

Analysis of certain aspects of the “Long-Term Legal Strategy Project for Preserving Security and Democratic Freedoms in the War on Terrorism” report in light of customary international law, human rights law and humanitarian law.

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INTRODUCTION

The Long-Term Legal Strategy Project for Preserving Security and Democratic Freedoms in the War on Terrorism report (“the Report”), a joint project of Harvard’s Kennedy School of Government and Harvard Law School, identified what the authors considered to be the ten “most important and difficult issues that the United States must address in combating terrorism.” They are:

1. Coercive Interrogations
2. Detentions of Suspected Enemies and Terrorists
3. Trying suspected Terrorists in Military Commissions
4. Targeted Killings (Assassinations)
5. U.S. Communications Intercepted During the Targeting of Foreign Persons Abroad
6. Information Collection (Data-Mining)
7. Identification of Individuals and Collection of Information for Federal Files (Biometric Information)
8. Surveillance of Domestic Religious and Political Meetings
9. Distinctions Based on Group Membership (Profiling)
10. Oversight of New Measures taken in the ‘War on Terrorism’

The analysis provided herein specifically focuses only on number 1, Coercive Interrogations.

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The purpose of the Report was to develop a legal framework and commentary with which the U.S. Government (“USG”) could legislatively negotiate the gray area between domestic law and international law as they applied to the emerging threats of terrorism. There is a second purpose to the Report, which tacitly appears to create an historical backdrop and possible explanation (the necessity to combat terrorism) for the unprecedented erosion of civil liberties in the U.S. since September 11, 2001. Whether this was a calculated purpose is unknown.

The fundamental question is why does the USG currently find itself in this position? Although this basic question is not the focus of the Report, one has to keep this question in the back of his or her mind in order to ultimately justify the erosion of civil liberties to “protect national security interests.” In recognition of the “choices” that the U.S. government has made in the War on Terror, there are two competing claims: (1) civil liberties; and (2) national security. The authors of the Report purport to balance the two claims. They call these two claims the “National security viewpoint” (“NSV”) and the “Democratic freedoms viewpoint” (“DFV”). It is fascinating to note that the Report states that, “the competing concerns...can largely be reconciled by the intelligent use of legislative and judicial processes to both support and constrain the executive branch authority.” The main fear being the inherent dangers of, “decades of unchecked discretionary powers vested in the executive branch.” This analysis will therefore focus solely on the legal consequences, both human rights law and humanitarian law, of the recommendations contained within the Report.

Self preservation is inherently required for survival, and is so recognized by international law. The legally justified ability of a state to defend itself from immanent

attack is unquestioned. NSV in its unimpeded form necessitates autonomy from democratic constraints (e.g. legal, political, economic, etc.) in order to optimally function. While this may increase the chance of success, it can be antithetical to the norms of a democratic society and has been repeatedly recognized by the Supreme Court with its “shock the conscience” test to determine whether such egregious executive behavior is unconstitutional and has denied a person of their due process rights guaranteed by the U.S. Constitution.

The Report adds yet another acronym to our lexicon with the introduction of highly coercive interrogation methods (“HCI”), which it defines as, “all those techniques that fall in the category between those forbidden as torture by treaty or statute and those traditionally allowed in seeking voluntary confession under the due process clauses of the U.S. Constitution.

Finally, the Report draws a distinction between torture, which is clearly forbidden in customary international law and “cruel, inhuman and degrading treatment” which the Report says, “[In all] but the rarest of cases” should be complied with. Therefore, the gray area is somewhere between torture at one end of the spectrum and the due process clauses of the U.S. Constitution at the other. It is the gray area between clear legality and clear illegality, between clear morality and clear immorality, in which not only the USG finds itself, but the average citizens too find themselves. The distinctions are stark and the ramifications extreme.

I. COERCIVE INTERROGATIONS

The first section of the Report, Coercive Interrogations, attempts to do three main things. The report attempts to:

- Define the scope of coercive interrogations; specifically, under what circumstances coercive interrogation methods can be justifiably utilized.
- Propose a regime for the governmental oversight of the sanctioning and usage of such extraordinary interrogation techniques.
- Assure that torture could never be justifiably sanctioned as a coercive interrogation method but that there exists a penumbra of highly coercive interrogation techniques that are permissible under the Torture Convention and therefore do not constitute torture but nevertheless would not be permitted under the due processes clauses of the U.S. Constitution.
- In the opinion of the authors of the Report there is little guidance available to the executive and one of the main objectives of the Report is to provide that guidance.

The first section is divided into five subsections. The first subsection, **I.**, is titled “Treaty and Statutory Commitments.” It begins with a bold and apparently irrefutable statement that, “without exception,” all legal obligations, both domestic and international, as they pertain to torture, will be recognized.

The Report:

I. Treaty and Statutory Commitments

- A. Without exception, the United States shall abide by its statutory and treaty obligations that prohibit torture.**

Analysis:

This apparently unequivocal statement is no more than a reflection of customary international law. For the purposes of this analysis, subsection **I.A.** raises two questions, which are:

- (1) What are the statutory and treaty obligations that “the U.S. shall abide by without exception?”
- (2) What exactly is torture as viewed through the lenses of customary international law, U.S. domestic law and the “War on Terrorism”?

Beginning with the first question, the USG has signed, ratified and even unsigned² different treaties focused on, *inter alia*, the prohibition and/or criminalization of torture.³ Congress passed a federal statute criminalizing torture.

- (1) What are the statutory and treaty obligations that “the U.S. shall abide by without exception?”**

They are (text of pertinent articles not provided):

- a) Federal and common law of the United States of America, specifically 18 U.S.C. 2340;
- b) **International Covenant on Civil and Political Rights**, G.A. Res. 2220A (xxi), 21 U.N. Doc., U.N. Doc. A/6316 (1966);
- c) **Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**, G.A. Res. 39/46, 39 U.N. Doc., U.N. Doc. A/39/51 (1984);

² The U.S. unsigned the Rome Statute (treaty forming the International Criminal Court).

³ See Annex #1 below for a list and status of international human rights treaties. For a full listing of international treaties which the U.S. has either signed and/or ratified, see the University of Minnesota’s Human Rights Library webpage at: <http://www1.umn.edu/humanrts/research/ratification-USA.html> (last visited 3 Mar 2005).

