</sup> See Toni Locy and John Diamond, “Memo Lists Acceptable ‘Aggressive’ Interrogation Methods: Justice Dept. Gave Guidance to CIA,” *USA Today*, June 28, 2004; Dana Priest, “CIA Puts Harsh Tactics on Hold,” *The Washington Post*, June 27, 2004.

<sup>205</sup> Testimony of Porter Goss, Senate Armed Services Committee, Hearing on Threats to U.S. National Security, March 17, 2005, p. 16.

<sup>206</sup> *The Istanbul Protocol: The Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, a prominent set of international guidelines for documentation of torture and its consequences, states:

Near asphyxiation by suffocation is an increasingly common method of torture. It usually leaves no marks and recuperation is rapid. This method of torture was so widely used in Latin America, that its Spanish name “submarino” became part of the human rights vocabulary. Normal respiration might be prevented through methods such as covering the head with plastic bag, closure of the mouth and the nose, pressure or ligature around the neck, or forced aspiration of dusts, cement, hot peppers, etc. This is also known as “dry submarino.” Various complications might develop such as petechiae of the skin, nosebleeds, bleeding from the ears, congestion of the face, infections in the mouth and acute and chronic respiratory problems. ....Forcible immersion of the head into water, often contaminated with urine, feces, vomit, or other impurities, may result in near drowning or drowning. Aspiration of the water into the lungs may lead to pneumonia. This form of torture is also called “wet submarino.”

(United Nations: Geneva, 1999), E.01.XIV.1.

<sup>207</sup> U.S. Department of State Country Reports on Human Rights Practices; Tunisia, 2004 [online], <http://www.state.gov/g/drl/rls/hrrpt/2004/41733.htm>. (“The forms of torture included: electric shock; confinement to tiny, unlit cells; submersion of the head in water.”)

<sup>208</sup> “Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,” Report of the Special Rapporteur, Mr. P. Kooijmans, appointed pursuant to Commission on Human Rights res. 1985/33 E/CN.4/1986/15, 19 Feb. 1986, at para. 119 (describing “suffocation by near-drowning in water (sous-marin) and/or excrement”).

<sup>209</sup> Dana Priest, “CIA Puts Harsh Tactics on Hold,” *The Washington Post*, June 27, 2004.

<sup>210</sup> See Physicians for Human Rights, Letter to President Bush, March 21, 2003 [online], [http://www.phrusa.org/waronterror/letter\\_032103.html](http://www.phrusa.org/waronterror/letter_032103.html). “As health professionals we are keenly aware that withholding necessary medical care for severe injuries also constitutes torture because it brings about unnecessary but deliberate additional suffering from those injuries.” This will, of course, depend on whether there is the intentional infliction of “severe

suffocation, ‘stress positions,’ light and noise bombardment, sleep deprivation, and making captives think they are being interrogated by another government.”<sup>211</sup> These techniques can easily amount to torture, particularly when used in a combined manner.<sup>212</sup>

According to *The Washington Post*:

The interrogation methods were approved by Justice Department and National Security Council lawyers in 2002, briefed to key congressional leaders *and required the authorization of CIA Director George J. Tenet for use*, according to intelligence officials and other government officials with knowledge of the secret decision-making process.<sup>213</sup>

The CIA has reportedly used torture and other prohibited mistreatment in other detention centers as well. As early as December 2002, *The Washington Post* reported that in the “forbidden zone” at the U.S.-occupied Bagram Airbase in Afghanistan:

Those who refuse to cooperate inside this secret CIA interrogation center are sometimes kept standing or kneeling for hours, in black hoods or spray-painted goggles, according to intelligence specialists familiar with CIA interrogation methods. At times they are held in awkward, painful positions and deprived of sleep with a 24-hour bombardment of lights — subject to what are known as “stress and duress” techniques.<sup>214</sup>

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pain or suffering” as required by the Convention against Torture. In *Hurtado v. Switzerland*, the European Commission on Human Rights unanimously found a violation of the prohibition against inhuman or degrading treatment “because [the detainee] was not given immediate medical treatment” for injuries suffered when he was apprehended (Eur. Ct. H.R., App. No. 17549/90 (January 28, 1994), at para. 12 (noting the Commission’s findings)). See also *Case of Cantoral-Benavides v. Peru*, Judgment of August 18, 2000, Inter-Am. Ct. H.R. (Ser C) No. 69 (2000). See *Jama v. U.S. Immigration and Naturalization Service*, 22 F. Supp.2d 353, 363 (D.N.J. 1998) (noting inadequate medical treatment as part of the conduct which constituted CID treatment). The Special Rapporteur on Torture has recommended that “Governments and professional medical associations should take strict measures against medical personnel that play a role, direct or indirect, in torture... [T]he withholding of appropriate medical treatment by medical personnel should be subject to sanction.” Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 2001/62, E/CN.4/2003/68, 17 December 2002, Annex 1.

<sup>211</sup> Dana Priest, “CIA Puts Harsh Tactics on Hold: Memo on Methods of Interrogation Had Wide Review,” *The Washington Post*, June 27, 2004.

<sup>212</sup> The U.N. Committee Against Torture, in its consideration of the report of Israel, for example, noted that methods allegedly included: “(1) restraining in very painful conditions, (2) hooding under special conditions, (3) sounding of loud music for prolonged periods, (4) sleep deprivation for prolonged periods, (5) threats, including death threats, (6) violent shaking, and (7) using cold air to chill, and are, in the Committee’s view, breaches of article 16 and also constitute torture as defined in article 1 of the Convention. This conclusion is particularly evident where such methods of interrogation are used in combination, which appears to be the standard case” (U.N. Committee against Torture (CAT), “Concluding Observations concerning Israel” (United Nations, Geneva, 1997), A/52/44, para. 257, emphasis added).

<sup>213</sup> Dana Priest, “CIA Puts Harsh Tactics on Hold,” *The Washington Post*, June 27, 2004.

<sup>214</sup> Dana Priest and Barton Gellman, “U.S. Decries Abuse but Defends Interrogations,” *The Washington Post*, December 26, 2002.

*Newsweek* reported a clash between the FBI and the CIA during the interrogation in Afghanistan of terror suspect Ibn al-Shaikh al-Libi:

FBI officials brought their plea to retain control over al-Libi's interrogation up to FBI Director Robert Mueller. The CIA station chief in Afghanistan, meanwhile, appealed to the agency's hawkish counterterrorism chief, Cofer Black. *He in turn called CIA Director George Tenet, who went to the White House. Al-Libi was handed over to the CIA. "They duct-taped his mouth, cinched him up and sent him to Cairo" for more-fearsome Egyptian interrogations, says the ex-FBI official. "At the airport the CIA case officer goes up to him and says, 'You're going to Cairo, you know. Before you get there I'm going to find your mother and I'm going to f--- her.' So we lost that fight."* (A CIA official said he had no comment.)<sup>215</sup>

*The Washington Post* likewise reported that the capture of al-Libi generated the first real fight over interrogations of the secret detainees: the CIA wanted to threaten his life and family; the FBI objected.<sup>216</sup>

***Under Director Tenet, and reportedly with his authorization, the CIA has sent detainees to countries in which they were tortured***

Even prior to September 11, the CIA was involved in the "extraordinary rendition" of terror suspects to third countries. In a written statement to the 9-11 Commission, Director Tenet stated that:

CIA's policy and objectives statement for the FY 1998 budget submission prepared in early 1997 evidenced a strong determination to go on the offensive against terrorists. The submission outlined our Counterterrorist Center's offensive operations and noted the goal to "render the masterminds, disrupt terrorist infrastructure, infiltrate terrorist groups, and work with foreign partners."<sup>217</sup>

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<sup>215</sup> Michael Hirsh, John Barry, and Daniel Klaidman, "A Tortured Debate," *Newsweek*, June 21, 2004, emphasis added.

<sup>216</sup> Dana Priest, "CIA Puts Harsh Tactics on Hold," *The Washington Post*, June 27, 2004.

<sup>217</sup> Statement by George Tenet, "Counterterrorism Policy: Hearing before the National Commission on Terrorist Attacks upon the United States," March 24, 2004 [online], [http://www.9-11commission.gov/archive/hearing8/9-11Commission\\_Hearing\\_2004-03-24.htm](http://www.9-11commission.gov/archive/hearing8/9-11Commission_Hearing_2004-03-24.htm)

Director Tenet said that the CIA took part in over eighty renditions before September 11, 2001.<sup>218</sup>

Shortly after the September 11 attacks, President Bush reportedly signed a still-classified directive giving the CIA broad authority to transfer terrorist suspects to third countries.<sup>219</sup> Since then, largely under Secretary Tenet, the CIA has reportedly flown 100 to 150 suspects to foreign countries, including many countries in the Middle East known to practice torture routinely.<sup>220</sup> In several cases, detainees rendered into third country custody are known or believed to have been tortured:

- Maher Arar, a Syrian-born Canadian in transit from a family vacation through John F. Kennedy airport in New York, was detained by U.S. authorities. After holding him for nearly two weeks, U.S. authorities flew him to Jordan, where he was driven across the border and handed over to Syrian authorities, despite his statements to U.S. officials that he would be tortured in Syria and his repeated requests to be sent home to Canada. Mr. Arar was released without charge from Syrian custody ten months later and has described repeated torture, often with cables and electrical cords, during his confinement in a Syrian prison. The United States has refused to cooperate with an official Canadian inquiry into the Arar rendition.<sup>221</sup>
- In early October 2001, Australian citizen Mamdouh Habib was arrested in Pakistan. Pakistan's interior minister later said that Habib was sent to Egypt on U.S. orders and in U.S. custody.<sup>222</sup> Habib says that while imprisoned in Egypt for six months, he was suspended from hooks on the wall, rammed with an electric cattle prod, forced to stand tip-toe in a water-filled room, and threatened by a German Shepard dog.<sup>223</sup> In 2002, Habib was transferred from Egypt to Bagram Air Force Base, and then to Guantánamo

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<sup>218</sup> Ibid. (It is not clear which transfers were included in this number, but it would appear that this number encompasses both transfers to the United States and those to other states.)

<sup>219</sup> Douglas Jehl and David Johnston, "Rule Change Lets CIA Freely Send Suspects Abroad to Jails," *The New York Times*, March 6, 2005.

<sup>220</sup> Ibid.

<sup>221</sup> This case and ten others are compiled from news reports in Association of the Bar of the City of New York & Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions"* (New York: ABCNY & NYU School of Law, 2004).

<sup>222</sup> "The Trials of Mamdouh Habib," *Dateline SBS*, July 7, 2004.

<sup>223</sup> See Declaration of Joseph Margulies, attached to Plaintiff's Application for Temporary Restraining Order, *Habib v. Bush*, filed November 24, 2004. (D.C. Dist.) (No. 02-CV-1130) According to *The New Yorker*, "Hossam el Hamalawy said that Egyptian security forces train German shepherds for police work, and that other prisoners have also been threatened with rape by trained dogs, although he knows of no one who has been assaulted this way" (Jane Mayer, "Outsourcing Torture," *The New Yorker*, February 14, 2005, p. 118). Dr. Hajib Al-Naumi, Qatar's former justice minister, told the Australian television program "Dateline" that according to reports from contacts of his in Egypt, Habib "was in fact tortured. He was interrogated in a way which a human cannot stand up... We were told that he -- they rang the bell that he will die and somebody had to help him" ("The Trials of Mamdouh Habib," *Dateline SBS*, July 7, 2004).

