Torture of Guantánamo Detainees with the Complicity of Medical Health Personnel: The Case for Accountability and Providing a Forum for Redress for These International Wrongs

By David Brennan*

I. Introduction

In the aftermath of 9/11, despite the United States’ statutory and international obligations prohibiting torture or inhumane treatment for prisoners or detainees, the use of harsh interrogation techniques was quickly envisioned by the Vice President, Secretary of Defense Rumsfeld (“Secretary Rumsfeld”) and others. Considerable planning and effort went into implementing these unusually harsh interrogation practices in Guantánamo and later at other detainee-camp locations.1 This action was pursued without careful consideration of the consequences of engaging in torture as a matter of government policy. The Government’s early decision to bypass domestic and international law obligations for the treatment of the detainees was rationalized in legal memoranda from the Department of Justice’s Office of Legal Counsel (“OLC”) after the 9/11 attack. These opinions would later be discredited because they were based on highly questionable reasoning and were subsequently found to lack coherence in

* Professor of Law in Residence at the University of San Diego Law School. I would like to thank Professor David Frakt for opening my eyes to the true depths of what occurred at Guantánamo. I would also like to thank my researcher, Ryan H. Bay, and the editorial staff at the University of San Francisco Law Review, who have toiled with this Article.

many instances. The Government rebuffed credible advice from its other branches and nongovernmental organizations against these practices based on concerns about the lack of humane treatment of detainees.

Medical personnel (physicians, psychiatrists, and psychologists) participated in the planning, designing, implementation, and monitoring of the interrogations that involved torture of detainees. Their participation included determinations of the fitness of individual detainees to undergo additional harsh measures, coupled with direct monitoring of detainees that enabled medical personnel to advise the interrogators which techniques, or combinations thereof, would better “break down” the detainee, even if he had reached near-limits of a human being’s capacity to endure any further ill treatment. Direct participation by medical health personnel in these activities constituted gross violations of international and domestic law, as well as their specific ethical and professional obligations.

While the major focus of the paper is focused on the conduct of the medical health personnel and the violations that occurred as a result of their participation in torture of detainees during interrogations, a considerable amount of background material will initially be provided to develop the understanding of how these practices became a policy for treatment of detainees. The applications of these illegal practices applied to dozens if not hundreds of detainees under the direction and oversight of medical health personnel occurred because the administration deliberately deviated from its obligations under the laws of war while simultaneously engaging in complete indifference to the possible legal consequences of such conduct in an international conflict situation.

Despite the gravity of this conduct it is unlikely that the medical health personnel, the legal counsel who created the opinions, the military, CIA, contract personnel, or the officials who commanded these illegal activities will ever be held accountable for any wrongdoing. The current administration of President Obama has apparently elected to dissociate itself from the notion of holding any of the actors who participated in these activities accountable on any statutory basis. This includes the current stance of failing to provide a reasonable form of redress for any of the detainees whose treatment constituted gross violations of domestic or international law.

This paper will conclude with the recommendation that the Government strongly consider taking certain steps to address these international wrongs, including enacting a provision for appropriate civil
remedies for the victims of torture. Addressing the accountability issue, even if by no more than remedial legislation or guidelines for medical health personnel in future conflict situations, would better serve to reassert the stature of the United States in the international community as a nation committed to its international obligations in times of conflict or under threat of terrorism.

A. Preliminary Comments on Torture

Unfortunately, modern civilization is no stranger to the use of torture. In this paper the use of the term “torture” is intended to include the statutory definition of “torture, cruel, inhuman and degrading treatment” under the Convention Against Torture. The continuing and disturbing revelations in cases before various international tribunals and some foreign courts confirm the persistent inability of civilized societies to effectively prevent these practices from being administered to captives. The fact that a state is a signatory to the international conventions prohibiting torture or those that mandate certain levels of humane treatment of captives in time of conflict or war is less often a guarantee that it will prevent those unlawful practices even by the most civilized states in times of conflict or crisis. Internalizing these prohibitions by a given state on an equal basis with their domestic law might strengthen the desired effect but still provides no guarantee that it will effectively prevent this conduct.

B. Rationalizing Torture Based on Supposed Result: Does Torture Really Work?

Sun Tzu recognized the important maxim for treatment of captives twenty-six centuries ago: “Treat the captives well, and care for them.” The United States’ modern recognition of the necessity for avoidance of the use of torture and inhuman treatment of captives was

---

2. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 113 [hereinafter Convention Against Torture]. The Convention’s Article 1 states that “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.”


incorporated into a 1983 manual produced by the Central Intelligence Agency ("CIA") that questioned the value of harsh interrogation of captives.\(^4\) During the early stages of the application of harsh interrogations of Guantánamo detainees, the Naval Criminal Investigative Service’s Chief Psychologist, Dr. Michael Gelles, confirmed that "most behavioral experts working in the field viewed torture and other less coercive interrogation tactics not only as illegal, but ineffective."\(^5\) These seminal recognitions, however, were lost on Secretary of Defense Rumsfeld, his "Working Group," the Justice Department’s Office of Legal Counsel, and many others in their rush to resort to torture and prohibited practices on the post-9/11 captives. Those decisions and the actions that followed will be seen as in substantial conflict with existing conventions, agreements, and the laws of war.

II. Standards for Treatment of Prisoners and the Prohibition of Torture

A. International Conventions

The United Nations Charter ("UN Charter") is the watershed document defining modern approaches to international relations among civilized states and fosters standards of conduct and cooperation in the post-World War II setting.\(^6\) The Charter established the General Assembly under Article 9, the Security Council under Article 23, and the International Court of Justice ("ICJ") under Chapter XIV. The three principal organs’ activities were conducted on the primary principles in Articles 1(1-3) that compelled a realization of international communities’ desire to raise the level of human dignity beyond what existed before World War II/1945.\(^7\) In 1948, the U.S. General Assembly enacted a major instrument, the Universal Declaration of Human Rights ("UDHR"), which included a number of important articles asserting specific individual human rights:

- Everyone has the right to life, liberty and the security of person;
- No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment;

---

4. MILES, supra note 1, at 15.
7. Id. at art. 9 et seq., art. 23, et seq.; see also id. at art. 93 (setting forth that all members of the United Nations are ipso facto parties to the Statute of the International Court of Justice).
• Everyone has the right to an effective remedy by the competent national tribunals for actions violating the fundamental rights granted him by the constitution or law;

• No one shall be subject to arbitrary arrest, detention or exile.\(^8\)

The four Geneva Conventions introduced in 1949 provided broad guidelines for the conduct by state parties and their forces in the treatment of civilians, wounded, prisoners of war, and combatants during armed conflicts or war. Geneva III (Prisoners of War) and Geneva IV (Protection of Civilian Persons in Time of War), have particular relevance to the subject of this paper.\(^9\) The four Geneva Convention included Common Article 3, which delineates the required minimum protections for prisoners of war and civilians:

The following acts shall remain prohibited at any time and in any place whatsoever with respect to the above mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture . . . (c) outrages upon personal dignity, in particular, humiliating and degrading treatment.\(^10\)

Geneva III contained separate requirements under Article 5 regarding the treatment of combatants who fall into the hands of another state to the effect that “[a]ny doubt arise[s] whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”\(^11\)

Geneva III’s Article 4 addresses the criteria for determination of prisoner of war status under the laws of armed conflict. Where a person does not fully meet those criteria, however, that person is nonetheless entitled to proper treatment in accordance with Geneva III until his actual status can be determined before a proper tribunal of the kind specified in Article 5.\(^12\) Conversely, Geneva IV’s Article 5 relating to civilian captives requires:

---


\(^10\) Geneva III, supra note 9, art. 3; Geneva IV, supra note 9, art. 3.

\(^11\) Geneva III, supra note 9, art. 5.

\(^12\) Id. at arts. 4–5; see also ANTONIO CASSESE, INTERNATIONAL LAW 405–08 (Oxford University Press, 2005) (describing that the definition of a lawful combatant set forth in Article 4 relates to the time of the Lieber Code (1863), which stood for the proposition that a lawful combatant is someone in uniform, with a recognized insignia, bearing arms and under the command of a person responsible for his subordinates while conducting...
In the occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited his rights of communication under the present Convention.13

Even suspected spies and saboteurs, or those engaged in activities hostile to the security of the States held captive under Geneva IV, were to be provided with certain minimal protections. In each case, such persons shall nevertheless be treated with humanity, and in the case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention.14

The Convention Against Torture, Cruel, Inhuman or Degrading Treatment (“Convention Against Torture”), adopts the language quoted in the UDHR’s Article 5.15 Torture is defined as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purpose 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.”16 The Convention’s Article 2 prohibits torture in extraordinary circumstances stating, “[n]o exceptional circumstances whatsoever, whether a state himself in accordance with the laws and customs of war. That definition has been blurred because of a variety of conflicts, including World War II, in which militias, insurgents, resistance movements or other forces did not fully comply with these requirements but were still often recognized as combatants during a conflict under certain conditions); id. at 405-409 (addressing the then classification of “unlawful combatant” by the United States in 1942, which he describes as “descriptive only,” because the misuse of the categorization tends to deprive the captive of humanitarian rights “under Geneva’s Optional Protocol 1, Article 75 and its fundamental minimum guarantees”); The Lieber Code of 1863, General Orders No. 100, Articles 84-85, http://www.civilwarhome.com/liebercode.htm (describing those categories of combatants not entitled to protections of the laws of armed conflict as “armed prowlers” and “war-rebels” not entitled to the protections of prisoner of war status).

13. Geneva IV, supra note 9, art. 5.

14. Id. Nothing in Article 5 eliminates the Common Article 3 protections or the protections under the four Geneva’s Additional Protocol 1 that address civilians or other categories of persons during war or conflict with specified ‘minimum’ protections. Likewise, Geneva III’s Article 5 relating to prisoners of war mandates that “[s]hould any doubt arise as to whether persons, having committed a belligerent act and having fallen in the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protections of the present Convention until such time as their status has been determined by a competent tribunal.” Geneva III, supra note 9, art. 5.

15. Convention Against Torture, supra note 2, art. 1.

16. Id.
of war or a threat of war, internal political instability or any other public emergency as a justification of torture.”

The 1966 International Convention on Civil and Political Rights reiterates the prohibitions against “torture, cruel, inhuman or degrading treatment or punishment” in this language: “In particular, no one shall be subject without his free consent to medical or scientific experimentation.” The voluntary actions by a substantial number of states that have adopted the above-cited instruments, even with reservations, confirm their status as international obligations and as part of customary international law.

B. Customary International Law and the International Agreements of the United States

The U.S. Constitution’s reference to the “laws of nations” includes the treaties, conventions, and agreements of the kind specified earlier, and together with principles of customary international law, has defined the obligations of the United States since the formation of the original thirteen colonies. International agreements and customary international law form part of the laws of the United States that are binding on the President.


19. U.S. Const. art. I, § 8, cl. 10; The Federalist No. 80 at 475-477 (Alexander Hamilton) (Charles R. Kesler ed., 2003); The Federalist No. 3 at 37-38 (John Jay) (Charles R. Kesler ed., 2003); The Federalist No. 64 at 392 (John Jay) (Charles R. Kesler ed., 2003) (Jay asserted that “[a] treaty is only another name for a bargain, and that it would be impossible to find a nation who would make any bargain with us, which should be binding on them absolutely, but only on us so long and so far as we may think proper to be bound by it.” The Federalist No. 64, supra note 19, at 392 (John Jay) (emphasis original); Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), 1986 I.C.J. 14, 97 (June 27) (“[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and opinio juris of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them” (internal quotation omitted)).

20. Restatement (Third) of Foreign Relations Law of the U.S. § 111 cmt. c (1987) (“That international law and agreements of the United States are law of the United States means also that the President has the obligation and the necessary authority to take care that they be faithfully executed.”); see U.S. Const. art. II, § 3; see also The Paquete Habana, 175 U.S. 677, 700 (1900) (asserting ways that “[i]nternational law is part of our law”).
The federal courts have the jurisdiction to interpret the laws and treaties of the United States. The court’s jurisdiction over all questions regarding interpretation of international law was challenged, nonetheless, by the OLC’s opinions that attempted to preclude the detainees’ access to the courts of the United States to be able to challenge their detention or rights under these international instruments or the U.S. Constitution. In December, 2001, for example, John C. Yoo of the DOJ’s Office of White House Counsel advised the Department of Defense that captives held at Guantánamo would not be able to challenge their detention or the jurisdiction of a Military Commission through a writ of habeas corpus based partly on a 1942 decision, *Ex Parte Quirin.*

### III. The Departure From U.S. Constitution and the Laws of Armed Conflict

#### A. The Executive Branch and Its Powers

At the time of the 9/11 attacks, Congress held the power to “declare war or make rules for captures or land or waters.” Similarly, Congress held the exclusive power to “define and punish offenses against the law of nations.” Congress also held the exclusive power to “make rules for the regulation of the land and naval forces.” Within days of the 9/11 attacks, the Vice President and his Chief of Staff, David Addington, together with Secretary Rumsfeld and other senior officials, asserted the proposition of near-unlimited powers of the President to pursue extremely aggressive responses to the attacks and to be able to disregard recognized restraints on those efforts.

[24. U.S. Const. art. I, § 8, cl. 11.]
[25. U.S. Const. art. I, § 8, cl. 10.]
[27. Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* 49–52 (2008) (“[T]he president, as commander in chief, had the authority to disregard virtually all previously known legal boundaries if national security demanded it.”).]
The officials focused on the “non-state status” of the attackers and the terrorist approaches used by the nineteen who were involved in the 9/11 attacks to justify the use of unconventional methods to track down those responsible and withhold the application of various protections that should be provided to prisoners of war or civilian captives.  

On September 12th, President Bush proposed—and quickly secured—an Authorization for the Use of Military Force (“Authorization”) based on a joint House-Senate Resolution that he proposed himself. The Authorization provided the President with authority for the use of all force necessary to bring those who were responsible for the 9/11 attacks to justice, but it was not a declaration of war. The War in Afghanistan, Operation Enduring Freedom, commenced two weeks later. The military efforts in Afghanistan were followed by President Bush’s first military order, “Detention, Treatment and Trial of Certain Non-Citizens in the War against Terrorism,” which outlined substantial modifications to existing military policy for detention and tribunals of captives taken into custody as part of the war’s active military operations. The international conventions and declarations that provided the framework of international obligations for member states were viewed as obstacles to the administration’s deliberate responses to the terrorist attacks of 9/11 and the planned efforts to obtain active intelligence from detainees, which were intended to

---

28. Id. at 51—52.


32. Military Order of November 13, 2001: Detention, Treatment and Trial of Certain Non-Citizens in the War against Terrorism, 3 C.F.R. 918 (2001), reprinted in 10 U.S.C. § 801 (Supp. IV 2004). This military order for the trial of Al Qaeda and other foreign nationals limited them to “military tribunals” but simultaneously precluded all captives from any relief or remedy in the federal courts of the United States, effectively limiting the Article III courts’ jurisdiction over “all cases and controversies,” that would ultimately be challenged in U.S. Supreme Court resulting in reaffirming the Article III jurisdiction over actions involving the foreign detainees. Id. at §§ 7(b)(2)–(3). See U.S. CONST. art. III, § 2; Rasul v. Bush, 542 U.S. 446, 476 (2004).
severely limit detainees’ protections because of the position taken that they were completely outside of the classification of prisoners of war under the Geneva III. The “legal grounds” for this position were presented in a memorandum from Jay S. Bybee addressed to both the White House and Department of Defense on January 22, 2002 in which he confirmed that neither the Geneva Conventions nor customary international law applied to the Al Qaeda or Taliban detainees from Afghanistan based on the President’s authority to deny them prisoner of war status.

