An open-access multidisciplinary peer-reviewed journal looking to the future of human rights research and practice.

http://www.ehrr.org

ehrr@ehrr.org

Essex Human Rights Review
Human Rights Centre, University of Essex,
Wivenhoe Park, Colchester CO4 3SQ, UK

HUMAN RIGHTS CENTRE

Essex Human Rights Review
Volume 6, Number 1 (December 2009)
Special Issue: "Preventing Torture in the 21st Century"

The Cumulative Effect: A medico-legal approach to United States torture law and policy

K. Alexa Koenig, Eric Stover and Laurel E. Fletcher*

Abstract

In the weeks following the events of September 11, 2001, the Bush administration granted the CIA authority to set up detention facilities known as 'black sites' outside the United States, and to employ new interrogation procedures on suspected terrorists taken into custody. Recently released legal memoranda by the US Department of Justice's Office of Legal Counsel condoned the use of several interrogation techniques (such as waterboarding and prolonged sleep deprivation), which the US itself had previously condemned as torture. This paper examines the legal rationalisations the Bush administration advanced to circumvent international and national laws prohibiting torture and other forms of cruel, inhuman, and degrading treatment. It also juxtaposes these rationalisations with medical evidence of the physical and psychological effects of torture and other forms of cruel, inhuman, and degrading treatment. Finally, it recommends several prohibitions and safeguards that the Obama administration should enact to prohibit torture and prevent authorised interrogation techniques from being used in such a way that their cumulative effect results in torture or illegal cruelty. Governments must consider the cumulative effect of interrogation practices and conditions of confinement when creating policies and procedures designed to prevent torture. Long-term political and legal policies must consider both the legal definitions of torture used in international law and the medico-legal evidence that certain interrogation techniques when used together, or in succession and over extended periods, can amount to torture. Finally, the paper calls on the Obama administration to establish an independent, non-partisan commission to investigate and publicly report on the post-9/11 treatment of detainees suspected of terrorist activities who have been held in US custody.

* K. Alexa Koenig, J.D., is a PhD Candidate in Jurisprudence and Social Policy at the University of California, Berkeley, School of Law; Eric Stover is Faculty Director of the Human Rights Center, and Adjunct Professor of Law and Public Health, at the University of California, Berkeley; Laurel E. Fletcher is Clinical Professor of Law and Director of the International Human Rights Law Clinic, University of California, School of Law. The authors of this article previously co-authored *The Guantanamo Effect: Exposing the Consequences of US Detention and Interrogation Practices*: a book based on a two-year study of former Guantanamo detainees. The authors thank the research librarians at Berkeley Law for their invaluable assistance. The authors also thank Jonathan Cobb for his editorial assistance.

1. Introduction

> The focus on waterboarding misses the main point of the [CIA's] program [for high-value detainees]. Which is that it was a program. Unlike the image of using intense physical coercion as a quick, desperate expedient, the program developed "interrogation plans" to disorient, abuse, dehumanize and torment individuals over time. The plan employed the combined, cumulative use of many techniques of medically-monitored physical coercion. Before getting to water-boarding, the captive had already been stripped naked, shackled to ceiling chains keeping him standing so he [could not] fall asleep for extended periods, hosed periodically with cold water, slapped around, [and] jammed into boxes[.][1]
> – Philip Zelikow, former executive director of the 9/11 Commission

'The United States will not torture,' President Obama declared, two days into his administration.[2] At a ceremony in the White House on 22 January 2009, with Vice-President Biden and former military officers at his side, the new president signed a series of executive orders to begin an overhaul of the country's interrogation and detention system for suspected terrorists. In so doing, Obama was seeking to reaffirm America's obligations under domestic and international law, and to close the chapter on the prisoner-abuse scandals that had dogged the Bush administration.

However, the President left many questions about detainee treatment unresolved. Although he directed the Central Intelligence Agency (CIA) to shut what remained of its network of secret prisons, he left himself leeway to reinstate portions of the CIA's programme, including (i) the practice of sending terrorist suspects to third countries for detention and interrogation that almost certainly would include torture, and (ii) the potential use of interrogation methods that an array of current, and retired, military officers and FBI agents have fiercely criticised as tantamount to torture.

Indeed, a week prior to Obama's announcement, Susan J. Crawford, a Pentagon official in charge of deciding whether to bring detainees before military commissions, had concluded that the techniques that US interrogators used on a Saudi national, Mohamed al-Khatani, over a 50-day period from November 2002 to January 2003 at the US detention facility in Guantánamo Bay, Cuba, amounted to torture. 'Shocked' and 'embarrassed' by the discovery, Crawford chose not to refer al-Khatani's case for prosecution. 'The techniques they used were all authorized,' she told Bob Woodward of the *Washington Post*,

> but the manner in which they applied them was overly aggressive and too persistent. You think of torture, you think of some horrendous physical act done to an individual. This was not any one particular act; this was just a combination of things that had a medical impact on him, that hurt his

[1] Philip Zelikow, 'The OLC [Office of Legal Counsel] "torture memos": thoughts from a dissenter,' *Foreign Policy*, 21 April 2009. Available at http://www.blogrunner.com/snapshot/D/4/1/the_olc_torture_memos_thoughts_from_a_dissenter. Last accessed 4 October 2009.

[2] Barack Obama, 'Remarks Following a Meeting with Retired Military Officers', 22 January 2009. Available at http://www.gpoaccess.gov/presdocs/2009/DCPD200900013.pdf. Last accessed 4 October 2009.

> health. It was abusive and uncalled for. And … clearly coercive. It was the medical impact that pushed me over the edge [to call it torture].[3]

Former General Counsel of the US Navy Alberto J. Mora held a similar opinion. In testimony before the Senate Committee on Armed Services, he declared that the use of 'so-called "harsh" techniques' at Guantánamo and other detention facilities 'was a mistake of massive proportions.' Drawing on basic legal distinctions, he urged the senators to focus their inquiry 'not merely on banning torture, but banning cruelty.' He added that

> The choice of the adjectives 'harsh' or 'enhanced' to describe these interrogation techniques is euphemistic and misleading. The more precise legal term is 'cruel.' Many of the 'counter-resistance techniques' authorized for use in Guantánamo in December 2002 constitute 'cruel, inhumane, and degrading' treatment that could, depending on their application, easily cross the threshold of torture.[4]

Taken together, the critiques offered by Crawford and Mora point to three under-examined dimensions of the Bush administration's interrogation regime. First, administration officials who set out to establish the legal parameters of what constituted torture developed 'unique' interpretations of international law and either misconstrued, or purposefully ignored, the medical literature on the relationship between the physical and psychological impacts of interrogation techniques. In this regard, international law prohibiting torture and abuse of prisoners recognises that an individual's experience of pain cannot be separated into purely physical or purely mental elements.[5] In terms of the character of stress experienced, for example, the physical assault of burning the body with lighted cigarettes and the psychological assault implicit in sensory deprivation techniques fall at points on a single physical-psychological continuum. Second, Bush administration officials failed to acknowledge that psychological and physical damage can result not only from individual acts of extreme cruelty, such as waterboarding, but from the cumulative nature of seemingly less severe acts, such as sleep deprivation, stress positions, and sexual humiliation, especially when applied in sequence and in combination over extended periods of time, with one technique intensifying the effects of the others. Third, with the aid of these omissions, administration officials distorted well-established legal standards applicable to individual and collective interrogation techniques; thus, they developed a rationale that (in their view) permitted torture of, and illegal cruelty to, suspected terrorists.

This paper attempts to answer several questions: What rationalisations did the Bush administration use to circumvent international and national laws prohibiting torture and other forms of cruel, inhuman, and degrading treatment? How do these rationalisations fare when juxtaposed to medical evidence of the physical and psychological effects of torture and other forms of cruel, inhuman, and degrading treatment? Finally, what prohibitions and safeguards should the Obama administration put in place to prohibit torture and prevent authorised

---

[3] Bob Woodward, 'Detainee Tortured, Says US Official – Trial Overseer Cites "Abusive" Methods Against 9/11 Suspect', *Washington Post*, 14 January 2009.

[4] Statement of Alberto J. Mora, 'Hearing on the Treatment of Detainees in US Custody', Senate Committee on Armed Services, 17 June 2008, p.2-3.

[5] See Hernàn Reyes, 'The worst scars are in the mind: psychological torture', (2007) *International Review of the Red Cross* 89, pp.591-617.

interrogation techniques from being used together, or in succession, in such a way that their cumulative effect results in torture or in cruel, inhuman or degrading treatment?

2. Torture and the 'New Paradigm' for the 'War on Terror'

Within days of the attacks of September 11, 2001, the Bush administration began developing what would come to be known as the 'New Paradigm' for the 'war on terror.'[6] A cornerstone of this paradigm would be, in the words of *New Yorker* writer Jane Mayer, 'a new, ad hoc system of detention and interrogation that operated outside any previously known coherent body of law.'[7] The President's first foray into this legal grey zone was a secret directive, issued on 17 September, granting the CIA authority to set up detention facilities known as 'black sites' outside the US, and employ what he would term 'an alternative set of interrogation procedures' on suspected terrorists taken into its custody.[8]

In support of the CIA's secret detention centres, the administration had to decide what rules would apply during interrogations of those captured in the 'war on terror.' Central to this effort was a search for ways to (i) inflict pain without causing the type of injury that might inhibit or prevent further interrogation and (ii) shield interrogators and their superiors from any potential legal consequences of their actions.

