# A CRITICAL ANALYSIS OF THE UNITED STATES' TREATMENT OF DETAINEES AT GUANTANAMO BAY NAVAL BASE IN THE CONTEXT OF INTERNATIONAL LAW

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**A THESIS SUBMITTED IN THE PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTERS OF ARTS (HUMAN RIGHTS) FACULTY OF GRADUATE STUDIES MAHIDOL UNIVERSITY 2005**

**ISBN 974-04-6445-9**

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Thesis
Entitled

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# ACKNOWLEDGEMENTS

The thesis is a result of many years of interest for and academic studies of human rights. It is not possible here to thank all the people who over the years have helped me to understand the issues of human rights and torture. For the thesis, however, I would like to thank the following people who have been very helpful.

My deepest and warmest thanks to Mr. Iljas Baker, who was the major advisor. During the whole thesis writing process he showed big confidence in my academic skills – at times bigger confidence than I had myself. Mr. Baker had an excellent sense of when to push me to work harder and when to cheer me up. It has been a huge privilege to be his advisee.

Special thanks to Dr. Mike Hayes, who stayed on the thesis as co-advisor despite his busy schedule. Mike has always – during the course work as well as thesis work - taken time to talk with students whenever we needed to clarify questions either regarding academic issues as well as administratively.

Special thanks to Mr. Richard Hiam for being co-advisor and for reminding me not to work too hard - despite that he as an advisor was supposed to always to tell me to work harder.

Special thanks to Mr. Somchai Homlaor, for accepting to be external examiner on the thesis.

I am grateful to Dr. Sriprapha Petcharamesree for accepting me on this Human Rights Masters program. Dr. Sriprapha admirably combines academic work and practical knowledge in her struggle to improve human rights and it is my hope to be able to adopt this ability.

Many thanks to the Rehabilitation and Research Centre for Torture Victims (RCT) in Copenhagen for granting me a "student place" in the research department in the Summer 2004. I am particularly indebted to the Documentary Centre at RCT for being extremely helpful with providing me with material.

Many thanks to Mr. Peter Vedel Kessing at the Danish Institute for Human Rights who gave feed back on some of the legal parts of the thesis in its early stages.

Many thanks to my dear friend, Suree, for technical assistance.

I am particularly grateful to my siblings, Mirjam, Stefan and Rachel for staying close despite the long geographical distance between us. Also thanks to my niece, Rebekka, and my nephew, Jonas. Being respectively 6 and 2 years old none of them have been very helpful regarding the thesis, but they are giving me many wonderful and memorable moments – as well as distractions.

My father, Ole, always supported me in whatever decision I have made in my life, which I have appreciated a lot. His work in various developing countries has been a big inspiration for me to choose working with human rights issues.

Words can never describe how grateful I am to my husband, Bent, for always being very caring and for filling my life with joy and happiness. During the thesis writing he had to endure my ups and downs with the thesis; he listened patiently when I for hours talked about interesting findings and cheered me up when I felt that I was lost.

Responsibility for any errors or mistakes is mine alone.

Maria Godskesen

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## ABSTRACT

Released detainees, the media and non-governmental organisations have claimed that the detainees at United States' Naval Base at Guantanamo Bay have been subjected to torture and inhumane treatment. In the thesis the treatment of the detainees has been analysed in the context of international humanitarian law and international human rights law. The reported treatment of the detainees at Guantanamo Bay Naval Base has been compared with similar treatment that has in other cases been defined as torture or inhumane treatment by the United Nations' Human Rights Committee, and the analysis of this comparison shows that the treatment of the detainees is violating the prohibition of torture and inhumane treatment in Geneva Convention III and in article 7 and article 10(1) International Covenant on Civil and Political Rights (ICCPR).

This thesis furthermore investigates how these violations have taken place without intervention from the international legal system. In this regard it is important to realize that when the United States acceded to ICCPR and Convention against Torture it made reservations to the definitions of torture and inhumane treatment. The Bush Administration has interpreted "torture" and "inhumane treatment" very narrowly, allowing treatment that otherwise would be considered as a violation of torture and inhumane treatment in international law. Because of weaknesses in international law it is not clear whether the United States' reservations are permissible, thereby making it impossible to say in legal terms whether the United States is violating the prohibition of torture and inhumane treatment as it is stated in international humanitarian and human rights law, despite the fact that treatment similar to the described treatment of the prisoners at Guantanamo Bay Naval Base has previously been judged as a violation.

KEY WORDS: GUANTANAMO/ TORTURE/ GENEVA CONVENTION III/ ICCPR/ CONVENTION AGAINST TORTURE

145 p. ISBN 974-04-6445-9

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# LIST OF ABBREVIATIONS

| | |
|---|---|
| CAT | Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment |
| FBI | Federal Bureau of Investigation |
| Geneva Convention III | Geneva Convention relative to the Treatment of Prisoners of War |
| Geneva Convention IV | Geneva Convention relative to the Protection of Civilian Persons in Time of War |
| ICCPR | International Covenant on Civil and Political Rights |
| ICRC | International Committee of the Red Cross |
| POW | Prisoner of War |
| US DoD | United States' Department of Defense |
| US DoJ | United States' Department of Justice |
| US SD | United States' State Department |

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This thesis is dedicated to my mother, Hanne Godskesen, who passed away 6th September 2001.

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# CHAPTER 1
# INTRODUCTION

In Europe, from the early 13th century to 16th century, torture was a part of the judicial system. At that time the penal system only distinguished between guilty or not guilty with severe punishment like torture for those who were found guilty. However, the punishment was inflicted with strict rules. According to Robert Thurston torture was never to be applied as the first step in a case (Thurston, 2000:33). In order to ensure that only persons who were very likely to be guilty of a crime would be interrogated under torture, torture was permitted only when a "half-proof" had been established. "Half-proof" meant either one eyewitness or circumstantial evidence. Thurston states that judges were supposed to weigh such factors carefully before deciding to proceed with torture. The evidence against a suspect had to be considerable before a judge could authorize physical torment (Langbein, 2004:96). Moreover, torture was not supposed to be used to "wring out an abject, unsubstantiated confession" (Thurston, 2000:33), but to get factual details of the crime. The interrogator was not allowed to ask "suggestive" questions, for example giving the accused information the interrogator wanted the accused person to admit, and information obtained from the accused person during torture had to be verified, for example if an accused person had admitted to killing somebody he or she had to tell where the murder weapon was, and the murder weapon had to be found. The statements obtained under torture could only be used against the accused person if he or she voluntarily repeated it one or two days later not under torture. However, these safeguards did not always protect the innocent person. For example if an interrogator asked a "suggestive" question, the mistake – if it was a mistake – would be hard to detect and correct. An accused person, who after being tortured denied the information given under torture, often risked being tortured again.

When the penal system changed and allowed for different degrees of punishment, convicted persons could be punished according to the degree of crime and

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thus torture was abolished. In England, under the common law, circumstantial evidence could be used to establish guilt in the absence of a confession or eyewitnesses, and those suspected of serious crimes were tried by a jury drawn from their locality. As a result, as there was no need for it, torture was prohibited by the common law. However, in the 16th Century torture was used in England with official approval as a means of extracting information from those who were accused of treason or other crimes against the State. But torture was also used in cases of counterfeiting, embezzlement, robbery, and murder (Hope, 2004: 810-812).

According to John Langbein torture was abolished within two generations (Langbein, 2004:97). The Enlightenment has often been given as a reason for why torture was abolished in Europe. However, both Thurston and Langbein disagree with this. Langbein argues that the moral outrage awakened by the Enlightenment writers was not advancing any arguments against torture that had not been known for centuries and is not so decisive as believed. Langbein argues it was a change in the method of punishing people that changed the European law of proof and was a decisive factor for the abolition of torture. The medieval law of proof had been formed at a time when serious crime was punished by death or maiming. When the new modes of punishment were introduced in the 16th and 17th centuries, the courts deemed themselves able to impose the new and less severe punishments according to a less strict standard of proof, one of persuasion rather than certainty (Langbein, 2004:98).

Michel Foucault characterises the change as the introduction of “a new theory of law and crime, a new moral or political justification of the right to punish; old laws were abolished, old customs died out (Foucault, 1977:7). Foucault argues that two processes, that did not have the same chronology or *raison d’etre*, abolished torture. The first one was the disappearance of punishment as a spectacle. As the ceremonial display of punishment disappeared, punishment became a hidden part of the new judicial process. The purpose of punishment changed from punishing a person to correct and cure a person. The second was that the body was not touched any longer and physical pain was not longer the central element of punishment. Punishment was carried out by confinement and forced labour. As a result it was no longer the executer who carried out the punishment, but prison guards, doctors, chaplains, psychiatrists, psychologists, educationalists.

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Despite Victor Hugo's famous statement that torture soon would be history, and despite the absolute prohibition of torture and inhumane treatment in national, regional and international law, torture and inhumane treatment is still used today[1]. However, today torture is not a part of the legal procedure and it is not the main tool of punishment and when torture and inhumane treatment take place it is done covertly and usually there are no official records of it. Like in the Medieval Europe it is used to get information and when a democratic judicial system does not exist or does not function.

Attacks on the World Trade Center in New York and the Pentagon in Washington D.C. on September 11 2001 were hugely embarrassing for the Bush Administration. On 14 September 2001 the United States' Congress adopted a joint resolution that gave President George W. Bush authority to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on 11 September 2001, or harboured such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons" ('Authorizing', 2001). Subsequently President George W. Bush declared a "war on terrorism". In his speeches President George W. Bush told the Americans (and the rest of the World) that the enemy in the "war on terrorism" was a new kind of threat. They were terrorists that "practiced a fringe form of Islamic extremism and who were directed to "kill all Americans", who "hate our freedoms – our freedom of religion, our freedom of speech, our freedom to vote and assemble and disagree with each other" (The White House, 2001a), the "new enemy seeks to destroy our freedom and impose its views" (The White House, 2001g) and they were "seeking chemical, biological and nuclear weapons. Given the means, our enemies [are] a threat to every nation and eventually, to civilization itself" (The White House, 2001e). The war involved increased intelligence gathering, military action in Afghanistan and detainment of numerous persons suspected of terrorism. From January 2003 many of the detainees from Afghanistan were brought to the United States' Naval Base at

[1] From 1997 – 2000 Amnesty International had received complaints about torture and inhumane treatment from 150 countries (Amnesty International 2002a:2).

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Guantanamo Bay in Cuba. The persons detained there were declared to be "unlawful combatants". The "unlawful combatants" were denied to have the reasons for their detainment tried at a United States' Federal Court and could thus be detained as long as the "war on terrorism" was going on or until the military decided on a case by case basis that a person was no longer a threat for the United States. The media, academics and non-governmental organisations and released detainees have alleged that the treatment of the detainees has amounted to torture or inhumane treatment. The Bush Administration has denied that there has been a policy of torture or inhumane treatment and claimed that the treatment of detainees has not violated international law[2].

In June 2004 the United States' Department of Defense declassified several documents in which the policy pertaining to the detainees at Guantanamo had been discussed. Among those documents was one memorandum approving interrogation techniques that are harsher than any interrogation techniques that previously had been used by the United States' armed forces. The Bush Administration maintained that the policy pertaining to the treatment of the detainees at the United States' Naval Base at Guantanamo Bay was not violating any laws and in June 2004 President George W. Bush stated:

> Let me make very clear the position of my government and our country. We do not condone torture. I have never ordered torture. I will never order torture. The values of this country are such that torture is not a part of our soul and our being (The White House, 2004b).

I will show in the thesis that when President Bush and other members of the Bush Administration talked about torture with reference to the detainees at Guantanamo Bay Naval Base they meant "torture" as they defined it and this definition is at odds with the definition of torture accepted by other State parties to International Covenant on Civil and Political Rights and Convention against Torture and Other Cruel, Inhuman

[2] A Pentagon spokesman stated 30 December 2004 that the treatment of detainees at Guantanamo is not improper (White & Mintz 2004). General Hood, the commander of the detention and interrogation facilities at Guantanamo, said in an interview with reporters in November 2004 "I'm satisfied that the detainees here have not been abused, they've not been mistreated, they've not been tortured in any way" (Lewis 2004b).

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or Degrading Punishment or Treatment and even at odds with how the United States' State Department defines torture when referring to practices of other countries. In this thesis it will be argued that the policy pertaining the treatment of the detainees at United States' Naval Base at Guantanamo Bay is a violation of the prohibition of torture and inhumane treatment in international law as it is stated in the Geneva Conventions and United Nations' human rights treaties.

### 1.1 Statement of Research Problem and Purposes

So far, arguments from the media and Non Governmental Organisations and scholars suggesting violations of international law and international human rights law have not been based on an analysis of treaty texts, General Comments, jurisprudence and Concluding Observations. It is important that such a critical analysis is undertaken to determine if the treatment of the detainees at the United States' Naval Base at Guantanamo Bay, Cuba, has violated international law. If it is concluded that violations took place we also need to understand why these violations have taken place within the United States Armed Forces given the country's commitment to uphold all relevant international and domestic law.

The purposes of this research are;

1) to describe how the detainees at United States' Naval Base at Guantanamo Bay have been treated,
2) to assess whether such treatment of the detainees at United States' Naval Base at Guantanamo Bay is in violation of International Humanitarian Law and International Human Rights Law,
3) To determine the contribution if any of the United States' policy pertaining to the treatment of detainees to any such violation.

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## 1.2 Research Questions

- Does the treatment of the detainees at United States' Naval Base at Guantanamo Bay violate Geneva Convention III, International Covenant on Civil and Political Rights and International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment? If so, in what way? If not, why not?
- What is the Bush Administration's policy pertaining to the treatment of the detainees at United States' Naval Base at Guantanamo Bay?
- How has the Bush Administration explained the policy pertaining to the treatment of the detainees at United States' Naval Base at Guantanamo Bay?
- Are the explanations acceptable from the perspective of Geneva Convention III, International Covenant on Civil and Political Rights and International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment?

## 1.3 Significance of Research

Freedom from torture and inhumane treatment is a fundamental right. In order to prevent it from happening it is imperative that there are clear rules regarding the treatment of detainees and that the rules are understood and obeyed. Any attempts to rationalise the use of torture and inhumane treatment and to thwart or circumvent the rules should be criticised and publicised.

## 1.4 Research Methods

The research is based on a traditional critical analytical method integrating a wide variety of literature from human rights, international law and politics to clarify and then form a judgement on the issues dealt with. Furthermore, documents and reports mainly from United States' governmental bodies, United States' Courts, United Nations, Non-governmental organisations' reports and articles from news media will

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also be used in the thesis. Only information from nationally and internationally recognised non-governmental organisations and the media that are generally considered to objective has been used. The criteria for both the non-governmental organisations and media have been that they do research on their own and that their statements are based on serious analysis.

### 1.5 Ethical Considerations and Trustworthiness

As a human rights student and having met torture survivors both in private as well as in work related contexts, I am - naturally - strictly against any use of torture or inhumane treatment. It has not been my aim to do a politically biased thesis just in order to air some dislike for the Bush Administrations' policy regarding the treatment of the detainees at United States' Naval Base at Guantanamo Bay. It is the use of torture and inhumane treatment itself that I am against and not the fact that it comes from an American government or that the government is Republican. The analysis is based on what the laws say, and not want I would like them to say.

As my research will be a textual analysis based on material that is publicly available there is no risk that anybody, including myself, will be in physical or mental danger because of my research. However, I have made some ethical considerations as a researcher. The considerations are based on Booth, Colomb and Williams' suggestions in "The Craft of Research". None of the findings that I will come up with in the thesis will be invented results nor will I misreport sources in order to make it "fit" to my thesis. Whenever possible I have tried to look up references and in cases where I have not been able to find it and therefore have to rely on what others have reported it will be clearly stated. All quotes have been doubled checked and the syntax is as found in the original text.

The material used in this thesis has been public available material and most of it has been found on the internet. A memorandum dated 16 April 2004 from the Department of Defense, signed by Secretary of Defense, which I have quoted from, was

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declassified 22 June 2004. However, it is stated on the memorandum “Not releasable to foreign nationals”. The memorandum is placed on a The New York Times web page, which is accessible worldwide, I have therefore, despite my non-US nationality, used it in the thesis.

### 1.6 Limitations of the Research

The main limitation of this research lies in the fact that it is based exclusively on documentary resources. No interviews were carried out. Statements by military and governmental officials and detainees have been taken on faith from the print media.

### 1.7 Outline of the Thesis

Chapter two will explain the context for detaining people at the United States’ Naval Base at Guantanamo Bay. As a reaction to the September 11 attacks President George W. Bush declared a “war on terrorism”. The Bush Administration wanted as much flexibility as possible in the “war on terrorism” in order to get information about the September 11 attacks and future attacks. It will be argued that in order to get that flexibility the Bush Administration adopted a policy that allowed treatment of the detainees at Guantanamo that amounted to torture and inhumane treatment. The policy is documented in several documents that were declassified in June 2004. The last section of chapter two is a summary of the reports of torture and inhumane treatment that have been reported by the media and Non Governmental Organisations.

Chapter three examines the obligation the United States has under international humanitarian law and international human rights law. The Bush Administration declared that the detainees were not prisoners of war, as they were “unlawful combatants”. The criteria for prisoner of war status will be examined as well as the rights of the detainees whose status is not clear. Furthermore, the prohibition, definition, territorial responsibility and reservations under United Nations’ International Covenant of Civil and Political Rights and Convention against Torture

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and Other Cruel, Inhuman or Degrading Treatment or Punishment, will be examined plus prison conditions.

Chapter four will analyse the Bush Administration's denial to acknowledge the detainees as prisoners of war, detention conditions, interrogation techniques, and the Bush Administration's definition of "torture" and "inhumane treatment" and whether they are violations of international humanitarian law or international human rights law. The analysis will be based on the treaty texts, General Comments and jurisprudence from the United Nations' Human Rights Committee and the United Nations' Committee against Torture, and academic research.

### 1.8 Scope of Research and Definitions

As mentioned earlier, the case of the detainees at United States' Naval Base at Guantanamo Bay is special, because interrogation techniques that amount to or constitute torture and inhumane treatment were justified and approved by the Bush Administration. Therefore this thesis will also investigate the Bush Administration's explanations of the treatment of detainees at United States' Naval Base at Guantanamo Bay, which has been documented in a number of documents from the Bush Administration, which were declassified and released in June 2004. The documents addressed the issues of prisoner of war status and the use of specific interrogation techniques and therefore these two issues will be analysed.

Though they are violations of international humanitarian law and international human rights law detention of children[3] will not be a part of the analysis of this thesis. The pictures of the torture and inhumane treatment of detainees at Abu Ghraib Prison in Iraq, and the pictures from Abu Ghraib broadcasted by CBS in the program "60 Minutes" were horrible, however, this thesis will not deal with those incidents of torture. There was not - at the time this research was done (from June

[3] According to a report from European Counsel's Committee on Legal Affairs and Human Rights, there were in May 2003 "a number of children between 13 and 15 years of age transferred from the Bagram Air Base [Afghanistan] in 2003, and a 16-year old Canadian national transferred late 2002" (European Counsel's Committee on Legal Affairs and Human Rights 2003, paragraph 1(b)). 3 children between 13 and 15 years were released in January 2004 and there were still "a number" of children detained at Guantanamo in April 2004 (Colson 2004).

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2004 to May 2005) – any evidence that the torture and inhumane treatment in the Abu Ghraib Prison was a part of the Bush Administration's policy although later on a number of commentators have pointed out that the treatment of detainees at United States' Naval Base at Guantanamo Bay had set the tone for the treatment of detainees in other United States' controlled prisons. There have been many reports about detainees having been transferred from Guantanamo to States that are notorious for torture. There were not at the time the research were conducted any official documents from the Bush Administration about these renditions, however, according to Jehl and Johnston there was a classified directive, which President George W. Bush signed within days of September 11 that gave the Central Intelligence Agency unusual expansive authority to transfer detainees to foreign countries for interrogation (Jehl and Johnston, 2005). Despite these claims that it was a policy of the Bush Administration that persons suspected of terrorism could be send to a country where he or she is at risk of torture this will not be analysed here as the document is not publicly available.

The time scope of the analysis of the Bush Administration's policy will be from 11 September 2001 to 28 April 2004 when the pictures from Abu Ghraib were broadcasted. As a reaction to the outcry over the pictures the Bush Administration decided after April 2004 to make some changes regarding the interrogation policy not only in Iraq, but also in Afghanistan and United States' Naval Base at Guantanamo Bay. However, it is the treatment and the justification for the treatment of the detainees suspected of terrorism before April 2004 that is addressed in this thesis. When the research started and throughout the most of the time when the research was done, the issue of the treatment of the detainees at Guantanamo Bay Naval Base was like an ongoing live event with new information and documents released constantly. The analysis is mainly based on documents issued before 28 April 2004, however documents issued after April 2004 have also been used if they can help understanding the treatment of the detainees at Guantanamo Bay Naval Base before 28 April 2004 or contain other relevant information.

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The category “unlawful combatants” was not defined in the memorandum of 7 February 2002 in which President George W. Bush first used the category “unlawful combatants”. In the documents from the Bush Administration, media and NGO reports both “unlawful combatants” and “enemy combatants” have been used as synonyms about the detainees at United States’ Naval Base at Guantanamo Bay. According to Richard Goldstone (2002) the United States’ Supreme Court used the category “unlawful combatants” already in 1942 about the German saboteurs captured on American soil, but there is no such category under humanitarian law (Goldstone, 2002:1051). The Bush Administration had not defined “unlawful combatants” or “enemy combatants” by April 2004[4]. In this thesis the two categories will refer to the detainees at United States’ Naval Base at Guantanamo Bay and will be used as they were referred to in the documents.

Throughout the thesis “inhumane treatment” means “other cruel, inhumane or degrading treatment or punishment” as referred to in international law. In chapter three it will be shown that “inhumane treatment” is as serious a violation of international humanitarian law and international human rights law as “torture”. However, as it will be argued in chapter three - that the fact that the United Nations has only been able to give a legal definition only of “torture” has made it, if not legal, then at least acceptable to use “inhumane treatment”. In order to emphasise the importance of the fact that “inhumane treatment” is still, with or without definition, strictly prohibited in international law, it will be used together with “torture” in most of the thesis.

[4] However, “Order Establishing Combatant Status Review Tribunal” established in July 2004, defines “enemy combatant” as “an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces” (United States’ Deputy Secretary of Defense 2004).

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# CHAPTER 2
# SEPTEMBER 11, "WAR ON TERRORISM' AND THE TREATMENT OF THE DETAINEES AT GUANTANAMO BAY NAVAL BASE

## 2.1 September 11

Tuesday 11 September 2001 a Hollywood disaster movie seemed to come true. Two planes hit within a few minutes the World Trade Center twin towers in New York. At about the same time a third plane crashed into the Pentagon in Washington D.C. and a fourth plane crashed at Pennsylvania apparently destined for the White House. News agencies soon broadcasted live from both New York and Washington D.C. Viewers all over the World were able to see desperate people jumping out of the twin towers and a few hours later saw the towers crashing down. Over 3,000 people lost their lives as a result of the attacks in New York and Washington D.C. It was later discovered that the four commercial planes had been hijacked for the purpose of the attacks. In his first speech short after the attacks in New York on 11 September 2001 President George W. Bush called the attacks an "apparent terrorist attack on our country" (The White House, 2001l) and stated; "Terrorism against our nation will not stand" (The White House, 2001l). However, in speech later on 11 September 2001 President George W. Bush did not use the words "terrorist" or "terrorism", but called the attacks "cowardly acts" (The White House, 2001m). Four days later it was for the first time stated that September 11 was the beginning of a war. President George W. Bush stated; "[T]he wreckage of New York City [was] the first battle of war" (The White House, 2001b) and "underneath our tears is the strong determination of America to win this war. And we will win it" (The White House, 2001b). In an address to a joint Congress 20 September 2001 President George W. Bush declared a "war on terrorism".

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11 September 2001: Four commercial plans were hijacked by men only armed with hobby knifes. Two of the planes crashed into World Trade Center in New York. One into Pentagon in Washington D.C. and the fourth plane crashed over Pennsylvania. It was believed that the fourth plane was targeted at the White House.

14 September 2001: The Congress passes a joint resolution in which they give President George W. Bush power to "use all necessary and appropriate" force to combat terrorism.

20 September 2001: In an address to a joint session of the Congress, President George W. Bush, declares "war on terrorism". President George W. Bush identifies Mr. Osama Bin Laden as the masterminder behind the September 11.

7 October 2001: "Operation Enduring Freedom"; the bombings in Afghanistan starts after the Taliban government in Afghanistan refused to extradite Mr. Osama Bin Laden to the United States.

11 January 2002: The first detainees were transferred from Afghanistan to Guantanamo

7 February 2002: President George W. Bush declared that the Geneva Conventions did not apply to the war against Al Qaeda and that Al Qaeda members were not entitled to prisoner of war status. The Geneva Conventions did apply to the war against Taliban, but Taliban members were not entitled to prisoner of war status.

July 2002: In a routine check Federal Bureau Intelligence agents by coincidence identified one of the detainees, Mr. Mohamed Al Kahtani, as the "20$^{th}$ hijacker". Mr. Mohamed Al Kahtani had landed in Orlando Airport in Florida on 3 August 2001 but was denied entry into the United States because he did not have a return ticket or hotel reservation. It was believed that he intended to help to hijack one of the planes 11$^{th}$ September 2001.

Early December 2002: Secretary of Defense approved 17 interrogation techniques that could be used on Mr. Mohamed Al Kahtani and Mr. Salim Ahmed Hamdan, who had been Mr. Osama Bin Laden's chauffeur. 10 of the interrogation techniques were used before military officials complained that they could be a violation of international law.

26 December 2002: Washington Post reported in the article "U.S. Decries Abuse but Defends Interrogations" that detainees in American custody in Afghanistan had been tortured.

January 2003: A Department of Defense Working Group was established in order to suggest interrogation techniques that were within international law.

16 April 2003: Secretary of Defense, Mr. Donald Rumsfeld, approved 24 interrogation techniques that were only allowed to be used on detainees at Guantanamo.

