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Alison Croessmann

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NOTES

Congress' Preliminary Response to the Abu Ghraib Prison Abuses

ROOM FOR REFORM?

I. INTRODUCTION

On July 22, 2004, Representative Rush Holt (D-NJ) introduced a bill in response to the prisoner abuses photographed at the Abu Ghraib detention facility in Iraq.¹ Divided into three parts, the bill directs the President to require: (1) the videotaping of interrogations and “other pertinent interactions” of detainees in the custody of the United States armed forces as well as intelligence operatives and contractors of the United States;² (2) “unfettered access” to detainees in the custody of the United States by members of various international human rights organizations;³ and (3) the developing of guidelines by the Judge Advocate General to ensure that the required videotaping in “section 1 is

¹ H.R. 4951, 108th Cong. (2d Sess. 2004) [hereinafter Interrogation Bill]. Representative Holt reintroduced the Interrogation Bill to Congress on January 4, 2005, stating that “Congress failed to do [its] job, doggedly investigate how and why [the Abu Ghraib prison] abuses occurred, and put in place new safeguards for interrogations in U.S. military detention facilities” 151 CONG. REC. E15 (daily ed. Jan. 4, 2005) (statement of Rep. Holt).

² Specifically, the bill orders the President to act “[i]n accordance with the Geneva Conventions of 1949, the International Covenant on Civil and Political Rights, the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment” and “the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States” when implementing a specific videotaping plan. Interrogation Bill, *supra* note 1, § 1(a). In addition, the bill also requires that “[v]ideotapes shall be made available . . . to both prosecution and defense to the extent they are material to any military or civilian criminal proceeding.” *Id.* § 1(b).

³ The human rights organizations mentioned in the bill are The International Federation of the International Committee of the Red Cross and the Red Crescent, The United Nations High Commissioner for Human Rights, and The United Nations Special Rapporteur on Torture. *Id.* § 2.

sufficiently expansive to prevent any abuse of detainees” that violates “law binding on the United States, including [international] treaties”⁴

Three formal reports evaluate the allegations of abuse at Abu Ghraib.⁵ The Taguba Report, commissioned by the United States Army and written by Major General Antonio Taguba, has been available to the public since May 2, 2004, despite the fact that it was initially marked SECRET/NO FOREIGN DISSEMINATION.⁶ The Schlesinger Report, researched and written by an independent panel commissioned by the government, was released to the public on August 24, 2004.⁷ Finally, the Jones-Fay Army Report, commissioned by the United States Army and compiled by Lieutenant General Anthony R. Jones and Major General George R. Fay, was declassified and released to the public on August 25, 2004.⁸

While the Taguba, Schlesinger, and Jones-Fay Reports evaluate allegations of prisoner abuse at the Abu Ghraib

⁴ *Id.* § 3(a).

⁵ Although a series of reports address the instances of abuse at Abu Ghraib, it appears that Representative Holt lends a tremendous amount of credence to three of them. See 151 CONG. REC. E15, *supra* note 1 (stating that “[l]ast year, three reports that were compiled by U.S. Army officers and the bipartisan investigative commission appointed by U.S. Defense Secretary Rumsfeld documented in horrifying detail the egregious human rights abuses that occurred at Abu Ghraib Prison”). From Representative Holt’s description of these reports, it can be inferred that he was referencing the Taguba Report, the Schlesinger Report and the Jones-Fay Report discussed in greater detail above. Accordingly, this paper will refrain from engaging in a lengthy discussion of additional released reports and instead rely on the aforementioned three reports’ findings. For a list of Abu Ghraib investigative reports completed or underway as of August 23 2004, see http://www.cbc.ca/news/background/iraq/prisonabuse_inquiries.html (last visited Nov. 5, 2005) (follow hyperlinks for specific reports).

⁶ ANTONIO M. TAGUBA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 1 (2004) [hereinafter TAGUBA REPORT], available at http://www.cbc.ca/news/background/iraq/pdf/taguba_report.pdf. General Sanchez of the United States Army appointed Maj. Gen. Antonio Taguba to write the report on January 31, 2004 after the International Committee of the Red Cross [hereinafter ICRC] planned to submit a twenty-four page written report to the United States detailing abuses to Abu Ghraib detainees by members of the United States military intelligence personnel. Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law: U.S. Abuse of Iraqi Detainees at Abu Ghraib Prison*, 98 AM. J. INT’L. L. 591, 594 (2004).

⁷ JAMES R. SCHLESINGER, FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS (2004) [hereinafter SCHLESINGER REPORT], available at <http://www.cbc.ca/news/background/iraq/pdf/schlesingerreport20040824.pdf>.

⁸ GEORGE R. FAY & ANTHONY R. JONES, AR 15-6 INVESTIGATION OF THE ABU GHRAIB PRISON AND 205TH MILITARY INTELLIGENCE BRIGADE [hereinafter JONES-FAY REPORT], available at http://www.cbc.ca/news/background/iraq/pdf/fay_report20040825.pdf. The Jones-Fay Report is actually a compilation of two separate reports. For clarification purposes, citations to the Jones-Fay Report will be followed by “Part I” or “Part II.” Part I refers to Jones’ report while Part II refers to Fay’s report.

detention facility, each report investigates the problem from a different angle. The Taguba Report explores the effectiveness of the 800th Military Police Brigade's⁹ detention procedures at the prison.¹⁰ The Jones-Fay Report assesses whether members of the 205th Military Intelligence Brigade¹¹ "requested, encouraged, condoned, or solicited [800th Military Police Brigade] personnel to abuse detainees" and whether Military Intelligence personnel "comported with established interrogation procedures and applicable laws and regulations."¹² Finally, the Schlesinger Report provides a general analysis of what factors resulted in detainee operational and interrogation difficulties at Abu Ghraib and what corrective measures can be taken to remedy the problem.¹³

Each of the reports make two consistent findings. First, Military Police and Military Intelligence personnel stationed at Abu Ghraib lacked extensive training in the Geneva Conventions.¹⁴ Second, confusion existed among Military Police and Military Intelligence personnel as to how to apply the Geneva Conventions to the War in Iraq.¹⁵ The reports' findings

⁹ The 800th Military Police Brigade, based in Uniondale, New York, was responsible for running the Abu Ghraib prison. Murphy, *U.S. Abuse*, *supra* note 6, at 593.

¹⁰ TAGUBA REPORT, *supra* note 6, at 6, para. 3. Specifically, the Taguba Report "[i]nvestigate[s] the training, standards, employment, command policies, internal procedures, and command climate in the 800th MP Brigade . . ." *Id.* at 7, ¶ 3(c).

¹¹ The 205th Military Intelligence Brigade screened and interrogated detainees at the Abu Ghraib prison. JONES-FAY REPORT, *supra* note 8, at 10 (Part I).

¹² *Id.* at 4 (Part II).

¹³ SCHLESINGER REPORT, *supra* note 7, at 21.

¹⁴ See JONES-FAY REPORT, *supra* note 8, at 114 (Part II) ("Interrogator training in the Laws of Land Warfare and the Geneva Conventions is ineffective."); SCHLESINGER REPORT, *supra* note 7, at 44 (Director of the Joint Interrogation and Debriefing Center at Abu Ghraib "failed to properly train and control his soldiers and failed to ensure prisoners were afforded the protections under the relevant Geneva Conventions."); TAGUBA REPORT, *supra* note 6, at 19-20 (Military Police personnel received "very little instruction or training . . . on the . . . Geneva Convention[s]" and "few, if any, copies of the Geneva Conventions were ever made available to [Military Police] personnel or detainees.").

¹⁵ See JONES-FAY REPORT, *supra* note 8, at 19 (Part II) ("Soldiers on the ground are confused about how they apply the Geneva Conventions and whether they have a duty to report violations of the conventions."); SCHLESINGER REPORT, *supra* note 7, at 82 (While the senior leadership at Abu Ghraib understood that the Geneva Conventions applied "[t]he message in the field, or the assumptions made in the field, at times lost sight of this underpinning."); TAGUBA REPORT, *supra* note 6, at 44 (The Commander of the 800th Military Police Brigade failed to ensure that her soldiers "knew, understood, and adhered to the protections afforded to detainees in the Geneva Convention Relative to the Treatment of Prisoners of War.").

and recommendations suggest that while some of the Military Police and Military Intelligence personnel stationed at Abu Ghraib intentionally committed sexual abuses and caused bodily harm to prison detainees for sadistic purposes, a large number of the abuses resulted from “misinterpretations of law or policy or resulted from confusion about what interrogation techniques were permitted by law”¹⁶ The abuses at Abu Ghraib cannot be attributed solely to the actions “of a few bad[]apple[s]”¹⁷ who chose not to abide by standard military procedures. Rather, they must also be viewed as the product of numerous Executive Branch and military policy errors that Representative Holt’s Interrogation Bill fails to fully address.

After the September 11, 2001 terrorists attacks, the Bush administration “attempted to build on precedents established during past wars to support extraordinarily broad claims of executive power.”¹⁸ President Bush employed his Commander-in-Chief authority to suspend the application of the Geneva Conventions to suspected al Qaeda and Taliban members detained in Afghanistan and Guantanamo Bay, Cuba.¹⁹ In addition, the Bush administration authorized the use of coercive interrogation methods that arguably violated general humanitarian principles as well as specific Geneva Conventions provisions.²⁰

Unlike in Afghanistan and Guantanamo Bay, the Bush administration currently insists that most prisoners²¹ detained

¹⁶ JONES-FAY REPORT, *supra* note 8, at 16 (Part I). *See also* SCHLESINGER REPORT, *supra* note 7, at 68.

¹⁷ John Barry, et al., *The Roots of Torture*, NEWSWEEK ONLINE, May 24, 2004, at ¶ 2, at <http://www.msnbc.msn.com/id/4989422/site/newsweek>.

¹⁸ Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 100 (2004).

¹⁹ *See* SEYMOUR M. HERSH, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB 17-18 (2004). *See infra* Part III.A.

²⁰ *See* Mark A. Drumbl, Symposium, *‘Terrorism on Trial’: Lesser Evils in the War on Terrorism*, 36 CASE W. RES. J. INT’L L. 335, 337 (2004) (finding that “[m]any experts agree that the detentions, as well as interrogation methods deployed against the detainees [in Guantanamo Bay], run afoul of international humanitarian law and international human rights law.”); Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT’L L. 811, 824 (2005) (arguing that the Bush administration’s authorization of severe interrogation tactics in Afghanistan was illegal and violated “Geneva law and nonderogable human rights.”); *See infra* Part III.B.

²¹ *See* Douglas Jehl, *U.S. Action Bars Rights of Some Captured in Iraq*, N.Y. TIMES, Oct. 26, 2004, at A6 (stating that “[a] new legal opinion by the Bush administration has concluded for the first time that some *non-Iraqi* prisoners captured by American forces in Iraq are not entitled to the protections of the Geneva Conventions”) (emphasis added).

in Iraq should be afforded full protection under the Geneva Conventions.²² Irrespective of the Executive Branch's contention on this matter, President Bush's failure to initially outline a clear Geneva Conventions policy in Iraq facilitated the prisoner abuses at Abu Ghraib.²³ The Bush administration assumed that *all* military personnel understood that the Geneva Conventions applied in Iraq.²⁴ However, in light of the Executive Branch's self-proclaimed "war on terror" and the suspension of the Geneva Conventions in Afghanistan and Guantanamo Bay, this assumption appears to be unfounded.²⁵

As written, the Interrogation Bill serves as a superficial response to a complex problem. While it succeeds in establishing deterrent measures that will assist in reducing individual instances of abuse,²⁶ it misses the mark in addressing the Executive Branch's policy errors that contributed to widespread detainee mistreatment. Instead of relying solely on reactive methods to prevent another Abu Ghraib atrocity, Congress must require the President to clearly articulate whether and how the Geneva Conventions apply at the onset of every military crisis. The Bush Administration's decision to withhold Geneva Conventions protections to al Qaeda prisoners effectively eradicated the pre-9/11 presumption that the treaty's provisions apply to all captured

²² U.S. Department of Defense News Transcript, Secretary Rumsfeld Media Availability Enroute to Baghdad (May 13, 2004), <http://www.defenselink.mil/transcripts/2004/tr20040513-secdef0749.html> (quoting Secretary Rumsfeld as saying Geneva Conventions "III and IV apply for the Iraqi prisoners of war and apply to the civilian non-military detainees. That has been the case from the beginning."). *But cf.* REED BRODY, HUMAN RIGHTS WATCH, THE ROAD TO ABU GHRAIB 7 (June 2004), available at <http://hrw.org/reports/2004/usa0604/usa0604.pdf> ("On May 5, 2004, [Secretary Rumsfeld] told a television interviewer the Geneva Conventions 'did not apply precisely' in Iraq but were 'basic rules' for handling prisoners.") (quoting United States Department of Defense News Transcript, Secretary Rumsfeld Interview with Matt Lauer, NBC "The Today Show," (May 5, 2004), <http://www.dod.gov/transcripts/2004/tr20040505-secdef1425.html>).

