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# LEAVE NO MARKS

ENHANCED  
INTERROGATION  
TECHNIQUES  
AND THE  
RISK OF  
CRIMINALITY

# I. EXECUTIVE SUMMARY

All U.S. personnel who engage in the CIA's so-called "enhanced" interrogation techniques and similarly abusive techniques are at serious risk of violating U.S. law. As detailed below, under U.S. law the severity of physical pain or mental harm caused by an interrogation technique is key to determining whether the technique can be considered torture or cruel, inhuman or degrading treatment. An extensive body of medical literature, derived from the treatment and study of torture survivors worldwide, demonstrates that the "enhanced" techniques are likely to cause significant physical and mental harm to detainees. As a result, officials and interrogators who authorize and participate in interrogations using these techniques face a substantial risk of criminal liability under the provisions prohibiting "torture" and "cruel or inhuman treatment" in the U.S. War Crimes Act (WCA), as amended by the Military Commissions Act of 2006 (MCA),<sup>1</sup> and under The Torture Convention Implementation Act of 1994 (the Torture Act).<sup>2</sup> Many of these interrogation techniques may also be prohibited by the Detainee Treatment Act of 2005 (DTA).<sup>3</sup> To protect U.S. officials and personnel from potential criminal liability and to ensure that all U.S. personnel adhere to U.S. law, these techniques should not be authorized.

## The CIA "Enhanced" Interrogation Methods

On July 20, 2007, President George W. Bush issued an executive order interpreting the application of Common Article 3 of the Geneva Conventions to a program of detention and interrogation by the CIA.<sup>4</sup> The order does not clarify what techniques the CIA can and cannot lawfully engage in. Press accounts, citing anonymous Administration offi-

icals, suggest that at least one of the "enhanced" techniques, waterboarding, may no longer be used. The fact that the Administration officials may have ruled out some "enhanced" techniques, though, raises serious questions about whether the CIA guidelines implementing the Executive Order will permit Agency interrogators to resume the other techniques previously authorized.<sup>5</sup>

While the details of the CIA's "enhanced" interrogation program remain classified, credible reports have disclosed several of the techniques that were authorized in March 2002 for use in the program, including waterboarding (mock drowning), exposure to extreme cold (including induced hypothermia), stress positions, extreme sensory deprivation and overload, shaking, striking, prolonged sleep deprivation, and isolation, among others.<sup>6</sup> Without identifying specifically approved techniques, the President has, in the past, publicly endorsed "alternative interrogation methods" and declared that the MCA, which he signed into law in October 2006, allows the CIA "program" to continue.<sup>7</sup> The new executive order fails explicitly to rule out the use of the "enhanced" techniques that the CIA authorized in March 2002.

The executive order does state clearly that any program of detention and interrogation approved by the Director of

<sup>1</sup> Military Commissions Act of 2006, 18 U.S.C. § 2441 (2006).

<sup>2</sup> Torture Act, 18 U.S.C.A. § 2340 [2004] [prohibits the infliction of "severe physical or mental pain and suffering," including "prolonged mental harm," in terms virtually identical to the MCA's provision prohibiting "torture."].

<sup>3</sup> Detainee Treatment Act of 2005, 42 U.S.C.S § 2000dd (2006).

<sup>4</sup> Executive Order, July 20, 2007, available at <http://www.whitehouse.gov/news/releases/2007/07/20070720-4.html>.

<sup>5</sup> Editorial, *A Return to Abuse: President Bush authorizes secret — and harsh — interrogation methods for the CIA.*, WASH. POST, July 25, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/24/AR2007072401965.html>.

<sup>6</sup> See, e.g., Dana Priest, *CIA Puts Harsh Tactics On Hold; Memo on Methods Of Interrogation Had Wide Review*, WASH. POST, June 27, 2004, available at <http://www.washingtonpost.com/ac2/wp-dyn/A8534-2004Jun26?language=printer> [According to the Washington Post article, the enhanced interrogation techniques were approved by Justice Department and National Security Council lawyers in 2002, briefed to key congressional leaders, and required the authorization of CIA Director George J. Tenet for use]; Brian Ross & Richard Esposito, *CIA's Harsh Interrogation Techniques Described*, ABC NEWS ONLINE, Nov. 18, 2005, available at <http://abcnews.go.com/WNT/Investigation/story?id=1322866>.

<sup>7</sup> Press Release, White House, George Bush, President of the United States, President Bush Signs Military Commissions Act of 2006 (October 17, 2006), available at <http://www.whitehouse.gov/news/releases/2006/10/20061017-1.html> [The methods and techniques reportedly used in the CIA program have also been referred to as "enhanced interrogation methods" by anonymous senior CIA officials]; See Priest, *supra* note 6.

