

**The “Torture Memos”: The Legality under
International Human Rights Law of the CIA’s Use of
‘Enhanced Interrogation Techniques’ on al-Qaeda
Detainees**

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A Dissertation submitted in partial fulfilment of the degree of Bachelor of Laws
(Honours) at the University of Otago, Dunedin, New Zealand.

14 October 2011

Acknowledgments

To my supervisor, Paul Roth, thank you for your help and advice throughout the year, I really appreciate it.

To my Mum, and lovely friends and flatmates for putting up with me.

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Table of Abbreviations

CAT	United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984
CIA	Central Intelligence Agency
CIDTP	Cruel, Inhuman, or Degrading Treatment or Punishment
DOJ	Department of Justice
ECHR	European Court of Human Rights
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights 1966
OGC	Office of General Counsel (Central Intelligence Agency)
OLC	Office of Legal Counsel
OMS	Office of Medical Services (Central Intelligence Agency)
PTSD	Post Traumatic Stress Disorder
SERE	Survival, Evasion, Resistance, and Escape
UDHR	Universal Declaration of Human Rights 1948

Introduction

The Office of Legal Counsel (OLC) is an agency of the United States Department of Justice (DOJ), whose function is to provide authoritative legal advice to the Executive Branch Agencies.¹ In the exercise of this function the OLC provides opinions on questions of law “that are centrally important to the functioning of the Federal Government”.²

Because the opinions of the OLC have been considered to be “controlling on questions of law in the Executive Branch”, the advice they proffer needs to be “ accurate, thoroughly researched, and soundly reasoned”.³ Moreover, the advice given must be independent and forthright, even when inconsistent with any policy aims of the Executive Branch.⁴ In July 2010 it was emphasised by the OLC, perhaps in light of the opinions which will be addressed, that the attorneys of the office were to base their advice on their best, impartial understanding of the law, rather than adopting a defence advocate’s position.⁵

In the wake of the 2001 September 11 terrorist attacks on the World Trade Center in New York, the OLC issued many formal legal opinions for various organs of the Executive Branch. These memoranda dealt with a myriad of questions relating to the legality of aspects of the so-called ‘War on Terror’, including the extraterritorial interrogation of non-citizen al-Qaeda detainees by the Central Intelligence Agency (CIA).

OLC opinions relating to CIA interrogation have been highly criticised, and their interpretation of conduct amounting to torture and cruel, inhuman, or degrading treatment or punishment (CIDTP) was questionable. The ‘enhanced interrogation techniques’

¹ 28 USC § 512.

² Memorandum from David J. Barron, Acting Assistant Attorney General, for Attorneys of the Office, Best Practices for OLC Legal Advice and Written Opinions (16 July 2010), at 1 [Best Practices for OLC Legal Advice].

³ Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, for Attorneys of the Office, Best Practices for OLC Opinions (16 May 2005), at 1 [Best Practices for OLC Opinions].

⁴ Ibid.

⁵ Best Practices for OLC Legal Advice, above n 2, at 1.

approved by the OLC should amount to CIDTP or torture under the international human rights law instruments of which the United States is a party. Whether such conduct meets these standards of ill-treatment is important, not only in determining whether the United States is fulfilling its international obligations, but also in terms of individual criminal responsibility.

Chapter One of this dissertation will examine these OLC memoranda in detail, including the OLC's interpretation of the United States federal torture standard and the international standard under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT 1984).⁶ It will also analyze the 'enhanced interrogation techniques' approved for use, both alone and as a course of conduct. Finally, it will also examine the OLC's interpretation of the CIDTP obligations under the CAT 1984 as well as the interpretation of techniques after the enactment of the Detainee Treatment Act 2005, implementing these CIDTP obligations into United States domestic law.⁷

Chapter Two will examine the international human rights law standards pertaining to torture and CIDTP. Focussing on the CAT 1984, the International Covenant on Civil and Political Rights 1966 (ICCPR 1966),⁸ and the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention 1950),⁹ this chapter will first examine the territorial application of the first two treaties to the United States. Next the substantive definition of torture will be analysed in relation to the facts at issue, and the distinction between torture and CIDTP will be examined in order to determine the categorization of this conduct. Finally, this chapter will analyse each of the 'enhanced interrogation techniques' in turn, determining their likely classification under international human rights law.

⁶ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (opened for signature 10 December 1984, entered into force 26 June 1987) [CAT 1984].

⁷ Detainee Treatment Act 42 USC, § 2000dd(a) [DTA 2005].

⁸ International Covenant on Civil and Political Rights (opened for signature 16 December 1966, entered into force 23 March 1976) [ICCPR 1966].

⁹ Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 4 November 1950, entered into force 3 September 1953), [European Convention 1950].

Chapter Three will address possible remedies for perpetrators and conspirators of ill-treatment. It will first focus on the inability of the international monitoring bodies to censure the United States. It will then move on to address individual criminal prosecution in the United States, noting that prosecution under federal provisions relating to CIDTP or torture is highly unlikely. It will finish by addressing the possibility of prosecuting high-level participation in torture in foreign domestic courts. The ‘Bush Six’ prosecution in Spain will be examined closely, as an example of the somewhat futile nature of these proceedings.

The Conclusion will outline the findings made in this dissertation.

Chapter One

Background: The Office of Legal Counsel Memoranda

I. The First Wave “Torture Memos”

The first published opinion relating to the (CIA) treatment of al-Qaeda detainees arose after the agency established a programme to detain and interrogate terrorists at sites abroad.¹⁰ The CIA believed Abu Zabaydah, a high-ranking member of the al-Qaeda terrorist organization, had become accustomed to his custodial treatment and appeared unwilling to disclose further information. In response, the CIA decided to “move interrogations to an increased pressure phase,”¹¹ and proposed the use of more coercive physical techniques. The CIA’s legal division, the Office of General Counsel (OGC) sought guidance from the OLC on the legal bounds of 18 USC §§ 2340-2340A (§§ 2340-2340A), the federal prohibition against extraterritorial torture¹² and described 12 ‘enhanced interrogation techniques’ for use. The OGC also consulted extensively with senior Administration officials to gain policy approval for the interrogation programme.¹³

2002 Standards Memorandum

The OLC’s interpretation was set out in *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A* (2002 *Standards of Conduct* memorandum).¹⁴ This memorandum was severely criticised, and was superseded in December 2004 by another opinion,¹⁵

¹⁰ Central Intelligence Agency Inspector General *Special Review: Counterterrorism Detention and Interrogation Activities (September 2001-October 2003)* (2004), at 1 [CIA Inspector General Report 2004].

¹¹ Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency from Steve G. Bradbury, Principal Deputy Assistant Attorney General, Interrogation of al-Qaeda Operative (1 August 2002) at 1 [2002 *Interrogation* Memorandum].

¹² 18 USC §§ 2340-2340A. This tracks the definition in the CAT 1984 as clarified by the United States Reservations, Understandings & Declarations. See attached Appendix II.

¹³ CIA Inspector General Report 2004, above n 10, at [45]-[46].

¹⁴ Memorandum for Alberto R. Gonzales, Counsel to the President from Jay S. Bybee, Assistant Attorney General, Regarding Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A (1 August 2002) [2002 *Standards of Conduct* memorandum].

¹⁵ Memorandum for James B. Comey, Deputy Attorney General, from Daniel Levin, Acting Assistant Attorney General, Legal Standards Applicable under 18 U.S.C §§ 2340-2340A (30 December 2004) [2004 *Legal Standards* memorandum].

despite the general proposition that the OLC does “not lightly depart” from its past opinions.¹⁶

This 2002 *Standards of Conduct* memorandum held that acts needed to be of “an extreme nature”¹⁷ to constitute torture under the federal provision or the CAT 1984. With regard to the infliction of “severe physical pain or suffering” requirement,¹⁸ the OLC stated that this pain must be as intense as that “associated with serious physical injury so severe that death, organ failure or permanent damage resulting in a loss of significant body function would likely result”,¹⁹ an extremely high threshold, and using a phrase borrowed from contextually unrelated federal statutes.²⁰ Regarding “severe mental pain or suffering”, the memorandum concluded that it must be “significant psychological harm of a significant duration”, for example, the development of Post Traumatic Stress Disorder (PTSD) lasting for months or years.²¹ Along with these limited definitions, the OLC held that in order for a defendant to have the requisite “specific intent” to be guilty of torture, the defendant’s precise objective must have been to inflict severe pain or suffering.²² A provision consistent with this minute analysis would practically ensure no government actor, acting to obtain human intelligence for national security ends would ever be guilty of committing torture.

In terms of their assessment of the international legal standard of torture, the OLC looked at the decision of the European Court of Human Rights (ECHR) in *Ireland v United Kingdom*, which held that five interrogation techniques, similar to those approved in other OLC memoranda, were only “inhuman and degrading treatment”.²³ This decision

¹⁶ Best Practices for OLC Legal Advice, above n 2, at 2.

¹⁷ 2002 *Standards of Conduct* memorandum, above n 14, at 1.

¹⁸ 18 USC § 2340(1).

¹⁹ 2002 *Standards of Conduct* memorandum, above n 14, at 6. See generally the 2002 *Standards of Conduct* memorandum, where elements of the federal crime of torture were held to be: (a) that the torture occurred outside the United States; (b) the defendant acted under colour of law; (c) the defendant exercised physical control over the victim, or held them in custody; (d) the defendant specifically intended to cause severe pain or suffering, and (e) the acts did cause severe pain and suffering.

²⁰ *Ibid*, at 5-6. These federal statutes defined an emergency medical condition for the purpose of providing health benefits.

²¹ 2002 *Standards of Conduct* memorandum, above n 14, at 1 and 7.

²² *Ibid*, at 3-4.

²³ *Ireland v United Kingdom* (5310/71), ECHR 18 January 1978 at [167].

reinforced the OLC's opinion that extreme conduct causing very intense pain was torture.²⁴ Importantly, at this time there was no extraterritorial federal criminal prohibition on CIDTP, so a decision that such techniques amounted to this standard was somewhat irrelevant in assessing CIA interrogators' criminal liability. The reliance on this decision alone is misplaced. While directly relevant in terms of context, the ECHR has recognised acts previously categorised as 'inhuman and degrading' could be categorized differently in the future.²⁵ Consequently, if these interrogation techniques arose before the ECHR today, they could be regarded as torture. In any case, even if some of the techniques do not amount to torture, it is relevant that they would be 'inhuman and degrading treatment' as this is now prohibited in United States domestic legislation, and is subject to the same obligations as torture under international human rights instruments.²⁶

The OLC also looked at the decision of the Supreme Court of Israel in *Public Committee Against Torture v. State of Israel*,²⁷ which they considered as indicating that coercive physical interrogation techniques did not constitute torture.²⁸ This reading of the decision is disputable, since the decision only decided that the interrogators "lacked positive authority under existing domestic Israeli law".²⁹ More relevant was the United Nations Committee Against Torture (Torture Committee) concluding in 1997,³⁰ that very similar methods employed by Israel were both CIDTP under Article 16 of the CAT 1984,³¹ and torture under Article 1.³²

²⁴ 2002 *Standards of Conduct* memorandum, above n 14, at 27. The OLC did not consider these international decisions to be binding on the interpretation of §§ 2340-2340A, but as useful indicators of the international community's view of torture.

²⁵ *Selmouni v France* (1999) 29 EHRR 403 (Grand Chamber, ECHR) at [101].

²⁶ In 2005 the Detainee Treatment Act was passed, which made 'cruel, inhumane or degrading treatment or punishment' a criminal offence under United States law. See DTA 2005, above n 7.

²⁷ *Public Committee Against Torture v. State of Israel* H.C. 5100/94 (1999).

²⁸ 2002 *Standards of Conduct* memorandum, above n 14, at 30-31.

²⁹ Ardi Imseis "'Moderate' Torture on Trial: Critical Reflections on the Israeli Supreme Court Judgment Concerning the Legality of General Security Service Interrogation Methods" (2001) Berkeley J Intl L 328 at 340.

³⁰ *Committee Against Torture, Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Conclusions and Recommendations of the Committee Against Torture, Israel A/52/44* (1997) at [257] [Conclusions and Recommendations of the Torture Committee on Israel 1997].

³¹ CAT 1984, above n 6, art 16.

³² CAT 1984, above n 6, art 1(1).

As for the standards set forth in the text of the CAT 1984 itself, the OLC felt that the requirement of “severe” pain or suffering in Article 1(1) reinforced the idea of torture encompassing only extreme acts.³³ However, the Torture Committee clearly indicated this was not the case in 2006 when they asked the United States to explain how a “statement that the prohibition against torture in §2340 covers only extreme acts is compatible with Art 1”.³⁴

2002 Interrogation Memorandum

A second memorandum entitled *Interrogation of al Qaeda Operative (2002 Interrogation memorandum)* determined that 10 enhanced interrogation techniques would not violate the federal torture provision.³⁵ This conclusion relied on, and was limited to, certain facts provided by the CIA.³⁶ The opinion placed great emphasis on the fact that most of the techniques were used as part of military Survival, Evasion, Resistance, and Escape (SERE) training without any reported incident of “prolonged mental harm”.³⁷ However, as the Central Intelligence Agency Inspector General *Special Review: Counterterrorism Detention and Interrogation Activities Report* (CIA Inspector General Report 2004) points out,³⁸ this reliance was inappropriate, particularly regarding the waterboard technique. In this report, the Office of Medical Services (OMS) asserted that the:³⁹

“SERE waterboard experience was so different from the subsequent Agency usage as to make it almost irrelevant. Thus there was no *a priori* reason to believe that applying the waterboard with the frequency and intensity with which it was used was either efficacious or medically safe”.

³³ 2002 *Standards of Conduct* memorandum, above n 14, at 15.

³⁴ Committee Against Torture *List of Issues to be Considered During the Examination of the Second Periodic Report of the United States of America* CAT/C/48/Add.3 (2006) at [1] [*Torture Committee List of Issues Pre-Second Periodic Report, United States*].

³⁵ Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency from Steven G. Bradbury, *Interrogation of al Qaeda Operative* (1 August 2002) [2002 *Interrogation* memorandum].

³⁶ *Ibid*, at 1. These facts included the OLC considering that the CIA had undertaken due diligence to ascertain the potential effect of the proposed techniques on Zabaydah’s mental health.

³⁷ *Ibid*, at 4.

³⁸ CIA Inspector General Report 2004, above n 10.

³⁹ *Ibid*, at 22 (footnote 26).

The OLC determined that the following ‘enhanced interrogation techniques’ did not reach the “severe pain or suffering” standard under §§ 2340-2340A:⁴⁰

- Extended Sleep Deprivation for up to 11 consecutive days;⁴¹
- The Attention Grasp: grasping on both sides of collar opening and quickly drawing the individual toward the interrogator;⁴²
- The Facial or Insult Slap to the area between the chin and earlobe;⁴³
- Walling: slamming the individual into a flexible plyboard wall, which produces a loud noise in order to shock or surprise him and magnify the impact;⁴⁴
- Wall Standing, a type of stress position inducing muscle fatigue from the prolonged holding of a position;⁴⁵
- A variety of stress positions, designed to produce physical discomfort in the form of muscle fatigue;⁴⁶
- The use of Cramped Confinement boxes;⁴⁷
- Cramped Confinement boxes in conjunction with the introduction of an insect;⁴⁸
- Waterboarding.⁴⁹

⁴⁰ See attached Appendix III for further descriptions of these and other techniques.

⁴¹ 2002 *Interrogation* memorandum, above n 35, at 3.

⁴² *Ibid.*, at 2.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*, at 3.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

The OLC noted that these individual techniques would be used in some combination, with limited repetition on an “as needed basis”, with the interrogation phase lasting no longer than 30 days.⁵⁰ The expectation was that the techniques would be used in an escalating fashion, and the OLC believed this course of conduct would not cause severe physical pain or suffering.⁵¹

Finally, the OLC determined that in any case, CIA interrogators would not have the specific intent necessary for torture, thus absolving them from liability, even if they were to cause Zabaydah severe pain or suffering, torturing him in all but in name. This emphasis on specific intent is contrary to the intent standard under the CAT 1948, which requires “an objective determination of the circumstances”, a much lower threshold.⁵²

2002 International Obligations memorandum

A third OLC memorandum held that the interrogation methods would also not violate the prohibition against torture in Article 1 of the CAT.⁵³ The CAT 1984 does employ different language in its definition of torture, but the OLC noted that the United States Understanding attached to the ratification document defined torture identically to § 2340, introducing the ‘specific intent’ requirement and defining severe mental pain or suffering in narrow terms.⁵⁴ Consequently, the OLC determined that the United States was only bound by the standard set forth in their Understanding, identical to their federal standard,

⁴⁹ Ibid, at 4. The CIA orally informed the OLC that one waterboard application would not last longer than 20 minutes. Later opinions are more detailed with regards to specific time limits for the use of the waterboard.

