



9-16-2009

Teaching Torture

Beth Van Schaack

Santa Clara University School of Law, bvanschaack@scu.edu

Ron Slye

Seattle University School of Law

Follow this and additional works at: <http://digitalcommons.law.scu.edu/facpubs>



Part of the [Law Commons](#)

Automated Citation

Beth Van Schaack and Ron Slye, *Teaching Torture* (2009),

Available at: <http://digitalcommons.law.scu.edu/facpubs/632>

This Book Chapter is brought to you for free and open access by the Faculty Scholarship at Santa Clara Law Digital Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.

PART III SUBSTANTIVE INTERNATIONAL CRIMINAL LAW

CHAPTER 9 TORTURE

C H A P T E R 9

Torture

I. Introduction

The prohibition against torture is one of the most widely codified proscriptions under international law. Torture is the subject of its own multilateral treaty—the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Torture Convention”). Prohibitions against torture can be found in every omnibus international human rights and humanitarian law treaty, as well as in each of the three regional human rights conventions, and is an enumerated war crime and crime against humanity. The prohibition against torture is now accepted as a *jus cogens* norm of international human rights law. It has been so recognized by both international criminal tribunals for Rwanda and the former Yugoslavia; by all three regional human rights regimes; by the Committee Against Torture (established to monitor compliance with the Torture Convention); by judges in numerous domestic jurisdictions; by authoritative statements of international law, including the Restatement (Third) of Foreign Relations Law of the United States; and by the Universal Islamic Declaration of Human Rights. The prohibition against torture is an absolute one; torture is prohibited in all circumstances, even in cases of war or national emergency. Not only are states prohibited from committing torture, they are also forbidden to extradite or otherwise send an individual to a place where there are substantial grounds for believing that the person will be tortured (the rule of *non-refoulement*). Almost every codified prohibition of torture is accompanied by a bar on other forms of cruel, inhuman or degrading treatment or punishment (CIDT), although such acts are not criminalized as extensively as torture.

No government today officially condones the use of torture. And yet, acts that violate the Torture Convention and related prohibitions have been recorded in almost all states of the world. See Atlas of Torture, <http://www.univie.ac.at/bimtor/countrymap>. Notwithstanding universal acceptance of the definition of torture under international law (quoted below), strong disagreements persist with respect to whether certain specific practices meet the definition, enabling states to claim that their police, detention practices, interrogation techniques, or systems of punishment do not run afoul of these prohibitions. The potential for equivocation around the scope of the prohibition against torture has taken on new urgency in light of the revelation that the United States government during the presidency of George W. Bush sanctioned the development and use of so called “enhanced interrogation techniques” in the “war on terror” that many observers consider to be torture and/or CIDT. Critics contend that the United States justified the use of coercive techniques by exploiting the apparent “gap” between torture and

CIDT in international law. Critics also charge that the United States' use of these techniques has undermined the torture prohibition and given "cover" for other states to adopt similar techniques against their own war-time detainees, criminal suspects, prisoners, and others who find themselves in the custody of state agents. The events of September 11, 2001—and the subsequent detention of suspected terrorists in Guantánamo, Abu Ghraib, and elsewhere—prompted a public debate in the United States concerning the morality, legality and utility of torture. This Chapter engages these issues with reference to caselaw emerging from the international criminal tribunals and domestic courts as well as memoranda generated by departments of the U.S. government and international reactions thereto.

Before engaging with the current debates on torture, we start with some historical context. The universal condemnation of torture is a relatively modern development. Not only was torture not always prohibited, at times throughout history it was viewed as a crucial element of a justice system.

John Langbein, *The Legal History of Torture*, in *Torture: A Collection*, at 93 (Sanford Levinson, ed., 2004)

European law of proof emerged in the city-states of northern Italy in the thirteenth century. It spread across the Continent together with the rest of Roman-canon criminal and civil procedure as part of the broader movement known as the reception of Roman law. Investigation under torture was reserved for cases of serious crime, for which the sanction was death or maiming. * * *

The largest chapter of the European law of torture concerned the prerequisites for examination under torture. European jurists devised what modern American lawyers would call a standard of probable cause, designed to ensure that only persons highly likely to be guilty would be examined under torture. Torture was permitted only when a so-called half proof had been established against the suspects. That meant either one eyewitness, or circumstantial evidence that satisfied elaborate requirements of gravity. In the example in which a suspect was caught with the dagger and the loot, each of those indicia would have been reckoned as a quarter proof, which, cumulated to a half proof, would have been sufficient to permit the authorities to examine the suspect under torture. * * *

Alas, because torture tests endurance rather than veracity, innocent persons might (as one sixteenth-century handbook on criminal procedure warned) yield to "the pain and torment and confess things that they never did." For a variety of reasons, the safeguards never proved adequate. If the examining magistrate engaged in suggestive questioning, even accidentally, his lapse could not always be detected or prevented. If the accused knew something about the crime but was still innocent, what he did know might be enough to give his confession verisimilitude. In some jurisdictions the requirement of verification was not enforced or was enforced indifferently.

In order to achieve a verbal or technical reconciliation with the requirement of the formal law of proof that the confession be voluntary, the law treated a confession extracted under torture as involuntary, hence ineffective, unless the accused repeated it free from torture at a hearing held a day or so later. Sometimes the accused who had confessed under torture did recant when asked to confirm his confession. But seldom to avail: The examination under torture could thereupon be repeated. When an accused confessed under torture, recanted, and was then tortured

anew, he learned quickly enough that only a "voluntary" confession at the ratification hearing would save him from further agony in the torture chamber. Thus, Johannes Julius, the seventeenth-century burgomaster of Bamberg, Germany, writing from his dungeon cell where he was awaiting execution, told his daughter why he had confessed to witchcraft "for which I must die. It is all falsehood and invention, so help me God. . . . They never cease to torture until one says something." Against the coercive force of the engines of torture, no safeguards were ever found that could protect the innocent and guarantee the truth. The agony of torture created an incentive to speak, but not necessarily to speak the truth.

These shortcomings in the law of torture were identified even in the Middle Ages and were the subject of emphatic complaint in Renaissance and early modern times. Cases arose recurrently in which the real culprit was detected after an innocent accused had confessed under torture and been convicted and executed. In the eighteenth century, as the law of torture was finally about to be abolished, along with the system of proof that had required it, Beccaria [an Italian philosopher and the author of *On Crimes and Punishments* (1764)] and Voltaire [a French enlightenment thinker] became famous as critics of judicial torture by pointing to such cases, but they were latecomers to a critical legal literature nearly as old as the law of torture itself. Judicial torture survived the centuries not because its defects had been concealed but in spite of their having been long revealed. * * *

The European states abolished the system of judicial torture within about two generations. Frederick the Great all but abolished torture within a month of his accession to the Prussian throne in 1740; torture was used for the last time in Prussia in 1752 and was definitely abolished in 1754. In 1770, Saxony and Denmark abolished torture; in 1776, Poland and Austria–Bohemia; in 1780, France; in 1786, Tuscany; in 1787, the Austrian Netherlands (Belgium); and in 1789, Sicily. Early in the nineteenth century, abolition reached the last corners of the Continent.

II. Defining Torture in Human Rights Law: Intent, Severity, Purpose, and State Action

Article 1(1) of the 1984 Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment sets forth a definition of torture:

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

The Convention further provides that

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the

consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10 [duty to train law enforcement, military, etc. personnel], 11 [duty to review interrogation practices], 12 [duty to ensure prompt and impartial investigation] and 13 [right to complain] shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment.

Article 1 is qualified by the statement that it is “without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.”

There are four elements to proving the crime of torture under the Convention definition: 1) severe pain or suffering 2) intentionally inflicted 3) for one of the enumerated purposes 4) by someone acting on behalf of a state. CIDT is not separately defined. The Torture Convention definition may be contrasted with that of the 1987 Inter-American Convention to Prevent and Punish Torture, which defines torture at Article 2 as:

For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.

Article 3 indicates that the treaty applies to public servants or employees as well as those who act at the instigation of a public servant or employee. About half of the eligible states are members; the United States is not a party.

As you review the materials in this Chapter, consider the way in which these definitions of torture, which have their origins in human rights treaties, have been adapted and applied in international criminal law. Pay particular attention to which elements of the above definitions have been retained and which have been abandoned and why. In addition, endeavor to formulate a definition of CIDT and consider when such conduct should give rise to criminal penalties under international or domestic law.

III. Defining Torture in International Criminal Law

The International Criminal Tribunal for the Former Yugoslavia (ICTY) compared the elements of the crime of torture in human rights law and international criminal law in a case involving the 1992 take-over by the Bosnian Serb Army and paramilitaries of the municipality of Foča. This case generated the first indictment exclusively addressing sexual violence (torture, rape, outrages upon dignity, and enslavement charged as war crimes and crimes against humanity). The charges stemmed from abuses committed in various improvised detention centers (some in hotels and private homes) where Muslim girls and women were repeatedly raped by occupation forces. Kunarac, the commander of a special reconnaissance unit of the Bosnian Serb Army, voluntarily surrendered to the ICTY in 1998; the multinational Stabilization Force in Bosnia (SFOR) arrested his co-defendants in 1999. In the opinion below, the Trial Chamber sets

forth the elements of torture under the ICTY Statute. The Appeals Chamber's opinion on rape as torture follows.

Prosecutor v. Kunarac, et al., Case No. IT-96-23 & 23-1, Judgement (Feb. 22, 2001) In the Trial Chamber

465. Torture has been charged against the three accused as a violation of the laws or customs of war under Article 3 of the Statute and as a crime against humanity under Article 5 of the Statute. * * *

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

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

468. The Trial Chamber in *Furundžija* held that "[i]nternational law, while outlawing torture in armed conflict, does not provide a definition of the prohibition." That Trial Chamber consequently turned to human rights law to determine the definition of torture under customary international law. The Trial Chamber, however, pointed out that it should "identify or spell out some specific elements that pertain to torture as considered from the specific viewpoint of international criminal law relating to armed conflicts."

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

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

(i) Firstly, the role and position of the state as an actor is completely different in both regimes. Human rights law is essentially born out of the abuses of the state over its citizens and out of the need to protect the latter from state-organized or state-sponsored violence. Humanitarian law aims at placing restraints on the conduct of warfare so as to diminish its effects on the victims of the hostilities. In the human rights context, the state is the ultimate guarantor of the rights protected and has both duties and a responsibility for the observance of those rights. In the event that the state violates those rights or fails in its responsibility to protect the rights, it can be called to account and asked to take appropriate measures to put an end to the infringements.

In the field of international humanitarian law, and in particular in the context of international prosecutions, the role of the state is, when it comes to accountability, peripheral.

Individual criminal responsibility for violation of international humanitarian law does not depend on the participation of the state and, conversely, its participation in the commission of the offence is no defense to the perpetrator.¹¹⁷⁵ Moreover, international humanitarian law purports to apply equally to and expressly bind all parties to the armed conflict whereas, in contrast, human rights law generally applies to only one party, namely the state involved, and its agents.

This distinction can be illustrated by two recent American decisions of the Court of Appeals for the Second Circuit rendered under the Alien Torts Claims Act. The Act gives jurisdiction to American district courts for any civil action by an alien for a tort committed in violation of the law of nations or a treaty of the United States. In the first decision, *In re Filártiga*, the Court of Appeals of the Second Circuit held that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties." This decision was only concerned with the situation of an individual *vis-à-vis* a state, either his national state or a foreign state. In a later decision in *Kadić v. Karadžić*, the same court made it clear that the body of law which it applied in the *Filártiga* case was customary international law of human rights and that, according to the Court of Appeals, in the human rights context torture is proscribed by international law only when committed by state officials or under the color of the law. The court added, however, that atrocities including torture are actionable under the Alien Tort Claims Act regardless of state participation to the extent that the criminal acts were committed in pursuit of genocide or war crimes.

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

471. The Trial Chamber is therefore wary not to embrace too quickly and too easily concepts and notions developed in a different legal context. The Trial Chamber is of the view that notions developed in the field of human rights can be transposed in international humanitarian law only if they take into consideration the specificities of the latter body of law. The Trial Chamber now turns more specifically to the definition of the crime of torture.

472. The Trial Chamber in the *Delalić* case considered that the definition contained in the Torture Convention "reflects a consensus which the Trial Chamber considers to be representative of customary international law." The Trial Chamber in the *Furundžija* case shared that view and held that there was general acceptance of the main elements contained in the definition set out in Article 1 of the Torture Convention.

473. This Trial Chamber notes, however, that Article 1 of the Torture Convention makes it abundantly clear that its definition of torture is limited in scope and was meant to apply only "for the purposes of this Convention." In addition, paragraph 2 of Article 1 of the Torture Convention states that this Article is "without prejudice to any international instrument or

¹¹⁷⁵ Art. 7(2) of the [ICTY] Statute states that: "The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment."

national legislation which does or may contain provisions of wider application." Therefore, insofar as other international instruments or national laws give the individual broader protection, he or she shall be entitled to benefit from it. This, and the fact that the definition was meant to apply only in the context of the Convention, are elements which should be kept in mind when considering the possibility that the definition of the Torture Convention produced an extra-conventional effect. * * *

478. Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention" or "Convention") provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. The European Court of Human Rights ("ECHR") held that the concept of torture attaches a special stigma to deliberate inhuman treatment causing very serious and cruel suffering. The European Commission of Human Rights held that torture constitutes an aggravated and deliberate form of inhuman treatment which is directed at obtaining information or confessions, or at inflicting a punishment. The three main elements of the definition of torture under the European Convention are thus the level of severity of the ill-treatment, the deliberate nature of the act, and the specific purpose behind the act. The requirement that the state or one of its officials take part in the act is a general requirement of the Convention—not a definitional element of the act of torture—which applies to each and every prohibition contained in the Convention. Article 1 of the Convention, which provides that the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention, is clearly addressed to member states, not to individuals. The ECHR is not a criminal court, which determines individual criminal responsibility, but an organ whose mandate is to determine state compliance with its obligations under the Convention.

479. The Trial Chamber notes, however, the ECHR's jurisprudence which has held that Article 3 of the Convention may also apply in situations where organs or agents of the state are *not* involved in the violation of the rights protected under Article 3. For example, in *HLR v. France*, the Court held that

Owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials.¹¹⁹¹

480. Article 7 of the 1966 International Covenant on Civil and Political Rights ("ICCPR") provides that no one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment. The Human Rights Committee held that the protection offered by Article 7 of the ICCPR was not limited to acts committed by or at the instigation of public officials but that it also possessed horizontal effects, and that states should therefore protect individuals from interference by private parties. The Committee stated the following: "It is also the duty of public authorities to ensure protection by law against such treatment even when committed by persons acting outside or without any official authority."

481. In a later Comment of 3 April 1992, the Human Rights Committee stated that

[i]t is the duty of the State party to afford everyone protection through legislative and

¹¹⁹¹ *HLR v. France*, 29 Apr. 1997, Reports 1997–III, p. 758, para. 40.

other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.¹¹⁹³

482. The Trial Chamber in *Furundžija* held that a conventional provision could have an extra-conventional effect to the extent that it codifies or contributes to developing or crystallizing customary international law. In view of the international instruments and jurisprudence reviewed above, the Trial Chamber is of the view that the definition of torture contained in the Torture Convention cannot be regarded as the definition of torture under customary international law which is binding regardless of the context in which it is applied. The definition of the Torture Convention was meant to apply at an inter-state level and was, for that reason, directed at the states' obligations. The definition was also meant to apply only in the context of that Convention, and only to the extent that other international instruments or national laws did not give the individual a broader or better protection. The Trial Chamber, therefore, holds that the definition of torture contained in Article 1 of the Torture Convention can only serve, for present purposes, as an interpretational aid.

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

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

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

- (i) The list of purposes the pursuit of which could be regarded as illegitimate and coming within the realm of the definition of torture.
- (ii) The necessity, if any, for the act to be committed in connection with an armed conflict.
- (iii) The requirement, if any, that the act be inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

485. The Trial Chamber is satisfied that the following purposes have become part of

¹¹⁹³ General Comment 20/44 of 3 April 1992 [Prohibition of Torture], para. 2. [Ed.: General Comments are authoritative interpretations of treaties by expert bodies charged with treaty enforcement roughly analogous to an advisory opinion].

customary international law: (a) obtaining information or a confession, (b) punishing, intimidating or coercing the victim or a third person, (c) discriminating, on any ground, against the victim or a third person. There are some doubts as to whether other purposes have come to be recognised under customary international law. The issue does not need to be resolved here, because the conduct of the accused is appropriately subsumable under the above-mentioned purposes.

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

487. Secondly, the nature of the relationship between the underlying offence—torture—and the armed conflict depends, under the Tribunal's Statute, on the qualification of the offence, as a grave breach, a war crime or a crime against humanity. If, for example, torture is charged as a violation of the laws or customs of war under Article 3 of the Statute, the Trial Chamber will have to be satisfied that the act was closely related to the hostilities. If, on the other hand, torture is charged as a crime against humanity under Article 5 of the Statute, the Trial Chamber will have to be convinced beyond reasonable doubt that there existed an armed conflict at the relevant time and place.

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

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

Under current international humanitarian law, in addition to individual criminal liability, State responsibility may ensue as a result of State officials engaging in torture or failing to prevent torture or to prevent torturers. If carried out as an extensive practice of State officials, torture amounts to a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, thus constituting a particularly wrongful act generating State responsibility.¹²⁰²

490. Several humanitarian law provisions fall within the first category of legal norms,

¹²⁰² *Prosecutor v. Furundžija*, Case IT-95-17/1-T, Judgement, para. 142 (Dec. 10, 1998).

expressly providing for the possibility of state responsibility for the acts of its agents: thus, Article 75 ("Fundamental Guarantees") of Additional Protocol I provides that acts of violence to the life, health, or physical or mental well-being of persons such as murder, torture, corporal punishment and mutilation, outrages upon personal dignity, the taking of hostages, collective punishments and threats to commit any of those acts when committed by civilian or by military agents of the state could engage the state's responsibility. The requirement that the acts be committed by an agent of the state applies equally to any of the offences provided under paragraph 2 of Article 75 and in particular, but no differently, to the crime of torture.