28 April 2004: CBS broadcasts the program "6o minutes" in which pictures taken in Abu Ghraib Prison in Iraq shows how American soldiers are torturing and treating detainees inhumanely.

22 June 2004: The Bush Administration released a number of memorandums regarding the prisoner of war status and interrogation techniques concerning the detainees at Guantanamo

**Figure 1: Chronology of Events Related to the Treatment of Detainees at Guantanamo**

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## 2.2 "War on Terrorism"

A few days after September 11 intelligence showed that all the hijackers in the September 11 attacks had a connection to the Al Qaeda network. Al Qaeda had previously attacked United States' embassies in Africa and USS Cole. Mr. Osama Bin Laden, the leader of the Al Qaeda network, was believed to be the masterminder of the attacks. In the days after September 11 there were many explanations from the Bush Administration and experts on who the terrorists were and what they wanted. Maja Zehfuss (2003) argues that President George W. Bush needed people to remember September 11 and remember the interpretations of the terrorists in order to justify the "war on terrorism". According to Zehfuss, however, "much of what we may wish to say about the terrorists is necessarily based on our interpretations, rather than theirs" (Zehfuss, 2003:515). Thus, the so-called knowledge about the Al Qaeda network and Mr. Osama Bin Laden that was in the Western media after September 11 was based on Western politicians' and Western experts' interpretation of Al Qaeda and Mr. Osama Bin Laden. This thesis will focus on the "war on terrorism" and it is important to understand the Bush Administration's reasons for declaring the "war on terrorism" and what that war was based on. Thus, in this thesis "terrorist", Al Qaeda and Mr. Osama Bin Laden will be according to the Bush Administration's version.

The Al Qaeda members were depicted as "[t]errorists [who] don't represent peace. They represent evil and war" (The White House, 2001a), "they follow in the path of fascism, Nazism, and totalitarianism. And they will follow that path all the way, to where it ends: in history's unmarked grave of discarded lies" (The White House, 2001c), "[a]nd make no mistake about it: This is good versus evil. These are evildoers. They have no justification for their actions. There's no religious justification, there's no political justification. The only motivation is evil"(The White House, 2001c), "[t]hey condone murder and claim to be doing so in the name of a peaceful religion. We have also seen the true nature of these terrorists in the nature of the regime they support in Afghanistan - - and it's terrifying" (The White House, 2001a) and "these cold-blooded killers hate freedom" (The White House, 2002a). The terrorists wanted to kill Americans because "[t]hey hate what we see right herein this chamber - - a

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democratic elected government…They hate our freedoms - - our freedom of religion, our freedom of speech, our freedom to vote and assemble and disagree with each other" (The White House, 2001a), "[w]ith every atrocity, they hope that America grows fearful, retreating from the world and forsaking our friends. They stand against us, because we stand in their way" (The White House, 2001a), "we are dealing with evil people who hate freedom and legitimate governments" (The White House, 2001c) and "[t]his new enemy seeks to destroy our freedoms and imposes it views" (The White House, 2001g). Regarding Mr. Osama Bin Laden President George W. Bush stated; "I consider bin Laden an evil man…This is a man who hates. This is a man who's declared war on innocent people. This is a man who doesn't mind destroying women and children. This is a man who hates freedom. This is an evil man" (The White House, 2001h). The Taliban government, who denied to extradite Mr. Osama Bin Laden and was therefore also an enemy in the "war on terrorism", was depicted as "committing murder" (The White House, 2001a). The White House spokesman described the people captured in Afghanistan as "These are people that have no regard for the rule of law. They have no regard for innocent civilians. They have no regard for values we hold so dearly in the United States…It is a different kind of war. It is a different kind of enemy, one that we have never faced before" (The White House, 2005).

The United States requested the Taliban government in Afghanistan to extradite Mr. Osama Bin Laden[5], but the Taliban government refused to extradite an individual who had not been proven guilty of a crime. The United States declared that it would, in the name of self-defense under Chapter VII of the United Nations' Charter, invade Afghanistan. On 7 October 2001 the United States invaded Afghanistan. The armed conflict in Afghanistan, which was called "Operation Enduring Freedom", began. The

[5] Even before September 11, Afghanistan had the duty to extradite Mr. Osama Bin Laden. In resolution 1267 from October 1999 the United Nations' Security Council stated: "Demands that the Taliban turnover Usama bin Laden without further delay to appropriate authorities in a country where he has been indicted, or to appropriate authorities in a country where he will be returned to such a country, or to appropriate authorities in a country where he will be arrested and effectively brought to justice" (United Nations' Security Council S/RES/1267, paragraph 2). This was reaffirmed in resolution 1333 in 2000, but the United Nations' Security Council did not reaffirm it in its resolution 1368 on 12 September 2001.

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Taliban government from Kabul was expelled and the infrastructure of Al Qaeda destroyed and attempted to capture and kill its leaders (Reisman, 2004:976). During the armed conflict in Afghanistan the United States' Armed Forces arrested and detained persons, whom they claim had valuable information about September 11 and future attacks. President George W. Bush's and his advisor team[6], analysed in several memorandums possibilities of how it was possible to detain the persons for an extended period of time without giving them access to federal courts in the United States. However, the Department of Defense established its own annual review process[7] in order to determine case by case if it were appropriate to keep a person detained. According to Golden the legal strategy took shape as the ambition of a small core of conservative administration officials whose political influence and bureaucratic skill gave them remarkable power in the aftermath of the September 11 attacks. Military lawyers were largely excluded from that process in the days after September 11. They have since waged a long struggle to ensure that terrorist prosecutions meet what they say are basic standards of fairness (Golden, 2004). By declaring them "unlawful combatants" in the "war on terrorism", the United States intended to be able to keep the detainees at United States' Naval Base at Guantanamo Bay (hereinafter Guantanamo) as long as the "war on terrorism" was going on.

There are no official records of how many detainees or who the detainees are at Guantanamo, however, it is believed that there are 500 – 600 persons detained at

[6] The advisor team consisted of Secretary of Defense Mr. Donald Rumsfeld, Counsel to the President Mr. Alberto R. Gonzales, and William J. Haynes II, General Counsel of the Department of Defense, Secretary of State Mr. Colin L. Powell, Attorney General Mr. John Ashcroft and Deputy Attorney General Mr. James B. Comey.

[7] A review board would review each case annually. The detainees had the opportunity to appear before the board to present information. The board would consider all the information about the detainee, including information provided by the detainee and by his government. In the process for assessing detainees for release or transfer each case was reviewed by an integrated team of interrogators, analysts, behavioral scientists, and regional experts. The Commander of the United States Southern Command, or his designee, made a recommendation that was forwarded to an interagency committee in Washington D.C, which reviewed the case and recommendations in order to make a more fully integrated assessment. It is the Secretary of Defense, or his designee, who makes the decision of release or transfer ('Guantanamo Detainees'). The detainees did not have a right to get legal assistance or being represented by a lawyer. Nor was it possible for the detainees to appeal the decisions made by the annual review board or the Secretary of Defense.

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Guantanamo[8]. Most of the detainees at Guantanamo were captured in Afghanistan during the war in late 2001 and early 2002. However, there are also detainees that have been captured in Gambia, Zambia, Bosnia and Thailand (United States' District Court of Columbia, 2005:3) and many of the persons detained at Guantanamo have never been "close to actual battlefield and may never have raised conventional arms against the United States or its allies. Nonetheless the military deemed them detainable as "enemy combatants" based on conclusions that they had ties to Al Qaeda or other terrorist organisations" (United States' District Court of Columbia, 2005:3).

In an interview with Mr. David Frost, BBC, the Secretary of Defense Mr. Donald Rumsfeld, explained that the reasons for detaining the people at Guantanamo were "the same as in any other war; to try them for doing something wrong, to interrogate them in order to save additional lives and to keep them off the battlefield". The Secretary of Defense added: "Even though you may not learn any information more from them, and even though you may not end up trying them, you simply don't want them going back on the battlefield and killing more of your people" (US DoD, 2004b). In this statement the Secretary of Defense was admitting that the detainees at Guantanamo did not have much valuable information, and that it was not the intention of the Bush Administration to try the detainees and hold them accountable for any crime they would be found guilty in, but the purpose was to keep them detained so they would not be able to fight.

A few months after the armed conflict in Afghanistan had started the Bush Administration realised that the "war on terrorism" could not be fought within the existing interpretations of international laws. In February 2002 President Bush declared in a memorandum:

> [T]he war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of states. Our Nation recognizes that this new paradigm - - ushered in not by us, but by the terrorists - - requires new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva [Conventions]" (The White House 2002a).

[8] Mr. Donald Rumsfeld stated in June 2004 in an interview with Mr. David Frost, BBC, that there were about 595 detainees and 150 – 200 had been released (US DoD, 2004b).

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The following extract from a press conference is an example of how President George W. Bush refused to discuss whether torture is justified and maintained that the United States are not violating any laws[9]:

> Q: Returning to the question of torture, if you knew a person was in U.S. custody and had specific information about an imminent terrorist attack that could kill hundreds or even thousands of Americans, would you authorize the use of any means necessary to get that information and to save those lives?
>
> THE PRESIDENT: Jonathan, what I've authorized is that we stay within the U.S. law.
>
> …
>
> Q: Mr. President, I wanted to return to the question of torture. What we've learned from these memos this week is that the Department of Justice lawyers and the Pentagon lawyers have essentially worked out a way that U.S. officials can torture detainees without running afoul of the law. So when you say that you want the U.S. to adhere to international and U.S. laws, that's not very comforting. This a moral question: Is torture ever justified?
>
> THE PRESIDENT: Look, I'm going to say it one more time. If I - - maybe - - maybe I can be more clear. The instructions went out to our people to adhere to law. That ought to comfort you. We're a nation of law. We adhere to laws. We have laws on the books. You might look at these laws, and that might provide comfort for you. And those were the instructions out of - - from me to the government. (The White House, 2004a).

The September 11 attacks had been used by the Bush Administration to justify harder interrogation techniques. In a report from a Working Group[10], established by Secretary of Defense in January 2003, it was stated:

> It may be the case that only successful interrogations can provide the information necessary to prevent the success of covert terrorist attacks upon the United States and its citizens ('Detainee', 2003: 24).

and

[9] Spokesperson for The White House, Mr. Scott McClellan, refused 12 days later to answer a reporter's question whether the President thinks torture works and Mr. Scott McClellan, has several times at press briefings maintained that the United States adheres to laws (for example The White House 2004c, The White House 2004d, The White House 2005).

[10] For further details about the Working Group Report please see section 2.3.

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> If an attack appears increasingly likely, but our intelligence services and Armed Forces cannot prevent it without the information from the interrogation of a specific individual, then the more likely it will appear that the conduct in question will be seen as necessary. If the intelligence and other information support the conclusion that attack is increasingly certain, then the necessity for the interrogation will be reasonable ('Detainee', 2003:29).

The expression "conduct in question" is not explained. Could it be conduct that amounts to torture or inhumane treatment? It could of course be a "normal" interrogation, where an officer asks questions and the detained person would voluntarily answer. However, the DoD Working Group also stated:

> Clearly, *any harm* that might occur during an interrogation would *pale to insignificance* compared to the harm avoided by preventing such an attack, which could take hundreds or thousands of lives ('Detainee', 2003:26). [Emphasis added]

Similar argument was repeated:

> [T]he fact that previous Al Qaida attacks have had their aim the deaths of American citizens, and that evidence of other plots have had a similar goal in mind, would justify proportionality of interrogation methods designed to elicit information to prevent them ('Detainee', 2003:29).

"Any harm" or "proportionality of interrogation methods designed to elicit information to prevent them" are not defined or explained, but if they "would pale to insignificance" compared with the deaths of hundreds or thousands people plus the fact that nowhere in the report it is mentioned that it is important to respect the prohibition of torture and inhumane treatment, I would argue that the DoD Working Group are referring to harm that amounts to torture or inhumane treatment. As it will be shown in chapter four, some of the interrogation techniques that were approved were based on the DoD Working Groups' recommendation indeed amounted to torture or inhumane treatment.

After the pictures from Abu Ghraib Prison were broadcasted and there were a lot of critique of the Bush Administration's treatment of detainees captured in the "war on terrorism", the Bush Administration still continued to use the September 11 attacks as

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a justification for tougher treatment of detainees. Following is an extract from an interview by Mr. Bill O'Reilly with Mr. Donald Rumsfeld:

> BILL O'REILLY: What do you think of the International Red Cross condemning the way the U.S.A is treating prisoners in Guantanamo Bay?
>
> DONALD RUMSFELD: I have not had a chance to read the latest missive from them.
>
> BILL O'REILLY: They basically say we're torturing them.
>
> DONALD RUMSFELD: Right.
>
> BILL O'REILLY: That's what they say.
>
> DONALD RUMSFELD: They say basically that holding people for the long term without indicating to them, is tantamount to mental torture.
>
> BILL O'REILLY: Do you agree with that?
>
> DONALD RUMSFELD: Well, I guess it's not. I'm not a lawyer, and I, my attitude is that if uh, that our President and our country and our government and I support it, made a decision that we lost three thousand people in this country, on September 11. And they were killed by extremists. And, the idea that we should go out and try to stop extremists from killing three thousand more, or thirty thousand more, for that matter, that we, we should go out and, and capture or kill them, and then release the ones that are alive, back into the terrorist movement so that they can kill more people, I just don't understand that (US DoD, 2004a).

Mr. Donald Rumsfeld was drawing a very terrifying picture of the detainees at Guantanamo. He made it appear as if all the detainees were terrorists, who wanted to kill (American) people and that future attacks at least would kill 3000 people like in the September 11 attack, and even 300,000 people or more and it was the fears that he had or had created, rather than facts, that justified the treatment of the detainees.

**2.3 "Torture Memos"**

After September 11 the main goal for the Bush administration was to obtain information that could lead to information regarding September 11, future attacks and

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the hiding place of Mr. Osama Bin Laden and to detain persons they feared would carry out new attacks. In order to be able to obtain information from the detainees two things had to be clarified. First, the armed forces had to be allowed to interrogate the detainees. As it will be mentioned in chapter three, POWs are only obligated to inform of their name, rank and military unit, and they do not have the obligation to give any further information. It was therefore important for the Bush Administration to analyse if the persons captured in Afghanistan would be entitled to POW status. Second, the armed forces had to be allowed to obtain information, using whatever interrogation techniques were considered necessary.

From January 2002 when the first detainees came to Guantanamo the interrogators relied on the techniques described in Field Manual 34 – 52[11] (hereinafter FM 34 –52). During the summer 2002 FBI realised that there were two detainees with high value at Guantanamo. One was Mr. Mohamed al-Kahtani, Saudi Arabian nationality, who had tried unsuccessfully to enter the United States on 3 August 2001 as the 20th hijacker in the September 11 attacks. The other was Mr. Salim Ahmed Hamdan, Mr. Osama Bin Laden's driver. In October 2002 the Commander of Joint Task Force requested the SOUTHCOM commander to approve 19 techniques that were not described in FM 34 – 52 in order to get information from these two detainees. In December 2002 Secretary of Defense, Mr. Donald Rumsfeld, approved 17 techniques that could be used on the two detainees. Those techniques included hooding, forced removal of clothing and use of dogs (Jehl, 2004). Shortly after the techniques were approved the General Counsel of the Department of Navy questioned the legality of the techniques. On 15 January 2003 Secretary of Defense withdrew some of the toughest techniques and established a working group in order to analyse the legal boundaries for interrogation techniques. Based on the report from the working group, Secretary of Defense approved 24 interrogation techniques on 16 April 2003, which still remained in effect in June 2005. According to Defense officials more aggressive methods then those from the 16 April 2003 Memorandum had been used on

[11] Field Manuel 34-52 serves as the basic primer for students and instructors at Fort Huachua and outlines the army's doctrine for conducting interrogations.

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two detainees at Guantanamo, but according to themselves they did not constitute torture (Jehl, 2004).

After the pictures of the abuses of prisoners at Abu Ghraib Prison were broadcast 28 April 2004, some of the documents regarding the treatment were leaked to the press. On 22 June 2004 the Bush Administration declassified the leaked memorandum plus other documents. The media called the documents "torture memos". The documents can be divided into three groups; the territorial status of Guantanamo, prisoner of war status and interrogation techniques. The four most important documents are;

A memorandum from the White House, dated 7 February 2002, signed by President George W. Bush, called "Humane Treatment of al Qaeda and Taliban Detainees" (appendix A). The memorandum states that the Al Qaeda members and Taliban members are not prisoners of war, but the Geneva Conventions are applicable in the armed conflict with the Taliban. President George W. Bush determined that the Taliban members were "unlawful combatants". It is further stated; "Our Nation has been and will continue to be a strong supporter of Geneva [Conventions] and its principles. As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent of appropriate and consistent with *military necessity*, in a manner consistent with the principles of Geneva [Conventions]" [Emphasis added]. The memorandum did not define what "military necessity" is.

A memorandum, dated 1 August 2002, written by the Office of Legal Counsel at the United States Department of Justice to Mr. Alberto Gonzalez, who was legal counsellor to the President (hereinafter August 2002 Memorandum). The Office of Legal Counsel stated in the memorandum that the President of the United States has under the American Constitution the authority "to order interrogations of enemy combatants to gain intelligence information concerning the military plans" and "any effort to apply Section 2340A[12] in a manner that interferes with the detention or interrogation of enemy combatants would thus be unconstitutional" (US DoJ, 2002d:31). Later in the memorandum torture is defined as extreme acts of severe pain

[12] Section 2340A in United States' domestic law states it is a criminal offence for any person to commit torture outside the United States.

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that is difficult for the victim to endure. The "August 2002 Memorandum" was withdrawn in June 2004 and was replaced by another memorandum 30 December 2004[13].

A working group report, dated 4 April 2003. The Working Group (hereinafter DoD Working Group) was established by Secretary of Defense, Mr. Donald Rumsfeld, and asked to assess the legal, policy, and operational issues relating to the interrogations of detainees held by United States Armed Forces in the war against terrorism. The DoD Working Group's report relied heavily on the "August 2002 Memorandum". The DoD Working Group suggested 35 interrogation techniques, among them sleep deprivation, removal of clothing, use of dogs, threat of transfer, prolonged interrogation (up to 20 hours) and hooding. In both the August 2002 memorandum and the DoD Working Group' report, the analyses are made from the point of what it takes to convict a person for torture and not when a person is suffering enough to have the feeling of being tortured. The grammatical subject is not a person who in danger of being tortured, but the defendant that is accused of having committed torture, for example even "if the defendant knows…" ('Detainee', 2003:9), "a defendant is guilty of torture only if…" ('Detainee', 2003:9), "the defendant could claim that he was fulfilling the Executive Branch's authority to protect the federal government, and the nation from attack" ('Detainee', 2003:30). Thus, at times it looks more like a manual in how to avoid to being convicted of torturing people. Though it is not explicitly stated in the report, the reader could get the idea that the responsibility for the use of the interrogation techniques lies at the top.

A memorandum, dated 16 April 2003, signed by Secretary of Defense, Donald Rumsfeld, memorandum for the commander, US Southern Command, Counter Resistance Techniques in the War on Terrorism (hereinafter April 2003 Memorandum) (appendix B). The memorandum consisted of a preamble/introduction, Table A Interrogation Techniques and Table B General Safeguards. The 24 interrogation techniques in Table A were approved were only in relation to "the

[13] In the memorandum of 30 December 2004 from Office of Legal Counsel, United States' Department of Justice, the President's Commander-in-Chief Power and the potential defences to liability has been withdrawn as well as the interpretation that torture is only "severe pain" amounting to pain such as "organ failure, impairment of bodily function or even death".

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interrogations of unlawful combatants held at Guantanamo Bay". The 24 interrogation techniques had been taken from the DoD Working Group's suggestions of interrogation techniques. Interrogation techniques like hooding, sleep deprivation, removal of clothes, up to 20 hours interrogation a day and face slap, which were suggested by the DoD Working Group had not been approved by Mr. Donald Rumsfeld. The Secretary of Defense emphasised that "US Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Geneva Conventions". It was added that if techniques B, I, O, or X were used the interrogator must "specifically determine that the military necessity requires its use and notify [the Secretary of Defense] in advance". In Tab B it is further stated that: "Interrogation approaches are designed to manipulate the detainee's emotions and weaknesses to gain his willing cooperation. Interrogation operations are never conducted in a vacuum; they are conducted in close cooperation with the units detaining the individuals" and "With respect to the employment of any techniques involving physical contact, stress or that could produce physical pain or harm, a detailed explanation of that technique must be provided to the decision authority prior to any decision".

According to Lewis, the Pentagon said that the information from the detainees at Guantanamo "has undoubtedly saved the lives of our soldiers in the field and that information also saves the lives of innocent civilians at home and abroad. At Guantanamo we are holding and interrogating people that are a clear danger to the U.S. and our allies and they are providing valuable information in the war on terrorism" (Lewis, 2004a). The Pentagon further stated: "Guantanamo guards provide an environment that is stable, secure, safe and humane. And that environment sets the conditions for interrogators to work successfully and to gain valuable information from detainees because they have built a relationship of trust, not fear" (Lewis, 2004a). Attorney General, Mr. John Ashcroft, also stated that it has gotten valuable information from interrogation of detainees at Guantanamo[14]. However, according to Golden and Van Natta, who based their information on interviews with a dozens of

[14] According to the Economist Attorney General Mr. John Ashcroft stated in early March 2003 that the government's tougher methods were yielding results (*The Economist*, 2003b).

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high-level military, intelligence and law-enforcement officials in United States, Europe and the Middle East there were only a dozen or two dozens sworn Al Qaeda members or other militants who would be able to elucidate Al Qaeda's inner workings detained at Guantanamo. The officials furthermore stated that while some of the intelligence gathered at Guantanamo has aided terrorism investigations, none of it has enabled intelligence or law-enforcement services to prevent imminent attacks. Already in September 2002 a top-secret study by Central Intelligence Agency raised questions about the significance of the detainees as many of them were low-level recruits who went to Afghanistan to support the Taliban or even innocent men swept up in the chaos of the war. They have not even been able to get the identity of all detainees. Some of the detainees are being held because of "what the officials do not know rather than what they do know" (Golden and Van Natta, 2004).

**2.4 Examples of reported Torture and Inhumane Treatment of the Detainees at Guantanamo**

When the first detainees arrived at Guantanamo the United States' Armed Forces showed the media how the culture of the detainees had been taken into consideration, for example the detainees got a copy of the Koran and an extra towel to be used as a praying mat. Reporters were invited to Guantanamo to see observe the detention facilities and interrogations. According to Lewis reporters who were permitted to watch an interview session behind a glass wall during General Hood's were shown an interrogator and detainee sharing a milkshake and fries from the base's McDonald's and appearing to chat amiably. It became apparent to reporters who compared notes that the tableau of the interrogator and prisoner sharing a McDonald's meal was presented to at least three sets of journalists (Lewis, 2005b).

Since December 2002 there have been reports about treatment of the detainees that could constitute or amount either in themselves or in combination torture or inhumane treatment. There has not been any evidence that the reported treatment is a part of the Bush Administration policy, but it might "at least have fostered a permissive climate in which such abuses were more likely"(Bilder and

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Vagts, 2004:691). The following pages are examples of treatment some of the detainees at Guantanamo have been subjected to. The Bush Administration has not released many details about torture or inhumane treatment that have taken place at Guantanamo and thus the following examples are based on information from NGO reports and from the media.

### 2.4.1 Random Punishment

In an interview with Mirror Newspaper a former Guantanamo detainee told "you would be punished for anything - - for having six packets of salt in your cell rather than five, for hanging your towel through the cage if it wasn't wet, even for having your spoon and things lined up in the wrong order (Colson, 2004).

### 2.4.2 Forced Nudity

Zernike and Rohde reported:

> At Guantanamo…a few British detainees said forced nudity had occurred. One of them, Tarek Dergoul, said after his release that some detainees had been stripped of their clothing, which would then be returned piece by piece in exchange for good behaviour. But Lt. Col. Leon H. Sumpter, a spokesman for the military joint task force that runs the detention center, said in a recent interview that nudity had never occurred in connection with interrogation or discipline and had not been approved. A military official who served at Guantanamo said that after a wave of suicide attempt by prisoners in late 2002 and early 2003, the military police guards had taken away clothing from some detainees who were considered suicide risks, out of concern that they might rip up their garments to make nooses (Zernike and Rohde, 2004).

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### 2.4.3 Cultural Attacks

There are many reports of various forms of cultural attacks. The use of dogs[15], insults of the Koran and sexual teasing and harassment by female interrogators.

[The guards] flushed a Koran down the toilet. The guards dance around when the detainees are trying to pray (FBI, 2002).

According to several sources female interrogators have used sexually suggestive tactics at the detainees at Guantanamo. Leoning and Priest reports that at least eight detainees have reported that female interrogators "rubbed their bodies against the men, wore skimpy clothes in front of them, made sexually explicit remarks and touched them provocatively" (Leonnig and Priest, 2005).

Erik Saar reported:

> When [the female interrogator and the translator] returned, the interrogator shed the top of her camouflage battle-dress uniform, the interrogator shed the top of her camouflage battle-dress uniform, revealed a tight Army T-shirt. The prisoner looked away. She rubbed her breasts against his back, taunting him about his erection. She stood in front of him touching her breasts. He spit in her face…When she and the first translator re-entered the interrogation booth, she told the detainee she was having her period. She stuck her hand in her pants, then withdrew a hand and showed the detainee what appeared to be blood on it. She asked again who had sent him to Arizona, and he glared at her silently. When she wiped the red ink on his face, he let out a shout, spat at her and lunged forward so forcefully that an ankle came loose from its shackle. The Saudi began sobbing uncontrollably, and the interrogator left, telling him the water in his cell had been shut off. He would not be able to wash, as Muslims are supposed to do before they pray[16].

Episodes like fake menstrual blood being used on Muslim men before their prayer combined with hindering them from washing themselves, thus making them unable to pray, have been confirmed by a Pentagon Official.

---

[15] Statement of Shafiq Rasul, Asif Iqbal and Rhuhel Ahmed given to Center for Constitutional Rights' report "Detention in Afghanistan and Guantanamo Bay" quoted in Human Rights Watch 2004b, page 12.