Bay. On January 28, 2005, Habib was sent home from Guantánamo to Sydney, Australia.<sup>224</sup>

- Two Egyptians, Ahmed Agiza and Mohammed al-Zari, were handed by the Swedish authorities to U.S. operatives at Bromma Airport in Stockholm in December 2001. The operatives hooded, shackled, and drugged them, placed them aboard a U.S. government-leased plane, and transported them to Egypt. There the two men were reportedly tortured, including in Cairo's notorious Tora prison.<sup>225</sup>
- Italian police are investigating whether American agents illegally seized Milan resident Osama Moustafa Nasr and flew him to Egypt. Nasr disappeared from Milan on November 16, 2003. Sometime in 2004, he called his wife and friends in Milan and reportedly described being stopped in the street "by western people," forced into a car, and taken to an air force base. From the airbase, Nasr was allegedly flown to Cairo and turned over to secret police. The *London Times* reported that Nasr "claimed he had been tortured so badly by secret police in Cairo that he had lost hearing in one ear. Italian officers who intercepted the call believe he has since been rearrested."<sup>226</sup>
- Muhammad Haydar Zammar, a German citizen of Syrian descent<sup>227</sup> was arrested in Morocco in November 2001 and flown to Syria.<sup>228</sup> Moroccan government sources have told reporters that the CIA asked them to arrest Zammar and send him to Syria,<sup>229</sup> and that CIA agents took part in his interrogation sessions in Morocco.<sup>230</sup> Zammar was taken to the same Syrian prison where Maher Arar was held.<sup>231</sup> On July 1, 2002, *Time* magazine reported:

U.S. officials tell *Time* that no Americans are in the room with the Syrian who interrogate Zammar. U.S. officials in Damascus submit written questions to the Syrians, who relay Zammar's answers back. State Department officials like the arrangement because it insulates the U.S.

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<sup>224</sup> Raymond Bonner, "Australian's Long Path in U.S. Antiterrorism Maze," *The New York Times*, January 29, 2005.

<sup>225</sup> "The Broken Promise," *Kalla Fakta*, Swedish TV4 Program, May 17, 2004 [online], <http://hrw.org/english/docs/2004/05/17/sweden8620.htm>; Craig Whitlock, "A Secret Deportation of Terror Suspects; 2 Men Reportedly Tortured in Egypt," *The Washington Post*, July 25, 2004.

<sup>226</sup> Stephen Grey, "U.S. Agents "Kidnapped Militant" for Torture in Egypt," *The Sunday Times*, February 6, 2005.

<sup>227</sup> As in Arar's case, Zammar was technically a dual citizen because Damascus does not allow those born in Syria to renounce their citizenship.

<sup>228</sup> Peter Finn, "Al Qaeda Recruiter Reportedly Tortured; Ex-Inmate in Syria Cites Others' Accounts," *The Washington Post*, January 31, 2003.

<sup>229</sup> Douglas Frantz, "War of Secrets: Sharing Information; Learning to Spy with Allies," *The New York Times*, September 8, 2002; John Crewsdon, "Bid for New Witness Could Slow Plot Trial; Defense Sets Sights on Radical in Syria," *The Chicago Tribune*, January 29, 2003.

<sup>230</sup> Peter Finn, "Al Qaeda Recruiter Reportedly Tortured; Ex-Inmate in Syria Cites Others' Accounts," *The Washington Post*, January 31, 2003.

<sup>231</sup> See Amnesty International, "Syria: Syrian German Held Three Years Without Charge in Rat-Infested Syrian 'Tomb,'" October 8, 2004 [online], <http://web.amnesty.org/library/Index/ENGMD240662004>

government from any torture the Syrians may be applying to Zammar. And some State Department officials suspect that Zammar is being tortured.<sup>232</sup>

- Muhammad Saad Iqbal Madni, a Pakistani national, was arrested in Jakarta, Indonesia on January 9, 2002. Indonesian officials and diplomats told *The Washington Post* that this was done at the CIA's request. Several days later, Egypt made a formal request that Indonesia extradite Madni for unspecified, terrorism-related crimes. However, according to "a senior Indonesian government official," "[t]his was a U.S. deal all along...Egypt just provided the formalities." On January 11, the Indonesian officials said, Madni was taken onto a U.S. registered Gulfstream V jet at a military airport, and flown to Egypt.<sup>233</sup> On September 11, 2004, the *Times* of London reported that despite repeated inquiries by Madni's relatives, "nothing has been seen or heard from" him since he was taken from Jakarta.<sup>234</sup>

The post 9/11 rendition of terror suspects was first reported in *The Washington Post* in December 2002, which described transfers to countries including Syria, Uzbekistan, Pakistan, Egypt, Jordan, Saudi Arabia, and Morocco, where they were tortured or otherwise mistreated. One official was quoted as saying, "We don't kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them."<sup>235</sup> Since then, the *New Yorker*, the *BBC* and *CBS*'s "60 Minutes" have described an organized U.S. program of renditions to Egypt of suspects captured in places such as Afghanistan, Albania, Croatia, and Sweden, resulting in many cases of torture and "disappearance."<sup>236</sup>

Director Tenet was certainly aware of the torture involved in these renditions. The Middle Eastern countries to which detainees have been rendered — Egypt, Syria, Pakistan, Jordan, Saudi Arabia, and Morocco — are notorious for their use of torture.<sup>237</sup> The U.S. State Department had

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<sup>232</sup> Mitch Frank, "Help From an Unlikely Ally," *Time Magazine*, July 1, 2002. *The Daily Telegraph* and *The Washington Post* have also reported that U.S. agents were telling Syrian interrogators what questions to ask Zammar; David Rennie & Toby Helm, "War on Terrorism: Syrians Reveal Secret Help in al-Qa'eda Hunt," June 20, 2002 ("American agents had been allowed to submit written questions to Zammar and had received a steady flow of information in return"); Glenn Kessler, "U.S.-Syria Relations Not Quite as Cold," *The Washington Post*, June 20, 2002. ("While U.S. officials have not been able to question Zammar, Americans have submitted questions to the Syrians"); Howard Schneider, "Syria Evolves as Anti-Terror Ally," *The Washington Post*, July 25, 2002 ("it is unclear whether U.S. officials are being allowed to question [Zammar] in person or merely pose questions through Syrian interrogators").

<sup>233</sup> Rajiv Chandrasekaran and Peter Finn, "U.S. Behind Secret Transfer of Terror Suspects," *The Washington Post*, March 11, 2002.

<sup>234</sup> Daniel McGory, "Ghost Prisoners Haunt Terrorism Hunt," *The London Times*, September 11, 2004.

<sup>235</sup> Dana Priest and Barton Gellman, "U.S. Decries Abuse but Defends Interrogations," *The Washington Post*, December 25, 2002.

<sup>236</sup> Jane Mayer, "Outsourcing Torture: The Secret History of America's 'Extraordinary Rendition' Program," *The New Yorker*, February 8, 2005; "Transcript of 'File on 4' Rendition," BBC Current Affairs Group, February 8, 2005; "CIA Flying Suspects to Torture?" "A 60 Minutes Special Report," March 6, 2005.

<sup>237</sup> See Human Rights Watch, "State Department Criticism of Torture in Countries to Which Detainees Have Allegedly Been Rendered," *A Human Rights Watch Press Release*, April 2003 [online], <http://hrw.org/press/2003/04/torture.htm>.

the following to say in its 2003 reports about torture in Egypt and Syria, two of the major “extraordinary rendition” destinations:

[Egypt:] [T]here were numerous, credible reports that security forces tortured and mistreated detainees. . . . Principal methods of torture reportedly employed . . . included victims being: stripped and blindfolded; suspended from a ceiling or doorframe with feet just touching the floor; beaten with fists, whips, metal rods, or other objects; subjected to electrical shocks; and doused with cold water.<sup>238</sup>

[Syria:] [T]here was credible evidence that security forces continued to use torture. . . . [Syrian groups and ex-detainees] reported that torture methods included administering electrical shocks; pulling out fingernails; forcing objects into the rectum; beating, sometimes while the victim is suspended from the ceiling; hyper extending the spine; bending the detainees into the frame of a wheel and whipping exposed body parts; and using a chair that bends backwards to asphyxiate the victim or fracture the victim’s spine.<sup>239</sup>

*Newsweek* reported that at a classified briefing for senators not long after September 11, 2001, Tenet was asked whether the United States was planning to seek the transfer of suspected al-Qaeda detainees from governments known for their brutality. Citing Congressional sources, *Newsweek* reported “that Tenet suggested it might be better sometimes for such suspects to remain in the hands of foreign authorities, who might be able to use more aggressive interrogation methods.”<sup>240</sup>

Michael Sheuer, head of the CIA’s bin Laden desk, who ran the detainee rendition program, provides evidence that Tenet was very aware of what was happening to detainees, yet nevertheless personally signed off on renditions. Sheuer said he “never a saw a set of operations that was more closely scrutinized by the director of central intelligence, the National Security Council and the Congressional intelligence committees” and that “we told them — again and again and again” that the detainees might be mistreated.<sup>241</sup> According to Sheuer, each individual operation, “I think, . . . went to either the Director of Central Intelligence or to the Assistant

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<sup>238</sup> U.S. Department of State Country Reports on Human Rights Practices: Egypt, February 2004 [online], <http://www.state.gov/g/drl/rls/hrrpt/2003/27926.htm>.

<sup>239</sup> U.S. Department of State Country Reports on Human Rights Practices: Syria, February 2004 [online], <http://www.state.gov/g/drl/rls/hrrpt/2003/27938.htm>. In November 2003, just days after Maher Arar was released from Syrian custody, President Bush declared that the government of Syria had left “a legacy of torture, oppression, misery, and ruin.” Remarks by the President George W. Bush on the Occasion of the 20th Anniversary of the National Endowment for Democracy, November 6, 2003 [online], <http://www.whitehouse.gov/news/releases/2003/11/20031106-2.html>

<sup>240</sup> John Barry, Michael Hirsh & Michael Isikoff, “The Roots of Torture,” *Newsweek*, May 24, 2004,

<sup>241</sup> Michael Scheuer, “A Fine Rendition,” *The New York Times*, March 11, 2005.

Director of Central Intelligence. So basically the number one and two men in the intelligence community are the ones who signed off.”<sup>242</sup>

As noted above, Director Tenet was reportedly involved in wresting from the FBI the terror suspect Ibn al-Shaikh al-Libi so he could be sent to Egypt.

U.S. law, in addition to criminalizing direct acts of torture, provides that “a person who *conspires* to commit [torture] shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.”<sup>243</sup> Similarly, U.S. law provides for so-called “aiding and abetting” liability:

1. Whoever commits an offense against the United States or aids, counsels, commands, induces or procures its commission, is punishable as a principal.
2. Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.<sup>244</sup>

As a general principle of U.S. criminal law, the liability of an accomplice or a conspirator depends upon giving encouragement or assistance with the knowledge that it will promote or facilitate a crime.<sup>245</sup>

In the light of these legal provisions, Director Tenet’s role in these renditions should be investigated to determine if it amounted to conspiracy to commit torture and/or to aiding and abetting in the commission of torture.<sup>246</sup>

Director Tenet might argue that the United States obtained “diplomatic assurances” from receiving states such as Syria and Egypt that the detainees would not be tortured. In a recent study of the use of “diplomatic assurances,” however, Human Rights Watch concluded:

In contexts where torture is a serious and persistent problem, or there is otherwise reason to believe that particular individuals will be targeted for torture and ill-treatment, diplomatic assurances do not and cannot prevent torture. Sending countries that rely on such assurances are either engaging in wishful

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<sup>242</sup> “Transcript of ‘File on 4’ Rendition,” BBC Current Affairs Group, February 8, 2005.

<sup>243</sup> 18 U.S.C. § 2340A(c), emphasis added.

<sup>244</sup> 18 U.S.C. § 2.

<sup>245</sup> Wayne R. Lafave, *Criminal Law* (3d ed. 2000), § 6.7.

<sup>246</sup> See Association of the Bar of the City of New York & Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions”* (New York: ABCNY & NYU School of Law, 2004), Section VIII.



thinking or using the assurances as a fig leaf to cover their complicity in torture and their role in the erosion of the international norm against torture.<sup>247</sup>

From the point of view of criminal law, liability would turn on Director Tenet's mental state — his intent that the detainee be tortured or his knowledge or reckless indifference to whether or not torture would result.<sup>248</sup>

In this respect, Human Rights Watch wrote in the study described above:

It defies common sense to presume that a government that routinely flouts its obligations under international law can be trusted to respect those obligations in an isolated case. And indeed, in an increasing number of cases, allegations of torture are emerging after individuals are returned based on such assurances.

