# 12 Torture

## 12.0. Introduction

The law of armed conflict (LOAC) and international humanitarian law (IHL) are clear in their positions regarding torture: It may never be engaged in, under any circumstances. U.S. military law, like the military law of all states, forbids torture. No exceptions are provided for. Torture nevertheless happens because, as Harvard law professor Alan Dershowitz points out, "[t]he tragic reality is that torture sometimes works, much though many people wish it did not."[1] Of course, asserting that torture sometimes works tells us nothing of its legal dimensions.

After the 9/11 attacks, a change in attitude overtook a portion of the American public, including members of the armed forces: In some circles torture came to be acceptable. A 2005 Associated Press–Ipsos survey of 1,000 Americans found that, where terrorism is involved, 61 percent of Americans do not rule out torture. Eleven percent responded that torture could be used often, 27 percent said sometimes, and 23 percent said rarely. Thirty-six percent said it could never be justified.[2] It is dismaying that, even the editor of *Armed Forces Journal*, a respected Washington publication, expressed support for torture in terrorism cases.[3] Richard A. Posner, the influential U.S. Court of Appeals judge for the Seventh Circuit, declared that in extreme circumstances the president can authorize torture to avoid catastrophic attack.[4] In 2004, Senator Trent Lott, when asked about his vocal defense of interrogation techniques used at Iraq's Abu Ghraib prison, replied, "... Interrogation is not a Sunday-school class. You don't get information that will save American lives by withholding pancakes. [Interviewer]: But unleashing killer dogs on naked Iraqis is not the same as withholding pancakes. [Lott]: I was amazed that people reacted like that. Did the dogs bite them? Did the dogs assault them? How are you going to get people to give information that will lead to the saving of lives?"[5] In 2006, President George W. Bush said, in a televised speech to the nation, "In some cases, we determine that individuals we have captured pose a significant threat, or may have intelligence that we and our allies need ... and they withhold information that could save American lives.

[1] Alan M. Dershowitz, *Why Terrorism Works* (New Haven, CT: Yale University Press, 2002), 137.
[2] Will Lester, "Poll Finds Support For Use of Torture In War on Terror," *Washington Times*, Dec. 7, 2005, 14. Majorities in Great Britain, France and South Korea responded similarly. In Italy and Spain majorities opposed torture under any circumstances.
[3] John G. Roos, "Editorial: Torture and Terrorists," *Armed Forces J.* (May 2005), 4.
[4] Richard A. Posner, *Not A Suicide Pact: The Constitution in A Time of National Emergency* (New York: Oxford University Press, 2006), 38.
[5] Deborah Solomon, "Questions for Trent Lott: All's Fair," *NY Times Sunday Magazine*, June 20, 2004, 15.

In these cases, it has been necessary to move these individuals to an environment where they can be held secretly, questioned by experts . . . And so the CIA used an alternative set of procedures."[6]

Professor Dershowitz has suggested "an alternative set of procedures" for interrogating captured terrorist suspects:

> [S]ay, a sterilized needle inserted under the fingernails to produce unbearable pain without any threat to health or life, or . . . a dental drill through an unanesthetized tooth. The simple cost-benefit analysis for employing such nonlethal torture seems overwhelming: it is surely better to inflict nonlethal 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.[7]

"American abhorrence to torture now appears to have extraordinarily shallow roots."[8] Is *kriegsraison* resurrected in America? Where terrorism is involved are any limits recognized? What is the worth of laws against torture, in practice? Should states honor treaties they have ratified, such as the Geneva Conventions and the Convention Against Torture, or should they not? Are the post–World War II convictions of Nazis for torture no more than victor's justice? Shall state governments ask their combatants to risk court-martial for extracting questionable intelligence from prisoners through torture? Proponents of torture ask, "What is torture and who defines it?" Shall military personnel shelter behind such sophistic hair-splitting to commit breaches of law and duty?

During the "war on terrorism," standards previously taken for granted have been questioned or ignored. "Just as worrisome is the subtler numbing effect on American society when the idea of torture begins to seem acceptable, even normal; when it becomes euphemized as 'extreme duress' or 'coercive' interrogation . . . "[9]

If a government orders or condones torture, is anyone other than the actual perpetrator responsible for the domestic and international law violations committed? In LOAC/IHL, principles of command responsibility and superior responsibility apply in an armed conflict, but how far up the chain of command does one go in finding culpability? To commanding generals? To theater commanders? Even higher?[10] In 2009,

[6] The White House. "President Discusses Creation of Military Commissions to Try Suspected Terrorists" (Sept. 6, 2006), available at: http://www.whitehouse.gov/news/releases/2006/09/20060906–3.html. Also see 100–4 *AJIL* (Oct. 2006), 936.

[7] Dershowitz, *Why Terrorism Works*, supra, note 1, at 144.

[8] David Luban, "Liberalism, Torture, and the Ticking Bomb," 91 *Va. L. Rev.* (2005), 1425, 1426.

[9] Pamela Constable, "Torture's Echoes," *Washington Post*, July 17, 2005, B3.

[10] Dan Eggen, "Bush Approved Meetings on Interrogation Techniques," *Washington Post*, April 12, 2008, A3: "President Bush said Friday that he was aware his top national security advisors had discussed the details of harsh interrogation tactics to be used on detainees. Bush also said . . . that he approved of the meetings, which were held as the CIA began to prepare for a secret interrogation program that included waterboarding, or simulated drowning, and other coercive techniques. . . . Bush said . . . 'And yes, I'm aware our national security team met on this issue. And I approved.'" Also, Sheryl G. Stolberg, "Bush Defends Interrogations, Saying Methods Aren't Torture," *NY Times*, Oct. 6, 2007, A1: "'I have put this program in place for a reason, and that is to protect the American people,' the president said." Also, Joby Warrick, "Top Officials Knew in 2002 of Harsh Interrogations," *Washington Post*, Sept. 25, 2008, A7: "[A]ccording to . . . the office of Secretary of State Condoleezza Rice . . . details of the controversial program were discussed in multiple meetings inside the White House over a two-year period . . . The written accounts specifically name former attorney general John D. Ashcroft and former defense secretary Donald H. Rumsfeld as participants . . . The committee's questionnaire did not specifically ask whether President Bush or Vice President Cheney attended the meetings . . . " Also, Joby Warrick, "CIA Tactics

Peru's Supreme Court convicted the former president of Peru, Alberto K. Fujimori, of ordering kidnappings and of the murder of twenty-five individuals in the early 1990s, during an internal armed conflict with Maoist Shining Path and Tupac Amaru guerrillas. Fujimori was sentenced to twenty-five years' confinement.[11] The concepts of civilian superior responsibility and military command responsibility are well-settled in LOAC/IHL jurisprudence.[12] Yale Professor W. Michael Reisman writes:

> [T]he national debate as to whether the president, as commander in chief in wartime, has an inherent "constitutional" power to order subordinates to torture in self-defense is irrelevant to an international inquiry . . . [V]iolations of international law by any organ or agency of a state will engage that state's responsibility; insofar as international law provides for individual responsibility, that responsibility now tracks up and down the chain of command that has ordered a violation of international law. Contrary national legal commands do not provide a defense.[13]

The potential responsibility of senior officers in the military chain of command for LOAC/IHL violations is clear:

> Superiors, by virtue of their elevated positions in the [military] hierarchy, have an affirmative duty to ensure that IHL is duly respected and that breaches are appropriately repressed. Their failure to do so can be interpreted as acquiescence in the unlawful acts of their subordinates, thereby encouraging further breaches and developing a culture of impunity. . . . [T]he consequences of a person's acts are necessarily more serious if he is at the apex of a military or political hierarchy and uses his position to commit crimes. Because he is a leader, his conduct is that much more reprehensible.[14]

Superior responsibility aside, a response to the assertion that torture is never permissible is that such an absolutist approach will cost American lives. Possibly it will, as do infantry attacks on enemy positions, air strikes on enemy facilities, or assaults on enemy-held coastlines. In wars, including the fight against terrorism, lives are lost, even the lives of civilians who have not enlisted in the fight. As British, Timorese, Irish, Spanish, and other civilian communities found in their conflicts with terrorists, Americans found on 9/11 that in some armed conflicts there are no exempt individuals, military or civilian.

Endorsed in Secret Memos," *Washington Post*, Oct. 15, 2008 A1: ". . . Rice last month became the first Cabinet-level official to publicly confirm the White House's awareness of the program in its earliest stages."

[11] For head of state immunity issues, see: Sarah Williams and Lena Sherif, "The Arrest Warrant for President Al-Bashir: Immunities of Incumbent Heads of States," 14-1 *J. of Conflict & Security L.* (Spring 2009), 71–92. Spain considered initiating prosecutions for torture against former-President Bush, Alberto R. Gonzales, John C. Yoo, Jay Bybee, William J. Haynes, David S. Addington, and Douglas J. Feith. Marlise Simons, "Spanish Court Weighs Criminal Inquiry on Torture for 6 Bush-Era Officials, *NY Times*, March 29, 2009, A6. The matter was quickly dropped after a preliminary review.

[12] For example, *Prosecutor v. Delalić*, IT-96-21-T (Nov. 16, 1998), paras. 377–378; and *Prosecutor v. Delalić*, IT-96-21-A (Feb. 20, 2001), paras. 200–209.

[13] W. Michael Reisman, "Editorial Comment: Holding the Center of the Law of Armed Conflict," 100–4 *AJIL* (Oct. 2006), 852, 854.

[14] Jamie Allan Williamson, "Some Considerations on Command Responsibility and Criminal Liability," 870 *Int'l Rev. of the Red Cross* (June 2008), 303, 312–13. This is emphasized in an ICTR case: "This Chamber finds as an aggravating circumstance that Kayishema as *Prefect*, held a position of authority. This Chamber finds that Kayishema was a leader . . . and this abuse of power and betrayal of his office constitutes the most significant aggravating circumstance." *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T (Sentence, May 21, 1999), para. 15.

If a nation is prepared to fight for principles, must not that nation be prepared to sacrifice, even die, for the same principles?

The Israeli high court writes, "A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties."[15]

During its war in Algeria, the French army tortured Algerian terrorist prisoners. "[T]his was to become a growing canker for France, leaving behind a poison that would linger in the French system long after the war itself had ended."[16] For seventeen years, during the Pinochet regime, Chile was a state of torture, murder, and disappearances. In their conflicts with terrorists, Israel, France, and Chile paid high prices for torturing.

In discussing torture it is difficult to separate the subject from societal values and imperatives that underlie its prohibition. In examining LOAC/IHL concerns relating to torture, this chapter includes issues that are not matters of law, but may influence a combatant's decisions regarding torture.

## 12.1. Torture Background

Ancient Greek law provided for the torture of foreigners and slaves to extract confessions. Freemen were exempted. Prior to the thirteenth century, trial by ordeal was conducted by the church, as it was around 1250, during the Inquisition. "Pope Innocent IV authorized the use of torture against heretics. Heresy, essentially 'treason against God,' was treated just like a serious crime before the civil courts . . . "[17] What the law refers to as "proof" developed in the thirteenth century in the city–states of Italy, and the concept of proof spread across the Continent. In early Roman law, circumstantial evidence alone, no matter how strong, was insufficient proof for conviction. Without two eyewitnesses, an accused could be convicted only if he confessed, and confessions were encouraged by torture. "Torture was permitted only when a so-called half proof had been established against the suspect. That meant either one eyewitness, or circumstantial evidence that satisfied elaborate requirements of gravity."[18] Unlike earlier Greek and Roman law, which allowed torture based on the status of the accused, the European justice system folded torture into general legal practice.[19]

Cases arose, however, in which the actual criminal was found out after an innocent accused had confessed under torture. By the mid-eighteenth century, after five hundred years of practice, judicial torture was abolished.

In 1863, the Lieber Code, in Article 16, addressed torture in a military context. "Military necessity does not admit of cruelty – that is, the infliction of suffering for the sake of suffering or for revenge . . . nor of torture to extort confessions. . . . " Today, torture is a grave breach of the 1949 Geneva Conventions. The 1993 Statutes of the International

[15] H.C. 5100/94, *Public Committee against Torture in Israel v. The State of Israel* (Sept. 6, 1999), at para. 39.
[16] Alistair Horne, *A Savage War of Peace* (New York: New York Review of Books, 1977), 195.
[17] James Ross, "A History of Torture," in Kenneth Roth, Minky Worden, and Amy Bernstein, eds., *Torture* (New York: The New Press, 2005), 10.
[18] John H. Langbein, "The Legal History of Torture," in Sanford Levinson, ed., *Torture: A Collection* (New York: Oxford University Press, 2004), 93–103, 95.
[19] Ross, "A History of Torture," supra, note 17, at 8.

Criminal Tribunals for the Former Yugoslavia and for Rwanda (ICTY, ICTR), charge it as a grave breach, and it is a crime against humanity under the Rome Statute of the International Criminal Court (ICC).

In international law, the 1984 UN Convention Against Torture (CAT),[20] and its Optional Protocol,[21] prohibit torture, as does the Universal Declaration of Human Rights.[22] The United States ratified the CAT in 1994.[23] Torture is a *jus cogens* offense – a peremptory norm in international law; a state may not "opt out" of the criminality of torture or of the enforcement of international legal provisions against it. "[P]erpetrators may be held criminally responsible notwithstanding national or even international authorization by legislative or judicial bodies to apply torture."[24]

A U.S. effort in the UN to set aside a 2002 optional protocol to the CAT establishing a system of worldwide inspections of prisons and detention centers was defeated in UN committee.[25] The United States has not signed the protocol.[26]

In U.S. domestic law implementing the CAT's prohibitions, torture is a felony under 28 U.S. Code §§ 1350, 2340(1) and 2340A, the latter section often referred to as the "Extraterritorial Torture Statute."* U.S. domestic law outlaws torture, but does not ban cruel, inhuman, or degrading treatment. The effectiveness of U.S. antitorture laws have not yet been demonstrated. Efforts of former Guantanamo detainees to bring torture charges against government officials encounter legal barriers that, so far, have closed courthouse doors to allegations of torture by U.S. officials.[27]

[20] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984).

[21] The CAT's Optional Protocol entered into force in June 2006. It establishes a Sub-Committee for the Prevention of Torture with authority to visit places of detention, such as police stations, prisons, military facilities, refugee camps, and immigration facilities, to assess their conditions and compliance with the CAT. State Parties are required to enact complementary domestic preventive mechanisms. See Alice Edwards, "The Optional Protocol to the Convention Against Torture and the Detention of Refugees," 57–4 *Int'l and Comp. L. Quarterly* (2008), 789–825.

[22] Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A (III), UN Doc. A/810 (1948), Art. 5. "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

[23] At ratification, the United States attached a reservation interpreting cruel, inhuman, and degrading treatment to mean treatment that violates the U.S. Constitution's 5th, 8th, and 14th Amendments.

[24] Christoph Burchard, "Torture in the Jurisprudence of the Ad Hoc Tribunals," in 6–2 *J. of Int'l Crim. Justice*, (May 2008), 159–182, at 162.

[25] Barbara Crossette, "U.S. Fails in Effort to Block Vote On U.N. Convention on Torture," *NY Times*, July 25, 2002, A5.

[26] Optional Protocol, U.N.G.A. Res. A/RES/57/199 (Dec. 18, 2002). At the time of writing, thirty-five states have ratified the protocol, in force since June 2006.

* In 2008, in Miami, Florida, Charles Taylor, the Boston-born son of former Liberian President Charles Taylor, was convicted of torturing prisoners, conspiring to torture, and use of a firearm in a violent crime, in Liberia's 1999–2003 common Article 3 armed conflict. The charges included allegations of electrically shocking various body parts of prisoners, and ordering the cutting of genitals of prisoners. Indictment, *U.S. v. Roy M. Belfast* (a.k.a. Chuckie Taylor, a.k.a. Charles M. Emmanuel) No. 06–20758 (S.D. Fla.), 2008. It was the first trial in the history of the 1994 "Extraterritorial Torture Act." John R. Crook, ed., "Contemporary Practice of the United States Relating to International Law," 103–1 *AJIL* (Jan. 2009), 132, 166. In January 2009, having been convicted of torture, conspiracy to torture seven victims, and use of a firearm in a violent crime, Taylor was sentenced to ninety-seven years' confinement.

[27] *Shafiq Rasul et al. v. General Richard Meyers, et al.*, 512 F3d 644 (C.A.D.C., Jan. 11, 2008). The federal appeals court held, at 661, " . . . it was foreseeable that conduct that would ordinarily be indisputably 'seriously criminal' would be implemented by military officials responsible for detaining and interrogating suspected enemy combatants." Besides the court's surprising assertion of foreseeability of military misconduct in Guantanamo interrogations, the court went on to find that the former detainees possessed no constitutional rights and ruled against them on all claims, even after assuming their allegations of torture

In military law, torture may be prosecuted under several provisions of the Uniform Code of Military Justice, including Article 128, assault and aggravated assault; Article 124, maiming; plus articles relating to the maltreatment of prisoners, dereliction of duty, and conduct unbecoming an officer or conduct prejudicial to good order and discipline. There are numerous military orders, directives, and instructions which may give rise to court-martial prosecution for violation of lawful general orders that prohibit torture.

## 12.2. Defining Torture

Wrenching fingernails from a prisoner's fingers is easily recognized as torture. Wiring a detainee's genitalia to an electrical source and applying current is torture. Hammering a captive's toes with a blunt instrument is torture. Tying the arms of a prisoners of war (POW's) behind his back until his elbows touch, then raising him off the floor by his bound arms via an overhead rope until his shoulders dislocate, is torture.[28]

Some mistreatment so clearly constitutes torture that it requires no definitional validation, but mistreatment meeting legal definitions of torture can be less clear. Is it torture to force a captive to stand for five hours? It depends. Is the captive a healthy twenty-four-year-old military pilot or a seventy-year-old grandmother with diabetes, asthma, and a heart condition?

"[T]he basic formula [prohibiting the ill-treatment of prisoners], 'torture or cruel, inhuman or degrading treatment or punishment', is that of Article 5 of the Universal Declaration of Human Rights. All the human rights treaties that contain the prohibition effectively reproduce this formula . . . This approach, of dividing the formula into its component parts, was started by the European Commission of Human Rights . . . "[29] Early cases attempting to differentiate between what constitutes torture and what is "merely" cruel, inhuman, and degrading treatment include the 1969 *Greek* case[30] and the 1978 *Five Techniques* case.[31]

Article 1 of the CAT provides a frequently cited human rights–oriented definition of torture:

> For the purposes of this Convention, the term "torture" means 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

and unlawful detention to be true. "The Court's ruling has the peculiar effect of validating the superior orders defence that has been criticized since Nuremburg. According to the Court, US military officials are immune for any action taken pursuant to superior orders, because such actions would be within the scope of employment. . . . " Jaykumar A. Menon, "Guantánamo Torture Litigation," 6–2 *J. of Int'l Crim. Justice* (May 2008), 323–45, 42. In Dec. 2008 the Supreme Court instructed the *Rasul* court to reconsider its opinion. An earlier federal appeals court decision, *Leon v. Wainwright*, 734 F.2d 770 (C.A. 11 (Fla.), 1984), was similarly unsympathetic to a plaintiff's action after Leon was tortured by Miami police officers to reveal a kidnap victim's location.

[28] Such torture is described in: VAdm. James B. Stockdale and Sybil Stockdale, *In Love and War* (Annapolis, MD: Naval Institute Press, 1990), 170–2; and, Lt.Cmdr. John M. McGrath, *Prisoner of War: Six Years in Hanoi* (Annapolis, MD: Naval Institute Press, 1975), 78–9.

[29] Nigel S. Rodley, *The Treatment of Prisoners Under International Law*, 2d ed. (Oxford: Oxford University Press, 1999), 75.

[30] *Askoy v. Turkey* (1996) 23 EHRR 533.

[31] *Ireland v. U.K.* (1978) 2 EHRR 25, ECtHR. The "five techniques" employed by British forces in interrogating IRA suspects were wall-standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink.

> 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 CAT's definition is altered by the ICTY's *Kunarac* decision, in that the involvement of a public official is not required.[32] Although not bound by ICTY decisions, it is likely that a U.S. war crime prosecution for torture would apply the *Kunarac* amendment.

CAT Article 2.2. notes, "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."

Definitions of torture contained in U.S. domestic law incorporate the central focus of the CAT's lumbering definition: severe pain or suffering, whether physical or mental. Under customary law, "the enumerated purposes [for torturing] do not constitute an exhaustive list, and there is no requirement that the conduct must be solely for a prohibited purpose. It suffices that the prohibited purpose is part of the motivation behind the conduct . . . "[33]

Conventions and definitions do not, however, pin down what actually constitutes torture. No document could. Torture, like "reasonableness," is a moving target. It cannot be defined with exactness. "Besides, it is always dangerous to try to go into too much detail – especially in this domain. However great the care taken in drawing up a list of all the various forms of infliction, it would never be possible to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes."[34] Torture to one person might be merely bothersome to another. Torture is individual and situational.

