Torture in the Name of National Security: Isolated Incidents or Covert State Policy?

Sabrina Bahir
School of International Service
Honors Capstone
Faculty Advisor: Prof. Julie Mertus

Abstract

The abhorrent practice of torture is prohibited by both internationally treaty and customary laws. International treaties such as the International Covenant for Civil and Political Rights, the Convention Against Torture and the Geneva Conventions all proscribe torture and other cruel and inhuman treatments. However, the Bush Administration has violated these laws in waging its 'War against Terror'. Were the atrocities of Bagram, Abu Ghraib and Guantanamo results of the misdeeds of a few bad apples or a manifestation of state sponsored torture? Having examined legal memos that attempted to manipulate laws, testimonies from interrogators and detainees and independent reports, I conclude that torture is a covert U.S. state policy that is not only practiced through administration of secret prisons and rendition, it is camouflaged as a national security measure. I argue that while torturing people does not increase national security, it has the inverse effect of making the country more vulnerable to foreign threats.

I INTRODUCTION:

The Bush administration has adopted a new paradigm in the 'War on Terror'. It claims it is fighting a different kind of war against a brutal enemy who hates the American way of life and does not understand American values like democracy and freedom. The administration argues that this enemy needs to be defeated and the American way of life defended. Unfortunately, in its quest to fight this undefined foe, the Bush administration has broken its own rules by engaging in torture-an utterly un-American and universally banned practice. Of course, the administration does not plead guilty, blames the wrongdoings on a few low-ranking officials, and manipulates the legal system to broaden the definition of torture so its inadmissible practices can fit within the boundaries of law.

This paper first discusses international and regional documents that prohibit torture. I will then briefly discuss the U.S. domestic law relating to torture. The main part of my paper will include two cases- the case of Maher Arar and Omar Khadr-whose lives were affected by

US government's practice of torture. I argue that although the US says it prohibits torture, the practice shows otherwise.

II INTERNATIONAL CONVENTIONS REGARDING TORTURE

1. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR)

The Universal Declaration of Human Rights (UDHR) came into being after the atrocities of World War II. Article 5 of UDHR is specifically about torture which states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Although, UDHR is not binding since it does not have an enforcement mechanism it is still considered customary international law. The most important measure established by UDHR is its message of human dignity which stands for respect for the human for the sole basis of being a human.[1]

2. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

International Covenant on Civil and Political Rights (ICCPR) is another major international human rights document which was adopted in 1966 and entered into force in 1976. The Convention establishes basic rights such as the right to self determination, freedom of expression, speech and religion. It also includes negative rights such as freedom from torture. ICCPR is a binding treaty, but states may hold reservations and declarations. The covenant has 70 signatories and 161 parties. The U.S signed the document on October 5th 1977, but did not ratify it until June 8th 1992. The U.S. has several reservations and understandings

[1] Universal Declaration on Human Rights, (Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948) *available at* http://www.un.org/Overview/rights.html (last visited April 20, 2008).

concerning this treaty. One of the important reservations concerns Article 7 of the Covenant which is about "cruel, inhuman and degrading treatment." The U.S understanding is that this phrase only applies to the extent that it carries the same meaning as "cruel, inhuman, or degrading treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States."[2] According to Alan M. Dershowitz's *Why Terrorism Works*[3], the Eighth Amendment's ban on "cruel and unusual punishment" extends only to convicted criminals. In other words, the accused receive Eighth Amendment protection only after a guilty verdict. Similarly, the "due process of law" granted by the Fifth and Fourteenth Amendments relate exclusively to judicial proceedings. Therefore, the U.S's understanding of "cruel, inhumane and degrading punishment" does not protect prisoners at Abu Ghraib. This is because such prisoners are held by the military in wartime. Their suffering regardless of its severity has nothing to do with judicial proceedings. Dershowitz claims that Senate's provisions not only limit the applicability of the treaty's "cruel, inhuman or degrading" clause, but also its prohibition of torture itself.[4]

The U.S. has also declared all articles of the Convention 'non self executing'. This means that none of the articles have any power in American courts if their provisions have been violated. The Convention cannot be implemented unless the American courts deem it to be appropriate. Despite this status, it is important to note that by signing on to the treaty, the

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[2] The International Covenant on Civil and Political Rights (General Assembly Resolution 2200A [xxi] of 16 December 1966) http://www2.ohchr.org/english/bodies/ratification/docs/DeclarationsReservationsICCPR.pdf (last visited April 20, 2008).

[3] Dershowitz, Alan. *Why Terrorism Works: Understanding the Threat, responding to the Challenge*, New Haven: Yale University Press, 2003.

[4] Ibid.

United States takes a legal obligation to abide by it and will be held accountable for its performance or lack thereof. [5]

3. EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

The European Convention for the Protection of Human Rights and Fundamental Freedoms (also known as the European Convention on Human Rights "ECHR") is a regional document. It was adopted by the Council of Europe in 1950.Compared to other international human rights convention, ECHR has judicial and enforcement mechanisms. The Convention established the European Court of Human Rights which allows any person whose rights are violated by a state member to bring his case to the Court. The decisions of the Court are legally binding; the Court also has the ability to award damages. To date, this Convention is the only piece of binding international law that allows for individual protection and permits states to bring suits against other member states though this right is seldom used. The United States is not bound by ECHR, but this convention is politically important to the States. Many of the United States' allies are members of this treaty who would then put political pressure on the States to adopt similar human rights values as the European ones.

Although ECHR provides for a judicial mechanism, the European Court of Human Rights has struggled with the meaning of torture. ECHR prohibits both torture and "inhuman or degrading treatment or punishment," without defining either term.[6] In the *Greek Case* the Court attempted to explain the difference between "torture" and "inhumane or degrading

[5] Ibid.
[6] The European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S 222, Art. 3 (November 4, 1950) ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment.").

treatment".[7] In that case the Court established a hierarchy of ill treatment with torture being the most egregious. The Court wrote:

> It is plain that there may be treatment to which all these descriptions apply, for all torture must be inhuman and degrading treatment, and inhuman treatment is degrading. The notion of inhuman treatment covers at least such treatments as deliberately causing severe suffering, mental or physical, which, in the particular situation, is unjustifiable…. The word "torture" is often used to describe inhuman treatment, which has a purpose, such as obtaining information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment.[8]

According to this definition pain has different levels. Pain progresses along a spectrum of severity from degrading treatment, through inhuman treatment, to torture. In another case the Court ruled that five interrogation methods were considered inhuman and degrading, but were not severe enough to qualify as torture.[9] This shows that although the ECHR attempt to enforce and legalize prohibition of torture, pain cannot be succinctly described. It would be impossible to quantify the severity of pain given that it can be emotional, psychological as well as physical.

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4. THE AMERICAN CONVENTION ON HUMAN RIGHTS

The American Convention on Human Rights is another regional human rights instrument to which the United States is a member. This convention was signed by the nations of the Americas in 1969. Article 5 of this convention relates specifically to humane treatment

[7] The Greek Case, YEAR BOOK OF THE EUROPEAN CONVETNION ON HUMAN RIGHTS 186 (1969).
[8] Ibid.
[9] Republic of Ireland v. the United Kingdom, 2 E.H.R.R 25, 36 (1979-80). The five techniques were wall-standing, hooding, subjection to noise, sleep deprivation, and deprivation of food and drink.

and section two of this article mentions torture. "No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."[10]

Most central and South American countries have signed and ratified this treaty. The United States has only signed it in 1977, but has not ratified it yet. The United States, therefore, is not bound by the treaty. However, by expressing its interest in one day becoming a Party to the treaty, the State has the "obligation not to defeat the object and purpose of the treaty until it has made its intention clear not to become a Party to the treaty." [11]

5. THE CONVENTION AGAINST TORTURE (CAT)

The Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") came into force in 1987. Over 135 parties have signed the CAT and it has been ratified by enough parties to become binding international law. The International Criminal Tribunal for the Former Yugoslavia explains that the international acceptance of the CAT and its definition of torture echo "a consensus… representative of customary international law."[12]

The definition of torture in the CAT is as follows:

> 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.[13]

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[10] http://www.hrcr.org/docs/American_Convention/oashr4.html
[11] http://conventions.coe.int/Treaty/EN/v3Glossary.asp
[12] Prosecutor v. Furundija, ICTFY, Case No.: IT-95-17/1, T, at ¶ 160 (Dec. 10, 1998).
[13] The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S 85 (hereinafter "CAT"). Art. 1.

This definition consists of the following components: (1) an act; (2) severe pain and suffering; (3) physical or mental pain; (4) intent; (5) particular purposes; (6) involvement of a public official; and (7) the absence of pain or suffering from lawful sanctions. Gail Miller in her book *Defining Torture*[14] has examined what each of these elements signifies. As I explain how she classifies each component, I argue that these definitions are vague, leave a loophole and create an atmosphere where torturers not only get away with their acts; their actions are reinforced by the flexibility of the international mechanisms.