The administration's first attempt to make the President's 'alternative' interrogation procedures appear legal can be traced to a 2002 memorandum written by Jay S. Bybee, then director of the Office of Legal Counsel (OLC), a division of the Department of Justice, and his colleague, John Yoo.[9] Contrary to all definitions of torture under international law, the memo opined that abuse did not rise to the level of torture under US law unless such abuse inflicted pain 'equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.'[10] Mental torture, according to the memo, required 'suffering not just at the moment of infliction but … lasting psychological harm, such as seen in mental disorders like post-traumatic stress disorder.'[11] It interpreted 'prolonged mental harm' to require

---

[6] President Bush first described this 'new war' in his 20 September 2001 'Address to a Joint Session of Congress and the American People'. Available at http://www.whitehouse.gov/news/releases/2001/09/print/20010920-8.html. Last accessed 23 August 2009.

[7] Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* (New York: Doubleday, 2008), pp.51-52.

[8] George W. Bush, 'President Discusses Creation of Military Commissions to Try Suspected Terrorists', *The White House*. Available at http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html. Last accessed 23 August 2009. Also see Bob Woodward, 'CIA Told to Do "Whatever Necessary" to Kill Bin Laden', *Washington Post*, 21 October 2001.

[9] See Memorandum from Jay S. Bybee, assistant secretary general, to Alberto R. Gonzales, White House counsel, 'Regarding Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A' ('Bybee-Yoo Memo'), 1 August 2002. Available at http://news.findlaw.com/hdocs/docs/doj/bybee80102ltr6.html. Last accessed 23 August 2009. The Bush administration withdrew the Bybee-Yoo Memo in December 2004. That same month, the Department of Justice released a replacement memo that pointedly departed from the earlier memo on several specific points. However, it did not change anything with respect to the CIA's interrogation program since it did nothing to restrict the specific techniques that had been approved previously.

[10] Bybee and Yoo. See fn.9 above

[11] Bybee and Yoo. See fn.9 above. For a definition of Post-Traumatic Stress Disorder, see the *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV).* Available at http://www.mental-health-today.com/ptsd/dsm.htm. Last accessed 23 August 2009.

proof of harm lasting 'months or years'.[12] To qualify as torture, causing physical pain or lasting psychological harm had to be the 'precise objective' of the abuse, rather than a by-product. An interrogator could know that his actions would cause pain but, 'if causing such harm is not the objective, he lacks the requisite specific intent' to be found guilty of torture, according to the administration's memo writers. In effect, Bybee and Yoo were using the law not as a means to prevent torture and cruel treatment, but as an instrument to expand the permissibility of such acts and protect those who carried them out.

Over the next three years, as hundreds of suspected terrorists were being taken into US custody, the OLC lawyers wrote several other secret legal memoranda[13] on detention and interrogation practices (the 'Torture Memos'), which were eventually made public. The first of these memos, written by Jay Bybee in August 2002, approved the use of interrogation techniques that included sleep deprivation, stress positions, confinement in a dark box with insects, and waterboarding, against Abu Zubaydah, considered by the CIA to be 'one of the highest ranking members' of Al Qaeda. The other three memos were prepared in May 2005 and signed by Steven G. Bradbury, then Assistant Attorney General of the OLC. They reviewed whether the use of specific 'enhanced interrogation techniques' on 'high-value' detainees in CIA custody would violate US obligations under the UN Convention against Torture or the US statute criminalising torture,[14] though they glossed over whether the use of techniques in the aggregate constituted torture, or cruel and inhuman treatment. Taken together, these memoranda condoned the use of several interrogation techniques, such as waterboarding and prolonged sleep deprivation, that the US itself had previously condemned as torture, and for which the US military had previously prosecuted its own servicemen.[15] In 2007, the International Committee of the Red Cross (ICRC) sent a confidential report to the Department of Justice and the CIA; this report was based on interviews with fourteen 'high value detainees' who had been transferred to Guantánamo from CIA secret prisons.[16] In it, the detainees, who were interviewed separately by ICRC doctors four

---

[12] Bybee and Yoo. See fn.9 above.

[13] Ariane de Vogue, 'DOJ [Department of Justice] Releases Controversial "Torture Memos"', *ABC News*, 16 April 2009; Wendy Norris, 'The ultimate Bush Administration torture timeline', *The Colorado Independent*, 26 April 2009. The Torture Memos include the following: 'Bybee-Yoo Memo', see fn. 9 above; Jay Bybee, assistant attorney general, US Department of Justice Office of Legal Counsel, 'Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency: Interrogation of al Qaeda Operative' ('Torture Memo 1'), 1 August 2002; Steven G. Bradbury, Principal Deputy Assistant Attorney General, US Department of Justice Office of Legal Counsel, 'Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, Re: Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee' ('Torture Memo 2'), 10 May 2005; Steven G. Bradbury, Principal Deputy Assistant Attorney General, US Department of Justice Office of Legal Counsel, 'Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, Re: Application of 18 USC. §§ 2340-2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees' ('Torture Memo 3'), 10 May 2005; Steven G. Bradbury, Principal Deputy Assistant Attorney General, US Department of Justice Office of Legal Counsel, 'Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency: Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May be Used in the Interrogation of High Value al Qaeda Detainees' ('Torture Memo 4'), 30 May 2005.

[14] 18 U.S.C. §§ 2340-2340A.

[15] Eric Weiner, 'Waterboarding: A Tortured History', *NPR.org*, 3 November 2007. Available at http://www.npr.org/templates/story/story.php?storyID=57886834. Last accessed 26 June 2009.

[16] ICRC Report on the Treatment of Fourteen 'High Value Detainees' in CIA Custody, February 2007. Available at http://www.nybooks.com/icrc-report.pdf. Last accessed 24 June 2009. Also see Mathias Vermeulen, 'New York Review of Books Posts Leaked ICRC Report in Full on Website', *The Lift: Legal Issues in the Fight Against Terrorism*, 8 April 2009; de Vogue, 'DOJ [Department of Justice] Releases Controversial "Torture Memos"', see fn.13.

weeks after their arrival at Guantánamo, gave remarkably uniform accounts of abuse, including waterboarding, confinement in a black box, prolonged stress positions, sleep deprivation, forced nudity, and beatings. These accounts led the ICRC to conclude that

> the ill treatment to which [many of the fourteen detainees] were subjected while held in the CIA program, either singly or in combination, constituted torture. In addition, many other elements of the ill treatment, either singly or in combination, constituted cruel, inhuman or degrading treatment.[17]

The *ICRC Report on the Treatment of Fourteen 'High Value Detainees' in CIA Custody* was kept confidential until March 2009, two months after Bush left office, when it was leaked to journalist Mark Danner and, subsequently, published in *The New York Review of Books*. Weeks later, the Obama administration, in response to the publication of the ICRC report and a lawsuit by the American Civil Liberties Union, released redacted copies of the Torture Memos.[18] In August 2009, the Obama administration released another previously highly classified document from the Bush era: a 2004 report by the CIA Inspector General chronicling abuses inside the agency's overseas prisons, including interrogators making suggestions about sexually assaulting members of a detainee's family, staging mock executions, intimidating a detainee with a handgun and power drill, choking another detainee repeatedly, and threatening to kill yet another detainee's children.[19] The 109-page report raised broad questions about the legality, political acceptability, and effectiveness of the harshest of the CIA methods, including some not authorised by the Department of Justice and others that were approved but are almost always considered torture, like waterboarding. It also paints a picture of the overwhelming control exercised by CIA Headquarters and the Department of Justice, with the help of doctors and lawyers, not only in terms of setting the programme's parameters but often dictating every facet of a detainee's daily routine. The CIA's Office of Medical Services, for example, prepared medical guidelines for interrogators and, in the case of simulated drowning, required that 'every application of the waterboard be thoroughly documented' so that doctors could make better 'medical judgments and recommendations' for future sessions.[20]

The day the CIA inspector general's report was released to the public, Attorney General Eric H. Holder Jr appointed a prosecutor to determine whether a full criminal investigation of the conduct of CIA interrogators or contractors was warranted.[21] In a move that formally stripped the CIA of its primary role in questioning high-level detainees, the Obama administration announced the creation of the High-Value Detainee Interrogation Group, a multi-agency unit within the

---

[17] ICRC Report on the Treatment of Fourteen 'High Value Detainees' in CIA Custody, p.26. See fn.16.

[18] A tactic-by-tactic comparison between what the Red Cross reported and what techniques were noted in the memos can be found in Olga Pierce, 'Torture Memos vs. Red Cross Report: Prisoners' Recollections Differ from Guidelines', *ProPublica*, 24 April 2009. Available at http://www.propublica.org/article/torture-memos-vs-red-cross-report-prisoners-describe-harsher-treatmen-042. Last accessed 1 September 2009.

[19] Inspector General, Central Intelligence Agency, 'Special Review: Counterterrorism Detention and Interrogation Activities (September 2001–October 2003)', 2003-7123-IG, 7 May 2004. Available at http://documents.nytimes.com/c-i-a-reports-on-interrogation-methods#p=1. Last accessed 25 August 2009.

[20] Inspector General, Central Intelligence Agency, 'Special Review', appendix. See fn.19.

[21] See Mark Mazzetti and Scott Shane, 'CIA Abuse Cases Detailed in Report on Detainees', *New York Times*, 26 August 2009. The Attorney General's announcement is available at http://www.usdoj.gov/ag/testimony/2009/ag-testimony-090824.html. Last accessed 25 August 2009.

Federal Bureau of Investigation (FBI), to oversee the interrogations of top terrorist suspects.[22] The new unit (comprised of interrogators, analysts, linguists, and additional personnel from defence departments, law enforcement, and other intelligence and law enforcement agencies) reports to the National Security Council.

