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Affirming the Ban on Coercive Interrogation

Mary Ellen O'Connell*

The infamous legal memoranda prepared by Bush Administration lawyers following September 11 go to great lengths to free American officials from any possible legal restraint in the Administration's so-called "global war on terror."¹ With regard to interrogating persons detained pursuant to the global war, the memoranda develop extraordinary definitions for terms such as "torture" and "transfer." In the contorted world of the memos, inflicting pain is not *torture* unless the pain is as great as that

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¹ Most of the documents referred to here as the "torture memos" have been gathered in *THE TORTURE PAPERS, THE ROAD TO ABU GHRAIB* (Karen J. Greenberg & Joshua L. Dratel eds., 2005)[hereinafter *THE TORTURE PAPERS*.] The torture memos mostly consist of legal analysis by lawyers in the Bush White House, Justice Department and Department of Defense. They generally argue that the 1949 Geneva Conventions and other international human rights and humanitarian law do not apply to persons in U.S. detention pursuant to the global war on terror. They also present arguments that prosecutions will not result even if interrogators use techniques involving torture, coercion, inhumanity, and abuse. See, in particular, Alberto Gonzales, Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban, Jan. 25, 2002, *id.*, at 118; Jay S. Bybee, Standards of Conduct for Interrogation under 18 U.S.C. §§2340-2340A, *id.*, at 172; John Yoo, Letter regarding the "views of our Office concerning the legality, under international law, of interrogation methods to be used on captured al Qaeda operatives," *id.*, at 218; Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Consideration, *id.*, at 286. (Also known as the "Haynes Memorandum.") See also, Michiko Kakutani, *Following A Paper Trail to the Roots of Torture* (Review of *THE TORTURE PAPERS*), N.Y. TIMES, Feb. 8, 2005, at B1.

associated with organ failure and death.² In the memos, moving someone from one country to another a country, where the detainee is likely to be subjected to torture, is not *transfer* if the move is temporary.³ The memos also assert that even though torture is absolutely prohibited, the president under his “complete discretion in the exercise of his Commander-in-chief authority” may authorize anything.⁴

Much has been and will be written about the expedient and erroneous legal analysis of the memos.⁵ One issue at risk of being overlooked, however, because the memos emphasize torture, is that the United States must respect limits far short of torture in the conduct of interrogations. The United States may not use any form of coercion

² “Torture” according to the memos is an act that inflicts extraordinary pain amounting to that experienced with organ failure or death, Bybee, *THE TORTURE PAPERS*, *supra* note 1, at 176 or mental suffering that lasts “months or years.” *Id.* at 177. The memos reject the inclusion of such well-known tortures as burning with a cigarette, electric shock, having digits cut off, fingernails pulled out, or needles shoved under fingernails. The memos do not explain how anyone knows what the pain associated with death feels like.

³ Article 49 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 prohibits individual or mass forcible transfers of persons out of an occupied territory to a third country. One of the torture memos constructs the argument that “illegal aliens” are not covered by the prohibition, nor are “temporary” transfers. See Jack Goldsmith, Permissibility of Relocating Certain “Protected Persons” from Occupied Iraq, Mar. 19, 2004, *THE TORTURE PAPERS*, at 367.

⁴ Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Consideration, *THE TORTURE PAPERS*, at 302-07.

⁵ Dean Harold Koh during confirmation hearings for Judge Alberto Gonzales, made this assessment of one early memo that was largely copied in later memos: “in my professional opinion as a law professor and a law dean, the Bybee memorandum is perhaps the most clearly legally erroneous opinion I have ever read.” U.S. Senate Judiciary Committee Holds a Hearing on the Nomination of Alberto Gonzales to be U.S. Attorney General, Jan. 6, 2005, Cong. Q. (FDCH Political Transcripts.) The Bybee Memo is found in *THE TORTURE PAPERS*, *supra* note, at 172. For a later memo that copies much of the Bybee Memo, see the Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Consideration, *THE TORTURE PAPERS*, at 286. *Accord* Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 *COLUM. J. TRANS’L. L.* 811 (2005).

See also the views of two eminent professors of international law regarding the memo writers’ breach of professional ethics and possible implication in the law violations resulting from their erroneous advice. Richard B. Bilder & Detlev F. Vagts, *Speaking Law to Power: Lawyers and Torture*, 98 *AM. J. INT’L L.* 689 (2004) and the statement by the former Legal Adviser to the State Department of the erroneous positions taken by lawyers at Justice, the White House and the Pentagon regarding detention law. Jess Bravin, *U.S. Mishandled Prisoner Policy, Ex-Adviser Says*, *WALL. ST. J.*, April 5, 2005, at B9.

against persons detained in armed conflict, nor may it engage in cruel, inhuman and degrading treatment at any time. The great effort of the memo writers to restrict torture to the most extreme conduct imaginable obscures the fact that the United States has wider obligations. Avoiding torture is not enough. Interrogators must also respect the broader restrictions on coercive, cruel, inhuman, and degrading treatment.⁶

The United States military and U.S. law enforcement officers know how to interrogate without using coercive or cruel techniques—as do the military and police of our peer nations. They have done so successfully for decades.⁷ So why did the Administration’s lawyers work so hard to argue that our interrogators could use coercive and cruel techniques with impunity? We do not yet know the answer, but can suggest two plausible explanations. It may be that the tactics have nothing to do with information gathering but rather aim to send a message to other would-be terrorists. Administration officials might have decided to adopt the use of tactics that would terrorize detainees in the hope of deterring potential recruits to terrorism.⁸ Or it may be that some in the

⁶ The main theme of several of the torture memos was on how much the interrogator could get away with. They particularly focused on what acts might lead to prosecution in the United States. As a result, the torture memos focus to a large extent on what violations of international law have been implemented in United States law. While it is true that international legal obligations implemented in national law may be easier to enforce in national courts than obligations not so implemented, it is a mistake to think that the United States is only obligated to respect such obligations. Americans are obligated to respect all the international legal obligations binding on the United States, whether in the form of customary international law, treaties or general principles.

And while it is also true that the legal obligation to enforce the prohibition on torture is generally more emphatic than the obligation to enforce the other obligations discussed here, the United States still has obligations to prevent all of these unlawful forms of interrogation. For a discussion of the obligation to enforce grave breaches of the Geneva Conventions, *infra* pp. ____ - ____.

⁷ *See infra*, pp. ____ - ____.

⁸ While no firm evidence of a plan to use torture and abuse for deterrence has come to light, plenty of information about the treatment of persons in U.S. detention has become public, including, photos. Cofer Black, the U.S. counter-terrorism coordinator stated that after 9/11 “the gloves came off.” Mark Bowden, *The Dark Art of Interrogation: the Most Effective Way to Gather Intelligence and Thwart Terrorism Can*

Administration have become persuaded that torture, coercion, cruelty and abuse can be effective methods of interrogation and that the need for information outweighs the illegality and immorality of using such means. The weight of the evidence is firmly against the conclusion that forceful interrogation is as reliable as non-forceful methods. In fact, the evidence on information gathering supports international law's absolute prohibition on torture, cruelty, and coercion.⁹

Regardless of the reasons why the Administration's lawyers have tried to create a legal climate in which interrogation techniques involving less than torture could be used, it is imperative to set the legal record straight.¹⁰ Interrogators face restrictions much stricter than a simple ban on torture. This article reviews those restrictions.

Beyond domestic law, two great bodies of international legal principles are relevant to the practice of interrogation.¹¹ During armed conflict and occupation,

Also Be A Direct Route Into Morally Repugnant Terrain. A Survey of the Landscape of Persuasion, ATLANTIC MONTHLY, Oct. 1, 2003, at 56.

Apparently there is even a term for torture aimed at deterring terrorists, "terrorist torture." See Daniel Stetman, *The Question of Absolute Morality Regarding the Prohibition on Torture*, 4 LAW & GOV'T 161, 162 (1997.)

⁹ The moral and practical problems posed by coercive interrogation are discussed in Part III below, *infra* pp. ____ - ____.

¹⁰ The memos explain why coercive, cruel, inhuman and degrading treatment is, in the view of the writers, generally available to interrogators. Torture may also be used but only with the president's authorization or where the interrogator can claim it is necessary. Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Consideration, THE TORTURE PAPERS, at 302-07. A new Justice Department memo that purportedly "supersedes" the Bybee memo does not reject the asserted right to use coercion and abuse nor does it state unequivocally that the President may never authorize unlawful methods. U.S. Dept. of Justice, Office of Legal Counsel, memorandum for James B. Comey from Daniel Levin, Re: Legal Standards applicable Under 18 U.S.C. §§ 2340-2340A, Dec. 30, 2004, available at http://news.findlaw.com/hdocs/docs/terrorism/doj_torture_123004mem.pdf.

¹¹ The article takes a classical approach to international law, meaning it is grounded in both positivism (modified by normative principle) and formalism. It is an approach that stands in marked contrast to the hegemonic approach of the Administration. Cf. Detlev Vagts, *Hegemonic International Law*, 95 AJIL 843, 844 (2001) with Mary Ellen O'Connell, *Taking Opinio Juris Seriously, A Classical Approach to International Law on the Use of Force*, in INTERNATIONAL CUSTOMARY LAW ON THE USE OF FORCE: A

international humanitarian law (IHL) applies. IHL expressly prohibits not just torture, but any form of coercion of detainees during interrogation. Second, international human rights law applies to persons detained outside of an armed conflict, but also to a certain extent to wartime detainees as well. Human rights law prohibits torture as well as cruel, inhuman, and degrading interrogation techniques. These international obligations have been partially implemented in United States domestic law.¹² Even where they have not been so implemented, the United States remains bound to respect them.¹³

Yet we now have irrefutable evidence of widespread use of unlawful interrogation techniques by American interrogators in Afghanistan, Iraq, Guantánamo Bay, and at undisclosed locations.¹⁴ The memo writers have apparently been successful in creating

METHODOLOGICAL APPROACH (Enzo Cannizzaro and Paulo Palchetti eds. forthcoming 2005); Anne Orford, *The Gift of Formalism*, 15 EJIL 1, 179 (2004); Mary Ellen O'Connell, *The End of Legitimacy*, 2004 ASIL PROC. 269; James Hathaway, *America, Defender of Democratic Legitimacy?*, 11 EJIL 121, 129 (2000). Martti Koskeniemi, *'The Lady Doth Protest Too Much', Kosovo and the Turn to Ethics in International Law*, 65 MOD. L. REV. 159 (2002).

¹² See War Crimes Statute, 18 U.S.C. § 2441 (2000); Anti-Torture Statute, 18 U.S.C. §§ 2340–2340A (West supp. 2005).

