Review Essay

Torture and Incompetence in the 'War on Terror'

Adam Roberts

Torture and Truth: America, Abu Ghraib, and the War on Terror
Mark Danner. New York: New York Review Books, 2004. $19.95. 580 pp.

The Torture Papers: The Road to Abu Ghraib
Karen J. Greenberg and Joshua L. Dratel, eds. Cambridge: Cambridge University Press, 2005. £30.00. 1,249 pp.

Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism
Bruce Ackerman. New Haven and London: Yale University Press, 2006. $28.00. 227 pp.

It has taken over five years of the disastrously mismanaged 'war on terror' for the United States to begin to accept certain conclusions about the status and treatment of detainees that should have been clear from the start. A critical turning-point was the decision of the US Supreme Court in June 2006 in *Hamdan v. Rumsfeld*, which at last recognised that some provisions of the Geneva Conventions – in particular those in their common Article 3 – applied to detainees in the 'war on terror'. No longer was this a matter of the US government stating that it would implement certain provisions on an optional basis: the Supreme Court made it clear that this was a matter of legal obligation. In particular, there was a clear prohibition on cruel treatment and torture, and a requirement that, if detainees are put on trial, it could not be by the military commissions planned by President George W. Bush, but must be in a better constituted court offering recognised judicial guarantees.

The US change of policy following this decision in 2006 is significant but still incomplete. On 7 July 2006 the Pentagon ordered all US armed forces to treat all detainees in accord with common Article 3 of the 1949 Geneva Conventions

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– arguing that, except in the matter of military commissions, previous orders and directives were in any case compliant with Article 3. On 6 September Bush acknowledged for the first time the existence of a secret CIA prison network, but did not propose any changes. On 17 October Bush signed the 2006 Military Commissions Act, which provides a clearer legal framework than before for trying non-US citizens deemed to be 'unlawful enemy combatants'. However, the new law contains controversial elements. It denies habeas corpus rights to detainees who have not been charged with any offence. Bush has emphasised that it allows the Central Intelligence Agency to continue its programme for questioning key terrorist leaders and operatives. At the signing ceremony he said that it is 'one of the most successful intelligence efforts in American history. It has helped prevent attacks on our country.' Meanwhile, the prison at Guantanamo – established as a convenient haven from the application of US law – is still in business. So, apparently, is the extraordinary rendition of detainees to locations where not too many questions will be asked about the conditions of their detention and interrogation – a matter that has been the subject of detailed reports in 2006–07 by the Council of Europe,[1] the US Congressional Research Service[2] and the European Parliament.[3] While the US government has issued numerous statements that US military personnel must not use torture, it has not faced up to the evidence that some of the officially sanctioned practices in the 'war on terror' – especially as applied by certain US intelligence personnel – have amounted to torture. Moreover, attempts by the US and its allies to clear up the mess caused by past failures of detainee policy are themselves problematical, and have led to a Babel-like set of arrangements and agreements in present-day Afghanistan.

The mishandling of the detainee question has had many kinds of costs. It has provided a propaganda gift to the United States' adversaries – especially terrorist groups, which have used the issue as a justification of their own actions and as a basis for recruiting. It has fatally undermined the coalition cause in Iraq, where Abu Ghraib was the beginning of the end of the US-led political project. It has been a divisive issue between the United States and some of its actual or potential allies. It has also undermined US leadership of the 'war on terror' in global opinion more generally.

In January 2007 a BBC World Service poll of more than 26,000 people across 25 countries showed exceptionally high disapproval levels for three critical aspects of the 'war on terror'. 73% disapproved of how the US government has dealt with Iraq; 68% believed the US military presence in the Middle East provokes more conflict than it prevents; and 67% disapproved of US handling of Guantanamo detainees.[4] This is a humiliating rebuff.

How did it happen?

