

he would construe the ban “in a manner consistent with the constitutional authority of the president” and his powers as commander-in-chief, implying that he may authorize acts prohibited by the law.<sup>35</sup>

## **B. Deliberate Circumvention of Human Rights Law in the “Global War on Terrorism” (Articles 1, 2, 16)**

The U.S. government, in the aftermath of the 9/11 attacks, decided to fight terrorism by picking and choosing what principles of humanitarian and human rights law to apply. “There was a before-9/11 and an after-9/11. After 9/11 the gloves came off,” testified Cofer Black, former director of the CIA’s counterterrorist unit, in prepared testimony to Congress in 2002.<sup>36</sup> The declassification of a series of legal memoranda by high-ranking legal officials in the executive branch made it clear that the gloves did come off in the government’s response to terrorism.

The torture and abuse of detainees described below was carried out pursuant to policies and practices devised at the highest levels of the U.S. government.<sup>37</sup> The abuse of detainees in U.S. custody was facilitated by the government’s decision not to apply the Geneva Conventions. The government further ignored the fact that, irrespective of the Geneva Conventions, all detainees are protected by analogous provisions in the Convention Against Torture, the International Covenant of Civil and Political Rights, and by customary international law.

Torture and cruel, inhuman or degrading treatment or punishment are prohibited at all times under human rights law, even in war or when fighting terrorism. Article 2(2) of the Convention Against Torture specifically states that “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as justification of torture.” The International Covenant of Civil and Political Rights similarly prohibits a state party to derogate from its obligations not to engage in acts of torture and other cruel, inhuman or degrading treatment or punishment even “in times of public emergency which threatens the life of the nation.”<sup>38</sup> The prohibition of cruel, inhuman or degrading treatment at all times is

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<sup>35</sup> Edward Alden, *Bush statement appears to contradict anti-torture pledge*, FINANCIAL TIMES, Jan. 6, 2006, at 6.

<sup>36</sup> *Pre 9/11 Intelligence Failures: Hearing before the U.S. House and Senate Intelligence Committees*, 107th Congress (2002) (statement of Cofer Black, former Director of the CIA's Counterterrorist Center).

<sup>37</sup> *A Guide to the Memos on Torture*, NY TIMES, [www.nytimes.com/ref/international/24MEMO-GUIDE.html](http://www.nytimes.com/ref/international/24MEMO-GUIDE.html); see also Annex B.

<sup>38</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), Art. 4, 21 UN GAOR, 21st Sess., Supp. No. 16, at 52, UN Doc. A/6316 (1966) (entered into force Jan. 3, 1976) (hereinafter “ICCPR”), available at <http://www.ohchr.org/english/law/pdf/ccpr.pdf>. The U.N. Human Rights Committee has said that the prohibition on torture and cruel, inhuman or degrading treatment is a peremptory norm of international law, non-derogable and binding on all states. U.N. Human Rights Committee, *General Comment 29 (States of Emergency, Article 4) in Compilation of General Comments and General Recommendations Adopted By Human Rights Treaty Bodies*, 13, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001), available at <http://www.hri.ca/fortherecord2001/documentation/tbodies/ccpr-c-21-rev1-add11.htm>; U.N. Human Rights Committee, *General Comment 20 (Article 7)*, available at [http://www.unhchr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/\\$FILE/G0441302.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/$FILE/G0441302.pdf).

applicable to state agents under Article 16(2) of the Convention Against Torture which states that the provisions “are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment”—such as the ICCPR. Yet the United States deliberately chose to bypass these prohibitions.

After September 11, senior administration lawyers, led by then-White House Counsel and current Attorney General Alberto Gonzales, developed the framework for the administration to circumvent international law restraints on detention and interrogation in a series of legal memoranda.