⁵⁰ 2002 *Interrogation* memorandum, above n 35, at 2.

⁵¹ Ibid, at 16.

⁵² Committee Against Torture *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No. 2, Implementation of Article 2 by States Parties* CAT/C/GC/2 (2008) at [9] [CAT *General Comment 2*].

⁵³ Letter to the Honorable Alberto R. Gonzales, Counsel to the President, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, regarding the United States obligations under the Torture Convention and Prosecution under the Rome Statute (1 August 2002) [2002 *International Obligations* memorandum].

⁵⁴ Office of the United Nations Commissioner for Human Rights “Declarations and Reservations” (2004) <www2.ohchr.org/english/law/cat-reserve.htm> at United States, Reservation II (1)(a) [CAT 1984 RUD’s]. See attached Appendix II for more on United States Reservations, Understandings & Declarations.

and arguably much harder to establish than that under the CAT. Comments made since by the Torture Committee raise doubts as to this conclusion.

II. The Second Wave “Torture Memos”

2004 Legal Standards Memorandum

In December 2004, as previously mentioned, the OLC issued a superseding opinion on the interpretation of the federal torture prohibition, *Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A* (2004 *Legal Standards* memorandum).⁵⁵ In this memorandum the OLC departed from their previous definition of “severe physical pain or suffering”.⁵⁶ Despite the recognition that this definition was contextually inaccurate and imposed an unduly high threshold, the OLC still held that the ordinary meaning of “severe” covered only intense pain and suffering.⁵⁷

As for “severe mental pain or suffering”, the OLC affirmed the resulting mental harm must have some lasting duration, although disagreed that this would have to last for months or years to qualify as ‘prolonged’.⁵⁸ Finally, this opinion refused to define “specific intent”, recognising the ambiguity of this term.⁵⁹ Notably however, the OLC specifically did not reiterate the precise objective test,⁶⁰ but did state that:⁶¹

“If an individual acted in good faith, and only after reasonable investigation establishing that his conduct would not inflict severe physical or mental pain or suffering, it appears unlikely that he would have the specific intent necessary to violate sections 2340-2340A”.

⁵⁵ 2004 *Legal Standards* memorandum, above n 28.

⁵⁶ *Ibid*, at 8.

⁵⁷ *Ibid*, at 9.

⁵⁸ *Ibid*, at 14 (footnote 24).

⁵⁹ *Ibid*, at 16.

⁶⁰ *Ibid*, at 16-17 (footnote 27).

⁶¹ *Ibid*, at 17.

This good faith analysis is similar to that detailed in the 2002 *Interrogation* memorandum, and as previously stated, is contrary to the more objective approach under the CAT 1984.⁶²

2005 Certain Techniques Memorandum

Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee (2005 *Certain Techniques* memorandum) approved the legality of 13 ‘enhanced interrogation techniques’, most of which were approved in the 2002 *Interrogation* memorandum.⁶³

Having set out their “understandings, limitations and safeguards”,⁶⁴ the OLC determined that the following enhanced interrogation techniques did not reach the “severe pain or suffering” standard under §§ 2340-2340A:⁶⁵

- Dietary Manipulation, where normal food is replaced by bland commercial liquid meals;⁶⁷
- Sleep Deprivation, this time for up to 7.5 days. Unlike the previous 2002 *Interrogation* memorandum, this addresses the effects of shackling and diaper use, part of how the sleep deprivation is maintained;⁶⁸
- Nudity;⁶⁹

⁶² See above, n 86.

⁶³ Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee (10 May 2005) at 15 (footnote 19) [2005 *Certain Techniques* memorandum].

⁶⁴ These safeguards included the OMS medical and psychological evaluation of detainees, along with their monitoring role, and duty to intervene to prevent severe pain or suffering. Emphasis was also placed on the fact the CIA medical and psychological personnel were involved in imposing limits and safeguards on these procedures, making them different from those approved in 2002, where OMS was not similarly consulted.

⁶⁵ 2005 *Certain Techniques* memorandum, above n 63, at 28.

⁶⁶ See attached Appendix III for further descriptions of these and other techniques.

⁶⁷ 2005 *Certain Techniques* memorandum, above n 63, at 9.

⁶⁸ *Ibid*, at 11.

- The Attention Grasp and Facial Slap, as in the 2002 *Interrogation* memorandum;⁷⁰
- The Abdominal Slap: hitting the individual between the naval and the sternum with the back of a bare hand;⁷¹
- Facial Hold, whereby the interrogator holds the detainee’s head immobile using open palms on either side of their face;⁷²
- Wall Standing, stress position use, Cramped Confinement and Walling, as in the 2002 *Interrogation* memorandum;⁷³
- Water Dousing, where cold potable water is poured on the detainee;⁷⁴
- Waterboarding, as adjusted since its approval in 2002 *Interrogation* opinion.⁷⁵

This opinion observed that waterboarding is extremely traumatic, and could subject detainees to a great degree of stress.⁷⁶ Despite this, the OLC did not consider the duration of mental harm inflicted to be sufficiently severe.⁷⁷ The Torture Committee has since stated that psychological torture should include a “wider category of acts which cause severe mental suffering, regardless of its duration”.⁷⁸ Even if prolonged mental harm were the correct standard, medical experts on torture have noted that this technique can

⁶⁹ Ibid, at 7-8.

⁷⁰ Ibid, at 8.

⁷¹ Ibid, at 8-9.

⁷² Ibid, at 8.

⁷³ Ibid, at 8-9.

⁷⁴ Ibid, at 9-10.

⁷⁵ Ibid, at 13.

⁷⁶ Ibid, at 41-42.

⁷⁷ Ibid, at 41 and 44.

⁷⁸ Committee Against Torture *Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Conclusions and Recommendations of the Committee Against Torture, United States of America* CAT/C/USA/CO/2 (2006) at [13] [*Conclusions and Recommendations of the Torture Committee* 2006].

result in long-term consequences such as PTSD”.⁷⁹ Zabaydah stated that during the procedure “he thought he was going to die and lost control of his urine, and still loses control of it four years later when under stress”.⁸⁰ Despite OLC argument, the safeguards and limitations on the technique are not enough to distinguish it from other uses of the waterboard that have been considered torture, as the physiological sensation of drowning would still be effected.⁸¹

2005 Combined Techniques Memorandum

The OLC also determined that combinations of these techniques would not breach the federal torture statute when applied to detainees like those previously considered in *Application of 18 U.S.C. §§ 234—2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees*.⁸² This memorandum noted that courts tend to take a “totality-of-the-circumstances” approach in determining whether torture has occurred, so the OLC assessed the techniques as a course of conduct.⁸³ A prototypical interrogation was described and approved, with this approval extending to other conceivable combinations.⁸⁴ Overall, reminiscent of previous opinions, the OLC placed great emphasis on the role of the OMS and the safeguards and limitations of the techniques in determining the course of conduct would not amount to torture.

2005 Obligations Under Article 16 Memorandum

The OLC then determined that these techniques would not violate the United States

⁷⁹ Daniel Kanstroom “On ‘Waterboarding’: Legal Interpretation and the Continuing Struggle for Human Rights” (2009) 32 BC Intl & Comp L Rev 203 at 204.

⁸⁰ Report for John Rizzo, Acting General Counsel, Central Intelligence Agency from Geoff Loane, Head of Regional Delegation for United States and Canada, International Committee of the Red Cross, ICRC Report on the Treatment of Fourteen “High Value Detainees” In CIA Custody (14 February 2007) at Annex 1(i) [ICRC *High Value Detainees* report 2007].

⁸¹ The international human rights standards on torture will be discussed in further detail in Chapter 3.

⁸² Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency from Steven G. Bradbury, Principal Deputy Assistant Attorney General, *Application of 18 U.S.C. §§ 234—2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees*, at 10 (10 May 2005) [2005 *Combined Techniques* memorandum].

⁸³ *Ibid*, at 3.

⁸⁴ See attached Appendix II for further description of a prototypical interrogation.

obligations under Article 16 of the CAT 1984.⁸⁵ In *Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May be Used in the Interrogation of High Value al Qaeda Detainees* (2005 *Obligations Under Article 16* memorandum),⁸⁶ the OLC determined that Article 16 did not apply to CIDTP conduct conducted outside United States territory where the United States does not exercise de facto governmental authority.⁸⁷ The OLC considered that the foreign ‘black sites’ where these interrogations took place were not “any territory under U.S. jurisdiction”.⁸⁸ This argument, as applied to CIDTP under the CAT 1948 has some credibility, since during the drafting the wider phrase “under its jurisdiction” was used.⁸⁹ However later comments by the Torture Committee suggest that any CIDTP acts undertaken by CIA agents as part of their intelligence gathering should violate the CAT 1984, even if they are outside the United States.

III. The Third Wave “Torture Memo”

In December 2005 the Detainee Treatment Act entered into force in the United States, implementing the United States obligation under Article 16 of the CAT 1948 as qualified by their Reservation I (1). This provided that:⁹⁰

“No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment”.

⁸⁵ CAT 1984, above n 6, art 16(1). See attached Appendix I.

⁸⁶ Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency from Steven G. Bradbury, Principal Deputy Assistant Attorney General, *Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May be Used in the Interrogation of High Value al Qaeda Detainees* (30 May 2005) [2005 *Obligations Under Article 16* memorandum].

⁸⁷ *Ibid*, at 1-2.

⁸⁸ *Ibid*.

⁸⁹ Craig Forcese “A New Geography of Abuse? The Contested Scope of U.S. Cruel, Inhuman and Degrading Treatment Obligations” (2006) 24 *Berkeley J Intl L* 908 at 916-917. See Chapter 3 for further clarification.

⁹⁰ DTA 2005, above n 7.

This meant that, contrary to previous conclusions made by the OLC, extraterritorial CIDTP was now prohibited by federal law, and the standard could be subjected to judicial inquiry. CIDTP here is limited to “the cruel, unusual, and inhuman treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States.”⁹¹

In response to this, and other events,⁹² the OLC issued another opinion, *Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to Certain Techniques that May Be Used by the CIA in the Interrogation of High-Value al Qaeda Detainees* (2007 War Crimes Act memorandum).⁹³ In this memorandum the OLC found that the following techniques did not amount to CIDTP under the Detainee Treatment Act 2005, as understood in light of the ‘shocks the conscience’ jurisprudence of the Fifth Amendment to the Constitution.⁹⁴

- Dietary Manipulation, Facial Hold, Attention Grasp and Facial Slap as in the 2005 *Certain Techniques* memorandum;⁹⁵
- Sleep Deprivation, limited to 96 consecutive hours;⁹⁶
- The combination of these techniques.⁹⁷ The OLC conceded that whilst this combination can cause uncertainty about treatment, this is necessary for the effectiveness of the techniques, and in the context is not arbitrary or outrageous.⁹⁸

⁹¹ Ibid, § 2000dd(d).

⁹² The other events being the United States Supreme Court decision in *Hamdan v Rumsfeld* 548 US 557 (2006), holding that Common Article 3 of the 1949 Geneva Conventions applied to al-Qaeda, and the enactment of the Military Commissions Act of 2006, which altered the definition of a ‘war crime’ under the War Crimes Act 1996.

⁹³ Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to Certain Techniques that May Be Used by the CIA in the Interrogation of High-Value al Qaeda Detainees (20 July 2007) [2007 *War Crimes Act* memorandum].

⁹⁴ Ibid, at 44.

⁹⁵ Ibid, at 8.

⁹⁶ Ibid.

⁹⁷ Ibid, at 47.

⁹⁸ Ibid, at 48.

IV. The Revocation of the OLC Memoranda

In January 2009 President Obama issued Executive Order 13491, *Ensuring Lawful Interrogations*.⁹⁹ This stated that agents of the United States government could not, in conducting interrogations, “rely upon any interpretation of the law governing interrogation issued by the Department of Justice between September 11, 2001, and January 20, 2009”.¹⁰⁰ This was soon followed in April and June of 2009 with the withdrawal of the OLC opinions addressing the CIA’s use of enhanced interrogation techniques.¹⁰¹

V. Conclusion

The OLC memoranda relating to the CIA’s use of ‘enhanced interrogation techniques’ rely on some questionable legal reasoning, and do not reflect the current views on torture and CIDTP under international human rights law. The subsequent revocation of these memoranda further undermines their validity. It is likely that the techniques approved by the OLC did breach prohibitions against torture and CIDTP as set out in international human rights instruments. Whether such violations have occurred must be assessed, as violation of international standards can affect individual criminal liability, and the obligations of the United States at international law, subjects of concern in the OLC memoranda.

⁹⁹ Barack Obama “Ensuring Lawful Interrogations”, Executive Order 13491 (22 January 2009).

¹⁰⁰ *Ibid*, at § (3)(c).

¹⁰¹ Memorandum for the Attorney General from David J. Barron, Acting Assistant Attorney General, Withdrawal of Office of Legal Counsel CIA Interrogation Opinions (15 April 2009); Memorandum for the Attorney General from David J. Barron, Acting Assistant Attorney General, Withdrawal of Office of Legal Counsel Opinion (11 June 2009).

Chapter Two

Do the ‘Enhanced Interrogation Techniques’ Violate the Prohibitions on Torture and Cruel, Inhuman, and Degrading Treatment in International Human Rights Law?

I. Introduction

Quite apart from the proscription against torture and CIDTP in customary international law, with the prohibition against torture widely regarded as a peremptory norm, there are many international instruments that proscribe such ill-treatment.¹⁰² This dissertation will focus upon the classification of the ‘enhanced interrogation techniques’ under the three most relevant human rights instruments, the CAT 1984, the International Covenant on Civil and Political Rights 1966 (ICCPR 1966),¹⁰³ and the European Convention of 1950.

International humanitarian law also deals with ill-treatment including torture and CIDTP, when it occurs in the context of an armed conflict, but the focus of this work is upon the relevant standards in international human rights law, which is applicable at all times.¹⁰⁴

The most relevant international standard by which to judge the legality of the CIA’s use of ‘enhanced interrogation techniques’ is the CAT 1984. This treaty was ratified by the United States in 1994, albeit subject to their Reservations, Understandings and Declarations.¹⁰⁵ The next most relevant international instrument is the ICCPR 1966, which amongst the guarantees of ‘civil and political’ rights, obliges States Parties to

¹⁰² Robert K Goldman “Trivializing Torture: The Office of Legal Counsel’s 2002 Opinion Letter and International Law Against Torture” (2004) 12 (1) Hum Rts Brief 1 at 2.

¹⁰³ ICCPR 1966, above n 8.

¹⁰⁴ In any case there is much overlap between international human rights and humanitarian law in the area of torture and CIDTP. In *Prosecutor v. Kunarac* IT 96 23 & IT 96 23/1-A (ICTY) 12 June 2002, it was held that elements of CAT 1984’s definition of torture represented customary international law. These included the severe pain and suffering requirement, the intentional infliction requirement, and the impermissible purposes requirement. These are the contentious elements that are addressed in great detail in this Chapter.

¹⁰⁵ CAT 1984 RUD’s above n 34. See attached Appendix II.

respect and ensure the rights of persons to be free from torture and CIDTP.¹⁰⁶ The United States became a party to this instrument in 1992, subject again to their Reservations, Understandings and Declarations.¹⁰⁷

Finally, the European Convention 1950, whilst not directly applicable to the United States, is extremely important because the jurisprudence under this Convention is the “most developed and effective in the world on this subject”.¹⁰⁸ This Convention also contains similar prohibitions against torture and CIDTP as those in other international agreements to which the United States is a party.

II. Territorial Application to the United States

CAT 1984

The CAT 1984 applies at all times, including armed conflicts, so it is directly applicable to the CIA’s interrogation programme.¹⁰⁹ This instrument requires State Parties to, *inter alia*, undertake to prevent acts of torture and CIDTP in any territory under their jurisdiction.¹¹⁰ This geographical limiter, “any territory under their jurisdiction” would appear to exclude the CAT 1984 extending to interrogations undertaken in undisclosed foreign CIA ‘black sites’, particularly since this phrase was revised during drafting. As mentioned in Chapter 1, the original draft contained the wider phrase “under its jurisdiction”, but this was narrowed in response to concerns it would require regulation of citizens abroad.¹¹¹

Nevertheless, in light of comments made by the Torture Committee, the CAT 1984 should extend to foreign locations where CIA interrogators exercise factual control over

¹⁰⁶ ICCPR 1966, above n 8, art 7.

¹⁰⁷ CAT 1984 RUD’s, above n 34. See attached Appendix II.