[16] From Erik Saar and Viveca Novak's forthcoming book about Guantanamo, "Inside the Wire" (quoted in *Time* 2005:28).

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> Mr. Murat Kurnaz told his lawyer that three women in lacy bras and panties strutted into the interrogation room where he was sitting in chains. They cooed about how attractive he was and suggested that 'they could have some fun'. When Mr. Murat Kurnaz closed his eyes one woman sat on his lap, another rubbed her breasts against his back and massaged his chest and a third squatted near his crotch. He head-butted the woman behind him, knocking her off him (Leonnig and Priest 2005).

> A female interrogator was apparently whispering "in the detainee's ear, and caressing and applying lotion to his arms (this was during the Ramadan when physical contact with a woman would have been particularly offensive to a [Muslim] male). On more than one occasion the detainee appeared to be grimacing in pain, and [female interrogator's] hands appeared to be making some contact with the detainee (US DoJ, 2004a).

### 2.4.4 False Location

In at least one occasion a detainee was led to believe he was in Egypt. Lewis reported:

> Mr. Mohamed al-Kahtani, a Saudi citizen, was given a tranquilizer, put in sensory deprivation garb with blackened goggles, and hustled aboard a plane that was supposedly taking him to the Middle East. After hours in the air, the plane landed back at [Guantanamo] where he was not returned to the regular prison compound but put in an isolation cell in the base's brig. There, he was subjected to harsh interrogation procedures that he was encouraged to believe were being conducted by Egyptian national security operatives (Lewis, 2005b).

### 2.4.5 Exposure to Loud Music and Strobe Light

There have been many reports of detainees who have been subjected to loud music and strobe light in rooms with extreme temperatures. The following are extractions from e-mails from FBI agents, who witnesses it.

> Following a detainee interview exact date unknown, while leaving the interview building at Camp Delta at approximately 8.30 pm or later, I heard and observed in the hallway loud music and flashes of light. I walked from the hallway into the open door of a monitoring room to see what was going on. From the monitoring room I looked inside the adjacent interview room. At that time I saw another detainee sitting on the floor of the interview room with an

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> Israeli flag draped around him, loud music being played and a strobe light flashing…at no time did I observe any physical assaults take place of this detainee or any others while assigned to [Guantanamo] (FBI, 2004b).

> On several occasions, I did hear loud music being played and people yelling loudly from behind closed doors of interview rooms but I could not say that detainees were present in those rooms. I also observed strobe lights in interview rooms on several occasions but never observed those being used on detainees (FBI, 2004a).

> On a couple of occasions, I entered interview rooms to find a detainee chained hand and foot in a fetal position on the floor, with no chair, food or water. Most times they had unnated and defacated on themselves, and had been left there for 18 24 hours or more. On one occasion, 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 MP's 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, 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, 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 (FBI, 2004d).

Cohen reports that the music the detainees were subjected to was Eminem and Rage Against the Machine and fusing the wail of an infant with an incessant meow from a cat food commercial (Cohen, 2005).

### 2.4.6 Sleep Manipulation

There have not been reports about detainees who had been subjected to sleep deprivation, where a detainee is not permitted to sleep. However, there have been reports about prison conditions that made it very difficult for the detainees to sleep and of manipulation of sleep.

> In one procedure a detainee would be awakened, subjected to an interrogation in a facility known as the Gold Building, then returned to a different cell. As

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> soon as the guards determined the inmate had fallen into a deep sleep, he was awakened again for interrogation after which he would be returned to yet a different cell. This could happen five or six times during a night (Lewis, 2004a).

### 2.4.7 Violence

According to three released detainees it was common that a detainee would be subjected to violence if he refused to be interrogated. The three detainees reported[17]:

> You would be pepper-sprayed in the face which would knock you to the floor as you couldn't breathe or see and your eyes would be subjected to burning pain. Five of them would come in with a shield and smack you and know you down and jump on you, hold you down and put the chains on you.

There is one example of a detainee who was beaten unconscious. A FBI agent reported:

> REDACTED stated he had been beaten unconscious approximately three or four weeks ago when he was still at Camp X-Ray. According to REDACTED an unknown number of guards entered his cell, unprovoked, and started spitting and cursing at him. The guards called him a "son of a bitch" and a "bastard," then told him he was crazy…REDACTED rolled onto his stomach to protect himself, REDACTED stated a soldier named REDACTED jumped on his back and started beating him in the face. REDACTED then choked him until he passed out. REDACTED stated that REDACTED was beating him because REDACTED is a Muslim, and REDACTED is a Christian. REDACTED indicated there was a female guard named REDACTED who was also beating him and grabbed his head and beat it into the cell floor (FBI, 2004c).

In the following example it is not clear if the detainee were subjected to physical or mental pain or suffering, but it is apparently very severe. A FBI agent reported:

> These tactics have produced no intelligence of a threat neutralization nature to date and CITF believes that techniques have destroyed any chance of prosecuting this detainee…If this detainee is ever released or his story made public in any way…(FBI, 2003).

[17] Statement of Shafiq Rasul, Asif Iqbal and Rhuhel Ahmed given to Center for Constitutinal Rights' report "Detention in Afghanistan and Guantanamo Bay" (quoted in Human Rights Watch 2004b:18).

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### 2.4.8 Isolation

The detainees were kept in isolation. Some reports stated that they were not allowed to talk other says they were allowed to talk with their neighbour.

> I was told not to talk with any other persons or shout or make noise or get close to the iron bars of my cell or the door of my cell[18].

> In July 2004 Deputy Assistant Director of the Counter terrorism Division of FBI reported that in September or October 2002 FBI agents observed a detainee "after he had been subjected to intense isolation for over three months. During that time period, [the detainee] was totally isolated (with exception of occasional interrogations) in a cell that was always flooded with light. By late November, the detainee was evidencing behavior consistent with extreme psychological trauma (talking to non-existent people, reporting hearing voices, crouching in a corner of the cell covered with a sheet for hours on end) (US DoJ, 2004a).

## 2.5 Summary of Chapter 2

As a response to the attacks on World Trade Center in New York and Pentagon in Washington D.C. on 11 September 2001 President George W. Bush declared "war on terrorism". The war started in Afghanistan in October 2001. During that war several hundred people were captured and detained. Many of the people captured in Afghanistan and some others captured outside Afghanistan were transferred to Guantanamo. President George W. Bush declared that the detainees were "unlawful combatants" and were thus not protected under the Geneva Conventions. The detainees could, according to the Bush Administration, be detained as long as the "war on terrorism" was going on. The main objective of the "war on terrorism" was to get information about the Al Qaeda network. The Bush Administration was prepared to use new tactics in order to get the information. As it has been expressed: "After 9/11 the gloves came off"[19]. One of the tactics was to implement harsher methods to get the

[18] Mr. Shah Mohammed Alikhil reported this to Human Rights Watch (Human Rights Watch 2004b:5).
[19] Head of the CIA Counterterrorist Center, Cofer Black used the expression in a joint hearing of the House and Senate intelligence communities 26 September 2002 (quoted in Priest and Gellman 2002).

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information. The detainees were subjected to different kinds of inhumane and humiliating treatment, for example sexual harassment by female interrogators, confined in a room for many hours with loud music and strobe light, and isolation.

Documents from the White House, Department of Defense, Department of Justice and State Department, which were released in June 2004 show analysis from the Bush Administration of how international law regarding the prohibition on torture and inhumane treatment could be avoided in order to be able to detain and interrogate the detainees at Guantanamo for an uncertain span of time.

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# CHAPTER 3
# STATES' OBLIGATIONS REGARDING THE PROHIBITION OF TORTURE AND INHUMANE TREATMENT UNDER INTERNATIONAL LAW

The aim of this chapter is to identify the obligations regarding torture and inhumane treatment that the United States has under the Geneva Conventions and the United Nations' human rights treaties. All these treaties are part of international law and the first section will discuss the main principles of international law. Section two and three will give overviews over and the background for and the protection mechanisms in the Geneva Conventions and the United Nations' human rights protection bodies. Section four will examine how torture in inhumane treatment is prohibited in the Geneva Conventions and the human rights treaties, hereunder territorial scope. In section four the definitions of "torture" and "inhumane treatment" will be identified by giving examples from international tribunals and documents from the United Nations human rights protection bodies. The United States has made reservations and understanding to the definitions of "torture" and "inhumane treatment" and section five will discuss the principles of making reservations to human rights treaties.

## 3.1 International Law

International law is concerned with the conduct between States. Traditionally the obligations and the rights understood as binding between those States were based upon customary practice, that is what was custom between states. However in modern times, treaties have become increasingly important in defining and creating international law. International treaties clash with the principle of State sovereignty, which is based on the premise that all States are equal in international law and that the States should respect each other's sovereignty. Thus, in international law a State is not

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bound to any rules unless it has given its consent. In order not to violate the principle of State sovereignty international treaties are deliberately vague in definitions. If there were very specific rules, then it would be difficult to get States to ratify the treaties, because States would feel that they would loose some of the national State sovereignty.

There is no clear body or supreme law-making authority regarding international law and there are no obvious sources. However, International Court of Justice (hereinafter ICJ), which is the supreme judicial organ of the United Nations, which can solve issues at international level. According to article 38 (1) of the Statute of International Court of Justice ICJ can base its decisions on following:

> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations;
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

International humanitarian law (hereinafter IHL) and international human rights law (hereinafter IHRL) are based on modern treaty law. In IHL and IHRL it is the individuals, and not the states, that are subjects of the law. For IHRL the most important sources are treaty law and international custom law. It is law associated with the concept of State practices, that is the way states habitually behave with one another. Two preconditions have to be met before a rule becomes customary law. First, there must be some unambiguous, discernible and uniform state practice in a particular field over a period of time. Second, practice followed out of a belief of legal obligations; that is *opinio juris*. For example treaties and declarations are *opinio juris*, because they are statements of belief rather then actual action. The first one, state practice, is the traditional development for customary international law. It develops slowly, because the unwritten nature of traditional custom makes its content inherently insecure and requiring repeated state practice is slow. The second one, *opinio juris,* is the modern development, which develops faster. However, one of the weaknesses of the *opinio juris* is, according to Roberts (2001), that it is descriptively inaccurate

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because it reflects ideal, rather than actual, standards of conduct. An example is the prohibition of torture, which is customary international law, but is still occurring, because states have not internalised them as standards of behaviour to guide their actions and judge the behaviour of others (Roberts, 2001:769).

IHL and IHRL are based on two different principles. There has been a tendency for NGOs, media, politicians and academics to focus either on humanitarian issues or on human rights issues. This is despite the fact that the United Nations at the Human Rights Conference in Tehran in 1968 adopted the resolution; "Human Rights in Armed Conflict" which states that respect for humanitarian law in armed conflict is a "condition for the full observance of human rights"[20]. Since the conference the United Nations has been considering humanitarian issues in both the making of new human rights treaties, for example article 38 (1) in the Convention on the Rights of the Child[21], and in adopting resolutions[22]. In the same vein, humanitarian law has implemented elements of human rights. The two optional protocols to the Geneva Conventions are examples of this.

Though IHL and IHRL have many differences, they also share some of the same concerns. Both IHL and IHRL are based on the non-discrimination principle. Moreover, they protect individuals from torture, slavery, giving judicial guarantees and the right to life.

### 3.2 The Geneva Conventions

According to Doswald-Beck and Vite (1993) IHL was developed at a time when there was no disgrace in starting a war. The aim of humanitarian law was to maintain the

[20] 'Human Rights in Armed Conflicts. Resolution XXIII adopted by the International Conference on Human Rights. Teheran, 12 May 1968'.
[21] Article 38 (1) Convention on the Rights of the Child reads: "State Parties undertake to respect and ensure respect for rules under international humanitarian law applicable to them in armed conflicts which are relevant to the child".
[22] For example in 1999 United Nations' Security Council referred to both IHL and IHRL in their resolution on the situation on East Timor (Resolution S/RES/1772).

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appropriate respect for other professional armies and to encourage discipline among the soldiers. IHL only applies in cases of “armed conflict”. Today’s IHL is based on The Hague Conventions, which addresses the equipment to be used in war, and the Geneva Conventions of August 12 1949 (hereinafter Geneva Conventions); Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949 (hereinafter Geneva Convention I), Geneva Convention for the Amelioration of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949 (hereinafter Geneva Convention II), Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (hereinafter Geneva Convention III), Geneva Convention to the Protection of Civilian Persons in Time of War of August 12, 1949 (hereinafter Geneva Convention IV). The four Geneva Conventions addresses the treatment of the victims of war. This thesis will only focus on the main four Geneva Conventions, which the United States ratified in September 1949.

The purpose of the four Geneva Conventions and the two optional protocols is to protect victims in armed conflict. The duties stated in the conventions try to balance between military necessity and the needs of humanity. And for these reasons IHL goes beyond the political obstacles relating to its applicability and concentrates on respect in practice for its provisions (Durr, 1987:263). The conventions and protocols contain duties that the States party to the conventions have. There are no treaty bodies that monitor the implementation of the conventions, although the International Committee for Red Cross (hereinafter ICRC) has made some commentaries, for example in 1958 ICRC issued “Commentary on Geneva IV, Convention Relative to the Protection of Civilian Persons in Time of War”. However, the rules of the Geneva Conventions have been integrated into military law and the various ad hoc tribunals have referred to IHL. In section 4.2 it will be argued that it is only Geneva Convention III that is relevant for the detainees at Guantanamo. Because the Bush Administration were in doubt whether the detainees at Guantanamo were POWs they should, according to article 5 Geneva Convention III, had been treated as POWs until a competent tribunal had determined the POW status.

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Freedom from torture and inhumane treatment is guaranteed in the following articles;

Article 13 Geneva Convention III

> Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest…Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation.

Article 14 Geneva Convention III states among other things:

> Prisoners of war are entitled in all circumstances to respect for their persons and their honour.

In article 17 Geneva Convention III it is stated:

> No physical or mental torture, nor any form for coercion, may be inflicted on prisoners of war to ensure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.

Article 21 Geneva Convention III states:

> [P]risoners of war may not be held in close confinement except where necessary to safeguard their health and then only during the continuation of the circumstances which make such confinement necessary.

Article 25 Geneva Convention III states:

> Prisoners of war shall be quartered under conditions as favourable as those for the forces of the Detaining Power who are billeted in the same area. The said conditions…shall in no case be prejudicial to their health…The premises provided for the use of prisoners of war individually or collectively, shall be…adequately…lightened, in particular between dusk and lights out.

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Article 38 Geneva Convention III states:

> While respecting the individual preferences of every prisoner, the Detaining Power shall encourage the practice of intellectual, educational, and recreational pursuits, sports and games amongst prisoners, and shall take the measures necessary to ensure the exercise thereof by providing them with adequate premises and necessary equipment.

Article 46 Geneva Convention III states:

> The transfer of prisoners of war shall always be effected humanely and in conditions not less favourable than those under which the forces of the Detaining power are transferred. Account shall always be taken of the climatic conditions to which the prisoners of war are accustomed and the conditions of transfer shall in no case be prejudicial to their health.

The Geneva Conventions themselves do not give a definition of torture. However, a commentary to Geneva Convention III states:

> The word torture refers here especially to the infliction of suffering on a person in order to obtain from that person, or from another person, confessions or information[23].

In the commentary it is stated that torture is the infliction of pain or suffering on another person for the purpose of obtaining confession or information. To determine what constitute humiliating or degrading treatment in IHL is not clearly stated in any of the four Geneva Conventions.

Geneva Convention IV applies, according to article 4 Geneva Convention IV, to persons who are not protected by Geneva Convention I, II or III and who:

> [A]t a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals…Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State

[23] From J. Pictet et al., Commentary to the III GC (Geneva: ICRC, 1952), page 627 (quoted in Arnold 2004 page 1002).

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> of which they are nationals has normal diplomatic representation in the State in whose hands they are.

The applicability of Geneva Convention IV depends on a person's nationality. This means that persons, who were fighting against the United States in the armed conflict in Afghanistan in 2001 and who had nationality of allies to the United States, such as Pakistan, United Kingdom, Australia and Denmark or persons of neutral States, for example Switzerland would not be protected by Geneva Convention IV if they were captured by the Untied States' Armed Forces. They would not be protected by Geneva Convention IV, because they were citizens of an allied country to the United States that country would have normal diplomatic relations with the United States. In section 4.1.1 it will be argued that the detainees at Guantanamo were protected by Geneva Convention III and therefore Geneva Convention IV will not be discussed in further detail here.

As mentioned earlier the Geneva Conventions have not established a body that monitors the implementation of the Geneva Conventions. However, ICRC does have a function in armed conflicts. They offer the parties to the conflict services such as medical relief and, under article 9 of Geneva Convention III, ICRC, or another impartial humanitarian organisation, is allowed to undertake "the protection of prisoners of war and their relief". Among other things ICRC with medical staff visits prisoners of war in order to take care of the detainees' health, and they transmit letters between family members. ICRC work as neutral, independent and impartial, which means that in case they suspect torture or inhumane treatment they will discuss it with the responsible government and write it in the annual report, which is only released to that government. The findings of ICRC are not made public nor does ICRC criticise a government's policy openly.

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### 3.2.1 Prisoner of War Status

The status of a person as an ordinary prisoner or as a POW determines the rights of the person. The definition of POW is stated in article 4(A) Geneva Convention III. It reads:

Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

> (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
>
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
> (a) that of being commanded by a person responsible for his subordinates;
> (b) that of having a fixed distinctive sign recognizable at a distance;
> (c) that of carrying arms openly;
> (d) that of conducting their operations in accordance with the laws and customs of war.
>
> (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
>
> (4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

If there are any doubt if a person belongs to POW status, article 5, Geneva Convention III, 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.

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The POW has only the duty to give information about his person. Article 17, Geneva Convention III, states:

> Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information.

### 3.3 United Nations' Human Rights Protection Mechanism

IHRL was developed after World War II within the framework of the United Nations. When World War II was over many states were shocked by the horrors that had taken place during the war and wanted to prevent similar things from happening again. As a response they established the United Nations in order to; "To achieve international co-operation…in promoting and encouraging respect for human rights and for fundamental freedoms..." [24]

In order to achieve this, members of the United Nations have the obligations stated in article 55 in the Charter of the United Nations:

> [T]he United Nations shall promote …universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Though the philosophical ideas about the individual's relation with the state and thus the idea of rights of the individual was founded by John Locke, Emmanuelle Kant and other philosophers in 17th century, it was first after World War II that it was recognised that there had to be international norms and laws in order to prevent a new Holocaust. The United Nations is mainly concerned with maintaining "international peace and security and to ensure…that armed forces shall not be used", as it is mentioned in the preamble to the Charter of the United Nations.

[24] United Nations, 'Charter of the United Nations', article 1 (3).

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The United Nations' human rights protection mechanism can be divided into treaty-based bodies and charter based bodies.

There are seven main human rights treaties[25] and each has a treaty body that monitors the implementation of the rights stipulated in the convention. The treaty bodies' work is to review periodic State reports, to review interstate complaints, and to review individual complaints[26] (for more detailed description of relevant treaty bodies' work please see section 3.3.1 and 3.3.2). The treaty bodies do not act as a court and their Concluding Observations and jurisprudence is not legally binding, but serve only as guidelines.

The charter-based bodies (these have also been called "special procedures" or "extra-conventional mechanism") get their mandate from the Charter of United Nations. The United Nations' Commission on Human Rights (hereinafter the Commission on Human Rights), which acts under the Secretary General of the United Nations, has three options in reaction to human rights violations; procedures on the basis of resolution 1235, procedures on the basis of resolution 1503 and thematic rapporteur or working group. In most cases of information of gross human rights violations the Commission on Human Rights starts with the 1503 procedure. The Commission on Human Rights makes confidential examination of consistent patterns of human rights violations based on information from non-governmental institutions. The 1235 Procedure authorises the Commission on Human Rights and the Sub-Commission on Promotion and Protection of Human Rights to examine gross violations of human rights and consistent patterns of human rights violations. The Commission on Human Rights has a public debate about the examinations under 1235 procedure at its annual meeting. The United Nations' charter-based bodies include working groups, thematic rapporteurs, country representatives, independent experts

[25] The seven main human rights conventions are; International Covenant on Civil and Political Rights, International Covenant on Social, Economical and Cultural Rights, Convention on Elimination of Discrimination, Convention on Elimination of Discrimination against Women, Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment, Convention on the Rights of the Child, and International Convention on the Protection on the Rights of All Migrant Workers and Members of Their Families.

[26] Under Optional Protocol 1 to International Covenant on Civil Political Rights, Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment and Optional Protocol to Convention on Elimination of Discrimination against Women individuals can submit complaints over their states.

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and delegations. They are appointed for a limited number of years and report annually to the Commission on Human Rights. The office of the United Nations' High Commissioner for Human Rights provides them with secretariat services.

### 3.3.1 ICCPR and Human Rights Committee

When the Universal Declaration of Human Rights (hereinafter UDHR), which as a declaration is not a legal binding document, was adopted in 1948 it was the intention that it should be converted into a legal binding treaty. However, due to the outbreak of the Cold War it was difficult for the members of United Nations to agree upon one document and thus UDHR was converted into two treaties; International Covenant on Social, Cultural and Economic Rights (hereinafter ICSCER), and International Covenant on Civil and Political Rights (hereinafter ICCPR). The two covenants were adopted by the General Assembly in 1966 and entered into force in 1976. In addition to these two covenants are an Optional Protocol to the International Covenant on Civil and Political Rights (hereinafter ICCPR – OP 1), which is about individual complaint procedures to Human Rights Committee regarding claim of violation of the rights in ICCPR, and a Second Optional Protocol to the International Covenant on Civil and Political Rights, aimed at the Abolition of the Death Penalty (hereinafter ICCPR – OP 2). UDHR, ICSCER, ICCPR, ICCPR – OP 1, and ICCPR – OP 2 are called the "Bill of Human Rights". The United States ratified ICCPR in June 1992, but has not ratified ICCPR – OP 1 or ICCPR – OP 2. ICSCER does not cover issues of torture and inhumane treatment, UDHR is not legal binding (though it has a strong moral importance) and thus of the "Bill of Human Rights" only ICCPR is relevant for the legal analysis in this thesis.

The articles from ICCPR, which are relevant for the thesis, will be discussed further below. The conventions in IHRL contain rights that the individual can claim of its State. Contrary to IHL, it is possible to derogate from some civil and political rights, however a few civil and political rights (for example the right to life, freedom from torture, freedom from slavery, freedom of thought, conscience or religion), are non-

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derogable or “hardcore rights”. A State party to ICCPR has the obligation to submit an initial state report one year after ratification in which the State reports about what measures it has taken in order to fulfil the obligations under ICCPR. After the initial state report, the State has the obligation to submit a report every fourth year or whenever the Human Rights Committee demands a report. In case a State does not submit a report by the deadline the Human Rights Committee cannot do much. The United States has only submitted an initial report to the Human Rights Committee in August 1994, one year after deadline and thus failed to submit the periodic state reports that were due 1997, 2001 and 2005.

Article 41 gives the Human Rights Committee authority to receive and consider communications to the effect that a State party to ICCPR claims that another State party to ICCPR is not fulfilling its obligations under ICCPR. However, this applies only to States that have declared the recognition of the Human Rights Committee to this article and a state can only complain over another State if that state has also declared the recognition of the Human Rights Committee for this article. The United States has not declared the recognition of the Human Rights Committee for article 41 ICCPR and it is thus not relevant.

The Human Rights Committee meets three times a year, and its duties are to issue General Comments, review periodical State reports, investigate individual complaints, and to investigate State complaints. General Comments are issued in order to define or clarify issues. After examining the State report and “shadow reports” from NGOs, the Human Rights Committee makes a Concluding Observation in which it states the positive initiatives from the State, concerns and recommendations. When the Human Rights Committee receives an individual complaint it will ask the State concerned to respond and then the individual can respond to the State’s response. On the basis of the individual complaint, the response from the State and the individual’s response to the State’s response the Human Rights Committee will, after determining if the complaint is admissible, rule whether there has been a violation of rights stipulated in ICCPR. So far there have not been any inter-State complaints.

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### 3.3.2 CAT and Committee against Torture

The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter CAT) was adopted by the General Assembly in 1984 and entered into force in 1987. It was formed on the basis of Declaration of the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The preamble of CAT refers to article 5 UDHR and article 7 ICCPR. The United States ratified CAT in October 1994.

The prohibition - or outlawing - of torture is not stated in CAT[27]. The articles in CAT stipulate measures that States party to CAT have to take in order to prevent torture and – in some cases – also inhumane treatment. According to Burgers and Danelius (1988) CAT is based upon the recognition that torture and inhumane treatment are already outlawed under international law and that the principle aim of CAT is to strengthen the existing prohibition (Burgers and Danelius, 1988:1). It is stated in the preamble "Desiring to make more effective the struggle against torture and other cruel, inhumane or degrading treatment or punishment throughout the world". Ingelse argues that even though torture was prohibited in other human rights instruments, CAT was not inappropriate. With CAT States party to the convention were now explicitly obliged to take specific effective measures in order to prevent and combat torture and "there was no longer any place for discussions regarding whether or not such obligations existed" (Ingelse, 2001:83). Boulesbaa argues that a State party to ICCPR and CAT are not held strictly liable for any and all acts of torture committed in territories under their control. A state can never guarantee that torture will not occur, but thus it can only be liable for failures to implement the preventive measures laid down in CAT (Boulesbaa, 1990:56).

Generally international human rights treaties stipulate the standards and a monitoring mechanism. CAT is unique because it stipulates measures States party to the convention should take in order to prevent torture from happening. States party to

[27] However, article 2 (1) states "Each Party shall take effective legislative, administrative, judicial or other measures to *prevent* acts of torture in any territory under its jurisdiction" [Emphasis added]. Thus the State Party has the obligation to prevent torture under CAT, but freedom from torture is not stated as a right in CAT.

