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BY SHEIKH SHOWKAT HUSSAIN
CONFLICT OR NO CONFLICT women remain targets of oppression. Some of the oppressive practices like Sati and dowry are rooted in Indian traditions whereas others are the product of laws and conflicts. The phenomenon prevails all across globe and we see instances of it even in “civilised countries”. Switzerland only granted women the power to vote in 1972 and the US is yet to have a woman head of state. Even in countries where women possess voting rights and occupy the highest political offices this does not necessarily indicate women’s empowerment. Since the end of World War II, human rights have become the focus of international attention, developing an international legal framework. This has been reflected too in the creation of specifically women’s rights: the United Nations established its Sub-Commission On Women and created a normative framework on rights of women. Right to equality and right to protection from discrimination became universally accepted standards of gender justice. Many legislations and judicial verdicts have tried to incorporate this internationally-recognised legal frame work into domestic jurisdiction. Despite these efforts women continue to suffer. Old forms of oppression and cruelty have been replaced by the new ones. Previously the girl child was buried alive — now we have feticide. Rape and dowry continue to haunt women throughout India.

Though the state of Jammu and Kashmir is comparatively free from so many social evils prevalent elsewhere, as conflict ridden zone Kashmir has a different set of problems for women. Rape remains a prevalent evil across India. Occurrence of rape by civilians has in some cases attracted lot of media and public attention. We have seen the enormity of this attention in some recent rape cases in the Indian capital of New Delhi. Public outcry brought legislations redefining the age of minority in relation to liability for rape prosecution.

The focus of judicial pronouncements within mainland India tend to focus on rapes committed by members of the Indian security forces. Yet this is not the case in the conflict zones of Kashmir and the North East. The Delhi Domestic Workers Forum case remains pertinent in this context. In this case, according to statement of one of the victims as narrated by the Supreme Court of India:

“I was coming from my home town to Delhi by the Muri Express. On 10-2-1993 at about 11.00pm, the Muri Express was at Khurja Railway station. At that time, I along with my village girls (1) UshaMinz D/o John Minz (2) Shanti D/o SiriAnuasMinz (3) JosphineKerketta D/o JunusKerketta (4) Rosy Kerketta D/o RemisKerketta (5) Nilli Ross D/o Boas Minz, was travelling in SHI Coach. I slept on Berth No. 50. Our friend, Shanti, woke up and told that some persons were teasing her. When, I and my remaining friends got up, we saw that about 7/8 army ‘jawans’ had come near us. Then we all friends got up and sat on our respective seats. Then all those army men began to molest us. First they – two Sikhs and 6 clean-shaved men made me and my five friends sit on lower seats and then kissed and hugged us and lured on our body and breasts. On our objection they caught us from our hair and began to beat us. When we tried to cry, they shut our mouths. Then they threatened me and my friends that in case we will make hue and cry they will throw us out of the running train and will kill us. On this we got frightened and sat there. From these 8 army men – two Sikhs and 6 clean-shaved, one
Sardar and clean-shaved men forcibly made me to lie down on the lower berth and on the other adjacent lower berth another Sardar took another girl and one clean-shaved fauji took Rosy to bathroom. Two other army men made Shanti to lie down on the nearby seat. Another two men tried to take Usha and Nillibut both sat under the seat to hide themselves. Thereafter, first Sardarfauji (whose name has been disclosed in the court as Dhir Singh S/o Puran Singh, PO: Dostpur, PS: Kalanaur, District Gurdaspur Punjab) forcibly put off my clothes and removed underwear, and raped me. After him, another clean-shaved fauji, whose face is round and height is about 5′5″ raped me. My friends, Rosy and Shanti were also forcibly raped by remaining army men. Thereafter, we tried to lodge a report with the police on the way, but nobody listened to us. When the train stopped at New Delhi Railway Station, then I and my friends attempted to catch these persons. They all got down and ran here and there. However, I and my friends could hold of aforesaid Sardar Dhir Singh, who had raped me. We all caught him. In the meanwhile, some persons gathered there. Some army officers and policemen overpowered him and took him to MCO office. Then after a while they came in Station and handed over Sardar Dhir Singh to you. Sardar Dhir Singh has raped me and his colleagues have raped me and my friends.”

Supreme Court of India admitted the petition and indicated several broad parameters relating to assistance of rape victims. These include provision of legal and medical assistance, maintenance of anonymity of the abused and compensation to the victim etc.

Despite these Supreme Court directives the situation does not appear to have changed. A similar incident of gang rape occurred recently against a 14 year old 10th class minor girl on board Howrah- Amritsar express. Members of the armed forces committed these heinous crimes onboard trains which remain under the protection of the Railway Protection Force, railway staff and under the surveillance of police of the areas through which the trains move. These incidents occurred, in spite of the fact that the accused were not on a combat mission and the victims were not members of a hostile population. The women were targeted even though the men in uniform didn’t enjoy immunity the way they avail within the disturbed areas of Kashmir and North East under the notorious 1958 Armed Forces Special Powers Act. This attitude is not confined to those segments of security personnel who come from humble background but also with its elite formations deputed to international peace keeping assignments under the auspices of UN. A few years back the Indian peace keepers were dispatched back from Congo for being involved in rape of civilian women.

Jammu & Kashmir has been a conflict ridden region for the past 26 years. It is densely militarised. Armed forces are deputed to assist civilian authorities to maintain law and order all across the state. These assignments often create hostility between locals and the forces. The hostile relations lead to incidents of rape and other human rights abuses against locals. This happens even though India is a party to the 1949 Geneva Conventions which forbid such acts in non-international armed conflicts under common Article 3. India is not a party to the1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment but it has ratified the 1979 Convention on the Elimination of All Forms of Discrimination against Women and the 1966 Covenant on Civil and Political Rights. These instruments identify all such acts as abuse of human rights. The provisions of these conventions are perceived to be part of customary international law thus binding even upon those states which are not party to the

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1 Delhi Domestic Working Women’s Forum V. Union Of India And Others (1995) I Supreme Court Cases 14.
2 Times of India (News paper) 30th December 2015.
3 Indian Express (Newspaper) 18th of March 2008.
Jammu & Kashmir has been a conflict ridden region for the past 26 years. It is densely militarised. Armed forces are deputed to assist civilian authorities to maintain law and order all across the state. These assignments often create hostile relations between locals and forces. The hostile relations lead to incidents of rape and other human rights abuses against locals.
Conflict ridden region for the past 26 years. Armed forces are deputed to assist law and order all across the state. Hostility between locals and the forces leads to incidents of rape and other human rights abuses against locals.
specific convention. Irrespective of Indian obligations under international law the constitution of India as interpreted by the Supreme Court provides for “right to dignity” and “protection against torture” as essential ingredients of right to life as guaranteed under Article 21 of the Indian Constitution.4

Some of the reported incidents of rape by security forces in Jammu & Kashmir are mentioned below:

May 1990: In one well-publicised case a young bride, Mubina Gani, was detained and raped by BSF soldiers while she was traveling from the wedding to her husband’s home. Her aunt was also raped.5

November 1991: Chak Saidapora, a hamlet of about fifty families, four kilometres from Shopian district headquarters was subjected to a crackdown in the evening. All adult males were brought out of the village. Forty to fifty women along with equal number of children remained in the village. All the women were molested throughout the night.6 Subsequent public outcry in Kashmir led to a government promise to initiate an inquiry. As the people did not trust the government efforts, NGOs, civil society, media and political parties collected information independently and dispatched it to international human rights groups. The Bar Association of Shopian brought three victims to Chief Judicial Magistrate’s Court in order to record their statements under Section 164 of Criminal Procedure Code. One of the victims was 68 years of age. Another victim was 42 years old and the third one was 22 years old. They represented three generations of an unfortunate family which had to undergo this trauma of sexual abuse and humiliation. The public response was overshadowed by other subsequent events. From the official inquiry the only result was two column news items from the Indian Express deeming the allegations baseless and, “simply a part of militant campaign to malign our troops”, the report itself being based on a press release issued by spokesman of Northern Command from Udhpur.

The official inquiry thus gave a clean chit to the perpetrators of crime.7

What happened in Chak Saidapora left a traumatic impact upon the psyche of Shopian youth. Failing to receive justice they involved themselves in and contributed to militancy for many years. For two decades Shopian was a hot bed of insurgency. Eventually the single-minded demand of Azadi (freedom) died down and voters began to enfranchise roads, water and electricity. This choice was interpreted as a vote of confidence in the system which failed to bring the culprits of Chak Saidapora to justice by no less a person than Sonia Gandhi at the inauguration of the Varmul Srinagar Railway line. Emboldened by this fading memory, the people Shopian were subjected to a similar traumatic experience on the night of May 30th, 2009: 17 year old Asiya and Neelofar of Bungam, Shopian proceeded to their orchards in Degam, Bhatpora across Rambiara Nala. Both were allegedly raped by custodians of law and their dead bodies thrown into the Nallah (water stream).8 What followed was a complete botching up of the whole situation. The government announced an enquiry while pronouncing results of the enquiry in advance.

Conflict in Kashmir is the root cause of the problem. It has made the life, property, dignity and chastity of Kashmiri women insecure. With a revival of militancy this scenario of insecurity is increasing day by day. Sandwiched between hundreds and thousands of

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5 The Times of India, (Newspaper) 18th of March, 2008.
6 See page number 9 of Asia watch report, volume 5 issue 9.
8 See “BBC” newspaper report 1st June 2009 / see “The New York times” News paper 15th of August 2009 (by Lydia Polgreen)
troops and hundreds of militants the population remain victims of crossfire, with women and children bearing the brunt of this situation.

Ghulam Nabi Azad, the former Chief Minister of Jammu & Kashmir and present leader of the opposition in the upper house of parliament of India is on record saying on the floor of the state legislature that only four percent of rapes in Kashmir are committed by security forces.9

Kunnan poshpora, Chaksaidapora, Shopian and other places have produced a lot of media coverage but the victims are yet to be provided with justice. These are not the only incidents of rape which have occurred in Kashmir, there so many other incidents which did not generate such media attention. There have been abuses against women from members of non-state actors as well. Since non-state actors have a small number of combatants in comparison to state actors the number of offences committed by them proportionately remains few — they cannot afford to invoke wrath of the population on whose support they require to survive, nor do they enjoy immunity due to any legislation like the 1958 Armed Forces Special Powers Act and the 1955 Disturbed Areas Act.

Most incidents of sexual harassment and assault go unreported on account of social stigmatisation and impunity availed by the state affiliated culprits. Yet rape is not the only problem which women face in Kashmir as a result of its excessive militarisation. There are so many other troubles which are the direct or indirect results of the conflict and its consequent fallout. Kashmir, though a conservative society, has always provided equal opportunities to women in the domain of economic activities. Women work shoulder-to-shoulder with men in the field of agriculture. Since the society still follows a feudalistic economic setup, rural women mostly remain involved in the rearing of cattle and harvesting fuel and fodder from forests and orchards. Militarisation has made women vulnerable to becoming targets of rape and harassment; they have been forced to abandon their traditional roles for fear of becoming victims of abuse by the armed forces. Confinement of women to homes thus deprived them of their economic resources as well.

Education of women has become another casualty of militarisation. In a rugged terrain where students have to walk miles in order to reach schools, female students abandoned schooling in the early nineties because they had to cross through vulnerable areas and face frisking associated with abuses.

Conflicts often lead to the migration of civilians. Kashmir was no exception to this phenomenon. Population migration led to the confinement of the roles played by women in their original localities. Those who migrated out of Kashmir were taken care of by the Indian state but those who migrated from one location to another within the valley or Jammu region did not benefit from the state and central government’s rehabilitation programmes. Migrants from the Kashmir valley tended to be Hindus, whereas those who migrated within the valley were mostly Muslims, which explains their discounting. It is only recently that migrants other than Kashmiri Pandits have become perceived as worthy of attention by the state government under the late Mufti Mohammad Syed.

The situation of those women whose kith and kin were involved in militancy remains even more precarious. Many were arrested with their families given no information as to their whereabouts. Women have to search for their missing family members from one detention centre to the next, with success being the exception rather than the rule. During their search, women are often subjected to exploitation by those in authority. Married women spend their lives in purgatory, now half widows as they remain unaware

of the fate of their husbands, they can neither remarry nor live a normal married life with their missing spouse. Women whose relations are associated with insurgency often become targets of deprivation of privacy, with raids conducted by security agencies in order to locate and arrest the ones involved in militancy. At times rape has been used as a technique to force the absconding activists to surrender for fear of losing chastity of their female family members. The families whose houses become shelters of militants often find themselves homeless after counter-insurgency operations. Women lose shelter and are subjected to a horrifying situation in the chilly weather conditions of Kashmir.

In this scenario the State Commission for Women and The State Human Rights Commission could have become important forums of redressal. Yet as simple recommendatory bodies they have not achieved much.

Members of Indian civil society tend to portray incidents of rape in Kashmir as part of the same phenomena which exists throughout India. Though similar, these rapes differ in terms of the nature of the protection and remedies available to victims. In mainland India the state system comes to the rescue of the victim. In contrast the state administration in Kashmir shields the culprits. The impunity of security forces involved in such crimes has been provided through enactments which make them immune from the investigative powers of ordinary courts as well as human rights commissions.10 Prior permission of the Indian government is needed under AFSPA for the trial of security forces members involved in such acts. Moreover, the 1997 Army Act and Protection of Human Rights Act renders them immune from the adjudicating and investigating powers of ordinary courts and human rights commissions.11 Individual criminals involved in such acts are punished but those associated with the security forces largely remain protected. Whenever incidents of rape and other abuses of human rights occur on the part of men in uniform the government announces the establishment of inquiry commissions. Given the track record of these commissions it is a common belief that such announcements are often aimed at defusing the public outrage and conveying to the international community that local remedies exist for offences against women, rather than producing real results.

Popular perception in Kashmir is that whatever exists in the name of remedies is mere eyewash. Women continue to suffer an absence of international and national focus, with the resulting lack of adequate judicial remedies. War fatigue, with the continuous presence on hostile terrain, has become exceedingly stressful for the Indian army in Kashmir. Reports of suicides and the murder of fellow soldiers are prevalent. Those embittered, tired and angry enough to kill themselves and their colleagues cannot be expected to behave much differently towards members of a hostile local population.

Sadly, this is not only the case with the Indian army. Any military force consistently exposed to hostile terrain and populations becomes vulnerable to committing such offences. Over 40,000 women were estimated to have been raped during the first Gulf War. Even women soldiers of the US army deployed in the Gulf became victims of rape committed by fellow soldiers.12 During World War II hostile armies abused many far Eastern women as “comfort women”. Japan recently acknowledged such crimes on the part of its army and prepared compensation for surviving victims.13 Unfortunately, the Indian state remains inclined to blind denial.

10 Section 70 of Army Act 1950.

13 “Japan may offer ¥100 100 million fund, apology to permanently settle sex slave dispute with Seoul” Japan Times 25th of December 2015.
It is obvious from the preceding facts that conflict takes a heavy toll on women and the Kashmir discord remains no exception to this phenomenon. The exposure of populations to combatants, security-related legislations shielding armed forces and war fatigue for soldiers remain prime sources for the problems of Kashmiri women. Human rights violations against women are likely to continue as long as militarisation is resorted to as a means of subjugation for a resistant population.
The undermining of Asian legal institutions

WHOSE RULES? THE U.S. AND ASIAN LEGAL PROGRESS
The undermining of Asian legal institutions by LAUREN GLENMERE

RULE OF LAW? UNDERMINING OF INSTITUTIONS

BY LAUREN GLENMERE
| ARTICLE CRIMINAL JUSTICE SYSTEM |

**Fundamentally, state torture** is concerned with the business of truth. This “truth belief” is twofold in nature: the belief that through torture truth may be acquired and that society will accept and behave according to the state’s particular “truth”. The citizenry will live under a world true to the wishes of the state. For once truth has been established, debate is over.

