The Prohibition of Torture and Other Abusive Treatments

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The Legal, Moral and Ethical Reasons on why the United States Should Never Use Physical or Mental Abuse On Any Individual It Detains Outside the United States

by
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Prior to September 11, 2001, the United States was one of the leading voices against the use of torture. In keeping with its fundamental belief in human rights, the United States joined with other civilized nations in consistently denouncing torture. It did not openly support, condone or use physical or mental torture or the relatively lesser infliction of cruel, inhuman or degrading treatment against other individuals in its custody. The interrogation techniques set out in the U.S. military manual to be used with individuals in its custody mirrored the protections found in the 1949 Geneva Conventions. All this changed following the terror attacks on the United States in September 2001. It is now known from papers released by the White House under court order that shortly after these attacks, the Bush Administration signed a secret order giving new powers to the U.S. Central Intelligence Agency (CIA). These CIA powers included the authority to set up secret detention centers outside the U.S. and to question anyone they detained with 'unprecedented harshness'. One justification given for breaking international and domestic laws prohibiting secret detentions and abusive treatment has been President George W. Bush's belief that as 'Commander-in-Chief' of the United States he has the legitimate right to fight the new 'global war on terror' in every possible way.

While reports of abusive behavior by certain U.S. forces against foreign detainees began surfacing shortly after the U.S.-led military coalition invaded Afghanistan on October 7, 2001, it was more than a year later before any report appeared in the media. On December 26, 2002 an article appeared in *The Washington Post* setting out some of the tactics being used by the Bush Administration in its 'war against terror'. U.S. officials related that detainees in Afghanistan were being held in a secret CIA interrogation center. These detainees were forced into awkward, painful positions for long lengths of time, deprived of sleep 24 hours a day, and sometimes beaten to "soften them up". Interviews with former intelligence officials and U.S. national security officials provided information that the U.S. government was running a number of secret detention centers overseas where U.S. due process did not apply. One U.S. official who supervised the capture and transfer of alleged terrorists stated, "If you don't violate someone's human rights some of the time, you probably aren't doing your job." The *Washington Post* article quotes U.S. officials as saying, "Thousands have been arrested and held with U.S. assistance in countries known for brutal treatment of prisoners." In the same article, a U.S. National Security Council spokesman declared, "The U.S. is treating enemy combatants in U.S. government control, wherever held, humanely and in a manner consistent with the principles of the Third Geneva Convention of 1949."

In January 2002, the United States began building prison facilities at its naval base at Guantanamo Bay, Cuba for detainees being held in Afghanistan. The U.S. government holds the land at Guantanamo Bay under a long lease from the Cuban government. The first prisoners from overseas arrived at Guantanamo Bay on January 11, 2002. Despite several U.S. Supreme Court decisions against it, the U.S. government has refused to acknowledge that Guantanamo Bay is a U.S. territory or under its jurisdiction. By choosing Guantanamo

Bay as the location for its prison, the U.S. government set up what has been termed a 'black hole' where no law applies. Despite almost total secrecy, numerous reports of prisoner abuse in this prison have been made, including by former prisoners. Although the U.S. government has released several hundred prisoners in the last few years to the government authorities in their own countries, some 270 prisoners, as of July 2008, remain in the Guantanamo Bay prison, down from a peak of some 680 prisoners in 2003.

Documents released by the White House show that by the summer of 2002, the Department of Defense (DoD) wanted additional interrogation techniques that went beyond those found in the then-current Army Field Manual 34-52. The Army manual is written for the U.S. military and describes how to conduct military interrogations that comply with U.S. and international law. In late 2002, new interrogation techniques were approved by Secretary of Defense Rumsfeld. These techniques were divided into three categories ranging from I to III, increasing in severity according to the category. Category I included methods such as yelling and deception, Category II included stress positions while Category III contained methods designed to convince the prisoner that death or severe and painful consequences were imminent as well as physical contact such as grabbing, and poking in the chest with a light finger. According to international jurist, Philippe Sands, all the techniques listed in Category III, and most of those in Category II violated international law because they were considered to be torture or cruel, inhuman or degrading treatment. Rumsfeld agreed to methods in Categories I and II although some six weeks later, he changed his mind about using even these methods. In April 2003, a working group on interrogation methods set up by Rumsfeld developed a list of some 35 different interrogation techniques to be used on 'unlawful enemy combatants' outside the United States. One technique called sensory deprivation entailed covering a prisoner's head with a bag for some 72 hours. Other techniques included stripping detainees nude, threatening them with dogs, and having them stand for up to four hours. When Rumsfeld was given the memo listing these techniques, his written comment was, "I stand for 8-10 hours a day. Why is standing limited to four hours?" Apparently, an aide reminded him that he had the option to sit down. Rumsfeld approved some 24 of the suggested 35 techniques with some 7 of these going beyond what was approved under the Army Field Manual 34-52.

The International Committee of the Red Cross, which began visiting Guantanamo prison in January 2002, made direct charges to the U.S. government in July 2004 describing the prisoner abuse by U.S. officials as being systematic. It accused the government of using psychological and physical coercion towards the prisoners that was 'tantamount to torture'. Members of the FBI also expressed concern about the U.S. government's tactics being used at Guantanamo Bay. In a memo about activities in late 2002, the FBI reported that Pentagon personnel were encouraged by their superiors to "use aggressive interrogation tactics". The FBI believed these tactics were "of questionable effectiveness and subject to uncertain interpretation based on law and regulation."

Following the U.S. invasion of Iraq on March 20, 2003, further stories of U.S. abuse towards detainees culminated in the publication in April 2004 of leaked photos and videotapes taken at Abu Ghraib prison in Iraq. These prison pictures graphically showed Iraqi prisoners being forced by their U.S. custodians into various demeaning and abusive postures. Many pictures showed men in explicit sexual poses with other men or with women. Almost all of the Iraqi prisoners in the pictures were naked or wearing the bare minimum of clothing. Many of the photos showed evidence of prisoners having been beaten. Some prisoners were blindfolded with one such prisoner shown standing on a box with his arms outstretched with what appears to be electric wires wrapped around his fingers and genitals. In a U.S. military report completed in February 2004, Major General A. Taguba stated there had been numerous incidents of sadistic, blatant and wanton criminal abuses at Abu Ghraib. He discovered that the systematic and illegal abuse of the Iraqis by the U.S. military police was actively requested by U.S. Army intelligence officers, CIA agents and private contractors who were

involved with the interrogations. Statements from the detainees said they were sexually humiliated and sodomized, threatened with rape, forced to masturbate in front of women and had their food thrown in toilets. At the time of these abuses, Brigadier General Janis Karpinski commanded the 800th Military Police Brigade which put her in charge of fifteen detention facilities including Abu Ghraib, as well as some 3,400 Army reservists. Major Taguba's report blamed Karpinski for the abuses because as commander, she had not paid attention to the daily operations of the prison. On January 17, 2004, Karpinski was given a written military reprimand and relieved of her duties in Iraq. One month after the appearance of the Abu Ghraib photographs, Major General Geoffrey Miller, former commander of the prison at Guantanamo Bay, was assigned to be senior commander in charge of detention operations in Iraq. Karpinski was later demoted to the rank of colonel although her demotion was not officially related to the abuse at Abu Ghraib prison. Karpinski later said that a memorandum from Alberto Gonzalez and John Yoo was posted at Abu Ghraib authorizing interrogation techniques that were a departure from the Geneva Conventions. The memo was signed by the Secretary of the Defense, Donald Rumsfeld. President Bush assured the American people and the world that these atrocities would be investigated. As *Newsweek* reported in its June 7, 2004 issue, the investigations were too limited to bring full accountability since the Pentagon was investigating itself.