- d) **Declaration on the Protection of All Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**, G.A. Res. 3452, 30 U.N. Doc., GAOR Supp. (No. 34) at 91 U.N. Doc. A/10034 (1976);
- e) **Universal Declaration of Human Rights**, G.A. res. 217A(iii), U.N. Doc. A/810 (1948);
- f) **Geneva Conventions**, e.g. **Convention Relative to the Protection of Civilian Persons in Time of War**, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [Fourth Geneva Convention], at least Common Article 3 of the four **Geneva Conventions** (for internal conflicts);
- g) Article 31 of the **United Nations Standard Minimum Rules for the Treatment of Prisoners**, U.N. Doc. A/CONF/611, ANNEX I, ESC Res. 663(c), 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc E/3048 (1957), amended E.S.C. Res. 2076, 62 U.N. ESCOR Supp. (No. 1), at 35, U.N. Doc. E/5988 (1977);
- h) **United Nations Charter** 59 S tat. 1031, 3 Bevans 1153 (1945);
- i) **1977 Protocol Additional to the Geneva Convention** of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I); **1977 Protocol Additional to the Geneva Convention** of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), entered into force, Dec. 7, 1978. U.N. Doc. A/32/144, Annex II (1977), reprinted in 16 I.L.M. 1442 (1977); and;
- j) **Customary International Law**. Prohibition of torture.

(2) What exactly is torture as viewed through the lens of customary international law, U.S. domestic law and the “War on Terrorism”?

- a) **Customary International Law and Torture;**
- b) **U.S. Domestic Law and Torture; and**
- c) **‘War on Terror’ (the Military Question) and Torture.**

a) Customary International Law and Torture.

“Treaties prohibiting torture are cold comfort to prisoners abused by their captors, particularly if the international human rights machinery enables those responsible to hide behind friends in high places.”

U.N. Secretary General Kofi Annan’s Report
“*In Larger Freedom: towards development, security
and human rights for all.*” Released 21 March 2005

The prohibition of the international crime of torture is *jus cogens*. The International Criminal Tribunal for the Former Yugoslavia (ICTY) held that it “seems incontrovertible that torture in time of armed conflict is prohibited by a general rule of international law.”⁴ And that, “this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules.”⁵ As a result of the hallowed plane on which *jus cogens* principles are held, no treaty or law is considered valid if it attempts to legalize what the *jus cogens* principle has outlawed, or vice versa.⁶ In other words, no government could legitimately pass a domestic statute, issue a memorandum of law, or enter into a treaty shielding itself from criminal liability for acts of torture.

The importance of distinguishing the extraordinary weight in international law given to *jus cogens* principles should solidify the recognition of the gravity of the offense. If someone were to violate the most sacred tenets of any order with impunity, chaos would be the inevitable consequence.⁷

⁴ Prosecutor v. Furundzija, (Appeals Chamber) ICTY, July 21, 2000 para. 139, 153.

⁵ Id.

⁶ Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 Law & Contemp. Probs. 63 (1996) at 66-7. (Stating that *jus cogens* principles, “are non-derogable in times of war as well as peace. Thus, recognizing certain international crimes as *jus cogens* carries with it the duty to prosecute or extradite, the non-applicability of statutes of limitation for such crimes, and universality of jurisdiction over such crimes irrespective of where they were committed, by whom, against what category of victims, and irrespective of the context of their occurrence (peace or war). Above all, the characterization of certain crimes as *jus cogens* places upon states the *obligatio erga omnes* not to grant impunity to the violators of such crimes.”)

⁷ Center for American Progress reported that Rear Admiral John Hutson (ret.), who was the Navy Judge Advocate General from 1997 to 2000, said, “When you say something down the chain of command like,

The Geneva Conventions, the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁸ are all international treaties deploring torture, and to which the United States is a ratifying state. The Geneva Conventions require states to prosecute those responsible for violations.⁹ Other treaties enunciating the prohibition against torture are the Universal Declaration of Human Rights, the U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and the U.N. Standard Minimum Rules for the Treatment of Prisoners.¹⁰

b) U.S. Domestic Law and Torture

The Report seems to question the absence of an objective definition of torturous acts as one of the possible culprits for the recent U.S. abuses. The Report states that the international agreements prohibiting torture do not define with sufficient specificity the actual torturous acts that they propose to prohibit, and as a result, there is an undefined

‘The Geneva Conventions don’t apply,’ that sets the stage for the kind of chaos that we’ve seen,” Document available at: <http://www.americanprogress.org/site/pp.asp?c=biJRJ8OVF&b=79532> (last visited 28 Feb 05).

⁸ In its reservations to the Convention against Torture, the United States claims to be bound by the obligation to prevent “cruel, inhuman or degrading treatment or punishment” only insofar as the term means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the [U.S. Constitution](#). Furthermore, U.S. reservations say that mental pain or suffering only refers to prolonged mental harm from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the use or threat of mind altering substances; (3) the threat of imminent death; or (4) that another person will imminently be subjected to the above mistreatment.

⁹ Geneva Convention IV, art. 149. At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention. If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed. Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.

¹⁰ These are examples of treaties deploring torture to which the U.S. is not a ratified member. This list of treaties prohibiting torture was taken from the Human Rights Watch web site at: <http://www.hrw.org/english/docs/2004/05/24/usint8614.htm>

zone between those acts which are patently legal and those that are manifestly prohibited. As nebulous as an objective definition of torture may be, there are certainly sufficient pronouncements, both international and domestic, regarding the subjective nature of torture—all of which are strictly prohibited. Let us examine a few:

The definition of torture, as provided by the **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**, states:

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

The ICTY, in the Kunarac Case (Appeals Chamber)¹¹ defined torture to be:

“(i) The infliction, by act or omission, of severe pain or suffering, whether physical or mental. (ii) The act or omission must be intentional. (iii) The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against a victim or a third person.”

The U.S. torture statute, **18 U.S.C. 2340**, defines torture as:

- (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;
- (2) “severe mental pain or suffering” means the prolonged mental harm caused by or resulting from—
 - (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
 - (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
 - (C) the threat of imminent death; or

¹¹ Prosecutor v. Kunarac June 12, 2002 (Appeals Chamber) Paragraph 179.

- (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; and
- (3) “United States” includes all areas under the jurisdiction of the United States including any of the places described in sections 5 and 7 of this title and section and section 46501(2) of title 49.

The act of torture is an intentional act with a subjective response. How is an interrogator to know that his subject is experiencing, as a result of the interrogation technique, severe mental pain or suffering? The Report appears to require that the executive promulgate two lists of interrogation techniques, for transparency purposes, that:

- (1) Supply a list of techniques that objectively produce severe physical and mental pain and suffering, so that they are not utilized by interrogators; and
- (2) Supply a list of highly coercive interrogation methods that do not constitute torture.

As fair minded as that may appear on its face, the recent exposure of the Alberto Gonzales “Torture Memo,” which the Report obliquely refers to by stating, “Department of Justice attorneys appear to have spent considerable time trying to defend maximum flexibility for interrogation tactics, but the [Bush] administration has now distanced itself from that analysis,” it has been made obvious that the definition of torture is malleable.

