$4.95

THE LONG TERM VIEW

Volume 6 A Journal of Informed Opinion *Number 4*

Are Our Highest Officials Guilty of Torture?

Lawrence R. Velvel — **Massachusetts School of Law**

J. Peter Pham — **James Madison University**

Mitch Wertlieb — **Vermont Public Radio**

David Weissbrodt — **University of Minnesota**

Francis A. Boyle — **University of Illinois at Urbana-Champaign**

Alex Hooke — **Villa Julie College**

Margaret L. Satterthwaite & Angelina Fisher — **New York University**

Marc Sapir — **Physician**

Jeffrey F. Addicott — **St. Mary's University**

George Phillies — **Worcester Polytechnic Institute**

PostScript Picture
(0 74470 82220 2 64

MASSACHUSETTS SCHOOL OF LAW
at Andover

OBJECTIVE

The Long Term View is a public policy journal that devotes each issue to an in-depth discussion of a single topic. Views expressed in *LTV* do not reflect the views of the journal, the editors, or the Massachusetts School of Law at Andover.

EDITORIAL PHILOSOPHY

To achieve our objective, we welcome submissions in many forms, including personal essays and analytical articles. Whatever the format, we want unambiguous, economical prose. Contributions will be edited for clarity, style, and brevity. Authors are responsible for the accuracy of all citations and data. Guidelines for submission are listed below.

LETTERS TO THE EDITOR

LTV welcomes correspondence.

The Long Term View
Massachusetts School of Law at Andover
500 Federal Street
Andover MA 01810
Tel: (978) 681-0800 Fax (978) 681-6330
E-mail: vietzke@mslaw.edu

GUIDELINES FOR SUBMISSIONS

The Long Term View encourages the submission of unsolicited manuscripts on future topics. Published articles generally range from 2,500 to 7,000 words, although some articles of greater or shorter length are published. Manuscripts must be typed; all citations must be listed as endnotes. Authors *must* provide an electronic copy, by disk or e-mail (vietzke@mslaw.edu). Accepted submissions will be edited for clarity and brevity. Authors are responsible for the accuracy of their data and citations.

ISSN 1066-1182

Printed by Kelley Solutions
Portsmouth, New Hampshire

THE LONG TERM VIEW

Volume 6, Number 4 *Spring 2006*

Are Our Highest Officials Guilty of Torture?

Table of Contents

Introduction	Lawrence R. Velvel	3
Torture, Democracy, and the War on Terrorism	J. Peter Pham	6
Do Americans Care About Torture?	Mitch Wertlieb	18
The Absolute Prohibition of Torture and Ill-Treatment	David Weissbrodt	22
A Campaign to Impeach President George W. Bush	Francis A. Boyle	43
The Pain Beyond Law	Alex Hooke	46
Tortured Logic: Renditions to Justice, Extraordinary Rendition, and Human Rights Law	Margaret L. Satterthwaite & Angelina Fisher	52
The Logic of Torture—Impunity, Democracy, and the State Power	Marc Sapir	72
The Practice of Rendition in the War on Terror	Jeffrey F. Addicott	77
America is Guilty of Torture	George Phillies	84

Introduction

Lawrence R. Velvel

The use of torture by Americans, the subject of this issue, is a topic in which I have had an interest, and on which I have been posting blogs, for nearly two years, i.e., since close to the time when the first information about torture became public. Unlike typical blogs, the postings have been standard essays, sometimes fairly lengthy ones, of the kind that normally appear not on blogs, but in hard copy. Lots of things that were said in the postings are also said below by writers in this issue of *The Long Term View.* One cannot, however, begin to explicate in this Introduction all the things that have been said, often quite extensively, either in the blogs, in articles in this issue, or in both.

Those interested in what the writers in this issue have to say will of course read their articles below. Those who may be interested in reading what was said in the blogs in 2004-2005 can read the postings online at VelvelOnNationalAffairs.com, or can now read them in book form because the blogs from 2004-2005 have been published in a book, with postings related to torture forming one separate section of the work and being set forth in chronological order in that section. The book is *Blogs From The Liberal Standpoint: 2004-2005*, pp. 43-186, and is available from both Amazon.com and the Massachusetts School of Law. The chronological organization of the work allows the reader to see what became known about torture at approximately what times, to see what was admitted by government at what times (in general, precious little was admitted), and to get a sense of the flow of information and ideas over time. In this vein, the blogs also tell when it became known beyond dispute that certain ideas the author initially treated as possibilities were in fact true, e.g., that what was done at Abu Ghraib had been done at Guantánamo, that the government descended to torture because it was desperate to try to get information to ward off possible attacks in America and on our soldiers in Iraq, that disgraceful, incompetent legal memos written by right wing zealots in the Department of Justice had been drafted to give attempted legal cover to Bush and company, that the government wanted to try detainees before military tribunals because it knew it had obtained evidence by means that would cause the evidence to be thrown out in civilian courts, that *The New York Times* might have been holding back important stories, as became known with certainty when it ran the story about the NSA's spying on civilians with the acknowledgment that it had been sitting on it for a year, and a number of other matters.

In addition to the foregoing, there are numerous other matters written of in the blogs, (and often written of below too). Among other matters, the blogs discuss the following:

- There is no question but that George W. Bush, and several of his colleagues like Cheney, Addington, Rumsfeld, Wolfowitz, Feith, and Cambone, are guilty of the federal crime of conspiracy to commit torture, a crime that is a felony punishable by up to life imprisonment under the federal Anti-Torture Statute and that is an impeachable offense.

- The media and politicians have been loathe to discuss that Bush is guilty of the felony of conspiracy to commit torture. Shockingly, even liberal bloggers have stayed away from the subject. It is, apparently, just too hot to handle.

- For two reasons the memoranda written by the Department of Justice to try to legalize the torture made it impossible for there ever to *be* torture. To begin with, the DOJ took the position that, regardless of the pain *actually* inflicted, torture cannot exist unless its *objective* is to inflict pain, rather than pain merely being the byproduct of some other objective. But the objective of torture is to get information, not to inflict pain. Pain is only the byproduct of this other objective, and therefore there is no torture.

  Secondly, the DOJ's memos took the position that, if the President, as commander-in-chief, orders or authorizes torture, then it is not a violation of law to torture someone notwithstanding the federal Anti-Torture Statute. What this meant, as was driven home in spades when the story about the President's authorization of spying on civilians by the NSA became public, is that the President can authorize and immunize violations of laws enacted by Congress.

- As again driven home subsequently by the NSA spying, the claims of presidential power undergirding the torture were and are a threat to the civil liberties of all Americans. For if the President can authorize violations of law if he claims this is necessary to protect the country, if he can authorize torture and electronic spying because he says they are necessary to protect the country, then why can't he, for the same reason, order break-ins as Nixon did, authorize the holding of people indefinitely as Bush did, authorize, or at least countenance, murder, as it seems very likely some presidents have done and as Bush surely has in certain ways. No one will be safe from a president who acts badly—which seems to be almost the only kind of president we have gotten since 1960.

- The DOJ lawyers who wrote the corrupt legal memos giving attempted cover to Bush's actions have been rewarded by federal judgeships, cabinet positions, and high falutin' professorships.

- Today, members of the media who call George W. Bush incompetent are virtually a drug on the market. But for a very long time almost no members of the media were willing to speak this obvious truth. And of the *very* few who were, the majority were African American. It says something very undesirable about this country when the very few people who are willing to speak an obvious truth are mainly people whose ancestors were slaves, and persons who come from the long dominant groups eschew speaking the truth.

- The man ultimately responsible for the torture had a unique preparation and persona for the presidency: he is a former drunk, was a serial failure in business who had to repeatedly be bailed out by daddy's friends and wanna-be-friends, was unable to speak articulately despite the finest education(s) that money and influence can buy, has a dislike of reading, so that 100-page memos have to be boiled down to one page for him, is heedless of facts and evidence, and appears not even to know the meaning of truth. This is a unique preparation for a

President and, except for not knowing the truth, is a unique persona for one.

- It is essential that we begin putting leaders who commit crimes (including torture) into the dock. The failure to do so, combined with the fact that it is not their children but other people's children who fight their (sometimes criminal) wars, has led to wars and, via wars, to torture itself. Putting leaders in the dock is the only way to deter future leaders from committing crimes. This was our theory at Nuremberg. It was our theory about trying Milosevic. Why should it be different for criminals like Johnson, Rush, McNamara, McGeorge Bundy, Nixon, Kissinger, Bush II, Cheney, Rumsfeld, Wolfowitz, Feith, Addington, and others? Indeed, the very length of the list shows the necessity of trying and punishing these people if we want others to be deterred from similar conduct in future.

There are many other points made in the blogs and/or made below in this issue of LTV. For we do not live in untroubled times, but in days afflicted by the Chinese curse: may you live in interesting times. I recommend the entire plethora of points to the reader. ■

Torture, Democracy, and the War on Terrorism

By J. Peter Pham

Before the attacks of September 11, 2001, most Americans found it rather difficult to credit the existential threat posed by the terrorist phenomenon in the manner poignantly described by British historian Paul Johnson over a decade and a half earlier:

> Terrorism is the cancer of the modern world. No State is immune to it. It is a dynamic organism which attacks the healthy flesh of the surrounding society. It has the essential hallmark of malignant cancer: unless treated, and treated drastically, its growth is inexorable, until it poisons and engulfs the society on which it feeds and drags it down to destruction.[1]

And even if 9/11 raised awareness of the challenge to the international community in general—and in the open societies of liberal democracies in particular—posed by terrorism, nonetheless the indications are that full scope of Johnson's cancer metaphor has yet as to be fully appreciated even as America's "global war on terror" enters its fifth year. Cancer, after all, is a disease which, when reduced to the most generic terms, develops when the cells in a given part of the body begin to grow out of control. Certain types of cancer respond very differently to different types of treatment, and certain treatments elicit distinct responses from varying patients, so determining the type of cancer and understanding the health and lifestyle of the patient are vital steps toward knowing which treatments will be most effective. Thus necessarily the treatment of cancer is characterized by a rather carefully regulated regimen of surgery, radiation, chemotherapy, and biologic therapies based on the unique situation of the patient. Consequently, while a cancer diagnosis usually engenders a sense of urgency in making choices about treatment and services, the best medical professionals urge their patients to take the time to consider all the options available in order to make decisions as well informed as possible.

If terrorism is to be likened to a cancer, then the patient—in this case liberal democracies in general and the United States in particular—may well have been notified on 9/11 of the diagnosis but has so far refused to listen to, much less to discuss, the treatment options. As a result, carrying the metaphor perhaps a bit further than its urbane author intended, the attending physicians have given way to technicians who hack away at tissue with little input from the patient who will ultimately bear the scars of their handiwork. In this sense, the citizens of the United States should be no more surprised by the abuses reported out of Guantánamo and Abu Ghraib than the

---

J. Peter Pham is director of the Nelson Institute for International and Public Affairs at James Madison University and a resident fellow at the Institute for Infrastructure and Information Assurance. Dr. Pham is the recipient of a 2005-2006 academic fellowship from the Foundation for the Defense of Democracies, a non-partisan policy institute focused on terrorism studies.

cancer patient who, refusing to discuss treatment options, discovers that his caregivers went ahead with some crudely effective, albeit drastic, therapy.

While some of the most horrific cases reported out of the worldwide network of detention centers run by U.S. military and intelligence agencies, those of detained terrorist suspects who died under interrogation—including that of Manadel al-Jamadi, whose body was wrapped in plastic and packed in ice when it was carried out of an Abu Ghraib shower room where he had been handcuffed to a wall, or that of Abed Hamed Mowhoush, who apparently suffocated after being thrust headfirst into a sleeping bag[2]—have received widespread notoriety (and almost equally widespread condemnation), it has yet to lead to what I described in another journal more than a year ago as "a public debate long overdue on the balance to be struck between the competing demands of civil liberties and national security and whether or not violent responses to violence render both sides morally indistinguishable."[3]

If anything, the confidential (and not-so-confidential) findings of the International Committee of the Red Cross,[4] the recommendations of non-governmental human rights groups,[5] and the investigative work of various journalists[6]—to say nothing of the official reports of government panels[7]—indicate that, beyond the factual question of whether or not acts of torture have been committed by some of those fighting the war on terror (it has by almost any common sense definition of "torture"), lies a whole host of issues. What interrogation techniques are our forces allowed to employ and under what circumstances? Are any of these tactics even effective, or are they counterproductive? And if the tactics adopted fail to elicit the hoped for results, can we hand prisoners over to other powers who may not be similarly constrained? If yes, under what circumstances and with what guarantees, if any? If not, what should we do?

The fact is that it has been two years since the emergence of the riveting images of Iraqi prisoners being forced by members of the now-disgraced 372nd Military Police Company into simulated sexual positions and otherwise abused generated a flurry of outrage in legal and media circles—all with little apparent consequence other than the criminal prosecution of the handful of the lower-level offenders on whom the consequences of military justice fell most heavily. While Pentagon investigations[8] led to some superior officers being relieved of their commands and others being reprimanded and having their careers essentially ended, none of these figures who were supposed to exercise command responsibility are likely to see the inside of a prison, military, or otherwise. In fact, the failure of the scandal to result in greater *political debate*—much less fallout—speaks volumes about our democratic polity and what it needs to confront. Why was it that, as Craig Whitney of the *New York Times* had piously hoped in his introductory essay to a volume of the abridged investigation reports, the electorate declined to render "judgment on November 2, 2004, on what responsibility should be borne by those who made the political and policy decisions that led, indirectly or not, to the aberrations at Abu Ghraib"?[9] Could it be that the reports—to say nothing of the photographs of the Abu Ghraib detainees and their smiling tormentors that led to the investigations of abuses—actually revealed more than many Americans wanted to know?

Beyond the Torture Warrant

If the juridical obligations of both international and U.S. law are fairly clear,[10] the practical (and ethical) application of those legal norms in some cases is perhaps more ambiguous. In a chapter provocatively entitled "Should the Ticking Time Bomb Terrorist Be Tortured?" in his book *Why Terrorism Works:*

Understanding the Threat, Responding to the Challenge, Harvard Law School Professor Alan Dershowitz, a noted civil libertarian, presented the case of Zacarias Moussaoui, the so-called 20th hijacker who was arrested before 9/11 after flight instructors reported suspicious statements he made while taking flight lessons (including his lack of interest in learning how to land an airplane), and noted:

> The government decided not to seek a warrant to search his computer. Now imagine they had, and that they discovered he was part of a plan to destroy large occupied buildings, but without any further details. They interrogated him, gave him immunity from prosecution, and offered him large cash rewards and a new identity. He refused to talk. They then threatened him, tried to trick him, and employed every lawful technique available. He still refused. They even injected him with sodium pentothal and other truth serums, but to no avail. The attack now appeared to be imminent, but the FBI still had no idea what the target was or what means would be used to attack it. An FBI agent proposes the use of non-lethal torture—say, a sterilized needle inserted under the fingernails to produce unbearable pain without any threat to health or life…The simple cost-benefit analysis for employing such non-lethal torture seems overwhelming: it is surely better to inflict non-lethal pain on one guilty terrorist who is illegally withholding information needed to prevent an act of terrorism than to permit a large number of innocent victims to die. Pain is a lesser and more remediable harm than death; and the lives of a thousand innocent people should be valued more than the bodily integrity of one guilty person.[11]

In response to the near-hysterical tenor of the criticism with which his proposal was greeted by his peers across the political spectrum,[12] Dershowitz appealed, among other authorities, to the utilitarian argument advanced by Jeremy Bentham who argued that happiness can be calculated and quantified, and it is consequently acceptable to inflict pain and suffering on the few to serve the wants and needs of the many.[13] Dershowitz went on to resolve the dilemma between the demands of public safety and security on the one hand and civil liberties and human rights on the other by appealing to a third value, accountability and visibility, to argue for the revision of legislation to accommodate torture in the "ticking bomb case" through the use of carefully delimited judicial "torture warrants" that would authorize the administration of a predetermined amount of non-lethal pressure.[14]

Dershowitz's reassurances about the constitutionality of his proposal[15] are hardly convincing to many civil libertarians and other human rights advocates[16]—to say nothing of their being comforting to anyone who might find himself or herself the object of one of the proposed warrants. Nevertheless, the professor may be on to something. Under the current controlling legal regime, there is almost universal opposition to torture (as well as the euphemistic "moderate physical pressure" that some have referred to as "highly coercive interrogation" or even "torture lite").[17] However, confronted with another Moussaoui, is there any doubt that officials would subject him to what the director of Central Intelligence Agency, Porter J. Goss, told a Senate committee earlier this year were "professional interrogation techniques"?[18] Moreover, is there any question that a large plurality—if not an absolute majority—of Americans would *expect* officials to use those tech-

niques, treaty obligations, and legal strictures notwithstanding? In short, is there no little hypocrisy in the liberal polity's condemnation of torture even as it knows full well—or at least it would know were it not in denial—that it has occurred, is occurring, and will likely occur again?

While Dershowitz's proposal is problematic (to civil libertarians) to say the least and, in any case, the evidence for the effectiveness of various coercive techniques for loosening the tongues of suspected terrorists is necessarily anecdotal and apparently mixed at best,[19] there is much truth in the Harvard professor's assertion that "it seems logical that a formal, visible, accountable, and centralized system is somewhat easier to control than an ad hoc, off-the-books, and under the radar-screen system."[20] In fact, I would take Dershowitz's argument a step further and posit that while imposing a ban on torture may be morally satisfying, doing so while knowingly avoiding evidence of the actual or likely occurrence of abuses only serves to promote disrespect for the rule of law in general and may even have the effect of increasing the instances of detainee abuse in particular.

Irrespective of whether we as individuals choose to acknowledge it or not, the democratic polity that we are a part of has implicitly—and, one could argue, even explicitly—struck a Faustian bargain. The primary task of military, security, and intelligence agencies is the prevention of future attacks, especially those directed against the homeland. In order to carry out this charge, agents of these services may come to believe that it is necessary to "work…sort of the dark side," as Vice President Dick Cheney told one interviewer shortly after 9/11.[21] Tactics adopted may include (and apparently have included) a number that are of dubious legality if not patently illegal, including the abduction, "rendition," and physical and psychological abuse of suspected terrorists. In exchange for the security that these measures presumably assure, the American public has allowed those it has entrusted with its defense a great deal of discretion, ostensibly because such latitude and secrecy concerning *modus operandi* are necessary so that terrorists do not develop means of circumventing or otherwise resisting the new counterterrorism efforts. Furthermore, there is, for many members of the American public, what may constitute an additional advantage to this arrangement: the less they know about the methods used by those charged with protecting the commonweal, the less they have to contemplate the costs, real and moral, of their newfound sense of security. Of course, unspoken is the fact that secrecy, as Dershowitz intuits, contains within itself the potential for abuse and, consequently, the heavy price that it exacts from those embracing it may at some point exceed that of the disaster averted.

Under the current controlling legal regime, there is almost universal opposition to torture....However, confronted with another Moussaoui, is there any doubt that officials would subject him to..."professional interrogation techniques"?

The Israeli Experience

To date, the only country in the world to publicly acknowledge its use of coercive techniques against suspected terrorists is, not surprisingly, the state of Israel, which has not only been a target of terrorist attacks since its foundation, but is also the only functional democracy in its neighborhood. As a conse-

quence, the citizens of the Jewish state had an opportunity to thresh out some of the dilemmas that such attacks pose for a democratic polity. In 1987, two well-publicized abuse cases led the government of Israel to establish a commission of inquiry to examine the methods of the principal state agency responsible for counterterrorism and internal security, the General Security Service, generally called by its Hebrew acronym as the Shabak (*Sherut ha-Bitachon ha-Klali*) and better known abroad as the Shin Bet. In carrying out its mission, the Shabak carries out investigations to gather the intelligence that it needs to preempt or otherwise prevent terrorist attacks. As court documents attest, in the past this has meant that the security service has resorted to physical force during its interrogations.[22]

The first case was that of Izat Nafsu, a member of the Circassian minority who was serving as a lieutenant in the Israeli Defense Force (IDF) when he was arrested and convicted of treason for spying for Syria in 1980. In 1987, Nafsu's conviction by a military tribunal was overturned by the Israeli Supreme Court which, sitting as the Court of Criminal Appeal, ruled that the confession that had been its basis had been obtained by his interrogators through coercion.[23] The second case involved the 1984 hijacking by four armed Palestinian terrorists from Gaza of a civilian commuter bus, the Egged No. 300 which runs from Tel Aviv to Ashkelon (both cities are within Israel's pre-1967 borders). A counterterrorism team stormed the bus, killing two of the hijackers and capturing the other two. Journalists who were present at the scene saw the two taken alive from the bus and took pictures of them being taken away. Shortly afterwards, however, a government spokesman announced that the two captured terrorists had died of their wounds on the way to a hospital. A subsequent inquiry by the comptroller of the Ministry of Defense concluded that the two terrorists had been taken alive from the bus but left open the question of how they died. A further investigation, conducted the following year by the state prosecutor, concluded that while there was insufficient evidence to bring charges for the killing, there were grounds for indicting a senior IDF officer, five Shabak agents, and three police officers for assault for their roles in the affair. The criminal case, however, ended when President Chaim Herzog pardoned the men involved.[24] A lively public debate nonetheless ensued around both these two cases, leading to the decision to publicly examine the issues raised through the vehicle of a special commission established under the chairmanship of retired Supreme Court Justice Moshe Landau, who earlier in his judicial career had presided at the 1961 trial of Nazi Adolf Eichmann.

Regardless of one's view of the specific recommendations made by the Landau Commission, the work of the panel and its final report are without parallel in any other contemporary democracy for its public examination and discussion of the investigative procedures employed by the government's security services in cases of terrorism.[25] While the report has been roundly criticized by human rights advocates in Israel and abroad,[26] it did condemn the use of torture which it acknowledged had been used by Shabak interrogators during their questioning of detainees. Nonetheless the commission recognized that the interrogators themselves labored under intense pressure—ultimately derived, although the report does not make this point explicit, from the public wherein sovereignty resides in a democratic polity—to protect the would-be targets of terrorists. Thus the commission called for the legislative articulation of a series of guidelines for the use of "moderate physical pressure" and "non-violent psychological pressure" in the interrogation of prisoners withholding information about impending acts of terrorism, when the knowledge thus obtained could save lives.[27]

The commission's unprecedented call for statutory regulation of specific interrogation practices—those often mentioned include shaking prisoners, depriving them of sleep, and placing them in various physically uncomfortable positions including the *Shabach* (where the prisoner is seated on a low stool or chair, tilted forward, with his or her hands tied behind the back and head covered by a sack, while loud music is played), the *Kasa'at at-tawlah* (where the prisoner is painfully stretched, using a table and direct pressure), and the *Qumbaz* or "frog crouch" (where the prisoner is forced to crouch on tiptoe with his or her hands tied behind his back)—was widely ridiculed, even by those who accepted that there are circumstances when extreme measures might be employed. One scholar asked whether there was ever a case where a state proclaimed its interrogation practices, torture or not, in its legal code.[28] (Codified or not, many interrogation techniques are known today either because they have been documented in legal proceedings, reported by those subject to them or their advocates, or even published by interrogators past and present.[29])

Despite a considerable body of necessarily anecdotal evidence—albeit much contested by opponents of the techniques used—that the coercive methods employed by the security services have saved a number of lives by preventing terrorist attacks, the Israeli Supreme Court brought the brief decade of openness to an end in 1999.[30] Writing for the tribunal, its president, Aharon Barak, prohibited the employment of physical pressure even if its use is considered necessary to prevent acts of terrorism. The court's judgment came even as its head acknowledged:

> The facts presented before this Court reveal that one hundred and twenty people died in terrorist attacks between 1.1.96 and 14.5.98. Seven hundred and seven people were injured. A large number of those killed and injured were victims of harrowing suicide bombings in the heart of Israel's cities. Many attacks—including suicide bombings, attempts to detonate car bombs, kidnappings of citizens and soldiers, attempts to hijack buses, murders, the placing of explosives, etc.—were prevented due to the measures taken by the authorities responsible for fighting the above described hostile terrorist activities on a daily basis.[31]

Its acknowledgment of the country's unique security challenges notwithstanding, the court held that the Shabak interrogations violated Basic Law: Human Dignity and Liberty clauses guaranteeing freedom from violation of an individual's body or dignity, rights that could lawfully be infringed upon only "by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required."[32] Consequently, the tribunal granted an absolute order *nisi* declaring that the security agency "does not have the authority to 'shake' a man, hold him in the 'Shabach' position…force him into a 'frog crouch' position and deprive him of sleep in a manner other than that which is inherently required by interrogation."[33]

[I]nterrogation practices... include shaking prisoners, depriving them of sleep, and placing them in various physically uncomfortable positions.

Irrespective of what one thinks of the wisdom or folly of the experiment initiated by

Justice Landau's commission and/or the ruling of Justice Barak's court, the remarkable fact remains that Israel's is the only democratic polity to directly and publicly confront the dilemma posed by Dershowitz's "ticking time bomb terrorist." While I do not know of such a case having arisen since the *Public Committee Against Torture* decision, the outbreak of the so-called "al-Aqsa intifada" in late 2001 with its attendant spike in suicide bombings and other terrorist attacks would tend to suggest a high probability that it has.[34] In any event, inevitably such a circumstance will occur and while the security services will, undoubtedly, be prepared to deal with it tactically and operationally, they and the society they are charged to protect will be bereft of the juridical framework necessary for the nation's elected political leadership to give them legitimate guidance on confronting it. Whether this scenario, with the security services dealing extra-legally with the situation, represents anything approaching ideal in a liberal society is, of course, entirely another question.

Fighting the Battles, Winning the War

Even if one opts to categorically as well as specifically—the ruling graphically catalogued some examples of banned measures—"prohibit all forms of physical pressure" as the Supreme Court of Israel does,[35] it could be argued that the tribunal's public confrontation of the awful dilemma over coercive interrogation practices—to say nothing of its equally unparalleled track record of granting emergency judicial review even during ongoing military operations—is inconceivable outside the vigorous (to say nothing of vociferous) culture of Israeli democratic politics. Dershowitz has convincingly argued that Israel's highest tribunal "was able to confront the issue of torture precisely because it had been openly addressed by the Landau Commission in 1987."[36] The State of Israel is, of course, exceptional in a number of ways. A small country where everyone seemingly knows everyone else, it has an extraordinary tradition of public discourse concerning its constantly precarious security situation about which no citizen is unaware. And while the debate is often heated, once definitive decisions are made, they tend to be widely respected. A number of Israeli contacts have told me that after the Supreme Court's ruling was released, clear directives were handed down the military and security chains of command to obey it, notwithstanding the personal and professional reservations of many experienced counterterrorism officers.

While human rights groups continue to document abuses, I have received credible—if at times grudging—acknowledgments from several Israeli and Palestinian activists that interrogation methods currently employed are markedly different from those before 1999. Tellingly, while human rights lawyers acting on behalf of detained terrorist suspects have brought a whole host of complaints before Israeli courts in the six years since the torture ban was established, Justice Barak has yet to hear a case alleging that his ruling banning torture has been flaunted. Instead, reports indicate that the security services have been forced to develop effective means of obtaining the intelligence they require without transgressing the now-acknowledged legal standards. (During a research trip to Israel this past summer, my colleagues and I visited a special facility for prisoners who had been convicted by courts of violent terrorist activities, included the murder of Israeli soldiers and civilians. The prison authorities allowed us to freely interview a number of Palestinian prisoners, including both Arab citizens of Israel and residents of the territories occupied after 1967. Although we recorded quite a number of grievances, running the gamut from the legitimate to the ludicrous, none of those we spoke with complained of torture.)

My point is not so much to extol the virtues of the Israeli approach as to contrast it with what has occurred in the United States in the aftermath of 9/11. The *New York Times*, for example, has reported that "[in] early November 2001, with Americans still staggered by the September 11 attacks, a small group of White House officials worked in great secrecy to devise a new system of justice for the new war they had declared on terrorism."[37] According to officials, the plan was considered so sensitive that "senior White House officials kept its final details hidden from the president's national security advisor, Condoleeza Rice, and the secretary of state, Colin Powell."[38] It goes without saying that the same officials were quoted by the report as saying they "hardly thought of consulting Congress."[39]

Thanks to the efforts of dedicated non-governmental human rights organizations, both international and American, combined with the tenacity of a number of investigative journalists, the mechanical elements of this "new system of justice" have been unveiled, including such investigative techniques as forcing naked detainees to stand with their feet shackled and their hands chained above their heads as well as covering the heads of prisoners with black hoods, forcing them "stand or kneel in uncomfortable positions in extreme heat or cold" that can shift quickly from "100 to 10 degrees," depriving them of sleep, subjecting them to disorienting lights and sounds, and withholding painkillers to those wounded during their capture.[40] Still other detainees are even less fortunate in the treatment they have received: an unknown number of those in this latter category have been turned over to authorities in states that are less than renowned for their human rights records. *The Wall Street Journal* quoted one "senior federal law-enforcer" as saying about one terrorist suspect, "There's a reason why [Mr. Mohammed] isn't going to be near a place where he has Miranda rights or the equivalent of them. He won't be someplace like Spain or Germany or France. We're not using this to prosecute him. This is for intelligence. God only knows what they're going to do with him. You go to some other country that'll let us pistol whip the guy."[41] Countries frequently named as receiving these "extraordinary renditions" include Egypt, Jordan, Saudi Arabia, and Uzbekistan.[42]

The problem with these crude methods is that, aside from the operational legal and ethical questions, they assume that torture (or "torture lite") necessarily works. As one veteran national security correspondent has observed: "Professional intelligence officers know that prisoners will confess to anything under intense pain. Information obtained through torture thus tends to be unreliable, in addition to being immoral."[43] Even conservative scholar Reuel Marc Gerecht, himself a former Central Intelligence Agency operative, has complained in the pages of the *Weekly Standard* that "[i]t is clear that the Bush administration hasn't thought through what it's doing in these prison facilities."[44] Gerecht's assessment of the *modus operandi* in America's fight with terrorists is, given its source, particularly damning:

> The Pentagon and the CIA should admit, however, that their intelligence officers can *regularly* make mistakes in their interrogations and debriefings. Interrogation is an art, not a science. Even in the best of hands judgments can always remain uncomfortably subjective. We should be honest and say that we don't always have the best of hands doing the questioning…Has the Pentagon or the CIA introduced standard procedures to review the quality of the product of its interrogations—or even to listen to the tapes of those interrogations? It's a good bet

> that neither the Senate and House intelligence oversight committees, nor the senior reaches of the administration, have any firm idea who the interrogators are at the secret CIA facilities, or their preferred methods.[45]

The problem is, once again, the secrecy that veils almost everything connected with America's global war on terrorism. While various congressional committees have taken

The problem is, once again, the secrecy that veils almost everything connected with America's global war on terrorism.