²³ See *infra* Part IV.B.ii.a.

²⁴ See HERSH, *supra* note 19, at 5 (quoting White House Counsel Alberto Gonzales as saying that "President [Bush] had 'made no formal determination' invoking the Geneva Conventions before the March 2003 invasion of Iraq . . . 'because it was automatic that Geneva would apply' and it was assumed that the military commanders in the field would ensure that their interrogation policies complied with the President's stated view.").

²⁵ In fact, President Bush's suspension of the Geneva Conventions in Afghanistan and Cuba led some military personnel stationed in Iraq to believe that their detainees need not be afforded treaty protections. Paust, *supra* note 20, at 849.

²⁶ The Interrogation Bill's videotape requirement and unfettered access requirement are examples of such deterrent measures. See *generally* Interrogation Bill, *supra* note 1.

detainees.²⁷ Moreover, if the President seeks to violate the Geneva Conventions during a military campaign, he may only do so with the Legislative Branch's express approval.²⁸

This Note challenges Congress' proposed response to the Abu Ghraib prison atrocity. Part II begins with a general description of the Geneva Conventions and other laws and international treaties signed and ratified by the United States to protect individuals held in U.S. custody from inhumane treatment. Part III traces the evolution of United States Army interrogation techniques from the period immediately preceding September 11, 2001 to the present. Part IV discusses the specific types of torture endured by detainees housed at the Abu Ghraib detention facility and also analyzes the Executive Branch mistakes that caused these abuses. Part V argues that Representative Holt's Interrogation Bill does not adequately address the underlying policy problems confronting the United States Army with regard to interrogation tactics and detention procedures in Iraq. Finally, this Note concludes by proposing and evaluating a substitute bill that will reduce the number of prisoner abuses at Abu Ghraib and other detention facilities by eradicating misinterpretations of law and policy within the military.

II. THE GENEVA CONVENTIONS AND INTERNATIONAL HUMANITARIAN LAW

A number of international laws and conventions seek to mitigate or prevent abuses during war by advancing the *jus in bello*, or "the rightful manner of war."²⁹ In general, international humanitarian law prohibits "unnecessary suffering"³⁰ and "set[s] [specific] limits on how war may be waged."³¹ Indeed, the United States is a party to the Geneva Conventions which, among other things, regulate the treatment of prisoners of war ("POWs") by banning the practice

²⁷ See *infra* IV.B.ii.a.

²⁸ See Jinks & Sloss, *supra* note 18, at 154 (arguing "that the Constitution is best interpreted to require the President to obtain congressional approval, in the form of legislation, if he wants to violate a treaty provision that is the law of the land.>").

²⁹ MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 180 (3d ed. 1999). See also Jinks & Sloss, *supra* note 18, at 108.

³⁰ JANIS, *supra* note 29, at 180. See also WERNER LEVI, CONTEMPORARY INTERNATIONAL LAW: A CONCISE INTRODUCTION 311 (2d ed. 1991).

³¹ See Randall P. Peerenboom, *Human Rights and Rule of Law: What's the Relationship?*, at 49 (Aug. 23, 2004) (unpublished manuscript, available at <http://law.bepress.com/expresso/eps/355>).

of torture.³² Although there are four different Geneva Conventions that the United States signed in 1949 and supplemented with two protocols in 1977, this Note will focus on Convention III Relative to the Treatment of Prisoners of War ("Convention III").³³ The international community's prohibition on torture is more generally stated in the Convention Against Torture³⁴ and the International Covenant on Civil and Political Rights,³⁵ additional treaties to which the United States is also a party.³⁶ However, two primary issues arising out of the Abu Ghraib prison scandal are whether all Military Police and Military Intelligence personnel knew that Convention III applied to soldiers captured and detained in Iraq and whether they fully understood the content of the treaty's articles. Accordingly, this section explores the general

³² See Jinks & Sloss, *supra* note 18, at 108-10.

³³ Erin Chlopak, *Dealing with the Detainees at Guantanamo Bay: Humanitarian and Human Rights Obligations Under the Geneva Conventions*, 9 HUM. RTS. BR. 6, 6 (2002). The other three conventions are Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea and Convention IV Relative to the Protection of Civilian Persons in Time of War. *Id.*

³⁴ Article 1 of the Convention Against Torture defines torture as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or 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.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 1, 23 I.L.M. 1027, 1465 U.N.T.S. 85.

³⁵ The International Covenant on Civil and Political Rights states that "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." International Covenant on Civil and Political Rights, Mar. 23, 1976, art. 7, I.L.M. 368, 999 U.N.T.S. 171.

³⁶ Domestically, the United States enacted a law that criminalizes the commission of torture by U.S. citizens on foreign soil. The United States Code defines torture as "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." 18 U.S.C. § 2340. The penalty for the commission or attempted commission of torture by a U.S. citizen on foreign soil is no more than twenty years' imprisonment. However, if torture results in the death of one or more individuals, the crime is punishable by death or life imprisonment. See 18 U.S.C. § 2340A. The United States also enacted the War Crimes Act that criminalizes the violation of the Geneva Conventions and other treaties that govern the laws of war. See 18 U.S.C. § 2441.

provisions of Convention III rather than other international treaties that espouse similar principles.

A. *Geneva Convention III Relative to the Treatment of Prisoners of War*

Convention III confers POW status on captured individuals who are military personnel of a party involved in an armed conflict between one or more states.³⁷ A “de facto state of armed conflict” as opposed to a formal declaration of war is enough to trigger Convention III protections.³⁸ Both states remain bound to the Convention even if one of the warring states is not an official party to the treaty.³⁹ In addition to armed conflict between states, Convention III also applies in non-international conflicts, including civil wars and other instances in which one or both of the warring parties are not official states.⁴⁰

Convention III delineates “modest but important humanitarian guarantees”⁴¹ for POWs, some of which pertain to interrogation tactics. Specifically, Convention III requires that all POWs “must . . . be humanely treated”⁴² and that they “are entitled . . . to respect for their persons and their honour.”⁴³ “[O]utrages upon personal dignity,” including torture, mutilation or any other form of degrading treatment, are strictly prohibited.⁴⁴ POWs must be afforded the right to attend religious services of their faith provided that they are not proven to have disciplinary problems.⁴⁵ In addition, their housing conditions are to be “as favourable as those for the . . . Detaining Power who are billeted in the same area.”⁴⁶ In terms of interrogation tactics, the Convention explicitly

³⁷ See Chlopak, *supra* note 33, at 8.

³⁸ See Jinks & Sloss, *supra* note 18, at 109.

³⁹ *Id.*

⁴⁰ The Association of the Bar of the City of New York, *Human Rights Standards Applicable to the United States' Interrogation of Detainees*, 59 THE RECORD 271, 275-76 (2004) [hereinafter *Human Rights Standards*]. Only article 3, as opposed to “the full protection of [Convention III], applies to non-international armed conflicts.” *Id.* See also Jinks & Sloss, *supra* note 18, at 110.

⁴¹ Jinks & Sloss, *supra* note 18, at 110.

⁴² Geneva Convention III Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 13, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Convention III].

⁴³ *Id.* art. 14.

⁴⁴ *Id.* art. 3.

⁴⁵ *Id.* art. 34.

⁴⁶ *Id.* art. 25.

prohibits “physical or mental torture, [and] any other form of coercion” for the purpose of procuring intelligence information.⁴⁷ POWs are only required to disclose their first names, rank, army serial number and date of birth to detaining officials.⁴⁸ Those prisoners who choose not to answer questions beyond that cannot be “threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.”⁴⁹

B. *Implementation and Enforcement*

The Geneva Conventions’ primary purpose is to make “human rights binding law.”⁵⁰ While Convention III clearly identifies what protections should be afforded to POWs who are taken into custody during an armed conflict, problems can arise in implementing and enforcing its provisions.⁵¹ United Nations agencies or their subcommittees are primarily responsible for ensuring that signatories to a treaty uphold their promises to respect human rights.⁵² However, enforcement can become burdensome because, among other reasons, United Nations agencies are not authorized to punish treaty violators.⁵³

Independent, nonpolitical institutions interested in preventing international humanitarian rights violations confront similar problems. For example, the International Committee of the Red Cross’ (“ICRC”)⁵⁴ inspections of the Abu Ghraib detention facility revealed inhumane prisoner abuses.⁵⁵ Instead of remedying the problems discovered, ICRC agents’ recourse was limited to submitting a report to the United

⁴⁷ *Id.* art. 17.

⁴⁸ Convention III, art. 17.

⁴⁹ *Id.*

⁵⁰ LEVI, *supra* note 30, at 311.

⁵¹ *See id.* at 183 (arguing that the implementation and enforcement of human rights protections in international treaties can be difficult).

⁵² *See id.*

⁵³ *See id.* at 184.

⁵⁴ The ICRC is “an independent, neutral organization” designed to ensure “humanitarian protection and assistance for victims of war and armed violence[.]”. *See generally* ICRC Homepage, <http://www.icrc.org/eng> (last visited Aug. 29, 2005).

⁵⁵ *See* REPORT OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC) ON THE TREATMENT BY THE COALITION FORCES OF PRISONERS OF WAR AND OTHER PROTECTED PERSONS BY THE GENEVA CONVENTIONS IN IRAQ DURING ARREST, INTERNMENT AND INTERROGATION 3 (2004), *available at* <http://www.columbia.edu/cu/lweb/indiv/usgd/hotdocs.html> (follow “Report of the International Committee of the Red Cross” hyperlink) [hereinafter ICRC REPORT].

States government that explained their committee's findings.⁵⁶ The process of conducting the inspections, writing the report and waiting for the United States government to respond took almost a full year and enabled the cycle of abuse to continue at Abu Ghraib.⁵⁷ In order to circumvent damaging bureaucratic delays, Congress must act preemptively and pass laws that identify and address the fundamental causes of prisoner abuse abroad. Although a solid attempt, the Interrogation Bill does not correct the underlying policy problems that existed at the Abu Ghraib detention facility; it merely restates a failed proposition.⁵⁸ This Note recommends a more effective bill in Part V.

III. EVOLUTION OF INTERROGATION TECHNIQUES

The September 11, 2001 attacks on the United States drastically altered the Bush administration's willingness to adhere to preexisting international law.⁵⁹ Cofer Black, the former director of the Central Intelligence Agency's counterterrorism unit, testified before Congress in early 2002 that "[t]here was a before-9/11 and an after-9/11" and that "[a]fter 9/11 the gloves came off."⁶⁰ Prior to the al Qaeda attacks, the United States Military applied the Geneva Conventions "broadly" and provided protection to all

⁵⁶ See Murphy, *U.S. Abuse*, *supra* note 6, at 594 (explaining that "[f]rom the start of the occupation of Iraq, representatives of the [ICRC] were allowed access to Iraqi detainees . . . and . . . regularly submitted observations and recommendations to the coalition forces regarding the treatment of such detainees.").

⁵⁷ The ICRC conducted inspections between March and November 2003. ICRC REPORT, *supra* note 55, at 3. The United States government received a copy of the report in February 2004. *Id.* at 1.

⁵⁸ The Interrogation Bill provides that various agencies be "immediately granted unfettered access to detainees or prisoners in the custody or under the effective control of the armed forces of the United States." Interrogation Bill, *supra* note 1, § 2. As noted earlier, however, the ICRC's "unfettered access" to the Abu Ghraib prison did not succeed in ending the cycle of abuse. See *supra* notes 50-57 and accompanying text.

⁵⁹ BRODY, *supra* note 22, at 1. President Bush embraced White House Counsel Judge Alberto Gonzales' argument that "the 'nature of the new war' on terrorism places such a premium on getting information from captured terrorists quickly, that '[t]his new paradigm' makes the restrictions of [Convention III] . . . 'obsolete.'" Barry C. Scheck, *The 'New Paradigm' and Our Civil Liberties*, 28-AUG CHAMPION 4 (Aug. 2004). See also Harold Hongju Koh, *Jefferson Memorial Lecture: Transnational Legal Process After September 11th*, 22 BERKELEY J. INT'L L. 337, 350 (finding that the "recent horrors at Abu Ghraib" demonstrate the Bush administration's "strategy of condoning wide-scale departures from traditional prisoner-of-war protections.").