¹³ All international actors are bound by international law. Aspects of a state's domestic law that might put the state into a situation of breach of international law is no defense to the breach. The International Court of Justice has referred to this as a fundamental principle of international law: it is a "fundamental principle of international law that international law prevails over domestic law." Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, 1988 ICJ Rep. 12, para. 57 (April 26). The United States Supreme Court has confirmed that international law is part of U.S. law. *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts").

¹⁴ An extraordinary amount of evidence is now available on the use of unlawful interrogation techniques at all detention centers operated by the United States in Afghanistan, Iraq, at Guantánamo Bay, Cuba, and at undisclosed locations since September 11. Some important examples of that evidence include: 1.) Time Magazine obtained an interrogator's log from Guantánamo Bay, Cuba. The log details how in addition to other unlawful treatment a detainee was forcibly given 3 ½ bags of intravenous fluid then forced to urinate on himself. Adam Zagorin and Michael Duffy *Inside the Interrogation of Detainee 063*, TIME, June 20, 2005, at 26, 30. 2.) CIA Director Porter Goss testified in March 2005 that the CIA is currently using lawful interrogation methods. He would not confirm this was the case in the recent past, but he also added that he considers "waterboarding" a "professional interrogation technique" and, therefore, acceptable. Waterboarding involves tying someone to a board and dunking him underwater to the point where the person fears he will drown. It is plainly a form of torture. Douglas Jehl, *Questions Left by C.I.A. Chief on Torture Use*, N.Y. TIMES, Mar. 18, 2005, at A1; see also, *Abuse in Secret*, WASH. POST, Mar. 5, 2005, 2005 WLNR 3373422. 3.) Communications from FBI agents have confirmed that beating, burning, sexual

the impression among interrogators that they may do anything to an interrogee short of intentionally inflicting the pain of organ failure or death. The American Civil Liberties Union summarized FBI e-mails on the treatment of detainees at Guantánamo Bay, Cuba, in the summer of 2004:

...[D]etainees were shackled hand and foot in a fetal position on the floor. The agent states that the detainees were kept in that position for 18 to 24 hours at a time and most had “urinated or defacated [sic]” on themselves. On one occasion, the agent reports having seen a detainee left in an unventilated, non-air conditioned room at a temperature “probably well over a hundred degrees.” The agent notes: “the detainee was almost unconscious on the floor, with a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night.” (Aug. 2, 2004)¹⁵

The law of interrogation, however, prohibits all of this treatment. It prohibits not only torture, but coercion, and cruelty. The conclusion here is that the President of the United States may no more authorize the use of coercion and cruelty against detainees

humiliation, and shackling for 24-hours, at a time without relief, food, or water have all been used in connection with interrogation at Guantánamo Bay, Cuba. The FBI documents were released to human rights organizations pursuant to a Freedom of Information Act request. American Civil Liberties Union, *Newly Obtained FBI Records Call Defense Department’s Methods “Torture,” Express Concerns Over “Cover-Up” That May Leave FBI “Holding the Bag” for Abuses*, Dec. 20, 2004, <http://www.aclu.org/news/NewsPrint.cfm?ID=17216&c=206> (last visited April 20, 2005); see also Zagorin & Duffy, *supra*. 4.) The International Committee of the Red Cross (ICRC) also reported in July 2004 on the use of interrogation techniques “tantamount to torture” at Guantánamo Bay. Demetri Sevastopulo & Frances Williams, *Red Cross Accuses US Over Guantánamo*, IR. TIMES, Dec. 1, 2004; Neil A. Lewis, *Fresh Details Emerge on Harsh Methods at Guantánamo*, N.Y. TIMES, Jan. 1, 2005, at A11. 5.) The ICRC has also reported on the use of techniques “tantamount to torture” against persons thought to have information throughout the U.S.’s Iraqi detention centers. See International Committee of the Red Cross, *Report on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation* (Feb. 2004), THE TORTURE PAPERS, at 383, 384-85. 6) Secretary of Defense Donald Rumsfeld, by his own admission, has authorized the use of unlawful interrogation techniques at Guantánamo Bay, Cuba during December 2002. He has also admitted to the unlawful transfer of persons out of Iraq to undisclosed locations for interrogation by the CIA and other persons known to use torture. See *infra*, pp. ___ - ___. See also, MARK DANNER, *TORTURE & TRUTH: AMERICA, ABU GHRAIB AND THE WAR ON TERROR* (2004); Congressional Testimony of Tom Malinowski, Human Rights Watch, Mar. 18, 2005.

¹⁵ American Civil Liberties Union, *Newly Obtained FBI Records Call Defense Department’s Methods “Torture,” Express Concerns Over “Cover-Up” That May Leave FBI “Holding the Bag” for Abuses*, Dec. 20, 2004, <http://www.aclu.org/news/NewsPrint.cfm?ID=17216&c=206> (last visited April 20, 2005).

than he may authorize torture. The proposal of Harvard Law School Professor Alan Dershowitz for a presidential “torture warrant” is an invitation for the president to violate international law.¹⁶ But so would a warrant to allow coercion or cruelty in interrogation.

To the extent torture, coercion, and cruelty have already occurred, the perpetrators have committed crimes. Their superiors may also be guilty of criminal wrongdoing if they gave orders or authorized the use of unlawful techniques and knew a crime would likely result from the order or if they knew of such offenses and did not stop them and report the criminal activity.¹⁷ Nor should reliance on the expedient legal advice contained in the torture memos be a defense.¹⁸ Law suits have already begun against the United States and Bush Administration officials in a variety of fora.¹⁹ Civil suits by victims have ample legal basis, but their success will depend on the courage of judges in

¹⁶ See Alan M. Dershowitz, *Stop Winking at Torture and Codify It, U.S. Must Decide Which Interrogation Tactics Are Allowable and Which Aren't*, L.A. TIMES, June 13, 2004, at 5.

¹⁷ Prosecutor v. Timor Blaskic, IT-95-14-A, 29 July 2004 (International Criminal Tribunal for the former Yugoslavia, available at www.icty.org.)

¹⁸ This is a complex topic that cannot be developed here beyond one example. The Nuremberg Tribunal did not excuse Germany's high political leaders for invading Norway, Denmark and the Low Countries despite the fact that the Foreign Minister Joachim von Ribbentrop had personally developed legal justifications for doing so. On the contrary, part of the case against Ribbentrop himself consisted of having developed these expedient legal arguments. 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 286 (1947-49); see also Bilder & Vagts, *supra* note, at 694.

¹⁹ See the website of the Center for Constitutional Rights (CCR) for details regarding a request that the German State Prosecutor open a criminal investigation of U.S. personnel linked to the detainee abuse scandal and for details regarding a civil suit against private contractors for their role in abuse of detainees in Iraq. <http://www.ccr.org> See the website of Human Rights First or the American Civil Liberties Union for details of a civil suit against Defense Secretary Donald Rumsfeld and former C.I.A. Director George Tenet for abuse of detainees. <http://www.humanrightsfirst.org/index.html>; <http://www.aclu.org>. See discussion of additional cases *infra* pp. ___-___

applying the binding law even against the Administration of the world's most powerful nation.²⁰

This article will examine the wartime ban on coercion, the peacetime ban, and the arguments to ignore the bans.

I. The Wartime Ban

The law applicable to interrogation during war or armed conflict is part of the larger body of rules called international humanitarian law or IHL.²¹ IHL consists of the famous and respected 1949 Geneva Conventions,²² the 1977 Additional Protocols thereto,²³ the Hague Conventions of 1899 and 1907,²⁴ several other lesser known

²⁰ The request by CCR, *supra* note, to the German State Prosecutor was initially dismissed apparently in connection with Donald Rumsfeld's attendance at a security conference in Munich. The claimants plan to appeal.

²¹ The United States military prefers the term "law of armed conflict" or "LOAC," but the International Committee of the Red Cross, the guardian of this law, uses the term international humanitarian law, as does the International Court of Justice, the chief legal organ of the United Nations, see e.g., the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. para. 89 (Advisory Opinion).

²² The two conventions relevant to this article are Geneva Convention [No. III] Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Art. 118, 75 U.N.T.S. 135 and Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, art. 143, 75 U.N.T.S. 287. Alberto Gonzales, United States Attorney General in the second George W. Bush Administration called the Conventions "quaint" and "obsolete." Gonzales, *supra* note 1, at 119. He did so just months before US Secretary of Defense demanded of Saddam Hussein that the Geneva Conventions be respected in every detail with regard to US service personnel captured in the invasion of Iraq.

²³ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, 1125 U.N.T.S. 3 (1979)[hereinafter AP I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977, 1125 U.N.T.S. 609 (1979).

²⁴ The most important of the fourteen conventions is the Convention Respecting the Laws and Customs of War on Land (1907 Hague Convention IV), Oct. 18, 1907, Annex, art. 43, 36 Stat. 2277, T.S. No. 539, 1 Bevans 631.

treaties,²⁵ and principles of customary international law.²⁶ In an international armed conflict, this law reflects three categories of individuals relevant to this discussion of interrogation: combatants, civilians, and unlawful combatants.²⁷ We will consider each of these categories in turn and the rules prohibiting coercive interrogation with respect to each. First, however, a few words on Bush Administration assertions that some wartime detainees have no legal protections at all while in detention.

A. The Administration's Use and Abuse of IHL²⁸

The extraordinary conclusion by the Administration that some individuals have no right not to be tortured or abused while in detention is simply wrong. It appears to grow out of several other Administration policies that are in themselves based on erroneous and sometimes even contradictory legal analyses. First, the Administration has declared that the United States is involved in a global war on terrorism based not on the fact of

²⁵ For example, the 1954 Convention for the Protection of Cultural Property in the Event of an Armed Conflict, 249 UNTS 240.

²⁶ See I & II CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005); see also MARY ELLEN O'CONNELL, INTERNATIONAL LAW AND THE USE OF FORCE, ch. 9 (2005).

One of the many erroneous statements in the torture memos is that the executive branch is not bound by customary international law, since it is "not Federal law." THE TORTURE PAPERS at 290. That has never been the official position of the United States. Indeed, it would lead to unending complications and absurd situations since the U.S. Federal government bases so much on customary international law—such as treaty law and maritime claims. At any rate, the Supreme Court stated clearly that customary international law is part of Federal common law in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004).

²⁷ Some authors refer to certain unlawful combatants as "unprivileged belligerents." See Charles Garraway, *Interoperability and the Atlantic Divide—A Bridge Over Troubled Waters*, 34 IS. YBK. H. R., 105, 107-17 (2004).

