



Khaled El-Masri leaving the US Court of Appeals for the Fourth Circuit, November 28, 2006.

American Torture

The Price Paid, the Lessons Learned

Lisa Hajjar

Starting with the publication of the Abu Ghraib photos in April 2004,¹ there has been a steady cascade of revelations about the Bush administration's brutal and dehumanizing interrogation and detention policies. These days, the last refuge for die-hard deniers is the euphemization that "enhanced interrogation" is not "torture." The current fault line in the public debate is not whether America tortured but whether it "worked." Although some important details and documents remain classified, and the first official efforts to

systematically study the relationship among the motivations, methods and fruits of interrogation have just begun, there is enough information available to draw some lessons from the US torture policy.

What We Now Know

The decision to authorize torture was made in the immediate aftermath of the attacks of September 11, 2001, before any suspects had been taken into custody. On September 17, President George W. Bush signed a memorandum of

Lisa Hajjar is chair of the Law and Society Program at the University of California, Santa Barbara and an editor of this magazine.

understanding granting the CIA authority to establish a secret detention and interrogation operation overseas. The Clinton-era rendition program was ramped up into “extraordinary rendition,” permitting the CIA to kidnap people from anywhere and disappear them into “black sites” or extralegally transfer them to states with well-established records of torture, like Egypt and Morocco. By December 2001, the Pentagon was exploring how to “reverse engineer” SERE (survival, evasion, resistance, extraction) techniques that had been developed during the Cold War to train US soldiers in case they were captured by regimes that do not adhere to the Geneva Conventions.²

The Bush administration circumvented the legal prohibitions against torturing and abusing prisoners by declaring the Geneva Conventions inapplicable in the “war on terror,” which the president did in a secret directive to his national security team (over State Department dissent) on February 7, 2002. Vice President Dick Cheney was the chief architect of the torture policy, and his counsel, David Addington, functioned as the *consigliere* over a team of “torture lawyers” from the White House, Department of Justice’s Office of Legal Counsel (OLC) and Pentagon.³ They constructed an elaborate set of legal interpretations and security rationales to authorize violent and painful interrogation tactics, and to negate the risk of criminal liability for doing so. Prisoners classified as “unlawful combatants” and detained at Guantánamo (GITMO) were to be held incommunicado with no status review hearings, which meant that they were afforded no habeas corpus rights, a contravention of, arguably, the most basic rule of law norm that dates back to the Magna Carta.

In 2002, OLC lawyers authored memos for the CIA narrowing the definition of physical torture to exclude anything less than “the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.” They also argued that cruel, inhuman or degrading (CID) treatment would not constitute mental torture unless it caused effects that lasted “months or even years.” The legal rationales devised for the CIA influenced subsequent Pentagon directives for military interrogations at GITMO. When top military lawyers protested, in early 2003 the OLC wrote memos that the Pentagon used to override their opposition.⁴ In August 2003, the GITMO commander went to Iraq to advise on interrogation and detention operations, and Iraqi prisons were subsequently “GITMOized.” Since 2006, the Bagram prison in Afghanistan has supplanted GITMO and the CIA black sites to detain new prisoners (other than those captured and detained in Iraq).

These torture-permissive interrogation and detention policies have affected tens of thousands of people: Considering only prisoners held overseas, approximately 500–600 have been held at Bagram at any given time since the 2001 invasion, a number that does not include prisoners held “off the books” by the CIA or Special Forces. In Iraq, the number rose at the end of 2007 as a result of the “surge” to 51,000, including hundreds of

juveniles. At its peak, GITMO held 775, and an estimated 100 were held in secret CIA detention. As of January 2009, there were 245 detainees at GITMO, 700 in Afghanistan, 200 in the Horn of Africa, and 39 known to have been taken by the CIA but whose whereabouts are currently unknown.⁵

The overwhelming majority was innocent or had no meaningful intelligence: Thousands were swept up in raids, hundreds were sold into custody for big bounties paid by the US, some were named by others under torture, and some were victims of mistaken identities. But most captives remained in custody, many continuing to be interrogated, long after their innocence or intelligence valuelessness was known.⁶ Despite growing awareness and criticism of the policy’s deep flaws, Bush, Cheney and other officials insisted through the end of their term that our “tough but lawful” methods were used on hardened terrorists and produced excellent intelligence that “kept Americans safe” from further “massive-casualty attacks” since 9/11.