Nor is torture always physical in nature. "Psychological torture is a very real thing. It should not be minimized under the pretext that pain and suffering must be physical in order to be real."[35] Particularly in cases involving female prisoners, mental torture suggesting sexual assault may occur even where actual rape or assault does not follow.

The American Psychological Association prohibits members from involvement in what it considers torture: waterboarding, mock execution, forced nakedness, induced hypothermia, stress positions, extended sleep deprivation, exposure to extreme heat or cold, and the use of psychotropic drugs,[36] among other restrictions sounding not only in torture but so-called "torture lite" – acts which may constitute cruel, inhuman, or degrading

[32] *Prosecutor v. Kunarac, et al.*, IT-96-23 & 23/1-A-T (Feb. 22, 2001), at paras. 482–9.

[33] Kriangsak Kittichaisaree, *International Criminal Law* (Oxford: Oxford University Press, 2001), 111.

[34] Jean S. Pictet, ed., *Commentary, IV Geneva Convention* (Geneva: ICRC, 1958), 39.

[35] Hernán Reyes, "The Worst Scars Are in the Mind: Psychological Torture," 867 *Int'l Rev. of the Red Cross*, (Sept. 2007), 591, 615.

[36] APA Press Release (Aug. 20, 2007), "American Psychological Association calls on U.S. government to prohibit the use of unethical interrogation techniques," available at: http://www.apa.org/releases/councilreso807.html. In Sept. 2008, the Association membership voted to prohibit any consultation in the interrogation of detainees at Guantanamo, and at any CIA-operated "black site." Later, it was revealed that CIA "Office of Medical Services" psychologists had nevertheless routinely been significant participants in the torture of detainees in secret CIA prisons. Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency; From: U.S. Department of Justice, Office of Legal Counsel; Re: Application of United States Obligations Under Article 16 of the Convention Against Torture (May 30, 2005), at 8.

treatment short of torture. The Geneva Conventions do not distinguish between torture and "torture lite" but simply ban the mistreatment of prisoners.

From the description of torture found in the CAT, in the Statute of the ICC, and in domestic laws, three categories of torture may be distinguished: torture as a crime against humanity under international criminal law as applied by international criminal legal bodies such as the ICTY; torture as a crime under customary international law, relating particularly to the CAT, as prosecuted most often in domestic courts; and torture as a war crime.[37] We concentrate here on torture, including cruel, inhuman, and degrading treatment, as a war crime. Although torture is everywhere denied,

> . . . implicit justifications of torture and inhuman treatment reappear even in democratic societies when they consider themselves under threat. Blunt denial of . . . torture or inhuman treatment is replaced by legalistic interpretations of what constitutes torture, as opposed to "only" cruel, inhuman or degrading treatment, or by considerations as to which measures should be allowed in so-called "highly coercive", "enhanced" or "in-depth" interrogation. A narrow interpretation of torture would render its prohibition virtually meaningless. An absurd interpretation of that kind culminated in an infamous memorandum . . . [38]

The "infamous memorandum" is the 2002 Bybee memo, named for its signatory, Assistant Attorney General Jay S. Bybee. Written in the Office of Legal Counsel (OLC) of the U.S. Department of Justice (DOJ), the Bybee memo defined torture so narrowly that no executive branch officer or employee, Central Intelligence Agency (CIA) agents, for example, could be convicted of torture in a U.S. domestic court. According to the U.S. Senate Armed Services Report on Torture, the Bybee memo "distorted the meaning and intent of anti-torture laws, rationalized the abuse of detainees . . . and influenced Department of Defense determinations as to what interrogation techniques were legal . . . "[39] Addressing the "specific intent" aspect of the crime, for example, the memo held that, " . . . the infliction of such pain must be the defendant's precise objective . . . If the defendant acted knowing that severe pain or suffering was reasonably likely to result . . . he would have acted only with general intent. . . . [A] defendant is guilty of torture only if he acts with the express purpose of inflicting severe pain or suffering . . . "[40] What constitutes "severe pain"? The memo answered, "the level [of pain] that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions . . . "[41] Apropos to interrogations conducted by military personnel, the memo ascribed surprisingly broad powers to the president: "As Commander-in-Chief, the President has the constitutional authority to order interrogations of enemy combatants to gain intelligence information . . . Any effort to apply Section 2340A [a U.S. federal law criminalizing torture] in a manner that interferes with

[37] Burchard, "Torture in the Jurisprudence of the Ad Hoc Tribunals," supra, note 24, at 161.
[38] Toni Pfanner, "Editorial," 867 *Int'l Rev. of the Red Cross* (Sept. 2007), 502.
[39] "Executive Summary: Senate Armed Services Report on Torture" (Dec. 12, 2008), 15, available at: http://media.washingtonpost.com/wp-srv/nation/pdf/12112008_detaineeabuse.pdf.
[40] Memorandum for Alberto Gonzales; from Department of Justice, Office of Legal Counsel; *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A* (Aug. 1, 2002), Reprinted in Karen J. Greenberg and Joshua L. Dratel, *The Torture Papers* (New York: Cambridge University Press, 2005), 172; available at: http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/terrorism/dojtorture123004mem.pdf.
[41] Id.

the President's direction of such core war matters as the detention and interrogation of enemy combatants thus would be unconstitutional."[42] The Bybee memo also asserted the availability of defenses understood in most courtrooms to be inapplicable for alleged acts of torture.

A subsequent head of the Justice Department's OLC wrote, "How could OLC have written opinions that, when revealed to the world . . . made it seem as though the administration was giving official sanction to torture, and brought such dishonor to the United States . . . ? How could its opinions reflect such bad judgment, be so poorly reasoned, and have such a terrible tone?"[43] John Yoo, reportedly the Bybee memo's principle author, argued:

> Classified memos prepared by OLC . . . were handed to the press. After administration opponents had finished scouring them for juicy passages for popular consumption, the charges that the Bush administration had sought to undermine or evade the law flew fast and furious. . . . But would limiting a captured terrorist to six hours sleep, isolating him, interrogating him for several hours, or requiring him to exercise constitute "severe physical or mental pain or suffering"?[44]

The Bybee memo covered much more than that, however. Because it was directed to federal law enforcement interrogations, the memo was not applied by the military. In 2003, however, another Yoo-authored memo that *was* applicable to military interrogators was delivered by OLC to the Pentagon's general counsel. The eighty-one-page memo asserted "that federal laws prohibiting assault, maiming and other crimes did not apply to military interrogators who questioned al-Qaeda captives because the president's ultimate authority as commander in chief overrode such statutes."[45] Nine months later, in December 2003, that memo was withdrawn by a new head of the OLC, who considered it badly reasoned and legally defective. In June 2004, the Bybee memo itself was withdrawn, two years after it was issued. It was replaced by a December 2004 memo that retained some of the core Bybee elements.[46]

In March 2003, Jay S. Bybee left the Justice Department to become a judge on the U.S. Ninth Circuit Court of Appeals. That might give pause to those who suggest court-issued "torture warrants."[47]

Professor Ruth Wedgwood and James Woolsey, a former director of the CIA, wrote of the OLC memos:

> Interrogation methods for combatants and detainees must be framed in light of the applicable law, even in the war against al Qaeda, and a president needs to know where the red lines are . . . Yet the recently released memos delivered by the Justice Department's

[42] Id.

[43] Jack Goldsmith, *The Terror Presidency* (New York: Norton, 2007), 165.

[44] John Yoo, *War by Other Means* (New York: Atlantic Monthly Press, 2006), 169, 171–2.

[45] Dan Eggen and Josh White, "Memo: Laws Didn't Apply to Interrogators," *Washington Post*, April 2, 2008, A1; and Mark Mazzetti, "'03 U.S. Memo Approved Harsh Interrogations," *NY Times*, April 2, 2008, A1. The two accounts refer to: Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations (April 4, 2003). Reprinted in Greenberg and Dratel, *Torture Papers*, supra, note 40, at 286.

[46] John R. Crook, ed., "Contemporary Practice of the United States Relating to International Law," 99–2 *AJIL* (April 2005), 479.

[47] For example, Dershowitz, *Why Terrorism Works*, supra, note 1, at 158. Torture warrants would be violations of international law.

> Office of Legal Counsel to the White House . . . do not give an adequate account of the law. . . . The president's need for wise counsel is not well served by arguments that bend and twist to avoid any legal restrictions . . . This diminished definition of the crime of torture will be quoted back at the United States for the next several decades.[48]

Army Lieutenant General Ricardo Sanchez was commander of coalition ground forces in Iraq from June 2003 to June 2004. He placed partial responsibility on Washington's political leadership for torture committed by military personnel under his command. Citing a presidential memorandum that, he incorrectly says, stated that the Geneva Conventions did not apply to the Taliban or al Qaeda,[49] General Sanchez writes:

> During the last few months of 2002 . . . there is irrefutable evidence that America was torturing and killing prisoners in Afghanistan. . . . In essence, the administration had eliminated the [U.S. military's] entire doctrinal, training, and procedural foundations that existed for the conduct of interrogations. It was now left to individual interrogators to make the crucial decisions of what techniques could be utilized . . . In retrospect, the Bush administration's new policy triggered a sequence of events that led to harsh interrogation tactics against not only al-Qaeda prisoners, but also eventually prisoners in Iraq.[50]

General Sanchez would draw a straight line from the White House to military interrogators in the field, but there are multiple layers of command authority between the two.[51] Regardless of the wisdom of the president initially denying Geneva coverage to prisoners, there were Department of Defense (DoD) Instructions, Department of the Army Directives, plus theater, corps, division, and battalion orders prohibiting torture and detailing permissible interrogation methods. Still, a confusing presidential directive that, " . . . detainees be treated humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva,"[52] gives military commanders chilling guidance: If you consider that military necessity requires it, disregard Geneva. Humanitarian protections were only a matter of policy, and the CIA was not included even as a matter of policy.

[48] Ruth Wedgwood and R. James Woolsey, "Law and Torture," *Wall Street Journal*, June 28, 2004, 10.

[49] White House memorandum (Feb. 7, 2002), For the Vice President, Secretary of State, Attorney General, Chief of Staff to the President, Director of Central Intelligence, Assistant to the President for National Security Affairs, and the Chairman of the Joint Chiefs of Staff; Subject: Humane Treatment of al Qaeda and Taliban Detainees. "2. Pursuant to my authority as Commander-in-Chief . . . I hereby determine as follows: a. . . . [N]one of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world . . . b. . . . I determine that the provisions of Geneva will apply to our present conflict with the Taliban [in Afghanistan]." The memo goes on to say that common Article 3 does not apply to either the Taliban or al Qaeda, and that neither group qualifies for POW status. Reprinted in Greenberg and Dratel, *Torture Papers*, supra, note 40, at 134.

[50] Lt.Gen. Ricardo Sanchez, *Wiser in Battle* (New York: Harper Collins, 2008), 150.

[51] Gen. Sanchez did not come to the issue with clean hands. See "Executive Summary: Senate Armed Services Report on Torture," supra, note 39, at 12, 17: "On September 14, 2003 . . . Lieutenant General Ricardo Sanchez issued the first CJTF-7 interrogation SOP [Standard Operating Procedure]. That SOP authorized interrogators in Iraq to use stress positions, environmental manipulation, sleep management, and military working dogs in interrogations. Lieutenant General Sanchez issued the . . . policy with the knowledge that there were ongoing discussions about the legality of some of the approved techniques. . . . Conclusion 17: Interrogation policies approved by Lieutenant General Sanchez . . . were a direct cause of detainee abuse in Iraq."

[52] White House memorandum (Feb. 7, 2002), For the Vice-President . . . and the Chairman of the Joint Chiefs of Staff. Reprinted in Greenberg and Dratel, *Torture Papers*, supra, note 40, at 135.

Does a threat to inflict pain constitute torture? In the well-known *Daschner* case, such a threat was a central issue.[53] In 2002, Frankfurt Police Vice-President Wolfgang Daschner questioned prisoner Magnus Gaefgen, a law student who had kidnapped the eleven-year-old son of a German bank executive. Gaefgen was captured by Frankfurt police as he picked up the ransom money and, at first, he resisted interrogation. At Daschner's order, a subordinate officer told Gaefgen that the police were prepared to inflict pain on him that "he would never forget" and that a police specialist in such matters was flying to Frankfurt for that purpose. Gaefgen promptly revealed that he had accidentally killed the child during the initial kidnapping and gave police the body's location. Gaefgen was unharmed and untouched by the police, although a specially trained officer had in fact been dispatched to Frankfurt. Gaefgen was convicted of murder and sentenced to life imprisonment. Daschner and the subordinate officer were also tried, giving rise to international debate heavily weighted in support of the policemen.

The German court trying the policemen dodged the legal issue of threatening to torture. It is a simplification of the court's judgment to relate that Daschner's written report admitting his order was ruled inadmissible. However, the court found he had committed coercion, and had ordered coercion, both of which are violations of the German Criminal Code. The subordinate officer was also found to have committed coercion. In German practice, however, court findings of "having committed" offenses are not the same as *convictions* of those offenses. The sympathetic court, invoking a rarely used rule, reprimanded both policemen, rather than convicting them. Daschner was fined 10,800 Euros, the subordinate 3,600 Euros.

To constitute a violation the CAT, Article 1 requires the actual "*infliction* of torture." Apropos to the Daschner case, however, the European Court of Human Rights, in a 1982 decision, held that a threat to torture which is "sufficiently real and immediate" itself constitutes torture.[54] No military case involving a threat to torture has been located.

### 12.2.1. *Defining Torture as a LOAC Violation*

Torture is prohibited by 1907 Hague Regulation IV, Article 4 (by implication); by 1949 Geneva Convention common Article 3, and common Article 50/51/130/147; by 1977 Additional Protocol I, Article 75.2 (ii); Additional Protocol II, Article 4.2.(a); and by the Statutes of the ICTY and ICTR. "State practice establishes this rule [against torture] as a norm of customary international law applicable in both international and non-international armed conflicts."[55] LOAC/IHL similarly prohibits cruel, inhuman, and degrading treatment.[56] The prohibitions against torture – international, domestic, military, and civilian – are universal and comprehensive, yet torture appears to be more common today than in any recent time.

As mentioned, ICTY case law has modified the CAT's definition of torture. Initially, the ICTY's definition retained the CAT's requirement that the torture must be committed

[53] No court opinion in English has been located. The case is discussed at length in, Florian Jessberger, "Bad Torture – Good Torture?" 3–5 *J. of Int'l Crim. Justice* (Nov. 2005), 1059; and (no author cited) "Respect for Human Dignity in Today's Germany," 4–4 *J. of Int'l Crim. Justice* (Sept. 2006), 862.

[54] *Campbell and Cosans v. U.K.* (Feb. 1982) 4 EHRR 293, para. 26.

[55] Jean-Marie Henckaerts and Louise Doswald-Beck, eds., *Customary International Humanitarian Law*, vol. I, *Rules* (Cambridge: Cambridge University Press, 2005), Rule 90, at 315.

[56] Id.

by a public official,[57] but the ICTY eventually abandoned that element.[58] The ICTY also finds torture without involvement of a public official in non-international armed conflicts, where it can also be committed by nonstate actors.[59]

The Rome Statute of the ICC, Article 8(2) (a) (ii)-1, lists the war crime of torture committed in an international armed conflict.[60] That war crime has six elements, akin to a definition of torture:

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.[61]
2. The perpetrator inflicted the pain or suffering for such purposes as obtaining information or a confession, punishment, intimidation, or coercion or for any reason based on discrimination of any kind.
3. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
4. The perpetrator was aware of the actual circumstances that established that protected status.
5. The conduct took place in the context of and was associated with an international armed conflict.[62]
6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Definitions and discussions of what constitutes cruel, inhuman, and degrading treatment, as opposed to torture, are the subject of articles and books. "[T]here is no difference in meaning between cruel and inhuman treatment. Also, the lines between degrading treatment, cruel or inhuman treatment and torture are fluid."[63] Cruel treatment does

[57] *Prosecutor v. Furundžija*, IT-95-17/1 (Dec. 10, 1998), para. 162.

[58] *Prosecutor v. Kunarac*, IT-96-23 & IT-96-23/1 (Feb. 22, 2001), paras. 491, 493. See Cases and Materials, this chapter.

[59] Cordula Droege, "'In Truth the *Leitmotiv*': The Prohibition of Torture and Other Forms of Ill-Treatment in International Humanitarian Law," 867 *Int'l Rev. of the Red Cross* (Sept. 2007), 515, 525–6. The 2006 Military Commissions Act, at 10 USC § 950v (b)(12), lists two definitions of cruel and inhuman treatment, one applying to mistreatment occurring before enactment of the Act, the other, more stringent definition, applying to acts after its enactment. The two definitions are an effort to immunize CIA personnel who engaged in torture early in the war on terrorism.

[60] ICC Article 8 (2) (c) (i)-4 is the war crime of torture in *non*-international armed conflict, the elements of which are much the same as in 8(2) (a) (ii)-1. Article 7 (1) (f) is the crime against humanity of torture, involving conduct "committed as part of a widespread or systematic attack directed against a civilian population."

[61] What level of pain or suffering is required? "It is difficult to establish precisely the threshold of suffering or pain required. . . . [M]ental anguish alone may constitute torture provided that the resulting suffering is sufficiently serious . . . [T]he 'severity' of the pain or suffering 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:'" Knut Dörmann, *Elements of War Crimes Under the Rome Statute of the International Criminal Court* (Cambridge: Cambridge University Press, 2003), Art. 8(2) (a) (ii), at 51, citing ECtHR, *Selmouni v. France*, Judgment of July 28, 1999, Reports of Judgments and Decisions, 1999-V, para. 100.

[62] With respect to both the fifth and sixth elements, it is not required that the accused make a legal evaluation as to the existence of an armed conflict or its character; and there is no requirement the accused be aware of the facts that established the character of the conflict. The requirement is that the accused be aware of facts establishing the existence of an armed conflict. Id., Dörmann, at 15.

[63] Droege, "'In Truth the *Leitmotiv*'," supra, note 59, at 519.

constitute a violation of common Article 3[64] and of Article 4(2)(a) of Additional Protocol II, which, reminiscent of common Article 3, describes it as "torture, mutilation or any form of corporal punishment . . . " Taking its guidance from Protocol II, one ICTY Trial Chamber concluded that, "[t]hese instances of cruel treatment [specified in ICTY Statute Article 4(2)(a)], and the inclusion of 'any form of corporal punishment' demonstrate that no narrow or special meaning is here being given to the phrase 'cruel treatment'."[65] In ICTY jurisprudence, cruel treatment has been charged in cases of beatings,[66] and inhumane living conditions in detention centers.[67]

In the ICC's view there is no difference between "cruel treatment" and "inhuman treatment."[68] ICTY case law similarly defines both cruel treatment and inhuman treatment as "treatment which causes serious mental or physical suffering or constitutes a serious attack upon human dignity, which is equivalent to the offence of inhuman treatment in the framework of the grave breaches provisions of the Geneva Conventions."[69] "Cruel treatment, inhuman treatment, and inhumane acts basically require proof of the same elements, though the terminology may vary slightly between the three of them. All three prohibitions function . . . as residual clauses capturing all serious charges not otherwise enumerated . . . "[70]

What constitutes the LOAC/IHL grave breach of torture is reasonably clear. Although cruel, inhuman and degrading treatment are LOAC/IHL violations in both international and non-international armed conflicts, they are not as well-defined. What can be said is that torture and cruel treatment are differentiated by the degree of seriousness required for the two offenses, and by the requirement of a prohibited purpose for the offense of torture.[71]

## 12.3. Why Torture?

Why engage in torture? Professor and ethicist David Luban posits that a person tortures with one of five aims, or purposes.[72] First, as a form of victor's pleasure – the military victor captures his enemy and tortures him to demonstrate his mastery and to humiliate the

[64] In an unreported Oct. 2005 case, *LJN: AU4373, Rechtbank's-Gravenhage, 09/751005–04*, and *09/750006–05*, on the basis of common Article 3, the Hague District Court convicted two Afghan asylum seekers of torturing civilians and of other war crimes in the 1978–1992 Afghan War. The two former members of the Afghan military intelligence service were sentenced to twelve and nine years' confinement, respectively. Guénaël Mettraux, "Dutch Courts' Universal Jurisdiction over Violations of Common Article 3 *qua* War Crimes," 4–2 *J. of Int'l Crim. Justice* (May 2006), 362; and Ward Ferdinandusse, "On the Question of Dutch Courts' Universal Jurisdiction," 4–4 *J. of Int'l Crim. Justice* (Sept. 2006), 881.

[65] *Prosecutor v. Tadić*, IT-94-1-T, Judgment (May 7, 1997), para. 725.

[66] *Prosecutor v. Jelisić*, IT-95-10-T (Dec. 14, 1999), paras. 42–45; and *Prosecutor v. Krnojelac*, IT-97-25-T (March 15, 2002), para. 176.

