

PHR

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Human Rights



BREAK THEM DOWN

**Systematic Use of
Psychological Torture
by US Forces**

Physicians for Human Rights

Physicians for Human Rights (PHR) mobilizes health professionals to advance the health and dignity of all people through action that promotes respect for, protection of, and fulfillment of human rights.

Since 1986, PHR members have worked to stop torture, disappearances, and political killings by governments and opposition groups and to investigate and expose violations, including: deaths, injuries, and trauma inflicted on civilians during conflicts; suffering and deprivation, including denial of access to health care, caused by ethnic and racial discrimination; mental and physical anguish inflicted on women by abuse; exploitation of children in labor practices; loss of life or limb from landmines and other indiscriminate weapons; harsh methods of incarceration in prisons and detention centers; and poor health stemming from vast inequalities in societies.

As one of the original steering committee members of the International Campaign to Ban Landmines, PHR shared the 1997 Nobel Peace Prize.

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I. Executive Summary

This report is the first to comprehensively examine the use of psychological torture by US personnel in the so-called “war on terror.”¹ It reviews the techniques used on detainees, what clinical experience and studies reveal about the long-lasting and extremely devastating health consequences of psychological torture, how a regime of psychological torture came about and was perpetuated, and what the current status of psychological torture is in US policy. Although the evidence is far from complete, what is known warrants the inference that psychological torture was central to the interrogation process and reinforced through conditions of confinement. Evidence exists of its continued use in 2004 and some practices likely remain in place to this day.

The use of psychological torture followed directly from decisions by the civilian leadership as well as high ranking military officers, including those in the Executive branch, and their support of decisions to “take the gloves off” in interrogations and “break” prisoners by employing techniques of psychological torture including sensory deprivation, isolation, sleep deprivation, forced nudity, the use of military working dogs to instill fear, cultural and sexual humiliation, mock executions, and the threat of violence or death toward detainees or their loved ones. These kinds of techniques have extremely devastating consequences for individuals subjected to them and can be just as harmful and are often more long-lasting than physical torture.

The infamous pictures from Abu Ghraib prison in Iraq indelibly brought home how severe forms of psychological coercion—detainees terrorized by snarling dogs and wires dangling from their wrists, subjected to severe sexual humiliation, and disoriented by hooding—are indeed forms of torture. What the images do not show, but what this report reveals, is that psychological torture, even if not as graphic as the images, was at the center of the treatment and interrogation of detainees in US custody in Afghanistan, Guantánamo and Iraq since 2002.

Since the Abu Ghraib scandal broke a year ago, the physical abuse of detainees through beatings, use of stress positions, deprivation of food, and infliction of severely cold and hot temperatures, has understandably gained the most attention, and the United States Army has itself labeled the deaths of 26 detainees as homicides. The evidence now available from witness accounts, documents released under the Freedom of Information Act, official investigations, leaked reports from the International Committee of the Red Cross (ICRC), media reports, and inquiries by Physicians for Human Rights, shows that physical forms of torture and cruel, inhuman and degrading treatment served only to punctuate the pervasive use of psychological torture by US personnel against detainees.

The use of the psychologically abusive interrogation methods is immoral and is illegal under the Geneva Conventions and other sources of international law to which the United States is a party, civil domestic law and the Uniform Code of Military Justice. US courts, international treaty bodies, UN special rapporteurs on torture, and the US State Department have all identified these techniques as a form of torture or cruel, inhuman, or degrading treatment. Indeed, when Congress enacted a law to implement the requirement of the Convention against Torture to criminalize torture, it defined precisely what it meant by the criminal act of mental or psychological torture. The US Congress defined the severe mental pain or suffering that

¹ The “war on terror” is the term the US government has given its continued operations in Afghanistan, Iraq, and Guantánamo.

constitutes an element of the crime of torture as including threats of death or injury and the administration or application or threatened administration or application of “procedures calculated to disrupt profoundly the senses or the personality.”² This definition encompasses exactly the procedures that were used.

Psychological torture also violates long-standing instructions for military interrogations. Army Field Manual 34-52, the Army’s guide on interrogations, currently being revised, allows psychological methods of interrogation, but draws a very sharp line at psychological coercion and efforts to break down detainees, which it considered both unlawful and ineffective:

[The] use of force, mental torture, threats, insults, or exposure to unpleasant or inhumane treatment of any kind is prohibited by law and is neither authorized nor condoned by the US Government. Experience dictates 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.³

The Federal Bureau of Investigation agrees. After the Abu Ghraib scandal, it issued an electronic communication that said that FBI policy “has consistently provided that FBI personnel may not obtain statements during interrogations by the use of force, threats, physical abuse, threats of such abuse or severe physical conditions.”⁴ It reiterated, “It is the policy of the FBI that no interrogation of detainees, regardless of status, shall be conducted using methods which could be interpreted as inherently coercive, such as physical abuse or the threat of such abuse to the person being interrogated or to any third party, or imposing severe physical conditions.”⁵ This reiteration of policy came on the heels of a number of complaints from the FBI to the Department of Defense regarding their use of unacceptably aggressive interrogation tactics.⁶

A Regime of Psychological Torture

Much of what took place in the closed facilities where detainees were kept and interrogated remains secret. In particular, the policies and practices of the Central Intelligence Agency (CIA) are almost completely shielded from public scrutiny. Yet there is sufficient evidence available now to show a consistent pattern of the use of psychological torture as a key element in the interrogation of detainees by US personnel. Various techniques were often applied in combination, in order to amplify and heighten their effect.

² 18 U.S.C. §2340(2)(B).

³ Department of the Army. Army Field Manual 34-52. Intelligence Interrogation. Chapter 1, Interrogation and the Interrogator. May 8, 1987. Available at: <http://www.globalsecurity.org/intell/library/policy/army/fm/fm34-52/>. Accessed April 26, 2005.

⁴ Electronic Communication to All Divisions. From General Counsel, Federal Bureau of Investigation. Title: Treatment of Prisoners and Detainees. May 19, 2004. Available at: <http://www.aclu.org/torturefoia/released/44A.pdf>. Accessed April 27, 2005.

⁵ *Id.*

⁶ See E-mail. From [redacted]. To T.J. Harrington (Div13)(FBI). Subject: Instructions to GTMO Interrogators. May 10, 2004. Disclosed to Senator Levin by William E. Moschella, Assistant Attorney General, US Department of Justice. March 18, 2005.

Prolonged Isolation

The use of prolonged isolation took place in all three theaters of operation throughout the “war on terror” and most likely is continuing today. There are reports from the US-run Bagram Air Force Base in Afghanistan that forces used solitary confinement at the base in 2002 and that the harshest treatment was directed at detainees held in isolation.⁷ US personnel also used isolation as an interrogation tactic in Iraq. Based on visits to detention facilities throughout Iraq in 2003, the ICRC found that detainees held at Baghdad International Airport were “held for nearly 23 hours a day in strict solitary confinement in small concrete cells devoid of daylight.”⁸

An even more restrictive use of isolation was in place at Abu Ghraib prison in Iraq. The Fay report found the use of total isolation there to be “routine and repetitive” and said that it amounted to abuse.⁹ The ICRC visited detainees in the “isolation section” of Abu Ghraib in 2003 and witnessed the practice of “keeping persons deprived of their liberty completely naked in totally empty concrete cells and in total darkness, allegedly for several consecutive days.”¹⁰ FBI agents who visited Abu Ghraib confirmed the use of isolation; they reported seeing detainees forced to strip naked and then placed in isolation with no clothes.¹¹ Apparently the use of isolation did not cease in Iraq after the Abu Ghraib scandal. A Criminal Investigation Command investigation report describes a detainee being kept in a small cell by himself at an unknown facility in Iraq in July 2004.¹²

Isolation was built into the housing system used at Guantánamo. Detainees held there in 2002 reported that “people would be kept [in isolation] for months and months and months.”¹³ This continued in 2003, with detainees at Guantánamo being kept in isolation for anywhere from two to three months to 18 months.¹⁴ In October 2003, the ICRC brought its concerns that “interrogators attempt to control the detainees through the use of isolation” to the attention of

⁷ Van Natta Jr. D. “Questioning Terror Suspects In a Dark and Surreal World.” *New York Times*. March 9, 2003.

⁸ International Committee of the Red Cross. *Report of the International Committee of the Red Cross (ICRC) 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*. February 2004: para. 43. [ICRC February 2004 report].

⁹ MG George R. Fay. AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade. 2004: 95. Available at: <http://www4.army.mil/ocpa/reports/ar15-6/AR15-6.pdf>. Accessed April 26, 2005. [Fay report].

¹⁰ ICRC February 2004 report. Para. 27.

¹¹ Federal Bureau of Investigation. Memorandum from Inspection. To Inspection. Title: Counterterrorism Division, Inquiry Regarding Activities of FBI Personnel at Abu Ghurayb Prison (AGP) During October 2003–December 2003. May 25, 2004. Available at http://www.aclu.org/torturefoia/released/t2969_3060.pdf. Accessed April 26, 2005. Describing investigation conducted by Supervisory Special Agent [redacted]. Los Angeles, California. May 17, 2004.

¹² Agent’s Investigation Report. ROI No. 0234-04-CID259-80271. July 19, 2004. In: US Army Criminal Investigation Command, Department of the Army. Memorandum for See Distribution. Subject: CID Report of Investigation—Initial/Final/SSI—0234-04-CID259-80271-/5C2/5Y2E/5X1. August 2, 2004. Available at: http://www.aclu.org/torturefoia/released/5245_5258.pdf. Accessed April 26, 2005.

¹³ Detention in Afghanistan and Guantánamo Bay: Statement of Shafiq Rasul, Asif Iqbal and Rhuheh Ahmed. July 26, 2004: para. 161. Available at: http://www.ccr-ny.org/v2/legal/september_11th/docs/Guantanamo_composite_statement_FINAL.pdf. Accessed April 26, 2005. [Tipton Three statement].

¹⁴ See, e.g., O’Neill B. “After Guantánamo.” *BBC News*. January 25, 2005. Available at: http://news.bbc.co.uk/2/hi/uk_news/magazine/4203803.stm. Accessed April 26, 2005; Tipton Three statement, paras. 193, 199–202, 231.

US officials at Guantánamo,¹⁵ but practice did not change. In fact, a source with knowledge of detainee operations at Guantánamo told PHR that in mid-2004, up to a quarter of the over 500 detainees were kept in isolation and that a new isolation facility, Camp Five, opened in May 2004.¹⁶ This facility is modeled on US “supermaximum” prisons, which often subject prisoners to near total isolation for years on end, and apparently has over 100 isolation units, where lights are kept on for 24 hours a day.¹⁷

Sleep Deprivation

The use of sleep deprivation appears to have been a common interrogation tactic in Afghanistan, Iraq, and Guantánamo. Detainees held at various locations in Afghanistan in 2002 and 2003 describe being routinely deprived of sleep.¹⁸ The spokesman for the American-led force in Afghanistan admitted in 2003 that sleep deprivation was “probably within the lexicon”¹⁹ and that a “common technique” for keeping detainees awake was to keep bright lights on at all times or to wake detainees every fifteen minutes.²⁰ At Guantánamo, sleep deprivation also was regularly employed. Personnel familiar with conditions there described how sleep deprivation was implemented at the naval base in 2003:

[A]n inmate was awakened, subjected to an interrogation in a facility known as the Gold Building, then returned to a different cell. As soon as the guards determined the inmate had fallen into a deep sleep, he was awakened again for interrogation after which he would be returned to yet a different cell. This could happen five or six times during a night.²¹

Its use continued in 2004, according to detainees held there during that time.²²

Sleep deprivation occurred in detention facilities throughout Iraq as well. One FBI report recounts an incident at Abu Ghraib in 2003 in which an agent witnessed a hooded detainee draped in a shower curtain and handcuffed to a waist high rail. A military policeman was lightly slapping the detainee on his back, which the agent was told was done because the “detainee

¹⁵ Joint Task Force 170, Department of Defense. Memorandum for Record. Re: ICRC Meeting with MG Miller on 09 Oct 03. Available at: <http://www.washingtonpost.com/wp-srv/nation/documents/GitmoMemo10-09-03.pdf>. Accessed April 26, 2005.

¹⁶ PHR Interview.

¹⁷ PHR Interview.

¹⁸ See, e.g., Van Natta Jr. D. “Questioning Terror Suspects In a Dark and Surreal World.” *New York Times*. March 9, 2003; Tipton Three statement, paras. 45, 52; *Ali v. Rumsfeld*. No. unassigned. N.D. Ill. filed Mar. 1, 2005. Paras. 19, 158(e). Available at: http://www.humanrightsfirst.org/us_law/etn/lawsuit/PDF/rums-complaint-022805.pdf. Accessed April 26, 2005. [*Ali v. Rumsfeld*].

¹⁹ Van Natta Jr. D. “Questioning Terror Suspects In a Dark and Surreal World.” *New York Times*. March 9, 2003. Quoting Colonel Roger King.

²⁰ Human Rights Watch. “*Enduring Freedom*”: *Abuses by U.S. Forces in Afghanistan*. Vol. 16. No. 3(C). 2004: 36. Available at <http://hrw.org/reports/2004/afghanistan0304/>. Accessed April 26, 2005. Citing Gannon K. “Prisoners Released from Bagram Forced to Strip Naked, Deprived of Sleep, Ordered to Stand for Hours.” *Associated Press*. March 14, 2003.

²¹ Lewis NA. “Broad Use of Harsh Tactics is Described at Cuba Base.” *New York Times*. October 17, 2004.

²² See, e.g., Amnesty International. *Human Dignity Denied: Torture and Accountability in the ‘War on Terror’*. AI Index: AMR 51/145/2004. 2004:25. Available at: <http://web.amnesty.org/library/index/engamr511452004>. Accessed April 26, 2005. Citing Interview with Amnesty International, Sweden, 27 July 2004.

was being subjected to sleep deprivation.”²³ The ICRC said that sleep deprivation at Abu Ghraib during mid-October 2003 was implemented through “the playing of loud music or constant light in cells devoid of windows.”²⁴ Interviews conducted by Maj. Gen. Taguba and General Fay for their respective reports confirmed the pervasive use of sleep deprivation at Abu Ghraib. Capt. Donald J. Reese, the warden of the hard site at Abu Ghraib, told Maj. Gen. Taguba that “sometimes [military intelligence personnel] would put [detainees] on special sleep deprivation plans.”²⁵ Colonel Thomas M. Pappas, the head of military intelligence at Abu Ghraib, explained that doctors were asked to monitor such plans.²⁶ Personnel were assigned to keep detainees awake.²⁷ The use of sleep deprivation was not limited to Abu Ghraib. Detainees held in January, March, and April 2004 in Mosul and Tikrit, Iraq report being subjected to sleep deprivation.²⁸

Severe Sexual and Cultural Humiliation

The use of humiliation as a means of breaking down the resistance of detainees, including forced nudity and forced grooming, began when the “war on terror” began. In 2002, reports from Afghanistan revealed that detainees were being stripped and photographed “in shameful and obscene positions”²⁹ or touched inappropriately by female interrogators.³⁰ Detainees held at Kandahar, Afghanistan in 2002 say they underwent forced grooming and forced cavity searches, which they believe were meant to humiliate them.³¹ Detainees held in 2003 and 2004 similarly report being subjected to forced nudity and sexual humiliation.³²

At Guantánamo, detainees’ accounts of forced nudity and sexual humiliation were confirmed by FBI reports. An FBI letter to an Army official states that during late 2002 an agent witnessed a female interrogator at Guantánamo rubbing lotion on a detainee’s arms during Ramadan, when

²³ Federal Bureau of Investigation. Memorandum from Inspection. To Inspection. Title: Counterterrorism Division, Inquiry Regarding Activities of FBI Personnel at Abu Ghurayb Prison (AGP) During October 2003–December 2003. May 25, 2004. Available at: http://www.aclu.org/torturefoia/released/t2969_3060.pdf. Accessed April 26, 2005. Describing investigation conducted by Supervisory Special Agent [redacted]. Portland, Oregon. May 18, 2004.

²⁴ ICRC February 2004 report. Para. 27.

²⁵ Interview by Maj. Gen. Taguba, CFLCC Deputy Commanding General, US Army. With Capt. Donald J. Reese, US Army Reserve. February 10, 2004: 44. Available at: <http://www.publicintegrity.org/docs/AbuGhraib/Abu10.pdf>. Accessed April 26, 2005.

²⁶ Article 15-6 Investigation Interview by Maj. Gen. Taguba, CFLCC Deputy Commanding General, US Army. With Col. Thomas M. Pappas, Commander, 205th Military Intelligence Brigade. February 9, 2004: 3.

²⁷ Maj. Gen. Antonio M. Taguba. Article 15-6 Investigation of the 800th Military Police Brigade. Findings and Recommendations, para. 11(a). Completed February 2004. [Taguba report].

²⁸ See Agent’s Investigation Report. ROI No. 0041-04-CID789. May 30, 2004. In: US Army Criminal Investigation Command, Department of the Army. Memorandum for See Distribution. Subject: CID Report of Investigation—Final (C)/SSI—0140-04-CID259-80204-/5C1Q2/5Y2E. July 8, 2004. Available at: http://www.aclu.org/torturefoia/released/4852_4872.pdf. Accessed April 26, 2005; Translation of Statement provided by Detainee [redacted]. 0180-04-CID259-80227. June 19, 2004. In: US Army Criminal Investigation Command, Department of the Army. Memorandum for See Distribution. Subject: CID Report of Investigation—Final (C)/SSI—0180-04-CID259-80227-/5C1C/5Y2E/5X1. July 28, 2004. Available at: http://www.aclu.org/torturefoia/released/1248_1288.pdf. Accessed April 26, 2005; Agent’s Investigation Report. ROI No. 0024-04-CID789. May 6, 2004. In: US Army Criminal Investigation Command, Department of the Army. Memorandum for: See Distribution. Subject: CID Report of Investigation—Final (C)/SSI—0147-04-CID259-80210-/5C1R2/5Y2E/5X1. July 17, 2004. Available at: http://www.aclu.org/torturefoia/released/5015_5069.pdf. Accessed April 26, 2005.

²⁹ Goldenberg S, Meek J. “Papers Reveal Bagram Abuse.” *Guardian* (U.K.). February 18, 2005.

³⁰ Bonner R. “Detainee Says He Was Tortured While in U.S. Custody.” *New York Times*. February 13, 2005.

³¹ Tipton Three statement. Para. 55.

³² *Ali v. Rumsfeld*. Paras. 18,19,161,164.

“physical contact with a woman would have been particularly offensive to a Moslem male.”³³ News reports confirmed that the use of female interrogators violating Muslim taboos regarding sex and contact with women occurred at Guantánamo in 2003 as well.³⁴ These accounts were confirmed to PHR by a source familiar with conditions there. According to the source, in 2003 female interrogators used sexually provocative acts as part of interrogation. For example, female interrogators sat on detainees’ laps and fondled themselves or detainees, opened their blouses and pushed their breasts in the faces of detainees, opened their skirts, kissed detainees and if rejected, accused them of liking men, and forced detainees to look at pornographic pictures or videos.³⁵ Although the use of female interrogators appeared to decline in 2004, a source told PHR that humiliation and violation of cultural and religious taboos, including forced shaving, persisted.³⁶

Humiliation of detainees was pervasive at Abu Ghraib. According to the Fay report, “[Military Intelligence] interrogators started directing nakedness at Abu Ghraib as early as 16 September 2003 to humiliate and break down detainees.”³⁷ Forced nudity was used not as a punishment, nor as an exception, but as an accepted method of interrogation. One captain interviewed by Maj. Gen. Taguba said that when he questioned the use of nudity at the prison, he was told “it’s an interrogation method that we use.”³⁸ Statements taken by General Fay from soldiers who worked at Abu Ghraib confirm the pervasive use of nudity.³⁹ Detainees at Abu Ghraib also were forced to wear women’s underwear and forced to assume sexually degrading positions. One soldier told General Taguba, “During my tour at the prison I observed that when the male detainees were first brought to the facility, some of them were made to wear female underwear, which I think was to somehow break them down.”⁴⁰

It is important to note that the very extreme forms of sexual humiliation seen in the photographs at Abu Ghraib were not routine. But the very pervasiveness and commonality of the use of forced nudity and other forms of sexual humiliation not only led to the more extreme abuses but created an environment in which even more extreme forms of humiliation and abuse were likely not seen as such.

The humiliation of detainees well documented at Abu Ghraib in 2003 was not isolated to that detention facility. The ICRC, in visits to other detention facilities in Iraq in 2003, found that

³³ Letter from T.J. Harrington, Deputy Assistant Director, Counterterrorism Division, Federal Bureau of Investigation. To Maj. Gen. Donald J. Ryder, Department of the Army. July 14, 2004. Available at: http://www.aclu.org/torturefoia/released/FBI_4622_4624.pdf. Accessed April 26, 2005.

³⁴ Leonnig CD, Priest D. “Detainees Accuse Female Interrogators.” *Washington Post*. February 10, 2005.

³⁵ PHR Interview.

³⁶ PHR Interview.

³⁷ Fay report at 69.

³⁸ Interview by Maj. Gen. Taguba, CFLCC Deputy Commanding General, US Army. With Capt. Donald J. Reese, US Army Reserve. February 10, 2004:127. Available at: <http://www.publicintegrity.org/docs/AbuGhraib/Abu10.pdf>. Accessed April 26, 2005.

³⁹ See, e.g., Sworn Statement of [redacted]. Civilian. June 7, 2004. In: Annex to Fay/Jones/Kern report. Available at: http://www.aclu.org/torturefoia/released/030905/DOD452_517.pdf. Accessed April 26, 2005; Memorandum for Record. Subject: Telephonic Interview. May 28, 2003. In: Annex to Fay/Jones/Kern report. Available at: http://www.aclu.org/torturefoia/released/030905/DOD863_905.pdf. Accessed April 26, 2005; Sworn Statement of [redacted]. E-4/AR, B Co 325 MI BN. July 20, 2004. In: Annex to Fay/Jones/Kern report. Available at: http://www.aclu.org/torturefoia/released/030905/DOD452_517.pdf. Accessed April 26, 2005; Sworn Statement of [redacted]. E-4/AD, A Company, 519th Military Intelligence Battalion, 525th Military Intelligence Brigade. June 15, 2004. In: Annex to Fay/Jones/Kern report. Available at: http://www.aclu.org/torturefoia/released/030905/DOD565_615.pdf. Accessed April 26, 2005.

⁴⁰ Taguba report. Findings and Recommendations, para. 11(e).

“[b]eing paraded naked outside cells in front of other persons deprived of their liberty, and guards, sometimes hooded or with women’s underwear over their head” and “[a]cts of humiliation such as being made to stand naked against the wall of the cell with . . . women’s underwear over the head for prolonged periods--while being laughed at by guards, including female guards, and sometimes photographed in this position” were among the methods of ill-treatment most frequently alleged during interrogation.⁴¹

Use of Threats and Dogs to Induce Fear of Death or Injury

Interrogators in Afghanistan, Iraq, and Guantánamo cultivated the fear of injury and death through the use of military working dogs, the threat of beatings or electrocutions, and mock executions.

There is evidence that the use of dogs to instill fear and threaten detainees was used as an interrogation technique in all three theaters of operation, from the beginning of the “war on terror.” Detainees held at Bagram Air Force Base and Kandahar, Afghanistan in 2002 report being threatened with dogs.⁴² An FBI letter states that in “September or October of 2002 FBI agents observed that a canine was used in an aggressive manner to intimidate [a] detainee”⁴³ at Guantánamo. There is evidence that use of dogs occurred in Afghanistan in 2003 as well.⁴⁴ At Abu Ghraib, the Fay report found that the use of dogs began almost immediately after the arrival of dog teams at Abu Ghraib on November 20, 2003.⁴⁵ Statements from dog handlers at Abu Ghraib confirmed the use of dogs to instill fear in detainees.⁴⁶

Aside from the use of dogs, mock executions and death threats were prevalent in Afghanistan and Iraq. A detainee in Kandahar, Afghanistan says that in 2002, a 9mm pistol was held to his temple.⁴⁷ A Criminal Investigation Command report describes a compact disc that contains digital images of American soldiers conducting mock executions on Afghan detainees beginning in early December 2003 at Fire Base Tycze, Dah Rah Wood, Afghanistan.⁴⁸

The most frequent use of threats of death or injury occurred in Iraq. Evidence suggests that the earliest use of mock executions from Iraq occurred in April 2003. A soldier stationed in Samarra, Iraq reported that beginning on April 15, 2003 he had “observed staged executions” of several detainees using M16 rifles and 9mm pistols.⁴⁹ There are reports of US personnel

⁴¹ ICRC February 2004 report. Para. 25.

⁴² See Goldenberg S, Meek J. “Papers Reveal Bagram Abuse.” *Guardian* (U.K.). February 18, 2005; Tipton Three statement. Paras. 46, 55.

⁴³ Letter from T.J. Harrington, Deputy Assistant Director, Counterterrorism Division, Federal Bureau of Investigation. To Maj. Gen. Donald J. Ryder, Department of the Army. July 14, 2004. Available at: http://www.aclu.org/torturefoia/released/FBI_4622_4624.pdf. Accessed April 26, 2005.

⁴⁴ *Ali v. Rumsfeld*. Para. 18.

⁴⁵ Fay report at 10.

⁴⁶ White J, Higham S. “Use of Dogs to Scare Prisoners Was Authorized.” *Washington Post*. June 11, 2004.

⁴⁷ Tipton Three statement. Para. 14.

⁴⁸ US Army Criminal Investigation Command, Department of the Army. Memorandum for: See Distribution. Subject: CID Report of Investigation—Final (C)/SSI-0133-2004-CID452-63629-5C1A/5M3A/5X3/5Y2D2/5C2B. August 25, 2004. Available at: http://www.aclu.org/torturefoia/released/021605/6176_6311.pdf. Accessed April 26, 2005.

⁴⁹ Sworn Statement of [redacted]. SGT/AD, 170th MP Det CID. July 18, 2003. In: US Army Criminal Investigation Command, Department of the Army. Memorandum for See Distribution. Subject: CID Report of Investigation—Final (C)—0139-03-CID469-60206-5Y2E2/5Y2P9/9G1. October 13, 2004. Available at: http://www.aclu.org/torturefoia/released/030705/8809_8877.pdf. Accessed April 26, 2005.

holding guns to detainees' heads in Karbala and Taji, Iraq in the summer of 2003.⁵⁰ An ICRC report describes the use of death threats at Umm Qasr and Camp Bucca, Iraq. The report states, "Persons deprived of their liberty undergoing interrogation . . . were allegedly subjected to frequent cursing, insults and threats, both physical and verbal, such as having rifles aimed at them in a general way or directly against the temple, the back of the head, or the stomach, and threatened with transfer to Guantanamo, death or indefinite internment."⁵¹ Threats were extended to family members, particularly the wives and daughters, of detainees.⁵²

Combination of Techniques

The evidence points to a widespread and systematic application of these techniques, often in combination. According to the Fay report, a Criminal Investigation Command investigation found that, "from December 2002, interrogators in Afghanistan were removing clothing, isolating people for long periods of time, using stress positions, exploiting fear of dogs and implementing sleep and light deprivation."⁵³ Detainees reported that at Guantánamo in late 2002, they observed techniques such as short-shackling, loud music playing in interrogation, forced shaving of beards and hair, putting people in cells naked, taking away people's comfort items, sleep deprivation, and the use of cold air.⁵⁴ Other detainees report being subjected to a range of psychologically abusive interrogation techniques at various locations in Afghanistan in 2003 and 2004.⁵⁵ In Iraq in 2003, the ICRC found numerous forms of ill-treatment, including threats, insults, verbal abuse, hooding, sleep deprivation, forced nudity, and sexual humiliation, being used at various detention facilities.⁵⁶ Other reports detail a similar combination of techniques used on detainees in Iraq in 2004.⁵⁷

A source familiar with conditions at Guantánamo in 2004 told PHR that US personnel there had devised a system to break people through a combination of humiliating acts, solitary confinement, temperature extremes, and use of forced positions.⁵⁸ This was confirmed by an internal FBI e-mail that documented an incident observed by an agent at Guantánamo during February 2004. The agent observed a detainee who was short shackled, in a room with the temperature significantly lowered, and subjected to strobe lights and possibly loud music.⁵⁹ The

⁵⁰ USMC Alleged Detainee Abuse Cases Since 11 Sep 01. Spreadsheet documenting alleged detainee abuse cases as of June 16, 2004. Available at: <http://www.aclu.org/torturefoia/released/navy3706.3713.pdf>. Accessed April 26, 2005; US Army Criminal Investigation Command, Department of the Army. Memorandum for: See Distribution. Subject: CID Report of Investigation—Final—0152-03-CID469-60212-5C1A/5C2/5T1. February 6, 2004. Available at: http://www.aclu.org/torturefoia/released/105_167.pdf. Accessed April 26, 2005.

⁵¹ ICRC February 2004 report. Para. 31.

⁵² *Id.* Para. 34.

⁵³ Fay report at 29.

⁵⁴ Tipton Three statement. Para. 161.

⁵⁵ *Ali v. Rumsfeld*. Paras. 18, 19, 21, 164.

⁵⁶ ICRC February 2004 report. Paras. 27, 30, 31, 34.

⁵⁷ See, e.g., Onishi N, Schmitt E. "U.S. Considers Reopening Inquiry Into Possible Abuse Before Iraqi Prison Scandal." *New York Times*. October 14, 2004; Agent's Investigation Report. ROI No. 0041-04-CID789. May 30, 2004. In: US Army Criminal Investigation Command, Department of the Army. Memorandum for See Distribution. Subject: CID Report of Investigation—Final (C)/SSI—0140-04-CID259-80204-/5C1Q2/5Y2E. July 8, 2004. Available at: http://www.aclu.org/torturefoia/released/4852_4872.pdf. Accessed April 26, 2005.

⁵⁸ PHR Interview.

⁵⁹ E-mail. From [redacted]. To [redacted]. Subject: reported incidents. May 5, 2004. Available at: http://www.aclu.org/torturefoia/released/FBI_4985_4987.pdf. Accessed April 26, 2005.

detainee was left in this condition for 12 hours, during which time he was not allowed to eat, pray or use the bathroom.⁶⁰

From the evidence it is clear that the military's own inquiries are incorrect about when abuses began. The 2004 report issued by an independent panel headed by the Honorable James R. Schlesinger, for example, claimed that in Afghanistan through the end of 2002, all forces followed Army Field Manual 34-52, the Army's guide on interrogations.⁶¹ The evidence clearly shows, however, that interrogators in Afghanistan were using psychologically abusive techniques far beyond what was permitted in FM 34-52 from early 2002 on. The executive summary of the report written by Vice Admiral Albert T. Church similarly claimed that interrogators in Guantánamo relied on FM 34-52 in 2002.⁶² Again, the evidence paints a different picture: US military personnel were using psychologically coercive tactics, including prolonged isolation, sexual humiliation, and military dogs at Guantánamo throughout 2002.

While the evidence permits the conclusion that the use of psychologically abusive interrogation methods was systematic from 2002 on, the picture remains incomplete. Reports from detainees are limited, since many remain in custody, and international human rights monitoring groups have been kept out of detention facilities. Official investigations released thus far have largely focused on what happened at Abu Ghraib, without undertaking a comprehensive investigation of conditions and abuses at Guantánamo, Afghanistan, and other detention facilities in Iraq. Much more can and should be investigated.

Health Consequences

Psychological torture and cruel, inhuman, and degrading treatment can have extremely destructive health consequences for individuals. Short and long-term effects can include memory impairment, reduced capacity to concentrate, somatic complaints such as headache and back pain, hyperarousal, avoidance, irritability, severe depression with vegetative symptoms, nightmares, feelings of shame and humiliation, and posttraumatic stress disorder.⁶³ Sources with knowledge of interrogation at Guantánamo told PHR that some detainees there suffer from incoherent speech, disorientation, hallucination, irritability, anger, delusions, and sometimes paranoia.⁶⁴ Some detainees who have been released from US-run detention facilities after being subjected to a combination of psychologically abusive interrogation techniques report that they suffer from depression, thoughts of suicide and nightmares, memory loss, emotional problems, and are quick to anger and have difficulties maintaining relationships and employment.⁶⁵ Based on past experience, post traumatic stress disorder is likely to be common.

⁶⁰ *Id.*

⁶¹ Final Report of the Independent Panel to Review DoD Detention Operations. August 2004: 8. Available at: <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>. Accessed April 26, 2005.

⁶² Naval Inspector General, Vice Admiral Albert T. Church, III. Executive Summary. March 10, 2005:4. [Church executive summary]. Church completed a comprehensive review of interrogation operations, but only the executive summary was made available to the public.

⁶³ Keller A, Gold J. "Survivors of Torture." In: Sadock B, Sadock V, eds. *Kaplan and Sadock's Comprehensive Textbook of Psychiatry*. Vol. 1. 8th ed. Philadelphia, PA: Lippincott Williams & Wilkins; 2005: 2400.

⁶⁴ PHR Interview.

⁶⁵ *Ali v. Rumsfeld*. Paras. 157–159, 163–169, 170–177.

Prolonged Isolation

In the 1950s and 1960s, studies demonstrated that short-term isolation caused an inability to think or concentrate, anxiety, somatic complaints, temporal and spatial disorientation, deficiencies in task performance, hallucinations, and loss of motor coordination.⁶⁶ The findings of contemporary research are consistent with the earlier findings of solitary confinement's harmful consequences. Effects include depression, anxiety, difficulty with concentration and memory, hypersensitivity to external stimuli, hallucinations and perceptual distortions, paranoia, and problems with impulse control.⁶⁷ People who are exposed to isolation for the first time develop "a predictable group of symptoms, which might almost be called a 'disease syndrome.'"⁶⁸ The symptoms include "bewilderment, anxiety, frustration, dejection, boredom, obsessive thoughts or ruminations, depression, and, in some cases, hallucination."⁶⁹

These reports of the severe health effects of solitary confinement parallel reports by government agencies, the ICRC and individual detainees who were subjected to prolonged isolation. In November 2002, FBI agents at Guantánamo observed a detainee after he had been subjected to intense isolation in a cell that was always flooded with light for over three months. They reported that the detainee "was evidencing behavior consistent with extreme psychological trauma (talking to non-existent people, reporting hearing voices, crouching in a corner of the cell covered with a sheet for hours on end)."⁷⁰ FBI agents brought this and other concerns about abusive treatment of detainees to the attention of Department of Defense officials in mid 2003, but there is no evidence that the concerns were appropriately addressed.

In late 2003, the ICRC warned the Administration publicly that a system in which detainees were held indefinitely would inevitably lead to mental health problems.⁷¹ When the ICRC visited Guantánamo in June 2004, it found a high incidence of mental illness produced by stress, much of it caused by prolonged solitary confinement.⁷² A source familiar with conditions at Guantánamo at that time told PHR that deprivation of sensory stimulation on the one hand and overstimulation on the other were causing spatial and temporal disorientation in detainees. The results were self-harm and suicide attempts.⁷³

⁶⁶ See, e.g., Graessner S. "Gesundheitliche Auswirkungen von Langzeithaft mit Isolation; Historische Wurzeln und Forderungen." In: Birck A, Pross C, Lansen J, eds. *Das Unsagbare*. Berlin, Germany: Springer Verlag; 2002:253-269; Leidermann PH. "Man Alone: Sensory Deprivation and Behavioral Change." *Corrective Psychiatry & Journal of Social Therapy*. 1962;8:64-74.

⁶⁷ See, e.g., Haney C. "Mental Health Issues in Long-Term Solitary and 'Supermax' Confinement." *Crime & Delinquency*. January 2003;49(1):124-156; Gendreau P, Freedman NL, Wilde GJS, Scott GD. "Changes in EEG Alpha Frequency and Evoked Response Latency During Solitary Confinement." *Journal of Abnormal Psychology*. 1972;79(1):54-59; Grassian S. "Psychopathological Effects of Solitary Confinement." *American Journal of Psychiatry*. 1983;140:1450-54.

⁶⁸ Brief of Professors and Practitioners of Psychology and Psychiatry as *Amicus Curiae* in Support of Respondent at 12-13. *Wilkinson v. Austin*. No. 04-495. S. Ct. filed 2005. Citing Hinckle LE, Wolff HE. "Communist Interrogation and Indoctrination of 'Enemies of the States'." *76 Archives of Neurology and Psychiatry*. 1956;76:115-174.

⁶⁹ *Id.* at 13.

⁷⁰ Letter from T.J. Harrington, Deputy Assistant Director, Counterterrorism Division, Federal Bureau of Investigation. To Major General Donald J. Ryder, Department of the Army. July 14, 2004. Available at: http://www.aclu.org/torturefoia/released/FBI_4622_4624.pdf. Accessed April 26, 2005.

⁷¹ Lewis NA. "Red Cross Finds Detainee Abuse in Guantánamo." *New York Times*. November 30, 2004.

⁷² *Id.* Summarizing findings from a leaked ICRC report to the US government, based on a June 2004 visit to Guantánamo.

⁷³ PHR Interview.

Sleep Deprivation

The most pronounced impact of total sleep deprivation is cognitive impairment,⁷⁴ which can include “impairments in memory, learning, logical reasoning, arithmetic skills, complex verbal processing, and decision making.”⁷⁵ Sleep-deprived individuals take longer to respond to stimuli, and sleep loss causes “attention deficits, decreases in short-term memory, speech impairments, perseveration, and inflexible thinking.”⁷⁶ These symptoms may appear after one night of total sleep deprivation, after only a few nights of sleep restriction (5 hours of sleep per night).⁷⁷ Sleep restriction also can result in hypertension and other cardiovascular disease.⁷⁸ One study correlates sleep deprivation with decreased pain tolerance,⁷⁹ which has significant implications for torture and other situations in which sleep restrictions are implemented in tandem with other torture techniques.

Two detainees held at Bagram Air Force Base, Afghanistan in March 2002 said that the sleep deprivation to which they were subjected lasted for several weeks and left them terrified and disoriented.⁸⁰

Sexual Humiliation

According to clinicians at the Minnesota-based Center for Victims of Torture (CVT), forced nakedness is intended to create a power differential between detainees and interrogators by stripping the victim of his/her identity, inducing immediate shame, and establishing an environment where the threat of sexual and physical assault is always present. By denying the victim the most basic forms of decency and privacy, forced nudity conveys the message that interrogators have absolute control over the detainees’ bodies and can do as they please. Implied in the context of forced nudity is the threat of other, more abusive violations, whether sexual or physical.⁸¹

There is evidence that US personnel directed sexual humiliation toward detainees because they knew that Arabs are particularly vulnerable to sexual humiliation and sought to exploit that vulnerability.⁸² Clinicians at the Center for the Treatment of Torture Victims in Berlin, Germany (Berlin Center), who treat a large population of Muslims, have found that Muslim victims of sexual torture forever carry a stigma and will often be ostracized by the community. They have found that male victims often feel degraded in their manhood, especially if the perpetrator was a woman. They have seen marriages and families break up due to the special concept of honor and dignity in Muslim culture that is violated by sexual torture. With respect to forced nudity,

⁷⁴ Sadock B, Sadock V, eds. *Kaplan and Sadock’s Comprehensive Textbook of Psychiatry*. Vol. 1. 8th ed. Philadelphia, PA: Lippincott Williams & Wilkins; 2005: 289.

⁷⁵ Nolen-Hoeksema S. *Abnormal Psychology*. 2nd ed. New York: McGraw-Hill; 2005:627.

⁷⁶ Sadock B, Sadock V, eds. *Kaplan and Sadock’s Comprehensive Textbook of Psychiatry*. Vol. 1. 8th ed. Philadelphia, PA: Lippincott Williams & Wilkins; 2005: 289.

⁷⁷ *Id.*

⁷⁸ Alvarez GG, Ayas NT. “The Impact of Daily Sleep Duration on Health: A Review of the Literature.” *Progress in Cardiovascular Nursing*. 2004;19:56–59.

⁷⁹ Hakki Onen S, Abdelkrim A, Gross A, Eschallier AE, Dubray C. “The Effects of Total Sleep Deprivation, Selective Sleep Interruption and Sleep Recovery on Pain Tolerance Thresholds in Healthy Subjects.” *Journal of Sleep Research*. 2001;10:35–42.

⁸⁰ Human Rights Watch. “*Enduring Freedom*”: *Abuses by U.S. Forces in Afghanistan*. Vol. 16. No. 3(C). 2004: 34. Available at: <http://hrw.org/reports/2004/afghanistan0304/>. Accessed April 26, 2005.

⁸¹ Personal communication with the Center for Victims of Torture.

⁸² Hersh S. “The Gray Zone.” *New Yorker*. May 24, 2004.

the Berlin Center clinicians have found that merely being stripped naked implies the breaking of a strict taboo, which leaves victims feeling extremely exposed and humiliated.⁸³

Erik R. Saar, a translator at Guantánamo from December 2002 to June 2003, wrote that after interrogation sessions, some of which included women interrogators telling detainees they were menstruating and then touching the detainees, the water in the detainee's cell would be turned off so that the detainee could not wash himself. This was done in order to "make the detainee feel that, after talking to [the female interrogator], he was unclean and was unable to go before his God in prayer and gain strength."⁸⁴

Staff members at CVT say that sexual humiliation often leads to symptoms of PTSD and major depression, and that victims often relive the session of humiliation in the form of flashbacks and nightmares long after their detention. In fact, many of their clients who have been sexually humiliated report that their most enduring and disabling symptoms are related to reliving memories of the voices of their torturers using sexually degrading insults or threats.⁸⁵ Clinicians at the Berlin Center similarly have found that victims of sexual torture often suffer from severe depression, anxiety, depersonalization, dissociative states, complex posttraumatic stress disorder, and multiple physical complaints such as chronic headaches, eating disorders, and digestive problems.⁸⁶ They also have found that suicides may occur unless a strong religious conviction forbids otherwise.⁸⁷

Threats to Induce Fear of Death or Injury

According to CVT clinicians, mock executions and other situations where death is threatened force victims to repeatedly experience their last moments before death, create a sense of complete unpredictability, and induce chronic fear and helplessness. Victims who were threatened with death speak of feeling a sense that one is already dead. They often relive these near-death experiences in their nightmares, flashbacks, and intrusive memories. Reliving these near death encounters can provoke feelings of intense anxiety that cause victims to act inappropriately in work and family settings and, in more extreme cases, cause injury to themselves. Staff members at CVT have dealt with victims of this sort of torture who have pleaded with torturers to kill them, preferring real death over its constant threat and continued intolerable pain.⁸⁸

Creating a New Legal Framework to Permit Psychological Torture

Psychological torture was the product of decisions taken at the highest levels to use far more coercive forms of interrogations than had been allowed in the past. To implement this approach, Bush Administration officials ignored previous guidance and set out new legal interpretations followed by new policies and rules. Historically, the United States has adhered

⁸³ Wenk-Ansohn M. "Folgen Sexualisierter Folter – Therapeutische Arbeit mit kurdischen Patientinnen." In: Birck A, Pross C, Lansen J, ed. *Das Unsagbare – Die Arbeit mit Traumatisierten am Behandlungszentrum für Folteropfer Berlin*. Berlin, Germany: Springer Verlag; 2000:57–77.

⁸⁴ Associated Press. "Ex-G.I. Writes About Use of Sex in Guantánamo Interrogations." *New York Times*. January 28, 2005. Quoting from Saar's classified manuscript.

⁸⁵ Personal communication with the Center for Victims of Torture.

⁸⁶ Wenk-Ansohn M. "Folgen Sexualisierter Folter – Therapeutische Arbeit mit kurdischen Patientinnen." In: Birck A, Pross C, Lansen J, ed. *Das Unsagbare – Die Arbeit mit Traumatisierten am Behandlungszentrum für Folteropfer Berlin*. Berlin, Germany: Springer Verlag; 2000:57–77.

⁸⁷ *Id.*

⁸⁸ Personal communication with the Center for Victims of Torture.

to strict limitations on interrogations, following its own guidance and the rule of law as established in the Geneva Conventions. Administration officials started by disparaging the Geneva Conventions and denying their coverage to detainees. Although they established a standard of “humane treatment” for detainees, this protection was undercut by permitting “military necessity” to override that obligation. The Administration then sought to define what constitutes torture very narrowly, so as to permit interrogators to use techniques considered unlawful by authorities ranging from courts to the State Department’s own human rights reports. The most notorious reinterpretation came in a memorandum from the Office of Legal Counsel of the Justice Department in August, 2002.⁸⁹

The new legal approach then became the basis for the approval of interrogation techniques that went far beyond the military’s traditional standards and violated the Geneva Conventions and Convention against Torture. In October 2002, commanders at Guantánamo sought approval for a host of interrogation techniques that went far beyond past practice or what is permitted by the Geneva Conventions and FM 34-52.⁹⁰ A legal memorandum prepared by Lt. Col. Diane E. Beaver in October 2002 considered the legality of the techniques proposed for use at Guantánamo. The memorandum approved the use of waterboarding, isolation, sensory deprivation, removal of clothing, hooding, and exploitation of detainees’ phobias.⁹¹ This approval was based on a combination of reasoning from the 2002 OLC opinion that narrowly interpreted the federal anti-torture statute and the President’s February 2002 directive stating that military necessity could overcome the mandate to treat detainees humanely.⁹²

This legal analysis and recommendations by other officials eventually led to Defense Secretary Donald Rumsfeld’s approval in December 2002 of psychologically abusive interrogation techniques, including sensory deprivation, isolation, hooding, removal of clothing, forced grooming, and use of dogs, for use at Guantánamo.⁹³ When the General Counsel of the Navy expressed reservations about these techniques, Secretary Rumsfeld rescinded them, but at the same time he also permitted exceptions, telling the Commander of US Southern Command that if one of the techniques was warranted, he should receive a request.⁹⁴ Rumsfeld also appointed a Working Group to assess various techniques and their policy implications.⁹⁵

⁸⁹ Memorandum for Alberto R. Gonzales, Counsel to the President. From Office of Legal Counsel, US Department of Justice. Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A. August 1, 2002.

⁹⁰ Memorandum for Commander, Joint Task Force 170. From Jerald Phifer, LTC, USA, Director J2. Subject: Request for Approval of Counter-Resistance Strategies. October 11, 2002. Available at: http://www.npr.org/documents/2004/dod_prisoners/20040622doc3.pdf. Accessed April 27, 2005.

⁹¹ Memorandum for Commander, Joint Task Force 170. From Diane E. Beaver, LTC, USA, Staff Judge Advocate. Subject: Legal Brief on Proposed Counter Resistance Strategies. October 11, 2002. Available at: http://www.npr.org/documents/2004/dod_prisoners/20040622doc3.pdf. Accessed April 27, 2005.

⁹² Memorandum for the Vice President, Secretary of State, Secretary of Defense, Attorney General, Chief of Staff to the President, Director of Central Intelligence, Assistant to the President for National Security Affairs, Chairman of the Joint Chiefs of Staff. From President Bush. Subject: Humane Treatment of al Qaeda and Taliban Detainees. February 7, 2002. Available at: <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf>. Accessed April 27, 2005.

⁹³ Memorandum. For Secretary of Defense. From William J. Haynes II, General Counsel. Subject: Counter-Resistance Techniques. November 27, 2002. Available at: http://www.npr.org/documents/2004/dod_prisoners/20040622doc5.pdf. Accessed April 27, 2005.

⁹⁴ Memorandum for Commander USSOUTHCOM. From Donald Rumsfeld, Secretary of Defense. Subject: Counter-Resistance Techniques. January 15, 2003.

⁹⁵ Memorandum for the General Counsel for the Department of Defense. From Donald Rumsfeld, Secretary of Defense. Subject: Detainee Interrogations. January 15, 2003. Available at: http://www.npr.org/documents/2004/dod_prisoners/20040622doc6.pdf. Accessed April 27, 2005.

The Working Group's report, released April 4, 2003, approved the use of psychologically abusive techniques, such as isolation, environmental manipulation, hooding, threats to transfer a detainee to a third country where the detainee is likely to fear death, forced grooming, removal of clothing, and inducement of fear.⁹⁶ Supposed safeguards were described – including, in some cases, medical examinations – but the overall message was permissiveness. The techniques were recommended despite the Working Group's acknowledgement that alleged safeguards did not ameliorate the danger of going beyond techniques authorized by FM 34-52 and the Geneva Conventions, that certain of the recommended techniques have not historically been used by US military forces, that some have been interpreted to constitute torture or cruel, inhuman, or degrading treatment, and that they could be viewed negatively by other countries. On the basis of this report, Secretary Rumsfeld approved 24 techniques for use at Guantánamo, including environmental manipulation and isolation.⁹⁷ The memo, however, did not exclude the use of techniques not specifically approved, giving latitude to interrogators to vary techniques depending on certain factors, like the detainee's culture. He also qualified the requirement to treat detainees humanely by subjecting it to "military necessity."

The policy directives and legal memorandums ending in Secretary Rumsfeld's April 16, 2003 guidance said that only certain techniques were permitted at Guantánamo. Yet the directives and memorandums also shattered the absolute prohibition on torture by privileging military necessity and defining torture narrowly. The mixed message and general approval of coercion from the highest levels led to the continued use of psychological torture, including techniques that went far beyond those traditionally permitted and those approved by Rumsfeld for use at Guantánamo.

