Law, Liberty, and the Pursuit of Terrorism

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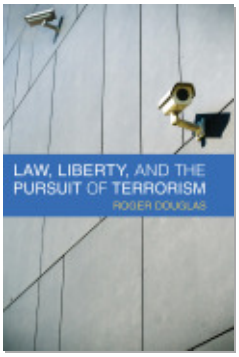

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NINE

Torture and Coercive Questioning

> We do not torture.
>
> *President George W. Bush, 2005*

> We also have to work the dark side, if you will, the shadows, in the intelligence world. . . . It is a mean, nasty, dangerous and dirty business, and we have to operate in that area.
>
> *Vice President Richard Cheney, 2001*[1]

> Human rights is a very flexible concept. It depends on how hypocritical you want to be on a particular day.
>
> *Michael Scheuer, former head of the CIA's Bin Laden Unit, 2005*[2]

> I assumed that if they were doing things out of the ordinary or outside the guidelines, someone would have said something. Also the wing belongs to MI [the Military Intelligence Corps] and it appeared MI personnel approved of the abuse.
>
> *Abu Ghraib corporal*[3]

As far as international law is concerned, official torture can never be justified. It is prohibited by customary international law, and the prohibition binds both states and individuals. The Geneva Conventions govern the treatment of those seized in the course of armed conflict. Convention expectations vary according to whether the conflict is an "international" armed conflict and, if it is not, according to whether the Second Protocol to the conventions applies. Even if the conflict is neither "international" nor governed by the Second Protocol, Common Article 3 of the conventions applies and forbids the torture and ill-treatment of those taken prisoner in the course of armed conflict and of nonparticipants. The conventions do not apply to conflict that falls short of constituting "armed conflict."

Article 7 of the International Covenant on Civil and Political Rights (ICCPR) absolutely forbids "torture or cruel inhuman or degrading treatment or punishment." The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Convention") came into effect on 26 June 1987. It prohibits "torture," which is defined to involve the

intentional infliction of severe injury by public officials. Its prohibition on torture is subject to no exceptions.[4] The convention also prohibits "cruel, inhuman or degrading treatment," but signatories' duties in relation to this are less exacting. As of mid-2012, there were 150 parties to the Torture Convention, a sizeable number of which have nonetheless engaged in or been complicit in torture or something closely resembling it. The discrepancy between norms and practice should come as no surprise: the exacting standards of international law owe their existence to national governments' capacity for hypocrisy; and, less cynically, the need for most forms of proscriptive law arises from the existence of the behaviour it proscribes. What is more interesting is how countries handle the strain between the apparent unacceptability of torture and the temptation to resort to it, and that is the subject of this chapter.

But first, I offer a caveat. Even when the term *torture* is defined, it may not always be clear whether a particular form of brutality falls within its rubric.[5] One of the more controversial elements of the US "torture memoranda" related to precisely this issue. Part of the problem with the memoranda lay with the point at which they drew the line, but part of the problem also seems to lie in understandable revulsion at the thought of lawyers calmly deciding and giving advice to the effect that some forms of very painful treatment should be denied the label "torture." Nonetheless, international law implies that lines must be drawn and that they have important consequences. The Torture Convention implies a distinction between "torture" and lesser (but nonetheless unacceptable) forms of ill-treatment.[6] The UN special rapporteur on torture has concluded that for the purposes of the Torture Convention, torture and inhuman treatment are distinguished not by severity of harm but by the fact that inhuman behaviour is covered by the convention regardless of whether it involves official conduct.[7] This view is contentious,[8] however, and has been expressly rejected by the Court of Appeal of England and Wales.[9] For the purposes of this chapter, I shall use the term *torture* loosely to include "inhuman" treatment.

Torture and Ill-Treatment: Use and Complicity

United States

The United States is a party to the Geneva Conventions, the ICCPR, and the Torture Convention, and it has passed legislation to give effect to the obligations it assumed by its 1994 ratification of the Torture Convention. However, Senate ratification was subject to a narrow definition of what was entailed in "severe mental pain or suffering." It also limited US obligations in relation to cruel, inhuman, or degrading treatment to "the cruel, unusual and inhuman

treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution." In anticipation of the ratification of the Torture Convention, Congress had earlier legislated to prohibit the use of torture. Its definition anticipated the Senate's subsequent reservation.[10]

Coercive interrogation has nonetheless been used by the United States in its War on Terror. It was widely used at Guantánamo[11] and Afghanistan[12] and has been used by the Central Intelligence Agency in prisons maintained by the agency.[13] The notorious use of torture at the Abu Ghraib prison in Iraq took place in a context in which the military police involved had been requested to "set physical and mental conditions for favorable interrogation of witnesses."[14] In addition, the CIA has outsourced interrogation to countries whose governments are notorious for their use of torture.[15] Because the United States takes law seriously, the agencies responsible for the use of potentially inhuman interrogation techniques were concerned about their legality and anxious to know how far they could go. In a series of controversial memoranda (here called the "torture memoranda"), lawyers in both the Department of Justice and the Department of Defense advised that they could go a very long way.

The torture memoranda advised that, for the purposes of US criminal law, "torture" involved the infliction of a higher degree of pain than was usually involved in coercive interrogations and gratuitously inflicted violence.[16] To be "severe," it was necessary that, at the very least, torture involve the infliction of lasting physical or mental harm. The memoranda also advised that an official might be able to rely on the defences of necessity and even self-defence. They also argued that insofar as the torture legislation purported to limit the power of the president as commander in chief, it was unconstitutional. The memoranda also cast doubt on whether the use of "lesser" forms of violence and humiliation for intelligence-gathering purposes was illegal under US law.

