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Torture After Nuremburg: US Law and Practice

Elizabeth Rapaport

1. Introduction

The torture accusation was leveled at the George W. Bush Administration throughout its conduct of the Global War on Terrorism (GWOT).¹ The Administration vacillated between strained denials that it tortures and admissions that we do resort to torture when necessary to confound our terrorist enemies. The Administration, however, consistently maintained that the “enhanced interrogation techniques”² employed in the CIA interrogation “program”³ to which “high value”⁴ Al Qaeda prisoners have been subjected is *legal*.⁵ The Administration may have admitted to torture and other cruel treatment, but if so, the necessary corollary was that torture, at least CIA torture authorized by the President, is lawful.

In this essay I will argue that the signature methods of interrogation used by CIA and military interrogators in the GWOT - “torture lite” techniques such as hypothermia and stress positions - may constitute torture, but that the question of their legality under U.S. and international law is not as straightforward as some critics of the Bush Administration maintained. I will take up only one thread in the complex discussion of GWOT interrogation practices and law, that of the boundary between torture and lesser cruelty.

The prevailing critique of Bush interrogation policies on the part of figures in past administrations and some in his own administration, as well as media and academic critics, was that Bush’s interrogation policies violate U.S. torture and war crimes statutes, our treaty commitments under the Convention Against Torture and the Geneva Conventions.⁶ As a member of the party of humanity, American branch, I share the goal of banning torture with those brothers and sisters I will call, collectively, Bush’s conventional critics. In my view, however, the conventional critics have failed to acknowledge the depth and extent of the failure of the United States and other democratic nations to vindicate the Nuremburg aspiration of banning torture. The excesses of the George W. Bush Administration should not be allowed to obscure the *status quo ante*: Torture has been accommodated in both law and practice from the Cold War to the GWOT. Pre- 9-11 law, like more recent legislation, accommodated the use of modern torture doctrine developed by the CIA.⁷ These practices are misleadingly denominated “torture lite.”

The signal differences between the Bush administration and its predecessors was a new if ambivalent candor about what we do and the corruption of military law, which had previously adhered to the Geneva

conventions.⁸ For, as we shall see, U.S. war crimes legislation enacted to punish violations of Geneva standards was more stringent prior to the G.W. Bush than was either international or U.S. torture law. It is also true that the George W. Bush Administration interpreted and reformed U.S. law so that it is friendlier to torturers; U.S. law is therefore worse than before from the standpoint of the party of humanity. But, if all vestiges of the George W. Bush era were extirpated from our law and we returned to the *status quo ante*, U.S. law would continue to accommodate torture lite on the part of clandestine services like the CIA, although not on the part of the military. Nor is the U.S. unique among robust democracies in so doing.

This essay aims to overcome the amnesiac tendencies of the conventional critics by reintegrating the modern history of torture and torture legislation into our understanding of the tasks that confront the party of humanity. While the George W. Bush Administration was at times flagrant where its predecessors were sly, pre-9-11 law, like more recent legislation, accommodates the use of the modern interrogation doctrine developed by the CIA. These practices are often referred to as “torture light”(or “lite”) or “psychological torture.”

Torture lite, as we shall see, was not developed to diminish or limit suffering but rather to enhance efficiency in its employment. The trick on which the law pivots is to define torture so that torture lite is classified as lesser cruelty, which, while condemned, is not subject to the severe criminal penalties or opprobrium that confront the practice of the type of torture identified with the medieval rack and wheel or more contemporary methods of breaking bones and rending flesh. Torture lite is nonetheless torture. Or, more accurately and completely, torture lite comprises practices that can be and are applied in a manner that satisfies the legal definition of torture despite the slight of hand manipulations that seek to deflect this conclusion. Moreover, old-fashioned heavy torture has never been entirely abandoned. It can be found in the annals of the CIA GWOT interrogation practice, and in the rendering of prisoners to Governments that practice torture by both the George W. Bush Administration and the Clinton Administration that preceded it, and in US interventions in, for example, Central and South America and in Vietnam.⁹ Throughout the public discussion of the GWOT era practices, there has been amnesiac failure of reference to law and practice before the Global War on Terrorism and the record that peers such as the British and Israelis have compiled without benefit of George W. Bush. Looking at the big picture, our collective problem is not that we veered away from the road taken at Nuremburg, but rather that, with the exception of the military, who were traveling that highway long before Nuremburg, we never got on the bus.

2. The Definition of Torture in Contemporary International Law

The Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment (CAT)¹⁰ is among the first international agreements prohibiting torture that *defines* the term;¹¹ it supplies the most widely accepted legal definition of torture, a definition that has been adopted as a model for other international agreements and in the domestic law of nations, including that of the United States. The United States Senate consented to the CAT subject to certain reservations, understandings and declarations in 1990, and the instrument of ratification was deposited in 1994. The CAT is generally regarded as expressing norms of customary international law, and indeed, *jus cogens* norms. CAT distinguishes between torture and lesser cruelties.

Torture is defined as,

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when 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 from legal sanctions.¹²

There are four principal predicates or requirements in the CAT definition; “severe pain or suffering,” “intentional infliction,” “purposes” and state or “public” action.

For my purposes, “severe pain and suffering” and “purposes” are the predicates upon which to focus attention. As to the purposes enumerated, the sole purpose for which torture has any constituency in the contemporary United States at present is interrogation to prevent future national security harms, or garnering “actionable intelligence”¹³ in the parlance of spokesmen for Bush Administration Global War on Terror. The scope of the following discussion will therefore be limited to the subject of interrogative torture for the purpose of preventing future national security harms. The elucidation of the standard “severe,” and the distinction between severe and lesser pain or suffering would be critical to a determination of whether the United States has practiced torture in courts throughout the world, including our own.

The CAT also bans, but does not define, “cruel, inhuman or degrading treatment or punishment which do not amount to torture.” The CAT ban on torture is nonderogable:

No exceptional circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.¹⁴

By contrast, the CAT does not denominate cruel, inhuman and degrading treatment nonderogable.

