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Ghost Detainees: Does the Isolation and Interrogation of Detainees Violate Common Article 3 of the Geneva Conventions?

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GHOST DETAINEES: DOES THE ISOLATION AND INTERROGATION OF DETAINEES VIOLATE COMMON ARTICLE 3 OF THE GENEVA CONVENTIONS?

Thomas F. Berndt† & Alethea M. Huyser‡

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I. INTRODUCTION

Following the attacks of September 11th, Vice President Dick Cheney appeared on NBC’s “Meet the Press” and told the nation that the new war may force the United States to go to “the dark side.”¹ Many recalled his statement when press reports revealed the existence of CIA-run detention sites, or “black sites,” where high-level detainees were held and interrogated.² The reports raised several concerns, among them that the CIA practices violated the Geneva Conventions.³ The White House did not then believe the Geneva Conventions applied to the detainees, nor did it acknowledge CIA involvement in their detention.⁴

Then, in the summer of 2006, the United States Supreme Court held in Hamdan v. Rumsfeld⁵ that the Geneva Conventions, and specifically the provisions in Common Article 3, applied to the War on Terror.⁶ The decision worried government officials about potential exposure to criminal liability for their role in the CIA program.⁷ The Hamdan decision led President Bush to publicly acknowledge the CIA prison program and encourage Congress to clarify the country’s obligations under the Geneva Conventions, thereby ensuring continuation of the CIA program.⁸ This led to the eventual creation of the Military Commissions Act (MCA).⁹

¹. Jane Mayer, A Deadly Interrogation, NEW YORKER, Nov. 14, 2005, at 44.
⁴. See infra Part III.
⁶. Id. at 2759, 2794–96.
This paper addresses whether the CIA detention and interrogation practices exceeded the legal limits of Common Article 3 of the Geneva Conventions. To do so, it is necessary to examine the language of Common Article 3 and consider how it has been interpreted domestically and internationally. This paper will consider whether future operation of the CIA program violates the U.S. Government's treaty obligations under the Geneva Conventions. Despite enactment of the MCA, which altered U.S. domestic laws, it is still pertinent to determine if the U.S. is complying with its international obligations.

II. CIA PRACTICES REVEALED

On September 6, 2006, President Bush delivered a speech from the East Room of the White House. In his speech, President Bush admitted that, in addition to housing suspected terrorists at the United States Naval Base at Guantanamo Bay, Cuba, a number of suspected high-level terrorists have been held and questioned outside the United States in secret prisons operated by the CIA. President Bush’s speech affirmed what press reports had previously disclosed.

In December 2004, a newspaper story first exposed the locations of several secret prisons, or “black sites.” A second story later claimed...
that approximately thirty suspected terrorists were being held in the prisons on a long-term basis, in almost complete isolation, in dark or underground cells, and without contact to anyone outside the CIA. Little was known outside these reports, including the locations of the prison sites, the names of the prisoners, the details of their confinement, or how decisions were made as to the length of a prisoner's detainment.

Reports of harsh interrogation techniques and possible prisoner deaths also began to surface. Prisoner abuse at Abu Ghraib, primarily a military prison, was already well publicized at the time. The reports of the CIA's presence in the prison, among other things, led human rights organizations to suspect and report alleged abuses in CIA prisons during 2004 and 2005. Press reports soon followed, including stories concerning a few detainee deaths in CIA-run prisons.

President Bush responded in his 2006 speech by announcing that all fourteen current prisoners being held in secret CIA prisons, among them Khalid Sheikh Mohammed, Abu Zubaydah, and Ramzi bin al Shibh, had been transferred to Guantanamo Bay. President Bush encouraged Congress to pass the Military Commissions Bill, which provided certain immunities to CIA interrogators to allow them to continue the interrogation program, which he felt was invaluable to the War on Terror.
III. THE GOVERNMENT’S POSITION BEFORE HAMDAN

Prior to the Supreme Court’s holding in Hamdan, the Government had been acting under the belief that the Geneva Conventions were inapplicable to al Qaeda detainees. Based on the opinion of White House attorneys, President Bush announced in February 2002 that neither Common Article 3, nor the Geneva Conventions, would apply to the treatment of detainees in the War on Terror.

The White House also sought legal advice concerning the treatment of detainees from the War on Terror in the summer of 2002. Believing that the Geneva Conventions did not apply, the Administration was concerned with the prohibition on torture under another treaty obligation, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The resulting memo, frequently called the "Torture Memo," repeatedly placed emphasis on the high degree of severity necessary for an act to rise to the level of torture. Testimony from the Senate


24. Memorandum from George W. Bush, President of the United States, to the Vice President et al., Subject: Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf. The President did determine, however, that the “provisions of Geneva” would apply to the conflict with the Taliban. Id. at 2.


26. See generally August 2002 Memo, supra note 25. Although analysis of the Convention Against Torture does not match up directly with Common Article 3 analysis, it aids in understanding the types of limits the Bush Administration was placing on interrogations, including the meaning they attached to certain language. The Convention is domestically codified at 18 U.S.C. §§ 2340–2340A (2000) criminally, and under 28 U.S.C. § 1350 note (2000) to allow for civil damages.

27. See August 2002 Memo, supra note 25, at 16 ("The Reagan administration . . . determined that [the Convention Against Torture’s] definition of
hearings on the Convention Against Torture was cited as support.\textsuperscript{28} In the Senate hearings, torture was described as equivalent to “the needle under the fingernail, application of electrical shock to the genital area, the piercing of eyeballs, etc.”\textsuperscript{29} There was also testimony that for acts causing mental suffering alone to qualify as torture, they must be “intentional acts such as those designed to damage and destroy the human personality.”\textsuperscript{30}

Furthermore, domestic courts typically look at “the entire course of conduct rather than any one act” in determining what constitutes torture.\textsuperscript{31} The following were cited as examples of acts found torturous in case law: severe beatings using instruments like clubs, mock executions, threats of imminent death, removing of extremities, burning, electric shocks to genitalia, rape, and forcing a prisoner to watch the torture of another.\textsuperscript{32} While the Torture Memo’s definition of torture has since been heavily criticized and ultimately repudiated,\textsuperscript{33} the examples of torture it lists are still useful as clear-cut illustrations of torture, though they should no longer be seen as defining the minimum threshold of torture.