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

The most widespread form of torture is practiced by public officials for the purpose of obtaining confessions, but torture is not only condemned as a judicial institution; *the act of torture is reprehensible in itself, regardless of its perpetrator*, and cannot be justified in any circumstances.¹²⁰⁴

492. The Trial Chamber also notes Article 12 ("Protection and Care") of 1949 Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, which provides that members of the armed forces and other defined persons who are wounded or sick shall be respected and protected in all circumstances. In particular, paragraph 2 of this Article provides that the wounded or sick shall not be tortured. The Commentary to this paragraph adds the following:

The obligation [of respect and protection mentioned in paragraph 1] applies to all combatants in an army, whoever they may be, and also to non-combatants. *It applies also to civilians*, in regard to whom Article 18 specifically states: "The civilian population shall respect these wounded and sick, and in particular abstain from offering them violence." A clear statement to that effect was essential in view of the special character which modern warfare is liable to assume (dispersion of combatants, isolation of units, mobility of fronts, etc.) and which may lead to closer and more frequent contacts between military and civilians. It was necessary, therefore, and more necessary today than in the past, that the principle of the inviolability of wounded combatants should be brought home, *not only to the fighting forces, but also to the general public*. That principle is one of the fine flowers of civilization, and should be implanted firmly in public morals and in

¹²⁰⁴ Sandoz, Swinarski and Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* 1373–1374 (1987).

the public conscience.¹²⁰⁷

493. A violation of one of the relevant articles of the Statute will engage the perpetrator's individual criminal responsibility. In this context, the participation of the state becomes secondary and, generally, peripheral. With or without the involvement of the state, the crime committed remains of the same nature and bears the same consequences. The involvement of the state in a criminal enterprise generally results in the availability of extensive resources to carry out the criminal activities in question and therefore greater risk for the potential victims. It may also trigger the application of a different set of rules, in the event that its involvement renders the armed conflict international. However, the involvement of the state does not modify or limit the guilt or responsibility of the individual who carried out the crimes in question. This principle was clearly stated in the *Flick* judgment [against German industrialists]:

But the International Military Tribunal [at Nuremberg] was dealing with officials and agencies of the State, and it is argued that individuals holding no public offices and not representing the State, do not, and should not, come within the class of persons criminally responsible for a breach of international law. It is asserted that international law is a matter wholly outside the work, interest and knowledge of private individuals. The distinction is unsound. International law, as such, binds every citizen just as does ordinary municipal law. Acts adjudged criminal when done by an officer of the Government are criminal also when done by a private individual. The guilt differs only in magnitude, not in quality. The offender in either case is charged with personal wrong and punishment falls on the offender in *propria persona* ["in his own person"]. The application of international law to individuals is no novelty. [...] There is no justification for a limitation of responsibility to public officials.¹²⁰⁸

494. Likewise, the doctrine of "act of State," by which an individual would be shielded from criminal responsibility for an act he or she committed in the name of or as an agent of a state, is no defense under international criminal law. This has been the case since the Second World War, if not before. Articles 1 and 7 of the Statute make it clear that the identity and official status of the perpetrator is irrelevant insofar as it relates to accountability. Neither can obedience to orders be relied upon as a defense, playing a mitigating role only at the sentencing stage. In short, there is no privilege under international criminal law which would shield state representatives or agents from the reach of individual criminal responsibility. On the contrary, acting in an official capacity could constitute an aggravating circumstance when it comes to sentencing, because the official illegitimately used and abused a power which was conferred upon him or her for legitimate purposes.

495. The Trial Chamber also points out that those conventions, in particular the human rights conventions, consider torture *per se* while the Tribunal's Statute criminalizes it as a form

¹²⁰⁷ Pictet, *Commentary to 1949 Geneva Convention I for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field* 135 (1952) (emphasis added).

¹²⁰⁸ *Trial of Friedrich Flick and Five Others* ("Flick Trial"), U.S. Military Tribunal, 20 Apr.–22 Dec. 1947, IX Law Reports of the Trials of War Criminals, 1, 18 (1948).

of war crime, crime against humanity or grave breach. The characteristic trait of the offence in this context is to be found in the nature of the act committed rather than in the status of the person who committed it.¹²¹⁰

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

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

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

Prosecutor v. Kunarac, et al., Case No. IT-96-23 & 23-1A, Judgement (June 12, 2002) In the Appeals Chamber

134. Neither Appellant challenges the Trial Chamber's definition of torture. Indeed, the Appellants seem to accept the conclusions of the Trial Chamber identifying the crime of torture on the basis of three elements, these being respectively an intentional act, inflicting suffering, and the existence of a prohibited purpose. Nonetheless, they assert that these three constitutive elements of the crime of torture have not been proven beyond reasonable doubt in relation to either Kunarac or Vuković and that their convictions were thus ill-founded.

¹²¹⁰ The Trial Chamber also notes the definition of torture contained in Art. 7(e) of the International Criminal Court Statute, Rome Statute of the International Criminal Tribunal, 17 July 1998, PCNICC/1999/INF/3, ("ICC Statute"), which provides: "'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions." See also Arts. 7(1)(f) (crimes against humanity) and 8(2)(a)(ii)-1 (war crimes), of the Finalized Draft Text of the Elements of the Crimes for the International Criminal Court, Report of the Preparatory Commission for the International Criminal Court, 6 July 2000, PCNICC/2000/INF/3/Add.2. Article 27(1) ("Irrelevance of the official capacity") of the ICC Statute further states that the Statute shall apply "equally to all persons without any distinction based on official capacity." Although the ICC Statute does not necessarily represent the present status of international customary law, it is a useful instrument in confirming the content of customary international law. These provisions obviously do not necessarily indicate what the state of the relevant law was at the time relevant to this case. However, they do provide some evidence of state *opinio juris* as to the relevant customary international law at the time at which the recommendations were adopted. See, e.g., *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgement, para. 227 (Dec. 10, 1998); *Prosecutor v. Tadić*, Case No. IT-94-A, Judgement, para. 223 (July 15 1999).

135. With regard to the first element of the crime of torture, the Appellant Kunarac contends that he committed no act which could inflict severe physical or mental pain or suffering and that the arguments raised by the Prosecutor, as well as the case-law to which she refers, are not sufficient to justify the findings of the Trial Chamber that some of Kunarac's victims experienced such mental pain or suffering. Kunarac states that he never asserted that rape victims, in general, could not suffer, but rather that, in the instant case, no witness showed the effects of physical or mental pain or suffering. In Kunarac's view, therefore, the first element of the crime of torture—the infliction of severe pain or suffering—is not met in his case.

136. * * * Appellant Vuković further challenges his conviction for torture through rape in the form of vaginal penetration on the basis that [victim] FWS-50, who was allegedly raped by Vuković, did not mention the use of force or threats. The Appellant appears to conclude from the absence of evidence of the use of physical force that the alleged rape of FWS-50 could not have resulted in severe *physical* pain or suffering on the part of FWS-50. The Appellant thus asserts that the first element of the crime of torture will only be satisfied if there is evidence that the alleged rape resulted in severe *mental* pain or suffering on the part of FWS-50. In this regard, the Appellant first contends that FWS-50 did not claim to have been inflicted with severe mental pain or suffering. Secondly, the Appellant seems to argue that, objectively, FWS-50 would not have experienced severe mental pain or suffering as a result of the alleged rape, as she had been raped on previous occasions by other perpetrators. Thirdly, the Appellant notes that two Defence expert witnesses testified that they did not find that the victims of the alleged rapes had suffered severe consequences. Finally, the Appellant states that the Prosecutor failed to prove beyond reasonable doubt that FWS-50 was inflicted with severe physical or mental pain or suffering. For these reasons, the Appellant Vuković contends that the first element of the crime of torture—the infliction of severe pain or suffering—is not met in his case and that the Trial Chamber erred in its application of the law and in finding him guilty of the crime of torture.

137. The Appellants also submit that they did not intend to inflict pain or suffering, rather that their aims were purely sexual in nature. The Appellants, therefore, argue that the second element of the crime of torture—the deliberate nature of the act or omission—has not been proven in either of their cases.

138. Both Appellants deny having pursued any of the prohibited purposes listed in the definition of the crime of torture, in particular, the discriminatory purpose. Kunarac further states that he did not have sexual relations with any of the victims in order to obtain information or a confession or to punish, intimidate or coerce the victim or a third person, or to discriminate on any ground whatsoever. Vuković seeks to demonstrate that the Trial Chamber erred when it established that his acts were committed for a discriminatory purpose because the victim was Muslim. Both Appellants thus conclude that the third constitutive element of the crime of torture—the pursuance of a prohibited purpose—was not established in their cases and that the Trial Chamber erroneously applied the law and committed an error in finding each guilty of the crime of torture.

139. The [Prosecutor] Respondent claims that the pain and suffering inflicted on FWS-50 through the Appellant Vuković's sexual acts was established. She asserts that, after leaving Foča, FWS-50 went to a physician who noted physiological and psychological symptoms resulting from rape, that she felt the need to go to a psychiatrist, and that she testified to having experienced suffering and pain when orally raped by Vuković.

140. The Respondent asserts that the crime of torture, as defined by customary international law, does not require that the perpetrator committed the act in question with the intent to inflict severe physical or mental suffering, but rather that the perpetrator committed an intentional act for the purpose of obtaining information or a confession, or to punish, intimidate or coerce the victim or a third person, or to discriminate on any ground whatsoever, and that, as a consequence, the victim suffered. There is thus no need to establish that the Appellants committed such acts with the knowledge or intention that those acts would cause severe pain or suffering.

141. According to the Respondent and as noted by the Trial Chamber, there is no requirement under customary international law for the act of the perpetrator to be committed *solely* for one of the prohibited purposes listed in the definition of torture. The Respondent also claims that the Trial Chamber reasonably concluded that the Appellant Vuković intended to discriminate against his victim because she was Muslim. She further submits that, in this case, all the acts of torture could be considered to be discriminatory, based on religion, ethnicity or sex. Moreover, all the acts of sexual torture perpetrated on the victims resulted in their intimidation or humiliation.

142. With reference to the Torture Convention and the case-law of the Tribunal and the International Criminal Court for Rwanda (ICTR), the Trial Chamber adopted a definition based on the following constitutive elements:

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

149. Torture is constituted by an act or an omission giving rise to “severe pain or suffering, whether physical or mental,” but there are no more specific requirements which allow an exhaustive classification and enumeration of acts which may constitute torture. Existing case-law has not determined the absolute degree of pain required for an act to amount to torture.

150. The Appeals Chamber holds that the assumption of the Appellants that suffering must be visible, even long after the commission of the crimes in question, is erroneous. Generally speaking, some acts establish *per se* the suffering of those upon whom they were inflicted. Rape is obviously such an act. The Trial Chamber could only conclude that such suffering occurred even without a medical certificate. Sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterisation as an act of torture.

151. Severe pain or suffering, as required by the definition of the crime of torture, can thus be said to be established once rape has been proved, since the act of rape necessarily implies such pain or suffering. The Appeals Chamber thus holds that the severe pain or suffering, whether physical or mental, of the victims cannot be challenged and that the Trial Chamber reasonably concluded that that pain or suffering was sufficient to characterise the acts of the Appellants as acts of torture. The Appellants’ grounds of appeal in this respect are unfounded and, therefore, rejected.

152. The argument that the Appellant Vuković has not been charged with any act inflicting severe pain or suffering, whether physical or mental, is erroneous since he is charged

with the crime of torture arising from rape. Moreover, the fact alleged in the Appeal Brief, that [the] Indictment does not refer to the use of physical force, does not mean that there was none.

153. The Appellants argue that the intention of the perpetrator was of a sexual nature, which, in their view, is inconsistent with an intent to commit the crime of torture. In this respect, the Appeals Chamber wishes to assert the important distinction between “intent” and “motivation.” The Appeals Chamber holds that, even if the perpetrator’s motivation is entirely sexual, it does not follow that the perpetrator does not have the intent to commit an act of torture or that his conduct does not cause severe pain or suffering, whether physical or mental, since such pain or suffering is a likely and logical consequence of his conduct. In view of the definition, it is important to establish whether a perpetrator intended to act in a way which, in the normal course of events, would cause severe pain or suffering, whether physical or mental, to his victims. The Appeals Chamber concurs with the findings of the Trial Chamber that the Appellants did intend to act in such a way as to cause severe pain or suffering, whether physical or mental, to their victims, in pursuance of one of the purposes prohibited by the definition of the crime of torture, in particular the purpose of discrimination.

154. The Appellant Kunarac claims that the requisite intent for torture, alleged by the Prosecutor, has not been proven. Vuković also challenges the discriminatory purpose ascribed to his acts. The Appeals Chamber finds that the Appellants have not demonstrated why the conclusions of the Trial Chamber on this point are unreasonable or erroneous. The Appeals Chamber considers that the Trial Chamber rightly concluded that the Appellants deliberately committed the acts of which they were accused and did so with the intent of discriminating against their victims because they were Muslim. Moreover, the Appeals Chamber notes that in addition to a discriminatory purpose, the acts were committed against one of the victims with the purpose of obtaining information. The Appeals Chamber further finds that, in any case, all acts were committed for the purpose of intimidating or coercing the victims.

155. Furthermore, in response to the argument that the Appellant’s avowed purpose of sexual gratification is not listed in the definition of torture, the Appeals Chamber restates the conclusions of the Trial Chamber that acts need not have been perpetrated solely for one of the purposes prohibited by international law. If one prohibited purpose is fulfilled by the conduct, the fact that such conduct was also intended to achieve a non-listed purpose (even one of a sexual nature) is immaterial.

156. The Appeals Chamber thus finds that the legal conclusions and findings of the Trial Chamber are well-founded and rejects all grounds of appeal relating to the crime of torture.

NOTES & QUESTIONS

1. **Case Outcome.** The three co-accused were convicted of many of the crimes charged, including cumulative crimes-against-humanity convictions for rape, enslavement, and torture with respect to two defendants. In regard to the cumulative convictions, the Tribunal reasoned:

Applying the approach adopted by the Appeals Chamber in the *Delalić* case, convictions for rape and torture under either Article 3 [the laws and customs of war] or Article 5 [crimes against humanity] based on the same conduct would be permissible. Comparing the elements of rape and torture under either Article 3 or Article 5, a materially distinct element of rape *vis-à-vis* torture is the sexual penetration element. A materially distinct

element of torture *vis-à-vis* rape is the severe infliction of pain or suffering aimed at obtaining information or a confession, punishing, intimidating, coercing or discriminating against the victim or a third person.

Kunarac Trial Chamber Judgement, *supra*, at para. 557. The theory behind cumulative convictions will be taken up in Chapter 11. The case is also notable as the first decision by the ICTY convicting a defendant for rape as a crime against humanity. The defendants' convictions and sentences were affirmed on appeal in the second opinion excerpted above. The defendants are serving the remainder of their sentences (ranging from 10-28 years) in Norway and Germany.

2. **State Actors.** The defendants were part of the Bosnian Serb Army, an ethnically-based militia fighting on behalf of the self-proclaimed Republika Srpska against the Bosnian army for the accession of parts of the newly independent Bosnia-Herzegovina with the rump Yugoslavia. Given their affiliation with Srpska, should the Trial Chamber's opinion concerning non-state actors be considered *dicta*? Is Srpska a state even though it was not formally recognized as such by any other state? The Serb enclave of Bosnia (the Republika Srpska) had many features of a state, including a legislative body, an elected head of state (Radovan Karadžić), control of territory, an army, and a constitution. For one articulation of the elements of statehood, see Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States (defining statehood in terms of a permanent population, a defined territory, a government, and the capacity to enter into relations with other states but not international recognition), available at http://avalon.law.yale.edu/20th_century/intam03.asp. Following the Dayton Peace Accords, Republika Srpska became a political-territorial division within Bosnia-Herzegovina. In a civil suit brought against him in the Second Circuit, Karadžić argued that the court had no jurisdiction over him for claims of war crimes and genocide because international law norms bind only states and persons acting under color of state law, not private actors. At the same time, Karadžić asserted that he was the president of the self-proclaimed Republika Srpska and thus entitled to head-of-state immunity. The Second Circuit ruled that some international law rules are actionable against both state and non-state actors, including the prohibitions against war crimes and genocide. At the same time, the court held that the plaintiffs were entitled to prove that Karadžić's regime satisfied the criteria for a state, or that he and his subordinates were acting in concert with the state of Yugoslavia, in order to prevail on those international law violations that do require state action. See *Kadić v. Karadžić*, 70 F.3d 232 (2d. Cir. 1995).

3. **State Action.** The ICTY has not been consistent in its rulings on the state action requirement for torture charges. Both the Trial Chamber in *Prosecutor v. Delalić*, Case No. IT-96-21-T, Judgement, para. 494 (Nov. 16, 1998), and the Appeals Chamber in *Prosecutor v. Furundžija*, Case No. IT-95-17/1, Judgement, para. 111 (Dec. 10, 1998), required a showing of the involvement of a public official or, in the words of the Appeals Chamber in *Furundžija*, someone acting in a "non-private" capacity. While the definition of torture adopted by the *Kunarac* Trial Chamber was not contested on appeal, the Appeals Chamber did agree (in a paragraph we did not excerpt above) that "the public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the Torture Convention." *Prosecutor v. Kunarac*, Case No. IT-96-23 and IT-96-23/1-A, Judgement, para. 148 (Feb. 22, 2002). See also *Prosecutor v. Kvočka*, Case No. IT-98-30/1-T, para. 139 (Nov. 2, 2001). Does the *Kunarac* decision mean that any non-state actor who intentionally inflicts severe pain or suffering on an individual in

furtherance of one of the prohibited purposes is liable for torture under international criminal law? Given that the Torture Convention defines torture in terms of state action, does this opinion violate the principle of legality and the prohibition against *ex post facto* law?

4. The Committee Against Torture and State Action. The Committee Against Torture is the body created to monitor compliance with the Convention Against Torture. State parties are required to submit periodic reports to the Committee, and individuals may bring petitions under the Convention against states that have agreed to be the subject of such claims. The Committee Against Torture has relaxed the state action requirement of the definition of torture in cases involving countries without an effective government. Thus, in the context of a claim brought by a Somali citizen challenging an Australian decision to return him to Somalia, the Committee found that a fear of severe ill treatment at the hands of groups that have set up "quasi-governmental institutions" and that "*de facto* ... exercise of certain prerogatives that are comparable to those normally exercised by legitimate governments" triggered Australia's *non-refoulement* obligations. *Elmi v. Australia*, CAT/C/22/D/120/1998 (1999), para. 6.5. A few years later, the Committee found that the recent creation of a Transitional National Government in Somalia precluded a finding that acts committed by non-state actors like those at issue in *Elmi* could qualify as torture under the Convention definition. *H.M.H.I. v. Australia*, CAT/C/28/D/177/2001 (2002), para. 6.4. In addition, states may bear responsibility for acts of torture committed by private actors when they fail to "exercise due diligence to prevent, investigate, prosecute and punish" such non-state actors. Committee Against Torture, General Comment 2, Implementation of Article 2 by State Parties, U.N. Doc. CAT/C/GC/2/CRP.1/rev. 4 (2007). (In human rights law, general comments are authoritative interpretations of a treaty by the expert bodies charged with overseeing its implementation). Similarly, the European Court of Human Rights has held, in the context of the prohibition of returning someone to a state where she may be tortured, that the prohibition against *refoulement* still applies even if the risk emanates from private groups or individuals. *HLR v. France*, III Eur. Ct HR 745; 26 EHRR 29 (1997).

5. A Feminist Critique. Should torture distinguish between "private" and "public" acts or motivations? Feminist scholars have long argued that the distinction between the public and private spheres privileges men and discriminates against women. This discrimination is reflected in the different treatment of assaults against individuals within private homes (which are predominantly directed against women and children), and assaults against individuals within state custody (which affect women and men, but is the primary place where men are the objects of such violence). For a discussion of the discriminatory impact of this distinction under international human rights law in the context of torture and its purpose requirement, see Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 Colum. Hum. Rts. L. Rev. 291 (1994). Ela Grdinic argues that domestic violence qualifies as torture under the jurisprudence of the European Court of Human Rights and the now-defunct European Commission of Human Rights. Ela Grdinic, *Application of the Elements of Torture and Other Forms of Ill-Treatment, as Defined by the European Court and Commission of Human Rights, to the Incidents of Domestic Violence*, 23 Hastings Int'l & Comp. L. Rev. 217 (2000). If the distinction between acts of torture by state actors and acts of torture by private actors were eliminated, would every act of domestic torture implicate international criminal law? For a more general treatment of the feminist critique of the public/private distinction and international human rights law, see Celina Romany, *Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, 6 Harv. Hum. Rts. J. 87 (1993).

