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# Memo in Support of Finding #1

This memo provides the raw analytical materials for determining whether such abuses may be characterized as torture and/or cruel, inhuman or degrading treatment (CID).

## Is Torture Prohibited?

Unequivocally, yes.

Torture is illegal under the domestic law of virtually every nation, including the United States.<sup>1</sup> The American legal prohibition against torture extends back to the Bill of Rights of the U.S. Constitution,<sup>2</sup> while explicit official rejection of its use, even during times of national emergency, extends back to at least the American Civil War.<sup>3</sup> Prohibitions against torture are so widespread that, according to the Supreme Court, “the torturer has become — like the pirate and slave trader before him — *hostis humani generis*, an enemy of all mankind.”<sup>4</sup>

Under U.S.<sup>5</sup> and international law,<sup>6</sup> as well as the laws of war,<sup>7</sup> the prohibition of torture is absolute, allowing neither exception nor modification for any reason whatsoever, including for reasons related to national security.<sup>8</sup> Under international law, the prohibition against torture is considered *jus cogens*, a non-derogable norm that may not be altered or qualified by state consent under any circumstances.<sup>9</sup> This view of torture is similarly embraced by the European Court of Human Rights,<sup>10</sup> the Inter-American Court of Human Rights,<sup>11</sup> the Inter-American Commission on Human Rights,<sup>12</sup> the International Criminal Tribunal for the former Yugoslavia,<sup>13</sup> and the International Criminal Tribunal for Rwanda,<sup>14</sup> among many others.

## What is the Legal Definition of Torture?

Torture is defined by various international and domestic legal instruments,<sup>15</sup> which differ on their specific details, but share certain core elements. These elements are clearly stated in the U.N. Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which forms the basis for many countries’ definition of torture, including the United States. Article 1 of CAT defines torture as:

- [A]ny 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.<sup>16</sup>

The U.S. adopted the CAT's definition of torture when it ratified the treaty in 1988 but with certain caveats, including a requirement for specific intent (rather than simple intent), an enumerated list of underlying offenses associated with mental pain or suffering, and a requirement that the victim be within the perpetrator's physical control, among others.<sup>17</sup>

The definition of torture with respect to U.S. criminal law is contained within the U.S. Torture Statute, passed in 1994 in compliance with CAT's requirement to enact enabling legislation.<sup>18</sup> The U.S. Torture Statute defines torture as:

[A]n act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.<sup>19</sup>

It further specifies what is meant by "severe mental pain or suffering" as:

[T]he prolonged mental harm caused by or resulting from—

- (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
- (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
- (C) the threat of imminent death; or
- (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.<sup>20</sup>

Unlike "severe *mental* pain and suffering," "severe *physical* pain and suffering" is left undefined beyond the ordinary meaning of the words, and without an enumerated list of underlying offenses.<sup>21</sup> U.S. courts, the Army Field Manual, military courts-martial, administrative courts, and other official and judicial sources have had no difficulty labeling certain acts as torture or Cruel, Inhuman or Degrading (CID).<sup>22</sup> Typically, judges and officials take a totality-of-the-circumstances, common-sense approach when determining what constitutes torture,<sup>23</sup> an approach that reflects the reality that abusive techniques are almost always inflicted in combination, rarely if ever in isolation.

The Military Commissions Act of 2009,<sup>24</sup> the War Crimes Act,<sup>25</sup> and the Torture Victims Protection Act<sup>26</sup> incorporate similar definitions of torture as that contained in the Torture Statute, but with one additional element, namely, the requirement that the act causing severe physical or mental pain or suffering be done with a specific purpose in mind. Such purposes

include: obtaining information or a confession, punishment, intimidation, coercion, or discrimination of any kind.<sup>27</sup>

The key difference between the CAT and U.S. definitions of torture pertains to the requirement for specific intent. Unlike CAT, which requires that the act of torture be *intentionally inflicted*,<sup>28</sup> the United States requires the act to be *specifically intended*.<sup>29</sup> American courts have interpreted the specific-intent requirement to mean that the perpetrator must harbor “the intent to commit the act as well as the intent to achieve the consequences of that act, namely the infliction of severe pain and suffering.”<sup>30</sup> The distinction is not, according to the U.S. Court of Appeals for the Second Circuit, between whether or not severe pain and suffering were foreseeable, but strictly whether or not severe pain and suffering were the intended goals.<sup>31</sup> U.S. courts have also made clear that the act need only be specifically intended to inflict severe pain and suffering, and not specifically intended “to commit torture.”<sup>32</sup> In other words, even in situations where a perpetrator did not intend to inflict torture *per se*, so long as he or she intended to cause severe pain and suffering, the specific-intent requirement for the crime of torture is met.

## What is the Legal Difference Between Torture and CID?

CID is, like torture, banned under international and U.S. domestic law.<sup>33</sup> Under U.S. law, CID is prohibited under the War Crimes Act of 1996 (WCA), the Detainee Treatment Act of 2005 (DTA), the Military Commissions Act of 2009 (MCA), the Uniform Code of Military Justice, Army Regulation 190-8, the Eighth Amendment, the Convention Against Torture, and the Geneva Conventions.

The DTA and the MCA, which incorporates the DTA’s definition,<sup>34</sup> tie the definition of CID to the “cruel, unusual, and inhuman treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments” of the U.S. Constitution.<sup>35</sup> The United States, upon ratifying CAT, lodged the same reservation to its interpretation of CID.<sup>36</sup>

The definition of CID for purposes of criminal law, contained in the War Crimes Act, is narrower than the Eighth Amendment or CAT definition. The War Crimes Act defines CID as:

The act of a person who commits, or conspires or attempts to commit an act intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incident to lawful sanctions), including serious physical abuse, upon another within his custody.<sup>37</sup>

## How Did the Early Bush Administration Define “Severe Pain and Suffering”?

During the Bush administration, the definition of “severe pain and suffering” was intensely debated. An initial definition was articulated by the Office of Legal Counsel (OLC) in August 2002 in a memo by OLC Director Jay Bybee to Alberto Gonzales. According to the OLC’s original definition, “severe pain” was interpreted as pain rising to a level that “death, organ failure, or serious impairment of bodily functions will reasonably result.”<sup>38</sup>

“Severe pain,” according to the memo, includes only “extreme acts” and is generally of the kind “difficult for the victim to endure.”<sup>39</sup> Where the pain is physical, according to the original OLC analysis, it is likely to be accompanied by “serious physical injury, such as damage to one’s organs or broken bones.”<sup>40</sup>

OLC derived the definition not from a treaty or criminal definition of “severe pain” but from a statute regulating Medicare benefits. Moreover, as Jack Goldsmith, Jay Bybee’s successor as the head of the OLC later pointed out, “the health benefit statute did not define ‘severe pain.’ Rather, it used the term ‘severe pain’ as a sign of an emergency medical condition that, if not treated, might cause organ failure and the like.”<sup>41</sup> Goldsmith wrote that in his opinion, “[i]t is very hard to say in the abstract what the phrase ‘severe pain’ means, but OLC’s clumsy definitional arbitrage didn’t seem even in the ballpark.”<sup>42</sup>