The CAT obliges parties to ensure that “all acts of torture are offences under its criminal law.”¹⁵ Parties to CAT are also obliged to prosecute, or extradite for prosecution elsewhere, persons who commit torture. Parties to the CAT are required thereby to “prevent” but not to criminalize cruelties not rising to the level of torture, although the practice of such cruelty *is* derogable. The United States ratified the CAT subject to certain stipulated reservations and understandings as to the definitions of “torture” and “cruel, inhuman and degrading treatment.” These revised definitions were employed in the domestic enabling legislation criminalizing torture.¹⁶ These revisions are also employed in the definitions in U.S. war crimes legislation,¹⁷ legislation the U.S. enacted in fulfillment of our obligations as a party to the Geneva Conventions of 1949.¹⁸ The George W. Bush era Detainee Treatment and Military Commissions Acts that amend the Torture Statute and the War Crimes Act rely upon the same seminal revisions of CAT definitions employed in the amended legislation.

3. Legal and Illegal Coercion in U.S. Law

Neither CAT nor U.S. municipal law equates all coercion with torture or other cruelty. There are in effect three levels of coercive interrogation recognized in United States law, of which the first is legal and the third is equated with heavily sanctioned felonies: (1) legal coercion, (2) violations of constitutional standards for the treatment of persons in state custody, and (3) torture. At the first level we find legitimate police interrogation practices. The third level is synonymous with such serious felonies as aggravated assault, murder and the crime of torture. At the second level we find conduct that the CAT treats as CID and requires to be prevented but not to be criminalized; level 2 acts may rise to civil wrongs, misdemeanors or even felonies under U.S. law.

U.S. law of interrogation is premised on the supposition that to be questioned in police custody is to be subject to coercion.¹⁹ The law of custodial interrogation requires that the suspect be advised of his or her rights, including the rights to remain silent and to legal counsel, in order to counteract this structural oppression and to prevent the overbearing of the suspect’s will. While notice of these rights and their exercise serve to guard against a suspect’s being forced to make admissions against his will, the

Constitution permits the police to exploit their domination of the suspect in custody - up to a point.

The law permits police to conduct sustained, intense interrogations but does not permit more than minimal incursions on normal expectations of eating or sleeping, nor may police assault their suspects. Police are permitted to lie and to trick suspects, *e.g.*, “your confederates have confessed,” or “we have all the evidence we need to convict.” They are permitted to paint a picture of the grim consequences of conviction but not to threaten physical harm or reprisals.

Levels 2 and 3 are prohibited under both international and U.S. law, but level 2 coercion is unlikely to be prosecuted as a heinous crime with severe penalties in the United States or other countries that have embraced the CAT. The CAT does not oblige ratifying nations to prosecute for level 2 offenses, and unlike torture, CID *is* derogable in emergencies.

Media reports have described GWOT interrogation practices that arguably satisfy the definition of torture in international and domestic law.²⁰ These reports encompass cases of conduct that clearly satisfy any legal definition of torture, *e.g.*, beating a prisoner to death,²¹ and conduct which may not be severe enough to merit that designation, *e.g.*, hooding. Recently, Bush Administration officials admitted the use of waterboarding by the CIA against three Al Qaeda prisoners in 2002 and 2003.²² It can’t creditably be denied that subjecting a prisoner to the fear of momentary death while he is immobilized and suffocating is torture. There have also been documented cases of the U.S. rendering and extraditing prisoners to governments who practice torture.²³

But what of the cruel practices known as torture lite about whose use at Abu Ghairib, Bagram, Guantanamo and CIA blacksites we have been reading almost since the inception of the GWOT, practices that the Bush Administration denied are torture under U.S. or international law? Let us look at some examples of these interrogation techniques employed during the GWOT, at their Cold War provenance, and at something of the history of their use by other democracies in the post-Nuremburg era of international agreements to prohibit the use of torture.

4. Some reported interrogation techniques employed in the GWOT

One such technique is Cold Cell, used in the CIA interrogation of Abu Zubaydah in the spring of 2002. The New York Times reports that,

At times, Mr. Zubaydah, still weak from his wounds, was stripped and placed in a cell without a bunk or blankets. He stood or lay on the bare floor, sometimes with air-conditioning adjusted so that, one official said, Mr. Zubaydah seemed to

turn blue.²⁴

Other interrogation techniques, whose use has been authorized by the Department of Defense or described in press accounts of authorized interrogations, include heated cell, long standing, stress positions, hooding, forced nudity, sexual humiliation, threats, sleep deprivation, and waterboarding. The use of two of these techniques at Guantanamo was described by an FBI agent in an intra-agency memo. The first of these is a “stress position”:

On a couple of occasions, I entered interview rooms to find a detainee chained hand and foot in a fetal position to the floor, with no chair, food or water. Most times they had urinated or defecated on themselves and had been left there for 18 24 (*sic*) hours or more.

The second is “Heated Cell:”

On another occasion, the A/C had been turned off, making the temperature in the unventilated room probably well over 100 degrees. The detainee was almost unconscious on the floor, with a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night.²⁵

It should be borne in mind that these techniques can be employed repeatedly and in combination. Here is a description of the interrogation of Mohammed al-Qahtani, believed to be the twentieth hijacker in the 9/11/01 attacks:

Qahtani had been subjected to a hundred and sixty days of isolation in a pen perpetually flooded with light, He was interrogated on forty-eight of fifty-four days, for eighteen to twenty hours at a stretch. He had been stripped naked; straddled by taunting female guards, in an exercise called “invasion of space by a female,” forced to wear women’s underwear on his head, to put on a bra; threatened by dogs, placed on a leash; and told his mother was a whore. By December, Qahtani had been subjected to a phony kidnapping, deprived of heat, given large quantities of liquid without access to a toilet, and deprived of sleep for three days... his heart rate had dropped so precipitately, to thirty-five beats a minute, that he required cardiac monitoring.²⁶

5. C.I.A. Interrogation Doctrine²⁷

The Holy Grail for both the CIA and the KGB in the early days of the Cold War was a chemical method, a drug, which would eliminate a subject's ability to resist and yet leave his or her mind sufficiently intact to permit successful interrogation. Such programs failed in both East and West. Medical and behavioral scientists next concentrated their efforts on psychological torture. The goal remained mind control: If you can control the subject's mind, why bother with the messy, unreliable business of breaking his body? In the West, the CIA developed interrogation doctrine with the critical assistance of the Canadians and the British. They were spurred on by the precocious and proficient Soviet adversary, and incorporated admired Soviet techniques.