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CAT have, in order to prevent torture and inhumane treatment, the obligation to educate and inform law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody that torture is prohibited. In case of allegations of torture the State Party has the obligation to investigate the allegations and if the allegations are true and if there is a case of torture the State has to make sure that the guilty persons are prosecuted. Moreover, the States Parties have to make sure that they do not extradite persons to other States where they are in danger of being tortured. Many of the same obligations can be found in General Comment no. 20 on article 7 ICCPR and in General Comment no. 21 on article 10 ICCPR both from the Human Rights Committee. Thus, even if a State party to ICCPR has not ratified CAT it still has some of the same obligations. For example according to the Human Rights Committee's General Comment no. 20 a State party to ICCPR has the responsibility to give appropriate instruction or training to enforcement personal, medical personnel, police officers and any other persons involved in the custody or treatment of any individual subjected to any form of arrest, detention or imprisonment[28], to keep interrogation rules, instructions, methods and practices as well as arrangements for the custody under systematic review[29] and prompt and impartial investigation by competent authorities[30]. Like States party to ICCPR, States party to CAT have to submit an initial report one year after ratification and then every four years submit a periodic state report in which they state which measures it has taken to improve human rights. In case of the reports of gross violations of CAT the United Nations' Committee against Torture (Hereinafter Committee against Torture) can ask a state to submit a special report.

Article 20 gives the Committee against Torture a mandate to make an inquiry if it has received "reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party". The purpose of article 20 is to issue statements on "situations" of systematic torture and to promote compliance with the Convention (Ingelse, 2001:158). "Reliable information" can be submitted by international and national governmental institutions

[28] 'General Comment no. 20', United Nations' Human Rights Committee, paragraph 10.
[29] 'General Comment no. 20', United Nations' Human Rights Committee, paragraph 11.
[30] 'General Comment no. 20', United Nations' Human Rights Committee, paragraph 14.

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and international and national NGOs and private persons. Article 20 (3) states that if a state party agrees the investigation can include a visit to the country. According to article 20 (5) the Committee against Torture is bound to confidentiality regarding the inquiry and can only publish a summary of the results in its annual reports after consultation with the concerned state. Not many countries have accepted an inquiry under article 20 CAT, which according to Roland Bank (2001) can be explained by the stigmatising effect the initiation of an inquiry produces (Bank, 1997:6). The Committee against Torture can make conclusion on entirely NGO reports, for example the Committee against Tortures investigation of Egypt in 1996 was based on NGO reports. Under article 28 CAT States can opt out of article 20 CAT. The United States has not used article 28 CAT to opt out of article 20 CAT and thus the Committee against Torture does have the mandate to investigate the treatment of detainees at Guantanamo if it receives complaints.

Article 21 is about inter-state complaints similar to the inter-state complaint under article 41 in ICCPR. The United States has recognised the competence of the Committee against Torture regarding inter-state complaints[31].

Article 22 enables the Committee against Torture to consider complaints from individuals. However, United States has not recognised the competence of the Committee against Torture to consider individual complaints against the United States.

The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter CAT – OP 1) was adopted in December 2002 and available for signature, ratification or accession from February 2003. The purpose of CAT – OP 1 is according to article 1:

> [T]o establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

[31] Upon ratification the United States declared; “The United States declares, pursuant to article 21, paragraph 1, of the Convention, that it recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention. It is the understanding of the United States that, pursuant to the above-mentioned article, such communications shall be accepted and processed only if they come from a State Party which has made a similar declaration”.

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By April 2005 only 29 states had signed, of which 6 had ratified, the United States has neither signed nor ratified, and CAT –OP 1 has not entered into force yet[32].

The duties of the Committee against Torture are to issue General Comments, reviewing periodical state reports, investigate individual complaints, state complaints and investigate information regarding systematic practice of torture. Regarding issuing of General Comments, reviewing of state reports and investigation of individual complaints[33] the Committee against Torture works like the Human Rights Committee.

Ingelse (2001) regrets the fact that there was established a Committee against Torture separately from the Human Rights Committee. His concerns are whether the two committees would build up a synchronous practice, if the Committee against Torture would go further than the Human Rights Committee (Ingelse, 2001:83) and he argues that institutional coordination is still lacking (Ingelse, 2001:116). I do not agree with Ingelse. In Concluding Observations from both the Human Rights Committee and the Committee against Torture comment on issues like the use of torture and *refoulement* of persons to states where they risk torture. The fact that two committees are able to be in dialogue with states regarding torture and inhumane treatment can only be an advantage for the prohibition of torture and inhumane treatment. However, Jurisprudence from the Human Rights Committee and the Committee against Torture shows that the two committees are working with different issues. The Human Rights Committee deals with complaints of torture or inhumane treatment of persons deprived of their liberty[34]. Most of the individual complaints that have been before the

[32] CAT – OP 1 will enter into force 30 days after 20 states have ratified or acceded according to article 20(1) CAT – OP 1.

[33] The Committee against Torture can, according to article 22 (5) (a), only review complaints that are not being or have not been examined by another procedure of international investigation, whereas the Human Rights Committee can review complaints that have been reviewed by another international procedure, but not complaints that currently is being reviewed.

[34] In *Ristic v. Yugoslavia* the Committee against Torture previously has stated: "With regard to articles 2 and 16, the Committee first considers that it does not fall under its mandate to assess the guilt of persons who have allegedly committed acts of torture or police brutality. Its competence is limited to considering whether the State party has failed to comply with any of the provisions of the Convention. In the present case, the Committee will therefore not pronounce itself on the existence of torture or ill-treatment". (*Ristic v. Yugoslavia*, CAT/C/26/D/113/1998, paragraph 9.3). However, in a later case, the Committee against Torture ruled: "The complainant alleges violations by the State party of article 2, para. 1 in connection with article 1, and of article 16, para. 1 of the Convention. The Committee notes in this respect the description made by the complainant of the treatment he was subjected to while in

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Committee against Torture concern violations of non-refoulement obligations as stated in article 3 CAT. Other individual complaints that have been reviewed by the Committee against Torture regard violations of article 12 (prompt and impartial investigation), article 13 (right to complain and to have the case promptly and impartially examined by competent authorities), article 14 (compensation) and article 15 (statements made under torture cannot be used in any proceedings). Thus the two committees are working with different issues when examining individual complaints.

The United States submitted its initial state report, which was due in 1995, in 1999. In May 2004 the Committee against Torture requested the United States for "updated information concerning the situation in places of detention in Iraq, up to the time of the submission of the report" (US SD, 2005) and in May 2005 the United States submitted its second state report.

### 3.3.3 Special Rapporteur on Torture

In 1985 the Commission on Human Rights decided to appoint a special Rapporteur for Torture. When the Special Rapporteur on Torture receives information about alleged cases on torture there are three procedures for responding. First, he can send a letter to the state. Second, he can issue an urgent appeal to the state that certain individuals are being tortured. Third, he can, if the government of that State agrees, visit the State against which allegation of torture have been made. The Special Rapporteur on Torture can publicly announce which countries he will visit and publish the whole report of the visit.

According to Bank the aim of all three procedures is promoting improvements through an assessment of legal structures and everyday realities of specific countries (Bank, 1997:3). Bank states that during the first years of the Special Rapporteurs on

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detention, which can be characterized as severe pain or suffering intentionally inflicted by public officials in the context of the investigation of a crime, and the written testimonies of witnesses to his arrest and release that the complainant has provided. The Committee also notes that the State party has not contested the facts as presented by the complainant, which took place more than five years ago. In the circumstances the Committee concludes that due weight must be given to the complaint's allegations and that the facts, as submitted, constitute torture within the meaning of article 1 of the Convention" (*Dimitrijevic v. Serbia and Montenegro* CAT/C/33/D/207/2002 paragraph 5.3).

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Torture's mandate the two first procedures were restricted to individual cases, but has since been enlarged to the aim of making a greater impact in those countries where the practice of torture is thought to be more pervasive (Bank, 1997:2).

The Special Rapporteur on Torture works informally and fast contrary to the individual complaint procedure that is a formal review by the treaty bodies.

### 3.4 Article 7 ICCPR, article 10(1) ICCPR and article 16(1) CAT (The prohibition on Torture and Inhumane Treatment)

Torture and inhumane treatment is prohibited in UDHR. Article 5 UDHR reads:

> No one shall be subjected to torture or to cruel, inhuman or degrading, treatment or punishment.

Regarding the treatment of detainees there are in addition to UDHR Standard Minimum Rules for the Treatment of Prisoners, Body Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and Code of Conduct for Law Enforcement Officials. Joseph, Schultz and Castan argue that the Standard Minimum Rules for the Treatment of Prisoners and maybe other codes as well, have been elevated to norms of international treaty law in article 10 (1) ICCPR (Joseph, Schultz and Castan, 2000:190). In *Mukong v. Cameroon* the Human Rights Committee stated:

> As regards to the conditions of detention in general, the Committee observes that certain minimum standards regarding the conditions of detention must be observed regardless of a State party's level of development. These include, in accordance with rules 10, 12, 17, 19 and 20 of the Standard Minimum Rules for the Treatment of Prisoners…minimum floor space and cubic content of air for each prisoner, provisions of a separate bed and provision of food of nutritional value adequate for health and strength[35].

Thus even though the Standard Minimum Rules for the Treatment of Prisoners is not strictly speaking a legal binding document, it can have the same effect as a treaty.

[35] *Mukong v. Cameroon*, CCPR/C/51/D/458/1991, paragraph 9(3).

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The prohibition of torture and inhumane treatment is mentioned in Body Principles for the Protection of All Persons. Principle 1 reads: “All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person”.

For the legal binding treaties freedom from torture and inhumane treatment is guaranteed in article 7 ICCPR and article 10(1) ICCPR.

Article 7 ICCPR reads:

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 10 (1) ICCPR complements article 7 ICCPR. It reads:

> All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

According to Joseph, Schultz and Castan the jurisprudence from the Human Rights Committees shows that article 10 (1) ICCPR seems to be more applicable in cases of poor detention conditions in general (Joseph, Schultz and Castan , 2000:173 and 187), while article 7 ICCPR is applicable in cases of treatment of persons. However, *Lobban v. Jamaica* the Human Rights Committee has stated:

> In the light of this finding in respect of article 10, a provision of the Covenant dealing specifically with the situation of persons deprived of their liberty and encompassing for such persons the elements set out generally in article 7, it is not necessary separately to consider the claims arising under article 7 of the Covenant[36].

Thus it seems as if the new practice from the Human Rights Committee is not to distinguish between violations of article 7 ICCPR and article 10 ICCPR. However, the

[36] *Lobban v. Jamaica* CCPR/C/80/D/797/1998, paragraph 8(2). The Human Rights Committee has made similar statements in other recent cases. E.g. *Pryce v. Jamaica* CCPR/C/80/D/793/1998, paragraph 6 (3), *Arutyunyan v. Uzbekistan*, CCPR/C/80/D/917/2000, paragraph 6(2), and *Siewpersaud, Sukhram, and Persaud v. Trinidad and Tobago*, CCPR/C/81/D/938/2000, paragraph 6(3).

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jurisprudence from the Human Rights Committee gives examples of violations of article 7 ICCPR and article 10(1) ICCPR respectively.

Examples of violations of article 7 ICCPR are; physically beaten[37], deprivation of food and drink for four days[38], prevention of contact with his family and with the outside world[39].

Examples of violations of article 10 (1) ICCPR are; denial of visit of family and severe censorship of correspondence[40], held in incommunicado for months[41], lack of medical and dental care[42], not being able to speak without supervision with officials from the Embassy[43], and only being allowed five minutes per day for personal hygiene and another five minutes for exercise in the open air[44].

The United States declared "war on terrorism" and used September 11 to limit some of the rights of the detainees at Guantanamo. Article 10 ICCPR can be derogated from in times of public emergency, however, the United States has never, not even after September 11, declared a state of public emergency. According to article 4 (1) and (2) a State party to ICCPR cannot derogate from article 7 not even "[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed". This is reaffirmed in General Comment no. 20, paragraph 3:

> The Committee also reaffirms that, even in situations of public emergency such as those referred to in article 4 [ICCPR], no derogation from the provision of article 7 is allowed and its provisions must remain in force.

Freedom from Torture as a non-derogable right is also stated in CAT. Article 2 (2) CAT also states that there is no justification for torture. The article reads:

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[37] *De Lopez v. Uruguay*, CCPR/C/13/D/52/1979, paragraph 11(3).
[38] *Birindwa and Tshisekedi v. Democratic Republic of Congo*, CCPR/C/37/D/242/1987, paragraph 13.
[39] *N'Goya v. Democratic Republic* CCPR/C/56/D/542/1993, paragraph 5(5).
[40] *Estralla v. Uruguay* CCPR/C/18/D/74/1980, paragraph 9(2).
[41] For example *de Bazzano v. Uruguay* CCPR/C/7/D/5/1977, paragraph 10, *Pietraroia v. Uruguay* CCPR/C/12/D/44/1979 paragraph 17, *de Casariego v. Uruguay* CCPR/C/13/D/56/1979 paragraph 11, *Altesor v. Uruguay* CCPR/C/15/D/10/1977 paragraph 15, *de Romero v. Uruguay* CCPR/C/21/D/85/1981 paragraph 13, *El-Megreisi v. Libyan Arab Jamahiriya* CCPR/C/50/D/440/1990 paragraph 5(4).
[42] *Lewis v. Jamaica* CCPR/C/57/D/527/1993, paragraph 10(4).
[43] *Wolf v. Panama* CCPR/C/44/D/289/1988, paragraph 6(7).
[44] *Parkanyi v. Hungary* CCPR/C/45/D/410/1990, paragraph 8(3).

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> No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

Principle 6 in Body of Principles for the Protection of All Persons under Any Form of Detention and Imprisonment reads: "No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstances whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment."

The fact that a state or threat of war exists, internal political instability or in situations of public emergency does not allow the use of torture has also been stated in Concluding Observations. Regarding Republic of Korea, which technically still is in war with People's Democratic Republic of Korea, and Israel, where there frequently have been Palestinian suicide bombers, the Committee against Torture has stated following;

In Concluding Observation for the Republic of Korea, the Committee against Torture stated:

> The Committee has tried to take this fact into consideration in formulating its conclusions and recommendations. However, it must be emphasized that no exceptional circumstances can ever provide a justification for failure to comply with the terms of the Convention[45].

In the Committee against Torture's Concluding Observation from 1997 on Israel it stated:

> The Committee acknowledges the terrible dilemma that Israel confronts in dealing with terrorist threats to its security, but as a State party to the Convention Israel is precluded from raising before this Committee exceptional circumstances as justification for acts prohibited by article 1 of the Convention. This is plainly expressed in article 2 of the Convention[46].

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[45] 'Concluding Observations of the Committee against Torture: Republic of Korea 1996',A/52/44, paragraph 54.

[46] 'Concluding Observations of the Committee against Torture: Israel, A/52/44', paragraph 258. In 2001 the Committee against Torture stated almost the same; "The Committee is fully aware of the difficult situation of unrest faced by Israel, particularly in the Occupied Territories, and understands its security concerns. While recognizing the right of Israel to protect its citizens from violence, it reiterated that no exceptional circumstances may be invoked as justification of torture (art. 2.2 of the Convention)." ('Concluding observations of the Committee against Torture: Israel', CAT/C/XXVII/concl.5, paragraph 5).

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### 3.5 Article 1(1) CAT (The Definition of Torture)

Even though torture is prohibited in ICPPR, there is no definition of torture in ICCPR or in any General Comments from the Human Rights Committee. In General Comment no. 20, paragraph 4, on article 7 ICCPR the Human Rights Committee wrote:

> The Covenant does not contain any definition of the concepts covered by article 7 [ICCPR], nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinction depends on the nature, purpose and severity of the treatment applied.

The reason could be that in the view of the Human Rights Committee the aim of article 7 "is to protect the dignity and the physical and mental integrity of the individual"[47].

#### 3.5.1 Definition of Torture

In order to find a definition of torture we have to look at article 1 (1) CAT. It reads:

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

There are four pillars in the definition; intensity of pain, the purpose, status of the perpetrator and lawful sanctions.

Torture is an "infliction of severe pain or suffering". Burgers and Danelius explain that the drafters of CAT considered "severe pain" sufficient to convey the idea that only acts of a certain gravity should be considered to constitute torture. According

[47] 'General Comment no. 20', United Nations' Human Rights Committee, paragraph 2.

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to Burgers and Danelius the most characteristic and easily distinguishable case of physical pain would be beating, kicking or similar acts or pain inflicted with help of objects such as canes, knives, cigarettes or metal objects which transmit electrical shocks (Burgers and Danelius, 1998:117). Since the Human Rights Committee has decided not to make any "distinction between the different kinds of punishment or treatment", the Human Rights Committee seldom specifies a violation of article 7 ICCPR is torture or inhumane treatment, rather it just describes it as "violation of Article 7"[48]. Joseph, Schultz and Castan raise the question whether the "intention" relates to an intention to cause pain and suffering, or an intention to commit the actual act. They conclude that it seems to be intent to cause pain and suffering (Joseph, Schultz and Castan , 2000:141-142).

In order to constitute torture there has to be a purpose with the infliction of pain. The purposes are; to obtain information or a confession, punishment, intimidation or coercion and discrimination. Burgers and Danelius state that the common element of the purposes referred to in the definition should be understood to be the existence of some – even remote – connection with the interest or policies of the State and its organs (Burger and Danelius, 1998:118-119). According to Burgers and Danelius pain or suffering of an accident or of mere negligence would not be torture (Burger and Danelius, 1998:118). Thus, if a detainee is hit by a falling bookshelf and the authorities had no control over the fall of the bookshelf, it would not be torture or inhumane treatment.

According to the definition in article 1 (1) CAT it is only a "public official or other person acting in an official capacity" who is capable of torture[49]. Thus, if a

[48] However, in a few cases the Human Rights Committee has stated that acts were torture, for example forced to remain standing for 14 hours, electric shocks and bastinado (blows) (*De Bazzano v. Uruguay*, CCPR/C/7/D/5/1977, paragraph 2), repeated beatings (*De Bazzano v. Uruguay*, CCPR/C/7/D/5/1977, paragraph 6.2), time spent on death row…because of the patently unfair proceedings at trial and the manifestly unsound verdict which resulted in the helplessness and anxiety placed on the author given he was wrongly convicted (*Wilson v. the Philippines*, CCPR/C/70/D/868/1999, paragraph 3.2), handcuffed to a radiator and beaten up by several police officers, struck by a big metal bar and later subjected to punching and beating with nightsticks and metal bars (*Dimitrijevic v. Serbia and Montenegro*, CAT/C/33/D/207/2002, paragraph 2.1).

[49] However, the Human Rights Committee has stated that "[i]t is the duty of the State party to afford everyone protection…against acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity" ('General Comment no. 20, paragraph 2').

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person in his or her private capacity or as a member of a group inflicts severe physical or mental pain or suffering to another person it is not considered as torture[50].

The definition excludes "pain or suffering arising only from, inherent in or incidental to *lawful sanctions*" [emphasis added]. Joseph, Schultz and Castan interpretate it as for example, imprisonment for a serious crime is "lawful" and the pain and suffering caused by such imprisonment to an extremely claustrophobic person would be excluded from the definition (Joseph, Schultz and Castan, 2000:147). In *Voulanne v. Finland* the Human Rights Committee stated:

> [T]he Committee expresses the view that for punishment to be degrading, the humiliation or debasement involved must exceed a particular level and must, in any event, entail other elements beyond the mere fact of deprivation of liberty[51].

An example is the fact of being on death row. The Human Rights Committee has stated in several cases that being on death row and delays in executions *per se* does not constitute torture or inhumane treatment[52], however circumstances regarding death row in *Pratt and Morgan v. Jamaica* the Human Rights Committee found that the fact that Mr. Earl Pratt and Mr. Ivan Morgan were not notified until 45 minutes before execution, and close to 29 hours after the executions were granted, was a violation of inhumane treatment within the meaning of article 7 ICCPR[53].

The definition of torture in IHRL is narrower than the definition in IHL, which only had two pillars "infliction of pain or suffering" and for the purpose of getting "information or confession". One could argue that even the definition of torture in article 1(1) CAT is too narrow; however considering the fact that the definition covers the articles in CAT it seems reasonable that a State party to CAT is only able to apply the articles for persons who act "in an official capacity".

[50] It would be a violation of the Right to Security, which is guaranteed under article 9 ICCPR.
[51] *Vuolanne v. Finland* CCPR/C/35/D/265/1987, paragraph 9(2).
[52] For example *Taylor v. Jamaica* CCPR/C/62/D/705/1996 paragraph 7(4).
[53] *Pratt and Morgan v. Jamaica* CCPR/C/35/D/225/1987, paragraph 13 (7).

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The definition of torture does not say when torture starts. Generally torture is believed only to take place in order to obtain information or confessions, but it is important to emphasise that if the purpose of inflicting pain and suffering is punishment, intimidation and/or coercion it is also torture. It is not uncommon in cases where the authorities want information from a person that the person is being "prepared" first, that is physically or mentally tortured or treated inhumanely so he or she is weaker when the interrogation torture starts.

### 3.5.2 Other Cruel, Inhuman or Degrading Treatment of Punishment

Regarding "other cruel, inhuman or degrading treatment or punishment" article 16(1) CAT states that no one should be subject to cruel, inhumane or degrading treatment or punishment "which does not amount to torture as defined in article 1 [CAT]". However, CAT does not give any definition of "other cruel, inhumane or degrading treatment or punishment"[54]. The only definition of "cruel, inhumane or degrading treatment or punishment" that has been made within the United Nations' human rights standards is a footnote to principle 6 in Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment adopted by General Assembly 9th December 1988. The footnote reads:

> The term 'cruel, inhuman or degrading treatment or punishment' should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.

The footnote is not a strict definition of "cruel, inhumane or degrading treatment or punishment", but states "widest possible protection against abuses, whether physical or mental" should be taken. The footnote, however, states "deprivation, temporarily or permanently, of any natural senses is "cruel, inhumane or degrading". It does not say

[54] According to Ingelse it is because at the time CAT was drawn up, no agreement could be reached on a universally accepted definition of cruel, inhumane or degrading treatment or punishment (Ingelse 2001, page 207).

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if there need to be a purpose or if it is only persons in official capacity that can commit "cruel, inhumane or degrading treatment or punishment".

In jurisprudence the Human Rights Committee has stated that among other things that deprivation of food and drink for four days[55] and being abducted under circumstances that have not been clarified and have no contact with family or the outside world[56] amounted to "cruel and inhumane treatment".

It is important to keep in mind that torture and inhumane treatment is not only physical pain, but also mental distress. In an individual complaint a mother whose daughter had been abducted by Uruguayan security forces and fate was unknown, complained that the mental distress of not knowing the fate of her daughter was a violation of article 7 ICCPR. The Human Rights Committee decided the following[57]:

> The Committee understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author has the right to know what has happened to her daughter. In these respects, she too is a victim of the violations of the Covenant suffered by her daughter in particular, of article 7 [ICCPR].

In *Sarma v. Sri Lanka* the author's son had been abducted by Sri Lankan Army and the author accidentally saw his son after some 15 months. The Human Rights Committee found the author and his wife were victims of violation of article 7 ICCPR because of the anguish and stress caused by the disappearance of the son and by continuing uncertainty concerning the sons fate and whereabouts[58].

Joseph, Schultz and Castan note that in many cases of allegations of violation of article 7 ICCPR, the Human Rights Committee has only to consider whether there was enough evidence that certain acts had occurred, rather than whether the alleged acts breached article 7. This is because numerous cases have raised allegations of acts that

[55] *Birindwa and Tshisekedi v. Democratic Republic of Congo*, CCPR/C/37/D/242/1987, paragraph 13
[56] *N'Goya v. Democratic Republic of Congo*, CCPR/C/56/D/542/1993, paragraph 5(5).
[57] *De Quinteros v. Uruguay*, CCPR/C/19/D/107/1981, paragraph 14.
[58] *Sarma v. Sri Lanka*, CCPR/C/78/D/950/2000, paragraph 9(5).

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are so atrocious that they undoubtedly breach article 7 ICCPR (Joseph, Schultz and Castan, 2000:190). In the case *Lewenhoff and de Bleier v. Uruguay*, the Human Rights Committee has stated:

> With regard to the burden of proof, this cannot rest alone on the author of the communication, especially considering that the author and the State party does not always have equal access to the evidence and that frequently the State party alone has access to relevant information…In cases where the author has submitted to the Committee allegations supported by substantial witness testimony…and where further clarification of the case depends on information exclusively in the hands of the State party, the Committee may consider such allegations as substantiated in the absence of satisfactory evidence and explanations to the contrary submitted by the State party[59].

Thus it is the State party to ICCPR that has to refute the allegations, and not the individual proving it.

### 3.5.3 Equal Prohibition of Torture and Inhumane Treatment

The fact that the two terms; "torture" and "other cruel, inhuman or degrading treatment or punishment" has been separated in CAT has two regrettable consequences.

First, not all the articles in CAT cover "other cruel, inhuman or degrading treatment or punishment". In fact, apart from article 16 CAT (about the obligation to prevent "acts of cruel, inhuman or degrading treatment or punishment) only article 10 CAT (about education of law enforcement personnel), article 11 CAT (systematic review of interrogation rules), article 12 CAT (prompt and impartial investigation) and article 13 CAT (an individual's rights to complain and have allegation investigated), deal with other cruel, inhuman or degrading treatment, the remaining articles relate only to torture. As a result a person can be expelled, return or extradited to a country where he or she is at risk of inhumane treatment, because article 3 CAT does only apply to torture. A person has a right to redress and compensation only in cases of

[59] *Lewenhoff and de Bleier v. Uruguay* CCPR/C/15/D/30/1978, paragraph 13 (3). This was repeated in *Kurbanova v. Tajikistan*, CCPR/C/79/D/1096/2002, paragraph 7.4.

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torture according to article 14 CAT[60]. Statements made under inhumane treatment can be used as evidence in any proceedings, as it is only statements made under torture that cannot be used according to article 15 CAT. Article 20 CAT, which gives the Committee against Torture competence to investigate well-founded indications of systematic use of torture, cannot be used in cases of inhumane treatment. Thus, persons who are at risk of or are suffering "only" from cruel, inhuman or degrading treatment or punishment do not have the same rights as persons who are at risk of or are suffering torture.