In Afghanistan, the informal use of psychologically coercive interrogation techniques beyond FM 34-52 became formalized in 2003. Details are classified, but according to the evidence, it appears that sensory deprivation, hooding, removal of clothing, forced grooming, isolation, and use of detainees' phobias were approved.⁹⁸

In Iraq, techniques approved for "unlawful combatants" in Guantánamo were adopted for use against detainees who were clearly covered by the Geneva Conventions. In September and October 2003, various memorandums approved the use of environmental manipulation, sleep adjustment, false flag, isolation, presence of military working dogs, sleep management, yelling, loud music and light control, deception, and stress positions.⁹⁹ Even when these techniques were rescinded because of concerns that they were too aggressive, the policies in place allowed the use of techniques not officially approved, if approval was secured by a senior commander. Apparently approval was freely given. For example, one soldier told investigators that interrogators "could send the detainee to isolation for thirty days or more as long as they

⁹⁶ Working Group Report on Detainee Interrogations in the Global War on Terrorism; Assessment of Legal, Historical, Policy, and Operational Considerations. April 4, 2003.

⁹⁷ Memorandum for the Commander, US Southern Command. From Donald Rumsfeld, The Secretary of Defense. Subject: Counter-Resistance Techniques in the War on Terrorism. April 16, 2003.

⁹⁸ See, e.g., Church executive summary at 6.

⁹⁹ See, e.g., Memorandum for Commander, US Central Command. From Ricardo S. Sanchez, Lieutenant General, US Army, Commanding. Subject: CJTF-7 Interrogation and Counter-Resistance Policy. September 14, 2003; Memorandum for C2 and C3, Combined Joint Task Force Seven, Baghdad and Commander, 205th Military Intelligence Brigade, Baghdad. From Ricardo S. Sanchez, Lieutenant General, Commanding, Combined Joint Task Force Seven, Baghdad. Subject: CJTF-7 Interrogation and Counter-Resistance Policy. October 12, 2003.

wrote the right memo. . . . No one was checking to ensure the recommendations were sound with any sort of regularity.”¹⁰⁰

The Present Situation

Because of extreme secrecy regarding detention operations and the decision to classify interrogation techniques (which were previously publicly available) it is difficult to ascertain what forms of psychological torture are currently in use. Some of the most egregious practices, such as use of snarling dogs, may have ended, but long-term isolation is still used.

It is especially disturbing, though, that the Bush Administration has recently reaffirmed an interpretation of psychological torture that essentially immunizes perpetrators from liability for it. In December, 2004, the Administration issued a new opinion interpreting the federal criminal statute on torture to replace its long-discredited opinion from August, 2002.¹⁰¹ That opinion twisted the definition of psychological torture to undermine plain language outlawing techniques “calculated to disrupt profoundly the sense or the personality.” The result is to insulate perpetrators of psychological torture from accountability, thus inviting its continuation.

Nor has the Bush Administration abandoned its refusal to abide by the absolute prohibition against torture. In April 2005, a draft of the Administration’s new detainee operations policy was leaked.¹⁰² Although the document says that there is no military exception to the requirement that detainees be treated humanely, it contradicts that statement only seven pages later by formalizing the category of “enemy combatant” and declaring that their humane treatment is subject to military necessity. This position is contrary to international and domestic law. It is the position that created the space for the ill-treatment and torture of detainees. This policy, especially when understood in tandem with the Administration’s continued interpretation of psychological torture, is a signal that nothing has changed, despite the public outrage over Abu Ghraib. The Administration will continue to seek justifications and legal maneuvers for using coercive interrogation methods.

A report on April 28, 2005 said that the Army is revising its interrogation manual to prohibit specific psychological torture techniques, including stripping prisoners, keeping them in stressful positions for prolonged periods, using military dogs to intimidate prisoners, and sleep deprivation.¹⁰³ Based on what was reported, it may not go far enough. The article does not mention whether other psychologically abusive techniques, like isolation, other methods of inducing fear, and other forms of sexual and cultural humiliation, are prohibited. There also is no mention of whether exceptions are permitted. The “unlawful combatant” category permits military necessity to override humane treatment; what does that mean for the specific prohibitions in this new manual? The new manual must be publicly released so that these issues can be identified and solved. Additionally, this manual is applicable only to the Armed

¹⁰⁰ Sworn Statement of [redacted]. SGT, B/CO 470th Military Intelligence Group. May 18, 2004. In: Annex to Fay/Jones/Kern report. Available at http://www.aclu.org/torturefoia/released/030905/DOD822_862.pdf. Accessed April 26, 2005.

¹⁰¹ Memorandum for James B. Comey, Deputy Attorney General. From Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice. December 30, 2004.

¹⁰² Department of the Army, Department of the Navy, Department of the Air Force, US Coast Guard, Jt. Chiefs of Staff. Joint Publication 3-63: Joint Doctrine for Detainee Operations. March 23, 2005. On file with PHR.

¹⁰³ Schmitt E. “Army, In Manual, Limiting Tactics in Interrogation.” *New York Times*. April 28, 2005: A1.

Forces; it does not guide interrogations by the CIA or other agencies. This gap must be addressed.

The Executive Branch must end and prohibit the use of psychological torture, withdraw legal opinions that permit psychological torture and replace them with an interpretation faithful to the federal criminal anti-torture statute, publicly disclose interrogation rules, hold perpetrators accountable, rehabilitate and compensate victims of torture, permit ongoing monitoring, and promote ethical practice by military medical personnel. The US Congress must establish an independent commission to investigate, carry out its oversight responsibilities, and enact appropriate legislation. Given the Administration's refusal to abide by law, its continued resistance to disclosure of its activities or its rules, a truly independent investigation and means of accountability is required.

II. Introduction

Since at least early 2002, the United States has been engaged in systematic psychological torture, often punctuated by severe physical abuse, against detainees in its custody in the “war on terror.”¹ It is understandable that physical abuse, including the 26 cases the US Army has called homicides,² has received the most intense attention and scrutiny from policy-makers, the media, and the public. Yet this physical abuse took place in the context of an ongoing regime of psychological torture of detainees, one made possible by new interpretations of laws governing psychological torture by the Departments of Justice and Defense and put into place in directives on authorized interrogation techniques. These interpretations, in truly Orwellian fashion, turned laws meant to protect people from torture into means of authorizing it. As recently as December 2004, the Office of Legal Counsel of the Justice Department reaffirmed an interpretation of psychological torture that gives a green light to the very practices the law was designed to prevent.

Beginning in early 2002, officials at the highest levels of the civilian leadership decided that limitations on interrogations and treatment of prisoners, as embodied in military guidelines and the laws of war, placed too many constraints on interrogations. So they began a process to authorize and to seek to justify legally a range of psychologically abusive interrogation techniques that go far beyond past practice and the protections of international humanitarian law. These techniques include sensory deprivation; isolation; sleep deprivation; humiliation, including sexual humiliation; threats of death, injury, or transfer to a place where they would be at risk of death; and the presence of military working dogs to instill fear. Many of these were frequently used in combination. Because of the government’s continued refusal to disclose information about its treatment of detainees or to permit an independent investigation of its practices, it is impossible to determine precisely how many detainees were subjected to which techniques of psychological torture since early 2002.

Based on a review of disclosed documents, comprising Administration memorandums, government documents released pursuant to a Freedom of Information Act (hereinafter FOIA) request, and leaked International Committee of the Red Cross (hereinafter ICRC) reports, as well as PHR’s own interviews, it is clear that US personnel have used these techniques systematically at detention facilities in Afghanistan, Guantánamo, and Iraq, from the beginning of the “war on terror” through 2004. Some techniques, like sleep deprivation and nakedness, were designed to part of interrogation plans and strategies for particular detainees; others, like long-term isolation, were part and parcel of the conditions of confinement for many detainees. Because of the close relationship between conditions of confinement and interrogation techniques, the victims could well number in the thousands. The evidence points to a system of consistent psychological torture and ill-treatment, accompanied by physical abuse that was central to the interrogation of detainees. There has been no accountability for the practice of psychological torture among officials responsible for putting the practices into place.

This report explores the system of psychological abuse at US-run detention facilities in Afghanistan, Guantánamo, and Iraq. It examines the techniques of psychological torture and cruel, inhuman, and degrading treatment that were used in the field, in all three theaters of

¹ The “war on terror” is the term the US government has given its continued operations in Afghanistan, Iraq, and Guantánamo.

² Jehl D, Schmitt E. “U.S. Military Says 26 Inmate Deaths May Be Homicide.” *New York Times*. March 16, 2005. This number reflects deaths in American custody in Iraq and Afghanistan since 2002.

operation. It looks at the impact of a system of psychological torture and ill-treatment on individuals. It describes the legal framework and policy directives that led to such a system. It reviews the legal prohibitions on the use of psychologically abusive interrogation methods. Finally, it provides recommendations for ending such a system.

There are legitimate psychological interrogation techniques that have proven effective in obtaining information without inducing psychological trauma. Army Field Manual 34-52 (hereinafter FM 34-52), the Army's guide on gathering information during interrogations, outlines these acceptable uses of psychology to build relationships that will yield information. While making clear that the use of force and mental torture is prohibited, FM 34-52 approves of the use of "psychological ploys, verbal trickery, or other nonviolent and noncoercive ruses used by the interrogator in questioning hesitant or uncooperative sources."³ FM 34-52 provides guidelines for interrogators on different approaches that use psychology.⁴ These include the "silent approach," by which the interrogator says nothing to the source while looking him in the eye, and the "futility technique approach," by which the interrogator plays on doubts already in the source's mind.⁵ The manual points out, however, that the most effective approach is the "direct approach," which is the "questioning of the source without having to use any type of approach" at all.⁶

The techniques recommended by FM 34-52, which are based on decades of wisdom and experience, do not cross the line into psychological torture or cruel, inhuman, and degrading treatment. The Field Manual makes this distinction clear when it says, "The psychological techniques and principles outlined should neither be confused with, nor construed to be synonymous with, unauthorized techniques such as brainwashing, mental torture, or any other form of mental coercion to include drugs."⁷ This is because the use of torture or cruel, inhuman, and degrading treatment is ineffective, counterproductive, and immoral. FM 34-52 makes this clear:

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.⁸

FM 34-52 was written to comply strictly with the provisions of the Geneva Conventions,⁹ which codify the laws governing conflicts and require warring parties to adhere to a set of basic

³ Department of the Army. Army Field Manual 34-52. Intelligence Interrogation. Chapter 1, Interrogation and the Interrogator. May 8, 1987. Available at: <http://www.globalsecurity.org/intell/library/policy/army/fm/fm34-52/>. Accessed April 26, 2005. [FM 34-52]. There is an updated version of FM 34-52 from 1992, but it is not available to the public. For purposes of this report, all references to FM 34-52 are from the 1987 version.

⁴ *Id.* Appendix H, Approaches.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* Chapter 1, Interrogation and the Interrogator.

⁸ *Id.*

⁹ Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field including Annex 1. August 12, 1949. 6 U.S.T. 3114. 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea. August 12, 1949. 6

principles. The Geneva Conventions are clear about the prohibition of torture and other forms of inhumane or degrading treatment and specifically prohibit the use of any form of coercion on protected persons, including prisoners of war (hereinafter POWs).¹⁰ FM 34-52 states that “almost any ruse or deception is usable as long as the provisions of the Geneva Convention are not violated.”¹¹ In its description of techniques, it is careful to point out which approaches, like “fear up (harsh),” should be implemented with extra care, in order to ensure that actions do not violate the Geneva Conventions.¹²

Early on, the Administration, however, took the position that FM 34-52 and the Geneva Conventions are too restrictive. For that reason, it adopted a new legal framework that manipulated the definition of torture in order to permit psychological torture. Torture is defined in the US federal criminal anti-torture statute as “an act committed by a person acting under the color of law specifically intended to inflict *severe physical or mental pain or suffering* . . . upon another person within his custody or physical control.”¹³ This means that psychological torture is prohibited by the statute. The statute defines “severe mental pain or suffering” as:

the prolonged mental harm caused by or resulting from—
(A) the intentional infliction or threatened infliction of severe physical pain or suffering;
(B) the administration or application, or threatened administration or application, of mind-altering substances or *other procedures calculated to disrupt profoundly the senses or the personality*;
(C) the threat of imminent death; or
(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality;¹⁴

The Administration interpreted the statute in such a way as to open the door to a range of psychologically coercive interrogation techniques that, under the plain language of the statute, are prohibited. The Administration also subjected the requirements of humane treatment in

U.S.T. 3217. 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, including Annexes I–V. August 12, 1949. 6 U.S.T. 3316. 75 U.N.T.S. 135 [Third Geneva Convention]; Convention Relative to the Protection of Civilian Persons in Time of War. August 12, 1949. 6 U.S.T. 3516. 75 U.N.T.S. 287 [Fourth Geneva Convention].

¹⁰ “[N]o 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.” Third Geneva Convention, *supra* note 9. Article 17; “No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.” Fourth Geneva Convention, *supra* note 9. Article 31; “Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms . . . shall in all circumstances be treated humanely. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever . . . [v]iolence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture.” Common Article 3(1). See also, Third Geneva Convention, *supra* note 9. Article 13. Requiring that prisoners of war must at all times be treated humanely; Fourth Geneva Convention, *supra* note 9. Article 27. Specifying that protected persons shall at all times be treated humanely.

¹¹ FM 34-52, *supra* note 3. Chapter 3, Interrogation Process.

¹² See, e.g., “Fear Up (Harsh)”: “Great care must be taken when doing this so that any actions taken would not violate the Geneva Conventions.” FM 34-52, *supra* note 3, Appendix H, Approaches.

¹³ 18 U.S.C. § 2340(1). Emphasis added.

¹⁴ 18 U.S.C. §2340(2). Emphasis added.

the Geneva Conventions to so-called “military necessity.” These policies led directly to guidelines that encouraged and, in some cases, mandated the use of psychologically abusive interrogation techniques. The result was the systematic use of psychological torture and cruel, inhuman, and degrading treatment, which led to devastating health consequences for the individuals subjected to them.

Physicians for Human Rights brings a long history of documenting torture. For nearly twenty years, PHR has documented and exposed acts of torture and ill-treatment and has medically examined torture victims from around the world. PHR is one of the principal organizers of the United Nations Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol), which contains international standards for effective investigation and documentation of torture and ill-treatment.

III. The Use of Psychological Torture at US-Run Detention Facilities in Afghanistan, Iraq, and Guantánamo

Techniques of psychological coercion began in prison facilities in Afghanistan in 2002, quickly spread to Guantánamo and then to Iraq, becoming more abusive in each new theater of operation.

A. The Use of Psychologically Coercive Tactics—Afghanistan and Guantánamo 2002

According to the 2004 report into DoD detention operations conducted by an independent panel headed by the Honorable James R. Schlesinger (hereinafter Schlesinger report), in Afghanistan “from the war’s inception through the end of 2002, all forces used FM 34-52 as a baseline for interrogation techniques.”¹⁵ The evidence paints a very different picture. It shows that interrogators at the beginning of the “war on terror” were not strictly following FM 34-52. Rather, it is obvious that the use of psychologically coercive techniques was already occurring in Afghanistan at this early date.

1. Bagram Air Force Base, Afghanistan

As early as 2002, before any official guidance was issued, reports of the use of psychological coercion during interrogations were emerging from Afghanistan. Although few documents have been produced, the evidence available suggests that psychologically coercive techniques were employed in 2002 at the US-run Bagram Air Force Base in Afghanistan. Wesam Abdulrahman Ahmed Al Deemawi, a Jordanian citizen, was detained there beginning on March 15, 2002. In a sworn affidavit, Mr. Deemawi claimed that during a forty-day period of detention at Bagram Air Force Base he was threatened with dogs, stripped and photographed “in shameful and obscene positions,” and placed in a cage with a hook and a hanging rope.¹⁶ Another detainee, Mamdouh Habib, stated that while being held there in April 2002, female soldiers “touched [him] in the private areas” while questioning him.¹⁷ Muhammad Shah, an Afghan farmer who was detained at the base for eighteen days, explained how US personnel deprived them of sleep; Mr. Shah reported that the facility is lighted 24 hours a day in order to make sleep almost impossible.¹⁸

Abdul Jabar and Hakkim Shah, two former detainees at Bagram in 2002, said conditions to which they were exposed were very harsh.¹⁹ They allege that they were forced to stand naked, hooded and shackled for long periods of time, and were deprived of sleep for several consecutive days.²⁰ Mr. Jabar described how he was kept naked while shackled to the ground with his arms chained to the ceiling. He was allowed to dress only when taken for interrogation or to the

¹⁵ Final Report of the Independent Panel to Review DoD Detention Operations. August 2004: 8. Available at: <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>. Accessed April 26, 2005. [Schlesinger report].

¹⁶ Goldenberg S, Meek J. “Papers Reveal Bagram Abuse.” *Guardian* (U.K.). February 18, 2005. Referring to an affidavit Mr. Deemawi made to a lawyer.

¹⁷ Bonner R. “Detainee Says He Was Tortured While in U.S. Custody.” *New York Times*. February 13, 2005.

¹⁸ Van Natta Jr. D. “Questioning Terror Suspects In a Dark and Surreal World.” *New York Times*. March 9, 2003.

¹⁹ Gall C. “U.S. Military Investigating Death of Afghan in Custody.” *New York Times*. March 4, 2003.

²⁰ *Id.*

bathroom.²¹ Two other detainees held at the Bagram detention facility in March 2002 told Human Rights Watch they were put in a group cell for several weeks where they were stripped to their undershirts and underwear.²² Bright lights were set up outside the cell and US military personnel kept the detainees awake by banging on the metal walls of the cell.²³ The men told Human Rights Watch that the sleep deprivation, which lasted for several weeks, left them terrified and disoriented.²⁴ According to accounts provided to the *New York Times*, US forces used solitary confinement at the base in 2002 and reserved the harshest treatment for the detainees kept in isolation.²⁵

The accounts of the use of psychologically abusive tactics by detainees held at Bagram Air Force Base in 2002 were confirmed by western intelligence officials who spoke anonymously to the *New York Times*. One intelligence official told the *Times* that one detainee held in a secret Central Intelligence Agency (hereinafter CIA) center at Bagram was “fed very little, while being subjected to sleep and light deprivation, prolonged isolation, and room temperatures that varied from 100 degrees to 10 degrees” during a three-month period at the base in 2002.²⁶ Reports by detainees have been corroborated by officials. When asked specifically about the use of such techniques, Col. Roger King, spokesman for the American-led force in Afghanistan at the time, claimed that they were acceptable. Col. King said that it was “legitimate to use lights, noise and vision restriction, and to alter, without warning, the time between meals, to blur a detainee’s sense of time.”²⁷ He also said that sleep deprivation was “probably within the lexicon”²⁸ and that a “common technique” for keeping detainees awake was to keep bright lights on at all times or to wake detainees every fifteen minutes.²⁹

2. Other Detention Facilities, Afghanistan

Psychologically coercive techniques have been documented at other detention facilities in Afghanistan throughout 2002. One detainee reported that on his first night of detention in December 2002 at a military base near Jalalabad, he was kept in a freezing cold cell, stripped naked, and doused with cold water.³⁰ Former detainee Tarek Dergoul recalled that while being detained at Kandahar, Afghanistan for three months in early 2002, “[s]ometimes I was just left sitting in the interrogation tent with nothing, no food or toilet facilities. . . . My body hair was shaved, including my pubic hair. . . .”³¹

²¹ *Id.*

²² Human Rights Watch. “*Enduring Freedom*”: Abuses by U.S. Forces in Afghanistan. Vol. 16. No. 3(C). 2004: 34. Available at <http://hrw.org/reports/2004/afghanistan0304/>. Accessed April 26, 2005. [HRW Afghanistan report]. According to Human Rights Watch (HRW), this information was gathered from interviews HRW conducted with the detainees in July 2003 and several interviews with a journalist who had interviewed the detainees prior to that. Names were withheld by HRW for security reasons.

²³ *Id.*

²⁴ *Id.*

²⁵ Van Natta Jr., *supra* note 18.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* Quoting Col. King.

²⁹ HRW Afghanistan report, *supra* note 22, at 36. Citing Gannon K. “Prisoners Released from Bagram Forced to Strip Naked, Deprived of Sleep, Ordered to Stand for Hours.” *Associated Press*. March 14, 2003.

³⁰ *Id.* at 35. Citing Gannon K. “Prisoners Released from Bagram Forced to Strip Naked, Deprived of Sleep, Ordered to Stand for Hours.” *Associated Press*. March 14, 2003.

³¹ Amnesty International. *Human Dignity Denied: Torture and Accountability in the ‘War on Terror’*. AI Index: AMR 51/145/2004. 2004:25. Available at: <http://web.amnesty.org/library/index/engamr511452004>.

In a statement to the Center for Constitutional Rights, Shafiq Rasul, Asif Iqbal and Rhuhel Ahmed (hereinafter Tipton Three), three British citizens detained in November 2001 in Afghanistan and later transferred to Guantánamo, state that they were exposed to a range of psychologically coercive interrogation techniques in December 2001 or early 2002 at Sherberghan Prison and at Kandahar, Afghanistan.³² During an interrogation by the US Army at Sherberghan, Mr. Iqbal states that he had a 9mm pistol held to his temple.³³ Mr. Rasul says that while detained at Kandahar, prison guards “were deliberately stopping us from sleeping.”³⁴ Mr. Rasul also says that “[prison guards] cut off all my clothes and forcefully shaved our beards and heads. . . . I was completely naked with a sack on my head and I could hear dogs barking nearby and soldiers shouting ‘get ‘em boy.’”³⁵ Mr. Rasul described how “when the soldiers would come into the tents in Kandahar they came with dogs. If you made any sudden movements the dogs would be brought right up to you snarling and barking very close to your face.”³⁶ While in Kandahar, the three men underwent forced cavity searches, which they believe “were used to degrade and humiliate them.”³⁷ At night, US personnel in Kandahar forced the detainees to move around from tent to tent so as to prevent the detainees from falling asleep. Mr. Ahmed describes how they “shone powerful lights into the tents which made things worse.”³⁸ The men claim that another goal was keeping detainees isolated from each other. Mr. Ahmed says, “You were not allowed to communicate with anyone in the tent. I started to feel crazy from the isolation.”³⁹

The use of psychologically abusive techniques in Afghanistan in late 2002 was confirmed in the report of Maj. Gen. George R. Fay (hereinafter Fay report).⁴⁰ According to the Fay report, a Criminal Investigation Command (hereinafter CID) investigation found that, “from December 2002, interrogators in Afghanistan were removing clothing, isolating people for long periods of time, using stress positions, exploiting fear of dogs and implementing sleep and light deprivation.”⁴¹

Accessed April 26, 2005. [Amnesty International report]. Citing Witness statement of Tarek Dergoul. *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs*. [2002] EWCA Civ 1598 69. May 21, 2004.

³² Detention in Afghanistan and Guantanamo Bay: Statement of Shafiq Rasul, Asif Iqbal and Rhuhel Ahmed. July 26, 2004: paras. 1–36. Available at:

http://www.ccr-ny.org/v2/legal/september_11th/docs/Guantanamo_composite_statement_FINAL.pdf.

Accessed April 26, 2005. [Tipton Three statement].

³³ *Id.* Para. 14.

³⁴ *Id.* Para. 45.

³⁵ *Id.* Para. 46.

³⁶ *Id.* Para. 55.

³⁷ *Id.*

³⁸ *Id.* Para. 52.

³⁹ *Id.*

⁴⁰ MG George R. Fay. AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade. 2004. Available at:

<http://www4.army.mil/ocpa/reports/ar15-6/AR15-6.pdf>. Accessed April 26, 2005. [Fay report]. Maj. Gen. Fay was appointed to investigate allegations that members of the 205th Military Intelligence Brigade were involved in detainee abuse at the Abu Ghraib Detention Facility.

⁴¹ *Id.* at 29.

3. *Guantánamo*

The executive summary of the report written by Vice Admiral Albert T. Church (hereinafter Church executive summary) says that “[a]t the beginning of interrogation operations at [Guantánamo] in January 2002, interrogators relied upon the techniques in FM 34-52.”⁴² It is obvious from the evidence that this reliance, if it existed at all, did not last long. Just as in Afghanistan, US military personnel were using psychologically coercive tactics at Guantánamo throughout 2002.

a. Prolonged Isolation

According to Shah Mohammed Alikhil, who was one of the first detainees to arrive at Guantánamo, “it was compulsory for a detainee to pass a month in Container Camp [the name of the camp’s isolation wing].”⁴³ Human Rights Watch documented its use as a disciplinary measure, but it appeared that it was imposed for minor “violations” such as having extra items like cups or salt or for exercising in the cell.⁴⁴ Tarek Dergoul, who was transferred to Guantánamo on May 1, 2002, says that about fifteen of the twenty-two months he spent at Guantánamo were spent in the isolation block as discipline for breaking rules.⁴⁵

The Tipton Three said that isolation was always being used at Guantánamo, but after the arrival of General Miller in November 2002, “people would be kept there for months and months and months.”⁴⁶ Documents released by the government pursuant to the FOIA confirm the use of prolonged isolation at Guantánamo in 2002. A letter from an FBI official to an Army official about highly aggressive interrogation techniques being used against detainees at Guantánamo reports that

in November 2002, FBI agents observed Detainee [redacted] after he had been subjected to intense isolation *for over three months*. During that time period, [detainee] was totally isolated (with the exception of occasional interrogations) in a cell that was always flooded with light. By late November, the detainee was evidencing behavior consistent with extreme psychological trauma (talking to non-existent people, reporting hearing voices, crouching in a corner of the cell covered with a sheet for hours on end).⁴⁷

⁴² Naval Inspector General, Vice Admiral Albert T. Church, III. Executive Summary. March 10, 2005:4. [Church executive summary]. Church completed a comprehensive review of interrogation operations, but only the executive summary was made available to the public.

⁴³ Human Rights Watch. *Guantanamo: Detainee Accounts*. A Human Rights Watch Backgrounder. 2004:15. Available at: <http://www.hrw.org/backgrounder/usa/gitmo1004/>. Accessed April 26, 2005. [HRW Guantanamo report].

⁴⁴ See *id.* at 16.

⁴⁵ *Id.* at 17.

⁴⁶ Tipton Three statement, *supra* note 32. Para. 161.

⁴⁷ Letter from T.J. Harrington, Deputy Assistant Director, Counterterrorism Division, Federal Bureau of Investigation. To Major General Donald J. Ryder, Department of the Army. July 14, 2004. Emphasis added. Available at: http://www.aclu.org/torturefoia/released/FBI_4622_4624.pdf. Accessed April 26, 2005. [Letter from TJ Harrington].

b. Sexual Humiliation

The Tipton Three describe being routinely stripped naked at Guantánamo. They felt that these practices were intended to humiliate them.⁴⁸ Similarly, Mr. Habib, who was transferred to Guantánamo in 2002, states that at the naval base interrogators doctored pictures to make it appear that his wife was naked next to Osama bin Laden.⁴⁹ He also said that during one interrogation session, a female interrogator said to him, “You Muslim people don’t like to see woman [sic].”⁵⁰ Then she reached under her skirt and pulled out what he described as a bloody stick and threw blood in his face.⁵¹

Again, documents produced by the government parallel detainees’ accounts of sexual humiliation. An FBI letter to an Army official states that during late 2002 an agent witnessed a female interrogator at Guantánamo rubbing lotion on a detainee’s arms during Ramadan when “physical contact with a woman would have been particularly offensive to a Moslem male.”⁵² The observing agent then saw the interrogator’s hands move toward the detainee’s lap and saw the detainee grimace in pain. When asked why the detainee had grimaced, a marine present during the interrogation replied that the interrogator had bent the detainees’ thumbs backwards and also grabbed the detainee’s genitals. The marine “implied that her treatment of that detainee was less harsh than her treatment of others by indicating that he had seen her treatment of other detainees result in detainees curling into a fetal position on the floor and crying in pain.”⁵³

c. Use of Dogs and Other Techniques

US military personnel also used dogs as a method of interrogation at Guantánamo as early as 2002. The FBI letter states that in “September or October of 2002 FBI agents observed that a canine was used in an aggressive manner to intimidate [a] detainee.”⁵⁴

The Tipton Three stated that they observed techniques such as short-shackling, loud music playing in interrogation, forced shaving of beards and hair, putting people in cells naked, taking away people’s comfort items, sleep deprivation, and the use of cold air beginning in November 2002.⁵⁵

d. Formalization of Techniques

As will be explained below, military personnel at Guantánamo in October 2002 sought approval for a new interrogation plan for the naval base that included techniques such as sensory deprivation, forced nudity, forced grooming, isolation, and use of detainees’ phobias, such as fear of dogs.⁵⁶ The request resulted in an approved interrogation policy from Secretary Rumsfeld on December 6, 2002 that permitted the use of these psychologically abusive techniques, all of which went far beyond FM 34-52.

⁴⁸ See, e.g., Tipton Three statement, *supra* note 32. Para. 60.

⁴⁹ Bonner, *supra* note 17.

⁵⁰ *Id.* Quoting Mr. Habib.

⁵¹ *Id.*

⁵² Letter from T.J. Harrington, *supra* note 47.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Tipton Three statement, *supra* note 32. Para. 161.

⁵⁶ See *infra* text accompanying notes 517–548.

B. Continued Use of Psychologically Coercive Tactics—Afghanistan and Guantánamo 2003

1. Afghanistan

The informal use of psychologically coercive interrogation techniques beyond FM 34-52 became formalized in Afghanistan in 2003 and included hooding, removal of clothing, isolation, sensory deprivation, and use of dogs.⁵⁷

Mehboob Ahmad, an Afghan citizen detained at various locations in Afghanistan between June and November 2003, claims that he was subjected to intimidation with a vicious dog, questioning while naked, threats directed at his family, and sensory deprivation.⁵⁸ The sensory deprivation consisted of being forced to wear black, opaque goggles almost continuously for the entire first month of his detention and for several days after, and being forced to wear sound-blocking earphones.⁵⁹ Said Nabi Siddiqi, an Afghan citizen detained at various locations in Afghanistan between July and August 2003, claims he was subjected to, among other things, verbal abuse of a sexual nature, humiliation by being photographed while naked, and sleep deprivation.⁶⁰ According to Mr. Siddiqi, guards prevented him from sleeping by throwing stones at him all night and by awakening him during the night, forcing him to roll around, dousing him with water, and verbally abusing him.⁶¹ In interviews conducted by Amnesty International of detainees who were captured in Afghanistan, one detainee said that he and others were stripped, shaved of their facial and head hair, and photographed before being transferred to Guantánamo.⁶²

The use of psychologically coercive techniques in Afghanistan in 2003 and early 2004 has been confirmed by at least one government report. A CID report describes a compact disc that contains digital photos of American soldiers conducting mock executions on Afghan detainees beginning in early December 2003 at Fire Base Tycze, Dah Rah Wood, Afghanistan.⁶³ The photos depict soldiers pointing pistols and M-4 rifles at the heads of detainees who are bound and hooded. The CID report also contains a statement from an Army team leader saying that similar photos had been destroyed following the publicity surrounding the detainee abuse scandal at Abu Ghraib prison in Iraq in order to avoid “another public outrage.”⁶⁴

⁵⁷ See *infra* text accompanying notes 599–603.

⁵⁸ *Ali v. Rumsfeld*. No. unassigned. N.D. Ill. filed Mar. 1, 2005. Para. 18. Available at: http://www.humanrightsfirst.org/us_law/etn/lawsuit/PDF/rums-complaint-022805.pdf. Accessed April 26, 2005.

⁵⁹ *Id.* Para. 155(f).

⁶⁰ *Id.* Para. 19.

⁶¹ *Id.* Para. 158(e).

⁶² Amnesty International report, *supra* note 31, at 25. Citing Interview of Mehdi Ghezali with Amnesty International. Sweden. July 27, 2004.

⁶³ US Army Criminal Investigation Command, Department of the Army. Memorandum for: See Distribution. Subject: CID Report of Investigation—Final (C)/SSI-0133-2004-CID452-63629-5C1A/5M3A/5X3/5Y2D2/5C2B. August 25, 2004. Available at: http://www.aclu.org/torturefoia/released/021605/6176_6311.pdf. Accessed April 26, 2005. The investigation established probable cause to believe various US personnel committed the offense of dereliction of duty but not the offense of aggravated assault. *Id.*

⁶⁴ Sworn Statement of [redacted]. File No. 0122-04-CID452. July 8, 2004. In: US Army Criminal Investigation Command, *supra* note 63.

2. Guantánamo

From December 2, 2002 until January 15, 2003, the Bush Administration used isolation, light deprivation, female interrogators to induce stress, and forced grooming at Guantánamo.⁶⁵ From January 15 until April 16, 2003, it appears that no policy was in place, although Secretary Rumsfeld was willing to consider the use of the abusive techniques.⁶⁶ Beginning on April 16, a new policy went into effect, which permitted isolation and environmental manipulation and gave considerable latitude to interrogators in the choice of techniques, leaving the door open to abuse.⁶⁷

a. Sleep deprivation

Personnel familiar with conditions at Guantánamo described to the *New York Times* how sleep deprivation was implemented in 2003:

[A]n inmate was awakened, subjected to an interrogation in a facility known as the Gold Building, then returned to a different cell. As soon as the guards determined the inmate had fallen into a deep sleep, he was awakened again for interrogation after which he would be returned to yet a different cell. This could happen five or six times during a night.⁶⁸

b. Sexual and Cultural Humiliation

A *Washington Post* article states that female interrogators at Guantánamo regularly violated Muslim taboos regarding sex and contact with women.⁶⁹ At least eight detainees claim that “women rubbed their bodies against [them], wore skimpy clothes in front of them, made sexually explicit remarks and touched them provocatively.”⁷⁰ According to the *Washington Post*, a Pentagon investigation generally confirms the allegations and uncovered numerous instances in which female interrogators smeared red dye, which they told detainees was menstrual blood, on the bodies of Muslim detainees.⁷¹ According to an official, the dye was smeared on detainees before they were supposed to pray because, according to Islamic beliefs, contact with a woman makes them impure and prevents them from being able to pray.⁷²

This account was confirmed to PHR by a source familiar with conditions at the base. According to the source, in 2003 female interrogators used sexually provocative acts as part of interrogation. For example, female interrogators sat on detainees’ laps and fondled themselves or detainees, opened their blouses and pushed their breasts in the faces of detainees, opened their skirts, kissed detainees and if rejected, accused them of liking men, and forced detainees to look at pornographic pictures or videos.⁷³

⁶⁵ See *infra* text accompanying note 606.

⁶⁶ See *infra* text accompanying notes 552–588.

⁶⁷ See *infra* text accompanying notes 588–595.

⁶⁸ Lewis NA. “Broad Use of Harsh Tactics is Described at Cuba Base.” *New York Times*. October 17, 2004.

⁶⁹ Leonnig CD, Priest D. “Detainees Accuse Female Interrogators.” *Washington Post*. February 10, 2005.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ PHR interview. PHR does not reveal the identity of sources, to protect against retaliation.

c. Prolonged Isolation

There is evidence of extreme isolation at Guantánamo during 2003.⁷⁴ Most detainees were isolated in single cells and allowed out of the cells only twice a week for fifteen minute periods in order to shower and exercise. No physical contact between detainees was permitted.⁷⁵ The ICRC brought concerns about the use of isolation to the attention of Maj. Gen. Miller, the commander of the US detention camp in Guantánamo, in October 2003. ICRC representatives told General Miller that they felt “interrogators attempt to control the detainees through the use of isolation.”⁷⁶

Detainees’ experiences confirm the use of prolonged, extreme isolation at Guantánamo in 2003. Two British citizens—Moazzam Begg and Feroz Abbasi—were put in isolation in 2003 and remained there for 18 months.⁷⁷ They say that they were kept in solitary confinement in Camp Echo, a high security facility within Camp Delta. The cells in which they were confined had no natural light and the detainees were cut off from all communication with others; they did not have the right to recreation, group prayers or association with other detainees. Authorities at Camp Echo reportedly removed a guard from outside the cell of Mr. Begg and replaced the guard with a video camera after they discovered that the guard had been conversing with Mr. Begg.⁷⁸ They were finally moved out in December 2004, after protests from the Foreign Office about their health.⁷⁹

Similarly, the Tipton Three were subjected to long periods of isolation at Guantánamo in 2003. Mr. Rasul claims that he was kept in isolation for extremely long periods of time. He says, “I remained in isolation. . . for a further two months without any comfort items at all, apart from a blanket and mat.”⁸⁰ He says that in response to his time in isolation he “was desperate for it to end and therefore eventually [he] just gave in and admitted [what they wanted to hear]. . . . After that [he] remained in isolation for another five or six weeks.”⁸¹ Similarly, Mr. Iqbal alleges that he was kept in isolation for at least “two or three months.”⁸² Mr. Iqbal describes what he had to endure in isolation:

The conditions in isolation were very hard. The cells were made of metal. They were extremely hot. The air conditioning was broken and hot air would come out. Sometimes the soldiers would put it on really hot. You had to sleep on a metal bunk. In the first few weeks I was given nothing, not a mattress or a blanket and I was denied all comfort items. I couldn’t talk to anyone.⁸³

⁷⁴ Van Natta Jr., *supra* note 18.

⁷⁵ *Id.*

⁷⁶ Joint Task Force 170, Department of Defense. Memorandum for Record. Re: ICRC Meeting with MG Miller on 09 Oct 03. Available at: <http://www.washingtonpost.com/wp-srv/nation/documents/GitmoMemo10-09-03.pdf>. Accessed April 26, 2005. [ICRC Oct. 2003 meeting].

⁷⁷ O’Neill B. “After Guantanamo.” *BBC News*. January 25, 2005. Available at: http://news.bbc.co.uk/2/hi/uk_news/magazine/4203803.stm. Accessed April 26, 2005.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Tipton Three statement, *supra* note 32. Para. 193.

⁸¹ *Id.* Paras. 199–202.

⁸² *Id.* Para. 231.

⁸³ *Id.* Para. 232.

d. Other Techniques

The *New York Times* confirmed the Tipton Three's statements about other techniques that began in late 2002. The *New York Times* reported, based on interviews with military guards, intelligence agents, and others, that

One regular procedure . . . at Camp Delta, the main prison facility at the naval base in Cuba, was making uncooperative prisoners strip to their underwear, having them sit in a chair while shackled hand and foot to a bolt in the floor, and forcing them to endure strobe lights and screamingly loud rock and rap music played through two close loudspeakers, while the air-conditioning was turned up to maximum levels.⁸⁴

C. **Migration** of Psychologically Coercive Tactics—Iraq 2003

After the invasion of Iraq in 2003 the interrogation techniques being used in Afghanistan and Guantánamo migrated to Iraq. These techniques were formalized in policy at various points and included the use of dogs, stress positions, isolation, sleep management, and sensory deprivation. While techniques such as environmental manipulation, sleep adjustment, sensory deprivation and stress positions were not approved for use at all times, they were nonetheless permitted with the approval of Lt. Gen. Sanchez, who was the theater commander in Iraq.⁸⁵

The ICRC verified the use of aggressive techniques by US personnel during its visits to detention facilities in Iraq between March and November 2003.⁸⁶ At interrogation facilities throughout Iraq, the ICRC found numerous forms of ill-treatment, which were usually applied in combination. These interrogation techniques included such methods of psychological coercion as threats, insults, isolation, verbal abuse, hooding, sleep deprivation, forced nudity, and sexual humiliation.⁸⁷

1. Threats

Evidence suggests that the earliest use of psychological abuse on record in Iraq had occurred by the summer of 2003. There are several CID investigation reports from this time of mock executions in which interrogators directly threatened the lives of detainees by pointing loaded weapons at detainees and discharging their weapons in close proximity to the detainees' heads. The earliest incident is from April 2003. A soldier stationed in Samarra, Iraq reported that beginning on April 15, 2003 he had "observed staged executions" of several detainees using M16 rifles and 9mm pistols.⁸⁸ According to the statement of an official, the soldier described what was happening in Samarra as a "chamber of horrors."⁸⁹

⁸⁴ Lewis, *supra* note 68.

⁸⁵ See *infra* text accompanying notes 609–641.

⁸⁶ International Committee of the Red Cross. Report of the International Committee of the Red Cross (ICRC) 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. February 2004. [ICRC February 2004 Report].

⁸⁷ See, e.g., *id.* Paras. 27, 30, 31, 34.

⁸⁸ Sworn Statement of [redacted]. SGT/AD, 170th MP Det CID. July 18, 2003. In: US Army Criminal Investigation Command, Department of the Army. Memorandum for See Distribution. Subject: CID Report of

On May 15, 2003, two Marines in Karbala held a 9 mm pistol to the head of a bound detainee while a third Marine took a picture.⁹⁰ A similar incident report from Taji, Iraq, dated August 2003, describes an incident in which a lieutenant, whose name is redacted from the report, “committed the offense of Communicating a Threat when he charged his 9mm pistol, positioned it threateningly during his interrogation of Mr. [redacted] and related he would kill Mr. [redacted] if he did not provide the appropriate information.”⁹¹ According to the report, when the detainee would not talk, the interrogator took the detainee outside where he was shown six soldiers standing in a line with their weapons in hand and was told, “if you don’t talk, they will kill you.”⁹² The interrogator then placed the head of the detainee into a clearing barrel and fired his pistol near the detainee’s head. The detainee “became hysterical and thought he was going to be killed by LTC [redacted].”⁹³

Another report of the direct communication of a death threat towards a detainee is described in a CID investigation memo dated October 1, 2003.⁹⁴ The memo includes a statement from a soldier who admits that he threatened to have another man shoot and kill the detainee being interrogated in Baghdad, Iraq. The soldier also handed the detainee being interviewed a bullet and told him that it would be the bullet to kill him. The soldier proceeded to make the detainees kneel down with their eyes closed while an unloaded weapon was charged.⁹⁵

A CID investigation into the mistreatment of enemy POWs between April and August 2003 at Camp Red in Baghdad, Iraq describes an extreme technique used to make detainees believe that they would be killed or injured if they did not provide information to interrogators.⁹⁶ One soldier describes how he was told that detainees were made to lie down on the extremely hot pavement while Bradley fighting vehicles were backed up on the sidewalk in an effort to make the detainees think that they would be run over. He was told this was done “to spook the detainees.”⁹⁷

Investigation—Final (C)—0139-03-CID469-60206-5Y2E2/5Y2P9/9G1. October 13, 2004. Available at: http://www.aclu.org/torturefoia/released/030705/8809_8877.pdf. Accessed April 26, 2005.

⁸⁹ Sworn Statement of [redacted]. E-8, B Co. 223 Military Intelligence. November 23, 2003. In: US Army Criminal Investigation Command, *supra* note 88.

⁹⁰ USMC Alleged Detainee Abuse Cases Since 11 Sep 01. Spreadsheet documenting alleged detainee abuse cases as of June 16, 2004. Available at: <http://www.aclu.org/torturefoia/released/navy3706.3713.pdf>. Accessed April 26, 2005.

⁹¹ US Army Criminal Investigation Command, Department of the Army. Memorandum for: See Distribution. Subject: CID Report of Investigation—Final—0152-03-CID469-60212-5C1A/5C2/5T1. February 6, 2004. Available at: http://www.aclu.org/torturefoia/released/105_167.pdf. Accessed April 26, 2005.

⁹² Agent’s Investigation Report. SA, 43rd Military Police Detachment, CID. Tikrit, Iraq. December 10, 2003. In: US Army Criminal Investigation Command, *supra* note 91.

⁹³ *Id.*

⁹⁴ US Army Criminal Investigation Command, Department of the Army. Memorandum for See Distribution. Subject: CID Report of Investigation—Final C—0129-03-CID899-63556/5C2. October 1, 2003. Available at: http://www.aclu.org/torturefoia/released/DOA_240_264.pdf. Accessed April 26, 2005. The investigation revealed probable cause to believe that the soldier committed the offense of assault. *Id.*

⁹⁵ Sworn Statement of [redacted]. SPC/S-4, HHC, 1/36 Infantry. September 20, 2003. In: US Army Criminal Investigation Command, *supra* note 94.

⁹⁶ US Army Criminal Investigation Command, Department of the Army. Memorandum for: See Distribution. Subject: CID Report of Investigation—Final (C)—0353-2003-CID093-45256-5Y2B0. December 19, 2003. Available at: http://www.aclu.org/torturefoia/released/709_744.pdf. Accessed April 26, 2005. The investigation established insufficient evidence to prove or disprove the offense. *Id.*

⁹⁷ Sworn Statement of [redacted]. November 14, 2003. In: US Army Criminal Investigation Command, *supra* note 96.

The ICRC report describes the use of death threats at Umm Qasr and Camp Bucca, Iraq. The report states,

Persons deprived of their liberty undergoing interrogation . . . were allegedly subjected to frequent cursing, insults and threats, both physical and verbal, such as having rifles aimed at them in a general way or directly against the temple, the back of the head, or the stomach, and threatened with transfer to Guantanamo, death or indefinite internment.⁹⁸

Threats were extended to family members, particularly the wives and daughters, of detainees.⁹⁹

Some detainees at Abu Ghraib were threatened with rape. Maj.Gen. Taguba's report on prison conditions confirms the use of rape threats as an interrogation technique.¹⁰⁰ One former detainee at Abu Ghraib, Saddam Saleh Aboud, claims that he was subjected to a combination of psychologically coercive tactics that culminated in the threat of rape.¹⁰¹ Mr. Aboud claims that during his detention he was held without clothing, brought naked before two snarling dogs, and subjected to 23 hours of isolation with loud music that prevented him from sleeping. Eventually, he was told by an American soldier, "If you do not confess, I will have my soldiers rape you."¹⁰² Another detainee alleged that he was subjected to a variety of techniques including being told by an American soldier that he would rape him on two separate occasions.¹⁰³

2. Hooding

The ICRC report also describes the use of hooding in Iraq. It says, "Hooding was sometimes used in conjunction with beatings thus increasing anxiety as to when blows would come. . . . Hooding could last for periods from a few hours to up to 2 to 4 consecutive days, during which hoods were lifted only for drinking, eating or going to the toilets."¹⁰⁴

3. Isolation

US personnel used isolation as an interrogation tactic in Iraq. The ICRC, in its 2003 visits, verified the use of isolation by US personnel in Iraq. It said that one of the methods most frequently alleged during interrogation was

[b]eing held in solitary confinement combined with threats (to intern the individual indefinitely, to arrest other family members, to transfer the individual to Guantanamo), insufficient sleep, food or water deprivation, minimal access to showers (twice a week), denial of access to open air and prohibition of contacts with other persons deprived of their liberty.¹⁰⁵

⁹⁸ ICRC February 2004 Report, *supra* note 86. Para. 31.

⁹⁹ *Id.* Para. 34.

¹⁰⁰ Maj. Gen. Antonio M. Taguba. Article 15-6 Investigation of the 800th Military Police Brigade. Findings and Recommendations, para. 7(e). Completed February 2004. [Taguba report].

¹⁰¹ Fisher I. "Iraqi Tells of U.S. Abuse, From Ridicule to Rape Threat." *New York Times*. May 14, 2004.

¹⁰² *Id.* Quoting Mr. Aboud quoting a sergeant named Ivan.

¹⁰³ Fay report, *supra* note 40, at 80.

¹⁰⁴ ICRC February 2004 Report, *supra* note 86. Para. 25.

¹⁰⁵ *Id.*

The ICRC found that “high value detainees” held at Baghdad International Airport were “held for nearly 23 hours a day in strict solitary confinement in small concrete cells devoid of daylight.”¹⁰⁶ According to the ICRC, the regime of isolation strictly prohibited any contact with other detainees, guards, family members, and the rest of the outside world. Detainees were allowed to exercise outside their cells for twenty minutes twice a day and to go to the showers or toilets but always alone and without any contact with others. Most of these detainees had already been subjected to this isolation for five months when the ICRC investigators arrived at the facility.¹⁰⁷

In mid-October 2003, the ICRC visited detainees in the “isolation section” of Abu Ghraib. There, they witnessed the practice of “keeping persons deprived of their liberty completely naked in totally empty concrete cells and in total darkness, allegedly for several consecutive days.”¹⁰⁸ When the ICRC immediately requested an explanation from authorities, it was told by the military intelligence officer in charge of interrogations that this practice was simply “part of the process.”¹⁰⁹ Evidently, this was part of a system in which detainees were “drip fed,” meaning that they were given new items and privileges (clothing, bedding, light) in exchange for their cooperation.¹¹⁰

Statements taken from detainees parallel the ICRC findings. One detainee at Abu Ghraib, Thaar Salman Dawod, says that he was put into solitary confinement on September 10, 2003 and remained there for sixty-seven days of “suffering and little to eat.”¹¹¹ Another detainee, Saddam Salah Abood Al-Rawi, told the Office of the High Commissioner for Human Rights (hereinafter OHCHR) that he was kept in solitary confinement at Abu Ghraib for three months.¹¹² Mr. Al-Rawi also told the OHCHR that at the time of an ICRC visit to the prison in January 2004, he was told that if he said anything to the ICRC that the prison guards did not like, “he would not live to regret it.”¹¹³

One officer at Abu Ghraib even complained to Brig. Gen. Janis Karpinski, who was in charge of the military police unit that ran Abu Ghraib and other prisons in Iraq, that ICRC visits interfered with the use of isolation as an interrogation tactic and were therefore to be avoided. Brig.Gen. Karpinski told Maj. Gen. Antonio Taguba

Major Potter . . . said to me, “The reason we don’t want the ICRC to go in there anymore is because it interrupts the isolation process. If we have them in isolation for a week, if they have a chance to interface with a person who is speaking their language, that interrupts the isolation process and we have to start all over again in order to put the pressure on them. So, if we can just have the cooperation of not letting the ICRC.”¹¹⁴

¹⁰⁶ *Id.* Para. 43.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* Para. 27.