²⁸ Marco Sassòli, *Use and Abuse of the Laws of War in the "War on Terrorism,"* 22 LAW & INEQ. 195, 210 (2004), citing, Lawyers Comm. for Hum. Rts., *Assessing the New Normal: Liberty and Security for the Post-September 11 United States* 71 (2003).

worldwide hostilities but rather the existence of terrorists in many parts of the world.²⁹ Second, despite this declaration, the Administration applies IHL in its global war only where IHL seems to give it advantages. Where applying IHL entails disadvantages, the Administration argues it does not apply. For example, the Administration claims the combatant's privilege to kill on the battlefield with respect to alleged terrorists wherever they are found. It claims this privilege even outside zones of active hostilities, arguing all the world is a battlefield.³⁰ Yet, the Administration does not really behave as though the entire world became a battlefield on September 11, 2001. It surely does not recognize that American military personnel may be targeted everywhere in the world. Plus, the letters it sent to the Security Council to justify the invasions of Afghanistan and Iraq did not mention a worldwide war. Indeed, if it recognized such a worldwide war, why send letters justifying the use of force in particular locations?

In addition to the combatant's privilege, the Administration apparently intends to detain people indefinitely on the basis of the IHL right to detain combatants until the end of active hostilities without the requirement of a trial.³¹ Yet, the Administration refuses to extend IHL detainee protections, such as the right to be free from coercion of any kind during interrogation; the right to be visited by the International Committee of the Red Cross, and the right to have detainee status reviewed.³²

²⁹ Mary Ellen O'Connell, *Ad Hoc War*, in *KRISENSICHERUNG UND HUMANITÄRER SCHUTZ—CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION* 405, 405 (Horst Fischer et al, eds., 2004).

³⁰ *Id.* at 405, 415-17.

³¹ *Id.* at 421-25.

³² *See generally*, Sassòli, *supra* note.

The Administration conveniently overlooks the fact that “combatant” is defined in international law. Such a status cannot simply be declared. A combatant is someone who takes direct part in hostilities. A situation of hostilities is one of intense, inter-group armed fighting.³³ The rights to kill without warning and to detain until the end of hostilities grow out of these situations, situations too chaotic for the usual criminal law to apply. Not only does IHL simply not apply to criminal activity outside of situations of hostilities, states traditionally resist elevating criminals to the plane of combatants. To do so acknowledges that the military challenge to the state has reached the point of chaos and emergency where the national criminal law can no longer apply. Nevertheless, the Administration has declared all terrorists are combatants whether the alleged terrorist has participated in an armed conflict or not. And it has declared that none of these combatants—real or constructed—have a right to IHL protections.³⁴

One need hardly respond to these brazen positions. But, in brief, all persons caught-up in armed conflict have at least some protection under IHL. State leaders have no discretion to refuse to extend these protections. Persons in non-conflict situations have basic peacetime human rights protections.³⁵ Again, the core protections are non-

³³ O’Connell, *Ad Hoc War*, *supra* note, at 407-414; *see also* Silvia Borelli, *Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the “War on Terror,”* 87 INT’L REV. RED CROSS 39, 45-46, 52-53 (2005); Christopher Greenwood, *War Terrorism and International Law*, 56 CURRENT LEGAL PROBS. 505, 529 (2003).

³⁴ *See* Gonzales, *supra* note; *see also* Memorandum from William J. Haynes, II, General Counsel of the Department of Defense, *Enemy Combatants*, *available at* <http://www.cfr.org/publication.php?id=5312>.

³⁵ *See infra* pp. ___ - ___.

derogable. It is simply not the case, as the Administration implies, that any human being can be placed in a situation beyond the reach of law—there are no “legal black holes.”³⁶

The Administration refuses to recognize that when al Qaeda members actually are combatants because they take direct part in hostilities such as in Afghanistan or Iraq, they must be covered by IHL. When al Qaeda members carry out criminal acts in non-conflict situations, such as in Yemen, the United States or Germany, peacetime criminal law applies. Criminal suspects may not be detained indefinitely without trial; they may not be killed without warning, and they may not be interrogated using cruel, inhuman or degrading methods.

The creation of the myth that some persons have no IHL protections apparently laid the foundation for the torture, coercion, and abuse of persons in United States detention.³⁷ The prevailing view at detention centers appears to be that because the Administration says terrorists are not protected by the Geneva Conventions or other IHL, they are not. The President has extended what he considers a discretionary promise to treat detainees humanely, but even that gesture is hedged by limiting it to the extent required by military necessity.

B. Universal IHL Protection

Turning away from the Administration’s version of the law to what the law actually requires, we find under IHL, persons who are members of the regular armed forces of a state involved in an armed conflict and persons who take direct part in the

³⁶ This is an expression used by several human rights organizations to describe what the Bush Administration has tried to do with respect to denying any human rights to certain persons in its custody. *See, e.g.*, Amnesty International, *Torture: No Place in the World in the Twenty-First Century*, April 1, 2005, 2005 WLNR 5074817.

³⁷ This is certainly the view of many human rights organizations and Democratic law-makers, *see, e.g.*, Curt Anderson, *Memos Outlined How U.S. Saw Geneva Rules*, SEATTLE TIMES, June 10, 2004, at A10.

armed conflict are combatants.³⁸ If a combatant has a right to take part in hostilities—such as the regular members of the armed forces or civilians involved in a “levée en masse,”³⁹ he is a lawful combatant. A person who has no right to take part, because he is not part of a regular armed force or a militia meeting certain criteria, is an unlawful combatant.⁴⁰ Persons taking no direct part are civilians. Different rules apply as to the wartime right to target and detain persons in each category—lawful combatant, unlawful combatant, and civilian. No person, regardless of category, may be tortured, coerced, or abused during interrogation.

In an armed conflict between two or more parties to the Geneva Conventions, lawful combatants detained by an adverse power must be treated as prisoners of war under the Third Geneva Convention Relative to the Treatment of Prisoner’s of War (Prisoner’s Convention). Under Article 17 of the Prisoners Convention:

No physical or mental torture, *nor any other form of coercion*, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.⁴¹

Civilians are protected under the Fourth Geneva Convention (Civilian’s Convention). If they are detained by an adverse power or an occupying power, they are protected under

³⁸ See O’CONNELL, *supra* note, at 522.

³⁹ The levée en masse occurs when the civilian population spontaneously takes up arms to resist an invading army where there is no time to organize.

⁴⁰ For more on this category, see, Mary Ellen O’Connell, *Enhancing the Status of Non-State Actors through a Global War on Terror*, 43 COLUM. J. TRANS’L L. 435 (2005); Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 COL. J. TRANS. L. (2004) 1, 37-55; Knut Dörmann, *The Legal Situation of “Unlawful/Unprivileged Combatants,”* 85 I.R.R.C. 45 (2003); George Aldrich, *The Taleban, Al Qaeda, and the Determination of Illegal Combatants*, 96 A.J.I.L. 891 (2002).

⁴¹ Geneva Convention [No. III] Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Art. 17 U.N.T.S. 135 [hereinafter Prisoner’s Convention.]

Article 31:

No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.⁴²

Unlawful combatants should be treated as prisoners of war who have committed a criminal offense.⁴³ At a minimum, however, such persons, indeed *all* persons detained in an international armed conflict are entitled to the protections of Additional Protocol I, Article 75. Article 75 is part of customary international law, and, therefore binding on all states.⁴⁴ The United States has confirmed this. The United States is not a party to

⁴² Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, art. 31, 75 U.N.T.S. 287 [hereinafter Civilian's Convention.] Article 4 of the Civilian's Convention does exclude nationals of a Party and of a co-belligerent to the Convention from its protections. Such persons are, nevertheless, protected under the Fundamental Guarantees owed to anyone caught up in armed conflict, *infra*, pp. ___ - ___. U.S. nationals also have Constitutional law protections discussed, *infra*, pp. ___ - ___.

⁴³ Additional Protocol I has two provisions particularly relevant to the detention of persons who fight in hostilities but do not meet the criteria of lawful combatant:

Article 44 (4) A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.

Article 45 (3) Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol. In occupied territory, any such person, unless he is held as a spy, shall also be entitled, notwithstanding Article 5 of the Fourth Convention, to his rights of communication under that Convention.

⁴⁴ A state that persistently objects at the time a rule of customary law is in formation may not be bound. The persistent objector rule, however, does not apply to the most important principles of international law, the *jus cogens* or peremptory norms. It is widely held that the prohibition on torture and other elements of Article 75 are *jus cogens*. Moreover, the United States is not a persistent objector to Article 75. The attempt by some in the Bush Administration to protest the rule in 2004-2005, simply comes too late. All of Article 75, *jus cogens* or not, binds the U.S.

Additional Protocol I, but has recognized that many of its provisions are customary international law, in particular, Article 75:⁴⁵

1. ...[P]ersons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the [1949] Conventions or under this Protocol shall be treated humanely in all circumstances... Each Party shall respect the person, honour, convictions and religious practices of all such persons.

2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:

- (a) violence to the life, health, or physical or mental well-being of persons, in particular;
 - (i) murder;
 - (ii) torture of all kinds, whether physical or mental;
 - (iii) corporal punishment and;
 - (iv) mutilation;
- (b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;...
- (e) threats to commit any of the foregoing acts.

While the word “coercion” does not appear in Article 75, techniques such as denying detainees religious material, forcefully shaving them, stripping them, menacing them with dogs, and so on, are plainly disallowed.⁴⁶

In civil war, torture and cruel treatment are also prohibited. The situation in Iraq is best characterized as civil war following the transfer of political authority from the

⁴⁵ Michael Matheson, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L L. & POL’Y 419-31 (1987.); see also Paust, *supra* note, at 818, n 27.

⁴⁶ One author in an analysis of the Geneva Conventions describes coercion as follows: “The essence of coercion is the compulsion of a person by a superior force, often a government, to do or refrain from doing something involuntarily. The intentional application of an unlawful force that robs a person of free will is coercive.” Jennifer K. Elsea, *Lawfulness of Interrogation Techniques under the Geneva Conventions*, Congressional Research Service, Report for Congress, Sept. 8, 2004, at 13. Bowden calls coercion “torture lite.” Bowden, *supra* note, at 5.