How was it that, in pursuit of the campaign against certain international terrorist movements, the policy on detainees was handled so disastrously? Mark Danner's *Torture and Truth* and the Karen Greenberg/Joshua Dratel compilation *The Torture Papers* provide a picture of US government decision-making that led to extensive torture and international public revulsion. Both mention Abu Ghraib in their subtitles. Both consist mainly of official documents, whether leaked or officially released. Virtually all documents in *Torture and Truth*, the first to be published, are also in *The Torture Papers*, which also has numerous others in its massive frame. Neither volume contains much not already widely available on the Internet and other channels, but by bringing the material together the authors should have made it possible to form at least a partial picture of the bureaucratic decision-making processes that led to such grim outcomes. Have they done so?

Mark Danner's multi-faceted account of how things went wrong in Iraq, based on a series of articles in the *New York Review of Books* in 2003–04, stands the test of time remarkably well. He is particularly convincing on the pressures on the US military in Iraq, at a time of growing insurgency in summer 2003, that led to the use of torture. He cites a mid-August 2003 e-mail in which a captain in military intelligence says of detainees classified as unprivileged belligerents: 'we want these individuals broken. Casualties are mounting and we need to start gathering info to help protect our fellow soldiers from any further attacks.'

By contrast, *The Torture Papers* has very little editorial matter, and what there is of it is less descriptive, and even more condemnatory, than Mark Danner's account. The flavour of this volume is well conveyed by the opening paragraph of Dratel's three-page introductory note on 'the legal narrative'. Is this a legal narrative or a denunciation?

> While the proverbial road to hell is paved with good intentions, the internal governmental memos collected in this publication demonstrate that the path to the purgatory that is Guantanamo Bay, or Abu Ghraib, has been paved with decidedly bad intentions. The policies that resulted in rampant abuse of detainees first in Afghanistan, then at Guantanamo Bay, and later in Iraq, were the product of three pernicious purposes designed to facilitate the unilateral and unfettered detention, interrogation, abuse, judgment, and punishment of prisoners: (1) the desire to place the detainees beyond the reach of any court of law; (2) the desire to abrogate the Geneva Convention with respect to the treatment of persons seized in the context

> of armed hostilities; and (3) the desire to absolve those implementing the policies of any liability for war crimes under U.S. and international law.

Disappointingly, neither book gives much attention to what exactly was the chain of events and reasoning that led the US into the fateful path of detainee abuse. It is fine to let the documents speak for themselves – and in many cases to condemn their authors through their demonstrations of incompetence and inhumanity. However, there are issues lurking behind the descent into torture that need more explicit discussion than they receive in the papers, reports and editorial passages in these volumes.

In particular, both books fail to give a full account of the raging debate within the administration. They contain only two short memos from the State Department. There are other memos which show how strenuously many qualified experts in the government and the armed forces argued against the departures from the Geneva Conventions but failed to carry the day. It is noticeable how some of the key memos from the Department of Justice were simply not copied to State. There was a direct line from the Department of Justice to Alberto Gonzales (at that time counsel to the president), occasionally including the Department of Defense. The US military lawyers are overlooked in these books because their voice has seldom been heard publicly, although some of them have pleaded to have their advice declassified.

There have been over ten major official investigations into allegations of prisoner abuse in Iraq, Afghanistan and Guantanamo. The reports of these investigations suggest something not highlighted in the editorial matter in these books – that a distinction can be drawn between torture which was a reflection of unprofessional and frequently incompetent behaviour, not linked in any way to serious interrogation, and torture that was at least supposedly part of a programme of intelligence collection. The first was exemplified by the horrific photos taken in Abu Ghraib, reproduced in all their awfulness in Danner's book. The second represents what may be a more sinister and enduring problem.

