

**2. CRUELTY, TORTURE, SECRECY:
THE INTERROGATION OF “WAR
ON TERROR” DETAINEES**

by: Jameel Jaffer*

Almost immediately after September 11, 2001, the President declared a “war on terror” in the name of which the United States subsequently invaded Afghanistan and Iraq, conducted smaller-scale military operations in several other countries, and apprehended and imprisoned thousands of people said to have belonged to, supported, or sympathized with al Qaeda. Some 600 of these detainees are now held at Guantánamo Bay Naval Base on the eastern tip of Cuba. Others are held at Bagram Air Base in Afghanistan or at a British-American base on Diego Garcia, a tiny island in the Indian Ocean. Still others are held on the instructions of the United States in the prisons of Egypt, Morocco, Saudi Arabia, and Jordan. David E. Kaplan, et al., *Playing Offense: The inside story of how U.S. terrorist hunters are going after al Qaeda*, U.S. News & World Report (June 2, 2003).

Notoriously, the United States has refused to accord these detainees the status of prisoners of war under the Geneva Conventions, instead variously labeling them “battlefield detainees,” “security detainees,” or “enemy combatants.” The administration has played down the significance of these labels, stating that, whatever the detainees’ formal status, they are being “treated humanely in accord[ance] with the principles of the Geneva Conventions.” Secretary of Defense Donald Rumsfeld said at a January 2002 Pentagon briefing that the Guantánamo detainees – there were then only 150 of them – had “warm showers; toiletries; water; clean clothes; blankets; regular, culturally appropriate meals; prayer mats and the right to practice their religion; modern

medical attention . . . ; exercise; quarters . . . eight-by-eight and seven-and-a-half feet high; writing materials; and visits by the International Committee of the Red Cross. Press Release, U.S. Department of State, *Detainees at Guantanamo Treated Humanely*, Rumsfeld Says (January 22, 2002).

Recent news reports indicate, however, that not all detainees have been treated humanely. Individuals apprehended by the United States are said to have been “softened up” by beatings, confined in tiny rooms, blindfolded, thrown into walls, bound in painful positions, deprived of sleep, forced to stand for long periods in black hoods, and denied medical care as a means of encouraging them to talk. Paul Harris & Burhan Wazir, *Briton tells of ordeal in Bush’s torture jail*, *The Observer* (December 29, 2002). Perhaps even more troubling than the treatment of detainees in United States custody, the United States is said to have “rendered” uncooperative detainees to foreign intelligence services known for their brutality. These practices appear to have widespread support among United States military and intelligence officials. “While the U.S. publicly denounces the use of torture,” one report noted, “each of the current national security officials [we] interviewed . . . defended the use of violence against captives as just and necessary.” Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, *Washington Post* (Dec. 26, 2002).

President Bush recently assured the public that the United States takes seriously its commitment to international law governing the treatment of detainees. In light of the proliferating reports that detainees have been mistreated and even tortured, it is increasingly difficult to take the President at his word.

* Jameel Jaffer is a Staff Attorney in the ACLU’s National Legal Department.

I. Emerging facts about the interrogation and treatment of detainees

In December 2002, the *Washington Post* published a lengthy article about the United States' interrogation of detainees at Bagram and other overseas detention facilities. "The picture that emerges," the authors found, "is of a brass-knuckled quest for information, often in concert with allies of dubious human rights reputation, in which the traditional lines between right and wrong, legal and inhumane, are evolving and blurred." The article described some of the techniques used to obtain information from the detainees. "Those who refuse to cooperate," the article explained, "are sometimes kept standing or kneeling for hours, in black hoods or spray-painted goggles, according to intelligence specialists familiar with CIA interrogation methods. At times they are held in awkward, painful positions and deprived of sleep with a 24-hour bombardment of lights – subject to what are known as 'stress and duress' techniques." *Id.* Other news articles have reported the use of similar methods. In March 2003, the *Wall Street Journal* interviewed intelligence officials about the interrogation of detainees at Guantánamo and Bagram. Detainees may be subjected to "a little bit of smacky-face," one official acknowledged. "Some al Qaeda just need some extra encouragement." Jess Bravin & Gary Fields, *How Do U.S. Interrogators Make a Captured Terrorist Talk?*, *Wall Street Journal* (March 4, 2003).