It is not much of a stretch for one to see that by defining what torture is objectively, an even more nebulous zone is created—that zone being everything that is not on the list is then presumed *not* to be torture. And, as the Gonzales Memo makes certain, the executive branch can give favorable opinions and definitions of quasi-ambiguous terminology which can at times be both counterintuitive and/or outcome

specific. Even though the USG has distanced itself from the definition of torture in the Gonzales Memo, subsequent USG memoranda have yet to clarify their current position.

Defining what torture is with sufficient specificity for the interrogator in the field would prove to be extremely difficult. Whether this is even possible or simply an academic exercise has yet to be seen. The Report requires such a definition so that HCI can be utilized in extraordinary circumstances and to assure that HCI do not cross over into torture. Without such a categorical definition of torture, the Report's conclusions regarding HCI cannot seemingly function. The Report believes that just such a list exists, when it states that, "A list of permissible and impermissible methods seems to have been promulgated, with few exceptions, at the general officer level, somewhere short of the cabinet or presidential level, in documents kept secret from the public."¹²

After only seeing the photographs from Abu Ghraib, one could easily imagine the content of such a list of "permissible interrogation techniques." It would be reasonable to doubt that the list will be made public. The U.S. Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction stated in its recent report that "[t]he Intelligence Community should train more human intelligence

¹² The U.S. Government is working on such a list. Amnesty International reported that: The Pentagon Working Group report lists 35 interrogation techniques. It recommended that 20) Hooding; 21) Mild physical contact; 22) Dietary manipulation; 23) Environmental manipulation; 24) Sleep adjustment; 25) False flag; 26) Threaten to transfer to a 3rd country where subject is likely to fear he would be tortured or killed were permissible. The Pentagon Working Group recommends that the remaining nine of the 35 techniques it lists in the report "be approved for use with unlawful combatants outside the United States." but with "specific limitations." The restrictions include that the interrogations be conducted at "strategic interrogation facilities," including Guantánamo Bay, Cuba; that the detainee is believed to have "critical intelligence"; that the detainee has been medically cleared for subjection to such techniques; and that the interrogators are specifically trained to use these methods. The nine techniques are: 27) Isolation; 28) Use of prolonged interrogations; 29) Forced grooming; 30) Prolonged standing; 31) Sleep deprivation; 32) Physical training; 33) Face or stomach slap; 34) Removal of clothing; 35) Increasing anxiety by use of aversions.

operators and collectors, and its training programs should be modified to support the full spectrum of human intelligence collection methods.”¹³

The USG has reacted to the Report with general acceptance of the Report’s recommendations. The excerpt below is from the U.S. Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction’s report and restates the Reports recommendations for HCI in emergency situations.

“Collecting Human Intelligence: Custodial Interrogations—
One source of critical intelligence, particularly with respect to terrorist plans and operations involving the use of nuclear, biological, or chemical weapons, is the interrogation of captured detainees. We consider it essential, and indeed have been assured that it is currently the case, that the Attorney General personally approves any interrogation techniques used by intelligence agencies that go beyond openly published U.S. government interrogation practices. While we recognize that public disclosure of Attorney General approved or forbidden techniques to be used by U.S. interrogators or by foreign personnel in interrogations in which the United States participates would be counterproductive, we emphasize that it is vital that all such practices conform to applicable laws. *Where special practices are allowed in extraordinary cases of dire emergency, those procedures should require permission from sufficiently high-level officials to ensure compliance with overall guidelines, and records should be kept to provide oversight for deviation from regular practices.* It is also important that notice of Attorney General approved techniques and the circumstances of any deviations from regular practices be given to appropriate congressional overseers. Interrogation guidelines should also form part of the training of relevant intelligence personnel. Compliance with approved practices should be uniformly enforced. Assurance that these steps have been taken across the Community will enhance the credibility of the Intelligence Community as a law-abiding and responsibly governed entity in the public mind, thereby enhancing its ability to perform its crucial functions.”¹⁴ (Emphasis my own.)

¹³ Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, *The Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction*, Report to the President of the United States, March 31, 2005, pg. 373.

¹⁴ Id.

c) ‘War on Terror’ (the Military Question) and Torture

During an international armed conflict, violations of international humanitarian law generally fall under the ambit of the law of war (usually synonymous with the “law of international conflict”). If an action is sufficiently grave, it can be prosecuted by a special tribunal with treaty power to incorporate other violations of international law which exist on the fringes of the law of war. The crime of torture, however, has sufficient enlightened focus of worldwide condemnation and does not exist on the periphery or within the penumbra of soft law. For example, whether or not the Geneva Conventions directly apply to the Serbian jailers of Kosovars or U.S. Army soldiers at Abu Ghraib and Guantánamo Bay, the preemptive *jus cogens* denunciation of torture would suffice for an international court to find an actionable crime. Evidence of this is seen in the statutes creating the ICTY, ICTR and the ICC. The U.S. is obligated by both domestic and international law to arrest and adjudicate suspected perpetrators of torture.

As for the U.S. military, it is commonly known that U.S. service personnel in the field are bound by the Geneva Conventions and the law of war. Douglas J. Feith, Under Secretary of Defense for Policy stated in May of 2004 that the U.S. military and armed forces are trained to treat captured enemy forces according to the Geneva Conventions.¹⁵ Even in the face of differing interpretations of the Geneva Conventions and their application to a situation like that in Abu Ghraib, Republican Rep. Steve Buyer of Indiana said, “This is a complete breakdown of the chain of command. The good

¹⁵ Douglas J. Feith, *Pentagon’s Feith Says U.S. Committed to Geneva Conventions*, Wall Street Journal Op-Ed (May 24, 2004).

message here is that the United States as signatory to the Geneva Conventions will abide by the conventions and prosecute those who have violated the law.”¹⁶

The Report:

- I. B. Except only as described in Section IV, the United States shall abide by its statutory and treaty obligations that prohibit cruel, inhuman or degrading treatment consistent with our reservation to the Convention Against Torture.**
- 1. Lawfulness under the U.S. reservation to Article 16 of the Convention Against Torture (“cruel, inhuman or degrading treatment”) requires at least compliance with the due process prohibition against actions that U.S. courts find “shock the conscience.”**
 - 2. Nothing in the following effort to define compliance with these obligations is intended to supplant our additional obligations when particular circumstances make applicable the Third and Fourth Geneva Conventions.**

Analysis:

As discussed above, the Report has unequivocally stated that the U.S. must always abide by the international and domestic prohibitions against torture (even though the Report says that the definition of torture is not clear). Subsection I.B. purports that with one exception, that being an “emergency exception” (discussed below), the same unequivocal U.S. abidance to prohibiting “cruel, inhuman or degrading treatment” as it is understood to mean in the applicable U.S. reservation to the Torture Convention.