6. Prohibited Acts. Why does the Torture Convention include a general definition without a list (exemplary or closed) of acts deemed torture *per se*? As you review the materials in this Chapter consider what acts you would include on such a list. In 1985, the United Nations established a Special Rapporteur on Torture with a mandate to examine allegations of torture in any state in the world. In a 1986 report, the Special Rapporteur identified the following acts as constituting torture: beatings; extraction of nails, teeth, etc.; burns; electric shocks; suspension; suffocation; exposure to excessive light or noise; sexual aggression; administration of drugs in detention or psychiatric institutions; prolonged denial of rest or sleep; prolonged denial of food; prolonged denial of sufficient hygiene; prolonged denial of medical assistance; total isolation and sensory deprivation; being kept in constant uncertainty in terms of space and time; threats to torture or kill relatives; total abandonment; and simulated executions. Report of the Special Rapporteur on Torture, U.N. Doc. No. E/CN.4/1986/15, para. 119 (1986).

7. Purpose. What justification is there for including a purpose element in the definition of torture? Should this element be removed? Restricted? Expanded? The language of the requirement, "for such purposes as," raises the question of whether the listed purposes are exhaustive. If the list is read exclusively, what types of torture are excluded from the Convention's definition? The ICTY has held that the Torture Convention's list of purposes is not exhaustive:

470. The use of the words "for such purposes" in the customary definition of torture, indicate that the various listed purposes do not constitute an exhaustive list, and should be regarded as merely representative. Further, there is no requirement that the conduct must be solely perpetrated for a prohibited purpose. Thus, in order for this requirement to be met, the prohibited purpose must simply be part of the motivation behind the conduct and need not be the predominating or sole purpose.

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

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

Prosecutor v. Delalić, Case No. IT-96-21-T, Judgement (Nov. 16, 1998) (citing J. Herman Burgess and Hans Danelius, *A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 119 (1988)).

8. Specific Intent, General Intent & Motive. Recall that the concept of specific intent encompasses the intent to produce a particular consequence or harm as a result of the crime. For example, the domestic crime of larceny/theft involves the taking of personal property with the

intent to permanently deprive its rightful owner of it. In order to convict a person of larceny, the prosecutor must prove that the defendant intended to keep the property permanently, not just that the defendant took the property. In international criminal law, genocide is the classic specific intent crime—it requires the specific intent to destroy in whole or in part a protected group. By contrast, a general intent crime only requires a showing that the defendant intended to commit the act that is prohibited by the law. As mental states with which an act may be committed, both forms of intent are thus distinct from an individual's motive, which is the reason that a person acts (or fails to act). Domestic systems that recognize the concept of specific intent allow the trier of fact to infer the intent from the facts in the case. In particular, the doctrine of presumed intent holds that individuals are presumed to intend the natural and probable consequences of their acts. Does the Torture Convention define torture in terms of specific intent, general intent, motive or some combination of the three? How is this question answered by the *Kunarac* case? Is the Appeals Chamber clear on the distinction between intent and motive? Does the Trial Chamber significantly alter the Torture Convention's definition of torture with its analysis?

9. Severity: Torture Versus Cruel, Inhuman or Degrading Treatment. The Convention Against Torture prohibits both torture and "other cruel, inhuman, or degrading treatment" (CIDT), but only requires that states criminalize torture (Articles 4 and 5). International humanitarian law also contains prohibitions of torture and other forms of cruel treatment, and these acts also constitute enumerated crimes against humanity. The Rwanda Tribunal Statute thus criminalizes "cruel treatment," "outrages upon personal dignity, in particular humiliating and degrading treatment," and "other inhumane acts." See ICTR Statute, Articles 3(i) ("other inhumane acts" constituting crimes against humanity), 4(a) (cruel treatment as a violation of common Article 3 of the Geneva Conventions and Protocol II), and 4(e) (outrages upon personal dignity as a violation of common Article 3 of the Geneva Conventions and Protocol II). See also ICTY Statute, Articles 2(b) (torture and inhuman treatment as grave breaches of the Geneva Conventions) and 5 (torture and "other inhumane acts" as constituting crimes against humanity). How should international criminal law distinguish between acts of torture, other acts of cruel treatment that fall short of torture, and other harmful conduct that does not rise to the level of an international crime?

Consider the following excerpt. Radomir Kovać was convicted by the ICTY of crimes against humanity as part of the *Kunarac* case excerpted above. Kovać, a member of a military unit known as the "Dragan Nikolić unit," was charged with acts of rape, enslavement, and outrages upon personal dignity committed against a number of young women whom he kept in an apartment. The Trial Chamber found that the young women, who ranged in age from 15 to 25, "were frequently sexually assaulted and that they were beaten, threatened, psychologically oppressed and kept in constant fear," were required to "take care of the household chores, the cooking and the cleaning," were forced to dance naked, and their diet and hygiene were "completely neglected." *Prosecutor v. Kunarac, et al.*, Case No. IT-96-23 & 23-1, Judgment, paras. 746-782 (Feb. 22, 2001). On appeal, Kovać challenged, among other things, his conviction for "outrages upon personal dignity," arguing that the Trial Chamber did not adequately define the acts that would qualify as the crime in question and that the Prosecution had neglected to establish his specific intent to humiliate or degrade the victims. The Appeals Chamber upheld Kovać's conviction and commented on the crime of "outrages upon personal dignity" as set forth below.

Prosecutor v. Kunarac, et al., Case No. IT-96-23 & 23-1A, Judgement (June 12, 2002) In the Appeals Chamber

157. The Appellant Kovać submits that, since every humiliating or degrading act is not necessarily an outrage upon personal dignity, the acts likely to be outrages upon personal dignity must be defined, and he further argues that the Trial Chamber did not do so.

158. Moreover, the Appellant asserts that to find a person guilty of outrages upon personal dignity, a specific intent to humiliate or degrade the victim must be established. In his opinion, the Trial Chamber did not prove beyond any reasonable doubt that he acted with the intention to humiliate his victims, as his objective was of an exclusively sexual nature.

159. In response to the Appellant's claim that the Trial Chamber did not state which acts constituted outrages upon personal dignity, the Respondent recalls that the Trial Chamber considered that it had been proved beyond any reasonable doubt that, during their detention in Kovać's apartment, the victims were repeatedly raped, humiliated and degraded. That the victims were made to dance naked on a table, that they were "lent" and sold to other men and that [witnesses] FWS-75 and FWS-87 were raped by Kovać while he was playing "Swan Lake" were all correctly characterised by the Trial Chamber as outrages upon personal dignity. * * *

161. The Trial Chamber ruled that the crime of outrages upon personal dignity requires:

- (i) that the accused intentionally committed or participated in an act or an omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity, and (ii) that he knew that the act or omission could have that effect.

162. Contrary to the claims of the Appellant, the Appeals Chamber considers that the Trial Chamber was not obliged to define the specific acts which may constitute outrages upon personal dignity. Instead, it properly presented the criteria which it used as a basis for measuring the humiliating or degrading character of an act or omission. The Trial Chamber, referring to the *Aleksovski* case, stated that the humiliation of the victim must be so intense that any reasonable person would be outraged. In coming to its conclusion, the Trial Chamber did not rely only on the victim's purely subjective evaluation of the act to establish whether there had been an outrage upon personal dignity, but used objective criteria to determine when an act constitutes a crime of outrages upon personal dignity.

163. In explaining that outrages upon personal dignity are constituted by "any act or omission which would be *generally* considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity," the Trial Chamber correctly defined the objective threshold for an act to constitute an outrage upon personal dignity. It was not obliged to list the acts which constitute outrages upon personal dignity. For this reason, this ground of appeal is dismissed.

164. According to the Trial Chamber, the crime of outrages upon personal dignity requires that the accused knew that his act or omission *could* cause serious humiliation, degradation or otherwise be a serious attack on human dignity. The Appellant, however, asserts that this crime requires that the accused knew that his act or omission *would have* such an effect.

165. The Trial Chamber carried out a detailed review of the case-law relating to the *mens rea* of the crime of outrages upon personal dignity. The Trial Chamber was never directly

confronted with the specific question of whether the crime of outrages upon personal dignity requires a specific intent to humiliate or degrade or otherwise seriously attack human dignity. However, after reviewing the case-law, the Trial Chamber properly demonstrated that the crime of outrages upon personal dignity requires only knowledge of the "possible" consequences of the charged act or omission. The relevant paragraph of the Trial Judgment reads as follows:

As the relevant act or omission for an outrage upon personal dignity is an act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity, an accused must know that his act or omission is of that character—i.e., that it could cause serious humiliation, degradation or affront to human dignity. This is not the same as requiring that the accused knew of the *actual* consequences of the act.

166. Since the nature of the acts committed by the Appellant * * * undeniably reaches the objective threshold for the crime of outrages upon personal dignity set out in the Trial Judgment, the Trial Chamber correctly concluded that any reasonable person would have perceived his acts "to cause serious humiliation, degradation or otherwise be a serious attack on human dignity." Therefore, it appears highly improbable that the Appellant was not, at the very least, aware that his acts could have such an effect. Consequently this ground of appeal is rejected.

NOTES & QUESTIONS

1. Other Outrages Upon Personal Dignity. In other cases, the ICTY found the following to also constitute outrages upon personal dignity: (1) subjecting individuals to inappropriate conditions of confinement, forcing individuals to engage in subservient acts or to relieve bodily functions in their clothing; and placing someone in fear of being subjected to physical, mental, or sexual violence (*Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1T, Judgement, para. 173 (Nov. 2, 2001)); and (2) using detainees as human shields or trench diggers (*Prosecutor v. Aleksovski*, Case No. IT-95-14/1T, Judgement, para. 229 (June 25, 1999); *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, paras. 653, 669 (July 29, 2004)). Would such acts constitute torture or CIDT under the Torture Convention or the Inter-American Convention on Torture? The International Criminal Court's Elements of Crimes provides further guidance on the definition of outrages upon personal dignity:

- The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons.
- The severity of the humiliation, degradation and other violation was of such a degree as to be generally recognized as an outrage upon personal dignity.

Does this formulation give sufficient notice to potential defendants of the prohibited conduct?

2. Lasting Impact of Harm. Should it matter whether the effect of the harm inflicted is long-lasting, or is a temporary impact sufficient? Consider the following ruling of the Trial Chamber in *Prosecutor v. Aleksovski*, Case No. 95-14/1T, Judgement, para. 56 (June 25, 1999):

An outrage against personal dignity is an act which is animated by contempt for the

human dignity of another person. The corollary is that the act must cause serious humiliation or degradation to the victim. It is not necessary for the act to directly harm the physical or mental well-being of the victim. It is enough that the act causes real and lasting suffering to the individual arising from the humiliation or ridicule.

The Trial Chamber in *Prosecutor v. Kunarac et al.*, Case No. 96–23 & 23/1–T, Judgement, para. 501 (Feb. 22, 2001), disagreed with the *Aleksovski* decision on this point:

Insofar as [*Aleksovski*] provides that an outrage upon personal dignity is an act which "cause[s] serious humiliation or degradation to the victim," the Trial Chamber agrees with it. However, the Trial Chamber would not agree with any indication from the passage above that this humiliation or degradation must cause "lasting suffering" to the victim. So long as the humiliation or degradation is real and serious, the Trial Chamber can see no reason why it would also have to be "lasting." In the view of the Trial Chamber, it is not open to regard the fact that a victim has recovered or is overcoming the effects of such an offence as indicating of itself that the relevant acts did not constitute an outrage upon personal dignity. Obviously, if the humiliation and suffering caused is only fleeting in nature, it may be difficult to accept that it is real and serious. However this does not suggest that any sort of minimum temporal requirement of the effects of an outrage upon personal dignity is an element of the offence.

How do you think the disagreement between the two Trial Chambers should be resolved? Should the requirement of lasting impact be the same as for torture, or should "outrages upon personal dignity" be treated differently? Why?

3. **Torture v. CIDT.** The Committee Against Torture, which monitors compliance with the Torture Convention, has affirmed the obligations to prevent torture and CIDT are "interdependent, indivisible and interrelated." Committee Against Torture, General Comment 2, Implementation of Article 2 by State Parties, U.N. Doc. CAT/C/GC/2/CRP.1/rev. 4 (2007). Nigel Rodley, a former U.N. Special Rapporteur on torture, identified three elements distinguishing torture from CIDT: (1) the relative intensity of the pain or suffering inflicted; (2) the purpose for inflicting the pain or suffering; and (3) the status of the perpetrator as a state or private actor. Sir Nigel Rodley, *The Definition(s) of Torture in International Law*, in Current Legal Problems 467 (Michael Freedman, ed. 2002). How should one measure severity? Should there be an objective test or a subjective test (along the lines of the famous "eggshell skull" rules from torts) given that the long term effects of such conduct can vary from person-to-person, depending upon the individual's personal circumstances, age and general state of physical and mental health, support network, length of detention, etc.? Rodley has argued that it is "virtually impossible" to ascertain the level of severity required for an act to qualify as torture. Nigel Rodley, *The Treatment of Prisoners Under International Law* 98 (2d ed. 1999). The ICTY has created a case-by-case test that combines objective and subjective elements, further complicating the issue:

In assessing the seriousness of any mistreatment, the objective severity of the harm inflicted must be considered, including the nature, purpose and consistency of the acts committed. Subjective criteria, such as the physical or mental condition of the victim, the effect of the treatment and, in some cases, factors such as the victim's age, sex, state of

health and position of inferiority will also be relevant in assessing the gravity of the harm. Permanent injury is not a requirement for torture; evidence of the suffering need not even be visible after the commission of the crime.

Prosecutor v. Brdjanin, Case No. IT-99-36-T, Judgement, para. 484 (Sept. 1, 2004). Compare the test articulated by the Trial Chamber in *Brdjanin* with that of a different Trial Chamber:

With respect to the assessment of the seriousness of the acts charged as torture, previous jurisprudence of the Tribunal has held that this should take into account all circumstances of the case and in particular the nature and context of the infliction of pain, the premeditation and institutionalization of the ill-treatment, the physical condition of the victim, the manner and the method used and the position of inferiority of the victim. Also relevant to the Chamber's assessment is the physical or mental effect of the treatment on the victim, the victim's age, sex, or state of health. Further, if the mistreatment has occurred over a prolonged period of time, the Chamber would assess the severity of the treatment as a whole. Finally, this Chamber concurs with the finding of the *Čelebići* Trial Chamber, made specifically in the context of rape, that in certain circumstances the suffering can be exacerbated by social and cultural conditions and it should take into account the specific social, cultural and religious background of the victims when assessing the severity of the alleged conduct.

Prosecutor v. Limaj, Case No. IT-03-66-T, Judgement, para. 237 (Nov. 30, 2005). Likewise, consider this approach, which reasoned that the subjective element of an outrage

must be tempered by objective factors; otherwise, unfairness to the accused would result because his/her culpability would depend not on the gravity of the act but wholly on the sensitivity of the victim. Consequently, an objective component to the *actus reus* is apposite: the humiliation to the victim must be so intense that the reasonable person would be outraged.

Prosecutor v. Aleksovski, Case No. IT-95-14/1, Judgment, para. 56 (June 25, 1999).

4. **Torture and CIDT within the European Human Rights System.** The earliest statements at the international level concerning the level of severity necessary for an act to constitute torture are from the European human rights system, with decisions from the European Commission of Human Rights (now defunct) and the European Court of Human Rights. Prior to the adoption of the Torture Convention, the European Commission of Human Rights in 1969 concluded that the practice of *falanga*—severe beatings administered to all parts of the body—constituted torture. *The Greek Case*, 12 Y.B. Eur. Conv. on H.R. (Eur. Comm'n of H.R.) 1, 186 (1969). There, the European Commission distinguished torture from cruel treatment primarily on the basis of purpose and severity: “torture is often used to describe inhuman treatment [that] has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment.” *Id.* at 168. For more background on this landmark case, see J. Becket, *Barbarism in Greece* 38–55 (1969) and J. Becket, *The Greek Case Before the European Human Rights Commission*, 1 Human Rights 91 (1970). A decade later, the European Commission and Court of Human Rights examined in detail the

measure of severity required for an act to constitute torture in a case brought by Ireland against the United Kingdom. At issue were the following five interrogation techniques used by the British:

- (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 "spread eagled 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.

Ireland v. United Kingdom, 23 Eur. Ct. H.R. (ser. B) at 96 (1976). While the European Commission of Human Rights found that these five techniques constituted torture, the European Court disagreed:

Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.

Id. at 167. The European Court found support for this approach at the international level from General Assembly Resolution 3452 (XXX)—a precursor to the Torture Convention—adopted unanimously by the members of the United Nations in 1975. Article 1(2) of that Resolution states that "Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment." In subsequent cases rendered after the promulgation of the Torture Convention, however, the European Court seemed to abandon its reliance on severity as the touchstone of torture. The Court subsequently found that the following acts constituted torture: being stripped naked and suspended by one's arms (*Aksoy v. Turkey*, 1996–VI Eur. Ct. H.R. 2260 (1996)); rape (*Aydin v. Turkey*, 1997–V Eur. Ct. H.R. 1866 (1997)); and the following

[The applicant] was detained over a period of three days during which she must have been bewildered and disorientated by being kept blindfolded, and in a constant state of physical pain and mental anguish brought on by the beatings administered to her during questioning and by the apprehension of what would happen to her next. She was also

paraded naked in humiliating circumstances thus adding to her overall sense of vulnerability and on one occasion she was pummeled with high-pressure water while being spun around in a tire.

Aydin v. Turkey, 1997–V Eur. Ct. H.R. 1866, 1891. The European Court has embraced an evolutionary approach to its constitutive treaty. In *Selmouni v. France*, for example, the Court noted that the European Convention on Human Rights is a “living instrument” such that “certain acts which were classified in the past as ‘inhuman and degrading treatment’ as opposed to ‘torture’ could be classified differently in the future.” *Selmouni v. France*, App. No. 258003/94, 1999-V Eur. Ct. Hum. Rts. 155, para. 101. Is such an approach appropriate for international criminal law?

5. **"Stress and Duress" Techniques in Israel.** Two decades after the European Court of Human Rights ruled on the *Ireland Case*, the Israeli Supreme Court evaluated a similar set of techniques used by the Israeli General Security Services (GSS). The techniques involved “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;” placing the suspect in the *shabach* position, which involves seating a hooded subject on a chair tipped forward with his hands tied behind him and subjecting him to loud music; the frog crouch; excessive tightening of handcuffs; and sleep deprivation. Both the U.N. Committee Against Torture and the Special Rapporteur on Torture had already concluded that the techniques were impermissible. The Israeli Supreme Court agreed that each of these techniques lacked legal authorization under existing law, although it did not call them “torture.” With respect to the *shabach* position, for example, the Court ruled as follows:

26. The "*Shabach*" method is composed of a number of cumulative components: the cuffing of the suspect, seating him on a low chair, covering his head with an opaque sack and playing powerfully loud music in the area. Are any of the above acts encompassed by the general power to investigate? Our point of departure is that there are actions which are inherent to the investigation power. Therefore, we accept that the suspect's cuffing, for the purpose of preserving the investigators' safety, is an action included in the general power to investigate. * * * Notwithstanding, the cuffing associated with the "*Shabach*" position is unlike routine cuffing. * * * One hand is placed inside the gap between the chair's seat and back support, while the other is tied behind him, against the chair's back support. This is a distorted and unnatural position. The investigators' safety does not require it. Therefore, there is no relevant justification for handcuffing the suspect's hands with particularly small handcuffs, if this is in fact the practice. The use of these methods is prohibited. * * * Moreover, there are other ways of preventing the suspect from fleeing from legal custody which do not involve causing the suspect pain and suffering.