Two detainees have died in United States custody at Bagram, apparently as a result of such methods. Military pathologists initially said that one of these detainees had died of a heart attack and the other of a blood clot. However, both detainees showed signs of blunt-force trauma and the deaths were ultimately classified as homicides. Marc Kaufman, *Army Probing Deaths of 2 Afghan Prisoners*, *Washington Post* (March 5, 2003). Another Afghan detainee died in United States custody

in June. While results from the investigation into the first two deaths have not been made public, military officials characterized the third death as "in no way . . . similar by any stretch of the imagination to what happened previously." Vanessa Gezari, *3rd detainee dies in U.S. custody*, *Chicago Tribune* (June 24, 2003). That comment and others to the same effect deepen suspicions that the first two deaths were the results of torture or severe physical abuse. One official questioned about the December 2002 deaths acknowledged that "this investigation may not go well for us." Barbara Starr, *Afghan detainees' deaths ruled homicides*, *CNN.com* (March 5, 2003).

United States officials have been more open about the methods used against detainees suspected to be al-Qaeda leaders. A CIA official has admitted that, in the case of Khalid Sheikh Mohammed, whom the United States has called the "mastermind" of the September 11 attacks, interrogators have used the detainee's children as leverage. The CIA took the 7 and 9-year old boys into custody when it detained their father in September 2003. "[Mohammed's] sons are important to him," the CIA official explained. "The promise of their release and their return to Pakistan may be the psychological lever we need to break him." Olga Craig, *CIA holds young sons of captured al-Qa'eda chief*, *Daily Telegraph* (September 3, 2003).

While there are no reports documenting torture or physical abuse of Guantánamo detainees, there is growing evidence that the psychological condition of many of the detainees is precarious. In August, the Associated Press reported that at least 20 Guantánamo detainees had attempted suicide, some more than once. Associated Press, *Guantánamo Suicide Attempts Rise to 31* (August 20, 2003). (None of those attempts was successful, but one detainee caused himself serious brain damage.) Of course, the despair of Guantánamo detainees may stem not from psychological methods used in interrogation but

from the circumstances of their confinement. The *New York Times* interviewed one of the few Guantánamo detainees whom the United States has released and concluded that what had driven him and other detainees to despair was uncertainty about the future. Carlotta Gall & Neil A. Lewis, *Inmates Released from Guantánamo Tell Tales of Despair*, *New York Times* (June 17, 2003). The prisoners have been denied access to lawyers, are held in near-total isolation, have not been charged with any particular offense, and have no idea whether they will ever be released.

Perhaps the most troubling allegation to have surfaced in recent news reports is the allegation that the United States is “rendering” detainees to the custody of foreign intelligence services known to use torture. This practice seems to be increasingly commonplace. In January 2002, the CIA provided information to Indonesia about Muhammad Saad Iqbal Madni, whom the CIA suspected to be an al Qaeda operative. The Indonesians arrested him. According to Indonesian officials, “[t]wo days later – without a court hearing or a lawyer – [Iqbal] was hustled aboard an unmarked, U.S.-registered Gulfstream V jet parked at a military airport in Jakarta and flown to Egypt.” Rajiv Chandrasekaran & Peter Finn, *U.S. Behind Secret Transfer of Terror Suspects*, *Washington Post* (March 11, 2002). A few months earlier, the United States detained a Yemeni microbiology student in Pakistan and rendered him to Jordan. Since September 11, the United States has secretly rendered dozens of people in this fashion, in each case bypassing legal formalities. See Faye Bowers & Philip Smucker, *US ships Al Qaeda suspects to Arab states*, *Christian Science Monitor* (July 26, 2002).

The extrajudicial rendition of detainees has not been limited to individuals apprehended on the battlefield. About a year ago, the United States detained a Canadian citizen, Maher Arar, at John F. Kennedy Airport in New York and rendered him to his native Syria, though he had

fled Syria 15 years earlier after refusing to serve in the military. Arar was released on October 5 after having spent over a year in solitary confinement in a Syrian prison. While his attorneys have not yet been able to speak to him about his experiences in Syrian detention, the leading Syrian human rights group has alleged that Arar was beaten and subjected to electric shocks. Jeff Sallot, *Canadian tortured: Syrian Group*, *Globe & Mail* (Aug. 7, 2003)

There is no question that the intent of such renditions is to transfer the detainees to the custody of intelligence services that do not consider themselves bound by international proscriptions against torture. “We don’t kick the [expletive] out of them,” one official explained. “We send them to other countries so they can kick the [expletive] out of them.” Priest & Gellman, *supra*. Indeed, the State Department’s own human rights reports document the routine use of torture by the governments to which the detainees are most commonly rendered – Pakistan, Jordan, Morocco, Syria, Egypt, and Saudi Arabia. The 2002 report on Egypt, for example, states that “there were numerous, credible reports that security forces tortured and mistreated citizens” and that “[i]ncommunicado detention is authorized for prolonged periods and frequently accompanied allegations of torture.” The report continues:

Principal methods of torture reportedly employed by the police included: Being stripped and blindfolded; suspended from a ceiling or doorframe with feet just touching the floor; beaten with fists, whips, metal rods, or other objects; subjected to electrical shocks; and doused with cold water. Victims frequently reported being subjected to threats and forced to sign blank papers to be used against the

victim or the victim's family in the future should the victim complain of abuse. Some victims, including male and female detainees, reported that they were sexually assaulted or threatened with the rape of themselves or family members. <http://www.state.gov/g/drl/rls/hr/rpt/2002/18274.htm>.

