

## THE UNHOLY TRINITY: INTELLIGENCE, INTERROGATION AND TORTURE

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### I. INTRODUCTION

The greatest contemporary challenge faced by liberal democratic societies in confronting terrorism is the dilemma of balancing the legitimate national security interests of the State and the civil liberties of the individual. Perhaps no issue represents that tension more than the dilemma faced by democratic societies about how to conduct interrogation of suspected terrorists in custody. Accounts of abuses that have occurred at Abu Ghraib, Guantanamo Bay, and Bagram<sup>1</sup> have served to bring this balancing issue to the forefront of the debate of how the United States ("U.S.") reacts to terrorism.

A number of commissions have investigated the events at Abu Ghraib, Guantanamo Bay, and Bagram and several members of the American armed forces have been court-martialed. As a result, a one-star general has been demoted one rank to full colonel and there have been demands for the resignation of Defense Secretary Donald Rumsfeld and others. The pictures from detention centers have been disturbing and distressing. Although their effect in confronting Americans with a certain reality has been very powerful, they are not the real story. What the President has termed "a few bad apples" in referring to Pvt. Charles Graner, Jr., Pfc. Lynndie England, and Spc. Sabrina Harman, among others, ignores the larger and more criti-

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<sup>1</sup> See Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, N.Y. TIMES, May 20, 2005, at A1 [hereinafter Golden, *Brutal Details*] (detailing the deaths of two Afghan detainees tortured by their Army captors). See also Tim Golden, *Army Faltered in Investigating Detainee Abuse*, N.Y. TIMES, May 22, 2005, at A1 [hereinafter Golden, *Army Faltered*].

cal issues: the relationship between intelligence and interrogation and whether the confluence of the two must necessarily lead to torture. I propose that these issues have not yet been fully addressed.

In order to discuss these issues, we shall define the terms used. One of the realities of the contemporary political discourse regarding terrorism is a loose usage of language, either for political purposes or due to a lack of attention.

## II. INTELLIGENCE INFORMATION

Unlike criminal evidence, which must be submitted to a court of law and is subject to confrontation via cross-examination, and unlike empirical evidence, which must meet scientific standards, intelligence information is largely gathered in the back alleys of the world where dark shadows rule. The ability to extract information from a source, who in all probability does not know the true identity of the individual with whom he is meeting or necessarily the true purpose of the desired information, is an art form onto itself.

Intelligence information is the backbone of counter-terrorism; without it, governments would not be able to implement any measures against terrorists. Intelligence information is information that has been gathered and collected either from human intelligence ("HUMINET") or from signal intelligence ("SIGNET") and subsequently analyzed.

### *A. Human Intelligence*

Human intelligence is gathered from sources that, either willingly or unwillingly, provide intelligence services with information that may or may not be relevant, valuable, accurate and ultimately actionable. Who is a source? A source is an individual who, for a variety of reasons is willing to provide information that incriminates another. Generally an individual will provide such information for two basic reasons: 1) financial remuneration; or 2) "wiping his slate clean." In confidential conversations with senior members of the Israeli General Security Service ("GSS"), this author was informed that Palestinian informants have included individuals who believed that Palestinian terrorism was a threat to the larger Palestinian cause and therefore provided the GSS with intelligence information.

### *B. Signal Intelligence*

Signal intelligence is information received by a variety of listening devices strategically positioned enabling intelligence officers to intercept conversations world wide. Sophisticated technology enables analysts to listen in on conversations occurring even in the most remote parts of the world.

### III. INTERROGATION

An interrogation, for purposes of this article, is the questioning of an individual suspected of either having committed a terrorist act or of being involved in the planning of an attempted attack. Usually, the interrogation takes place in a room sparsely furnished with a table, a couple of chairs, pen and paper on the table and the suspect facing the interrogator(s). The room is not Hilton-like nor should it be; it is a sterile environment permeated with the stench of sweat and fear.

The interrogator seeks the suspect's confession to the crime he believes the individual has committed. In addition, he wants the suspect to provide additional information concerning the involvement and location of others involved in the terrorist operation. This additional information, from the perspective of the interrogator, is critical to building what is referred to as the "jig-saw puzzle" of intelligence.

Furthermore, the interrogation process involves the complex development of a dependent relationship between the suspect and the interrogator. This relationship requires that the suspect feel comfortable in confessing to the interrogator. The critical issues are how that relationship develops and whether the interrogator uses illegal means in its establishment.

### IV. TORTURE

To start, I posit unequivocally that torture is wrong—legally, morally and operationally.

I propose that torture be divided into three categories: 1) interrogation based; 2) functional torture, whereby a ruler, leader or government demonstrates that there is a "new sheriff in town;" and 3) evil and sadistic torture. While the methods may bear some similarity, it is important to understand that these categories have fundamentally different purposes.

Though illegal, the first category is explainable both philosophically and practically. Harsh measures of interrogation, or what some would call torture, have been upheld by scholars and courts alike on the basis of legitimate self-defense in order to protect innocent lives. Furthermore, based on professional experience and knowledge, I submit that torture in certain interrogation settings is tempting. The burden of sensing that the suspect is "hiding something" and not being able to coax it out, can no doubt be overwhelming for the interrogator.

The other two proposed categories are unexplainable under any circumstance and must be vigorously denounced.

This section is divided into three subsections: 1) definitions of torture; 2) an analysis of interrogation methods based on an Israeli High Court of Justice ("HCJ") holding, *Ireland v. United Kingdom*, and a 1984 Israeli Commission of Inquiry; and 3) an analysis of both functional torture and sadistic torture based on an examination of the Bybee memo.

### A. Definitions of Torture

Webster's Dictionary defines torture as "the infliction of intense pain (as from burning, crushing, or wounding) to punish, coerce, or afford sadistic pleasure."<sup>2</sup> The U.S. Code makes it a criminal offense for any person outside the U.S. to commit or attempt to commit torture.<sup>3</sup> Torture is defined in the Code as "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 incident to lawful sanctions) upon another person within his custody or physical control."<sup>4</sup>

Common Article 3 of the Geneva Conventions prohibits the use of torture in any circumstance without actually defining what constitutes torture.<sup>5</sup> All four of the Geneva Conventions also dictate that the use of torture is a grave breach.<sup>6</sup> The 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, or Punishment ("1984 Convention Against Torture") defines torture as:

[A]ny act which by 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 . . . or intimidating or coerc-

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<sup>2</sup> MERRIAM-WEBSTER ONLINE DICTIONARY, [www.m-w.com](http://www.m-w.com).