(1) "An Act"

Scholars agree that an act includes both pro-active behavior such as hanging someone to a wire ceiling and an omission such as prohibiting an individual from eating and drinking. [15] This is important in the context of the "War on Terror" where, according to Red Cross reports, prisoners are denied medical care, meals and religious services and other amenities if they do not cooperate. Medical care, for example, is made available as a reward for cooperation and withheld to punish uncooperative detainees.[16]

(2) "Severe Pain and Suffering"

The determination of "severe pain and suffering" is based on a subjective standard; CAT does not offer any objective scale for severity. Each individual's pain tolerance is different

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[14] Miller, Gail. *Defining Torture,* New York: Benjamin N. Cardozo School of Law, 2005.

[15] AHCENE BOULESBAA, THE U.N. CONVENTION ON TORTURE AND THE PROSPECTS FOR ENFORCEMENT 9-15 (Martinus Nijhoff Publishers 1999) "an omission in an 'act' where there is a legal duty to act and, as the legal duty of States to act in this respect has been established in the previous international conventions, it would be absurd to conclude that the prohibition of torture in the context of Article 1 does not extend to conduct by way of omission.") ; HERMAN J. BURGERS & HANS DANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: AHANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 118 (Martinus Nijhoff Publishers 1988) ("in special cases an omission should be assimilated to an act.").

[16] Ratner, 43.

and one act can have two very different effects on two people depending on their threshold.[17]Article 2 of the CAT requires that each country institute its own legislation to prevent torture. [18] This has allowed signatories to fiddle with CAT's definition of torture and redefine the term. This has led to numerous definitions of torture instead of a single universal designation. Some states have narrowly interpreted "severe pain", thus limiting the reach of the CAT. The U.S, for example, which ratified the treaty in 1994, for a few years abided by the definition put forth in the Justice Department memo which asserted that "severe pain" is equivalent to the "pain associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in loss of significant body functions will likely result." [19] This is a watered-down definition of torture. Physical damage should not matter; the fact of inflicting severe pain should be enough to constitute torture.

(3) "Physical or Mental Pain"

The CAT's definition of torture includes pain that causes mental or physical harm. However, the CAT does not outline what amounts to physical or mental pain or where the boundary between the two is. The U.S. definition of torture, however, has a detailed description of the mental harm element. When considering the ratification of the CAT, the United States Senate was not satisfied with the international definition of mental torture. Therefore, as a ratification condition, the United States submitted the following understanding in order to precisely define mental torture:

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[17] Report of the Special Rapporteur, Sir Nigel S. Rodley, submitted pursuant to Commission on Human Rights Resolution 1995/37, E/CN. 4/1995/34 at ¶ 10 (January 9, 1996).

[18] Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction." CAT, *supra* note 1, at Art. 2 § 1.

[19] The U.S. Department of Justice's reinterpretation of the legal definition of torture highlights both the unstable meaning of the term and the significance placed on defining torture. *See* Memorandum from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, to James B. Comey, Deputy Attorney General, *RE: Legal Standards Applicable Under 18 U.S.C §§2340-234A (*December 30, 2004)

> An act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to *prolonged* mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of *mind altering* substances or other procedures calculated to disrupt profoundly the 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 substances or other procedures calculated to disrupt profoundly the senses or personality.[20]

A 2003 Justice Department legal memorandum sent to the Pentagon defended the use of "mind-altering drugs that do not produce "an extreme effect" calculated to "cause a profound disruption of the senses or personality." The challenge is this: How does one measure "extreme effect"? [21] It is a judgment call that the interrogator makes and according to this memo, they do not have to abide by the law when making that judgment.

This understanding, a provision added by the Senate which found the U.N. definition of mental harm insufficient, is ironically very vague itself. How, for example, does one define "prolonged mental harm"? Without a distinction between transient and prolonged mental harm, the understanding narrows the applicability of CAT. Should the harm be constant and durable or do intermittent flashbacks suffice? There are instances where an individual experiences severe mental pain or suffering, but the harm did not arise from any specific cause. In that case, the act would not constitute torture under the U.S. understandings even though applying CAT directly would have classified the act as torture. Furthermore, isn't sleep deprivation a "mind altering procedure"? Nicole Bieske, spokesperson for Amnesty International says, "At the very least it (sleep deprivation) is cruel, inhumane and degrading.

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[20] The United States ratified the CAT with reservations, understandings and declarations (hereinafter RUDs). *Convention against Torture and Other Cruel, Inhuman or degrading Treatment or Punishment, Reservations, Understandings and Declarations Made by the United States of America, available at* http://www.unhchr.ch/html/menu2/6/cat/treaties/convention-reserv.htm Open Document (last visited April 20, 2008) emphasis added.

[21] Dan Eggen and Josh White, "Memo: Laws Don't Apply to Interrogators", *Washington Post,* April 2, 2008.A1.

If used for prolonged periods of time it is torture."[22] A sleep deprived person hallucinates, has a distorted "personality" and is usually delusional. A study conducted by Williamson, Professor of Psychology in Sydney Australia and Anne Feyer of the New Zealand Occupational and Environmental Health Research Center finds that "moderate sleep deprivation produces impairments in cognitive and motor performance equivalent to legally prescribed levels of alcohol intoxication".[23]Darius Rejali, in his comprehensive book *Torture and Democracy,* writes that "sleep-deprived people are highly suggestible, making sleep deprivation ideal for inducing false confessions". He goes on to say that due to auditory and visual hallucinations, sleep-deprived individuals could believe incredible things such as making a "secret pact wit the devil". [24]

(4) "Intent to inflict"

Under the CAT definition of torture, severe pain and suffering has to be "intentionally inflicted upon a person. [25] This means that, if a victim was severely punished by a state official, but the official did not intend his action to cause severe pain, then that act does not constitute torture. The torturer must intend to *inflict* severe pain and suffering, not just intent to do an act that causes such harm. While lawyers turn to "general intent" and "specific intent" when attempting to analyze the kind of intent required, the text of the CAT does not require either intent. [26] General intent is less demanding and means that the actor intends to carry out the conduct as opposed to intent to cause a particular type of violation. Specific intent means that the violator intends to commit a particular crime.[27] The United States'

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[22]"Sleep Deprivation is Torture", *The Sydney Morning Herald*, Oct. 3, 2006, *available at* http://www.smh.com.au/news/National/Sleep-deprivation-is-torture-Amnesty/2006/10/03/1159641317450.html
[23] http://oem.bmj.com/cgi/content/abstract/57/10/649 (last visited March 10, 2008).
[24] Darius Rejali, *Torture and Democracy* (Princeton, NJ: Princeton UP, 2007) 290.
[25] CAT, *supra* note 11, at Art. 1 § 1.
[26] Miller, 14.
[27]Ibid 14

formal understandings at the time of ratification included the world "specifically" to the issue of intent. The drafters of the U.S. understandings to the CAT, were concerned that the CAT definition requires only general intent, so they added a provision to make it specific.

In its memos on defining torture, the U.S. Department of Justice (DOJ) asserts that specific intent is required. However, DOJ lawyers fail to define specific intent in this context. Instead, extreme scenarios of intent are described. For example, the DOJ says that if someone consciously commits an act with the intention of inflicting severe pain and suffering, then the specific intent standard is fulfilled. However, if an individual performed an act in good faith and did not think his action would result in severe pain, then the specific intent standard is not met. This leaves the middle ground fuzzy and ambiguous. Would someone chain a detainee's arms to the ceiling 'in good faith' assuming it would not be painful?

(5) "The Purposes"

The CAT definition states that an act can only be constituted as torture if it was performed for certain purposes. The act must be committed for:

> Such purposes as obtaining from (the victim) or a third person information for 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. [28]

Countries vary in implementing the purpose requirement. Some signatories specify purposes in their definitions of torture. Sometimes, these particular purposes are inconsistent with the purposes listed in CAT. For example, Spain's definition states that pain should be for obtaining a confession from someone or for punishing him for an act. Therefore, if a prison guard inflicts pain for discriminatory purposes such as ethnic or racial hatred, such act will

[28] CAT, *supra* note 11, at Art. 1 § 1.

not constitute torture under Spanish law.[29] Under U.S. law, an actor's purposes are irrelevant.[30]

It is difficult to speculate why some countries have specific purposes and others do not. Perhaps, the purpose requirement helps contextualize the violence in relation to other forms of abuse. Similarly, the lack of a purpose may be an effort to hold public officials responsible for all sorts of intense brutality.