The reader gets insufficient guidance in the area of torture as part of interrogation policy. Greenberg's four-page introductory note touches tantalisingly on issues the memos overlook, but does not go far enough. In particular, there is a need for fuller discussion on such matters as:

- How did the argument that ill-treatment would yield good intelligence develop in certain parts of the US government and armed forces? In particular, was this a classic case of 'bogus realism' based on lazy thinking and no evidence, or was there a serious basis for

it? Was there an obsessive focus on the utterly exceptional but much-cited case of the ticking nuclear time-bomb as justification for torture? Was there ever a serious discussion within the US government of the numerous reasons for questioning the assumption that ill-treatment results in good intelligence, and even more that it is a way to help end insurgency?[5]

- Is there something peculiar to US legal culture that can take seriously such arguments as those in the notorious memorandum sent from the Justice Department to the White House on 1 August 2002? This memo, which had to be withdrawn in 2004, stood the plain meaning of words on their head when it redefined 'torture' to allow a huge range of cruel and inhuman treatment to escape the definitional net of US and international legislation. It also strained belief when it stated that the president had total and unfettered discretion to ensure that prisoners were effectively interrogated, even to the point of authorising torture.
- Why were officials and others dealing with these issues so prone to arguing abstractly, without any reference to historical events and previous cases of torture? Did the alleged uniqueness of the al-Qaeda threat, and of the US struggle, mean that all historical evidence was deemed irrelevant? Did the experience of the British, who had been through a disastrous period in Northern Ireland in 1971–72, when they introduced internment, maltreated detainees and paid a huge price for their errors in terms of political fall-out and intensified insurgency, ever get considered in the US debate? Or that of the French in the Algerian War? If not, why not?
- Was consideration given to the risk that, if the pre-eminent power in the international system is perceived as tolerating torture, other governments and armed groups may feel freer to engage in it, for example against their own compatriots?

The legal problem

There is a further omission. Neither book has as a starting point a thorough discussion of the legal status of detainees. This is unfortunate, as genuine legal problems are raised in the 'war on terror'. There are well-known difficulties in applying the body of law first considered in matters of detainee treatment in armed conflict – the laws of war. In particular, in numerous contemporary conflicts – including ongoing operations in Iraq and Afghanistan – some of the adversaries of US-led forces may not meet the criteria for entitlement to the

status of prisoner of war as outlined in the 1949 Geneva Convention III, Article 4. As a result, it is not absurd to conclude, as the US government has done, that some detainees belong in the contested category of 'unlawful combatants' or 'unprivileged belligerents' – a category not explicitly mentioned in treaties on the laws of war, but whose existence can be inferred from numerous legal provisions, including those setting out criteria for who is to qualify for the status of either prisoner of war or civilian. The critical issue is not whether this category exists, but rather what legal rules govern the treatment of those persons in the category. There are provisions in the laws of war – especially common Article 3 of the 1949 Geneva Conventions and Article 75 of 1977 Geneva Protocol I – that constitute a basis for their treatment, as the US Supreme Court belatedly noted in its *Hamdan* decision in 2006.

In a memorandum signed by Bush on 7 February 2002, the US government rejected the view that there were legal rules governing the treatment of these detainees. The memorandum, reprinted in both volumes, is of critical importance as one of the very few documents on this subject signed by the president, and because it was issued so early in the 'war on terror'. In it Bush stated:

> I accept the legal conclusion of the Department of Justice and determine that none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva …
>
> I also accept the legal conclusion of the Department of Justice and determine that common Article 3 of Geneva does not apply to al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to 'armed conflict not of an international character'.
>
> Based on the facts supplied by the Department of Defense and the recommendations of the Department of Justice, I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva. I note that, because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war.
>
> Of course, our values as a Nation … call for us to treat detainees humanely, including those who are not legally entitled to such treatment … As a matter of policy, the United States armed forces shall continue to treat detainees humanely.[6]

This set the tone for public statements issued by the White House and others.[7] It sent out ambiguous signals. The State Department was and remained worried that the result of such a policy would be a vulnerability of captured US forces to mistreatment by their adversaries. Many also feared the inherent weakness and vulnerability to events of this policy framework based on the idea that the detainees did not qualify for prisoner-of-war status as of right, but would be treated humanely as a matter of policy. It appeared that CIA operatives were not covered by the policy injunction to US armed forces to treat detainees humanely. Such concerns proved all too prescient. The results of the US approach were even more disastrous, and riddled with paradox, than had been feared.

