

# Tortured Logic: The (Il)legality of United States Interrogation Practices in the War on Terror

J. Trevor Ulbrick\*

## AUTHOR'S UPDATE

¶1 In the year since this article was written, the debate surrounding United States interrogation methods in the “war on terror” has only grown more heated—and with good reason. Reports from Abu-Ghraib prison in Iraq, Bagram Air Force Base in Afghanistan, Guantanamo Bay in Cuba, and undisclosed CIA facilities abroad provide strong evidence that the Bush Administration either sanctioned illegal interrogation tactics, or created a deliberate atmosphere of legal ambiguity in order to facilitate them. The horrific images from Abu-Ghraib have shed harsh light on this shadowy world, resulting in the court marshal of several low-level military personnel. Members of the US military and intelligence establishment have come under intense criticism for their treatment of detainees. Still, as yet no high-ranking officer or civilian has been held accountable.

¶2 One thing is clear: these issues are not going away. If anything, with the recent suicide bombings in London, the persistent volatility in Iraq, Osama Bin Laden still at large, and the war on terror still raging, the fundamental questions addressed in this article—(1) whether current US interrogation practices are illegal, and (2) whether the terrorist threat is so severe that domestic and international law governing interrogation should be revised—are more urgent than ever. These questions remain open. Because there has been no formal investigation of US interrogation practices, we know little more today than we did a year ago. Despite the media scrutiny, what really happened—or is still happening—to detainees at Abu Ghraib, Bagram, Guantanamo, and elsewhere remains a mystery.

¶3 Consequently, I decided that it was important to leave this article unaltered, in its state of pre-Abu-Ghraib innocence. As such, it serves a useful historical purpose, revealing how drastically public opinion shifted after 9/11, and what was known about US interrogation practices before they became front-page news.

¶4 My conclusions have not changed. Perhaps Congress will one day decide that the dire threat posed by Islamic terrorism requires harsher interrogations in certain cases—but that day has not yet arrived. For now, torture and other forms of cruel, inhumane, and degrading treatment are illegal under US and international law. Rendition—the practice of transferring prisoners to allies to be tortured—is also illegal. If Bush Administration is violating both of these long-standing prohibitions, this disregard for the rule of law has troubling implications for our democracy.

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\* J.D. cum laude, Northwestern University School of Law, 2005; M.A. in International Relations, University of Chicago, 2003; M.A. in Philosophy with distinction, University College London, 2001; B.A., Washington & Lee University, 1997. I would like to thank Professor Douglass Cassel for his constructive criticism and advice; and Ethel Derby Weld, my intellectual foil, for her patience and support. I welcome comments or suggestions at [j-ulbrick2005@law.northwestern.edu](mailto:j-ulbrick2005@law.northwestern.edu).

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More than anything, the allegations of prisoner abuse illustrate the need for oversight, guidance, and transparency in the interrogation process. It is not too late to right these wrongs. Strict rules of engagement should be drafted to conform to US law, and steps should be taken to hold the architects of any illegal interrogation practices accountable. America must address these issues quickly; as the Israeli experience demonstrates, terrorism is not going away, and neither are the uncomfortable issues it raises about coercive interrogation.

## I. INTRODUCTION

¶6 It has been said of torture that “[n]o other practice except slavery is so universally and unanimously condemned in law and human convention.”<sup>1</sup> Perhaps no country embodied this ideal more than the United States. For much of its history, the US shunned torture and other forms of coercive interrogation.<sup>2</sup> Then came September 11th, 2001. The shock of that disaster, coupled with the threat of further attacks by al-Qaeda and the proliferation of nuclear, chemical and biological weapons, has fueled an unprecedented re-examination of torture’s legal and moral status. As a result, torture and other forms of coercive interrogation are rapidly losing their stigma.

¶7 This shift in attitude spans the media, the academy, the judiciary and highest levels of the government. Alan Dershowitz, the prominent Harvard law professor and civil liberties advocate, has proposed “torture warrants” in cases of “ticking time bomb terrorists.”<sup>3</sup> Richard Posner, the federal appellate judge and University of Chicago law professor, opined, “Only the most doctrinaire civil libertarians (not that there aren’t plenty of them) deny that if the stakes are high enough, torture is permissible.”<sup>4</sup> Not only does Posner think torture is sometimes necessary, he also thinks our leaders must share this view: “no one who doubts this is the case should be in a position of responsibility.”<sup>5</sup> Although this view has vocal critics, it has found increasing support among academics.<sup>6</sup> Inside the Beltway, the foreign policy mandarins are listening. “We put emphasis on due process and sometimes it strangles us,”<sup>7</sup> said Richard L. Thornburgh, a former Attorney General. Even *The Economist*, the venerable newsmagazine, has suggested “vigorous questioning short of torture,” including “prolonged interrogation, mild sleep deprivation, perhaps the use of truth serum” to make al-Qaeda detainees talk.<sup>8</sup>

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<sup>1</sup> Henry Shue, *Torture*, 7 PHIL. & PUB. AFF. 124 (1977).

<sup>2</sup> See discussion, *infra* p. 3.

<sup>3</sup> ALAN M. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 136 (2002) [hereinafter DERSHOWITZ, WHY TERRORISM WORKS]. See also Alan M. Dershowitz, *Is There a Torturous Road to Justice?*, L.A. TIMES, Nov. 8, 2001, at B19; ALAN M. DERSHOWITZ, SHOUTING FIRE: CIVIL LIBERTIES IN A TURBULENT AGE 477 (2002); Alan M. Dershowitz, *Is it Necessary to Apply “Physical Pressure” to Terrorists-And to Lie About It?*, 23 ISR. L. REV. 192 (1989); Alan M. Dershowitz, *Want to Torture? Get a Warrant*, S.F. CHRON., Jan. 22, 2002, at A19. Still, Dershowitz wants to restrict torture warrants to only the most egregious cases. See, e.g., Alan M. Dershowitz, *Letter to the Editor*, S.F. CHRON., Jan. 28, 2002, at B4 (“My personal hope is that no torture warrant would ever be issued, because the criteria for obtaining one would be so limited and rigorous.”).

<sup>4</sup> Richard A. Posner, *The Best Offense*, NEW REPUBLIC, Sept. 2, 2002, at 30.

<sup>5</sup> *Id.*

<sup>6</sup> See, e.g., *Symposium on the Report of the Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity*, 23 ISR. L. REV. 141 (1989); Steve Chapman, *Should We Use Torture to Stop Terrorism?*, CHI. TRIB., Nov. 1, 2001, at 31; Michael James & Peter Hermann, *Torture Likely Tool in Anti-Terror Fight*, BALT. SUN, Oct. 10, 2001, at A11 (quoting Professor David Powell’s suggestion that “[e]xtraordinary behavior is necessary under extraordinary circumstances”); Jodie Morse, *How Do We Make Him Talk?*, TIME, Apr. 15, 2002, at 44 (quoting Professor Anthony D’Amato’s assertion that torture may be “required to save lives” in certain cases); Patricia Williams, *War and the Law*, OBSERVER (London), Dec. 2, 2001, at A1 (discussing former Clinton Justice Department official Robert Litt’s claim that torture could be used in emergencies).

<sup>7</sup> Walter Pincus, *Silence of 4 Terror Probe Suspects Poses Dilemma for FBI*, WASH. POST, Oct. 21, 2001, at A6.

<sup>8</sup> Editorial, *Is Torture Ever Justified?*, ECONOMIST, Jan. 11, 2003, at 11.

¶8 This growing acceptance of torture has had real-world consequences. By all accounts, US interrogation policy has undergone dramatic changes since September 11th. At issue are so-called “stress and duress” (“S&D”) techniques reportedly being used at Bagram Air Force Base in Afghanistan and at other undisclosed locations.<sup>9</sup> According to *The Washington Post*, uncooperative detainees “are sometimes kept standing or kneeling for hours, in black hoods or spray-painted goggles . . . . At times they are held in awkward, painful positions and deprived of sleep with a 24-hour bombardment of lights.”<sup>10</sup> When S&D does not work, the US allegedly sends terrorist suspects to allies like Egypt, Jordan and Morocco, which are well known for their medieval methods of extracting information.<sup>11</sup>

¶9 These reports raise crucial and unresolved questions about the legality of “moderate” forms of mental and physical coercion generally, and US interrogation practices in particular. Does S&D amount to torture under international and domestic law? If not, does it nevertheless violate important human rights norms? Legality aside, should the US employ harsher methods, as Judge Posner argues, when “the stakes are high enough”? Or is the US committed to a doctrinaire interpretation of human rights, no matter how grave the risk to national security? Are there effective methods of interrogation that are consistent with US law and international human rights?

¶10 This comment analyzes these issues in the context of September 11th and the ongoing war on terror. Section II discusses the recent shift in US interrogation policy, and examines how the unique threat posed by al-Qaeda led the US to consider harsher interrogation techniques. Section III discusses the status of S&D under international law, looking in particular at recent decisions of the European Court of Human Rights and the Supreme Court of Israel. Section IV discusses the legality of S&D under US law. Section V analyzes the legality of US interrogation practices. Section VI evaluates a common hypothetical used to justify S&D: the “ticking time bomb” scenario. Section VII offers my conclusions and recommendations. Although alleged US interrogation practices do not amount to torture, they are nevertheless illegal under international and domestic law.

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<sup>9</sup> Eric Schmitt, *There Are Ways to Make Them Talk*, N.Y. TIMES, June 16, 2002, at A1. See also Dana Priest & Barton Gellman, *US Decries Abuse but Defends Interrogations*, WASH. POST, Dec. 26, 2002, at A1.

<sup>10</sup> Priest & Gellman, *supra* note 9. See also Peter Finn, *Al Qaeda Recruiter Reportedly Tortured*, WASH. POST, Jan. 31, 2003, at A14 (reporting that Mohammed Haydar Zammar, a Syrian-born German citizen, was arrested in Morocco and then transferred to Syria at the request of US agents, who participated in his abusive interrogation).