\section{IV. COMMON ARTICLE 3}

The \textit{Hamdan} decision focused on the use of military commissions to try detainees.\textsuperscript{34} President Bush’s subsequent decision to transfer prisoners out of the secret CIA prisons was based on the broader implication of \textit{Hamdan}—that Common Article 3 applied to al Qaeda

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{28} Id. at 19–20.
\item \textsuperscript{29} Id. (quoting Mark Richard, Deputy Assistant Attorney General, Criminal Division, Department of Justice).
\item \textsuperscript{30} Id. at 20 (again quoting Richard).
\item \textsuperscript{31} Id. at 24. Domestic courts have never convicted a U.S. official of torture under the Torture Statute or the War Crimes Act, so the only applicable judicial interpretation is under the Torture Victims Protection Act, 28 U.S.C. § 1350 note (2000) (hereinafter “TVPA”), which provides a remedy to victims of torture. Id. at 22. There are some differences between the TVPA and Convention Against Torture, namely TVPA includes a list of purposes for which torture is conducted, such as obtaining information. Id. at 23.
\item \textsuperscript{32} Id. at 24.
\item \textsuperscript{34} See 126 S. Ct. 2749, 2798 (2006).
\end{itemize}
\end{footnotesize}
detainees. Stating that the application of Common Article 3 to al Qaeda "put in question the future of the CIA program," President Bush feared that the secret prisons and the interrogation methods used at these prisons could be challenged as a violation of Common Article 3.

A. History and Purpose of Common Article 3

The Geneva Conventions of 1949 were created partially in reaction to the atrocities committed by the Germans and Japanese during World War II. Common Article 3, so named because it is common to all four Conventions, was adopted as part of the 1949 Conventions. Referred to as a "Convention in miniature," Common Article 3 was created to provide a "minimum yardstick" of protection to persons not qualifying for more comprehensive prisoner-of-war protections.

35. See Bush Address, supra note 8.
36. Id. In his speech, President Bush stated: [The Supreme Court's recent decision has impaired our ability to prosecute terrorists through military commissions, and has put in question the future of the CIA program. In its ruling on military commissions, the court determined that a provision of the Geneva Conventions known as "Common Article Three" applies to our war with al Qaeda. This article includes provisions that prohibit "outrages upon personal dignity" and "humiliating and degrading treatment." The problem is that these and other provisions of Common Article Three are vague and undefined, and each could be interpreted in different ways by American or foreign judges. And some believe our military and intelligence personnel involved in capturing and questioning terrorists could now be at risk of prosecution under the War Crimes Act—simply for doing their jobs in a thorough and professional way.

Id.
40. See id. at 38 (stating that Common Article 3 is a compulsory minimum of rights); see also Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 114 (June 27) ("There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in
Initially created to protect non-combatants in civil wars, Common Article 3 applies to any “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.” Unlike other articles of the Geneva Conventions, Common Article 3 does not contain a reciprocity clause. Thus, its protections are obligatory upon a party to a conflict regardless of whether the opposing party abides by them.

Common Article 3 states that all persons who qualify for its protections “shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.” It is to this end—humane treatment—that the specific prohibitions are to be attained, including the prohibition of “(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; [and] (d) the passing of sentences . . . without previous judgment pronounced by a regularly constituted court . . . “.

The touchstone of Common Article 3 is humane treatment, or stated in the negative, the prohibition of inhuman or inhumane treatment. The American Heritage Dictionary defines “humane” as “[c]haracterized by kindness, mercy, or compassion.” Unfortunately, this definition does not clearly delineate the boundaries of humane treatment or provide clear standards for determining which interrogation techniques are acceptable.

Although humane treatment is not explicitly defined within Common Article 3, it is implicitly defined by what it is not. The Official Commentary to Common Article 3 states that the specific prohibitions contained in sections (a) through (c) are offered in addition to the more elaborate rules which also apply to international conflicts.”).
contradistinction to "humane" treatment. In order to determine what constitutes inhumane or inhuman treatment, it is necessary to examine each section of Common Article 3.

B. Cruel Treatment and Torture

Section (a) prohibits "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture." While "murder" and "mutilation" are relatively unambiguous, the terms "cruel treatment" and "torture" are vague. Because Common Article 3 does not define the terms, it is necessary to examine their ordinary or plain meaning. The dictionary definition of "cruel" is "disposed to inflict pain or suffering." However, this definition does not set a threshold for the amount of pain or suffering required (i.e., great pain or suffering), nor does it require any actual pain or suffering.

The International Criminal Tribunal of Yugoslavia (ICTY) has defined cruel treatment as "an intentional act or omission which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity." This provides a better standard, requiring an intentional mens rea, an objective judgment, and the imposition of serious pain or suffering. However, what constitutes "serious" is still vague.

Perhaps a better understanding of the phrase "cruel treatment" can be gained through viewing section (a) as a whole. Section (a) expressly prohibits "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture." The fact that cruel

51. Id.
52. Common Article 3, supra note 3.
53. See F.D.I.C. v. Meyer, 510 U.S. 471, 476 (1994) ("In the absence of such a definition, we construe a statutory term in accordance with its ordinary or natural meaning.").
54. AMERICAN HERITAGE DICTIONARY, supra note 48, at 437.
56. See United States v. Morton, 467 U.S. 822, 828 (1984) ("We do not ... construe statutory phrases in isolation; we read statutes as a whole.").
57. Common Article 3, supra note 3. Additionally, the Official Commentary states that section (a) also prohibits biological experiments from being carried out on detained
treatment is listed conjunctively with torture implies that cruel treatment refers to some sort of mistreatment comparable to torture. While some commentators assert that cruel treatment refers to treatment falling short of torture, others argue that cruel treatment does not differ in severity from torture but only in purpose. In analyzing the severity of treatment, the ICTY used an objective analysis of the severity of the harm, as well as subjective analysis of the effect. The case law also laid out many other factors that may come into consideration:

The nature and context of the infliction of pain, the premeditation and institutionalisation of the ill-treatment, the physical condition of the victim, the manner and method used, and the position of inferiority of the victim. In particular, to the extent that an individual has been mistreated over a prolonged period of time, or that he or she has been subjected to repeated or various forms of mistreatment, the severity of

persons. Official Commentary, supra note 39, at 39. This further demonstrates the high threshold for inhumane treatment set by section (a).