<sup>3</sup> 18 U.S.C. § 2340A (1994).

<sup>4</sup> 18 U.S.C. § 2340 (1994). *See id.* (defining "severe mental pain or suffering" as the "prolonged mental harm caused by or resulting from—(A) the intentional infliction or threatened infliction of severe physical pain or suffering; (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (C) the threat of imminent death; or (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality."). *See also* Letter from John C. Yoo, Deputy Assistant Attorney Gen., U.S. Dep't of Justice to Alberto Gonzales, Counsel to the President (Aug. 1, 2002), *reprinted in* MARK DANNER, TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR 109 (2004) (In order to convict a person of torture, "the prosecution must establish that: (1) the torture occurred outside the United States; (2) the defendant acted under the color of law; (3) the victim was within the defendant's custody or physical control; (4) the defendant specifically intended to cause severe physical or mental pain or suffering; and (5) that the act inflicted severe physical or mental pain or suffering.").

<sup>5</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV].

<sup>6</sup> Geneva I, *supra* note 5, art. 50; Geneva II, *supra* note 5, art. 51; Geneva III, *supra* note 5, art. 130; Geneva IV, *supra* note 5, art. 147.

ing . . . when such pain or suffering is inflicted . . . with the consent or acquiescence of a public official . . . [i]t does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>7</sup>

Furthermore, the 1984 Convention Against Torture states that there are no exceptional circumstances which may be invoked as justifications of torture.<sup>8</sup>

The International Criminal Court's definition of torture is very similar to both the U.S. Code definition and the 1984 Convention Against Torture. It defines torture as "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions."<sup>9</sup> It is important to note that while many international conventions prohibit the use of torture, very few actually define it in any manner.<sup>10</sup>

The U.S. Senate, when ratifying the 1984 Convention Against Torture, gave consent to the Convention subject to its own definition of torture:

[I]n order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: the intentional infliction or threatened infliction of severe physical pain or suffering; the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; the threat of imminent death; or 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>11</sup>

The U.S. became a party to the 1984 Convention Against Torture on November 20, 1994. The ratification of the 1984 Convention Against Torture

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<sup>7</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Torture Convention].

<sup>8</sup> *Id.* art. 2.

<sup>9</sup> Rome Statute of the International Criminal Court art. 7(2)(e), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

<sup>10</sup> See Geneva I, *supra* note 5; Geneva II, *supra* note 5; Geneva III, *supra* note 5; Geneva IV, *supra* note 5; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171. U.N. Econ. & Soc. Council [ECOSOC], *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, Annex, U.N. Doc. E/CN.4/1985/4 (Sept. 28, 1984) [hereinafter *Siracusa Principles*].

<sup>11</sup> Sanford Levinson, *Brutal Logic*, VILLAGE VOICE, May 12, 2004, at 27 (quoting U.S. Reservations, Declarations, and Understandings to the Convention Against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, 136 CONG. REC. 36 (1990)).

made effective 18 U.S.C. §§ 2340, 2340A, and 2340B.<sup>12</sup> These provisions of the U.S. Code codified the U.S. obligation to prohibit and prevent torture as required by the 1984 Convention Against Torture.

The Bybee memo was a “formal legal opinion of the Office of Legal Counsel” which interpreted the 1984 Convention Against Torture and the corresponding U.S. Code.<sup>13</sup> The American armed forces prior to the Bybee memo used the definition of torture from 18 U.S.C. § 2340A.<sup>14</sup> Based on the Bybee memo analysis, American armed forces narrowed the definition by stating that “severe” was defined so that the physical or mental pain “must be of such a high level of intensity that the pain is difficult for the subject to endure.”<sup>15</sup>

Unlike the codified U.S. definition of torture, the State of Israel’s definition does not focus on the specific level of pain but rather defines torture as pressure that reaches the “level of physical torture or maltreatment of the suspect, or grievous harm to his honour, which deprives him of his human dignity.”<sup>16</sup> Israel “has always maintained that the interrogation procedures used by the . . . [GSS], to prevent acts of terrorism in Israel, do not constitute torture as defined by Article 1” of the 1984 Convention Against Torture.<sup>17</sup>

The British government defines torture as the intentional infliction of “severe pain or suffering on another at the instigation or with the consent

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<sup>12</sup> Act of April 30, 1994, Pub. L. No. 103-236, Title V, Part A, § 506(c), 108 Stat. 463 states that 18 U.S.C. § 2340 et seq. would become effective either on the later date between the date of enactment of the provision (April 1994) or the date that the U.S. became a party to the 1984 Convention Against Torture (Nov. 20, 1994).

<sup>13</sup> John W. Dean, *The Torture Memo by Judge Jay S. Bybee that Haunted Alberto Gonzales’s Confirmation Hearings*, FINDLAW, Jan. 14, 2005, <http://writ.news.findlaw.com/dean/20050114.html>.

<sup>14</sup> Cf. Human Rights First, *U.S. Law for Prosecuting Torture and Other Serious Abuses Committed by Civilians Abroad*, HUMAN RIGHTS FIRST, [http://humanrightsfirst.org/us\\_law/detainees/us\\_torture\\_laws.htm](http://humanrightsfirst.org/us_law/detainees/us_torture_laws.htm) (discussing military law and U.S. Code provisions that are applicable to members of the U.S. armed forces).

<sup>15</sup> Jess Bravin, *Pentagon Report Set Framework for Use of Torture: Security or Legal Factors Could Trump Restrictions, Memo to Rumsfeld Argued*, WALL ST. J., June 7, 2004, at A1.

<sup>16</sup> Alan Baker, Legal Adviser, Ministry of Foreign Affairs, Opening Statement to Second Periodic Report of Israel Concerning the Implementation of The Convention Against Torture (May 15, 1998), [http://www.mfa.gov.il/MFA/MFAArchive/1990\\_1999/1998/5/Alan+Baker+-Opening+Statement+to+Second+Periodic+R.htm?DisplayMode=print](http://www.mfa.gov.il/MFA/MFAArchive/1990_1999/1998/5/Alan+Baker+-Opening+Statement+to+Second+Periodic+R.htm?DisplayMode=print).