Other memoranda addressed and approved the use of particular methods of interrogation.[17] While the CIA continued to use "enhanced techniques" that had been specifically approved, it did not take full advantage of the broader powers postulated in the memoranda.[18] The use of violence and degradation in military facilities was less constrained and more widespread and was manifested both in violent interrogations and in the gratuitous mistreatment of prisoners, both at Guantánamo and in other prisons, including, notoriously, Abu Ghraib.[19] However, like the CIA, the Defense Department did not authorise the full exercise of the powers implicit in the two general memoranda.[20]

Under the Detainee Treatment Act of 2005 and onwards, the powers of the military have been restricted so as to preclude use of interrogation methods other than those listed in the army's field manual on intelligence interrogation,[21] which itself was amended so as to impose tighter standards than those

required by the Geneva Conventions.[22] However, the legislation also provided considerable protection to interrogators who had used techniques on the basis of assurances that the techniques were legal.[23] But while the Detainee Treatment Act extended the prohibition on torture and inhuman treatment so that it applied to anyone in the physical custody of the United States, regardless of where, it did not subject the CIA to the field manual.

The Supreme Court decision in *Hamden v Rumsfeld* meant that, contrary to the administration's view, prisoners at Guantánamo were also entitled to the protections afforded by Common Article 3 of the Geneva Conventions.[24] Congress responded by narrowing the scope of the relevant legislation (18 USC § 2441(3)(c)) and limiting the circumstances under which officers and service personnel could be prosecuted under the section for offences committed between 2001 and 2005.[25]

A bill that would have subjected the CIA to the field manual restraints was vetoed by President Bush and failed to secure the congressional majority needed to overcome the veto.[26] President Obama's executive order of 22 January 2010 banned the use of torture by the CIA.[27] However, it provides no protection against a subsequent president's issuing of a fresh and inconsistent order.

An alternative to the use of torture by US agents is its use by foreign governments on behalf of or with the connivance of the United States. In some cases, this involved the capture of suspects outside the torturing state and their transfer to countries where they have been subjected to lengthy periods of torture and ill-treatment.

The focus of this section has been on torture for the purposes of interrogation, but the boundary between torture for interrogation and its expressive use can be vague, and in any case, it is clear that torture or inhumane treatment was not limited to its use in the context of interrogation. Practices developed for ostensibly instrumental coercion were reflected in noninstrumental mistreatment. Abu Ghraib was its visible face, and it was far less atypical than one would wish. Moreover, complicity in torture was not confined to the victims of extraordinary rendition. While there is some evidence that US personnel sometimes tried to prevent the use of torture by the Iraqi government, recently disclosed US Army field reports have disclosed a general failure to investigate reports of abuse by Iraqi authorities.[28]

United Kingdom

Historically, the United Kingdom has not been averse to the use of coercion as a means of gathering information from suspected terrorists. It was used in the course of the attempts to control anticolonial insurgencies in the 1950s.[29]

The United Kingdom's treatment of suspected Irish terrorists may not have involved torture, but it did involve the use of highly coercive tactics, to the point where it violated the ECHR.[30] However, the United Kingdom is a party to the Torture Convention, its accession not having been subject to any reservations. It has passed legislation to give effect to its obligations under the convention.[31] Its governments have unequivocally denounced torture. Its security services have claimed that "coercive interrogation techniques were alien to the Services' general ethics, methodology and training."[32]

In keeping with this stance, UK officials expressed concerns about the US treatment of detainees. However, committees of members of parliament have been critical of the government's failure to do more. The Intelligence and Security Committee (which consists of parliamentarians appointed by the prime minister) was critical of the instructions given to UK officials following the expression of concerns. These advised that officers should "consider" reporting ill-treatment to a senior US officer; they should have advised that officers were obliged to do this. The committee also complained that the UK government did not always follow up on its concerns.[33] It was also critical of failure to ensure that some of those involved in interrogation were unaware of their obligations under the Geneva Conventions and under the relevant standard operating instructions.[34]

Moreover, while the UK government has emphasised its abhorrence at the use of torture and its refusal to resort to it, abhorrence has coexisted with willingness to use the fruits of torture by foreign intelligence agencies.[35] Some ambiguity surrounds what UK interrogators are permitted to do and the extent to which there is compliance with these instructions. A 2002 "guidance document" emphasised the importance of not condoning or being party to the ill-treatment of interviewees and warned that servants of the Crown who engaged in inhuman or degrading treatment of prisoners would be criminally liable under UK law. A subsequent document was issued in 2004, after it "became clear to SIS and the security service that their existing Guidance to staff on dealing with foreign liaison services was insufficiently detailed given the increasing requirement to cooperate with foreign services in counterterrorism operations." But apart from brief extracts, the documents enjoyed classified status, and the government argued against their disclosure in the litigation of *Al Rawi v Security Service*.[36] The government has, however, finally released its *Consolidated Guidance to Intelligence Officers*.[37] This document precludes interrogation where the person knows or believes that torture will take place, and it permits interrogation where the person believes there is a lower-than-serious risk of cruel, inhuman, or degrading treatment. In other circumstances, senior personnel must be consulted. Cruel, inhuman, and degrading punishment is defined to include use of stress positions, sleep deprivation, hooding,

physical abuse, and degrading treatment. The guidance document is misleading insofar as it implies that interrogation may legally proceed if there is a real risk of torture or inhuman treatment, provided a senior officer or the relevant minister or ministers approves it.[38] But its standards are far more exacting than those that governed interrogation at Guantánamo, and they clearly encompass the activities alleged in the torture litigation cases. Insofar as similar guidance applied prior to 2010, the government was purporting to authorise torture and inhuman treatment only in cases where the relevant minister or ministers or a senior officer was willing to take responsibility for doing so.