The state law and justice system is also concerned with the business of truth. At least, ideally. The legal system aims to uphold societal fairness while the justice system ensures laws are upheld through punishment, protection and rehabilitation. The “Rule of Law” concept shares the the second “truth belief” of state torture — that society will accept and behave according to the state’s particular “truth” — with one important qualification. This legal principle upholds that law should govern a nation, instead of the arbitrary decisions of individual government leaders and officials.

The World Justice Project defines the Rule of Law as the upholding of the following four universal principles:

1. The government and its officials and agents as well as individuals and private entities are accountable under the law.
2. The laws are clear, publicised, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons and property and certain core human rights.
3. The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient.
4. Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.¹

As such, the Rule of Law principle remains an aggravating thorn in the side for anyone aspiring to corruption. At the state level it is particularly debilitating — the lack of impunity or advantage conferred can be difficult to overcome when seeking unfair enrichment or population control.

There are two major ways around such a conundrum. Firstly, the creation of discriminatory laws, with the denial of fundamental rights to citizens. This is difficult to achieve while avoiding the unenviable pariah state status of countries such as North Korea. The international community, international law and international legal institutions all pressure states to adopt laws generally considered as equitable towards their citizenry.

It is both easier domestically and a softer sell internationally to undermine state legal institutions. A variety of methods present themselves for consideration: subverting the separation of powers model, eroding equality before the law and systematically underfunding the legal, policing and

¹ http://worldjusticeproject.org/what-rule-law.
justice systems to ensure their inefficacy. Taking a mix-and-match approach will create a society where the rule of law is all but nominal. Under such a society, contemptible practices such as torture thrive, pushing the population to accept and behave according to the state’s truth; this “truth” being that of the powerful ruling elites, and paying no heed to the needs of the citizens.

In the Asian context, examining the legal institutions of states with a predilection for torture is an interesting exercise. Their deliberate weakening, through the aforementioned methods, goes hand-in-hand with a tendency to resort to torture, extra-judicial killings and whatever else is perceived as necessary to maintain the desired order or “truth” of the political ruling classes. After all, supporting strong legal institutions where justice and Rule of Law are the reigning “truth” is hardly conducive to corrupt control.

Probing this idea further, let us look at the undermining of legal institutions in Asia to better understand this method of maintaining elite control and adherence to state “truth”.

THE SEPARATION OF POWERS

Representation in the modern nation state is underpinned by the separation of powers. The distinction of the legislative, executive and judiciary, operating within a system of checks and balances, is entrenched and underwrites the relationship between the individual and state. Political coercion is mediated by the power of the legislature to make laws and the capacity of the judiciary to decide on the rights of the individual.

Attempts to drive this separation of powers model in many Asian countries have been largely scuppered by overbearing and self-interested political elites. Executive dominance is a common state of affairs, with limited judicial power and a legislature of dubious independence. In this manner, the social contract is suppressed while executive fears for its longevity provoke a stranglehold on the legislative and judicial branches of power.

Myanmar’s 2008 Constitution states the separation of the legislative, executive and judicial branches of sovereign power. Yet the legal system in Myanmar
has been carefully designed and maintained to protect the state. Completely subordinate to the executive since 1962, the Supreme Court and legal system neither have the capacity nor the will to defend the judiciary and the separation of powers. Corruption has been institutionalised, with payments documented as being made at all stages of the legal process, to all levels of officials. Indeed, the entire regime is a military one and all branches are deeply connected, despite claims from the military that they no longer involve themselves in politics. Chief Justice of the Supreme Court of the Union, Htun Htun Oo is a former military captain of the Southwestern Regional Command of the Myanmar Army, while newly nominated Attorney General U Tun Tun Oo comes from the Military Advocate General’s Office. At the Union Supreme Court, four out of seven judges are former military personnel. Moreover, the majority of citizens are unaware of how constitutional law concerns them and the Constitution itself is vague in regards to judicial independence: separation is necessitated only “to the extent possible” and judges are selected by the President.

In such a feeble legal system torture is practiced rampantly by the authorities, with the culprits enjoying an impunity they perceive to be natural. On 22 May, 2013 U Than Htun was tortured to death while in police custody in Pyay District, Myanmar. The police officers involved claimed the victim died from hitting himself with an iron pole due to the effects of alcoholism. In contrast, a post mortem examination confirmed that death was caused by bleeding inside the lung from broken ribs, that no organs were in a condition that would cause death and that the skin of both wrists was shredded from prolonged handcuffing. His wife, Daw Myint Htay, lodged a complaint at the Pandaung Court and opened a case against the police station commander. In response, the judge stated that permission was needed to sue the police and dismissed the complaint. A further attempt the at Pyay District Court met with the same result. Eventually, at the Bago Region High Court, the judge deemed the death unnatural yet did not order any action. Daw Myint Htay never saw any result for her laborious efforts.

A more explicit example of collusion between the police and judiciary is the case of Lahtaw Brang Shawng, a labourer who lived in Jan Mai Kawng relief camp for internally displaced persons. On 17 June, 2012 a police station chief, civilian official and ten men took Lahtaw Brang Shawng away for questioning over three explosions. Sent to a military intelligence facility, he was severely tortured: hit on the head with bamboo, a bamboo roller ran along the back of his thighs, stabbed on his thighs, the flat side of a hot knife held to his face, threatened with death and ordered to dig his own grave. On 20 June he was brought back to the camp, with visible injuries, to reenact his alleged crimes. A week later his case was brought to court, and on 28 June led to make a confession in front a judge. The judge, noticing a black eye, asked the defendant to raise his shirt, thereupon finding a recording advice taped to his body. The judge took photographs of the device and refused to record the confession. The next day, Lahtaw Brang Shawng was returned to court. A new judge sat on the bench, recorded the confession and Lahtaw Brang Shawng was sentenced to solitary confinement in the town prison. The armed group he is supposedly involved with, the Kachin Independence Army, have denied his affiliation.

Besides judicial failings and executive dominance, the examples from Myanmar also indicate a profound contempt for its citizens, their status and the worth of the law itself.

EQUALITY BEFORE THE LAW

Perhaps the greatest achievement in the development of the legal system of modern nation states is the concept of equality before the law. This established principle has been gradually extended and has been profoundly influential in all manner of social struggles — from the abolition of slavery to the rights of workers to women’s equality. Indeed, equality before the law has surpassed abstraction to become a real practice with consistent commitment to the development of its realisation. Not so in many Asian countries. Attitudes of legal professionals remain elitist, with a common understanding of one law for the rich and influential, another for the poor.

Bangladesh guarantees that, “all citizens are equal
before the law and are entitled to equal protection of law” in Article 27 of its Constitution. Yet political parties are notorious for shielding their activists from justice. Student politics in Bangladesh, largely under the two main political parties, has become synonymous with thuggery as extortion, drug trading, killing, rape, mutilation, feuding and other crimes have proliferated. Impunity for the political elites is well known, with police refusing to register a complaint of rape in the Chittagong Hill Tracts against prominent local political leader Mr. Didarul Islam, president of the youth wing of the Bangladesh Nationalist Party in 2012. The non-ethnic settler victim was also refused the right to a credible medical examination.

Legal egalitarianism is also enshrined in the Universal Declaration of Human Rights. Article 7 states, “All are equal before the law and are entitled without any discrimination to equal protection of the law.” In 2015 Myanmar’s parliament approved “Protection of Race and Religion” bills which allowed local government to introduce ever more repressive measures against persecuted groups like the Rohingya. Non-discriminatory laws notwithstanding, the selective application of existing laws remains a real barrier to public support for and belief in the Rule of Law.

In Pakistan former military dictator, General Pervez Musharraf, has been recently allowed to leave the country for medical treatment despite charges pending of sedition, the murder of former Prime Minister Benazir Bhutto and abrogation of the Constitution. The power of the military has rendered the Rule of Law a casualty. The Supreme Court ruled that travel restrictions were the prerogative of the Executive, with the state and judiciary appearing equally uneasy to take responsibility for inditement.

Corruption and inequality are not restricted to the highest social and political elites. Also in Pakistan, a case documented by the Asian Human Rights Commission in April 2016 follows the rape of a 14 year old girl from Sindh Province and her family’s failure to receive justice. Two brothers, Mustaq Mangrio and Suleman Mangrio, gang-raped the girl as was confirmed by the district hospital. The rapists were landlords, members of the PML-Functional political party and held 14 members of the girl’s family as bonded labourers. A peasant, her father stated he had no choice but to accept 1200 kilograms of wheat as compensation through the illegal _jirga_ system, given that the rapists were influential community members and had made further threats against his family. The Umer Kot police lodged a First Information report yet refused to take action against the perpetrators, assisting the landlord rapists to settle the case through the illegal _jirga_ court run by tribal leaders. Media attention and the involvement of ruling party (PPP) Sindh Assembly member, Mr. Sardar Shah, led to the arrest of Mustaq Mangrio yet his brother remains at large and no police action has been taken against the illegal _jirga._

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EFFECTIVE POLICING, LEGAL AND JUDICIAL SYSTEMS

The final section of our focus is the systematic underfunding of policing and judicial systems at all levels. Enfeebled, corrupted and selectively applied, the administration of justice already operates without a system of checks and balances. Slowing the processes further through underfunding and understaffing prevents independence and facilitates Executive control.

Scarce technical resources, poorly or undertrained staff and a failure to allocate for sufficient judges, lawyers and even courtrooms has led to hugely overloaded legal structures. Trials linger for years. In 2013, India had 15.5 judges for every million people, with over 30 million open cases.

Such chaos almost beckons corruption. It is almost impossible to achieve any semblance of transparency or accountability when legal systems are at the point of collapse. Public institutions for the administration justice are so deeply defective that professions of adherence international norms can be no more than wishful thinking. Instead, extortion and impunity for the elite are the order of the day.

The Philippines proffers some excellent examples here. The Philippines possesses a grand constitution, fine bill of rights and various other laws designed to protect the people. Its government has been outspoken against human rights abuses in Myanmar under the military junta. In October 2015, the Philippines was even elected to serve on the United Nations Human Rights Council, for the fourth time. Yet the rights of the poor are illusory: rights only become real through the implementation of laws, not merely their enactment. The police and prosecution enjoy a cosy relationship, complaints about the courts are common and killings, disappearances, torture, assault and arbitrary detention are flagrantly committed by state officers.

Fernando Obedencio was arrested in 2005 in General Santos City. An active human rights advocate of the Blaan tribe he was driving home on his motorcycle when stopped at a police checkpoint. The police claimed to find 64.1 grams of marijuana, a prohibited drug, and Obedencio was arrested and then detained in General Santos City Jail. Three intelligence officers, purporting to be human rights workers, came to to see him and demanded he disclose the whereabouts to two alleged rebel leaders. When Obedencio was unable to answer their questions they took him to a house and tortured him for roughly three hours each day for three days. Obedencio was kicked, punched, his hands pounded with a pistol and fingers crushed to force him to admit his involvement in communist rebel group the New People’s Army. Obedencio denied all allegations and came up negative for tests of drug use. He made a complaint at the police station but it was not recorded. Almost nine years and several court delays later, Obedencio was finally freed when the fabricated charges were dismissed and the marijuana presented as evidence was seen to not be the same sample as supposedly confiscated. No investigation into his torture ever took place.

Rolly Panesa, a 48 year old security guard from Quezon City, was arrested on 5 October, 2012 and taken to Camp Vicente Lim, in Laguna. There he was tortured, with his teeth remaining broken to this day, in order to force a confession that he was in fact 61 year old Benjamin Mendoza, a leader of the Communist Party of the Philippines with a bounty of P5.6M. Denied medical treatment and his right to counsel, Panesa was detained for ten months. Upon his release, Panesa filed charges of illegal arrest, detention and torture. His complaints were dismissed and the military have stood by the arrest.

Impunity is part and parcel of the criminal justice system in the Philippines. Police investigators have been known to contract witness statements, ignore motives, fail to collect sufficient evidence and — most heinously — arrest and torture ordinary individuals in order to make them confess to crimes they did not commit. Underpaid, with an emphasis on prosecuting rather than solving crimes and abuse towards subordinates or recruits common within the police force itself, it is not surprising that the police system is so broken. Effective investigative techniques simply aren’t taught. Get a confession and get out. Torture is cheap — it doesn’t require any equipment besides ones fists — and it is a quick
route to getting the “truth” you want. Torture’s legitimisation also breeds other violences and abuses of Rule of Law — most notably extortion.

Proper investigation and prosecution goes from unlikely to almost impossible when members of the elite or the police force itself stand accused. Witnesses frequently go missing, are threatened or killed. The police force itself is misused during elections for suppressing political opposition.

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The Philippines is not atypical in its dysfunctional legal system. Such an approach should not be seen as the rule of law but one of law and order. Under such a system any means are legitimate if they maintain order — from torture and extrajudicial killings to false arrests and the fabrication of charges. The judiciary are limited, heads of state are above the law, powers of arrest and detention are manipulated, cases are mishandled, trials are delayed and the very concept of justice is treated with bitter cynicism. This is business as usual. Exceptional circumstances, such as periods of emergency rule, civil uprising or terrorist threat, bear witness to ever more brutish behaviour.

When legal institutions are so comprehensively undermined torture and abuse are the inevitable side-products. In their pursuit of their “truth”, corrupt state elites have reconfigured the justice system to suit. Attempting to rectify this state of affairs is akin to climbing Mount Everest. Yet ever more activists, legal thinkers, policy makers and experts are scaling the foothills. Truth will eventually win out. But whose?

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WHAT IS PSYCHOLOGICAL MDF
WHAT IS PSYCHOLOGICAL TORTURE?

BY ALMERINDO E. OJEDA
PSYCHOLOGICAL TORTURE (PT) is a practice that is often proscribed but seldom defined. This is to be expected, as a series of complex issues arise as soon as we take on the question of PT. What is psychological pain? How is it different from physical pain? And doesn’t physical torture produce psychological pain as well? How much psychological pain should a practice induce in order to count as torture? And don’t individuals vary as to the amount of pain they can tolerate? If so, how can we justify a universal threshold of torturous pain?

Finding a satisfying definition of PT is a challenge. It is also an imperative, as a clear, legally binding definition of PT is essential for the detection, prosecution and eradication of this pernicious practice.

Indeed, back in 1972, Lord Hubert Lister Parker, Baron of Waddington, was asked to review earlier inquiries into the abusive treatment of suspected members of the Irish Republican Army (see below). In his final report, Lord Parker of Waddington asked “where, however, does hardship and discomfort end and for instance humiliating treatment begin, and where does the latter end and torture begin? Whatever words of definition are used, opinions will inevitably differ as to whether the action under consideration falls within one or the other definition.”