B. The Justifications from the OLC for Departing from the Laws of War

In his recent article, The Torture Lawyers, Michael P. Scharf performed a thorough vivisection on the interactions of the White House Counsel, the Department of Defense (“DOD”), the CIA, the Department of Justice (“DOJ”) and its Office of Legal Council (“OLC”), and the lawyers who legitimized the United States’ unilateral departure from this international legal framework that provided minimum protections for captives or detainees during war or conflict. Scharf documents the efforts of a “War Council” to address in legal terms the departure from the requirements of the four Geneva Conventions, its Common Article 3 and the War Crimes Act (“WCA”). The “War Council” consisted of David Addington, Vice President Cheney’s chief counsel; “Jim” Haynes, the Department of Defense chief counsel; Alberto Gonzales, the White House Counsel; and John Yoo, a deputy assistant Attorney General in OLC who created and used a number of legal memoranda for his superior, Jay S. Bybee, to justify departures from existing torture/interrogation law and to also provide “legal” cover for those who would be engaging in interrogations of detainees.
while ignoring the obligation to provide detainees with the protections that were required under domestic and international law.\footnote{Id. at 392–97.}

Yoo advised DOD General Counsel Haynes regarding the detainees in a memo that asserted neither the War Crimes Act, nor the four 1949 Geneva Conventions would apply to the detainees.\footnote{Draft Memorandum from John Yoo, Deputy Assistant Att’y Gen, U.S. Dep’t of Justice Office of Legal Counsel, and Robert J. Delahunty, Special Counsel, U.S. Dep’t of Justice Office of Legal Counsel, to William J. Haynes, Gen. Counsel, Dep’t of Def., Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002) [hereinafter Yoo Memo of Jan. 9, 2002], available at http://upload.wikimedia.org/wikipedia/en/9/91/20020109_Yoo_Delahunty_Geneva_Convention_memo.pdf (concluding that international treaties would not be considered to provide any of the prisoner of war protections to members of Al Qaeda and Taliban because they did not enjoy a status appropriate to obtain those protections); see War Crimes Act, 18 U.S.C. § 2441 (1994).}

His position was that “the al Qaeda organization and Taliban militia were not protected by Treaties and Laws, including the four Geneva Conventions or their Optional Protocols requiring certain treatment in time of war, because the two organizations were not a party to the specified international agreements governing the laws of war.”\footnote{Yoo Memo of Jan. 9, 2002, supra note 38, at 6 (asserting that the “the possibility of grave breaches of the Geneva Convention III, article 130,” would only occur “by causing great suffering or serious bodily injury to POWs, killing or torturing them, depriving them of access to a fair trial.) Id.; contra Ingrid Deeter, THE LAW OF WAR 329 (2000) (observing that Protocol II of 1977 to the Geneva Conventions (1949) and other humanitarian law guarantees would at least “imply that a prisoner of war must not be subjected to any act included in the catalogue of prohibited practices;” that Protocol II includes as “(a) violence to life, health, or physical or mental well-being of persona, in particular murder as well as cruel treatment such as torture” among others.) Id. at 319.}

Scharf focuses on two significant legal memos dated August 1, 2002, drafted by Yoo and bearing the signature of Jay Bybee, then head of the Justice Department’s OLC. These memos excluded the application of the Torture Convention for any of the al Qaeda or Taliban captives, thereby opening the door for the administration of harsh interrogation practices that constituted torture, or at least were prohibited by the lesser terms, “cruel, inhuman or degrading treatment” based on the practices that were signed for their application to the detainees.\footnote{Scharf, supra note 35, at 397–99.} The Yoo/Bybee August 1, 2002 memos also confirmed the legality of a battery of harsh techniques for use by military and CIA personnel, thus endorsing the use of the techniques advocated by the Secretary Rumsfeld for the military, and were heartily endorsed by the CIA’s John Rizzo for use by his CIA agents.\footnote{Id. at 398–400.} In order to understand the degree of harsh treatment allowed under the Bybee
memorandum addressed to the White House of the same date, he opined that “[f]or an act to constitute torture as defined by Section 2340A, it must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function or even death; for purely mental pain or suffering to amount to torture under Section 2340, it must result in significant psychological harm of significant duration, e.g., lasting for months or even years.”42

Despite opposition to abandonment of the Geneva Conventions and other international law provisions by then Secretary of State Colin Powell and his Deputy Secretary of State and General Counsel William H. Taft IV, the efforts to pursue the harsh interrogations of detainees could not be deterred. The Secretary of Defense and his staff vigorously pursued the program for harsh interrogations of detainees while the Secretary of State’s legal staff, headed by its General Counsel’s all-important international-law legal staff, known as “L”, were summarily excluded from the communication of further OLC memos on these subjects.43

Geneva’s Common Article 3 bound contracting parties to the prohibition against “violence to life, person, in particular murder of all kinds, mutilation, cruel treatment and torture . . . [and] outrages upon personal dignity, in particular, humiliating and degrading treatment,” making Yoo’s opinion excepting al Qaeda and Taliban detainees from the protections of Geneva III and IV completely untenable.44 The OLC’s classification of all captives as “enemy combatants” was not

42. Memorandum from Jay S. Bybee, Assistant Att’y Gen. for the U.S. Dep’t of Justice Office of Legal Counsel, to Alberto R. Gonzalez, Counsel to the President, Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A 1 (Aug. 1, 2002) [hereinafter Bybee Memo to Gonzalez of Aug. 1, 2002], available at https://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.08.01.pdf; see Memorandum from Donald Rumsfeld, Sec’y of Defense, for the Commander, U.S. Southern Command, Counter-Resistance Techniques in the War on Terrorism, at 1–4 (Apr. 16, 2003), available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.04.16.pdf (describing practices including dietary manipulation, environmental manipulation (adjusting temperature, use of unpleasant smells), sleep adjustment, and isolation—all techniques that would later give way to harsher practices that included waterboarding, shackling, “wallowing” or driving a detainees face into the wall, confinement in cramped boxes, and extremes (cold, heat, noise and sleep deprivation) already documented in this paper).

43. Scharf, supra note 35, at 398–400.

44. Geneva III, supra note 9, art. 3. The four Geneva’s Common Article 3 standards are defined as “bound to be applied at a minimum” by contracting parties, which challenges the incredible reach of Yoo’s opinions that they could be unilaterally withdrawn by a major contracting party. Id.
in keeping with Common Article 3’s guiding principles. In addition to this erroneous classification, while many of the al Qaeda and Taliban captives may have not fallen squarely within the traditional definition of prisoners of war under Geneva III’s Article 4, its Article 5 was directly applicable to the civilians and noncombatants taken into custody in locations that were far from any field of battle. The administration refused to make any provision for the required Article 5 classification hearing for the captives until long after the U.S. Supreme Court decision in *Rasul v. Bush*. *Rasul* ended the OLC opinions’ validation of the President’s authority to suspend the Geneva Conventions and Common Article 3, which had been based on the notion of unlimited presidential powers under Article II of the U.S. Constitution during times of conflict, powers which simply did not exist.

C. The Practice of *Rendition* to Facilitate Harsh Interrogation Methods

In general, the practice of *Rendition* involves the forced transfer of a detainee from one captor power to another state in a secret location where the protections of the Geneva Conventions, Common Article 3, and the Optional Protocols will be ignored and the detainee will be powerless to object to the transfer or the subsequent ill treatment administered in defiance of those international law obligations. One
memorandum by Jay Bybee to DOD’S general counsel Haynes confirmed the *legality* of forced transfers of detainees to foreign locations for further interrogation and treatment based on the President’s power to transfer al Qaeda and Taliban prisoners to foreign countries, which arose under his plenary authority as Commander-in-Chief. Bybee analogized this power of the President in a constitutional democracy to Henry V’s decision to slaughter his French prisoners at Agincourt in 1415. This bizarre comparison conveniently disregarded the progress of humanitarian law through the twentieth century that produced the 1907 Hague Convention’s requirement to “treat prisoners humanely.” Bybee concluded that neither the Convention Against Torture nor the four Geneva’s or their Common Article 3, were obstacles to the President’s unilateral power to *rendition* these prisoners as he saw fit.

### IV. The Guantánamo Regime for Harsh Interrogation of Detainees

The introduction of the harsh interrogations at Guantánamo presented new challenges for the Office of Legal Counsel. Bybee’s August 1 memo to the Central Intelligence Agency’s John Rizzo stated the remote possibility that a U.S. agent inflicting torture on a detainee would be held liable under a criminal standard as follows:

To convict a defendant of torture, the prosecution must establish that: (1) the torture occurred outside the United States; (2) the defendant acted under color of law; (3) the victim was within the defendant’s custody or control; (4) the defendant specifically intended to inflict severe pain or suffering; and (5) that the act inflicted severe pain or suffering.

“No State Party shall expel, return . . . 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”;

In another memo issued that same day, Yoo assured Alberto Gonzales, Counsel to the President, that the interrogation methods to be employed on al Qaeda and Taliban detainees complied with the U.S. Torture Statute, the Convention Against Torture, and the International Criminal Court Statute ("ICC"), thus assuring their full implementation in military camps or CIA settings. The three memos sent by Bybee and Yoo that day resonated as somewhat of a "Guns of August" approach to unleash the harsh interrogations for detainees who were in the custody of U.S. forces or the Central Intelligence Agency, regardless of where they were captured and whether or not they were captured in the theaters of conflict.

Guantánamo was viewed by Secretary Rumsfeld, aided by OLC’s legal opinions, as immune from the U.S. courts’ Article III jurisdiction over cases or claims from captured detainees; he was satisfied such cases would be blocked because Guantánamo was "not territory of the United States." This false premise taken by the OLC that the U.S. courts were without jurisdiction over the detainee cases would be initially rejected by the U.S. Supreme Court in its decision in Hamdi v. Rumsfeld allowing the right of a citizen-detainee who was classified as an unlawful enemy combatant to challenge his status before the courts of the United States.

Secretary Rumsfeld’s techniques were intended primarily for use by military personnel but limited the applications of certain interrogation techniques on the list to his permission, which was not binding on the CIA’s conduct of interrogation of high-value detainees, or those detainees renditioned to black sites or foreign locations. His proposed interrogation techniques for high-value detainees included: "water-boarding, extremes of cold, heat, water, light, sound and other sensory deprivations or over-stimulations, sleep deprivation, shackling..."
for prolonged periods in standing or other contorted positions, isolation in cramped containers," as well as prolonged application of combinations of these techniques. He did not wish to be constrained by either the Army Field Manual or recognized principles of the laws of armed conflict or international law while pursuing these harsh interrogations.

A. The Existing Legal Constraints on the Proposed Interrogation Methods for Guantánamo Detainees

1. The Army Field Manual

Interrogations, an approved counter-insurgency method, are governed by the U.S. Army-Marine Corps Counterinsurgency Field Manual ("Army Field Manual"), which contains a number of provisions regarding these methods, none of which remotely provide for the harsh interrogation practices that were to be administered to detainees in the post-9/11 era. The revised 2006 Army Field Manual's forward authored by General David H. Petraeus continued the earlier manual's version prohibition in Article 7-42, "[a]buse of detainees is immoral, illegal and unprofessional." He admonished the reader that, "[t]hose who engage in cruel or inhuman treatment of prisoners betray the standards of the profession of arms and U.S. Laws," providing a direct challenge to the legitimacy of Secretary Rumsfeld and his Working Group's deviations, and by his further admonishment that, "[n]o exceptional circumstances permit the use of torture and other cruel, inhuman or degrading treatment." These commands fully recognize the application of the Geneva Conventions, Common Article 3,

59. JAFFER & SINGH, supra note 1, at 148–53 (listing twenty-four of the original thirty-six techniques signed off by the Secretary of Defense for use at Guantánamo).

60. MAYER, supra note 27, at 188–90.


63. 2006 ARMY FIELD MANUAL, supra note 61, at 251.
and the existing laws of armed conflict that were “suspended by the President” to permit harsh interrogation of all captives or civilians.64

2. The Guantánamo Experience with Harsh Interrogation Methods

Beyond the earlier cited OLC memos discussed by Michael Scharf, Lieutenant Colonel Diane Beaver, U.S. Army Judge Advocate General Corp, the most senior Judge Advocate of the U.S. Army for the JTF-170 (Guantánamo) command, presented her superiors with legal approval to use the harshest interrogation methods in late 2002.65 Her opinion seemed to follow the Bybee memo to Rizzo of the CIA66 that focused on the treatment for “high profile” detainee Abu Zubaydah, known as detainee #63.67 The harsh practices advocated by Lt. Col. Beaver and the August 1, 2002 Bybee-Rizzo memo were applied to detainees outside of the United States by personnel were based on Bybee’s earlier cited disconcerting view of torture68:

The definition of torture for an activity could only be sustained if the person performing the act under color of law intended only to inflict severe pain and suffering upon the person within his custody or physical control, that the term “severe mental pain or suffering” meant prolonged mental harm resulting from (A) intentional infliction or threatened infliction of severe physical pain and suffering; (B) the administration or application, or threatened administration or application, of mind-altering substances or other

64. See Bush Memo of Feb. 7, 2002, supra note 22; see also LOUIS HENKIN ET AL., HUMAN RIGHTS 1590–91 (2009) (noting the suspension of the Geneva Conventions between the United States and Afghanistan that included the determination of the nonapplicability of its Article 4 and Common Article 3, but the President added a call for us to treat detainees humanely, including those who are not legally entitled to such treatment based, which he apparently based on an earlier Bybee to Alberto Gonzales Memo of Jan. 22, 2002), http://findlaw.com/news.findlaw.com.hdocs.docs.doj.bybee12202mem.pdf.


67. Bybee Memo to Rizzo of Aug 1, 2002, supra note 53 (advocating that without the “specific intent to inflict severe pain or suffering” it would unlikely be a violation of Section 2340 in the case of Zubaydah, the high-value detainee).

procedures calculated to disrupt the senses or personality; (C) the threat of imminent death.\textsuperscript{69}

The Department of Justice’s Office of Professional Responsibility Report later denounced the Bybee memos and other approvals of the use of sleep deprivation, stress positions, and shackling in a stinging condemnation that called the opinions “flawed, not-thorough, and non-objective with rather un-candid analysis.”\textsuperscript{70} The practices instituted at Guantánamo, were also quickly recognized by agents of the Federal Bureau of Investigation to constitute violations of domestic and international law, resulting in the agents’ continuing complaints to superiors, which were also addressed more recently in the Department of Justice Office of Inspector General’s Report.\textsuperscript{71}

3. The Later Wave of OLC Memos—More Torture Authorizations

Jack Goldsmith replaced Bybee as head of the Office of Legal Counsel in late 2003 and withdrew the Bybee opinion of August 1, 2002, to Albert Gonzales, but not the one to CIA’s John Rizzo. Goldsmith withdrew another opinion by Yoo to Haynes dated March 14, 2003, on the grounds that the torture memoranda “rested on cursory and one-sided legal opinions” that were “legally flawed, tendentious in substance and tone, and overbroad and thus largely unnecessary.”\textsuperscript{72} He called for a revised set of memoranda that were later submitted by OLC lawyer Steven Bradbury on May 10, 2005.\textsuperscript{73}

\textsuperscript{69} Bybee Memo to Gonzalez of Aug. 1, 2002, supra note 42, at 1, 22–23. Bybee had already been confirmed by the U.S. Senate for a lifetime appointment as a judge on the Ninth Circuit Court of Appeals, but the Senate was apparently not aware of the OLC memorandums authored by him with approvals for harsh treatment of the detainees.


\textsuperscript{71} See U.S. DEP’T OF JUSTICE, OFFICE OF INSPECTOR GEN., A REVIEW OF THE FBI’S INVOLVEMENT IN AND OBSERVATIONS OF DETAINEE INTERROGATIONS IN GUANTÁNAMO BAY, AFGHANISTAN, AND IRAQ, at x–xii, 361–65 (2008), http://www.justice.gov/oig/special/s0805/final.pdf [hereinafter DOD-OIG REPORT OF MAY 2008] (complaints regarding these activities eventually were voiced to the highest officials at the DOJ, who took no strong action beyond raising concerns with the National Security Council Director, who, likewise, took no action to curb any of the ongoing practices).

\textsuperscript{72} Scharf, supra note 35, at 403–04.

Bradbury’s memoranda continued to endorse the application of the EIT’s including water boarding, a technique actually proposed by the CIA’s Office of Medical Service (“OMS”) physicians for use on high-value detainees. His memo added that water boarding was not so physically painful because of the administration of it to thousands of military trainees in the SERE program without any ill effects. Unfortunately, the use of the EITs had been secretly disclosed to ranking members of Congress, including House and Senate Leaders, who understood their nature but failed to strongly oppose their continued use on high-value detainees, a fact that Bradbury used for additional support of his approval of the use of harsh techniques on high-value detainees.