Article 16 of the Convention Against Torture requires the USG to “undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading

¹⁶ CNN website. Document available at: <http://www.cnn.com/2004/ALLPOLITICS/05/10/how.works> (last visited 28 Feb 05).

treatment or punishment which do not amount to torture.” The U.S., upon ratifying the convention in 1994, lodged a reservation agreeing to be bound by the prohibition on cruel, inhuman or degrading treatment only to the extent required under the U.S. constitutional ban on “cruel and unusual” punishments. The dilemma was that Article 16 prohibits not only “cruel and unusual punishments” but also “degrading treatment.” So as to circumvent the prospect that this provision could be interpreted to compel a higher standard of conduct, the “U.S. government adopted a reservation stating that the Torture Convention prohibits no more than the ‘cruel and unusual punishment’ provision of the U.S. Constitution.”¹⁷

Article 19 of the Vienna Convention on the Law of Treaties¹⁸ does not allow for reservations that strike at the object and purpose of the treaty. Some have argued that the U.S. reservations¹⁹ to the Convention Against Torture struck at the object and purpose of the treaty. To that effect, in 2000, the Committee against Torture, the U.N. committee formed to monitor states’ adherence to the Convention Against Torture, said that the U.S.

¹⁷ Kenneth Roth, *The Charade of U.S. Ratification of International Human Rights Treaties*, Chicago Journal of International Law (Fall 2000).

¹⁸ U.N. Doc. A/CONF. 39/27 (May 23, 1969) The U.S. signed the convention on April 24, 1970 but has yet to ratify it, although the U.S. has admitted that the convention is customary international law.

¹⁹ U.S. Reservations and Understandings to the Covenant Against Torture (in pertinent part): **I.** The Senate's advice and consent is subject to the following reservations: **(1)** That the United States considers itself bound by the obligation under article 16 to prevent ‘cruel, inhuman or degrading treatment or punishment’, only insofar as the term ‘cruel, inhuman or degrading treatment or punishment’ means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States. **(2)** That pursuant to article 30 (2) the United States declares that it does not consider itself bound by Article 30 (1), but reserves the right specifically to agree to follow this or any other procedure for arbitration in a particular case. **II.** The Senate's advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Convention: **(1) (a)** That with reference to article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from **(1)** the intentional infliction or threatened infliction of severe physical pain or suffering; **(2)** the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; **(3)** the threat of imminent death; or **(4)** the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

reservation should be withdrawn as it was incompatible with the object and purpose of the Convention Against Torture, and considered it void. The U.S. has yet to withdraw its reservation.

Furthermore, the U.S. understandings to the Convention Against Torture say that mental pain or suffering only refers to prolonged mental harm from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the use or threat of mind altering substances; (3) the threat of imminent death; or (4) that another person will imminently be subjected to the above mistreatment.

Similarly, the U.S. reservations and understandings to the International Convention on Civil and Political Rights²⁰ were to allow the U.S. to sentence any person (other than pregnant women) who are duly convicted, including such punishment for crimes committed by person below eighteen years of age to capital punishment. However, in March of 2005, the U.S. Supreme Court ruled on a juvenile death sentence case and held that it was unconstitutional to sentence someone to death for a crime they committed when they were a minor. In Roper, Superintendent, Potosi Correctional

²⁰ U.S. Reservations to the ICCPR: (1) That article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States. (2) That the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age. (3) That the United States considers itself bound by article 7 to the extent that ‘cruel, inhuman or degrading treatment or punishment’ means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States. (4) That because U.S. law generally applies to an offender the penalty in force at the time the offence was committed, the United States does not adhere to the third clause of paragraph 1 of article 15. (5) That the policy and practice of the United States are generally in compliance with and supportive of the Covenant’s provisions regarding treatment of juveniles in the criminal justice system. Nevertheless, the United States reserves the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2 (b) and 3 of article 10 and paragraph 4 of article 14. The United States further reserves to these provisions with respect to States with respect to individuals who volunteer for military service prior to age 18.

Center v. Simmons,²¹ the Court held that the Eighth²² and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.

The Court held that the Eighth Amendment’s prohibition against “cruel and unusual punishments” must be interpreted according to its text, by considering “history, tradition, and precedent,” and with due regard for its purpose and function in the constitutional design. To implement this framework the Court established the “propriety and affirmed the necessity” of referring to “the evolving standards of decency that mark the progress of a maturing society” to determine which punishments are so disproportionate as to be “cruel and unusual.”²³ Justice Scalia, in his dissent, chastised the majority for unjustifiably elevating themselves to be the arbiter of international and domestic consensus regarding what is and what is not considered cruel and unusual.

The Report:

Subsection I.B.1.

I. B. Except only as described in Section IV, the United States shall abide by its statutory and treaty obligations that prohibit cruel, inhuman or degrading treatment consistent with our reservation to the Convention Against Torture.

²¹ 543 U.S. ____ (2005).

²² The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” The provision is applicable to the States through the Fourteenth Amendment. Furman v. Georgia, 408 U. S. 238, 239 (1972); Robinson v. California, 370 U. S. 660, 666–667 (1962); and Louisiana ex rel. Francis v. Resweber, 329 U. S. 459, 463 (1947).

²³ Trop v. Dulles, 356 U. S. 86, 100–101. In 1988, in Thompson v. Oklahoma, 487 U. S. 815, 818–838

1. Lawfulness under the U.S. reservation to Article 16 of the Convention Against Torture (“cruel, inhuman or degrading treatment”) requires at least compliance with the due process prohibition against actions that U.S. courts find “shock the conscience.”

Analysis:

Substantive due process protections which “shock the conscience” are to afford protection against governmental arbitrariness.²⁴ The U.S. Supreme Court in Rochin v. California,²⁵ created the “shock the conscience” test in 1952. The test has undergone somewhat of a metamorphosis over the years. However, “shock the conscience” still stands as the test to determine whether such egregious executive behavior is unconstitutional, having denied a person of their substantive due process rights guaranteed in the U.S. Constitution. Only the most egregious executive action can be said to be “arbitrary” in the constitutional sense.²⁶ The cognizable level of executive abuse of power is that which shocks the conscience.²⁷ For over fifty years the Court has spoken of the cognizable level of executive abuse of power as that which “shocks the conscience.”²⁸ The executive action must offend due process as conduct “that shocks the conscience” and violates the “decencies of civilized conduct”²⁹ and must be so “brutal” and “offensive” that it could not comport with traditional ideas of fair play and decency.³⁰ The threshold is quite high.

²⁴ Hurtado v. California, 110 U.S. 516, 527, 28 L. Ed. 232, 4 S. Ct. 111. See also, Daniels v. Williams, 474 U.S. 327, 331, 88 L. Ed. 2d 662, 106 S. Ct. 662.

²⁵ 342 U.S. at 172-173

²⁶ See, Collins v. Harker Heights, 503 U.S. 115, 129, 117 L. Ed. 2d 261, 112 S. Ct. 1061

²⁷ Id. at 128. See also, Rochin v. California, 342 U.S. 165, 172-173, 96 L. Ed. 183, 72 S. Ct. 205.