United States to Iraqis. Article 3, common to all four Geneva Conventions, includes the following basic protections -- nearly identical to Article 75 -- for all persons detained in a civil war:

In the case of armed conflict not of an international character ... each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, ... shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or, faith, sex, birth, or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;

Defense Secretary Donald Rumsfeld authorized the use of techniques at Guantánamo Bay, Cuba, that included stress positions, forced grooming, nudity, dogs, and physical coercion.⁴⁷ General Sanchez authorized the use of muzzled dogs to threaten detainees, stress positions, isolation, and sleep deprivation in Iraq.⁴⁸ One need not elaborate for present purposes on the patently unlawful and abhorrent technique of “waterboarding,” practiced by the CIA at undisclosed locations,⁴⁹ or the practices observed by the FBI at Guantánamo Bay, including chaining a person in the fetal position

⁴⁷ See Donald Rumsfeld, Counter Resistance Techniques, Dec. 2, 2002, THE TORTURE PAPERS, at 236; see also, Counter Resistance Techniques, Jan. 15, 2003, THE TORTURE PAPERS, at 239. See also, Tim Golden & Tom Van Natta, Jr., *U.S. Said to Overstate Value of Guantánamo*, N.Y. TIMES, June 21, 2004, at A5.

⁴⁸ LTG Ricardo Sanchez, CJTF-7 Interrogation and Counter-Resistance Policy, Sept. 14, 2003, available at the website of the American Civil Liberties Union, <http://www.aclu.org>.

⁴⁹ See discussion of evidence of CIA unlawful interrogation methods, including waterboarding, *supra* note 11.

for twenty-four hours without relief, sexual abuse and humiliation, and burning inside the ear with cigarettes.⁵⁰

Neither the Geneva Conventions nor the Additional Protocols allow derogation from IHL interrogation protections for any reason, including military necessity. While the Conventions do recognize military necessity as a defense or standard against which to measure some actions, no necessity defense is provided respecting the provisions just discussed.⁵¹

Despite these clear mandates of IHL, the media is reporting at time of writing that the United States military is developing a new policy on detainee operations that creates a category called “enemy combatant,” whose protections may be “subject to military necessity.”⁵² Plainly IHL provides no military necessity exception to protections during interrogation enjoyed by any detainee.

In addition to the protections of IHL from torture, coercion, and abuse, the Geneva Conventions require that each party take certain implementation and enforcement measures. Parties to the Conventions must train their personnel in the rules and investigate and prosecute violations. All parties to the Conventions have an obligation to prosecute grave breaches of the Conventions: “Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered

⁵⁰ For a discussion of FBI communications on unlawful interrogations techniques at Guantánamo Bay, *supra* note 11.

⁵¹ It should perhaps be emphasized that this was a voluntary restriction that states took on upon becoming party to the Geneva Conventions, the ICCPR, and the Convention Against Torture.

⁵² *Pentagon Will Spell Out Care, Handling of Detainees*, ST. LOUIS POST-DISPATCH, April 9, 2005, at 30. Also, when Republican Senators McCain, Warner and Graham tried to introduce legislation in the summer of 2005 requiring compliance with existing law on treatment of detainees, Vice President Cheney said the legislation would interfere with the President’s authority. Eric Schmitt, *Cheney Working to Block Legislation on Detainees*, N.Y. TIMES July 24, 2005 at 23.

to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.”⁵³

The grave breaches of the Civilians Convention are found in Article 146 and include torture and inhuman treatment. These are the violations of the Convention that all parties have a duty to aid in enforcing. The official commentary indicates that Article 146 uses the “legal meaning” of “torture,” which is “the infliction of suffering on a person to obtain from that person, or from another person, confessions or information.” Inhuman treatment refers to more than “physical injury or injury to health. Certain measures, for example, which might cut the civilian internees off completely from the outside world and in particular from their families, or which caused grave injury to their human dignity, could conceivably be considered as inhuman treatment.”⁵⁴

The grave breaches provision of the Prisoner’s Convention, Article 130, also includes “torture or inhuman treatment” as grave breaches of the Convention. The Official Commentary defines “torture” as the “infliction of suffering on a person in order to obtain from that person, or from another person, confessions or information.”⁵⁵ “Inhuman treatment” includes “certain measures, for example, which might cut prisoners of war off completely from the outside world and in particular from their families, or which would cause great injury to their human dignity....”⁵⁶ Additional Protocol I

⁵³ Civilian’s Convention, *supra* note, at art. 146; Prisoner’s Convention, *supra* note, at art. 129.

⁵⁴ *Id.*

⁵⁵ III COMMENTARY TO THE 1949 GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 598 (Jean Pictet ed., 1960).

⁵⁶ *Id.*

reiterates and adds to the list of grave breaches and the obligations on parties to take enforcement measures.

This law relative to interrogation was applied in 2003 by the Ethiopia-Eritrea Claims Commission:

75. Ethiopia alleges frequent abuse in Eritrea's interrogation of POWs commencing at capture and evacuation. International law does not prohibit the interrogation of POWs, but it does restrict the information they are obliged to reveal and prohibits torture or other measures of coercion, including threats and "unpleasant or disadvantageous treatment of any kind."⁵⁷
76. Ethiopia presented clear and convincing evidence, unrebutted by Eritrea, that Eritrean interrogators frequently threatened or beat POWs during interrogation, particularly when they were dissatisfied with the prisoner's answers. The Commission must conclude that Eritrea either failed to train its interrogators in the relevant legal restraints or to make it clear that they are imperative. Consequently, Eritrea is liable for permitting such coercive interrogation.⁵⁸

II. The Peacetime Ban

Persons detained outside an armed conflict or zone of occupation are not subject to the law of armed conflict but rather the law of peace. National criminal law in the first instance determines who may be detained and how individuals must be treated. National treatment is subject to international human rights law as the United States itself has made clear in its criticism of countries from Afghanistan to Zimbabwe.

Prohibition of torture, cruel, inhuman, and degrading treatment has been at the core of modern human rights law since the human rights movement began in the aftermath of

⁵⁷ Prisoner's Convention, *supra* note, at Art. 17.

⁵⁸ Federal Democratic Republic of Ethiopia v. State of Eritrea (Perm. Ct. Arb. 2003), *available at* <http://www.pca-cpa.org/PDF/ET04%20-%20Part%203.pdf>.

World War II. Article 5 of the Universal Declaration of Human Rights states that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”⁵⁹ This principle has been reconfirmed, restated and elaborated in a series of important treaties, including the International Covenant on Political and Civil Rights of 1966 (Article 7);⁶⁰ the American Convention on Human Rights (Article 5),⁶¹ the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 3),⁶² the Convention Against Torture (Article 1, Article 16),⁶³ and the African (Banjul) Charter on Human and Peoples’ Rights (Article 5).⁶⁴ The customary international law of human rights also prohibits torture as well as cruel, inhuman and degrading treatment.⁶⁵

The European Convention’s prohibition in Article 3 has been the subject of a series of cases at the European Court of Human Rights (ECHR), and thus forms the basis of sophisticated jurisprudence on torture, inhuman, and degrading treatment. In addition, the European Court has in recent years taken the Convention Against Torture (CAT) into

⁵⁹ Universal Declaration on Human Rights, United Nations G.A. Res. 217A(III), 3rd Sess., art. 5, U.N. Doc. A/RES/3/217 (1948).

⁶⁰ International Civil and Political Rights Covenant, Dec. 16, 1966 art. 7, 999 U.N.T.S. 171.

⁶¹ American Convention on Human Rights, opened for signature Nov. 22, 1969, 1144 U.N.T.S. 123.

⁶² European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature April 11, 1950, 213 U.N.T.S. 222, *available at* <http://www.echr.coe.int/Eng/BasicTexts.htm>.

⁶³ U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984).

⁶⁴ African (Banjul) Charter on Human and Peoples’ Rights of June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

⁶⁵ See the Restatement (Third) of the Foreign Relations Law of the United States, sec. 702, “Customary International Law of Human Rights, A state violates international law if, as a matter of state policy, it practices, encourages or condones...(d) torture or other cruel, inhuman or degrading treatment or punishment.”

account in its decisions,⁶⁶ and, thus, the ECHR's jurisprudence on torture, cruel, inhuman and degrading treatment is informative for all parties to the CAT, including the United States.⁶⁷ The European Convention's Article 3 mandates that "no one shall be subjected to torture or inhuman or degrading treatment or punishment."

Denmark, Norway, Sweden, and the Netherlands brought the first complaint under Article 3 against Greece in 1967 for the severe beating of individuals to obtain information about suspected subversive activities.⁶⁸ The European Commission on Human Rights found that beating persons to obtain information was torture. In 1976, the European Court of Human Rights decided a landmark case between Ireland and Britain over British detention and interrogation practices in Northern Ireland in the early 1970's that included hooding, sleep deprivation, and restricted diets.⁶⁹ The Court distinguished between torture and inhuman or degrading treatment, finding the practices violated Article 3, but did not amount to torture. The techniques were nevertheless declared unlawful, and the United Kingdom discontinued the practices.⁷⁰ Conditions of detention can also come under Article 3. Prisons with no light, no open air, no communication, and

⁶⁶ In *Ilhan v. Turkey* and in *Salman v. Turkey* the Court expressly referenced the Convention Against Torture. June 27 Judgment para. 85-88 (2000), July 28 Judgment para. 114-116, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=ilhan%20%7C%20v.%20%7C%20turkey&sessionid=471501&skin=hudoc-en>.

⁶⁷ The decisions of the ECHR are not strictly binding on the U.S. but its interpretation and application of a treaty to which the U.S. is a party are authoritative.

⁶⁸ Greek Case, Report of the HR Commission, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=35&portal=hbkm&action=html&highlight=greece&sessionid=471113&skin=hudoc-en>.

⁶⁹ *Ireland v. UK*, Judgment, at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=3&portal=hbkm&action=html&highlight=United%20%7C%20Kingdom&sessionid=471103&skin=hudoc-en>.

⁷⁰ Under more recent decision of the ECHR, some believe the methods used by the U.K. would amount to torture. See David Hope, *Torture*, 53 INT'L & COMP. L. Q. 807, 826 (2004).

no exercise space have been considered in violation of Article 3.⁷¹ Additionally, sending persons to a country where they might be tortured or subject to inhuman treatment can itself be an inhumane action in violation of Article 3.⁷²

In recent cases, the European Court has focused more on the purpose of the unlawful conduct rather than on trying to measure the severity of pain. This approach is in line with the Convention Against Torture⁷³ where the focus is also on the purpose for which the victim is being subjected to pain—to gain information or a confession. In *Keenan v. UK* (2001), the Court stated that “[w]hile it is true that the severity of suffering...has been a significant consideration in many of the cases decided by the Court under Article 3, there are circumstances where proof of the actual effect on the person may not be a major factor.”⁷⁴ In a 2004 case, *Aktas v. Turkey*,⁷⁵ Mr. Aktas was presumptively beaten to his death. The Court had “no difficulty drawing the inference that the suffering inflicted was particularly severe and cruel, and that the purpose of the perpetrators was to obtain information or a confession of guilt.”⁷⁶

The Human Rights Committee, charged with implementing the ICCPR, has found the following cruel and inhuman treatment:

⁷¹ See, Malcolm Evans, *Getting to Grips with Torture*, 51 INT’L. COMP. L. Q. 365 (2002).