The CIA and their collaborators recruited from the ranks of academic scientists discovered that sensory deprivation and self-inflicted pain are more effective at undermining resistance than physical assaults. Sensory deprivation and self-inflicted pain are the *alpha* and *omega* of CIA interrogation doctrine. In general, the proponents of torture lite adhere to the view that interrogation succeeds by undermining the capacity for resistance through inducing "regression", *i.e.*, weakness and dependency upon the interrogator. From this perspective, pain inflicted by the interrogator can stimulate and prolong resistance, while sensory deprivation and self-inflicted pain, together with the fear of physical harm rather than the experience of brutality by captors, perhaps assisted by assaults on identity and sexual humiliation, unravel the capacity to resist.²⁸ The goal is not to limit or moderate pain or suffering but to crush the will or ability to resist.

Among the iconic images of our time are the photographs of prisoners at Abu Ghraib, posed nude or hooded, in stilted postures or naked piles. One of these images is perhaps as familiar and recurrent as any image of the post-9-11 era: A figure, presumably male, hooded, wearing a loose rudimentary gown, stands on the top of an oblong box or device. There is scarcely enough space on the small platform for his bare feet. His arms are extended at a 45° angle. Wires extend from the fingers of his outstretched hands. This image illustrates techniques of sensory deprivation and self-inflicted pain. Hooding or other sensory deprivations or manipulation of the sensory environment through isolation, noise, heat or cold, can produce profound, terrifying disorientation with astonishing rapidity. The figure on the box is forced to stand in a "stress position." How long can he maintain the posture and endure the weight of his outstretched arms? Will current jolt his body when he falters? This stress position is an application of self-inflicted pain, synergistically amplified by the hooding and draping: the subject, disoriented, stripped of his social identity, is confronted not by an enemy to loathe and resist but his own weakness.

Is torture lite to be ranked as lesser cruelty, as (mere) cruel, inhuman

or degrading treatment, or as torture? While at first blush relatively innocuous compared to the flesh cutting, bone crushing practices in the ancient and medieval worlds, torture lite and medieval torture have in common that they are grounded in the best extant science for extracting information without extinguishing the life or reason of the subject before he or she reveals what the interrogator wants to learn. Torture lite was understood by its CIA and KGB inventors to be an advance in efficiency, not humanity, and in the case of the CIA, operating as agents of a democracy, to be an ingenious way of getting on with the job at hand without, arguably, violating international and domestic law.²⁹ These techniques are designed to overcome the resistance of the most committed, brave and well trained subjects. In this regard torture lite is the functional equivalent of medieval torture. The CAT definition of torture does not invoke the unendurable, that which overcomes the most stalwart will, but rather the degree or severity of pain or suffering. One dimension of assessment of severity is the long term effect upon those subjected to sensory deprivation and stress positions, a question one need not ask about torture heavy. We will have ample opportunity over the coming decades to study the long-term effects of torture lite. As to the pain or suffering caused by the application of torture lite *in situ*, it is reasonable to conclude that it could constitute either CID or torture depending upon circumstances. Thus, to place a naked healthy man in a cold cell overnight might not produce sufficient pain or suffering to reach the torture threshold, but to place a naked wounded man from whom medical treatment is withheld, or, for that matter, a healthy man, in a cold cell for weeks would constitute torture. Sustained application of a technique like cold cell, much less its concatenation with the sustained use of other techniques, such as isolation, relentless noise, stress positions, food and sleep deprivation, and long bouts of interrogation, would produce severe pain or suffering, at least as the terms “severity” is ordinarily understood. Media reports about Guantanamo and CIA blacksite interrogations establish that the sustained concatenation of torture lite techniques have been inflicted on Al Qaeda prisoners. If this is the commonsense understanding, what then is the legal understanding of the level of coercion at which we are to peg torture lite?

6. Torture and CID in the Post-Nuremburg Law and Practice of Other Contemporary Democracies

Two seminal cases, arising out of the conflict in Northern Ireland and the Israeli/Palestinian conflict, respectively in the European Court of Human Rights³⁰ in 1978 and the Israeli Supreme Court³¹ in 1999, have addressed the issue of whether at least some of the types of interrogation techniques employed in the GWOT constitute torture or are otherwise illegal under municipal and international law. Neither court found that these

practices constituted torture. The European Court of Human Rights held that the practices in question were cruel, inhuman and degrading, and as such violated the European Convention on Human Rights, but were *not* torture.

The practices challenged and held to be CID but not torture were:

- (a) wall-standing: forcing the detainees to remain for periods of some hours in a 'stress position,' described by those who underwent it as being 'spreadeagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers';
- (b) hooding: putting a black or navy coloured bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation;
- (c) subjection to noise: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise;
- (d) deprivation of sleep: pending their interrogations, depriving the detainees of sleep;
- (e) deprivation of food and drink: subjecting the detainees to a reduced diet during their stay at the centre and pending interrogations.

