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Study Abroad Research Context

Before I left for my semester abroad, I began defining my thesis topic with my advisors at Brown University. I knew that I wanted to write about international humanitarian law (IHL) and its ability to protect individuals, but I was not sure from what angle to approach my research. In France, I researched in various libraries, archives and ministries to gather primary source material on France's relationship to IHL. Primary source memoranda debating the legality of military actions and interrogation tactics as well as interviews conducted with detainees supplemented my analysis. Because the French case study was not as well documented in primary source evidence, I conducted interviews with French military personnel. I also drew upon relevant military literature, and reports from the International Committee of the Red Cross. The classes I took on comparative law were captivating; I had never before been exposed to many of the methods and ideas I encountered, and I worked hard to understand them.

As my French language skills progressed and my cultural understanding developed, I began to focus on the differences and similarities between the French and American legal systems. In April, photographs from Abu Ghraib prison in Iraq appeared in the French press along with allegations of torture in violation of the Geneva Conventions and broader IHL. In class a few days later, a professor asked me (since I was one of only two Americans present) how America could still call itself the protector of human rights. I had no answer, but spoke with him after class. Musing aloud, he reflected on the French-Algerian conflict, a situation, he said, that might have been similar. Meeting with him and other professors as often as possible, I plunged into research on the French-Algerian conflict using all available resources through Sciences Po, its connected and related libraries, especially the Institut du Monde Arabe (the Institute of Arab Studies) where I was able to find books and documents that seemed unavailable anywhere else. I returned to

France in January 2005 as my project was nearly complete to interview both those who fought in the conflict and the Inspector-General of the Ministry of War Veterans, a professor whom I had met at Sciences Po who specialized in the political memory of war.

The thesis I completed discusses the relationship of liberal democratic countries to IHL legislation. The comparison it makes between the United States and France was formulated during my time abroad. When I realized that noncompliance with international humanitarian law was not specific to one state, but a difficulty that plagued the international system as whole, I developed a passion for finding better ways to protect individuals with international legislation intended, which became the focus of my research.

Justifying Torture: Explaining Democratic States' Noncompliance with International Humanitarian Law[†]

Torture, Humanitarian Law and Democracies

Regarding the rights of prisoners of war, the principle specifying that prisoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them, should be borne in mind. Prisoners of war are entitled in all circumstances to respect for their persons and their honour.¹

Someone else asked me, "Do you believe in anything?" I said to him, "I believe in Allah." So he said, "But I believe in torture and I will torture you." . . . Then they handcuffed me and hung me to the bed. They ordered me to curse Islam and because they started to hit my broken leg, I cursed my religion.²

On June 28, 1951, France ratified the 1949 Geneva Conventions, which prohibited the torture of prisoners of war.³ On August 2, 1955, the United States of America ratified the same document. Between 1954 and 1962, France fought a war against Algeria, which sought its independence from colonial rule. From September 11, 2001 until the present, the United States has been engaged in what its government has termed "The Global War on Terror," which has involved wars in Afghanistan, Iraq and holding detainees for interrogation at Guantanamo Bay. Although the two cases must be distinguished from one another based on different situational, ideological and historical characteristics, there are critical commonalities. During the French-Algerian War, in order to obtain information, the French army employed violent interrogation tactics, as documented both by those interrogated and by their interrogators. During the Global War on Terror, in addition to graphic photographs, came witness accounts of the maltreatment detainees had endured at the hands of the US military. These actions amounted to torture as defined by the international law that bound both France

[†]*Editor's Note:* Emily's Kanstroom's article as printed here is a much-condensed form of the original thesis paper. Due to space limitations, this version of her work concentrates on the analytical arguments she presents. The original paper also presented fully documented, historical case studies, which are summarized here.

and the United States. Both states had signed relevant legislation, domestically and internationally, agreeing with the rest of the international community that torture should be banned. In the conflicts in which they were engaged, however, they set aside their legal and moral obligations to the prohibition against torture and tortured enemy prisoners of war.

This study focuses on two distinct research questions: first, what explains the rationale by which France and the United States, two democratic states, violated international and domestic law by torturing prisoners of war? Second, how did these two states justify this noncompliance?

I argue that France and the United States explained their actions in violation of international humanitarian law (IHL) in three ways. First, both states engaged in practices that amounted to torture where such actions seemed to expedite victory in a conflict in which their nationals and their homeland were in danger, an argument I call “the security benefits of torture.” Second, in breaching their legal obligations, neither state expected repercussions for their actions at a sufficient level to induce compliance.⁴

In addition to the first two explanations for the behavior of these states is a third explanation, an argument I term the “identity of the opponent.” This argument is a departure from conventional literature on compliance. Both France and the United States determined their adversaries (the Front de Libération Nationale and al Qaeda respectively) to be individuals who did not belong in the community of “civilized” states. The identity of those detained by France and the United States meant that, to both states, the detainees fell outside the protections guaranteed by international law, making it possible for two democracies to set aside their proclaimed values and legal obligations and torture detainees for information.

Although the explanations for state actions are similar, the two states justified their actions quite differently. While the French government engaged in a process of disavowal and denial, detaching itself as much as possible from the actions of its army, the US government made every effort to justify its actions through a legalistic approach, determining that neither international nor domestic legislation in fact applied. It sought to draw fine legal distinctions, distinguishing its actions from those that would be illegal, and blaming the violations on “a few American troops.”⁵

This article engages the question of how international humanitarian law (IHL) operates or fails to operate in constraining state actors. By focusing on the explanations and subsequent justifications for violations of IHL invoked by two of its most prominent creators, this article illuminates some of the challenges IHL faces today in ensuring state compliance.⁶ Enforcing the codified standards

of behavior inherent in international humanitarian law, has been difficult. The International Committee of the Red Cross (ICRC) has remarked on a “disturbing decline in respect for international humanitarian law, particularly as regards the treatment of prisoners of war...”⁷

International Condemnation of Torture

International and domestic legislation have condemned torture as unacceptable behavior on the part of any state.⁸ Moving beyond codified treaty law, torture has been condemned in customary international law; it has attained the status of a “peremptory norm of general international law,” or *jus cogens*.⁹ Where *jus cogens* norms exist regarding a particular crime, even if a state is not a party to any codified international legislation on that point, it is obliged to punish perpetrators. The creation of a universal mandate of punishment indicates the level of contempt the international community harbors for such heinous crimes.¹⁰

International Legislation Prohibiting Torture

International legislation against torture began notably with the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on December 10, 1948,¹¹ which states: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”¹² The 1949 Geneva Conventions banned “violence to the life, health and physical or mental well-being, particularly: murder, torture in any form, whether mental or physical, corporal punishment, mutilations” as well as “outrages upon personal dignity, in particular humiliating and degrading treatment...”¹³ France and the United States ratified the document in 1951 and 1955 respectively. Subsequent to the Geneva Conventions, the International Covenant on Civil and Political Rights entered into force on March 26, 1976.¹⁴ France signed the document on February 4, 1981 and the United States ratified it on September 8, 1992; Articles 7 and 10 of the document respectively prohibit “torture or cruel, inhuman or degrading treatment or punishment” and insist that “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment “desiring to make more effective the struggle against torture...throughout the world” came into effect on June 26, 1987.¹⁵ This legislation was not in effect during the French-Algerian War, but the United States signed the document six years prior to the start of the Global War on Terror, on October 21, 1994.

Domestic Legislation Prohibiting Torture

Both the United States and France have strong domestic legislation against torture. The United States considers itself bound to prevent “cruel, inhuman or degrading treatment or punishment” (as the Convention Against Torture mandates in Article 16) only insofar as this term means the same as it does in the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States. This deference to domestic law, however, hardly detracts from US obligations. In the United States, a federal anti-torture statute, enacted in 1994, mandates the prosecution of any US national or person present in the United States who, while outside the United States, commits or attempts to commit torture.¹⁶ Two years later, the War Crimes Act of 1996 made war crimes as defined by the 1949 Geneva Conventions a criminal offense for US military personnel and US nationals; this includes violations of common Article 3 to the Geneva Conventions, which prohibits torture.¹⁷ Thus, the United States has historically exhibited a strong domestic as well as international commitment to prohibiting torture.

Legislation against torture is also part of French domestic law. According to Article 222-1 of the Code pénal, torture will be punished by fifteen years in criminal reclusion.¹⁸ In 1954, France (like the United States) was under the obligation of its penal code, in addition to its international obligations.

Using the State Perspective to Strengthen IHL

Conventional wisdom on state compliance with IHL focuses on four broad categories of arguments: normative arguments, power-based arguments, problem-solving or constructivist arguments and regime type or enmeshment arguments. Political scientist Sonia Cardenas identifies “one prominent gap” in the literature on the effects of international human rights on state behavior.¹⁹ This gap, she says, is “the continued inability to account for why states sometimes resist international human rights norms, even when the conditions for compliance appear propitious.”²⁰ To remedy this problem, she calls for, among other solutions, the incorporation of studies of comparative politics into these analyses of state behavior. Although the conditions for compliance in the two cases I analyzed were not necessarily “propitious,” this article responds to the call for comparative political assessments of state behavior. Drawing on the extant literature on compliance and the traditional perspectives within which it has been analyzed, I move beyond these traditional explanations of state behavior by contributing an analysis emphasizing ideology and notions of identity for two democratic states.

As exhorted by international law scholar Michael Byers, this study is theoretically and analytically interdisciplinary.²¹ It unites international relations theory with legal theory, analyzing the case studies from legal, philosophical and political perspectives to draw conclusions, providing a theoretical basis for improvements in IHL. This article's analysis of state behavior as well as its focus on the psychological and sociological argument concerning the "identity of the opponent" distinguish this study from others in the field.

State Compliance with International Law

The existence of international law raises critical questions about how allegedly sovereign states in the Westphalian system²² can be bound by some law "that has not been generated, is not interpreted, and cannot be enforced by a centralized, legitimate authority."²³ International law and specifically international humanitarian law, may have the "status of law," but does international humanitarian law have all of the necessary enforcement mechanisms and obligatory powers that make a legal regime binding?²⁴ The continued existence of international legal regimes and conventions depends on the ability of international law to both bind and protect actors in the international system. The limited punitive mechanisms in international law make state behavior critical to universal and continued compliance.

This section examines the conventional wisdom on what factors contribute to state compliance with international law, how *states* view their obligations to comply with IHL.

Theories of State Compliance with International Humanitarian Law

Scholars have identified the following methods of enforcing state compliance: diplomatic recourse, reprisals, the prosecution of war crimes, hostage-taking and claims for compensation.²⁵ As the two case studies in this thesis indicate, however, despite existing mechanisms of enforcing compliance, states *do* violate international humanitarian law. The international community, thus, must look further in determining explanations for state noncompliance and the resulting atrocities committed.

Based on syntheses of previous approaches, I propose four categories of explanations: Realism or Power Compliance, Rationalist or Interdependence Compliance, Domestic Level Compliance, and Normative Compliance. I argue that not only are some of these conditions more salient than others, that is, more difficult to ignore from the state's perspective, but also that no previous approach has adequately taken into account the argument regarding the "identity of the opponent."