⁶⁰ Barry, *supra* note 17, at ¶ 3.

individuals captured in an international armed conflict.⁶¹ In accordance with the United States Constitution's Supremacy Clause,⁶² the Geneva Conventions achieved the status of "supreme federal law" and could not be undermined or ignored unless one of two things occurred: (1) a particular Geneva Convention treaty provision "exceed[ed] the scope of the treaty-makers' domestic lawmaking powers"; or (2) "a subsequent inconsistent treaty or statute supersede[d] the [Geneva Convention] treaty provision at issue."⁶³ Prior to the terrorist attacks, the government did not seek to undercut the United States' obligations under the Geneva Conventions because, up until that point, the treaty did not interfere with any foreign engagement or military campaign.⁶⁴

In early 2002, however, President Bush concluded that terrorism could not be fought by strictly adhering to international rules of law.⁶⁵ Officials from the White House, the Department of Defense, and the Department of Justice drafted a number of memoranda concerning the application of the Geneva Conventions to the War in Afghanistan and the implementation of interrogation policies for use on al Qaeda and Taliban detainees.⁶⁶ According to White House Counsel Judge Alberto Gonzales, the documents "explore[d] the limits of the legal landscape as to what the Executive Branch can do within the law and the Constitution as an abstract matter."⁶⁷

⁶¹ BRODY, *supra* note 22, at 5.

⁶² The Supremacy Clause states that "all Treaties made . . . under the Authority of the United States shall be the supreme Law of the Land." U.S. CONST. art. 6.

⁶³ Jinks & Sloss, *supra* note 18, at 123-24.

⁶⁴ In fact, on October 1, 1997, the government codified the Geneva Conventions in an Army Regulation handbook [Army Regulation 190-8], which established policies and procedures "for the administration, treatment, employment, and compensation of enemy prisoners of war . . ." Jinks & Sloss, *supra* note 18, at 125 (quoting U.S. ARMY, ARMY REGULATION 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES §1-1(a) (1997)). This handbook cited the Geneva Conventions as "directly binding on all U.S. military forces as a matter of . . . law, even where they conflict with the military's own regulations." *Id.*

⁶⁵ David J. Gottlieb, *How We Came to Torture*, 14 KAN. J.L. & PUB. POL'Y 449, 453 (2005) (The Bush Administration "fairly quickly decided that the threat it was facing was entirely unprecedented. Existing treaties were seen as impediments to be overcome. Concerned with the need to acquire as much 'actionable intelligence' as possible, by whatever means, the Administration adopted a strategy to permit something close to unfettered power in dealing with terrorist suspects.").

⁶⁶ See BRODY, *supra* note 22, at 5-6. See also Neil MacMmaster, *Torture: from Algiers to Abu Ghraib*, 46 RACE & CLASS 1, 17-18 (2004).

⁶⁷ Press Briefing by White House Counsel Judge Alberto Gonzales, Dep't of Def. Gen. Counsel William Haynes, Dep't of Def. Deputy Gen. Counsel Daniel Dell'Orto

After reviewing the parties' arguments, President Bush determined that terrorists or suspected terrorists would be deemed "unlawful combatants" and denied protections under Convention III.⁶⁸ President Bush provided leeway for the implementation of harsh interrogation policies by holding that unlawful combatants should be treated in a manner consistent with the Geneva Conventions but that "military necessity" ultimately dictates detainee treatment.⁶⁹ The Bush administration's unwillingness to offer full Convention III protections to terrorists coupled with its hesitancy to completely ignore established international law resulted in the breakdown of a clear Geneva Conventions policy in Iraq, including the Abu Ghraib detention facility.⁷⁰

A. *Applicability of Geneva Convention III to the War in Afghanistan*

Legal memoranda⁷¹ written by White House Counsel, the Department of Defense and the Department of Justice influenced President Bush's decision not to apply Convention III to Taliban and al Qaeda prisoners. In a document dated January 22, 2002, Assistant Attorney General Jay S. Bybee expressed the view that al Qaeda is "not a nation-State"⁷² or

and Army Deputy Chief of Staff for Intelligence Gen. Keith Alexander (June 22, 2004) (transcript available at www.whitehouse.gov/news/releases/2004/06/20040622-14.html [hereinafter Press Briefing]).

⁶⁸ See Barry, *supra* note 17, at ¶ 9.

⁶⁹ Memorandum from President Bush to the Vice President, et al. 2 (Feb. 7, 2002), <http://digitalarchive.oclc.org/da/ViewObject.jsp?objid=0000007678&reqid=3164> (follow "Feb 7, 2002 – Memo from President Bush" hyperlink) [hereinafter Bush Memorandum].

⁷⁰ See Drumbl, *supra* note 20, at 339-40 (Finding that "[t]here is cause to believe that [the] memoranda [pertaining to the War in Afghanistan], along with other deliberate decisions made at senior levels to circumscribe the role of law, had an impact upon the degree of respect for law in the Abu Ghraib prison . . ."); see *infra* Parts III.B, IV.B.2.a; see also *supra* note 25 and accompanying text.

⁷¹ On June 22, 2004, both the White House and the Department of Defense released a total of twenty-eight documents regarding the Administration's military interrogation policies since September 11, 2001. At least six additional documents, including the Taguba report, were leaked to the news media and are now available to the public as well. For a complete list of all available and unavailable documents pertaining to the applicability of the Geneva Conventions abroad as well as U.S. military interrogation procedures, see *The Interrogation Documents: Debating U.S. Policy and Methods* from the National Security Archive Website, <http://digitalarchive.oclc.org/da/ViewObject.jsp?objid=0000007678&reqid=3164> (last visited Nov. 7, 2005). Because the content of many of the letters and memoranda is repetitive, only a limited number of the documents will be referenced in this Section.

⁷² Memorandum from Assistant Att'y Gen. Jay S. Bybee, from the Office of Legal Counsel at the U.S. Dep't of Justice, to White House Counsel Judge Alberto

“High Contracting Party”⁷³ as required under Convention III. Rather, he believed al Qaeda should be classified as a “non-governmental terrorist organization composed of members from many nations, with ongoing operations in dozens of nations.”⁷⁴ According to Bybee’s interpretation of Convention III, non-governmental organizations cannot be recognized as parties to the treaty and therefore should not be provided the protection of its provisions.⁷⁵ Bybee also concluded that President Bush reserved the right to suspend U.S. treaty obligations to Afghanistan because it was a non-functioning state and the Taliban militia was not a valid government.⁷⁶ President Bush’s acceptance of Bybee’s determinations would effectively accomplish two tasks. First, the trials and long-term detentions of al Qaeda terrorists would not be subject to humanitarian protections under Convention III.⁷⁷ Second, because Afghanistan constituted a “failed state,” Taliban military personnel would also not receive POW status under Convention III.⁷⁸

White House Counsel Judge Alberto Gonzales agreed with Bybee that Taliban and al Qaeda detainees should not be afforded POW status under Convention III. In a January 25, 2002 memorandum to President Bush, Gonzales argued that the conflict in Afghanistan did not “form[] the backdrop” for the Geneva Conventions.⁷⁹ He believed that the war against terrorism constituted a new kind of war that demanded the procurement of valuable intelligence information from captured

Gonzales, and Gen. Counsel of the Dep’t of Def. William J. Haynes II, at 1 (Jan. 22, 2002), <http://digitalarchive.oclc.org/da/ViewObject.jsp?objid=0000007678&reqid=3164> (follow “Jan 22, 2002” hyperlink) [hereinafter Bybee Memorandum 1/22/02]. The term “nation-state” has been used synonymously with the term “nation.” Symposium, *Conceptions of International Peace Environmental Rights: “The Remains of the Day,”* 59 TENN. L. REV. 651, 657 (1992).

⁷³ Bybee Memorandum 1/22/02, *supra* note 72, at 9. Convention III applies to “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties . . .” Convention III, *supra* note 42, art. 2. A “High Contracting Party is a country, or sovereign state, that has signed the Geneva Conventions.” Heather Alexander, Comment, *Justice for Rwanda Toward a Universal Law of Armed Conflict*, 34 GOLDEN GATE U. L. REV. 427, 434 n.55 (2004).

⁷⁴ Bybee Memorandum 1/22/02, *supra* note 72, at 9.

⁷⁵ *Id.* at 10.

⁷⁶ *Id.* at 10-11.

⁷⁷ *Id.* at 9-10.

⁷⁸ *Id.* at 10-11.

⁷⁹ Memorandum from White House Counsel Judge Alberto R. Gonzales, to President George W. Bush (Jan. 25, 2002), <http://www.msnbc.msn.com/id/4999734/site/newsweek/> (follow “January 25, 2002” hyperlink) [hereinafter Gonzales Memorandum].

terrorists.⁸⁰ Gonzales further argued that in order to preserve interrogation flexibility, the Geneva Conventions must be rendered obsolete.⁸¹ Irrespective of the inapplicability of Convention III, Gonzales concluded that the United States should still be “constrained” by “its commitment to treat the detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of [Convention III].”⁸² Gonzales adopted from Secretary of Defense Donald Rumsfeld the argument that the Geneva Conventions do not apply to the conflict in Afghanistan *but* that Taliban and al Qaeda detainees should be treated in a humane manner.⁸³ The negative effects resulting from the Executive Branch’s endorsement of these two seemingly irreconcilable viewpoints ultimately extended to the Abu Ghraib prison facility.⁸⁴

In response to Gonzales’ memorandum, an “outraged”⁸⁵ Secretary of State Colin L. Powell expressed his concern that the United States had never before determined that Convention III did not apply to an armed conflict involving its military.⁸⁶ Powell also disagreed with Gonzales’ memorandum insofar as it did “not squarely present to the President the options that [were] available to him. Nor [did] it identify the

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ On January 19, 2002, Secretary of Defense Donald Rumsfeld requested that the Chairman of the Joint Chiefs of Staff inform all combatant commanders in Afghanistan that “Al Qaida and Taliban individuals under the control of the Department of Defense are not entitled to prisoner of war status for purposes of the Geneva Conventions of 1949” but that they should be treated “in a manner consistent with the principles of the Geneva Conventions of 1949.” Memorandum from Sec’y of Def., Donald Rumsfeld to the Chairman for the Joint Chiefs of Staff (Jan. 19, 2002), <http://digitalarchive.oclc.org/da/ViewObject.jsp?objid=0000007678&reqid=3164> (follow “Jan 19, 2002” hyperlink). Two days later, the Chairman for the Joint Chiefs of Staff transmitted Rumsfeld’s requested message to the military commanders in Afghanistan. See Message from the Chairman for the Joint Chiefs of Staff to Military Commanders in Afg. (Jan. 21, 2002), <http://digitalarchive.oclc.org/da/ViewObject.jsp?objid=0000007678&reqid=3164> (follow “Jan 21, 2002” hyperlink); see also BRODY, *supra* note 22, at 5.

⁸⁴ See *infra* Part IV.B.2.a. See also *supra* notes 25 and 70 and accompanying text.

⁸⁵ Paust, *supra* note 20, at 826.

⁸⁶ Memorandum from Sec’y of State, Colin L. Powell, to White House Counsel and the Assistant to the President for Nat’l Sec. Affairs 5 (Jan. 26, 2002), <http://digitalarchive.oclc.org/da/ViewObject.jsp?objid=0000007678&reqid=3164> (follow “Jan 26, 2002” hyperlink) [hereinafter Powell Memorandum]. See Drumbl, *supra* note 20, at 338 (“Secretary of State Colin Powell submitted a sharp critique of [Gonzales’] recommendation.”).

significant pros and cons of each option.”⁸⁷ Despite his deep-seated conviction that Convention III should not be limited,⁸⁸ Powell drafted his memorandum with the intent to clarify Gonzales’ propositions.⁸⁹ In option one, Convention III would not apply to the conflict in Afghanistan because it is a failed state and cannot be regarded as a High Contracting Party.⁹⁰ In option two, Convention III would apply to the conflict in Afghanistan, but al Qaeda and Taliban detainees would neither be afforded any protections nor be entitled to POW status.⁹¹ Powell preferred the latter option because option one would “reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and undermine the protections of the law of war for our troops”⁹² Under both alternatives, however, Powell embraced the Gonzales/Rumsfeld view that all detainees should be treated in a manner consistent with Convention III principles.⁹³

On February 7, 2002, President Bush issued a formal memorandum regarding the applicability of Convention III to al Qaeda and Taliban detainees, in which he made five crucial determinations. First, Convention III does not apply to al Qaeda primarily because it is not a High Contracting Party.⁹⁴ Second, Convention III applies to the conflict with the Taliban,⁹⁵ but the President possesses the authority to suspend all protections in Afghanistan at any point.⁹⁶ Third, Article 3 of Convention III does not apply to either al Qaeda or Taliban detainees because the “conflicts are international in scope and . . . Article 3 applies only to ‘armed conflict not of an

⁸⁷ Powell Memorandum, *supra* note 86, at 1.

⁸⁸ *Id.* at 1-4.

⁸⁹ *Id.* at 1.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 2.

⁹³ See Powell Memorandum, *supra* note 86, at 5.

⁹⁴ See Bush Memorandum, *supra* note 69, at 1.

