

DO AS WE SAY, NOT AS WE DO:  
THE CHANGING ROLE OF AMERICA AS TORTURE  
PROSECUTOR TO TORTURE  
PERPETRATOR

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I. INTRODUCTION

President Barack Obama banned the usage of enhanced interrogation techniques against al-Qaeda members and other detainees on January 22, 2009, via Executive Order 13,491<sup>2</sup>—requiring the Central Intelligence Agency (hereinafter the “CIA”) to “close as expeditiously as possible” any currently operating detention facilities and prohibiting the operation of any detention facilities in the future.<sup>3</sup> Executive Order 13,491 was a one hundred and eighty degree turn from President George W. Bush's February 7, 2002 Memo 11, which stated that the Geneva Convention provisions—namely Article 3 and 4—did not apply to al-Qaeda or Taliban detainees.<sup>4</sup> The memo stated that although United States Armed Forces were not legally required to treat the detainees humanely, they would continue to do so as long as military necessity did not require otherwise.<sup>5</sup> In March 2002, after declaring that the Geneva Convention provisions did not apply to al-Qaeda or Taliban detainees, the CIA was authorized to use “enhanced interrogation techniques” to gather intelligence from al-Qaeda and Taliban detainees.<sup>6</sup> The usage of “enhanced

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<sup>2</sup> Executive Orders are official documents, numbered consecutively through which the President of the United States manages the operations of the Federal Government. *Executive Orders FAQ's*, NATIONAL ARCHIVES, <http://www.archives.gov/federal-register/executive-orders/about.html#orders> (last visited Nov. 3, 2014).

<sup>3</sup> Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 27, 2009).

<sup>4</sup> Mark Stencel & Ryan Thornburg, *Bush Administration Documents on Interrogation*, WASH. POST (June 23, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A62516-2004Jun22.html>.

<sup>5</sup> *Id.*

<sup>6</sup> Brian Ross & Richard Esposito, *CIA's Harsh Interrogation Techniques Described*, ABC NEWS (Nov. 18, 2005), <http://abcnews.go.com/Blotter/Investigation/story?id=1322866>.

interrogation techniques” continued uninterrupted and unchallenged until the ban in 2009.<sup>7</sup>

It is common knowledge that the Nazi regime was one of the most atrocious governmental systems in history, responsible for numerous war crimes and crimes against humanity. The armed forces of Nazi Germany were responsible for the systematic torture and the attempted extermination of the Jewish peoples and other minorities throughout Europe.<sup>8</sup> During World War II, Nazi forces also engaged in intelligence gathering from prisoners through a method known as “verschärzte vernehmung” or “sharpened interrogation.”<sup>9</sup> While it is known that these techniques were knowingly used beginning in 1937 until the collapse of the regime in 1945, it is likely that they were used prior to 1937 on an unofficial basis.<sup>10</sup>

Part II of this note will discuss the “enhanced interrogation techniques” used by the Nazis during World War II and the United States during the War on Terror. This section only describes the techniques used and encourages the reader to draw comparisons between the techniques of the two regimes. Part III of this note details the applicable legal standards for torture and how they have changed since the Nuremberg Trials. Part IV of this note will apply the legal standards developed at Nuremberg to the actions of the United States during the War on Terror prior to Executive Order 13,491’s ban on torture.

The aim of this article is to compare the “enhanced” interrogation techniques used by the CIA from 2002 until 2009 with the “sharpened” interrogation techniques used by the Nazi regime and determine whether the conduct in which the United States engaged could have been prosecuted as crimes against humanity and war crimes by the International Military Tribunal and the Norwegian government under the standards used to prosecute Nazi war criminals. This article does not attempt to compare the actions of the United States with the actions of Nazi Germany or to compare their respective leaders. This article only attempts to point out the irony of the United States’ use of

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<sup>7</sup> John A. Wahlquist, *Enhancing Interrogation: Advancing a New Agenda*, 39 ARMY WAR COLLEGE BARRACKS QUARTERLY PARAMETERS 38, 41 (2009).

<sup>8</sup> Andrew Sullivan, “Vershärzte Vernehmung,” THE ATLANTIC, (May 29, 2007), <http://www.theatlantic.com/daily-dish/archive/2007/05/versch-auml-rfte-vernehmung/228158/>.

<sup>9</sup> *Id.*

<sup>10</sup> DARIUS REJALI, TORTURE AND DEMOCRACY 94 (2007).

"enhanced" interrogation techniques not being deemed torture while some of the same or similar acts, when conducted during World War II by the Nazis, were prosecuted as torture.

## II. INTERROGATION TECHNIQUES

The United States Army Field Manual on Intelligence Interrogation defines interrogation as "the systematic effort to procure information to answer specific collection requirements by direct and indirect questioning techniques of a person who is in the custody of the forces conducting the questioning."<sup>11</sup> Interrogation techniques have been used throughout history to gather intelligence information, including during Nazi-era Germany and the present day American War on Terror.<sup>12</sup> Interrogations have the potential to provide extremely useful information to the intelligence community who is conducting the interrogations, but can easily cross the line from an effective intelligence gathering tool to torture.