Central Intelligence may not include any acts prohibited by the War Crimes Act or the Torture Act. Yet a close analysis of the War Crimes Act and other U.S. law, informed by medical and psychological expertise, reveals that these “enhanced” interrogation techniques, may constitute “torture” and/or “cruel or inhuman treatment” and, consequently, authorization of their use under the executive order would place interrogators at serious legal risk of prosecution for war crimes or other violations.

A recently declassified report by the Pentagon’s Office of the Inspector General (OIG) revealed that these techniques were based in large part on techniques of torture and cruelty used by the U.S. military in its Survival, Evasion, Resistance, and Escape (SERE) program. The SERE program was intended to train personnel to resist interrogation under such abuse if captured.<sup>8</sup> According to the OIG, these techniques were transformed, with the assistance of military psychologists, into “standard operating procedure” (SOP) for interrogations at the Guantánamo Bay detention facility. This Guantánamo SOP, the OIG reports, also was brought to Afghanistan and Iraq and, according to media reports, provided a basis for techniques used by CIA personnel, also with assistance from psychologists.<sup>9</sup> The origin of these techniques is directly related to the focus of this report. They were designed to inflict physical and psychological harm for the purpose of breaking down interrogation subjects. This report describes the nature and extent of that harm and the legal consequences to interrogators of employing techniques that cause it.

## Violations of the War Crimes Act, the Torture Act and the Detainee Treatment Act

The recent amendments to the War Crimes Act establish as war crimes “grave breaches” of Common Article 3 of the Geneva Conventions,<sup>10</sup> including “torture” and “cruel or inhuman treatment.”<sup>11</sup> “Torture” is characterized, in pertinent part, as “an act specifically intended to

inflict *severe physical or mental pain or suffering*.”<sup>12</sup> The separate war crime of “cruel or inhuman treatment,” is defined as “an act intended to inflict *severe or serious physical or mental pain or suffering*.”<sup>13</sup>

For the crime of torture under the WCA<sup>14</sup> and the Torture Act,<sup>15</sup> severe mental pain or suffering is defined as “the *prolonged* mental harm caused by or resulting from” several specified actions, including “the intentional infliction or threatened infliction of severe physical pain or suffering” and “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.”<sup>16</sup>

For the WCA crime of “cruel or inhuman treatment,” *serious* mental pain or suffering is defined as “the *serious and non-transitory* mental harm (which need not be prolonged) caused by or resulting from” the same specified actions.<sup>17</sup>

The Detainee Treatment Act requires that “no person in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to torture or cruel, inhuman, or degrading treatment or punishment (CIDT).”<sup>18</sup> The DTA defines CIDT as conduct prohibited by the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

## Adverse Physical and Mental Consequences

Medical literature clearly establishes that tactics such as the CIA’s reported “enhanced” interrogation techniques cause the types of physical and mental anguish that are criminalized under the WCA and other laws. In a letter sent to Senator John McCain during the height of the MCA debate, several leading medical and psychological experts, including current and past presidents of the American Psychiatric Association and the American Psychological Association, conveyed this collective knowledge:

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<sup>12</sup> *Id.* (emphasis added).

<sup>13</sup> *Id.* (emphasis added).

<sup>14</sup> Military Commissions Act of 2006, §5(b)(2)(A) (“the term ‘severe mental pain or suffering’ shall be applied ... in accordance with the meaning given that term in section 2340(2) of this title”).

<sup>15</sup> Torture Act, 18 U.S.C.A. § 2340(2) (2004) (defining the term “severe mental pain or suffering”).

<sup>16</sup> Torture Act, 18 U.S.C.A. § 2340 (2004), *amended by* Military Commissions Act, 18 U.S.C.A. § 2441(d)(2)(E)(ii) (2006).

<sup>17</sup> *Id.*

<sup>18</sup> Detainee Treatment Act of 2005, 42 U.S.C.A. § 2000dd (2006).

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<sup>8</sup> Office of the Inspector Gen. of the Dept. of Def. Report No. 06-INTEL-10, Review of DoD-Directed Investigations of Detainee Abuse (U) (August 25, 2006) [declassified May 18<sup>th</sup>, 2007], *available at* <http://www.fas.org/irp/agency/dod/abuse.pdf>.

<sup>9</sup> Mark Benjamin, *The CIA’s Torture Teachers*, Salon.com, June 21, 2007, [http://www.salon.com/news/feature/2007/06/21/cia\\_sere/index\\_np.html](http://www.salon.com/news/feature/2007/06/21/cia_sere/index_np.html).