U.S. military and intelligence officials to task for the abuses that have been exposed, none has taken on the responsibility of providing the executive branch with any legislative guidance on interrogation and other tactics to be used against terrorists and suspected terrorists. The closest thing in the United States to Israel's Landau Commission has been the unofficial (although partially funded by a grant from the Department of Homeland Security) Long Term Strategy Project for Preserving Security and Democratic Freedoms in the War on Terrorism, a joint project of Harvard University's John F. Kennedy School of Government and Harvard Law School involving roughly two dozen former government officials from the United States and Great Britain. The group's final report asserted that there were "highly coercive interrogation techniques" that "also comply with our additional treaty obligations not to engage in 'cruel, inhuman, or degrading treatment.'"[46] A list of techniques meeting these requirements—unlike the Landau Commission's appendices, no menu of suggestions is included here—would be prepared by the President and communicated to the relevant congressional oversight committees. Even then, these would be used in individual cases only when exigent circumstances are certified by a designated senior government official who communicates the certification to the Attorney-General and the Senate and House Intelligence Committees. Detailed oversight and other accountability mechanisms were also delineated.[47] A similar case, albeit without the detailed statutory architecture, was made by Gerecht, who has argued: "If the CIA believes it's necessary to 'waterboard' a chief al-Qaeda operative who may have information about a devastating terrorist strike, then the administration should make the case before Congress, or at least before the intelligence oversight committees, that simulated drowning is morally and operationally justified."[48]

In the end, however, while the idea that America should set up the institutions and mechanisms that would make its interrogation of terrorist suspects less arbitrary and more accountable has attracted, not unexpectedly, the ire of civil libertarians and human rights advocates, it has found little traction on either side of the aisle in the halls of Congress. And, despite its foreign policy of spreading democracy abroad, the Bush administration has not gone out of its way to pursue a debate that would subject its tactics to public scrutiny, much less risk the possibility of having its executive authority in the war on terror circumscribed. In the face of this stance, the elected representatives of the people apparently prefer, like their constituents, to continue with their Faustian arrangement of obtaining what they perceive to be security in exchange for ignorance of its costs—legal, diplomatic, moral, or otherwise.[49]

In his 2002-2003 Gifford Lectures at the University of Edinburgh, journalist and human rights scholar Michael Ignatieff sum-

marized the dilemma that democratic societies face in confronting international terrorism:

> When democracies fight terrorism, they are defending the proposition that their political life should be free of violence. But defeating terrorism requires violence. It may also require coercion, deception, secrecy, and violation of rights. How can democracies resort to these means without destroying the values for which they stand?[50]

The answer to this query is by no means easy. And the give-and-take of the democratic process, no matter how open or inclusive, offers no guarantee concerning the virtue or even justice of its public policy choices—to say nothing of their transcendent rightness or wrongness. After all, choices, even erroneous ones, as well as their attendant consequences are unavoidable elements of the human experience. However, while the adversarial dynamics of democratic proceedings are fallible, they also allow for the possibility of exposing and, ultimately, correcting mistakes. Consequently, in liberal societies, every action, especially those involving controversial clashes between values, ought to be subject to open debate and due deliberation, rather than surreptitiously carried out by unaccountable functionaries—a point that somehow eluded an administration otherwise committed to exporting the notion that in any society, regardless of cultural circumstances, openness and democracy are the keys to improving political life. Our not-too-distant history is replete with the wreckage of policies undertaken without the benefit of the imprimatur of the democratic political process. However a free people, who will ultimately bear the burden of decisions made in their name, can neither approve nor disapprove of governmental action of which they (or at least their elected representatives) are ignorant—willfully, hypocritically, or otherwise. If free polities are to prevail through the current conflicts without becoming irredeemably weakened, then no topic, no matter how unpleasant, should be off limits. If the ticking time bomb terrorist must be subjected to coercive interrogation techniques, then our political process must go through the battle of prospectively contemplating that possibility. If he or she should not be tortured, even if a threat of mass devastation can only be avoided through coercion, then the decision to assume the cost of adhering to that value—if it is indeed a value of the *demos*—needs to likewise be considered in advance and *that* burden democratically assumed. Any war, even a "war on terrorism," can only be won by fighting each battle as it comes—winning some and perhaps losing others. Whatever the momentary surge or ebb of the tides of conflict and the opposing shoals of anarchy and tyranny, history has shown that the liberal vessel has a remarkable resilience so long as it remains anchored in the legitimacy that can only be conferred by the battles of an open democratic process. ■

Endnotes

[1] Paul Johnson, *The Cancer of Terrorism*, in TERRORISM: HOW THE WEST CAN WIN 31 (Benjamin Netanyahu ed., 1986).

[2] *See* Joseph Lelyveld, *Interrogating Ourselves*, N.Y. TIMES MAG., June 12, 2005, at 36.

[3] J. Peter Pham, *Law, Human Rights, Realism and the "War on Terror,"* 4 HUM. RTS. & HUM. WELFARE 91 (2004) (reviewing Michael Ignatieff, THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR (2004)).

[4] *See, e.g.*, INTERNATIONAL COMMITTEE OF THE RED CROSS, REPORT ON THE TREATMENT BY THE COALTION FORCES OF PRISONERS OF WAR AND OTHER PROTECTED PERSONS BY THE GENEVA CONVENTIONS IN IRAQ DURING ARREST, INTERNMENT AND INTERROGATION (2004), *available at* http://www. globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.pdf.

[5] *See, e.g.*, AMNESTY INTERNATIONAL, ISSUE BRIEF: AMNESTY INTERNATIONAL CALLS FOR INDEPENDENT COMMISSION (2005), *available at* http://www. amnestyusa.org/uspolicy/issuebriefs/independent_commission.pdf.

[6] *See, e.g.,* Seymour M. Hersch, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB (2004).

[7] *See, e.g.,* OFFICE OF THE INSPECTOR GENERAL, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (2003), *available at* http://www.usdoj.gov/oig/special/0306/index.htm; *also see* INDEPENDENT PANEL TO REVIEW DEPARTMENT OF DEFENSE DETENTION OPERATIONS, FINAL REPORT (2004), *available at* http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf.

[8] *See, e.g.,* ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE (2004) ("the Taguba Report"), *available at* http://www.johnmccrory.com/download/taguba_report.pdf; *see also* ARTICLE 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND THE 205TH MILITARY INTELLIGENCE BRIGADE (2004) ("the Jones Report"), and ARTICLE 15-6 INVESTIGATION OF THE ABU GHRAIB PRISON AND THE 205TH MILITARY INTELLIGENCE BRIGADE (2004) ("the Fay Report"), *available at* http://www.washingtonpost.com/wp-srv/nationi/documents/fay_report_8-25-04.pdf.

[9] Craig R. Whitney, *Introduction*, THE ABU GHRAIB INVESTIGATIONS: THE OFFICIAL REPORTS OF THE INDEPENDENT PANEL AND PENTAGON ON THE SHOCKING PRISONER ABUSE IN IRAQ vii, xxiii (Steven Strasser ed., 2004).

[10] *See, e.g.*, United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51 at 197, U.N. Doc A/39/51 (1984) (defining torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" and declaring "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture"); *see also* Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8490 (1999) (interpreting the Convention in the light of the U.S. Senate's reservation limiting the acceptance of the treaty's proscriptions against "cruel, inhuman, or degrading treatment or punishment" to the understanding in the American constitutional jurisprudence of the "Fifth, Eighth, and/or Fourteenth Amendments to the Constitution"). For an anthology of declassified and otherwise released internal legal memoranda with which certain members of the Bush administration sought to justify policies undertaken, *see* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

[11] Alan M. Dershowitz, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 143-144 (2002).

[12] *See generally* Marcy Strauss, *Torture*, 48 N.Y.L. SCH. L. REV. 201 (2003).

[13] Alan M. Dershowitz, *The Torture Warrant: A Response to Professor Strauss*, 48 N.Y.L. SCH. L. REV. 275, 275-276 (2003).

[14] *Id*. at 277-279; *also see* Alan M. Dershowitz, *Torture "Off the Books"?*, NATION, June 10, 2002, at 2 (Letter to the Editor) (responding to a review by Amnesty International U.S.A. executive director William Schulz).

[15] Alan M. Dershowitz, SHOUTING FIRE: CIVIL LIBERTIES IN A TURBULENT AGE 470-477 (2002) (arguing that as long as the information obtained is not used in criminal prosecution of the subject the Fifth Amendment is not violated and as long as the intent is prevention rather the retribution the Eighth is likewise not transgressed).

[16] *See generally* Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 J. CONST. L. 278 (2003).

[17] Mark Bowden, *The Dark Art of Interrogation*, ATLANTIC MONTHLY, Oct. 2003, at 54.

[18] Faye Bowers, *Interrogation Tactics Draw Fire*, CHRISTIAN SCIENCE MONITOR, Mar. 30, 2005, at 2.

[19] *See generally* Jason Vest, *Pray and Tell*, THE AMERICAN PROSPECT, July 2005, at 47.

[20] Dershowitz, *supra* note 11, at 158.

[21] *Meet the Press with Tim Russert* (NBC television broadcast, Sept. 16, 2001), *available at* http://www.whitehouse.gov/vicepresident/news-speeches/speeches/vp20010916.html.

[22] *See generally* H.C. 5100/94, The Pub. Comm. Against Torture in Israel v. The State of Israel, 53 (4) P.D. 817, *available at* http://www.derechos.org/humanrights/mena/doc/torture.html.

[23] *See* Cr.A. 124/87, Nafsu v. Military Prosecutor Gen., 41 (2) P.D. 631.

[24] *See* Ian Black & Benny Morris, SECRET WARS: A HISTORY OF ISRAEL'S INTELLIGENCE SERVICES 400-405 (1991).

[25] *See* REPORT OF THE COMM'N OF INQUIRY INTO THE METHODS OF INVESTIGATION OF THE GENERAL SECURITY SERVICE REGARDING HOSTILE TERRORIST ACTIVITY (1987) [hereinafter LANDAU REPORT].

[26] *See generally* Emanuel Gross, *Legal Aspects of Tackling Terrorism: The Balance Between the Right of a Democracy to Defend Itself and the Protection of Human Rights*, 6 UCLA J. INT'L & FOR. AFF. 89, 107 (2001).

[27] *See generally* LANDAU REPORT, *supra* note 25.

[28] *See* Sanford H. Kadish, *Torture, the State and the Individual*, 23 ISR. L. REV. 345, 352 (1989).

[29] *See* HUMAN RIGHTS WATCH, TORTURE AND ILL-TREATMENT—ISRAEL'S INTERROGATION OF PALESTINIANS FROM THE OCCUPIED TERRITORIES 111-146 (describing interrogation techniques used by Israeli security forces); *see also* Chris Mackey & Greg Miller, THE INTERROGATORS: INSIDE THE SECRET WAR AGAINST AL QAEDA 479-483 (2004) (Mackey is the pseudonym for a U.S. military interrogator in Afghanistan who details sixteen different interrogation approaches used by American personnel against detainees suspected of belong to al-Qaeda or the Taliban).

[30] *See Pub. Comm. Against Torture v. State of Israel*, 38 I.L.M. at 1471 (1999).

[31] *Id*. at 1473.

[32] *Id*. at 1489.

[33] *Id*.

[34] *See generally* Michele K. Esposito, *The al-Aqsa Intifada: Military Operations, Suicide Attacks, Assassinations, and Losses in the First Four Years*, 34 J. PALESTINE STUD. 85 (2005).

[35] *Pub. Comm. Against Torture v. Israel, supra* note 30, at 1488.

[36] Dershowitz, *supra* note 13, at 288.

[37] Tim Golden, *After Terror, A Secret Rewrite of Military Law*, N.Y. TIMES, Oct. 24, 2004, at A1.

[38] *Id*.

[39] *Id.*

[40] Don Van Natta, Jr., et al., *Threats and Responses: Interrogations; Questioning Terror Suspects in a Dark and Surreal World*, N.Y. TIMES, Mar. 9, 2003, at A1.

[41] Jess Bravin & Gary Fields, *How Do U.S. Interrogators Make a Captured Terrorist Talk?*, WALL ST. J., Mar. 3, 2003, at B1.

[42] Don Van Natta, Jr., *Growing Evidence U.S. Sending Prisoners to Torture Capital; Despite Bad Record on Human Rights, Uzbekistan is Ally*, S.F. CHRON., May 1, 2005, at A4.

[43] David Ignatius, *"Rendition" Realities*, WASH. POST, Mar. 9, 2005, at A21.

[44] Reuel Marc Gerecht, *What's the Matter with Gitmo? Detention, Torture, and Other Illiberal Things*, WKLY. STANDARD, July 4/July 11, 2005, at 19.

[45] *Id*. at 24.

[46] LONG-TERM STRATEGY PROJECT FOR PRESERVING SECURITY AND DEMOCRATIC FREEDOMS IN THE WAR ON TERRORISM 2 (Philip B. Heyman & Juliette N. Kayyem eds., 2004).

[47] *Id*. at 23-32.

[48] Gerecht, *supra* note 44, at 25.

[49] At the time of this writing, there were reports in the media that Vice President Cheney was leading an administration lobbying effort to block legislation, still being drafted, offered by three Republic senators—John McCain, Lindsey Graham, and John W. Warner—that would bar the military from hiding prisoners from the International Committee of the Red Cross; prohibit cruel, inhumane, or degrading treatment of detainees; and require interrogators to use only techniques authorized in a new Army field manual. If the reports are accurate, then there is at least some possibility of public discussion. *See* Eric Schmitt, *Cheney Working to Block Legislation on Detainees*, N.Y. TIMES, July 24, 2005, at A16.

[50] Michael Ignatieff, THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR vii (2004).

Do Americans Care About Torture?

By Mitch Wertlieb

So what was it that persuaded President Bush to change his mind about the use of torture? For weeks the White House fought tooth and nail against a bill sponsored by Senator John McCain of Arizona that would specifically ban cruel or inhumane treatment of terror suspects anywhere in the world. Then in December the White House announced it would accept the bill, and President Bush withdrew his previous veto threat. Why the sudden change of heart?

Well, the President did meet with McCain a number of times prior to finally giving in on the issue. McCain, of course, knows a thing or two about torture, having spent years himself as a prisoner of war in Vietnam. Maybe the senator convinced the President that the bill would send a clear and necessary message that U.S. officials—whether they be in the military or working as CIA interrogators—are not like the terrorists they're fighting. Maybe the President saw the wisdom in McCain's hope that it would have the broad and long term effect of winning the hearts and minds of people all over the world—especially the Muslim world—who would otherwise remember the pictures of torture and humiliation that emerged from Abu Ghraib and assume that America has no moral high ground to stand upon when it comes to inhumane treatment.

Or maybe it was the outcry from outraged Americans who demanded that the White House adopt the bill to reflect the values of decency, compassion, and integrity that should represent the world's greatest democracy, and the President—shamed by the sentiment, or even swayed by the sheer numbers of those protesting his resistance, realized he was fighting a losing battle, and so withdrew his objection.

At the risk of appearing hopelessly cynical, I would say it was none of the above.

A simpler reason would be the 107 Republican lawmakers who joined their Democratic colleagues in a non-binding House vote supporting the McCain anti-torture bill, a clear indication that the President would not be able to sustain a veto and did not want to suffer the political defeat.

But President Bush is nothing if not consistent in his disdain for legislation that doesn't jibe with his beliefs and especially with laws that challenge his authority. So while the President *did* sign the bill, he couldn't resist doing so with a sneaky caveat: Bush made sure to pen his OK during a traditional lull in media coverage over the New Year's holiday, because he issued along with his approval a "signing statement" that gives him the right to circumvent the law under his powers as commander in chief. For a far better publicized comparison, look no further than the controversy over the President's blatant disregard for the 1978 law issued by Congress that disallows the use of domestic wiretapping without a warrant. Bush's signing statement gives him the authority to *interpret* the new anti-torture law, according to White House legal aid specialists who said that Bush believes he can

---

Mitch Wertlieb is the morning anchor for Vermont Public Radio.

waive the restrictions of the McCain bill if he feels it's necessary. That's because of those vague but seemingly omnipotent "broader powers" the President is so fond of bringing up whenever the equally debatable issue of what constitutes "national security" pops up.

Now, a Pollyanna supporter of the McCain legislation might say "OK, great, who cares *why* it worked, let's just be pleased with the result—Bush did end up signing the law, even if he weakened its overall strength by adding the signing statement; at least the anti-torture law is on the books." True enough. But dig deeper into this question of torture, and what may even be more disturbing is the nagging question of whether the bill would ever have seen the light of day *at all* without Senator McCain's dogged persistence and initiative to introduce it in the first place. He certainly gave no indication that his constituents demanded it, and it is that strangely mute public concern over the torture question—as opposed, say, to the greater furor expressed over whether the government is spying on us—that raises doubts about whether Americans care about torture, and upholding the highest moral standard to the rest of the world.

McCain's own personal prisoner of war experience, and the subsequent support from another politician with actual combat experience, Representative John Murtha of Pennsylvania, a Democrat who called for the non-binding vote on McCain's bill in the House, drove the successful fight against the President and his inner circle—none of whom, it should be noted, ever fought in any war and certainly have no clue about what must be the horrific effects of torture on a human being.

It is in fact a terribly bitter irony that the most ardent resisters to the anti-torture legislation—from Vice President Dick Cheney to Defense Secretary Donald Rumsfeld, Secretary of State Condoleezza Rice, and to the President himself, are in no way familiar with the realities and sufferings of combat, while veterans like McCain and Murtha—men who have sacrificed and served their country and actually fought in wartime—are the ones pleading for a civilized policy on torture driven by mercy rather than brutality to achieve a higher goal in the current war on terror.

It is in fact a terribly bitter irony that the most ardent resisters to the anti-torture legislation are the ones pleading for a civilized policy on torture driven by mercy rather than brutality to achieve a higher goal in the current war on terror.

What's more troubling still is that the American public seemed not very much moved by the revelations of inhumane treatment at Abu Ghraib, allegations of torture and illegal detainment of prisoners at the Guantánamo Bay detention center in Cuba, or reports of secret CIA detention camps. Even well before the McCain bill became news, there was barely an eyebrow lifted among the general public when President Bush refused to join the U.S. in the newly created International Criminal Court, which seeks to set standards for military forces the world over, holding them accountable for inhumane treatment of prisoners. Sure, there was the expected grumbling from the political left in America, but by and large most people could not be bothered.

The whole question of torture and why it seems to resonate with combat veterans like

McCain and Murtha and John Kerry, but not with the general public, has a lot do, I believe, with the collective memory of the 9/11 attacks, and in a more subtle way, the residual fear that is constantly reinforced not just by the Bush administration, but by every day cultural cues that strike an emotional chord of terror among the American public.

These cues are found in the popular television programs of the day, in movies and video games, and perpetuate a mentality of the "us vs. them" mode of thinking that is ultimately a simpler, black and white, and therefore far more effective message than one that asks a frightened populace to uphold ideals of tolerance and morality in the face of unknown danger.

What most Americans know about terrorism is gleaned from the unforgettable images of an airliner flying into the Twin Towers, and from popular TV shows like *24* that concoct increasingly terrifying fictional terrorist threats designed specifically to generate the kind of fear that leads to high ratings and advertising dollars.

So a bill designed to win over the heart and mind of a potential terrorist, perhaps a young Muslim living in squalor who may be tempted to join a terrorist organization, has little meaning when put up against the possibility that there's a bomb lurking somewhere—right now!—in some unsuspecting American city, and if Kiefer Sutherland has to beat a terrorist within an inch of his life to find that bomb and defuse it before it's too late, so be it.

In fact, the bomb-about-to-go-off-and-terrorist-in-custody-who-knows-where-it-is construct was a front and center argument in opposing the McCain bill as it was debated in the press. Conservative columnist Charles Krauthammer even used it as justification for torture in a *Weekly Standard* article. Who would not agree that torturing a suspect in order to potentially save millions of lives is a necessary evil?

This hypothetical is, of course, based on the assumption that such torture would work, that all the Hollywood-like elements would fall into place perfectly and a hero or heroes would subsequently find and disarm the bomb. Could it happen? Sure, I guess it could. But is that really the most likely scenario?

Americans who would argue that no one ever suspected the horror of planes being flown into the Twin Towers and Pentagon should remember that exactly such scenarios were mentioned in national security reports read by then National Security Advisor Condoleezza Rice well before 9/11 under the heading, "Bin Laden determined to attack inside the U.S." The lack of communication between FBI and CIA operatives and failure to heed the warnings of myriad officials keeping track of bin Laden has been well documented, and it has been suggested that with a little more foresight and awareness on the part of government officials stretching back to the Clinton and first President Bush administrations, the attacks may well have been prevented. It wasn't a matter of not being able to torture a terrorist due to ivory tower laws that prohibit it that led to the terrible result.

In any event, constructing an argument of such simplicity masks a complex yet far more realistic situation that a war on terrorism, against an enemy with no fixed borders that thrives on rhetoric and propaganda depicting Americans as crusading infidels, depends critically on countering those very images. Isn't it better to foster a strategy for the war on terrorism for the long term, given that the conflict—as President Bush himself suggested shortly after 9/11—would be a long and difficult struggle?

And the most effective way to do that is not by looking for loopholes to keep torture as a legal option for that remotely possible but more likely improbable movie moment when a ticking time bomb is split screen with a bound-and-gagged, straight-from-central-

casting Arab terrorist. Instead, wouldn't it be better to demand of our government a message to the rest of the world that it's ultimately better to side with a country that rejects torture, humiliation, illegal detentions, and secret prisons; that champions human rights and favors compassion and mercy and tolerance even when it wields unmatched military might; that Americans were victimized by people with no respect for human life on that tragic day in September, but that by caring deeply about what our government does in response is a direct rebuke of that disdain for life?

Hollywood scare-fests or the tactics of an administration bent on secrecy and abuse of power should not be driving American foreign policy. It should instead be the ideals of civility and respect from those who know firsthand what the worst of war does to the body and soul of people of any faith or creed.

The McCain anti-torture bill and the bi-partisan support it received represents the triumph of a higher ideal for the greater good over the base short-sightedness of "fighting fire with fire" the Bush administration has embraced since 9/11. Which philosophy the American public turns to will ultimately decide whether the war on terrorism comes to an end, or lives on as a permanent testament to a country that allowed fear to erode its own sense of liberty and the rejection of tyranny from which it was born. ■

The Absolute Prohibition of Torture and Ill-Treatment

By David Weissbrodt[1]

The President, the Secretary of State, and other U.S. government officials have repeatedly assured the world that the United States does not engage in "torture." Whenever they try to issue such statements, the critical listener must ask such questions as "What do they mean by torture?" Have they so narrowly defined "torture" as to ask the listener to overlook the mounting evidence of extremely brutal treatment which U.S. personnel have perpetrated against detainees in Afghanistan, Guantánamo, Iraq, and other secret detention facilities? Many detainees held by the U.S. have been subjected to ill-treatment that would, under international definitions and jurisprudence, qualify as torture.

Further, the international prohibition extends not only to torture, but also to "cruel, inhuman or degrading treatment or punishment." When U.S. officials repeatedly deny that they are engaging in torture, the critical listener should be wondering: Are they trying to ask the listener to overlook the obligation of the U.S. to prevent and protect against "cruel, inhuman or degrading treatment or punishment"? When the U.S. ratified the principal treaties forbidding torture and cruel, inhuman, or degrading treatment or punishment, the U.S. interposed an "understanding" that tried to further define "cruel, inhuman or degrading treatment or punishment" by referring to the U.S. Constitution's fifth, eighth, and fourteenth amendments. The U.S. initially explained that reservation as necessary to help clarify the vagueness of the phrase "cruel, inhuman or degrading treatment or punishment," but high level U.S. officials, including the Secretary of Defense, have instructed U.S. personnel in Afghanistan, Guantánamo, Iraq, and other secret detention facilities to engage in ill-treatment that is forbidden by both treaties and authoritative interpretations of the U.S. Constitution. The U.S. also did not attempt to interpose any reservation or restriction on its obligation under the Civil and Political Covenant: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

The latest lame defense of U.S. ill-treatment is that the U.S. Constitution does not apply to actions by government officials outside the United States. Not only is this newly concocted excuse not consistent with the object and purpose of the treaties that the U.S. was purporting to ratify, but treaty obligations apply to any person who is within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained. The U.S. also did not attempt to interpose any reservation or

---

David S. Weissbrodt is the Fredrikson and Byron Professor of Law at the University of Minnesota Law School. He is a world-renowned scholar in international human rights law and teaches international human rights law, administrative law, immigration law, and torts. In July 2005 he was designated as one of twenty Regents Professors at the University of Minnesota.

restriction on its obligation under the Civil and Political Covenant: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

While visiting Europe on October 7, 2005, Secretary of State Condoleezza Rice declared for the first time that the U.S. as "a matter of policy" "prohibits all its personnel from using cruel or inhuman techniques in prisoner interrogations, whether inside or outside U.S. borders."[2] Her statement was intended to assuage concerns expressed by European nations and to avoid legislation proposed by Senator John McCain to reaffirm as a matter of legal obligation that U.S. officials at home and abroad will not engage in "cruel, inhuman or degrading treatment or punishment." The Secretary of State further stated that the U.S. had not engaged in "torture," but could not make the same statement about other forms of forbidden ill-treatment.

The objective of this article is to set forth the absolute prohibition in human rights treaties, the Geneva Conventions, and other international humanitarian/human rights law against both torture and cruel, inhuman, or degrading treatment or punishment, followed by a discussion about how that prohibition applies to the United States.[3]

Development of the Prohibition of Torture and Cruel, Inhuman, or Degrading Treatment or Punishment

The first and most visible international pronouncements on this subject occurred in 1948 and 1949—following the close of hostilities in World War II and the Holocaust. In those days, the community of nations was trying to bind the wounds of war and build a new global structure that would prevent another such catastrophe with about 60 million killed. In some ways you could say that they were closing the door after the horse had left the paddock. But they also were foresightful in understanding that safeguards were necessary to help prevent another world war and protect human rights.

In 1948 the Universal Declaration of Human Rights was adopted by the U.N. General Assembly as the most authoritative international definition of human rights and as a contemporaneous interpretation of the treaty obligations of all U.N. member states to "take joint and separate action" to promote "universal respect for, and observance of, human rights...." Article 3 of the Universal Declaration proclaims: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

A year later in 1949, the Third Geneva Convention on the Protection of Prisoners of War declared in Article 17 as to international armed conflicts:

> No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted or exposed to any unpleasant or disadvantageous treatment of any kind.[4]

Similarly, the Fourth Geneva Convention on the Protection of Civilian Persons, also of 1949, in Article 32 as to international armed conflicts, including periods of military occupation, provides:

> The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but

> also to any other measures of brutality whether applied by civilian or military agents.[5]

Not only do the Geneva Conventions forbid torture and other ill-treatment in those terms, but they also declare "torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health" to be grave breaches.[6] Such grave breaches, if committed during international armed conflicts, are subject to universal criminal jurisdiction as to which each of the 188 nations that have ratified the Geneva Conventions (including the United States) are obligated to bring perpetrators, "regardless of their nationality, before its own courts."[7]

The Geneva Conventions of 1949 deal not only with international armed conflicts between High Contracting Parties, but also cover non-international armed conflicts in Common Article 3, which states: "Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely."[8] Common Article 3 prohibits "at any time and in any place whatsoever" certain acts, such as:

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; . . . [and]

(c) Outrages upon personal dignity, in particular, humiliating and degrading treatment....

The next major step in establishing an international bulwark against torture occurred when the Universal Declaration of Human Rights of 1948 was transposed into treaty obligations by the International Covenant on Civil and Political Rights of 1966.[9] Article 7 of the Civil and Political Covenant repeated precisely Article 3 of the Universal Declaration, but then added one further prohibition deriving from the trial of the Nazi doctors at Nuremberg:

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

The Civil and Political Covenant further provides that while some rights may be the subject of derogation during a "time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed," there are certain provisions of the Covenant that are not subject to derogation at any time by any of the 154 States Parties, including the United States. One of those nonderogable provisions is Article 7 on torture and other ill-treatment.

The Human Rights Committee—the international body that monitors the implementation of the Covenant on Civil and Political Rights—has provided some guidance on what treatment constitutes a violation of Article 7. While not drawing a definite distinction between treatment that amounts to torture and that which constitutes cruel, inhuman, or degrading treatment, the Committee has determined that beatings;[10] electric shocks;[11] mock executions;[12] forcing prisoners to stand for prolonged periods;[13] incommunicado detention;[14] and denial of food, water, and medical care for an extended period of time[15] violate Article 7 as either torture and/or cruel, inhumane, or degrading treatment.

The absolute treaty prohibition of torture[16] was reinforced in 1984 by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[17] which has now been ratified by 139 nations, including the United States. Article 1 of the Convention Against Torture defines torture as

> any act by which severe pain or suf-

> fering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The Convention against Torture not only calls for States Parties to prevent acts of torture, but it also provides in Article 2(2):

> No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

Furthermore, Article 2(3) makes clear that "An order from a superior officer or a public authority may not be invoked as a justification of torture."

Article 3 of the Torture Convention further provides that *no person shall be expelled, returned, or extradited "to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."* (Emphasis added.) Article 4 establishes *criminal responsibility not only for "all acts of torture," but also for attempts to commit torture and complicity in torture.* Articles 5 to 9 call for criminal jurisdiction over nationals who are alleged to have committed torture as well as acts of torture committed in the territory of a State party or against one of its nationals. An alleged perpetrator must either be tried or extradited to a State that can establish jurisdiction over the case. States Parties shall afford each other mutual assistance in investigating and establishing criminal jurisdiction.

The Committee Against Torture—the international body that monitors the implementation of the Convention Against Torture—has determined that several methods of interrogation constitute torture as defined by Article 1 of the Convention. In its concluding remarks on the periodic report submitted by Israel in 1997, the Committee decided that the following acts may be considered torture, particularly when used in combination: (1) restraining in very painful conditions, (2) hooding under special conditions, (3) sounding of loud music for prolonged periods, (4) sleep deprivation for prolonged periods, (5) threats, including death threats, (6) violent shaking, and (7) using cold air to chill.[18] The Committee also considered these methods to constitute cruel, inhuman, or degrading treatment.

The European Court of Human Rights has offered additional guidance regarding the meaning of torture and other ill-treatment. Article 3 of the European Convention on Human Rights states that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."[19] While Article 3 of the European Convention is similar to Article 7 of the Civil and Political Covenant, the two provisions are not identical. In *Ireland v. United Kingdom* (1978), the Court ruled that five interrogation methods used by the United Kingdom in its counter-terrorism efforts against the IRA violated Article 3, but did not constitute torture. The techniques included protracted standing against the wall on the tip of one's toes; covering the suspect's head throughout the detention (except during the actual interrogation); exposing the suspect to powerfully loud noise for a prolonged period; the deprivation of sleep; and the deprivation of food and water. The Court attempted to distinguish torture from inhuman or degrad-

ing treatment:

> In the Court's view, this distinction derives principally from a difference in the intensity of the suffering inflicted. The Court considers in fact that, whilst there exists on the one hand violence which is to be condemned both on moral grounds and also in most cases under the domestic law of the Contracting States but which does not fall within Article 3 (art. 3) of the Convention, it appears on the other hand that it was the intention that the Convention, with its distinction between 'torture' and 'inhuman or degrading treatment', should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.[20]

Further, the Court introduced the idea of "minimum threshold of severity," reasoning that "ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc."[21]

In *Ireland v. U.K.,* the Court did not, in contrast with the European Commission, consider the five methods to be torture, the suffering having not met "sufficient threshold of severity." The Commission had unanimously considered the combined use of the five methods to amount to torture, on the grounds that (1) the intensity of the stress caused by techniques creating sensory deprivation "directly affects the personality physically and mentally"; and (2) "the systematic application of the techniques for the purpose of inducing a person to give information shows a clear resemblance to those methods of systematic torture which have been known over the ages...a modern system of torture falling into the same category as those systems applied in previous times as a means of obtaining information and confessions."[22] Supporting the Commission's reasoning in *Ireland v. U.K.*, the Court ruled in *Ilhan v. Turkey* (2000) that in order for an act to be considered torture, it must be committed with certain intent:

> In addition to the severity of the treatment, there is a purposive element, as recognised in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which came into force on 26 June 1987, which defines torture in terms of the intentional infliction of severe pain or suffering with the aim, *inter alia,* of obtaining information, inflicting punishment or intimidating.[23]

Further, in *Tyrer v. United Kingdom* (1978), the Court reinforced "hierarchical" interpretation of Article 3, attempting to distinguish acts of torture from acts of inhumane treatment and acts of degrading treatment based upon a threshold of severity: torture presents a higher degree of seriousness than inhumane treatment, which is more severe than degrading treatment.[24]

In its most significant decision on torture and ill-treatment since *Ireland,* the European Court in *Selmouni v. France* (1999), noted that the Court's view on these issues was evolving with time so that the kinds of conduct that might have been considered ill-treatment in 1987 might eventually be viewed as torture. The Court ruled that a range of factors come into play when establishing whether a victim's pain or suffering is so severe as to constitute "torture," as distinct from other prohibited ill-treatment. According to *Selmouni*, determining whether the treatment in a particular case constituted "torture" depends on all

the circumstances of the case.[25] The Court stressed the fact that:

> [T]he [European Convention on Human Rights] is a living instrument which must be interpreted in the light of present-day conditions...and that certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in the future....[T]he increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.[26]

In respect to persons deprived of their liberty, in *Tomasi v. France* (1992), the Court ruled that "any use of physical force in respect of a person deprived of his liberty which is not made strictly necessary as a result of his own conduct violates human dignity and must therefore be regarded as a breach of the right guaranteed under Article 3 of the Convention. At the most the severity of the treatment is relevant in determining, where appropriate, whether there has been torture."[27] The Court, however, has demonstrated in several judgments a reluctance to find prison conditions to be in breach of Article 3, perhaps because of the high burden that would be placed on very poor countries.[28]

The prohibition of torture or inhuman treatment has become an important factor in evaluating the permissibility of deportations. The Court ruled in *Soering v. United Kingdom* (1989) that Article 3 prohibits the extradition of a person who is threatened with torture or inhuman or degrading treatment or punishment in the requesting country. Extradition in such circumstances would, according to the Court, "plainly be contrary to the spirit and intendment of the Article" and would "hardly be compatible with the underlying values of the Convention."[29] In two cases decided in 1991, the Court held that the same considerations apply to expulsion cases.[30]

Important, Article 3 protects against torture and ill-treatment irrespective of what a person has done or has been accused of doing, even if an individual is a suspected terrorist. In *Chahal v. the United Kingdom* (1996), for example, the U.K. wished to deport Mr. Chahal to India because his alleged terrorist activities posed a risk to the national security of the U.K. The Court, however, confirmed that, "Article 3 enshrines one of the most fundamental values of democratic society....The Court is well aware of the immense difficulties faced by States in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct."[31]

The first time that the Court made a finding of torture was in *Aksoy v. Turkey* (1996). In that case, the Court found that, while held in police custody, Mr. Aksoy was subjected to what is known as "Palestinian hanging." The Court expressed its view that this treatment could only have been deliberately inflicted. It would appear to have been administered with the aim of obtaining admissions or information from the applicant. In addition to the severe pain which it must have caused at the time, the medical evidence shows that it led to a paralysis of both arms which lasted for some time. The Court considers that this treatment was of such a serious and cruel nature that it can only be described as torture.[32]

Since then, the Court has ruled that treatment such as rape and sexual assault by the police of a detainee,[33] and severe beating by the police of a detainee,[34] amount to torture. In *Assenov v. Bulgaria*, the Court concluded that a violation of Article 3 had occurred, not for ill-treatment *per se* but for a failure to carry

out effective official investigation on the allegation of ill treatment. The Court recognized that

> circumstances, where an individual raises an arguable claim that he has been seriously ill treated by the police or other such agents of the State, unlawfully and in breach of Article 3, that provision, read in conjunction with Article 1 of the Convention "to secure everyone within their jurisdiction the rights and freedoms in the Convention," requires by implication that there should be an effective official investigation. This obligation should be capable of leading to the identification and punishment of those responsible. If this is not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity.[35]

The Statute of the International Criminal Court[36] which has been ratified by 99 nations (although not the United States) further establishes criminal jurisdiction over war crimes and crimes against humanity. It defines crimes against humanity to include torture and other "inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health." The Statute also gives the ICC "war crimes" jurisdiction over "[t]orture or inhuman treatment, including biological experiments; ... [and] Wilfully causing great suffering, or serious injury to body or health."