There were many high level U.S. officials who disagreed with the new U.S. interrogation techniques. Retired and current military leaders opposed the Bush Administration's position of ignoring the United States' international obligations under the 1949 Geneva Conventions. One major concern of the military leaders was what effect this action would have on those members of the U.S. military captured by enemy forces. Scott Horton, Chairman of the New York City Bar Association's Committee on International Human Rights, was visited by senior military legal officers in 2003 who wanted the Committee to challenge the Bush Administration about its standards for detentions and interrogations. These military officials said that the Bush Administration's war on terror had ended a fifty-year history in the United States of exemplary application of the Geneva Conventions. During 2002 and 2003, Alberto Mora, the General Counsel of the U.S. Navy, made unsuccessful efforts to convince the Pentagon to renounce its prisoner abuse at Guantanamo Bay. Lawyers at the State Department disagreed with the international law interpretation and analysis by lawyers at the Justice Department. In the Spring of 2006, the American Civil Liberties Union issued a report regarding its recent review of some 100,000 documents released by the U.S. government. The ACLU reported that these documents showed a systematic and pervasive pattern of torture and abuse of detainees in U.S. custody.

On September 6, 2006, after years of denial, President Bush finally admitted that the U.S. was running secret CIA detention centers outside the United States for detaining and interrogating suspected terrorists. Several individuals who were taken by U.S. operatives to secret detention centers have now brought legal actions against the U.S. government accusing it of kidnapping, detention, and torture.

In February 2006, Human Rights First published, "Command's Responsibility; Deaths in U.S. Custody in Iraq and Afghanistan", reporting that 98 detainees had died in U.S. custody since 2002. At that time about half of these deaths were suspected or confirmed homicides. Another report published by several human rights organizations investigated detainee abuse occurring up until 2006. This report, "By the Numbers – Finding of Detainee Abuse and Accountability Project", by Human Rights First, Human Rights Watch and the Center for Human Rights and Global Justice documented that some 460 detainees in U.S. custody were subjected to abuse. Of the some 600 individuals implicated in abusive behavior, only 54 military personnel were convicted by military court martial; 40 of these went to prison with the majority serving prison time of less than a year.

Despite the Bush Administration's actions since 2001, there are solid legal, moral and ethical reasons why the United States government should never lower its standards and resort to torture or any other abusive treatments towards other human beings. These legal and moral obligations require the United States to set specific boundaries on how it treats each person it detains and also on how it obtains information from each of these individuals to ensure that both fall far short of any abusive behavior.

Defining Torture and Other Abuses

The prohibitions of torture and the relatively lesser abuses are clearly stated in many international treaties and conventions, reflecting the absolute right of each human being in the world not to be physically or mentally abused. One treaty, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Convention"), sets out a definition of torture. Under the Torture Convention, "torture" is any intentional act by which severe physical or mental pain or suffering is inflicted upon a person for a reason (to obtain information or a confession or as punishment), and is instigated or consented to by someone in an official capacity.

"Torture" in also defined under U.S. law in an antitorture statute enacted in 1994, as required of parties to the Torture Convention. This statute only covers actions done outside the U.S. by anyone subject to U.S. jurisdiction. While the U.S. definition of torture generally follows the Torture Convention's definition, one notable change in semantics narrows the U.S. statute so that it applies to fewer actions. The U.S. definition of torture (18 USC Sec. 2340 (1)) states that torture is an act done by someone 'under the color of law' with the specific intent to inflict severe physical or mental pain or suffering on someone. The difference between the two definitions is that the Torture Convention's definition involves an intentional action that causes severe pain while under the U.S. definition, the action is specifically intended to inflict severe pain.

But, from 2002 until the end of 2004, it was not the U.S. torture definition that formed the basis of interrogation techniques used by U.S. personnel on foreign detainees. Instead, the Bush Administration relied on a definition of torture found in one of the 'Bybee memos' from the Justice Department's Office of Legal Counsel. These memos, named after the more senior of the two authors, Jay Bybee and John Yoo, were written at the request of the CIA and the While House to address the U.S. international legal obligations under the Geneva Conventions, the Torture Convention, and the subsequent U.S. criminal provisions. Under the Bybee definition, torture was only those acts that inflicted a similar level of extraordinary pain as one would experience upon organ failure or death. Further, 'mental suffering', only referred to suffering that lasted months or even years. The narrowness of this definition of torture is reflected by the fact that certain techniques traditionally accepted as torture such as electroshock, ripping fingernails out, cutting off digits or being burned with cigarettes, do not amount to 'torture' under this definition. Referring to the Bybee definition of torture, one legal scholar remarked, "Saddam Hussein would have been exculpated".

Torture Definitions:
Torture Convention: "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 …, 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."
U.S. Federal Law (18 USC Sec. 2340 (1): "Torture means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control."
Bybee Memo: "Where the pain is physical, it must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure. Severe mental pain requires …lasting psychological harm as seen in mental disorders like posttraumatic stress disorder."

1949 Geneva Conventions Commentary: Torture is the "infliction of suffering on a person in order to obtain from that person, or from another person, confessions or information."
ICRC--International Humanitarian Law: "There must exist a specific purpose (such as obtaining a confession or as punishment) plus an intentional infliction of severe pain or suffering. There is no obligation for this to be instigated or consented by someone in an official capacity."

Cruel or inhuman definitions:
Torture Convention: "Acts of cruel, inhuman or degrading treatment or punishment are those not amounting to torture 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."
U.S. Federal Law: None specifically; refer instead to the U.S. Constitution and court cases for examples.
Bybee Memo: Refers only to the U.S. Constitution for 'cruel, unusual, and inhumane treatment or punishment'.
1949 Geneva Conventions Commentary: "Inhuman Treatment" includes "certain measures, for example, which cut PoWs off completely from the outside world and in particular from their families, or would cause great injury to their human dignity."
ICRC--International Humanitarian Law: For cruel or inhuman treatment, no specific purpose is necessary such as obtaining information and/or the level of pain is less than under torture although a significant level of suffering or pain must be inflicted for this category. For outrages upon personal dignity, no specific purpose is required but a significant level of humiliation or degradation is necessary.

Methods of Torture and Other Abuses:

Examples of Torture
Torture has been used down the centuries by regimes and individuals to obtain information and confessions as well as for punishment and extortion. Methods of torture include beatings using fists, feet, electric batons, beltbuckles, and iron rods; exposure to extreme temperatures; aerial suspension; extraction of blood; forced staring into the sun for hours; and long-term solitary confinement. Electroshock is given by wrapping electric wires around the victim's wrists or attaching the wires to the sex organs. Water can be added to intensify the electroshock to the victim. A common torture practice used against women is rape. Nuns are also singled out for rape. Having taken vows of chastity, nuns have been known to suffer spiritually, in addition to the physical and psychological scars. Women are also violated by having electric prods inserted into the vagina and/or the anus. While torture victims may recover from the physical abuse over time, it is the psychological abuse that causes such deep scars that they often last a lifetime. If torture is continued too long or is too destructive, the woman, man or child being tortured will die.

Examples of Cruel, Inhuman or Degrading Treatment or Punishment
In a European case, *Ireland v. the United Kingdom* (1978), the European Court of Human Rights indicated what constituted cruel, inhuman or degrading treatment when it ruled against the U.K. for using certain techniques towards IRA suspects in Ireland. With regard to the five disputed techniques used by the U.K. -- stress positions, hooding, auditory white noise, sleep deprivation and deprivation of food and drink -- the European Court ruled that while none of the acts amounted to torture, they were still illegal because they constituted inhuman and degrading treatment which was also prohibited. Subsequently, the European Commission of Human Rights stated that the combination of these techniques did amount to torture.

Human rights committees (such as the European Commission on Human Rights, the (U.N.) Human Rights Committee, and the Committee against Torture) agree with these examples from the European Court. To this list they've added: holding detainees or prisoners incommunicado for more than a year; forcing individuals to stand spread-eagled against the wall; being forced to constantly stand or crouch for hours at a time; chaining prisoners to a chair overnight; blindfolding; and dunking detainees.