As noted in the famous August 1, 2002 U.S. Justice Department Memorandum³² (known as "the torture memo"), the European Court of Human Rights (ECHR) relied on the distinction made by the European Convention on Human Rights, which parallels that of the CAT, between severity or intense cruelty and lesser cruelty, as the demarcation between torture and CID. The memo takes note that some of the detainees were "beaten severely" and then forced into the wall standing position, some were "continuously kicked" while wall standing and some of these beatings produced "massive injuries." To understand the decision of the ECHR about the intensity or severity of suffering required to reach the level of torture one must bear in mind the high ceiling assigned to mere CID in the *Ireland* decision. These men were not subjected to a single application of one of these methods, but to sustained reiterations and combinations of them. At least some were subjected to old fashion assault in order to enhance the impact of the more innovative ministrations of their interrogators.

The Israeli Supreme Court subsequently held in 1999 that five interrogation methods employed by the General Security Service's (GSS or Shabach) violated Israeli law. The Supreme Court did *not* find that these methods constituted torture under Israeli and international law, and indeed

did not even consider that possibility. The Supreme Court also held that although these methods are illegal, a necessity defense was available to GSS interrogators who used them if the national security circumstances were grave. If indeed these methods do not constitute torture, then, under the CAT at least, their use in emergency circumstances might be consistent with international law. Only torture is nonderogable under the CAT.³³

The five methods challenged and held to violate Israeli law were:

1. Shaking - the forceful shaking of the suspect's upper torso, back and forth, repeatedly, in a manner which causes the neck and head to dangle and vacillate rapidly.
2. The "Shabach" (GSS) Position³⁴ - "He is seated on a small and low chair, whose seat is tilted forward, towards the ground. One hand is tied behind the suspect, and placed inside the gap between the chair's seat and back support. His second hand is tied behind the chair, **against** its back support. The suspect's head is covered by an opaque sack, falling down to his shoulders. Powerfully loud music is played in the room."
3. Frog Crouch - This refers to consecutive, periodical crouches on the tips of one's toes, each lasting for five minute intervals.
4. Sleep Deprivation
5. Excessive Tightening of hand and ankle cuffs

The similarities shared by British and Israeli methods and those of the CIA point to their origins in Cold War interrogation science. The history of U.S. law also reveals a like exploitation of a capacious definition of CID to protect torture lite and those who employ it from opprobrium and criminal liability. President George W. Bush and Administration spokesmen indignantly insisted that, although we are necessarily harsh in interrogating terror suspects, we do not practice torture. Their point was that we eschew medieval torture.³⁵ However, it was conceded that that torture lite techniques were practiced and constitute at least CID.³⁶ In this regard the United States followed the path already taken by Europe and Israel, although the Bush Administration broke new ground by corrupting military law. Let us look at the history of the reception of international legal standards governing the conduct of interrogations into U.S. law, and in particular, the distinction between torture and CID in U.S. law.

7. History of U.S. Torture Law

A. Dueling Definitions of Torture in U.S. Law

In December 2004 the Department of Justice repudiated the definition of torture in the notorious "torture memo," leaked earlier that year. The earlier memo had narrowed the definition of torture previously uniformly employed

to explicate the meaning of torture in U.S. law and in treaties into which the United States entered in the post-Nuremburg world. The 2004 memo superceded the 2002 memo “in its entirety” but it took aim expressly at its narrow definition of torture: “excruciating or agonizing pain” or pain “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.” The superceding 2004 memo reminds us that under CAT and US law as previously understood, severe suffering, mental, as well as physical, constitutes torture; mutilation or death dealing assault are not the sole inhabitants of this category.³⁷ The newer memo returns to the definitional strategy of the Reagan and first Bush Administration, adopted by the Clinton Administration, which oversaw the deposit of the instrument of ratification of CAT and the passage of the Torture Statute. That strategy employs the common sense understanding of “severity” of pain or suffering as the demarcation between torture and lesser forms of cruelty. The Department of Justice lawyers who were proponents of the 2004 memo deserve recognition for combating the blatant endorsement of torture represented by the 2002 memo. However, reversion to the law produced in keeping with the ratification strategy is not sufficient to satisfy Nuremburg aspirations for a law that bans torture.

B. The Definitions of Torture and CID in CAT as Ratified

The Reagan Administration unsuccessfully sought Senate approval of the CAT in 1988.³⁸ The G. H. W. Bush Administration won Senate approval in 1990, subject to a revised and augmented package of reservations, understandings and declarations, including revision of the definitions of torture and CID in the treaty.³⁹ It was ratified in 1994, during the Clinton Administration, which also saw passage of the requisite implementing legislation, the Torture Statute.⁴⁰ The avowed purpose of narrowing the definition of torture in the CAT was to interpret the term “torture” in the CAT in a fashion “corresponding to the common understanding of torture,” which reserves the term for “extreme, deliberate, and unusually cruel practices.”⁴¹ The Senate did not offer further refinement of the concept of physical torture, but did offer guidance by way of examples of physical torture: “sustained systematic beating, application of electric shock to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain.”⁴²

“Mental torture” was further defined to ensure that the severity threshold was sufficiently high and the pain and suffering were objectively manifest:

Mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) intentional infliction or threatened infliction of severe physical pain or suffering; (2)

the administration or application, or threatened administration, 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 calculated to disrupt the senses or personality.⁴³

Having addressed the need for a stringent understanding of torture, it remained to distinguish between CID and lawful police procedures. The “cruel, inhuman and degrading” language of CAT was deemed too vague to delineate this boundary: conduct lawful under the US Constitution might be construed as CID absent clarification. Citing a 1977 European Commission of Human Rights case in which official failure to recognize “an individual’s [desire for] change of sex” was held to be degrading treatment as an example of a broader understanding of CID than that required by U.S. law,⁴⁴ the U.S. ratified subject to the understanding that CID means conduct “prohibited by the Fifth, the Eighth and/or Fourteenth Amendment to the Constitution of the United States.”⁴⁵

The *Ireland* case predates Reagan Administration’s referral to the Senate in 1988 by 10 years. Yet there is no discussion of the techniques of sensory deprivation or stress positions classified as CID by the European Court of Human Rights in *Ireland*. The Report of the Senate Committee on Foreign Relations recommending ratification in 1990 is equally silent. Nowhere in these official submittals and reports is the curtain lifted on the covert science developed by the CIA. CIA science, as practiced by the United States and her allies, the subject matter of *Ireland*, remained cloaked. The inference that this negative record invites is that that the drafters of U.S. torture law relied upon *Ireland’s* conclusions about Cold War interrogation doctrine. They defined CID expansively to encompass torture lite, but preferred not to call attention to these techniques or this disheartening enervation of human rights law. For once the nature of these techniques are exposed, they pose a formidable challenge to the legal fictions that torture lite is not torture and that torture has been banned. To this extent George W. Bush followed the lead of Europe and preceding U.S. administrations: They all balked at fulfilling the promise of Nuremburg.

