

## U.S. LAW PROHIBITS TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Any practice of torture or other cruel, inhuman or degrading treatment or punishment by United States officials violates international human rights standards to which the United States is a party. These include the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Torture Convention), and the International Covenant on Civil and Political Rights.<sup>1</sup>

The use of torture also violates U.S. law. In 1994, Congress passed a new federal law which specifically provides for penalties including fines and up to 20 years' imprisonment for acts of torture committed by American or other officials outside the United States. In cases where torture results in death of the victim, the sentence is life imprisonment or execution.<sup>2</sup>

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<sup>1</sup> The International Covenant on Civil and Political Rights is available at [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm) (accessed January 27, 2003). The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is available at <http://www.hrweb.org/legal/cat.html> (accessed January 27, 2003). Article 1 of the Torture Convention defines "torture" as:

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

<sup>2</sup> 18 U.S.C. § 2340A, available at [http://caselaw.lp.findlaw.com/cascode/uscodes/18/parts/i/chapters/113c/sections/section\\_2340a.html](http://caselaw.lp.findlaw.com/cascode/uscodes/18/parts/i/chapters/113c/sections/section_2340a.html) (accessed March 3, 2003). Section 2340 (available at [http://caselaw.lp.findlaw.com/scripts/ts\\_search.pl?title=18&sec=2340](http://caselaw.lp.findlaw.com/scripts/ts_search.pl?title=18&sec=2340) (accessed March 3, 2003)) provides the following definitions:

- (1) "Torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;
- (2) "Severe mental pain or suffering" means the prolonged mental harm caused by or resulting from –
  - (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
  - (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
  - (C) the threat of imminent death; or
  - (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality....

“Renderings” to countries known to engage in routine torture violate article 3 of the Torture Convention, which prohibits sending an individual to another state where there are “substantial grounds for believing that he would be in danger of being subjected to torture.”<sup>3</sup> Such transfers, and even credible threats of such transfers, made to combatants detained in an armed conflict also violate article 17 of the Third Geneva Convention, which provides that “[n]o physical *or mental* torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be *threatened*, insulted, or exposed to unpleasant or disadvantageous treatment of any kind” (emphasis added). Indeed, if committed against persons protected by the Geneva Conventions, “torture or inhuman treatment...[or] willfully causing great suffering or serious injury to body or health,” would all constitute “grave breaches” under the Geneva Conventions.<sup>4</sup>

Even if the practices alleged in the recent press reports do not constitute “torture,” article 16 of the Torture Convention obliges states not to commit “*other* acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture” (emphasis added).<sup>5</sup>

When the U.S. Senate ratified this treaty, it construed this language as being consistent with U.S. domestic legal principles.<sup>6</sup> This important international standard has been carefully interpreted by courts for the last 25 years.

In an important decision, *Judgment Concerning the Interrogation Methods Implied [sic] by the General Security Services*,<sup>7</sup> in 1999, the Supreme Court of Israel ruled that even in the face of the “harsh reality” of continual terror unleashed against

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<sup>3</sup> Similarly, General Comment 20 (October 3, 1992) of the U.N. Human Rights Committee, which is the official body charged with interpreting the International Covenant on Civil and Political Rights, has stated its view that the Covenant’s article 7 prohibition against torture and cruel, inhuman or degrading treatment or punishment includes the principle that “States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.” General Comment 20 is available at [http://193.194.138.190/tbs/doc.nsf/\(symbol\)/CCPR+General+comment+20.En?OpenDocument](http://193.194.138.190/tbs/doc.nsf/(symbol)/CCPR+General+comment+20.En?OpenDocument) (accessed January 27, 2003).

<sup>4</sup> See article 130 of the Third Geneva Convention; and article 147 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949, available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6756482d86146898c125641e004aa3c5?OpenDocument> (accessed February 10, 2003).

<sup>5</sup> Article 16, Torture Convention (emphasis added). The European Court of Human Rights has stressed this point. “Even in the most difficult of circumstances, such as the fight against organized terrorism and crime, the [European Convention on Human Rights] prohibits in absolute terms torture *or* inhuman or degrading treatment or punishment” (emphasis added). *Aksoy v. Turkey*, Case No. 21987/93, Judgment of the European Court of Human Rights (December 18, 1996).