3. Torture by Any Other Name

How did the Department of Justice lawyers in the Bush administration rationalise signing off on techniques that, once they became public, would be roundly condemned as torture, in violation of an array of international laws?[23]

Most countries, including the US, have ratified the United Nations Convention against Torture and other cruel, inhuman or degrading treatment or punishment (UNCAT).[24] Article 1 of the convention defines 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 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.[25]

Article 16 of the UNCAT also obligates States Parties to prevent 'acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture' committed by, or at the behest of, a public official.[26] Unlike the prohibition against torture, the UNCAT does not require States to criminalise cruel, inhuman or degrading treatment.[27] However, the UNCAT maintains that if States Parties fail to prevent such treatment (what we term 'illegal cruelty'), they have violated their treaty obligations.

---

[22] See David Johnston, 'US Says Rendition to Continue, but With More Oversight', *New York Times*, 25 August 2009.

[23] For a detailed overview of the various laws relevant to understanding torture from the United States' perspective see, for example, Louis-Philippe F. Rouillard, 'Misinterpreting the Prohibition of Torture under International Law: The Office of Legal Counsel Memorandum', (2005) *American University International Law Review* 21, p.9; Kate Riggs, Richard Blakeley, and Jasmine Marwaha, 'Prolonged Mental Harm: The Torturous Reasoning Behind a New Standard for Psychological Abuse', (2007) *Harvard Human Rights Journal* 20, p.263.

[24] UNCAT, adopted by the UN General Assembly, UN Doc. A/Res/39/46, 10 December 1984, entered into force 26 June 1987.

[25] UNCAT, Article 1. UNCAT also demands that a State Party 'undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture.' UNCAT, Article 16. See fn.24.

[26] UNCAT, Article 16. See fn.24.

[27] UNCAT, Articles 4 and 16. See fn.24. Also see, for example, Gail H. Miller, *Defining Torture* (New York: Benjamin N. Cardozo School of Law, 2005), pp.3-4: Miller explains that States have the right to prosecute those who commit torture in a territory within their jurisdiction, based on the prohibition of torture as *jus cogens* and, thus, as a fundamental principle of international law to which there are no exceptions. This status does not extend to cruel, inhuman or degrading treatment, which States are required to prevent but not prosecute.

The distinctions between 'torture' and 'cruel, inhuman or degrading treatment' in the UNCAT remain purposely vague in the hope that the scope of their application will be 'interpreted so as to extend the widest possible protection against abuses, whether physical or mental.'[28] In effect, the UNCAT's authors wanted state signatories to extend the treaty's protections to cover a wide array of potential abuses, largely because experience had demonstrated 'that the conditions that give rise to ill-treatment frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent ill-treatment.'[29] While UNCAT gave state signatories the right to interpret the Convention's provisions in light of their domestic laws and statutes, it does not entitle them to look for ways to authorise abuse and evade legal accountability.

The US Senate ratified the UNCAT in 1994, but qualified its interpretation to restrict the practices that the US considered unlawful. First, the US stated that the intent required by the UNCAT could not be a general intent to use certain abusive interrogation techniques. Instead, according to the Senate-drafted reservation, 'in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering.'[30] Thus, without a specific intent to inflict severe pain and suffering, individuals' actions, no matter how heinous, could not be considered torture.[31] This restriction was, apparently, drafted to ensure that the US' obligations under the UNCAT would be no more restrictive than US Constitutional requirements. In practice, it created an intentional vagueness that the Department of Justice would later try to exploit when arguing that various harsh interrogation practices did not amount to torture. However, several scholars have rightly argued that, if given a strict interpretation, this reservation might be viewed as abrogating the UNCAT and, thus, without legal validity.[32]

Second, the US narrowed the definition of mental torture. Mental torture was limited to psychological suffering that is 'prolonged' and accompanied by one of four predicate acts: [33]

> (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 subject to death, severe physical

[28] See commentary to Article 5 of the *United Nations Code of Conduct for Law Enforcement Officials* (1979) that is discussed, along with similar resolutions, in *United Nations Actions in the Field of Human Rights* (New York: United Nations Publications), pp.161-6.

[29] Committee against Torture, 'Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment General Comment No 2: Implementation of article 2 by States Parties', UN Doc. CAT/C/GC/2/CRP.1/Rev.4, 23 November 2007.

[30] US Reservations, Declarations, and Understandings, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 Congressional Record 36198 (1990) (emphasis added). Available at http://www1.umn.edu/humanrts/usdocs/tortres.html. Last accessed 1 September 2009.

[31] Parties to treaties are permitted to include reservations unless 'the treaty itself prohibits it … or the reservation is incompatible with the object and purpose of the treaty.' Frederic L. Kirgis, 'Reservation to Treaties and United States Practices' (2003), American Society of International Law. Available at http://www.asil.org/insigh105.cfm. Last accessed 21 October 2009. This reservation was created to require that those considered to have tortured have a 'sufficiently culpable state of mind' such that the infliction of pain on another was 'wanton'.

[32] See, for example, Jordan J. Paust, 'The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions' (2008) *Valparaiso University Law Review* 43, pp.1535, 1573.

[33] Paust, 'The Absolute Prohibition of Torture', para. II. See fn.33.

> pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the sense or personality.[34]

In regard to 'cruel, inhuman or degrading treatment', the US chose to interpret this standard in terms of the definition of 'cruel, unusual and inhumane treatment' contained in amendments to the US Constitution.[35] The US obligations under the international treaty were made enforceable in domestic courts through the 1994 Federal Anti-Torture Statute.[36] This domestic statute incorporated the US interpretation of the UNCAT, codifying its reservations to the international instrument and their application to the United States.[37] In June 2005, shortly after the last torture memo was written, the US reported to the UN Committee against Torture (the body established by the UNCAT to oversee its application by States Parties) that its reservation regarding its interpretation of cruel, inhuman or degrading treatment was not intended to contravene the treaty but, rather, to clarify the 'vague and ambiguous nature of the term "degrading treatment."'[38] At the time, however, Bradbury's secret memo interpreted the US reservations narrowly to effectively eliminate application of US domestic standards of illegal cruelty to CIA detainees.

Many legal and public health scholars regard the difference between torture and cruel, inhuman or degrading treatment to be of degree rather than kind, with torture constituting 'an aggravated form of inhuman treatment.'[39] The distinction between the categories reflects a 'progression of severity – from degrading treatment, through inhumane treatment, to torture – [that] creates a hierarchy of harms with torture as the most egregious.'[40] As noted by Eric Stover and Elena Nightingale, '[i]t can be argued, for example, that one blow to a detainee's body should be considered "ill-treatment", while continued beatings … constitute "torture".'[41] This idea that the difference between torture and ill-treatment is one of degree has been underscored by the European Court of Human Rights, which has ruled that 'th[e] difference derives principally from a difference in the intensity of the suffering inflicted.'[42] This distinction is ultimately important

---

[34] Paust, 'The Absolute Prohibition of Torture'. See fn.32.

[35] Paust, 'The Absolute Prohibition of Torture'. See fn. 33. This wording was later codified in the Detainee Treatment Act of 2005, which states that 'no individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment. … The term "cruel, inhuman, or degrading treatment or punishment" means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States.' 119 Statute 2739, 2740 (2005). See Christopher B. Shaw, 'The International Proscription Against Torture and the United States' Categorical and Qualified Responses' (2009) *Boston College International & Comparative Law Review* 32, p.289.

[36] Riggs et al., 'Prolonged Mental Harm', pp.265-6. See fn.23. The Act defines torture as '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 custody or physical control.' 18 USC. § 2340(2).

[37] Riggs et al., 'Prolonged Mental Harm', pp.265-7. See fn.23.

[38] Committee against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: United States of America, UN Doc. CAT/C/48/Add.3, 29 June 2005, pp.42-43, para. 147.

[39] Miller, *Defining Torture* p.9 (quoting 'The Greek Case, Year Book of the European Convention on Human Rights' (1969), p.12 [emphasis omitted]). See fn.27.

[40] Miller, *Defining Torture*, p.9. See fn.27.

[41] Eric Stover and Elena O. Nightingale, *The Breaking of Bodies and Minds: Torture, Psychiatric Abuse, and the Health Professions* (New York: W.H. Freeman and Company, 1985), p.5.

[42] *Ireland v. United Kingdom* (5310/71), para. 167. Available at www.bailii.org/eu/ECHR/1978/1.html. Last accessed 25 August 2009.

because, under the UNCAT, States are required to criminalise (and, presumably, to prosecute) acts of torture, but not illegal cruelty.[43]

Bradbury and his Office of Legal Counsel (OLC) colleagues decided that the US reservation to Article 16 effectively eliminated cruel, inhuman and degrading treatment as a restraint on 'enhanced interrogation' techniques. The reservation states that the US will apply the international standard of cruel, inhuman or degrading treatment pursuant to three US Constitutional amendments: the 5th Amendment due process protections against executive action that 'shocks the conscience', the 8th Amendment's ban on 'cruel and unusual punishment', and the 14th Amendment's requirement that American States provide equal protection under the law to all people in their jurisdictions.[44]

US courts have adopted a 'totality of the circumstances' test to determine whether prison conditions 'alone or in combination, may amount to cruel and unusual punishment,' under the 8th Amendment.[45] Bradbury argued that the 8th Amendment standard does not apply to detainees in CIA custody because the 8th Amendment applies only to cases of criminal conviction, not military detention, and detainees had not been convicted of any crime.[46] The 14th Amendment, the OLC argued, did not apply because it was relevant only to state, not federal, action.[47] With respect to the 5th Amendment, the OLC concluded that 'enhanced interrogation' techniques did not violate the 'shock the conscience' standard because they inflicted pain not arbitrarily but for a higher good: namely, to protect the American people from the threat of Al Qaeda. The OLC also argued that the use of 'enhanced interrogation' techniques was conducted with appropriate safeguards, including the presence of medical personnel.[48] In effect, the OLC side-stepped US obligations to prevent cruel, inhuman or degrading treatment by reading out of the US obligations under the UNCAT the US constitutional provisions that explicitly forbid illegal cruelty.