¹⁰⁸ Matthew G St Armand “Public Committee Against Torture in Israel v. the State of Israel et al: Landmark Human Rights Decision by the Israeli High Court of Justice or Status Quo Maintained?” (2000) 25 NCJ Int’l L & Com Reg 655 at 673.

¹⁰⁹ *Conclusions and Recommendations of the Torture Committee* 2006, above n 78, at [14].

¹¹⁰ CAT 1984, above n 6, art 2(1) and art 16(1).

¹¹¹ Forcese, above n 89, at 916-917.

al-Qaeda detainees, and perhaps part of their custodial locations, but where the United States does not exercise sole de facto control over territory. In 2006 the Torture Committee specifically made mention of ‘intelligence activities’, and recalled that these activities, “notwithstanding their author, nature or location, are acts of the State party”.¹¹² Again, in 2008, in a General Comment on Article 2, the Torture Committee stated that “‘any territory under its jurisdiction’ includes *any* territory or facilities and must be applied to protect any person, citizen or non-citizen subject to the de jure or de facto control of a State party”. These comments suggest that any control exercised by CIA interrogators over foreign detention locations used to collect human intelligence, qualifies as being within the jurisdiction of the United States.

ICCPR 1966

Article 2(1) of the ICCPR 1966 obliges all State Parties to ensure all of the rights in the Convention to “all individuals within their territory and subject to its jurisdiction”.¹¹³ This textual territorial scope is *prima facie* wider than that contained in the CAT 1984, giving two alternative descriptions of the Covenant’s reach.¹¹⁴ In a 2004 General Comment by the Human Rights Committee (HRC) it was made clear that the obligation to afford the rights in the Convention covered everyone “within the power or effective control of the State Party”, even when they are not within the States Party’s territory.¹¹⁵ Al-Qaeda detainees subject to the CIA interrogation programme, despite being held outside the United States, would qualify as being under the effective control of the United States. The 2004 General Comment also makes clear that the Convention overlaps with international humanitarian law, and thus, like the CAT 1984, it applies at all times.¹¹⁶

¹¹² *Conclusions and Recommendations of the Torture Committee* 2006, above n 78, at [17].

¹¹³ *Ibid*, at [16].

¹¹⁴ Claire De Than and Edwin Shortt *International Criminal Law and Human Rights* (Sweet & Maxwell, London, 2003) at chapter 7.

¹¹⁵ Human Rights Committee *International Covenant on Civil and Political Rights, General Comment No. 31 [80], Nature of the General Legal Obligation Imposed on States Parties to the Covenant* CCPR/C/21/Rev.1/Add.13 (2004) at [10].

¹¹⁶ *Ibid*, at [11].

Conclusion

It appears clear that the supervisory bodies of the CAT 1984 and the ICCPR 1966 would regard extraterritorial actions undertaken by CIA interrogators as acts of the United States, and thus subject to their international obligations.

III. Definition of Torture

ICCPR 1966 and the European Convention 1950

Article 7 of the International Covenant on Civil and Political Rights 1966 (ICCPR 1966) states that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”.¹¹⁷ This phrase is taken directly from Article 5 of the Universal Declaration of Human Rights 1948 (UDHR 1948).¹¹⁸ Unlike ‘torture’ under the CAT 1984, these terms are left undefined, so their meaning must be deduced from comments made by the HRC in the exercise of their function of monitoring the implementation of the ICCPR 1966.¹¹⁹

Article 3 of the European Convention 1950 states “no one shall be subjected to torture or to inhuman or degrading treatment or punishment”.¹²⁰ This provision is also taken from Article 5 of the UDHR 1948,¹²¹ save for the term “cruel”, which was considered to have a wide and subjective interpretation.¹²² Again, the terms used in Article 3 have not been defined, so their meaning must be ascertained from the jurisprudence of the ECHR, and

¹¹⁷ ICCPR 1966, above n 8, art 7.

¹¹⁸ *Universal Declaration of Human Rights* GA Res 217 A III UN GOAR, 3rd sess, 183rd plen mtg (1948), art 5 [UDHR 1948].

¹¹⁹ ICCPR 1966, above n 8, art 40.

¹²⁰ European Convention 1950, above n 9.

¹²¹ UDHR 1948, above n 118, art 5.

¹²² Omer Ze’ev Bekerman “Torture--The Absolute Prohibition of a Relative Term: Does Everyone Know What is in Room 101?” (2005) 53 Am J Comp L 743 at 753.

prior to November 1998, the European Commission on Human Rights (European Commission).¹²³

CAT 1984

Article 1(1) of the CAT 1984 provides an extensive definition of torture in international law, although some commentators have argued that this cannot act as a national legal definition due to its lack of clarity.¹²⁴ However, this lack of clarity does allow for flexibility, and appears to catch a wider range of conduct than §§ 2340-2340A. Article 1 contains the proviso that the definition is “for the purposes of this Convention”,¹²⁵ although it is clear there is overlap between this definition and other areas of international law dealing with torture and CIDTP, including those instruments discussed in detail here.

The text of Article 1(1) reads:¹²⁶

“For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”.

1. Act

First it should be noted that the term “act” is also read to include omissions where appropriate, so as far as certain ‘enhanced interrogation techniques’ such as dietary

¹²³ The European Commission on Human Rights was abolished on 1 November 1998, with the entry into force Protocol 11 to the European Convention 1950.

¹²⁴ Chris Ingelse *The UN Committee Against Torture: An Assessment*, (Kluwer Law International, The Hague, 2001) at 206.

¹²⁵ CAT 1984, above n 6 art 1(1).

¹²⁶ *Ibid.*

manipulation and nudity could be seen as deliberately omitting to provide food and clothing, they fall within this definition.¹²⁷ It would be contrary to the object and purpose of the CAT 1984 to exclude such conduct.¹²⁸

2. Severe pain or suffering

The next component of this definition requires the actual infliction of “severe pain or suffering”. During drafting of the definition, the word “severe” was left in, despite proposals to have it removed.¹²⁹ This suggests that particularly serious suffering must be effected before conduct will amount to torture. Conversely, the rejection of the concept of “extremely” severe pain or suffering during the drafting process suggests that the intensity threshold ought not to be too high either.¹³⁰ As for ‘severe mental pain or suffering’, the Torture Committee indicated to the United States in 2006 that this should not be limited to “‘prolonged mental harm’ as set out in their Understanding, and instead should constitute a wider category of acts which cause severe mental suffering, regardless of their prolongation or its duration.”¹³¹

The jurisprudence of the Torture Committee, Human Rights Committee, and the European Court and Commission of Human Rights regarding previous cases of adequate and inadequate severity will be of most assistance in determining whether the ‘enhanced interrogation techniques’ were likely to, and did cause severe pain or suffering.

3. Intention

This definition of torture requires the infliction of the severe pain or suffering to be intentional. During drafting the United States proposed replacing “intentionally” with

¹²⁷ See attached Appendix II for further description of these techniques.

¹²⁸ Ahcene Boulesbaa *The UN Convention on Torture and the Prospects for Enforcement* (M Nijhoff Publishers, The Hague, 1999) at 14-15.

¹²⁹ *Ibid*, at 16.

¹³⁰ *Ibid*, at 17.

¹³¹ *Conclusions and Recommendations of the Torture Committee* 2006, above n 78, at [13].

“deliberately or maliciously”, although this was rejected.¹³² This higher standard preferred by the United States is reflected in their Understanding I(1),¹³³ and in their federal torture definition, which requires “specific intent” mens rea.¹³⁴ The Torture Committee has stated that this intention requirement in Article 1 “does not require a subjective inquiry into the motivations of the perpetrators, rather an objective determination in the circumstances”.¹³⁵ Thus it is likely that under the CAT 1984, if a prohibited purpose can be found, and severe pain and suffering has been inflicted, intention will generally follow, absent any circumstances which could suggest accidental infliction of such pain.

4. Prohibited purposes

As indicated, this definition requires the act to be intentionally inflicted for a listed purpose, or a purpose in common with those listed. Burgers and Danelius, who chaired the Working Group drafting the CAT 1984, believed that an unlisted purpose must be “connected to the interests or policies of the State” to fit within this definition.¹³⁶ The ‘enhanced interrogation techniques’ used by the CIA were believed to be necessary “to elicit threat information from...senior al-Qaeda detainees”¹³⁷ Moreover, they were employed “to protect against grave threats to United States interests”.¹³⁸ The interrogators used the enhanced techniques to extract information from detainees, and it is very clear that this was connected with the interests of the United States government. Thus the acts were undertaken for one or more of the prohibited purposes.

5. Infliction by public official or person acting in official capacity

The CAT 1984 only covers acts inflicted, instigated, acquiesced or consented to by public officials or those acting as de facto public officials. The CIA is an Executive Agency

¹³² Boulesbaa, above n 128, at 20.

¹³³ CAT 1984 RUD’s, above n 34, at United States, Reservation I (1). See attached Appendix II.

¹³⁴ 18 USC § 2340(1).

¹³⁵ CAT *General Comment 2*, above n 32, at [9].

¹³⁶ Ingelse, above n 124, at 209.

¹³⁷ CIA Inspector General Report 2004, above n 10, at [4].

¹³⁸ 2005 *Obligations Under Article 16* memorandum, above n 36, at 3.

branch of the United States government, so acts undertaken by their agents in furtherance of their interrogation programme are acts undertaken by public officials. It is also possible that such a broad range of modes of responsibility could cover other high-ranking officials such as the Director of the CIA, the authors of the OLC memoranda, and members of the Bush Administration who were consulted in order to gain policy approval for the interrogation programme.¹³⁹ The Torture Committee has made it clear that they are concerned about “establishing responsibility of persons in the chain of command as well as direct perpetrators”.¹⁴⁰ The Committee stated that senior officials cannot escape criminal responsibility for torture where they have encouraged impermissible conduct, or “knew that such conduct was occurring and failed to take reasonable preventative measures”,¹⁴¹ or authorized torture in any way by issuing guidelines or orders.¹⁴² This wide ambit indicates that persons beyond direct perpetrators are equally liable for acts of torture.¹⁴³¹⁴⁴

The Contentious Issues

As in the 2002 *Standards of Conduct* memorandum, and the 2004 *Legal Standards* memorandum, the contentious issues with respect to whether the techniques amount to torture are whether severe pain or suffering was inflicted, and whether the CIA interrogators had the requisite intention.¹⁴⁵

¹³⁹ CIA Inspector General Report 2004, above n 10, at [45]-[46].

¹⁴⁰ CAT *General Comment 2*, above n 32, at [7].

¹⁴¹ *Ibid.*, at [26].

¹⁴² Torture Committee *List of Issues Pre-Second Periodic Report, United States*, above n 34 at [10].

¹⁴³ Note that under the ICCPR 1966, the Human Rights Committee has indicated that conduct need not be inflicted by those acting in a public or official capacity in order to engage the duty of the States Party to protect individuals under Article 7. Persons are to be protected against torture and CIDTP whether or not it is inflicted by a person acting in a public capacity.

¹⁴⁴ It has also been suggested there is a custody or detention requirement for torture under the CAT 1984, despite this not being expressly included in Article 1. In any case, if the CAT 1984 requires the individual to be within the custody or control of the perpetrator, this requirement is met. The al-Qaeda members subjected to these ‘enhanced interrogation techniques’ are ‘detainees’ and are under CIA custody and/or control.

¹⁴⁵ The author would like to note that any use of techniques beyond those authorised in the aforementioned OLC memoranda will not be addressed here. Many of these techniques reported in the media, including the abuses that occurred at places of detention such as Abu Ghraib in Iraq and Bagram in Afghanistan, were undoubtedly torture and are an affront to humanity.

IV. Cruel, Inhuman or Degrading Treatment or Punishment

None of the international instruments discussed in detail here define CIDTP, nor do any other treaties on the topic. However, how this concept is dealt with in each of the treaties and by the relevant supervisory bodies gives some insight into its meaning.

CAT 1984

1. Obligations attaching to CIDTP

The separation of torture and CIDTP within the CAT 1984 appears somewhat problematic, particularly since this division is not found in other international instruments.¹⁴⁶ Apparently the Working Group drafting the CAT 1984 found the concept impossible to adequately delineate so subsequently, unlike torture, CIDTP is not defined in the Convention.¹⁴⁷

Article 16 specifies that the obligations in Articles 10 to 13 apply to CIDTP as well as torture.¹⁴⁸ Glaringly absent from this list of obligations is the requirement to criminalize acts of CIDTP in domestic legislation,¹⁴⁹ to establish jurisdiction over CIDTP offending, and to extradite or punish persons suspected of committing CIDTP when found in the States Party's territory. These obligations, *inter alia*, apply to torturous conduct.¹⁵⁰ However, despite the apparent textual limitations on CIDTP, the Torture Committee has since pointed out that Article 16 referred to Articles 10 to 13 "in particular", and that Articles 3 to 15, including those obligations regarding criminalization and prosecution, are "likewise obligatory as applied to torture and ill treatment".¹⁵¹

¹⁴⁶ Bekerman, above n 122, at 752.

¹⁴⁷ Christian M De Vos "Mind the Gap: Purpose, Pain, and the Difference Between Torture and Inhuman Treatment" (2006) 14 2 Hum Rts Brief 4 at 5.

¹⁴⁸ CAT 1984, above n 6, art 16(1).

¹⁴⁹ Although conduct which would fall within CIDTP is likely to be covered by other domestic criminal prohibitions such as assault and battery.

¹⁵⁰ CAT 1984, above n 6, art 4.1, art 5.1 and art 7.1

¹⁵¹ CAT *General Comment 2*, above n 32, [3].

Another text-based distinction between torture and CIDTP in the CAT 1984 is found in the explicit statements that torture is unjustifiable, regardless of exceptional circumstances,¹⁵² or superior orders.¹⁵³ The absence of an equivalent provision in relation to Article 16 suggests that States may derogate from their CIDTP obligations in extenuating circumstances. Despite this textual difference, in 2001, in relation to the September 11 attacks, the Torture Committee reminded States Parties of the “non-derogable nature of most of the CAT obligations, including Article 16”.¹⁵⁴ Again in 2008 the Committee noted “the prohibition on ill treatment under Art 16 is likewise non-derogable”.¹⁵⁵

While the textual division between CIDTP and torture at first appears problematic, the Torture Committee has made it clear that State Party obligations attach to all ill-treatment dealt with under the Convention. However, it is still important to distinguish between CIDTP and torture, as how conduct is classified can affect individual liability of perpetrators in domestic proceedings.

2. CIDTP versus torture

Article 16 of the CAT 1984 provides that:¹⁵⁶

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

¹⁵² CAT 1984, above n 6, art 2(2)

¹⁵³ CAT 1984, above n 6, art 2(3).

¹⁵⁴ Committee Against Torture *Statement of the Committee against Torture* CAT/C/XXVII/Misc.7 (2001).

¹⁵⁵ CAT *General Comment 2*, above n 32, [3].

¹⁵⁶ CAT 1984, above n 6, art 16(1).

The question under Article 16 is whether the use of the techniques, alone or as part of a course of conduct, amounts to “other acts of CIDTP, which do not amount to torture”.¹⁵⁷ The debates regarding what separates lesser ill-treatment from torture have centred around the role of impermissible purposes and the severity of suffering imposed.

Unlike the General Assembly’s 1975 Declaration on Torture,¹⁵⁸ which defined torture very similarly to Article 1, during the drafting of the CAT 1984, the paragraph stating “torture constitutes an aggravated and deliberate form of CIDTP”¹⁵⁹ was removed by the Working Group.¹⁶⁰ Some commentators have argued that the rejection of this paragraph indicated that the drafters of the CAT 1984 favoured a more purposive test in distinguishing between torture and CIDTP, particularly since Article 16 does not require particular purposes.¹⁶¹ Commentators favouring this approach argue that CIDTP is already an aggravated behaviour, but the purpose for which it is inflicted makes it the grave crime of torture.¹⁶² The other school of thought is that the severity of pain and suffering distinguishes CIDTP and torture. The OLC memoranda appear to lean toward this approach, focusing on the severity of pain alone when referencing the CAT 1984.¹⁶³

In reality, the approach taken by the Torture Committee appears to encompass both approaches. In 2008 the Committee said that “the definitional threshold is unclear, but ill-treatment may differ from torture in severity of the pain or suffering and it doesn’t require proof of impermissible purposes”.¹⁶⁴ The jurisprudence under the Article 22 individual complaints procedure supports this median position.

In two recent complaints against Serbia and Montenegro, the Torture Committee found that treatment amounted to torture, as it could be “characterized as severe pain or

¹⁵⁷ CAT 1984, above n 6, art 16(1).

¹⁵⁸ *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* GA Res 3452 (XXX), A/10034 (1975), art 1(1).