⁷² *Id.* The U.S. is well known to send detainees to countries that torture. See *infra* note ___.

⁷³ Convention Against Torture, *supra* note; see also, Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (Principle 6), G.A. Res. 43/173, U.N. GAOR, 43d Sess., Annex, Supp. No. 49, U.N. Doc. A/43/49 (1988).

⁷⁴ Judgment, para. 112, *available at*, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=keenan%20%7C%20v.%20%7C%20UK&sessionid=471501&skin=hudoc-en>.

⁷⁵ 38 Eur. Ct. Hum. Rts. 18 (2004).

⁷⁶ *Id.* at H29.

beating to point of unconsciousness; denial of appropriate medical care; incommunicado detention for more than a year; repeated beatings with clubs, pipes, and batons without medical attention; detainment in a cell measuring twenty by five meters with 125 other prisoners and without any food or water; death threats; incarceration in a cell for twenty-three hours per day without bedding, food, sanitation, or natural light; being forced to stand for thirty-five hours, with wrists bound by coarse cloth and eyes continuously bandaged; and deprivation of food and drink for four days following arrest while being detained in unsanitary conditions.⁷⁷

The Committee has found the following acts to be degrading:

...dumping a bucket of urine on a prisoner's head, throwing his food and water on the floor, and his mattress out of his cell; beating prisoners with rifle butts and subsequently refusing them medical treatment; detaining individuals in cages and displaying them to the media; assaulting prisoners kept in tiny cells and limiting the number of visitors they may receive; chaining detainees to bed springs for three months; rubbing salt into prisoners' nasal passages and forcing them to spend the night chained to a chair; administering beatings requiring stitches; blindfolding and dunking detainees' heads in a canal; denial of exercise, medical treatment, and asthma medication; and whippings and beatings with a birch or tamarind switch.⁷⁸

The European Court has also found that states will be in breach of Article 3 not only when their own agents are perpetrating the ill-treatment, but also when the state fails to prevent serious forms of ill-treatment from occurring, or fails to make adequate investigations into claims of abuse.⁷⁹ Further, the Court has expanded the definition of

⁷⁷ Jason R. Odeschoo, *Truth or Dare?: Terrorism and "Truth Serum" in the Post-9/11 World*, 57 STAN. L. REV. 209, 243 (2004), citing *Linton v. Jamaica*, Comm. No. 255/1987, U.N. GAOR Hum. Rts. Comm., 46th Sess., U.N. Doc. CCPR/C46/D255/1987 (1992); *Polay Campos v. Peru*, Comm. No. 577/1994, U.N. GAOR Hum. Rts. Comm., 61st Sess., U.N. Doc. CCPR/C61/D255/1987 (1992).

⁷⁸ *Id.* at 243-44.

⁷⁹ See, *Mahmut Kaya v. Turkey* (2000), <http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=2208317&skin=hudoc-en&action=request> ; Case of *Z v. UK*, <http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=2208317&skin=hudoc-en&action=request> (2001).

who can count as a victim under Article 3. In *Kurt v. Turkey* a mother who witnessed the abduction of her son was considered a victim of an Article 3 violation.⁸⁰

The United States understands the prohibition on torture, cruel, inhuman, and degrading treatment of the Convention Against Torture to be the same as the as the prohibition on “cruel and unusual punishment” of the U.S. Constitution.⁸¹ This may or may not be so, and to the extent it is not, it cannot alter America’s legal obligations under the CAT, but American jurisprudence should be helpful toward understanding what is cruel and inhuman treatment in interrogation. People are interrogated by law enforcement personnel in the United States for two reasons: because they are suspected of having committed a crime and the police are seeking a confession or because they are suspected of having information about a crime. We will briefly review the protections around interrogations in both situations.

The United States Supreme Court has ruled that the due process clauses of the 14th Amendment and the 5th Amendment privilege against self-incrimination require voluntary confessions of guilt.⁸² More generally, Justice Frankfurter wrote that “coerced confessions offend the community’s sense of fair play and decency.”⁸³ Before a jury can hear a confession, the judge must make a determination that the confession was

⁸⁰ 27 EHRR 373 (1998).

⁸¹ See, U.S. Senate Resolution of Advice and Consent to Ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 Cong. Rec. S17, 486-01 (1990).

⁸² *Culombe v. Connecticut* 367 U.S. 568, 602 (1961); see generally on this subject, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE, chs. 22 & 23 (3d ed., 2002); Welsh S. White, *What is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001 (1998).

The Eight Amendment is relevant, too, in its prohibition cruel and unusual punishment.

⁸³ *Rochin v. California*, 342 U.S. 165, 173-74 (1952).

voluntarily given by a preponderance of the evidence.⁸⁴ The court must consider the totality of the circumstances regarding whether the defendant's will was actually overborne.⁸⁵ Factors to consider include the suspect's age, education, and mental and physical condition, along with the setting, duration, and manner of police interrogation.⁸⁶

Confessions have been found to be involuntary for diverse reasons. A confession was involuntary if the defendant is physically beaten or subjected to inordinately long interrogation.⁸⁷ A D.C. district court considered a case where a suspect was being interrogated for passing an altered dollar bill. After receiving *Miranda* warnings, the suspect was interrogated by Secret Service agents who forced him to strip and stand naked for a period of time while the questioning continued. The court found that in light of the circumstances, the defendant's waiver of his *Miranda* rights and subsequent confession were involuntary.⁸⁸

⁸⁴ *Lego v. Twomey*, 404 U.S. 477, 486 (1972). Involuntary confessions are inadmissible "not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system--a system in which the State must establish guilt by evidence independently and freely secured..." *Rogers v. Richmond* 365 U.S. 534, 540-41 (1961).

⁸⁵ *Spano v. New York*, 360 U.S. 315 (1959).

⁸⁶ *Id.*, citing *Haley v. Ohio*, 332 U.S. 596 (1948) (age), *Payne v. Arkansas*, 356 U.S. 560 (1958) (education), *Fikes v. Alabama*, 352 U.S. 191 (1957) (low intelligence), *Davis v. North Carolina*, 384 U.S. 737 (1966) (the lack of any advice to the accused of his constitutional rights), *Chambers v. Florida*, 309 U.S. 207 (1940) (length of detention), *Ashcraft v. Tennessee*, 322 U.S. 143 (1944) (the repeated and prolonged nature of the questioning), *Reck v. Pate*, 367 U.S. 433 (1961) (deprivation of food or sleep). Other factors to consider may be the race of the suspect and the suspect's prior experience with police. 22 AMERICAN JURISPRUDENCE PROOF OF FACTS 2D *Involuntary Confession: Psychological Coercion* 539 § 2 (2004).

⁸⁷ *Brown v. Mississippi*, 297 U.S. 278, 285-86 (1936); *Leyra v. Denno*, 347 U.S. 556, 561 (1954).

⁸⁸ *U.S. v. Blocker*, 354 F.Supp. 1195, 1201 (D.C.D.C., 1973) ("Since the strip search in this case occurred at the outset of the interrogation, the only reasonable conclusion is that the agents conducted the strip search to humiliate the defendant into confessing against his will. While in certain circumstances a strip search may be reasonable and indeed necessary, this court cannot countenance such a procedure when its sole purpose is to break down resistance by humiliating and personally degrading an individual in police custody.").

Police do trick and deceive defendants during interrogation.⁸⁹ However, some promises and threats will make confessions inadmissible. Unlawful threats are those of physical violence, refusal to provide medication, removal of a spouse or child, the arrest of friends or family, and harsher punishments if confession is not given.⁹⁰ Promises that make a confession inadmissible include those that promise an impossible, improper or illusory result, examples of which are promises of immunity and clemency.⁹¹ Appeals to religious beliefs are only coercive if they are designed to overcome the suspect's resistance by appealing to his fear of divine judgment.⁹²

In 1966, the U.S. Supreme Court recognized that custodial police interrogation is inherently coercive and held that a person in custody must be read his "rights" before interrogation.⁹³ These "*Miranda* rights" include the right to remain silent, the warning that anything said can and will be used against the individual in court, the right to have counsel present before interrogation and at the interrogation, and the right to have counsel

⁸⁹ MARC L. MILLER & DONALD F. WRIGHT, CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS 473 (2003).

⁹⁰ While the courts generally have held that a confession is involuntary if it was in fact induced by such a threat or promise concerning the arrest, release, or custody of a relative or close friend, the courts have not always been in agreement as to what constitutes such a threat or promise, and in many cases the facts themselves are sharply disputed. 22 AMERICAN JURISPRUDENCE PROOF OF FACTS 2D *Involuntary Confession: Psychological Coercion* 539 § 5 (2004).

⁹¹ *Id.* at § 4. Confessions required by the explicit conditions of the plea bargain are inadmissible. *Hutto v. Ross*, 429 U.S. 28, 30 (1976).

⁹² 22 AMERICAN JURISPRUDENCE PROOF OF FACTS 2D *Involuntary Confession: Psychological Coercion* 539 § 4 (2004).

⁹³ *Miranda v. Arizona*, 384 U.S. 436, 467-68 (1966). ("We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.") If a suspect does not understand English, the suspect must receive the warnings in his own language. *See State v. Santiago*, 556 N.W.2d 687, 690 (Wis. 1996).

appointed if the person is indigent.⁹⁴ Today, a confession will be generally inadmissible in a prosecutor's case in chief if the police have either failed to inform a defendant of her rights or failed to get a waiver of those rights. No use may be made at trial of a coerced confession.⁹⁵ Other uses of a coerced confession could result in claims by the victim of coercion that her 14th Amendment due process rights were violated.

Another context in which national law enforcement agents interrogate occurs in the questioning of witnesses. Sometimes witnesses are uncooperative. The common law has long embraced a device to secure the cooperation of such witnesses through material witness detention: "A material witness is an individual who has unique information about a crime, beneficial to defense or prosecution. The United States has a history of authorizing and sanctioning the custodial detention of such witnesses to ensure their appearance and testimony at relevant court proceedings."⁹⁶ The detention of the witness is clearly a form of pressure to get cooperation, but it is not considered unlawful coercion.⁹⁷ Still, it is understood that such detention should happen only rarely.⁹⁸

⁹⁴ *Id.* at 469-473.