4. International jurisprudence on torture and illegal cruelty

For the past forty years, international legal bodies have been far more incisive than Bradbury and his administration associates in their considerations as to whether or not an individual had been subjected to torture or illegal cruelty. Indeed, many of these institutions have issued rulings that diametrically oppose the rationales offered by the OLC lawyers. One of the first to do so was the European Commission on Human Rights (ECHR), which, in 1976, decided *Ireland v. United Kingdom*.[49] The ECHR concluded that the combined effect of five 'in-depth' interrogation practices[50] constituted torture. The ECHR's finding was later overruled by the European Court of Human Rights, which found that the conduct did not descend to the level of torture but did

[43] UNCAT, Articles 1 and 16. See fn.24.
[44] 136 Congressional Record 36198 (1990).
[45] 85 American Law Reports Federal Table of Cases 750 (citing *Rhodes v. Chaman*, 452 US 337 [1981]).
[46] Torture Memo 4, p.26. See fn.13.
[47] Torture Memo 4, p.26. See fn.13.
[48] Torture Memo 4, 27-38. See fn.13.
[49] *Ireland v. United Kingdom* 1976 Yearbook European Convention on Human Rights, pp.512, 792-4.
[50] *Ireland v. United Kingdom* 1976. para. 96. See fn.49.

constitute illegal cruelty.[51] While the Court did not find that the detainees had been tortured, it relied on the fact that the techniques were used in combination and over time to reach its conclusion that the practices were cruel and, thus, similarly illegal.[52]

In 1997, the UN Committee against Torture, the body of experts that reviews the compliance with their obligations under UNCAT, similarly found that Israel's treatment of prisoners violated the prohibition against torture and cruelty.[53] The condemned practices included the 'standard' use of multiple techniques, especially in combination: restraining individuals in painful positions, hooding them, exposing them to loud music, depriving them of sleep for prolonged periods, threatening them, shaking them, and using cold air to chill them.[54] Two years later, the High Court of Israel similarly ruled that certain interrogation practices used by Israel's General Security Service (GSS) – including shaking, use of the '*shabach*' position (shackling in a painful configuration, often while hooded and bombarded with loud music), and sleep deprivation – were illegal.[55]

Other international and regional courts have examined the broader context in which captives have been detained and subjected to particular interrogation techniques. The International Criminal Court for the Former Yugoslavia (ICTY) ruled, in 2002, that, in evaluating whether acts constituted torture, the court needed to 'take into account all the circumstances of the case', which included the 'nature and context of the infliction of pain', the extent to which abuse was planned and 'institutionalized', the physical condition of the victim, as well as the methods used and the manner in which the treatment was administered.[56] If an individual had been subjected to a variety of types of ill-treatment, the court noted that 'the severity of the acts should be assessed as a whole to the extent that it can be shown that this lasting period or the repetition of acts are

---

[51] *Ireland v. United Kingdom* 1978 25 European Court of Human Rights, pp.p.66-67. Here it was suggested that while the controversial practices did violate the European Convention on Human Rights, they did not constitute torture).

[52] *Ireland v. United Kingdom* 1978. para. 167. See fn.51.

[53] Committee against Torture, Concluding observations of the Committee against Torture: Israel, UN Doc. A/52/44, para. 253-60.

[54] Committee against Torture, Concluding observations of the Committee against Torture: Israel, para. 257. See fn. 53.

[55] *Public Committee Against Torture in Israel v. Israel* 1999, HCJ 5100/94. The Court held that the practices were prohibited, although they avoided declaring that they amounted to torture. Instead, the Court referenced *Ireland v. United Kingdom* to note that, in *Ireland*, similar interrogation techniques were found inhumane and degrading but not torturous and, thus, were barred only on that lesser ground. The High Court ruled that the 'combination' of interventions 'gives rise to pain and suffering' such that the practice should be prohibited as cruel and inhuman. The Court also considered the temporal element of such techniques, declaring them to be a harmful method 'particularly when … employed for a prolonged period of time.' One commentator suggested that the High Court's ruling did not consider whether the combined use of two or more harsh techniques could cross the threshold from cruelty to torture. He wrote that Israel's 'extreme applications of a combination of … factors – prolonged lack of sleep, being forced to stand for unreasonable periods of time with arms held to the front at shoulder level, being denied food and use of a lavatory for extended periods, culminating with concentrated questioning and verbal threats of future abuse – could be considered torture, [even though] any one of these activities by itself might not be severe enough to constitute torture per se.' See Barak Cohen, 'Democracy and the Mis-Rule of Law: The Israeli Legal System's Failure to Prevent Torture in the Occupied Territories', (2001) *Indiana International & Comparative Law Review* 21, pp.75, 77-8.

[56] *Prosecutor v. Krnojelac*, Case No IT-97-25 (Trial Chamber), 15 March 2002, para. 182.

inter-related, follow a pattern or are directed toward the same prohibited goal.'[57] The ICTY has embraced the trial court's 'totality of the circumstances' approach in subsequent cases.[58]

The Inter-American Court of Human Rights has also suggested that the effect of cumulative ill-treatment may constitute torture. For example, in the case of *Miguel Castro-Castro Prison v. Peru* the Court held that 'the totality of the acts of aggression and the conditions in which the State deliberately [put various individuals] … which caused all of them a serious psychological and emotional suffering, constituted a psychological torture.'[59] Similarly, in a case involving the rape of three sisters, the Court ruled that, under some circumstances, rape could constitute torture.[60]

Since *Ireland*, it has been sporadically argued that what have been termed 'torture lite' tactics (those that may not be judged to violate the prohibition against torture when taken separately) could be considered torture in the aggregate. As Andrew Moher has noted

> [while] all of these techniques, individually, might be classified as torture lite [sleep deprivation, use of stress positions, etc.] … [t]aken together … they seem to epitomize a routine of torture so devious that it cannot reasonably be described any other way. It becomes impractical to make legal exceptions for torture lite practices when they will add up to extreme torture in the aggregate.[61]

5. US interpretations of international and domestic prohibitions on torture and illegal cruelty

Not surprisingly, Bradbury and his associates made only cursory mention of international rulings in their analysis of US obligations under the UNCAT, thus ignoring a significant body of international jurisprudence that supports a broader, more contextual analysis to determine whether an individual has been subjected to torture or illegal cruelty.[62] The authors of the torture

---

[57] *Prosecutor v. Krnojelac*. See fn.56.

[58] See, for example, *Prosecutor v. Blagoje Simic et al.* (Trial Judgment), IT-95-9-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 17 October 2003, para. 80. Available at http://www.unhcr.org/refworld/docid/414839e14.html. Last accessed 6 August 2009. *Prosecutor v. Milan Martic* (Judgment), IT-95-11-T, ICTY, 12 June 2007, para. 75. Available at www.unhcr.org/refworld/docid/469de5652.html. Last accessed 6 August 2009. *Prosecutor v. Milan Simic* (Sentencing Judgement), IT-95-9/2-S, ICTY, 17 October 2002, para. 34. Available at www.unhcr.org/refworld/docid/4148380e4.html. Last accessed 6 August 2009. *Prosecutor v. Limaj et al.* (Trial Judgment), IT-03-66-T, ICTY), 30 November 2005, para. 237. Available at www.unhcr.org/refworld/docid/48ac17cc2.html. Last accessed 6 August 2009.

[59] *Case of Miguel Castro-Castro Prison v. Peru* 2006 Series C #160, Inter-American Court of Human Rights 5, 25 November 2006.

[60] Inter-American Commission on Human Rights, Organization of American States, Report No 53/01, Case 11.565, 'Ana, Beatriz and Celia Gonzalez Perez', Mexico, 4 April 2001, para. 47, available at www.cidh.org/annualrep/2000eng/chapteriii/merits/mexico11.565.htm. Last accessed 6 August 2009.

[61] Andrew A. Moher, 'The Lesser of Two Evils? An Argument for Judicially Sanctioned Torture in a Post-9/11 World', (2004) *Thomas Jefferson Law Review* 26, pp.469, 479.

[62] 'Torture Memo 2', for example, disregards the discussion of sleep deprivation by the European Court of Human Rights case of *Ireland v. United Kingdom,* as well as the UNCAT Committee's report on Israel, noting that neither body identified the duration of episodes of sleep deprivation and, thus, these 'precedents provide little or no helpful guidance.' 'Torture Memo 2', p.51. See fn.13.

memos analysed the 'enhanced interrogation' techniques using both the US interpretation of torture under the UNCAT and the US domestic anti-torture statute to develop a three-part rationale for the Bush administration practices, which, they anticipated, would shield CIA, military, and government officials from liability in connection with their use. They asserted that (i) international and domestic laws prohibiting torture did not apply to terrorist suspects held outside the US, (ii) even if the laws did apply, the CIA's 'enhanced interrogation' techniques should not be considered either torture or cruel, inhuman or degrading treatment under domestic or international law, and (iii) use of such tactics in combination would fail to violate prohibitions against torture. Numerous legal scholars have challenged the first two arguments,[63] but the third has remained under-analysed.