Claims that UK soldiers have been involved in the torture or mistreatment of prisoners in Iraq have been the subject of public inquiries (and still are), as well as of a representative action before the UK courts seeking damages and/or judicial review remedies on behalf of more than 140 Iraqis.[39] An inquiry into the circumstances surrounding the death in custody of Baha Mousa documented not only the brutality with which Mousa was treated but the systematic use of ostensibly prohibited procedures, including hooding and the use of stress positions. There is also evidence of UK complicity in torture and ill-treatment elsewhere. Issues of complicity have arisen in a number of contexts. In early 2002, the UK government had been advised that British citizens were possibly being tortured in a US prison in Kabul, but it did little to try to prevent this.[40] The UK's intervention on behalf of prisoners at Guantánamo was less than wholehearted, and the UK cooperated with the extraordinary rendition program.[41] It was involved in the 2004 rendition of people associated with the anti-Gaddafi Libyan Islamic Fighting Group to Libya, where they were tortured.[42] It has sometimes handed over prisoners to the Afghan National Security Directorate and to the Iraqi authorities in circumstances where they faced a serious risk of torture or death.[43] Like their US counterparts, UK forces in Iraq have sometimes failed to investigate reports of abuse of detainees by Iraqi authorities.[44] Moreover, there can be little doubt that the security services have provided information that has been the basis for subsequent rendition and interrogation.[45] UK forces working with US forces in Afghanistan and Iraq have been responsible for arrests of people who have subsequently been transferred to US prisons.[46] UK agents have interviewed people whom they knew had been ill-treated during detention, although officers had been instructed by 2009 that they were forbidden from conducting any further questioning of a detainee after being informed by the detainee that the detainee had been tortured.[47]

The government also accepts that there might be circumstances in which the use of tainted evidence for intelligence purposes might be justified.[48] In *A v Secretary of State for the Home Department (No 2)*, the home secretary stated that it was not his policy to rely on information that he knew to have been obtained

by torture,[49] but he argued that he was entitled to make detention decisions based on evidence obtained from foreign intelligence sources, notwithstanding that the foreign agency had in fact used torture to extract it. He further argued that a court considering the reasonableness of continued detention was required to treat the evidence as admissible, provided it was probative.[50]

Canada

Canada is a party to the Torture Convention and has passed legislation to give effect to its obligations under the convention.[51] There is no evidence that Canadian officials have been directly involved in torture. There is, however, evidence that Canadian officials have indirectly caused people to be subjected to torture and that Canadians have handed prisoners to Afghani police in circumstances where they could assume that there was a serious risk that prisoners would subsequently be subjected to torture.

There have been four cases where Canadian inquiries have found that Canada indirectly contributed to the torture of its citizens in Syria and Egypt. Canadian involvement included the provision of unduly prejudicial material to the American authorities, but the commission of inquiry concluded both that Canadian authorities had not anticipated that Arar would be transported to Syria and that Arar was subjected to no further torture once Canadian authorities were aware of Arar's detention there.[52] The Iacobucci inquiry concluded that Canadian officials had indirectly contributed to torture of three Canadians by directly or indirectly passing on information to foreign governments, by failing to pass allegations of torture on to superiors and other interested government agencies (in two cases), by failing to visit detainees speedily and frequently (in two cases), by sending questions to be asked by the Syrians without inquiring into the circumstances in which these questions would be asked (in two cases), and by communicating concern to a foreign government about the possibility that one of the detainees might be released (in one case).[53] In *Abdelrazik v Canada (Minister of Foreign Affairs)*, a federal court judge found, on the evidence before the court, that the CSIS had recommended the imprisonment of Mr. Abdelrazik—a Canadian citizen—by the Sudanese authorities and that Canada knew that conditions would be harsh but did not know, until after his release, that Mr. Abdelrazik had in fact been tortured.[54] Canadian courts also found that Omar Khadr, a Canadian citizen detained at Guantánamo, had been interviewed by CSIS officials, who sought to question him still further in 2004, notwithstanding that they knew he had been subjected to sleep deprivation with a view towards making him more compliant.[55]

More recently, there have been allegations that Canadian forces in Afghanistan have been handing prisoners to Afghani police units, knowing that this

was likely to result in their being tortured. The latter allegations have been the subject of hearings before the Canadian House of Commons Special Committee on the Canadian Military Mission in Afghanistan. In evidence before the committee, a senior Canadian diplomat reported that Canada did little to monitor the fate of those it transferred to Afghan custody, that it was dilatory in reporting transfers to the International Committee of the Red Cross, and that its record keeping was poor.[56] There is, in short, no evidence that Canadian officials directly participated in or intentionally encouraged torture. But there is evidence of elements of complicity. However, in 2009, the Canadian government has directed CSIS to "not knowingly rely upon information which is derived from the use of torture" and to take "all reasonable measures to reduce the risk that any action on the part of the Service might promote or condone, or be seen to promote or conduct the use of torture, . . . when sharing information with foreign agencies."[57] A 2010 directive dealt with the case where a foreign agency has provided information whose source cannot be determined, but such that ignoring it would constitute an "unacceptable risk to public safety." In such cases, public safety is paramount, and the information may be shared.[58]

Australia

Australia is a signatory to the Torture Convention and has passed legislation broadly consistent with its convention responsibilities.[59] Moreover, while the Australian government argued that the Afghanistan conflict was a noninternational armed conflict, its expressed policy was to treat prisoners as if they had been captured in the course of an international armed conflict.[60] Australia has not maintained any prisons in Afghanistan, and it transferred detainees to allies in the conflict or to the Afghan government. A Defence Department inquiry found a complaint of ill-treatment of a detainee (made by a member of the Afghan National Army) to be largely unfounded. (There was no medical evidence to sustain claims of abuse, and the Dutch—to whom the detainees had been transferred—had not noted anything untoward.)[61]

Although Australia participated in the Iraq War, its role was a marginal one,[62] and there appear to have been no reported instances of Australian involvement in torture and mistreatment of prisoners, perhaps partly because Australia did not maintain its own prisons and transferred such people as it apprehended to its allies. But a Senate committee found that its monitoring of their treatment was imperfect. Reports from Defence Department personnel about their own and the Red Cross's concerns were poorly followed up and did not come to the attention of senior officers or the government.[63] Moreover, the Australian government's failure to establish processes for monitor-

ing the treatment of prisoners by transferee governments was in breach of its Geneva Convention responsibilities.

