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# The Militarization of Mass Incapacitation and Torture during the Sunni Insurgency and American Occupation of Iraq

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**Abstract:** While scholars and journalists have focused important attention on the recent militarization of intensive policing and imprisonment policies in the United States, there is little reciprocal recognition of how militarized versions of these policies were also exported for use in the occupation of Iraq. Intensive policing and imprisonment enabled the American-led and Shia-dominated Iraq Ministries of Defense and Interior along with U.S. forces to play significant roles in the ethnic cleansing and displacement of Arab Sunnis from Baghdad neighborhoods, and in their disproportionate detention in military- and militia-operated facilities, of which the Abu Ghraib prison is only the best known. The failure of American authorities alone and working with Iraq's government to intervene in stopping the use of police and prisons as places of torture is a violation of U.N.-invoked and U.S.-ratified treaties, and thereby subject to prosecution. Such prosecutions have imported into international law the concept of "joint criminal enterprise" anticipated by the criminologist Donald Cressey and incorporated in the American Racketeer Influenced and Corrupt Organizations (RICO) statutes used to convict organized criminals. We elaborate how the concept of joint criminal enterprise can be used to understand and possibly prosecute a chain of command responsibility for the use of policing and prisons as sites of torture in Iraq. We analyze the previously neglected international consequences of U.S. policing, prison, and mass incapacitation strategies with links to American criminology.

**Keywords:** crime; violence; population; war

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"The message is becoming loud and clear: criminal organizations should be dealt with as organizations, not merely as collections of individual criminals, and any 'attack' on them must deal with organizational structures and the social contexts in which the structures thrive."

Donald Cressey [1]

## 1. Introduction

During the invasion and early occupation of Iraq, it was possible to think of the group-linked consequences of the U.S.-led overthrow of Saddam Hussein's regime as largely limited to the elimination of members of the Sunni-led Ba'athist Party from the highest levels of the Iraq government and the disbandment of the Iraq military. These alone were major consequences, but much more was involved. Regime change in Iraq had especially widespread and systematic implications for the larger Sunni population. We argue that the Sunni as a group were disproportionately subjected to U.S.-led strategies and policies of mass incapacitation associated with crimes of torture in Iraq.

The American sociologist and criminologist, Donald Cressey [1], played a unique role in developing concepts of informal and formal criminal organization for the social scientific purposes of understanding, as well as the legal purposes of prosecuting, organized forms of crime. Cressey [2] played a major role in the development of the legal concept of “group enterprise” that was first incorporated in the Racketeer Influenced and Corrupt Organizations (RICO)c Act and used to prosecute members of American organized crime families [3], before more recently being used in the prosecution of white-collar crime and war crimes (see [4,5]; [6], pp. 221–24).

The focus on group conduct—brought to the attention of policy makers through Cressey’s work with the 1967 President’s Commission on Law Enforcement and the Administration of Justice—was later incorporated through the doctrine of “joint criminal enterprise” (JCE) in prosecutions of war crimes in international courts [7]. This paper uses Cressey’s organizational approach and the concept of joint criminal enterprise to focus first on the informal origins in American criminology of mass incapacitation strategies that became a part of military policies in Iraq, and second to conceptualize and document the formal organization and possible prosecution of the application of these incapacitation strategies by the U.S. military during the occupation of Iraq.

A significant aspect of Cressey’s organizational theory was that he saw delinquent groups as informally organized and adult criminal groups as more formally organized. In an analogous way, we argue that the development of a mass incapacitation focus in American criminology during the Reagan administration provided an informal organizational backdrop for the implementation of mass incapacitation and torture policies during the U.S.-led occupation of Iraq. Participation of American criminologists in advancing mass incapacitation policies set a conceptual foundation for their broad application. We will further argue that the war crimes associated with the application of these policies were perpetrated in a formally organized way through a joint criminal enterprise involving the U.S. political and military chain of command.

## 2. Mass Incapacitation and American Criminology

The U.S. military doctrine known as “COIN” (counterinsurgency) included a mass incapacitation strategy that was a key part of the 2007 troop Surge in Iraq [8,9]. This doctrine was an important part of the larger post-9/11 War on Terror. It was designed as a key part of the militarized response to politically organized threats to the peace and security of the United States and allied governments, which included the new Iraq government. COIN involved military offensives against suspected terrorist individuals and groups, combining the forward redeployment into Iraqi communities of “in-country” U.S. troops with the newly “surged” U.S. forces. These offensive operations disproportionately targeted Arab Sunni communities in Iraq.

The expectation was that offensive operations would incapacitate insurgents and terrorists, which at the time principally included the Sunni-dominated group known as Al Qaeda in Iraq (AQI). The detention and torture of suspected insurgents played a key part in the mass incapacitation strategy in Iraq, which is increasingly cited as having radicalized insurgents, most notably through the detention of Ayman al-Zawahiri and Abu Bakr al-Baghdadi, the respective founders of AQI and the Islamic State (ISIS).

The COIN strategy developed for use in Iraq was influenced by the emergence of an incapacitation theory during the formation of the Reagan administration’s U.S. crime policies in the 1980s [10]. American criminals, like foreign terrorists, were seen by incapacitation theory as “intractable and insusceptible to change” ([11], p. 15). The rationale for incapacitation through imprisonment was that crimes that would otherwise be committed could be prevented if these offenders could be removed from the population.

The theory of incapacitation gained important academic credibility from Blumstein et al.’s ([12], pp. 21–22) writings about the concept of “lambda”—the mathematical tendency of offenders to keep offending at a near constant rate. Lambda and incapacitation theory were focal points in the Reagan era’s preoccupation with “chronic offenders” [13], “career criminals” [13], and “super predators” [10].

President Reagan was impressed ([10], p. 108) with this emerging criminological literature that focused on “habitual law-breakers, career criminals, call them what you will,” and he was especially taken with the finding that “study after study has shown that a small number of criminals are responsible for an enormous amount of crime in American society” ([10], p. 109).

James Q. Wilson’s academic writings provided an influential foundation in policy circles for the incapacitation approach, through his book, *Thinking about Crime* [14] and, with Richard Herrnstein, in his follow-up volume on *Crime and Human Nature* [15]. President Reagan (cited in [16], p. 47) was particularly taken with rhetorical descriptions of “career criminals” and “super predators.” He described such individuals in his speeches as having a “stark, staring face—a face that belongs to a frightening reality of our time: the face of the human predator.” Wilson [15] had encouraged this view with his own description of “the blank, unremorseful face of a feral, pre-social being.” It was a short step from such characterizations to Wilson’s influential prediction that “the gains from merely incapacitating convicted criminals might be very large” ([15], p. 22).

This kind of thinking moved during the Reagan era from academic speculation to formally organized policy, and from its application to U.S. street criminals to international military strategy. During the Reagan administration, the Iran-Contra arms scandal was grounded in fears of “narcoterrorism” and the need to incapacitate “narco-terrorists,” and more broadly linked to the perceived global threat of communist aggression in Latin America ([10], p. 214). Then-Congressman Richard Cheney defended the Iran-Contra arms agreement as a proper exercise of executive authority, and operatives from the Reagan administration’s war on narcoterrorism, such as Elliott Abrams and James Steele, emerged again as principals in the George W. Bush administration’s war in Iraq [17,18].

Jonathan Simon [19] recently has observed that beliefs about “total incapacitation” not only have guided national U.S. crime policies associated with mass incarceration, but also have been a central part of American foreign policy, such as during the Iraq War and the War on Terror. Simon ([19], p. 60; see also p. 39) notes of the mass incapacitation advocates that, “They assume the prisoner is an unrelenting enemy, just as in the new war prisons, Guantanamo, Abu Ghraib, and the rest. All war prison-inmates are [assumed to be] enemies who can be neither treated nor deterred.” This reference to “war prison inmates” draws the link between domestic crime policy and U.S. military thinking that is central to the remainder of this paper.