V. The Direct Participation of Medical Health Personnel in Torture and Human Experimentation

A. The Post-World War II Epoch

The 1946 Nuremberg Code formed the international legal basis for the so-called “Doctors Trial” by the International Military Tribunal (“IMT”) that prosecuted twenty-three Nazi doctors who had engaged in these practices. Despite the physician’s responsibility to a patient, the Hippocratic Oath (“the Oath”) that originated in Greece in 500

74. Id. at 29–30, 44–46. Bradbury assured Rizzo and the CIA that “[h]owever frightening the experience [of water boarding] may be, OMS have informed us that the water board technique is not physically painful.” Id. at 44.


76. Nuremberg Code, 1946, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Vol. 2, pp. 181-182. Washington, D.C.: U.S. Gov’t Printing Office 1949, http://ohsr.od.nih.gov/guidelines/nuremberg.html [hereinafter Trials of War Criminals]. See also, Opening Statement in the Doctors Trial of Brigadier General Telford Taylor, at 10 (Dec. 9, 1946), http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/doctoropen.html (“I intend to pass very briefly over matters of medical ethics, such as the conditions under which a physician may lawfully perform a medical experiment upon a person who as voluntarily subjected himself to it. . .none of the victims of the atrocities perpetrated by these defendants were volunteers. . .whatever book or treatise on medical ethics we may examine, and whatever expert on forensic medicine we may questions, will say that it is a fundamental and inescapable obligation of every physician under any known system of law not to perform a dangerous experiment without the subject’s consent.”); Charter of the International Military Tribunal, 59 Stat. 1544, 82 U.N.T.S. 279 (1945) (“Crimes against humanity. Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population . . .”) Id. art. 6(C). Control Council Law # 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity (1945), art. II(1)(c), available at http://www1.umn.edu/humanrts/instree/ccno10.htm.
B.C., Nazi doctors were willing to engage in these practices with government approval. The Oath established the requirement for a physician to obtain consent from any human subject in work involving human experimentation, resulting in a legal ethic. The trial determined the doctors’ criminal responsibility for engaging in practices on human subjects who were eventually going to be exterminated in Nazi detention facilities.

Legitimate and therapeutic human experimentation by the German medical profession had been undertaken decades before the Nazi era, when the German states created an ethical approach for the conduct of human experiments that was codified in a directive from the Prussian minister of the Interior in 1891 to regulate the administration of tuberculin vaccine in German and Italy. Efforts to establish a stronger informed consent ethic over the next four decades produced a distinction between therapeutic or new therapy and human experimentation in the German Government’s 1931 guidelines, promulgated two years prior to the ascendency of the Nazi regime. Thus, the pre-Nazi world community understood the necessity for controls and limitations on any experimentation that involved human subjects.

The Nazi regime’s irrational and criminal practice of the declaring groups or classes of persons “undesirables,” who were then detained by the Reich for eventual extermination, created a pool of victims for a dark program of human experimentation, which purportedly existed for scientific purposes at detention camps in Nazi-occupied regions. The IMT’s Doctors Trial revelations and verdict, convicting sixteen of twenty-three medical doctors and executing seven of them, should have permanently closed the door on these abhorrent practices. The doctors’ defenses of ‘scientific importance’ or


78. See generally Trials of War Criminals, supra note 76. See also The Nuremberg Code (1947), available at http://www.cirp.org/library/ethics/nuremberg/.

79. Jochen Vollman & Rolf Wineau, Informed Consent in Human Experimentation Before the Nuremberg Code, Correspondence to Professor Vollman, 313 B RIT. MED. J. 1445 (1996). Events that propelled the German/Prussian medical community toward a realistic ethic included the work by Albert Neisser in which he collected information on 600 cases of “unethical non-therapeutic research on humans,” which he used to emphasize the necessity of an the “informed consent” requirement for any human experimentation.

80. Id. at 1446–47.

'national necessity' were swiftly rejected because their primary crime was “violat[ing] the Hippocratic commandments which they had solemnly sworn to uphold and abide by, including the fundamental principles never to do harm—primum non nocere.”

B. U.S. Medical Health Personnel—From SERE Training Practice to BSCT Teams

Water boarding, perhaps one of the most aggressive and life-threatening of the approved harsh interrogation practices, was used in the late 1990s in a military training program designed to teach military personnel to resist captivity called SERE, an acronym that stands for “survival, evade, resist, and escape.” The training required thorough indoctrination of the trainees to calm their fears, and water boarding was practiced on soldiers with continuous assurances that that it would be administered briefly—twenty seconds—for only one session as part of the entire training.

The experience of military trainees would be dramatically different from that of the detainees who received no indoctrination regarding the practice or its dangers where water boarding was not limited to merely a single application, there was no counseling to calm their fears or reactions to being water boarded, and the water boarding was intended to have a profound physical and psychological impact on their ability to resist prolonged interrogation.

1. The Development of the BSCT Teams with Medical Health Personnel

The SERE program training sessions mandated the presence of trained psychologists throughout the training. This was found to be necessary, as later reported in Senator Levin’s Armed Services Committee Report (“Senate Report”), to enable the psychologists to “intervene should the need arise and to talk to the students during and...
after the training to help them cope with associated stress.” The implications were documented in the hearings’ report as: (1) that there is an inherent degree of stress associated with even a single training episode of water boarding applied to a student, and (2) the presence and intervention of psychologists was deemed essential to the conduct of the training process. The Senate Report also noted that the “SERE schools obviously take extreme care to avoid injuring our own soldiers,” which was not the case for detainees who were subjected to multiple doses of this regimen.

The SERE team practices on servicemen were converted to help design the programs for direct interrogation of detainees. The SERE model of application of waterboarding included medical health personnel’s involvement in gathering data based on the detainees’ experiences and reactions, which aided in designing “improved interrogation practices for future detainees,” an important part of the interrogation programs. Other medical personnel (psychiatrists, medical doctors, and psychologists) would become directly involved in these practices.

U.S. Army Colonel Larry C. James, Ph.D., who was assigned to Abu Ghraib in 2004 after the public exposure of hundreds of photographs depicting despicable acts performed on detainees at that detention facility, endorsed the critical importance to include psychologists as behavioral science advisors to assist the interrogation teams. Dr. James’s task was to remedy the chaotic situation, which included the fact that medical services were not being provided to the detainees and that many of them, including those under the age of eighteen, were not being adequately treated or cared for by the medi-

85. Id. at 3.
86. Id. at 30–31.
87. Id. at 103–05. See also U.S. Senate, Committee on Armed Services, Hearing: The Origins of Aggressive Interrogation Techniques (Release of June 17, 2008), p. 2 http://levin.senate.gov/newsroom/release.cfm?id=299242.
88. DOD-OIG Report of May 2008, supra note 71, at 23–26; Dr. Stephen Soldz, who has testified as an expert in these cases that “the release of the OIG’s report, it is now irrefutable that both SERE psychologists and Guantanamo BSCT psychologists were involved in the development of these forms of interrogation abuse, forms of interrogation that clearly constitute psychological torture and were illegal under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.”; see Tom Burghardt, Psychologists Collaborated with “War on Terror” Torture Program, GLOBAL RESEARCH (May 3, 2008), http://www.globalresearch.ca/index.php?context=va&aid=8884.
89. See LARRY C. JAMES, FIXING HELL: AN ARMY PSYCHOLOGIST CONFRONTS ABU GhRAIB (2008).
Dr. James was positively influenced by the American Psychological Association ("APA") “PENS Task Force Report” supporting the ability of psychologists to assist in and consult during interrogations, something Dr. James termed a “no brainer for any decent moral psychologist.” Dr. James addressed critics of their participation by stating “the benefits that psychologists had to offer in interrogations was just not enough for many of the radical left-wing members of the APA and other human rights and physician societies around the country.”

Unfortunately, many of Dr. James’s psychology colleagues were not so enamored with his, or their colleagues, advancing the cause of interrogations of detainees because of the primary APA Code of Ethics that prohibited their participation in these practices, despite the recommendation of the PENS Task Force. His advocacy for the Behavioral Science Consulting Teams (“BSCT”), or “biscuits,” has been challenged in many circles, including the APA’s prominent member Dr. Steven Reisner, whose parents survived the Holocaust and Auschwitz, who has relentlessly pursued the exposure of psychologists who engaged in the BSCT activities involving detainees.

Dr. James later answered the challenges to his ethics and character as a psychologist, stating, “I will be as clear as I possibly can: I strongly object to, have never used, and will never use torture, cruel, or abusive treatment or punishment of any kind, for any reason, in any setting.”

---

90. Id. at 131–34.
92. James, supra note 89, at 248–49.
94. Dan Ephron, The Biscuit Breaker, Newsweek (October 27, 2008), http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/testimoniess-of-military-psychologists/index/the-biscuit-breaker. Dr. Reisner, an advisor to Physicians for Human Rights, received an award from the New York Psychologists Association in 2010 for his efforts to expose the activities of the BSCTs including their participation in the breaking down of detainees, including some who were minors, by providing psychological advice to interrogators on methodologies for accomplishing that goal. Congratulations to Dr. Steven Reisner, Ph.D, Beacon Award Winner, Physicians for Hum. Rts. Blog (June 7, 2010), http://phrblog.org/blog/2010/06/07/congratulations-to-dr-steven-reisner-beacon-award-winner.
95. James, supra note 89, at 251. James’s denunciations in the letter to the APA President regarding SERE techniques is at odds with a number of the OLC Memos, the Senate Report of 2008, and the Department of Defense Inspector General’s Report of August 25, 2006, that document the involvement by psychologists in SERE-related activities. Senate
the presence of a BSCT team member for the entire duration of all interrogations, thereby assuring their full participation in the administration of harsh interrogation practices on the detainees.96

2. The CIA’s Use of Medical Health Personnel for Harsh Interrogations

Following the 2004 Abu Ghraib disclosures, Congress passed the Detainee Treatment Act (“DTA”), which “provided that detainees held in U.S. military custody were entitled to the protections of the Geneva Conventions” and put an end to harsh interrogations of detainees by the U.S. military.97 What was not covered by the new act was the treatment of the detainees in CIA custody, including those who had been renditioned to foreign states.98

In May 2005, Bradbury sent a memo to John Rizzo at the CIA addressing Article 16 of the Convention Against Torture, in which Bradbury approved the twelve enhanced interrogation techniques (“EITs”) applied to fourteen high-level detainees.99 The EIT practices included dietary manipulation, nudity, attention grasp, walling, facial hold, facial slap or insult slap, abdominal slap, cramped confinement, wall standing, stress position, water dousing, sleep deprivation, and the water board.100 The individual accounts of the fourteen detainees subjected to these measures are so extensive that they cannot be provided here but are available in graphic detail in the 2007 Report of the International Committee of the Red Cross.101

---

96. Id. at 258 (Dr. James’s version of torture and inhumane treatment as being mostly unrelated to interrogations of detainees seems significantly at odds with the reports from the ICRC, PHR and other entities, including interrogation logs that document the chronicity of the ill-treatment as directly related to the harsh interrogations).
98. Scharf, supra note 35, at 404–05. Goldsmith’s March 19, 2004 memo provided the CIA with more legal cover for the use of rendition and continuing authorization “to seize noncitizens from Iraq or other territory over which it exercises de facto control and transfer them for purposes of interrogation in other countries.” Id. at 404.
100. Id.
Bradbury recognized that the Detainee Treatment Act ("DTA") of December 30, 2005, as legislation that “bars the imposition of ‘cruel, unusual, [or] inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution’ on anyone in the custody of the U.S. government, regardless of location and nationality.” He concluded his legal authorization for the use of the six techniques that he perceived did not violate the Act by asserting “[t]he tactics necessary to defend against this unconventional enemy thus present a series of new questions under the laws of armed conflict.” Despite Bradbury’s contention that the interrogation practices were legally justified under the Detainee Treatment Act, to adjust, or to stop particular methods. . . . [Though the medical] personnel did not identify themselves . . . the detainees presumed from their presence and function that they were either physicians or psychologists.” The ICRC determined that the involvement of the health personnel constituted a “gross breach of medical ethics, and in some cases amounted to participation in torture and/or cruel, inhuman or degrading treatment.”

Bradbury provides explicit information regarding these in his 2005 Memo to Rizzo. Coercive techniques place the detainee in more physical and psychological stress than other techniques. Cold water is doused from a container or a hose without a nozzle. Cramped confinement involves placing the detainee in an uncomfortably small container and may last up to eight hours; the technique accelerates the physical and psychological stresses of captivity. Water boarding places the detainee face up on a gurney with his head inclined downward; a cloth is placed over his face on which cold water is then poured for periods of 40 seconds, creating a barrier through which it is difficult to breathe. The technique induces a sensation of drowning. Water boarding may be authorized for at most one thirty-day period. Bradbury Memo of May 10, 2005, supra note 73, at 14–17. Bradbury concludes that “The CIA interrogation program does not implicate U.S. obligations under Article 16 of the CAT because Article 16 has limited geographical scope. . . by its terms, Article 16 places no obligations on a State Party outside ‘territory under its jurisdiction.’”

Interestingly, the Convention Against Torture’s Article 16 states: “Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment. . . ” Convention Against Torture, supra note 2, art. 16, § 1.

102. Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to John A. Rizzo, Acting Gen. Counsel, Central Intelligence Agency, Re: Application of the War Crimes Act, at 2 (July 20, 2007) [hereinafter Bradbury Memo of July 20, 2007], available at http://www.washingtonpost.com/wp-srv/nation/documents/2007_0720_OLC_memo_warcrimesact.pdf (confirming the importance of the participation by OMS in the interrogation procedures from the careful evaluation of the detainees by medical and psychological professionals from the OMS). Id. at 26–27. He went forward to confirm the use of the “conditioning” techniques that included “extended sleep deprivation and dietary manipulation, coupled with “corrective techniques” that included a number of physical measures (facial hold, abdominal slap, facial slap), that are “observed by medical and psychological personnel.” Id. at 7–11.

103. Id. at 16–24, 75–79. Bradbury added: “Indeed, no technique is administered until medical personnel have determined that there is no medical contraindication to the use of the technique with that particular detainee,” a clear demonstration that medical health personnel were present during the commission of practices that violated of the Convention Against Torture—wherever committed—that did, contrary to his memorandum’s assur-
and the War Crimes Act as “not likely to produce a substantial risk of death, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of the functions of a bodily member, organ or mental faculty,” the fourteen high-level detainees reported specific, profound, and prolonged mental and physical effects from the infliction of these measures in various combinations of them to the representatives of the International Committee of the Red Cross.104 Either OMS or BSCT medical-health personnel were directly involved in the administration of the EITs, contrary to the significant body of international and domestic law that provided no justification for allowing their participation in these kinds of activities, or the information provided to the ICRC during interviews with the subjects of the EITs is entirely false information.105 The latter premise is obviously untenable and has never been substantiated.