<sup>17</sup> Yaakov Levy, Ambassador, Permanent Representative of Israel to the United Nations Office in Geneva, Opening Statement Consideration of Israel’s Third Periodic Report to the Committee Against Torture (Nov. 20, 2001), <http://www.mfa.gov.il/MFA/Foreign+Relations/Israel+and+the+UN/Speeches+-+statements/Opening+Statement+by+Ambassador+Yaakov+Levy+-+Genev.htm><http://www.mfa.gov.il/MFA/Foreign+Relations/Israel+and+the+UN/Speeches+-+statements/Opening+Statement+by+Ambassador+Yaakov+Levy+-+Genev.htm>.

or acquiescence—(i) of a public official; or (ii) of a person acting in an official capacity;” and the “official or other person is performing or purporting to perform his official duties when he instigates the commission of the offence or consents to or acquiesces in it.”<sup>18</sup> According to British law, “it is immaterial whether the pain or suffering is physical or mental and whether it is caused by an act or an omission.”<sup>19</sup>

### *B. Interrogation Based Torture*

#### 1. 1984 Israeli Commission of Inquiry

In the aftermath of the 1967 Six-Day War and the subsequent establishment of the Israel Defense Forces Military Government in the West Bank and Gaza Strip, the GSS assumed responsibility for the interrogation of Palestinians suspected of terrorist activities. From 1967 to 1984, complaints regarding torture were regularly lodged, not only by Palestinians prisoners, but also by Palestinian and Israeli human rights groups. These complaints were largely dismissed as exaggerated.

In 1984, a National Committee of Inquiry<sup>20</sup> concluded that controlled, moderate physical duress could be allowed in “ticking bomb” interrogations.<sup>21</sup> A “ticking bomb” interrogation occurs “when a bomb is known to have been placed in a public area and will undoubtedly explode causing immeasurable human tragedy if its location is not revealed at once.”<sup>22</sup>

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<sup>18</sup> Criminal Justice Act, 1988, c.33, § 134(a)(1)-(2), (b) (Eng.)

<sup>19</sup> *Id.* § 134(3).

<sup>20</sup> Known as the Landau Commission, named after Moshe Landau, a Supreme Court Justice, the Commission was established in the aftermath of the killing of a Palestinian terrorist by a senior member of the GSS. The terrorist was killed in the wake of an IDF rescue mission of a bus, which had been hijacked by Palestinian terrorists in Israel and then commandeered to the Gaza Strip. A newspaper photographer captured on film the GSS official and the terrorist leaving the bus. When the picture was published on the front cover of the newspaper, the media attempted to determine the identity and whereabouts of the detained terrorist. It was discovered that minutes after the picture was taken the Palestinian was brutally killed by the GSS official, who claimed that he was acting on the orders of the Head of the GSS. The Head in turn claimed that he was acting upon orders he received directly from the Prime Minister, Yitzhak Shamir. During the course of its investigation, the Committee of Inquiry learned that GSS agents when called to testify in court concerning confessions made by suspected Palestinian terrorists systematically lied when asked whether suspects had confessed of their own free will and volition. Furthermore, the Commission discovered that one of its members, a senior GSS official, regularly updated the Head of the GSS regarding the Commission's daily proceedings and prepared GSS agents prior to their testimony before the Commission. The Commission also discovered that the GSS had attempted to frame a Brigadier General for the murder of the terrorist.

<sup>21</sup> See H CJ 5100/94 Public Comm. Against Torture in Israel v. Israel [1999] IsrSC 46(2), ¶ 16, available at <http://www.derechos.org/human-rights/mena/doc/torture.html>.

<sup>22</sup> *Id.* ¶14.

Therefore, if the GSS strongly suspected that the detainee knew the location of the ticking bomb and that the information in the detainee's possession could prevent that bomb from exploding, limited means of physical duress could be used. The report included a section available to the public as well as a confidential portion detailing the physical means that were permissible.<sup>23</sup> According to various media reports, the Commission held that the following interrogation methods were legal: wall standing, the playing of loud music, sleep deprivation, physical discomfort through manipulation of room temperature, sitting in an uncomfortable position, and the wearing of a hood. Furthermore, and perhaps most importantly, in ticking bomb situations, the detainee could be violently shaken.<sup>24</sup>

## 2. Shaking Technique and the "Ticking Bomb"

Shaking has been defined by the HCJ as "the forceful shaking of the suspect's upper torso, back and forth, repeatedly, in a manner which causes the neck and head to dangle and vacillate rapidly."<sup>25</sup> The consequences of shaking are disputed but may include serious brain damage and harm to the spinal cord, which can cause the suspect to "lose consciousness, vomit and urinate uncontrollably, and suffer serious headaches."<sup>26</sup>

In the aftermath of the Commission's report, the GSS implemented the "shaking" technique for "ticking bombs." However, a series of petitions filed with the HCJ<sup>27</sup> argued that "ticking bomb" had been expanded to include virtually every Palestinian detainee instead of the imposition of duress being limited only to those cases where a ticking bomb truly existed. According to the petitions, torture became a "bureaucratic routine" for the GSS.<sup>28</sup> Nevertheless, the HCJ repeatedly denied the petitions<sup>29</sup> without addressing the legality of shaking.

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<sup>23</sup> B'Tselem, The Israeli Information Center for Human Rights in the Occupied Territories, Background on the High Court of Justice's Decision, B'Tselem, [www.btselem.org/english/Torture/Background.asp](http://www.btselem.org/english/Torture/Background.asp) [hereinafter Background on the High Court's Decision].

<sup>24</sup> See *See HCJ 5100/94 Public Comm. Against Torture in Israel v. Israel* [1999] IsrSC 46(2), ¶ 15, available at <http://www.derechos.org/human-rights/mena/doc/torture.html>.

<sup>25</sup> *Id.* ¶ 9.