<sup>11</sup> *Id.* For a more detailed description of these medieval methods, see THOMAS L. FRIEDMAN, FROM BEIRUT TO JERUSALEM 80 (1995) (“Whenever a person is tortured, he is ordered to strip naked. Inside the room there is an electric apparatus, a Russian tool for ripping out fingernails, pincers and scissors for plucking flesh and an apparatus called the Black Slave, on which they force the torture victim to sit. When switched on, a very hot and sharp metal skewer enters the rear, burning its way until it reaches the intestines, then returns only to be reinserted.”).

## II. HUMAN RIGHTS, SEPTEMBER 11TH, AND THE WAR ON TERROR

### A. *The Official US Position on Torture Prior to September 11th*

¶11 In America the prohibition on torture has deep cultural and legal roots. The prevailing view, as articulated by the Second Circuit, is that the torturer, “like the pirate and slave trader before him,” is “*hostis humanis generis*, an enemy of all mankind.”<sup>12</sup> The US Constitution has always prohibited torture and S&D;<sup>13</sup> the US Supreme Court views torture as one of the gravest violations of international law.<sup>14</sup> The prohibition on torture “applies to the actions of officials throughout the United States at all levels of government,” and “all individuals enjoy protection under the Constitution, regardless of nationality or citizenship.”<sup>15</sup> Moreover, the US has made opposition to torture a cornerstone of its foreign policy,<sup>16</sup> and has fiercely criticized those countries—friend and foe—that practice it. In its initial report to the UN Committee Against Torture, the US declared, “[T]orture . . . is categorically denounced as a matter of policy and as a tool of state authority.”<sup>17</sup> The prohibition on torture, the report continued, is absolute: “No official of the Government, federal or state, civilian or military, is authorized to commit or to instruct anyone else to commit torture. Nor may any official condone or tolerate torture in any form. No exceptional circumstances may be invoked as a justification of torture.”<sup>18</sup>

### B. *The New Face of Terrorism*

¶12 In even the most civilized countries, the balance between security and civil liberties is a tenuous one. In times of crisis this balance is easily upset. In some countries military coups, social revolutions and other radical shifts in government are as regular as the seasons. The US, however, shielded by pacific neighbors and vast oceans, has remained relatively immune to such upheaval. As a result, when threatened, the US is sometimes prone to rash judgments and extreme measures.<sup>19</sup> In this context, the significance of September 11th for civil liberties in America cannot be underestimated. It marks only the second time in the twentieth century that the US has been attacked by a foreign power.

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<sup>12</sup> *Filartiga v. Pena-Irala*, 630 F. 2d 876, 890 (2d Cir. 1980).

<sup>13</sup> The Fifth Amendment to the Constitution prohibits conduct against persons in US custody that “shocks the conscience,” including torture. *Rochin v. California*, 342 U.S. 165, 172-73 (1952). The Eighth Amendment also prohibits such conduct, as its core function is “to proscribe torture and other barbarous methods of punishment.” *Estelle v. Gamble*, 429 U.S. 97, 102 (1976).

<sup>14</sup> *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2763 (2004).

<sup>15</sup> Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Initial Reports of States Parties Due in 1995, Addendum: United States of America*, ¶ 49, U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000) [hereinafter *Initial Report*].

<sup>16</sup> See, e.g., Joint Resolution Regarding the Implementation of the Public Policy of the United States Government in Opposition to the Practice of Torture by any Foreign Government, H.R.J. Res. 605, 98th Cong., 98 Stat. 1721 (1984) (codified in 22 U.S.C. § 2656 (2000)) (affirming “a continuing policy of the United States to oppose the practice of torture by public and private diplomacy . . . [and to oppose] acts of torture wherever they occur, without regard to ideological or regional considerations”).

<sup>17</sup> *Initial Report*, *supra* note 15, ¶ 6.

<sup>18</sup> *Id.*

<sup>19</sup> See, e.g., Geoffrey R. Stone, *Civil Liberties at Risk Again: A US Tradition*, CHI. TRIB., Feb. 16, 2003, at C1.

The first—the Japanese surprise attack on Pearl Harbor—not only plunged America into World War II, but also led to the forced internment of thousands of Japanese-Americans without due process. In *Korematsu v. US*,<sup>20</sup> one of the most widely criticized Supreme Court decisions in American history, the Court upheld this internment on national security grounds.<sup>21</sup>

¶13 Today, the threat America faces is just as dire, and the potential for human rights abuse just as great. Yet there are important differences between then and now. Nazi Germany and Imperial Japan, for all their military might, were conventional enemies. Their forces, if not easily attacked, were at least easily identified. Although some of their tactics were unconventional, they fought according to time-honored norms of a nation at war: with soldiers, warships, artillery, aircraft, and a vast infrastructure to support them. More importantly, they were, by and large, willing to abide by the laws of armed conflict, at least as they pertained to combatants; after all, World War II ended with a peace treaty.

¶14 Al-Qaeda is a more vexing foe for several reasons.<sup>22</sup> First, it is a stateless entity, with no bridges to bomb, no battleships to sink, and no leadership with which to negotiate. It operates in tight-knit cells that are nearly impossible to infiltrate. Second, its adherents follow a militant strain of Islam that preaches *jihad*—uncompromising holy war—against the US and its allies, and al-Qaeda recruits are all too ready to die for their cause. Third, as September 11th so tragically demonstrated, al-Qaeda has found America’s Achilles’ heel—the very trust and openness that has made the US the world’s most prosperous democracy. Finally, and most troubling, al-Qaeda is actively seeking nuclear, biological and chemical weapons—commonly referred to as weapons of mass destruction, or “WMD”—for its next attack.<sup>23</sup>

¶15 Experts believe that WMD are now “the single most serious long-term security threat facing the advanced democracies of the West.”<sup>24</sup> WMD are portable, increasingly accessible, and immensely lethal. The threat of chemical and biological attacks on US soil is real. In 2002, Italian security services thwarted a plot hatched by four Moroccan members of al-Qaeda to poison the water supply of the US Embassy in Rome with biological agents.<sup>25</sup> During the invasion of Afghanistan, US soldiers found plans for airborne devices, such as helium balloons, to deploy anthrax.<sup>26</sup> And these are just the plots that have been made public.

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<sup>20</sup> 323 U.S. 214 (1944).

<sup>21</sup> *Id.* at 215-16.

<sup>22</sup> The best overview of al-Qaeda’s history can be found in PETER L. BERGEN, *HOLY WAR, INC.: INSIDE THE SECRET WORLD OF OSAMA BIN LADEN* (2001). See also Al Venter, *America’s Nemesis: Usama Bin Laden*, *JANE’S INTELLIGENCE REVIEW* (1998). On the rise of militant Islam generally, see MARY ANNE WEAVER, *A PORTRAIT OF EGYPT: A JOURNEY THROUGH THE WORLD OF MILITANT ISLAM* (1999); JOEL L. ESPOSITO, *THE ISLAMIC THREAT: MYTH OR REALITY?* (1992); MICHAEL GRIFFITH, *REAPING THE WHIRLWIND: THE TALIBAN MOVEMENT IN AFGHANISTAN* (2001); DILIP HIRO, *HOLY WARS: THE RISE OF ISLAMIC FUNDAMENTALISM* (1989); ROBERT D. KAPLAN, *SOLDIERS OF GOD: WITH THE MUJAHIDIN IN AFGHANISTAN* (1990); and JUDITH MILLER, *GOD HAS NINETY-NINE NAMES: REPORTING FROM A MILITANT MIDDLE-EAST* (1996).

<sup>23</sup> Michael R. Gordon, *US Says It Found Qaeda Lab Being Built to Produce Anthrax*, *N.Y. TIMES*, Mar. 23, 2002, at A1.

<sup>24</sup> RICHARD A. FALKENRATH ET AL., *AMERICA’S ACHILLES’ HEEL: NUCLEAR, BIOLOGICAL, AND CHEMICAL TERRORISM AND COVERT ATTACK I* (1998).

<sup>25</sup> BERGEN, *supra* note 22, at 243.

<sup>26</sup> *Id.*

¶16 A nuclear attack, most analysts argue, is less likely because fissile material is still relatively rare. Still, with the rise of rogue states and the disintegration of the former Soviet Union, material for “dirty bombs” is increasingly available.<sup>27</sup> After a botched uranium heist at a Russian naval yard in 1994, one investigator, noting the nonexistent security measures at the nuclear submarine fuel repository, wryly observed, “Potatoes get guarded better.”<sup>28</sup> Another worrying scenario is that al-Qaeda might acquire a tactical nuclear weapon. During the Cold War, the Soviet Union developed portable nuclear weapons, or “suitcase bombs,” one hundred of which remained unaccounted for as of 1997.<sup>29</sup> Similarly, the US developed similar weapons that weighed as little as sixty pounds.<sup>30</sup> A nuclear attack by al-Qaeda remains a remote possibility, but a possibility nonetheless.

¶17 In several respects, then, the dangers posed by al-Qaeda are greater than those posed by a hostile nation. Al-Qaeda does not obey international laws of war or human rights; indeed, it is a lawless, even anarchic organization. It attacks by stealth and deception, targeting civilians as well as the military. Its operatives lurk not only in shadowy, borderless regions, but also in the heart of the civilized world: Chicago and New York, London and Madrid. Because al-Qaeda is organized in autonomous cells, few members know where or when the next attack will occur. Victory in this war, more than in any other, will hinge on good intelligence. The best sources for this intelligence are al-Qaeda members themselves, but they rarely talk. US policymakers now face a difficult question: how far can—and should—we go to make them?

### C. *US Interrogation Practices in the War on Terror: Flirting with Torture*

#### 1. Generally

¶18 Al-Qaeda members are immune to conventional methods of coercion, according to government officials. Material incentives, such as promises of reduced prison sentences, jobs, or money, have not worked. America’s reputation for respecting human rights is a further impediment. One FBI counterterrorism specialist described the dilemma facing US interrogators this way:

We are known for humanitarian treatment, so basically we are stuck.  
Usually there is some incentive, some angle to play, what you can do for

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<sup>27</sup> Dirty bombs are crude explosive devices that scatter radioactive material. They require far less technical expertise to manufacture than atomic or hydrogen bombs. Yet they can be effective weapons for sowing terror and causing economic damage, since they have the potential to make cities uninhabitable.