Second, the division of torture and inhumane treatment has implicitly made treatment of detainees an issue whether it is torture (according to the legal definition) or not. It is very unfortunate as it gives the impression that if it is not torture, then it is acceptable. *The Wall Street Journal* reported that interrogators are learned techniques that are just a hair's breath away from being torture (Quoted in Levinson, 2003:2025). As Sanford Levinson states: "We must be as attentive, intellectually and emotionally, to 'inhumane and degrading' acts as to 'torture', lest we fall victim to accepting anything 'short of torture' as in fact fully acceptable, morally even if not legally" (Levinson, 2004a:39). By making a big distinction between "torture" and "inhumane treatment" and only condemning "torture" the international society, states, as well as human rights defenders, leave victims of inhumane treatment high and dry.

In order to avoid the above-mentioned situation, it is important to emphasise that "torture" and "other cruel, inhuman or degrading treatment" is prohibited equally in international law. The Human Rights Committee has stated that it "considers violations of article 7 [ICCPR] and 10, paragraph 1, [ICCPR] to be extremely serious"[61]. The Human Rights Committee has decided not to distinguish between torture and inhumane treatment or "treated with humanity and with respect for the inherent dignity of the human person" it is not relevant to the definition when an act of torture starts. Any treatment of a person that is "torture", "cruel, inhuman or

[60] However, in a recent jurisprudence the Committee against Torture stated: "Nevertheless, article 14 of the Convention does not mean that the State party is not obliged to grant redress and fair and adequate compensation to the victim of an act in breach of article 16 of the Convention." (*Dzemajl v. Yugoslavia*, CAT/C/29/D/161/2000, paragraph 9.6).

[61] *Dunaway and Zelaya v. Nicaragua*, CCPR/C/51/D/328/1988, paragraph 10(6).

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degrading" or is not "with humanity or respect for the inherent dignity of the person" is a serious violation of ICCPR according to the Human Rights Committee, whether it is at the arrest, during interrogation or detention facilities.

### 3.6 Article 2 ICCPR (Territorial Responsibility)

Not much research has been done regarding territorial and jurisdictional responsibilities under United Nations' human rights treaties. It might stem from the fact that the purpose of international human rights law was about the obligations that states have towards its citizens in order to prevent human rights violations. The detainees have been captured and detained outside American territory and in order to determine whether ICCPR is applicable it is necessary to analyse the general responsibility under ICCPR, which is stated in article 2 (1) ICCPR, which reads:

> Each State Party to the present Covenant undertakes to respect and to ensure to *all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant*, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, birth or other status. [Emphasis added]

Gibney, Tomasevski and Vedsted-Hansen argue that the territorial limitation of international human rights law is conflicting with the idea of universality of human rights. Admitted, when the human rights are territorial limited they are no longer universal in the sense that they are not applicable for everybody everywhere. However, I do not believe that it was the idea with the universality concept when international human rights law was founded. As treaties are only binding to states that are party to a treaty the territorial universality is already ruined. The universality in international human rights should not be seen as territorial applicability but for the reasons stated in article 1 in UDHR, which states; "All human beings are born free and equal in dignity and human rights".

Article 29 in the Vienna Convention on the Law of Treaties (hereafter the Vienna Convention) states about the territorial scope of treaties: "Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party

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of its entire territory". Article 29 in the Vienna Convention thus states that a treaty is only binding in the territory of a State party to a treaty unless it is stated in the treaty. However, paragraph 4 in the General Comment no. 23, on article 27 the Human Rights Committee referred to article 2 (1), as applying to all individuals "within the territory *or* under the jurisdiction of the state" [emphasis added]. In the light of General Comment no. 23 on article 27 in and paragraph 10 in General Comment no. 31 I would argue that article 2, paragraph 1, ICCPR should be understood that the state party to the ICCPR has responsibility for individuals in its territory plus individuals under its jurisdiction.

Joseph, Schultz and Castan state that article 2 (1) ICCPR "seem to expressly to exclude liability for a State Party for acts which occur outside its territory" (Joseph, Schultz and Castan, 2000:59), but that "the [Human Rights Commission] has interpreted the jurisdictional limits of state responsibility broadly to apply extraterritorially, despite the wording of article 2 (1) ICCPR" (Joseph, Schultz and Castan, 2000:62). Theodore Meron believes that "the purposes and objects of human rights treaties, there is no *a priori* reason to limit a state's obligation to respect human rights to its national territory" (Meron, 1995:80). Like Joseph, Schultz and Castan, Meron finds that the jurisprudence of Human Rights Committee does not support a narrow territorial interpretation.

In *de Lopez v. Uruguay* the Human Rights Committee stated: "[I]t would be unconscionable to so interpret the responsibilities under article 2 [ICCPR] as to permit a State Party to perpetrate violations of [ICCRP] on the territory of another State, which violations it could not perpetrate on its own territory"[62]. Thus the provisions in ICCPR are applicable outside the territory of a State party to ICCPR[63].

[62] *De Lopez v. Uruguay* CCPR/C/13/D/52/1979, paragraph 12(3).
[63] In May 2004 the Human Rights Committee issued a General Comment which stated: "[A] State party must respect and ensure the rights laid down in [ICCPR] to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party…This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained" ('General Comment no. 31,United Nations' Human Rights Committee, paragraph 10).

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### 3.7 The Issue of Reservations

"Ratify or ruin?". The subtitle to Liesbeth Lijnzard's book on "Reservations to United Nations' Human Rights Treaties" reflects the dilemma about reservations to human right treaties. If reservations are allowed it ruins the philosophy that all human rights are equal for all human beings. On the other hand it could be argued that if States could not make reservations then in some cases they would not ratify a human rights treaty and it is better to have more States ratifying the human rights treaties, even if there are some reservations. This section will not discuss the dilemma if reservations should be permitted or not, but look at the technicalities about when a reservation is permissible or not.

Reservations can be made for various reasons, among them clarification or acknowledging that a State is not able to fulfil an obligation, uncertainty, but according to Lijnzard (page 79) common for the reasons for making reservations is to minimize the responsibility of the State. A reservation to a treaty cannot be incompatible with the object and purpose of the treaty. Article 19 Vienna Convention on the Law of Treaties (hereinafter the Vienna Convention) reads:

> A State may, when signing, ratifying, accepting, approving or acceding to a treaty formulate a reservation unless:
> (a) The reservations in prohibited by the treaty
> (b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
> (c) In cases not falling under sub-paragraphs (a) and (b), *the reservation in incompatible with the object and purpose of the treaty*.
> [emphasis added]

According to article 2(1)(d) Vienna Convention a reservation is defined as following:

> [A] unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application of that State.

Thus, a reservation does not have to be called "reservation" by the reserving State, but any "unilateral statement, however phrased or named" is a reservation.

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The Human Rights Committee stated in General Comment No. 24: "It necessarily falls to the [Human Rights Committee] to determine whether a specific reservation is compatible with the object and purpose of [ICCPR]"[64]. It stated: "provisions in [ICCPR] that represent customary international law…may not be subject of reservations. Accordingly, a State may not reserve the right…to torture, to subject persons to cruel, inhuman or degrading treatment or punishment…"[65] and "[n]or may a State reserve an entitlement not to take the necessary steps at the domestic level to give effect to the rights of [ICCPR]…"[66].

Whether the Human Rights Committee is, or other human rights monitoring bodies are, qualified to determine if a reservation is compatible with the object and purpose of the treaty to which a reservation is made is a dispute among legal scholars. The core of the discussion is about how the Vienna Convention should be interpreted. The Vienna Convention is based on the assumption that treaties are bilateral agreements between States and the question regarding reservations is whether human treaties are sufficiently different from other treaties and if article 20(3) Vienna Convention apply for human rights treaties. It reads:

> When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

Lijnzard divides the discussion among scholars into two; the traditional system and the institutional system (Lijnzard, 1995:96).

The traditional system argues that article 20(3) does not apply for human rights treaties, because human rights treaties are not different from other international treaties. The obligations are reciprocal and if a reservation is to be considered as incompatible other State Parties to the relevant human rights treaty have to object and declare that the treaty is not entered into force between the two States. The critique of the traditional system is that States only object if their interest is at stake. Human rights treaties are generally about a State's obligations towards its own nationals and

[64] 'General Comment No. 24',United Nations' Human Rights Committee, paragraph 18.
[65] 'General Comment No. 24', United Nations' Human Rights Committee, paragraph 8.
[66] 'General Comment No. 24', United Nations' Human Rights Committee, paragraph 9.

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thus other States do not see any interest in objecting. It is the government that is objecting and therefore an objection could easily be linked to international policy.

The institutional system argues that article 20(3) applies for human rights treaties, because it is not a bilateral, but multilateral treaties, and it is the monitoring bodies which decide if a reservation is compatible with the object and purpose of the relevant treaty.

The United Nations' Office of Legal Affairs stated in 1976 that the United Nations' Committee on the Elimination of Racial Discrimination did not have the competence to decide the compatibility of reservations and it made the same statement for the United Nations' Committee on the Elimination of Discrimination against Women in 1983. The two conclusions were based on article 20 Vienna Convention (Korkelia, 2002:447-448). It seems strange that the Human Rights Committee declared it was competent to decide the compatibility of reservations when the United Nations' Office of Legal Affairs two times has stated that the human rights treaty bodies are not competent to do that. It could be explained by the fact that ICCPR was adopted before the decisions from United Nations' Office of Legal Affairs, which might explain why there is no clause saying that no reservations can be made to ICCPR. CAT was not adopted before 1987 and it is surprising that it is not stated that no reservations can be made to CAT. However, the Committee against Torture is avoiding the issue about reservations in CAT – OP 1, where it has stated in article 30 that no reservations are permitted.

When the Human Rights Committee stated that it found it was one of its duties to determine whether reservations are compatible with the object and purpose of ICCPR it was aware of this disagreement when the General Comment No. 24 was issued. In paragraph 17 it stated:

> [T]he Committee believes that its provisions on the role of State objections in relation to reservations are inappropriate to address the problem of reservations to human rights treaties…because of the operation of the classic rules on reservations it so inadequate for the Covenant, States have often not seen any legal interest in or need to object to reservations. The absence of protest by

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> States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant…In short, the pattern is so unclear that it is not safe to assume that a non-objecting State thinks that a particular reservation is acceptable. In the view of the Committee, because of the special characteristic of the Covenant as a human rights treaty, it is open to question what effect objections have between States inter se.

Reservations are often written in a vague language and Lijnzard argues that reservations have to be interpreted which is often done by the monitoring body. It is exactly the same argument the Human Rights Committee used. One of its arguments for considering itself competent to determine whether a reservation is compatible with the object and purpose if ICCPR was that it "is a task the [Human Rights Committee] cannot avoid in the performance of its functions"[67]. It further stated: "Because of the special character of a human rights treaty, the compatibility of a reservation with the object and purpose of [ICCPR] much be established objectively, by reference to legal principles, and the [Human Rights Committee] is particularly well placed to perform this task"[68].

In case the Human Rights Committee decided that a reservation is not compatible with the object and purpose of ICCPR, "[ICCPR] will be operative for the reserving part without the benefit of the reservation"[69]. In *Kennedy versus Trinidad and Tabago*, the Human Rights Committee found the complaint was admissible, even though the State Party had made a reservation that complaints regarding death penalty could not be considered by the Human Rights Committee. With reference to its General Comment No. 24 the Human Rights Committee stated that it has the competence to determine if a reservation is compatible with the object and purpose of the relevant treaty[70].

Not only among scholars there is a disagreement whether it is the other States party to a human rights treaty or a human rights monitoring body that have the competence to declare a reservation incompatible with the object and purpose of the relevant treaty.

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[67] 'General Comment No. 24', United Nations' Human Rights Committee, paragraph 18.
[68] 'General Comment No. 24', United Nations' Human Rights Committee, paragraph 18.
[69] 'General Comment No. 24', United Nations' Human Rights Committee, paragraph 18.
[70] *Kennedy versus Trinidad and Tabago* (CCPR/C/67/D/845/1999), paragraph 6.4.

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Within the United Nations there seems to be disagreement; the United Nations' Office of Legal Affairs has twice stated that a monitoring body is not competent to decide whether a reservation is compatible with a treaty, but despite of this the Human Rights Committee has declared that it considers itself competent to declare a reservation compatible. Thus, the dispute about whether it is other States party to a human rights treaty or human rights monitoring bodies that are competent to determine the compatibility of a reservation is not solved legally.

The United States made reservations to the definition of "torture" and "inhumane treatment" upon acceding ICCPR and CAT. In section 4.2 it will be analysed whether the reservations are permissible or not.

### 3.8 Summary of Chapter 3

According to Geneva Convention III a person fighting on behalf of a party of an armed conflict and who has fallen into the power of the enemy. In cases where there is doubt whether a person is a POW that person has the right to have his or her status reviewed by a competent tribunal. Until such a review has taken place the person is entitled be treated as a POW. A POW only has to state his or her surname, first names rank, date of birth, and army, regimental, personal or serial number. He or she is not obligated to give any further information. Article 13, 14, 17, 21, 25, 38 and 46 Geneva Convention III protects a POW from torture and inhumane treatment.

Torture and inhumane treatment is prohibited in both the Geneva Conventions, which apply in armed conflicts, and in the UDHR and ICCPR. UDHR is not a legally binding document, but is a very morally strong document. The Geneva Conventions are applicable in armed conflicts and cannot be derogated from. Both ICCPR and CAT states that the prohibition of torture cannot be derogated from, not even in times of war or threat to national security. The prohibition of torture under ICCPR and CAT applies in the "territory and jurisdiction" of a State party to ICCPR. Furthermore CAT states that torture is a crime if a national of a State party to the CAT commits torture, regardless of the territorial status. The prohibition of torture and inhumane treatment

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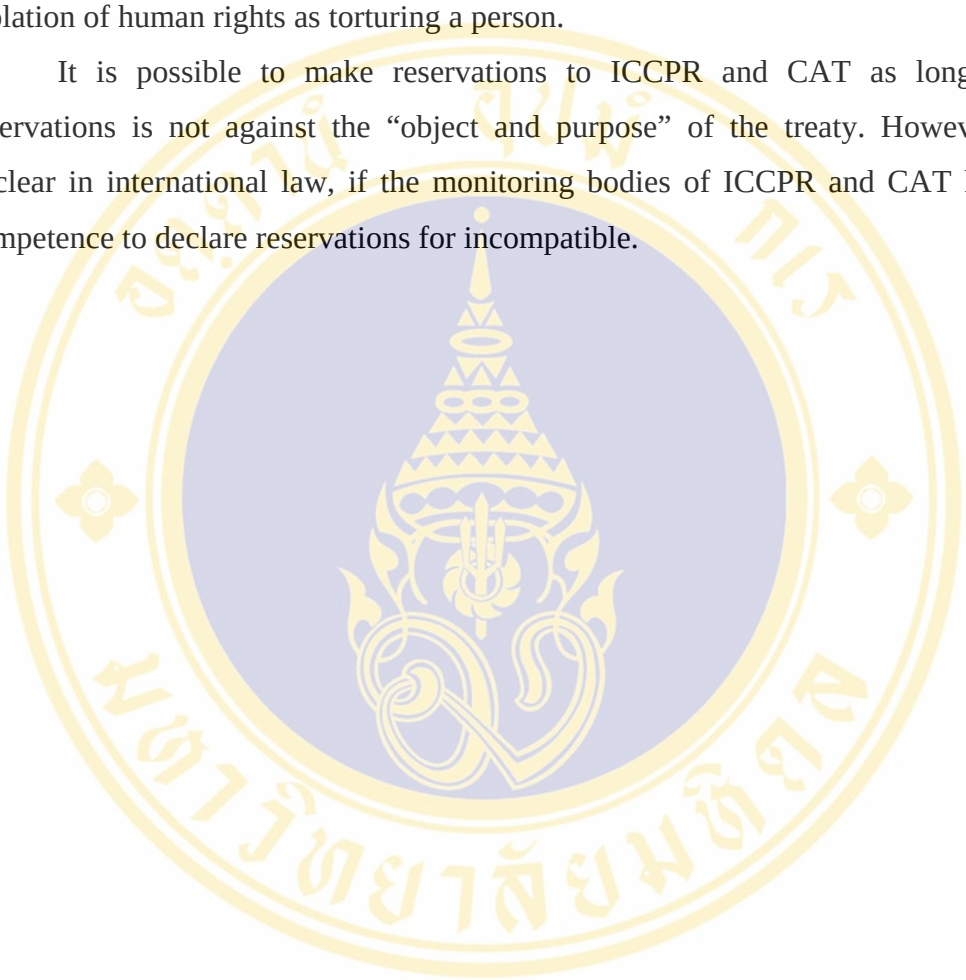
does not apply only in interrogation situations but also for transfer and detention conditions. Even though there is only a definition of “torture”, “torture” and “cruel, inhuman or degrading treatment or punishment” is equally prohibited. Subjecting a person to “cruel, inhuman or degrading treatment or punishment” is as serious a violation of human rights as torturing a person.

It is possible to make reservations to ICCPR and CAT as long as the reservations is not against the “object and purpose” of the treaty. However, it is unclear in international law, if the monitoring bodies of ICCPR and CAT have the competence to declare reservations for incompatible.



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# CHAPTER 4
# THE TREATMENT OF DETAINEES AT GUANTANAMO BY UNITED STATES' ARMED FORCES

The aim of this chapter is to analyse how the Bush Administration circumvented its obligation under international law regarding torture and inhumane treatment to be able to carry out its "war on terrorism" policy and to analyse how some of the treatment of the detainees is in violation of IHL and IHRL. The special thing about Guantanamo was that the Bush Administration in several documents discussed what the minimum standards for the treatment of persons suspected of terrorism were. This chapter will have two main sections. The first section will make a critical analysis of the treatment of the detainees from the perspective of international law. It will be shown that some of the treatment of the detainees at Guantanamo were subjected to was in violation of the Geneva Convention III. In addition to that it will be shown that Concluding Observations, General Comments and jurisprudence from the Human Rights Committee and the Committee against Torture have stated that treatment similar to what the detainees at Guantanamo has been subjected to would be amounting to or in violation of article 7 ICCPR and article 10 (1) ICCPR. Upon ratification of ICCPR and CAT the United States made reservations, and in light of these reservations the Bush Administration made a very narrow definition of what constitutes torture compared with the definition in article 1(1) CAT. This will be analysed in the second section.

## 4.1 Critical Analysis of the United States' Treatment of the Detainees at Guantanamo Bay Naval Base

As mentioned earlier most academics focus on either IHL or IHRL. There have recently been some few academic works on both IHL and IHRL (for example Doswald-Beck & Vite (1993) and Freeman 2000)), however, these works tend to

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explain the differences rather than incorporating both kinds of laws in the analysis. Nigel Rodley's "Treatment of Prisoners under International Law" is an exception. In his research he has been focusing on both IHL and IHRL regarding treatment of prisoners. After the Bush Administration declared that it would use Guantanamo to detain prisoners captured in Afghanistan and declared that they were "enemy combatants" there have been some academic articles regarding treatment of detainees. There are articles either analysing the rights of the detainees from the perspective of IHL (Moore 2003) or from IHRL (Condorelli & De Sena 2004). There has also been analysis incorporating both IHL and IHRL (Caresse 2004, Sassoli 2004 and Vierucci 2004). These articles are more case studies than legal theoretical research.

### 4.1.1 Prisoners of War Status

Getting information and paralysing the Al Qaeda network were important parts of the "war on terrorism". The "war on terrorism" applied for both Al Qaeda members, members of the Taliban government and others who were suspected of having connections with Al Qaeda. Within the Bush Administration there were in January and February 2002 discussions whether to apply one of following two options regarding the conflicts with respectively the Al Qaeda and the Taliban;

- Option 1: The Geneva Conventions were not applicable, thus automatically rejecting the idea that the detainees had POW status.
- Option 2: The Geneva Conventions were applicable to the conflict, but detainees would not be entitled to POW status, because they acted as "unlawful combatants".

The legal reasoning for not accepting the applicability of the Geneva Conventions in the war against Al Qaeda was that Al Qaeda was not a High Contracting Party to the Geneva Conventions. The Office of Legal Counsel argued:

> Al Qaeda is not a State. It is a non-governmental terrorist organization composed of members from many nations, with ongoing operations in dozens of nations. Non-governmental organizations cannot be parties of any of the

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> international agreements here governing the laws of war. Common article 2, which triggers the Geneva Convention provisions regulating detention conditions and procedures for trial of POWs, is limited to cases of declared war or armed conflict "between two or more of the High Contracting Parties" (US DoJ, 2002c:9).

Though Al Qaeda was not a High Contracting Party to the Geneva Conventions, it could be argued Al Qaeda members could be entitled to POW status under article 4(A)(2) and (3) Geneva Convention III, which respectively gives POW status to members of irregular forces and to members of "regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power". The Office of Legal Counsel stated that if there is no conflict subject to common article 2, then article 4 is not applicable. As stated above the war with Al Qaeda is not subject to common article 2, because Al Qaeda is not a High Contracting member of the Geneva Conventions. Moreover the Office of Legal Counsel stated that Al Qaeda "have attacked purely civilian targets of no military value; they refused to wear uniform or insignia or carry arms openly, but instead hijacked civilian airliners, took hostages, and killed them; and they themselves do not obey the laws of war concerning the protection of the lives of civilians or the means of legitimate combat" (US DoJ, 2002c:10) and therefore Al Qaeda members do not meet the conditions stated in article 4 (A) (2).

As noted earlier Common Article 2 is complemented by Common Article 3. Common Article 3 is applicable in case of a non-international armed conflict in the territory of one of the High Contracting Parties. According to the Office of Legal Counsel Common Article 3:

> [P]rovides substantial reason to think that it refers specifically to a condition of civil war, or a large-scale armed conflict between a State and an armed movement within it own territory…It does not sweep in all armed conflicts, nor does it address a gap left by common article 2 for international armed conflicts that involve non-state entities (such as an international terrorist organization) as parties to the conflict (US DoJ, 2002c:6).

The Office of Legal Counsel further stated:

> If the state parties had intended the [Geneva] Conventions to apply to <u>all</u> forms of armed conflict, they could have used broader, clearer language…article 3 was ratified during a period in which the traditional, State-centered view of

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> international law was still dominant and was only just beginning to give way to human-rights-based approach. Giving due weight to the state practice and doctrinal understanding of the time, the idea of an armed conflict between a nation-State and a transnational terrorist organization (or between a nation-State and a failed State harbouring and supporting a transnational terrorist organization) could not have been within the contemplation of the drafters of common article 3 (US DoJ, 2002c:8).

Regarding the Taliban members, the Office of Legal Counsel under the United States' Department of Defense argued that Taliban members were not protected by the Geneva Conventions, even though Afghanistan had been a High Contracting Party to all four Geneva conventions since 1996. The Office of Legal Counsel suggested that President George W. Bush could suspend the whole of the Geneva Conventions[71] or parts of them because "Afghanistan was a "failed state" whose territory had been largely held by a violent militia or faction rather than by a government" and that there appeared "to be developing evidence that the Taliban leadership had become closely intertwined with, if not utterly dependent upon, [Al Qaeda]" (US DoJ, 2002c:11). Thus, it was proposed that the fact that Taliban had close connection with Al Qaeda could be reason enough to suspend the Geneva Conventions. The Office of Legal Counsel stated later in the same memorandum that even if the President decided that the Geneva Conventions are applicable to the conflict with Taliban, he can decide that all Taliban members fall outside the category stated in article 4 Geneva Convention III (US DoJ, 2002c:30). As Marco Sassoli remarks it is astonishing that the Bush Administration among other reasons justified not granting Taliban members POW on the grounds that they did not show a distinctive sign recognizable from a distance that they were member of a militia or volunteer forces, when they could attack Taliban command and control centres without complaining about an impossibility to distinguish Taliban from civilians (Sassoli, 2004:102).

Catherine Moore argues that recognition of a state or government is not necessary for an armed conflict to be international and by using article 51 of the United Nations' Charter the United States instigated an international armed conflict (Moore, 2003:3).

[71] According to the Office of Legal Counsel President George W. Bush could suspend the Geneva Conventions or parts of them by using article II of the American Constitution.

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The fact that the Taliban was not a recognised government is irrelevant for the POW status, because Geneva Convention III applies to members of regular armed forces whether or not the United States recognises their government or not (Moore, 2003:6-7). However, the recognition of the members of Al Qaeda is not clear. Moore states that an international armed conflict is synonymous with an inter-state armed conflict and that an armed conflict is international in nature if it involves the use of force by one state directed against another state. She further argues that by using article 51 of the United Nations Charter, which gives a state right to self-defense if an armed attack occurs against the state, the United States instigated an international armed conflict within the meaning of Common article 2 and thus the Geneva Conventions are applicable (Moore, 2003:3-4).

In case of doubt the detainees are entitled to have their status tried by a competent tribunal until their status is established they have the right to be treated as POWs, which is stated in article 5 Geneva Convention III. The Office of Legal Counsel maintained that a presidential determination of denying the Taliban members POW status would "eliminate any legal 'doubts' (US DoJ, 2002c:31)". The fact that the Bush Administration needed to analyse the Geneva Convention laws in at least three memorandums shows that there were doubts over whether the Al Qaeda members and the Taliban members were POWs. The memorandums were written after the analysis from the Office of Legal Counsel show that within the Bush Administration there were disputes whether the Geneva Conventions should be applicable to the Taliban and Al Qaeda members.

The Bush Administration tried to prevent detainees who wanted to have their case examined from doing so in American Courts[72]. The fact that the United States denied the detainees at Guantanamo to have their status tested by a "competent tribunal" is a violation of article 5 Geneva Convention III. Moreover, article 5 Geneva Convention III states that detainees shall "enjoy the protection of the present

[72] However, on 28 June 2004 the Supreme Court ruled that federal judges have the jurisdiction to consider cases of *habeas corpus* from detainees at Guantanamo. In response to that the Bush Administration established a military tribunal, Combatant Status Review Tribunal. On 31 January 2005 the Federal District Court in Washington D.C. ruled that the military tribunal was not competent, which is another violation of the same article (United States' District Court of District of Columbia 2005).