⁹⁵ 22 AMERICAN JURISPRUDENCE PROOF OF FACTS 2D *Involuntary Confession: Psychological Coercion* 539 § 1 (2004). *Berkemer v. McCarty*, 468 U.S. 420, 433, n. 20 (1984). "[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare."

⁹⁶ Stacey M. Studnicki & John P. Apol, *Witness Detention and Intimidation: The History and Future of Material Witness Law*, 76 ST. JOHN'S L. REV. 483, 485 (2002).

⁹⁷ Waldron argues that "penalties for contempt and perjury are coercive: they impose unwelcome costs on certain options otherwise available to the witness. Even so, there is a difference of quality, not just a difference of degree, between the coercion posed by legally established penalties for non-compliance and the sort of force that involves using pain to twist the agency and break the will of the person being interrogated." Waldron, *supra* note, at 23-24, citing Bradley Graham, *Abuse Probes' Impact Concerns the Military; Chilling Effect on Operations is Cited*, WASH. POST, Aug. 29, 2004, at A20. Waldron also writes, "...law can be forceful without compromising the dignity of those whom it constrains and punishes." *Id.*, at 54.

⁹⁸ Studnicki & Apol, *supra* note, at 485. The right to detain material witnesses has been abused since September 11, 2001. The material witness law "was never conceived...as a means to detain those whom

Unlawful coercion of a material witness may result in exclusion of the witness's testimony. Examples include actual and threatened physical violence. Such coerced confessions are also excluded under the Federal Rules of Evidence.

Thus, international law, which generally includes these domestic law protections, provides broad substantive rights to interrogees in peacetime from cruel, inhuman, and degrading treatment. Important to the enjoyment of these protections, international law does not recognize excuses or defenses by interrogators for suspending them. Israel's High Court of Justice in a 1999 case ruled that "neither the government nor the heads of the security services have the authority to establish directives regarding the use of physical means during the interrogation of suspects suspected of hostile terrorist activities...."⁹⁹ Unfortunately, the Court left a loophole through which the whole prohibition could be swallowed. It decided that even though necessity could not be used as authority to permit physical coercion in interrogation, necessity could be invoked as a

the authorities suspected of being a threat to society but did not have enough evidence to charge...With the War on Terrorism, the legal seas have changed. The designation of material witness has often become a temporary moniker to identify an individual who will soon bear the status of defendant." Laurie L. Levenson, *Detention, Material Witnesses & the War on Terrorism*, 35 LOY. L. A. L. REV. 1217, 1222-1223; Studnicki & Apol, *supra* note, at 485-86: "The detention of material witnesses should be a seldom-used procedure. Recent events, however, particularly the September 11, 2001 terrorist attacks on the United States, have brought material witness laws to the forefront as the government seeks to use the laws as investigatory tools to detain individuals while determining whether a crime has been committed by the detainee or perhaps by an acquaintance of the detainee. Such 'investigatory detentions' are not only a misuse of the material witness laws, but also troubling and potentially unconstitutional." (Footnotes omitted.)

⁹⁹ H.C. 5100/94, Public Committee Against Torture in Israel v. Israel (Sept. 9, 1999), p. 36. <http://62.90.71.124/eng/verdict/framesetSrch.html> See also, Ardi Imseis, "Moderate" Torture on Trial: Critical Reflections on the Israeli Supreme Court Judgment Concerning the Legality of General Security Service Interrogation Methods, 19 BERKELEY J. INT'L L. 328; Melissa Clark, *Israel's High Court of Justice Ruling on the General Security Service Use of "Moderate Physical Pressure": An End to the Sanctioned Use of Torture?*, IND. INT'L & COMP. L. REV. 145 (2000). For more on the situation in Israel before the High Court decision, see, John Quigley, *International Limits on Use of Force to Elicit Confessions: A Critique of Israel's Policy on Interrogation*, 14 BROOKLYN J. INT'L L. 485 (1988).

defense by an interrogator who is accused of using coercion.¹⁰⁰ The U.N. Human Rights Committee has commented with respect to this aspect of the Israeli case that necessity cannot be a defense to the use of torture.¹⁰¹

The Convention Against Torture also disallows necessity and other excuses as defenses to torture. Article 2(2) provides: “No exceptional circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” It does not specifically disallow necessity as an excuse for lesser violations of the Convention, i.e., for cruel, inhuman and degrading treatment. The International Civil and Political Rights Covenant, however, in providing for derogations during emergencies, prohibits derogation from Article 7 as a whole. In addition, the Committee of Ministers of the Council of Europe affirmed in July 2002, that “[t]he use of torture or of inhuman or degrading treatment or punishment is absolutely prohibited, in all circumstances, and in particular during the arrest, questioning and detention of a person suspected of ...terrorist activities, irrespective of the nature of the acts that the person is suspected of....”¹⁰² Thus, torture, cruel, inhuman and degrading treatment are all considered non-derogable prohibitions even in times of

¹⁰⁰ Public Committee v. Israel, *supra* note, at 39.

¹⁰¹ “The committee is concerned that interrogation techniques incompatible with article 7 of the Covenant are still reported frequently to be resorted to and the ‘necessity defence’ argument, which is not recognized under the Covenant, is often invoked and retained as a justification for ISA actions in the course of investigations.” Concluding Observations of the Human Rights Committee: Israel. 21/08/2003, U.N. Doc. CCPR/CO/78/ISR, 78th Sess., para. 18 (21 Aug. 2003).

See also Paola Gaeta, *May Necessity Be Available as a Defence for Torture in the Interrogation of Suspected Terrorists?*, 2 J. INT’L CRIM. L. 785 (2004.) The author concludes necessity is not a defense, in part because torture is never “necessary” being an unreliable and time-consuming form of information-gathering.

¹⁰² Guidelines on Human Rights and the Fight Against Terrorism, *cited in* Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, at 7, n. 17, <http://www.columbia.edu/cu/law/fed-soc/otherfiles/waldron.pdf>

national emergency.¹⁰³ This conclusion is further supported by the ECHR decisions discussed above finding that the U.K. and Turkey breached prohibitions on inhuman treatment although both states faced emergencies.

III. Ignore the Bans?

This is the law governing interrogation, and it is likely to remain the law. Even the Bush Administration has made no move to request any formal change in IHL, the Convention Against Torture, or the International Convention on Civil and Political Rights.¹⁰⁴ None of the other parties to these treaties show any willingness to effectuate change. Nevertheless, there are a few in the United States who have called for our country to ignore this law. They argue that it is effective to torture and coerce during interrogation and that effectiveness justifies law violation in a war on terror. The next section looks at these claims. Toward the end it also considers briefly the erroneous notion that international law cannot be enforced and therefore need not be taken seriously. This misconception has also been part of the discussion around coercive interrogation and will be clarified here.

A. Unjustified Law Violations

It should be completely irrelevant to Americans that coercive interrogation can result in useful information. The practice is unlawful and we are a nation under law that does not engage in unlawful practices as a matter of official policy. Even if the practice

¹⁰³ ICCPR, *supra* note, at Article 4.

¹⁰⁴ It has, however, refused to become a party to the CAT protocol allowing surprise prison inspections as a measure to deter torture and cruel, inhuman, and degrading treatment. Indeed, the United States tried to prevent the protocol from being adopted. *See* Barbara Crossette, *U.S. Fails in Effort to Block Vote on U.N. Convention on Torture*, N.Y. TIMES, July 25, 2002, at A7.

were not unlawful, it is immoral, and for that reason alone we must reject it regardless of any arguments of effectiveness.¹⁰⁵ To torture, coerce, or abuse someone in custody is an affront to human dignity; it offends any moral code. As Israel's High Court said in its decision prohibiting the use of physical coercion during interrogation of suspected terrorists:¹⁰⁶

This is the destiny of a democracy—it does not see all means as acceptable, and the ways of its enemies are not always open before it. A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties.

There is only one phrase of this eloquent statement about which more presently needs to be said. The High Court assumes that relinquishing coercive interrogation techniques means giving up some advantage in the struggle against terrorism. This is a false assumption. The evidence indicates that societies that respect legal rights and human dignity even of the most heinous criminals have greater success in repressing crime than those that do not.¹⁰⁷ Refusing to coerce detainees is not fighting with “one hand tied behind its back.” On the contrary, the weight of the evidence shows that trained and skillful interrogators do not need to use coercion, and the use of coercion and the

¹⁰⁵ See, e.g., the views of Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, p. 81, <http://www.columbia.edu/cu/law/fed-soc/otherfiles/waldron.pdf>

¹⁰⁶ H.C. 5100/94, *Public Committee Against Torture in Israel v. Israel* (Sept. 9, 1999), p. 37, <http://62.90.71.124/eng/verdict/framesetSrch.html>

¹⁰⁷ See *infra* pp. ___ - ___. The wartime situation has an analog to this observation on peacetime protections. Since the time of Augustine in the 5th Century, commentators on IHL have observed that those armies respecting the rights of their enemy have a greater chance to secure the peace following victory on the battlefield. See O'CONNELL, *supra* note, at 151.

violation of other important human rights have been counter-productive in struggles against terrorism.

Two popular writers, Mark Bowden and Alan Dershowitz, have both called for the use of coercion and even torture by the United States in the interrogation of terrorist suspects. They both believe forceful interrogation is an effective means of information gathering.¹⁰⁸ Both authors, however, rely on anecdotes to support their arguments. Most of the anecdotes that actually condone coercion come from Israeli interrogators, men who have used torture and coercion, and, therefore, have a vested interest in presenting the use of such measures as successful. Their claims must be discounted.