Bybee’s memo was leaked to the press, and published on *The Washington Post* website on June 13, 2004. The definition of torture contained in the Bybee memo was rejected by many members of the legal community as well. A group of nearly 130 lawyers, including law school professors, retired judges, seven past presidents of the American Bar Association, and a former FBI director concluded that the OLC’s legal analysis of torture “circumvent[s] long established and universally acknowledged principles of law and common decency,” and that “[t]he position taken by the government lawyers in these legal memoranda amount to counseling a client as to how to get away with violating the law.”<sup>43</sup> Harold Hongju Koh, then Dean of Yale Law School, characterized the definition as “blatantly wrong,” stating that it was based on “erroneous legal analysis.”<sup>44</sup> Cass Sunstein, a law professor at the University of Chicago, and Martin Flaherty, another expert of international law, both similarly rejected the OLC’s definition of torture. Flaherty described it as “extreme, one-sided and poorly supported by the legal authority relied on,”<sup>45</sup> while Sunstein described it as “egregiously bad,” “very low level,” and “embarrassingly weak, just short of reckless.” Other commentators criticized the definition for ignoring Supreme Court precedent, straying from the definition contained in the CAT,<sup>46</sup> and for representing a “pre-ordained result” requested by the CIA.<sup>47</sup>

The Bybee memo’s interpretation of “severe pain” was ultimately repudiated by the Bush administration itself. On June 15, 2004, Goldsmith informed Attorney General John Ashcroft of his intention to withdraw the Bybee memo. In December 2004, OLC issued a superseding memo, written by Daniel Levin, which concluded that

“severe” pain under the statute is not limited to “excruciating or agonizing” pain or pain “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily functions, or even death.” The statute also prohibits certain conduct specifically intended to cause “severe physical suffering” distinct from “severe physical pain.”<sup>48</sup>

On July 29, 2009 the Justice Department’s Office of Professional Responsibility (OPR) released a 289-page report documenting its 5½-year investigation into OLC relating to the CIA’s interrogation program. OPR concluded that John Yoo and Jay Bybee, the attorneys primarily responsible for the original memo “dishonored their office and the entire Department of Justice” and committed “professional misconduct” when they defined torture in such a narrow way.<sup>49</sup> Associate Deputy Attorney General David Margolis did not adopt

OPR's findings of professional misconduct, but did agree that the memo's definition of "severe pain" was deficient.<sup>50</sup>

## What Specific Coercive Techniques Did the Bush Administration Find Not to Be Torture or CID?

The OLC issued a second memorandum signed by Bybee in August 2002 (hereinafter Bybee Techniques Memo) that concluded 10 specific "enhanced" techniques were not torture, and could be used lawfully by the CIA. The techniques were: "(1) attention grasp, (2) walling, (3) facial hold, (4) facial slap (insult slap), (5) cramped confinement, (6) wall standing, (7) stress positions, (8) sleep deprivation, (9) insects placed in a confinement box, and (10) the waterboard."<sup>51</sup>

In finding that the 10 techniques were not torture, the Bybee Techniques Memo relied not only on a narrow legal definition of torture, but on factual representations about how the techniques would be implemented that later proved inaccurate. To give one example, the OLC memorandum stated the volume of water used to waterboard a suspect would be carefully controlled, and that while enhanced techniques might be used more than once, "repetition will not be substantial." In fact, one detainee was waterboarded 83 times, and another detainee 183 times, by interrogators who "continuously applied large volumes of water."<sup>52</sup>

The Bybee Techniques Memo also relied heavily on the CIA's assurance that "a medical expert ... will be present throughout," and "the procedures will be stopped if deemed medically necessary to prevent severe mental or physical harm."<sup>53</sup>

Later memoranda placed even greater reliance on medical experts from the CIA's Office of Medical Services (OMS) to ensure that the pain and suffering interrogators inflicted on detainees would not reach the level of torture.<sup>54</sup> Those memos, signed by acting OLC head Steven Bradbury in 2005 and declassified in 2009, give the most detailed description available of the "enhanced" CIA techniques.

In addition to the techniques listed above, the Bradbury memos approved "water dousing," in which interrogators pour cold water on a detainee. In order to prevent hypothermia, "[a] medical officer must observe and monitor the detainee throughout application of this technique" and "ambient temperatures must remain above 64°F," and there were time limits placed on detainees exposure:

- For water temperature of 41°F, total duration of exposure may not exceed 20 minutes without drying and rewarming.
- For water temperature of 50°F, total duration of exposure may not exceed 40 minutes without drying and rewarming.
- For water temperature of 59°F, total duration of exposure may not exceed 60 minutes without drying and rewarming.<sup>55</sup>

The Bradbury memoranda considered the legality of two techniques under the torture statute — waterboarding and extended sleep deprivation by means of shackling — to present a "substantial question."<sup>56</sup>

## **Sleep Deprivation**

According to Bradbury's memo,

The primary method of sleep deprivation involves the use of shackling to keep the detainee awake. In this method, the detainee is standing and is handcuffed, and the handcuffs are attached by a length of chain to the ceiling. The detainee's hands are shackled in front of his body, so that the detainee has approximately a two-to-three foot diameter of movement. The detainee's feet are shackled to a bolt in the floor. Due care is taken to ensure that the shackles are neither too loose nor too tight for physical safety. We understand from discussions with OMS that shackling does not result in any significant physical pain for the subject.<sup>57</sup>

Bradbury wrote that detainees were continually monitored by closed-circuit television to ensure that they would not fall asleep and dangle from their shackles, and monitored for edema, swelling in the lower legs:

OMS has advised us that this condition is not painful, and that the condition disappears quickly once the detainee is permitted to lie down. Medical personnel carefully monitor any detainee being subjected to standing sleep deprivation for edema or other physical and psychological conditions.<sup>58</sup>

Because several detainees did experience edema as a result of standing sleep deprivation, the CIA, in consultation with OMS, developed an alternative protocol for "horizontal sleep deprivation," which involved shackling detainees' arms and legs to the floor far enough away from their bodies that the limbs "cannot be used for balance or comfort" but not so far as to "force the limbs beyond natural extension or create tension on any joint." The CIA assured OLC that this was "not significantly painful, according to the experience and professional judgment of OMS and other personnel."<sup>59</sup>

While they were being shackled in a standing position for purposes of sleep deprivation, detainees were kept in diapers rather than being unshackled or allowed to use a bucket or latrine. The CIA told OLC in 2005 that releasing a detainee from shackles during sleep deprivation to urinate or defecate "would interfere with the effectiveness" of the sleep deprivation technique.<sup>60</sup> Written guidelines from the CIA Office of Medical Services in May 2004 list diapering "generally for periods not greater than 72 hours" as a standard measure, "prolonged diapering" as an enhanced measure, and states that only the medical limitation on diapering is "[e]vidence of loss of skin integrity due to contact with human waste materials."<sup>61</sup> In 2005, however, the CIA assured OLC that diapers were regularly checked and changed if soiled, and detainees had not developed skin lesions.<sup>62</sup>

According to the Bradbury memos, the longest consecutive period a detainee was deprived of sleep was 180 hours.<sup>63</sup>

## **Waterboarding**

Waterboarding, according to written guidelines by the CIA's Office of Medical Services, was "by far the most traumatic of the enhanced interrogation techniques." OMS described serious risks

based on the CIA's previous experience administering the waterboard:

[F]or reasons of physical fatigue or psychological resignation, the subject may simply give up, allowing excessive filling of the airways and loss of consciousness. An unresponsive subject should be righted immediately, and the interrogator should deliver a sub-xyphoid thrust to expel the water. If this fails to restore normal breathing, aggressive medical intervention is required. Any subject who has reached this degree of compromise is not considered an appropriate candidate for the waterboard.<sup>64</sup>

Before this occurred, however, OMS stated that “a series of several relatively rapid waterboard applications is medically acceptable. ... Several such sessions per 24 hours have been employed without apparent medical complication.” OMS recommended a careful medical assessment before more than 15 waterboard applications within a 24 hour period, and warned of “cumulative” effects after three to five consecutive days of intense waterboarding.<sup>65</sup>

The 2005 OLC memos contain more details about potential medical complications of waterboarding, and precautions taken to avoid them. These included: (1) feeding detainees liquid diets beforehand to reduce the risk of vomiting, and (2) using saline solution instead of water to reduce the risk of pneumonia. The memo also states that that equipment for emergency resuscitation and medical supplies for performing a tracheotomy are available for detainees subjected to waterboarding.<sup>66</sup>

Throughout the 2005 memos, Bradbury placed great reliance on OMS's assurances about the safety of the techniques and their role in monitoring interrogation and modifying techniques as needed. A May 10 memorandum on the legality of individual techniques under the Torture Statute cited a CIA assurance that medical and psychological personnel are continuously present and that “[d]aily physical and psychological evaluations are continued” during the entire period of use for “enhanced” techniques.<sup>67</sup>

OMS participation was especially crucial to Bradbury's finding that waterboarding and sleep deprivation enforced by shackling did not violate the Torture Statute. Footnote 31 stated that OMS had assured OLC that “although the ability to predict is imperfect — they would object to the initial or continued use of any technique if their psychological assessment of the detainee suggested that the use of the technique might result in post-traumatic stress disorder (PTSD), chronic depression, or other condition that could constitute prolonged mental harm.”<sup>68</sup> The memorandum concluded with a paragraph again emphasizing the crucial role of medical and psychological personnel, and OLC's assumption that in addition to monitoring interrogations and stopping or adjusting techniques when needed, “medical and psychological personnel are continually assessing the available literature and ongoing experience with detainees.”<sup>69</sup>

A second memo, on whether combined techniques would rise to the level of torture, states of medical professionals' evaluations of detainees and monitoring of interrogations that “these safeguards, which were critically important to our conclusions about individual techniques, are even more significant when techniques are combined.” The same memo later states that OMS's role is “essential to our advice” that the CIA program does not violate the torture statute.<sup>70</sup> A third memo, regarding whether the CIA program constitutes cruel, inhuman, or degrading treatment, places similar reliance on OMS.<sup>71</sup>

In 2006, in response to revelations about the role of mental health professionals' involvement in "enhanced" interrogation, the American Medical Association adopted ethical guidelines stating that physicians may not "directly participate in an interrogation" or "monitor interrogations with the intention of intervening in the process," because "a role as physician-interrogator undermines the physician's role as healer."<sup>72</sup> Similarly, the American Psychiatric Association has stated that "[n]o psychiatrist should participate directly in the interrogation of persons held in custody."<sup>73</sup>

Over the objections of some members, the American Psychological Association (APA) permits its members to participate in interrogation, but since 1985 it has forbidden them from facilitating "cruel, inhuman, or degrading treatment or punishment" even if it did not reach the level of torture.<sup>74</sup> In 2007, the APA forbade any participation in the following techniques:

Mock executions; water-boarding or any other form of simulated drowning or suffocation; sexual humiliation; rape; cultural or religious humiliation; exploitation of fears, phobias or psychopathology; induced hypothermia; the use of psychotropic drugs or mind-altering substances; hooding; forced nakedness; stress positions; the use of dogs to threaten or intimidate; physical assault including slapping or shaking; exposure to extreme heat or cold; threats of harm or death; isolation; sensory deprivation and over-stimulation; sleep deprivation; or the threatened use of any of the above techniques to an individual or to members of an individual's family.<sup>75</sup>

## What Specific Acts Have U.S. Courts Identified as Torture or CID?

Certain patterns and themes appear in those U.S. cases in which the offense of torture is found. First, if a practice is considered a violation of the Fifth, Eighth or 14th Amendment then it will likely be deemed CID at the very least.<sup>76</sup> Second, courts focus on the duration, repetition and combination of methods when considering whether torture has occurred.<sup>77</sup> The longer and more repetitious a practice's duration, particularly when combined with other abusive acts, the more likely it will be considered torture.<sup>78</sup> Third, serious harm resulting from the treatment makes a finding of torture more likely.<sup>79</sup> Lasting medical conditions will make a finding of torture or CID more likely.<sup>80</sup> Methods that lead to broken bones,<sup>81</sup> loss of organ function,<sup>82</sup> scarring,<sup>83</sup> loss or limited use or maiming of limbs and other appendages,<sup>84</sup> or ongoing mental-health issues have been found to constitute torture or CID.<sup>85</sup>

U.S. courts, using the sort of totality-of-the-circumstances approach discussed above, have determined that the following combinations of acts amount to torture:

- Slapping that causes temporary hearing loss; kicking with boots; physical beating; beating the head and chest until consciousness was lost;<sup>86</sup>
- Twenty days of physical beatings and electric shocks through needles;<sup>87</sup>
- Brutal beating with an electric baton, a leather belt, and iron chains until the victim bled and lost consciousness;<sup>88</sup>
- Beatings while blindfolded by punching, kicking and hitting with the butts of rifles;<sup>89</sup>

- Administration of the “water cure,” where “a cloth was placed over the detainee’s mouth and nose, and water poured over it producing a drowning sensation;”<sup>90</sup>
- Russian roulette;<sup>91</sup>
- Binding the victim’s hands and arms behind his back and leaving him naked outside for 25 days, providing very little food and water, and regularly whipping him until he bled;<sup>92</sup>
- Binding the victims, forcing them to lie in shallow pits of dank water filled with corpses and vermin, beating them, burning them, shocking them with cattle prods, cutting their genitals, forcing them to play soccer with heavy stones while barefoot, denying them medical treatment, rape, covering them with ants among other practices;<sup>93</sup>
- Beatings and cigarette burns;<sup>94</sup>
- Beatings, suffocation, dousing victims with cold water, slapping, hair-pulling, forcing victims to kneel for hours, sleep deprivation, binding and suspending victims by their arms.<sup>95</sup>

Several U.S. courts have decided cases involving allegations of torture through the forcible administration of water, though most of the precedents predate the ratification of the Convention Against Torture. In the early 20th century, U.S. Army Captain Elwin Glenn was court-martialed for administering the “water cure” to civilians during the combat operations in the Philippines.<sup>96</sup> Japanese military personnel were convicted of war crimes by the International Military Tribunal for the Far East for using the “water treatment” method on POWs.<sup>97</sup> And several lower-ranking soldiers were convicted of waterboarding, a war crime, in the years following the war.<sup>98</sup>