⁹⁵ President Bush’s second determination is somewhat confusing. After reviewing all four of the President’s conclusions, it can be inferred that Convention III applies to the conflict in Afghanistan generally, but that al Qaeda and Taliban detainees do not qualify for POW status. *Id.* See *Human Rights Standards*, *supra* note 40, at 275 (finding that the “President accepted application of the Geneva Conventions in principle to the conflict with the Taliban, while asserting that Taliban personnel did not qualify under [Convention] III for status as prisoners of war. However, the Administration denied that the Geneva Conventions applied at all to Al Qaeda and to the broader War on Terror, although it announced that it would adhere to comparable humanitarian standards.”).

⁹⁶ Bush Memorandum, *supra* note 69, at 1-2.

international character.”⁹⁷ Fourth, Taliban detainees are unlawful combatants and do not qualify as POWs under Convention III. Finally, because al Qaeda is not protected under Convention III, al Qaeda detainees do not qualify for POW status either.⁹⁸ President Bush’s determinations created an avenue by which Convention III did not need to be applied to the Taliban conflict thus, “preserv[ing] maximum flexibility with the least restraint by international law.”⁹⁹ These same determinations led some military personnel stationed at Abu Ghraib to improperly conclude that they could deny Geneva law protections to a number of their detainees as well.¹⁰⁰

B. Authorized Interrogation Tactics in Afghanistan and Guantanamo Bay

After President Bush determined that the Geneva Conventions do not protect al Qaeda and Taliban detainees, a series of memoranda¹⁰¹ circulated throughout the White House, Department of Defense and Department of Justice regarding the implementation of interrogation procedures in Afghanistan and Guantanamo Bay.¹⁰² A number of these documents addressed whether 18 U.S.C. §§ 2340-2340A,¹⁰³ the statutes that criminalize the commission of torture by U.S. citizens on foreign soil, could impede the military’s ability to employ harsh interrogation methods abroad. Both the Department of Justice and the White House expressed the view that even if specific interrogation methods violated the United States Code, the President, as Commander-in-Chief, could still utilize “flexible” interrogation methods for the purpose of gaining intelligence information concerning the enemy’s military plans.¹⁰⁴ In

⁹⁷ *Id.* at 2.

⁹⁸ *Id.*

⁹⁹ *Human Rights Standards*, *supra* note 40, at 275.

¹⁰⁰ *See supra* notes 25 and 70 and accompanying text.

¹⁰¹ *See supra* note 71 and accompanying text.

¹⁰² In January 2002, the United States began sending individuals “picked up during the armed conflict in Afghanistan” to Guantanamo Bay, Cuba. The naval base located there ultimately housed over 700 detainees from forty-four countries. BRODY, *supra* note 22, at 5.

¹⁰³ *See supra* note 36 and accompanying text.

¹⁰⁴ *See* Memorandum from Assistant Att’y Gen. Jay S. Bybee, from the Office of Legal Counsel at the U.S. Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President 31 (Aug. 1, 2002), <http://digitalarchive.ocl.org/da/ViewObject.jsp?objid=0000007678&reqid=3164> (follow “Aug 1, 2002” hyperlink) [hereinafter Bybee Memorandum 8/1/02]. *See also* Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational

support of this proposition, the Department of Justice and the White House argued that Congress lacks the authority “to set the terms and conditions under which the President may exercise his authority as Commander-in-Chief to control the conduct of operations during a war.”¹⁰⁵ The President alone is vested with the “entire charge of hostile operations”¹⁰⁶ and thus far, Congress has not interfered with this authority.¹⁰⁷

The Department of Justice also concluded that the definition of torture articulated in 18 U.S.C. §§ 2340-2340A only covers “extreme acts” and that there exist a number of interrogation methods that may be regarded as cruel, inhumane or degrading but do not technically constitute torture.¹⁰⁸ Specifically, the Department of Justice concluded that the infliction of severe mental and physical pain does not constitute torture unless the pain is intended to have lasting psychological effects or cause death or organ failure.¹⁰⁹ Under this definition, the beating of a prisoner into unconsciousness or the breaking of his bones would not violate federal law.¹¹⁰

The Government’s analysis of domestic laws reached high-ranking military personnel stationed in Guantanamo Bay, Cuba.¹¹¹ Major General Michael B. Dunlavey responded to the Department of Justice and the White House’s discourse regarding the President’s responsibility to adhere to the United States Code with a request for the authorization of more aggressive interrogation techniques at the Guantanamo Bay naval base.¹¹² The Military Intelligence personnel stationed abroad felt constrained by the procedures outlined in the Army

Considerations 21 (Apr. 4, 2003), <http://www.washingtonpost.com/wp-srv/nation/documents/040403.pdf> [hereinafter Working Group Report] (stating that “Congress may no more regulate the President’s ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield.”). This report was prepared for Secretary of Defense Donald Rumsfeld by a group of executive branch attorneys. See Murphy, *U.S. Abuse*, *supra* note 6, at 592.

¹⁰⁵ Bybee Memorandum 8/1/02, *supra* note 104, at 34-35. See Working Group Report, *supra* note 104, at 21-22.

¹⁰⁶ Bybee Memorandum 8/1/02, *supra* note 104, at 34 (quoting Hamilton v. Dillin, 88 U.S. 73, 87 (1874)). See Working Group Report, *supra* note 104, at 20.

¹⁰⁷ Bybee Memorandum 8/1/02, *supra* note 104, at 39.

¹⁰⁸ *Id.* at 46.

¹⁰⁹ *Id.*

¹¹⁰ Peter Irons, *William Howard Taft Lecture: “The Constitution Is Just a Scrap of Paper:” Empire Versus Democracy*, 73 U. CIN. L. REV. 1081, 1089 (2005).

¹¹¹ See Memorandum from Major Gen. Michael B. Dunlavey, Dep’t of Def., Joint Task Force 170, Guantanamo Bay, Cuba to Commander for the U.S. Southern Command (Oct. 11, 2002), <http://digitalarchive.oclc.org/da/ViewObject.jsp?objid=0000007678&reqid=3164> (follow “Oct 11, 2002” hyperlink).

¹¹² *Id.*

FM 34-52 Intelligence Interrogation Manual.¹¹³ In light of President Bush's February 7, 2002 directive that the Geneva Conventions do not apply to unlawful combatants, it can be argued that the aforementioned personnel desired a clear policy on permissible interrogation methods as well.

Secretary Rumsfeld subsequently approved a list of proposed interrogation techniques¹¹⁴ including, but not limited to, yelling, the use of stress positions for a maximum of four hours,¹¹⁵ deprivation of light and auditory stimuli, the use of twenty-hour interrogations, removal of clothing, forced grooming, using detainees' individual phobias to induce stress and the use of "mild, non-injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing."¹¹⁶ Secretary Rumsfeld later rescinded his broad-based approval for the interrogation techniques, arguing that the methods could not be employed without "a thorough justification" and "a detailed plan for [their] use."¹¹⁷ He concluded by reaffirming his position that detainees must be treated in a humane manner during interrogations.¹¹⁸ Following the submission of an Executive Branch report regarding permissible detainee interrogations in the war against terrorism, Secretary Rumsfeld again modified the

¹¹³ The Schlesinger Report indicates that Major General Michael B. Dunlavey's request was a reaction "to tenacious resistance by some detainees to existing interrogation methods, which were essentially limited to those in Army Field Manual 34-52." SCHLESINGER REPORT, *supra* note 7, at 35. The Army FM 34-52 Intelligence Interrogation Manual provides that the "use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind is prohibited by law and is neither authorized nor condoned by the US Government." Murphy, *U.S. Abuse*, *supra* note 6, at 592 (quoting U.S. ARMY, INTELLIGENCE INTERROGATION 34-52 ch. 1 (1987)).

¹¹⁴ See Action Memorandum from White House General Counsel William J. Haynes II to Sec'y of Def. Donald Rumsfeld (Nov. 27, 2002), <http://digitalarchive.oclc.org/da/ViewObject.jsp?objid=0000007678&reqid=3164> (follow "Dec 2, 2002" hyperlink). Secretary Rumsfeld officially approved the interrogation methods discussed in the memorandum on December 2, 2002. *Id.*

¹¹⁵ Underneath his signature approving interrogation techniques discussed in the November 27, 2002 Action Memorandum, Secretary Rumsfeld handwrote the following statement: "I stand for 8-10 hours a day. Why is standing [for interrogation purposes] limited to 4 hours?" *Id.*

¹¹⁶ Memorandum from Jerald Phifer, LTC to Commander of Joint Task Force 170 (Oct. 11, 2002), <http://digitalarchive.oclc.org/da/ViewObject.jsp?objid=0000007678&reqid=3164> (follow "Oct 11, 2002" hyperlink).

¹¹⁷ Memorandum from Sec'y of Def. Donald Rumsfeld to the Commander of the U.S. Southern Command (USSOUTHCOM) (Jan. 15, 2003), <http://digitalarchive.oclc.org/da/ViewObject.jsp?objid=0000007678&reqid=3164> (follow "Jan 15, 2003 - Department of Defense memo" hyperlink).

¹¹⁸ *Id.*

approved list of unlawful combatant interrogation techniques.¹¹⁹ Although the new techniques did not expressly authorize the use of physical contact or other methods that might violate international treaties and United States domestic laws,¹²⁰ subsequent investigations revealed that many of the same methods previously approved, but later rescinded by Secretary Rumsfeld were actually still being utilized at Guantanamo Bay.¹²¹

The numerous policy changes authorized by Secretary Rumsfeld demonstrate the government's hesitancy to implement a clear interrogation policy with regard to unlawful combatants. By determining that Convention III does not apply to unlawful combatants, yet arguing that these individuals should still be treated in a manner consistent with the treaty, the government created an amorphous set of guidelines that, in effect, authorized military personnel to haphazardly violate humanitarian standards.¹²² As a result, the long-standing assumption that the Geneva Conventions applied to all military campaigns was eradicated.¹²³

Secretary Rumsfeld's authorization of coercive interrogation methods¹²⁴ in conjunction with President Bush's February 7, 2002 directive that unlawful combatants be treated in a manner consistent with Convention III caused confusion at the Abu Ghraib prison.¹²⁵ The Taguba, Schlesinger, and Jones-

¹¹⁹ See Memorandum from Sec'y of Def. Donald Rumsfeld to Commander for the U.S. Southern Command (USSOUTHCOM) (April 16, 2003), <http://digitalarchive.oclc.org/da/ViewObject.jsp?objid=0000007678&reqid=3164> (follow "Apr 16, 2003" hyperlink).

¹²⁰ Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law: General International and U.S. Foreign Relations Law: Executive Branch Memoranda on Status and Permissible Treatment of Detainees*, 98 AM. J. INT'L. L. 820, 828 (2004).

¹²¹ JONES-FAY REPORT, *supra* note 8, at 29 (Part II). Such techniques included the "use of stress positions, isolation for up to thirty days, removal of clothing, and the use of detainees' phobias (such as the use of dogs)." *Id.*

¹²² Gottlieb, *supra* note 65, at 455 (finding that while "Secretary Rumsfeld may not have specifically authorized the use of the worst tortures . . . there should be no mistaking of how short the distance was between practices that the reservists were authorized to engage in or thought they were authorized to engage in and the tortures and humiliations that were in fact committed.").

¹²³ See *supra* note 24 and accompanying text.

¹²⁴ See *supra* note 122 and accompanying text.

¹²⁵ Paust, *supra* note 20, at 849 (noting that some military personnel stationed in Iraq believed that Convention III protections could be suspended and harsh interrogation tactics utilized based on President Bush's reasoning from his February 7th memorandum); Gottlieb, *supra* note 65, at 449 ("The Government's policies were a moral, legal, and political disaster. At worst, these rules were seen as winking at torture. At best, they sent confusing signals to American troops and contractors

Fay Reports conclude that the interrogation policies delineated by Secretary Rumsfeld and employed in Afghanistan and Guantanamo Bay were unlawfully used at Abu Ghraib.¹²⁶ These errors could have been avoided had President Bush ensured that military personnel understood whether and how Convention III applied to the War in Iraq.¹²⁷

IV. ABUSES AND FUNDAMENTAL MISTAKES AT THE ABU GHRAIB DETENTION FACILITY

Neither President Bush nor the Department of Defense admitted to authorizing the incidents of abuse at Abu Ghraib.¹²⁸ Nonetheless, a number of Military Police and Military Intelligence personnel working at the prison engaged in inhumane treatment and conducted unlawful interrogations of Iraqi detainees.¹²⁹ An investigation into the policy errors at Abu Ghraib reveals a plethora of mistakes that could have been avoided had proper procedural safeguards been codified by Congress.