As former CIA counterterrorism official Vincent Cannistraro has remarked: "You would have to be deaf, dumb and blind to believe that the Syrians were not going to use torture, even if they were making claims to the contrary."<sup>249</sup>

### **Lieutenant General Ricardo Sanchez**

"As senior commander in Iraq, I accept responsibility for what happened at Abu Ghraib"

- Ricardo Sanchez<sup>250</sup>

*Lt. Gen. Sanchez should be investigated for war crimes and torture either as a principal or under the doctrine of "command responsibility." Gen. Sanchez authorized interrogation methods that violate the Geneva Conventions*

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<sup>247</sup> See Human Rights Watch, "Still at Risk: Diplomatic Assurances No Safeguard against Torture," *A Human Rights Watch Report*, April 2005 [online], <http://hrw.org/reports/2005/eca0405/>.

<sup>248</sup> See Wayne R. Lafave, *Criminal Law* (3d ed. 2000), §6.7 (d). U.S. courts differ on whether liability rests on whether mere "knowing assistance" suffices for criminal liability or whether the defendant must desire the result (that the detainee be tortured).

<sup>249</sup> Shannon McCaffrey, "Canadian Sent to Syria Prison Disputes U.S. Claims against Torture," *Knight Ridder*, July 28, 2004 [online] <http://www.realcities.com/mld/krwashington/9264400.htm>. See also Dana Priest, "Man was Deported after Syrian Assurances," *The Washington Post*, November 20, 2003: "Spokesmen at the Justice Department and the CIA declined to comment on why they believed the Syrian assurances to be credible." *The Washington Post* quoted an "Arab diplomat, whose country is actively engaged in counterterrorism operations and shares intelligence with the CIA," as saying that it was unrealistic to believe the CIA really wanted to follow up on the assurances. "It would be stupid to keep track of them because then you would know what's going on," he said. "It's really more like 'Don't ask, don't tell'" (Dana Priest, "CIA's Assurances on Transferred Suspects Doubted," *The Washington Post*, March 17, 2005).

<sup>250</sup> Testimony of Lt. Gen Ricardo Sanchez, Senate Armed Services Committee, Hearing on Iraq Prisoner Abuse, May 19, 2004.

*and the Convention against Torture. He knew, or should have known, that torture and war crimes were committed by troops under his direct command, but failed to take effective measures to stop these acts.*

### **Gen. Sanchez promulgated interrogation rules and techniques that violated the Geneva Conventions and the Convention against Torture**

Lt. Gen. Sanchez took command of V Corps in Baghdad in April 2003 and went on to become Commander of the Combined and Joint Task Force 7 (CJTF-7). Over the spring and summer of 2003, CJTF-7 was responsible for the detention of combatant and civilian prisoners in Iraq.<sup>251</sup>

Although Gen. Sanchez testified before Congress that compliance with the Geneva Conventions in Iraq “was always the standard,”<sup>252</sup> it has since been revealed that Gen. Sanchez, “despite lacking specific authorization to operate beyond the confines of the Geneva Conventions” (in the words of the Schlesinger report), took it upon himself to declare some prisoners “unlawful combatants.”<sup>253</sup>

As noted by the Schlesinger panel, during the early and mid-2003, General Sanchez’s troops interrogated detainees at Abu Ghraib and elsewhere relying “on Field Manual 34-52 and on unauthorized techniques that migrated from Afghanistan.”<sup>254</sup> Members of the 519<sup>th</sup> MI Battalion, which had previously been accused in a Criminal Investigation Command homicide investigation of abusive interrogation practices in Afghanistan, were left to devise interrogation rules on their own.<sup>255</sup> In so doing, they were said to have copied rules “almost verbatim” from the “Battlefield Interrogation Team and Facility Policy” of Special Operations Forces/Central Intelligence Agency Joint Task Force 121, a secretive Special Operations Forces/CIA mission seeking former government members in Iraq.<sup>256</sup> That policy reportedly endorsed the use of stress positions during harsh interrogation procedures, the use of dogs, yelling, loud music, light control, isolation, and other procedures used previously in Afghanistan and Iraq.<sup>257</sup>

In mid-August 2003, according to journalist Mark Danner, a captain in military intelligence at Abu Ghraib sent his colleagues an e-mail in which, responding to an earlier request from interrogators, he sought to define “unlawful combatants,” distinguishing them from “lawful combatants [who] receive protections of the Geneva Convention and gain combat immunity for

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<sup>251</sup> Jones report, pp. 9-10.

<sup>252</sup> Testimony of Lt. Gen Ricardo Sanchez, Senate Armed Services Committee, Hearing on Iraq Prisoner Abuse, May 19, 2004, p. 26.

<sup>253</sup> Schlesinger report, p. 83.

<sup>254</sup> Ibid, p. 14.

<sup>255</sup> Fay report, p. 29.

<sup>256</sup> Douglas Jehl and Eric Schmitt, “Army’s Report Faults General in Prison Abuse,” *The New York Times*, August 27, 2004.

<sup>257</sup> Ibid.

their warlike acts.” After promising to provide rules of engagement — “that addresses the treatment of enemy combatants, specifically, unprivileged belligerents,” the captain asked the interrogators for “input...concerning what their special interrogation knowledge base is and more importantly, what techniques would they feel would be effective techniques.” Then, reminding the intelligence people to “provide Interrogation techniques ‘wish list’ by 17 AUG 03,” the captain signed off saying: “The gloves are coming off gentlemen regarding these detainees, Col Boltz<sup>258</sup> has made it clear that we want these individuals broken. Casualties are mounting and we need to start gathering info to help protect our fellow soldiers from any further attacks.”<sup>259</sup>

Gen. Miller, who ran the detention operations at Guantánamo Bay, visited Iraq from August to September 2003, and met with Gen. Sanchez and others. Gen. Sanchez recalls that Gen. Miller “left behind a whole series of SOPs that could be used as a start point for CJTF-7 interrogation operations.”<sup>260</sup> Gen. Sanchez took into consideration Gen. Miller’s “call for strong, command-wide interrogation policies,” when he finally formalized the interrogation rules for Iraq in a memorandum dated September 14.<sup>261</sup>

Sanchez’s September 14 memo<sup>262</sup> — released only in March 2005 in response to a FDIA lawsuit — approved the use of a number of harsh interrogation techniques, including:

- “Presence of Military Working Dog: Exploits Arab fear of dogs while maintaining security during interrogations. Dogs will be muzzled and under control of ...handler at all times to prevent contact with detainee”;
- “Sleep Management: Detainee provided minimum 4 hours of sleep per 24 hour period, not to exceed 72 continuous hours”;
- “Yelling, Loud Music and Light Control: Used to create fear, disorient detainee and prolong capture shock. Volume controlled to prevent injury”;
- “Stress Positions: Use of physical postures (sitting, standing, kneeling, prode, etc.) for no more than 1 hour per use. Use of technique(s) will not exceed 4 hours and adequate rest between use of each position will be provided”;
- “False Flag: Convincing the detainee that individuals from a country other than the United States are interrogating him.”

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<sup>258</sup> Col. Steven Boltz, the second-ranking military intelligence officer in Iraq.

<sup>259</sup> Mark Danner, *Torture and Truth; America, Abu Ghraib and the War on Terrorism* (New York: The New York Review of Books, 2004), p. 33.

<sup>260</sup> Fay report, p. 58.

<sup>261</sup> Schlesinger report, pp. 9-10.

<sup>262</sup> From Lt. Ricardo Sanchez to Commander U.S. Central Command, memorandum, Interrogation and Counter-Resistance Policy, September 14, 2003 [online], <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=17851&c=206>.

Among the goals Gen. Sanchez thought these techniques would accomplish were “to create fear, disorient detainees and capture shock.”

The Schlesinger report found that Gen. Sanchez’s September 14 memorandum included “a dozen interrogation techniques beyond [Army] Field Manual 34-52 — five beyond those approved for Guantánamo.”<sup>263</sup> As described above in the section on Donald Rumsfeld, these techniques also violate the Geneva Conventions and, depending on their use, can constitute war crimes.

Unreleased portions of the report by Maj. Gen. George R. Fay state that with Gen. Sanchez’s September 14 order, national policies and those of Gen. Sanchez “collided, introducing ambiguities and inconsistencies in policy and practice,” and that “Policies and practices developed and approved for use on al-Qaeda and Taliban detainees who were not afforded the protection of the Geneva Conventions now applied to detainees who did fall under the Geneva Conventions’ protections.”<sup>264</sup> The report adds that the memo “established a requirement to obtain LTG Sanchez’s approval prior to using certain techniques on EPWs [enemy prisoners of war].” The policy failed to address what, if any, approval authority had to be obtained for using any of the interrogation techniques on civilian internees, who were the bulk of the detainees at that time.<sup>265</sup> In other words, Gen. Sanchez apparently gave Abu Ghraib interrogators the blanket authority to use dogs to threaten detainees — an act that may easily amount to torture or cross the threshold into torture.

Gen. Sanchez appears to have misled Congress in his sworn testimony on this issue. Asked in May 2004, months before the release of his actual memoranda, if he had “ordered or approved the use of sleep deprivation, intimidation by guard dogs, excessive noise and inducing fear,” Gen. Sanchez replied: “I never approved any of those measures to be used within the CJTF-7 at any time in the last year.” In response to a follow-up question, he repeated, “I have never approved the use of any of those methods within CJTF-7 in the 12-and-a-half months that I’ve been in Iraq.”<sup>266</sup>

At the same time, Gen. Sanchez was apparently relaying the pressure from above for “actionable intelligence.” According to one soldier whose testimony is in a declassified attachment to the Fay report:

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<sup>263</sup> Schlesinger report, p. 9.

<sup>264</sup> Fay report, pp. 25-26. See Mark Danner, *Torture and Truth; America, Abu Ghraib and the War on Terrorism* (New York: The New York Review of Books, 2004), p. 461, which includes sections of the Fay report not released to the public.

<sup>265</sup> Fay report, p. 26; Mark Danner, *Torture and Truth; America, Abu Ghraib and the War on Terrorism* (New York: The New York Review of Books, 2004), p. 462.

<sup>266</sup> Senate Armed Services Committee, Hearing on Allegations of Mistreatment of Iraqi Prisoners, May 19, 2004.

COL Pappas and (REDACTED) were under intense pressure from LTG Sanchez to provide intelligence reporting...On occasion (REDACTED) and (REDACTED) conducted interrogations themselves. One interrogation occurred at the request of LTG Sanchez in the middle of the night.<sup>267</sup>

These guidelines were used by personnel at Abu Ghraib until October 2003.<sup>268</sup> Gen. Sanchez's September 14 guidelines were criticized by CENTCOM, however, which viewed them as "unacceptably aggressive," resulting in Gen. Sanchez drafting new guidelines on October 12, 2003.<sup>269</sup>

While the September 14 memo did not qualify its approval of dogs for interrogation, the October 12 memo confusingly contained two seemingly contradictory sheets of paper. One sheet, a list of approved techniques, did not include dogs. The second sheet, a list of safeguards, now said, "should military working dogs be present during interrogations, they will be muzzled and under control of handler at all times to ensure safety."<sup>270</sup> This memo, Gen. Fay noted, "confused doctrine and policy even further."<sup>271</sup>

As Gen. Fay pointed out:

Another confusing change involved removing the use of dogs from the list of approaches. The October 12, 2003 policy did not specifically preclude it. In fact, the safeguards section of the policy established the conditions for the use of dogs, should they be present during interrogations: They had to be muzzled and they had to be under the control of a trained handler. Even though it was not listed in the approved techniques section, which meant that it required the LTG Sanchez's approval, its inclusion in the safeguards section is confusing. In fact, the Commander, 205 MI BDE, COL Pappas, believed that he could approve the use of dogs. Dogs as an interrogation tool should have been specifically excluded because the practice was never doctrine. In approving the concept, LTG Sanchez did not adequately consider the distinction between using dogs at the facility to patrol for security and using them as an interrogation tool, and the implications for interrogation policy. Interrogators at Abu Ghraib used both

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<sup>267</sup> Sworn Statement of E5, A Company, 519th Military Intelligence Battalion, 525th Military Intelligence Brigade, Fort Bragg, June 4, 2004.

<sup>268</sup> Colonel Thomas M. Pappas, "AR 15-6 Investigation Interview," February 9, 2004, p. 34.

<sup>269</sup> CJTF-7 Interrogation and Counter-Resistance Policy, memorandum, October 12, 2003 [online], <http://www.aclu.org/torturefoia/released/a94.pdf>.