(6) "Public Official"

According to the CAT definition of torture, an act must be "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."[31] Even the most atrocious treatments are not considered torture if the state is not involved. The United States, in ratifying the CAT, presented the following understanding in respect to the public official requirement:

> 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…
> (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 activity. [32]

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[29] *Consideration of Reports Submitted By State Parties under Article 19 of the Convention,* Spain, U.N. Doc. CAT/C/55/Add.5, at ¶ 16, *available at* http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CAT.C.55.Add.5.En?Opendocument (last visited April 22, 2008), citing Spanish Penal Code, Art. 174.

[30] *See* 18 U.S.C. 2340 (1) (2004) ("'torture' means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.").

[31] CAT, *supra* note 11, at Art. 1 § 1.

[32] *U.S. Reservations, Declarations, and Understandings, supra* note 20. The first draft of understandings required the public official to have "knowledge" of such activity. This requirement was later changed to mere "awareness" after Senate Foreign Relations Committee expressed concern that the conditions "'created the impression that the United States was not serious in its commitment to end torture worldwide'." *Khouzam,* 361 F.3d at 170, citing S. Exec. Rep 101-30, at 4, 9, (1990).

In addition to the concept of physical control, the U.S. understandings also add the term "offender" without defining it. Thus, it is unclear whether the "offender" refers to the person charged with torture or the person merely involved in the torture. [33]

(7) "Does Not Include Pain or Suffering from Lawful Sanctions"

Finally, the CAT states that "pain or suffering arising only from, inherent in or incidental to lawful sanctions" does not constitute torture. [34] What this essentially means is that in the right context, acts that inflict severe pain can be acceptable. If this provision is broadly interpreted, it could constitute the exception that erased the rule. However, this is rather hypothetical because countries do not often defend themselves against torture accusations on the grounds that such action is incidental to lawful sanctions. Keep in mind, however, that the lawful sanction provision does preclude any debate that capital punishment is torture. Many signatories argue that the lawful sanctions language undermines the universality of the definition of torture under the CAT. In its understanding, the United States clarified the lawful sanctions immunity as follows:

> (c) That with reference to article 1 of the Convention, the United States understands that 'sanctions' include judicially-imposed sanctions and other enforcement actions authorized by the 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.[35]

This explanation attempts to reconcile U.S. domestic laws, which permit certain practices which may otherwise be banned by the CAT. The lawful sanctions exemption is a potential slippery slope because differences in national laws can undermine the strength and enforceability of the CAT.

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[33] Ibid.
[34] CAT, *supra* note 11, at Art. 1 § 1.
[35] U*.S. Reservations, Declarations, and Understandings, supra* note 20.

All of the above treaties and documents demonstrate that signatories must have a policy against torture. The location where the torture occurs is irrelevant because the CAT establishes universal jurisdiction for all cases of torture. [36]If torture is occurring outside a country, a member state is not expected to sit idly, but instead take a stance politically and diplomatically. The United States, however, does not always take an active position against other countries that practice torture. While the States condemns countries like Egypt and Syria for their human rights violations in the annual reports, detainees are rendered to these countries to be tortured. The practice of extraordinary rendition is against all international norms. Not only is the United States standing by as other countries torture, the United States is facilitating this torture, participating in it and giving other countries incentives and reasons to continue this abhorrent practice.

In this section, I summarized the CAT and analyzed how torture is defined under this Convention. The careful language that drafters of the CAT utilized has serious repercussions on how states conduct themselves regarding acts that may constitute torture. Moreover, the provision within the CAT that allows countries to create their own legislation to prevent torture is a legal loophole that member states exploit to legalize torture. Next, I will briefly outline some key domestic provisions that also reiterate the torture ban set forth in international treaties.

III U.S DOMESTIC LAW

Since the reports of detainee abuse in Abu Ghraib prison in Baghdad were released in April 2004, the discussion of torture has focused on U.S. detainee interrogation policies and

[36] Ratner 31.

practices. Officially, the United States denounces torture.[37] However, actions speak louder than words. Since the definition of torture is vague and it is difficult to understand what exactly the government means by that term, it is easier for public officials to get away with torture.

Public officials have lied to the American people by standing by and facilitating torture in practice and condemning it on record. For example, in a Senate Committee hearing, Porter J. Goss, former Director of Central Intelligence, stated, "We don't torture."[38] Nonetheless, he tried to differentiate between "professional interrogation" and torture. According to Goss, professional interrogations techniques are tools used to fight terrorism and are perfectly legal. [39] However, his argument shattered with his claim that waterboarding, an interrogation technique currently used by the CIA, is a legal interrogation tactic. Under the CAT definition, it is easy for any ordinary person to classify waterboarding as torture.[40]

While torture is a federal crime and CAT requires that States have specific legislation to prevent it within their territory, the State Department has stated that "existing criminal law was determined to be adequate to fulfill the Convention's prohibitory obligations, and in

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[37] *See* Statement by President George W. Bush on United Nations International Day in Support of Victims of Torture, 40 WEEKLY COMP. PRES. DOC. 1167 (July 5, 2004) ("Freedom from torture is an inalienable human right.") *See also* 22 U.S.C. § 2152 (2004) (Findings of the Torture Victim Relief Act of 1988) ("The American people abhor torture by any government or person. The existence of torture creates a climate of fear and international insecurity that affects all people."); *CAT, Treaty Doc.* 100-20: *Hearing Before the Senate Comm. On Foreign Relations*, 101st Cong. 1 (1990) (statement of Sen. Helms) ("Nobody is in favor of torture. Not anybody in this committee, not anybody in Congress, not anybody in Government. Nobody favors torture under any circumstances."). (The Second Circuit opined that "the torturer has become like the pirate and slave trader before his hostis humani generis, an enemy of all mankind." Filartiga v. Pena-Irala, 630 F. 2d 876, 890 (2nd Cir. 1980).

[38] *See* Douglas Jehl, *Questions Left By C.I.A. Chief On Torture Use,* N.Y. Times, March 18, 2005, at A1.

[39] *Id* Goss's testimony was further clarified in a CIA press statement which reiterated the CIA's lawful interrogation techniques are not torture. *Statements by* CIA *Director of Public Affairs, Jennifer Millerwise,* March 18, 2005, *available at* http://www.cia.gov/cia/public_affairs/press_release/2005/pr03182005.html (last visited April 24, 2008).

[40] Human Rights First claims that waterboarding constitutes torture under domestic and international law. *See* CNN *Report on* DOD *Memos Authorizing Torture,* June 21, 2004, *available at* www.humanrightsfirst.org/us_law/digest/digest-04/usls_digest04_070104.htm (last visited April 21, 2008).

deference to the federal-state relationship."[41] On the other hand, federal law does prohibit torture that occurs *outside* the U.S. For example, U.S.C § 2340 adopts the CAT definition of torture, but incorporates the U.S. understanding to CAT specifying and restricting the meaning of mental pain and suffering and including the specific intent condition. Additionally, § 2340 does not include the list of purposes necessary for an act to be considered torture. This ambiguity broadens the definition of torture to include acts that do not have a specifically stated purpose. [42]

IV THE US AND ITS PRACTICE OF TORTURE

The official record of the United States is that it does not condone, promote or practice torture. President Bush claims that even today, America has the 'moral high ground' in terms of protecting human rights. His statements, however, cannot be corroborated. As will be discussed below, this administration has outsourced torture, held innumerable ghost detainees in secret locations around the world and plans to indict a 15 year old based on evidence obtained through torture which is legally impermissible in any court of law. Not only has the United States lost its moral high ground, it has tremendously damaged its international bargaining power and legitimacy which can have alarming consequences on the security apparatus of the country. In this section, I will provide case studies that demonstrate how the United States tortures and tries to justify it by appealing to the fear factor.

1. THE EXTRAORDINARY RENDITION OF MAHER ARAR

[41] *Consideration of Reports Submitted By State Parties under Article 19 of the Convention,* Spain, U.N. Doc. CAT/C/55/Add.5, at ¶ 16, *available at* http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CAT.C.55.Add.5.En?Opendocument (last visited April 22, 2008), citing Spanish Penal Code, Art. 174.

[42] U.S.C § 2340 *available at* http://www.capdefnet.org/fdprc/contents/shared_files/titles/18_usc_2340.htm

Article 3 of the CAT states, "no State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[43] However, this is exactly what happened to Maher Arar, a Syrian-born Canadian citizen. In the next few paragraphs I reports facts that a commission of inquiry in Canada found on Arar's case.