In ICTY decisions, for example, the degree of physical or mental suffering required for a finding of cruel and inhuman treatment is lower than torture. Prosecutor v. Kvocka et al., Case No. IT-98-30/1 (Trial Chamber), Judgment, ¶ 161 (Nov. 2, 2001), quoted in Former Yugoslavia Criminal Tribunal Opinions, supra note 55 (under “II) d) iii) (2) mental suffering requirement lower than for torture” subheading). The language used in such opinions mirrors those interpreting the Convention Against Torture, which also considers both the severity of harm and the purpose for which it is inflicted. Compare id. at ¶¶ 142–43 (under “II) d) i) (3) severe pain and suffering must be inflicted (element 1)” subheading), with Ireland v. United Kingdom, Case No. 5310/71, 25 Eur. Ct. H.R. (ser. A) at ¶ 162 (1978), quoted in DAVID WEISSBRODT, MATERIALS ON TORTURE AND OTHER ILL-TREATMENT 63 (2005), available at http://www1.umn.edu/humanrts/intlhr/chapter19.doc.

See Jennifer Moore, Practicing What We Preach: Humane Treatment for Detainees in the War on Terror, 34 DENVER J. INT’L L. & POL’Y 33, 49 (2006) (stating that torture is no more severe than inhuman treatment but differs in that it is used to extract information). Support for this proposition can also be found in the elements of war crimes as used by International Criminal Court (ICC) to interpret and apply article 8 of the Rome Statute. See INTERNATIONAL CRIMINAL COURT, ELEMENTS OF CRIMES, http://www.un.org/law/icc/asp/1stsession/report/english/part_ii_b_e.pdf (last visited Apr. 15, 2007). The elements of a prima facie case encompass each of the prohibited war crimes listed in Common Article 3, including the war crime of cruel treatment. See id. art. 8(2)(c)(i)-3. The distinctive element for cruel treatment is “[t]he perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.” Id. The crime of torture contains the same element but further requires “[t]he perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.” Id. art. 8(2)(c)(i)-4. When viewed together, the ICC’s elements of cruel treatment and torture depict cruel treatment as equivalent to torture in severity, and differing only in purpose.

Kvocka et al., supra note 58, at ¶¶ 142–43 (under “II) d) i) (3) severe pain and suffering must be inflicted” subheading).
the acts should be assessed as a whole to the extent that it can be shown that this lasting period or the repetition of acts are inter-related, follow a pattern or are directed towards the same prohibited goal.\footnote{Prosecutor v. Knojelac, Case No. IT-97-25 (Trial Chamber), Judgment, ¶ 182 (Mar. 15, 2002), quoted in Former Yugoslavia Criminal Tribunal Opinions, supra note 55 (under “II) d) i) (3) severe pain and suffering must be inflicted” subheading). Some of the acts which the tribunal considered likely to constitute torture were: beatings, sexual violence, prolonged denial of sleep, food, hygiene, and medical assistance, as well as threats to torture, rape, or kill relatives. Kvocka et al., supra note 58, at 144 (under “II) d) i) (7) (a) examples of acts constituting torture” subheading).}

Although the terms “cruel treatment” and “torture” are somewhat amorphous, it is clear that the severity of the pain necessary to establish either is high.

C. Outrages upon Personal Dignity: Degrading and Humiliating Treatment

One of President Bush’s most prominent objections to the application of Common Article 3 was the vague prohibition on “outrages upon dignity.”\footnote{See, e.g., President George W. Bush, Press Conference of the President (September 15, 2006), transcript available at http://www.whitehouse.gov/news/releases/2006/09/20060915-2.html (“And that Common Article III says that there will be no outrages upon human dignity. It’s very vague. What does that mean, ‘outrages upon human dignity’? That’s a statement that is wide open to interpretation.”).}

Section (c) prohibits “[o]utrages upon personal dignity, in particular, humiliating and degrading treatment.”\footnote{Common Article 3, supra note 3.} The wording of this section is certainly general and ambiguous.\footnote{See Bush Address, supra note 8 (“Common Article Three... includes provisions that prohibit ‘outrages upon personal dignity’ and ‘humiliating and degrading treatment.’ The problem is that these... are vague and undefined, and each could be interpreted in different ways by American or foreign judges.”); see also Official Commentary, supra note 39, at 39 (explaining that wording of Common Article 3 is intentionally general).} In viewing section (c) as a whole, it appears the examples of “humiliating and degrading treatment” are offered as specific instances of “outrages upon personal dignity,” used to clarify what constitutes an outrage upon personal dignity.\footnote{See Common Article 3, supra note 3.}

The American Heritage Dictionary defines “dignity” as “the quality or state of being worthy of esteem or respect” and “inherent nobility and worth,”\footnote{AMERICAN HERITAGE DICTIONARY, supra note 48, at 507.} “humiliate” as “to lower the pride, dignity, or self respect of,”\footnote{Id. at 856.} and “degrade” as “to lower in dignity; dishonor or disgrace... to
lower in moral or intellectual character; debase....” The terms humiliate and degrade both refer to treatment that demeans, embarrasses, or lowers the dignity of detainees. The ICTY defined this offense as requiring: “(i) that the accused intentionally committed or participated in an act or an omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity, and (ii) that [the actor] knew that the act or omission could have that effect.”