While Australian authorities appear generally to have complied with the requirements of the legislation, Mamdouh Habib, a victim of extraordinary rendition and a former detainee at Guantánamo, has claimed (in a book about his experiences[64] and in a claim before the Australian Federal Court),[65] that agents of ASIO and other commonwealth officials were, in various ways, party to his torture, their contributions including the provision of information to interrogators, their knowledge that torture was taking place, their presence at interrogations where torture was used, their suggestions that release would be dependent on confessions, their failure to take steps to ensure secure his release, and their knowing use of the fruits of torture. The case was scheduled to be tried in mid-2011 but was settled on undisclosed terms (reported to have involved a payment of damages) in early 2011.[66] A subsequent report by the Australian inspector-general of security and intelligence concluded that while Australian officials could and should have done more to look after Mr. Habib's welfare, they had not been complicit in his mistreatment.[67]

New Zealand

New Zealand's involvement in the Afghanistan War has been slight, but it has been enough to give rise to concerns that it may have been or may be in danger of being implicated in torture. In 2002 (when New Zealand was governed by a Labour-led coalition), New Zealand forces handed over a number of detainees to US forces, without recording their names, although it did record other details.[68] More recently, after New Zealand's Special Air Service (SAS) was once more sent to Afghanistan (this time under a National-led coalition), concerns were expressed that the SAS was working with Afghan authorities in operations where those taken prisoner are at risk of being detained and tortured.[69] The government has acknowledged the cooperative activity but has argued that the Afghans are the lead authority in the relevant exercises and that the SAS therefore does not take and hand over prisoners.[70] Government supporters have, predictably, expressed confidence that the SAS did not and will not assist torture.[71] Green MPs do not share this confidence. The SAS's activities have generated no litigation.

The Development of the Law

Unlike in the other areas of law already discussed in this book, terrorist concerns have made almost no impact on the legislation governing torture. There have been virtually no attempts to water down antitorture legislation, and in-

sofar as there have been statutory developments, these have involved tightening the relevant prohibitions. The only relaxation of legal prohibitions on torture has been the statutory protection afforded to members of the US intelligence community, and that was retrospective. Indeed, insofar as post-9/11 legislation has addressed the use of torture and ill-treatment, it has narrowed the range of permissible coercive techniques. It represents a response not to terrorism but to abuses committed in the name of counterterrorism.

Institutions and Torture and Inhuman Treatment

Differences between executive and legislative priorities are only tenuously reflected in the development of legislation. They are reflected more dramatically in the contrast between the law as interpreted by the executive and the law as understood by the courts. However, while courts have generally proceeded on the basis that torture and inhuman treatment are abhorrent, their decisions sometimes suggest that their abhorrence is qualified.

Torture and the Executive Arm

For those charged with the protection of national security, there may be circumstances where torture seems justified. One justification is that the infliction of pain as a counterterror measure is necessary to avert a greater evil. Some argue that interrogators may need to use the infliction of pain as a means of extracting information that can be used to take effective action against would-be terrorists. Whether this argument is correct is highly controversial, but claims by governments and others that coercive interrogation has yielded useful information[72] may generate and reinforce beliefs to this effect. Popular culture may do its bit,[73] and bad logic may be persuasive: terrorists' manuals tell terrorists how to resist interrogation, and if a person refuses to give information about his or her involvement in terrorism, an interrogator may reason that the person is a terrorist and that he or she will respond only to force.[74] Moreover, use of ill-treatment may increase the interrogator's determination to extract admissions, since the lack of admissions leaves open the worrying possibility that the interrogator has been ill-treating an innocent person. Governments are likely to want to believe that torture has not been in vain and are therefore inclined to believe that it can often be instrumentally effective.

However, whatever the instrumental attractions of inflicting pain might be, it is also clear that there are powerful restraints against doing so. First, within the executive arm, there was considerable resistance to the use of torture. This is evidenced by arguments in relation to the status of the Geneva

Conventions. The torture memoranda tended to dismiss the conventions as irritating irrelevancies that either did not apply, given the nature of the War on Terror, or, if they did apply, conferred rights and duties on states only. This interpretation was welcomed by the president but rejected by the State Department and regarded with concern by the Defense Department lawyers and by the Joint Chiefs of Staff.[75] A narrower issue is related to the use of torture and some less-painful forms of coercive questioning, whether by the armed forces or the CIA. The utility of coercive questioning was accepted within the CIA and (to some extent) within the armed forces,[76] but not by the FBI or the State Department.[77]

One reason for both restraint and its lack lies in the logic of the Geneva Conventions. The vast majority of those subjected to ill-treatment were people captured in the course of armed conflict, whose treatment was governed by the conventions. But as a matter of practice, the effective operation of the rules of war depends partly on reciprocity.[78] Ideally, unilateral compliance will be its own reward, and this is what the conventions require, if necessary—with the defaulting parties being dealt with later as war criminals. Well-disciplined armies may engage in unilateral compliance most of the time, but the strains will be considerable. They tend to be particularly acute in the context of unconventional wars, where insurgents tend not to reciprocate. Nonetheless, it is striking that even in the context of the Afghanistan and Iraq wars, the US Joint Chiefs of Staff and Defense Department lawyers were uneasy about suggestions that the conventions could be disregarded.

Stances on torture also appear to reflect agency priorities. One would expect the State Department to be concerned at policies that would have negative ramifications for the international standing of the United States, and consistent with this was its objections to the Department of Justice's arguments for a narrow reading of the obligations imposed by the Geneva Conventions. The FBI's doubts about the efficacy of coercive questioning may be partly explicable in terms of its institutional reasons for collecting information. Given its role in criminal prosecutions,[79] the FBI had no choice but to base its operating procedure on the need to ensure that its evidence was noncoercively acquired. Conversely, the CIA was accustomed to operating outside the law, given the exigencies of operating in hostile countries and its subjection to the different imperatives of gathering intelligence rather than proof and of averting attacks rather than responding to them.