¹⁵⁹ *Ibid*, art 1(2).

¹⁶⁰ De Vos, above n 147, at 5.

¹⁶¹ Boulesbaa, above n 128, at 5-8.

¹⁶² Jennifer Moore “Practicing What We Preach: Humane Treatment for Detainees in the War on Terror” (2006) 34 *Denv J Int'l L & Pol'y* 33 at 40.

¹⁶³ See particularly the 2002 *Standards of Conduct* memorandum.

¹⁶⁴ CAT *General Comment 2*, above n 32, at [10].

suffering, intentionally inflicted in the context of an investigation of a crime”.¹⁶⁵ Commentators in favour of the purposive approach considered the ‘investigation’ purpose to be the reason the conduct amounted to torture.¹⁶⁶ Such an analysis is questionable because impermissible purposes could have easily been found in other Torture Committee decisions where the conduct amounted only to CIDTP, such as *Keremedchiev v. Bulgaria*,¹⁶⁷ where the ill-treatment occurred in the context of an arrest, or *Osmani v. Serbia and Montenegro*, where the ill-treatment occurred in the context of a discriminatory eviction.¹⁶⁸ Also, in the recent decisions where torture was established, the treatment and injuries sustained were described as “severe pain or suffering”.¹⁶⁹ In contrast, in cases where only CIDTP was established, phrases used fell short of this standard, such as beyond a “slight physical injury” but “not appearing to amount to severe pain and suffering”.¹⁷⁰ Whilst identifying a particular impermissible purpose or purposes is necessary to establish torture, the Torture Committee’s decisions show severity plays a large role in deciding whether conduct is CIDTP or torture.

ICCPR 1966

1. Obligations attaching to CIDTP

The convergence of the terms torture and CIDTP in Article 7 means that the obligations incurred in relation to these two concepts are the same. Whilst the ICCPR 1966 requires States to adopt legislation to comply with their obligations,¹⁷¹ obligations such as exercising criminal jurisdiction over perpetrators are not set out in the text. The lack of ‘concrete’ obligations may explain why the ill-defined concept of CIDTP is subject to the

¹⁶⁵ *Dragan Dimitrijevic v. Serbia and Montenegro* (207/2002) CAT/C/33/D/207/2002, UN Committee Against Torture (CAT), 29 November 2004, [5.3]; *Jovica Dimitrov v. Serbia and Montenegro* (171/2000) CAT/C/34/D/171/2000 (2005). UN Committee Against Torture (CAT), 3 May 2005 [7.1].

¹⁶⁶ De Vos, above n 147, at 7.

¹⁶⁷ *Keremedchiev v. Bulgaria* (257/2004) CAT/C/41/D/257/2004 UN Committee Against Torture (CAT), 11 November 2008 [9.3]

¹⁶⁸ *Osmani v. Republic of Serbia* (261/2005) CAT/C/42/D/261/2005 UN Committee Against Torture (CAT), 8 May 2009 [2.1] and [10.4].

¹⁶⁹ See for example *Danilo Dimitrijevic v. Serbia and Montenegro* (172/2000) CAT/C/35/D/172/2000 UN Committee Against Torture (CAT), 16 November 2005 [7.1].

¹⁷⁰ *Keremedchiev v. Bulgaria*, above n 167, at [9.3].

¹⁷¹ ICCPR 1966, above n 8, art 2(2).

same requirements as torture in this Covenant. Also, according to Article 4(2), these rights are non-derogable.¹⁷²

2. CIDTP versus torture

Apparently during the drafting of the ICCPR 1966 there was no mention of the difference between the terms torture and CIDTP.¹⁷³ The HRC did note in 1992 that the distinctions depended on “nature, purpose and severity”, a similar test to that espoused by the Torture Committee, but thought it unnecessary to establish sharp distinctions between treatment.¹⁷⁴ In their consideration of recent individual complaints under the Optional Protocol to the International Covenant on Civil and Political Rights (Optional Protocol ICCPR),¹⁷⁵ the HRC has tended to find a violation of Article 7, but has not gone on to specify how the treatment is classified.¹⁷⁶ Recent jurisprudence of this Committee is therefore quite unhelpful in establishing whether treatment amounts to torture or CIDTP.

Despite this approach, the HRC has stated the minimum severity of conduct required to amount to degrading or inhuman treatment depends on the “circumstances of the case, including the duration and manner of the treatment, the physical and mental effects, as well as the sex, age and state of health of the victim”.¹⁷⁷

European Convention 1950

1. Obligations regarding CIDTP

¹⁷² Ibid, art 4(2). This was affirmed in 1992, where the Human Rights Committee stated that no derogation or justification from Article 7 is permissible.

¹⁷³ Ingelse, above n 124, at 208.

¹⁷⁴ Human Rights Committee *International Covenant on Civil and Political Rights, General Comment No. 20, Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Art. 7)* H R Comm, 44 sess (1992) at [4] [Human Rights Committee *General Comment 20* 1992].

¹⁷⁵ Optional Protocol to the International Covenant on Civil and Political Rights (opened for signature 16 December 1966, entered into force 23 March 1976).

¹⁷⁶ See for example *Dunaev v. Tajikistan* (1195/2003) CCPR/C/95/D/1195/2003 Human Rights Committee (HRC), 30 March 2009 [7.2] – [7.3].

¹⁷⁷ *Vuolanne v. Finland* (265/1987) CCPR/C/35/D/265/1987 Human Rights Committee (HRC), 7 April 1989, [9.2].

Article 15(2) of the European Convention 1950, like Article 4(2) of the ICCPR 1966, states that the rights in Article 3 are non-derogable.¹⁷⁸ In this manner, the texts of the European Convention 1950 and the ICCPR 1966 are wider than the CAT 1984, as they make it explicit that the right to be free from the lesser forms of ill-treatment is also absolute.

2. CIDTP versus torture

The question of what separates torture from lesser inhuman and degrading treatment also arises under the European Convention 1950. The ECHR, like the HRC has considered that there is a distinction drawn between torture and lesser ill-treatment, despite the fact that these concepts are not placed in separate articles, as in the CAT 1984.¹⁷⁹

In *Ireland v United Kingdom* the ECHR stated that the basic distinction between inhuman treatment and torture was severity alone. Despite the fact that the techniques' purpose was the extraction of information, the ECHR believed that they "did not occasion the kind of suffering of the particular cruelty and intensity implied by torture".¹⁸⁰ This reasoning "held sway over the court for 20 years", and the ECHR found many cases of inhuman treatment but few of torture.¹⁸¹ However, it appears the ECHR has retreated from its focus on severity alone in distinguishing torture and lesser inhuman treatment.¹⁸² In recent decisions such as *Akkoç v Turkey* and *Gäfgen v. Germany* it was explicitly recognized that torture also contains a purposive element, with reference to the CAT 1984.¹⁸³ These later cases show the ECHR has moved away from a sole 'severity of

¹⁷⁸ The ECHR reaffirmed this principle in *A and Others v United Kingdom* (2009) 49 EHRR 29 (Grand Chamber, ECHR) [126], specifically in reference to measures taken against al-Qaeda members in "the fight against terrorism".

¹⁷⁹ See for example *Dikme v Turkey* (20869/92) Section I, ECHR 11 July 2000 [93].

¹⁸⁰ *Ireland v United Kingdom* 1978, above n 23, at [176].

¹⁸¹ De Vos, above n 147, at 6.

¹⁸² *Ibid.* For example in *Keenan v United Kingdom* (2001) 33 EHRR 913 (Section III, ECHR) [113], the ECHR noted that while severity of suffering was a significant consideration, in some circumstances the proof of the actual effect of conduct on victims may not be such a major factor where individuals are deprived of their liberty and are subjected to unnecessary physical force.

¹⁸³ *Akkoç v Turkey* (2002) 34 EHRR 51 (Section I, ECHR) [115]; *Gäfgen v Germany* (2010) 52 EHRR 1 (Grand Chamber, ECHR) [90].

suffering test’, to one that considers the purpose for infliction as well, a test resembling that established by the Torture and Human Rights Committees.

However, even these cases note that it was the intention of the European Convention to attach a “special stigma” to torture,¹⁸⁴ and that an “elevated level of cruelty is required to attain” this threshold.¹⁸⁵ The ECHR’s statements on the nature of torture make it clear that this label only applies to the most severe treatment, despite the mixed purpose-severity test. This elevation of torture in the case law must be viewed in light of the structure of this instrument. Whether treatment amounts to torture is somewhat irrelevant, as all ill-treatment is equally prohibited under Article 3. The Court may be unwilling to ‘name and shame’ a State Party, given that it can find a lesser violation entailing the same consequences.¹⁸⁶

Like under the ICCPR 1966, ill-treatment needs to attain a minimum level of severity in order to amount to a violation of Article 3. The case of *Selcuk and Asker v Turkey* made it clear that whether a violation can be made out depends on the circumstances of the case.¹⁸⁷ With respect to persons deprived of their liberty, the ECHR noted in *Akhmetov v Russia* that States must ensure the conditions of detainment “do not subject detainees to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention” in order avoid meeting this minimum level.¹⁸⁸

3. The ‘definitions’ of CIDTP

The Article 3 terms short of torture have been treated as distinct,¹⁸⁹ as opposed to the Torture Committee’s jurisprudence, where CIDTP is treated as a single concept. As a

¹⁸⁴ Ibid.

¹⁸⁵ Ibid, at [108].

¹⁸⁶ Ibid, at 758.

¹⁸⁷ *Selcuk and Asker v Turkey* (1998) 26 EHRR 477 (ECHR) [76]. These circumstances include factors such as the physical and mental effects of the treatment on the victim, its duration, and in some circumstances the sex, age, and state of health of the victim.

¹⁸⁸ *Akhmetov v Russia* (37463/04) Section I, ECHR 1 April 2010 [74].

¹⁸⁹ De Than and Shorts, above n 114, at chapter 7.

result, the European jurisprudence is quite helpful in determining the exact categorization of ill-treatment.

The European Commission in *Denmark v Greece* held that ‘degrading treatment or punishment’ occurs when an individual is “grossly humiliated before others or is driven to act against their will or conscience”.¹⁹⁰ Although in *Raninen v Finland* it was held that it is sufficient for the victim to be humiliated in his own eyes.¹⁹¹ In *Ireland v United Kingdom* the ECHR further stated that degrading conduct “arouses feelings of fear, anguish and inferiority in victims”.¹⁹² Also in *Denmark v Greece*, the Commission stated that ‘inhuman treatment’ occurs when a person “deliberately causes severe mental or physical suffering, which is unjustifiable in the circumstances”.¹⁹³ In *Gäfgen v. Germany* the ECHR noted that ‘inhuman treatment’ had been previously found due to factors such as long duration of application.¹⁹⁴

Conclusion on CIDTP

None of these instruments define CIDTP, but they do require a minimum level of severity to be met in the circumstances for conduct to amount to a violation. The Torture Committee tends to find that conduct is CIDTP as a whole, whereas the European Court and Commission tend to distinguish between inhuman and degrading treatment. The HRC on the other hand, has gone even further than the Torture Committee and refuses to distinguish between the grades of ill-treatment, preferring to note a violation of the Article 7 without further explanation.

On the face of the texts, the CAT 1984 imposes fewer obligations with regard to CIDTP than for torture. However, subsequent statements by the Torture Committee have

¹⁹⁰ Ibid.

¹⁹¹ *Raninen v Finland* (1997) 26 EHRR 563 (EComHR) [51].

¹⁹² *Ireland v United Kingdom* 1978, above n 23, at [167]. Later cases indicate that the absence of a humiliating or degrading purpose does not “conclusively rule out a violation of Article 3”. *Yordanov v Bulgaria* (56856/00) Section V, ECHR 10 August 2006 [87].

¹⁹³ *Denmark, Norway, Sweden and the Netherlands v Greece* (1969) 12 Yearbook 186 (EComHR) [*Denmark v Greece* 1969].

¹⁹⁴ *Gäfgen v Germany*, above n 183, at [89].

narrowed the gap between these categories, bringing the Convention into line with the other instruments. This positive development prevents the United States claiming that they may derogate from their obligations and engage in conduct amounting to CIDTP but not to torture.

Over time, the test applied by the supervisory bodies to distinguish between torture and CIDTP has become the same, a mixed purpose-severity test. Intention proves less of a problem under the CIDTP standard, with some commentators arguing it is not a necessary ingredient in establishing this conduct.¹⁹⁵ Intent, as distinct from impermissible purposes has been relatively ignored in the human rights jurisprudence, and in any case, intention as an element of torture is to be established objectively in light of the circumstances. Since the circumstances in issue here include the deliberate application of ‘enhanced interrogation techniques’ for the impermissible purpose of extracting information, if these techniques amount to severe pain or suffering, then almost certainly, the requisite intention will be met, and the acts will amount to torture.

Given that impermissible purposes can be established, and arguably intention, the question is whether the ‘enhanced interrogation techniques’ resulted in “severe pain or suffering”, thus making them torture, or whether they caused less severe suffering but still amount to CIDTP under these treaties.

V. Application

Sleep Deprivation

The Torture Committee has stated that sleep deprivation for a prolonged period, and restraining in very painful conditions are both CIDTP and torture.¹⁹⁶ The HRC has also

¹⁹⁵ De Than and Shorts, above n 114, at chapter 7.

¹⁹⁶ *Conclusions and Recommendations of the Torture Committee on Israel 1997*, above n 30, at [257].

stated that Israeli use of sleep deprivation was a violation of Article 7.¹⁹⁷ Whilst the exact length and method of sleep deprivation referred to by the Committees cannot be confirmed, it is probably analogous to sleep deprivation ranging from four to 11 days,¹⁹⁸ using shackling and diapering to maintain the technique.¹⁹⁹ Both Committees also commented directly on the use of this technique by the United States, with the Torture Committee asking how “techniques like sleep...adjustments” are congruent with Article 16 CIDTP obligations,²⁰⁰ and the HRC expressing concern over the use of sleep adjustment and prolonged stress positions, stating that their use violated the prohibitions in Article 7.²⁰¹

Regarding the method of sleep deprivation, components of the treatment found to violate Article 7 in the decision of *Al Zery v. Sweden* are similar to elements of sleep deprivation in question here. In that case, treatment including stripping the detainee, placing him in diapers and shackling was part of a course of conduct violating Article 7,²⁰² even without the added discomfort inherent in prolonged sleep deprivation. In light of this jurisprudence and comments made by the HRC, the use of this technique amounts to a violation of Article 7 of the ICCPR 1966.

This technique causes physical discomfort such as fatigue,²⁰³ nausea, and diminished cognitive ability.²⁰⁴ This physical distress was accepted by the OLC as being “substantial”,²⁰⁵ and the method of sleep deprivation was also accepted as being

¹⁹⁷ Human Rights Committee *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Israel* CCPR/C/79/Add.93 (1998) at [19].

¹⁹⁸ See attached Appendix III.

¹⁹⁹ *Ibid.*

²⁰⁰ Torture Committee *List of Issues Pre-Second Periodic Report, United States*, above n 34 at [52].

²⁰¹ Human Rights Committee *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, United States of America*, CCPR/C/USA/CO/3 (2006) at [13] [*Conclusions and Recommendations of the Human Rights Committee 2006*].

²⁰² *Al Zery v. Sweden* (1416/2005) CCPR/C/88/D/1416/2005 Human Rights Committee (HRC), 25 October 2006 [3.11] and [11.6].

²⁰³ 2002 *Interrogation* memorandum, above n 35, at 3 and 14-15.

²⁰⁴ 2005 *Certain Techniques* memorandum, above n 63, at 37.

²⁰⁵ *Ibid.*, at 36-39.

potentially humiliating.²⁰⁶ Given the substantial distress caused by this technique, its prolonged duration, and the comments of the Torture Committee, including that torture does not cover only “extreme acts”,²⁰⁷ extended sleep deprivation should amount to severe physical, and perhaps mental suffering, and thus constitutes torture under the CAT 1984.

In *Ireland v United Kingdom*, the ECHR decision relied upon so heavily in the OLC memoranda, a course of conduct including sleep deprivation was considered to be inhuman and degrading.²⁰⁸ It is likely that sleep deprivation as practiced by the CIA amounts to inhuman and degrading treatment also, given its effects and method of execution. However, given the extremely high threshold the ECHR has placed on torture, it is unlikely that the use of this technique would be grave enough to meet this standard under the European Convention 1950, despite the vulnerability of the detainees, and the information-extracting purpose. The “level of cruelty required to attain the threshold of torture”²⁰⁹ was met in *Aksoy v Turkey*, where the detainee was subjected to the “Palestinian Hanging” technique.²¹⁰ It was also met in *Aydin v Turkey*, where a teenage detainee was raped and subjected to other horrific ill-treatment over a four day period.²¹¹ Whilst the sleep deprivation technique does amount to severe suffering, when contrasted with previous ECHR jurisprudence, it is unlikely to be considered cruel enough to attract the special stigma of torture under the European Convention.