In analyzing behavior under this standard, the ICTY looked to both a subjective factor—whether or not the victim had experienced an outrage on personal dignity—as well as an objective factor—whether humiliation was so intense that a reasonable person would be outraged. The severity of the humiliation was required to be both real and serious. The tribunal did not require a minimum temporal harm, but recognized that fleeting harm would probably not qualify as real and serious.

V. DOES COMMON ARTICLE 3 PROHIBIT THE USE OF SECRET PRISONS?

In his September 6th speech, after admitting the existence of the secret CIA prison program and announcing the transfer of its current detainees to Guantanamo Bay, President Bush stated, “[t]he current transfers mean that there are now no terrorists in the CIA program. But as more high-ranking terrorists are captured...having a CIA program for questioning terrorists will continue to be crucial to getting life-saving

68. Id. at 478.
69. Prosecutor v. Kunarac, Kovac, & Vokovic, Case No. IT-96-23 and IT-96-23/1 (Appeals Chamber), Judgment, ¶ 161 (June 12, 2002), quoted in Former Yugoslavia Criminal Tribunal Opinions, supra note 55 (under “II) d) vi) outrages upon personal dignity (1) defined” subheading).
70. Id. at ¶ 162 (under “II) d) vi) (2) requires humiliation so intense any reasonable person would be outraged” subheading); Prosecutor v. Aleksovski, Case No. IT-95-14/1 (Trial Chamber), Judgment, ¶¶ 56–57 (June 25, 1999) quoted in Former Yugoslavia Criminal Tribunal Opinions, supra note 55 (under “II) d) vi) (2) requires humiliation so intense any reasonable person would be outraged” subheading).
71. Prosecutor v. Kunarac, Kovac, & Vokovic, Case No. IT-96-23 and IT-96-23/11 (Trial Chamber), Judgment, ¶ 501 (Feb. 22, 2001) (under “II) d) vi) (3) humiliation must be real and serious” subheading). Some of the harms the ICTY felt constituted an outrage on personal dignity included “inappropriate conditions of confinement,” “performing subservient acts,” “being forced to relieve bodily functions in [one’s] clothing,” and enduring the “constant fear of being subjected to physical, mental, or sexual violence.” Kvocka et al., supra note 58, at ¶ 173 (under “II) d) vi) (8) examples” subheading).
72. Kunarac, Kovac, & Vokovic, supra note 71, at ¶ 501 (under “II) d) vi) (3) humiliation must be real and serious” subheading).
Later in his speech, President Bush emphasized the need "to ensure that the CIA program goes forward in a way that follows the law..." Because President Bush did not foreclose future operation of the CIA-prison program, it is still pertinent to determine whether operating a secret-prison program breaches Common Article 3.

The secrecy of this program is meant to discourage attempted attacks on the prison as well as retribution against the countries in which they are located. However, within the prisons themselves, the prisoners are kept in complete isolation from the outside world and have access to no one except CIA officials. Prisoners have no access to family, attorneys, or humanitarian organizations such as the Red Cross. Such isolation borders on solitary confinement, which is generally prohibited by the Geneva Conventions with regard to prisoners of war who are awaiting trial.

A. Is Isolation Inhuman Treatment as Defined by Common Article 3?

As previously stated, section (a) prohibits "(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture." Because isolation is obviously not murder or mutilation, the prohibitions that deserve the closest analysis within section (a) are those on cruel treatment and torture.

Initially, isolation from the outside world, falling short of solitary confinement, should not be considered torture. The potential mental
anguish caused by such isolation is not nearly as severe as the pain experienced from “the needle under the fingernail, application of electric shock to the genital area, and the piercing of eyeballs.” Although there could be forms of torture less severe than these examples, stretching the definition of torture to include isolation from the outside world would be too broad and could create a slippery slope. Considering isolation from the outside world to constitute torture would effectively recognize, within Common Article 3’s prohibition of torture, an affirmative right to access to the outside world. This, in turn, would present difficult problems of line drawing in defining exactly how much access to the outside world detainees are entitled to under Common Article 3.

Furthermore, testimony from Senate hearings stated that for acts causing mental suffering alone to qualify as torture, they must be “intentional acts such as those designed to damage and destroy the human personality.” Although isolation from friends, family, and country could emotionally harm detainees, it is not close to the type of intense mental suffering capable of destroying the human personality. Therefore, isolation should not be considered torture.

Whether isolation amounts to cruel treatment under section (a) depends on whether one accepts the International Criminal Court’s definition of cruel treatment as being equal in severity to torture and differing only in purpose. If one accepts this definition, then isolation should not be considered either cruel treatment or torture, and therefore would not violate section (a).

If one accepts the ICTY’s position that cruel treatment is less severe than torture, the question of whether isolation amounts to cruel treatment is more difficult. In applying the ICTY’s factors for determining what constitutes cruel treatment, it is apparent that the isolation employed in the CIA’s secret prisons is intentional, premeditated and institutionalized, and is prolonged over a long period of time. Nonetheless, in viewing section (a) as a whole, it appears that the drafters intended a very high threshold for cruel treatment. Murder and mutilation represent the most severe acts imaginable. While murder, mutilation, and many forms of torture involve a physical intrusion upon the body, isolation does not. Thus, considering the context in which “cruel treatment” is used in

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80. See supra notes 28–29 and accompanying text.
81. Id. at 20 (quoting Mark Richard, Deputy Assistant Attorney General, Criminal Division, Department of Justice).
82. See supra note 59 and accompanying text.
83. See Krnojelac, supra note 61, at ¶ 182 (under “II) d) i) (3) severe pain and suffering must be inflicted” subheading) (listing factors to be considered).
section (a), isolation should not qualify.