8. George W. Bush Administration Legislation: The Detainee Treatment Act and The Military Commissions Act

The Geneva Conventions differ from the CAT in that both torture and CID are nonderogable and that parties to the Geneva Conventions unlike the CAT are required to criminalize both levels of cruelty. There is, therefore, tension and lack of alignment between human rights and humanitarian law to

this extent. Almost from the onset, the Bush Administration took the position that the GWOT is “a new kind of war,”⁴⁶ in which the *jihadis* with whom we are engaged are not entitled to the protections of the Geneva Conventions.⁴⁷ Further, the War Crimes Act, the enabling legislation the U.S. enacted to comply with our obligations under the Geneva Conventions, differs from the Torture Statute in that it provides severe penalties for CID, as does the Uniform Code of Military Justice, the criminal code governing serving military personnel. The taste for cruel interrogation methods could therefore potentially have exposed Administration officials to criminal liability derived from U.S. treaty commitments under the Geneva Conventions, even if the CAT proved toothless. For under the law that Bush inherited, both military and CIA interrogators were subject to the War Crimes Act,⁴⁸ and in the case of military interrogators, the Uniform Military Code of Justice as well, both of which impose the strictures of the Geneva Conventions regarding the treatment of prisoners. The Administration received a stunning setback when the Supreme Court held in 2006 that Common Article 3 of the Geneva Conventions applied to Guantanamo detainees.⁴⁹ The outcome of the battle over retention of Geneva standards in U.S. law is far from concluded at this writing. The Administration suffered some reversals to its interrogation policies with the passage of the 2005 Detainee Treatment Act, also known as the McCain Amendment after its eponymous sponsor, Senator John McCain, but it also gained ground in that 2005 legislation as well as in the 2006 Military Commissions Act.

A. War Crimes in U.S. Law as Enacted in 1996

The law of war, or humanitarian law, as codified by the Geneva Conventions of 1949, prohibits both torture and inhumane treatment of all persons protected by the Conventions. Common Article 3, so called because it appears *verbatim* as Article 3 in each of the four conventions, prohibits “at any time and in any place”⁵⁰

Violence to life or person, in particular murder of all kinds, mutilation, cruel treatment and torture, taking of hostages, outrages upon personal dignity, in particular, humiliating and degrading treatment;⁵¹

In *Hamdan v. Rumsfeld*⁵² the US Supreme Court held that Common Article 3 applies to our conflict with al Qaeda, thus vindicating the view, championed by the Powell Department of State and the Armed Services, that no person or class of persons is outside the protection of the Geneva Conventions. The Court held that Common Article 3 applies to anyone who is not otherwise protected under the Conventions who is “involved in a conflict in the territory of a signatory.”⁵³ Thus Al Qaeda prisoners, if not deemed prisoners of war and protected as such, are nevertheless protected

under Common Article 3. Common article 3 stipulates the minimal protection owed to anyone by parties to the Conventions.

As parties to the Geneva Conventions of 1949, the United States was obligated to enact legislation that criminalizes "grave breaches of the Conventions."⁵⁴ In fulfillment of this obligation, the United States enacted War Crimes Act in 1996. Grave breaches include:

Willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health.⁵⁵

Under both the Geneva Conventions and the War Crimes Act of 1996, *both* torture *and* CID are grave offenses. Unlike the Torture Statute, the War Crimes Act does not lend itself to the exploitation of the distinction between torture and CID: The legal assimilation of egregious treatment of detainees under interrogation to mere CID is not as promising a maneuver under this parallel law which could be invoked against both civilian and military officials.

The legal definitions of torture and CID employed in the War Crimes Act enacted in 1996 and in subsequent Bush Administration amendments to the Act are those devised by the Reagan and G. H. W. Bush State Departments and incorporated in CAT as ratified. Torture is therefore defined in the War Crimes Act as extreme cruelty and CID as conduct that would violate the 5th, 8th or 14th Amendments to the U.S. Constitution. If *mere* CID is a war crime, then there is potential for liability for heinous crimes by senior and field grade officials for interrogations employing torture lite. The Bush Administration has sought to safeguard its interrogation policies, their authors, and their agents through new legislation; its domestic opponents have sought with limited success to keep the United States aligned with the standards recognized in the Geneva Conventions.

B. GWOT Era Legislation: The Detainee Treatment Act and the Military Commissions Act

In 2005 and 2006 respectively Congress passed the Detainee Treatment Act⁵⁶ (DTA) and the Military Commissions Act⁵⁷ (MCA) respectively. In the DTA and MCA, Senator McCain's bargain was to call a halt to the corruption of the military but condone presidential authority to order the CIA to use interrogation techniques forbidden to the military. The DTA reveals the bifurcation in U.S. law between the legal constraints on members of the military on the one hand and other U.S. agents. The DTA prohibits the Department of Defense from subjecting any person in its custody to any interrogation technique not authorized by the Army Field Manual.⁵⁸ The manual, as revised in 2006, continues to impose traditional strict adherence to Geneva standards.⁵⁹ For the military, CID, like torture, is

prohibited. Senator McCain's accomplishment in the DTA is the reaffirmation of the military's commitment to the Geneva Conventions. This achievement will give the military heart to attempt to resuscitate the law of war and the culture that surrounded it before Bagram, Abu Ghraib and Guantanamo corrupted military law and practice.