27. * * * We accept that seating a man is inherent to the investigation. This is not the case when the chair upon which he is seated is a very low one, tilted forward facing the ground, and when he is sitting in this position for long hours. This sort of seating is not encompassed by the general power to interrogate. Even if we suppose that the seating of the suspect on a chair lower than that of his investigator can potentially serve a legitimate investigation objective (for instance, to establish the "rules of the game" in the

contest of wills between the parties, or to emphasize the investigator's superiority over the suspect), there is no inherent investigative need for seating the suspect on a chair so low and tilted forward towards the ground, in a manner that causes him real pain and suffering. * * * All these methods do not fall within the sphere of a "fair" interrogation. They are not reasonable. They impinge upon the suspect's dignity, his bodily integrity and his basic rights in an excessive manner (or beyond what is necessary). * * *

28. We accept that there are interrogation related considerations concerned with preventing contact between the suspect under interrogation and other suspects and his investigators, which require means capable of preventing the said contact. The need to prevent contact may, for instance, flow from the need to safeguard the investigators' security, or that of the suspects and witnesses. It can also be part of the "mind game" which pins the information possessed by the suspect against that found in the hands of his investigators. For this purpose, the power to interrogate—in principle and according to the circumstances of each particular case—includes preventing eye contact with a given person or place. In the case at bar, this was the explanation provided by the State for covering the suspect's head with an opaque sack, while he is seated in the "*Shabach*" position. * * * All these methods are not inherent to an interrogation. They do not confirm the State's position, arguing that they are meant to prevent eye contact between the suspect being interrogated and other suspects. Indeed, even if such contact should be prevented, what is the purpose of causing the suspect to suffocate? Employing this method is not connected to the purpose of preventing the said contact and is consequently forbidden. Moreover, the statements clearly reveal that the suspect's head remains covered for several hours, throughout his wait. For these purposes, less harmful means must be employed, such as letting the suspect wait in a detention cell. * * * For it appears that at present, the suspect's head covering—which covers his entire head, rather than eyes alone—for a prolonged period of time, with no essential link to the goal of preventing contact between the suspects under investigation, is not part of a fair interrogation. It harms the suspect and his (human) image. It degrades him. It causes him to lose sight of time and place. It suffocates him. All these things are not included in the general authority to investigate. * * *

See Judgment Concerning the Legality of the General Security Service's Interrogation Methods, 38 I.L.M 1471 (1999). Excerpts from this opinion are reproduced in Chapter 15 on Defenses under International Criminal Law.

6. **Torture's Effects.** There is a sophisticated body of medical literature on the short- and long-term effects of torture and other forms of ill-treatment, both physical and psychological on victims. Less research exists on the impact of torture on torturers. A study of survivors of the five British techniques discussed above found that survivors experienced traumatic effects, including a state of psychosis, with long-lasting aftereffects. John Conroy, *Unspeakable Acts, Ordinary People: The Dynamics of Torture* 6 (2000); Stefan Priebe & Michael Bauer, *Inclusion of Psychological Torture in PTSD [Post Traumatic Stress Disorder] Criterion A*, 152 *American Journal of Psychiatry* 1691-2 (1995). A report produced by 75 experts organized by the Human Rights Foundation of Turkey and Physicians for Human Rights listed the following physical and psychological effects of torture:

Common somatic complaints include headache, back pain, gastrointestinal symptoms, sexual dysfunction, and muscle pain. Common psychological symptoms include depressive affect, anxiety, insomnia, nightmares, flashbacks, and memory difficulties.

Istanbul Protocol, para. 170, U.N. Doc. HR/P/PT/8 (1999), available at <http://www.unhchr.ch/pdf/8istprot.pdf>. In a study of the effect of psychological torture by U.S. forces against detainees, Physicians for Human Rights listed the following possible impacts of psychological torture:

memory impairment, reduced capacity to concentrate, somatic complaints such as headache and back pain, hyperarousal, avoidance, and irritability. Additionally, victims often experience severe depression with vegetative symptoms, nightmares, and 'feelings of shame and humiliation' associated with sexual violations, among others.

Physicians for Human Rights, *Break Them Down: Systematic Use of Psychological Torture by U.S. Forces* (2005), available at <http://www.physiciansforhumanrights.org/library/documents/reports/break-them-down-the.pdf>. For an extensive discussion of the medical effects of torture, see the three part series by Ole V. Rasmussen et al., *Medical, Physical Examination in Connection with Torture*, in 14 *Torture Journal* 46 (2004) (Section 1); 15 *Torture Journal* 37 (2005) (Section 2); and 16 *Torture Journal* 48 (2006) (Section 3). For a profound philosophical and cultural treatment of torture and pain that draws upon literature, art, documentation of torture from Amnesty International, and the writings of Clausewitz, Churchill, and Kissinger, see Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* (1985). For a study of individuals who had been detained on Guantánamo, see Laurel E. Fletcher & Eric Stover, *The Guantánamo Effect* (2009).

7. **“Torture Lite.”** Interrogation techniques such as sleep deprivation, stress positions (so-called “self-inflicted pain”), isolation and sensory deprivation, temperature and dietary manipulation, noise bombardment, psychological humiliations (forced nudity, prevention of personal hygiene, forced grooming, denial of privacy, and infested surroundings), threats against self or family, attacks on cultural values or religious beliefs, and mock execution, have been described as “torture lite,” because they do not at first consideration bear the hallmarks of brutality associated with ancient forms of torture—such as those described by Professor Langbein—or of today’s notorious authoritarian regimes. These forms of abuse—which are often called “clean” or “stealth” torture—do not physically mutilate or maim the victim’s body, leave permanent traces, require direct contact between the victim and the individual utilizing the particular technique, or cause pain immediately. And yet, are such techniques truly less severe than the rack and screw of yesteryear? Detainees in U.S. custody have died as a result of these techniques: for example, one individual reportedly froze to death in a CIA “black site” prison in Afghanistan, and another died after being beaten and then placed in a stress position in Abu Ghraib. How would the special characteristics of “torture lite” alter the way in which victims, perpetrators, policy-makers, or the general public might interpret the legality, efficacy, and morality of these techniques? Might the combined effects of such techniques be more disruptive and damaging than a short but brutal beating? A 2007 study of victims of torture compared the long-term psychological effects of “torture lite” techniques and more physically violent torture. The authors conclude:

Ill treatment during captivity, such as psychological manipulations, humiliating treatment, and forced stress positions, does not seem to be substantially different from physical torture in terms of the severity of mental suffering they cause, the underlying mechanism of traumatic stress, and their long-term psychological outcome. * * * These findings suggest that physical pain *per se* is not the most important determinant of traumatic stress in survivors of torture. * * * These findings [also] imply that various psychological manipulations, ill treatment, and torture during interrogation share the same psychological mechanism in exerting their traumatic impact. All three types of acts are geared toward creating anxiety or fear in the detainee while at the same time removing any form of control from the person to create a state of total helplessness.

See Metin Başoğlu, Maria Livanou, & Cvetana Crnobaric, *Torture vs Other Cruel, Inhuman, and Degrading Treatment: Is the Distinction Real or Apparent?*, 64(3) Archives of General Psychiatry 277, 284 (2007), available at <http://archpsyc.ama-assn.org/cgi/content/full/64/3/277>. According to these researchers, what mattered most in terms of long-term effects were subjective factors, such as the victim's level of distress, feelings of helplessness, stressor interactions, and the perceived degree of uncontrollability of the situation. Indeed, declassified CIA-funded research from the 1950s and 1960s found that such techniques could be very effective at breaking prisoners. See *Kubark Counterintelligence Interrogation* (1963), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB27/01-01.htm>. Further research by Başoğlu, Head of Section of Trauma Studies at King's College London and the Istanbul Centre for Behaviour Research and Therapy, appears in the American Journal of Orthopsychiatry at <http://psycnet.apa.org/index.cfm?fa=browsePA.volumes&jcode=ort>. In this paper, he concludes on the basis of self-reporting by detainees in the former Yugoslavia and Turkey that acts of CIDT are ranked as more severe than acts of physical torture and are more often associated with Post Traumatic Stress Disorder (PTSD). Should the assessment of whether conduct constitutes torture or CIDT turn on whether the conduct causes long-term physical or psychological effects or is the degree of immediate suffering by a victim more relevant? On "torture lite," consider this perspective:

[T]he use of terms like "torture lite" and the nature of such techniques encourage a moral psychology in which the violence and cruelty of torture is denied, the victim's suffering is hidden, minimized and doubted, and the torturer's responsibility is diminished. As such, the use of torture lite techniques is likely to encourage the normalization of torture. * * * The distinction between the methods referred to as torture lite and so-called real torture serves a further aim: it is sometimes used to distinguish not only between types of torture methods but also between the *moral character* of torturers and their *motivations*. According to this view, torturers who use such methods as beatings and mutilations are clearly brutal and sadistic, whereas those who use torture lite techniques can be portrayed as professionals motivated by the need to gain intelligence essential for saving lives. * * * By creating a false distinction between *torture* (understood as violent, brutal, and physically mutilating) and *torture lite* (with its connotations of minimal harm, minimal force, and minimal violence), those who authorize the use of torture and those who carry it out are able to portray their actions (to themselves and to observers) as something other

than *real* torture, with all the negative connotations of that word. * * * Terms such as "torture lite" and "enhanced interrogation" neutralize the violence of these techniques and downplay the suffering they cause. Such euphemisms can also have a strong impact on how those using these terms (interrogators, public officials, and the general public) perceive the morality of the techniques thus described.

Jessica Wolfendale, *The Myth of "Torture Lite,"* 23 *Ethics and International Affairs* 47 (2009), available at <http://www3.interscience.wiley.com/cgi-bin/fulltext/122275823/HTMLSTART>.

8. ***Incommunicado Detention.*** Might *incommunicado* detention, even in luxurious conditions, constitute torture, CIDT, or some other international crime? How would you make such an argument within the framework of the Torture Convention or the ICC Statute?

PROBLEM

Prior to 2008, Nicaraguan law permitted "therapeutic abortions" only for those women and girls whose life or health was threatened by the continuation of their pregnancy and, in some cases, for victims of rape. The revised penal code (which came into force in 2008), repealed this provision. See Law No. 164, Penal Code of the Republic of Nicaragua, available at http://www.poderjudicial.gob.ni/arc-pdf/CP_641.pdf. Nicaraguan law now completely prohibits abortion, regardless of the circumstances and even if the health of the woman has been raped, is the victim of incest, or is at risk from the continuation of the pregnancy. Abortion is also prohibited if the baby is unviable as in cases of anencephaly—a neural tube defect in which the fetus fails to develop a brain or skull vault and is born with dramatic physical defects. The condition is uniformly fatal; the baby is literally born dying and usually survives only a few days.

A violation of this law can result in prison terms for both doctors and women or girls who carry out, or seek, an abortion (Article 143) and for doctors who cause unintentional harm to a fetus while administering medically necessary treatment to a pregnant woman or girl (Articles 145, 148, and 149). Article 143 provides:

Whosoever causes an abortion with the consent of the woman shall be sanctioned with a penalty of one to three years in prison. If the person is a medical professional or health worker, the penalty will simultaneously include being prohibited from working in medicine or as a health worker for two to five years. The woman who intentionally causes her own abortion or agrees with someone else to provide an abortion will face a penalty of one to two years in prison.

In a submission to the Committee Against Torture—the body charged with ensuring state compliance with the Convention Against Torture—Amnesty International argued that the penal legislation violated Nicaragua's obligations under the treaty. See Amnesty International, *Nicaragua: The Impact of the Complete Ban of Abortion in Nicaragua: Briefing to the United Nations Committee Against Torture*, Index No. AMR 43/005/2009 (April 29, 2009), available at <http://www.amnesty.org/en/library/info/AMR43/005/2009/en>. How would you make such an argument? If you were a lawyer within the Foreign Ministry of Nicaragua, how would you defend against such charges? Do such laws rise to the level of crimes against humanity?

III. United States' Definitions of Torture

The United States has come under increasing scrutiny for certain interrogation practices undertaken at the U.S. military base in Guantánamo Bay, Cuba, and other U.S. military detention centers throughout the world. While United States officials continually proclaim that the United States neither practices nor condones torture, evidence of the severe mistreatment of detainees has emerged. In addition, legal memoranda prepared by government lawyers have been made public that discuss when and how detainees may be interrogated using so-called “enhanced interrogation techniques” (“EITs”). In these memoranda, government lawyers offered a number of controversial interpretations of what constitutes torture under the international definition of the offense as well as the prohibition in U.S. law (18 U.S.C. § 2340). These memoranda have been posted on the website of the ACLU (www.aclu.org), which obtained them through the use of litigation, the Freedom of Information Act, and other advocacy, as well as here: <http://www1.umn.edu/humanrts/OathBetrayed/policies-index.html>. Government officials initially claimed that these memoranda were drafted in advance of the use of EITs; careful chronological research has revealed that some of these legal opinions were actually issued after particular techniques had already been employed.

The memoranda take as their starting point the RUDS—reservations, understandings, and declarations—issued by the United States when it ratified the Convention Against Torture in 1994 and the criminal prohibition against torture codified at 18 U.S.C. § 2340. See U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990), available at <http://www1.umn.edu/humanrts/usdocs/tortres.html>. One reservation stated that “the United States considers itself bound by the obligation under Article 16 to prevent ‘cruel, inhuman or degrading treatment or punishment,’ only insofar as the term ‘cruel, inhuman or degrading treatment or punishment’ means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.” An “understanding” stated that a form of specific intent is required for an act to constitute torture and set forth a closed list of forms of punishable mental torture:

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

Upon ratification, the U.S. defined torture in its penal code as follows:

an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to

lawful sanctions) upon another person within his custody or physical control.

18 U.S.C. § 2340(1). Severe mental pain or suffering is defined as:

the prolonged mental harm caused by or resulting from

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

(B) 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;

(C) the threat of imminent death; or

(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of a mind-altering substance or other procedures calculated to disrupt profoundly the senses or personality.

18 U.S.C. § 2340(2). In the wake of September 11, 2001, this statute was amended by the USA PATRIOT Act (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism, Pub. L. 107-56) to penalize conspiracy to commit torture. 18 U.S.C. §2340A(c). This crime of conspiracy is prosecuted only when it is committed “outside the United States;” now defined as “the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.” In 2001, however, the USA PATRIOT Act expanded the Special Maritime and Territorial Jurisdiction (SMTJ) of the United States to include the premises of U.S. military or other government missions or entities in foreign states. This expansion of the SMTJ narrowed the reach of §2340, because it rendered certain overseas facilities within the SMTJ and thus no longer “outside the United States.” This apparent anomaly was corrected by the National Defense Authorization Act for Fiscal Year 2005, which prospectively amended §2340 as set forth above to included only the states and territories of the U.S.

An August 1, 2002 memorandum drafted by then Assistant Attorney General Jay S. Bybee (a former professor of law and now a judge on the Ninth Circuit Court of Appeals) to the then Counsel to the President, Alberto Gonzalez, interpreted the definition of torture under §2340 as follows:

Specific Intent: “To violate Section 2340A, the statute requires that severe pain and suffering must be inflicted with specific intent. In order for a defendant to have acted with specific intent, he must expressly intend to achieve the forbidden act. * * * As a result, the defendant had to act with the express ‘purpose to disobey the law’ in order for the *mens rea* element to be satisfied. * * * [A] defendant [must] act with the specific intent to inflict severe pain, [and] the infliction of such pain must be the defendant's precise objective. * * * If the defendant acted knowing that severe pain or suffering was

reasonably likely to result from his actions, but no more, he would have acted only with general intent. * * * As a theoretical matter, therefore, knowledge alone that a particular result is certain to occur does not constitute specific intent. * * * While as a theoretical matter such knowledge does not constitute specific intent, juries are permitted to infer from the factual circumstances that such intent is present. * * * [A] showing that an individual acted with a good faith belief that his conduct would not produce the result that the law prohibits negates specific intent. * * * Where a defendant acts in good faith, he acts with an honest belief that he has not engaged in the proscribed conduct. * * * A good faith belief need not be a reasonable one. * * * Where a defendant holds an unreasonable belief, he will confront the problem of proving to the jury that he actually held that belief.”

Severe Pain or Suffering: “[To qualify as severe pain, an act must cause damage that rises to] the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions.”

Severe Mental Pain or Suffering: “In order to prove ‘severe mental pain or suffering,’ the statute requires proof of ‘prolonged mental harm.’ * * * [T]he acts giving rise to the harm must cause some lasting, though not necessarily permanent, damage. For example, the mental strain experienced by an individual during a lengthy and intense interrogation—such as the one that state or local police might conduct upon a criminal suspect—would not meet this requirement. On the other hand, the development of a mental disorder such as post-traumatic stress disorder, which can last months or even years, or even chronic depression, which also can last for a considerable period of time if untreated, might satisfy the prolonged harm requirement.* * *

A defendant must specifically intend to cause prolonged mental harm for the defendant to have committed torture. It could be argued that a defendant needs to have specific intent only to commit the predicate acts that give rise to prolonged mental harm. Under that view, so long as the defendant specifically intended to, for example, threaten a victim with imminent death, he would have had sufficient *mens rea* for a conviction. According to this view, it would be further necessary for a conviction to show only that the victim factually suffered prolonged mental harm, rather than that the defendant intended to cause it. We believe that this approach is contrary to the text of the statute. The statute requires that the defendant specifically intend to inflict severe mental pain or suffering. Because the statute requires this mental state with respect to the infliction of severe mental pain, and because it expressly defines severe mental pain in terms of prolonged mental harm, that mental state must be present with respect to prolonged mental harm. * * * A defendant could negate a showing of specific intent to cause severe mental pain or suffering by showing that he had acted in good faith that his conduct would not amount to the acts prohibited by the statute. Thus if a defendant has a good faith belief that his actions will not result in prolonged mental harm, he lacks the mental state necessary for his action to constitute torture. Because the presence of good faith would negate the specific intent element of torture, it is a complete defense to such a charge.

of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002) (citations removed).

The August 2002 memo reflected the official U.S. policy on the definition of torture under U.S. law until it was leaked in the summer of 2004, the same summer during which reports, including photographs, of torture and other abuses by U.S. military personnel at the Iraqi prison, Abu Ghraib, were made public. The Bybee memo was "withdrawn" on June 22, 2004 and replaced in December 2004 by a Memorandum written by Acting Assistant Attorney General Daniel Levin to the then Deputy Attorney General James B. Comey. That memo re-interpreted the definition of torture in 18 U.S.C. § 2340 as follows:

Severe: "Although Congress defined 'torture' * * * to require conduct specifically intended to cause 'severe' pain or suffering, we do not believe Congress intended to reach only conduct involving 'excruciating and agonizing' pain or suffering. * * * Drawing distinctions among gradations of pain (for example, severe, mild, moderate, substantial, extreme, intense, excruciating, or agonizing) is obviously not an easy task, especially given the lack of any precise, objective scientific criteria for measuring pain. * * * We conclude that under some circumstances 'severe physical suffering' may constitute torture even if it does not involve 'severe physical pain.' * * * To constitute 'severe physical suffering' [as distinct from pain] would have to be a condition of some extended duration or persistence as well as intensity."