B. Is Isolation an Outrage upon Personal Dignity as Defined by Common Article 3?

The next section of Common Article 3 that could reasonably prohibit isolation is section (c). Section (c) prohibits “[o]utrages upon personal dignity, in particular, humiliating and degrading treatment.” While the phrase “outrages upon personal dignity” is vague, the text points to one example of such an outrage: “humiliating and degrading treatment.” If section (c)’s prohibition of “humiliating and degrading treatment” is interpreted according to its common usage, isolation from the outside world would not run afoul of this prohibition because such isolation does not “lower the pride, dignity or self respect of” detainees or “dishonor or disgrace” them. An intuitive example of treatment that would violate this prohibition is the recently-exposed conduct at the Abu Ghraib prison in Iraq, where detainees were forced to perform sexual acts and were photographed nude, smeared with excrement. In contrast, isolation from the outside world would not demean or embarrass prisoners in the same sense as forcing them to perform sexually-demeaning acts or stripping them nude and smearing excrement on them. While isolation can be a means of applying pressure on prisoners, it does not do so through embarrassment. Thus, if section (c)’s specific prohibition of “humiliating and degrading treatment” is interpreted according to its common usage, it would not prohibit isolation.

A more difficult inquiry is whether isolation from the outside world constitutes some other form of outrage upon personal dignity. If dignity is interpreted according to common usage, isolation from the outside world would not qualify because isolation does not lower “the quality or state of being worthy of esteem or respect” or “the inherent nobility and worth” of detainees. If interpreted in this way, even if a particular detainee subjectively felt his or her inherent nobility and worth were lowered as a result of being isolated from the outside world, thus meeting

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84. Because isolation is not “taking of hostages” as prohibited by section (b), section (b) does not need to be examined. Similarly, section (d) does not need to be examined because isolation as taking place during the duration of the conflict, can not be considered to be the passing of sentences without previous judgment by a regularly-constituted court.
85. Common Article 3, supra note 3.
86. See supra notes 67–68 and accompanying text.
88. See supra note 66 and accompanying text.
the ICTY's subjective component, isolation would fail the ICTY's objective component because no reasonable prisoner would feel his or her nobility or worth were lowered as a result of being isolated from the outside world. Thus, isolation from the outside world most likely does not violate the plain meaning of section (c).

While there is danger in interpreting Common Article 3 too narrowly, construing Common Article 3 so broadly as to prohibit isolation from the outside world would deny countries fair warning of what is prohibited, give tribunals interpreting it too much discretion to define the law on an ad hoc basis, and increase the likelihood of arbitrary enforcement. 89 A domestic criminal statute that used such vague wording as “cruel treatment” or “outrages upon personal dignity” would almost certainly be struck down as unconstitutionally vague under the Due Process Clause. 90 Indeed, such vagueness is what prompted President Bush to call for Congress to “clarify” Common Article 3. 91

Finally, there is reason to think that the framers of the Geneva Conventions did not intend isolation to be prohibited by Common Article 3. If the drafters of Common Article 3 meant to prohibit isolation, they could have included an express prohibition of it. The Official Commentary to Article 103 generally prohibits solitary confinement with regard to prisoners of war awaiting trial. 92 The Official Commentary’s express prohibition of solitary confinement with regard to Article 103, combined with the absence of such an express prohibition with regard to Common Article 3, raises the presumption that the drafters did not intend Common Article 3 to prohibit solitary confinement. 93 It follows that if the drafters of Common Article 3 did not intend Common Article 3 to prohibit solitary confinement, they certainly would not have intended it to prohibit mere isolation from the outside world, which falls short of solitary confinement. Thus, sections (a) through (d) of Common Article 3, when viewed as a whole, most likely do not prohibit isolation from the

89. See Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972) (discussing similar policy concerns with respect to vague domestic criminal statutes).
90. See, e.g., Kolender v. Lawson, 461 U.S. 352, 357 (1983) (holding criminal statute that required loiterers to provide “credible and reliable” identification unconstitutionally vague under Due Process Clause of the Fourteenth Amendment); Coates v. Cincinnati, 402 U.S. 611, 615 (1971) (holding criminal statute that prohibited “annoying” conduct unconstitutionally vague under Due Process Clause of Fourteenth Amendment).
91. See supra note 8 and accompanying text.
92. Official Commentary, supra note 39, art. 103.
93. See United States v. Barnes, 222 U.S. 513, 518–19 (1912) (espousing the canon of legislative intent expressio unius est exclusio alterius—the expression of one implies the exclusion of others not mentioned).
outside world. 94

VI. DO THE INTERROGATION TECHNIQUES VIOLATE COMMON ARTICLE 3?

The particular interrogation techniques the CIA has been using in secret prisons have not been officially acknowledged. Nevertheless, clues indicate the interrogation techniques in use are more severe than those traditionally used by FBI and military interrogators. 95 In 2005, both the Director of CIA and Vice President Cheney approached Congress, during debates over the McCain Amendment, to argue against a broad prohibition on cruel, inhuman, and degrading treatment. 96 In 2006, the interrogations started to make more and more headlines on human rights websites and in the press, and many of the techniques have since been revealed.97

The more severe techniques, often called “enhanced techniques,” listed in documents and reported by the press include: stress positions, cold celling and induced hypothermia, waterboarding, noise and light bombardments, solitary confinement, and sleep deprivation.98 The

94. As a matter of policy, the drafters of the Geneva Conventions could not have reasonably foreseen a war, such as the War on Terror, which could potentially last for decades. Had the drafters foreseen this type of perennial war, which invokes only the minimal protections of Common Article 3, they may have created higher standards of protection for such a situation. If the war continues indefinitely, detainees could potentially be held isolated in secret CIA prisons for the rest of their lives. Moreover, the isolation and secrecy of the CIA prisons removes public accountability which, in domestic prisons, is a strong disincentive against prisoner mistreatment. Without outside oversight, there is not significant protection against the use of torture or other prisoner mistreatment. At the very least, the secrecy of the CIA prisons fuels public skepticism about the legality of the interrogation tactics used.

95. For a discussion of FBI and military limitations on interrogation techniques, see Memorandum from FBI on Legal Analysis of Interrogation Techniques (Nov. 27, 2002); Memorandum from William J. Haynes II, Counsel for the Department of Defense, to Secretary of Defense Donald Rumsfeld, on Counter-Resistance Techniques (Dec. 2, 2002); Memorandum from Donald Rumsfeld, Secretary of Defense, on Counter-Resistance Techniques in the War on Terrorism (Apr. 16, 2003) (describing approved methods for military interrogations), all available at http://www.humanrightsfirst.org/us_law/etn/gov_rep/gov_memo_intlaw.htm (last visited Apr. 15, 2007).