The definition of torture has varied over time. The United States currently 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 sanction) upon another person within his custody or physical control."<sup>13</sup> Nazi Germany had a different definition of torture: they did not have one at all.<sup>14</sup> Nazi war criminals denied the usage of torture or torture-like tactics during the Nuremberg Trials and the judges agreed to some extent—returning only one guilty verdict for torture.<sup>15</sup>

### *A. Interrogation Techniques Employed by Nazi Germany*

While the Nazis did not have a uniform interrogation policy, they did employ "verschärfte vernehmung"—translated as "sharpened interrogations"—to concentration camp prisoners and other detainees.<sup>16</sup> The "sharpened" techniques were only to be

<sup>11</sup> HEADQUARTERS, DEPT. OF THE ARMY, FIELD MANUAL NO. 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS (2006).

<sup>12</sup> Wahlquist, *supra* note 7, at 40.

<sup>13</sup> 18 U.S.C. § 2340(1) (2013).

<sup>14</sup> REJALI, *supra* note 10, at 95.

<sup>15</sup> REJALI, *supra* note 10, at 36.

<sup>16</sup> Sullivan, *supra* note 8.

employed if the baseline interrogation revealed that the prisoner was likely to offer more information with continued pressure.<sup>17</sup> "Sharpening" techniques included, but were not limited to, "simplest rations (bread and water), hard bed, dark cell, deprivation of sleep, exhaustion exercises, but also the resort to blows with a stick (in case of more than 20 blows, a doctor must be present)."<sup>18</sup> The Gestapo mainly conducted sharpened interrogations and were only used on certain categories of prisoners, including Communists, Marxists, terrorists, saboteurs, members of the Bible-researcher sect, and members of the Nazi resistance movement.<sup>19</sup> The techniques were not to be used to induce confessions or cause a prisoner to incriminate himself, and any exceptions to the policy were to be authorized by the Gestapo chief, Müller.<sup>20</sup> The intention was for "sharpened" interrogation to be used only when necessary and in a highly controlled atmosphere;<sup>21</sup> however, the reality was that Nazi interrogators used the "sharpened" techniques, and more severe techniques, with virtually unfettered discretion.<sup>22</sup>

The prosecutors at the International Military Tribunal Trial of the Major War Criminals at Nuremberg presented evidence that Nazi interrogation techniques regularly went well beyond the "sharpened techniques" authorized by Gestapo chief Müller.<sup>23</sup> Evidence was presented that, in France, six major methods of torture were used: (1) the lash; (2) the bath; (3) electric current; (4) crushing the testicles in a press specially made for the purpose; (5) hanging; and (6) burning with a soldering-lamp or with matches.<sup>24</sup> Although this list is not all-inclusive, it represents the predominant methods of torture employed on prisoners.

The first method of torture, the lash, was the practice of whipping or beating a prisoner until the information sought was revealed.<sup>25</sup> Lashing was fairly common, and was not presented with any additional context at the Nuremberg Trials.<sup>26</sup> The second

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17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.*

21 Sullivan, *supra* note 8.

22 REJALI, *supra* note 10.

23 *Id.*

24 *Id.* at 92-93.

25 *Id.* at 92.

26 *Id.* at 92.

method—the bath—became common practice throughout the German occupation of France.<sup>27</sup> After a prisoner was lashed he was then "plunged head first into a tub full of cold water until he was asphyxiated."<sup>28</sup> Once asphyxiation occurred, the Gestapo then applied artificial respiration.<sup>29</sup> This process was repeated several times in a row if the prisoner continued to remain silent and the prisoner would then be confined to a cold cell without a change of clothes.<sup>30</sup> The bath was so commonly used in France that French prisoners referred to it as "being washed."<sup>31</sup> The third method consisted of applying an electric current to the body through terminals placed on the hands, feet, and ears, as well as one in the anus and one on the end of a prisoner's penis.<sup>32</sup> Interrogators used hand-cranked machines to generate the electric charge to shock the prisoners.<sup>33</sup>

The fourth technique, pressing, was very common as well. A device was developed to crush and twist the testicles of the prisoner.<sup>34</sup> Pressing was not limited to the prisoner's private areas; however, devices were also developed to "crush the ends of fingers," tighten around the wrist, tighten around the skull, and squeeze the entire body.<sup>35</sup> The fifth method, hanging, consisted of a prisoner's hands being handcuffed behind him, a hook being inserted through the handcuffs, and the prisoner being lifted up via a pulley system.<sup>36</sup> At first, the prisoner would be jerked "up and down" and then suspended for periods up to four hours.<sup>37</sup> Testimony was offered in the Nuremberg Trials of at least one prisoner, who after being suspended "for more than four hours, had lost the use of both arms."<sup>38</sup> The last commonly used technique was burning. Prisoners would be burned by blow-torches, receive pokes from red hot pieces of metal on their backs,

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<sup>27</sup> REJALI, *supra* note 10, at 92.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> REJALI, *supra* note 10, at 92.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 93.

<sup>37</sup> REJALI, *supra* note 10, at 93.

