

# Torture Papers, Never Again – Guarantees of Non-repetition for the Torture Committed by the Bush Administration during the ‘War on Terror’

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## Abstract

The Bush Administration has advanced a variety of legal justifications for its actions in the ‘war on terror’ and, in particular, for the use of ‘enhanced interrogation techniques’ against suspected terrorists. The most significant justifications for these actions stem from a set of memorandums written by governmental lawyers from different US State agencies. Commonly referred to as the ‘Torture Papers,’ these memorandums attempted to legally justify the use of enhanced interrogation techniques based on their analysis of loopholes and ambiguities under domestic law in the United States. This paper analyses how the Torture Act, among other pieces of legislation, made the interpretation reached by the Torture Papers possible. Existing measures guaranteeing non-repetition are discussed, along with recommendations for improving guarantees.

Keywords: non-repetition, reparations, terrorism, torture

## 1. Introduction

Waterboarding, sleep deprivation, violent shaking, sexual humiliation, stress positions, beating, and temperature manipulation are just some examples of treatments that were inflicted on suspected terrorists as part of the ‘enhanced interrogation’ techniques used by the US under the Bush administration.<sup>1</sup> Notwithstanding, former President George W. Bush declared: ‘We do not torture.’<sup>2</sup> The Bush Administration considered these enhanced interrogation techniques to be aggressive, yet lawful.<sup>3</sup> UN expert bodies and mandates, as well as NGOs hold the opposite position.<sup>4</sup>

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<sup>1</sup> Physicians for Human Rights, Submission to the United Nations Universal Periodic Review of the United States of America, 8<sup>th</sup> Session of the Working Group on the Universal Periodic Review Human Rights Council, 2 November to 3 December, 2010, para. 4, [hereinafter Physicians for Human Rights UPR].

<sup>2</sup> Office of the Press Secretary, ‘President Bush Meets with President Torrijos of Panama’, 7 November 2005. Available at <http://georgewbush-whitehouse.archives.gov/news/releases/2005/11/20051107.html>. Last accessed 20 June 2011.

<sup>3</sup> See fn. 2.

<sup>4</sup> Committee against Torture, Conclusions and Recommendations of the Committee against Torture: United States, U.N. Doc. CAT/C/USA/CO/2, 25 June 2006, para. 24; Special Rapporteur on the promotion and

The Bush Administration argued for the legality of these techniques through different means, including a set of memorandums written by governmental lawyers from different State agencies, commonly referred as the ‘Torture Papers.’<sup>5</sup> It was the rationale of these memorandums that led then-president Bush to claim that ‘We do not torture.’

According to Bassiouni, the Torture Papers had a ‘trickle-down effect’ that enabled the torture of the suspected terrorists detained by the United States in different parts of the world:<sup>6</sup> the Torture Papers were used by the Department of Defense’s Working Group on Acceptable Interrogation Practices; the CIA included them in its own materials, and ‘[o]perators in the field also relied on these memoranda when making decisions about interrogations.’<sup>7</sup> It is uncertain if torture began occurring before or after the first Torture Papers were issued, and whether the Torture Papers were an advisory opinion prior to action or justification for techniques already being employed.<sup>8</sup> Therefore, it is not possible to establish that, without the Torture Papers, torture would not have been committed. Nevertheless, the Torture Papers permitted the practice of using enhanced interrogation techniques, or at least allowed for their continuation.<sup>9</sup>

Through the Torture Papers, high level US Government lawyers interpreted the law in a way to systematically deny individuals a human right so clearly established as the right to be free from torture, inhuman and degrading treatment or punishment.<sup>10</sup> Measures must be taken in order to ensure that these erroneous legal interpretations do not recur.

This paper explores the US Government’s non-repetition guarantees regarding interpretations made within the Torture Papers and proposes other measures to complement existing ones. Following a brief explanation of the Torture Papers and other related legal justifications, this paper explains the legal obligations of the United States regarding guarantees of non-repetition and outlines the steps taken towards guarantee of non-repetition. Finally, this paper proposes other measures the United States could pursue to fulfil guarantees of non-repetition.

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protection of human rights and fundamental freedoms while countering terrorism, Human Rights Council, U.N.Doc. A/HRC/6/17/Add.3,22 November 2007, para. 33 (by Martin Scheinin) [hereinafter Special Rapporteur Counter-Terrorism]; ‘Amnesty International, USA: Torture in black and white, but impunity continues’, 17 April 2009, AI Index AMR 51/055/2009; Human Rights Watch, ‘Fighting Terrorism Fairly and Effectively: Recommendations for President-Elect Barack Obama’, 16 November 2008.

<sup>5</sup> Cherif Bassiouni, *The Institutionalization of Torture by the Bush Administration. Is Anyone responsible?* (Antwerp – Oxford – Portland: Intersentia, 2010), p. 119.

<sup>6</sup> See fn. 5, pp. 109-140.

<sup>7</sup> See fn. 5, pp. 207-208.

<sup>8</sup> Richard B. Bilder and Detlev F. Vagts, ‘Speaking Law to Power: Lawyers and Torture’ in Karen J. Greenberg (ed.), *The Torture Debate in America* (Cambridge: Cambridge University Press, 2006) p. 152. See also Scott Horton, ‘Which Came First, Memo or Torture’, *L.A. Times*, 21 April 2008. Available at <http://articles.latimes.com/2008/apr/21/opinion/oe-horton21/>. Last accessed 26 June 2011.

<sup>9</sup> Scott Horton, *Which Came First, Memo or Torture*, See fn. 8. See also Bassiouni, *The Institutionalization of Torture by the Bush Administration. Is Anyone Responsible?*, p. 22. See fn. 5.

<sup>10</sup> Jordan Paust, *Beyond the Law. The Bush Administration’s Unlawful Responses in the ‘War’ on Terror* (New York: Cambridge University Press, 2007) p. 24.

## 2. A Brief Explanation of the Torture Papers

This section describes the arguments found in the Torture Papers for the purpose of analysing guarantees of non-repetition.<sup>11</sup>

The Torture Papers analyse the definition of torture included in the U.S. Statute 18 United States Code §§ 2340 2340A (hereinafter the Torture Act). The Torture Act defines torture as ‘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.’<sup>12</sup> The Torture Act further defines ‘severe mental pain or suffering’ as:

- (2) [...] 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.<sup>13</sup>

The Torture Papers concludes that for an act to amount to torture, the severe pain caused must rise to ‘the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions.’<sup>14</sup> For ‘severe mental pain or suffering,’ to amount to torture, the treatment must cause ‘prolonged mental harm’ which, according to the Torture Papers, implies ‘lasting’ damage.<sup>15</sup> This interpretation permits use of the following interrogation techniques: ‘1) attention grasp, 2) walling, 3) facial hold, 4) facial slap 5) cramped confinement, 6) wall standing, 7) stress positions, 8) sleep deprivation, 9) insects placed in a confinement box, and 10) waterboarding.’<sup>16</sup> The lawyers alleged that these treatments did not meet the severity requirement for torture, and as such their infliction did not violate the Torture Act or the

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<sup>11</sup> Bassiouni, *The Institutionalization of Torture by the Bush Administration. Is Anyone Responsible*, See fn. 5; Paust, *Beyond the Law. The Bush Administration’s Unlawful Responses in the ‘War’ on Terror*, p. 44. See fn. 10; Jeremy Waldron, ‘Torture and Positive: Jurisprudence for the White House’ (2005) *Columbia Law Review* 105, pp. 1681, 1707-1708.

<sup>12</sup> 18 United States Code § 2340 (1) (2004).

<sup>13</sup> 18 United States Code § 2340 (2) (2004).

<sup>14</sup> Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation under 18 United States Code §§2340-2340A (Aug. 1, 2002) reprinted in *The Torture Papers. The Road to Abu Ghraib* (Karen Greenberg and Joshua Dratel ed. 2005) p. 176 [Hereinafter Bybee Memo]. The Bybee memo used the definition of severe pain found in the Statute that regulates to obligation to provide health care on emergency situations. For a critique on use of this statute see Waldron, ‘Torture and Positive: Jurisprudence for the White House’, pp. 1707-1708. See fn. 11.