[67] Id., *Krnojelac*, para. 128; and *Prosecutor v. Delalić*, IT-96-21-T (Nov. 16, 1998), paras. 554–8.

[68] Dörmann, *Elements of War Crimes*, supra, note 61, Art. 8(2) (c) (i) – 3, at 398.

[69] *Prosecutor v. Delalić*, supra, note 67, at para. 551.

[70] Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford: Oxford University Press, 2005), 116. Footnote omitted. *Prosecutor v Delalić*, IT-96-21-A (Feb. 20, 2001), does specify elements required to prove cruel treatment, at para. 424. *Prosecutor v. Vasiljević*, IT-98-32-T (Nov. 29, 2002), paras. 234–7, specifies elements necessary to prove inhumane acts; in this case, attempted murders.

[71] Mettraux, id., at 117. The prohibited purposes necessary to commit the LOAC/IHL violation of torture, per the CAT, are obtaining information or a confession; punishing, intimidating, or coercing the victim or a third person; and discriminating on any ground against the victim or a third person.

[72] Luban, "Liberalism, Torture, and the Ticking Bomb," supra, note 8, at 1429.

loser. Second, to instill terror – dictators from Hitler to Saddam tortured political prisoners to terrorize their subjects into submission. Third, punishment – criminal punishment to deter opposition and demonstrate the power of the government, or the ruler, was employed until the last two centuries. Fourth, extracting confessions – as mentioned, premodern legal rules required eyewitnesses or confessions for criminal convictions, perversely resulting in judicial torture. Other confessions related to "true faith" – the Inquisition and the Salem witchcraft trials, for instance. The torturer was merely the instrument of justice of the Almighty. Fifth, intelligence gathering – torture to extract information from prisoners who will not willingly talk. We are concerned with Professor Luban's last purpose, torture applied in times of armed conflict; its reasons, justifications, results, and its LOAC/IHL issues.

Torture related to LOAC/IHL differs from torture related to law enforcement. "[T]he nature and objectives of police interrogations differ significantly from those in military or intelligence contexts. In essence, most LE interrogations seek to obtain a confession from a suspect, rather than to gather accurate, useful intelligence."[73] What little empirical study has been conducted regarding interrogation relates to law enforcement scenarios. Still, there are instructive parallels between torture for military intelligence and torture for police confessions.

### 12.3.1. *Torture Does Not Produce Actionable Intelligence*

In the summer of 1969, in the U.S.–Vietnam conflict, the 1st Battalion of the 7th Marines was in continuous combat. In a single August engagement, the battalion commander was killed, along with eighteen other Marines and two navy corpsmen.

Following one of that summer's firefights, a North Vietnamese Army (NVA) soldier with a slight buttock wound was captured. "The NVA had a battle dressing placed on his buttocks and tied around his leg, and he was stiff, frightened, and in a lot of pain. Two Vietnamese scouts crouched beside him and began firing off questions. The NVA gritted his teeth in a grimace of pain, and shook his head no, no, no. One of the scouts slid his knife up the prisoner's anus, then twisted. The man's eyes almost popped from his head. He talked."[74]

Talked of what, one wonders? Did he reveal weapons caches or tactical plans? Tactical interrogation of low-level suspected terrorists is unlikely to yield significant intelligence, according to reports from Iraq.

Military interrogation experts confirm that torture is unproductive. Major General Geoffrey Miller, past commander of Guantanamo's detention center, reported that on a monthly basis as much as fifty percent more actionable intelligence was obtained from prisoners after coercive practices like hooding, stripping, and sleep deprivation were banned and a system encouraging rapport between prisoner and interrogator was initiated. Miller said, "In my opinion, a rapport-based interrogation that recognizes respect and dignity, and having well-trained interrogators, is the basis by which you develop intelligence rapidly and increase the validity of that intelligence."[75] At a 2007 reunion of

[73] Randy Borum, "Approaching Truth: Behavioral Science Lessons on Educing Information from Human Sources," in *Educing Information: Interrogation: Science and Art* (Washington: Nat'l Defense Intelligence College, 2006), 17, 18.

[74] Keith William Nolan, *Death Valley* (Novato, CA: Presidio Press, 1987), 60.

[75] Dexter Filkins, "General Says Less Coercion of Captives Yields Better Data," *NY Times*, Sept. 7, 2004, A12.

World War II interrogators, the interrogator of Hitler's Deputy, Rudolf Hess, commented, "We got more information out of a German general with a game of chess . . . than they do today with their torture."[76] History Professor Philip Zelikow notes, "in World War II, the United States and Britain had special programs for 'high value' captives. Thousands of lives were at stake. Yet, even in a horrifyingly brutal war, neither government found it necessary to use methods like the ones in this C.I.A. program. [World War II Army Chief of Staff, General] George Marshall would not have needed a lawyer to tell him whether such methods were O.K."[77]

Federal Bureau of Investigation (FBI) Agent George L. Piro, a professional interrogator, interviewed the captured Saddam Hussein and gained valuable intelligence. "'The interviews were designed to develop a rapport between him and me,' Piro says. . . . Piro established trust with Saddam. He interviewed him every day . . . [H]e spent five to seven hours a day with him. Piro took no holidays or days off."[78] After an initial period during which the United States concedes using harsh tactics, including waterboarding, the same rapport building was reportedly employed in the interrogation of Khalid Sheikh Mohammed.[79] The actionable intelligence that led to the 2006 targeted killing of Abu Musab al-Zarqawi, the savage Jordanian leader of Al Qaeda in Iraq, was teased, bit by bit, day by day, from prisoners held by experienced Air Force, Army, and Navy interrogators of Task Force 145 – not through violence or pressure, but by calculated patient conversation and noncoercive questioning.[80]

The objection is sometimes raised that, in interrogating a suspected terrorist, there is no time to develop a relationship of rapport. In response, the need for instant actionable intelligence is not often the case. Even presuming that it is, Major Matthew Alexander, leader of the Task Force 145 team that gained the information that led to al-Zarqawi's killing, responds, "A trained, experienced interrogator with a Koran can get more information from a subject in ten minutes than a heavy hand can extract in three days."[81] "Rapport" does not imply a deep personal relationship of enduring trust; a modest level of rapport can be established quickly, as demonstrated in "good cop-bad cop" interrogations.

There is a case in which actionable intelligence reportedly was gained through torture. In Manila, in January 1995, a week before Pope John Paul II was to visit the Philippine capital, Abdul Hakim Murad, a Pakistani citizen, accidentally started a small fire in his apartment. Responding police found extensive bomb-making materials. They set about learning what their prisoner might know. "For weeks, agents hit him with a chair and a long piece of wood . . . [H]is captors were surprised that he survived."[82]

> His interrogators reportedly beat him so badly that most of his ribs were broken; they extinguished cigarettes on his genitals; they made him sit on ice cubes; they forced water down his throat so that he nearly drowned. This went on for several weeks. In the end, he provided names, dates and places behind an al Qaeda plan to blow up 11 commercial

[76] Petula Dvorak, "Fort Hunt's Quiet Men Break Silence on WW II," *Washington Post*, Oct. 6, 2007, A1.
[77] Philip Zelikow, "A Dubious C.I.A. Shortcut," NY *Times*, April 24, 2009, A23.
[78] Ronald Kessler, *The Terrorist Watch* (New York: Crown Forum, 2007), 147, 148.
[79] Scott Shane, "Inside the Interrogation of a 9/11 Mastermind," NY *Times*, June 22, 2008, A1.
[80] Mark Bowden, "The Ploy," *The Atlantic*, May, 2007, 54–68.
[81] Maj. Matthew Alexander, USAF, "Interrogating Terrorists," Address to student body, Command & Staff College, Marine Corps University; Quantico, Virginia, Jan. 23, 2009.
[82] Marites D. Vitug and Glenda M. Gloria, *Under the Crescent Moon: Rebellion in Mindanao* (Quezon City, PI: Institute for Popular Democracy, 2000), 223. Murad was tortured for sixty-seven days.

> airliners and fly another one into the headquarters of the Central Intelligence Agency. He also confessed to a plot to assassinate the pope. . . . Murad may have nearly died, but he didn't crack until a new team of interrogators told him falsely that they were from the Mossad and would be taking him to Israel.[83]

Torture worked and critical intelligence was obtained; therefore, the end justified the means? Professor Luban points out, "And they tortured him for weeks, during which time they didn't know about any specific al Qaeda plot. What if he too didn't know? Or what if there had been no al Qaeda plot? Then they would have tortured him . . . for nothing . . . You cannot use the argument that preventing the al Qaeda attack justified the decision to torture, because at the moment that decision [to torture] was made no one knew about the al Qaeda attack."[84]

Thanks to an iconic motion picture, many military officers know of the battle for Algiers, fought during the French battle against Algerian nationalists. The French army engaged in torture to win that battle, but "What did torture achieve in the Battle of Algiers? Putting aside any consideration of morality, was it even effective?"[85] Military historians agree that the French commander, General Jacques Massu, could not have won the battle without the use of torture. "This is certainly true of the short term, but in the longer term – as the Nazis in the Second World War, and as almost every other power that has ever adopted torture as an instrument of policy, have discovered – it is a double-edged weapon . . . "[86]

In 2006, the U.S. Army published a new interrogation manual. At a briefing for reporters, Lieutenant General Jeff Kimmons, Deputy Chief of Staff for Intelligence, was asked if torture was useful in gaining military intelligence. He replied:

> No good intelligence is going to come from abusive practices . . . I think the empirical evidence of the last five years, hard years, tells us that. And moreover, any piece of intelligence which is obtained under duress, through the use of abusive techniques, would be of questionable credibility, and additionally it would do more harm than good when it inevitably became known that abusive practices were used . . . Some of our most significant successes on the battlefield have been – in fact, I would say all of them, almost categorically all of them, have accrued from expert interrogators using mixtures of authorized humane interrogation practices.[87]

It would be disingenuous to suggest that torture never succeeds; that torture does not sometimes produce actionable information. "[I]f official and unofficial government reports are to be believed, the methods work. In report after report hard-core terrorist leaders are said to be either cooperating or, at the very least, providing some information – not just vague statements but detailed, verifiable, useful intelligence."[88] No doubt torture has elicited valuable intelligence in some cases. Repeated exaggerated or false assertions of valuable life-saving information gained through "enhanced interrogation" methods have led, however, to a jaded disbelief that is not always warranted. Hidden behind the impenetrable screen of "national security," it is impossible to either verify or discredit

[83] Peter Maas, "If a Terror Suspect Won't Talk, Should He Be Made To?" NY *Times*, March 9, 2003, wk4. Also, Dershowitz, *Why Terrorism Works*, supra, note 1, at 137.
[84] Luban, "Liberalism, Torture, and the Ticking Bomb," supra, note 8, at 1442.
[85] Horne, *A Savage War of Peace*, supra, note 16, at 204.
[86] Id., at 205.
[87] George Packer, "The Talk of the Town; Comment: Prisoners," *The New Yorker*, Sept. 18, 2006, 26.
[88] Mark Bowden, "The Dark Art of Interrogation," *Atlantic Monthly*, Oct. 2003.

assertions of success or failure of abusive interrogation. It can only be said that history, research, and international experience make clear that positive results from torture are, at best, unusual, and certainly not the norm.

In March 2008, President George W. Bush "vetoed a bill [an amendment to the 1978 Foreign Intelligence Surveillance Act] that would have explicitly prohibited the [Central Intelligence] agency from using interrogation methods like waterboarding."[89] In a national radio address regarding the veto the President said, "This program [that includes enhanced interrogation methods] has produced critical intelligence that has helped us prevent a number of attacks. The program helped us stop a plot to strike a U.S. Marine camp in Djibouti, a planned attack on the U.S. consulate in Karachi, a plot to hijack a passenger plane and fly it into Library Tower in Los Angeles, and a plot to crash passenger planes into Heathrow Airport or buildings in downtown London."[90]

Senator John D. Rockefeller IV responded, "As Chairman of the Senate Intelligence Committee, I have heard nothing to suggest that information obtained from enhanced interrogation techniques has prevented an imminent terrorist attack. And I have heard nothing that makes me think the information obtained from these techniques could not have been obtained through traditional interrogation methods used by military and law enforcement interrogators. On the other hand, I do know that coercive interrogation can lead detainees to provide false information in order to make the interrogation stop."[91] In a 2008 interview, "F.B.I. director since 2001, Robert S. Mueller III, was asked whether any attacks had been disrupted because of intelligence obtained through the coercive methods. 'I don't believe that has been the case,' Mr. Mueller answered."[92]

### 12.3.2. *Intelligence Gained through Torture Is Unreliable*

In October 1967, at the height of the U.S.–North Vietnamese conflict, a U.S. Navy pilot flying an A-4 Skyhawk off the aircraft carrier *Oriskany* was shot down while on a bombing run over Hanoi, North Vietnam. In ejecting, both of his arms and his right knee were broken. Immediately captured upon landing, he was beaten, questioned, and given little medical care. A few weeks later, when medical complications set in, the pilot was left to die in his cell. Fate intervened when the North Vietnamese learned that the prisoner's father was commander-in-chief of U.S. naval forces in Europe. Lieutenant John S. McCain was taken to a hospital in time to save his leg. McCain writes, "[o]nce my condition had stabilized, my interrogators resumed their work. Demands for military information were accompanied by threats to terminate my medical treatment if I did not cooperate. Eventually, I gave them my ship's name and squadron number . . . Pressed for

[89] Steven Lee Myers, "Bush Vetoes Bill on C.I.A. Tactics, Affirming Legacy," *NY Times*, March 9, 2008, A1. Also see: John R. Crook, "Contemporary Practice of the United States Relating to International Law: President Vetoes Legislation to Limit CIA Interrogation Methods," 102–3 *AJIL* (July 2008), 650.

[90] President's Radio Address (March 8, 2008), available at: http://www.whitehouse.gov/news/releases/2008/03/print/20080308.html.

[91] Dan Froomkin, "A Legacy of Torture," *Washington Post*, March 10, 2008, n.p.

[92] Scott Shane, "Interrogations' Effectiveness May Prove Elusive," *NY Times*, April 23, 2009, A14. It should be noted that Director Mueller's assessment is in sharp contrast to assertions by four former CIA directors. Still, FBI refusal to participate in interrogations it viewed as unlawful caused them to withdraw from all CIA interrogations. An FBI supervisory special agent initially involved in the CIA interrogations said, "[T]he message came through from . . . an F.B.I. assistant director, that 'we don't do that' . . . " Ali Soufan, "My Tortured Decision," *NY Times*, April 23, 2009, A25.

more useful information, I gave the names of the Green Bay Packers' offensive line, and said they were members of my squadron."[93]

Vice Admiral James B. Stockdale, awarded the Medal of Honor for heroism as a prisoner of the North Vietnamese for seven and a half years, was shot down in September 1965. When captured, he realized that, as a Navy commander, he was the senior American military captive in the war. While recovering from his initial interrogations under torture he considered his duty as the senior captured officer. "I put a lot of thought into what my first orders should be. They would be orders that could be obeyed, not a 'cover your ass' move of reiterating some U.S. government policy like 'name, rank, serial number and date of birth,' which we had no chance of standing up to in the torture room."[94] He recounts instances when he and other American military prisoners provided false information under torture. "Some of my accounts matched reality and some did not."[95] Admiral Stockdale's statement that "the more the degradation, the more the pain, the more the humiliation, the more the human spirit was challenged, the better it performed"[96] was demonstrated by American prisoners' continued resistance to North Vietnamese torture. Torture increased resistance and often resulted in the giving of false information. That torture results in unreliable information is supported by research:

> [F]ear may motivate an enemy source to 'talk,' but not necessarily to provide accurate intelligence. . . . Psychological theory . . . and related research suggests that coercion or pressure can actually *increase* a source's resistance and determination not to comply. Although pain is commonly assumed to facilitate compliance, there is no available scientific or systematic research to suggest that coercion can, will, or has provided accurate useful information from otherwise uncooperative sources.[97]

Abu Zubaydah, a senior al Qaeda member and one of the fourteen "high value detainees" transferred to Guantanamo from a "black site" in 2006, was shot in the chest, groin, and thigh during his 2003 capture in Pakistan. As an interrogation tactic, medical treatment was reportedly limited or withheld. As a result, "Zubaydah apparently gave false information that led the Justice Department to issue warnings that were later discredited."[98] "Most of what these [fourteen high value] captives told us is already common knowledge or dated . . . "[99]

The unreliability of military information obtained through coercion is also documented in law enforcement–oriented research. Many of the same interrogation techniques are employed in both arenas. Gisli Gudjonsson, a psychologist and expert on law enforcement interrogation techniques, documents cases of false confessions – innocent suspects, influenced by interrogators without the use of physical force, who make detailed false confessions to serious crimes. Gudjonsson writes:

> [N]o police interrogation is completely free of coercion, nor will it ever be. Furthermore, a certain amount of persuasion is often needed for effective interrogation. The real issue

[93] John McCain, *Faith of My Fathers* (New York: Random House, 1999), 193–4.
[94] VAdm. James B. Stockdale, *Stockdale on Stoicism II: Master of My Fate* (Annapolis, MD: United States Naval Academy, Center for the Study of Professional Military Ethics, n.d.), 9.
[95] Stockdale and Stockdale, *In Love and War*, supra, note 28, at 260.
[96] James Bond Stockdale, "Leadership in Times of Crisis," in, *Thoughts of A Philosophical Fighter Pilot* (Stanford: Hoover Institution Press, 1995), 41.
[97] Borum, "Approaching Truth," in *Educing Information*, supra, note 73, 17, 35. Emphasis in original.
[98] Eric Lichtblau and Adam Liptak, "Questioning to Be Legal, Humane and Aggressive, The White House Says," NY *Times*, March 4, 2003, A13.
[99] Ron Suskind, "The Unofficial Story of the al-Qaeda 14," *Time*, Sept. 10, 2006, 35.

> [is] about the extent and nature of the manipulation and persuasion used. . . . Innocent suspects may be manipulated to confess falsely, and in view of the subtlety of the techniques utilized innocent suspects may actually come to believe that they are guilty.[100]

For military personnel, the significance of Gudjonsson's research, and his compilation of cases of false confessions, is in documenting the unreliability of information obtained through interrogation. In the law enforcement realm, false confessions commonly lead to innocent suspects being imprisoned. The media frequently report individuals released from prison, exonerated through new DNA evidence. A 2007 report noted, "[I]n about a quarter of the 201 wrongful convictions that have been overturned with the use of DNA evidence, people had confessed or admitted to crimes they did not commit."[101] In 1997, for example, three U.S. Navy sailors confessed to rape and murder, each of their separately given accounts including specific lurid details of the rape–murder of a fellow sailor's wife. All three were convicted and sentenced to life imprisonment, only to be exonerated through DNA evidence eight years later.[102] Individually, each of the three, without physical coercion, swore to committing heinous crimes of which he actually had no knowledge or involvement.

Add torture to the mix, and the reliability of military intelligence obtained only becomes more doubtful. "A suspect who wants to avoid the unkindness of having his teeth extracted with a set of dirty pliers may say whatever he thinks his torturers want to hear."[103] A tortured prisoner will admit any act, confess any crime, or offer any intelligence to end the pain. During the Korean War (1950–1953) U.S. Air Force Colonel Harold E. Fischer was shot down and captured. A captain then, he was held for more than two years in Manchuria, where he was tortured and finally confessed to germ warfare. "I was grilled day and night, over and over, week in and week out, and, in the end, to get Chong and his gang off my back, I confessed . . . The charges, of course, were ridiculous . . . [I]t was not really me . . . who signed that paper. It was a mentality reduced to putty."[104]

"From a purely intelligence point of view, experience teaches that more often than not the collating services are overwhelmed by a mountain of false information extorted from victims desperate to save themselves further agony. Also, it is bound to drive into the enemy camp the innocents who have wrongly been submitted to torture."[105]

### 12.3.3. *Torture Can Accompany and Promote Other Battlefield Misconduct*

A military unit that tortures prisoners may be undisciplined in other ways, as well. Michael Walzer writes, "the best soldiers, the best fighting men, do not loot and rape. Similarly, the best soldiers do not wantonly kill civilians."[106]

[100] Gisli H. Gudjonsson, *The Psychology of Interrogations and Confessions* (West Sussex, UK: Wiley, 2003), 37.
[101] Tina Kelley, "DNA Clears Inmate of New Jersey Child Murders," NY *Times*, May 16, 2007, A18.
[102] Brian Bennett, "True Confessions?" *Time*, Dec. 12, 2005, 45–6; and Alan Berlow, "What Happened In Norfolk?" NY *Times Magazine*, Aug. 19, 2007, 36.
[103] Maas, "If a Terror Suspect Won't Talk, Should He Be Made To?" supra, note 83.
[104] Dennis Hevesi, "Harold E. Fischer Jr., 83, American Flier Tortured in a Chinese Prison, Is Dead," NY *Times*, May 8, 2009, B10.
[105] Horne, *A Savage War of Peace*, supra, note 16, at 205.
[106] Michael Walzer, *Arguing About War* (New Haven, CT: Yale University Press, 2004), 26.