But those disposed to favour the use of coercive interrogation were also concerned about the legality of doing so, as evidenced by the fact that the CIA and armed forces sought clarification of the legality of proposed interrogation techniques.[80] The advice of the torture memoranda was reassuring. This was not surprising: those who were asked to give it tended to be people sympa-

thetic to the view that the law conferred sweeping powers on the executive in times of national emergency.[81]

If law is what the courts are likely to say it is, the advice of the memoranda was flawed. Even lawyers sympathetic to the government soon concluded that the memoranda were seriously flawed. Jack Goldsmith, who had considerable respect for John Yoo, nonetheless concluded that the memoranda had to be withdrawn. In a 2009 report, the Department of Justice's Office of Professional Responsibility (OPR) concluded that the memoranda had been flawed in that they, first, had inadequately addressed material that was contrary to their conclusions and, second, had misused sources in order to reach tendentious conclusions.[82] The OPR concluded that Professor Yoo must have known "that his view of Commander-in-Chief power was a minority view" and that he should have advised his client "that his analysis was a novel and untested one."[83] However, while critical of some of the reasoning used in a 2005 memorandum giving advice in relation to the legality of methods employed by the CIA, the OPR concluded that its flaws did not rise to the level of professional misconduct.[84] The OPR's report was submitted to David Margolis, an associate deputy attorney general, for the purposes of determining whether it should be referred to the disciplinary authorities of the relevant state bar associations. He decided against doing so, but not on the grounds that the memoranda represented a balanced assessment of the law.[85]

The advice of the torture memoranda proved politically sound. There have been no prosecutions of CIA or military interrogators. A major reason for this is that advice from the Office of Legal Counsel has a quasi-constitutive effect. It is authoritative within the executive arms, and its effect is such as to make it politically impractical to punish those who relied on it.

Courts

As a prediction of how courts would react to torture, the advice of the torture memoranda was less prescient. Executive powers in security cases are not as broad as the memoranda assumed, and torture encompasses a wider range of practices than the memos assumed. But insofar as the memos suggested that harsh techniques could be used with impunity, their authors have largely been vindicated. The only cases in which people detained outside the United States have had much success in relation to torture and ill-treatment claims against the United States have been habeas corpus cases where petitioners have succeeded on the basis of claims that admissions, confessions, and hearsay evidence adverse to their claims were obtained through torture or ill-treatment.[86] The courts' rejection of evidence tainted by torture and coercion is unsurprising, and as a corollary, courts have been willing to order discovery of docu-

ments relating to the likelihood that evidence adverse to habeas corpus applicants has been obtained by torture.[87]

Otherwise, torture-based claims have had little success. US courts have attached finality to government certificates in relation to whether Guantánamo detainees face the risk of torture if returned to their country of citizenship or sent somewhere else, as well as in relation to whether detainees in foreign countries face torture if transferred to the custody of the foreign government.[88] To date, alleged victims of extraordinary rendition have been unsuccessful in attempts to recover damages from the United States and from a corporation that allegedly assisted in the plaintiffs' transfer. In each case, the state secrets doctrine has proved fatal to some claims, albeit by the narrowest of margins in one case.[89]

Other cases failed on the basis of narrow interpretations of the circumstances under which people have a right to damages for harm suffered in consequence of breach of their constitutional rights (*Bivens* claims). Maher Arar had far less success before the US courts than in Canada.[90] In an en banc hearing, the Second Circuit decided by majority (7–5) that Arar's *Bivens* claim could not be sustained, its reasoning being that there were "special factors counseling hesitation" against extending the tort to cover the alleged wrongs. These included both the fact that it involved issues relating to foreign relations and the fact that it would potentially involve state secrets and required that proceedings be partly closed. The dissenters argued that this reasoning was flawed and that if the case did indeed require the disclosure of state secrets, it could and should be dismissed on this ground, given the normal rule that courts should not consider constitutional issues if a case could be disposed of on nonconstitutional grounds. The minority favoured remanding the case for a decision on the state secrets issue.

Afghan and Iraqi citizens who were held by US military forces were also unsuccessful in a suit alleging mistreatment by the US military. The district court dismissed a *Bivens* claim, on the grounds that the claimants were not entitled to the protection of the Fifth and Eighth Amendments: they were "nonresident aliens who were injured extra-territorially while detained by the military in foreign countries where the United States is engaged in wars."[91] The court determined that even if constitutional rights had been violated, the defendants could rely on special immunity (since the status of the rights had not been clear at relevant times) and on "special factors." In a split decision, the court of appeals found it unnecessary and undesirable to resolve whether *Boumediene v Bush* meant that the district court's analysis of the constitutional position was correct. Dismissal was nonetheless warranted on the grounds of qualified immunity (given the uncertain state of the law) and the undesirability of disrupting and hindering "the ability of our armed forces 'to act

decisively and without hesitation in defense of our liberty and national interests.'"[92] Other avenues were blocked. The plaintiffs had failed to exhaust the administrative remedies on which claims based on the Federal Court Claims Act were predicated, and the Alien Tort Statute did not create substantive rights.

By contrast, a *Bivens* claim by José Padilla against John Yoo, based on his alleged contribution to the plaintiff's imprisonment, survived an application for summary dismissal in the district court.[93] The court held that *Bivens* claims extended to Yoo's conduct and that the law was not sufficiently unclear to ensure that Yoo would be able to rely on a defence of qualified immunity. In a related case in South Carolina, *Lebron v Rumsfeld*, the plaintiffs failed on both issues. The district court held that there were "special factors" counting against extending the scope of the tort. These included the probable scope of the pretrial discovery process, which

> would require the devotion of massive government resources, which by necessity would distract the affected officials from their normal security and intelligence related duties. Moreover, [a] trial on the merits would be an international spectacle with Padilla, a convicted terrorist, summoning America's present and former leaders to a federal courthouse to answer his charges. This massive litigation would have been authorised not by a Congressionally established statutory cause of action, but by a court implying an action from the face of the American Constitution.[94]

Given the outcome of the litigation surrounding Padilla's habeas corpus applications, it could not be said that the unlawfulness of his detention and his subsequent treatment had been clearly established.[95] The court of appeals affirmed, agreeing that it was not a case where a *Bivens* action could be maintained. It related to matters that were properly the prerogative of the political branches.[96]

By the time the Ninth Circuit Court of Appeals eventually heard Yoo's appeal, a Supreme Court majority had ruled that plaintiffs in a *Bivens* action had to show that "every reasonable official" would have understood that the behavior in question would violate the plaintiff's constitutional rights.[97] The court concluded that the plaintiffs could not meet the exacting standards required by this decision.[98] Unlike the district court in *Lebron*, it made no reference to political justifications for its decision. Indeed, it inclined to the view that the facts alleged by Padilla would, if true, mean that he had been tortured.[99]

Two *Bivens* claims against Donald Rumsfeld and others arising out of the alleged ill-treatment of American civilians detained in US prisons in Iraq succeeded at first instance. One failed before the DC Circuit Court of Appeals.