Lies and Lessons

President Barack Obama came into office promising to end torture. Immediately after his inauguration on January 20, 2009, his first act in office was to sign three executive orders: to close GITMO within one year, to require that all US interrogations (including by the CIA) must be conducted in accordance with the 2006-revised *Army Field Manual for Human Intelligence Collector Operations*, and to cancel the military commissions and develop a plan to handle GITMO cases.

The challenges of ending torture and restoring the rule of law have proved daunting and complex. Obama has decided or been impelled by circumstances to continue some aspects of the Bush policy. For example, in April 2009, a federal District Court judge interpreted *Boumediene v. Bush* (granting GITMO prisoners a constitutional right to habeas) to apply to Bagram, too. The Obama administration filed a motion appealing that decision, thus endorsing Bagram’s status as a “legal black hole” where prisoners have no right to challenge their detention.

Since January, there has been a steady flow of new revelations, including newly declassified OLC memos for the CIA, and journalist Mark Danner’s reporting on the contents of a leaked International Committee of the Red Cross report with accounts from prisoners held in black sites.⁷ Obama reversed his own promise, and a 2005 court order in a Freedom of Information Act case filed by the ACLU to release additional photos from Abu Ghraib. Demands for some form of accountability, whether prosecutions or a “truth commission,” have been roiled by partisan dissension and foiled by the administration’s unwillingness to “re-litigate the past.”

Since leaving office, Cheney has become uncharacteristically voluble in his efforts to defend the Bush administration’s record. In numerous media interviews and a May 21 speech at the American Enterprise Institute (AEI), he delivered the message that government-approved brutal interrogation tactics (which,

in his view, are “tough” but not “torture”) had been used only after other methods had failed, and had produced excellent intelligence. He admonished the Obama administration for sacrificing security by relinquishing methods that work. At AEI, Cheney attempted a *coup de grace* by claiming that several classified documents he had seen prove the efficacy of CIA interrogations. On May 29, Carl Levin, chair of the Senate Armed Services Committee, reported that he examined the documents to which Cheney was referring which “say nothing about the numbers of lives saved, nor do [they] connect acquisition of valuable intelligence to the use of abusive techniques.”

Former FBI agent Ali Soufan, a top al-Qaeda profiler, had interrogated Abu Zubaydah (*nom de guerre* for Zayn al-Abidin Muhammad), the first “high value target” to be captured in early 2002. In an April 2009 *New York Times* op-ed, he broke his seven-year silence about “the false claims magnifying the effectiveness of the so-called enhanced interrogation techniques.” On May 13, he testified at a Senate Judiciary Committee hearing that he had used conventional interrogation methods (deception and rapport-building) to elicit information from Abu Zubaydah, including names of people affiliated with al-Qaeda. His most significant revelation, according to Soufan, was the identity of the 9/11 mastermind: Khalid Sheikh Muhammad (KSM). At that point a CIA team headed by James Mitchell, a psychologist contractor with no interrogation experience, took over. They stripped Abu Zubaydah naked and began applying reverse-engineered SERE tactics on him. He stopped talking. Soufan and his team were permitted to resume their interrogation, but when he started talking, the CIA took over again, and again he stopped talking. The third time the CIA took over, Soufan got so agitated at the illegal and ineffective methods they were using, he called FBI headquarters and threatened to arrest the CIA agents on the spot. Soufan and the FBI team were pulled out, and the Bureau stopped working with the CIA on interrogations.