A. *Specific Allegations and Instances of Abuse*

The Taguba, Schlesinger, and Jones-Fay Reports reveal that Abu Ghraib detainees experienced “numerous incidents of sadistic, blatant, and wanton criminal abuses.”¹³⁰ While the exact number of substantiated incidents of abuse varies in each report, it is generally agreed that between forty-four and fifty-five unlawful acts transpired at the prison.¹³¹ The abuses

in . . . Iraq.”). See Michael Isikoff, *Memos Reveal War Crimes Warning*, NEWSWEEK ONLINE, May 17, 2004, at ¶ 9, at <http://msnbc.msn.com/id/4999734/site/newsweek/> (“Administration critics have charged that key legal decisions . . . including the White House’s February 2002 declaration not to grant any Al Qaeda and Taliban fighters prisoners of war status under the Geneva Convention, laid the groundwork for the interrogation abuses . . . in the Abu Ghraib prison in Iraq.”).

¹²⁶ See TAGUBA REPORT, *supra* note 6, at 8; SCHLESINGER REPORT, *supra* note 7, at 68; JONES-FAY REPORT, *supra* note 8, at 14-15 (Part I).

¹²⁷ See *infra* Part IV.B.2.a.

¹²⁸ MacMaster, *supra* note 66, at 14 (“Bush and Rumsfeld . . . claimed ignorance of malpractice Implicit in such a discourse was the claim that there was no systematic deployment of torture interrogation techniques in the US army and that sadistic acts were isolated to degraded individuals and did not reach up through the chain of command.”).

¹²⁹ See *infra* Part IV.A.

¹³⁰ See TAGUBA REPORT *supra* note 6, at 16.

¹³¹ The Schlesinger Report indicates that “[o]f the 66 already substantiated cases of abuse, eight occurred at Guantanamo, three in Afghanistan and 55 in Iraq. Only about one-third were related to interrogation, and two-thirds to other causes.” SCHLESINGER REPORT, *supra* note 7, at 13. In contrast, the Jones-Fay Report indicates

occurred at the hands of individual soldiers as well as small military groups.¹³² While the Schlesinger Report does not provide specific examples of the abuses,¹³³ the other two reports convey the details of each act.

The most severe forms of abuse occurred on the night shift of Tier 1 at Abu Ghraib¹³⁴ and involved both physical attacks and sexual assaults.¹³⁵ United States military personnel exclusively operated Tiers 1A and 1B, designated for military intelligence "holds," while Iraqi prison guards supervised regular prisoners in Tiers 2 through 7.¹³⁶ With regard to physical abuse, military personnel hit, punched, slapped and kicked detainees,¹³⁷ sometimes until they were rendered unconscious.¹³⁸ There are also reports of military personnel jumping on detainees' feet and simulating electric torture by attaching wires to naked detainees' extremities.¹³⁹ Dogs were frequently used to frighten detainees and on at least one occasion, to bite and severely injure a prisoner.¹⁴⁰ In addition, twenty detainees died suspiciously while in U.S. military custody, but these deaths are still under investigation.¹⁴¹

The sexual abuses at Abu Ghraib spanned from the photographing and videotaping of naked detainees¹⁴² to rape.¹⁴³ Other examples of abuse include forcing detainees to remain naked for days at a time¹⁴⁴ as well as arranging naked male detainees into a pyramid formation and jumping on them.¹⁴⁵ In

that there were forty-four incidents of detainee abuse at Abu Ghraib. JONES-FAY REPORT, *supra* note 8, at 15 (Part I).

¹³² See JONES-FAY REPORT, *supra* note 8, at 9 (Part II).

¹³³ See SCHLESINGER REPORT, *supra* note 7, at 12-13.

¹³⁴ *Id.* at 43. See also Edward T. Pound & Kit R. Roane, *Hell on Earth*, U.S. NEWS & WORLD REP ONLINE, Jul. 19, 2004, at ¶¶ 21-23, at <http://www.usnews.com/usnews/news/articles/040719/19prison.htm>.

¹³⁵ See JONES-FAY REPORT, *supra* note 8, at 9 (Part II). See also TAGUBA REPORT, *supra* note 6, at 18-19.

¹³⁶ See SCHLESINGER REPORT, *supra* note 7, at 74.

¹³⁷ See TAGUBA REPORT, *supra* note 6, at 18.

¹³⁸ See JONES-FAY REPORT, *supra* note 8, at 9 (Part II).

¹³⁹ See TAGUBA REPORT, *supra* note 6, at 16-17.

¹⁴⁰ *Id.* at 19.

¹⁴¹ See SCHLESINGER REPORT, *supra* note 7, at 13; MacMaster, *supra* note 66, at 15 ("In November 2003, one prisoner died under torture, but interrogators, it is alleged, were able to dispose of his body since the dead Iraqi was never entered into the inmate control system . . .").

¹⁴² See TAGUBA REPORT, *supra* note 6, at 16.

¹⁴³ See JONES-FAY REPORT, *supra* note 8, at 9 (Part II).

¹⁴⁴ See TAGUBA REPORT, *supra* note 6, at 16.

¹⁴⁵ *Id.* at 17.

a few instances, Military Police personnel required male detainees to masturbate themselves¹⁴⁶ and each other¹⁴⁷ while being photographed and videotaped. At the instruction of a Military Police guard, one naked detainee wore a dog chain around his neck so that a female guard could pose with him for a photograph.¹⁴⁸ And finally, the words “I am a Rapest” [sic] were written on the body of a detainee accused of raping another prisoner.¹⁴⁹

B. The Causes of Abuse at the Abu Ghraib Detention Facility

The Schlesinger and Jones-Fay Reports acknowledge that the Abu Ghraib abuses stemmed from two very different types of improper conduct. Some military personnel harmed detainees for sadistic and self-serving purposes.¹⁵⁰ Others committed prisoner abuses either because they misinterpreted the law dictating what interrogation and detention methods could be employed, or because they did not know what interrogation methods were permissible.¹⁵¹ In the former instances, military personnel intentionally committed violent acts designed to inflict pain or embarrassment on to the detainees.¹⁵² In the latter instances, military personnel did not know, for a variety of reasons, that their actions violated Convention III.¹⁵³

1. Moral Corruption and Criminal Misconduct

Social psychologists argue that the combination of different psychological¹⁵⁴ and environmental risk factors¹⁵⁵ can

¹⁴⁶ *Id.* at 16.

¹⁴⁷ See JONES-FAY REPORT, *supra* note 8, at 9 (Part II).

¹⁴⁸ See TAGUBA REPORT, *supra* note 6, at 17.

¹⁴⁹ *Id.* The Taguba Report lists additional abuses that he “find[s] credible based on the clarity of [the detainees’] statements and supporting evidence provided by other witnesses.” *Id.* These abuses include, but are not limited to, pouring phosphoric liquid from chemical lights on detainees, beating detainees with a broom handle and sodomizing a detainee with a chemical light and a broom stick. *Id.*

¹⁵⁰ See JONES-FAY REPORT, *supra* note 8, at 4 (Part I). See also SCHLESINGER REPORT, *supra* note 7, at 68.

¹⁵¹ See *supra* note 150.

¹⁵² See JONES-FAY REPORT, *supra* note 8, at 4 (Part I).

¹⁵³ *Id.*

¹⁵⁴ Some psychological factors to be considered include inherent personality traits, beliefs, attitudes, and values. Emotional factors like “[a]nger, fear, and

motivate individuals and groups to act inhumanely.¹⁵⁶ With regard to environmental risk factors, Military Police personnel at Abu Ghraib lacked sufficient training and staff support and constantly feared attacks from enemy forces.¹⁵⁷ The stress of protecting themselves from outside threats and from potentially volatile detainees heightened the likelihood that Military Police personnel would engage in prisoner abuses.¹⁵⁸ In terms of psychological factors, the widespread practice of stripping detainees for interrogation purposes also contributed to the prevalence of abuse at the prison.¹⁵⁹ Wearing clothes “is an inherently social practice, and therefore the stripping away of clothing may have had the unintended consequence of dehumanizing detainees in the eyes of those who interacted with them.”¹⁶⁰ The “anti-social reactions” of the Military Police personnel demonstrate that pathological situations, like a prison environment, can modify the behavior of seemingly normal individuals.¹⁶¹

Intentionally committed abuses can be prevented or curtailed through the use of reactive measures, some of which are articulated in the Interrogation Bill.¹⁶² Having said this, it

emotional arousal can heighten the tendency to act out aggressively” as well. SCHLESINGER REPORT, *supra* note 7, at app. G, at 4.

¹⁵⁵ Environmental, or situational factors, such as the presence of weapons, verbal provocation, and physical discomfort can increase the likelihood that an individual will behave in an aggressive manner. *Id.*

¹⁵⁶ In a simulated prison experiment conducted at Stanford University in 1973, twenty-four male college students were divided into two groups, prisoners and guards. *Id.* at app. G, at 1. The psychologists conducting the experiment did not direct the “guards” to behave in any specific manner towards their “prisoners,” in hopes of determining how wartime psychological and environmental stresses can affect an individual’s behavior. Craig Haney & Philip Zimbardo, *The Past and Future of U.S. Prison Policy: Twenty-five Years After the Stanford Prison Experiment*, 53 AM. PSYCHOLOGIST 709, 710 (July 1998). The study revealed that several of the “guards” devised sadistically inventive ways to harass and degrade the prisoners, and none of the “less actively cruel mock-guards ever intervened or complained about the abuses they witnessed.” *Id.* at 709. See Ralph R. Reiland, *Unlearned Prison Lessons*, 64 THE HUMANIST 18, 20-21 (2004).

¹⁵⁷ See SCHLESINGER REPORT, *supra* note 7, at app. G, at 7.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* According to the Schlesinger Report, stripping detainees remains a popular military practice because it succeeds in making “detainees feel more vulnerable and therefore more compliant with interrogations.” *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Craig Haney, Curtis Banks & Philip Zimbardo, *Interpersonal Dynamics in a Simulated Prison*, 1 INT’L J. CRIMINOLOGY & PENOLOGY 69, 90 (1973).

¹⁶² The Interrogation Bill requires that all interrogations “and other pertinent interactions” between a detainee and military personnel be videotaped. Interrogation Bill, *supra* note 1, at 2; see *supra* note 2 and accompanying text. Arguably, the fear of

is important for the Legislature to understand that wartime operations “carry inherent risks for human mistreatment”¹⁶³ and that laws dictating interrogation policies should perhaps include provisions that are not limited to the punishment of military personnel. Had all Abu Ghraib military personnel unequivocally understood how to apply the Geneva Conventions to the War in Iraq, then perhaps the abuses would have been limited to isolated instances of torture that the Interrogation Bill directly addresses and seeks to punish.¹⁶⁴ This, however, is not the case. Evidence suggests that in light of the Bush administration’s suspension of the Geneva Conventions to al Qaeda and Taliban detainees, Abu Ghraib military personnel did not understand the extent to which Convention III protected their prisoners.¹⁶⁵ For this reason, the Interrogation Bill must be revised to include sections that require a clear Geneva Conventions policy to be announced at the onset of every military campaign.

2. Misinterpretations of Law and Policy at Abu Ghraib

a. Application of the Geneva Conventions in Iraq

A second factor contributing to the abuses at Abu Ghraib was general confusion among military personnel as to what detention and interrogation techniques could be practiced.¹⁶⁶ Much of this confusion stemmed from President Bush’s failure to indicate, in light of his determinations with regard to the War in Afghanistan, how treatment in a manner consistent with the Geneva Conventions differs from strict adherence to the Geneva Conventions.¹⁶⁷ Lacking a definitive prisoner treatment and detention policy, the junior military personnel who engaged in the abuses relied on their

getting caught on videotape will deter military personnel from committing violent acts against detainees.

¹⁶³ See SCHLESINGER REPORT, *supra* note 7, app. G, at 1.

¹⁶⁴ Interrogation Bill, *supra* note 1, § 1.

¹⁶⁵ See *supra* note 125 and accompanying text.

¹⁶⁶ SCHLESINGER REPORT, *supra* note 7, at 9-10; JONES-FAY REPORT, *supra* note 8, at 5 (Part 1).

¹⁶⁷ Murphy, *General International*, *supra* note 120, at 830-31 (President Bush quoted as saying that the “authorization I issued was that anything we did would conform to U.S. law and would be consistent with international treaty obligations.”) (quoting The President’s News Conference in Savannah, Georgia, 40 WEEKLY COMP. PRES. DOC. 1049, 1051 (June 10, 2004)).

supervisors' orders at Abu Ghraib.¹⁶⁸ The supervisors, in turn, based their instructions both on the authorized tactics used during the Afghanistan conflict¹⁶⁹ as well as the reasoning advanced in President Bush's February 7, 2002 directive and accompanying advisory memoranda.¹⁷⁰ Thus, in order to fully understand the misinterpretation of law and policy at Abu Ghraib, it is important to closely examine President Bush's directive regarding the application of the Geneva Conventions in Afghanistan.¹⁷¹ President Bush's lack of a clear prisoner treatment and detention policy in Iraq, in conjunction with his failure to provide an extensive explanation for his decision to withhold Convention III protections to Taliban and al Qaeda detainees,¹⁷² contributed to Abu Ghraib military personnel utilizing unlawful interrogation and detention techniques.¹⁷³

¹⁶⁸ MacMaster, *supra* note 66, at 14 (arguing that "senior military intelligence (MI) officers had directed or encouraged the MP guards to 'set favourable conditions' for interrogation by torturing and breaking down prisoners before questioning That this system derived from the highest level [has been] confirmed"). *See also* Timothy L. Burger, et al., *The Scandal's Growing Stain*, TIME, May 17, 2004, at 31 ("The MPs told investigators they [committed the abuses] because officers in the military-intelligence unit . . . told them to 'loosen up' men for interrogation.").