Of course, American criminologists have long played a role in the politics of crime policy, a role that did not begin with the Reagan era. Donald Cressey, whose work is central to this paper, influenced crime policy in the later years of the “Age of Roosevelt” [10,20].

### **3. Origins and Applications of the Racketeer Influenced and Corrupt Organizations (RICO) Act Concept of “Enterprise”**

Donald Cressey’s perspective on highly organized forms of crime was more than a criminological theory. For example, it was the basis for an influential chapter he wrote on “The Functions and Structure of Criminal Syndicates” for the Katzenbach Commission Report that was part of the 1967 President’s Commission on Law Enforcement and the Administration of Justice. Cressey argued in his chapter that a new kind of criminal law was needed for purposes of prosecuting criminals joined together for the organized planning and commission of crimes.

At the time, Cressey was most concerned with the activities of the kinds of organized crime families he wrote about in his 1969 book, *Theft of a Nation*. His writings were highly influential in the drafting of the federal RICO Act, which was passed in 1970, largely in response to fears about organized crime families and syndicates. A key element in the RICO Act was the concept of “criminal enterprise,” which was used to refer to groups organized for the purpose of committing crimes.

The RICO statutes have recently been used in the United States to prosecute heads of financial firms and other business people engaged in organized white-collar crimes, the crimes that Edwin Sutherland, Cressey’s former professor and mentor, made famous. Cressey [1,21] used the concepts of “buffering” (for the insulation of top level perpetrators) and “corrupters” and “corruptees” (for those

who transmit and carry out the directives of top level perpetrators) to explain how organized crime is hierarchically structured and perpetrated. He argued that successful prosecution of this form of criminal organization required attacking the structure implied by these concepts, rather than merely attacking the individuals occupying positions in this structure. This insight was centrally incorporated in the RICO statutes through the concept of “enterprise.”

In the 1990s, the U.S. Department of Justice “seconded” 22 lawyers and investigators to the International Criminal Tribunal for the former Yugoslavia (ICTY) ([10], p. 64) who brought with them their experience with the American RICO Act and put its key principles to work in indicting and prosecuting war criminals. Perhaps most notably, the concept of “joint criminal enterprise” was used to indict and prosecute the first sitting head of state—Slobodan Milosevic—by an international criminal court ([10], p. 228). The lead prosecutor in this case, Mark Harmon, was experienced in the application of the RICO Act from his role as a lead prosecutor for the U.S. Department of Justice in the Exon Valdez case ([10], pp. 64–65).

Former U.S. prosecutors and others at the ICTY used the concept of joint criminal enterprise to attribute responsibility to participants for their relative positions of responsibility within leadership groups and chains of command organized to perpetrate war crimes that ranged from forcible transfer, persecution, and torture to genocide [22]. The elements of successful joint criminal enterprise (JCE) prosecutions include two group requirements—a plurality of persons (P1) and a common purpose (P2)—and two individual requirements—participation (P3) and mens rea (MR) ([12], p. 524).

The requirement of a plurality of persons can be met by showing a group involvement of leaders of political bodies, armed forces, or police in relevant settings. It does not require showing that these persons acted together ([12], p. 524). The common purpose requirement can be met by showing shared intentions. It does not require that the purpose be previously arranged or formulated. Rather, the purpose may materialize extemporaneously and be inferred from the facts as they happen ([12], p. 525).

The participation requirement can be met by showing either assistance or contribution. It does not require presence during the perpetration. Moreover, the participation can be minimal, e.g., simple non-intervention against perpetrators ([12], pp. 525–26).

Finally, the mens rea requirement can be met by showing that the accused had sufficient knowledge that subsequent crimes were a natural and foreseeable consequence of actions of the accused. It does not require an action on the part of the accused. Again, it can simply involve not taking action, such as when a prison warden who knows that torture is occurring does not act to stop it ([12], pp. 526–27).

The remainder of this paper focuses on these requirements in showing joint criminal enterprise in the perpetration of torture in Iraq. For actual criminal prosecution, the standard of evidence would require certainty about the above elements, “beyond reasonable doubt.” However, for social scientific purposes, the standard of evidence is probabilistic, more akin to the “balance of probabilities” requirement in civil law. In our judgement, both standards can be met by evidence of the kind summarized below. However, for the purposes of social scientific criminology, the lesser probabilistic standard is sufficient.

#### 4. The Geneva Conventions and International Laws against Torture

The war crimes evidenced below arguably range from forcible transfer, persecution, and torture to genocide. However, it is the crime of torture—emanating from the ethnic persecution and forcible transfer of predominately Sunni detainees in the U.S. COIN mass incapacitation policy—that is that focal point of the joint criminal enterprise discussed below. We therefore briefly summarize the basics of the laws of torture that were violated in Iraq. It is important to note that the joint criminal enterprise that resulted in torture during the U.S. occupation of Iraq in large part followed from tendentious interpretations and neglect of the laws we briefly introduce next.

Torture is identified as a crime in both international and U.S. domestic law. Article 5 of the Universal Declaration of Human Rights provides that “no one shall be subjected to torture or to cruel,

inhuman or degrading treatment or punishment.” This provision is in turn incorporated in Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and in the Convention against Torture (CAT). The prohibition of torture applies to the conduct of parties during armed conflicts, outlawing torture of captured noncombatants, including soldiers, for example, under Article 3 of the Geneva Conventions. Article 31 of the Fourth Geneva Convention specifically prohibits torture for the purpose of obtaining information from captured and detained persons. Nations are obligated by Article 4 of the Convention against Torture to make acts of torture criminal under their domestic laws, which in the U.S. include state as well as federal laws.

Yet from the outset of the Iraq war, officials of the United States government—through tendentious interpretation and neglect of these provisions of international and domestic laws prohibiting torture—allowed torture to occur. We first describe the context in which torture became a part of mass incapacitation and the COIN doctrine in Iraq. We then describe in greater detail the joint criminal enterprise in which this torture was embedded, including evidence relating to the four elements of joint criminal enterprise—plurality of persons (P1), common purpose (P2), participation (P3), and mens rea (MR)—identified above.

### 5. Mass Incapacitation and the COIN (Counterinsurgency) Doctrine

If Americans had known more about the day-to-day conflict in Iraq, the spread of ideas about incapacitation from the U.S. to their militarized application in Iraq might have been more apparent [23,24]. As the occupation by U.S.-led forces advanced, the parallels increased, with nighttime raids and dragnet sweeps that represented militarized versions of American “intensive policing” and “mass incapacitation” strategies.

The American political and military leadership feared that the resistance to the invasion and occupation would come from remnants of Saddam’s Sunni dominated Ba’athist regime. This was at least in part a self-fulfilling prophecy. During the first two weeks of his appointment as presidential envoy and head of the Coalition Provisional Authority that presided over the post-invasion occupation of Iraq, Paul Bremer banned government employment of members from the top four leadership levels of the Ba’athist Party and dissolved the army, the navy, the Ministry of Defense, and the Iraqi Intelligence Service.

These actions created a pool of more than a half-million educated and angry unemployed persons—mainly Arab Sunnis—with little incentive but to support an insurgency against the American-led occupation. The unemployment rate in Iraq was already over 40 percent, and the ban and dissolution added to this number with well-educated and highly experienced Sunni bureaucrats and generals. Some credited Bremer with having singlehandedly created an angry and violent Sunni insurgency [25].

By the summer of 2003, violence against American forces was increasing. When Secretary of Defense Donald Rumsfeld met the press for a briefing on June 19, he confronted the fact that 42 U.S. soldiers had been killed in the previous two weeks—the date when President Bush had prematurely declared the apparent end of the war and “mission accomplished.” Rumsfeld made a misleading attempt at comparative criminology in defending the continuing violence in the Iraq capital, saying, “Look, you’ve got to remember that if Washington, D.C. were the size of Baghdad, we would be having something like 215 murders a month. There’s going to be violence in a big city.”