¹⁰⁹ *Id.* Quoting unnamed military intelligence officer.

¹¹⁰ *Id.*

¹¹¹ Translation of Statement Provided By Thaar Salman Dawod. No. 150427. January 17, 2004. Available at: <http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/150427.pdf>. Accessed April 26, 2005.

¹¹² Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights: The Present Situation of Human Rights in Iraq. UN ESCOR. 61st Sess. Agenda Item 4. U.N. Doc. E/CN.4/2005/4. 2004: para. 57.

¹¹³ *Id.*

¹¹⁴ Article 15-6 Investigation Interview by Maj. Gen. Taguba, CFLCC Deputy Commanding General, US Army. With Brig. Gen. Janis L. Karpinski, US Army. Camp Doha, Iraq. February 15, 2004: 91.

The practice of keeping detainees hidden was taken to the extreme by the CIA. In some cases, detainees were not properly documented, so that no one knew of their existence. These detainees were known as “ghost detainees.” A sergeant explained to investigators for the Fay report that ghost detainees were brought to Abu Ghraib by the CIA and kept in isolation. He said:

Ghost detainees were detainees who were brought to our facility by Other Government Agencies (OGA) [name given to identify CIA]. . . . They were kept in isolation to prevent them from being identified by someone else. . . . Some of the detainees in isolation were kept there longer than 30 days and we would request from MI their status but we were not given one.¹¹⁵

In another reference to ghost detainees, a soldier told investigators for the Fay report that he knew of detainees “that were off limits for Army interrogators and that some OGA [Other Governmental Agencies] detainees have waited for months for OGA interrogators to see them, violating the 30 [day] isolation limit rule.”¹¹⁶ The Church investigation found 30 cases in which detainees were kept off the books.¹¹⁷

As explained below, isolation for periods of longer than thirty days had to be approved,¹¹⁸ but evidence suggests that such requests were rarely turned down. One soldier told investigators for the Fay report that interrogators “could send the detainee to isolation for thirty days or more as long as they wrote the right memo. . . . No one was checking to ensure the recommendations were sound with any sort of regularity.”¹¹⁹ One detainee told investigators for the Fay report that he was transferred to the Abu Ghraib facility on December 27, 2003 where he stayed in the hard site “and for 55 days no one came to see [him].”¹²⁰

The Fay report details the use of total isolation at Abu Ghraib, which the report calls “routine and repetitive.”¹²¹ The report contains multiple references to “the hole” at Abu Ghraib, a small, lightless isolation closet, which was used in an “abusive and unauthorized” manner.¹²² The report notes that US personnel subjected detainees to “the complete removal from outside contact other than required care and feeding by MP guards and interrogation by MI.”¹²³ The Fay report states the “[d]ocumentation of this technique in the interrogation reports implies those

¹¹⁵ Sworn Statement of [redacted]. SGT, 372nd Military Police Company, Camp Victory. May 7, 2005. In: Annex to Fay/Jones/Kern report. Available at: http://www.aclu.org/torturefoia/released/030905/DOD695_737.pdf. Accessed April 26, 2005.

¹¹⁶ Sworn Statement of [redacted]. SPC/E4, B Company, 2d Military Intelligence Battalion, 66th Military Intelligence Group. May 25, 2004. In: Annex to Fay/Jones/Kern report. Available at: http://www.aclu.org/torturefoia/released/030905/DOD738_779.pdf. Accessed April 26, 2005.

¹¹⁷ Church executive summary, *supra* note 42, at 18.

¹¹⁸ See *infra* text accompanying notes 623–630.

¹¹⁹ Sworn Statement of [redacted]. SGT, B/CO 470th Military Intelligence Group. May 18, 2004. In: Annex to Fay/Jones/Kern report. Available at http://www.aclu.org/torturefoia/released/030905/DOD822_862.pdf. Accessed April 26, 2005.

¹²⁰ Sworn Statement of [redacted]. Baghdad Correction Facility, Abu Ghraib. Undated. In: Annex to Fay/Jones/Kern report. Available at http://www.aclu.org/torturefoia/released/030905/DOD695_737.pdf. Accessed April 26, 2005.

¹²¹ Fay report, *supra* note 40, at 95.

¹²² *Id.* at 74.

¹²³ *Id.* at 10.

employing it thought it was authorized.”¹²⁴ The report also makes it clear that the isolation amounted to abuse.¹²⁵

The Federal Bureau of Investigation also described the use of isolation at Abu Ghraib in a report that details interviews conducted with 13 FBI employees about abuses they witnessed while working at Abu Ghraib between October and December 2003.¹²⁶ According to the report, one agent said that he was aware that “the Department of Defense utilized . . . isolation for prescribed periods of time.”¹²⁷ Evidently “[i]t was his understanding, those techniques were allowed for limited periods of time.”¹²⁸ Another agent reported that he did not observe any misconduct or mistreatment of detainees, but did observe detainees, on three or four occasions, who were “ordered to strip and then placed in isolation with no clothes.”¹²⁹

4. Sleep Deprivation

The FBI report indicates that sleep deprivation was being employed at Abu Ghraib. One agent said that he was aware that “the Department of Defense utilized sleep deprivation . . . for prescribed periods of time.”¹³⁰ As with solitary confinement, “it was his understanding, those techniques were allowed for limited periods of time.”¹³¹ Another FBI employee reported that a detainee complained that he was “stripped naked, kept naked in his cell and subjected to sleep deprivation.”¹³² He explained that it “was his understanding that those in charge of the prison allowed sleep deprivation, although he was not aware if it was a permissible tactic or not.”¹³³ The report also recounts an incident in which an FBI agent witnessed a hooded detainee draped in a shower curtain and handcuffed to a waist high rail. A military policeman was lightly slapping the detainee on his back, which the agent was told was done because the “detainee was being subjected to sleep deprivation.”¹³⁴

Like the FBI, the ICRC documented the use of sleep deprivation at Abu Ghraib during mid-October 2003. In its February 2004 report, the ICRC states that sleep deprivation was implemented through “the playing of loud music or constant light in cells devoid of windows.”¹³⁵ Interviews conducted by Maj. Gen. Taguba confirmed the use of sleep deprivation at Abu Ghraib. Capt. Donald J. Reese, the warden of the hard site at Abu Ghraib, told Maj. Gen. Taguba that

¹²⁴ *Id.* at 95.

¹²⁵ *Id.*

¹²⁶ Federal Bureau of Investigation. Memorandum from Inspection. To Inspection. Title: Counterterrorism Division, Inquiry Regarding Activities of FBI Personnel at Abu Ghurayb Prison (AGP) During October 2003–December 2003. May 25, 2004. Available at http://www.aclu.org/torturefoia/released/t2969_3060.pdf. Accessed April 26, 2005.

¹²⁷ *Id.*

¹²⁸ *Id.* Describing investigation conducted by AI [redacted]. INSD. New York, NY. May 17, 2004.

¹²⁹ *Id.* Describing investigation conducted by Supervisory Special Agent [redacted]. Los Angeles, California. May 17, 2004.

¹³⁰ *Id.* Describing investigation conducted by AI [redacted]. INSD. New York, NY. May 17, 2004.

¹³¹ *Id.*

¹³² *Id.* Describing investigation conducted by Supervisory Special Agent [redacted]. Los Angeles, California. May 17, 2004.

¹³³ *Id.*

¹³⁴ *Id.* Describing investigation conducted by Supervisory Special Agent [redacted]. Portland, Oregon. May 18, 2004.

¹³⁵ ICRC February 2004 Report, *supra* note 86. Para. 27.

“sometimes [MI] would put [detainees] on special sleep deprivation plans.”¹³⁶ When asked about how MIs would “break new detainees,” Sergeant First Class Keith Aaron Comer told interviewers that “[d]etainees were brought in subject to sleep depravation [sic], cold showers every 30 mins. cuffed and forced to stand for long periods of time”¹³⁷ Another member of the military who worked at Abu Ghraib, Specialist Sabrina Harman, told Maj. Gen. Taguba in a sworn statement that “her job was to keep detainees awake.”¹³⁸

Sworn statements given to investigators working on the Fay Report show that sleep deprivation was pervasive at Abu Ghraib. One soldier told investigators that “[t]echniques as sleep deprivation were a common thing. Sleep management was part of the extended IROE [Interrogation Rules of Engagement].”¹³⁹ Another soldier told investigators that when he first arrived at Abu Ghraib in September 2003 “it was common practice to use sleep deprivation and sleep management with the detainees.”¹⁴⁰ A civilian contractor who worked at Abu Ghraib said he heard reports of “sleep management where in a detainee would only be allowed an hour or so sleep in a 24 hour period.”¹⁴¹ According to a civilian contract interrogator, sleep deprivation was accomplished by “keeping lights on in the detainee’s cell for 20 of the 24 hours and varying the detainee’s feeding schedule to throw off the detainee’s biorhythm.”¹⁴² Other personnel said military police kept detainees awake by making loud noises, making detainees walk, stand, and sit, or putting detainees in different positions.¹⁴³ In addition, according to the Fay report, US personnel took detainees out of their cells, stripped them and gave them cold showers to keep them awake.¹⁴⁴ Sleep deprived detainees often would be subjected to interrogation sessions. A description of an interrogation provided by a soldier at Abu Ghraib describes how military personnel were instructed to use the “fear up” approach with a detainee who “had just ended a 72-hour adjusted sleep schedule The detainee collapsed during questioning.”¹⁴⁵

There are reports of sleep deprivation being used at other Iraq detention facilities. For example, the ICRC report says that one detainee at Camp Cropper at Baghdad International Airport alleged that he had been hooded and cuffed, threatened with torture and death, and deprived of sleep for

¹³⁶ Interview by Maj. Gen. Taguba, CFLCC Deputy Commanding General, US Army. With Capt. Donald J. Reese, US Army Reserve. February 10, 2004: 44. Available at: <http://www.publicintegrity.org/docs/AbuGhraib/Abu10.pdf>. Accessed April 26, 2005.

¹³⁷ Sworn Statement of Keith Aaron Comer. E7/Active, 372nd Military Police Company. February 9, 2004. Available at: <http://www.publicintegrity.org/docs/AbuGhraib/Abu15.pdf>. Accessed April 26, 2005.

¹³⁸ Taguba report, *supra* note 100. Findings and Recommendations, para. 11(a). Quoting SPC Sabrina Harman, 372nd MP Company.

¹³⁹ Sworn Statement of [redacted]. E6, 500th MI Grp. CIDET-J OFO. June 14, 2004. In: Annex to Fay/Jones/Kern report. Available at: http://www.aclu.org/torturefoia/released/030905/DOD395_451.pdf. Accessed April 26, 2005.

¹⁴⁰ Sworn Statement of [redacted]. B Co. SPC, 321 MI Bn. May 25, 2004. In: Annex to Fay/Jones/Kern report. Available at http://www.aclu.org/torturefoia/released/030905/DOD452_517.pdf. Accessed April 26, 2005.

¹⁴¹ Sworn Statement of [redacted]. CIV, Titan Corp. June 1, 2004. In: Annex to Fay/Jones/Kern report. Available at: http://www.aclu.org/torturefoia/released/030905/DOD452_517.pdf. Accessed April 26, 2005.

¹⁴² Sworn Statement of [redacted]. CIV. June 4, 2004. In: Annex to Fay/Jones/Kern report. Available at: http://www.aclu.org/torturefoia/released/030905/DOD395_451.pdf. Accessed April 26, 2005.

¹⁴³ See, e.g., Sworn Statement of [redacted]. 320th MP Bn. May 26, 2004. In: Annex to Fay/Jones/Kern report. Available at: http://www.aclu.org/torturefoia/released/030905/DOD395_451.pdf. Accessed April 26, 2005; Sworn Statement of [redacted]. E4/Reserve, 325 MI Bn. June 4, 2004. In: Annex to Fay/Jones/Kern report. Available at: http://www.aclu.org/torturefoia/released/030905/DOD518_564.pdf. Accessed April 26, 2005.

¹⁴⁴ Fay report, *supra* note 40, at 70.

¹⁴⁵ Sworn Statement of [redacted]. CW2, A/Co.519th Military Intelligence Battalion. May 19, 2004. In: Annex to Fay/Jones/Kern report. Available at: http://www.aclu.org/torturefoia/released/030905/DOD863_905.pdf. Accessed April 26, 2005.

four consecutive days.¹⁴⁶ In a sworn statement for the Fay report, a detainee said that at Ruthwania Palace, he was not allowed to sleep for four days.¹⁴⁷

5. Sexual Humiliation

Sexual humiliation was also pervasive during this period. According to the Fay report, “MI interrogators started directing nakedness at Abu Ghraib as early as 16 September 2003 to humiliate and break down detainees.”¹⁴⁸ Indeed, graphic photographic evidence of sexual abuse at the Abu Ghraib prison facility dates these incidents from late 2003. The photographs depict naked and semi-naked Iraqi detainees forced into sexually humiliating acts including piling into a human pyramid and being forced to masturbate in front of one another. The detainees also were forced into explicit homosexual acts in order to cause further humiliation through the violation of sexual and cultural taboos. When the photographs surfaced, they were a source of great public outcry, but evidence suggests that sexual humiliation was not new. As detailed above, the technique had previously been employed in Afghanistan and at the detainee holding facilities in Guantánamo during 2002 and 2003. The Fay report confirms this: “The use of nudity as an interrogation technique or incentive to maintain the cooperation of detainees was not a technique developed at Abu Ghraib, but rather a technique which was imported and can be traced through Afghanistan and GTMO.”¹⁴⁹

Forced nudity was used not as a punishment, nor as an exception, but as an accepted method of interrogation at Abu Ghraib. Capt. Reese explained during an interview with Maj. Gen. Taguba that when he questioned the use of nudity at the prison, he was told “it’s an interrogation method that we use.”¹⁵⁰ It was used even when the detainee was not actually being interrogated. Capt. Reese told Maj. Gen. Taguba that detainees “were in the cells and they would just be standing there without clothes on.”¹⁵¹ This was part of a process to soften them up for interrogation.

Statements taken by General Fay from soldiers who worked in the Abu Ghraib prison facility also suggest that nudity was commonplace and used for interrogation purposes. A civilian interrogator told General Fay simply that “[t]here was a lot of detainee nakedness at [Abu Ghraib].”¹⁵² A military police officer stated that “it was not uncommon to see people without clothing and that the whole nudity thing was an interrogation procedure used by MI.”¹⁵³ Another soldier states that there were “quite a few others naked in the cell. I did not discuss this with anyone because it was known that the detainees were in their cells naked. It was a call by the

¹⁴⁶ ICRC February 2004 Report, *supra* note 86. Para. 34.

¹⁴⁷ Sworn Statement of [redacted]. Baghdad Correction Facility, Abu Ghraib. Undated. In: Annex to Fay/Jones/Kern report. Available at: http://www.aclu.org/torturefoia/released/030905/DOD695_737.pdf. Accessed April 26, 2005.

¹⁴⁸ Fay report, *supra* note 40, at 69.

¹⁴⁹ *Id.* at 10.

¹⁵⁰ Interview by Major General Taguba, *supra* note 136, at 48.

¹⁵¹ *Id.* at 49.

¹⁵² Sworn Statement of [redacted]. Civilian. June 7, 2004. In: Annex to Fay/Jones/Kern report. Available at: http://www.aclu.org/torturefoia/released/030905/DOD452_517.pdf. Accessed April 26, 2005.

¹⁵³ Memorandum for Record. Subject: Telephonic Interview. May 28, 2003. In: Annex to Fay/Jones/Kern report. Available at: http://www.aclu.org/torturefoia/released/030905/DOD863_905.pdf. Accessed April 26, 2005.

MPs [Military Police] to keep them naked in the cells.”¹⁵⁴ Yet another soldier witnessed nude detainees “on at least four occasions It was a practice, especially for MI holds to take their clothes in a possible attempt to renew the ‘capture shock’ of detainees who had been in US custody for an extended period of time or were transferred from other facilities”¹⁵⁵ The Fay report concludes that “removal of clothing was employed routinely and with the belief it was not abuse.”¹⁵⁶

Forced nudity was not the only form of sexual humiliation inflicted upon detainees at Abu Ghraib in 2003. A statement taken from one victim of sexual humiliation for purposes of a CID investigation describes how, beginning on October 3, 2003, he was made to wear women’s underwear for a total of 51 days while in isolation.¹⁵⁷ The detainee also notes that other detainees were instructed “to do like homosexuals,” meaning that they were to perform sexual acts with one another.¹⁵⁸ According to testimony by Specialist Matthew Wisdom, an MP who transported detainees to Abu Ghraib, he witnessed two naked detainees, one of whom was “masturbating to another kneeling with its [sic] mouth open.”¹⁵⁹ Specialist Neil A. Wallin told Major General Taguba, “During my tour at the prison I observed that when the male detainees were first brought to the facility, some of them were made to wear female underwear, which I think was to somehow break them down.”¹⁶⁰

The Fay report details various incidents of extreme sexual humiliation at Abu Ghraib including one entry describing how, on October 25, 2003, three detainees were stripped of their clothing, handcuffed together nude, and forced to lie on top of one another and simulate sex while US soldiers took photographs.¹⁶¹ Another entry describes how on the night of November 7–8, 2003, seven detainees were placed in a pile and forced to masturbate.¹⁶² One soldier giving a sworn statement for the Fay report described a scene in which three naked detainees “were handcuffed together in such a way to mimic homosexual relations.”¹⁶³ US personnel then “asked for a confession, promising to stop this punishment if the detainees confessed. Using their feet, [redacted] the MPs shoved the detainees’ hips to further mimic sexual relations.”¹⁶⁴

¹⁵⁴ Sworn Statement of [redacted]. E-4/AR, B Co 325 MI BN. July 20, 2004. In: Annex to Fay/Jones/Kern report. Available at: http://www.aclu.org/torturefoia/released/030905/DOD452_517.pdf. Accessed April 26, 2005.

¹⁵⁵ Sworn Statement of [redacted]. E-4/AD, A Company, 519th Military Intelligence Battalion, 525th Military Intelligence Brigade. June 15, 2004. In: Annex to Fay/Jones/ Kern report. Available at: http://www.aclu.org/torturefoia/released/030905/DOD565_615.pdf. Accessed April 26, 2005.

¹⁵⁶ Fay report, *supra* note 40, at 88.

¹⁵⁷ Translation of Statement provided by [redacted]. Detainee. January 18, 2004. In: US Army Criminal Investigation Command, Department of the Army. Memorandum for See Distribution. Subject: CID Report of Investigation—Final (C)/SSI—0132-04-CID259-80198-/6F8A/6X1/5Y2E. July 1, 2004. Available at: http://www.aclu.org/torturefoia/released/294_334.pdf. Accessed April 26, 2005. The investigation was into a claim of forcible sodomy and the investigation did not develop sufficient evidence to prove or disprove the allegation.

¹⁵⁸ *Id.*

¹⁵⁹ Hersh SM. “Torture at Abu Ghraib.” *New Yorker*. May 10, 2004. Quoting testimony given by Specialist Matthew Wisdom during an Article 32 hearing on April 9, 2004.

¹⁶⁰ Taguba report, *supra* note 100. Findings and Recommendations, para. 11(e).

¹⁶¹ Fay report, *supra* note 40, at 72.

¹⁶² *Id.* at 77.

¹⁶³ Sworn Statement of [redacted]. SPC, HHD, 504 MIBDF. June 4, 2004. In: Annex to Fay/Jones/Kern report. Available at: http://www.aclu.org/torturefoia/released/030905/DOD695_737.pdf. Accessed April 26, 2005.

¹⁶⁴ *Id.*

These examples of sexual abuse and extreme sexual humiliation at Abu Ghraib, including incidents captured in the infamous photographs, were not routine. But the very pervasiveness and commonality of the use of forced nudity and other forms of sexual humiliation not only led to the more extreme abuses but created an environment in which even more extreme forms of humiliation and abuse were not seen as such.

The humiliation that has been well documented at Abu Ghraib prison in 2003, moreover, was not isolated to that detention facility. The ICRC, in visits to other detention facilities in Iraq in 2003, found that “[b]eing paraded naked outside cells in front of other persons deprived of their liberty, and guards, sometimes hooded or with women’s underwear over their head” and “[a]cts of humiliation such as being made to stand naked against the wall of the cell with . . . women’s underwear over the head for prolonged periods--while being laughed at by guards, including female guards, and sometimes photographed in this position” were among the methods of ill-treatment most frequently alleged during interrogation.¹⁶⁵ A report from Samara, Iraq states that a detainee was subjected to various forms of humiliation and ill-treatment, including being held for three days in a “hole in the ground,” having all of his hair shaved, and being stripped of his clothing and sprayed with cold water.¹⁶⁶

Sexual humiliation was inflicted upon female detainees in Iraq as well. In one CID investigation report, an elderly woman claims that she was held for five days in August 2003 at an unknown location in Iraq.¹⁶⁷ During her detention she said she was made to crawl on her hands and knees as a “large man rode” on her and called her an animal.¹⁶⁸ The report states that she claims he “straddled her and placed ropes in her mouth and across her eyes and attempted to ride her like a horse.”¹⁶⁹ She alleges that he also told her that he liked to have sex with “old women.”¹⁷⁰ According to the detainee, the sexual humiliation quickly escalated to sexual and physical abuse. The man allegedly used a stick to strike her on the buttocks and inserted the stick into her anus while others in the room laughed.¹⁷¹ After five continuous days of sexual abuse and humiliation, the woman says she was moved to a different facility and put in a room with two other women. The man from the prior detention facility then arrived and released a dog into the room. The dog attacked one of the women.¹⁷² The Fay report recounts an incident from October 7, 2003, in which three MI personnel allegedly sexually assaulted a female detainee.¹⁷³ According to the report, the detainee alleges that while being detained she was taken by three military police officers and forcibly kissed by one of the soldiers.¹⁷⁴ She was then shown a naked

¹⁶⁵ ICRC February 2004 Report, *supra* note 86. Para. 25.

¹⁶⁶ Memorandum. From SAC, 78th Military Police Det (CID). To Director, USACRC, USACIDC, Fort Belvoir, VA et al. Subject: CID Report—Initial/SSI—0149-04-CID259-80212-/5C1R2/5Y2E/6X1. June 4, 2004. Available at: http://www.aclu.org/torturefoia/released/1458_1508.pdf. Accessed April 26, 2005.

¹⁶⁷ Agent’s Investigation Report. 0094-04-CID259-80177. May 30, 2004. In: US Army Criminal Investigation Command, Department of the Army. Memorandum for: See Distribution. Subject: CID Report of Investigation—Final “C”/SSI—0094-04-CID259-80177/6F8A/6C1/5C1/7G1A1/5Y2E. June 10, 2004. Available at: http://www.aclu.org/torturefoia/released/335_403.pdf. Accessed April 26, 2005. The investigation did not develop sufficient evidence to prove or disprove the woman’s allegations.

¹⁶⁸ Agent’s Investigation Report. 0094-04-CID259-80177. May 30, 2004. In: US Army Criminal Investigation Command, *supra* note 167.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Fay report, *supra* note 40, at 72.

¹⁷⁴ *Id.*

male detainee and told that the same would happen to her if she did not cooperate. They took her back to her cell where they removed her shirt.¹⁷⁵

6. Use of Dogs

US personnel used military working dogs to exploit the fear of dogs that is common in Arab cultures.¹⁷⁶ According to the Fay report, “[i]nterrogations at Abu Ghraib . . . were influenced by several documents that spoke of exploiting the Arab fear of dogs.”¹⁷⁷ The abuse of detainees with military working dogs began almost immediately after the arrival of dog teams at Abu Ghraib on November 20, 2003. According to the Fay report, “[b]y that date, abuses of detainees was [sic] already occurring and the addition of dogs was just one more device.”¹⁷⁸ Sgts. Michael J. Smith and Santos A. Cardona, Army dog handlers, told investigators that they were asked multiple times to bring their dogs to prison interrogation sites.¹⁷⁹ Smith claims that military intelligence personnel asked him to instill fear in detainees with his dog and he would, at their request, bring his dog within six inches of the detainees.¹⁸⁰

One specialist said in a sworn statement for the Fay report that he witnessed an MP guard and dog handler enter a cell holding two juveniles.¹⁸¹ According to the specialist, the dog was on a leash, but was not muzzled. The soldier then allowed the dog to “go nuts on the kids.”¹⁸² The juveniles were screaming in terror and the smaller juvenile attempted to hide behind the other one. The specialist also stated that after this happened, he overheard the dog handler mention a game that was being played to see which handler could scare detainees to the point where they would defecate on themselves.¹⁸³ The dog handler “mentioned that they had already made some urinate, so they appeared to be raising the competition.”¹⁸⁴

The use of military dogs at times escalated into physical violence. Ballendia Sadawi Mohammed, a detainee at Abu Ghraib, told investigators that he was removed from his cell and two dogs were released on him.¹⁸⁵ The dogs attacked him after he tried to run and was cornered. The attack caused sufficient injuries to require twelve stitches.¹⁸⁶ Ameen Sa’eed al-Sheikh, another detainee at Abu Ghraib, described in a sworn statement how he was attacked by military working dogs. According to his statement, prison guards would “hang [him] to the door allowing the dogs to try to bite [him].”¹⁸⁷

¹⁷⁵ *Id.*

¹⁷⁶ See *infra* section IV.A.

¹⁷⁷ Fay report, *supra* note 40, at 10. For an explanation of documents that authorized the use of dogs and linked it to Arab fear, see *infra* section V.B.2.

¹⁷⁸ Fay report, *supra* note 40, at 10.

¹⁷⁹ White J, Higham S. “Use of Dogs to Scare Prisoners Was Authorized.” *Washington Post*. June 11, 2004.

¹⁸⁰ *Id.*

¹⁸¹ Sworn Statement of [redacted]. SPC/E-4, B Company, 2d Military Intelligence Battalion, 66th Military Intelligence Group. May 25, 2004. In: Annex to Fay/Jones/Kern report. Available at: http://www.aclu.org/torturefoia/released/030905/DOD738_779.pdf. Accessed April 26, 2005.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ White & Higham, *supra* note 179. Referring to documents obtained by the *Washington Post*.

¹⁸⁶ *Id.*

¹⁸⁷ Sworn Statement of Ameen Sa’eed al-Sheikh. Civ/Detainee. Baghdad Correctional Facility, Abu Ghraib. January 16, 2004. Available at: <http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/151362.pdf>. Accessed April 26, 2005.

7. Combination of Techniques

The psychologically coercive techniques were often used in combination in order to inflict a greater degree of humiliation and fear. Sherzad Kamal Khalid, an Iraqi man who was held at various locations in Iraq between July and September of 2003, says that he was placed in front of a mock firing squad with simulated gunfire, was hooded and terrorized with random and unanticipated blows, sexually assaulted and humiliated, and routinely deprived of sleep through frequent beatings.¹⁸⁸ The ICRC describe the approach taken by US personnel at Abu Ghraib:

In certain cases, such as in Abu Ghraib military intelligence section, methods of physical and psychological coercion used by the interrogators appeared to be part of the standard operating procedures by military intelligence personnel to obtain confessions and extract information. Several military intelligence officers confirmed to the ICRC that it was part of the military intelligence process to hold a person deprived of his liberty naked in a completely dark and empty cell for a prolonged period to use inhumane and degrading treatment, including physical and psychological coercion, against persons deprived of their liberty to secure their cooperation.¹⁸⁹

D. Continued Use of Psychologically Coercive Tactics—Afghanistan, Guantánamo, Iraq Early 2004

In early 2004, before the Abu Ghraib scandal became public, despite complaints from the FBI and ICRC, the use of psychologically coercive interrogation techniques continued to be a common practice in all three theatres of operation. As before, various techniques were being used in combination in an effort to obtain information from detainees.

1. Afghanistan

The psychologically abusive techniques formalized in 2003 for Afghanistan remained in effect until the Abu Ghraib scandal became public in May 2004.¹⁹⁰

Several detainees captured and held in Afghanistan in 2004 claim that they suffered a combination of psychologically coercive techniques at the hands of US forces. Mohammed Karim Shirullah, a 45-year-old Afghan citizen, was detained in December 2003 and held for six months at various locations around Afghanistan.¹⁹¹ Mr. Shirullah claims that for more than two weeks during his detention, he was made to wear black, opaque goggles that prohibited any visual stimulus. In addition to sensory deprivation, he was subjected to solitary confinement for over one month. He also was sexually humiliated by US forces. He claims that he was stripped naked and had his anus probed while he was photographed.¹⁹² Another Afghan detainee, Haji Abdul Rahman, was detained in Afghanistan between December 2003 and May

¹⁸⁸ *Ali v. Rumsfeld*. No. unassigned. N.D. Ill. filed Mar. 1, 2005. Paras. 174–75. Available at: http://www.humanrightsfirst.org/us_law/etn/lawsuit/PDF/rums-complaint-022805.pdf. Accessed April 26, 2005.

¹⁸⁹ ICRC February 2004 Report, *supra* note 86. Para. 24.

¹⁹⁰ See *infra* text accompanying notes 604–605.

¹⁹¹ *Ali v. Rumsfeld*. No. unassigned. N.D. Ill. filed Mar. 1, 2005. Paras. 20, 160. Available at: http://www.humanrightsfirst.org/us_law/etn/lawsuit/PDF/rums-complaint-022805.pdf. Accessed April 26, 2005.

¹⁹² *Id.* Para. 161.

2004.¹⁹³ He claims that US forces made him wear “black out goggles” for virtually the entire first month of his detention. Mr. Rahman was then placed in solitary confinement for fifteen days and made to wear headphones which deadened all outside sounds. He was subjected to sleep deprivation by being held in a room that was brightly lit for 24 hours a day and kept awake with loud noises.¹⁹⁴ He was also anally probed on several occasions and photographed naked by US forces.¹⁹⁵

A memorandum documenting a Counterterrorism Unit interview confirms that isolation was being used in Afghanistan in February 2004. During an interview, the detainee requested to be “moved back to [the] general population” in order to minimize dizzy spells he claims are a result of minimal water intake due to a limited opportunity to use the bathroom – while in isolation, he was allowed to visit the bathroom once every six hours.¹⁹⁶

2. *Guantánamo*

In Guantánamo, the April 16, 2003 policy of Secretary Rumsfeld governed interrogations in 2004. As mentioned above and explained further below, this memo approved certain techniques, including isolation and environmental manipulation, but gave great latitude to interrogators and subjected humane treatment of detainees to “military necessity.”

Evidence shows that various psychologically coercive interrogation tactics were used in combination at Guantánamo in 2004. In fact, it appears that US personnel at the naval base in 2004 became more insistent on using psychologically coercive techniques against detainees held there. A source familiar with conditions at the naval base told PHR that US personnel at Guantánamo had devised a system to break people through humiliating acts, solitary confinement, temperature extremes, and use of forced positions.¹⁹⁷ The source said that US personnel were using predominantly psychological but also physical means that were intentionally inflicted in order to gather intelligence. Daily life for detainees at Guantánamo in 2004 consisted of humiliation and violations of cultural and religious taboos, including forced shaving. Interrogation methods included exposure to loud and persistent noise and music, prolonged subjection to deliberate cold temperatures, forced positions while shackled, altered sleep patterns, and some beatings.¹⁹⁸

The source’s reports are supported by FBI agents’ observations when visiting Guantánamo. An internal FBI e-mail documenting incidents observed by agents at Guantánamo states that during the second or third week of February 2004 a detainee was short shackled, the room temperature was significantly lowered, and strobe lights and possibly loud music were used.¹⁹⁹ The detainee was left in this condition for 12 hours, during which time he was not allowed to eat, pray or use the bathroom.²⁰⁰

¹⁹³ *Id.* Para. 21.

¹⁹⁴ *Id.* Para. 164.

¹⁹⁵ *Id.*

¹⁹⁶ Federal Bureau of Investigation. Memorandum from Counterterrorism, ORS/MLDU/Bagram, Afghanistan. To Counterterrorism, New York. February 29, 2004. Available at: http://www.aclu.org/torturefoia/released/t3482_3483.pdf. Accessed April 26, 2005.

¹⁹⁷ PHR interview.

¹⁹⁸ PHR interview.

¹⁹⁹ E-mail. From [redacted]. To [redacted]. Subject: reported incidents. May 5, 2004. Available at: http://www.aclu.org/torturefoia/released/FBI_4985_4987.pdf. Accessed April 26, 2005.

²⁰⁰ *Id.*

Sleep deprivation also was used as an interrogation tactic. An Amnesty International interview of Mehdi Ghezali, a Swedish detainee, reveals details of the technique at Guantánamo in 2004:

They kept doing it for about two weeks around 11 April 2004. The Americans took me to an interrogation that lasted 14-16 hours. Then they brought me back to my cell. Shortly thereafter, just as I was going to bed, the guards came and said that I was going to be moved to another cell. One hour later I was moved once more to another cell. I once saw how the guards treated an Australian prisoner in this way, by moving him from cell to cell and thus preventing him from getting any sleep. At the end, there was blood coming from both his nose and his ears. He was so tired.²⁰¹

3. Iraq

In January 2004, a memorandum confirmed that the use of psychologically coercive interrogation techniques beyond FM 34-52 were available for use. While listing such techniques as sleep deprivation, environmental manipulation, the use of dogs, isolation for longer than 30 days, and sensory deprivation, it also left the door open to additional approaches.²⁰² The evidence shows that these techniques and more were being used in Iraq in 2004.

On January 2, 2004, four Iraqis, all of whom were employees of Western news agencies, were arrested and held at Forward Operating Base Volturno in Iraq for about three days. During this period of time, the Iraqis claim that US soldiers deprived them of sleep, hit them, made them assume painful positions, threatened them with sexual assault, and forced them to simulate sex acts that were photographed by US personnel.²⁰³ An initial inquiry occurred in January 2004, months before the Abu Ghraib detainee abuse scandal came to light. The inquiry concluded, "The detainees were purposefully and carefully put under stress, to include sleep deprivation, in order to facilitate interrogation; they were not tortured."²⁰⁴

Another detainee who was captured in January 2004 in Iraq alleges that while being detained at the Mosul Airport he was held with a hood over his head, sprayed with cold water, deprived of sleep, and told that if he did not tell interrogators what they wanted to know they would hurt his brother and father.²⁰⁵ An Iraqi man detained near Mosul, Iraq reported in a CID investigation that he was deprived of sleep while being held at a US holding facility in March 2004:

. . . [T]hey turned on a very loud recorder near my head, and that continued for all the detaining period. That way continued for continuous seven days, where I had no sleep except for two limited periods, and that was done by the recorder and cold water, and there was no place assigned for sleep as well,

²⁰¹ Amnesty International report, *supra* note 31, at 67. Citing Interview with Amnesty International, Sweden, 27 July 2004.

²⁰² See *infra* text accompanying notes 639-641.

²⁰³ Onishi N, Schmitt E. "U.S. Considers Reopening Inquiry Into Possible Abuse Before Iraqi Prison Scandal." *New York Times*. October 14, 2004.

²⁰⁴ *Id.* Citing a copy of the inquiry's unclassified executive summary sent to Reuters.

²⁰⁵ Agent's Investigation Report. ROI No. 0041-04-CID789. May 30, 2004. In: US Army Criminal Investigation Command, Department of the Army. Memorandum for See Distribution. Subject: CID Report of Investigation—Final (C)/SSI—0140-04-CID259-80204-/5C1Q2/5Y2E. July 8, 2004. Available at: http://www.aclu.org/torturefoia/released/4852_4872.pdf. Accessed April 26, 2005. The investigation did not develop sufficient evidence to prove or disprove the allegations.

and the weather was too cold, and I was completely naked, as well as I got only eight pieces of biscuits along with the first seven days, which resulted in quick prostration of my body.²⁰⁶

A detainee held at an unknown facility in Tikrit, Iraq alleged that in mid-April 2004 he was beaten on various parts of his body, kept in a small box which forced him to remain on his knees, and deprived of sleep.²⁰⁷ He also alleged that soldiers opened capsules of medicine that the detainee had been given and made him watch as they poured the medicine on the floor of the prison.²⁰⁸

A CID investigation was opened into detainee abuse at the detention facility at Baghdad International Airport after an interrogator filed a report of abuse that took place in April 2004.²⁰⁹ The interrogator describes the treatment of detainees as “inhumane,” even though all of the techniques had been approved by the commander and the medical staff. The interrogator alleges that detainees were subjected to sleep deprivation and twenty-hour interrogation sessions.²¹⁰

There are also reports of continued sexual humiliation. In a CID investigation file, a detainee claims that he was detained on April 23, 2004 and held for 15-16 days in a house near Adymiah Palace in Iraq. During his detention, US forces witnessed non-US forces forcing him to drink urine and denying him food and water.²¹¹ At one point he claims a US soldier placed his penis on the detainee’s head and asked him “how big it was.”²¹²

There is evidence to suggest that the threat of death or injury to a detainee and his family continued to be employed in 2004 in order to obtain information and as a way of silencing the detainees. Arkan Mohammed Ali, an Iraqi detainee, was held in various locations in Iraq through June 2004.²¹³ In addition to being deprived of sleep though frequent beatings and locked in a coffin-like box for several days, he claims that US personnel held guns to his head and

²⁰⁶ Translation of Statement provided by Detainee [redacted]. 0180-04-CID259-80227. June 19, 2004. In: US Army Criminal Investigation Command, Department of the Army. Memorandum for See Distribution. Subject: CID Report of Investigation—Final (C)/SSI—0180-04-CID259-80227-/5C1C/5Y2E/5X1. July 28, 2004. Available at: http://www.aclu.org/torturefoia/released/1248_1288.pdf. Accessed April 26, 2005. The investigation did not develop sufficient evidence to prove or disprove the allegations.

²⁰⁷ Agent’s Investigation Report. ROI No. 0024-04-CID789. May 6, 2004. In: US Army Criminal Investigation Command, Department of the Army. Memorandum for: See Distribution. Subject: CID Report of Investigation—Final (C)/SSI—0147-04-CID259-80210-/5C1R2/5Y2E/5X1. July 17, 2004. Available at: http://www.aclu.org/torturefoia/released/5015_5069.pdf. Accessed April 26, 2005.

²⁰⁸ *Id.* The investigation did not develop sufficient evidence to prove or disprove the allegations. US Army Criminal Investigation Command, *supra* note 207.

²⁰⁹ US Army Criminal Investigation Command, Department of the Army. Memorandum for See Distribution. Subject: CID Report of Investigation—Final Referred—0117-04-CID259-80188-5C1Q2/5Y2E. May 31, 2004. Available at: http://www.aclu.org/torturefoia/released/030705/9117_9134.pdf. Accessed April 26, 2005.

²¹⁰ *Id.*

²¹¹ Agent’s Investigation Report. ROI No. 0152-04-CID899-81708. May 16, 2004. In: Department of the Army. Memorandum for See Distribution. Subject: CID Report of Investigation—Final (C) -0152-04-CID899-81708-5C1L/5Y2P9. July 23, 2004. Available at: http://www.aclu.org/torturefoia/released/595_647.pdf. Accessed April 26, 2005.

²¹² *Id.* The investigation established that the offense of aggravated assault and maltreatment of a prisoner did not occur as initially alleged. Department of the Army, *supra* note 211.

²¹³ *Ali v. Rumsfeld*. No. unassigned. N.D. Ill. filed Mar. 1, 2005. Para. 14. Available at: http://www.humanrightsfirst.org/us_law/etn/lawsuit/PDF/rums-complaint-022805.pdf. Accessed April 26, 2005.

threatened to run him over with a military vehicle.²¹⁴ He was also threatened with transfer to Guantánamo, where he was told that soldiers could kill him with impunity. When he was finally released, he claims that a US official told him that if he ever reported the abuse he suffered, US forces would find him and he would never see his family again.²¹⁵

E. Post Abu Ghraib

Even after the public exposure and outrage over what happened at Abu Ghraib in April 2004, abuses continued, especially in Guantánamo, where the April 16, 2003 memorandum remained in place.

1. Guantánamo

A source with knowledge of the detainee operations at the Guantánamo facility told PHR that in mid-2004, up to a quarter of the over 500 detainees were kept in isolation.²¹⁶ There are a number of separate units where detainees are isolated. One of these is Camp Echo, which consists of 8 windowless huts, each of which is divided into two separate compartments containing steel detention cells of eight feet by five feet.²¹⁷ Sources tell PHR that the number of isolation units in Camp Echo has been expanded to more than 20.²¹⁸

In May 2004, the US authorities opened Camp Five at Guantánamo, a maximum security unit composed of sealed boxes, made of steel, concrete, and aluminum. These were modeled on supermax prisons, with “overstimulation and monopolization of perception.”²¹⁹ Detainees in Camp Five are held in solitary confinement in concrete cells for up to 24 hours a day and they are under 24-hour video surveillance.²²⁰ Although there is a limit of a 30-day confinement in the unit, this limit allegedly is regularly ignored. Camp Five reportedly has over 100 isolation units.²²¹ Sources tell PHR that the lights are kept on in the new facility for 24 hours a day.²²²

A leaked ICRC report to the US government based on June 2004 visits to Guantánamo found a system designed to break the will of the detainees and make them wholly dependent on their interrogators through “humiliating acts, solitary confinement, temperature extremes, use of forced positions.”²²³ The ICRC said that rather than curtailing the use of such methods after the outrage about what happened at Abu Ghraib, the regime at Guantánamo had become “more refined and repressive.”²²⁴

²¹⁴ *Id.* Para. 167.

²¹⁵ *Id.* Paras. 167–68.

²¹⁶ PHR interview.

²¹⁷ Brief of Amici Curiae Human Rights First, Physicians for Human Rights, et al. in Support of Petitioner at 15. *Hamdan v. Rumsfeld*, S. Ct. filed Dec. 27, 2004. No. 04-702. Citing Decl. of Lt. Cmdr. Charles Swift. ¶ 3. *Swift v. Rumsfeld*, No. 04 Civ. 0777L. W.D. Wash. filed May 3, 2004.

²¹⁸ PHR Interview.

²¹⁹ PHR Interview.

²²⁰ Amnesty International report, *supra* note 31, at 75.

²²¹ *Id.* at 125.

²²² PHR Interview.

²²³ Lewis NA. “Red Cross Finds Detainee Abuse in Guantánamo.” *New York Times*. November 30, 2004. Quoting summary of leaked ICRC report.

²²⁴ *Id.*

2. Afghanistan

The UN Independent Expert on the Situation of Human Rights in Afghanistan, M. Cherif Bassiouni, visited the country in August 2004 and conducted research and consultations. He found that Coalition forces at that time were employing forced nudity, public embarrassment, sleep deprivation, prolonged standing, hooding, and sensory deprivation.²²⁵ A follow up report in March 2005 repeated the allegations of these abuses.²²⁶

3. Iraq

A CID investigation states that a detainee claims in mid July 2004 he was held at an unknown facility in Iraq in a small cell by himself for 16 days and that he started screaming and crying because of it.²²⁷ Three soldiers entered his cell and restrained him by sandwiching him between two stretchers for three hours.²²⁸

F. The Role of Health Professionals

Health personnel employed by the Department of Defense and other agencies in the “war on terror” are bound by international law. In addition, they should abide by ethical standards of the World Medical Association and the American Medical Association. The Declaration of Tokyo, adopted by both bodies, prohibits participation of physicians in torture and all forms of cruel, inhuman, and degrading treatment.²²⁹ This includes providing “knowledge” to “facilitate the practice of torture or other forms of cruel, inhuman or degrading treatment.”²³⁰ It also prohibits the physician’s presence when any of these practices takes place.²³¹ This has been interpreted to prohibit examinations prior to or after interrogation because such examinations involve health personnel in calibrating coercive or unlawful techniques of interrogation. The UN Principles of Medical Ethics provide similar guidelines for health personnel charged with the medical care of prisoners and detainees.²³² There is evidence, however, of failure on the part of health professionals to report acts of abuse as well as evidence of health professional complicity in acts of physical and psychological torture. As with incidences of psychological torture, the picture is incomplete and more investigation is needed.²³³

²²⁵ Report of the Independent Expert of the Commission on Human Rights on the Situation of Human Rights in Afghanistan. U.N. GAOR. 59th Sess. Agenda Item 105(c). para. 50. U.N. Doc. A/59/370. September 21, 2004.

²²⁶ Advisory Services and Technical Cooperation in the Field of Human Rights: Report of the Independent Expert on the Situation of Human Rights in Afghanistan, M. Cherif Bassiouni. U.N. ESCOR. 61st Sess. Agenda Item 19. para. 44. U.N. Doc. E/CN.4/2005/122. March 11, 2005.

²²⁷ Agent’s Investigation Report. ROI No. 0234-04-CID259-80271. July 19, 2004. In: US Army Criminal Investigation Command, Department of the Army. Memorandum for See Distribution. Subject: CID Report of Investigation—Initial/Final/SSI—0234-04-CID259-80271-/5C2/5Y2E/5X1. August 2, 2004. Available at: http://www.aclu.org/torturefoia/released/5245_5258.pdf. Accessed April 26, 2005.

²²⁸ *Id.* The investigation “established probable cause to believe [the detainee] was not abused during his detention.” US Army Criminal Investigation Command, *supra* note 227.

²²⁹ World Medical Association. The Declaration of Tokyo. 1975.

²³⁰ *Id.* Para. 2.

²³¹ *Id.* Para. 3.

²³² UN Principles of Medical Ethics. 1982.

²³³ A number of articles review the issue and what evidence is currently known. See Miles SH. “Abu Ghraib: Its Legacy for Military Medicine.” *Lancet*. 2004;364:725–729; Bloche MG, Marks JH. “When Doctors Go to War.” *New England Journal of Medicine*. 2005;352(1):3–6; Lifton RJ. “Doctors and Torture.” *New England Journal of Medicine*. 2004;351(5):415–416.

There is some evidence that medical personnel were aware of abuse but failed to report it. The Fay report cited some medical corps personnel for observing and failing to report instances of abuse at Abu Ghraib.²³⁴ The Fay report recommended an inquiry into whether medical personnel were aware of detainee abuse and failed to properly document and report the abuse.²³⁵

There is evidence that interrogators had direct access to detainees' medical files. The ICRC raised concerns about this with Maj. Gen. Miller in an October 2003 meeting about treatment of detainees at Guantánamo.²³⁶ In the meeting, ICRC representatives told Maj. Gen. Miller that "medical files are being used by interrogators to gain information in developing an interrogation plan."²³⁷ They expressed concern that "there is a link between the interrogation team and the medical team."²³⁸ The ICRC called this a "breach of confidentiality between a physician and a patient" and explained to Maj. Gen. Miller that "[o]nly medical personnel are supposed to have access to these files."²³⁹ In a leaked report based on visits in June 2004, the ICRC said that medical files of detainees were "literally open" to interrogators.²⁴⁰ A source with knowledge of operations at Guantánamo confirmed to PHR that confidentiality was openly disregarded by many members of the US medical staff there, and that this was due to an order "from the top."²⁴¹

There is evidence that in addition to sharing medical records, health professionals participated more directly in interrogations. This is not surprising, given that the April 16, 2003 memo by Secretary Rumsfeld explained that interrogation techniques at Guantánamo were to be used only after detainees are "medically . . . evaluated as suitable."²⁴² This reliance on medical evaluation and approval appears repeatedly in the guidance and directives. For example, it appeared in memorandums governing interrogations in Iraq as well.²⁴³ A January 27, 2004 memorandum for Iraq specifies that dietary manipulation, sleep management, and sensory deprivation all must be "monitored by medics."²⁴⁴

Col. Thomas M. Pappas, the head of military intelligence at Abu Ghraib, described to General Taguba how that worked in practice.

If the interrogation plan falls within the outline set by LTG Sanchez then the O5 Deputy Director or myself approve the plans. Those interrogation plans include

²³⁴ Fay report, *supra* note 40, at 136.

²³⁵ *Id.*

²³⁶ ICRC Oct. 2003 meeting, *supra* note 76.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ Lewis, *supra* note 223. Quoting summary of leaked ICRC report.

²⁴¹ PHR Interview.

²⁴² Memorandum for the Commander, US Southern Command. From Donald Rumsfeld, Secretary of Defense. Subject: Counter-Resistance Techniques in the War on Terrorism. April 16, 2003.