<sup>38</sup> *Id.*

have their toes burned with cotton pads dipped in gasoline, and be subject to an "electric bench where the feet are slowly roasted."<sup>39</sup>

Although expansive testimony was offered regarding the six techniques described above, usage of the "sharpened interrogation techniques" authorized by Gestapo chief Müller are the only ones that resulted in conviction at the Nuremberg Trials or at subsequent war crimes trials.<sup>40</sup>

### B. Interrogation Techniques Employed by the United States

While adamantly opposed to torture as defined by Federal torture statute, the United States has used "enhanced interrogation techniques" to probe Taliban and al-Qaeda detainees.<sup>41</sup> Enhanced interrogation techniques are those techniques, which are "designed to psychologically 'dislocate' the detainee, maximize his feeling of vulnerability and helplessness, and reduce or eliminate his will to resist" efforts to obtain critical intelligence information.<sup>42</sup> These techniques were to be employed when the standard measures were not producing adequate results.<sup>43</sup> Standard interrogation measures consist of shaving, stripping, diapering, hooding, isolation, subjection to white noise or loud music, continuous light or darkness, uncomfortably cool environment, dietary restrictions, shackling, and sleep deprivation not to last longer than 48 hours.<sup>44</sup> The standard measures are to be applied without physical or substantial psychological pressure.<sup>45</sup>

The "enhanced measures," to be applied with physical or psychological pressure beyond that of the standard measures, include attention grasps, facial holds, insult slaps, abdominal slaps, prolonged diapering, sleep deprivation for periods more than 48 hours, water dousing, stress positioning, walling, cramped

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<sup>39</sup> REJALI, *supra* note 10, at 93 (quoting INTERNATIONAL MILITARY TRIBUNAL (IMT), TRIAL OF THE MAJOR WAR CRIMINALS (Nuremberg: n.p., 1949), 6:173).

<sup>40</sup> *Id.* at 94.

<sup>41</sup> *Id.* at 500.

<sup>42</sup> Letter to Dan Levin, Acting Assistant Attorney General 7 (May 17, 2004), available at <https://www.aclu.org/sites/default/files/torturefoia/released/103009/cia-olc/2.pdf> (regarding OMS guidelines on medical and psychological support to detainee rendition, interrogation, and detention). .

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 8.

confinement, and waterboarding.<sup>46</sup> The goal of both the standard and the “enhanced” techniques is to trigger a psychological impact and “dislocat[e] [the prisoner’s] expectations regarding the treatment he believes he will receive.”<sup>47</sup>

Some of the “enhanced” techniques are rather self-explanatory, such as the facial holds, insult slaps, abdominal slaps, and sleep deprivation. However, some of the other techniques such as walling, water dousing, stress positioning, and waterboarding require additional context. Walling involves the use of a flexible, false wall into which the detainee is “quickly and firmly” pushed by the interrogator.<sup>48</sup> The detainee’s impact with the wall is supposed to create a loud noise that further serves to shock and surprise the detainee.<sup>49</sup> Walling may be employed as little as one time per interrogation session to upwards of thirty consecutive times.<sup>50</sup> Water dousing is a technique where “cold water is poured on the detainee either from a container or from a hose without a nozzle.”<sup>51</sup> The water must be drinkable and cannot be colder than forty-one degrees Fahrenheit; however, the warmer the water the longer the duration of exposure may continue up to one hour for water that is fifty-nine degrees.<sup>52</sup> A variation of water dousing called “flicking” was also authorized.<sup>53</sup> Flicking occurs when an interrogator wets his fingers and flicks them at the detainee causing droplets of water to hit the detainee’s face.<sup>54</sup> The flicking variation is used to create a temporary feeling of humiliation or insult.<sup>55</sup>

Interrogators were also authorized to use stress positioning to encourage detainee cooperation.<sup>56</sup> Stress positioning was limited to three variations: "(1) sitting on the floor with legs

<sup>46</sup> *Id.* at 7.

<sup>47</sup> Letter to Dan Levin, Acting Assistant Attorney General, *supra* note 42, at 7.

<sup>48</sup> Memorandum from U.S. Department of Justice for John A. Rizzo Senior Deputy General Counsel, CIA 10 (May 10, 2005), available at <http://www.justice.gov/olc/docs/memo-bradbury2005-3.pdf> (regarding techniques that may be used in the interrogation of a high value al Qaeda detainee).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 11.

<sup>52</sup> *Id.* at 11-12.