Abu Zubaydah’s treatment (including being waterboarded 83 times and confined in a coffin-like box with insects) set the stage for the whole CIA interrogation program, which subsequently “migrated” to GITMO and then to Iraq. A factor contributing to the escalating harshness was that his importance had been overestimated. Contrary to the initial presumption that he was al-Qaeda’s chief of operations and top recruiter, in fact, he was more like a receptionist responsible for moving people in and out of training camps. He had not even joined al-Qaeda until after 9/11.⁸ According to former senior government officials who followed his interrogations, not a single plot was foiled as a result of his tortured confessions, but false statements that he made to stop the pain (e.g., about planned attacks on shopping malls, nuclear plants, the Brooklyn Bridge and the Statue of Liberty) sent hundreds of CIA and FBI investigators in pursuit of phantoms.⁹

Unlike Abu Zubaydah (and the overwhelming majority of prisoners subjected to US torture), KSM was a valuable intelligence asset. He was captured in 2003 not as a result

of information gleaned by torture but rather a \$25 million dollar reward. KSM was subjected to waterboarding 183 times along with the full panoply of tactics in the CIA’s repertoire. According to former CIA and Pentagon officials with direct knowledge of his interrogations, most of what he said under torture was lies, and he gave up no actionable intelligence.

Torture’s inefficacy in the interrogation of someone as valuable as KSM was true of the entire torture program. According to investigative journalist David Rose, who interviewed numerous counterterrorism officials from the US and elsewhere, their conclusions were unanimous: “not only have coercive methods failed to generate significant and actionable intelligence, they have also caused the squandering of resources on a massive scale... chimerical plots, and unnecessary safety alerts...”¹⁰ Thus, the indirect costs of interrogational torture include misallocation of resources to follow false leads and, as falsehoods accrete, an increasing incapacity to detect the difference between accurate and inaccurate intelligence.

The other key Bush administration claim that the use of harsh interrogation methods was motivated to prevent future attacks has become far less plausible in light of information in recently declassified memos.¹¹ Justifying war against Iraq was the motivation that caused the first major spike in the use of the harshest methods; in the weeks prior to the 2003 invasion, CIA and military interrogators were under intense pressure to produce evidence that would persuade Britain that Iraq had an active weapons of mass destruction (WMD) program and that the regime of Saddam Hussein had links to al-Qaeda. The evidence that the administration presented to the world to make the case for war included the claim that Iraq had been training al-Qaeda operatives in the use of chemical weapons, thus connecting Iraq to 9/11. This “information” was extracted by torture from a Libyan prisoner, Ibn al-Shaykh al-Libi, who subsequently recanted the lies he had told interrogators to make the pain stop. The second spike in the use of the harshest methods occurred several months into the occupation of Iraq, when the WMD failed to materialize, and was motivated to stay cracks in public support for the war. The Abu Ghraib debacle, representing a third spike, emanated from the desperate quest for intelligence about the insurgency because the administration was suffering politically for the rising American death toll.

The Effects of the Torture Policy

Obama has been critical about the torture policy and its defenders in numerous speeches and interviews, including a March 22 interview on “60 Minutes” in which he said, “I fundamentally disagree with Dick Cheney.” This disagreement, elaborated in his May 21 speech to the nation, engaged only passingly with the purported efficacy of torture techniques, which he disputed. Rather, his substantive disagreement with Cheney (and all pro-torture consequentialists) was that the effects of the torture policy have hurt national interests and



Entrance to Szczytno Szymany air field used by the CIA for the extraordinary rendition of detainees.

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done serious damage. “[Brutal methods] undermine the rule of law. They alienate us in the world. They serve as a recruitment tool for terrorists, and increase the will of our enemies to fight us, while decreasing the will of others to work with America. They risk the lives of our troops... and [make it] more likely that Americans will be mistreated if they are captured. In short, they did not advance our war and counter-terrorism efforts—they undermined them...”

Obama’s harsh assessments have substantial empirical foundations. In terms of the rule of law, the use of torture has fouled prospects for legal justice for 9/11 by making it difficult to prosecute suspects. In November 2008, the convening authority for the military commissions, Susan J. Crawford, had ruled that Muhammad al-Qahtani, the prisoner suspected of being the “20th hijacker” and for whom the “special measures” at GITMO were initially devised, was unprosecutable because he had been tortured. Before that, six military prosecutors quit because they refused to participate in a system that relies on tortured evidence. Only three people, none of them charged with planning 9/11, were prosecuted in the commissions during the Bush years.