Category I: Realism or Power Compliance

In the realist view, international law is inherently weak because it lacks real or effective enforcement mechanisms. Supported by “statist” or state-centric theories regarding the primacy of the sovereign state, realists predict that states determine when to comply with international law based on an analysis of the gains and losses that will incur.

Realist theorists believe that state actions are defined by two limiting factors: a state’s self-interest and its power to pursue that self-interest.²⁶ The decentralized nature of the international legal system and its lack of enforcement mechanisms mean that the observance of law is often largely at the whim of the states. State power confers a legitimacy and relevance on the international system, encouraging other, weaker, states to comply with the legal regime endorsed by the powerful state. If the noncomplying state *is* the powerful state, however, this argument lacks explanatory power.

In realist theory, there is room neither for an international centralized authority, nor for an international judicial body. States are the principle actors, and their main focus is on their own security.²⁷ The sovereign state model thus often proves antithetical to the protection of humanitarian law and human rights, as scholar Hedley Bull argues.²⁸ The protection of the sovereign state coupled with the general lack of punitive enforcement mechanisms may thus lead to noncompliance. In the case of torture, the realist argument would suggest that, to states, the benefit of protecting their country or their nationals outweighs the costs of committing torture. In this way, state action is viewed as “self-defense of the nation,” an argument invoked notably by the United States in its Global War on Terror. Statistically, armed conflict is one of the leading conditions under which states violate human rights, especially where any armed group challenges state authority.²⁹ As I show in my case studies, this argument, which I call the “security benefits of torture” argument, has support based on the actions of both France and the United States.³⁰

Category II: Rationalist or Interdependence Compliance

Liberals argue that states, even if sovereign, exist in an “international society” where norms, rules and law matter.³¹ Liberal theory rests on three core assumptions: the primacy of societal actors (individuals and international groups), the state as a representative not solitary actor whose duty it is to represent the interests of domestic society and, finally, that state behavior is determined by the configuration of the international system resulting in interdependent state entities.³² Unlike the realist notion of rigid sovereignty, liberals argue that

states often knowingly surrender sovereignty or in other ways compromise their own self-interest in accordance with the demands of domestic groups or other representative institutions.³³

This view of a benevolent and responsive state leads liberals to view state sovereignty and international law as mutually reinforcing; state sovereignty fosters and supports the emergence of regulatory international law, which then protects sovereign states from each other. Valuing the role of international institutions in regulating interstate relations, liberals further argue that punitive mechanisms do exist in the form of disapproval and loss of respect, or in concrete manifestations of disagreement, like the halt of trade with an offending state.

Based in liberal theory, rational choice models have been expanded into the theory that states attempt to avoid a result (economic, social or environmental), which would be suboptimal both for the state and for international society (in contrast to the realist view).³⁴ Political scientist Beth Simmons presents two mechanisms that rational-functionalists argue encourage compliance: reputation and reciprocity.

Though some authors have argued that the threat of reputation damage is more salient for developing countries that want to be seen as part of the law-abiding community, reputation may be equally important for countries that believe themselves already to be a part of such a community. Elaborating on their notion of “norm cascades,” scholars Martha Finnemore and Katherine Sikkink identify socialization as the dominant mechanism to ensure compliance with these established norms.³⁵ They argue that states “fashion a political self or identity in relation to the international community,” and as new norms arise, these states ‘peer pressure’ each other into adoption. To what extent these concerns matter in terms of compliance, however, remains unproven.

The principle of reciprocity³⁶ enhances state compliance when states expect their interaction with another state or group of states will be repeated.³⁷ States will, in theory, treat others as they wish to be treated based on the knowledge that if they misbehave or mistreat their opponent, in the next interaction, they may expect to see the same behavior from their opponent.³⁸ This, however, becomes difficult if governments do not see their opponent as one who will reciprocate under any conditions. The identity of the opponent is thus critical to the viability of reciprocity as a theory. As political scientist Robert O. Keohane argues, “[g]overnments certainly cannot be counted on to behave benignly toward one another on the basis of a vague sense of global public interest.”³⁹ Based on the two case studies, I question the strength of reciprocity as a mechanism of controlling state behavior.

Category III: Domestic Level Compliance

Compliance Based on Regime Type

International security scholar John M. Owen argues that “...liberal ideas cause liberal democracies to tend away from war with one another, and [these] same ideas prod these states into war with illiberal states.”⁴⁰ The claim that liberal states exhibit a general respect for individual freedom and “peaceful intentions” in their foreign policy is, however, hardly axiomatic. Although liberal theory predicts a general cooperation among states, this does not ensure peace.⁴¹ The case studies I examine are examples of this bellicose action, under which individuals from illiberal states suffered at the hands of liberal ones. If regime-type arguments like those postulated by Cardenas are accurate,⁴² the actions of both France and the United States are severe counter-examples. It has previously been argued that democracies perpetuate peace; their systemic characteristics may also make them more likely than other types of regimes to “revere law, promote compromise, and respect processes of adjudication.”⁴³ The case studies examined here do not support this claim.

Enmeshment

Simmons identifies two mechanisms that will strengthen the relationship between national law and international law. First, the incorporation of international legislation into domestic law further increases the possibility of compliance, according to Robert O. Keohane, Andrew Moravcsik and Anne-Marie Slaughter’s conceptualization of “embeddedness” or “enmeshment” between international norms and domestic structures.

Second, once international obligations become part of domestic law, domestic interest groups begin acting to ensure compliance; this capability is a notable quality of democracies as opposed to other types of regimes. Given this body of scholarly thought, the case studies I analyzed assume an even more central role in contributing to theories of compliance. These are two democracies that not only incorporated international legislation on torture into their domestic systems, but also adopted such legislation domestically *prior* to signing the international accords. In engaging in torture, they violated both sets of law.

Category IV: Normative Compliance

Focusing on the centrality of norms and identity to national and international interests, constructivists reexamine the realist notion of sovereignty, arguing that its components are fluid, not permanent. These theorists thus focus on the creation of norms and law, focusing on *why* and *how* such standards

came to exist in order to preserve the possibility of engineered transformation of these laws.⁴⁴

Since IHL is often conceptualized as a codification of preexisting norms and sentiments regarding the treatment of human beings, it is logical that there are norms prescribing compliance. Norms are defined, according to Andrew Hurrell, as “regularities of behaviour among actors.”⁴⁵ According to Jean Pictet, a member of the International Committee of the Red Cross and a noted scholar of humanitarian law, international humanitarian law exists where moral concerns have been codified into law.⁴⁶ The notion of some “moral force or compulsion” lies at the heart of a more constructivist approach put forth in 1977 by Hedley Bull.⁴⁷ Bull explains that shared and accepted norms and beliefs are critical to an effective international society; without a shared morality, law is ineffective. Bull took this argument even further, arguing that state boundaries were no longer as rigid as previously thought, but that an international community was arising, transcending the sovereign state, nourished by universally accepted norms. It is a certain understood morality that allows for the creation and observance of constructed legal regimes.

Analyzing Bull’s theory, Friedrich Kratochwil and John Ruggie point out that in order to determine the centrality of norms to the observation of rules, it is necessary to analyze the rationales proffered by states to justify their behavior.⁴⁸ Such justifications, these scholars argue, yield information about what states perceive a particular normative regime to be. Compliance and noncompliance thus become subjective; if states perceive an international norm to lack legitimacy, they can easily justify a breach of that norm. In an attempt to overcome the subjective nature of normative compliance, Jeffrey Legro has proposed variables by which to consider the relative strength of a norm.⁴⁹ He concludes that norms that are more straight-forward, likely to be lasting, and widely-endorsed are those that are likely to be observed. By this logic, a norm against torture of other human beings should be such an observed norm. In these case studies, normative arguments would suggest that the recognized norm against torture would prevent both states from torturing prisoners of war.

The Identity of the Opponent: A New Approach

If the opponent is not perceived as an equal, but instead as antithetical to a state’s moral values and defining ideology, what impact does this perception have on state behavior? Cardenas argues:

[...] anywhere that powerful groups see others as less equal than themselves, the stage is set as discriminating against certain members of society and violating the personal integrity of a wide range of groups: political opponents...adherents of certain ideologies or religious groups...and anyone suspected of terrorism or other illicit activity.⁵⁰

I argue that there is a category of discourse, comprised of three separate perspectives, that sets forth an “exclusion based on identity” theory regarding state compliance with IHL. A first perspective emphasizes the critical role of psychological “grouping” in determining state behavior. A second perspective emphasizes the notion of “civilized states,” or conduct that must conform to a certain level of “civility,” meaning modernity, for it to be acceptable in the international community. A third perspective emphasizes socio-psychological arguments about the creation and image of “the other.” Although theorists have already examined psychological and legal motivations for violating human rights using individuals as subjects, I argue that the same conditions are applicable to an analysis of state actors.⁵¹ Taking these arguments conjunctively, I posit a new category, which I term the “identity of the opponent” argument regarding state noncompliance with IHL.

Concerning the first body of theory, there is much to be said for the existence of a certain community of “law-abiding” states, generally liberal democracies, who not only generally protect human rights, but also intervene when other states external to this community violate international law. Closely related to the arguments about the importance of regime type, this argument must be expanded to include a body of social and psychological “group theory.” In this theory, people (and by extension states) form “in-groups” to which they feel they belong and in which they find others to be similar to themselves. Those external to an in-group are viewed as outsiders in that they are perceived to be outside one’s own moral code, belief and value systems and different from one’s own defining ideologies. Applying this theory to the international community, I argue that states perceive that they have significantly reduced obligations to outsider states than to ‘in-group’ members.

The second body of theory in my synthetic argument stems largely from Gerrit W. Gong’s theory of the central role of ‘civilization’ in international society. Gong argues that in the nineteenth century, “overtly religious (Christian) and culturally or geographically limited (European) definitions of international law” became “based more on secular and universal ‘civilization.’”⁵² States that did not meet these requirements were not considered functional legal bodies

and were not included in any notion of the international sphere; they fell strictly outside the international legal community. Although the twentieth century saw the decline and possible vanishing point of this standard, Gong argues that it was replaced by at least two other standards, that of “non-discrimination” and that of human rights. This latter has even been recognized as a legal standard⁵³ Declared and behavioral acceptance of human rights treaties remains a prerequisite for acceptance into the international community both legally and sociologically. Prior to World War I, along with a standard of ‘civilization’ came a standard of ‘civilized warfare,’ or the methods by which warfare was to be conducted between ‘civilized’ states. There were rules regulating a soldier’s right to kill when engaged in conflict with other ‘civilized’ states, rules closely connected to the generally accepted notion of “right and wrong.”⁵⁴ This standard has arguably been incorporated into treaties like the Geneva Conventions. If soldiers viewed their opponent as excluded from the ‘civilized’ international community, and also that the general laws of war are inapplicable to nationals of this state because the state does not meet certain standards, the soldiers may believe on some level that, for example, in torturing individuals, they are not in fact violating international law.