<sup>53</sup> Memorandum from U.S. Department of Justice for John A. Rizzo Senior Deputy General Counsel, CIA , *supra* note 48, at 12.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 11.

extended straight out in front and arms raised above the head, (2) kneeling on the floor while leaning back at a 45 degree angle, and (3) leaning against a wall generally about three feet away from the detainee's feet, with only the detainee's head touching the wall, while his wrists are handcuffed in front of him or behind his back.<sup>57</sup> The most controversial technique that garnered the most media and other attention is the waterboard technique. When a detainee was waterboarded he would be laying on his back on a gurney that was angled at ten to fifteen degrees downward.<sup>58</sup> His head would be at the lower end of the gurney and a cloth would be placed over his face obstructing his nose and mouth.<sup>59</sup> An interrogator would then pour cold water on the cloth from a height of approximately six to eighteen inches away from the detainee's face.<sup>60</sup> The cloth creates a barrier once it gets wet that makes it difficult, if not impossible, for the detainee to breathe.<sup>61</sup> Under the protocol, waterboarding may only be applied in short duration in order to prevent drowning.<sup>62</sup> If the detainee attempts to defeat the waterboarding application, the interrogator "may cup his hands around the detainee's nose and mouth to dam the runoff."<sup>63</sup> Additionally, if the detainee tries to hold his breath during application, the interrogator may begin pouring the water as the detainee is exhaling.<sup>64</sup> The interrogators were also required to use saline solution instead of potable water in case the detainee chose to try and defeat waterboard application by swallowing the liquid.<sup>65</sup> The CIA also contended that usage of saline solution instead of water protected the detainees from hyponatremia if they chose to drink the solution during application.<sup>66</sup> The waterboarding experience is not meant to induce physical pain, only to cause fear and panic and allow the detainee to experience the sensation of drowning.<sup>67</sup>

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<sup>57</sup> *Id.*

<sup>58</sup> Memorandum from U.S. Department of Justice for John A. Rizzo Senior Deputy General Counsel, CIA, *supra* note 48, at 15.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Memorandum from U.S. Department of Justice for John A. Rizzo Senior Deputy General Counsel, CIA, *supra* note 48, at 13.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 14.

<sup>66</sup> *Id.* at 13.

<sup>67</sup> *Id.*

All of the techniques described were authorized for usage on al-Qaeda and Taliban detainees from early 2002 until President Barack Obama issued Executive Order 13,491 in January 2009, prohibiting the CIA from operating any detention facilities and requiring them to close any currently operating detention facilities.<sup>68</sup>

### III. LEGAL STANDARDS APPLICABLE TO TORTURE

The legal prohibitions on torture have changed over time both internationally and within the United States. Prior to the Nuremberg Trial proceedings, the Hague Conventions of 1899 and 1907 governed the customary laws of war.<sup>69</sup> While the Hague Conventions do not specifically address or prohibit torture, they do address the treatment of prisoners of war in Article 4 of the Annex to the Convention, stating that they must be treated humanely.<sup>70</sup> In between the Hague Conventions and the Nuremberg Trials, the United States and several other powers entered into the Geneva Convention of 1929, which related directly to the treatment of prisoners of war.<sup>71</sup> Article 5 of the 1929 Geneva Convention specifically states, "No pressure shall be exercised on prisoners to obtain information regarding the situation in their armed forces or their country. Prisoners who refuse to reply may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind whatever."<sup>72</sup> Subsequent to the Nuremberg Trials, the Geneva Convention of 1949 specifically addressed torture in common article 3, stating that "the following acts are and shall remain prohibited at any time and in any place . . . (a)

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<sup>68</sup> Exec. Order No. 13,491, *supra* note 3.

<sup>69</sup> *Regulations Concerning the Laws and Customs of War on Land, the Hague, 29 July 1899*, ICRC, <https://www.icrc.org/applic/ihl/ihl.nsf/INTRO/150?OpenDocument> (last visited Feb. 8, 2015).

<sup>70</sup> *Treatment of Prisoners of War. Geneva, 12 August 1949*, ICRC, <https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=E160550475C4B133C12563CD0051AA66> (last visited Feb. 8, 2015).

<sup>71</sup> *Treatment of Prisoners of War. Geneva, 27 July 1929*, ICRC, <https://www.icrc.org/ihl/INTRO/305> (last visited Feb. 8, 2015).

<sup>72</sup> *Treatment of Prisoners of War. Geneva. 27 July 1929*, ICRC, <https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=0ED35000620A78B7C12563CD00518D84> (last visited Feb. 8, 2015).

violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture."<sup>73</sup>

Currently, in addition to the Geneva Conventions, the United States is a party to the United Nations Convention Against Torture.<sup>74</sup> The Convention Against Torture was introduced in 1984, and the United States ratified the treaty on October 21, 1994.<sup>75</sup> The Convention defines torture as follows:

the term "torture" means 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.<sup>76</sup>

The Convention also requires all parties to the treaty to actively prevent torture in any territories under its jurisdiction via legislative, administrative, or judicial measures.<sup>77</sup> The second section of article 2 prohibits the usage of justifications for torture of a "state of war or a threat of war, internal political instability or any other public emergency."<sup>78</sup> The third section of article 2

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<sup>73</sup> *Treatment of Prisoners of War. Geneva, 12 August 1949*, ICRC, <https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=E160550475C4B133C12563CD0051AA66> (last visited Feb. 8, 2015). .

<sup>74</sup> *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?mtidsg\\_no=IV-9&chapter=4&lang=en#top](https://treaties.un.org/Pages/ViewDetails.aspx?mtidsg_no=IV-9&chapter=4&lang=en#top) (last modified Feb. 8, 2015).