During the U.S.–Vietnam conflict, Army Lieutenant William Calley's 1st Platoon of C Company was attached to Task Force Barker. At My Lai, in March 1968, in a single horrific incident, the 1st Platoon committed hundreds of murders, many rapes and sexual mutilations, and other grave breaches. It was a prototypical undisciplined and poorly led military unit. C Company was commanded by Captain Ernest Medina. Even before My Lai, a deterioration in C Company's performance was noted.

> Whereas Medina had once been a strong disciplinarian . . . he now began to let slide misdemeanors he would have previously pounced on . . . [T]he battalion commander . . . saw Medina's troops behaving sloppily. Their appearance was not up to scratch and he found them drinking alcohol in the field. . . . The troops' physical condition and general behavior had deteriorated . . . there was virtually no discipline, leadership, or respect for those in command . . . Calley continued to be particularly detested by his men . . . [107]

Even before My Lai, Calley "was so detested by his men . . . that they put a bounty on his head. That was only one indication of the total deterioration of discipline within Charlie Company."[108] Lieutenant General William Peers, who led the Army's investigation of the My Lai incident, considered "that at all levels, from division down to platoon, leadership or the lack of it was perhaps the principle causative factor in the tragic events . . . "[109] Military officers recognize that units like C Company are candidates for battlefield excesses; candidates even for My Lai.

In early 2004, Lieutenant Colonel Nathan Sassaman, a nineteen-year Army veteran, was one of the most highly regarded battalion commanders in Iraq. His battalion was assigned to Balad, a difficult and deadly area. As time wore on, however, disciplinary problems appeared in the battalion. Lieutenant Colonel Sassaman recalled, " . . . a degree of cynicism had infiltrated the ranks."[110] A group of his soldiers went to the house of a suspected truck hijacker. Sassaman was not there, but, according to the *New York Times*, his soldiers gave the absent man's family fifteen minutes to pull furniture from the house before they destroyed it with four antitank missiles. Elsewhere, Sassaman's soldiers threw a wounded prisoner into a cell and threatened to withhold treatment "unless he told them everything he knew."[111] One of the battalion's sergeants said, "People don't exactly get beaten up . . . They got slapped around, roughed up, usually after they were detained. It was gratuitous. Sassaman didn't do it, but he definitely knew about it."[112]

The indiscipline culminated when one of Lieutenant Colonel Sassaman's officers, First Lieutenant Jack Saville, ordered five of his men to throw two Iraqis caught out after curfew into the Tigris River. One of the five soldiers refused the order. The other four carried out the drowning one of the Iraqis, who was nineteen years old. His body was never found.

When the incident was investigated, Lieutenant Colonel Sassaman directed a subordinate to conceal evidence ("'Don't say anything about the water' [into which the Iraqis had been thrown], I instructed."[113]) and he withheld portions of the incident from

[107] Michael Bilton and Kevin Sim, *Four Hours in My Lai* (New York: Viking, 1992), 196–7.
[108] Michal R. Belknap, *The Vietnam War on Trial* (Lawrence, KS: University of Kansas Press, 2002), 88.
[109] Lt.General W.R. Peers, *The My Lai Inquiry* (New York: Norton, 1979), 232.
[110] Lt.Col. Nathan Sassaman, *Warrior King* (New York: St. Martin's Press, 2008), 207.
[111] Dexter Filkins, "The Fall of the Warrior King," *NY Times Magazine*, Oct. 23, 2005, 52, 59.
[112] Id., at 66.
[113] Sassaman, *Warrior King*, supra, note 110, at 245.

investigators. At court-martial, Lieutenant Saville pleaded guilty to reduced charges of two specifications (counts) of assault, obstruction of justice, and dereliction of duty. He was sentenced to forfeit $2,000 pay per month for six months, and confinement for forty-five days.[114] Sassaman and two others received written reprimands for impeding the investigation. His career over, an outspokenly disrespectful and embittered Lieutenant Colonel Sassaman retired from the Army, a victim of the indiscipline of his own command.[115]

The ICTY, while trying individuals for 1993 war crimes committed in Sarajevo, in the former Yugoslavia, heard testimony that "... there were units where there was talk of indiscipline and insubordination ... According to Dževad Tirak, the 6th Corps chief of staff ... two brigades had the worst reputation in terms of discipline and [war crimes] incidents."[116] Indiscipline, insubordination, and incidents in the same brigades brought dishonor to the army as a whole.

The best led military units rarely commit LOAC violations.

### 12.3.4. *Torture Is Counterproductive on an International Level*

History demonstrates that, ultimately, torture is ineffective in achieving a state's larger goals, while diminishing the state in the eyes of the world. The executive director of the 9/11 Commission writes, "There is another variable in the intelligence equation: the help you lose because your friends start keeping their distance ... [S]ome of America's best European allies found it increasingly difficult to assist us in counterterrorism because they feared becoming complicit in a program their governments abhorred."[117]

In 1987, the Government of Israel appointed a commission of inquiry headed by a former Israeli Supreme Court President, Moshe Landau. The Landau Commission examined the General Security Service's (GSS, roughly equivalent to the American CIA) methods of questioning suspected terrorists and formulated guidelines regarding interrogation methods. The guidelines allowed use of a "moderate degree of physical pressure" to obtain information when dealing with terrorists who represented a grave threat to the state and its citizens. In a still-secret section of its report, the Commission specified permissible forms of pressure.[118] In 1997, a *New York Times* editorial scolded, "The character of a country is determined in some measure by how it treats its enemies and prisoners. Israel harms its international stature by torturing its foes."[119]

After objections regarding prisoner treatment were raised, an Israeli investigation confirmed "systematic abuses while interrogating prisoners during the Palestinian uprising

[114] *U.S. v. Saville* (Fort Hood, TX, 2005). Because the punishment adjudged by the court-martial, a fine, and confinement for forty-five days was below (*well* below) that required by UCMJ Art. 66 for appellate review, the case was reviewed by no appellate body and no appellate opinion was generated. For a criticism of this and similar court-martial outcomes see Lt.Col. Gary Solis, "Military Justice?" U.S. Naval Institute *Proceedings* (Oct. 2006), 24–7.

[115] Sassaman, *Warrior King*, supra, note 110, at 267. Lieutenant Colonel Sassaman writes of his reprimand by commanding general Major General Raymond Odierno, "I did not trust my commanding officers. I didn't trust my brigade commander at all. And General Odierno? He lived in the palace in Tikrit. He was in the same room Saddam used to be in."

[116] *Prosecutor v. Halilavić*, IT-01-48-T (Nov. 16, 2005), para. 122.

[117] Zelikow, "A Dubious C.I.A. Shortcut," supra, note 77.

[118] The account of the Israeli experience is from Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (New York: Oxford University Press, 2008), A1:69–74, at 55–8.

[119] "Using Torture in Israel," *NY Times*, May 9, 1997, n.p.

and that its agents had lied about their actions in court."[120] The Committee Against Torture, an enforcement body required by Article 17 of the CAT, also assessed the methods used by the GSS in a 1997 report:

> Although these combined [interrogation] methods were fairly similar to those applied by British security forces in *Northern Ireland* and found . . . to violate Article 3 ECHR [European Convention on Human Rights] (restraining in very painful conditions, hooding under special conditions, sounding of loud music for prolonged periods, sleep deprivation, threats, including death threats, violent shaking and using cold air to chill), the Israeli Government maintained that they had not crossed the threshold of either Article 1 or 16 [of the] CAT as they did not cause suffering. The Committee strongly rejected this position and concluded that the interrogation methods . . . constitute torture as defined in Article 1 of the Convention [Against Torture].[121]

Israel contested the Committee's judgment but, in 1999, the Israeli Supreme Court held that GSS interrogation methods involving physical force, and those of the GSS's successor, the Israel Security Agency, were indeed illegal and violated suspects' constitutional protections to a right to dignity. The Court specifically rejected hooding, shaking, forced crouching on toes, painful handcuffing, seating suspects on low and inclined stools, sleep deprivation, and prolonged extremely loud music. The judgment was based on Israeli domestic law, rather than the CAT.[122]

Moderate physical pressure was initially authorized only in special cases, but Israeli security services soon saw every case involving suspected terrorists as a special case. The exception became the norm until, in 1999, the abused norm was declared illegal.

Israel is hardly alone among democratic states in committing torture. During the "Algerian independence war" (1954–1962), the conduct of France's military forces in Algeria, including their use of torture, brought international condemnation upon France and "absolutely voided the capability of the military force . . . "[123]

The Algerian armed conflict pitted French settlers, *colons*, against Algerian nationalists, most of whom were Muslims. In 1954, encouraged by the French defeat at Dien Bien Phu, the Algerian nationalists began planning to evict the French in a bid for national independence. The nationalist's political arm was the *Front de Libération Nationale* (FLN). The FLN became a classic insurgent force. Beginning in 1954, from bases in neighboring Tunisia they launched strikes on public buildings, communications centers, and police and military posts. Ultimately, 415,000 French troops were stationed in Algeria to fight them. At first, the FLN limited their kidnappings, murders, and mutilations to *colons* and captured soldiers, but eventually expanded their victims to include nonsupportive civilians. Schools, shops, and cafes became FLN bombing targets.

In response, the French army initiated stern "counter-terrorist" measures. Under a concept of collective responsibility, remote villages were attacked and the inhabitants killed. Although there were dissenting voices,[124] the French raised arguments that would

[120] Joel Greenberg, "Israel Reports Abuses in Past Interrogations of Palestinians," NY *Times*, Feb. 10, 2000, A-3.

[121] Nowak and McArthur, *United Nations Convention Against Torture*, supra, note 118, A1:71, at 56. Footnotes omitted. The British case referred to, "*Northern Ireland*," is *A and others v. Secretary of State for the Home Department* [2005] UKHL 71.

[122] Public Committee Against Torture in, *Israel v. The State of Israel* (HCJ 5100/94), 1999.

[123] General Rupert Smith, *The Utility of Force* (New York: Alfred Knopf, 2007), 246.

[124] General Jacques de Bollardière objected in writing to Massu that his orders were "in absolute opposition to the respect for man that constituted the very foundation of my life and I refuse to take responsibility

later be heard in the conflict against al Qaeda and the Taliban. "[T]he soldiers . . . saw themselves as unencumbered by traditional norms of military justice. One note from [French army commander] General Massu finished . . . 'Our current laws are unsuited to dealing with terrorism for the simple reason that this form of aggression was never envisioned.'"[125]

In the 1956 battle of Algiers, General Jacques Massu's 10th Colonial Parachute division, employing torture and murder, achieved impressive results. Within three months, French forces prevailed. Massu's intelligence chief was Colonel Paul Aussaresses. In his postwar account of the war (after a 1968 French amnesty was declared for crimes committed during the war), Aussaresses freely admitted to torture, disappearances, and murder. Describing a "ticking bomb" scenario, he wrote:

> Just think for a moment that you are personally opposed to torture as a matter of principle and that you have arrested a suspect who is clearly involved in preparing a violent attack. The suspect refuses to talk. You choose not to insist. The attack takes place and it's extremely bloody. What explanation will you give to the victim's parents, the parents of a child, for instance, whose body was torn to pieces by the bomb, to justify the fact that you didn't use every method available to force the suspect into talking? . . . [T]orture a suspected terrorist or tell the parents of the victims that it's better to let scores of innocent people be killed rather than make a single accomplice suffer.[126]

Aussaresses later describes his interrogation technique. "[F]or 'extreme' interrogations: first, a beating, which in most cases was enough; then other means, such as electric shocks, known as the famous '*gégène*'; and finally water. Torture by electric shock was made possible by generators used to power field radio transmitters . . . Electrodes were attached to the prisoner's ears or testicles, then electric charges of varying intensity were turned on. . . ."[127] How did General Massu's intelligence chief, a career army officer and holder of the *Légion d'Honneur* who retired as a brigadier general, handle hardcore FLN? "[T]he diehards, those who were ready to start all over again the next day . . . How should we handle them once they had been questioned and had told us everything they knew? I picked a few groups of NCOs and ordered them to shoot the prisoners . . . They didn't have any qualms."[128]

When Aussaresses's book was published in France in 2001, it "brought cries of outrage,"[129] but "Aussaresses wasn't telling the French something that they could claim had been kept from them. Yet his very brazenness forced the French public to confront some uncomfortable truths about their *mission civilisatrice* in Algeria."[130]

In Algiers the FLN, at great cost to both sides, had demonstrated its ability to strike French power bases in Algeria, but its leadership had been killed or compromised

for them." General de Bollardière then ordered his troops to not engage in torture. He soon resigned his command, telling his long-time friend Massu, "I despise your action." Alon Harel and Assaf Sharon, "What is Really Wrong With Torture?" 6–2 *J. of Int'l Crim. Justice* (May 2008), 241, 241–2.

[125] Marie-Monique Robin, "Counterinsurgency and Torture," in Roth, Worden, and Bernstein, *Torture*, supra, note 17, at 48.

[126] B General Paul Aussaresses, *The Battle of the Casbah* (New York: Enigma Books, 2002), 17.

[127] Id., at 20.

[128] Id., at 50–1.

[129] Keith B. Richburg, "France Faces Its Demons For Algerian War Brutality," *Washington Post*, May 10, 2001, A26.

[130] Adam Shatz, "The Torture of Algiers," *The New York Review of Books*, Nov. 21, 2002, 53, 54.

and military defeat was near. In France, however, public opinion grew weary of conscripted service to continue the fight and, internationally, France's major allies deserted, repelled by French tactics.

In 1959, French President Charles De Gaulle, a former general and World War II leader, recognized Algeria's right to self-determination and withdrew French forces from the country. Shockingly, in 1960 and 1961, armed French army revolts and assassination attempts against De Gaulle were unsuccessfully mounted. The army was years in recovering its reputation and French popular trust.

In 1962, Algeria gained independence. Deaths in the conflict totaled 24,000 French and an estimated half million Algerians. The army's torture, disappearances, and murders had not forestalled the outcome and, as the tactics became known to the French public, played a role in achieving the FLN's ultimate goal.

Today, some see the United States as tarred with the brush that marred the national reputations of Israel and France. An American commentator referred to a 2006 presidential speech that cited a need for harsh interrogation tactics:[131]

> The president of the United States. Interrogation by torture. This just can't be happening. . . . It is not possible for our elected representatives to hold any sort of honorable "debate" over torture . . . [C]ivilized nations do not debate slavery or genocide, and they don't debate torture, either . . . There is one ray of encouragement: the crystal clear evidence that the men and women of our armed forces want no part of torturing anybody. . . . But we shouldn't have to talk about the practicalities of torture, because the real question is moral: What kind of a nation are we? What kind of people are we?[132]

A former Commandant of the Marine Corps and a former commanding general of Central Command, in 2007 urged,

> . . . . These assertions that "torture works" may reassure a fearful public, but it is a false security . . . and any "flexibility" about torture at the top drops down the chain of command like a stone . . . The rules must be firm and absolute; if torture is broached as a possibility, it will become a reality . . . If we forfeit our values by signaling that they are negotiable in situations of grave or imminent danger, we drive those undecideds into the arms of the enemy. This way lies defeat, and we are well down the road to it.[133]

The UN's Special Rapporteur on torture noted that nations charged with torture point to the United States as their example. "We're not doing something different than what the United States is doing."[134] A 2008 Canadian manual for diplomats listed the United States among the countries that potentially torture prisoners.[135] A retired U.S. Army colonel and Vietnam-era special forces officer commented:

> At this moment in Iraq, we are turning to the lessons of the French – and we will make exactly the same mistakes the French made in Algeria and the Americans made

[131] White House. "President Discusses Creation of Military Commissions," supra, note 6.
[132] Eugene Robinson, "Torture is Torture," *Washington Post*, Sept. 19, 2006, A21.
[133] Generals Charles C. Krulak and Joseph P. Hoar, "It's Our Cage, Too," *Washington Post*, May 17, 2007, A17.
[134] Nick Wadhams, "U.N. Says Human Rights Violators Cite U.S.," *Washington Post*, Oct. 24, 2006, A4.
[135] Ian Austen, "Canadian Manual Has U.S. on Torture List," *NY Times*, Jan. 18, 2008, A10. When the diplomatic training manual became public, the Canadian government removed the United States from the list. "Canada to Remove U.S., Israel From List of Nations That Torture," *Washington Post*, Jan. 20, 2008, A21.

> in Vietnam. In the name of gathering information, we will use torture, which is not only immoral but ineffective, since information obtained under torture is absolutely not reliable. Torture is an expression of shortsighted policy . . . because it is the best recruiter for the terrorists it claims to fight.[136]

Alberto J. Mora, former General Counsel of the U.S. Navy who, in 2006, retired in protest of government interrogation policies, and John Shattuck, a former Assistant Secretary of State, note that, "Cruelty diminishes the international standing of the United States . . . [T]he damage to our national security may be even worse. [O]ur ability to build and maintain the broad alliance needed to efficiently fight the war on terrorism has been crippled."[137]

An Army general adds, "If anyone believes that the information gained through torture has been worth the price to our national honor and capacity to persuade other nations to follow our lead, it's time for them to produce hard evidence of torture's superior worth. Our torture policy has been disastrously counterproductive . . . "[138]

**SIDEBAR**. Does the "frequent flier program" constitute torture? Canada's Department of Foreign Affairs reported that Omar Khadr, held at Guantanamo since he was sixteen years old (his detention continued beyond his twenty-first birthday) was charged with killing an American soldier in Afghanistan. The report says that, in 2004, to make him "'more amenable and willing to talk' Khadr was moved to a new cell every three hours for three weeks, 'thus denying him uninterrupted sleep.' . . . [T]his practice, [is] referred to as the 'frequent flier program,' . . . "[139] According to Guantanamo confinement facility records, in 2004, another prisoner, Mohammed Jawad "was moved repeatedly from one detention cell to another in quick intervals and usually at night, a program designed to deprive detainees of sleep. . . . [P]rison logs show that [Jawad] was moved 112 times in 14 days . . . for no apparent reason."[140] Air Force Lieutenant General Randall M. Schmidt, who investigated the practice,[141] said it was banned in March 2004. "I did not term the frequent flier program as torture," but it "was considered abusive if it was not properly done."[142] The general did not detail the proper method.

[136] Robin, "Counterinsurgency and Torture," supra, note 125, at 65.
[137] Alberto Mora and Jack Shattuck, "Self-Inflicted Wounds," *Washington Post*, Nov. 6, 2007, A19.
[138] BGen. (Ret.) David R. Irvine, "Rationalizing Torture," *Washington Times*, Nov. 2, 2005, 17.
[139] Ian Austen, "Citing New Report, Lawyers for Canadian Detainee Denounce Abuse," *NY Times*, July 11, 2008, A9. A copy of the brief Canadian report, p. 9 of a U.S Air Force interrogation report, is available at: http://media.miamiherald.com/smedia/2008/07/10/08/khadrdocs.source.prod_affiliate.56.pdf.
[140] Josh White, "Detainee's Attorney Seeks Dismissal Over Abuse," *Washington Post*, June 8, 2008, A4.
[141] See Army Regulation 15–6: Final Report; Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility (April 1, 2005, amended Jun 9, 2005), available at: http://www.defenselink.mil/news/Jul2005/d20050714report.pdf. As well as confirming the "frequent flier program," the Final Report documents a female interrogator wiping fake menstrual blood on a detainee, frequent use of loud music, use of extremes of heat and cold, sleep deprivation, a use of duct tape to cover a detainee's mouth and head, chaining detainees to the floor in a fetal position, use of a military dog to threaten a detainee, female interrogators "lap dancing" on restrained detainees, forcing a "high value" detainee to wear a bra and a thong over his head, leading him by a leash and forcing him to perform dog tricks and to stand naked before female interrogators.
[142] Id.

Frequent forced movement from location to location is nowhere specifically described as torture or cruel, inhuman, or degrading treatment. But methods and techniques of torture are nowhere exhaustively specified. Applying the basic elements of most definitions of torture, does the frequent flier program cause severe physical or mental pain or suffering? Is the frequent flier program merely an aggressive and permissible pre-interrogation technique, or is it torture?

