22. Torture and counter-terrorism

Ben Saul and Mary Flanagan

1. INTRODUCTION

Despite the absolute international legal prohibition on torture and cruel, inhuman or degrading treatment, torture became more prevalent as a counter-terrorism instrument after the terrorist attacks on the United States of 11 September 2001. State torture of terrorists is nothing new, as evidenced in decolonization struggles such as the Algerian people's war of independence from France,[1] British practices in Northern Ireland[2] and its colonial territories,[3] Israeli interrogation of Palestinians,[4] or in many states' repression of their political opponents.

Yet, the post-9/11 practice of torture exhibited its own distinctive characteristics. This chapter examines two key trends. First, the US argued that aggressive or 'enhanced' interrogation techniques did not amount to torture or ill-treatment, despite clear international legal authority to the contrary. The infamous 'torture memos', some of which were operationalized, licensed torture by military or CIA interrogators until they were eventually rescinded in 2009. Political figures and government lawyers also played indispensable roles in authorizing or permitting torture. Secondly, even where torture was prohibited, some state personnel acted

[1] Malcolm Evans and Rod Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (OUP, 1998), 27–31.

[2] Michael O'Boyle, 'Torture and Emergency Powers under the European Convention on Human Rights: *Ireland v The United Kingdom*' (1971) 71 *American Journal of International Law* 674; Chairman Sir Edward Compton, 'Report of the Enquiry into Allegations against the Security Forces of Physical Brutality in Northern Ireland arising out of Events on the 9th August 1971' (HMSO, 1971).

[3] Chairman Lord Parker, 'Report of the Committee of Privy Counsellors Appointed to Consider Authorised Procedures for the Interrogation of Persons Suspected of Terrorism' (HMSO, 1972) (finding that five harsh interrogation techniques had been used in Palestine, Malaya, Kenya, Cyprus, British Cameroons, Brunei, British Guiana, Aden, Borneo, and the Persian Gulf prior to Northern Ireland).

[4] Eventually prohibited in *Public Committee against Torture in Israel v State of Israel*, Supreme Court of Israel, 6 September 1999, HCJ 5100/94, [18].

in excess of their legal authority in interrogating or detaining suspects. While sometimes dismissed as the misconduct of a few aberrant 'bad apples', their individual responsibility can only be understood in the light of the prevailing military and political institutional cultures generated by the 'war on terror' and the protection of the 'homeland'.

This chapter explores these developments, as well as domestic, regional and international legal efforts to secure criminal or civil accountability for torture. The focus is on the US because of its detailed legal arguments defending coercive interrogation, as well as its standard-setting influence on other states. Simple law breaking by other states that have tortured in the war on terror is not examined here. The related issue of rendition to torture or ill-treatment in another state is considered separately in the preceding chapter.

2. THE INTERNATIONAL PROHIBITION ON AND CRIME OF TORTURE

Torture, or cruel, inhuman or degrading treatment or punishment is absolutely prohibited under international[5] and regional treaty law.[6] While cruel, inhuman or degrading treatment is not defined in treaty law, Article 1 of the Torture Convention 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

---

[5] International Covenant on Civil and Political Rights, adopted 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR'), art 7; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('Torture Convention').

[6] European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) ('ECHR'), art 3; American Convention on Human Rights, adopted 22 November 1969, No. 36, 1149 UNTS 123 (entered into force 18 July 1978), art 5; Inter-American Convention to Prevent and Punish Torture, 9 December 1985, OAS Treaty Series 67 (entered into force 9 December 1985); African Charter on Human and Peoples' Rights, adopted 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986), art 5; Arab Charter on Human Rights, adopted 22 May 2004, 12 IHRR 893 (2005) (entered into force 16 March 2008), arts 8, 9 and 20; Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms, adopted 26 May 1995 (entered into force 11 August 1998), art 3; ASEAN Human Rights Declaration, adopted 18 November 2012, art 14.

> 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.[7]

The three key features of torture are, therefore, that it involves severe physical or mental pain or suffering, inflicted for a prohibited purpose, with some degree of official involvement (which can include non-state actors contracted by a state). Pain or suffering 'arising only from, inherent in or incidental to lawful sanctions' does not amount to torture,[8] though this exception does not extend to pre-conviction interrogation.

The prohibition on torture is also part of customary international law.[9] Torture is regarded as a human rights violation as well as a general international crime,[10] a war crime,[11] and a crime against humanity.[12] It is prohibited in both internal and international armed conflicts under international humanitarian law (IHL).[13] IHL also prohibits a state from compelling a prisoner of war to provide any more than minimum information about their identity and affiliation,[14] but does not otherwise prohibit

---

7 Torture Convention, art 1.

8 Ibid.

9 Eyal Benvenisti, 'The Role of National Courts in Preventing Torture of Suspected Terrorists' (1997) 8 *European Journal of International Law* 596, 603.

10 Torture Convention, art 4.

11 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, adopted 12 August 1949, 75 UNTS 31 (entered into force 21 October 1951) ('Geneva Convention I'), arts 3 and 50; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, adopted 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) ('Geneva Convention II'), arts 3 and 51; Geneva Convention Relative to the Treatment of Prisoners of War, adopted 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) ('Geneva Convention III'), arts 3 and 130; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, adopted 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) ('Geneva Convention IV'), arts 3 and 147; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts ('Protocol I'), adopted 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978), arts 11 and 85; Rome Statute of the International Criminal Court, adopted 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('Rome Statute'), art 8(2)(a)(ii) and art 8(2)(c).