96. Mayer, supra note 1.


98. For press reports, see id. Human rights groups have also reported on these techniques. See, e.g., Amnesty International, Torture and secret detention: Testimony of the ‘disappeared’ in the ‘war on terror’, Aug. 4, 2005,
interrogation techniques are undoubtedly being used to obtain information, and thus if severe enough could amount to torture.\textsuperscript{99} In determining whether the techniques could amount to torture, cruel treatment, or an outrage upon personal dignity, analysis on the nature of the act and the severity of the harm to the detainee will be determinative.\textsuperscript{100}

\textbf{A. Sensory Manipulation}

Noise and light manipulation is reported in government deprivation technique, but press reports indicate it may be more common to play music, such as country-western or rap music, into detainees’ cells.\textsuperscript{101} It has been reported that, because the music is so foreign, it has the effect of making the prisoners feel frantic.\textsuperscript{102} Possible side effects of loud noise or lights include an inability to sleep, while sustained excessive noise may lead to increased stress and risk to mental health.\textsuperscript{103}

Despite the existence of side effects, use of the technique would not constitute a violation unless the severity of any mental or physical effect rose to a level constituting torture or cruel treatment. Whether cruel treatment is held to a lower standard than torture or not,\textsuperscript{104} it seems unlikely the effects would rise to such a level. Examples of cruel treatment in international case law, such as use of prisoners as human

\textsuperscript{99} See Bush Address, \textit{supra} note 8 (discussing the importance and value of the CIA program and that it is obtaining timely and actionable intelligence). For an international law definition of torture as pain or suffering performed for the purpose of obtaining information, see \textit{ELEMENTS OF CRIMES}, \textit{supra} note 59, art. 8(2)(c)(i)-4; see also Former Yugoslavia Criminal Tribunal Opinions, \textit{supra} note 55.

\textsuperscript{100} See Kunarac, Kovac, & Vokovic, \textit{supra} note 69, at ¶ 153-56 (under "II) d) i" (4)" subheading) (explaining severity is the distinguishing factor in determining war crimes violations).

\textsuperscript{101} Memorandum from FBI, \textit{supra} note 95; Memorandum from Haynes, \textit{supra} note 95. See Ross & Esposito, \textit{supra} note 97 (describing reports of Afghani prisoners who claim music from rap artist Eminem was played in their cells); Amnesty International, \textit{supra} note 98 (reporting individual accounts claiming western music was played 24 hours a day for an entire month).

\textsuperscript{102} Ross & Esposito, \textit{supra} note 97.

\textsuperscript{103} Inmates of Occoqran v. Barry, 844 F.2d 828, 830 (D.C. Cir. 1998) (citing an expert’s testimony that constant and loud televisions in prison dormitory could have harmful effects); United States v. Marzook, 435 F. Supp. 2d 708, 736 (N.D. Ill. 2006) (involving prisoners in an Israeli prison prevented from sleep by playing loud music).

\textsuperscript{104} For the discussion of competing interpretations, see \textit{supra} notes 56–61 and accompanying text.
shields,\textsuperscript{105} are far more severe. There may be a stronger case that this practice constitutes an outrage on personal dignity.\textsuperscript{106} The ICTY did find “inappropriate conditions of confinement” to be an outrage on personal dignity.\textsuperscript{107} However the tribunal also required that conditions result in mental suffering that is both real and serious—a definition that rarely includes transitory harm.\textsuperscript{108}

B. Stress Positions

A stress position involves placing a detainee in an uncomfortable position, often forcing them to stand, for prolonged periods of time.\textsuperscript{109} The FBI has limited use of the technique to a maximum of four hours.\textsuperscript{110} CIA prisoners, however, have described being forced “to stand, handcuffed and with their feet shackled to an eye bolt in the floor for more than 40 hours,” and report that it frequently results in exhaustion and sleep deprivation as well.\textsuperscript{111}

Stress positions are designed to cause physical pain. When analyzing the use of stress positions, international courts have considered factors such as the nature and context of the infliction of pain, the premeditation and institutionalization of the treatment, the physical condition of the victim, the manner and method used, and the position of inferiority of the victim.\textsuperscript{112} International court opinions have ruled stress positions to cause sufficient physical and mental pain and suffering for a finding of cruel treatment, although they are typically analyzed in

\textsuperscript{105} Kvocka et al, \textit{supra} note 58, at ¶ 161 (under “II) d) iii) (4)” subheading).

\textsuperscript{106} Kunarac, Kovac and Vokovic, \textit{supra} note 69, at ¶ 162 (under “II) d) vi) (2)” subheading); Aleksovski, \textit{supra} note 70, at ¶¶ 56–57 (under “II) d) vi) (2)” subheading).

\textsuperscript{107} Kvocka et al, \textit{supra} note 58, at ¶ 173 (under “II) d) vii) (8)” subheading).

\textsuperscript{108} Kunarac, Kovac and Vokovic, \textit{supra} note 71, at ¶ 501 (under “II) d) vi) (3)” subheading). A domestic court applying Common Article 3 would probably be even less willing to find this to be a violation. One U.S. court has declared that loud televisions playing in prisoners’ dormitories are “a far cry” from a violation of the prisoners’ Eighth Amendment protections against cruel treatment. \textit{Inmates of Occoquan}, 844 F.2d at 837 (denying a cruel treatment claim by prisoners whose claim was based on constant loud television noise). They are unlikely to extend greater protection to a high-level terrorist.

\textsuperscript{109} This position is described as “Long Time Standing” in Ross & Esposito, \textit{supra} note 97; see also Memorandum from FBI, \textit{supra} note 95. There are specific accounts that describe positions which are more uncomfortable. See, e.g., Mayer, \textit{supra} note 1.