- *January 22, 2002*: A Department of Justice memorandum concluded that “customary international law does not bind the President or the U.S. Armed Forces in their decisions concerning the detention and conditions of al-Qaeda and Taliban prisoners.”<sup>39</sup>
- *January 25, 2002*: Then White House counsel Alberto Gonzales, in a legal memorandum, argued that the Geneva Conventions would restrict interrogation methods used by the U.S. in this “new kind of war.”<sup>40</sup> Non-applicability would preserve U.S. “flexibility” in the war against terrorism, which “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, referring to the federal War Crimes Act, a 1996 law that carries the death penalty, if the Conventions were applied.<sup>41</sup>
- *February 7, 2002*: President George W. 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 because, in the U.S. view, they did not meet the requirements of an armed force. With regard to captured members of al-Qaeda, he stated that the U.S. government considered the Geneva Conventions inapplicable but would nonetheless treat the detainees “humanely . . . and to the extent appropriate and consistent with military necessity.”<sup>42</sup> Nowhere did this memorandum cite parallel

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<sup>39</sup> Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel to Alberto Gonzales, Counsel to the President and William J. Haynes II, General Counsel, Dep’t of Defense, *Re: Application of treaties and laws to al Qaeda and Taliban detainees* at 37 (January 22, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.22.pdf>.

<sup>40</sup> Memorandum from Alberto Gonzales, Counsel to the President to George W. Bush, President, *Re: Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban* at 2 (Jan. 25, 2002), available at <http://www.msnbc.msn.com/id/4999148/site/newsweek/>.

<sup>41</sup> *Id.* 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.” *Id.*

<sup>42</sup> Memorandum from President George W. Bush to the Vice President, et al., *Re: Humane Treatment of al Qaeda and Taliban Detainees* at 2 (Feb. 7, 2002) (hereinafter “President Bush, Feb. 2002 Memorandum”), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf>.

- U.S. treaty obligations under the Convention Against Torture and the ICCPR, which prohibit all forms of torture and cruel, inhuman or degrading treatment or punishment at all times. In 2005, former deputy White House counsel Timothy Flanigan revealed in his testimony to the U.S. Senate that, in the administration's view, "inhumane treatment" is not "susceptible to a succinct definition." In fact, the White House provided no guidance on the meaning of inhumane treatment, he explained.<sup>43</sup>
- *August 1, 2002*: Jay S. Bybee, then assistant attorney general and now a federal judge, argued that torturing al-Qaeda detainees in captivity abroad "may be justified," and that laws against torture may be unconstitutional if they "encroached upon the President's constitutional power to conduct a military campaign" as commander-in-chief.<sup>44</sup> The memorandum argued that the doctrines of "necessity or self-defense may justify interrogation methods that might violate" criminal laws on the part of officials who tortured al-Qaeda detainees.<sup>45</sup> The memorandum 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."<sup>46</sup> The memorandum also suggested that "mental torture" only included acts that resulted in "significant psychological harm of significant duration, e.g., lasting for months or even years."<sup>47</sup>
  - *October 2002*: Guantánamo authorities, in a series of four memoranda, requested approval from U.S. Secretary of Defense Donald Rumsfeld to employ harsher interrogation techniques on prisoners.<sup>48</sup>
  - *November 27, 2002*: William J. Haynes, II, General Counsel, Department of Defense recommended that Secretary Rumsfeld approve sixteen of the requested techniques for use in interrogations at Guantánamo.<sup>49</sup>

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<sup>43</sup> Written responses from Timothy Flanigan to questions submitted by U.S. Senator Richard Durbin following Flanigan's confirmation hearing to become U.S. Deputy Attorney General, at 2 (July 26, 2005), available at [http://balkin.blogspot.com/flanigan\\_durbin.pdf](http://balkin.blogspot.com/flanigan_durbin.pdf).

<sup>44</sup> Bybee, August 2002 Memorandum, *supra* note 2 at 31.

<sup>45</sup> *Id.* at 2. 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." *Id.* at 24

<sup>46</sup> *Id.* at 1.

<sup>47</sup> *Id.*

<sup>48</sup> Memorandum from James T. Hill, General to Chairman of the Joint Chiefs of Staff, *Re: Counter-Resistance Techniques* (Oct. 25, 2002), reprinted in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB, *supra* note 3, at 223-24; Memorandum from Michael E. Dunlavey, Major General to Commander, U.S. Southern Command, *Re: Counter-Resistance Strategies* (Oct. 11, 2002) reprinted in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB, *supra* note 3, at 225; Beaver, Oct. 2002 Memorandum, *supra* note 20, at 226; Memorandum from Jerald Phifer, Lieutenant Colonel to Commander, Joint Task Force 170 *Re: Request for approval of Counter-Resistance Strategies* (Oct. 11, 2002), reprinted in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB, *supra* note 3 at 227-28.