12 Rome Statute, art 7(1)(f) and art 7(2)(e).

13 Geneva Conventions I–IV, common art 3(1)(a) and (c).

14 Geneva Convention III, art 17.

the state from questioning detainees or prohibit detainees from answering. The defence of superior orders is not available to a charge of torture,[15] nor is the official capacity of the perpetrator a defence.[16] Amnesties are unavailable.[17] The prohibition aims 'to protect both the dignity and the physical and mental integrity of the individual'.[18]

The Torture Convention also states 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'.[19] Freedom from torture is thus an absolute right subject to no derogation or limitation.[20] Human rights protections do not cease in armed conflict[21] and complement IHL's own prohibitions on torture. States are also required to guarantee human rights to all persons in their territory and jurisdiction,[22] including when states act outside their own territory.[23]

A person must also not be returned to a place where he or she might foreseeably face torture or cruel, inhuman or degrading treatment,[24] and this prohibition is also part of customary international law.[25] A diplomatic assurance from one state to another that a detainee will not be tortured upon return will only be sufficient if it is enforceable.[26] Finally, statements obtained by torture may not be admitted in evidence in any judicial

---

[15] Torture Convention, art 2(3).

[16] Rome Statute, art 27; see also *Regina v Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte (No. 3)* [2001] 1 AC 147.

[17] UN Human Rights Committee, General Comment No. 20: Article 7 (10 March 1992), [15].

[18] Ibid, [2].

[19] Torture Convention, art 2(2); *Aksoy v Turkey*, 23 EHRR 553 (18 December 1996), [62].

[20] UN Human Rights Committee, General Comment No. 20, above n 17, [3].

[21] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, [24]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* (2004) ICJ Rep 136, [106].

[22] ICCPR, art 2; see also UN Human Rights Committee, General Comment No. 3: Implementation at the National Level (Art. 2) (29 July1981).

[23] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, above n 21, [109].

[24] Torture Convention, art 3; see also ICCPR, art 7; ECHR, art 3; ibid at art 3(1); Committee Against Torture, General Comment No. 1 (21 November 1997), [2].

[25] Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion' (UNHCR, 20 June 2001), [223].

[26] See, eg, *Agiza v Sweden*, UN Committee against Torture Communication No 223/2003 (24 May 2005), [13.4]; Human Rights Watch, 'Empty Promises: Diplomatic Assurances No Safeguard against Torture' (April 2004).

proceeding,[27] though the executive may still use intelligence obtained by torture.[28]

Despite the strong legal condemnation of torture, its blatant use or justification in the war on terror in some ways simply augments its more mundane occurrence. From 1997 to mid-2000, Amnesty International received reports of torture or ill-treatment in over 150 states; people died from it over 80 states.[29] Post-9/11 practices worsened the situation not only because a democratic superpower used torture, but because such use signalled its acceptability to other states and undermined the universal normativity of the prohibition.

3. ARGUMENTS THAT ENHANCED INTERROGATION IS NOT TORTURE

A. Interrogation Methods Authorized After 9/11

Soon after 9/11, senior lawyers in the Bush Administration asserted that certain 'enhanced' interrogation methods did not constitute torture. The legal opinions emanated mainly from politically appointed civilian lawyers, rather than career civil servants, military lawyers or commanders, or law enforcement professionals; many in the latter groups opposed the new methods.[30] Some of the legal opinions were approved and operationalized by senior US government officials. The opinions enabled the US to publicly assert its commitment to the prohibition on torture,[31] while aggressively extracting information by illegal methods.

The opinions were primarily aimed at authorizing interrogation methods to obtain intelligence, rather than collecting self-incriminating evidence for use in criminal trials. There have, however, been concerns

---

[27] Torture Convention, art 15.

[28] *A v Secretary of State for the Home Department* [2005] UKHL 71, [68–75] (Lord Nicholls).

[29] Amnesty International, 'Sad Fact that Fight Against Torture Must Continue in the 21st Century', Press Release, 25 June 2003, AI INDEX: POL 30/006/2003.

[30] See, eg, Damian Whitworth, 'FBI Considers Torture as Suspects Stay Silent', *Times*, 23 September 2003; Emanuel Gross, 'Democracy in the War against Terrorism: The Israeli Experience' (2002) 35 *Loyola of Los Angeles Law Review* 1161, 1184–5; Suzanne Goldenberg, 'Former Guantánamo Chief Clashed with Army Interrogators', *The Guardian* (19 May 2004).

[31] The US President committed the US to the worldwide prohibition of torture on 26 June 2003, the UN day for torture victims: 'The Pledge', *The Economist* (5–11 July 2003), 47.

about the admission of coerced evidence in terrorism trials. Many of the techniques discussed below were designed to confuse, frighten, wear down, or psychologically disorientate detainees, and to break their resistance to questioning.

The legal opinions were initially promulgated in the so-called 'torture memos'.[32] The memos were prepared by the Office of Legal Counsel (OLC) of the Department of Justice (DoJ) to provide guidance to the Central Intelligence Agency (CIA) on the permissibility of certain interrogation techniques for use on high-ranking Al Qaeda suspects. A crucial preliminary finding which facilitated the sanctioning of these techniques was the view that the Geneva Conventions did not apply to suspected Al Qaeda or the Taliban members captured in Afghanistan (or elsewhere) in the 'war on terror'.[33] This decision marked a radical departure from past practice and an expansive interpretation of US presidential authority.

In August 2002, DoJ Assistant Attorney General and head of the OLC Jay Bybee issued two decisive memos. The first was addressed to Alberto Gonzales, Counsel to the President, and narrowly construed the meaning of torture under US and international law. It stated that acts intended to inflict severe pain or suffering, whether mental or physical, must be of an extreme nature to rise to the level of torture.[34] It transposed a definition of 'severe pain' from a domestic health care statute to argue that severe pain amounting to torture must 'be equivalent in intensity to the pain accompanying serious physical injury such as organ failure, impairment of bodily function, or even death'.[35]

The second memo was addressed to John Rizzo, Acting General Counsel of the CIA, and considered interrogation methods intended to be used on a particular prisoner. It concluded that the following methods were legally acceptable: attention grasp, walling, facial hold, facial slap, cramped confinement, wall standing, stress positions, sleep deprivation, insects placed in a confinement box, and waterboarding.[36]

---

[32] Republished in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (CUP, 2005), 134.