\textsuperscript{110} Memorandum from FBI, \textit{supra} note 95, at 1.

\textsuperscript{111} Ross & Esposito, \textit{supra} note 97. The combination of stress positions and injuries are reported to have caused the death of at least one detainee. Mayer, \textit{supra} note 1.

\textsuperscript{112} Krnojelac, \textit{supra} note 61, at ¶ 182 (under “II) d) i) (3)” subheading).
conjunction with other confinement conditions. More to the point, one international committee has criticized the United States's use of stress positions and "short shackling" on detainees in the War on Terror, stating that the use is cruel and inhuman treatment in violation of the Convention Against Torture.

If a court treated cruel treatment as the ICTY did, holding it to be less severe than torture, then such a prolonged use of a stress position may violate Common Article 3. However, a finding of cruel treatment still requires pain and suffering to be severe and not temporary. Ultimately, whether this technique violates Common Article 3 must depend on the circumstances, length, and consequences of its use.

C. Sleep Deprivation

Sleep deprivation is likely to occur in conjunction with many of the techniques that are being considered here. Sleep deprivation was reportedly achieved by housing detainees in cold cells without bunks, and using sensory overload and constant interruptions. The CIA has reportedly subjected detainees to sleep deprivation for weeks at a time. Sleep deprivation is an old and common form of coercing a detainee. It has been described as creating a need or desire for sleep stronger than the urge for food or water. Some evidence shows that

115. For a discussion of competing theories, see supra notes 58–60 and accompanying text.
116. See, e.g., Human Rights Watch, U.S. Operated Secret 'Dark Prison' in Kabul, Dec. 19, 2005, http://hrw.org/english/docs/2005/12/19/afghan12319.htm (stating that various detainees claim to have been deprived of sleep due to shackling, cold, and noise); Ross & Esposito, supra note 97 (reporting an escaped prisoner as saying, "They would not let you rest, day or night. Stand up, sit down, stand up, sit down. Don't sleep. Don't lie on the floor.").
118. See, e.g., Human Rights Watch, Descriptions of Techniques Allegedly Authorized by the CIA, Nov. 11, 2005, http://hrw.org/english/docs/2005/11/21/usdom12071.htm (containing description of use of sleep deprivation in both Soviet and North Korean Gulags). Secretary of Defense Rumsfeld approved a limited use of this technique for the military in which the detainee's schedule was simply altered from day to night. Memorandum from Rumsfeld, supra note 95, at 4 (emphasizing that it was not a sleep deprivation technique).
119. Human Rights Watch, Descriptions of Techniques Allegedly Authorized by the
sleep deprivation causes cognitive impairment, decreased pain tolerance, and possible hypertension and other cardiovascular disease. The ICTY did cite "prolonged denial of sleep" as likely to constitute torture. On the other hand, there is little evidence of lasting harm created by sleep deprivation. The stronger argument may be that it causes serious, although somewhat transitory, physical and mental suffering, and thus constitutes a serious attack on human dignity. However, the lack of permanent physical or mental harm may militate against a violation of Common Article 3.

D. Solitary Confinement

The serious health consequences of solitary confinement have been thoroughly documented and long recognized by courts. While the use of solitary confinement was limited in military and FBI analyses to a period no longer than thirty days, reports indicate the CIA may keep detainees in solitary confinement for a year or more. Depending on

CIA, supra note 118 (containing the statement by Former Israeli Prime Minister Menachem Begin that, "In the head of the interrogated prisoner a haze begins to form ... and he has one sole desire: to sleep, to sleep just a little, not to get up, to lie, to rest, to forget.... Anyone who has experienced this desire knows that not even hunger or thirst are comparable with it.... I came across prisoners who signed what they were ordered to sign, only to get what the interrogator promised them. He did not promise them their liberty. He promised them—if they signed—uninterrupted sleep!").


Kvocka, supra note 58, at ¶ 144 (under "II) d) i) 7) (a)" subheading).

PHYSICIANS FOR HUMAN RIGHTS, supra note 120, at 69–70 (noting temporary but not necessarily any permanent harmful effects of sleep deprivation).

Kvocka, supra note 58, at ¶ 172 ("The focus of violations of dignity is primarily on acts, omission, or words that do not necessarily involve long-term physical harm, but which nevertheless are serious offences deserving of punishment.") (under "II) d) vi) (4)" subheading).

In 1890, the Supreme Court heard In re Medley, 134 U.S. 160 (1890). The Court stated, "A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community." Id. at 168. For an examination of the psychological impact and legal implications of solitary confinement, see Craig Haney & Mona Lynch, Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement, 23 N.Y.U. REV. L. & SOC. CHANGE 477 (1997).

Memorandum from FBI, supra note 95; Memorandum from Haynes, supra note 95.

See, e.g., Amnesty International, supra note 98 (stating that individuals report being held in CIA custody in solitary confinement for approximately a year and a half).
the length of confinement, as well as the extent of the deprivation of communication, a prisoner may face visual disturbances, psychopathological disorders, depression, anxiety, and loss of cognitive and memory function, during and after confinement.\textsuperscript{127}

Objectively, extensive use of solitary confinement has the potential to cause significant mental harm. International case law also looks to the subjective effects on the particular victim.\textsuperscript{128} Whether use of the technique would rise to the level of torture, or cruel treatment if treated as a lesser standard, depends largely on whether the particular victim experienced non-transitory mental harm.\textsuperscript{129} In fact, at least one international court has also held prolonged solitary confinement to be inhuman treatment and a violation of Common Article 3.\textsuperscript{130}

E. Cold Ceiling

Cold ceiling, also known as induced hypothermia, is achieved by leaving a detainee naked in a cell which is kept at a temperature around fifty degrees Fahrenheit and periodically dousing him with water.\textsuperscript{131} Individual reports indicate some cells can be even colder, approximately at refrigeration temperatures, and that individuals are left in the cold cells without bunk or blanket.\textsuperscript{132}

\textsuperscript{127} Haney & Lynch, \textit{supra} note 124, at 500–10. It is useful for interrogations because the need for sensory and human interaction frequently causes detainees to look forward to interrogations and want to talk. \textit{See id. at} 504.