The *Washington Post* reported that “[o]ne official who has had direct involvement in renditions said he knew they were likely to be tortured. ‘I . . . do it with my eyes open,’ he said.” Priest & Gellman, *supra*.

The involvement of United States personnel in a detainee’s interrogation does not necessarily end after the detainee is rendered to a foreign intelligence service. The United States may supply questions to the interrogators, or oversee the interrogation from behind a one-way mirror. A story in *Newsday* quoted a former CIA official who had either witnessed the interrogation of a detainee rendered to Egypt or who been provided a detailed summary. “They promptly tore [the detainee’s] fingernails out and he started telling things,” the official explained. Knut Royce, *Mixed Reviews From Experts*, *Newsday* (Feb. 6, 2003).

II. International proscriptions against torture and cruel, inhuman, or degrading treatment

Both torture and “cruel, inhuman or degrading treatment or punishment” are unequivocally proscribed by numerous international legal instruments. The Universal Declaration of Human Rights states that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” The International Covenant on Civil and Political Rights, which the United States ratified in 1992, includes an identical proscription. The Third Geneva Convention of

1949 provides that “No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever.” Detained civilians are similarly protected by the Fourth Geneva Convention.

As noted above, the United States considers the detainees neither prisoners of war nor civilians. However, all wartime detainees, regardless of their legal status, are protected by customary international humanitarian law. The First Additional Protocol to the Geneva Conventions, which restates customary international law, prohibits “torture of all kinds, whether physical or mental” against “persons who are in the power of a Party to the conflict and who do not benefit from more favorable treatment under the [Geneva] Conventions.”

The central international legal instrument in this area is the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”). The CAT requires each State Party to “ensure that all acts of torture are offences under its criminal law” and prohibits any State Party from expelling, returning, or extraditing a person to another state if there are substantial grounds for believing that the person would be tortured on return. Since the United States ratified the CAT in 1994, the United States Code has included a note stating that “[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.” 8 U.S.C. § 1231, n.1.

The CAT defines torture as “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.”

While the United States has ratified the CAT, it entered a reservation stating that “the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.” As a result of the reservation, it is possible that some of the methods that might be characterized as torture by the international community might not be so characterized by the United States. There is little doubt, however, that some of the allegations concerning the United States’ treatment of detainees fall even within the relatively narrow definition set forth in the reservation. For example, the two Bagram detainees who died as a result of blunt-force injuries were almost certainly subjected to “severe physical pain or suffering.”

In any event, the CAT also requires each State Party to “undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture . . . , when such acts are committed by or at the instigation of or with the consent or

acquiescence of a public official or other person acting in an official capacity.”¹ There is no question that some of the techniques allegedly used by the United States constitute “cruel, inhuman or degrading treatment.” Indeed, the State Department has repeatedly – and appropriately – condemned other countries for using many of the same methods that the United States is now accused of employing.

III. Official secrecy and doublespeak

In response to allegations that United States personnel have disregarded international principles governing the treatment of detainees, the Bush administration has generally reaffirmed the United States’ commitment to the laws and norms that proscribe torture. On June 26, 2003 – International Day in Support of Victims of Torture – the President reassured the public that “[t]he United States is committed to the world-wide elimination of torture and we are leading this fight by example.” In the same statement, the President also noted that “[n]otorious human rights abusers, including, among others, Burma, Cuba, North Korea, Iran, and Zimbabwe, have long sought to shield their abuses from the eyes of the world by staging elaborate deceptions and denying access to international human rights monitors.”²

The Defense Department, too, has denied that its personnel use torture or render detainees to face torture elsewhere. In response to a letter of concern from Human Rights Watch, the Defense Department stated that United States policy condemns and prohibits torture; that Defense Department personnel are required to follow this policy and “applicable laws” prohibiting torture; and that the Department will investigate any allegations of mistreatment of or injuries to detainees. The Defense Department also stated that “if the war on terrorists of global reach required transfer of detained enemy combatants to other countries for continued detention on our behalf, U.S. government instructions are to seek and obtain

appropriate assurances that such enemy combatants are not tortured.”³ The Department of Defense repeated essentially the same information in a subsequent letter in response to concerns expressed by Senator Patrick Leahy.⁴

Unfortunately, these assurances presumably rely on the definition of torture used in the United States’ reservation to the CAT, and not on the broader definition used by the CAT itself. In addition, the assurances do not address “stress and duress” techniques that may not constitute torture but undoubtedly constitute “cruel, unusual, or degrading treatment.” Nor do they address the specifics of any of the numerous reports documenting the mistreatment of detainees in United States custody and the rendition of detainees to foreign intelligence services that engage in torture. Given the credible reports that the United States has been complicit in the torture of detainees, the administration’s vague statements on the issue provide little reassurance that the United States is indeed abiding by its obligations.