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Convention until such time as their status has been determined by a competent tribunal", that is be regarded as POWs. This means that the detainees at Guantanamo should have been treated as POWs, which among other things means that the detainees could not be interrogated, until a "competent tribunal" had decided if they were POWs or not.

POWs are to be released when the armed conflict is over. Article 118 Geneva Convention III states among other things: "Prisoner of war shall be released and repatriated without delay after the cessation of active hostilities". The United States declared after a few months that the Taliban government had been successfully removed, but claimed that the United States' Armed Forces could detain Taliban and Al Qaeda members as long as the "war on terrorism" was going on. However, "terrorism" was not party to the conflict in Afghanistan. If we again assume that the reason for letting the Geneva Conventions apply in the conflict with Taliban was that they recognised the Afghanistan under Taliban governance as a High Contracting Party to the Geneva Conventions then it is when the war with Afghanistan under Taliban governance is over that the armed conflict is over.

Sassoli states that Al Qaeda members captured in Afghanistan may be justified to be denied POW and should thus be treated as what he calls "unprivileged combatants", a term he uses for "civilians" who are "heavily armed 'terrorists' captured in an international armed conflict" (Sassoli, 2004:104). He argues that since they were not protected by Geneva Convention III they would be protected by Geneva Convention IV (Sassoli, 2004:101). However, whether a person is protected by Geneva Convention IV depends on nationality.

In the memorandum dated 7 February 2002 President George W. Bush did not explain why he decided that the Geneva Conventions applied in the conflict with Afghanistan (The White House, 2002a) (even though he as the President of the United States has the authority to suspend the Geneva Conventions between the United States and Afghanistan (The White House, 2002a)) despite the fact that several of the memorandums that analysed the application of the Geneva Convention and POW

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status stated that the argument that Afghanistan was a “failed state” could be used. In a memorandum dated 26 January 2002 Secretary of State, Mr. Colin Powell, stated: “[A]ny determination that Afghanistan is a failed state would be contrary to the official U.S. government position. The United States and the international community have consistently held Afghanistan to its treaty obligations and identified it as a party to the Geneva Conventions” (US SD, 2002). If this was the reason for applying the Geneva Convention to the conflict in Afghanistan, then the Bush Administration did recognise Afghanistan as a High Contracting Parties to the Geneva Conventions. Common Article 2 states that Geneva Conventions apply in case an “armed conflict…which may arise between two or more of the High Contracting Party”.

In section 3.1 it was stated that whether Geneva Convention IV applies depends on the nationality of the person. However, I would argue that the Bush Administration was in doubt whether the both Taliban and Al Qaeda members were POWs and therefore the detainees were entitled to be treated as POWs until a competent tribunal had established their status. Thus it is only Geneva Convention III that was relevant for whether the treatment of the detainees at Guantanamo violated IHL as the POW status of the detainees at Guantanamo was not settled in April 2004. Even if the Geneva Conventions does not apply, they are still protected under international human rights standards.

President George W. Bush could still have chosen to apply the Geneva Conventions, even if he had legal justification for not doing it. Within the Bush Administration there were dissenting views whether the Geneva Conventions should be applicable or not.

The Secretary of State, Mr. Colin Powell, was in favour of option 2, that is applying the Geneva Conventions but not giving Al Qaeda or the Taliban members POW status. In a memorandum Mr. Colin Powell argued that the costs of choosing not to apply the Geneva Conventions would be “negative international reaction”, “undermine public support among critical allies”, “Europeans and others would have legal problems regarding extraditing terrorists to the United States”, and it would “reverse over a century of United States’ policy and practice in supporting the Geneva Conventions and undermine the protections of the law of war for our troops” (US SD,

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2002). Mr. William Taft, a legal advisor at the United States' State Department, wrote in a memorandum on 2 February to the Counsel of the President: "From a policy standpoint, a decision that the [Geneva] Conventions apply…demonstrates that the United States bases its conduct not just on its policy preferences but on its international legal obligations" and if the Geneva Conventions were not applied it would deprive "our troops there of any claim to the protection of the [Geneva Conventions] in the event they are captured" (Taft, 2002).

Attorney General, Mr. John Ashcroft, disagreed with Mr. Colin Powell. Mr. John Ashcroft's concerns were not about international reputation, but about accountability of American military officers, intelligence officials and law enforcement officials. Regarding option 1, that is to deny the applicability of the Geneva Conventions for the conflicts, Mr. John Ashcroft stated in a memorandum dated 1 February 2002, that this would:

> [P]rovide the highest assurance that no court would subsequently entertain charges that American military officers, intelligence officials, or law enforcement officials violated Geneva Convention rules relating to field conduct, detention conduct or interrogation of detainees (United States' Office of the Attorney General, 2002).

Mr. John Ashcroft further stated if option 2 was applied then "American officials [do not] have the same protection from legal consequences [as option 1]…If a court chose to review for itself the facts underlying a Presidential interpretation that detainees were unlawful combatants, it could involve substantial criminal liability for involved U.S. officials" (United States' Office of the Attorney General, 2002). Later in the memorandum it is stated regarding option 2; "[it] is also a legal option, but its legal implications carry "*higher risk* of liability, criminal prosecution, and judicially-imposed conditions of detainment [than option 1]" [emphasis added] (United States' Office of the Attorney General, 2002). Thus, Mr. John Ashcroft concern was not whether American military officers, intelligence officials and law enforcement officials would treat the detainees "humanely and in consistent with the Geneva Conventions", but with choosing the option that meant less risk that the American military officers, intelligence officials and law enforcement officials could be prosecuted for not following the Geneva Conventions. It is not so surprising that the

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protection of the United States' Armed Forces in the conflict as well as international reaction were considered when making a decision about applying the Geneva Conventions. It is remarkable, though, that like in the August 2002 memorandum and the DoD Working Group Report, Mr. John Ashcroft expressed concerns about the protection of the American interrogators in case they were accused of torture. None of the arguments for applying the Geneva Conventions mention respecting the basic rights of the detainees, showing respect for human dignity or that any treatment below the Geneva Conventions is without respect for the human dignity of the detainees.

Elisa Massimino points out the fact that the Bush Administration focused on using interrogation almost exclusively for the purpose of obtaining information, rather than to get confessions or other evidences admissible in courts (Massimino, 2004:74). By declaring the detainees as "unlawful combatants" the Bush Administration wanted to ensure that they would never be heard in a court and thus the means of getting that information would never be discovered or the interrogators held accountable.

In a newsletter for the United States' Armed Forces Mr. Mario Mancuso, a special assistant to the Department of Defence's General Counsel, stated in March 2005, several of months after the establishment of a Combatant Review Tribunal, that the detainees at Guantanamo did not deserve POW status. He compared POW status with earning "Gold Card" status on a credit card and stated; "POW status is a sort of like that - - you have to earn it, and if we give this status away without having combatants earn the status, then there is not incentive for them to comply with the laws of war". Mr. Mario Mancuso apparently missed the facts that the Geneva Convention III is a "minimum safety net"[73] for treatment of POW and that the decision of whether a person is a POW is based on whether a person is fighting in an army under a government that is High Contracting Party to the Geneva Conventions and if that person clearly shows that he or she belongs to an army. Either a person is entitled to POW status or not. He or she cannot "earn" that status. That views like this can be stated as if it is a governmental opinion in an official newsletter could be an indication of views that the politicians support, but cannot say aloud in public.

[73] This is expression is used by Sassoli (Sassoli, 2004:102).

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### 4.1.2 Territorial Responsibility

Article 4 and article 5 CAT state among other things that torture is a criminal offence if it is committed in any territory under its jurisdiction or when the alleged offender is a national of that State. Thus, according to CAT the United States has the obligation to prosecute anybody who commits and act of torture within its territory or if an American public official or a person acting in an official capacity commits an act of torture.

In a memorandum from the United States' Department of Justice to the Department of Defense regarding the potential legal exposure if a detainee successfully convinced a federal court to exercise habeas jurisdiction. The Department of Justice replied:

> There is little doubt that such a result could interfere with the operation of the system that has been developed to address the detainment and trial of enemy aliens…a habeas petition would allow a detainee t challenge the legality of his stams and treatment under international treaties, such ad the Geneva Conventions and the International Covenant on Civil and Political Rights (Philibin and Yoo, 2001).

However, as it was discussed in section 3.7 ICCPR, hereunder the prohibition of torture in article 7 ICCPR and guarantee of respect for human dignity in article 10(1) ICCPR, is only applicable "within its territory and subject to its jurisdiction". Therefore it is necessary to examine if the United States' Naval Base at Guantanamo Bay is within United States' territory and under its jurisdiction.

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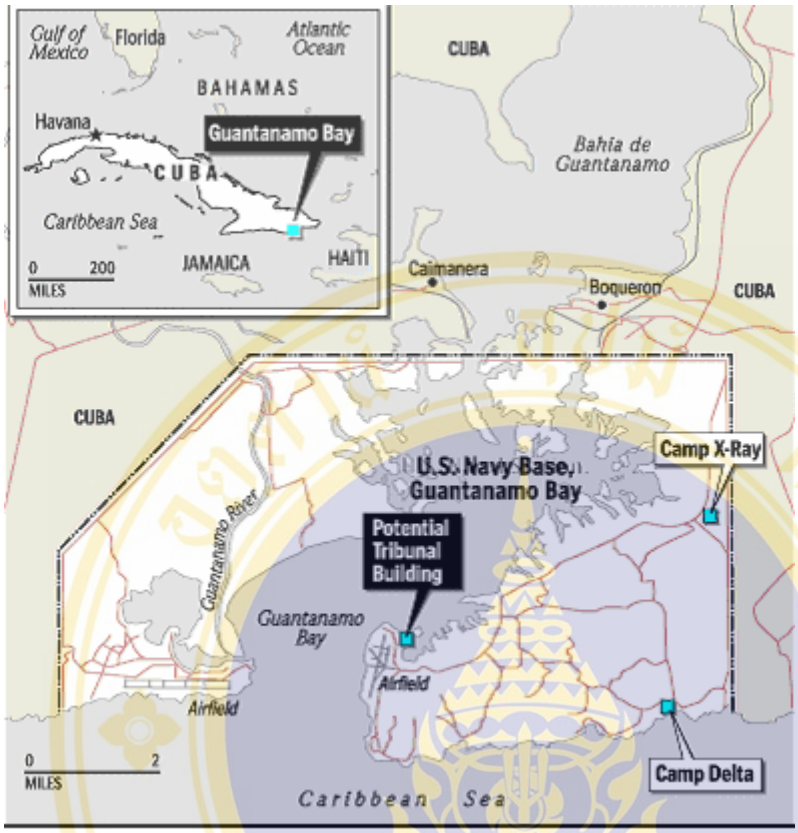


**Figure 2: Map of United States' Guantanamo Bay Naval Base** (Source: Washington Post, http://www.washingtonpost.com/wp-srv/world/daily/graphics/guantanomotime_050104.htm (Visited 11 December 2004))

The American Naval Base at Guantanamo Bay in Cuba is 117.6 square kilometres. It was ceded to United States as a part of an agreement regarding "Lease of Coal and Naval Stations" from February 1903 and made to an American Concession under a treaty between Cuba and United States from 1934. The United States pays the value of 2.000 gold coins[74] a year for leasing it[75].

The Bush Administration maintained that the detainees at Guantanamo could not have the legality of the detainment tested at a federal court of the United States, because

[74] In January 2002 it was 4,085 US dollars. However the Cuban government refuses to receive the money (sun-sentinel.com).

[75] Article 1 in Lease of Coal and Naval Stations: Agreement between the United States of America and Cuba from 1932 says; "The United States of America agrees and covenants to pay for the Republic of Cuba the annual sum of two thousand dollars, in gold coin of the United States, as long as the former shall occupy and use said areas of land by virtue of said Agreement".

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Guantanamo Bay is not located in the United States' territory. In a memorandum from January 2001 it was concluded:

> [T]hat a district court cannot properly entertain an application for a writ of habeas corpus by an enemy alien detained by Guantanamo Bay Naval Base, Cuba. Because the issue has not yet been definitively resolved by the courts, however, we caution that there is some possibility that a district court would entertain such an application (Philbin and Yoo, 2001).

Article 3 of Lease of Coaling or Naval Stations: Agreement between United States of America and Cuba from 1903 reads:

> While on the one hand the United states recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United states of said areas under the terms of this agreement the United states shall exercise complete jurisdiction and control over and within said areas with the right to acquire (under conditions to be hereafter agreed upon by the two Governments) for the public purposes of the United States any land or other property therein by purchase or by exercise of eminent domain with full compensation to the owners thereof[76].

The Bush Administration argued the agreement with the words, "[t]he United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the…areas of land and water", were very definitive in the fact that the Naval Base at Guantanamo Bay was not under American sovereignty (Philbin and Yoo, 2001). However, as stated in section 3.6 the Human Rights Committee has in its jurisprudence shown that the provisions of ICCPR are applicable outside the territory of a State party if a violation is committed by agents from the State. Thus ICCPR is applicable for the detainees at Guantanamo.

### 4.1.3 Detention Conditions

In this section the treatment of the detention conditions will be analysed. As it has been argued earlier torture and inhumane treatment is not only what happens

[76] 'Lease of Coal and Naval Stations: Agreement between the United States of America and Cuba from 1932'.

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during interrogation sessions, but a process that starts already from the arrest. Though there have not been any declassified documents regarding the transfer and detention circumstances of the detainees at Guantanamo, this will be a part of the analysis. There have been many reports from various sources that the conditions the detainees were subjected to during transfer and detention at Guantanamo were amounting to or constituting torture or inhumane treatment. As it was mentioned in section 2.3 Secretary of Defense, Mr. Donald Rumsfeld, stated in the April 2003 memorandum that "Interrogations are never conducted in a vacuum; they are conducted in close cooperation with the units detaining the individuals". The many reports and the statement from Mr. Donald Rumsfeld make it very likely that there has been a policy and transfer and detention conditions and therefore transfer and detention conditions will also be a part of the analysis. The first part will examine the conditions of the detainees during transfer from Afghanistan to Guantanamo, the second part will examine the detention facilities and third part the circumstances of the detention.

#### 4.1.3.1 Transfer from Afghanistan to Guantanamo

**Figure 3: Transfer of detainees** (Source: BBC News, http://news.bbc.co.uk (visited 21 March 2005))

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The above graphic shows how the detainees were transferred in the plane from Afghanistan to Guantanamo. The transfer took 25 hours during which the detainees did not have access to toilet (Human Rights Watch, 2004b:2). They were handcuffed and shackled and made to wear mittens and surgical masks and ear-muffs and had their heads shaved and their beards shaved off[77]. The ear-muffs are standard requirement for all passengers on military planes. BBC reports that the detainees were wearing goggles covered with black tape. The United States' authorities claimed that it was a security precaution taken whenever the detainees are likely to be near anyone they may want to attack. The surgical mask was in order to prevent transmission of infectious respiratory diseases such as tuberculosis and the forced shaving in order to deal with lice. The large thick mittens were required partly in order to prevent the detainees from manipulating the restraints and partly because it could become cold in the plane during the flight (BBC News).

The Geneva Convention III states that POWs shall be transferred humanely and safely. Article 46 Geneva Convention III states among other things: "The transfer of prisoners of war shall always be effected humanely and in conditions not less favourable than those under which the forces of the Detaining Power are transferred".

Not being able to see or hear anything for 25 hours could be argued to be depriving of sensory deprivation and thus inhumane treatment without respect for the human dignity which would be a violation of article 10(1) ICCPR.

Article 45 (2) of Standard Minimum Rules for the Treatment of Prisoners states: "The transport of prisoners…in any way which would subject them to unnecessary physical hardship, shall be prohibited".

Given that the detainees were restrained properly it would not be necessary to let the detainees wear the black goggles or mittens in order to prevent them from attacking a nearby person. As mentioned earlier Mr. Donald Rumsfeld considered all detaining

[77] European Council's Committee on Legal and Human Rights Affairs 2003, paragraph D.a.87.

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units to be a part of the interrogation session. Transferring the detainees in a humiliating way could be the first step of “soften up” the detainees for interrogation.

**4.1.3.2 Detention Facilities**

The following description of the detention facilities are based on information from Amnesty International (2003), BBC News, the European Council’s Committee on Legal Affairs and Human Rights (2003) and Human Rights Watch (2004b). The detainees at Guantanamo were held in small wire mesh cages at Camp X-ray during the first three and a half months. The cages in Camp X-ray measured 1.8 by 2.4 meters and were only furnished with a foam mattress. Two buckets were provided; one with water and one to use as toilet (urinal). From 28 April 2002 Camp X-Ray was replaced by a newly built more permanent maximum-security prison, Camp Delta, which had capacity for 800 detainees. The cells in Camp Delta measured 2.03 by 2.44 meters and had a bed, toilet, wash-basin and a window. In both Camp X-ray and Camp Delta the light in the cells would be turned on from 6 pm until daylight, which made it difficult for the detainees to get proper sleep. The detainees in both Camp X-ray and Camp Delta were only allowed 15 minutes exercise twice a week and were only allowed to talk with detainees in adjoining cells, but not with prison guards or other personnel. They were not allowed to have any personal belongings. They were not initially allowed to read books, but after intervention from ICRC the detainees were provided with books. When the detainees were outside their cells in order to get medical examination or be interrogated, they were handcuffed and shackled. Inside Camp Delta a medium-security facility, called Camp 4, was opened in April 2003. Detainees who cooperated with the authorities were allowed to live there. There was space for 160 detainees and the regime was less harsh. The prisoners lived communally, were allowed to wear white clothes instead of orange jumpsuits and had more exercise time and other benefits (Amnesty International, 2003:16-17). For all detainees who were practising Muslims a copy of the Koran and a skullcap were provided and they were attended by a chaplain at their 5 daily prayers.

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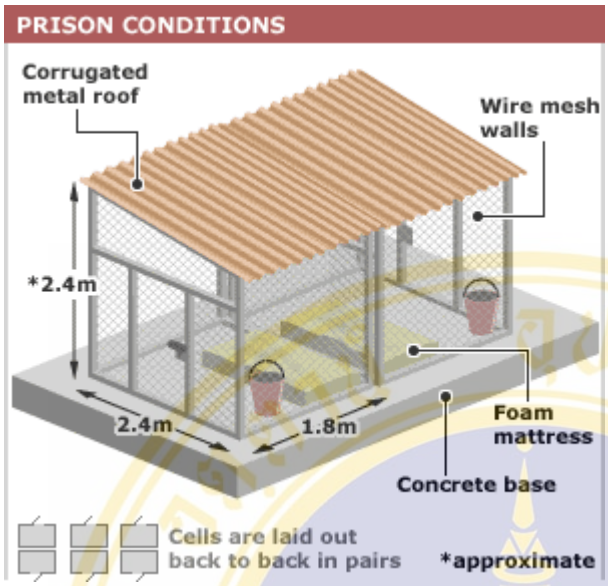


**Figure 4: Prison Conditions** (Source: British Broadcast Company, http://news.bbc.co.uk/1/hi/world/americas/1766037.stm (visited 2 August 2004))

According to article 21 Geneva Convention III POWs "may not be held in close confinement except where necessary to safeguard their health and then only during the continuation of the circumstances which make such confinement necessary". Article 25 Geneva Convention III states that POWs "shall be quartered under conditions as favourable as those for the forces of the Detaining Power who are billeted in the same area…The foregoing provision shall apply in particular to the dormitories of prisoners of war as regards both total surface and minimum cubic space, and the general installations, bedding and blankets". Moreover POWs are entitled to recreation facilities, among them sport. Article 38 Geneva Convention III reads:

> While respecting the individual preferences of every prisoner, the Detaining Power shall encourage the practice of intellectual, educational, and recreational pursuits, sports and games amongst prisoners, and shall take the measures necessary to ensure the exercise thereof by providing them with adequate premises and necessary equipment. Prisoners shall have opportunities for taking physical exercise, including sports and games, and for being out of doors. Sufficient open spaces shall be provided for this purpose in all camps.

Thus, being held in a small wire mesh cage with only a mattress are violations of articles 21, 25 and 38 of Geneva Convention III.

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The detainees in Camp X-ray and Camp Delta were held in small cells and only let outside their cells up to 2.5 hours per week and with light on during nights is violation of article 10(1) ICCPR, which guarantees persons deprived of their liberty respect for their human dignity.

In *Johnson v. Uruguay* the Human Rights Committee found that cells measure 1.6 x 2 m, electric lights were kept continuously on, the only piece of furniture was a mattress provided at nights and where the detainees had to remain in the cells 24 hours per day in Solitary confinement were a violation of article 10 (1) ICCPR[78].

In *Edwards v. Jamaica* the Human Rights Committee found that being held in a cell measuring 6 feet by 14 feet, let our only for three and half hours a day, was provided with no recreational facilities and received no books was a violation of article 10(1) ICCPR[79].

In *de Polay v. Peru*, a detainee was not allowed to speak or to write to anyone during that time, which also implies that he would have been unable to talk to a legal representative, or that he was kept in his unlit cell for 23 and a half hours a day... The Human Rights Committee found it was a violation of article 10(1) ICCPR[80].

In *McTaggart v. Jamaica* the author was kept in a solitary cell, with only a foam mattress to sleep on, and a slops bucket for all sanitation which he may only empty twice a day. Intermittently, his visitors are sent away and when allowed in it is only very briefly[81], which the Human Rights Committee found constituted a violation of article 10(1) ICCPR.

The fact that the lights were turned on during the night and there have been reports that the detainees were not allowed to cover their heads could constitute sleep deprivation, which would be a violation of article 10(1) ICCPR.

Not being able to exercise more than totally up to 3 hours a week is a violation of Standard Minimum Rules for the Treatment of Prisoners of which article 21 (1) states: “Every prisoner who is not employed in outdoor work shall have at least one hour of

[78] *Johnson v. Uruguay* CCPR/C/21/D/123/1982, paragraph 9 (2).
[79] *Edwards v. Jamaica*, CCPR/C/60/D/529/1993, paragraph 8(3).
[80] *De Polay v. Peru*, CCPR/C/61/D/5777/1994, paragraph 8(5).
[81] *McTaggart v. Jamaica* CCPR/C/62/D/749/1997, paragraph 8(6).

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suitable exercise in the open air daily if the weather permits". Thus, being detained in incommunicado in a small cell up to 23 hours a day is a violation of article 10 (1) ICCPR and article 21 (1) Minimum Standard Rules for the Treatment of Prisoners.

#### 4.1.3.3 Detention Circumstances

There are at least two examples of detainees at Guantanamo (please see section 2.4.7), who have been subjected to beatings by guards. It is a clear violation of article 7 ICCPR. As stated in section 3.5 torture and inhumane treatment is not only physical infliction of pain and suffering during interrogation, but can also be mental pain and suffering outside interrogation sessions.

Many of the detainees who were transferred to Guantanamo in January 2002 did not know at least until 1 February 2002 where they were[82].

Being held in incommunicado has in several decisions been declared as violation of article 10(1). In *El-Megreisi v. Libyan Arab Jamahiriya* the Human Rights Committee found that Mr. Youssef El-Megreisi: "[B]y being subjected to prolonged incommunicado detention in an unknown location, is the victim of torture and cruel and inhuman treatment in violation of articles 7 [ICCPR] and article 10, paragraph 1, [ICCPR]"[83]. In *M'Boissona v. Central African Republic* the Human Rights Committee found that the fact that the detainee "was not brought promptly before a judge or of other officer authorized to exercise judicial power, was denied access to counsel and was not, in due time, afforded the opportunity to obtain a decision by a court on the lawfulness of his arrest and detention" amounted to violation of articles 7, 9 and 10 ICCPR[84].

Not being able to communicate with family and the outside world is also a violation of article 7 ICCPR. In *N'Goya v. Demoratic Republic of Congo* the Human Rights Committee found that "removal of the victim and the prevention of contact with his family and the outside world constitute cruel and inhuman treatment, in

[82] European Council's Office of Legal Affairs and Human Rights 2003, paragraph D.c.102.
[83] *El-Megreisi v. Libyan Arab Jamahiriya* CCPR/C/50/D/440/1990, paragraph 5(4).
[84] *M'Boissona v. Central African Republic* CCPR/C/D/428/1990, paragraph 5(2).

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violation of article 7 [ICCPR]"[85]. Regarding control or censorship of correspondence the Human Rights Committee stated in *Estrella v. Uruguay*: "[T]he degree of restriction must be consistent with the standard of humane treatment of detained persons required by article 10(1) [ICCPR]. In particular, prisoners should be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, by correspondence as well as by receiving visits"[86]

Family members that have not been informed about the detention of a relative are also victims of violation of article 7 ICCPR. In *Quniteros v. Uruguay* in which the Human Rights Committee found that the Uruguayan authorities had violated article 7 ICCPR by not telling a mother about her daughter's detention and conclude "in principle, the anxiety of the Guantanamo detainees about the uncertainty of their own situation may also be considered as a form of inhuman and degrading treatment" (Condorelli and De Sena, 2004:117). Thus, the family members of the detainees at Guantanamo would also be in victims of violations of article 7 ICCPR.

### 4.1.4 Interrogation Techniques

As stated in section 2.3 Mr. Donald Rumsfeld approved 17 techniques in December 2002 that could be used on two of the detainees at Guantanamo who were believed to have valuable information. Some of the techniques were hooding, use of dogs, forced removal of clothes, up to 20 hours interrogation and prolonged detention. These interrogation techniques were withdrawn, because military lawyers claimed that the interrogation techniques were violating international law. In an interview with Mr. David Frost from BBC, Secretary of Defense Mr. Donald Rumsfeld, openly admitted that these techniques had been used on Mr. Mohammed Al Kahtani, who was believed to be the 20th hijacker. In the interview, Mr. Donald Rumsfeld further stated: "The techniques…were not used, I'm told, on anyone one other than [Mr. Mohammed Al Kahtani]. We may find out that's not correct at some point in the future, but at least

[85] *N'Goya v. Democratic Republic of Congo* CCPR/C/56/D/542/1993, paragraph 5(5). Similar statement is made in *Atachahua v. Peru* CCPR/C/56/540/1993, paragraph 8(5).
[86] *Estrella v. Uruguay*, CCPR/C/18?D/74/1980, paragraph 9(2).