One unexpected consequence has been the difficulty of putting detainees on trial, and the failure to do so in practically all cases. At least until 2006, procedures for trial by military commissions laid down by the Bush administration had little chance of being viewed as legitimate by any international body or by any US appellate court, so the administration was inhibited from initiating the very trials it had claimed to want. Numerous interrogators, increasingly fearful of claims or revelations that they had used torture, were and remain afraid to give evidence.

All this suggests that the charge against the Bush administration's handling of the entire issue of detainee status and treatment should be not just the pernicious purposes and bad intentions emphasised by Greenberg and Dratel, but also sheer incompetence. Nor is this all an exclusively American matter. Charges can also be laid at the door of many European and other governments because of their complicity in the secret transport, detention and maltreatment of prisoners, as the above-mentioned Council of Europe and European Parliament reports in 2006 and 2007 have suggested. Meanwhile, the reputational damage done has necessitated some exceptional measures to try to rectify the situation, especially in Afghanistan, a country critical to the success of any serious policy against international terrorism.

Afghanistan since 2005

The case of Afghanistan, and in particular the complex attempts to develop a detainee regime there, illustrates how even five years into the 'war on terror' there is wasteful effort and ongoing policy confusion on a vital issue. Much of the story post-dates the publication of *Torture and Truth* and *The Torture Papers*. Yet the failure to agree on and implement a clear set of international standards on detainee treatment described in the two books is currently having worrying consequences.

The treatment of detainees in Afghanistan has long been problematic, resulting in many disturbing events, including the 25 November–1 December

2001 prison revolt at Qala-e Jhangi Fort near Mazar-e Sharif, and cases of mistreatment and killing of prisoners in the area of Shebarghan from December 2001 onwards. Efforts to address the problem have been tangled and incomplete.

The NATO-led International Security Assistance Force (ISAF) in Afghanistan has from the beginning operated within a framework of commitment to human rights. This is evident in the Security Council resolutions defining its mission, starting with Resolution 1386 of December 2001 which contained a reference to 'inalienable rights' to be enjoyed by all Afghans.[8] It is also clear from the Military Technical Agreement concluded in January 2002 between ISAF and the Interim Administration of Afghanistan, on the basis of Resolution 1386. This agreement states:

> 1. The Interim Administration recognises that the provision of security and law and order is their responsibility. This will include maintenance and support of a recognised Police Force operating in accordance with internationally recognised standards and Afghanistan law and with respect for internationally recognised human rights and fundamental freedoms, and by taking other measures as appropriate.[9]

ISAF is now a large multinational enterprise in which over 30,000 troops from 37 NATO and non-NATO countries are participating. In 2006 it undertook a considerably expanded range of responsibilities throughout the country: they involve combat as well as peacekeeping.[10] In particular, on 31 July 2006 it took over command of the Southern Region of Afghanistan, and on 5 October the Eastern Region, with many units being transferred to ISAF command from the US-led coalition under Combined Forces Command Afghanistan (CFCA).[11] The US command in Afghanistan continued to have a lead role in counter-terrorism as well as in providing support to reconstruction, training and equipping of the Afghan National Army and Afghan National Police. In 2007, with the US having taken over leadership of ISAF on 4 February, a further degree of integration of US-led and ISAF activities is anticipated.

The extensive roles of foreign forces in Afghanistan, coupled with awareness of the potential of detainee issues to cause political disaster, have added salience and urgency to the question of treatment of detainees that the various units comprising ISAF (or indeed the US-led Coalition forces) may take in the course of their operations. The issue is particularly delicate because detainees have to be handed over to the Afghan authorities. There has been an obvious requirement for a coherent integrated approach on the handling of detainee matters. As

a result of considerable attention being devoted to this matter, there have been two kinds of policy outcomes.