<sup>26</sup> *Id.*

<sup>27</sup> According to a 1968 legal opinion written by then Attorney General Meir Shamgar, Palestinians or those acting on their behalf, may seek redress against the executive in the HCJ regarding either actions taken or actions contemplated. Depending on the matter at issue, the Court may hear the petition immediately and issue a restraining order asking the executive to explain the considerations involved.

<sup>28</sup> Background on the High Court's Decision, *supra* note 23, [www.btselem.org/english/Torture/Background.asp](http://www.btselem.org/english/Torture/Background.asp).

<sup>29</sup> *Id.*

Other countries also have allowed the use of torture or interrogation methods that harm the suspect, in order to stop a “ticking bomb.” One example of this occurred in the Philippines in 1994-1995 when the authorities received information that Ramzi Yousef, one of the masterminds of the 1993 World Trade Center bombing, planned to blow up a dozen jumbo jets over the Pacific Ocean.<sup>30</sup> The Philippine authorities were able to foil the plan after they tortured a suspected terrorist for sixty-seven days.<sup>31</sup> Therefore, in that instance, torture successfully stopped a “ticking bomb.”

On at least one occasion in Israel, a detainee died during the course of his interrogation because of the shaking technique, which led to discussion regarding both its legality and effectiveness.<sup>32</sup> Since the death of a shaken detainee in 1995, the HCJ has explicitly stated that “shaking is a prohibited investigation method” as it “harms the suspect’s body...[and] violates his dignity.”<sup>33</sup> Thus, Israel no longer allows the “shaking” interrogation method, even if it would help save civilian lives, the way torture did for the Philippine authorities in 1994-1995.

### 3. HCJ 5100/94

In *Public Committee Against Torture in Israel v. State of Israel and General Security Service*, the HCJ ruled that while the GSS had the authority to conduct interrogations, their ability to employ certain methods would be restricted in the future.<sup>34</sup> The court limited the GSS investigators to the same powers as any police officer stating that neither “possess the authority to employ physical means which infringe upon a suspect’s liberty during the interrogation, unless these means are inherently accessory to the very essence of an interrogation and are both fair and reasonable.”<sup>35</sup> The court specifically prohibited forcing a suspect to crouch on the tips of his toes for five-minute intervals as “it does not serve any purpose inherent to an inves-

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<sup>30</sup> Tung Yin, *Ending the War on Terrorism One Terrorist at a Time: A Non-Criminal Detention Model for Holding and Releasing Guantanamo Bay Detainees*, 29 HARV. J. L. PUB. POL’Y 149, 157 (2005) (citing THE 9/11 COMMISSION REPORT 109 (2003) and ALAN M. DERSHOWITZ, WHY TERRORISM WORKS 138, 249 n.10 (2002)).

<sup>31</sup> *Id.* at 157-158 (citing ALAN DERSHOWITZ, WHY TERRORISM WORKS 137, 249 n.10 (2002)).

<sup>32</sup> See AMNESTY INT’L, COMBATING TORTURE: A MANUAL FOR ACTION (2002) (describing that Palestinian detainee Abd al-Samad Harizat was sent unconscious to the hospital twenty-four hours after his arrest by the GSS on April 22, 1995. He died three days later due to hemorrhaging within the skull overlying the brain, which results from sudden jarring movements of the head.).

<sup>33</sup> See HCJ 5100/94 Public Comm. Against Torture in Israel v. Israel [1999] IsrSC 46(2), ¶ 24, available at <http://www.derechos.org/human-rights/mena/doc/torture.html>.

<sup>34</sup> *Id.* ¶ 38.

<sup>35</sup> *Id.*

tigation.”<sup>36</sup> Concerning placing a hood on the suspect’s head, the court states that limiting the eye contact between suspects is a legitimate consideration, but having a hood that covers the entire head and causes the suspect to suffocate is forbidden. The court recommended that the GSS find a less harmful means to prevent eye contact and communication between detainees. The court instructed the State that usage of a ventilated sack allowing the suspect to breathe was insufficient.<sup>37</sup>

The court did not explicitly state that the use of loud music was always prohibited. The court held that in the circumstances of the current case, loud music when combined with an impermissible method is forbidden.<sup>38</sup> Furthermore, the court held sleep deprivation may be allowed as an “inevitable result of an interrogation, or one of its side effects.”<sup>39</sup> However, the suspect cannot be “intentionally deprived of sleep for a prolonged period of time, for the purpose of tiring him out or ‘breaking him.’”<sup>40</sup>

The court specifically defined interrogation as “an exercise seeking to elicit truthful answers.”<sup>41</sup> The court recognized that interrogations inherently infringe on a suspect’s freedom even without the use of physical means. While the court did not explicitly define torture, it held that legality of interrogation techniques is “deduced from the propriety of . . . purpose and from its methods.”<sup>42</sup> Nevertheless, what is irrefutable is that the HCJ definitively held that physical duress may not be implemented except in those very limited cases where the Head of the GSS personally authorizes such an exception, provided that a “ticking bomb” is genuinely suspected to exist. The court held that it is “prepared to assume that . . . the ‘necessity’ defence is open to all, particularly an investigator, acting in an organizational capacity of the State in interrogations of that nature” and that “the ‘necessity’ exception is likely to arise in instances of ‘ticking time bombs.’”<sup>43</sup> However, the court also stated that the physical means used must still be “inherently accessory to the very essence of an interrogation and . . . [be] both fair and reasonable.”<sup>44</sup> Therefore, the court held that while some instances of physical means are legitimate, they would be determined on a case-by-case basis as the necessity defense inherently cannot be defined prior to its use.

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<sup>36</sup> *Id.* ¶ 25.

<sup>37</sup> *Id.* ¶ 28.

<sup>38</sup> *Id.* ¶ 29.

<sup>39</sup> *Id.* ¶ 31.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* ¶ 18.

<sup>42</sup> *Id.* ¶ 23.

<sup>43</sup> *Id.* ¶ 34.

<sup>44</sup> *Id.* ¶ 38.

The decision in HCJ 5100/94 has stood the test of time. Interrogators have commented that the ruling necessitated the development and honing of advanced psychological interrogation methods in the place of more physical means.<sup>45</sup> Whether the ruling was "popular" among the intelligence community, who had to search for new legitimate means of interrogation, is ultimately irrelevant because the court's decision that certain interrogation methods are prohibited must be respected as the essence of the rule of law.