Rumsfeld was ignoring Iraqi deaths and speaking as if only the deaths of the 42 American soldiers “counted.” In the years that followed, the death toll in Baghdad would spike to extraordinary levels, with bodies in 2005–2006 literally piling up in the streets of the city. These deaths disproportionately consisted of Sunni residents. Sunni residents who were displaced from the neighborhoods of Baghdad numbered in the hundreds of thousands, as Shia militias grew in number and size and enacted an ethnic cleansing of the city’s Sunni and mixed neighborhoods [26]. Amos [27] called the outcome of the battle for Baghdad the “eclipse of the Sunnis,” while Nasr [28] called Iraq “the first Arab Shia



state.” Ethnic cleansing had played a major role in changing the balance of power and demography in Baghdad [26].

The Sunni residents of Baghdad not only lost their lives, but their property and businesses as well. Economic losses suffered by the Sunnis were over \$40 billion in U.S. dollars, compared to about \$27 billion for Shia and \$21 billion for all others. A plausible estimate for Iraq as a whole was nearly one trillion U.S. dollars. Again, these losses were disproportionately concentrated among the Arab Sunni population [29]. As the violence and property losses peaked in Iraq in 2007, the U.S.-led coalition responded with the implementation of the incapacitation-based COIN doctrine and resulting Surge of more than 30,000 additional forces.

For comparative purposes, the size and population of Iraq is similar to the state of California. Although no precise estimates are available of the scale of imprisonment that occurred during the aftermath of the invasion and occupation, some official statistics are available. Between 2004 and 2006, the number of persons imprisoned in Iraq doubled from about 7000 to over 16,000. This number jumped again to about 29,000 in 2008, and increased to 39,000 in 2010. By 2012, the number of the officially imprisoned in Iraq reached nearly 45,000. The rapid growth in these numbers overwhelmingly involved Sunni detainees. The prisons of Iraq were by official estimates operating at about 136 percent of their planned capacity. Perhaps coincidentally, this is the approximate level of recent overcrowding in California’s prisons [30].

Tens of thousands of suspected and uncharged insurgents and terrorists were initially detained in the U.S.-operated Camp Bucca and Abu Ghraib prisons. The methods used to produce the rapid growth of imprisonment included home invasions and sweeps through neighborhoods using tactics ranging from breaking down doors, followed by the detention of family members, to lethal assaults on homes and neighborhoods with artillery and helicopter gunships. As further demonstrated below, the violence of imprisonment included forms of torture that were imported by the U.S. Department of Defense from Guantanamo to Iraq [31]. These included the torture scenes that went photographically viral and global on the international internet [32,33].

The U.N. Assistance Mission used the language of “mass incapacitation” in its September 2005 Human Rights Report about U.S.-led Coalition detention practices. The report noted that “mass detentions of persons without warrants continue to be used in military operations by MNF-I (Multi-National Force-Iraq). Reports of arbitrary arrest and detention continue to be reported...There is an urgent need to provide remedy to lengthy internment for reasons of security without adequate judicial oversight” [34].

## 6. Cressey’s Theory as Applied to Mass Incapacitation and Torture in Iraq

As it became increasingly apparent that the decision to invade Iraq was premised on false intelligence, and as the challenges of bringing peace and security to Iraq became clear, the occupying U.S.-led coalition used torture techniques in the hope of acquiring new intelligence about the increasingly violent opposition to the presence of the U.S.-led coalition forces in Iraq and to the new Iraq government. Torture was used extensively at detention facilities operated by both the U.S. government and the new Ministry of Interior installed by the U.S.-led and coalition-guided Iraq government.

The account that follows provides evidence that the resorting to mass incapacitation and torture emerged through the kind of joint criminal enterprise envisioned by Donald Cressey in his organizational theory. This is both theoretically and practically significant because of the potential application of the joint criminal enterprise concept for the prosecution of the mass detention and torture policy during the U.S.-led occupation of Iraq. The challenge is to identify organizational relationships among criminal participants as the foundation for attributing criminal responsibility. By these means, international criminal prosecutors previously have held participants in war crimes responsible for abuse of positions of power and responsibility within organized leadership groups [22]. As noted above, during the U.S.-led occupation of Iraq, these war crimes have ranged from forcible

transfer and persecution and have led to torture. After a brief description of our data and methods, the remainder of this paper focuses on the elements of these kinds of crimes in Iraq and the command responsibility of the participants in the joint criminal enterprise of their planning and perpetration.

## 7. Data and Methods

The data utilized in this paper draw from a variety of sources: specifically, news media reports (*New York Times*, *The Guardian*, BBC, *The Wall Street Journal*) and declassified government documents such as Senate Committee Hearing transcripts, other documents released through Freedom of Information Act requests filed by organizations such as the ACLU, and Wikileaks.

Although our citations from Wikileaks are not extensive, they are drawn from two specific groupings of leaked documents. The first group we examined was the Iraq War documents leak, otherwise known as the “Iraq War Logs.” These cables are made up of United States Army field reports from the Iraq war that span from 2004–2009, and were released on the internet in October of 2010. These cables contain reports of civilian deaths, which had not been previously acknowledged by the United States Government, as well as logs showing that US authorities failed to investigate hundreds of allegations of abuse, torture, rape, and murder committed by Iraqi soldiers, and that coalition forces had a formal policy to ignore such allegations.

The second group of documents we examined was the Guantánamo Bay Files Leak, otherwise known as the Gitmo Files. These documents, which were written by the Pentagon’s Joint Task Force Guantanamo, were released in 2011, and consist of classified assessments, interviews and internal memos regarding detainees. When going through the Wikileaks documents, we searched for the names of various key individuals (e.g., Rumsfeld, Shiffrin, Hill, and Miller), and places and concepts/terms (e.g., Abu Ghraib, Camp Bucca, SERE, and JPRA).

The development of the analysis presented below begins by establishing the background of the use of torture that occurred in Iraq, and then documents, mostly in chronological order, about the unfolding use of mass incapacitation and torture in Iraq. Our presentation unfolds chronologically—rather than being organized around the four specific elements of a joint criminal enterprise—in order to best demonstrate that the essential common purpose (P2) element of the joint criminal enterprise that led to torture in Iraq materialized contemporaneously as the U.S. occupation unfolded ([12], p. 525). To assist the reader in recognizing the relevance of evidence to the four required elements of the joint criminal enterprise offense, we use abbreviated references (P1, P2, P3, MR) to these four elements below.

## 8. The Background of Torture in Iraq

On 1 August 2002, in response to a request from White House Counsel Alberto Gonzales, the Office of Legal Counsel (OLC) issued a memorandum entitled “Standards of Conduct for Interrogation,” now commonly known as the “Torture Memo.” This memo was written by a Berkeley law professor then working in the OLC, John Yoo, and signed by his superior at the OLC, Assistant Attorney General Jay Bybee.

As a legal matter, the purposes of an OLC memo are to advise the president as to the state of the law and to serve as a binding legal interpretation. As a graduate of Yale Law School and assistant professor of law at the University of California-Berkeley School of Law, Yoo (P3) was a highly knowledgeable and essential participant at a low but essential and ultimately highly visible rung of an organizational ladder in the chain of command of responsibility for torture in Iraq.

Following the September 11 attacks, the Bush administration had declared its “Global War on Terror,” a central part of which became the war in Iraq. The techniques and venues of interrogation became subjects of intense discussion at the highest levels of the administration, as a central part of the intention to wage this global war. President Bush signed a statement on 7 February 2002 asserting his determination that “none of the provisions of Geneva apply to our conflict with Al Qaeda in Afghanistan or elsewhere throughout the world” [35], thus reserving the right to subsequently disregard the constraints of the Geneva Conventions. President Bush (P3) was obviously at the

highest rung of the chain of command, and the February signing was a sobering signal of growing command responsibility.