The prohibition against torture and other ill-treatment has become so widely accepted as a matter of legal obligation that many courts now consider the prohibition to qualify not only as a matter of customary international law, but also an even more forceful principle of *jus cogens*, that is, a preemptory norm of international law that would even trump treaty obligations. For example, the well-respected Restatement of the Foreign Relations Law of the United States declares in regard to the customary international law of human rights that:

A state violates international law if, as a matter of state policy, it practices, encourages, or condones

(a) genocide,
(b) slavery or slave trade,
(c) the murder or causing the disappearance of individuals,
(d) torture or other cruel, inhuman, or degrading treatment or punishment,
(e) prolonged arbitrary detention,
(f) systematic racial discrimination, or
(g) a consistent pattern of gross violations of internationally recognized human rights.[37]

Application of the Prohibition of Torture and Ill-treatment to the United States

U.S. Reservations to Human Rights Treaties and their Validity

Given all these clear and unequivocal legal principles prohibiting torture and ill-treatment, we need to review their application to the United States. The United States is a party to most of the relevant treaties, that is, the U.N. Charter as elaborated by the Universal Declaration of Human Rights, the Geneva Conventions, the Covenant on Civil and Political Rights, and the Convention against Torture. In ratifying two of those treaties, the U.S. interposed reservations and an understanding that purported to limit their application to the U.S. For example, in ratifying the Civil and Political Covenant, the U.S. submitted a reservation

> (3) That the United States considers itself bound by Article 7 to the extent that "cruel, inhuman or degrading treatment or punishment" means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.[38]

Similarly, in ratifying the Convention Against Torture, the U.S. submitted a reservation

> That the United States considers itself bound by the obligation under Article 16 to prevent "cruel, inhuman or degrading treatment or punishment," only insofar as the term "cruel, inhuman or degrading treatment or punishment" means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.[39]

The U.S. further submitted an understanding to the Convention Against Torture stating:

> (a) That with reference to Article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.
>
> (b) That the United States understands that the definition of torture in Article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control.

In order to be valid, a reservation must be consistent with the object and purpose of a treaty. The Human Rights Committee and the Committee against Torture are the two institutions responsible for implementing the Civil and Political Covenant and the Convention against Torture, respectively. The Human Rights Committee reviewed the first U.S. report under the Civil and Political Covenant in 1995 and declared:

> The Committee regrets the extent of the State party's reservations, declarations and understandings to the Covenant....The Committee is also particularly concerned at reservations to...article 7 of the Covenant, which it believes to be incompatible with the object and purpose of the Covenant.[40]

Similarly, in reviewing the U.S. report under the Convention against Torture, the Committee against Torture expressed its concern about the "reservation lodged to article 16, in violation of the Convention, the effect of which is to limit the application of the Convention...."[41] The U.S. in its report to the Committee against Torture sought to reassure the Committee that the principal reason for the reservation related to the term "degrading treatment," which the U.S. found to be vague and ambiguous. The U.S. also indicated that the federal Constitution and interpretations of the Constitution "provide extensive protections against cruel and inhuman punishment, and these protections reach much of the con-

duct and practice to which article 16 is in fact addressed."[42]

It should be noted that despite the efforts of the U.S. to limit the application of the prohibition of cruel, inhuman, or degrading treatment or punishment, the United States failed to interpose any reservation or understanding to Article 10 of the Civil and Political Covenant that provides: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." As we consider the further conduct of the United States in Afghanistan, Guantánamo, and Iraq, we should keep that provision in mind.

Application of the Humanitarian Law Prohibition of Torture and Ill-Treatment to the United States with regard to al Qaeda and Taliban Detainees

President George W. Bush on February 7, 2002, declared with regard to the "Humane Treatment of al Qaeda and Taliban detainees" that:

> Of course, our values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment. Our nation has been and will continue to be a strong supporter of Geneva and its principles. As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva....The United States will hold states, organizations, and individuals who gain control of United States personnel responsible for treating such personnel humanely and consistent with applicable law.[43]

On the one hand, this statement appears to commit the United States military to treating detainees humanely and appears to be consistent with the traditional respect of the United States for human rights. On the other hand, a closer reading reflects a bold and treacherous attack on the international legal prohibition of torture and other ill-treatment. President Bush says that al Qaeda and Taliban detainees are "not legally entitled to" be treated humanely. Further, they will be treated humanely consistent with the Geneva Conventions only "to the extent appropriate and consistent with military necessity." There is no qualification in the Geneva Conventions for military necessity with regard to the prohibition of torture or ill-treatment. There is no qualification of any kind with regard to the prohibition of torture and cruel, inhuman, or degrading treatment in the Convention against Torture or the Civil and Political Covenant, which President Bush did not even mention.

What could have been the basis for President Bush's disregard of U.S. international law obligations? In his February 7, 2002, declaration, President Bush indicated his reliance upon the Department of Justice opinion of January 22, 2002, that none of the provisions of the Geneva Conventions apply to al Qaeda.

As to international armed conflicts, Article 2 of the Geneva Conventions indicate that those treaties "apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." The Geneva Conventions also "apply to all cases of partial or total occupation." Hence, the Geneva Conventions clearly apply to the armed conflicts in Afghanistan and Iraq, because Afghanistan, Iraq, and the United States are High Contracting Parties, that is, states that

have ratified the treaties.[44]

As to al Qaeda, however, President Bush and the Justice Department opinion of January 22nd are correct in that the al Qaeda is not a state and has certainly not ratified the Geneva Conventions. But President Bush went on to say:

> I also accept the legal conclusion of the Department of Justice and the recommendation of the Department of Justice that common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and Common Article 3 applies only to "armed conflict not of an international character."

In making this finding, President Bush and the Department of Justice ignored the authoritative commentary of the International Committee of the Red Cross[45] in regard to Common Article 3 and the overall approach of the Geneva Conventions which is to cover all armed conflicts whether international or national. The ICRC Commentary states that Article 3 represents "the minimum which must be applied in the least determinate of conflicts." Common Article 3 was intended to reflect the "few essential rules" that governments should follow in peacetime and in war as well as in dealing with common criminals or rebels. The drafters of the Geneva Conventions intended that Common Article 3 would protect those basic and fundamental rights that deserve respect at all times.[46]

In April 2005 the International Committee of the Red Cross concluded a multi-year project in which it worked with the most distinguished international law experts from the entire globe to study the law and practice of all nations in the world with regard to humanitarian law, that is, the law of armed conflict. The ICRC study found that customary international humanitarian law includes the following globally applicable rule:

> Rule 90: Torture, cruel or inhuman treatment and outrages on personal dignity, in particular humiliation and degrading treatment, are prohibited.

In drawing this conclusion, the ICRC referred to Article 75 of Additional Protocol I to the Geneva Conventions.[47] Article 75 covers "persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the [Geneva] Conventions." Accordingly, if there were a gap between the international armed conflicts covered by Article 2 of the Geneva Conventions and the basic principles of Article 3, Article 75 would supply a standard. Article 75 states

> The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:
>
> (a) Violence to the life, health, or physical or mental well-being of persons, in particular:
> (i) Murder;
> (ii) *Torture of al kinds, whether physical or mental*;
> (iii) Corporal punishment; and
> (iv) Mutilation; [as well as]
>
> (b) Outrages upon personal dignity, *in particular humiliating and degrading treatment*, enforced prostitution and any form of indecent assault;....

The United States is not one of the 146 States Parties to the Additional Protocol I—for reasons that have nothing do to with Article 75. But the International Court of Justice has found that Article 75 reflects "fun-

damental general principles of international humanitarian law" and a "minimum yardstick" for all armed conflicts.[48]

Support for the U.S. position can be found in the contemporaneous memorandum of the Secretary of State criticizing the Department of Justice and White House advice that the President Bush was receiving and on which the President eventually relied.[49] Secretary of State Colin Powell said:

> I am concerned that the draft does not squarely present to the President the options that are available to him. Nor does it identify the significant pros and cons of each option.

Among the con arguments that Secretary Powell identified were the following with regard to the proposed view that the Geneva Convention does not apply to the conflict:

> It will reverse over a century of U.S. policy and practice in supporting the Geneva conventions and undermine the protections of the law of war for our troops, both in this specific conflict and in general.
>
> It has a high cost in terms of negative international reaction, with immediate adverse consequences for our conduct of foreign policy.
>
> It will undermine public support among critical allies, making military cooperation more difficult to sustain.
>
> Europeans and others will likely have legal problems with extradition or other forms of cooperation in law enforcement, including in bringing terrorists to justice.
>
> It may provoke some individual foreign prosecutors to investigate and prosecute our officials and troops.

President Bush in his February 7, 2002, statement had one further rationale for denying the al Qaeda and Taliban detainees status as prisoners of war under Article 4 of the Geneva Conventions, which he stated as follows:

> Based on the facts supplied by the Department of Defense and the recommendation of the Department of Justice, I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva. I note that, because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war.

The Geneva Conventions identify four major kinds of participants in international armed conflicts. First, there are combatants who have the privilege of using violence against each other. Second, there are prisoners of war who are former combatants but are detained and thus no longer in the conflict. They are given extensive protections under the Third Geneva Convention, but they may be questioned and may even be subjected to criminal prosecution for war crimes. A war crime, however, does not include attacking the enemy during armed conflict. Third, there are civilians who are protected under the Fourth Geneva Convention from attack, but may be detained under administrative order for periods of six months at a time, may be questioned, and may be prosecuted for criminal offenses. Finally, in the Fourth Geneva Convention, there is a brief mention of spies and saboteurs, who are subject to the protections afforded civilians except that they may also be deprived of only one relevant right, that is, the right to communication with the outside world.[50]

There is no category of "unlawful combatants" in the Geneva Conventions, and the Geneva Conventions are intended to be comprehensive in their application—omitting

protection for no one. If there is any doubt as to whether a former combatant qualifies as a prisoner of war, Article 5 of the Third Geneva Convention indicates that there must be an individual determination of whether he qualifies as a POW. Until that determination is made, the individual must be treated as a POW. With regard to the question of whether an individual may be subjected to torture or ill-treatment, however, the issue of whether a detainee qualifies as a POW is really irrelevant—a complete red herring. Under both the Geneva Conventions and under customary international humanitarian law, the detainees in Afghanistan, Guantánamo, and Iraq are entitled at least to fundamental protections against torture and ill-treatment.

Application of the Human Rights Prohibition of Torture and Ill-Treatment to the United States with regard to al Qaeda, Taliban, and Iraqi Detainees

In his February 7, 2002 statement about the treatment of al Qaeda and Taliban, President Bush did not even mention the Civil and Political Covenant or the Convention against Torture. President Bush relied upon the Department of Justice memorandum of January 22nd that also omitted reference to human rights law. As we have already noted, international human rights law, reflected in the Civil and Political Covenant and the Convention against Torture, forbids torture and ill-treatment of anyone. That prohibition applies not only in times of peace but even in times of national emergency threatening the life of the nation, such as a war or a terrorist attack.

After President Bush made his statement about the February 2002 treatment of al Qaeda and Taliban, politically-appointed lawyers at the Justice Department have sought in a series of once secret, but now leaked memos to justify their failure even to mention human rights treaties. What arguments did they make?

In a memorandum of August 1, 2002, the Office of Legal Council purported to analyze the Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A. Sections 2340-2340A are two statutes that were adopted by the United States to fulfill its treaty obligations under the Convention Against Torture to subject torturers to criminal sanctions. The approach of the Office of Legal Counsel (OLC) was to give advice as to how U.S. interrogators could avoid being subjected to prosecution under the two statutes. Instead, the OLC lawyers should have asked the question: How can the U.S. comply with its treaty obligations to prevent torture and ill-treatment? If you were asked by the Minneapolis Police to give advice on interrogation of suspects, would you narrow the question to only: How can you avoid being prosecuted for your conduct? You would fulfill your function more effectively by focusing on the need to prohibit incommunicado detention, avoiding exclusive reliance on confessions to prove guilt, using video cameras in places where detainees are held or transported, training, and other measures that would help prevent torture and ill-treatment.

There is no category of "unlawful combatants" in the Geneva Conventions, and the Geneva Conventions are intended to be comprehensive in their application—omitting protection for no one.

The August 2002 OLC memo also focused exclusively on an extremely narrow definition of torture—omitting any discussion of cruel, inhuman, or degrading treatment or punish-

ment. You will recall that the U.S. interposed an understanding and a reservation to the Convention against Torture—the understanding narrowed the definition of torture and the reservation narrowed the definition of "cruel, inhuman or degrading treatment or punishment." Rather than maintaining the substance of those two limitations, the August 2002 OLC memo attempted to narrow the prohibited torture and ill-treatment even further. For example, the August 2002 memo defined torture as follows:

> Physical pain amounting to torture must be equivalent to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture under Section 2340 it must result in significant psychological harm of significant duration, e.g., lasting for months or even years.[51]

The August 2002 OLC memo failed to cite any authority in the Convention against Torture, its jurisprudence, or any other international interpretations of torture to justify that narrowly brutal requirement for extreme pain. You will recall that the Convention against Torture requires only "severe pain or suffering, whether physical or mental." The August 2002 OLC definition of torture, however, narrows this definition in several ways. Most important, it requires far more pain or suffering when it says "torture must be equivalent to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."

The OLC memo also narrows the kind of intent required to say "pain must be the defendant's precise objective." It would not be enough that the perpetrator "acted knowing that severe pain or suffering was reasonably likely to result from his actions."[52] The U.S. reservation on ratification narrowed that definition by requiring that "an act must be specifically intended to inflict severe physical or mental pain or suffering." But the requirement of a precise objective of inflicting severe pain goes beyond that reservation and would conflict with the language of the Convention that anticipates several motivations for torture, that is, is "intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind...."

The OLC's extremely narrow definition of torture . . . was withdrawn by the Justice Department sometime during fall 2004 and was replaced in a memo . . . just prior to the confirmation hearings of Alberto Gonzalez who had been the recipient of the August 2002 memo.

The OLC's extremely narrow definition of torture—particularly as to the threshold of pain required—was withdrawn by the Justice Department sometime during fall 2004 and was replaced in a memo of December 31, 2004—just prior to the confirmation hearings of Alberto Gonzalez who had been the recipient of the August 2002 memo.

One aspect of the U.S. position, however, has not changed, that is, the failure effectively

to prohibit "cruel, inhuman or degrading treatment or punishment" as required by the Civil and Political Covenant and the Convention against Torture. International jurisprudence in several cases has viewed torture as an extreme form of cruel, inhuman, or degrading treatment or punishment. Essentially, the difference has focused on the intent of the actor whereby a perpetrator who intends to inflict severe pain and suffering will be considered to have committed torture. The distinction may also deal with the severity of the pain inflicted. It should be recalled, however, that both torture and cruel, inhuman, or degrading treatment or punishment are forbidden.

The U.S. sought to narrow its obligation in that respect by referring in its reservations to the meaning of "the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States." The U.S. explained its reservation at the time by stating that "cruel, inhuman or degrading treatment or punishment" might be too vague to be applied in the U.S. It is unclear to what extent the content of the Fifth, Eighth, and Fourteenth Amendments have been interpreted in a way significantly different from the content of the treaty prohibition against "cruel, inhuman or degrading treatment or punishment." My initial research reflects several propositions: First, the Fifth And Fourteenth Amendments prohibit conduct that shocks the conscience of the court. The leading case dealt with a suspect who had appeared to swallow drugs and the police had pumped his stomach in order to obtain proof of his drug possession.[53] The Supreme Court found that conduct to be shocking to their conscience, although the Court later found that a required blood test to prove alcohol consumption was not shocking.[54] One cannot be sure, however, that the "shock the conscience" test provides much greater precision that the cruel, inhuman, or degrading treatment standard.

A second proposition is that the Eighth Amendment's prohibition of cruel and unusual punishment applies only to sanctions imposed after a trial. Since none of the al Qaeda and Taliban detainees have been subjected to a trial, the Eighth Amendment would not apply.

A third concern is that the Fifth, Eighth, and Fourteenth Amendments may only apply to conduct within the territory of the United States or its jurisdiction. There are some Supreme Court cases that have applied the Constitution to court-martial proceedings at U.S. military bases abroad.[55] The June 2004 Supreme Court decision in *Rasul v. Bush*[56] permitted detainees in Guantánamo to file habeas corpus petitions in U.S. courts, but that decision was based on an interpretation of the habeas statute rather than the Constitution. The U.S. has taken the position that the Covenant on Civil and Political Rights applies only within the territory of the U.S., but the Human Rights Committee has repeatedly indicated that each State Party is responsible for protecting the rights of all persons "within the power or effective control of that State Party, even if not situated within the territory of the State Party."[57] The Convention against Torture and the Geneva Conventions are also applicable to the conduct of governments wherever they exercise their authority.

Whatever the content of the Fifth, Eighth, and Fourteenth Amendments and the impact of the U.S. reservations, the U.S. is still obligated by the Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to prevent not only torture but also some kinds of ill-treatment. Hence, it is particularly troubling to note that the various OLC memos focus entirely on an extremely narrow definition of torture. Similarly, when U.S. officials say that torture is inconsistent with American values, it calls into question all the methods of ill-treatment

that U.S. military forces have been authorized by the Secretary of Defense and other high level officials to use. While one or two of these forms of ill-treatment might not constitute torture by themselves, they reflect a climate of impunity. For example, a memo citing the legal arguments from February and August 2002 and signed by Secretary of Defense Donald Rumsfeld on December 2, 2002 authorizes interrogation techniques for detainees in Guantánamo, including:

(1) identifying the interrogator as coming from a country with a reputation for harsh treatment of detainees;
(2) the use of stress positions (like standing), for a maximum of four hours (there is no indication, however, how often that stress positions may be repeated or how much time the detainee would have between the use of techniques.[58] Also, Secretary Rumsfeld in approving the document handwrote a complaint: "However, I stand for 8-10 hours a day. Why is standing limited to 4 hours?");
(3) use of the isolation facility for up to 30 days with extensions to be approved by the Commanding General;
(4) deprivation of light and auditory stimuli;
(5) hooding;
(6) use of 20-hour interrogations;
(7) removal of all comfort items (including religious items);
(8) removal of clothing;
(9) forced grooming (shaving of facial hair, etc.);
(9) use of detainees' individual phobias (such as fear of dogs) to induce stress;
(10) in some cases, use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family;
(11) exposure to cold weather or water;
(12) use of a wet towel and dripping water to induce the misperception of suffocation, etc. In addition, the CIA was reportedly given permission by the Justice Department to use "waterboarding," the practice of forcing the detainees head under water for prolonged periods of time.[59]

These techniques can be used cumulatively or all at once. If used together, and for long periods of time, these techniques constitute torture. Many of the detainees in Guantánamo have been held for more than two or three years. It is no wonder that there have been dozens of attempted suicides among the detainees. Interviews and statements by released detainees indicate that violent beatings have periodically occurred against groups or individual detainees by military guards. Interviews with released detainees, reports of human rights monitoring groups, and journalists' accounts reveal that many of the interrogation methods approved and implemented first in Guantánamo were exported to detention facilities in Afghanistan and Iraq.

Rumsfeld's interrogation policy issued on December 2, 2002 contained techniques that were beyond those permitted by the Army's Field Manual 34-52, which contains the interrogation guidelines in conformity with the Geneva Conventions. The field manual established more restrictive interrogation rules, for example, prohibiting pain induced by chemicals or bondage; forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time; and food deprivation. Under psychological torture, the manual prohibited mock executions, sleep deprivation, and chemically induced psychosis.[60]

In December 2002 and January 2003, the Federal Bureau of Investigation (FBI)[61] and Judge Advocates[62] complained to the Defense Department about aggressive interrogation methods that were resulting in abuse and several deaths. In January 2003, Secretary of

Defense Rumsfeld rescinded his blanket approval of the techniques he had authorized in December 2002. Instead, requests for using the harshest interrogation methods were to be forwarded directly to him, along with a "thorough justification" and "a detailed plan for the use of such techniques."[63]

In addition, Rumsfeld established a Working Group to assess legal and policy issues for detainee interrogation. The Working Group's report was sent to Rumsfeld on April 4, 2003,[64] recommending 35 interrogation techniques, many of which seemed to mirror Rumsfeld's December 2002 guidelines, including hooding, prolonged standing, sleep deprivation, face slap/stomach slap, and removal of clothing in order to create a feeling of vulnerability.[65] The Working Group reasoned that "[d]ue to the unique nature of the war on terrorism...it may be appropriate...to authorize as a military necessity the interrogation of such unlawful combatants in a manner beyond that which may be applied to a prisoner of war who is subject to the protections of the Geneva Conventions." On April 16, 2003, Rumsfeld approved 24 of the techniques recommended by the Working Group, including dietary and environmental manipulation, sleep adjustment, and isolation.[66] Again, some of these techniques were clearly inconsistent with the Army Field Manual that had been used since 1987.

In August 2003, Major General Geoffrey Miller, who had been responsible for interrogations in Guantánamo, was sent to Iraq to "gitmo-ize" Iraqi detention facilities, or according to a subsequent inquiry by Major General Antonio M. Taguba, Miller's task was "to review current Iraqi Theater ability to rapidly exploit internees for actionable intelligence." Miller reportedly suggested that prison guards be used to "soften up" prisoners for interrogations, and it is now known that he was often present at Abu Ghraib.[67] In September 2003, Lt. General Sanchez authorized 29 interrogation techniques (mirroring Rumsfeld's April 16 techniques) for use in Iraq, including the use of dogs, stress positions, sensory deprivation, loud music, and light control.[68]

Since January 9, 2002—the day the Department of Justice lawyers sent that first memo to the Pentagon arguing that the Geneva conventions do not apply to the war in Afghanistan, or to members of al-Qaeda or the Taliban—until the present, numerous accounts of detainee abuse and some deaths have been reported. In May 2003, the International Committee of the Red Cross (ICRC) reported to U.S. Central Command 200 cases of alleged detainee abuse in U.S. custody in Iraq, and continued to express concern confidentially about the abuse of the detainees throughout 2003.[69] In December 2003, a secret U.S. Army report detailed abuses committed by a task force of Military Operations and CIA officers, known as Task Force 121 against detainees in Iraq.[70] On January 13, 2004, Joseph Darby gave Army criminal investigators a CD containing the Abu Ghraib photographs depicting detainee torture and abuses that had occurred from September to December 2003. On February 24, 2004, the ICRC issued a confidential report to the Coalition Provisional Authority documenting widespread abuse in various detention facilities in Iraq and command failures to take corrective action. The report was eventually leaked, revealing that the ICRC had observed abusive methods being used at Camp Cropper in Iraq, including "hooding a detainee in a bag, sometimes in conjunction with beatings, thus increasing anxiety as to when blows would come"; applying handcuffs so tight the skin would be broken; beating with rifles and pistols; issuing threats against family members; and stripping detainees naked for several days in solitary confinement in a completely dark cell.[71] During its Press Conference on May 7, 2004,

a representative of the ICRC said that "what appears in the report of February 2004 are observations consistent with those made earlier on several occasions orally and in writing throughout 2003. In that sense the ICRC has repeatedly made its concerns known to the Coalition Forces and requested corrective measures prior to the submission of this particular report."[72]

Two days after the ICRC report was transmitted, Maj. Gen. Taguba completed an informal investigation of the detention and internment operations in Iraq, reporting "systematic" and "sadistic, blatant and wanton criminal abuses" at Abu Ghraib.[73] Examples of detainee treatment from the Taguba report include: "Breaking chemical lights and pouring the phosphoric liquid on detainees; pouring cold water on naked detainees; beating detainees with a broom handle and a chair; threatening male detainees with rape; allowing a military police guard to stitch the wound of a detainee who was injured after being slammed against the wall in his cell; sodomizing a detainee with a chemical light and perhaps a broom stick, and using military dogs to frighten and intimidate detainees with threats of attack, and in one instance actually biting a detainee."[74] Further, Taguba reported that the CIA kept some detainees in Abu Ghraib prison off the official rosters. This practice of allowing "ghost detainees" at the prison was, in Taguba's words, "deceptive, contrary to Army Doctrine, and in violation of international law." He concluded that the purpose of this practice was to hide the prisoners from the Red Cross.[75]

Following the Taguba Report, which indicated that the abuses that occurred at Abu Ghraib were not isolated events, the Pentagon initiated a number of investigations, including the "Schlesinger Panel," the Fay-Jones Report, and the Church Report. Nearly all of these reports, however, involved the military investigating itself. In addition, all of the investigators placed the blame on lower-level troops, claiming to find no evidence that senior U.S. officials played a direct role in ordering the abuses, even though secret memos revealed that senior officials and several generals were responsible for giving instructions that resulted in torture.[76] The investigators' sharpest criticism, perhaps, was that senior officials had created conditions for the abuse to occur. The "Schlesinger Panel," for example, stated that the abuse occurred due to confusion in the field as to what techniques were authorized.[77] Further, the "Church Report" concluded that there was "no single, overarching explanation" for the "few" cases in which detainees had not been treated humanely, and that "there is no link between approved interrogation techniques and detainee abuse."[78]

On March 3, 2005, pursuant to litigation by the American Civil Liberties Union (ACLU) under the Freedom of Information Act, the Army released more than 1,000 pages of criminal investigations. Among the facts included in the documents are one undetermined manner of death, three justifiable homicides, one alleged rape, one alleged larceny, and seven alleged assaults or cruelty and maltreatment. The allegations and circumstances in each of these 13 cases were investigated and the cases were closed; however, the investigations failed to result in any criminal charges.[79] On March 16, 2005, the Army reported to the *New York Times* that 26 deaths of inmates in Afghanistan and Iraq might be cases of homicide.[80] Although this statistic is certainly a warning signal, it is not conclusive because of the lack of information regarding the circumstances of those deaths.

Conclusion

Although the U.S. government has claimed that incidents of detainee abuse have been isolated to a few weeks at Abu Ghraib and blamed the abuse on a handful of low-level and poorly trained officers, the evidence indi-

cates that torture and ill-treatment in Guantánamo and later in Afghanistan, Iraq, and other military facilities were authorized or at least condoned by high-level officials beginning in 2002 and continuing even after investigations of the abuses at Abu Ghraib. In fact, the secret legal memoranda exchanged by senior White House and Justice Department lawyers since 2001 indicate a deliberate and carefully constructed framework for circumventing international law restraints on the treatment of detainees.

As former Secretary of State Colin Powell observed with regard to the policies proposed to President Bush in February 2002 and that have resulted in torture and ill-treatment of detainees, the use of torture and ill-treatment will undermine the protections of the law of war for our troops, both in this specific conflict and in general. It has a high cost in terms of negative international reaction, with immediate adverse consequences for our conduct of foreign policy. It will undermine public support among critical allies, making military cooperation more difficult to sustain. Europeans and others will likely have legal problems with extradition or other forms of cooperation in law enforcement, including in bringing terrorists to justice. It may provoke some individual foreign prosecutors to investigate and prosecute our officials and troops.

The struggle to end torture and other cruel, inhuman, or degrading treatment by the United States is the single most important international human rights concern of our day. If the United States continues its use of torture and other serious forms of ill-treatment as well as its practice of transferring detainees to nations that are known to engage in such torture and ill-treatment, the U.S. will undermine the credibility not only of the international prohibitions against such grave abuses, but threatens the credibility of all international human rights treaties and institutions.

If the most powerful country in the world resorts to torture and ill-treatment violating its most solemn international commitments, how can other nations be expected to comply with fundamental human rights obligations? ■

Endnotes

[1] Regents Professor and Fredrikson & Byron Professor of Law, University of Minnesota. © 2005 David Weissbrodt.

[2] Glenn Kessler and Josh White, "Rice Seeks to Clarify Policy on Prisoners," *Washington Post*, Dec. 8, 2005, at A1. *Available at* http://www.washingtonpost.com/wp?dyn/content/article/2005/12/07/AR2005120700215.html.

[3] The author wishes to acknowledge the very significant intellectual debt he owes in preparing this article to Professor Nigel Rodley and the remarks Prof. Rodley presented to the American Society of International Law in April 2005, entitled "Torture, Violence and the 'Global War on Terror'" as well as his presentation at the University of Minnesota Law School on September 22, 2004. In addition, the author expresses his appreciation to the following individuals for their contributions to this article: Professor Barbara Frey, Nicholas Velde, Rochelle Hammer, and Bridget Marks.

[4] Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, *entered into force* Oct. 21, 1950.

[5] Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, *entered into force* Oct. 21, 1950.

[6] Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, *entered into force* Oct. 21, 1950, Art. 130.

[7] *Id*. Art. 129.

[8] *Id*. Art. 3.

[9] International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

[10] *Lucia Arzuada Gilboa v. Uruguay*, Communication No. 147/1983, U.N. Doc. Supp. No. 40 (A/41/40) at 128 (1986). *available at* http://www1.umn.edu/humanrts/undocs/session41/147?1983.htm.

[11] *Delia Saldias de Lopez v. Uruguay*, Communication No. 52/1979, U.N. Doc. CCPR/C/OP/1 at 88 (1984). *available at* http://www1.umn.edu/humanrts/undocs/html/52_1979.htm.

[12] *Linton v. Jamaica*, Communication No. 255/1987, U.N. Doc. CCPR/C/46/D/255/1987 (1992). *available at* http://www1.umn.edu/humanrts/undocs/html/dec255.htm.

[13] *Esther Soriano de Bouton v. Uruguay*, Communication No. 37/1978, U.N. Doc. CCPR/C/OP/1 at 72 (1984). *available at* http://www1.umn.edu/humanrts/undocs/html/37_1978.htm.

[14] *El-Megreisi v. Libyan Arab Jamahiriya*, Communication

No. 440/1990, U.N. Doc. CCPR/C/50/D/440/1990 (1994). *available at* http://www1.umn.edu/humanrts/undocs/html/vws440.htm.