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my information thus far is that that's the case" (US DoD, 2004b). It is not known how many times and for how long these techniques were used[87]. However, a combination of these techniques together would very likely cause "severe mental pain or suffering" and would thus be torture as defined in article 1(1) CAT. These techniques are in violation of international law and it is remarkable that Mr. Donald Rumsfeld did not make a thorough investigation in order to find out if other detainees had been subjected to some of these interrogation techniques. The fact that he, without showing any concern, states that in the future it might turn out that other detainees were subjected to the interrogation techniques makes one wonder if he opened that possibility, because he knew that other detainees had been subjected to the interrogations techniques that were only approved for two of the detainees.

After the techniques that were approved for the two detainees that were believed to have valuable information were withdrawn and on basis of the DoD Working Group Report, the Secretary of Defense, Mr. Donald Rumsfeld, approved in April 2003 24 interrogation techniques that could be used on all the detainees at Guantanamo (see appendix B). Some of the interrogation techniques might not – if used separately – constitute torture or inhumane treatment. For example interrogation technique F, "Fear up Mild", in itself would not be torture or inhumane treatment. In Tab B of the memorandum Mr. Donald Rumsfeld states: "[I]t must be understood that in practise, techniques are usually used in combination". It is beyond the scope of this thesis to fully analyse the legality of all the various combinations. But it is clear that some of the techniques used in combination might well constitute "insult or unpleasant or disadvantageous treatment", which is prohibited in article 17 Geneva Convention III, without "respect for the inherent dignity of the human person", which is guaranteed in article 10(1) ICCPR or "severe mental pain or suffering" which would constitute torture. According to Bloche and Marks (2005) health care providers at Guantanamo were encouraged to give information about the detainees to the interrogators and a "Behavioural Science Consultations Team", whose task was to make interrogations

[87] Time obtained parts of the interrogation log of Mr. Mohammed Al Kahtani and states that according to the log "several" of the approved interrogation techniques over a period of five weeks (*Time* 2005b:19).

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more productive, was staffed with a psychiatrist and a psychologist, who observed some of the interrogations and gave feedback to the interrogators. Thus, the interrogators in some circumstances would know the psychological weaknesses of the detainees and would use the interrogation techniques that would be most “effective”.

However, some of the interrogation techniques in themselves are a violation of IHL or IHRL. Below is an examination of six of the permitted interrogation techniques.

Interrogation Technique B; Incentive/Removal of incentive. It is explained as follows: “Provided a reward or removing a privilege, above and beyond those that are required by the Geneva Convention, from detainees”. In square brackets there is a caution that other nations may consider that religious items like the Koran are protected. However, according to documents, which were released by the FBI in May 2005 a detainee reported: “Interrogators who had taken the Koran from individual detainees as a reprisal or incentive to cooperate had failed” (Lewis, 2005a). Thus despite of the warning of not removing the Koran it took place. Furthermore, the example in section 2.4.2 shows that some of the detainees were stripped of their clothes, which would be returned piece by piece in exchange for good behaviour. Being stripped of their clothes is especially humiliating for Muslims who prohibited by their religion from exposing their bodies.

Interrogation Technique E; Fear Up Harsh. Exposing detainees to menstrual blood (examples given in section 2.4.3) was a way of increasing the fear level in the detainee. It is an “intimidation” which is prohibited in article 13 Geneva Convention III, an “insult or unpleasant and disadvantageous treatment” which is prohibited in article 17 Geneva Convention III and without “respect for the inherent dignity of the human person”, which is guaranteed in article 10(1) ICCPR.

Interrogation Technique I; Pride and Ego Down. The technique is described as attacking or insulting the ego of a detainee, not beyond the limits that would apply for POW and in square brackets it is states according to article 17 Geneva Convention III a POW may not be threatened, insulted or exposed to any unpleasant or disadvantageous treatment of any kind. The use of female interrogators sexual harassment as described in section 2.4.3 is attacking or insulting a Muslim man.

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Moreover, it is an “intimidation” which is prohibited in article 13 Geneva Convention III and without “respect for the inherent dignity of the human person”, which is guaranteed in article 10(1) ICCPR.

Interrogation Technique O; Mutt and Jeff, which is a team of a friendly and harsh interrogator. In square brackets it is stated that other nations might believe it could be a violation of article 13 Geneva Convention III, which prohibits intimidation. Mr. Muktar Warafi told that one soldier told him that Mr. Muktar Warafi had to start telling the truth or he would be raped. The soldier left the room and another person entered immediately into the room and told Mr. Muktar Warafi: “That interrogator is new and doesn’t know the rules. We apologize on his behalf. Now let’s talk”. Rape is defined as torture as it cost “severe mental pain” and thus a threat of rape would constitute torture which would be a violation of article 7 ICCPR.

Interrogation Technique S; Change of Scenery Down. The interrogation technique is explained as: “Removing the detainee from the standard interrogation setting and placing him in a setting that may be less comfortable; would not constitute a substantial change in environmental quality”. The reports from FBI agents about detainees who were exposed to loud music and strobe light, and in some cases in either very hot or very cold rooms for several hours (examples given in section 2.4.5) were a change of scenery. These detainees were not treated “humanely” as guaranteed in article 13 Geneva Convention III, they were subject to “unpleasant and disadvantageous treatment” which is prohibited in article 17 Geneva Convention III and without “respect for the inherent dignity of the human person”, which is guaranteed in article 10(1) ICCPR. In addition to that in at least one case a detainee, who had pulled out his hair during the night, had suffered “severe mental pain”. If the detainee were subjected to that kind of treatment for the purpose of “punishment”, “intimidation” or “coercion” then it would clearly be which is torture as defined in article 1 CAT and thus a violation of article 7 ICCPR.

Interrogation Technique T; Dietary Manipulation. The interrogation technique is explained as “no *intended* deprivation of food or water; no adverse medical or cultural effect and without *intent* to deprive subject of food or water” [emphasis added]. It is not explained what is meant with “intended”. The detainees are

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guaranteed sufficient food. Rule 20 (1) of Standard Minimum Rules for the Treatment of Prisoners states: “Every prisoner shall be provided by the administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served”. Article 26 Geneva Convention III states: “The basic daily food rations shall be sufficient in quantity, quality and variety to keep prisoners of war in good health and to prevent loss of weight or the development of nutritional deficiencies. Account shall also be taken of the habitual diet of the prisoners”. A person has the right to everyday receive enough nutritious quality food that is well-prepared and takes into consideration the habitual diet of the person. If manipulation of diet is going to make a person reveal important information, it is difficult to see how it can be done without violation any of the two rules.

Interrogation Technique U; Environmental Manipulation. The technique is explained with altering the environment to create moderate discomfort (for example adjusting temperature or introducing an unpleasant smell). In the square brackets it says that this technique has been determined as inhumane treatment by courts in other nations. It seems as if this technique used in the following three examples from FBI agents who reported about torture or inhumane treatment at Guantanamo. See also Interrogation Technique S.

Interrogation Technique V; Sleep Adjustment. It is explained that it is NOT sleep deprivation. The example in section 2.4.6 of a detainee who were woken up and interrogated every time he fell asleep is an “intimidation” which is prohibited in article 13 Geneva Convention III and an “unpleasant and disadvantageous treatment” which is prohibited in article 17 Geneva Convention III.

Interrogation Technique W; False Flag. Article 48 Geneva Convention III states among other things: “In the event of transfer, prisoners of war shall be officially advised of their departure and of their new postal address”. Thus, if the Geneva Conventions were respected then a detainee would never believe in false flag, because he would know that he would have been informed if he were moved to another location.

Interrogation Technique X; Isolation. In square brackets it is stated that isolation could be violations of article 13 Geneva Convention III and article 14

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Geneva Convention III. In several cases the Human Rights Committee has stated that prolonged isolation is a violation of article 10 (1) as it is treatment contrary to the human dignity[88].

### 4.2 United States' Reservations to the Definition of "Torture" and "Inhumane Treatment"

The United States has made number of understandings and reservations to ICCPR and CAT. Those, which are relevant for the issue of torture and inhumane treatment, are in the boxes beneath;

> Reservation to article 7 ICCPR;
>
> That the United States considers itself bound by article 7 to the extent that 'cruel, inhumane or degrading treatment or punishment', means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States

> Understanding to article 1 CAT in which the United States understand the definition of torture as;
> (a) That with reference to article 1, the United States understand that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain and suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substance or other procedures calculated to disrupt profoundly the senses or personality.

[88] For example *de Bazzano v. Uruguay* CCPR/C/7/D/5/1977, paragraph 10, *Pietraroia v. Uruguay* CCPR/C/12/D/44/1979 paragraph 17, *de Casariego v. Uruguay* CCPR/C/13/D/56/1979 paragraph 11, *Altesor v. Uruguay* CCPR/C/15/D/10/1977 paragraph 15, *de Romero v. Uruguay* CCPR/C/21/D/85/1981 paragraph 13, *El-Megreisi v. Libyan Arab Jamahiriya* CCPR/C/50/D/440/1990 paragraph 5(4).

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(b) That the United States understands that the definition of torture in article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control.

(c) That with reference to article 1 of the Convention, the United States understands that 'sanctions' includes judicially-imposed sanctions and other enforcement actions authorized by United States law or by judicial interpretation of such law. Nonetheless, the United States understands that a State Party could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture.

(d) That with reference to article 1 of the Convention, the United States understands that the term 'acquiescence' requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activities.

(e) That with reference to article 1 of the Convention, the United States understands that noncompliance with applicable legal procedural standards does not *per se* constitute torture.

United States have made following reservation to article 16 CAT:

That the United States considers itself bound by the obligation under article 16 to prevent 'cruel, inhuman or degrading treatment or punishment', only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

As mentioned in section 3.7 according to article 2(1)(d) Vienna Convention a reservation is any "unilateral statement, however phrased or named" and thus the understandings made by the United States to article 1(1) CAT is regarded as reservations.

Based on domestic law regarding the fifth, eighth and fourteenth amendment the United States' Department of Justice in 2003 in several documents determined what would constitute torture according to the American reservations. In the "August 2002 Memorandum" the Office of Legal Counsel stated:

> "Severe" conveys that the pain or suffering must be of such a high level of intensity that the pain is difficult for the subject to endure…[it] must rise to a

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> similarly high level…such as death, organ failure or serious impairment of the body functions (US DoJ, 2002d:5-6).

In the same memorandum "Severe mental pain or suffering" has been defined as:

> The prolonged mental harm caused by or resulting from
> a) the intentional infliction or threatened infliction of severe physical pain or suffering
> b) the administration or application, or threatened or administration or application, of mind-altering substance or other procedures calculated to disrupt profoundly the senses of the personality.
> c) the threat of imminent death; or
> d) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substance or other procedures calculated to disrupt profoundly the senses of personality (US DoJ, 2002d:6-8)

By limiting the definition of physical torture to pain rising to "a similarly high level as death, organ failure or serious impairment of the body functions" torture techniques like "falanga"[89], "water board"[90] and "Palestine hanging"[91], which for long has been recognised as torture techniques would not be defined as torture. The DoD Working Group concluded that interrogation techniques like threat of transfer to a 3rd country that detainee would be likely to fear would subject him to torture or death, hooding, sleep deprivation, removal of clothing and prolonged standing, would be legal. Furthermore, according the interpretation of the reservations to the definition of torture, made by the DoD Working Group, shackling a detainee in an extremely cold or hot room with loud music and flashing lights for a whole night, which was used several of times at Guantanamo would not be torture, because it would not inflict "severe physical pain".

The DoD Working Group stated that American domestic law distinguishes between general intent and specific intent. In order to constitute torture there has to be "specific intent":

[89] A person is beaten on the foot soles.
[90] A person is tied to one end of a board and put into water until the person believes that he or she is being drowned.
[91] A person is tied with his arms to beam is hanging in his or her arms.

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> Thus, even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith. Instead, a defendant is guilty of torture only if he acts with the express purpose of inflicting severe pain or suffering on a person within his custody or physical control (US DoJ, 2002e:4).

The DoD Working Group has reached the same conclusions (‘Detainee’, 2003:10-16). It stated:

> [A] defendant act with the specific intent to inflict severe pain, the infliction of such pain must be the defendant’s precise objective. If the statute had required only general intent, it would be sufficient to establish guilt by showing that the defendant “possessed knowledge with respect to the *actus reus* of the crime…Thus, even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith. Instead, a defendant is guilty of torture only if he acts with the express purpose of inflicting severe pain or suffering on a person within his custody or physical control (‘Detainee’, 2003:9).

It is important to notice that the “specific intent” can be cases where an official inflicts severe physical or mental pain, but the main purpose is for example to get information and it would thus not be torture. The definition of article 1(1) CAT does mention that in order to be torture it has to be “intentionally inflicted”. According to Herman Burgers and Hans Danelius “pain or suffering as the result of an accident…” would not constitute torture (Burgers and Danelius, 1988:118). Thus if a detained person falls out of the bed by himself and gets injured it would not be considered torture. However, according to the DoD Working Group’s report if a person can argue that the infliction of “severe physical or mental pain” was done for another purpose than inflicting the pain itself, for example in order to get important information, it would be very difficult to convict anybody for acts of torture. The DoD Working Group report’s definition of torture as only in cases where the interrogator with “express purpose” inflicts severe pain or suffering seems to be the same as sadism. In an interrogation the main purpose is to get information, and thus it would be very likely that interrogators would argue that the specific intentions of the inflictions of pain or sufferings were to get information. However, it goes against the definition of torture in article 1(1) CAT, which states that obtaining information can be a purpose in

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order to constitute torture. It also contradicts the definition the Working Group made of "cruel, inhuman or degrading treatment". It also contradicts the definition of torture, which was stated in a commentary to Geneva Convention III (see section 3.2). According to the commentary torture in Geneva Convention III "refers to the infliction of suffering on a person in order to obtain…confessions or information"[92].

The DoD Working Group's report further stated that an act would not be torture if the interrogator acted in self-defense. A person can claim his or her right to self-defense both as to the individual and as to the nation as a whole. It is not necessary for an unlawful violence to be "imminent" for a person to be allowed to use force. According to the DoD Working Group's report in case "the fact of the attack becomes certain and no other options remain the use of force may be justified" ('Detainee', 2003:28). The person does not have to be one who will carry out the unlawful violence. The DoD Working Group's report stated: Self-defense as usually discussed involves using force against an individual who is about to conduct the attack. In the current circumstances, however, an enemy combatant in detention does not himself present a threat of harm. He is not actually carrying out the attack, rather he has participated in the planning and preparation for the attack, or merely has knowledge of the attack through his membership in the terrorist organization" ('Detainee', 2003:29). Defending the nation from terrorist attacks cannot be used as an excuse for torturing or treating a person inhumanely. It is stated in article 4(1) and (2) ICCPR that article 7 ICCPR is non-derogable.

Thus, according to the Bush administration, for an act to be defined as torture, the pain or suffering of the torture victim must be equal to the pain of dying, organ failure or serious impairment of the body functions, or mental pain or suffering caused by threats of death, infliction of severe physical pain or the use of mind-altering substance *plus* it must be the "express purpose of inflicting severe pain or suffering on a person within his custody or physical control". Severe pain and suffering can be inflicted in case of self-defense, both for the individual or the nation.

[92] From J. Pichet et al., Commentary to the III GC (Geneva: ICRC, 1952), page 627 (quted in Arnold 2004, page 1002).

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In the reservation to article 1(1) CAT the United States has further stated; "the definition of torture in article 1 [(1) CAT] is intended to apply only to acts directed against persons in the offender's custody or physical control". Compared with the definition it narrows down who can be convicted for acts of torture. The definition in article 1(1) CAT states, "…inflicted by or at the instigation of or with the consent or acquiescence of…". The understanding made by the United States does not define "offender's custody". Are the detainees at Guantanamo in Mr. Donald Rumsfeld's custody? Are they in President George W. Bush's custody? It also excludes for example an interrogator who knows that other interrogators will torture[93] a person or FBI agents who know that the armed forces will use torture.

The United States has made the understanding that "with reference to article 1 [(1) CAT], the United States understands that 'sanctions' includes judicially-imposed sanctions…". It could be argued that the interrogation techniques approved for the use on detainees at Guantanamo are "judicially-imposed sanctions". However, States cannot permit sanctions that constitute torture. This is mentioned later in the understanding made by the United States itself: "a State Party could not through its domestic sanctions defeat the object and purpose of [CAT] to prohibit torture". Thus, the United States is well aware of the fact that it cannot "legalise" torture techniques in order to use them as "lawful sanctions".

As noted in section 3.5.2 the Human Rights Committee has not defined the term "other cruel, inhuman or degrading treatment or punishment". The Human Rights Committee considers any breach of article 7 ICCPR whether it is torture or inhumane treatment as serious. However, the term has been defined in courts in the United States and the DoD Working Group has defined it as follows:

> Under the Torture Convention, no person may be subjected to cruel, inhuman or degrading treatment…These terms, as defined by U.S. courts, could be

[93] The United States has also made the understanding that " 'acquiescence' requires that the public official, prior to the activity constituting torture, have awareness of such activity and therefore breach his legal responsibility to intervene to prevent such activity". Thus "acquiescence" is only about knowledge of an act of torture before it takes place.

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> understood to mean: to inflict pain or harm without a legitimate purpose; to inflict pain or injury for malicious or sadistic reasons; to deny the minimal civilized measures of life's necessities and such denial reflects a deliberate indifference to health and safety; and to apply force and cause injury so severe and so disproportionate to the legitimate government interest being served that it amounts to a brutal and inhumane abuse of official power literally shocking the conscience ('Detainee', 2003:67).

This definition of "cruel, inhuman or degrading treatment" only defines it from the purpose of the act. It is not about the degree of pain or suffering. If the (specific?) intent is to inflict (severe?) "pain or injury for malicious or sadistic reasons", it will be cruel, inhuman or degrading treatment – and not torture.

It should be noted that the DoD Working Group is only discussing "cruel, inhumane or degrading treatment" and not "cruel, inhuman or degrading punishment". The American analysis does not consider cases where an officer wants to punish a person. For example, if an officer inflicts severe physical or mental pain or suffering as revenge for September 11 or as a punishment for hanging the towel a place where the officer does not want towels, it would not be considered as "cruel, inhuman or degrading".

Several States have stated that they do not believe that the reservations and understandings made by the United States regarding the definition of "torture" or "inhumane treatment" upon ratification are compatible with the object and purpose of ICCPR or CAT. To the reservations made by the United States the government of the Netherlands has stated upon the ratification to CAT by the United States that the understanding of what acts constitute torture "appears to restrict the scope of the definition of torture under article 1…". Finland, the Netherlands, and Sweden have objected to the reservations made to article 16 CAT. All of these countries state that the reservation is incompatible with the object and purpose of CAT[94].

[94] Finland, the Netherlands and Sweden have made the same objection to the reservation made by the United States to Article 7 ICCPR. Furthermore Denmark, Norway, Portugal and Spain also objected to the reservations to Article 7 ICCPR.

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The Human Rights Committee has also found the reservations incompatible with the purpose of ICCPR. In the Concluding Observation the Human Rights Committee stated that it was "particularly concerned with the reservation to…article 7 of the Covenant, which it believes to be incompatible with the object and purpose of the Covenant"[95]. The Committee against Torture did in the Concluding Observation express concern over the reservation made to Article 16 CAT. It stated; "The reservation lodged to article 16, in violation of the Convention, the effect of which is to limit the application of the Convention"[96]. The Committee against Torture did not express concern over the understanding of the definition of torture but it recommend the United States to withdraw the reservation[97].

In section 3.7 it was concluded that it is not clear in international law if it is States or monitoring bodies that have competence to declare reservations incompatible with the object and purpose of a treaty. It dependence on how international human rights treaties are regarded. If international human rights treaties are regarded as bilateral agreements then a reservation is only incompatible if other State parties to the treaty object to the reservation. If international human rights treaties are regarded as multilateral agreements then a monitoring body has the competence to declare a reservation for against the purpose and object of a treaty. So even though the Human Rights Committee in a concluding observation has stated that it considers the reservation made by United States to article 7 to be incompatible it is not clear if that invalidates the reservation. However, the fact that eight states have objected to either the reservation to article 7 ICCPR, article 1(1) CAT and/or article 16 CAT, and that the Human Rights Committee has stated that it regards the reservation to be against the object and purpose of ICCPR suggests that the reservations are not ethically consonant with the Untied States' obligations under ICCPR regardless of the in legal status.

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[95] 'Concluding Observation of the Human Rights Committee: United States of America', CCPR/C/79/Add. 50, A/50/40, paras. 266 – 304, United Nations' Human Rights Committee, paragraph 279.

[96] 'Concluding Observation of the Human Rights Committee: United States of America', CCPR/C/79/Add. 50, A/50/40, paras. 266 – 304, United Nations' Human Rights Committee, paragraph 179 (b).

[97] 'Concluding Observation of the Human Rights Committee: United States of America', CCPR/C/79/Add. 50, A/50/40, paras. 266 – 304, United Nations' Human Rights Committee, paragraph 180 (a).

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The fact that the reservations are not declared inadmissible does not mean that the definitions of torture and inhumane treatment based on the reservations made by the United States have been accepted by the United Nations' human rights protection mechanism. The third Rapporteur on Torture, Mr. Theo van Boven stated in September 2004:

> The Special Rapporteur notes with serious concern that attempts have been made to narrow the scope of the definition of torture contained in article 1 of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. For instance, torture has reportedly been defined elsewhere as physical pain that is difficult to endure, and which should be equivalent to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. Similarly, it has reportedly been argued that some harsh methods should not be considered as torture, but merely as cruel, inhuman or degrading treatment or punishment and therefore not absolutely prohibited and permissible in exceptional circumstances[98].

Also fourth Special Rapporteur on Torture, Mr. Manfred Nowak, stated to the 61st session of the Commission on Human Rights the Special Rapporteur on Torture:

> For the first time since World War II, this important consensus of the international community seems to have been called into question by some Governments in the context of their counter-terrorism strategies. As my predecessor, I am deeply concerned about any **attempts to circumvent the absolute nature of the prohibition of torture and other forms of ill-treatment in the name of countering terrorism**. These attempts include, *inter alia*, narrow interpretations of the terms torture, cruel, inhuman or degrading treatment or punishment contrary to established case-law of competent international and regional human rights bodies…[99]

It is not only up to the treaty bodies to act within the treaty body mechanism, States that are party to CAT or NGOs can give complaints to the Committee against Torture.

Under article 21 CAT regarding inter-state complaints other states, which have recognised the Committee against Torture's competence to review interstate complaints, can complain that the United States, by maintaining the understanding to

[98] 'Interim report by the Special Rapporteur on Torture to the United Nations General Assembly, September 2004', A/59/324, paragraph 16.
[99] 'Statement of the Special Rapporteur on Torture, Manfred Nowak to the 61st Session of the UN Commission on Human Rights, Geneva, 4 April 2005', [Special Rapporteur on the Question of Torture], viewed 10 April 2005, http://www.ohchr.org

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article 1(1) CAT and article 16 CAT, is not "fulfilling its obligations" under CAT. It may be argued that for international political reasons states refrain from complaining over another state under article 21 CAT. However, within the European Human Rights system where inter-state complaints are possible there have been inter-state complaints in cases of torture and inhumane treatment, for example *Ireland versus United Kingdom* and *Denmark versus Turkey*. In addition to that many countries that are party to CAT and have recognised the competence of Committee against Torture regarding inter-state complains, some of them are allies with the United States in the "war on terrorism", have officially condemned the treatment of detainees at Guantanamo. In a statement to the Commission on Human Rights in Geneva in March 2005 State Secretary for Foreign Affairs of Denmark did not refer directly to United States but stated:

> Notwithstanding the absolute nature of the prohibition, attempts have been made to legitimise certain aggressive interrogation measures. Such measures have been described as "practising torture in a morally correct way". In our view, this is a mockery of the firm prohibition against torture. Any nation, which condones the use of or allows its agents to engage in torture should be met with an unequivocal and strong reaction by the international community…The unconditional prohibition of torture also applies in the fight against terrorism. Obviously, it is a primary duty of any government to ensure the security of its citizens. But security should not be used as a pretext to undermine the fundamental rights enshrined in international human rights and humanitarian law. The question is not to strike a so-called "balance" between human rights and security concerns as if the two were competing or antagonistic concepts. They are not. Security provides the environment, which enables us to enjoy our rights (Danish Ministry of Foreign Affairs, 2005).

Denmark, Finland, Germany, the Netherlands, Norway, Portugal, Spain and Sweden are all parties to CAT and have recognised the Committee against Tortures competence for inter-state complaints and have objected either to the reservation to article 7 ICCPR or article 1(1) CAT. These states have thus already once declared that they consider the reservations made by the United States regarding the definition of torture not to be compatible with ICCPR or CAT. Even though if one, some or all of these States bring a complaint to the Committee against Torture, the question will still remain if the Committee against Torture has the competence to determine if the

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reservations are illegal or not. However, if these eight states did file a complaint it could put pressure on the United States to withdraw the reservations, not for legal reason, but in order not to lose face. Klabbers argues “to the extent that reservations pose a problem it is often a problem of diverging political views…which therewith calls for a solution by political means” (Klabbers, 2004:5). This can explain why no States so far has made inter-state complaints, because it would become an international political issue. Issues of international politics are usually dealt with within the charter-based bodies.

### 4.3 Summary of Chapter 4

After the “war on terrorism” started the Bush Administration analysed in several documents whether the Geneva Conventions should apply to the war with respectively Taliban and Al Qaeda and whether Taliban members and Al Qaeda members were POWs, and how the United States’ Armed Forces could use harsher interrogation techniques within United States’ international obligations.