Because of the importance then attributed to Al Qaeda in Iraq in the War on Terror, the administration wanted specific legal advice about the methods CIA interrogators could use with suspected Al Qaeda detainees. White House Counsel Alberto Gonzales requested that Assistant Attorney General Jay Bybee and John Yoo provide the guiding OLC opinion about the restrictions imposed by the Convention against Torture (CAT), as well as the other binding agreements enumerated above.

In the memo, Yoo argued:

*18 U.S.C. section 2340A* does not prohibit as “torture” merely cruel and inhuman interrogation techniques, but only those interrogation techniques that inflict pain akin in severity to death or organ failure...But if we are wrong, to the extent *18 U.S.C. section 2340 A* prohibits interrogation techniques the President approved, the law would violate the American Constitution. This is because it is inherent in the Presidential office to determine what interrogation techniques shall be used, and neither Congress nor the Supreme Court has a greater power than the President on the subject...However, if the President’s commands were found subject to *18 U.S.C. section 2340 A* without violating the Constitution, then, nevertheless, the President’s endorsement of such interrogation techniques could still be justified as a matter of necessity and self-defense, being the moral choice of a lesser evil: harming an individual enemy combatant in order to prevent further Al Qaeda attacks upon the United States.

Written in the aftermath of the September 11 attack on the United States, Yoo was first asserting that there was a legal distinction between torture and “merely” or “extremely” cruel and inhuman interrogation practices. This was early and essential evidence of the evolving common purpose of the administration to use torture against detainees in Iraq (P2).

Torture, the Yoo memo reasoned, referred only to those interrogation techniques that it specified as causing “pain similar to death or organ failure.” According to Yoo, although the Convention against Torture prohibits both “cruel, degrading, and inhumane treatment” as well as extreme torture, there is a distinction between the two. Yoo claimed that, “certain acts may be cruel, inhuman, or degrading, but still not produce enough pain and suffering of the requisite intensity to fall within section 2430(A)’s proscription against torture.”

Yoo then further claimed that the president of the United States had constitutional authority to determine which interrogation techniques shall be used as a matter of national necessity and self-defense against further Al Qaeda attacks.

Finally, Yoo argued for a legal distinction between protected prisoners of war and unlawful enemy combatants to justify the use of torture. He claimed that the Taliban and Al Qaeda prisoners were not entitled to prisoner-of-war status under the Geneva Conventions, which by this means could protect U.S. personnel and officials from being prosecuted under the War Crimes Act.

The intent of Yoo’s memo and its expression of common purpose was to nullify the legal scope and force of the Geneva Conventions and to place the final authority in the hands of the U.S. President to determine what torture meant more broadly, and specifically in the context of Al Qaeda in Iraq (P2). Jack Goldsmith, who followed Yoo at the Office of Legal Counsel (OLC), writes that:

The message of the 2 August 2002, OLC opinion was indeed clear: violent acts aren’t necessarily torture; if you do torture, you probably have a defense; and even if you don’t have a defense, the torture law doesn’t apply if you act under the color of presidential authority. CIA interrogators and their supervisors, under pressure to get information about the next attack, viewed the opinion as a golden shield, as one CIA official later called it, that provided enormous comfort ([36], p. 144).



Goldsmith was asserting that the intention (MR) and common purpose (P2) of the development of the OLC opinion was to facilitate the use of torture in the global War on Terror (P2).

Jack Goldsmith was a tenured professor of law at Harvard University when he was appointed head of the OLC. Soon after coming to the office, Goldsmith [36] made it known that he did not accept the Torture Memo's reasoning. He took the highly unusual step of withdrawing the Torture Memo in 2004. Indeed, Goldsmith felt so strongly about the torture issue that he resigned from the Office of Legal Counsel simultaneously with his withdrawal of the memo.

Goldsmith was hardly alone in this view. A former White House lawyer has suggested (MR) that "if you line up 1000 law professors, only six or seven would sign up to [the Torture Memo's viewpoint]" [37]. Nonetheless, and in the face of this internal administration disagreement about the reasoning and intent of the Torture Memo, the following head of the Office of Legal Counsel, Daniel Levin, reaffirmed in subsequent opinions the interpretations of Yoo's earlier memo, again facilitating the continued use of torture in Iraq. The Supreme Court finally held in the 2004 *Hamdi v. Rumsfeld* case, agreeing with the internal dissenters inside the administration, that legal protections of the Geneva Conventions applied to Al Qaeda [38]. However, by this time, the use of torture at Guantanamo and in Iraq had already become extensive.

The importance of the Torture Memo was that, despite internal dissent within the Bush administration, this memo had set the predicate for torture of detained suspects in the global War on Terror and in Iraq (P2). Following September 11th, coercive interrogation techniques, developed out of the little known program of "Survival Evasion Resistance and Escape (SERE) techniques" [31], had been authorized at the highest levels of the administration, legally certified by attorneys in the White House and Department of Justice, overseen by Donald Rumsfeld (P3) in conjunction with the Joint Recovery Agency in the Department of Defense (DoD), and communicated down the chain of command to prison guards and interrogators. These were key links in a chain of command of the kind identified in Cressey's concept of a highly organized criminal enterprise involving a plurality of persons (P1).

### **9. Reversing the Role of Survival Evasion Resistance and Escape (SERE)**

The previously little known Joint Recovery Agency (JPRA) is a part of the Department of Defense tasked with training captured military personnel in Survival Evasion Resistance and Escape (SERE) techniques. During SERE training, U.S. military personnel are subjected to physical and psychological measures designed to replicate the conditions they might experience when taken prisoner by "enemies" that do not abide by the Geneva Conventions. As one JPRA instructor explained (MR), SERE training is "based on illegal exploitation [under the Geneva Conventions] of prisoners over the last 50 years" [31]. The techniques used in SERE training are based, in part, on techniques used by Chinese government interrogators during the Korean war to elicit false confessions, including stripping subjects of their clothing, placing them in stress positions, putting hoods over their heads, disrupting their sleep, subjecting them to loud music, flashing lights, extreme temperatures, and until recently, waterboarding.

It is important to further emphasize that SERE training is not designed to obtain reliable intelligence information from detainees. Rather, the job of the interrogators using SERE tactics is, as one instructor put it, to "train our personnel to resist providing reliable information to our enemies...the expertise of JPRA lies in training personnel how to respond and resist interrogations—not in how to conduct interrogations" [39]. Notwithstanding this important difference of purpose, in 2002 high-ranking officials within the Bush administration were already investigating the possibility of utilizing SERE for interrogations in the War on Terror. In doing this, the high-ranking officials were participating in the subversion of the formally recognized goals of SERE within the DoD to the new formally organized goals of the War on Terror [39]. This subversion of the established role of SERE was evidence of the criminal intent involved in a joint criminal enterprise to use torture against detainees in Iraq (MR).

Thus in the summer of 2002, William “Jim” Haynes II and Richard Shiffrin, DoD General and Deputy Counsel for Intelligence, contacted JPRA requesting information on SERE physical pressures and interrogation techniques that had been used against Americans. JPRA provided the General Counsel’s office with several documents including excerpts from SERE lesson plans, a list of psychological and physical pressures used in resistance training, and a memo from a psychologist assessing the long-term effects of SERE training. Richard Shiffrin later confirmed in a senate report investigating the abuse of detainees that the purpose of this request (MR) was to “reverse engineer” the techniques [39].