<sup>28</sup> Oleg Bukharin and William Potter, *Potatoes Were Guarded Better*, BULL. OF THE ATOMIC SCIENTISTS, May/June 1995, at 48; see also Richard and Joyce Wolkovir, *Where Staving off Armageddon Is All in a Day’s Work*, SMITHSONIAN, Feb. 1997, at 115-127.

<sup>29</sup> ANDREW AND LESLIE COCKBURN, ONE POINT SAFE: A TRUE STORY 211 (1997). For allegations by Alexander Lebed, see Laura Myers, *Yeltsin Foe Says Russia Lost Nukes*, ASSOCIATED PRESS, Sept. 5, 1997 (reporting that according to one former general, these weapons were left behind in the Baltic states, the Caucasus, and the Ukraine after the Soviet withdrawal in the early 1990s. The former general claimed that each weapon could kill 100,000 people or more, depending on population density.).

<sup>30</sup> Walter Pincus, *US Developed 60-Pound Nuclear Weapon a Parachute Could Deploy*, WASH. POST, Dec. 23, 1997, at A4.

them. But it could get to that spot where we could go to pressure . . . where we don't have a choice, and we are probably getting there.<sup>31</sup>

In such cases, some former and current government officials have argued that S&D is appropriate. "We ought to look at the options and consider invasive procedures short of torture to penetrate al-Qaeda's worldwide network,"<sup>32</sup> said former CIA and FBI Director William Webster.

¶19 Such statements, as well as the reports coming out of Bagram and elsewhere, have prompted several human rights groups to allege that the US is abusing its detainees. In a letter to President Bush, Irene Kahn, the secretary-general of Amnesty International, wrote:

The treatment alleged falls clearly within the category of torture and other cruel, inhuman or degrading treatment or punishment which is absolutely prohibited under international law . . . [We] urge the US government to instigate a full, impartial inquiry into the treatment of detainees at the Bagram base and to make the findings public.<sup>33</sup>

¶20 For its part, the Bush Administration has repeatedly denied these charges. In a June 26, 2003, press release, President Bush reaffirmed America's prohibition on torture, saying, "The US is committed to the world-wide elimination of torture and we are leading this fight by example."<sup>34</sup> Similarly, in a letter to US Senator Patrick Leahy, Department of Defense General Counsel William Haynes stated: "[I]t is the policy to the United States to comply with all of its legal obligations in its treatment of detainees . . . [which] include conducting interrogations in a manner that is consistent with the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment."<sup>35</sup> Haynes also noted that this definition encompasses techniques that would be considered "cruel" under the US Constitution.<sup>36</sup>

¶21 Both statements, of course, fail to give any description of the specific methods by which the US is eliciting this information. Official discussions of interrogation methods are rare, but statements by administration officials indicate that they now push the envelope of legality. As the US official in charge of al-Qaeda suspects in Afghanistan suggested, "If you don't violate someone's human rights some of the time, you probably aren't doing your job."<sup>37</sup> Testifying at a September 26, 2001, joint hearing of the House and Senate intelligence committees, Coffer Black, then head of the CIA counterterrorism center, implied that US interrogations had indeed become harsher: "[T]his is a highly

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<sup>31</sup> Damian Whitworth, *Stymied FBI Looks to Torture*, AUSTRALIAN, Oct. 23, 2001, at 12.

<sup>32</sup> Ian Bruce, *US Told to Give Captives Truth Drugs*, HERALD (Glasgow), Apr. 29, 2002, at 8.

<sup>33</sup> Mark Bowden, *The Dark Art of Interrogation: A Survey of the Landscape of Persuasion*, ATLANTIC MONTHLY, Oct. 2003, at 56.

<sup>34</sup> George W. Bush, Statement by the President: United Nations International Day in Support of Victims of Torture (June 26, 2003), available at <http://www.whitehouse.gov/news/releases/2003/06/20030626-3.html> (last visited Oct. 29, 2005).

<sup>35</sup> Letter from William Haynes, General Counsel, Department of Defense, to Senator Patrick Leahy (June 26, 2003), available at <http://hrw.org/press/2003/06/tortureday.htm> (last visited Oct. 29, 2005).

<sup>36</sup> *Id.*

<sup>37</sup> Priest & Gellman, *supra* note 9.

classified area. All I want to say is that there was ‘before 9/11’ and ‘after 9/11.’ After 9/11 the gloves came off.”<sup>38</sup>

¶22 Although an official elaboration of what is underneath the gloves has not been forthcoming, many senior officials have been willing to talk to reporters off the record. Their statements indicate that US interrogation practices can be broadly grouped into three categories: psychological methods, physical methods, and “renditions.”

## 2. Psychological Methods

¶23 Past practice indicates that US interrogators prefer psychological methods. One Honduran who attended the “School of the Americas,” a US joint-training exercise infamous for producing human rights abusers, described his training this way:

They taught us psychological methods—to study the fears and weaknesses of a prisoner. Make him stand up, don’t let him sleep, keep him naked and isolated, put rats and cockroaches in his cell, give him bad food, serve him dead animals, throw cold water on him, change the temperature.<sup>39</sup>

Still, according to this trainee, the US drew the line at harsher methods: “The Americans didn’t accept physical torture.”<sup>40</sup> Echoing these comments, Vincent Cannistraro, the former CIA counter-terrorism chief, described US interrogation techniques as being more mental than physical: “Sleep deprivation, psychological techniques, divorce him from contact with his environment, blindfold him, fly him around so that when he’s finally taken to a holding area he doesn’t know if he’s in Hawaii or the Sahara desert. Tell him his comrades have betrayed him, the mind games.”<sup>41</sup> Similarly, according to a *Wall Street Journal* investigation, the interrogators—“human intelligence collectors” in the Army jargon—are “authorized not just to lie, but to prey on a prisoner’s ethnic stereotypes, sexual urges and religious prejudices, his fear for his family’s safety, or his resentment of his fellows.”<sup>42</sup> The US also uses a technique called “false flag,” whereby interrogators try to convince a detainee that he is being held by a country that tortures.<sup>43</sup>

## 3. Physical Methods

¶24 Although US interrogators tend to focus on the psychological, they do use some forms of physical coercion. According to Cannistraro, US interrogators will not use force to extract information (if only for selfish reasons): “US personnel, under US law, cannot engage in physical coercion . . . . It’s against the law. Anyone who does it could be criminally liable. So, they don’t do physical coercion.”<sup>44</sup>

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<sup>38</sup> Bowden, *supra* note 33, at 59.

<sup>39</sup> James LeMoyne, *Testifying to Torture*, N.Y. TIMES MAG., June 5, 1988, at 45.

<sup>40</sup> *Id.*

<sup>41</sup> Christopher Hustul, *The Temptation to Torture*, TORONTO STAR, Mar. 9, 2003, at F3.

<sup>42</sup> Jesse Bravin, *Interrogation School Tells Army Recruits How Grilling Works; 30 Techniques in 16 Weeks, Just Short of Torture; Do They Yield Much?* WALL ST. J., Apr. 26, 2002, at A1.

<sup>43</sup> Dale Van Natta, Jr., *Questioning Terror Suspects in a Dark and Surreal World*, N.Y. TIMES, Mar. 9, 2003, at A14.

<sup>44</sup> Hustul, *supra* note 41.

¶25 However, the *Wall Street Journal* disputes this assertion. While direct physical abuse is frowned upon, the *Journal* reports, some more ambiguous forms of physical coercion are permitted. According to Sgt. Giersdorf, an interrogation instructor, “‘You can put a source in any position you want. You can chain his legs to the table, you can handcuff his hands behind him,’ force him to stand at attention or have military police thrust him to the ground.”<sup>45</sup> Giersdorf says that the US does not employ the harsher versions of this technique, called “stress positions,” but some US allies do.<sup>46</sup> Contrary to Cannastrano’s assertion, then, US interrogators are being trained to use *some* physical techniques—just not those that are unequivocally human rights violations.

¶26 Moreover, there are indications that the physical methods at Bagram are more abusive than those taught by Sgt. Giersdorf. Many of the psychological methods are the same. But at Bagram, according to *The Washington Post*, interrogatees are kept “standing or kneeling for hours” and held in “in awkward, painful positions.”<sup>47</sup> These sound less like the techniques that Giersdorf detailed and more like “stress positions,” which have been employed in the past by both Israel and the United Kingdom.<sup>48</sup> Stress position interrogation involves the “chaining, handcuffing, shackling, confining or otherwise constraining of detainees in painful positions for hours or days.”<sup>49</sup> At Bagram newly captured suspects are allegedly beaten and thrown into walls by Special Forces troops to “soften them up” for interrogation.<sup>50</sup> High-level officials have also alluded to beatings, saying that when suspects are recalcitrant, US forces use “a little bit of smacky-face.”<sup>51</sup> And *The New York Times* has noted “isolated, if persistent, reports of beatings in some American-operated centers.”<sup>52</sup>

#### 4. Renditions

¶27 What happens when stress positions or “smacky-face” do not work? The most uncooperative prisoners at Bagram are reportedly “rendered” to allies, such as Morocco, Egypt, Jordan, and Saudi Arabia, which are known to torture prisoners.<sup>53</sup> The level of direct CIA involvement depends on the country at issue. In Saudi Arabia, for example, CIA officials are “able to observe through one-way mirrors the live investigations.”<sup>54</sup> In other countries, US officials do not participate, presumably to retain plausible deniability about their specific knowledge of torture: “We don’t kick the [expletive] out of them. We send them to other countries so that they can kick the [expletive] out of them.”<sup>55</sup>

¶28 This policy has allegedly produced tragic results. According to Amnesty International, the US deported Maher Arar, a Canadian citizen, to Syria last year because

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<sup>45</sup> Bravin, *supra* note 42, at A1.