\textsuperscript{128} Knjilejac, \textit{supra} note 61, at ¶ 182 (under "II) d) i) (3)" subheading).

\textsuperscript{129} Kvocka, \textit{supra} note 58, at ¶ 149; Kunarac, Kovac and Vokovic, \textit{supra} note 71, at ¶ 501.

\textsuperscript{130} Velásquez Rodríguez Case, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4, \textit{reprinted in} 28 I.L.M. 291 (1989), \textit{cited in} WEISSBRODT, \textit{supra} note 58, at 67. A domestic court is less likely to find such a violation. Solitary confinement is used regularly in the U.S. criminal prison system, and is generally upheld by domestic courts as constitutionally viable. \textit{See}, e.g., Sostre v. McGinnis, 442 F.2d 178, 192 (2d Cir. 1971) (describing solitary confinement as one of “the main traditional disciplinary tools of our prison systems”). When considering the constitutionality of solitary confinement and “strip cells” in U.S. prisons, courts generally balance the length of time against the conditions of the imprisonment. \textit{See} Hutto v. Finney, 437 U.S. 678, 686–87 (1978) (a seminal case stating that the confinement “might be tolerable for a few days and intolerably cruel for weeks and months”); Gibson v. Lynch, 652 F.2d 348 (3d Cir. 1981) (discussing prisoner’s claim that confinement was cruel and unusual punishment).

\textsuperscript{131} Ross & Esposito, \textit{supra} note 97. It is called “Exposure to cold weather or water (with medical monitoring)” in government memoranda. Memorandum from FBI, \textit{supra} note 95, at 1; Memorandum from Haynes, \textit{supra} note 95, at 13.

\textsuperscript{132} \textit{See}, e.g., Mayer, \textit{supra} note 1; David Johnston, \textit{At a Secret Interrogation, Dispute Flared Over Tactics}, N.Y. TIMES, Sept. 10, 2006 (stating that the detainee at times seemed to turn blue from the cold). This technique is reported to have resulted in at least one death. Priest, \textit{supra} note 2, at A4.
Cold celling seems more likely to be treated as a violation of Common Article 3 than the previous techniques. Because hypothermia can be deadly, it certainly places a detainee in a grave situation. Cold celling has resulted in at least one death when applied improperly, and certainly can be expected to lead to physical and mental suffering. Whether the technique would amount to a violation may depend on whether cruel treatment was treated as less severe or equal to torture. However, if applied severely enough that the detainee was near organ failure or death, it would certainly rise to the level of torture even under the more extreme definitions of that term. Because the detainees are left naked and shivering, there is also a strong argument it would constitute an outrage on personal dignity.

F. Waterboarding

Waterboarding is alleged to be the most extreme measure used by CIA interrogators. It is a technique in which the prisoner is “bound to an inclined board, feet raised and head slightly below the feet. Cellophane is wrapped over the prisoner’s face and water is poured over him.” The effectiveness of the technique relies on creating in the

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133. See Elci & Others v. Turkey, App. No. 23145/93, Eur. Ct. H.R. (Mar. 24, 2003), at ¶ 54, available at http://www.echr.coe.int/ (victim was tortured by being stripped, insulted, hosed down with cold water, causing probable hypothermia). See also Kvočka, supra note 58, at ¶ 144 (denial of medical care and hygiene as commonly listed varieties of torture).

134. Ross & Esposito, supra note 97.

135. Id. A prisoner in a Soviet gulag, left in cold and hungry for a prolonged period of time, describes feeling like he was in a semi-conscious state and an automaton. Human Rights Watch, Descriptions of Techniques Allegedly Authorized by the CIA, supra note 118 (under “Exposure to cold”).

136. See supra Part IV.B–C (discussing the differing interpretations of Common Article 3). Domestic courts have found exposure to similar temperatures, even without the water dousing, to violate a prisoner’s constitutional right not to be subjected to cruel treatment. See, e.g., Murphy v. Walker, 51 F.3d 714, 720–21 (7th Cir. 1995) (confinement in cold cell without clothes and heat for a week and a half in the middle of November); Lewis v. Lane, 816 F.2d 1165, 1171 (7th Cir. 1987) (claim that prison administrators allowed cell temperatures to fall at times to between 52 and 54 degrees remanded for further proceedings). Eighth Amendment claims, however, do have some substantial differences from Common Article 3 violation claims.

137. See August 2002 Memo, supra note 25, at 1 (defining severe pain or suffering as pain equivalent to serious physical injury, such as organ failure).

138. Urinating and defecating on oneself have been found to be an outrage on personal dignity. Kvočka, supra note 58, at ¶ 173 (under “II) d) vi) (8)” subheading). Extreme exposure to cold may be similarly degrading.

139. Ross & Esposito, supra note 97.

140. Id.
mind of the detainee the feeling of drowning, essentially operating as a mock execution. Mental health professionals report mock executions to have significant mental effects on detainees. Mock executions have been cited by both domestic and international authorities as constituting torture.

VII. CONCLUSION

President Bush has emphasized the importance of the CIA interrogation program to the War on Terror. The MCA was passed, in part, to ensure that CIA activities could continue. Enactment of the MCA, however, does not absolve the U.S. from its duty to the international community to uphold its treaty obligations under the Geneva Conventions. If the CIA continues its secret-prison program, it appears that the use of isolation would not constitute per se breaches of Common Article 3. However, some of the enhanced interrogation techniques tread the line of permissibility under Common Article 3. Ultimately, there may have been some purpose to the vague wording in Common Article 3—it may deter governments from treading so closely. Either way, Vice President Cheney’s prediction that the U.S. would have to “go to the dark side” does not seem far off.

141. Human Rights Watch, Descriptions of Techniques Allegedly Authorized by CIA, supra note 118.
144. Bush Address, supra note 8.
145. Id.
146. See discussion supra note 12.