[15] F. Birindwa ci Bithashwiwa, *E. Tshisekedi wa Mulumba v. Zaire*, Communication Nos. 241/1987and 242/1987, U.N. Doc. CCPR/C/37/D/242/1987 (1989). *available at* http://www1.umn.edu/humanrts/undocs/session37/241?1987.html.

[16] *See* Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481, 1490-97 (2004); *see also* Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional*, 88 YALE L.J. 1011 (2003)/.

[17] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], *entered into force* June 26, 1987.

[18] Conclusions and recommendations of the Committee against Torture, Israel, U.N. Doc. A/52/44, paras. 253-260 (1997). *available at* http://www1.umn.edu/humanrts/cat/observations/israel1997.html. *See also* Conclusions and recommendations of the Committee against Torture, Republic of Korea, U.N. Doc. A/52/44, paras. 44-69 (1996). *available at* http://www1.umn.edu/humanrts/cat/observations/korea1996.html. Conclusions and recommendations of the Committee against Torture, New Zealand, U.N. Doc. A/48/44, paras. 133-160 (1993). *available at* http://www1.umn.edu/humanrts/cat/observations/newzealand1993.html. Inquiry under Article 20: Committee Against Torture, Findings concerning Peru (2001), U.N. Doc. No. A/56/44, at para. 35.

[19] 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953, *as amended by* Protocols Nos 3, 5, 8, and 11 *which entered into force* on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 *respectively. available at* http://www1.umn.edu/humanrts/instree/z17euroco.html.

[20] *Ireland v. United Kingdom*, Case No. 5310/71, Judgment of the Eur. Ct. H.R., 18 January 1978, para. 167.

[21] *Id*., para. 162.

[22] Language of the Commission as quoted in Nigel S. Rodley, *The Treatment of Prisoners under International Law* (Oxford 2000), at 91-92. Many commentators have found the Commission's view to be more persuasive than the Court's. See Rodley's discussion at 90-95.

[23] *Ilhan v. Turkey*, Case No. 22494/93, Judgment of the Eur. Ct. H.R., 27 June 2000, para. 85.

[24] *Tyrer v. United Kingdom*, Case No. 5856/72, Judgment of the Eur. Ct. H.R., 25 April 1978, para. 29.

[25] *Selmouni v. France*, Case No. 25803/94, Judgment of the European Court of Human Rights, July 28, 1999.

[26] *Id*.

[27] *Tomasi v. France*, Case No. 12850/87, Judgment of the Eur. Ct. H.R., 27 August 1992. *See also Ribitsch v. Austria*, Case No. 18896/81, Judgment of the Eur. Ct. H.R., 4 December 1995.

[28] For example, *see Zhu v. the United Kingdom*, No. 36790/97, Judgment of the Eur. Ct. H.R., 12 September 2000. *See also Assenov v. Bulgaria*, Case No. 24764/94, Judgment of the Eur. Ct. H.R., 28 October 1998.

[29] *Soering v. United Kingdom*, Case No. 14038/88, Judgment of the Eur. Ct. H.R., 7 July 1989.

[30] *Cruz Varas et al. v. Sweden*, Case No. 15576/89, Judgment of the Eur. Ct. H.R., 20 March 1991. *Vilvarajah et al. v. United Kingdom*, Case No. 13163/87, Judgment of the Eur. Ct. H.R., 30 October 1991.

[31] *Chahal v. the United Kingdom*, Case No. 22414/93, Judgment of the Eur. Ct. H.R., 15 November 1996.

[32] *Aksoy v. Turkey*, Case No. 21987/93, Judgment of the Eur. Ct. H.R., 18 December 1996.

[33] *Aydin v. Turkey*, Case No. 23178/94, Judgment of the Eur. Ct. H.R., 25 September 1997.

[34] *Selmouni v. France*, Case No. 25803/94, Judgment of the Eur. Ct. H.R., 28 July 1999.

[35] *Assenov v. Bulgaria*, Case No. 24760/94, Judgment of the Eur. Ct. H.R., 28 October 1998.

[36] 2187 U.N.T.S. 3, *entered into force* July 1, 2002.

[37] Restatement of the Law—Foreign Relations Law of the United States Restatement (Third) of Foreign Relations Law of the United States § 702 (2005) (emphasis added).

[38] U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992).

[39] U.S. reservations, declarations, and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990).

[40] Concluding Observations of the Human Rights Committee: United States of America, U.N. Doc. CCPR/C/79/Add.50, A/50/40 (1995).

[41] Conclusions and Recommendations of the Committee against Torture: United States of America, 15/05/2000, U. Doc. A/55/44, paras. 175-180 (Concluding Observations/Comments).

[42] United States of America, Consideration of Reports Submitted by States Parties under Article 19 of the Convention, U.N. Doc. CAT/C/28/Add.5 paras. 303-04 (2000).

[43] President George W. Bush to the Vice President, Secretary of State, Secretary of Defense, Attorney General, Chief of Staff to the President, Director of Central Intelligence, Assistant to the President for National Security Affairs and Chairman of the Joint Chiefs of Staff, memorandum,

"Humane Treatment of al Qaeda and Taliban Detainees," February 7, 2002. *available at* http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/dir_20020207_Bush_Det.pdf.

[44] The Department of Justice concluded that the President had the authority to suspend application of the Geneva Conventions with regard to Afghanistan because Afghanistan was a failed state and thus unable to comply with its treaty obligations. That view would undermine the global protective nature of the Geneva Conventions and would open the door for many other countries to seek excuses for avoiding their fundamental obligations under humanitarian law. As a factual matter the Justice Department conclusion was highly questionable at the time that it was rendered and would be unsustainable at the present time. President Bush, in any case, declined to exercise his supposed authority to suspend application of the Geneva Conventions with regard to Afghanistan.

[45] Jean S. Pictet, Geneva Conventions of 12 August, 1949: Commentary 36 (1958).

[46] *Id*. 49-50; David Weissbrodt, *The Role of International Organizations in the Implementation of Human Rights and Humanitarian Law in Situations of Armed Conflict*, 21 Vanderbilt J. Int'l L. 313, 339-40 (1988).

[47] Additional Protocols I and II to the Geneva Conventions of 12 August 1949, 1125 U.N.T.S. 3, 609, *entered into force* Dec. 7, 1978.

[48] The U.S. Judge Advocate General's Operational Law Handbook considers Article 75 as one of the large number of Geneva Convention and Additional Protocol provisions that are "either legally binding as customary international law or acceptable practice though not legally binding."

[49] Colin L. Powell, Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan (January 26, 2002).

[50] Article 5 of the Fourth Geneva Convention: "Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention."

[51] U.S. Department of Justice, Office of Legal Counsel, Memorandum for Alberto R. Gonzales, *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A (August 1, 2002)*.

[52] *Id*. at 3-4.

[53] In *Rochin v. People of California*, 342 U.S. 165 (1952), sheriffs found the door to the defendant's home ajar, entered the defendant's home, and forced his bedroom door open. They saw two pills on the nightstand near the defendant. They asked the defendant whose pills they were and he grabbed them up and put them in his mouth. Several officers jumped on him in an effort to get the pills, but he managed to swallow them. The defendant was then taken to a hospital where his stomach was pumped and Morphine pills were recovered. This conduct violated the 14th Amendment because it shocked the conscience of the court. *Id.* at 172.

[54] In *Breithaupt v. Abram*¸ 352 U.S. 432 (1957), the Supreme Court held that a blood test taken from an unconscious man to test his blood alcohol level did not shock the conscience when performed by a skilled technician. The defendant had been driving his pickup truck and struck another vehicle head-on killing the other driver. An empty whiskey bottle in the truck and the smell of alcohol on the driver motivated the Emergency Room staff to call the sheriff who requested the test. The test showed the driver was above the legal limit for blood-alcohol. The defendant argued under *Rochin* and lost.

[55] *Trop v. Dulles*, 356 U.S. 86 (1958).

[56] 124 S.Ct. 2686 (2004) (the Supreme Court held that the *habeas corpus* statute, 28 U.S.C.A. § 2241, provided jurisdiction for twelve Kuwaiti citizens and two Australian nationals captured in Afghanistan to challenge their detention at the Guantánamo Bay Naval Base in Cuba. The Court avoided any constitutional or international law issues at stake in the case.) In *Hamdan v. Rumsfeld*, No. 04-5393, slip op. (D.C. Cir. July 15, 2005) *at* http://caselaw.lp.findlaw.com/data2/circs/dc/045393a.pdf, the Court of Appeals rejected the constitutional and international claims of a Guantánamo detainee against military commissions.

[57] Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 10; http://www1.umn.edu/humanrts/gencomm/hrcom31.html.

[58] William J. Haynes II, General Counsel of the Department of Defense, Action Memo for Secretary of Defense (November 27, 2002), Approved by Secretary of Defense (December 2, 2002).

[59] Human Rights Watch, "Getting Away with Torture: Command Responsibility for the U.S. Abuse of Detainees" 12 (April 2005).

[60] Further, the U.S. Army Intelligence Interrogation Field Manual (FM 34-52) states, "[the Geneva Conventions] and U.S. policy expressly prohibit acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation. Such illegal acts are not authorized and will not be condoned by the U.S. Army. Acts in violation of these prohibitions are criminal acts punishable under the [Uniform Code of Military Justice]." The Field Manual (FM 34-52) is available in its entirety at http://www.globalsecurity.org/intell/library/policy/army/fm/fm34?52/. Field Manual 34-52 was issued in 1987 and the Army announced in April 2005 that it would be replaced by a new interrogation manual. Although the new manual remains confidential, the press reported that the new manual specifically forbids practices that were portrayed in the Abu Ghraib photos, such as stripping prisoners,

keeping them in "stress" positions, imposing dietary restrictions, employing police dogs to intimidate prisoners, and using sleep deprivation as an interrogation method. While human rights groups have acknowledged that the new manual is an improvement from 34-52, some have expressed concern that the manual is only applicable to the Army, and not for other military or intelligence operations, such as the CIA. Eric Schmitt, *Army, in manual, limiting tactics in interrogations*, *New York Times*, April 28, 2005.

[61] In a letter obtained by *The Associated Press*, Thomas Harrington, an FBI counterterrorism expert suggested the Pentagon did not act on FBI complaints about several incidents that occurred in Guantanamo, including a female interrogator grabbing a detainee's genitals and bending back his thumbs, another where a prisoner was gagged with duct tape, and a third where a dog was used to intimidate a detainee who later was thrown into isolation and showed signs of "extreme psychological trauma." Paisley Dodds, "FBI letter complains of aggressive interrogation techniques at Guantanamo starting in 2002," *Associated Press*, December 6, 2004. The ACLU has obtained a number of emails documenting the interrogation techniques and abuse observed by FBI agents. *available at* http://www.aclu.org/International/International.cfm?ID=13962&c=36.

[62] James Gordon Meek, "At war with Gitmo grilling: Military counsel fought and lost," *New York Daily News*, February 13, 2005.

[63] Memo from Secretary of Defense Rumsfeld to General Counsel, U.S. Dept. of Defense (January 15, 2003). *available at* http://news.findlaw.com/hdocs/docs/dod/rums11503mem.pdf.

[64] *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations*. The Working Group was chaired by Mary L. Walker, General Counsel, U.S. Air Force. *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.04.04.pdf.

[65] The U.S. Army Intelligence Interrogation Field Manual (FM 34-52) states, "[the Geneva Conventions] and U.S. policy expressly prohibit acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation. Such illegal acts are not authorized and will not be condoned by the U.S. Army. Acts in violation of these prohibitions are criminal acts punishable under the [Uniform Code of Military Justice]." The Field Manual (FM 34-52) is available in its entirety at http://www.globalsecurity.org/intell/library/policy/army/fm/fm34?52/.

[66] "Counter-Resistance Techniques in the War on Terrorism," memo from the Secretary of Defense for the Commander U.S. Southern Command (April 16, 2003). *available at* http://www.defenselink.mil/news/Jun2004/d20040622doc9.pdf.

[67] Eric Schmitt, "Official Declines to Pin Blame for Blunders in Interrogations," *New York Times*, March 11, 2005.

[68] Memo from Lt. Gen. Ricardo S. Sanchez to Commander, U.S. Central Command (September 14, 2003). *available at* http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=17851&c=206.

[69] Human Rights Watch, "The Road to Abu Ghraib," June 2004, p. 30.

[70] Josh White, "U.S. Generals in Iraq Were Told of Abuse Early, Inquiry Finds," *Washington Post*, December 1, 2004.

[71] "Report of the International Committee of the Red Cross (ICRC) on the treatment by the Coalition Forces of Prisoners of War and other Protected Persons by the Geneva Conventions in Iraq during arrest, internment and interrogation," February 2004. *available at* http://www.information-clearinghouse.info/article6170.htm.

[72] For a transcript of the press conference, *see* http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/iraq?OpenDocument#Press%20briefing.

[73] Major General Antonio M. Taguba, Article 15-6 Investigation of the 800th Military Police Brigade, February 26, 2004. *available at* http://news.findlaw.com/cnn/docs/iraq/tagubarpt.html.

[74] *Id*.

[75] *Id*.

[76] On May 6, 2005, Brig. Gen. Janis Karpinski of the Army Reserve was demoted to colonel and relieved of command of the 800th Military Police Brigade. Karpinski commanded detention operations at Abu Ghraib prison during the time the now-famous photos of abuse were taken. On May 12, 2005, the U.S. Army found Col. Thomas Pappas, the officer whose military intelligence unit was in charge of interrogations at the Abu Ghraib prison, guilty of two counts of dereliction of duty and was subsequently reprimanded and fined $8,000.

[77] "Final Report of the Independent Panel to Review DoD Operations," also called the "Schlesinger Panel," August 24, 2004. *available at* http://news.findlaw.com/wp/docs/dod/abughraibrpt.pdf.

[78] U.S. Department of Defense, "Executive Summary," available to the public since March 2005, the "Church Report." (Only 21 pages of 400 are declassified.) *available at* http://www.defenselink.mil/news/Mar2005/d20050310exe.pdf.

[79] Documents *available at* http://www.aclu.org/International/International.cfm?ID=13962&c=36.

[80] Douglas Jehl and Eric Schmitt, "U.S. Military Says 26 Inmate Deaths May Be Homicide," *New York Times*, March 16, 2005.

A Campaign to Impeach President George W. Bush

By Francis A. Boyle

Since the U.S. Supreme Court's installation of George W. Bush as President in January of 2001, the peoples of the world have witnessed a government in the United States of America that demonstrates little if any respect for fundamental considerations of international law, international organizations, and human rights, let alone appreciation of the requirements for maintaining international peace and security. What the world has watched instead is a comprehensive and malicious assault upon the integrity of the international legal order by a group of men and women who are thoroughly Machiavellian in their perception of international relations and in their conduct of both foreign policy and domestic affairs.

This is not simply a question of giving or withholding the benefit of the doubt when it comes to complicated matters of foreign affairs and defense policies to a U.S. government charged with the security of both its own citizens and those of its allies in Europe, the Western Hemisphere, and the Pacific. Rather, the Bush Jr. administration's foreign policies represent a gross deviation from those basic rules of international deportment and civilized behavior that the United States government had traditionally played the pioneer role in promoting for the entire world community. Even more seriously, in many instances specific components of the Bush Jr. administration's foreign policies constitute ongoing criminal activity under well-recognized principles of both international law and U.S. domestic law, and in particular the Nuremberg Charter, the Nuremberg Judgment, and the Nuremberg Principles.

Depending upon the substantive issues involved, those international crimes typically include, but are not limited to, the Nuremberg offenses of crimes against peace, crimes against humanity and war crimes, as well as grave breaches of the Four Geneva Conventions of 1949 and the 1907 Hague Regulations on land warfare, torture, disappearances, and assassinations. In addition, various members of the Bush Jr. administration committed numerous inchoate crimes incidental to these substantive offenses that under the Nuremberg Charter, Judgment, and Principles were international crimes in their own right: viz., planning, preparation, solicitation, incitement, conspiracy, complicity, attempt, aiding and abetting, etc. Of course the great irony of today's situation is that six decades ago at Nuremberg, representatives of the U.S. government participated in the prosecution, punishment and execution of Nazi government officials for committing some of the same types of heinous international crimes that members of the Bush Jr. administration currently inflict upon people all around the world. To be sure, I personally oppose the imposition of capital punishment upon any person for any reason no matter how mon-

---

Francis Boyle is a professor of law at the University of Illinois College of Law of the University of Illinois at Urbana-Champaign. He is the author of eight books, including Destroying World Order, *published in 2004.*

strous their crimes: Bush Jr., Tony Blair, Saddam Hussein, Slobodan Milosevic, Vladimir Putin, Ariel Sharon, and even my former client John Wayne Gacy.

Furthermore, according to basic principles of international criminal law, all high-level civilian officials and military officers in the U.S. government who either knew or should have known that soldiers or civilians under their control committed or were about to commit international crimes, and failed to take the measures necessary to stop them, or to punish them, or both, are likewise personally responsible for the commission of international crimes. This category of officialdom who actually knew or at least should have known of the commission of such substantive or inchoate international crimes under their jurisdiction and failed to do anything about it typically includes the Secretary of Defense, Secretary of State, Director of Central Intelligence, the National Security Adviser, the Attorney General, the Pentagon's Joint Chiefs of Staff and regional CINCs, and presumably the President and Vice President. These U.S. government officials and their immediate subordinates, among others, were personally responsible for the commission or at least complicity in the commission of crimes against peace, crimes against humanity, and war crimes as specified by the Nuremberg Charter, Judgment, and Principles—at a minimum. In international legal terms, the Bush Jr. administration itself should be viewed as constituting an ongoing criminal conspiracy under international criminal law.

For example, White House Counsel Alberto Gonzales issued a memorandum authorizing the CIA to transfer detainees out of Iraq for interrogation—a practice that contravenes the Geneva Conventions—and subsequently led to widespread abuse of Iraqi prisoners at Abu Ghraib. (Incidentally, the person who wrote the actual memo for Gonzales was Assistant Attorney General Jack Goldsmith, whom Harvard University recently hired to join its law school faculty.) According to *The Washington Post*, the CIA used the memo as legal support for secretly transporting out of Iraq as many as 12 detainees. Gonzales also specifically tries to exempt the U.S. from the Geneva Conventions for Guantánamo and Afghanistan. Gonzales was afraid of Bush and others being held directly accountable.

Secretary of Defense Donald Rumsfeld is culpable because he was at Abu Ghraib last fall. Indeed, Sy Hersch's *New Yorker* article on Abu Ghraib claims with good substantiation that he was totally aware and even signed off on the use of techniques which are clearly torture. Rumsfeld was given a tour by Brig. General Janet Karpinski, who was supposed to be in charge of the prison—although she said nothing when she was prohibited from accessing certain areas of it—and so she's also accountable. It's important to understand that the Geneva Conventions, the Hague Regulations of 1907, and the U.S. Army Field Manual, all mandate that a criminal investigation be opened. And now President Bush, as Commander in Chief, would be accountable under Field Manual 27-10 precisely because he is Commander in Chief of the U.S. armed forces under the U.S. Constitution.

Consequently, on Tuesday, March 11, 2003, with the Bush Jr. administration's war of aggression against Iraq staring the American People, Congress, and Republic in their face, Congressman John Conyers of Michigan, the Ranking Member of the House Judiciary Committee (which has jurisdiction over Bills of Impeachment), convened an emergency meeting of 40 or more of his top advisors, most of whom were lawyers. The purpose of the meeting was to discuss and debate immediately putting into the U.S. House of Representatives Bills of Impeachment against President Bush Jr., Vice President Dick Cheney, Rumsfeld, and then Attorney General

John Ashcroft in order to head off the impending war. Congressman Conyers kindly requested that Ramsey Clark and I come to the meeting in order to argue the case for impeachment.

This impeachment debate lasted for two hours. It was presided over by Congressman Conyers, who quite correctly did not tip his hand one way or the other on the merits of impeachment. He simply moderated the debate between Clark and I, on the one side, favoring immediately filing Bills of Impeachment against Bush Jr., *et al*, to stop the threatened war, and almost everyone else there who was against impeachment for partisan political reasons. Obviously no point would be served here by attempting to digest a two-hour-long vigorous debate among a group of well-trained lawyers on such a controversial matter at this critical moment in American history. But at the time, I was struck by the fact that this momentous debate was conducted at a private office right down the street from the White House on the eve of war.

Suffice it to say that most of the "experts" there opposed impeachment not on the basis of enforcing the Constitution and the Rule of Law, whether international or domestic, but on the political grounds that it might hurt the Democratic Party effort to get its presidential candidate elected in the year 2004. As a political independent, I did not argue that point. Rather, I argued the merits of impeaching Bush Jr., Cheney, Rumsfeld, and Ashcroft under the United States Constitution, U.S. federal laws, U.S. treaties, and other international agreements to which the United States is a party. Article VI of the U.S. Constitution provides that treaties "shall be the supreme Law of the Land." This so-called Supremacy Clause of the U.S. Constitution also applies to international executive agreements concluded under the auspices of the U.S. President such as the 1945 Nuremberg Charter.

Congressman Conyers was so kind as to allow me the closing argument in the debate. Briefly put, the concluding point I chose to make was historical: The Athenians lost their democracy. The Romans lost their Republic. And if we Americans did not act now, we could lose our Republic! The United States of America is not immune to the laws of history!

After two hours of most vigorous debate among those in attendance, the meeting adjourned with second revised draft Bills of Impeachment sitting on the table.

Certainly, if the U.S. House of Representatives can impeach President Clinton for sex and lying about sex, then *a fortiori* the House can, should, and must impeach President Bush for war, lying about war, and threatening more wars. All that is needed is for one Member of Congress with courage, integrity, principles and a safe seat to file these currently amended draft Bills of Impeachment against Bush Jr., Cheney, Rumsfeld, and now Gonzales, who bears personal criminal responsibility for the Bush Jr. administration torture scandal. Failing this, the alternative is likely to be an American Empire abroad, a U.S. police state at home, and continuing wars of aggression to sustain both—along the lines of George Orwell's classic novel *1984*. Despite all of the serious flaws demonstrated by successive United States governments that this author has amply documented elsewhere during the past quarter century as a Professor of Law, the truth of the matter is that America is still the oldest Republic in the world today. "We the People of the United States" must fight to keep it that way! ■

The Pain Beyond Law

By Alex S. Hooke

I want to proceed as Raphael did and never paint another image of torture. There are enough sublime things so that one does not have to look for the sublime where it dwells in sisterly association with cruelty; and my ambition also could never find satisfaction if I became a sublime assistant to torture.

Friedrich Nietzsche, The Gay Science (#313)

Introduction

Can torture be adjudicated? It involves a suffering that eludes interpretation or translation into legal terms. This is not because torture evokes a state of nature in which civilizations and their laws lose pertinence; this assumes nature to be an example of lawlessness, where brute strength callously reigns. Nothing in nature displays civilizations' varied tastes for the cruelties brought by torture.

The chronicles of torture bear witness to this potential inefficacy of law. Early Christians were routinely impaled, dismembered, and fed to beasts as part of pagan spectacles and festivities. According to historians, these occasional public pleasures were celebrated as interruptions to everyday routines and momentary transgressions of conventions and rules. In a measure of reciprocity, later Christians used equally harsh measures—the rack, removal of eyes or tongues, the fork, piercings—against alleged heretics and infidels.

Modern secularism does not fare much better. Its chronicles of torture include gulags, concentration camps, and ethnic cleansings. While revolutionaries distance themselves from religious zealots, often under the guise of progress or human dignity, they readily duplicated the knack for finding innovative ways to torture other humans. Still today torture is public fare for entertainment in a variety of television shows, including *Prison Break*, *Smallville*, and most notably *24*.

The following pages address this possible limit to the powers of law. The next section presents three positions seeking the law's occasional tolerance of torture. Section three focuses on whether an existentialist play, "Dirty Hands," supports this tolerance. The closing section briefly clarifies the distinction between savages and barbarians.

Where The Law Ends

No law seems to have satisfactorily curtailed or prevented the proliferation of torture. Its political and moral efficacy surprisingly wanes whenever it confronts this unique domain of inflicting pain. Whether anchored to divine justice, international consensus, or universal rights, laws attempting to curtail torture lose punch. They can also be counterproductive, insofar as they provide humans an illusory sense of progress and security, thus

---

Alex Hooke is a professor of philosophy at Villa Julie College in Stevenson, Maryland. He is the editor of Virtuous Persons, Vicious Deeds *(McGraw-Hill) and co-editor of* Encounters with Alphonso Lingis (*Lexington*). *Alex has also written articles appearing in* Journal of Phenomenological Psychology, Philosophy Now, *and* Encyclopedia for Science, Technology and Ethics.

leaving them with moments of paralyzing disappointment and political cynicism.

This enervation of law is illuminated by several remarkable insights from law professor Oona Hathaway. Her research finds that since the 1984 United Nations adoption of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, countries signing onto the treaty seem more likely to practice torture against potential enemies and their own citizens. Paradoxically, countries already renouncing torture tend to police themselves, so they are not as eager to sign a burdensome treaty. Thus a "perverse predictability" arises in which those who publicly pledge to eliminate torture are the more probable candidates for (privately) employing it. These and similar situations, she emphasizes, challenge those "who believe in the power of international law to impose global order."

Despite these findings, contemporary moralists and international analysts insist on appealing to the law in order to proclaim a judgment about torture and to offer a prudent voice about the possible uses and misuses of torture as a military or political option. This option has most recently been raised regarding the war on terrorism, a war that has itself been accused of circumventing compliance with international law. Though disputants may disagree on the nature of torture or the legitimacy of its use, they often assent to the idea that law—whether local, international, or even divine—has the efficacy to either forbid, permit, or regulate torture.

The legitimacy of these efforts has been proffered through three perspectives. First, there is the appeal to precedent and judicial authority. As Alan Dershowitz contends, the law can help adjudicate the rare moments when a democratic nation must consider and use the option of torture in dealing with its most pernicious enemies. A second perspective, articulated by political scientists such as Jean Elshtain, contends that the existentialist proclamation about dirty hands applies to those who are committed to defending a Western cultural tradition that protects basic rights and liberties. And a third perspective, presented by figures in President George Bush's administration, proposes that certain deployments of physical coercion are not barred under international law as defined by the 1948 Geneva Convention because several of its stipulations do not cover official or unofficial targets of the contemporary war on terrorism.

Each of these perspectives needs some elaboration. In the case of the Bush administration, at least before the scandals of Abu Ghraib and Guatánamo Bay, memos were circulated that outlined a defensible position for certain harsh treatments of alleged members of al Qaeda or the Taliban. While making the obligatory overtures to the central values of the Geneva Convention on treatment of prisoners of war (GPW), officials in the Bush administration, including then Legal Counsel to the President Alberto Gonzales, have contended that the Geneva Convention does not apply to these suspects. First, they are not citizens *fighting* for a recognizable state ("high contracting parties" in terms of the convention). Second, the Geneva Convention addressed prisoners of conventional warfare. Contemporary terrorists do not engage in such warfare; they are savages and barbarians. As unlawful combatants, they thereby renounce any legal (and human) rights. One memo signed by the President charges terrorists with forcing a new paradigm of warfare upon their democratic adversaries. Hence, suspects captured in the war on terrorism are not entitled to the legal or moral respect that is now established for prisoners of war.

Dershowitz, a legal specialist whose causes have ranged from protecting citizens' rights under the bill of rights to defending O.J. Simpson in his trial for the murder of his ex-

wife, surprisingly avoids snubbing international consensus with this sort of pettifogging. In a newspaper commentary and more academic forums, he acknowledges that torture regrettably needs to remain a viable option for human societies. Further, citing its use by countries with purported democratic credentials such as Israel, Dershowitz upholds the rare exception when soldiers (or police) have no choice other than torture. In these cases, however, the torturers should first seek some form of warrant from a judicial official. While during the time of the torture this will be a strictly secret process, eventually the warrant will be subject to public discussion. Thus, concludes Dershowitz, smug self-righteousness and political hypocrisy will subside. Citizens will be compelled to confront their own acceptance or rejection of torturing others upon rumored or imminent peril. Torture might continue but with some open accountability.

Jean Elshtain is less concerned with exposing contemporary hypocrisy and more worried about preventing another terrorist attack on United States soil. Throughout her life, she admits, torture was an impossibility in her moral world. When George H.W. Bush's 1988 presidential campaign unleashed the Willie Horton scandal, Elshtain's moral sensibility was indeed outraged. 9/11, however, is for her a "watershed event." That means that the 20th century's chronicles of genocides of millions of people—Jews, Armenians, Russians, Cambodians, and Rwandans, to name a few—did not suffice to shake her moral convictions, whereas the loss of nearly 3,000 fellow citizens from the World Trade Center attack in New York City did. Not only has she determined the invasion of Iraq to be consistent with just war theory, Elshtain now holds that the occasional use of torture arises from the basic Christian principle of love one's (innocent) neighbor. She finds an exemplar in the story of an Israeli torturer who imposes great fear upon his victims while administering minimal physical pain. "Torture lite" is the name given to this art of interrogation.

Dirty Hands?

These rationales often invoke the "ticking bomb" scenario. Imagine a bomb planted in a school where hundreds of innocent children are certain to die. Authorities have captured a suspect and are certain that he knows the bomb's location and its detonation time. Despite the moral reprehensibility of torture, in such a scenario are we not justified in resorting to extreme physical coercion of a cruel criminal in order to save the innocent?

Although a specific law should not mandate this option, proponents argue that a torturer's country should not abandon him. He should be aware that potentially he has official support. The torturer should proceed by either first obtaining a warrant from a judicial body or be prepared after the torture to present his case before public judgment as part of a rational and ethical discourse. Hence, a democracy can uphold its legal prohibition of torture while granting the rare exception through moral deliberation.

Skeptics suspect here a cavalier manner of respecting the law at best. At worst, such circumvention of international treaties and transgression of basic human rights demonstrates a reckless and desperate war on terrorism in which anything goes.

To the contrary, contend proponents. Their rejoinder appeals to French philosopher Jean-Paul Sartre's play, *Dirty Hands*. It takes place during World War II, when a group of rebels—socialists, anarchists, and leftist party members—debate their immediate options. Assassination and dealing with traitors to the party highlight the discussion. Hoederer, an articulate and charming leader, and Hugo, a writer with some idealistic tendencies, disagree about lying to one's own comrades. Finally, Hoederer becomes frustrated and rais-

es his voice to Hugo: "How you cling to your purity, young man! How afraid you are to soil your hands!...You intellectuals and bourgeois anarchists use it as a pretext for doing nothing. To do nothing, to remain motionless, arms at your sides, wearing kid gloves. Well, I have dirty hands. Right up to the elbows. I've plunged them in filth and blood."

Alan Dershowitz, Jean Elshtain and a handful of government officials are among many reluctant proponents of rare deeds of cruelty who find Sartre's play persuasive. It can be a nasty world, made uglier and crueler by savages and barbarians who, under the guise of religious fundamentalism, hatred of America, or antiglobalism, willingly kill any available target. The tragedy of 9/11, however, should not obscure some obvious points. The terrorists did not aim randomly. They had specific targets, one symbolic of economic globalization and the other a basis of American international policy. If they were really intent on killing as many Americans as possible, all they had to do was wait a couple of days until Saturday afternoon and steer their planes into four university football stadiums, with casualties easily reaching a quarter million.

In torture proponents' crystal ball, if there were an opportunity to arrest someone with likely knowledge of an attack on the World Trade Centers in New York, the suspected terrorist would confess valuable information within minutes of a torture session. Most researchers agree that trained terrorists (in fact, any one trained to engage in surreptitious and possibly revolutionary or counter-revolutionary tactics) are likely to withstand torture long enough so their comrades know of the capture and can change plans or alter positions.

Torture proponents remain undaunted by this point. For them precedents abound. They recall how the French would torture Algerians to squash rebellious movements. They cite Israel's efficacious use of physical force upon Palestinians by the Israeli General Security Services. They can even point to the fictional television drama *24*, where counter-agent Jack Bauer helps his country by cutting, shocking, prodding, and burning suspects for information about a hidden virus or planted nuclear device.

What is especially disturbing in the case for torture is the very appeal to Sartre's references to dirty hands. In the play itself, dirty hands meant not only the readiness to compromise on one's idealistic or ethical principles. (The noble lie in Plato's *Republic*, for example, has already shaped the tradition of making infrequent compromises or exceptions to basic principles.) Rather, as Hoederer explains, dirty hands meant having one's own flesh soaked in the effects of cruel deeds perpetrated on another. You saw the pain their eyes. You felt their trembling when their limbs quivered when sensing the nearness of the metal rod or electric prod. The torturer smells the other's blood, sweat, and tears. To assassinate another, to kill another while looking into his or her eyes, to slaughter an innocent bystander in the name of a greater justice or more noble truth, involves an action which one cannot pass off to another.