Bradbury also approved of “conditioning” techniques in 2007 for detainees. These “acceptable” techniques included dietary manipulation, extended sleep deprivation, hanging by wrists from chains/shackles, and wearing disposable diapers (to prevent the need to remove the detainee from the shackled position for bodily functions). These techniques could be supplemented by so-called “corrective” measures, including “facial hold, attention grasp, abdominal slap,” all of which would occur with both medical and psychological personnel physically present or otherwise observing.106 Of greater significance was his admonition to the CIA that “medical and psychological personnel were required to be involved in every step of the interrogation procedures” coupled with the fact that “OMS personnel have the authority and responsibility to stop a technique if harm is observed.”107 Bradbury assured the CIA that none of the six regimens violated the Detainee Treatment Act, the four Geneva’s, its Common Article 3, or

105. Id. at 21–23. The U.S. Government has never disputed the contents of the ICRC’s 2007 Report, which was received by them in February 2007, a report that included their documentation of the specific acts that constituted torture of the detainees together with their denouncement of the role of medical-health professionals in these interrogation activities. Following the public leak of the report in 2009, President Obama stated: “Nobody’s above the law and if there are clear instances of wrongdoing, people should be prosecuted.” Jonathan Adams, Red Cross Report Says Detainees at CIA ‘Black Sites’ Were Tortured, Christian Science Monitor, March 16, 2009, http://www.markdanner.com/press/show/14.
107. Id. at 6–7.
other applicable U.S. law because of the very carefully crafted CIA detention and interrogation program, which included the essential component of medical and psychological monitoring at every step of the way but was purportedly narrowly applied only to only high value detainees believed to hold significant knowledge or information about terrorist activities and for which the U.S. national security interests would allow such practices to be performed on them.\footnote{Id. at 8–11.}

It should be readily apparent that despite the mounting concern in the United States and by the international community and its organizations over the mistreatment of detainees through 2007, the harsh interrogation practices, in varying forms and numbers, continued to be applied. It was not until 2008 that there were efforts to seriously upend the continuing practices that were profound violations of both domestic and international law.\footnote{Id. at 8–11.}

The conclusion from even a cursory review of these memoranda is that Bradbury, among other OLC legal counsel, provided an inordinate amount of legal justification for the Central Intelligence Agency to circumvent every international and domestic instrument enacted to prevent the infliction of physical or mental harm on captives of any kind in this theater of conflict. He created a safe-harbor sphere of exceptionalism for the Agency operating at “black sites” that might have brought tears to the eyes of medical and military defendants—charged as war criminals—who faced comparable charges before not-so-distant past tribunals that were based on mistreatment of captives and detainees.\footnote{Id. at 8–11.}

Curiously, his final paragraph of the seventy-nine-
page memorandum of July 20, 2007, asserts that such “tactics are necessary to defend against this unconventional enemy,” for which he narrows the band of EITs to be applied by the CIA to the “the most knowledgeable and dangerous of terrorists,” but which are “not intended to be used with all detainees or by all U.S. personnel who interrogate captured terrorists.”111 This concluding passage does not mention the Convention Against Torture’s Article 2(2) admonition that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”112

C. The Evidence Conflicting with OLC’s Bradbury Opinions for the CIA

The publicly-available and extensive interrogation logs that document the interrogation of detainees at Guantánamo and other locations confirm that detainees were subjected to mistreatment that rose to the level of crimes against humanity. The case of al-Qahtani, the so-called twentieth 9/11 plotter, for example, is described in an opinion by Dr. Abigail Seltzer113 based on her review of treatment logs carefully reviewed for Phillip Sands’s book.114 Her opinion provides a vivid account of the ongoing physical and mental conditions of detainees who were subjected to weeks of interrogation that included “extreme psychological trauma and dehydration to a point where a medical professional could not insert a needle into the detainee’s veins for the purpose of administering an IV.”115 The detainees were provided with what Dr. Seltzer called “decent medical care,” but this care was administered for the primary purpose of preparing individual detainees for additional harsh interrogations.116

111. Bradbury Memo of July 20, 2007, supra note 102, at 79; Convention Against Torture, supra note 2, art. II, § 2.
112. See sources cited supra note 111.
113. Dr. Seltzer, a medical doctor and psychiatrist in London, is a consulting psychiatrist with extensive experience with asylum seekers and other refugees and affiliated with the Medical Foundation for the Care of Victims of Torture. The review of the logs pertaining to al-Qahtani reveal: interrogated fifty-four days for eighteen to twenty hours per day; forced nudity, shaving, forced enemas, extreme noise, cell with no heat, large amounts of intravenous fluids with no access to a toilet, and hospitalized several times for hypothermia during the interrogations. Profile: Abigail Seltzer, History Commons, http://www.historycommons.org (search for “Abigail Seltzer”).
115. Id. at 164–72.
116. Id. at 161–68. The chapter describes al-Qahtani’s condition, evidenced in treatment logs documenting an “extremely distressed person who was entirely out of control,
There is an element of the macabre in this disclosure that cannot be reconciled in any terms with proper medical practice, given that the interrogation of the individual was conducted with a battery of medical-health personnel in attendance. These medical personnel maintained extensive logs about the effects of various harsh interrogation techniques but continued to “treat him (al Kahtani or al-Qahtani) for the effects” so they could continue to certify his capacity to endure more harsh/enhanced interrogations.\textsuperscript{117}

The interrogation practices by OMS, BSCT, and SERE medical health personnel involving detainees might seem proportionally inappropriate for comparison to the practices of Nazi physicians who tortured captives, but that criticism overlooks certain essential points. The comparatives in both settings are quite similar. Consider that in both settings: (1) government officials provided approval and encouragement for the experimentation on detainees; (2) the medical health personnel were provided with a supply of human subjects who lacked the capacity to object to the practices; and (3) the medical personnel who were ethically bound to be primarily concerned with the subject’s well-being were actually part of the teams applying the medically and/or psychologically-harmful practices. The SERE, BSCT, or the OMS medical health personnel who participated fulfilled the same role as the Nazi doctors by their decisions based on medicine, physiology, or psychology recommending or deciding on additional applications of interrogation regimens or combinations that interrogators could or should use, including the point at which interrogation had to stop.

\textsuperscript{117} S\textsc{ands}, \textit{supra} note 114, at 170–72.
1. The Required Consent for Engaging in Human Experimentation

No one could justly contend that any of the fourteen high-level detainees mentioned above, or al-Qahtani specifically, had the “option” to refuse to undergo the EITs applied to them, which remains the primary consideration in determining whether or not human experimentation was involved.\textsuperscript{118} The consent of the human subject in any medical experimentation is a core requirement that has been a cornerstone of U.S. law for decades. A Michigan circuit court case, \textit{Kaimowitz v. Department of Mental Health}, examined the propriety of an involuntary detainee at a state mental hospital who was compelled to undergo an experimental procedure to control his violent behavior in order to obtain results that were intended to benefit persons suffering from a condition similar to his.\textsuperscript{119} The \textit{Kaimowitz} court applied the Nuremberg standards of “competence, knowledge and voluntariness,” in reaching its conclusion that the human subject could not consent to the experimentation in that setting.\textsuperscript{120} This and many similar decisions underscore Bassiouni’s observation regarding the prohibitions on human experimentation since the Nuremberg Doctors Trial and particularly the codification of those prohibitions in the United States since 1960.\textsuperscript{121}

The passage and acceptance by the United States of the Convention Against Torture and other international conventions and agree-

\textsuperscript{118} 1 MENTAL DISABILITY L. REP 142, 147 (1976) (summarizing Kaimowitz v. Dep’t of Mental Health, No. 73-19434-AW (Mich. Cir. Ct. 1973)).

\textsuperscript{119} Kaimowitz v. Dep’t of Mental Health, No. 73-19434-AW (Mich. Cir. Ct. 1973). See also M. Cheriff Bassiouni et al., An Appraisal of Human Experimentation in International Law and Practice: The Need for International Regulation of Human Experimentation, 72 J. C RIM. L. & CRIMINOLOGY 1597, 1619–21 (1981) (discussing Kaimowitz). See also Geneva III, supra note 9, art. 13, and Geneva IV, supra note 9, art. 28, to which the United States was a party and directly addressed the issue of forms of experimentation of prisoners of war or civilian captives.

\textsuperscript{120} Kaimowitz, No. 73-19434-AW, at 150; Bassiouni et al., supra note 119, at 1620.

\textsuperscript{121} Bassiouni et al., supra note 119, at 1617–18, 1627–31. Bassiouni and his colleagues confirm that “there was not a great amount of interest in regulating human experimentation until the Nuremberg Trials, but that historians have had no disagreement with the tribunal decisions involving those defendants as opposed to all of the other tribunals involving war criminals.” Id. at 1641. Despite the Nuremberg Declaration and the efforts by the World Medical Association to codify the prohibitions on human experimentation, George J. Annas has put that effort into a contemporary context by his observation that “Few Americans, I’m sure, ever thought that their government would condone and practice torture, inhuman and degrading treatment, let alone publicly justify torture as necessary for national security.” George Annas, American Bioethics After Nuremberg: Pragmatism, Politics, and Human Rights. University Lecture, Boston University 11 (2005), available at www.pitt.edu/~super1/lecture/lec30701/lecture.pdf. See generally George J. Annas, AMERICAN BIOETHICS, CROSSING HUMAN RIGHTS AND Health Law Boundaries (2005).
ments and the continuous declarations and principles articulated by the World Medical Association and stated by the IMT at the Doctors Trial, tell us in absolute terms that human experimentation on prisoners in an armed conflict violates the Nuremberg Code.\textsuperscript{122} Sir Ian Brownlie, a recognized international scholar, observed that practices involving forms of assaults on an individual’s physical or psychological well-being that amounted to torture, cruel, inhuman or degrading treatment are prohibited in a variety of international instruments. The prohibition of these acts express states’ duties that constitute a recognized “body of \textit{jus cogens},” such that the obligations “cannot be set aside by treaty or acquiescence” because they are of the class of prohibited crimes against humanity.\textsuperscript{123} The Doctor’s Trial at Nuremberg focused on the fact that none of the victims of these experiments that either horribly injured or killed them were in a position to object to being a human subject.\textsuperscript{124}

2. The ICCPR Prohibitions on Human Experimentation

The United States ratified the International Covenant on Civil and Political Rights (“ICCPR”) in 1966. Article 7 of the ICCPR states: “No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”\textsuperscript{125} The U.S. interpretations of Article 7 in light of regulations on human experimentation existing at the time of its adoption in 1992 provide ample evidence of the scope of the protections that were intended to be provided under this enactment:

178. \textit{Medical or scientific experimentation}. Non-consensual experimentation is illegal in the U.S. Specifically, it would violate the 4th Amendment’s proscription against unreasonable searches and seizures (including seizing a person’s body), the Fifth Amendment’s proscription against depriving one of life, liberty or property without due process, and the Eighth Amendment’s

\begin{itemize}
\item \textsuperscript{122} Bassiouni et al., \textit{supra} note 119, at 1642–45 (confirming that, at least in the draft version of the WMA’s Code of Ethics on Human Experimentation as part of the 1964 Helsinki Declaration, “Prisoners of war, military or civilian, should never be used as subjects of experiment,” a provision which was unfortunately deleted from the final draft of the Code of Ethics.) \textit{Id.} at 1645.
\item \textsuperscript{123} Ian Brownlie, \textit{Principles of Public International Law} 488–89 (6th ed. 2003) (noting that crimes against humanity are “ranked with piracy, slavery, genocide and racial discrimination” that are essentially without dispute in the international community.)
\item \textsuperscript{124} Bassiouni et al., \textit{supra} note 119, at 1606–07.
\item \textsuperscript{125} ICCPR, \textit{supra} note 18, art. 7.
\end{itemize}
prohibition against the infliction against cruel and unusual punishment.126

Paragraph 178 and the remainder of the United States’ submissions to the ICCPR Committee express a broad interpretation of the Convention that demonstrates the Government’s understanding of the prohibition against all forms of human experimentation in any context where the human subject is incapable of providing an “informed consent.”127

The ICCPR statements represent the United States’ fully-developed understanding of the international treaties and covenants on the subject of human experimentation and the obvious prohibition of the involvement of medical health personnel in human experimentation, though these agreements were never addressed by the OLC opinions or the government agencies (CIA, U.S. Military, Contract Interrogators) that employed medical health services personnel while engaged in activities prohibited by domestic and international law.

D. The International Committee of the Red Cross (“ICRC”): Overseeing of the Plight of Detainees

The primary organization charged by the Geneva Conventions with humanitarian inspection and oversight to ensure protection of captives (civilian and military) in time of war or conflict is the ICRC.128 The nature and importance of its activities mandated by the Geneva Conventions are conducted primarily at prisoner of war camps and other detention centers during all forms of conflict that are basic knowledge for the U.S. military branches and its medical


127. Id.

128. See generally ADAM ROBERTS & RICHARD GUELFF, DOCUMENTS ON THE LAWS OF WAR (Oxford 2005) (Geneva Conventions III and IV, its Common art. 3, and the 1977 Geneva Protocol I to the Geneva Conventions of 12 August 1949, art. 5, and Protocol II to the Geneva Conventions of 12 August 1949, art. 4). The United States is not a signatory to Protocol I or II, but the very nature of the requirements in the cited articles should have had binding affect under principles of customary international law that were indicative of the practices of civilized nations in a modern conflict setting. See JORDAN PAUST, EXECUTIVE PLANS 44–46 (2007) (concluding that the decision to ignore these humanitarian obligations by the President amounted to a degrading of the United States and constituted violations of both customary and statutory international law).
Both parties and nonparties to the Geneva Conventions are obligated to cooperate with and provide access for the ICRC’s representatives to ensure fulfillment of the Conventions’ requirements that ICRC personnel may “[c]arry out the humanitarian functions assigned to them . . . in order to ensure the protection and assistance to the victims of conflict.”

The ICRC submitted a report in February 2004 regarding the treatment of detainees by the coalition forces under the Geneva Conventions’ requirements. This 2004 report documented a pattern of:

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

Detainees who were interviewed by ICRC representatives described these unlawful practices as “frequent, for those who were held in Baghdad, Basra, Ramadi, and Tacrit, which suggested to reporters a consistent pattern with respect to times and places of brutal behavior during arrest” found to be disproportional under the circumstances. The ICRC also noted the particular conditions for “high value” detainees who were held incommunicado for months, during which time they had almost no access to light, air, or the outdoors, and were subjected to very harsh treatment. The ICRC determined the overall pattern of treatment, from time of capture through internment that included forced transfers and other activities that resulted in illnesses and in some cases the death of the detainee.

---

130. Id.; Geneva III, supra note 9; Geneva IV, supra note 9.
132. Id. at 3.
133. Id.
134. Id. at 4–5.
135. Id. at 9–10.
reported that both the physical and psychological effects of these practices were torture, including the placement of nude detainees in cold cells in the dark and treatment during interrogation periods that included: hooding; handcuffed behind back, pressing face or body into ground with boots, threats of ill-treatment to detainee or family; solitary confinement; inadequate food, showers or sanitary conditions; being paraded naked outside of cell with a loss of dignity; acts of humiliation using women’s underwear and being photographed wearing such garments; exposure to loud music; handcuffed to cell bars; and forced stress positions, including squatting or standing with or without arms lifted.136

During visits to Umm Quasar, Camp Bucca, and other locations, the ICRC representatives documented similar, or in some cases, worse treatment of detainees. Not only were there reports of death resulting from harsh treatment/interrogation practices, but the representatives actually witnessed shootings of prisoners during these visits. The net result was their documentation of dozens of violations of the Geneva Conventions, some of which amounted to gross violations because of the intensity and frequency with which the treatment was administered.137

Addressing the participation of the medical health personnel in these activities, the ICRC commented, “There is no requirement or need for physicians/psychiatrists to function in this capacity.”138 Regarding the BSCT teams, the ICRC found that, “[t]here is no doctrine or policy that defines the role of behavioral science personnel in support of interrogation activities” and recommended that “DOD should develop well-defined doctrine and policy for the use of BSCT personnel.”139

136. Id. at 11–13.
137. Id. Grave Breaches involving Geneva Convention III are those “involving any of the following acts, if committed against persons or property protected by the Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health . . . or willfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.” Geneva III, supra note 9, art. 130, at 3420. A comparable definition is found in Article 147 to Geneva Convention IV, Geneva IV, supra note 9, at 3618, relating to civilians and in Article 11 of Additional Protocol 1 to the four Geneva Conventions. Geneva Protocol I, supra note 129, at 1400.
138. DOD-OIG Report of 2006, supra note 95, at 75. This did not explain how then a psychologist could make a “medical determination” in case of a situation involving a detainee during interrogation that would involve a physiological response, because psychologists can neither evaluate nor treat medical/organic conditions of the kind that are limited to physicians.
139. Id. at 75.