By September 2002, a group of interrogators and behavioral scientists from Guantanamo Bay expanded the operation by traveling to Fort Bragg to attend a training session conducted by the instructors from JPRA’s SERE school. Just days after the interrogators returned to Cuba, a delegation of senior administration lawyers visited Guantanamo Bay. And on 11 October 2002, two behavioral scientists that had attended the SERE training session drafted a memo proposing new interrogation techniques for use at Guantanamo (P2). This memo was then sent to General James Hill, the Commander of U.S. Southern Command (SOUTHCOM) for approval. According to one of those scientists, by early October 2002, there was “increasing pressure to get ‘tougher’ with detainee interrogations.” He further stated that “if the interrogation policy memo did not contain coercive techniques then it wasn’t going to go very far” [39].

By November 2002, Jim Haynes sent Donald Rumsfeld a one-page memo (P2) recommending that he approve all but three of the 18 techniques in the Guantanamo request (Memorandum from Haynes, 2002) [40]. Haynes’ memo indicates that he had discussed the request with Deputy Secretary of Defense Paul Wolfowitz, Under Secretary of Defense for Policy Doug Feith, and General Meyers, all of whom agreed with his recommendation (P1). On 2 December 2002, Rumsfeld (P3) signed the recommendation, adding a handwritten note that referred to the limits proposed in the memo on the use of stress positions: “I stand for 8–10 h a day. Why is standing limited to 4?” [41].

Following Rumsfeld’s authorization, senior staff at Guantanamo began drafting a Standard Operating Procedure (SOP) specifically for the use of SERE techniques in interrogations (P2). The SOP stated that: “The premise behind this is that the interrogation tactics used at U.S. military SERE schools are appropriate for use in real-world interrogations. These tactics and techniques are used at SERE school to ‘break’ SERE detainees. The same tactics and techniques can be used to break real detainees during interrogation” [42]. This was a statement about the practical effect and commonly shared purpose of applying the SERE methods (P2) despite their illegality (MR), for example, under the CAT.

In January 2003, Secretary of Defense Donald Rumsfeld formed a working group to further study the interrogation techniques based on the SERE program (P1). Much of the language of the Torture Memo was incorporated in the resulting report [41], thereby falsely asserting the legality of the SERE methods. The report itself was an historic form of what Daniel Patrick Moynihan [43] called “defining deviance down.” It identified illegal forms of torture and redefined them as “enhanced interrogation” (MR).

Rumsfeld subsequently developed a list of 24 aggressive interrogation procedures to be used at Guantanamo Bay [42] and, as indicated in the Taguba Report discussed next, the use of these SERE techniques as well as instructors from the JPRA SERE unit reappeared in Iraq [40]. In August of 2003, this included the advisory role at Abu Ghraib of Geoffrey Miller (P3), the commander at Guantanamo Bay. By these clearly intended means (MR), the formally organized SERE program was exported from Washington, D.C. to Guantanamo and on to Iraq.

## 10. Detention and Torture Sites in Iraq

The two largest U.S.-run prisons in Iraq were by their very names, Abu Ghraib and Camp Bucca, a vengeful mix of American and Iraq practices of mass incarceration. Abu Ghraib prison was the site of the Saddam Hussein regime’s most notorious human rights abuses, holding more than 50,000 inmates and imposing weekly executions. Iraqis literally tore Abu Ghraib apart after the fall of Hussein, only

to see it rebuilt by the Americans as the site of new human rights abuses. Additional detainees were held in brigade and division facilities across the country.

Abu Ghraib was rebuilt to hold 4000 persons, but housed as many as 7000, a level of overcrowding similar to what the U.S. Supreme Court held in *Brown v. Plata* (2011) was a violation of the U.S. 8th Amendment clause on cruel and unusual punishment. The Taguba Report discussed below included a description of conditions at the two largest U.S.-run prisons in Iraq that read like a passage from the Supreme Court majority opinion which described mass incarceration in California as degrading, and in 8th Amendment terms, as cruel and unusual punishment:

The Abu Ghraib and Camp Bucca detention facilities are significantly over their intended maximum capacity while the guard force is undermanned and under resourced. This imbalance has contributed to the poor living conditions, escapes, and accountability lapses at the various facilities. The overcrowding of the facilities also limits the ability to identify and segregate leaders in the detainee population who may be organizing escapes and riots within the facility.

The report speculated that the overcrowding was also intensified in a way analogous to prisons in the United States: by slowness in releasing a majority of detainees who “are of no intelligence value and no longer pose a significant threat to Coalition forces” [44].

Camp Bucca was larger than Abu Ghraib and named for an American victim of the attack on the World Trade Center—a New York City fire marshal, Ronald Bucca. This naming was a reminder of the (false) linkage claimed by the Bush administration between the former Iraq regime and 9/11. Both Abu Bakr Al-Baghdadi, who became the leader of ISIS, and Ayman Al-Zawahiri, who became the leader of Al-Qaeda in Iraq (AQI), were incarcerated at Camp Bucca. Like the great majority of detainees during U.S.-led occupation, Al-Baghdadi and Al-Zawahiri were Arab Sunnis.

While multiple Pentagon investigations were conducted in response to charges about the mistreatment of detainees in U.S. custody, the best known<sup>1</sup> and most revealing of these investigations of the 800th Military Police Brigade was conducted by Major General Antonio Taguba. The introduction presented as “Background” at the outset of the report made clear that this investigation was in response to a January 2004 request of Lieutenant General Ricardo Sanchez, commander of the forces in Iraq. Sanchez requested Taguba’s investigation in response to mounting reports of detainee abuse and accountability problems in 2003 at a number of U.S. prisons operated by the 800th Brigade, including Camp Bucca, Camp Ashraf, Abu Ghraib, and the High Value Detainee Complex/Camp Cropper.

Taguba’s investigation included a review of the then recent investigation in September 2003 by Major General Geoffrey Miller, Commander at Guantanamo (GTMO), who had been tasked with assessing the “ability to rapidly exploit internees for actionable intelligence” in U.S. forces prisons in Iraq. Geoffrey Miller (P3) is a crucial link in the chain of command and joint criminal enterprise that connected the enhanced interrogation/torture techniques developed under Donald Rumsfeld at the Department of Defense in Washington to their implementation at Guantanamo and their migration to Abu Ghraib. Use of the enhanced interrogation/torture techniques during Miller’s command were widely reported to be excessive, with FBI documents indicating that “in late 2002 and continuing into mid-2003, the Behavioral Analysis Unit raised concerns over interrogation tactics being employed by the U.S. Military” [46].

Lieutenant General Randall Schmidt and Brigadier General John Furlow had previously conducted an investigation of the application of these techniques during Miller’s command at Guantanamo [47]. FBI agents had alleged the following interrogation techniques:

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<sup>1</sup> Journalist Seymour Hersh gained access to Taguba’s report before it became public, leading to several articles in *The New Yorker* magazine and his book, *Chain of Command* [45]. True to the “first draft of history” tradition, the book contains no citations based on the report itself. While the report itself is more opaque in its prose, it importantly provides an official government presentation of the facts of torture in U.S. detention facilities in Iraq.

- (1) That military interrogators improperly used military working dogs during interrogation sessions to threaten detainees, or for some other purpose;
- (2) That military interrogators improperly used duct tape to cover a detainee's mouth and head;
- (3) That DoD interrogators improperly impersonated FBI agents and Department of State officers during the interrogation of detainees;
- (4) That, on several occasions, DoD interrogators improperly played loud music and yelled loudly at detainees;
- (5) That military personnel improperly interfered with FBI interrogators in the performance of their FBI duties;
- (6) That military interrogators improperly used sleep deprivation against detainees;
- (7) That military interrogators improperly chained detainees and placed them in a fetal position on the floor, and denied them food and water for long periods of time;
- (8) That military interrogators improperly used extremes of heat and cold during their interrogation of detainees ([48], p. 4).