### 12.3.5. *Torture Endangers Warfighters*

If the United States is perceived as torturing prisoners, it can be anticipated that similar tactics will be employed against future U.S. prisoners. In the Vietnam conflict, Senator John McCain was a prisoner for five years and five months. He says, "Mistreatment of enemy prisoners endangers our own troops who might someday be held captive. While some enemies, and Al Qaeda surely, will never be bound by the principle of reciprocity, we should have concern for those Americans captured by more traditional enemies, if not in this war then in the next."[143]

The lead Air Force interrogator of Task Force 145, which gleaned intelligence leading to the 2006 killing of Abu Musab al-Zarqawi without using harsh techniques, states:

> Torture and abuse cost American lives. I learned in Iraq that the No. 1 reason foreign fighters flocked there to fight were the abuses carried out at Abu Ghraib and Guantanamo. Our policy of torture was directly and swiftly recruiting fighters for al-Qaeda in Iraq . . . It's no exaggeration to say that at least half of our losses and casualties in that country have come at the hands of foreigners who joined the fray because of our program of detainee abuse . . . How anyone can say that torture keeps Americans safe is beyond me.[144]

## 12.4. Waterboarding Is Torture

The American debate about waterboarding – is it torture, is it not – brings to mind the 1957 television play, and later Broadway production and motion picture, *Judgment at Nuremberg*. Near the drama's end, the central character, American Judge Dan Haywood, says,

> This trial has shown that under the stress of a national crisis, ordinary men, even able and extraordinary men, can delude themselves into the commission of crimes and atrocities . . . There are those in our country today, too, who speak of the protection of the country. Of survival. The answer to that is: survival as what? A country isn't a rock. And it isn't an extension of one's self. It's what it stands for, when standing for something is the most difficult.[145]

There is a certain attraction to waterboarding as an "enhanced interrogation technique." It leaves no mark, and within an hour, or less, the victim can be alert and on his

[143] John McCain, "Torture's Terrible Toll," *Newsweek*, Nov. 21, 2005, 34.
[144] Matthew Alexander, "Torture's the Wrong Answer. There's a Smarter Way," *Washington Post*, Nov. 30, 2008, B1.
[145] Abby Mann, *Judgment at Nuremberg* (London: Cassell, 1961), 170–1.

feet. "Waterboarding" and its variations, "water torture," "water rag," "wet bag," "*chiffon*," "*submarino*," and the "water cure," are, by any name, torture. Applying the basic elements of most definitions of torture, does waterboarding cause severe physical or mental pain or suffering? One account of water torture from the French-Algerian conflict, a half century ago, suggests the answer:

> Then there were the various forms of water torture: heads thrust repeatedly into water troughs until the victim was half-drowned; bellies and lungs filled with cold water from a hose placed in the mouth, with the nose stopped up. "'I couldn't hold on for more than a few moments,' says Alleg [an Algerian prisoner of the French]; 'I had the impression of drowning, and a terrible agony, that of death itself, took possession of me . . . '" [146]

In the U.S.–Philippine war (1899–1902), the water cure was commonly inflicted on prisoners of the United States. George Kennan, a well-known American explorer and writer of the day, and second cousin to the later U.S. diplomat, George F. Kennan, was commissioned to investigate charges of cruelty by U.S. military forces. He reported:

> That we have inspired a considerable part of the Philippine population with a feeling of intense hostility toward us, and given them reason for deep-seated and implacable resentment, there can be no doubt . . . [W]e hold fifteen hundred or two thousand of them in prison . . . and we are now resorting directly or indirectly to the old Spanish inquisition methods such as the "water cure" in order to compel their silent prisoners to speak . . . [147]

What was the water cure? "The most notorious method of interrogation was the 'water cure,' described by one witness thus: 'The victim is laid flat on his back and held down by his tormentors. Then a bamboo tube is thrust into his mouth and some dirty water, the filthier the better, is poured down his unwilling throat.'"[148]

In U.S. "war on terrorism" practice, waterboarding is a more clinical event, described by the Department of Justice in workman-like clinical detail:

> [T]he individual is bound securely to an inclined bench, which is approximately four feet by seven feet. The individual's feet are generally elevated. A cloth is placed over the forehead and eyes. Water is then applied to the cloth in a controlled manner . . . [T]he cloth is lowered until it covers both the nose and the mouth. Once the cloth is saturated and completely covers the mouth and nose, air flow is slightly restricted for 20 to 40 seconds . . . This causes an increase in carbon dioxide level in the individual's blood . . . [T]he cloth produces the perception of "suffocation and incipient panic," i.e., the perception of drowning . . . During those 20 to 40 seconds, water is continuously applied from a height of twelve to twenty-four inches. After this period, the cloth is lifted, and the individual is allowed to breath unimpeded for three or four breaths . . . The procedure may then be repeated. . . . The waterboard, which inflicts no pain or actual harm whatsoever, does not, in our view inflict "severe pain or suffering." . . . The waterboard is simply a controlled acute episode, lacking the connotation of a protracted period of time generally given to suffering. . . . [149]

[146] Horne, *A Savage War of Peace*, supra, note 16, at 200.
[147] Charles F. Adams, Carl Schurz, Edwin B. Smith, and Herbert Welsh, *Secretary Root's Record: "Marked Severities" in Philippine Warfare* (Boston: Geo. H. Ellis Co., 1902), 60.
[148] Brian McAllister Linn, *The Philippine War* (Lawrence, KS: University of Kansas Press, 2000), 223.
[149] Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency; from U.S. Department of Justice, Office of Legal Counsel (August 1, 2002), 3–4, 11. This was one of four "Top Secret"

"No actual harm whatsoever." Three prisoners were waterboarded by the CIA in 2002 and 2003, the United States has admitted.[150] One of the three was waterboarded 183 times, another 83 times.[151] The third, twice.[152]

Some object that waterboarding cannot be torture because the United States subjects its own soldiers, pilots, civilian contractors, and DoD civilians to Survival, Evasion, Resistance and Escape (SERE) training that includes waterboarding. SERE school provides training on how to survive and resist the enemy in the event of capture. Waterboarding is indeed in the syllabus of several SERE schools. A former Chief of Training at the U.S. Navy's San Diego SERE school (who was himself waterboarded) writes, "waterboarding is called 'simulated drowning,' but that's a misnomer. It does not simulate drowning, as the lungs are actually filling with water. There is no way to simulate that. The victim *is* drowning."[153] SERE interrogation methods have been used against U.S. detainees in Iraq, as well.[154]

To confuse waterboarding in training with waterboarding by an enemy captor misunderstands the crux of what constitutes torture. No formalized training, with supervisors standing by and medical personnel present, can replicate an actual torture victim's utter dependency on the torturer for mercy and surcease, for life itself.[155] SERE school introduces the student to the horror that may await, but it cannot *be* the horror.

In the U.S.–Philippine war (1898–1902), three U.S. Army officers were convicted by courts-martial for torturing prisoners by application of the "water cure." A particularly barbarous officer, Major Edwin F. Glenn, was convicted in 1902.[156] (See Chapter 2, Cases and Materials, for an extract from Glenn's record of trial.) The other convicted officers were First Lieutenants Julien Gaujot and Preston Brown.[157] Two other lieutenants were

DOJ memos released on April 16, 2009. The memo later addresses severe *mental* pain or suffering, declaring, at 15, "We find that the use of the waterboard constitutes a threat of imminent death . . ." finding, at 18, "we conclude . . . the use of these methods separately or [as] a course of conduct would not violate Section 2340A [of Title 18, U.S. Code]."

[150] Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency; from: U.S. Department of Justice, Office of Legal Counsel (May 30, 2005), at 6. The three who were waterboarded were Khalid Shaikh Mohammed, the alleged 9/11 master planner who reportedly went through "about 100" waterboardings; Abd al-Rahim al-Nashiri, a Saudi who allegedly planned the 2000 bombing of the *USS Cole*; and Abu Zubaydah, allegedly al Qaeda's logistics specialist who reportedly broke "after 35 seconds" of waterboarding. Scott Shane, "Inside a 9/11 Mastermind's Interrogation," *NY Times*, June 22, 2008, A1.

[151] Scott Shane, "Memo Says Prisoner Got Waterboarded 183 Times," *NY Times*, April 20, 2009, A8.

[152] Memorandum for John Rizzo; from: Department of Justice (May 30, 2005), supra, note 150, at 8.

[153] Malcolm Nance, "Waterboarding is Torture . . . Period," *Small Wars Journal Blog*, Oct. 31, 2007, available at: http://smallwarsjournal.com/blog/2007/10/waterboarding-is-torture-perio/. Emphasis in original.

[154] Erik Holmes, "Interrogator: SERE Tactics Used in Iraq," *Marine Corps Times*, Oct. 13, 2008, 32.

[155] "Executive Summary: Senate Armed Services Report on Torture," supra, note 39, at 8: "There are fundamental differences between a SERE school exercise and a real world interrogation. At SERE school, students are subject to an extensive medical and psychological pre-screening prior to being subjected to physical and psychological pressures. The schools impose strict limits on the frequency, duration, and/or intensity of certain techniques. Psychologists are present throughout SERE training to intervene should the need arise and to help students cope with associated stress. And SERE school is voluntary; students are even given a special phrase they can use to immediately stop the techniques from being used against them."

[156] *U.S. v Maj. Edwin F. Glenn*, Samar, P.I. (1902). Glenn eventually retired from the Army with the grade of Brigadier General.

[157] Lieutenant Gaujot's sentence, reflecting the court-martial's dismissive view of the water cure, was suspension from command for three months and forfeiture of fifty dollars pay each month for three months.

tried for imposing the water cure and acquitted.[158] Another officer, Captain Cornelius Brownell, escaped court-martial for the murder of a local priest he water cured because Brownell was discharged from the Army before his act was discovered.[159]

After World War II, it was the enemy who was tried for waterboard-like war crimes. The Supreme Court of Norway convicted a Nazi, Karl-Hans Klinge of, *inter alia*, beating a Norwegian prisoner, stripping the bound victim, and placing him in a bath of ice-cold water where his head was repeatedly forced underwater, after which he died.[160] Klinge was sentenced to death.

American Judge Evan Wallach cites four other post–World War II U.S. military commission convictions for water torture.[161] *U.S. v. Shigeru Sawada*[162] involved the water torture of U.S. Army Air Corps Captain Chase Nielsen, one of Lieutenant Colonel James Doolittle's 1942 raiders who, after his thirty seconds over Tokyo, ditched near China and was captured and tortured.[163] In another case, Japanese Sergeant-Major Chinsaku Yuki was sentenced to life imprisonment for torture and murder, including the water torture of a suspected Philippine guerilla.[164] In *U.S. v. Nakamura et al.* and an associated case,[165] two Japanese soldiers, Lieutenant Seitara Hata and Master Sergeant Takeo Kita, civilian interpreter Yukio Asano, and civilian camp guard Yagoheiji Iwata were convicted of the water torture of Americans held in POW camps in Japan.[166] The Japanese soldiers were sentenced to twenty-five and fifteen years confinement, respectively; the two civilians to fifteen and twenty years.

In World War II, British Lieutenant Eric Lomax was captured and held by the Japanese for three and a half years and forced to help construct the Burma–Siam railway described in Pierre Boulle's book, *The Bridge Over the River Kwai*. Discovered with a radio he had made, Lomax was repeatedly tortured.

> The NCO suddenly stopped hitting me. He went off to the side and I saw him coming back holding a hosepipe dribbling with water . . . He directed the full flow of the now gushing pipe on to my nostrils and mouth at a distance of only a few inches. Water poured down my windpipe and throat and filled my lungs and stomach. The torrent was unimaginably choking. This is the sensation of drowning, on dry land, on a hot dry

[158] Major Mynda G. Ohman, "Integrating Title 18 War Crimes into Title 10: A Proposal to Amend the Uniform Code of Military Justice," 57 *Air Force L. R.* (2005), 1, fn. 78.

[159] Id., at fn. 79.

[160] *Trial of Kriminalassistent Karl-Hans Hermann Klinge*, S. Ct. of Norway (Dec. 8, 1945 and Feb. 27, 1946), in, *LRTWC*, vol. III (London: U.N. War Crimes Commission, 1948), 1.

[161] Evan Wallach, "Drop by Drop: Forgetting the History of Water Torture in U.S. Courts," 45–2 *Columbia J. of Transnational L.* (2007), 468, fns. 59, 66, 71 and 85 (2007).

[162] Cited by Judge Wallach at fn. 59 as *U.S. v. Sawada*, 5 LRTWC 1 (1948), Judge Advocate General's Office File No. 119–19–5 (1946), at 1, available at National Archives. (The correct year of trial is 1946.)

[163] General James H. Doolittle, *I Could Never Be So Lucky Again* (New York: Bantam, 1991), 549.

[164] Cited by Judge Wallach at fn. 66 as *U.S. v. Yuki*, Philippines Trials, March 21, 1947, SCAP Prosecution Section File 142, available at National Archives, NND 775011, Record Group 331: Allied Operational and Occupation Headquarters, World War II, Entry 1321; SCAP; Legal Section; Prosecution Division, U.S. v. Japanese War Criminals Case File, 1945–49, Box 1586.

[165] Cited by Judge Wallach at fn. 85 as *U.S. v. Mineno*, Military Commission Case Docket No. 47 Tried at Yokohama June 25–28, 1946. NARA NND 735027 Record Group 153, Office of the Judge Advocate General (Army), Entry 143: War Crimes Branch; Case Files, 1944–49, Box 1025, File No. 36–449 – Vol. I.

[166] Cited by Judge Wallach at fn. 71 as *U.S. v. Nakamura, Asano, Hata and Kita*, U.S. Military Commission, Yokohama, 1947, available at National Archives, NND 735027, Record Group 153; Office of the Judge Advocate General (Army), Entry 143: War Crimes Branch; Case Files, 1944–49, Box 1025, File No. 36–219 – Vol. I.

> afternoon. Your humanity bursts from within you as you gag and choke. I tried very hard to will unconsciousness, but no relief came . . . When I was choking uncontrollably, the NCO took the hose away . . . I had nothing to say; I was beyond invention. So they turned on the tap again, and again . . . [167]

Following World War II, the Far East International Military Tribunal called the water treatment "torture."[168] In the U.S.–Vietnam conflict, a 1970 *Washington Post* front-page photo of an American soldier pouring water onto a rag held over a prisoner's mouth and nose while the prisoner was held down by South Vietnamese soldiers led to the criminal investigation of Staff Sergeant David Carmon. Army records indicate unspecified disciplinary action, but no court-martial is recorded.[169]

South Africa's Truth and Reconciliation Commission found that the "wet bag" was a standard torture method. A wet cloth or bag "placed over the victim's heads took them to the brink of asphyxiation, over and over again."[170]

U.S. domestic courts have punished domestic government authorities for waterboard-like acts, one case involving a Texas sheriff abetted by three deputies,[171] the other involving Philippine government agents who inflicted water torture in the course of interrogations.[172] Sheriff James Parker, of San Jacinto County, Texas, handcuffed prisoners to chairs. In the words of the court, "This generally included the placement of a towel over the nose and mouth of the prisoner and the pouring of water in the towel until the prisoner began to move, jerk, or otherwise indicate that he was suffocating and/or drowning."[173]

In 2003, Chile's President established a National Commission of Political Imprisonment and Torture to identify those who had undergone state-administered political imprisonment and torture during the rule of General Augusto Pinochet. Waterboarding was among the interrogation tortures reported by the Commission.

> [It was] aimed at causing physical and psychological suffering by confronting them with the possibility of death. Asphyxiation was usually caused by submerging the detainee's head into water several times, producing a near-death experience . . . Usually the water used was contaminated or filled with debris. Other alternatives included . . . forcing with high pressure great amounts of water through hoses into the detainee's mouth or nose."[174]

The Commission report describes one victim's water torture at the hands of military captors: "They tied my hands and legs and submerged me in a 250-liter tank that had ammonia, urine, excrement, and sea water. They submerged me until I could not breathe

[167] Eric Lomax, *The Railway Man* (London: Jonathan Cape, 1995), 143.
[168] Judgment of the International Military Tribunal at Tokyo (1948), para. 663, at 49.
[169] Author's 2008 inquiry of Washington D.C. Army Judge Advocate General's Corps records.
[170] Suzanne Daley, "Apartheid Torturer Testifies, As Evil Shows Its Banal Face," *NY Times*, Nov. 9, 1997, A1.
[171] *U.S. v. Lee*, 744 F.2d 1124 (5th Cir. 1984).
[172] *In Re Estate of Ferdinand E. Marcos, Human Rights Litigation*, 910 F. Supp. 1460, 1463 (1995).
[173] *U.S. v. Lee*, supra, note 171, at appeal record (May 31, 1984), Brief for U.S., at 3. Plaintiffs were awarded $766 million in damages.
[174] Cristián Correa, "Waterboarding Prisoners and Justifying Torture: Lessons for the U.S. from the Chilean Experience," 14–2 *Human Rights Brief* (Winter 2007), 21, Washington: Cntr. for Human Rts. & Humanitarian Law, American University, Washington College of Law, 21.

anymore. They repeated it over and over, while beating me and asking me questions. That is what they call the submarine."[175]

In 2008, Louise Arbour, then UN High Commissioner for Human Rights, specified waterboarding as torture, and called for prosecutions on the basis of universal jurisdiction.[176] Manfred Nowak, UN Special Rapporteur on Torture, called waterboarding unjustifiable and "absolutely unacceptable . . ."[177] In 2008, Retired Admiral Mike McConnell, the U.S. Director of National Intelligence, ventured that waterboarding "would be torture" if used against him, or if someone under interrogation was taking water into his lungs.[178] Tom Ridge, the first Secretary of Homeland Security said, "There's just no doubt in my mind, under any set of rules, waterboarding is torture."[179] A former CIA officer involved in the interrogation of Zayn abu Zubaida, whom the United States admitted waterboarding, said he "now regards the tactic as torture."[180] A former chief prosecutor at Guantanamo, Air Force Colonel Morris Davis, writes, "After . . . simulating the drowning of detainees to persuade them to talk, we can no longer say we 'don't do stuff like that' – and we do not have to look far to see the damage."[181]

Waterboarding is torture. In Algeria, the French believed it to be so and employed it as such. A body of U.S. military commission and court-martial convictions from 1899 to 1947 confirm that it is torture. U.S. domestic case law indicates that it is torture. International and American domestic antiterrorism officers say it is torture.

The CAT, international and domestic U.S. case law, expert testimony and commentary, and U.S. and foreign experience in armed conflicts all clearly indicate that waterboarding constitutes severe physical or mental pain or suffering, the essentials of torture. The evidence that it is *not* torture is . . .

## 12.5. The Ticking Time Bomb

Opponents of torture are sometimes challenged with a familiar scenario: A powerful time bomb has been planted in a heavily populated area. Military (or civilian) authorities have captured a suspected terrorist who, the authorities are confident, knows where the bomb is located, but the prisoner will not reveal the location. When it detonates it will kill hundreds, perhaps thousands, of innocent civilians. "[W]e cannot afford to be squeamish in the midst of a war on terrorism. Because the United States has been spared further attacks at home . . . moralists may delude ourselves into thinking that we can once again afford the luxury of pure principle and uncompromised civil liberties."[182]

What should be done with the recalcitrant prisoner? U.S. Supreme Court Associate Justice Antonin Scalia suggests, "some physical interrogation techniques could be used on a suspect in the event of an imminent threat, such as a hidden bomb about to blow

[175] Id., at 22.
[176] "Tactic Called Torture," NY *Times*, Feb. 9, 2008, A8.
[177] Dan Eggen, "White House Pushes Waterboarding Rationale," *Washington Post*, Feb. 13, 2008, A3.
[178] "Intelligence Chief Couches Reference to Waterboarding as 'Torture.'" *Washington Post*, Jan. 13, 2008, A6.
[179] "National Briefing," NY *Times*, Jan. 19, 2008, A12.
[180] Joby Warrick and Dan Eggen, "Waterboarding Recounted," *Washington Post*, Dec. 11, 2007, A1.
[181] Morris Davis, "Unforgivable Behavior, Inadmissible Evidence," *NY Times*, Feb. 17, 2008, WK 12.
[182] Fred Hiatt, "The Consequences of Torture," *Washington Post*, June 14, 2004, A17. Contrary to the tone of this quote, the writer's point is that torture should never be permitted.

up. 'It would be absurd to say you couldn't do that,' Scalia says."[183] Columnist Charles Krauthammer agrees with Justice Scalia:

> . . . A terrorist has planted a nuclear bomb . . . It will go off in one hour. A million people will die. You capture the terrorist. He knows where it is. He's not talking. . . . [O]n this issue there can be no uncertainty: Not only is it permissible to hang this miscreant by his thumbs. It is a moral duty. . . . [T]he conclusion – yes, in this case even torture is permissible – is telling because it establishes the principle: Torture is not always impermissible.[184]

"Absurd" to not torture? "A moral duty" to torture? Sociologist and philosopher, Slavoj Žižek, writes:

> Some don't find [torture] troubling. The counterargument goes: The war on terrorism *is* dirty, one is put in situations where the lives of thousands may depend on information we can get from our prisoners, and one must take extreme steps . . . And when torture becomes just another in the list of counterterrorism techniques, all sense of horror is lost . . . [O]ne does not need to argue against rape: it is "dogmatically" clear to everyone that rape is wrong. If someone were to advocate the legitimacy of rape, he would appear so ridiculous as to disqualify himself from any further consideration. And the same should hold for torture . . . Are we aware that the last time such things were part of the public discourse was back in the late Middle Ages, when torture was still a public spectacle . . . ? Do we really want to return to this kind of primitive warrior ethics? . . . [185]

European human rights courts (no authorities, for Justice Scalia) are clear in their rulings on public emergency cases: "The [1950 Convention on Human Rights] prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct . . . there can be no derogation therefrom even in the event of a public emergency threatening the life of the nation."[186]

The ticking time bomb scenario, transforming the torturer from criminal to public savior, means to force torture opponents to concede that, if 100,000 lives were at stake, torture would be acceptable. The opponent of torture, in making that concession, would concede his "no torture" principle. If torture is acceptable to save 100,000 lives, how about 10,000 lives? How about 100? When the principle is breached, all that is left is haggling over price. "Once you accept that only the numbers count, then anything, no matter how gruesome, becomes possible."[187]

The ticking time bomb scenario is an intellectual fraud. It presumes there actually is a hidden bomb. It presumes the authorities know the bomb has been planted in a public place. It presumes the authorities have seized the correct individual, the person who planted the bomb or knows its details. It presumes the authorities know they have the correct bomb-planting individual, or individual who knows of the bomb planting. The possibility of those conjoined circumstances is slim.