²⁴³ See, e.g., Memorandum for Commander, US Central Command. From Ricardo S. Sanchez, Lieutenant General, US Army, Commanding. Subject: CJTF-7 Interrogation and Counter-Resistance Policy. September 14, 2003. Specifying that application of the techniques is subject to, *inter alia*, medically evaluating the detainee as suitable; Memorandum for C2 and C3, Combined Joint Task Force Seven, Baghdad and Commander, 205th Military Intelligence Brigade, Baghdad. From Ricardo S. Sanchez, Lieutenant General, Commanding. Combined Joint Task Force Seven, Baghdad. Subject: CJTF-7 Interrogation and Counter-Resistance Policy. October 12, 2003. Specifying that one safeguard is that the "security internee is medically evaluated as a suitable candidate for interrogation."

²⁴⁴ Memorandum For Record. From Department of the Army, Joint Interrogation & Debriefing Center, Abu Ghurayb Prison, Iraq APO AE 09302. Subject: CJTF-7 Interrogation Rules of Engagement. January 27, 2004.

a sleep plan and medical standards. A physician and a psychiatrist are on hand to monitor what we are doing.

...

Typically, the MP has a copy of the interrogation plan and a written note as to how to execute. There should also be files in the detainee files as to what is going on when an exception is needed. The interrogator uses these files to keep a record as to what has happened to the detainee. The doctor and psychiatrist also look at the files to see what the interrogation plan recommends; they have the final say as to what is implemented.²⁴⁵

At Abu Ghraib and Guantánamo, “behavioral science consultation teams” (hereinafter BSCT), composed of psychologists and psychiatrists, were formed with the purpose of facilitating interrogation. A source knowledgeable with BSCT’s functioning at Guantánamo told PHR that interrogators and heads of medical staff met with BSCT in order to discuss detainees’ medical conditions that may cause problems during interrogations.²⁴⁶ But interrogators did not go through BSCT in all cases; interrogators were able to go directly to medical staff without going through BSCT members.²⁴⁷ In its leaked report, the ICRC complained to the US about BSCT and the fact that doctors and medical personnel conveyed information about detainees’ mental health and vulnerabilities directly to interrogators.²⁴⁸ Evidently, interrogators found this approach effective. One e-mail about Guantánamo made available through the FOIA lawsuit says, “I’ve met with the BISC (Biscuit) people several times and found them to be a great resource. They know everything that’s going on with each detainee, who they’re talking to, who the leaders are, etc. I’ve encouraged the interview teams to meet with them prior to doing their interviews.”²⁴⁹

These arrangements compromised the care of detainees at Guantánamo. A source told PHR that detainees refused to discuss their psychiatric problems with US physicians because they knew that the information was passed on to interrogators, who could then use it against them during interrogations.²⁵⁰ It also damaged the relationship between doctors and detainees. Many detainees were convinced that their health care was actually controlled by interrogators and did not believe the doctors’ claim that they were there for the benefit of the detainee. In a report to the US government based on a June 2004 visit to the naval base, the ICRC pointed out these problems to the US government.²⁵¹ It called what was happening at Guantánamo a “flagrant violation of medical ethics.”²⁵²

²⁴⁵ Article 15-6 Investigation Interview by Major General Taguba, CFLCC Deputy Commanding General, US Army. With Colonel Thomas M. Pappas, Commander, 205th Military Intelligence Brigade. February 9, 2004: 3.

²⁴⁶ PHR Interview.

²⁴⁷ Lewis, *supra* note 223.

²⁴⁸ *Id.*

²⁴⁹ E-mail. From [redacted]. To [redacted]. Subject: Re: GTMO. July 31. Available at: http://www.aclu.org/torturefoia/released/t3186_3187.pdf. Accessed April 26, 2005.

²⁵⁰ PHR Interview.

²⁵¹ Lewis, *supra* note 223

²⁵² Lewis, *supra* note 223. Quoting summary of leaked ICRC report.

IV. Health Consequences of Psychological Torture

Psychological torture is designed to destroy the victim's sense of privacy, intimacy, trust of others and security, as well as one's sense of self and how one relates to one's surroundings. According to Ian Robbins, head of the Traumatic Stress Service at St. George's Hospital in London and a former interrogator in the Royal Medical Corps, the methods of psychological coercion are meant "to assert complete control over the victim and break down any will they might have to resist the interrogator's demands."²⁵³ Psychological torture often makes victims feel that they are responsible for the pain and suffering that they experience²⁵⁴ and induces feelings of intense humiliation leading to feelings of worthlessness. Victims often feel that they had a choice, or even that they share in the responsibility of what was done to them, when in reality they were powerless.²⁵⁵ Victims of these techniques are often told that their lack of cooperation will lead to the torture of others, causing the victim of torture to believe that he or she shares the responsibility for the pain and suffering of others. The effects can be particularly harmful when the victim is forced to witness pain being inflicted on others as a result of not giving information to interrogators. According to clinicians who treat torture survivors, severe psychological pain usually results from various combinations of intense and prolonged fear, shame, humiliation, horror, guilt, grief, and mental and physical exhaustion.²⁵⁶

Psychological torture and cruel, inhuman, and degrading treatment can have extremely destructive health consequences for detainees. The effects can include memory impairment, reduced capacity to concentrate, somatic complaints such as headache and back pain, hyperarousal, avoidance, and irritability.²⁵⁷ Additionally, victims often experience severe depression with vegetative symptoms, nightmares, and "feelings of shame and humiliation" associated with sexual violations, among others.²⁵⁸

Although these short- and long-term consequences can be debilitating, the suffering of victims of psychological torture is often disregarded because they do not have physical evidence of the abuse they suffered.²⁵⁹ The lack of physical signs can make psychological torture seem less significant than physical torture, but the consensus among those who study torture and rehabilitate its victims is that psychological torture can be more painful and cause more severe and long-lasting damage even than the pain inflicted during physical torture. Indeed, as the UN Special Rapporteur on torture pointed out:

Often a distinction is made between physical and mental torture. This distinction, however, seems to have more relevance for the means by which torture is practised than for its character. Almost invariably the effect of

²⁵³ Robbins I. "We Have Ways...." *New Scientist*. November 20, 2004.

²⁵⁴ Hodge J, Cooper L. "Roots of Abu Ghraib in CIA Techniques." *National Catholic Reporter*. November 5, 2004. Summarizing comments of Alfred McCoy, professor of history at the University of Wisconsin-Madison and author of "Closer Than Brothers," a study of the impact of the CIA's torture methods on the Philippine military.

²⁵⁵ Robbins, *supra* note 253.

²⁵⁶ Personal communication with the Center for Victims of Torture.

²⁵⁷ Keller A, Gold J. "Survivors of Torture." In: Sadock B, Sadock V, eds. *Kaplan and Sadock's Comprehensive Textbook of Psychiatry*. Vol. 1. 8th ed. Philadelphia, PA: Lippincott Williams & Wilkins; 2005: 2400.

²⁵⁸ *Id.*

²⁵⁹ When physical evidence is absent, the frustration of being unable to prove that torture occurred can compound the suffering of the victim. On the other hand, when psychological torture is paired with physical torture, the presence of scars can serve as a constant reminder of the traumatic experience, forcing the victim to relive the experience and prolonging the cognitive distress that results from torture.

torture, by whatever means it may have been practised, is physical and psychological. Even when the most brutal physical means are used, the long-term effects may be mainly psychological, even when the most refined psychological means are resorted to, there is nearly always the accompanying effect of severe physical pain. A common effect is the disintegration of the personality.²⁶⁰

This result of psychological torture is confirmed by the Human Resource Exploitation Training Manual, a 1983 CIA interrogation manual released to the *Baltimore Sun* in response to a Freedom of Information Act request. The 1983 CIA manual confirms that the goal of psychological torture is to

induce psychological regression in the subject by bringing a superior outside force to bear on his will to resist. Regression is basically a loss of autonomy, a reversion to an earlier behavioral level. As the subject regresses, his learned personality traits fall away in reverse chronological order. He begins to lose the capacity to carry out the highest creative activities, to deal with complex situations, or to cope with stressful interpersonal relationships or repeated frustrations.²⁶¹

The 1983 CIA manual notes that the successful application of psychologically coercive techniques results in debility, dependency on the interrogator, and dread.²⁶² The result can be “a physiological condition involving impairment of brain function.”²⁶³ In this state, “a person is capable of only simple activities, and as it progresses they may become restless, talkative and delirious. Ultimately they become totally confused and can even lapse into unconsciousness.”²⁶⁴ Indeed, the 1983 CIA manual warns that “if the debility-dependency-dread state is unduly prolonged, the subject may sink into a defensive apathy from which it is hard to arouse him.”²⁶⁵

Symptoms shown by victims of psychological torture are typically those associated with anxiety disorders, including acute stress disorder, depression, and posttraumatic stress disorder (hereinafter PTSD). People who suffer from PTSD experience longer-term suffering than those who suffer from acute stress disorder. Acute stress disorder has similar symptoms to those associated with PTSD, including dissociative and depressive symptoms. The primary difference is that acute stress disorder occurs within one month of a traumatic event and is short-lived, usually lasting no longer than four weeks.²⁶⁶ Onset of PTSD symptoms usually occurs within

²⁶⁰ Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. U.N. GAOR. 59th Sess. Agenda Item 107(a). 2004; para. 45. U.N. Doc. A/59/324. Quoting the first Special Rapporteur on Torture, Peter Kooijmans.

²⁶¹ Central Intelligence Agency. *Human Resource Exploitation Training Manual – 1983*. Coercive Techniques, para. L1. Available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB122/CIA%20Human%20Res%20Exploit%20H0-L17.pdf>. Accessed April 22, 2004. [1983 CIA Manual]. See also, “Torture Was Taught by CIA.” *Baltimore Sun*. Jan. 27, 1997. Original news article reporting the declassification of the manual. It is unclear whether this manual is still in use.

²⁶² 1983 CIA Manual, *supra* note 261. Paras. L3–L5.

²⁶³ Robbins, *supra* note 253.

²⁶⁴ *Id.*

²⁶⁵ 1983 CIA Manual, *supra* note 261. Para. L5.

²⁶⁶ “Acute Stress Disorder.” First MB, ed. *Diagnostic and Statistical Manual—Text Revision*. 4th ed. Washington, DC: American Psychiatric Association; 2000.

months after trauma (although delays of months or even years have been cited); however, over half of cases last longer than 3 months “with many others having persisting symptoms for longer than 12 months.”²⁶⁷

One-third of PTSD sufferers fail to recover even after many years.²⁶⁸ Several studies done on soldiers who fought in World War II have confirmed the chronic nature of PTSD. One study of posttraumatic stress disorder in World War II prisoners of war reported in 1989 found that more than 75% reported some symptom trouble and almost 25% of the subjects reported being continually troubled by PTSD symptoms.”²⁶⁹ Another study of World War II Dutch resistance fighters demonstrated a marked pattern of delayed-onset PTSD symptoms for over 80% of subjects, and over 70% of the study group experienced a progressive chronic or remission-exacerbation manifestation of illness ranging from five to more than 35 years post-initiation.²⁷⁰

PTSD is extremely common among survivors of torture. A study of torture survivors from six different countries who were subjected to a wide range of torture techniques showed that there was a high prevalence of PTSD, ranging from sixty-nine to ninety-two percent,²⁷¹ compared to the incidence of about 3.6 percent of Americans between the ages of 18 and 54.²⁷²

PTSD has three distinct sets of symptoms. The first of these is the “repeated re-experiencing of the traumatic event.”²⁷³ These symptoms include intrusive images or thoughts, recurring nightmares, or flashbacks of the traumatic event.²⁷⁴ The second set of symptoms involves “emotional numbing and detachment.” People report that they feel removed and unable to relate to others. They often experience a sense of unreality and feel detached even from themselves and their immediate surroundings. The final set of symptoms involves “hypervigilance and chronic arousal.” Anything that reminds the PTSD sufferer of the traumatic event can induce a state of panic and a sense of urgency to escape from the situation. PTSD symptoms can persist for years following a traumatic event.²⁷⁵

²⁶⁷ “Posttraumatic Stress Disorder.” First MB, ed. *Diagnostic and Statistical Manual—Text Revision*. 4th ed. Washington, DC: American Psychiatric Association; 2000.

²⁶⁸ Kessler R, Sonnega A, Bromet E, Hughes M, Nelson CB. “Posttraumatic Stress Disorder in the National Comorbidity Survey.” *Archives of General Psychiatry*. 1995;52:1048–60.

²⁶⁹ Zeiss RA and Dickman HR. “PTSD 40 years later: Incidence and Person- Situation Correlates in Former POWs.” *Journal of Clinical Psychology*. 1989;45:80–87.

²⁷⁰ Op den Velde W, Falger PRJ, Hovens JE, et al. “Posttraumatic Stress Disorder in Dutch Resistance Veterans from World War II.” In: Wilson JP, Raphael B, eds. *International Handbook of Traumatic Stress Syndromes*. New York: Plenum; 1993:219–230.

²⁷¹ Moisander PA, Edston E. “Torture and Its Sequel—A Comparison Between Victims from Six Countries.” *Forensic Science International*. 2003;137:133–140.

²⁷² National Institute of Mental Health. “The Numbers Count: Mental Disorders in America.” NIH Publication No. 01-4584. 2001. Available at: <http://www.nimh.nih.gov/publicat/numbers.cfm>. Accessed April 22, 2005. Citing Narrow WE, Rae DS, Regier DA. NIMH Epidemiology Note: Prevalence of Anxiety Disorders. One-year Prevalence Best Estimates Calculated from ECA and NCS Data. Population Estimates based on U.S. Census Estimated Residential Population Age 18 to 54 on July 1, 1998. Unpublished.

²⁷³ “Acute Stress Disorder.” First MB, ed. *Diagnostic and Statistical Manual—Text Revision*. 4th ed. Washington, DC: American Psychiatric Association; 2000.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

The persistent nature of PTSD symptoms may eventually lead to personality changes in torture survivors,²⁷⁶ the negative consequence of which can be felt by the associates of those who suffer from PTSD. Many studies addressing the effect of PTSD on victim contacts are restricted to studies of Vietnam War veterans and their families. One study found that children of Vietnam veterans with PTSD were significantly more likely to have behavioral difficulties than children of veterans not suffering from PTSD, and that spouses or partners of the same group of veterans also were more likely to report marital problems.²⁷⁷ According to another study of children of Vietnam War veterans with PTSD, these behavior issues include “aggression, delinquency, hyperactivity, and difficulty in developing and maintaining close friendships.”²⁷⁸

It has been argued by researchers in the field that the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), the manual which describes the symptoms of psychological disorders, should be modified to include psychological torture under the PTSD heading.²⁷⁹ In its current form, the DSM-IV includes as criteria for diagnosing PTSD only “events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others [Criterion A1].”²⁸⁰ The authors of the proposed change studied political prisoners in East Germany who, though never experiencing any situations in which physical harm or death was threatened, suffer from symptoms of PTSD.²⁸¹

Some researchers have argued that PTSD does not adequately describe the exact nature of the symptoms resulting from torture and have argued for the creation of a specific “torture syndrome,” distinguished by memory and concentration impairment, sleep disturbance and nightmares, susceptibility to emotional instability (emotional lability), anxiety, depression, and somatic complaints, including gastrointestinal, cardiopulmonary, and sympathetic distress.²⁸² Others have argued that torture survivors suffer from complex PTSD, or disorders of extreme stress, which are characterized by depression, impairment in mood regulation, sexual disturbances, amnesia, dissociative disorder, depersonalization, feelings of guilt and shame, self-accusation, self-mutilation, suicidality, excessive fantasies of revenge, disturbed perception of the perpetrator (idealization), social isolation, extreme mistrust, tendency for revictimization, hopelessness, despair, psychosomatic complaints, and conversion syndromes.²⁸³ Survivors of torture often develop substance abuse problems as a means of suppressing traumatic memories and managing the anxiety that results from torture.²⁸⁴

²⁷⁶ Pétur Hauksson. Council of Europe. “Psychological Evidence of Torture.” November 6, 2003: para. 61. CPT (2003) 91. Available at: <http://www.cpt.coe.int/en/working-documents/cpt-2003-91-eng.pdf>. Accessed April 22, 2005. Citing ICD-10. WHO’s International Classification of Diseases. 10th ed.

²⁷⁷ Jordan BK, Marmar CR, Fairbank JA, et al. “Problems in Families of Male Vietnam Veterans with Posttraumatic Stress Disorder.” *Journal of Consulting and Clinical Psychology*. 1992;60:916–926.

²⁷⁸ Parsons J, Kehle TJ, Owen SV. “Incidence of Behavior Problems Among Children of Vietnam War Veterans.” *School Psychology International*. 1990;11:253–325.

²⁷⁹ Priebe S, Bauer M. “Inclusion of Psychological Torture in PTSD Criterion A.” Letter to the Editor. *American Journal of Psychiatry*. 1995;152(11):1691–92.

²⁸⁰ “Posttraumatic Stress Disorder.” First MB, ed. *Diagnostic and Statistical Manual—Text Revision*. 4th ed. Washington, DC: American Psychiatric Association; 2000.

²⁸¹ Priebe S, Bauer M, *supra* note 279.

²⁸² Sadock B, Sadock V, eds. *Kaplan and Sadock’s Comprehensive Textbook of Psychiatry*. Vol. 1. 8th ed. Philadelphia, PA: Lippincott Williams & Wilkins; 2005: 2399–40.

²⁸³ *Id.*; van der Kolk B, Roth S, Pelcovitz D, Mandel F. “Complex PTSD: Results of the Field Trials for DSM IV.” Washington: American Psychiatric Association Press; 1993; Herman JL. “Sequelae of Prolonged and Repeated Trauma: Evidence for a Complex Posttraumatic Syndrome (DESNOS).” In: Davidson JRT, Davidson FE, eds. *Posttraumatic Stress Disorder: DSM-IV and Beyond*. Washington: American Psychiatric Press; 1994.

²⁸⁴ Hauksson, *supra* note 276. Para. 10.

These damaging health effects have been observed among detainees who have been subjected to a combination of psychologically coercive interrogation techniques at US-run detention facilities in Afghanistan, Iraq, and Guantánamo.

An official who worked at Camp Delta, the main prison facility at Guantánamo, admitted that sessions involving making uncooperative detainees strip to their underwear and sit in a chair while shackled hand and foot to a bolt in the floor while enduring strobe lights and loud rock and rap music with the air-conditioner turned to maximum levels “fried” the detainees.²⁸⁵ Another person familiar with the procedures admitted that after the detainees were subjected to such sessions, which could last up to 14 hours, they “were very wobbly. They came back to their cells and were just completely out of it.”²⁸⁶ Similarly, an e-mail from an FBI agent described observing at Guantánamo detainees being chained in a fetal position to the floor and subjected to extreme heat, cold and extremely loud rap music, with no chair, food, or water.²⁸⁷ The agent says that the detainees had been left there for 18 to 24 hours or more and in most cases, had urinated or defecated on themselves. According to the e-mail, this type of treatment drove at least one of the detainees to self mutilation. The agent witnessed a detainee who “was almost unconscious on the floor, with a pile of hair next to him.”²⁸⁸ The detainee had apparently been “literally pulling his own hair out throughout the night.”²⁸⁹

A source with knowledge of interrogation at Guantánamo told PHR that isolation, repeated interrogation, deprivation of social contacts, an extremely harsh and overly stringent regime of internment, and constant sources of harassment, cultural or otherwise, were major causes of the deterioration of mental health of detainees at Guantánamo in 2002.²⁹⁰ These effects continued in 2003. According to the source, detainees held in Guantánamo in 2003 were under a constant state of stress and suffered from garbled conversation, disorientation, hallucination, irritability, anger, delusions, and sometimes paranoia.²⁹¹ After observing detainees, the source opined that for some, the prolonged psychological and physical stress of coercive interrogation appeared to have induced dependence on interrogators or regression.²⁹²

The deterioration of some detainees’ mental health at Guantánamo was confirmed by military officials. According to an Army spokesperson, in 2003 alone, there were 350 acts of self-harm, including 120 “hanging gestures.”²⁹³ Although the level of self injurious behavior diminished after the opening of a psychiatric ward at the Guantánamo facility in 2003, there were still 110 incidents of self harm in 2004.²⁹⁴ A *New York Times* article on March 9, 2003 confirmed reports that as of that date, there had been twenty reported suicide attempts among detainees at Guantánamo.²⁹⁵ Since then, there have been many more suicide attempts at the naval base, including a mass suicide attempt in August 2003 in which twenty three detainees attempted to

²⁸⁵ Lewis, *supra* note 68. Quoting unnamed official.

²⁸⁶ *Id.* Quoting unnamed “person familiar with the procedure.”

²⁸⁷ E-mail. From [Redacted]. To Valerie E. Caproni (OGC) (FBI). Subject FW: GTMO. August 2, 2004. Available at: <http://www.aclu.org/torturefoia/released/FBI.121504.5053.pdf>. Accessed April 22, 2005.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ PHR Interview.

²⁹¹ PHR Interview.

²⁹² PHR Interview.

²⁹³ “Mass Guantanamo Suicide Protest.” *BBC News*. January 25, 2005. Quoting Army spokesman Lt. Col. Sumpter.

²⁹⁴ *Id.* Quoting Lt. Col. Sumpter and Army Gen. Jay Hood.

²⁹⁵ Van Natta Jr., *supra* note 18.

hang or strangle themselves.²⁹⁶ Dr. Terry Kupers, a psychiatrist who has studied mental health in prisons, told the *New York Times* that the number of suicide attempts at Guantánamo is an “extraordinarily high number compared with other prison populations.”²⁹⁷

Reports from detainees confirm the mental health problems they and others faced. The Tipton Three reported, based on their time at Guantánamo, that many detainees held there were prescribed antidepressants.²⁹⁸ They said that “[f]or at least 50 of those so far as we are aware their behaviour is so disturbed as to show that they are no longer capable of rational thought or behaviour. . . . [I]t is something that only a small child or an animal might behave like.”²⁹⁹ Shah Mohammed Alikhil, a detainee at Guantánamo, told interviewers with Human Rights Watch that he attempted suicide three times while in detention.³⁰⁰ Another former detainee, Alif Khan, told interviewers that “[t]wo men next to me went crazy. They were trying to kill themselves.”³⁰¹

Other detainees explained the long-term effects of a combination of psychologically coercive interrogation techniques used on them in other theaters of operation.³⁰² Said Nabi Siddiqi, who was subjected to various forms of torture, including sexual humiliation and sleep deprivation in Afghanistan between July and August 2003, claims that, among other things, “he has had depression, thoughts of suicide and nightmares, is quick to anger, and has suffered from memory loss.”³⁰³ Haji Abdul Rahman, detained in Afghanistan between December 2003 and May 2004 and subjected to sensory deprivation, sexual humiliation, solitary confinement, and sleep deprivation, claims that he suffers vision problems and memory lapses, has emotional problems and is quick to anger, “which has caused difficulties with his family and work.”³⁰⁴ Arkan M. Ali, subjected to, among other things, prolonged sensory and sleep deprivation, forced nudity, and death threats in Iraq between July 2003 and June 2004, suffers severe depression and has frequent nightmares and episodes of shortness of breath.³⁰⁵ As a result, Mr. Ali “has been unable to maintain employment and his personal relationships with his family and others have deteriorated.”³⁰⁶ Thahe M. Sabbar, detained in Iraq from July 2003 to January 2004, was subjected to mock executions, hooding, and humiliation, among other things. He suffers from severe nightmares, incontinence, impotence, and uncontrollable bouts of shaking and crying.³⁰⁷ Among other things, Sherzad K. Khalid was subjected to sexual humiliation, prolonged sleep deprivation, and mock executions in Iraq from July to September 2003. He claims to suffer from severe depression and nightmares that have caused serious difficulties in his work and family relationships.³⁰⁸

²⁹⁶ “Mass Guantanamo Suicide Protest,” *supra* note 293.

²⁹⁷ Van Natta Jr., *supra* note 18.

²⁹⁸ Tipton Three statement, *supra* note 32. Para. 267.

²⁹⁹ *Id.*

³⁰⁰ HRW Guantanamo report, *supra* note 43, at 22. Citing Human Rights Watch interview with Shah Mohammed Alikhil. January 3, 2004.

³⁰¹ *Id.* Citing “Inside Guantanamo.” BBC Panorama. Broadcast October 5, 2003.

³⁰² These psychological abuses were often punctuated by incidents of physical abuse.

³⁰³ *Ali v. Rumsfeld*. No. unassigned. N.D. Ill. filed Mar. 1, 2005. Paras. 157–159. Available at: http://www.humanrightsfirst.org/us_law/etn/lawsuit/PDF/rums-complaint-022805.pdf. Accessed April 22, 2005.

³⁰⁴ *Id.* Paras. 163–165.

³⁰⁵ *Id.* Paras. 166–169.

³⁰⁶ *Id.* Para. 169.

³⁰⁷ *Id.* Paras. 170–173.

³⁰⁸ *Id.* Paras. 174–177.

Tarek Dergoul, a detainee who faced abuse in both Afghanistan and Guantánamo, complained of somatic symptoms as well as psychological suffering as a result of his detention. He told interviewers: “I get migraines, I’m depressed and I suffer from memory loss. There’s stuff that happened, embedded in my head, that I can’t remember.”³⁰⁹ One former Guantánamo detainee told Human Rights Watch:

It has left its impression on me: I feel terrified sometimes and see terrible nightmares. I dream I am in prison and then I shout and I wake up, and perspiration is running from my back. Therefore, I visit psychiatrist and take medicines, which is very expensive and I cannot afford it.³¹⁰

While the psychologically abusive interrogation techniques were usually applied in combination and it is difficult to separate out the health consequences for individual techniques, this report will consider four main categories of psychological torture used against detainees by US forces.³¹¹ These are fear of injury or death to self or loved ones, humiliation, sensory deprivation, including isolation, and sleep deprivation. The devastating health consequences of these techniques are evident through literature, observations of clinicians, and reports from victims themselves. It is important to keep in mind that a combinations of such methods of abuse is likely to result in more than a simple, additive effect.

A. Threats to Induce Fear of Death or Injury

The 1983 CIA manual teaches interrogators that the threat of coercion is often more effective at weakening resistance than the actual act itself.³¹² It states that “the threat to inflict pain can trigger fears more damaging than the immediate sensation of pain.”³¹³ The manual goes on to say that a threat is only effective so long as the detainee is given a reasonable escape route from the threatened pain. Threat of death, on the other hand, induces a state of sheer hopelessness in the detainee. The detainee is likely to feel that he will be killed regardless of his compliance. Crossed out in the manual, but still legible, is a statement that threats of physical coercion must be carried out if the detainee remains uncooperative. Otherwise, subsequent threats will be ineffective.³¹⁴ The Army Field Manual agrees. It states that “the inability to carry out a threat of violence or force renders an interrogator ineffective should the source challenge the threat.”³¹⁵

According to clinicians who treat torture survivors at the Minnesota-based Center for Victims of Torture (hereinafter CVT), mock executions and other situations where death is threatened force victims to repeatedly experience their last moments before death, create a sense of complete unpredictability (never knowing when death might come), and induce chronic fear

³⁰⁹ HRW Guantanamo report, *supra* note 43, at 23. Citing Rose D. “They Tied Me Up Like a Beast and Began Kicking Me.” *Observer* (London). May 16, 2004.

³¹⁰ *Id.* Citing Human Rights Watch interview with A. February 6, 2004.

³¹¹ This separation is somewhat artificial, as it is almost impossible to separate out the unique effects of any single technique. Techniques are not chosen or practiced in isolation but rather within an overall context that is designed to achieve certain overarching psychological goals.

³¹² 1983 CIA Manual, *supra* note 261. Para. L11.

³¹³ *Id.*

³¹⁴ *Id.* Between 1984 and 1985, the manual was altered to discourage torture after an outrage in Congress and the media about CIA techniques being used in Central America. “Torture Was Taught by CIA,” *supra* note 261.

³¹⁵ FM 34-52, *supra* note 3. Chapter 1: Interrogation and the Interrogator.

and helplessness.³¹⁶ Victims who were threatened with death speak of feeling a sense that one is already dead. They often relive these near-death experiences in their nightmares, flashbacks, and intrusive memories.³¹⁷ Reliving these near death encounters can provoke feelings of intense anxiety that cause victims to act inappropriately in work and family settings and, in more extreme cases, cause injury to themselves.³¹⁸ Staff at CVT have dealt with victims of this sort of torture who have pleaded with torturers to kill them, preferring real death over its constant threat and continued intolerable pain.³¹⁹

It is clear that interrogators cultivated the fear of injury and death in Afghanistan, Iraq, and Guantánamo through the use of military working dogs, the threat of beatings or electrocutions, and mock executions. Many of these techniques were approved as part of the “fear-up” interrogation technique.³²⁰ The September 14, 2003 CJTF-7 Interrogation and Counter-Resistance Policy made this clear when it acknowledged that the use of military working dogs was meant to “Exploit[] Arab fear of dogs.”³²¹ According to clinicians at the Center for the Treatment of Torture Victims in Berlin, Germany (hereinafter Berlin Center), who treat a large population of men and women from Muslim cultures, the dog is regarded as an unclean animal among Muslims.³²² So if a man has been touched by a dog’s mouth, he becomes unclean and is unable to pray.

The Tipton Three describe how one man suffered profound psychological damage after being attacked by a dog at Guantánamo.

. . . Moussa Madini got bitten in his cell in isolation by a dog very badly, taking, . . . a big chunk of his leg out, the muscle part of his calf He was very mentally affected and for instance, he would hardly eat. (. . . He was extremely skinny and could eat very little. He would be pacing around his cell really fast for hours. It would consist of stepping back and stepping forward because there was no space at all. . . .)³²³

B. Sexual Humiliation

The use of sexual humiliation is difficult to classify as either purely psychological torture or as physical torture. While many of the sexual acts committed at Abu Ghraib, such as rape and forced sodomy, are clearly forms of physical torture, they can have profound psychological effects. The sexual humiliation practices, including forced nudity, forced assumption of sexually degrading positions, and forced masturbation, used in detention facilities in Afghanistan, Guantánamo, and Iraq are physical in nature but do not necessarily cause physical pain to the victims. Nevertheless, they can have devastating mental health consequences for individuals, particularly Muslims.

³¹⁶ Personal communication with the Center for Victims of Torture.

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ Fay report, *supra* note 40, at 10. “Fear up” is a technique approved by Army Field Manual 34-52 and consists of the interrogator behaving in a heavy, overpowering manner with a loud and threatening voice. FM 34-52, *supra* note 3. Appendix H, Approaches. The Field Manual makes clear, however, that “[g]reat care must be taken when doing this so that any actions taken would not violate the Geneva Conventions.” *Id.*

³²¹ Memorandum for Commander, US Central Command. From Ricardo S. Sanchez, Lieutenant General, US Army, Commanding. Subject: CJTF-7 Interrogation and Counter-Resistance Policy. September 14, 2003.

³²² Personal communication with the Center for the Treatment of Torture Victims in Berlin, Germany.

³²³ Tipton Three statement, *supra* note 32. Para. 271.

Both male and female victims of sexual torture often experience feelings of shame, grief and fear. These feelings often manifest themselves in symptoms that are commonly associated with PTSD, including difficulty falling asleep, nightmares, flashbacks, jumpiness, and irritability, as well as symptoms of major depression and anxiety, including suicidal ideation.³²⁴ Uwe Jacobs, the executive director of Survivors International, which provides counseling, medical care, and social services to torture survivors, reported on his experience in working with victims:

Sexual abuse, whatever form it takes, is an extremely damaging form of torture. For tormentors to penetrate this most private realm produces deep feelings of despair and self-loathing; I have heard survivors say they would have preferred to be beaten. When they are forced into humiliating acts, they can feel responsible for participating in their own degradation. The shame they feel eats away at them forever.³²⁵

In a study done on the treatment and detention of asylum seekers entering the United States, several of the individuals who were interviewed likened sexual humiliation to the physical abuse that they had experienced prior to coming to the United States.³²⁶ Even routine procedures like strip searches can have this impact. One of the individuals told researchers that, “[b]eing strip searched and body cavity searched was like physical abuse.”³²⁷ Another told a similar story of humiliation and the physical and psychological suffering that he experienced as a result. He said, “When I was strip-searched it was so painful because there were two of them and they told me to take off my clothes and bend over and they put their hand . . . I found it very humiliating.”³²⁸

The most widely documented form of sexual humiliation in the “war on terror” has been the practice of forcibly disrobing detainees and keeping them in a state of nakedness over long periods of time. The Kubark Counterintelligence Interrogation manual (hereinafter Kubark manual), a 1963 CIA manual on interrogation, states that clothing allows a detainee to retain a piece of his or her identity and thus increases capacity for resistance.³²⁹

According to CVT clinicians, forced nakedness is intended to create a power differential between the detainees and interrogators by stripping the victim of his/her identity, inducing immediate shame, and establishing an environment where the threat of sexual and physical assault is always present.³³⁰ Based on their work with torture survivors, they believe that by denying the victim the most basic forms of decency and privacy, forced nudity conveys the message that interrogators have absolute control over the detainees’ bodies and can do as they please.³³¹

³²⁴ Peel M. “Male Sexual Abuse in Detention.” In: Peel M, Iacopino V, eds. *The Medical Documentation of Torture*. London: Greenwich Medical Media; 2002:184.

³²⁵ Jacobs U. “Struggling with Our Own Inhumanity.” *San Francisco Chronicle*. March 2, 2005.

³²⁶ Physicians for Human Rights, Bellevue/NYU Program for Survivors of Torture. *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers*. 2003:148.

³²⁷ *Id.*

³²⁸ *Id.* at 148–149.

³²⁹ Central Intelligence Agency. *Kubark Counterintelligence Interrogation – July 1963*. 1963:86. Available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB122/CIA%20Kubark%2061-112.pdf>. Accessed April 22, 2005. [1963 CIA manual].

³³⁰ Personal communication with the Center for Victims of Torture.

³³¹ *Id.*

Implied in the context of forced nudity is the threat of other, more abusive violations, whether sexual or physical.³³² While authorization of nudity may have been rationalized as innocuous, akin to locker-room nudity, the infamous Abu Ghraib photos reveal a very different reality. Simple juxtapositions of nudity and humiliating acts have profound effects, not only on the victims, but all who were indirectly exposed to such acts of torture.³³³

While female interrogators have been implicated in the sexual humiliation from both Abu Ghraib and Guantánamo, the majority of the incidents revealed to date involve the sexual humiliation of male detainees by male interrogators. Researchers who are familiar with male sexual humiliation and abuse say that the abuse is a way of establishing a power hierarchy between abuser and victim. It is meant explicitly to humiliate the victim and to make them feel weak.³³⁴ Sexual humiliation is used in the prison environment as a tool to punish, coerce confessions, or, when done in a public manner, to intimidate the prison population.³³⁵ In the case of the sexual humiliation of males, many survivors do not readily disclose that they have been victims of abuse. Symptoms include loss of appetite, inability to sleep, development of new phobias, and revenge fantasies, all of which can be long lasting.³³⁶

CVT clinicians have found that sexually humiliating treatment emasculates male victims and destroys their sense of identity and autonomy.³³⁷ In *The Arab Mind*, Raphael Patai describes the view of homosexuality held in Arab culture. He writes that “acceptance of the role of the passive homosexual is considered extremely degrading and shameful because it casts the man or youth into a submissive, feminine role.”³³⁸ With respect to masturbation, Patai says that “whoever masturbates . . . evinces his inability to perform the active sex act, and thus exposes himself to contempt.”³³⁹ In fact, according to a professor of Middle Eastern studies, homosexual acts are against Islamic law.³⁴⁰

Clinicians at the Berlin Center, who treat a large population of Muslims, have found that Muslim victims of sexual torture forever carry a stigma and will often be ostracized by the community.³⁴¹ They have found that male victims often feel degraded in their manhood, especially if the perpetrator was a woman. They have seen marriages and families break up due to the special concept of honor and dignity in Muslim culture that is violated by sexual torture.³⁴² CVT clinicians have found that for Muslim women, sexual humiliation is so shaming that they cannot admit it to their communities and families without fearing rejection or ostracism. Male

³³² *Id.*

³³³ Vince Iacopino, MD, PhD, Director of Research, Physicians for Human Rights and Principal Organizer of the Istanbul Protocol Project.

³³⁴ Peel M. “Male Sexual Abuse in Detention.” In: Peel M, Iacopino V, eds. *The Medical Documentation of Torture*. London: Greenwich Medical Media; 2002:189.

³³⁵ *Id.*

³³⁶ Groth AN, Burgess AW. “Male rape: Offenders and Victims.” *American Journal of Psychiatry*. 1980;137: 808–809.

³³⁷ Personal communication with the Center for Victims of Torture.

³³⁸ Raphael Patai. *The Arab Mind*. Revised ed. Hatherleigh Press; 2002:134. Cited in Amnesty International report, *supra* note 31, at 40.

³³⁹ *Id.* at 135.

³⁴⁰ Hersh S. “Torture at Abu Ghraib.” *New Yorker*. April 30, 2004. Citing Bernard Haykel, professor of Middle Eastern studies at New York University.

³⁴¹ Wenk-Ansohn M. “Folgen Sexualisierter Folter – Therapeutische Arbeit mit kurdischen Patientinnen.” In: Birck A, Pross C, Lansen J, eds. *Das Unsagbare – Die Arbeit mit Traumatisierten am Behandlungszentrum für Folteropfer Berlin*. Berlin, Germany: Springer Verlag; 2000:57–77.

³⁴² *Id.*

victims can experience similar consequences from this sort of abuse.³⁴³ With respect to forced nudity, the Berlin Center clinicians have found that merely being stripped naked implies the breaking of a strict taboo, which leaves victims feeling extremely exposed and humiliated.³⁴⁴

It has been reported that officials knew that Arabs are particularly vulnerable to sexual humiliation and sought to exploit that vulnerability.³⁴⁵ In fact, *The Arab Mind*, cited above, was reportedly “the bible” among pro-war Washington conservatives in the months before the invasion of Iraq.³⁴⁶ The evidence shows, however, that the use of nudity and other forms of sexual humiliation was taking place before the Iraq invasion.

The purpose of sexual humiliation was confirmed by Erik R. Saar, a translator at Guantánamo from December 2002 to June 2003. In a manuscript about his time at the naval base, Saar wrote about the military using women as part of psychological interrogation tactics.³⁴⁷ Saar wrote that after interrogation sessions, some of which included women interrogators telling detainees they were menstruating and then touching the detainees, the water in the detainee’s cell would be turned off so that the detainee could not wash himself. This was done in order to “make the detainee feel that, after talking to [the female interrogator], he was unclean and was unable to go before his God in prayer and gain strength.”³⁴⁸

The Tipton Three reported that the sexual humiliation was targeted at Muslims and produced shame in its victims:

It did not come about at first that people came back and told about [the sexual humiliation]. They didn’t. What happened was that one detainee came back from interrogation crying and confided in another what had happened. That detainee in turn thought that it was so shocking he told others and then other detainees revealed that it had happened to them but they had been too ashamed to admit to it. . . . It was clear to us that this was happening to the people who’d been brought up most strictly as Muslims.³⁴⁹

Feelings of shame that were specific to the immediate situation may, over time, become generalized and affect the way in which victims of sexual humiliation view and interact with the world.³⁵⁰ According to CVT clinicians, survivors often struggle with feelings of shame and self-blame.³⁵¹ These experiences can undermine their sense of capability and autonomy, leaving them helpless and without psychological resources to begin to recover.³⁵² These survivors often are cut off from their spouses and other family members and become isolated as a result of the shame associated with their victimization. Staff members at CVT say that sexual humiliation

³⁴³ Personal communication with the Center for Victims of Torture.

³⁴⁴ Wenk-Ansohn M. “Folgen Sexualisierter Folter – Therapeutische Arbeit mit kurdischen Patientinnen.” In: Birck A, Pross C, Lansen J, eds. *Das Unsagbare – Die Arbeit mit Traumatisierten am Behandlungszentrum für Folteropfer Berlin*. Berlin, Germany: Springer Verlag; 2000:57–77.

³⁴⁵ Hersh S. “The Gray Zone.” *New Yorker*. May 24, 2004.

³⁴⁶ *Id.* Quoting an academic.

³⁴⁷ Associated Press. “Ex-G.I. Writes About Use of Sex in Guantánamo Interrogations.” *New York Times*. January 28, 2005.

³⁴⁸ *Id.* Quoting from Saar’s classified manuscript.

³⁴⁹ Tipton Three statement, *supra* note 32. Para. 161.

³⁵⁰ Sadock B, Sadock V, eds. *Kaplan and Sadock’s Comprehensive Textbook of Psychiatry*. Vol. 1. 8th ed. Philadelphia, PA: Lippincott Williams & Wilkins; 2005: 2401.

³⁵¹ Personal communication with the Center for Victims of Torture.

³⁵² *Id.*

often leads to symptoms of PTSD and major depression, and that victims often relive the session of humiliation in the form of flashbacks and nightmares long after their detention. In fact, many of their clients who have been sexually humiliated report that their most enduring and disabling symptoms are related to reliving memories of the voices of their torturers using sexually degrading insults or threats.³⁵³ Clinicians at the Berlin Center similarly have found that victims of sexual torture often suffer from severe depression, anxiety, depersonalization, dissociative states, complex PTSD, and multiple physical complaints such as chronic headaches, eating disorders, and digestive problems.³⁵⁴ They also have found that suicides may occur unless a strong religious conviction forbids otherwise.³⁵⁵

The policy of forcibly disrobing detainees also can have harmful effects on military police officers charged with the oversight of detainees. The state of forced nudity gave military police officers the idea that the detainees were in some way less than human and allowed for the normal guidelines of human interaction to deteriorate. The Schlesinger report concluded:

While the removal of clothing may have been intended to make detainees feel more vulnerable and therefore more compliant with interrogations, this practice is likely to have had a psychological impact on guards and interrogators as well. The wearing of clothes is an inherently social practice, and therefore the stripping away of clothing may have had the unintended consequence of dehumanizing detainees in the eyes of those who interacted with them. . . . [T]he process of dehumanization lowers the moral and cultural barriers that usually preclude the abusive treatment of others.³⁵⁶

C. Sensory Deprivation, Including Solitary Confinement

Different forms of sensory deprivation, including solitary confinement, are often used in combination. The confined person can become so desperate to relate to another person and so hungry for sensory stimulus that he or she will gratefully accept any stimulus that is offered. All forms of sensory deprivation can have profound and long-lasting psychological consequences.

Experiments bear this out. In an experiment performed in the mid 1950s, psychologists served as their own subjects and underwent periods of sensory deprivation lasting six days. All three experimenters described disturbances of visual perception as being “unexpectedly profound and prolonged.”³⁵⁷ These disturbances included the apparent movement of fixed objects, distortions of shape, “accentuations of afterimages, perceptual lag, and increase in color saturation and contrast.”³⁵⁸ Experimental work from the same laboratory done three years later showed the same results. Experimenters described “fluctuating curvature of surfaces and lines and disturbances in size constancy . . . [and] a loss of accuracy in tactual perception and

³⁵³ *Id.*

³⁵⁴ Wenk-Ansohn M. “Folgen Sexualisierter Folter – Therapeutische Arbeit mit kurdischen Patientinnen.” In: Birck A, Pross C, Lansen J, eds. *Das Unsagbare – Die Arbeit mit Traumatisierten am Behandlungszentrum für Folteropfer Berlin*. Berlin, Germany: Springer Verlag; 2000:57–77.

³⁵⁵ *Id.*

³⁵⁶ Schlesinger report, *supra* note 15. App. G at 7.

³⁵⁷ Heron W, Doane, BK, Scott TH. “Visual Disturbances After Prolonged Perceptual Isolation. *Canadian Journal of Psychology*, 1956;10:13–18.

³⁵⁸ *Id.*

spatial orientation was noted.”³⁵⁹ Experiments with sensory deprivation were performed in Germany in the 1970s.³⁶⁰ Subjects were held for a limited period of time in a specially prepared dark and sound-proof room (camera silens). Their behavior and body functions were monitored by a video camera, EEG, and subsequent psychological tests. The researchers found that sensory deprivation caused visual and auditory hallucinations, change of body schemes, change of sense of time, impairment of cognitive functions, impairment of complex thinking to find solutions, slowing down of EEG-activity, a hunger for stimuli, and increased suggestibility.³⁶¹

The effects of sensory deprivation explored in the experiments are confirmed by interrogation manuals. The CIA’s Kubark manual says that sensory deprivation forces a person to “turn[] his awareness inward, upon himself and then project[] the contents of his own unconscious outwards, so that he endows his faceless environment with his own attributes, fears, and forgotten memories.”³⁶² The Kubark manual says, “The more completely the place of confinement eliminates sensory stimuli, the more rapidly and deeply will the interrogatee be affected.”³⁶³ The later Human Resource Exploitation Training Manual says that extreme sensory deprivation “induces unbearable stress and anxiety and is a form of torture.”³⁶⁴

All forms of sensory deprivation, in particular solitary confinement, can have profound negative mental and physical health effects, some of which may be long lasting. This has been shown through studies,³⁶⁵ reports from ex-prisoners subjected to the techniques, and clinical experience.

1. Solitary Confinement

In the 1950s and 1960s, studies demonstrated that short-term isolation caused an inability to think or concentrate, anxiety, somatic complaints, temporal and spatial disorientation, deficiencies in task performance, hallucinations, and loss of motor coordination.³⁶⁶ The findings of contemporary research are consistent with the earlier findings of solitary

³⁵⁹ Doane BK, Mahatoo W, Heron W, Scott TH. “Changes in Perceptual Function After Isolation.” *Canadian Journal of Psychology*. 1959;13:210–219.

³⁶⁰ Kempe P, Gross J. “Deprivationsforschung und Psychiatrie.” *Sonderdruck aus Psychiatrie der Gegenwart*, Bd 1 u. 2. 2. Aufl., Springer Verlag Berlin Heidelberg;1980; Kempe P, Schönberger J, Gross J. “Sensorische Deprivation als Methode in der Psychiatrie.” *Nervenarzt*. 1974;45:561–568.

³⁶¹ The researchers suggested that these effects might be successfully applied as a supplement to psychotherapy to overcome defense mechanisms, obsessive compulsive behavior, and to reduce states of delusion. They hoped that it could also be applied in the treatment of drug addicts, alcoholics, over-eaters, and smokers. However they emphasized the ethical ambivalence of these findings considering that the mechanisms were still rather unclear and that the effects of sensory deprivation could be misused by totalitarian regimes to brainwash and reeducate political dissidents.

³⁶² 1963 CIA manual, *supra* note 329, at 88.

³⁶³ *Id.* at 90.

³⁶⁴ 1983 CIA Manual, *supra* note 261. Para. L10. Part of this is handwritten over the original text, which read “Deprivation of social stimuli induces stress and anxiety. The more complete the deprivation, the more rapidly and deeply the subject is affected.” The handwritten portion was added by the CIA between 1984 and 1985 in response to Congressional and media outrage about CIA training techniques being used in Central America. “Torture Was Taught by CIA,” *supra* note 261.

³⁶⁵ Ethical concerns now generally prevent experiments on these techniques.

³⁶⁶ See, e.g., Graessner S. “Gesundheitliche Auswirkungen von Langzeithaft mit Isolation; Historische Wurzeln und Forderungen.” In: Birck A, Pross C, Lansen J, eds. *Das Unsagbare*. Berlin, Germany: Springer Verlag; 2002:253–269; Leidermann PH. “Man Alone: Sensory Deprivation and Behavioral Change.” *Corrective Psychiatry & Journal of Social Therapy*. 1962;8:64–74.

confinement's harmful consequences.³⁶⁷ Effects include depression, anxiety, difficulty with concentration and memory, hypersensitivity to external stimuli, hallucinations and perceptual distortions, paranoia, and problems with impulse control.³⁶⁸ People who are exposed to isolation for the first time develop "a predictable group of symptoms, which might almost be called a 'disease syndrome.'"³⁶⁹ The symptoms include "bewilderment, anxiety, frustration, dejection, boredom, obsessive thoughts or ruminations, depression, and, in some cases, hallucination."³⁷⁰ One researcher found that solitary confinement

results in deep emotional disturbances. Aggression is mobilized in two directions, suicidal and homicidal. A third reaction is a withdrawal into the self leading to a psychotic-like state or a psychosis. Between these three states there is an intermediate condition, a state of rage. It is a kind of crossroads from which the inmate moves in one direction or another. He may return to the crossroads and take another path. These three reactions may thus be interchangeable.³⁷¹

The Kubark manual describes the symptoms most commonly associated with sensory deprivation as "superstition, intense love of any other living thing, perceiving inanimate objects as alive, hallucinations, and delusions."³⁷²

In fact, early experiences with solitary confinement in US prisons produced such detrimental effects on prisoners' mental health that they did not go unnoticed by the Supreme Court. In an 1890 case, the US Supreme Court considered the severity of solitary confinement.³⁷³ The Court said that "solitary confinement is not, as seems to be supposed by counsel . . . a mere unimportant regulation as to the safe-keeping of the prisoner."³⁷⁴ Rather, the court found solitary confinement to be "punishment of the most important and painful character."³⁷⁵ Much of its decision rests on the harmful consequences of solitary confinement, which in the late 18th century consisted of "the complete isolation of the prisoner from all human society, and his confinement in a cell of considerable size, so arranged that he had no direct intercourse

³⁶⁷ Some studies have found neutral or positive effects of solitary confinement. See, e.g., Suedfeld P, Roy C. "Using Social Isolation to Change the Behavior of Disruptive Inmates." *International Journal of Offender Therapy and Comparative Criminology*. 1975;19:90-99; Walters RH, Callagan JE, Newman AF. "Effect of Solitary Confinement on Prisoners." *American Journal of Psychiatry*. 1963;119:771-773. However, researchers have criticized these results and these types of studies are contradicted by overwhelming research showing negative effects.