[33] Ibid.

[34] Jay S Bybee (Assistant Attorney General) 'Memorandum to Alberto Gonzales (Counsel to the President): Standards for Conduct for Interrogation under 18 USC. §§ 2340–2340A' (OLC, 1 August 2002). See Greenberg and Dratel (eds), above n 32, 172.

[35] Ibid, 176.

[36] Jay S Bybee (Assistant Attorney General) 'Memorandum to John Rizzo (Acting General Counsel, CIA), Interrogation of Al Qaeda Operative' (OLC, 1 August 2002).

By April 2004, widespread abuse at Abu Ghraib prison in Iraq had become public knowledge and Bybee's successor rescinded the August 2002 memo to Gonzales. In December 2004, Acting Assistant Attorney General Daniel Levin drafted a new memo, which revised the narrowest interpretations of torture and rejected the severity standard of the August 2002 memo.[37] In a revealing footnote, however, the new memo stated that, '[w]hile we have identified various disagreements with the August 2002 Memorandum, we have reviewed this Office's prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum'.[38]

In 2005, the OLC continued to issue memos to guide the CIA on interrogation techniques. Acting Assistant Attorney General Steven Bradbury (who succeeded Levin) authored three memos in May 2005 to Rizzo at the CIA.[39] Bradbury's memos utilized the legal analysis in Levin's December 2004 memo and discussed in detail several interrogation techniques including: dietary manipulation, nudity, attention grasp, walling, facial hold, facial slap, abdominal slap, cramped confinement, wall standing, stress positions, water dousing, sleep deprivation and waterboarding.[40] His first memo concluded that 'any physical pain resulting from the use of these techniques, even in combination, cannot reasonably be expected to meet the level of "severe physical pain" contemplated by the [US Torture] statute'.[41]

---

[37] Daniel B Levin (Acting Assistant Attorney General) 'Memorandum to Deputy Attorney General, DOJ: Legal Standards Applicable under 18 USC §§ 2340–2340A' (OLC, 30 December 2004), 2.,

[38] Ibid, 8.

[39] Steven G Bradbury (Acting Assistant Attorney General) 'Memorandum No. 13 to John A. Rizzo (Senior Deputy General Counsel, CIA): Application of 18 USC. §§ 2340–2340A to Certain Techniques That May Be Used in the Interrogation of a High Value Al Qaeda Detainee' (OLC, 10 May 2005) ('Bradbury Memo No. 13'); Steven G Bradbury (Acting Assistant Attorney General) 'Memorandum No. 12 to John A. Rizzo (Senior Deputy General Counsel, CIA): Application of 18 USC. §§ 2340–2340A to Certain Techniques That May Be Used in the Interrogation of a High Value Al Qaeda Detainee' (OLC, 10 May 2005) ('Bradbury Memo No. 12'); Memorandum from Steven G Bradbury (Acting Assistant Attorney General) 'Memorandum to John A. Rizzo (Senior Deputy General Counsel, CIA): Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value Al Qaeda Detainees' (OLC, 30 May 2005).

[40] Bradbury, Memo No. 13, ibid. Bradbury, Memo No. 12, ibid, 10.

[41] Bradbury, Memo No. 12, ibid, 10.

At the Department of Defence (DoD), several Pentagon lawyers had significant disagreements over the appropriate interrogation techniques for detainees at Guantánamo Bay.[42] In April 2004, a DoD Working Group Report on Detainee Interrogations, established by Defence Secretary Donald Rumsfeld, recommended interrogation tactics for approval.[43] The report was influenced by the DoJ advice and the Bybee memo of August 2002.[44] On the basis of this report, Secretary Rumsfeld authorized a list of techniques that included dietary manipulation, environmental manipulation, sleep adjustment, false flag and isolation.[45] While these and even harsher techniques had been authorized against high-value detainees in CIA custody, the new list applied to the far larger population in military custody at Guantánamo.

These enhanced interrogation techniques migrated rapidly from Guantánamo Bay to Afghanistan and Iraq.[46] The secrecy of interrogations and detention initially made it difficult for those outside the US Government to monitor the extent to which these techniques were actually used. Over time, however, evidence emerged to substantiate numerous claims of what amounted to torture or cruel, inhuman or degrading treatment under international law.

For example, in relation to Iraq, in May 2003 the International Committee of the Red Cross made over 200 allegations of ill-treatment of prisoners of war; it made another 50 allegations concerning Camp Cropper in July 2003.[47] Graphic photographic evidence of US torture of detainees in Iraq was exposed in April 2004, along with details of an internal US military report on torture at Abu Ghraib prison.[48] That report

---

[42] See *Report of the Constitution Project's Task Force on Detainee Treatment* (2013), 41.

[43] 'Working Group Report, Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operation Considerations' (DOD, 4 April 2003).

[44] See 'Inquiry into the Treatment of Detainees in US Custody' (Senate Armed Services Committee (110th Congress), 20 November 2008), 118.

[45] Donald Rumsfeld, 'Memorandum for the Commander, US Southern Command, Counter-Resistance Techniques in the War on Terrorism' (16 April 2003).

[46] Harold Brown, Tillie K Fowler, Charles A Homer and James R Schlesinger (US DoD), *Final Report of the Independent Panel to Review DOD Detention Operations* (2004), 12–13.

[47] Reed Brody, 'The Road to Abu Ghraib' in Rachel Meeropol (ed), *America's Disappeared: Secret Imprisonment, Detainees, and the War on Terror* (Seven Stories Press, 2011), 123.