#### 4. International Judicial Precedent

The Reagan Administration relied on *Ireland v. United Kingdom* in arguing that torture is limited to "extreme, deliberate and unusually cruel practices."<sup>46</sup> In *Ireland*, the European Court of Human Rights analyzed methods of interrogation used by the United Kingdom when interrogating detainees suspected of terrorist activities in Northern Ireland.<sup>47</sup> The court held that while measures including wall standing, hooding, subjection to noise, sleep deprivation and deprivation of food and drink were inhuman and degrading, they did not amount to torture.<sup>48</sup> The Court stated:

Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular *intensity* and *cruelty* implied by the word torture.<sup>49</sup>

#### 5. U.S. Interrogation Methods

Section 2(c)(1) of a memo written by LTC Jerald Pfifer on October 11, 2001 specified which Category III interrogation techniques<sup>50</sup> may be used against detainees held in Guantanamo. These included "the use of scenarios designed to convince the detainee that death or severely painful con-

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<sup>45</sup> Confidential conversations between author and senior GSS members.

<sup>46</sup> Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep't of Justice to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), *reprinted in* DANNER, *supra* note 4, at 139 [hereinafter Bybee Memo] (quoting *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978)).

<sup>47</sup> *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978).

<sup>48</sup> *Id.* ¶ 167. *See also* DANNER, *supra* note 4, at 139.

<sup>49</sup> *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978) (emphasis added by DANNER, *supra* note 4, at 140).

<sup>50</sup> Category III techniques require special approval and are "required for a very small percentage of the most uncooperative detainees." They may be used in a carefully coordinated manner to help interrogate exceptionally resistant detainees. Memorandum from Jerald Pfifer, Dir., J2 to Michael E. Dunlavey, Commander, Joint Task Force 170, U.S. Dep't of Def., Request for Approval of Counter-resistance Strategies (Oct. 11, 2002), *reprinted in* DANNER, *supra* note 4, at 167.

sequences are imminent for him and/or his family."<sup>51</sup> Also allowed, if approved "by the Commanding General with appropriate legal review and information to Commander," is the "use of a wet towel and dripping water to induce the misperception of suffocation."<sup>52</sup>

Water-boarding, a Category III technique, induces the detainee to believe that death is imminent. This technique requires that the detainee be strapped or held down to induce the sensation of drowning as either water is repeatedly poured down the individual's throat or the head is immersed in water. Detainees who have experienced water-boarding have universally expressed an overwhelming fear because the method prevents breathing. Furthermore, according to some reports, a number of individuals have died as a result of water-boarding.<sup>53</sup> There is little doubt that this technique represents torture, yet in a subsequent memo, Secretary of Defense Rumsfeld ordered water-boarding be used only in those cases he personally approved.<sup>54</sup>

#### 6. Controls on Interrogation Methods

Professor Alan Dershowitz advocates "controlling and limiting the use of torture by means of a warrant or some other mechanism of accountability."<sup>55</sup> The essence of this argument relates to torture in the context of the "ticking bomb" theory.<sup>56</sup> The argument propounded by Dershowitz is philosophically and legally akin to self-defense, for example, how a nation protects itself in the face of a mass terror attack. As mentioned above, torture in the context of a legitimate interrogation with proper controls is explainable, though according to both international law and American domestic law, it is illegal. The distinction between torture and methods of harsh interrogation referred to in *Ireland* and as approved by the Israeli Commission of Inquiry is critical.<sup>57</sup>

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Human Rights Watch, 'Stress and Duress' Techniques Used Worldwide, June 1, 2004, [http://hrw.org/english/docs/2004/06/01/usint8632\\_txt.htm](http://hrw.org/english/docs/2004/06/01/usint8632_txt.htm) (In the submarine technique, the victim's head is covered with a cloth hood and intermittently forced into a vessel containing water, similar to water-boarding, has been used by many countries (Argentina, Chile, Uruguay, Zimbabwe, and China). In several instances, for example in Zimbabwe and Uruguay, its use has led to the death of the suspect.).

<sup>54</sup> Memorandum from Donald Rumsfeld, Sec'y of Def., U.S. Dep't of Def. to Commander, U.S. Southern Command, Counter-resistance Techniques (Jan. 15, 2003), reprinted in DANNER, *supra* note 4, at 183.

<sup>55</sup> Alan Dershowitz, *Tortured Reasoning*, in TORTURE: A COLLECTION 257 (Sanford Levinson ed., 2004). Professor Alan Dershowitz is a law professor at Harvard Law School and world renowned scholar on terrorism and the law.

<sup>56</sup> *See supra* Part IV.B.2.

<sup>57</sup> *See supra* Part IV.B.3-5.

The “ticking bomb” argument<sup>58</sup> is valid if it is implemented *only* in those cases where a sound basis for a ticking bomb exists and not as a convenient catch-all justification. In addition, the “ticking bomb” theory requires hands-on supervision and oversight by the head of the security services. Such matters cannot be left to the discretion of the individual interrogator, no matter how dedicated and skilled he or she may be.

The meeting place between the interrogator and the suspect, as described above, is fraught with tension; however, according to the Israeli High Court of Justice, liberal democratic regimes must have self-imposed restraints. These restraints result in what Barak has termed fighting terrorism with “one hand tied behind” the back.<sup>59</sup> Liberal democratic regimes must be vigilant at all times, not only regarding the rule of law, but also to a finely tuned moral compass. As described below, these two principles were disregarded with respect to interrogation torture in Abu Ghraib, Guantanamo Bay and Bagram.<sup>60</sup>

In the following sections, we shall explore torture that induces mental suffering akin to the physical pain required to meet the torture definition. The humiliation and degradation suffered by detainees at the hands of U.S. military personnel is defined as evil and sadistic torture.

### *C. Functional Torture and Sadistic Torture*

In the aftermath of September 11th and the subsequent American-led coalition invasions of Afghanistan and Iraq, the Bush Administration was confronted with legal and moral dilemmas regarding the limits of counter-terrorism.