More recently, on July 13, 2005, Lieutenant General Randall M. Schmidt appeared before the Armed Services Committee of the U.S. Senate to testify about the interrogation methods used at Guantánamo. There General Schmidt found that “the lines were hard to define. Humane treatment, torture I felt were the clear lines […] anything else beyond that was fairly vague.” He believed that “[s]omething might be degrading but not necessarily torture. And it may not be inhumane. It may be humiliating, but it may not be torture.” General Schmidt felt that “the cumulative effect of simultaneous applications of numerous authorised techniques had an abusive and degrading impact on the detainee [with ISN 063].” Yet, in the general’s judgement, the application of those techniques “did not rise to the level […] of inhumane treatment.”

Overall, “no torture occurred.”

In essence, the questions that arise when we attempt a definition of PT are two:

What is psychological pain (as opposed to physical pain)?

How much of it must torture produce (in order to count as such)?

We will call (1) the qualitative question, as it inquires about the nature of psychological pain. We will call (2) the quantitative question, as it asks about the amount thereof needed to qualify as PT. The purpose of this essay is to argue that neither one of these difficult questions needs to be answered in order to define PT. We will proceed constructively, by proposing a satisfying definition of PT which does not try to dispose of the thorny issues above.

AN EXTENSIONAL DEFINITION

In principle, there are two ways in which we could define PT. One of them is to list all (and only) the practices that constitute PT. The other is to identify the property or properties that practices must satisfy in order to count as instances of PT. The former is the extensional definition of the term; the latter is the intensional one.

Intuitively, when we think of PT we think of a set of practices that include:

A1. Isolation: solitary confinement (no human contact whatsoever) or semi-solitary confinement (contact only with interrogators, guards, and other personnel ancillary to the detention).

A2. Psychological Debilitation: the effect of

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1 I am indebted to Nelson Martínez Berrios, Jonathan Marks, and Alfred McCoy for comments to earlier versions of this article.


3 U.S. Senate Armed Services Committee, Hearing on Treatment of Guantánamo Bay Detainees, July 13, 2005.
deprivation of food, water, clothes, or sleep, the disruption of sleep cycles, prolonged standing, crouching, or kneeling, forced physical exertion, exposure to temperatures leading to stifling or hypothermia.

A3. Spatial Disorientation: confinement in small places; small, darkened or otherwise nonfunctional windows.

A4. Temporal Disorientation: denial of natural light; night-time recreation time; erratic scheduling of meals, showers, or otherwise regular activities.

A5. Sensory Disorientation: Use of magic rooms, i.e. holding facilities or interrogation chambers that induce misperceptions of sensory failure, narcosis, or hypnosis.

A6. Sensory Deprivation: use of hooding, blindfolding, opaque goggles, darkness, sound proofing/canceling headsets, nasal masks (possibly deodorised), gloves, arm covers, sensory deprivation tanks or vaults.

A7. Sensory Assault (Overstimulation): use of bright or stroboscopic lights; loud noise (or music); shouting or using public address equipment at close range.

A8. Induced Desperation: arbitrary arrest; indefinite detention; random punishment or reward; forced feeding; implanting sense of guilt, abandonment, or “learned helplessness”.

A9. Threats: to self or to others; threats of death, physical torture, or rendition; mock executions; forced witnessing of torture (visually or aurally).

A10. Feral Treatment: berating victim to the subhuman level of wild animals; forced nakedness; denial of personal hygiene; overcrowding; forced interaction with pests; contact with blood or excreta; bestialism; incest.

A11. Sexual Humiliation: forcing the victim to witness or carry out masturbation, copulation, or other forms of sexual behaviour.

A12. Desecration: forcing victims to witness or engage in the violation of religious practices (irreverence, blasphemy, profanity, defilement, sacrilege, incest, Satanism).

A13. Pharmacological Manipulation: non-therapeutic use of drugs or placebos.

We propose to define PT, extensionally, as the set of practices A1 through A13.

The instances of the practices in A1 - A13 can be defined to an unusually high degree of precision. Forced nakedness and contact with pests or excreta are already precise. Isolation, sleep deprivation, temporal disorientation, and prolonged standing can be quantified in terms of time; sensory assault can be measured in terms of lumens and decibels; food and water deprivation can be measured as ratios of caloric intake or volume of water taken per day; overcrowding can be defined as a ratio of detainees to area; sensory deprivation, forced feeding, sensory disorientation, and mock execution involve straightforwardly specifiable equipment; acts of sexual humiliation and desecration have been carefully codified by religion; pharmacological manipulation can be established through chemical analysis; verbal threats and berating involve linguistic expressions that can be tested for their effects on the victims’ peers.

An extensional definition of PT as the set of practices in A1–A13 would thus inherit the high degree of precision with which their instances can be defined. Needless to say, the practices in A1–A13 could be revised (or supplemented by other equally well-defined practices). Given the modular nature of the proposed definition, these revisions can be done on one practice (or module) of the definition without compromising the others. The definition under consideration is therefore one that facilitates its improvement.

Now, it might be pointed out that some of the practices mentioned in A2 are forms of physical rather than psychological torture. There is no question that prolonged standing, kneeling, and crouching can produce pain and bodily harm that qualify as physical torture. Similarly, prolonged shackling in stressful or painful positions (as is always the case with short-shackling), and manipulation of bodily temperature (be it by exposure to inclement weather, by heating
or cooling equipment, or by dousing with cold water), should be considered physical torture. Yet, A2 pertains not to them, but to the psychological debilitation they produce in their victims. This debilitation, which includes cognitive impairment, is what A2 is about.

It should be noted, finally, that the definition of PT under consideration is phenomenological rather than teleological, as it proceeds by defining a set of practices in themselves rather than in terms of the goals, intended or attained, of those who designed these practices or carried them out. This means that the pain these practices may produce plays no role in the definition of PT. Thus, no reference is necessary to a definition of psychological pain (as opposed to physical pain) nor to the necessary amount thereof (to establish torture). In short, we have arrived at an extensional definition of PT that avoids, as desired, both the qualitative and the quantitative questions.

RELEVANCE OF THIS EXTENSIONAL DEFINITION

The set of practices embodied in the extensional definition of PT have been applied throughout the world for more than fifty years. They have also been widely characterised either as psychological torture or as another form of cruel, inhuman, or degrading treatment or punishment—as we will presently see.

Stunned by the unlikely confessions made at the Stalinist show trials of the 1930s, at the Hungarian trial of Cardinal Mindszenty in the 1940s, and at the American POW camps in the Korean war, hundreds of studies were published in the 1950s and 1960s to identify the methods whereby Communist regimes could exact implausible confessions from their enemies (and to understand, more broadly, the psychology of coercion).4

The methods in question, it was soon discovered, were psychological rather than physical in nature. Outlined in Biderman (1956, 6-13), the “basic communist techniques of coercive interrogation” were as follows.5

[B1] Isolation: complete solitary confinement (where prisoner has no social contact whatsoever); complete isolation (where prisoner lives only with interrogator or guard), semi-isolation (where two to four prisoners are isolated from the rest, frequently making sure that one of them is more inclined to capitulation than the rest); group isolation (where eight to thirty prisoners are isolated from the rest under extremely crowded and difficult conditions calculated to promote destructive competition and dissension).

[B2] Monopolisation of Attention: physical isolation (small, bare, windowless cells, sometimes in complete darkness); other restrictions of sensory stimulation (denial of gratifying sensations or the pleasure of movement; forbidding deviations from a fixed posture; hearing real or feigned cries of anguish from another victim; receiving a visit from a “friendly” interrogator); prolonged interrogation and forced writing (regarding answers to very general questions).

[B3] Induced Debilitation and Exhaustion: semi-starvation (survival rations); exposure (intense cold, intense heat, or dampness); exploitation of wounds and chronic illness (which are not immediately life threatening; offering medical treatment after interrogations are completed); sleep deprivation (through uncomfortable positions, with minimal protection from the cold, and on hard or vermin-infested surfaces; waking prisoners up for interrogation or “bed-checks”); prolonged constraint (forced sitting, standing at attention, or in other forced positions; confinement to a hole or box; shackles permitting only painful, unnatural postures); prolonged interrogation and forced writing (lasting many hours a day and over weeks or months, and carried out by successive interrogators).

4 See Streatfeild (2007) for a gripping account of the mindset of the period. According to the KUBARK Counterintelligence Interrogation Manual to be discussed below, more than a thousand works were published on the counterintelligence interrogation of resistant sources by 1963. See KUBARK 1963, 103.

5 Like all bracketed material in this chapter, the codes heading the various practices cited throughout the chapter have been supplied by the author in order to ease future reference to them.
[B4] Cultivation of Anxiety and Despair: threats of death (verbal threats, grave digging, fake executions, death sentences in fake trials); threats of non-repatriation (absent compliance); threats of punishment as a “war criminal” (possibly at civilian hands); threats of endless isolation (or interrogation; prisoners are told that “interrogators are not in a hurry”); vague threats (either by veiling threats in order to fake a benevolent interest in the prisoner, or by threatening with “a fate more terrible than words can express”); threats against prisoner’s family; mysterious changes of treatment or place of confinement (of the prisoner and his “belongings”), changes in questioning and interrogators.

[B5] Alternating Punishments and Rewards: occasional “favours” (to plant the belief that the interrogators are “good people”, to remind the prisoner of how pleasant things can be, and to prevent him to adjust to doing without comforts); extreme fluctuations of interrogator’s attitudes (either within a single interrogator or within a team playing the good cop/bad cop routine, where the interrogator with higher authority plays the good cop and pretends not to approve of the methods of his subordinate); promises of improved conditions (including POW status, given compliance), special promises (jobs, status, or other rewards in exchange for cooperation), rewards given for partial compliance (all of which would be trivial), tantalising (displaying prisoners receiving better treatment; offering cigarettes with no matches or appetising food in minuscule quantities).

[B6] Demonstrating “Omnipotence” and “Omniscience” of Captor: omniscience (by painstakingly gathering detailed facts about the prisoner, interrogators attempt to create the impression that they know all about him, including the answers to the questions they ask, so that the interrogation is only “a test of the cooperativeness and veracity of the prisoner,” who is constantly accused of lying and being caught in lies); omnipotence (displaying overwhelming force, repeated mention of the captor’s might; taking cooperativeness for granted and resistance as a foolish aberration; presenting “evidence” that other prisoners, especially acquaintances of his, have capitulated).

[B7] Degradation: personal hygiene prevented (withholding of combs, and shaving equipment; individual may even be forced to live in his own filth); filthy or infested surroundings (prisoners are kept in filthy, vermin- or rodent infested places of confinement), demeaning punishments (slapping, ear-twisting, and other degrading but physically mild punishments may be inflicted); insults and taunts (repeating insults that seem to affect the prisoner; casting aspersions about wife’s morality; issuing false diagnoses of venereal diseases), denial of privacy (subjection to constant surveillance; if vulnerable to embarrassment, prisoners may be forced to perform private functions in public).

[B8] Enforcing Trivial and Absurd Demands: forced writing (and rewriting answers to numerous, exceedingly trivial questions; very general instructions are given out, but prisoners are forced to rewrite their answers over and over again until an “acceptable” answer is completed), enforcing rules (numerous rules are handed out; punishments are meted for unstated rules; rules may include the positions to be assumed when sleeping, with the prisoner awakened if he changes position; permission is required to perform almost any act, including washing or going to the latrine), “upping the ante” (pretending that only a relatively trivial demand needs to be met, only to place increasingly taxing demands afterwards; the interrogator may demand, for example, that the prisoner write a denial of the accusations levelled against him, then go on to ask him to break down those denials into increasingly detailed denials, and then convince him to eliminate each of these denials—thus turning the denial of an accusation into a confession of guilt).

After outlining these techniques authoritatively, Biderman (1956, 16) goes on to qualify them as “abominable outrages,” adding that “[p]robably no other aspect of communism reveals more thoroughly its disrespect for truth and the individuals than its
resort to these techniques” (Biderman 1956, 3f). Yet, by 1963, several of these techniques had become recommended CIA practice.

In July 1963, the CIA drafted a comprehensive interrogation manual titled KUBARK Counterintelligence Interrogation. It is a systematic presentation of successful and unsuccessful interrogation techniques drawn from the author’s review of the literature on the psychology of coercion produced between 1950 and 1961. Originally secret, the handbook was declassified in 1997 through a Freedom of Information Act (FOIA) request initiated by The Baltimore Sun.

The KUBARK Counterintelligence Interrogation manual recommends a number of the interrogation techniques identified in Biderman (1956), namely:

[C1] Monopolisation of Attention: The more completely the place of confinement eliminates sensory stimuli, the more rapidly and deeply will the interrogatee be affected […] An early effect of such an environment is anxiety […] The interrogator can benefit from the subject’s anxiety […] The deprivation of stimuli induces regression [of the interrogatee’s to his childhood] by depriving the subject’s mind of contact with an outer world and thus forcing it upon itself (90).

[C2] Induced Debilitation and Exhaustion: An over-stuffed chair for the use of the interrogatee is sometimes preferable to a straight-backed, wooden chair because if he is made to stand for a lengthy period or is otherwise deprived of physical comfort, the contrast is intensified and increased disorientation results (45, emphasis supplied) | When the individual is told to stand at attention for long periods […] [t]he immediate source of pain is not the interrogator but the victim himself. The motivational strength of the individual is likely to exhaust itself in this internal encounter (94, emphasis supplied).

[C3] Cultivation of Anxiety and Despair: The interrogator can and does make the subject’s world not only unlike the world to which he had been accustomed but also strange in itself - a world in which familiar patterns of time, space, and sensory perception are overthrown (52) | A pale face indicates fear and usually shows that the interrogator is hitting close to the mark (55) | What we aim to do is to ensure that the manner of arrest achieves, if possible, surprise, and the maximum amount of mental discomfort […] The ideal time at which to arrest a person is in the early hours of the morning because surprise is achieved then (85, emphasis in the original) | the circumstances of detention are arranged to enhance within the subject his feelings of being cut off from the known and the reassuring, and of being plunged into the strange. Usually his own clothes are immediately taken away, because familiar clothing reinforces identity and thus the capacity for resistance. […] Detention permits the interrogator to cut through these links and throw the interrogatee back upon his own unaided internal resources. […] Control of source’s environment permits the interrogator to determine his diet, sleep pattern, and other fundamentals. Manipulating these into irregularities, so that the subject becomes disorientated, is very likely to create feelings of fear and helplessness […] In any event, it is advisable to keep the subject upset by constant disruptions of patterns (86f) | it is usually useful to intensify [the subject’s feelings of guilt] (103) | See also Monopolisation of Attention.

[C4] Alternating Punishments and Rewards: The commonest of the joint interrogator techniques is the Mutt- and-Jeff routine: the brutal, angry, domineering type contrasted with the friendly, quiet type. This routine works best with women, teenagers, and timid men […] An interrogator working alone can also use the Mutt- and-Jeff technique […] (72f). | Half-hearted efforts to cooperate can be ignored, and conversely he can be rewarded for non-cooperation. (For example, a successfully resisting source may
become distraught if given some reward for the “valuable contribution” that he has made.) (77)

Meals and sleep granted irregularly, in more than abundance or less than adequacy, the shifts occurring on no discernible time pattern, will normally disorient an interrogatee and sap his will to resist more effectively than a sustained deprivation leading to debility (93).