<sup>6</sup> “[T]he United States considers itself bound by the obligation under article 16 to prevent ‘cruel, inhuman or degrading treatment or punishment’, only insofar as the term ‘cruel, inhuman or degrading treatment or punishment’ means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.” U.S. Reservations upon Ratification of the Torture Convention, available at: <http://193.194.138.190/html/menu3/b/treaty12.asp.htm> (accessed March 7, 2003).

<sup>7</sup> Supreme Court of Israel, sitting as the High Court of Justice (September 6, 1999), available at <http://62.90.71.124/mishpat/html/en/system/index.html> (accessed March 5, 2003).

Israeli civilians, torture or cruel and inhuman treatment have no place in a democratic state, and must be prohibited. In a rigorous examination of the physically coercive interrogation practices employed by the Israeli General Security Services (GSS), the court insisted that two general principles must at all times be respected. These are:

First, a reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment of the subject and free of any degrading handling whatsoever....These prohibitions are ‘absolute.’ There are no exceptions to them and there is no room for balancing. Indeed, violence directed at a suspect’s body or spirit does not constitute a reasonable investigation practice.....

Second, a reasonable investigation is likely to cause discomfort. It may result in insufficient sleep. The conditions under which it is conducted risk being unpleasant. Indeed, it is possible to conduct an effective investigation without resorting to violence. Within the confines of the law, it is permitted to resort to various machinations and specific sophisticated activities which serve investigations today....In the end result, the legality of an investigation is deduced from the propriety of its purpose and from its methods. Thus, for instance, sleep deprivation for a prolonged period, or sleep deprivation at night when this is not necessary to the investigation time wise may be deemed a use of an investigation method which surpasses the least restrictive means.<sup>8</sup>

With these principles as a guide, the Israeli Supreme Court found a number of interrogation techniques to be absolutely forbidden under international and Israeli law, including: cuffing,<sup>9</sup> hooding,<sup>10</sup> loud music,<sup>11</sup> deprivation of sleep,<sup>12</sup> and position abuse.<sup>13</sup>

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<sup>8</sup> Ibid.

<sup>9</sup> While accepting that the “suspect’s cuffing, for the purpose of preserving the investigators’ safety, is... within the investigator’s authority,” cuffing a person in a “distorted and unnatural position... [and]causing pain” is not required to preserve the investigators’ safety and is prohibited. Ibid.

<sup>10</sup> Accepting the legitimacy of the security service’s asserted need to “prevent contact between the suspect under interrogation and other suspects and his investigators” (to preclude collusive communications among suspects, for example, or to safeguard the investigators’ security), the court nonetheless rejected the use of a “head covering...entirely opaque...reaching the suspect’s shoulders,” as outside the scope of lawful authority. “Less harmful means must be employed, such as letting the suspect wait in a detention cell...[or covering the suspect’s eyes] in a manner that does not cause him physical suffering.” Ibid.

<sup>11</sup> The court was “prepared to assume that the authority to investigate an individual equally encompasses precluding him from hearing other suspects under investigation or voices and sounds that, if heard by the suspect, risk impeding the interrogation’s success.” But requiring the suspect to hear “powerfully loud music...causes the suspect suffering...[and so does not] fall within the scope of a fair and responsible interrogation.” Ibid.

<sup>12</sup> The court recognized that “[t]he interrogation of a person is likely to be lengthy...[and that t]he suspect...is at times exhausted...often [as] the inevitable result of an interrogation...part of the ‘discomfort’ inherent to an interrogation.” But the court insisted that the “situation is different [when]...sleep deprivation shifts from being a ‘side effect’...to an end in itself. If the suspect is intentionally deprived of sleep for a prolonged period of time, for the purpose of tiring him out or ‘breaking’ him – it shall not fall within the scope of a fair and reasonable investigation,” and is absolutely prohibited. Ibid.

The Israeli Supreme Court also emphasized that the effect of these individual treatments is enhanced when they are used together. When an interrogation position “includes all the outlined methods employed simultaneously...[t]heir combination, in and of itself gives rise to particular pain and suffering...particularly when it is employed for a prolonged period of time.”<sup>14</sup>

In 1978, the European Court of Human Rights dealt with a similar though not identical combination of interrogation methods, in that case examining the United Kingdom’s counter-terrorism efforts against the IRA. The five methods dealt with in *Ireland v. United Kingdom* were: protracted standing against the wall on the tip of one’s toes; covering the suspect’s head throughout the detention (except during the actual interrogation); exposing the suspect to powerfully loud noise for a prolonged period, and deprivation of sleep, and of food and drink.<sup>15</sup>

In *Ireland v. United Kingdom*, the European Court of Human Rights found that the combination of these five techniques

applied...for hours at a stretch...caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation....The techniques were also degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.