Did the U.S., as a liberal democratic society, intend to fight with one hand behind its back, or would it fight with both hands and ignore the rule of law? This is the critical question liberal democratic societies face when determining how they shall combat terrorism. Will such societies be true to their moral ethos even in times of horrific terror attacks or will they place in temporary abeyance those very morals that distinguish them from the terrorist? Liberal democratic societies cannot allow themselves the luxury of disregarding their ethical and moral ethos. In doing so they lose their *raison d’être* and lower themselves to the level of the terrorist. If they do so, they have lost what they are fighting for.

A careful reading of Professor Mark Danner's book, *Torture and Truth: America, Abu Ghraib and the War on Terror*,<sup>61</sup> suggests that Barak's

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<sup>58</sup> See *supra* Part IV.B.2.

<sup>59</sup> HCJ 5100/94 Public Comm. Against Torture in Israel v. Israel [1999] IsrSC 46(2), ¶ 39, available at <http://www.derechos.org/human-rights/mena/doc/torture.html>.

<sup>60</sup> Golden, *Brutal Details*, *supra* note 1; Golden, *Army Faltered*, *supra* note 1.

<sup>61</sup> DANNER, *supra* note 4.

one-handed approach was not adopted. In the context of the debate regarding the legality and implementation of torture, the memo drafted by then Assistant Attorney General (now Ninth Circuit Court of Appeals Judge) Jay Bybee stands out as most disturbing. Though Danner's book suggests that there was debate within the Administration regarding the legality of torture, ultimately the policy adopted as suggested in the memo, reflects the worst in policy-making and legal advice.

The memo's language, implicitly and explicitly, may have contributed to the horrific events that transpired at Abu Ghraib, Guantanamo Bay, Bagram, and additional secret facilities. The legalistic hair-splitting, which can generously be described as "mental gymnastics," is best brought to light in the argument regarding "prolonged mental harm."<sup>62</sup> The Bybee memo argues that the harm must be "endured over some period of time" and so mental strain from a long intense interrogation would not be considered prolonged unless it extended for a number of months or years.<sup>63</sup> According to the Bybee memo, for an act to be defined as torture the interrogator must have intended to cause the detainee prolonged harm.<sup>64</sup> Therefore, if an interrogator did not intend to cause harm lasting beyond the interrogation itself, the actions could not be considered torture regardless of how long the pain actually lasts.

#### 1. Abu Ghraib

It is irrelevant whether the soldiers posing with the Iraqis in Abu Ghraib ever met Mr. Bybee or read his memo. It is equally insignificant whether their superiors were acquainted with it. What is relevant is that someone's superior read it and understood its true meaning—that the American government endorses and therefore encourages torture. The attempt to distinguish between various degrees of pain that may be inflicted (mental or physical), though interesting from a theoretical and intellectual perspective, does a fundamental disservice to the only individuals who matter—those in the field who are on the front-lines of counter-terrorism and the detainees.

Counter-terrorism is not an abstract legal exercise; rather it involves real decisions made by people "on the ground." The greatest disservice that can be done to these individuals—generally young people, men and women alike—is to place them in a situation with unclear and murky instructions. In files obtained by the *New York Times*, there is a clear demonstration of the failure of the command structure to teach those in the field what actions

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<sup>62</sup> Bybee Memo, *supra* note 46, at 121.

<sup>63</sup> *Id.* at 120.

<sup>64</sup> *Id.* at 121.

are and are not permissible regarding detainees.<sup>65</sup> The documents quote the individuals in charge of detention centers asking for clarification from the Staff Judge Advocate regarding what interrogations techniques may properly be used; however, no training was ever offered.<sup>66</sup> The Bybee memo is in direct conflict with that very important command principle of the commander telling his troops what is and is not acceptable.

This difficulty of those on the ground is exacerbated not only when their training is minimal at best, but also when those who have sent them seek to obtain plausible deniability.

The President's oft-repeated comment, that America is a nation of laws and those involved in Abu Ghraib are "bad apples," is disingenuous. The conduct of Private Charles Graner, Jr., Private First Class Lynndie England, Specialist Sabrina Harman, among others is inexcusable, criminal, and sadistic. However, the environment that allowed for the horrific abuses at Abu Ghraib, Guantanamo Bay, and Bagram was created by the Administration's own manipulation of the definition of torture.

The Bybee memorandum's overly legalistic, almost painful to read, hair-splitting arguments attempting to find a justification for the torture of detainees reflects the most inappropriate and ultimately damaging response to September 11th. I would suggest that the pictures that shocked the world and caused America such enormous damage in the Middle East were a result—it is insignificant whether direct or indirect—of that memo. Even once the soldiers in the field acted impermissibly, their commanders and the leadership of the U.S. did very little, if anything, to correct it or secure justice for the victims until their inaction was disclosed by the media.<sup>67</sup> Not only is that most disturbing, but also, in the context of this paper, it raises important questions that must be addressed.

## 2. The Role of Policy-Makers

Policy, domestic or foreign, must not only be legal, but will ultimately be judged by its effectiveness. Policy advisors, be they generalists or specialists such as a legal counsel, must be confident that their policy recommendations serve not only the short term political interests of a particular

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<sup>65</sup> Golden, *Army Faltered*, *supra* note 1; Golden, *Brutal Details*, *supra* note 1.

<sup>66</sup> Golden, *Army Faltered*, *supra* note 1. Abuses at the Bagram Detention Center in Afghanistan were poorly investigated which allowed the same military intelligence unit that lacked command in Afghanistan to be deployed to Abu Ghraib three months later without any indication that proper training or direction as to permissible actions were given before the deployment to Abu Ghraib.

<sup>67</sup> *Id.* The investigation, while still open, was at a standstill until a March 4, 2003 article in the *New York Times* reported that at least one of the deaths of a detainee had been reported as a homicide. Carlotta Gall, *U.S. Military Investigating Death of Afghan in Custody*, N.Y. TIMES, Mar. 4, 2003, at A1.

superior but also—and not less importantly—long term, national strategic goals.

On this note, I would suggest that the Bybee memorandum fails in ways that neither Mr. Bybee nor his superiors imagined.<sup>68</sup>

An analysis of the memo in the context both of September 11th and the two sections outlined above, intelligence and interrogation, shows a national leadership literally scrambling to respond to the terror attacks. Indeed the U.S. entered a new age at 8:43 a.m. on September 11, 2001, and has been playing catch-up, trying to make up for lost time in attempting to level the playing field between itself and global terrorism. As has previously occurred in American history, there is a tendency to go overboard under such circumstances.<sup>69</sup> The question as it relates to the issue at hand was whether the U.S. government was going to "throw caution to the wind" and adopt a philosophy reflective of "a la guerre comme a la guerre."