The DTA also expressly quelled the position taken by the Bush Administration that CAT Article 16, required the prevention of CID only *within* the United States.⁶⁰ This Administration position was arrived at by adducing from the fact that the U.S. ratified CAT subject to the understanding that CID meant conduct prohibited by the US Constitution that the U.S. was obliged to prevent CID only where the Constitution was in force.⁶¹ The DTA repudiated this position; not jurisdiction, but standards of treatment are at issue: No one in U.S. custody anywhere in the world may be subject to CID.

Despite its express prohibition of CID by any U.S. agents any where in the world, the DTA accommodated *CIA* CID: It enacted a good faith defense for interrogators who employ officially authorized interrogation methods that constitute CID,⁶² and enacted measures, strengthened in the MCA, that severely constrict detainees' ability to find redress in federal courts.⁶³ Most significantly for the inquiry at hand, the MCA gives the president authority to determine whether a particular torture lite technique forbidden to the military may be legally employed by the CIA.

In the Military Commissions Act the theme of a law too vague for practical application, previously heard when the Senate ratified the CAT subject to certain understandings, is heard once more. This time, it is the imprecision of the War Crimes Act that calls for redefinition or refinement. Under the War Crimes Act prior to amendment by the MCA, any grave breach of the Geneva Conventions, including CID, would subject officials to the possibility of prosecution for a serious felony. The War Crimes Act as amended by the MCA enumerates grave breaches of common Article 3 of the Geneva Conventions and assigns to the President the authority to determine offenses *not* grave.⁶⁴ Thus, with an interrogation technique not enumerated, whether it be from the repertoire of torture lite, hyperthermia perhaps, or a technique like waterboarding that looks more like torture heavy, it is for the President to determine whether its use is legitimate or whether its use constitutes a Geneva violation and a war crime. An official who relied upon a presidential order, bolstered by a Department of Justice opinion that a technique was lawful, would have a good faith defense. However, hypothermia and other techniques in the torture lite repertoire remain crimes if committed by serving military personnel subject to the Field Manual and the Uniform Code of Military Justice.

C. The Evolution of the Fifth Amendment Test for CID: The Achilles Heel of a Better Future for U.S. Law

When the CAT was ratified, the standard for permissible interrogation under CAT was pegged to the level of coercion tolerated by the Fifth, Eighth, and Fourteenth Amendments to the Constitution. That demarcation line between legal coercion and CID continues to inform The Torture Statute, the War Crimes Act, and U.S. interpretations of her international obligations. However, the test for legality in Fifth Amendment jurisprudence has undergone a dramatic change in the direction of making it easier to argue, plausibly, that torture lite techniques pass constitutional muster.

When CAT was ratified, the Fifth Amendment demarcation was, as it is today, established by judicial deployment of the “shocks the conscience” test. That test was formulated in *Rochin v. California*.⁶⁵ The case presented the question of whether police use of an emetic to force a suspect to disgorge swallowed narcotics was a substantive due process violation. The Court held that it was because it “shocked the conscience.” Although vague and uncertain from the inception - the sensibilities of judges could be expected to vary appreciably - *Rochin* stood for the proposition that some government conduct was absolutely beyond the pale whether or not the government sought to introduce the evidence or confession so compelled into a court of law.⁶⁶ In *Sacramento v. Lewis*,⁶⁷ the Court recast the shock the conscience test as a balancing test, under which the interests of the state are weighed against the injury inflicted on the person in custody. The Supreme Court moved away from the long familiar bright-line version of the shock the conscience test to an interpretation of the test under which the strength of state need to impose pain or suffering informs the outcome of the test as well as the quality and quantity of the injury inflicted. The reinterpreted test is more congenial to arguments for the legality of the enhanced interrogation program approved for use by the CIA. Indeed, there is reason to believe that the Bush Administration looked to the new shock the conscience test for support of the legality of torture lite: The Administration secured classified opinions from the Department of Justice in 2005 that reportedly rely upon the balancing test version of shock the conscience to justify torture lite and the heavy torture practice of waterboarding:

Relying on a Supreme Court finding that only conduct that “shocks the conscience” was unconstitutional, the [one of the two secret 2005 Department of Justice opinions] opinion found that in some circumstances not even waterboarding was necessarily cruel, inhuman or degrading, if for example the suspect was believed to possess crucial intelligence about a planned terrorist attack...⁶⁸

Fortuitously, *Sacramento* invites the balancing of the safety of the nation against the suffering of a terrorist suspect. Such unfettered utilitarian calculation is alien not only to the *Rochin* version of the test, but utterly inimical to the realization of the Nuremburg dispensation.

9. Conclusion

The admission by high Administration officials that the CIA had waterboarded three prisoners in 2002 and 2003 provided a “gotcha” moment.⁶⁹ After years of responding to the torture accusation by alternating tough talk about doing whatever it takes to defend Americans with unequivocal denials that we torture, the Bush Administration provided its critics with the satisfaction of confession. In my view, the waterboarding controversy is, if not a red herring, then a prime example, of what is wrong with the discussion of GWOT torture in the United States. We did not need to wait for an admission of waterboarding to vindicate the torture accusation. Rather, we need to recognize that the routine practice of torture lite at Bagram, Abu Ghairib, and Guantanamo and CIA blacksites was torture. Next, we need to acknowledge that torture has proven irresistible to democratic governments since Nuremburg. The party of humanity, therefore, should seek to expose torture lite for what it is, and introduce into international and municipal law explicit prohibitions of these practices as torture and therefore nonderogable. There is nothing objectionable in principle about the avowed Reagan, G.H.W. Bush, and Clinton strategy of seeking a categorical ban on the worst cruelty while conceding that a legal regime capable of attracting broad support and compliance could not aim to eliminate all state cruelty. This stance does not satisfy humanitarians who believe that state cruelty can be routed altogether. Yet an honest legal ban on torture would take us far beyond anything yet achieved.