Accordingly, the court held this conduct to be absolutely prohibited.<sup>16</sup>

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<sup>13</sup> The particular position examined by the court involved seating the suspect for long hours on a very low chair, tilted forward facing the ground and tied in a contorted position. The court was willing to “suppose that the seating of the suspect on a chair lower than that of his investigator can potentially serve a legitimate investigation objective (for instance, to establish the ‘rules of the game’ in the contest of wills between the parties, or to emphasize the investigator’s superiority over the suspect),” but it found no defensible grounds to justify seating the suspect “in a manner that causes him real pain and suffering.” Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> *Ireland v. United Kingdom*, Case No. 5310/71, Judgment of the European Court of Human Rights (January 18, 1978).

<sup>16</sup> Ibid. Though the court determined this conduct to be “inhuman and degrading treatment,” the court was not able to agree that it “occasion[ed] suffering of the particular intensity and cruelty implied by the word torture as so understood.” The distinction did not in any way lessen the absolutely prohibited status of the five techniques, however. In previously hearing the case, the European Commission on Human Rights had unanimously considered the combined use of the five methods to amount to torture, on the grounds that (1) the intensity of the stress caused by techniques creating sensory deprivation “directly affects the personality physically and mentally”; and (2) “the systematic application of the techniques for the purpose of inducing a person to give information shows a clear resemblance to those methods of systematic torture which have been known over the ages...a modern system of torture falling into the same category as those systems...applied in previous times as a means of obtaining information and confessions.” 19 Yearbook of the European Conventions on Human Rights (1976) (language of the Commission as quoted in Nigel S. Rodley, *The Treatment of Prisoners under International Law* (Oxford 2000), pp. 91-92). Many commentators have found the Commission’s view to be more persuasive than the Court’s. See generally Rodley’s discussion, pp. 90-95.

A range of factors come into play in establishing whether a victim's "pain or suffering" is so "severe" as to constitute "torture," as distinct from other prohibited ill-treatment under the Torture Convention. As the European Court of Human Rights explained in 1999 in the case of *Selmouni v. France*, determining whether the treatment in a particular case constituted "torture" is "in the nature of things relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim."<sup>17</sup>

Recent European Court of Human Rights cases have stressed the fact that:

[T]he [European Convention on Human Rights] is a living instrument which must be interpreted in the light of present-day conditions....and that certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in the future....[T]he 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.<sup>18</sup>

Courts that have been required to gauge the proper balance between the rights and dignity of the individual and the security of the nation have been highly sensitive to the dangers posed to civilized society by organized terrorist groups. As Israeli Supreme Court President Aharon Barak concluded in the *Judgment Concerning the Interrogation Methods Implied [sic] by the GSS*:

This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties.<sup>19</sup>

The United States has played a leading role in making torture a crime punishable under universal jurisdiction, beginning with the Nuremberg trials. President Bush's statement in his 2002 State of the Union Address, that "America will always stand firm for the non-negotiable demands of human dignity," was consistent with this tradition of support for the highest international standards.

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<sup>17</sup> *Selmouni v. France*, Case No. 25803/94, Judgment of the European Court of Human rights (July 28, 1999).

<sup>18</sup> *Ibid.*

<sup>19</sup> Supreme Court of Israel, sitting as the High Court of Justice (September 6, 1999), available at <http://62.90.71.124/mishpat/html/en/system/index.html> (accessed March 5, 2003).

Today the universal standards the United States helped establish are at risk. When U.S. officials themselves boast that U.S. forces are using “stress and duress” interrogation techniques, this sends a message that human rights standards are flexible. An open door to physical and psychological mistreatment of those being questioned also can have a corrosive effect on the United States’ military and police institutions, its judiciary, and the integrity of its political process. It can devastate its claim to moral authority at home and abroad. Equally, it can set in motion a reversal of progress in halting torture and cruel, inhuman and degrading treatment of detainees around the world.

It is imperative now for senior U.S. officials to reaffirm the absolute prohibition of torture and other cruel, inhuman or degrading treatment everywhere. In cases where there are allegations of improper interrogation practices by U.S. forces, including recent reports of deaths in custody, U.S. authorities must ensure prompt, thorough investigations leading to criminal prosecutions in cases where violations are discovered.