[48] Seymour Hersh, 'Torture at Abu Graib', *New Yorker* (19 May 2004); 'Photos show Jail Abuse by US Troops', *Sydney Morning Herald* (30 April 2004).

found that from October to December 2003, there were numerous 'sadistic, blatant, and wanton criminal abuses' at the prison by US military police, interrogators, and private security contractors.[49] Abuses included:

> Breaking chemical lights and pouring the phosphoric liquid on detainees; pouring cold water on naked detainees; beating detainees with a broom handle and a chair; threatening male detainees with rape; allowing a military police guard to stitch the wound of a detainee who was injured after being slammed against the wall in his cell; sodomizing a detainee with a chemical light and perhaps a broom stick, and using military working dogs to frighten and intimidate detainees with threats of attack, and in one instance actually biting a detainee.[50]

A 2006 report by Human Rights Watch, Human Rights First and the New York University Centre for Global Justice documented over 330 cases in which US military and civilian personnel were credibly alleged to have abused or killed detainees.[51] These cases involved more than 600 US personnel and over 460 detainees at US facilities in Afghanistan, Iraq and Guantánamo Bay.[52] Human Rights First also reported in 2006 that nearly 100 detainees had died while in US custody in Iraq and Afghanistan.[53]

At Guantánamo Bay, a leaked DoD interrogation log showed that a detainee, thought to have been the missing 20th hijacker of the 9/11 attacks, was subjected to 160 days of isolation in a pen perpetually flooded with artificial light.[54] He was interrogated on 48 of 54 days, for 18–20 hours at a stretch. He was stripped naked; straddled by taunting female guards; forced to wear women's underwear on his head and to put on a bra; threatened by dogs; placed on a leash; subjected to a phony kidnapping; deprived of heat; given large quantities of intravenous liquids without access to a toilet; deprived of sleep; and forced to undergo an enema.

As allegations came to light, including through robust reporting by the US media, numerous international and domestic organizations condemned the US practices, often describing them as torture or cruel, inhuman or degrading, and as violations of constitutional law, human

---

[49] Report of Major General Antonio Taguba, quoted in Hersh, ibid.

[50] Hersh, ibid.

[51] Center for Human Rights and Global Justice, Human Rights First and Human Rights Watch, *By the Numbers: Findings of the Detainee Abuse and Accountability Project* (2006).

[52] Ibid, 6.

[53] 'Command's Responsibility: Detainee Deaths in US Custody in Iraq and Afghanistan' (Human Rights First, February 2006), 5.

[54] Adam Zagorin and Michael Duffy, 'Inside the Interrogation of Detainee 063', *Time Magazine* (12 June 2005).

rights law or international humanitarian law. The groundswell of domestic and international criticism, and a change in US presidents, eventually produced a policy shift by 2009. In January 2009, US President Obama signed Executive Order 13491 on 'Ensuring Lawful Interrogation', which: revoked an earlier order which restrictively interpreted common Article 3 of the Geneva Conventions;[55] prohibited reliance on DoJ or other legal advice on interrogation adopted between 11 September 2001 and 20 January 2009; and required all interrogations in armed conflict, by any US government agency, to follow the US Army Field Manual. The Field Manual requires all interrogations to accord with US law but also the law of war and international law,[56] and expressly forbids, for instance, beating detainees or threatening them with dogs. The Field Manual, however, had already been revised in 2006 to regularize some questionable practices.[57] This chapter next considers the extent to which the torture memos were out of step with the international jurisprudence on torture.

B. Interrogation Methods Constituting Torture or Ill-treatment

Several United Nations bodies condemned the US for its erroneous interpretation of the Torture Convention and breaches of its international obligations. On the issue of what constitutes 'severe pain or suffering', a UN Special Rapporteur, Manfred Nowak, stated:

> Only acts which cause severe pain or suffering can qualify as torture [. . .] The severity does not have to be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure or impairment of bodily functions or even death, as suggested in the "torture memos" under the Bush administration in the United States.[58]

In its report on the US in 2006, the UN Committee against Torture stated that it was concerned by 'reliable reports of acts of torture or cruel,

---

[55] George W Bush, 'Executive Order 13440: Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency' (20 July 2007).

[56] US Army, *Field Manual 2–22.3* (FM 34–53): 'Human Intelligence Collector Operations' (September 2006), rules 8–17.

[57] Ibid, Ch 8 and Appendix M: Restricted Interrogation Technique – Separation (such as 'fear up'; good cop/bad cop ('Mutt and Jeff'); 'False Flag' (deceiving a detainee about the state of custody); and 'separation' (protracted solitary confinement)).

[58] Manfred Nowak, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc A/HRC/13/39/Add.5 (5 February 2010), [32].

inhuman and degrading treatment or punishment committed by certain members of the State party's military or civilian personnel in Afghanistan and Iraq'.[59] It called upon the US to 'rescind any interrogation technique, including methods involving sexual humiliation, "waterboarding", "short shackling" and using dogs to induce fear that constitutes torture or cruel, inhuman or degrading treatment or punishment, in all places of detention under its de facto effective control'.[60] In the same year, a joint report submitted by five holders of mandates of special procedures of the UN Commission on Human Rights concluded that:

> [T]he interrogation techniques authorized by the [United States] Department of Defense, particularly if used simultaneously, amount to degrading treatment in violation of article 7 of ICCPR and article 16 of the Convention against Torture. If in individual cases, which were described in interviews, the victim experienced severe pain or suffering, these acts amounted to torture as defined in article 1 of the Convention.[61]

As noted earlier, international treaty law provides a general definition of torture, but does not enumerate specific prohibited acts. Treaty law also does not define cruel, inhuman or degrading treatment or punishment.[62] The lack of concrete specification of what is torture or ill-treatment necessarily creates some ambiguity and brings potential for subjective interpretation. Clearly not every unpleasant act in interrogation is torture. Even routine police custody and interrogation relies to some extent on mental pressure, by creating 'hardship and discomfort'.[63] As the Israeli Supreme Court noted: 'An interrogation inevitably infringes upon the suspect's freedom, even if physical means are not used. Indeed, undergoing an interrogation infringes on both the suspect's dignity and his individual privacy.'[64] At the other end of the spectrum is organ failure or death. In the torture memos, the US lawyers resolved the textual ambiguity in a manner which suited the prevailing imperative of the then US Government to maximize the extraction of intelligence and in turn to maximize American

---

[59] UN Committee Against Torture, *Conclusions and Recommendations on the United States of America*, UN Doc CAT/C/USA/CO/2 (25 July 2006), [26].