The dehumanization and rejection of the “other” because they beyond the scope of one’s community is a psychological argument, which has already been transposed onto political theory. Psychologically, there are two underlying theories. First, the notion of cognitive stability or consistency, one which holds that individuals seek to maintain their beliefs when such beliefs are challenged by “discrepant information.” In so doing, they act irrationally, rejecting or invalidating cognitively dissonant information. The second theory builds on this rigidity, making any formed image of the “other” permanent. As Janice Gross Stein, professor of political science who has previously applied psychology to studies of conflict resolution and negotiation, explains:

Insofar as enemy images contain an emotional dimension of strong dislike, there is little incentive to seek new information. Stereotyped images generate behavior that is hostile and confrontational, and increase the likelihood that an adversary will respond with hostile action...Research has established at least three different schemas of enemies: imperials, barbarians and degenerates.⁵⁵

In both case studies, this identity argument suggests that both states ideologically viewed their opponent as outside the civilized community and thus unworthy of international protection.

Two Case Studies: The French Algerian War and the US Global War on Terror

The previous section analyzed the conventional wisdom on state compliance with international law. Although these theories analyze state behavior, they do not focus on the justifications offered by states for their illegal actions. What follows are summaries of two case studies, examined at length and in depth in the original thesis paper (see Editor's note) in light of the conventional theory and the synthetic and interdisciplinary theoretical addition I postulate, the "identity of the opponent" argument.

The first case is the French-Algerian War (1954–1962). The French-Algerian War was not classified as an official "war" by the French until 1999. It was, however, an international armed conflict, and, as such fell within the purview of international legislation. The second case is the United States' "Global War on Terror," which, for my purposes, comprises three parts: Operation "Enduring Freedom" in Afghanistan, the US detention center at Guantanamo Bay, and Operation "Iraqi Freedom" in Iraq.

In the Global War on Terror, I focused on the detention facilities in Afghanistan, at the Abu Ghraib prison in Iraq, and at Guantanamo Bay Naval Base in Cuba. The detentions at Guantanamo Bay were critically distinguished by the fact that, in February 2002, the US government determined that the Guantanamo Bay detainees were *not* prisoners of war in terms of legal status. By refusing to grant *legal recognition* of the detainees as prisoners of war, the United States was able to argue that they fell outside the scope of the Geneva Conventions regarding prisoners of war. This fact, instead of detracting from the relevance of this case study in fact makes it more relevant. "Prisoners of war" are defined as "combatants who fall into enemy hands."⁵⁶ In a perversion of this definition, the US government classified its detainees as "enemy combatants."⁵⁷ Although this case is unlike the others (Abu Ghraib, Afghanistan and the French-Algerian War) in that armed conflict did not occur at Guantanamo Bay, it is nonetheless instructive in that it provides insight into the US government's attempts to justify its actions, and the measures the United States took to distinguish its actions from those that *would* breach IHL. I ended my examination of the US case in January 2005. At this point in time, memoranda from the Bush administration had been made public explaining how and why the administration justified its actions and charges against those soldiers directly responsible for abuse of detainees had been filed. Analysis of state justification is thus possible at this point, although the Global War on Terror and military action in Iraq were ongoing.

I analyzed each case in the context of each country's previous stated and behavioral commitments to IHL, as well as the extent to which there were either domestic or international outcries against such action. My analysis further included the extent to which states punished relevant parties, refused to accept responsibility for their actions or attempted to justify them. Primary source memoranda and interviews conducted with detainees supplement the analysis of the US case study. Because the French case study was not as well documented in primary source evidence, I conducted interviews with French military personnel and drew upon relevant literature from the military and the International Committee of the Red Cross. I based my analysis of the French case study on implicit historical and political factors combined with published accounts, while the analysis of the US case focuses on explicit justificatory statements and witness testimony. The French and US cases make a valid and instructive comparison. These are precisely the states who *should*, given their histories and states ideologies, be supporting or at the least complying with IHL regimes.

The French-Algerian War

The French counter-insurgency war in Algeria (1954–1962) led to accusations of torture on the part of the French army, which remain unresolved. The French government has neither explained nor attempted to justify what occurred. It has instead maintained a fairly stoic silence on the topic. Even as late as 2004, intellectuals were calling for an end to the denial. At present, however, that call still goes unanswered.

Accusations of torture began to appear in the French press as early as 1955. As a result of ensuing debate in the National Assembly, Inspector-General Roger Wullaume completed a report on the orders of Interior Minister François Mitterrand and Prime Minister Pierre Mendès France, the former condemning these “wrongful, distressing, detestable practices.”⁵⁸ The stated purpose of the Wullaume Report report, which was completed and delivered on March 2, 1955, one month after it was commissioned, was threefold. Wullaume was to determine:

1. The type of (mal)treatment that occurred (*les sévices*)
2. Who had authority over the treatment of those detained (*les responsabilités*).
3. The usefulness, under certain conditions, of this maltreatment (*l'utilité dans certaines conditions des sévices*).

Although Wuillaume was able to describe various severe interrogation tactics, since the instructions he received prior to writing his report made no mention of the word “torture,” he never defined the word, identifying practices only which seemed to be excessively cruel. For example, he writes, “the procedures of the water-pipe and electricity, when used with caution, would produce a shock with a much more psychological effect than physical, and therefore that excludes all excessive cruelty.”⁵⁹ Wuillaume maintained that “Maltreatments have been committed; certain ones are truly serious and have the character of true tortures.”⁶⁰ However, he ultimately determined that no attempt should be made to assign responsibility, saying “the investigation of individual responsibilities is an extremely difficult investigation. And besides, I consider it inopportune.”⁶¹ The reports had little or no impact on either government or military action, but provided documentary evidence that the government had at least conducted an investigation into the allegations.⁶²

The Wuillaume Report in fact predates the high-tide of torture allegations, which came during the 1957 “Battle of Algiers.” As the allegations mounted in the press and became increasingly public, on March 27, 1957, Governor-General Guy Mollet spoke in the National Assembly. He said, “I am sure, Ladies and Gentlemen, that none of you would commit the injury of thinking that the government, the army or the administration could want and organize torture.” He continued, saying that any contravention of the rights of man or respect for his dignity was forbidden.⁶³ By October of 1957, however, 5,000 people had “disappeared” from Algiers.⁶⁴

Although there is a paucity of documents either confirming or denying governmental knowledge of the atrocities, the evidence that the French government was aware of the torture greatly outweighs that suggesting it might have been ignorant of it. In addition to the Wuillaume and other reports and the complaint and testimony of Djamila Boupacha, the government also had all of the published material, including books, articles, and brochures affirming that torture had taken place.

In the aftermath of the war, as Talbott wrote, “On the subject of Algeria, a great silence fell over the land.”⁶⁵ In the forty-three years that have elapsed since the signing of the Évian Accords that ended the conflict, a general secrecy and silence has surrounded the war. In 2000, Henri Alleg said in an interview, “During all these years, we have cultivated ignorance and lies.[...] The generations of today have a right to the truth.”⁶⁶

In 1999, the official policy of silence was disturbed by two trials, those of Maurice Papon and Paul Aussaresses, which brought the atrocities committed in

Algeria into focus. The former was sentenced in 1998 to ten years in prison for complicity in crimes against humanity, but then freed in 2002 by an Appeals Court decision, which cited his ill health. Because general amnesty laws passed at the end of the war made prosecution difficult, human rights groups overcame this difficulty by filing suit based on the book he wrote and charging him with “complicity in justifying war crimes.” Aouissou was fined along with his editors.

Although Aouissou’s punishment was negligible compared to the severity of his crimes, his trial and his testimony in conjunction with that of Papon do have historical merit. The proceedings inspired victims of the torture to come forward with accounts, and thus reopened discussion to some degree. In the book for whose content he was convicted, General Aouissou wrote, “Before turning the page, the page must be read, and therefore, written.”⁶⁷ The page of French history on the Algerian war cannot be turned; it awaits governmental acknowledgement before it can, properly, be written. With public debate so recently reopened, governmental recognition and response may still come.

The US “Global War on Terror”

On September 11, 2001, between 8:45 a.m. and 10:10 a.m., four American airplanes, hijacked by terrorists, crashed into both towers of the World Trade Center in New York, the Pentagon in Washington D.C., and in a field in Somerset County, Pennsylvania, resulting in 2996 deaths.⁶⁸ At 1:04 p.m., President George W. Bush addressed the American people from Barksdale Air Force Base in Louisiana, saying, “Make no mistake, the United States will hunt down and punish those responsible for these cowardly acts.”⁶⁹

The United States’ reaction to the attacks planned and executed by the Muslim terrorist network, al Qaeda, came in the form of a multi-front war against non-state actors—the Bush administration has officially called it “the Global War on Terror,” (GWOT). In the course of this war, the US army engaged in combat operations in Afghanistan and Iraq, interrogating prisoners in both countries, as well as detaining suspects at the Naval Base at Guantanamo Bay, Cuba.

On September 14, 2001, President George Bush proclaimed a National Emergency by Reason of Certain Terrorist Attacks.⁷⁰ On November 13, 2001, he signed Military Order No. 1. This document authorized the detention of any individual who, at the relevant time, “is or was a member of the organization known as al Qaeda; (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism...” These suspects were to be detained “at an appropriate location designated by the Secretary of Defense outside or within the United States.”⁷¹

US bombing of Afghanistan in “Operation Enduring Freedom” began on October 7, 2001. The initial goal of the operation was to remove the Taliban government from the country and replace it with new leadership. On December 22, 2001, US authorities transferred sovereign power of the country to an Interim Authority, Hamid Karzai. Karzai was inaugurated on June 19, 2002, ending international armed conflict between the United States and Afghanistan. US forces remained, however, with the permission of the Karzai government. Following US entry into Afghanistan, between 35,000 and 40,000 people were arrested and detained, mostly by the Northern Alliance.⁷² These arrests demonstrate a second US goal: the disruption and destruction of terrorist cells united by the global network al-Qaeda. Those arrested were often given no reason for their detention, but were initially sent to facilities in Bagram and Kandahar, Afghanistan.

Overt international critique of the US’s actions came largely from the International Committee of the Red Cross (ICRC). The only response to the ICRC, however, was a letter dated December 24, 2003 and signed by Brigadier General Janis Karpinski (who oversaw Abu Ghraib). Acknowledging the ICRC’s concern regarding US denial of access to certain prisoners, the letter only says: “Improvement can be made for the provision of clothing, water and personal hygiene items.”⁷³ In response to ICRC concerns, the US may have deliberately hid “ghost detainees;” by keeping detainees off the prison rolls, they were effectively hidden from ICRC investigators—a policy approved by then-Secretary of Defense Donald Rumsfeld.⁷⁴ Furthermore, the authors of the Schlesinger Report wrote:

[t]he Panel also believes the ICRC, no less than the Defense Department, needs to adapt itself to the new realities of Conflict, which are far different from the Western European environment from which the ICRC’s interpretation of Geneva Conventions was drawn.”⁷⁵

In June 2004, pressed on the authorization of certain interrogation tactics, President Bush responded, “The instructions went out to our people to adhere to the law. That ought to comfort you.”⁷⁶ That same month, the top United Nations’ human rights official declared that the mistreatment of Iraqi prisoners could constitute a war crime on the part of the United States, and called for “the immediate naming of an international figure to oversee the situation.”⁷⁷ This was never done.