Several state courts have decided cases involving waterboarding as well. In *White v. State*, the Mississippi Supreme Court threw out a 1922 murder conviction because the defendant’s confession had been obtained using the “water cure.”<sup>99</sup> In that case, men held the appellant down while one stood on him and the other poured water into his nose in order to gain a confession.<sup>100</sup> The court described this treatment as “barbarous” and “brutal treatment,” “causing pain and horror.”<sup>101</sup>

In *Cavazos v. State*, the Texas Court of Criminal Appeals similarly reversed a murder conviction where officers had extracted a confession by coercive means, including the water cure.<sup>102</sup> The Cavazos court found in 1942 that the trial judge had improperly admitted a confession that was “obtained by force and physical and mental torture.”<sup>103</sup>

Four decades after *Cavazos*, four Texas law-enforcement officers who had waterboarded suspects were convicted of “violating and conspiring to violate the civil rights of prisoners in their custody.”<sup>104</sup> The defendants, a sheriff and three deputies, had “draped a towel over each man’s face and pour[ed] water over it until the men gagged.”<sup>105</sup> While not considering the nature of the treatment itself on appeal, the U.S. Court of Appeals for the Fifth Circuit in 1984 repeatedly described the actions of the sheriff and deputies as “torture.”<sup>106</sup>

While all of the above cases were decided prior to CAT's ratification, U.S. courts have held that waterboarding is a form of torture after the U.S.'s ratification as well. For example, in *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, the U.S. District Court for the District Court of Hawaii specifically listed waterboarding (or "water cure") as one form of torture practiced by the Marcos regime, which used such techniques against political dissidents who then brought their claims in U.S. courts when seeking asylum.<sup>107</sup> The U.S. Court of Appeals for the Ninth Circuit subsequently supported this finding.<sup>108</sup> The Marcos regime used waterboarding against political dissidents while it was in control of the Philippines, and it was the basis of many claims by victims in the ensuing litigation in American courts.

## What Specific Acts do International and Foreign Cases Identify as Torture?

International and foreign cases may also be helpful in evaluating what constitutes torture. War crimes tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), the European Court of Human Rights (ECHR), and foreign courts have generated a large body of case law regarding torture and CID. While these decisions are not binding on U.S. courts, they provide examples of how other courts around the world have interpreted torture and CID. Though uncommon, some U.S. courts have cited foreign decisions when considering allegations of torture or other violations of international law.<sup>109</sup>

The enacting statute for every international criminal tribunal includes torture as a punishable offense.<sup>110</sup> Typically, these international tribunals have fewer required elements for torture than in U.S. law. These elements include: (1) an act or omission (2) intentionally inflicted (3) to cause severe mental or physical pain and suffering (4) for a prohibited purpose such as obtaining information or a confession, punishing, humiliating, coercing, or discriminating.<sup>111</sup>

Unlike most of the U.S. torture statutes, the ICTY and the ICTR do not require that the perpetrator be a public official, have no explicit custody requirement, and do not require specific intent.

The ICTY uses an approach similar to that used by the ECHR when evaluating claims of torture. The Trial Chamber of the ICTY has stated that when assessing a claim of torture, the tribunal should

take into account all circumstances of the case and in particular the nature and context of the infliction of pain, the premeditation and institutionalization of the ill-treatment, the physical condition of the victim, the manner and the method used and the position of inferiority of the victim. Also relevant to the Chamber's assessment is the physical or mental effect of the treatment on the victim, the victim's age, sex, or state of health. Further, if the mistreatment has occurred over a prolonged period of time, the Chamber would assess the severity of the treatment as a whole.<sup>112</sup>

The Extraordinary Chambers in the Courts of Cambodia (ECCC), a tribunal established jointly by the United Nations and the Cambodian government to prosecute atrocities committed by the

Khmer Rouge regime, has held waterboarding to be torture. In Judgment 001, the Cambodian tribunal convicted Kaing Guek Eav (aka “Duch”) of the crime against humanity of persecution, enslavement, imprisonment, torture and grave breaches of the Geneva Conventions of 1949 due to his involvement with the notorious S-21 prison camp. Waterboarding was one of the acts of torture charged, specifically “pouring water into [the victim’s] nose to induce a sensation of suffocation and drowning.”<sup>113</sup> Applying CAT’s definition of torture, the court found that waterboarding was torture since it “inflicted severe physical pain or mental suffering for the purpose of obtaining a confession or punishment.”<sup>114</sup>

In *Ireland v. The United Kingdom*, the ECHR found that the following practices, applied “for hours at a stretch” for a total period of up to one week, constituted “inhuman and degrading treatment” but did not rise to the level of torture:

- Wall-standing: forcing the detainees to remain for hours in a “stress position,” described by those who underwent it as being spread-eagled against the wall, with fingers placed high above the head against the wall, legs spread apart and feet back, causing them to stand on their toes and to put most of the body’s weight on the fingers;
- Hooding: placing a dark-colored bag over the detainee’s head and, at least initially, keeping it there continually except during interrogation;
- Subjection to noise: pending an interrogation, holding a detainee in a room with continuous loud and hissing noises;
- Deprivation of sleep: keeping detainees awake for prolonged periods prior to interrogation;
- Deprivation of food and drink: subjecting detainees to a reduced diet.<sup>115</sup>

The ECHR found that the distinction between torture and inhuman and degrading treatment “derives primarily from a difference in the suffering inflicted” and that the five practices enumerated above “did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.”<sup>116</sup> Each of these five techniques has been used, repeatedly and systematically, on detainees in U.S. custody over the course of the past decade — often for much longer consecutive periods than discussed in the ECHR decision.<sup>117</sup>

In *Aksoy v. Turkey*, the ECHR found that a man subjected to “Palestinian hanging,” whereby a prisoner has his hands tied behind his back and is then suspended by his arms, had been tortured.<sup>118</sup> Variations of this treatment lasted for four days, leaving him unable to use his hands.<sup>119</sup> The court held that this practice was “of such a serious and cruel nature that it can only be described as torture.”<sup>120</sup>

Most recently, in *El-Masri v. Macedonia*, the ECHR found that the CIA’s treatment of German citizen Khaled El-Masri amounted to torture. The court credited El-Masri’s allegations that at the Skopje airport, he was

beaten severely by several disguised men in black. He was stripped and sodomised with an object. He was placed in a [diaper] and dressed in a dark

blue short-sleeved tracksuit. Shackled and hooded, and subjected to total sensory deprivation, the applicant was forcibly marched to a CIA aircraft. ... When on the plane, he was thrown down to the floor, chained down, and forcibly tranquilised. While in that position the applicant was flown to Kabul. ... In the Court's view, such treatment amounted to torture.<sup>121</sup>

The court found that El-Masri had been further mistreated in Afghanistan, but examined those allegations in less detail because it was primarily concerned with evaluating Macedonia's responsibility.<sup>122</sup>

## What Acts are Prohibited Under the Army Field Manual?

The 1992 Army Field Manual on interrogation, which remained in effect until a revision in 2006, absolutely banned torture and CID. The 1992 Field Manual listed the following acts as examples of prohibited "physical torture":

- Electric shock;
- Infliction of pain through chemicals or bondage (other than legitimate use of restraints to prevent escape);
- Forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time;
- Food deprivation;
- Any form of beating;<sup>123</sup>