<sup>15</sup> Bybee Memo, p. 177. See fn. 14.

<sup>16</sup> Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to John Rizzo, General Counsel of the Central Intelligence Agency, Interrogation of Al-Qaida Operatives, 1 August 2002) in Bassiouni, *The Institutionalization of Torture by the Bush Administration. Is Anyone Responsible?*, p. 22. See fn. 5.

obligations of the United States under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).<sup>17</sup>

The United States argued the non-applicability of certain aspects of international law to the ‘war on terror.’ Regarding the International Covenant on Civil and Political Rights (ICCPR), the United States argues that the ICCPR only applies to acts or omissions that take place in the United States’ ‘territory and subject to its jurisdiction.’<sup>18</sup> This argument is based on Article 2 of the ICCPR, which establishes States must respect and ensure the rights recognised in the Covenant ‘to all individuals within its territory and subject to its jurisdiction.’<sup>19</sup> The United States have maintained that since the ICCPR uses the conjunction ‘and’ instead of ‘or’, it means that the ICCPR only applies to acts.<sup>20</sup> In other words, both conditions must be met. During the Bush administration, this argument formed the basis for denying human rights to the detainees of Guantanamo Bay, because Guantanamo Bay was not considered to be US territory.<sup>21</sup>

In addition to the alleged non-application of the ICCPR, the Bush Administration argued that international humanitarian law protections did not apply to suspected terrorists detained in an armed conflict.<sup>22</sup> International humanitarian law (IHL) is the body of law that regulates the conduct of hostilities during an armed conflict.<sup>23</sup> The rules that apply vary depending on whether the armed conflict is between two States, known as an international armed conflict, or between a State and a non-State group or between two non-State groups, known as a non-international armed conflict.<sup>24</sup> The United States is a party to, and therefore is bound to apply

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<sup>17</sup> Memorandum from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, U.S.

Department of Justice, to Alberto R. Gonzales, Counsel to the President, Legality under international law of interrogation methods (1 August 2002) reprinted in *The Torture Papers*, p. 218. See fn. 14.

<sup>18</sup> See Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations, 6 March 2003, reprinted in *The Torture Papers*, p. 218. See fn. 14. See also Concluding Observation of the Human Rights Committee regarding United States, ‘Consideration of Reports Submitted by States Parties under Article 40 of the Covenant’, para. 19, U.N. Doc. CCPR/C/USA/CO/3/Rev.1, 18 December 2006.

<sup>19</sup> International Covenant on Civil and Political Rights, Article 2.1, 16 December 1966, 99 United Nations Treaty Series 171 [hereinafter ICCPR].

<sup>20</sup> Comments by the Government of the United States of America on the concluding observations of the Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant*, 2, U.N. Doc. CCPR/C/USA/CO/3/Rev.1/Add.1 (12 February 2008).

<sup>21</sup> Marco Sassòli, ‘Guantanamo, Detainees’ para. 19 in *The Max Planck Encyclopedia of Public International Law* (Rüdiger. Wolfrum ed. 2008), Online edition. Available at <http://www.mpepil.com>.

<sup>22</sup> Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., and Robert J. Delahunty, Special Counsel, U.S. Dep’t of Justice, to William J. Haynes II, Gen. Counsel, Dep’t of Defense, Application of Treaties and Laws to Al-Qaida and Taliban Detainees (9 January 2002), reprinted in *The Torture Papers*, p. 38. See fn. 14. Nigel S. Rodley, ‘The Prohibition of Torture: Absolute Means Absolute’ in Wolfgang Kaleck *et al* (ed.), *International Prosecution of Human Rights Crimes*, (1997), pp. 185-200, at p. 187.

<sup>23</sup> Malcolm N. Shaw QC, *International Law* (New York: Cambridge University Press, 2010), p. 1167.

<sup>24</sup> See fn. 23.

the Geneva Conventions in international armed conflicts<sup>25</sup> as well as common Article 3 of the Geneva Conventions in non-international armed conflicts.<sup>26</sup> There is also customary international law applicable to the two kinds of armed conflicts.<sup>27</sup> The prohibition against torture and other cruel, inhuman, and degrading treatment applies in both international and non-international armed conflicts.<sup>28</sup>

Even though some actions by the United States against Al-Qaida rose to the level of an armed conflict,<sup>29</sup> former President George W. Bush denied the protections given by IHL<sup>30</sup> to Al-Qaida and Taliban detainees.<sup>31</sup> First the Bush Administration determined that Al-Qaida and Taliban detainees were not acting on behalf of a State, thus the armed conflict was not an international one.<sup>32</sup> Second, Bush contended that the protection given by Common Article 3 did not apply to Al-Qaida and Taliban detainees because the conflict was ‘international in scope’ and Common Article 3 applies to internal conflicts only.<sup>33</sup>

The alleged non-applicability of the ICCPR and IHL together with the arguments forwarded in the Torture Papers also permitted the use of confessions extracted through the ‘enhanced

<sup>25</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Article 2, Aug. 12, 1949, 75 United Nations Treaty Series 31; Geneva Convention for the Amelioration of the Shipwrecked Members of Armed Forces at Sea, Article 2, Aug. 12, 1949, 75 United Nations Treaty Series 85; Geneva Convention relative to the Treatment of Prisoners of War, Article 2, Aug. 12, 1949, 75 United Nations Treaty Series 135, and Geneva Convention relative to the Protection of Civilian Persons in Time of War, Article 2, Aug. 12, 1949, 75 United Nations Treaty Series 287. Additional Protocol I is also applicable to international armed conflicts, however, the United has not ratified it. See, States parties to Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of International Armed Conflicts (Protocol I). Available at <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P>. Last accessed 16 December 2010.

<sup>26</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Article 3. See fn. 25; Geneva Convention for the Amelioration of the Shipwrecked Members of Armed Forces at Sea, Article 3. See fn. 25; Geneva Convention relative to the Treatment of Prisoners of War, Article 3. See fn. 25; Geneva Convention relative to the Protection of Civilian Persons in Time of War, Article 3. See fn. 30. Additional Protocol II is also applicable to non-international armed conflicts; however, the United has not ratified it. See States parties to Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of Non-International Armed Conflicts (Protocol II). Available at <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=475&ps=P>. Last accessed 16 December 2010.

<sup>27</sup> See Jean-Marie Henckaerts, ‘Estudio Sobre el Derecho Internacional Humanitario Consuetudinario: Una Contribución a la Comprensión y al Respeto del Derecho de los Conflictos Armados’ (2005) *International Review of the Red Cross* [hereinafter CIL IHL] 87.

<sup>28</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Article 3, 12. See fn. 25; Geneva Convention for the Amelioration of the Shipwrecked Members of Armed Forces at Sea, Article 3, 12. See fn. 25; Geneva Convention relative to the Treatment of Prisoners of War, Article 3, 12. See fn. 25, and Geneva Convention relative to the Protection of Civilian Persons in Time of War, Article 3, 12. See fn. 25. It is also prohibited in international and non-international armed conflicts by customary international law. See CIL IHL, rule 90. See fn. 27.

<sup>29</sup> *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 at 2796 (2006). It is necessary to point out that the actions of the United States against Al-Qaida cannot be qualified as an international or non-international armed conflict as a whole. The so called ‘war on terror’ is composed by international armed conflicts, like the conflict in Iraq, non-international armed conflicts, like the attacks against terrorist groups whose actions are not attributable to a State, and situations that may not reach the threshold of intensity required by international humanitarian law (IHL) in order to qualify as an armed conflict. In these situations, IHL prohibits torture regardless of whether the armed conflict is characterised as international or non-international.

<sup>30</sup> For example the detainees were denied the possibility to be considered as Prisoners of War. This in turned meant that they could be prosecuted for their mere participation in the armed conflict. See Derek Jinks, ‘The Declining Significance of POW Status’ (2004) *Harvard International Law Journal* 45(367), p. 376.