Part of the reason the public knows so little about the practices of CIA and military interrogators is that the United States has refused to allow independent monitoring and human rights groups access to many detention facilities. While the ICRC has been permitted to monitor the treatment of detainees held at Guantánamo, it has been denied access to at least one detention facility at Bagram. Some CIA detention facilities are off-limits not only to non-governmental organizations like the ICRC but also to other government agencies. And in most cases neither the ICRC nor any other non-governmental organization has been provided access to individuals detained by other countries at the request of the United States.

IV. Lifting the shield of secrecy

On October 7, the ACLU, the Center for Constitutional Rights, Physicians for Human Rights, Veterans for Common Sense, and Veterans for Peace submitted a Freedom of

Information Act request for records concerning the treatment of detainees held by the United States and the rendition of detainees to foreign intelligence services. While the administration is likely to resist the disclosure of records that document the use of illegal interrogation techniques, the FOIA request may nonetheless be a useful means of determining whether the United States has truly committed itself to the Convention Against Torture and other international legal instruments governing the treatment of detainees. The request seeks, among other things, records describing measures taken by the United States to ensure that detainees are not tortured or subjected to cruel, inhuman, or degrading treatment; records relating to investigations or disciplinary proceedings initiated in connection with the alleged maltreatment of detainees; records relating to the deaths of detainees in United States custody; and records relating to the rendition of detainees to foreign intelligence services. The request also seeks records describing the role of medical personnel in the interrogation of detainees. The FOIA request and related documents are available at <http://www.aclu.org/International/InternationalMain.cfm>.

The FOIA request is motivated by a host of concerns. First, it is motivated by a concern about the harm that torture causes its victims. In a statement released in conjunction with the filing of the FOIA request, Physicians for Human Rights emphasized the profound injuries that torture – even purely psychological torture – can cause:

[P]sychological forms of torture and cruel, inhuman and or degrading treatment may not leave any physical signs but often cause extreme emotional pain and suffering. If a gun is held to someone's head and the trigger pulled in a mock execution, there may be no

physical marks, but the overwhelming terror and psychological harm can be devastating and may last a lifetime. Similarly, threats of harm to family members, threats to turn prisoners over to authorities of countries known to torture and subjecting them to humiliating acts including binding them naked for extended periods can result in enormous psychological suffering.

The request is also motivated by a concern that the United States' use of torture – or complicity in others' use of torture – ultimately endangers Americans abroad. Veterans for Peace explains: “It is of vital interest to military men and women all over the world that the protections against torture and cruel, inhuman or degrading treatment be evenhandedly applied by all nations at all times. This is the only way we can assure that these protections will be afforded to our citizens when and if they become prisoners during the conduct of war.”

It is critical that the United States honor its commitment to the CAT and other international legal instruments governing the treatment of detainees. Requiring the government to provide more specific information about its compliance – or non-compliance – with international law would at the very least force the government to defend and justify its practices. As the President himself noted in his June 26 statement, those nations that have employed torture as a matter of policy have been able to do so only because they were able “to shield their abuses from the eyes of the world.”⁵ The FOIA request filed by the ACLU, the Center for Constitutional Rights, and other organizations may go some way toward lifting this shield.

Endnotes

¹ The United States entered a reservation stating that it “considers itself bound by the obligation under article 16 to prevent ‘cruel, inhuman or degrading treatment or punishment’, only in so far as the term ‘cruel, inhuman or degrading treatment or punishment’ means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.”

² Statement by the President, United Nations International Day in Support of Victims of Torture, (June 26, 2003), *at* <<http://www.whitehouse.gov/news/releases/2003/06/20030626-3.html>>.

³ Letter from William J. Haynes II, General Counsel of the Department of Defense, to Kenneth Roth, Executive Director, Human Rights Watch (April 2, 2003), *at* <<http://www.hrw.org/press/2003/04/dodltr040203.pdf>> .

⁴ Letter from William J. Haynes II, General Counsel of the Department of Defense, to the Hon. Patrick J. Leahy (June 25, 2003), *at*, <<http://www.hrw.org/press/2003/06/tortureday.htm>>.

⁵ Statement by the President, United Nations International Day in Support of Victims of Torture, (June 26, 2003), *at* <<http://www.whitehouse.gov/news/releases/2003/06/20030626-3.html>>