The other, which involved the alleged mistreatment of whistle-blowers who had previously reported details of corruption to US authorities, survived before the Seventh Circuit Court of Appeals, only to be vacated pending a hearing en banc, and subsequently reversed.

In each case, the alleged basis for Rumsfeld's liability was that he was responsible for the policies that had caused the plaintiffs' ill-treatment. The district courts dismissed summary dismissal applications based on "special factors" and qualified immunity. The cases did not involve the courts interfering with the conduct of military activities. If the cases threatened the disclosure of state secrets, this could be dealt with at a later stage. The relevant law was clear, and the government had not argued that the conduct in question would not amount to torture. In each case, the courts regarded it as relevant that the plaintiffs were Americans and entitled to correspondingly greater constitutional protection from the US government.[100] Similar reasoning underlay the decision of the Seventh Circuit panel.[101] (The decisions predated the court of appeals decisions in *Padilla v Yoo* and *Lebron*.)

The DC Circuit Court of Appeals disagreed, arguing, "The Supreme Court has never implied a *Bivens* remedy in a case involving the military, national security or intelligence." There was no appellate authority for permitting *Bivens* actions in such cases. (The Seventh Circuit decision in *Vance v Rumsfeld* had been vacated.) In providing limited relief to the victims of torture, Congress had implicitly decided not to create "a cause of action for detainees to sue federal military and government officials in federal court for their treatment while in detention." The court did not decide whether Rumsfeld could rely on qualified immunity.[102] In its en banc decision, a majority of the Seventh Circuit Court of Appeals agreed.[103] The majority opinion concluded that *Bivens* actions were not available against soldiers and others in the military chain of command, and that in any case, Rumsfeld's alleged involvement in the plaintiffs' mistreatment was too tenuous to justify his being held personally liable. A seventh judge disagreed with the majority on the availability issue, but agreed with the tenuous link argument. Three judges dissented.

The upshot of these cases is that no victim of brutal treatment by US officials outside the United States has yet managed to win a damages case against the US government. This is not because the alleged conduct does not amount to torture: none of the relevant decisions have been based on this ground. In part, it is a result of the nature of federal torts law. But it is clearly also a result of judicial choice. While the decisions have tended to bear out advice that ill-treatment could be engaged in with impunity, they also coexist with interpretations suggesting that cases could easily have gone the other way, at least at the summary dismissal stage. Detainees mistreated within the United States have had somewhat more success. In a suit brought by a handful of

those detained in the Metropolitan Detention Center, the US eventually settled the claims of five plaintiffs for $1.26 million, and several of those responsible for their mistreatment were prosecuted.[104]

UK courts have given the government limited leeway in relation to the use of evidence tainted by the circumstances surrounding its collection. However, the courts have granted applications for judicial review of decisions to refuse to hold inquiries into alleged mistreatment by UK troops in Iraq. UK courts have also proved much more sympathetic than their US counterparts to torts claims with an obvious potential to involve state secrets.

In *A v Secretary of State for the Home Department (No 2)*, two members of the House of Lords expressly distinguished between torture and ill-treatment, concluding that the latter, when engaged in by state officials, was prohibited neither by the Torture Convention nor by ius cogens.[105] In *R v Ahmed*, the court of appeal followed these dicta,[106] applying this decision in a case where the government did not depend on evidence derived from torture or ill-treatment but where the prior investigation had been assisted by intelligence from a state known to engage in torture. In doing so, the court expressly rejected the opinion—held by a special rapporteur for the United Nations and by the Joint Parliamentary Human Rights Committee—that such behaviour constituted complicity in torture.[107] With varying degrees of enthusiasm, the House of Lords considered that the home secretary was entitled to rely on information both notwithstanding that it came from a government that had used torture to obtain it and provided that it was probative despite its tainted source. But it also ruled that the quasi-judicial commission responsible for review of the secretary's decision was precluded from doing so, regardless of whether the evidence was probative.[108]

In civil claims brought by plaintiffs claiming to be victims of torture, judicial rulings have tended to favour the plaintiffs and have involved findings to the effect that the Security Service (MI5) must have known that the plaintiff was being subject to torture, that it had misled the Intelligence and Security Committee, and that it had indirectly caused the foreign secretary to mislead the court.[109] The High Court has been prepared to prohibit UK forces in Afghanistan from delivering prisoners to particular agencies after having found, on the evidence, that there would be a real risk that prisoners would be tortured if they were transferred.[110]

Article 3 of the ECHR creates a duty on member states to hold inquiries into credible allegations of breaches of the convention and such systemic issues as arise from these. In *(R) Mousa v Secretary of State for Defence*,[111] the court of appeal held that the secretary had erred in concluding that it was proper to delay an inquiry into systemic issues until the findings of three current inqui-

ries were reported. Consideration of one of the current inquiries was flawed insofar as there was an institutional relationship between its investigators and those doing the investigation into systemic issues.