I would argue that such an approach is not only in violation of U.S. law<sup>70</sup> under 18 U.S.C. §§ 2340-2340A and international law, especially as the 1984 Convention Against Torture explicitly states that there are no exceptions that would allow for the use of torture,<sup>71</sup> but just as importantly, it violates principles of "morality in armed conflict."<sup>72</sup>

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<sup>68</sup> If they did imagine in advance, then woe to us.

<sup>69</sup> See *The Prize Cases*, 67 U.S. 635 (1863); *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>70</sup> The explicit definition of "severe" given in 18 U.S.C. §2340A is redefined in the Bybee memo to require that the pain not only be prolonged but that a high level of intensity exists. Bybee Memo, *supra* note 46, at 116.

<sup>71</sup> Torture Convention, *supra* note 7, art. 2. See also Geneva I, *supra* note 5, art. 3; Geneva II, *supra* note 5, art. 3; Geneva III, *supra* note 5, art. 3; Geneva IV, *supra* note 5, art. 3. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948). International Covenant on Civil and Political Rights, *supra* note 10. *Siracusa Principles*, *supra* note 10. Rome Statute, *supra* note 9, art. 7(2)(e). All the aforementioned documents prohibit torture without stating any situation which would allow for the use of torture.

<sup>72</sup> In September, 2003 the Israel Defense Forces, School of Military Law, under my command, produced an interactive training video developed in conjunction with commanders. The video teaches soldiers an 11 point code-of-conduct based on international law, Israeli law, and the IDF Code. Commanders' and soldiers' personal responsibility to respect international humanitarian law requirements and the dignity of civilians is emphasized. The video's fundamental message is that violations of the principle of morality in armed conflict are not only in violation of international law, but ultimately aid only the enemy. The Bybee memo is a classic example not only of a violation of the morality of armed conflict but paradoxically an unintended advantage given to America's enemies in the Middle East.

### 3. Implementation of the Bybee Memo

In seeking to define what torture is, Bybee quotes from the 1990 Congressional testimony of Mr. Mark Richard, Deputy Assistant Attorney General, Criminal Division, Department of Justice:

[T]orture is understood to be that barbaric cruelty which lies at the *top of the pyramid* of human rights misconduct. . . . As applied to physical torture, there appears to be some degree of consensus that the concept involves conduct, the mere mention of which sends chills down one's spine. . . . [T]he needle under the fingernail, the application of electrical shock to the genital area, the piercing of eyeballs, etc.<sup>73</sup>

As to mental torture, according to Bybee, Richard testified:

[N]o international consensus had emerged as to what degree of mental suffering is required to constitute torture but . . . severe mental pain or suffering “does not encompass the normal legal compulsions which are properly a part of the criminal justice system: interrogation, incarceration, prosecution, compelled testimony against a friend, etc.—notwithstanding the fact that they may have the incidental effect of producing mental strain.”<sup>74</sup>

While I doubt that Mr. Richard and Mr. Bybee intended for the phrase “top of the pyramid” to be understood literally by Private Graner and his colleagues, the picture from Abu Ghraib forever seared into the collective memory of the Arab world will be that of naked *Iraqi men* forced by U.S. soldiers to form themselves into a human *pyramid* under the enthusiastic eye of *American women*.

The repeated use of certain techniques at Abu Ghraib, such as those that mocked Islamic beliefs, belies the Bush Administration’s claim that this was the work of a few “bad apples.” At least one of the methods used is “an arcane torture method known only to veterans of the interrogation trade.”<sup>75</sup> While perhaps any National Guardsman or reservist hastily pressed into service could probably realize that Koranic abuse would hurt and offend religious Muslims, the repeated use of methods that go to the detainees’ religious beliefs, for example their sexual morality and attitudes about dogs, suggests that people higher in the chain of command with some knowledge of Islamic culture allowed the creation of the environment in which the abuses occurred.<sup>76</sup> One example of a reservist relying on the example set by

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<sup>73</sup> Bybee Memo, *supra* note 46, at 131 (emphasis added) (citing *Convention Against Torture: Hearing Before the Senate Comm. On Foreign Relations*, 101st Cong. 16 (1990)) (testimony of Mark Richard, Deputy Assistant Attorney General, U.S. Department of Justice).

<sup>74</sup> *Id.*

<sup>75</sup> John Barry et al., *The Roots of Torture*, NEWSWEEK, May 24, 2004, at 26.

<sup>76</sup> See generally Edward T. Pound & Kit R. Roane, *Hell on Earth*, U.S. NEWS & WORLD REP., July 19, 2004, at 10.

superiors is that of Army Captain Donald Reese. As the newly installed warden of part of Abu Ghraib, Captain Reese visited it for the first time in October of 2003. He was a reservist and window-blinds salesman in civilian life who admits that he was ill-prepared for being warden of Abu Ghraib, as he had never been in a prison, even to visit, and “knew nothing of the Geneva Conventions, which specify conditions for humane treatment of enemy prisoners of war and others.”<sup>77</sup> When he arrived and saw many of the prisoners without clothing, Captain Reese was assured by Army intelligence officers that there was nothing “illegal or wrong about it” and that “stripping the prisoners was a tried-and-true intelligence tactic used to make the prisoners uncomfortable.”<sup>78</sup>

The litany of the humiliations and degradations inflicted by American soldiers is literally mind-boggling: building naked human pyramids, staging menstruation, forcing detainees to masturbate, servicewomen fondling themselves in the presence of the detainees, forcing the detainees to walk while leashed to a chain as if they were dogs, and mishandling of the Koran.<sup>79</sup> While Mr. Bybee and others in the Administration may argue that the above actions did not cause physical pain, I would argue that the mental pain and suffering inflicted *is no less severe* than physical pain for all are tantamount to profound violations of Islamic belief.<sup>80</sup> While the pain and suffering were mental, not physical, they constitute torture because of their severity and under the definitions discussed earlier.