³⁶⁸ See, e.g., Haney C. "Mental Health Issues in Long-Term Solitary and 'Supermax' Confinement." *Crime & Delinquency*. January 2003;49(1):124-156; Gendreau P, Freedman NL, Wilde GJS, Scott GD. "Changes in EEG Alpha Frequency and Evoked Response Latency During Solitary Confinement." *Journal of Abnormal Psychology*. 1972;79(1):54-59; Grassian S. "Psychopathological Effects of Solitary Confinement." *American Journal of Psychiatry*. 1983;140:1450-54.

³⁶⁹ Brief of Professors and Practitioners of Psychology and Psychiatry as *Amicus Curiae* in Support of Respondent at 12-13. *Wilkinson v. Austin*. No. 04-495. S. Ct. filed 2005. Citing Hinckle LE, Wolff HE. "Communist Interrogation and Indoctrination of 'Enemies of the States'." *Archives of Neurology and Psychiatry*. 1956;76:115-174.

³⁷⁰ *Id.* at 13.

³⁷¹ Cormier BM, Williams PJ. "La Privation Excessive de la Liberte." *La Revue de L'association des Psychiatres du Canada*. 1966;11(4):484.

³⁷² 1963 CIA manual, *supra* note 329, at 88. Citing a study by John C. Lilly.

³⁷³ *In re Medley*. 134 U.S. 160. 1890. Holding that a statutory solitary confinement provision adopted after a defendant committed the charged crime constituted additional punishment for *ex post facto* purposes.

³⁷⁴ *Id.* at 167.

³⁷⁵ *Id.* at 171.

with or sight of any human being, and no employment or instruction.”³⁷⁶ The effects of such isolation were noted by the Court:

A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others, still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.³⁷⁷

In August 1979, an administrative decision was made at the maximum security Massachusetts Correctional Institution at Walpole to close the steel doors on the cells of prisoners in isolation.³⁷⁸ Until this date, these doors had been left open, allowing natural light and air to enter the cells and permitting inmates to speak with one another. The decision to close the steel doors resulted in a class action lawsuit brought by fifteen prisoners who charged that the conditions of isolation created by the closing of these doors were a violation of their Eighth Amendment protection against cruel and unusual punishment.³⁷⁹ The average duration of confinement in isolation for the group of prisoners was two months. A court-ordered psychological evaluation of the inmates found that they had consistent psychiatric symptoms, including perceptual changes, affective disturbances, difficulties with thinking, concentration, and memory, disturbances of thought content, and problems with impulse control.³⁸⁰ One of the Massachusetts prisoners reported that during isolation, “I can’t concentrate, can’t read . . . Your mind’s narcotized . . . sometimes can’t grasp words in my mind that I know. . . . Memory is going. You feel you are losing something you might not get back.”³⁸¹ Another reported, “I cut my wrists—cut myself many times when in isolation. Now, it seems crazy. But every time I did it, I wasn’t thinking—lost control—cut myself without knowing what I was doing.”³⁸² Stuart Grassian, who reviewed the evaluations of the prisoners, found that “rigidly imposed solitary confinement may have substantial psychopathological effects and that these effects may form a clinically distinguishable syndrome.”³⁸³ Despite the fact that the Walpole prisoners were not “preselected by overt psychiatric status,” the results of the psychiatric evaluations are strikingly similar to earlier German reports on the effects of solitary confinement on populations with psychotic histories.³⁸⁴

These negative health effects due to prolonged isolation are evident in “supermax” prisons in the United States. These prisons differ from traditional forms of confinement facilities primarily in the totality and duration of the isolation. Prisoners are housed in “virtual isolation and subjected to almost complete idleness for extremely long periods of time. Supermax prisoners rarely leave their cells . . . and typically no group or social activity of any kind is permitted.”³⁸⁵ Unlike traditional forms of incarceration, which use short term isolation as

³⁷⁶ *Id.* at 168.

³⁷⁷ *Id.*

³⁷⁸ Grassian S. “Psychopathological Effects of Solitary Confinement.” *American Journal of Psychiatry*. 1983;140:1450–54.

³⁷⁹ *Id.*

³⁸⁰ *Id.*

³⁸¹ *Id.*

³⁸² *Id.*

³⁸³ *Id.*

³⁸⁴ *Id.*

³⁸⁵ Haney, *supra* note 368, at 126. The U.N. Committee against Torture expressed concern in May 2000 about the “excessively harsh regime of the ‘supermaximum’ prisons.” Consideration of Reports Submitted by State

punishment for bad behavior, supermax prisons often subject prisoners to this near total isolation for years on end. Case studies of supermax prisoners provided by prison psychiatrists describe a range of symptoms resulting from long term isolation, including appetite and sleep disturbances, anxiety, panic, rage, loss of control, paranoia, hallucinations, suicidal ideation and self mutilations.³⁸⁶ A review of the studies of supermax facilities shows that “there is not a single published study of solitary or supermax-like confinement in which nonvoluntary confinement lasting for longer than 10 days, where participants were unable to terminate their isolation at will, that failed to result in negative psychological effects.”³⁸⁷ As mentioned above, in the summer of 2004, US authorities opened a new detention facility at Guantánamo that is modeled on supermax prisons.³⁸⁸ It is different than the regular supermax prisons in one important way: supermax prisons hold prisoners convicted of major crimes; at Guantánamo the new unit holds individuals who have not even been charged with a crime.

The results of the clinical research and the studies of prison populations are consistent with doctors’ evaluations of political prisoners held in isolation. For example, in Germany in the 1970s, members of the Red Army Faction (hereinafter RAF) were being held in solitary confinement with sensory deprivation for periods ranging from months to several years. In order to determine whether they were fit for trial, a court ordered doctors to examine the prisoners. The doctors found that the RAF prisoners suffered from considerable physical and psychological constraints: irritability, exhaustion, sleep disturbance, chronic fatigue, trembling, sweating, loss of sense of reality, memory loss, lack of concentration, dizziness, walking difficulties, chronic headache and generalized body pain, depression, and claustrophobia.³⁸⁹ Similarly, there has been documentation of the negative effects of solitary confinement from the detention of political prisoners in the German Democratic Republic (hereinafter GDR), as well as the former Soviet Union and China, and of American prisoners held during the Korean War.³⁹⁰

These effects also have been observed by clinicians who treat torture survivors. At the Berlin Center, psychiatrists have diagnosed and treated more than 100 ex-political prisoners of the East German communist regime, the GDR, and the Staatssicherheitsdienst, the East German Secret Service (hereinafter Stasi). Most of the ex-prisoners have been exposed to solitary

Parties Under Article 19 of the Convention, Conclusions and Recommendations of the Committee against Torture, United States of America. U.N. Committee against Torture. 24th Sess. 2000: para. 5(f). U.N. Doc. CAT/C/XXIV/Concl.6.

³⁸⁶ Haney, *supra* note 368, at 130.

³⁸⁷ *Id.* at 132. Isolation can be particularly harmful for individuals with mental illnesses. See, e.g., American Civil Liberties Union. “Indiana’s “Supermax” Confinement Worsens Mental Illness in Prisoners, ACLU Charges.” February 3, 2005. Press release accompanying suit charging that prisoners’ mental illness is exacerbated by the conditions found in an Indiana supermax prison. Available at: <http://www.aclu.org/Prisons/Prisons.cfm?ID=17413&c=121>. Accessed April 22, 2005; Physicians for Human Rights, Bellevue/NYU Program for Survivors of Torture. *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers*. 2003:75. Noting that “[f]or a person who is affected by post-traumatic stress, the prospect of solitary confinement can be especially fearsome.”

³⁸⁸ See *supra* text accompanying notes 219–222.

³⁸⁹ Gutachten Dr. Schmidt-Voigt zu Astrid Proll, Landgericht Frankfurt AM. 1973. Cited in Graessner S. “Gesundheitliche Auswirkungen von Langzeithaft mit Isolation; Historische Wurzeln und Forderungen.” In: Birck A, Pross C, Lansen J, eds. *Das Unsagbare*. Berlin, Germany: Springer Verlag; 2002:253–269; *Ärztgruppe Westberlin für eine ausreichende medizinische Versorgung in den Haftanstalten: Medizin als Strafe, Erfahrungen aus dem Strafvollzug*. Berlin: AG Spak M 30; 1977:63–86.

³⁹⁰ See, e.g., Kubzansky PE. “The Effects of Reduced Environmental Stimulation on Human Behavior: A Review.” In: Biderman, Zimmer, eds. *The Manipulation of Human Behavior*. New York: Wiley; 1961:54.

confinement with sensory deprivation for long periods—from several months to several years.³⁹¹ Torture methods included sleep deprivation, long lasting interrogation night and day, and disorientation techniques.³⁹² Prisoners were confronted with falsified letters from spouses and close friends, telling them that they had abandoned them, or asking them to cooperate with the regime. Parents, siblings, spouses and close friends were successfully turned around by the Stasi to work on the prisoner. In many cases the Stasi managed to infiltrate the entire social network, including family, friends, and workplace, of a dissident with informers. The Stasi used its intimate knowledge of the prisoners' susceptibilities and vulnerabilities, personal weaknesses, familial conflicts, and problems at the workplace that it acquired from the network of informers to undermine the prisoners' basic belief and trust in others.³⁹³ While in prison they report experiencing most of the symptoms that the researchers have found under experimental conditions. Ex-prisoners reported that they were so confused and disoriented because of the interrogators' techniques that they no longer trusted their own perceptions. Prisoners report that they went through psychotic states with delusions and hallucinations and experienced a total loss of cognitive function.³⁹⁴

The psychologist Hans-Eberhard Zahn, a dissident under the communist regime in East Germany, was held in special prisons of the Stasi from 1953 until 1960. He gave a detailed account of his symptoms from the methods of psychological torture practiced by the Stasi.³⁹⁵ His longing for human contact became so overwhelming that he started to desire being beaten by his guards and he remembers breaking out in tears when a guard shook his hand to say hello. His torturers emotionally confused him by playing the good cop/bad cop game with him and he remembers how grateful he felt towards the good cop. They deprived him of sleep by interrogating him all night, by switching on the light and shouting at him in short intervals. He lost his sense of time, of night and day. He started hallucinating and lost his ability to defend himself in interrogations. He lost his cognitive capability to differentiate contradicting messages, which his tormentors used to discourage him, e.g., telling him that his political allies outside had betrayed and abandoned him. He reported that the final straw came when the guards made him believe that his girlfriend went out with another man.³⁹⁶

³⁹¹ Pross C. "Wir sind unsere eigenen Gespenster." In: Behnke K, Fuchs J, eds. *Zersetzung der Seele, Psychologie und Psychiatrie im Dienste der Stasi*. Hamburg, Germany: Rotbuch Verlag; 1995: S.303–315; Pross C. "Social and Individual Effects of Trauma in the Former German Democratic Republic." In: Graessner S, Gurrus N, Pross C, eds. *At the Side of Torture Survivors, Treating a Terrible Assault on Human Dignity*. Baltimore, MD: The Johns Hopkins University Press; 2001. Pross C. "Zersetzung" – Psychologische Techniken der Staatssicherheit und ihre Folgen. ein Blick in das zukünftige Instrumentarium von Diktaturen?" In: Birck A, Pross C, Lansen J, eds. *Das Unsagbare. Die Arbeit mit Traumatisierten im Behandlungszentrum für Folteropfer Berlin. Festschrift zum 10jährigen Bestehen des Behandlungszentrums für Folteropfer Berlin*. Berlin, Germany: Springer Verlag; 2002: 271–287; Pross C. "Wir tragen die Diktatur in uns. Gruppentherapie mit Stasiverfolgten." In: Annegret S, ed.: 1945 bis 2000, Ansichten zur deutschen Geschichte. Zehn Jahre Gedenkstätte Moritzplatz Magdeburg für die Opfer politischer Gewaltherrschaft 1945 bis 1989. Landeszentrale für politische Bildung Sachsen-Anhalt 2002. [Findings of the Center for the Treatment of Torture Victims in Berlin, Germany].

³⁹² Findings of the Center for the Treatment of Torture Victims in Berlin, Germany.

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ Zahn H. "Haftbedingungen und Geständnisproduktion in den Untersuchungs-Haftanstalten des MfS – Psychologische Aspekte und biographische Veranschaulichung." *Schriftenreihe des Berliner Landesbeauftragten für die Unterlagen des Staatssicherheitsdienstes der ehemaligen DDR*. Band 5. Berlin; 1999.

³⁹⁶ *Id.*

This account parallels that of Ali Laaridh, a prisoner in Tunisia who was active in Tunisia's Islamist movement.³⁹⁷ Mr. Laaridh spent more than eleven of his fourteen years in prison in solitary confinement. This isolation was strictly enforced by the prison administration. He ate all of his meals alone and guards escorted him to the shower and emptied the infirmary during visits so that he never came into contact with other prisoners.³⁹⁸ He described the effects of isolation to interviewers with Human Rights Watch on December 8, 2004:

In isolation, the only person you can speak to is the guard. But from time to time, the prison staff would decide not to address a single word to you, sometimes for a few hours, sometimes for an entire week. You might ask for a medication, or to see a doctor, and they wouldn't even say 'Yes' or 'No,' or, 'We are looking at your request.' It makes you despondent, ready to do something desperate, toward the guard, or toward yourself, just to prove you exist.³⁹⁹

He went on to describe, in more general terms, the toll that isolation took on his mind: "I have lost the ability to concentrate. It now takes a great effort for me to look at a problem in all its dimensions, to get beyond the surface."⁴⁰⁰

Some former political prisoners who have been held in long-term solitary confinement with sensory deprivation wrote down their stories and published them after their release. One of these was the Argentine physician Jacobo Timerman, who was confined during the military junta in Argentina in the late 1970s. Although Timerman experienced various forms of torture, including electric shocks, beatings, exposure to threatening dogs, and mock executions,⁴⁰¹ isolation was the primary form of torture used during his detention. Timerman described how he began to talk to himself and to hear voices while in solitary confinement. He also described his emotional confusion, how he started hating his wife when he received letters from her, and his inability to integrate the distress of solitude, emptiness, and helplessness with positive images and memories of the outside world. He longed to go crazy as a form of relief from the loneliness and fantasized about committing suicide in order to obtain a feeling of power over his torturers.⁴⁰² Even years after his release, Timerman continued to experience fear and the effects of what happened to him. He writes, ". . . I'm trying to forget it. Every day, since my release, I've been waiting for some vital shock to take place, some deep, extended nightmare to explode suddenly in the middle of the night, allowing me to relive it all. . . . But nothing has happened, and I find this calm terrifying."⁴⁰³ He also said, "A journalist asked me how freedom feels. I still do not feel it."⁴⁰⁴

The effects of isolation are exacerbated when prisoners are held in isolation without being told the reasons for their confinement or how long they will be held. Thomas Hilliard, a psychologist who studied conditions at San Quentin Adjustment Center, found that the absence of exercise, activity or other outlets, the indeterminacy of prison terms, and the absence of any program leading to release from isolation led to a "pervasive sense of frustration and hopelessness,"

³⁹⁷ Human Rights Watch. *Tunisia: Crushing the Person, Crushing the Movement: The Solitary Confinement of Political Prisoners*. Vol. 17. No. 4(E). 2005: 13.

³⁹⁸ *Id.* at 15.

³⁹⁹ *Id.* at 15.

⁴⁰⁰ *Id.* at 18.

⁴⁰¹ Timerman J. *Prisoner Without a Name, Cell Without a Number*. New York: Alfred A. Knopf; 1981:6-10.

⁴⁰² *Id.* at 84-85, 91.

⁴⁰³ *Id.* at 34.

⁴⁰⁴ *Id.*

“deep feelings of despair,” and the feeling that the psychological pain caused by isolation may cause prisoners to resort to “extreme actions, and desperate solutions.”⁴⁰⁵ Prisoners’ uncertainty about their fate in detention often makes the impact of prolonged isolation more severe. Psychologists studying a group of prisoners held without a trial at the Belmarsh high security jail in south London concluded, “Indefinite detention is linked to deterioration in mental health and fluctuations in mental state are related to the prisoner regime and to the vagaries of the appeal system.”⁴⁰⁶ Research done by Professor Craig Haney on US prisoners confirms that “prisoners who are held in solitary-like confinement . . . often complain about the uncertainty of their confinement – not knowing why they are being held there or, and this is most important, when they are getting out or what [they] have to do in order to be released.”⁴⁰⁷ This information is particularly relevant to detainees held by the United States, who are held in legal limbo and without knowledge of the reason for or length of their detention.

These reports of the severe health effects of solitary confinement parallel reports by government agencies, the ICRC and individual detainees who were subjected to prolonged isolation. As stated above, an FBI memorandum from Guantánamo dated from November 2002 says that FBI agents observed a detainee after being subjected to intense isolation for over three months who was exhibiting symptoms of extreme psychological trauma.⁴⁰⁸

Similarly, a CID report referenced above describes an interview with a detainee who, on the ninth day of sixteen days in solitary confinement at a detention facility near Al Satar City, on Rashad Base, Iraq, claims he began to scream “because he did not like being by himself.”⁴⁰⁹ When taken to a room by himself after the interview, the agent reports that the detainee became visibly upset and asked to be placed in a cell with other detainees.⁴¹⁰

In its report of visits to Iraq in 2003, the ICRC called attention to the harmful consequences of extended isolation. ICRC medics who examined detainees described one detainee held in isolation as “unresponsive to verbal and painful stimuli.”⁴¹¹ The physical examination determined that his heart rate was 120 beats per minute and his respiratory rate was 18 per minute. The detainee was diagnosed as suffering from “somatoform (mental) disorder, specifically a conversion disorder, most likely due to the ill-treatment he was subjected to during interrogation.”⁴¹²

The Tipton Three, who were held in extended isolation at Guantánamo, describe effects of isolation very similar to those found in studies and by clinicians. With regard to isolation, Mr. Rasul told interviewers that, “I felt like I was going out of my mind. I didn’t know where the

⁴⁰⁵ Brief of Professors and Practitioners of Psychology and Psychiatry as *Amicus Curiae* in Support of Respondent at 18. *Wilkinson v. Austin*. No. 04-495. S. Ct. filed 2005. Citing Hilliard T. “The Black Psychologist in Action: A Psychological Evaluation of the Adjustment Center Environment at San Quentin Prison.” *Journal of Black Psychology*. 1976;2:80.

⁴⁰⁶ O’Neill, *supra* note 77. Quoting report by British psychologists.

⁴⁰⁷ *Id.* Quoting Craig Haney, professor of psychology at the University of California at Santa Cruz.

⁴⁰⁸ See *supra* text accompanying note 47.

⁴⁰⁹ Agent’s Investigation Report. ROI No. 0234-04-CID259-80271. July 19, 2004. In: US Army Criminal Investigation Command, Department of the Army. Memorandum for See Distribution. Subject: CID Report of Investigation—Initial/Final/SSI—0234-04-CID259-80271-/5C2/5Y2E/5X1. August 2, 2004. Available at: http://www.aclu.org/torturefoia/released/5245_5258.pdf. Accessed April 22, 2005.

⁴¹⁰ *Id.*

⁴¹¹ ICRC February 2004 Report, *supra* note 86. Para. 27.

⁴¹² *Id.*

others were, I didn't know why I was being held there. Nobody would talk to me . . . I was extremely anxious."⁴¹³ Likewise, Mr. Iqbal states:

Amongst the effects of isolation was that over a period of time it was certainly draining. You would get worn out from it. If you were already depressed it makes you more depressed because you keep thinking repetitively about the same thing and there's no one there to comfort you or distract you. Sometimes you welcome interrogation when you've been in isolation because there is someone to talk to and it's a release . . .⁴¹⁴

The attorneys for Moazzam Begg and Feroz Abbasi, who were subjected to strict isolation at Guantánamo for 18 months beginning in February 2003, tell a similar story. According to their attorneys, both men suffered from post-traumatic stress and had attempted suicide.⁴¹⁵ After visiting her client in Guantánamo, Mr. Abbasi's lawyer said, "I left my first visit with [Abbasi and other detainees] thinking the longer they are in Guantanamo, the more psychological and physical damage they are going to suffer at that place."⁴¹⁶

In late 2003, the ICRC warned the Administration publicly that a system in which detainees were held indefinitely would inevitably lead to mental health problems.⁴¹⁷ When the ICRC visited Guantánamo in June 2004, it found a high incidence of mental illness produced by stress, much of it caused by prolonged solitary confinement.⁴¹⁸ A source familiar with conditions at Guantánamo at that time told PHR that deprivation of sensory stimulation on the one hand and overstimulation on the other were causing spatial and temporal disorientation in detainees. The results were self-harm and suicide attempts.⁴¹⁹

One current detainee, Salim Ahmed Hamdan, a Yemeni national, was held in solitary confinement at Camp Echo at Guantánamo from December 2003 to late October 2004. While at Camp Echo he was denied contact with other detainees and permitted only very limited access to a translator. Mr. Hamdan was initially denied outdoor exercise during daylight and medical treatment despite his repeated requests.⁴²⁰ He described his mood during solitary confinement as "deteriorating, . . . encompassing frustration, rage (although he has not been violent), loneliness, despair, depression, anxiety, and emotional outbursts."⁴²¹ Mr. Hamdan's appointed military defense counsel, Lieutenant Commander Charles Swift, described his client's condition as "initially agitated and withdrawn" and said that he witnessed in Mr. Hamdan significant mood swings, including "uncontrollable weeping at inappropriate times, undirected anger, and unresponsiveness."⁴²² Based on these descriptions, an expert psychiatrist

⁴¹³ Tipton Three statement, *supra* note 32. Para. 182.

⁴¹⁴ *Id.* Para. 233.

⁴¹⁵ O'Neill, *supra* note 77.

⁴¹⁶ Leonnig CD. "Further Detainee Abuse Alleged." *Washington Post*. December 26, 2004. Quoting Gitanjali S. Gutierrez, Abbasi's lawyer and one of the first attorneys to receive clearance to visit Guantánamo Bay.

⁴¹⁷ Lewis, *supra* note 223.

⁴¹⁸ *Id.* Summarizing findings from a leaked ICRC report to the US government, based on a June 2004 visit to Guantánamo.

⁴¹⁹ PHR Interview.

⁴²⁰ Brief of Amici Curiae Human Rights First, Physicians for Human Rights, et al. in Support of Petitioner at 15. *Hamdan v. Rumsfeld*. S. Ct. filed Dec. 27, 2004. No. 04-702. Citing Pet. App. 60-61.

⁴²¹ *Id.* at 16. Quoting Decl. of Daryl Matthews, M.D., Ph.D. ¶ 11. *Swift v. Rumsfeld*. No. 04 Civ. 0777L. W.D. Wash. filed Mar. 31, 2004.

⁴²² *Id.* Quoting Decl. of Lt. Cmdr. Charles Swift. ¶¶ 7-11. *Swift v. Rumsfeld*. No. 04 Civ. 0777L. W.D. Wash. filed May 3, 2004.

concluded that Mr. Hamdan was “at significant risk for future psychiatric deterioration, possibly including the development of irreversible psychiatric symptoms.”⁴²³ The psychiatrist also noted “the psychological stress of the uncertainty he faces over his lack of charges and about the nature and duration of his future confinement.”⁴²⁴

Although some of the symptoms will diminish once an individual is removed from isolation,⁴²⁵ there are often long lasting, harmful effects. A study of Danish prisoners held in solitary confinement for longer than four weeks were twenty times more likely to be admitted to a psychiatric hospital than a prisoner in a standard prison environment.⁴²⁶ The study concludes that “individuals detained [in solitary confinement] are forced into an environment that increases their risk of hospitalization . . . for psychiatric reasons.”⁴²⁷ Some of the effects of isolation, including an inability to engage in normal social interactions, may be permanent. One study of former prisoners of war found that even forty years after their release, some soldiers still suffered symptoms of anxiety, confusion, depression, suspiciousness and detachment from social interactions.⁴²⁸ Long lasting effects encountered by doctors treating ex-prisoners at the Berlin Center include a deep, basic mistrust of other people, chronic anxiety, and fear of becoming psychotic again.⁴²⁹ People who have experienced long term isolation may also show marked problems with relationships, including the dissolution of marriages, friendships and parent-child relationships. Long term exposure to extreme isolation can lead to an increased withdrawal of prisoners into themselves. One study found that

[a]s [prisoners] become increasingly unfamiliar and uncomfortable with social interaction, they are further alienated from others and made anxious in their presence. In extreme cases, another pattern emerges: This environment is so painful, so bizarre and impossible to make sense of, that they create their own reality- they live in a world of fantasy instead.⁴³⁰

The doctors at the Berlin Center also report that ex-prisoners recall having felt affection and love for their perpetrators, who during the period of total isolation and solitude were their only human contact.⁴³¹ This contradiction, of having affectionate feelings toward a person who was abusive, may be impossible to integrate into one’s value system and view of the world. Ex-prisoners also found that those in the outside world were reluctant to believe what had happened to them inside the prison. Before finding a specialist who recognized the after-effects of Stasi persecution, they were often misdiagnosed as suffering from borderline disorder, paranoid behavior, or psychosis.⁴³²

⁴²³ *Id.* Quoting Decl. of Daryl Matthews, *supra* note 421, at ¶ 14.

⁴²⁴ *Id.* Quoting Decl. of Daryl Matthews, *supra* note 421, at ¶ 15.

⁴²⁵ See Grassian S. “Psychopathological Effects of Solitary Confinement.” *American Journal of Psychiatry*. 1983;140:1450–54.

⁴²⁶ Haney, *supra* note 368, at 144. Citing Sestoft D, Anderson H, Lilleback T, Gabrielson G. “Impact of Solitary Confinement on Hospitalization Among Danish Prisoners in Custody.” *International Journal of Law and Psychiatry*. 1998;21:99–108.

⁴²⁷ *Id.*

⁴²⁸ Sutker PB, Winstead DK, Galina ZH, Allain AN. “Cognitive Deficits and Psychopathology Among Former Prisoners of War and Combat Veterans of the Korean Conflict.” *American Journal of Psychiatry*. 1991;148(1): 67–72.

⁴²⁹ Findings of the Center for the Treatment of Torture Victims in Berlin, Germany, *supra* note 391.

⁴³⁰ Haney, *supra* note 368, at 140.

⁴³¹ Findings of the Center for the Treatment of Torture Victims in Berlin, Germany, *supra* note 391

⁴³² *Id.*

These negative effects on individuals have led those who study solitary confinement to caution against its use.⁴³³ Craig Haney, an expert on the psychological effects of incarceration, has stated that “[m]any of the negative effects of solitary confinement are analogous to the acute reactions suffered by torture and trauma victims, including post-traumatic stress disorder or PTSD and the kind of psychiatric sequelae that plague victims of what are called ‘deprivation and constraint’ torture techniques.”⁴³⁴ Even in situations where solitary confinement is imposed as a form of discipline or punishment, and thus not within the legal definition of torture, clinicians have understood solitary confinement to be a form of torture,⁴³⁵ psychological torture,⁴³⁶ or inhumane treatment.⁴³⁷

D. Sleep Deprivation

Sleep deprivation also causes a host of negative psychological effects. According to the *Comprehensive Textbook of Psychiatry*, “the most prominent effect of total sleep deprivation in humans is cognitive impairment.”⁴³⁸ Cognitive impairment associated with sleep deprivation includes “impairments in memory, learning, logical reasoning, arithmetic skills, complex verbal processing, and decision making.”⁴³⁹ Sleep-deprived individuals take longer to respond to stimuli, and sleep loss causes “attention deficits, decreases in short-term memory, speech impairments, perseveration, and inflexible thinking.”⁴⁴⁰ These symptoms may appear after one night of total sleep deprivation, after only a few nights of sleep restriction (5 hours of sleep per night).⁴⁴¹ Sleep restriction also can result in hypertension and other cardiovascular disease.⁴⁴²

One review of the literature summarizes the effect of sleep deprivation on decreased immune function, which makes sleep-deprived individuals more vulnerable to illness. In addition, the literature links sleep deprivation to altered glucose tolerance and insulin resistance.⁴⁴³ Another study concludes that “[i]t seems reasonably certain that [sleep manipulations performed in previous studies] produce disturbances of metabolism and alter some central nervous system

⁴³³ Anderson HS, Sestoft D, Lillebæk, Gabrielson G, Hemmingsen R, Kramp P. “A longitudinal Study of Prisoners on Remand: Psychiatric Prevalence, Incidence, and Psychopathology in Solitary vs. Non-solitary Confinement.” *Acta Psychiatrica Scandinavica*. 2000;102:19–25. Concluding that from a medical point of view solitary confinement is questionable; Grassian S, Friedman N. “Effects of Sensory Deprivation in Psychiatric Seclusion and Solitary Confinement.” *International Journal of Law and Psychiatry*. 1986;8:49–65. Promoting limited use of solitary confinement due to “major psychiatric risks” as well as its vulnerability to misuse and inadequate safeguards.”

⁴³⁴ Haney, *supra* note 368, at 132.

⁴³⁵ Lucas WE. “Solitary Confinement: Isolation as Coercion to Conform.” *Australian and New Zealand Journal of Criminology*. 1976;9:153.

⁴³⁶ Thoenig RH. “Solitary Confinement—Punishment with the Letter of the Law, or Psychological Torture?” *Wisconsin Law Review*. 1972;237.

⁴³⁷ Singer RG. “Confining Solitary Confinement: Constitutional Arguments for a ‘New Penology.’” *Iowa Law Review*. 1971;56:1296.

⁴³⁸ Sadock B, Sadock V, eds. *Kaplan and Sadock’s Comprehensive Textbook of Psychiatry*. Vol. 1. 8th ed. Philadelphia, PA: Lippincott Williams & Wilkins; 2005: 289.

⁴³⁹ Nolen-Hoeksema S. *Abnormal Psychology*. 2nd ed. New York: McGraw-Hill; 2005:627.

⁴⁴⁰ Sadock B, Sadock V, eds. *Kaplan and Sadock’s Comprehensive Textbook of Psychiatry*. Vol. 1. 8th ed. Philadelphia, PA: Lippincott Williams & Wilkins; 2005: 289.

⁴⁴¹ *Id.*

⁴⁴² Alvarez GG, Ayas NT. “The Impact of Daily Sleep Duration on Health: A Review of the Literature.” *Progress in Cardiovascular Nursing*. 2004;19:56–59.

⁴⁴³ Carskadon, MA. “Sleep deprivation: Health Consequences and Societal Impact.” *Medical Clinics of North America*. 2004;88(3):767–776.

functions.”⁴⁴⁴ The study also correlates sleep deprivation with decreased pain tolerance, which has significant implications for torture and other situations in which sleep restrictions are implemented in tandem with other torture techniques.

The former Israeli Prime Minister, Menachem Begin, describes his experiences with sleep deprivation while being held in a Soviet prison:

In the head of the interrogated prisoner a haze begins to form. His spirit is wearied to death, his legs are unsteady, and he has one sole desire: to sleep, to sleep just a little, not to get up, to lie, to rest, to forget. . . . Anyone who has experienced this desire knows that not even hunger or thirst are comparable with it. . . . I came across prisoners who signed what they were ordered to sign, only to get what the interrogator promised them. He did not promise them their liberty. He promised them – if they signed – uninterrupted sleep!⁴⁴⁵

E. Individual Responses to Torture

Each individual, of course, responds uniquely to the stressors encountered under psychological torture. Attempting to isolate any one aspect of a given interrogation technique is almost impossible given that the characteristics of the human psyche vary considerably, even within the most homogeneous population. Determining which aspects of psychological stress lead to the negative health consequences exhibited by some victims of psychological torture is still more difficult. Moreover, victims of psychological torture are, in most cases, subjected to a combination of techniques, making it nearly impossible to determine the specific cause of psychopathology shown. Moreover, studies on concentration camp survivors have shown that massive psychic trauma can break through the defenses of even the strongest and healthiest person.⁴⁴⁶

Despite these difficulties, certain personal characteristics have emerged as being important factors in determining the effects of psychological torture. Studies of torture survivors have shown that the severity of the torture, post-torture psychosocial stressors, family history of psychiatric illness, post-captivity social support, “psychological preparedness for trauma,” and the education level of victims are predictors of long term psychological status.⁴⁴⁷ Among these variables, “psychological preparedness for trauma” appears to be the strongest predictor of post torture psychological health.⁴⁴⁸ Several different factors contribute to one’s “psychological preparedness.” These factors can be broken down into two main categories: cognitive processes and behavioral processes. Cognitive processes include a strong belief system (political, religious or other) and the ability to rationalize the torture experience and give meaning to the

⁴⁴⁴ Hakki Onen S, Abdelkrim A, Gross A, Eschallier AE, Dubray C. “The Effects of Total Sleep Deprivation, Selective Sleep Interruption and Sleep Recovery on Pain Tolerance Thresholds in Healthy Subjects.” *Journal of Sleep Research*. 2001;10:35–42.

⁴⁴⁵ Malinowski T. “The Logic of Torture.” *Washington Post*. June 27, 2004. Quoting Mr. Begin.

⁴⁴⁶ Eitinger L. *Concentration Camp Survivors in Norway and Israel*. London; 1964; Eitinger L. “Psychiatrische Untersuchungsergebnisse bei KZ-Überlebenden.” In: Herberg HJ, ed. *Spätschäden nach Extremlastungen*. Herford; 1971:144 n.237.

⁴⁴⁷ Basoglu M, Jaranson JM, Mollica R, Kastrup M. “Torture and Mental Health: A Research Overview.” In: Gerrity E, Keane TM, Tuma, F, eds. *The Mental Health Consequences of Torture*. New York: Kluwer Academic/Plenum; 2001:50.

⁴⁴⁸ *Id.*

trauma. Behavioral processes are largely dependent on an individual's prior exposure to torture, which provides victims with a better understanding of what is to be expected.⁴⁴⁹

During the torture experience, both of these processes influence the victim's locus of control—the level of perceived control the victim has during the torture experience. Individuals with no prior experience with torture likely will not have developed coping mechanisms and will perceive that the torture experience is out of their control. The theories of the cognitive processes surrounding trauma maintain that PTSD is brought on as a reaction to the violation of previously held assumptions concerning invulnerability and personal safety.⁴⁵⁰ Locus of control is also an important factor when discussing the impact of different torture techniques. Techniques that are highly unpredictable or involve a high degree of uncontrollability are associated with higher degrees of distress than those techniques in which the victim feels that he or she has some degree of control over the level of pain and suffering that is inflicted.

F. Caring for Survivors of Torture⁴⁵¹

Survivors can be helped to rebuild their lives, to restore their dignity and to resume their productivity in society. Although organized treatment services for survivors of torture began about twenty years ago, the disparity between the needs of survivors and the availability of services in the US and abroad is still considerable. Most of these initiatives started through the efforts of a few clinicians who recognized the need for clinical services.

Since torture may affect many aspects of one's life, effective clinical interventions usually require individual needs assessments and a multi-disciplinary treatment approach. Therapeutic services typically include a variety of medical, psychological, and social services to address different dimensions of survivors' problems. For example, restoring the balance between different spheres of life (social, physical, intellectual, emotional, and spiritual) may require a variety of therapeutic interventions.

Cultural differences between health providers and survivors have important therapeutic implications. The use of a "bicultural approach" may help to mitigate such differences; however, culture is a heterogeneous phenomenon. Even within the same "culture," many interpersonal differences may exist such as differences in social class, political views, educational level, religious beliefs, language and levels of acculturation. The issue of culture underscores the therapeutic imperative of individualizing and contextualizing treatment approaches. Some of the most significant needs that survivors identify relate to legal assistance for political asylum, food, shelter, personal safety, or may have very little to do with past traumatic experiences.

Treatment centers provide more than integration and consolidation of services; they provide professional expertise in dealing with complex emotional issues of survivors and providers alike, a safe and structured environment, and the ability to carry out much needed research. However, these specialized treatment centers have reached only a fraction of those affected by torture.

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.* at 52.

⁴⁵¹ This section was written by Vince Iacopino, MD, PhD, Director of Research, Physicians for Human Rights, and Principal Organizer of the Istanbul Protocol Project.

V. Justifying and Facilitating Psychological Torture

A. The Imposition of a New Legal Framework

Psychological torture has long been outlawed and its use also was contrary to the guidance and tradition of the US military. How did it come about? At the beginning of 2002, the Bush Administration began to create a new legal framework to permit coercive interrogations. The first steps taken by the Administration focused on how to classify detainees from the “war on terror” and whether the protections of the Geneva Conventions could be denied them. The Geneva Conventions protect prisoners of war and civilians in times of war and delineate the protections that they must be afforded. They provide clear prohibitions on the use of torture and other forms of inhumane and degrading treatment and specifically prohibit the use of any form of coercion on protected persons, including POWs.⁴⁵² The US is a party to the Geneva Conventions and is bound by its terms, so to justify the use of coercive interrogation techniques, it found a way around applying the Conventions. At the same time, the federal anti-torture statute and other legal prohibitions on the use of torture and cruel, inhuman, and degrading treatment outlaw the techniques interrogators sought to use. So the second step in developing a new legal framework involved restricting the definition of torture, including psychological torture. Following these changes, the Administration approved the use of specific techniques based on the denial of the Geneva Conventions and the new definition of torture.

1. *Classification of Detainees and Application of Geneva Conventions*

On January 9, 2002, the repudiation of US commitments began. John Yoo, Deputy Assistant Attorney General in the Office of Legal Counsel at the Department of Justice, sent a memorandum to William J. Haynes II, the Department of Defense General Counsel, arguing that the laws of armed conflict do not protect members of al Qaeda and the Taliban.⁴⁵³ Mr. Yoo also sent a copy to William H. Taft, IV, Legal Adviser at the Department of State. Mr. Taft offered comments to Mr. Yoo in a memorandum on January 11.⁴⁵⁴ He said that “both the most important factual assumptions on which your draft is based and its legal analysis are seriously flawed.”⁴⁵⁵ He noted, “In previous conflicts, the United States has dealt with tens of thousands of detainees without repudiating its obligations under the Conventions.”⁴⁵⁶ A series of memos between Mr. Yoo and Mr. Taft followed,⁴⁵⁷ as Mr. Taft contested the repudiation of coverage of certain detainees.⁴⁵⁸

⁴⁵² See *supra* note 10.

⁴⁵³ Memorandum for William J. Haynes II, General Counsel, Department of Defense. From John Yoo, Deputy Assistant Attorney General, Robert J. Delahunty, Special Counsel, Office of the Legal Counsel, US Department of Justice. Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees. January 9, 2002. Available at: <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf>. Accessed April 27, 2005.

⁴⁵⁴ Unclassified Memorandum. From William H. Taft, IV, Legal Adviser, U.S Department of State. To John C. Yoo, Deputy Assistant Attorney General, Office of the Legal Counsel, US Department of Justice. Subject: Your Draft Memorandum of January 9. January 11, 2002.

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.*

⁴⁵⁷ See Memorandum. From John Yoo, Deputy Assistant Attorney General. To The Honorable William H. Taft, IV, Legal Adviser, Department of State. January 14, 2002; Memorandum. From William H. Taft, IV, Legal Adviser, Department of State. To John C. Yoo, Deputy Assistant Attorney General, Office of the Legal Counsel, US Department of Justice. Subject: Your Draft Memorandum of January 18. January 23, 2002:1.

⁴⁵⁸ See Memorandum. From William H. Taft, IV, *supra* note 457, at 1, 4.

Secretary of Defense Donald Rumsfeld adopted Mr. Yoo's approach and on January 19, 2002, sent a memorandum to Richard B. Myers, Chairman of the Joint Chiefs of Staff. In it, he asked Gen. Myers to transmit to Combatant Commanders the following message: that "Al Qaida and Taliban individuals under the control of the Department of Defense are not entitled to prisoner of war status for purposes of the Geneva Conventions of 1949" but that "The Combatant Commanders shall . . . treat them humanely and, to the extent appropriate and *consistent with military necessity*, in a manner consistent with the principles of the Geneva Conventions of 1949."⁴⁵⁹ It is critically important to note that military necessity can never be a justification for torture under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment⁴⁶⁰ (hereinafter Convention against Torture) or the Geneva Conventions.⁴⁶¹ The right to be free from torture is non-derogable, which means that it can not be repudiated in any case, even when there is "military necessity." With this memorandum, Secretary Rumsfeld offered a legally incoherent message that nonetheless got a certain point across: that the Administration did not believe the prohibition against torture was absolute.

Meanwhile, the Justice Department was preparing a formal statement on the matter. On January 22, 2002, Jay S. Bybee, Assistant Attorney General in the Office of Legal Counsel at the Department of Justice, wrote a memorandum on the subject to Mr. Haynes and to Alberto Gonzales, the White House Counsel.⁴⁶² Mr. Bybee opined that neither the federal War Crimes Act nor the Geneva Conventions would apply to the detention conditions of al Qaeda prisoners and that the President has the constitutional power to suspend US treaty obligations toward Afghanistan during the period of the conflict. Mr. Bybee also contended that customary international law has no binding legal effect on either the President or the military because it is not federal law, as recognized by the Constitution.⁴⁶³

The White House Counsel, Mr. Gonzales, adopted this view in a memorandum to President Bush on January 25, 2002.⁴⁶⁴ These legal revisions clearly served to increase coercion in interrogations. In the memo, Mr. Gonzales called the war on terror a "new kind of war" that rendered "obsolete Geneva's strict limitations on questioning of enemy prisoners."⁴⁶⁵ He also rejected the arguments of Secretary of State Colin Powell to apply the Geneva Conventions to all

⁴⁵⁹ Memorandum for Chairman of the Joint Chiefs of Staff. From Secretary of Defense Donald Rumsfeld. Subject: Status of Taliban and Al Qaida. January 19, 2002. Emphasis added. Available at: http://www.npr.org/documents/2004/dod_prisoners/20040622doc1.pdf. Accessed April 27, 2005. On January 21, 2002, Myers transmitted the message. See Memorandum. To United Commands and Services. From Chairman of the Joint Chief of Staff. Subject: Status of Taliban and Al Qaida. January 21, 2002.

⁴⁶⁰ "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. G.A. Res. 39/46. U.N. GAOR. 39th Sess. Supp. No. 51. U.N. Doc. A/Res/39/46. 1984:197. *Entered into force* June 26, 1987. Article 2(2).

⁴⁶¹ See *supra* note 10. Citing articles of the Geneva Conventions that prohibit torture and inhumane treatment in all circumstances and at all times.

⁴⁶² Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense. From Jay S. Bybee, Assistant Attorney General, US Department of Justice. Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees. January 22, 2002.

⁴⁶³ *Id.*

⁴⁶⁴ Memorandum for the President. From Alberto R. Gonzales. Subject: Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban. January 25, 2002. Available at: <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf>. Accessed April 27, 2005.

⁴⁶⁵ *Id.* at 2.

detainees, finding them “unpersuasive.”⁴⁶⁶ Attorney General John Ashcroft similarly argued against applying the Geneva Conventions to Taliban detainees.⁴⁶⁷

The day after Mr. Gonzales sent his memo to President Bush, Secretary Powell sent a memorandum to Mr. Gonzales⁴⁶⁸ objecting to the decision not to apply the Geneva Conventions. He pointed out that the consequences would be to “reverse over a century of U.S. policy and practice . . . and undermine the protections of the law of war for our troops, both in this specific conflict and in general.”⁴⁶⁹ He also noted that denying the Conventions would have “a high cost in terms of negative international reaction.”⁴⁷⁰ Mr. Taft set out objections in greater length in a later memo.⁴⁷¹ In addition to legal arguments, he noted that “[f]rom a policy standpoint, a decision that the Conventions apply provides the best legal basis for treating the al Qaeda and Taliban detainees in the way we intend to treat them. It demonstrates that the United States bases its conduct not just on its policy preferences but on its international legal obligations.”⁴⁷²

On February 7, Mr. Bybee wrote another memorandum to Mr. Gonzales, this time laying out the Office of Legal Counsel’s views concerning the status of members of the Taliban militia under Article 4 of the Third Geneva Convention.⁴⁷³ The memorandum opined that the President can determine that Taliban fighters do not qualify as POWs, thereby eliminating any legal “doubt” as to their status and obviating any need for article 5 tribunals.⁴⁷⁴

The rejection of the Geneva Conventions for al Qaeda and Taliban detainees was incorporated into a directive President Bush issued on February 7, 2002.⁴⁷⁵ In it, the President accepted OLC’s reasoning and determined that the Geneva Conventions do not apply to the conflict with al

⁴⁶⁶ *Id.* at 3.

⁴⁶⁷ Letter to the President. From John Ashcroft, Attorney General. February 1, 2002.

⁴⁶⁸ Memorandum. From Colin L. Powell. To Counsel to the President and Assistant to the President for National Security Affairs. Subject: Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan. January 26, 2002. Available at: <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.26.pdf>. Accessed April 27, 2005.

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.*

⁴⁷¹ Memorandum. From William H. Taft, IV. To Counsel to the President. Subject: Comments on Your Paper on the Geneva Convention. February 2, 2002. Available at: http://www.nytimes.com/packages/html/politics/20040608_DOC.pdf. Accessed April 27, 2005.

⁴⁷² *Id.*

⁴⁷³ Memorandum for Alberto R. Gonzales, Counsel to the President. From Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Department of Justice. Re: Status of Taliban Forces Under Article 4 of the Third Geneva Convention. February 7, 2002.

⁴⁷⁴ *Id.* at 2. Article 5 of the Third Geneva Convention states, “Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy belong [to any of the categories for prisoners of war], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.” Third Geneva Convention, *supra* note 9. Article 5. Traditionally, the US has adhered to this principle and has used such tribunals in conflicts from Vietnam to the Gulf War. See Human Rights Watch. Background Paper on Geneva Conventions and Persons Held by U.S. Forces. January 29, 2002. Available at: <http://www.hrw.org/backgrounder/usa/pow-bck.htm>. Accessed April 27, 2005. Allowing the President to make the determination wholesale, without individualized consideration, undermines the principles of the Geneva Conventions.

⁴⁷⁵ Memorandum for the Vice President, Secretary of State, Secretary of Defense, Attorney General, Chief of Staff to the President, Director of Central Intelligence, Assistant to the President for National Security Affairs, Chairman of the Joint Chiefs of Staff. From President Bush. Subject: Humane Treatment of al Qaeda and Taliban Detainees. February 7, 2002. Available at: <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf>. Accessed April 27, 2005.

Qaeda in Afghanistan. While he decided that the Geneva Conventions apply to the Taliban, he deemed all Taliban detainees to be “unlawful combatants” who do not qualify for POW status. The memo also adopted the Rumsfeld position that detainees must be treated humanely and “consistent with military necessity, in a manner consistent with the principles of Geneva.”⁴⁷⁶ Mr. Gonzales later confirmed that this directive applied only to the Armed Forces, not to the CIA.⁴⁷⁷

2. Expanding Authority for Coercive Interrogation Tactics

The decision not to apply the Geneva Conventions to detainees in the “war on terror” created confusion among agencies about what methods were available to them in interrogations. Many of the agencies were accustomed to following directives on interrogations—like FM 34-52—that strictly complied with the Geneva Conventions. A decision that the Taliban and al Qaeda detainees were not entitled to the Geneva Conventions protections but were to be treated humanely, consistent with military necessity, left vague the rules for interrogations.

According to news reports, the CIA—which was not included in the President’s February 7, 2002 directive—had questions about how far the agency could go in interrogating terror suspects without committing illegal acts. These questions led to high-level meetings, starting in July 2002, about different techniques, including “waterboarding,” that were proposed by the CIA. The attendees, including Mr. Gonzales and Mr. Yoo, discussed in great detail how to legally justify certain techniques.⁴⁷⁸ Following in part from those meetings, the Office of Legal Counsel in the Department of Justice issued two legal opinions on August 1, 2002. The first, written by Mr. Yoo, reviewed the OLC’s views whether interrogation methods used on al Qaeda operatives would violate United States obligations under the Convention against Torture.⁴⁷⁹ The memo concluded that if interrogation methods are in compliance with the federal anti-torture statute, 18 U.S.C. §§ 2340-2340(A), the methods will not run afoul of US obligations under the Convention against Torture.⁴⁸⁰

The second August 1, 2002 OLC opinion, written by Mr. Bybee, provided an interpretation of the federal anti-torture statute, 18 U.S.C. §§ 2340 & 2340(A).⁴⁸¹ This opinion appears to build on the

⁴⁷⁶ *Id.* Other memorandums discussing legal issues and response to public inquiries followed the President’s directive. See Memorandum for William J. Haynes, II, General Counsel, Department of Defense. From Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Department of Justice. Re: Potential Legal Constraints Applicable to Interrogations of Persons Captured by U.S. Armed Forces in Afghanistan. February 26, 2002; Memorandum. From John C. Yoo, Deputy Assistant Attorney General, US Department of Justice. To William H. Taft, IV, Legal Adviser, Department of State. March 28, 2002.