[60] Ibid, [24].

[61] UN Commission on Human Rights, *Report on the Situation of Detainees at Guantánamo Bay*, UN Doc SE/CN.4/2006/120 (7 February 2006), [87].

[62] See Rebecca Schechter, 'Intentional Starvation as Torture: Exploring the Gray Area between Ill-treatment and Torture' (2003) 18 *American University International Law Review* 1233.

[63] Parker Report, above n 3, [9].

[64] *Public Committee Against Torture in Israel v State of Israel*, 6 September 1999, HCJ 5100/94, [18].

security. Aggressive interrogation was thought to be effective in countering terrorism, despite the contrary views of many professional interrogators, and the experience of the common law courts over many centuries,[65] that torture information is often unreliable. In doing so, the lawyers subordinated other interests to the security imperative, including the human rights of suspects, the US' international commitments, and the pragmatic assessment of whether torturing terrorists may radicalize more terrorists and reduce American security.

In international law, a treaty provision is to be given its ordinary meaning, in context, and in light of the treaty's object and purpose;[66] subsequent agreement or practice among the parties may also be relevant, along with the drafting history. The interpretations in the torture memos are impossible to reconcile with these principles. For a start, the 'ordinary' meaning of severe pain or suffering does not imply only organ failure or death. Further, the intuition that the nominated methods do not cause 'severe' pain or suffering is not evidence-based and under-estimates the likely physical or psychological harm caused by such methods.[67] The interpretations of the torture lawyers are also acontextual: a domestic medical care benefits statute, which was analogously invoked, serves an entirely different policy function than a law against torture.[68] The false analogy was also illogical, since death may not cause pain at all, while severe pain may be caused by methods which do not risk organ failure or death.[69]

Such interpretations are also not properly informed by the object and purpose of the law against torture, which is to prevent abuses in custody and protect against violations of the body by the state. It must, therefore, be read in this spirit, to give fullest expression to the prohibitions, and not to minimize the scope of protection in pursuit of other policy interests. As already noted, an absolute prohibition was purposefully imposed even during emergencies, signifying that balancing or trade-offs with security interests is not permitted.

By contrast, the torture memos are an example of instrumental legal

---

[65] *A v Secretary of State for the Home Department*, above n 28, [51]–[52] (Lord Bingham).

[66] Vienna Convention on the Law of Treaties, adopted 22 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 31.

[67] See, e.g., Nigel Rodley, *The Treatment of Prisoners under International Law* (2nd edn, Clarendon Press, 1999), 92–3.

[68] See also US DoJ Office of Professional Responsibility, *Report on the Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Related to the Central Intelligence Agency's Use of 'Enhanced Interrogation Techniques' on Suspected Terrorists*, 29 July 2009, 178.

[69] Ibid.

reasoning to justify the client's position, where lawyers 'manipulate and stretch law and legal processes to their very outer limits, no matter how far away from or contrary to its underlying spirit'.[70] The result is that legal rules become 'nothing but tools lawyers utilize on behalf of whichever side they represent',[71] taking advantage of ambiguities. Such an approach detracts from the binding quality of law, and its certainty, stability, and equality; the instrumental view of law as a means to an end undermines the very ideal of the rule of law.[72] While all lawyers necessarily seek to represent their client's interests, they also owe a duty of fidelity to the law. Government lawyers advising on institutional legal positions bear special responsibilities to cautiously weigh their advice and its likely consequences.

Had the torture lawyers more carefully considered the decades of international jurisprudence, it would have been obvious that their restrictive and contorted interpretations were not plausible or within the zone of reasonable alternatives. It was noted earlier that there is no enumerative definition of torture or other ill-treatment. Given the purpose of the prohibitions, the definitional flexibility inherent in these legal concepts provides a basis for expansive protection rather than restrictive interpretations to narrow their scope.

Accordingly, in interpreting Article 7 of the International Covenant on Civil and Political Rights (ICCPR), the UN Human Rights Committee has stated that it does not 'consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment'.[73] Rather, the Committee believes that 'the distinctions depend on the nature, purpose and severity of the treatment applied'.[74] Thus, in responding to Israel's use of 'moderate physical pressure' in interrogations, in 1998 the UN Human Rights Committee found that the methods of handcuffing, hooding, shaking, and sleep deprivation are violations 'in any circumstances' of the ICCPR prohibition on torture or ill-treatment, in addition to prolonged solitary confinement violating the prohibition.[75]

This followed a finding in 1997 by the UN Committee against Torture

---

[70] Brian Tamanaha, 'The Tension between Legal Instrumentalism and the Rule of Law' (2006) 33 *Syracuse Journal of International Law and Commerce* 131, 146.

[71] Ibid.

[72] Ibid.

[73] UN Human Rights Committee, General Comment No. 20: Article 7 (10 March 1992), [4].

[74] Ibid.