[C5] Demonstrating “Omniscience” of Captor:

[The interrogator] can create and amplify an effect of omniscience in a number of ways. For example, he can show the interrogatee a thick file bearing his own name. Even if the file contains little or nothing but blank paper, the air of familiarity with which the interrogator refers to the subject’s background can convince some sources that all is known and that resistance is futile (52) | The interrogator […] explains to the source that the purpose of the questioning is not to gain information; the interrogator knows everything already. His real purpose is to test the sincerity (reliability, honour, etc.) of the source. The interrogator then asks a few questions to which he knows the answers. If the subject lies, he is informed firmly and dispassionately that he has lied. By skilled manipulation of the known, the questioner can convince a naive subject that all his secrets are out (67).

[C6] Demonstrating “Omnipotence” of Captor:

[The interrogator] exercises the powers of an all-powerful parent, determining when the source will be sent to bed, when and what he will eat, whether he will be rewarded for good behaviour or punished for being bad (52).

In addition, it recommended four of the practices listed in A1-A13 above, namely:

[C7 Temporal Disorientation]: The subject may be left alone for days; and he may be returned to his cell, allowed to sleep for five minutes, and brought back to an interrogation which is conducted as though eight hours had intervened. The principle is that sessions should be so planned as to disrupt the source’s sense of chronological order (49f) | There are a number of non-coercive techniques for inducing regression

[…] Some interrogatees can be re[g]ressed by persistent manipulation of time, by retarding and advancing clocks and serving meals at odd times -- ten minutes or ten hours after the last food was given. Day and night are jumbled. Interrogation sessions are similarly unpatterned[,] the subject may be brought back for more questioning just a few minutes after being dismissed for the night (76f).

[C8 Sensory Disorientation]: The confusion [or Alice-in-Wonderland] technique is designed not only to obliterate the familiar, but to replace it with the weird […] When the subject enters the room, the first interrogator asks a double talk question--one which seems straightforward but is essentially nonsensical […] the second interrogator follows up […] with a wholly unrelated and equally illogical query […] No pattern of questions and answers is permitted to develop […] as the process continues, day after day if necessary, the subject begins to try to make sense of the situation, which becomes mentally intolerable (76) | [as an example of the magic room technique,] the prisoner […] is given a hypnotic suggestion that his hand is growing warm. However, in this instance, the prisoner’s hand actually does become warm, a problem easily resolved by the use of a concealed diathermy machine. Or it might be suggested . . . that. . . a cigarette will taste bitter. Here again, he could be given a cigarette prepared to have a slight but noticeably bitter taste (77f).

[C9 Threats]: The threat of coercion usually weakens or destroys resistance more effectively than coercion itself. The threat to inflict pain, for example, can trigger fears more damaging than the immediate sensation of pain […] The same principle holds for other fears: sustained long enough, a strong fear of anything vague or unknown induces regression, whereas the materialisation of the fear, the infliction of some form of punishment, is likely to come as a relief […] Threats delivered coldly are more effective than those shouted in rage (90f).

[C10 Pharmacological Manipulation]: Persons burdened with feelings of shame or guilt are likely to unburden themselves when drugged,
especially if these feelings have been reinforced by the interrogator […] drugs (and the other aids discussed in this section) should not be used persistently to facilitate the interrogative debriefing that follows capitulation. Their function is to cause capitulation, to aid in the shift from resistance to cooperation (100).

Many of the techniques advocated in KUBARK Counterintelligence Interrogation were applied, within the United States, in the “hostile interrogation” of Soviet defector Yuri Nosenko – an affair that lasted 1277 days from 1964 to 19678. At the same time, the CIA “set about disseminating the new practices worldwide, first through U.S. AID’s Office of Public Safety to police departments in Asia and Latin America and later, after 1975, through the U.S. Army Mobile Training Teams active in Central America during the 1980s” (McCoy 2006, 10f). A detailed account of the application of these techniques in Latin America can be found in Timerman (1981).

But the practices spread to Europe as well. In 1971, the Royal Ulster Constabulary (the Belfast police) resorted to the combined application of five particular techniques during the interrogation in depth” of fourteen alleged members of the Irish Republican Army. Based on facts established by the European Commission of Human Rights, the European Court of Human Rights described these techniques as follows.9

[D1] Wall-standing: Forcing the detainees to remain for periods of some hours in a “stress position”, described by those who underwent it as being “spread eagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers.”

[D2] Hooding: Putting a black or navy coloured bag over the detainees’ heads and, at least initially, keeping it there all the time except during interrogation.

[D3] Subjection to Noise: Pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise.

[D4] Deprivation of sleep: Pending their interrogations, depriving the detainees of sleep.

[D5] Deprivation of food and drink: Subjecting the detainees to a reduced diet during their stay at the centre and pending interrogations.

These five techniques were soon regarded as instances of torture, inhuman or degrading treatment or punishment. Thus, in their report on the case surrounding these techniques, the European Commission of Human Rights concluded, unanimously, that the combined use of the five techniques in the cases before it constituted a practice of inhuman treatment and of torture in breach of Article 3 of the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms10. Similarly, in its judgment of the case, the European Court of Human Rights concluded that recourse to the five techniques amounted to a practice of inhuman and degrading treatment (though not torture), which practice was in breach of Article 3 of the said Convention11. Within the United Kingdom, both the Prime Minister and the Attorney-General spoke for the Government saying that the five techniques


According to these hearings, John Hart was a career agent with the CIA, where he served for 24 years. He was the chief of station in Korea, Thailand, Morocco, and Vietnam. He also held senior posts at CIA headquarters in Virginia. In 1976 he authored an extensive study of the handling of Yuri Nosenko by the CIA. See also The CIA Family Jewels Report, p. 522, available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB222/index.htm

9 European Court of Human Rights, Case of Ireland v. The United Kingdom, Application No. 5310/71, paragraph 96.

10 European Court of Human Rights, Case of Ireland v. The United Kingdom, Application No. 5310/71, paragraph 147. Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms reads, in its entirety, as follows: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

11 European Court of Human Rights, Case of Ireland v. The United Kingdom, Application No. 5310/71, paragraph 168.
would not be reintroduced, under any circumstances, as an aid to interrogation.

Intelligence training to Latin American military officers was also offered at the U.S. Army School of the Americas. This training took place from 1965 to 1976, when it was halted by the Carter Administration and by a Congressional panel that witnessed the training. But training soon resumed under the Reagan Administration. Indeed, according to Sergeant Florencio Caballero, from the Honduran Army, he was taken to Texas with 24 others for six months between 1979 and 1980. There, Americans taught me interrogation, in order to end physical torture in Honduras. They taught us psychological methods—to study the fears and weaknesses of a prisoner. [E1] Make him stand up, [E2] don’t let him sleep, [E3] keep him naked, [E4] and isolated, [E5] put rats and cockroaches in his cell, [E6] give him bad food, [E7] serve him dead animals, [E8] throw cold water on him, [E9] change the temperature (James LeMoyne, “Testifying to Torture,” New York Times Magazine, June 5, 1988).

And these lessons did not fall on deaf ears. Both Sergeant Caballero and Ms. Inés Murillo (one of his victims at a clandestine prison near Tegucigalpa, Honduras) say that, while she was in captivity in 1983, “Mr. Caballero and other interrogators gave her raw dead birds and rats for dinner, threw freezing water on her naked body every half hour for extended periods and made her stand for hours without sleep and without being allowed to urinate.” (James LeMoyne, “Testifying to Torture,” New York Times Magazine, June 5, 1988).

In 1983, another CIA manual was produced. It was the Human Resource Exploitation Training Manual-1983. It drew heavily—if not verbatim—from the KUBARK manual. Yet it elaborated upon many of the techniques found there and in the Biderman outline. These elaborations bear citing in some detail (see below). Like the KUBARK manual, the Human Resource Exploitation Training Manual-1983 was declassified under a FOIA request initiated by The Baltimore Sun. Curiously, the version declassified for this newspaper was amended by hand in ways that invariably soften the more objectionable passages of the original. In the selections found below, passages crossed out by hand are indicated by strikethrough characters, while the material added by hand is given in italics. Parenthesised references of the form Y-X are to page X of section Y of the manual. Throughout the manual, all the derivatives of the verb to question appear in quotes.

[F1] Isolation: Total isolation should be maintained until after the first “questioning” session (F-4)

[F2] Monopolisation of Attention: [Cell] window should be set high in the wall with the capability of blocking out light. (This allows the “questioner” to be able to disrupt the subject’s sense of time, day and night.) (E-3) | [The “questioning” room should have] no windows, or windows that can be completely blacked out (E-5). | Deprivation of Sensory Stimuli. Solitary confinement acts on most persons as a powerful stress. A person cut off from external stimuli turns his awareness inward and projects his unconscious [sic] outward.

The symptoms most commonly produced by solitary confinement are superstition, intense love of any other living thing, perceiving inanimate objects as alive, hallucinations, and delusions. Deliberately causing these symptoms [sic] is a serious impropriety and to use prolonged solitary confinement for the purpose of extracting information in questioning violates policy (K-6).

12 European Court of Human Rights, Case of Ireland v. The United Kingdom, Application No. 5310/71, paragraphs 101-102.

13 See DOD, SOUTHCOM CI Training-Supplemental Information, 31 July 1991. This document can be downloaded from the National Security Archive at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB122/index.htm#southcom.

14 See Gary Cohn, Ginger Thompson, and Mark Matthews “Torture was taught by CIA. Declassified manual details the methods used in Honduras. Agency denials refuted”. The Baltimore Sun, January 27, 1997.
Induced Debilitation and Exhaustion: Heat, air and light should may be externally controlled, but not to the point of torture (E-3).

Cultivation of Anxiety and Despair: Cell doors should be of heavy steel [...] The slamming of a heavy steel door impresses upon the subject that he is cut off from the rest of the world (E3) | Bedding should be minimal – cot and blanket – no mattress. (The idea is to prevent the subject from relaxing and recovering from shock.) (E-3) | The ideal time at which to make an arrest is in the early hours of the morning. When arrested at this time, most subjects experience intense feelings of shock, insecurity, and psychological stress and for the most part have great difficulty adjusting to the situation (F-1) | Subject should be made to believe that he has been forsaken by his comrades (F-4) | The effectiveness of most “questioning” techniques depends upon their unsettling effect. The “questioning” process itself is unsettling to most people encountering it for the first time. The “questioner” tries to enhance this effect, to disrupt radically the familiar emotional and psychological associations of the subject. Once this disruption is achieved. The subject’s resistance is seriously impaired. He experiences a kind of psychological shock [...] during which he is far more open to suggestion and far likelier to comply, than he was before he experiences the shock. Frequently the subject will experience a feeling of guilt. If the “questioner” can intensify these guilt feelings, it will increase the subject’s anxiety and his urge to cooperate as a means of escape. (J-1 and J-2) | The “questioner” is able to manipulate the subject’s environment, to create unpleasant or intolerable situations, to disrupt patterns of time, space, and sensory perception (J-2).

Demonstrating “Omnipotence” and “Omniscience” of Captor: Throughout his detention, subject must be convinced that his “questioner” controls his ultimate destiny, and that his absolute cooperation is essential to survival (F-4).

Degradation: There should be no built-in toilet facilities, the subject should have to ask to relieve himself then he should either be given a bucket or escorted by a guard to a latrine. The guard stays at his side the entire time he is in the latrine (E-3).

With a nation traumatised from the terrorist attacks of September 11 2001, President George W. Bush announces, a month later, the initiation of military strikes against Al Qaeda and Taliban positions in Afghanistan. On January 16, 2006, the first suspected Al Qaeda and Taliban prisoners arrive at the detention facilities of the Naval Base at Guantánamo Bay, Cuba. Nine months later, on October 11, 2002, LTC Jerald Phifer sent a memorandum to the Commander of Joint Task Force 170 (Guantánamo) claiming that current guidelines for interrogation procedures at the detention facilities were limiting the ability of the interrogators to counter “advanced resistance” from the detainees. He therefore requested the base commander to approve the use of the following “counter-resistance strategies” at the base (if the “direct approach” to interrogation failed)15.

Yelling at the detainee (not directly in his ear or to the level that it would cause physical pain or hearing problems).

Techniques of deception (multiple interrogator techniques; the interviewer may identify himself as an interrogator from a country with a reputation for harsh treatment of detainees).

Use of stress positions (like standing), for a maximum of four hours.

The use of falsified documents or reports.

Use of isolation facility for up to thirty days (permission may be requested for isolation to cover medical visits of a non-emergent nature and extend beyond the initial thirty days).

Interrogation of the detainee in an environment other than the standard interrogation booth.

Deprivation of light and auditory stimuli.

15 This memorandum can be downloaded from the Human Rights Watch website at http://hrw.org/english/docs/2004/08/19/usdom9248_txt.htm
[G8] Detainee may also have a hood placed over his head during transportation and questioning. The hood should not restrict breathing in any way and the detainee should be under direct observation when hooded.


[G10] Removal of all comfort items (including religious items).

[G11] Switching the detainee from hot rations to MRE.


[G13] Forced grooming (shaving of facial hair, etc.).

[G14] Using detainees’ individual phobias (such as fear of dogs) to induce stress.

[G15] The use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family.

[G16] Exposure to cold weather or water (with appropriate medical monitoring).

[G17] Use of a wet towel and dripping water to induce the misperception of suffocation [or waterboarding].

[G18] Use of mild, non-injurious physical contact such as grabbing, poking in the chest with the finger and light pushing.

These eighteen techniques were put into three categories in the Phifer memo. Category I included techniques G1 and G2. Category II techniques covered techniques G3 through G14, and required permission of the OIC, Interrogation Section. Category III techniques involved G15 through G18, and required approval of the Commanding General and information to the Commander of U.S. Southern Command.

Category III techniques “and other aversive techniques, such as those used in U.S. military interrogation resistance training or by other U.S. government agencies, may be utilised,” the memo proposed, “to help interrogate exceptionally resistant detainees.” Thus, defensive programs designed for the resistance to interrogation would become offensive programs for the enhancement of interrogation. As detailed in an August 25, 2006 report from the Department of Defense Inspector General, one of these defensive-turned-offensive training programs was SERE (for Survival-Evasion-Resistance-Escape). This is a program that incorporates physical and psychological pressures that “replicate harsh conditions that the Service member might encounter if they are held by forces that do not abide by the Geneva Conventions.”

Indeed, a month prior to LTC Phifer’s memo, a SERE psychologist conference was organised in Fort Bragg, North Carolina, for Guantánamo interrogation personnel. At that conference, Guantánamo personnel understood that they were to become familiar with SERE training and be capable of determining which SERE information and techniques might be useful in interrogations at Guantanamo. Guantanamo Behavioral Science Consultation Team personnel understood that they were to review documentation and standard operating procedures for SERE training in developing the standard operating procedure for the JTF-170 [Guantanamo], if the command approved those practices.

And, on at least two occasions, “SERE instructors from Fort Bragg responded to Guantánamo requests for instructors trained in the use of SERE interrogation resistance techniques.”

On December 2, 2002, Secretary of State Donald Rumsfeld approved all the techniques G1 through G14, as well as G18. On that very month, Dr. Michael Gelles, chief psychologist at the Naval Criminal Investigative Service said that Guantánamo interrogators were using defensive programs designed for the resistance to interrogation would become offensive programs for the enhancement of interrogation. As detailed in an August 25, 2006 report from the Department of Defense Inspector General, one of these defensive-turned-offensive training programs was SERE (for Survival-Evasion-Resistance-Escape). This is a program that incorporates physical and psychological pressures that “replicate harsh conditions that the Service member might encounter if they are held by forces that do not abide by the Geneva Conventions.”