<sup>75</sup> *Id.*

<sup>76</sup> No. 24841, *Multilateral, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, art. 1, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201465/volume-1465-I-24841-English.pdf> (last visited Feb. 8, 2015).

<sup>77</sup> *Id.* at art. 2(1).

<sup>78</sup> *Id.* at art. 2(2).

prohibits using an order from a superior or a public authority as a justification of torture.<sup>79</sup> These provisions essentially eliminate any possibility that torture would be permissible under any circumstance.

#### *A. Standard Established to Prosecute Nazi War Criminals*

The United States, France, the United Kingdom, and the Soviet Union established the International Military Tribunal at Nuremberg on August 8, 1945, "for the just and prompt trial and punishment of the major war criminals of the European Axis."<sup>80</sup> Section 2 of the Constitution of the International Military Tribunal sets out the jurisdiction and general principles for which the Tribunal was established.<sup>81</sup> The Tribunal was established for the prosecution of three types of crimes: (1) crimes against peace; (2) war crimes; and (3) crimes against humanity.<sup>82</sup> The ill treatment or torture of prisoners of war fell under the war crimes provision and ill treatment of the civilian population fell under the crimes against humanity provision.<sup>83</sup>

Despite the inhumane treatment of millions of civilians only one conviction was returned at Nuremberg for torture.<sup>84</sup> Ernst Kaltenbrunner, the head of the Reich Main Security Office and Chief of the Security Police and Security Service, was convicted of war crimes and crimes against humanity and sentenced to death for his participation in the system of concentration camps.<sup>85</sup> Kaltenbrunner's convictions stemmed from the treatment of prisoners housed in the concentration camp system and the interrogation of said prisoners for intelligence

<sup>79</sup> *Id.* at art. 2(3).

<sup>80</sup> *Constitution of the International Military Tribunal § I, art. 1*, YALE LAW SCHOOL, available at <http://avalon.law.yale.edu/imt/imtconst.asp> (last visited Feb. 8, 2015).

<sup>81</sup> *Constitution of the International Military Tribunal § II, art. 6*, YALE LAW SCHOOL, available at <http://avalon.law.yale.edu/imt/imtconst.asp> (last visited Feb. 8, 2015).

<sup>82</sup> *Constitution of the International Military Tribunal § II, art. 6(a) – (c)*, YALE LAW SCHOOL, available at <http://avalon.law.yale.edu/imt/imtconst.asp> (last visited Feb. 8, 2015).

<sup>83</sup> *Constitution of the International Military Tribunal § II, art. 6(b), (c)*, YALE LAW SCHOOL, available at <http://avalon.law.yale.edu/imt/imtconst.asp> (last visited Feb. 8, 2015).

<sup>84</sup> REJALI, *supra* note 10.

<sup>85</sup> Judgment: Kaltenbrunner, YALE LAW SCHOOL, <http://avalon.law.yale.edu/imt/judkalt.asp> (last visited Feb. 8, 2015).

information while he was head of the Reich Main Security Office.<sup>86</sup> The interrogation methods that Kaltenbrunner authorized for usage in the concentration camps were referred to as “third degree” methods and included a “bread and water diet, dark cells, deprivation of sleep, drill to exhaustion, and flogging.”<sup>87</sup> These “third degree” methods are the same methods described in the Müller memo and were markedly less severe than the methods testified to during portions of the Nuremberg Trials.

Kaltenbrunner’s conviction established the standard for torture as the third degree or sharpened interrogation methods described in the Müller memo.<sup>88</sup>

The second standard established for the prosecution of Nazi war criminals was one established by Norway outside of the Nuremberg Trials.<sup>89</sup> The Director of Public Prosecutions in Norway charged Richard Wilhelm Hermann Bruns and two others with war crimes that were in violation of several articles of the Norwegian Civil Criminal Code.<sup>90</sup> The defendants, including Bruns, were found not guilty of the murder charges but guilty of the torture charges.<sup>91</sup> They subsequently appealed the decisions to the Supreme Court of Norway.<sup>92</sup> The defendants based their appeals on the grounds that the acts of torture were carried out on superior orders and that they were acting under duress, that the acts of torture did not result in death, only minor injuries, and that the acts of torture committed were permissible under international law as reprisal against illegal military organizations who were acting in violation of international law.<sup>93</sup> The Supreme Court of Norway rejected all three grounds for appeal and the

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<sup>86</sup> *Id.*

<sup>87</sup> *War Crimes and Crimes Against Humanity, Part III Common Plan and Conspiracy in the Establishment of Concentration Camps*, Donovan Nuremberg Trials Collection, Vol. IX, Section 16.01, available at [http://library2.lawschool.cornell.edu/donovan/pdf/Nuremberg\\_3/Vol\\_IX\\_16\\_01.pdf](http://library2.lawschool.cornell.edu/donovan/pdf/Nuremberg_3/Vol_IX_16_01.pdf) (last visited Feb. 8, 2015).

<sup>88</sup> REJALI, *supra* note 10.