On September 26, 2002, Arar was captured by U.S. immigration officers, reportedly with the approval of the then Acting Attorney General Larry Thompson. He was arrested at JFK airport, on his way back to Canada from a family vacation in Tunisia. Arar was held in solitary confinement at the Metropolitan Detention Center in Manhattan for eleven days (September 27th, 2002- October 7th, 2002) where he was interrogated and denied access to a lawyer on the grounds that he was not a U.S. citizen and did not have right to counsel.[44] U.S. immigration authorities authorized the "expedited removal" of Arar. He was repeatedly questioned about links to Al-Qaeda and he repeatedly denied any connections whatsoever with any of the named Al-Qaeda operatives.[45] During his confinement in New York, he was allowed very little food and sleep and was not permitted to pray. His interrogation sessions in the U.S. sometimes lasted for 18 hours. [46]

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[43] CAT, article 3 *available at* http://www.unhchr.ch/html/menu3/b/h_cat39.htm

[44] According to the lawsuit filed by Arar against Attorney General John Ashcroft and other U.S. officials, Larry D. Thompson, J. Scott Blackman (then Regional Director of the immigration and Naturalization Services for the Eastern District), Edward J. McElroy (formerly District Director for the Immigration and Naturalization Services for the New York City District and presently District Director of U.S. Immigration Customs Enforcement), Robert Mueller (Director of the FBW), and others, unlawfully detained and interrogated Arar for Thirteen days. Complain and Demand for Jury trail, filed with the U.S. District East District of New York in *Arar v. Ashcroft, et al., available at* http://www.ccr-ny.org/v2/legal/september_11/docs/ArarComplaint.pdf (last visited April 25, 2008) (Arar v. Ashcroft).

[45] *Id.* paras. 31,33.

[46] *See* Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar*, Report of Professor Stephen J. Toope Fact Finder* (Oct. 14, 2005) *available at* http://www.ararcommission.ca/eng/ToopeReport_final.pdf (last visited April 20, 2008)

After the eleven days of interrogation in the U.A. Arar was informed that the Director of the US Immigration and Naturalization Service had ordered him to be sent, not across the border to Canada, a country that does not torture which he was citizen of, but to Syria – a country internationally known for practicing torture. Then, he was blindfolded, shackled, put on a van and sent to New Jersey and was loaded onto a small private jet heading for Syria.[47] Arar arrived in Jordon in the middle of the night. He had not slept since he left New York. The next morning, after being questioned by a doctor and an interrogator, he was told what he already knew: "You are clear, you are going to Syria". [48] That same day, he was driven away and eventually was transported to a building with pictures of Presidents Assad, his way of knowing that he was in Syria.. He later realized that he was in the Far Falestin prison. Arar felt so desperate after realizing where he was that he later told Canada's commission of inquiry that if he could have figured out a way to kill himself, he would have done it.

In Far Falestin prison, he was beaten for hours, interrogated by a man named "George" who Arar later learned was George Salloum, the head interrogator. After received some bread and potatoes to eat, Arar was taken to the basement and a very small cell (seven feel high by six feet long by three feet wide). Mr. Arar explained that the cell contained two thin blankets, a "humidity isolator" and two bottles, "one for water and one for pee". [49] For the next ten months Arar remained in Syria, was continuously beaten, and whipped with an electrical cable. He was regularly threatened with more torture and kept in a confined place similar to a shallow grave. [50] He remembers that he was threatened the first day he was in Syria and by the second day the beatings started. His interrogator brought in an electric cable,

[47] *Id.*
[48] *Id*
[49] *Id.* 14.
[50] *Id.* para. 61; *see also* Dana Priest & Joe Stephens, *Secret World of U.S. Interrogation: Long History of Tactics in Overseas Prisons Is Coming to Light,* WASHINGTON POST, May 11, 2004, at A1.

asked him if he knew what it was and then started beating him so hard with it that he "forgot every enjoyable moment in life"[51] Arar later reported that grew more desperate, disoriented and fragile, he was ready to "say anything" necessary to avoid torture.[52] He was forced to 'confess' that he attended an Al-Qaeda training camp in Afghanistan. In actuality, Arar has never been to Afghanistan. [53] This shows that torture produces unreliable information. The Syrian Ambassador to the United States, Imad Moustapha, said, "We did our investigations. We traced links. We traced relations. We tried to find anything. We couldn't." [54] Even the government of Syria, condemned by the State Department's annual reports for its abhorrent use of torture, found Arar to be innocent and his confession unreliable and fabricated.

Arar was finally released from the Syrian prison and sent to Canada nearly a year after his initial detention. After mounting pressure from human rights organizations and the public, the Canadian government opened an inquiry into the case. Arar received legal representation and sued the Canadian government who established the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar. This was established in February 2004 under Canada's Inquiries Act. The Commission concluded that:

1. There is no evidence that Arar committed any crime or was involved in terrorist activity.
2. There is no evidence that Canadian officials took part in the U.S. decisions to render Arar to Syria.
3. The U.S. relied on "inaccurate and unfair information" provided by Royal Canadian Mountain Police, the Canadian national police service and an agency of the Ministry of Public Safety Canada.

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[51] *See* Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar*, Report of Professor Stephen J. Toope Fact Finder* (Oct. 14, 2005) *available at* http://www.ararcommission.ca/eng/ToopeReport_final.pdf (last visited April 20, 2008)\

[52] *Id* 14.

[53] *Id.*

[54] Center for Constitutional Rights. Fact Sheet on Extraordinary Rendition, *Extraordinary Rendition: The Story of Maher Arar*. *Available at* http://ccrjustice.org/files/extraordinary%20rendition_0.pdf (last visited April 23, 2008).

4. Canadian officials did not expedite Arar's release from Syria and leaked false information upon his release, damaging his credibility. [55]

While, according to the second finding of the Inquiry Commission, the Canadian officials did not take part in the U.S. decision to render Arar, Jack Hooper, then the deputy director of the Canadian Security Intelligence Service (CSIS) sent a memo, soon after Arar was captured, that said, "*I think the United States would like to get Arar to Jordon where they can have their way with him*."[56] This was the first conclusive piece of evidence that indicated the Canadian government's knowledge of U.S. activities. A year later, in October 2003, Hooper contacted the Department of Foreign Affairs and International Trade to tell them that it was not in Canada's interest to demand that the United States send Arar back. [57]

In January 2007, the Canadian government settled Mr. Arar's civil case for $11 million. Canada's Prime Minister and the Commissioner of the RCMP (Royal Canadian Mounted Police) apologized to Arar and his family for the "terrible ordeal" they suffered. The Commissioner of the RCMP resigned. Harper showed initiative by pressing the United States to "come clean" and admit the "deficiencies and inappropriate conduct that occurred."[58]To date, not only has the United States fought to dismiss Arar's lawsuit, *Arar v. Ashcroft,* it persists that he has links to terrorists even though he has been exonerated by the Canadian commission. The U.S. refused to cooperate with the inquiry, to remove Arar from national watch lists and has denied him admission to the country. U.S. officials, speaking on condition on anonymity, have stated that Arar's case constituted the CIA's practice of Extraordinary Rendition – the practice of handing over low-level suspected terrorists to foreign intelligence

[55] Ibid.
[56] "CSIS Suspected Arar Could Face Torture: Documents", *Canadian Press*, 10 August 2007.
[57] Doyle, Simon (2006-10-02). CSIS didn't want Arar returned to Canada. The Hill Times. Available at http://www.thehilltimes.ca/html/index.php?display=story&full_path=/2006/october/2/csis/&c=1 (last visited April 24, 2008).
[58] *Id*

services who are notorious for condoning and practicing torture. [59] In the glare of the media hype accompanying Arar's release, the U.S. government has tried to justify its actions. The administration conspired to commit torture which is a serious crime,[60] and Arar's extradition was approved by a top Justice Department official.[61]

The Case of Maher Arar shows that the U.S. practices torture by shipping its victims out of the U.S borders. Arar's case also shows that torture produces unreliable confessions. After another government's detailed inquiry, the U.S. is still in denial and does not even want to apologize for its mistake.

2 OMAR KHADR – USING EVIDENCE OBTAINED UNDER TORTURE

Fifteen year old Omar Khadr was captured in Afghanistan on July 27, 2002. He was involved in a firefight where he allegedly fired a hand grenade that killed Sergeant First Class (SFC) Christopher Speer. The only witness is SFC Layne Morris who received an eye injury from the incident and is suing Khadr for $102 million. If Khadr is proven innocent, Morris will not be able to collect this money. This conflict of interest gives Morris the incentive to provide false information to implicate Khadr. In June 2007, U.S. military judge Peter Brownback dismissed the charges against Khadr stating that he could only make rulings for "unlawful enemy combatants"[62]. A Combatant Status Review Tribunal held in September 2004 had determined Khadr to be an "enemy combatant". This was done despite the fact that

[59] DeNeen, L. Brown & Dana Priest, *Deported Terror Suspect Details Torture in Syria; Canadian's case Called Typical of CIA,* WASHINGTON POST, Nov. 5, 2003, at Al. Gar Pardy, one of Canada's most senior diplomats, stated that, "The fact that you went looking for assurances, which is reflected here, tells you that even in the minds of people who made this decision.. I mean there were some second thoughts." 60 minutes II, *His Year in Hell* (Jan. 21, 2004) *available at* http://www.cbsnews.com/stories/2004/01/21/60II/main594974.shtml (last visited Apr. 21, 2008).
[60] 18 U.S.C. 2340 et seq.
[61] Dana Priest, "Top Justice Aide Approved Sending Susptect to Syria," *Washington Post,* Nov. 19, 2003.
[62] "In whose interest" 6.