<sup>31</sup> Memorandum from George W. Bush, President of the United States, to the Vice-President, *et al*, humane treatment of Al-Qaida and Taliban detainees (Feb. 7, 2002) reprinted in *The Torture Papers*, p. 134. See fn. 14.

<sup>32</sup> See fn. 31.

<sup>33</sup> See fn. 31, pp. 134-135.

interrogation techniques’ as evidence in the military commissions. The Military Order of 13 November 13 2001 established military commissions for the trial of suspected terrorists.<sup>34</sup> The order stated that ‘it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.’<sup>35</sup> Although military commissions are conceived for times of armed conflict, the Military Order made no mention of the Geneva Conventions.<sup>36</sup> It was this Military Order that first permitted the use of evidence obtained through coercion.<sup>37</sup>

The Military Commissions created by the Military Order of 13 November 13 2001 were declared unconstitutional by the United States Supreme Court in *Hamdan v. Rumsfeld*.<sup>38</sup> The Court also held that Common Article 3 was applicable to members of Al-Qaida, since the war against Al-Qaida was a non-international armed conflict.<sup>39</sup> In order to comply with the Supreme Court’s decision, Congress replaced the Military Order of November 13 with the Military Commission Act of 2006 (hereinafter MCA).<sup>40</sup> The MCA prohibited the use as evidence in the military commissions of ‘[a] statement obtained by use of torture.’<sup>41</sup> The MCA also prohibited the use of statements obtained by the use of cruel, inhuman or degrading treatment if that statement was made after December 2005, when the Detainee Treatment Act was enacted.<sup>42</sup> On the other hand, if the statement was obtained before December 2005, it is irrelevant whether the interrogation method used amounted to cruel, inhuman or degrading treatment. The statement was admissible when the judge found that ‘the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and the interests of justice would best be served by admission of the statement into evidence.’<sup>43</sup> The same conditions apply for the validity of statements obtained through disputed coercive methods that do not amount to a cruel, inhuman or degrading treatment if the statement was obtained after December 2005.<sup>44</sup>

It was argued in the Torture Papers that the enhanced interrogation techniques did not amount to torture, the evidence that was obtained by them was not considered to be prohibited for use in a military commission. Consequently, statements obtained by enhanced interrogation techniques could be used as evidence in the Military Commission as long as the judge found the justifications explained above.

The Torture Papers also interpreted US and international law in a way so as to shield those involved in the enhanced interrogation techniques from prosecuted. The Torture Papers concluded that in order to charge somebody with the crime of torture, it was necessary ‘that a

<sup>34</sup> Military Order of November 13, 2001, Presidential Documents p. 57831-57836, sec. 4.

<sup>35</sup> Military Order of November 13, 2001, sec. 1. See fn. 34.

<sup>36</sup> David W. Bowker, ‘Unwise Counsel: The War on Terrorism and the Criminal Mistreatment of Detainees in U.S. Custody’ in Karen J. Greenberg (ed.), *The Torture Debate in America* (Cambridge: Cambridge University Press, 2006), p. 186.

<sup>37</sup> *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 at 2786 (2006).

<sup>38</sup> *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

<sup>39</sup> *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 at 2795-96 (2006).

<sup>40</sup> Military Commissions Act of 2006, Pub. L. No. 109-336, 120 Stat. 2600. Regarding the Hamdan decision, see, Thomas M. Gore, *Commission Control: The Court’s narrow holding in Hamdan v. Rumsfeld spurred congressional action but left many questions unanswered, so what happens now?* (2007) 58 Mercer L. Rev. 741.

<sup>41</sup> Military Commissions Act of 2006, § 948r, Pub. L. No. 109-336, 120 Stat. 2600.

<sup>42</sup> Military Commissions Act of 2006, § 948r, Pub. L. No. 109-336, 120 Stat. 2600. As it will be explain, the United States considers a treatment to be cruel, inhuman or degrading if it violates the Fifth, Eighth and/or Fourteenth Amendment to the United States Constitution.

<sup>43</sup> Military Commissions Act of 2006, § 948r, Pub. L. No. 109-336, 120 Stat. 2600.

<sup>44</sup> Military Commissions Act of 2006, § 948r, Pub. L. No. 109-336, 120 Stat. 2600.

defendant act with the specific intent to inflict severe pain. The infliction of such pain must be the defendant's precise objective.'<sup>45</sup> The Torture Papers reasoned that the precise objective was not the infliction of pain, but information gathering. Second, the Torture Papers argued that in the case of a criminal prosecution concerning torture, the defendant could rely on the arguments of necessity or self-defence to justify the interrogation methods used.<sup>46</sup>

The Bush Administration also amended the War Crimes Act (WCA)<sup>47</sup>, so that the definition of torture within the War Crimes Act and Torture Act is congruent. Because the Torture Papers interpreted the definition of torture as it appears in the Torture Act, the War Crimes Act might be interpreted in the same manner as in the Torture Papers.

In summary, these legal interpretations and amendments made it possible for the United States to interpret and amend the law to suit their own interests. The definition of torture in the War Crimes Act and Torture Act should be amended further to prevent an analysis such as that made by the Torture Papers<sup>48</sup> as a necessary element of guaranteeing non-repetition.<sup>49</sup>

### 3. Legal Obligations Regarding the Guarantees of Non-Repetition

As the name suggests, the goal of the guarantees of non-repetition is to prevent future violations of the same norm.<sup>50</sup> State obligation to implement guarantees of non-repetition arises when a State violates a norm of international law. The existence of the obligation to make guarantees of non-repetition was recognised by the Permanent Court of International Justice in the *Factory at Chorzów* case.<sup>51</sup> The obligation to make guarantees of non-repetition as regards human rights violations can be also found in the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (hereinafter the Basic Principles) as part of the measures States should take to repair the harm suffered.<sup>52</sup> The Human Rights Committee has also recognized guarantees of non-repetition by stating that 'where appropriate, reparation can involve [...] guarantees of non-repetition.'<sup>53</sup> On a regional level, the Inter-American Court of Human Rights and the Committee of Ministers of the Council of Europe<sup>54</sup> have ordered States to make guarantees of non-repetition.<sup>55</sup>

<sup>45</sup> Bybee Memo, p. 174. See fn. 14.

<sup>46</sup> See fn. 45, pp. 207-213.

<sup>47</sup> See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Article 3. See fn. 25.

<sup>48</sup> See Waldron, 'Torture and Positive: Jurisprudence for the White House', p. 1709. See fn. 11.

<sup>49</sup> See fn. 48; *Gomes-Lund et al (Guerrilha do Araguaia) v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 219, para. 281-287 (24 November 2010)*. See also Dinah Shelton, *Remedies in International Human Rights Law*, 2<sup>nd</sup> ed. (Oxford: Oxford University Press, 2005), p. 279.

<sup>50</sup> General Assembly Resolution 60/147, annex, para. 23, U.N. Doc. A/RES/60/147 (16 December 2005). See Sandrine Barbier, 'Assurances and Guarantees of Non-repetition', in James Crawford et al. ed., *The Law of International Responsibility* (Oxford: Oxford University Press, 2010), p. 551.

<sup>51</sup> *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 22*. See Articles on responsibility of States for internationally wrongful acts, Article 30, General Assembly Resolution 56/83 annex, U.N. Doc. A/RES/56/83 (28 January 2002) and *LaGrand (Germany v. United States of America)*, Judgment, International Court of Justice Reports 2001, p. 485, para. 48.

<sup>52</sup> General Assembly Resolution 60/147, para. 23. See fn. 50.

<sup>53</sup> Human Rights Committee, General Comment 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para. 16, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004).

<sup>54</sup> Council of Minister. Available at [http://www.coe.int/t/cm/aboutCM\\_en.asp](http://www.coe.int/t/cm/aboutCM_en.asp). Last accessed 29 June 2011.