The 1992 Field Manual listed as examples of banned "mental torture";

- Mock executions;
- Abnormal sleep deprivation;
- Chemically induced psychosis.<sup>124</sup>

The 2006 revision of the Army Field Manual lists the following (when used in connection with interrogation) as examples of prohibited behavior:

- Forcing the detainee to be naked, perform sexual acts, or pose in a sexual manner;
- Placing hoods or sacks over the head of a detainee; using duct tape over the eyes;
- Applying beatings, electric shock, burns, or other forms of physical pain;
- Waterboarding;

- Using military working dogs;
- Inducing hypothermia or heat injury;
- Conducting mock executions;
- Depriving the detainee of necessary food, water, or medical care.<sup>125</sup>

The 2006 Field Manual makes it clear that the above list is not exhaustive. Even so, it no longer includes the 1992 version's specific prohibitions on stress positions, sleep deprivation and improper use of restraints.<sup>126</sup>

## What Acts has the U.S. Government Defined as Torture or Abuse When Performed by Other Governments Around the World?

The United States has routinely and firmly condemned as torture and/or abuse many of the same techniques used by U.S. personnel against detainees over the course of the past decade.

The Department of State (DOS), in its annual U.S. country reports on human rights practices, has characterized many of the coercive techniques used against detainees in U.S. custody in the post-September 11 era as torture, abuse or cruel treatment. These reports, assessing the human rights situation in 194 countries around the world, are submitted annually as required by both the Foreign Assistance Act of 1961 and the Trade Act of 1974.

The CIA, in an internal review, acknowledged that the “[enhanced interrogation techniques] used by the [CIA] ... are inconsistent with the public policy positions that the United States has taken regarding human rights.”<sup>127</sup>

The following techniques and treatments have both been used by the U.S. against detainees within its control and been deemed torture, abuse or cruel treatment in DOS's annual Human Rights Reports.<sup>128</sup>

***Stress Positions:*** DOS criticized Jordan in its 2006 Human Rights Report for subjecting detainees to “forced standing in painful positions for prolonged periods.” In its 2000, 2001 and 2002 reports on Iran, “suspension for long periods in contorted positions” is described as torture. In its 2001 and 2002 Human Rights Reports on Sri Lanka, “suspension by the wrists or feet in contorted positions” and remaining in “unnatural positions for extended periods” are described as “methods of torture.”

***Temperature Manipulation:*** In its 2005 Human Rights Report on Turkey, DOS classified “exposure to cold” as torture. Similarly, in its 2005 human rights report on Syria, it referred to “dousing with cold water” as a form of “torture and ill-treatment,” while referring to “dousing victims with freezing water and beating them in extremely cold rooms” as “torture.” Exposure to cold was similarly cited as “torture and abuse” in the 2006 reports for both Turkey and Syria, and as “torture and degrading treatment” in its report for China. Dousing with hot or cold water was similarly described as “torture” in the 2000 Human Rights Report on Egypt.

**Waterboarding:** In the section entitled Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, the 2003–2007 Human Rights Reports on Sri Lanka classified “near-drowning” as “torture and abuse.” In its Human Rights Reports for Tunisia from 1996 to 2004, “submersion of the head in water” is deemed “torture.” In the 2005 and 2006 Human Rights Reports for Tunisia, this practice is considered “torture and abuse.”

**Threats of Harm to Person, Family or Friends:** In its 2002 and 2006 Human Rights Reports for Brazil, Egypt, Tunisia and Turkey, DOS referred to the use of threats against prisoners as a form of torture or cruel, inhuman or degrading treatment.

**Sleep Deprivation:** In the 2005 Human Rights Reports on Indonesia, Iran, Jordan, Libya, Saudi Arabia and Turkey, sleep deprivation was condemned as torture or CID. In its 2000, 2001 and 2002 reports on Pakistan, denial of sleep is described as a common torture method.

**Sensory Overload-Noise and Light:** The 1999, 2001 and 2002 Human Rights Reports on Turkey refer to the use of “loud music” as a “[c]ommonly employed method[] of torture.” Interrogating prisoners for long periods of time under “bright lights” was considered “mistreatment” and included under the “Torture and CID” section in the 2001 Human Rights Report on Burma.

**Sexual Humiliation:** The United States regularly criticizes other governments for subjecting detainees to torture through sexual humiliation. In its 2006 Human Rights Report on Egypt, and in its 2000, 2001, 2002 and 2006 Human Rights Reports on Turkey, the State Department noted that detainees were subject to “torture” by forcing them to strip in front of the opposite sex, subjecting them to sexual touching or insult, or threatening them with rape.

**Prolonged Solitary Confinement:** In the 2005 and 2006 Human Rights Reports on Jordan, “extended solitary confinement” is deemed “torture.”

**Forced Nudity:** In the 2000, 2001 and 2002 Human Rights Reports for Cameroon, the United States refers to the stripping of inmates as “degrading treatment.”

**Confinement in Small Space:** The 2001 and 2002 Human Rights Reports on Iraq described extended solitary confinement in small dark compartments as torture. In its 2002 report on North Korea, “confinement to small ‘punishment cells,’ in which prisoners were unable to stand upright or lie down, where they could be held for several weeks” is defined as a method of torture.

**Forced Prolonged Standing:** In its 2001 and 2002 Human Rights Reports on Turkey, forced prolonged standing is described as a method of torture.

## **Have Any Former Bush Administration Officials or Military Officials Concluded That Detainees in U.S. Custody Have Been Tortured?**

Yes, various Bush officials and military officials have publicly stated that certain detainees in U.S. treatment were tortured, though many others maintain that the “enhanced interrogation techniques” did not rise to the level of torture.

Susan J. Crawford, the convening authority for the Guantánamo military commissions from 2007 to 2010, is one such example. According to Crawford, “We tortured [Mohammed al] Qahtani,” whose “treatment met the legal definition of torture.”<sup>129</sup> Because of this, Crawford refused to refer al Qahtani to the military commissions for trial.<sup>130</sup>

Alberto Mora, who served as general counsel of the Navy, strongly opposed the use of many of the interrogation techniques approved by a Secretary of Defense Donald Rumsfeld on Dec. 2, 2002, and subsequently used in Guantánamo Bay. According to Mora, many of these techniques, whether used singly or in combination, could “rise to the level of torture.”<sup>131</sup> In 2006, Mora publically stated that cruel, inhuman or degrading treatment had been applied in Abu Ghraib, Guantánamo, “and other locations” and that the treatment “may have reached the level of torture in some instances.”<sup>132</sup>

Colonel Lawrence Wilkerson, chief of staff to Secretary of State Colin Powell, is another example. According to Wilkerson:

America’s armed forces were involved in practices that violated the Geneva Conventions, the International Convention Against Torture, U.S. domestic law, and the written and unwritten moral code of the American soldier. Simply put, American fighting men and women were abusing detainees.<sup>133</sup>

He has also publically stated that “waterboarding is a war crime.”<sup>134</sup>

Major General Antonio Taguba, who led the U.S. Army investigation of prisoner abuse at Abu Ghraib, has also publicly stated that detainees in U.S. custody there were tortured.<sup>135</sup>

Many more Bush administration officials, including President George W. Bush, Vice President Cheney, Rumsfeld, and CIA Directors George Tenet, Michael Hayden, and Porter Goss, have denied that the approved CIA techniques constitute torture or that detainees were tortured as a result of administration policy.