¹⁶⁹ The Schlesinger Report indicates that "none of the senior leadership or command [in Iraq] considered any possibility other than that the Geneva Conventions applied." SCHLESINGER REPORT, *supra* note 7, at 82. Nonetheless, "[t]he message in the field, or the assumptions made in the field, at times lost sight of this underpinning. [Military] [p]ersonnel familiar with the law of determinations for [Afghanistan] tended to factor those determinations into their decision-making for military actions in Iraq." *Id.* Thus, it can be argued that although some senior military personnel understood that the Geneva Conventions applied to military campaigns unless the President directed otherwise, not all lower-level military officials were privy to this "assumption." The Taguba Report further supports this argument by finding that supervisors from the 800th Military Police Brigade "[n]ever attempted to remind . . . [s]oldiers of the requirements of the Geneva Conventions regarding detainee treatment or took any steps to ensure that such abuse was not repeated." TAGUBA REPORT, *supra* note 6, at 20.

¹⁷⁰ Paust, *supra* note 20, at 849. While some senior military personnel understood that the Geneva Conventions applied to the War in Iraq, President Bush's memoranda as well as additional documents issued by the Department of Justice led them to believe that protections could be suspended with regard to certain detainees. *Id.*

¹⁷¹ *See generally* Bush Memorandum, *supra* note 69.

¹⁷² *Id.*

¹⁷³ SCHLESINGER REPORT, *supra* note 7, at 14 ("[T]he changes in DoD interrogation policies between December 2, 2002 and April 16, 2003 [with regard to the War in Afghanistan] were an element contributing to uncertainties in the [Iraq] field as to which techniques were authorized Policies approved for use on al Qaeda and Taliban detainees, who were not afforded the protection of the Geneva Conventions, now applied to [Abu Ghraib] detainees who did fall under the Geneva Convention[s]."). As of yet, the Bush administration fails to acknowledge that it did not establish a clear Geneva Convention policy in Iraq. In fact, Condoleezza Rice argued that "[t]he problem . . . was not the President's policies, which explicitly ruled out [detainee] abuse, but the 'implementation of policy. There's obvious confusion in the

In the February 7 memorandum, President Bush accepted the Department of Justice's legal conclusion that Convention III "[did] not apply to either al Qaeda or Taliban detainees, because . . . the relevant conflicts are international in scope and common Article 3 applies only to 'armed conflict not of an international character.'"¹⁷⁴ Although President Bush did not specify which Department of Justice documents formed the basis for this conclusion, it is likely that he was referring to a January 22, 2002 memorandum written by Assistant Attorney General Jay S. Bybee.¹⁷⁵ In the Bybee memorandum, the Department of Justice argued that Article 3 of Convention III refers only to civil wars that occur when the government of a state engages in conflict with non-international armed factions within its territory.¹⁷⁶ Based on President Bush's limited analysis of Article 3¹⁷⁷ and his reliance on the Department of Justice's legal reports, Convention III *would not* apply to the crisis in Iraq. American and British forces were sent to Iraq in March 2003 to locate and disarm weapons of mass destruction and to overthrow Saddam Hussein's government.¹⁷⁸ The conflict was thus international from the beginning and therefore outside the scope of Convention III's Article 3.

With regard to the conflict in Afghanistan, President Bush also held that Taliban detainees are unlawful combatants and, therefore, should not receive protections under Convention

military' . . . not in the White House . . . but inside the military." HERSCH, *supra* note 19, at 71.

¹⁷⁴ Bush Memorandum, *supra* note 69, at 2. Article 3 refers to a "case of armed conflict not of an international character" that "occur[s] in the territory of one of the High Contracting Parties." See Convention III, *supra* note 42, at art. 3.

¹⁷⁵ Immediately preceding the issuance of President Bush's February 7, 2002 directive, Bybee submitted two memoranda to the White House and Department of Justice. See generally Bybee Memorandum 1/22/02, *supra* note 72; Memorandum from Assistant Att'y Gen. Jay S. Bybee to White House Counsel Alberto R. Gonzales (Feb. 7, 2002), <http://www.news.findlaw.com/wp/docs/torture/bybee20702mem.html> (follow "Feb 7, 2002 - Department of Justice memo" hyperlink). However, only Bybee's January 22, 2002 memoranda addressed Article 3 of Convention III. See Bybee Memorandum 1/22/2002, *supra* note 72, at 5-6.

¹⁷⁶ See Bybee Memorandum 1/22/02, *supra* note 72, at 6. This legal conclusion is largely based on a commentary issued in 1987. See COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 4339 (Yves Sandoz et al. eds., 1987).

¹⁷⁷ President Bush did not explain the Department of Justice's Article 3 legal conclusions. Rather, he merely accepted them at face value. See Bush Memorandum, *supra* note 69, at 2.

¹⁷⁸ See Operation Iraqi Freedom, Global Security website, www.globalsecurity.org/military/ops/iraqi_freedom.htm (last visited Nov. 4, 2004).

III.¹⁷⁹ Convention III provides that an individual captured during an armed conflict must ultimately be labeled a POW,¹⁸⁰ an innocent, or an unprivileged belligerent.¹⁸¹ Unprivileged belligerents, such as terrorist groups, are individuals who do not qualify for POW status, and therefore are denied all Convention III protections.¹⁸² While unlawful combatants are not mentioned anywhere in Convention III,¹⁸³ individuals who “act[] as . . . associate[s] of a terrorist organization” and who are not entitled to POW status are typically regarded as such.¹⁸⁴ Thus, it can be argued that unprivileged belligerents, including terrorists, are unlawful combatants.¹⁸⁵ Nonetheless, the current policy on unlawful combatants remains both “vague and lacking.”¹⁸⁶ The terms “unlawful combatant” and “enemy

¹⁷⁹ See Bush Memorandum, *supra* note 69, at 2.

¹⁸⁰ POW status

is conferred on individuals who are ‘[m]embers of the armed forces of a Party to the conflicts’ as well as ‘[m]embers of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party . . . provided that such . . . fulfill[s]’ four specific 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; and
- (d) That of conducting their operations in accordance with the laws and customs of war.

Jeffrey F. Addicott, *Into the Star Chamber: Does the United States Engage in the Use of Torture or Similar Illegal Practices in the War on Terror?*, 92 KY. L.J. 849, 869 (2004) (quoting, in part, Convention III, *supra* note 42, art. 4A). See also Chlopak, *supra* note 33, at 6-7.

¹⁸¹ Scheck, *supra* note 59.

¹⁸² See *id.*

¹⁸³ Gottlieb, *supra* note 65, at 450.

¹⁸⁴ Addicott, *supra* note 180, at 871 (quoting Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 593 (S.D.N.Y. 2002), *aff’d on reh’g sub nom.* Padilla *ex rel.* Newman v. Rumsfeld, 243 F. Supp. 2d 42 (S.D.N.Y. 2003), *aff’d in part, rev’d in part sub nom.* Padilla *ex rel.* Newman v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003), *rev’d*, 542 U.S. 426 (2004)). See also *supra* note 180 and accompanying text for POW status criteria. In his memorandum, President Bush failed to explain what characteristics define an unlawful combatant. Instead, he briefly argued how, in light of the new war against terrorism, the United States should rethink the applicability of the Geneva Conventions to “groups with broad, international reach [that] commit horrific acts against innocent civilians . . .” Bush Memorandum, *supra* note 69, at 2. Thus, the memorandum suggests that terrorists are unlawful combatants.

¹⁸⁵ See Chlopak, *supra* note 33, at 7 (“Unlawful combatants,’ often referred to as ‘unprivileged combatants’ [or belligerents] are those fighters who are not entitled to the privileges of POW status.”).

¹⁸⁶ See SCHLESINGER REPORT, *supra* note 7, at 81. See also Chlopak, *supra* note 33, at 7 (“The U.S. government’s classification of . . . detainees as ‘unlawful combatants’ has generated confusion and controversy.”).

combatant” are frequently used interchangeably.¹⁸⁷ Although case precedent suggests that both of these designations mean the same thing, the government and the Supreme Court have not defined either of them.¹⁸⁸ The Bush administration did state that enemy combatants are individuals who “support[] . . . and engag[e] in . . . armed conflict against the United States”¹⁸⁹ and who commit or plan to commit mass murder.¹⁹⁰ However, a list of criteria used to classify individuals as enemy combatants or unlawful combatants does not appear to exist.

Because the Executive Branch characterized all individuals who do not qualify for POW status, including terrorists, as unlawful combatants,¹⁹¹ Convention III would not protect many Abu Ghraib detainees. In addition to searching for weapons of mass destruction and ending Saddam Hussein’s regime, Operation Iraqi Freedom military objectives also included dispelling terrorists from the country and gathering intelligence information regarding terrorist networks.¹⁹² President Bush subsequently affirmed these objectives by publicly referring to some Iraqis as terrorists.¹⁹³ If the threat of terrorism served as one of the Government’s primary rationales in denying Taliban detainees protection under Convention III,¹⁹⁴ then it is only logical to conclude that military personnel might assume that Iraqi detainees charged with offenses

¹⁸⁷ See Addicott, *supra* note 180, at 871 (quoting *Padilla*, 233 F. Supp. 2d at 593).

¹⁸⁸ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004) (“There is some debate as to the proper scope of th[e] term [‘enemy combatant’], and the Government has never provided any court with the full criteria that it uses in classifying individuals as such.”).

¹⁸⁹ *Id.* at 516 (quoting Brief for Respondents at 3).

¹⁹⁰ Edward Greer, “We Don’t Torture People in America”: *Coercive Interrogation in the Global Village*, 26(3) NEW POL. SCI. 371, 382-83 (Sept. 2004) (quoting President Bush in Mike Allen & Susan Schmidt, *Bush Defends Secret Tribunals for Terrorism Suspects*, WASH. POST, Nov. 30, 2001, at A28).

¹⁹¹ See *supra* notes 182-90 and accompanying text.

¹⁹² See Operation Iraqi Freedom, Global Security Website, *supra* note 178.

¹⁹³ See Transcript: President Bush Holds Post-G-8 Summit News Conference (June 10, 2004), at www.washingtonpost.com/wp-dyn/articles/A32143-2004June10.html (President Bush admitting to calling some individuals situated in Iraq “terrorists” and “killers.”).

¹⁹⁴ Paust, *supra* note 20, at 812 (“A common plan to violate customary and treaty-based international law concerning the treatment and interrogation of so-called ‘terrorist’ and enemy combatant detainees and their supporters captured during the U.S. war in Afghanistan emerged within the Bush Administration in 2002.”).

against the United States would not be protected under the same Convention either.¹⁹⁵

The most confusing aspect of President Bush's February 7, 2002 memorandum, however, is his espousal for the humane treatment of all detainees, including unlawful combatants.¹⁹⁶ President Bush acknowledged that while certain prisoners may not qualify for protection under the Geneva Conventions, they should still be treated in a manner consistent with the treaties' principles.¹⁹⁷ Only in instances of "military necessity" could the torture or inhumane treatment of detainees be authorized.¹⁹⁸ Despite President Bush's asserted commitment to upholding the Conventions' provisions, the Department of Defense approved numerous coercive and arguably inhumane interrogation tactics for use in the war against terrorism.¹⁹⁹ Thus, while "[t]he President . . . spoke out against torture, . . . his equivocations on the terms of [Convention III] suggest that he perceive[d] wiggle room between ideal and practice."²⁰⁰ In essence, the Executive Branch authorized a new and unmanageable Geneva Conventions policy that instilled a tremendous amount of discretionary power to military personnel. In an effort to eradicate terrorism, President Bush created an outlet for unrestrained abuse that ultimately resurfaced at the Abu Ghraib prison one year later.²⁰¹

The inclusion of the "military necessity" clause in President Bush's directive served as an exception that "swallow[ed] the rule."²⁰² According to government officials, military necessity suspends the application of Geneva Convention principles when "force protection," or conduct necessary to protect U.S. troops, is required.²⁰³ This definition of the exception appears to be mischaracterized. Government

¹⁹⁵ Iraqi prisoners charged with offenses against their countrymen were under the supervision of Iraqi soldiers. From this fact, it can be inferred that those detainees under the supervision of US military personnel in Tiers 1A and 1B were charged with offenses against the United States. See SCHLESINGER REPORT, *supra* note 7, at 74.