<sup>270</sup> *Ibid.*

<sup>271</sup> Fay report, p. 27.

dogs and isolation as interrogation practices. *The manner in which they were used on some occasions clearly violated the Geneva Conventions.*<sup>272</sup>

Gen. Jones added that “policy memoranda promulgated by the CJTF-7 Commander [Sanchez] led indirectly to some of the non-violent and non-sexual abuses at Abu Ghraib.”<sup>273</sup> Jones added that some of these abuses “may have violated international law.”

***Lt. Gen. Sanchez knew or should have known about torture and war crimes committed by troops under his command***

In his Congressional testimony, Gen. Miller was asked to explain how abuse at Abu Ghraib had taken place without the top leadership knowing about it. He replied, “I think there are failures in people doing their duty, there are failures in systems. *And we should have known and we should have uncovered it and taken action before it got to the point that it got to.* I think there’s no doubt about that.”<sup>274</sup>

U.S. military personnel under the command of Gen. Sanchez committed numerous war crimes. The Schlesinger report noted 55 substantiated cases of detainee abuse in Iraq, plus 20 instances of detainee deaths still under investigation.<sup>275</sup> The earlier Taguba report had found “numerous incidents of sadistic, blatant, and wanton criminal abuses” that constituted “systematic and illegal abuse of detainees” at Abu Ghraib.<sup>276</sup> The Fay report documents 44 allegations of acts that may amount to war crimes.<sup>277</sup> An ICRC report concluded that in military intelligence sections of Abu Ghraib, “methods of physical and psychological coercion used by the interrogators appeared to be part of the standard operating procedures by military intelligence personnel to obtain confessions and extract information.”<sup>278</sup> The ICRC also found that “the use of ill-treatment against persons deprived of their liberty went beyond exceptional cases and might be considered as a practice tolerated by the CF [Coalition Forces].”<sup>279</sup>

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<sup>272</sup> Fay report, p. 28, emphasis added. The Schlesinger report noted that “The Taguba and Jones/Fay investigations identified a number of abuses related to using muzzled and unmuzzled dogs during interrogations.” Schlesinger report, p. 77. See also Douglas Jehl and Eric Schmitt, “Army’s Report Faults General in Prison Abuse,” *The New York Times*, August 27, 2004.

<sup>273</sup> Jones report, p. 4.

<sup>274</sup> Testimony of Gen. Miller, Senate Armed Services Committee, Hearing on Allegations of Mistreatment of Iraqi Prisoners, May 19, 2004, emphasis added.

<sup>275</sup> Schlesinger report, pp. 12-13.

<sup>276</sup> Taguba report, p. 16.

<sup>277</sup> Fay report, p. 7.

<sup>278</sup> International Committee of the Red Cross, *Report on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq during Arrest, Internment and Interrogation*, February 2004 [online], <http://www.icrc.org/web/eng/siteeng0.nsf/iwpList74/E4EC091842422511C1256EB500636F70> .

<sup>279</sup> *Ibid.*

Gen. Jones concluded that:

[I]n retrospect, indications and warnings had surfaced at the CJTF-7 level that additional oversight and corrective actions were needed in the handling of detainees... Examples of these indications and warnings include: the investigation of an incident at Camp Cropper,<sup>280</sup> the International Committee of the Red Cross (ICRC) reports on handling of detainees in subordinate units, ICRC reports on Abu Ghraib detainee conditions and treatment, CID investigations and disciplinary actions being taken by commanders, the death of an OGA detainee at Abu Ghraib.<sup>281</sup>

Indeed, Brigadier General Janis Karpinski has said that when CJTF-7 was alerted to prisoner abuse by the ICRC in November 2003, lawyers who answered directly to Sanchez responded by restricting the access of the ICRC.<sup>282</sup> In May 2003, the ICRC sent a memorandum documenting over 200 allegations of ill-treatment. Though Gen. Sanchez has denied seeing it, the memorandum was forwarded to U.S. Central Command in Qatar.<sup>283</sup> Gen. Sanchez also concedes that he spoke numerous times with U.S. Ambassador Paul Bremer during the summer and fall of 2003 about, among other things, issues of “quality of life of prisoners and the conditions that existed.”<sup>284</sup>

A confidential report in December 2003 by retired Col. Stuart A. Herrington, which was commissioned by Maj. Gen. Barbara Fast, the top intelligence officer in Iraq, warned of detainee abuse throughout Iraq.<sup>285</sup> The report, which was reportedly seen by Gen. Sanchez, found that members of Task Force 121 — the joint Special Operations and CIA mission searching for weapons of mass destruction and high-value targets — had been abusing detainees throughout Iraq and had been using a secret interrogation facility to hide their activities.

According to the Schlesinger report, “[b]oth the CJTF-7 commander [Gen. Sanchez] and his intelligence officer, CJTF-7 C2 [Major General Walter Wojdakowski], visited the prison [Abu Ghraib] on several occasions.”<sup>286</sup> These visits were among those that the report concluded

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<sup>280</sup> In early July 2003, the ICRC presented a paper detailing approximately 50 allegations of ill-treatment in the military intelligence section of Camp Cropper, at Baghdad International Airport.

<sup>281</sup> Jones report, p. 12.

<sup>282</sup> Douglas Jehl and Eric Schmitt, “Army Tried to Limit Abu Ghraib Access,” *The New York Times*, May 20, 2004.

<sup>283</sup> International Committee of the Red Cross, *Report on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq during Arrest, Internment and Interrogation*, February 2004 [online], <http://www.icrc.org/web/eng/siteeng0.nsf/iwpList74/E4EC091842422511C1256EB500636F70>.

<sup>284</sup> Testimony of Lt. Gen. Ricardo Sanchez, Senate Armed Services Committee, Hearing on Iraq Prisoner Abuse, May 19, 2004.

<sup>285</sup> Josh White, “U.S. Generals in Iraq Were Told of Abuse Early, Inquiry Finds,” *The Washington Post*, December 1, 2004.

<sup>286</sup> Schlesinger report, p. 65.

“undoubtedly” contributed to the fact that “pressure was placed on the interrogators to produce ‘actionable’ intelligence.”<sup>287</sup> One soldier in the 800<sup>th</sup> MP Brigade stated that he believed Brig. Gen. Karpinski spoke to Lt. Gen. Sanchez “every 3 days or so.”<sup>288</sup> According to another soldier serving at Abu Ghraib, whose allegation has not been corroborated, Gen. Sanchez was present during some interrogations and was aware of the abuse.<sup>289</sup>

A letter from Col. Pappas to Gen. Sanchez dated November 30, 2003 requested permission to throw tables and chairs while continuously yelling at a detainee, drive the detainee around hooded while interrogating him, threaten him with barking dogs, conduct a strip search while the detainee was hooded, place him in isolation on an adjusted sleep schedule while also using techniques such as loud music and stress positions “in accordance with CJTF-7 IROE.”<sup>290</sup> Gen. Sanchez told Congress that he had never seen the letter.<sup>291</sup>

Despite these warnings, Gen. Sanchez seems to have taken no steps to curtail the rampant abuses that were ongoing during his command.

Gen. Jones concluded that “LTG Sanchez... failed to ensure proper staff oversight of detention and interrogation operations”<sup>292</sup> and that “CJTF-7 staff elements reacted inadequately to earlier indications and warnings that problems existed at Abu Ghraib.”<sup>293</sup> The Schlesinger report stated that “[w]e believe LTG Sanchez should have taken strong action in November when he realized the extent of the leadership problems at Abu Ghraib. We concur with the Jones findings that LTG Sanchez and MG Wojdakowski failed to ensure proper staff oversight of detention and interrogation operations.”<sup>294</sup>

In addition, the Schlesinger panel noted that “the unclear chain of command established by CJTF-7, combined with the poor leadership and lack of supervision, contributed to the atmosphere at Abu Ghraib that allowed the abuses to take place.”<sup>295</sup>

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<sup>287</sup> Ibid.

<sup>288</sup> First Lieutenant Elvis L. Mabry, “AR 15-6 Investigation Interview,” February 15, 2004, p. 3.

<sup>289</sup> Joe Stephens and Josh White, “Prison Visits by General Reported in Hearing; Alleged Presence of Sanchez Cited by Lawyer,” *The Washington Post*, May 23, 2004.

<sup>290</sup> Col. Thomas M. Pappas to Commander CJTF-7 LTG Sanchez, “Request for Exception to CJTF-7 Interrogation and Counter Resistance Policy,” memorandum, November 30, 2003.

<sup>291</sup> Testimony of Lt. Gen. Ricardo Sanchez, Senate Armed Services Committee, Hearing on Iraq Prisoner Abuse, May 19, 2004, pp. 31-32.

<sup>292</sup> Jones report, p. 24.

<sup>293</sup> Ibid., p. 4.

<sup>294</sup> Schlesinger report, p. 15.

<sup>295</sup> Ibid., p. 45.



## **Major General Geoffrey Miller**

*Major General Geoffrey Miller, as commander at the tightly-controlled prison camp at Guantánamo Bay, Cuba, should be investigated for his potential responsibility in the war crimes and acts of torture committed against detainees there.*

Gen. Miller was commander of Joint Task Force-Guantánamo (JTF-GTMO) from November 2002 until April 2004, when he became deputy commanding general of detention operations in Iraq, the position he currently holds.

### ***Gen. Miller knew or should have known that troops under his command were committing war crimes and acts of torture against detainees at Guantánamo***

As commander of JTF-Guantánamo, Gen. Miller oversaw both military intelligence and military police functions. His mission was “to integrate both the detention and intelligence function to produce actionable intelligence for the nation... operational and strategic intelligence to help the [United States] win the global war on terror.”<sup>296</sup> Before Gen. Miller was brought to Guantánamo, his predecessor in charge of detention, Brigadier General Rick Baccus, was reportedly accused by Pentagon officials of interfering with interrogation by “coddling” detainees for addressing them with words such as “peace be with you,” and “may God be with you,” promising them that they would be “treated humanely,” and authorizing placement in the camp of ICRC posters specifying certain rights that prisoners have under the Geneva Conventions.<sup>297</sup> Under Gen. Miller, detention and interrogation functions were brought together for the first time. The Schlesinger panel described the use of interrogation techniques at Guantánamo as “carefully controlled.”<sup>298</sup> Church described the “strict command oversight” and “controlled conditions.”<sup>299</sup>

Because no independent monitors with the ability to publicly report on conditions have been able to visit Guantánamo, it is difficult to get a complete picture of practices under Gen. Miller. However based on the testimony of people released from Guantánamo, as well as evidence that has been released as a result of litigation, it appears that under Gen. Miller’s command, detainees at Guantánamo were frequently subject to torture or other cruel, inhuman or degrading treatment. The ICRC has reportedly described the psychological and sometimes physical

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<sup>296</sup> Testimony of General Miller, Senate Armed Forces Committee, Hearing on Iraq Prisoner Abuse, May 19, 2004.

<sup>297</sup> See Bill Gertz and Rowan Scarborough, “Inside the Ring,” *The Washington Times*, October 4, 2002; David Rose, *Guantánamo* (New York, The New Press, 2004), p. 85; “GITMO Camp Commander Relieved,” *The Washington Post*, October 14, 2002.

<sup>298</sup> Schlesinger report, p. 9.

<sup>299</sup> Church report, p. 9.

coercion on prisoners at Guantánamo as “tantamount to torture.”<sup>300</sup> Among tactics that appear to have regularly been in use are prolonged sleep deprivation and shackling prisoners in uncomfortable “stress positions” for many hours.<sup>301</sup>

Released detainees also describe: threats with unmuzzled dogs; forced stripping; being photographed naked; being intentionally subjected to extremes of heat and cold for the purpose of causing suffering; being kept around the clock in filthy cages with no exercise or sanitation; denial of access to necessary medical care; deprivation of adequate food, sleep, communication with family and friends, and of information about their status; and violent beatings.<sup>302</sup>

In one case, military intelligence officials and interrogators told *The New York Times* that Mohammed al-Kahtani, a Saudi detainee, was put on a plane, blindfolded, and made to believe that he was being flown to the Middle East. After several hours in the air, the plane returned to Guantánamo and al-Kahtani was allegedly put in an isolation cell for several months, hidden from the ICRC, and subjected to harsh interrogations conducted by people he was encouraged to believe were Egyptian security agents. Al-Kahtani was reportedly forcibly given an enema because it was uncomfortable and degrading.<sup>303</sup>

The *Times* also reported that:

[I]nterviews with former intelligence officers and interrogators provided new details and confirmed earlier accounts of inmates being shackled for hours and left to soil themselves while exposed to blaring music or the insistent meowing of a cat-food commercial. In addition, some may have been forcibly given enemas as punishment.