First, bilateral agreements have been made between individual ISAF- or Coalition-participating governments and the government of Afghanistan in 2005 and 2006. Some are unpublished and presumably secret, whereas some can be dug out on websites of the governments concerned. These include the agreements made by Canada, requiring detainees to be treated in accord with Geneva Convention III,[12] and by the Netherlands, with different but clear stipulations on detainee treatment.[13]

Secondly, some pronouncements and agreements of a more general nature have been concluded: for example, an ISAF Standard Operating Procedure on detainee issues was adopted in May 2006. Paragraph 1 of this document is notable for its joint appeal to the rival gods of law and strategy when it states:

> Commanders at all levels are to ensure that detention operations are conducted in accordance with applicable international law and human rights standards, and that all detainees are treated with respect and dignity at all times. The strategic benefits of conducting detention operations in a humanitarian manner are significant. Detention operations that fail to meet the high standards mandated herein will inevitably have a detrimental impact on the ISAF Mission.[14]

The Afghan government would be entitled to be bemused by the complexity of the legal arrangements for classification and treatment of detainees, consisting as they do of an extraordinary variety of different documents from different states. It is especially noteworthy that the dialogue on these matters with the United States, despite its almost baroque complexity, fails to put any emphasis on the application of human-rights law. Nor is there a clear and agreed line on the relevant and applicable rules of the laws of war. Canada says bluntly that the standards of Geneva Convention III must be followed, but others do not. NATO has been defective in failing to address the issue seriously and provide personnel or resources that might assist the Afghan government in this matter. The US government has assisted the government of Afghanistan in building a new maximum-security detention facility, to be run by the Afghan government, in Puli Charkhi Prison on the outskirts of Kabul. While the facility has far better physical conditions than those for the normal inmates, the legal regime is less reassuring than the physical environment.

One logical follow-up to the range of activities and agreements on these issues would be for the Afghan government itself to produce a document

setting out the detention regime that operates throughout the country. Such a regime, which might take the form of a presidential decree, has been under active discussion. The Afghan government has been under pressure from Washington to establish a detainee regime consistent with the US approach, but it has not received clear and consistent support from outside powers generally in its efforts to develop a policy, which have suffered accordingly. Meanwhile, there has been a conflict within the Afghan government, between the Ministry of Defence and the National Department of Security, about who should have the final say over detainees handed over by foreign forces in the country.

The outside powers and the Afghan authorities are making attempts to prevent a repetition of the muddles and disasters surrounding detainee treatment in Afghanistan, Guantanamo, Iraq and elsewhere, but they may not be enough. There has been an attempt, mainly led by non-Americans but with some US input, to work out a system to ensure that detainees are not maltreated and do not disappear off the radar screens of the International Committee of the Red Cross, the Afghan Independent Human Rights Commission, or the transferring governments. There is concern with how these attempts will evolve following the US takeover of the leadership of ISAF in early 2007. The states involved appear to understand, at least up to a point, the moral and strategic importance of these issues.

However, there are still elements of conceptual muddle and indecisiveness in their various approaches, especially those of NATO and the United States. The demand of detaining powers, while handing over responsibility for detainees, to still have continued access to them has the admirable purpose of ensuring that the detainees do not end up in circumstances like those at Guantanamo or the US base at Bagram in Afghanistan, but is the subject of two concerns. First, it may not work: even some of the larger states in NATO have no formal means of tracking and monitoring the movement of individuals. Secondly, it could mean that political problems concerning detention – whether of newly detained individuals or those passed on from Guantanamo and Bagram – are shuffled off onto the Afghan authorities, while outside powers maintain a high level of de facto control in certain cases. The facts that the UN Assistance Mission in Afghanistan has received cases of alleged torture in maximum security cells of the Afghan National Security Directorate, and that it has faced difficulties in recent months accessing those detention facilities despite previously good access, suggests that the concerns are not theoretical.

On a broader level, it is puzzling to many students of the laws of war that the historical tendency, particularly pronounced since the mid-nineteenth century, to secure agreement on a uniform set of internationally agreed rules on such

basic matters as treatment of prisoners should have been stood on its head in Afghanistan, with a plethora of different rules and precious little uniformity.