[75] UN Human Rights Committee, Concluding Observations: Israel, UN Doc CCPR/C/79/Add.93 (18 August 1998), [19–20].

that Israel's use of violent shaking, restraint in painful positions (*shabeh*), hooding, prolonged loud music, prolonged sleep deprivation, threats, and prolonged exposure to cold air constituted torture.[76] Earlier in 1994, the UN Committee against Torture found that a report by Israel's Landau Commission, which sanctioned 'moderate physical pressure', was 'completely unacceptable' because it led to 'the risk of torture or cruel, or inhuman or degrading treatment'.[77]

In 1999, the Israeli Supreme Court finally agreed with the UN bodies that such methods were unlawful.[78] In *Public Committee Against Torture v Israel*, the Court found that 'a reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment of the subject and free of any degrading handling whatsoever'.[79] The Court concluded that shaking, crouching, *shabach* (cuffing and hooding a suspect, seated on a low chair, and subjected to loud music), and prolonged sleep deprivation were all prohibited. Handcuffing was only permissible if it was necessary to ensure the investigator's safety, while sleep deprivation was permissible if it was incidental to routine interrogation and not used as a specific interrogation method.[80]

In contrast to the UN bodies, the European regional human rights system initially drew sharper distinctions between torture and cruel, inhuman or degrading treatment.[81] In the *Greek* case (1969), the European Commission on Human Rights indicated that while inhuman treatment also involves 'severe suffering, mental or physical', torture 'is generally an aggravated form of inhuman or degrading punishment'.[82] In *Ireland v UK*, the European Court likewise held that the distinction between the terms 'derives principally from a difference in the intensity of the suffering inflicted':

> ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of

---

[76] UN Committee against Torture, Concluding Observations: Israel, UN Doc A/52/44 (5 September 1997), [257].

[77] UN Committee against Torture, Concluding Observations: Israel, UN Doc A/49/44 (12 June 1994), [168].

[78] *Public Committee Against Torture in Israel v State of Israel*, Supreme Court of Israel, 6 September 1999, HCJ 5100/94, [24]–[32].

[79] Ibid, [23].

[80] Ibid, [26] and [31] respectively.

[81] Evans and Morgan, above n 1, 56–7 and 76.

[82] *Denmark and Others v Greece* (European Commission on Human Rights) (5 November 1969) 12 *Yearbook of the European Convention on Human Rights* 186 (1969) ('*Greek* case').

> the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.[83]

In that case, the five techniques of British interrogation in Northern Ireland – prolonged wall standing, hooding, subjection to noise, bread-and-water diet, and sleep deprivation – were held to constitute inhuman and degrading treatment. They were not found to be torture, however, because 'they did not occasion suffering of the particular intensity and cruelty implied by the word torture'.[84] The Court found an intention behind the drafting of the European Convention to 'attach a special moral stigma' to torture.[85] The Court nonetheless found that the British techniques were degrading because they were designed to cause fear, anguish, inferiority, humiliation, and debasement and aimed to break the detainees' resistance.[86]

Attempting to grade the severity of treatment has been described as an 'invidious task'[87] and highly subjective.[88] Later European cases have retreated from the earlier restrictive approach, for example by finding violations of Article 3 as a whole, rather than distinguishing between torture and ill-treatment.[89] In *Selmouni v France*, the European Court signalled a more protective approach:

> having regard to the fact that the Convention is a 'living instrument which must be interpreted in the light of present-day conditions' . . . the Court considers that certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.[90]

Thus after 9/11 the UK House of Lords incidentally remarked that the conduct in *Ireland v UK*, as well as the techniques in the torture memos,

---

[83] *Ireland v United Kingdom* (1980) 2 EHRR 25, [162].

[84] Ibid, [167].

[85] Ibid; see also *Aksoy v Turkey*, above n 19, [63].

[86] *Ireland v United Kingdom*, above n 83, [79]–[80].

[87] Ibid.

[88] Benvenisti, above n 9, 605.

[89] See, e.g., *Soering v UK* App No 14038/88 (1988) 11 EHRR 439, [104]. See also *Aydin v Turkey* App No 23178/94 European Commission on Human Rights (7 March 1996), [185] (the conduct was later found to be torture by the European Court: *Aydin v Turkey* App No 23178/94 ECtHR (25 September 1997), [85]).

[90] *Selmouni v France* App No 25803/94 (2000) 29 EHRR 403, [101].

'would now be held to fall within the definition in article 1 of the Torture Convention'.[91] The distinction between torture and other ill-treatment is better understood as relating to the powerlessness of the victim rather than than the intensity or severity of the act. As the then UN Special Rapporteur on torture, Manfred Nowak, explains of the approach under the Torture Convention:

> [A] thorough analysis of the travaux préparatoires of articles 1 and 16 of the CAT as well as a systematic interpretation of both provisions in light of the practice of the Committee against Torture leads one to conclude that the decisive criteria for distinguishing torture from CIDT (cruel, inhuman and degrading treatment) may best be understood to be the purpose of the conduct and the powerlessness of the victim, rather than the intensity of the pain or suffering inflicted. . . .[92]

Because torture and other ill-treatment are equally prohibited, a finding that conduct amounts to ill-treatment and not torture is more of moral or symbolic significance, since 'greater moral opprobrium' attaches to designating an act as 'torture'.[93] Many of the interrogation techniques used since 9/11, which are asserted not to constitute torture, are prohibited regardless of whether they amount to torture or cruel, inhuman or degrading treatment. The distinction can, however, have significance in domestic legal orders which have criminalized torture but have not taken steps to also rule out other forms of ill-treatment.

4. INVESTIGATION, PUNISHMENT AND ACCOUNTABILITY

Efforts to secure accountability for US torture in the war on terror have addressed two distinct categories of actor: those who exceeded their domestic US legal authority, and those who drafted or acted under the domestic legal authority of the torture memos but, as discussed earlier, exceeded the international legal prohibition on torture or other ill-treatment.

---

[91] *A v Secretary of State for the Home Department*, above n 28, [53] (Lord Bingham).

[92] Manfred Nowak, *Report of the Special Rapporteur on the question of torture*, UN Doc E/CN.4/2006/6 (23 December 2005), [39]. See also Manfred Nowak and Elizabeth McArthur, *The United Nations Convention against Torture: A Commentary* (OUP, 2008), 69.

[93] Evans and Morgan, above n 1, 79.