²⁸ County of Sacramento v. Lewis, 523 U.S. 833, 846-7.

²⁹ Id.

³⁰ See, Whitley v. Albers, 475 U.S. 312, 327, 89 L. Ed. 2d 251, 106 S. Ct. 1078 (1986)

Cases dealing with executive action repeatedly emphasize that only the most egregious official conduct can be said to be arbitrary in the constitutional sense. To prove a violation of substantive due process in cases involving executive action, a plaintiff must show that the state acted in a manner that shocks the conscience.

The Report recognizes the necessity to apply the “shock the conscience” test to the U.S. reservation to the Convention Against Torture and all actions of the executive. Therefore, any executive actions pertaining to Article 16 of the Convention Against Torture which “shock the conscience” (“violates the decencies of civilized conduct,” “so brutal and offensive that it could not comport with traditional ideas of fair play and decency,” etc.) deny substantive due process and are unconstitutional and arguably cruel, inhuman and degrading treatment.

The Report:

Subsection I.B.2.

- I. B. Except only as described in Section IV, the United States shall abide by its statutory and treaty obligations that prohibit cruel, inhuman or degrading treatment consistent with our reservation to the Convention Against Torture.**
- 1. (See above)**
 - 2. Nothing in the following effort to define compliance with these obligations is intended to supplant our additional obligations when particular circumstances make applicable the Third and Fourth Geneva Conventions.**

Analysis:

The Report notes that it has attempted to define the USG’s international legal requirements and their exceptions, as manifested in the U.S. reservations and understandings to different treaties, but that it does not intend to supplant any additional

legal obligations when “particular circumstances make the Third and Fourth Geneva Conventions” applicable. This raises two questions, which are:

- (1) What circumstances could make the Third Geneva Convention³¹ (GCIII) and Fourth Geneva Convention³² (GCIV) applicable? And
- (2) What are the obligations under GCIII and CGIV?

(1) What circumstances could make the Third Geneva Convention (GCIII) and Fourth Geneva Convention (GCIV) applicable?

Analysis:

The GCIII states in article 2 that it “shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them,” and that it shall also “apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.” If the conflict is not international in nature then article 3 of the GCIII will apply. All of the Geneva conventions contain “common article 3” which guarantees a minimum standard of treatment for “[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause....”

³¹ Geneva Convention relative to the Treatment of Prisoners of War. The convention was adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, held in Geneva from 21 April to 12 August, 1949. The convention entered into force 21 October 1950.

³² Geneva Convention relative to the Protection of Civilian Persons in Time of War. The convention was adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, which was held in Geneva from 21 April to 12 August, 1949. The convention entered into force 21 October 1950.

Each Geneva Convention and Protocol is concerned with different subsections of people.

GCI: Treatment of battlefield casualties. (1864)

GCII: Extended the principles from the first convention to apply also to war at sea. (1906)

GCIII: Treatment of prisoners of war. (1949)

GCIV: Treatment of civilians during wartime(1949)

Protocol I: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts. (1977)

Protocol II: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts. (1977)

The GCIV relates to the protection of civilians during times of war “in the hands” of an enemy and under the occupation by a foreign power. GCIV should not be confused with the Third Geneva Convention which deals with the treatment of Prisoners of war, and is more widely known.

(2) Legal Obligations under GCIII and GCIV.

Analysis:

The legal obligations of U.S. under the Geneva Conventions (III & IV) are far too vast and detailed for a brief analysis. The International Committee on the Red Cross, the official holders of the Geneva Conventions, reveals a good synopsis of the obligations of the high contracting parties to be:

(1)The parties to a conflict must at all times distinguish between the civilian population and combatants in order to spare the civilian population and civilian property. **(2)** Neither the civilian population as a whole nor individual civilians may be attacked. **(3)** Attacks may be made solely against military objectives. **(4)** People who do not or can no longer take part in the hostilities are entitled to respect for their lives and for their physical and

mental integrity. (5) Such people must in all circumstances be protected and treated with humanity, without any unfavorable distinction whatever. (6) It is forbidden to kill or wound an adversary who surrenders or who can no longer take part in the fighting. (7) Neither the parties to the conflict nor members of their armed forces have an unlimited right to choose methods and means of warfare. (8) It is forbidden to use weapons or methods of warfare that are likely to cause unnecessary losses or excessive suffering. (9) The wounded and sick must be collected and cared for by the party to the conflict which has them in its power. (10) Medical personnel and medical establishments, transports and equipment must be spared. (11) The red cross or red crescent on a white background is the distinctive sign indicating that such persons and objects must be respected. (12) Captured combatants and civilians who find themselves under the authority of the adverse party are entitled to respect for their lives, their dignity, their personal rights and their political, religious and other convictions. (13) They must be protected against all acts of violence or reprisal. (14) They are entitled to exchange news with their families and receive aid. (15) They must enjoy basic judicial guarantees.³³

Analysis:

Subsection II, Transfer of Individuals, is simply a restatement of the current U.S. international legal obligations. The Report is apparently wary of some sort of vicarious liability for torture. Even if the U.S. were to treat a detainee in accordance with the appropriate applicable Geneva Convention standard (GCIII, GCIV or common article 3) but the U.S. were to knowingly transfer the detainee to a state where torture is openly practiced by the ruling power, it is tantamount to having committed torture. Therefore, the transferring of a person from U.S. custody to the custody of a state whose “past conduct suggests” that it has engaged in torture, shall not occur. Now for the “what ifs”: what if the transfer of the individual is not to a state, but a group of interrogators all with different nationalities and non-aligned with any state? Would the “state” be the actual

³³ The International Committee of the Red Cross has an excellent website. Document available at: <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/5ZMEEM> (last visited 30 March 2005).

place where the interrogation takes place? If so, who would provide the assurances that the suspect would not be tortured? What if the interrogation were to take place in an airplane over the Indian Ocean? As ludicrous as this may sound, there have been reports that the CIA has flown ghost detainees half the way around the world on private jets. The Boston Globe reported on March 21, 2005 that one of the minority owners of the Boston Red Sox had indeed chartered his private jet to the CIA. The report states that a “published report suggest[s] that the plane might have been used for special renditions, the controversial practice in which terrorism suspects arrested abroad have been forcibly returned to their native countries for interrogation, sometimes with methods that are barred by U.S. law”³⁴

The Report also attempts to apply a standard of oversight and checks for the transfer of persons in U.S. custody. What the Report fails to do is delineate a credible scheme for ultimate accountability. There is no specific person or office that would be held accountable if the transferred individual is tortured in the custody of a “state” to which the U.S. had determined did not engage in torture, or had provided the U.S. with credible assurances that it would not torture the individual.