Guarantees of non-repetition become necessary when the *status quo* cannot ensure the non-recurrence of the violation.<sup>56</sup> Guarantees of non-repetition are closely related to the root causes of the particular violation at issue<sup>57</sup> and vary in each case. The Inter-American Court of Human Rights has, for example, demanded that States train public officials, reform relevant legislation, and publically assume responsibility for violations.<sup>58</sup>

#### 4. Steps towards Guarantees of Non-Repetition

Publication of the Torture Papers marked the first step towards non-repetition.<sup>59</sup> The first of the Torture Papers became public when the Washington Post obtained a copy after the Abu Ghraib scandal.<sup>60</sup> Other papers have since become public following Freedom of Information Act requests.<sup>61</sup> Although the Torture Papers were not made public by a direct action of the government, their publication should be taken into account. Publication of the Torture Papers invoked public discussion on the matter, providing the public with insight into what had occurred. This, in turn, could motivate civil society to demand a response to these violations.

Apart from publication of the Torture Papers, the Bush and Obama Administration have taken some measures to ensure that the erroneous legal analysis in the Torture Papers does not happen again. This section will examine the measures taken by these two administrations in two subsections.

##### 4.1 *The Bush Administration*

In December 2005, the Detainee Treatment Act (also known as the McCain Amendment) was enacted.<sup>62</sup> The Detainee Treatment Act states that ‘[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.’<sup>63</sup> The Detainee Treatment Act further states that ‘[n]othing in this section shall be construed to impose any geographical limitation on the applicability of the prohibition against cruel, inhuman, or degrading treatment or punishment under this section.’<sup>64</sup> The Act also states that

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<sup>55</sup> *Garrido & Baigorria v. Argentina, Reparations and Costs*, Judgment, Inter-American Court of Human Rights (ser. C) No. 39, 27 August 1998, para. 41.

<sup>56</sup> James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text, and Commentaries* (Cambridge: Cambridge University Press, 2002) p. 198.

<sup>57</sup> Barbier, ‘Assurances and Guarantees of Non-repetition’, p. 557. See fn. 50.

<sup>58</sup> Francisco Quintana, ‘Conference: Reparations in the Inter-American System’ (2007) *American University Law Review* 56, pp. 1385-1386. See Thomas M. Antkowiak, ‘Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond’ (2008) *Columbia Journal of Transnational Law* 46(351).

<sup>59</sup> International Center for Transitional Justice, Submission to the United Nations Universal Periodic Review of the United States of America, para. 15 (16 April 2010).

<sup>60</sup> Dana Priest and Jeffrey Smith, *Memo Offered Justification for Use of Torture*, Washington Post, 8 June 2004, at A01.

<sup>61</sup> See American Civil Liberties Union, *Documents Released under FOIA*. Available at <http://www.aclu.org/accountability/released.html>. Last accessed 16 December 2010.

<sup>62</sup> Detainee Treatment Act (2005).

<sup>63</sup> Detainee Treatment Act, §1003 (a) (2005).

<sup>64</sup> Detainee Treatment Act, §1003 (b) (2005).

the term ‘cruel, inhuman, or degrading treatment or punishment’ means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.<sup>65</sup>

Steiner examines ‘whether the due-process test employed (through the Fourteenth Amendment) in the *Rochin* case [...] to bar evidence would now permit national security considerations to be employed in a balancing test. Such a test might ask whether the harm inflicted in interrogations is worth the information gained.’<sup>66</sup> In order to ensure the protection of human rights and fundamental freedoms, US laws relating to cruel, inhuman or degrading treatment must be amended.<sup>67</sup>

The Detainee Treatment Act also establishes that the only interrogation methods permitted are those included in the Army Field Manual when the person is ‘in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense.’<sup>68</sup>

On September 2006, the new Army Field Manual on interrogations, FM-2-22-3, was published.<sup>69</sup> The Manual prohibits the use of torture and other cruel, inhuman or degrading treatment,<sup>70</sup> and expressly prohibits, among other actions, ‘waterboarding, using military working dogs, inducing hypothermia or heat injury, and conducting mock executions.’<sup>71</sup> This express prohibition is a great step towards the elimination of the use of techniques that may amount to torture. The Manual includes in its Appendix M ‘restrictive interrogation techniques’ that may be applied to specific unlawful enemy combatants prior to receipt of special permission.<sup>72</sup> The techniques include isolation, sensory deprivation, and sleep deprivation. It is possible that these techniques, individually or in combination, may amount to torture or at least constitute cruel, inhuman and degrading treatment.<sup>73</sup>

In 2006, the Bush Administration amended the War Crimes Act of 1996. The War Crimes Act of 1996 defined a war crime as any conduct ‘which constitutes a violation of common Article 3 of the [Geneva Conventions].’<sup>74</sup> In 2006, this was changed to any conduct ‘which constitutes a grave breach of common Article 3 (as defined in subsection (d)) when

<sup>65</sup> Detainee Treatment Act, §1003 (d) (2005).

<sup>66</sup> Henry Steiner et al, *International Human Rights in Context*, 3<sup>rd</sup> ed. (Oxford: Oxford University Press, 2008) p. 258

<sup>67</sup> Paust, *Beyond the Law. The Bush Administration’s Unlawful Responses in the ‘War’ on Terror*, p. 44. See fn. 10. Steiner et al, *International Human Rights in context*, p. 258. See fn. 66.

<sup>68</sup> Detainee Treatment Act, §1002 (a) (2005).

<sup>69</sup> Army Field Manual on Interrogations, FM-2-22-3, para. 8 (3) (6 September 2006). Available at <http://www.army.mil/institution/armypublicaffairs/pdf/fm2-22-3.pdf>. Last accessed 16 December 2010.

<sup>70</sup> See fn. 69, para. 5.21.

<sup>71</sup> See fn. 69.

<sup>72</sup> See fn. 69, Appendix M.

<sup>73</sup> Special Rapporteur Counter-Terrorism, para. 35. See fn. 4; Physicians for Human Rights UPR, paras. 14-16. See fn. 1; and Human Rights First, Submission to the United Nations Universal Periodic Review of the United States of America (26 November 2010) p. 4. See section 5.3 below.

<sup>74</sup> Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, 105 P.L. 118; 111 Stat. 2386; 1997 Enacted H.R. 2159; 105 Enacted H.R. 2159.

committed in the context of and in association with an armed conflict not of an international character.<sup>75</sup> Substitution of the words ‘non-international armed conflict’ for the original text, which read ‘not of an international character’ reflects the same wording used in the Geneva Convention.<sup>76</sup> This new wording is less conducive to the Bush Administration’s argument that common Article 3 is not applicable to Al-Qaida detainees, since the conflict is of an international character. The words ‘non-international armed conflict’ make clear that common Article 3 applies to any armed conflict that is not an international one.

The 1996 War Crimes Act did not detail possible violations of Article 3, but referred to them as ‘violations of Article 3,’ which means that all violations of Common Article 3 were also violations of the War Crimes Act. On the other hand, the new War Crimes Act listed the possible violations of Common Article 3. However, the list is incomplete; the new Act does not include the prohibition of ‘outrages upon personal dignity, in particular humiliating and degrading treatment’ as well as the prohibition of ‘passing [...] sentences and [...] carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples,<sup>77</sup>’ as stated in Common Article 3. In this way, the new act limits the scope of what the United States considers to be a war crime. The new War Crimes Act uses the same definition of torture as the Torture Act, which spurred the draconian interpretations of domestic law found in the Torture Papers.

On 20 July 2007, President Bush signed Executive Order 13440.<sup>78</sup> The Executive Order determined that the CIA must to apply Common Article 3 in its operations against Al-Qaida, the Taliban, and associated forces.<sup>79</sup> Nonetheless, the order ‘fail[ed] explicitly to rule out the use of the ‘enhanced’ techniques that the CIA authorized in March 2002.’<sup>80</sup>

#### 4.2 *The Obama Administration*

President Obama has instituted policy changes since President Bush left office. President Obama declared that ‘brutal methods of interrogation are inconsistent with our values, [and] undermine the rule of law.’<sup>81</sup> Along these lines, the United States report to the Human Rights Council in its Universal Periodic Review stated that ‘there are no law-free zones; [...] everyone is entitled to protection under the law.’<sup>82</sup>

<sup>75</sup> War Crimes Act, 18 United States Code Service § 2441.