## **Has the Red Cross Referred to the Treatment of Detainees as Torture or Abuse?**

Yes. While most reports from the International Committee of the Red Cross (ICRC) are typically confidential and not available to the public, those that have become public include allegations of abuse, which in some cases — in the ICRC’s words — “amount to torture”<sup>136</sup> or are “tantamount to torture.”<sup>137</sup>

Two reports in particular have been publicly released. The first discusses the treatment of detainees in Iraq,<sup>138</sup> and the second discusses the treatment of 14 “high-value detainees” in CIA custody.<sup>139</sup> In each, the ICRC finds evidence of detainee abuse, including torture, as further discussed below.

In its report on detainee treatment in Iraq, the ICRC highlights a series of “serious violations of International Humanitarian Law,” some of which are “tantamount to torture.”<sup>140</sup> The primary violations occurred largely in the beginning stages of the internment process, except for those labeled “high value,” who experienced mistreatment throughout their detention.<sup>141</sup> Some of the violations catalogued by the ICRC include:

- Brutality against protected persons upon capture and initial custody, sometimes causing death or serious injury;
- Absence of notification of arrest of persons deprived of their liberty to their families causing distress ...;
- Physical or psychological coercion during interrogation to secure information;
- Prolonged solitary confinement in cells devoid of daylight;
- Excessive and disproportionate use of force against persons deprived of their liberty resulting in death or injury during their period of internment.<sup>142</sup>

In this report, the ICRC describes the “brutality”<sup>143</sup> and “ill-treatment” experienced by detainees upon capture as “frequent,” indicating a “consistent pattern with respect to times and places of brutal behavior during arrest.”<sup>144</sup> More specifically, those suspected of security offenses or deemed to have an “intelligence value,” were at “high risk of being subjected to a variety of harsh treatments ranging from insults, threats and humiliations to both physical and psychological coercion, which in some cases was tantamount to torture.”<sup>145</sup> Among other harsh treatments, they were kept in strict solitary confinement in cells devoid of sunlight for nearly 23 hours a day, an act that, according to the ICRC, constitutes “a serious violation of the Third and Fourth Geneva Conventions.”<sup>146</sup> At least one allegation involved “death resulting from harsh conditions of internment and ill-treatment during initial custody.”<sup>147</sup> However, high-value detainees were not the only ones subjected to ill-treatment, some of which constituted torture. Indeed, the ICRC notes that “the use of ill-treatment” against “persons deprived of their liberty,” not just high-value detainees, “went beyond exceptional cases and might be considered as a practice tolerated” by the coalition forces, of which the United States had the lead.<sup>148</sup> This is compounded by the fact that according to the ICRC’s own estimate, which was based on military intelligence officers, “between 70% and 90% of the persons deprived of their liberty in Iraq had been arrested by mistake.”<sup>149</sup>

The report cites the 12 most frequently alleged “methods of ill-treatment,” which were used “in a systematic way to gain confessions and extract information” from those suspected of security offenses or deemed to have an intelligence value.<sup>150</sup> These systematically observed and documented methods include:<sup>151</sup>

- Hooding. This was used to restrict vision, to disorient, and to prevent the detainee from breathing freely. It lasted anywhere from a few hours to 2–4 consecutive days, and was “sometimes used in conjunction with beatings” to “increase anxiety as to when blows would come.”
- Extremely tight handcuffing with flexi-cuffs. At times they were made so tight and used for such extended periods that they caused skin lesions and long-term medical consequences, such as nerve damage.
- Beatings with hard objects, such as pistols and rifles, slapping, punching, and kicking with knees or feet.
- Pressing the face into the ground with boots.

- Threats of ill-treatment, reprisals against family members, imminent execution or transfer to Guantánamo.
- Forced nudity for several days while held in solitary confinement in an empty and completely dark cell that included a latrine.
- Solitary confinement combined with threats, insufficient sleep, food/water deprivation, minimal access to showers, denial of access to open air, and prohibition of contacts with other detainees.
- Being paraded naked outside of cells in front of other detainees and guards, while hooded or with women's underwear over their heads.
- Acts of humiliation such as being made to stand naked against the wall of the cell with arms raised or with women's underwear over their head for prolonged periods, while being mocked by guards, including female guards, and sometimes photographed.
- Being attached repeatedly over several days, for several hours each time, with handcuffs to the bars of the cell door in humiliating (naked or in underwear) and/or uncomfortable positions causing physical pain.
- Exposure while hooded to loud noise or music, prolonged exposure while hooded to the sun over several hours, including during the hottest time of the day.
- Being forced to remain for prolonged periods in stress positions such as squatting or standing with or without the arms lifted.

Other findings reported by the ICRC include:

- Suspects being “severely beaten” by coalition forces after having their neck stamped on by soldiers and their money confiscated without receipt.<sup>152</sup>
- A detainee being forced to sit “on the hot surface of what he surmised to be the engine of a vehicle, which had caused severe burns to his buttocks. The victim lost consciousness. The ICRC observed large crusted lesions consistent with his allegation.”<sup>153</sup>
- Another detainee was forced to lie face down, on a hot surface during transportation, causing “severe skin burns that required three months hospitalization,” which involved skin grafts, the amputation of his right index fingers, and the loss of use of another finger.<sup>154</sup>
- Occasional observations of “haematoma and linear marks compatible with repeated whipping or beating.”<sup>155</sup>

The report highlights problems at the Abu Ghraib prison at a time prior to the public uproar over the abuses occurring there following the release of pictures depicting torture and cruel conditions. The report notes that “[i]n certain cases, such as in Abu Ghraib military intelligence

section, methods of physical and psychological coercion used by the interrogators appeared to be part of the standard operating procedures by military intelligence personnel to obtain confessions and extract information.”<sup>156</sup> More specifically, several military intelligence officers confirmed to the ICRC that it was part of the military intelligence process [at Abu Ghraib] to ... use inhumane and degrading treatment, including physical and psychological coercion” in order to secure the detainees’ cooperation.<sup>157</sup>

Confirming how widespread and systematic the abuses were at certain detention centers throughout Iraq (not just at Abu Ghraib), the report cites various memoranda given to coalition forces documenting episodes of “ill-treatment.” In one such memo, “over 200 allegations of ill-treatment” are catalogued; in other, “approximately 50” are reviewed.<sup>158</sup> In a description of one detainee’s experience, the report states:

In one illustrative case, a [detainee] arrested at home by the [coalition forces, “CF”] on suspicion of involvement in an attack against the CF, was allegedly beaten during interrogation in a location in the vicinity of Camp Cropper. He alleged that he had been hooded and cuffed with flexi-cuffs, threatened to be tortured and killed, urinated on, kicked in the head, lower back and groin, force-fed a baseball which was tied into the mouth using a scarf and deprived of sleep for four consecutive days. Interrogators would allegedly take turns ill-treating him. When he said he would complain to the ICRC he was allegedly beaten more. An ICRC medical examination revealed haematoma in the lower back, blood in urine, sensory loss in the right hand due to tight handcuffing with flexi-cuffs, and a broken rib.<sup>159</sup>