The complex ways in which the issue of detainee treatment have been played out in Afghanistan reflect deeper ambiguities relating to the application of human-rights law and the laws of war in contemporary external military actions. They also reflect the ways in which divisions between and among allies, combined with poor leadership, result in activities in a key battleground that teeter on the edge of incoherence. A charitable interpretation of developments in Afghanistan is that, at an extraordinarily slow pace, with a lot of separate and inadequately coordinated efforts, a muddled picture is slowly transforming into something more coherent and defensible. There remains a high risk that these disparate efforts will come unstuck. The same goes for the handling of the detainee issue in the 'war on terror' more generally.

The most logical way to address this risk, both in Afghanistan and more generally, would be for NATO collectively to develop a comprehensive and binding set of rules on all aspects of the treatment of security detainees who are not self-evidently prisoners of war in the Geneva definition.

In any process of negotiation, whether within governments, in NATO or more generally, two genuinely difficult issues need to be taken into account. Both of them touch on human-rights law as well as the laws of war, relate to those security detainees who do not come fully within the protection of either the Prisoner of War or the Civilians Convention, and highlight the need for clarification of how some of the provisions of common Article 3 of the Geneva Conventions apply in present circumstances. First, what should be procedures, criteria and safeguards regarding the continuation and ultimate duration of detention – an issue that is proving especially troublesome in the 'long war'? Secondly, if in certain cases extraordinary rendition is considered necessary, for example to take a detainee out of a country where the government is too terrorised by its opponents to be able to release anyone to foreign justice, what safeguards can be put in place to ensure such rendition does not lead to secret prisons and abuse against individuals, nor becomes a more general practice?

Before the next attack

Meanwhile, a fierce debate continues in the United States, invigorated by the Democrats' new control of Congress. Sustained efforts are being made to secure release of further documentation on detainee mistreatment, but they go beyond that. One of the Democrats' main themes is that the Bush administration's expansive claims of executive power in wartime are a threat not only to America's moral reputation abroad, but also to its framework of civil liberties at

home. For example, there is concern that in a statement to the Senate Judiciary Committee on 18 January 2007 Attorney General Alberto Gonzales claimed the authority to deny the right of habeas corpus to US citizens. This flew in the face of the Supreme Court's decision in 2004 in the case of *Hamdi v. Rumsfeld* that US citizens had the right to seek writs of habeas corpus even when declared to be 'enemy combatants'. It is not surprising that many have sensed a threat, not just to the civil liberties of individuals, but also to the separation of powers that is the bedrock of the US system of constitutional rule.

On the question of how the US constitutional system should be preserved when under challenge from international terrorist movements, Bruce Ackerman of Yale University has written a work of unashamed advocacy. His concern is the risk that emergency measures taken in the wake of terrorist attacks could result in the erosion, even obliteration, of democratic systems of government. He notes certain inadequacies in the otherwise attractive notion of treating the terrorist threat as a purely criminal issue. He recognises the threat as serious, and does not quarrel with the principle that emergency measures may be needed to cope with it, especially in the event of a decapitation attack aimed at the US government. However, he is deeply suspicious of the US Patriot Act, with its generous allocation of powers to the president and the executive without time limits. His book is an argument for an emergency constitution that would adapt the inherited US legal system to meet the distinctive challenges of the twenty-first century. The central, guiding idea is that presidents will only have emergency powers for up to two months, and must then return to Congress for reauthorisation. Each time the president asks for such reauthorisation he will require an increasing majority, rising to 80%. All this should be debated and agreed over time, so that the United States is ready with a defensible emergency regime when it is needed.

When he addresses detainee issues, Ackerman is contemptuous of the performance of the Bush administration, and notes acidly how the authors of the more egregious memoranda have been rewarded with plum legal jobs. However, he does accept that there is a difficult underlying problem in determining guidelines for interrogation. He proposes a 'Decency Commission', with a majority drawn from the judiciary, as the appropriate body to determine interrogation guidelines in advance. He also declares, with a generosity that not all his compatriots share, that the US government must compensate detainees $500 for every day they are deprived of freedom. The prospect of that might start many tongues wagging!