<sup>89</sup> *Case No. 12, Trial of Kriminalsekretär, Richard Wilhelm Hermann Bruns and Two Others*, available at [http://www.worldcourts.com/ildc/eng/decisions/1946.07.03\\_Norway\\_v\\_Bruns.pdf](http://www.worldcourts.com/ildc/eng/decisions/1946.07.03_Norway_v_Bruns.pdf) (last visited Feb. 8, 2015).

<sup>90</sup> *Id.* at 15.

<sup>91</sup> *Id.* at 19.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

defendants' convictions were upheld.<sup>94</sup> The lower court determined that Bruns specifically had interrogated a sick Norwegian using leg screws to hold him in place and beating him with various implements.<sup>95</sup> After the beating was concluded, Bruns confined the unconscious Norwegian to a cellar for four days before receiving any medical attention.<sup>96</sup> The lower court also found that Bruns, within the three year period of 1942 to 1945, used the "method of 'verschärfte Vernehmung'" on 11 Norwegian citizens.<sup>97</sup> The court describes the method as using "various implements of torture, cold baths and blows and kicks in the face and all over the body."<sup>98</sup> The court also noted that most of the prisoners suffered considerably because of the injuries received as a result of the interrogations.<sup>99</sup>

The Supreme Court of Norway held that "the method of 'verschärfte Vernehmung' was nothing but a German routine police method and could not be a reprisal."<sup>100</sup> The court also held that the defendants' claims of acting under superior orders and duress were insufficient because there was no proof that such orders were given and also that defendants' had "used torture on their own accord."<sup>101</sup> The two decisions of the International Military Tribunal and the Supreme Court of Norway both regard the "sharpened" interrogation techniques detailed in Muller's memo as acts of torture.

#### *B. Standard Established by the United States Office of Legal Counsel*

In addition to the Geneva Convention, the United States is currently a party to the Convention Against Torture, and also has an anti-torture statute codified at 18 U.S.C.

§ 2340A.<sup>102</sup> However, during the War on Terror, the Office of Legal Counsel (hereinafter "OLC") has been called on several

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<sup>94</sup> Case No. 12, *Trial of Kriminalsekretär, Richard Wilhelm Hermann Bruns and Two Others*, *supra* note 89, at 19.

<sup>95</sup> *Id.* at 16.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> Case No. 12, *Trial of Kriminalsekretär, Richard Wilhelm Hermann Bruns and Two Others*, *supra* note 89, at 16.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> 18 U.S.C. § 2340A (2012).

times to determine if actions taken by the CIA violate the United States anti-torture statute.<sup>103</sup> In a collection of documents written in 2005, known as the “Torture Memos,” the OLC issued opinions as to the legality of certain methods of “standard” and “enhanced” interrogation techniques.<sup>104</sup>

The first memo, issued May 10, 2005, explored the application of the anti-torture statute to interrogation techniques that may be used on high value al-Qaeda detainees.<sup>105</sup> The memo declares that “[t]orture is abhorrent both to American law and values” and that the President has stated without a doubt that the United States is not to engage in torture.<sup>106</sup> However, after the bold declaration against torture, the OLC states their conclusion that the techniques used by the CIA do not amount to torture and do not violate the United States anti-torture statute.<sup>107</sup>

The CIA represented to the OLC that enhanced interrogation techniques would only be used on high value detainees, defined as a person who:

- (1) is a senior member of al-Qai’da or an al-Qai’da associated terrorist group (Jemaah Islamiyah, Egyptian Islamic Jihad, al-Zarqawi Group, etc.); (2) has knowledge of imminent terrorist threats against the USA, its military force, its citizens and organizations, or its allies; or that has/had direct involvement in planning and preparing terrorist actions against the USA or its allies, or assisting the al-Qai’da leadership in planning and preparing such terrorist actions; and (3) if released, constitutes a clear and continuing threat to the USA or its allies.<sup>108</sup>

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<sup>103</sup> DAVID COLE, TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE 3-4 (2009).

<sup>104</sup> *Id.*

<sup>105</sup> Memorandum from U.S. Department of Justice for John A. Rizzo Senior Deputy General Counsel, CIA, *supra* note 48, at 1.

<sup>106</sup> *Id.* at 1-2. See e.g., 40 Weekly Comp. Pres. Doc. at 1167-68, GPO, available at <http://www.gpo.gov/fdsys/pkg/WCPD-2004-07-05/pdf/WCPD-2004-07-05-Pg1167.pdf> (last visited Feb. 8, 2015) (“America stands against and will not tolerate torture . . . Torture is wrong no matter where it occurs, and the United States will continue to lead the fight to eliminate it everywhere.”).

<sup>107</sup> Memorandum from U.S. Department of Justice for John A. Rizzo Senior Deputy General Counsel, CIA, *supra* note 48, at 5.

<sup>108</sup> *Id.* at 6.