The ICRC’s 2007 report was addressed directly to John Rizzo of the CIA. Customarily, ICRC reports are not “public information” but are submitted on a confidential basis to government officials to enable the officials to respond to deficiencies or complaints in accordance with the laws of armed conflict and the ICRC’s protective mandate under the Geneva Conventions. The report focused on the treatment by CIA personnel of fourteen “high value” detainees, and addressed the specific issues of arrest followed by rendition, the fact that detainees were held incommunicado in continuous solitary confinement, the twelve EIT methods of ill-treatment, the conditions of detention in later stages of their detention, the health provisions the detainees faced, and the role of medical staff. The record described the individual treatment of these captives in great detail, such that the treatment should not have been ignored by the CIA’s counsel. A few months after the ICRC report, Steven G. Bradbury submitted his July 20, 2007 memorandum to Rizzo at the CIA, which focused on the harsh treatment of high-value detainees. The practices of torture that are documented in other reports from international organizations are identified later that confirm the fact that these practices continued per the approval provided by the OLC memos from Steven G. Bradbury between 2005 and 2007 to Rizzo for the CIA’s operations.

141. See id. at 3–9, 37 n.1 (expressing moral outrage that these fourteen high-level detainees had been held for up to three years or more and that despite the ICRC’s requests for information about them, nothing had been revealed by the CIA until the President announced in September 2006 that the fourteen detainees had been transferred from the CIA facilities to Guantánamo.) Id. at 3–4. The ICRC was particularly outraged by the “undisclosed detention” of the detainees, as expressed in the first note on p.37 of the narrative. ICRC’s primary mission under the Geneva Conventions of 1949, to act as the guardian of humanitarian law and convince governments to address human rights concerns, was effectively precluded for several years in case of the detainees who were renditioned. See ICRC Resource Center, http://www.icrc.org/eng/resources/documents/misc/about-the-icrc-311298.htm.
142. ICRC Report of 2007, supra note 101, at 7–9. (including continuous solitary confinement and suffocation by water, prolonged standing stress position, beatings and use of a collar, beating and kicking, confinement in a box, prolonged nudity, sleep deprivation, exposure to cold temperature, prolonged shackling, forced shaving and deprivation from solid food). Id. at 8–9 This treatment was administered irrespective of the supposed limits in the Bradbury Memo of July 20, 2007 or other limitations.).
143. See Bradbury Memo of July 20, 2007, supra note 102 and accompanying text.
144. Id. See also Bradbury Memo of May 10, 2005, supra note 73.
1. BSCT and OMS Medical Health Personnel Engaged in Human Experimentation

The direct involvement of BSCT teams in military interrogations, and of OMS in CIA-conducted interrogations, were never addressed in the OLC’s memoranda regarding possible violations of medical ethics, professional medical responsibilities, the WMA declarations, the Nuremberg Code, or U.S. domestic law prohibiting medical health personnel from involvement in interrogation and mistreatment of prisoners or detainees. These omissions, which are addressed in detail, placed the medical health personnel at considerable risk because they directly participated in activities involving the use of human subjects to help design improved interrogation techniques. Medical personnel also made medical or psychological determinations about the interrogation subject’s breaking points and advised the interrogators of the ability of a subject to withstand additional enhanced interrogation techniques.

F. Codes of Conduct for Medical Personnel Viewed through the Nuremberg Code

The activity by medical health personnel described in the preceding passages was prohibited conduct, as defined by domestic and international law. The international and domestic statutory law that prohibited this wrongful conduct could not have been overlooked, but the failure of the OLC memoranda by completely ignoring the medical health personnel’s potential culpability brought them squarely under the purview of these laws that were conveniently or intentionally not addressed in the memorandums. An examination of those recognized codified principles exposes this serious deficiency in the OLC “legal memoranda.”

The 1946 Doctors’ Trial at Nuremberg produced ten standards that physicians are obligated to conform to for experiments involving human subjects, which have been generally accepted on a worldwide basis. The standards, codified in the 1947 Nuremberg Code, addressed the required human consent for any form of human experimentation, coupled with the overarching requirement that doctors

145. Miles, supra note 1, at 50–58.
146. Id. at 59–61.
147. Nuremberg Code, supra note 78.
avoid any actions that might injure human patients.\textsuperscript{148} Principle number one provides:

The voluntary consent of the human subject is absolutely essential. This means that the person involved shall have the legal capacity to give consent, should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision. This latter element requires that before the acceptance of an affirmative decision by the experimental subject there should be made known to him the nature, duration and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonably to be expected; and the effects upon his health or person which may possibly come from his participation in the experiment.\textsuperscript{149}

This language makes the practices by medical health personnel in the detainee camps untenable, given that the human subjects had neither the capacity nor the ability to legitimately “consent” to experimental combinations of harsh interrogation practices.

The WMA upgraded the Nuremberg Code in the 1948 Declaration of Geneva, to include a new “Physician’s Oath” intended to be administered at the time of entry into the medical profession.\textsuperscript{150} The introduction to the Physician’s Oath reads in part: “[T]his oath requires the physician to ‘not use [his] medical knowledge contrary to the laws of humanity.’”\textsuperscript{151} A physician already was obligated to swear to “[p]ractice my profession with conscience and dignity; the health of my patient will be my first consideration.”\textsuperscript{152} The simultaneous adoption of the Universal Declaration of Human Rights (“UDHR”) enumerated and strengthened the recognized fundamental rights for “all persons” in the wake of the Nazi-era excesses during World War II.\textsuperscript{153} The WMA’s International Code of Medical Ethics incorporated

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{148} Vollman & Wineau, supra note 79.
\item \textsuperscript{149} Id. Nuremberg Code, supra note 78, art. 1.
\item \textsuperscript{150} World Medical Association, Declaration of Geneva (Sept. 1948), Physician’s Oath [hereinafter WMA Physician’s Oath], available at http://www.cirp.org/library/ethics/geneva/; UDHR, supra note 8, arts. 3, 5, 7, 8. U.N. General Assembly Resolution 217’s admonition states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,” requiring “the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.” Id. arts. 5, 8.
\item \textsuperscript{151} WMA Physician’s Oath, supra note 150 (alteration in original).
\item \textsuperscript{152} Id.
\item \textsuperscript{153} UDHR, supra note 8, arts. 1, 3, 5, 7, 8.
\end{itemize}
\end{footnotesize}
the Physician’s Oath and was the next important document addressing human experimentation.\textsuperscript{154}

The International Code of Medical Ethics was next included in the WMA’s 1964 Declaration of Helsinki, which provided additional important recommendations for physicians engaged in biomedical research, especially in cases involving human subjects.\textsuperscript{155} The ethical requirements of the International Code that were directly applicable to Guantánamo and other detainee locations include:

Biomedical research involving human subjects must conform to generally accepted scientific principles and should be based on adequately performed laboratory and animal experimentation and on a thorough knowledge of the scientific literature . . . . Every biomedical research project involving human subjects should be preceded by careful assessment of predictable risks in comparison with foreseeable benefits to the subject or others. Concern for the interest of the subject must always prevail over the interests of science and society.\textsuperscript{156}

The Declaration of Helsinki further declared that, “it is the duty of the physician to remain the protector of the life and health of that person on whom biomedical research is being carried out.”\textsuperscript{157} Article 10 of the declaration confirms the physician’s obligation to obtain consent from the patient if the patient is under duress but also requires that an independent physician, who is not engaged in the experimentation, be employed to accomplish that important requirement.\textsuperscript{158}

It is glaringly apparent from the known BSCT and OMS practices that none of these codes or human-subject concerns were an integral part of the protocols’ “treatment” of detainees, save making decisions

\begin{itemize}
\item \textsuperscript{155} World Medical Association, Declaration of Helsinki (1964) [hereinafter Declaration of Helsinki], available at http://cirp.org/library/ethics/helsinki/. The principles that are included in this declaration have a significant impact on the ethical practice of using detainees and captives for human experimentation, even if the purpose would be for devising “improved” methods of interrogation where torture, inhumane or degrading treatment are at the core of the experimentation.
\item \textsuperscript{156} Id. at I(1), I(5).
\item \textsuperscript{157} Id. at III(1).
\item \textsuperscript{158} Id. at I(10). Compliance with the Declaration of Helsinki is impossible in the situation involving a Guantánamo (or any location) detainee who is subjected to practices amounting to torture or inhumane treatment on his physical and mental being without even a consideration of the detainee’s consent, much less the required ethical practice for protection of the subject and his psyche from harm during the experimentation on him to determine which or any combination of tortures is most effective.
\end{itemize}
to stop the harsh interrogations at some extreme point. Bradbury even opined that the CIA interrogation techniques, with their careful screening procedures and medical monitoring, “do not shock the conscience,” an apparent reference to the language in the U.S. Supreme Court decision in County of Sacramento v. Lewis.

WMA’s 1975 Declaration of Tokyo directly addressed the primary subject of torture. The declaration codified the essential ethical obligations for medical health personnel, prohibiting their involvement in torture occurring during the detention and imprisonment of any human subjects. The declaration defines torture as “the deliberate, systematic or wanton infliction of physical or mental suffering by one or more persons acting alone or on the orders of any authority, to force another person to yield information, to make a confession or for any other reason.”

The “any other reason” language eliminates all possible tactical, strategic, or other exigencies that would justify subjecting detainees to water boarding, shackling, sleep deprivation, and a variety of other inhumane practices. The instrument absolutely precludes even the tacit participation by medical personnel in torture activities, making the active involvement of the CIA’s OMS or military BSCTs in interrogation activities out of the question. The introductory language states in absolute terms: “The doctor shall not provide any premises, instruments, substances or knowledge to facilitate the practice of torture or other forms of cruel, inhuman or degrading treatment or to diminish the ability of the victim to resist such treatment.”

The Medical Ethics Manual published by the WMA in 2005 incorporated all of the previously cited major declarations, many of which confirmed the requirement for human subjects’ consent to any form

---

159. Bradbury Memo of May 10, 2005, supra note 73, at 8. Bradbury documents the CIA’s OMS involvement in evaluating detainees before any enhanced technique is authorized in order to ensure that the detainee is not likely to suffer any severe physical or mental pain or suffering as a result of interrogation. Id. at 6–8. He also makes reference to OMS Guidelines on Medical and Psychological Support to Detainee Rendition, Interrogation and Detention (2004), which is a clear indication that the OMS medical and psychological personnel were firmly involved in all phases of the detainees’ treatment. Id.


162. Id.; see generally Convention Against Torture, supra note 2; ICCPR, supra note 18.

163. Declaration of Tokyo, supra note 161.

164. Id. The language is quite specific, stating that the doctor is also prohibited from being “present during any procedure during which torture or other forms of cruel, inhuman or degrading treatment are used or threatened.” Id. (emphasis added).
of experimentation as the cornerstone of the physician’s ethical obligations.\textsuperscript{165} These would include the Nuremberg Code, the International Covenant on Civil and Political Rights (“ICCPR”), the Declaration of Helsinki 1964, the Declaration of Tokyo 1975, the Declaration of Geneva 1983, and similar international instruments.\textsuperscript{166}

G. U.S. Law Regulating Human Experimentation

The U.S. Department of Health and Human Services (“HHS”) Office for Human Research Protections (“OHRP”) provides extensive information for medical health professionals to identify their basic obligations under federal guidelines for human experimentation projects.\textsuperscript{167} The information provided by OHRP’s extensive website includes responses to Frequently Asked Questions, the first of which is “Do the human research regulations apply to non-U.S. Institutions” which is answered in the affirmative.\textsuperscript{168} The answer to the question “Are investigators responsible for obtaining and documenting informed consent,” also confirms the necessity for obtaining consent from human subjects, and makes an exact reference to the provisions of the Code of Federal Regulations that are applicable to the obtaining of that consent.\textsuperscript{169}

HHS’s specific federal regulations\textsuperscript{170} pertain to a variety of other persons in situations involving human experimentation and includes what is referred to as “The Common Rule.” The Common Rule for the Protection of Human Subjects was previously adopted by both the Departments of Justice and Defense, along with other federal agencies.\textsuperscript{171} Again, the issue was not addressed in the OLC memos in terms

\begin{footnotesize}
\begin{enumerate}
\item[166.] Nuremberg Code, supra note 78; ICCPR, supra note 18; World Medical Association Handbook of Declarations, available at http://www.wma.net/en/30publications/10policies/10about/index.html
\item[168.] Id.
\item[169.] Id. See also 45 C.F.R. §§ 46.116, 46.117.
\item[170.] 45 C.F.R. § 46(A)(46).
\end{enumerate}
\end{footnotesize}
of the legal or ethical obligations of medical health personnel that were imposed by the federal regulations.\footnote{172}

1. The American Medical Association’s Position on Medical Ethics for Interrogation and Torture

The American Medical Association ("AMA") is a constituent member of the World Medical Association, which requires its top officials to participate directly in the discussions and voting on WMA’s declarations as part of that international professional relationship.\footnote{173} The AMA’s ethical guidelines and opinions confirm its adoption of the Declaration of Helsinki and the Declaration of Tokyo.\footnote{174} Their positions were reinforced in a formal report to the AMA’s Council on Ethical and Judicial Affairs in 2006 that addressed the growing concern over the issue of physicians’ participation in the interrogation of detainees at Guantánamo and other locations.\footnote{175} The report focused on the significant limitations on physicians’ participation in interrogations of detainees, which were outlined in the Army Field Manual, the prohibitions of the Convention Against Torture, the four Geneva Conventions, and other recognized international instruments.\footnote{176} The AMA’s report added specific recommendations to two of its existing Ethics Opinions, 2-067 (Torture) and 2-068 (Interrogations), whose language previously prohibited physicians from involvement in any activities that would violate the recognized battery of instruments just identified.\footnote{177}

The American Psychiatric Association, an affiliate of the AMA, maintained a comparable ethical approach to the AMA’s on the sub-
ject of torture and interrogations, except that APA members could, under certain circumstances, provide advice on interrogations within certain confined areas.\textsuperscript{178} Physicians for Human Rights ("PHR"), however, noted that the Psychiatric Association was in conformity with the AMA’s formal report on Medical Ethics, which precluded psychiatrists from “[d]irect participation in interrogations.”\textsuperscript{179} Despite this prohibition, it is apparent that psychiatrists participated directly in these practices at Guantánamo and other detention camps, planning and conducting interrogations, observing high-value detainees to determine the effects of the interrogations and other practices (isolation, sleep deprivations, manipulations of environment, and the like), while evaluating the psychological, mental, or physical impacts to determine the capacity of the detainee to undergo further harsh interrogation.

2. The American Psychological Association’s Position on Participation in Harsh Interrogations

Prior to 2002, the APA’s ethical code provided protections for its members who engaged in human experimentation but only if they complied with recognized protocols.\textsuperscript{180} A 2002 proposed amendment to the ethical code was fashioned to permit the psychologist to waive the informed consent requirement in certain circumstances, for example “where permitted by law for a valid purpose.”\textsuperscript{181}

The APA’s 2002 proposed amendment was followed by a three-year study for Psychological Ethics and National Security (the “PENS Study”) designed to evaluate the ethical constraints that prevented psychologists from participating in national security-related activities involving detainees.\textsuperscript{182} The 2005 PENS Study Report provided a series of observations and recommendations, one of which asserted that psychologists “should not engage in, direct, support, facilitate or offer training in torture or other cruel, inhuman or degrading treat-


\textsuperscript{179} AMA CEJA REPORT 10-A-06, supra note 176.


The APA had already supported the Convention Against Torture in its overall ethical requirements, which would be used to evaluate any situation in which a member was involved in interrogations where such practices might occur. The PENS Study Report, however, failed to address the nature of the techniques being used as approved interrogation methods that were continuously approved in OLC memoranda including shackling, sleep deprivation, water boarding, and other forms of cruel, inhuman, and degrading treatment. Additionally, by the time the PENS Study began, psychologists were already participating in military interrogations with BSCT teams at Guantánamo, Abu Ghraib, and Bagram.