Khadr did not participate nor requested any witnesses. The status determination was based solely on classified information that the government refused to disclose for security reasons.[63] There are reports that the evidence to reach this conclusion was obtained from other individuals through torture.

What is more disturbing though is the evidence against Khadr. The official document that was to be presented in the military tribunal read: "Omar Khadr *and/or other suspected al Qaeda members* threw and/or fired grenades at nearby coalition forces resulting in numerous injuries." The Convening Authority for Military Commission, Susan J. Crawford crossed out, initialed and dated by the phrase "and/or other suspected al Qaeda members" before presenting it to the court. This is the most blatant manifestation of manipulating the truth, removing evidence and implicating Khadr as the only person responsible for the death of SFC Speer.[64] Even if Khadr did fire the grenade that killed SFC Speer, there are no legal grounds to charge him for murder. After all, the administration claims that we are fighting a war and Khadr was a soldier in this war fighting for the enemy.

About eight months before Khadr was taken into U.S custody, President Bush set the stage for people just like him to be exploited by signing Military Order of November 13, 2002 *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terror.*[65] This *order,* issued without congressional authority, provided for the detentions of noncitizens without a trial. While at first it was assumed that most detainees were captured under this *order,* it was later discovered that they were detained under the president's powers as commander in chief. The president abandoned administering the country as a civilian leader

[63] Ibid.
[64] Charge Sheet, *available at* http://www.defenselink.mil/news/Apr2007/Khadrreferral.pdf (last visited Apr. 21, 2008).
[65] President's Military Order of November 13, 2001, *available at* http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html (last visited April 20, 2008).

and issued an order that allowed him to run the country as a general. The *order* gave President Bush absolute power to arrest noncitizens anywhere in the world including the United States and allege them to be international terrorists. All noncitizens became subject to the will of the executive branch if they fit into one of the three categories: alleged members of Al Qaeda; anyone who harbors alleged members of Al Qaeda, whatever "harboring" means; and anybody alleged to be involved in international terrorism, whatever "involved" and "international terrorism" mean. [66] The Bush administration considers members of the African National Congress and a lot of other national liberation movements international terrorists. It is plausible, therefore that a lot of innocent people have been captured and wrongly classified as belonging to one of the three haphazard categories and be sentenced by an incompetent military commission whose members are selected by the President and the Secretary of State, "the acting authority". [67]

Issued in response to the events of September 11, 2001, the *order* fails to reference, neither directly nor indirectly, the Geneva Conventions. According to the Bush Administration Khadr and other Guantanamo detainees are not Prisoners of War (POWs) and thus fall outside the protections of the Geneva Conventions. Let's not forgot that the Geneva Conventions consist of four treaties and the fourth one deals specifically with civilians captured during times of war. Therefore, even if Khadr is not considered to be a POW, which he should be because he was caught on the battlefield fighting for America's opposition, he is entitled to humane treatment by virtue of being human and a 'protected person'. Common Article 3 prohibits "outrages upon human dignity" and the Supreme Court, in 2006, has ruled

[66] Ratner, Michael and Ellen Ray. *Guantanamo: What the World Should Know.* Vermont: Chelsea Green Publishing. 2004, 24.

[67] Ibid.

that this provision applied to terror suspects. This led to infighting within the Republican Party in 2006 when five Republican senators including John McCain, John Warner and Lindsay Graham pressed the President that interrogation tactics used by intelligence forces need to comply with the Geneva Conventions. In turn, the President asked Congress to 'reinterpret' Common Article 3.

In a Press Conference held on September 15, 2006, the President said:

> This debate is occurring because of the Supreme Court's ruling that said that we must conduct ourselves under the Common Article III of the Geneva Convention. And that Common Article III says that there will be no outrages upon human dignity. It's very vague. *What does that mean, "outrages upon human dignity"? That's a statement that is wide open to interpretation.* And what I'm proposing is that there be clarity in the law so that our professionals will have no doubt that that which they are doing is legal.[68]

Another astonishing statement by President Bush is cloaked in the Military Order.
In Section 1(f) of Military Order No. 1, the President says:

> Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, *that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.*[69]

In other words, the President was asking Congress to legalize the harsh interrogation techniques, CIA's extraordinary rendition program and the existence of illegal 'black sites' which, according to official U.S. figures, hold over 27,000 'ghost detainees'. [70]

Human rights advocates have complained that Khadr's detention is illegal because of his age. "Age", according to the Pentagon, "is not a determining factor in detention"[71] It goes

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[68] Press Conference of the President, September 15, 2006, *available at* http://www.whitehouse.gov/news/releases/2006/09/20060915-2.html (last visited April 20, 2008).
[69] President's Military Order of November 13, 2001, *available at* http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html (last visited April 20, 2008).
[70] For a list of ghost prisoners *see* http://www.hrw.org/english/docs/2005/11/30/usdom12109.htm, *see also* Clive Stafford Smith talking about Sami al Hajj *available at* http://youtube.com/watch?v=ZwgqegEPurM&feature=related (last visited May 2nd 2008).
[71] Transfer of juvenile detainees completed, US Department of Defense news relaease, 29 January 2004.

without saying that minors do not have the mental capacity, judgment, experience and perspective that adults do. Therefore, they are more susceptible to their emotions and can easily be influenced. This forms the basis of juvenile laws that apply relatively lax punishments on minors. The United States, instead of granting Khadr child status, has deemed him to be an "enemy combatant", a category unrecognizable by international law. Like other detainees, Khadr was denied access to a lawyer or an impartial and independent court. His case was eventually reviewed, two years after he was captured, by the incompetent and powerless executive scheme known as Combatant Status Review Tribunal (CSRT). He is now facing a 'war crimes' trial by a military commission which does not meet international fair trial standards and has no juvenile justice provision. His trial was originally scheduled for May 5th 2008, but has been indefinitely postponed due to continuing pre-trial proceedings.[72]

In its annual reports on human rights practices in other countries, the U.S. Department of State condemns the use of children in armed conflict and continues to make the prevention of recruiting children for conflict a policy priority. The United States has ratified the Convention for the Rights of the Child (CRC) and its Optional Protocol which prohibits non-state actors from recruiting children under 18 years of age for armed conflict. Furthermore, states are required to provide any child in such a condition who comes within their jurisdiction "all appropriate assistance to their physical and psychological recovery and their social reintegration". [73]

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[72] Amnesty International, *United States of America, in whose Best Interests? Omar Khadr, child 'enemy combatant' facing military commission*, *available at* http://www.amnesty.org/en/library/asset/AMR51/028/2008/en/13a24eda-0bd0-11dd-badf-1352a91852c5/amr510282008eng.pdf . (last visited April 22, 2008).

[73] *Id* 3.

The information U.S. government itself published about Khadr's background and the conditions under which he was captured, places him within the reach of the Optional Protocol. Instead, the United States has used alleged actions Khadr committed at the age of 10 to prosecute him for war crimes before a military commission. The U.S. ratified the Optional Protocol shortly after sending Khadr to Guantanamo. States who have ratified the protocol are bound by the obligation set forth in the preamble which states that this international tool "will contribute effectively to the implementation of the principle that the best interest of the child are to be given primary consideration in all actions concerning children". [74] However, the United States' treatment of Khadr as an "enemy combatant" certainly goes against the child's interest. The international standards set forth by CRC and other treaties have to be abided. The application of a double standard delegitimizes the efforts of the United States.

The State Department's 2003 human rights report about Syria states:

> "torture methods include administering electrical shocks, pulling out fingernails; forcing objects into the rectum; beating, sometimes while the victim is suspended from the ceiling; hyper-extending the spine; and using a *chair* that bends backwards to asphyxiate the victim or fracture the victim's spine… Although torture occurs in prison, torture is most likely to occur while the detainees are being held at one of the many detention centers run by the various security services throughout the country, and particularly while the authorities are attempting to extract a confession or information regarding an alleged crime or alleged accomplices."[75]

A more recent State Department Human Rights Report states in the introduction:

> There were significant limitations on citizens' right to change their government. In a climate of impunity, there were instances of arbitrary or unlawful deprivation of life, and members of the security forces tortured and physically abused prisoners and detainees. Security forces arbitrarily arrested and detained individuals, while lengthy pretrial and *incommunicado detention* remained serious problems. Beginning in 2005 and continuing throughout the year, the government increasingly violated *citizens'*

[74] *Id*

[75] U.S. DEPT OF STATE COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2003: SYRIA, *available at* http://www.state.gov/g/drl/rls/hrrpt/2003/27938.htm (last visited April 21, 2008). *See also* U.S. DEPT OF STATE COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2007: SYRIA, *available at* http://www.state.gov/g/drl/rls/hrrpt/2007/100606.htm (last visited April 21, 2008).