- *December 2, 2002*: Secretary Rumsfeld approved the recommended list, which included such techniques as the use of “stress positions,” 20-hour interrogations, removal of clothing, playing upon a detainee’s phobias to induce stress (such as through the use of dogs), deception to make the detainee believe the interrogator was from a country with a reputation of torture, use of falsified documents and reports, isolation for up to 30 days, and sensory deprivation.<sup>50</sup> These techniques were contrary to the Army Field Manual FM 34-52 and “migrated” to Iraq and Afghanistan where they were regularly applied to detainees.
- *January 15, 2003*: Senior members of the U.S. military, including the General Counsel of the Department of Navy, were critical of the techniques approved by Secretary Rumsfeld on December 2, 2002, leading Secretary Rumsfeld to rescind his blanket authorization. However, in an order to the commander of the U.S. Southern Command, Secretary Rumsfeld stated that he could personally authorize the continued use of these rescinded techniques.<sup>51</sup>
- *January 24, 2003*: The Commander of Task Force-180 (“CJTF-180”) of Afghanistan forwarded to the Pentagon Working Group a list of interrogation techniques used in Afghanistan. One suggested technique was the use of forced nudity. The memorandum “highlighted that deprivation of clothing had not historically been included in battlefield interrogations. However, it went on to recommend clothing removal as an effective technique that could potentially raise objections as being degrading or inhumane, but for which no specific written legal prohibition existed.”<sup>52</sup>
- *February 2003*: The CJTF-180 memorandum was “included in a Special Operations Forces (SOF) Standard Operating Procedures document published in February 2003,” and used in Afghanistan. In Iraq, interrogation guidelines were initially drafted that were “a near copy of the Standard Operating Procedure created by SOF.”<sup>53</sup>
- *April 4, 2003*: The Secretary of Defense commissioned a Report of the Working Group on Detainee Interrogations (“Pentagon Working Group Report”)

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<sup>49</sup> Memorandum from William J. Haynes, General Counsel to Donald Rumsfeld, Sec’y of Defense (Nov. 27, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.12.02.pdf>.

<sup>50</sup> *Id.*

<sup>51</sup> Memorandum from Donald Rumsfeld, Sec’y of Defense to Commander USSOUTHCOM, *Re: Counter-Resistance Techniques* (Jan. 15, 2003), available at [www.washingtonpost.com/wp-srv/nation/documents/011503rumsfeld.pdf](http://www.washingtonpost.com/wp-srv/nation/documents/011503rumsfeld.pdf). His order stated: “Should you determine that particular techniques in either of these categories are warranted in an individual case, you should forward that request to me. Such a request should include a thorough justification for the employment of those techniques and a detailed plan for the use of such techniques.” *Id.*

<sup>52</sup> Major General George R. Fay, *AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205<sup>th</sup> Military Intelligence Brigade*, at 88 (2004) (hereinafter “Fay-Jones Report”), available at <http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf>.

<sup>53</sup> James R. Schlesinger, et al., *Final Report of the Independent Panel to Review DoD Detention Operations* at 8-9 (Aug. 2004) (hereinafter “Schlesinger Report”), <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>.

concerning the interrogation of prisoners. The report asserted the need to interrogate prisoners “in a manner beyond that which may be applied to a prisoner of war who is subject to the Geneva Conventions.”<sup>54</sup> The working group’s report made clear that, in reviewing interrogation techniques, they relied heavily on the logic of the President’s February 7, 2002 memorandum regarding the applicability of the Geneva Conventions to al-Qaeda and Taliban prisoners. Specifically, the report states that U.S. law prohibiting torture “must be construed as inapplicable to interrogations undertaken pursuant to his [the President’s] Commander-in-Chief authority.”<sup>55</sup>

- *April 4, 2003*: The Pentagon Working Group recommended interrogation techniques for Guantánamo detainees.
  - Techniques included hooding, mild physical contact, dietary and environmental manipulation, sleep adjustment, false flag (leading detainees to believe that interrogator is from another country), isolation, threats of transfer to a third country where the detainee knows there is risk of torture or death.<sup>56</sup> All techniques, except hooding, mild physical contact, and threats to third country transfer, were approved by Secretary Rumsfeld.<sup>57</sup>
  - Nine techniques were recommended “for use with unlawful combatants outside the United States.”<sup>58</sup> Those techniques included isolation, use of prolonged interrogations, forced grooming, prolonged standing, sleep deprivation (not to exceed four days in succession), physical training, face or stomach slap, removal of clothing, and increasing anxiety by use of aversion (e.g. presence of dogs).<sup>59</sup> Secretary Rumsfeld approved the use isolation and indicated that additional techniques could be approved on a case-by-case basis.<sup>60</sup>

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<sup>54</sup> Dep’t of Defense, *Working Group Report*, *supra* note 3, at 287.