Most researchers agree that trained terrorists are likely to withstand torture long enough so their comrades know of the capture and can change plans or alter positions.

Proponents of torture miss Sartre's point. He does not endorse torture, of course; his play highlights the risks of warfare with intellectual candor and existential commitment. Today's torture proponents defend the ration-

ale while refusing to get their own hands dirty. Anyone can take an electric prod and apply it to another's temple, neck, or genitals. A college degree is hardly required in order to deprive another of sunlight, fresh air, or sight. Anyone can try to gain information from a suspect by subjecting him to extreme noise, needles in sensitive spots, or threats of raping or slaughtering his daughter or son before his very eyes. The proponents' rhetoric is typical. They uphold a drastic deed while neglecting to follow through by volunteering themselves to torture potential terrorists. Instead, they seek a rationale that permits others—those in authority, underlings, army recruits—to engage in acts of cruelty.

Those resisting the proponents' arguments are accused by Elshtain of "moral laziness." Perhaps the proponents really believe that their appeal to Sartre's play exemplifies intellectual and moral diligence. Regardless, they do show existential cowardice. Proponents of torture endorse a political ethic anchored by inauthenticity.

Savages and Barbarians

Discussion about terrorists and torturers makes frequent allusions to savages and barbarians. White House memos, legal briefs, and academic treatises easily collapse these terms. "Those savages" and "barbarous acts" are used interchangeably.

Michel Foucault observed a crucial distinction between them. Studying 18th and 19th century texts of scholars on the rights and duties of defending a state's sovereignty, Foucault found that savages were not considered to be inherent enemies of a modern state the way barbarians can be. Savages, in the hypothetical state of nature, readily make the transition to civilization by exchanging some of their basic freedoms for the goods and security promised by society. The barbarian, by contrast, does not exist prior to civilization, but at its expense. He thrives to the extent that there is already a state or society which can be invaded, plundered, and occupied.

In his 1975-76 lectures, "Society Must Be Defended," Foucault describes the barbarian as a "vector of domination...he always seizes existing property; similarly, he makes others serve him." He then cites texts from the 1700 and 1800s in which political thinkers acknowledge a grudging respect for barbarians. A proud, brutal people without laws; great and noble souls who live by the sword; and poor, uncouth, without arts, but free, were some of the observations.

For western political thought, according to Foucault, the problem has not been to defeat or extinguish the barbarian. Instead, it has been to filter out the bad elements of barbarism while filtering in the good ones. For the last 200 years the dilemma for modern states is not civilization *or* barbarism. The challenge lies in finding the right mix of civilization *and* barbarism. The modern state needs the barbarian's capacity for inflicting treachery and cruelty upon its threats and enemies.

Today's proponents for torture believe they have found the right mix of civilization and barbarism. Their recourse to the ticking bomb scenario or an existentialist play, however, has little to do with justice or the alleged war on terrorism. Nor does their obligatory gesture to the rule of democratic or international law free them from Foucault's historical indictment. After all, what do barbarians have to do with laws?!

Whether under the rubric of tough interrogation, physical coercion or torture lite, proponents are adding their own chapter to the chronicles of torture. Instead of infidels or heretics, revolutionaries, and counter-revolutionaries, they now have terrorists and suspected terrorists as their targets. This means that anyone can be a candidate for torture. For anyone can be suspected of terrorism, just as

anyone in earlier times could have been suspected for heretical ideas or revolutionary beliefs.

This does not deter the proponents. So long as they presume to find functionaries and anonymous inflictors of pain, they betray their aspiration for a life of sovereignty where laws are transgressed. Such a life offers a sublime experience—not of justice, but of horrific cruelty. Thus proponents sanction a human practice where pain is beyond the law. ■

Sources

Mark Danner, *Torture and Truth* (New York Review of Books, 2004).

Sanford Levinson, ed., *Torture: A Collection* (Oxford University Press, 2004). Contains essays by Waltzer, Dershowitz, Elshtain, Hathaway, and numerous other scholars.

Georges Bataille, *The Tears of Eros*, trans. Peter Connor (City Lights, 1989).

Michel Foucault, *Society Must Be Defended: Lectures at the College de France, 1975-1976*, trans. David Macey (Picador, 2003).

Jean-Paul Sartre, *Dirty Hands*, from *No Exit and Three Other Plays* (Vintage, 1949).

Lisa Silverman, *Tortured Subjects: Pain Truth, and the Body in Early Modern France* (University of Chicago Press, 2001).

Mariano-Florentino Cuellar, "Reflections on Sovereignty and Collective Security," *Stanford Journal of International Law* 40/2 (Summer, 2004).

Ervand Abrahamian, *Tortured Confession* (University of California, 1999).

Mark Bowden, "The Dark Art of Interrogation," *The Atlantic Monthly* (Oct., 2003).

Tortured Logic: Renditions to Justice, Extraordinary Rendition, and Human Rights Law

By Margaret L. Satterthwaite & Angelina Fisher

I. Introduction

In the four years since September 11, 2001, the United States has interrogated, detained, and transferred thousands of individuals in many parts of the world in an effort to investigate, prevent, and halt terrorism.[1] The most extreme techniques used in these efforts—from coercive and degrading interrogation techniques to detention in undisclosed locations—have come under extensive criticism by human rights groups,[2] humanitarian agencies,[3] and members of Congress.[4] The federal courts have been asked to examine many of these activities in the "War on Terror," with varying results.[5] On June 28, 2004, in a landmark decision in *Rasul v. Bush*, the U.S. Supreme Court ruled that U.S. courts have jurisdiction to consider claims by foreign nationals captured abroad in connection with the global "War on Terror" and incarcerated at Guatnánamo Bay.[6] The scope of substantive rights cognizable through this review and whether the jurisdictional holding will extend to cover those detained extraterritorially outside Guantánamo remains to be seen.

While the federal courts work to make such determinations, the Bush Administration continues to employ strategies that appear to be aimed at keeping "War on Terror" detainees outside the ambit of the U.S. legal system, including through renditions, extraordinary renditions,[7] reverse renditions,[8] and transfers to secret detention facilities apparently located in foreign countries.[9] This article considers only extraordinary rendition—one piece of a broader policy of transferring, "disappearing" and interrogating detainees on foreign soil.[10]

Cases of extraordinary rendition involve transfers occurring entirely outside the United States (i.e., between two foreign nations with the involvement of U.S. agents) as well as transfers out of Guatnánamo Bay to third countries. Below is a non-exhaustive list of known extraordinary renditions:[11]

- Ahmed Agiza and Mohammed al-Zari were expelled from Sweden on December 18, 2001, and transferred to Egypt. According to the Swedish TV program *Kalla Fakta*, both men were flown on a Gulfstream V jet alleged to be owned by a U.S. company and which reportedly is used mainly by the U.S. government. The Swedish government relied upon "diplomatic assurances" from Egypt that the two men would not be tortured and would have fair trials upon

Margaret L. Satterthwaite is an assistant professor of clinical law at NYU School of Law. She was project director of Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions" *and is co-author of* Beyond Guantánamo: Transfers to Torture One Year After *Rasul v. Bush. Ellen VanScoyoc assisted with research for this article.*

Angelina Fisher served as assistant research scholar with the Center for Human Rights and Global Justice and is one of the principal authors of Torture by Proxy. *She is also co-author of* Beyond Guantánamo.

return. U.S. agents were involved in the transfer of Agiza and al-Zari. The U.N. Committee against Torture recently held that in deporting Agiza and al-Zari to Egypt, Sweden violated the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

- Egyptian-born Hassan Osama Nasr (a.k.a. Abu Omar) disappeared from his city of residence, Milan, in February 2003. He briefly surfaced 15 months later, when he called his family in Italy claiming to have been kidnapped by U.S. and Italian forces, taken to Egypt and tortured. Based on the latest available information, Abu Omar is being held in the Tora prison on the edge of the Egyptian capital Cairo. Italian authorities are currently conducting an inquiry into Nasr's purported kidnapping. On June 23, 2005, an Italian judge issued arrest warrants for 13 alleged C.I.A agents in connection with Abu Omar's kidnapping. On the same day, another Italian judge issued an indictment against Abu Omar for crimes relating to terrorism. In July 2005, the Italian government issued warrants for six more alleged CIA agents accused of helping plan the kidnapping. In November 2005, prosecutors requested that the Italy's Justice Ministry seek the extradition of the CIA agents from the U.S.
- Khaled El-Masri, a German citizen born in Lebanon, was arrested by police at the Macedonian border on December 21, 2003. He was then reportedly held in a Macedonian hotel room for 23 days. During this time he says he was constantly interrogated by Macedonian agents about connections to Islamic organizations and accused of having been in a terrorist training camp in Jalalabad. At the end of this time he was allegedly beaten, stripped, shackled, blindfolded, and placed aboard a plane. El-Masri was delivered to a prison in Afghanistan that he says was nominally run by Afghan officials but was actually under U.S. control. While in the prison, he was repeatedly interrogated and photographed naked by individuals el-Masri identified as U.S. agents. U.S. authorities have neither confirmed nor denied these allegations. In May of 2004, el-Masri was returned to Europe, having never been charged with a crime. A reporter, Stephen Grey, and the ZDF television show *Frontal 21*, have independently determined that the details of al-Masri's statement coincide with the flight schedule of a U.S-charted Boeing 737 used by the CIA El-Masri's release was reportedly personally ordered by the U.S. Secretary of State Condoleezza Rice after she learned the man had been mistakenly identified as a terrorist suspect. German authorities are currently investigating the case and have determined that he was in Afghanistan during the time of his disappearance by using isotope analysis of his hair.
- In October 2001, Jamil Qasim Aseed Mohammed, a Yemeni microbiology student, was allegedly flown from Pakistan to Jordan on a U.S.-registered Gulfstream jet after Pakistan's intelligence agency reportedly surrendered him to U.S. authorities at the Karachi airport. U.S. officials alleged that Aseed Mohammed was an Al Qaeda operative who played a role in the bombing of the USS *Cole*. The handover of the shackled and blindfolded Aseed Mohammed reportedly took place in the middle of the night in a remote corner of the airport, without the benefit of extradition or deportation procedures.
- Apparently on information provided by

the C.I.A, Indonesian authorities reportedly detained Muhammad Saad Iqbal Madni in early January 2002. Iqbal Madni is suspected by the CIA of having worked with Richard Reid (the "shoe-bomber"). According to a senior Indonesian official, a few days later, Egypt formally asked Indonesia to extradite Iqbal, who carried an Egyptian as well as a Pakistani passport. The request did not specify the crime, noting broadly that Egypt sought Iqbal in connection with terrorism. On January 11, allegedly without a court hearing or a lawyer, Iqbal was put aboard an unmarked U.S.-registered Gulfstream V jet and flown to Egypt. A senior Indonesian official said that an extradition request from Egypt provided political cover to comply with the CIA's request. "This was a U.S. deal all along," the senior official said. "Egypt just provided the formalities."

- In September 2002, U.S. immigration authorities, reportedly with the approval of then-Acting Attorney General Larry Thompson, authorized the "expedited removal" of a Syrian-born Canadian citizen, Maher Arar, to Syria under section 235(c) of the *Immigration and Nationality Act* of 1952. U.S. authorities alleged that Arar had links to Al Qaeda. While in transit at John F. Kennedy International Airport in New York, Arar was taken into custody by officials from the FBI and Immigration and Naturalization Service (since reorganized into the Department of Homeland Security) and shackled. Arar's requests for a lawyer were dismissed on the basis that he was not a U.S. citizen and therefore he did not have the right to counsel. Despite the fact that he is a Canadian citizen and has resided in Canada for 17 years, Arar's pleas to return to Canada were ignored. Officials repeatedly questioned Arar about his connection to certain members of Al Qaeda. Arar denied that he had any connections whatsoever to the named individuals. He was eventually put on a small jet that first landed in Washington, D.C. and then in Amman, Jordan. Once in Amman, Arar was allegedly blindfolded, shackled, and transferred to Syria in a van. Arar was then placed in a prison where he was allegedly beaten for several hours and forced to falsely confess that he had attended a training camp in Afghanistan in order to fight against the U.S. Arar remained in Syria for 10 months during which he was repeatedly beaten, tortured, and kept in a shallow grave. Arar has subsequently been released and returned to Canada. No charges were ever filed against him in any of the countries involved in his transfer. Following intense public pressure, Canada initiated a public inquiry into the circumstances surrounding Arar's transfer. The U.S. has refused the invitation to participate in the Canadian inquiry. U.S. officials, speaking on condition of anonymity, have said that the Arar case fits the profile of extraordinary rendition.
- Australian citizen Mamdouh Habib was arrested in Pakistan in October 2002 and, reportedly at the request of the U.S. authorities, flown to Egypt where he was allegedly severely tortured. Habib remained in Egypt for six months, after which he was transferred to Guantánamo. On January 11, 2005, Habib was released from Guantánamo without charge and subsequently transferred to Australia.

Despite the recent spate of media attention concerning the practice, there is much confusion about the term "extraordinary rendition." It has been variously used and defined by the media, politicians, lawyers, and academics. Frequently, the term is used interchangeably

with "rendition to justice" and other types of extraterritorial transfers.[12] When discussed in this article, extraordinary rendition refers to the transfer of an individual, with the involvement of the United States or its agents, to a foreign state in circumstances that make it more likely than not that the individual will be subjected to torture or cruel, inhuman, or degrading treatment.[11]

This brief article will examine the transformation of "rendition to justice" into extraordinary rendition. It will also examine the human rights law applicable to extraordinary rendition, focusing specifically on the extraterritorial application of relevant human rights norms. The article concludes that the apparent purpose of extraordinary rendition—to benefit from the fruits of coercive interrogations while keeping an individual outside U.S. jurisdiction—is foiled by human rights law, since the very act of transfer brings an individual within U.S. jurisdiction under human rights norms.

II. How Rendition to Justice Became Rendition to Torture

The Development and Authorization of Rendition to Justice

Based on publicly available sources, it now appears that extraordinary rendition is an updated form of "rendition to justice," a practice that was first secretly authorized by President Reagan in 1986.[14] Rendition was authorized along with a variety of other procedures in National Security Decision Directive 207, which formalized U.S. policy to fight terrorism.[15] According to reports about a classified document analyzing the practice when it was first approved, rendition to justice involved the abduction of suspected terrorists from (a) countries in which no government exercises effective control (i.e. "failed states" or states in chaos because of civil war or other massive unrest); (b) countries known to plan and support international terrorism; or (c) international waters or airspace.[16] These were locations where the U.S. government could not expect to obtain custody over an individual suspected of a crime using the traditional method of international extradition.

During the 1980s, the United States experienced significant difficulties obtaining jurisdiction over suspected terrorists, in part because the U.S. did not have valid extradition treaties with the countries most commonly harboring terrorists, and in part because those states sometimes asserted that the suspects were not eligible for extradition, since their crimes were "political" crimes, acts that have traditionally been excluded from extradition arrangements.[17] The rendition to justice policy was born of the frustration with what one former intelligence official has called "the enormously cumbersome and sometimes impossible process" of extradition.[18] The formulation of the policy evidences a desire to avoid violations of public international law (if not human rights law) while also allowing the U.S. to obtain custody of individuals who otherwise would walk free because of the limits of extradition law. By limiting the authorization of abductions to the three specified geographical locations, the policy's architects were choosing spaces where U.S. agents would not be invading the sovereignty of another state without clear justification.[19]

When carrying out renditions to justice, U.S. agents would abduct the individual from one of these three locations (sometimes luring suspects to the chosen location through elaborate ruses[20]) and then apprehend the suspect and forcibly transfer him to the United States where he would face indictment on criminal charges for specific acts of terrorism aimed at the U.S. or its citizens.[21] In the end, renditions to justice were a forcible means of obtaining personal jurisdiction over an individual who

was sought on regular criminal charges.[22] While some cases of rendition involved allegations of mistreatment during abduction or interrogation,[23] it has never been suggested that the purpose of the program was to subject the detainees to torture or cruel, inhuman, or degrading treatment. Once in the United States, the rendered individual would be treated like any other federal detainee awaiting trial.

Historical Precedent and Court Approval of Renditions to Justice

The Reagan-era renditions to justice were by no means the first examples of forcible abduction and transfer for the purpose of obtaining criminal jurisdiction over a fugitive or suspect. Indeed, the maxim *mala captus bene detentus* (improperly captured, properly detained) had long justified the infrequent resort to abductions when extradition treaties were not available, or when the local government was not cooperative for other reasons.[24]

In the United States, the *Ker-Frisbie* doctrine provided the well-known acceptance of this rule.[25] Despite these historical examples, the creation of a *policy* of rendition and the increasing frequency of such abductions brought the practice into some prominence in the 1980s. Indeed, despite the acceptance of these transfers by some public international law commentators,[26] they were considered deeply troubling by other international law and human rights scholars,[27] since they appeared to be specifically aimed at *avoiding* the formal process of international and domestic law that facilitated the transfer of suspects and fugitives through the process of extradition. Extradition procedures had been modified over the years to include some built-in protections for the rights of suspects sought for transfer.[28] These protections included the loosening of old doctrines that barred extradition judges from considering the treatment a detainee was likely to face upon transfer (in the U.S. called the "rule of non-inquiry"[29]) and the imposition of human rights restrictions on extradition to states likely to torture or execute the transferee.[30] The latter restrictions were required by some human rights treaties, either explicitly through treaty provisions concerning extradition and transfer, or implicitly through the rulings of human rights bodies' interpretations of broad prohibitions on torture or mistreatment.[31]

In the United States, judicial concern for the treatment of individuals forcibly brought to the U.S. for criminal trial reached its apex in the rendition context in the 1974 case *U.S. v. Toscanino*. In that case, the Second Circuit appeared to carve out an exception to the *Ker-Frisbie* doctrine by finding that jurisdiction was not properly exercised over an individual who had been brought before the court after he was kidnapped in Uruguay, bound and blindfolded, held incommunicado for 11 hours before being transferred to Brazil, where he was subjected to torture for more than two weeks in the presence of—and with the assistance of—an agent of the U.S. Bureau of Narcotics.[32] The exclusion was narrow and ultimately short-lived: subsequent decisions severely limited this potential exception.[33] In 1992 the *Ker-Frisbie* doctrine was upheld and expanded by the Supreme Court in *United States v. Alvarez-Machain.*[34] In that case, the Supreme Court reexamined and upheld the aging doctrine by holding that U.S. courts were not deprived of jurisdiction over an individual who had been kidnapped in Mexico and brought to the United States against his will, despite the existence of a valid extradition treaty.[35] This holding effectively removed the limits on the rendition policy by making practically irrelevant the existence of formal methods of approving transfer between countries.[36] While the decision may not have appeared to increase the chances that an individual would be subjected to grave abuse—

after all, those being rendered were being sent to the United States, where torture was not prevalent—the impact of the decision was just that. The Court's acceptance of the policy of rendition may have provided one of the needed steps in the transformation of rendition to justice into extraordinary rendition during the "War on Terror."

President Clinton Emphasizes Rendition to Justice

During the 1990s, rendition to justice came to be seen as an imperative—though limited—method for bringing suspected terrorists to the Unites States for trial. Although the document itself remains classified, President George H.W. Bush authorized specific procedures for renditions in 1993 through National Security Directive 77 ("NSD-77").[37] President Clinton followed the lead of Presidents Reagan and H.W. Bush by continuing the rendition program. President Clinton appears to have gone farther, however, emphasizing rendition as a key counter-terrorism strategy and signing several presidential decision directives ("PDDs") concerning the practice. PDD-39, dated June 21, 1995, includes a section entitled "Return of Indicted Terrorists to the U.S. for Prosecution," which states:

> When terrorists wanted for violation of U.S. law are at large overseas, their return for prosecution should be a matter of the highest priority and shall be a continuing central issue in bilateral relations with any state that harbors or assists them....If we do not receive adequate cooperation from a state that harbors a terrorist whose extradition we are seeking, we shall take appropriate measures to induce cooperation. Return of suspects by force may be effected without the cooperation of the host government, consistent with the procedures outlined in NSD-77, which shall remain in effect.[38]

Renditions were carried out during this period by an interagency team made up of personnel from the CIA, the FBI, the State Department, and the Department of Defense. Several arrests by such teams were reported publicly to have been effective,[39] though conflicts between the Departments of State and Justice about their respective roles in renditions existed throughout this period.[40]

President Clinton signed PDD-62 on May 22, 1998, setting up streamlined responsibilities for 10 major anti-terror programs, the first of which was called "Apprehension, Extradition, Rendition, and Prosecution."[41] In keeping with the focus on the prosecution of abducted suspects, the Justice Department was designated as the lead agency for this policy, to be supported by the Department of State.[42]

In the era preceding 9/11, renditions to justice became a cornerstone of U.S. anti-terror policy. As the National Commission on Terrorist Attacks Upon the United States ("9/11 Commission") explained:

> Under the presidential directives in the Clinton administration, PDD-39 and PDD-62, the CIA had two main operational responsibilities for combating terrorism, rendition and disruption....[I]f a terrorist suspect is outside of the United States, the CIA helps to catch and send him to the United States or a third country.…Overseas officials of the CIA, FBI and State Department may locate the terrorist suspect, perhaps using their own sources. If possible, they seek help from a foreign government. Though the FBI is often part of the process, the CIA is usually the main player, building and defining the relationships with the foreign government intelligence

> agencies and internal security services.[43]

Then-CIA Director George Tenet testified in 2000 that the CIA had rendered more than two dozen suspects between 1998 and 2000;[44] in 2004, he estimated there had been more than 80 renditions before September 11, 2001.[45]

Two important Clinton-era renditions must be included in this historical overview: the cases of Tal'at Fu'ad Qassim and the Tirana Cell.[46] Qassim was an Egyptian national who had been granted asylum in Denmark and traveled to Bosnia in the mid-1990s, reportedly to write about the war.[47] Concerned by the increasing globalization of terrorism and the radical Islamists whom the U.S. saw as the central players, the United States demanded that the Bosnian government expel militants found inside its territory during the war.[48] When the Bosnian government failed to do so, the U.S. government targeted Tal'at Fu'ad Qassim for rendition—to Egypt—not to the United States. According to news reports, Qassim was taken aboard a U.S. navy ship and interrogated before being transferred to Egyptian custody in the Adriatic Sea.[49] As Human Rights Watch reports, "Qassim's case is the first known rendition by the U.S. government to a third country with a record of torture."[50] Qassim was reportedly executed while in Egyptian custody.[51] Three years later, the CIA worked with Albanian secret police to monitor the activities of a suspected terrorist cell made up of Egyptian nationals living in Tirana.[52] After determining that the men were in fact engaged in terrorist activities, the Albanian police apprehended four men and handed them to the CIA, which in turn rendered the men to Egypt.[53] Within a month, the CIA rendered another Egyptian national from Bulgaria to Egypt.[54] According to a former intelligence official, "'[t]he only requirement [for transfer] was that there be some kind of legal process (to which the rendered person would be subject)' in the receiving country."[55] The men were tried as part of a mass trial and alleged that they had been severely abused while in pre-trial detention.[56]

The model for extra-legal transfers had thus been created; in the aftermath of 9/11, the complete transition would be made: the legal process requirement would be dropped, countries with a record of torture would be selected for transfer, and rendition to justice would become extraordinary rendition.

Completing the Transition

> The United States is aware of allegations that it has transferred individuals to third countries where they have been tortured. The United States does not transfer persons to countries where the United States believes it is "more likely than not" that they will be tortured. This policy applies to all components of the United States government.[57]

In response to allegations in the press that the Bush Administration had authorized the forcible transfer of individuals to countries where they would face torture, U.S. officials at first simply denied the practice, explaining that the longstanding policy of "rendition to justice" was being stepped up in the aftermath of the attacks of September 11.[58] To those familiar with the earlier practice, however, there seemed to have been a crucial shift in policy.

By piecing together news accounts, leaked and released documents, and attending to the Bush Administration's arguments in court, it has been possible to "reverse engineer" this shift. The most important change was that renditions are no longer used to obtain personal jurisdiction over individuals suspected of criminal acts; instead, they have become an

interrogation strategy in the global "War on Terror."[59] This change in focus was dramatic, apparently transforming not only the purpose of transfers (no longer to prosecute, but instead to get an individual to talk) but also the means and personnel involved in such processes.

While the Department of Justice and/or the Department of State worked closely with the CIA in the old version of the renditions program, the new one is apparently led by the CIA. According to a senior government official who explained the program to the *New York Times*, the CIA was given the lead role and expanded authority for renditions within days of the September 11, 2001 attacks.[60] Whereas in the past, approval from an interagency group including the Departments of State and Justice were apparently required for any rendition, the new policy reportedly gives the CIA advance authorization to render suspects to countries for interrogation or detention without consultation.[61] Notably, those involved feel that no new legal authorization was needed for this new version of rendition, since "the CIA has existing authorities to lawfully conduct these operations."[62] The program is not aimed at having individuals tortured, it was explained, but was designed to augment the detention system the U.S. has created for "War on Terror" detainees, and is aimed at obtaining actionable intelligence from detainees.[63] In short, unnamed sources have confirmed the main contours of a policy of extraordinary rendition, rebutting only the allegation that individuals are sent to be tortured. That purpose, one official insisted, is not part of the program, which safeguards the rights of detainees by obtaining promises of humane treatment from receiving governments.[64]

Other accounts tell a very different story. In a memo recently revealed by *Newsweek* magazine, a supervisory special agent of the FBI wrote to his superiors on November 27, 2002 to warn them that a special form of interrogation—extraordinary rendition—was being contemplated for use with an unnamed high-value detainee.[65] Labeled "Category IV," the practice was summarized in the memo as follows:

> Detainee will be sent off GTMO, either temporarily or permanently, to Jordan, Egypt, or another third country to allow those countries to employ interrogation techniques that will enable them to obtain the requisite information.[66]

All of the elements of extraordinary rendition are present in this description—including the missing link—the intent to have the detainee subjected to coercive interrogation techniques. The memo goes on to analyze "Category IV," concluding that:

> In as much as the intent of this category is to utilize, outside the U.S., interrogation techniques which would violate 18 U.S.C. § 2340 [the criminal torture statute] if committed in the U.S., it is a per se violation of the U.S. Torture Statute. Discussing any plan which includes this category, could be seen as a conspiracy to violate 18 U.S.C. 2340. Any person who takes any action in furtherance of implementing such a plan, would inculpate all persons who were involved in creating this plan. This technique can not be utilized without violating U.S. Federal law.[67]

What is remarkable here is the acknowledgement, in writing and by a government official familiar with the practice, of the *intent* by the government to have the detainee subjected to coercive interrogation. Such intent had been reported in statements by unnamed officials speaking on condition of anonymity, but had not been located in any government documents before the FBI memo.[68] This ele-

ment, the most striking and disturbing, is ultimately not required to demonstrate that the practice is unlawful,[69] but its acknowledgement demonstrates that the transformation was complete: renditions to justice had become extraordinary renditions—transfers to torture.

III. Extraordinary Rendition and International Human Rights Law

It is now clear that a policy favoring transfers to countries where an individual is at risk of torture was adopted following 9/11 and used as an interrogation technique, though the contours of that policy remain shrouded in secrecy.[70] It is equally clear—though not equally understood by the general public—that extraordinary rendition is prohibited by a number of international human rights treaties to which the United States is a party, including the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[71] ("CAT" or "Torture Convention") and the International Covenant on Civil and Political Rights[72] ("ICCPR" or "the Covenant"). Both treaties prohibit torture, a prohibition that has become a non-derogable norm of the highest order under international law, as well as cruel, inhuman, and degrading treatment. Both treaties also—either directly (in the text of the treaties) or indirectly (*i.e.*, through the jurisprudence or commentary of courts, commissions or treaty bodies charged with interpreting a particular treaty)—prohibit the *refoulement*, or transfer, of an individual to another state where that individual faces the risk of torture. Finally, both treaties require ratifying states to institute domestic laws penalizing torture,[73] and the Torture Convention specifically requires states to criminalize conspiracy and aiding and abetting in torture.[74] Although these treaties differ in their particulars, they prohibit (and, in some instances, require the United States to criminalize)—through their rules against torture and *non-refoulement*—instances of extraordinary rendition.

The *non-refoulement* obligations in the ICCPR and the Torture Convention apply to all individuals equally; even individuals who have committed the gravest crimes are protected from return to countries where they may be maltreated. The ICCPR does not include an explicit *non-refoulement* rule. Article 7 provides that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"; by the terms of the treaty, this article is non-derogable, meaning that it may not be limited during times of emergency or war.[75] The Human Rights Committee has interpreted Article 7 to include a *non-refoulement* obligation: states may not to "expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*."[76] The Committee has specified the threshold of risk encompassed in the obligation not to "expose individuals to the danger" of ill-treatment: whenever there is a "real risk" of torture or ill-treatment, the state may not complete the transfer.[77] Adding precision to this rule, the Committee has determined that a State party

> would itself be in violation of the Covenant if it handed over a person to another State in circumstances in which it was foreseeable that torture would take place. The foreseeability of the consequence would mean that there was a present violation by the State party, even though the consequence would not occur until later on.[78]

This obligation was further clarified by the Human Rights Committee in its general comment on *The Nature of the General Legal Obligation on State Parties to the Covenant*. There, the Committee stated that the require-

ment that states "respect and ensure" the rights in the Covenant

> entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 [right to life] and 7 [prohibition on torture and cruel, inhuman or degrading treatment] of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.[79]

Thus, the sending state must ensure that it does not expose an individual to the risk of torture, ill-treatment, or a threat to life though a transfer that may be followed by subsequent transfers. In other words, a state cannot discharge its duty not to expose a detainee to risk by first sending the individual to a safe state. The trajectory is irrelevant; what matters is the knowing transfer in the face of a risk.

There is no specific guidance from the Human Rights Committee concerning the territorial reach of the *non-refoulement* obligation. In the passage quoted above, the Committee refers to the obligation of states not to remove anyone "from their territory." This is puzzling, and should not decide the matter, since the Committee has developed a doctrine on the extraterritorial application of the Convention more generally. Article 2 of the Covenant provides that states must respect and ensure the rights set out in the convention to all individuals "within its territory and subject to its jurisdiction." While this may sound like it would require the two elements to be simultaneously present, the Human Rights Committee has read them disjunctively: the Covenant applies to all individuals who are either in the territory of the state, or subject to its jurisdiction. This interpretation has been widely accepted.[81]

Through decisions on individual cases, the review of states' reports, and interpretive guidance in General Comments, the Human Rights Committee has explored the meaning of both prongs of its provision on scope of application. It is now clear that a state's "territory" for the purpose of the application of the ICCPR includes not only the territory of the state itself and those territories over which it exercises formal control (such as the U.S.' insular areas), but also any territory that can be said to be under the "effective control" of a state party to the Covenant, even if that control is transitory.[82] The Committee has made clear that the latter includes territories under occupation by the military of a state party and territories where a state's troops make up part of a multilateral peacekeeping operation if that operation is exercising effective control.[83]

With respect to extraordinary renditions, the "effective control" rule would extend the *non-refoulement* prohibition to forbid transfers from territory under U.S. control, including Guantánamo, Afghanistan, and Iraq during the period of occupation. The effective control test would also potentially encompass spaces such as Diego Garcia, where the U.S. has established a military base to the exclusion of almost any other activity, even by the titled owner of the land, the United Kingdom. Less clear is the application of the ICCPR under the territorial rule to spaces within Iraq or Afghanistan after occupation has ended, where the U.S. could be seen to exercise effective control, but with the permission of the sovereign state.

We need not belabor this analysis, however, since the second test for the application of the Covenant shifts the analysis away from territory and asks whether an individual is "subject to the jurisdiction" of a state. The Human Rights Committee has found that Covenant rights apply to individuals who are abducted or arrested by a state's agents, even when

those actions occur entirely outside the territory of the state.[84] The individual control test was reiterated and clarified in the Human Rights Committee's 2004 General Comment on *The Nature of the General Legal Obligation on State Parties to the Covenant*:

> States parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State party. As indicated in general comment No. 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum-seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State party. This principle also applies to those within the power or effective control of the forces of a State party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained....[85]

This General Comment clearly demonstrates that the ICCPR's *non-refoulement* obligation would apply to any rendition carried out at the hands of U.S. agents, regardless of where it occurs, since such transfers necessarily involve an exercise of power over those persons. Any transfer that is carried out by U.S. agents is therefore governed by the ICCPR; the *non-refoulement* obligation bars renditions to states where the individual is at risk of torture or cruel, inhuman, or degrading treatment or punishment.