<sup>76</sup> See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Article 3. See fn. 25.

<sup>77</sup> See, for example, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Article 3.1(c)(d). See fn. 25.

<sup>78</sup> Executive Order 13440, ‘Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency’, 20 July 2007. Available at <http://edocket.access.gpo.gov/2007/pdf/07-3656.pdf>. Last accessed 27 June 2011 [hereinafter Executive Order 13440]

<sup>79</sup> See fn. 78.

<sup>80</sup> Physicians for Human Rights UPR, para. 1. See fn. 1.

<sup>81</sup> Office of the Press Secretary, Statement by the President on the International Day in Support of Victims of Torture, 24 June 2010. Available at <http://www.whitehouse.gov/the-press-office/statement-president-international-day-support-victims-torture>. Last accessed 16 December 2010.

<sup>82</sup> United States of America, National Report Submitted in Accordance with Paragraph 15 (a) of the Annex to Human Rights Council Resolution 5/1, para. 82, U.N. Doc. A/HRC/WG.6/9/USA/1 (23 August, 2010).

Two days after President Obama assumed presidency, he signed Executive Order 13491, which prohibited relying on analysis within the Torture Papers.<sup>83</sup> Although Executive Order 13491 prevents these memorandums from being used, this alone is insufficient. Measures should be taken to ensure similar interpretations of the law do not recur.

Executive Order 13491 recognises that Common Article 3 applies to all armed conflicts, including the one against Al-Qaida.<sup>84</sup> The Executive Order further states that no detainee shall ‘be subjected to violence to life and person (including murder of all kinds, mutilation, cruel treatment, and torture), nor to outrages upon personal dignity (including humiliating and degrading treatment).’<sup>85</sup> This prohibition applies regardless of the place where the individuals are detained when ‘in the custody or under the effective control of an officer, employee, or other agent of the United States Government or detained within a facility owned, operated, or controlled by a department or agency of the United States.’<sup>86</sup> The order also indicates that interrogations are to be conducted in accordance with the Army Field Manual 2-22-3.

While the Executive Order constitutes a major achievement,<sup>87</sup> an executive order can be easily reversed.<sup>88</sup> The enactment of legislation is preferable, since it necessitates the approval by the majority of the legislative branch instead of the will of one person. Furthermore, Executive Order 13491 stipulates that interrogations shall be made in accordance with the Army Field Manual ‘unless the Attorney General with appropriate consultation provides further guidance,’<sup>89</sup> which leaves potential for altering the interrogation methods that are permitted.

The wording of the Executive Order suggests that it only applies to armed conflicts.<sup>90</sup> Whereas the Executive Order regards Common Article 3 of the Geneva Conventions as a minimal standard for the treatment of detainees,<sup>91</sup> Common Article 3 only applies during an armed conflict. The Executive Order does not clarify the minimum standard for times of peace; it vaguely mentions the UNCAT, but does not mention the ICCPR or any other human rights obligations. This omission is significant, considering that not all suspected terrorists have been detained as the result of an armed conflict.<sup>92</sup>

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<sup>83</sup> See Executive Order 13491, ‘Ensuring Lawful Interrogations’, January 2009, para. 3(c). Available at <http://www.presidency.ucsb.edu/ws/index.php?pid=85669>. Last accessed 28 June 2011 [hereinafter Executive Order 13491].

<sup>84</sup> See fn. 83, at para. 3(a).

<sup>85</sup> See fn. 83, at para. 3.

<sup>86</sup> See fn. 83, at para. 3(a).

<sup>87</sup> See International Center for Transitional Justice, Submission to the United Nations Universal Periodic Review of the United States of America, para. 13. See fn. 59; International Commission of Jurists, Submission to the United Nations Universal Periodic Review of the United States of America, 9<sup>th</sup> Session of the Working Group on the Universal Periodic Review (April 2010) p. 3, and American Bar Association, Universal Periodic Review Submission – United States of America, November 2010, paras. 6-7.

<sup>88</sup> American Bar Association, Universal Periodic Review Submission – United States of America, para. 7. See fn. 87.

<sup>89</sup> See Executive Order 13491, para. 3(c). See fn. 83.

<sup>90</sup> See American Bar Association, Universal Periodic Review Submission – United States of America, para. 7. See fn. 87. See also Douglass Cassel, ‘Torture: Outlawed in America?’ (15 September 2009) in *Doug Cassel’s Human Rights Commentaries*. Available at <http://law.nd.edu/news/13799-worldview-commentary-no-296-on-wbez-91-5-chicago-public-radio/>. Last accessed 27 June 2011.

<sup>91</sup> Executive Order 13491, par. 3 (a). See fn. 83.

<sup>92</sup> Douglass Cassel, ‘Torture: Outlawed in America?’ See fn. 90.

Regarding the use of coerced statements as evidence in military commissions, Obama suspended Military Commission proceedings after taking office.<sup>93</sup> This was, however, a momentary measure; he subsequently requested Congress to prepare a new Military Commissions Act. On 28 October 2009 Congress enacted the Military Commissions Act of 2009, which amended the MCA of 2006. The new Military Commissions Act prohibited all coerced statements, regardless of whether they were made before or after the enactment of the Detainee Treatment Act. The Act also added a subsection on ‘Determination of Voluntariness.’ This subsection includes guidelines for the Commission in its determination of whether the statement made by the accused was voluntary.<sup>94</sup> Unfortunately, the Act does not prohibit the use of coerced statements made by persons other than the accused if the treatment did not amount to what could be characterised as cruel, inhuman or degrading.<sup>95</sup>

Attorney General Eric H. Holder Jr., declared that waterboarding is torture;<sup>96</sup> this declaration helps to ensure that waterboarding will never again be considered as anything short of torture. A similar declaration of unlawfulness ought to be made regarding other ‘enhanced interrogation techniques.’<sup>97</sup>

As explained by the International Center for Transitional Justice, ‘The door is not fully closed on the possible use of [enhanced interrogation techniques]. Political pressure continues in some quarters to revive the use of ‘enhanced interrogation techniques.’ [...] Their future use is not adequately barred should the political climate shift,’<sup>98</sup> thus, it is necessary to examine what other ‘guarantee of non-repetition’ measures the United States ought to implement.

## 5. Compliance with Obligation to Guarantee Non-Repetition

### 5.1 Amendments to the Torture Act

The United States has to reform the Torture Act. As explained above, the Torture Papers used the definition of torture found in the Torture Act. The definition of torture found in the Torture Papers is different from the definition under the UNCAT,<sup>99</sup> which means the

<sup>93</sup> Andrea Prasow, ‘Falling Short: Justice in the Military Commissions’, *Juris: Legal News & Research* (8 December 2009). Available at <http://jurist.law.pitt.edu/forumy/2009/12/falling-short-justice-in-new-military.php>. Last accessed 27 June 2011.

<sup>94</sup> Military Commissions Act of 2009, Chapter 47A of title 10, United States Code, § 948r (d); Joanne Mariner, ‘A first look at the Military Commissions Act of 2009, Part Two,’ *Findlaw* (30 November 2009). Available at <http://writ.news.findlaw.com/mariner/20091130.html>. Last accessed 27 June 2011.

<sup>95</sup> Joanne Mariner, ‘A First Look at the Military Commissions Act of 2009, Part Two,’ *Findlaw* (30 November 2009). Available at <http://writ.news.findlaw.com/mariner/20091130.html>. Last accessed 27 June 2011.

<sup>96</sup> Scott Shane, ‘2 Suspects Waterboarded 266 times’, *N.Y. Times*, 20 May 2009. Available at <http://www.nytimes.com/2009/04/21/world/21detain.html>. Last accessed 20 June 2011.

<sup>97</sup> International Center for Transitional Justice, Submission to the United Nations Universal Periodic Review of the United States of America, para. 6. See fn. 59.