CIA "No Touch" Torture
Besides techniques of physical torture and abuse, extremely effective psychological torture techniques have been developed by the CIA over the past fifty years. These techniques,

described as "no-touch" torture and developed by the CIA during its secret research of coercion and consciousness from 1950 to 1962, consist of two steps. In the first stage, interrogators employ non-violent techniques of hooding or sleep deprivation, and moving on to sexual humiliation, to disorient the individuals they are holding in custody. Once an individual becomes disoriented, interrogators move to a second stage where the individual is compelled to do a 'self-inflected' action such as standing for hours with his or her arms extended or balancing on one foot. This type of action coupled with the earlier disorientation phase convinces the individual that he or she is responsible for the pain they are suffering. It then follows that they realize they can end their pain by capitulating to the interrogator's demands. The seemingly innocuous "no-touch" torture will leave deep psychological scars. These methods were noted in the CIA's "Kubark Counterintelligence Interrogation" manual in 1963 and disseminated to police in Asia and Latin America by USAID's Office of Public Safety. Although the U.S. Senate closed down the office in 1975, the no-touch techniques have resurfaced in the current U.S. government's 'war on terror'. In 2002, Pentagon investigators found several Afghans dead at the Bagram Air Base near Kabul, Afghanistan following the use of these methods. Similar methods to those found in the Kubark manual appeared in Iraq in 2004.

Reported Abuse by Individuals Detained by U.S. Agents.
Since 2001, the following documented methods of torture or cruel, inhuman and degrading treatment have been practiced by the United States through its military, its interrogation agents (CIA, FBI) or its private contractors against individuals detained and in the custody of the United States: punching, slapping and kicking; threatening death; videotaping and photographing naked male and female detainees; raping; hooding and blindfolding; forcing individuals to remove their clothes and stay naked several days; beatings with broom handles and chairs; sleep deprivation through the continuous 24-hour use of lights or music; denying food, water and medicine; actual or threatened use of military dogs; long exposure to cold and heat; and solitary confinement for long periods of time. The gravity of some of these techniques increases when the specific cultural norms of the prisoners are considered. Since homosexuality is illegal under Islamic law, forcing two Iraqi men to stroke each other's penis may be considered a form of torture. Two abusive techniques used by the U.S. have received much publicity. With the first, duct tape, handcuffs or chains are used to bind person in U.S. custody into a stressful position for periods of 18 to 24 hours. The person put into a 'stress position' will suffer extreme physical pain and will probably also degrade and humiliate him or herself by urinating and/or defecating while in this position. The second technique referred to as 'waterboarding' involves securely tying the prisoner onto a board which is pushed under water to convince the victim that he or she is drowning. Another method which causes the prisoner to believe that he or she is drowning involves laying a cloth over the prisoner's face and pouring water over the cloth to promote suffocation. Some commentators have referred to this as waterboarding.

The Legal Prohibition of Torture and Other Physical and Mental Abuses

International Law
The use of torture and any other cruel, inhuman or degrading treatment is strictly prohibited by international law. International law, previously referred to as the law of nations, consists of rules, laws and principles that govern the relations between nation States and which bind all international actors. It applies to States, between States, to international organizations and, in some instances, to individuals. At the core of international law is the belief that all commitments made publicly, formally and voluntarily by a State should be honored ("pacta sunt servanda"). In practice, international law is based on a reciprocity whereby one State treats other States as it wants to be treated. In matters of world-wide concern, it is international law that determines the responsibilities and obligations of each State. Despite recent bad press, especially in the United States, international law is both important and necessary for international cooperation at all levels.

Applicable international law
Deciding on what specific international law should be applied depends on the circumstances surrounding the detainment of each individual. The sub-categories of international law that cover the acts of torture and other abusive treatment are international humanitarian law, human rights law, and criminal law. Humanitarian law applies during an armed conflict or an occupation and provides protection for the individuals involved in either. Human rights law applies to individuals at all times, during war and during peace. In an armed conflict when both human rights law and humanitarian law apply, certain human rights may be in conflict with rules of humanitarian law but it is the rules of humanitarian law that govern the situation. Both international and domestic criminal law apply at all times; both when a country is at peace and during times of armed conflict when certain acts go beyond what is acceptable behavior for such conflicts and become criminal.

a) International humanitarian law – Applies during armed conflicts and occupations
International humanitarian law applies to all hostilities in the world that reach the intensity of an armed conflict. A conflict may be "international" (fighting between the armed forces of at least two States or being a fight of national liberation) or "non-international" (fighting on the territory of a State between the regular armed forces and identifiable armed groups, or between armed groups fighting one another).

The main principles of international humanitarian law are found in the 1949 Geneva Conventions (composed of four separate conventions); the 1977 Additional Protocols (I & II) to the 1949 Geneva Conventions; the Hague Conventions of 1899 and 1907; and in customary law. The United States ratified the 1949 Geneva Conventions (the "Geneva Conventions") in 1955. Although U.S. is one of only a hand-full of States which has not yet ratified the two 1977 Additional Protocols (each an "Additional Protocol"), the U.S. government does acknowledge and follow those sections of these protocols that reflect customary law.

The type and extent of protection given under humanitarian law will depend not only on the type of armed conflict but also on the role each participant plays in the conflict (either as a combatant (lawful or unlawful) or as a civilian). For international armed conflicts, the Geneva Conventions and the Additional Protocol I apply. If the armed conflict is non-international then Article 3, common to all four of the Geneva Conventions, and the Additional Protocol II apply. These refinements determine the exact wording of the protections and rights for all individuals detained under international humanitarian law. The International Committee of the Red Cross ("ICRC") has stated, "There is no intermediate status; nobody in enemy hands can be outside the law."

(i) *Non-international armed conflict*. The rules found in common Article 3 apply to detainees in non-international armed conflict situations and are considered to be customary law. They represent a minimum standard of protection under the Geneva Conventions. In applying common Article 3, the United States is required to treat any person in its custody humanely. Among other things, it cannot commit an act of murder, torture or even outrage against anyone it detains from this type of armed conflict. The protections and rights of prisoners captured in a non-international armed conflict were reviewed by the U.S. Supreme Court in *Hamdan v. Rumsfeld*, a case brought by Salim Ahmed Hamdan who was and remains a prisoner held at Guantanamo Bay. In its June 29, 2006 decision of *Hamdan*, the Supreme Court ruled against the U.S. government's position by concluding that Hamden, having been captured in Afghanistan by the U.S. during fighting with al Qaeda, a "conflict not of an international character", was entitled to the minimal protections and rights of common Article 3.

Common Article 3 of the Geneva Conventions – Non-International Conflicts

Persons not taking active part in the hostilities shall in all instances be treated humanely. The following acts are and shall remain prohibited at any time and in any place:
(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal dignity, in particular humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised people.

(ii) *International armed conflict*. In the case of an international armed conflict, the Third Geneva Convention applies to those individuals held by the enemy who have been identified as 'prisoners of war' (PoWs). These protections also apply to all individuals where there is any doubt as to their status as a PoW and will continue until such time that a competent tribunal can establish the actual status of each person. Individuals detained by the U.S. during the armed conflict in Afghanistan or Iraq or during occupation may be entitled to the status of PoW and the ensuing protections. When the U.S. agents interrogate PoWs (including those whose status is in doubt), this Third Convention states they are prohibited from using physical or mental torture or any other form of coercion to obtain information of any kind. As depicted in war movies, a PoW is only required to give his or her name, rank, serial number and birthday; they are not required to give any other information. Any PoW refusing to answer any other question "may not be threatened, insulted or exposed to any unpleasant or disadvantageous treatment of any kind".

Third Geneva Convention – Prisoners of War
Article 12: The Party detaining the individuals is responsible for their treatment
Article 13: Prisoners must at all times be humanely treated. An unlawful act/omission by the detaining Party resulting in death or seriously endangering the health of the PoW is a serious breach of the Convention. Measures of reprisal against PoWs are prohibited.
Article 14: PoWs are entitled in all circumstances to respect for their persons and their honour. Women shall be treated with all the regard due to their sex.
Article 16: PoWs shall be treated alike by the Detaining Power, without any adverse distinction based on race, nationality, religious belief or political opinions or any other distinction founded on similar criteria.
Article 17: Every PoW is bound to give only his or her surname, first names and rank, date of birth, and army regimental, personal or serial number. No physical or mental torture nor any other form of coercion, may be inflicted on PoWs to secure from them information of any kind whatever.