In the Torture Convention, the *non-refoulement* rule is set out in Article 3. This provision is silent with respect to the provision's scope of application:

> No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.[86]

Under general principles of international law, when a treaty is silent on its scope of application, it is presumed to apply to a state's "entire territory," except when "a different intention appears from the treaty or is otherwise established."[87] The *travaux préparatoires* of the Torture Convention, combined with the protective purpose of the treaty, demonstrate that the treaty as a whole was not intended to be restricted to a state's territory. Indeed, certain provisions apply extraterritorially on their face, while others contain a restriction that applies the norms to "any territory under its jurisdiction," and still others are silent. With respect to those articles that are silent concerning scope, the question is how best to understand the omission.

While Article 3's geographic reach seems not to have been an issue in its drafting, the negotiating states were concerned about reaching the different types of transfer that states were using at the time to move people across borders. This concern is demonstrated through a key amendment made during the drafting process. While the original draft of the Torture Convention included reference only to expulsion and *refoulement*,[88] States agreed to add a reference to extradition in order to "cover all measures by which a person is physically transferred to another state."[89] The Convention's drafters probably

did not contemplate the extra-territorial abduction and transfer of persons by a ratifying state—indeed, the practice of rendition to justice was not yet part of U.S. policy at the time of the treaty's negotiation, 1977-1986. This failure of imagination should not be construed as an affirmative decision to exclude such transfers from the scope of the treaty. Instead, the best approach to interpreting Article 3 is to follow the rules concerning extraterritorial application of human rights treaties generally. Under the effective control test used by the Human Rights Committee, Article 3 would apply to spaces abroad that are under the control of the United States, as well as to the physical territory of the state itself, a rubric that would certainly encompass transfers from Guantánamo, Bagram Air Base, and locations where the U.S. has detention centers, such as Bagram air base and possibly Diego Garcia. If this were the end of the analysis, Article 3 would not prohibit extraordinary renditions that originated from outside the United States unless they originated in territory under the effective control of the United States. The personal control test, however, would extend to cover *all* extraordinary renditions carried out by the U.S., no matter where they originate.

The personal control doctrine is especially suitable to cases of transfer, which involve direct control by state agents through physical custody of an individual. Further, while the extension of human rights norms to all territory under a state's effective control has been somewhat controversial,[90] the application of such norms to state agents involved in detentions and abductions abroad has been widely supported. The difference may lie in the desire to limit a state's obligations to those duties it can clearly fulfill: applying all of a state's human rights obligations to territory abroad—even where it exercises control—brings up thorny problems concerning rights that implicate affirmative duties, as well as the realities of control over spaces in conflict or post-conflict settings. This is not the case when dealing with abductions and detentions, which both entail unequivocal physical control over an individual. In other words, while it may be difficult for a state to uphold the affirmative rights of the entire population of an area where it exercises effective control, the state has the unencumbered ability to respect (or violate) the rights of an individual it holds in custody.[91]

[W]hile it may be difficult for a state to uphold the affirmative rights of the entire population of an area where it exercises effective control, the state has the unencumbered ability to respect (or violate) the rights of an individual it holds in custody.

Although the CAT Committee has not had the opportunity to explore this approach, it has indicated that the state's ability to violate or respect an individual's rights is a prerequisite to applying Article 3. In *H.W.A. v. Switzerland*, a Syrian citizen claimed that his involuntary transfer by Switzerland to Syria would amount to a violation of Article 3, since he feared ill-treatment upon return.[92] Between the time of the filing of his complaint and the Committee's decision on admissibility, however, the petitioner had left Switzerland to live in Ireland, where he was seeking asylum. Switzerland argued that the case had become moot since the petitioner was no longer living in that country. The Committee did not rely on the argument that the case was moot, but instead found that "[i]n the case in question, the author, being legally present in the territory of another State, cannot be returned by

Switzerland; consequently, article 3 of the Convention does not apply." It appears from this analysis that the Committee found that Article 3 did not apply because, at least in part, the state did not have the *ability* to remove the petitioner. The case would likely have turned out differently if Switzerland had abducted the petitioner from Ireland in order to return him to Syria.

In a recent resolution, the Sub-Commission on the Promotion and Protection of Human Rights signaled its acceptance of the extraterritorial application of the *non-refoulement* norm, emphasizing that "States must respect and ensure the human rights of everyone within the power or effective control of that State even if he or she is not situated within the territory of that State" and noting that "this entails the obligation not to extradite, deport, expel or otherwise remove a person from their territory or their control, where there are substantial grounds for believing that there is a real risk of irreparable harm, either in the country to which removal is to be effected or in any country to which the person may be subsequently removed."[93] The resolution further confirmed that "the transfer of a person to a State where that person faces a real risk of being subjected to torture, cruel, inhuman or degrading treatment or extrajudicial killing would be a breach of customary international law."[94]

International human rights law is thus unequivocal: extraordinary renditions, whether originating in territories under U.S. control (actual or effective) or merely carried out by U.S. agents, are unlawful and in violation of international treaties to which the United States is a party.[95] Despite this clear prohibition, the Bush Administration continues to engage in this practice, using it to transfer detainees out of the reach of U.S. courts and into the realm of secret detentions and brutal interrogations. Having altered the procedure from a transfer sanctioned by U.S. courts to a transfer that is extralegal, this Administration completed the transformation of extraordinary rendition from transfer *to* justice to transfer *out* of the justice system.

IV. Conclusion

From trial to interrogation—from justice to torture—the new form of rendition is prohibited under international human rights law and uniformly condemned. Instead of working to bring those committing crimes against the United States to justice in U.S. courts, the Bush Administration seems intent on doing exactly the opposite—keeping such individuals away from U.S. courts, hidden in a web of secret prisons, underground interrogation cells, and in the hands of cooperative governments.[96] ■

Endnotes

[1] The exact number of those detained or interrogated is unknown. The Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 requires the Secretary of Defense to submit to Congress "[g]eneral information on the foreign national detainees in the custody of the Department of Defense during the 12-month period." Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_public_laws&docid=f:publ375.108.pdf. At the time of this writing, no reports have been released. Most recently, THE WASHINGTON POST estimated that about 30 "high-value" detainees have been transferred to CIA's secret facilities in foreign countries, including Eastern European countries. Another 70 detainees of less importance have been rendered to intelligence services in Egypt, Jordan, Morocco, Afghanistan, and other countries where they are detained in jails operated by host nations "with CIA financial assistance and, sometimes direction." Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, THE WASHINGTON POST, Nov. 2, 2005.

[2] *See, e.g.*, Amnesty Int'l., USA: *Memorandum to the U.S. Government on the Rights of People in U.S. Custody in Afghanistan and Guantánamo Bay* (April 2002), *available at* http://web.amnesty.org/library/index/engamr510532002 (last visited Oct. 25, 2004); Amnesty Int'l., *Iraq: Memorandum on Concerns Relating to Law and Order* (July 2003), *available at* http://web.amnesty.org/library/Index/ENGMDE141572003 (last visited Oct.25, 2004); *and* Human Rights Watch, *U.S.: Reports of Torture of Al Qaeda Suspects* (Dec. 27, 2002), *available at* http://www.hrw.org/press/2002/12/us1227.htm (last visited Oct. 25, 2004).

[3] The International Committee of the Red Cross, which has a special status under international law as the guardian of international humanitarian law, issued a number of reports concerning ill-treatment of prisoners held by the United States, one of which was made public in the wake of the Abu Ghraib revelations. *See* International Committee of the Red Cross, *Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation* (Feb. 2004), *available at* http://www.derechos.org/nizkor/us/doc/icrc-prisoner-report-feb-2004.pdf (last visited Oct.25, 2004).

[4] Association of the Bar of the City of New York & Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions"* (New York: ABCNY &NYU School of Law, 2004); Center for Human Rights and Global Justice, *Beyond Guantánamo: Transfers to Torture One Year After* Rasul v. Bush (New York: NYU School of Law, 2005).

[5] *See e.g., Rasul v. Bush*, 124 S. Ct. 2686 (2004). 542 U.S. 466 (2004), 321 F.3d 1134, *reversed and remanded; Hamdi v. Rumsfeld*, 542 US 507 (2004); *Padilla v. Hanft*, 423 F.3d 386 (4th Cir., 2005), *on remand from Rumsfeld v. Padilla*, 542 U.S. 426 (2004), 352 F.3d 695; *Hamdan v. Rumsfeld*, 415 F.3d 33 (U.S. Dist. Ct. DC, 2005); *Omar Abu Ali v. Ashcroft*, Civil Action No. 04-1258 (JDB) (U.S. Dist. Ct. DC, 2004); Complaint and Demand for Jury Trial, filed with the U.S. District Court, Eastern District of New York in *Arar v. Ashcroft, et al., available at* http://www.ccr-ny.org/v2/legal/september_11th/docs/ArarComplaint.pdf (last visited Nov. 1, 2005).

[6] *Rasul, Id*.

[7] *Torture by Proxy, supra* note 4.

[8] *See Beyond Guantánamo, supra* note 4.

[9] Human Rights First, *Behind the Wire: An Update to "Ending Secret Detentions,"* March 2005, *available at* http://www.humanrightsfirst.org/us_law/PDF/behind-the-wire-033005.pdf (last visited June 21, 2005). Amnesty International, *Yemenis held in secret US detention centres*, THE WIRE, Aug. 2005, *available at* http://web.amnesty.org/wire/August2005/USA (last visited Oct. 25, 2005).

[10] The number of individuals transferred in connection with the "global war on terror" through extra-legal means is unknown. Some experts have estimated that 150 people have been transferred since 2001. The Prime Minister of Egypt has publicly acknowledged that more than "60 or 70" detainees have been sent to Egypt by the United States since September 11, 2001—a statement that suggests that the estimate of 150 transfers to all countries is a significant underestimate. Shaun Waterman, *Terror Detainees Sent to Egypt; Official, U.S. deny torture is condoned*, WASHINGTON TIMES, May 16, 2005, p.4. During an interview with NBS news in Washington, Egypt's prime minister denied that torture was a widespread practice in Egypt, stating:

> We are a country that has been subject to terrorism. Our police force sometimes has to take necessary actions to make sure that we have peace and stability inside Egypt, as well. So I don't blame them very much in many cases. But we do tell them not to abuse their forces as much as humanly possible.

Egypt Confirms 'Rendition' of Terror Suspects, ISN SECURITY WATCH, May 17, 2005, *available at* http://www.isn.ethz.ch/news/sw/details.cfm?id-11297 (last visited May 31, 2005). Indeed, according to Jane Mayer, a journalist for THE NEW YORKER, "one source knowledgeable about the rendition program, suggested that the number of renditions since September 11, 2001 may have reached as high as several thousands." Jane Mayer, speaking at the panel discussion, Transferring Terrorist Suspects to Other Countries: Legal and Policy Implications of Extraordinary Rendition, Constitution Project, Wash. D.C. (Apr. 20, 2005). The broad scope of the policy favoring extra-legal transfers is demonstrated by off-the-record statements by officials, and evidence of an infrastructure created to facilitate such transfers. For a detailed review, *see Torture by Proxy, supra* note 4; *see also Beyond Guantánamo, supra* note 4.

[11] These examples are all taken from Center for Human Rights and Global Justice, *Briefing Paper: Torture by Proxy: International Law Applicable to 'Extraordinary Renditions'*, Dec. 2005 (citations omitted).

[12] For a discussion of the different forms of transfer, *see Beyond Guantánamo, supra* note 4. Formal transfers from the territory or borders of the United States are governed by statute and regulations, and usually involve certain forms of judicial review. For example, extradition involves the certification of an individual as extraditable by a judicial officer; immigration removals are carried out according to detailed rules of the Immigration and Naturalization Act (INA) and its accompanying regulations and often include some opportunity for judicial review. With both types of transfer, safeguards exist to ensure compliance with the Convention Against Torture, including the obligation on the United States not to return an individual to a risk of torture (the obligation of *non-refoulement*). On the other hand, the informal transfers known as renditions are apparently authorized by a series of secret presidential directives, do not involve any opportunity for judicial review, and are not governed by specific statutes or regulations. *See Beyond Guantánamo, supra* note 4, *Torture by Proxy, supra* note 4. There are no rules in place to ensure that the United States will uphold its obligation not to return individuals to a risk of torture when carrying out renditions. Even more disturbing, extraordinary renditions are undertaken entirely in secret and involve the exposure of individuals to a risk of torture. They are therefore by definition not carried out according to processes set out in statutes or regulations, and they blatantly flout the requirement that the United States refrain from transferring individuals to countries where they are at risk of torture.

[13] This is the definition developed in *Torture by Proxy, supra* note 4. The "more likely than not" standard for assessing an individual's risk upon transfer was chosen because it is the

test that the United States employs when assessing that risk. The authors acknowledge that this approach excludes cases of extraordinary rendition that could be legal under federal law, but which would violate international human rights law that is binding on the United States. The relevant human rights treaties contain significantly more protective standards concerning the level of risk of torture or CID treatment that an individual faces upon transfer. The standard under Convention Against Torture (CAT) requires the presence of "substantial grounds for believing [the individual] would be in danger of being subjected to torture" upon transfer. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* December 10, 1984, G.A. Res. 39/46, 39 UN GAOR Supp. No. 51, at 197, UN Doc. A/RES/39/708 (1984), *entered into force* June 26, 1987, 1465 U.N.T.S. 85, 23 I.L.M. 1027 (1984), as modified, 24 I.L.M. 535, *available at* http://www.ohchr.org/english/law/cat.htm, art. 4(1). The International Covenant on Civil and Political Rights (ICCPR) has been authoritatively interpreted to prohibit transfer in cases where there are "substantial grounds for believing that there is a real risk of irreparable harm" from torture or cruel, inhuman, and degrading treatment. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), UN GAOR, 21st Sess., Supp. No. 16, at 52, UN Doc. A/6316 Dec. 16, 1966, *entered into force* March 23, 1976, 999 U.N.T.S. 171 *available at* http://www.ohchr.org/english/law/ccpr.htm (last visited Oct. 24, 2004) (ICCPR). Human Rights Committee, General Comment 31, *Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) (HRC General Comment 31). The United States has codified a standard that is more stringent, requiring that it be "more likely than not" that an individual will face torture upon transfer. For a discussion of U.S. law implementing CAT, *see Torture by Proxy*, *supra* note 4, Section V.A.5. For a discussion of CAT standards, *see Torture by Proxy*, *supra* note 4, Section V.A. For a discussion of ICCPR standards, *Torture by Proxy*, *supra* note 4, Section V.B.

[14] D. Cameron Findlay, *Abducting Terrorists Overseas for Trial in the United States: Issues of International and Domestic Law*, 23 TEX. INT'L L.J. 1 (1988) at 2-3 (citing Walcott & Pasztor, Reagan Ruling to Let CIA Kidnap Terrorists Overseas is Disclosed, WALL ST. J., Feb. 20, 1987, at 1, col. 6). *See also* Shaun Waterman, *Analysis: Rendition a Routine Practice*, UNITED PRESS INTERNATIONAL, March 8, 2005 (citing a former intelligence official knowledgeable about rendition who explained that rendition was approved in 1986 by President Reagan along with the establishment of the Counterterrorist Center); *and* Dana Priest, *CIA Challenged About Suspects' Torture Overseas*, THE WASHINGTON POST, March 17, 2005.

[15] *See* United States General Accounting Office, *Combating Terrorism: Issues to be Resolved to Improve Counter-terrorism Operations* (May 1999), at 3. National Security Decision Directive 207 has only been partly declassified; the sections discussing rendition have not been made public. *See* Partial Text of NSDD 207 (Jan. 20, 1986).

[16] Findlay, *supra* note 14, at 3 (citing a classified annex to a Presidential report on renditions to justice).

[17] *See* Findlay, *Id*, at 6-15.

[18] *See* Waterman, supra note 14.

[19] Disintegrating states, by the 1980s, were perceived as penetrable by the international community, and foreign agents could carry out discrete operations on their territory without raising significant sovereignty concerns. *See* Findlay, *supra* note 14 at 16-17 (analyzing the Reagan rendition policy and finding that international law would pose no obstacles to rendition from states where no government exerted effective territorial control). The concept of the "failed state" became prominent in international relations and international affairs literature in the early 1990s as a distillation of long articulated concerns about the consequences of states where lawlessness and anarchy prevailed. When President Reagan signed his covert finding on rendition in 1986, a large literature existed on disintegrating states if not yet "failed states" using that terminology. *See* Gerald B. Helman & Steven R. Ratner, *Saving Failed States*, 89 FOREIGN POL'Y 3 (1992); Robert D. Kaplan, *The Coming Anarchy*, ATLANTIC MONTHLY, Feb. 1994, at 44; and Jon H. Sylvester, *Sub-Saharan Africa: Economic Stagnation, Political Disintegration and the Specter of Recolonization*, 27 LOY. L.A. L. REV. 1299 (1994). States sponsoring or carrying out terrorist attacks were vulnerable to limited incursions of their sovereignty under the doctrine of self-defense, whereby a suspected terrorist would be abducted in an act of self-help by the injured state. Findlay, *supra* note 14, at 25-29. And a state's actions in international waters or airspace could not—by definition—disturb another state's sovereignty, making that final location an especially attractive one for U.S. agents conducting renditions. *But see* Office of Legal Counsel, Extraterritorial Apprehension by the Federal Bureau of Investigation, 4B OP. OFF. LEGAL COUNSEL 543 (1980) at 549 (concluding that self-help and self-defense were not available as excuses for the actions of one state's agents when forcibly abducting a fugitive on another state's territory). The eight-year difference between these two opinions is most likely the cause of the different results. The 1980 opinion also states that "[t]he interests protected by international law are those of sovereign nations. Any interest of individuals is at best derivative"—a statement that by 1988 was incorrect from any standpoint.

[20] Consider, for example, the case of Fawaz Yunis, who was lured into international waters by undercover FBI agents posing as drug traffickers and then arrested and transferred to an American munitions ship. Yunis' objections to this method of gaining jurisdiction over him were rejected by the D.C. Circuit. *See United States v. Yunis*, 859 F.2d 953, at 957 (D.C. Cir. 1988) (describing arrest), and 924 F.2d 1086 (D.C. Cir. 1991) (upholding jurisdiction to try Yunis).

[21] Findlay, *supra* note 14, at 3-4.

[22] *See generally* Findlay, *supra* note 14.

[23] *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *United States v. Toscanino*, 398 F. Supp. 916 (E.D.N.Y. 1975), *on*

remand from 500 F.2d 267 (2d Cir. 1974), *reh'g denied*, 504 F.2d 1380 (2d Cir. 1974). *U.S. ex rel. Lujan v. Gengler*, 510 F.2d 62, 66 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975).

[24] *See* M. Cherif Bassiouni, *Abduction and Unlawful Seizure as Alternatives to Extradition,* in INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE (4th ed., 2002), at 250-251 (noting that "there is no deterrent to [forcible renditions] because they produce legally valid results").

[25] In *Ker v. Illinois*, 119 U.S. 436 (1886), the Supreme Court held that U.S. courts could try an individual who had been abducted from Peru and brought to the United States to face charges of embezzlement and larceny; in *Frisbie v. Collins*, 342 U.S. 519 (1952), the Court upheld the *Ker* rule.

[26] *See generally* Findlay, *supra* note 14.

[27] *See, e.g.*, Joan Fitzpatrick, *Rendition and Transfer in the War Against Terrorism: Guantánamo and Beyond*, 25 LOY. L.A. INT'L & COMP. L. R. (2003) 457, 468-469 (discussing the history of irregular renditions before 9/11); Royal J. Stark, Comment, *The Ker-Frisbie-Alvarez Doctrine: International Law, Due Process, and the United States Sponsored Kidnapping of Foreign Nationals Abroad*, 9 CONN. J. INT'L L. 113 (1993) (criticizing the Court's rejection of international law as a basis for declining jurisdiction over a rendered suspect).

[28] *See* Valerie Epps, *The Development of the Conceptual Framework Supporting International Extradition*, 25 LOY. L.A. INT'L & COMP. L. R. 369, 377-381 (2002).

[29] *See generally*, John Quigley, *The Rule of Non-Inquiry and Human Rights Treaties*, 45 CATH. U. L. REV. 1213 (1996).

[30] *See generally*, Amnesty International, *United States of America—No return to execution—The US death penalty as a barrier to extradition*, Nov. 2001, *available at* http://web.amnesty.org/library/Index/ENGAMR511712001?open&of=ENG-2M4 (last visited Nov. 1, 2005). In the last 10 years, extradition requests from various U.S. jurisdictions have proceeded only on the basis of guarantees that the extradited person would not be subject to capital punishment. For example: in 1991, Texas prosecutors were compelled to provide binding assurances against the death penalty to the French authorities in the extradition of Joy Aylor (*French court upholds Aylor's extradition; U.S. vows no death penalty in capital murder case*, DALLAS MORNING NEWS, Oct. 16, 1993); in 1997, a Connecticut prosecutor assured Irish authorities that capital murder suspect Beth Ann Carpenter would not be subjected to the death penalty (*The trial of her life*, HARTFORD COURANT, Oct. 28, 2001); also in 1997, Florida prosecutors were able to obtain the extradition of a murder suspect from Mexcio only after providing assurances against the death penalty (*Del Toro won't face death penalty*, ST. PETERSBURG TIMES, Dec. 18, 1997); similar assurances were provided in the 2001 extraditions of Mario Betancourt and Romeo Lopez from Mexico.

[31] Article 3 of CAT is a paradigmatic example, and will be discussed *infra*.

[32] *Toscanino*, *supra* note 23.

[33] The Second Circuit itself signaled a retreat from its apparent exception in *Toscanino* by holding—soon after refusing to rehear Toscanino en banc—that a merely illegal abduction would not divest a U.S. court of criminal jurisdiction over a detainee—only an abduction that "shocks the conscience" would do so. *Gengler*, *supra* note 23.

[34] *U.S. v. Alvarez-Machain*, 504 U.S. 655 (1992) provided the Supreme Court with an opportunity to reaffirm the *Ker-Frisbie* doctrine in the modern era of human rights.

[35] *Id*.

[36] *See generally* Fitzpatrick, *supra* note 27.

[37] *See* Federation of American Scientists, *National Security Directives: Bush Administration 1989-1993* (listing NSD-77 as classified), *available at* http://www.fas.org/irp/offdocs/nsd/ (last visited Aug. 15, 2005). The only unclassified reference to the content of NSD-77 is in PDD-39, discussed *infra*.

[38] *See* Federation of American Scientists, *Presidential Decision Directives: Clinton Administration 1993-2000* (containing the unclassified segments of PDD-39), *available at* http://www.fas.org/irp/offdocs/pdd/index.html (last visited Aug. 15, 2005).

[39] Successful renditions to justice during this period reportedly included including the renditions of Ramzi Yousef (February 1995), Ayyad Najim (July 1995), Wahli Khan (December 1995), Tsutomo Shirasaki (September 1996), Matwan Al-Safadi (November 1996), Mir Aimal Kansi (Jun 1997), Mohamed Said Rasheed (June 1998), Mohamed Sadeck Odeh (August 1998), and Mohamed Rasheed Daoud Al Owhali (August 1998). *See* United States General Accounting Office, *supra* note 15, at 6.

[40] *See* United States General Accounting Office, *supra* note 15, at 8 (identifying disagreements between these agencies about "specific operational issues" concerning renditions).

[41] PDD-62 has not been declassified. It is discussed in *National Commission on Terrorist Attacks Upon the United States, Staff Statement No. 5: Diplomacy* at 5, *available at* http://www.9-11commission.gov/staff_statements/staff_statement_5.pdf (last visited Aug. 15, 2005). An unclassified summary of PDD-62 states: "To meet these challenges, President Clinton signed Presidential Decision Directive 62. This Directive creates a new and more systematic approach to fighting the terrorist threat of the next century. It reinforces the mission of the many U.S. agencies charged with roles in defeating terrorism; it also codifies and clarifies their activities in the wide range of U.S. counter-terrorism programs, from apprehension and prosecution of terrorists to increasing transportation security, enhancing response capabilities and protecting the computer-based systems that lie at the heart of America's economy." The White House, *Fact Sheet: Combating Terrorism: Presidential Decision Directive 62, available at* http://www.fas.org/irp/offdocs/pdd-62.htm (last visited Aug. 15, 2005).

[42] *Id*.

[43] *Counterterrorism Policy: Hearing Before the National Commission on Terrorist Attacks Upon the United States* (March 24, 2004) (statement of, Chris Kojm, Testimony of the Deputy Executive Director and former Deputy Assistant Secretary of State), *available at* http://www.9-11commission.gov/archive/hearing8/9-11Commission_Hearing_2004-03-24.pdf. There was disagreement in the 1990s among agencies concerning the role of the Department of State in renditions: the General Accounting Office reported in 1999 that "the Department of State, the Department of Justice, and the FBI have not reached agreement on the level of State participation in highly sensitive missions to arrest suspected terrorists overseas." United States General Accounting Office, *Combating Terrorism: Issues to be Resolved to Improve Counterterrorism Operations* (May 1999), at 1.

[44] *See* Waterman, *supra* note 14.

[45] *Counterterrorism Policy: Hearing Before the National Commission on Terrorist Attacks Upon the United States* (March 24, 2004) (statement by George Tenet, former Director of Central Intelligence), *available at* http://www.9-11commission.gov/archive/hearing8/9-11Commission_Hearing_2004-03-24.htm.

[46] HUMAN RIGHTS WATCH, BLACK HOLE: THE FATE OF ISLAMISTS RENDERED TO EGYPT 19 (2005). (Hereinafter "BLACK HOLE.")

[47] HUMAN RIGHTS WATCH, BLACK HOLE, *Id*., at 19.

[48] HUMAN RIGHTS WATCH, *Id*., at 19.

[49] HUMAN RIGHTS WATCH, *Id*., at 20; Anthony Shadid, *Syria is Said to Hang Egypt Suspect Tied to Bin Laden*, BOSTON GLOBE, Nov. 20, 2001; Andrew Higgins and Christopher Cooper, *Cloak and Dagger: A CIA-Backed Team Used Brutal Means to Crack Terror Cell*, WALL STREET JOURNAL, Nov. 20, 2001.

[50] HUMAN RIGHTS WATCH, BLACK HOLE, *supra* note 46, at 20. It is impossible to know if this was the first such transfer, since such actions were covert. One former intelligence official told UPI that this form of rendition was common, and even qualified "rendition to justice" in the United States as the exception to the norm of rendition to third states. *See* Waterman, *supra* note 14. Research did not locate corroboration of this account.

[51] HUMAN RIGHTS WATCH, BLACK HOLE, *supra* note 46, at 21.

[52] HUMAN RIGHTS WATCH, *Id*., at 21.

[53] HUMAN RIGHTS WATCH, *Id*., at 21-22.

[54] HUMAN RIGHTS WATCH, *Id*., at 21.

[55] Quoted in Waterman, *supra* note 14.

[56] HUMAN RIGHTS WATCH, BLACK HOLE, *supra* note 46, at 21-24.

[57] United States of America, *Second Periodic Report of the United States of America to the Committee Against Torture*, Submitted by the U.S. to the U.N. Committee Against Torture, May 6, 2005, para. 30 (citations omitted) *available at* http://www.state.gov/g/drl/rls/45738.htm (last visited Oct. 25, 2005).

[58] *See Torture by Proxy*, *supra* note 4.

[59] As Joan Fitzpatrick observed, "Prior practice was hardly respectful of the rights of terrorist suspects. On the other hand, certain basic principles became widely accepted. These established principles relate to substantive limits and procedural guarantees for extradition; circumstances under which refugee protection was granted or denied; bans on nonrefoulement to regimes with serious human rights violations; second state complicity for human rights violations committed in states to which victims are forcibly transferred; and the expectation that the receiving state would grant the suspect a fair trial on recognizable criminal charges." Fitzpatrick, *supra* note 27.

[60] Douglas Jehl and David Johnston, *Rule Change Lets CIA Freely Send Suspects Abroad to Jails*, N.Y. TIMES, March 5, 2005, p. A1.

[61] *Id*.

[62] *Id*.

[63] *Id*.

[64] *Id*.

[65] Michael Isikoff, *Exclusive: Secret Memo—Send to be Tortured*, NEWSWEEK, Aug. 8, 2005, *available at* http://www.msnbc.msn.com/id/8769416/site/newsweek/ (last visited Nov. 1, 2005).

[66] Memo dated November 27, 2002 (first reported by Michael Isikoff of NEWSWEEK; on file with authors).

[67] *Id.*

[68] *See* Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations; 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, THE WASHINGTON POST, Dec. 26, 2002, at A1. Other officials have framed the issue as one of knowledge rather than intent: as one official explains, "It's widely understood that interrogation practices that would be illegal in the U.S. are being used." Dana Priest, *CIA's Assurances On Transferred Suspects Doubted*, THE WASHINGTON POST, March 17, 2005.

[69] *See Torture by Proxy*, *supra* note 4, Part VIII(A) discussing criminal liability for engagement in extraordinary renditions.

[70] Specific planes owned by the CIA and possibly used by other U.S. agencies have appeared in locations known to have received detainees transferred by the United States. The fact that the planes are being used by U.S. agencies for renditions is supported by the flight logs. For example, most recently, the Boeing 737 allegedly flew from Sudan to Baltimore-Washington International Airport on April 17, 2005 and returned to Sudan on April 22, 2005, dates that coincide with a visit of the Sudanese intelligence chief to Washington that

was reported on April 30, 2005 by THE LOS ANGELES TIMES. Scott Shane, Stephen Grey, Margot Williams, *CIA Expanding Terror Battle Under Guise of Charter Flights*, N.Y. TIMES, May 31, 2005. For a detailed review of various on- and off-the-record statements by U.S. officials, *see Torture by Proxy, supra* note 4. Most recently, THE WASHINGTON POST has revealed that a number of "high-level" Al-Qaeda captives are being held and interrogated by the CIA in secret detention facilities in eight countries, including Thailand, Afghanistan, and several Eastern European countries. Priest, *supra* note 1.

[71] CAT, *supra* note 12.

[72] ICCPR, *supra* note 12. The Refugee Convention, whose substantive norms bind the United States, also contains norms relevant to the practice of extraordinary rendition. For the sake of brevity, this article only examines the Torture Convention and the ICCPR, which include norms that apply to *all* individuals, in contrast to the Refugee Convention, which contains a number of exclusions. *See* Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 *U.S.T. 6259, 6261*, 189 U.N.T.S. 150, 152, *entered into force* Apr. 22, 1954, *available at* http://www.ohchr.org/english/law/refugees.htm (last visited Oct. 24, 2004) (Refugee Convention). Although the United States did not ratify the Refugee Convention, it is a party to it through its accession to the 1967 Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, *19 U.S.T. 6223*, 606 U.N.T.S. 267, entered into force Oct. 1967, *available at* http://www.ohchr.org/english/law/protocolrefugees.htm (last visited Oct. 24, 2004) (1967 Protocol), which adopted and extended the Refugee Convention's protections. Also relevant but not discussed here is the American Declaration of the Rights and Duties of Man, May 2, 1948, OEA/ser. L./V/II.23, doc. 21 rev. 6, (1979), *available at* http://www.iachr.org/Basicos/basic2.htm (last visited Oct. 9, 2004) (American Declaration). The American Declaration was adopted by the Ninth International Conference of the OAS held at Bogotá, Columbia, March 30-May 2, 1948, and applies to the United States through its membership in the Organization of American States (OAS). The Inter-American Court of Human Rights has determined that the American Declaration is a source of international obligation for the United States and other OAS member states that are not parties to the American Convention on Human Rights, based upon Articles 3, 16, 51, 112, and 150 of the OAS Charter. *See* Inter-Am. Court H.R., Advisory Opinion OC-10/89, *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, July 14, 1989, Ser. A No. 10 (1989), paras. 35-45.