The investigation did not review the legal validity of the interrogation techniques then approved by Secretary of Defense Rumsfeld and then in use at Guantanamo ([48], p. 4). This is crucial, as the investigation revealed, for example, in "Finding 16K" that "On seventeen occasions, between 13 December 2002 and 14 January 2003, interrogators, during interrogations, poured water over the subject of the first Special Interrogation Plan head" ([48], p. 19). This is a reference to the infamous use of waterboarding in the interrogation of suspects (P3).

The Special Interrogation Plan was authorized for use at Guantanamo by Secretary of Defense Rumsfeld and implemented under the command of Geoffrey Miller (P1, P3). The treatment of the detainee identified in "Finding 16K" is further detailed:

The techniques used against [the detainee who was] the subject of the first Special Interrogation Plan were done in an effort to establish complete control and create the perception of futility and reduce his resistance to interrogation. For example, this included the use of strip searches, the control of prayer, the forced wearing of a woman's bra, and other techniques noted above. It is clear based upon the completeness of the interrogation logs that the interrogation team believed that they were acting within existing guidance. Despite the fact that the AR 15-6 concluded that every technique employed against [the detainee who was] the subject of the first Special Interrogation Plan was legally permissible under the existing guidance, the AR 15-6 finds that the creative, aggressive, and persistent interrogation of [the detainee who was] the subject of the first Special Interrogation Plan resulted in the cumulative effect being degrading and abusive treatment. Particularly troubling is the combined impact of the 160 days of segregation from other detainees, 48 of 54 consecutive days of 18 to 20-h interrogations, and the creative application of authorized interrogation techniques. Requiring [the detainee who was] the subject of the first Special Interrogation Plan to be led around by a leash tied to his chains, placing a thong on his head, wearing a bra, insulting his mother and sister, being forced to stand naked in front of a female interrogator for five minutes, and using strip searches as an interrogation technique the AR 15-6 found to be abusive and degrading, particularly when done in the context of the 48 days of intense and long interrogations [48].

By the tendentious reasoning of this investigation, and its decision not to address the legal validity of the techniques applied under Miller's command at Guantanamo, this treatment was found to be humane and within legal limits of acceptability.

A key part of the investigation related directly to procedures and practices that Taguba reported Miller had introduced through his recommendations subsequently at Abu Ghraib (P3). These procedures and practices had led in the earlier Schmidt-Furlow investigation at Guantanamo to

“Recommendation #26.” This recommendation indicated the necessity of “a policy-level determination on role of Military Police in ‘setting the conditions’ for intelligence gathering and interrogation of detainees at both the tactical level and strategic level facilities” ([48], p. 29).

When Lieutenant General Schmidt was interviewed by journalist Seymour Hersh [49], he observed that “for lack of a camera, you could have seen in Guantanamo what was seen at Abu Ghraib” (P2). Schmidt had concluded Miller was responsible for abusive and degrading interrogations at Guantanamo. Again, these interrogations were not in his report judged as inhumane, using the specious reasoning that the techniques had been introduced by Secretary Rumsfeld and that their legal validity was not within the purview of his report [49].

The Taguba Report also reviewed a November 2003 investigation directed by Major General Donald Ryder of detention and corrections operations. Although conducted only months earlier and in the same settings, neither the Miller nor Ryder reports raised the issues of torture identified in the Taguba report.

Taguba first addressed the Miller report, which he noted was specifically focused on the strategic interrogation of detainees/internees in Iraq. He observed that “Miller’s team recognized that they were using JTF-GTMO operational procedures and interrogation authorities as baselines for its...recommendations” ([48], p. 31). This has been widely referred to as “Gitmoizing” the use of enhanced interrogation/torture in Iraq and as raising chain of command issues, since Miller reported to the deputies of Secretary of Defense Donald Rumsfeld who oversaw development of these techniques and their implementation at Guantanamo (P1, P2, P3). Taguba emphasized that Guantanamo and Iraq detainees were presumably quite different, with the latter including many if not most suspected criminals rather than terrorists or members of terrorist organizations [35].

Taguba further observed that Miller’s report had recommended that “the ‘guard force’ be actively engaged in setting the conditions for successful exploitation of internees.” Taguba emphasized that military guards are not trained in the same way as military interrogators and are thus not permitted by military regulations to engage in “setting the conditions for successful exploitation of internees” (MR).

The Taguba Report then reviewed the results of the November 2003 investigation headed by Major General Ryder. This review emphasized that the explicit recommendation of the Ryder report—to stop the practice introduced by Miller of having guards “set the conditions” for the interrogators—was not implemented. He wrote that “the systemic problems that surfaced during MG Ryder’s Team’s assessment are the very same issues that are the subject of this investigation” [50].

Taguba then emphatically took issue with the Ryder report’s conclusion that guards had not been instructed (i.e., following Miller’s September 2003 recommendations) to “set the conditions” for interrogations. Taguba wrote that “I disagree with the conclusion of MG Ryer’s Team in one critical aspect, that being its conclusion that the 800th MP Brigade had not been asked to change its facility procedures to set the conditions for MI interviews” ([48], p. 12). This conclusion was critical because it underlined the link between the development of interrogation practices under Secretary of Defense Rumsfeld, the implementation of these practices by Major General Miller in his command role at Guantanamo, and the migration of these practices to Iraq through Miller’s recommendations (P1, P2, P3). These were the key linkages in the joint criminal enterprise and formally organized chain of command that brought the use of torture to detention facilities in Iraq (MR).

Thus the latter recommendations resulted in interrogators being sent to Iraq from Guantanamo, where witnesses reported that they encouraged guards to “set the conditions” for interrogations. “It is obvious from a review of comprehensive CID interviews of suspects and witnesses,” Taguba wrote, “that this was done at lower levels.” He reported that, “Military Intelligence (MI) interrogators and Other U.S. Government Agency’s (OGA) interrogators actively requested that MP guards set physical and mental conditions for favorable interrogation of witnesses” ([48], p. 31).

Taguba identified in detail how guards “set the conditions” for interrogators, beginning with references to the infamous photos that were withheld from the report, and most of which have not yet been declassified: “We reviewed numerous photos and videos which are now in control of the U.S.



Army Criminal Investigation Command and the CJTF-7 prosecution team" ([48], p. 12). Some of the photos were soon placed on the *New Yorker* magazine website and shown on the CBS network show "60 Minutes." The decision not to release most of the 1800 reported photos, which has continued into the Obama administration, notwithstanding earlier promises to release them, is a reflection of their probable provocative and probative content (P3, MR).

In lieu of photos, the "Taguba Report" includes an extensive itemization of observed forms of "intentional abuse of detainees by military police," including:

- (1) Punching, slapping, and kicking detainees; jumping on their naked feet; Videotaping and photographing naked male and female detainees;
- (2) Forcibly arranging detainees in various sexually explicit positions for photographing;
- (3) Forcing detainees to remove their clothing and keeping them naked for several days at a time;
- (4) Forcing naked male detainees to wear women's underwear;
- (5) Forcing groups of male detainees to masturbate themselves while being photographed and videotaped;
- (6) Arranging naked male detainees in a pile and then jumping on them;
- (7) Positioning a naked detainee on an MRE Box, with a sandbag on his head, and attaching wires to his fingers, toes, and penis to simulate electric torture;
- (8) Writing "I am a Rapist" (sic) on the leg of a detainee alleged to have forcibly raped a 15-year-old fellow detainee, and then photographing him naked;
- (9) Placing a dog chain or strap around a naked detainee's neck and having a female soldier pose for a picture;
- (10) A male MP guard having sex with a female detainee;
- (11) Using military working dogs (without muzzles) to intimidate and frighten detainees, and, in at least one case, biting and severely injuring a detainee;
- (12) Taking photographs of dead Iraqi detainees.