> *privacy rights* and increased already significant restrictions on freedoms of speech, press, assembly, and association, amidst an atmosphere of government corruption and *lack of transparency.*[76]

The statement above is derived from the 2007 Country Report on Human Rights Practices in Syria. However, as the tone of the paragraph, highlighted by my own italics shows, it might as well be about the United States. It is unfortunate that the actions of a country that has a strong tradition for upholding human rights, for being the beacon of freedom and prosperity resemble those of a nation that has a history of systematic torture and abuse. The Syrians only carried out American orders, asked Arar the questions Americans wanted about his activities with Al Qaeda, not his lack of military service in Syria or his Sunni background as the administration wants the public to believe. While an anonymous source insisted that Maher had the names of Al-Qaeda members in his possession, Mr. Moustapha, a high-level Syrian diplomat had the guts to say the Americans never provided such evidence.[77] After they tortured Arar on behalf of the Americans and carried out their investigation, the Syrians were embarrassed and had the dignity to say they found no evidence against Arar. Sadly, their eventual response was better than America's where Arar still remains on a terror watch list.

Arar and Khardr's cases blatantly show the Bush administration's hypocrisy and its *intent to inflict* torture by outsourcing it. Clearly, the government wanted Arar to be severely mistreated. Why else would he be sent to Syria? U.S. officials hide behind the cloak of diplomatic assurances claiming that Syrians promised they will not torture him.[78] When Alberto Gonzales appeared for the first time before the Senate Judiciary Committee since the

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[76] U.S. DEPT OF STATE COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2007: SYRIA, *available at* http://www.state.gov/g/drl/rls/hrrpt/2007/100606.htm (last visited April 21, 2008). Emphasis added.

[77] Dana Priest, "Man Deported After Syrian Assurances," *Washington Post,* Nov. 19, 2003.

[78] Ibid.

Democrats took over, committee Chair, Patrick Leahy asked him why Maher was sent to Syria. Gonzales requested he be given 'some additional time'. Leahy also asked if the administration took steps to ensure that Maher will not be tortured. Gonzales first hesitated and then said that General Ashcroft had made a public statement that "there were assurances sought that he would not be tortured in Syria." This preposterous comment made Leahy really angry who passionately demonstrate his rage:

> "We knew damn well if he went to Canada, he won't be tortured. He would be held and he'd be investigated. We also knew damn well if he went to Syria, he'd be tortured. It is beneath the dignity of this country, a country that has always been a beacon of human rights, to send someone to another country to be tortured." [79]

Senator Leahy was being very reasonable. The Syrians may say they will not torture, but we shouldn't trust them. If the government's intent to make sure Maher is not tortured, he would have never been sent on the long journey in the first place. Anyone who has some fundamental knowledge of Syrian history knows what the Assad family has done. After all, we do not have diplomatic ties wit the Syrian government because our government claims we cannot take their word for anything.

A common question that people ask themselves after they hear about horror stories such as that of Arar and Khadr is, how did this happen? It is hard to imagine that a freedom loving country whose leaders advocate democracy and liberty could be responsible for such grave violations of human rights. In his book, *American Methods: Torture and the Logic of Domination*, Kristian Williams lists two theories as explanations for the abuse that took place in Abu Ghraib. The first explanation is the one that is widely circulated by the Bush administration and its proponents. According to this theory, a few 'hillbillies' took advantage

[79] U.S Senate Judiciary Committee. Legislative Oversight Hearing, January 2007, Washington, *available at* http://youtube.com/watch?v=L4qyxZio5nQ&feature=related, for Senator Leahy's legislative podcasts *see* http://leahy.senate.gov/POD/index.html.

of their supervisor's 'permissive managerial style' and took matters into their own hands.[80] Senator James Inhofe advocates this view in his statement:

> We have seven bad guards…And I stress that that's seven out of 700 in that prison. They did things that they should not have done. They are being punished. And they were being punished long before those pictures came out, so that's all behind us. It's been taken care of. [81]

This is the explanation that the American public wants to believe. One would be fine with a few erratic, out of control young soldiers and interrogators committing atrocious acts. They would be blamed and punished for their mistakes and the public would count on the government to deliver justice and make sure such horrendous acts are never repeated. Unfortunately, that is wishful thinking. Thorough investigations conducted by the Red Cross, Amnesty International, General Taguba, Lieutenant General Anthony Jones and others have revealed that what happened in Bagram, Abu Ghraib and Guantanamo started at the top of the chain of command and trickled down.

The second theory Williams offers, however is realistic and supported by fact. The Schlesinger Report, conducted by the Honorable James Schlesinger and an independent panel to review the DOD detention operations, found that many military deficiencies such as ineffective interrogation operations, lack of oversight, unclear and imprecise instructions and allowing military intelligence officers to do the job of the military police led to disregard for the rule of law. According to the report, shortfalls in resource, leadership and training led to interrogation flaws that paved the way to harsher abuse. Following the Cold War, human intelligence has reduced. As the Afghanistan and Iraq wars began, Army human intelligence personnel, especially interpreters were ill equipped and untrained. The MIs and MPs lacked

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[80] Williams, Kristian. *American Methods: Torture and the Logic of Domination.* Cambridge: South End Press, 2006

[81] Quoted in Mark Leibovich, "The Scandal Scandal?" *Washington Post,* May 13, 2004.

cultural knowledge of the detainees' values, their countries of origin and their ways of life. A shortage of interpreters led to a backlog of detainees to be interrogated. Some were in custody for 90 days before being interrogated for the first time. Untrained and inexperienced interrogators felt lost and did not understand the commands they were given. For example, they were told, "Make sure he has a bad night; make sure he gets the treatment." Such vague directions were intentional and open to interpretation. This led to abusive interrogation methods and an overall lawless environment where anything goes. [82]

Furthermore, the report points towards poor leadership and an unorganized structure of the 205th MI Brigade which had no interrogation elements and had been eliminated by the downsizing of the 1990s. Leadership was lacking, the Commander of the 800th MP Brigade failed to provide his soldiers with appropriate Standard Operating Procedures (SOPS) and the Commander of the 205th MI Brigade failed to properly train his soldiers. Additionally, interrogation methods that were only intended for Guantanamo were later used in Iraq and Afghanistan. What added to the confusion was the use of contractors as interrogators. These civilians were badly trained, received very high salaries and did not have to abide by the United Code of Military Justice. This certainly leads to lawlessness and abuse. What is worse, no one can be held accountable because no rules are actually being broken if there are no rules to begin with. Moreover, a lack of communication between the 800th MP Brigade and the 205th MI Brigade led to friction.

Schlesinger Report draws sharp contrasts with Senator Inhofe:

> The migration of interrogation techniques from Afghanistan to Iraq… More important, their authorization in Afghanistan and Guantanamo was possible only because the

[82] Danner, Mark. *Torture and Truth: America, Abu Ghraib and the War on Terror.* New York: New York Review of Books 2004: 365.

> President had determined that individuals subjected to these interrogation techniques fell outside the strict protections of the Geneva Conventions. [83]

According to Schlesinger, the interrogation methods which were only approved for Guantanamo whose prisoners were allegedly not covered by Geneva Conventions were applied in Iraq and Afghanistan. The prisoners in Iraq were POWs and Iraq was a conventional war zone. Despite these realities, the impermissible interrogation of Guantanamo was utilized. This was mainly due to the leadership decision taken at the highest ranks of the Department of Defense. General Geoffrey Miller, in charge of Guantanamo and hence the abuse that took place there, was sent to Abu Ghraib to advice the MPs and MIs there. He brought along with him a list of interrogation methods he had used in Guantanamo and he used them to 'gitmoize' Abu Ghraib.

In addition to Miller, several other high ranking officials have made wrong decisions that have been carried out and led to prisoner abuse. Carolyn Wood, Army Captain in Afghanistan, was infamous for the new techniques that she introduced at Bagram. These included use of stress positions, removal of clothing, exploitation of phobias such as use of barking dogs and extended isolation. Her unit specialized in "tactical exploitation". The directives that Wood posted at Abu Ghraib differed sharply from those that General Ricardo Sanchez, her superior, had issued. Sanchez's directives included unsigned memos from September 10th and 28th, 2003 and signed directives from September 14th and October 12th. The interrogation techniques explained in these memos complied with Army Field Manual 34-52.[84] However, Wood ignored these orders. Consequently, under her watchful eyes, two

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[83] James R. Schlesigner, chair. Final Report on the Independent Panel Review DoD Operations (The Schlesinger Report)," in *Torture and Truth: America, Abu Ghraib, and the War on Terror,* by Mark Danner (New York: New York Review Books, 2004), 375.