Thanks to ground-breaking reporting by several journalists,[64] and to reports by both the ICRC and the Senate Armed Services Committee,[65] we know that the roots of the CIA interrogation programme stretch back to several CIA-sponsored studies of sensory deprivation, 'learned helplessness', and induced psychosis, and to the work of consultants and psychologists who had been involved in shaping and administering 'counter-resistance' programs that the US military developed.[66] One of the lessons learned from this research was that dramatic results in breaking down prisoners could be achieved when different interrogation techniques were applied simultaneously, or in rapid succession, over extended periods of time. As the 2007 *ICRC Report on the Treatment of Fourteen 'High Value Detainees' in CIA Custody,* and the 2004 CIA Inspector General's review make clear, the CIA did not apply each interrogation technique in a vacuum. Often, if a technique or a set of techniques failed to produce the desired results, a new set would be introduced. Some detainees, for example, were regularly deprived of sleep for days, held in isolation, or otherwise 'softened up' prior to interrogation; some were subjected to different combinations of stress positions, short shackling, sleep deprivation, dietary manipulation, and other abusive techniques, simultaneously or sequentially.[67]

Bradbury did consider the effects of the combined use of certain techniques. He focused on two techniques that, in his interpretation, could potentially descend to the level of torture when used in combination with other tactics (sleep deprivation and waterboarding).[68] He dismissed, however, the possibility that the combined use of any enhanced interrogation practices would violate international or domestic law:[69] 'the authorized use of these techniques in combination by adequately trained interrogators could not reasonably be considered specifically intended to

---

[63] See, for example, Rouillard, 'Misinterpreting the Prohibition of Torture under International Law', see fn.23; Riggs et al., 'Prolonged Mental Harm', see fn.23; Daniel Kanstroom, 'On "Waterboarding": Legal Interpretation and the Continuing Struggle for Human Rights', (2009) *Boston College International & Comparative Law Review* 32, p.203; David Cole, 'The Torture Memos: The Case Against the Lawyers', *New York Review of Books*, 8 October 2009, pp.14-16.

[64] See, for example, Mayer, *The Dark Side*, see fn.7; Mark Danner, 'US Torture: Voices from the Black Sites', *New York Review of Books*, 9 April 2009, pp.69-77; 'The Red Cross Torture Report: What it Means', *New York Review of Books*, 30 April 2009, pp.48-56.

[65] Senate Armed Services Committee Inquiry into the Treatment of Detainees in US Custody. Available at http://levin.senate.gov/newsroom/supporting/2008/Detainees.121108.pdf. Last accessed 1 September 2009.

[66] See Scott Shane, '2 US Architects of Harsh Tactics in 9/11's Wake', *New York Times*, 12 August 2009.

[67] ICRC Report on the Treatment of Fourteen 'High Value Detainees', see fn.16.

[68] 'Torture Memo 3', pp.56-8. See fn.13.

[69] 'Torture Memo 3', p.2. See fn.13.

cause severe physical or mental pain or suffering, and thus would not violate [the anti-torture statutes].'[70]

Bradbury's logic in relation to 'specific intent' and the behaviour of 'adequately trained interrogators' hardly fits the facts of what we now know took place in the CIA's secret detention centres. Consider something as innocuous sounding as sleep deprivation in the treatment doled out to Khaled Shaik Mohammed, as recorded by the ICRC in its 2007 report:

> I was kept for one month in the cell in a standing position with my hands cuffed and shackled above my head and my feet cuffed and shackled to a point in the floor. Of course during this month I fell asleep on some occasions while still being held in this position. This resulted in all my weight being applied to the handcuffs around my wrists resulting in open and bleeding wounds … . Both my feet became very swollen after one month of almost continual standing.[71]

What Khaled Shaik Mohammed describes is known in interrogation circles as 'high cuffing', a technique that is extremely painful, even fatal, when applied over long periods of time. In December 2002, for example, two detainees – Mullah Habibullah and another man known as Dilawar – died in US custody in Afghanistan after being subjected to high cuffing and beatings.[72] During the Korean War, Communist interrogators used high cuffing extensively against captured US airmen. A 1956 study published by two American psychologists notes that '[a]fter 18 to 24 hours of continuous standing, there is an accumulation of fluid in the tissues of the legs … [and the] ankles and feet of the prisoner swell to twice their normal circumference.'[73] Moving becomes agonising, and large blisters develop that can 'break and exude watery serum … '.[74] In some cases, permanent nerve damage may occur and the kidneys can eventually shut down.

The CIA interrogation program was designed to 'ratchet up' the severity and, in some cases, the duration of certain techniques was extended until the desired information was obtained. Under these conditions interrogators – working far from independent oversight, under intense pressure to produce actionable intelligence, and applying a definition of torture that left little prohibited – could easily embrace tactics that 'singly or in combination' constituted torture. This phenomenon is known in social psychology as 'force drift.'[75] In a July 2004 memorandum criticising the Pentagon's interrogation techniques, the then General Counsel of the US Navy, Alberto J. Mora, described the use of escalating force to extract information. 'If some force is good,' he wrote, '[interrogators] come to believe … the application of more force must be better. Thus, the level

---

[70] 'Torture Memo 3', p.58. See fn.13.

[71] ICRC doctors noted that Kaled Shaik Mohammed bore '[s]cars consistent with this allegation … on both wrists as well as on both ankles.' 2007 ICRC Report on the Treatment of Fourteen 'High Value Detainees', p.35. See fn.16

[72] See Tom Lasseter, 'US Abuse of Detainees was Routine in Afghanistan Bases', *McClatchy Newspapers*, 17 June 2008.

[73] See Lawrence E. Hinkle Jr and Harold G. Wolff, 'Communist Interrogation and Indoctrination of "Enemies of the State"', (1956) *American Medical Association Archives of Neurology and Psychiatry* 76(2), p.134.

[74] Hinkle and Wolff, 'Communist Interrogation and Indoctrination of "Enemies of the State"'. See fn.73.

[75] See Philip Zimbardo, *The Lucifer Effect: Understanding How Good People Turn Evil* (New York: Random House, 2007) and Stanley Milgram, *Obedience to Authority: An Experimental View* (London: Pinter & Martin, 2004); Albert Bandura, Bill Underwood, and Michael E. Fromson, 'Disinhibition of Aggression Through Diffusion of Responsibility and Dehumanization of Victims', (1975) *Journal of Research in Personality* 9, pp.253-69.

of force applied against an uncooperative witness tends to escalate such that, if left unchecked, force levels, to include torture, could be reached.'[76]

For the purposes of rationalising the use of a multitude of methods, Bradbury dismisses the possibility that there is anything cumulative in their effects – as if that was not, in fact, the point of their combination. Might sleep deprivation, for instance, exacerbate the pain of other techniques? While Bradbury notes that 'one study found a statistically significant drop of 8-9% in subjects' tolerance thresholds for mechanical or pressure pain after 40 hours of total sleep deprivation',[77] and that detainees could be deprived of sleep for as long as 180 hours, he ultimately concludes that '[b]ecause sleep deprivation appears to cause at most only relatively moderate decreases in pain tolerance, the use of these techniques in combination with extended sleep deprivation would not be expected to cause severe physical pain.'[78] This is not a view shared by the UN Committee against Torture, which stated (in 2002) that, in cases of prolonged interrogation, it was 'impossible' to distinguish between the lawful use of sleep deprivation 'incidental' to interrogation and its illegal use for the 'the purpose of breaking the detainee.'[79]

Similarly, Bradbury argues that shackling 'is [only] employed as a passive means of keeping a detainee awake and is used in a way designed to prevent causing significant pain;'[80] thus, it could not be considered a technique that would enhance the severity of others. He simply takes at face value the CIA's assertion that

> the interrogation techniques at issue would not be used during a course of extended sleep deprivation with such frequency and intensity as to induce in the detainee a persistent condition of extreme physical distress such as may constitute 'severe physical suffering' within the meaning of sections 2340-2340A.[81]

Bradbury and his associates, as one might expect, downplayed medical research that warned of the deleterious effects of sleep deprivation, especially when used in combination with other techniques. They also failed to acknowledge that American courts bar sleep deprivation for detainees held in police custody. In *Ashcraft v. Tennessee* (1944), the Supreme Court tossed out a conviction of a defendant accused of killing his wife as it was based on a confession extracted after 36 hours of sleep deprivation and repeated interrogation.[82] The Court ruled that such practices were unacceptable in a democratic society.

---

[76] Alberto J. Mora, *Memorandum for Inspector General, Department of the Navy: Statement for the Record: Office of the General Counsel Involvement in Interrogation Issues*, 7 July 2004, p.4. Mora's memorandum was submitted to Vice Admiral Albert Church, who led a Pentagon investigation, in 2004, into abuses at Guantànamo.

[77] 'Torture Memo 3', p.62 (citing S. Hakki Onen et al., 'The Effects of Total Sleep Deprivation, Selective Sleep Interruption and Sleep Recovery on Pain Tolerance Thresholds in Healthy Subjects', (2001) *Journal of Sleep Research* 10(1), p.41). See fn.13.

[78] 'Torture Memo 3', p.63. See fn.13. He concluded this even for techniques that 'may involve a degree of physical pain … including facial and abdominal slaps, walling, stress positions, and water dousing.'

[79] Report of the Committee against Torture, A/57/44 (2002), para. 52(a)(ii) (Committee's concerns regarding Israel's report).

[80] 'Torture Memo 3', p.64. See fn.13.

[81] 'Torture Memo 3', p.65. See fn.13.

[82] *Ashcraft v. Tennessee* (1944), 322 United States 143, 155.