In an international armed conflict, the 1949 Fourth Geneva Convention provides protection for those it defines as 'protected persons'. One of the most important groups included in this definition are 'civilians'. Some humanitarian law experts hold the view that if a detainee from an international armed conflict is deemed not to be a PoW under the Third Geneva Convention, the next port-of-call is the Fourth Geneva Convention covering the rights and protection of 'protected persons'. Protected persons must be protected against any threats and acts of violence and from insult. Again, no physical or moral coercive methods can be used to obtain information from these persons. All persons in this category, including those who lose their entitlement to these protections, shall be treated with humanity. (Articles 5, 27, 31).

Another source of protection for international armed conflicts is the Additional Protocol I. In Article 75 of this protocol, certain protections are given for a class of prisoners who have fought in the conflict but have no PoW status nor any benefit from the Fourth Geneva Convention. Article 75 provides a minimum standard of protection by providing that each such person "shall be treated humanely." Further, the detaining party "shall respect the person, and honor the convictions and religious practices of all such persons." One of the acts prohibited at all times is torture, regardless of being done by a civilian or military agent.

(iii) *Grave breaches of the law results in war crimes.* Last, all four Geneva Conventions and the two Additional Protocols state that any "grave breach" of their covered protections and rights will elevate the breach to the level of a "war crime" due to the offensive and serious

nature of such a breach. Grave breaches are criminal acts and include, willful killing, torture or inhuman treatment, or willfully causing great suffering or serious injury to any prisoner's body or health When a war crime has occurred, every signatory that is a party to the Geneva Conventions or the Additional Protocols is legally obligated to "search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and to bring such persons, regardless of their nationality, before its own courts". This jurisdictional right of a State to bring an action against non-citizens for a crime that was not committed in the State's jurisdiction is known as "universal jurisdiction". Although the U.S. government enacted the U.S. War Crimes Statute (18 USC 2441) which did reflect the same crimes as listed in the Geneva Conventions, the recent U.S. Military Commissions Act has now amended it to exclude certain crimes.

Thus, under international humanitarian law, each and every person captured during an armed conflict or occupation and now in U.S. custody anywhere in the world, including Afghanistan, Iraq or Guantanamo Bay, is protected by one of these specific provisions: Article 75, common Article 3, the Third Geneva Convention for prisoners of war, or the Fourth Geneva Convention for protected persons. The United States government has a legal obligation to apply these rights and protections to all detainees regardless if they are members of the Taliban or al Qaeda. It is only in the case where no armed conflict or occupation exists that the Geneva Conventions do not apply to any detainees. If the situation surrounding the arrest or detention of a member of al Qaeda or of the Taliban is not an armed conflict or occupation but, instead, is the planning or implementing of a terrorist attack, then domestic criminal law will generally apply.

b) International human rights – Applies at all times

In addition to international humanitarian law governing armed conflicts, international human rights law applies to every individual at any time, including those caught up in armed conflicts. It is also international human rights law and a State's domestic law that protects individuals detained or held in custody during peace or when the situation does not involve armed conflict or occupation. The right not to be tortured or subjected to cruel, inhuman and degrading treatment has been an integral part of international human rights law since its rapid development following the end of the Second World War. These fundamental human rights can be found in Article 5 of the 1948 Universal Declaration of Human Rights which states, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." These prohibitions are repeated in numerous human rights treaties including the International Covenant on Civil and Political Rights; the American Convention on Human Rights; the European Convention for the Protection of Human Rights; and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The prohibition of torture and other abusive treatment is absolute. No derogation of these obligations is allowed for any State, even during a public emergency which threatens the life of the nation. The United States became a party to the International Covenant on Civil and Political Rights in 1992.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Convention"), reflecting customary international law, sets out specific obligations and responsibilities for each State party concerning these prohibited offences. The U.S. government ratified the Torture Convention in 1994. To-date, a majority of States (146) have legally agreed this treaty. Upon its ratification of the Torture Convention, the U.S. government filed both an 'understanding' regarding the definition of torture and a 'reservation' stating it was obligated to prevent 'cruel, inhuman or degrading treatment' only to the extent such wording agreed with the U.S. Constitutional wording of 'cruel, unusual and inhumane treatment or punishment'. This reservation is one that the U.S. routinely makes to other human rights treaties it signs and ratifies.

Some obligations and responsibilities of States to the Torture Convention:

--Take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction;
--No person can be expelled, returned or extradited to another State if there are substantial grounds to believe he or she is in danger of being tortured;
--Ensure all acts of torture are offences under its domestic criminal law;
--Establish jurisdiction over offences that are: (i) committed in any territory controlled by it including a ship/aircraft registered to that State, (ii) committed by any of its nationals, and (iii) committed to any of its nationals;
--Prohibit the use of any statements obtained by torture as evidence in any proceedings (except as against the torturer);
--Promptly and impartially investigate any complaints of torture;
--Give fair and adequate compensation for victims of torture; and
--Prevent any cruel, inhuman or degrading treatment occurring anywhere under its jurisdiction.

As with the crimes considered to be grave breaches under the Geneva Conventions, the Torture Convention confers universal jurisdiction on all States that are party to it. Thus, each State party has a legal obligation over any alleged torturer present in any territory under its jurisdiction to arrest, investigate and prosecute this person or to extradite them to another State party. It was under this convention that Spain issued a warrant for the arrest of General Pinochet, the former president of Argentina. In 1998, when Pinochet was in the United Kingdom for medical treatment, the U.K. received an arrest warrant from Spain alleging that Pinochet had been involved with numerous acts of torture and disappearance that occurred during the time he was the leader of Argentina. As a party to the Torture Convention, the U.K. had an obligation to extradite him to Spain if it could demonstrate that Pinochet's actions fell within the Torture Convention. During the U.K. extradition hearings, the Law Lords' ruling indicated that a former head of State would no longer be able to claim immunity from prosecution for his or her actions which occurred while head of a State.

As a safeguard and protection against any of these prohibited acts being committed, the Torture Convention requires each party to submit a periodic report every four years explaining what measures it has taken to comply with the convention. These periodic reports are presented to a specific committee consisting of "ten experts with high moral standing and recognized competence in human rights" (the "Torture Committee").

On 5 May 2006, the United States presented its second periodic report to the Torture Committee which issued its response some two weeks later. The Torture Committee complimented the U.S. on its thorough presentation of documents ("more than anyone had even done before") and noted its satisfaction with the U.S. government's clarification that a statement made by President Bush on signing the Detainee Treatment Act of 2005 was "not to be interpreted as a derogation from the absolute prohibition of torture." The Torture Committee then proceeded to state over 20 concerns and regrets it had regarding recent actions taken by the United States.

One of the Torture Committee's main points was its disagreement with the U.S. government's opinion that the Torture Convention did not apply in the context of armed conflict. The United States had argued that it believed only international humanitarian law applied during an armed conflict because "if the Torture Convention also applied, it would overlap different treaties and undermine the objective of eradicating torture". The Torture Committee stated that the U.S. should recognize and ensure that the Torture Convention applied at all times, whether in peace, war or armed conflict. Another concern of the Torture Committee was that certain interrogation techniques used by the United States breached its obligations under the Torture Convention and under international law.

The Torture Committee's concerns included:
--the non-application of the Torture Convention during armed conflicts;
--the allegation that the U.S. government controlled secret detention centers in other countries;
--denial of access to the ICRC as required by humanitarian law;
--the U.S. definition of psychological torture; and

-- the torture, abuse and general mistreatment of prisoners held by the U.S. in Guantanamo Bay, Iraq, Afghanistan, and in secret facilities in Europe and other locations that breached the Torture Convention and international law.