While all the detainees were threatened with harsh tactics if they did not cooperate, about one in six were eventually subjected to those procedures, one former interrogator estimated. The interrogator said that when new interrogators arrived they were told they had great flexibility in extracting information from detainees because the Geneva Conventions did not apply at the base.<sup>304</sup>

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<sup>300</sup> Neil A. Lewis, “Red Cross Finds Detainee Abuse in Guantánamo,” *The New York Times*, November 30, 2004.

<sup>301</sup> See Human Rights Watch, “Guantánamo: Detainee Accounts,” *A Human Rights Watch Backgrounder*, October 2004 [online], <http://www.hrw.org/backgrounder/usa/gitmo1004/>; Center for Constitutional Rights, “Report of Former Guantánamo Detainees,” August 4, 2004 [online], <http://www.ccr-ny.org/v2/reports/docs/Gitmo-compositestatementFINAL23july04.pdf>.

<sup>302</sup> *Ibid.*

<sup>303</sup> Neil A. Lewis, “Fresh details emerge on harsh methods at Guantánamo,” *The New York Times*, January 1, 2005.

<sup>304</sup> *Ibid.*

Documents released to the American Civil Liberties Union and the Center for Constitutional Rights following a Freedom of Information Act (FOIA) lawsuit paint a bleak picture of the treatment of Guantánamo detainees under Gen. Miller. In particular, agents of the Federal Bureau of Investigation express their shock at techniques used on detainees. In one e-mail, an FBI agent wrote:

Here is a brief summary of what I observed at GTMO. On a couple of occasions (sic), I entered interview rooms to find a detainee chained hand and foot in a fetal position to the floor, with no chair, food, or water. Most times they had urinated or defecated (sic) on themselves and had been left there for 18, 24 hours or more. On one occasion (sic), the air conditioning had been turned down so far and the temperature was so cold in the room, that the barefooted detainee was shaking with cold. When I asked the [military police] what was going on, I was told that interrogators from the day prior had ordered this treatment, and the detainee was not to be moved. On another occasion (sic), the A/C had been turned off, making the temperature in the unventilated room probably well over 100 degrees. The detainee was almost unconscious on the floor with a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night. On another occasion (sic), not only was the temperature unbearably hot, but extremely loud rap music was being played in the room, and had been since the day before, with the detainee chained hand and foot in the fetal position on the tile floor.<sup>305</sup>

Another FBI agent reported seeing a detainee “sitting on the floor of the interview room with an Israeli flag draped around him, loud music being played and a strobe light flashing.” In another recently-declassified FBI e-mail, the author writes:

from what cnn reports, gen karpinsky at abu gharib (sic) said that gen miller came to the prison several months ago and told her they wanted to “gitmotize” abu ghraib. i am not sure what this means. however, if this refers to intell gathering as i suspect, it suggests he has continued to support interrogation strategies we not only advised against, but questioned in terms of effectiveness.

yesterday, however, we were surprised to read an article in stars and stripes, in which gen. miller is quoted as saying that he believes in the rapport-building approach. this is not what was saying at gitmo when i was there. [redacted] and i

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<sup>305</sup> American Civil Liberties Union, E-mail from [redacted] to [redacted], August 2, 2004 [online], [www.aclu.org/torturefoia/released/FBI\\_5053\\_5054.pdf](http://www.aclu.org/torturefoia/released/FBI_5053_5054.pdf) (though this was written in 2004, it was recalling earlier events).

did cart wheels. the battles fought in gitmo while gen. miller he was there are on the record.

Recently-revealed videotapes of so-called “Immediate Reaction Forces” (or “Extreme Reaction Force” (ERF)) reportedly show guards punching some detainees, a guard kneeling a detainee in the head, tying one to a gurney for questioning and forcing a dozen to strip from the waist down. One guard squad was all-female, traumatizing some Muslim prisoners.<sup>306</sup>

Between 2002 and 2004, Gen. Miller met on several occasions with the ICRC, which made him aware of their evolving concerns over the treatment of detainees. In October 2003, the ICRC conducted more than 500 interviews at Guantánamo before meeting with Miller and his top aides. According to defense department documents,<sup>307</sup> the ICRC told Miller of its concern over the lack of a legal system for the detainees, the continued use of steel cages, the “excessive use of isolation” and the lack of repatriation for the detainees. The ICRC felt that the interrogators had “too much control over the basic needs of detainees... the interrogators have total control over the level of isolation in which detainees were kept; the level of comfort items detainees can receive; and the access to basic needs of the detainees.” According to the documents, Gen. Miller responded that interrogation techniques were not the ICRC’s concern. The ICRC countered that those methods and the lengths of interrogations were coercive and having a “cumulative effect” on the mental health of the detainees.<sup>308</sup>

One of the detainees whom Gen. Miller refused to show to the ICRC as recently as February 2, 2004, was Abdallah Tabarak, a Moroccan citizen and allegedly Osama bin Laden’s personal bodyguard. According to a Department of Defense memo, Gen. Miller told the ICRC that “Because of military necessity, the ICRC may not have private talks with him.” Tabarak was transferred to Morocco in August 2004. In December 2004, he reportedly said that in Guantánamo, he had been beaten, given forcible injections, and held in a dark cell which left him with eyesight problems.<sup>309</sup>

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<sup>306</sup> Paisley Dodds, “Guantánamo Tapes Show Teams Punching, Stripping Prisoners,” Associated Press, February 1, 2005. In November 2002, just before Miller arrived, U.S. National Guardsman Spc. Sean Baker was allegedly abused by an ERF while posing undercover as a detainee. Baker was told to put on an orange jumpsuit and crawl under a bunk in a cell. According to Baker, the ERF members “grabbed my arms, my legs, twisted me up and unfortunately one of the individuals got up on my back from behind and put pressure down on me while I was facedown. Then he — the same individual — reached around and began to choke me and press my head down against the steel floor. After several seconds, twenty to thirty seconds, it seemed like an eternity because I couldn’t breathe, I began to panic...” Baker was evacuated to a hospital in Virginia, and was later sent to an Army hospital for treatment of traumatic brain injury and he has been plagued by seizures ever since. See David Rose, *Guantánamo* (New York, The New Press, 2004), pp. 72-74.

<sup>307</sup> These documents are collected at “Conditions at Guantánamo Bay: DoD Documents Detail Red Cross Comments on Detainee Treatment and Actions Taken in Response,” *The Washington Post*, June 18, 2004 [online], <http://www.washingtonpost.com/wp-srv/nation/documents/gitmomemos.html>.

<sup>308</sup> See also Scott Higham, “A Look Behind the ‘Wire’ at Guantánamo: Defense Memos Raise Questions about Detainee Treatment as Red Cross Sought Changes,” *The Washington Post*, June 13, 2004.

<sup>309</sup> See Amnesty International, “United States of America: Guantánamo — An Icon of Lawlessness,” January 6, 2005.

In June 2004, shortly after Gen. Miller left Guantánamo, the ICRC conducted a full visit and concluded (in the words of *The New York Times*, which obtained a memorandum based on the ICRC report that quotes from it in detail and lists its major findings):

[I]nvestigators had found a system devised to break the will of the prisoners at Guantánamo... and make them dependent on their interrogators through “humiliating acts, solitary confinement, temperature extremes, use of forced positions.” ...[T]he methods used were increasingly “more refined and repressive” than what the Red Cross learned about on previous visits. “The construction of such a system, whose stated purpose is the production of intelligence, cannot be considered other than an intentional system of cruel, unusual and degrading treatment and a form of torture.” It said that in addition to the exposure to loud and persistent noise and music and to prolonged cold, detainees were subjected to “some beatings.”<sup>310</sup>

Thus, there is a mounting body of evidence that acts of torture and war crimes were committed at Guantánamo, and that Gen. Miller, as the commander of the tightly-controlled camp, knew or should have known about these crimes.

***Gen. Miller may have proposed interrogation methods for Iraq which were the proximate cause of the torture and war crimes committed at Abu Ghraib***

As discussed above, the most severe abuses at Abu Ghraib occurred just after Gen. Miller went to Iraq to advise Gen. Sanchez on the hunt for “actionable intelligence” among Iraqi prisoners.

Gen Janis Karpinski, commander of the 800<sup>th</sup> Military Police Brigade with authority over the U.S. prison facilities in Iraq, said that Miller “came up there and told me he was going to ‘Gitmoize’ the detention operation.”<sup>311</sup> Miller has denied using this word.<sup>312</sup>

As Gen. Taguba highlighted in his report, Miller recommended that “the guard force be actively engaged in setting the conditions for successful exploitation of the internees.” As the Fay report makes clear, Gen. Sanchez “relied heavily on the series of SOPs [standard operating procedures] which MG G. Miller provided to develop not only the structure, but also the interrogation policies for detainee operations.”

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<sup>310</sup> Neil A. Lewis, “Red Cross Finds Detainee Abuse in Guantánamo,” *The New York Times*, November 30, 2004.

<sup>311</sup> Scott Wilson and Sewell Chan, “As Insurgency Grew, So Did Prison Abuse,” *The Washington Post*, May 9, 2004.

<sup>312</sup> Testimony of Gen. Miller, Senate Armed Services Committee, Hearing on Iraq Prison Abuse, May 19, 2004 (“Senator, I did not tell General Karpinski I was going to Gitmo-ize Abu Ghraib. I don't believe I've ever used that term — ever”).

There is controversy over Gen. Miller's alleged recommendation regarding the use of dogs. According to Col. Thomas Pappas, the top U.S. intelligence officer at Abu Ghraib, Gen. Miller, "said that they used military working dogs at Gitmo [Guantánamo], and that they were effective in setting the atmosphere for which, you know, you could get information" from the prisoners.<sup>313</sup> Pappas said that Gen. Miller said the use of the dogs "with or without a muzzle" was "okay." Gen. Miller is said to deny this.<sup>314</sup> Gen. Fay found that:

Abusing detainees with dogs started almost immediately after the dogs arrived at Abu Ghraib on 20 November 2003. By that date, abuses of detainees was already occurring and the addition of dogs was just one more abuse device. Dog Teams were brought to Abu Ghraib as a result of recommendations from MG G. Miller's assessment team from JTF-GTMO. MG G. Miller recommended dogs as beneficial for detainee custody and control issues, especially in instances where there were large numbers of detainees and few guards to help reduce the risk of detainee demonstrations or acts of violence, as at Abu Ghraib.<sup>315</sup>

Gen Karpinski said that Gen. Miller told her that prisoners "are like dogs, and if you allow them to believe at any point that they are more than a dog then you've lost control of them."<sup>316</sup> Gen. Miller denies this.

### ***Other Generals in Iraq***

Because all of the published probes have focused on the event at Abu Ghraib, the public record is more developed than for the other theatres of abuse. Other generals identified in the Pentagon reports who may bear liability for the crimes committed at Abu Ghraib are:

**Major General Barbara Fast:** Described in the Jones report as the "senior intelligence officer" on Gen. Sanchez's staff (the "C2" of CJTF-7), Gen. Fast was responsible for "[p]riorities for intelligence collection, analysis and fusion."<sup>317</sup> The Jones report states that Fast was responsible for designing the new intelligence-gathering "architecture" put in place at Abu Ghraib in late 2003 and was centrally involved in defining intelligence gathering needs at Abu Ghraib.<sup>318</sup> The Fay report states that directions as to interrogation needs from Col. Pappas, who played a central

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<sup>313</sup> Jeffrey R. Smith, "General Is Said to Have Urged Use of Dogs," *The Washington Post*, May 26, 2004.

<sup>314</sup> *Ibid.* ("Miller never had a conversation with Colonel Pappas regarding the use of military dogs for interrogation purposes in Iraq. Further, military dogs were never used in interrogations at Guantánamo," said Brig. Gen. Mark Kimmitt, spokesman for U.S. forces in Iraq.)

<sup>315</sup> Fay report, p. 83.