In addition, the report includes credible witness descriptions of detainee abuse by military police, including:

- (1) Breaking chemical lights and pouring the phosphoric liquid on detainees; Threatening detainees with a charged 9 mm pistol;
- (2) Pouring cold water on naked detainees;
- (3) Beating detainees with a broom handle and a chair;
- (4) Threatening male detainees with rape;
- (5) Allowing a military police guard to stitch the wound of a detainee who was injured after being slammed against the wall in his cell;
- (6) Sodomizing a detainee with a chemical light and perhaps a broom stick;
- (7) Using military working dogs to frighten and intimidate detainees with threats of attack, and in one instance actually biting a detainee.

These described abuses were accompanied by named witnesses who testified about the role of military interrogators in encouraging these practices by military police (P3). In Cressey's organizational terms, the military interrogators were the "corrupters" and the military police were the "corruptees."

The report further indicated that the military police were untrained and uninformed about detention/internee operations and the applicable rules of the Geneva Convention (P3). Taguba wrote that "I also find that very little instruction or training was provided to MP personnel on the applicable rules of the Geneva Convention relative to the treatment of prisoners of war...Moreover, I find that few, if any, copies of the Geneva Conventions were ever made available to MP personnel or detainees" ([48], pp. 19–20). More generally, the report concluded that "there was virtually a complete lack of detailed SOPs (Standard Operating Procedures) at any of the detention facilities" (P3, MR) ([48], p. 31).

## 11. Responsibility for Torture by Commission and Omission

Although Taguba's report implicating Miller was submitted in March of 2004, a month later, Geoffrey Miller was appointed Deputy Commander for Detainee Operations overseeing Abu Ghraib (MR). Miller's assignment was to correct the abuses that the Taguba Report had exposed in graphic detail—the same abuses the Taguba Report had attributed to practices recommended by Miller in his August 2003 report on Abu Ghraib. Miller was a key participant (P3) among a plurality of persons (P1) with the common purpose (P2) of bringing criminal torture practices (MR) to Abu Ghraib. Although lower level members of the military were prosecuted, there was no official investigation of the formal organization of the joint criminal enterprise and chain of command responsibility for the torture program.

The installation of a new Iraq government in June of 2004 brought changes in the legal and organizational arrangements in Iraq. The conflict between the newly named but still U.S.-led Multi-National Force and a still-growing insurgency was now regarded in legal terms as "non-international." This modified the application of the Geneva Conventions, but Article 3 that applies to the four Geneva Conventions, continued to require the humane treatment of those held in detention. Furthermore, the basic provisions for the protection of detainees in the International Covenant on Civil and Political Rights (ICCPR) also continued in force, as the United States and Iraq were both parties to the covenant.

The official change in the legal standing of the Iraq conflict in June 2004 coincided with a growing role of the Iraq Army and the Ministry of the Interior in the operation of its own detention facilities and in their relationship with the U.S. military. By the end of 2007, a U.S. State Department report indicated that the Iraq Ministry of Justice had nine prisons and seven pre-trial detention facilities in operation. In addition, the Iraq Ministry of Defense operated 17 holding areas or detention facilities in Baghdad and at least another 13 spread across Iraq. However, the most notorious facilities were operated by the Ministry of the Interior, and these were estimated to number in excess of 1000. Unofficial detention centers were also assumed to be in operation throughout the country [37].

Allegations of abuse and torture within these facilities became common, and the U.S. military, again with leadership from Secretary of Defense Rumsfeld (P3), declined to take much public or formal responsibility for their organization or operations. This conflicted with continued legal obligations under the Geneva Conventions and the ICCPR, given that American force levels would increase through the Surge in 2007.

It is important to have a sense of how extensive Iraq detention operations became, although as noted above, there are no precise numbers. Estimates based on the Iraq War Logs go far beyond the Iraq government's own estimates, indicating that 180,000 Iraqis were detained between 2004 and 2009, which would be the equivalent of about one in 50 of Iraq's male population [35].

Knowledge of the full extent of the abuse and torture of these detainees is also uncertain, but there is evidence that the problem has been acute. Human Rights Watch interviewed 90 detainees in Iraq facilities between July and October 2004, about three-quarters of whom reported that they were tortured or ill-treated during their detention [50]. The report indicates a pattern in which torture occurred soon after detention and while the detainees were held in solitary confinement. If they were taken before an investigative judge, it was usually after the evidence of physical torture had disappeared [50]. About a quarter of the detainees reported they were held as a result of their political activities or suspected involvement with militia groups. A high and disproportionate portion of detainees were Arab Sunnis.

Soon after the period of the Human Rights Watch interviews, from November to December, U.S. forces reported on several Iraq-run detention facilities in Baghdad where detainees showed signs of torture and ill-treatment. Amnesty International [51] summarized what they found:

US military forces raided one detention facility controlled by the Interior Ministry in the al-Jadiriya district of Baghdad, where they reportedly found more than 170 detainees

being held in appalling conditions, many of whom alleged that they had been tortured. On 8 December 2005, Iraqi authorities and US forces inspected another detention facility in Baghdad, also controlled by the Interior Ministry. At least 13 of the 625 detainees found there required medical treatment, including several reportedly as a result of torture or ill-treatment...[T]he US ambassador to Iraq, Zalmay Khalilzad, stated that “over 100” detainees found at the detention facility in al-Jadiriya and 26 detainees at the other detention location had been abused.

Follow-up reporting confirmed that detainees in both sites indicated that they had received electric shocks and had finger nails pulled out [52,53].

In the interval between these accounts of detention and associated torture in Iraq-run facilities, Secretary Donald Rumsfeld and the Head of the National Security Council, General Peter Pace, held a press conference in Washington. Rumsfeld and Pace disagreed in their answers when asked the following question:

Q Sir,...I can give you actual examples from coalition forces who talked to me when I was over there—about excesses of the Interior Ministry, the Ministry of Defense, and that is in dealing with prisoners or in arresting people and how they’re treated after they’re arrested. What are the obligations and what are the rights of the U.S. military over there in dealing with that?...

SEC. RUMSFELD: That’s a fair question. I’ll start, and Pete, you may want to finish... Obviously, the United States does not have a responsibility when a sovereign country engages in something that they disapprove of; however, we do have a responsibility to say so and to make sure that the training is proper and to work with the sovereign officials so that they understand the damage that can be done to them in the event some of these allegations prove to be true.

Q And General Pace, what guidance do you have for your military commanders over there as to what to do if—like when General Horst found this Interior Ministry jail?

GEN. PACE: It is absolutely the responsibility of every U.S. service member, if they see inhumane treatment being conducted, to intervene to stop it.

SEC. RUMSFELD: But I don’t think you mean they have an obligation to physically stop it; it’s to report it...

GEN. PACE: If they are physically present when inhumane treatment is taking place, sir, they have an obligation to try to stop it.

General Pace’s clear and concise answer was consistent with U.S. obligations under international law, but inconsistent with what American forces were mostly doing, while Secretary Rumsfeld’s response was inconsistent with international law, but more consistent with what American forces were not doing—that is, not intervening when they encountered inhumane treatment in Iraq facilities. Recall that non-intervention is allowed as evidence of criminal intent (MR) in a joint criminal enterprise.

Much of what we know about Iraq detention facilities is based on separate analyses by *The Guardian* [54] and the Bureau of Investigative Journalism [35] using the Iraq War Logs. The latter consist of nearly 400,000 reports by U.S. soldiers of “SIGACTS”—or significant actions—from 2004 through 2009 and released through WikiLeaks. While these data require further validation and analysis, the two reviews of these data by the above media sources are consistent with one another, and the basic descriptive account they provide of what U.S. soldiers encountered and observed during the 2004–2009 period has not been questioned. The Department of Defense responded to these reports in a statement published in the *New York Times* indicating that, “‘significant activities’ reports are initial,

raw observations by tactical units. They are essentially snapshots of events, both tragic and mundane, and do not tell the whole story" [55].