<sup>98</sup> See fn. 97.

<sup>99</sup> The Convention against Torture defines torture as ‘any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions’. Convention against Torture and Other

conclusion reached in the Torture Papers would have been different had the latter definition been employed. The Torture Act considers mental pain or suffering as torture, whereas the UNCAT definition does not. The former further states that the treatment must cause prolonged mental harm to be considered as torture. The Torture Papers interpreted this to mean that the treatment must cause ‘lasting’ damage.<sup>100</sup> Lastly, the Torture Act establishes a list of reasons that may cause severe mental pain or suffering.<sup>101</sup> International law is devoid of any such limitations.<sup>102</sup>

The UNCAT requires that the act amounting to torture be ‘intentionally inflicted.’<sup>103</sup> On the other hand, the Torture Act states that the defendant must have ‘specifically intended’ to inflict the treatment.<sup>104</sup> This phrase was interpreted by the Torture Papers to mean that ‘[t]he infliction of such pain must be the defendant’s precise objective.’<sup>105</sup> The difference between both definitions rests on the fact that the international law standard requires only general intent.<sup>106</sup> General intent is ‘[t]he intent to perform an act even though the actor does not desire the consequences that result.’<sup>107</sup> Specific intent, on the other hand, is ‘[t]he intent to accomplish the precise criminal act that one is later charged with.’<sup>108</sup> Consequently, the interpretation of the phrase ‘specifically intended’ severely limits what constitutes torture. This interpretation contravenes the prohibition of torture, which was traditionally conceived in the context of interrogations and with the purpose of extracting confessions.<sup>109</sup>

It is necessary to mention that the definition found in the Torture Act closely resembles the definition in the United States reservation to the UNCAT.<sup>110</sup> The reservation limits the scope

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Cruel, Inhuman or Degrading Treatment or Punishment, Article 1(1), 10 December 1984, 1465 United Nations Treaty Series 85.

<sup>100</sup> Bybee Memo, p. 177. See fn. 14.

<sup>101</sup> 18 United States Code § 2340 (2) (2004).

<sup>102</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 1(1). See fn. 99.

<sup>103</sup> See fn. 102.

<sup>104</sup> 18 United States Code § 2340 (1) (2004).

<sup>105</sup> Bybee Memo, p. 174. See fn. 14.

<sup>106</sup> Aditi Bagch, ‘Intention, Torture, and the Concept of State Crime’ (2009) *Penn State Law Review*, 114(1), p. 15; Manfred Nowak and Elizabeth McArthur, *The United Nations Convention against Torture: A Commentary* (Oxford: Oxford University Press, 2008), pp. 73-74; International Commission of Jurists, Submission to the United Nations Universal Periodic Review of the United States of America, p. 3. See fn. 87.

<sup>107</sup> Black’s Law Dictionary (9th ed. 2009), intent, p. 882.

<sup>108</sup> See fn. 107.

<sup>109</sup> Omer Ze’ev Bekerman, ‘Torture – The Absolute Prohibition of a Relative Term: Does Everyone Know What Is In Room 101?’ (2005) *The American Journal of Comparative Law* 53, pp. 745-747.

<sup>110</sup> The United States refers to the reservation as an understanding. Understandings in international law have the same legal consequences as reservations: they ‘modify the legal effect of certain provisions of the treaty in their application to that State.’ Vienna Convention on the Law of the Treaties, Article 2.1(d), 23 May 1969, 1155 United Nations Treaty Series 331. The understanding establishes that: the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality. Status of Ratifications, Declarations and Reservations to the Convention against Torture. Available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en). Last accessed 20 June 2011.

of the obligations to recognise an act as torture by changing the parameters of UNCAT's definition of torture.

In order to actually have legal effects and modify the international obligations imposed by the treaty, the reservation must be in accordance with the object and purpose of the treaty.<sup>111</sup> While this paper does not analyse whether the United States' understanding of the torture definition is a valid reservation or not,<sup>112</sup> it proposes that the United States should withdraw its reservation from the UNCAT.<sup>113</sup> Even if the reservation is valid, acts that amount to torture under UNCAT would not amount to torture under the reservation, thus limiting the scope of protection against torture.

Regardless of whether the United States withdraws its reservation from the UNCAT, it should amend the definition of torture under the Torture Act. An amended definition should be drafted in a way that excludes the possibility of inciting loose interpretations of what behaviour constitutes torture such as or similar to those found in the Torture Papers.<sup>114</sup> Only general intent and not specific intent should be required and the level of severity of treatment should not be set too high.<sup>115</sup> In terms of psychological torture, its occurrence does not rely on the existence of prolonged harm.<sup>116</sup>

Amendments to the Torture Act should also specify that no derogation is permitted from the absolute prohibition of torture.<sup>117</sup> As a consequence of this absolute prohibition, the Torture Act should also specifically prohibit the use of statements extracted by torture as evidence in Courts, military commissions, or any other juridical entity. According to the former Special Rapporteur on Torture, Manfred Nowak, the prohibition of this evidence is an appropriate safeguard for two reasons:

[f]irst, confessions or other information extracted by torture are usually not reliable enough to be used as a source of evidence in any legal proceedings. Second, prohibiting the use of such evidence in legal proceedings remove[s] an important incentive for the use of torture and, therefore, shall contribute to the prevention of such practice.<sup>118</sup>

<sup>111</sup> Vienna Convention on the Law of the Treaties, Article 19 (c). See fn. 110

<sup>112</sup> Committee against Torture, Conclusions and Recommendations of the Committee against Torture: United States, U.N. Doc. CAT/C/USA/CO/2, 25 June 2006, para. 40; Antonio Cassese, 'Are International Human Rights Treaties and Customary Rules on Torture Binding upon US Troops in Iraq' (2004) *Journal of International Criminal Justice* 23(872), and Bassiouni, *The Institutionalization of Torture by the Bush Administration. Is Anyone responsible?*, p. 22. See fn. 5.

<sup>113</sup> Committee against Torture, Conclusions and Recommendations of the Committee against Torture: United States, para. 40. See fn. 4.

<sup>114</sup> Organization for Defending Victims of Violence, Individual Universal Periodic Review Submission - United States of America, para. D (4) (4 November 2010).

<sup>115</sup> International Commission of Jurists, Submission to the United Nations Universal Periodic Review of the United States of America, p. 3. See fn. 87.

<sup>116</sup> Committee against Torture, Conclusions and recommendations of the Committee against Torture: United States, para. 13. See fn. 4.

<sup>117</sup> See fn. 116, p. 19.

<sup>118</sup> Manfred Nowak, *Obligations of States to Prevent and Prohibit Torture in an Extraterritorial Perspective*, in Mark Gibney and Sigrun Skogly ed., 'Universal Human Rights and Extraterritorial Obligations' (Philadelphia: University of Pennsylvania Press, 2010) 11, p. 25.

In order to ensure the Torture Act mirrors the protections found under the UNCAT, the Act should include prohibition of cruel, inhuman or degrading treatment or punishment. The problem is that neither the UNCAT, nor any other international treaty, defines cruel, inhuman or degrading treatment or punishment.<sup>119</sup> The Detainee Treatment Act defines cruel, inhuman or degrading treatment to be the equivalent of ‘the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.’<sup>120</sup> The United States used the same definition in its reservation to the ICCPR<sup>121</sup> and the UNCAT.<sup>122</sup>

These reservations regarding other cruel, inhuman or degrading treatment are not in accordance with the object and purpose of the ICCPR and the UNCAT.<sup>123</sup> Prohibitions against these types of treatment under the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States are more limited than those found international law.<sup>124</sup> When assessing whether an act violates the Fourteenth Amendment, the United States uses a balancing test which can permit the admission of evidence obtained by interrogation methods amounting to cruel, inhuman or degrading treatment.<sup>125</sup> In order for the United States to meet its human rights obligations under international law, it should first withdraw its reservations concerning cruel, inhuman or degrading treatment or punishment, and amend the definition of torture and cruel inhuman or degrading treatment in the Torture Act to mirror the principles set out under international human rights instruments. Congress should thus amend the War Crimes Act, the Detainee Treatment Act, the Army Manual, and related statutes that use definitions devoid of adequate protection.