They also stated that any detainee potentially subject to “enhanced” interrogation techniques would be examined and evaluated by CIA medical and mental health professionals to “ensure that he is not likely to suffer any severe physical or mental pain or suffering as a result of interrogation.”<sup>109</sup> In addition, medical and mental health professionals were to be on-scene throughout the interrogation to make sure detainees were not pushed beyond their limits.<sup>110</sup> The CIA also reasoned that the techniques to be used on the detainees “have all been imported from military Survival, Evasion, Resistance, Escape (“SERE”) training, where they have been used for years on U.S. military personnel.”<sup>111</sup> The limited application to high value detainees, the medical safeguards, and the fact that the techniques have been used on U.S. military personnel were all offered as reasons why the enhanced interrogation techniques did not amount to torture under the anti-torture statute.<sup>112</sup>

The United States anti-torture statute contains the following definition of torture: “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 incident to lawful sanctions) upon another person within his custody or physical control.”<sup>113</sup> To determine whether the CIA sanctioned enhanced interrogation techniques could be construed as torture, the OLC sought to determine the meaning of four phrases within the statute: “(1) the meaning of ‘severe’; (2) the meaning of ‘severe physical pain or suffering’; (3) the meaning of ‘severe mental pain or suffering’; and (4) the meaning of ‘specifically intended.’”<sup>114</sup>

The OLC first sought to construe the meaning of the word “severe,” as it was not specifically defined in the statute.<sup>115</sup> They looked to three factors when determining the meaning: 1) the ordinary or natural meaning; 2) the common understanding of the word “torture” and 3) the context in which the statute was

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 8.

<sup>112</sup> Memorandum from U.S. Department of Justice for John A. Rizzo Senior Deputy General Counsel, CIA, *supra* 48, at 5.

<sup>113</sup> 18 U.S.C. § 2340(1) (2012).

<sup>114</sup> Memorandum from U.S. Department of Justice for John A. Rizzo Senior Deputy General Counsel, CIA, *supra* note 48, at 20-21.

<sup>115</sup> *Id.* at 21.

enacted.<sup>116</sup> The natural meaning of “severe” is relatively straightforward and does not require much additional explanation; however, the common understanding of the word “torture” and the statutory context required additional investigation. The OLC looked to other U.S. torture-related statutes as well as international treaties and judicial interpretations of similar language in the U.S. torture statutes.<sup>117</sup> The conclusion was that the meaning of “severe” in the context of torture was a “sensation or condition that is extreme in intensity and difficult to endure.”<sup>118</sup>

The statute also does not provide a specific meaning for “severe physical pain or suffering.” The first clause, “severe physical pain,” is “relatively straightforward; it denotes physical pain that is extreme in intensity and difficult to endure.”<sup>119</sup> However, “severe physical suffering” requires more precision because of the lack of definition of the word “suffering.” The OLC looked to the text of the anti-torture statute and the Convention Against Torture, but was unable to find adequate guidance as to Congress’s intent.<sup>120</sup> They resorted to their prior understanding of “suffering” from a 2004 opinion, *Legal Standards Opinion*, as well as the commonly understood dictionary meaning, to come up with a definition.<sup>121</sup> They concluded that “severe physical suffering” under the anti-torture statute “means a state or condition of physical distress, misery, affliction, or torment, usually involving physical pain, that is both extreme in intensity and significantly protracted in duration or persistent over time.”<sup>122</sup>

Although the anti-torture statute does provide a specific meaning for “severe mental pain or suffering,” there was a question as to whether the four elements that were determined to create severe mental pain or suffering were exclusive.<sup>123</sup> The statute defines “severe mental pain or suffering” as:

[T]he prolonged mental harm caused by or resulting from –

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 22.

<sup>118</sup> *Id.* at 21.

<sup>119</sup> Memorandum from U.S. Department of Justice for John A. Rizzo Senior Deputy General Counsel, CIA, *supra* note 48, at 24.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 25.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 26.

- (A) The intentional infliction or threatened infliction of severe physical pain or suffering;
- (B) The administration or application, or threatened administration or application, or mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
- (C) The threat of imminent death; or  
 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>124</sup>

The OLC sought to determine if acts that fell outside of the four elements listed in the statute could still constitute acts causing “severe mental pain or suffering.”<sup>125</sup> The OLC again looked at the general dictionary meaning, as well as the 2004 opinion, *Legal Standards Opinion*, to determine Congress’s intent as to exclusivity.<sup>126</sup> They reached their conclusion based on the clear language of the statute, mainly because the statute does not include any phrases suggesting that additional acts might fit.<sup>127</sup> The definite language of the statute was instructive as to Congress’s intent to limit acts that produce severe mental pain or suffering to the four elements listed.<sup>128</sup>

The OLC had a little bit more trouble grappling with the meaning of “specific intent” within the statute.<sup>129</sup> They indicated that the case law on point was unclear and inconsistent.<sup>130</sup> However, they again resorted to the commonly understood meaning of “specific intent,” which is “to designate a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime.”<sup>131</sup> After detailing the usage of “specific intent” within several different Supreme Court cases and one Circuit Court case, the OLC stated

<sup>124</sup> 18 U.S.C. § 2340(2) (2012).

<sup>125</sup> Memorandum from U.S. Department of Justice for John A. Rizzo Senior Deputy General Counsel, CIA, *supra* note 48, at 26.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 27.

<sup>129</sup> *Id.* at 29.