[84] Douglas Jehn and Eric Schmitt, "The Reach of War: The interrogators; Afghan Polices on Questioning Landed in Iraq," *The New York Times,* May 21, 2004.

Bagram detainees, Dilawar and Habibullah were beaten and killed. Even after these controversies, she was awarded a Bronze star and sent to Abu Ghraib where she continued to use her techniques which were overturned by military lawyers.[85] After her service in Abu Ghraib, she was given another Bronze Star in early 2004 and sent to Fort Huachuca in Arizona where she is an interrogation instructor. Does promoting Wood and giving her medals say that the administration is seriously disgusted by the abuses taking place? Does it mean that they are serious about bringing those responsible for the abuses to justice? While low ranked soldiers like Sgt. Thomas Curtis, Pfc. Willie Brand, Damien Corsetti and others get face court martial, service time in prison or do community services, their superiors such as Carolyn Wood roam free and deny any involvement with what the bad apples in the 'night shift' did.

Schlesinger persists that over a hundred criminal, military and administrative inquires have been initiated in respect to the unlawful practices committed by U.S. personnel. These have occurred in all three major detention facilities located in Afghanistan, Iraq and Cuba. Realistically, it is impossible to view these allegations as isolated incidents committed by 'a few bad apples'.

The fact that the abuses are rampant across the world, the fact that the Bush administration is going out of its way to send prisoners to third countries known to torture, the fact that abusive techniques used in Guantanamo are transferred to battlegrounds of Iraq and Afghanistan and the fact that commanders and officers are not charged for their poor leadership, but are instead promoted, all points towards a state sponsored policy of torture.

[85] Ibid.

The Center for Human Rights and Global Justice at NYU School of Law, Human Rights Watch and Human Rights First have jointly undertaken a Detainee Abuse and Accountability Project (DAA Project). The Project traces abuse allegations and investigates criminal prosecutions and disciplinary measures that may have taken place. By analyzing individual cases and general trends, the Project illustrated some key findings:

- Over 330 cases of abuse involving U.S. military and civilian personnel have been discovered. 600 U.S personnel and over 460 detainees are involved.
- Only 54 military personnel have been convicted by court-martial, forty of them have received prison sentences.
- Investigations are inadequate and the military has prematurely closed investigations.
- No U.S. military officer has been held accountable for acts committed by subordinates under the 'doctrine of command responsibility'. Only three officers have been convicted by court martial for detainee abuse and none of the convictions were for actions committed by their subordinates.
- Of the 79 courts-martial ordered by commanders, 54 resulted in a conviction or a guilty plea. Another 57 people faced non-judicial proceedings with no prison time.
- 75% of the cases where investigations were conducted did not result in any punishment (160 of the 210 cases involving 260 accused personnel). 110 cases were closed without punishment.
- The most common type of abuse was assault (220 cases), physical or non-physical humiliation (90 cases), sexual assault (sixty cases) and use of 'stress' techniques (forty cases). [86]

The Project's researchers collected data by analyzing documents released by the U.S. government such as those obtained under the Freedom of Information Act (FOIA). Furthermore, HRW and HRF conducted interviews with witnesses and victims.

Analysis of the abuse reveals a collapse of the doctrine of command responsibility. High ranking officials in particular have not been held accountable. Lack of accountability can be measured by how severely the accused were punished and how strictly laws were enforced. While some like Charles Graner and Ivan Frederick, both convicted for assaults and misconduct in Abu Ghraib, were sentenced to ten and eight years in prison respectively, many

[86] Human Rights Watch. *By the Numbers: Findings of the Detainee Abuse and Accountability Project*, *available at* http://www.hrw.org/reports/2006/ct0406/index.htm (last visited April 20, 2008)

others who committed horrible crimes were given a slap on the wrist. For example, a Marine in the 3rd Battalion, 5th Marine Regiment in Iraq was accused of 'mock executing' four Iraqi juveniles by making them kneel near a ditch as the Marine fired his weapon to simulate an execution. The Marine was sentenced to 30 days of hard labor without confinement and a fine of $1000. Three Marines who shocked a detainee 'with an electric transformer' were dishonorably discharged. The one Marine who held the wires around the detainee's shoulders was also confined for one year. [87]

Investigative failures also point towards a flaw in the policy that leads to lack of accountability. In December 2002, a CIA officer working near Kabul, Afghanistan ordered an Afghan detainee to be stripped naked and dragged naked on rocky ground and then restrained overnight, naked, in the cold. The detainee died that night and the CIA internal investigation resulted in a criminal referral to the Department of Justice which has yet to bring any charges. The officer was promoted.[88]

If one puts aside the illegality and immorality of torture and focuses on the practical implications and effects that torture leaves on a community, one finds that the damage is usually irreparable and the cost far greater than any benefits that may have been reaped. Three major implications of state sponsored torture are the country's reputation, a weakened justice system and the high risk of backlash which leads to the important question of whether torture makes us safer or puts us in more danger. I will now discuss how implementation of state sponsored torture affects each of the three areas discussed above.

Every sovereign nation strives to make itself known in the international community. In order to gain leverage, be seen as a favorable recipient or donor of aid, and trusted as a

[87] Ibid.
[88] Ibid.

regional neighbor, countries make compromises and sacrifices. The United States, being the only super power in the world, has a bigger reputation to maintain that many small developing countries. While the United States is not proud of being one of the biggest energy consumer and waste producer in the world, Americas pride themselves for their freedom, the rule of law and democratic values that they so cherish. America is viewed as the beacon of democracy, as a non discriminatory and just country that accepts refugees and the poor with open arms. Americans can proudly stand up to world dictators and proclaim that even the most horrible criminals are treated humanely and given a fair trial. Every American cherishes the Constitution because it protects rights like due process, protection against self incrimination, prohibition of cruel and unusual punishment and many more. Human rights and the United States are two natural parts of any sentence. However, the educated and well traveled American is not so proud anymore. He is struggling to believe that America still treats everyone the same, no matter what crime one may have committed, or what nationality, race or gender one belongs to.

Due to unfortunate events that have occurred in the recent past, America's image is changing and the government's defense and intelligence tactics are taking a sharply negative turn. Some would say that desperate times call for desperate measures. Advocates of tough criminal and interrogation policies would persuade the general public that we are fighting a different kind of enemy and living in a different time where we have to use harsh measures to keep the homeland safe. This would include using abusive methods to extract sensitive information that could potentially save thousands of innocent lives. This 'ticking bomb' scenario is most cited by advocates of tough interrogation methods i.e. torture. The problem is, no empirical evidence has been shown that torture actually works and that it works better

than conventional and human methods. No statistical studies have been conducted that demonstrate that using torture increases the chances of getting valuable and credible information that is useful to the intelligence community. How then, can the Bush administration get away with using torture when it is not even convincing people that it is the only necessary and effective manner to get the right information? The answer is simple. America is powerful and the administration has taken it upon itself to essentially rewrite the Constitution by using the good offices of the Office of Legal Council. The memos written by Alberto Gonzales, then the White House Counsel, John Yoo and especially Jay Bybee which became known as the 'torture memo', made it very clear that the abuses taking place in Abu Ghraib were not the work of 'a few bad apples'. Two of Yoo's memos got declassified and published in the *Washington Post* in the last two weeks. Both of these memos have been rescinded by the then Secretary of Defense Donald Rumsfeld. However, they were part of military law for months and no one can say that after they were rescinded, the interrogation techniques outlined in these memos stopped.

As Arar's case reveals, the United State's is clearly pro torture. While the government officials' statements are that the United States does not torture, the administration facilitates this horrible practice by sending detainees to countries that have a history of torture. Since 1996, the United States State Department has called out Syria on its human rights abuses in its annual reports. Ironically, this same government is now sending people to Syria to be tortured and then releasing them without charge. By signing CAT, the United States is sending the wrong message to the international community. In this case, the Canadian authorities had given important information about Arar to the American officials who then used the

information against him. A law abiding country would assume that as a signatory to the Convention, the United States adheres by its provisions and does not violate them.

V CONCLUSION

This paper has attempted to show that torture is not only immoral, illegal and deplorable; it is highly ineffective and unreliable when used as an interrogation technique. It has been empirically shown that people confess to anything while they are tortured and this information is neither reliable nor permissible in a court of law. However, the United States has relied on information obtained from tortured individuals and key policy and military decisions have been based on such faulty intelligence. Not only is this ineffective and costly, it is risky from a security stand point. By torturing a lot of people and then having its cover blown, the administration is facing immense opposition, not only at home, but more importantly abroad. As a result of the careless wars and the shockingly incompetent methods in which they have been fought, the United States finds itself in a less secure position than it did after 9/11. The country is more vulnerable and the likelihood of another terrorist attack is higher because of the damage the United States has done to itself. The wise saying goes, 'keep your friends close and your enemies closer." It seems like the Bush administration converted some friends to enemies and created a whole host of new enemies who have newfound reason to strike America.