16 See Greenberg and Dratel (2005, xxvii). According to a November 27, 2002 memo from an FBI agent to his superiors, there was also a Category IV technique by which “Detainee will be sent off GTMO, either temporarily or permanently, to Jordan, Egypt, or another third country to allow those countries to employ interrogation techniques that will enable them to obtain the requisite information.” See Margulies (2006, 98).

“abusive techniques” and “coercive psychological procedures” on one of the Guantánamo prisoners (Mohammed al Qahtani; on his interrogation, see Gutierrez, this volume). Furthermore, Alberto Mora, general counsel for the Navy, told his superiors at the Pentagon that these methods were “unlawful and unworthy of the military services,” and that the use of “coercive techniques” placed all involved in risk of prosecution (McCoy 2006, 128).

Six weeks later, on January 15, 2003, Mr. Rumsfeld rescinds his blanket permission to use previously approved categories G3 through G14, and category G18 (but allows their use on a case-by-case basis and with approval of the Secretary of Defence). He also convenes a working group of top legal advisors from the U.S. Armed Forces to assess legal, policy, and operational issues relating to the interrogation of detainees. On April 4, 2003, this working group issued a report recommending the following thirty-five techniques “for use with unlawful combatants outside the U.S.” 18

[H1] Direct: Asking straightforward questions.

[H2] Incentive/Removal of Incentive: Providing a reward or removing a privilege, above and beyond those [POW privileges] required by the Geneva Convention, from detainees [...].

[H3] Emotional Love: Playing on the love a detainee has for an individual or group.

[H4] Emotional Hate: Playing on the hatred a detainee has for an individual or group.

[H5] Fear Up Harsh: Significantly increasing the fear level in a detainee.

[H6] Fear Up Mild: Moderately increasing the fear level in a detainee.

[H7] Reduced Fear: Reducing the fear level of a detainee.

[H8] Pride and Ego Up: Boosting the ego of a detainee.

[H9] Pride and Ego Down: Attacking or insulting the ego of a detainee, not beyond the limits that would apply to a POW.

[H10] Futility: Invoking the feeling of futility of a detainee.

[H11] We Know All: Convincing the detainee that the interrogator knows the answer to questions he asks the detainee.

[H12] Establish Your Identity: Convincing the detainee that the interrogator has mistaken the detainee for someone else.

[H13] Repetition Approach: Continuously repeating the same question to the detainee within interrogation periods of normal duration.

[H14] File and Dossier: Convincing the detainee that the interrogator has a damning and inaccurate file that must be fixed.

[H15] Mutt and Jeff: A team consisting of a friendly and harsh interrogator. The harsh interrogator might employ the Pride and Ego Down technique.

[H16] Rapid Fire: Questioning in rapid succession without allowing the detainee to answer.

[H17] Silence: Staring at the detainee to encourage discomfort.

[H18] Change of Scenery Up: Removing the detainee from the standard interrogation setting (generally to a location more pleasant, but no worse).

[H19] Change of Scenery Down: Removing the detainee from the standard interrogation setting and placing him in a setting that may be less comfortable; would not constitute a substantial change in environmental quality.

[H20] Hooding: This technique is questioning the detainee with a blindfold in place. For interrogation purposes, the blindfold is not on other than during the interrogation.

[H21] Mild Physical Contact: Lightly touching a detainee or lightly poking the detainee in a completely non-injurious manner. This also includes softly grabbing of shoulders to get the

18 This report can be downloaded from the Human Rights Watch website at http://hrw.org/english/docs/2004/08/19/usdom9248_txt.htm
[H22] Dietary Manipulation: Changing the diet of a detainee; no intended deprivation of food or water; no adverse medical or cultural effect and without intent to deprive subject of food or water; e.g. hot rations to MREs.

[H23] Environmental Manipulation: Altering the environment to create moderate discomfort (e.g. adjusting temperature or introducing an unpleasant smell). Conditions would not be such that they would injure the detainee. Detainee would be accompanied by interrogator at all times.

[H24] Sleep Adjustment: Adjusting the sleeping times of the detainee (e.g. reversing sleep cycles from night to day). This technique is NOT sleep deprivation [sleep deprivation is a separate technique; see H31 below].

[H25] False Flag: Convincing the detainee that individuals from a country other than the United States are interrogating him.

[H26] Threat of Transfer: Threatening to transfer the subject to a third country that subject is likely to fear would subject him to torture or death. (The threat would not be acted upon nor would the threat include any information beyond the naming of the receiving country).

[H27] Isolation: Isolating the detainee from other detainees while still complying with basic standards of treatment.

[H28] Use of Prolonged Interrogations: The continued use of a series of approaches that extend over a long period of time (e.g. 20 hours per day per interrogation).

[H29] Forced Grooming: Forcing a detainee to shave hair or beard. (Force applied with intention to avoid injury. Would not use force that would cause serious injury.)

[H30] Prolonged Standing: Lengthy standing in a “normal” position (nonstress). This has been successful, but should never make the detainee exhausted to the point of weakness or collapse. Not enforced by physical restraints. Not to exceed four hours in a 24-hour period.

[H31] Sleep Deprivation: Keeping the detainee awake for an extended period of time (Allowing the individual to rest and then awakening him, repeatedly). Not to exceed four days in succession.

[H32] Physical Training: Requiring detainees to exercise (perform ordinary physical exercises actions) (e.g., running, jumping jacks); not to exceed 15 minutes in a two-hour period; not more than two cycles, per 24-hour periods) Assists in generating compliance and fatiguing the detainees. No enforced compliance.

[H33] Face Slap / Stomach Slap: A quick glancing slap to the fleshy part of the cheek or stomach. These techniques are used strictly as shock measures and do not cause pain or injury. They are only effective if used once or twice together. After the second time on a detainee, it will lose the shock effect. Limited to two slaps per application; no more than two applications per interrogation.

[H34] Removal of Clothing: Potential removal of all clothing; removal to be done by military police if not agreed to by the subject. Creating a feeling of helplessness and dependence. This technique must be monitored to ensure the environmental conditions are such that this technique does not injure the detainee.

[H35] Increasing Anxiety by Use of Aversions: Introducing factors that of themselves create anxiety but do not create terror or mental trauma (e.g. simple presence of dog without directly threatening action). This technique requires the commander to develop specific and detailed safeguards to insure the detainee’s safety.

Several of the Phifer/Working Group techniques have been considered torture in the U.S. State Department Country Reports on Human Rights Practices (CRHRP). Consider for instance the following19.

The Constitution prohibits torture; however, the security service routinely and systematically tortured

detainees. According to former prisoners, torture techniques included [...] denial of food and water, extended solitary confinement in dark and extremely small compartments [G3, G7], and threats to rape or otherwise harm family members and relatives [G15] (CRHRP 2001, Iraq, §1.c).


Common torture methods include: [...] prolonged isolation [G5, H27] [...] denial of food or sleep [H31] [...] and public humiliation [H9, H34] (CRHRP 2001, Pakistan, §1.c).

[S]ecurity officials mainly used torture methods that did not leave physical traces, including repeated slapping [G18, H33], exposure to cold [G16, H23], stripping [G12, H34] and blindfolding [G8, H20], food and sleep deprivation [H31], threats to detainees or family members [G15], dripping water on the head, squeezing of the testicles, and mock executions [G15] (CRHRP 2004, Turkey, §1.c).


During the year there continued to be reports that security forces used extreme physical abuse such as bondage, heat exposure [H23] [...] (CRHRP 2005, Eritrea, §2.c).

But criticisms would not come only from the State Department. An early draft of the April 2004 report circulated by the Working Group had elicited objections from top legal advisers in the military. Deputy judge advocate general for the Air Force, Major General Jack Rives, observed that “the more extreme interrogation techniques, on their face, amount to violations of domestic law and the UCMJ [Uniform Code of Military Justice],” placing interrogators “at risk of criminal accusations”. Similarly, the Navy’s chief lawyer, Rear Admiral Michael F. Lohr, expressed concern that the American people would condemn the military for “condoning practices that, while technically legal, are inconsistent with our most fundamental values” (McCoy 2006, 128f).

All these objections would be cast aside. In a memo issued on April 16, 2003, Secretary Rumsfeld approved techniques H1–H19, H22–H25, and H27 (Greenberg and Dratel 2005, Memo 27). Beyond this, all of these techniques (plus two others) would be eventually authorised for use in the interrogation of Iraqi prisoners.

In the summer of 2003, at a Pentagon briefing on the growing Iraqi resistance to American forces in Iraq, Secretary Rumsfeld gave oral orders for the Guantánamo commander, Major General Geoffrey Miller, to “Gitmoize” Iraqi intelligence. Traveling to Iraq, the general issued a report for Army Headquarters in Iraq. In it he argued for a radical restructuring of detainee policy, to make Iraq’s prisons the front line for information warfare (McCoy 2005, 133). Five days after General Miller’s departure from Iraq, on September 14, 2003, Lt. General Ricardo S. Sanchez, commander of the Coalition forces in Iraq, issued a memo authorising an interrogation policy for Iraq “modelled on the one implemented for interrogations conducted at Guantanamo Bay, but modified for applicability to a theatre of war in which the Geneva Conventions apply”20.

The techniques recommended in this memo were H1–H19, H22–H25, H27, H31,21 and a particular instance of H35, namely

Presence of Military Working Dog: Exploits Arab fear of dogs while maintaining security during interrogations. Dogs will be muzzled and under

20 This memo was made public by the ACLU. See: http://www.aclu.org/safefree/general/17562prs20050329.html
21 Except that the technique is called “Sleep Management” rather than “Sleep Deprivation” here.
control of MWD handler at all times to prevent contact with detainee.

In addition, it recommended an expansion of the Phifer techniques G1 and G3, and a blend of techniques G2 and G4:

Yelling, Loud Music, and Light Control: Used to create fear, disorient the detainee, and prolong capture shock. Volume controlled to prevent injury.

Deception: Use of falsified representations including documents and reports.

Stress Positions: Use of physical postures (sitting, standing, kneeling, prone, etc.) for no more than 1 hour per use. Use of technique will not exceed 4 hours and adequate rest between use of each position will be provided.

In a subsequent memo General Sanchez limited his recommendations to techniques H1-H17, but justified isolation (called there segregation) of “security detainees” for up to thirty days (or longer if his permission was granted)22.

In February 2004, the International Committee of the Red Cross (ICRC) presented a Report on the Treatment by the Coalition Forces of Prisoners of War and other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation23. This report, which was based on visits made by the ICRC to Iraqi places of detention between March and November 2003, found that the methods of ill-treatment most frequently alleged during interrogation included:

[J1] Hooding, used to prevent people from seeing and to disorient them, and also to prevent them from breathing freely [...] Hooding was sometimes used in conjunction with beating thus increasing anxiety as to when blows would come [...] Hooding could last for periods from a few hours to up to two or four consecutive days [...]  

[J2] Threats (of ill-treatment, reprisals against family members, imminent execution, or transfer to Guantanamo).

[J3] Being stripped naked for several days while held in solitary confinement in an empty and completely dark cell that included a latrine.

[J4] Being held in solitary confinement combined with threats (to intern the individual indefinitely, to arrest other family members, or transfer the individual to Guantanamo) insufficient sleep, food or water deprivation, minimal access to showers [...], denial of access to open air and prohibition of contacts with other persons deprived of their liberty.

[J5] Being paraded naked outside cells [...] sometimes hooded or with women’s underwear over the head.

[J6] Acts of humiliation such as being made to stand naked against the wall of the cell with arms raised or with women’s underwear over the head [...] while being laughed at by guards, including female guards, and sometimes photographed in this position.

[J7] Being attached repeatedly over several days, for several hours each time, with handcuffs to the bars of their cell door in humiliating (i.e. naked or in underwear) and/or uncomfortable position causing physical pain.

[J8] Exposure while hooded to loud noise or music, prolonged exposure while hooded to the sun over several hours, including during the hottest time of the day, when temperatures could reach 50 degrees Celsius (122 degrees Fahrenheit) or higher.

[J9] Being forced to remain for prolonged periods in stress positions such as squatting, or standing, with or without the arms lifted.

On April 28, 2004, pictures of abuse at Abu Ghraib exploded into the public consciousness. Response to this was swift. In 2005, Physicians for Human Rights issued a scathing report which found that “there is sufficient evidence available now to show a consistent pattern of the use of psychological torture as a key element in the interrogation of detainees
by US personnel” during the war on terror. The report furthermore identified four techniques of “a regime of psychological torture”, sometimes used in combination:

[K1] Prolonged Isolation
[K2] Sleep Deprivation
[K4] Use of Threats and Dogs to Induce Fear of Death or Injury

The practices included in this table span a period of fifty years and spread over three continents. They are taken from descriptions composed by victims (cf. Biderman and ICRC), perpetrators (Caballero),

training manuals (KUBARK, HRETM 83), military officers (Phifer), military lawyers (Working Group), and human rights judges (Ulster) or physicians (PHR).

But the proposed definition is at the same time discriminating. Excluded by it are techniques which should not count as torture — i.e. direct interrogation (H1), comfort item removal (G10, G11, H2, H22), misleading the detainee into believing there is false information about him (G4, H12, H14), or the ostensibly inane interrogation “in an environment other the interrogation booth” (G6). Excluded also are forms of physical contact like pushing, poking, or slapping, which may or may not fall within the parameters of physical torture (G18, H21, H33).

**CONCLUSION**

We have presented in this paper an extensional definition of PT that avoids settling the complex quantitative and the qualitative questions raised by PT. This definition is precise, modular, phenomenological,
relevant, comprehensive, and discriminating. Thus, it is in many respects satisfying.

Yet, it might be thought that the proposed definition is wanting in some respects. One may wonder, for example, whether the definition is fully exhaustive. To settle this issue one should test the definition against more data. Although the data from official sources is notoriously difficult to come by, testimony from victims is, unfortunately, abundant. Testimony found in the online Guantánamo Testimonials Project currently being developed by the UCDavis Centre for the Study of Human Rights in the Americas may be a good place to turn to in this regard. Other collections of testimony gathered by human rights groups and truth commissions are rich sources as well.

But beyond exhaustiveness, it might be thought that we should have an understanding of the practices in A1-A13 that will explain why they constitute PT. In other words, we should have an intensional definition of PT. One approach that will not work is to define it by the psychological pain (or mental suffering) it produces, as all forms of torture produce it. A more promising approach in this regard is to define PT by its modus operandi—i.e. by the fact that it does not involve direct physical violence (beating, lashing, slashing, burning, electrocuting, hanging, pulling, or twisting, to name a few). Whether PT can indeed be defined as “no-touch torture” (McCoy 2006) is an issue that must be left for future research.

REFERENCES

Torture Continues, While Torture Survivors Await Justice And Redress

GOOD COMMITMENT

POOR IMPLEMENTATION

An old woman in Nepal photo © Tyler Byber courtesy via www.flickr.com/photos/byber

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GOOD COMMITMENT
POOR IMPLEMENTATION

by KAMAL RAJ PATHAK

COMMITMENT DEMENTATION

Survivors Await Justice And Redress
Nepal was the first country in South Asia to accede to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), in the year 1991. Nepal has since ratified and is a party to at least four major UN treaties that expressly prohibit torture - the Geneva Conventions, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Rights of the Child (CRC). The obligations under these conventions and covenants unambiguously prohibit torture.