A. Ill-treatment of Detainees

In relation to the first category, the war on terror unleashed numerous cases of detainee abuse in apparent violation of existing US laws on humane detainee treatment. The spectrum of abuse committed by US personnel in Guantánamo, Iraq and Afghanistan ranged from forceful interrogation, to punishment or discipline, to acts intended to humiliate, degrade, or break down the resistance of detainees.

Some official explanations for abuse, exemplified by the response to abuses by US military personnel Lynndie England and Charles Graner at Abu Ghraib, were that such misbehaviour was the work of a 'few bad apples'.[94] However, the evidence from US Government sources and inquiries, international organisations,[95] NGOs, and the media suggests that abuse was more widespread, systematic and culturally institutionalized.

For instance, US military investigations recorded around 300 allegations of abuse in 20 US-run detention centres by mid-2004 alone.[96] The CIA also found cases of abuse and referred some for prosecution.[97] As noted earlier, the ICRC made over 200 allegations of ill-treatment of prisoners of war in May 2003, and another 50 allegations at Camp Cropper alone in July 2003.[98] Human Rights First reported that nearly 100 detainees died in US custody, 34 of which the US military classified as suspected or confirmed homicides.[99]

A number of factors account for the institutionalized pattern of detainee ill-treatment contrary to the US' own legal controls, including: inadequate training;[100] poor command discipline, weak leadership, and a lack of oversight;[101] and the stress of protracted or repeat deployments. The refusal to apply the Geneva Conventions also created a void which

---

[94] 'Just a Few Bad Apples?', *The Economist* (20 January 2005).

[95] See 'Report on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation' (ICRC, February 2004).

[96] See *Panel Report*, above n 46, 909.

[97] *By the Numbers Report*, above n 51, 2.

[98] Brody, above n 47, 123.

[99] Human Rights First, above n 53, 5.

[100] David Rose, *Guantánamo: America's War on Human Rights* (Faber and Faber, 2004), 45 (citing Pentagon and military investigations on Afghanistan and Iraq).

[101] *Panel Report*, above n 4, 10–12, 14–17, 27–31, 36–8, 43–52, 66–70, 74–7; see also 'Investigation of Intelligence Activities at Abu Ghraib' (US DoD, 23 August 2004); Eric Schmitt, 'Abuses at Prison Tied to Officers in Intelligence', *New York Times* (23 August 2004), A1.

was inadequately filled by other rules.[102] The torture memos also created ambiguity and confusion about which methods were authorized or not, creating an atmosphere conducive to abuse.[103]

All of this was aggravated by high-level political messaging that the unprecedented threat of terrorism required an exceptional response. As Vice President Cheney stated soon after 9/11: 'It's going to be vital for us to use any means at our disposal . . . to achieve our objective'.[104] Cofer Black, Director of the CIA's Counterterrorist Centre until 2002, summed up this brave new world in his Congressional testimony: 'After 9/11, the gloves came off.'[105]

In principle, US military personnel are subject to both criminal federal law under Title 18 of the US Code and to the Uniform Code of Military Justice.[106] Under the latter, military personnel may be court-martialled for offences such as aggravated assault, dereliction of duty, mistreatment of detainees, and murder, regardless of whether the conduct occurred in or outside US territory. To date, however, there has been a general failure to ensure accountability. For example, a report by the Constitution Project found that only 53 US military personnel are known to have been convicted by courts-martial.[107]

Even where military investigations have substantiated abuse, commanders have often chosen to proceed with weaker non-judicial disciplinary action.[108] Further, where courts-martial convened, only a few convictions resulted in significant prison time. Many sentences have been for less than a year, with only ten people sentenced to a year or more in prison, despite the serious nature of abuses.[109] No US military officer has been charged under the doctrine of command responsibility for abuses committed by subordinates, nor have any senior government officials been held accountable.[110] Also, the DoJ indicted only one civilian CIA

---

[102] Ricardo S Sanchez and Donald T Phillips, *Wiser in Battle* (Harper Collins Publishers, 2008), 149–50.

[103] See Marcy Strauss, 'The Lessons of Abu Ghraib' (2005) 66 *Ohio State Law Journal* 1269.

[104] Amanda Ripley, 'Redefining Torture', *Time Magazine* (21 June 2004) 49, 50.

[105] Mark Bowden, 'The Dark Art of Interrogation', *The Atlantic Monthly* (October 2003), 56.

[106] Constitutional protections for mistreatment in detention under the Fifth and Eighth Amendments have thus far not been applied against US officials acting outside the US: see *Munaf v Green*, 128 S.Ct. 2207 (2008).

[107] *Detainee Treatment Report*, above n 42.

[108] *By the Numbers Report*, above n 51, 2.

[109] Ibid.

[110] Ibid, 3.

contractor[111] and in mid-2012 announced that it would close its investigation into the CIA's alleged torture and abuse, with no charges brought.[112]

B. Reliance on the Torture Memos

In relation to the second category of actors, the US has conferred practical immunity from prosecution on interrogators who acted on the basis of the torture memos, despite bad legal advice (or mistake of law) not being a defence to the international crime of torture. In April 2009, President Obama stated that he would 'assure those who carried out their duties relying in good faith upon the legal advice from the Department of Justice that they will not be subject to prosecution'.[113] There have also been no prosecutions of those who ordered specific 'enhanced' interrogations, or approved the torture memos (such as Defence Secretary Rumsfeld), again such as under the doctrine of command responsibility.

In relation to the lawyers who drafted the torture memos, in 2009 the DoJ's Office of Professional Responsibility concluded that Jay Bybee and John Yoo (who had assisted Bybee) had committed professional misconduct, by violating their duty to provide independent legal judgment and render thorough, objective and candid legal advice.[114] The memos were found to have pursued permissive and aggressive interpretations of the law. The Office found, for instance, that the Bybee memo was marred by 'errors, omissions, misstatements, and illogical conclusions'.[115] It misrepresented and falsely analogized the domestic medical care statute; was based on scant legal authority; ignored contrary authorities; selectively discussed the US ratification history of the Convention against Torture; and incompletely discussed the international jurisprudence.[116]

No disciplinary proceedings were initiated, however, because in 2010 the Associate Deputy Attorney General disagreed with the Office of Professional Responsibility and refused to refer the cases to the state bar associations. Instead the drafters of the memos were found to have

---

[111] *United States v Passaro*, 577 F.3d 207, 211 (4th Cir. 2009), *cert. denied*, 130 S. Ct. 1551 (2010).