One of the main themes of Obama’s May 21 speech was the problem of dealing with GITMO. He laid out five categories and courses of action: First, those who violated criminal laws will be prosecuted in federal courts. There is strong indication

that these are people who can be charged for pre-9/11 crimes to avoid the problem of tortured evidence and to prevent their mistreatment at GITMO and elsewhere from being part of their defense. The first such GITMO detainee, Ahmed Ghailani, was transported to New York in May to stand trial in federal court for his alleged involvement in the 1998 embassy bombings. Second, those who violated the laws of war (like KSM and other “high value targets”) will be prosecuted in military commissions. Thus Obama essentially rescinded his January 20 cancellation, but promised that the reformed commissions would not admit evidence elicited through torture or CID. The third and fourth categories are, respectively, people who can and must be released (e.g., the Chinese Uighurs), and those who can be transferred to other countries. However, in June, rather than face down bipartisan opposition to permit the resettlement of any GITMO detainees in the US, the Obama administration submitted a motion in a habeas case that the continued detention of innocents is “not unlawful detention, but rather the consequence of their lawful exclusion from the United States, ...coupled with the unavailability of another country willing to accept them.”

The fifth category, which poses the “toughest” problem, contains people who cannot be prosecuted but who cannot be released because it is feared that they continue to pose a threat. Although vague about plans, Obama implied that some form



Ali Soufan.

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of preventive detention was being considered. The two obvious reasons that people in this category—such as al-Qahtani—are unprosecutable is because they have been tortured, and because there is no solid non-tortured evidence that they were involved in terrorist activities. But the alternative, indefinite (possibly permanent) detention without trial, is a far cry from the restoration of rule of law standards.

In terms of the US's international status and relations with allies, the effects of the torture policy have been deleterious. In November 2005, the *Washington Post* reported that the CIA engaged in kidnappings and ran black sites in Europe. This prompted several investigations into illegal US activities on the continent. The Council of Europe report, released in June 2006, concluded that 100 people had been kidnapped in Europe, and recommended a review of all US-European Union bilateral military basing agreements. The European Parliament report, released in February 2007 and endorsed by a large majority, exposed extensive collusion with the CIA's extraordinary rendition program by European security services and other government agencies. The ire that these revelations provoked among domestic European constituencies has increased governments' wariness about cooperating with US intelligence agencies.

The US torture program also prompted national investigations, some of a criminal nature, in various European

countries. In 2005, an Italian court issued indictments for 22 CIA agents who had kidnapped Hassan Mustafa Osama Nasr (aka Abu Omar) in Milan in February 2003 and transported him to Egypt for torture. In 2007, a German court issued arrest warrants for 13 CIA agents involved in the December 2003 kidnapping of Khaled El-Masri, a German citizen, from Macedonia. He was transported to Afghanistan where he was tortured and held incommunicado for months. When the CIA realized that El-Masri was not who they thought he was and decided to release him, in an attempt to avoid public acknowledgment and embarrassment, they dumped him in a remote area of Albania, from which he eventually made it back to Germany.

The Canadian government colluded with the US in the extraordinary rendition of their citizen, Maher Arar, to Syria where he was tortured for 18 months until this innocent man was released and returned home. The Canadian government ultimately apologized to Arar and paid him compensation of \$10 million; the US has yet to apologize or even acknowledge culpability, and he remains on the "no fly" list. The Second Circuit Court of Appeals dismissed Arar's civil suit against US officials responsible for his rendition and torture because the government invoked the "state secrets" privilege, but the case was reheard *en banc* in December 2008 and a decision is pending.