The Bureau of Investigative Journalism reported that The Iraq War Logs included more than 1300 cases of detainee abuse by Iraqi authorities reported by U.S. soldiers. However, even more revealing were references in many of these reports to two military orders that help inform the background of the above-transcribed press conference exchange between General Pace and Secretary Rumsfeld (MR).

*Der Spiegel* created its own annotated version of Iraq War Logs and provides the following documentation of the first significant action report that referred to two interrelated "fragmentary" orders which required no intervention or reporting by U.S. soldiers of evidence of "Iraq on Iraq" abuse (FRAGO 242), and then required no intervention but the filing of a report (FRAGO 039):

Iraqi on Iraqi (no US forces personnel were involved) note: MNCI FRAGO 039 DTD 29 April 2005 has modified FRAGO 242 and now requires reports of Iraqi on Iraqi abuse be reported through operational channels. Incidents of detainee abuse committed by Iraqi forces fall with MNF-IS CCIR #8. Reporting will be made using the format attached to MNCI FRAGO 039. Provided the initial report confirms US forces were not involved in the detainee abuse, no further investigation will be conducted unless directed by HHQ [56].

The files record a great deal of abuse in Iraq's detention facilities and there is no indication in the files or in the Department of Defense response that most or even many of these "significant actions" were further investigated (MR).

## 12. Conclusions

American authorities turned over control of Abu Ghraib prison to the Iraq government in 2006. It was closed by the Iraq government in 2014, ten years after the photo-driven torture scandal broke. In the year before the 2006 turnover occurred, the State Department reported to Congress that 92 new and unprosecuted cases of alleged detainee abuse were recognized as "founded." Despite prosecutions of lower level participants for their involvement in torture at Abu Ghraib, however, no higher level officials have been punished beyond receiving military reprimands or demotions.

Yet Donald Cressey's theory of informally and formally organized crime provides a way of seeing that what happened at Abu Ghraib prison and more widely in Iraq was, in language largely borrowed from the Racketeer Influenced and Corrupt Organizations (RICO) statutes that Cressey helped draft, a joint criminal enterprise that in its more fully understood form was of much greater significance than the sum of its lower level parts. This joint criminal enterprise was the product of a formally organized chain of command that reached to the highest levels of the American government.

The torture policy implemented in Iraq was an important part of the planning and implementation of the War on Terror. American authorities quickly became convinced during the occupation of Iraq of the threat posed by a Sunni insurgency. The response was mass detention and torture of Arab Sunnis suspected of either being current or potential participants in an insurgency.

The practice of widespread and systematic detainment, otherwise known as mass incarceration, was already well into its third decade of growth in the U.S. by the time of the U.S.-led invasion of Iraq. The Reagan administration had claimed notable similarities between the threats posed by American street criminals and by international "narco-terrorists." The same ideas, and some of the same actors, reemerged in the Bush administration's War on Terror. Guantanamo prison became a principle site for incapacitation and torture.

An important part of the planning for a war of aggression in Iraq was President George W. Bush's February 2002 determination in a memo to Vice President Richard Cheney that protections of the Geneva Conventions did not apply to Al Qaeda in Afghanistan or anywhere else. This was an early signal of the legal elements of a joint criminal enterprise that would have international repercussions:

an organized plurality of persons participating with a common purpose and criminal intent to commit war crimes, notably including torture of Sunni detainees in Iraq.

The intent to use torture in waging aggressive war in Iraq was advanced in August 2002 when John Yoo and John Bybee, through the Office of Legal Counsel of the Department of Justice, responded to a request for advice from the president. Cressey would have called this request a “buffering” mechanism, distancing the president from the commission of war crimes. Also during the summer of 2002, the Department of Defense under Secretary Donald Rumsfeld adopted for use in the War on Terror and in Iraq techniques that had been used previously to elicit false confessions by Chinese interrogators during the Korean War. A plurality of actors—from the president, through his vice-president, his secretary of defense, to John Bybee and John Yoo—formed a plurality of persons joined as participants in a common purpose with the criminal intent to organize torture of detainees in Iraq.

The Commander at Guantanamo Bay, Geoffrey Miller, was a crucial connecting figure. Cressey would have called Miller a key “corrupter” who created “corruptees.” The FBI’s Behavioral Analysis Unit alleged that torture techniques were being used at Guantanamo in late 2002 and continuing into mid-2003. Miller was in command at Guantanamo during the period when the torture techniques were authorized for use by Secretary Rumsfeld. A military investigation by Generals Schmidt and Furlow later found that prisoners were abused under Miller’s command, although the report was not tasked with assessing the legal standing of the techniques applied. Nonetheless, the forms of the abuse made clear the criminal intent to torture detainees. The report questioned use of abusive techniques under Miller’s command by military guards who “set conditions” for interrogators.

Miller was directed to conduct an investigation and report on the Abu Ghraib prison in September of 2003. His report included a key recommendation that at Abu Ghraib, as at Guantanamo, military guards be employed in “setting the conditions” for “successful exploitation of internees.” Soon after Miller’s report and recommendations, accounts began to emerge of abuse and torture at the Abu Ghraib prison. A November 2003 investigation and report by Major General Ryder also questioned the use of military guards to “set conditions” for interrogations at Abu Ghraib. The “setting of conditions” clearly involved forms of torture prohibited in international law and therefore demonstrated criminal intent.

When General Antonio Taguba was placed in charge of an investigation in early 2004, he came into possession of numerous photographs of flagrant abuse at Abu Ghraib. The visual evidence of the intentionally criminal means of “setting conditions” for interrogations was now inescapably clear. Taguba observed that Miller’s team intentionally drew from operational procedures and interrogation authorizations at Guantanamo as the foundation for their recommendations that the military guard force at Abu Ghraib be used “in setting the conditions for successful exploitation of internees.” Taguba emphasized that military guards were not trained in the same way as military interrogators and thus were not permitted by military regulations to do this.

Taguba’s report was submitted in March 2004. In April 2004, a month after the submission of Taguba’s report, Geoffrey Miller was appointed Deputy Commander for Detainee Operations overseeing Abu Ghraib. His mission presumably was to correct the same abuses that his August 2003 report had recommended for implementation at Abu Ghraib. Furthermore, investigators who had already abused detainees at Guantanamo were now sent to initiate the same procedures involving guards in “setting conditions” for interrogations at Abu Ghraib. All the legal elements of a joint criminal enterprise were evident: this was a large plurality of persons organized with common participatory criminal intent and purpose to mobilize torture techniques against detainees in Iraq.

Despite the evidence leading from the approval of torture in Washington, through the use of torture at Guantanamo, to the implementation of a similar torture regime at the Abu Ghraib prison—there was no official investigation and punishment of the joint criminal enterprise and chain of command activities that led to this outcome.

Although the U.S.-led and renamed Multi-National Military Force did not reach peak troop levels until the 2007 Surge, official sovereign responsibility was passed in 2006 from the Coalition



Provisional Authority to the new government of Iraq. This included increased responsibility of the Iraq government for detention facilities. Since U.S. forces were still operating alongside and training the Iraq military throughout the country, the U.S. as well as the Iraq government were still bound by international prohibitions against the use of torture. However, intervention was uncommon: a result of orders instructing U.S. soldiers not to take action beyond reporting when they observed evidence of “Iraq on Iraq” torture.

Sufficient evidence exists in photographic and documentary form to warrant the further investigation and likely charging of U.S. joint criminal enterprise and chain of command responsibility for torture in Iraq. Torture was an important part of the planning and conduct of a mass incapacitation COIN (counterinsurgency) doctrine in Iraq. The investigation and prosecution of military and political leaders responsible for torture practices in Iraq can be an important step toward criminal accountability for American war crimes in Iraq. Donald Cressey’s organizational theory offers a conceptually prescient and legally applicable explanation of how such war crimes occurred.

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