[183] Eggen, "White House Pushes Waterboarding Rationale," supra, note 177.
[184] Charles Krauthammer, "Case Study: Terrorist Hides Bomb. Terrorist Is Captured, but Won't Speak. Is Torture O.K.?", *NY Times*, Dec. 11, 2005, n.p.
[185] Slavoj Žižek, "Knight of the Living Dead," *NY Times*, March 24, 2007, A27.
[186] *Case of Ireland v. United Kingdom*, App. no. 5310/71, Judgment (Jan. 1978), para. 163. To the same effect, *Tomasi v. France*, Series A, No. 241-A, App. No. 12850/87, 15 EHRR 1, at para. 115 (1992); and *Chahal v. United Kingdom*, App. No. 22414/93, Judgment (Nov. 1996),at paras. 79–80.
[187] Luban, "Liberalism, Torture, and the Ticking Bomb," supra, note 8, at 1444.

The ticking time bomb is nevertheless the argument of first resort for those who believe that, in some cases, good people must resort to torture. No actual case of a ticking time bomb scenario has been found in U.S. or Israeli experience.[188]

## 12.6. Torture: Never, or Sometimes, Maybe?

Deontology is the science of duty or moral obligation. Deontologists, like students of LOAC/IHL, have long studied torture. They suggest there are two camps with regard to torture: "absolutists," who contend that torture is never justified, no matter the seriousness of the circumstances or the human consequences of not acting, and "consequentialists," who argue that torture may be necessary in extreme circumstances – when its perceived benefits exceed its costs; "[T]orture may be permissible or even mandatory as an immediate response to urgent circumstances."[189]

Consequentialists can speak of torture as "a means for fulfilling one's duty," and of torture being "morally commendable,"[190] designating such acts "preventive (administrative) torture,"[191] when employed in extreme cases – in a ticking time bomb case, for example, where the torturer argues the criminal law defense of necessity.[192] Two consequentialists write:

> It is not surprising that the absolutist view is unpopular even among committed deontologists. The idea that the possible death of a great number of innocent people cannot warrant the torture of a single terrorist seems unreasonable. Judge Richard Posner gives this sentiment sharp expression when he says: "no one who doubts that [if the stakes are high enough, torture is permissible] should be in a position of responsibility." Indeed, the absolutist interpretation of deontology seems like a form of moral fundamentalism.[193]

In the view of LOAC/IHL anti-torture absolutists, there is a problem with the utilitarian consequentialist position that goes beyond torture's illegality and moral repugnance:

> The utilitarian argument for justifiability (that ill-treatment is justified in order to elicit information that may save others) has been advanced in a number of cases. . . . Those who argue in the language of utilitarian reasoning, when seeking to rebut the utilitarian challenge, tend to point to the impossibility of confining the facts to the classic example of the lesser evil for the greater good. How many broken wills to save a government? Will torture create more terrorists? It is a version of the "slippery slope" argument: once

[188] There are anecdotal reports of captured bombers in Israel who, under interrogation, revealed planned bombings in public places, leading to evacuations and discovery of bombs of deadly but non-Apocalyptic size.

[189] Harel and Sharon, "What Is Really Wrong With Torture?" supra, note 124, at 243.

[190] Id., at 254 and 250, respectively.

[191] Kai Ambos, "May A State Torture Suspects to Save the Life of Innocents?" 6–2 *J. of Int'l Crim. Justice* (May 2008), 261, 264, 286.

[192] Jens David Ohlin, "The Bounds of Necessity," 6–2 *J. of Int'l Crim. Justice* (May 2008), 289. In the context of criminal law, rather than war crimes, the author interestingly examines the defense of necessity as legal excuse, and as legal justification. He contends that if necessity is viewed as a legal justification it negates the unlawfulness of the act; if viewed as a legal excuse, it only negates the culpability of the actor while the criminal act remains unlawful.

[193] Harel and Sharon, "What Is Really Wrong With Torture?" supra, note 124, at 245–6. Brackets in original. Footnotes omitted.

> torture is permitted on grounds of necessity, nothing can stop it from being used on grounds of expediency.[194]

David Luban adds that the consequentialist position "assumes a single, ad hoc, decision about whether to torture, by officials who ordinarily would do no such thing except in a desperate emergency. But in the real world of interrogations, decisions are not made one-off. The real world is a world of policies, guidelines, and directives. It is a world of practices, not of ad hoc emergency measures."[195] Michael Reisman agrees that, "torture, by its nature, once sanctioned and however contingent and restrictive in intent the authorization for its application may be, metastasizes quickly, infecting the whole process of interrogation."[196]

Still, there are consequentialist civilians and soldiers, who believe that in exceptional circumstances torture is acceptable, even a civic duty. They usually agree that torture, by whatever definition, must always be unlawful, but there must be those who, in exceptional circumstances, like ticking bombs, are willing to violate the law for the greater good and face later punishment.[197]

Absolutists who oppose torture under any circumstance are seen by consequentialists as romantics, willing to trade innocent lives for airy idealism. Despite military and civilian laws, judicial opinion, and historical experience, the two viewpoints are unlikely to be reconciled while terrorists are at large, as they always will be. In the Armed Forces, however, actions, if not viewpoints, can be imposed.

## 12.7. U.S. Military Practice

Torture has always been prohibited, absolutely, by the armed services of most states.[198] *The Law of Land Warfare*, the 1956 U.S. warfighting field manual, forbids torture,[199] as do its predecessor manuals, as did Article 16 of the 1863 Lieber Code. Torture of a prisoner is a violation of the Uniform Code of Military Justice.[200]

An objective view of recent history makes evident that, in the "war on terrorism," the United States, including its Armed Forces, has engaged in torture. Not in isolated cases involving a few criminally inclined individuals, but as a matter of policy. It is not a definitional issue or a matter of fine legal distinctions.

When an Army lieutenant general, formerly commanding all ground forces in Iraq, writes, "there is irrefutable evidence that America was torturing and killing prisoners in Afghanistan," torture is indicated. [201] When the convening authority for Guantanamo military commissions declines to refer a detainee's case to trial because the prisoner was

[194] Rodley, *The Treatment of Prisoners Under International Law*, supra, note 29, at 80.
[195] Luban, "Liberalism, Torture, and the Ticking Bomb," supra, note 8, at 1445.
[196] Reisman, "Holding the Center of the Law of Armed Conflict," supra, note 13, at 855–6.
[197] Bowden, "The Dark Art of Interrogation," supra, note 88, is a persuasive example of this position.
[198] Jean-Marie Henckaerts and Louise Doswald-Beck, eds., *Customary International Humanitarian Law*, vol. II, *Practice* (Cambridge: Cambridge University Press, 2005), §§ 1039–1215, at 2112–34, specifying the military manuals, handbooks, regulations, rules, instructions, guides, and codes of the armed forces of forty-one states, along with domestic legislation relating to the conduct of the armed forces of ninety states.
[199] Dept. of the Army, *The Law of Land Warfare* (Washington: GPO, 1956), at para. 271.
[200] UCMJ, Art. 93, Cruelty and maltreatment.
[201] Sanchez, *Wiser in Battle*, supra, note 50, at 210.

tortured, torture is indicated.[202] When the International Committee of the Red Cross (ICRC), in a confidential report to a U.S. government agency, writes of "high value detainees," that "... ill-treatment to which they were subjected ... constituted torture," torture is indicated.[203] When the military death certificates of two Bagram detainees states that both were beaten to death, torture is indicated.[204]

The full U.S. Senate Armed Services Report on Torture remains classified and unavailable. Its Executive Summary is public, however:

> The abuse of detainees in U.S. custody cannot simply be attributed to the actions of "a few bad apples" acting on their own. The fact is that senior officials in the United States government solicited information on how to use aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees. Those efforts damaged our ability to collect accurate intelligence that could save lives, strengthened the hand of our enemies, and compromised our moral authority.... [T]he decision to replace well established military doctrine, i.e., legal compliance with the Geneva Conventions, with a policy subject to interpretation, impacted the treatment of detainees.... In early November 2002 ... the military services identified serious legal concerns about the techniques and called for additional analysis.... [205]

In April 2009, four formerly top secret Department of Justice memoranda regarding CIA interrogation techniques were made public. Former Vice President Cheney urged that other secret memoranda be released that showed successful outcomes of interrogations employing the torture techniques.[206] But the U.S. Department of Justice, in one of the four released memoranda, notes that, "Intelligence acquired from the [CIA enhanced] interrogation program ... is difficult to quantify with confidence and precision ... [I]t is difficult to determine conclusively whether interrogations have provided information critical to interdicting specific imminent attacks."[207] What information came from which interrogation or investigative method, and whether the same information would have been gained without the legal and moral cost of "enhanced interrogation techniques" is debated, even in the CIA.[208]

Assuming that memoranda exist indicating the efficacy of "enhanced interrogation techniques," is it government policy that the end justifies the means? "[A]rguments for torture, regardless of how they are framed, suffer from the same defect. We deny terrorists the right to be free from torture, but we are not willing to forego this right for ourselves ... If we can use torture to prevent armed attacks, then our enemies can use torture against us as well."[209] Torture becomes nothing more than business as usual.

[202] Bob Woodward, "Detainee Tortured, Says U.S. Official," *Washington Post*, Jan. 14, 2009, A1.
[203] ICRC Report to Acting General Counsel, Central Intelligence Agency (Feb. 14, 2007), 26.
[204] Solis, "Military Justice?" supra, note 114, at 24. The incident was one of eleven 2005 Bagram detainee abuse cases that resulted in eleven courts-martial preferrals, three of which were dropped before trial. Two others ended in acquittal. An Army private first class, Willie Brand, accused of beating one of the two shackled detainees to death was convicted of assault, maiming, and maltreatment. He was merely sentenced to a reduction in rank to private.
[205] Executive Summary: "Senate Armed Services Report on Torture," supra, note 39, at 1–2.
[206] Jimmy Orr, "Cheney to Obama: Release More of the Torture Memos," *Christian Science Monitor*, April 21, 2009, available at: http://features.csmonitor.com/politics/2009/04/21/cheney-to-obama-release-more-of-the-torture-memos.
[207] Memorandum for John Rizzo; from: U.S. Department of Justice, supra, note 150, at 9–10.
[208] Shane, "Interrogations' Effectiveness May Prove Elusive," supra, note 92.
[209] George P. Fletcher and Jens David Ohlin, *Defending Humanity: When Force is Justified and Why* (Oxford: Oxford University Press, 2008), 170.

After 9/11, U.S. military civilian leadership initiated changes in the long-standing absolute military torture prohibition. In November 2002, the DoD General Counsel, William J. Haynes, advised Secretary of Defense Donald Rumsfeld that it was acceptable to subject Guantanamo detainees to two categories of interrogation techniques that, it has been argued, constituted cruel treatment, if not torture.[210] What the General Counsel referred to as "Category II interrogation techniques" included use of stress positions for up to four hours, isolation for up to thirty days, sound and light deprivation, twenty-hour questioning sessions, and forced nudity. Category III "advanced counter-resistance strategies" included exposure to cold weather or water, convincing "the detainee that death or severely painful consequences are imminent," and "use of a wet towel to induce the misperception of suffocation . . . "[211] Secretary of Defense Rumsfeld approved use of all these, and other, interrogation techniques. The Staff Judge Advocates General of all the U.S. Armed Services* strongly objected, however, and in January 2003, authority to employ category III techniques was withdrawn.[212]

A year later, in 2004, Army Major General Antonio M. Taguba was directed to investigate detainee abuses by military personnel that had been revealed at Iraq's Abu Ghraib prison. His report documented many interrogations that went beyond the approved Category II techniques, and revealed misconduct and derelictions of duty from the most junior soldier to generals.[213] General Taguba said, "[T]he fact is that we violated the laws of land warfare in Abu Ghraib. We violated the tenets of the Geneva Convention. We violated our own principles and we violated the core of our military values. The stress of combat is not an excuse, and I believe, even today, that those civilian and military leaders responsible should be held accountable."[214]

Public disclosure of events at Abu Ghraib, along with revelation of approval of Category II and III interrogation techniques, led to congressional amendment of the Detainee Treatment Act (DTA).[215] The DTA amendment, bearing the *sub silentio* endorsements of the Judge Advocates General of all the Armed Services, was passed by Congress over Presidential objection. The amendment prohibited use of cruel, inhuman, or degrading treatment by U.S. government personnel anywhere in the world, and prohibited U.S. military interrogators from using any interrogation technique not included in the Army's

[210] Action Memo for: Secretary of Defense; from: William J. Haynes II, General Counsel; Subject: Counter-Resistance Techniques (Nov. 27, 2002). Reprinted in Greenberg and Dratel, *The Torture Papers*, supra, note 40, at 237.

[211] Memorandum for Commander, Joint Task Force 170; from LTC Diane E. Beaver, Staff Judge Advocate, JTF 170, Guantanamo Bay; Subject: Legal Brief on Proposed Counter-Resistance Strategies; dtd. Oct. 11, 2002. Reprinted in Greenberg and Dratel, *The Torture Papers*, supra, note 40, at 229.

* Including the Marine Corps' Staff Judge Advocate to the Commandant of the Marine Corps. The Marines have no Judge Advocate General. They look to the Navy's JAG for those few acts which statutorily must be accomplished by a Judge Advocate General. Otherwise, the Marines' SJA to the CMC functions as do the other U.S. service JAGs.

[212] James Ross, "Black Letter Abuse: The Legal Response to Torture Since 9/11," 867 *Int'l Rev. of the Red Cross* (Sept. 2007), 561, 573. Footnotes omitted.

[213] "Article 15–6 Investigation of the 800th Military Police Brigade (2004), available at: http://www.npr.org/iraq/2004/prison_abuse_report.pdf.

[214] Seymour M. Hersh, "The General's Report," *The New Yorker*, June 25, 2007, 69. General Taguba believes the frank truthfulness of his investigation report led to his forced early retirement from the Army. David S. Cloud, "General Says Prison Inquiry Led to His Forced Retirement," NY *Times*, June 17, 2007, A10.

[215] Detainee Treatment Act of 2005, Pub. L. No. 109–148, §§ 1001–1006 (2005).

*Field Manual on Intelligence Interrogation*.[216] Upon signing the amended DTA into law, President Bush issued a "signing statement" indicating that his authority as commander-in-chief trumped the Act's restrictions.[217] "For good measure, he reserved the power to violate the torture bill itself if he thought it necessary for the purposes of national security."[218]

In September 2006, the Army, the lead authority for POW and detainee matters for all U.S. Armed Forces, issued *Human Intelligence Collection Operations*, to replace the *Manual on Intelligence Interrogation*. The new manual reads: "In accordance with the Detainee Treatment Act of 2005, the only interrogation approaches and techniques that are authorized for use against any detainee, regardless of status or characterization, are those authorized and listed in this Field Manual."[219] The manual directs:

> Any inhumane treatment – including abusive practices, torture, or cruel, inhuman, or degrading treatment or punishment . . . is prohibited and all instances of such treatment will be reported immediately . . . Beyond being impermissible, these unlawful and unauthorized forms of treatment are unproductive because they may yield unreliable results, damage subsequent collection efforts, and result in extremely negative consequences at national and international levels.[220]

The manual prohibits military working dogs in interrogations and requires non-DoD agencies that interrogate military prisoners, such as the CIA, to adhere to the manual's standards.[221] It also prohibits hooding, forced nakedness, hypothermia or heat injury, mock executions, electric shocks, burns, "or other forms of physical pain," specifically including waterboarding.[222] With this 2006 manual, the armed forces reaffirmed their absolutist position against torture.

No law will deter the lawless, however. Inevitably, instances of torture by military personnel will come to light. The Uniform Code of Military Justice, written orders, and field manual mandates provide the military's requirements and prohibitions, and, when violations become known, the means of charging, trial, and punishment.

The potential ineffectiveness of such prohibitions was highlighted in a 2006 anonymous survey of 1,767 soldiers and Marines of the Multi-National Force–Iraq, conducted by a Mental Health Advisory Team from the Office of the Army Surgeon General.[223] Thirty-six percent of soldiers surveyed and thirty-nine percent of Marines responded that, in Iraq, torture should be allowed to gather important information about insurgents. Additionally, if torture will save the life of a soldier or Marine it should be allowed, responded forty-one percent of soldiers and forty-four percent of Marines surveyed. Only

[216] DTA available at: http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr359&dbname=109&. See § 1002.A.

[217] President's Statement on Signing of HR 2836 (Dec. 30, 2005), available at: http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html. "The executive branch shall construe . . . the Act, relating to detainees, in a manner consistent with the constitutional authority of the President . . . as Commander in Chief and consistent with . . . achieving the shared objective of the Congress and the President . . . of protecting the American people from further terrorist attacks."

[218] Jonathan Mahler, "After the Imperial Presidency," *NY Times Sunday Magazine*, Nov. 9, 2008, 49.

[219] Dept. of the Army, FM 2–22.3, *Human Intelligence Collection Operations* (Washington: GPO, 2006), vi.

[220] Id., at Appendix M-5.

[221] Id.

[222] Id., para. 5–75, at 5–21.

[223] Mental Health Advisory Team (MHAT) IV; Operation Iraqi Freedom 05–07; Final Report, Nov. 17, 2006, available at: http://www.defenselink.mil/releases/release.aspx?releaseid=10824.

forty-six percent of soldiers and thirty-two percent of Marines would report a unit member who mistreated a noncombatant.[224] Those surveyed were junior enlisted combatants, and youthful bravado may have influenced responses. Also, there sometimes is a gap between a soldier's or Marine's talk and his behavior. No matter how viewed, the survey results were more than a disappointment.

Following release of the survey, General David H. Petraeus, then the commander of U.S. forces in Iraq, cautioned against torture in a letter to all members of his command. He wrote:

> I was concerned by the results of a recently released survey . . . that revealed an apparent unwillingness on the part of some US personnel to report illegal actions taken by fellow members of their units. . . . Seeing a fellow trooper killed by a barbaric enemy can spark frustration, anger, and a desire for immediate revenge . . . [W]e must not let these emotions lead us – or our comrades in arms – to commit hasty, illegal actions. In the event that we witness or hear of such actions, we must not let our bonds prevent us from speaking up. Some may argue that we would be more effective if we sanctioned torture . . . to obtain information from the enemy. They would be wrong. Beyond the basic fact that such actions are illegal, history shows that they are also frequently neither useful nor necessary. Certainly, extreme physical action can make someone "talk"; however, what the individual says may be of questionable value . . . Leaders, in particular, need to discuss these issues with their troopers. – and, as always, they need to set the right example and strive to ensure proper conduct.[225]

West Point's Colonel David Wallace succinctly summarizes the U.S. military's position: "The best way to approach the torture and ill-treatment question is simply through a principle-oriented approach. The appropriate guidance for any soldier participating in the current conflict (or any conflict for that matter) is: 'no torture, no ill-treatment, no exceptions'."[226]

## 12.8. Summary

Torture "works," says Professor Dershowitz. No doubt it does sometimes "work." Even if torture gained actionable intelligence in the preponderance of cases, and the evidence is that it does not, the greater issue is not whether torture works or does not work. If results were all that mattered, should the military torture every captive? Of course not.

It is unusual for torture to result in actionable intelligence. Information gained through torture is seldom reliable. Torture may accompany other military indiscipline. Torture damages the nation's image in international eyes and diminishes the armed forces in the domestic view. Torture endangers one's own soldiers who are subsequently captured. Torture is illegal under domestic, international, and customary law. Finally, naive as it may sound, torture is simply wrong.