While Ackerman's book may be easily dismissed as insensitive to political realities, and perhaps as underestimating the extent to which the international

campaign against terrorism is by nature long term, his underlying concern to reconcile constitutional democracy, human rights and security is admirable. The fundamental notion is that the appropriate response of a democratic society to terrorist assault should be neither a generalised 'war on terror' nor a stretching of the crime model to its breaking point, but rather a carefully conceived state of emergency. This may not be an answer to all problems, but it is a better starting point than the one we have actually had in the years since 11 September 2001.

Notes

)1 See especially the report, containing much new information, prepared by the investigator appointed by the Council of Europe's Committee on Legal Affairs and Human Rights, the Swiss senator Dick Marty, *Alleged Secret Detentions and Unlawful Inter-state Transfers of Detainees Involving Council of Europe Member States* (Council of Europe: Parliamentary Assembly Doc. 10957, 12 June 2006), available at http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957.pdf.

2 The Congressional Research Service report, based on available open-source documentation and not on any new investigation, is *Undisclosed U.S. Detention Sites Overseas: Background and Legal Issues* (Washington DC: Congressional Research Service Report for Congress, 12 September 2006), available at http://digital.library.unt.edu/govdocs/crs.

3 European Parliament, Temporary Committee on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, Final Report, 26 January 2007, available at: http://www.europarl.europa.eu/comparl/tempcom/tdip/default_en.htm.

4 The poll was conducted between November 2006 and January 2007. The results, published on 23 January 2007, plus links to related sites, are available at http://www.bbc.co.uk/pressoffice/pressreleases/stories/2007/01_january/23/us.shtml

5 A vigorous argument that torture, apart from being objectionable on moral grounds, does not yield useful intelligence results, was made in a letter from intelligence and military professionals submitted to the Senate Judiciary Committee on 26 September 2006. Available at: http://www.truthout.org/cgi-bin/artman/exec/view.cgi/64/22776.

6 President George Bush, Memorandum on 'Humane Treatment of al Qaeda and Taliban Detainees', 7 February 2002.

7 White House, Office of the Press Secretary, 'Fact Sheet: Status of Detainees at Guantanamo', 7 February 2002, p. 1.

8 ISAF was originally established in Afghanistan in January 2002 on the basis of UN Security Council Resolution 1386 of 20 December 2001, passed unanimously. Subsequent resolutions extending and modifying ISAF's mandate, structure and scope of operations are: UNSCR 1413 of 23 May 2002, UNSCR 1444 of 27 November 2002, UNSCR 1510 of 13 October 2003, UNSCR 1563 of 17 September 2004, UNSCR 1623 of 13 September 2005, and UNSCR 1659 of

15 February 2006. NATO has exercised command and control of ISAF since 11 August 2003.

9 Military Technical Agreement between the International Security Assistance Force and the Interim Administration of Afghanistan, 4 January 2002, Article III(1). Text in *International Legal Materials*, vol. 41, no. 5, September 2002, p. 1032. Text (plus annexes) also available at http://www.operations.mod.uk/isafmta.pdf.

10 The ISAF website is http://www.jfcbs.nato.int/ISAF/index.htm.

11 The CFCA website is http://www.cfc-a.centcom.mil.

12 'Arrangement for the Transfer of Detainees between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan', Kabul, 18 December 2005, available at http://www.forces.gc.ca/site/operations/archer/agreement_e.asp.

13 'Memorandum of Understanding between the Ministry of Defense of the Islamic Republic of Afghanistan and the Minister of Defense of the Kingdom of the Netherlands concerning the transfer of persons by Netherlands military forces in Afghanistan to Afghan authorities, 'concluded in late 2005, available at http://www.minbuza.nl/nl/actueel/brievenparlement,2006/02/kamerbrief_afghanistan_overzicht_van_bijdragenx_eu_inzet_volgens_razeb_en_verslag_van_de_londen_conferentie___bijlage_3.html.

14 Paragraph 1 of 'Standard Operating Procedures: Detention of Non-ISAF Personnel', SOP 362, Headquarters, ISAF, Kabul, 2nd ed., 23 May 2006. Copy on file with author.