[112] US Attorney General Eric Holder, 'Statement of on Closure of Investigation into the Interrogation of Certain Detainees', <www.justice.gov/opa/pr/2012/August/12-ag-1067.html>.

[113] US President Barack Obama, 'Statement on Release of OLC Memos' (16 April 2009).

[114] US DoJ Office of Professional Responsibility, above n 68.

[115] Ibid, 159.

[116] Ibid, 178, 181, 184–6, 190–6.

made minor errors and exercised poor judgment, but they did not knowingly or recklessly provide incorrect advice, exercise bad faith, or show conscious indifference to the consequences.[117] There was also no evidence that the opinions were issued to satisfy the client's wishes or motivated by improper purposes. It was observed, however, that John Yoo held sincere but extreme legal views of executive power which clouded his judgment, and he failed to appreciate the heavy responsibility of issuing institutional legal opinions.[118]

Civil litigation is another avenue through which victims of torture have attempted to seek redress, but with little success.[119] A number of civil tort claims in the US courts failed to surmount the pre-trial stage, often because of defences such as qualified immunity or the state secrets privilege.[120] Some claimants in the UK have had more success, with the government settling a number of civil lawsuits with former Guantánamo detainees. However this was done on confidential terms and without admitting liability.[121]

C. International Accountability

Prospects for international accountability of US personnel seem remote. Various UN treaty bodies have adversely commented on US practices, as already noted, but these are recommendations rather than binding determinations. The US has not submitted to the jurisdiction of the International Criminal Court and there is no possibility that the Security Council would refer US conduct to it. The US is, however, bound by the Inter-American regional human rights system, which has issued precautionary measures to prevent irreparable harm to detainees at Guantánamo Bay,[122] but thus far

---

[117] David Margolis (Associate Deputy Attorney General), 'Memorandum on Decision Regarding the Objections to the Findings of Professional Misconduct' (5 January 2010), 64–5. See also *Padilla v Yoo*, 633 F. Supp. 2d 1005 (N.D. Cal. 2009) (Padilla unsuccessfully sought damages for injuries flowing from Yoo's advice).

[118] Ibid, 67.

[119] See George Brown, 'Accountability, Liability, and the War on Terror – Constitutional Tort Suits as Truth and Reconciliation Vehicles' (2011) 63 *Florida Law Review* 193.

[120] For example, see *In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d 85, 94 (DDC 2007); *Arar v Ashcroft*, 585 F.3d 559, 563 (2d Cir. 2009), *El-Masri v United States*, 479 F.3d 296, 302 (4th Cir. 2007).

[121] Ian Cobain, 'Guantánamo Detainee Payouts will Draw Line under Affair, Says Government', *The Guardian* (17 November 2010).

[122] *Precautionary Measures 259–02: Detainees at Guantanamo, United States* (12 March 2002), Inter-American Court of Human Rights.

the US has not respected its orders. While the European Court of Human Rights has found against European states for complicity in CIA rendition operations,[123] it has no jurisdiction over the US. Various non-binding foreign inquiries also exposed other states' cooperation in US renditions[124] and led, for instance, to an apology and compensation to a Canadian citizen,[125] but such inquiries do not directly affect the US.

Other states may certainly exercise universal or extraterritorial criminal jurisdiction over torture by US personnel, whether war crimes under IHL or the general crime under the Torture Convention. But effective action requires custody of a suspect. The US would almost certainly oppose extradition, and bring diplomatic pressure to bear on states contemplating the prosecution or extradition of US citizens. While Italy convicted CIA agents *in absentia* for the abduction and rendition of a suspect to Egypt, it has been unable to enforce the convictions.[126] Status of forces agreements also confer criminal immunities on US forces hosted with the consent of the territorial state, as in post-occupation Iraq and Afghanistan.

5. CONCLUSION

The post-9/11 abuses by the US, as the lead belligerent in the 'war on terror', placed severe strain on the international prohibitions on torture and cruel, inhuman or degrading treatment. The torture memos introduced a new, evasive legalism into what were intended to be morally clear international rules. Though the texts of such rules are not wholly unambiguous, it was long understood that their effectiveness relies on good-faith interpretation of their humanitarian spirit, especially by superpowers. In addition to its own violations, US torture, coupled with renditions, had ripple effects by degrading the law's normative hold on other states, in a world where torture was already commonplace and accountability scarce.

Despite these pressures, the rescission in 2009 of US legal authority to torture signalled a retreat from exceptionalism and a return to relative legal normalcy. Domestic and international push-back against the US position was overwhelming and helped to restore US commitment to the

---

[123] *El-Masri v The Former Yugoslav Republic of Macedonia* App No 39630/09 (ECHR, 13 December 2012).

[124] See Ch 21 in this book.

[125] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar* (2006).

[126] Corte d'Appello di Milano, 12 February 2012 (published 3 April 2013), No 6709/2013.

prohibitions. It helped that many realists also came to view torture as counter-productive: even if it works in some cases, as it must, exposure of US torture aggravated anti-American sentiment and radicalized new terrorists. Abu Ghraib was a fertile, albeit inadvertent, terrorist recruitment exercise. There nonetheless remains unfinished business. The US has not been keen to revisit the past by ensuring accountability for abuses. A culture of impunity prevails, in a field where there is little public sympathy in the US for tortured 'terrorists', and a limited capacity of foreign legal institutions to do justice there.