<sup>10</sup> *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (holding that Common Article 3 applies to alleged members of Al Qaeda and the Taliban).

<sup>11</sup> Military Commissions Act of 2006, 18 U.S.C.A. §2441 (2006).

*There must be no mistake about the brutality of the “enhanced interrogation methods” reportedly used by the CIA. Prolonged sleep deprivation, induced hypothermia, stress positions, shaking, sensory deprivation and overload, and water-boarding (which may still be authorized), among other reported techniques, can have a devastating impact on the victim’s physical and mental health.*<sup>19</sup>

The pain and suffering arising from the individual and combined use of waterboarding, hitting, induced hypothermia, prolonged bombardment with loud music and flashing lights, stress positions, total and long-term isolation, and other “enhanced” interrogation techniques is directly related to the purpose of these techniques: to “break” detainees, mentally and physically.<sup>20</sup> The medical consequences of such abuse have been well-documented through years of research and treatment of survivors of violence and severe trauma.

Some of the enhanced techniques, particularly waterboarding, hitting, induced hypothermia, and stress positions are capable of causing “severe” or “serious” physical pain and suffering, the intentional infliction of which violates the “torture” and “cruel or inhuman treatment” provisions of the WCA. Each of the techniques can also cause significant psychological harm. According to one recent study, in fact, the significance of the harm caused by non-physical, psychological abuse is virtually identical to the significance of the harm caused by physical abuse.<sup>21</sup>

This mental harm can take many different forms, including:

- *Posttraumatic stress disorder* (PTSD), manifested in: prolonged, recurring flashbacks and nightmares; significant impairment and instability in life functions; suicidal ideation; and weakened physical health, among

other consequences.<sup>22</sup> Rates of PTSD range from 45% to 92% of torture survivors, subjected to both physical and mental torture.<sup>23</sup>

- *Depressive disorder*, manifested in self-destructive and suicidal thoughts and behavior, and other characteristics.<sup>24</sup>
- *Psychosis*, in the form of delusions, bizarre ideations and behaviors, perceptual distortions, and paranoia, among other manifestations.<sup>25</sup>

These techniques, moreover, are generally used in combination<sup>26</sup> — prolonged isolation, for example, combined with sleep deprivation, light and sound bombardment, and exposure to cold — compounding their devastating psychological impact.

<sup>19</sup> Letter from Allen S. Keller, Program Dir., Bellevue/NYU Program for Survivors of Torture, Gerald P. Koocher, President, American Psychological Association, Burton J. Lee, Physician to the President for George H.W. Bush, Bradley D. Olson, Chair, Divisions for Social Justice, American Psychological Association, Pedro Ruiz, President of the American Psychiatric Association, Steven S. Sharfstein, Immediate Past President, American Psychiatric Association, Brigadier General Stephen N. Xenakis, (Ret. U.S.A) and Philip G. Zimbardo, Prof. Emeritus, Stanford & past President, American Psychological Association, to Sen. John McCain (Sept. 21, 2006), available at <http://physiciansforhumanrights.org/library/news-2006-09-22.html>.

<sup>20</sup> PHYSICIANS FOR HUMAN RIGHTS, *BREAK THEM DOWN: THE SYSTEMATIC USE OF PSYCHOLOGICAL TORTURE BY U.S. FORCES 48-72* (2005), available at <http://physiciansforhumanrights.org/library/report-2005-may.html> [hereinafter *PHR BREAK THEM DOWN*].

<sup>21</sup> See generally M. Basoglu, et al., *Torture vs Other Cruel, Inhuman, and Degrading Treatment: Is the Distinction Real or Apparent?* 64 *ARCHIVES GEN. PSYCHIATRY* 277 (2007).

<sup>22</sup> See generally AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STAT. MANUAL OF MENTAL DISORDERS* (4<sup>th</sup> ed. 2000) [hereinafter *APA MANUAL*] (serves as the main diagnostic reference of mental health professionals in the United States of America); Office of the U.N. High Comm’r for Human Rights, *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 48, U.N. Doc HR/P/PT/8/REV.1 (Aug. 9, 1999), available at <http://www.ohchr.org/english/about/publications/docs/8rev1.pdf> [hereinafter *ISTANBUL PROTOCOL*] (The UN Commission on Human Rights in April, 2000, and the General Assembly in December, 2000, adopted resolution 55/89, the “Principles on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment”, commonly known as the Istanbul Protocol. The Istanbul Protocol is intended to provide international guidelines for the assessment of victims who allege torture and ill-treatment and describes the fundamental principles of any viable investigation into incidents of torture. The manual was the result of three years of work of more than 75 experts in law, health and human rights, representing 40 organizations or institutions from 15 countries); Ronald C. Kessler, *Posttraumatic Stress Disorder: The Burden to the Individual and to Society*, 61 *J. CLIN. PSYCHIATRY* 4 (2000), available at <http://www.lawandpsychiatry.com/html/Costs%20of%20PTSD.pdf>.