The UK courts have also been prepared to adjudicate claims for damages arising out of the UK's failure to take adequate steps to prevent the mistreatment of British nationals detained at Guantánamo Bay. They did not regard the likely complexity of the litigation or the sensitivity of the issues as grounds for not allowing the case to proceed, notwithstanding estimates that resolving the issues of public interest immunity would require the services of 60 lawyers over three years.[112] (The case was finally settled.)[113] The High Court has also held that questions of whether a person is likely to be tortured in another country are to be resolved by the courts, even if this means finding that the government has erred in assuming that it might be possible to gain a worthwhile diplomatic undertaking from foreign governments.[114]

Australian and Canadian courts have had only limited occasion to adjudicate torture-related cases. In Habib's claim for damages arising out of his mistreatment, an application by the government for summary judgment was successful in relation to a number of claims, but at first instance and on appeal the federal court found that, as a matter of law, the Criminal Code provisions applied to commonwealth officers, regardless of where the alleged torture took place, and that commonwealth officers were therefore under a legal duty not to aid, abet or counsel torture or ill-treatment, and if they did so, would be acting in breach of their lawful authority. The fact that the claim rested on proof of the alleged misconduct of officers of foreign states was not a bar: the act of state doctrine did not apply when the act of state involved torture.[115] The court did not, however, address the overall merits of the case, except insofar as it found against Habib in relation to the fact relating to one of the factual issues underpinning his claim.

Canadian courts addressed torture-related issues in a number of cases. One involved Omar Khadr's application for judicial review of the government's failure to take adequate steps to ensure his release from Guantánamo. As noted earlier, the courts found evidence of Canadian officials being complicit in his mistreatment by US officials.[116] Claims arising from the mistreatment of Abou-Elmaati, Almalki, and Nureddin are currently before the courts, with trial not due to start until late in 2012.[117] The government appears not to have sought summary dismissal except in relation to a limitation defence, pleaded in response to claims by relatives and a former employer of Mr. Almalki for losses suffered as a result of their having been wrongly suspected of being terrorists.[118] Courts also addressed whether Canada was obliged under the Charter of Rights and Freedoms to refuse to transfer detainees in its cus-

tody to the Afghan authorities in circumstances where this would expose the detainees to a substantial risk of torture. The trial judge and the federal court of appeal held that the charter did not apply and that the application failed.[119]

Public Opinion

Both the reluctance of governments to admit to using or even being complicit in torture and the strict requirements of antitorture legislation suggest that governments and legislators doubt that there is much popular support for torture. If they do, their perceptions are largely borne out. US poll data suggest ambivalence and that tolerance of torture is sensitive to question wording and to response categories. In eight polls since 2004, the Pew Research Center has asked US respondents whether the use of torture "against suspected terrorists in order to gain important information" was "often," "sometimes," "rarely," or "never" justified. Responses have been relatively stable: on average, 16 percent said that torture might be justified "often," 31 percent "sometimes," 21 percent "rarely," and 29 percent "never."[120] Similar results have been reported in polls with slightly different response categories.[121]

Fifty-eight percent of respondents considered torture justified if it "might lead to the prevention of a major terrorist attack."[122] However, apparent willingness to condone torture must be understood in the light of the question, which assumes the utility of torture: only a third of respondents were prepared to support torture if it made it more likely that Americans might be tortured, and almost three-quarters considered that the recent allegations of torture had hurt America's image "a lot" or "somewhat."[123] When told that members of the US military were "required to abide by the Geneva Convention standards which prohibit the humiliating and degrading treatment of prisoners," a comfortable majority (57 percent) said that the CIA, when interrogating a person believed to have information about possible terrorist plots against the US, should comply with the conventions, rather than use measures that are more forceful.[124] Consistent with this ambivalence are the results of a December 2005 poll conducted for *ABC News* and the *Washington Post*, in which only a third of respondents said they regarded the use of torture against suspected terrorists as an acceptable part of the US campaign against terrorism.

Polls where respondents are asked to choose between "sometimes" and "never" justified yield a higher proportion of "never" responses than polls where, as in the case of the Pew polls, respondents are given four possible response categories. In a 2006 poll, 56 percent of respondents opted for the "never" category over "sometimes." Answers were strongly related to party, but even among the Republicans, only half said torture was "sometimes" justified. Differently worded polls giving a choice between never using torture and sometimes doing so have yielded similar results.[125]

Only 40 percent of respondents to a 2007 poll said that they thought "waterboarding" (which was briefly described) should be allowed; a differently worded 2009 poll yielded a similar result; and in a 2010 poll, 39 percent strongly or moderately approved of the practice.[126] In a 2009 poll asking respondents whether they approved or disapproved of the "harsh interrogation procedures" used by the Bush administration, 50 percent said they approved, and 46 percent said they disapproved.[127] In a 2010 poll asking respondents whether they thought the use of these techniques by the military and intelligence agencies was justified, 26 percent thought this was always justified, 31 percent that it was justified most of the time, 19 percent that it was sometimes justified, and 15 percent that it was never justified.[128] Given the vagueness that surrounds what constitutes "torture," the poll figures should be interpreted with care, but they suggest that attitudes towards the use of torture have been stable over the last five years and that many Americans are willing to accept the use of torture in some circumstances, despite the negative connotations of the word.

Elsewhere, polls tapping attitudes towards torture have been less frequent. In a 2005 UK poll, only 20 percent considered that it was acceptable to allow evidence obtained abroad by the use of torture to be used in British courts.[129] However, this does not reflect blanket opposition to the use of torture. Questioned about whether torture could be justified on rare occasions, British respondents were only slightly less likely than Americans to consider that it could be justified.[130] By contrast, most Australians either strongly agreed (28 percent) or agreed (31 percent) that the use of torture to prevent a terrorist attack was never justified. The percentage that neither agreed nor disagreed was 16.7, and 20.7 percent disagreed or strongly disagreed. (The remainder admitted not knowing.)

In a 25-nation poll on torture, respondents were asked to choose between two alternatives. One was that "clear rules against torture should be maintained because any use of torture is immoral and will weaken international human rights standards against torture." The other was that "terrorists pose such an extreme threat that governments should now be allowed to use some degree of torture if it may gain information that saves innocent lives." The Australian, Canadian, and UK responses were almost identical: three-quarters (75 percent of Australians, 74 percent of Canadians, and 72 percent of UK respondents) opted for the former alternative, and 22 percent of Australians and Canadians and 24 percent of UK respondents opted for the latter. US respondents were rather less hostile to torture: 58 percent favoured the first position, and 36 percent the second.[131]

The data suggest that there is little political capital to be gained by advocating torture but that if governments do wish to engage in torture, they should justify it in terms of its necessity. They also suggest the possibility of a

relationship between national involvement in torture and national acceptance of torture. They leave open the reasons for the relationship.