The domestic response to US actions was characterized by outrage at the abuse of detainees, and demands for governmental accountability. It included action taken by journalists, lawyers and human rights organizations. Richard Cohen of *The Washington Post* wrote that “[t]he Bush administration has shamed us all, reduc-

ing us to the level of those governments that also have wonderful laws forbidding torture, but condone it anyway.”⁷⁸ Among other actions taken by human rights organization, the American Civil Liberties Union and Human Rights First filed a federal lawsuit against Secretary of Defense Rumsfeld on behalf of eight men who were tortured by US forces in Iraq and Afghanistan. Lucas Guttentag, lead counsel in the lawsuit *Ali et al. v. Rumsfeld* and director of the ACLU’s Immigrants’ Rights Project, said, “Secretary Rumsfeld bears direct and ultimate responsibility for this descent into horror by personally authorizing unlawful interrogation techniques and by abdicating his legal duty to stop torture.”⁷⁹

The US government never faced international prosecution, though individuals in the military were held accountable.⁸⁰ On March 13, 2003, Jay S. Bybee, author of the memorandum that justified US interrogation practices that amounted to torture as defined by domestic and international law, was confirmed as a federal appellate judge for the US Court of Appeals for the Ninth Circuit. Since the emergence of the photographs from Abu Ghraib, President Bush has been re-elected for a second term and Alberto Gonzales has been named Attorney General. If these men feared punitive repercussions, either internationally or domestically, they have experienced none as individuals, though their actions are certainly not without repercussion for the reputation of the United States as a protector of human rights.

French President Jacques Chirac commented, “Yes, we should fight terrorism, but we should not forget the principles on which our civilization rests, such as human rights.”⁸¹ President Chirac’s statements, given the French-Algerian War, are not without hypocrisy. How are these two states similar in the explanations they invoked for noncompliance with IHL? Did they provide similar justifications? Having examined both French and US actions, I turn now to a comparative analysis of both states’ explanations and justifications for their noncompliance with IHL.

Justifying Torture: An Analysis of State Behavior

What explains why France and the United States, two democratic states, violated international and domestic law by torturing prisoners of war? How did these two states justify this non-compliance?

My findings indicate the dominance of three explanations for state actions. First, both states engaged in practices that amounted to torture where such actions seemed to expedite victory in a conflict in which their nationals and their homeland were in danger, the “security benefits of torture” argument. Second,

any concerns France and the United States had over domestic or international repercussions, including reputation damage, were outweighed by the desire for conflict resolution. Third, both states believed that they had a certain right to torture the individuals they did because of the individuals' identity; the "identity of the opponent" argument. My findings indicate the significant explanatory power of this argument, which has been largely neglected by conventional literature on the topic.

The respective methods of justification invoked by France and the United States. are similar for both states, however, the two states subsequently justified their actions quite differently. The difference in the two states' methods of justification is the product of the differences in civil/military relations between France and the United States, as well as of the political environment each state faced.⁸²

Explaining the Noncompliance of Liberal Democratic States with IHL

France

Security Benefits of Torture

The French decision to use torture was based not only on the desire to end the conflict as swiftly as possible, but also on the type of conflict in which France was engaged. The counter-insurgency war the French fought in Algeria was frustrating for the French government and military. They perceived Algeria not as a colony, but as a French department, an integral component of the French mainland, with many inhabitants identifying themselves as French, not Algerian. Both the government and military, however, sought an end to the conflict, which sapped French resources, soldiers and morale. The type of fighting, guerilla warfare, in which the French were engaged compounded the frustration felt by both the government and the military. Their opponent, the FLN, employed terrorist tactics to mount an insurgency. Because the FLN was a non-state actor, however, France had difficulty responding militarily. The fighters of the FLN had not signed any international conventions that might govern their behavior. The French could not, for example, attempt to negotiate with the head of state of the FLN as they might have done in a conflict with another state. In fact, the French were torturing captured fighters just to find out the identity of the FLN's leaders. According to authors Martin S. Alexander, Martin Evans and J.F.V. Kreiger:

[...]Algeria witnessed a weakening of army morale accompanied by military frustration at constraining 'rules of engagement'. Like other counter-insurgency wars, Algeria was a conflict without front lines and without uniformed regular opponents. This increased the propensity of certain French units to perpetuate atrocities...⁸³

Even as the French army engaged in increasing atrocities, the French government provided little if any guidance to the army in terms of the limitations on interrogation of detainees. When the Special Powers Law was passed, the army understood its duty to be providing a rapid end to the conflict by pacifying the terrorist insurgency that was killing innocent civilians. The comments notably of General Aussaresses indicate that, to the military, French security for their nationals as well as for the French department of Algeria, was dependent on the elimination of the FLN. If information could be gained from a captured FLN fighter, it was far more important to obtain the information than to abide by any laws. Aussaresses wrote:

By demanding that the military reestablish order in Algiers, the civil authorities had implicitly acknowledged the principle of summary executions. When it seemed to us useful to obtain more explicit instructions, this principle was clearly reaffirmed.⁸⁴

When the government became aware of the torture that was occurring, it remained silent instead of objecting to the military's practices. The French government and military thus set aside their legal and moral obligations as a liberal democracy and party to the Geneva Conventions in order to, more rapidly, end a nontraditional war that threatened French security.

Relative Importance of Expected Repercussions

Because of the separation between the civil state and the military in the French case, I analyze separately the repercussions that the two entities might have feared. As far as the army was concerned, it had been ordered to do what was necessary to maintain order. Colonel Bigeard in his 1959 conversation with de Gaulle did not believe de Gaulle meant that his order to stop the torture was to be taken seriously. The available evidence indicates that the military had been given no reason to believe it would be punished under national or international law. Although theoretically military officers should have been aware of the laws constraining their interrogations, the evidence in this case indicates that they believed their duty to the state meant that they needed to prioritize successful interrogation over these obligations.

The French government might have been concerned about both domestic and international repercussions. Historical evidence indicates that it limited the possibility of domestic repercussions by censoring the press and refusing to comment on accusations. The evidence does not indicate that the possibility of domestic outrage had any effect on the decision to torture prisoners; at no point did the government stop or even weigh the possibility of stopping such behavior out of concern for domestic response.

Scholars Martha Finnemore and Katherine Sikkink, among others, have theorized that the threat of international reputational damage may induce states to comply with certain norms.⁸⁵ Based on the lack of response of other countries, the French government, however, had no reason to expect any reputational damage. The paramount concern of other countries as publicly expressed was not the torture, but the granting of self-determination to the Algerian people. Although newspapers in America reported the accusations of torture all the way through the war, the largest international response came near the end of the conflict when de Gaulle advocated Algerian self-determination, a major shift in French policy, which other countries (notably the United States) supported. At a news conference on April 27, 1960, US President Dwight D. Eisenhower said to de Gaulle, referring to the policy of granting Algerian self-determination, "I endorse what you are doing and wish you well in its progress."⁸⁶ He made no reference to torture. It was not until the publication of General Aussaresses' book in 2001 and his ensuing trial, which stirred domestic and international sentiment, that any call for acknowledgment came.

Limited evidence indicates that the government did weigh the possibility of reputational damage. It is possible that reputational concerns led the government to respond publicly when the report of the ICRC, critical of French actions, appeared in *Le Monde*. Premier Michel Debré spoke on behalf of the government, saying that the government would "take the greatest account of the conclusions of the International Red Cross Committee," and that it was pursuing action designed "to make the operations in Algeria more humane each day."⁸⁷ After this statement, however, the government did not allow ICRC inspectors into its facilities for the rest of the year. This facet of the case study lends strength to the notion that fear of repercussions, especially of reputational damage, might induce a governmental *response*; it does not, however, support the claim that such threats induce *compliance*. There is no evidence that the emergence of the ICRC report convinced the French government to stop the torture or even to moderate it.

It is, however, important to note that any fear over reputational damage the French government had would have been blunted by the government's relative

uninvolvement in the torture; there is no explicit evidence that the decision to torture came from the upper echelons of the French chain of command. Although the fact that the government made the decision not to stop the torture and, subsequently, not to prosecute responsible parties indicates some complicity, the government was afforded a certain level of protection by its separation from the military. It was never forced to respond to accusations. This fact distinguishes the French case from that of the United States. The French government had no reason to expect international repercussions. At the rare moments when repercussions seemed possible, however, the threat was not enough to induce compliance.

United States

Security Benefits of Torture

With a stated purpose of globally eradicating terrorist threats, the Global War on Terror (GWOT) is a nontraditional war in the sense that it is being fought against non-state terrorist actors who must be sought out individually. As in the French case, there is no state against which the United States can direct a military response to defeat effectively their opponent. According to government and military officials, the way to expedite the end to this conflict was by successful interrogation. On October 11, 2002, Lieutenant Colonel Jerald Phifer, stationed at Guantanamo, wrote a memorandum lamenting the interrogators' lack of success. He wrote, "PROBLEM: The current guidelines for interrogation procedures at GTMO limit the ability of interrogators to counter advanced resistance."⁸⁸

In response to military concerns over inefficient interrogations, US officials set about redefining limitations on interrogation techniques and authorizing more severe approaches.⁸⁹ Much like the French interrogation of FLN operatives, US interrogation of captured al Qaeda fighters was designed to search out and destroy al Qaeda leaders, increasing US security. Unlike the French case, however, such tactics were explicitly authorized by the civil state. As evidenced by government authorized memoranda that advocated increasingly severe interrogation tactics, the United States' determination to end the conflict by eradicating terrorist cells that threatened the security of both the United States and US nations outweighed its concerns over its IHL obligations.

Relative Importance of Expected Repercussions

Unlike France, in the United States the civil state was not separated from the military. Instead, the two were intimately related, exchanging memoranda and information regarding the treatment of the detainees. Memoranda justifying the torture of detainees came from the highest echelons of the civil chain of

command. The government, therefore, could not remain silent regarding military actions. The US government, in authorizing the torture, had two separate issues to weigh in terms of repercussions; would the world find out, and, if it did, would the United States experience negative reprisals? Evidence of legal determinations indicates that the United States clearly weighed the reprisals it might suffer against its goals in the GWOT.

First, the choice of Guantanamo Bay as a detention facility suggests that the United States did take international opinion into account. Guantanamo Bay has been referred to as “the legal black hole;” it was chosen because the extent to which US laws would apply to the detention facility was unclear. Further shielding Guantanamo from international law was the declaration that those detained would not be entitled to the protections to which detainees in the United States are usually entitled. They were determined to be “unlawful combatants,” not “prisoners of war.” This indicates that the US government was concerned over international opinion and possible repercussions; it specifically set up facilities in a lawless zone and made sure the detainees held there would, at least in name, be outside relevant international law.

The issue of the opinion of other nations and reputational damage was also explicitly discussed in governmental memoranda. The threat of reputational damage, however, did not induce compliance.