Bowden, does provide additional anecdotes from the United States and Germany. Far from supporting coercion, these anecdotes lead us to conclude that *non-coercive* interrogation is amply effective. Bowden's American story concerns a New York City Police Detective named Jerry Giorgio. Giorgio, according to Bowden, is a masterful interrogator. But in describing Giorgio's success, Bowden never mentions that he uses coercion. On the contrary, Giorgio does not even play "good cop/bad cop" in interrogation, because he never needs a "bad cop." The secret to getting information is getting a good interrogator and a good interrogator is someone people will talk to: "You want a good interrogator? ... Give me somebody who people like, and who likes people. Give me somebody who knows how to talk to put people at ease. Because the more comfortable they are, the more they talk, and the more they talk, the more trouble they're

¹⁰⁸ See Bowden, *supra* note and ALAN DERSHOWITZ, WHY TERRORISM WORKS, UNDERSTANDING THE CHALLENGE (2002).

in—the harder it is to sustain a lie.”¹⁰⁹ Who likes to talk to someone who is sticking needles under his fingernails?¹¹⁰ Indeed, as will be discussed further below, the use of force during interrogation is counter-productive to the intelligence gathering effort, since once abused, a person will not cooperate.¹¹¹

Bowden’s example from Germany equally fails to support coercion. A deputy police chief threatened a suspect with torture to get the suspect to take him to where a kidnapped boy was hidden. The suspect went to the place, but the boy was dead. This tragic outcome must disqualify this example as one of successful coercive interrogation. The policeman was prosecuted for his unlawful action, found guilty, and lost his job.¹¹²

Dershowitz also relies heavily on the case of Abdul Hakim Murad for his conclusion that torture works. Dershowitz says Murad was tortured in the Philippines for 67 days at which point he “may” have revealed information about various al Qaeda plots.¹¹³ Writers referring to the case, however, have raised doubts as to whether Murad was actually tortured and whether anything he told the Philippine authorities was actually

¹⁰⁹ Bowden, *supra* note, at 19. Bowden also spends several pages of his article reviewing experiments from the 1960s aimed at finding effective means of coercive and tortuous interrogation. He includes in all cases that the experiments proved inconclusive. Cf. “One thing all these experiments made clear was that no matter what drugs or methods were applied, the results varied from person to person.” *Id.*, at 10. Several of his anecdotes bear this out. Yet, he concludes: “It is wise of the President to reiterate U.S. support for international agreements banning torture, and it is wise for American interrogators to employ whatever coercive methods work.” *Id.*, at 28.

¹¹⁰ This is one of the techniques recommended by Alan Dershowitz in *WHY TERRORISM WORKS*, *supra* note, at 138.

¹¹¹ See *infra*, pp. ____ - ____.

¹¹² Von Hans Holzhaider, *Schriftliches Urteil im Frankfurter Folter-Prozess: Daschners Drohung “Verletzte de Menschenwuerde,”* SUDDEUTSCHE ZEITUNG, Feb. 16, 2005, 2005 WLNR 2179016.

¹¹³ DERSHOWITZ *supra* note, at 137.

true.¹¹⁴ Further, professional interrogators dismiss out of hand the claim that after 67 days anything Murad might have told authorities could have been of any real value in preventing plots.

A case involving a U.S. Army Colonel in Iraq that occurred after Bowden and Dershowitz wrote has received considerable attention to the point it has become an urban legend. The actual facts provide no support for the effectiveness of coercive interrogation: In April 2003, north of Baghdad, Colonel Allen B. West, on a tip from an informant, ordered his men to beat a detainee for information.¹¹⁵ When the detainee would say nothing, West fired his revolver at him twice, near the man's head, the second time after counting down. Following the second mock execution, the man began to provide all kinds of details—names, dates, etc. “[H]e was not sure what he told the Americans, but that it was meaningless information induced by fear and pain.”¹¹⁶ No evidence of a plot was ever found; no one was arrested. The detainee was released after 45 days without charge. Colonel West was fined and dismissed from the service. He was not court martialed.¹¹⁷

Saying anything to get the pain and fear to stop—that is the usual result of coercive interrogation. Based on this fact, the long-held United States Army and FBI

¹¹⁴ See Jonathan F. Lenzer, *From a Pakistani Stationhouse to the Federal Courthouse: A Confession's Uncertain Journey in the U.S.-Led War on Terror*, 12 CARDOZO J. INT'L & COMP. L. 297, 314 (2004) and Andrew A. Moher, *The Lesser of Two Evils? An Argument for Judicially Sanctioned Torture in a Post 9/11 World*, 26 T. JEFFERSON L. REV. 469, 480-481 (2004) (“...[T]he veracity of Murad's confessions has recently come into dispute....”)

¹¹⁵ Deborah Sontag, *How U.S. Officer's Risk in Iraq Backfired*, INT'L HERALD TRIB., May 28, 2004, at 2, 2004 WLNR 5206945.

¹¹⁶ *Id.*

¹¹⁷ Rather, he was cheered at a luncheon talk a few short weeks after the national broadcast of the abuse pictures from Abu Ghraib prison in Iraq. Lona O'Connor, *Army Officer who Threatened Prisoner Addresses Luncheon*, PALM BEACH POST, May 28, 2004, 2004 WLNR 3034975.

policies have rejected coercive interrogation as unlawful, immoral, and unreliable. The 1987 United States Army Interrogation Field Manual 34-52 includes the following statement:

The use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind is prohibited by law and is neither authorized nor condoned by the US Government. Experience indicates that the use of force is not necessary to gain the cooperation of sources for interrogation. Therefore, the use of force is a poor technique, as it yields unreliable results, may damage subsequent collection efforts, and can induce the source to say whatever he thinks the interrogator wants to hear. However, the use of force is not to be confused with psychological ploys, verbal trickery, or other nonviolent and noncoercive ruses used by the interrogator in questioning hesitant or uncooperative sources.¹¹⁸

Similarly, FBI agents prefer “the bureau’s long-accepted court-approved interrogation policy of building rapport with detainees to obtain information about terrorism.”¹¹⁹ In a serious academic study of the effectiveness of coercion in interrogation, Darius Rejali concluded “there is no empirical evidence to suggest that [torture] works, at least in the way that people claim that it does in the war against terrorism....”¹²⁰

Rejali’s conclusion is confirmed by Douglas Johnson, Executive Director, Center of Victims of Torture. The Center has provided care to over 7500 victims of torture from 60 countries. In testimony before Congress, Johnson said:

¹¹⁸ The United States Army is preparing a new interrogation field manual that will expressly prohibit harsh techniques. See, Eric Schmitt, *Army, in Manual Limiting Tactics in Interrogation, Seeking to Avoid Abuses, Harsh Techniques Used at Abu Ghraib Will be Expressly Banned*, N.Y. TIMES, Apr. 28, 2005, at A1.

¹¹⁹ Toni Locy & Kevin Johnson, *FBI had warned Pentagon on tactics*, USA TODAY, available at http://www.usatoday.com/news/washington/2004-12-07-fbi-documents_x.htm?POE=NEWISVA. (Dec. 7, 2004); Email (parties redacted) re GTMO related e-mails, notes etc., http://www.aclu.org/torturefoia/released/FBI_4142.pdf (May 10, 2004) (indicating concern about DoD interrogation practices and the FBI position recommending “rapport based” interrogation).

¹²⁰ Michael Slackman, *The World: A Dangerous Calculus; What’s Wrong with Torturing a Qaeda Higher-Up?*, N.Y. TIMES, May 16, 2004, 2004 WLNR 5564172; see DARIUS REJALI, *TORTURE & MODERNITY: SELF, SOCIETY AND STATE IN MODERN IRAN* (1994).

The assumption behind the [torture] memoranda ... is that some form of physical and mental coercion is necessary to get information to protect the American people from terrorism. These are unproven assumptions based on anecdotes from agencies with little transparency, but they have been popularized in the American media by endless repetition of what is called the ticking time bomb scenario. Based on our experience at the center with torture survivors and understanding the systems in which they have been abused, we believe it is important that these discussions [about interrogation] not be shaped by speculation but rather through an understanding of how torture is actually used in the world. From our understanding, we have derived eight broad lessons. And those are:

First of all, torture does not yield reliable information.

Secondly, torture does not yield information quickly.

Third, torture has a corrupting effect on the perpetrator.

Fourth, torture will not be used only against the guilty.

In fact, fifth, torture has never been confined to narrow conditions; once it's used, it broadens;

Psychological torture results in long-term damage.

Stress and duress techniques are forms of torture.

And finally, number eight, we cannot torture and still retain the moral high ground.¹²¹

Highly trained and experienced United States Army interrogators confirm Johnson's conclusions. Indeed, they would go further to say that the use of coercion and abuse is counter-productive to intelligence-gathering. Its use by the United States since 9/11 has likely cost this country lives:

Such behavior not only causes needless suffering for the victim and is criminal, it jeopardizes the intelligence collection effort. Once a prisoner

¹²¹ U.S. Senate Judiciary Committee Holds a Hearing on the Nomination of Alberto Gonzales to be U.S. Attorney General, Jan. 6, 2005, Cong. Q. (FDCH Political Transcripts.) For similar conclusions, see also Gaeta, *supra* note, at 791-92 and Merle L. Pribbenow, *The Man in the Snow White Cell*, 48 STUDIES IN INTELLIGENCE 59 (2004).

has been abused, gaining his or her willing cooperation is often impossible, even for a highly-skilled interrogator. In addition, any information gained during such an interrogation cannot be regarded as dependable or reliable.¹²²

The Administration has claimed that it has gotten useful information using coercive and abusive tactics at Guantánamo. One of the FBI e-mails from Guantánamo Bay, released in December 2004, however, states “These tactics have produced no intelligence of a threat neutralization nature to date.”¹²³

Finally, societies known to use torture, coercion and abuse have not resolved their problems with terrorism. Societies that have abandoned such practices or never used them in the first place have had greater success. Northern Ireland is a telling example. In the early years of the “Troubles” in Northern Ireland, the British government adopted emergency powers that led to the coercive and abusive treatment of terrorism suspects:

¹²² Declaration of Peter Bauer Filed in Support of Plaintiffs’ Motion for Preliminary Injunction Against CACI International, para. 9, *Saleh v. Titan*, Case No. 04 CV 1143 R (NLS) (S.D. Cal. 2004); *see also* Declaration of Marney Mason Filed in Support of Plaintiffs’ Motion for Preliminary Injunction Against CACI International. (The two declarants have eleven and eighteen years of experience as Army interrogators respectively.) Apparently military lawyers also objected to the Administration departure from long-time policy and codified law. Vanessa Blum, *Early Warning: Military Lawyers Fought Justice Department, Argued Interrogation Techniques Would Backfire*, BROWARD DAILY BUS. REV., Aug. 3, 2005, at 10.

For the similar views of experienced FBI agents see Jason Vest, *Pray and Tell*, AM. PROSPECT, July 2005, at 47.

The Israeli High Court based its allowance of the necessity defense for some cases of coercion on the basis of the infamous “ticking time bomb” hypothetical. Public Committee, *supra* note. Plainly if torture and coercion are unreliable, the last time you would want to use them are in situations where time is of the essence. Therefore no more need be said here on the ticking time bomb. But for a discussion of the unrealistic nature of the ticking time bomb scenario and the ability to restrict torture to very limited situations, see Waldron, *supra* note, at 38-39, citing, in particular, Henry Shue, *Torture*, 7 PHILOSOPHY AND PUBLIC AFFAIRS 124 (1978.)

¹²³ Spencer Ackerman, *Why the Bush Administration Defends Guantánamo*, The New Republic Online, Aug. 22, 2005, <http://tnr.com/docprint.mhtml?i=20050822&s=ackerman> 082205, at 4. *Cf.* Guantánamo Provides Valuable Intelligence Information, News Release from the Department of Defense, No. 592-05, June 12, 2005.