Following the Torture Committee's report, those U.S. officials involved in the presentation issued a statement that hundreds of pages of information supplied by the U.S. had been ignored. One U.S. official noted that it was "not an auspicious time for the U.S. to be filing its periodic report in the aftermath of Abu Ghraib". Despite the belief that the Torture Committee erred in its comments about U.S. law and practice, the U.S. officials reconfirmed that the U.S. took its obligations under the Torture Convention seriously.

As with the Geneva Conventions, the United States has certain human rights obligations that are legally binding on it under both customary and treaty law. The main point under human rights law is that there is an absolute right not to be tortured. The definition of torture in the Torture Convention is one that is binding on the U.S. and should be used to judge actions of the U.S. government and its agents in accordance with its legal international obligations. In addition, no cruel, inhuman or degrading treatment towards individuals in the custody of the U.S. government is permitted.

Domestic Law

Constitutional Law

Even before the recent flurry of new laws purporting to address the prohibition of torture and cruel, inhuman and degrading treatment of detainees, the U.S. domestic law already contained such prohibitions. In 1789, several years after the defeat of the British, a constitution was presented for signing that set out the general principles and rules of the newly formed republic. Five of the thirteen states refused to sign the constitution unless a 'bill of rights' was added. In 1791, the ten amendments known as the Bill of Rights were added to the U.S. Constitution. The Bill of Rights reflect the fundamental concerns of the former colonialists and set out specific civil liberties for the protection of the individual against a powerful and over-zealous government. These civil liberties are the basic principles that form the foundation of the American democracy.

U.S. Constitution

Fourth Amendment: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

Fifth Amendment guarantees that no person "…shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law…".

Eighth Amendment: "Excessive bail shall not be required…nor cruel and unusual punishment inflicted."

The Constitution and especially the Bill of Rights reflect the long-held standard of behavior expected of the U.S. federal government towards the people. In the U.S. Supreme Court judgment of Ashcraft v. Tennessee, (1944), Justice Black stated,

> There have been, and are now, certain foreign nations with governments…which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture. So long as the Constitution remains the basic law of our Republic, America will not have that kind of government.

The U.S. courts have upheld numerous constitutional protections for individuals being detained and/or interrogated while in custody in the United States. Rulings include protection against torture during interrogation, the right to remain silent during interrogations, and the right to be free of cruel or unusual punishment. The U.S. Supreme Court has condemned the use of force amounting to torture and other ill treatment during interrogations. In addition,

the individual states' constitutions also prohibit torture by generally mirroring the Bill of Rights' protections. Under the Torture Victims Protection Act (28 USC section 1350), enacted in 2000 as required under the Torture Convention to provide a tort remedy for victims of torture, the U.S. courts have also found these actions, among others, to constitute torture: severe beatings with an instrument; threats of imminent death, such as mock executions; threats of removing extremities; burning, especially with cigarettes; rape or sexual assault; and forcing the prisoner to watch the torture of others. The torture definition under this act mirrors that of the Torture Convention, not the one found in U.S. federal law.

From interviews of government officials and documents released by the White House it can be demonstrate that the U.S. government and its agents began stepping outside of the law by the end of 2001 by authorizing kidnappings, secret detention centers and 'enhanced' interrogation techniques, including techniques that other civilized nations regard as torture.

The Law According to the Bybee Memos

It now appears that the Bybee memos, written in August 2002, were written after the fact and in defense of harsh interrogation techniques already used by the CIA on top-ranking members of al Qaeda beginning in 2001. These memos, relied upon by the White House, contained erroneous analyses which resulted in incorrect conclusions. One legal commentator said not only was the legal analysis faulty and plain wrong but here were lawyers who were actually defending the use of torture and other cruel and degrading treatment when all these acts were illegal. The lawyers gave advice as to where the line of torture existed, in their opinion, and how to get as close as possible to that line without actually committing torture. One conclusion stated in the memos was if an act was not defined as torture under U.S. law than it could not be torture under the Torture Convention. This would mean that U.S. law is superior to all other law, even trumping agreed international law. Other incorrect pronouncements in these memos were that the U.S. Congress could not interfere with President Bush's interrogation conduct of enemy combatants because of the powers he held by virtue of being Commander-in-Chief and that U.S. nationals could not be prosecuted by the International Criminal Court for committing torture since the U.S. had not ratified the underlying Rome Statute. Harold Koh, an expert in international human rights and the dean of Yale Law School, said that the second Bybee memorandum defining torture was perhaps the most clearly erroneous legal opinion he had ever read. He listed "five obvious failures" within the memo: ignoring the "zero tolerance policy" on torture; defining torture so narrowly that it tolerated such acts as "beating, pulling out fingernails, suspension by the arms from the ceiling"; tolerating "cruel, inhuman or degrading treatment" which was contrary to existing law; grossly overextending the U.S. president's constitutional power to a point where President Bush could "order genocide or other kinds of acts" and not be stopped by Congress or the courts; and advising that executive officials would escape prosecution if they were carrying out President Bush's orders since he was the Commander-in-Chief.

Detainee Treatment Act of 2005

On October 11, 2005, following continued reports of prisoner abuse in U.S. custody, Senator John McCain (R), on behalf of himself and several other senators, introduced an amendment to the Defense Authorization bill, again calling for the complete prohibition of any cruel, inhuman or degrading treatment or punishment towards any individual under U.S. control. McCain's amendment cited the then-current U.S. Army Field Manual, the FM 34-52 as the authoritative guide for acceptable interrogation techniques. Both the Senate and the House of Representatives passed this amendment by a large majority. Despite the exceptionally large and non-partisan Congressional support for this amendment, Vice President Cheney, backed by President Bush, immediately began to lobby against it. Cheney argued that torture was sometimes necessary and that the option to use it should be left open. In November 2005, on a visit to Panama, President Bush said that he would veto the bill, adding, "Any activity we do conduct is within the law. We do not torture."

Despite his apparent opposition, President Bush signed the bill containing McCain's amendment into law on 30 December 2005 with the new title of, "Detainee Treatment Act of 2005" (the "DTA"). Following the signing of the DTA, Amnesty International USA claimed that the number of loopholes in the act actually signaled that torture was now an official U.S. policy. Under the DTA, any U.S. government agent who is charged with acts of torture or other ill-treatment can defend such action by stating he or she was not aware such actions were unlawful. Abusive acts are excused if they were officially authorized and determined to be lawful at the time. Thus, if someone higher up the chain of command said it was lawful and the interrogator did not realize his or her act was illegal, then the abusive act may be excused. Although the DTA does attempt to protect detainees in U.S. custody against cruel, inhuman or degrading treatment, it also takes away certain detainee rights as did the later Military Commissions Act.

Points of the DTA:
--Denies the right to file a writ of *habeas corpus* by or for any prisoner at Guantanamo Bay;
--Gives the D.C. Court of Appeals, exclusive jurisdiction for any appeal of a sentence of death or imprisonment of more than ten years; although for all lesser sentences, review by the Court of Appeals is discretionary; and
--Provides procedural protection for U.S. personnel accused of improper interrogation techniques.

Military Army Field Manual 2-22.3 2006
The Army field manuals are important in setting out acceptable behavior during military endeavors for all military personnel including interrogators. One main drawback of the DTA is that it refers to interrogation techniques in a specific Army manual, the Army Field Manual 34-52. The overall tone of the DTA is changed when a new Army manual is produced. In December 2005, several weeks before President Bush signed the DTA into law, the *New York Times* reported that the Department of Defense (DoD) was in the process of writing a new field manual to replace the manual referred to in the soon-to-be DTA. The new draft Army field manual was said to contain some 10 pages of classified interrogation techniques. Being classified, these interrogation techniques were not open to public scrutiny. Numerous demands were then made to have these interrogation techniques transparent and available to the public. In May 2006, the U.S. envoy informed the Torture Committee that it intended "to adopt a new Army field manual for intelligence interrogation, applicable to all its personnel, which would ensure that interrogation techniques fully comply with the [Geneva] Convention." Finally, on September 6, 2006, the DoD announced the publication of its new Army Field Manual 2-22.3, replacing Army Field Manual 34-52.