Section III of the PENS Study Report contained ten specific recommendations, some of which reaffirmed the 1986 APA resolution supporting the Convention Against Torture. The Report’s eighth recommendation, however, conflicted with the Convention’s position by opening the door to the participation of psychologists in activities involving interrogations where “national security issues” were at the forefront. This point caused considerable debate within the APA’s governance and membership over psychologists’ participation in the interrogation practices. The 2008 Levin Senate Report was pronounced in its condemnation of psychologists’ participation not only in torture but in all forms of cruel, inhumane and degrading treatment of detainees. When an APA referendum for reforming the weakened ethical codes passed but could not be fully implemented...
during the 2007 APA convention, a number of its members, led by Dr. Beth Shinn, promptly resigned their membership.190

By the time of the new s administration in 2009, the APA’s leadership fully recognized the predicament created by its members’ active participation in this highly unethical activity and proposed a new resolution to eliminate permissive involvement in human experimentation, which addressed the existing ethical code’s failure to provide for sanctioning of any of its members for involvement in these unlawful activities.191

VI. Responsibility of Medical Health Personnel for Torture and Human Experimentation

The 2007 ICRC Report addressed the issues of provision of health care and the role of medical staff observing that “health personnel gave instructions to interrogators to continue, to adjust, or to stop particular methods.”192 The extent of this activity was substantially in conflict with any suggestion that psychologists or other medical health professionals limited their involvement in interrogations.193 The ICRC Report limited the role of physicians and other medical personnel by “expressly prohibit[ing] them from using their scientific knowledge and skills to facilitate such practices in any way.”194 The ICRC also confirmed that “the interrogation process is contrary to international law [to the extent that] participation of health personnel in such a


193. JAMES, supra note 89, at 95 (documenting Dr. James’s major goals, including, “Do no harm . . . . I wanted to leave Iraq knowing that no prisoners were physically or psychologically hurt while I was there, and that the structures I put in place would ensure that none would be hurt after I left.”)). Id.

194. ICRC Report of 2007, supra note 101, at 23. The ICRC Report confirmed that the primary obligation of the medical health personnel at the detention facilities should have been “the health care and interests of the detainee.” Id. The report condemned the participation of health professionals from participating in the interrogation processes which it found were “contrary to international law and the participation of health personnel in such a process is [completely] contrary to international standards of medical ethics.” Id.
process is contrary to international standards of medical ethics.” 195
These findings are essential to the mission of the ICRC under the Ge-
neva Conventions. It should be noted that the ICRC was eventually
released after being leaked to the public in 2009 despite the agency’s
customary confidentiality that surrounded these reports to particular
government agencies. 196

A. The Report of Dr. Stephen H. Miles

Dr. Steven H. Miles’s book, Oath Betrayed, provided in-depth cov-
erage of the involvement of BSCTs in conducting interrogations that
were, in his opinion, “tantamount to torture,” based on the earlier
disclosures in the 2004 ICRC reports and information gathered from
other sources. 197 Miles described how General Miller, who worked
with Joint Task Force (“JTF”) 170 and commanded the Guantánamo
Bay Camp, “created [the BSCT] teams to work with intelligence com-
mittees in Iraq and Guantánamo.” 198 He stated that “These teams,
comprised of operational behavioral psychologists and psychiatrists,
are essential in developing interrogations strategies and assessing in-
terrogation intelligence production.” 199 He concluded that BSCTs
“played a central role in designing interrogation plans to exploit pris-
oners’ psychological and physical weaknesses.” 200

195. Id. at 23 (adding that the “primary purpose appears to have been to serve the
interrogation process, and not the patient [in which case] the health personnel have con-
donned, and participated in ill-treatment.”).
197. MILES, supra note 1, at 49 (describing how General Sanchez and Colonel Pappas
“remade Abu Ghraib as an interrogation center . . . [where] military personnel and ‘special
agents’ without name tags came from Guantánamo and Afghanistan to assist in the pro-
ject,” and where “Army Intelligence devised interrogation plans, which it and the guards
jointly administered . . . CIA independently admitted unregistered ghost prisoners.”).
198. Id. at 53–54.
199. Id. (taking into account a detainee’s emotional and physical strengths and weak-
nesses for interrogation approaches designed to manipulate the detainee’s emotions and
weaknesses to gain his willing cooperation). The ICRC had noted that this activity included
medical health personnel threatening to withhold medical treatment unless detainees co-
operated during the interrogation. ICRC REPORT OF 2007, supra note 101, at 22. The
dichotomy here is that medical personnel did provide adequate medical care when injuries
or conditions of the detainees warranted but quickly slipped back into the medical health
person’s norm in the face of real medical concerns that had been in part, caused by the
participation of other medical health personnel in harsh interrogation.
200. MILES, supra note 1, at 53–54. The ICRC Report noted that this activity included
medical health personnel threatening to withhold medical treatment unless detainees co-
operated during the interrogation. Id. at 61–62. The ICRC’s 2007 Report identified this
major delict on the part of medical health personnel who participated in these activities in
these words: “Medical ethics are based on a number of principles; [the first two] include
the principle of beneficence (a medical practitioner should act in the best interest of the
General Miller denied the ICRC access to the detainee’s medical records, which were routinely provided by the physicians to intelligence personnel, who the physicians were advising whether the detainees were strong enough to withstand further questioning during interrogations. The medical and clinical information obtained by the BSCT from the detainees’ interrogations and medical records were used for two purposes: “[c]lear prisoners for harsh interrogation,” and “to develop a plan to break a prisoner’s resistance to questioning.”

Dr. Miles notes the extraordinary position taken by Secretary Rumsfeld to withhold prisoner’s medical care, by authorizing punitive denials of treatment that apparently continued throughout the prison system, resulted in unequivocal direct violations of Geneva Convention III. These activities involving detainees at Abu Ghraib, Guantanamo, and other locations support the ICRC’s 2007 Report conclusions that medical health personnel “[p]articipat[ed] . . . in the interrogation process and, either directly or indirectly, in the infliction of ill-treatment constituted a gross breach of medical ethics and, in some cases, amounted to participation in torture and/or cruel, inhuman or degrading treatment.” This finding mirrors the language of the Convention Against Torture’s and other conventions’ prohibitions of this unethical conduct by medical health professionals in the case of detainees.

B. The 2008 Report to the U.S. Helsinki Commission

In 2008, Dr. Allen S. Keller, M.D., provided a statement to the U.S. Helsinki Commission addressing the issue of torture by U.S. personnel reported earlier in greater detail in a published report by the Physicians for Human Rights (“PHR”). The Helsinki Commission is

---

201. MILES, supra note 1, at 54.
202. Id. at 55. This consists of a complex and bizarre number of practices in this consulting by both psychiatrists and psychologists, all of which confirmed the substantial degree of participation in the design, plan, evaluation, and use of the information detained from the interrogation practices—“human experimentation” assisted by medical health personnel at every step of the process. See id. at 62–67.
203. Id. at 61–62.
204. ICRC REPORT OF 2007, supra note 101, at 26–27.
205. Id.
an independent U.S. Government agency created by Congress in 1976 to monitor and encourage compliance with the 1975 Helsinki Final Act commitments.” Dr. Keller’s testimony was based on studies he conducted in collaboration with his colleagues, all of whom had specialized skills and experience on the subject of victims of torture and mistreatment which they had obtained while on assignment in many foreign locales. His testimony was also based in part on the studies and evaluations, originally performed for the PHR, that involved one detainee from Abu Ghraib and one from Guantánamo, for whom Dr. Keller chronicled the variety of enhanced interrogation techniques, ranging from beatings to sleep deprivation, sensory overload and deprivation, sexual humiliation, temperature manipulations, and others.

Dr. Keller denounced the practices that had been administered to the detainees and described them as “techniques [that] can cause significant and long lasting psychological and often physical pain and harm.” He advised the commission that “[m]any forms of torture and abuse, including ‘enhanced interrogation techniques,’ may leave no physical scars but can nonetheless cause severe physical and psychological suffering.” After conducting extensive examinations and interviews of the two detainees, Dr. Keller rendered his opinion that “torture and inhuman interrogation techniques are cruel, ineffective and can have devastating health consequences, as evidenced by the two former detainees I described. . . . [T]hese abuses and the harm they cause deeply offend medical ethics and values.”

---


208. Helsinki Commission, supra note 206. Dr. Keller’s unimpeachable qualifications to render these opinions are based on his recognized status as a Professor of Medicine at NYU School of Medicine, as a Director of a Program For survivors of Torture in New York City, and a member of the American College of Physicians Ethics and Human Rights Committee.

209. Id. at 2–3.

210. Id. at 2.

211. Id. at 2.

212. Id. at 11.
C. Investigations and Reports by the Physicians for Human Rights

PHR, a recognized nonprofit organization founded in 1986, published several reports based on information it had collected since 2004 regarding the "systematic use of psychological and physical torture by U.S. personnel at [detention locations]." ²¹³ Their 2005 report, Break Them Down, chronicles the various techniques and their impacts, the methods of administering these techniques, and the effects on the detainees.²¹⁴ This in-depth analysis documents the fact that Secretary Rumsfeld and the Working Group recognized that the approved practices were in direct conflict with the Field Manual and the four Geneva Conventions but were to be applied to the new category of detainees who were not to be considered "prisoners of war." ²¹⁵ PHR noted that during the Working Group’s efforts to design interrogation methods, their concerns about the harmful effects on the detainees of some of these practices resulted in a recommendation for the use of "medical sign-offs," in addition to “command approval and monitoring,” though the Working Group possessed no evidence that these safeguards would somehow prevent or control harmful psychological impacts.²¹⁶

PHR’s 2009 Report, Aiding Torture, further confirmed that the medical health professions were engaged in torture, which included the activities previously performed by the OMS and BSCT personnel.²¹⁷

The PHR’s June 2010 White Paper addressed the issue of using human subjects in research and experimentation in the “enhanced” interrogation programs that were ongoing at Guantánamo and other locations.²¹⁸ The White Paper documented research by medical health personnel that focused, for example, on detainees’ susceptibility to severe pain. A program had been conducted where twenty-five detainees were subjected to “individual and combined applications of

²¹⁴. Id.
²¹⁵. Id. at 85–88.
²¹⁶. Id. at 123.
²¹⁷. PHR Aiding Torture, supra note 213, at 4–6. PHR’s findings were substantiated by the release in 2009 of the CIA Inspector General’s Report of 2004 that “provides greater detail on the central role that health professionals played in the CIA’s torture program and reveals a level of ethical misconduct that had not previously come to light.” Id. at 1.
²¹⁸. PHR REPORT OF JUNE 2010, supra note 83, at 1.
the EITs” to determine their susceptibility to severe pain, despite the fact that the particular experiment had “no direct clinical health care applications,” and could not be categorized as “in the detainees’ personal interest [or] part of their medical management.”

Appendix 1 of the White Paper chronicles the path of SERE activities by addressing the results of their applications in medical terms relating to psychological and other measurable impacts to detainees, which resulted from the administration of EITs and SERE practices, and were administered by the BSCT teams.

D. Government Reports and Hearings that Confirm Medical Health Personnel Involvement in the Torture of Detainees


By 2006, the Department of Defense’s Office of Deputy Inspector General for Intelligence (“DOD OIG”) completed an extensive review of detainee abuse in a report addressing the practices that were ongoing at the detention camps. This report documents the fact that 70,000 detainees had passed through custody in various camps, and that the treatment of detainees produced a total of 842 criminal investigations, which resulted in some disciplinary action involving U.S. military personnel.

Appendix N to the Report, provided by the U.S. Army Surgeon General, was the result of extensive interviews of medical personnel at detainee camps in Bagram in Afghanistan, Guantánamo, and also in Iraq. The Surgeon General documented the considerable confusion on the part of medical personnel as to the “medical standard of care for detainees,” arising in part because of a number of different

219. Id. at 9. The “why” of this study was reported by PHR as a “key part of the OLC’s legal strategy to demonstrate the lack of intent to commit torture” an issue that had been addressed in a 2003 OLC Memo authored by John Yoo suggesting that “a defendant could show that he acted in good faith by taking such steps. . .reviewing evidence gained from past experience.” Id. at 11 (quoting John Yoo’s March 14, 2003 memorandum to William J. Haynes II, General Counsel of the Dept. of Defense) (citation omitted).

220. Id. at 20–24.

221. DOD-OIG REPORT OF 2006, supra note 95, at i. The executive summary recommended that “DOD officials overseeing and determining policy on detainee operations and training personnel involved in detention and interrogation operations should read this report to understand the significance of oversight, timely reporting, and investigating allegations of detainee and prisoner abuse.” Id. at i.

222. Id. at 5.

223. Id. at 71.
The Surgeon General found that there was “no doctrine of policy that defines the role of behavioral science personnel in support of interrogation activities,” a deficiency that he stated required the Secretary of Defense to develop a well-defined doctrine and policy for their use.225 This, of course, was never accomplished.

One of the Surgeon General’s recommendations that exposed the lack of coherence was that “at all levels of professional training, medical personnel should receive instruction on the requirement to detect, document and report actual or suspected detainee abuse.”226 This recommendation provided no guidance or a bright-line rule as to what interrogation practices, if any, would constitute abuse of a detainee.227 Some of his recommendations would have been at odds with the existing OLC memoranda and certainly in direct conflict with the ongoing practices of the BSCT and OMS personnel, making it questionable that this set of findings and recommendations materially altered the interrogation processes that were still imbedded and ongoing at this later stage of ill-treatment of the detainees.

2. The Senate Armed Services Committee Hearings on the Origins and Practices of Aggressive Interrogations

The Senate Armed Services Committee Hearing produced a Senate Report in November 2008, which is a very comprehensive examination of detainee abuse.228 The committee listened to testimony from dozens of witnesses who had actively participated in the interrogation processes from design and management, to implementation, enabling the committee to provide a comprehensive report on the interrogation process that was ongoing during the first two-to-three years after 9/11. The committee was also able to identify some of the decision making and attitudes about the practices and their imple-

---

224. *Id.* at 72 (noting that inconsistencies in medical screenings, medical care, and medical documentation were also found to exist, which was further compounded by medical personnel who were unclear whether interrogations could be continued if a detainee required medical care during the interrogation.).
225. *Id.* at 76.
226. *Id.* at 75.
227. *Id.* at 74.
228. *Id.* at 53.
mentation. President Bush advised the committee that his decision to develop an “alternative set of tough interrogation techniques for Abu Zubaydah” and other “high value detainees” had been a goal of his administration. The committee learned that the highest officials of the administration, including National Security Director Condoleezza Rice and CIA Director George Tenet, were involved in these high-level decisions. The Senate Report exposes the early knowledge regarding the long-term effects of the application of harsh interrogation techniques to the detainees, based on a report to the senior commanders at Guantánamo in which Major Burney, a psychiatrist, addressed some of the category II and III techniques approved by Secretary Rumsfeld as follows:

The interrogation tools outlined could affect the short term and/or long term physical and/or mental health of the detainee. Physical and/or emotional harm from the above techniques may emerge months or even years after their use. It is impossible to determine if a particular strategy will cause irreversible harm if employed.

The Senate Report documented that the command at Guantánamo received a number of visiting officials from the U.S. government, including the CIA’s Rizzo and other senior generals, whose goal was to move the EIT process along in order to obtain results from the detainees’ interrogations. In response to demands for “get-tougher” interrogation techniques, the BSCT teams were engaged to design the interrogation techniques and the policies for conducting them, actions that were direct violations of prohibitions against involvement of medical-health personnel, including psychologists, in this kind of activity.