<sup>46</sup> *Id.*

<sup>47</sup> Priest & Gellman, *supra* note 9.

<sup>48</sup> *See* discussion, *infra*, pp. 20-22.

<sup>49</sup> HUMAN RIGHTS WATCH, ISRAEL’S INTERROGATION OF PALESTINIANS FROM THE OCCUPIED TERRITORIES 111 (1994).

<sup>50</sup> *Id.*

<sup>51</sup> Jesse Bravin & Gary Fields, *How Do US Interrogators Make a Captured Terrorist Talk?*, WALL ST. J., Mar. 4, 2003, at B9.

<sup>52</sup> *See* Van Natta, *supra* note 43, at 1.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

he was suspected of recruiting for al-Qaeda.<sup>56</sup> After being detained at JFK airport on Sept. 26, 2002, Amnesty reported, Arar was held in US custody for 13 days and then transported to Syria by the CIA.<sup>57</sup> There, he claims, he was beaten with electrical cable and threatened with electric shocks. After six days of such treatment, Arar falsely confessed to having trained in Afghanistan with al-Qaeda.<sup>58</sup> According to the report, he was then held in a tiny basement cell for more than ten months, which his captors called “the grave,” with no release for exercise or exposure to natural light.<sup>59</sup> He was finally returned to Canada after the US determined that he was, in fact, not a member of al-Qaeda. Given that the US State Department, in its 2002 Human Rights Report, cited “credible evidence that [Syrian] security forces continue to use torture,”<sup>60</sup> Maher Arar’s story, if true, illustrates the perils of current US interrogation policy.

### III. TORTURE AND ILL-TREATMENT UNDER INTERNATIONAL LAW

¶29 Torture is absolutely prohibited under international law. This prohibition, which applies in peace and war, in even the most urgent circumstances, is codified in numerous treaties.<sup>61</sup> The International Covenant on Civil and Political Rights, for example, provides that “no one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.”<sup>62</sup> States may not derogate from this prohibition, even in “time of public emergency which threatens the life of the nation.”<sup>63</sup>

¶30 Many commentators maintain that torture is prohibited by custom as well. The views of Pieter Kooijmans, the first Special Rapporteur on Torture for the UN Commission on Human Rights and current ICJ justice, are illustrative:

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<sup>56</sup> Press Release, Amnesty International, USA: Deporting for Torture? (Nov. 14, 2003), *available at* <http://web.amnesty.org/library/Index/ENGAMR511392003?open&of=ENG-USA> (last visited Nov. 6, 2005).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, US DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2002: SYRIA (Mar. 31, 2003), *available at* <http://www.state.gov/g/drl/rls/hrrpt/2002/18289.htm> (describing some of the more horrific Syrian torture methods: “administering electrical shocks; pulling out fingernails; forcing objects into the rectum; beating, sometimes while the victim is suspended from the ceiling; hyper extending the spine; bending the detainees into the frame of a wheel and whipping exposed body parts; and using a chair that bends backwards to asphyxiate the victim or fracture the victim’s spine”) (last visited Aug. 15, 2005).

<sup>61</sup> *See* Universal Declaration of Human Rights, G.A. Res. 217, at art. 5, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) (stating that “no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment”); Geneva Convention Relative to the Protection of Civilian Persons in Times of War art. 3, Aug. 12, 1949, 6 UST. 3516, 75 U.N.T.S. 287 (requiring that torture and cruel treatment of civilians be prohibited); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 3, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (also stating that “no one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment”); Protocol Relating to the Protection of Victims of International Armed Conflicts art. 75, Dec. 12, 1977, 16 I.L.M. 1391; Protocol Relating to the Protection of Victims of Non-International Armed Conflicts art. 4, Dec. 12, 1977, 16 I.L.M. 1442; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 221 (declaring that torture and inhuman or degrading treatment or punishment is prohibited); American Convention on Human Rights art. 5, Nov. 22, 1969, 9 I.L.M. 101 (providing that every person has the right to be free from torture and cruel treatment); African Charter on Human and People’s Rights art. 5, June 27, 1981, 21 I.L.M. 58.

<sup>62</sup> International Covenant on Civil and Political Rights, *supra* note 61, at art. 7.

<sup>63</sup> *Id.*, art. 4.2.

[T]he prohibition of torture can be considered to belong to the rules of jus cogens. If ever a phenomenon was outlawed unreservedly and unequivocally it is torture . . . If there was some disagreement [in the General Assembly] in respect to [the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment], it had to do with the methods of control and implementation. There was no disagreement whatsoever on the fact that torture is absolutely forbidden.<sup>64</sup>

Similarly, the American Law Institute's *Restatement (Third) of the Foreign Relations Law of the United States* ("Restatement") also concludes that torture is a violation of customary international law.<sup>65</sup> Other commentators echo this sentiment.<sup>66</sup>

¶31 It is no surprise that neither Kooijmans nor the Restatement mention actual state practice. Despite lofty rhetoric and numerous treaties, torture remains commonplace.<sup>67</sup> Nor is the practice confined to developing nations.<sup>68</sup> Yet customary international law is generally defined as state practice that, over time, has gained the force of law.<sup>69</sup> Given the disjuncture between state rhetoric and practice, the argument that torture is prohibited by customary international law is at best problematic. Still, whatever the status of the customary prohibition on torture, there can be little doubt that the US is bound by treaties, domestic law, and specific state practice, to not torture.

#### A. *US Obligations Under the Convention Against Torture*

¶32 Despite the universal conviction that torture is illegal, the concept has proven notoriously difficult to define. The only international agreement that adequately defines torture is the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT").<sup>70</sup> Under this definition of torture, the act must (1) produce severe pain and suffering; (2) be intentionally inflicted; (3) by or with the consent of a government official; (4) to obtain information, a confession, or one of the other designated purposes.<sup>71</sup> The definition does not include "pain or suffering arising

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<sup>64</sup> Commission on Human Rights, *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Report by Special Rapporteur, Mr. P. Kooijmans, appointed pursuant to Commission on Human Rights resolution 1985/33*, ¶ 3, UN Doc. E/CN4/1986/15 (Feb. 19, 1986) (footnotes omitted).

<sup>65</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS 702(d) (1986).

<sup>66</sup> See, e.g., DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 465-66 (1999).

<sup>67</sup> See AMNESTY INTERNATIONAL, *CAMPAIGN LAUNCH REPORT : TAKE A STEP TO STAMP OUT TORTURE* (2000), available at <http://web.amnesty.org/pages/stoptorture-index-eng> (last visited Aug. 12, 2005) (reporting that torture has occurred in one-hundred forty countries since 1997, and that it is "widespread and persistent" in approximately seventy-seven states).

<sup>68</sup> *Id.* (estimating that fully 75% of the world's governments have recently used torture).

<sup>69</sup> See, e.g., Statute of the International Court of Justice art. 38(1)(b), 59 State. 1055, Treaty Ser. No. 993 (1945).

<sup>70</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984) [hereinafter CAT]. For an analysis of the definitional problems surrounding torture, see J. HERMAN BURGERS & HANS DANIELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT* 114 (1988) (explaining that prior to the CAT, international human rights agreements had failed to adequately define torture).

<sup>71</sup> "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

only from, inherent in or incidental to lawful sanctions.”<sup>72</sup> Like other international treaties prohibiting torture, the CAT provides, “[n]o 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.”<sup>73</sup>

¶33 The US ratified the CAT in 1994, but took a reservation that limited its obligations under international law.<sup>74</sup> This reservation narrows the scope of the torture definition in several important respects.<sup>75</sup> First, it requires that the actor have specific intent. Second, it defines mental suffering as “prolonged mental harm,” implying that temporary mental harm or discomfort does not rise to the level of torture. The term “prolonged,” moreover, is left undefined.

¶34 The CAT also proscribes “other acts of cruel, inhuman, and degrading treatment or punishment” [“ill treatment”] which do not amount to torture.<sup>76</sup> State parties must “undertake to prevent in any territory under its jurisdiction other acts of [ill treatment] which do not amount to torture as defined in article I.”<sup>77</sup> The ill-treatment regime functions as a catch-all provision for acts that do not amount to torture but nevertheless offend human dignity. The CAT, however, does not define ill-treatment.<sup>78</sup> States have far fewer obligations with respect to the ill-treatment regime.<sup>79</sup>

¶35 The US reservation is also significant with respect to the ill-treatment regime. Because the CAT leaves “cruel, inhuman, or degrading treatment or punishment” undefined, the US interpreted the phrase to mean “cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.”<sup>80</sup> Consequently, because the US definition of ill-treatment is linked to domestic jurisprudence, the US and other countries could come to

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him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.” CAT, *supra* note 70, at art. 1.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at art. 3.

<sup>74</sup> S. Exec. Res. on Advice and Consent to Ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 101st Cong., 138 Cong. Rec. S17486-01 (1990) [hereinafter “US Reservation”] (“(a) That with reference to article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the international infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality”).

<sup>75</sup> John T. Parry, *What Is Torture, Are We Doing It, and What If We Are?*, 64 U. PITT. L. REV. 237, 243 (2003).

<sup>76</sup> CAT, *supra* note 70, at art. 16.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *See id.*, arts. 10-13. For further background on the applicability of CAT to ill-treatment, *see* LIBRARY OF CONGRESS, CONGRESSIONAL RESEARCH SERVICE, REPORT NO. RL32438, U.N. CONVENTION AGAINST TORTURE (CAT): OVERVIEW AND APPLICATION TO INTERROGATION TECHNIQUES (2005), *available at* [www.fas.org/sgp/crs/misc/RL32438.pdf](http://www.fas.org/sgp/crs/misc/RL32438.pdf).

<sup>80</sup> US Reservation, *supra* note 74.

different conclusions about whether a particular interrogation method constitutes ill-treatment. Under the terms of its reservation, the US can engage in any practice not prohibited by the US Constitution, even if that practice might be considered a violation of international law by other nations.