The new Army manual clearly states several times in the interrogation section that no person in the custody or under control of the DoD, regardless of nationality or physical location, shall be subject to torture or cruel, inhuman or degrading treatment or punishment in accordance with U.S. law. It follows the 1949 Third Geneva Convention by stating that any detained person not yet classified will be treated as a prisoner of war until such time the detainee's status can be determined by a competent authority. One point of confusion may be in deciding what law prevails from numerous legal sources listed: "US law, the law of war (i.e., humanitarian law), relevant international law, several DoD directives, and DoD instructions". Its clarity isn't helped by such things as referring to U.S. law which includes the 1949 Geneva Conventions (First, Third, and Fourth), and the Detainee Treatment Act. This causes a circular source since the DTA refers to the current Army field manual which refers to the DTA.

Regarding the Geneva Conventions
The new Army Manual 2-22.3 refers to several sources of law without stating what prevails.
The old Army Manual FM34-52 said if a conflict existed between the Geneva Conventions and any rule listed in the military manuals, the Geneva Conventions prevailed.

Miscellaneous
The new Army manual 2-22.3 clearly states the "use of torture is not only illegal but also is a poor technique that yields unreliable results, may damage subsequent questioning and may induce the person to say what he thinks the interrogator wants to hear."

The new Army manual: doesn't discuss 'force'.
The old Army manual on the use of force: from both legal and moral viewpoints, the restrictions established by international law, agreements and customs render threats of force, violence and deprivation useless as interrogation techniques

Approaching a line between permissible actions and prohibited actions-- New Army Manual 2-22.3
First Method: as an interrogator, think about the same approach or technique used on a fellow soldier. In that situation, would you consider it to be an abuse?
Second Method: consider if the proposed technique would violate a law or regulation.
If 'yes' is the answer to either of these questions, the technique should not be used.

While the protections under the Third Geneva Convention for prisoners of war are clearly set out in the new Army manual, rights and protections for other individuals without this status are not. In many places the language of the new manual has been watered down. Overall, the new Army manual seems to contradict itself whereas the earlier Army manual, FM 34-52, said clearly and directly, "The use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind is prohibited by law and is neither authorized nor condoned by the US Government."

Supreme Court Ruling 2006
In the Autumn of 2001, the executive branch declared that non-U.S. citizens being held in U.S. custody outside the United States under the U.S. 'war on terror' would be tried by military commissions for war crimes. In November 2005, the U.S. Supreme Court agreed to review a ruling made by the Court of Appeals for D.C. against Mr. Salim Hamdan, a prisoner held at Guantanamo Bay by the U.S. government. The Court of Appeals' ruling in the case of *Hamdan v. Rumsfeld* supported the U.S. government's arguments that the Geneva Conventions were not "judicially enforceable". Mr. Hamdan had filed writs of habeas corpus and mandamus challenging the means of the U.S. executive branch to try this action. Mr. Hamdan, a Yemeni national, was taken into U.S. military custody in November 2001 in Afghanistan. He was told in 2003 he would be tried by a military commission for unspecified crimes. In 2004, he was charged with conspiracy. On 29 June 2006, the U.S. Supreme Court published its opinion in the *Hamdan* case, finding against the U.S. government. A majority of Justices found that the military commissions to be convened by President Bush did not have the necessary authority to try Mr. Hamdan because both the proposed structure and procedures of these military commissions violated U.S. military law and the Geneva Conventions. Although most of the court's decision focused on the proposed military commissions, including whether the Supreme Court had jurisdiction to hear the case under the recent Detainee Treatment Act, the Justices also discussed other pertinent areas of law. Four of the nine Justices also concluded that since 'conspiracy' was not an offence under humanitarian law, it could not be tried by military commissions. One of the government's arguments was that the Geneva Conventions did not protect Mr. Hamdan since he was a member of al Qaeda in Afghanistan. While the court did not want to go into the merits of this assertion, it unequivocally stated that common Article 3 of the Geneva Conventions applied to Mr. Hamdan on the basis of him being involved in a non-international armed conflict. For this reason, he was entitled to all the protections afforded by this article.

Military Commissions Act 2006
Several months later, in response to the *Hamdan* decision, the Bush Administration requested Congress to pass the Military Commissions Act (Military C. Act) to address the points made by the Supreme Court regarding military tribunals to adjudicate actions against individuals being detained outside the United States. A large push by President Bush resulted in the

Military C. Act being signed into law on October 17, 2006. The shortness of time meant that the Bush Administration backed down on many of its original proposals including the continued use of certain interrogation techniques such as stress positions, waterboarding, and induced hypothermia. The lack of time also meant that Congress did not thoroughly examine the act. The Bush Administration agreed not to have Congress replace the absolute prohibition of inhumane treatment of common Article 3 of the Geneva Conventions with a 'flexible' standard but instead, to leave it as written. Many individual rights were denied or continued to be denied which are considered to be essential and traditional principles for the conduct of fair trials.

Main Points of the Military Commissions Act
--Grants unprecedented and unchecked authority to the Executive Branch to label individuals, including those in the U.S. as being "unlawful enemy combatants";
--Does not allow evidence obtained through torture to be used against any defendant;
--Allows evidence obtained through coercion to be used against defendants, conditional on judicial preview;
--Allows hearsay evidence to be used unless the defendant can show it is unreliable or lacking in probative value;
--Grants the President the authority to interpret and apply the 1949 Geneva Conventions with such interpretation being published in the Federal Register;
--Denies certain rights of those in custody including the right of *habeas corpus* to challenge the legality of their detention; the principle of "fair trial" under the Geneva Conventions and human rights treaties is not met with the denial of the right of a speedy trial and rejection of sections relating to compulsory self-incrimination and pretrial investigations that generally apply in trials.
--The crimes triable by military commissions include terrorism, conspiracy, and the use of torture or cruel or inhuman treatment;
--Narrows the scope of the War Crimes Act by redefining and eliminating some crimes; and
--Restricts judicial review of the tribunals' rulings to the U.S. Court of Appeal, D.C. Circuit.

The Military C. Act also prohibits anyone from bringing a claim under the Geneva Conventions in lawsuits against the U.S. government or its agents. As important, the Military C. Act attempts to eliminate accountability for past illegal acts and excludes several actions previously defined as criminal offences. In an interview published on October 19, 2006, Jakob Kellenberger, president of the International Committee of the Red Cross, reported that the ICRC had certain concerns and questions about the new legislation including, "[t]he very broad definition of who is an "unlawful enemy combatant" and the fact that there is no explicit prohibition on the admission of evidence attained by coercion are examples." He warned that the legislation could weaken basic guarantees given under the Geneva Conventions which are supposed to protect everybody from humiliating and degrading treatment.

Executive Order Regarding CIA Detentions and Interrogations 2007
On July 20, 2007, President Bush issued a signed Executive Order interpreting the common Article 3 of the Geneva Conventions as it applied to the CIA's program of detention and interrogation. In his Executive Order, President Bush reiterated and reaffirmed his statement of February 7, 2002 that common Article 3 did not apply to members of al Qaeda, the Taliban or associated forces. He reaffirmed and reinforced his authority as President and Commander-in-Chief of the U.S. military forces to interpret the meaning and application of common Article 3 and said that this should be treated as authoritative for all purposes of U.S. law and also in satisfaction of U.S. international obligations. President Bush stated, "I hereby determine that a program of detention and interrogation approved by the Director of the CIA fully complies with obligations under Common Article 3." Although no details of the CIA's program were provided in the order, the President stated that the interrogation practices determined by the Director of the CIA will be based on personal advice as to what is safe to use with each detainee. The order sets out certain guidelines concerning the CIA's detention and interrogation practices stating that these practices should not include murder, torture, cruel or inhuman treatment or willful and outrageous acts of personal abuse due to humiliate or degrade someone in a manner that is so serious to be deemed beyond the bounds of human decency. Under this order, President Bush also assigned to the Director of National

Intelligence the function given to him by the Military Commissions Act (section 6(c)(3)). This function is the President's obligation to take action to ensure compliance with the prohibition of cruel, inhuman or degrading treatment.