Attention Grasp and Facial Hold

The Torture Committee does not appear to have previously considered any acts like the attention grasp or facial hold,²¹² although the actions could fall under “physical contact”,

²⁰⁶ *Ibid*, at 37.

²⁰⁷ Torture Committee *List of Issues Pre-Second Periodic Report, United States*, above n 34, at [1].

²⁰⁸ *Ireland v United Kingdom* 1978, above n 23, at [96] and [168].

²⁰⁹ *Gäfgen v Germany*, above n 183, at [108].

²¹⁰ *Aksoy v. Turkey* (1993) 23 EHRR 553 (ECHR) [64]. This caused severe pain and led to paralysis of the arms lasting for some time.

²¹¹ *Aydin v Turkey* (1997) 25 EHRR 251 (ECHR) [75]. This ill-treatment included being beaten, stripped naked, and sprayed with pressurized water.

²¹² See attached Appendix III.

which was indicated as being contrary to Article 16 in its comments to the United States.²¹³ While the OLC has stated that these techniques were “meant to startle, produce fear or insult”,²¹⁴ they are unlikely to be severe enough to reach the CIDTP standard under the CAT 1984, which appears to be treated as a complete concept, rather than being broken down into its constituent parts. Cases in which CIDTP have been found involve much more serious conduct than the attention grasp or the facial hold alone.²¹⁵

The use of either of these methods alone should not be considered to violate Article 7 of the ICCPR 1966 either, as the humiliation or debasement involved probably does not exceed the threshold established by the HRC.²¹⁶ Whilst mental suffering is covered by this prohibition,²¹⁷ any humiliation possibly caused by use of these two techniques is far removed from the mental anguish previously found to amount to a violation, such as that felt by persons whose loved ones are kept in incommunicado detention,²¹⁸ or the “uncertainty, anguish and mental distress” felt by a detainee returned to death row without explanation.²¹⁹ However, given that recourse to such techniques “entails other elements beyond the mere deprivation of liberty”,²²⁰ and is aimed at the humiliation of a detained person, it would probably violate Article 10(1) of the Covenant, which deals with the rights of detained persons to humane and dignified treatment.

Conversely, given the wide interpretation of ill-treatment by the ECHR, this conduct should amount to degrading treatment under the European Convention. The ECHR decision in *Ireland v United Kingdom* stated that degrading conduct is that which “arouses feelings of fear, anguish and inferiority in victims, capable of humiliating and

²¹³ Torture Committee *List of Issues Pre-Second Periodic Report, United States*, above n 34 at [52].

²¹⁴ 2002 *Interrogation* memorandum, above n 35, at 2 and 10.

²¹⁵ For example conduct such as “physically restraining in painful positions and hooding”, and “beating prisoners, denying them medical treatment, food, and proper places of detention”. Forcese, above n 89, at 915.

²¹⁶ *Vuolanne v. Finland*, above n 177 at [9.2].

²¹⁷ Human Rights Committee *General Comment 20* 1992, above n 174, at [5].

²¹⁸ *Titiahonjo v. Cameroon* (1186/2003) CCPR/C/91/D/1186/2003 Human Rights Committee (HRC), 26 October 2007 [6.4].

²¹⁹ *Chisanga v. Zambia* (1132/2002) CCPR/C/85/D/1132/2002 Human Rights Committee (HRC), 18 October 2005 [7.3].

²²⁰ *Vuolanne v. Finland*, above n 177 at [9.2].

debasing them”.²²¹ The effects of these two techniques fall squarely within this characterization of degrading treatment. Moreover, other similarly ‘slight’ conduct has been previously considered to be degrading, such as the forced shaving of a detainee’s hair without an acceptable justification.²²² These techniques would likely amount to degrading treatment, but do not inflict such severe suffering as to amount to inhuman conduct under the European Convention of 1950.

Facial and Abdominal Slaps

The use of these techniques on al-Qaeda detainees as punishment for non-compliance is very likely to be a violation of Article 7 of the ICCPR 1966.²²³ The HRC has consistently stated that corporal punishment amounts to CIDTP.²²⁴ Given that physical punishment of convicted persons is a violation of the prohibition on ill-treatment, logically the Committee should regard physical punishment of persons not yet convicted of any offence, but deprived of their liberty as a violation also.

Like the attention grasp or facial hold these techniques were also meant to surprise, shock or humiliate.²²⁵ In addition however, these techniques may have caused “minor physical pain”.²²⁶ This extra element is likely to place the use of these techniques within the bounds of the CIDTP prohibition of the CAT 1984. There can be some parallels drawn between the use of these, which may be repeatedly applied,²²⁷ and the recent Article 22 decision of *Osmani v. Serbia and Montenegro*, where the physical and mental suffering caused by slapping and hitting the complainant, aggravated by his particular vulnerability as a Roma individual, was CIDTP.²²⁸ Detainees subjected to these slaps are also

²²¹ *Ireland v United Kingdom*, above n 23, at [167].

²²² *Yankov v Bulgaria* (39084/97) Section I, ECHR 11 December 2003 [114-122].

²²³ See attached Appendix III.

²²⁴ *Pryce v. Jamaica* (793/1998) CCPR/C/80/D/793/1998 Human Rights Committee (HRC), 15 March 2004) [6.2].

²²⁵ See attached Appendix III.

²²⁶ 2005 *Certain Techniques* memorandum, above n 63, at 8-9.

²²⁷ See attached Appendix III.

²²⁸ The complainant’s vulnerability in that case arose from his identity as Roma individual, a group who had been historically been subject to great prejudice. Whilst al-Qaeda detainees do not have the same vulnerability, they are vulnerable by reason of their detainment.

vulnerable, being detained in incommunicado enemy detention. It is therefore likely that these techniques amount to CIDTP, particularly when used repeatedly.

For reasons already discussed in relation to the attention grasp and facial hold, these methods would amount to degrading treatment under the European Convention 1950. Injuries that may result from these techniques are more analogous to the four raised marks caused by strokes of the cane in the *Y v United Kingdom*, where the treatment was characterized as degrading.²²⁹ This can be compared with the bruises and wounds covering the applicant's body as a result of treatment in *Tekin v Turkey*, where the treatment was considered inhuman as well.²³⁰ It is likely therefore that these techniques can be characterized as degrading, but fall short of inhuman treatment.

Walling

This technique, accepted by the OLC as “rough handling”, and intended to shock or surprise,²³¹ was approved for repeated use up to 30 times.²³² The collar designed as a safeguard was, in fact, used to slam the detainees into the wall,²³³ and Zabaydah complained that such treatment caused his shackles to dig painfully into his ankles.²³⁴ The same reasoning applicable to the slaps would also apply here. The extra element of pain caused suggests that the use of this technique would amount to CIDTP. Like the Article 22 communications where CIDTP was established, this technique is also likely to leave visible injuries, such as multiple bruising.²³⁵ However, such injuries are unlikely to be sufficiently severe to be categorised as torture, being more analogous to injuries that

²²⁹ *Y v United Kingdom* (1992) 17 EHRR 238 (EComHR).

²³⁰ *Tekin v Turkey* (1998) 31 EHRR 95 (ECHR) [53].

²³¹ 2002 *Interrogation* memorandum, above n 35, at 13.

²³² See attached Appendix III.

²³³ ICRC *High Value Detainees* report 2007, above n 80, at 1.3.3.

²³⁴ *Ibid*, at Annex 1(i).

²³⁵ *Keremedchiev v. Bulgaria*, above n 167, at [9.3].

are more than a “slight physical injury”, but not amounting to severe pain or suffering,²³⁶ than to sufficiently severe injuries.²³⁷

Depending on the actual use of this technique in practice, walling could also amount to inhuman treatment under Article 3 of the European Convention 1950. If repeatedly used, the pain inflicted could have been quite significant,²³⁸ and although any resultant observable injuries may be “relatively slight”, they demonstrate that physical force was inflicted on a detained person.²³⁹ Given this reasoning of the ECHR in *Tomasi v France*, recourse to such physical force, resulting in even minor injuries is very likely to characterised as inhuman and degrading.²⁴⁰

Recent jurisprudence of the HRC has established that corporal punishment is *prima facie* a violation of Article 7,²⁴¹ and that the excessive use of force involved in uncomfortable shackling, blindfolding, and cutting the clothes off a detained individual amounts to a breach of article 7 of the Covenant.²⁴² In light of these it appears clear that the excessive use of force inherent in the use of the walling technique is a breach, particularly since it is not necessary in order to achieve some legitimate law enforcement purpose.²⁴³

Wall Standing and Other Stress Positions

In 2006 the Torture Committee indicated that the use of “prolonged stress positions” was contrary to the United States’ CIDTP obligations.²⁴⁴ This was also singled out by the HRC as contrary to Article 7 of the ICCPR in 2006.²⁴⁵ Given this position of the HRC, and the finding in *Carranza v. Peru* that a course of ill-treatment, including forcing the

²³⁶ Ibid.

²³⁷ *Ali v. Tunisia* (171/2000) CCAT/C/41/D/291/2006 UN Committee Against Torture (CAT), 26 November 2008 [2.6] and [15.4]. Sufficiently severe injuries in that case included those such as cranial trauma and multiple lesions or bruises requiring two weeks of recovery.

²³⁸ See attached Appendix III.

²³⁹ *Tomasi v France* (1992) 15 EHRR 1 (ECHR) [115].

²⁴⁰ Ibid.

²⁴¹ *Pryce v. Jamaica*, above n 224, at [6.2].

²⁴² *Al Zery v. Sweden*, above n 202, at [3.11], [11.6].

²⁴³ Ibid, at [11.6].

²⁴⁴ Torture Committee *List of Issues Pre-Second Periodic Report, United States*, above n 34 at [52].

²⁴⁵ *Conclusions and Recommendations of the Human Rights Committee* 2006, above n 201, at [13].

complainant to remain standing for an entire day amounted to a violation of article 7,²⁴⁶ it is likely that the use of such stress positions amounts to such a violation.

In 1997 the Torture Committee also found that “restraining in very painful conditions” was both CIDTP and torture.²⁴⁷ On balance, it is unlikely that the pain and suffering caused by this technique would be sufficiently severe to constitute torture in the Torture Committee’s view. The Torture Committee’s reference to “*restraining* in very painful conditions” suggests the detainees were shackled in some way, something not utilised in these techniques. The Torture Committee’s focus on injuries sustained by victims of torture in their Article 22 decisions also speaks against this technique amounting to torture. Nonetheless, if these techniques went beyond those explicitly mentioned in the OLC memoranda and involved the use of restraints, or did cause severe physical pain, their use would likely amount to torture.²⁴⁸

The use of ‘wall standing’ as part of a course of conduct, was found to be inhuman and degrading treatment under the European Convention 1950 due to causing “at least intense physical and mental suffering”.²⁴⁹ While prolonged stress positions do cause physical discomfort in the form of muscle fatigue,²⁵⁰ it is questionable whether these techniques used in isolation would be considered inhuman in light of the ECHR and European Commission’s more recent jurisprudence, which also focuses quite heavily on the severity of injuries inflicted. However, given that injuries such as “relatively slight” bruising and haematomas have been found to be sufficiently serious,²⁵¹ and taking into account the adaptability and “living nature” of the Convention,²⁵² the use of stress

²⁴⁶ *Carranza v. Peru* (1126/2002) CCPR/C/85/D/1126/2002 Human Rights Committee (HRC), 28 October 2005 [2.2] and [7.2].

²⁴⁷ *Conclusions and Recommendations of the Torture Committee on Israel* 1997, above n 30 at [257].

Apparently this referred to the use of the ‘Shabach’ and ‘Frog crouch’ positions. In the ‘Shabach’ position detainees were bound to a small chair that was tilted forward, with their arms bound painfully behind them. The ‘Frog crouch’ position required the detainees to crouch on the tips of their toes for a prolonged period of time.

²⁴⁸ ICRC *High Value Detainees* report 2007, above n 80, at [3].

²⁴⁹ *Ireland v United Kingdom*, above n 23, at [167].

²⁵⁰ 2002 *Interrogation* memorandum, above n 35, at 3 and 13.

²⁵¹ *Tomasi v France*, above n 239, at [115]; *Assenov and Others v Bulgaria* (1999) 28 EHRR 652 (ECHR) at [11] and [95].

²⁵² De Than and Shorts, above n 114, at chapter 7.

positions, including wall standing could amount to inhuman treatment as well, depending on the circumstances surrounding their use.

Cramped Confinement

This technique shares some similarities with stress positions since it too causes physical discomfort through restricting the detainee's movement.²⁵³ The OLC noted that the boxes restricted light,²⁵⁴ but in practice it was “completely black, hot and hard to breathe”.²⁵⁵ Despite the time limits placed on the use of the boxes, in 1993 the Torture Committee said that solitary confinement cells known as ‘coffins’, which were similarly dark, inadequately ventilated, and restrictive in size, *per se* constituted a form of torture.²⁵⁶ Consequentially this ‘enhanced interrogation technique’ contravenes the Article 1 prohibition on torture in the CAT 1984.

Unlike the Torture Commission, the ECHR does not appear to have made any previous statements regarding the use of such confinement boxes. In view of their previous jurisprudence on conduct amounting to torture, this probably would not be considered cruel enough to be condemned as torture under the European Convention 1950. The arguments applicable to wall standing and stress positions would apply similarly here, and again, on balance, their use would likely be considered inhuman and degrading.

Whilst the use of these boxes is classified by the OLC as an ‘enhanced interrogation technique’, it is possible that their use would be considered a condition of confinement by the HRC, which tend to be assessed for their compatibility with the rights under Article 10 (1), rather than Article 7. In *Benhadj v. Algeria* the complainant was kept in “solitary confinement in a tiny cell without ventilation or sanitary facilities” for over four months,

²⁵³ See attached Appendix III.

²⁵⁴ 2002 *Interrogation* memorandum, above n 35, at 3 and 13-14.

²⁵⁵ ICRC *High Value Detainees* report 2007, above n 80, at [1.3.5].

²⁵⁶ *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 A/48/44/Add.1* (1993) [52]. Cramped confinement with an insect will not be addressed, as this technique was never actually used on any detainees. See attached Appendix III for more information on this technique.

and subsequently confined in a cell that was “too small to allow him to stand or to lie down”.²⁵⁷ In this decision, the HRC considered that these conditions were incompatible with the Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules),²⁵⁸ and thus violated Article 10.

Despite the differences in duration of use, it is still likely that the CIA’s use of this technique contravened Article 10. The Standard Minimum Rules for the Treatment of Prisoners sets regulations for the accommodation of prisoners, which require regard to be paid to “cubic content of air, minimum floor space, lighting, heating and ventilation”,²⁵⁹ conditions which are of concern in the use of the confinement boxes. Furthermore, the placement of a detainee into a dark cell is prohibited as a punishment for disciplinary offences under the Standard Minimum Rules.²⁶⁰ Should the HRC examine the compatibility of this technique with Article 7, it would be likely to violate this provision as well. Earlier jurisprudence of the HRC has found that inadequate conditions of confinement for a period of 50 hours amounted to inhuman and degrading treatment, and thus were a violation of Article 7.²⁶¹

Dietary Manipulation

The Torture Committee asked the United States in 2006 to explain how they reconciled the use of techniques such as “diet adjustments” with their CIDTP obligations under Article 16. Despite this, it is unlikely that controlled dietary manipulation, where a minimal fluid and calorie intake is prescribed, and detainees are monitored for weight loss, would alone amount to CIDTP under the CAT 1984.²⁶² While such a diet may be unappetising and cause some hunger, the Torture Committee’s jurisprudence regarding

²⁵⁷ *Benhadj v. Algeria* (1173/2003) CCPR/C/90/D/1173/2003 Human Rights Committee (HRC), July 2007 [2.5] and [8.5].

²⁵⁸ *Standard Minimum Rules for the Treatment of Prisoners* ESC Res 663 C (XXIV), (1957) and ESC Res 2076 (LXII) (1997).

²⁵⁹ *Ibid*, at [10].

²⁶⁰ *Ibid*, at [31].

²⁶¹ *Portorreal v. Dominican Republic* (188/1984) CCPR/C/31/D/188/1984 Human Rights Committee (HRC), 5 November 1987 [9.2] and [11].

²⁶² 2005 *Certain Techniques* memorandum, above n 63, at 9.

treatment previously considered to be CIDTP would not encompass such a relatively mild technique.