The ratification of about half a dozen UN treaties by Nepal government in 1990s added a new milestone in the promotion and protection of human rights in the country. These steps were taken by the government after the People’s Movement in 1990 which ended the autocratic, monarchical and party-less Panchayat System, establishing a constitutional monarchical multi-party parliamentary system in its wake. The ratification of these UN treaties provided a positive message to the international community of Nepal’s readiness to protect and promote human rights domestically. In the 1990s, this political upheaval and commitment to human rights was praiseworthy, and attracted attention.

Apart from ratification of the UN treaties, the Nepal Government also expressed strong commitment through written reports and formal speeches to protect the human rights of its citizens during international forums at UN headquarters. Moreover, during the first and second Universal Periodic Reviews (UPR) of Nepal in 2011 and 2015, the government of Nepal clearly expressed its intention to fully comply with its international human rights obligations. Among these strong commitments made in the international forums including UPR sessions, the government also expressed its willingness to criminalise torture and prohibit acts of torture and ill-treatment in Nepal.

It has now been two decades since Nepal ratified the UN Convention against Torture in 1991. It cannot be denied that there have been several ups and downs in Nepalese politics since the 1990s. The country underwent internal armed conflict between 1996 and 2006 in which at least 13,000 people lost their lives with a further 1,300 still missing. It is estimated that thousands of people were tortured by both state security forces and Maoists during the conflict. After the formal end of the internal armed conflict in 2006, the country is in peace process. The former Maoists combatants were integrated in to the Nepalese army with a new constitution promulgated in 2015. The Truth and Reconciliation Commission (TRC) has been functioning without the formal endorsement from conflict victims and human rights community in Nepal, who doubt that the TRC will be able to provide justice for them.

Critically analysing Nepal’s obligations under the Convention against Torture must take place within this context. This article therefore assesses Nepal’s commitment to prohibit torture and the status of the implementation of these international commitments.

STATE OBLIGATION UNDER UNCAT

Torture is one of the most brutal and horrendous human right violations, constituting a direct attack on the core of human dignity. The convention was the first binding international instrument exclusively

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1 Second state Periodic report to UN Committee against Torture, CAT/C/33/Add.6, 14 January 2005, http://www.univie.ac.at/bimtor/dateien/nepal_cat_2005_report.pdf
2 http://indicators.ohchr.org/
3 https://www1.umn.edu/humanrts/research/ratification-nepal.html
dedicated to the struggle against torture. It contains only a limited number of individual rights, with most provisions imposing obligations on states parties.\(^6\) It is one of the most widely ratified human rights conventions with 159 states parties, including Nepal as of February 2016.\(^7\)

Every treaty in force is binding upon its parties and must be performed by them in good faith.\(^8\) The UNCAT is a proactive treaty that requires states parties to ensure that their domestic legal framework prohibits conduct amounting to torture and that they abstain from acts amounting to torture. Importantly, it goes further to require states to take specific measures to ensure practical implementation of the prohibition of torture, including positive measures of prevention, ensuring adequate and effective mechanisms to investigate allegations of torture and, where sufficient evidence exists, initiate prosecutions.\(^9\) As a state party to the convention, Nepal has obligation to ensure adequate and effective mechanisms to investigate allegations of torture and prosecute perpetrators at home.

Moreover, Nepal has an obligation to prevent torture not only under UNCAT but also pertaining to other treaties and conventions including the Geneva Conventions, the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC).\(^10\) As Nepal is a state party to these conventions, it has legal obligations to prevent torture and ill-treatment as well as to domesticate the provisions of these conventions into local laws and policies.

The main obligation of a state under UNCAT is to prevent act of torture in its jurisdiction using various measures. Article 1 of UNCAT requires a state party to prevent any act of torture that might be committed through its agent’s direct participation as well as acts of torture by private individuals with the consent or acquiescence of a public official. This clearly connotes that a state has positive as well as negative obligations. The negative obligation of a state is it should refrain from interfering in individual’s right to be free from torture.\(^11\) Similarly, no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.\(^12\) Therefore, the right against torture is absolute and can not be derogated under any circumstances by the states who have ratified the convention. As a state party to the convention, Nepal has a strong obligation to prevent acts of torture in its jurisdiction which cannot be justified under any reasoning such as internal conflict, etc.

Similarly, Nepal has legal obligation to criminalise torture in its domestic laws after ratification of the UNCAT. Article 4 of the convention clearly states, “each State Party shall ensure that all acts of torture are offences under its criminal law”, which requires states parties to define “all acts of torture” as crimes under national law. Moreover, to accomplish the convention’s objectives and purposes successfully – the reasonable prevention of torture – requires not only that the states parties abstain from the practice of torture as an official policy, but also that they enact such legislative, administrative and judicial measures to prevent such human rights violations.\(^13\)

The TCA also stipulates several other state obligations regarding the protection of torture victims and

\(^6\) Ineke Boeren (2009), Establishing state responsibility for breaching human rights treaty obligations: Avenues under Human Rights treaties, page 185, Netherlands International Law Review / Volume 56 / Issue 02

\(^7\) http://indicators.ohchr.org/


\(^10\) http://indicators.ohchr.org/


\(^12\) Article 2 (2), UN Convention against Torture.

prevention of torture. For instance, in accordance with the general rule, ‘the ordinary meaning’ of the terms of Article 14 is that it requires each state party to ensure in its legal system that any victim of an act of torture, regardless of where it occurred, obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full a rehabilitation as possible. As a state party it is the duty of the Nepal Government to enact proper laws or policies to provide fair and adequate compensation and rehabilitation to the victims of torture in line with UNCAT.

Thus, every state which ratifies UNCAT, including Nepal, has legal obligations to take effective measures to protect acts of torture at home, provide effective judicial, administrative remedies and supply redress to the victims of torture. Torture can not be justified in any circumstances under international human rights law.

COMMITMENT VS. IMPLEMENTATIONS

The Nepal Government has taken a few measures to comply with the obligations created by the UN Convention against Torture. The first initiative by the government to prohibit torture was introduced in the 1990 Constitution of Nepal. Article 14 (4) of the constitution prohibits act of torture but does not criminalise it. Similarly, the 2007 Interim Constitution of Nepal also prohibits torture and makes it punishable by law in article 26. The latest constitution promulgated in September 2015 prohibits torture and states that no person who is arrested or detained shall be subjected to physical or mental torture or to cruel, inhuman or degrading treatment and shall be punishable by law, and any that person who is the victim of such treatment shall have the right to obtain compensation in accordance with law.

Thus, it only prohibits physical or mental torture and cruel, inhuman or degrading treatment but also renders such acts punishable by law with right to compensation to the victims of torture.

After the ratification of UNCAT, Nepal enacted the 1996 Torture Compensation Act (TCA) to comply with the obligations of UNCAT. Section 2 (a) of the Act defines torture as “Physical or mental torture of any person who is in detention in the course of inquiry, investigation or hearing, or for any other reason”. The term includes cruel, inhuman, or insulting treatment of such person. However, the act fails to define torture in detail in line with the UNCAT. Moreover, the TCA fails to comply with the standards of the UNCAT in several essential aspects, first and foremost by failing to criminalise torture. The assessment of the TCA by Advocacy Forum states that “the TCA neither defines torture as a crime nor specifies the legal repercussions to be taken against perpetrators, so those responsible for the acts of torture have never been held criminally accountable. The only exceptions are in cases of excesses, where the victim died as a direct result of torture and perpetrators were charged for murder”.

Similarly, the 1992 Children Act includes a prohibition of torture and cruel treatment, albeit qualified. Likewise, Article 9 of the 1974 Evidence Act stipulates that confessions made through the use of torture are inadmissible as evidence in court. The Muluki Ain (Country Code) of Nepal even contains a chapter on “Beating”. The chapter provides provisions for fines/punishment according to the nature of the wound(s) or gravity of the assault/beating. “Even more important is the fact that even this ‘beating’ section of the Civil Code does not provide any specific provision for assault which has taken place whilst the victim is in

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16 Constitution of Nepal 2015, article 22.

19 Section 7: ‘No child shall be subjected to torture or cruel treatment. Provided that, the act of scolding and minor beating by his father, mother, member of family, guardian or teacher for the interests of the child shall not be deemed to violate the provisions of this section.’
custody, that is, with state involvement”. Therefore, this section cannot provide justice to the victims of torture.

When the internal armed conflict was at its peak and cases of torture and ill-treatment were burgeoning in 2005, the UN Special Rapporteur on the Question of Torture undertook a visit to Nepal from 10-16 September 2005, at the invitation of the Government. The Special Rapporteur concluded that torture was systematically practised by the police, armed police and Royal Nepalese Army. The Special Rapporteur stated that, “domestic law, namely the 1996 Compensation Relating to Torture Act, does not contain a definition of torture in line with article I of the Convention, nor does it provide for effective remedies; it does not provide for the criminalisation of torture, nor the imposition of punishment commensurate with the gravity of torture”. Similarly, the UN Committee against Torture in its concluding observation on Nepal in 2007 expressed similar concerns and asked the Nepal Government to amend the 1996 Torture Compensation Act (TCA) in compliance with the conventions.

Despite the obligations of the UNCAT and recommendations made by different UN mechanisms including the Committee against Torture and the Special Rapporteur on the Questions of Torture, the Nepal Government fails to implement these recommendations and obligations. Yet neither do they reject these recommendations, instead expressing a commitment to implement that remains unfulfilled.

In its Second periodic report to UN Committee against Torture in 2004, the Nepal Government stated that, “Acts of torture are not offences under the criminal law of the Kingdom of Nepal, therefore, a draft Criminal Code, which explicitly makes torture punishable, has been prepared. The Code is waiting for the Parliament to resume”. Several states including Switzerland, Denmark and the United Kingdom recommended the criminalisation of torture and to ensure compliance with the UNCAT, which Nepal government accepted during the first cycle review of Nepal under the UPR in 2011. The recommendations were, however, not met until the second cycle review of Nepal under the UPR in late 2015. Moreover, in the second national periodic report to the CCPR in 2012, the Nepal government stated that “In order to make torture related legislations to be further harmonised with the CAT, the government has already given the final shape to the bill to criminalise the act of torture”.

The Nepal Government made similar commitments to fully comply with the UNCAT during the second Universal Periodic Review of Nepal in September 2015. In the national report of Nepal to the UPR in 2015, the government again stated that “a separate Bill to criminalise all forms of torture and ill treatment has been submitted to the Legislature Parliament”. The report also clearly indicated that the government of Nepal was making efforts to create domestic legislations more compatible with the UNCAT. Several states raised concerns regarding the criminalisation of torture and justice to torture victims during the UPR session in 2015. The government never denied to a will to implement the recommendations of the UPR, UN Special Rapporteur on Torture, and Committee against Torture to criminalise torture and fulfil other obligations imposed by UNCAT. However, these

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21 Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak 2006, Available at; https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/101/19/PDF/G0610119.pdf?OpenElement

22 Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, para 31.

23 Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, para 3.


25 Second Periodic state report to Committee against Torture, 2005, para 66


28 Nepal’s national report to UPR, 6 August, 2015, para 50.
commitments have not yet materialised at the local level.

The UN bodies were not only concerned with the lack of criminalisation of torture, they also strongly recommended the provision of adequate reparations or compensations to the victims of torture. They were also disquieted with the lack of proper investigations for acts of torture committed by the state security forces. The Special Rapporteur on the Question of Torture was deeply concerned with the prevailing culture of impunity for torture in Nepal, especially the emphasis on compensation for acts of torture as an alternative to criminal sanctions against the perpetrator. Thus, in terms of justice for acts of torture, victims have only the possibility of compensation, and only “departmental actions” (e.g. demotions, suspensions, fines, delayed promotions, etc.) are expected for perpetrators.

The prevailing culture of impunity for the perpetrators of torture remains a specific area of concern for UN bodies. Recommendations have been made by the Special Rapporteur on the Question of Torture, the Committee against Torture and during UPR sessions to investigate cases of torture and to prosecute those responsible for torture. For instance, Nepal accepted the recommendation to “Undertake legal and administrative efforts to end torture and related impunity” during the 2011 UPR process. The implementation, as always, remains problematic and frustrating.

As a result of non-compliance with the obligations of UNCAT and non-implementation of recommendations made by UN mechanisms including the UPR Working Group, torture continues and impunity remains as a major challenge in Nepal. Though the end of conflict has abated the use of torture, the prevailing culture of impunity has allowed perpetrators to go unpunished and the overall trend of torture to continue. The percentage of torture use in police detention centres has decreased in recent years but torture and ill-treatment are still practiced in large numbers across Nepal. According to a 2015 report, Torture in Nepal in 2014: More of the Same published by Advocacy Forum, the percentage of torture use in police detention in Nepal was 16.2% during 2014, only a small drop from 16.7% in 2013.

Despite the commitments made by the government to protect victims of torture and to prosecute those responsible for acts of torture, victims and witnesses remain vulnerable. According to Human Rights of Asia report published by Asian Human Rights Commission in 2013, “The missing victim protection and witness protection mechanisms exposes victims to abuse and threats if they want to report torture and as a result, most of them choose to keep silent in Nepal”. In the absence of a suitable victim/witness protection mechanism, victims frequently find themselves or their families in danger if they lodge a formal complaint under the act. The threat of further harm is enough to convince most victims that it is best to suffer quietly than to seek legal recourse.

There are several examples that display how victims of torture and their families are routinely denied access to justice and threatened to discourage filing cases against Nepalese security officers. Torture survivor Padam Bahadur Khadka and his family members were repeatedly threatened in 2015 for having filed a torture compensation case against army Lance

29 Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, para 26.
30 Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, para 14.
33 Torture in Nepal in 2014, More of the Same, June 2015, Advocacy Forum report
Corporal Man Bahadur Khadka. Similarly, another torture victim, Mr. Puradi Prasad Pandey, received death threats after filing a case against a police officer under the Torture Compensation Act on 23 February 2007. A couple from Dhanusha district were also threatened with death for a filing torture case against a police officer in Dhanusha district in 2012. There are several other cases where I have personally visited victims of torture who have been seriously threatened for filing cases against the police or army in Nepal.

Apart from these security incidents, there are other obstacles to access to justice for the victims of torture in Nepal. For instance, section 5 of the TCA stipulates that a victim of torture must file their complaint “within 35 days from the day the torture is inflicted on him or the day he has been released from custody.” This provision is the single most significant factor in denying compensation to thousands of victims of torture.

Victims of torture and their families are routinely denied justice at home. In their search for justice, a total of 19 cases, including several of torture, have been submitted to the UN Human Rights Committee in Geneva under the provisions of the ICCPR and its Optional Protocol. For instance, in April 2011 in the torture case of Yubraj Giri vs. Nepal, the UN Human Rights Committee found Mr Giri and his family to be victims of violations of the International Covenant on Civil and Political Rights, and called on Nepal to fulfil its obligation under the Covenant to provide Mr Giri and his family with an effective remedy. Specifically, the Committee in this case stated that Nepal must ensure a thorough and diligent investigation into the torture and ill-treatment suffered by Mr Giri and prosecute and punish those responsible, among other suggestions. However, these recommendations have still not been carried out. There are almost a dozen similar cases of torture and other human rights violations where the government of Nepal has failed to fully implement views of the UN Human Rights Committee.