Congressional Legislation banning harsh CIA interrogation methods 2008
On March 8, 2008, President Bush vetoed legislation passed by Congress which sought to limit the type of interrogation techniques the CIA could use on prisoners. This bill would have limited the CIA to 19 tactics described in the U.S. Army Field Manual for interrogations. Some of the techniques that would have been banned by this legislation included waterboarding, using extreme temperatures, extended forced standing, and other harsh methods. These are interrogations techniques that are at odds with those used and supported by the FBI and other agencies. Congress did not have a two-thirds majority necessary to override the President's veto. With regard to presidential hopefuls, Senator John McCain supported President Bush's veto while both Senator Hillary Clinton and Senator Barack Obama supported the Congressional ban although neither was present in the Senate to vote on it.

Summary of Law
When this article was first being contemplated, U.S. law clearly prohibited torture and cruel, inhuman and degrading treatment of those in the custody of U.S. agents. Now with the passing of the Detainee Treatment Act and the Military Commissions Act as well as the release of the new Army manual, there are many grey areas that may actually allow abusive treatment because they either do not clearly prohibit it or because they are discretionary. Generally, the U.S. courts and domestic law prohibit torture and abusive treatment. There are also Constitutional protections for both U.S. and non-U.S. citizens in the United States. President Bush's veto of March 8, 2008 on Congressional legislation banning CIA interrogation techniques does not change the fact that when the CIA used waterboarding and other abusive techniques in 2002 and 2003 they were illegal. They continue to be illegal today. On April 11, 2008, President Bush admitted on ABC News that he knew and supported the decision of his national security team to approve the torture techniques used by the CIA. These security advisors included Dick Cheney, Condoleeza Rice, Donald Rumsfeld, Colin Powell and George Tenet. Having presidential approval and support of torture techniques does not lend validity or legality to torture. Susan Lee, one of the directors of Amnesty International, stated, "No one, not even a president, can authorize torture. Anyone who orders, condones or carries out torture exposes themselves to criminal liability under international law."

In 1999, the Israeli High Court said in a case contesting the use of government torture:

> This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties.

When the United States decides to act contrary to its legal obligations and responsibilities, it sends out two strong messages to the rest of the world. The first is that the United States no longer supports or follows the rule of law. Philippe Sands, a well-respected international lawyer and scholar, takes the position that because of the recent actions taken by the United States, it must now be considered a lawless nation. The second message is that if the most powerful State in the world considers itself above the law and refuses to follow the law, why should other States adhere to the rule of law? The human rights organization, Human Rights Watch, recently observed, "When a government as dominant and influential as the United States openly defies the laws against torture, it virtually invites others to do the same." This

point is illustrated by a report issued at the end of October 2006 by the U.N. special rapporteur on torture, Manfred Nowak. In his report, he states that several governments replied to criticism of how they handled detainees by pointing out that they were only following the U.S. example in fighting terrorism. Nowak said that several governments have asked why they are being criticized when they have not done anything different from the United States.

Moral and Ethical Considerations of Torture

The illegality of torture and any cruel, inhuman or degrading treatment should be enough to ensure that no country condones, supports or encourages such actions. Every State that considers itself a civilized nation with a solid regard for human rights and a belief and commitment in the rule of law has moral and ethical standards that it should follow.

In order for the many different and diverse States in the world to co-exist peacefully, there are certain standards of behavior sought from each and every State. Moral behavior is less dictated by law and more dictated by the view of what is right and fair. Moral and ethical principles are not enforceable but are ideals to be aspired to by all States although in practice they may only be upheld by a handful of civilized nations. In a truly evolved society, ethical and moral principles alone would dictate how States treat each other, how they treat individuals and how each person is treated by another. Unfortunately, because a truly civilized and ethical evolution of the world continues to prove elusive, laws remain the necessary means of compelling a minimum standard of behavior from States.

The United States is considered to be a civilized nation both by its citizens and by other States. It was conceived as a democracy founded on the ideals of life, liberty and the pursuit of happiness. The Constitution speaks of forming a more perfect union built on the concrete principles of justice and integrity and on the belief that all humans should be treated justly, fairly, and honestly. When a democracy founded on high ideals and principles allows or promotes barbaric treatment or punishment to be used on other human beings, it undermines and devalues itself. Torture and cruel, degrading treatment are methods used by lawless States, by dictators, and by violent regimes. An absolute prohibition of torture and cruel abusive treatment is necessary not only to protect all individuals but also to prevent the splash that such acts make from widening. Once abusive treatment is used or condoned by a State, the moral and ethical boundaries are pushed out farther and farther. The Tibetan Centre for Human Rights and Democracy in Dharmasala, India observed, "The practice of torture and ill-treatment which denies transparency, accountability, and responsibility, often triggers enhanced levels of human rights violations such as disappearances and extra judicial killings."

As the November 2006 Congressional contests demonstrated, most Americans prefer and want the United States to uphold a high moral and ethical standard in its policies and actions; to be a country that is respected and looked up to; and to follow the rule of law rather than to pick and choose what laws it will obey. One of the more convincing reasons for the U.S. military invasion of Iraq was Saddam Hussein's barbaric and inhumane use of torture against his people. In his 2003 State of the Union message, President Bush spoke about Saddam Hussein's torture methods, "Electric shock, dripping acid on the skin, mutilation with electric drills. If this is not evil, then evil has no meaning."

At this time, the United States is the most powerful nation in the world. On the basis of its great influence and the impact of its actions, the United States has an even higher obligation to uphold its moral and ethical standards as stated in its founding principles. The question is never whether one *can* act legally, the more important question from a truly moral and ethical position is whether it *will* act legally. At such times that the United States is breaking the law, it cannot speak from the moral high-ground it has when its actions match its words. At this point in time, the United States no longer has any right to point its finger at any other country

for human rights abuses when it is unable to legally or morally defend its own actions. The Bush administration's use of torture and other abusive treatment means there is a current and discernable void in the global leadership to defend human rights. The U.S. has a more defendable position against terrorists only if it holds its own moral high ground and does not use the illegal tactics of its opponents. This may be the true test of a great nation that in the midst of uncertainty and fear, armed conflicts and widening terrorism, it continues to follow the rule of law and maintains a high standard of moral and ethical behavior.

Effectiveness of Torture

The answer to the question of effectiveness depends on why torture is used. If torture is used to punish or inflict injury on another person, it is very effective. It can cause lasting physical, psychological and even spiritual scars on those being tortured. Very few torture victims (or, 'survivors', as they are sometimes referred to) are able to forget their ordeal of torture for any length of time; some have trouble getting through even a day without some residual fear or other psychological scar presenting itself. A Bahrainian man imprisoned for over twelve years said that he was hung upside down and beaten along the legs. Nails were put in his fingers and he was burnt with a cigarette lighter. Now, some ten years after his release he said, "I've been tortured physically and mentally and in every way I am disabled. I am thinking about killing myself; I see I'm nothing in this world." A British man imprisoned in Saudi Arabia in the 1980's said, "When you've been tortured you feel very isolated and you only trust close members of your family. You also find it difficult to cope with anything, even to focus."