In more recent complaints under the European Convention 1950, including *Ramishvili and Kokhreidze v Georgia*, the ECHR noted that there must be “appropriate catering arrangements” in detention, as part of the “State’s obligation to ensure the well-being of persons deprived of their liberty”.²⁶³ In *Kadikis v. Latvia (no. 2)* it was held that this obligation included the implication that detainees ought to be fed properly.²⁶⁴ Despite the inadequate food provision in these cases being only part of a course of conduct amounting to an Article 3 violation, it is likely that dietary manipulation alone, as used by the CIA amounted to at least degrading treatment under Article 3. The duration of food deprivation, around two to four weeks,²⁶⁵ and the fact that detainees were deliberately deprived of solid food went beyond the “unavoidable level of suffering inherent in detention”.²⁶⁶

The HRC has consistently held that the deprivation of food, as well the monotony and inadequate nature of food provided violates Article 10 (1).²⁶⁷ Normally dietary manipulation would not be assessed for compliance with Article 7, but given the comment by the HRC that the United States’ use of “dietary adjustments” contravenes Article 7,²⁶⁸ it must be conceded that this technique breaches this provision as well.

²⁶³ *Ramishvili and Kokhreidze v Georgia* (1704/06) Section II, ECHR 27 January 2009 [87]. In this case a lack of sufficient personal space, insufficient sanitary conditions and insufficient food provision by the State for a four-day period amounted to inhumane and degrading treatment.

²⁶⁴ *Kadikis v. Latvia (no. 2)* (62393/00) Section III, ECHR 4 May 2006. Insufficient food, along with other insufficient conditions amounted to degrading treatment in the view of the Court.

²⁶⁵ ICRC *High Value Detainees* report 2007, above n 80, at [1.3.12].

²⁶⁶ *Akhmetov v Russia*, above n 188, at [74].

²⁶⁷ *Sharifova v. Tajikistan* (1241/2004) CCPR/C/92/D/1209,1231/2003& 1241/2004 Human Rights Committee (HRC), 1 April 2008 [6.4]; *Aber v. Algeria* (1439/2005) CCPR/C/90/D/1439/2005 Human Rights Committee (HRC), 13 July 2007 [7.7].

²⁶⁸ *Conclusions and Recommendations of the Human Rights Committee* 2006, above n 201, at [13].

Nudity

According to the OLC, this technique is meant to cause psychological discomfort and may be humiliating, especially if the detainee has cultural sensitivities.²⁶⁹ Since detainees subjected to these techniques were believed to be al-Qaeda members, Sunni Muslims, whose belief is that exposing the area between the navel and the knees is a sin, this would certainly be considered degrading and inhuman from the detainees' point of view.²⁷⁰ Moreover the exposure of the nude detainees to female staff adds to the gravity of this technique.²⁷¹

The Torture Committee made statements in 2006 indicating that the “removal of clothing...and the use of female interrogators” amounted to CIDTP.²⁷² This statement and the extremely humiliating effect of this technique on the detainees demonstrate that enforced prolonged nudity amounts to CIDTP under the CAT 1984. It is unlikely however, that the humiliation caused would be severe enough mental suffering to amount to torture.²⁷³

The use of nudity for the purpose of debasing and humiliating the detainees, without any “persuasive justification therefore” also amounts to degrading treatment contrary to Article 3 of the European Convention 1950.²⁷⁴

The HRC also touched upon this in their conclusions on the United States in 2006, stating that removal of clothing and the “exploitation of detainees' individual phobias” were

²⁶⁹ See attached Appendix III.

²⁷⁰ MI5 - The Security Service “Al Qaida's Ideology” (2009) <www.mi5.gov.uk/output/al-qaidas-ideology.html>; BBC “Religions: Hijab (2009) <www.bbc.co.uk/religion/religions/islam/beliefs/hijab_1.shtml#h4>.

²⁷¹ 2005 *Certain Techniques* memorandum, above n 63, at 7-8.

²⁷² Torture Committee *List of Issues Pre-Second Periodic Report, United States*, above n 34, at [52].

²⁷³ For example, it is quite unlike the recent Article 22 decision in *Ali v. Tunisia*, above n 237, at [2.6] where the individual who had been tortured had “anxiety, serious sleeping problems, and loss of short-term memory” which required a psychiatrist's visit and the proscription of anti-depressants.

²⁷⁴ *Iwanczuk v Poland* (25196/94) Section IV, ECHR 15 November 2001 [59]. Persuasive justifications include strip-searches for security purposes.

contrary to the prohibitions on ill-treatment in Article 7.²⁷⁵ As the technique involved removal of clothing, and allowed interrogators to exploit the fears of detainees by exposing them to female interrogators,²⁷⁶ the use of this technique falls squarely within this prohibition in Article 7.

Water Dousing

This technique is analogous to the Israeli GSS' "use of cold air to chill", which the Torture Committee stated was both CIDTP and torture in 1997.²⁷⁷ It would also fall within "exposure to cold", a technique irreconcilable with the United States' Article 16 obligations under the CAT 1984,²⁷⁸ and a violation of Article 7 of the ICCPR.²⁷⁹

Given the limits imposed on this technique, the severity of the physical discomfort due to the cold is unlikely to be sufficiently painful to qualify as torture,²⁸⁰ but its sometimes daily usage²⁸¹ and the comments of the Committees indicate it would amount to CIDTP under the CAT 1984 and a violation of Article 7 of the ICCPR 1966.

This technique also meets the minimum threshold required for a contravention of Article 3, subjecting detainees to distress of an intensity "exceeding the unavoidable level of suffering inherent in detention".²⁸² This distress is probably unlikely to be of sufficient severity to qualify as inhuman treatment due to the time limitations. It should therefore be classified as degrading treatment under the European Convention 1950.

²⁷⁵ *Conclusions and Recommendations of the Human Rights Committee* 2006, above n 201, at [13].

²⁷⁶ See attached Appendix III.

²⁷⁷ *Conclusions and Recommendations of the Torture Committee on Israel* 1997, above n 48 at [257].

²⁷⁸ *Torture Committee List of Issues Pre-Second Periodic Report, United States*, above n 34 at [52].

²⁷⁹ *Conclusions and Recommendations of the Human Rights Committee* 2006, above n 201, at [13].

²⁸⁰ 2005 *Certain Techniques* memorandum, above n 63, at 9-10.

²⁸¹ ICRC *High Value Detainees* report 2007, above n 80, at Appendix 1(i) and (ii).

²⁸² *Akhmetov v Russia*, above n 188, at [74].

Waterboarding

This procedure causes suffocation, panic and an uncontrollable physiological sensation of drowning.²⁸³ The OLC also conceded that it could result in potentially threatening medical problems requiring aggressive medical intervention.²⁸⁴ An interrogation process requiring medical monitoring and perhaps intervention “must have inherent health risks,” indicating that such procedures are contrary to prohibitions on torture or CIDTP.²⁸⁵ Contrary to the opinion of the OLC this technique causes severe mental pain or suffering.²⁸⁶ Given the Torture Committee’s recommendation that psychological torture should reach a wide range of acts, including those that are not prolonged,²⁸⁷ the fear of imminent death, even limited to a 10-40 second application of water is enough to amount to torture. Given the fact that detainees sustained injuries during this technique from struggling in the panic of being unable to breathe, it should be clear that this practice did in fact amount to torture under the CAT 1984.²⁸⁸

The ECHR has found that pain and suffering inflicted was cruel enough to amount to torture on a few occasions, including where psychological suffering has been taken into consideration alongside physical suffering.²⁸⁹ Despite the European jurisprudence focusing predominantly on physical suffering and the severity of complainants’ injuries, it is likely the psychological effects of this technique alone are sufficiently cruel to amount to torture. In *Gafgen v Germany*, it was stated that “a threat of torture can amount to torture, as the nature of torture covers ...mental suffering”, provided the circumstances render it sufficiently cruel to amount to torture.²⁹⁰ Given the information gathering

²⁸³ See attached Appendix III.

²⁸⁴ Ibid.

²⁸⁵ ICRC *High Value Detainees* report 2007, above n 80, at [3].

²⁸⁶ See discussion on the Waterboard technique above in Chapter 1, particularly the comments made by Abu Zabaydah concerning his fears about imminent death and his resultant long-term problems with incontinence.

²⁸⁷ *Conclusions and Recommendations of the Torture Committee* 2006, above n 78, at [13].

²⁸⁸ ICRC *High Value Detainees* report 2007, above n 80, at Appendix 1(3). The Torture Committee also asked the United States to rescind such a practice to the extent it amounted to CIDTP or torture in 2006, *Conclusions and Recommendations of the Torture Committee* 2006, above n 78, at [13].

²⁸⁹ For example see *Akkoç v Turkey*, above n 183, at [116]-[117].

²⁹⁰ *Gäfgen v Germany*, above n 183, at [108]. These circumstances include factors such as the severity of pressure, intensity of mental suffering and purpose of the conduct.

purpose of the technique and the intense psychological suffering inherent in the immediate and overwhelming perception of drowning, the use of the waterboard should amount to torture under the European Convention 1950, despite the high threshold required for this characterization.

In *Arhuacos v. Colombia*, the HRC held that treatment including blindfolding individuals and dunking them into a canal amounted to torture under Article 7.²⁹¹ In *Estrella v. Uruguay*, the HRC also decided that very severe treatment including near-asphyxiation by water amounted to torture.²⁹² Whilst the HRC has since shied away from demarcating treatment as torture, it is possible, in light of these previous decisions, the immediate psychological effects of this technique,²⁹³ and the possible long-term mental consequences such as PTSD,²⁹⁴ that the Committee would be prepared to label this treatment torture. Given that distinctions between grades of ill-treatment depend on the “nature, purpose and severity” of the treatment.²⁹⁵ It is certainly arguable that the severe mental suffering imposed, as well as the lesser physical pain,²⁹⁶ and the premeditated nature and information-extracting purpose would elevate this technique to torture. Given the less severe techniques considered to violate Article 7 by the HRC in their comments on the United States, this technique would unquestionably violate this Article also.²⁹⁷

VI. Conclusion

Given that each one of these techniques violates the prohibitions on ill-treatment under at least one of three instruments considered here, it is obvious that these techniques, used in

²⁹¹ *Arhuacos v. Colombia* (612/1995) CCPR/C/60/D/612/1995 Human Rights Committee (HRC), 29 July 1997) [8.4].

²⁹² *Estrella v. Uruguay* (74/1980) CCPR/C/OP/2 at 93 Human Rights Committee (HRC), 29 March 1983 [1.6] and [10].

²⁹³ See attached Appendix III.

²⁹⁴ Kanstroom, above n 79, at 205.

²⁹⁵ Human Rights Committee *General Comment 20* 1992, above n 174, at [4].

²⁹⁶ ICRC *High Value Detainees* report 2007, above n 80, at Appendix 1(3). For example, injuries sustained from individuals struggling against their straps in the panic of being unable to breathe.

²⁹⁷ *Conclusions and Recommendations of the Human Rights Committee* 2006, above n 79, at [13].

combination, given the incommunicado nature of detention,²⁹⁸ the prolonged 30 day interrogation period, the uncertainty felt by detainees in the face of escalating ill-treatment, and the prohibited purpose of information extraction, would amount to, at the very least, CIDTP, if not torture, under all of the relevant instruments.

Certainly the use of sleep deprivation, cramped confinement boxes and especially waterboarding, alone or in combination with other techniques can be considered torture, based on the standards under these instruments. It is particularly significant that sleep deprivation and cramped confinement would be considered torture under the CAT 1984, because the text of this instrument, with its division of torture and lesser ill-treatment, requires the Torture Committee to make a finding that conduct breaches Article 16 *or* Article 1. The Human Rights Committee and the European bodies may find a general violation of Article 7 or Article 3 without elucidating further, and so while their jurisprudence is helpful, it does not require the same demarcation of ill-treatment, and thus cannot be of as much assistance in deciding whether particular conduct reaches torture, or is merely CIDTP.

Whilst cramped confinement and waterboarding were used restrictively, sleep deprivation, being the “most common form of ill-treatment”,²⁹⁹ was most likely used on many CIA detainees subjected to ‘enhanced interrogation techniques’, thus it is likely that many of these detainees were in fact tortured.

²⁹⁸ Incommunicado detention has been considered to be a form of ill-treatment in itself according to the ICRC in ICRC *High Value Detainees* report 2007, above n 80, at [1.2].

²⁹⁹ *Ibid*, at [1.3.6].

Chapter 3

Remedies

Interrogations undertaken by CIA interrogators outside the United States, which used a combination of ‘enhanced interrogation techniques’ on alien al-Qaeda detainees amounted to either CIDTP or torture under international human rights standards. The next step is to determine what remedies, if any, are available. This Chapter will address liability of both the United States government at international law, as well as individual criminal responsibility. Civil remedies within the United States, possibly under the Alien Tort Claims Act of 1789 or the Torture Victim Protection Act of 1991, may also be available, but these will not be addressed here.³⁰⁰

I. International Human Rights Bodies

ICCPR 1966

As noted, the United States ratified this Covenant subject to its Reservations, Declarations and Understandings. The most important one being Reservation (3), stating:³⁰¹

"That the United States considers itself bound by article 7 to the extent that ‘cruel, inhuman or degrading treatment or punishment’ means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States”.

The ICCPR 1966 does allow reservations,³⁰² but it is very unlikely that the HRC

³⁰⁰ 28 USC § 1350; Torture Victim Protection Act of 1991 Pub L 102–256, 106 Stat 73 (1992).

³⁰¹ United Nations Treaty Collection “Human Rights, International Covenant on Civil and Political Rights, Declarations and Reservations” (2001)

<http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en United States> at Reservation (3) [ICCPR 1966 RUD’s]. See attached Appendix II.

would interpret this reservation as allowing treatment it would otherwise consider contrary to the international standard pertaining to CITDP. Under Article 19(c) of the Vienna Convention on the Law of Treaties, whose provision on this subject is considered to represent customary international law,³⁰³ a reservation may be entered as long as it is not “incompatible with the object and purpose of the treaty”.³⁰⁴

In a 1994 General Comment by the HRC, the Committee stated that State objections to reservations, of which there are at least 11 in relation to Reservation (3),³⁰⁵ may provide guidance as to whether such a reservation is valid, but it is for the Committee to decide whether the object and purpose test of a human rights treaty is met.³⁰⁶

The HRC, the body responsible for determining the validity of the United States reservations has made comments such as “reservations should not seek to remove an autonomous meaning to Covenant obligations...pronouncing them as accepted only insofar as they are identical with existing provision of domestic law”.³⁰⁷ It is therefore highly improbable they would accept conduct somehow compatible with the substantive provisions provided in the United States constitutional law, but seemingly incompatible with the autonomous standard set out in international law. The HRC also stated that a State may not reserve the right to subject

³⁰² Human Rights Committee *International Covenant on Civil and Political Rights, General Comment 24 (52), General Comment on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant* CCPR/C/21/Rev.1/Add.6 (1994) at [5] and [6]. [Human Rights Committee *General Comment 24* 1994].

³⁰³ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Rep 15.

³⁰⁴ Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered in to force 27 January 1980), art 19(c) [Vienna Convention 1969].

³⁰⁵ Belgium, Finland and Germany are among those who entered objections. It is questionable whether these objections to the United States reservation are valid in any case as it is possible they were not ‘timely’ enough under the Vienna Convention 1969, art 20(5), being made more than 12 months after the United States made its reservation. However this is a question for another paper.

³⁰⁶ Human Rights Committee *General Comment 24* 1994, above n 302, at [17].

³⁰⁷ *Ibid*, at [19].

individuals to torture or CIDTP.³⁰⁸ Whilst Reservation (3) does not have the outright effect of allowing state use of CIDTP, insofar as it could be read to sanitize conduct otherwise regarded as CIDTP under the ICCPR 1966, this would be rejected by the HRC as contrary to the object and purpose of creating legally binding standards for human rights.³⁰⁹

Apart from the rejection of the substantive application of this reservation, any argument that it places a procedural limit upon United States obligations should also be rejected. Arguments by the OLC that this reservation limits the application of CIDTP obligations to citizens within the territory of the United States are probably void.³¹⁰ The phrase “CIDTP *means* the cruel and unusual...” links the prohibited treatment to that prohibited by the constitutional amendments, not the geographical limitations placed on these provisions by the United States judiciary.³¹¹ Therefore it appears that the reservation is a substantive one only, and one whose substantive limitations would be rejected by the HRC insofar as they reduce the standard of conduct set in the international jurisprudence.

1. State responsibility

Despite the fact that almost all of the techniques used, and certainly their use in combination would be considered a violation of Article 7 of this Covenant, even taking into account the aforementioned reservation, there is very little the HRC can do. They can continue to censure the United States in their examination of periodic reports,³¹² which has no binding legal effect beyond ‘naming and shaming’. They may also receive and consider inter-state communications from other States Parties about the United States’ non-compliance with their

³⁰⁸ Ibid, at [8].