⁴⁷⁷ See Responses of Alberto R. Gonzales, Nominee to be Attorney General. To the written questions of Senator Patrick Leahy. 2005. On file with PHR.

⁴⁷⁸ Isikoff M, Klaidman D, Hirsh M. “Torture’s Path.” *Newsweek*. December 27, 2004. Available at: <http://www.msnbc.msn.com/id/6733213/site/newsweek/>. Accessed April 27, 2005. When asked about these meetings in his confirmation hearing for the position of Attorney General, Mr. Gonzales said he had “a recollection that we had some discussions in my office” but said he could not remember the details. Transcript: Senate Judiciary Committee Confirmation Hearing. January 6, 2005. On file with PHR.

⁴⁷⁹ Letter to The Honorable Alberto R. Gonzales, Counsel to the President. From John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice. August 1, 2002. The memo also addressed whether interrogation methods would create the basis for a prosecution under the Rome Statute of the International Criminal Court.

⁴⁸⁰ *Id.* at 2–5.

⁴⁸¹ Memorandum for Alberto R. Gonzales, Counsel to the President. From Office of Legal Counsel, US Department of Justice. Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A. August 1, 2002. [2002 OLC opinion].

prior memorandum, which determined that if an interrogation method complies with the federal anti-torture statute, it does not violate the Convention against Torture. The opinion created a legal definition of torture permitting a wide range of interrogation methods, including those that amount to torture.

The content of the 2002 OLC opinion is well-known. It concluded that the federal anti-torture statute may be unconstitutional if applied to interrogations of enemy combatants undertaken pursuant to the President's power as Commander-in-Chief.⁴⁸² It also provided a justification for excluding officials from prosecution when they are carrying out the President's powers.⁴⁸³ Additionally, the opinion provided justification defenses that would be available to potentially eliminate criminal liability for the use of torture.⁴⁸⁴

The narrow definition of torture crafted by the OLC opinion is also well-known. The OLC opined that for an act to constitute torture, it must inflict pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."⁴⁸⁵ It was an extremely restrictive definition of torture, which was inconsistent with prior interpretations of the term by US and international courts, entities responsible for the interpretation of the Convention against Torture, and the State Department. This definition was pulled from statutes defining an emergency medical condition for the purpose of providing health benefits, even though the memo admits that these statutes address a substantially different subject from the anti-torture statute.⁴⁸⁶ The opinion never references either the FM 34-52 or the Uniform Code of Military Justice (hereinafter UCMJ). In an admitted departure from the terms of the Convention against Torture, the opinion stated that in order to be convicted of torture, the defendant must have specifically intended to inflict severe pain.⁴⁸⁷ And it developed a defense to negate a charge of specific intent.⁴⁸⁸

What is less well-known about the opinion was its new interpretation of psychological torture. The federal anti-torture statute says:

"severe mental pain or suffering" means the prolonged mental harm caused by or resulting from—
(A) the intentional infliction or threatened infliction of severe physical pain or suffering;
(B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
(C) the threat of imminent death; or
(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.⁴⁸⁹

⁴⁸² *Id.* at 31–35.

⁴⁸³ *Id.* at 35.

⁴⁸⁴ See *id.* at 39–46. Examining the defenses of necessity and self-defense.

⁴⁸⁵ *Id.* at 1.

⁴⁸⁶ *Id.* at 5–6.

⁴⁸⁷ *Id.* at 15 n.7. Admitting that the language in the Convention against Torture "might be read to require only general intent for violations of the Torture Convention. . . . If . . . the Convention established a general intent standard, then the Bush understanding represents a modification of the obligation undertaken by the United States."

⁴⁸⁸ *Id.* at 8.

⁴⁸⁹ 18 U.S.C. §2340(2).

The statute was a definition agreed to by the Bush Administration and Congress, and reflected an effort to more precisely define psychological torture.⁴⁹⁰ But here, too, the OLC sought to strip the statute of any content. The opinion concluded that in order for mental pain or suffering to amount to torture, it must “result in significant psychological harm of significant duration, e.g., lasting for months or even years.”⁴⁹¹ It did note, however, that “the development of a mental disorder such as posttraumatic stress disorder . . . or even chronic depression . . . might satisfy the prolonged mental harm requirement.”⁴⁹² In addition, the opinion noted, someone accused of torture must specifically intend to cause prolonged mental harm to have committed torture.⁴⁹³ As with severe pain, the opinion additionally argued that someone accused of torture could negate a showing of specific intent to cause severe mental pain or suffering if he has a *good faith belief that his actions will not result in prolonged mental harm*. The opinion then gave advice on how to show that an action was taken in good faith.⁴⁹⁴ This defense turns torture on its head; instead of focusing on actions that amount to torture, it focuses on the torturer’s beliefs about the extent of harm to the victim.

In considering death threats, the 2002 OLC opinion said that “the threat must indicate that death is ‘imminent.’”⁴⁹⁵ It concluded that mock executions or playing Russian roulette with detainees would qualify as imminent. But it added that the existence of a threat must be assessed from the perspective of a reasonable person in the same circumstances.⁴⁹⁶

When interpreting the phrase “the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality,” the OLC not surprisingly provided a construction that denudes the phrase of content. It determined that to constitute such acts, the method must “penetrate to the core of an individual’s ability to perceive the world around him, substantially interfering with his cognitive abilities, or fundamentally alter his personality.”⁴⁹⁷ The OLC considered the following to constitute a profound disruption of the senses or personality: drug-induced dementia; the onset of “brief psychotic disorder, including delusions and hallucinations”; the onset of obsessive-compulsive disorder; and pushing individuals to the brink of suicide.⁴⁹⁸ This extremely narrow construction of the language of the statute goes far beyond any past interpretation and opened the door to the use of psychological torture.

Reportedly, a companion memorandum to the August 2002 OLC opinion outlined specific methods that the CIA could use. It remains classified.⁴⁹⁹

Although the 2002 OLC opinion drove interrogation policies, this interpretation remained secret for almost two years, and the Administration never acknowledged that it had substantially reinterpreted the law governing torture. After the opinion was leaked, on June 22, 2004, the

⁴⁹⁰ See 2002 OLC opinion, *supra* note 481, at 18–19.

⁴⁹¹ *Id.* at 1.

⁴⁹² *Id.* at 11.

⁴⁹³ *Id.* at 8.

⁴⁹⁴ “A defendant could show that he acted in good faith by taking such steps as surveying professional literature, consulting with experts, or reviewing evidence gained from past experience.” *Id.* at 8.

⁴⁹⁵ *Id.* at 12.

⁴⁹⁶ *Id.* See also, *id.* at 9. Developing the reasonable person standard for assessing threats under part (A) of 18 U.S.C. §2340(2).

⁴⁹⁷ *Id.* at 11.

⁴⁹⁸ *Id.*

⁴⁹⁹ Jehl D. “C.I.A. Is Seen as Seeking New Role on Detainees.” *New York Times*. February 16, 2005.

Administration released the 2002 OLC opinion to the public. After an uproar about the views expressed in the opinion, the Administration said that it was no longer good policy and that it would be revised.

It was not until December 30, 2004 that a new opinion was issued by the OLC.⁵⁰⁰ The 2004 OLC opinion interpreting the meaning of torture under the US criminal statute purports to restore the commitment of the Bush Administration to ending torture. A closer look at the new opinion, however, shows the Administration's continued refusal to stop psychological torture.

The new opinion repudiated three important claims in the 2002 OLC opinion. First, it declines to support the claim of the earlier opinion that the President, in his role as Commander in Chief, can choose to ignore international treaties and our own criminal statutes. The new opinion says that because President Bush opposes torture by US forces, there is no need to consider whether the authority exists to engage in it.⁵⁰¹

Second, the new opinion repudiates the prior interpretation of "severe" pain in the definition of torture. The new opinion interprets "severe" in the ordinary sense, that is, "extremely violent and intense."⁵⁰² It does consider torture to be an extreme form of cruel and inhuman treatment,⁵⁰³ and cites a case from the European Court of Human Rights that the combined use of wall-standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink constituted inhuman or degrading treatment but not torture under the European Convention.⁵⁰⁴ It also cites a series of cases under the Torture Victims Protection Act that illuminate the definition.⁵⁰⁵ Moreover, it acknowledges that since torture can be defined by "severe suffering" as well as "severe pain" there are circumstances where a practice amounts to torture even in the absence of severe pain if it is of extended duration or persistence.⁵⁰⁶

Third, it revises the specific intent requirement. It rejects the idea that the specific intent requirement of the statute means that the infliction of severe pain or suffering must be the "precise objective" of the perpetrator.⁵⁰⁷ It also makes clear that the specific intent requirement is different from motive, and that "there is no exception . . . permitting torture to be used for a 'good reason,'" including to protect national security.⁵⁰⁸

With respect to its interpretation of mental pain and suffering, however, the new opinion introduces a new interpretation that allows psychological torture.⁵⁰⁹

The new opinion does not, as the 2002 OLC opinion did, discuss each of the four practices specifically forbidden by the domestic anti-torture statute. These four practices inflict severe

⁵⁰⁰ Memorandum for James B. Comey, Deputy Attorney General. From Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice. December 30, 2004. [2004 OLC opinion].

⁵⁰¹ *Id.* at 2.

⁵⁰² *Id.* at 5.

⁵⁰³ *Id.* at 6–7.

⁵⁰⁴ *Id.* at 6 n.14.

⁵⁰⁵ *Id.* at 9–10.

⁵⁰⁶ *Id.* at 11–12.

⁵⁰⁷ *Id.* at 16 n.27.

⁵⁰⁸ *Id.* at 17.

⁵⁰⁹ See Physicians for Human Rights. New Opinion Will Not Prevent Torture or Cruel, Inhuman or Degrading Treatment, Particularly Severe Mental Pain and Suffering: An Analysis of the Office of Legal Counsel Opinion of December 30, 2004 by Physicians for Human Rights. January 4, 2005. Available at: <http://www.phrusa.org/research/torture/tortureopinion.html>. Accessed April 27, 2005.

forms of mental pain, including the use or threatened use of “procedures calculated to disrupt profoundly the sense or personality.”⁵¹⁰

The language of the statute on this point is clear.⁵¹¹ It is obvious from the language and syntax that the four practices enumerated in the statute are prohibited. The use of the phrase “the prolonged mental harm caused by” is a determination that Congress deemed each of these to cause harm; if it were otherwise, the language would read “prolonged mental harm caused by.” The inclusion of the word “the” makes this clear.

The new OLC opinion, however, refuses to abide by this natural reading. It acknowledges the language, but says that it does not reflect Congress’ intent.⁵¹² But it cites nothing to suggest that Congress had a different intent except language summarizing the provision without the word “the.” There is no elucidation, no explanation, no assessment that the language in the statute means anything other than what it says. In fact the OLC analysis claims Congress did not intend a material change, nor to go beyond, the definition of mental pain and suffering in the Convention against Torture.⁵¹³ But the Convention itself contains no definition of mental pain and suffering at all, and it seems evident that the very reason Congress placed the four examples in the statute was, as the legislative history makes clear, to implement the section. It did so by giving greater precision to the term than the Convention does.

This is critical because it means that in OLC’s view the four types of procedures will not necessarily constitute torture at all and thus are unlikely to be prohibited. Even worse, in OLC’s view, these techniques only amount to torture if there is a *specific* showing of prolonged mental harm to the victim, which OLC interprets to mean harm over a long period of time. Its examples suggest that the effects must last years after the fact.⁵¹⁴ This contradicts its statement that to the extent the 2002 OLC interpretation of the phrase “prolonged mental harm” was “intended to suggest that the mental harm would have to last for at least ‘months or even years,’ we do not agree.”⁵¹⁵ Given that, there would be no reason for the Defense Department or CIA to prohibit them, since they are only unlawful if it is shown that they led to prolonged suffering after an extended period.

In other words, under OLC’s current view, the acts themselves—which are specifically enumerated in the anti-torture statute—are not considered torture. It is only when there exists proof of long term harm that OLC will concede that torture was committed. This turns the very idea of the prohibition against torture on its head since the purpose of the laws against torture is to prevent interrogators from using it in the first place, not waiting to see what impact it may have. With such an interpretation, there is little reason for interrogators to worry about being held accountable for engaging in horrific acts of psychological torture. In short, if OLC’s interpretation is followed, psychological torture in the form of death threats, sensory deprivation, isolation, sexual humiliation, and sleep deprivation, is likely to continue.

⁵¹⁰ 18 U.S.C. § 2340(2)(B).

⁵¹¹ See *supra* text accompanying note 489.

⁵¹² 2004 OLC opinion, *supra* note 500, at 13.

⁵¹³ *Id.* at 13, 14.

⁵¹⁴ *Id.* at 15. Reviewing *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002), where “mental effects were continuing years after the infliction of the predicate acts” and *Sackie v. Ashcroft*, 270 F. Supp. 2d 596 (E.D. Pa. 2003), where the resulting mental harm continued over a three-to-four year period.

⁵¹⁵ 2004 OLC opinion, *supra* note 500, at 14 n.24.

B. Translating the Legal Interpretations into Policy Guidance

1. Formalizing Methods Already Being Used

The repudiation of the Geneva Conventions' applicability to al Qaeda and Taliban detainees left a void, which was soon filled with improvised forms of coercion. There is evidence, detailed above, that as soon as the "war on terror" began, so too did the use of psychologically abusive interrogation methods.⁵¹⁶ Soon, however, commanders at Guantánamo sought to formalize their improvised forms of psychological coercion through policy guidance.

On October 11, 2002, Lt. Col. Jerald Phifer of the US Army sent a joint task force memorandum to Maj. Gen. Michael Dunlavey, the Commander of Joint Task Force 170, the intelligence task force at Guantánamo at the time.⁵¹⁷ In it, Lt. Col. Phifer complained that the "current guidelines for interrogation procedures at GTMO limit the ability of interrogators to counter advanced resistance."⁵¹⁸ He then requested approval for a new interrogation plan, in which a detainee deemed "uncooperative" could be subjected to increasingly intense interrogation methods.

The proposed interrogation plan separated methods into three different categories. Category I techniques included yelling at the detainee and techniques of deception. Category II techniques included deprivation of light and auditory stimuli, hooding during transportation and questioning, the use of 20 hour interrogations, removal of comfort items and clothing, forced grooming, and using detainees' individual phobias (such as fear of dogs) to induce stress. These required approval of the Officer in Charge of the Interrogation Section. The use of the isolation facility for up to 30 days also was categorized as a Category II technique, although a request had to be made and extensions beyond 30 days had to be approved by the Commanding General. Category III techniques included the use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family and use of a wet towel and dripping water to induce the misperception of suffocation (waterboarding). These techniques required the submission of a request and appropriate legal review. The memo stated that Category III techniques were required for less than 3% of the most uncooperative detainees.⁵¹⁹ It also specified that the techniques would be administered only by individuals specifically trained in their safe application.

Accompanying the Phifer memorandum was a memorandum by Lt. Col. Diane E. Beaver, a Staff Judge Advocate in the US Army.⁵²⁰ The Beaver memorandum offered a legal analysis of the proposed interrogation plan to justify the proposed techniques. It authorized the proposed techniques despite recognizing that they violate the UCMJ and the federal anti-torture statute⁵²¹ and have been shown to cause mental harm.

⁵¹⁶ See *supra* Section III.A.

⁵¹⁷ Memorandum for Commander, Joint Task Force 170. From Jerald Phifer, LTC, USA, Director J2. Subject: Request for Approval of Counter-Resistance Strategies. October 11, 2002. Available at: http://www.npr.org/documents/2004/dod_prisoners/20040622doc3.pdf. Accessed April 27, 2005. [Phifer Memorandum].

⁵¹⁸ *Id.*

⁵¹⁹ *Id.*

⁵²⁰ Memorandum for Commander, Joint Task Force 170. From Diane E. Beaver, LTC, USA, Staff Judge Advocate. Subject: Legal Brief on Proposed Counter Resistance Strategies. October 11, 2002. Available at: http://www.npr.org/documents/2004/dod_prisoners/20040622doc3.pdf. Accessed April 27, 2005.

⁵²¹ See *infra* Section VI.B.1 and VI.C.1.

The Beaver memorandum started by noting that the commonly approved interrogation techniques being used by Department of Defense (hereinafter DoD) interrogators at Guantánamo were being resisted by detainees. Lt. Col. Beaver pointed out that “compounding this problem is the fact that there is no established clear policy for interrogation limits and operations at GTMO, and many interrogators have felt in the past that they could not do anything that could be considered ‘controversial.’”⁵²² She highlighted the confusion felt by interrogators and commanders who were told by the President that the detainees were not considered enemy prisoners of war but nevertheless were to be treated humanely. Indeed, the confusion was evident when Lt. Col. Beaver stated that the procedures in Army Field Manual 34-52 are not binding because they only apply in situations governed by the Geneva Conventions.⁵²³

The Beaver memorandum thus concluded that the counter-resistance techniques proposed in the Phifer memorandum “are lawful because they do not violate the Eighth Amendment. . . or the federal torture statute An international law analysis is not required for the current proposal because the Geneva Conventions do not apply to these detainees since they are not [enemy prisoners of war].”⁵²⁴

Lt. Col. Beaver also took into account the 2002 OLC opinion that redefined torture to allow a host of highly coercive interrogation techniques. With respect to the federal anti-torture statute, the Beaver memorandum mirrored the conclusions of the OLC August 2002 torture opinion:

The federal torture statute will not be violated so long as any of the proposed strategies are not specifically intended to cause severe physical pain or suffering or prolonged mental harm. Assuming that severe physical pain is not inflicted, absent any evidence that any of these strategies will in fact cause *prolonged and long lasting mental harm*, the proposed methods will not violate the statute.⁵²⁵

Using the OLC’s constricted interpretation of the federal torture statute and ignoring the Convention against Torture and Geneva Conventions allowed Lt. Col. Beaver to give legal cover to the use of psychologically abusive interrogation methods that amount to torture and/or cruel, inhuman, and degrading treatment.

The memorandum then considered each interrogation technique in turn, allowing for many coercive interrogation techniques, including those outlawed by the UCMJ. For example, the memo noted that placing a wet towel or hood over a detainee’s head would constitute a per se violation of Article 128 of the UCMJ.⁵²⁶ She similarly found that threatening a detainee with death may constitute a violation of either Article 128 or Article 134 of the UCMJ. She concluded, however, that these were permissible, advising only, “It would be advisable to have permission or immunity in advance from the convening authority, for military members utilizing these methods.”⁵²⁷

⁵²² *Id.* at 1.

⁵²³ *Id.* at 1.

⁵²⁴ *Id.* at 5.

⁵²⁵ *Id.* at 5. Emphasis added.

⁵²⁶ *Id.* at 5.

⁵²⁷ *Id.* at 5.

Other methods were approved based on a combination of reasoning from the 2002 OLC opinion and the President's February 7 directive, which stated that military necessity could overcome the mandate to treat detainees humanely.

With respect to the use of isolation, the Beaver memorandum said its use for up to 30 days is legally permissible "so long as no severe physical pain is inflicted and prolonged mental harm intended, and because there is a legitimate governmental objective in obtaining the information necessary" ⁵²⁸ She noted that "absent medical evidence to the contrary, there is no evidence that prolonged mental harm would result" ⁵²⁹ This advice is contrary both to the universal standard that military objectives can never justify torture and to the extensive evidence, cited below, that isolation often does cause prolonged mental harm. ⁵³⁰

The memo further argued that the deprivation of light and auditory stimuli, the placement of a hood over a detainee's head during transportation and questioning, and the use of 20 hours of interrogation were "all legally permissible so long as there is an important governmental objective, and it is not done for the purpose of causing harm or with the intent to cause prolonged mental suffering." ⁵³¹

The memo also approved of the use of forced grooming, removal of clothing, and exploitation of detainees' phobias:

Forced grooming and removal of clothing are not illegal, so long as it is not done to punish or cause harm, as there is a legitimate governmental objective to obtain information, maintain health standards in the camp and protect both the detainees and the guards. . . . The use of the detainee's phobias is equally permissible. ⁵³²

The memo did, however, caution about the use of some techniques. With respect to techniques that would deprive a detainee of sleep, Lt. Col. Beaver noted that while "[t]here is no legal requirement that detainees must receive four hours of sleep per night," in order to "pass Eighth Amendment scrutiny, and as a cautionary measure, they should receive some amount of sleep so that no severe physical or mental harm will result." ⁵³³ The memo did not explain what is meant by "some amount of sleep."

With respect to Category III techniques, Lt. Col. Beaver opined that the use of scenarios designed to convince the detainee that death or severely painful consequences are imminent is not illegal despite its explicit prohibition in the federal anti-torture statute. She justified its use on the basis that exists a compelling governmental interest and it is not done intentionally to cause prolonged harm. ⁵³⁴ She noted, however, that "caution should be utilized with this technique because the torture statute specifically mentions making death threats as an example of inflicting mental pain and suffering." ⁵³⁵ Such cautions, of course, are meaningless when a legal green light is given to use the technique, which is exactly what Lt. Col. Beaver did.

⁵²⁸ *Id.*

⁵²⁹ *Id.* at 6.

⁵³⁰ See *supra* Section IV.C.1.

⁵³¹ *Id.* at 6.

⁵³² *Id.*

⁵³³ *Id.*

⁵³⁴ *Id.* at 6.

⁵³⁵ *Id.*

Regarding waterboarding, Lt. Col. Beaver found, “The use of a wet towel to induce the misperception of suffocation would also be permissible if not done with the specific intent to cause prolonged mental harm, and absent medical evidence that it would.”⁵³⁶ She did not, “Caution should be exercised with this method, as foreign courts have already advised about the potential mental harm that this method may cause.”⁵³⁷

In the end, Lt. Col. Beaver recommended that all of the proposed methods of interrogation be approved, and that interrogators be properly trained in the use of the methods.⁵³⁸ She further recommended that all Category II and III methods undergo a legal, medical, behavioral science, and intelligence review prior to their use.⁵³⁹

After receiving the memos from Phifer and Beaver, Maj. Gen. Dunlavey requested that General James T. Hill, Commander of the United States Southern Command (hereinafter SOUTHCOM), approve the Category I, II, and III interrogation techniques.⁵⁴⁰ Apparently relying on Lt. Col. Beaver’s memo, which followed the reasoning of the 2002 OLC opinion, he argued that these techniques “do not violate U.S. or international law.”⁵⁴¹

Gen. Hill did not approve all of the recommendations. In a memorandum to Gen. Richard B. Myers, Chairman of the Joint Chiefs of Staff, on October 25, 2002, Gen. Hill stated that he believed the first two categories of interrogation techniques are “legal and humane.”⁵⁴² He noted, however, that he was uncertain whether all the techniques in the third category are legal under US law, given the absence of judicial interpretation of the US torture statute, and indicated that he was “particularly troubled by the use of implied or expressed threats of death of the detainee or his family.”⁵⁴³ He nonetheless requested to have “as many options as possible at my disposal” and said he would “welcome any suggested interrogation methods that others may propose” because “we should provide our interrogators with as many legally permissible tools as possible.”⁵⁴⁴

Subsequently, William Haynes, General Counsel of the Defense Department, sent a memorandum on November 27, 2002 to Secretary Rumsfeld that recommended the authorization of the Category I and II techniques during the interrogation of detainees at Guantánamo. Moreover, Haynes argued that they were not prohibited by law and even recommended the use of one technique listed in Category III: mild, non-injurious physical contact such as grabbing, poking in the chest with a finger, and light pushing.⁵⁴⁵ In other

⁵³⁶ *Id.*

⁵³⁷ *Id.*

⁵³⁸ It is interesting that categories were created in the first place, considering that all techniques were authorized.

⁵³⁹ *Id.* at 7.

⁵⁴⁰ Memorandum for Commander, United States Southern Command. From Michael E. Dunlavey, Major General, USA, Commanding. Subject: Counter-Resistance Strategies. October 11, 2002. Available at: http://www.npr.org/documents/2004/dod_prisoners/20040622doc3.pdf. Accessed April 27, 2005.

⁵⁴¹ *Id.*

⁵⁴² Memorandum for Chairman of the Joint Chiefs of Staff. From James T. Hill, General, US Army, Commander. Subject: Counter-Resistance Techniques. October 25, 2002. Available at: http://www.npr.org/documents/2004/dod_prisoners/20040622doc4.pdf. Accessed April 27, 2005.

⁵⁴³ *Id.*

⁵⁴⁴ *Id.*

⁵⁴⁵ Memorandum. For Secretary of Defense. From William J. Haynes II, General Counsel. Subject: Counter-Resistance Techniques. November 27, 2002. Available at:

words, the only forms of torture he did not recommend for use at Guantánamo were threats of imminent death to detainees and/or detainees' families, exposure to cold weather or water, and waterboarding.⁵⁴⁶ At the same time, Mr. Haynes noted, "While all Category III techniques may be legally available, we believe that, as a matter of policy, a blanket approval of Category III techniques is not warranted at this time. Our Armed Forces are trained to a standard of interrogation that reflects a tradition of restraint."⁵⁴⁷ This memo is consistent with the prior ones in sending a conflicting message—one that claims to adhere to tradition of restraint in the Armed Forces while undermining that tradition by approving techniques that both go far beyond accepted practices and rely on a legal argument that repudiated the absolute prohibition against torture.

On December 2, 2002, Secretary Rumsfeld approved the interrogation methods recommended by Mr. Haynes for use at Guantánamo, noting, "However, I stand for 8-10 hours A day. Why is standing limited to 4 hours?"⁵⁴⁸

This series of memorandums among military officials was clearly designed to open the door to severe forms of psychological coercion. This was recognized by an FBI agent at Guantánamo who sent an e-mail on December 9, 2002 that included some documents he thought "may be of interest" to someone "reviewing the legal aspects of interviews."⁵⁴⁹ One of the included documents was a "review of interrogation methods by a DOD lawyer."⁵⁵⁰ This could be the Beaver memorandum, or could refer to Mr. Haynes' approval of the techniques. The FBI agent noted, "[B]asically, it appears that the lawyer worked hard to [write] a legal justification for the type of interviews they [the Army] want to conduct here."⁵⁵¹

On January 15, 2003, however, Secretary Rumsfeld issued a memorandum for the Commander of SOUTHCOM that rescinded the December 2, 2002 approval of the use of all Category II techniques and the one Category III technique.⁵⁵² According to reports, this rescission occurred because of reservations expressed by the General Counsel of the Department of the Navy, Alberto J. Mora.⁵⁵³ Despite rescinding his approval of the techniques, Secretary Rumsfeld said in the January 15 memorandum that if use of one of the rescinded techniques was warranted, he should receive a request. This willingness to consider the use of techniques that had been rescinded over concerns about their abusive nature conflicts with another statement in the memo: "In all interrogations, you should continue the humane treatment of detainees, regardless of the type of interrogation technique employed."⁵⁵⁴ The mixed message of coercion and humane treatment continued.

http://www.npr.org/documents/2004/dod_prisoners/20040622doc5.pdf. Accessed April 27, 2005. [Haynes Memorandum].

⁵⁴⁶ Compare Phifer Memorandum, *supra* note 517, with Haynes Memorandum, *supra* note 545.

⁵⁴⁷ Haynes Memorandum, *supra* note 545.

⁵⁴⁸ *Id.*

⁵⁴⁹ E-mail. From [redacted]. To [redacted]. Subject: Legal Issues re: Guantanamo Bay. December 9, 2002. Available at: <http://www.aclu.org/torturefoia/released/FBI.121504.4076.pdf>. Accessed April 27, 2005.

⁵⁵⁰ *Id.*

⁵⁵¹ *Id.*

⁵⁵² Memorandum for Commander USSOUTHCOM. From Donald Rumsfeld, Secretary of Defense. Subject: Counter-Resistance Techniques. January 15, 2003.

⁵⁵³ Schlesinger report, *supra* note 15, at 7; Church executive summary, *supra* note 42, at 4.

⁵⁵⁴ Memorandum for Commander USSOUTHCOM. From Donald Rumsfeld, Secretary of Defense. Subject: Counter-Resistance Techniques. January 15, 2003.

The same day, Secretary Rumsfeld issued a memorandum establishing a working group within the Department of Defense to assess the legal, policy, and operational issues relating to the interrogation of detainees. He directed the Working Group, composed of administration lawyers, to develop recommendations on the legal considerations raised by interrogation, the policy considerations with respect to the choice of interrogation techniques, and recommendations for employment of particular interrogation techniques by DoD interrogators.⁵⁵⁵ This review was not limited to Guantánamo, but rather was to “take into account the various potential geographic locations where U.S. Armed Forces may hold detainees.”⁵⁵⁶

On April 4, 2003, the Working Group released its report on detainee interrogations.⁵⁵⁷ The report considered three types of interrogation techniques:

(i) routine (those that have been ordinarily used by interrogators for routine interrogations), (ii) techniques comparable to the first type but not formally recognized, and (iii) more aggressive counter-resistance techniques than would be used in routine interrogations.⁵⁵⁸

The Working Group report reiterated the view that the Geneva Conventions do not protect al Qaeda detainees and that Taliban detainees do not qualify for POW status. The Working Group also adhered to the view that notwithstanding settled law on the absolute prohibition against torture, including psychological torture, using coercive tactics beyond those permitted by the Geneva Conventions could be justified by “military necessity.”⁵⁵⁹

The Working Group report then turned its attention to the federal anti-torture statute. It first contended that the federal anti-torture statute does not apply to the conduct of US personnel at Guantánamo since the statute requires that the offense occur “outside the United States” and the Working Group concluded that Guantánamo is included within the definition of the special and territorial jurisdiction of the United States.⁵⁶⁰

The Working Group report’s interpretation of the federal anti-torture statute closely tracked the August 2002 OLC opinion. Like the 2002 OLC opinion, the report looked at legal doctrines under federal criminal law that could render specific conduct, otherwise criminal, *not* unlawful.

⁵⁵⁵ Memorandum for the General Counsel for the Department of Defense. From Donald Rumsfeld, Secretary of Defense. Subject: Detainee Interrogations. January 15, 2003. Available at: http://www.npr.org/documents/2004/dod_prisoners/20040622doc6.pdf. Accessed April 27, 2005.

⁵⁵⁶ Memorandum for the General Counsel of the Department of the Air Force. From William J. Haynes II, General Counsel of the Department of Defense. Subject: Working Group to Assess Legal, Policy, and Operational Issues Relating to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism. January 17, 2003. In this memo, Mr. Haynes, who was directed to oversee the Working Group, appointed the General Counsel to the Department of the Air Force as Chair of the Working Group and asked for recommendations to be provided to him by January 29, 2003. *Id.*

⁵⁵⁷ Working Group Report on Detainee Interrogations in the Global War on Terrorism; Assessment of Legal, Historical, Policy, and Operational Considerations. April 4, 2003. [Working Group Report].

⁵⁵⁸ *Id.* at 2.

⁵⁵⁹ “It may be appropriate for the appropriate approval authority to authorize as a military necessity the interrogation of such unlawful combatants in a manner beyond that which may be applied to a prisoner of war who is subject to the protections of the Geneva Conventions.” *Id.* at 3.

⁵⁶⁰ *Id.* at 7–8. This view conflicts with the arguments the Administration made before the Supreme Court in *Rasul v. Bush*, where it argued that Guantánamo is not part of the sovereign US for purposes of granting detainees the right of habeas corpus. See Brief for the Respondents at 11. *Rasul v. Bush*. 124 S. Ct. 2686. 2004. Nos. 03-334, 03-343.

Specifically, it considered commander-in-chief authority, declaring, as did OLC, the President's complete authority over the conduct of war and concluding that the prohibition against torture "must be construed as inapplicable to interrogations undertaken pursuant to his Commander-in-Chief authority."⁵⁶¹ Like the OLC, it reviewed and approved of necessity and self-defense as justifications for torture,⁵⁶² and added the defense of superior orders.⁵⁶³

The Working Group report repeated language verbatim from the 2002 OLC opinion regarding the specific intent needed to commit torture.⁵⁶⁴ It also followed OLC's definition of torture, setting a very high threshold for qualification of torture under the statute.⁵⁶⁵

The Working Group report also iterated the OLC opinion's analysis of severe mental pain or suffering verbatim, including requirements that there must be prolonged mental harm, that it requires specific intent to cause prolonged mental harm, and that a showing of good faith could be a complete defense to a charge.⁵⁶⁶ By adopting the same extremely constricted construction of the meaning of torture as the OLC, the Working Group report created space for the use of psychological torture.

With respect to the prohibition against cruel, inhuman, and degrading treatment contained in the Convention against Torture, the Working Group noted that the United States considered the term to mean the same as treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the US Constitution. The Working Group therefore undertook a review of these standards but interpreted the cases it considered very narrowly.⁵⁶⁷

The Working Group report included a section on considerations affecting policy. It understood the implications for the United States and its military personnel of the use of extreme and abusive interrogation techniques. It said consideration should be given to "the possible adverse effects on U.S. Armed Forces culture and self-image, which at times in the past may have suffered due to perceived law of war violations" and to "whether implementation of such exceptional techniques is likely to result in adverse effects on DOD personnel who become POWs, including possible perceptions by other nations that the United States is lowering standards related to the treatment of prisoners, generally."⁵⁶⁸ These considerations did not deter it from approving severe psychological coercion.

The Working Group recognized the potential for confusion and problems when allowing coercion, as the Army Field Manual and Geneva Conventions do not. It cautioned that the

⁵⁶¹ Working Group Report, *supra* note 557, at 21.

⁵⁶² Compare Working Group Report, *supra* note 557, at 25–30, with 2002 OLC opinion, *supra* note 481, at 39–46.

⁵⁶³ See Working Group Report, *supra* note 557, at 32–33.

⁵⁶⁴ Compare *id.* at 8–9, with 2002 OLC opinion, *supra* note 481, at 3–4.

⁵⁶⁵ The Working Group report removed the discussion of "severe pain" in statutes defining an emergency medical condition for the purpose of providing health benefits, which the OLC used as a reference for its definition of torture. And it left the definition of "severe" at "of such a high level of intensity that the pain is difficult for the subject to endure" rather than saying that it must rise to the level of death, organ failure, or serious impairment of bodily function." Compare Working Group Report, *supra* note 557, at 10–11, with 2002 OLC opinion, *supra* note 481, at 5–6.

⁵⁶⁶ Compare Working Group Report, *supra* note 557, at 11–16, with 2002 OLC opinion, *supra* note 481, at 6–12.

⁵⁶⁷ See Working Group Report, *supra* note 557, at 35–43.

⁵⁶⁸ *Id.* at 55.

[g]eneral use of exceptional techniques (generally, having substantially greater risk than those currently, routinely used by U.S. Armed Forces interrogators), even though lawful, may create uncertainty among interrogators regarding the appropriate limits of interrogations. They should therefore be employed with careful procedures and only when fully justified.⁵⁶⁹

The report also acknowledged that “[p]articipation by U.S. military personnel in interrogations which use techniques that are more aggressive than those appropriate for POWs would constitute a significant departure from traditional U.S. military norms and could have an adverse impact on the cultural self-image of U.S. military forces.”⁵⁷⁰ Nevertheless, as detailed below, it recommended the use of all techniques beyond FM 34-52 that it considered.

The report considered each individual interrogation technique. In doing so, it assessed the utility, international and US law interpretations, and policy considerations, such as consistency with major partner nation views, effect on captured US forces, and potential effect on detainee prosecutions. It assigned either a green, yellow, or red light for each of the categories. The report acknowledged that “*[w]hile techniques are considered individually within this analysis, it must be understood that in practice, techniques are usually used in combination; the cumulative effect of all techniques to be employed must be considered before any decisions are made regarding approval for particular situations.*”⁵⁷¹ Hooding, environmental manipulation, threats to transfer to a third country where the person could face death, isolation, forced grooming, removal of clothing, sleep deprivation, and inducement of fear were all approved.

With respect to hooding, which was defined as questioning the detainee with a blindfold in place,⁵⁷² the Working Group found that it has a high utility, that it is acceptable under the Convention against Torture, is not cruel, inhuman, and degrading treatment, and is acceptable under US domestic law. It approved its use.

When considering the use of environmental manipulation, the Working Group found that it has a high utility, is acceptable, in its view, under the Convention against Torture, is not considered cruel, inhuman, or degrading treatment, and is acceptable under US domestic law. The report did acknowledge, however, that international case law suggests that it might in some circumstances be viewed by other countries as inhumane.⁵⁷³

As to threats to transfer the detainee to a third country where the detainee is likely to fear the use of torture or death, the Working Group found this technique to be of medium utility. The report said that it is acceptable under the Convention against Torture and US domestic law and is not considered cruel, inhuman, or degrading—this despite its explicit prohibition in the federal anti-torture statute. The report gave this technique a green light for all policy considerations, although it acknowledged that it “may significantly affect admissibility of statements provided based on voluntariness consideration (lesser issue for military commissions).”⁵⁷⁴

⁵⁶⁹ *Id.* at 69.

⁵⁷⁰ *Id.*

⁵⁷¹ *Id.* at 62. Emphasis in original.

⁵⁷² *Id.* Chart at 2A, 2B, 5 n.8.

⁵⁷³ *Id.* Chart at 2A, 2B, 5 n.10.

⁵⁷⁴ *Id.* Chart at 3A, 3B.

Regarding the use of isolation, the Working Group found that it is of high utility but it is “Not known to have been generally used for interrogation purposes for longer than 30 days.”⁵⁷⁵ The Working Group found, “The use of isolation as an interrogation technique requires detailed implementation instructions, including specific guidelines regarding the length of isolation, medical and psychological review, and approval of extensions of the length of isolation by the appropriate level in the chain of command.”⁵⁷⁶ Nevertheless, it gave isolation a green light. With respect to major partner nations, the report gave isolation a yellow light since other countries that assert that POW protections would apply to the detainees would find it inconsistent with the requirements of the Geneva Conventions. It recommended its use subject to limitations outlined in the report and that it be approved by an officer no lower than the Combatant Commander.⁵⁷⁷

When considering the use of forced grooming, the Working Group categorized it as “force applied with intention to avoid injury.”⁵⁷⁸ It claimed forced grooming is of high utility but acknowledged that where there are religious or cultural sensitivities, this technique could raise the issue of whether it is “degrading” if it is not applied in accordance with general limitations. Yet the report still gave forced grooming a green light, even though it acknowledged that US forces have not used it historically. It also noted that the technique could be viewed by major partner nations as degrading in some circumstances. It recommended that its use be exceptional and subject to limitations and that approval must come from an officer no lower than a General Officer or Flag Officer.⁵⁷⁹

As to sleep deprivation, which the report said is not to exceed 4 days in succession, the report said it is of high utility. It acknowledged, however, that the Committee against Torture has interpreted “sleep deprivation for prolonged periods” to be a violation of both Articles 16 and 1 of the Convention against Torture.⁵⁸⁰ It also noted that the European Court of Human Rights has held that sleep deprivation, in conjunction with four other problematic techniques, constituted inhuman and degrading treatment. The Working Group also cautioned against its use for the effect on captured US forces and potential adverse effect for participants and supervisors. In addition, it acknowledged that the use of sleep deprivation may “significantly affect admissibility of statements provided based on voluntariness consideration (lesser issue for military commissions).”⁵⁸¹ Finally, it said that knowledge of the use of sleep deprivation may have a significant adverse impact on public opinion. Nevertheless, it recommended its use, subject to limitations and with approval coming from an officer no lower than the Combatant Commander.⁵⁸²

When considering the removal of clothing, the Working Group acknowledged that it can create a feeling of helplessness and dependence in the detainee.⁵⁸³ It therefore said that its use must be monitored to ensure the environmental conditions are such that this technique does not injure the detainee. It said it is of high utility, but that depending on application of the technique, it could be construed as degrading. It also gave it yellow lights for US law, consistency with major

⁵⁷⁵ *Id.* Chart at 3A, 3B, 6 n.14.

⁵⁷⁶ *Id.* Chart at 3A, 6 n.11.

⁵⁷⁷ *Id.* Chart at 3A, 3B.

⁵⁷⁸ *Id.* Chart at 11.

⁵⁷⁹ *Id.* Chart at 3A, 3B, 6 n.19, 7 n.21 & 22.

⁵⁸⁰ *Id.* Chart at 3B, 7 n.24.

⁵⁸¹ *Id.* Chart at 3B, 7 n.25.

⁵⁸² *Id.* Chart at 3B, 7 n.26.

⁵⁸³ *Id.* Chart at 11.

partner nation views, and potential effect on detainee prosecutions. Finally, it noted that knowledge of this technique may have a significant adverse impact on public opinion. Nonetheless, it recommended its use, subject to limitations and approval from no lower than the Combatant Commander.⁵⁸⁴

Regarding severely increasing detainee fear by the use of aversive methods, such as the “simple presence of dogs without directly threatening action,” the Working Group said that this technique requires the commander to develop specific and detailed safeguards to insure detainees’ safety.⁵⁸⁵ The report said it is of high utility but that it could be considered cruel, inhuman, or degrading, depending on the specific technique employed. It also said that, depending on the technique used and subject response, “potential exists that technique could be viewed as violating 5th/8th/14th Amendment standards, and therefore violate U.S. interpretation of Torture Convention.”⁵⁸⁶ It acknowledged that its use could provide a basis for other nations to justify the use of more aggravated mental techniques on US POWs, but still gave it a green light. It recommended its use but on an exceptional and limited level and with approval from no lower than the Combatant Commander.

Thus, despite the numerous concerns it recognized about the use of psychologically abusive interrogation techniques and the prohibition of many of them under law, the Working Group nonetheless recommended the use of 35 techniques. The Working Group recommended 26 techniques for use with alleged unlawful combatants outside the United States subject to general limitations. The first 17 of these techniques were taken from FM 34-52. The remaining 9 included hooding, environmental manipulation, sleep adjustment, false flag, and threaten to transfer to a 3rd country. It then recommended an additional 9 techniques, including isolation, forced grooming, sleep deprivation, removal of clothing, and increasing anxiety by use of aversions. These were recommended to be approved for use with unlawful combatants outside the United States subject to the general limitations as well as the specific limitations regarding “exceptional” techniques as follows: conducted at strategic interrogation facilities; where there is a good basis to believe that the detainee possesses critical intelligence; the detainee is medically and operationally evaluated as suitable (considering all techniques to be used in combination); interrogators are specifically trained for the technique(s); a specific interrogation plan (including reasonable safeguards, limits on duration, intervals between applications, termination criteria and the presence or availability of qualified medical personnel) is developed; appropriate supervision is provided; and, appropriate specific senior level approval is given for use with any specific detainee (after considering the foregoing and receiving legal advice).⁵⁸⁷

Overall, the Working Group report acknowledged that such alleged safeguards did not ameliorate the danger of going beyond techniques authorized by Army FM 34-52 and the Geneva Conventions; that certain of the recommended techniques have not historically been used by US military forces; that some have been interpreted to constitute torture or cruel, inhuman, and degrading treatment; and that they could be viewed negatively by other countries and the public. Yet the Working Group approved the use of these psychologically abusive techniques. Although it recommended the use of safeguards, the overall message of the report was one of permissiveness.

⁵⁸⁴ *Id.* Chart at 3A, 3B, 8 n.34–37.

⁵⁸⁵ *Id.* Chart at 11.

⁵⁸⁶ *Id.* Chart at 3A, 8, n.38 & 39.

⁵⁸⁷ *Id.* at 70.

On April 16, 2003, in response to the Working Group's report, Secretary Rumsfeld sent a memorandum to SOUTHCOM, the command with control over Guantánamo, regarding counter-resistance techniques in the "war on terror."⁵⁸⁸ The memo approved the use of 24 specified counter-resistance techniques, which were attached to the memo, including environmental manipulation and isolation.⁵⁸⁹ The memo did not explain why it omitted 11 of the techniques approved by the Working Group, including hooding, threat of transfer, use of prolonged interrogation, forced grooming, sleep deprivation, removal of clothing, and increasing anxiety by use of aversions. The techniques not mentioned were not completely excluded, however. The memo states, "It is important that interrogators be provided reasonable latitude to vary techniques depending on the detainee's culture, strengths, weaknesses, environment, extent of training in resistance techniques as well as the urgency of obtaining information that the detainee is known to have."⁵⁹⁰

The memo acknowledged that "[w]hile techniques are considered individually within this analysis, it must be understood that in practice, techniques are usually used in combination; the cumulative effect of all techniques to be employed must be considered before any decisions are made regarding approval for particular situations."⁵⁹¹

With respect to isolation, the memo cautioned,

The use of isolation as an interrogation technique requires detailed implementation instructions, including specific guidelines regarding the length of isolation, medical and psychological review, and approval for extensions of the length of isolation by the appropriate level in the chain of command. This technique is not known to have been generally used for interrogation purposes for longer than 30 days. Those nations that believe detainees are subject to POW protections may view use of this technique as inconsistent with the requirements of Geneva III, Article 13 which provides that POWs must be protected against acts of intimidation; Article 14 which provides that POWs are entitled to respect for their person; Article 34 which prohibits coercion and Article 126 which ensures access and basic standards of treatment. Although the provisions of Geneva are not applicable to the interrogation of unlawful combatants, consideration should be given to these views prior to application of the technique.⁵⁹²

The cover memo noted that if isolation is intended, "you must specifically determine that military necessity requires its use and notify me in advance."⁵⁹³

⁵⁸⁸ Memorandum for the Commander, US Southern Command. From Donald Rumsfeld, The Secretary of Defense. Subject: Counter-Resistance Techniques in the War on Terrorism. April 16, 2003.

⁵⁸⁹ The first 18 approaches all appeared in the current (1992) version of FM 34-52, except the Mutt-and-Jeff approach, which was derived from the superseded 1987 version of FM 34-52. The remaining approaches were similar to the ones identified in the Working Group report and derived from the CJTF-180 memorandum, explained below, and the original October 2002 request asking for approval of methods for Guantánamo. Fay report, *supra* note 40, at 23.

⁵⁹⁰ Memorandum for the Commander, US Southern Command. From Donald Rumsfeld, The Secretary of Defense. Subject: Counter-Resistance Techniques in the War on Terrorism. April 16, 2003.

⁵⁹¹ *Id.*

⁵⁹² *Id.*

⁵⁹³ *Id.*

Although Secretary Rumsfeld reiterated that the US Armed Forces “shall continue to treat detainees humanely,”⁵⁹⁴ he qualified that mandate in two ways. He said that detainees should be treated humanely only “to the extent appropriate and consistent with military necessity.”⁵⁹⁵ He also gave latitude to interrogators in the choice of techniques. And although Secretary Rumsfeld noted the approved techniques were limited to interrogations of unlawful combatants held at Guantánamo, as will be explained below, the techniques intended for Guantánamo and the qualification on humane treatment found their way to other theaters of operation.

2. Techniques in the Field

The policy directives and legal memorandums ending in Secretary Rumsfeld’s April 16, 2003 guidance said that only certain techniques were permitted at Guantánamo. Yet the directives and memorandums also shattered the absolute prohibition on torture by privileging military necessity and defining torture narrowly. The mixed message and general approval of coercion from the highest levels led to the adoption of techniques in the field that went far beyond those traditionally permitted and those approved by Rumsfeld for use at Guantánamo.

As mentioned above, the Schlesinger report said that interrogators in Afghanistan in 2002 were following FM 34-52.⁵⁹⁶ Similarly, the Church executive summary said that in early 2002, interrogators at Guantanamo relied on FM 34-52 techniques.⁵⁹⁷ However, the evidence, including internal FBI documents, CID reports, and other documents released by the government pursuant to the Freedom of Information Act, shows that interrogators at the beginning of the “war on terror” were not strictly following FM 34-52.⁵⁹⁸ Rather, it is obvious from the evidence that psychologically coercive techniques far beyond what was authorized in FM 34-52 were allowed and were being utilized throughout 2002 in both Afghanistan and Guantánamo.

The informal use of psychologically coercive interrogation techniques beyond FM 34-52 became formalized in 2003 in Afghanistan. Although the directives that guided interrogations there remain classified, investigations and reports have shed light on them. According to the Church executive summary, a January 24, 2003 memorandum from the Combined Joint Task Force-180 (hereinafter CJTF-180)⁵⁹⁹ Acting Staff Judge Advocate described the interrogation tactics already being used in Afghanistan.⁶⁰⁰ The details remain classified but Adm. Church reported that these techniques were similar to the ones that Secretary Rumsfeld approved on December 2, 2002 for use only at Guantánamo.⁶⁰¹ Since those included sensory deprivation, hooding, removal of comfort items and clothing, forced grooming, isolation, and use of detainees’ phobias, this confirms that interrogators had already gone far beyond the restrictions of FM 34-52 by early 2003.