Since the current Torture Act only applies to acts committed outside the United States, Congress should likewise revisit the scope of application of the Torture Act to extend to acts committed within US territory.<sup>126</sup>

## 5.2 *Amendments to the Detainee Treatment Act*

As mentioned above, the definition of cruel, inhuman or degrading treatment under the Detainee Treatment Act mirrors the definition found in the Fifth, Eighth, and Fourteenth

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<sup>119</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 16. See fn. 99. See also ICCPR, Article 7. See fn. 19.

<sup>120</sup> See for example, the Detainee Treatment Act (2005).

<sup>121</sup> Status of the International Covenant of Civil and Political Rights. Available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en#EndDec](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec). Last accessed 27 June 2011.

<sup>122</sup> Status of Ratifications, Declarations and Reservations to the UNCAT. Available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en). Last accessed 20 June 2011.

<sup>123</sup> Report of the Committee against Torture, 23<sup>rd</sup> session (8-19 November 1999); 24<sup>th</sup> session (1-19 May 2000) U.N. Doc. A/55/44, para. 179 (b), and Concluding Observations of the Human Rights Committee regarding United States: Consideration of Reports submitted by states parties under article 40 of the covenant in the Report of the Human Rights Committee to the General Assembly, para. 279, U.N. Doc. A/50/40 (3 October 1995).

<sup>124</sup> Concluding Observations of the Human Rights Committee regarding United States: Consideration of Reports submitted by states parties under article 40 of the covenant *in* the Report of the Human Rights Committee to the General Assembly, para. 279, U.N. Doc. A/50/40 (3 October 1995) (declaring the reservation regarding cruel, inhuman or degrading treatments as against the object and purpose of the ICCPR).

<sup>125</sup> See fn. 124.

<sup>126</sup> Committee against Torture, ‘Conclusions and Recommendations of the Committee against Torture: United States’, para. 179, U.N. Doc. A/55/44 (5 May 2000).

Amendments to the Constitution of the United States. This definition should be amended to ensure adherence to standards of protection under international law. As such, there are some treatments that are permissible under domestic law are prohibited by international law. Furthermore, the Detainee Treatment Act should limit interrogation methods to those permitted by the Army Field Manual; these limitations should apply to all State agents, and not just agents who work for the Department of Defense.

### 5.3 *Changes to the Army Field Manual*

Executive Order 13491 states that the standards relating to interrogation found in the Army Field Manual FM-2-22-3 must be followed while conducting interrogations. The standardisation of interrogation techniques should apply to all state agents.

Permitted interrogation techniques, such as those found in the Army Field Manual, must give due regard to the issue of severity. The UNCAT does not define severity or to what levels of severity amount to torture. To determine whether a treatment meets the severity requirement of torture, it is necessary to examine both objective and subjective factors.<sup>127</sup> The objective factor is the treatment itself, while the subjective factor refers to the characteristics of the victim, such as age, gender, cultural beliefs, and religion, among others.<sup>128</sup> As such, there are types of treatment that could amount to torture if inflicted on some persons, but would not be considered as such if inflicted on others.<sup>129</sup>

The fact that the question of whether torture has been committed depends on characteristics of the victims demonstrates why it is problematic to have a list of ‘permissive acts’ like the one included in the Army Field Manual or the one in the Torture Papers. As the former Special Rapporteur on torture explained, the enhanced interrogation techniques already meet all the other elements of torture; the remaining one is severity, which ‘is difficult to assess in abstracto.’<sup>130</sup>

There are some types of treatment that should be expressly prohibited, since they are regarded as torture irrespective of subjective factors.<sup>131</sup> In this respect, ‘restrictive interrogation techniques’, found in the Army Field Manual, should be eliminated.<sup>132</sup> These ‘restrictive interrogation techniques’ include isolation, sensory deprivation, and sleep

<sup>127</sup> *Prosecutor v. Kvočka et al.*, Case No IT-98-30/1, Judgment, para. 143 (International Criminal Tribunal for the former Yugoslavia, 2 November 2001). See also, Human Rights Centre, University of Essex, ‘The Torture Reporting Handbook’ (2000) pp. 13-14. Available at <http://www.essex.ac.uk/torturehandbook/english.htm>. Last accessed 16 December 2010.

<sup>128</sup> University of Essex, ‘The Torture Reporting Handbook’, p. 13. See fn. 127.

<sup>129</sup> Gail Miller, *Defining Torture* (New York: Benjamin N. Cardozo School of Law, 2005) pp. 13-14.

<sup>130</sup> Report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on freedom of religion or belief, and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, para. 51, U.N. Doc. E/CN.4/2006/120 (27 February 2006) (by Leila Zerrougui, Leandro Despouy, Manfred Nowak, Asma Jahangir and Paul Hunt).

<sup>131</sup> University of Essex, *The Torture Reporting Handbook*, p. 13. See fn. 127. See also William A. Schabas, ‘Symposium ‘Torture and the War on Terror: The Crime of Torture and the International Criminal Tribunals’, (2006) *Case Western Reserve Journal of International Law* 37(349).

<sup>132</sup> Physicians for Human Rights UPR, para. 2. See fn. 1. See also, Human Rights First, Submission to the United Nations Universal Periodic Review of the United States of America, p. 5. See fn. 73; and International Commission of Jurists, Submission to the United Nations Universal Periodic Review of the United States of America, p. 3. See fn. 87.

deprivation. The Army Field Manual should expressly prohibit other enhanced interrogation techniques.<sup>133</sup>

#### 5.4 *Amendments to the War Crimes Act*

Congress should amend the War Crimes Act to cover the range of possible violations of Common Article 3 by eliminating the list of specifications included in the current Act. Congress could draw from the Rome Statute and customary international humanitarian law when amending the Act<sup>134</sup> and include definitions that are uniform with international human rights instruments.

#### 5.5 *Application of International Humanitarian Law and International Human Rights Law*

In Executive Order 13491, the United States recognises the application of IHL to suspected terrorists detained by the United States.<sup>135</sup> Notwithstanding, not all suspected terrorists who are in US custody have been detained during an armed conflict. The application of IHL applies only in situations that amount to an armed conflict; its application is limited geographically to the location of the armed conflict.<sup>136</sup> IHL protections are applicable only to those detained during an armed conflict in the territory where the armed conflict is taking place.<sup>137</sup>

In general, the United States argues against the application of the ICCPR and human rights during an armed conflict;<sup>138</sup> this interpretation contravenes the ICCPR,<sup>139</sup> which allows for derogation from some of its articles during an armed conflicts.<sup>140</sup> As such, international humanitarian law and international human rights law are not mutually exclusive during an armed conflict.<sup>141</sup> The United States should revisit its policy to guarantee the protection of human rights during armed conflicts,<sup>142</sup> except in cases where legitimate derogations apply.

<sup>133</sup> International Center for Transitional Justice, Submission to the United Nations Universal Periodic Review of the United States of America, para. 6,20. See fn. 59.

<sup>134</sup> Rome Statute of the International Criminal Court, Article 8, 17 July 1998, 2187 United Nations Treaty Series 90. See fn. 27.

<sup>135</sup> Executive Order 13491. See fn. 83.

<sup>136</sup> Mary Ellen O’Connell, ‘Combatants and the Combat Zone’ (2009) *University of Richmond Law Review* 43(845), p. 858.

<sup>137</sup> See fn. 136.

<sup>138</sup> Concluding Observation of the Human Rights Committee regarding United States, ‘Consideration of Reports Submitted by States Parties under Article 40 of the Covenant,’ para. 19, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (31 August 2001).

<sup>139</sup> As explained by the Human Rights Committee, ‘[T]he Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While in respect of certain Covenant rights, more specific rules of international humanitarian law may be especially relevant for the purpose of the interpretation of the Covenant rights, both spheres of law are complementary, not mutually exclusive.’ Human Rights Committee, General Comment 31, para. 11. See fn. 53.