Second, the United States engaged in a thorough legal analysis to determine the extent to which other nations could claim US actions were illegal. Diane E. Beaver, Staff Judge Advocate, specifically weighed the possibility of international judicial punishment in the International Criminal Court (a body not in existence during the French-Algerian war). Beaver pointed out that since the United States had never ratified the Rome Statute for the International Criminal Court, it would not be subject to international judicial punishment.⁹⁰ In terms of customary international law, a governmental Working Group on Detainee Interrogations in the Global War on Terror, concluded on April 4, 2003: “Customary international law does not provide legally-enforceable restrictions on the interrogation of unlawful combatants under DoD control outside the United States.”⁹¹ After analyzing the Eighth Amendment to the Constitution, the federal torture statute and relevant domestic and international issues, Beaver argued that current techniques did not violate the Eighth Amendment and that no analysis of international law was necessary since the Geneva Conventions did not apply to the detainees.⁹² Beaver’s conclusion is thus that the United States would not be held legally accountable. It could, however, still suffer reputational damage both domestically and internationally.

Demonstrating the fact that the United States was aware of the possibility of reputational damage despite its legal justifications, in a June 18, 2004 memoranda on interrogation techniques signed by Secretary of Defense Donald Rumsfeld, a cautionary note was added to the description of the “Mutt and Jeff” technique. “Mutt and Jeff” refers to the use of a team consisting of both a friendly and a harsh interrogator. The cautionary addendum, however, reads as follows:

Caution: Other nations that believe that POW protections apply to detainees may view this technique as inconsistent with Geneva III, Article 13 which provides that POWs must be protected against acts of intimidation. Although the provisions of Geneva are not applicable to the interrogation of unlawful combatants, consideration should be given to these views prior to the application of the technique.⁹³

The fact that the United States determined both what international punishment and what reputational damage it might suffer prior to authorizing certain techniques indicates that it did take into account the issue of international reputation (based on the opinion of other nations) and punitive repercussions. This evidence thus does not indicate that the issue of reputational damage was ignored by the US government, but that the perceived benefits to be gained by aggressive interrogations were deemed more important.

The “Identity of the Opponent” Argument

The “identity of the opponent” argument refers to the notion that an opponent’s identity prompts states that have overt commitments to certain standards of behavior to set aside these obligations. In the two cases analyzed here, the identity of the opponent as a “terrorist” belonging to a state that was outside the community of “civilized” states is critical to an understanding of the decisions made by France and the United States to engage in torture.

According to scholar Harumi Befu, there is a specific ideological process involved in dehumanizing, or, as he says, “demonizing” an adversary:

To demonize a human is to strip a person or a group of persons of moral pulchritude entirely, ascribing to them all immoral and evil attributes existing in society. Reducing a human to a subhuman or nonhuman demonic form is a drastic psychological process, often requiring special ideological justification. It is this reduction of humans to nonhuman beings which enables annihilation of the Other without guilt or remorse... The demonized Others are not only depicted as a threatening enemy and

violator of the fundamental values of one's community, they do not belong to humanity as defined by one's own moral standard.⁹⁴

I argue that France and the United States “demonized” the FLN and al Qaeda respectively, depicting them as the uncivilized “threatening enemy.”

**France: *La Mission Civilisatrice*
and the Role of Identity in the Conflict**

The French views regarding the identity of their opponent are predicated upon their perception and understanding of their own culture and country. Maran theorizes that the French actions in Algeria stemmed from two conflicting and subsequently deformed ideologies: *la mission civilisatrice* (the civilizing mission) and the “rights of man,” an ideological touchstone dating back to the French Revolution of 1789. The perversion of the civilizing mission in a misguided attempt to spread the ideology of human rights, according to Maran, is critical to an understanding of “*la torture*,” or the torture that occurred in the French-Algerian War. The combination of these two ideologies results in what I have called “the identity of the opponent” explanation for torture.

From the time France first colonized Algeria in 1830, the French notion that they were bringing civilization to an uncivilized group of heathens was always present. The ideology of *la mission civilisatrice* was an implicit indication that the Arabs were of an inferior race, and that the French were there to teach them to behave in a civilized fashion. Henri Alleg maintains that this ideology fed directly into the torture, allowing the military to commit atrocities with no qualms. In an interview conducted in 2000, he said:

Why were thousands of Algerians subjected to torture? What is primary is the system imposed by the colonial system and the colonists during the entire period of colonialism. It's colonization that must be denounced, the ignorance in which it kept its people, the constant injustice that it engendered...It's the entire system of racist colonial disdain that resulted in the torture in Algeria, and that drove a “military effort” with no problems of conscience.⁹⁵

The colonial ideology contributed to the process of demonization as explained by Befu, facilitating torture. Furthermore, Jean-Pierre Vittori, author of multiple memoirs and a soldier during the war, says that the reality was that France was drowning in a war during which everything was permissible in the name of bringing and defending “civilization.”⁹⁶ Trying to quell the rising tide of rebellion, the French army tortured for information.

When the French army tortured members of the FLN, they were not torturing people they viewed as equals to themselves. The chaplain of the 10th Paratroop Division, Père Delarue, called on the soldiers to defend the innocent people suffering at the hands of the militant FLN:

We face **TERRORISM** in all its cowardice, all its horror. . . here it is no longer a question of making war, but of annihilating an enterprise of organized, generalized assassination. . . . In this case, what does your conscience as a Christian, as a civilized man demand? . . . that you efficaciously protect innocents whose existence depends on the manner in which you carry out your mission. . .⁹⁷

What arose out of Père Delarue's discourse and the ingrained ideology of a civilizing mission was "the counterimage of the indigenous non-Christian Muslim enemy. It went without saying that Christian, civilized behavior could not be expected of those others."⁹⁸ Members of the FLN were the uncivilized, inhuman "terrorists" who understood neither of the defining French ideologies. It is of course ironic that as France "brought civilization" to Algeria, their soldiers committed acts that had long been banned by the "civilized" world of countries who had prioritized the protection of human rights.

United States: "The Enemies of Freedom"

Like France, the United States in the GWOT clearly set forth its own identity as a civilized nation, a protector of human rights and a democratic liberator. It also clearly established the identity of its opponent, al Qaeda, as a group of uncivilized terrorists. On September 20, 2001, President Bush said of the terrorists who had recently attacked America: "They hate our freedoms — our freedom of religion, our freedom of speech, our freedom to vote and assemble and disagree with each other."⁹⁹ The terrorists were the antithesis of the American ideal; they were undemocratic, unable to accept difference, and, thus, as Gong theorized "uncivilized."

A March 20, 2002 speech given by President Bush indicates the government's perception of America's role and defining ideology compared to that of al Qaeda fighters. Bush referred to al Qaeda fighters as "people who hate America."¹⁰⁰ Discussing American actions in Afghanistan, he continued, "We have freed Afghan people from the clutches of one of the most barbaric, backward regimes history has ever known."¹⁰¹ In subsequent US military actions, America was portrayed as the liberator, the protector of justice and the bringer of freedom and democracy. In contrast, al Qaeda fighters and the regimes that harbored them were "barbaric, backward regimes" of "trained killers."

President Bush ultimately declared: “freedom itself is under attack,”¹⁰² determining, however, that al Qaeda was a new face on an old enemy:

We have seen their kind before. They are the heirs of all the murderous ideologies of the 20th century. By sacrificing human life to serve their radical visions—by abandoning every value except the will to power—they follow in the path of fascism, and Nazism, and totalitarianism. . . . Freedom and fear, justice and cruelty, have always been at war, and we know that God is not neutral between them.¹⁰³

President Bush’s discourse dehumanizes and demonizes al Qaeda fighters, setting them beyond the bounds of civility and morality.

Exploiting the Identity of the Opponent

However, not only was the identity of al Qaeda fighters thus portrayed as the antithesis of American ideals, defining traits of Arab culture were also later exploited by US interrogators. Raphael Patai, a cultural anthropologist, writes:

Honor in the Arab world is a generic concept which embraces many different forms. . . . All these different kinds of honor, clearly distinguished in Arab life and operative at various times and on various occasions, interlock to surround the Arab ego like a coat of armor. The smallest chink in this armor can threaten to loosen all the loops and rings, and must therefore be repaired immediately and with determination.¹⁰⁴

According to Patai, one of the critical manifestations of the concept of honor is in the sexual realm. What Patai identifies as a “taboo of sex” is highly significant in the Arab culture.¹⁰⁵ Although much of the concept of sexual honor is focused on a woman’s behavior, Patai argues, “As far as the traditional Arab sex mores can be observed. . . . the impression is gained that they are the product of severe repressions.”¹⁰⁷ Patai’s study became “a talking-point among pro-war Washington conservatives in the months before the March 2003 invasion of Iraq,” according to Hersh. Gary Myers, the attorney for Sergeant Frederick, asked rhetorically in reference to the abuses at Abu Ghraib, “Do you really think a group of kids from rural Virginia decided to do this on their own? Decided that the best way to embarrass Arabs and make them talk was to have them walk around nude?”¹⁰⁷ Myers’ implication is that the decision to use Arab ideology to torture captured individuals came from significantly higher on the chain of command.

The identity of al Qaeda fighters ultimately determined the way they were treated. As in the French case, this response ironically included abuse of detainees contrary to the “civilized” identity the US government sought to portray. “Some things,” wrote Richard Cohen of the *Washington Post*, “are not American. Torture, for damned sure, is one of them.”¹⁰⁸ It appears, however that when the identity of the opponent is perceived as sufficiently contrary to a state’s moral values and when that opponent is sufficiently dehumanized, torture may not have been ruled out even by one of the world’s most liberal democracies.

Commonalities in the Identity Arguments of Both States

Both states, in addition to calling their adversary “uncivilized” and viewing themselves as a civilizing force, also used the word “terrorist” to describe their opponent. Both states fought against an opponent who belonged to no state, either geographically or in terms of the existence of an autonomous government, making it difficult for their opponents to apply tactics of traditional warfare. They cannot go through diplomatic channels; as was true in these two cases, they may not even be able to identify leaders with whom they could negotiate. The ensuing frustration over a state’s inability to respond militarily may have led them to set aside the rules that govern a military response to another state. Since the terrorist will not hold himself to “civilized” standards, democratic states may decide that the individual does not have to be treated in accordance with legal standards. Democratic states have no reason to believe captured individuals from terrorist organizations will behave in accordance with documents like the Geneva Conventions. Further, to these democratic states, terrorists did not deserve the treatment a prisoner-of-war of another democratic state would receive; the United States explicitly asserted that captured al Qaeda operatives could not qualify for this status. Based on these case studies, state behavior indicates a critical link between the identity of the opponent as a terrorist, the perceived exigencies of warfare against this type of opponent and violations of international humanitarian law.

Mechanisms with Limited Explanatory Power

Although both the theoretical arguments for reciprocity and normative compliance operated in a limited capacity for both states, they were not salient factors in determining state compliance. In terms of reciprocity, although this issue was examined in US memoranda, the fear that other states would torture American nationals was not enough to compel the US government to comply with the Geneva Conventions. There is no evidence that the French government examined the issue.