More than a hundred and fifty years ago, Clausewitz, using the term "intelligence" as a mental attribute, wrote, "If, then, civilized nations do not put their prisoners to death or devastate cities and countries, it is because intelligence plays a larger part in their

[224] Id., Figures 16 and 18, respectively.
[225] Commanding General David H. Petraeus's Letter about Values (May 10, 2007).
[226] Col. David A. Wallace, "Torture v. the Basic Principles of the US Military," 6–2 *J. of Int'l Criminal Justice* (May 2008), 309, 316.

methods of warfare and has taught them more effective ways of using force than the crude expression of instinct."[227]

The U.S. military counterinsurgency manual puts it clearly: "No exceptional circumstances permit the use of torture . . . Prohibitions against mistreatment may sometimes . . . place leaders in difficult situations, where they must choose between obedience to the law and the lives of their Soldiers and Marines. U.S. law and professional values compel commanders to forbid mistreatment of noncombatants, including captured enemies."[228]

Veteran military interrogator Major Matthew Alexander led the interrogation team that painstakingly located and made possible the 2006 targeted killing of Abu Musab al-Zarqawi, leader of Al Qaeda in Iraq. Alexander says, "*Coerce* information and the subject will tell you the location of a safe house. *Convince* the subject to give you the information and he'll tell you it's booby-trapped."[229]

Yet, one fears that, should there be another terrorist attack inside America's borders, the percentage of Americans, military and civilian, favoring torture will be higher than ever.

# CASES AND MATERIALS

## PROSECUTOR V. VASILJEVIC

IT-98-32-T (29 November, 2002), footnotes omitted.

***Introduction.*** *This ICTY opinion defines, for purposes of ICTY jurisprudence, at least, what constitutes an "inhumane act."*

XI. INHUMANE ACTS

A. The Law

234. The Accused is charged . . . with inhumane acts as a crime against humanity pursuant to Article 5(i) of the [ICTY] Statute. The crime of inhumane acts, like inhumane treatment under Article 3, and cruel treatment under Article 2, functions as a residual category for serious charges which are not otherwise enumerated under Article 5. All of these offenses require proof of the same elements. The elements to be proved are:

(i) the occurrence of an act or omission of similar seriousness to the other enumerated acts under the Article;

[227] Carl von Clausewitz, *On War* (Michael Howard and Peter Paret, eds. and trans., New York: Knopf, Everyman's Library, 1993), 85.

[228] *The U.S. Army–Marine Corps Counterinsurgency Field Manual* (Chicago: University of Chicago Press, 2007), paras. 7–42 and – 43, at 251.

[229] Maj. Matthew Alexander, USAF, address at United States Military Academy's Rule of Law Conference, on "The Future of International Criminal Justice," West Point, NY (April 17, 2009).

(ii) the act or omission caused serious mental or physical suffering or injury or constituted a serious attack on human dignity; and
(iii) the act or omission was performed deliberately by the accused or a person or persons for whose acts and omissions he bears criminal responsibility.

235. To assess the seriousness of an act, consideration must be given to all the factual circumstances. These circumstances may include the nature of the act or omission, the context in which it occurred, the personal circumstances of the victim including age, sex and health, as well as the physical, mental and moral effects of the act upon the victim. While there is no requirement that the suffering imposed by the act have long term effects on the victim, the fact that an act has had long term effects may be relevant to the determination of the seriousness of the act.

***Conclusion.*** *Do you agree with the elements specified by the Trial Chamber's definition? Does it substitute a new series of undefined terms for the original undefined term? Is it reasonable to expect any better definitional effort?*

## "THE ĈELEBIĆI CASE" PROSECUTOR V. DELALIĆ, ET AL.

IT-96-21-T, Trial Judgment (16 November 1998), footnotes omitted.

***Introduction.*** Delalić *does not provide a definition of torture, but it does specify examples of what has been found to constitute torture. It also gathers authorities and confirms that, in LOAC, rape constitutes grave breach of torture. Most of the examples arise from human rights courts, rather than war crime trials, but they would likely be considered torture in any judicial forum. The judgment confirms that the prohibition of torture is customary law and a nonderogable* jus cogens *norm. When the opinion refers to the "Torture Convention," it is referring to the CAT. The* Delalić *judgment is also notable for applying the prohibition of torture to nonstate actors in IHL situations.*

(iii) Discussion
1. a. The Definition of Torture Under Customary International Law

452. There can be no doubt that torture is prohibited by both conventional and customary international law.

452. There can be no doubt that torture is prohibited by both conventional and customary international law. In addition to the proscriptions of international humanitarian law . . . there are also a number of international human rights instruments that express the prohibition . . .

453. In addition, there are two international instruments that are solely concerned with the prohibition of torture, the most significant of which is the Torture Convention. This Convention was adopted by the General Assembly . . . and has been ratified or acceded to by 109 States . . . representing more than half of the membership of the United Nations. It was preceded by the Declaration on the Protection from Torture, which was adopted by the United Nations General Assembly on . . . 1975 without a vote.

454. Based on the foregoing, it can be said that the prohibition on torture is a norm of customary law. It further constitutes a norm of *jus cogens*, as has been confirmed by the

United Nations Special Rapporteur for Torture. It should additionally be noted that the prohibition contained in the aforementioned international instruments is absolute and non-derogable in any circumstances.

455. Despite the clear international consensus that the infliction of acts of torture is prohibited conduct, few attempts have been made to articulate a legal definition of torture. In fact, of the instruments prohibiting torture, only three provide any definition. The first such instrument is the Declaration on torture, article 1 . . .

456. This definition was used as the basis for the one subsequently articulated in the Torture Convention, which states, in article 1 that,

> the term "torture" means 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 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.

458. The third such instrument, the Inter-American Convention . . . definition of torture contained in Article 2 thereof incorporates, but is arguably broader than, that contained in the Torture Convention, as it refrains from specifying a threshold level of pain or suffering which is necessary for ill treatment to constitute torture.

b. Severity of Pain or Suffering

461. Although the Human Rights Committee, a body established by the ICCPR [1966 International Covenant on Civil and Political Rights] to monitor its implementation, has had occasion to consider the nature of ill-treatment prohibited under article 7 of the ICCPR, the Committee's decisions have generally not drawn a distinction between the various prohibited forms of ill-treatment. However, in certain cases, the Committee has made a specific finding of torture, based upon the following conduct: beating, electric shocks and mock executions, *plantones*, beatings and lack of food; being held incommunicado for more than three months whilst being kept blindfolded with hands tied together, resulting in limb paralysis, leg injuries, substantial weight loss and eye infection.

467. Finally, it should also be noted that the Special Rapporteur on Torture . . . provided a detailed, although not exhaustive, catalogue of those acts which involve the infliction of suffering severe enough to constitute the offense of torture, including: beating; extraction of nails, teeth, etc.; burns; electric shocks; suspension; suffocation; exposure to excessive light or noise; sexual aggression; administration of drugs in detention or psychiatric institutions; prolonged denial of rest or sleep; prolonged denial of food; prolonged denial of sufficient hygiene; prolonged denial of medical assistance; total isolation and sensory deprivation being kept in constant uncertainty in terms of space and time; threats to torture or kill relatives; total abandonment; and simulated executions.

469. As evidenced by the jurisprudence set forth above, it is difficult to articulate with any degree of precision the threshold level of suffering at which other forms of mistreatment become torture. However, the existence of such a grey area should not be seen as an invitation to create an exhaustive list of acts constituting torture, in order to neatly categorise the

prohibition. As stated by [Nigel S.] Rodley [when he was the U.N.'s Special Rapporteur on Torture], "... a judicial definition cannot depend upon a catalogue of horrific practices; for it to do so would simply provide a challenge to the ingenuity of the torturers, not a viable legal prohibition."

471. A fundamental distinction regarding the purpose for which torture is inflicted is that between a "prohibited purpose" and one which is purely private. The rationale behind this distinction is the prohibition on torture is not concerned with private conduct, which is ordinarily sanctioned under national law. In particular, rape and other sexual assaults have often been labeled as "private", thus precluding them from being punished under national or international law. However, such conduct could meet the purposive requirements of torture as, during armed conflicts, the purposive elements of intimidation, coercion, punishment or discrimination can often be integral components of behaviour, thus bringing the relevant conduct within the definition. Accordingly,

> [o]nly in exceptional cases should it therefore be possible to conclude that the infliction of severe pain or suffering by a public official would not constitute torture ... on the ground that he acted for purely private reasons.

472. ... [T]he Defence argues that an act can only constitute torture if it is committed for a limited set of purposes, enumerated in the Commentary to article 147 of the Fourth Geneva Convention. This proposition does not reflect the position at customary law ... which clearly envisages prohibited purposes additional to those suggested by the Commentary.

d. Official Sanction

473. Traditionally, an act of torture must be committed by, or at the instigation of, or with the consent or acquiescence of, a public official or person acting in an official capacity. In the context of international humanitarian law, this requirement must be interpreted to include officials of non-State parties to a conflict, in order for the prohibition to retain significance in situations of internal armed conflicts or international conflicts involving some non-State entities.

474. The incorporation of this element into the definition of torture contained in the Torture Convention again follows the Declaration on Torture and develops it further by adding the phrases "or with the consent or acquiescence of" and "or other person acting in an official capacity". It is thus stated in very broad terms and extends to officials who take a passive attitude or turn a blind eye to torture, most obviously by failing to prevent or punish torture under national penal or military law, when it occurs.

(iv) Rape as Torture

475. The crime of rape is not itself expressly mentioned in the provisions of the Geneva Conventions relating to grave breaches, nor in common article 3, and hence its classification [in the ICTY Statute] as torture and cruel treatment. ...

476. There can be no doubt that rape and other forms of sexual assault are expressly prohibited under international humanitarian law. ...

477. There is on the basis of these provisions alone [Geneva Convention IV, Article 27; Additional Protocol I, Article 76 (1); Additional Protocol II, Articles 4 (1) and (2); implicitly

in 1907 Hague Regulation IV, Article 46; the Nuremberg IMT Charter, Article 6(c); and the ICTY Statute, Article 5] a clear prohibition of rape and sexual assault under international humanitarian law. However the relevant provisions do not define rape. Thus, the task of the Trial Chamber is to determine the definition of rape in this context.

486. . . . First, in considering whether rape gives rise to pain and suffering, one must not only look at the physical consequences, but also at the psychological and social consequences of the rape. Secondly, in its definition of the requisite elements of torture, the Inter-American Commission did not refer to the customary law requirement that the physical and psychological pain and suffering be severe. However, this level of suffering may be implied from the Inter-American Commission's finding that the rape, in the instant case, was "an act of violence" occasioning physical and psychological pain and suffering that caused the victim: a state of shock; a fear of public ostracism; feelings of humiliation; fear of how her husband would react; a feeling that family integrity was at stake and an apprehension that her children might feel humiliated if they knew what had happened to their mother.

489. By stating that it would have found a breach of article 3 [of the European Convention] even if each of the grounds had been considered separately, the European Court . . . specifically affirmed the view that rape involves the infliction of suffering as a requisite level of severity to place it in the category of torture. . . .

490. In addition, the Akayesu Judgment [*Prosecutor v. Akayesu*, ICTR-96-4-T (2 Sept. 1998), para. 597] expresses a view on the issue of rape as torture most emphatically, in the following terms:

> Like torture rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment control or destruction of a person. Like torture rape is a violation of personal dignity, and rape in fact constitutes torture when 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.

***Conclusion.*** *In the foregoing quote, note the ICTR Trial Chamber's language, reflecting the long-accepted view of the ICTY and other IHL and human rights courts, and based on the CAT definition of torture, that to constitute the war crime of torture, rape must be committed by a public official. Indeed, the opinion itself reflects that requirement. That long-accepted requirement is rejected in the following ICTY case.*

## PROSECUTOR V. KUNARAC, ET AL.

IT-96-23 & 23/1-A-T (22 February 2001), footnotes omitted*

***Introduction.*** *The* Kunarac *trial judgment announces a shift in the definition of the war crime of torture. The Trial Chamber also provides an instructive tutorial on the similarities and differences between the mandates of human rights law versus the legal requirements of IHL. It also discusses distinctions between human rights law and international criminal law.*

* The inconsistent capitalizing of the word, "State," and the hyphenating of terms is as in the original.

466. Torture is prohibited under both conventional and customary international law and it is prohibited both in times of peace and during armed conflict. The prohibition can be said to constitute a norm of *jus cogens*. However, relatively few attempts have been made at defining the offence of torture . . . All [past definitional attempts have been contained in] human rights instruments.

467. Because of the paucity of precedent in the field of international humanitarian law, the Tribunal has, on many occasions, had recourse to instruments and practices developed in the field of human rights law. Because of their resemblance, in terms of goals, values and terminology, such recourse is generally welcome and needed assistance to determine the content of customary international law in the field of humanitarian law. With regard to certain of its aspects, international humanitarian law can be said to have fused with human rights law.

469. . . . The absence of an express definition of torture under international humanitarian law does not mean that this body of law should be ignored altogether. The definition of an offence is largely a function of the environment in which it develops. Although it may not provide its own explicit definition of torture, international humanitarian law does provide some important definitional aspects of this offence.

470. In attempting to define an offence under international humanitarian law, the Trial Chamber must be mindful of the specificity of this body of law. In particular, when referring to definitions which have been given in the context of human rights law, the Trial Chamber will have to consider two crucial structural differences between these two bodies of law:

(i) Firstly, the role and position of the state as an actor is completely different in both regimes. Human rights law is essentially born out of the abuses of the state over its citizens and out of the need to protect the latter from state-organised or state-sponsored violence. Humanitarian law aims at placing restraints on the conduct of warfare so as to diminish its effects on the victims of the hostilities.

In the human rights context, the state is the ultimate guarantor of the rights protected and has both duties and a responsibility for the observance of those rights. In the event that the state violates those rights or fails in its responsibility to protect the rights, it can be called to account and asked to take appropriate measures to put an end to the infringements.

In the field of international humanitarian law, and in particular in the context of international prosecutions, the role of the state is, when it comes to accountability, peripheral. Individual criminal responsibility for violation of international humanitarian law does not depend on the participation of the state and, conversely, its participation in the commission of the offence is no defence to the perpetrator. Moreover, international humanitarian law purports to apply equally to and expressly bind all parties to the armed conflict whereas, in contrast, human rights law generally applies to only one party, namely the state involved, and its agents.

This distinction can be illustrated by two recent American decisions of the Court of Appeals for the Second Circuit rendered under the Alien Torts Claims Act. The Act gives jurisdiction to American district courts for any civil action by an alien for a tort committed in violation of the law of nations or a treaty of the United States. In the first decision, *In re Filártiga*, the Court of Appeals of the Second Circuit held that "deliberate torture perpetrated under colour of official authority violates universally accepted norms of the international law of

human rights, regardless of the nationality of the parties". This decision was only concerned with the situation of an individual *vis-à-vis* a state, either his national state or a foreign state. In a later decision in *Kadic v Karadžic*, the same court made it clear that the body of law which it applied in the *Filártiga* case was customary international law of *human rights* and that, according to the Court of Appeals, in the human rights context torture is proscribed by international law only when committed by state officials or under the colour of law. The court added, however, that atrocities including torture are actionable under the Alien Tort Claims Act regardless of state participation to the extent that the criminal acts were committed in pursuit of genocide or war crimes.

(ii) Secondly, that part of international criminal law applied by the Tribunal [i.e., the ICTY] is a penal law regime. It sets one party, the prosecutor, against another, the defendant. In the field of international human rights, the respondent is the state. Structurally, this has been expressed by the fact that human rights law establishes lists of protected rights whereas international criminal law establishes lists of offences.

482. . . . In view of the international instruments and jurisprudence reviewed above [the 1948 Universal Declaration of Human Rights, the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"), European Court of Human Rights torture decisions, the 1966 International Covenant on Civil and Political Rights, and the ICTY's own *Furundžija* decision, the Trial Chamber is of the view that the definition of torture contained in the Torture Convention [the CAT] cannot be regarded as the definition of torture under customary international law which is binding regardless of the context in which it is applied. The definition of the Torture Convention was meant to apply at an inter-state level and was, for that reason, directed at the states' obligations. The definition was also meant to apply only in the context of that Convention, and only to the extent that other international instruments or national laws did not give the individual a broader or better protection. The Trial Chamber, therefore, holds that the definition of torture contained in Article 1 of the Torture Convention can only serve, for present purposes, as an interpretational aid.

483. Three elements of the definition of torture contained in the torture Convention are, however, uncontentious and are accepted as representing the status of customary international law on the subject:

(i) Torture consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental.
(ii) This act or omission must be intentional.
(iii) The act must be instrumental to another purpose, in the sense that the infliction of pain must be aimed at reaching a certain goal.

484. On the other hand, three elements remain contentious:

(i) The list of purposes the pursuit of which could be regarded as illegitimate and coming within the realm of the definition of torture.
(ii) The necessity, if any, for the act to be committed in connection with an armed conflict.
(iii) The requirement, if any, that the act be 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.

485. The Trial Chamber is satisfied that the following purposes have become part of customary international law: (a) obtaining information or a confession, (b) punishing, intimidating or coercing the victim or a third person. There are some doubts as to whether other purposes have come to be recognized under customary international law. The issue does not need to be resolved here, because the conduct of the accused is appropriately subsumable under the above-mentioned purposes.

486. There is no requirement under customary international law that the conduct must be solely perpetrated for one of the prohibited purposes. As was stated by the Trial Chamber in the *Delalić* case, the prohibited purpose must simply be part of the motivation behind the conduct and need not be the predominating or sole purpose.

487. Secondly, the nature of the relationship between the underlying offence – torture – and the armed conflict depends, under the [ICTY's] Statute, on the qualification of the offence, as a grave breach, a war crime or a crime against humanity. If, for example, torture is charged as a violation of the laws or customs of war under . . . the Statute, the Trial Chamber will have to be satisfied that the act was closely related to the hostilities. If, on the other hand, torture is charged as a crime against humanity . . . the Trial Chamber will have to be convinced beyond reasonable doubt that there existed an armed conflict at the relevant time and place.

488. Thirdly, the Torture Convention requires that the pain or suffering be 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. As was already mentioned, the Trial Chamber must consider each element of the definition "from the specific viewpoint of international criminal law relating to armed conflicts." In practice, this means that the Trial Chamber must identify those elements of the definition of torture under human rights law which are extraneous to international criminal law as well as those which are present in the latter body of law but possibly absent from the human rights regime.

489. The Trial Chamber draws a clear distinction between those provisions which are addressed to individuals. Violations of the former provisions result exclusively in the responsibility of the state to take the necessary steps to redress or make reparation for the negative consequences of the criminal actions of its agents. On the other hand, violations of the second set of provisions may provide for individual criminal responsibility, regardless of an individual's official status. While human rights norms are almost exclusively of the first sort, humanitarian provisions can be of both or sometimes of mixed nature. This has been pointed out by the Trial Chamber in the *Furundžija* case:

> Under current international humanitarian law, in addition to individual criminal liability, State responsibility may ensue as a result of State officials engaging in torture or failing to prevent torture or to prevent torturers. If carried out as an extensive practice of State officials, torture amounts to a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, thus constituting a particularly wrongful act generating State responsibility.

490. Several humanitarian law provisions fall within the first category of legal norms, expressly providing for the possibility of state responsibility for the acts of its agents: thus, Article 75 ("Fundamental Guarantees") of Additional Protocol I provides that acts of violence to the life, health or physical or mental well-being of persons such as murder, torture, corporal punishment and mutilation, outrages upon personal dignity, the taking of hostages, collective

punishments and threats to commit any of those acts when committed by civilian or by military agents of the state could engage the state's responsibility. The requirement that the acts be committed by an agent of the state applies equally to any of the offences provided under paragraph 2 of Article 75 and in particular, but no differently, to the crime of torture.

491. This provision should be contrasted with Article 4 ("Fundamental Guarantees") of Additional Protocol II. The latter provision provides for a list of offences broadly similar to that contained in Article 75 of Additional Protocol I but does not contain any reference to agents of the state. The offences provided for in this Article can, therefore, be committed by any individual, regardless of his official status, although, if the perpetrator is an agent of the state he could additionally engage the responsibility of the state. The Commentary to Additional Protocol II dealing specifically with the offences mentioned in Article 4 (2)(a) namely, violence to the life, health, or physical or mental well being of persons in particular murder and cruel treatment such as torture, states:

> The most widespread form of torture is practiced by public officials for the purpose of obtaining confessions, but torture is not only condemned as a judicial institution; *the act of torture is reprehensible in itself, regardless of its perpetrator*, and cannot be justified in any circumstances.

493. A violation of one of the relevant articles of the Statute will engage the perpetrator's individual criminal responsibility. In this context, the participation of the state becomes secondary and, generally, peripheral. With or without the involvement of the state, the crime committed remains of the same nature and bears the same consequences. . . .

494. Likewise, the doctrine of "act of State", by which an individual would be shielded from criminal responsibility for an act he or she committed in the name of or as an agent of a state, is no defence under international criminal law. This has been the case since the Second World War, if not before . . . Neither can obedience to orders be relied upon as a defence playing a mitigating role only at the sentencing stage. In short, there is no privilege under international criminal law which would shield state representatives or agents from the reach of individual criminal responsibility. On the contrary, acting in an official capacity could constitute an aggravating circumstance when it comes to sentencing, because the official illegitimately used and abused a power which was conferred upon him or her for legitimate purposes.