[73] CAT Article 4 requires that acts of torture must be treated as offenses under the criminal laws of the states party to the convention. CAT, *supra* note 13, Art. 4. In the context of the ICCPR, the Human Rights Committee has stated that "[i]t is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity." Human Rights Committee, General Comment 20, *Article 7*, UN Doc. A/47/40 (1992) *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 30 (1994), (HRC General Comment 20). In addition, the Human Rights Committee has said that "States parties should indicate when presenting their reports the provisions of their criminal law which penalize torture and cruel, inhuman and degrading treatment or punishment, specifying the penalties applicable to such acts, whether committed by public officials or other persons acting on behalf of the State, or by private persons. Those who violate article 7, whether by encouraging, ordering, tolerating or perpetrating prohibited acts, must be held responsible."). HRC General Comment 20, para. 13. *See also* HRC General Comment 31, *supra* note 13, para. 8 ("The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities....States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3. The Covenant itself envisages in some articles certain areas where there are positive obligations on States Parties to address the activities of private persons or entities....It is also implicit in article 7 that States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power.").

[74] CAT, *supra* note 12, Art. 4 (obligations to criminalize "shall apply to an attempt to commit torture and *to an act by any person which constitutes complicity or participation in torture*.") (emphasis added). In addition, article 1's definition of acts of torture includes the phrase "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." CAT, *supra* note 13, Art. 1.

[75] Article 4 of the ICCPR specifies that rights set out in specific articles may not be limited, even in times of emergency which threaten the life of the nation; Article 7 is included in this short list.

[76] HRC General Comment 20, *supra* note 73.

[77] *Kindler v. Canada*, Communication No. 470/1991, Human Rights Committee, U.N. Doc. CCPR/C/48/D/470/1990 (1993).

[78] *Ng v. Canada*, Communication No. 469/1991, U.N. Doc. A/49/90, Vol. II 189 (1993).

[79] United Nations High Commission for Human Rights, Human Rights Committee, General Comment on Article 2: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/74/CRP.4/Rev.6, (March 29, 2004), 80th session, para. 12. ("Moreover, the

article 2 obligation requires that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters.").

[80] The interpretation of the phrase "within its territory and subject to its jurisdiction" has been subject to debate. If territory and jurisdiction are read in conjunction then only people who are within the territory *and* subject to a state's jurisdiction would be protected. The *travaux préparatoires* to the ICCPR, however, provide for a broader interpretation. They assert that "a State should not be relieved of its obligations…to persons who remained within its jurisdiction merely because they were not within its territory." *See also Saldias de Lopez v. Uruguay*, Communication No. 52/1979, U.N. Doc. CCPR/C/OP/1 at 88 (1984) ("it would be unconscionable to so interpret" this provision "as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.").

[81] *See, e.g.*, Meron's examination of the extraterritorial application of the ICCPR in Meron, *Agora: The 1994 U.S. Action in Haiti: Extraterritoriality of Human Rights Treaties*, 89 A.J.I.L. 78 (arguing that "[i]n view of the purposes and objects of human rights treaties, there is no a priori reason to limit a state's obligation to respect human rights to its national territory. Where agents of the state, whether military or civilian, exercise power and authority (jurisdiction, or de facto jurisdiction) over persons outside national territory, the presumption should be that the state's obligation to respect the pertinent human rights continues. That presumption could be rebutted only when the nature and the content of a particular right or treaty language suggest otherwise."); Dominic McGoldrick, *Extraterritorial Application of the International Covenant on Civil and Political Rights*, in EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (Fons Coomans & Menno T. Kamminga, eds., 2004).

[82] *See generally* McGoldrick, *supra* note 81, and Martin Scheinin, *Extraterritorial Effect of the International Covenant on Civil and Political Rights*, in Coomans & Kamminga, *supra* note 81.

[83] *Id*.

[84] *See López Burgos v. Uruguay*, Human Rights Committee, 29 July 1981, U.N. Doc. A/36/40, 176. For a general discussion, *see* McGoldrick, *supra* note 81, and Scheinin, *supra* note 81.

[85] HRC General Comment 31, *supra* note 13, para. 10.

[86] CAT, supra note 13, Article 3(1).

[87] The Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, *entered into force* Jan. 27, 1980, art. 32, 1155 U.N.T.S. 331, *available at* http://www.un.org/law/ilc/texts/treaties.htm (last visited Oct. 24, 2004), Article 29 ("unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory").

[88] J. Herman Burgers & Hans Danelius, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT (1988) at 124-128.

[89] *Id*., at 120; *see also Torture by Proxy*, *supra* note 4, at 215 (quoting and citing Burgers and Danelius: "CAT was intended to apply to "any person who, for whatever reason, is in danger of being subjected to torture if handed over to another country." Burgers & Danelius, [cite omitted] at 125.").

[90] Compare *Loizidou v. Turkey* [1996] IIHRL 112 (18 Dec. 1996) (the European Court of Human Rights held that "although Article 1…sets limits on the reach of the Convention, the concept of 'jurisdiction' under this provision is not restricted to the national territory of the High Contracting Parties….The responsibility of a Contracting Party may also arise when…it exercises *effective control* of an area outside its national territory.") and *Bankovic v. Belgium and others* 2001 41 ILM 517 (the European Court of Human Rights observed that the jurisdictional competence of a state, while not excluding extraterritorial acts per se, is essentially territorial in nature and hence limited by the sovereign territorial rights of the states). The *Loizidou* case involved a landowner in the Republic of Cyprus who claimed that she was denied her property rights by Turkish forces in the area. The Court supported her claim, stating that Turkey was responsible due to its exercise of "effective overall control over that part of the island…." *Loizidou, supra* para. 52-56. The *Bancovic* case was brought against 17 NATO member states by the relatives of those killed during the NATO bombing of Radio-Television Serbia (RTS) headquarters during the Kosovo conflict. The applicants argued that the bombing of RTS violated Article 2 (right to life), Article 10 (freedom of expression), and Article 13 (right to an effective remedy) of the European Convention on Human Rights. The Court concluded that because NATO states did not exercise "effective control" over the bombed territory, these states did not have jurisdiction over the applicants and their deceased relatives.

[91] Former Human Rights Committee member Martin Scheinin suggests reformulating both doctrines into a single one that examines the state's relationship to the potential or actual human rights violation. The question should not be about effective control over a territory; rather it should be about whether the state has effective control over the deprivation or respect of the individual's right. In situations where the state has the ability to respect or violate an individual's right, human rights norms should apply to require compliance. *See* Scheinin, *supra* note 81 at 73-81. Scholars have also expressed concern about the incentives that would flow from a doctrine that fails to apply norms to abductions or detentions that are conducted extraterritorially with the *purpose* of avoiding the application of protective norms. A doctrine that applies the same rules to both territorial and extraterritorial detentions or abductions will remove the incentive to violate individuals' rights.

[92] U.N. Committee Against Torture, Communication No. 48/1996, *H.W.A. v. Switzerland*, U.N. Doc. No. CAT/C/20/D/48/1996 (1996).

[93] Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Question of the Violation of Human Rights and Fundamental Freedoms, including Policies of Racial Discrimination and Segregation, in All Countries, with Particular Reference to Colonial and Other Dependent Countries and Territories: Transfer of Persons, Report on Human Rights Resolution 8(XXIII), U.N. Doc. E/CN.4/Sub.2/2005/L.12, 4 August 2005.

[94] *Id*.

[95] The international humanitarian regime, which applies in situations of armed conflict, is similarly prohibitive of extraordinary renditions. A discussion of this regime is beyond the scope of the paper. For a summary, *see Torture by Proxy*, *supra* note 4.

[97] *See* Priest, *supra* note 1.

The Logic of Torture—Impunity, Democracy, and the State Power

By Marc Sapir[1]

The current cabal that controls the U.S. government has perfected self-contradiction as an ideology. They repudiate "big bureaucratic government" which they claim interferes in our personal lives and destroys our moral fiber. Yet they enact laws to ensure that the State—in particular the government military-security enforcement apparatus—grows at the greatest pace in history, imprisons ever more people under questionable circumstances, puts 100,000 on a terrorist watch list, takes over control of the most personal individual decisions such as those pertaining to reproduction, and has every intention of interfering more in our personal lives through the imposition of fundamentalist religious and cultural standards that repudiate scientific fact. They claim they are against deficit spending while they assure war, war crimes, and a homeland security budget that drives the Federal deficit to outer limits. This in turn guarantees vast profits to their friends and an artificial temporary respite from the economic crisis of the distorted and overdeveloped world Capitalist productive machine.

They argue that they are defenders of democracy while instituting and supporting terrorist dictatorships (such as that in Haiti), imposing their will on other democracies (such as El Salvador, which was threatened with economic destruction had it elected Shafik Mandel President), and attempting to kill and overthrow elected and popular leaders (such as Venezuela's Hugo Chavez and Cuba's Fidel Castro). When such leaders do not accept their interventionism and economic and political domination, they simply put them on a hit list. They say they believe in the will of the American people while snidely snubbing their noses at the will of the people on every important matter from war to social security retirement rights; from torture to workers rights to employment protection; from the right to health care, housing and safety, to protection of the North American and global environment.

They also claim to honor the U.S. Constitution and the rights it guarantees us. Yet they promulgate laws (such as the USA Patriot Act) that remove many of those rights. They conspire among themselves to steal elections and violate laws that get in the way of their various and vast nefarious projects.

These bizarre contradictions are particularly glaring with regard to torture. The Bush men claim to oppose torture and to adhere to the Geneva Conventions on war and torture while, without blinking an eye, they proclaim the legal right to, and do, violate the 1994 Convention on Torture. They have imple-

---

Marc Sapir MD, MPH is a semi-retired family practice physician working in Alameda County, California's ambulatory care clinics. He was co-convener of the 2005 UC Berkeley Teach-In on Torture (www.tortureteachin.org). After retiring as medical director of the Center for Elders' Independence in Oakland in 2001, he formed the Retro Poll group, an organization which performs opinion polls intended to expose how media-government collaboration misinforms and misrepresents pubic views (www.retropoll.org). He has also recently published a satiric novel (2004), The Last Tale of Mendel Abbe*. He can be contacted at marcsapir@comcast.net.*

mented a worldwide apparatus to seize and torture people whom they suspect of wrongdoing—with or without any evidence. And by the end of July they were working hard against a Republican-sponsored bill that would require adherence to the Geneva Torture Convention. In a word, they make life painful not only by physically killing, torturing, intimidating, and dominating people, but also by torturing the logic of language and the precepts of law, and then, having laid logic to rest—often with the assistance of the corporate media—they govern with total impunity, answerable to no one. They are the father who, when asked by his child why he can smoke or drink though he tells his children not to, responds, "Because I can."

Though some of us might like to see Mr. Bush and his cohort sent to the Bar of Justice to stand trial for war crimes, that is not about to happen soon. Zogby International reported on July 6 that 42 percent of the public believes that if the evidence shows Bush lied to take us to war, he should be impeached. However, there seems limited public awareness that the U.S. is becoming a nation whose laws are being changed to allow for lawlessness and impunity. Though citizens are in general distressed and fearful, most go on about their lives as best they can. People sit on juries, work—if they have jobs—get and pay parking and speeding tickets, live in doorways, apartments, or mansions, pay taxes, get screwed by Enron and other corporate rip-off artists given unrestrained powers under "deregulation." Most citizens, residents, and undocumented people still follow the basic rules set down by State legislatures and Congress, the Courts, the President, and the TV because the appearance of an intact system of intractable, even semi-fair laws is sustained by 200-plus years of belief and history. That is the strength of Capitalist democracy, yet Mr. Bush's minions seem unconcerned about protecting that appearance.

Indeed, the necessary order of the most successful Capitalist power in history is under attack not mainly by terrorists but by the most craven of capitalist punk criminals who hold power. Yet the market itself and the State (which is different from the particular individuals in power) collaborate and in many, though not all, circumstances assure that the rules are changed to abrogate the historically successful corrective mechanisms such as those elaborated under Keynesian economics. Only a few under the capitalist tent—whistle blowers and suddenly turned "outsiders"—feel responsible for righting this ship. This was similarly the case in Germany as Hitler rose. And this again reveals that when a Capitalist State turns to fascism, the economic interests and powers that pay for and buy most politicians exhibit a strange state of detachment from the surrogates they have let loose. This reveals that under no circumstances are moral principles to guide political-economic policies. To the political-economic elite, fascism is better than a class war and loss of power.

"Checks and Balances" Reflects the Potential for Largesse within a Growing Imperialist State

The Capitalist democracy under which we live has always rendered unto Caesar while at the very same time providing, as only imperialism is able, the general schema of a social contract under which the law shall assure to the common man "equal and fair" treatment. Of course Indians and Blacks (and even women) received no such guarantee under the U.S. Constitution, but rectification projects appeared historically under the law in the form of the 13th, 14th, 15th, 19th, 24th, and 26th Amendments. And only in the case of slavery was a civil war required to make the necessary changes. These are certainly not trivial accomplishments even if separate but equal survived until 1954, immigrants suffered the Palmer Raids, the CIO suffered the

McCarthy raids, and today one in three African American males is under some control of the criminal justice system. There were still the checks and balances. To some extent the presumptive checks and balances were God's gift to the new Capitalist era and this behemoth democracy to be. Yet now Capitalism—the system of asymmetric money replication and power by divine (in God we trust) right—is putting up a rather meek effort to defend its democratic history and institutions.

A story I recently heard on public radio may help clarify how the sense of American fairness is collapsing around us and how that crashing (like the $60 dollar barrel of oil) may well affect not only people's views of Mssrs. Bush, Cheney, and friends, but public perception of the entire political class and order itself. A young man who was heavily recruited by the military while in high school decided not to enlist, but instead enrolled in community college in the Seattle area. However, with so many young Americans voting against the current war with their feet, the local marine recruiters were becoming desperate. They badgered the young man at school and at home several times and then showed up at the family's home one night when his mother was out and cajoled the young fellow into going downtown to the recruiting office in the dead of night. In fact, they told him he *had* to come and he believed them. Once there they subjected him to intense pressure, perhaps resembling, in form, a terrorism or Patriot Act interrogation. They allowed him no food for many hours and when his mother figured out where he had been taken at 3 a.m., they refused to let her into the building to see him. She got a lawyer and eventually broke the siege.[2]

Suffice it to say this family is seeking some justice, and the young man is not joining the marines. This story represents a serious change in the quality of U.S. democracy and how the value of individual life is assessed. Certainly even relatively benign kidnapping of young Americans to bolster the Iraq war effort is likely to have a different effect upon public perceptions of U.S. democracy than Mr. Rumsfeld's helpmates would imagine. But this is also an example showing that the behaviors of Abu Ghraib, Guantánamo, and the kidnapping and renditions for torture are certainly not merely aberrancies, but grow out a qualitative change in the way force and power are exercised and the way the value of our lives is measured by those in power. And on June 23, that was corroborated by the announcement in the newspapers that the Pentagon has secretly and privately contracted out a list—a project to assemble the names, demographics, views, grades, and other details of hundreds of thousands of high school and college-age American youths to help them with their manpower shortage.

Torture and Democracy: Where Does the U.S. Public Stand?

Turning specifically to the issue of torture: Where does the public stand on the issue of torture in their name? Beginning in October of 2003, Retro Poll (*www.retropoll.org*), a small volunteer public opinion research organization I lead, asked a random sample of 150 Americans whether they support or oppose torture as U.S. policy. Eighty five percent said they oppose it. The same question was repeated in polls taken in April and October of 2004 and May of 2005 (with 205, 155, and 513 participants). The results were 88 percent, 71 percent, and 80 percent opposing torture as U.S. policy. Although these are small samples, the consistency of opposition (as well as the summary data of over 80 percent opposition) suggests that overwhelmingly Americans are opposed to what the government is doing in their name when it tortures. The trick of the game, however, is our finding that a clear majority do not know, or believe, that the U.S. is systematically torturing people. Many have

received just enough mixed media-government messages to believe that the torture problem is just a "few bad apples" despite the incredibly strong exposés by Seymour Hersh, Mark Danner, and others.

In February 2005, as torture exposés intensified, UC Berkeley Associate Professor of Asian-American studies Ling-chi Wang and I formed a committee and convened a teach-in on torture. The Teach-In on Torture was sponsored by UC Berkeley's Ethnic Studies Department, International and Area Studies Department, and Program on Peace and Social Conflict Studies (see *www.torture teachin.org*) and endorsed by more than 100 University of California faculty. We sought not only to expose that the government was violating U.S. and international laws and committing acts that it vociferously condemns when committed by others, but also we were attempting to expose how far the government's behavior and policies had strayed from the beliefs of the American people. Or to put it another way, that the U.S. might now find it difficult to lay claim to being the leading democracy on the planet. For both in actual content and in defiance of social norms, laws, and treaties, and the will of its citizens, the U.S. government's capture and torture policies repudiate the principles of democracy, fairness, and law.

Mr. Henry Kissinger, one of the founding fathers of the era of impunity, would likely be arrested and face prosecution for his direct role furthering war crimes and the deaths of hundreds of thousands of people should he show up in certain European and Latin American countries. This pertains to U.S. involvement in South East Asia and Latin America during the 1960s and 1970s. While the Bush cabal does not yet face this concern, that is not because the prima facie case is less compelling. Instead, the current power of the U.S. and the ease with which it can bully almost any nation on earth protect those in power. In this context, if U.S. citizens advocate universal principles of laws and democratic values toward other nations, we appear absurd, even if we oppose the current government. We are now forced to live as in an insulated refrigerator with very thick walls, isolated from both the necessarily responsive legal apparatus and the justifiable anger of much of the world as well. No one outside is in a position to catch these war criminals, but neither are we. This is, for the moment, the conundrum: Justice seems unattainable. Yet, imagine it we must. For it is by imagining that the means will come into being.

Torture is Derivative of Impunity. Impunity is the Dictum of Every Fascist State.

To try to challenge torture requires a broader discussion of the State, the Nation State. The idea, structure, and function of the "State" is often perceived to be in some contradiction with pure individual rights (as espoused by Libertarians and laissez faire Capitalists) but is nevertheless fundamental to Class rule and specifically Capitalism. An important feature of the State is that the exercise of the State power is necessarily in *direct contradiction with democratic process governance* in general terms. That is to say, it is not just the individual whose rights the State often overwhelms but the collective's populace. The State exists as a pre-emption of ongoing day-to-day authoritative participatory processes for the common citizens as a class. Most Americans have been taught to believe that the individual right to vote for members of Congress, the President, and so forth are fundamental democratic rights, but these were neither rights placed in the Constitution nor are they valuable rights when they replace the right of the people to themselves participate in governance, substituting "representative democracy." Representative democracy could work in theory given a nation in which each person was equal in influence (*i.e.* there were

no classes or hierarchies to heavily influence the selection of candidates or the behavior of officials in office). But that is not the case, and thus the State is in essence an apparatus of force, compulsion, and control, creating laws and enforcing order for those with most influence and power and other classes of people who may temporarily develop such power. The notion that this process involves the "will of the governed" through national elections is not an actuality. Only under local government in small areas can a purely electoral system provide any assurance, or even consistent high likelihood, that replacing one political party or one politician with another will lead to a more responsive or democratic State, even if changing parties causes policy changes. That is why Mr. Bush could make the preposterous claim that in his second term he had "earned political capital" to do whatever he damn well wanted. He understands the disconnect between elections and policy better than most. Elections provide little more than the appearance of effective public power within class society.

The State, of course, does have necessary functions independent of class society. We may not need drug laws and vast prisons from coast to coast to hold millions of citizens; we may not need hundreds of thousands of armed law enforcement agents, spies, and infiltrators, to criminalize those who oppose the State or those the State peripheralizes; but we do need to regulate commerce between and within countries. We may not need the government to do the bidding of wealthy contributors or to privatize all the public wealth and resources, but we do need to assure the safety of drugs sold or even given free to the public. The government needs to be responsible for there being enough housing for everyone and free quality health care and public education. There is a need for local courts to help people who cannot work out their disputes through mediation and to remove people judged a danger to the community and so on. And even in the best of circumstances one can conceive of the need for either a national defense or an international State to assure peace. These are a few important state functions. But the propensity of the State to embody the class interests of the rich and powerful is historically demonstrated. So what would true democracy look like? ■

For interested readers, the second part of this extended two part article may be obtained by subscribing online to Retro Poll's e-mail list at www.retropoll.org *and asking for Part II of "Logic of Torture" on the comment line. There is no fee.*

Endnotes

[1] Special thanks to Warren Gold, Jane Franklin and Mary Ann Tenuto for helpful criticisms in the preparation of this paper.

[2] Susan Paynter, *When marine recruiters go way beyond the call*, Seattle Post-Intelligencer, June 8, 2005.

The Practice of Rendition in the War on Terror

By Jeffrey F. Addicott

Introduction

In any civilized society the most important task is achieving a proper balance between freedom and order. In wartime, reason and history both suggest that this balance shifts to some degree in favor of order—in favor of the government's ability to deal with conditions that threaten the national well-being.[1]

William H. Rehnquist

The terrorist attacks of September 11, 2001, and the subsequent echoes of al-Qa'eda[2] inspired murder from "Bali to Turkey to Kenya to Spain"[3] to London,[4] has spawned an international "war"[5] that pits the United States and its allies against the forces of a "virtual"[6] State. In this, of course, rests the dilemma which confronts the United States and its allies—although al-Qa'eda clearly receives support from certain nations,[7] it is not a nation-state.[8] Among other things, this means that the rules for fighting the War on Terror are facing challenges not yet fully appreciated (or anticipated) by international law, let alone domestic law.[9] Nevertheless, as various issues present themselves, e.g., use of force, detention of enemy combatants, etc., the policy and legal considerations must be framed within the existing rule of law.

One issue that has received much attention in the context of the interrogation of suspected terrorists[10] is the improper use of rendition,[11] where some allege that the United States' sends detainees to third nations where they are subjected to interrogations that employ torture or other illegal techniques.[12]

Like allegations of torture, charges of illegal rendition roll off the tongue with ease and are raised by a variety of individuals and interest groups,[13] including Amnesty International.[14] For instance, in May 2005, Amnesty International issued a human rights report that reserved its most scathing criticism for the United States, claiming that the United States ignored international law and had created a network of supplicant countries to "subcontract" illegal detention and mistreatment.[15]

Whatever one may think of the efficacy of Amnesty International in the cause of promoting war avoidance and human rights, evaluating whether such allegations are true or not requires a lucid understanding of the applicable legal standards associated with rendition. Recognizing that the practice of sending certain individuals to third nations for questioning or detention is not itself illegal, it is imperative that one view allegations of illegal rendition with a clear understanding of the applicable legal standards set out in law. Only then can one set aside the rhetoric and objectively

---

Jeffrey Addicott is an associate professor of law and director of the Center for Terrorism Law at St. Mary's University School of Law in San Antonio, Texas. This paper was prepared under the auspices of the Center for Terrorism Law, whose goal is to examine both current and potential legal issues attendant to terrorism.

establish whether or not the United States stands in violation of the rule of law.[16] The purpose of this article is to briefly examine the primary international legal instrument dealing with illegal rendition.

Defining Illegal Rendition

Was I sent [to Syria] by the Canadians and Americans so they could get information out of me using methods that would be prohibited here?[17]

Maher Arar

The primary international instrument dealing with the practice of illegal rendition is the 1984 United Nations Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention).[18] Article 3 of the Torture Convention makes it unlawful for any State Party to "expel, return (*"refouler"*) or extradite any person to another State where there are substantial grounds"[19] to believe that the person will be subjected to torture.[20]

In order to understand whether a State is engaged in illegal rendition, it is necessary to first define the terms "torture"[21] and "other acts of cruel, inhuman, or degrading treatment or punishment."[22] A reading of the Torture Convention reveals that the document does not exhibit the same precision in defining what it means by "other cruel, inhuman or degrading treatment or punishment as it does with regard to torture."[23] The Torture Convention defines torture as follows:

> [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind when such pain or suffering is inflicted by or at the instigation of…a public official or other person acting in a public capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[24]

In summary, for torture to exist in the context of an interrogation, the criteria can be broken down as follows: First, the action must be based on an intentional act; second, the action must be performed by an agent of the State; third, the action must cause *severe pain* or suffering to body or mind; and fourth, the action must be accomplished with the intent to gain information or a confession. In adopting the Torture Convention, the United States Senate provided the following reservations which require specific intent and better defines the concept of mental suffering:

> [T]he United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the sense or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subject to death, or severe physical pain or suffering, or the administration or application of mind altering substances calculated to disrupt profoundly the senses or per-

sonality.[25]

Article 2 of the Torture Convention is significant because it absolutely excludes the defense of exceptional circumstances to justify torture.[26] "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture."[27]

In contrast to defining torture, the companion phrase "other acts of cruel, inhuman, or degrading treatment or punishment,"[28] e.g., "ill-treatment,"[29] is not defined in the Torture Convention.[30] The Torture Convention certainly obliges each State party to the document to "undertake to prevent…other acts of cruel, inhuman, or degrading treatment or punishment,"[31] but Article 16 of the Torture Convention is the only part of the treaty that addresses the consequences to a nation that engages in ill-treatment.[32] In turn, interrogation practices that do not rise to the level of ill-treatment may be repugnant by degree but would be perfectly legal under international law.

But how does a State Party determine if sending an individual to a third State would be legal or illegal under the Torture Convention? In determining whether or not to send an individual to a third State for the purpose of detention or questioning, for example, the State Party is required at Article 3(2) "to take into account all relevant considerations"[33] with particular emphasis to whether or not there exists "*a consistent pattern of gross, flagrant or mass violations of human rights* [emphasis added]."[34]

Obviously, the standard for action in the Torture Convention provides a wide amount of latitude for the State Party. The combined factors of "substantial grounds" with "a consistent pattern of gross, flagrant or mass violations of human rights"[35] allows considerable flexibility for a State Party to justify a particular rendition. Thus, although the prohibition on illegal rendition is firmly established, the standard of evaluation is a rather subjective one. Certainly, one could argue that any nation that the United States' executive branch lists as a "terrorist nation" would probably serve as prime instance of a nation that employs torture.[36] In this light, receiving "assurances from Syria"[37] that it would not engage in torture were an individual delivered to it is clearly problematic. Furthermore, Congress regularly lists nations that it considers to be in gross violation of human rights for the purposes of providing foreign aid.[38] This list would also strongly indicate a prohibited State. Apparently, on a case-by-case basis, the United States does seek letters of assurance from receiving States that the person so rendered will not be subjected to torture or ill-treatment. Indeed, the federal standard for determining whether a particular rendition will stand in violation of the Torture Convention is whether it is "more likely than not"[39] that the individual will be tortured by the receiving State.[40]

If the test for illegal rendition in the context of torture is hazy, the matter is far more disappointing *vis a vis* rendition to a nation that practices ill-treatment. Inexplicably, Article 16 of the Torture Convention has no similar requirement for a State Party that might contemplate rendering an individual to a third State that practices ill-treatment.[41] In short, this might mean that a State Party to the Torture Convention is absolutely free to hand over an individual to a State that it knows engages in ill-treatment![42]

In addition to the lack of definition of the concept of ill-treatment (or of even a minimum level of sanction in the Torture Convention), the entire definitional issue is further aggravated by a controversial and often cited European Court of Human Rights[43] ruling entitled *Ireland v. United Kingdom*.[44] The *Ireland* court specifically found certain

interrogation practices by British law enforcement agents used in Northern Ireland to be "inhuman and degrading,"[45] i.e., ill-treatment under the European Convention on Human Rights, but not severe enough to rise to the level of torture in the Torture Convention. According to the *Ireland* court, the finding of ill-treatment rather than torture "derives principally from a difference in the intensity of the suffering inflicted."[46] The use of five investigative measures called the "the five techniques"[47] were evaluated. These involved such actions as prolonged standing, hooding, and deprivation of sleep and food.[48]

Conclusion

All that is necessary for evil to triumph is for good men to do nothing.[49]

Edmund Burke

When one addresses emotionally charged issues such as torture or illegal rendition, it is imperative that the discussion center on the applicable legal standard for the practice, the major gauge set out in the Torture Convention. The purpose of detainee interrogation, whether it is done domestically or via rendition, is to glean as much valuable intelligence as possible in order to blunt the murderous machinations of those associated with the al-Qa'eda terrorist network. The al-Qa'eda will not be kept at bay without the use of intelligence gathering which includes interrogation.

The quote by former Chief Justice William H. Rehnquist cited at the beginning of this article reminds those living in a free society that achieving a proper balance between freedom and order in time of national crisis requires a shift, to some degree, to measures associated with increased security.[50] While those who accuse the United States of "betraying American values by outsourcing interrogation to countries notorious for torture"[51] certainly have the right to make such accusations, the question of illegality—not *weltanschauung*—is really the touchstone. Is the United States acting in violation of the applicable international rule of law?

On the other hand, weighing the credibility of the allegations of illegal rendition is not simply understanding the rule of law—one must have sufficient facts to plug into the equation. Unfortunately, this is a difficult task since most of the media reports about illegal rendition cases cite unnamed sources and anecdotal evidence as proof. Moreover, the dilemma of separating fact from speculation is further aggravated by the government's understandable penchant for secrecy in prosecuting the War on Terror. To its credit, the government has admitted numerous crimes, errors, and missteps by its agents,[52] but it steadfastly denies a systemic policy of illegality in terms of the treatment of detainees and the issue of illegal rendition.[53] From the inception of the War on Terror, the White House has repeatedly assured the public that the United States is "in full compliance with international law dealing with torture,"[54] and that wherever detainees are being held they are all treated "humanely, in a manner consistent with the third Geneva Convention."[55]

At the end of the day, the chief enforcement tool has always been America's commitment to the rule of law coupled with the judgment of its citizens. Accordingly, it is imperative that the judgment of the people be rooted, so far as possible, in the facts and the applicable rule of law. In short, the actual rule of law regarding rendition as set out in the Torture Convention leaves much discretion to the Party State. While one can certainly agree that the rule is a prime candidate for revision, it does not follow that free license is given to critics to assert that the United States is currently violating the rule. ■

Endnotes

[1] William H. Rehnquist, *All the Laws But One*, 222 (1998).

[2] The al-Qa'eda terror organization was founded in 1989 by a Saudi named Osama bin Laden. Dedicated to the destruction of the West, the organization has demonstrated over the past four years that it is truly international in scope with the resources and personnel to coordinate sophisticated terror attacks on a scale never before seen. It is linked to a variety of terrorist groups from the Philippines to Indonesia and has trained tens of thousands of Arab and non-Arab militants in Afghanistan under the Taliban regime. Fueled by a super-fundamentalist Islamic radicalism its foot soldiers of hate gladly embrace death in their continuing quest for mass murder. *See* Michael Elliott, *Why the War on Terror Will Never End*, TIME, May 26, 2003, at 29.

[3] *See* Evan Thomas & Stryker McGuire, *Terror at Rush Hour*, NEWSWEEK, July 18, 2005, at 30.

[4] *Id*. (describing the July 7, 2005 terror bombs in the London Underground subway on and on a bus).

[5] *See generally* Jeffrey F. Addicott, *Terrorism Law*, 15-29 (2006, 3d ed.) (arguing that use of the term "war on terror" is more than a mere metaphor, particularly in light of various acts and pronouncements of the executive and legislative bodies of government concerning the use of force as well as the nature and structure of the al-Qa'eda virtual State); *see e.g.*, Authorization for Use of Military Force Joint Resolution, Public Law 107-40, 115 Stat. 224 (Congressional authorization for the use of force against the Taliban regime) [hereinafter Joint Resolution Against Afghanistan]; Prize Cases, 67 U.S. (2 Black) 635, 17 L.Ed. 459 (1862) (rejecting a challenge to President Lincoln's authority to blockade secessionist Southern States without a Congressional declaration of war); Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub L. No. 107-243, 116 Stat. 1498.

[6] *See Id.*, Addicott at 10 (describing the al-Qa'eda as "not just a terrorist group but a 'virtual State'").

[7] *See* 9/11 COMMISSION REPORT 63-70 (2004) (describing the relationship of the Taliban regime in Afghanistan to the al-Qa'eda network).

[8] *See* Addicott, *supra* note 5, at 10.

> The virtual State description [for al-Qa'eda] is fundamentally valid. This virtual State exhibits many of the characteristics of the classic nation-State, but is able to walk in the shadows of international law because it has no fixed national boundaries. The al-Qa'eda virtual State has a military, a treasury, a foreign policy, and links to other nation-States. *Id*.