At the same time, the report makes clear that at “regular internment facilities,” the treatment of detainees was generally “respectful,” with a few “individual exceptions.”<sup>160</sup>

Also in 2004, the ICRC reported that medical personnel in Guantánamo were reporting to interrogators about prisoners’ mental health and vulnerabilities, usually through a group of psychologists called the Behavioral Science Consultation Team who advised interrogators. The ICRC called this “a flagrant violation of medical ethics,” and stated that it was part of a systematic effort to coerce prisoners through

humiliating acts, solitary confinement, temperature extremes, use of forced positions. ... The construction of such a system, whose stated purpose is the production of intelligence, cannot be considered other than an intentional system of cruel, unusual and degrading treatment and a form of torture.<sup>161</sup>

In the 2007 ICRC report on the treatment of 14 high-value detainees held in CIA custody before being transferred to Guantánamo Bay under Defense Department authority, the ICRC concludes that the “allegations of ill-treatment of the detainees indicate that, in many cases, the ill-treatment to which they were subjected while held in the CIA program, either singly or in combination, constituted torture.”<sup>162</sup> The report then goes on to catalogue the various “methods of ill-treatment” alleged by the detainees, which are variously described as “severe and multifaceted,”<sup>163</sup> “extremely harsh,”<sup>164</sup> and “intrusive and humiliating,”<sup>165</sup> among other such descriptions. These methods, which were inflicted in combination — “either simultaneously, or in succession” — include:

- Continuous solitary confinement and incommunicado detention.”<sup>166</sup> All 14 detainees were kept in continuous incommunicado, solitary confinement while in CIA custody, ranging from 16 months to 4½ years. For 11 of the 14 detainees, it was for more than three years.<sup>167</sup> During this time they had “no knowledge of where they were being held,” no contact with legal representation, no contact whatsoever with their families, no access to an independent third party (including the ICRC), and “no contact with persons other than their interrogators or guards,” the latter of whom were typically masked and rarely, if ever, communicated with the detainees.<sup>168</sup> Essentially, the ICRC concludes, the detainees were “missing persons,” a phenomenon that “violates, or risks violating, a range of customary [international] rules, most notably ... the prohibition of torture and/or other cruel, inhuman or degrading treatment (CID).<sup>169</sup>
- Suffocation by water poured over a cloth placed over the nose and mouth, alleged by three of the fourteen.
- Prolonged stress standing position, naked, held with the arms extended and chained above the head, as alleged by ten of the fourteen, for periods from two or three days continuously, and for up to two or three months intermittently, during which period toilet access was sometimes denied resulting in allegations from four detainees that they had to defecate and urinate over themselves.
- Beatings by use of a collar held around the detainees neck and used to forcefully bang the head and body against the wall, alleged by six of the fourteen.
- Beating and kicking, including slapping, punching, kicking to the body and face, alleged by nine of the fourteen.
- Confinement in a box to severely restrict movement alleged in the case of one detainee.
- Prolonged nudity alleged by eleven of the fourteen during detention, interrogation and ill-treatment; this enforced nudity lasted for periods ranging from several weeks to several months.
- Sleep deprivation was alleged by eleven of the fourteen through days of interrogation, through use of forced stress positions (standing or sitting), cold water and use of repetitive loud noise or music. One detainee was kept sitting on a chair for prolonged periods of time.
- Exposure to cold temperature was alleged by most of the fourteen, especially via cold cells and interrogation rooms, and for seven of them, by the use of cold water poured over the body or, as alleged by three of the detainees, held around the body by means of a plastic sheet to create an immersion bath with just the head out of the water.
- Prolonged shackling of hands and/or feet was alleged by many of the

fourteen.” One detainee alleged to have been shackled for 19 months straight. Another detainee’s shackles had to be cut off his ankles “as the locking mechanism [had] ceased to function, allegedly due to rust.”<sup>170</sup>

- Threats of ill-treatment to the detainee and/or his family, alleged by nine of the fourteen.
- Forced shaving of the head and beard, alleged by two of the fourteen.
- Deprivation/restricted provision of solid food from 3 days to 1 month after arrest, alleged by eight of the fourteen.<sup>171</sup>

The above techniques were “further exacerbated” by the conditions of confinement, which were “clearly manipulated in order to exert pressure on the detainees concerned” according to the ICRC.<sup>172</sup>

In the section on “prolonged stress positions,” the ICRC provides the following description:

While being held in this position [a prolonged standing stress position involving being shackled to a bar or hook in the ceiling by the detainee’s wrists, typically while naked, for a continual period of time, ranging from two to three days continuously, up to two or three months intermittently] some of the detainees were allowed to defecate in a bucket. A guard would come to release their hands from the bar or hook in the ceiling so that they could sit on the bucket. None of them, however, were allowed to clean themselves afterwards. Others were made to wear a garment that resembled a diaper. This was the case for Mr. Bin Attash in his fourth place of detention. However, he commented that on several occasions the diaper was not replaced so he had to urinate and defecate on himself while shackled in the prolonged stress standing position. Indeed, in addition to Mr. Bin Attash, three other detainees specified that they had to defecate and urinate on themselves and remain standing in their own bodily fluids. ... Although this position prevented most detainees from sleeping, three of the detainees stated that they did fall asleep once or more while shackled in this position. ... When they did fall asleep held in this position, the whole weight of their bodies was effectively suspended from the shackled wrists, transmitting the strain through the arms to the shoulders.<sup>173</sup>

The ICRC emphasizes repeatedly how the methods of ill-treatment were always used in combination, never in isolation.<sup>174</sup> In the section of the report discussing the practice of placing detainees in small confinement boxes, the report makes this point clear:

The boxes were used repeatedly during a period of approximately one week in conjunction with other forms of ill-treatment, such as suffocation by water, beatings and use of the collar to slam him against the wall, sleep deprivation, loud music and deprivation of solid food. During this period, between sessions of ill-treatment he [Abu Zubaydah] was made to sit on the floor with a black hood over his head until the next session began.<sup>175</sup>

The report also highlights how the detainees’ conditions of confinement, which were “clearly

manipulated in order to exert pressure on the detainees concerned,” “exacerbated” the “ill-treatment to which the fourteen were subjected.”<sup>176</sup> These abusive conditions of confinement were a core part of the CIA’s detention regime, which was “clearly designed to undermine human dignity and to create a sense of futility by inducing, in many cases, severe physical and mental pain and suffering, with the aim of obtaining compliance and extracting information, resulting in exhaustion, depersonalisation and dehumanisation.”<sup>177</sup>

Such conditions involved the deprivation and restriction of various basic needs, including:

- Deprivation of access to the open air
- Deprivation of exercise
- Deprivation of appropriate hygiene facilities and basic items in pursuance of interrogation
- Restricted access to the Koran linked with interrogation<sup>178</sup>

The ICRC wrote that “the consistency of the detailed allegations provided separately by each of the fourteen adds particular weight to the information provided” in the report.<sup>179</sup>

The former detainees’ accounts of their own torture, their medical records, and their current medical status are considered classified information, so it is not possible to further corroborate or evaluate their accounts.

## Have U.S. Civilian Courts Found Evidence of Abuse and/or Torture of Detainees in U.S. Custody?

Yes, in some cases.