Notes

¹ See, for example, D Priest and B Gellman, ‘U.S. Decries Abuse but Defends Interrogations ‘Stress and Duress’ Tactics Used on Terrorism Suspects held in Secret Overseas Facilities’, *Washington Post*, December 26, 2002, p. A01, an early account of Defense Department and CIA interrogation practices.

² S Shane, D Johnston and J Risen, ‘Secret U.S. Endorsement of Severe Interrogations,’ *New York Times*, October 3, 2007, p. A1.

³ *ibid.*

⁴ *ibid.*

⁵ ‘President Bush’s Speech on Terrorism’ [transcript] *New York Times*, September 6, 2006, p.A1, confirmed that ‘an alternative set of procedures’

was used to interrogate high value Al Qaeda prisoners at CIA secret prisons. The President therein asserts that the Department of Justice has determined that the “program” of alternative procedures “complied with our laws.”

⁶See, for example, Harold Hongju. Koh, now Dean of Yale Law School, and Assistant Secretary of State for Democracy, Human Rights, and Labor in the Clinton Administration and a lawyer in the Office of Legal Counsel in the Justice Department under President Reagan., ‘A World Without Torture,’ *Columbia Journal of Transnational Law*, 2005, pp. 641-62. “I had long thought that United States law and policy are both clear and unambiguous. Torture and cruel, inhuman and degrading treatment are both illegal and totally abhorrent to our values and constitutional traditions.” P. 643. In the same article he recalls reporting to the UN Committee Against Torture, acting in his official capacity, that the United States does not as a matter of law or policy order or condone torture. He proceeds to criticize the “infamous Department of Justice, August 1, 2002 memo arguing the legality of torture as “the most clearly erroneous legal opinion I have ever read.” Pp. 646-7. Or, see, Anthony Lewis, former New York Times columnist, castigating the politically appointed radical lawyers who overrode the opposition of lawyers and other officials in the military, Departments of State and Justice “who wanted to carry on the American tradition of humane treatment of prisoners,” ‘The Torture Administration,’ *The Nation*, December 26, 2005.

⁷ AW McCoy, ‘A Question of Torture: CIA Interrogation, from the Cold War to the War on Terror,’ Henry Holt, New York, 2006, is an indispensable contemporary work that recounts a history that has been frequently ignored but is not unknown.

⁸ On the opposition of the Armed Services to abandoning the Geneva Conventions, see for example, J Meyer, ‘The Memo, How an internal effort to ban the abuse and torture of detainees was thwarted,’ *The New Yorker*; 2/27/2006, Vol. 82 Issue 2, pp. 32-41.

⁹ M Satterthwaite & A Fisher, ‘Tortured Logic: Renditions to Justice, Extraordinary Rendition, and Human Rights Law,’ *The Long Term View*, vol. 6, pp 49-66 (2006).

¹⁰ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT), 1465 U.N.T.S. 85 (1984) (entered into force June 26, 1987).

¹¹ Hearing before the Senate Foreign Relations Committee, on the Convention Against Torture, testimony of Deputy Attorney General Mark Richard, January 30, 1990, S. Hrg. 101-78, p. 16.

¹² CAT, Article 1, *op. cit.* note 10.

¹³ See, for example, statement by President Bush, S G Stolberg, ‘Bush Interrogation Methods aren’t Torture,’ *New York Times*, October 5, 2007.

¹⁴ CAT, *op cit.*, Articles 2 & 16.

¹⁵ CAT, Article 4.

¹⁶ 18 U.S.C. §§2340-2340 (2000).

¹⁷ 18 U.S.C. § 2441 (2000).

¹⁸ Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Conditions of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilians in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. (Geneva Conventions I-IV)

¹⁹ *Miranda v. Arizona*, 384 U.S. 436, is the *locus classicus* of this constitutional doctrine.

²⁰ See, for example, M Bowden, 'The Dark Art of Interrogation,' *Atlantic Monthly*, October, 2003, pp. 51-76.

²¹ H Shamsi, D Perlstein (ed.), 'Command Responsibility: Detainee Deaths in Custody,' Human Rights First, Report, February, 2006, retrieved 14 July 2008, <<http://www.humanrightsfirst.info/pdf/06221-etn-hrf-rep-web.pdf>>

²² M Isikoff and M Hosenball, 'The Truth Will Out,' *Newsweek*, February 6, 2008, <http://www.newsweek.com/id/108719/output/print>.

²³ J Meyer, 'Outsourcing Torture,' *The New Yorker*, Feb. 14, 2005, Vol 81, Issue 1, pp. 106-23.

²⁴ D Johnston, 'At a Secret Interrogation, Dispute Flared Over Tactics,' *New York Times*, September 10, 2006, p. 1.

²⁵ N A Lewis and D. Johnston, 'New FBI Files Describe Abuse of Iraq Inmates,' *New York Times*, December 21, 2004, p. A1.

²⁶ J Mayer, *The Memo*, *op. cit.* note 8.

²⁷ Throughout this section, I rely on A W McCoy's, 'A Question of Torture: CIA interrogation from the Cold War to the War on Terrorism,' *op. cit.* note 7. McCoy assembles information that has been available for decades, but has nonetheless nearly vanished from national consciousness.

²⁸ *ibid.*, pp.50-52 and *passim.*. See also pp.90-91.

²⁹ *ibid.*

³⁰ *Republic of Ireland v. United Kingdom*, 2 E.C.H.R. (Ser. A) (1978)

³¹ *Public Committee Against Torture in Israel v. State of Israel*, 38 I.L.M. 1471 (1999).

³² Office of Legal Counsel, U.S. Department of Justice, *Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A*, August 1, 2002. <<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/>>

³³ Interest in possible defenses to charges of torture and war crimes against

national security officials suffices the August 1, 2002 Office of Legal Counsel Memo, *id.*

³⁴ The Israeli Court held expressly that the practice of hooding was prohibited. If a detainee could not be physically separated from others with whom interrogators wished to prevent contact, they could resort to covering his eyes in a manner not harmful to the detainee. Hooding “suffocates” and “degrades” the detainee.