[9] One example of domestic legislation is the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001). The bill passed the Senate by a landslide vote of 98-1. 147 Cong. Rec. S11,059-60 (daily ed. Oct. 25, 2001). The House of Representatives passed their version by a similar lopsided vote of 357-66. 147 Cong. Rec. H7224 (daily ed. Oct, 25, 2001).

[10] *See* Jeffrey F. Addicott, *Into the Star Chamber: Does the United States Engage in the Use of Torture or Similar Illegal Practices in the War on Terror?*, 92 KENTUCKY L.J. 849 (2003-2004) (arguing that the United States does not engage in a systemic pattern of torture or illegal interrogation practices).

[11] *See Black's Law Dictionary* (7th ed. 1999). Black defines rendition as "The return of a fugitive from one state to the state where the fugitive is accused or convicted of a crime."

[12] *See* Barton Gellman & Dana Priest, *U.S. Decries Abuse But Defends Interrogations; 'Stress and Duress' Tactics Used On Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A1; Alan Cooperman, *CIA Interrogation Under Fire; Human Rights Group Say Techniques Could Be Torture*, WASH. POST, Dec. 28, 2002, at A9. (Human Rights Watch accused the United States of violating international law by not only torturing detainees at home, but also turning detainees over to States that engaged in torture); Rajiv Chandraseskaran & Peter Finn, *U.S. Behind Secret Transfer of Terror Suspects*, WASH. POST, Mar. 11, 2002, at A1 (citing unnamed "officials and diplomats" as its primary source). *Id*.

[13] *See e.g.*, Scott Shane, *The Costs of Outsourcing Interrogation: A Canadian Muslim's Long Ordeal in Syria*, N.Y. TIMES, May 29, 2005, at K11 (citing various rights advocates who denounce sending people to States notorious for torture).

[14] Kim Sengupta & Anne Penketh, *U.S. Terror Laws "Creating a New Generation of the Disappeared'"* THE INDEPENDENT (London), May 26, 2005, at 27 (accusing the United States of engaging in torture and using surrogate nations to "subcontract illegal detention and mistreatment"). *Id*.

[15] *Id*.

[16] *Black's Law Dictionary* 1332 (7th ed. 1999). The rule of law is defined in Black's as "a substantive legal principle" and "[t]he doctrine that every person is subject to the ordinary law within the jurisdiction."

[17] *See* Shane *supra* note 13. Mr Arar is a 34-year-old alleged al-Qa'eda operative from Syria that was detained at Kennedy Airport on September 26, 2002, and deported to Syria. Syria released him in October 2003.

[18] *United Nations Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, U.N. FAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984). [hereinafter Torture Convention].

[19] *Id*. at art. 3(1).

[20] *Id*.

[21] *Id*. at art. 1.

[22] *Id*. at art.16.

[23] *Id*.

[24] *Id*. at art. 1.

[25] *U.S. Reservations, Declarations, and Understandings and Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment II*.(1)(a), 136 Cong. Rec. S 17491-92 (1994).

[26] Torture Convention *supra* note 18, at. art. 2(2). Article 2 also states that superior orders may not be invoked as a defense to torture.

[27] *Id*. art. 2(3) also provides that "[a]n order from a superior officer or a public authority may not be invoked as a justification for torture." *Id*.

[28] *Id*. at art. 16.

[29] *See, e.g.*, Catherine M. Grosso, *International Law in the Domestic Arena: The Case of Torture in Israel*, 86 IOWA L. REV. 305, Oct. 2000, at 308.

[30] Torture Convention *supra* note 18, at art.16.

[31] *Id*.

[32] *Id*.

[33] *Id*. at. art. 3(2).

[34] *Id*.

[35] The term "human rights" is commonly meant to include so-called first and second-generation human rights. Through treaty and customary international law, first generation human rights are binding on all nation-states. *See* Restatement (Third) of the Foreign Relations Law of the United States § 702 (1987): Customary International Law of Human Rights, lists these first generation human rights as: (1) genocide, (2) slavery or slave trade, (3) the murder or, or causing the disappearance of , individuals, (4) torture or other cruel, inhumane or degrading treatment or punishment, (5) prolonged arbitrary detention, (6) systematic racial discrimination, and (7) a consistent pattern of committing gross violations of internationally recognized human rights. Second generation human rights are legally binding only on those nation-states that have obligated themselves through treaty. Second generation human rights speak to political and civil freedoms such as the freedom of religion, peaceful assembly, privacy, association, fair and public trial, open participation in government, movement, etc. Second generation human rights are the functional equivalents of democratic values found in the U.S. Constitution. *See generally*, Frank Newman & David Weissbrodt, *International Human Rights*, (Anderson Pub. Co.: 1991).

[36] Office of the Coordinator for Counterterrorism, US Department of State, Publication 11248, Country Reports on Terrorism 2004 (2005). 8 U.S.C. § 1189(a) authorizes the Secretary of State to designate foreign terrorist organizations.

[37] *See* Shane *supra* note 13 and 17. The United States accepted assurances from Syria that Mr Maher Arar would not be tortured. Mr. Arar claims that Syrian agents beat him with a metal cable and held him for ten months in a tiny cell. *Id*.

[38] 8 C.F.R. § 1208.17(a) (2003).

[39] *See* Bellout v. Ashcroft, 363 F.3d 975 (9th Cir. 2004) (affirming the immigration judge's determination that the petitioner had failed to establish that it was more likely than not that he would face torture if returned to Algeria).

[40] Office of the Coordinator for Counterterrorism, US Department of State, Publication 11248, Country Reports on Terrorism 2004 (2005).

[41] Torture Convention, *supra* note 18, at art. 16.

[42] *Id*.

[43] The current incarnation of the European Court of Human Rights was instituted on November 1, 1998, as a means to systematize the hearing of Human Rights complaints from Council of Europe member states. The court's mission is to enforce the Convention for the Protection of Human Rights and Fundamental Freedoms, ratified in 1953; *See* European Court of Human Rights homepage *available at* http://www.echr.coe.int.

[44] *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978).

[45] European Convention on Humans rights does not include the term "cruel" in describing the ill-treatment category, but makes the same distinction between torture and other inhuman and degrading treatment.

[46] *Ireland*, 25 Eur. Ct. H.R. (ser. A) (1978) (of the 17 judges on the panel, 13 held that the five techniques did not constitute torture. Sixteen of the judges held that the five techniques were "ill-treatment"). *Id*.

[47] *Id*.

- Wall-standing: Forcing the detainees to stand for some period of hours in a stress position described as "spreadeagled against the wall, with their fingers put high above their head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers." Wall-standing was practiced for up to 30 hours with occasional periods for rest.

- Hooding: Placing a dark hood over the head of the detainee and keeping it on for prolonged periods of time except during interrogation.

- Deprivation of Sleep: Depriving detainees of sleep for prolonged periods of time.

- Deprivation of Food and Drink: Reducing the food and drink to suspects pending interrogations.

[48] *Id*.

[49] William J. Federer, *America's God And Country Encyclopedia Of Quotations* 82 (1994).

[50] Rehnquist, *supra* note 1.

[51] *See* Shane *supra* note 13.

[52] *See* Addicott, *supra* note 5, at 248 (noting that the military self-reported the prisoner abuse scandal at Abu Ghraib).

[53] Alan Cooperman, *CIA Interrogation Under Fire; Human Rights Group Say Techniques Could Be Torture*, WASH. POST, Dec. 28, 2002, at A9. "Wherever U.S. forces are holding combatants, they are being held 'humanely, in a manner consistent with the Third Geneva Convention.'"

[54] *Id*.

[55] *Id*.

America is Guilty of Torture

By George Phillies

Once upon a time, it was Americans who were rigorous in obeying the laws of war and depraved foreign enemies who tortured prisoners. Once upon a time, it was the American government that was scrupulous in respecting legal rights, and the secret police of depraved foreign dictators who kidnapped their citizens and held them without trial.

I begin with a personal anecdote as told to me by my father, the late Eustace G. Phillies, M.D. In World War II, he served in the Army, spending 1944-1945 as Medical Officer for a P.O.W. camp in Georgia. The camp largely held Germans. As Christmas approached, the German Officers approached the camp authorities, proposing to make Christmas sausage on a traditional German recipe. They demonstrated that the needed ingredients and tools were readily available in camp. Naturally, the camp authorities agreed. It was Christmas, after all.

The sausage was made, eaten, and soon thereafter, large numbers of POWs became very seriously ill with trichinosis. It seems that the Christmas pork sausage was customarily eaten near-raw, a practice apparently perfectly safe in central Europe, where pigs received scientific diets. In rural Georgia in 1944, eating undercooked pork sausage was inadvisable.

What had happened was not torture or abuse. A quarter century later, what had happened still pained my father. There had been no malice, but the prisoners for whom he was responsible had through cultural misunderstanding become ill. In World War II, Americans protected their prisoners of war, and our G.I.'s got the benefit. German soldiers were willing to surrender to Americans rather than fighting to the death, taking large numbers of Americans with them, because they knew that if they surrendered to us, they would not be ill-treated.

Now the world has changed. The following refers to the changes, first appealing to Federal Law and then to an older authority.

Torture is a Crime

Now it is Americans who are reported to use torture. William Fisher reported that "the ACLU has disclosed a Sept. 14, 2003 memo signed by Lt. Gen. Ricardo A. Sanchez, then senior commander of U.S. forces in Iraq, authorizing 29 interrogation techniques, including 12 that 'far exceeded limits established by the Army's own Field Manual...."'[1]

When Americans torture foreigners abroad, a crime is committed. And when someone dies abroad as a result of American torture, it is a capital crime. I remind readers of 18 U.S.C., Sections 2340 and 2340A, which provide in part:

> 2340(1) "torture" means an act committed by a person acting under color of law specifically intended to inflict severe physical or mental pain or suffering...upon another person within his

---

George Phillies is a professor of physics at Worcester Polytechnic Institute. He is the State Political Facilitator of the libertarian action group Liberty for Massachusetts, and in 1998, he was the Libertarian Party candidate for U.S. Congress in the Massachusetts 3rd District. In 2005, he was elected Chair of the Worcester County Chapter, ACLU of Massachusetts.

custody or physical control;

(2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from

A) the intentional infliction or threatened infliction of severe physical pain or suffering;…

(C) the threat of imminent death…

2340A:

(a) Offense. Whoever outside the United States commits or attempts to commit torture shall be fined...or imprisoned not more than 20 years… and if death results…from [prohibited] conduct…shall be punished by death or imprisoned....

(b) Jurisdiction. There is jurisdiction over the activity prohibited in subsection (a) if

(1) the alleged offender is a national of the United States; or

(2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.

(c) Conspiracy. A person who conspires to commit an offense under this section shall be subject to the…penalties prescribed for the offense....[2]

Readers will note that the methods for causing someone to become tortured are not restricted, so torturing someone by employing foreign assistants is not excluded from the statute's coverage. Nor is there an exclusion for Americans acting under color of authority. Under this reading, persons who participate in "extraordinary rendition" by transporting a victim to a foreign land and participating in torture-based interrogations are as guilty as people who wield the rubber hoses and electric wires themselves. The people who flew the participants and victims to the torture site are their co-conspirators, subject to the penalties of 2340A(c). In a government where questions may be asked and answered, perhaps-faceless bureaucrats who facilitated the acts by assuring the torturers that no crime was committed may also be part of a conspiracy.

Of course, noting what recently has happened at the end of Presidential terms, Americans who went to foreign lands to torture people may be hoping for Presidential pardons. These people are perhaps still covered by the Convention on Torture (a ratified treaty, the "Law of the Land"), which provides in part:

Article 1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering…is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed- when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a…person acting in an official capacity. It does not include pain or suffering arising [from] lawful sanctions."[3]

Claiming that the torture was carried out as part of the War on Terror and was therefore protected by some Presidential Order encounters in the same convention:

Article 2.....2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.[4]

In any event, a Pardon deals with criminal

matters and does not void the civil liability created when the Senate ratified the same convention:

> Article 14 1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation…."[5]

Extraordinary Rendition Might Be Kidnapping

In addition to the statutes relating to *torture*, the United States also has laws relating to *kidnapping*. In particular

> Whoever, within the jurisdiction of the United States, conspires...to commit at any place outside the United States an act that would constitute the offense of murder, kidnapping, or maiming if committed in…the United States shall, if any of the conspirators commits an act within the jurisdiction of the United States to effect any object of the conspiracy, be punished [by]:
>
> (A) imprisonment for any term of years or for life if the offense is conspiracy to murder or kidnap; and
>
> (B) imprisonment for not more than 35 years if the offense is conspiracy to maim.[6]

In the case of the Italian extraordinary renditions, there is an Italian Magistrate's finding on June 23, 2005 that the removal of Hassan Mustafa Osama Nasr from Italy to Egypt was a criminal act, for which arrest warrants were issued for 13 U.S. intelligence agents. Would this constitute kidnapping or maiming if performed inside the United States?

18 U.S.C. § 1201 seems fairly clear on kidnapping:

> (a) Whoever unlawfully…abducts… any person…when
>
> (1) the person is willfully transported in interstate or foreign commerce…shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment.[7]

Extraordinary rendition would appear to fit well under this description. One would need a detailed description of the tortures employed against the persons who had been rendered to know if the tortures satisfied the legal description of maiming. For the persons who rented the aircraft, processed the checks, etc., there is also the conspiracy section:

> (c) If two or more persons conspire to violate this section and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished by imprisonment for any term of years or for life.[8]

Taking Hostages is a War Crime

Nor is torture the only technique to which we have fallen. The United States and Iraq are both contracting parties of the Fourth Geneva Convention (1949), which provides in part

> The Convention shall also apply to all cases of…occupation of the territory of a High Contracting Party…In the case of occupied territory,…the Occupying Power shall be bound…to the extent that such Power exercises the functions of government in such territory, by the…following Articles

which includes Article 3:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound…as a minimum…(1) Persons taking no active part in the hostilities …shall in all cir-

> cumstances be treated humanely…the following acts are…prohibited at any time…whatsoever with respect to the above-mentioned persons…
>
> (b) taking of hostages…

But we read in the *Washington Post* on the front page:

> Col. David Hogg, commander of the 2nd Brigade of the 4th Infantry Division, said tougher methods are being used to gather the intelligence. On Wednesday night, he said, his troops picked up the wife and daughter of an Iraqi lieutenant general. They left a note: 'If you want your family released, turn yourself in.' Such tactics are justified, he said, because, 'It's an intelligence operation with detainees, and these people have info.'[9]

It is not apparent how such tactics can be justified under International Law. Indeed, given that the wife and daughter appear to have been non-belligerents, the Fourth Geneva Convention appears to come into play. For these people are referenced by the convention as

> Art. 4. Persons protected by the Convention are those who…find themselves, in case of a[n]…occupation, in the hands of a[n]…Occupying Power of which they are not nationals.

The Convention provides with respect to protected persons:

> Art. 147. Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, *unlawful deportation or transfer or unlawful confinement of a protected person…taking of hostages* and extensive destruction…not justified by military necessity and carried out unlawfully and wantonly. (Emphasis added.)

Violations of the convention, such as hostage taking, are treated under Federal Law:

> (a) Offense. Whoever…commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.
>
> (b) Circumstances. The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States…the term "war crime" means any conduct (1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949….[10]

It appears challenging, if the published reports were accurate, to avoid the conclusion that hostages were taken and it might then be the case that this is a "Grave Breach" of the Geneva Convention and that 18 USC § 2441 might be applicable. One might also question whether dropping 2000-pound bombs in occupied cities can be justified by military necessity.

Detainees in Afghanistan and Elsewhere Are Protected

After the invasions of Afghanistan, the Bush Administration surfaced with the notion that some of the people who had been captured were not Prisoners of War, and were also not protected civilians. This matter is covered by the Geneva Convention, namely

> Art. 5. Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.
>
> In each case, such persons shall nevertheless be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention….

It is not apparent to all parties that the Guantánamo detainees have been treated with humanity. For example, FBI members who witnessed Guantánamo events were in some cases disturbed by what they saw. Would more senior officers have known, or might activities of junior officers have passed unnoticed?

Fortunately the press does on occasion have access to Guantánamo. I quote from an MSNBC interview between reporter Natalie Allen and analyst Retired Army Col. Jack Jacobs. After he returned from a trip to the facility, Jacobs sat down with Allen to discuss his impressions of the prison. When asked about his access to the base while visiting, Jacobs answered, "Well, it's probably an exaggeration to say we had the run of the place, but we saw absolutely everything, everything we wanted to see. Nothing was held back. It's not a very big place, so it's difficult to hide anything anyway, but we had complete and total access to everything." And asked if there were signs of misconduct or abuse, Jacobs said, "I can tell you this, the lay of the place, the way it was arranged, the way the interrogations were conducted, by whom they're conducted, and the supervision that takes place indicates to me that it's going to be extremely difficult to abuse anybody without somebody knowing about it."[11]

A Socratic Dialogue

Some readers may prefer an appeal to older laws, not enshrined in the laws of the land but enshrined by their faith. For them, I offer half of a Socratic dialogue.

In 1956, during the Hungarian Revolution, the Soviet Air Force bombed Pecs, Hungary. It was justly condemned for its deeds. Last year, the American Air Force bombed city-center targets with 500 and 2000 pound bombs. Those weapons destroy sections of city blocks, places not evacuated of bystanders.

I ask: *How many innocents would Jesus bomb?*

Once upon a time, Americans condemned countries that attacked their neighbors without provocation. At Nuremberg, we took German leaders who had committed Crimes Against Peace and sent them to the gallows they had richly earned. Recently, a member of Congress, while attending church, reportedly suggested that Syria should be attacked, by bombing Syrian cities with atomic weapons. Syria has not attacked us. It has not threatened us.

I ask: *How often would Jesus slaughter innocents by the cityful?*

Once upon a time, Americans believed that only depraved foreign dictators would kidnap people and torture them. Now, under the practice of extraordinary rendition, our own government kidnaps people from the streets and flies them to foreign dictatorships so our spies can have them tortured.

I ask: *Which Disciple would Jesus have made his torturer, so that his hands were clean?*

Once upon a time, it was foreigners who occupied foreign countries by conducting atrocities against civilians. In 1942, the Germans destroyed the Czech town of Lidice, killing the men, forcing women and children

to flee, and leveling the town. Now we advance to the once-scenic city of Fallujah, where during the course of the year unnamed people murdered four Coalition mercenaries. This past year, Fallujah was stormed by our military. In the course of the fighting, large fractions of the city were leveled while much of the civilian population fled.

I ask: *How many cities did Jesus raze, because some of their inhabitants had martyred his Disciples?*

Once upon a time, Americans believed that truth was the light that cleansed the world. Now the Pentagon has a hidden set of Abu Ghraib photographs, which Secretary of Defense Donald Rumsfeld reportedly told Congress show "acts that can only be described as blatantly sadistic, cruel, and inhuman."[12] Senator Saxby Chambliss reportedly said his "stomach gave out," and NBC News reportedly described "American soldiers beating one prisoner almost to death, apparently raping a female prisoner, acting inappropriately with a dead body, and taping Iraqi guards raping young boys."[13] Congress and the Administration hid these photographs, hid them so that Americans will not know the truth and think ill of it.

I ask: *How often would Jesus have hidden the guilty, so that their crimes would not be known to the world, and so that they would not feel pressured to repent?*

I ask: *Who would Jesus torture?* ■

Endnotes

[1] This quote appeared on www.antiwar.com on April 1, 2005.

[2] 18 U.S.C. §§ 2340, 2340A (2005).

[3] http://www.ohchr.org/english/law/cat.htm.

[4] *Id*.

[5] *Id*.

[6] 18 U.S.C. § 956 (2005).

[7] 18 U.S.C. § 1201 (2005).

[8] *Id*.

[9] Thomas E. Ricks, *U.S. Adopts Aggressive Tactics on Iraqi Fighters, Intensified Offensive Leads To Detentions, Intelligence*, WASH. POST, p.A01, July 28, 2003.

[10] 18 U.S.C §2441 (2005).

[11] http://www.msnbc.msn.com/id/8408074/ (June 29, 2005).

[12] http://www.antiwar.com.

[13] *Id*.

BACK ISSUES

Issue	Number	Qty
Congressional Term Limits: Pro & Con	Vol 1, No 1	n/a
Is the Press Competent?	Vol 1, No 2	
Lying: An American Pandemic?	Vol 1, No 3	
Are Standardized Tests Contributing to Social Stratification?	Vol 1, No 4	
Is Effective Government Possible?	Vol 2, No 1	
Does America Need a Third Political Party?	Vol 2, No 2	
Has American Education Forsaken Critical Thinking?	Vol 2, No 3	
Assessing Responsibility for the Plight of Minorities	Vol 2, No 4	
Law Clerks: The Silent Transformation of the Judiciary	Vol 3, No 1	n/a
Sports in America—A Distortion or Reflection of Life?	Vol 3, No 2	
Fundamental Sources of Morality in American Politics	Vol 3, No 3	n/a
Assessing Competence in the Professions	Vol 3, No 4	n/a
Judicial Misconduct	Vol 4, No 1	
Community and Isolation	Vol 4, No 2	
History in America	Vol 4, No 3	
Medicine in Transition	Vol 4, No 4	
Legacies of Vietnam	Vol 5, No 1	
Dissatisfactions of American Democracy	Vol 5, No 2	
Failures and Reforms in Higher Education	Vol 5, No 3	
Bigness is Badness	Vol 5, No 4	
Secrecy is Everywhere	Vol 6, No 1	
Why We Seek War	Vol 6, No 2	
Thugs Who Have Run Governments in the Last Century	Vol. 6, No 3	

**n/a indicates that issue is currently out of print*

Ship to: _____

Name

_____

Address

_____

City State Zip

Please enclose a payment of $5.95 for each issue desired and mail to:

The Long Term View
Massachusetts School of Law at Andover
500 Federal Street
Andover MA 01810

MSL Informational Television and Video Tapes

"The Massachusetts School of Law Educational Forum" and "Books of Our Time"

The Massachusetts School of Law has pioneered among law schools in bringing serious informational television programs to the public. The **"Massachusetts School of Law Educational Forum"** is a one-hour panel discussion program, shown once a month, on which experts discuss a single topic for the entire hour. Usually hosted by Professor Diane Sullivan (but occasionally by Professor Michael Coyne or Dean Lawrence Velvel), this seven-year-old program has won nearly 30 awards for high quality television programming.

"Books of Our Time" is a two-year-old, award winning program hosted by Dean Lawrence R. Velvel and is shown approximately 15 times a year. On this program authors of important books discuss their works for one hour each.

MSL's programs are shown on Sunday mornings at 11 a.m. throughout New England on AT&T Channel 3, and at varying times in numerous other parts of the country. Tapes of the programs listed below can be acquired, at $15.00 per tape to cover the cost of reproduction and shipping, by contacting MSL at 500 Federal Street, Andover, MA 01810, (978) 681-0800. Fax: (978) 681-6330.

Tapes of "The Massachusetts School of Law Educational Forum"

1. Whether Effective Government Is Possible
2. Is the Press Competent?
3. Whether Sports Are A Reflection or Distortion of American Life
4. Whether Lying in America is Pandemic
5. Assessing the Plight of Minorities
6. Whether America Needs a Third or Even Fourth Political Party
7. Conversation and Attitude Differences of Men and Women
8. Isolation In American Life
9. Morality
10. Loyalty
11. Managed Health Care
12. Testing and Accreditation
13. Higher Education
14. Greed
15. The Jury System
16. Domestic Violence Against Women
17. Reproductive Technology
18. The Juvenile Justice System
19. Police Misconduct
20. Extreme Sports
21. Judicial Misconduct - Part I
22. Judicial Misconduct - Part II
23. School Choice
24. The Civil War - Part I
25. The Civil War - Part II
26. The Press
27. Parenting and Custody
28. Immigration - Part I
29. Immigration - Part II
30. Civility
31. Divorce and Fatherlessness
32. Childcare Issues
33. Gambling

34. Worldwide Treatment of Women
35. *What is College For?* - Part I
36. *What Is College For?* - Part II
37. Cults
38. Local TV News
39. War Power - Part I
40. War Power - Part II
41. The Clinton Legacy
42. Poverty
43. Elder Care
44. Next Millennium
45. *Argument Without End:* Robert McNamara and Vietnam
46. College Sports
47. Religion in America in the 21st Century
48. Print and Electronic Journalism
49. Schools, God and the Internet
50. Death, Dying and Physician Assisted Suicide
51. Testing and Educational Reform
52. Fairy Tales
53. Strong Women - Fitness
54. HMO's - Part I
55. HMO's - Part II
56. NASA: Is it worth keeping?
57. Youth and Sports
58. Three Airplane Crashes (Electromagnetic Inteference)
59. The Life Of A Police Officer
60. Youth and Media Violence
61. Our Nation of Secrets
62. Optimism
63. Lobbying
64. TV's Influence On American Society
65. Elitism
66. Sexual Education in Public Schools
67. Animal Rights
68. Adoption
69. Diabetes
70. Attention Deficit Hyperactivity Disorder (A.D.H.D.)
71. Obesity
72. Anorexia and Bulimia
73. Boston Marathon Memories
74. Latch Key Kids
75. Kids' Views on Safety and Security
76. NBA - Part I
77. NBA - Part II
78. Women in Sports
79. Women and Space
80. The Best of the NBA Then & Now
81. Emotional Intelligence
82. Alternative Medicine
83. Hazing
84. Cancer
85. Skin Cancer
86. Affirmative Action
87. People and Their Pets
88. Stress in the Workplace
89. National Hockey League: Will it Survive? Part I
90. National Hockey League: Will it Survive? Part II
91. Bullying
92. Global Warming
93. Robotics
94. Time Management
95. Women and Medicine
96. Dishonesty in the Professions
97. Youth Summit: Kids' Views on Confidence & Trust
98. Gender Equality in Medicine
99. Women's College Basketball
100. Alternative Fuel
101. 10 Years: A Look Back (Compilation Show)
102. Arctic Climate Impact
103. The Nursing Crisis
104. Understanding Iran and the Implications for U.S. Policy
105. Eminent Domain: *Kelo v. The City of New London*
106. Outsourcing of Torture
107. Title IX and Women
108. Social Security Reform
109. Distance Learning/Online Education
110. The North in the Civil War
111. The Return of the Wolf
112. A Day in the Life of the American Woman
113. Tax Reform Proposal

Tapes of "Books of Our Time"

1. *Founding Brothers*
Author: Joseph Ellis

2. *Pride Before The Fall*
Author: John Heilemann

3. *Dr. Folkman's War*
Author: Robert Cooke

4. *Culture Matters*
Co-editor, Lawrence Harrison

5. *Irish America*
Author: Maureen Dezell

6. *Grant*
Author: Jean Edward Smith

7. *A History Of Jews and Yale*
Author: Dr. Dan Oren

8. *In the Interests of Justice*
Author: Deborah L. Rhode

9. *Where I'm Bound*
Author: Allen Ballard

10. *Whistleblowers*
Author: C. Fred Alford

11. *The Metaphysical Club*
Author: Louis Menand

12. *The Last Campaign*
Author: Zachary Karabell

13. *Making The Most Of College*
Author: Richard Light

14. *Public Intellectuals*
Author: Richard A. Posner

15. *A Woman's Education*
Author: Jill Ker Conway

16. *Ahead of the Curve*
Author: Shane Crotty

17. *Abraham Lincoln - Part I*
Author: William Gienapp

18. *Abraham Lincoln - Part II*
Author: William Gienapp

19. *Beer and Circus*
Author: Murray Sperber

20. *What Kind of Nation?*
Author: James F. Simon

21. *A Legend In The Making*
Author: Richard J. Tofel

22. *World War II - Part I*
Author: Donald Miller

23. *World War II - Part II*
Author: Donald Miller

24. *A Grand Delusion - Part I*
Author: Robert Mann

25. *A Grand Delusion - Part II*
Author: Robert Mann

26. *Eisenhower & Churchill*
Author: James C. Humes

27. *Look Away: A History Of The Confederate States of America*
Author: William Davis

28. *Adventures In The Atomic Age*
Author: Eric Seaborg

29. *Race and Reunion: The Civil War in America Memory*
Author: David W. Blight

30. *The American Revolution: A History*
Author: Gorden S. Wood

31. *The Vanishing Voter*
Author: Thomas Patterson

32. *The Minority Quarterback*
Author: Ira Berkow

33. *Supreme Command*
Author: Elliot A. Cohen

34. *Vietnam, Now*
Author: David Lamb

35. *War Is A Force That Gives Us Meaning*
Author: Chris Hedges

36. *Fixing Elections*
Author: Steven Hill

37. *The Game They Played*
Author: Stanley Cohen

38. *American Empire*
Author: Andrew Bacevich

39. *You Can't Be Neutral on a Moving Train: Failure to Quit*
Author: Howard Zinn

40. *Pragmatism, Law and Governance*
Author: Judge Richard Posner

41. *No Excuses: Closing the Racial Gap in Learning*
Authors: Abigail and Stephen Thernstrom

42. *Doin' Our Own Thing*
Author: John McWhorter

43. *10 Tax Questions The Candidates Don't Want You to Ask*
Author: John Fox

44. *The Cheating Culture: Why More Americans Are Doing More To Get Ahead*
Author: David Callahan

45. *The Two Income Trap*
Author: Elizabeth Warren

46. *Still Fighting the Civil War*
Author: David Goldfield

47. *Success Without Victory*
Author: Jules Lobel

48. *Confessions of a Tax Collector*
Author: Richard Yancey

49. *Perfectly Legal*
Author: David Cay Johnston

50. *The Myth of Moral Justice*
Author: Thane Rosenbaum

51. *Tommy the Cork*
Author: David McKean

52. *Above All, Be Kind*
Author: Zoe Weil

53. *Doing Battle* and *The Boy's Crusade Part I*
Author: Paul Fussell

54. *Doing Battle* and *The Boy's Crusade Part II*
Author: Paul Fussell

55. *Limbo: Blue-Collar Roots, White-Collar Dreams*
Author: Alfred Lubrano

56. *Gag Rule*
Author: Lewis Lapham

57. *The Progress Paradox*
Author: Gregg Easterbrook

58. *Right From Wrong*
Authors: Michael Riera & Joseph DiPrisco

59. *His Excellency*
Author: Joseph J. Ellis

60. *On The Take*
Author: Jerome P. Kassirer

61. *Bad Leadership*
Author: Barbara Kellerman

62. *A Very Dangerous Woman*
Authors: Sherry H. Penney and James D. Livingston

63. *Selling Women Short*
Author: Liza Featherstone

64. *The Power and Promise of Humane Education*
Author: Zoe Weil

65. *Many Unhappy Returns*
Author: Charles Rossotti

66. *Perilous Times*
Author: Geoffrey R. Stone

67. *The Long Emergency*
Author: James Kunstler

68. *State of Grace: A Memoir of Twilight Time*
Author: Robert Timberg

69. *On Capitol Hill*
Author: Julian E. Zelizer

70. *Al Jazeera: The Inside Story of the Arab News Channel that is Challenging the West*
Author: Hugh Miles

71. *Food Politics*
Author: Marion Nestle

72. *The Bomber War: The Allied Offensive Against Nazi Germany*
Author: Robin Neillands

73. *The New American Militarism: How Americans Are Seduced By War*
Author: Andrew J. Bacevich

74. *Thomas Paine and the Promise of America*
Author: Harvey J. Kaye

75. *My Life in the Middle Ages*
Author: James Atlas

76. *The Chosen - Part l*
Author: Jerome Karabel

77. *The Chosen - Part ll*
Author: Jerome Karabel

78. *Song for the Blue Ocean: Encounters Along the World's Coasts and Beneath the Seas*
Author: Carl Safina

The Massachusetts School of Law is the leader in the now-growing movement for reform in legal education. The many reforms MSL has pioneered include admitting people on the basis of their entire life-record and their considered aspirations instead of on the basis of LSAT scores, providing students with extensive training in the practical professional skills needed by practicing lawyers, enhancing practical education with intellectual theory by insuring that sociological, economic, political and other ideas underlying fields of law are specially discussed in every course, keeping law school costs down so that tuitions can be kept low—MSL's tuition is only about 60 percent of the average tuition of other private law schools as well as of many state-supported law schools—and using admissions and financial policies to fulfill its mission to make quality legal education and resulting social and economic mobility available to persons who have been traditionally excluded from the legal profession.

MASSACHUSETTS SCHOOL OF LAW
AT ANDOVER

Woodland Park
500 Federal Street
Andover MA 01810