The Fay report confirms that the techniques went beyond standard military practice. It said that one technique discussed in the memo was deprivation of clothing. The Fay report found that the memorandum

⁵⁹⁴ *Id.*

⁵⁹⁵ *Id.*

⁵⁹⁶ See *supra* text accompanying note 15.

⁵⁹⁷ See *supra* text accompanying note 42.

⁵⁹⁸ See *supra* Section III.A.

⁵⁹⁹ Combined Joint Task Force 180 is the forward deployed headquarters for Afghanistan.

⁶⁰⁰ Church executive summary, *supra* note 42, at 6.

⁶⁰¹ *Id.*

highlighted that deprivation of clothing had not historically been included in battlefield interrogations. However, it went on to recommend clothing removal as an effective technique that could potentially raise objections as being degrading or inhumane, but for which no specific written legal prohibition existed.⁶⁰²

According to the Church executive summary, on February 27, 2003 the CJTF-180 Commander revised the January 24, 2003 techniques in response to investigations of detainee deaths.⁶⁰³ The revised policy remained in place in Afghanistan until March 2004. At that point, new interrogation guidance was issued.⁶⁰⁴ Rather than moving toward an absolute prohibition on psychological torture, the new guidance revived interrogation practices from the January 2003 memo, tactics that went far beyond FM 34-52. According to the Church executive summary, some of these techniques were identical to Secretary Rumsfeld's April 2003 policy, which was intended for use only in Guantánamo.⁶⁰⁵

In Guantánamo, meanwhile, according to a one page summary issued to reporters by Bush aides on June 22, 2004, techniques actually used at the facility between December 2002 and January 15, 2003 included isolation in Camp X-Ray, deprivation of light (use of red light), inducing stress (use of female interrogators), and forced grooming (to include shaving facial hair and head).⁶⁰⁶ Secretary Rumsfeld later said that those procedures, which he had authorized and had to approve, "were not torture."⁶⁰⁷ From January 15, 2003 to April 16, 2003, as explained above, it appears that there was no clear policy as Secretary Rumsfeld awaited the recommendations of the Working Group.⁶⁰⁸ As of April 16, 2003, Secretary Rumsfeld's new policy went into effect, with its troubling message of humane treatment unless justified by military necessity.

In Iraq, Gen. Miller arrived from Guantánamo in August 2003 in order to conduct an assessment of DoD counter-terrorism interrogation and detention operations in Iraq. General Karpinski, who was then in charge at Abu Ghraib, said that Gen. Miller told her they wanted to "GITMOize" Abu Ghraib.⁶⁰⁹ One FBI agent wrote in an e-mail that he was not sure what that meant, but thought that it "suggests [Gen. Miller] has continued to support interrogation strategies we not only advised against, but questioned in terms of effectiveness."⁶¹⁰

⁶⁰² Fay report, *supra* note 40, at 88.

⁶⁰³ Church executive summary, *supra* note 42, at 7.

⁶⁰⁴ *Id.*

⁶⁰⁵ *Id.*

⁶⁰⁶ GTMO Interrogation Techniques. June 22, 2004. Available at: http://www.washingtonpost.com/wp-srv/world/daily/graphics/interrogation_062304.htm. Accessed April 27, 2005.

⁶⁰⁷ Secretary of Defense Donald H. Rumsfeld. Speech at the National Press Club. September 10, 2004. Available at: <http://www.defenselink.mil/transcripts/2004/tr20040910-secdef1286.html>. Accessed April 27, 2005.

⁶⁰⁸ See *supra* text accompanying notes 552–588.

⁶⁰⁹ Article 15-6 Investigation Interview by Maj. Gen. Taguba, CFLCC Deputy Commanding General, US Army. With Brig. Gen. Janis L. Karpinski, US Army. Camp Doha, Iraq. February 15, 2004: 89.

⁶¹⁰ E-mail. From [redacted]. To [redacted]. Subject: current events. May 13, 2004. Available at: http://www.aclu.org/torturefoia/released/FBI_4140.pdf. Accessed April 27, 2005. For more on the disagreement between the FBI and DoD regarding techniques, see *infra* Section V.D.

When he arrived in Iraq, Gen. Miller had with him Secretary Rumsfeld's April 16, 2003 memorandum of approved techniques for Guantánamo.⁶¹¹ He gave it to Combined Joint Task Force-7 (hereinafter CJTF-7)⁶¹² as a possible model for techniques in Iraq. This memo was eventually copied into a new document entitled CJTF-7 Interrogation and Counter-Resistance Policy (ICRP).⁶¹³ This policy was then sent to the 519th Military Intelligence Battalion, *which added the use of dogs, stress positions, sleep management, sensory deprivation, and yelling, loud music and light control* from its 27 August 2003 memo.⁶¹⁴ The use of all the techniques was to apply to interrogations of detainees, security internees, and Enemy Prisoners of War (hereinafter EPWs).⁶¹⁵ These techniques were formally added to the official CJTF-7 memo between September 10 and 14, 2003.⁶¹⁶ Upon the guidance and recommendation of the Staff Judge Advocate staff, it was decided that Lt. Gen. Sanchez would approve the use of those additional methods on a case-by-case basis.⁶¹⁷

On September 14, 2003, Lt. Gen. Sanchez approved the CJTF-7 Interrogation and Counter-Resistance Policy, authorizing a dozen interrogation techniques beyond FM 34-52—five beyond those approved for Guantánamo.⁶¹⁸ In doing so, he used reasoning from the President's February 7 memorandum denying Geneva Convention protections to al Qaeda and Taliban detainees⁶¹⁹ even though the Administration conceded that the Geneva Conventions applied to the conflict in Iraq. The memo claimed that the policy was "modeled on the one implemented for interrogations conducted at Guantanamo Bay, but modified for applicability to a theater of war in which the Geneva Conventions apply."⁶²⁰ Nevertheless, the policy approved 12 techniques beyond what is authorized in the 1987 Army Field Manual 34-52: change of scenery up, change of scenery down, dietary manipulation, environmental manipulation, sleep adjustment, false flag, isolation, presence of military working dogs, sleep management, yelling, loud music and light control, deception, and stress positions.⁶²¹

With respect to environmental manipulation, the memo acknowledged, "Based on court cases in other countries, some nations may view application of this technique in certain circumstances to be inhumane."⁶²² Regarding isolation, the memo noted that

⁶¹¹ Schlesinger report, *supra* note 15, at 9.

⁶¹² Combined Joint Task Force 7 was the forward deployed headquarters for Operation Iraqi Freedom.

⁶¹³ Fay report, *supra* note 40, at 25.

⁶¹⁴ The 519th Military Intelligence Brigade was the tactical exploitation element of the 525th Military Intelligence Brigade. Company A was located at Abu Ghraib. The August 27, 2003 memo is not available to the public. According to Mark Danner, who obtained a classified section of the Fay report, this memo might have been based on the interrogation policy of the "shadowy, elite unit Joint Task Force-121, which spent its time searching for 'high value' targets in Iraq." According to Danner, the Fay report says, "'At some point,' the leading military intelligence battalion at Abu Ghraib 'came to possess the JFT-121 interrogation policy' and the first set of interrogation rules used by this unit 'were derived almost verbatim from JTF-121 policy,' which 'included the use of stress positions during fear-up harsh interrogation approaches, as well as presence of military working dogs, yelling, loud music, and light control. The memo also included sleep management and isolation approaches.'" Danner M. *Torture and Truth: America, Abu Ghraib, and the War on Terror*. New York: New York Review of Books; 2004:44.

⁶¹⁵ Fay report, *supra* note 40, at 25.

⁶¹⁶ *Id.*

⁶¹⁷ *Id.*

⁶¹⁸ Schlesinger report, *supra* note 15, at 9.

⁶¹⁹ *Id.* at 10.

⁶²⁰ Memorandum for Commander, US Central Command. From Ricardo S. Sanchez, Lt. Gen., US Army, Commanding. Subject: CJTF-7 Interrogation and Counter-Resistance Policy. September 14, 2003.

⁶²¹ *Id.*

⁶²² *Id.*

the use of isolation as an interrogation technique requires detailed implementation instructions, including specific guidelines regarding the length of isolation, medical and psychological review, and approval for extensions of the length of isolation by the 205th MI BDE Commander. Use of this technique for more than 30 days, whether continuous or not, must be briefed to 205th MI BDE Commander prior to implementation.⁶²³

The memo acknowledged that the use of military working dogs “[e]xploits Arab fear of dogs while maintaining security during interrogations.”⁶²⁴

Some of these techniques, including isolation, presence of military working dogs, and yelling, loud music and light control, required approval from Lt. Gen. Sanchez personally before use and requests had to be accompanied by a legal review. Yet this restriction was undermined by the apparent flexibility given to interrogators:

It is important that interrogators be provided reasonable latitude to vary techniques depending on the detainee’s culture, strengths, weaknesses, environment, extent of training in resistance techniques as well as the urgency of obtaining information that the detainee is believed to have.⁶²⁵

Although the policy noted that “CJTF-7 is operating in a theater of war in which the Geneva Conventions are applicable” and “[c]oalition forces will continue to treat all persons under their control humanely,”⁶²⁶ the techniques approved undercut those statements. The techniques approved amount to coercion, which is flatly prohibited by the Geneva Conventions and cannot be justified by military necessity.

Controversy about the use of psychological coercion continued within the Pentagon. On October 12, 2003, CJTF-7 approved new interrogation rules of engagement,⁶²⁷ in part because US Central Command thought the September 14 memo was unacceptably aggressive.⁶²⁸ In the new memo, Lt. Gen. Sanchez approved only the use of approaches contained in the 1987 FM 34-52. Despite this apparent return to the standards of the Army Field Manual, other statements contained in the policy implied permissiveness with use of other techniques. For example, the policy said that “requests for use of approaches not listed in Enclosure 1 will be submitted to [Lt. Gen. Sanchez] . . . and will include a description of the proposed approach and recommended safeguards.”⁶²⁹ So while limiting approval to those techniques listed in FM 34-52, it also told personnel that they could use techniques beyond that if they first sought approval. There is evidence that such approval was freely given.⁶³⁰

⁶²³ *Id.*

⁶²⁴ *Id.*

⁶²⁵ *Id.*

⁶²⁶ *Id.*

⁶²⁷ Memorandum for C2 and C3, Combined Joint Task Force Seven, Baghdad and Commander, 205th Military Intelligence Brigade, Baghdad. From Ricardo S. Sanchez, Lt. Gen., Commanding, Combined Joint Task Force Seven, Baghdad. Subject: CJTF-7 Interrogation and Counter-Resistance Policy. October 12, 2003. [Sanchez memorandum].

⁶²⁸ Schlesinger report, *supra* note 15, at 10.

⁶²⁹ Sanchez memorandum, *supra* note 627.

⁶³⁰ See *supra* text accompanying note 119.

Second, it included provisions found in the superseded 1987 FM 34-52 that authorized interrogators to control “all aspects of the interrogation, to include the lighting, heating and configuration of the interrogation room, as well as the food, clothing and shelter given to the security internee.”⁶³¹ In the Field Manual, this sentence is followed closely by one that says, “However, everything that he says and does must be within the limits of the Geneva and Hague Conventions, as well as the standards of conduct outlined in the UCMJ.”⁶³² The October 12 policy omitted this portion. The Fay report found that the inclusion of the sentence regarding control by the interrogator created confusion among interrogators about the use certain techniques.⁶³³ Finally, while it acknowledged the applicability of the Geneva Conventions and the requirement to treat all detainees humanely, it also “cited Articles 5 and 78 noting specifically that those ‘detainees engaged in activities hostile to security of coalition forces had forfeited their Geneva Convention rights of communication.’”⁶³⁴

On October 16, 2003, an officer of the Joint Interrogation and Debriefing Center produced an “Interrogation Rules of Engagement” chart as an aid for interrogators in Iraq based on the October 12, 2003 policy.⁶³⁵ It listed the approved approaches, which included all but two of the FM 34-52 techniques.⁶³⁶ It also identified the techniques not authorized as interrogation techniques, but which nonetheless could be used with Lt. Gen. Sanchez’s approval. These included change of scenery down, dietary manipulation, environmental manipulation, sleep adjustment, isolation for longer than 30 days, presence of military working dogs, sleep management, sensory deprivation, and stress positions. According to the Fay report, “the chart was confusing.”⁶³⁷ Gen. Fay found that

[w]hat was particularly confusing was that nowhere on the chart did it mention a number of techniques that were in use at the time: removal of clothing, forced grooming, hooding, and yelling, loud music and light control. Given the detail otherwise noted on the aid, the failure to list some techniques left a question of whether they were authorized for use without approval.⁶³⁸

On January 27, 2004, a memorandum was issued to review the policy of October 12, 2003.⁶³⁹ This memorandum confirmed that techniques beyond FM 34-52 were acceptable for use, with prior approval. The memo specifically cited environmental manipulation, sleep deprivation for 72 hours maximum, the presence of working dogs, isolation for longer than 30 days, and sensory deprivation for 72 hours maximum. The memorandum confirmed that “[t]his is not an all-inclusive list for approaches.”⁶⁴⁰ At the same time that it approved these techniques, many of which amount to torture or cruel, inhuman or degrading treatment, the policy memorandum noted, “At no time will detainees be treated inhumanely nor maliciously humiliated.”⁶⁴¹ This policy was in existence through the Abu Ghraib scandal.

⁶³¹ Sanchez memorandum, *supra* note 627.

⁶³² FM 34-52, *supra* note 3. Chapter 3, Interrogation Process.

⁶³³ Fay report, *supra* note 40, at 16.

⁶³⁴ *Id.* at 26.

⁶³⁵ Taguba report, *supra* note 100. Annex no. 28. Interrogation Rules of Engagement.

⁶³⁶ Not included were the Mutt and Jeff approach and the Pride and Ego Down approach.

⁶³⁷ Fay report, *supra* note 40, at 28.

⁶³⁸ *Id.*

⁶³⁹ Memorandum For Record. From Department of the Army, Joint Interrogation & Debriefing Center, Abu Ghurayb Prison, Iraq APO AE 09302. Subject: CJTF-7 Interrogation Rules of Engagement. January 27, 2004.

⁶⁴⁰ *Id.*

⁶⁴¹ *Id.*

C. The Current Situation

After the Abu Ghraib scandal was exposed in late April and early May 2004, more attention was given to what interrogation techniques were actually being used at US-run detention facilities. In early May 2004, Gen. Miller admitted the routine use of certain psychologically coercive tactics and said their use would end. According to the *New York Times*, Gen. Miller said, "We will no longer, in any circumstances, hood any of the detainees. We will no longer use stress positions in any of our interrogations. And we will not use sleep deprivation in any of our interrogations."⁶⁴² On May 14, 2004, Lt. Gen. Ricardo S. Sanchez, the Commander of the US forces in Iraq, reportedly barred virtually all coercive interrogation practices such as forcing detainees to crouch for long periods or depriving them of sleep. Yet according to a senior Central Command officer who briefed reporters that day, the Commander would still consider requests to hold detainees in isolation for more than 30 days and had reportedly approved 25 such requests since October 2003.⁶⁴³

The different theaters of operation have different policies in effect today. In Guantánamo, the April 16, 2003 guidance from Secretary Rumsfeld remains in effect. This policy approved 24 interrogation techniques, including isolation. In Afghanistan new policy was adopted in June 2004. Details of this policy are classified, but according to the Church executive summary, this policy relies almost exclusively on interrogation techniques specifically outlined in FM 34-52.⁶⁴⁴ This policy remains in effect for Afghanistan.

Details are also scarce about current policy in Iraq. According to the Church executive summary, the Commander, Multi-national Forces Iraq (hereinafter MNF-I), approved on January 27, 2005 a new interrogation policy for Iraq. Evidently, this policy "approves a more limited set of techniques for use in Iraq, and also provides additional safeguards and prohibitions, rectifies ambiguities, and – significantly – requires commanders to conduct training on and verify implementation of the policy and report compliance to the Commander, MNF-I."⁶⁴⁵ But the contents of this policy remain confidential.

Even more troubling than the lack of details on current policy is the fact that many problematic and legally incoherent memorandums and guidance remain in effect. For example, the April 2003 Working Group report has not been repudiated, despite the fact that it contains language verbatim from the now repudiated 2002 OLC opinion and is presumably still applicable to all three theaters of operation.

In April 2005, it became clear that the Administration continued its strategy of claiming to uphold the prohibition on torture and cruel, inhuman and degrading treatment while finding ways to avoid it. Human Rights Watch obtained a 142-page final draft document prepared by the Joint Chiefs of Staff entitled "Joint Publication 3-63: Joint Doctrine for Detainee Operations."⁶⁴⁶

⁶⁴² Van Natta Jr. D. "The Struggle for Iraq: Techniques; Interrogation Methods in Iraq Aren't All Found in Manual." *New York Times*. May 7, 2004.

⁶⁴³ Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights: The Present Situation of Human Rights in Iraq. UN ESCOR. 61st Sess. Agenda Item 4. 2004: para. 66. U.N. Doc. E/CN.4/2005/4. Citing the *New York Times*. May 15, 2004: 1.

⁶⁴⁴ Church executive summary, *supra* note 42, at 7.

⁶⁴⁵ *Id.* at 9.

⁶⁴⁶ Department of the Army, Department of the Navy, Department of the Air Force, US Coast Guard, Jt. Chiefs of Staff. Joint Publication 3-63: Joint Doctrine for Detainee Operations. March 23, 2005. On file with PHR.

According to the document, dated March 23, 2005, its purpose is “to establish joint level doctrine that will govern detainee operations.”⁶⁴⁷ The policy says that “all detained personnel shall be accorded the appropriate legal status under the law of armed conflict, and shall be treated humanely at all times.”⁶⁴⁸ It goes on to say:

The inhumane treatment of detainees is prohibited by international law and DOD policy. *There is no military necessity exception to this humane treatment mandate.* Accordingly, neither the stress of combat operations, the need for actionable information, nor the provocations by captured/detained personnel justify deviation from this obligation. Acts and/or omissions that constitute inhumane treatment are violations of the law of armed conflict.⁶⁴⁹

Yet only 7 pages later, the document contradicts this statement. It formalizes “enemy combatant” as an “additional classification” of detainee and declares that, “they are still entitled to be treated humanely, *subject to military necessity*. . . .”⁶⁵⁰ As noted repeatedly above, this is a position contrary to international and domestic law and a position that created the space for the ill-treatment and torture of detainees. This policy, especially when understood in tandem with its continued interpretation of psychological torture, is a signal that nothing has changed, despite the public outrage over what happened at Abu Ghraib. The Administration will continue to seek justifications and legal maneuvers for using coercive interrogation methods.

On April 28, 2005, a front page story in the *New York Times* reported that the Army is preparing to issue an updated interrogations manual, to be titled “Human Intelligence Collector Operations.”⁶⁵¹ This manual will expressly prohibit techniques like stripping prisoners, keeping them in stressful positions for prolonged periods, using military dogs to intimidate prisoners, and sleep deprivation.⁶⁵² According to the *Times*, “[a]ccompanying the new manual, which runs more than 200 pages, will be a separate classified training document that will provide dozens of interrogation sessions and go into exacting detail on what procedures may or may not be used, and in what circumstances.”⁶⁵³ If what the *New York Times* reports is true, these prohibitions are good. But it does not go far enough. The article does not mention whether other psychologically abusive techniques, like isolation, other methods of inducing fear, and other forms of sexual and cultural humiliation, are prohibited. There also is no mention of whether exceptions are permitted. The “unlawful combatant” category permits military necessity to override humane treatment; what does that mean for the specific prohibitions in this new manual? The new manual must be publicly released so that these issues can be identified and solved. Additionally, this manual is applicable only to the Armed Forces; it does not guide interrogations by the CIA or other agencies. This gap must be addressed.

D. Other Governmental Agencies

The CIA played a major role in the development of the legal framework to permit coercive interrogation techniques. As mentioned above, the February 7, 2002 directive from President Bush ordering the humane treatment of detainees was not meant to apply to the CIA, in effect

⁶⁴⁷ *Id.* at 1–2.

⁶⁴⁸ *Id.* at 1–3.

⁶⁴⁹ *Id.* at 1–4. Emphasis added.

⁶⁵⁰ *Id.* at 1–11. Emphasis added.

⁶⁵¹ Schmitt E. “Army, In Manual, Limiting Tactics in Interrogation.” *New York Times*. April 28, 2005: A1.

⁶⁵² *Id.*

⁶⁵³ *Id.*

authorizing the CIA to use abusive treatment against detainees.⁶⁵⁴ And, as explained above, the CIA sought clarification of the legality of certain tactics, leading to the infamous August 2002 OLC opinion and a still-classified companion document that outlined specific methods the agency could use.⁶⁵⁵ Reportedly, the CIA views the repudiation of the 2002 OLC opinion as “undercutting its authority to use coercive methods in interrogations.”⁶⁵⁶

CIA policy and the CIA’s treatment of detainees are shrouded in secrecy, but some details are known. There have been reports that the CIA operates interrogation centers at Bagram Air Force Base in Afghanistan and in other locations.⁶⁵⁷ Apparently the CIA has used techniques of psychological torture at these interrogation centers.⁶⁵⁸ One intelligence official called such techniques, “not quite torture, but about as close as you can get.”⁶⁵⁹ The CIA also reportedly “hid” some detainees by keeping them unregistered and placed in certain cells, including at Abu Ghraib.⁶⁶⁰ Finally, the CIA has used a process called extraordinary rendition, in which it turns suspects over to countries that are known to employ torture techniques in gathering information.⁶⁶¹ American and foreign intelligence officials acknowledged that suspects were sent to Jordan, Syria, and Egypt,⁶⁶² all countries that the US has criticized for using psychological torture.⁶⁶³

With respect to the FBI, there is evidence that FBI policy to treat detainees humanely conflicted with DoD policy and there is evidence that FBI agents expressed concerns about what they witnessed upon visiting DoD-run detention facilities.

There is evidence that FBI agents witnessed techniques that they considered abusive when they visited DoD-run detention facilities. One e-mail from an FBI agent about Guantánamo said that “I was in GTMO and I did observe aggressive interrogation practices and as a Behavioral Analysis Advisor on interrogation techniques was aware of extreme interrogation techniques that were planned and implemented against certain detainees.”⁶⁶⁴ Another agent sent an e-mail saying, “I did observe treatment [at Guantánamo] that was not only aggressive, but personally very upsetting It seemed that these techniques were being employed by the military, government contract employees and [redacted].”⁶⁶⁵

⁶⁵⁴ See *supra* text accompanying note 477.

⁶⁵⁵ See *supra* Section V.A.2. Reportedly, there are additional documents spelling out the agency’s authorization to use coercive interrogation methods that remain classified. Jehl, *supra* note 499.

⁶⁵⁶ Jehl, *supra* note 499. Summarizing the views of unnamed current and former intelligence officials.

⁶⁵⁷ Van Natta Jr., *supra* note 18. See also, Priest D. “CIA Avoids Scrutiny of Detainee Treatment.” *Washington Post*. March 3, 2005: A1. Describing the Salt Pit, a secrete prison run by the CIA just north of Kabul.; Pearlstein D, Patel P. Human Rights First. Behind the Wire: An Update to *Ending Secret Detentions*. 2005: 1–11. Discussing other suspected CIA-run facilities. Available at: http://www.humanrightsfirst.org/us_law/PDF/behind-the-wire-033005.pdf. Accessed April 27, 2005.

⁶⁵⁸ See *supra* text accompanying notes 26–29.

⁶⁵⁹ Van Natta Jr., *supra* note 18. Quoting unnamed Western intelligence official.

⁶⁶⁰ See *supra* text accompanying notes 115–117. See also, White J. “Army Documents Shed Light on CIA ‘Ghosting.’” *Washington Post*. March 24, 2005: A15.

⁶⁶¹ Mayer J. “Outsourcing Torture.” *New Yorker*. February 14, 2005.

⁶⁶² Van Natta Jr., *supra* note 18.

⁶⁶³ See *infra* section VI.E.

⁶⁶⁴ E-mail. From [redacted]. To [redacted] (INSD) (FBI). Subject: GTMO. Undated. Available at: <http://www.aclu.org/torturefoia/released/t3449.pdf>. Accessed April 27, 2005.

⁶⁶⁵ E-mail. From [redacted]. To [redacted]. Subject: RE GTMO. July 12, 2004. Available at: <http://www.aclu.org/torturefoia/released/FBI.121504.5054.pdf>. Accessed April 27, 2005.

On July 14, 2004, T.J. Harrington, Deputy Assistant Director of the Counterterrorism Division of the FBI, sent a letter to Maj. Gen. Ryder regarding three situations where FBI agents witnessed the use of “highly aggressive” interrogation techniques being used against detainees at Guantánamo. He notes, “Although [the person who first brought these concerns to DoD’s attention] was assured that the general concerns expressed, and the debate between the FBI and DoD regarding the treatment of detainees was known to officials in the Pentagon, I have no record that our specific concerns regarding these three situations were communicated to DoD for appropriate action.”⁶⁶⁶

Evidence also indicates that the FBI and DoD were engaged in a struggle to define what was appropriate behavior for interrogators. On December 5, 2003, an e-mail from an FBI agent about Guantánamo said that the FBI’s Military Liaison and Detainee Unit (MLDU) “requested this information be documented to protect the FBI. MLDU has had a long standing and documented position against use of some of DOD’s interrogation practices, however, we were not aware of these latest techniques until recently.”⁶⁶⁷

On May 5, 2004 in a series of e-mails about Guantánamo, an FBI agent wrote that “Our Behavioral Assessment Unit (BAU) disagreed with the use of specific techniques in the case of [redacted] as they opined that the techniques would not be successful and they could produce unreliable results.”⁶⁶⁸

On May 10, 2004, an FBI agent wrote an e-mail that says, “We did advise each supervisor that went to GTMO to stay in line with Bureau policy and not deviate from that [as well as made them aware of some of the issues regarding DoD techniques].”⁶⁶⁹ The agent also states that FBI representatives met with Generals Dunleavy and Miller at Guantánamo to explain their position on law enforcement techniques compared to DoD techniques.⁶⁷⁰ It says, “Both agreed the Bureau has their way of do[ing] business and DoD has their marching orders from the Sec Def.”⁶⁷¹ The e-mail goes on to note, “In my weekly meetings with DOJ we often discussed DoD techniques and how they were not effective or producing Intel that was reliable.”⁶⁷² The agent cites one case in particular, where DoD evidently gave the FBI a deadline “to use our traditional methods. Once our timeline [that DoD put into place] was up, DoD took the reigns [sic].”⁶⁷³ This happened because the DoD wanted to “get ‘more out of him.’”⁶⁷⁴ He also explains how Gen. Miller, FBI, and others met with the Pentagon Detainee Policy Committee. During the meeting, the agent “voiced concerns that the intel produced was nothing more than what FBI got using simple investigative techniques.”⁶⁷⁵ He said the conversations were “somewhat heated” and that “DoD finally admitted the information was the same info the Bureau obtained” but that “it

⁶⁶⁶ Letter from T.J. Harrington, *supra* note 47.

⁶⁶⁷ E-mail. From [redacted]. To Gary Bald, Frankie Battle, Arthur Cummings. Subject: Impersonating FBI at GTMO. December 5, 2003. Available at: http://www.aclu.org/torturefoia/released/FBI_3977.pdf. Accessed April 27, 2005.

⁶⁶⁸ E-mail. From [redacted]. To [redacted] (Div13)(FBI). Subject: RE: Detainee abuse claims. May 5, 2004. Available at: http://www.aclu.org/torturefoia/released/t3137_3139.pdf. Accessed April 27, 2005.

⁶⁶⁹ E-mail. From [redacted]. To T.J. Harrington (Div13)(FBI). Subject: Instructions to GTMO Interrogators. May 10, 2004. Disclosed to Senator Levin by William E. Moschella, Assistant Attorney General, US Department of Justice. March 18, 2005.

⁶⁷⁰ *Id.*

⁶⁷¹ *Id.*

⁶⁷² *Id.*

⁶⁷³ *Id.*

⁶⁷⁴ *Id.*

⁶⁷⁵ *Id.*

still did not prevent them from continuing the 'DoD methods.'"⁶⁷⁶ Another e-mail to Harrington dated May 10, 2004 says that BAU wrote an electronic communication (hereinafter EC) that explained "the Bureau way of interrogation vs. DoDs methodology."⁶⁷⁷ BAU explained "FBI has been successful for many years obtaining confessions via non-confrontational interviewing techniques."⁶⁷⁸

On May 19, 2004, the FBI sent an electronic communication (EC) to all divisions.⁶⁷⁹ Its purpose was to remind FBI personnel of FBI policy in light of the Abu Ghraib abuses. It stated that FBI policy "has consistently provided that FBI personnel may not obtain statements during interrogations by the use of force, threats, physical abuse, threats of such abuse or severe physical conditions."⁶⁸⁰ It reiterated, "It is the policy of the FBI that no interrogation of detainees, regardless of status, shall be conducted using methods which could be interpreted as inherently coercive, such as physical abuse or the threat of such abuse to the person being interrogated or to any third party, or imposing severe physical conditions."⁶⁸¹ The EC also states that if FBI employees know or suspect non-FBI personnel have abused or are abusing or mistreating a detainee, they must report the incident.

⁶⁷⁶ *Id.*

⁶⁷⁷ E-mail. From [redacted]. To T.J. Harrington (Div13)(FBI). Subject: RE: pls confirm. May 10, 2004. Disclosed to Senator Levin by William E. Moschella, Assistant Attorney General, US Department of Justice. March 18, 2005.

⁶⁷⁸ *Id.*

⁶⁷⁹ Electronic Communication to All Divisions. From General Counsel, Federal Bureau of Investigation. Title: Treatment of Prisoners and Detainees. May 19, 2004. Available at: <http://www.aclu.org/torturefoia/released/44A.pdf>. Accessed April 27, 2005.

⁶⁸⁰ *Id.*

⁶⁸¹ *Id.*

VI. Legal Prohibitions against the Use of Psychological Torture and Cruel, Inhuman and Degrading Treatment

The use of psychologically abusive interrogation methods by US forces in Afghanistan, Guantánamo, and Iraq are in direct violation of the prohibition against torture and cruel, inhuman and degrading treatment, which is firmly established in US law, international treaties signed by the US, and other international instruments.

A. Geneva Conventions

The Geneva Conventions govern the treatment of detainees in situations of armed conflict. Captured combatants are covered under the Third Geneva Convention relative to the Treatment of Prisoners of War.⁶⁸² Article 5 of the Third Geneva Convention says that if any doubt arises as to whether a captured individual is entitled to POW status, that person should be protected by the Third Geneva Convention until a competent tribunal determines the individual's correct status.⁶⁸³ In the "war on terror," the US decided to allow the President to determine the status of all al Qaeda and Taliban detainees, without the benefit of individualized determinations that the Third Geneva Convention contemplates. As explained above, President Bush decreed that the Geneva Conventions do not apply to al Qaeda operatives. With respect to the Taliban detainees, President Bush created a new category of individuals, "unlawful combatants" and deemed that they do not qualify for POW status.⁶⁸⁴

According to the Geneva Conventions, however, individuals who are not entitled to POW status, even so-called "unlawful combatants," are covered by the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War.⁶⁸⁵

According to the ICRC, all detainees fall somewhere within the protections of these two Conventions.⁶⁸⁶

⁶⁸² Third Geneva Convention, *supra* note 9.

⁶⁸³ Article 5 of the Third Geneva Convention states, "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy belong [to any of the categories for prisoners of war], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." Third Geneva Convention, *supra* note 9. Article 5.

⁶⁸⁴ See *supra* text accompanying notes 475–476.

⁶⁸⁵ Fourth Geneva Convention, *supra* note 9.

⁶⁸⁶ According to the ICRC Commentary:

Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or . . . , a member of the medical personnel of the armed forces who is covered by the First Convention. 'There is no' intermediate status; nobody in enemy hands can be outside the law.

International Committee of the Red Cross. *Commentary: Convention (IV) Relative to the Protection of Civilian Persons in Time of War*. Geneva, 12 August 1949. Article 4—Definition of Protected Persons: 51.

Available at:

[http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/18e3ccde8be7e2f8c12563cd0042a50b?](http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/18e3ccde8be7e2f8c12563cd0042a50b?OpenDocument) OpenDocument. Accessed April 25, 2005.

1. Third Geneva Convention

The Third Geneva Convention protects POWs. Article 17 specifically prohibits mental torture and any other form of coercion of POWs in order to secure information.⁶⁸⁷ Additionally, it protects POWs who refuse to give information from threats, insults, or exposure to unpleasant treatment.⁶⁸⁸

The Third Geneva Convention defines POWs and delineates general provisions that prohibit abusive treatment of POWs and protect their health:

- Article 13 requires that POWs must at all times be treated humanely, and that any unlawful act or omission by the detaining power that causes death or seriously endangers the health of a POW will be regarded as a serious breach of the Convention.⁶⁸⁹
- Article 14 says that POWs are entitled to respect for their person and their honor.⁶⁹⁰
- Article 87 forbids collective punishment for individual acts, corporal punishment, imprisonment in premises without daylight and, in general, any form of torture or cruelty.⁶⁹¹
- Article 89 says that in no case shall disciplinary punishments be inhuman, brutal or dangerous to POW's health.⁶⁹²
- Under Article 130, torture or inhuman treatment, or willfully causing great suffering or serious injury to body or health of a POW are considered "grave breaches" of the Convention.⁶⁹³

In addition, the Third Geneva Convention describes specific conditions of confinement for prisoners of war.⁶⁹⁴

2. Fourth Geneva Convention

The Fourth Geneva Convention protects civilians in times of war. Like the Third Geneva Convention, the Fourth provides a specific prohibition on coercion. Article 31 provides that "No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties."⁶⁹⁵

The Fourth Geneva Convention also contains general prohibitions on ill-treatment, as well as specific conditions.

⁶⁸⁷ "[N]o 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." Third Geneva Convention, *supra* note 9. Article 17.

⁶⁸⁸ "Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind." *Id.*

⁶⁸⁹ *Id.* Article 13.

⁶⁹⁰ *Id.* Article 14.

⁶⁹¹ *Id.* Article 87.

⁶⁹² *Id.* Article 89.

⁶⁹³ *Id.* Article 130.

⁶⁹⁴ See, e.g., *id.* Article 21. Specifying that POWs may not be held in close confinement except where necessary to safeguard their health; Article 25. Specifying conditions must make allowance for the habits and customs of POWs and "shall in no case be prejudicial to their health."; Article 90. Prohibiting punishment that lasts more than 30 days.

⁶⁹⁵ Fourth Geneva Convention, *supra* note 9. Article 31.

- Article 27 says that protected persons are entitled to respect for their persons, honor, religious convictions and practices, manners and customs. In addition, it specifies, “They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof. . . .”⁶⁹⁶
- Article 32 prohibits measures that cause physical suffering, including murder, torture and mutilation.⁶⁹⁷
- Article 118 forbids without exception imprisonment in premises without daylight, and, in general, all forms of cruelty.⁶⁹⁸

The ICRC, after visiting various detention facilities in Iraq during 2003, reported to the US that it was violating various provisions of the Geneva Conventions by using psychologically abusive interrogation methods. In its February 2004 report, the ICRC said:

- “In the case of ‘High Value Detainees’ held in Baghdad International Airport, their continued internment, several months after their arrest, in strict solitary confinement in cells devoid of sunlight for nearly 23 hours a day constituted a serious violation of the Third and Fourth Geneva Conventions.”
- It went on to elaborate: “The internment of persons in solitary confinement for months at a time in cells devoid of daylight for nearly 23 hours a day is more severe than the forms of internment provided for in the Third and Fourth Geneva Conventions It cannot be used as a regular, ordinary mode of holding of prisoners of war or civilian internees. The ICRC reminds the authorities of the Coalition Forces in Iraq that internment of this kind contravenes Articles 21, 25, 89, 90, 95, 103 of the Third Geneva Convention and Articles 27, 41, 42, 78, 82, 118, 125 of the Fourth Geneva Convention.”⁶⁹⁹
- The ICRC also found violations of Articles 13, 14, 17, 87 of the Third Geneva Convention and Articles 5, 27, 31, 32, 33 of the Fourth Geneva Convention.

B. US Law

1. Federal Criminal Anti-Torture Statute

The federal anti-torture statute, 18 U.S.C. § 2340A, prohibits the use of torture outside of the United States.⁷⁰⁰ It defines torture as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering . . . upon another person within his custody or physical control.”⁷⁰¹ As described above, the statute defines “severe mental pain or suffering” as

the prolonged mental harm caused by or resulting from—
 (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
 (B) the administration or application, or threatened administration or application, of mind-altering substances or *other procedures calculated to disrupt profoundly the senses or the personality*;
 (C) the threat of imminent death; or

⁶⁹⁶ *Id.* Article 27.

⁶⁹⁷ *Id.* Article 32.

⁶⁹⁸ *Id.* Article 118.

⁶⁹⁹ ICRC February 2004 report, *supra* note 86. Para. 44.

⁷⁰⁰ 18 U.S.C. § 2340(A).

⁷⁰¹ 18 U.S.C. § 2340(1).

(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality;⁷⁰²

The death threats and mock executions used on detainees in Afghanistan, Iraq, and Guantánamo fall under part (C) of the statute, as they are threats of imminent death. In fact, even the 2002 OLC memo recognized that “subjecting a prisoner to mock executions . . . would have sufficient immediacy to constitute a threat of imminent death” and therefore qualify as torture under the statute.⁷⁰³ Threats made about detainees’ family members and relatives also qualify as torture, and are covered by part (D) of the statute. The use of military working dogs qualifies under part (A): the “threatened infliction of severe physical pain or suffering,” and in cases where detainees were actually bit by the dogs, “the intentional infliction” of severe physical pain or suffering. Additionally, the 2002 OLC opinion said that threats of rape or sexual assault could constitute torture under the statute.⁷⁰⁴ As shown above, the use of sensory deprivation, including prolonged isolation and sleep deprivation, is clearly meant to and does “disrupt profoundly the senses or the personality”⁷⁰⁵ and therefore qualifies as torture under part (B).

As explained above, however, the Office of Legal Counsel’s latest interpretation of the statute undermines the plain interpretation of severe mental pain or suffering.⁷⁰⁶ Its interpretation could mean that the four types of procedures specifically enumerated in the statute will not necessarily constitute torture and are not prohibited per se. This is an unacceptable reading of the statute, but it has not received the condemnation and outrage that it deserves. The legal interpretation of the OLC is so unreasonable that it appears to reflect a deliberate attempt to authorize acts of torture by US officials.

Even more troubling is the OLC’s view that for one of the enumerated acts to amount to torture, there must be a specific showing of prolonged mental harm to the victim, with harm lasting years after the fact. This interpretation turns the prohibition of torture on its head, since the purpose of laws against torture is to prevent it from being used in the first place, rather than waiting to see the impact on individuals years after the fact. Moreover, it is clear from the literature, studies, and experiences of clinicians treating torture survivors, detailed above, that the types of psychologically coercive interrogation techniques employed by US personnel in Afghanistan, Iraq, and Guantánamo have been shown to have devastating and long-lasting mental harm. Thus, although PHR strongly disagrees with OLC’s interpretation of the statute, we believe these techniques nonetheless constitute torture under the OLC’s extremely narrow definition.

⁷⁰² 18 U.S.C. §2340(2). Emphasis added.

⁷⁰³ 2002 OLC opinion, *supra* note 481, at 12.

⁷⁰⁴ See *id.* at 24.

⁷⁰⁵ See *supra* section IV.C.

⁷⁰⁶ See *supra* text accompanying notes 509–514.

2. Other US Statutes

Although jurisprudence under the federal anti-torture criminal statute is limited, federal courts have considered what constitutes torture in cases brought under the Alien Tort Claims Act⁷⁰⁷ (hereinafter ATCA) and the Torture Victims Protection Act⁷⁰⁸ (hereinafter TVPA).

In one case brought under both ATCA and the TVPA, a court found that mental torture included fearing “they would be killed by [defendant] during the beatings he inflicted or during games of ‘Russian roulette.’”⁷⁰⁹ The court noted that the plaintiffs continue to suffer long-term psychological harm, including anxiety, nervousness, frequent nightmares, depression, difficulty sleeping, inability to work, and difficulty trusting people.⁷¹⁰ The 2002 OLC opinion read this case to confirm its view that, to satisfy the prolonged mental harm requirement of the federal anti-torture statute, the harm must be of a substantial duration.⁷¹¹ The 2004 OLC opinion also cites this case, similarly pointing out that the “mental effects were continuing years after the infliction of the predicate acts.”⁷¹² But the 2004 OLC opinion specifically rejected the 2002 OLC opinion’s conclusion that “to constitute ‘prolonged mental harm,’ there must be ‘significant psychological harm of significant duration, e.g., lasting for months or even years.’”⁷¹³ Its reading of the case, however, suggests otherwise.⁷¹⁴

In another case, one plaintiff was held at gunpoint, threatened with physical injury, and incarcerated in a room with no bed, window, light, electricity, water, toilet, or adequate access to sanitary facilities. Other plaintiffs faced similar treatment. The court found that these acts constituted torture.⁷¹⁵ Similarly, a court found that a course of conduct including beatings, threats of imminent death, attempts to play Russian roulette, and prolonged solitary confinement, constituted torture.⁷¹⁶

Another court considered the ATCA case of a plaintiff who was, among other things, blindfolded, beaten while handcuffed, threatened with death, and denied sleep. The court found that “all of

⁷⁰⁷ 28 U.S.C. § 1350. The ATCA permits civil actions by an alien for a tort committed “in violation of the law or nations or a treaty of the United States.” *Id.*

⁷⁰⁸ 28 U.S.C. § 1350 note. 2000. The TVPA supplies a tort remedy for victims of torture.

⁷⁰⁹ *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1346. N.D. Ga. 2002.

⁷¹⁰ *Id.* at 1334, 1336, 1337–38, 1340.

⁷¹¹ 2002 OLC opinion, *supra* note 481, at 26.

⁷¹² 2004 OLC opinion, *supra* note 500, at 15.

⁷¹³ *Id.* at 14, n.24.

⁷¹⁴ The 2004 OLC opinion also approves of *Sackie v. Ashcroft*, 270 F. Supp. 2d 596 (E.D. Pa. 2003), in which an individual was forcibly recruited as a child soldier at age 14 and given narcotics and threatened with death over the next three to four years. The court concluded that the resulting mental harm, which continued over the three to four year period, qualified as prolonged mental harm. *Id.* at 15. It distinguishes *Villeda Aldana v. Fresh Del Monte Products, Inc.*, 305 F. Supp. 2d 1285 (S.D. Fla. 2003), in which a court rejected a claim under the TVPA brought by individuals who were held at gunpoint and repeatedly threatened with death for one night. The court concluded that they failed to show that their experience caused lasting damage. *Id.*

⁷¹⁵ *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19, 25. D.D.C. 2001. This case was actually brought under the Foreign Sovereign Immunities Act, but the FSIA adopts the definition of torture used in the TVPA.

⁷¹⁶ *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62. D.D.C. 1998. This case also was brought under the Foreign Sovereign Immunities Act.

the abuses to which he testified—including the eight years during which he was held in solitary or near-solitary confinement—constituted a single course of conduct of torture.”⁷¹⁷

Although the types of conduct these cases consider appear similar to those perpetrated by US forces in the “war on terror,” OLC pointed to these cases in its 2004 opinion to support its determination that conduct constituting torture under the federal anti-torture statute is extreme in nature.⁷¹⁸

There have been cases, however, in which courts have considered evidence of acts of psychological coercion but found them insufficient to meet the definition of torture. For example, in one TVPA case a plaintiff alleged she was interrogated and then held incommunicado, threatened with death, and forcibly separated from her husband.⁷¹⁹ Although the district court found that the plaintiff had stated a claim for torture on which relief could be granted,⁷²⁰ the appeals court reversed.⁷²¹ It said, “Although these alleged acts certainly reflect a bent toward cruelty on the part of their perpetrators, they are not in themselves so unusually cruel or sufficiently extreme and outrageous as to constitute torture”⁷²²

3. US Constitution

Certain practices may not rise to the level of intensity to constitute psychological torture. They will, however, constitute cruel, inhuman, or degrading treatment or punishment. When the US ratified the Convention against Torture, it issued a reservation to Article 16, which prohibits the use of cruel, inhuman, and degrading treatment or punishment. The US said:

That the United States considers itself bound by the obligation under Article 16 to prevent “cruel, inhuman or degrading treatment or punishment,” only insofar as the term . . . means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.⁷²³

Jurisprudence under each of these Amendments makes clear that many of the psychologically coercive techniques qualify as cruel and unusual punishment under domestic law, and thus are considered cruel, inhuman, and degrading treatment.

Courts have recognized the destructive nature of solitary confinement and have held it unconstitutional under the Eighth Amendment. For example, the United States District Court for the Eastern District of Illinois considered the conditions at a maximum security prison in Illinois, where prisoners were held in small cells, some of which were equipped with a steel

⁷¹⁷ *Hilao v. Estate of Marcos*. 103 F.3d 789, 795. 9th Cir. 1996. The court does say, however, “To the extent [plaintiff’s] years in solitary confinement do not constitute torture, they clearly meet the definition of prolonged arbitrary detention. . . .” *Id.*

⁷¹⁸ 2004 OLC opinion, *supra* note 500, at 10.

⁷¹⁹ *Simpson v. Socialist People’s Libyan Arab Jamahiriya*. 180 F. Supp. 2d 78. D.D.C. 2001.

⁷²⁰ *Id.* at 88.

⁷²¹ *Simpson v. Socialist People’s Libyan Arab Jamahiriya*. 326 F.3d 230. D.C. Cir. 2003.

⁷²² *Id.* at 234.

⁷²³ U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. Cong. Rec. S17486-01. Daily ed. October 27, 1990. Available at: <http://www1.umn.edu/humanrts/usdocs/tortres.html>. Accessed April 25, 2005.

front door kept closed as a disciplinary measure.⁷²⁴ The court recognized the harmful health consequences of being isolated in the cells, even the ones without a closed front door. It found that “[t]he impact of confinement on Control Unit prisoners’ mental and physical health can be harmful, debilitating and dehumanizing.”⁷²⁵ The court found that use of the closed front cells constituted a violation of the Eighth Amendment’s prohibition on cruel and unusual punishment. The court said that the “sensory deprivations occasioned by use of the [the closed front cells], along with the lack of any idea about what could be done to be released from the control unit, resulted in both mental and physical deterioration. Simultaneously, unnecessary pain and suffering was the result.”⁷²⁶

The United States District Court for the Southern District of Texas also found solitary confinement to be a violation of the Eighth Amendment and even called it tantamount to torture. In a case concerning the prison system in Texas, the court found that inmates in administrative segregation “suffer actual psychological harm from their almost total deprivation of human contact, mental stimulus, personal property and human dignity.”⁷²⁷ The court went on to say, “It goes without question that an incarceration that inflicts daily, permanently damaging, physical injury and pain is unconstitutional. Such a practice would be designated as torture.”⁷²⁸ The court therefore found a violation of the Constitution’s prohibition against cruel and unusual punishment. It eloquently stated:

As the pain and suffering caused by a cat-o’-nine tails lashing an inmate’s back are cruel and unusual punishment by today’s standards of humanity and decency, the pain and suffering caused by extreme levels of psychological deprivation are equally, if not more, cruel and unusual. The wounds and resulting scars, while less tangible, are no less painful and permanent when they are inflicted on the human psyche.⁷²⁹

There are cases in which US courts have determined that allegations of sleep deprivation did not rise to the level of cruel and unusual punishment.⁷³⁰ However, as noted above, the Beaver memorandum considering the legality of interrogation techniques noted that sleep deprivation could constitute a violation of the Eighth Amendment.⁷³¹

⁷²⁴ *Bono v. Saxbe*, 450 F. Supp. 934, D. Ill. 1978. According to the court, each of the cells measured approximately 6’6” by 8’ by 8’6” (high), had three concrete walls, and a steel bar front and was equipped with one steel bunk, a stainless steel commode and sink combination, and one light fixture containing a 40 or 60 watt bulb. *Id.* at 937. Ten of the cells were equipped with a steel front door. *Id.*

⁷²⁵ *Id.* at 940.

⁷²⁶ *Id.* at 947.

⁷²⁷ *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 913, S.D. Tex. 1999.

⁷²⁸ *Id.* at 914.

⁷²⁹ *Id.*

⁷³⁰ See *Singh v. Holcomb*, 1992 U.S. App. LEXIS 24790, 8th Cir. 1992. Holding that the sleep deprivation described by the plaintiff “did not show the ‘extreme deprivation’ needed to fulfill the objective component of an Eighth Amendment conditions-of-confinement claim.”; *Ferguson v. Cape Girardeau County*, 88 F.3d 647, 8th Cir. 1996. Holding that the totality of the circumstances, including the fact that the plaintiff was observed sleeping ninety-three hours of the fourteen days he spent confined in the vestibule area of the jail did not constitute an Eighth Amendment violation; *Green v. CSO Strack*, 1995 U.S. App. LEXIS 14451, 9th Cir. 1995. Rejecting an Eighth Amendment claim for sleep deprivation where plaintiff failed to produce evidence of excessive noise to interrupt sleep.