In terms of normative compliance, non-governmental organizations and individuals in both cases called upon both governments to uphold their commitments to the protection of human rights. In these case studies, however, normative compliance does not appear to have affected high-level decision-making. The security benefits of torture outweighed both fears over reciprocal treatment by other nations and the perceived necessity of upholding normative values.

Reciprocity has theoretically been considered to be a primary mechanism of control over state compliance. The finding that it carries little weight in these case studies is surprising and demonstrates the necessity of a reexamination of state behavior by studies like the present one to determine what factors are the most salient in inducing state compliance.

Justifying Noncompliance with IHL

France

The profound silence that has, for so many years, surrounded the French-Algerian War, as suggested above, was facilitated by the separation in civil state-military relations in France as well as by the international and domestic environment.

The paucity of evidence implicating the government in the actions taken by the military facilitated the government's vague responses and general silence. The government also carefully preserved the civil state-military separation; no investigative reports, memoranda or discussions between the government and the military are documented after 1955.¹⁰⁹ In addition, the international and domestic climate contributed to the government's silence. The limited accusations of torture that the government did face were significantly less public than those faced by the United States today. There were no digital photographs sent instantly around the world, nor news broadcasts watched by millions. There were significantly fewer of the human rights non-governmental organizations that played such a large role in exposing the actions of the US military.¹¹⁰ The facts that the ICRC did achieve a limited response and that these organizations have begun calling for French accountability in the present era indicates that, had such advocate groups been in existence at the time, the French might have faced greater political pressure.

United States

France's silence stands in stark contrast to the relative transparency of US justifications as evidenced by now-public memoranda. As explained above, not only did US officials weigh international opinion in determining prisoner-of-war status for those at Guantanamo Bay, but also the highest-ranking members of the

Bush administration analyzed interrogation tactics. Unlike the French decision to leave the definition of torture ambiguous, Assistant Attorney General Jay S. Bybee carefully and critically framed a remarkably narrow definition of torture in August 2002. He went on to justify US actions on legal grounds. Whether his interpretation was designed to vindicate practices that were already occurring is unclear. If it was designed as a preemptive justification, it laid the foundation for interrogation practices that were, according to human rights organizations and lawyers, tantamount to torture.¹¹¹

Bybee further wrote, “If a government defendant were to harm an enemy combatant during an interrogation... he would be doing so in order to prevent further attacks on the United States by the al Qaeda terrorist network.”¹¹² Bybee’s “self-defense of the nation” argument, coupled with his narrow interpretation of the torture statute facilitated later justifications of military actions by rendering them legal, in the view of a US legal advisor. The decision to situate actions at Guantanamo Bay, as explained above, further contributes to the legal lengths the US went to provide itself a response should the legality of its actions be questioned. According to Rose, “From the moment the Guantanamo detention camp was first conceived at the Pentagon in December 2001, its most salient feature was that Gitmo and its prisoners would be outside all known mechanisms of American and international law.”¹¹³

The US government even flaunted its own Supreme Court’s wishes when on June 28, 2004, the Court dismissed the Bush administration’s claim that no US court had jurisdiction over the Guantanamo detainees. The Pentagon managed nonetheless to establish military review tribunals under government control drastically limiting involvement of the US judiciary and thus the application of federal or international law.¹¹⁴

Explaining the Different Justifications

There are two principal explanations for the different justificatory tactics used by the two states, that is, for the fact that the French government remained silent while the US government developed an elaborate legalistic analysis. The first explanation is the difference in civil state-military relations in France and the United States. The second explanation is the non-governmental human rights organizations that were in existence during the US GWOT but did not exist during the French war in Algeria.

As evidenced by the French case study, the government and the military were clearly distinct. Although there is evidence that the French government was aware of the torture that was occurring, there is no evidence that the

government was involved in the decision to torture captured FLN operatives. The US government, in contrast, was intimately linked to the actions of the military—its connection has been amply documented through memoranda exchanged by the government and the military. Second, as explained above, the non-governmental human rights organizations that vociferously objected to US actions and cried out for accountability did not exist during the French-Algerian war. The ICRC, one of the only such organizations in existence, did object and managed to force the government to ameliorate some conditions. In the United States, however, these organizations have played a critical role not only in raising public and international awareness, but also in demanding a governmental response. Furthermore, the differences in political climate were exacerbated by differences in technology. If Specialist Joseph Darcy had *not* given the digital pictures of torture at Abu Ghraib to Army investigators, how much would the world have known? The existence of digital pictures of the torture that occurred further incited public opinion and calls for accountability.

As a result of these differences between the two states, the French government was able to maintain its silence when the military was accused of certain actions while the US government, because of its clear involvement in the authorization of torture, was forced to respond publicly to allegations.

This response, however, was forced even further by human rights organizations. In fact, it is because of these organizations that the French may not be able to maintain this silence indefinitely—Human Rights Watch, for example, in the wake of the Aussaresses trial has already begun calling for French accountability.¹¹⁵

Using Studies of State Behavior to Strengthen the IHL Regime

Explanations and Justifications

My study began with two research questions: first, what explains state violations of international humanitarian law and, second, how do states subsequently justify these violations? I conclude that there are three explanations for state behavior in violation of IHL. First, I conclude that expediting the end of a conflict, protecting nationals or a homeland, and responding to exigencies of warfare are deemed more important than abiding by IHL obligations, the “security benefits of torture” argument. Second, the threat of international condemnation or reputational damage is not enough to induce compliance; exigencies of a conflict are more important. Although conventional theories

argue that the threat of reputational damage might be enough to induce state compliance, in practice, this threat is insufficient.

The third explanation for state action, largely neglected by conventional literature, is the identity of the opponent. Through two case studies, I have demonstrated the significant explanatory power of this argument. This contribution to compliance literature lays the foundation for future research. Given this new and relatively unexamined explanation for state behavior, future research could examine if and how the identity of the opponent can be overcome to ensure state compliance with IHL.

The security benefits of torture outweighed states' concerns over reciprocity, and normative arguments, though present in the political discourse, did not induce compliance. Based on this finding, which is contradictory to conventional wisdom on compliance, future research could reexamine the relative strength of reciprocity and norms in inducing compliance when states perceive their security to be at risk.

Addressing my second research question, the justification invoked by states depends on their political environment and the pressure exerted upon them both domestically and internationally. Notably, human rights NGOs and individual activists play a critical role in forcing a governmental response to allegations of torture.

Broader Implications

The torture committed by France and the United States, and their explanations and justifications for their actions indicate that IHL is not perceived as binding by some of its principle architects. Based on the explanations and justifications set forth by these two states, it is possible that IHL legislation needs to be updated and amended in ways that will overcome noncompliant behavior. Notably, IHL may need to take into account the paradigm of terrorist warfare, an issue discussed by both France and the United States. The results of this research indicate that, to democratic states, extant IHL does not encompass terrorist warfare. This is both because of the identity of the adversary as well as the perceived inability of existing law to respond to the exigencies inherent in combating terrorism. Future research could examine the possibility of amending or updating IHL legislation to include specific legislation applicable to terrorist warfare.

The actions of both states, however, are also explained by the fact that, as realist theory would predict, they prioritized expediency in conflict resolution above compliance. It is unlikely that additional legislative amendments alone would change states' perceptions that conflict resolution takes precedence over

compliance. Instead, noncompliance must carry some additional weight so that compliance is prioritized over a swift end to a conflict. This weight must be more tangible than the threat of international reputational damage or condemnation. It is likely that, to induce compliance, repercussions must be punitive in nature. If the cost of noncompliance carries punitive consequences, it may outweigh the benefits (like expediency of resolution).

Exploring Punitive Repercussion

The notion of punitive repercussions led to the establishment of international war crimes tribunals, beginning with the Nuremberg war crimes tribunals established after World War II. At Nuremberg, prosecutors tried and punished individuals, publicly indicting them for their crimes against humanity. The guiding principle behind the establishment of *ad hoc* tribunals was that the accused was charged with crimes against mankind in general. The trials therefore fell outside the purview of individual states and were conducted with the participation of multiple states and international organizations. Since Nuremberg, the United Nations Security Council established similar *ad hoc* war crimes tribunals in Rwanda and in the former Yugoslavia. Over the past fifty years, however, many in the international community sought a permanent court with jurisdiction over international crimes and international criminals. The creation of the document establishing such a court began on June 15, 1998.¹¹⁶ By July 17, 1998 the Rome Statute of the International Criminal Court (ICC) was ready for signatures—one hundred-twenty nations voted for it, twenty-one abstained, and seven voted against. Among these seven was the United States, one of the most powerful members present.¹¹⁷ Support for the ICC will be critical in ensuring future compliance of states since it establishes clear consequences on the international level for behavior contrary to international law; this may change the priorities of states.

The French government has yet to proffer any justification for French actions in Algeria. Had the ICC been in existence, it is possible that France might not have been allowed to keep silent. If French generals had been facing international prosecution, it is likely that there would have been at least some governmental accountability and public response. France did become a party to the ICC on June 9, 2000.

In addition to exploring the issue of punitive reprisals, future research could also focus on the critical role of nongovernmental human rights organizations in eliciting governmental responses, a role demonstrated by this study's comparison between the French and American responses to accusations

of torture. If governments expect to be held accountable for their actions, that is, if they believe that they will have to publicly justify their behavior, are they more likely to comply?

A Universal Cry of Indignation

General Jacques Pâris de Bollardière, dissenting from the torture committed by the French army said, as he exposed their crimes, “Here is my indignation, the cry that I cannot contain...”¹¹⁸ Efforts by human rights organizations, lawyers, activists and scholars have made the difference in the campaign calling for US government acknowledgement of torture. This article is my contribution to a universal cry of indignation against the torture that occurred, and that is still occurring today, a contribution to international efforts to ensure compliance with international humanitarian law. International society has evolved since 1962, and the power of public critique has been enhanced. Although this evolution is critical in changing the behavior of governments, the international community still has a long way to go in ensuring consistent compliance with IHL.

Justice Robert Jackson, in the closing argument he gave for the prosecution at the Nuremberg War Crimes Tribunal on July 26, 1946, said:

It is common to think of our own time as standing at the apex of civilization, from which the deficiencies of preceding ages may patronizingly be viewed in the light of what is assumed to be “progress.” The reality is that in the long perspective of history the present century will not hold an admirable position, unless its second half is to redeem its first.¹¹⁹

While civilization has progressed greatly from 1946, as these case studies have shown, even in 2005 we do not stand at the apex, and it is unclear whether we have redeemed ourselves from the wrongs to which Justice Jackson referred. What we should take from his comments, however, is the necessity of striving constantly for a higher level of civilization. We cannot rest upon our current achievements; we have made progress, but there is still much more to be made. Whether or not we seek redemption for our prior wrongs, we should continue to seek an international community that consistently abides by its humanitarian commitments; we should continue to strive for a world that has, with one voice, eradicated torture.

Notes

¹ The International Committee of the Red Cross, *Basic Rules of the Geneva Conventions and their Additional Protocols*, (Geneva: The Committee, 1983), 25.