The UN Human Rights Committee has become almost a last resort for the victims of torture in Nepal when justice is denied at home. There are no any regional human rights mechanisms in South Asia to deal with cases of human rights violations. As Nepal has not ratified the Rome Statute, the option of filing cases before the International Criminal Court has been closed. Yet, there is a case where senior Nepalese army officer, Colonel Kumar Lama, was arrested in London, UK on 3 January, 2013 and charged with two counts of torture under Section 134(1) of the 1988 United Kingdom Criminal Justice Act. According to a briefing paper published by the International Commission of Jurists (ICJ) “The charges are based on allegations that in 2005, during Nepal’s decade-long internal armed conflict between the government and Maoist forces, Colonel Lama participated in the torture of two detainees at an army barracks under his command”. He was arrested in UK as “The United Kingdom is exercising its authority pursuant to the legal principle of ‘universal jurisdiction’, which requires states to investigate and prosecute, or extradite for prosecution, any person suspected of committing certain acts criminalised under international law – including torture. The final trial in the case is expected to take place soon in London.

39 Hope and Frustration, Advocacy Forum torture report, page 27
40 http://www.redress.org/case-docket/giri-v-nepal-
The decisions from the UN Human Rights Committee in the individual cases of torture and other cases of human rights violations, and the arrest of colonel Kumar Lama in connection with torture in Nepal, provide a little hope for victims of torture and the human rights community in Nepal. However, the assumption is that the state is the primary actor responsible for creating an environment that allows people to live in human dignity. It is the prime responsibility of the Nepal government to create torture free society and provide access to justice to the victims of torture at home under UNCAT and other UN conventions.

CONCLUSION

The measures taken by the Nepal government in protecting victims of torture and ill-treatment since the 1990s are a welcome development. The ratification of UNCAT and commitments made through written reports and formal verbal speeches before the UN and other international forums are praiseworthy. However, there is a big gap between the commitments on paper and their implementation at home. The parties to a treaty are legally bound to fulfil and implement the obligations contained in the treaty. These obligations should be met in good faith by the parties under the principle of Pacta sunt servanda.

It is the obligation of Nepal to provide justice to domestic victims of torture. Local remedies should be easier to access, with the perfect option being that human rights claims should be dealt with in close proximity to the site where they emerge. The Torture Compensation Act is an important but insufficient piece of legislation in the history of Nepal’s turbulent path towards recognising and respecting universal human rights. Moreover, the inadequacy of the Torture Compensation Act has allowed the continuation of practice of torture as well as promoted a culture of impunity in Nepal. The Special Rapporteur on the Question of Torture stated in his report that, “legal safeguards are routinely ignored and effectively meaningless. Impunity for acts of torture is the rule, and consequently victims of torture and their families are left without recourse to adequate justice, compensation and rehabilitation”.

The government of Nepal should comply with the obligations created by UNCAT and other UN Conventions to build a torture-free just society in Nepal. It is time to implement these commitments to respect and protect the rights of the people in the county.

About the Author: Kamal Raj Pathak is a human rights lawyer from Nepal. He has worked in a Nepalese human rights NGO Advocacy Forum for 10 years until August 2015 and is actively engaged in human rights movements including the anti-torture campaign in Nepal. Currently, Mr. Pathak is studying for an MA in Human Rights Policy and Practice in three prestigious universities in Sweden, Spain and UK under the Erasmus Mundus scholarship. Pathak can be contacted at kamal220@gmail.com

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48 Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, para 31.
NEW POLITICAL ORDER BEGINS IN BURMA

by AUNG ZAW

“IT’S NOW OFFICIAL AND IT’S PARTY TIME!” many Burmese said to each other. Millions were glued to live television footage of the long awaited official political handover which took place at the presidential palace on Wednesday.

A new government came into power and the National League for Democracy’s (NLD) Htin Kyaw, a close confidant of Aung San Suu Kyi, was sworn in as Burma’s ninth president.
As the new administration settles in, it is expected that fundamental changes and surprises await—the first of which is talk of a new political position being created for Suu Kyi, who now holds four Cabinet posts in the new government as minister of foreign affairs, electric power and energy, the president’s office and education.

While no title yet exists for this role, it is likely to be “state political counselor,” or even “state adviser in chief.” A draft “State Adviser Bill” is being discussed in the Upper House that would effectively make Suu Kyi head of state, according to one NLD lawmaker.

Such a broad designation would not only allow the Lady to move freely within the government and offer guidance to President Htin Kyaw—it could also fulfill her repeated claim that in a new administration, she would be “above the president,” or, at the very least, his equal.

Her intentions have been revealed earlier than expected, but everything surrounding the new leadership’s inauguration is unfolding rapidly.

Htin Kyaw’s first presidential speech, which lasted only three minutes, did not exactly capture the political momentum of the occasion or provide national inspiration. But in a limited time frame, he did to emphasise the importance of building a peaceful, federal and democratic nation in an ethnically diverse country plagued by civil war. He also stressed his party’s continued push for constitutional reform.

“I have an obligation to work toward having a Constitution that is of a democratic standard and which is suitable for the country,” he said.

In the three-minute speech, Htin Kyaw also mentioned Suu Kyi’s name, with a gentle reminder that she remains the real political boss, even before knowledge of the draft state adviser bill was made public.

Many NLD supporters described the succinct speech as straightforward and meaningful. It was a comparatively brief political statement in the context of Burma’s modern history, which the public welcomed. After all, Htin Kyaw’s executive predecessors were notorious for delivering long-winded monologues unsupported by policies and action, leaving Burma in limbo for generations.
Like the speech, the handover ceremony at the President’s house was also rather abrupt. Observers on social media were not critical of the hasty proceedings, however, and many responded by posting jokes and satirical commentary about the occasion.

“The faster the better, because I want them to leave as soon as possible,” said one user, implying that Thein Sein’s administration was an extension of the former military regime—and highlighting an eagerness to see this period of Burma’s history give way to change.

At the dinner hosted in the presidential palace to conclude the day’s events, Thein Sein and his former cabinet ministers were nowhere to be seen, but military commander-in-chief Srn-Gen Min Aung Hlaing was present. It was Suu Kyi who was once again the centre of attention, rather than loyalist Htin Kyaw.

On Thursday morning, state-owned newspapers, which were once described as “Stalinist,” splashed photos of the new government on their pages. Suu Kyi is, predictably, at the centre of these images; Htin Kyaw is there too, and a smiling Min Aung Hlaing also makes an appearance.

This government-owned media is now operating under the new information minister, Pe Myint, a well-known and respected writer in Burma. Until midnight after his inauguration, the newly appointed minister was reportedly working on the production of Thursday’s paper, knowing it would represent a new political message.

Poems written by some revolutionary heavyweights—including former student leader and longtime political prisoner Min Ko Naing—were published for the first time in a state-run paper. It was also the first time that a respected editorial cartoonist, APK, was invited to contribute a piece of his work to such a publication.

Headlines in Thursday’s Burmese version of The New Light of Myanmar read: “New history begins in Burma...” Similarly, The Mirror, which once served as a mouthpiece to the repressive military regime and denounced opposition, thundered: “The greatest change ever in 50 years and a government is formed under the guidance of a Daw Aung San Suu Kyi-led National League for Democracy government!”

Indeed, the undeniable fact is that a new political order has begun in a once military-ruled Burma.

Some cannot help but reflect back on Suu Kyi’s first landmark political speech in 1988, when the Lady, then 43, famously described the fight for democracy as a “second struggle for independence,” meaning that it was necessary to liberate Burma and citizens from the army’s generals the way that her father did from British domination.

After more than two decades, this long struggle is now beginning to witness some vital changes and political shifts, but it has not succeeded just yet.

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Aung Zaw is the founding editor-in-chief of The Irrawaddy, a well known journal on Burma.
The fight against Satan’s Land

by ARPAN RACHMAN AND ANDI AISYAH LAMBOGE

In Indonesia, mass evictions have become the modus operandi of a government desperate to develop its industries. Local residents view the situation very differently, fearing the loss of their homes and livelihoods. Street battles are not infrequent. Torture Magazine here provides a grassroots perspective on how these processes play out in a story so common it is largely overlooked in lieu of more glamorous human rights abuses.

Citizens who live on Bulogading Street have amazing courage. When the government tried to demolish their residences they invited the police to start a civil war. Not limited to threatening banners, the inhabitants extended their boldness to a show of armed force against the police. This is an old story about evictions in Indonesia, from the perspective of a community fighting back against injustice.
Bone Pos reported:

_Makassar District Court passed an execution plan amid ongoing chaos in Bulogading Street on Monday afternoon, 23 November, 2015._

_Hundreds people gathered along the Somba Opu Street and pelted police with stones. In addition, a number of people proved ready to arm themselves with sharp weapons._

Noon that day saw Bulogading residents fighting against the police. Dozens of people armed with rocks and arrows shut down Somba Opu Street, stalling its gold trade. Residents damaged flower pots on the pavements, threw stones onto the road and installed a wooden bar to stop vehicles accessing the street. Gold stores closed hurriedly as police chased the malcontents.

Bulogading itself is located under sub district Ujung Pandang, on the Losari Beach ahead of the Makassar Strait. For all intents and purposes it is a largely unremarkable area, typical of the Indonesian archipelago. Many of its residents live simply, selling roasted banana along Losari Beach to tourists to get by.

Yet something threatens them and their way of life. The state sees Bulogading settlement as recognising the property of someone else. A land area of over 2,000 square meters is under contest by heirs who claim to own the land, with the plaintiffs only possessing an expired land certificate in a case stretching back to 1971.

“In the court, we do not see the plaintiff. We fight against Satan,” said Kostari, a 42 year old man who lives with his wife and three children, working as a gold trader at Somba Opu. He tells his story in his own home, located down a narrow alley off the base of Bulogading Street.

Kostari’s relationship with the street stretches back three generations. His grandfather lived there during the days of the Japanese occupation of Indonesia, from 1942-45. As a resident, he was mailed an order of eviction after the Makassar District Court decision on 12 August, 2015. Later cancelled after resident resistance, some people preferred to sell their houses rather than face eviction.

Berita Kota Makassar reports:

_Makassar District Court has not been able to ascertain and determine the schedule of eviction of land in Bulogading. “I don’t know when to schedule the eviction,” said a spokesperson for the Makassar District Court, Ibrahim Palino, at Thursday, 20 August, 2015._
Palin noted that until now the courts have postponed the eviction of the land. Although the court will continue to carry out the eviction, based on the decision won by the plaintiff.

Maulana, a lawyer from YLBHM, said, “Bulogading citizens [were] sued by the plaintiff in 1971. Haji Hashim Daeng Manama claims to be the owner of the land. His proof is a photocopy of a land certificate named the Building Rights Title (HGB). He acquired the HGB in an auction process and then continued the lawsuit in court.” Maulana admonished that the court never carried out a trial on the Haji’s lawsuit in 1971.

The earliest named owner of the Bulogading land is Ho Tjing Ling, a Chinese man. He possessed the Eigendom Verponding certificate under the Dutch government during the era before Indonesia’s independence. Under the Basic Agrarian Law Act No. 5 of 1960, the entire parcel used to fall under Dutch state-owned land, later converted to the Building Rights Title certificate as foreigners could not own land.

Ahmad Rianto, another YLBHM lawyer, points this out, as well as the fact that the land has been occupied continuously by native people since 1924. “All the land certificates under HGB expired in 1980. As it was not re-registered by the original owner, the state undertook an auction”. Yet this auction was marred with mistakes, such as legal terms not matching. Moreover, since 1980, the HGB was not extended until the present time, more than 30 years later.

In the 1980s, the court ordered a reopening of the case, probing why the plaintiff held only the outdated Eigendom Verponding certificate and the lack of local land review, meaning boundaries are unclear.

The Haji’s heir, Sadhiah filed a lawsuit in Makassar District Court in 2009. In the following litigation the Bulogading residents were defeated. An appeal saw the case defeated again, under the South Sulawesi High Court decision No. 142 dated 11 August, 2011.
“Then we filed cassation to the Supreme Court and the case was decided 5 August, 2013, the citizens lost. We filed a judicial review again in 2014, a new decision was accepted November 2015 and was rejected,” stated Maulana.

The court considers the plaintiff’s Eigendom Verponding as a valid declaration of ownership. Yet between the first appeal and reconsideration, the plaintiff has multiplied into seven people, up from the original singular claim by Sadhiah alone.

Desperate residents are now appealing to the Mayor of Makassar, Danny Pomanto, about this land dispute now dogging them for over 45 years.

Rakyatku reports:

Mayor of Makassar, Danny Pomanto, has shown his sincerity to help residents in Bulogading in their plan to undertake a lawsuit against the decision of the Makassar District Court.

Head of Legal Government of Makassar, Sofyan Manai, will seek a meeting with the National Land Agency in Makassar to find evidence for saving the residential land inhabited by 250 people.

What this promised help will come to is as yet unknown. In any case, this complicated legal battle boils down to the passionate determination of the Bulogading residents to keep their land and secure their homes. Our bearing witness to their struggles is the least they deserve.

Arpan Rachman studied at Metro Data Prasidha. He is a football fan, winner of a 2013 Indonesia Stock Exchange writing contest, and an investigative reporter with the 2014 annual fellowship from SEAPA (Southeast Asian Press Alliance).

Andi Aisyah Lamboge graduated from University of Hasanuddin and is a journalist and activist, an investigative reporter with a fellowship from the Society of Indonesia Environmental Journalists (2012).
“If liberty means anything at all, it means the right to tell people what they do not want to hear.”
— George Orwell

Freedom of speech is the sine qua non of a democratic society. It is the single most important political right of citizens. Without free speech, no political action is possible and therefore no resistance to injustice or oppression is possible. The freely expressed opinions of citizens help to restrain oppressive rule. It is futile to expect political freedom or, consequently, economic freedom in a society where free speech is strangled or curbed.

The Constitution of Pakistan guarantees freedom of press under Article 19, subject to “reasonable restrictions”. However, the freedom of the press is curtailed by the ambiguous wording of the provision, which states that:

“There shall be freedom of the press, subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, [commission of] or incitement to an offence.”

A cursory glance through the provisions of the article makes it evidently clear that freedom of expression is not being guaranteed, rather it is being denied to the citizens of Pakistan. The number and extent of qualifications and exceptions embedded in the text of the provision makes it impossible for anyone to exercise any semblance of free speech. These “claw back” provisions are broad and generic.

Article 19 falls short of meeting international standards for the protection of the right to freedom of expression. The use of words like “reasonable restrictions” are themselves curtailing freedom, while the international standards and the rest of the world advocate “necessary” or “legitimate aim”, as well as “clear and present threat.” The muzzling of freedom of expression thus ensures that Pakistani democracy, which, in essence, is an autocracy, perpetuates its autocratic regime without being questioned by societally conscious press.
The case laws in terms of Article 19 have never been expanded on by the higher judiciary, as occurs with US and UK jurisdiction. Judges have fallen short of clearly defining and expanding categories of untouchable speech or alternatively, categorically and clearly delimiting certain kinds of speech and the circumstances under which they can be legitimately proscribed by the State. Instead, the courts have essentially adopted a case-by-case approach in Pakistan.