³⁰⁹ Forcese, above n 89, at 922.

³¹⁰ See 2005 *Obligations Under Article 16* memorandum, above n 36.

³¹¹ Forcese, above n 89, at 912.

³¹² ICCPR 1966, above n 8, art 40.

obligations,³¹³ but this procedure has never been used,³¹⁴ nor is it likely to be. The HRC cannot entertain individual communications against the United States, because it has not ratified the Optional Protocol to the ICCPR.³¹⁵

2. Individual responsibility

Because this Convention places obligations on States alone, it is inapplicable to individual responsibility. Moreover, because the United States Declaration (1) states that “the provisions of articles 1 through 27 of the Covenant are not self-executing”, its provisions cannot be invoked in United States domestic courts.³¹⁶

CAT 1984

The United States entered an identical reservation to Reservation (3) to the ICCPR 1966, under Article 16 of this instrument.³¹⁷ Again, for the reasons detailed above, the effect of this reservation is substantive rather than geographical. The fact that this reservation was inserted due to fears about the vague nature of CIDTP underscores this conclusion.³¹⁸ More concerning is the United States Understanding II (1), which purports to alter the United States’ obligations as follows:³¹⁹

“With reference to article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged

³¹³ Ibid, art 41. The United States Declaration recognizing the competence of the Human Rights Committee under article 41 was made upon ratification on 8 Jun 1992.

³¹⁴ Office of the United Nations High Commissioner for Human Rights “Human Rights Bodies – Complaints Procedures - Inter-State Complaints” (2011)
<<http://www2.ohchr.org/english/bodies/petitions/index.htm#interstate>>.

³¹⁵ Optional Protocol to the International Covenant on Civil and Political Rights (opened for signature 16 December 1966, entered into force 23 March 1976) [Optional Protocol ICCPR].

³¹⁶ ICCPR 1966 RUD’s, above n 301, at Declaration (1). See attached Appendix II.

³¹⁷ CAT 1984 RUD’s, above n 34, at United States, Reservation I(1). See attached Appendix II.

³¹⁸ Forcese, above n 89, at 930.

³¹⁹ CAT 1984 RUD’s, above n 34, at United States, Understanding II (1) (a). See attached Appendix II.

mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.”

This is contrary to the formulation of torture under the CAT 1984 in a few important ways. It first elevates the intent requirement from general intent to be determined objectively in the circumstances,³²⁰ to “specific intent”, and removes the requirement of prohibited purposes. It also defines mental pain or suffering very narrowly.

It is unclear whether the Torture Committee would consider conduct to violate United States obligations where it does amount to torture or CIDTP under Articles 1 or 16 of the CAT 1984, but does not appear to amount to ill-treatment as defined in the United States reservations and understandings. However, comments made by the Committee in 2006 recommending that the United States “enact a federal crime of torture consistent with article 1 of the Convention...in order to fulfil its obligations” could well suggest that the Torture Committee does not believe the United States reservations, as mirrored in their federal statutes, are compatible with the object and purpose of the Convention.³²¹

1. State responsibility

The Torture Committee cannot, like the HRC, do much anyway. Again, they can

³²⁰ CAT *General Comment 2*, above n 32, at [9].

³²¹ *Conclusions and Recommendations of the Torture Committee 2006*, above n 78, at [13].

continue to censure the United States in their consideration of periodic reports,³²² and may also hear inter-state complaints against the United States under Article 21, an illusory power at best. The Torture Committee cannot entertain individual complaints against the United States because it has not accepted this jurisdiction under Article 22.³²³

2. Individual responsibility

The United States also entered a declaration stating that the CAT 1984 was not self-executing.³²⁴ As a result the provisions of this Convention cannot be invoked in the United States domestic courts, except as implemented through domestic legislation. Also the Convention only deals with the obligations of States, although some of the CAT's obligations entail the exercise of jurisdiction over individual persons suspected of torture in foreign domestic courts.

Conclusion

There is very little the supervisory bodies of these international instruments can do, despite violations of international law obligations regarding torture and CIDTP. Because States are only bound to the extent to which they consent under these treaties, the hands of these bodies are tied. It is therefore left to domestic law to enforce these prohibitions.

II. United States Domestic Criminal Prosecution

Federal Torture Statute

Because the CAT 1984 is not self-executing, any prosecutions of individuals for torture must be undertaken under §§ 2340-2340A.³²⁵ Aside from the determination that some of

³²² CAT 1984, above n 6, art 19.

³²³ Ibid, art 22.

³²⁴ CAT 1984 RUD's, above n 34, at United States, Reservation III(1). See attached Appendix II.

³²⁵ 18 USC §§ 2340-2340A.

the techniques used amounted to torture under international legal standards, in 2008 a Senate Committee on Armed Services found that the “OLC opinions distorted the meaning and intent of anti-torture laws, rationalized the abuse of detainees in U.S. custody”.³²⁶

Having decided sleep deprivation could amount to torture under the CAT 1984, mainly based upon the substantial physical suffering involved in this technique, it is possible that it could amount to severe physical suffering under §§ 2340-2340A. The use of the cramped confinement boxes may be more contentious, given the time limits imposed on their use. Waterboarding, whilst probably amounting to torture under the three most relevant human rights conventions, may pose more of an issue under the federal statute. The requirement of prolonged mental harm in § 2340A suggests that the fear of imminent death felt during the application of water may not be enough to satisfy the requirement of mental pain or suffering. However, if prolonged mental harm did develop, such as PTSD or chronic depression, this technique would probably satisfy the severe mental pain or suffering requirement. The requirement of “specific intent” is the most troubling. Given the differing treatment of this amorphous concept by the judiciary, it is unclear whether the safeguards and background research relied upon by the interrogators and drafters of the techniques would be enough to negate the intent requirement.³²⁷

The one person prosecuted under this provision was ‘Chuckie’ Taylor, son of President Charles Taylor, who was convicted of committing numerous acts of torture in Liberia. The Appellate court stated that the federal Act “tracks the provisions of the CAT in all material respects”, and that “the CAT created a floor, not a ceiling, for its signatories in their efforts to combat torture, and settled rules of treaty interpretation require that we construe the CAT generously”.³²⁸ These comments suggest that specific intent may not be materially different from the general intent requirement, and further, that specific intent would be interpreted widely in order to give effect to the CAT 1984.

³²⁶ Committee on Armed Services, United States Senate *Inquiry into the Treatment of Detainees in U.S. Custody* (2008) at [xxvi][Armed Services Report on Detainee Treatment 2008].

³²⁷ This presumes that the CIA personnel acted in good faith in relying upon their due diligence undertaken to ascertain the potential effects of the techniques.

³²⁸ *United States v Belfast* 611 F 3d 783 (11th Cir 2010). [13]–[15].

However, the conduct in that case was more severe than that here. It included “acts of branding, scalding, severe beating, decapitation, and the administration of electrical shocks”.³²⁹ Taylor also sought to compel production of the OLC memoranda in his case, and the Eleventh Circuit commented that it was not clear “how any of his conduct...is in any way similar to the conduct described in the Torture Memos, which discuss waterboarding and exposure to extreme temperatures”.³³⁰ The Court also stated “the CAT requires that torture...be both intentional and malicious,” a seemingly higher standard than general intent determined objectively in the circumstances, the standard actually required by the Torture Committee.

It is therefore quite unclear whether the use of these ‘enhanced interrogation techniques’ would satisfy the elements of the federal torture provisions as they do the international standard. As there has only been one prosecution under this provision it remains to be seen what will be made of specific intent requirement.

Detainee Treatment Act

Enacted in December 2005, this Act prohibits CIDTP of individuals in the custody or physical control of the United States government, regardless of nationality or physical location.³³¹

A course of conduct containing the aforementioned ‘enhanced interrogation techniques’ undertaken by CIA interrogators would amount at least to CIDTP under international standards. However, it is unlikely that any domestic criminal prosecution of acts of CIDTP, for example, under the War Crimes Act 1996, would succeed. Even if the OLC was incorrect in its determination that these techniques did not amount to CIDTP under

³²⁹ Ibid, at [60].

³³⁰ Ibid, at [15].

³³¹ DTA 2005, above n 7, § 2000dd(a).

the Detainee Treatment Act 2005, something that is very possible, § 2000dd-1 of the Detainee Treatment Act probably provides a complete defence.³³² It states that:³³³

“In any criminal prosecution against an agent of the United States Government...which arises out of their engaging in specific operational practices, that involve detention and interrogation of aliens who the President or his designees have determined are believed to be engaged in or associated with international terrorist activity that poses a serious, continuing threat to the United States...and that were officially authorized and determined to be lawful at the time that they were conducted, it shall be a defence that such person did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful. Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful”.

This defence, made applicable retroactively to cover acts committed between September 11, 2001, and December 30, 2005 by the Military Commissions Act,³³⁴ places specific emphasis on good faith reliance on legal counsel, something especially applicable here. It provides “a good faith defence for officials who believed that their actions were legal and authorized by the U.S. government”,³³⁵ and consequentially will most likely apply to the CIA interrogators who relied upon the OLC memoranda.

No Domestic Prosecutions Likely

1. CIA interrogators

³³² Ibid, § 2000dd-1(a).

³³³ Ibid.

³³⁴ Military Commissions Act of 2006 Pub L No 109-366, 120 Stat 2600 (2006), § 8(b). Applicable where criminal prosecutions are undertaken pursuant to violations of Common Article 3 under the War Crimes Act. Note there are other provisions on torture or CIDTP applicable under the War Crimes Act 1996, which apply to torture or CIDTP, but these will not be addressed here.

³³⁵ *Vance v. Rumsfeld* CA 7 (Ill) (7th Cir 2011).

In April 2009, when OLC memoranda were released publicly by the DOJ, President Obama released a statement saying “it is our intention to assure those who carried out their duties relying in good faith upon legal advice from the Department of Justice that they will not be subject to prosecution”.³³⁶ In August 2009 Attorney General Eric Holder announced the commencement of a preliminary review into “whether federal laws were violated in connection with the interrogation of specific detainees at overseas locations”.³³⁷ Despite this, Holder reiterated the President’s assurance, and in June 2011 accepted the recommendation of this review. A full criminal investigation would be undertaken where two detainees had died in custody, but criminal investigation of the “remaining matters”, that is, any conduct which fell within that approved in the OLC memoranda, was considered unwarranted.³³⁸ The DOJ believed this fully satisfied the need to examine the “detainee treatment issue”.³³⁹

It appears quite clear that the DOJ has no intention to prosecute individual interrogators responsible for torture or CIDTP.³⁴⁰ Certainly prosecution would raise issues of fairness. It is questionable whether such individuals, relying upon legal advice “controlling on questions of law in the Executive Branch”,³⁴¹ and the policy decisions of their superiors, made in consultation with Administration officials, such as Principals within the National Security Council and Senior Administration Attorneys, should be prosecuted.³⁴² Analogies can be drawn between the so-called ‘Nuremberg defence’ of superior orders, which is unable to be invoked as a justification for torture under Article 2(3) of the CAT 1984,³⁴³ and a ‘legal authorization’ defence.³⁴⁴ This weighs against electing not to prosecute CIA agents merely because they relied upon OLC legal advice, particularly

³³⁶ The White House, Office of the Press Secretary “Statement of President Barack Obama on Release of OLC Memos” (statement, 16 April 2009).

³³⁷ Department of Justice, Office of Public Affairs “Statement of the Attorney General Regarding Investigation into the Interrogation of Certain Detainees” (statement, 30 June 2011).

³³⁸ *Ibid.*

³³⁹ *Ibid.*

³⁴⁰ Note that the statute of limitations may limit the ability to prosecute persons guilty of torture to 8 years under 18 USC §3286(a). This may pose an issue relating to any actions done before late 2003.

³⁴¹ *Best Practices for OLC Opinions*, above n 3, at 1.

³⁴² CIA Inspector General Report 2004, above n 10, at [17] and [45]-[46], Armed Services Report on Detainee Treatment 2008, above n 326, at xxvi-xxvii.

³⁴³ CAT 1984, above n 6, art 2(3).

³⁴⁴ Mark W S Hobel “‘So Vast an Area of Legal Irresponsibility’? The Superior Orders Defense and Good Faith Reliance on Advice of Counsel” (2011) 111 Colum L Rev 574 at 576.

since interrogators are not obliged to follow authorisations in the same way subordinates in the armed forces are required to follow superior orders.

2. OLC attorneys and administration officials

Whether or not one believes the actual interrogators ought to be subject to prosecution, the OLC attorneys, as well as those in the White House who approved the ‘enhanced interrogation techniques’, could also be liable domestically, for example, for conspiracy to torture.³⁴⁵ The Torture Committee have made it quite clear that “establishing responsibility of persons in the chain of command” is important.³⁴⁶ In July 2009 an Office of Professional Responsibility Report found that John Yoo and Jay Bybee, two authors of the OLC memoranda relating to ‘enhanced interrogation techniques’, were guilty of professional misconduct.³⁴⁷ Despite this, in January 2010, the Acting Deputy Attorney General found that these authors were guilty only of poor judgment. This decision again represented the DOJ’s final decision on this matter.³⁴⁸ In a March 2011 letter from the DOJ’s Criminal Division to the Spanish judge Eloy Velsaco, it was said that in light of the Acting Deputy Attorney General’s decision “there exists no basis for the criminal prosecution of Yoo and Bybee, and in addition the Department of Justice has concluded it is not appropriate to bring criminal cases with respect to any other executive branch officials”.³⁴⁹

³⁴⁵ 18 USC § 2340A(c).

³⁴⁶ CAT *General Comment 2*, above n 32, at [9].

³⁴⁷ Department of Justice, Office of Professional Responsibility *Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Related to the Central Intelligence Agency’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists* (2009) at 260.

³⁴⁸ Gary G. Grindler, Acting Deputy Attorney General ““Office of Professional Responsibility Investigation into Office of Legal Counsel Memoranda” (speech before the Senate Judiciary Committee, 26 February 2010).

³⁴⁹ Letter to Paula M. Royo, Subdirectora General de Cooperacion Juridica Internacional, from Mary E. Warlow, Director and Kenneth Harris, Associate Director, Europe, United States Department of Justice, Criminal Division, Office of International Affairs, Request for Assistance from Spain in the Matter of Addington, David; Bybee Jay, Feith, Douglas; Haynes, William; Yoo, John; and Gonzales, Alberto (2011) at 2 [Bush Six Letter 2011].

Conclusion

Despite the existence of domestic prohibitions on torture and CIDTP, the Department of Justice will not prosecute those who formulated the OLC memoranda, approved it, or followed it. Any prosecution must therefore take place outside the United States.

III. The Exercise of 'Universal Jurisdiction'

Article 5 of the CAT 1984 requires States Parties to establish jurisdiction over torture offences, including acts that equate to complicity or participation in torture.³⁵⁰ This section requires jurisdiction to be established on the grounds of territoriality, the active personality principle, and where appropriate, the passive personality principle.³⁵¹ Article 5(2) in conjunction with Article 7 requires States Parties to establish jurisdiction over torture offences where the alleged offender is present in any territory under its jurisdiction, unless they extradite said offender.³⁵² Comments made by the Torture Committee in 2008 extended these *aut dedere aut punire* obligations to cover acts of CIDTP also.³⁵³ However, since this CIDTP obligation is not strictly stated in the text, in practice, it is only acts amounting to torture that tend to be investigated in foreign courts by reason of States Parties being obliged to prosecute under the CAT 1984.³⁵⁴ It is therefore unlikely that any course of conduct that did not amount to torture will be brought before foreign courts. However, since sleep deprivation should be considered torture under the CAT 1984, it is probable that most CIA detainees subjected to 'enhanced interrogation techniques' were tortured.³⁵⁵ Thus the perpetrators of this conduct are liable to be prosecuted in foreign domestic courts.

³⁵⁰ CAT 1984, above n 6, art 4(1).

³⁵¹ *Ibid*, art 5(1).

³⁵² *Ibid*, art 5(2) and art 7(1).

³⁵³ CAT *General Comment 2*, above n 32, at [3]. See Chapter 2 for more detail.

³⁵⁴ Or possibly being obliged to prosecute under the Rome Statute of the International Criminal Court (opened for signature 17 July 1998, entered into force 1 July 2002) [Rome Statute 2002]. Although this will not be discussed further in this paper.