The Report:

II. Transfer of Individuals

- A. The United States shall abide by its treaty obligations not to transfer an individual to a country if it has probable cause to believe that the individual will be tortured there.**

³⁴ Gordon Edes, The Boston Globe, *CIA Uses Jet, Red Sox Partner Confirms*, 21 March 2005. Document available at http://www.boston.com/news/nation/articles/2005/03/21/cia_uses_jet_red_sox_partner_confirms?mode=PF (last visited 29 Mar 2005).

1. **If past conduct suggests that a country has engaged in torture of suspects, the United States shall not transfer a person to that country unless:**
 - a. **The Secretary of State has received assurances from that country that he determines to be authentic that the individual will not be tortured and has forwarded such assurances and determination to the Attorney General; and**
 - b. **The Attorney General determines that such assurances are “sufficiently reliable” to allow deportation or other forms of rendition.**
2. **The United States shall not direct or request Information from an interrogation or provide assistance to foreign governments in obtaining such information if it has substantial grounds for believing that torture will be utilized to obtain the information.**
3. **The United States shall not encourage another nation to make transfers in violation of the prohibitions of the Convention Against Torture.**

Analysis:

The U.S. is already legally obligated to not transfer individuals to states that practice torture. Article 3 of the Convention Against Torture states, “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” There is little debate on either side of this issue and it appears to be settled law.

Subsection II of the Report begins with the rule “If past conduct suggests that a country has engaged in torture of suspects, the U.S. shall not transfer a person to that country unless” and then the Report provides for the inevitable exception, “[t]he Secretary of State has received assurances from that country that...” The bureaucratic oversight, with which the Secretary of State and Attorney General become ensconced, will most likely be delegated to other employees within their respective departments and

generally lacks credibility and genuine accountability for authentic oversight of extradition and rendition to states where there is the minimum possibility that torture would be utilized.

The Report would allow for an exception to the international treaty obligation of the U.S. under article 3 of the Convention Against Torture. Under certain circumstances, the U.S. can transfer a suspect to a state that actively practices torture if it obtains political assurances that the state will not torture the individual. Both the Secretary of State and the Attorney General must sign off on the transfer of a person to a state that has “past conduct” which suggests it has engaged in torture. The U.S., if it has probable cause to believe that the state has engaged in torture, must obtain assurances from that state that it will not torture the person who is in U.S. custody. The Secretary of State must receive assurances which are believed to be “authentic” and forward only those “authentic” assurances to the Attorney General who must then determine that they are “sufficiently reliable.” Apparently, only once the Attorney General makes the determination that the credible assurances are sufficiently reliable can the transfer take place.

This raises a few questions. The U.S. will not transfer a person to a state that practices torture *unless* it obtains the state in question’s pledge to not torture the suspect. What is the threshold for the state’s pledge? The test is that it has to be “authentic” for it to get through the first door at the State Department, then only the “authentic” pledges are forwarded to the Department of Justice where the Attorney General will decide whether they are “sufficiently reliable.”

Is an “authentic” pledge a 95% chance that the state will not torture? A 90% chance? Even a promise that guarantees a 95% chance that the suspect will not be tortured allows for a sanctioned 5% exception that the individual will be tortured. Subsection **I.A.**, above, stated that “*Without exception*, the United States shall abide by its statutory and treaty obligations that prohibit torture.” If the meaning of an “authentic assurance” is that there is absolutely no possibility that an individual would be tortured, why would there be a requirement of the Attorney General’s approval? Bilateral extradition treaties should suffice to extradite the suspect. The U.S. has extradition treaties with all but approximately 50 nations in the world.

Just such a regime exists in various states worldwide and has been repeatedly proven to be ineffectual to stop countries from practicing torture. The Canadian government requires a security certificate for deportations of suspects to states where there is the minimum fear that the suspect will be tortured. However, two Egyptian men who had been denied asylum in Sweden were subsequently repatriated based on political assurances that the suspects would not be tortured, causing a national scandal in Sweden after the men alleged that they had been tortured while in Egyptian custody. There is apparently still a gap between those countries that treat international standards with good faith efforts and credibility and those who do not. No extraditions, renditions or repatriations should ever occur to receiving states that practice torture. The U.S. State Department is aware of those states that practice torture and should promulgate a list which would serve to not only denounce such atrocious state-sanctioned acts of barbarity but to assure that no person is handed over in any circumstance.

If the U.S. were to transfer an individual to a state after the Secretary of State has received an “authentic assurance” and the Attorney General agrees that the assurance is “sufficiently reliable” and the individual was tortured anyway, what happens? The Report is silent with regard to this reality, breaching U.S. treaty obligations. In the most blatant case, the state who gave the U.S. its assurance, simply disregards its promise and tortures the suspect anyway. (1) How would the U.S. find out that the individual was tortured? Does the U.S. keep a person there to monitor the individual while he is in the custody of the other state? Is the suspect subsequently returned to U.S. custody and given a medical examination? (2) If the suspect is tortured, is the Secretary of State liable? Or is the Attorney General liable? Are both liable? (3) What are the consequences of any liability that may exist? Will they lose their jobs? The Report allows for money damages in subsection V.A. (discussed below) but only for those individuals, who were improperly subjected to HCI, not tortured by a third party state who had given the U.S. its assurance that it would not torture the suspect. It appears as if those who were sufficiently unfortunate to have been subjected to torture notwithstanding the “receiving state’s” authenticated assurances not to engage in torture are barred from bringing a claim against the USG in federal court.

It would seem both expeditious and prudent for the USG to promulgate a list of states that it recognizes as ones that sanction torture and accordingly never transfer individuals to those states. Who are the states that practice torture? NGO’s have made lists of countries. Many are U.S. allies. For example:

Egypt	Suspension from a ceiling or doorframe; beatings with fists, whips, metal rods, and other objects; administration of electric shocks; being doused with cold water; sexual assault or threat with sexual assault.
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Jordan	Beatings on the soles of the feet; prolonged suspension in contorted positions; beatings.
Morocco	Severe beatings.
Pakistan	Beatings; burning with cigarettes; sexual assault; administration of electric shocks; being hung upside down; forced spreading of the legs with bar fetters
Saudi Arabia	Beatings; whippings; suspension from bards by handcuffs; drugging
Syria	Administration of electric shocks; pulling out fingernails; forcing objects into the rectum; beatings; bending detainees into the frame of a wheel and whipping exposed body parts.

The Report:

II.A.2.