<sup>55</sup> *Id.* at 303. “In response to intensive questioning before the U.S. Senate Armed Services Committee as to whether the 2002 DOJ memo or subsequently authorized interrogation practices had contributed to individual soldiers committing abuses, [Vice Admiral Church, former Navy Inspector General] responded that ‘clearly there was no policy, written or otherwise, at any level, that directed or condoned torture or abuse; there was no link between the authorized interrogation techniques and the abuses that, in fact, occurred.’” U.S. Report, Annex, Part Two, § III(B)(1).

<sup>56</sup> Dep’t of Defense, *Working Group Report*, *supra* note 3, at 358-359.

<sup>57</sup> Memorandum from Donald Rumsfeld, Sec’y of Defense to Commander, US Southern Command, *Re: Counter-Resistance Techniques in the War on Terrorism*, at 1-4 (Apr. 16, 2003) (hereinafter “Rumsfeld, April 2003 Memorandum”), available at <http://www.washingtonpost.com/wp-srv/nation/documents/041603rumsfeld.pdf>.

<sup>58</sup> Dep’t of Defense, *Working Group Report*, *supra* note 3, at 354, 358-359.

<sup>59</sup> Rumsfeld, April 2003 Memorandum, *supra* note 57, at 1.

<sup>60</sup> Army Field Manual 34-52 lists “abnormal sleep deprivation” as an example of mental torture, and “forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of times” as an example of physical torture. Army Field Manual 34-52, *supra* note 7.

- *August 2003*: In April 2005, the ACLU released government documents obtained through FOIA litigation showing that a Military Intelligence official in Iraq asked interrogators for a “wish list” of interrogation techniques they felt would be effective, adding, “The gloves are coming off gentleman [sic] regarding detainees, [redacted] has made it clear the we want these individuals broken.” Interrogators responding to that request sought approval for the use of “low voltage electrocution,” “phone book strikes,” “muscle fatigue inducement,” “sleep deprivation,” “closed-fist strikes” and other “coercive” techniques that “cause no permanent harm to the subject ... [but] often call for medical personnel to be on call for unforeseen complications.”<sup>61</sup>
- *September 14, 2003*: Lieutenant General Richardo Sanchez, the senior commander in Iraq, authorized a set of interrogation techniques based on techniques authorized by Secretary Rumsfeld in April of 2003, and suggestions by Captain Carolyn Wood, head of the 519<sup>th</sup> Military Intelligence Battalion.<sup>62</sup> The memorandum specifically allows for interrogation techniques involving the use of military dogs, sensory deprivation, stress positions, yelling, loud music, and light control.<sup>63</sup>
- *October 12, 2003*: Lt. Gen. Sanchez issued a revised set of interrogation techniques for use in Iraq. The techniques included authorizing interrogators to “control” the lighting, heating, food, shelter, and clothing of detainee, and requiring a muzzle when using dogs in interrogations.<sup>64</sup>

ACLU review of more than 100,000 pages of unclassified but redacted government documents released through FOIA litigation shows that harsh treatment of detainees was ordered as part of an approved list of interrogation methods to “soften up” detainees in U.S. custody in Afghanistan, Guantánamo, and Iraq.

According to the Schlesinger Commission, which was tasked to examine Department of Defense detention operations, coercive interrogation methods approved by Defense Secretary 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 removal of clothing for long periods—“migrated to Afghanistan

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<sup>61</sup> Annex B1-3, *supra* note 13; see also Josh White, *Soldiers’ ‘Wish Lists’ Of Detainee Tactics Cited*, WASH. POST, Apr. 19, 2005.