<sup>140</sup> Human Rights Committee, General Comment 29, States of Emergency (Article 4), para. 3, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004).

<sup>141</sup> Human Rights Committee, *General Comment No. 31*, para. 11. See fn. 53.

<sup>142</sup> Committee against Torture, Conclusions and recommendations of the Committee against Torture: United States, paras. 14-15. See fn. 4, and International Commission of Jurists, Submission to the United Nations Universal Periodic Review of the United States of America, p. 1. See fn. 87.

The prohibition of torture and other cruel, inhuman or degrading treatment or punishment, however, is non-derogable.<sup>143</sup>

For those who are not detained during an armed conflict and/or are not located in the territory where an armed conflict is taking place, the United States must recognise the absolute application of human rights law. In this situation, the United States must adhere to the ICCPR within its territory or jurisdiction.<sup>144</sup>

There is no doubt that if the article declaring the application of the ICCPR is read literally the United States' interpretation would be the correct one.<sup>145</sup> Nonetheless, any interpretation must be accomplished by taking into account the context as well as the object and purpose of the treaty.<sup>146</sup> Taking into account the object and purpose of the ICCPR it must apply both if a subject is in the territory or subject to the jurisdiction of a State Party.<sup>147</sup> This position is also supported by the International Court of Justice and the Human Rights Committee.<sup>148</sup> The United States should join the common interpretation given to the ICCPR and accept that this treaty applies to individuals within its territory or under its jurisdiction.

## 6. Conclusion

There are many reasons why the application of enhanced interrogation techniques was possible in an established democracy with a strong rule of law, such as the United States.<sup>149</sup> The lack of clarity within domestic and international law is one factor. The Torture Papers, in justifying the use of enhanced interrogation techniques, based their interpretation mainly on loopholes found in domestic and international law. These loopholes must be eliminated to assure that the interpretations found in the Torture Papers are not repeated.

The Torture Act must be amended to reflect the protections against torture, cruel, inhuman and degrading treatment found in the UNCAT. The War Crimes Act should likewise be modified in accordance with international law; all conduct that constitutes a war crime under international law should be criminalised as such by domestic law. The Detainee Treatment Act should also be amended to ensure that all State agents are obliged to follow interrogation methods found in the Army Field Manual. Finally the Army Field Manual should be applied by taking into account the particular characteristics of the detainee being subjected to interrogation. By failing to take these characteristics into account, the Army Field Manual allows the use of some interrogation methods that might amount to torture, such as those found in Appendix M of the Manual.

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<sup>143</sup> ICCPR, Article 4.2. See fn. 19.

<sup>144</sup> See Committee against Torture, Conclusions and recommendations of the Committee against Torture: United States, paras. 14-15. See fn. 4, and International Commission of Jurists, Submission to the United Nations Universal Periodic Review of the United States of America, p. 1. See fn. 87.

<sup>145</sup> See, Nicola Wenzel, 'Human Rights, Treaties, Extraterritorial Application and Effects', para. 4 in Rüdier. Wolfrum ed., *The Max Planck Encyclopedia of Public International Law* (2008), Online edition. Available at: <http://www.mpepil.com>. Last accessed 13 June 2011.

<sup>146</sup> Vienna Convention on the Law of the Treaties, Article 31.1. See fn. 110.

<sup>147</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, International Court of Justice Reports Reports 2004, paras. 109, 111 (9 July 2004).

<sup>148</sup> See fn. 147, at paras. 109-111. See also General Comment 31, para. 10. See fn. 53.

<sup>149</sup> Bassiouni, *The Institutionalization of Torture by the Bush Administration. Is Anyone Responsible?*, p. 9. See fn. 5.

The United States should withdraw its reservations to the UNCAT and the ICCPR, and recognise the applicability of the ICCPR to individuals ‘within its territory or jurisdiction.’ The United States must also accept the application of human rights during armed conflicts.

These proposed measures represent important steps towards assuring the non-repetition of the interpretations found in the Torture Papers.

Amending the law, however progressive, is not enough. Judges, lawyers, prosecutors, politicians, legislators, policy makers and others interpreting the law have a shared responsibility to ensure that the meaning of laws is not manipulated.

This ethical responsibility always applies to the actions of attorneys, but varies depending on whether the attorney exercises an adversarial or a counsellor function.<sup>150</sup> The adversarial function implies arguing only in favour of the client.<sup>151</sup> To reach a conclusion, the adversarial model requires a neutral third party who makes an independent judgement after hearing both arguments from both parties. The counsellor function occurs when a lawyer advises his or her client on all aspects of the law without there being an opposing party.<sup>152</sup> The counsellor function is a quasi-judicial role, which necessitates neutrality.<sup>153</sup> While exercising this counsellor function, lawyers have a higher ethical responsibility,<sup>154</sup> especially when the State is the lawyer’s client.<sup>155</sup>

The Torture Papers failed to distinguish between these two functions.<sup>156</sup> The analysis contained within the Torture Papers centred on arguments in support of their interpretation that failed to mention recent legal developments that challenge its position.<sup>157</sup> Government lawyers who advise the executive branch on the scope of the law should exercise their counsellor function. For this reason, the drafters of the Torture Papers should have taken into account all of the relevant aspects of the law.

Guarantees of non-repetition necessitate the investigation of professional misconduct and application of disciplinary measures as appropriate. The Department of Defense ordered an investigation of two Government employees, Jay Bybee and John Yoo, who had drafted the Torture Papers. The Department concluded that the Torture Papers were written in good faith;<sup>158</sup> this conclusion decreases the likelihood that similar investigations will take place in the future.<sup>159</sup> Transparency and accountability must be placed at forefront of investigations and resultant disciplinary action to strengthen guarantees of non-repetition.

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<sup>150</sup> E. Wayne Thode, ‘The Ethical Standard of the Advocate’ (1961) *Texas Law Review Association* 39(575), p. 578.

<sup>151</sup> See fn. 150.

<sup>152</sup> Stanley Z. Fisher, ‘In Search of the Virtuous Prosecutor: A Conceptual Framework’ (1987-1988) *American Journal of Criminal Law*, 15(197), p. 224 (explaining the different functions of a prosecutor).

<sup>153</sup> Fisher, ‘In Search of the Virtuous Prosecutor: A Conceptual Framework’, p. 216. See fn. 152.

<sup>154</sup> See Wayne Thode, ‘The Ethical Standard of the Advocate’, p. 578. See fn. 150.

<sup>155</sup> Richard B. Bilder and Detlev F. Vagts, ‘Speaking Law to Power: Lawyers and Torture’ in Karen J.

Greenberg (ed.), *The Torture Debate in America* (Cambridge: Cambridge University Press, 2006) p. 152.

<sup>156</sup> Bassiouni, *The Institutionalization of Torture by the Bush Administration. Is Anyone responsible?*, p. 35. See fn. 5.

<sup>157</sup> See fn. 156, p. 37.

<sup>158</sup> Memorandum from David Margolis, Associate Deputy Attorney General to the Attorney General (5 January 2010).

<sup>159</sup> Bassiouni, *The Institutionalization of Torture by the Bush Administration. Is Anyone responsible?*, p. 259. See fn. 5.

Legal education in the United States is predominantly based on preparing students to exercise an adversarial function.<sup>160</sup> Bar associations likewise fail to adequately differentiate between the adversarial and counsellor functions of lawyers. These institutions should revisit their policies to ensure due regard is given to functions.

In addition to these measures, the State should have a duty to educate society about the absolute prohibition of torture, so that society is in a position to challenge practices that limit human rights protections.

Since 9/11, hard earned human rights protections were eroded in laws that emerged in response to the threat of terrorism. The United States must revisit its domestic legislation on countering terrorism to ensure it conforms to its obligations under international human rights law and international humanitarian law and prevent the repetition of human rights violations that arose from the wrongful interpretation of permissible State actions found in the Torture Papers.

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<sup>160</sup> See fn. 159, p. 37.