Experts agree that sleep deprivation 'is a basic, and potentially dangerous, physiological need state, [because the need for sleep is] similar to hunger or thirst and as basic to survival.'[83] Sleep deprivation reduces the 'body's tolerance for muscolskeletal pain, causing deep aches, first in the lower part of the body, followed by similar pains in the upper body.'[84] By generating major cognitive deficiencies similar to alcoholic inebriation, it works as a multiplier effect, enhancing the psyche's sensitivity to other mechanical (stress positions), thermal (exposure to heat and cold), and electrical (electric shock) interrogation methods. Sleep deprivation, however, also has its drawbacks in interrogation. Under repeated questioning, sleep-deprived subjects display 'a higher confidence, but not greater accuracy,' resulting in false information and confessions.[85]

'In any particular case, a combination of techniques might have unexpected results,' Bradbury admits, but then asserts that doctors and psychologists would stop the interrogations 'if deemed medically necessary to prevent severe mental or physical harm.'[86] This reasoning, however, ignores the real possibility that a doctor or psychologist is unlikely to recognise a 'medical crisis' until it happens, to say nothing of the fact that the definition of torture hinges not on lasting harm, but on severe pain and suffering. Indeed, at one point in their December 2004 memo, the authors seemingly contradict themselves by quoting an article in a medical journal to the effect that 'pain is a subjective experience and there is no way to objectively quantify it.'[87]

In their memoranda, Bradbury and his OLC associates also chose to ignore numerous ethical codes and declarations that international associations and medical associations have adopted, since the end of the Second War, that explicitly ban medical participation in torture and ill treatment. Among them are the 'Declaration of Tokyo' adopted by the World Medical Association in 1975, which states that physicians and other health professionals must not provide 'any premises, instruments, substances or knowledge to facilitate the practice of torture or other forms of [ill treatment] … or to diminish the ability of the victim to resist such treatment.'[88] More recently, the American Medical Association, in response to publicity about clinical involvement in interrogation sessions at Guantánamo and in CIA prisons, prohibited its members

---

[83] See J.A.E. Fleming, 'Pharmacological Aspects of Drowsiness' in Colin Shapiro and Alexander Smith (ed.), *Forensic Aspects of Sleep* (Chichester, NY: John Wiley and Sons, 1997), p.152.

[84] See Martha Lentz, Carol Landix, James Rothermel, and Joan Shaver, 'Effects of Selective Slow Wave Sleep Disruption on Musculoskeletal Pain and Fatigue in Middle Aged Women', (1999) *Journal of Rheumatology* 26, pp.1586-92. Also see S. Hakki Onen, Abdelkrim Alloui, Annette Gross, Alain Eschallier and Claude Dubray, 'The Effects of Total Sleep Deprivation, Selective Sleep Interruption and Sleep Recovery on Pain Tolerance Thresholds in Health Subjects', (2002) *Journal of Sleep Research* 10(1), pp.35-42.

[85] Mark Blagrove and Lucy Akehurst, 'Effects of Sleep Loss on Confidence-Accuracy Relationships for Reasoning and Eyewitness Testimony', (2000) *Journal of Experimental Psychology: Applied* 6(1), and Gisli Gudjonson, *The Psychology of Interrogations and Confessions* (West Sussex, England: Wiley, 2003), pp.389-90.

[86] 'Torture Memo 3', p.62. See fn.13.

[87] See Dennis C. Turk, 'Assess the Person, Not Just the Pain' (September 1993) *Pain: Clinical Updates*. Turk writes that 'Pain is a complex, subjective, perceptual phenomenon with a number of dimensions – intensity, quality, time course, impact, and personal meaning – that are uniquely experienced by each individual and, thus, can only be assessed indirectly.'

[88] A copy of the World Medical Association's 'Declaration of Tokyo', and other professional codes of ethics barring physicians from assisting in torture and ill treatment, can be found in . Stover and Nightingale (ed.), *The Breaking of Bodies and Minds,* pp.270- 9, Appendix A. See fn.41.For a discussion of the predicaments of 'dual loyalty' – where health professionals' loyalty toward their clients is in tension with their loyalty to the institutions they serve: see Elena O. Nightingale and Eric Stover, 'Toward the Prevention of Torture and Psychiatric Abuse' in Stover and Nightingale (ed.), *The Breaking of Bodies and Minds,* pp.244-6. See fn.41.

from participating in interrogations.[89] It also barred physicians from monitoring 'interrogations with the intention of intervening in the process, because this constitutes direct participation in interrogation.'[90] In 2008, members of the American Psychological Association voted to prohibit consultation by its members in the interrogation of detainees.[91]

6. The physical and psychological sequelae of torture and other forms of illegal cruelty

Bradbury, in reaching his conclusion that various harsh interrogation practices do not descend to the level of torture, even when used in combination, also disregards or discounts the medical and psychological research on the cumulative nature of abuse. He admits that 'the use of these techniques in combination is intended to, and in fact can be expected to, physically wear down a detainee,' but claims that 'it is difficult to assess as to a particular individual whether the application of multiple techniques renders that individual more susceptible to physical pain or suffering…'.[92] Nevertheless, he relies solely on the CIA's 'experience' when concluding that '[n]o apparent increase in susceptibility to severe pain has been observed either when techniques are used sequentially or when they are used simultaneously.'[93] Even as Bradbury explains that 'conditioning techniques' (such as nudity, sleep deprivation, and dietary manipulations) are often used prior to interrogation to 'wear down the detainee, physically and psychologically, and to allow other techniques to be more effective,' he still concludes that 'when combined [these techniques] would not operate in a different manner from the way they do individually, so as to cause severe pain.'[94] He cites no medical or psychological literature when making this assertion, saying only that '[the Office of Medical Services] doctors and psychologists … confirm [this].'[95]

The literature tells a different story. One recent study of torture survivors, for example, found that exposure to pain over time could produce 'a complex cumulative trauma.'[96] The researchers explained that 'when trauma accumulates beyond the person's threshold of resilience, [even] an added mild or moderate trauma can become "the last straw that broke the camel's back", causing all previous trauma to come to the forefront.'[97] Further insights emerge from the legal literature on domestic violence in relation to the debilitating effects of highly coercive relationships. As

---

[89] See American Medical Association Council on Ethical and Judicial Affairs, Statement on Interrogation of Prisoners (7 July 2006).

[90] American Medical Association Council on Ethical and Judicial Affairs, Statement on Interrogation of Prisoners.

[91] American Psychiatric Association, Psychiatric Participation in Interrogation of Detainees (21 May 2006); see also Benedict Carey, 'Psychologists Vote to End Interrogation Consultations', *New York Times*, 18 September 2009. In August 2009, the American Psychological Association also voted to amend its ethics code to clarify that it will not recognise a 'following the law' or 'following orders' defence to violations of human rights law during ethics adjudications. American Psychological Association Press Release, 'APA Council of Representatives Directs Change in its Ethics Code to Prevent So-Called Nuremburg Defense', 5 August 2009.

[92] 'Torture Memo 3', p.52. See fn.13.

[93] 'Torture Memo 3', pp.51, 61. See fn.13.

[94] 'Torture Memo 3', p.52. See fn.13

[95] 'Torture Memo 3', p.52. See fn.13

[96] American Psychological Association Press Release, 'Torture Victims More Resilient than Other Trauma Victims, but Cumulative Effects Take their Toll, According to New Research', 1 August 2004.

[97] American Psychological Association Press Release, 'Torture Victims More Resilient than Other Trauma Victims'. See fn.96

noted by Hopkins, in situations of domestic violence, fear is used 'as an underlying tactic to exacerbate the impact of individual acts of violence, and … maintain psychological control of the victim even in the absence of a violent act.'[98] The constant state of fear in which detainees are kept, and the ongoing (and escalating) nature of the interrogation tactics used against them, indicate the relevance of this literature to their condition, and the ways in which seemingly mundane treatment can add up to something much more insidious. Indeed, the similarities between the effects on victims of domestic violence and war-related trauma have been carefully documented.[99]

The torture memos also pay little attention to psychological torture. Bradbury argues that the principle effect of harsh interrogation techniques would be 'on the detainee's will to resist other techniques, rather than on the pain that the other techniques cause,'[100] and, thus, torture would not be implicated. Through this statement, Bradbury infers that physical pain is a more important consideration than psychological trauma when determining whether torture has been committed. However, research based on interviews with 279 torture survivors from Bosnia, Herzegovina, Republica Srpska, Croatia and Serbia has established that even '[f]orms of ill treatment during captivity that do not involve physical pain – such as psychological manipulation, deprivation, [and] humiliation … appear to cause as much mental distress and traumatic stress as physical torture.'[101] According to the researchers, '[s]ham executions, witnessing torture of close ones, threats of rape, fondling of genitals and isolation were associated with at least as much, if not more, distress than some of the physical torture stressors.'[102] Thus, the researchers concluded that

> aggressive interrogation techniques or detention procedures involving deprivation of basic needs, exposure to adverse environmental conditions, forced stress positions, hooding or blindfolding, isolation, restriction of movement, forced nudity, threats, humiliating treatment and other psychological manipulations do not appear to be substantially different from physical torture in terms of the extent of mental suffering they cause, the underlying mechanisms of traumatic stress and their long-term traumatic effects.[103]

Accordingly, the researchers concluded that their 'findings do not support the distinction between torture versus other cruel, inhuman and degrading treatment.'[104] Thus, they called for 'a broader definition of torture based on scientific formulations of traumatic stress and empirical evidence rather than on vague distinctions … that are open to endless and inconclusive debate and, most important, potential abuse.'[105] An accompanying editorial also encouraged a broader

---

[98] Catherine Quince Hopkins, 'Rescripting Relationships: Towards a Nuanced Theory of Intimate Violence as Sex Discrimination', (2001) *Virginia Journal of Social Policy and the Law* 9, pp.411, 432.