¶36 In addition, the CAT prevents states from rendering people to countries “where there are substantial grounds for believing that [the person] would be in danger of being subjected to torture.”<sup>81</sup> The US Senate’s resolution of ratification contains the understanding that this phrase means, “if it is more likely than not that [the person] would be tortured.”<sup>82</sup>

### B. *Is the US Reservation Valid?*

¶37 The validity of reservations to multilateral human rights treaties is hotly debated. Although some human rights groups often argue that reservations impair the effectiveness of the treaties, the International Court of Justice (“ICJ”) takes the view that it is important to permit reservations to treaties “adopted for a purely humanitarian and civilizing purpose” in order to secure the participation of “as many States as possible.”<sup>83</sup> One might object, as the UN Human Rights Committee did, that powerful states like the US are allowed to get away with “widely formulated reservations which essentially render ineffective all Covenant rights which would require any change in national law.”<sup>84</sup> In other words, such reservations are “intended to ensure that the United States has accepted what is already the law of the United States.”<sup>85</sup>

¶38 Does this argument affect the validity of the US reservation to the CAT? According to the Vienna Convention on the Law of Treaties, a valid reservation is one that (1) is not prohibited by the treaty; and (2) is compatible with its “object and purpose.”<sup>86</sup> Some countries have argued that the US reservation to the CAT is invalid because it is incompatible with the treaty’s “object and purpose”; the Netherlands, for example, objected that the US reservation “appeared to restrict the scope of the definition of torture under article 1 of the Convention.”<sup>87</sup>

¶39 Despite these objections, whether the US reservation contravenes the “object and purpose” of the treaty hinges on state consent. As the Vienna Convention provides, “an objection by another contracting State to a reservation does not preclude the entry into force of the treaty . . . unless a contrary intention is definitely expressed by the objecting state.”<sup>88</sup> A reservation’s compatibility with the “object and purpose” of a treaty is thus a matter for the other state parties to decide. Thus, if states merely object to a reservation

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<sup>81</sup> CAT, *supra* note 70, at art. 3.

<sup>82</sup> US Reservation, *supra* note 74.

<sup>83</sup> Reservations to Convention on Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, at 24 (May 28).

<sup>84</sup> Human Rights Committee, *General Comment 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant*, ¶ 12, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Apr. 11, 1994).

<sup>85</sup> Human Rights Committee, *Concluding Observations of the Human Rights Committee: United States of America*, ¶ 279, U.N. Doc. CCPR/C/79/Add.50; A/50/40, paras. 266-304 (Oct. 3, 1995).

<sup>86</sup> Vienna Convention on the Law of Treaties, G.A. Res. 2166 (XXI) & 2287 (XXII), art. 19, 1155 U.N.T.S. 331 (May 23, 1969) [hereinafter Vienna Convention].

<sup>87</sup> CAT, *supra* note 70.

<sup>88</sup> Vienna Convention, *supra* note 86, at art. 20(4)(b).

without stating that the objection is serious enough to void the treaty, the reservation is valid. By this reasoning, the US reservations to the CAT are valid. No state party indicated its objections were intended to prevent the CAT from entering into force with the US.<sup>89</sup>

¶40 Some regard this as another case of the “US double standard” phenomenon in multilateral human rights treaties.<sup>90</sup> As one commentator put it, “the United States government exerts tremendous efforts to impose international human rights standards on others and, at the same time, strongly resists the imposition of international human rights standards on its own sovereignty.”<sup>91</sup> Other states go along with US reservations, the argument goes, because it is better to have the US supporting the treaty than to risk having no treaty at all. Still, state consent remains the foundation of the law of treaties. One can argue, as a matter of morality or foreign policy, that the US should not exert its outsized power to gain exemptions from human rights treaties. Still, whatever the moral or political ramifications of this “double standard,” it has no legal impact under the Vienna Convention.

### C. *Distinguishing Between Torture and Ill-Treatment*

¶41 The distinction between torture and ill-treatment is significant in at least three respects. First, although the CAT bans torture absolutely, even in times of extreme crisis,<sup>92</sup> it is silent on the status of ill-treatment during an emergency. Second, although the CAT prohibits rendering or extraditing people to countries where they might face torture, there is no comparable prohibition for ill-treatment.<sup>93</sup> Finally, there is a difference in magnitude. Torture, as the European Court of Human Rights (“ECHR”) observed, carries a “special stigma.”<sup>94</sup> Ill-treatment, while still technically illegal, might be acceptable for interrogating terrorist suspects in extreme “ticking time bomb” situations.

¶42 Although international courts have long recognized a theoretical distinction between torture and ill-treatment, drawing this distinction has proven difficult. The CAT provides no definition of ill-treatment, nor any criteria to distinguish it from torture. In the absence of a clear textual distinction between torture and ill-treatment, international case law—specifically the decisions of the ECHR and the Supreme Court of Israel—provides the best guidance.

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<sup>89</sup> See Ratifications and Reservations: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, <http://www.ohchr.org/english/countries/ratification/9.htm#reservations> (last updated Oct. 7, 2005).

<sup>90</sup> Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1175 (1999).

<sup>91</sup> Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 A.J.I.L. 531, 545 (2002).

<sup>92</sup> CAT, *supra* note 70, at art. 2 (“No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”).

<sup>93</sup> *Id.* at art.16.

<sup>94</sup> *Selmouni v. France*, No. 25803/94, 29 Eur. H.R. Rep. 403, 407 (1999).

## 1. The European Court of Human Rights

¶43 A line of cases in the ECHR has evaluated alleged violations of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Like the CAT, article 3 of the European Convention provides that “no one shall be subjected to torture or inhuman or degrading treatment or punishment.”<sup>95</sup> Unlike the CAT, however, the European Convention makes both torture and ill-treatment obligations non-derogable. Although ECHR decisions are not binding precedent on US courts, they indicate the direction in which international law is evolving. As such, they provide a useful standard with which to evaluate US interrogation practices vis-à-vis other western democracies.

¶44 The ECHR’s most thorough analysis of the distinction between torture and ill-treatment appears in *The Republic of Ireland v. The United Kingdom*.<sup>96</sup> The Ireland Court addressed the legality of five techniques employed by the British security forces against suspected IRA terrorists.<sup>97</sup> These included “wall-standing,” “hooding,” subjection to noise, deprivation of sleep and deprivation of food and drink, all techniques similar to those currently used by the US against terrorist suspects.

¶45 The distinction between torture and cruel, inhuman and degrading treatment, the Ireland court “derived principally from a difference in the intensity of the suffering inflicted.”<sup>98</sup> According to the court, the CAT distinguished torture by attaching “a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.”<sup>99</sup> The Court held that these five techniques, when used in combination for long periods, “undoubtedly amounted to inhuman and degrading treatment.”<sup>100</sup> Still, the Court found that they did not “occasion suffering of the particular intensity and cruelty implied by the word torture.”<sup>101</sup> Although the Ireland court established the difference between torture and ill-treatment, it failed to articulate a threshold. Thus, as Israel noted in its 1997 report to the UN Committee Against Torture, “the question whether each of these measures separately would amount to inhuman and degrading treatment was . . . left open by the Court.”<sup>102</sup>

¶46 In subsequent cases, the ECHR has looked to the severity of the pain and suffering to determine whether a particular technique amounts to torture. In *Aksoy v. Turkey*,<sup>103</sup> the Court evaluated whether a detainee’s treatment during interrogation by the Turkish police amounted to torture. The Turkish police used a technique known as “Palestinian hanging,” in which Aksoy was stripped naked, with his hands tied behind his back, and hung by his arms.<sup>104</sup> In addition, the police administered electric shocks to Askoy’s genitals and beat him for periods of thirty minutes to two hours.<sup>105</sup>

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<sup>95</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, *opened for signature* Apr. 11, 1950, 213 U.N.T.S. 222.

<sup>96</sup> Ireland v. United Kingdom, 2 Eur. H.R. Rep. (Ser. A) 25 (1978).

<sup>97</sup> *Id.* at 25.

<sup>98</sup> *Id.* at 26.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Committee Against Torture, *Second Periodic Reports of States Parties Due in 1996: Israel*, U.N. Doc. CAT/C/33/Add.2/Rev. 1 (Feb. 18, 1997).

<sup>103</sup> Aksoy v. Turkey, No. 21987/93, 23 Eur. H.R. Rep. 553 (1996).

<sup>104</sup> *Id.* at 560.

<sup>105</sup> *Id.*

¶47 The *Askoy* court, citing *Ireland*, noted the distinction between torture and ill-treatment embodied in Article 3. The European Convention, the Court reasoned, reserves the “special stigma” of torture for “deliberate inhuman treatment causing very serious and cruel suffering.”<sup>106</sup> The Court found that “Palestinian Hanging” required such preparation that it must have been deliberately carried out.<sup>107</sup> This, coupled with the fact that it caused “severe pain” and the “paralysis of both arms,” led the Court to conclude that *Askoy* had been tortured.<sup>108</sup> Having determined that “Palestinian hanging” was sufficient for torture, the Court did not inquire as to whether electric shocks and beating constituted torture as well.

¶48 Since *Ireland*, however, the ECHR has clearly become more sensitive to potential violations of the ill-treatment regime. In *Selmouni v. France*, Mr. Selmouni was arrested on suspicion of narcotics trafficking.<sup>109</sup> While in police custody, Selmouni was beaten repeatedly and sodomized with a club.<sup>110</sup> The Court found that this “physical and mental violence” was severe enough to constitute torture under Article 3 of the Convention.<sup>111</sup> Beyond this, the Court placed particular emphasis on Selmouni’s degrading treatment at the hands of the police:

[T]he court also notes that the applicant was dragged along by his hair; that he was made to run along a corridor with police officers positioned on either side to trip him up; that he was made to kneel down in front of a young woman to whom someone said “Look, you’re going to hear somebody sing”; that one police officer then showed him his penis, saying “Here, suck this,” before urinating over him; and that he was threatened with a blowlamp and then a syringe.<sup>112</sup>

Such treatment, the Court observed, would be “heinous and humiliating for anyone, irrespective of their condition.”<sup>113</sup> Accordingly, because the “acts complained of were such as to arouse in the applicant feelings of fear, anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical and moral resistance,” the Court found that Mr. Selmouni had suffered inhuman and degrading treatment as well.<sup>114</sup> Significantly, the *Selmouni* Court indicated that threshold for ill-treatment had lowered since *Ireland*:

[T]he Court considers that certain acts which were classified in the past as “inhuman and degrading treatment” as opposed to “torture” could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater

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<sup>106</sup> *Id.* at 555.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Selmouni*, 29 Eur. H.R. Rep. at 403.