Underlying Beliefs

Like other issues relating to the control of terrorism, interrogation policy involved party-related splits. The Detainee Treatment Act, passed in the aftermath of the revelation of the abuses occurring at the Abu Ghraib prison in Iraq, received widespread bipartisan support. However, the nine Senators who voted against it were all Republicans, and President Bush had threatened a presidential veto in response to Congress's failure to include an exception for national security emergencies.[132] His signing statement indicated that his administration would interpret the measure in accordance with "the constitutional authority of the President to supervise the unitary executive branch." The Senate Select Committee on Intelligence split along party lines over a 2005 inquiry into the CIA's role in rendition to torture and its detention practices, and its response to the Church Report on interrogations involved a similar split.[133] Following the Democrats' successes in the 2006 elections, Congress passed a bill to impose restrictions on CIA questioning that were similar to those imposed on the armed forces under the Treatment Act. An attempt to override the president's veto failed, with the nays largely drawn from the Republicans. Voting on the Intelligence Authorization Act of 2008 and on whether it should pass, despite the president's veto, was heavily partisan. On the latter issue, in the House of Representatives, only 5 Republicans out of 190 voted "aye," while only 3 out of 223 voting Democrats voted "nay."[134] The Obama years have not yielded torture-related legislation, but they have yielded executive orders consistent with the proposition that tolerance of coercive torturing is not simply an institutional response but a response reflecting decision makers' general political beliefs.

Similar results emerge from poll data. In response to a November 2005 *Newsweek* poll, 59 percent of Republicans, 42 percent of independents, and 36 percent of Democrats thought torture could sometimes to be justified to gain important information from terrorists,[135] and in September 2006, 50 percent of Republicans, 32 percent of independents, and 25 percent of Democrats thought that torture was "sometimes" justified (the alternatives were "never" or "depends"). In a 2010 poll, 52 percent of Republicans, 32 percent of independents, and 34 percent of Democrats considered the use of torture against suspected terrorists to be always justified or justified most of the time. Tolerance of use of enhanced interrogation techniques was also considerably higher among Republicans (77 percent) than among independents (60 percent) and Democrats (48 percent), as was strong or moderate approval of

waterboarding (58 percent of Republicans, 42 percent of independents, and 30 percent of Democrats).[136] In a multivariate analysis of 2006 data, Hetherington and Suhay found that support for the use of torture was related to party identification and also to ideology and a measure of authoritarianism. They found that as worry about the threat posed by terrorism increased, the relevance of authoritarianism decreased. Their analysis does not report whether there was a similar interactive effect between worry and other "dispositional" variables.[137]

In the United Kingdom, there were no relevant House of Commons divisions, but poll data suggest a very weak relationship between party preference: Conservatives were slightly more likely to regard the use of evidence obtained by torture as acceptable (22 percent) than were Labour supporters (17 percent) and Liberal Democrats (16 percent).[138] In Australia, where there were also no relevant parliamentary votes, analysis of a 2007 poll showed that distaste for torture bears a moderate relationship to voting intention. Disapproval of torture was lowest among those intending to vote National (56 percent) or Liberal (54 percent), higher among Labor voters (64 percent), and highest among Greens (78 percent). In a logistic regression analysis, the relationship continued, after controls for the perceived risk of a terrorist attack.[139]

Conclusions

Poll data suggest that the general public is unwilling to countenance torture but that there are some circumstances where sizeable minorities and even majorities consider that it might be justified. Neither heightened concern nor a perception that it might sometimes be necessary have moved legislators even to consider relaxing statutory prohibitions on torture, although Congress provided limited statutory protection for past sins. Courts have unequivocally condemned torture, citing a proud history of judicial resistance to the use of coerced evidence in judicial proceedings. Governments disown torture and proscribed forms of ill-treatment.

Yet it is self-evident that governments are sometimes willing to countenance the use and threat of pain against their prisoners. Their willingness is strongly related to context. First, the use of torture has been largely directed against those captured in the course of armed conflict. Second, its post-9/11 victims have usually—but not invariably—been nonnationals, and when nationals have been victims, they have typically been outside the country.

Courts denounce torture, but US courts have generally proved unhelpful to those claiming to be victims of torture. To a considerable extent, this reflects general legal principles and, in particular, the limited circumstances in which victims of official misfeasance may sue either the US government or

US officials. These limits are reflected in the ease with which *Bivens* claimants are able to satisfy the requirement that there are no alternative avenues for redress. They also reflect the *Bivens* requirements themselves. It is not enough that an official acted unlawfully. The remedy is available only if there was a breach of constitutional duties and if, at the time of the breach, it was settled law that the conduct in question did indeed amount to a breach. There must also be no "special factors" counseling against the availability of damages as a remedy. Moreover, there is ample judicial authority to suggest that special factors include the possibility that permitting a cause of action could interfere with the protection of national security. The relevant decisions suggest that these principles are sufficiently vague to allow judges to base their decisions on varied assessments of what, if anything, national security requires in particular cases, as well as on the dangers of allowing victims of torture to sue those responsible in the US courts, as compared with the dangers of not allowing them legal redress. Courts elsewhere have a better record, but this is partly explicable in terms of different legal contexts: laws that have removed crown immunity and give full effect to the Torture Convention, quasi-subordination to the ECtHR (in the case of the UK courts), and cultural contexts that seem less tolerant of torture.

Law probably has the potential to discourage torture, but it may be difficult to disentangle the effect of law on torture from the impact on law of those factors that prompt torture. In particular, the nexus between the Afghanistan and Iraq wars and the use of torture suggests that if one wants governments to abstain from torture, one should oppose their involvement in wars. If war is a necessity, the best one can hope is that governments will recognise the dangers of tolerating torture, that well-trained troops will be sufficiently disciplined to keep its incidence to a minimum, and that law will provide some redress when discipline breaks down.