<sup>23</sup> Pia A. Moisaner & Erik Edston, *Torture and its sequel — a comparison between victims from six countries*, *FORENSIC SCI. INT’L*, Nov. 26, 2003, at 133, 133-140.

<sup>24</sup> Richard F. Mollica, *Surviving Torture*, 351 *NEW ENG. J. MED.* 5 (2004).

<sup>25</sup> *ISTANBUL PROTOCOL*, *supra* note 22, at 48.

<sup>26</sup> MAJ. GEN. GEORGE R. FAY, AR 15-6 *INVESTIGATION OF INTELLIGENCE ACTIVITIES AT ABU GHRAIB*, Aug. 2004, at 9-10, available at <http://www4.army.mil/ocpa/reports/ar15-6/AR15-6.pdf> [hereinafter *FAY REPORT*]; see also *PHR BREAK THEM DOWN*, *supra* note 20, at 7.

## The Legal Risk Under U.S. Law<sup>27</sup>

Given this body of medical and psychological knowledge, officials who authorize these techniques place themselves and those who engage in them at significant risk: namely, that in future trials involving the War Crimes Act and other legal prohibition described in this report, courts will be presented with credible and compelling evidence of harm, provided by medical and psychological experts skilled in the documentation of physical and psychological consequences of torture and ill-treatment, in accordance with internationally accepted protocols.<sup>28</sup>

It is the responsibility of the Executive Branch to ensure that its agents abide by the law. If instead it purports to authorize acts that violate the law, agents who carry out those acts will be put at risk of prosecution for serious crimes.

## Conclusion and Recommendations

This report demonstrates that “enhanced” techniques of interrogation, whether practiced alone or in combination, may cause severe physical and mental pain. In fact, the use of multiple techniques of “enhanced” interrogation virtually assures the infliction of severe physical and mental pain upon detainees. Given this knowledge, U.S. policy makers and interrogation personnel should understand that if such methods are practiced, it would be reasonable for courts to conclude that the resulting harm was inflicted intentionally.

The interrogation techniques analyzed above — and other techniques that have comparable medical consequences — implicate legal prohibitions and could result in

felony criminal prosecutions. It is therefore inappropriate for any such techniques to be used by U.S. personnel in interrogations, and it is the responsibility of U.S. policy makers to ensure that the use of such techniques is effectively precluded.

In issuing interrogation policy, the United States should refrain from repeating the mistake of allowing euphemistic descriptions of interrogation techniques to stretch the line between permissible and impermissible treatment. Instead, all U.S. agencies should firmly adhere to a single standard of humane treatment that protects the lives and health of individuals in U.S. custody.

### Recommendations to the Executive Branch

1. Prohibit the “enhanced” interrogation techniques, in order to protect U.S. officials and personnel from potential criminal liability and to ensure that all U.S. personnel adhere to U.S. law.
2. Prohibit the use of any other method that, alone or in combination with other interrogation methods, presents a significant risk of causing serious or severe physical and/or mental pain or suffering.
3. Instruct all U.S. interrogators in effective, legal, non-harmful methods of interrogation.
4. Declassify and release all documents, from all relevant U.S. agencies, which contain information on U.S. interrogation policy and practice, including but not limited to the “enhanced” interrogation methods.

### Recommendations to the U.S. Congress

1. Clarify existing language in the MCA, which under a reasonable interpretation currently prohibits the use of the “enhanced” techniques, by explicitly listing the techniques, forbidding them, and making clear that they remain criminal.
2. Establish a single standard for detainee treatment and interrogation practices to be followed by all U.S. personnel, including CIA personnel.

<sup>27</sup>This report focuses on the legality of “enhanced” interrogation techniques under U.S. law. But it is important to note that even if the use of techniques that cause serious or severe physical or mental pain or suffering is found not to violate U.S. law or if there are found to be valid defenses to such violations under domestic law, their use may nonetheless subject interrogators to criminal prosecution internationally by countries with universal jurisdiction over the commission of war crimes.

<sup>28</sup>See generally *ISTANBUL PROTOCOL*, *supra* note 22.