<sup>110</sup> *Id.* at 406.

<sup>111</sup> *Id.* at 408.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 407.

firmness in assessing breaches of the fundamental values of democratic societies.<sup>115</sup>

*Selmouni* seems to suggest that were *Ireland* tried today, each individual method would be considered ill-treatment, irrespective of whether they were used in combination. Still, this is difficult to establish with any degree of certainty. Because the ECHR's torture analysis depends heavily on the severity of the interogatee's suffering, whether a particular practice amounts to torture can vary widely from case to case.

## 2. Israel

¶49 The status of S&D under international law has also received considerable scrutiny in Israel. Until recently, Israel defended the use of stress and duress techniques, which the Israelis refer to as “moderate physical pressure.” Facing mounting criticism from the UN and various human rights groups, however, the Israeli government appointed a special Commission of Inquiry (the “Landau Commission”) to investigate the legality of employing these methods during interrogation of suspected Palestinian terrorists.<sup>116</sup> The Commission concluded that moderate physical pressure was legal and justified if there was an imminent danger to human lives.<sup>117</sup> Still, the Landau Commission cautioned that the interrogations must not reach the level of torture, and recommended that such methods be subject to the strictest scrutiny and supervision.

¶50 In 1999, however, the Supreme Court of Israel, sitting as the High Court of Justice, ruled that domestic and international law prohibited the use of moderate physical pressure.<sup>118</sup> The Court evaluated five interrogation methods approved by the Landau Commission, several of which were also addressed in *Ireland*: two stress positions—the “Shabach” position and the “frog crouch”—excessive tightening of handcuffs, violent shaking, and sleep deprivation.<sup>119</sup> According to the Court, the law allows a “reasonable interrogation,” which involves balancing the dignity of the suspect against the need to prevent terrorist attacks.<sup>120</sup> Nevertheless, because international treaties to which Israel is a party unambiguously ban torture and ill-treatment, where these practices are concerned there is “no room for balancing.”<sup>121</sup> “A reasonable interrogation,” the Court reasoned, “is

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<sup>115</sup> *Id.*

<sup>116</sup> See Committee Against Torture, *Second Periodic Reports of States Parties Due in 1996: Israel*, *supra* note 102.

<sup>117</sup> *Id.* ¶ 7.

<sup>118</sup> H CJ 5100/95 Public Committee Against Torture in Israel v. Israel [1999] IsrSC 53(4), reprinted in 38 I.L.M. 1471 (1999).

<sup>119</sup> *Id.* at paras. 8-13, 24-32. The “Shabach” position, for suspects awaiting interrogation, involved seating the suspect on a small and low chair, with his arms handcuffed in an awkward position. His head covered with a sack, and loud music is played. *Id.* at para. 10. The “Frog Crouch” refers to “consecutive, periodical crouches on the tips of one’s toes, each lasting for five minute intervals.” *Id.* at para. 11. Another method was to use excessively small handcuffs, which “is likely to cause injuries to the suspect’s hands and feet.” *Id.* at para. 12. Shaking, regarded as the harshest of the five methods, involved “forceful and repeated shaking of the suspect’s upper torso, in a manner which causes the neck and head to swing rapidly.” *Id.* at para. 9.

<sup>120</sup> *Id.* at para. 23.

<sup>121</sup> *Id.*

necessarily one free of torture, free of cruel, inhuman treatment, and free of any degrading conduction whatsoever.”<sup>122</sup>

¶51 On this basis, the Court held that four of the five interrogation methods illegal. Sleep deprivation is permissible because “a reasonable investigation is likely to cause discomfort” including “insufficient sleep.”<sup>123</sup> Still, sleep deprivation is only legal when it is a “side effect of the interrogation,” not an end in itself.<sup>124</sup> Ultimately, the Court found, “it is possible to conduct an effective investigation without resorting to violence,”<sup>125</sup> for “[a] democratic, freedom-loving society does not accept that investigators may use any means for the purpose of uncovering the truth.”<sup>126</sup> Still, the Court left open the possibility that the legislature could sanction physical interrogation methods, provided that the law “befits the values of the State of Israel, is enacted for a particular purpose, and [infringes the suspect’s liberty] to an extent no greater than required.”<sup>127</sup>

#### IV. ILL-TREATMENT UNDER US LAW

¶52 As previously discussed, the US reservation to the CAT sidesteps the inherent ambiguity of “cruel, inhuman, or degrading treatment or punishment” by limiting its obligation to the prohibition of “cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.”<sup>128</sup> In essence, the US reservation allows the use of any interrogation technique that would be legal under the US Constitution. This raises the possibility that the US is bound to a different standard than other nations. In theory, the US could use interrogation techniques short of torture that would be considered illegal by European courts without violating the CAT. Therefore, the legality of S&D hinges on whether they are permitted under the Constitution.

##### A. *The Eighth Amendment*

¶53 The principal constitutional barrier to S&D is the Eighth Amendment’s prohibition against cruel and unusual punishment.<sup>129</sup> The Eighth Amendment provides that “excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>130</sup> The framer’s definition of “cruel and unusual” was undoubtedly different from our own; after all, floggings were commonplace in colonial times.<sup>131</sup> Still, Eighth Amendment jurisprudence has evolved to meet changing mores.<sup>132</sup>

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at para. 22.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at para. 39.

<sup>128</sup> US Reservation, *supra* note 74.

<sup>129</sup> Because the Eighth Amendment is mentioned explicitly in the US reservation, I proceed here on the assumption that the Eighth Amendment applies.

<sup>130</sup> US Const. Amend. VIII. The Eighth Amendment was applied to the states via the Fourteenth Amendment in *Robinson v. California*, 370 U.S. 660 (1962).

<sup>131</sup> See MYRA C. GLENN, *CAMPAIGNS AGAINST CORPORAL PUNISHMENT* 10 (1984) (noting that in 1775, Congress authorized whipping as a punishment aboard Naval vessels).

<sup>132</sup> *Stanford v. Kentucky*, 492 U.S. 361, 368 (1989).

The essential purpose of the Eighth Amendment is “to proscribe torture and other barbarous methods of punishment.”<sup>133</sup> Moreover, it is now hornbook law that the amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>134</sup>

¶54 Strict textualists, such as Justice Scalia, might also argue that the Eighth Amendment does not apply to coercive interrogations because interrogations are not punishments *per se*.<sup>135</sup> Having been convicted of no crime, the status of Al-Qaeda detainees means that they cannot be punished in a technical sense. Thus, the argument goes, their status is analogous to that of pre-trial detainees domestically. Still, this hardly leaves more leeway for mistreatment. The modern view is that the Eighth Amendment can be extended to conditions that arise from confinement itself, and are not punishments mandated by the court. The Supreme Court, for example, has routinely applied the Eighth Amendment to brutal post-trial treatment that is not a part of the detainee’s sentence.<sup>136</sup> Thus, this argument, which has been proffered by Alan Dershowitz in support of the legality of torture, seems specious.<sup>137</sup>

¶55 Aside from public standards of decency, a punishment must also preserve the “dignity of man,” a concept that underpins the Eighth Amendment.<sup>138</sup> The Court has thus interpreted the Eighth Amendment as banning “excessive” punishments.<sup>139</sup> The excessiveness test has two prongs: first, the punishment must not involve the “unnecessary and wanton infliction of pain”<sup>140</sup>; second, the punishment must not be disproportionate to the crime.<sup>141</sup> In *Hudson v. McMillian*, the Court evaluated the meaning of the Eighth Amendment vis-à-vis the use of force by prison guards to discipline inmates.<sup>142</sup> The Court observed that in determining whether the use of force was “wanton and unnecessary,” it may also be proper to evaluate the need for application of force, the relationship between that need and the amount of force used, the threat “reasonably perceived by responsible officials,” and “any efforts made to temper the severity of a forceful response.”<sup>143</sup> Ultimately, the Court held that “the unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment.”<sup>144</sup> This is because force applied “maliciously or sadistically” violates “contemporary standards of decency.”<sup>145</sup>

¶56 This characterization of the Eighth Amendment seemingly leaves the door open for S&D, since such methods are arguably not “unnecessary or wanton” if they are carefully

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<sup>133</sup> *Estelle*, 429 U.S. at 102.

<sup>134</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

<sup>135</sup> *See, e.g., Hudson v. McMillian*, 503 U.S. 1, 7-9 (1992) (Scalia, J., dissenting) (“A use of force that causes only insignificant harm to a prisoner may be immoral, it may be tortious, it may be criminal, but it is not cruel and unusual punishment”).

<sup>136</sup> *See id.*

<sup>137</sup> *See* DERSHOWITZ, WHY TERRORISM WORKS, *supra* note 3.

<sup>138</sup> *Trop*, 356 U.S. at 100.

<sup>139</sup> *Gregg v. Georgia*, 428 U.S. 153, 175 (1976).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 7-9.

<sup>143</sup> *Id.* at 7 (quoting *Whitley v. Albers*, 475 U.S. 312, 319 (1986)).

<sup>144</sup> *Id.* at 5 (citing *Whitley v. Albers*, 475 U.S. 312, 319 (1986) (quoting *Ingraham v. Wright*, 430 U.S. 651, 670 (1977)).

<sup>145</sup> *Id.*

controlled and used to extract time-sensitive intelligence. However, the Supreme Court has also interpreted the Eighth Amendment to prohibit “disproportionate” punishments.<sup>146</sup> Here, S&D likely fails constitutional scrutiny if it is applied on a widespread and/or indiscriminate basis, as is alleged at Bagram. It unclear, however, whether S&D applied in a more limited fashion—say, only to al-Qaeda leadership—would be considered disproportionate. Much depends on whether there are less severe methods available to achieve the purposes for which S&D is employed,<sup>147</sup> and whether the Court, in its “evolving standards of decency” analysis, takes into account the jurisprudence of other western democracies.