The original focus of the harsh interrogation policies was detainee number sixty-three, Qahtani, the reputed twentieth 9/11 plotter. His interrogation caused strong protests by FBI agents that “[i]t is irrelevant whether these detainees are considered prisoners of war, they are still entitled to minimal conditions of treatment—many of the techniques addressed appear to move well beyond the minimal

230. Id. at 17.
231. Id. at 16–17.
232. Senate Executive Summary, supra note 229, at 52 (citation omitted).
233. Id. at 50–52.
requirements.”234 Documents later reviewed by the Senate committee confirmed that the interrogation techniques were acquired by “[t]he staff at Guantánamo by working with BSCT teams, and by having gone up to our SERE school and developed a list of techniques which our lawyers decided and looked at, said were OK.”235

The Senate Report confirms that in early 2002, senior JAG officers of the Armed Services’ four branches challenged the legality of the proposed harsh interrogation techniques at Guantánamo and elsewhere, but their concerns were too late to derail them because it was already policy during the early days following the 9/11 attack.236 U.S. Navy Captain (later Rear Admiral) of the Judge Advocate Corps Jane Dalton was legal counsel to the Chairman of the Joint Chiefs of Staff, General Myers, the highest ranking officer at the time. She described Lt. Col Beaver’s memorandum on interrogation practices and authority to perform all them as “woefully inadequate,” because it “relied on a methodology and conclusions that were very strained,” necessitating in her mind a complete and thorough review of the entire interrogation policy and its consequences.237 General Myers advised her to cease the effort to pursue any policy review for the questionable interrogations.238 As the Senate Armed Services hearings determined, there were a number of successful steps taken in 2002 to foreclose any internal debate on conduct of harsh interrogation.239

234. Id. at 85–86.
235. Id. at 88 (disclosing that the interrogation techniques applied to prisoner #063 al Qahtani for nearly two months (November 22, 2002, to January 16, 2003) included these additional measures: “stripping, forced grooming, invasion of space by a female interrogator, treating (sic) like an animal, using a military working dog, and forcing him to pray to an idol shrine.”). These practices were not included in the Bybee Memo of August 1, 2002, supra note 53, or the Bradbury Memo of July 20, 2007, supra note 102. See also ICRC Report of 2007, supra note 101, at 28–37 (containing the narratives of unspeakable practices conducted on several of the fourteen high-level detainees that defy any attempt to except them from the prohibitions of the Convention Against Torture); Convention Against Torture, supra note 2, arts. 1, 4(1). Not everyone would find these practices repugnant as Jane Mayer notes the glee with which CIA operatives either participated in them or those who relished the opportunity to watch them being applied to the high level detainees. Mayer, supra note 27, at 271–75.
237. Senate Report, supra note 84, at 70–72.
238. Id. at 72.
239. Senate Executive Summary, supra note 232, at xviii–xix.
E. Standard Operation Procedures for Interrogation and Treatment of All Detainees

At the time of the creation of a list of so-called Standard Operating Procedures (“SOPs”) at Guantánamo, Maj. Paul Burney questioned the propriety of implementing the SOPs at Guantánamo on a number of grounds, including the lack of trained interrogators, the need for psychiatric screening of the interrogators, and the requirement that they also go through the SERE training program. Despite his concerns, SOPs were routinely carried out on most detainees at Guantánamo, including isolation, sleep deprivation, environmental manipulation, and other harsh measures. Mr. Mohammad Jawad, an Afghanistan Pashtu juvenile captured in early January 2003 in Kabul, was subjected to a number of SOPs at Guantánamo, including sleep deprivation, demonstrating that once the government-approved program for harsh treatment and interrogations was “unleashed,” the supposed constraints, limitations, or required approvals for monitoring them became a window dressing. The ninety-seven page Amnesty International report chronicles a passage for Mohammad Jawad.

240. Id. at 100–01 (having “approved an interrogation plan that included SERE techniques and [being] willing to consider using them in the [Qahtani interrogation,” Major General Miller “ testified to the Army Inspector General that the techniques in the SOPs ‘were too aggressive and not appropriate for use [at Guantánamo,]’” despite the fact that they were used for an extended period of time under his command.).


242. Interviews with then Major, now Lieutenant Colonel David A. Frakt, USAFR (JAG Corps), now Professor of Law at Berry University School of Law in Orlando, Florida, who served as defense counsel for Mohammad Jawad from January 2008 through July 2009. Major Frakt forced the government to produce records that confirmed that his client, Mr. Jawad, was subjected to a substantial number of “frequent-flyer” adjustments (prolonged sleep deprivation) that involved moving him from cell to cell every hour to two hours during a fourteen day period. This occurred in 2005 after Secretary Rumsfeld had ordered these practices to be ended. Mr. Jawad, and Mr. Kadhri, both juveniles when first captured, were subjected to this treatment along with many other Guantánamo detainees, all of whom were entitled to special protections under the Geneva Conventions and the laws of armed conflict; see also Amnesty International, United States of America from Ill-Treatment to Unfair Trial, The case of Mohammed Jawad, child “enemy combatant” (13 August 2008) available at http://www.amnesty.org/en/library/asset/AMR51/091/2008/en/d47d41f693e11dd-8e5e-43ca85d15a69/amr510912008eng.pdf Jawad documented to a military investigator the degree of interrogation abuse he underwent at Bagram (while he was a juvenile) as well as what he had witnessed occurring to other detainees. Id. at 10–11.

through ill-treatment from Kabul to Guantánamo, which did not end until the U.S. Government released him from custody in 2009 as a result of the intense and successful efforts of his counsel, then Maj. David A. Frakt, USAFR (JAG). 244

VII. Justifying Redress for Victims of Torture and Human Experimentation

A. U.S. Personnel Administered Torture to the Detainees from 2001 through 2008

Irrespective of this recount of U.S.-constructed and -ordered “wrongs” inflicted on detainees with the direct participation of medical health personnel after the 9/11 attacks at Guantánamo, the “enhanced interrogation” victims have not been afforded realistic or adequate avenues for any form of redress. The majority of these illegal acts were performed by U.S. military personnel, CIA agents, and civilian contractors, with the direct involvement of medical health personnel who were in the employ or agents of the United States. 245 Many of the practices perpetrated on these detainees were unquestionably torture under the Convention against Torture and 18 U.S.C. § 2340 as well as serious violations of other international and domestic statutory law. The medical-health personnel were even further outside of those prohibitions, measured by the significant number of declarations, medical ethics, and other international and domestic instruments whose obligations were violated by their conduct involving the detainees for several years. 246

Despite the clear violation by U.S. personnel of detainees’ human rights, there are no adequate legal remedies available to the detainees who were victims of this treatment. The government has chosen a different path to dispose of these issues of breaches of domestic and international law.

1. Terminating the Legalization and Practice of Torture of Detainees

A January 27, 2009, Executive Order by President Obama (Ensuring Lawful Interrogation—EO 13491) withdrew the extensive legal

244. Id.
246. See Declaration of Tokyo, supra note 161, arts. 1, 3, 4; ICCPR, supra note 18, art. 7; Geneva III, supra note 9, art. 13; Geneva IV, supra note 9. See also supra notes 126–27 and accompanying text.
memoranda that were issued from September 11, 2001, until January 20, 2009, by the Office of Legal Counsel from operative consideration for all branches of the government in the conduct of interrogations, unless further guidance was provided by the Attorney General.\footnote{Exec. Order No. 13491, 47 Fed. Reg. 16 (Jan. 27, 2009), available at http://www.archives.gov/federal-register/executive-orders/2009-obama.html.}


2. The Investigation of CIA Activities Involving Detainees—Another Road to Nowhere

In August of 2009, Attorney General Eric Holder designated John H. Durham, a veteran Department of Justice prosecutor, to investigate the CIA interrogations, including those resulting in the deaths of detainees.\footnote{Carrie Johnson, Prosecutor to Probe CIA Interrogations: Attorney General Parts with White House in Approving Preliminary Investigation, Wash. Post, Aug. 25, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/08/24/AR2009082401743.html.} Durham’s report, which is long overdue despite Justice De-
partment assurances of its release in 2010, remains unavailable at the
time of this paper. The Obama administration elected to take the
path of least resistance by pursuing no other direct action beyond
Durham’s inquiry despite the broader issue of individual and state ac-
countability for the prolonged mistreatment of detainees, which
involved many actors beyond just those who administered the harsh
interrogations. Except for a number of low-level military court-martial
proceedings, together with administrative actions, further criminal
proceedings are unlikely against anyone (CIA or military personnel),
particularly not the medical health professionals for their direct par-
ticipation in acts of torture and human experimentation.252

It may seem satisfactory to many that the offending legal opinions
have been withdrawn and the illegal procedures authorized by them
are no longer operative per Executive Order No. 13491,253 but that
accomplishes only the very first in a series of steps a state would be
obligated to consider to fulfill its international responsibilities.254 The
persons who were direct victims of the ill-treatment of detainees, in-
cluding detainees’ survivors in the cases of death, currently face closed
forums in the United States for obtaining any form of relief or com-
ensation because of the wrongs that were committed. The El-Masri
case discussed below graphically confirms that the door to a remedy is
closed for victims of these outrages even where the person victimized
was simply the wrong person, who had the misfortune to be severely
brutalized during several weeks of detention.255 Despite this “misiden-
tification” it will be shown below that the harm that was inflicted on

In 2008, Durham was also tasked to investigate the destruction of the CIA tapes of interro-
gations that prevented congressional oversight committees from accessing and viewing
them as part of an ongoing inquiry. See Mark Mazzetti & Charles Savage, No Charges in
2010/11/10/world/10tapes.html (casting considerable doubt on the prospect for any CIA
personnel being held accountable for mistreatment of the detainees).

252. Memorandum for the Sec’y of Defense by Vice Admiral A.T. Church III, U.S.
Navy, Office of the Secretary of Defense, Department of the Navy, on Review of Depart-
ment of Defense Detention Operations and Detainee Interrogation Techniques, 175–79
(March 7, 2005) [hereinafter Church Memo], available at http://www.aclu.org/national-
security/church-report.

253. Exec. Order No. 13491, 47 Fed. Reg. 16 (Jan. 27, 2009); Interrogation Opinion
Withdrawal, supra note 250, at 249.

r56.htm.

255. El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007) El-Masri anticipated the
continued use of the “state-secrets evidentiary privilege” to summarily dismiss similar ac-
Mr. El-Masri by the CIA would not be the basis for any compensation to him for the wrongs committed.

3. State Responsibility to Provide Redress for its Wrongs

Restatement (Third) of Foreign Relations Law of the United States provides for certain remedies for violations of international human-rights obligations: “An individual victim of a violation of a human rights agreement may pursue any remedy provided by that agreement or by other applicable international agreements.”256 The restatement further allows that a private party must have the right to bring actions to address human rights violations.257 The Convention Against Torture’s Article 14 provides:

> [e]ach 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.258

Likewise, the International Convention on Civil and Political Rights obligates a signatory to provide an effective remedy for a violation of those rights.259

Irrespective of these provisions of the Restatement (Third) of Foreign Relations Law of the United States and other cited enactments, the available domestic legislation has proven ill-suited to provide the required remedy for the victims of torture and inhumane treatment. The Detainee Treatment Act of 2005, the Torture Victim Protection Act of 1991, and the Torture Act all simply fail to provide a victim of torture under the circumstances of the detainees with a civil remedy for redress. The domestic implementation of legislation and

---

256. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 703(3) (1987) [hereinafter REST. 3D FRLUS]; see also Alvarez-Machain v. United States, 331 F.3d 604, 616 n.9 (9th Cir. 2003), cert. granted 540 U.S. 1045, 124 S. Ct. 807, 157 L.Ed.2d 692 (2003), judgment vacated 374 F.3d 1384 (9th Cir. 2004).
257. REST. 3D FRLUS, supra note 256, arts 901–05.
258. Convention Against Torture, supra note 2, art. 14.
259. ICCPR, supra note 18, arts. 2.3(a-c), 9, 14. The United States recognized that obligation in its Resolution of Advice and Consent on the ICCPR in 1992 with this language: [T]he United States understands the right to compensation referred to in Articles 9(5) and 14(6) to require the provision of effective and enforceable mechanisms by which a victim of an unlawful arrest or detention or a miscarriage of justice may seek and, where justified, obtain compensation from either the responsible individual or the appropriate government entity.
adoption of these international and domestic enactments has not provided a corresponding forum that will provide a realistic remedy for the detainees when the rights enumerated under them have been seriously violated.

4. Examples of the United States’ Closed Door to State Responsibility—Two Cases in Point

Khaled El-Masri, a German citizen, was detained by Macedonian authorities crossing the border between Serbia and Macedonia, and he was held for twenty-three days before being turned over to CIA officials in January 2004. He was renditioned to Kabul by the CIA, where, over a four-month period, he was subjected to unspeakable treatment and interrogations using EITs. Mr. El-Masri was released by the CIA in May 2004, when the CIA reluctantly accepted the fact that he was not the person they were seeking; he was then taken and left at night on an abandoned road in Albania. Mr. El-Masri was able to make his way back to his native Germany to obtain treatment for serious injuries to his physical and mental health, having lost substantial weight during his incarceration and interrogation by the CIA.

Given that he was wrongfully taken into custody, his credible claims for damages were filed against the director of the CIA and various other government and private entity actors under three theories. The first was a Bivens claim for violation of his 5th Amendment right to due process under the 14th Amendment, based on the conduct of persons acting under the color of law to deprive him of his liberty and prevent him from obtaining legal process to contest the detention and treatment. His second claim, asserted under the Alien Tort Statute, was for violation of international legal norms prohibiting prolonged arbitrary detention. His third cause of action, also pled under the Alien Tort Statute, was for the infliction of “cruel, inhuman or degrading treatment” while in the CIA’s custody and control for over four months.

261. Id. at 300.
262. Id.
263. Id. at 300–01.
264. 28 U.S.C. § 1350 et seq.
265. Id.; El-Masri v. United States, 479 F.3d 296, 301 (4th Cir. 2007).
The federal district court dismissed El-Masri’s action based on the government’s assertion of the state-secrets privilege, a doctrine long recognized under U.S. law, which insulates the government from required disclosure of state secrets in a civil action when those disclosures would potentially result in harm to U.S. national security or interests. In dismissing all of his claims, the court ruled that the “state-secrets privilege” serves to block discovery of information that would impair the nation’s defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments. This decision was upheld by the Fourth Circuit Court of Appeals a year later, and the U.S. Supreme Court denied certiorari on October 9, 2007. Mr. El-Masri is now pursuing a claim against the former CIA director and other agents before the Inter-American Human Rights Commission in a proceeding that could require considerable time and expense, though it provides no guarantee of a recovery against the United States for the harm done to him. In addition to his claim before the Inter-American Human Rights Commission against the United States, he is pursuing a claim against Macedonia before the European Court of Human Rights based on their extraordinary rendition of him on January 23, 2004 to the custody of the United States after which he was subjected to interrogations involving torture and inhumane treatment by Central Intelligence Agency operatives.

The U.S. Supreme Court similarly foreclosed the attempts by Shafiq Rasul and three other British nationals to obtain civil damages against officials of the United States by denying their appeal from the District of Columbia Circuit Court’s decision in Rasul v. Myers (“Rasul II”). Rasul II, upheld the lower court’s dismissal of the claims the

268. El-Masri, 479 F.3d at 311–13; see also In re Under Seal, 945 F. 2d 1285, 1287 n. 2 (4th Cir. 1991) (quoting Ellsberg v. Mitchell, 709 F.2d 51, 57 (D.C. Cir. 1983)).
269. El-Masri, 479 F.3d 296.
plaintiffs asserted under the Alien Tort Statute, Bivens claims under the Fifth and Eighth Amendments to the U.S. Constitution, claims under the Geneva Conventions, and claims under international law, including a claim under the Religious Freedom Restoration Act (“RFRA”),274 which the court found inapplicable because the plaintiffs were not among the protected persons for whom the legislation was enacted.275

The prospects under existing law for the plaintiffs in the cited cases and a few others that have met with similar dismissals are not encouraging. In a December 2010 article in Virginia Lawyer, Robert H. Wagstaff, an accomplished constitutional-law attorney who has appeared before the Supreme Court, expressed considerable pessimism about the prospects for any relief or remedy for the detainees who were tortured.276 That view is enhanced by the recognition that one of the most egregious cases of torture and inhumane treatment perpetrated by the Central Intelligence Agency on El-Masri—the misidentified German citizen—ultimately caused him to seek redress before the Inter-American Human Rights Commission and the European Court of Human Rights after his complete rebuff from the Courts of the United States.