² Statement of Ammen Sa'eed Al-Sheikh detained by the U.S. Army, Abu Ghraib, Iraq, statement to the International Committee of the Red Cross 16 January 2004, in Mark Danner, *Torture and Truth: America, Abu Ghraib and the War on Terror* (New York: New York Review of Books, 2004), 227.

³ See specifically Geneva III, arts. 17 and 87 prohibiting torture or the inhuman treatment of prisoners of war. For an explanation of the Third Geneva Convention regarding the treatment of Prisoners of War see Claude Pilloud, "Protection of the Victims of Armed Conflicts, II-Prisoners of War," in *International Dimensions of Humanitarian Law*, ed. Henry Dunant Institute (Geneva)/ UNESCO (Paris) (The Netherlands: Martinus Nijhoff Publishers, 1988), 167–185.

⁴ Repercussions, for the purpose of this analysis, include long-term reputational damage as well as domestic and international criticism. The term "repercussions," as discussed in this analysis, does not include punitive repercussions in the sense of those that could be expected from a body like the International Criminal Court (ICC). The French case study took place more than thirty years before the ICC came into existence and the United States is not a party to the court. Nonetheless, the possible influence an entity like the ICC might have in changing the weight of repercussions is examined in Chapter 6.

⁵ George W. Bush, "5 Step Plan for Democracy in Iraq," speech given at U.S. Army War College (Carlisle, PA, 24 May 2004).

⁶ According to Jean Pictet, a noted scholar of international humanitarian law, "Humanitarian law consists of that important part of international public law which finds its inspiration in humane ideals, and which focuses on the protection of the individual in time of war... it is on these legal provisions and no other that the life and freedom of countless human beings may depend if, by mischance, war casts its sinister shadow over the world." Jean Pictet, "International Humanitarian Law: Definition," in *International Dimensions of Humanitarian Law*, ed. Henry Dunant Institute (Geneva)/ UNESCO (Paris) (The Netherlands: Martinus Nijhoff Publishers, 1988), xix. For more on IHL, see Provost, *International Human Rights and Humanitarian Law*; Kenneth Watkin, "Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict." *The American Journal of International Law* 98, no. 1 (Jan. 2004): 1–34; Theodor Meron, "On the Inadequate Reach of Human Rights and Humanitarian Law and the Need for a New Instrument," *The American Journal of International Law* 77, no. 3 (July 1983): 589–606.

⁷ International Committee of the Red Cross, “Respect for International Humanitarian Law in Armed Conflicts and Actions by the ICRC for Persons Protected by the Geneva Conventions,” 25th International Conference of the Red Cross, Geneva, 23 to 31 October 1986, *International Review of the Red Cross* no. 256 (31 December 1986): 340–388, Resolution I.

⁸ International legislation, detailed below, includes the Universal Declaration of Human Rights (1948), the Geneva Conventions and their Additional Protocols (1949), the International Covenant on Civil and Political Rights (1976) as well as the Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (1987). Domestic legislation differs between the two countries; specific statutes are explained below.

⁹ As defined by Article 53 of the Convention on the Law of Treaties, 1969. For more on customary law and jus cogens norms, see Malcolm N. Shaw, *International Law*, 4th Edition (Cambridge: Cambridge University Press, 1997).

¹⁰ “Rather, there exists a core of rights that cannot be suspended, consisting of customary, jus cogens norms and those the breach of which would result in gross violations.” René Provost, *International Human Rights and Humanitarian Law* (Cambridge: Cambridge University Press, 2002), 218.

¹¹ Since this Declaration is not technically a part of binding, international law, there were no signatories. Instead, it was adopted by a General Assembly vote of 48 to none, with 8 abstentions. According to the Preamble, it is designed to uphold the “inherent dignity [and] the equal and inalienable rights of all members of the human family” and to prevent “barbarous acts which have outraged the conscience of mankind.” It sets a standard for the type of state behavior that would indicate respect for human rights.

¹² Art. 5, Universal Declaration of Human Rights, *Adopted and proclaimed by General Assembly resolution 217 A (III)*.

¹³ 1949 Geneva Conventions, Common Article 3, Additional Protocol II, 4 “Human Treatment,” a) “Fundamental Guarantees.” Additionally, Geneva III, art. 13 and Geneva IV, art. 27 mandate the humane treatment of detainees whether or not they are prisoners of war; Geneva III, art. 17 and Geneva IV, art. 31 prohibit “physical or mental coercion” of detainees during interrogation. Torture and inhuman treatment of “prisoners of war” are considered grave breaches of the Conventions, and fall under the category of “war crimes.” States are under a binding obligation either to prosecute responsible parties or to extradite them to another state for prosecution.

¹⁴ General Assembly Resolution 2200A (XXI).

¹⁵ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment statements preceding articles.

¹⁶ 18 U.S.C. § 2340A

¹⁷ “The War Crimes Act” 18 U.S.C. § 2441. In addition, military contractors working for the Department of Defense can be prosecuted under the Military Extraterritorial Jurisdiction Act of 2000 (Public Law 106–778), which permits the prosecution in federal court of U.S. civilians who commit certain crimes while accompanying U.S. forces abroad. This law, however, has not been invoked as the Department of Defense has yet to issue the required implementing regulations.

¹⁸ Code pénal Article 222-1.

¹⁹ Sonia Cardenas, “Norm Collision: Explaining the Effects of International Human Rights Pressure on State Behavior,” *International Studies Review* 6, issue 2 (June 2004): 213.

²⁰ Cardenas, “Norm Collision,” 213.

²¹ See Byers, *Custom, Power and the Power of Rules* on the desirability and necessity of such an approach to state perception of international legal obligation.

²² As Stephen D. Krasner indicates, the term “sovereignty” has multiple meanings. I focus on the term as he principally defines it two: international legal sovereignty referring to the mutual recognition of states and Westphalian sovereignty referring to the “exclusion of external actors from domestic authority configuration.” Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999), 9.

²³ Harvey Starr, “International Law and International Order,” in *Controversies in International Relations Theory*, ed. Charles W. Kegley, Jr (New York: St. Martin’s Press, 1995), 300.

²⁴ Hedley Bull, *Anarchical Society: A Study of Order in World Politics* (New York: Columbia University Press, 2002), 122. Barrister Christopher Greenwood writes, “The weakest part of international law has always been its methods for ensuring compliance, and nowhere is this weakness more apparent than in the law of armed conflict or international humanitarian law.” Christopher Greenwood, “Ensuring Compliance with the Law of Armed Conflict,” in *Control over Compliance with International Law*, ed. William Butler (The Netherlands: Martinus Nijhoff Publishers, 1991), 195.

²⁵ Greenwood, “Ensuring Compliance,” 196.

²⁶ See for example Hans Morgenthau, *Politics Among Nations*, 2nd ed. (New York: Alfred Knopf, 1954); Kenneth Waltz, *Theory of International Politics* (New York: McGraw-Hill, 1979).

²⁷ See Robert Jervis, "Realism in the Study of World Politics," *International Organization* 52, issue 4 (October 1998): 980–984 for the continued importance of the security assumption in realism.

²⁸ Bull, *The Anarchical Society*, 146.

²⁹ Steven C. Poe, C. Neal Tate and Linda Camp Keith, "Repression of the Human Right to Personal Integrity Revisited," *International Studies Quarterly* 43 (1999), 291–313; Christian Davenport,

"“Constitutional Promises” and Repressive Reality: A Cross-National Time-Series Investigation of Why Political and Civil Liberties are Suppressed.” *Journal of Politics* 58 (1996), 627–664.

³⁰ Although there is debate on the topic, I do not discuss whether the information obtained by torture is useful, only whether or not states perceived that the information they could get by torturing would be productive in enhancing their overall security. For more on this issue see John T. Parry and Welsh S. White, "Interrogating Suspected Terrorists: Should Torture be an Option?" in *Civil Liberties vs. National Security in a Post-9/11 World*, ed. M. Katherine B. Darmer, Robert M. Baird and Stuart E. Rosenbaum (New York: Prometheus Books, 2004), 229–250.

³¹ For more on systemic interdependence theory, see Robert O. Keohane and Joseph S. Nye, *Power and Interdependence*, 2nd ed. (Boston: Scott, Foresman, 1989).

³² Andrew Moravcsik, "Taking Preferences Seriously: A Liberal Theory of International Politics," *International Organization* 51, issue 4 (October 1997): 513–553. Moravcsik argues that these core assumptions represent three separate strands of liberal theory: "ideational, commercial and republican liberalism," p. 524.

³³ *Ibid.*, 519–520.

³⁴ Simmons, "Compliance with International Agreements," 80.

³⁵ Martha Finnemore and Katherine Sikkink, "International Norm Dynamics and Political Change" *International Organization* 52, issue 4 (October 1998): 893.

³⁶ I use reciprocity here not as a legal term but in the theoretic tradition of bilateral and multilateral cooperation. For reciprocity as a principle of international law, see e.g. Byers, *Custom, Power and the Power of Rules*, 88–105.

³⁷ For a comparison of the results of using reciprocity to induce compliance versus other influence strategies see Russell J. Leng and Hugh G. Wheeler, "Influence Strategies, Success and War," *The Journal of Conflict Resolution* 23, no. 4 (Dec. 1979): 655–684.

³⁸ Byers, *Custom, Power and the Power of Rules*, 89.

³⁹ Keohane, "Reciprocity in International Relations": 20. If reciprocity can be institutionalized as a general entrenched pattern of behavior, other theorists

believe it can be an effective means of limiting state behavior, though they ultimately argue that such diffuse reciprocity is usually untenable in world politics and bilateral specific reciprocity is more stable.

⁴⁰ John M. Owen, "How Liberalism Produces Democratic Peace," *International Security* 10, no. 2 (autumn 1994): 88.

⁴¹ Political scientist Michael W. Doyle analyzes the claim to inherent pacifism in the liberal world order, arguing that although liberal states are peaceful, they are also prone to bellicose action where such action is supported by Kantian liberal reasoning. Michael W. Doyle, "Liberalism and World Politics," *The American Political Science Review* 80, no. 4 (Dec. 1986): 1151–1169.

⁴² Cardenas, "Norm Collision," 217.

⁴³ Simmons, "Compliance with International Agreement," 84.

⁴⁴ Fearon and Wendt, "Rationalism v. Constructivism": 53–4.

⁴⁵ Andrew Hurrell, "Norms and Ethics in International Relations," in *The Handbook of International Relations*, ed. Walter Carlsnaes, Thomas Risse and Beth A. Simmons (London: Sage Publications, 2002), 143.

⁴⁶ Jean Pictet, *Development and Principles of International Humanitarian Law* (The Netherlands: Martinus Nijhoff Publisher, 1985), 1.

⁴⁷ Bull, *The Anarchical Society*.

⁴⁸ Friedrich Kratochwil and John Ruggie, "International Organization: A State of the Art on an Art of the State," *International Organization* 40, no. 4 (autumn 1986): 753–775.

⁴⁹ Jeffrey W. Legro, "Which Norms Matter? Revisiting the 'Failure' of Internationalism.," *International Organization* 51, no. 1 (winter 1997): 31–63.