The implications of the Bush administration's treatment of detainees are grave and even irreversible. Americans should care more about what is going on in Guantanamo even more now that prisoners like Sami Al Hajj, who was on a hunger strike for over a year, are released. First, Guantanamo is a scandal that has become symbolic in the Arab and Muslim

world. This has fueled anger and hatred directed towards Americans. If we want to keep the world safer, we should send a message that says we treat humans worse than animals. We should convey a message of hope and liberty. We want to build bridges with the Muslim world, but instead our government has dug trenches and made our country less safe. Secondly, we should care about how others are going to treat our citizens. The Bush administration denied Al-Qaeda and the Taliban Geneva Conventions rights on the basis that they are not signatories to these treaties and therefore we should not abide by them either when dealing with them. By that logic, should we expect other countries to treat our citizens in the inhumane manner that we have been treating theirs? This is not our intention, but certainly this is the message we are sending to the international community. Our country is giving lawless nations a carte blanche to mistreat our own citizens. Thirdly, Americans should care about what our country is doing on our behalf because all these actions have serious implications for the future of rule of law. Our government, through its practice of torture, portrays itself as a dictatorship where the commander in chief has the final say. Since the Magna Carta in 1215, governments have persisted that every human being has a right to a fair judicial process before being sent to jail. The United States, however, has reversed this fundamental principle of Anglo-American jurisprudence and international law and gone back to the pre-Magna Carta medieval system of executive fiat. This simply should not be allowed and the citizens of the world need to mobilize to avoid further corruption in the name of law abiding citizens. An independent commission needs to be arranged to investigate the war crimes committed by the administration officials. The perpetrators of torture need to be brought to justice. Only then could America try to get back on its feet and start the uphill climb towards legitimacy within the international community. The United States may never

reach its previous position at the top of the hill in terms of human rights, but if the leaders who ordered and facilitated torture are held responsible, at least this country can have a fresh start and maintain its promise of freedom and democracy instead of commit acts that are reminiscent of past dictatorial regimes.

Bibliography

American Convention on Human Rights (adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969) *available at* http://www.cidh.org/Basicos/English/Basic3.American%20Convention.htm (last visited April 25, 2008).

Amnesty International, United States of America: *In whose Best Interests? Omar Khadr, child 'enemy combatant' facing military commission*, *available at* http://www.amnesty.org/en/library/asset/AMR51/028/2008/en/13a24eda-0bd0-11dd-badf-1352a91852c5/amr510282008eng.pdf. (last visited April 22, 2008).

Amnesty International, United States of America: *Justice Delayed or Justice Denied? Trials under Military Commissions Act,* March 22, 2007 *available* at http://www.amnesty.org/en/library/info/AMR51/044/2007 (last visited April 25, 2008).

Blakeley, Ruth. "Why Torture." *Review of International Studies* 33 (2007): 373-394.

Brecher, Jeremy, Jill Cutler and Brendan Smith. Eds. *In the Name of Democracy: American War Crimes in Iraq and Beyond.* New York: Metropolitan Books, 2005.

Center for Constitutional Rights. Fact Sheet on Extraordinary Rendition, *Extraordinary Rendition: The Story of Maher Arar*. *Available at* http://ccrjustice.org/files/extraordinary%20rendition_0.pdf (last visited April 23, 2008

Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar, *Report of Professor Stephen J. Toope Fact Finder* (Oct. 14, 2005) *available at* http://www.ararcommission.ca/eng/ToopeReport_final.pdf (last visited April 20, 2008)

"CSIS Suspected Arar Could Face Torture: Documents", *Canadian Press*, 10 August 2007.

Danner, Mark et al., *Abu Ghraib: The Politics of Torture.* Berkeley: North Atlantic Books, 2004.

Danner, Mark. *Torture and Truth: America, Abu Ghraib, and the War on Terror.* New York: New York Review of Books, 2004.

DeNeen, L. Brown & Dana Priest, *Deported Terror Suspect Details Torture in Syria;Canadian's case Called Typical of CIA,* WASHINGTON POST, Nov. 5, 2003

Dershowitz, Alan. *Why Terrorism Works: Understanding the Threat, responding to the Challenge*, New Haven: Yale University Press, 2003.

Doyle, Simon (2006-10-02). CSIS didn't want Arar returned to Canada. The Hill Times. Available at http://www.thehilltimes.ca/html/index.php?display=story&full_path=/2006/october/2/csis/&c=1 (last visited April 24, 2008).

The European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S 222, Art. 3 (November 4, 1950)

Golden, Tim. "In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths." *The New York Times.* May 20, 2005. http://www.nytimes.com/2005/05/20/international/asia/20abuse.html?pagewanted=1&_r=1

Greenberg, Karen.,ed. *The Torture Debate in America.* New York: Cambridge UP, 2006.

Guiora, Amos N., and Erin M. Page. "The Unholy Trinity: Intelligence, interrogation and Torture." *Case Western Reserve Journal of International Law* 37- 2 (2006): 427447.

Harbury, Jennifer K. *Truth, Torture, and the American Way.* Boston: Beacon Press, 2005.

HERMAN J. BURGERS & HANS DANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: AHANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (Martinus Nijhoff Publishers 1988)

Hersh, Seymour. "Torture at Abu Ghraib." *The New Yorker.* May 10, 2004: 1-4. http://www.newyorker.com/archive/2004/05/10/040510fa_fact

Hersh, Seymour. "Chain of Command." *The New York.* May 17, 2004: 1-5. http://www.newyorker.com/archive/2004/05/17/040517fa_fact2

Huq, Aziz, Z. "Democratic Torture, Has Mill's Safeguard Weakened?" *World Policy Institute* Winter 2007/2008: 99-107.

Mayer, Jane. "The Memo." *The New Yorker* February 27, 2006: 1-9. http://www.newyorker.com/archive/2006/02/27/060227fa_fact

Mayer, Jane. "Outsourcing Torture: The Secret History of America's 'extraordinary rendition program" *The New Yorker* February 14, 2005: 1-9. http://www.newyorker.com/archive/2005/02/14/050214fa_fact6

McCarthy, Andrew, C. "Thinking about the Unthinkable" in Greenberg, Karen.,ed. *The Torture Debate in America.* New York: Cambridge UP, 2006.

Miller, Gail. *Defining Torture,* New York: Benjamin N. Cardozo School of Law, 2005.

Monahan, Torin. "Securing the Homeland: Torture, Preparedness, and the Right to Let Die." *Social Justice* 33. 1 (2006): 95-106.

Olshansky, Barbara. *Democracy Detained.* New York: Seven Stories Press, 2007.

Priest, Dana. "Top Justice Aide Approved Sending Susptect to Syria," *Washington Post,* Nov. 19, 2003.

QUIET RAGE: THE STANFORD PRISON STUDY. Ken Musen. DVD. Stanford, CA: Stanford University, c1988-2004. (50 min.)

Ratner, Michael and Ellen Ray. *Guantanamo: What the World Should Know.* Vermont:

Chelsea Green Publishing. 2004.

Rejali, Darius. *Torture and Democracy.* New Jersey: Princeton UP, 2007.

Report of the Special Rapporteur, Sir Nigel S. Rodley, submitted pursuant to Commission on Human Rights Resolution 1995/37, E/CN. 4/1995/34 at ¶ 10 (January 9, 1996).

Rose, David. *Guantanamo: The War on Human Rights.* New York: The New Press, 2004.

Schulz, William., ed. *The Phenomenon of Torture.* Philadelphia, University of Pennsylvania Press: 2007.

Sixty minutes II, *His Year in Hell I* (Jan. 21, 2004) *available at* http://www.cbsnews.com/stories/2004/01/21/60II/main594974.shtml (last visited Apr. 21, 2008).

Taxi to the Dark Side. Alex Gibney. DVD. Jigsaw Productions. 2007.

The International Covenant on Civil and Political Rights (General Assembly Resolution 2200A [xxi] of 16 December 1966) *available at* http://www2.ohchr.org/english/bodies/ratification/docs/DeclarationsReservationsICCPR.pdf (last visited April 22, 2008).

U.S. DEPT OF STATE COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2003: SYRIA, *available at* http://www.state.gov/g/drl/rls/hrrpt/2003/27938.htm (last visited April 21, 2008).

U.S Senate Judiciary Committee. Legislative Oversight Hearing, January 2007, Washington, *available at* http://youtube.com/watch?v=L4qyxZio5nQ&feature=related

Williams, Kristian. *American Methods: Torture and the Logic of Domination.* Cambridge: South End Press, 2006

Williams, Kristian. "Legitimizing Torture." *Commonwealth* 132. 21 (2005): 22-25.