³⁵ See, for example, President Bush’s statement, “I want to be absolutely clear with our people and the world: The United States does not torture.” President Bush’s Speech on Terrorism, *op.cit.* note 5.

³⁶ For example, the CIA inspector general concluded in 2004 that ten of the enhanced techniques authorized post-9-11 were CID under the CAT. D Jehl, ‘Report Warned C.I.A. on Tactics in Interrogation,’ *New York Times*, November 9, 2005.

³⁷ Office of Legal Counsel, U.S. Department of Justice, *Memorandum for James B. Comey, Deputy Atty. General, from Daniel Levin, Acting Asst. Atty. General, Legal Standards Applicable Under 18 U.S.C. 2340-2340A*, Dec. 30, 2004. <<http://www.usdoj.gov/olc/18usc23402340a2.htm>>

³⁸ President’s Message to Congress Transmitting the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment of Punishment, Summary and Analysis, May 23, 1988, S. Treaty Doc No. 100-20, *reprinted in* 13857 U.S. Cong. Series(1990).

³⁹ Senate Executive Report No. 101-30, 101st Cong., 2^{ns} Sess., Report from the Committee on Foreign Relations on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, August 30, 1990 (Senate Committee on Foreign Relations).

⁴⁰ 18 U.S.C. §2340(a) (2000).

⁴¹ Senate Committee on Foreign Relations, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, August 30, 1990, Exec. Report 101-30, p. 13-14.

⁴² *ibid.*

⁴³ *Ibid.*, p. 36

⁴⁴ *Ibid.*, pp. 25-6.

⁴⁵ *Ibid.*, p. 36.

⁴⁶ Alberto E Gonzales, Counsel to the President, *Memorandum for the President, Decision re Application of the Geneva Conventions on Prisoners of War to the Conflict with Al Qaeda and the Taliban*, January 25, 2002.

⁴⁷ President Bush, Order, *Humane Treatment of Al Qaeda and Taliban Detainees*, February 7, 2002. The President declared that Al Qaeda, and Taliban fighters were “unlawful combatants” and as such outside the protections of the Geneva Conventions. He did, however, undertake to treat

detainees “humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.”

⁴⁸ 18 U.S.C. § 2441 (2000).

⁴⁹ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

⁵⁰ Geneva Conventions (Gen. Con.), Common Article 3.1

⁵¹ Gen. Con., Common Article 3.1 (a)-(c)

⁵² *Hamdan, v. Rumsfeld*, *op. cit.* note 58.

⁵³ *ibid.*, p. 2757.

⁵⁴ Gen. Con. I, Article 49, Gen. Con. II, Article 50, Gen. Con. III, Article 129, Gen. Con. IV, Article, 146, *op. cit.* note 19.

⁵⁵ Gen. Con. I, Article 50, Gen. Con. II, Article 51, Gen. Con. III, Article 130, Gen. Con. IV, Article 147, *ibid.*

⁵⁶ The Detainee Treatment Act of 2005 (DTA) (Pub. L. 109-148, Div. A, Title X, Dec. 30, 2005, 119, Stat. 2739).

⁵⁷ Military Commissions Act of 2006 (Pub. L. 109-366, Oct. 17, 2006, 120 Stat. 2006).

⁵⁸ DTA § 1002 (a). *op. cit.* note 65.

⁵⁹ Army Field Manual FM 2-22.3 (FM 34-52) Human Intelligence Collector Operations (Sept. 2006) available at www.army.mil/institution/armypublicaffairs/pdf/fm2-22-3.pdf.

The Field Manual forbids CID. It also expressly prohibits certain torture lite techniques, including hooding or covering the eyes, privation of food, water and medical care, forced nudity, performance or simulation of sexual acts, and inducing hypothermia and heat injury.

⁶⁰ DTA §1003(a), *op. cit.* note 65.

⁶¹ Abraham Sofaer, legal advisor to the State Department in the first Bush Administration, and the official who presented the CAT to the Senate for ratification for that Administration, explained in a letter to the Senate Committee on the Judiciary and in a letter to the Wall Street Journal contemporaneous with the Senate confirmation hearings for Attorney General Alberto Gonzales, that the Reagan and first Bush Administrations were proposing that CID be understood to *mean* prohibited by the constitution *not a jurisdictional or geographical limitation*. See letter from Abraham Sofaer to Senator Patrick Leahy, Committee, (Jan. 21, 2005), reprinted in 151 Cong. Rec. S12382-83; Abraham D. Sofaer, ‘No Exceptions,’ *Wall Street Journal*, Nov. 26, 2005, A11.

⁶² DTA § 1004(a), *op. cit.* note 65. Further, the DTA exhibits the same sensitivity to the need to insure that officials charged with torture or war crimes will be able to avail themselves of legal defenses that we encountered in the 2002 Department of Justice Memo. The DTA provides the President’s men and women and the CIA with a legal defense to a criminal or civil action if he or she did not know the interrogation practice was illegal provided also

that a person of “ordinary sense and understanding” would not know the practice was illegal. Under the MCA, reliance on the advice of counsel “is an important factor” in determining whether the official acted as a person of ordinary sense and understanding would act.

⁶³ DTA §(D) (3), *op. cit.* note 65.

⁶⁴ MCA § 6, *op. cit.* note 66.

⁶⁵ 342 U.S. 165 (1952).

⁶⁶ In *Chavez v. Martinez*, 538 U.S. 760 (2003), a majority of the Supreme Court so concluded.

⁶⁷ 523 U.S. 833 (1998).

⁶⁸ S Shane, D Johnston and J Risen, ‘Secret Endorsement of Severe Interrogations,’ *op. cit.* note 2.

⁶⁹ M Isikoff and M Hosenball, ‘The Truth Will Out,’ *op. cit.* note 23.

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