³⁵⁵ ICRC *High Value Detainees* report 2007, above n 80

It is clear that the United States is unwilling to prosecute any individuals despite these obligations, and States Parties to the Convention who allowed the CIA to establish covert ‘black-sites’ on their territory are probably similarly unwilling. It is most likely that presence of perpetrators in a States Party’s territory, whose domestic legislation covers extraterritorial ill-treatment as required by the CAT 1984, will be the grounds used to establish jurisdiction. It is unlikely that the low-level CIA interrogators will be prosecuted in this manner, and they may not even be able to be identified. These so-called ‘universal jurisdiction’ prosecutions instead tend to focus on the ‘big names’ involved in torture, including the authors of the OLC memoranda and members of the Bush Administration.

European states are the most likely forums for such prosecutions, and many European countries have legislation allowing for the prosecution of crimes that must be prosecuted in their jurisdiction according to their international agreements,³⁵⁶ such as under the Rome Statute of the International Criminal Court, and the CAT 1984.³⁵⁷ However, this jurisdiction is not truly universal and is often restricted by at least two principles, along with the realities of international diplomacy. First, most domestic jurisdictions allowing the prosecution of extraterritorial torture perpetrators and conspirators require the presence of these individuals within their jurisdiction, and second, the principle of *forum non conveniens* can prevent prosecution where investigation and prosecution is intended or undertaken in a more appropriate forum, such as in the United States.³⁵⁸

The Spanish “Bush Six” Example

A complaint made in Spain in early 2009 against the so-called “Bush Six”, including Yoo, Bybee and White House counsel Alberto Gonzales, was stayed in April 2011. This complaint alleged that each of the six “participated or aided and abetted the torture and

³⁵⁶ See for example the Organic Law 6/1985 1985 (Spain), Article 23(4) (the Organic Law on the Judiciary).

³⁵⁷ Rome Statute 2002, above n 334.

³⁵⁸ Kai Ambos “Accountability for the Torture Memos: Prosecuting Guantanamo in Europe: Can and Shall the Masterminds of the ‘Torture Memos’ Be Held Criminally Responsible on the Basis of Universal Jurisdiction?” (2009) 42 Case W Res J Int’l L 405 at 412.

other serious abuse of persons detained at U.S. run-facilities at Guantánamo and other overseas locations”.³⁵⁹ This stay was granted because the United States indicated that there were “effective judicial processes being pursued under U.S law to address violations”. These ‘effective processes’ included two federal prosecutions for manslaughter and assault, the preliminary review of CIA treatment of detainees, which at this point was still ongoing, and the prosecutions of low-level Department of Defense individuals.³⁶⁰ In this author’s opinion, low-level prosecutions and the effective amnesties granted to the OLC attorneys, administration officials and CIA interrogators relying on the legal memoranda should not qualify as establishment of the prosecution and effective investigation of these deeds, and thus the *forum non conveniens* doctrine should not be applied. The decision to stay this case has been appealed, and while one is hesitant to comment on the likely outcome, it appears that political pressure will probably win out in the end. It has been revealed that the United States government put pressure on Spanish officials to try to prevent these prosecutions, with a US Senator indicating to the Spanish Acting Foreign Minister “ that the prosecutions would not be understood or accepted in the U.S. and would have an enormous impact on the bilateral relationship”.³⁶¹ Similar governmental pressure has been identified in relation to prosecutions undertaken in Germany, where two such prosecutions, one in 2004, and one in 2006, were dismissed under prosecutorial discretion.³⁶²

Conclusion on Universal Jurisdiction

The prosecution for high-level complicity or participation in torture is possible under many European jurisdictions,³⁶³ but this will largely depend on the presence of the accused in the jurisdiction and the ability to establish these forms of liability, which may

³⁵⁹ Center for Constitutional Rights “The Spanish Investigation into U.S. Torture” (2011) <<http://ccrjustice.org/spain-us-torture-case>>.

³⁶⁰ Bush Six Letter 2011, above n 349, at 3-6.

³⁶¹ Cable to the Secretary of State in Washington, from the Foreign Embassy of Madrid, Attorney General Recommends Court Not Pursue GTMO Criminal Case v Former USG Officials (17 April 2009).

³⁶² Katherine Gallagher “Universal Jurisdiction in Practice: Efforts to Hold Donald Rumsfeld and Other High-level United States Officials Accountable for Torture” (2009) 7 JICJ 1087 at 1100-1108.

³⁶³ See Wolfgang Kaleck “*From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008*” (2009) 30 Mich J Int'l L 927 for further information about individual jurisdictions.

be quite difficult. This will also depend on the effect of immunities,³⁶⁴ and unfortunately, on whether political pressure is sufficient to persuade foreign officials that the United States has done enough in the way of investigating and prosecuting those responsible.

Conclusion

Very little can be done at the international level because the doctrine of State sovereignty limits the reach of the treaty supervisory bodies. Individual criminal prosecution of anyone involved with torture or CIDTP within the United States seems impossible, even under the Obama Administration, which has concentrated on moving forward despite international obligations to punish those guilty of ill-treatment. Individual criminal prosecution outside the United States is possible, although subject to the political realities of diplomatic relations between States, amongst other concerns. Foreign prosecution remains the most viable option, but only time will tell whether these actions will come to anything and stop global impunity of these individuals once and for all.

³⁶⁴ It is extremely likely that no immunities will apply here. The relevant individuals, including George W. Bush, are no longer in office, thus are entitled to immunity *ratione materiae*. In *R v Bow Street Metropolitan Stipendiary Magistrate; Ex Parte Pinochet Ugarte (No 3)* [1999] 2 WLR 827, the House of Lords made it quite clear that torture could not be an official act of state, so no such immunity could attach to these actions. Most States' laws relating to criminal liability reflect this position on immunity. However procedural immunity does apply in some States, like Belgium, where possible perpetrators are shielded from immunity where they visit as part of an official delegation. Consequentially, these former public officials are probably 'fair game' in terms of immunity if they visit foreign States on personal business.

Conclusion

The OLC came to questionable conclusions about the nature and definition of torture and lesser ill-treatment in their memoranda, and approved the use of techniques which alone or as a course of conduct, violated the United States' international human rights law obligations.

Based on the previous jurisprudence and comments of the supervisory bodies under the CAT 1984, the ICCPR 1966 and the European Convention of 1950, this dissertation has found that the 'enhanced interrogation techniques' approved by the OLC, and used by the CIA on alien al-Qaeda detainees outside the United States, are likely to amount to CIDTP, and in many cases, torture under international human rights law.

Despite this finding, this dissertation has also concluded that the supervisory bodies do not have any substantive power to enforce obligations under the treaties. As for individual criminal responsibility, the United States appears unwilling to prosecute, leaving only prosecution by foreign domestic courts. Whilst this is an option, it must be concluded that its success is yet to be proved.

Appendix I
Selected Provisions of the United Nations Convention Against Torture
and Other Cruel, Inhuman or Degrading Treatment or Punishment
1984

Article 1

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

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

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

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

Article 5

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases: (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State; (b) When the alleged offender is a national of that State; (c) When the victim is a national of that State if that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article.

Article 6

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

Article 7

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

Article 10

1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials 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.

Article 11

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

Article 12

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

Article 13

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

Article 16

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply

with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

Appendix II

Selected United States' Reservations, Understandings and Declarations

I. CAT 1984

Reservations

I. The Senate's advice and consent is subject to the following reservations:

(1) That the United States considers itself bound by the obligation under article 16 to prevent 'cruel, inhuman or degrading treatment or punishment', only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

Understandings

II. The Senate's advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Convention:

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

substances or other procedures calculated to disrupt profoundly the senses or personality.

(b) That the United States understands that the definition of torture in article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control.

Declarations

III. The Senate's advice and consent is subject to the following declarations:

(1) That the United States declares that the provisions of articles 1 through 16 of the Convention are not self-executing.

II. ICCPR 1966

Reservations

(3) That the United States considers itself bound by article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

Declarations

(1) That the United States declares that the provisions of articles 1 through 27 of the Covenant are not self-executing.

Appendix III

The Author's Descriptions of the 'Enhanced Interrogation Techniques'

I. 2002 Interrogation Memorandum

Extended Sleep Deprivation

For up to 11 days at a time in order to reduce Zabaydah's ability to think on his feet and motivate him to cooperate by providing information. As mentioned previously, some abnormal reactions such as hallucinations can develop, although the OMS personnel would intervene if this were to result. There is likely to be some physical discomfort, such as fatigue, although previous studies indicate that no permanent brain damage or psychosis would result, and the procedure is not considered to profoundly disrupt the senses to a requisitely extreme level.

Attention Grasp

This involves grasping Zabaydah on both sides of his collar opening and quickly drawing him toward the interrogator. This does not involve physical pain, but is meant to startle, produce fear or insult according to this memorandum

Facial Slap

Slap to the area between the chin and earlobe. This invades Zabaydah's personal space and is meant to induce shock, surprise or humiliation as well as dislodging any expectations that he would not be handled aggressively in custody. While it may hurt, the effect is of "smarting or stinging", rather than severe physical pain and to this end, precautions such as only using splayed hand contact to the 'fleshy' area of the face are used, and it will generally involve only two slaps in an application.

Walling

Whereby Zabaydah will be slammed into a flexible plyboard wall, which produces a loud noise in order to shock or surprise him and magnify the impact. Precautions such as using

a collar to prevent whiplash and allowing him to rebound from the wall are also in place. The OLC conceded that this action may hurt and “can be characterised as rough handling”, but concluded it would not cause severe physical pain, nor would it cause Zabaydah to anticipate future treatment of the requisite severity, despite the possibility it may alter his expectation of treatment received.

Wall standing

A type of stress position inducing muscle fatigue from the prolonged holding of a position. This involves Zabaydah standing four to five feet from a wall and supporting his entire body weight with his fingers touching the wall. The OLC determined the discomfort involved in forcing Zabaydah to remain in an uncomfortable position would not produce the extreme pain required for torture.

Stress Positions

Also designed to produce physical discomfort in the form of muscle fatigue.

Cramped Confinement

With time limits of two hours in a smaller box where a person may only sit, and 18 hours in a larger box where there is standing room. The purpose of these boxes is to cause physical discomfort, although not to require contortion of the body. Whilst the boxes restrict light, the OLC did not consider that their use would cause substantial interference with Zabaydah’s cognitive abilities or alter his personality.

Cramped confinement boxes in conjunction with the introduction of an insect

To exploit Zabaydah’s apparent fear of insects, the CIA wished to introduce a harmless insect into the confinement box, whilst informing him that it was a stinging insect.

Waterboarding

Whereby Zabaydah would be placed upon a stretcher with a cloth covering his face, which would then have water poured on it for around 20 to 30 seconds at a time. Zabaydah would then be allowed to breathe normally for three to four breaths before the

procedure may be repeated. This procedure causes suffocation, panic and an uncontrollable automatic physiological sensation of drowning, even though the person may be aware they are not in fact drowning. The OLC considered this did not cause physical pain, and was not protracted enough to constitute severe physical suffering. Whilst it could be called a threat of imminent death due to the perception of drowning, the OLC determined that any mental harm is not sufficiently long lasting. Safeguards surrounding this technique included having a medical expert present with the ability to stop the procedure if “medically necessary to prevent severe mental or physical harm.

II. 2005 Certain Techniques Memorandum

Dietary Manipulation

Where normal food is replaced by bland commercial liquid meals. Detainees have a minimum kilojoules per day intake, and are also monitored to see that they do not lose more than 10% of their body weight. The OLC considered that whilst this technique may cause some hunger, it would not constitute starvation nor physical pain.

Extended Sleep Deprivation

This time for up to 7.5 days (180 hours). Unlike the previous *Interrogation* opinion, this addresses the effects of shackling and diaper use, part of how the sleep deprivation is maintained. Obviously these aspects of the technique are extremely important in assessing whether its use amounts to torture or CIDTP and for this reason the previous analysis of sleep deprivation was extremely deficient. In this technique the detainee stands shackled with their hands between their heart and chin, although their hands may be raised about their head for a maximum two-hour period. Detainees are not allowed to dangle by their wrists. While the detainee is restrained in this manner a diaper is used, which is checked and changed regularly. Presumably this would be the only item the detainee would be wearing and the OLC concedes this could be humiliating, but believed it would not cause prolonged mental harm.³⁶⁵ The OLC states that this technique causes “unpleasant physical sensations such as a lack of coordination of body movement,

³⁶⁵ Id, at 37.

difficulty with speech, nausea, blurred vision, the diminishment of cognitive function, feeling physically weak and having a drop in body temperature”. They also note that there may be a drop in pain tolerance, which may mean a detainee’s physical distress may be substantial, despite this apparently causing no physical pain or severe physical suffering. Edema and hallucinations may also develop as a result of this technique, although medical intervention is required to prevent this, and they both tend to dissipate rapidly. These conditions are not considered to be sufficiently painful nor a profound mental disruption of the senses.

Nudity

This technique is meant to cause psychological discomfort and may be humiliating especially if the detainee is modest or has cultural sensitivities. The detainee is not to be unduly exposed but the technique can exploit fears, and female staff may see the detainees.

Abdominal Slap

Where minor physical pain is inflicted by the interrogator hitting the detainee between the naval and the sternum with the back of their bare hand. This technique is used to condition the detainee to pay attention to questioning and to dislodge expectations that they will not be touched in custody.

Facial Hold

Whereby the interrogator holds the detainees head immobile using open palms on either side of their face. This memorandum is the first available mention of the use of this technique.

Wall Standing, Stress Positions, Cramped Confinement and Walling

As detailed in the 2002 *Interrogation* opinion. Regarding walling, it is noted that the collar to prevent whiplash may cause some, non-severe pain or irritation, and that the technique as a whole can be repeated from one to 20-30 times to increase shock, although this is not thought to cause severe pain despite the considerable force used.

Water Dousing

Where cold potable water is poured on the detainee, ensuring it does not enter the mouth, nose or eyes. There are minimum water and air temperatures and the maximum time of exposure is calculated at “2/3 of the time at which hypothermia sets in for healthy individuals”. This procedure is meant to weaken the detainees resistance, and despite some physical discomfort cause by the cold it isn't considered intense or prolonged enough to cause severe physical pain or suffering.

Waterboarding

As adjusted since its approval in 2002 *Interrogation* opinion. Specific time limits are placed on the technique, in terms of days, hours and applications of water. One such limitation is that only 12 minutes of water application is permitted within a 24-hour period. The OLC also notes potentially threatening medical problems can arise from use of this technique. A detainee may not be breathing freely after the cloth has been removed from their airways, or they may vomit and aspirate, or aspirate water - causing pneumonia. In rare cases, once upright they may suffer larynx spasms preventing breathing, which would result medical personnel intervening and undertaking a tracheotomy with equipment that is present but not necessarily visible to detainee, if necessary. Detainees may also ‘give up’, aspirate water and lose consciousness, whereby medical personnel can thrust to expel water once upright or use aggressive medical intervention.

III. 2005 Combined Techniques Memorandum

A Prototypical Interrogation

Part 1

The detainee is started on dietary manipulation and stripped naked. They are shackled and hooded with the walling collar on. If they act inconsistently with the interrogation the interrogator may employ the abdominal slap or facial slap, if they are very uncooperative they may use walling. They then will then begin sleep deprivation. It should be noted that

the ‘baseline’ techniques of nudity, sleep deprivation and dietary manipulation are used in concert with one another and the other techniques.³⁶⁶

Part 2

The detainee will be hooded and placed by the ply wall with collar on. The attention grasp will be used, then the hood taken off. The interrogator may then use the facial or abdominal slap, followed by walling. They may then use water dousing, before placing the detainee back into the sleep deprivation position.

Part 3

Walling, water dousing, both slaps, the facial hold and the attention grasp may be used. The interrogator may integrate stress positions and wall standing and may use the threat of walling to encourage the detainee to hold these positions longer. The interrogation session would then end again with sleep deprivation.

Part 4

The interrogation would continue as above, with the interrogator employing the most effective techniques and dropping those that are less effective. The interrogator may also add in cramped confinement.

IV. 2007 War Crimes Act Memorandum

Dietary Manipulation, Facial Hold, Attention Grasp and Facial Slap

As in the 2005 *Certain Techniques* memorandum, although medical personnel would observe *all* techniques and intervene if they appeared to be causing severe pain or suffering, unlike previously.

Extended Sleep Deprivation

³⁶⁶ Id, at 5.

Limited to four days (96 hours) consecutively, after which the detainee would be allowed eight hours of uninterrupted sleep, and would be allowed to wear shorts over his diaper.

The combination of these techniques.

Particularly since the detainees are closely monitored and “the frequency and intensity of the other techniques may be altered during a period of sleep deprivation”. The OLC conceded that whilst the combination of these techniques can cause uncertainty about treatment on the part of the detainee, this is necessary to the effectiveness of the techniques, and in the context is not arbitrary or outrageous.

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