¹⁹⁶ See Bush Memorandum, *supra* note 69, at 2.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ See *supra* note 20 and accompanying text.

²⁰⁰ Mark Bowden, *Lessons of Abu Ghraib*, THE ATLANTIC, July 2004, at 40.

²⁰¹ See *supra* notes 25, 70 and 125 and accompanying text.

²⁰² See Press Briefing, *supra* note 67. Edward Greer argues that "[w]hat constitutes military necessity under this scheme is merely the unilateral decision of the Executive itself – a far cry from the specific legal constraints set forth in the Conventions." Greer, *supra* note 190, at 379.

²⁰³ See Press Briefing, *supra* note 67.

interest in preventing another September 11-type attack against the United States prompted the White House and the Department of Justice to find valid reasons to suspend Convention III protections to Taliban and al Qaeda detainees.²⁰⁴ Although President Bush encouraged detainees to be treated in a manner consistent with the Geneva Conventions, he acknowledged an overwhelming need to provide military personnel with the means to successfully procure information from suspected terrorists regarding possible future attacks.²⁰⁵ The military necessity clause achieved this purpose by serving as a license to deviate from Convention III principles when the lives of innocent American civilians, not just U.S. troops, might be at stake. Thus, by discretely incorporating the necessity exception into the memorandum, President Bush arguably strived to accomplish two dichotomous tasks: to provide the United States military with the flexibility to conduct coercive interrogations abroad²⁰⁶ *and* to maintain an honorable reputation within the international humanitarian rights community.²⁰⁷

²⁰⁴ See Gonzales Memorandum, *supra* note 79.

[T]he war against terrorism is a new kind of war. It is not the traditional clash between nations adhering to the laws of war that formed the backdrop for [Convention III]. The nature of the new war places a high premium on other factors, such as the ability to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities against American civilians, and the need to try terrorists for war crimes such as wantonly killing civilians.

Id. See also Bush Memorandum, *supra* note 69, at 1.

[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 terrorists – requires new thinking in the law of war

Id.; Greer, *supra* note 190, at 372.

²⁰⁵ See *supra* note 204 and accompanying text.

²⁰⁶ *Human Rights Standards*, *supra* note 40, at 275 (“The purposes of this interpretation [of the Geneva Conventions with regard to the War in Afghanistan] were to preserve maximum flexibility with the least restraint by international law and to immunize government officials from prosecution under the War Crimes Act”); Gottlieb, *supra* note 65, at 453 (“Concerned with the need to acquire as much ‘actionable intelligence’ as possible, by whatever means, the [Bush] Administration adopted a strategy to permit something close to unfettered power in dealing with terrorist suspects.”).

²⁰⁷ See Richard B. Bilder & Detlev F. Vagts, *Speaking Law to Power: Lawyers and Torture*, 98 AM. J. INT’L L. 689, 695 (2004) (finding that “[a] nation’s reputation for decency and respect for law is a vital national asset that can strongly affect its influence and leadership.”).

The effect of President Bush's military necessity exception in conjunction with his support for the humane treatment of all detainees created vast confusion at the Abu Ghraib detention facility.²⁰⁸ While it might be customary for military officials to assume that the Geneva Conventions apply to all international conflicts unless otherwise informed,²⁰⁹ President Bush apparently complicated this issue. The February 7, 2002 memorandum drew a distinction between behaving in a manner consistent with Convention III principles and strictly abiding by these principles. In light of this development in military policy, the President's request that military personnel in Iraq treat their detainees humanely could no longer be viewed as a direct order to abide by the Geneva Conventions.

*b. Difficulty Applying Convention III Principles:
Inadequate Training and the Unlawful
Migration of Interrogation Methods*

Assuming that Abu Ghraib military personnel understood that the Geneva Conventions applied to Iraq, inadequate training and the migration of interrogation methods from Afghanistan and Guantanamo Bay contributed to the treaty's failed application.²¹⁰ The Jones-Fay Report indicates that "[d]espite the emphasis on the Geneva Conventions, it is clear from the results at Abu Ghraib . . . that Soldiers on the ground are confused about how they apply the Geneva Conventions . . ."²¹¹ To demonstrate this fact, the report argues that Military Police and Military Intelligence personnel did not receive training on interrogation techniques such as sleep adjustment, isolation, segregation, environmental adjustment, dietary manipulation, the use of military dogs, and the removal of clothing.²¹² Furthermore, upon their arrival into Iraq, U.S. soldiers received a mere thirty-six minutes of general human rights training at the Joint Interrogation & Debriefing

²⁰⁸ See *supra* notes 25, 70 and 125 and accompanying text.

²⁰⁹ Press Briefing, *supra* note 67 (White House Counsel Alberto Gonzales arguing that "soldiers are trained from day one in their service to apply [the] Geneva [Conventions] . . . [T]hat's . . . the default position . . . that Geneva is going to apply.").

²¹⁰ See TAGUBA REPORT, *supra* note 6, at 19-20, 22, 26, 43-45; SCHLESINGER REPORT, *supra* note 7, at 14, 44; JONES-FAY REPORT, *supra* note 8, at 14-16 (Part I); JONES-FAY REPORT, *supra* note 8, at 19, 114 (Part II).

²¹¹ See JONES-FAY REPORT, *supra* note 8, at 19 (Part II).

²¹² *Id.*

Center (JIDC).²¹³ While insufficient training undoubtedly increased the frequency and severity of the abuses, none of the reports acknowledge the more fundamental problem that the implementation of the aforementioned interrogation techniques arguably violated Convention III principles.²¹⁴ Accordingly, in addition to improper training, abuses occurred at Abu Ghraib because military personnel did not understand the basic principles of Convention III, including what constitutes “outrages upon personal dignity” and “humiliating and degrading treatment.”²¹⁵ Without a comprehensive knowledge of the treaty’s provisions, Abu Ghraib military personnel became more likely to commit unauthorized abuses.²¹⁶

The migration of interrogation techniques from Afghanistan and Guantanamo Bay to Abu Ghraib also contributed to military personnel’s confusion regarding the breadth and content of Convention III principles. In September 2003, Major General Geoffrey D. Miller, Commander at Guantanamo Bay, conducted a review of the interrogation methods employed in Iraq.²¹⁷ In his report, Miller concluded that “[i]t is essential that the guard force be actively engaged in setting the conditions for successful exploitation of the internees,” adding that the regime at Abu Ghraib would help create a “synergy between [Military Police] and [Military Intelligence] resources”²¹⁸ Accordingly, Miller submitted

²¹³ Steven H. Miles, *Abu Ghraib: Its Legacy for Military Medicine*, 364 LANCET 725, 726 (Aug. 21, 2004). Major General Taguba, however, found that 372nd Military Police Battalion and the 372nd Military Police Company received no training on detention procedures and that very little training was provided to Military Police personnel regarding Convention III. See TAGUBA REPORT, *supra* note 6, at 19-20.

²¹⁴ Gottlieb, *supra* note 65, at 455.

[Although] Secretary Rumsfeld may not have specifically authorized the use of the worst tortures . . . there should be no mistaking of how short the distance was between practices that the reservists were authorized to engage in or thought they were authorized to engage in and the tortures and humiliations that were in fact committed. The administration authorized the use of dogs, the administration authorized the stripping naked of prisoners, the administration authorized exploiting Islamic concerns for modesty, the administration authorized the causing of physical pain. In Iraq, these procedures were ultimately used against a population that America claimed to be liberating.

Id.

²¹⁵ See Convention III, *supra* note 42, at art. 3. See also *supra* note 15 and accompanying text.

²¹⁶ See *supra* note 15 and accompanying text.

²¹⁷ MacMaster, *supra* note 66, at 14.

²¹⁸ GEOFFREY MILLER, ASSESSMENT OF DoD COUNTERTERRORISM INTERROGATION AND DETENTION OPERATIONS IN IRAQ 6 (2003), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB140/a20.pdf>.

recommendations to Lieutenant General Ricardo Sanchez, the senior military commander in Iraq, regarding the possible implementation of interrogation techniques utilized in Afghanistan and Guantanamo Bay.²¹⁹ Although conflicting reports exist as to whether Miller warned Sanchez that the suggested interrogation tactics violated Convention III, Sanchez accepted his recommendations and distributed a memo to Abu Ghraib Military Intelligence officers that ultimately formed the basis for a set of coercive interrogation guidelines.²²⁰

In addition to Sanchez's memorandum, unlawful questioning also became institutionalized through "word of mouth" techniques passed to Abu Ghraib military personnel from assistant teams in Guantanamo Bay.²²¹ What little understanding of the Geneva Conventions Abu Ghraib soldiers possessed after their JIDC training diminished considerably following the migration of interrogation techniques from Afghanistan and Guantanamo Bay. The methods advanced by Miller and other military personnel stationed in Afghanistan and Cuba arguably violated Convention III principles.²²² At the very least, introducing these techniques to soldiers stationed in Iraq created a misimpression as to what interrogation techniques satisfied Convention III's humanitarian requirements.

The Jones-Fay Report suggests that "interrogation is an art . . . and knowing the limits of authority is crucial."²²³ Abu Ghraib military personnel did not understand how to comply with Convention III principles, in large part, because of President Bush's February 7, 2002 directive.²²⁴ America's "war on terror" provided the Bush Administration with a justification to create an ambiguous Geneva Conventions

²¹⁹ Mark Mazzetti, et al., *Inside the Iraq Prison Scandal*, U.S. NEWS & WORLD REP ONLINE., May 24, 2004, at ¶¶ 2-3, 9, 14, at http://www.usnews.com/usnews/news/articles/040524/24leadall_5.htm.

²²⁰ Paust, *supra* note 20, at 847-48. The guidelines allowed for "sleep deprivation, forcing prisoners into 'stress' positions for up to 45 minutes, and threatening them with guard dogs." Mazzetti, *supra* note 219, at ¶ 9.

²²¹ JONES-FAY REPORT, *supra* note 8, at 15 (Part I).

²²² See Working Group Report *supra* note 104, at 2A-2B (stating that the interrogation techniques authorized by Secretary Rumsfeld raised "major issue[s] in [the] area of consideration that cannot be eliminated" with regard to international treaties and United States domestic laws). See also *supra* note 20 and accompanying text.

²²³ JONES-FAY REPORT, *supra* note 8, at 15 (Part I).

²²⁴ See *supra* notes 25 and 125 and accompanying text.

policy.²²⁵ The directive's "military necessity" exception enabled military personnel to circumvent the Geneva Conventions when national security might be at issue.²²⁶ By establishing an exception to the Geneva Conventions, the Bush Administration effectively ignored international humanitarian rights standards and formed an outlet for detainee abuse.²²⁷ With regard to the War in Iraq, President Bush never formally indicated that the Geneva Conventions did, in fact, apply.²²⁸ And even if Abu Ghraib military personnel correctly assumed that detainees qualified for full protection under Convention III, it still remained unclear whether the "military necessity" exception carried over from Afghanistan and Guantanamo Bay. Accordingly, Abu Ghraib military personnel followed their predecessors' example and utilized interrogation methods unlawful under the Geneva Conventions.²²⁹

After reviewing the facts and circumstances surrounding the Abu Ghraib prison atrocity, it becomes clear that the Bush Administration's failure to implement a clear Convention III policy in Iraq ignited a chain of events that led to the abuse of numerous detainees.²³⁰ Accordingly, a strategy must be devised to prevent additional wartime human rights violations. Representative Holt's Interrogation Bill attempts to achieve this goal by proposing a series of deterrent measures, designed to address individualized instances of abuse.²³¹ A more effective bill, however, would focus on remedying the underlying policy problems that initially facilitated the prisoner abuse.

²²⁵ Greer, *supra* note 190, at 372 ("Since September 11, 2001 . . . torture has been the practice and *de facto* policy of the Bush administration . . . as a core means of conducting the so-called 'war on terror.'"). "It's not that the United States has any particular interest in egregious human rights violations. It's just that it's a natural corollary to what it is interested in, and to how you achieve goals like that." NOAM CHOMSKY, *POWER AND TERROR: POST-9/11 TALKS AND INTERVIEWS* 48 (2003).

²²⁶ See *supra* notes 202-07 and accompanying text.

²²⁷ The February 7, 2002 memorandum "is potentially one of the broadest putative excuses for violations of Geneva law." Paust, *supra* note 20, at 828. MacMaster, *supra* note 66, at 4 (stating that "international law makes it clear that protection from cruel, inhumane and degrading treatment by the state is not negotiable or open to derogation.").

²²⁸ See *supra* notes 22 and 24 and accompanying text.

²²⁹ See *supra* notes 217-220 and accompanying text.