275. Rasul v. Myers, 512 F.3d 644, 649, (D.C. Cir. 2009), cert. granted, 129 S. Ct. 763 (2008) (Rasul I). The plaintiffs and their counsel had been hopeful that the decision in Boumediene v. Bush, 553 U.S. 723 (2008), would provide them some further consideration from the Circuit Court’s earlier decision in Rasul I on these claims. The circuit court made short work of their case in a decision on April 24, 2009, Rasul v. Myers, 563 F.3d 527 (D.C. Cir. 2009) (Rasul II), dismissing all of Rasul’s claims. Boumediene had confirmed the prior to that decision, “the Court had never held that noncitizens detained by our Government in territory over which another country maintains de jure sovereignty have any rights under our Constitution.” 553 U.S. 723, 770 (2008). On December 14, 2009, the U.S. Supreme Court rejected Rasul’s petition for review of the Rasul II decision, ending the quest by Rasul and three other detainees to obtain some form of remedy on the grounds alleged, including those under the Alien Tort Statute and violations of international law. Rasul v. Myers, 130 S. Ct. 1013 (2010).
276. Robert H. Wagstaff, In the Wake of Boumediene: The International Rule of Law Remains in Jeopardy, 59 VA. LAWYER 40, 45–46 (2010). His account of the several important cases that have been trumped by one court or another is disheartening, with only the decision by the government of Great Britain in the case of Binyam Mohamed and twelve others to provide them with compensation for what occurred at Guantánamo, Id. at 41–44. Binyam Mohamed and four other plaintiffs were also blocked by the Ninth Circuit in a companion action against Jeppesen Dataplan, Inc., a subsidiary of the Boeing Company, under the Alien Tort Statute for the defendant Jeppesen’s arrangement of their “rendition flight” by a Ninth Circuit Decision. Id. at 44.
B. Engaging a Rational and Legitimate Path to Redress

Lisa Magarrell and Lorna Peterson performed a very laudable service by their recent research identifying all of the possible causes of action under the various statutory enactments that would be available to victims of torture and inhumane treatment, some of which were asserted by El-Masri and the Rasul plaintiffs but rejected on various grounds.277 The two authors provide cogent arguments in favor of addressing the torture of the detainees that would require the government to take direct steps to redress the physical and psychological harm inflicted, while other arguments focus on the prospect of economic redress.278 The idea of monetary compensation in particular, administered through a neutral mechanism by a claims commission, seems to present an appropriate method to fulfill the State obligations.279 These obligations are in consonance with the previously identified articles of the Restatement (Third) of Foreign Relations Law of the United States, which identify the same obligations.280 The legal basis for providing the victims of torture and inhumane treatment described in this article as part of a State’s action is inescapable; nonetheless exerting the political will to undertake that responsibility during the ten-year ongoing “war on terrorism” situation will be daunting, if virtually impossible to achieve. This is perhaps best exemplified by the Final Report of the Guantánamo Review Task Force of January 10, 2010, which was attuned entirely to the “proper disposition—transfer, prosecution or continued detention—of all 240 detainees subject to” review by the President’s Executive Order 13492 of January 22, 2009, but was devoid of any mention of the issues of their torture or inhumane treatment during their prolonged detention.281

278. Id. at 29–30, 39–40.
279. Responsibility of States for Internationally Wrongful Acts, supra note 254, art. 36; REST. 3D FRLUS, supra note 256. It would also seem to conform to the United States’ obligations under the ICCPR, among others, and the Senate Resolution confirming the availability of some form of compensation or remedy for victims of violations of that international instrument. See supra note 259.
280. See REST. 3D FRLUS, supra note 256, § 703.
281. Final Report, Guantánamo Review Task Force, 22–23 (Jan. 22, 2010), available at http://www.justice.gov/ag/guantanamo-review-final-report.pdf. The review and report was a product of a collaborative effort of the Departments of Justice, Defense, State, Homeland Security, Director of National Intelligence, and Joint Chiefs of Staff. The twenty-seven page report is distinguished by the absence of addressing anything beyond the categorization of the detainees and the methods for “disposition” of them. Intended to be a basis for closing the Guantánamo facility within one year of the new administration, a campaign promise by

The International Law Commission ("ILC") Draft Articles on Responsibility of States for Internationally Wrongful Acts was promulgated in 2001. Under the Draft Articles, an offending State has an obligation to make full reparation for the "damage, whether material or moral, caused by the internationally wrongful act of a State." The Draft Articles have received increasing reference in international law and by international tribunals in establishing a norm for the obligations of States for civil and other international wrongs.

The Paquette Habana case, cited previously, illustrates the application of this principle in time of war or conflict that was determined by the U.S. Supreme Court over one hundred years ago based on a proper determination under "customary [international] law." In Paquette Habana, two small fishing boats, the Paquette Habana and The Lola, were working around Havana, Cuba in 1898 during the Spanish-American war, when they were seized by American warships, sold and the owners were left without a remedy. After a lengthy review of customary international law relating to the practice of exempting small fishing vessels from seizure during conflicts, the U.S. Supreme Court granted the boat owners’ claims against the United States, which, they noted, was an unlawful taking and entitled the owners to the amount received for selling the boats and cargos and for damages. Granted that this was a maritime matter, but the application of customary international law rings equally true here for the Laws of Armed Conflict, including the often-referenced international and domestic statutory prohibitions on the use of torture, inhuman, cruel and degrading treatment to captives. Of course it must be recognized that the 1900 decision involved merely “property damage” claims.

President Obama, its long overdue closure was upended by the April 4, 2011 reversal by the White House and decision to refer a number of the detainees for trial by military commission. Charlie Savage, In A Reversal, Military Trials For 9/11 Cases, N. Y. Times, April 5, 2011, at 1.

283. Id. arts. 31–33. The obligations include “compensation and satisfaction, either singly or in combination, or in accordance with the provisions of this chapter.” Id. arts. 34, 36.
284. The Paquette Habana, 175 U.S. 677, 707 (1900).
285. Id. at 678–80.
286. Id. at 714.
2. The Case of Sixteen Detainees Tortured by Great Britain’s MI5 and MI6 Personnel at Guantánamo

The United States could also consider an approach more appropriate to addressing the mistreatment of detainees at Guantánamo, which has been very recently undertaken by Great Britain in providing compensation for the victims of torture and inhumane treatment during the conflicts in Iraq and Afghanistan.287

In November 2010, Great Britain’s Parliament agreed to create a commission to determine the compensation for sixteen victims of comparable torture activities at Guantánamo, perpetrated by Britain’s MI5 and MI6 personnel, agencies that are comparable to the U.S. Central Intelligence Agency.288 The British commission (and the quick settlement it facilitated) was necessary to prevent the detainee-victims, who were seeking compensation in a lawsuit in Great Britain’s civil courts, from exposing graphic facts and documents to the public, which would have confirmed that MI5 and MI6 personnel participated in torture of detainees at Guantánamo and violated international law at Guantánamo.289 The plaintiffs included Binyan Mohamed, a long-term detainee at Guantánamo, who was released from custody with no charges pending.290 In addition to the requirement for prompt compensation for the sixteen victims of torture at Guantánamo, British Prime Minister David W. D. Cameron ordered an inquiry into the subject of torture at Guantánamo.291

3. The Use of Commission Proceedings to Address the Detainees’ Claims

The U.S. Department of Justice presently operates the Foreign Claims Settlement Commission under the International Claims Settlement Act of 1949 (“Settlement Commission”).292 The Settlement Commission addresses a variety of claims for loss of property or per-

---

288. Id.
289. Id.
290. Wagstaff, supra note 276, at 43–44. See also discussion of Binyan Mohamed’s case supra note 279.
291. Worthington, supra note 287 (reporting the action by Prime Minister David Cameron seeking a “judicial inquiry into British complicity in Torture”).
sonnel that are related to foreign conflict situations.\textsuperscript{293} The Settlement Commission, however, does not entertain the claims of foreign citizens against the United States for actions by U.S. Officials or military personnel.\textsuperscript{294}

Claims incidental to the noncombat activities of the armed forces in foreign countries that include property loss and personal injuries are, however, cognizable under 10 U.S.C. § 2734 but would be questionable for actual enemy combatants. There is a $100,000 cap on claims, but in a meritorious case, a higher amount can be considered if the cap is waived by the Secretary of the particular service branch.\textsuperscript{295} The problem with this statutory scheme is that it raises a number of issues for potential claims from Iraq, Afghanistan, or other locales regarding the fairness of the claims process, as well as its administration, which is undertaken mostly by the military branches of the government. Claims involving injury to or death of a spouse have been handled in the zone of active field operations, but of the few claims that were accepted, the amounts paid were quite meager: $3000 for the death of a husband, with an average of $4200 for loss of life.\textsuperscript{296} Nonetheless, the small success of these few claims demonstrates at least some form of redress might be available for victims of conduct involving military personnel. It does not, however, address the conduct of contract civilians or CIA personnel.

The enactment of a provision for a dedicated claims commission addresses the specific issue suggested by Magarrell and Peterson that “[a]t some point, the U.S. government will need to confront its own responsibility for these harms if it wants to regain its stature in the international community and truly uphold its commitment to honor international human rights.”\textsuperscript{297} This would require either a presidential decree of some sort or congressional enactment, neither of which appears to be a likely prospect at this time or in the foreseeable future given the ongoing conflict and military engagement in both Iraq and Afghanistan.


\textsuperscript{294} See 22 U.S.C. § 1623(a)(1)(B) (limiting international claims to those by U.S. nations involving nationals as defined in 22 U.S.C. § 1621(c): “It does not include aliens”).

\textsuperscript{295} Id. at § 2743(d).

\textsuperscript{296} Magarrell & Peterson, supra note 277, at 13–16.

\textsuperscript{297} Id. at 28.
The cases addressing the enhanced interrogation that have occurred since 9/11 have ranged from extraordinary rendition,\textsuperscript{298} to those involving government contractors,\textsuperscript{299} to detention and abuse.\textsuperscript{300} These cases seem to produce inconsistent and unsatisfactory results for claims that appear quite justified under the factual circumstances of the gross mistreatment of the individuals and the attendant violations of domestic and international law.\textsuperscript{301} Whatever domestic gain can be accomplished through the consistent denial of a remedy for these individuals will be lost in the court of world opinion on the United State’s avoidance of acceptance of its international obligations under the principles identified above.

A legitimate claims commission approach would be instantly recognized by the international community as a strong signal of acceptance of its international obligations by the United States. There is no guarantee, nor should there be, that each claim will be resolved in favor of the claimant, but simply allowing an otherwise potentially legitimate claim to proceed to an early resolution provides the hallmarks of true acceptance of state responsibility for wrongs that lend support to the efficacy of its process. Adherence to obligations under the Convention Against Torture, the ICCPR and the many other international instruments discussed in this article might also be reinvigorated for the United States under one of the more basic principles of international law: \textit{pacta sunt servanda}, a principle that according to Ian Brownlie operates “as a general principle of international law; a treaty in force is binding upon the parties and must be performed by them in good faith.”\textsuperscript{302} The claims commission concept put forth by Magarrell and Peterson has the potential to accomplish just that goal.

\textsuperscript{298} El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007).

\textsuperscript{299} Saleh v. Titan Co., 131 S. Ct. 379 (2010). Of some irony is the fact that Saleh received a Foreign Claims Act payment of $5000 despite that fact that the Military Services determined that he had not been subject to torture or inhumane treatment, though he was interrogated by a civilian contractor at Abu Ghraib. Magarrell & Peterson, \textit{supra} note 277, at 15.

\textsuperscript{300} Rasul v. Myers, 563 F.3d 527 (D.C. Cir. 2009), \textit{cert. denied} 130 S. Ct. 1013 (2009).

\textsuperscript{301} \textit{Id.} See also Magarrell & Peterson, \textit{supra} note 277, at 32–35. Some of the cases are still pending while others have been dismissed.

\textsuperscript{302} Brownlie, \textit{supra} note 123, at 592–93. This could have the effect of raising the bar on the ILC’s Draft Articles on the Responsibility of States for International Wrongful Acts, \textit{supra} note 254, arts. 17, 31, 34, which is apparently a position taken by Great Britain in awarding compensation by a government commission to fourteen detainees at Guantánamo who had been tortured by their government agents.
Finally, the international community’s concerns, coupled with the continuing political debate, would be significantly abated by the establishment of a legal basis to provide the actual remedies that are required under the Convention Against Torture and the ICCPR that are currently of marginal or legally ineffective value to the victims.303

VIII. Conclusion

Two years later, the new administration has demonstrated its desire to continue, and in some cases even enhance, the two conflicts in Iraq and Afghanistan. The future enactment of a congressionally-funded claims commission to address the wrongdoing involving the detainees would likely be met with broad-based and very strong opposition.304 The current efforts from both of the legislative houses seem bent on adding further restrictions on the treatment of remaining detainees and to pursue prosecuting at least some of them before Military Commission trials that will be compromised because of the legal effects of torture on evidence and the conduct of them.305

The pending inquiry by the Department of Justice to identify individuals who may be held responsible for violations of law in connection with the treatment of detainees holds little promise for anyone ultimately being actually held responsible. None of the medical-health personnel who were involved in the interrogations have either been charged or held accountable by military or federal authorities for their actions or inactions. A strong indicator against any possibility of

304. The House Armed Services Committee Chair, Buck McKeon, signaled during hearings on March 8, 2011, that the Congress intended to strengthen the restrictions on Guantánamo detainees in new legislation to be introduced one day after President Obama had issued an Executive Order on Guantánamo, Armed Services Committee, Press Release, Mar. 8, 2011, http://armedservices.house.gov/index.cfm/press-releases?ContentRecord_id=2bb095a5-d841-449a-b4c0-483b09c2fa6&ContentType_id=ec07822-826f-493d-8ce5-1e21aa53e12a&GroupId=12580721-af41-4987-849c25b730d096d [hereinafter Armed Services Committee Press Release]. McKeon noted the inclusion of “blocking proposed legislation would block funding for the creation or renovation of any of the Guantánamo facility” and for measures create restrictions to “make it tougher for detainees to return to the battlefield or share information with other terrorists or malign actors.” Id. The President’s Executive Order of March 7, 2011, had provided for a more comprehensive system of review of the status of the detainees, among other items. Exec. Order, Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force (Mar. 7, 2011) [hereinafter Executive Order of March 7, 2011], available at http://www.whitehouse.gov/the-press-office/2011/03/07/executive-order-periodic-review-individuals-detained-guant-namo-bay-nav.
305. Armed Services Committee Press Release, supra note 304; Executive Order of March 7, 2011, supra note 304.
holding medical health personnel responsible was the recent appointment by President Obama of Dr. Larry James, Ph.D., to a White House-led task force on “wellness.”306 His book, Fixing Hell, was a strident vindicator of the medical-health personnel’s involvement in the interrogations.307

A hopeful outcome may be that the eight-year epoch during which the United States ignored customary international law, the Nuremberg Code, and the body of World Medical Association prohibitions against the conduct by medical health personnel, does not permanently diminish the importance of those instruments and their obligations. If nothing else, the expose of what was inflicted on the Guantánamo detainees should at least “encourage shame” in the medical-health personnel who participated in activities that were in direct conflict with their professional, legal, and ethical obligations.308 The medical-health community should strive to strengthen its resolve against resorting to those unlawful practices in future conflicts consistent with the World Medical Associations Resolution of May 2009 that prohibited physicians from participation in torture, which may prove to be the only form of realistic redress available, albeit one that may hold some promise of a positive lasting effect.309

The current administration, however, will have to do substantially more than merely withdraw the legal opinions by the Justice Department’s OLC that fostered the legitimacy of this unlawful conduct by military, CIA, and medical health personnel if it intends to demonstrate to the international and human-rights community a clear departure from this unfortunate epoch.310 Steps must be taken to fulfill Anne-Marie Slaughter’s comments when she confronted the realization that our forces had departed from our American sense of justice


307. Id. See also James, supra note 89.

308. Remarks by Professor Connie de la Vega, Professor of Law, University of San Francisco, on March 26, 2011, during a presentation at USF Law School at the 13th Annual Trina Grillo Public Interest and Social Justice Law Retreat.

309. World Medical Association Council Resolution of Prohibition of Physician Participation in Torture, art. 1, WMA 182nd Council Session (May 2009), available at http://www.wma.net/en/30publications/10policies/30council/cr_8/index.html. This resolution reaffirmed the Declaration of Tokyo with its guidelines for physicians concerning torture and other cruel, inhuman, and degrading treatment or punishment in relation to detention and imprisonment, and which essentially prohibited all forms of participation in such conduct. See Declaration of Tokyo, supra note 161.

by engaging in the unlawful conduct exposed at Abu Ghraib and other detention facilities.\footnote{Anne-Marie Slaughter, The Idea that Is America: Keeping Faith with Our Values in a Dangerous World 145 (2007).} She aptly invoked Daniel Webster’s observation that “justice was the ligament that holds civilized beings and civilized nations together,” adding a powerful exhortation that “we are losing that ligament . . . we must find our way back and fight our way forward to liberty and justice for all.\footnote{id.} The ligament remains available to be grasped, with the political will only to be found.