<sup>62</sup> Annex B220-225, Memorandum from Lieutenant General Sanchez to Commander, U.S. Central Command, *re: CJTF-7 Interrogation and Counter-Resistance Policy* (Sept. 14, 2003). The officer who drafted interrogation guidelines for use in Iraq was Captain Carolyn A. Wood, officer in charge of the 519<sup>th</sup> Military Intelligence Battalion, Fort Bragg, North Carolina. Prior to its deployment to Iraq in August 2003, Captain Wood’s unit “allegedly conducted the abusive interrogation practices in Bagram resulting in a Criminal Investigation Command (CID) homicide investigation.” Fay-Jones Report, *supra* note 52, at 29.

<sup>63</sup> Fay-Jones Report, *supra* note 52, at 24-25.

<sup>64</sup> Annex B226-230. Memorandum from Lieutenant General Sanchez to Commander, Combined Joint Task Force Seven, *Re: CJTF-7 Interrogation and Counter-Resistance Policy* (Oct. 12, 2003).

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.<sup>65</sup>

### **C. Legal Status of Persons Captured by United States’ Forces in the “Global War on Terrorism”**

According to media reports, the United States has detained more than 83,000 persons since September 11, 2001.<sup>66</sup> As of December 2005, roughly 14,000 detainees remain in U.S. custody in Iraq, almost 500 persons are reportedly detained at Guantánamo, and over 400 are in U.S. custody in Afghanistan.<sup>67</sup> An unknown number of detainees have “disappeared” after entering U.S. custody. The CIA continues to hold al-Qaeda suspects in prolonged incommunicado detention in “secret locations,” outside the United States, without notifying their families, and without providing them with access to the International Committee of the Red Cross or any other independent oversight body of any sort.<sup>68</sup> Since September 11, 2001, the U.S. government has also unlawfully rendered 100 terror suspects to foreign countries for detention and interrogation purposes and to CIA secret detention centers overseas.

#### **1. Executive Rather than Judicial Determinations on Detention**

The United States asserts that all detainees captured in the U.S. government’s “global war on terrorism” are “enemy combatants” and can be held pursuant to the President’s powers as commander-in-chief and under the laws of war until the end of hostilities. The U.S. argues that detaining enemy combatants prevents them from returning to the battlefield, thereby deterring further attacks, and allows the U.S. to gather intelligence through interrogation which also acts to prevent future attacks.<sup>69</sup> The government in effect argues that the need to fight a “global war on terrorism”—with no end in sight—justifies the indefinite detention of persons without charge, without access to counsel and family members, and with no judicial oversight.

The U.S. has denied persons detained during hostilities in Afghanistan the status of prisoners of war (“POW”) under international humanitarian law and has denied other meaningful protections under international human rights law.<sup>70</sup> The U.S. Report states that “there is no doubt under international law as to the status of al-Qaida, the Taliban,

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<sup>65</sup> Schlesinger Report, *supra* note 53, at 14.

<sup>66</sup> Katherine Shrader, *U.S. Has Detained 83,000 in War on Terror*, ASSOCIATED PRESS, Nov. 22, 2005.

<sup>67</sup> *Id.*; Eric Schmidt and Thom Shanker, *U.S., Citing Abuse in Iraqi Prisons, Holds Detainees*, NY TIMES, Dec. 25, 2005; Associated Press, *U.S. Frees 81 Afghan Prisoners; Kabul Officials Push for Release of 400 More*, AKRON BEACON JOURNAL, Jan. 17, 2005, at A3.

<sup>68</sup> In December 2005, Human Rights Watch reported that twenty-six al-Qaeda suspects have disappeared and are likely in CIA custody. Human Rights Watch, *List of “Ghost Prisoners” Possibly in CIA Custody*, (Dec. 1, 2005), available at [http://hrw.org/english/docs/2005/11/30/usdom12109\\_txt.htm](http://hrw.org/english/docs/2005/11/30/usdom12109_txt.htm); see also Human Rights First, *Behind the Wire: An Update to Ending Secret Detentions* (Mar. 2005), available at <http://www.state.gov/g/drl/rls/55712.htm> (noting evidence supporting assertion that secret U.S.-run prisons exist in Diego Garcia, Jordan, and U.S. military ships, particularly USS Bataan and USS Peleliu).

<sup>69</sup> U.S. Report, Annex, Part One, § II(A).

<sup>70</sup> ICCPR, *supra* note 38, Arts. 9, 14 (requires that lawfulness of detention must be reviewed by court and providing the right to fair trial).