²³⁰ Equally troubling, the Bush Administration has not yet issued a new order directing compliance with the Geneva Conventions in Iraq. The order that "merely Geneva 'principles' should be applied and then only if 'appropriate' and if 'consistent with military necessity'" still governs. Paust, *supra* note 20, at 854.

²³¹ See generally Interrogation Bill, *supra* note 1.

V. PROPOSED SOLUTION TO THE ABU GHRAIB PRISON ABUSES: ERADICATE MISINTERPRETATIONS OF LAW AND POLICY WITHIN THE MILITARY

Representative Holt's Interrogation Bill serves as a strong preliminary response to a complicated controversy. Section One directs the President to order the videotaping of interrogations and "other pertinent interactions" of detainees in the custody of the United States armed forces as well as intelligence operatives and contractors of the United States.²³² Section Two requires the President to "take such actions as are necessary" to ensure that human rights organizations are granted "unfettered access" to detainees in the custody of the United States.²³³ Finally, Section Three requires that the Judge Advocate General develop guidelines that are "sufficiently expansive to prevent any abuse of detainees" that violates "law binding on the United States, including [international] treaties."²³⁴

In general, the Interrogation Bill's provisions are designed to prevent future abuses through the use of effective scare tactics. By requiring the videotaping of interrogations and "other pertinent actions"²³⁵ between a detainee and United States military personnel, it is expected that soldiers will refrain from committing inhumane acts for fear of getting caught. The same rationale applies with regard to granting the United Nations and other human rights organizations unfettered access to all detention facilities.²³⁶ Unannounced and spontaneous detention facility visits by human rights organizations increases the probability that more human rights abuses will be discovered, and as a consequence, disobedient military personnel will be punished.

The attractiveness of the bill's simple logic, however, does not outweigh its many defects. For example, the Interrogation Bill's videotape and unfettered access requirements do not address the problem that many Abu Ghraib military did not understand the applicability of Convention III to the crisis in Iraq, including its breadth and

²³² *Id.* § 1.

²³³ *Id.* § 2.

²³⁴ *Id.* § 3.

²³⁵ *Id.* § 1.

²³⁶ *Id.* § 2.

scope.²³⁷ These problems emanated from the White House's failure to establish a coherent Geneva Conventions policy during Operation Iraqi Freedom.²³⁸ The Executive Branch's ambiguity in this respect led to the military's reliance on detention operations and interrogation techniques utilized during the War in Afghanistan.²³⁹ The success of the bill's videotape and unfettered access requirements largely depends upon military personnel's understanding of what acts fail to comply with the Geneva Conventions. Although some U.S. soldiers stationed in Iraq knew that their behavior violated the Geneva Conventions,²⁴⁰ others employed coercive interrogation tactics because they believed the Executive Branch had sanctioned them.²⁴¹ As written, the Interrogation Bill only addresses the former group of military personnel. Its deterrence measures are contingent upon soldiers' awareness of the treaty's applicability. And because one cannot be deterred from engaging in acts that he or she does not know violate Convention III, the Interrogation Bill fails to achieve its designated purpose.

Thus, in order to prevent another Abu Ghraib atrocity, Congress must focus on remedying the fundamental policy and interpretation of law errors that existed at the detention facility. Accordingly, a more effective bill proposal would direct the President, as Commander-in-Chief, to clearly indicate to military personnel at the onset of every international conflict to what extent detainees should be treated in accordance with the Geneva Conventions.²⁴² In order to accomplish this task, the

²³⁷ See *supra* Part IV.

²³⁸ See *supra* Part IV.B.ii.a.

²³⁹ See *supra* Part IV.B.ii.a-b.

²⁴⁰ See *supra* Part IV.B.i.

²⁴¹ See *supra* Part IV.B.ii.a-b.

²⁴² Any congressional attempt to dictate military policy will always raise Separation of Power concerns. As Commander-in-Chief, the President enjoys the broad authority to *exclusively* control all war operations. See *supra* notes 104-07 and accompanying text. See also *Hamilton v. Dillin*, 88 U.S. 73, 87 (1874) ("the President alone . . . is constitutionally invested with the entire charge of hostile operations."). However, some scholars have contended that the "power to regulate the treatment of wartime detainees is shared between the legislative and executive branches." Jinks & Sloss, *supra* note 18, at 172. When "the United States ratifies a treaty that constrains the President's operational discretion [i.e., Convention III], that treaty ratification empowers Congress to regulate in areas where it could not otherwise regulate." *Id.* at 176. Specifically, under the Constitution's Define and Punish and Necessary and Proper Clauses, Congress possesses the power to regulate "matters governed by [a] treaty, even if those matters would otherwise be subject to the President's exclusive power." *Id.* at 179. Moreover, the Government and Regulation Clause also grants Congress "the power to prescribe rules for the treatment of wartime detainees . . ." *Id.*

bill must require the President to: (1) assess whether the warring state qualifies as a “High Contracting Party” under Article 4 of Convention III;²⁴³ (2) assess whether the armed conflict is “not of an international character occurring in the territory of one of the High Contracting Parties” under Article 3 of Convention III;²⁴⁴ (3) define “unlawful combatant” and assess whether the enemy force should not receive protection under Convention III because it qualifies as such; and (4) obtain congressional approval before attempting to violate any or all Convention III articles.²⁴⁵

The incorporation of the aforementioned provisions into the Interrogation Bill address the underlying policy problems that gave rise to the Abu Ghraib prison abuses. Sections One and Two prevent the President from assuming that military personnel understand that Convention III always applies to instances of armed conflict unless otherwise informed. This task is accomplished by requiring the President to discern the applicability of Convention III to military campaigns using the treaty’s own language. In effect, a formal analysis process will compel the President to establish a clear Convention III policy, thus reducing the possibility of future confusion among low-level military personnel stationed abroad.

Section Three responds to the ambiguity arising from President Bush’s use of the term “unlawful combatant” in his February 7, 2002 directive.²⁴⁶ In order to prevent this term from being employed as a broad-based exception to the Geneva Conventions, a list of criteria defining unlawful or enemy combatant must be created. After formulating a definition, President Bush may use it as an additional tool to assist him in delineating a clear Geneva Conventions policy at the onset of every military campaign. Section Three, however, cannot be read in a vacuum. If the President determines that certain detainees are unlawful combatants, he cannot deny protection

at 175. Under this clause, it can be argued that “the vast majority of the provisions embodied in the Geneva Conventions address matters that are well within the scope of Congress’s . . . [p]ower.” *Id.* at 175. Because this Note’s proposed modifications deal exclusively with the President’s compliance with Convention III, it can be argued that they do not exceed the scope of legislative supervision and do not infringe upon the Executive Branch’s Article II powers.

²⁴³ See Convention III, *supra* note 42, art. 4.

²⁴⁴ *Id.* art. 3.

²⁴⁵ See Jinks & Sloss, *supra* note 18, at 106.

²⁴⁶ Bush Memorandum, *supra* note 69, at 2.

under the Geneva Conventions without Congress' express approval as articulated in Section Four.²⁴⁷

Section Four refutes the Bush Administration's position that the President can unilaterally violate²⁴⁸ Convention III provisions to protect national security.²⁴⁹ Even if a presidential action can be justified on "national security grounds" (e.g., denying Geneva Conventions protections to suspected enemy combatants for the purposes of procuring important intelligence information), the action "may [still] impose significant constraints on personal liberty."²⁵⁰ In order to prevent discretionary abuse and "conciliate the confidence of the [American] people,"²⁵¹ Congress must be able to prescribe guidelines for the treatment of wartime detainees so long as they do not interfere with the President's control over battlefield operations.²⁵² Accordingly, Executive branch directives regarding the possible violation of Convention III protections are subject to legislative review.²⁵³ This rule does not undermine the Executive Branch's Commander-in-Chief Power with regard to law-of-war treaties. On the contrary, the President may still suspend and terminate treaties so long as such actions are made in accordance with the treaties' terms.²⁵⁴

In effect, Section Four strengthens the government's commitment to upholding humanitarian rights standards by requiring the Executive Branch to gain congressional authorization before breaching any of the United States' treaty obligations. It places a check on the President's ability to

²⁴⁷ Some scholars contend that even if a prisoner is deemed an unlawful combatant, thereby rendering Convention III inapplicable, the prisoner should still be afforded protection under Convention IV Relative to the Protection of Civilian Persons in Time of War. Jinks & Sloss, *supra* note 18, at 101. Accordingly, to deprive the prisoner any form of protection would be a violation of the treaty, which is impermissible without congressional approval. *Id.* at 102, 146-47.

²⁴⁸ It is important to note that there is a difference between "treaty termination" and "treaty suspension" or "violation." International law principles enable "parties to a treaty [to] jointly terminate a treaty either by consent of all the parties or by concluding a later treaty. A state may unilaterally terminate or suspend the operation of a treaty in response to a material breach by another party." *Id.* at 154. Furthermore, a state may also "invoke 'the impossibility of performing a treaty,' or '[a] fundamental change of circumstances' as a ground for terminating . . . the operation of a treaty." *Id.* (footnotes omitted).

²⁴⁹ Jinks & Sloss, *supra* note 18, at 102, 146-47.

²⁵⁰ *Id.* at 153.

²⁵¹ *Id.* at 174 (quoting THE FEDERALIST No. 70, at 403 (Alexander Hamilton) (Isaac Kramnick ed., 1987)).

²⁵² *See id.* at 175.

²⁵³ *See id.* at 164, 172-73.

²⁵⁴ *See id.* at 163.

violate Convention III protections when Congress questions his reasons for wanting to do so. In light of President Bush's suspension of Convention III protections to al Qaeda and Taliban detainees and its repercussions in Iraq, this Section serves to prevent detainee abuses and to rehabilitate the government's reputation within the international human rights community.

The incorporation of the aforementioned provisions into Representative Holt's Interrogation Bill provides a comprehensive response to the Abu Ghraib prison abuses. Representative Holt proposes deterrent measures that can only prevent additional abuses if military personnel understand the applicability of the Geneva Conventions as well as the breadth and scope of the treaty's protections.²⁵⁵ The four additional provisions introduced and analyzed in this Note, however, address the fundamental policy problems that originated in the Executive Branch during the War in Afghanistan and that existed during Operation Iraqi Freedom as well. Specifically, Sections One, Two, and Three ensure that soldiers will no longer be confused about the applicability of the Geneva Conventions during military campaigns in light of President Bush's ambiguous February 7, 2002 directive. Section Four, on the other hand, prevents the President from violating the Geneva Conventions without congressional authorization. Compliance with Representative Holt's Interrogation Bill might result in the apprehension of a handful of transgressors. Adherence to this Note's proposals, however, ensures that the number of broad-based policy problems confronting military personnel at Abu Ghraib and other prison facilities will be minimized.

VI. CONCLUSION

Confusion regarding the applicability of Convention III at the Abu Ghraib prison can largely be attributed to the development of expansive military policies after the September 11, 2001 terrorist attacks. What began as an attempt by the Bush Administration to protect national security through the procurement of vital intelligence information during the Afghanistan conflict became a means to commit unsanctioned abuses in Iraq. By not clearly limiting his February 7, 2002 directive to the War in Afghanistan, President Bush left open

²⁵⁵ See *supra* notes 237-241 and accompanying text.

for interpretation whether many Iraqi detainees should not be afforded Convention III protections. Moreover, those military personnel that did understand Convention III's applicability in Iraq undoubtedly misinterpreted the treaty's provisions after becoming privy to the coercive interrogation methods utilized in both Afghanistan and Guantanamo Bay.

In light of these fundamental problems, Congress must introduce a bill that not only seeks to apprehend and punish transgressors, but that prevents the Executive Branch from creating ambiguous detainee treatment policies. Representative Holt's Interrogation Bill serves as a solid foundation. The bill's videotape and unfettered access requirements arguably will prevent military personnel who understand Convention III's applicability and protections from committing unauthorized abuses. Nonetheless, because a number of U.S. soldiers stationed in Iraq either did not understand Convention III's applicability or did not understand the breadth and scope of the treaty's protections, additional provisions are needed to prevent another Abu Ghraib atrocity. Accordingly, this Note's proposed modifications require the Executive Branch to delineate clear Convention III guidelines at the onset of every military campaign and limit its ability to violate the treaty's articles. The incorporation of such provisions will hopefully reduce the number and magnitude of future detainee abuses and assist in the rebuilding of our government's reputation within the international humanitarian rights community. Moreover, such a law should still be passed even if it cannot take effect until after U.S. troops pull out of Iraq. In light of the government's "war on terror," it is conceivable that other countries might be invaded in the near future. Congress must not lose sight of this fact and continue to work towards preventing prisoner abuses, not just in Iraq, but in all subsequent military campaigns.

Alison Croessmann[†]

[†] B.A., Colgate University; J.D. Candidate 2006, Brooklyn Law School. The author extends her gratitude to the *Brooklyn Law Review* staff, and to her family, friends and Ben for their unwavering support.