⁵⁰ Cardenas, "Norm Collision," 223.

⁵¹ See for example Otto Klineberg, *The Human Dimension in International Relations* (New York: Holt, Rinehart and Winston, Inc., 1964); Lyal S. Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations* (The Netherlands: Martinus Nijhoff Publishers, 1992).

⁵² Gerrit W. Gong, *The Standard of 'Civilization' in International Society* (Oxford: Clarendon Press, 1984), 54.

⁵³ See for example Ian Brownlie, *Principles of Public International Law*, 3rd ed. (Oxford: Clarendon Press, 1979).

⁵⁴ Michael Walzer, *Just and Unjust Wars* (Harmondsworth: Penguin Books, 1978), 41–2.

⁵⁵ Janice Gross Stein, "Psychological Explanation of International Conflict," in *The Handbook of International Relations*, ed. Walter Carlsnaes, Thomas Risse and Beth A. Simmons (London: Sage Publications, 2002), 294.

⁵⁶ Additional Protocol I to the Geneva Conventions, art. 44, § 2.

⁵⁷ This classification stemmed from a 1942 Supreme Court decision in *Ex parte Quirin*, (317 U.S. 1). The term refers to both lawful and unlawful combatants; lawful combatants receive prisoner of war status, unlawful combatants do not. The United States ultimately classified the detainees at Guantanamo Bay as unlawful combatants.

⁵⁸ Pierre Vidal-Naquet, *La Raison d'état* (Paris: Les Éditions de Minuit, 1962), 54. Author's translation.

⁵⁹ Vidal-Naquet, *La Raison d'état*, 65. Author's translation.

⁶⁰ *Ibid.*, 63–4. Author's translation.

⁶¹ Vidal-Naquet, *La Raison d'état*, 76. Author's translation.

⁶² *Ibid.*, 51.

⁶³ Guy Mollet, speech before the National Assembly, in Maran, *Torture*, 44.

⁶⁴ Kessel, *Guerre d'Algérie*, 47.

⁶⁵ Talbott, *The War Without a Name*, 249.

⁶⁶ Henri Alleg, interview with Jacques Dimet, which appeared in *L'Humanité* on November 3, 2000, in Silvestre, *La Torture aux aveux*, 30–1. Author's translation.

⁶⁷ Aussaresses, *Services spéciaux*, 10.

⁶⁸ As of 11 March 2005. Alex Spektor, *September 11 Victims*, 18 April 2005 <<http://www.september11victims.com/september11victims/>>.

⁶⁹ CNN, CNN.com/U.S.: Chronology of Terror (Cable News Network, LP, 2001), 13 February 2005 <<http://archives.cnn.com/2001/US/09/11/chronology.attack>>.

⁷⁰ Proclamation 7463, September 14, 2001.

⁷¹ George W. Bush, "Military Order of November 13, 2001 "Detention, Treatment of Trial of Certain Non-Citizens in the War Against Terrorism," Federal Register 66, no. 22, Presidential Documents (16 November 2001): 57831–57836.

⁷² Michael Ratner and Ellen Ray, *Guantanamo: What the World Should Know* (Vermont: Chelsea Green Publishing, 2004), 9.

⁷³ Fay, *The Jones/Fay Report* in Danner, *Torture and Truth*, 503.

⁷⁴ Douglas Jehl, "The Reach of War: Detainee Treatment; Rules on Prisoners Seen as Sending Mixed Messages to G.I.'s," *New York Times* 22 June 2004, late ed.: A7; Josh White. "Rumsfeld Authorized Secret Detention of Prisoner," *Washington Post*, 18 June 2004: A22.

⁷⁵ *Ibid.*, 378.

⁷⁶ Dana Milbank and Dana Priest, "Bush: U.S. Expected to Follow Law on Prisoners," *Washington Post*. 11 June 2004: A6.

⁷⁷ Warren Hoge, "The Reach of War: Report from Geneva; U.N. Rights Chief Says Prison Abuse May Be War Crime," *New York Times*, 5 June 2004, late ed.: A6.

⁷⁸ Richard Cohen, "A Plunge from Moral Heights," *Washington Post*, 10 June 2004: A19.

⁷⁹ Human Rights First, "ACLU and Human Rights First Sue Defense Secretary Rumsfeld Over U.S. Torture Policies." *Human Rights First Press Release*, 1 March 2005. <http://www.humanrightsfirst.org/media/2005_alerts/etn_0301_lit.htm. >

⁸⁰ On May 19, 2004, Specialist Jeremy Sivits pleaded guilty to mistreating detainees and dereliction of duty for failing to protect them from abuse ; he was sentenced to one year in jail. On September 24, 2004, Private Lynndie England was arraigned, facing nineteen counts of abuse and indecent acts. She did not enter a plea, and no trial has occurred to date. On October 20, 2004, U.S. Army reservist Staff Sergeant Ivan (Chip) Frederick pleaded guilty to five charges of abusing prisoners in Abu Ghraib, including dereliction of duty, assault and committing an indecent act. He was later sentenced to eight years in prison. On January 15, 2005, U.S. Army Specialist Charles Graner Jr. was sentenced to ten years in prison after being convicted on five charges related to abusing Iraqi detainees at Abu Ghraib.

⁸¹ Milbank and Priest, "Bush: U.S. Expected to Follow Law on Prisoners," *Washington Post*. 11 June 2004: A6.

⁸² The analysis of the two states is based on the evidence available for each. The published governmental documentation including investigative reports and official memoranda available in the U.S. case is not available in the French case. I therefore base my analysis of the French case study on implicit explanations and justifications drawn from historical context and the political actions that were taken.

⁸³ Alexander, Evans and Kreiger, *The Algerian War*, 9.

⁸⁴ Aussaresses, *Services spéciaux* 151. Author's translation.

⁸⁵ Finnemore and Sikkink, "International Norm Dynamics," as explained in Chapter 2.

⁸⁶ U.S. President, *Public Papers of the Presidents of the United States*, (Washington, D.C.: Office of the Federal Register, National Archives and Records Service, January 1, 1960–January 20, 1961); Dwight D. Eisenhower, 1960, 363.

⁸⁷ Blair, "France Improves P.O.W. Conditions," 5.

⁸⁸ Rose, *Guantanamo*, 97.

⁸⁹ See Chapter 4.

⁹⁰ Beaver also analyzed U.S. obligations under relevant international law. She concluded that the United Nation's Universal Declaration of Human Rights, though it might provide evidence of customary law, was not itself enforceable. The Convention Against Torture, she concluded, had only been ratified by the United States with the reservation that "cruel, inhuman, and degrading treatment" would be defined in a manner consistent with the Eighth Amendment of the U.S. Constitution. Diane E. Beaver, Department of Defense, Legal Brief, 11 October 2002 in Danner, *Torture and Truth*, 171.

⁹¹ *Pentagon Working Group on Detainee Interrogations in the Global War on Terror: Assessment of Legal, Historical, Policy and Operational Considerations*, 4 April 2003, in Danner, *Torture and Truth*, 194.

⁹² Beaver, Legal Brief, 11 October 2002 in Danner, *Torture and Truth*, 175.

⁹³ Donald Rumsfeld to General James T. Hill, 16 April 2003, in Danner, *Torture and Truth*, 201–2.

⁹⁴ Harumi Befu, "Demonizing the "Other." in *Demonizing the Other: Antisemitism, Racism and Xenophobia*, ed. Robert S. Wistrich (The Netherlands: Harwood Academic Publishers, 1999), 26.

⁹⁵ Silvestre, *La Torture aux aveux*, 31 quoting Henri Alleg. Author's translation.

⁹⁶ Jean-Pierre Vittori, *Nous les appelés d'Algérie* (Paris: Messidor/Tempo Actuels, 1983), 9.

⁹⁷ Maran, *Torture*, 97.

⁹⁸ *Ibid.*, 98.

⁹⁹ George W. Bush, "Address to a Joint Session of Congress and the American People," Washington, D.C., 20 September 2001, The White House, 16 March 2005 <<http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>>.

¹⁰⁰ George W. Bush Speech in O'Fallon, Missouri, March 20, 2002. *US Embassy in Islamabad* 16 March 2005 <<http://islamabad.usembassy.gov/www02032001.html>>.

¹⁰¹ *Ibid.*

¹⁰² Bush, "Address to a Joint Session of Congress and the American People," 20 September 2001.

¹⁰³ Bush, "Address to a Joint Session of Congress and the American People," 20 September 2001.

¹⁰⁴ Raphael Patai, *The Arab Mind* (New York: Charles Scribner's Sons, 1983), 90–91.

¹⁰⁵ *Ibid.*, 118.

¹⁰⁶ Patai, *The Arab Mind*, 128.

¹⁰⁷ Ibid., 38.

¹⁰⁸ Cohen, “A Plunge from Moral Heights.”

¹⁰⁹ The one commissioned report, the Wuillaume report, never defines “torture,” but refers to practices that seemed to be excessively cruel; the report also determined these to be efficient interrogation tactics. This fact preserved plausible deniability on the part of the government. If, at any point, it had been confronted with the military’s actions, there was no proof the government had played any role in the torture.

¹¹⁰ The ICRC was involved in Algeria and produced reports to that effect. Amnesty International, however, was founded in 1961, Human Rights Watch in 1978 as “Helsinki Watch,” and Human Rights First in 1978.

¹¹¹ Specifically, Bybee concluded that applying 18 U.S.C. § 2340A to the interrogations of enemy combatants (which makes it a criminal offense for any person “outside the United States [to] commit[] or attempt[] to commit torture,” was unconstitutional because it conflicted with the President’s authority to conduct war. Bybee went on to provide “standard criminal law defenses of necessity and self-defense” that could justify interrogation methods and shield relevant parties from criminal liability.

¹¹² Ibid., 151. Bybee continued, “Clearly, any harm that might occur during an interrogation would pale to insignificance compared to the harm avoided by preventing such an attack [like that of September 11, 2001], which could take hundreds of thousands of lives.” Ibid., 155.

¹¹³ Rose, *Guantanamo*, 22.

¹¹⁴ Steven Watt, a human rights lawyer with the Center for Constitutional Rights called the Pentagon’s alleged investigations into complying with the Court’s wishes “a complete farce,” and rejected the proposed military tribunal, which he called the “ad hoc kangaroo tribunal.” Human Rights Watch, “U.S.: Court Limits President’s Powers Over Terrorism Detainees,” *Human Rights News*, 28 June 2004.

¹¹⁵ Kenneth Roth, Human Rights Watch, “Letter to French President Jacques Chirac Calling for War Crimes Investigation,” *Human Rights News*, 14 May 2001.

¹¹⁶ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.

¹¹⁷ The United States expressed concern over exposing its nationals to international prosecution. Under President Bill Clinton, the United States signed the Rome Statute; under President Bush the country has since not only refused ratification, but has even revoked its initial signature

¹¹⁸ Bollardière, *Bataille D'Alger*, 130.

¹¹⁹ Robert Jackson, *Summation for the Prosecution*, Nuremberg War Crimes Tribunal, 26 July 1946.