### B. The Fifth Amendment

¶57 The other constitutional barrier to S&D is the Fifth Amendment’s substantive due process requirement. Substantive due process “refers to the principle that a law adversely affecting an individual’s life, liberty, or property is invalid, even though offending no specific constitutional prohibition, unless the law serves a legitimate government objective.”<sup>148</sup> In the early twentieth century, the police often tortured suspects into confessing.<sup>149</sup> In 1936, however, the Supreme Court ruled in *Brown v. Mississippi*<sup>150</sup> that such confessions are not only inadmissible, but also *per se* violations of substantive due process. In *Brown*, three black suspects were hung from a tree and whipped until they confessed to a murder.<sup>151</sup> The Court observed that “[it] would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions,”<sup>152</sup> implying for the first time that severe interrogations violated the suspect’s due process rights, regardless of whether the confessions were admissible in court.

¶58 Since *Brown*, the Court has refined this requirement to ban intrusions of bodily integrity that are “needlessly severe.” In *Rochin v. California*,<sup>153</sup> the Supreme Court refined the needless severity standard into a more specific test: whether the conduct “shock[s] the conscience.”<sup>154</sup> Evaluating a case where the police had “forcibly extracted” the contents of the petitioner’s stomach in order to obtain evidence, the Court observed that some “methods [are] too close to the rack and the screw to permit of constitutional differentiation.”<sup>155</sup> Sanctioning the pumping of Rochin’s stomach “would be to afford brutality the cloak of law.”<sup>156</sup> As Justice Frankfurter observed, the due process clause prohibits methods that “offend those canons of decency and fairness which express the

<sup>146</sup> *Solem v. Helm*, 463 U.S. 277, 292 (1983).

<sup>147</sup> *Id.* (noting that the proper criteria for determining disproportionality are comparative in nature, such as whether the same punishment is imposed in the jurisdiction and other states).

<sup>148</sup> Michael Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689, 733 (1976).

<sup>149</sup> WELSH S. WHITE, *MIRANDA’S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON* 18 (2001).

<sup>150</sup> 297 U.S. 278 (1936).

<sup>151</sup> *Id.* at 281-84.

<sup>152</sup> *Id.* at 286.

<sup>153</sup> 342 U.S. 165 (1952).

<sup>154</sup> *Id.* at 172.

<sup>155</sup> *Id.* at 169 (quoting *Malinski v. New York*, 324 U.S. 401, 412 (1945)).

<sup>156</sup> *Rochin*, 342 U.S. at 173.

notions of justice of English-speaking people, even toward those charged with most heinous offenses.”<sup>157</sup>

¶159 Although the states have often tried to justify harsh treatment on the basis of necessity, the Supreme Court has rejected this argument. In *Chambers v. Florida*,<sup>158</sup> the Court addressed, *inter alia*, whether necessity ever justifies abusive interrogations. In *Chambers*, a group of murder suspects were subjected to “persistent and repeated questioning” over the course of five days, without being allowed to contact a lawyer. The government maintained that when heinous crimes were at issue, the public’s interest in solving them justified the use of coercive methods. But the Court, citing “the historical truth that the rights and liberties of people accused of crime could not be safely entrusted to secret inquisitorial process,” declared that it was “not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws.”<sup>159</sup> The necessity argument is flawed, the Court found, because “the Constitution proscribes such lawless means irrespective of the end.”<sup>160</sup>

¶160 Although the Court has consistently condemned harsh interrogation practices when used to produce confessions, it is not entirely clear whether it would apply the same standard to terrorist suspects. Due-process jurisprudence is predicated on balancing the rights and liberties of common criminal suspects against the necessity of solving common crimes. No common criminal, however, poses a threat to society as grave as that of a suicide bomber armed with WMD. Even so, the cases discussed above strongly indicate that S&D violates the Fifth Amendment.

## V. DO US INTERROGATION PRACTICES VIOLATE THE CAT?

### A. *Mental Practices*

¶161 Based on past practice and current reports, the US is currently using a variety of mental techniques to elicit information. These include sleep deprivation, subjecting detainees to bright lights and noise, and mind games like “false flag.” The above case law indicates that none of the mental techniques, by themselves, amount to torture *per se*. But, as the *Ireland* court indicated, much depends on the length and intensity of the interrogation, and whether the techniques are used alone or in combination.

¶162 It is conceivable, for example, that long periods of sleep deprivation could rise to the level to torture. The US reservation is becomes relevant here, since it stipulates that only prolonged mental suffering counts as torture. If, as *The Washington Post* reported, the US only keeps its detainees awake for twenty-four hours at a stretch, the detainees are arguably experiencing only discomfort. Several days of sleep deprivation would cause extreme fatigue. Still, it is admittedly difficult to meaningfully distinguish between discomfort, extreme fatigue, and prolonged mental suffering. Sleep deprivation for more than twenty-four hours is certainly endurable. Elite military units in the US military, for example, regularly endure up to ninety-six hours of sleep deprivation as part of their

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<sup>157</sup> *Id.*

<sup>158</sup> 309 U.S. 227 (1940).

<sup>159</sup> *Id.* at 241.

<sup>160</sup> *Id.*

training.<sup>161</sup> According to a prominent study, while going without sleep for four days had a significant temporary impact on the soldiers' mental state, it did not do permanent damage.<sup>162</sup> Presumably, the US military does not consider this torture. A significant difference between interrogation and SEAL training, however, is that SEAL candidates have an out: they can be "dropped on request."<sup>163</sup> Another important difference is that SEAL team members are in peak physical form, which might make sleep deprivation more tolerable. Therefore, although the US might arguably interrogate suspects for longer than twenty-four hours at a stretch, the average person could not be subjected to ninety-six hours of interrogation without causing "prolonged mental suffering."

¶63 Sleep deprivation and other disorienting techniques, however, clearly fall under the definition of ill-treatment. Many international courts consider sleep deprivation to be ill-treatment if it is not incidental to the interrogation. The Israeli Supreme Court, for example, found that sleep deprivation is prohibited "if [it] shifts from being a 'side effect' inherent to the interrogation, to an end in itself."<sup>164</sup> If the purpose of the sleep deprivation is intentionally prolonged to break the prisoner's will, "it shall not fall within the scope of a fair and reasonable investigation."<sup>165</sup> "Such means," the Court found, "harm the rights and dignity of the suspect in a manner surpassing that which is required."<sup>166</sup>

### B. Physical Methods

¶64 As previously discussed, the information on which—if any—physical techniques the US is employing at Bagram is far more limited.<sup>167</sup> Recent reports from *The Washington Post* indicate that stress positions are being used.<sup>168</sup> Both the Israeli Supreme Court and the ECHR have considered the legality of stress positions under international law. Rulings from both courts suggest that stress positions amount to ill-treatment rather than torture. The Israeli Supreme Court ruled that stress-positions, if used specifically to break the suspect's will, constitutes ill-treatment, and the Ireland court found that the five techniques in combination only amounted to ill-treatment. Of course, stress positions, if applied for long enough to cause severe pain or suffering, or in combination with beatings, might constitute torture. But the reports from Bagram suggest that beatings are localized, not prolonged, and not used in combination with other techniques.<sup>169</sup> Thus, while the use of stress positions clearly violates the CAT ill-treatment regime, it is probably not torture.

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<sup>161</sup> Lieberman et. al., *Effects of Caffeine, Sleep Loss, and Stress on Cognitive Performance and Mood During US Navy SEAL Training*, J. OF PSYCHOPHARMACOLOGY 250-61 (Nov. 2002).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> Public Committee Against Torture in Israel, *supra* note 118, at para. 22.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> See discussion of physical interrogations at Bagram, *supra* p. 12-13.

<sup>168</sup> See Priest & Gellman, *supra* note 10.

<sup>169</sup> Public Committee Against Torture in Israel, *supra* note 118, at para. 22.

## VI. “TICKING TIME BOMB” TERRORISTS—WHAT SHOULD THE US DO?

A. *The Necessity Defense*

¶65 Although the Israeli Supreme Court determined that moderate physical coercion was illegal under Israeli law, it carved out an exception for emergencies. The Court accepted that, “in appropriate circumstances, GSS investigators may avail themselves of the ‘necessity’ defense if criminally indicted.”<sup>170</sup> In the case of “ticking bomb” scenario, GSS officials would be justified in using harsh methods on a suspect who “holds information respecting the location of a bomb that was set and will immediately explode.”<sup>171</sup> Yet the Court was careful to place strict limits on the necessity defense: it is only available *post factum* for an interrogator “who applied physical interrogation methods for the purpose of saving human life.”<sup>172</sup> Moreover, the necessity defense does not confer the authority to use “physical means.”<sup>173</sup> In other words, it cannot be a substitute for legislative authority.

¶66 Does the necessity defense provide US policymakers with a way out of the torture dilemma? After all, the necessity defense seemingly offers the best of both worlds. The US could maintain its international commitments to ban torture while still using it in cases of true necessity. Academics and officials who support limited torture or ill-treatment frequently cite the “ticking time bomb” scenario.<sup>174</sup> Under the necessity defense, harsh methods, even those that are illegal, could still be used in emergencies. And since the US government would not formally sanction these methods, US reputation would suffer few—if any—ill effects.

¶67 Still, the necessity defense has serious drawbacks. As the Israeli Supreme Court noted, “the lifting of criminal responsibility does not imply authorization to infringe upon a human right.”<sup>175</sup> A superior could not legally order a subordinate to torture on the basis of necessity. Thus, in “ticking bomb” situations, the US would have to rely on the willingness of interrogators to break the law, leaving them vulnerable to charges from both the criminal and military justice systems. Given the severity of the crime involved, it seems highly unlikely that interrogators would be willing to break the law of their own accord. But in “ticking bomb” cases, would US commanders realistically leave the fate of thousands to chance? In all probability, the interrogator would be given “a wink and a nod” from his commanders that harsh tactics would be tolerated. Of course, this commander could invoke the necessity defense, as could the entire chain of command. Still, because the necessity defense is merely a defense, not a grant of authority, this process is just as illegal as a more formalized system of torture.