Severe Mental Pain or Suffering: "[W]e do not believe that Congress intended the definition [of the crime] to create a presumption that any time one of the predicate acts occurs, prolonged mental harm is deemed to result. Turning to the question of what constitutes 'prolonged mental harm caused by or resulting from' a predicate act, we believe that Congress intended this phrase to require mental 'harm' that is caused by or that results from a predicate act, and that has some lasting duration. * * * This damage need not be permanent, but it must continue for a 'prolonged' period of time."

Special Intent: "[T]he [specific intent] cases are inconsistent. Some suggest that only a conscious desire to produce the proscribed result constitutes specific intent; others suggest that even reasonable foreseeability suffices. * * * In light of the President's directive that the United States not engage in torture, it would not be appropriate to rely on parsing the specific intent element of the statute to approve as lawful conduct that might otherwise amount to torture. Some observations, however, are appropriate. It is clear that the specific intent element would be met if a defendant performed an act and 'consciously desired' that act to inflict severe physical or mental pain or suffering. Conversely, if an individual acted in good faith, and only after reasonable investigation establishing that his conduct would not inflict severe physical or mental pain or suffering, it appears unlikely that he would have the specific intent necessary to violate section 2340. Such an individual could be said neither consciously to desire the proscribed result, nor to have 'knowledge or notice' that his act 'would likely have resulted in' the proscribed outcome.

Two final points on the issue of specific intent. First, specific intent must be distinguished from motive. There is no exception under the statute permitting torture to be used for a 'good reason.' Thus a defendant's motive (to protect national security, for example) is not relevant to the question whether he has acted with the requisite specific intent under the statute. Second, specific intent to take a given action can be found even if

the defendant will take the action only conditionally. Thus, for example, the fact that a victim might have avoided being tortured by cooperating with the perpetrator would not make permissible actions otherwise constituting torture under the statute. Presumably that has frequently been the case with torture, but that fact does not make the practice of torture any less abhorrent or unlawful.”

Dept. Of Justice, Memorandum for James B. Comey, Deputy Attorney General re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (Dec. 30, 2004) (citations removed).

NOTES & QUESTIONS

1. **Comparing the Memos.** Do you agree with either interpretation of § 2340? In what ways did the Levin memo alter the views contained within the Bybee memo? In what ways is it consistent with those views? In a footnote, Levin concludes that he has “reviewed this Office’s prior opinions addressing issues involving treatment of detainees and [does] not believe that any of their conclusions would be different under the standards set forth in this memorandum.” *Id.* at 2, n.8. Do you agree?

2. **The United States’ Understanding.** Several states formally objected to the United States’ “understanding” of the definition of torture. The Netherlands and Sweden, for example, declared that such an understanding should not affect the obligations of the United States under the treaty. The Netherlands stated the following:

The Government of the Kingdom of the Netherlands considers the [above-quoted] understanding to have no impact on the obligations of the United States of America under the Convention [as it] ... appears to restrict the scope of the definition of torture under Article 1 of the Convention.

Do you agree with this assertion that the U.S.’s “understanding” improperly narrows the definition of torture? How?

3. **Specific Intent.** In the Torture Convention, which element of the definition is modified by the terms “intentionally inflicted”? What arguments might a defendant make to avoid a finding of specific intent under the various formulations? What is the effect of Bybee and Levin formulations of specific intent? Would it constitute an act of torture if an individual did not intend to inflict severe pain or suffering but did in fact do so? What if the perpetrator knew there was a high likelihood that severe pain or suffering would result from her actions? Can a finding of specific intent be based on willful indifference, which exists where an actor is subjectively aware of the high probability of the fact in question? How might one prove this subjective state of mind? Would the fact that an individual, in good faith, thought his or her actions would not cause severe pain or suffering exonerate someone who did in fact cause serious suffering? How would an individual demonstrate that they were acting “in good faith?” Could an interrogator consult a lawyer for a legal opinion on whether a particular act would cause severe pain or suffering, whether physical or mental?

4. **Additional Memoranda.** Upon taking office in 2009, President Barack Obama declassified additional “torture memos” (containing varying degrees of redaction). Further memos were released as a result of litigation. Consider the following excerpt from a May 10,

2005 memorandum written by Stephen G. Bradbury, then a Deputy Assistant Attorney General for the Office of Legal Council (OLC) of the Department of Justice. The OLC provides legal advice to the Executive Branch under the leadership of an Assistant Attorney General (see <http://www.usdoj.gov/olc/>).

U.S. Department of Justice
Office of Legal Counsel

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

*Re: Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques
That May Be Used in the Interrogation of a High Value al Qaeda Detainee*

You have asked us to address whether certain specified interrogation techniques designed to be used on a high value al Qaeda detainee in the War on Terror comply with the federal prohibition on torture, codified at 18 U.S.C. §§ 2340-2340A. * * * Because you have asked us to address the application of sections 2340-2340A to specific interrogation techniques, the present memorandum necessarily includes discussion of the applicable legal standards and their application to particular facts. * * *

Torture is abhorrent both to American law and values and to international norms. The universal repudiation of torture is reflected not only in our criminal law, *see e.g.* 18 U.S.C. §§ 2340-2340A, but also in international agreements, in centuries of Anglo-American law, and in the longstanding policy of the United States, repeatedly and recently reaffirmed by the President. Consistent with these norms, the President has directed unequivocally that the United States is not to engage in torture.

The task of interpreting and applying sections 2340-2340A is complicated by the lack of precision in the statutory terms and the lack of relevant case law. In defining the federal crime of torture, Congress required that the defendant “*specifically intend*” to inflict “*severe physical or mental pain or suffering*,” and Congress narrowly defined “*severe mental pain or suffering*” to mean “*the prolonged mental harm caused by*” enumerated predicate acts, including “*the threat of imminent death*” and “*procedures calculated to disrupt profoundly the senses or personality.*” 18 U.S.C. § 2340 (emphases added). These statutory requirements are consistent with U.S. obligations under the United Nations Convention Against Torture [“CAT”], the treaty that obligates the United States to ensure that torture is a crime under U.S. law and that is implemented by sections 2340-2340A. The requirements in sections 2340-2340A closely track the understandings and reservations required by the Senate when it gave its advice and consent to ratification of the Convention Against Torture. They reflect a clear intent by Congress to limit the scope of the prohibition on torture under U.S. law. However, many of the key terms used in the statute (for example, “*severe*,” “*prolonged*,” “*suffering*”) are imprecise and necessarily bring a degree of uncertainty to addressing the reach of sections 2340-2340A. Moreover, relevant judicial guidance, coupled with the President’s clear directive that the United States does not condone or engage in torture, counsel great care in applying the statute to specific conduct. We have attempted to exercise such care throughout this memorandum.

With these considerations in mind, we turn to the particular question before us: whether

certain specified interrogation techniques may be used by the Central Intelligence Agency (“CIA”) on a high value al Qaeda detainee consistent with the federal statutory prohibition on torture, 18 U.S.C. §§ 2340-2340A.⁵ For the reasons discussed below, and based on the representations we have received from you (or officials of your Agency) about the particular techniques in question, the circumstances in which they are authorized for use, and the physical and psychological assessments made of the detainee to be interrogated, we conclude that the separate authorized use of each of the specific techniques at issue, subject to the limitations and safeguards described herein, would not violate sections 2340-2340A. Our conclusion is straightforward with respect to all but two of the techniques discussed herein. As discussed below, use of sleep deprivation as an enhanced technique and use of the waterboard involve more substantial questions, with the waterboard presenting the most substantial question. * * *

I.

In asking us to consider certain specific techniques to be used in the interrogation of a particular al Qaeda operative, you have provided background information common to the use of all of the techniques. You have advised that these techniques would be used only on an individual who is determined to be a “High Value Detainee,” defined as:

a detainee who, until time of capture, we have reason to believe: (1) is a senior member of al-Qai’da or an al-Qai’da associated terrorist group (Jemaah Islamiyyah, Egyptian Islamic Jihad, al-Zarqawi Group, etc.); (2) has knowledge of imminent terrorist threats against the USA, its military forces, its citizens and organizations, or its allies; or that has/had direct involvement in planning and preparing terrorist actions against the USA or its allies, or assisting the al-Qai’da leadership in planning and preparing such terrorist actions; and (3) if released, constitutes a clear and continuing threat to the USA or its allies.

Fax for Daniel Levin, Acting Assistant General, Office of Legal Counsel, from [REDACTED] Assistant General Counsel, CIA, at 3 (Jan. 4, 2005) (“January 4 [REDACTED] Fax”). * * *

You have also explained that, prior to interrogations, each detainee is evaluated by medical and psychological professionals from the CIA’s Office of Medical Services (“OMS”) to ensure that he is not likely to suffer any severe physical or mental pain or suffering as a result of interrogation.

[T]echnique-specific advanced approval is required for all “enhanced” measures and is conditional on on-site medical and psychological personnel confirming from direct detainee examination that the enhanced technique(s) is not expected to produce “severe physical or mental pain or suffering.” As a practical matter, the detainee’s physical

⁵ We have previously advised you that the use by the CIA of the techniques of interrogation discussed herein is consistent with the Constitution and applicable statutes and treaties. In the present memorandum, you have asked us to address only the requirements of 18 U.S.C §§ 2340-2340A. Nothing in this memorandum or in our prior advice to the CIA should be read to suggest that the use of these techniques would conform to the requirements of the Uniform Code of Military Justice that governs members of the Armed Forces or to United States obligations under the Geneva Conventions in circumstances in which those Conventions would apply. We do not address the possible application of article 16 of the CAT [prohibiting cruel, inhuman, or degrading treatment or punishment], nor do we address any question relating to conditions of confinement or detention, as distinct from the interrogation of detainees. * * *

condition must be such that these interventions will not have lasting effect, and his psychological state strong enough that no severe psychological harm will result.

OMS Guidelines on Medical and Psychological Support to Detainee Rendition, Interrogation and Detention at 9 (Dec. 2004) (“*OMS Guidelines*”). * * * In addition, “subsequent medical rechecks during the interrogation period should be performed on a regular basis.” *Id.* As an additional precaution, and to ensure the objectivity of their medical and psychological assessments, OMS personnel do not participate in administering interrogation techniques; their function is to monitor interrogations and the health of the detainee. * * *

We understand that, when approved, interrogation techniques are generally used in an escalating fashion, with milder techniques used first. Use of the techniques is not continuous. Rather, one or more techniques may be applied—during or between interrogation sessions—based on the judgment of the interrogators and other team members and subject always to the monitoring of the on-scene medical and psychological personnel. Use of the techniques may be continued if the detainee is still believed to have and to be withholding actionable intelligence. The use of these techniques may not be continued for more than 30 days without additional approval from CIA Headquarters. *See generally* George J. Tenet, Director of Central Intelligence, *Guidelines on Interrogations Conducted Pursuant to the [REDACTED]* at 1-2 (Jan 28, 2003) (describing approval procedures required for use of enhanced interrogation techniques). Moreover, even within that 30-day period, any further use of these interrogation techniques is discontinued if the detainee is judged to be consistently providing accurate intelligence or if he is no longer believed to have actionable intelligence. This memorandum addresses the use of these techniques during no more than one 30-day period. We do not address whether the use of these techniques beyond the initial 30-day period would violate the statute.

Medical and psychological personnel are on-scene throughout (and, as detailed below, physically present or otherwise observing during the application of many techniques, including all techniques involving physical contact with detainees), and “[d]aily physical and psychological evaluations are continued throughout the period of [enhanced interrogation technique] use.” CIA Inspector General, *Counterterrorism Detention and Interrogation Activities* (September 2001-October 2003), No. 2003-7123-IG (May 7, 2004) 30 n. 35 (“IG Report”). * * * In addition, “[i]n each interrogation session in which an Enhanced Technique is employed, a contemporaneous record shall be created setting forth the nature and duration of each such technique employed.” *Interrogation Guidelines* at 3. At any time, any on-scene personnel (including the medical or psychological personnel, the chief of base, substantive experts, security officers, and other interrogators) can intervene to stop the use of any technique if it appears that the technique is being used improperly, and on-scene medical personnel can intervene if the detainee has developed a condition making the use of the technique unsafe. More generally, medical personnel watch for signs of physical distress or mental harm so significant as possibly to amount to the “severe physical or mental pain or suffering” that is prohibited by sections 2340-2340A. * * *

These techniques have all been imported from military Survival, Evasion, Resistance, Escape (“SERE”) training, where they have been used for years on U.S. military personnel, although with some significant differences described below. *See IG Report* at 13-14. Although we refer to the SERE experience below, we note at the outset an important limitation on reliance on that experience. Individuals undergoing SERE training are obviously in a very different

situation from detainees undergoing interrogation; SERE trainees know it is part of a training program, not a real-life interrogation regime, they presumably know it will last only a short time, and they presumably have assurance that they will not be significantly harmed by the training.

You have described the specific techniques at issue as follows:

1. *Dietary manipulation.* This technique involved the substitution of commercial liquid meal replacements for normal food, presenting detainees with a bland, unappetizing, but nutritionally complete diet. You have informed us that the CIA believes dietary manipulation makes other techniques, such as sleep deprivation, more effective. * * * Calories are provided using commercial liquid diets (such as Ensure Plus), which also supply other essential nutrients and make for nutritionally complete meals.¹¹ * * *

2. *Nudity.* This technique is used to cause psychological discomfort, particularly if a detainee, for cultural or other reasons, is especially modest. When the technique is employed, clothing can be provided as an instant reward for cooperation. During and between interrogation sessions, a detainee maybe kept nude, provided that ambient temperatures and the health of the detainee permit. For this technique to be employed, ambient temperature must be at least 68°F. No sexual abuse or threats of sexual abuse are permitted. Although each detention cell has full-time closed circuit video monitoring, the detainee is not intentionally exposed to other detainees or unduly exposed to the detention facility staff. We understand that interrogators “are trained to avoid sexual innuendo or any acts of implicit or explicit sexual degradation.” Letter from ██████████ Associate General Counsel, CIA, to Dan Levin, Acting Assistant Attorney General, OLC (October 12, 2004) at 2 (“*October 12 ██████████ Letter*”). Nevertheless, interrogators can exploit the detainee’s fear of being seen naked. In addition, female officers involved in the interrogation may see the detainees naked; and for purposes of our analysis, we will assume that detainees subjected to nudity as an interrogation technique are aware that they may be seen naked by females. * * *

4. *Walling.* This technique involves the use of a flexible, false wall. The individual is placed with his heels touching the flexible wall. The interrogator pulls the individual forward and then quickly and firmly pushes the individual into the wall. It is the individual’s shoulder blades that hit the wall. During this motion, the head and neck are supported with a rolled hood or towel that provides a C-collar effect to help prevent whiplash. To reduce further the risk of injury, the individual is allowed to rebound from the flexible wall. You have informed us that the false wall is also constructed to create a loud noise when the individual hits it in order to increase the shock or surprise of the technique. We understand that walling may be used when the detainee is uncooperative or unresponsive to questions from interrogators. Depending on the extent of the detainee’s lack of cooperation, he may be walled one time during an interrogation session (one impact with the wall) or many times (perhaps 20 or 30 times) consecutively. We understand that this technique is not designed to, and does not, cause severe pain, even when used repeatedly as you have described. Rather, it is designed to wear down the detainee and to shock or surprise the detainee and alter his expectations about the treatment he believes he will receive. In particular,

¹¹ While detainees subject to dietary manipulation are obviously situated differently from individuals who voluntarily engage in commercial weight-loss programs, we note that widely available commercial weight-loss programs in the United States employ diets of 1000 kcal/day for sustained periods of weeks or longer without requiring medical supervision. While we do not equate commercial weight loss programs and this interrogation technique, the fact that these calorie levels are used in the weight-loss programs, in our view, is instructive in evaluating the medical safety of the interrogation technique.

we specifically understand that the repetitive use of the walling technique is intended to contribute to the shock and drama of the experience, to dispel a detainee's expectations that interrogators will not use increasing levels of force, and to wear down his resistance. It is not intended to—and based on experience you have informed us that it does not—inflict any injury or cause severe pain. Medical and psychological personnel are physically present or otherwise observing whenever this technique is applied (as they are with any interrogation technique involving physical contact with the detainee). * * *

6. *Facial slap or insult slap.* With this technique, the interrogator slaps the individual's face with fingers slightly spread. The hand makes contact with the area directly between the tip of the individual's chin and the bottom of the corresponding earlobe. The interrogator thus "invades" the individual's "personal space." We understand that the goal of the facial slap is not to inflict physical pain that is severe or lasting. Instead, the purpose of the facial slap is to induce shock, surprise, or humiliation. Medical and psychological personnel are physically present or otherwise observing whenever this technique is applied. * * *

8. *Cramped confinement.* This technique involves placing the individual in a confined space, the dimensions of which restrict the individual's movement. The confined space is usually dark. The duration of confinement varies based upon the size of the container. For the larger confined space, the individual can stand up or sit down; the smaller space is large enough for the subject to sit down. Confinement in the larger space may last no more than 8 hours at a time for no more than 18 hours a day; for the smaller space, confinement may last no more than two hours.¹³ * * *

10. *Stress positions.* There are three stress positions that may be used. You have informed us that these positions are not designed to produce the pain associated with contortions or twisting of the body. Rather, like wall standing, they are designed to produce the physical discomfort associated with temporary muscle fatigue. The three stress positions are (1) sitting on the floor with legs extended straight out in front and arms raised above the head, (2) kneeling on the floor while leaning back at a 45 degree angle, and (3) leaning against a wall generally about three feet away from the detainee's feet, with only the detainee's head touching the wall, while his wrists are handcuffed in front of him or behind his back, and while an interrogator stands next to him to prevent injury if he loses his balance. As with wall standing, we understand that these positions are used only to induce temporary muscle fatigue.

11. *Water dousing.* Cold water is poured on the detainee either from a container or from a hose without a nozzle. This technique is intended to weaken the detainee's resistance and persuade him to cooperate with interrogators. The water poured on his head must be potable, and the interrogators must ensure that water does not enter the detainee's nose, mouth, or eyes. A medical officer must observe and monitor the detainee throughout application of this technique, including for signs of hypothermia. Ambient temperatures must remain about 64°F. If the detainee is lying on the floor, his head is to remain vertical, and a poncho, mat, or other material must be placed between him and the floor to minimize the loss of body heat. At the conclusion of the water dousing session, the detainee must be moved to a heated room if necessary to permit his body temperature to return to normal in a safe manner. To ensure an adequate margin of

¹³ In *Interrogation Memorandum*, we also addressed the use of harmless insects placed in a confinement box and concluded that it did not violate the statute. We understand that—for reasons unrelated to any concern that it might violate the statute—the CIA never used that technique and has removed it from the list of authorized interrogation techniques; accordingly, we do not address it again here.

safety, the maximum period of time at which, based on extensive medical literature and experience, hypothermia could be expected to develop in healthy individuals who are submerged in water of the same temperature. * * *

The minimum permissible temperature of the water used in water dousing is 41°F, though you have informed us that in practice the water temperature is generally not below 50°F, since tap water rather than refrigerated water is generally used. We understand that a version of water dousing routinely used in SERE training is much more extreme in that it involved complete immersion of the individual in cold water (where water temperatures may be below 40°F) and is usually performed outdoors where ambient air temperatures may be as low as 10°F. Thus, the SERE training version involves a far greater impact on body temperature, SERE training also involves a situation where the water may enter the trainee's nose and mouth. * * *

12. *Sleep deprivation (more than 48 hours)*. This technique subjects a detainee to an extended period without sleep. You have informed us that the primary purpose of this technique is to weaken the subject and wear down his resistance.