<sup>130</sup> Memorandum from U.S. Department of Justice for John A. Rizzo Senior Deputy General Counsel, CIA, *supra* note 48, at 29.

<sup>131</sup> *Id.*

that they “will not attempt to ascertain the precise meaning of ‘specific intent’ in sections 2340-2340A.”<sup>132</sup> However, they state that “specific intent” would be present if “an individual performed an act and ‘consciously desire[d]’ that act to inflict severe physical or mental pain or suffering.”<sup>133</sup> They also reinforced two points regarding specific intent within the statute that it is different from motive and that specific intent can be found even if the interrogator would take the action only in certain conditions.<sup>134</sup>

#### IV. APPLICATION OF ESTABLISHED STANDARD TO AMERICAN ACTIONS

Although the OLC declared in its “Torture Memos” that the “enhanced” interrogation techniques did not violate the U.S. anti-torture statute nor the Convention Against Torture, is that really dispositive of whether these techniques are torture? The standards employed at the Nuremberg Trials, as well as in Norway, to prosecute Nazi war criminals, suggest that American “enhanced” interrogation techniques would amount to torture if prosecuted similarly. However, the likelihood of an International Military Tribunal being created and convened to address American “enhanced interrogation techniques” is virtually non-existent; the United States is the unofficial “world police,” not the loser in a world war.

As detailed above, Nazi war criminals were prosecuted for war crimes and crimes against humanity based on the usage of the sharpened interrogation techniques in the Müller memo. The majority of the techniques are identical to those detailed in the “Torture Memos” from the OLC. The only technique not specifically stated as employed by the CIA that was employed by Nazi war criminals were blows to the body with a stick. The United States enhanced interrogation techniques differ from that of the Nazi war criminals in that they include water dousing and waterboarding. The United States water techniques are the most serious of the enhanced interrogation techniques<sup>135</sup> and more serious than those techniques used by the Nazi war criminals;

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<sup>132</sup> *Id.* at 28.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> Memorandum from U.S. Department of Justice for John A. Rizzo Senior Deputy General Counsel, CIA, *supra* note 48, at 43.

however, they do not amount to torture under the anti-torture statute or the Convention Against Torture.<sup>136</sup>

The United States was a major force in the establishment of the International Military Tribunal at Nuremberg and helped in developing the standards for Nazi war crimes prosecutions. The United States should now hold itself to those same standards when considering the legality of “enhanced” interrogation techniques. If the techniques used today are more severe than those proved as torture at Nuremberg, it logically follows that the techniques would be considered torture. That is not to say that the Nazis did not employ techniques that were far more severe and vicious than what the United States used to interrogate detainees. However, the only successful prosecutions were based on those techniques in the Müller memo and that is what the United States techniques must be compared to.

In making that comparison, it is clear that if the tables were turned and the United States was on the losing end of the War on Terror, the detainees from Middle Eastern countries that were subjected to “enhanced” interrogation techniques would have a case for torture based on the Nuremberg and Norwegian trials. The “Torture Memos” issued by the OLC provide direct evidence that CIA operators applied the “enhanced” interrogation techniques and establish that the CIA engaged in what would be considered organized torture under the Nuremberg Trial and Norwegian trial standards. A prosecutor in a case for torture against the United States would likely succeed where the prosecutors at Nuremberg failed because they could establish an official torture policy. The amount of documentation regarding the usage of “enhanced interrogation techniques” would seem to easily satisfy the Nuremberg standard of “showing that everywhere and in every case the German policy used the same methods.”<sup>137</sup> Although that is a difficult statement to make and a more difficult one to believe, the logic does not fail. Because the United States is the one to write the rules, we also have the ability to designate ourselves above the rules under the guise of statutory interpretation.

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<sup>136</sup> *Id.*

<sup>137</sup> REJALI, *supra* note 10.

## V. CONCLUSION

The United States is in a unique international position; we help to set standards of conduct for the remainder of the world, and in turn we must abide by those standards ourselves. Engaging in the use of “enhanced” interrogation techniques, which are not legally torture according to the OLC, would amount to torture if the same legal standards used to prosecute Nazi war criminals were employed. However, make no mistake, the purpose of this article is not to compare the United States intelligence gathering tactics in the War on Terror with the Nazi regime during World War II, nor to compare the CIA with the *Gestapo*. Those comparisons are not valid and would only serve to inflame an already sensitive area of discussion.

The sole purpose of this article is to theorize that if the roles were reversed, the tactics used by the United States to gather intelligence in the War on Terror would be prosecutable under the standard for torture established by the International Military Tribunal at Nuremberg and the Norwegian Supreme Court. In evaluating the actions of the United States, one must look to the standards propagated by the United States and other world powers almost seventy years ago and wonder why, after all the public declarations and enactments of international treaties and federal statutes against torture, the standard for what constitutes torture today is so much higher than it was then. As we move forward in a global society, is the United States still in a position to hold others to a higher standard while ignoring that standard in our own actions, or rationalizing our actions through a created legal fiction? This article attempts to prove the answer to that question is no; in order to hold others accountable, we must first be accountable to ourselves.