[99] Judith Lewis Herman, *Trauma and Recovery: The Aftermath of Violence—From Domestic Abuse to Political Terror* (Basic Books, 1997).

[100] 'Torture Memo 3', p.62. See fn.13.

[101] 'Physical and Psychological Torture Have Similar Mental Effects', *Medical News Today*, 12 March 2007. Available at http://www.medicalnewstoday.com/articles/64611.php (reporting on study results presented in (2007) *Archives of General Psychiatry* 64, pp.277-85). Last accessed 5 October 2009.

[102] 'Physical and Psychological Torture Have Similar Mental Effects,' *Medical News Today*. See fn.101.

[103] 'Physical and Psychological Torture Have Similar Mental Effects,' *Medical News Today*. See fn.101.

[104] 'Physical and Psychological Torture Have Similar Mental Effects,' *Medical News Today*. See fn.101.

[105] 'Physical and Psychological Torture Have Similar Mental Effects,' *Medical News Today*. See fn.101.

understanding of torture, arguing that '[the researchers] show that the severity of long-lasting adverse mental effects is unrelated to whether the torture or degrading treatment is physical or psychological and unrelated to objective measures of the severity of techniques.'[106]

Research findings by Metin Basoglu, head of section of Trauma Studies at King's College London and the Istanbul Centre for Behaviour Research and Therapy, confirm many of the findings of the Yugoslav study. Basoglu and his team found that being held captive in a hostile and life-threatening environment, deprivation of basic needs, sexual abuse, psychological manipulations, humiliation, exposure to extreme temperatures, isolation, and forced stress positions caused more psychological damage than physical torture.[107] Basoglu and his colleagues examined the effects on 432 individuals who were held captive and tortured in two different contexts. The group included 230 survivors from the recent wars in the former Yugoslavia who were tortured for weeks and months at a time, and 202 survivors who were detained and tortured for political reasons after the military *coup d'etat* in Turkey in the early 1980s. The researchers found that being held captive in a war setting was associated with a 2.8 times greater risk of Post-Traumatic Stress Disorder (PTSD) in comparison to being detained by state authorities in one's own country, possibly due to the greater perceived threat to life. In addition, being held captive by an enemy was a stronger risk factor for PTSD than the experience of physical torture itself.

Does a broad definition of torture downplay the importance of the problem of physical torture? Basoglu responded thus:

> Such views reflect a rather stereotypical image of torture as involving only certain atrocious acts of physical violence. While such disturbing images may be useful in channeling public reactions against torture, they also foster a skewed image of torture, reinforcing the perception in some people that 'cruel, inhuman, and degrading' treatments do not amount to torture. Far from downplaying the problem of torture, our studies highlight the fact that the reality of torture is far more serious than people generally believe.[108]

The importance of considering both physical and psychological suffering in identifying torture and other forms of inhuman treatment is illustrated by the experience of waterboarding. The authors of the torture memos argued, almost surreally, that, despite the drowning sensation experienced by the detainee, '[n]othing leads us to believe that the detainee would understand the procedure to constitute a threat of imminent death.'[109] Later, they focused on the temporal aspect of the practice, explaining that, because each application would last no more than 40 seconds, any physical distress ('which … would occur only during the actual application of water')[110] would be minimal, and, thus, any mental suffering could not be considered prolonged.[111] Besides

---

[106] Stephen H. Miles, 'Editorial: No Difference Between Torture, Other Forms of Maltreatment', (2007) *Archives of General Psychiatry* 64, pp.275-6.

[107] Metin Basoglu, 'A Multivariate Contextual Analysis of Torture and Cruel, Inhuman, and Degrading Treatments: Implications for an Evidence-Based Definition of Torture', (2009) *American Journal of Orthospychiatry* 79, pp.135-45.

[108] Basoglu, 'A Multivariate Contextual Analysis of Torture', pp.143-4. See fn.107

[109] 'Torture Memo 2', p.35. See fn.13.

[110] 'Torture Memo 2', p.45. See fn.13.

[111] 'Torture Memo 2', p.46. See fn.13.

the fact that 40 seconds can seem an eternity when experiencing extreme distress, these comments ignore the numerous times that an individual could be waterboarded in close succession. Indeed, at least one detainee was later revealed to have been waterboarded more than 180 times.[112]

Physicians for Human Rights has established that simulated drowning, even on its own, can result in the severe physical and psychological harm equated with torture. 'The experience of near suffocation is … associated with the development of predominantly respiratory panic attacks, high levels of depressive symptoms, and prolonged posttraumatic stress disorder.'[113] The Office of Legal Counsel (OLC) compared Survival, Evasion, Resistance, Escape (SERE) training experiences with detainees' experiences to argue that any harm must be nominal, but the situations are quite different.[114] The SERE program was initially developed, as noted in one *New York Times* article, 'to give American pilots and soldiers a sample of the torture methods used by Communists in the Korean War, methods that had wrung false confessions from Americans.'[115] The OLC reasoned that, because few service-persons had experienced prolonged mental harm following their exposure to various SERE techniques – the same techniques that the CIA was proposing to use on the detainees – the techniques could not be found to result in harm.[116]

Their conclusion, though, once again ignored contextual factors: first, SERE trainees have little reason to think that they will suffer severe harm. For detainees who are being held by hostile forces, there is no such reassurance and, thus, the psychological context is quite different. Additionally, SERE trainees are rarely subjected to multiple interrogation techniques in the same combinations, and to the same extent, as detainees. Furthermore, the waterboarding technique ultimately used by the CIA was more extreme than the technique, discussed by the OLC, that is common to SERE training[117] and, therefore, was not directly comparable. The duration of the technique also differed: as the OLC itself admitted, whereas SERE trainees are subjected to waterboarding at most twice,[118] one detainee was waterboarded 83 times and another was waterboarded 183 times.[119]

---

[112] See Scott Shane, 'Waterboarding Used 266 Times on 2 Suspects', *New York Times*, 19 April 2009.

[113] Physicians for Human Rights, *Leave No Marks: Enhanced Interrogation Techniques and the Risk of Criminality*, August 2007 (citing Colin Bouwer and Dan J. Stein, 'Panic disorder following torture by suffocation is associated with predominantly respiratory symptoms', [1999] *Psychological Medicine* 29, p.233). Available at http://physiciansforhumanrights.org/library/documents/reports/leave-no-marks.pdf. Last accessed 22 October 2009. Hans-Peter.P. Kapfhammer et al., 'Posttraumatic stress disorder and health-related quality of life in long-term survivors of acute respiratory distress syndrome', (2004) *American Journal of Psychiatry* 161, p.45.

[114] See Scott Shane and Mark Mazzetti, 'In Adopting Harsh Tactics, No Look at Past Use', *New York Times*, 21 April 2009.

[115] Shane and Mazzetti, 'In Adopting Harsh Tactics, No Look at Past Use'. See fn.144.

[116] Since SERE is used to train US military personnel to withstand torturous interrogation practices inflicted by other nations, by necessity the tactics must rise to that extreme. Yet, the OLC contradicts its own logic by arguing that none of the enhanced interrogation techniques that were 'reverse engineered' from SERE, such as waterboarding, would constitute torture, either in combination or alone. See 'Torture Memo 3', p.68. See fn.13.

[117] Andy Worthington, 'Ten Terrible Truths About the CIA Torture Memos (Part One)', 21 April 2009. Available at http://www.andyworthington.co.uk/2009/04/21/ten-terrible-truths-about-the-cia-torture-memos-part-one. Last accessed 5 October 2009.

[118] See 'Torture Memo 4', p.37. See fn.13.

[119] CIA Inspector General, 'Counterterrorism Detention and Interrogation Activities (September 2001-October 2003)', No 2003-7123-IG (7 May, 2004), pp. 90-1; see 'Torture Memo 4', p.37. See fn.13.

Sleep deprivation, as a potential aggravating factor, was apparently more difficult for the OLC to disregard. The predominant concern, from a psychological perspective, was hallucinating, since sleep deprivation resulting in hallucinations could be found to violate the Federal Anti-Torture statute's prohibition on techniques that are 'calculated to disrupt profoundly the senses or the personality.'[120] However, the OLC found that any disruption to the senses or personality that resulted from sleep deprivation could not be considered either 'prolonged' or 'profound', since those who are sleep deprived tend to recover quickly.[121] In contrast, Physicians for Human Rights has explained that sleep deprivation can result in prolonged mental harm, such as 'cognitive impairments including deficits in memory, learning, logical reasoning, complex verbal processing, and decision-making.'[122] They have also asserted that there is a 'complex and bidirectional relationship between sleep disturbance and psychiatric disorders.'[123] Notably, even the US Government has recognised sleep deprivation as torture when utilised by other nations.[124]

Finally, the authors of the torture memos ignore or gloss over the pernicious effects of solitary confinement,[125] especially when it is applied in conjunction with harsh interrogation techniques over extended periods. In contrast, the 2006 Army Field Manual recognised that solitary confinement, when used as part of an interrogation plan, was a highly sensitive technique that could cause harm to the detainee and, thus, should be strictly regulated.[126] Stuart Grassian, a psychiatrist with extensive experience in evaluating the psychiatric effects of confinement, has found that solitary confinement, especially when combined with severely restricted stimuli and activity, can have 'a profoundly deleterious effect on mental functioning'[127] and can cause both short- and long-term psychological and physical damage.