2. **The United States shall not direct or request Information from an interrogation or provide assistance to foreign governments in obtaining such information if it has substantial grounds for believing that torture will be utilized to obtain the information.**

Analysis:

Again, the Report accurately affirms the current state of customary international law and U.S. treaty obligations. As a result, the U.S. cannot benefit from the poisoned fruits of information obtained through torture. The U.N. Committee against Torture stated that “the inadmissibility of unlawfully obtained confessions and other tainted evidence” is one of the essential means in preventing torture.³⁵ Article 15 of the **Convention Against Torture** prohibits any illegally obtained information, extracted as a result of torture, and is therefore inadmissible in evidence in “any proceeding,” judicial or otherwise, except, of course, in proceedings against the alleged torturer. Article 12 of the **Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**; Article 69(7) of the **Rome Statute**; Principle 27, **UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment** all make inadmissible any statements

³⁵ U.N. Doc. A/54/44 (1999), para. 45.

obtained through torture as well as those statements obtained by cruel, inhuman or degrading treatment or punishment.

The Human Rights Committee, the U.N. committee established to monitor compliance with the **International Covenant on Civil and Political Rights** stated that the “law must prohibit the use or admissibility in judicial proceeding of statements or confessions obtained through torture or other prohibited treatment.”

The Report:

II.A.3.

- 3. The United States shall not encourage another nation to make transfers in violation of the prohibitions of the Convention Against Torture.**

Analysis:

In order to live up to its domestic and international legal obligations prohibiting torture, the U.S. cannot “encourage” other states to transfer detainees to states that practice torture. There is no international obligation mandating that the U.S. discourage other states to refrain from practicing torture.

The Report:

III. Oversight of the Use of Any Highly Coercive Interrogation Techniques

- A. Highly coercive interrogation methods (“HCI”) are all those techniques that fall in the category between those forbidden as torture by treaty or statute and those traditionally allowed in seeking a voluntary confession under the due process clauses of the U.S. Constitution.**
 - 1. The Attorney General shall recommend and the President shall promulgate and provide to the Senate and House Intelligence, Judiciary and Armed Services Committees, guidelines stating**

which specific HCI techniques are authorized.

- a. To be authorized, a technique must be consistent with U.S. law and U.S. obligations under international treaties including Article 16 of the Convention against Torture, which under Section I above, prohibits actions that the courts find “shock the conscience.”**
 - b. These guidelines shall address the duration and repetition of use of a particular technique and the effect of combining several different techniques together.**
 - 2. The Attorney General shall brief appropriate committees of both Houses of Congress upon request, and no less frequently than every six months, as to which HCIs are presently being utilized by federal officials or those acting on their behalf.**
- B. No person shall be subject to highly coercive interrogation techniques authorized under Section III above unless:**
 - 1. Authorized interrogators have probable cause to believe that he is in possession of significant information, and there is no reasonable alternative to obtain that information, about either:**
 - a. A specific plan that threatens U.S. lives or**
 - b. A group or organization making such plans whose capacity could be significantly reduced by exploiting the information.**
 - 2. The determination of whether probable cause is met has been made by senior government officials in writing and on the basis of sworn affidavits.**
 - 3. The determination and its factual basis will be made available to congressional intelligence committees, the Attorney General and the Inspectors General of the pertinent departments (i.e. Department of Justice, Department of Defense, etc.).**

Analysis:

The Report would allow for an abrogation of certain guaranteed human rights, an excusable breach of the legal obligation to not engage in “cruel, inhuman or degrading

treatment,” in a circumstance commonly referred to as the “ticking time bomb scenario.” This is a patent violation of many international treaties and U.S. law. It would be a paradigmatic shift and one which could spell reciprocal treatment for U.S. nationals in custody of third-party states.

How many lives must there be at stake before there can be a legitimate abrogation of fundamental human rights? If there are millions of lives at stake, can we condone torture? These are not legal questions, but moral ones and thus, are beyond the scope of this analysis. These questions however are ostensibly the essence of the differing ideologies and approaches to the dilemma.

The Report would allow “authorized interrogators” who have no other reasonable means to obtain intelligence information and who have probable cause to utilize HCI when there is a “specific plan that threatens U.S. lives” or when “a group or organization making such plans whose capacity could be significantly reduced by exploiting the information.” This section demands a thorough analysis by government officials with expertise in the areas questioned below. The questions that need answers, which this analysis is unable to reach, are: **(1)** How does one become an “authorized interrogator”? **(2)** How does an “authorized interrogator” know when he has no other “reasonable means” in which to obtain the information that is sought? **(3)** Is probable cause a sufficient standard for condoning HCI? **(4)** How many U.S. lives have to be threatened before HCI can be officially sanctioned? **(5)** How senior of a government official will make the “probable cause” determination before HCI is applied to a suspect? **(6)** Will the determinations, which the Report requires to be in writing, be made public?

The U.S. Government has so far proven inept at standardizing the detainee situation in Iraq. The Department of the Army Investigator General's (DAIG) report declared that the alleged Abu Ghraib abuses were "attributed to individual failure to abide by known standards and/or individual failure compounded by a leadership failure to enforce known standards, provide proper supervision, and stop potentially abusive situations from occurring."³⁶ This allegation is directly and repeatedly refuted by General Taguba's Report which found that the military officers who were directly responsible for Abu Ghraib were not only cognizant of the brutal conditions that some of the Iraqi detainees were being exposed to,³⁷ but that the inaction and lack of adequate supervision of their direct subordinates and of civilian C.I.A. and Military Intelligence contractors has a causal link to the abuses.³⁸ The U.S. Army demonstrated in Iraq that physical violence and intimidation were approved techniques to "soften up" the detainees for interrogation. The A.C.L.U. released an Army memo that was signed by Lieutenant General Ricardo A. Sanchez and authorized 29 interrogation techniques, "including 12 which far exceeded limits established by the Army's own Field Manual...General Sanchez authorized interrogation techniques that were in clear violation of the Geneva Conventions and the Army's own standards."³⁹

The Report:

IV. Emergency Exception

³⁶ DAIG Report, at pg. iv.

³⁷ U.S. Army Investigative Report, Article 15-6 Investigation of the 800th Military Police Brigade, (The Taguba Report) pp. 15-34.

³⁸ Seymour Hersch, *Torture at Abu Gharib. American Soldiers Brutalized Iraqis. How Far Up Does the Responsibility Go?* The New Yorker, May 10, 2004.

³⁹ ACLU, *Interrogation Techniques Approved by Lieutenant General Sanchez Included Intimidation by Dogs, Stress Positions, Sensory Deprivation*, March 29, 2005. Document available at: <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=17852&c=206>

- A. No U.S. official or employee, and no other individual acting on behalf of the United States, may use an interrogation technique not specifically authorized in this way except:**
- 1. With the express written approval of the President on the basis of a finding of an urgent and extraordinary need.**
 - 2. The finding, which must be submitted within a reasonable period to appropriate committees from both Houses of Congress, must state the reason to believe that:**
 - a. The information sought to be obtained concerns a specific plan that threatens U.S. lives,**
 - b. The information is in possession of the individual to be interrogated and**
 - c. There are no other reasonable alternatives to save the lives in question.**

Analysis:

All of the legal issues as they pertain to international law, human rights law and humanitarian law contained within Subsection IV have been discussed above. There are no new issues.