The primary method of sleep deprivation involves the use of shackling to keep the detainee awake. In this method, the detainee is standing and is handcuffed, and the handcuffs are attached by a length of chain to the ceiling. The detainee's hands are shackled in front of his body, so that the detainee has approximately a two to three foot diameter of movement. The detainee's feet are shackled to a bolt in the floor. Due care is taken to ensure that the shackles are neither too loose nor too tight for physical safety. We understand from discussions with OMS that the shackling does not result in any significant physical pain for the subject. The detainee's hands are generally between the level of his heart and his chin. In some cases, the detainee's hands may be raised above the level of his head, but only for a period of up to two hours. All of the detainee's weight is borne by his legs and feet during standing sleep deprivation. You have informed us that the detainee is not allowed to hang from or support his body weight with the shackles. Rather, we understand that the shackles are only used as a passive means to keep the detainee standing and thus to prevent him from falling asleep; should the detainee begin to fall asleep, he will lose his balance and awaken, either because of the sensation of losing his balance or because of the restraining tension of the shackles. The use of this passive means for keeping the detainee awake avoids the need for using means that would require interaction with the detainee and might pose a danger of physical harm.

We understand from you that no detainee subjected to this technique by the CIA has suffered any harm or injury, either by falling down and forcing the handcuffs to bear his weight or in any other way. You have assured us that detainees are continuously monitored by closed-circuit television, so that if a detainee were unable to stand, he would immediately be removed from the standing position and would not be permitted to dangle by his wrists. We understand that standing sleep deprivation may cause edema, or swelling, in the lower extremities because it forces detainees to stand for an extended period of time, OMS has advised us that this condition is not painful, and that the condition disappears quickly once the detainee is permitted to lie down. * * *

We understand that a detainee undergoing sleep deprivation is generally fed by hand by CIA personnel so that he need not be unshackled; however, "if progress is made during interrogation, the interrogators may unshackle the detainee and let him feed himself as a positive incentive." *October 12* ■ *Letter* at 4. If the detainee is clothed, he wears an adult diaper under his pants. Detainees subject to sleep deprivation who are also subject to nudity as a separate

interrogation technique will at times be nude and wearing a diaper. If the detainee is wearing a diaper, it is checked regularly and changed as necessary. The use of the diaper is for sanitary and health purposes of the detainee; it is not used for the purpose of humiliating the detainee, and it is not considered to be an interrogation technique. The detainee's skin condition is monitored, and diapers are changed as needed so that the detainee does not remain in a soiled diaper. You have informed us that to date no detainee has experienced any skin problems resulting from use of diapers.

The maximum allowable duration for sleep deprivation authorized by the CIA is 180 hours, after which the detainee must be permitted to sleep without interruption for at least eight hours. You have informed us that to date, more than a dozen detainees have been subjected to sleep deprivation of more than 48 hours, and three detainees have been subjected to sleep deprivation of more than 96 hours; the longest period of time for which any detainee has been deprived of sleep by the CIA is 180 hours. * * *

13. *The "waterboard."* In this technique, the detainee is lying on a gurney that is inclined at an angle of 10 to 15 degrees to the horizontal, with the detainee on his back and his head toward the lower end of the gurney. A cloth is placed over the detainee's face, and cold water is poured on the cloth from a height of approximately 6 to 18 inches. The wet cloth creates a barrier through which it is difficult—or in some cases not possible—to breathe. A single "application" of water may not last for more than 40 seconds, with the duration of an "application" measured from the moment when water—of whatever quantity—is first poured on to the cloth until the moment the cloth is removed from the subject's face. *See* Letter from ██████████ Associate General Counsel, CIA, to Dan Levin, Acting Assistant Attorney General, OLC (August 19, 2004) at 1 ("*August 19* ██████████ *Letter*"). When the time limit is reached, the pouring of water is immediately discontinued and the cloth is removed. We understand that if the detainee makes an effort to defeat the technique (e.g., by twisting his head to the side and breathing out of the corner of his mouth), the interrogator may cup his hands around the detainee's nose and mouth to dam the runoff, in which case it would not be possible for the detainee to breathe during the application of the water. In addition, you have informed us that the technique may be applied in a manner to defeat efforts by the detainee to hold his breath by, for example, beginning an application of water as the detainee is exhaling. Either in the normal application, or where countermeasures are used, we understand that water may enter and may accumulate in the detainee's mouth and nasal cavity, preventing him from breathing. * * *

We understand that the effect of the waterboard is to induce a sensation of drowning. This sensation is based on a deeply rooted physiological response. Thus, the detainee experiences this sensation even if he is aware that he is not actually drowning. We are informed that based on extensive experience the process is not physically painful but that it usually does cause fear and panic. The waterboard has been used many thousands of times in SERE training provided to American military personnel, though in that context it is usually limited to one or two applications of no more than 40 seconds each.

You have explained that the waterboard technique is used only if: (1) the CIA has credible intelligence that a terrorist attack is imminent; (2) there are "substantial and credible indicators the subject has actionable intelligence that can prevent, disrupt or delay this attack"; and (3) other interrogation methods have failed or are unlikely to yield actionable intelligence in time to prevent the attack. You have also informed us that the waterboard may be approved for use with a given detainee only during, at most, one single 30-day period, and that during that

period, the waterboard technique may be used on no more than five days. We further understand that in any 24 hour period, interrogators may use no more than two “sessions” of the waterboard on a subject—with a “session” defined to mean the time that the detainee is strapped to the waterboard—and that no session may last more than two hours. Moreover, during any session, the number of individual applications of water lasting 10 seconds or longer may not exceed six. As noted above, the maximum length of any application of water is 40 seconds (you have informed us that this maximum has rarely been reached). Finally, the total cumulative time of all applications of whatever length in a 24 hour period may not exceed 12 minutes. * * *

Your medical personnel have explained that the use of the waterboard does pose a small risk of certain potentially significant medical problems and that certain measures are taken to avoid or address such problems. First, a detainee might vomit and then aspirate the emesis [vomit]. To reduce this risk, any detainee on whom this technique will be used is first placed on a liquid diet. Second, the detainee might aspirate some of the water, and the resulting water in the lungs might lead to pneumonia. To mitigate this risk, a potable saline solution is used in the procedure. Third, it is conceivable (though, we understand from OMS, highly unlikely) that a detainee could suffer spasms of the larynx that would prevent him from breathing even when the application of water is stopped and the detainee is returned to an upright position. In the event of such spasms, a qualified physician would immediately intervene to address the problem, and, if necessary, the intervening physician would perform a tracheotomy. * * *

As noted, all of the interrogation techniques described above are subject to numerous restrictions, many based on input from OMS. Our advice in this memorandum is based on our understanding that there will be careful adherence to all of these guidelines, restrictions, and safeguards, and that there will be ongoing monitoring and reporting by the team, including OMS medical and psychological personnel, as well as prompt intervention by a team member, as necessary, to prevent physical distress or mental harm so significant as possibly to amount to the “severe physical or mental pain or suffering” that is prohibited by sections 2340-2340A. Our advice is also based on our understanding that interrogators who will use these techniques are adequately trained to understand that the authorized use of the techniques is not designed or intended to cause severe physical or mental pain or suffering, and also to understand and respect the medical judgment of OMS and the important role that OMS personnel play in the program. * * *

III.

In the discussion that follows, we will address each of the specific interrogation techniques you have described. Subject to the understandings, limitations, and safeguards discussed herein, including ongoing medical and psychological monitoring and team intervention as necessary, we conclude that the authorized use of each of these techniques, considered individually, would not violate the prohibition that Congress has adopted in sections 2340-2340A. This conclusion is straightforward with respect to all but two of the techniques. Use of sleep deprivation as an enhanced technique and use of the waterboard, however, involve more substantial questions, with the waterboard presenting the most substantial question. Although we conclude that the use of these techniques—as we understand them and subject to the limitations you have described—would not violate the statute, the issues raised by these two techniques counsel great caution in their use, including both careful adherence to the limitations and restrictions you have described and also close and continuing medical and psychological

monitoring. * * *

1. *Dietary manipulation.* Based on experience, it is evident that this technique is not expected to cause any physical pain, let alone pain that is extreme in intensity. * * * Nor could this technique reasonably be thought to induce “severe physical suffering.” Although dietary manipulation may cause some degree of hunger, such an experience is far from extreme hunger (let alone starvation) and cannot be expected to amount to “severe physical suffering” under the statute. * * * This technique presents no issue of “severe mental pain or suffering” within the meaning of sections 2340-2340A, because the use of this technique would involve no qualifying predicate act. * * *

2. *Nudity.* * * * Even if this technique involves some physical discomfort, it cannot be said to cause “suffering”, let alone “severe physical pain or suffering,” and we therefore conclude that its authorized use by an adequately trained interrogator could not reasonably be considered specifically intended to do so. Although some detainees might be humiliated by this technique, especially given possible cultural sensitivities and the possibility of being seen by female officers, it cannot constitute “severe mental pain or suffering” under the statute because it does not involve any of the predicate acts specified by Congress. * * *

4. *Walling.* Although the walling technique involves the use of considerable force to push the detainee against the wall and may involve a large number of repetitions in certain cases, we understand that the false wall that is used is flexible and that this technique is not designed to, and does not, cause severe physical pain to the detainee. We understand that there may be some pain or irritation associated with the collar, which is used to help avoid injury such as whiplash to the detainee, but that any physical pain associated with the use of the collar would not approach the level of intensity needed to constitute severe physical pain. * * * We also do not believe that the use of this technique would involve a threat of infliction of severe physical pain or suffering or other predicate act for purposes of severe mental pain or suffering under the statute. Rather, this technique is designed to shock the detainee and disrupt his expectations that he will not be treated forcefully and to wear down his resistance to interrogation. Based on these understandings, we conclude that the authorized use of this technique by adequately trained interrogators could not reasonably be considered specifically intended to cause severe physical or mental pain or suffering in violation of sections 2340-2340A.³⁸ * * *

6. *Facial slap or insult slap.* Although this technique involves a degree of physical pain, the pain associated with a slap to the face, as you have described it to us, could not be expected to constitute severe physical pain. We understand that the purpose of this technique is to cause shock, surprise, or humiliation not to inflict physical pain that is severe or lasting; we assume it will be used accordingly. * * * Therefore, the authorized use of this technique by adequately trained interrogators could not reasonably be considered specifically intended to cause severe

³⁸ In *Interrogation Memorandum*, we did not describe the walling technique as involving the number of repetitions that we understand may be applied. Our advice with respect to walling in the present memorandum is specifically based on the understanding that the repetitive use of walling is intended only to increase the drama and shock of the technique, to wear down the detainee’s resistance, and to disrupt expectations that he will not be treated with force, and that such use is not intended to, and does not in fact, cause severe physical pain to the detainee. Moreover, our advice specifically assumes that the use of walling will be stopped if there is any indication that the use of the technique is or may be causing severe physical pain to a detainee.

physical or mental pain or suffering in violation of sections 2340-2340A.³⁹ * * *

8. *Cramped confinement.* This technique does not involve any significant physical pain or suffering. It also does not involve a predicate act for purposes of severe mental pain or suffering. Specifically, we do not believe that placing a detainee in a dark, cramped space for the limited period of time involved here could reasonably be considered a procedure calculated to disrupt profoundly the senses so as to cause prolonged mental harm. Accordingly, we conclude that it's authorized use by adequately trained interrogators could not reasonably be considered specifically intended to cause severe physical or mental pain or suffering in violation of sections 2340-2340A. * * *⁴⁰ * * *

11. *Water dousing.* OMS has advised that, based on the extensive experience in SERE training, the medical literature, and the experience with detainees to date, water dousing as authorized is not designed or expected to cause significant physical pain, and certainly not severe physical pain. Although we understand that prolonged *immersion* in very cold water may be physically painful, as noted above, this interrogation technique does not involve immersion and a substantial margin of safety is built into the time limitation on the use of the CIA's water dousing technique—use of the technique with water of a given temperature must be limited to no more than two-thirds of the time in which hypothermia could be expected to occur from *total immersion* in water of the same temperature. * * *

12. *Sleep deprivation.* We understand from OMS, and from our review of the literature on the physiology of sleep, that even very extended sleep deprivation does not cause physical pain, let alone severe physical pain.⁴⁴ * * * Although it is a more substantial question, particularly given the imprecision in the statutory standard and the lack of guidance from the courts, we also conclude that extended sleep deprivation, subject to the limitations and conditions described herein, would not be expected to cause “severe physical suffering.” * * * Nevertheless, because extended sleep deprivation could in some cases result in substantial physical distress, the safeguards adopted by the CIA, including ongoing medical monitoring and intervention by the team if needed, are important to ensure that the CIA's use of extended sleep deprivation will not run afoul of the statute. * * * Moreover, we emphasize our understanding that OMS will intervene to alter or stop the course of sleep deprivation for a detainee if OMS concludes in its medical judgment that the detainee is or may be experiencing extreme physical distress. The team, we understand, will intervene not only if the sleep deprivation itself may be having such effects, but also if the shackling or other conditions attendant to the technique appear to be

³⁹ Our advice about both the facial slap and the abdominal slap assumes that the interrogators will apply those techniques as designed and will not strike the detainee with excessive force or repetition in a manner that might result in severe physical pain.

⁴⁰ A stress position that involves such contortion or twisting, as well as one held for so long that it could not be aimed only at producing temporary muscle fatigue, might raise more substantial questions under the statute. Cf. *Army Field Manual 34-52: Intelligence Interrogation* at 1-8 (1992) (indicating that “[f]orcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time” may constitute “torture” within the meaning of the Third Geneva Convention’s requirement that “[n]o physical or mental torture, not any other form of coercion, may be inflicted on prisoners of war,” but not addressing 18 U.S.C. §§ 2340-2340A); United Nations General Assembly, *Report of the Special Rapporteur on Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment*, U.N. Doc. A/59/150 at 6 (Sept. 1, 2004) (suggesting that “holding detainees in painful and/or stressful positions” might in certain circumstances be characterized as torture).

⁴⁴ Although sleep deprivation is not itself physically painful, we understand that some studies have noted that extended total sleep deprivation may have the effect of reducing tolerance to some forms of pain in some subjects. * * *

causing severe physical suffering. * * *

Finally, we also conclude that extended sleep deprivation cannot be expected to cause “severe mental pain or suffering” as defined in sections 2340-2340A, and that its authorized use by adequately trained interrogators could not reasonably be considered specifically intended to do so. First, we do not believe that use of the sleep deprivation technique, subject to the conditions in place, would involve one of the predicate acts necessary for “severe mental pain or suffering” under the statute. * * * It may be questioned whether sleep deprivation could be characterized as a “procedure calculated to disrupt profoundly the senses or personality” within the meaning of sections 2340(2)(B), since we understand from OMS and from the scientific literature that extended sleep deprivation might induce hallucinations in some cases. * * * Even assuming, however, that the extended use of sleep deprivation may result in hallucinations that could fairly be characterized as a “profound” disruption of the senses, we do not believe it tenable to conclude that in such circumstances the use of sleep deprivation could be said to be “calculated” to cause such profound disruption to the senses, as required by the statute. The term “calculated” denotes something that is planned or thought out beforehand. * * * Here, it is evident that the potential for any hallucinations on the part of a detainee undergoing sleep deprivation is not something that would be a “calculated” result of the use of this technique, particularly given that the team would intervene immediately to stop the technique if there were signs the subject was experiencing hallucinations.

Second, even if we were to assume, out of an abundance of caution, that extended sleep deprivation could be said to be a “procedure calculated to disrupt profoundly the senses or personality” of the subject within the meaning of sections 2340(2)(B), we do not believe that this technique would be expected to—or that its authorized use by adequately trained interrogators could reasonably be considered specifically intended to—cause “*prolonged* mental harm” as required by the statute, because, as we understand it, any hallucinatory effects of sleep deprivation would dissipate rapidly. * * *

13. *Waterboard*. We previously concluded that the use of the waterboard did not constitute torture under sections 2340-2340A. We must reexamine the issue, however, because the technique, as it would be used, could involve more application in longer sessions (and possibly using different methods) than we earlier considered.⁵¹ * * *

However frightening the experience may be, OMS personnel have informed us that the waterboard technique is not physically painful. * * * As you have informed us, the CIA has previously used the waterboard repeatedly on two detainees, and, as far as can be determined, these detainees did not experience physical pain or, in the professional judgment of doctors, is there any medical reason to believe they would have done so. * * * We also conclude that the use of the waterboard, under the strict limits and conditions imposed, would not be expected to cause “severe physical suffering” under the statute. * * * To the extent that in some applications the use

⁵¹ The *IG report* noted that in some cases the waterboard was used with far greater frequency than initially indicated, *see IG Report* at 5, 44, 46, 103-04, and also that it was used in a different manner. *See id.* at 37 (“[T]he waterboard technique... was different from the technique described in the DoJ opinion and used in the SERE training. The difference was in the manner in which the detainee’s breathing was obstructed. At the SERE school and in the DoJ opinion, the subject’s airflow is disrupted by the firm application of a damp cloth over the air passages; the interrogator applies a small amount of water to the cloth in a controlled manner. By contrast, the Agency interrogator ... applied large volumes of water to a cloth that covered the detainee’s mouth and nose. One of the psychologists/interrogators acknowledged that the Agency’s use of the technique is different from that used in SERE training because it is ‘for real’ and is more poignant and convincing.”) * * *

of the waterboard could cause choking or similar physical—as opposed to mental—sensations, those physical sensations might well have an intensity approaching the degree contemplated by the statute. However, we understand that any such physical—as opposed to mental—sensations caused by the use of the waterboard end when the application ends. Given the limits imposed, and the fact that any physical distress (as opposed to possible mental suffering, which is discussed below) would occur only during the actual application of water, the physical distress caused by the waterboard would not be expected to have the duration required to amount to severe physical suffering. * * *

The most substantial question raised by the waterboard relates to the statutory definition of “severe mental pain or suffering.” The sensation of drowning that we understand accompanies the use of the waterboard arguably could qualify as a “threat of imminent death” within the meaning of section 2340(2)(C) and thus might constitute a predicate act for “severe mental pain or suffering” under the statute.⁵⁶ * * * Nevertheless, the statutory definition of “severe mental pain or suffering” also requires that the predicate act produce “prolonged mental harm.” As we understand from OMS personnel familiar with the history of the waterboard technique, as used both in SERE training (though in a substantially different manner) and in the previous CIA interrogations, there is no medical basis to believe that the technique would produce any mental effect beyond the distress that directly accompanies its use and the prospect that it will be used again. * * * But the physicians and psychologists at the CIA familiar with the facts have informed us that in the case of the two detainees who have been subjected to more extensive use of the waterboard technique, no evidence of prolonged mental harm has appeared in the period since the use of the waterboard on those detainees, a period which now spans at least 25 months for each of these detainees. * * * The technique may be designed to create fear at the time it is used on the detainee, so that the detainee will cooperate to avoid future sessions. Furthermore, we acknowledge that the term “prolonged” is imprecise. Nonetheless, without in any way minimalizing the distress caused by this technique, we believe that the panic brought on by the waterboard during the very limited time it is actually administered, combined with any residual fear that maybe experienced over a somewhat longer period, could not be said to amount to the “prolonged mental harm” that the statute covers. * * *

Assuming adherence to the strict limitations discussed herein, including the careful medical monitoring and available intervention by the team as a necessary, we conclude that although the question is substantial and difficult, the authorized use of the waterboard by adequately trained interrogators and other team members could not reasonably be considered specifically intended to cause severe physical or mental pain or suffering and thus would not violate sections 2340-2340A.