Seventy-five experts in medicine and law, meeting in Istanbul in 2007, concluded that solitary confinement can cause 'serious health problems regardless of the specific conditions, regardless of time and place, and regardless of pre-existing personal factors.'[128] Studies of the health aspects of solitary confinement suggest that symptoms can include perceptual distortions and hallucinations, extreme anxiety, hostility, confusion, difficulty with concentration, hyper-sensitivity to external stimuli, sleep disturbance, and psychosis.[129] Nine of the eighteen attorneys

---

[120] 18 U.S.C. § 2340(2)(B).

[121] 'Torture Memo 3', p36. See fn.13.

[122] Physicians for Human Rights, *Leave No Marks*, p.22. See fn.113.

[123] Physicians for Human Rights, *Leave No Marks*, pp.22-23. See fn.113.

[124] Physicians for Human Rights, *Leave No Marks*, p.24. See fn.113.

[125] Solitary confinement is defined as 'the physical isolation of individuals who are confined to their cells for twenty-two to twenty-four hours a day.' See 'The Istanbul Statement on the Use and Effects of Solitary Confinement' (2008) 18 *Torture*, pp.63-65 (adopted 9 December 2007 at the International Psychological Trauma Symposium, Istanbul).

[126] Army Field Manual 2-22.3, Human Intelligence Collector Operations, Appendix M, Restricted Interrogation Technique–Separation (emphasis added).

[127] See Stuart Grassian, 'Psychiatric Effects of Solitary Confinement', (2006) *Washington University Journal of Law and Policy* 22, pp.325-83.

[128] The Istanbul Statement on the Use and Effects of Solitary Confinement, p.63. See fn.125.

[129] See Stuart Grassian, 'Psychiatric Effects of Solitary Confinement'. See fn.127. See also Peter Scharff Smith, 'The Effects of Solitary Confinement on Prison Inmates: A Brief History of the Literature', (2006) *Crime and Punishment* 34, pp.441-528. A longitudinal study of prisoners in Denmark found that the incidence of psychiatric disorders developed 'was significantly higher in SC [solitary confinement] (28%) than in non-SC prisoners (15%).' See H.S. Anderson et al., 'A Longitudinal Study of Prisoners on Remand: Psychiatric Prevalence, Incidence, and Psychopathology in Solitary v. Non-Solitary Confinement', (2001) *Acta Psychiatrica Scandinavica* 102, pp.19-25.

that we interviewed for a study of former Guantánamo detainees said that prolonged periods of isolation and solitary confinement at the detention facility had particularly affected the mental health of their clients.[130] 'Negative health effects can occur after only a few days in solitary confinement, and the health risks rise with each additional day spent in such conditions.'[131]

What all of these studies demonstrate is that both physical and psychological torture can lead to negative health consequences and, in many cases, to the need for treatment. This reinforces why the authors of the UN Convention against Torture (UNCAT) urge States to cast a broad legal net aimed at banning a wide range of abusive practices. Indeed, if anti-torture laws like the UNCAT are to protect individuals from harm, they must be viewed in absolute terms[132] and not as inconvenient obstacles to be evaded by any means necessary.

7. Conclusion

In January 2009, Susan J. Crawford, the Pentagon official in charge of determining whether to bring Guantànamo detainees before military commissions, decided not to refer the case of Mohamed al-Khatani for prosecution based on her finding that the duration and negative effects of multiple interrogation techniques used on the Saudi national cumulatively constituted torture. What practices did Crawford find added up to torture? 'For 160 days [al-Khatani's] only contact was with interrogators.' He also experienced '18-20 hour interrogations' on '[f]orty-eight [out] of 54 consecutive days', '[s]tanding naked in front of a female agent', being '[s]ubject to strip searches … [a]nd insults to his mother and sister.'[133] In addition, he was threatened with a military dog, forced to wear women's underwear, and led around by a leash. According to his lawyers, he suffers from memory loss, loss of concentration, and paranoia, and is now 'a broken, suicidal man who can never be prosecuted because of his treatment at the hands of his captors.'[134] What Crawford recognised, and what Bradbury and his OLC associates ignored, is that no amount of parsing over legal definitions can overcome the medical evidence that severe abuse and mistreatment can equate with torture.

President Obama's early initiatives to rein in the interrogation polices established by his predecessor are starting to take shape. On 24 August 2009, Attorney General Holder announced that the administration would create a special multi-agency unit, the High-Value Detainee

---

[130] Laurel E. Fletcher and Eric Stover, *The Guantánamo Effect: Exposing US Detention and Interrogation Practices* (Berkeley, CA: University of California Press, 2009), p.73.

[131] The Istanbul Statement on the Use and Effects of Solitary Confinement, p.63. See fn.125.

[132] The UNCAT provides that 'no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political stability or any other public emergency, may be invoked as a justification of torture.' UNCAT Article 2. See fn.24.

[133] Bob Woodward, 'Detainee Tortured, Says US Official – Trial Overseer Cites "Abusive" Methods Against 9/11 Suspect', *Washington Post*, 14 January 2009.

[134] 'Official in Charge of Prosecuting Guantanamo Detainees Says Detainee Was Tortured by US', 14 January 2009. Available at http://www.historycommons.org/entity.jsp?entity=susan_crawford_. Last accessed 5 October 2009. Also see William Glaberson, 'Detainee Was Tortured, a Bush Official Confirms', *New York Times*, 14 January 2009. Department of Justice Press Release, 'Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President', 24 August 2009. Available at http://www.usdoj.gov/opa/pr/2009/August/09-ag-835.html. Last accessed 19 September 2009.

Interrogation Group (HIG), to oversee the interrogation of terrorist suspects.[135] The creation of the HIG provides an opportunity for the United States to reverse past policies to ensure that US interrogation practices do not subject detainees to illegal cruelty or torture. To achieve that goal, the HIG must take the following steps. First, the task force should consider the relationship between conditions of detention and interrogation practices. Detainees are affected by their conditions of confinement, as well as by the interrogation techniques to which they are subjected. A narrow examination of the impact of interrogation risks inadvertently permitting illegal treatment of detainees. For example, in our study of former Guantánamo detainees, we found that camp commanders explicitly subordinated camp administration and procedures to the priorities of interrogation and, thus, created an atmosphere of constant surveillance and intrusion in the cellblocks that dehumanised detainees. The operating assumption was that camp conditions should serve to weaken the defences of detainees and enable interrogators to break them down psychologically. Each component of the camp system – from the use of numbers, instead of names, to identify detainees to solitary confinement – was designed to increase the authority and power of camp interrogators, while compounding the detainee's sense of isolation, powerlessness, and uncertainty.[136] The question the task force must grapple with is 'when do conditions of incarceration become illegal cruelty or torture?'

Second, the task force should establish clear, unambiguous, and uniform guidelines for medical personnel working in all detention facilities where interrogations take place. The guidelines should be informed by existing codes of professional conduct and should take into consideration the ICRC's conclusion that the participation of medical personnel in abusive CIA interrogations was a 'gross beach of medical ethics.'[137] Finally, as former General Counsel of the US Navy Alberto Mora suggested in his testimony before the Senate Committee on Armed Services, the task force must develop a standard for evaluating when detention and interrogation practices descend to the level of torture or illegal cruelty under the UNCAT and domestic law. Interrogators and soldiers need clear guidance in the field to ensure that they recognise and comply with orders consistent with legal standards of humane treatment, and, conversely, are protected from sanctions for disobeying an illegal order. Such guidance should be based on a medico-legal approach to defining and analysing what constitutes torture and illegal cruelty.

Ultimately, the US must develop interrogation policies and practices that conform to both the letter and spirit of domestic and international law. Had the OLC lawyers had an interest in doing this, writes David Cole, 'they could have stopped the CIA abuses in their tracks. Instead, they used law not as a check on power but to facilitate brutality, deployed against captive human beings who had absolutely no other legal recourse.'[138]

A thorough revision of past policies and practices must include an investigation and assessment of responsibility for the US's adoption and implementation of torture, and other coercive interrogation policies. President Obama should appoint an independent, non-partisan commission of distinguished citizens to conduct this review. The commission should have subpoena power to compel witnesses to provide testimony and to allow the commission to gain access to all

---

[135] Anne E. Kornblut, 'New Unit to Question Key Terror Suspects: Move Shifts Interrogation Oversight from the CIA to the White House', *Washington Post,* 24 August 2009.

[136] Fletcher and Stover, *The Guantánamo Effect,* pp.119-20. See fn.130.

[137] ICRC Report on the Treatment of Fourteen 'High Value Detainees' in CIA Custody, pp.26-7. See fn.16.

[138] David Cole, 'The Torture Memos: The Case Against the Lawyers', (2009) *The New York Review of Books* 56, p.16. Available at www.nybooks.com/articles/23114. Last accessed 5 October 2009.

classified materials concerning the apprehension, detention, and interrogation of detainees taken into US custody and subjected to 'enhanced interrogation' techniques. The commission should have the authority to recommend a range of responses, including professional sanction of lawyers and medical personnel, or criminal proceedings against those who perpetrated abuses or who allowed such abuses to take place. The focus of the commission should be retrospective – to determine what went wrong and why – as well as prospective. Only then will the commission be able to create meaningful safeguards to prevent such a descent into sanctioned cruelty from ever happening again.

An open-access multidisciplinary peer-reviewed journal looking to the future of human rights research and practice.

http://www.ehrr.org

ehrr@ehrr.org

Essex Human Rights Review
Human Rights Centre, University of Essex,
Wivenhoe Park, Colchester CO4 3SQ, UK

HUMAN RIGHTS CENTRE