A case in France against former Defense Secretary Donald

Rumsfeld was dismissed in 2008—on erroneous legal reasoning that officials have immunity for activities connected to their work. In Germany, a motion was submitted in May 2009 to reconsider the dismissal of a case against a number of former US officials in light of new evidence. Currently, Spanish investigating judges are developing a case against six US lawyers who helped author the torture policy and provide its legal cover.

The British government is implicated in the torture of Binyam Mohamed, a British resident who was arrested in Pakistan in 2002 and extraordinarily rendered to Afghanistan, then to Morocco where he was held for 18 months. In addition to being beaten repeatedly to the point of unconsciousness and threatened with rape and execution, his penis was repeatedly sliced with a razor and hot stinging liquid was poured on the wounds. From Morocco he was transferred to Afghanistan's "dark prison" (a black site near Kabul), and then to GITMO in 2004. Mohamed knew that British intelligence was involved because of the detailed questions interrogators asked about his youth.¹² The Bush administration, responding to British requests, offered to release Mohamed on condition that he would remain silent about his treatment, which he refused. He was finally released and returned to Britain in March 2009. The public disclosures about his treatment and Britain's involvement sparked intense political controversy and led to the first criminal investigation against British intelligence agents for their collusion in CIA torture. However, the British High Court had to dismiss Mohamed's case against the government in the interest of national security because the Obama administration threatened to interrupt bilateral counter-terrorism cooperation if documents detailing his torture by the CIA were revealed.¹³

The torture policy has had damaging effects on US national security, and deadly consequences for US forces as well as civilians in Iraq, Afghanistan and elsewhere. The torture of Arabs and Muslims has been a major recruitment tool for al-Qaeda and other terrorist organizations. According to Matthew Alexander (pseudonym), a retired Air Force major with extensive interrogation experience in Iraq, the number one reason foreign fighters gave for coming to Iraq was anger at the torture and abuses of Abu Ghraib and Guantánamo.¹⁴ Because the majority of casualties and injuries (military and civilian) are the result of suicide and roadside bombings, the majority of which are carried out by foreign fighters, according to Alexander, "At least hundreds but more likely thousands of American lives (not to count Iraqi civilian deaths) are linked directly to the policy decision to introduce the torture and abuse of prisoners."¹⁵

Torture Doesn't Work

America's disastrous past experiences with torture—in Vietnam, Chile and Guatemala, to name a few—should have been lesson enough to deter officials from authorizing torture after 9/11. But now we have a fresh opportunity to

learn some lessons. First, torture cannot be employed with strategic precision; there is institutional "creep" as the use of techniques spreads and there is the inevitable and, in the US case, immense, imprecision of torturing innocents. Second, torture is ineffective in enhancing security; on the contrary, states that do not torture (or extra-judicially execute) prisoners experience substantially less terrorism, and their counter-terrorism efforts are more effective.¹⁶ What the US lacked and desperately needed after 9/11 was human intelligence about al-Qaeda and affiliated organizations. But the decision to authorize torture to compensate for the lack of intelligence had the reverse effects: By indiscriminately arresting innocent people, and by subjecting so many prisoners to violent and dehumanizing treatment, the quest for intelligence assistance and cooperation in critically important communities, let alone "hearts and minds" was damned. Third, the universal illegitimacy and illegality of torture brings disgrace to those who violate the prohibition. American torture squandered "we are all Americans" global empathy after 9/11 and invited righteous condemnation by allied foreign governments. The torture policy reduced domestic support and confidence in the administration, especially among military officers, legal professionals and the intelligentsia.

At a very high cost, the US case confirms that torture does not work by any measure. No modern regime or society is more secure as a result of torture. Its use spreads, its harms multiply, and its corrosive consequences boost rather than diminish the threat of terrorism. ■

Endnotes

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- 4 See ACLU, *Torture Documents Released under Freedom of Information Act*, available at: <http://aclu.org/safefree/torture/torturefoia.html>.
- 5 "Harper's Index," *Harper's Magazine*, March 2009.
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- 16 James I Walsh and James A Piazza, "Why Respecting Physical Integrity Rights Reduces Terrorism," *Comparative Political Studies*, forthcoming.