In sum, based on the information you have provided and the limitations, procedures, and safeguards that would be in place, we conclude that—although extended sleep deprivation and use of the waterboard present more substantial questions in certain respects under the statute and the use of the waterboard raises the most substantial issue—none of these specified techniques, considered individually, would violate the prohibition in sections 2340-2340A. The universal rejection of torture and the President’s unequivocal directive that the United States not engage in

⁵⁶ It is unclear whether a detainee being subjected to the waterboard in fact experiences it as a “threat of imminent death.” We understand that the CIA may inform a detainee on whom this technique is used that he would not be allowed to drown. Moreover, after multiple applications of the waterboard, it may become apparent to the detainee that, however frightening the experience may be, it will not result in death.

torture warrant great care in analyzing whether particular interrogation techniques are consistent with the requirements of sections 2340-2340A, and we have attempted to employ such care throughout our analysis. * * * As is apparent, our conclusion is based on the assumption that close observation, including medical and psychological monitoring of the detainees, will continue during the period when these techniques are used; that the personnel present are authorized to, and will, stop the use of a technique at any time if they believe it is being used improperly or threatens a detainee's safety or that a detainee may be at risk of suffering severe physical or mental pain or suffering that the medical and psychological personnel are continually assessing the available literature and ongoing experience with detainees, and that, as they have done to date, they will make adjustments to techniques to ensure that they do not cause severe physical or mental pain or suffering to the detainees, and that all interrogators and other team members understand the proper use of the techniques, that the techniques are not designed or intended to cause severe physical or mental pain or suffering, and that they must cooperate with OMS personnel in the exercise of their important duties.

Please let us know if we may be of further assistance.

NOTES & QUESTIONS

1. **Implementing The Memos.** These memoranda provide highly detailed, almost choreographed, instructions on how to utilize particular techniques without running afoul of prohibition against torture. How, as a practical matter, might such limitations have been arrived at? Are the opinions within the memoranda about whether particular techniques constitute torture within the competency of the lawyers providing the legal analysis? How are such instructions likely to be implemented in the context of a real-life interrogation? What would happen, for example, if a detainee refused to stand up and allow himself to be hung by his hands or wrists? What if a detainee continued to resist questioning after 180 hours of sleep deprivation?

2. **Mens Rea.** Is the United States' "understanding" of specific intent in the statute and in these memoranda consistent with your understanding of the concept as it applies to ordinary domestic law, the crime of torture under the Torture Convention, or the jurisprudence of the ICTY in *Kunarac*?

3. **Combined Techniques.** The excerpted memo considers each technique in turn and explicitly does not consider their concurrent or consecutive use. In 2005, Bradbury authored another memorandum ("the Combined Use Memo") to Rizzo on the application of § 2340 to the "Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees." Bradbury cautioned that "[t]he issue of the combined effects of interrogation techniques raises complex and difficult questions and comes to us in a less precisely defined form than the questions treated in our earlier opinions about individual techniques." Bradbury also noted that "it is possible that the application of certain techniques might render the detainee unusually susceptible to physical or mental pain or suffering," such that careful monitoring is necessary to prevent the infliction of "severe physical or mental pain or suffering." Nonetheless, he concluded that "the use of the techniques in combination as ... described ... would" not "be expected to inflict 'severe physical or mental pain or suffering' within the meaning of the statute," although he cautioned that extended sleep deprivation and the waterboard may present "more substantial risk of physical distress." Under Bradbury's reasoning, so long as the interrogator did not specifically intend to cause severe pain or suffering, would it constitute torture if he or she did in

fact do so with a combined set of techniques? The Combined Use Memo is available here: http://luxmedia.vo.llnwd.net/o10/clients/aclu/olc_05102005_bradbury_20pg.pdf. Research has demonstrated that “The cumulative impact of torture stressors is also determined by the interactions among them. The distressing or helplessness-inducing effect of a particular stressor might be compounded when combined with another stressor. * * * Thus, the relative impact of each stressor needs to be considered in the context of its interactions with other concurrent stressors. A measure of mere exposure to torture stressors fails to capture such important information.” Baçoğlu, *supra*, at 283.

4. **CIDT.** Also in 2005, Bradbury prepared a memo (the “CIDT Memo”) addressed to the question of whether the particular techniques violated Article 16 of the Torture Convention, which states:

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

As a preliminary argument, the memorandum noted that Article 16 applies only to “territory under [U.S.] jurisdiction,” which—in Bradbury’s estimation—limits its applicability to areas “over which the U.S. exercises at least *de facto* authority as the government.” The CIA apparently had assured Bradbury that no interrogations took place in such areas; thus, the memo concluded that Article 16 was inapplicable to current detainees. Even if Article 16 were applicable, Bradbury noted that the U.S. Senate’s advice and consent to ratification to the Torture Convention was subject to a reservation that the U.S. was “bound by the obligation under Article 16 * * * only insofar as the term ‘cruel, inhuman or degrading treatment or punishment’ means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution.” Bradbury identified prior Supreme Court precedent, *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) that dictated that even if the 5th Amendment to the Constitution applied to aliens abroad, the interrogation techniques would have to “shock the conscience” by involving the arbitrary “exercise of power without any reasonable justification in the service of a legitimate government objective” to run afoul of the Constitution. (Only the 5th Amendment governs pre-conviction federal conduct; the 8th amendment kicks in only upon conviction). He concluded that the techniques were not constitutionally arbitrary, because they “are employed by the CIA only as reasonably deemed necessary to protect against grave threats to U.S. interests . . . pursuant to careful screening procedures;” they have been “carefully designed to minimize the risk of suffering or injury and to avoid inflicting any serious or lasting physical or psychological harm;” and the CIA believes that the program has been “largely responsible for preventing a subsequent attack within the United States.” On this latter point, the memo detailed instances in which information obtained from “high value detainees” provided valuable insight into Al Qaeda’s inner workings, was used to uncover further attacks or identify other Al Qaeda operatives, and led to more than 6,000 intelligence reports. Bradbury noted that other situations in which similar governmental conduct might shock the conscience (such as within an “ordinary criminal investigation”) involve different governmental interests and implicate specific constitutional guarantees, such as the privilege against self-incrimination and due process trial protections. In this regard, Bradbury

cited *Rochin v. California*, 342 U.S. 165, 172 (1952), a case in which the Supreme Court reversed a conviction in a case in which the prosecution had introduced evidence obtained by the forcible pumping of the defendant's stomach—conduct that the Court considered “close to the rack and screw.” The memo also dismissed the relevance of U.S. military doctrine, which eschews such coercive techniques, to determine whether the conduct might “shock the conscience” on the reasoning that such doctrine is designed for traditional armed conflicts governed by the Geneva Conventions. With respect to the relevance of the State Department's annual country reports, which condemn similar conduct, Bradbury noted that the reports do not provide sufficient detail of the types of techniques used, the contexts in which they are employed, or the governmental purposes that they seek to advance. The CIDT Memo is available here: http://luxmedia.vo.llnwd.net/o10/clients/aclu/olc_05302005_bradbury.pdf.

5. Interrogation Theory. In the CIDT Memo, Bradbury also explicated a taxonomy of the various techniques. First, there are “conditioning techniques” (nudity, dietary manipulation, and sleep deprivation), which are used to “demonstrate to the [detainee] that he has no control over basic human needs” so that he will “value his personal welfare, comfort, and immediate needs more than the information he is protecting.” Second, there are “corrective techniques” (the insult slap, abdominal slap, facial hold, and attention grasp) that “condition a detainee to pay attention to the interrogator's questions and dislodge expectations that the detainee will not be touched.” Finally, there are “coercive techniques” (walling, water dousing, stress positions, wall standing, cramped confinement, and the waterboard) that “place the detainee in more physical and psychological stress.” In the Combined Use Memo, Bradbury described the prototypical phases of an interrogation:

- “Initial Conditions”: this involves a medical examination, sensory deprivation, transportation to the interrogation site, and being shaved and photographed, which confronts the detainee with a sudden change of environment to create uncertainty and dread as to what will happen next.
- “Transition to Interrogation”: this involves an initial interview in a relatively benign environment to ascertain the detainee's willingness to cooperate. This phase continues so long as the detainee is providing information on “actionable threats” and the location of “High-Value Targets.” If the detainee is not cooperative, then interrogators draft a detailed interrogation plan to the CIA for approval.
- “Interrogation”: at this point, the enhanced techniques are employed interchangeably, in succession, and simultaneously over a number of sessions for up to thirty days to frighten, wear down, and ultimately gain compliance from the detainee. As the detainee begins to cooperate, the interrogation techniques are decreased.

6. Waterboarding. As acknowledged by the memo excerpted above, one of the more controversial interrogation techniques used by the United States against suspected terrorists and other detainees is waterboarding. “Waterboarding” consists of using water to suffocate an individual, either by placing a wet towel or pouring water over a person's face to simulate a feeling of drowning. The declassified U.S. memoranda admitted that at least three individuals have been waterboarded by U.S. agents: Abu Zubaydah (a “senior lieutenant” in al Qaeda captured in March 2002 who apparently wrote al Qaeda's manuals on resistance techniques and ran training camps) and Khalid Sheikh Mohammed (considered a primary architect of the 9/11

attacks) were waterboarded 83 and 183 times, respectively, in some instances before the practice was officially sanctioned. The third is Abd al-Rahim al-Nashiri, alleged to be the mastermind of the bombing of the U.S.S. Cole in the Yemeni port of Aden in 2000 in which seventeen sailors were killed and thirty-nine others were injured. A footnote in the CIDT Memo indicates that the use of waterboarding may have been “unnecessary” on Zubaydah as the on-scene interrogation team judged him to be compliant, but “elements within CIA Headquarters still believed he was withholding information.” CIDT Memo, *supra*, at 31 n. 28. Reports are inconclusive as to whether actionable intelligence was revealed as a result of these techniques; some reports suggest that Zubaydah had revealed useful information prior to the harsh methods being used. Do you agree with the conclusion of the legal memoranda discussed above that waterboarding does not constitute torture or CIDT under the Torture Convention or U.S. law? If you think it does constitute torture, is it physical or mental torture? How would you characterize it under the Torture Convention and 18 U.S.C. § 2340?

7. **Waterboarding Through The Ages.** According to Professor Alfred McCoy, the first reference to waterboarding appears in a 1541 French judicial handbook called “*Torturae Gallicae Ordinariae*.” Alfred McCoy, *The U.S. has a History of Using Torture*, History News Network (Dec. 4, 2006), available at <http://hnn.us/articles/32497.html>. As the woodcut below indicates, waterboarding was a practice used in Europe at least as early as the 16th century:

VAN9,SIZE-25 PICAS,TYPE-PDSI

Japan used waterboarding and other similar techniques against U.S. soldiers during World War II. At both the Tokyo war crimes trials as well as in subsequent war crimes trials conducted by the U.S., Japanese citizens were prosecuted and convicted of torture for such actions committed against U.S. and other Allied personnel. For example, Yukio Asano was sentenced by a U.S. court to fifteen years hard labor for the war crime of subjecting a U.S. citizen to a form of waterboarding. *United States of America v. Hideji Nakamura, Yukio Asano, Seitara Hata, and Takeo Kita*, U.S. Military Commission, Yokohama, May 1–28, 1947, NARA Records, NND 735027 RG 153, Entry 143 Box 1025. Waterboarding was also practiced by the United States in Vietnam, as illustrated by this photograph from 1968 that was originally published in *The Washington Post*. Within one month of the appearance of the photograph, court martial proceedings were initiated against one of the soldiers.

VAN10,SIZE-22 PICAS,TYPE-PDSI

For more on this case and the history of the prosecution of waterboarding by U.S. courts, see Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 Columbia J. Trans'l L. 468 (2007).

8. **Conditions of Confinement.** Bradbury also wrote an August 31, 2006 letter to Rizzo evaluating conditions of confinement (specifically: the practice of blocking detainees’ vision during transport around the facility, the use of *incommunicado* and solitary confinement, the playing of white noise in walkways to prevent communication, the constant illumination in cells, the use of shackling, and the policy of forcibly shaving detainees upon arrival) in CIA detention centers against the proscriptions in common Article 3. With respect to the prohibition against “outrages upon personal dignity,” he opined as follows:

[S]ubparagraph (c)'s use of the phrase "outrages upon personal dignity" should be understood to mean a relatively significant form of ill-treatment. In this context, "outrage" appears to carry the meaning of "an act or condition that violated accepted standards." * * * [A]n act must violate some relatively clear and objective standard of behavior or acceptable treatment; it must be something that does not merely insult the dignity of the victim, but does so in an obvious or particularly significant manner. * * * Importantly, the text is clear that humiliating and degrading treatment" is merely a subset of "outrages upon personal dignity." This text stands in contrast to provisions in other treaties, such as Article 16 of the Convention Against Torture, in which prohibitions on "degrading" treatment stand alone. * * * The prohibition does not reach trivial slights or insults, but instead reaches only those that represent a more fundamental assault on the dignity of the victim. * * * Certain activities may well be intended solely to humiliate and to degrade in certain settings, but may be undertaken for a legitimate purpose in others. For example, a systematic practice of marching detainees blindfolded in public with the intent to humiliate may so evince a "hostility to human dignity" as to run afoul of common Article 3. In contrast, obstructing the vision of the detainee during transport, with no needless exposure to the public, for the purpose [of] maintaining the security of the facility would not trigger the same concerns.

Letter from Bradbury to Rizzo (Aug. 31, 2006). The same conditions were evaluated under the Detainee Treatment Act in a subsequent memorandum. See Dept. of Justice, Memorandum for John H. Rizzo, Acting General Counsel, Central Intelligence Agency, *Application of the Detainee Treatment Act to Conditions of Confinement at Central Intelligence Agency Detention Facilities* (Aug. 31, 2006), available at <http://www.aclu.org/torturefoia/released/082409/olc/08312006%20Memorandum%20to%20Rizzo.pdf>. Compare this interpretation of what constitutes outrages upon personal dignity with the ICYT's interpretation of the crime in *Kunarac*.

9. Abu Zubaydah Interrogation. Prior to the issuance of the excerpted memorandum and contemporaneous memoranda discussed above, the Department of Justice was asked in 2002 to evaluate the legality of the interrogation plan for Abu Zubaydah. This memorandum (the "Zubaydah Memo") was also authored by Judge Bybee. Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, *Interrogation of al Qaeda Operative* (Aug. 1, 2002), available at http://luxmedia.vo.llnwd.net/o10/clients/aclu/olc_08012002_bybee.pdf. One of the proposed techniques was to place Zubaydah in a cramped confinement box with an insect. Zubaydah, whom the U.S. government had determined had a fear of insects, would have been told that the insect was a stinging insect, but the insect would actually be a harmless one, such as a caterpillar. In opining on the legality of the proposal, Bybee noted that this technique might implicate § 2340's prohibition against "the intentional infliction or threatened infliction of severe physical pain or suffering" or "the threat of imminent death." Accordingly, he advised:

If you [tell him it is a stinging insect], to ensure that you are outside the predicate act requirement, you must inform him that the insects will not have a sting that would produce death or severe pain. If, however, you were to place the insect in the box without informing him that you are doing so, then, in order not to commit a predicate act, you

should not affirmatively lead him to believe that any insect is present which has a sting that could produce severe pain or suffering or even cause his death. [REDACTED] [S]o long as you take either of the approaches we have described, the insect's placement in the box would not constitute a threat of severe physical pain or suffering to a reasonable person in his position. An individual placed in a box, even an individual with a fear of insects, would not reasonably feel threatened with severe physical pain or suffering if a caterpillar was placed in the box.

With respect to the waterboard, the memo concluded that “the use of the waterboard constitutes a threat of imminent death.” The memo noted that in order to be actionable under §2340, any such technique must cause “prolonged mental harm” and that the CIA did not “anticipate that any prolonged mental harm would result from the use of the waterboard,” because “relief is almost immediate when the cloth is removed from the nose and mouth.” The Obama administration withdrew four of the memos discussed above (the Zubaydah, §2340, Combined Use, and Article 16). See David Barron, Acting Assistant Attorney General, *Withdrawal of Office of Legal Counsel CIA Interrogation Opinions* (April 15, 2009), available at <http://www.usdoj.gov/olc/2009/withdrawalofficelegalcounsel.pdf>. The Conditions of Confinement Memo appears to still be in place.

10. Uniform Code of Military Justice. U.S. military personnel are subject to the Uniform Code of Military Justice, which contains a number of potentially applicable punitive articles, although no provision on torture *per se*. Relevant charges include: Article 93 (cruelty and maltreatment), Article 118 (murder), Article 119 (manslaughter), Article 120 (rape and carnal knowledge), Article 124 (maiming), Article 125 (sodomy), Article 128 (assault), and Article 133 (conduct unbecoming an officer). The Code recognizes the inchoate offenses of attempt (Article 80), conspiracy (Article 81), accessory after the fact (Article 78), and solicitation (Article 82). The assault formulation is particularly elastic; a simple assault can be consummated by “an unlawful demonstration of violence ... which creates in the mind of another a reasonable apprehension of receiving immediate bodily harm.” The specific intent to actually inflict bodily harm is not required under this provision. To the extent that there is no particular UCMJ provision directly on point, members of the armed forces can also be prosecuted for non-capital violations of Title 18 (including torture and war crimes) pursuant to Article 134, which allows for federal crimes to be charged by courts martial. A memorandum drafted by Staff Judge Advocate Diane Beaver acknowledged that many interrogation techniques would potentially fall afoul of these provisions (indeed, she reasoned that *any* physical contact with detainees might constitute an assault). Nonetheless, she concluded in her memo that the methods “do not violate applicable federal law,” although she suggests that military members using these tactics be granted “permission or immunity in advance.” Dept. of Defense, Counter-Resistance Strategies (Oct. 11, 2002), available at <http://f11.findlaw.com/news.findlaw.com/hdocs/docs/dod/dunlavey101102mem.pdf>. The Beaver memo was a response to a request by interrogators to escalate the techniques used on Mohammed Al-Kahtani (or Qahtani), the putative 20th hijacker, who had not yet been broken.

11. The Committee Against Torture and the United States. Parties to the Torture Convention must periodically submit reports to the Committee Against Torture, a body of experts charged with enforcing the treaty. The Committee considered the United States’ second periodic report in 2006. Acknowledging the allegations of torture against detainees, the United

States' report emphasized that the Bush Administration prohibits torture and prosecutes substantiated allegations. The report included an Annex of relevant proceedings. In response, the Committee in its concluding observations welcomed the United States' comprehensive submission, but raised the following concerns and recommendations, among others:

- The U.S. should enact a domestic torture statute rather than rely on ordinary crimes of murder and assault to prosecute domestic torture.
- U.S. law should reflect the fact that acts of psychological manipulation need not cause "prolonged mental harm" to constitute torture.
- The U.S. should ensure that the Convention applies at all times, even in armed conflict, in any area under the party's jurisdiction, defined as areas under the state's *de facto* effective control.
- The U.S. should register all persons it detains anywhere in the world as a safeguard against acts of torture and ensure that no one is detained in any secret detention facility. No secret detention facilities should be utilized.
- The U.S. should apply the *non-refoulement* guarantee to all detainees in its custody, even those detained outside U.S. territory, and refrain from relying on "diplomatic assurances" when it sends detainees to states that systematically violate the Convention.
- The U.S. should close the Guantánamo detention facility and charge or return individuals to a place where they do not face a risk of torture.
- Interrogation techniques such as water-boarding or the use of dogs should be ceased.
- Victims of torture should have the opportunity to obtain redress.
- All allegations of torture or CIDT should be investigated.