⁷³¹ See *supra* text accompanying note 533.

With respect to the due process clause of the Fifth and Fourteenth Amendments, courts have found that psychological coercion can constitute a violation of due process. In one case, a court explained that under the due process clause of the Fourteenth Amendment, “[p]sychological coercion can suffice.”⁷³² The court found that the plaintiff was “weakened by pain and shock, *isolated from family, friends, and legal counsel*, and barely conscious, and his will was simply overborne.”⁷³³ The court said that this “can fairly be described as sophisticated psychological torture.”⁷³⁴ Another court said that “[e]motional distress can produce injury of the same severe magnitude as occurred in the cases of physical harm. . . and it can be inflicted in the same wanton and unreasonable manner.”⁷³⁵

Courts also have stated that a threat is enough to constitute a violation of the due process clause of the Fifth and Fourteenth Amendments.⁷³⁶ In one case, in which an individual being held by police had a pistol pointed to his temple, thereby inflicting severe mental distress, a court held that the due process clause of the Fifth and Fourteenth Amendments has “long been interpreted to include freedom from severe, and sometimes not so severe . . . , bodily harm . . . , to which severe mental distress can reasonably be compared.”⁷³⁷

C. US Military Law, Regulations, and Guidelines

1. Uniform Code of Military Justice

US military personnel are subject to the UCMJ.⁷³⁸ This code applies to US forces on active duty, at all times and in all places throughout the world. Like Army policy, the UCMJ prohibits actions that are intended to degrade or humiliate. Article 93 focuses on cruelty, oppression or maltreatment.⁷³⁹ According to the Working Group report, the cruelty, oppression, or maltreatment need not be physical.⁷⁴⁰ Article 128 prohibits assault, which includes the use of threatening words accompanied by a menacing act or gesture.⁷⁴¹

As noted above, the Beaver memorandum regarding interrogation techniques found that placing a wet towel or hood over a detainee’s head would constitute a per se violation of Article 128 of the UCMJ.⁷⁴² The memo similarly found that threatening a detainee with death may constitute a violation of either Article 128 or Article 134 of the UCMJ.⁷⁴³ The Army Field Manual agrees. It states, “The absence of threats in interrogation is intentional, as their enforcement and use normally constitute violations of international law and may result in prosecution under the UCMJ.”⁷⁴⁴

⁷³² *Cooper v. Dupnik*, 963 F.2d 1220, 1245, 9th Cir. 1992.

⁷³³ *Id.* at 1247. Emphasis in original.

⁷³⁴ *Id.* at 1248.

⁷³⁵ *Rhodes v. Robinson*, 612 F.2d 766, 772, 3rd Cir. 1979.

⁷³⁶ See, e.g., *Gray v. Spillman*, 925 F.2d 90, 4th Cir. 1990.

⁷³⁷ *Wilkins v. May*, 872 F.2d 190, 195, 7th Cir. 1989.

⁷³⁸ 10 U.S.C. §§ 801–941 (1994 and Supp. IV, 1999).

⁷³⁹ “Any person subject to this chapter who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct.” 10 U.S.C. § 893.

⁷⁴⁰ See Working Group report, *supra* note 557, at 45.

⁷⁴¹ 10 U.S.C. § 928; Working Group report, *supra* note 557, at 46. Citing MCM IV-81; MJB, Section 3-54-1.

⁷⁴² See *supra* text accompanying note 526.

⁷⁴³ See *supra* text accompanying note 527.

⁷⁴⁴ FM 34-52, *supra* note 3. Chapter 1: Interrogation and the Interrogator.

General Fay found that keeping detainees in a state of undress and simulated sexual positions at Abu Ghraib was clearly degrading and humiliating and violated the UCMJ and other laws and regulations.⁷⁴⁵

2. Army Regulations

Army Regulation 190-8 (hereinafter AR 190-8) establishes the policy in executive agency for detention operations.⁷⁴⁶ It enumerates in paragraphs 1-5 the general policy and treatment of not just enemy prisoners of war, but civilian internees, retained personnel, and other detainees. AR 190-8 makes clear that torture and coercion are prohibited.⁷⁴⁷ Some of the most relevant directives regarding treatment of detainees include:

- to treat detainees with respect for their person and honor and to treat them humanely⁷⁴⁸;
- to protect detainees against violence, insults, or any form of indecent assault⁷⁴⁹;
- not to imprison a detainee in a place without daylight⁷⁵⁰;
- not to confine for more than 30 consecutive days.⁷⁵¹

General Fay concluded in his report on Abu Ghraib that all of these directives were violated by psychologically coercive interrogation methods, such as stripping detainees and placing them in isolation.⁷⁵² General Fay also found a violation of the policy and intent of AR 190-12 when interrogators ordered the use of dogs as an interrogation technique at Abu Ghraib.⁷⁵³

3. Army Field Manual 34-52

Army Field Manual 34-52 provides general guidelines for commanders, staff officers, and other personnel in the use of interrogation elements in Army intelligence units.⁷⁵⁴ The manual outlines procedures for handling sources of interrogations, the processing of documents, and the reporting of intelligence gained through interrogation. FM 34-52 specifically prohibits the use of force, mental torture, threats, and inhumane treatment. It says:

⁷⁴⁵ Fay report, *supra* note 40, at 69.

⁷⁴⁶ Army Regulation 190-8. Military Police: Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees. Washington, DC: Headquarters Departments of the Army, the Navy, the Air Force, and the Marine Corps. October 1, 1997. Available at: <http://www.au.af.mil/au/awc/awcgate/law/ar190-8.pdf>. Accessed April 25, 2005.

⁷⁴⁷ "No form of physical torture or moral coercion will be exercised against the CI [civilian internee]." *Id.* Para. 5-1(1).

⁷⁴⁸ "In all circumstances, [civilian internees] will be treated with respect for their person, their honor, their family rights, their religious convictions and practices, and their manners and customs. At all times the CI will be humanely treated and protected against all acts of violence or threats . . ." *Id.* Para. 5-1a(2).

⁷⁴⁹ "The CI will be especially protected against all acts of violence, insults, public curiosity, bodily injury, reprisals of any kind, sexual attack such as rape, forced prostitution, or any form of indecent assault." *Id.* Para. 5-1a(3).

⁷⁵⁰ "Imprisonment in premises without daylight is prohibited." *Id.* Para. 6-11a(5).

⁷⁵¹ "The duration of any single disciplinary punishment will not exceed 30 consecutive days." *Id.* Para. 6-12d(1).

⁷⁵² Fay report, *supra* note 40, at 30.

⁷⁵³ *Id.*

⁷⁵⁴ FM 34-52, *supra* note 3.

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. . . .⁷⁵⁵

As stated above, legitimate psychological ploys and deception techniques are permitted by FM 34-52, as long as they do not violate the Geneva Conventions.⁷⁵⁶

Other Field Manuals also contain relevant provisions. For example, FM 3-19.40 specifically directs that internees will retain their clothing.⁷⁵⁷ General Fay found a violation of this directive because detainees were stripped of their clothes during interrogations at Abu Ghraib.⁷⁵⁸

D. International Human Rights Treaties

The US has ratified the International Covenant on Civil and Political Rights (hereinafter ICCPR) and the Convention against Torture, both of which prohibit torture and other forms of ill-treatment. The treaty bodies responsible for interpreting the treaties have made clear their view that the use of psychologically coercive techniques can have harmful psychological consequences and can constitute treaty violations.

1. *International Covenant on Civil and Political Rights (ICCPR)*

The United States ratified the International Covenant on Civil and Political Rights in 1992. Article 7 of the ICCPR prohibits both torture and cruel, inhuman or degrading treatment or punishment.⁷⁵⁹ According to the Human Rights Committee, which is charged with interpreting the treaty and hearing cases that arise under it, “[t]he aim of the provisions of article 7 . . . is to protect both the dignity and the physical and mental integrity of the individual.”⁷⁶⁰ Indeed, the Human Rights Committee has said that the prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim.⁷⁶¹ Article 7 allows no exceptions.⁷⁶² The Human Rights Committee has affirmed that no derogation is permitted even in situations of public emergency⁷⁶³ and that no justifications, such as those based on orders from a superior officer, can be invoked to excuse violations.⁷⁶⁴

⁷⁵⁵ *Id.*

⁷⁵⁶ See *supra* text accompanying notes 3–6.

⁷⁵⁷ Department of the Army. Army Field Manual 3-19.40. Military Police Internment/Resettlement Operations. Chapter 5, Civilian Internees. Paras. 5-20. August 1, 2001. Available at: <http://www.globalsecurity.org/military/library/policy/army/fm/3-19-40/ch5.htm#par4>. Accessed April 25, 2005.

⁷⁵⁸ Fay report, *supra* note 40, at 30.

⁷⁵⁹ “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” International Covenant on Civil and Political Rights. Opened for signature December 16, 1966. Article 7. 999 U.N.T.S. 171. Entered into force March 23, 1976. [ICCPR].

⁷⁶⁰ General Comment No. 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment [Art. 7]:10/03/92. Human Rights Committee. CCPR General Comment No. 20. 44th Sess.;1992: para. 2. [General Comment No. 20].

⁷⁶¹ *Id.* Para. 5.

⁷⁶² See *id.* Para. 3.

⁷⁶³ ICCPR, *supra* note 759. Article 4. Prohibiting derogation under any circumstances from the obligations under Article 7.

⁷⁶⁴ General Comment No. 20, *supra* note 760. Para. 3.

Article 7's prohibition of torture and cruel, inhuman, and degrading treatment is complemented by positive requirements in article 10, paragraph 1, which says, "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."⁷⁶⁵ The Human Rights Committee explained:

Article 10, paragraph 1, imposes on States parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of their liberty, and complements for them the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in Article 7 of the Covenant. Thus, not only may persons deprived of their liberty not be subjected to treatment that is contrary to Article 7 . . . , but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons.⁷⁶⁶

The Human Rights Committee has made clear that psychologically coercive interrogation techniques, including death threats, solitary confinement, and sleep deprivation, can have negative mental health effects and can violate Articles 7 and 10 of the treaty.

In its concluding observations regarding Israel's compliance with the treaty, the Human Rights Committee noted:

that the methods of handcuffing, hooding, shaking and sleep deprivation have been and continue to be used as interrogation techniques, either alone or in combination. The Committee is of the view that the guidelines can give rise to abuse and that *the use of these methods constitutes a violation of article 7 of the Covenant in any circumstances*. . . . The Committee urges the State party to cease using the methods⁷⁶⁷

With respect to death threats, the Human Rights Committee held in one case that a mock execution, along with other ill-treatment, "constitute cruel and inhuman treatment within the meaning of article 7 and, therefore, also entail a violation of article 10, paragraph 1, of the Covenant, which requires that detained persons be treated with respect for their human dignity."⁷⁶⁸

The Human Rights Committee has clearly condemned the use of solitary confinement as a violation of the ICCPR. It has stated that "prolonged solitary confinement . . . may amount to acts prohibited by article 7."⁷⁶⁹

2. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment

⁷⁶⁵ ICCPR, *supra* note 759. Article 10(1).

⁷⁶⁶ General Comment 21. Human Rights Committee. 44th Sess.;1992: para. 3.

⁷⁶⁷ Concluding Observations of the Human Rights Committee : Israel. Human Rights Committee. 63rd Sess.1998: para. 19. U.N. Doc. CCPR/C/79/Add.93. Emphasis added.

⁷⁶⁸ Communication No. 255/1987: Jamaica, 22/10/92. Human Rights Committee. 46th Sess. 1992: para 8.5. U.N. Doc. CCPR/C/46/D/255/1987.

⁷⁶⁹ General Comment No. 20, *supra* note 760. Para. 6.

The US ratified the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment in 1994. The Convention against Torture prohibits torture and other forms of cruel, inhuman and degrading treatment.⁷⁷⁰ Like the ICCPR, the Convention against Torture says that these prohibitions are absolute; no emergency or exceptional circumstance can permit their limitation.⁷⁷¹

The Committee against Torture, which interprets the provisions of the Convention against Torture, has recognized the negative health consequences of psychologically coercive interrogation techniques and has said that they constitute torture and ill-treatment, thereby violating the Convention against Torture's provisions.

In 1997, the Committee Against Torture considered techniques used by Israel. These included (1) restraining in very painful conditions, (2) hooding under special conditions, (3) sounding of loud music for prolonged periods, (4) sleep deprivation for prolonged periods, (5) threats, including death threats, (6) violent shaking, and (7) using cold air to chill. The Committee found that they are "in the Committee's view, breaches of article 16 and also constitute torture as defined in article 1 of the Convention. This conclusion is particularly evident where such methods of interrogation are used in combination, which appears to be the standard case."⁷⁷²

The Committee returned to methods of interrogation used by the Israeli Security Agency in 2001, when it considered Israel's report.⁷⁷³ The Israel Supreme Court had just issued a decision on the methods of interrogation,⁷⁷⁴ including covering a suspect's head with an opaque sack during interrogation. The Court held that such a method is not inherent to an interrogation, is forbidden, and "harms the suspect and his (human) image. It degrades him. . . ."⁷⁷⁵ The Court similarly prohibited the playing of loud music while in a stress position.⁷⁷⁶ With respect to sleep deprivation, the Court noted that interrogations may be lengthy and as a "side effect" may cause a person not to be able to sleep during the interrogation. The Court noted, however, that the situation changes if

sleep deprivation shifts from being a 'side effect' inherent to the interrogation, to [being] an end in itself. If the suspect is intentionally deprived of sleep for a prolonged period of time, for the purpose of tiring him out or 'breaking' him – it shall not fall within the scope of a fair and reasonable investigation. Such means harm the rights and dignity of the suspect in a manner surpassing that which is required.⁷⁷⁷

With respect to the Israel Supreme Court's ruling, the Committee against Torture said that the ruling "was a step in the right direction, although, unfortunately, it did not outlaw torture

⁷⁷⁰ Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. G.A. Res. 39/46. U.N. GAOR. 39th Sess. Supp. No. 51. 1984:197. *Entered into force* June 26, 1987. U.N. Doc. A/Res/39/46.

⁷⁷¹ "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." *Id.* Article 2(2).

⁷⁷² Concluding Observations of the Committee against Torture: Israel. 09/05/97. Committee against Torture. 1997:para. 257. U.N. Doc. A/52/44.

⁷⁷³ Consideration of Reports Submitted by States Parties Under Article 19 of the Convention. Committee against Torture. 2001. U.N. Doc. CAT/C/54/Add.1. [Israel report].

⁷⁷⁴ Public Committee Against Torture in Israel v. Israel. HCJ 5100/94. September 1999.

⁷⁷⁵ Israel report, *supra* note 773. Para. 14(v). Quoting Israel Supreme Court decision. Para. 28.

⁷⁷⁶ *Id.* Para. 14(vi). Quoting Israel Supreme Court decision. Para. 29.

⁷⁷⁷ *Id.* Para. 14(viii). Quoting Israel Supreme Court decision. Para. 31.

completely. It fell short of the obligations imposed by the Convention because it allowed such measures as deprivation of sleep so long as they were not used as a means of interrogative pressure; in other words the [Israel Security Agency] could continue to torture.”⁷⁷⁸

It is worth noting that the Israel Supreme Court also considered the defense of necessity. Although the Court held that such a defense might be available, it held that the necessity defense could not serve as a statutory basis for authorizing, in advance, the use of abusive methods in the course of an investigation. In other words,

the ‘necessity’ defense does not constitute a source of authority The very fact that a particular act does not constitute a criminal act (due to the ‘necessity’ defense) does not in itself authorize the administration to carry out this deed and in doing so infringe upon human rights.”⁷⁷⁹

In its consideration of the Republic of Korea’s report in 1996, the Committee against Torture expressed concern about reports from NGOs that show that many political suspects continued to endure various methods of ill-treatment during interrogation. It singled out the use of sleep deprivation: “The *sleep deprivation* practiced on suspects, which *may in some cases constitute torture* and which seems to be routinely used to extract confessions, *is unacceptable*.”⁷⁸⁰ In 1993, the Committee Against Torture said that blindfolding during interrogation “should be expressly prohibited.”⁷⁸¹

The Committee against Torture also has made clear its concern about the use of solitary confinement. In 2002, the Committee considered the case of a woman in Denmark who was held in solitary confinement for less than two months total. In considering the circumstances, the Committee notes that the cell measured 8 by 2 and had no windows, that the woman had no radio and TV was only available upon payment of a fee, and that she was never informed about the access to certain books from a local library. The Committee also noted that the prison doctor reported that the woman was “close to a psychotic breakdown... [which] can fully be explained as the result of incarceration and solitary confinement.”⁷⁸² The Committee against Torture said:

It is clear from the Committee’s concluding observations [to Denmark] that solitary confinement, particularly in cases of pre-trial detention, is considered to have *extremely serious mental and psychological consequences for the detainee; States parties are encouraged to abolish the practice*. Although abolition is preferable, the concluding observations of the Committee reveal that solitary confinement should be applied only in exceptional cases and not for prolonged periods of time.”⁷⁸³

⁷⁷⁸ Summary record of the 496th meeting: Israel. Committee against Torture. November 29, 2001: para. 45. U.N. Doc. CAT/C/SR.496.

⁷⁷⁹ Israel report, *supra* note 773. Para. 18. Quoting Israel Supreme Court decision. Para. 36.

⁷⁸⁰ Concluding Observations of the Committee against Torture: Republic of Korea. Committee against Torture. November 13, 1996: para. 56. U.N. Doc. A/52/44. Emphasis added.

⁷⁸¹ Activities of the Committee against Torture Pursuant to Article 20 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment: Turkey. 15/11/93. Committee against Torture. November 15, 1993: para. 48(a). U.N. Doc. A/48/44/Add.1.

⁷⁸² Communication No. 202/2002: Denmark. Committee against Torture. May 11, 2004: para. 25. U.N. Doc. CAT/C/32/D/202/2002.

⁷⁸³ *Id.* Para. 5.6. Emphasis added.

In its conclusions and recommendations to New Zealand in 2004, the Committee against Torture expressed concerns about “[c]ases of prolonged non-voluntary segregation in detention (*solitary confinement*), the strict conditions of which may amount, in certain circumstances, to acts prohibited by article 16 of the Convention.”⁷⁸⁴

E. US State Department Report on Human Rights

A strong indication of the US interpretation of legal restrictions on torture and cruel, inhuman, and degrading treatment over many years can be found in the annual Country Reports on Human Rights Practices by the US State Department. These reports describe the status of internationally recognized human rights in nearly all countries outside the US. In the 2005 report’s section on torture and other cruel, inhuman, or degrading treatment or punishment, the US government has consistently referred to the use of isolation, sleep deprivation, “humiliations such as public nakedness,” and “being forced to stand-up and sit-down to the point of collapse.”⁷⁸⁵ The report criticizes Egypt, for example, as having a “systematic pattern of torture”⁷⁸⁶ and points to stripping prisoners naked and blindfolding them and the use of threats, including threats of rape.⁷⁸⁷ With respect to Iran, the report criticizes the use of sleep deprivation, “prolonged solitary confinement with sensory deprivation,” and threats of execution.⁷⁸⁸ The report condemns Libya for threats of attack by dogs and calls them acts of torture.⁷⁸⁹ Other countries, including North Korea,⁷⁹⁰ Jordan,⁷⁹¹ Pakistan,⁷⁹² Saudi Arabia,⁷⁹³ and Syria⁷⁹⁴ are chastised in the report for similar violations of human rights.⁷⁹⁵ It is evident that these very techniques were approved and systematically used by the United States as methods of interrogation in the “war on terror.”

F. Special Rapporteur on Torture

The Special Rapporteur on Torture, an independent expert mandated by the United Nations Human Rights Commission to report on the situation of torture around the world, has considered a wide range of psychologically coercive interrogation techniques and their effects on detainees. In 2004, the Special Rapporteur specifically responded to allegations about the

⁷⁸⁴ Conclusions and Recommendations of the Committee against Torture: New Zealand. Committee against Torture. June 11, 2004: para. 5(d). U.N. Doc. CAT/C/CR/32/4. Emphasis added.

⁷⁸⁵ *US State Department Report on Human Rights 2004*. February 28, 2005. Available at: <http://www.state.gov/g/drl/rls/hrrpt/2004/index.htm>. Accessed April 25, 2005.

⁷⁸⁶ *Id.* Citing U.N. Committee Against Torture.

⁷⁸⁷ *Id.*

⁷⁸⁸ *Id.*

⁷⁸⁹ *Id.*

⁷⁹⁰ “Methods of torture included . . . humiliations such as public nakedness; confinement to small ‘punishment cells,’ in which prisoners are unable to stand upright or lie down, where they could be held for several weeks.” *Id.*

⁷⁹¹ “The most frequently reported methods of torture included beating, sleep deprivation, extended solitary confinement, and physical suspension.” *Id.*

⁷⁹² “Security force personnel continued to torture persons in custody throughout the country. . . . [M]ethods used included . . . prolonged isolation; denial of food or sleep.” *Id.*

⁷⁹³ “Ministry of Interior officials were responsible for most incidents of abuse of prisoners, including beatings, whippings, and sleep deprivation.” *Id.*

⁷⁹⁴ *Id.* Citing a case reported by Amnesty International in which four young men were “subjected to various forms of torture and ill-treatment, including . . . hearing loud screams and beatings of other detainees; being stripped naked in front of others; and being prevented from praying and growing a beard.”

⁷⁹⁵ *Id.*

kinds of psychological methods being used on detainees in the “war on terror.” He was clear in his condemnation of the methods as torture and ill-treatment:

The Special Rapporteur has recently received information on certain methods that have been condoned and used to secure information from suspected terrorists. They notably include holding detainees in painful and/or stressful positions, depriving them of sleep and light for prolonged periods, exposing them to extremes of heat, cold, noise and light, hooding, depriving them of clothing, stripping detainees naked and threatening them with dogs. The jurisprudence of both international and regional human rights mechanisms is unanimous in stating that such methods violate the prohibition of torture and ill-treatment.⁷⁹⁶

The Special Rapporteur said that “blindfolding and hooding should be forbidden.”⁷⁹⁷ He also has determined that intimidation, including threats, can be torture:

A number of decisions by human rights monitoring mechanisms have referred to the notion of mental pain or suffering, including suffering through intimidation and threats, as a violation of the prohibition of torture and other forms of ill-treatment. Similarly, international humanitarian law prohibits at any time and any place whatsoever any threats to commit violence to the life, health and physical or mental well-being of persons. It is my opinion that serious and credible threats, including death threats, to the physical integrity of the victim or a third person can amount to cruel, inhuman or degrading treatment or even torture, especially when the victim remains in the hands of law enforcement officials.⁷⁹⁸

As for solitary confinement, the Special Rapporteur expressed particular concern, noting that the use of solitary confinement “in itself may constitute a violation of the right to be free from torture.”⁷⁹⁹ The Special Rapporteur also said that solitary confinement can amount to cruel, inhuman or degrading treatment.⁸⁰⁰ He has recognized that prolonged solitary confinement in conditions of severe material deprivation and with no or little activity may have a serious impact on the psychological and moral integrity of the prisoner.⁸⁰¹ He has noted a specific limitation in its use; in a report to Chile, the Special Rapporteur on Torture said, “Judges should not have the power to order solitary confinement, other than as a measure in cases of breach of institutional discipline, for more than two days.”⁸⁰²

⁷⁹⁶ Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. U.N. GAOR. 59th Sess. Agenda Item 107(a). September 1, 2004: para. 17. U.N. Doc. A/59/324.

⁷⁹⁷ Civil and Political Rights, Including the Question of: Torture and Detention, Report of the Special Rapporteur, Sir Nigel Rodley, Submitted Pursuant to Commission on Human Rights Resolution 2001/62. U.N. ESCOR. 58th Sess. Agenda Item 11(a). December 27, 2001; Annex 1, para. (f). U.N. Doc. E/CN.4/2002/76.

⁷⁹⁸ *Id.* Annex II.

⁷⁹⁹ Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 796. Para. 20.

⁸⁰⁰ Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report of the Special Rapporteur, Mr. Nigel S. Rodley, Submitted Pursuant to Commission on Human Rights Resolution 1995/37, Visit by the Special Rapporteur to Chile. U.N. ESCOR. Commission on Human Rights. 52nd Sess. Agenda Item 8. December 4, 1996: para. 76(c). U.N. Doc. E/CN.4/1996/35/Add.2. [Chile Visit].

⁸⁰¹ Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 796. Para. 46.

⁸⁰² Chile Visit, *supra* note 800. Para. 76(c).

The Special Rapporteur also has considered the legal framework constructed by the Bush Administration in its efforts to justify psychologically abusive interrogation methods.

In a 2004 document published a few months after the 2002 OLC opinion became public, the Special Rapporteur clarified his views on the definition of torture.

The Special Rapporteur notes with serious concern that attempts have been made to narrow the scope of the definition of torture contained in article 1 of the Convention Against Torture In this respect, the Special Rapporteur wishes to stress that the definition contained in the Convention cannot be altered by events or in accordance with the will or interest of States. The Special Rapporteur also wishes to recall that the prohibition applies equally to torture and to cruel, inhuman or degrading treatment or punishment.⁸⁰³

He also made clear that the prohibition on torture applies regardless of legal status of individuals

[A]lthough the status of detainees may remain unclear, there is no uncertainty as to the international obligations, standards and protections that apply to them, the prohibition of torture being applicable to all individuals without exception and without discrimination, regardless of their legal status.⁸⁰⁴

He also responded to arguments put forward to permit the use of torture.

While being aware of the threats posed by terrorism and recognizing the duty of States to protect their citizens and the security of the State against such threats, the Special Rapporteur would like to reiterate that the absolute nature of the prohibition of torture and other forms of ill-treatment means that no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture.

. . .

No special circumstance may be invoked to justify a violation of the prohibition of torture for any reason, including an order from a superior officer or a public authority.⁸⁰⁵

G. Other International Instruments

Other international instruments, including the American Convention on Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, also have found the use of psychologically coercive interrogation techniques to cause harmful psychological effects and to violate prohibitions on torture and ill-treatment. Although the US is not a party to these treaties, the jurisprudence that has developed from them is some of the most fully developed in the human rights movement and is therefore a useful

⁸⁰³ Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 796. Para. 16.

⁸⁰⁴ *Id.* Para. 22.

⁸⁰⁵ *Id.* Paras. 14–15.

barometer of the international view of what actions amount to torture or cruel, inhuman, and degrading treatment. As the 2002 OLC opinion noted, international decisions “provide guidance about how other nations will likely react to our interpretation of the [Convention against Torture] and [the federal anti-torture statute].”⁸⁰⁶

1. *American Convention on Human Rights*

The American Convention on Human Rights, which was signed by US in 1977 but never ratified, has a specific prohibition of torture and cruel, inhuman or degrading treatment or punishment.⁸⁰⁷ It also specifies that “all persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.”⁸⁰⁸

In the *Loayza Tamayo* case, the Inter-American Court of Human Rights held, “The violation of the right to physical and psychological integrity of persons is a category of violation that has several gradations and embraces treatment ranging from torture to other types of humiliation or cruel, inhuman or degrading treatment with varying degrees of physical and psychological effects. . . .”⁸⁰⁹

It also explained what it meant by degradation and respect for dignity in the context of a struggle against terrorism:

The degrading aspect is characterized by the fear, anxiety and inferiority induced for the purpose of humiliating and degrading the victim and breaking his physical and moral resistance. . . . That situation is exacerbated by the vulnerability of a person who is unlawfully detained . . . Any use of force that is not strictly necessary to ensure proper behavior on the part of the detainee constitutes an assault on the dignity of the person . . . in violation of Article 5 of the American Convention. The exigencies of the investigation and the undeniable difficulties encountered in the anti-terrorist struggle must not be allowed to restrict the protection of a person’s right to physical integrity.⁸¹⁰

It found that “*incommunicado* detention, . . . solitary confinement in a tiny cell with no natural light, blows, and maltreatment, including total immersion in water, intimidation with threats of further violence, a restrictive visiting schedule . . . , all constitute forms of cruel, inhuman or degrading treatment in violation of Article 5(2) of the American Convention.”⁸¹¹

In another case, the Inter-American Court of Human Rights held that “the mere subjection of an individual to prolonged isolation and deprivation of communication is in itself cruel and inhuman treatment which harms the psychological and moral integrity of the person, and violates the right of every detainee under Article 5(1) and 5(2) to treatment respectful of his dignity.”⁸¹²

⁸⁰⁶ 2002 OLC opinion, *supra* note 481, at 27.

⁸⁰⁷ “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” American Convention on Human Rights. November 22, 1969. Article 5. 1144 U.N.T.S. 123.

⁸⁰⁸ *Id.*

⁸⁰⁹ *Loayza Tamayo*. Judgment of September 17, 1997. Inter-Am. Ct. H.R. (Ser. C). No. 33. 1997: para. 57.

⁸¹⁰ *Id.*

⁸¹¹ *Id.* Para. 58.

⁸¹² *Velasquez Rodriguez* Case. Judgment of July 29, 1998. Inter-Am. Ct. H.R. (Ser. C). No. 4. 1998: para. 187.

2. European Convention for the Protection of Human Rights and Fundamental Freedoms

Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter European Convention) has a strict prohibition on torture and inhuman or degrading treatment or punishment.⁸¹³ The European Convention, however, does not contain a definition of torture and does not specifically mention a prohibition on mental or psychological torture. The European Court of Human Rights (hereinafter European Court), which decides cases brought under the European Convention, interprets the provisions of the European Convention. The European Court has noted, “Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment.”⁸¹⁴ There is no derogation allowed even in the event of a war or public emergency threatening the life of a nation.⁸¹⁵ The European Court has considered treatment to be “inhuman” because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering. It has deemed treatment to be “degrading” because it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them.⁸¹⁶

The European Court has declared various forms of psychologically coercive interrogation techniques to be torture or cruel, inhuman, and degrading treatment.

In a 1978 case, the European Court examined the government of Northern Ireland’s policy of arrest and detention.⁸¹⁷ In doing so, it considered the arrest and internment of 12 persons at unidentified centers. At the centers, detainees were submitted to a form of “interrogation in depth,” which involved the combined application of five particular sensory deprivation techniques: wall-standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink.⁸¹⁸ The European Court held that the “five techniques were applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation.”⁸¹⁹ Accordingly, the European Court held that the use of the five techniques constituted a practice of inhuman and treatment. They also found that the practices were degrading, since “they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.”⁸²⁰

⁸¹³ “No one shall be subjected to torture or to inhumane or degrading treatment or punishment.” European Convention for the Protection of Human Rights and Fundamental Freedoms. November 4, 1950. 213 U.N.T.S. 221. As amended by Protocols Nos. 3, 5, 8, and 11, which entered into force on Sept. 21, 1970, Dec. 20, 1971, Jan. 1, 1990, and Nov. 1, 1998, respectively. Article 3. [European Convention].

⁸¹⁴ *Ilascu and Others v. Moldova and Russia*. Application no. 48787/99. Judgment. July 8, 2004: para 424.

⁸¹⁵ European Convention, *supra* note 813. Article 15(2); *Ocalan v. Turkey*. Application no. 46221/99. Judgment. March 12, 2003: para. 218. “The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim’s conduct. Article 3 makes no provision for exceptions and no derogation from it is permissible even under Article 15 of the Convention in time of war or other national emergency.”

⁸¹⁶ *Ilascu and Others v. Moldova and Russia*. Application no. 48787/99. Judgment. July 8, 2004: para 425.

⁸¹⁷ *Ireland v. United Kingdom*. Application no. 5310/71. Judgment. December 13, 1977.

⁸¹⁸ *Id.* Para. 96.

⁸¹⁹ *Id.* Para. 167.

⁸²⁰ *Id.*

Although the European Court held that these acts did not constitute torture, it did say, in a subsequent decision 20 years later, that

certain acts which were classified in the past as “inhuman and degrading treatment” as opposed to “torture” could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.⁸²¹

In a 1998 case considered by the European Court, the applicant had been blindfolded while being aggressively interrogated, assaulted and threatened with death, detained for four days in total darkness in sub-zero temperatures with no bed or blankets, and denied food and liquids. He also was stripped naked, hosed with cold water, beaten with a truncheon on his body and the soles of his feet, and had electric shocks administered to his fingers and toes.⁸²² The European Court found a violation of Article 3 of the Convention.⁸²³

In a 1997 case, the applicant had been subjected to rape, blindfolding, and being paraded around naked. The European Court recognized the harmful effects of such techniques:

She was detained over a period of three days during which she must have been bewildered and disoriented by being kept blindfolded, and in a constant state of physical pain and mental anguish brought on by the beatings administered to her during questioning and by the apprehension of what would happen to her next. She was also paraded naked in humiliating circumstances thus adding to her overall sense of vulnerability.⁸²⁴

The European Court found that “the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of Article 3 of the Convention. Indeed, the Court would have reached this conclusion on either of those grounds taken separately.”⁸²⁵

In one case, the European Court noted in particular “threats made concerning the ill-treatment of [the applicant’s] children, which caused the applicant intense fear and apprehension. This treatment left the applicant with long-term symptoms of anxiety and insecurity, diagnosed as post-traumatic stress disorder and requiring treatment by medication.”⁸²⁶ The Court therefore finds that “[the applicant] was a victim of very serious and cruel suffering that may be characterised as torture.”⁸²⁷

In one case before the European Court, an applicant was stripped naked in the presence of a female police officer, with the intention of humiliating him. He was then ordered to squat, and his sexual organs and the food he had received from his visitor were examined by guards who

⁸²¹ *Selmouni v. France*. Application no. 25803/94. Judgment. July 28, 1999: para. 101.

⁸²² *Tekin v. Turkey*. Application no. 52/1997/836/1042. Judgment. June 9, 1998: para. 49.

⁸²³ *Id.* Para. 54.

⁸²⁴ *Aydin v. Turkey*. Application no. 57/1996/676/866. Judgment. September 25, 1997: para. 25.

⁸²⁵ *Id.* Para. 27.

⁸²⁶ *Akkoc v. Turkey*. Application nos. 22947/93 and 22948/93. Judgment. October 10, 2000: para. 116.

⁸²⁷ *Id.* Para. 117. Citation omitted.

were not wearing gloves. The Court found a violation of Article 3. It noted that, "Obliging the applicant to strip naked in the presence of a woman, and then touching his sexual organs and food with bare hands showed a clear lack of respect for the applicant, and diminished in effect his human dignity. It must have left him with feelings of anguish and inferiority capable of humiliating and debasing him."⁸²⁸

In another, the applicant was stripped to his underwear in front of a group of prison guards and the guards verbally abused and derided the applicant.⁸²⁹ The European Court found, "Their behaviour was intended to cause in the applicant feelings of humiliation and inferiority. This, in the Court's view, showed a lack of respect for the applicant's human dignity."⁸³⁰ Accordingly, there was a violation of Article 3.⁸³¹

The European Court has considered various forms of sensory deprivation and has consistently found it to have negative health consequences and to violate Article 3's prohibition on torture and/or cruel, inhuman and degrading treatment. Indeed, the Court has said that "complete sensory isolation, coupled with total social isolation can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason. . . ."⁸³² Similarly, the European Court said "that artificially depriving prisoners of their sight by blindfolding them for lengthy periods spread over several days may, when combined with other ill-treatment, subject them to strong psychological and physical pressure."⁸³³

In one case, the applicant, who being held in prison under a death sentence, was locked up for 24 hours a day in cells which offered a very restricted living space and had covered windows blocking access to natural light.⁸³⁴ In addition, there was no provision for any outdoor exercise, and there was little or no opportunity for activities by which the applicant could occupy himself or have contact with others.⁸³⁵ The European Court said, "It considers that the conditions of detention . . . must have caused him considerable mental suffering, diminishing his human dignity."⁸³⁶ According, there was a violation of Article 3 of the European Convention.

In another case, the European Court found that the applicant was detained in very strict isolation for eight years, with no contact with other prisoners, no news from the outside, and no right to contact his lawyer or receive regular visits from his family. In addition, his cell was unheated, and had no natural light source or ventilation. The European Court noted that the applicant's conditions of detention had deleterious effects on his health and found a violation of Article 3.⁸³⁷

Another applicant in the same case faced blows and ill-treatment, deprivation of food, and solitary confinement in an unheated, badly ventilated cell without natural light. The European

⁸²⁸ *Valasinas v. Lithuania*. Application no. 44558/98. Judgment. July 24, 2001: para. 117.

⁸²⁹ *Iwanczuk v. Poland*. Application no. 25196/94. Judgment. November 15, 2001: para. 15.

⁸³⁰ *Id.* Para. 59.

⁸³¹ *Id.* Para. 60.

⁸³² *Ilascu and Others v. Moldova and Russia*. Application no. 48787/99. Judgment. July 8, 2004: para. 432.

⁸³³ *Ocalan v. Turkey*. Application no. 46221/99. Judgment. March 12, 2003: para. 222.

⁸³⁴ *Kuznetsov v. Ukraine*. Application no. 39042/97. Judgment. April 29, 2003: para. 125.

⁸³⁵ *Id.*

⁸³⁶ *Id.* Para. 126.

⁸³⁷ *Ilascu and Others v. Moldova and Russia*. Application no. 48787/99. Judgment. July 8, 2004: paras. 438–442.

Court said, “such treatment was apt to engender pain and suffering, both physical and mental, which could only be exacerbated by the applicant’s total isolation and were calculated to arouse in him feelings of fear, anxiety and vulnerability likely to humiliate and debase him and break his resistance and will.”⁸³⁸ Accordingly, the Court found a violation of Article 3.

3. *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*

The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment grew out of Article 3 of the European Convention on Human Rights. Again, although the US is not a party to this instrument, its interpretation is instructive in considering what acts amount to torture and cruel, inhuman and degrading treatment.

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter CPT), which ensures implementation of the Convention, has said that psychologically coercive interrogation techniques can constitute methods of torture and ill-treatment.

For example, in a report on a visit to the Russian Federation, the CPT said that threats of sexual humiliation “could be considered to amount to psychological torture.”⁸³⁹ Similarly, in a report to Finland, it recommended “that the practice of placing prisoners naked in the observation cell be ended immediately.”⁸⁴⁰

The CPT has paid “particular attention to prisoners detained in conditions akin to solitary confinement. . . . Solitary confinement can, in certain circumstances, amount to inhuman and degrading treatment; in any event, all forms of solitary confinement should be as short as possible.”⁸⁴¹ The CPT has acknowledged the harmful consequences of solitary confinement. It said, “It is generally acknowledged that *all forms of solitary confinement* without appropriate mental and physical stimulation *are likely, in the long term, to have damaging effects, resulting in deterioration of mental faculties and social abilities.*”⁸⁴²

⁸³⁸ *Id.* Paras. 443–449.

⁸³⁹ Report to the Russian Government on the Visit to the Russian Federation Carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 2 to 17 December 2001. June 30, 2003: para. 18. Doc. No. CTP/Inf (2003) 30.

⁸⁴⁰ Report to the Finnish Government on the Visit to Finland Carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 7 to 17 June 1998. May 11, 1999: para. 102. Doc. No. CPT/Inf (99) 9.

⁸⁴¹ Report to the Finnish Government on the Visit to Finland Carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 10 to 20 May 1992. April 1, 1993: para. 67. Doc. No. CPT/Inf (93) 8. The conditions that were referenced by CPT: “Most of the cells contained only a platform bed and a lavatory—both made of concrete. . . . Many of the cells were in an unhygienic condition and some were extremely dirty. . . . To sum up, the vast majority of prisoners spent their time alone in their cells, with little to occupy them. Given the extended periods for which persons may be held under voluntary or non-voluntary segregation, the regime which was offered to them cannot be regarded as acceptable.” *Id.* Paras. 70–72.

⁸⁴² *Id.* Para. 73. Emphasis added.

It has condemned other psychologically coercive interrogation various techniques:

- In a report on a visit to the Ukraine, the CPT said that the use of muzzled dog, along with tear gas, “can only be justified in very exceptional circumstances.”⁸⁴³
- The CPT visited Turkey in September 2003 and received reports of ill-treatment, including sleep deprivation, prolonged standing, blindfolding, and threats to harm the detainee and/or family members.⁸⁴⁴
- In a visit report to the former Yugoslav Republic of Macedonia, the CPT listed sleep deprivation during prolonged periods and mock executions as types of ill-treatment being used.⁸⁴⁵

Based on a consideration of criminal, constitutional, and military US law, it is clear that the use of psychologically abusive interrogation methods is a violation of the federal anti-torture statute, the US Constitution, and military law and regulations. It is also a violation of international human rights treaties to which the US is a party. Finally, after considering other international instruments and jurisprudence surrounding interrogation methods, it is clear that the use of psychologically abusive interrogation methods places the US out of step with the rest of the world, even though it claims to be a human rights standard setter and role model. The US is clearly not fulfilling its legal obligations to prevent torture and cruel, inhuman, or degrading treatment.

⁸⁴³ Report to the Ukrainian Government on the Visit to Ukraine Carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 24 November to 6 December 2002. December 1, 2004: para. 140. Doc. No. CPT/Inf (2004) 34.

⁸⁴⁴ Report to the Turkish Government on the Visit to Turkey Carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 7 to 15 September 2003. June 18, 2004: para. 11. Doc. No. CPT/Inf (2004) 16.

⁸⁴⁵ Report to the Government of “the former Yugoslav Republic of Macedonia” on the Visit to “the former Yugoslav Republic of Macedonia” Carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 15 to 19 July 2002. January 16, 2003: para. 9. Doc. No. CPT/Inf (2003) 5.

VII. Conclusion

The descent into routine use of psychological torture required a willingness to depart from values, law, and practices long enshrined in military and civilian investigative traditions. The process inexorably followed from the willingness to “take the gloves off” and replace the firm and unyielding standards of the Geneva Conventions and Convention against Torture with some vague notion of “humaneness,” which was always to be balanced against claimed military necessity. After that, practices in the field, legal interpretations, and policy directives all reinforced one another. At Abu Ghraib, for example, nakedness became an accepted part of interrogation strategy and Pentagon lawyers found a way to justify its use, which in turn served to reinforce its use. The authors of the policies recognized that many of the coercive and abusive techniques were very harmful and degrading, so they introduced bogus “safeguards” like medical sign-offs, command approval, and monitoring. There is no indication that these supposed safeguards were carried out; on the contrary, the evidence suggests that even limitations placed in directives on abusive techniques that had become commonplace had little effect. Like all forms of abuse, once unleashed, psychological torture became the norm.

The full extent of psychological torture remains unknown. In the first place, despite the thousands of pages of documents now produced, many questions still exist. How many detainees were subjected to sleep deprivation and to what effect? How many have been kept in isolation for days, weeks, and even months at a time? Who signed off on interrogation plans allowing illegal techniques? What was the role of medical personnel in interrogation planning and monitoring? What was the impact on the detainees – perhaps numbering in the thousands – subjected to psychological torture? Freedom of Information Act requests and leaked documents are no substitute for a full and independent investigation by an entity that can subpoena documents and witnesses.

Second, there has been no accountability at the highest levels.

Third, there has been virtually no concern for the victims. The United States gives more than \$5 million to the UN Voluntary Fund for Victims of Torture,⁸⁴⁶ yet it has never acknowledged the harm it has done to individuals through its own policies and practices, much less offered any assistance to them. It should be noted, too, that this report does not address the impact of participation in torture by perpetrators, but there is abundant evidence of long term psychological effects on those who participated in or witnessed torture.

Finally, and most disturbing of all, there are strong indications that psychological torture remains in use to this day. The recent announcement by the Defense Department that a new interrogation manual will eliminate techniques like stripping prisoners, keeping them in stressful positions for prolonged periods, using military dogs to intimidate prisoners, and sleep deprivation is a welcome sign but it remains unclear whether other techniques, including isolation and severe humiliation, remain permitted, and whether there are exceptions either at the behest of commanders or for certain detainees. And while the December 2004 opinion of the Office of Legal Counsel of the Justice Department largely restored individual accountability for engaging in physical torture, it essentially immunized military and intelligence officials from liability for psychological torture. The elimination of psychological torture requires decisive and unequivocal action.

⁸⁴⁶ *US State Department Report on Human Rights 2004*. February 28, 2005. Appendix E: Economic and Security Assistance. Available at: <http://www.state.gov/g/drl/rls/hrrpt/2004/41783.htm>. Accessed April 28, 2005.

VIII. Recommendations

I. To the Executive Branch

A. End and Prohibit Use of Psychological Torture

1. All agencies of the United States government should end the use of all psychologically coercive interrogation methods and custodial practices against detainees that amount to torture or cruel, inhuman and degrading treatment or punishment, including but not limited to the use of death threats, mock executions, military working dogs, cultural and sexual humiliation, sensory deprivation and overload, isolation, and sleep deprivation. These prohibitions should be contained in instructions to US personnel and contract employees issued by the Department of Defense, the Central Intelligence Agency (CIA) and other agencies that have custody responsibilities or engage in interrogations.

2. In this connection, the Department of Defense should also repudiate the Working Group report from April 2003, which incorporated language verbatim from the August 2002 torture opinion by the Office of Legal Counsel of the Department of Justice and approved the use of interrogation techniques that amount to psychological torture or cruel, inhuman or degrading treatment.

3. Education and information regarding the prohibition against torture under domestic and international law, including psychological torture, should be fully included in the training of military and intelligence personnel, and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention, or imprisonment.

B. Withdraw Legal Opinions That Permit Psychological Torture and Replace with Interpretation Faithful to Statute

1. The Department of Justice should repudiate and withdraw the December 30, 2004 opinion of the Office of Legal Counsel that purports to interpret the federal anti-torture statute to permit the use of psychological torture. It should replace the December 30 opinion with an interpretation that is consistent with the language of the statute criminalizing torture, the Convention Against Torture, with the Geneva Conventions, and with decisions and opinions regarding psychological torture under domestic and international law.

2. The Department of Justice should provide guidance on the prohibition of cruel, inhuman, or degrading treatment, which is embodied in Article 16 of the Convention against Torture, that is consistent with the Senate Reservation in adopting the Convention.

3. The Department of Justice should make clear that the obligations of the United States to prohibit the use of cruel, inhuman or degrading treatment extend to the CIA.

4. The Department of Justice and White House Counsel should withdraw opinions that al Qaeda and Taliban detainees are not covered under the Geneva Conventions.

C. Publicly Disclose Interrogation Rules

In the tradition and consistent with Army Field Manual 34-52, all agencies of the United States government that engage in interrogation must make public the current policies that govern interrogations in Afghanistan, Guantánamo, Iraq and elsewhere.

D. Hold Perpetrators Accountable

In view of the failure to prosecute officials responsible for the policies leading to psychological torture, the Attorney General should appoint a special counsel to investigate and, where appropriate, prosecute officials at every level for crimes they may have committed, including violating the prohibition on psychological torture.

E. Rehabilitate and Compensate Victims of Torture

The United States should provide compensation and resources to rehabilitate victims of torture, including psychological torture. For individuals released from custody, those resources should be provided to assure the individuals have access to rehabilitation services if needed. For those who remain in custody, rehabilitation services should be provided directly.

F. Permit Ongoing Monitoring

All agencies of the United States government that hold detainees should provide access to facilities where detainees are being held to independent human rights organizations that report their findings publicly.

G. Promote Ethical Practice by Military Medical Personnel

1. The Department of Defense should respect the duty of health personnel not to participate in any way in torture and/or ill treatment as provided in the World Medical Association's Declaration of Tokyo and the UN Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. It should communicate these ethical standards to all military medical personnel and assure that commanders in the field do not seek to compromise them.

2. Military medical personnel also should be trained in the effective investigation and documentation of torture and ill-treatment.

II. To Congress

A. Establish an Independent Commission to Investigate

Congress should create a 9/11-style independent commission to fully investigate the use of torture, including psychological torture, and cruel, inhuman and degrading treatment by US personnel at detention facilities in Afghanistan, Iraq, and Guantánamo. Its mandate should include the role of medical personnel in advising interrogators and custodians about interrogation methods, monitoring or evaluating detainees before, during or after interrogation, providing medical records to interrogators, reporting on abuses they may have witnessed, and engaging in policy-making on interrogation. The commission should have subpoena power for personnel and documents (including tasking orders, physician reports, and cable traffic related to the health of detainees), hold hearings, and report publicly.

B. Carry out its Oversight Responsibilities

Congressional committees with oversight responsibilities should hold full hearings and obtain all records relating to the use of psychological torture by agencies of the United States government.

C. Legal reform

1. Enact legislation that reaffirms the prohibition against psychological torture, including a provision that overturns and corrects the interpretation of psychological torture in the opinion from the Justice Department's Office of Legal Counsel in December, 2004.

2. Enact legislation that reaffirms that the Central Intelligence Agency is subject to the prohibitions on torture and cruel, inhuman and degrading treatment.

3. Enact legislation requiring that medical personnel abide by ethical requirements of their profession regarding the custody and interrogation of detainees and that they be protected from pressures from commanders to subordinate their ethical responsibilities to the policies of commanders.