In their actions, Graner and others reflected both sadistic and functional torture. By deliberately violating basic Islamic tenets in an Islamic country, members of the U.S. military, whose actions were reflective of Administration policy, clearly demonstrated to the local population that there was a new sheriff in town. The concept of the new sheriff was articulated—advertently or inadvertently—by President Bush's now famous “bring 'em” statement. Functional torture represents a new order: in Afghanistan the replacement of the Taliban, in Iraq the downfall of Saddam.

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Thom Shanker, *Inquiry by U.S. Reveals 5 Cases of Koran Harm*, N.Y. TIMES, May 27, 2005, at A1.

<sup>80</sup> Islam 101, <http://www.islam101.com/rights/hrM2.htm> (last visited Mar. 3, 2006). Important aspects of the Charter of Human Rights granted by Islam is respect and protection for a woman's chastity, an individual's right to freedom or the right not to be a slave, equality of men, and the right to safety of life. *Id.* Homosexuality and sexual promiscuity are also forbidden. Many of the actions performed by Private Graner et al., showed fundamental and mind-boggling disrespect and disregard for these aspects of the Islamic faith.

## V. CONCLUSION

Torture predicated on self-defense (the “ticking bomb”) is not akin to humiliation and degradation in violation of religious beliefs.<sup>81</sup> In the opinion of this writer, the actions of Graner and others are tantamount to causing great mental anguish, which is defined as torture and therefore banned according to 18 U.S.C. § 2340, 1984 Convention Against Torture, Rome Statute of the International Criminal Court, and the definition given by the U.S. Senate when it gave consent to ratify the 1984 Convention Against Torture.

While indeed Graner and others must be punished,<sup>82</sup> the issue at hand goes far beyond the actions of a “few bad apples.” The question that must truly be addressed is how do policymakers construct policy reflective both of an operational reality (counter-terrorism) and the rule of law while balancing between legitimate national security concerns and equally legitimate rights of the individual.

The Bybee memo is an excellent example of how not to develop, articulate, and implement policy. It is wrong legally and it creates an environment whereby the actions of Graner and others were inevitable. In the context of the U.S. attempting to develop a new Middle East, it dramatically fails on the policy front.

That having been said, the theories such as those postulated both in the Landau Commission and by Dershowitz are conceivably explainable even though highly problematic legally, morally, and operationally. They are legally problematic because the distinction between harsh yet permissible methods of interrogation and torture is tenuous and requires superb training and outstanding command and control mechanisms. This is particularly difficult to implement successfully in the context of operational counter-terrorism. However, should a government decide to implement such measures, the potential consequences must be clear to decision and policy makers alike who must not allow themselves—nor be allowed—to hide behind “plausible deniability.” There are few things more demoralizing and

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<sup>81</sup> See *supra* Part IV.B.2.

<sup>82</sup> *New Hearing for Soldier over Abu Ghraib Charges*, CNN.COM, May 19, 2005, <http://www.cnn.com/2005/LAW/05/19/england.court martial/>. Private Graner was found guilty on nine of the ten major counts, guilty for three photographs and guilty of each charge of abuse and is currently serving a sentence of ten years. A mistrial in Private First Class England’s court-martial was recently declared after Private Graner testified at Private First Class England’s sentencing phase.). See also *Harmon Gets 6 Months for Abu Ghraib Scandal*, USATODAY.COM, May 17, 2005, [http://www.usatoday.com/news/nation/2005-05-17-harman-convicted\\_x.htm](http://www.usatoday.com/news/nation/2005-05-17-harman-convicted_x.htm). Specialist Harmon was sentenced to six months after being convicted on six of seven counts for her role in Abu Ghraib. Specialist Harmon and Private Graner are the only two soldiers to be tried in the scandal as others have arranged plea bargains.

debilitating to those in the front lines. Should decision and policy makers decide to allow the implementation of measures such as those discussed in *Ireland*, then the guidelines must be clearly articulated and must inherently include limits which err on this side of caution.

The question will inevitably be asked: if an interrogator is convinced that the detainee knows on which bus the bomb is placed and when is it to go off, can the measures become harsher? The reader is asked to understand that this writer was professionally involved for almost two decades in such matters. My involvement was not in the context of an abstract, intellectual exercise but rather hands-on legal and policy advice regarding counter-terrorism. I have ordered the detention of hundreds of Palestinian suspected of terrorism and have spent literally hundreds of hours in detention facilities with suspects and interrogators alike. I have had the opportunity to examine the conditions of suspects and have been subjected—like them—to the loud and obnoxious music, have clearly met with sleep deprived individuals who complained about the temperature in the detention facility. In addition, I have seen detainees sitting for extended periods in very uncomfortable positions with hoods over their heads. While the reader may find these measures difficult, possibly repugnant, it is also true that an interrogation inherently is not meant to be a pleasant conversation between friends over coffee and cake.

Ultimately, the interrogation is a vital cog in counter-terrorism. Based on the information the interrogator learns, additional suspects may be detained and the bomb may well be neutralized before innocent civilians are killed. The ultimate question is one of balance. Therefore, to answer the question asked above—yes, harsh methods may be implemented provided the interrogator is highly trained and that the head of the organization has *personally* approved the decision and that there is hands-on oversight. However, torture as described by Richard<sup>83</sup> and as performed by Graner and others is prohibited by law and by a well-tuned moral compass.

The Bybee memo has done the U.S. a great disservice; untrained and unsupervised individuals seemingly with their own sadistic agenda acted in its spirit. Ultimately, according to many U.S. military sources, intelligence that could form the basis for counterterrorism measures was not received.

A final thought—one of the significant problems with torture is that a detainee in order to stop the pain will tell his interrogator *what he thinks he wants to hear* either consciously (disinformation) or unconsciously (misinformation). From an operational perspective, both are highly problematic.

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<sup>83</sup> Bybee Memo, *supra* note 46, at 130-32 (emphasis added) (citing *Convention Against Torture: Hearing Before the Senate Comm. On Foreign Relations*, 101st Cong. 16 (1990)) (testimony of Mark Richard, Deputy Assistant Attorney General, U.S. Department of Justice).

Limited resources can be misdirected (a military force will stop bus number 5, rather than bus number 7 that actually has the bomb). That in and of itself, is cause enough to forbid torture.