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<sup>170</sup> *Id.* at para. 34.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* (“In the Court’s opinion, a general authority to establish directives respecting the use of physical means during the course of a GSS interrogation cannot be implied from the necessity defense.”).

<sup>174</sup> See DERSHOWITZ, *supra* note 3; Posner, *supra* note 4.

<sup>175</sup> Public Committee Against Torture in Israel, *supra* note 118, at para. 36.

### B. *Truth Serums: A More Humane Alternative?*

¶68 So-called “truth serums” offer another potential solution to “ticking time bomb” situations. Contrary to their representation in popular culture, truth serums are not drugs created for the express purpose of interrogation; they are barbiturate sedatives commonly used as anesthetics. When administered in lower doses, these drugs—sodium pentothal, scopolamine, and, more recently, sodium amytal—“induce a relaxed state of mind in which the suspect becomes more talkative.”<sup>176</sup> The effect is similar to that of heavy doses of alcohol or cannabis: sodium amytal “induces a mild state of hypnosis,”<sup>177</sup> the primary effect of which is to “make [the subject] more amenable to questioning.”<sup>178</sup> But can these drugs legally be administered against someone’s will?

#### 1. Legality Under International and US Law

¶69 Under the US reservation to the CAT, torture constitutes “severe mental pain or suffering,” including that caused by “the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses of the personality.”<sup>179</sup> Whether truth serums “disrupt the senses profoundly” is unclear, and probably depends on several factors, including the drug, the dosage and the physiology of the subject. The consensus of the medical community is that, unlike LSD, opium, or other dangerous narcotics and hallucinogens, truth serum merely “puts the individual in a completely relaxed physiological and mental condition.”<sup>180</sup>

¶70 Under US law, the legality of truth serums is unclear, at least in the case of an uncooperative terrorist suspect in a “ticking bomb” situation. The Supreme Court has held that statements elicited by truth serums are inadmissible.<sup>181</sup> Moreover, the forced admission of barbiturates is potentially a violation of the Fifth Amendment. One leading case, *Winston v. Lee*,<sup>182</sup> held that courts must weigh “the extent of the intrusion on respondent’s privacy interests” against “the State’s need for the evidence.”<sup>183</sup> Still, given the extraordinary deference that courts have historically shown the Executive branch in times of national emergency, the forced admission of truth serum might be constitutional, especially where an uncooperative al-Qaeda suspect was concerned.

#### 2. Effectiveness

¶71 Courts and medical experts are divided on whether truth serums are effective. On one hand, the Supreme Court observed, “it is at least generally recognized that sufficient doses of scopolamine will break down the will.”<sup>184</sup> Similarly, the Ninth Circuit found that “[t]ruth serums remove certain inhibitions so that the individual will spontaneously

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<sup>176</sup> John M. MacDonald, *Truth Serum*, 46 J. CRIM. L. & CRIMINOLOGY 259 (1955).

<sup>177</sup> *Cain v. State*, 549 S.W.2d 707, 711 (1977).

<sup>178</sup> *Id.*

<sup>179</sup> U.S. Reservation, *supra* note 74.

<sup>180</sup> *Cain*, 549 S.W.2d at 711.

<sup>181</sup> *Townsend v. Sain*, 372 U.S. 293, 306 (1963).

<sup>182</sup> 470 U.S. 753 (1985).

<sup>183</sup> *Id.* at 763.

<sup>184</sup> *Id.*

say what the individual would have said without trying to exercise control over not saying it.”<sup>185</sup> Still, although some courts have acknowledged that truth serums are effective, they remain skeptical enough to bar this information from trials. As one court noted, “the great weight of authority in this country regards results of truth serum tests as inadmissible, inasmuch as they have not attained scientific acceptance as a reliable and accurate means of ascertaining truth or deception.”<sup>186</sup>

¶72 In the medical literature, sodium amytal is considered too unreliable to be admissible in court. In one study, for example, “one half of the subjects were able to maintain a lie under the influence of sodium amytal.”<sup>187</sup> Still, this does not mean that it would not be a useful tool for interrogations. Moreover, truth serum seems to offer a more humane and politically acceptable method of interrogation than S&D. As such, it warrants further analysis.

## VII. POLICY RECOMMENDATIONS

¶73 How can the US maintain its commitments to international law and still conduct successful interrogations? This article makes three recommendations.

¶74 First, given the unsettled state of international law regarding ill-treatment, the US should recalibrate its interrogation guidelines to reflect the recent decisions of the ECHR and the Israeli Supreme Court. By the standards of these courts and the CAT, the US is probably not torturing al-Qaeda detainees. But al-Qaeda detainees are clearly being subjected to interrogation practices that meet the threshold for ill-treatment. Moreover, as the *Selmouni* decision makes plain, this threshold has fallen, at least in the European Community. The *Selmouni* court also held that explicitly humiliating and degrading treatment is prohibited. Some might object that the US Supreme Court is not obligated to take the values of Western Europe and Israel into account in its Eighth Amendment analysis of “evolving standards of decency.” This is true. But if the US wants to be known for championing human rights, it must embrace the same standards as the rest of the civilized world.

¶75 Moreover, US law is comparatively unambiguous. S&D is clearly impermissible under the Fifth and Eighth amendments. If the reports from Bagram are accurate, the US is in clear violation of the CAT, whether or not S&D reaches the level of torture. Although US officials may feel that S&D is essential to win the war on terror, they lack the constitutional authority to employ these methods. In the absence of clear thresholds and definitions, the US should tread cautiously. The more questionable the method, the greater the potential damage to US reputation.

¶76 Second, in the event that the US Congress feels S&D is necessary, it should create a system of safeguards to ensure that innocent people are not subjected to abuse. This could be accomplished by drafting standards to separate actual al-Qaeda members from those who might be merely guilty by association. Coercive tactics of questionable legality, such as sleep deprivation, should only be used against known members of al-Qaeda who possess actionable intelligence—that is, intelligence that will save lives by preventing future attacks.

<sup>185</sup> *Lindsey v. United States*, 237 F.2d 893, 894 (9th Cir. 1956).

<sup>186</sup> *Cain*, 549 S.W.2d at 712.

<sup>187</sup> Phillip J. Resnick, *The Detection of Malingered Mental Illness*, 2 BEHAV. SCI. & L. 21, 24 (1984).

¶77 What should be the standard of proof in this analysis? This is a difficult question to answer without knowing more about the inner workings of US intelligence. Clearly, the burden should be lower than the “beyond a reasonable doubt” standard required for criminal convictions in the US courts, but not be so low that it implicates those who were in the wrong place at the wrong time. One standard would be to limit harsh interrogations to individuals who have been shown, by a preponderance of the evidence, to hold senior leadership positions. Even for al-Qaeda leaders, interrogators should exhaust all non-coercive methods before resorting to harsher methods like stress positions or sleep deprivation. The interrogation of innocents could be avoided if the US only allowed such interrogations in “ticking bomb” situations. Still, officials should be wary of relying on the necessity defense.

¶78 Third, the US should not, under any circumstances, “render” uncooperative suspects to countries that torture. The practice is flagrantly illegal under US and international law. US officials are no less culpable because the victim is being tortured at their request, rather than by their own hands. The legality of rendering suspects for ill-treatment is murkier. Still, there are good reasons to be wary of this practice. It has already undermined America’s standing in the world. Moreover, it might erode human rights in countries where they are already fragile. If countries like Morocco and Egypt use torture as a way of currying political favor with the US, then other countries might follow suit. More powerful countries, like China, will see this as a sign that there is a “terrorism exception” for torture. What, then, is to stop these countries from torturing dissidents by simply by branding them “terrorists”? Terrorism could become an all too convenient pretext for crushing legitimate political expression.

### VIII. CONCLUSION

¶79 Given the unsettled state of international and domestic jurisprudence on S&D techniques, the US is probably not torturing al-Qaeda suspects. However, the available evidence strongly indicates that the US is violating the CAT’s ill-treatment regime. As the situation exists today, S&D violates the interrogation standards the courts have established under the Eighth and Fourteenth amendments. But these standards do not reflect the gravity of the al-Qaeda threat, and serious thought should be given to revising them. If another catastrophic attack occurs, the pressure to use harsh methods will be difficult for policymakers to resist. Al-Qaeda clearly has the will to carry out more devastating attacks; given the shoddy state of nuclear non-proliferation, they may soon have the means. In such a situation, truth serums might provide a more effective—and more humane—alternative to the outright torture that some have advocated.

¶80 Some commentators have suggested that the US should maintain its formal commitments not to torture, but look the other way when it comes to terrorists. This would mark the end of a coherent US human rights policy. If the government feels that S&D interrogations are necessary, it is better to acknowledge the fact openly, so that we, as a nation, can have an open discussion about how far we are prepared to go. By introducing transparency into the shadowy world of interrogation, Congress can regulate the process, ensuring that the government uses S&D only as a last resort, and does not use methods that violate our fundamental values.

¶81 Yet even this approach has dangers. Coercive interrogation necessarily involves, in the words of the *Rochin* court, “force so brutal and so offensive to human dignity in

securing evidence” that it would “brutalize the temper of a society.”<sup>188</sup> No judicial body knows these perils better than the Supreme Court of Israel. Faced with unrelenting terrorism, Israel has nevertheless rejected cruel, inhuman and degrading interrogations, and thus remained true to its democratic ideals. Before we legalize violations of human dignity, we would do well to consider the words of Justice Aharon Barak:

This is the destiny of a democracy—it does not see all means as acceptable, and the ways of its enemies are not always open before it. 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.<sup>189</sup>

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<sup>188</sup> *Rochin*, 342 U.S. at 174.

<sup>189</sup> Public Committee Against Torture in Israel, *supra* note 118, at para. 39.