Moreover, coercive tactics have resulted in deaths – hardly an outcome likely to aid information gathering. *See Prisoner Deaths in U.S. Custody in Iraq, Afghan Wars*, PHILA. INQUIRER, Mar. 16, 2005.

The mistreatment of suspects while in custody under emergency powers included use of methods that have been condemned by courts worldwide. These include intensive interrogations for extended periods, sleep deprivation, hooding of suspects, the use of white noise, forcing suspects to stand or kneel in uncomfortable positions for extended periods of time, threats and beatings of suspects, and standing on the backs of suspects' legs, among others. Even government commissions, while attempting to minimize the allegations, have acknowledged that the government adopted abusive interrogations practices as a policy.¹²⁴

While the emergency powers were in place and these abuses were being committed, the “Commander of the IRA in the Maze Prison, Jim McVeigh called the emergency provisions ‘the best recruiting tools the IRA ever had.’”¹²⁵ Academics studying the case reach the same conclusion:

Kiernan McEvoy, of Queens University-Belfast, who has studied the use of emergency legislation in Northern Ireland, has identified spikes in violence surrounding the use of emergency powers to target the Catholic Republican community. Initially, some of the measures used had the effect of suppressing violence. But the manner in which the powers were used—disproportionately against the Republican community and with unchecked aggression by security forces—led to explosions in violence.¹²⁶

Britain ended the use of coercive interrogation techniques after the decision in the case before the European Court of Human Rights, discussed above. Subsequently, Britain reached a peace accord with Republican parties and the use of violence and support of the IRA have waned substantially. Germany and Italy provide even stronger examples of states that eliminated serious terrorism challenges from the Red Army Faction and the Red Brigades in their countries while remaining committed to requirements of international human rights principles.

¹²⁴ Michael P. O'Connor & Celia M. Rumann, *Into the Fire: How to Avoid Getting Burned by the Same Mistakes made Fighting Terrorism in Northern Ireland*, 24 CARDOZO L. REV. 1657, 1683 (2003).

¹²⁵ *Id.* at 1702.

¹²⁶ *Id.* at 1701-02.

Israel is a counter-example. Still understood to permit coercive interrogation methods through the necessity-defense loophole¹²⁷ and after decades when use of coercion was directly lawful and very widely used, it remains the target of unending terrorist attacks. According to Bowden, two-thirds of all Palestinian suspects in Israeli custody have been subjected to torture or coercion in Israeli detention.¹²⁸ No one suggests today that Israel is resolving its terrorism problem in the way the British, Germans or Italians have.¹²⁹

B. Enforcement of International Law

Bowden asserts in his article that international law is unenforceable, and he implies that it may therefore be ignored.¹³⁰ This observation is factually incorrect, but also ignorant of the nature of law. The binding nature of law—all law—is not assessed

¹²⁷ This was the finding of the Human Rights Committee in 2003, *supra* note; Bowden cites an Israeli human rights activist who confirms that torture did not end after the 1999 Public Committee decision. Bowden, *supra* note, at 26.

¹²⁸ *Id.*

¹²⁹ Early indications from the Iraq conflict are consistent with these observations. We know that when the media began reporting on U.S. use of torture and coercion of detainees in Iraq, insurgent groups cited the abuse as a reason for their own acts of violence.

In May 2005, anti-American rioting broke out in four countries resulting in the deaths of as many as 17 people. The anger was triggered by a *Newsweek* story that interrogators at Guantánamo Bay, Cuba, had flushed a Koran down a toilet. *Newsweek* formally “retracted” the story when the magazine’s sole anonymous source refused to confirm it following publication—and following the rioting. The story had been credible to *Newsweek* given the considerable evidence that the United States has used unlawful interrogation methods, including some that exploit an interogee’s Muslim faith. Around the Muslim world, the Bush Administration’s denial of this one incident was little believed, again owing to the widespread knowledge that unlawful techniques have been used against Muslims. See Katharine Q. Seelye & Neil A. Lewis, *Newsweek Says It Is Retracting Koran Report, White House Criticized Article as Damaging*, N.Y. TIMES, May 17, 2005, at A 1. The Administration promised to respect the holy Koran, but failed to commit to full compliance with international law respecting interrogation, including full access to detainees by the ICRC. In this author’s view, it will only be when such a promise is made—and kept—that the United States will begin to regain a modicum of respect in the Muslim world. Compliance with international law following September 11 would have saved us from this current costly and shameful situation.

¹³⁰ Bowden, *supra* note, at 22.

based on the number of enforcement actions brought in response to law violations.¹³¹ Nevertheless, international law does have means of enforcement and those means are generally similar to the means available in national legal systems. The primary difference is that international society does not have a dedicated police force at its disposal. Rather states use their own police forces to enforce international law, unilaterally or collectively, and occasionally specialized forces are organized for particular purposes. States and international organizations also enforce international law through military force, sanctions of all kinds, and through international and national courts.

International law of the type discussed in this article concerns the legal duty of nation-states to exercise due diligence in ensuring that their personnel use only lawful methods in interrogation. Where a state fails in this duty, other states can hale them before international courts and tribunals, such as in the case brought by Denmark, Norway, Sweden, and the Netherlands against Greece for peacetime torture; the case brought by Ireland against Britain for peacetime cruel, inhuman and degrading treatment, and Ethiopia's case against Eritrea for wartime torture and coercion.¹³² States can have shortcomings aired before human rights monitoring bodies, as Israel and the United States have had, and they may be subjected to sanctions—a choice the United States has particularly advocated over the years.¹³³

¹³¹ See generally, H.L.A. HART, *THE CONCEPT OF LAW* (1961). For discussions of the nature of international law and why nations obey, see, LOUIS HENKIN, *HOW NATIONS BEHAVE*, 319-332 (2d ed. 1979); see also, Harold Koh, *Why Nations Obey*, 106 *YALE L.J.* 2599 (1997).

¹³² See *supra* pp. ____ - ____.

¹³³ For a review of major sanctions programs instituted by the Security Council to respond to human rights violations and other breaches of international law, see Mary Ellen O'Connell, *Debating the Law of Sanctions*, 13 *EUR. J. INT'L L.* 63 (2002).

In addition, where a state fails to enforce international law against its own citizens, other states are increasingly stepping in to hold individuals accountable. The Geneva Conventions, as discussed above, mandate that those guilty of grave breaches be held accountable before the courts of any of the 190 parties.¹³⁴ Italy has now instituted prosecutions against 13 CIA officers for the kidnapping of an Islamic cleric from the streets of Milan. He was found subsequently in Egypt where he charges he was tortured.¹³⁵ A number of states will enforce other international crimes, such as torture, regardless of the nationality of the suspect or victim or the place of the crime. Criminal complaints under such laws have been filed by citizens in Chile and Germany against Secretary of Defense Donald Rumsfeld, former CIA Director George Tenet, and others for the abuse of detainees in Iraq, Afghanistan, Guantánamo Bay and at undisclosed locations.¹³⁶ Further, civil actions may be brought for compensation when rights are violated. Two such actions have already been filed in the United States by victims of

The Inter-American Commission on Human Rights has asked the U.S. twice to have a competent tribunal determine the status of persons at Guantánamo Bay, Cuba on the request of human rights groups alleging the U.S. was in breach of the Geneva Conventions. Precautionary Measures in Guantánamo Bay, Cuba, Inter-Am.C.H.R. (Mar.13, 2002), available at <http://www1.umn.edu/humarts/iachr/guantanamomeasures2002.html>; Letter from Ariel Dulitzky, Inter-American Commission on Human Rights, to Jennifer M. Green et al. 3 (July, 2003), http://www.ccrny.org/v2/legal/september_11th/docs/73202GovtResponsetoObservations_andIACHR_Decision.pdf, cited in Diane Marie Amann, Guantánamo, 42 COL. J. TRANS. L. 263, (2004).

¹³⁴ See *Director of Public Prosecutions v. T* (Denmark, 1994) excerpted in O'CONNELL, *supra* note, at 558. (The Danish prosecuted a Croatian in Denmark on an asylum visa for grave breaches of the Geneva Conventions in the beating of POWs in Bosnia.)

¹³⁵ *Unauthorized Flights*, GUARDIAN, Sept. 19, 2005, at 13. Germany, Denmark, Sweden and Austria have launched official investigations or taken other measures in response to use of their airspace by the CIA for rendition of persons to places where they may face torture. See *id.*; see also *Germany Investigates Alleged CIA Abductions*, COLS.DISPATCH July 22, 2005, at A11.

¹³⁶ For details regarding the complaints filed in Germany, see the website of the Center for Constitutional Rights, http://www.ccrny.org/v2/legal/september_11th/sept11Article.asp?ObjID=1xiADJOOQx&Content=472.

torture and abuse at the hands of Americans.¹³⁷ More legal action can be expected given the position taken in many countries that their courts have jurisdiction over torture, coercion, cruelty, and abuse during interrogation in war and peace.¹³⁸

Conclusion

Whether a combatant or a civilian criminal suspect, those detained by the United States in its so-called war on terror have certain inalienable rights. Likewise, the United States government, its military and agencies, and those working under the control of the U.S. government have specific legal obligations that form a framework within which individuals can be detained. Neither wishful legal analysis nor creative classification of detainees relieves the government of its responsibilities. While there is no treaty, law, or regulation prohibiting the interrogation of prisoners and detainees, such interrogation must be carried out in a manner consistent with law, both domestic and international. Anyone authorizing, supervising, or conducting interrogations in which illegal techniques are used should be held accountable in accord with the international bans on coercive interrogation. In complying with this law lies our nation's best chance of triumphing over terrorism – not in the narrow sense of stopping every attack but in the larger sense of being a society worth defending from terrorism.

¹³⁷ Human Rights First and the American Civil Liberties Union have brought a civil suit on behalf of victims of torture against Donald Rumsfeld, George Tenet and others, see http://www.humanrightsfirst.org/us_law/etn/lawsuit/statements/lit-posner-030105.htm ; the Center for Constitutional Rights and human rights lawyers have brought a RICO action on behalf of victims of torture against two private contracting firms that supplied interpreters and contractors to the U.S. government, see <http://www.ccr-ny.org/v2/reports/report.asp?ObjID=cBct36Qkps&Content=401>

¹³⁸ For a discussion of jurisdiction over the crime of torture, see, James Thuo Gathii, *Torture, Extraterritoriality, Terrorism and International Law*, 67 ALBANY L. R. 335 (2003).