<sup>316</sup> "Iraq Abuse 'Ordered from the Top,'" *BBC*, June 15, 2004 [online], <http://news.bbc.co.uk/1/hi/world/americas/3806713.stm>.

<sup>317</sup> Jones report, p. 14.

<sup>318</sup> *Ibid.*, pp. 11, 13.

role in the abuse (as discussed in more detail below) were “coming from LTG Sanchez directly as well as from MG Fast, the C2.”<sup>319</sup>

**Major General Walter Wojdakowski:** deputy commanding general of Combined Joint Task Force Seven (CJTF-7), (i.e. Sanchez’s Deputy). According to the Schlesinger report, Gen. Sanchez “delegated responsibility for detention operations to his Deputy, MG Wojdakowski.”<sup>320</sup> Pappas told Taguba that interrogation plans involving the use of dogs, shackling, “making detainees strip down,” or similar aggressive measures followed Sanchez’s policy, but were often approved by Gen. Wojdakowski.<sup>321</sup> Gen. Wojdakowski was also reportedly aware from meetings with the ICRC in November 2003 of allegations of crimes at Abu Gharib and failed to take action.<sup>322</sup> The Schlesinger report found, among other criticisms, that “Wojdakowski failed to ensure proper staff oversight of detention and interrogation operations.”<sup>323</sup>

**Brigadier General Janis Karpinski:** commander of the 800<sup>th</sup> Military Police Brigade with authority over the U.S. prison facilities in Iraq. Gen. Taguba noted that “following the abuse of several detainees at Camp Bucca in May 2003, I could find no evidence that BG Karpinski ever directed corrective training for her soldiers or ensured that MP Soldiers throughout Iraq clearly understood the requirements of the Geneva Conventions relating to the treatment of detainees.”<sup>324</sup> The Fay report noted that throughout 2003, Gen. Karpinski received ICRC reports regarding abuses at Abu Ghraib.<sup>325</sup> Nevertheless, as noted by the Schlesinger panel, Gen. Karpinski “failed to ensure that soldiers had appropriate SOPs [standard operating procedures] for dealing with detainees.”<sup>326</sup> Taguba wrote that “LTG Sanchez also cited the recent detainee abuse at Abu Ghraib (BCCF) as the most recent example of a poor leadership climate that ‘permeates the Brigade.’ I totally concur with LTG Sanchez’ opinion regarding the performance of BG Karpinski and the 800th MP Brigade.” The Schlesinger report agreed and found:

that the weak and ineffectual leadership of the Commanding General of the 800th MP Brigade [Karpinski] and the Commanding Officer of the 205th MI Brigade [Pappas] allowed the abuses at Abu Ghraib. There were serious lapses of leadership in both units from junior non-commissioned officers to battalion and

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<sup>319</sup> Fay report, p. 109.

<sup>320</sup> Schlesinger report, p. 45.

<sup>321</sup> Jeffrey R. Smith, “General Is Said to Have Urged Use of Dogs,” *The Washington Post*, May 26, 2004.

<sup>322</sup> Douglas Jehl, “U.S. Rules on Prisoners Seen as a Back and Forth of Mixed Messages to G.I.’s,” *The New York Times*, June 24, 2004. (“[S]everal senior Army officers knew by last November that the Red Cross had complained about problems at the prison, including forced nudity and physical and verbal abuse of prisoners. Among those aware of the concerns were General Sanchez’s top deputy, Maj. Gen. Walter Wojdakowski.”)

<sup>323</sup> Schlesinger report, p. 25.

<sup>324</sup> Taguba report, p. 24.

<sup>325</sup> Fay report, pp. 65-67.

<sup>326</sup> Schlesinger report, p. 67.

brigade levels. *The commanders of both brigades either knew, or should have known, abuses were taking place and taken measures to prevent them...* The independent panel finds that BG Karpinski's leadership failure helped set the conditions at the prison which led to the abuses, including her failure to establish appropriate standard operating procedures (SOPs) and to ensure the relevant Geneva Conventions protections were afforded prisoners, as well as her failure to take appropriate actions regarding ineffective commanders and staff officers.<sup>327</sup>

## **Abu Ghraib-based Officers**

Gen. Taguba wrote:

I suspect that COL **Thomas M. Pappas**, LTC. **Steve L. Jordan**, Mr. **Steven Stephanowicz**, and Mr. **John Israel** were either directly or indirectly responsible for the abuses at Abu Ghraib (BCCF) and strongly recommend immediate disciplinary action as described in the preceding paragraphs as well as the initiation of a Procedure 15 Inquiry to determine the full extent of their culpability.<sup>328</sup>

The Fay report found that Col. **Pappas**, Col. **Jordan**, Maj. **David Price**, Maj. **Michael Thompson**, and Capt. **Carolyn Wood**, among others, bore individual responsibility for detainee abuse at Abu Ghraib and that their cases should be forwarded to their chains of command for appropriate action.

The Jones report states that Sanchez used Colonel **Marc Warren**, the staff judge advocate for CJTF-7 and Gen. Sanchez's senior legal advisor, "to advise him on the limits of authority for interrogation and compliance with the Geneva Conventions for the memos published."<sup>329</sup> Colonel **Stephen Boltz**, the second-ranking military intelligence officer in Iraq under General Barbara Fast, was centrally involved in administering intelligence gathering efforts in Iraq, including at Abu Ghraib. The journalist Mark Danner obtained an e-mail sent by an intelligence captain at Abu Ghraib in August 2003 that reads: "The gloves are coming off gentlemen regarding these detainees, Col. Boltz has made it clear that we want these individuals broken."<sup>330</sup>

Some of the individuals named above are looked at here in more detail:

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<sup>327</sup> Ibid., p. 43, emphasis added.

<sup>328</sup> Taguba report, p. 42.

<sup>329</sup> Jones report, p. 14.

<sup>330</sup> Mark Danner, *Torture and Truth; America, Abu Ghraib and the War on Terrorism* (New York: The New York Review of Books, 2004), p. 33.



**Colonel Thomas Pappas:** commander of the 205<sup>th</sup> Military Intelligence Brigade with “tactical control” of Abu Ghraib from November 19, 2003 to February 6, 2004. Col. Pappas visited Abu Ghraib regularly, even occasionally staying overnight. As of November 16, 2003, he took up residence at Abu Ghraib.<sup>331</sup> Col. Pappas saw the ICRC report on abuse at Abu Ghraib, and twice refused to allow the ICRC teams access to specified detainees, including one detainee who was “abused by the use of dogs.”<sup>332</sup> According to the testimony of Capt. Donald J. Reese, commander of the 372<sup>nd</sup> Military Police Company, on November 4, 2003, he witnessed a group of intelligence personnel standing around the body of a bloody detainee discussing what to do. Reese said that Pappas, one of those present, said “I’m not going down for this alone.” Reese said no medics were called, the detainee’s identification was never logged, and the death was covered up.<sup>333</sup> Fay reported that after a female soldier stripped a male detainee as punishment for uncooperative behavior and forced the detainee to walk semi-naked across the camp, Pappas left the issue for Jordan to handle, and his failure to take sterner action sent the wrong message to the troops.<sup>334</sup> The Fay report found that Col. Pappas, *inter alia*:

Improperly authorized the use of dogs during interrogations. Failed to properly supervise the use of dogs to make sure they were muzzled after he improperly permitted their use. Failed to take appropriate action regarding the ICRC reports of abuse. Failed to take aggressive action against Soldiers who violated the ICRP, the CJTF-7 interrogation and Counter-Resistance Policy and the Geneva Conventions.

Taguba, Jones, and Schlesinger were similarly critical of Pappas.<sup>335</sup>

**Lieutenant Colonel Stephen L. Jordan:** director of the Joint Intelligence and Debriefing Center (JIDC) in Iraq, which included all of the interrogators at Abu Ghraib. According to Capt. Donald J. Reese, commander of the 372<sup>nd</sup> Military Police Company, “Jordan was very involved in the interrogation process and the day to day activity that occurred.”<sup>336</sup> Reese also implicated Col. Jordan in the covering up of the death of a detainee (see above).<sup>337</sup> Col. Jordan also

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<sup>331</sup> Fay report, p. 55.

<sup>332</sup> *Ibid.*, pp. 66-67.

<sup>333</sup> See Fay report, p. 53; Jackie Spinner, “MP Captain Tells of Efforts to Hide Details of Detainee’s Death,” *The Washington Post*, June 25, 2004.

<sup>334</sup> Fay report, p. 91.

<sup>335</sup> Taguba report, p. 45. See also Jones report pp. 5, 17 and Schlesinger report, p. 15.

<sup>336</sup> Captain Donald J. Reese’s sworn statement and interview on January 18, 2004. (Appendix to Taguba report, [online], <http://usnews.com/usnews/news/articles/040709/Pappas.pdf>.)

<sup>337</sup> See Fay report, p. 53; Jackie Spinner, “MP Captain Tells of Efforts to Hide Details of Detainee’s Death,” *The Washington Post*, June 25, 2004.

supervised “the first documented incident of abuse with dogs” which became a “chaotic” situation.<sup>338</sup> Fay concluded that:

Jordan is responsible for allowing the chaotic situation, the unauthorized nakedness and resultant humiliation, and the military dog abuses that occurred that night. . . . The tone and the environment that occurred that night, with the tacit approval of Ltc. Jordan, can be pointed as the causative factor that set the stage for the abuses that followed for days afterward related.<sup>339</sup>

Col. Jordan reportedly told Col. Phillabaum that “it was common practice for some of the detainees to be kept naked in their cells.”<sup>340</sup> According to Gen. Fay, Col. Jordan’s failure to adequately punish soldiers who walked a semi-nude detainee across the camp “did not send a strong enough message to the rest of the JIDC that abuse would not be tolerated.”<sup>341</sup> Col. Jordan also reversed earlier policy to allow the CIA to conduct interrogations without the presence of Army personnel which “eroded the necessity in the minds of Soldiers and civilians for them to follow Army rules.”<sup>342</sup> General Fay also concluded that Col. Jordan: “Failed to prevent the unauthorized use of dogs and the humiliation of detainees who were kept naked for no acceptable purpose while he was the senior officer in charge; Failed to accurately and timely relay critical information to his superior officer about the International Committee of the Red Cross report.”<sup>343</sup> The Schlesinger report found that leadership problems by Col. Jordan allowed the abuses to occur at Abu Ghraib.<sup>344</sup>

To Human Rights Watch’s knowledge, however, no criminal investigations are underway regarding any of the officers or contactors listed above.

## **V. Non-Governmental Attempts at Accountability**

Because the United States has failed to date to allow for an independent criminal investigation into the role and responsibility of high-ranking civilian and military officials for widespread crimes against detainees, victims and human rights activists have sought alternative routes to justice.

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<sup>338</sup> Fay report, pp. 56, 84.

<sup>339</sup> *Ibid.*, p. 56.

<sup>340</sup> *Ibid.*, p. 65.

<sup>341</sup> *Ibid.*, p. 91.

<sup>342</sup> *Ibid.*, pp. 44-45.

<sup>343</sup> *Ibid.*, p. 121.

<sup>344</sup> Schlesinger report, p. 15.

### *The attempted prosecution of Secretary Rumsfeld and others in Germany*

Four Iraqis allegedly abused at Abu Ghraib filed a criminal complaint in November 2004 with the German Federal Prosecutor's Office in Karlsruhe, Germany, under the doctrine of "universal jurisdiction."<sup>345</sup> Officials named as defendants include Secretary Rumsfeld, current Attorney General and former White House Counsel Alberto Gonzales, Director Tenet, Undersecretary of Defense Stephen Cambone, Gen. Miller, Gen. Sanchez, Gen. Wojdakowski, Gen. Karpinski, Lt. Col. Jerry L. Phyllabaum, Col. Pappas, and Lt. Col. Stephen L. Jordan.<sup>346</sup>

The complainants were assisted by the Center for Constitutional Rights (CCR) which argued that Germany was "a court of last resort," as it was "clear that the U.S. government is not willing to open an investigation into these allegations against these officials."