U.N. Committee Against Torture, Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006), available at <http://www2.ohchr.org/english/bodies/cat/cats36.htm>.

12. Extraterritorial Application. A recurring issue in human rights law concerns the question of the degree to which treaty obligations of states apply in extraterritorial contexts. The Committee Against Torture in a "General Comment" on the Torture Convention emphasized that the Convention applies to "any territory under [a state's] jurisdiction," which protects any person "subject to the *de jure* or *de facto* control of a State party," including when persons are in the hands of individuals acting at the behest of a State party. See Committee Against Torture, General Comment No. 2: Implementation of article 2 by States parties, U.N. Doc., No. CAT/C/GC/2, para. 7 (Jan. 24, 2008), available at <http://daccessdds.un.org/doc/UNDOC/GEN/G08/402/62/PDF/G0840262.pdf?OpenElement>.

13. SERE Training. Under the Survival, Evasion, Resistance, Escape (SERE) program, U.S. military personnel have voluntarily participated in survival training that includes the use of tactics to resist physical and psychological interrogations if captured. The goal of the program is to prepare soldiers for the types of abuse they might suffer if captured by hostile forces. The U.S. Air Force established the program at the end of the Korean War based upon the experiences of U.S. and allied prisoners of war. It was expanded after the Vietnam War to cover other branches of the military. In an article on the program, *The New Yorker* magazine reported that

psychologists who helped develop and implement the SERE program had been advising detention and interrogation personnel at Guantánamo Bay and elsewhere on how the results of SERE might be “re-engineered” for the purpose of developing effective interrogation and counter-resistance programs, especially against individuals who may have received resistance training themselves. In addition, Behavioral Science Consultation Teams (“biscuits” in military jargon) from the military intelligence units were apparently also employed to develop interrogation strategies, some individually tailored to particular detainees. See Jane Mayer, *The Experiment*, *The New Yorker* (July 11, 2005), available at http://www.newyorker.com/archive/2005/07/11/050711fa_fact4. For what purpose is the SERE program invoked in the excerpted memorandum? How relevant to the question of the legality of the techniques discussed is the fact that members of the U.S. armed forces were subjected to waterboarding and other authorized interrogation techniques in connection with the SERE program?

14. Doctors and Psychologists. The memo above references the CIA’s Office of Medical Services (OMS), a division of the Agency tasked in part to ensure the physical and mental wellbeing of CIA employees and their families as well as to produce psychiatric and medical intelligence. Other memoranda, a report from the International Committee of the Red Cross (ICRC), and the testimony of detainees reveals that medical personnel, particularly psychologists, were aware of, designed, supervised, and were in some cases involved in, the abuse of detainees. In some cases, it appears medical personnel collected aggregate data on detainees’ reactions to particular techniques, suggesting some level of medical experimentation. The World Medical Association, a membership organization representing physicians around the world including those in the United States, issued in 1975 the Declaration of Tokyo—Guidelines for Physicians Concerning Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment (available at <http://www.wma.net/e/policy/c18.htm>). The Declaration prohibits medical personnel from participating in any way in torture or other forms of abuse, even as monitors. In particular, the Declaration states that a physician “shall not use nor allow to be used, as far as he or she can, medical knowledge or skills, or health information specific to individuals, to facilitate or otherwise aid any interrogation, legal or illegal, of those individuals.” Both the American Medical Association and the American Psychiatric Association have ethics statements prohibiting the involvement of healthcare personnel in interrogations and torture. In 2006, the Pentagon released new guidelines (“Medical Program Support for Detainee Operations,” Instruction No. 2310.08E) prohibiting doctors charged with the medical care of detainees from participating in interrogations, but allowing the participation of non-treating health care personnel (i.e., individuals not involved in giving care) such as behavioral science consultants. This position is shared by the American Psychological Association, many of whose members view psychology as not only a mental health profession, but also a science of human behavior. For more on evolving policies around the use of psychologists in detention and interrogation, see Carroll H. Greene III & L. Morgan Banks, *Ethical Guideline Evolution In Psychological Support To Interrogation Operations*, 61 *Consulting Psychology Journal: Practice and Research* 25–32 (2009). For a discussion of doctors and torture, see Elena Nightingale, *The Breaking of Bodies and Minds* (1985); Steven Miles, *Oath Betrayed: Torture, Medical Complicity, and the War on Terror* (2006). In addition to potential violations of ethical guidelines, may criminal sanctions attach where doctors or others from the healing professions participate in abusive interrogations?

15. Advice-of-Counsel & Reliance Defenses. Given the existence of the “Torture Memos,” might a CIA agent subject to prosecution raise either the defense of advice of counsel or reasonable reliance on official interpretation? The advice-of-counsel doctrine works to establish a defendant’s good faith and can negate the *scienter* requirement of a particular crime or cause of action (i.e., the intent to engage in, or the knowledge of, wrongdoing). The advice-of-counsel doctrine is generally employed with respect to offenses defined by an intent to defraud, willfulness, or bad faith. The defendant who relies upon the advice of counsel may thus be able to prove that he had a good faith belief that his actions were legal prior to his actions. Because the doctrine does not require that the defendant admit any aspect of the accuser’s case, the doctrine is not technically an affirmative defense that results in exoneration notwithstanding that all elements of the claim or crime have been established. Likewise, the reliance defense applies more often in situations involving regulatory crimes rather than intrinsically wrong (*malum in se*) acts. The U.S. Model Penal Code at §2.04 treats these defenses under the heading “Ignorance or Mistake:”

(1) Ignorance or mistake as to a matter of fact or law is a defense if:

(a) the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense * * *

(3) A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when: ...

(b) [the defendant] acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in

- (i) a statute or other enactment;
- (ii) a judicial decision, opinion or judgment;
- (iii) an administrative order or grant of permission; or
- (iv) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense.

Both defenses rely on basic moral principles of, and utilitarian rationales for, criminal responsibility and punishment that consider it odious or useless to punish someone who manifested a clear intent not to break the law formed in reliance on legal or official advice. If you represented a hypothetical CIA interrogator who employed enhanced interrogation techniques, how would you argue that these defenses were applicable? Are *scienter* or willfulness elements of torture as it is defined in the Torture Convention or the Torture Memos? Is the degree of pain caused by a particular technique something on which a lawyer can provide an expert opinion? Would it be reasonable to rely upon one of the torture memos in determining whether particular interrogation techniques were lawful?

16. Torture Warrants. Alan Dershowitz, a law professor at Harvard Law School, became one of the most public proponents of establishing a system that, in some circumstances, would allow torture notwithstanding the United States’ treaty obligations. In these debates, Dershowitz admitted that he opposed torture "as a normative matter," but he accepted that it was being widely used by U.S. officials and agents. Rather than argue for increased enforcement of

the prohibition against torture, Dershowitz argued that the practice should be made public, and thus subject to more transparent forms of accountability by requiring that an official secure a judicial warrant authorizing torture. See Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (2002). For a thoughtful collection of essays on the morality, legality, and history of torture, including an essay by Dershowitz and a critical response by Elaine Scarry, see Sanford Levinson, ed., *Torture: A Collection* (2004).

17. **Extraordinary Rendition.** The United States and other states have engaged in a secret program known as "extraordinary rendition," whereby an individual suspected of terrorism is transferred from one state to another for purposes of interrogation, detention, and possible prosecution. Critics of the program contend that its purpose is to transfer suspects to places where torture is regularly practiced, and thus is—in effect—a program for “outsourcing torture.” For one of the early stories revealing the U.S. extraordinary rendition program, see Jane Mayer, *Annals of Justice: Outsourcing Torture*, *The New Yorker* (Feb. 14, 2005); see also Meg Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 *George Wash. L. Rev.* 1333 (2007). One of the stories highlighted in the Mayer article is that of Maher Arar, a Canadian citizen who, while traveling through the U.S. on his way home to Canada, was detained by U.S. immigration officials and questioned about possible links to terrorism for thirteen days. Arar was born in Syria, but moved to Canada with his family when he was 17. After his interrogation, he was flown by plain-clothed officials to Syria, where he was beaten and tortured for one year. A year later, the Syrian government released him, claiming they were unable to find any connection of Arar to terrorism. The Canadian government established a commission of inquiry into its own complicity in Arar's detention and rendition to Syria. The commission concluded that there was no credible evidence linking Arar to any form of terrorism, and that while Canadian officials provided information to the U.S. government concerning Arar, they were unable to conclude that the Canadian government participated in or supported Arar's detention by U.S. officials and subsequent rendition to Syria. The full report of the Canadian commission of inquiry can be found here, http://www.ararcommission.ca/eng/AR_English.pdf. For a discussion of the United States' non-refoulement obligations, see Congressional Research Service, *The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens* (Jan. 21, 2009), available at <http://www.fas.org/sgp/crs/intel/RL32276.pdf>. The European Court of Human Rights has affirmed that individuals cannot be returned to a place where they may be tortured, even if the receiving government has given assurances that the person will not be mistreated. *Chahal v. United Kingdom*, 1996-V Eur. Ct. H.R. 1831, para. 105, available at <http://www.echr.coe.int/echr/>.

18. **“Does Torture Work”?** Many consequentialist arguments about torture (which are premised on the belief that torture is justified in extreme situations in order to save the lives of others) hinge on the assumption that torture “works” to force subjects to divulge true and actionable information. Indeed, according to the “one percent doctrine” attributed to former Vice President Dick Cheney, so long as there is a one percent chance that torture will produce useful intelligence, torture should be employed. “Proof” however is often lacking or deemed to be a state secret, unable to be divulged. On the other hand, anti-torture absolutists insist—with equally little empirical data for support—that torture does not work and is counter-productive. Given the absolute prohibition against torture under international law, is any debate about its efficacy valid? How would one judge the veracity of statements made by subjects under torture? Even if some

useful information was revealed, how would one judge whether the use of torture was “worth” the costs associated with such a practice? For a discussion that torture has not worked in any historical context in which it has been systematically employed, see Lisa Hajjar, *Does Torture Work? A Sociological Assessment of the Practice in Historical and Global Perspective*, 5 Ann. Rev. of Law and Soc. Science 11.1 (2009).

PROBLEMS

1. Ticking Bomb. Consider the following scenario. The police have information suggesting that a bomb has been planted in a crowded civilian location and will be detonated soon. They have arrested an individual whom they believe was involved in the planting of the bomb, knows its location, and knows the means by which it will be detonated. Two interrogators repeatedly tortured the individual in order to determine the location of the bomb. Later, the two interrogators are prosecuted for torture under a statute similar in formulation to §2340. Under what circumstances should they be convicted? What test would you devise to allow the defense of necessity in such a situation? Does it matter if, as a result of the torture, the individual discloses the location of the bomb and it is defused? What if the suspect discloses the location, but there is not enough time to stop its detonation? What if the individual does not disclose the location of the bomb, and the bomb is detonated? What if it turns out there was no bomb? Is the ticking time bomb scenario a useful one to utilize to discuss whether or not torture or harsh interrogation techniques should be legal or authorized? Is it useful to considering whether a defense of necessity should be recognized for interrogations in the context of threats to national security? Is an individual likely to divulge the location of a hidden bomb if it is likely to be detonated in the immediate future, which presumably would end the torture? How does the scenario impact rhetorically the way in which the legality and efficacy of torture is debated?

2. Forcefeeding. Starting in 2002, detainees on Guantánamo began staging non-violent hunger strikes to protest their detention and conditions of confinement. The strikes have occurred, off and on, since then, occasionally involving up to 200 men participating in shifts. At least 30 men detained on Guantánamo have been force-fed in response to these hunger-strikes. Force-feeding involves strapping the detainee in a six-point restraint chair (marketed by the vender as “a padded cell on wheels”) or on a bed with Velcro straps (at times after a forcible extraction from their cells). A tube, alleged to be as thick as a finger, is inserted into the nostril of the detainee, and upwards of 1.5 liters of liquid food, such as Ensure Plus, is administered by either medics or, it is alleged, untrained guards or riot squad personnel. The individuals remain strapped down for up to an hour after the feeding in order to prevent them from regurgitating the foodstuff. Reports from Guantánamo indicated that guards would at times leave the feeding tube in place between feedings in order to avoid having to re-insert them each time. It has also been alleged that the tubes are not sterilized between detainees and that the liquid food was laced with laxatives.

Force-feeding can cause complications such as infections, dizziness, “dumping syndrome” (an expulsion reaction caused by over-feeding), inflammation, internal bleeding, bloating, vomiting blood, and gastrointestinal disorders (such as nausea and diarrhea). Muhammad Ahmad Abdallah Salih (31), who may have been tubefed more than any other detainee, apparently committed suicide during a hunger strike in which he was forcefed, although how he accomplished this has not been revealed. Another detainee, Farhan Abdul Latif,

attempted to cover himself with his own excrement in order to avoid being force fed, but the tube was allegedly inserted through the excrement covering his nostrils. One detainee explained his resort to a hunger strike as follows:

This hunger strike is the only way I have to speak out. I do not strike because I enjoy hunger, thirst, fever, fatigue, pain, lightheadedness, or my body consuming itself. I do it to protest the injustice all the prisoners endure—the attacks on my religion, the disrespect shown to the Qur'an, the denial of medical treatment, the torture, and the cruelty of the interrogators. My strike is a form of peaceful protest against this injustice.

This quote and the above accounts are drawn from a formal communication filed by several human rights groups against U.S. Army General Bantz John Craddock, then U.S. Southern Command Commander in charge of Guantánamo and former NATO Supreme Allied Commander Europe (SACEUR). The communication was filed with the United Nations Special Rapporteurs on Torture, Health, and the Promotion of Human Rights while Countering Terrorism. See Center for Constitutional Rights et al., Formal Communication for Consideration and Action (April 2, 2009), available at <http://ccrjustice.org/files/Formal%20Communication%20Craddock%20April%202,%202009.pdf>

Does the practice of forcefeeding hunger strikers constitute torture or cruel, inhuman or degrading treatment under U.S. or international law? Is it a violation of common Article 3, which requires detaining authorities to treat prisoners humanely and to refrain from acts of cruel treatment and from degrading or humiliating treatment? Are there parallels between force-feeding and the dietary manipulation authorized by the excerpted memorandum? Is it relevant that standing guidelines used by the U.S. Bureau of Prisons and the Immigration and Customs Enforcement's Office of Detention and Removal allow prison/ICE officials to force prisoners to eat when the individual's life or health is at risk? *See, e.g.*, 28 C.F.R. § 549.65 (Refusal to Accept Treatment). By way of comparison, the World Medical Association's Guidelines for Physicians Concerning Torture and other Cruel, Inhuman or Degrading Treatment of Punishment in Relation to Detention and Imprisonment ("Declaration of Tokyo") states:

Where a prisoner refuses nourishment and is considered by the physician as capable of forming an unimpaired and rational judgment concerning the consequences of such a voluntary refusal of nourishment, he or she shall not be fed artificially. The decision as to the capacity of the prisoner to form such a judgment should be confirmed by at least one other independent physician. The consequences of the refusal of nourishment shall be explained by the physician to the prisoner.

Should U.S. detention officers allow hunger strikers to die as the British did with Irish Republican Army captives in the 1980s?

3. Prosecute or Praise? Imagine a multi-ethnic country in Southeast Asia where the sense of peace and security is increasingly shattered by a separatist movement in the north of the country, predominantly populated by an ethnic minority. Historically, members of the movement employed the political process, a savvy media campaign, and non-violent direct action tactics to achieve change. In recent years, however, a wing of the movement has grown increasingly frustrated with the slow pace of change and has begun resorting to terrorist methods to bring

attention to its cause. These methods have primarily involved delivering, on a weekly basis, incendiary devices disguised as harmless letters and packages to prominent members of the ethnic majority group. At the beginning of each week, the entire country is on edge awaiting the next attack.

Following up on a tip, the country's criminal investigative agency apprehended an individual who turned out to be a relatively senior operative of the movement. In her possession was a laptop with a number of coded files that seemed to detail past and potentially future attacks. After thoroughly searching the remote safe house where she and a confederate were captured, the investigative agents staged a firefight that destroyed the building. The central government then announced that the operative had been killed in the firefight and that no important leads had been discovered.

Meanwhile, the operative's captors began secretly interrogating her in an effort to fully break the code and identify the victims and modalities of future attacks. After she refused to cooperate, the agents escalated the harshness of tactics used on her. In addition to being kept for long periods of time in various stress positions, the operative was deprived of sleep, kept in an excessively cold and then hot cell, interrogated and photographed naked by male interrogators, and denied immediate medical attention for wounds received upon capture (although she was eventually treated). She was repeatedly subjected to strip and bodily cavity searches, ostensibly because she might have come into possession of prohibited items. The confederate captured with her was subjected to similar conduct. Individuals in lab coats observed these sessions, occasionally recording the captives' vital signs.

After the rebels staged an attack on the country's Constitutional Court, the Prime Minister convened a secret meeting of senior national security, intelligence, and foreign ministry cabinet members and a few key deputies to address the growing terrorism threat in the country. In an effort to more effectively halt and prevent the attacks, the Prime Minister asked the team to design a program to capture and interrogate members of the separatist group who were prone to violence. He insisted that the program be consistent with the country's international law obligations and domestic law, which includes a statute penalizing torture and cruel, inhuman and degrading treatment that copies verbatim the formulation of those offenses contained within the Torture Convention. The group—dubbed the Senior National Security Advisors (SNSA)—eventually approved a classified interrogation program for captured terrorists that authorized the techniques already used on the senior operative and her confederate in addition to other enhanced tactics, such as prolonged solitary confinement, the manipulation of ethnic loyalties or cultural beliefs, the exploitation of phobias, and mock executions. In support of the program, several law professors who had short term appointments with the Ministry of Justice presented research on the legality of the proposed tactics. In addition, several physicians and psychologists were contracted from the private sector to provide advice on the design and implementation of the program. Members of the Ministry of Defense reportedly raised strong objections to some of the more harsh tactics, but the group ultimately unanimously signed off on the program. The Prime Minister did not attend the meetings, but he was briefed on their contours and results in a series of classified memoranda. Senior interrogators were instructed on elements of the program in confidential training sessions.

After an extensive interrogation by intelligence officials that followed 180 hours of sleep deprivation, the confederate eventually revealed the key to break the code on the seized laptop. Two subsequent attacks were successfully thwarted, and additional members of the separatist

movement were captured and detained. They too were interrogated by intelligence agents in accordance with the program devised by the Senior National Security Advisors. In most cases, interrogators followed the instructions they had received in their training. On several occasions, however, when it was suspected that a subject was not being cooperative, interrogators exceeded the limits imposed on them by the program with respect to certain tactics.

The next national election resulted in the ouster of several members of parliament, including the Prime Minister. The reconfigured parliament passed new legislation that amended the torture/CIDT statute to prohibit a number of enumerated interrogation tactics, including sleep deprivation for more than 48 hours, mock executions, and the use of any nudity, dogs, or prolonged stress positions (exceeding 5 hours) in interrogations. Nothing in the legislative record reveals whether the legislation is to be applied retroactively.

You are a recently appointed senior official in the Ministry of Justice tasked with determining whether to bring charges against anyone involved in the design and implementation of the SNSA interrogation policy. How would you approach your mandate? Who—if anyone—would you target for investigation and possible prosecution? Would you prosecute individuals who stayed within the “four corners” of the original program or only those who exceeded the limits placed on them in training? Assuming you decide to go forward with prosecutions, what theories of liability would you employ to reach the different participants in the program?