The Report:

V. Individual Remedies and Applicability

- A. An individual subjected to HCI in circumstances where the conditions prescribed above have not been met shall be entitled to damages in a civil action against the United States.**
- B. No information obtained by highly coercive interrogation techniques may be used at a U.S. trial, including military trials, against the individual detained.**

Analysis:

The Report puts forward a system by which money damages are made available to victims of improper applications of HCI. Article 14 of the Convention Against Torture

had previously established such a regime, “Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.”

Conclusion—Coercive Interrogation

The Report accurately reports the current state of customary international law and the U.S. obligations contained within. With that in mind, the Report sets out exceptions to the U.S. legal obligations and appears to offer certain justifications for the exceptions to those legal obligations. Although the Report says that torture could never be justifiably utilized by the U.S., the creation of HCI and the extraordinary use of cruel, inhuman or degrading treatment is a stark step backwards. The exceptions to U.S. treaty obligations would be a paradigmatic shift in U.S. foreign policy and the nature of binding international legal obligations. The decision to use HCI and cruel, inhuman and degrading treatment could spell reciprocal treatment for U.S. nationals in the custody of third-party states and continue to erode U.S. credibility.

As the world begins to deal with the issues associated with post-conflict rule of law, for the sole remaining superpower to engage in activities on the fringe of decency appears counterintuitive. It is disingenuous for the U.S. to argue the moral high ground for its invasion and occupation of Iraq while at the same time turn a blind eye to the violations of preemptive international legal norms prohibiting torture and cruel, inhuman or degrading treatment. The invasion of Iraq was, according to the U.N. Secretary

General, a violation of international law.⁴⁰ It would appear that the U.S. had already begun with the rolling back of inconvenient international law. Further debate and public input should be recommended before the U.S. legislature attempts to fasten new derivations of international law and treaty obligations.

⁴⁰ On March 11, 2003, the United Nations Secretary-General Kofi Annan said that, “[if] the U.S. and others were to go outside the [Security] Council and take military action it would not be in conformity with the Charter.” <http://www.cnn.com/2003/WORLD/meast/03/11/sprj.irq.un/> (last viewed 2/2/05).

Annex #1

United States of America Status of International Human Rights Treaties

International Bill of Human Rights	Signature	Ratification
International Covenant on Economic, Social and Cultural Rights	5 Oct 1977	
International Covenant on Civil and Political Rights	5 Oct 1977	8 Jun 1992
Optional Protocol to the International Covenant on Civil and Political Rights	Not signed	
Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty	Not signed	
Prevention of Discrimination on the Basis of Race, Religion, or Belief; and Protection of Minorities	Signature	Ratification
International Convention on the Elimination of All Forms of Racial Discrimination	28 Sep 1966	21 Oct 1994
Women's Human Rights	Signature	Ratification
Convention on the Elimination of All Forms of Discrimination against Women	17 Jul 1980	
Optional Protocol to the Convention on the Elimination of Discrimination against Women	Not signed	
United Nations Convention against Transnational Organized Crime	13 Dec 2000	
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime Preamble, supplementing the United Nations Convention against Transnational Organized Crime	13 Dec 2000	
Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime	13 Dec 2000	
Slavery and Slavery-Like Practices	Signature	Ratification
Slavery Convention		
Protocol amending the Slavery Convention	16 Dec 1953	7 Mar 1956 (Acceptance)
Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery		
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others	Not signed	
Protection from Torture, Ill-Treatment and Disappearance	Signature	Ratification
European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment	Not signed	
Protocol No. 1 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment	Not signed	
Protocol No. 2 to the European Convention for the Prevention of Torture and inhuman or Degrading Treatment or Punishment	Not signed	
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	18 Apr 1988	21 Oct 1994

Rights of the Child	Signature	Ratification
Convention on the Rights of the Child	16 Feb 1995	
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts	5 Jul 2000	23 Dec 2002
Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour		2 Dec 1999
Freedom of Association	Signature	Ratification
Freedom of Association and Protection of the Right to Organise Convention		
Right to Organise and Collective Bargaining Convention		
Employment and Forced Labour	Signature	Ratification
Convention concerning Forced or Compulsory Labour		
Equal Remuneration Convention	Not signed	
Abolition of Forced Labour Convention		25 Sep 1991
Discrimination (Employment and Occupation) Convention	Not signed	
Employment Policy Convention	Not signed	
Convention concerning Occupational Safety and Health and the Working Environment	Not signed	
Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	Not signed	
Education	Signature	Ratification
Convention against Discrimination in Education	Not signed	
Refugees and Asylum	Signature	Ratification
Convention relating to the Status of Refugees	25 Sep 1991	
Protocol Relating to the Status of Refugees		
Nationality, Statelessness, and the Rights of Aliens	Signature	Ratification
Convention on the Reduction of Statelessness	Not signed	
Convention relating to the Status of Stateless Persons	Not signed	
War Crimes and Crimes Against Humanity, Genocide, and Terrorism	Signature	Ratification
Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity	Not signed	
Convention on the Prevention and Punishment of the Crime of Genocide	11 Dec 1948	25 Nov 1988
Rome Statute of the International Criminal Court	31 Dec 2000	
Law of Armed Conflict	Signature	Ratification
Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field	12 Aug 1949	2 Aug 1955 (rat/acced)
Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea	12 Aug 1949	2 Aug 1955 (rat/acced)
Geneva Convention relative to the Treatment of Prisoners of War	12 Aug 1949	2 Aug 1955 (rat/acced)
Geneva Convention relative to the Protection of Civilian Persons in Time of War	12 Aug 1949	2 Aug 1955 (rat/acced)
Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)	Not signed	
Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims on Non-International Armed Conflicts (Protocol II)	Not signed	
Terrorism and Human Rights	Signature	Ratification
International Convention Against the Taking of Hostages	21 Dec 1979	7 Dec 1984
International Convention for the Suppression of Terrorist Bombing	12 Jan 1998	26 Jun 2002
International Convention for the Suppression of the Financing of Terrorism	10 Jan 2000	26 Jun 2002
International Convention for the Suppression of Unlawful Seizure of Aircraft	16 Dec 1970	14 Sep 1971

International Convention on the Prevention and Punishment of Crimes Against International Protected Persons	28 Dec 1973	26 Oct 1976
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U.N. Activities and Employees	Signature	Accession
<u>Convention on the Privileges and Immunities of the United Nations</u>		29 Apr 1970
<u>Convention on the Safety of United Nations and Associated Personnel</u>	19 Dec 1994	