The case apparently became hostage to political events, however, when the German prosecutor dismissed the complaint on the eve of a visit to Germany by Secretary Rumsfeld. When questioned about the case at a Pentagon press conference on February 3, 2005, Secretary Rumsfeld hinted that that he might refuse to attend the annual Munich Conference on Security Policy because of the lawsuit, stating, "[W]hether I end up there, we'll soon know. It will be a week, and we'll find out."<sup>347</sup>

On February 10, 2005, a few days before the Munich conference, German prosecutor Kay Nehm dismissed the complaint on the ground that the United States, which has primary jurisdiction for prosecuting the alleged crimes, would investigate the matter. Nehm maintained that "there are no indications that the authorities and courts of the United States of America are refraining, or would refrain, from penal measures as regards the violations described in the complaint. Thus several proceedings have already been conducted against participants, even against members of the 800<sup>th</sup> Military Police Brigade." The next day, Secretary Rumsfeld announced that he would attend the Munich conference.

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<sup>345</sup> See e.g., Human Rights Watch, "The Pinochet Precedent: How Victims Can Pursue Human Rights Criminals Abroad," last modified March 2000 [online], <http://www.hrw.org/campaigns/chile-98/brochfln.htm>. (The doctrine of "universal jurisdiction" holds that every state has an interest in bringing to justice the perpetrators of particular crimes of international concern, no matter where the crime was committed, and regardless of the nationality of the perpetrators or their victims.)

<sup>346</sup> See all the relevant documents at "Center for Constitutional Rights Seeks Criminal Investigation in Germany into Culpability of U.S. Officials in Abu Ghraib Torture," [online], [http://www.ccr-ny.org/v2/legal/september\\_11th/sept11Article.asp?ObjID=1xiADJOOQx&Content=472](http://www.ccr-ny.org/v2/legal/september_11th/sept11Article.asp?ObjID=1xiADJOOQx&Content=472). The German Code of Crimes against International Law in Article 1, Part 1, Section 1 states: "This Act shall apply to all criminal offenses against international law designated under this Act, to serious criminal offences designated therein even when the offence was committed abroad and bears no relation to Germany." In addition, three of the defendants are present in Germany: Lt. General Sanchez and Major General Wojdakowski are stationed in Heidelberg, and Colonel Pappas is in Wiesbaden.

<sup>347</sup> DoD News Briefing, February 3, 2005 [online], <http://www.defenselink.mil/transcripts/2005/tr20050203-secdef2082.html>. The exchange continued as follows: "Reporter: Are you concerned at all about the universal jurisdiction that Germany has, and the fact that ... Rumsfeld: It's certainly an issue, as it was in Belgium [where suits against U.S. officials led Secretary Rumsfeld to threaten to move NATO headquarters]. It's something that we have to take into consideration."

The plaintiffs are currently filing a petition for re-consideration with the prosecutor's office, before they file a formal appeal to a German superior court.

The German prosecutor's decision flies in the face of the evidence, presented in this report, that the United States is not pursuing accountability for those most responsible for the pattern of crimes against detainees in U.S. custody.

### ***Civil suits in the United States against Secretary Rumsfeld and others***

On March 1, 2005, Iraqi and Afghan civilians who were allegedly tortured and abused while in U.S. custody, filed lawsuits in U.S. federal courts against Secretary Rumsfeld, Gen. Sanchez, Gen. Karpinski, and Col. Pappas, assisted by the ACLU and Human Rights First. The lawsuit against Secretary Rumsfeld alleges that he and the others ordered the torture and abuse of detainees in Iraq and Afghanistan and that he failed to stop the torture and cruel, inhuman, and degrading treatment even after credible reports of such treatment began to emerge in the media and in military documents. The victims seek a court order that their treatment was unlawful and violated international law, the U.S. Constitution, and U.S. military law. They also seek monetary compensation for the harms they suffered.<sup>348</sup>

## **VI. The Need for a Special Prosecutor**

This report has set forth the publicly-available evidence against two senior civilian leaders and two top military generals in connection with the widespread abuse of detainees in U.S. detention. Human Rights Watch expresses no opinion about the ultimate guilt or innocence of these men, particularly because so much evidence has been withheld and so many questions remain unanswered, but does believe that a criminal investigation is called for with respect to each of them. There may be other senior officials whose conduct also justifies an investigation.

Because there is no realistic possibility that the U.S. Attorney General or the U.S. military will investigate these senior leaders for the crimes described above, the appointment of a special prosecutor is warranted.

Under the Convention against Torture and the Geneva Conventions, the United States is required to prosecute acts of torture and war crimes.

Article 12 of the torture convention provides that:

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<sup>348</sup> The legal papers are collected at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=17572&c=206>.

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

Similarly, the Geneva Conventions require the United States to investigate allegations of “grave breaches” of the Geneva Conventions,<sup>349</sup> including “willful killing, torture or inhuman treatment” of POWs and civilians qualified as “protected persons,” and to prosecute, or extradite to another state that will prosecute, perpetrators of “grave breaches.”<sup>350</sup>

Under U.S. law, as described above, there are two avenues to prosecution for the alleged crimes described in this report — the civilian and the military justice systems.

Under the civilian justice system, criminal enforcement is committed to the U.S. Department of Justice and, in particular, to the Attorney General — Alberto Gonzales.

Under the military justice system, criminal investigations may be undertaken by command authority, with the Secretary of Defense — Donald Rumsfeld — as the ultimate authority.

Given that the two people who can trigger investigations and prosecutions for the alleged war crimes and acts of torture discussed in this report have been deeply involved in the policies leading to these alleged crimes, if not in the crimes themselves, it is extremely unlikely that any such investigations will be undertaken.

Human Rights Watch, together with the American Bar Association, the American Civil Liberties Union, the Center for Constitutional Rights, Human Rights First, and other groups, has called for the appointment of a special prosecutor to pursue these crimes.

Under the former Independent Counsel Act (28 U.S.C. § 591, expired 1999), it might have been possible to compel the appointment of an independent counsel by a special panel. That act expired in 1999, however.

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<sup>349</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I, 1949), Article 51; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II, 1949), Article 52; Convention Relative to the Treatment of Prisoners of War, (Geneva Convention III, 1949), Article 131; Convention Relative to the Protection of Civilian Persons in Time of War, (Geneva Convention IV, 1949), Article 148.

<sup>350</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I, 1949), Article 50; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II, 1949), Article 51; Convention Relative to the Treatment of Prisoners of War, (Geneva Convention III, 1949), Article 130; Convention Relative to the Protection of Civilian Persons in Time of War, (Geneva Convention IV, 1949), Article 147.

Nevertheless, U.S. Department of Justice regulations call for the appointment of an outside special counsel when a three-prong test is met:

First, a “criminal investigation of a person or matter [must be] warranted.”<sup>351</sup> Second, the “investigation or prosecution of that person or matter by a United States Attorney’s Office or litigating Division of the Department of Justice would present a conflict of interest for the Department.”<sup>352</sup> Third, “under the circumstances it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter.”<sup>353</sup> If the regulation’s three-prong test is met, then the Attorney General is to select a special counsel from outside the government.<sup>354</sup>

In this case, it is easy to see how those three prongs are met. A criminal investigation is warranted, as outlined above. Attorney General Gonzales’ conflict of interest is plain. The public interest in uncovering the truth about these alleged crimes that have shocked the nation’s conscience and damaged the reputation and the interests of the United States is also self-evident.<sup>355</sup>

The Bush administration has already appointed one special prosecutor. When an unidentified government official retaliated against a critic of the Bush administration by revealing his wife to be a CIA agent — a serious crime because it could endanger her — the administration agreed, under pressure, to appoint a special prosecutor who, while not from outside the Department of Justice, has been promised independence from administration direction.<sup>356</sup> Yet the administration has refused to appoint a special prosecutor to determine whether senior officials authorized torture and other forms of coercive interrogation, which are far more serious and systematic offenses.

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<sup>351</sup> 28 C.F.R. 600.1

<sup>352</sup> *Ibid.*

<sup>353</sup> *Ibid.*

<sup>354</sup> *Ibid.*, at 600.3.

<sup>355</sup> See American Civil Liberties Union, “Letter to Senate Urging Alberto Gonzales to Appoint Outside Special Counsel,” January 28, 2005, <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=17374&c=206>.

<sup>356</sup> U.S. Attorney Patrick J. Fitzgerald of Chicago was appointed to lead the investigation. Although Fitzgerald is a career prosecutor, the choice of someone from within the Department of Justice was criticized as outside the regulations. Deputy Attorney General James Comey, in making the announcement, explained that he wanted to “avoid the delay that would come from selecting, clearing and staffing an outside special counsel operation” and promised that Fitzgerald would have the authority to make all prosecutorial decisions — including issuing subpoenas, granting immunity to witnesses, or bringing charges — without first getting approval from the Justice Department. (Deputy Attorney General James Comey and Assistant Attorney General Christopher Ray, “Department of Justice Press Conference, Washington, D.C., Appointment Of Special Prosecutor to Oversee Investigation into Alleged Leak of CIA Agent Identity and Recusal of Attorney General Ashcroft from the Investigation,” December 30, 2003 [online], <http://news.findlaw.com/hdocs/docs/doj/comey123003doj-pconf.html>.)

As a result, no criminal inquiry that the administration itself does not control is being conducted into the U.S. government's abusive interrogation methods. The flurry of self-investigations cannot obscure the lack of any genuinely independent one.

Under the Department of Justice regulations,

[a]n individual named as Special Counsel shall be a lawyer with a reputation for integrity and impartial decision making, and with appropriate experience to ensure both that the investigation will be conducted ably, expeditiously and thoroughly, and that investigative and prosecutorial decisions will be supported by an informed understanding of the criminal law and Department of Justice policies. The Special Counsel shall be selected from outside the United States Government. Special Counsels shall agree that their responsibilities as Special Counsel shall take first precedence in their professional lives, and that it may be necessary to devote their full time to the investigation, depending on its complexity and the stage of the investigation.

The special counsel has “full power and independent authority to exercise all investigative and prosecutorial functions of any United States Attorney.”

Such a prosecutor, however, would not have authority to investigate or prosecute officers within the military, such as General Sanchez and General Miller, for their violations of the UCMJ,<sup>357</sup> although as noted above, a prosecutor would be able to investigate those officers' violations of federal law. A prosecutor outside the military would also be unable to investigate and subpoena lower-level officers and soldiers for UCMJ violations (such as “dereliction of duty”) and thus obtain their cooperation in the prosecution of more senior officers — a standard prosecutorial tool. Without such powers, it would be difficult for a prosecutor to compel such persons to cooperate with investigations.

A solution to this problem would be for the secretary of defense to appoint a consolidated convening authority within the military to cooperate with a civilian prosecutor and serve to prosecute UCMJ violations in connection with the prosecutor's investigations.

The appointment of a special prosecutor could answer the many questions which remain about the officials listed in this report, as well as about detainee policy generally.

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<sup>357</sup> Only military investigators can investigate UCMJ violations, and only an officer in the military chain of command can act as a convening authority to appoint a court martial to try UCMJ violations.

With respect to Secretary Rumsfeld, the probe could examine whether any of the illegal coercive interrogation methods approved by Secretary Rumsfeld for use on detainees at Guantánamo between December 2, 2002 and January 15, 2003 were actually used on Guantánamo detainees during that period. It could determine whether Secretary Rumsfeld was actually aware that troops were committing torture and war crimes in Afghanistan, Iraq, and Guantánamo. It could determine, once and for all, what orders, if any, did Secretary Rumsfeld give to Gen. Miller before his mission to Iraq. It could examine the allegations by Seymour Hersh that Secretary Rumsfeld authorized a “secret access program” to treat prisoners roughly and expose them to sexual humiliation.

With respect to the CIA and Director Tenet, an independent investigation could examine whether the CIA, as reported, subjected Khalid Shaikh Mohammed to waterboarding or withheld painkillers from Abu Zubaydah, or subjected them or other detainees to other forms of torture, and whether that treatment was approved by Director Tenet or other senior officials. It could also examine the policy of “extraordinary renditions” and determine Director Tenet’s role, if any, in the rendition of suspects to countries such as Syria and Egypt where they were tortured.

With respect to Gen. Sanchez, the inquiry should establish if and when he became personally aware of the abuses committed under his command and whether, as alleged, he personally witnessed detainee abuse yet did not act to end the abuse.