In *United States v. Ghailani*, the U.S. District Court for the Southern District of New York held that the government may not use in a criminal trial “the testimony of a witness whom the government obtained only through information it allegedly extracted by physical and psychological abuse of the defendant.”<sup>180</sup> Finding such abuse, the court suppressed the testimony of a key witness.<sup>181</sup> The government itself did not dispute that all statements made by defendant that related to the present motion “were coerced and obtained in violation of his Fifth and Sixth Amendment rights.”<sup>182</sup>

Courts, evaluating the *habeas corpus* petitions of detainees, have similarly found evidence of torture and abuse.

In *Ali Ahmed v. Obama*, the U.S. District Court for the District of Columbia suppressed the statements of certain detainee witnesses due to the fact that they were subjected to torture.<sup>183</sup> Though the opinion, which is heavily redacted, fails to specify the details of this torture in the un-redacted sections, the court makes clear that “there is evidence that [redacted] underwent torture, which may well have affected the accuracy of the information he supplied to interrogators. [Redacted] spent time at Bagram and the Dark Prison, and alleges that he has

been tortured.”<sup>184</sup> The court further doubts the identification by the witness “due to the fact that it was elicited at Bagram amidst actual torture or fear of it.”<sup>185</sup> The court, finding that the government “presented no evidence to dispute the allegations of torture at Bagram or the Dark Prison,”<sup>186</sup> and citing the existence widespread, credible reports of torture and detainee abuse<sup>187</sup> at Bagram Prison, said it could not conclude “that past instances of torture did not impact the accuracy of later statements.”<sup>188</sup>

In *Saki Bacha v. Obama*, the U.S. District Court for the District of Columbia granted the detainee’s unopposed motion to suppress his out-of-court statements because the statements were made “as a product of torture.”<sup>189</sup> Ultimately, the judge granted the detainee’s petition for *habeas corpus* because of the failure to justify the reasons for his detention.<sup>190</sup>

In *Mohammed v. Obama*, the U.S. District Court for the District of Columbia suppressed the testimony of a key witness, Binyam Mohammed, because it was the product of torture.<sup>191</sup> In a sworn declaration summarized by the court, Mohammed stated that he “was brutalized for years while in United States custody overseas at foreign facilities.”<sup>192</sup> Much of the alleged mistreatment occurred after a rendition to Morocco,<sup>193</sup> but some took place in the so-called “Prison of Darkness” in Kabul. As summarized by the court, Mohammed’s head was banged against the wall of his cell repeatedly; he was chained to the floor and locked in complete darkness; he was deprived of sleep; and he was shackled frequently, “once for eight days on end in a position that prevented him from standing or sitting.”<sup>194</sup> Initially, Mohammed’s cell was kept dark for 23 hours a day. Showers were not permitted, and he received food once every 36 hours. Gradually, however, conditions improved, though only slightly.<sup>195</sup> The government did not challenge or deny any of the evidence of Mohammed’s abuse recounted above.<sup>196</sup>

In *Anam v. Obama*,<sup>197</sup> the U.S. District Court for the District of Columbia once again suppressed the majority of the government’s evidence because they were based on statements “tainted by the coercive interrogation techniques which Al Madhwani was subject [to] and [therefore] lack sufficient indicia of reliability.”<sup>198</sup> The court recounts the abuse inflicted on Al Madhwani, which included being blasted with music 24 hours a day where his “sole respite from the deafening noise was the screams of other prisoners,”<sup>199</sup> and being suspended in his cell from his left hand, causing long-term medical consequences.<sup>200</sup> Notably, the court found that not only did the government fail to refute the petitioner’s descriptions of his confinement, but it corroborated his “debilitating physical and mental condition ... thereby confirming his claims of harsh treatment.”<sup>201</sup> This harsh treatment involved, according to the court, “forty days of solitary confinement, severe physical and mental abuse, malnourishment, sensory deprivation, anxiety, and insomnia.”<sup>202</sup> Though his treatment improved once he was transferred to Guantánamo, the court concluded that “the Government fail[ed] to establish that months of less-coercive circumstances provide sufficient insulation from forty days of extreme coercive conditions [while detained by the U.S. in Afghanistan].”<sup>203</sup>

In *Hatim v. Obama*,<sup>204</sup> the U.S. District Court for the District of Columbia similarly found that the detainee petitioning for *habeas* review “was tortured at Kandahar and that he told his interrogators that he had attended [an Al Qaeda terrorist camp] only to avoid further punishment.”<sup>205</sup> As before, the court also noted that the government “does not refute the petitioner’s allegations of coercion or the widespread allegations of torture of other detainees prior to their arrival at [Guantánamo].”<sup>206</sup> The “torture” experienced by the detainee included, according to the allegations accepted by the court, being “severely mistreated,” being “beaten

repeatedly” and “kicked in the knees,” having “duct tape used to hold blindfolds on his head,” and being “threatened with rape if he did not confess to being a member of the Taliban or al-Qaida.”<sup>207</sup> Given the detainee’s “unrefuted allegations of torture,” the court stated:

When — as here — the government presents no evidence to dispute the detainee’s allegations of torture and fails to demonstrate that the detainee was unaffected by his past mistreatment, the court should not infer that the prior instances of coercion or torture did not impact the accuracy of the detainee’s subsequent statements.<sup>208</sup>

On the basis of such unrefuted claims, the court granted the detainee’s *habeas corpus* petition.<sup>209</sup>

In *Abdah v. Obama*, the U.S. District Court for the District of Columbia similarly rejected the statements of two detainee witnesses because of “unrebutted evidence in the record that, at the time of the interrogations at which they made the statements, both men had recently been tortured.”<sup>210</sup> Such torture included, according to the sworn testimony of the detainees, being “kept in complete darkness,” and being “hooded, given injections, beaten, hit with electric cables, suspended from above, made to be naked, and subjected to continuous loud music.”<sup>211</sup> Moreover, according to the court:

At a detention facility at Bagram, Afghanistan, Kazimi [one of the detainee witnesses] was “isolated, shackled, ‘psychologically tortured and traumatized by guards’ desecration of the Koran’ and interrogated ‘day and night, and very frequently.’ ” Both men asserted that they confessed to their interrogators’ allegations so that the torture would cease.<sup>212</sup>

In another *habeas* petition adjudicated in *Abdah*, the district court acknowledged “evidence in the record to support the contention that Esmail [the detainee petitioning for *habeas* review] was subjected to mistreatment while in United States custody,” but found that the detainee had exaggerated the extent of his mistreatment and declined to suppress his statements to interrogators.<sup>213</sup>

In *Salahi v. Obama*, the U.S. District Court for the District of Columbia found “ample evidence” that Salahi, the detainee petitioning for habeas review, “was subjected to extensive and severe mistreatment at Guantánamo.”<sup>214</sup> While admitting that Salahi had been mistreated by interrogators from mid-June through September of 2003, the U.S. government argued that subsequent statements made by Salahi should be admissible because their connection to the mistreatment was sufficiently attenuated through the passage of time to remove any taint.<sup>215</sup> The court, however, dismissed this argument concluding instead that Salahi’s statements were “tainted by coercion and mistreatment.”<sup>216</sup>