The level of effectiveness significantly decreases when torture is used to obtain information or confessions. After many sessions of torture or cruel punishment, most people, if not all, will give information or make a confession. Torture does not generally consist of only one short session. Instead, it will be used on someone systematically over days, weeks or months. The reasons for having more than one torture session are obvious. Psychologically, the person doing the torture wants the man or woman or child being tortured to be worn down, to have his or her will broken. The interrogator/torturer wants the tortured person to feel vulnerable and alone. Pain is inflicted deliberately and specifically to achieve these ends. Another reason for multiple sessions is that torturer(s) is not getting either the information or confession she or he is seeking. Most people being tortured for information, especially those who have not been trained in resisting torture techniques (i.e., the general public), generally volunteer any information they have in a fairly short time once their fingernails are being pulled out or electrodes are being connected to their testicles. If someone does not have information, it is very difficult to even make up something that will satisfy the torturers. Most times, torturers will hold the victims until the offered information can be confirmed. If the offered information is faulty or false, the torture or abuse will be repeated but using harsher torture methods. If torture is being used to extract a confession, generally all people being tortured will confess at some point even if it's not true. The pain inflicted will occupy one's brain, one's body to such an extent that it will overpower all other thoughts and sensations. Since the strongest motivation of human beings is survival and because pain reflects a threat to that survival, there is a compelling motivation to end the pain by confessing, regardless of the truth of this confession. When information is given under any type of torture or abuse, the interrogator is faced with a dilemma: what part, if any, of this information is reliable? Can I depend on this information? The answer has to be 'no' in all cases. Pieces of the information may be true but how to separate the true statements from the false ones? Numerous studies demonstrate that information garnered by torture or by the threat of torture or other coercive means is not reliable. The innocent will make something up and those with real information and trained to resist interrogation will alter the information or present carefully rehearsed lies.

The emotional and mental scars of abusive treatment are ones that are often forgotten by others but not by the victims. Mental torture and abuse is caused by prolonged solitary confinement, lack of contact with the outside world including letters or visits, not knowing when one will be freed, physical threats by the interrogators and by threatening animals, and by being in a situation where one feels useless and forgotten. The human body and brain function amazing well in a variety of situations including war but each human has a breaking point where he or she can no longer withstand the physical and mental stress of their situation. To survive physical or mental abuse, most people learn to cut-off from his or her emotions and not feel any more because they feel too much. Once freed, abused individuals experience much difficulty in rejoining society, in being in touch with any emotions besides fear, and in trusting new individuals and situations. Most individuals never recover fully.

In 2005, Douglas Johnson, the executive director of the Center for Victims of Torture in Minnesota (the 'Center'), gave testimony before the U.S. Congress about the results and effectiveness of torture. By then, the Center had treated over 7,500 victims of torture from some sixty countries. Mr. Johnson stated that there were certain assumptions that physical and mental coercion is necessary to protect the American people from terrorism. These unproven assumptions seemed to be based on reports from agencies with little transparency. In contrast to these unproven assumptions, the staff at the Center derived eight broad lessons from working with torture victims. First, torture does not yield reliable information. Second, torture does not yield information quickly. Third, torture has a corrupting effect on the person doing the torture. Fourth, torture will not be used only against the guilty. Fifth, torture has never been confined to narrow conditions, once it's used, it broadens. Sixth, psychological torture results in long-term damage. Seventh, stress and duress techniques are forms of torture. And, eighth, anyone using torture has lost all moral high ground.

A key point that may have been forgotten is that the United States has well-trained interrogators with years of experience who are effective in obtaining reliable information while continuing a trust relationship with the individual being questioned. Practice has shown that more information is obtained when the interrogator is both likeable and someone the detainee can feel comfortable with and come to trust. There have been many reports from FBI agents stating they prefer the long-accepted, court-approved interrogation policy of building rapport with detainees to obtain information about terrorism. Supporting the FBI agency's stance on the prohibition of torture both verbally and in writing have been an extraordinarily large number of active and retired military leaders. In March 2008, Retired Army Lt. Gen. Harry E. Soyster, a former director of the Defense Intelligence Agency, said, "If they [those promoting torture] think these methods work, they're woefully misinformed. Torture is counterproductive on all fronts. It produces bad intelligence. It ruins the subject, makes them useless for further interrogation. And it damages our credibility around the world." In a separate forum held in March 2008, Navy Rear Adm. Mark H. Buzby, commander of Guantanamo Bay prison, supported less-coercive methods when he stated, "we get so much dependable information from just sitting down and having a conversation and treating them like human beings in a businesslike manner."

In a seminar held at Georgetown University in November 2006, a group of psychologists and former interrogators released a report again confirming that cooperation was crucial to collecting reliable information and that torture was actually counterproductive to intelligence interrogations. The 'ticking time bomb' hypothetical was discussed but dismissed by the interrogators because, with their combined 100 years of interrogation experience, they had never encountered it.

As a last point, torture is very effective in destroying trust, changing political ideologies, and in leaving permanent psychological and emotional scars on those who have been tortured. Torture is counterproductive because it turns those abused prisoners against the torturer. Instead of respect, trust, support or liking, there is anger, abuse, helplessness and revenge.

Those who have been tortured will come to dislike and even hate their torturers. This dislike and hatred extends to both the torturing State's officials and the State that these torturers represent. By using torture, cruel, inhuman or degrading treatment with the individuals it detains, the United States is ensuring that future generations will not like or trust either the United States or individual Americans. Several recent reports have now verified that the U.S. government has worsened the global terrorist situation by the very actions it has taken against those it detains.

Summary and Recommendations

International law absolutely prohibits the United States from using torture or any other treatment or punishment which is cruel, inhuman or degrading against any person in its custody. These international obligations continue to exist even if the U.S. domestic law states differently. Many of the reported physical and mental acts inflicted on persons held under U.S. custody in such places as Abu Ghraib and Guantanamo Bay prisons are prohibited specifically under international humanitarian law and human rights law. Some of the reported abuses may constitute grave breaches and as such are war crimes. At this time, U.S. domestic law on the use of torture or cruel, inhuman and degrading treatment or punishment is a grey and muddy area.

Besides being illegal, the use of any physical or mental abuse against other human beings is morally and ethically repugnant. Lastly, numerous psychological studies over the past decades have demonstrated that the information obtained through torture, coercion and abuse cannot be relied upon. Stating that torture must be available in case there is "a ticking bomb" scenario is disingenuous. By practicing abusive and coercive techniques including those judged to be 'torture', the United States has damaged the high esteem and good-will that other countries had for it following the terrorist attacks of September 11, 2001.

To change the current course of the U.S. government, the following recommendations are made. First, the U.S. government, especially the executive branch, should endeavor to obey both domestic and international law. It should fulfill its international obligations to other countries and to all individuals. It is important that it is transparent in its policies and in its dealings with others especially those it detains. The United States should review its official policies to ensure that no detainee is extradited, returned or sent to any State where there are substantial grounds for believing torture will be used. The United States government, in accordance with the law, should discontinue its policies of illegally kidnapping foreign nationals and interrogating them in secret detention centers around the world. If the U.S. government believes it has sufficient grounds to bring someone to trial for terrorism or other criminal actions, it should do so. It should ensure that all fair and legal trial procedures are followed. If the U.S. forces detain anyone during an armed conflict or an occupation, the correct protections should be provided as set out in the Geneva Conventions and the Additional Protocols. Outside of any armed conflict or occupation, human rights shall apply. The U.S. government should determine who is entitled to what protections and ensure those protections remain in place.

Finally, in any situation requiring the interrogation of detainees, the U.S. government should once again turn to its highly-trained, expert interrogators who obtain proven and reliable information without using coercive, brutal and cruel techniques. It is important in going forward that the actions of the United States government match its words including those of the Constitution. The United States can only build a better world if it remains true to its own principles of democracy.

If you are interested in learning more or expressing your support of the prohibition against torture and other illegal abuse or coercion, please visit any of the following organizations which have all produced information on this topic: Human Rights Watch, Physicians for Human Rights, Human Rights First, Amnesty International USA, American Civil Liberties Union, and the UN Committee Against Torture.

There are many good articles by noted international legal experts on the use of torture and other degrading and humiliating behavior by the U.S. government. Philippe Sands has written several books including, Lawless World, published in 2006 which discusses the making and breaking of global rules by the U.S. and the U.K., and his most recent book, Torture Timing, published in March 2008 for which he interviewed numerous U.S. officials directly involved in implementing and carrying out torture and other abuses on behalf of the U.S. government.

The End