The documents showed that one of the reasons for not wanting to apply the Geneva Conventions to the war with respectively Taliban and Al Qaeda members was that the United States’ military personnel and interrogation officers could be held responsible for the treatment of the detainees. On 7 February 2002 President George W. Bush declared that the Geneva Conventions did apply in the war with the Taliban members, but not in the war with Al Qaeda, and that none of the captured Taliban members or Al Qaeda members were POWs, because they were “unlawful combatants”. The fact that the Bush Administration discussed the POW status of Taliban members and Al Qaeda members in several documents is an indication that there was doubt. Thus, the detainees had the right to have their status reviewed by a competent tribunal and until their status was clear they were to be treated as POWs and be protected under Geneva Convention III.

Even though Guantanamo is located outside the territory of the United States article 2(1) ICCPR states that the United States is responsible for state agents violating ICCPR outside the United States and thus ICCPR is applicable for Guantanamo.

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Many of the detention conditions and some of the interrogation techniques that the detainees at Guantanamo were subjected to were a violation of Geneva Convention III and ICCPR.

The United States has made reservations to the definition of "torture" and "inhumane treatment" when ratifying both ICPPR and CAT. According the Bush Administration for an act to be defined as torture, the pain or suffering of the torture victim must be equal to the pain of dying, organ failure or serious impairment of the body functions, or mental pain or suffering caused by threats of death, infliction of severe physical pain or the use of mind-altering substance. "Inhuman treatment" is only defined from the purpose of the act. It is not about the degree of pain or suffering. If the (specific?) intent is to inflict (severe?) "pain or injury for malicious or sadistic reasons", it will be cruel, inhuman or degrading treatment – and not torture. Thus it is almost impossible to convict a person for torture. If a person inflicts severe pain with a specific intent other than inflicting the pain or suffering itself, it is not torture. If the persons inflicts pain or suffering for the sake of the pain or suffering of the victim it is "only" "cruel, inhuman or degrading treatment".

Many of the detention conditions and interrogations techniques that would be considered as "torture" or "inhumane treatment" by the Human Rights Committee, the Committee against Torture and the Special Rapporteur on Torture are not considered to be "torture" or "inhumane treatment" by the United States, because of the reservations. However, it is a paradox that in the country report on the Human Rights situations the United States' State Department has called techniques similar to those used on the detainees at Guantanamo as torture; for example forced to the assume stressful, uncomfortable and painful position for lengthy periods (US SD, 2003) and incommunicado detention (US SD, 2004). United States has not accepted the definition of torture stated in article 1(1) CAT, but the State Department uses reports from the Committee against Torture and Special Rapporteur on Torture in the criticism of human rights in their country reports.

By May 2005 two investigations were completed regarding the allegations of torture and inhumane treatment at Guantanamo, 'Final report on the independent panel to review DoD detention operations' 2004 which was completed in August 2004 and

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‘Executive Summary’ which was completed in March 2005. Both investigations were established by Secretary of Defense, Mr. Donald Rumsfeld, and thus these two investigations cannot be deemed to be independent (regardless of the title of the investigations). By not establishing an independent panel to investigate the allegations of torture and inhumane treatment the Bush Administration sent a signal that they are not taking the allegations seriously and do not want to find the truth.

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# CHAPTER 5
# CONCLUSIONS

After the attacks on World Trade Center in New York and the Pentagon in Washington D.C. 11 September 2001, President George W. Bush declared a “war on terrorism”. The enemy, Mr. Osama Bin Laden, Taliban and Al Qaeda members were depicted as evil people who hated American values of freedom and who had biological weapons and other weapons of mass destruction with which they wanted to kill American people. The “war on terrorism” began in October 2001 with an armed conflict with the Taliban government in Afghanistan, who had refused to extradite Mr. Osama Bin Laden. During this armed conflict the Bush Administration captured thousands of people they believed to be Taliban or Al Qaeda members. From January 2003 the United States started to send some of these people to United States’ Naval Base at Guantanamo Bay in Cuba. There are no official records of how many prisoners have been detained at Guantanamo Bay, but figures from non-governmental organisations and the media indicates that 500 – 600 were still detained in June 2005. In addition to this an unknown number of detainees have been released.

Non-governmental organisations, released detainees and FBI officers have reported that the detainees at Guantanamo have among other things been subjected to prolonged isolation, physical violence, cultural insults, sexual harassment and being kept in a very hot or cold interrogation room for many hours with loud music and strobe light. Detainees in other places of the world have been, are being in this moment and most likely will be in the future, subjected to similar or even worse treatment. The special thing about the case of the detainees at Guantanamo is that the treatment arose from the policy of the Bush Administration. In documents that were released in June 2004 it is shown how the Bush Administration condoned and rationalised torture and by doing so the Bush Administration has not been fulfilling its obligation to prevent torture as the United States has obligation to under article 2(1) in

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the CAT. Several documents, which were declassified in June 2004, show how the policy of the treatment of the detainees, a policy which amounts to and in some cases constitutes torture or inhumane treatment, was developed. The Bush Administration wanted to avoid applying the Geneva Convention III, which among other things protects prisoners of war from torture and inhumane treatment. The Secretary of Defense, Mr. Donald Rumsfeld, approved in April 2003 24 interrogation techniques that could only be used on the detainees at Guantanamo. Among the techniques were isolation, creating fear, sleep adjustment and environmental change. All the techniques approved by Mr. Donald Rumsfeld were tougher than the interrogation techniques normally used by the United States' Armed Forces and violate international law.

The Taliban and the Al Qaeda members that were captured during the "war on terrorism", were not given prisoners of war status under Geneva Convention III, which among other things protect the prisoners of war from torture and inhumane treatment. President George W. Bush decided that Al Qaeda as a non-governmental organisation was not a high contracting party to the Geneva Conventions and therefore the Al Qaeda members were not prisoners of war and that Taliban members were "unlawful combatants" and were therefore not prisoners of war. Thus, by denying the detainees at Guantanamo to contest the reasons for detaining them and by declaring them "enemy combatants" and denying them prisoner of war status the Bush Administration tried to ensure that the detainees at Guantanamo could be detained as long as the "war on terrorism" was going on so that they could be interrogated.

The declassified documents show that the Bush Administration justified the treatment of the detainees at United States' Naval Base at Guantanamo with the need to gather information in order to prevent future terrorist attacks and to make the Al Qaeda network unable to work. Secretary of Defense, Mr. Donald Rumsfeld, has in interviews stated that the treatment of the detainees is justified.

Both torture and inhumane treatment are prohibited in IHL as well as IHRL. Acts of torture or inhumane treatment are considered a "grave breach" of the Geneva Conventions and a person who during an armed conflict commits torture or inhumane

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treatment can be convicted for war crimes. The prohibition of torture and inhumane treatment in IHRL is an absolute right that cannot be derogated from. War or threat to national security does not justify torture or inhumane treatment. Torture and inhumane treatment are not only infliction of physical pain or suffering during an interrogation session. The Geneva Conventions as well as General Comments and jurisprudence from the Human Rights Committee and Committee against Torture show that torture and inhumane treatment, physical as well as mental, does not only take place during interrogation sessions, but also includes among other things transfer and detention conditions.

A critical analysis in the context of international humanitarian law and international human rights law has argued that some of the Bush Administration's policies pertaining to the detainees at Guantanamo are violating international law. The Bush Administration condoned and rationalised treatment that violated international law regarding the prohibition of torture and inhumane treatment and must be considered a cynical negation of its responsibilities under ICCPR and CAT.

Article 5 Geneva Convention III states that a detained person has a right to have the prisoner of war status tried by a competent tribunal in case of doubt whether a person is a prisoner of war or not. Until the competent tribunal has made the decision the person has to be treated like a prisoner of war. It has been argued in this thesis that the fact that the Bush Administration had to make deep legal analysis shows that there was doubt whether the Taliban and the Al Qaeda members were prisoners of war and they therefore should have been treated as prisoners of war.

The transfer from Afghanistan to Guantanamo and the detention facilities of the detainees at the Naval Base at Guantanamo Bay in Cuba are in violation of IHL and IHRL. The transportation was not carried out humanely and with respect for the human dignity. Being detained for up to 23 hours a day without being able to communicate with other people and with no contact with family members is inhuman and degrading treatment and violation of article 7 ICCPR.

Some of the interrogation techniques violate one or more of the articles in Geneva Convention III and/or article 7 ICCPR and article 10(1) ICCPR. For instance,

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"sleep adjustment" is a violation of article 13 Geneva Convention III, which protects a prisoner of war from "intimidation" and of article 13 Geneva Convention III which protects from "unpleasant and disadvantageous treatment". Another example is isolation, which is a violation of articles 13, 14, 34 and 126 Geneva Convention III and of article 10(1) ICCPR. In addition to that, a combination of the interrogation techniques would very likely inflict "severe mental pain and suffering" and would thus be a torture as it is defined in article 1(1) CAT.

The Bush Administration has maintained that the detainees at Guantanamo have been treated according to international law.

Upon accession of ICCPR and CAT the United States made understandings and reservations to the definition of "torture" and "other cruel, inhuman or degrading treatment and punishment". The Bush Administration stated that an act is only "torture" if it inflicts "severe pain or suffering" and if it is done with "specific intent". In order to be "severe pain or suffering" the pain or suffering of the torture victim must be equal to the pain of dying, organ failure or serious impairment of the body functions, or mental pain or suffering caused by threats of death, infliction of severe physical pain or the use of mind-altering substance. Thus, "waterboarding", "Palestine hanging" and other techniques that have been recognised as torture techniques would not be considered as torture according to the Bush Administration's interpretation of the reservations. "Specific intent" has been interpreted by the Bush Administration when an act is done for the purpose of inflicting severe pain or suffering. If an interrogation officer claims that the intention of inflicting of pain or suffering was done either to get information or as a necessity in order to defend the nation, then the intention was not to torture the person, but the intention was to get information or defend the nation and the act would thus not be torture.

The United States is not the only country that has been subject for terrorist attacks and is still at risk of further attacks. Many other countries, among them Thailand have likewise been subject to terrorist attacks and are still fighting with terrorists. If the United States gets away with making very narrow interpretations of the definition of

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"torture" and "inhumane treatment" and it will be tempting for a country like Thailand, which also face terrorism, to make similar reservations in order to have wide scope for getting information. Accepting the American reservation to the definition of "torture" could also undermine the importance of the non-derogable or core rights, for example the right to freedom from slavery, which is guaranteed in article 8 ICCPR.

IHRL deliberately gives space to interpretations of definitions and reservations to avoid that States declining from ratifying the international human rights treaties, because a State would consider ratification as an infringement the principle of national sovereignty. The Vienna Convention on the Law of Treaties from 1969, however, states that reservations cannot be against the purpose of the treaty. The Human Rights Committee has declared that it considers United States' reservations to be against the purpose of ICCPR. However, it is not clear in international law or among legal scholars whether a human rights treaty monitoring body is competent to declare a reservation as invalid. One argument is that the Vienna Convention on the Law of Treaties states that reservations are invalid if it goes against the purpose of the treaty. Another ongoing discussion is whether the Vienna Convention on the Law of Treaties was meant for bilateral treaties and not multilateral agreements like human rights treaties. The result of the lack of clarity is that reservations to multilateral treaties like human rights treaties becomes a political issue, because it is the governments which have to agree on what the obligations in a treaty do – and do not – contain. As Klabbers explain:

> [T]here is something spurious about the presumption that we can leave it all to human rights, because we do not know with certainty the content of human rights. Put differently, human rights are themselves highly political: their contents are never fixed, and as few of them (if any) are absolute standards, the very debate on whether to apply the rule or to apply the exception is always a highly charged political debate (Klabbers, 2003:374).

In the documents the Bush Administration approached the issue of torture and inhumane treatment from the angle of how to protect the American Armed Forces and officers from prosecution. At no point in the debate within the Bush Administration was there a concern for the respect of the human dignity of the detainees, the risk of

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detaining innocent people or whether it was moral correct or not. The discussion about whether to apply Geneva Convention III to Taliban and Al Qaeda members evolved around issues like the protection of the United States' Armed Forces in the armed conflict with Afghanistan, international reaction and the accountability for the Untied States' Armed Forces or intelligence officers who would be accused of violating international law. Thus it is concern for its own personnel and international reactions that made the Bush Administration consider upholding its international obligations. In addition to that the Bush Administration clearly did not think their policy was wrong. The Secretary of Defense, Mr. Donald Rumsfeld, has openly admitted – without excuses or regrets – that at least one detainee had been subjected to interrogation techniques that were stopped to be used because they amounted to torture and inhumane. Nonetheless, some of the interrogation techniques approved for use against detainees at Guantanamo have been criticised by the United States' State Department when used by other countries. Torture is apparently a flexible tool for American politicians. When it can be used to criticise other countries the definition is wide, but when American politicians need to protect the United States the definition is very narrow.

The policy from the Bush Administration regarding the detainees at the Naval Base at Guantanamo Bay permits harder treatment than the standards in international humanitarian law and international human rights law permits. The Bush Administration has not even tried to hide that fact. In the thesis it has been shown that the treatment of the detainees at Guantanamo Bay Naval Base was torture or inhumane treatment according to international law and an examination of the Bush Administration's policy and explanation concluded that the United States has been able to exploit weaknesses in the international treaty body system to allow even such clear violations of basic human rights as torture. So far, the international community has been unable to address this dilemma in any meaningful way. The success of the Bush Administration in having a policy of treatment of detainees that the international human rights monitoring bodies clearly describes as torture or inhumane treatment, should serve as a grim reminder of the inadequacy of the United Nations' system to

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safeguard the fundamental human rights and calls into question whether absolute prohibition of torture and inhumane treatment really is guaranteed in the present system. Reservations and understandings like the ones the United States has made to the definition of torture and inhumane treatment undermine the whole purpose of human rights, which is to ensure that all people, who are deprived of their liberty, as a minimum are treated with respect for their human dignity regardless of the circumstances. It should be considered a matter of great urgency for members of the United Nations and the United Nations' systems not to let individual countries make reservations that violates the print of the treaties, but instead take firm action to prevent these kinds of infringement on fundamental human rights.

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# APPENDIX

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THE WHITE HOUSE

WASHINGTON

February 7, 2002

MEMORANDUM FOR THE VICE PRESIDENT
THE SECRETARY OF STATE
THE SECRETARY OF DEFENSE
THE ATTORNEY GENERAL
CHIEF OF STAFF TO THE PRESIDENT
DIRECTOR OF CENTRAL INTELLIGENCE
ASSISTANT TO THE PRESIDENT FOR NATIONAL SECURITY AFFAIRS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF

SUBJECT: Humane Treatment of al Qaeda and Taliban Detainees

1. Our recent extensive discussions regarding the status of al Qaeda and Taliban detainees confirm that the application of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (Geneva) to the conflict with al Qaeda and the Taliban involves complex legal questions. By its terms, Geneva applies to conflicts involving "High Contracting Parties," which can only be states. Moreover, it assumes the existence of "regular" armed forces fighting on behalf of states. However, the war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of states. Our Nation recognizes that this new paradigm -- ushered in not by us, but by terrorists -- requires new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva.

2. Pursuant to my authority as Commander in Chief and Chief Executive of the United States, and relying on the opinion of the Department of Justice dated January 22, 2002, and on the legal opinion rendered by the Attorney General in his letter of February 1, 2002, I hereby determine as follows:

a. I accept the legal conclusion of the Department of Justice and determine that none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva.

b. I accept the legal conclusion of the Attorney General and the Department of Justice that I have the authority under the Constitution to suspend Geneva as between the United States and Afghanistan, but I decline to

NSC DECLASSIFICATION REVIEW [E.O. 12958 as amended]
DECLASSIFIED IN FULL ON 6/17/2004
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exercise that authority at this time. Accordingly, I determine that the provisions of Geneva will apply to our present conflict with the Taliban. I reserve the right to exercise this authority in this or future conflicts.

c. I also accept the legal conclusion of the Department of Justice and determine that common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to "armed conflict not of an international character."

d. Based on the facts supplied by the Department of Defense and the recommendation of the Department of Justice, I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva. I note that, because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war.

3. Of course, our values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment. Our Nation has been and will continue to be a strong supporter of Geneva and its principles. As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.

4. The United States will hold states, organizations, and individuals who gain control of United States personnel responsible for treating such personnel humanely and consistent with applicable law.

5. I hereby reaffirm the order previously issued by the Secretary of Defense to the United States Armed Forces requiring that the detainees be treated humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.

6. I hereby direct the Secretary of State to communicate my determinations in an appropriate manner to our allies, and other countries and international organizations cooperating in the war against terrorism of global reach.

[redacted]

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THE SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

APR 16 2003

MEMORANDUM FOR THE COMMANDER, US SOUTHERN COMMAND

SUBJECT: Counter-Resistance Techniques in the War on Terrorism (S)

(U) ~~(S/NF)~~ I have considered the report of the Working Group that I directed be established on January 15, 2003.

(U) ~~(S/NF)~~ I approve the use of specified counter-resistance techniques, subject to the following:

(U) a. The techniques I authorize are those lettered A-X, set out at Tab A.

(U) b. These techniques must be used with all the safeguards described at Tab B.

(U) ~~(S)~~ c. Use of these techniques is limited to interrogations of unlawful combatants held at Guantanamo Bay, Cuba.

(U) ~~(S)~~ d. Prior to the use of these techniques, the Chairman of the Working Group on Detainee Interrogations in the Global War on Terrorism must brief you and your staff.

(U) ~~(S/NF)~~ I reiterate that US Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Geneva Conventions. In addition, if you intend to use techniques B, I, O, or X, you must specifically determine that military necessity requires its use and notify me in advance.

(U) ~~(S/NF)~~ If, in your view, you require additional interrogation techniques for a particular detainee, you should provide me, via the Chairman of the Joint Chiefs of Staff, a written request describing the proposed technique, recommended safeguards, and the rationale for applying it with an identified detainee.

(U) ~~(S)~~ Nothing in this memorandum in any way restricts your existing authority to maintain good order and discipline among detainees.

Attachments:
As stated

Declassified Under Authority of Executive Order 12958
Executive Secretary, Office of the Secretary of Defense
William P. Marriott, CAPT, USN
June 18, 2004

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TAB A

## INTERROGATION TECHNIQUES

(U) ~~(S//NF)~~ The use of techniques A - X is subject to the general safeguards as provided below as well as specific implementation guidelines to be provided by the appropriate authority. Specific implementation guidance with respect to techniques A - Q is provided in Army Field Manual 34-52. Further implementation guidance with respect to techniques R - X will need to be developed by the appropriate authority.

(U) ~~(S//NF)~~ Of the techniques set forth below, the policy aspects of certain techniques should be considered to the extent those policy aspects reflect the views of other major U.S. partner nations. Where applicable, the description of the technique is annotated to include a summary of the policy issues that should be considered before application of the technique.

(U) A. ~~(S//NF)~~ Direct: Asking straightforward questions.

(U) B. ~~(S//NF)~~ Incentive/Removal of Incentive: Providing a reward or removing a privilege, above and beyond those that are required by the Geneva Convention, from detainees. [Caution: Other nations that believe that detainees are entitled to POW protections may consider that provision and retention of religious items (e.g., the Koran) are protected under international law (see, Geneva III, Article 34). Although the provisions of the Geneva Convention are not applicable to the interrogation of unlawful combatants, consideration should be given to these views prior to application of the technique.]

(U) C. ~~(S//NF)~~ Emotional Love: Playing on the love a detainee has for an individual or group.

(U) D. ~~(S//NF)~~ Emotional Hate: Playing on the hatred a detainee has for an individual or group.

(U) E. ~~(S//NF)~~ Fear Up Harsh: Significantly increasing the fear level in a detainee.

(U) F. ~~(S//NF)~~ Fear Up Mild: Moderately increasing the fear level in a detainee.

(U) G. ~~(S//NF)~~ Reduced Fear: Reducing the fear level in a detainee.

(U) H. ~~(S//NF)~~ Pride and Ego Up: Boosting the ego of a detainee.

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I. (U) ~~(S//NF)~~ Pride and Ego Down: Attacking or insulting the ego of a detainee, not beyond the limits that would apply to a POW. [Caution: Article 17 of Geneva III provides, "Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind." Other nations that believe that detainees are entitled to POW protections may consider this technique inconsistent with the provisions of Geneva. Although the provisions of Geneva are not applicable to the interrogation of unlawful combatants, consideration should be given to these views prior to application of the technique.]

J. (U) ~~(S//NF)~~ Futility: Invoking the feeling of futility of a detainee.

K. (U) ~~(S//NF)~~ We Know All: Convincing the detainee that the interrogator knows the answer to questions he asks the detainee.

L. (U) ~~(S//NF)~~ Establish Your Identity: Convincing the detainee that the interrogator has mistaken the detainee for someone else.

M. (U) ~~(S//NF)~~ Repetition Approach: Continuously repeating the same question to the detainee within interrogation periods of normal duration.

N. (U) ~~(S//NF)~~ File and Dossier: Convincing detainee that the interrogator has a damning and inaccurate file, which must be fixed.

O. (U) ~~(S//NF)~~ Mutt and Jeff: A team consisting of a friendly and harsh interrogator. The harsh interrogator might employ the Pride and Ego Down technique. [Caution: Other nations that believe that POW protections apply to detainees may view this technique as inconsistent with Geneva III, Article 13 which provides that POWs must be protected against acts of intimidation. Although the provisions of Geneva are not applicable to the interrogation of unlawful combatants, consideration should be given to these views prior to application of the technique.]

P. (U) ~~(S//NF)~~ Rapid Fire: Questioning in rapid succession without allowing detainee to answer.

Q. (U) ~~(S//NF)~~ Silence: Staring at the detainee to encourage discomfort.

R. (U) ~~(S//NF)~~ Change of Scenery Up: Removing the detainee from the standard interrogation setting (generally to a location more pleasant, but no worse).

S. (U) ~~(S//NF)~~ Change of Scenery Down: Removing the detainee from the standard interrogation setting and placing him in a setting that may be less comfortable; would not constitute a substantial change in environmental quality.

T. (U) ~~(S//NF)~~ Dietary Manipulation: Changing the diet of a detainee; no intended deprivation of food or water; no adverse medical or cultural effect and without intent to deprive subject of food or water, e.g., hot rations to MREs.


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(U)
U. (~~S//NF~~) Environmental Manipulation: Altering the environment to create moderate discomfort (e.g., adjusting temperature or introducing an unpleasant smell). Conditions would not be such that they would injure the detainee. Detainee would be accompanied by interrogator at all times. [Caution: Based on court cases in other countries, some nations may view application of this technique in certain circumstances to be inhumane. Consideration of these views should be given prior to use of this technique.]

(U)
V. (~~S//NF~~) Sleep Adjustment: Adjusting the sleeping times of the detainee (e.g., reversing sleep cycles from night to day.) This technique is NOT sleep deprivation.

(U)
W. (~~S//NF~~) False Flag: Convincing the detainee that individuals from a country other than the United States are interrogating him.

(U)
X. (~~S//NF~~) Isolation: Isolating the detainee from other detainees while still complying with basic standards of treatment. [Caution: The use of isolation as an interrogation technique requires detailed implementation instructions, including specific guidelines regarding the length of isolation, medical and psychological review, and approval for extensions of the length of isolation by the appropriate level in the chain of command. This technique is not known to have been generally used for interrogation purposes for longer than 30 days. Those nations that believe detainees are subject to POW protections may view use of this technique as inconsistent with the requirements of Geneva III, Article 13 which provides that POWs must be protected against acts of intimidation; Article 14 which provides that POWs are entitled to respect for their person; Article 34 which prohibits coercion and Article 126 which ensures access and basic standards of treatment. Although the provisions of Geneva are not applicable to the interrogation of unlawful combatants, consideration should be given to these views prior to application of the technique.]



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TAB B

**GENERAL SAFEGUARDS**

(U) ~~(S//NF)~~ Application of these interrogation techniques is subject to the following general safeguards: (i) limited to use only at strategic interrogation facilities; (ii) there is a good basis to believe that the detainee possesses critical intelligence; (iii) the detainee is medically and operationally evaluated as suitable (considering all techniques to be used in combination); (iv) interrogators are specifically trained for the technique(s); (v) a specific interrogation plan (including reasonable safeguards, limits on duration, intervals between applications, termination criteria and the presence or availability of qualified medical personnel) has been developed; (vi) there is appropriate supervision; and, (vii) there is appropriate specified senior approval for use with any specific detainee (after considering the foregoing and receiving legal advice).

(U) The purpose of all interviews and interrogations is to get the most information from a detainee with the least intrusive method, always applied in a humane and lawful manner with sufficient oversight by trained investigators or interrogators. Operating instructions must be developed based on command policies to insure uniform, careful, and safe application of any interrogations of detainees.

(U) ~~(S//NF)~~ Interrogations must always be planned, deliberate actions that take into account numerous, often interlocking factors such as a detainee's current and past performance in both detention and interrogation, a detainee's emotional and physical strengths and weaknesses, an assessment of possible approaches that may work on a certain detainee in an effort to gain the trust of the detainee, strengths and weaknesses of interrogators, and augmentation by other personnel for a certain detainee based on other factors.

(U) ~~(S//NF)~~ Interrogation approaches are designed to manipulate the detainee's emotions and weaknesses to gain his willing cooperation. Interrogation operations are never conducted in a vacuum; they are conducted in close cooperation with the units detaining the individuals. The policies established by the detaining units that pertain to searching, silencing, and segregating also play a role in the interrogation of a detainee. Detainee interrogation involves developing a plan tailored to an individual and approved by senior interrogators. Strict adherence to policies/standard operating procedures governing the administration of interrogation techniques and oversight is essential.

Classified By: Secretary of Defense
Reason: 1.5(a)
Declassify On: 2 April 2013



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(U) ~~(S//NF)~~ It is important that interrogators be provided reasonable latitude to vary techniques depending on the detainee's culture, strengths, weaknesses, environment, extent of training in resistance techniques as well as the urgency of obtaining information that the detainee is known to have.

(U) ~~(S//NF)~~ While techniques are considered individually within this analysis, it must be understood that in practice, techniques are usually used in combination; the cumulative effect of all techniques to be employed must be considered before any decisions are made regarding approval for particular situations. The title of a particular technique is not always fully descriptive of a particular technique. With respect to the employment of any techniques involving physical contact, stress or that could produce physical pain or harm, a detailed explanation of that technique must be provided to the decision authority prior to any decision.



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