With respect to Guantánamo and Gen. Miller, a probe should investigate the treatment of prisoners at the base, and whether Gen. Miller was aware of the tactics alleged in this report and whether he approved them. An investigation could also establish whether Gen. Miller proposed the use in Iraq of guard dogs during the interrogation of detainees, and whether his recommendations were a proximate cause of the crimes committed at Abu Ghraib.

## **VII. An Independent Commission**

In addition, Congress should create a special commission, along the lines of the National Commission on Terrorist Attacks upon the United States (also known as the 9-11 Commission),<sup>358</sup> to investigate the issue of prisoner abuse, including all the issues described above. Such a commission would hold hearings, have full subpoena power, and be empowered

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<sup>358</sup> The National Commission on Terrorist Attacks Upon the United States (also known as the 9-11 Commission) was an independent, bipartisan commission created by congressional legislation and the signature of President George W. Bush in late 2002, to prepare an account of the circumstances surrounding the September 11, 2001 terrorist attacks, including preparedness for and the immediate response to the attacks. Its report is available at <http://www.9-11commission.gov/>.



to recommend the creation of a special prosecutor to investigate possible criminal offenses, if the Attorney General had not yet named one.

An independent commission could compel evidence that the government has continued to conceal, including directives reportedly signed by President Bush in late 2001 which have not been public and which are said to authorize the CIA to establish secret detention facilities and to transfer detainees to the custody of foreign nations,<sup>359</sup> and the still-secret August 2002 Justice Department guidance to the CIA on permissible interrogation techniques which reportedly authorized the use of waterboarding.<sup>360</sup>

The commission could also examine Secretary Rumsfeld's role in the chain of events leading to the worst period of abuses at Abu Ghraib.

Unless a special counsel or an independent commission are named, and those who designed or authorized the illegal policies are held to account, all the protestations of "disgust" at the Abu Ghraib photos by President George W. Bush and others will be meaningless. If there is no real accountability for these crimes, for years to come, the perpetrators of atrocities around the world will point to the U.S.'s treatment of prisoners to deflect criticism of their own conduct. Indeed, when a government as dominant and influential as the United States openly defies laws against torture, it virtually invites others to do the same. Washington's much-needed credibility as a proponent of human rights, damaged by the torture revelations, will be further damaged if the torture is followed by the substantial impunity that has prevailed until now.

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<sup>359</sup> Douglas Jehl and David Johnston, "Rule Change Lets C.I.A. Freely Send Suspects Abroad to Jails," *The New York Times*, March 6, 2005; John Barry, Michael Hirsh & Michael Isikoff, "The Roots of Torture," *Newsweek*, May 24, 2004 [online], <http://msnbc.msn.com/id/4989422/site/newsweek/>.

<sup>360</sup> See Toni Locy and John Diamond, "Memo Lists Acceptable 'Aggressive' Interrogation Methods: Justice Dept. Gave Guidance to CIA," *USA Today*, June 28, 2004; Dana Priest, "CIA Puts Harsh Tactics on Hold," *The Washington Post*, June 27, 2004.

## Annex — A Note on Command Responsibility

The first and most significant U.S. case involving “command responsibility” was that of General Tomoyuki Yamashita, commander of the Japanese forces in the Philippines in World War II, whose troops committed brutal atrocities against the civilian population and prisoners of war. Gen. Yamashita, who had lost almost all command, control, and communications over his troops, was nevertheless convicted by the International Military Tribunal in Tokyo based on the doctrine of command responsibility. The U.S. Supreme Court affirmed the decision, holding that General Yamashita was, by virtue of his position as commander of the Japanese forces in the Philippines, under an “affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population.”<sup>361</sup> General Yamashita was executed by hanging.

International and U.S. authorities have since set forth three elements to establishing liability for criminal acts pursuant to the doctrine of command responsibility:

1. There must be a superior-subordinate relationship.
2. The superior must have known or had reason to know that the subordinate was about to commit a crime or had committed a crime.
3. The superior failed to take necessary and reasonable measures to prevent the crime or to punish the perpetrator.<sup>362</sup>

U.S. Army *Field Manual 27-10*, Section 501 states:

In some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control. Thus, for instance, when troops commit massacres and atrocities against the civilian population of occupied territory or against prisoners of war, the responsibility may rest not only with the actual perpetrators but also with the commander. Such a responsibility arises directly when the acts

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<sup>361</sup> In *Re Yamashita* 327, U.S. 1, 16 (1946).

<sup>362</sup> In *Re Yamashita*; *The Prosecutor v. Delalic et al. (Celebici Case)*, Case No. IT-96-21-T, ICTY TC, November 16, 1998 [online], <http://www.un.org/icty/celebici/trialc2/jugement/main.htm>. More recently, several decisions under the Torture Victim Protection Act of 1991 (28 U.S.C.S. § 1350) have applied the doctrine of command responsibility. See *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 767, 777-78 (9th Cir. 1996); *Kadic v. Karadzic*, 70 F.3d 232, 239, 242 (2d Cir. 1995); *Paul v. Avril*, 901 F.Supp. 330,335 (S.D.Fla. 1994); *Xuncax v. Gramajo*, 886 F.Supp. 162, 171-172 (D.Mass. 1995). In *Ford v. Garcia*, 289 F.3d 1283 (11th Cir. Fla. 2002), for example, family members of victims of atrocities committed by members of the Salvadorian National Guard, filed a case in a Florida federal court against a general and the former minister of defense. The judge directed that the two generals could be held responsible for the crimes of their subordinates if the defendants were in “effective command” and if they “knew or should have known” that persons under their effective command were committing such crimes.

in question have been committed in pursuance of an order of the commander concerned. 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 to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.

Similarly, the U.S. Department of Defense draft instructions for guidance to military commissions states: "A person is criminally liable for a completed substantive offense if that person commits the offense, aids or abets the commission of the offense, solicits commission of the offense, or is otherwise responsible due to command responsibility," and provides the following elements:

1. The accused had command and control, or effective authority and control, over one or more subordinates;
2. One or more of the accused's subordinates committed, attempted to commit, conspired to commit, solicited to commit, or aided or abetted the commission of one or more substantive offenses triable by military commission;
3. The accused either knew or should have known that the subordinate or subordinates were committing, attempting to commit, conspiring to commit, soliciting, or aiding and abetting such offense or offenses; [and]
4. The accused failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of the offense or offenses.<sup>363</sup>

The rule under customary international law is the same. According to an authoritative study by the ICRC, that rule is:

Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.<sup>364</sup>

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<sup>363</sup> Department of Defense, "Military Commission Instruction No. 2, Crimes and Elements for Trials by Military Commission," April 30, 2003 [online], <http://www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf>.

<sup>364</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, 2005.

## Superior-subordinate relationship

A superior-subordinate relationship is clearest when there are formal rules, for example when legislation or a military chain of command specify the existence of a relationship. However, even in the absence of formal rules, a superior can have actual and effective control.<sup>365</sup> Thus, civilian and political superiors, as well as those in military command, may be held liable under this doctrine.<sup>366</sup> In establishing whether a superior-subordinate relationship exists, case law has found the following questions useful: What are the powers of influence of the alleged superior?<sup>367</sup> What capacity does the superior have to issue orders?<sup>368</sup> Does analysis of the distribution of tasks within any relationship demonstrate a superior-subordinate relationship?<sup>369</sup>

## The superior's knowledge

A superior may be held liable under the command responsibility doctrine where he or she either knew, had reason to know, or should have known that crimes were being committed by his/her subordinates.<sup>370</sup>

According to A. P. V. Rogers, one of the foremost authorities on the laws of war, there are three ways of proving knowledge:

1. that he actually knew (admission or documentary or witness evidence), or
2. that he must have known (evidence of notoriety), or
3. that he ought to have known (serious nature of offence plus evidence of a dereliction of duty on the part of the commander or of his being put on notice).<sup>371</sup>

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<sup>365</sup> Sadaiche case, cited in 15 Law Reports, at 175. Which held that "superior means superior in capacity and powers to force a certain act. It does not mean superiority only in rank."

<sup>366</sup> The Prosecutor v. Delalic et al. (Celebici Case), Case No. IT-96-21-T, ICTY TC, November 16, 1998. See also Article 28 of Statute of the International Criminal Court:

With respect to superior and subordinate relationships not described in paragraph (a) [military chain of command], a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

- (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
- (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
- (iii) The superior 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.

<sup>367</sup> United States v. von Weizsaecker, 14 Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 (1952).

<sup>368</sup> Celebici judgment.

<sup>369</sup> Prosecutor v. Nikolic, Case No. IT-94-2-R61, ICTY TC, Oct. 20, 1995.

<sup>370</sup> In Re Yamashita 327 U.S. 1. See also Article 86 of Geneva Conventions Protocol I.

Rogers thus notes that “If knowledge cannot be proved by direct evidence, it may be inferred from the surrounding circumstances, for example, the widespread nature, severity or notoriety of offences.” Similarly, if “he is told that a report deals with, say, the massacre of civilians by troops under his command, he is put under a duty to do something about it. He cannot simply turn a blind eye to it. He must give appropriate orders to his staff.”

Rogers concludes that:

Actual knowledge may be difficult to prove, but can be inferred from the surrounding circumstances, especially if war crimes by those under command are so widespread as to be notorious, for example, when soldiers under command carry out sustained and frequent unlawful attacks, . . . Liability may also attach to a commander even if he did not actually know about the acts of subordinates but ought to have known about them and his failure in this respect constituted a dereliction of duty on his part, for example, if he is put on notice but fails to do anything about it.

### **Superior duty to take necessary and reasonable measures to prevent the crime or to punish the perpetrator**

Superiors have both a duty to prevent and a duty to punish the crimes of subordinate persons. These constitute distinct and independent legal obligations.<sup>372</sup>

The duty to prevent renders superiors responsible where they failed to consider elements that point to the likelihood that such crimes would be committed.<sup>373</sup> Superiors successfully discharge their duty to prevent subordinate crimes when they employ every means in their power to do so.<sup>374</sup>

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<sup>371</sup> A.P.V. Rogers, “Command Responsibility under the Law of War,” [online], [http://lciil.law.cam.ac.uk/lectures/lecture\\_papers.php](http://lciil.law.cam.ac.uk/lectures/lecture_papers.php). The UN Commission of Experts in the former Yugoslavia established in 1992, pursuant to Security Council Resolution 780, also recognized three forms of knowledge:

(a) actual knowledge, (b) such serious personal dereliction on the part of the commander as to constitute wilful and wanton disregard of the possible consequences, or (c) an imputation of constructive knowledge, that is, despite pleas to the contrary, the commander, under the facts and circumstances of the particular case, must have known of the offences charged and acquiesced therein.

*Final Report of the Commission of Experts, Established Pursuant to Security Council Resolution 780 (1992)*, UN SCOR, Annex, UN Doc. S/1994/674, para. 58 (May 27, 1994).

<sup>372</sup> Ilias Bantekas, “The Contemporary Law of Superior Responsibility,” 93 A.J.I.L. 573, 591 (1999).

<sup>373</sup> *Final Report of the Kahan Commission* (authorized English translation), 22 ILM 473 (1983).

<sup>374</sup> See *United States v. von Weizsaecker*, 14 Trials of War Criminals before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1952).

“A superior’s ‘duty to punish’ arises after the commission of an offense. It is predicated upon offenses by others which have already occurred, not future offenses. Punishment is, therefore, intended to deter the commission of future offenses.”

## Acknowledgements

This report was written by Reed Brody, special counsel with Human Rights Watch. Research assistance was provided by: John Sifton, Afghanistan researcher; Katherine Kruk, intern; Joshua Franco, Warisha Farasat, and Kamran Serhat Choudhry, students at Columbia Law School; and Katherine Hawkins, student at Harvard Law School. Joe Saunders, deputy program director, edited the report; Wilder Tayler, legal and policy director, and James Ross, senior legal advisor; provided a legal review. Tom Malinowski, Washington advocacy director, added helpful comments. Rania Suidan, associate, prepared the report for publication, together with Katherine Kruk. Andrea Holley, publications director for Human Rights Watch, and Fitzroy Hepkins, mail manager, made possible the production of this report. Human Rights Watch is grateful to the Center for Constitutional Rights and to the Center for Human Rights and Global Justice of NYU School of Law for sharing their legal analyses with us.

Human Rights Watch would also like to thank the Atlantic Philanthropies and Franz Allina, who helped made this work possible.