495. The Trial Chamber also points out that those conventions, in particular the human rights conventions, consider torture *per se* while the Tribunal's Statute criminalises it as a form of war crime, crime against humanity or grave breach. The characteristic trait of the offence in this context is to be found in the nature of the act committed rather than in the status of the person who committed it.

496. The Trial Chamber concludes that the definition of torture under international humanitarian law does not comprise the same elements as the definition of torture generally applied under human rights law. In particular, the Trial Chamber is of the view that the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law.

497. On the basis of what has been said, the Trial Chamber holds that, in the field of international humanitarian law, the elements of the offence of torture, under customary international law are as follows:

(i) The infliction, by act or omission, of severe pain or suffering, whether physical or mental.
(ii) The act or omission must be intentional.
(iii) The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.

***Conclusion.*** *The definition of the war crime of torture enunciated by the* Kunarac *Trial Chamber is followed in subsequent ICTY torture trials.*

*Does the Trial Chamber's discussion in paragraphs 488–494, regarding the responsibility of state officials for torture, suggest possible liability as to authors of policies regarding the interrogation of detainees in the Iraq and Afghanistan conflicts?*

## THE LIEUTENANT COLONEL AND THE MOCK EXECUTION

Lieutenant Colonel Allen B. West, with nineteen years of Army service, commanded an artillery battalion in the 4th Infantry Division, near Saba al Boor, in "the Sunni Triangle" of northern Iraq. Lieutenant Colonel West had been in Iraq for four months.

In August 2003, in conversation with an Army intelligence officer, Lieutenant Colonel West was told that there was an Iraqi plot to kill him. Such a plot could also kill or wound soldiers accompanying him. An Iraqi policeman who sometimes worked for the Americans, Yehiya Kadoori Hamoodi, was reported to be involved in the plot. After a week or so, during which a patrol he was supposed to be with was fired upon, Lieutenant Colonel West directed several of his soldiers to go to the nearby village, seize Hamoodi, and bring him to the U.S. base. They did so, depositing him in an on-base interrogation room, blindfolded and in handcuffs. Roughly questioned, Hamoodi denied knowledge of any ambush.

"Hamoodi said he felt relieved to hear the colonel was expected. He considered Colonel West to be 'calm, quiet, clever and sociable.'"[230] Lieutenant Colonel West recalled, "I asked for soldiers to accompany me and told them we had to gather information and that it could get ugly."[231] According to a newspaper interview of West, as the lieutenant colonel entered the interrogation room he drew his 9-millimeter pistol, cocked it, sat down and placed it in his lap, in view of Hamoodi. After briefly questioning him further, other soldiers in the room began to shove and punch Hamoodi. Lieutenant Colonel West, an artillery officer who had never before questioned a prisoner, said that he would have stopped the punching of the handcuffed prisoner, "had it become too excessive."[232] Instead, according to an Army pretrial investigator's report, West said to Hamoodi, "I came here for one of two reasons, to get the information I need, or to kill you."[233] Such a dramatic approach seems unsupported by the level of combat experienced by Lieutenant Colonel West, who had but one of his soldiers wounded and none killed during his tour of duty in Iraq. Even the wounded soldier returned to duty with the unit.[234]

[230] Deborah Sontag, "How Colonel Risked His Career By Menacing Detainee and Lost," *NY Times*, May 27, 2004, A1.
[231] Rowan Scarborough, "Army Files Charges In Combat Tactic," *Washington Times*, Oct. 29, 2003, A1.
[232] Sontag, "How Colonel Risked His Career," supra, note 230, A1.
[233] Richard Berry, *A Missing Link in Leadership* (Bloomington, IN: Author House, 2008), 27.
[234] Id., at 59.

The lieutenant colonel and his soldiers moved Hamoodi outside and threatened to kill him. West fired a pistol shot in the air, and then directed his soldiers to force Hamoodi's head into a sand-filled metal barrel used to ensure soldiers' weapons were clear before entering office spaces. Pointing his pistol at Hamoodi's head, Lieutenant Colonel West began to count down from five. When Hamoodi failed to respond, West fired a round into the sand-filled barrel, angling his pistol away from Hamoodi's head. Hamoodi promptly admitted a planned attack and provided the names of involved Iraqis. Interviewed later, Hamoodi said he gave false information out of fear.

One of the Iraqis named by Hamoodi was arrested and his home searched. No ambush plans or weapons were found. Hamoodi was held for forty-five days, after which he was released without charges.

"[T]he abusive interrogation might never have come to light if a sergeant in another battalion had not subsequently written a letter of complaint about the 'command climate' under Colonel West's immediate superior officer, the artillery brigade commander. In that letter, the sergeant mentioned . . . that Colonel West had interrogated a detainee using a pistol."[235] A general court-martial was initiated by Lieutenant Colonel West's division commander. West was relieved of command, transferred to another unit, and charged with aggravated assault and communicating a threat. If convicted, Lieutenant Colonel West faced dismissal from the Army and possible imprisonment for eight years. At a November 2003 pretrial investigation held in Tikrit, Lieutenant Colonel West testified that he would "go through hell with a gas can" to protect the lives of his soldiers.

Some within the U.S. Army, and many American civilians, considered criminal charges against Lieutenant Colonel West to be an injustice. One Congressman urged that West should be "commended for his actions and interrogation."[236] Other lawmakers wrote to the Secretary of the Army to protest West's charges. Not everyone took so sympathetic a view, however. "Even more disturbing than West's decision to fire his pistol near the head of the Iraqi detainee, [an un-named Army] official said, was West's admission during the preliminary hearing that, before firing his pistol, he watched as his soldiers beat the Iraqi in an attempt to get him to talk."[237] Retired General Barry McCaffrey agreed, saying, "You can't physically maltreat prisoners, and we can't have our officer corps tolerating that."[238]

Attempting to turn official condemnation into heroism, Lieutenant Colonel West "said his actions might have caused the end of his career, but they saved lives."[239] The Army disagreed: "According to the evidence, the organization and its decision-makers did not believe there was an extraordinary threat to LTC West or his unit."[240]

Shortly after his pretrial investigation, which recommended administrative punishment rather than a court-martial, Lieutenant Colonel West's commanding general, Major General Raymond Odierno, accepted the investigating officer's recommendation and fined West $2,500 pay per month for two months. Lieutenant Colonel West, who consistently confused friendship with subordinates with leadership of subordinates, and who never saw the inherent

[235] Sontag, "How Colonel Risked His Career," supra, note 230, at A1.
[236] Vernon Loeb, "Army Officer's Actions Raise Ethical Issues," *Washington Post*, Sept. 30, 2003, A24.
[237] Id.
[238] Id.
[239] Emily Tower, "Retired Officer Discusses Ethics with Upperclassmen," *Pointer View*, newspaper of the West Point campus (Oct. 23, 2008), 5.
[240] Berry, *A Missing Link in Leadership*, supra, note 233, at 23, referring to Lieutenant Colonel West's pretrial Article 32 investigating officer's report.

conflict between mission accomplishment and force security,[241] was allowed to retire, as he had requested just before his pretrial investigation.[242]

***Conclusion.*** *Did Lieutenant Colonel West torture the detainee? There are other, more compelling, cases in which younger officers, their soldiers killed by a duplicitous enemy in their midst, gave in to anger and carried out mock executions.*[243] *Do you agree with Lieutenant Colonel West's commanding general's decision? What would you have done, in Colonel West's place, if told there was a plot to kill you?*

*Does a mock execution constitute torture in violation of LOAC? It is not among the ICC Statute's Article 8 war crimes. The ICTR, however, has held, "that the following acts committed by the Accused or by others in the presence of the Accused, at his instigation or with his consent or acquiescence, constitute torture: (i) the interrogation of Victim U, under threat to her life, by the Accused. . . ."*[244] *The UN Human Rights Committee and the Inter-American Commission on Human Rights consider mock executions torture.*[245]

*The U.S. Army's interrogation manual (which did not take effect until September 2006, three years after Lieutenant Colonel West's interrogation), specifically prohibits mock executions.*[246] *That manual also notes, "Compliance with laws and regulations, including proper treatment of detainees, is a matter of command responsibility. Commanders have an affirmative duty to ensure their subordinates are not mistreating detainees . . ."*[247]

## FROM A "TOP SECRET" CIA TORTURE MEMORANDUM

***Introduction.*** *This memo, classified "Top Secret" until released on April 16, 2009, pursuant to a litigation-generated Freedom of Information request, describes and discusses each of the "enhanced interrogation techniques" employed by the CIA, and indicates why, according to the DOJ's Office of Legal Counsel, none of them, alone or in combination, necessarily constitutes severe physical or mental pain or suffering. The memo also takes the reader through a "typical"*

[241] Id., at 59. Lieutenant Colonel West: "My mission was security and stability in my designated area in Iraq and the return of my men to their loved ones." Every commander wishes for minimal casualties and, whenever possible, acts to ensure that end. Mission accomplishment is always primary, however. Most troop leaders recognize the hard truth that in combat there can be no assurance that men and women in their charge will not be killed or wounded. The enemy always has a vote in that outcome. A commander's mission cannot at the same time be mission accomplishment and the assured return home of subordinates. A commander's concern for subordinates' welfare is never an excuse to abuse prisoners in violation of military law and LOAC.

[242] Vernon Loeb, "Army Fines Officer for Firing Pistol Near Iraqi Detainee," *Washington Post*, Dec. 13, 2003, A18.

[243] P.J. Tobia, "The Other Front," *Washington Post*, Dec. 14, 2008, B1, an account of the pretrial investigation of a 101st Airborne Division company commander, his second in command, his first sergeant, and several of his soldiers, some of whom allegedly beat bound captives, after which the company commander admittedly carried out a mock execution. An enlisted accused said, "If it was us, they'd cut our heads off, videotape it and put it on al-Jazeera for our families to see." Available at: http://washingtonpost.com/wp-dyn/content/article/2008/12/12/AR2008121203291.html.

[244] *Prosecutor v. Akayesu*, ICTR-96-4-T (Sept. 2, 1998), para. 682.

[245] Dörmann, *Elements of War Crimes Under the Rome Statute of the International Criminal Court*, supra, note 61, at 54, citing *Muteba v. Zaire* and *Gilboa v. Uruguay*, Report of the Human Rights Committee, Communication No. 124/1982, UN Doc. A/39/40, pp. 182 ff; 79 ILR 253; and Communication No. 147/1983, UN Doc. A/41/40, pp. 128 ff., respectively.

[246] FM 2–22.3, *Human Intelligence Collection Operations*, supra, note 219, at para. 5–75.

[247] Id., at para. 5–54.

*thirty-day interrogation cycle. Only that portion of the memo is extracted here. The many quotation marks in the extract indicate quotes from an internal CIA document provided to the Justice Department for use in determining the lawfulness of CIA interrogation techniques. That document is entitled,* Background Paper on CIA's Combined Use of Interrogation Techniques. *The bracketed term, "[detainee]", appears frequently in the original. Any material elided here is minimal; nothing is taken out of context:*

May 10, 2005

**MEMORANDUM FOR JOHN A. RIZZO,**
**SENIOR DEPUTY GENERAL COUNSEL,**
**CENTRAL INTELLIGENCE AGENCY**

From: U.S. Department of Justice, Office of Legal Counsel

Re: Application of 18 U.S.C. 2340–2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees

. . . . Phases of the Interrogation Process

The first phase of the interrogation process, "Initial Conditions," does not involve interrogation techniques . . . The "Initial Conditions" nonetheless set the stage for use of the interrogation techniques, which come later.

[B]efore being flown to the site of interrogation, a detainee is given a medical examination. He then is "securely shackled and is deprived of sight and sound through the use of blindfolds, earmuffs, and hoods" during the flight . . . Upon arrival at the site, the detainee "finds himself in complete control of Americans" and is subjected to "precise, quiet, and almost clinical" procedures designed to underscore "the enormity and suddenness of the change in environment, the uncertainty about what will happen next, and the potential dread [a detainee] may have of US custody." His head and face are shaved, his physical condition is documented through photographs taken while he is nude; and he is given medical and psychological interviews to assess his condition and to make sure there are no contraindications to the use of any particular interrogation techniques.

The detainee then enters the next phase, the "Transition to Interrogation." The interrogators conduct an initial interview, "in a relatively benign environment," to ascertain whether the detainee is willing to cooperate. The detainee is "normally clothed but seated and shackled for security purposes." The interrogators take "an open, non-threatening approach," but the detainee "would have to provide information on actionable threats and location information on High-Value Targets at large – not lower-level information – for interrogators to continue with [this] neutral approach." If the detainee does not meet this "very high" standard, the interrogators submit a detailed interrogation plan to CIA headquarters for approval. If the medical and psychological assessments find no contraindications . . . the interrogation moves to the next phase.

Three interrogation techniques are typically used to bring the detainee to "a baseline, dependent state," "demonstrat[ing] to the [detainee] that he has no control over basic human needs" and helping to make him "perceive and values his personal welfare, comfort, and immediate needs more than the information he is protecting." The three techniques used to

establish this "baseline" are nudity, sleep deprivation (with shackling and, at least at times, with use of a diaper), and dietary manipulation . . .

Other techniques, which "require physical interaction between the interrogator and detainee," are characterized as "corrective" and "are used principally to correct, startle, or achieve another enabling objective with the detainee." These techniques "are not used simultaneously but are often used interchangeably during an individual interrogation session." The insult slap is used "periodically throughout the interrogation process when the interrogator needs to immediately correct the detainee or provide a consequence to a detainee's response or non-response." The insult slap "can be used in combination with water dousing of kneeling stress positions" – techniques that are not characterized as "coercive." Another corrective technique, the abdominal slap "is similar to the insult slap in application and desired result" and "provides the variation necessary to keep a high level of unpredictability in the interrogation process." The abdominal slap may be simultaneously combined with water dousing, stress positions, and wall standing. A third corrective technique, the facial hold, "is used sparingly throughout interrogation." It is not painful, but "demonstrates the interrogator's control over the [detainee]." It too may be simultaneously combined with water dousing, stress positions, and wall standing. Finally, the attention grasp "may be used several times in the same interrogation" and may be simultaneously combined with water dousing or kneeling stress positions.

Some techniques are characterized as "coercive." These techniques "place the detainee in more physical and psychological stress." Coercive techniques "are typically not used in combination, although some combined use is possible." Walling "is one of the most effective interrogation techniques because it wears down the [detainee] physically, heightens uncertainty in the detainee about what the interrogator may do to him, and creates a sense of dread when the [detainee] knows he is about to be walled again." A detainee "may be walled one time (one impact with the wall) to make a point or twenty to thirty times consecutively when the interrogator requires a more significant response to a question," and "will be walled multiple times" during a session designed to be intense . . .

Water temperature and other considerations of safety established by OMS [the CIA Office of Medical Services] limit the use of another coercive technique, water dousing. The technique "may be used frequently within those guidelines." As suggested above, the interrogators may combine water dousing with other techniques, such as stress positions, wall standing, the insult slap, or the abdominal slap.

The use of stress positions is "usually self-limiting in that temporary muscle fatigue usually leads to the [detainee's] being unable to maintain the stress position after a period of time." Depending on the particular position, stress positions may be combined with water dousing, the insult slap, the facial hold, and the attention grasp. Another coercive technique, wall standing, is "usually self-limiting" in the same way as stress positions. It may be combined with water dousing and the abdominal slap. OMS guidelines limit the technique of cramped confinement to no more than eight hours at a time and 18 hours a day, and confinement in the "small box" is limited to two hours . . .

We understand that the CIA's use of all these interrogation techniques is subject to ongoing monitoring by interrogation team members who will direct that techniques be discontinued if there is a deviation from prescribed procedures and by medical and psychological personnel from OMS who will direct that any or all techniques be discontinued if in their professional judgment the detainee may otherwise suffer severe physical or mental pain or suffering.

A Prototypical Interrogation

In a "prototypical interrogation," the detainee begins his first interrogation session stripped of his clothes, shackled, and hooded, with the walling collar over his head and around his neck. The interrogators remove the hood and explain that the detainee can improve his situation by cooperating and may say that the interrogator "will do what it takes to get important information." As soon as the detainee does anything inconsistent with the interrogators' instructions, the interrogators use an insult slap or abdominal slap. They employ walling if it becomes clear that the detainee is not cooperating in the interrogation. This sequence "may continue for several more iterations as the interrogators continue to measure the [detainee's] resistance posture and apply a negative consequence to [his] resistance efforts." The interrogators and security officers then put the detainee into position for standing sleep deprivation, begin dietary manipulation through a liquid diet, and keep the detainee nude (except for a diaper). The first interrogation session, which could have lasted from 30 minutes to several hours, would then be at an end.

If the interrogation team determines there is a need to continue, and if the medical and psychological personnel advise that there are no contraindications, a second session may begin. The interval between sessions could be as short as an hour or as long as 24 hours. At the start of the second session, the detainee is released from the position for standing sleep deprivation, is hooded, and is positioned against the walling wall . . . Even before removing the hood, the interrogators use the attention grasp to startle the detainee. The interrogators take off the hood and begin questioning. If the detainee does not give appropriate answers to the first questions, the interrogators use an insult slap or abdominal slap. They employ walling if they determine that the detainee "is intent on maintaining his resistance posture." This sequence "may continue for multiple iterations as the interrogators continue to measure the [detainee's] resistance posture. The interrogators then increase the pressure on the detainee by using a hose to douse the detainee with water for several minutes. They stop and start the dousing as they continue the interrogation. They then end the session by placing the detainee in the same circumstances as at the end of the first session: the detainee is in the standing position for sleep deprivation, is nude (except for a diaper), and is subjected to dietary manipulation. Once again, the session could have lasted from 30 minutes to several hours.

. . . [A] third session may follow. The session begins with the detainee positioned as at the beginning of the second. If the detainee continues to resist, the interrogators continue to use walling and water dousing. The corrective techniques – the insult slap, the abdominal slap, the facial hold, the attention grasp – "may be used several times during this session based on the responses and actions of the [detainee]. The interrogators integrate stress positions and wall standing into this session. Furthermore, "[i]ntense questioning and walling would be repeated multiple times." Interrogators "use one technique to support another." For example, they threaten the use of walling unless the detainee holds a stress position, thus inducing the detainee to remain in the position longer than he otherwise would. At the end of the session, the interrogators and security personnel place the detainee into the same circumstances as at the end of the first two sessions, with the detainee subject to sleep deprivation, nudity, and dietary manipulation.

In later sessions, the interrogators use those techniques that are proving most effective and drop the others. Sleep deprivation "may continue to the 70 to 120 hour range, or possibly beyond that for the hardest resisters, but in no case exceed the 180-hour time limit. If

the medical or psychological personnel find contraindications, sleep deprivation will end earlier. While continuing the use of sleep deprivation, nudity, and dietary manipulation, the interrogators may add cramped confinement. As the detainee begins to cooperate, the interrogators "begin gradually to decrease the use of interrogation techniques." They may permit the detainee to sit, supply clothes, and provide more appetizing food.

The entire process in this "prototypical interrogation" may last 30 days. If additional time is required and a new approval is obtained from headquarters, interrogation may go longer than 30 days. Nevertheless, "[o]n average, the actual use of interrogation techniques covers a period of three to seven days, but can vary upward to fifteen days based on the resilience of the [detainee]." . . .

***Conclusion.*** A country is what it stands for, when standing for something is the most difficult. *One can only wonder what Supreme Court Justice Robert Jackson, Chief Prosecutor of the Nuremberg International Military Tribunal (and former Attorney General of the United States), would say upon reading this document; his wrath at the perversion of American justice and ideals. What would he have responded to the tired argument that it was all for the protection of Americans?*

*Telford Taylor, Justice Jackson's successor as Nuremberg Chief Prosecutor, and later Nash Professor of Law at Columbia University's School of Law, wrote of Nazi documents admitted as trial evidence at Nuremberg, "even the most damning memoranda of this sort can be minimized by clever explanation and excuse . . . "*[248]

*The April 2009 release of this document, signed by Steven G. Bradbury, Principle Deputy Assistant Attorney General of the Department of Justice, along with three other "torture memos," was controversial.*[249] *Mr. Karl Rove, Deputy Chief of Staff to President George W. Bush for seven years, on a televised talk show encouraged Americans to read the memos, saying, "You'll be reassured about what your government was doing." Mr. Rove continued, "All of these techniques have now been ruined."*[250]

*One can only hope.*

[248] BGen. Telford Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials Under Control Council Law No. 10* (Washington, DC/Buffalo, NY: Hein reprint, 1949/1997), 67.

[249] R. Jeffrey Smith, Michael D. Shear, and Walter Pincus, "In Obama's Inner Circle, Debate Over Memos' Release Was Intense," *Washington Post*, April 24, 2009, A1.

[250] *The O'Reilly Factor* (Fox television broadcast April 18, 2009), available at: http;//realclearpolitics.com/video/2009/04/17/oreilly_is_america_a_torture_nation.html