There have been several important judgments that underline the importance of interpreting the Constitution. For example, in Benazir Bhutto vs Federation of Pakistan the Supreme Court held that, “Constitutional interpretation should not just be ceremonious observance of the rules and usages of interpretation but instead inspired by, inter alia, Fundamental Rights, in order to achieve the goals of democracy, tolerance, equality and social justice. The prescribed approach while interpreting Fundamental Rights is one that is dynamic, progressive and liberal, keeping in view the ideals of the people, and socio-economic and politico cultural values, so as to extend the benefit of the same to the maximum possible.”

In another case the court observed that the role of the courts is to expand the scope of such a provision and not to extenuate the same.

Though the courts understand the significance of free speech for the survival and sustenance of democracy, in an overwhelming number of cases they have held that such rights are not absolute, that reasonable restrictions based on reasonable grounds can be imposed, and that reasonable classifications can be created for differential treatment.

In Jameel Ahmad Malik vs. Pakistan Ordinance Factories Board, Wah Cantt, the court held that, “In a democratic set-up, freedom of speech/expression and freedom of press are the essential requirements of democracy and without them; the concept of democracy cannot survive. From perusal of Article 19, it is, however, absolutely clear that above right is not absolute but reasonable restrictions on reasonable grounds can always be imposed. Reasonable classification is always permissible and law permits so.”

While dwelling on what constitutes a “reasonable restriction” the courts have taken a cautionary approach and interpreted the term in a very limited manner. For example in Ghulam Sarwar Awan vs. Govt of Sind the court stated:

“The phrase ‘reasonable restriction’ connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond that [which] is required in the interest of the public. The word ‘reasonable’ implies intelligent care and deliberation, that is, the choice of a course which reason dictates.”

Barring a new notable exceptions, the courts in Pakistan have played a fiddle to atrocious state policies, especially when it comes to the right to freedom of expression for minorities. Ahmedis are often denied the right to free speech under draconian Ordinance XX of 1984 which proscribes the publication of their literature in any form. Recently, on 19 December, 2015 a Supreme Court of Pakistan bench denied bail to the publisher of Al-Fazl, a 102-year-old Ahmadiyya publication, who is behind bars for three years on blasphemy and terrorism charges.

The courts so far have taken no suo motu notice of the National Action Plan established in January 2015 that vows to curb free speech under the guise of “national security”. As per point number 11 and 14 of the rudderless plan, “Print and electronic media will not be allowed to give any space to terrorists.” And, “Social media and the Internet will not be allowed to be used by terrorists to spread propaganda and

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4 P.L.D. (Sindh H.C.) 414, 418–24 (Pak.)
hate speech, though exact process for that will be finalised”. State policies are increasingly shifting towards strangling free media and free speech, while the courts as the guardians of the fundamental rights of the people remain a silent spectator to the atrocities committed in the name of “national security”.

Catherine Anne Fraser, Chief Justice of Alberta, Canada once said, “We have independence for one reason – to protect the rights of our citizen”. However, in case of Pakistan the nominal independence of the judiciary has done little to protect the freedom of citizens.

On September 9, 2014 the Supreme Court issued contempt of court notices to anchorperson Mubashir Luqman and CEO of the ARY TV channel for allegedly maligning the judges of the apex court in a programme broadcast on May 29, 2014. The court ordered that Luqman had gone too far, with his behaviour provoking hatred towards the judiciary. It also ordered strict actions to be taken against any channels that allowed the anchor to broadcast.

In many countries across the world, the judiciary has restricted the ability of government bodies, including judicial courts, elected bodies, State-owned corporations and even political parties to bring an action against journalists for defamation. This is in recognition of the vital importance of open disparagement of government and public authorities for a democracy, including of courts. Sadly the legal jurisprudence on the right to freedom of speech in Pakistan has yet to reach this level of maturity.

On 28 October, 2015 a 19 year old blogger and political worker of Pakistan Tehreek Insaaf (PTI) was arrested by the Federal Investigation Agency for allegedly criticising a sitting judge of a Peshawar High Court. Qazi Jalal was arrested for his tweets against the judiciary, under the 2002 Pakistan Electronic Transaction Ordinance, and is said to be still in FIA’s custody. Media reports have stated that action against the teenager Qazi Jalal was undertaken after an unknown complaint was filed, and he was arrested on charges of creating negative propaganda against the judiciary through his twitter account.

Blasphemy is another area where the scale of justice tips against the accused. In August 2000, Justice Nazir Akhtar of the Lahore High Court stated in a public lecture that, “we shall slit every tongue that is guilty of insolence against the Holy Prophet”. 5 People accused of violating Pakistan’s draconian “blasphemy laws” face proceedings that are glaringly flawed. In the report, “On Trial: the Implementation of Pakistan’s Blasphemy Laws” published by The International Commission of Jurists, it was stated that judges of the lower judiciary demonstrate bias and prejudice against defendants during the course of blasphemy proceedings as well as in judgments, with details of widespread trial violations.

The judiciary in Pakistan has taken a cost-benefit approach to striking a balance between preservation of freedom of speech and protecting public interest within the restrictive categories of Article 19. Courts historically have limited the freedom of speech to press and have

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5 The Daily Din, 28 August 2000.
curtailed it. For instance, in Syed Masroor Ahsan v.
Ardeshir Cowasjee, the court observed that freedom
of press was not “absolute, unlimited and unfettered”
and that its “protective cover” could not be used for
wrongdoings”.6

Likewise, in Sheikh Muhammad Rashid vs. Majid
Nizami, Editor-In-Chief, The Nation and Nawa-E-
Waqat the court held:

“The Article 19 provides the freedom of press subject
to any reasonable restrictions which may be imposed
by law in the public interest and glory of Islam,
therefore, the press is not free to publish anything
they desired. The press is bound to take full care and
cautions before publishing any material in press and to
keep themselves within the bounds and ambit of the
provisions of the article”.7

French writer, philosopher and historian Voltaire
rightly stated, “I do not agree with what you have to
say but I will defend to death your right to say it”.8
The judiciary, state and legislature in Pakistan are not
yet ready to allow citizens their fundamental right to
speak their mind. Tolerance of criticism is the echelon
of a civilised and democratic society but cannot be
expected from a society whose moral fabric is torn
by religious fundamentalists with no respect for
difference of opinion.

6 (1998) 50 P.L.D. 823, 834 (Pak.)
7 P L D 2002 SC 514.
The first person to seriously engage me in a discussion of Marxism was a member of the United States Black Panther Party. It was in the summer I turned fifteen. I was sitting in Gruneberg Park near the American High School in Frankfurt am Main, Bundesrepublik Deutschland listening to music and hoping one of the German hippies in the circle of musicians and hangers-on would pass me a pipe with some hashish in it. Suddenly, out of the bushes three Frankfurt city police appeared. The musicians and most of their audience quickly packed up and scattered. I walked quickly away to another part of the park and sat down. While enjoying the sunshine and watching a couple older men play chess, a young African-American man walked up and sat next to me on the bench I was sitting. He nodded hello and asked me what book I was reading (I had a copy of some Herman Hesse novel in my hand). I showed him and he began to talk. About Marxism. I was curious and I listened.

I wasn’t politically naïve, but I had a lot to learn. In fact, I had read the Communist Manifesto and even attempted Das Kapital, but found it too complex. I was also reading some of Emma Goldman’s works and found the more political underground papers to be better reading material than those geared towards drugs and sex, although I read both. My bench partner introduced himself. Then he asked me if I was against the Vietnam War and I answered yes, I was. He followed that question by asking if I knew what imperialism was. I hesitated and he began to explain capitalism and imperialism. Then he opened up his backpack and brought a copy of the Black Panther newspaper and Mao’s Little Red Book. That was when he told me he was a member of the Black Panther Party who had been recently discharged from the US Army.

He had decided to stay in Europe and recruit for the party among GIs and military dependents. We talked for another hour or so. Thus began my introduction to Marxist thought. I met him four or five more times that summer, talking communism and occasionally smoking a little hashish. He went back to the States in the fall and I never heard from him again. However, his approach to our conversations was crucial not only to my growing understanding of leftist thought, but also to organising in general. He never spoke down to me and never belittled my life or my ability to understand. It is this latter practice that I have tried to carry with me in my years of organising since then.

I tell the above story because the basic programme of the Black Panther Party remains unfulfilled fifty years after the Party’s founding. This truth is a tragic
acknowledgement of both the failure of US capitalism to resolve its greatest disgrace and an admission that it may not be able to. As Ned and Constance Sublette make clear in their 2015 masterwork The American Slave Coast, the African slave trade and the subsequent breeding and trading of their descendants was fundamental to the development of the US capitalist economy. When the Southern confederacy lost its attempt to secede and begrudgingly remained a part of the Union, it was acknowledging that the emancipation of the slaves had dissolved the bulk of their financial holdings. Equally true, although less discussed, is the fact that the loss of those holdings also affected the northern economy. So, slaves were not only labourers creating surplus labour, they were also legal tender, like money in the bank.

The Black liberation movement and its radical allies shared an understanding similar to that put forth in the Sublettes’ text. This is why they knew that achieving economic and political equality while the US capitalist economy and the racist political system remained was impossible. The situation fifty years later proves that their understanding was correct. Of course, this does not mean things are as bad for Black Americans and other working-class residents as they were then. However, it does seem to indicate that the solution to the crisis of inequality and racism does not exist under the existing structure. Indeed, that structure only appears to be making it worse.

I want to share the ten-point program of the Black Panther Party as written down in 1966.

- We Want Freedom. We Want Power To Determine The Destiny Of Our Black Community.
- We Want Full Employment For Our People.
- We Want An End To The Robbery By The White Men Of Our Black Community. (later changed to “We Want An End To The Robbery By The Capitalists Of Our Black Community.”)
- We Want Decent Housing, Fit For The Shelter Of Human Beings.
- We Want Education For Our People That Exposes The True Nature Of This Decadent American Society. We Want Education That Teaches Us Our True History And Our Role In The Present-Day Society.
- We Want All Black Men To Be Exempt From Military Service.
- We Want An Immediate End To Police Brutality And Murder Of Black People.
- We Want Freedom For All Black Men Held In Federal, State, County And City Prisons And Jails.
- We Want All Black People When Brought To Trial To Be Tried In Court By A Jury Of Their Peer Group Or People From Their Black Communities, As Defined By The Constitution Of The United States.
- We Want Land, Bread, Housing, Education, Clothing, Justice And Peace.

This is not a radical list of demands. With a couple slight changes in wording to render it less race-specific, it could easily be the political program of a labour-oriented party in almost any nation with a parliamentary system. The fact that it was considered radical, even revolutionary, is more of a testament to the essential backwardness of the United States than it is to the radicalness of its creators. The fact that most of these demands remain unmet for the majority of African-Americans and a growing number of other residents of the United States is an cruel indictment of the system most of its leaders champion and profit from. Furthermore, its fundamental message is one oppressed peoples around the world can identify with and support, if not make it their own with modifications appropriate to their situation.
IN THE UNITED STATES, the Republican primaries are becoming more surreal, more grotesque, from day to day, from tweet to tweet. It is hard to predict what new low Donald Trump will plummet to next, eagerly followed by his fellow Republican candidates.

Trump is singular because he says what a sizeable section of the American populace, including political leaders and opinion makers, believe but do not voice. He has been able to make statement after outrageous statement and suffer no diminution in his support levels (not just among registered Republicans but also among a segment of the US electorate which identifies itself as independent), because his antediluvian and extremist opinions are not a fringe phenomenon.

Some of Trump’s obnoxious statements are expressions of bad taste; but others, many others, have a bearing not just on US policy but also on global developments.

A prime example is his stand on the use of torture.

The US has a history of condemning the use of torture in public forums while enabling and even practicing torture behind closed doors. Euphemisms are employed to mislead the public and to provide torture with a respectable, acceptable, patina. The most recent example is the term “enhanced interrogation techniques”, used by the second Bush administration to provide legal cover to waterboarding and other forms of torture.

Donald Trump cannot be bothered such verbal hide-and-seek. He defends the use of torture openly and says he will use torture to prevent Paris/Brussels type attacks on American soil. “Frankly, the waterboarding, if it was up to me, and if changed the laws or had the laws, waterboarding would be fine,” he said, soon after the Brussels attacks.

“I would do a lot more than waterboarding. You have to get the information from these people.”

Not only does Trump defend torture he also attacks international regulations against torture. Recently he claimed that these regulations were developed by “eggheads,” an outstanding insult in the anti-intellectual Trumpian universe.

Fortunately for the US and the world, it is unlikely

2 http://www.businessinsider.com/donald-trump-brussels-attacks-waterboarding-2016-3
to the point of impossibility for Donald Trump to become the next occupant of the Oval Office. But his ‘in your face’ politics have exposed a disturbing truth about the American electorate: a substantial portion of American voters approve of the use of torture on anyone seen as a security threat, and believe that torture is both good and effective when used on enemies.

This pro-torture mindset is not an American malaise. It is truly a global malady. And as so-called Islamic State (IS) intensifies its acts of terror, the number of those who believe in torture will grow. This growth cannot but affect political opinion and government policy across the globe.

**IS AS TRENDSETTER**

IS will defeat itself, eventually. But before that final outcome, it will do much harm, not just physically, not just in the form of lives, limbs and property but also mentally, by changing opinions and attitudes for the worse. As the atrocities committed by IS increases, those who believe that aping IS methods is the only way to defeat IS are likely to become more numerous. And politicians, especially ones on their way up, will step in to give voice to these opinions, to demand that these attitudes be reflected in policy.

Donald Trump and his open advocacy of torture are omens of this future.

In justifying the use of torture, Trump not only mentioned the terror threat from IS but also the horrendous methods of execution used by IS. He defended the reintroduction of waterboarding by using a particularly gruesome IS practice – putting prisoners in cages and submerging the cages in water. If the IS can kill people by drowning, why can’t opponents of IS use a little drowning on suspected IS operatives to obtain information – this appears to be the Trumpian logic.

Aside from death by slow drowning, IS also practices death by slow burning and death by quick explosion. It puts prisoners in cages and sets them on fire, puts prisoners in vehicles and fires missiles at them. Will we have Trump-like politicians arguing that these barbaric IS practices justify the controlled and moderate use of fire and explosives as methods of torture? If that sounds outrageously impossible, the prospect of the leading contender for Republican nominations using the IS practice of drowning prisoners to publicly justify waterboarding would have seemed preposterous too, just a couple of weeks ago.

Come November, Donald Trump will be defeated. But that will not make those people who believe in torture go away. As with Trump, facts or evidence do not work with these people. There is a general consensus among intelligence and military communities in the US and elsewhere that torture does not work, it is not effective. But those who support torture pay no heed to such expert opinion. They are as deaf to voices of reason, to facts, figures and logic, as Climate Change Deniers or Creationists are. With each IS atrocity, especially outside the Arab and Islamic world, their intensity will grow and so will their numbers. Sooner or later, we will hear democratic politicians in the US and elsewhere justifying a little bit of torture to prevent terror attacks, to save lives. Unlike Trump, they will sound reluctant. Unlike Trump, they will use suitably worded euphemisms. But torture, by some other name, will become less illegal, less abnormal, less unacceptable, part of policy, part of a new normal.

Great artists can glimpse the future, sometimes. “Terror does not evolve except towards a worse terror,” warned Albert Camus in *Resistance, Rebellion and Death*. If the democratic nations of the occident and the orient allow IS to become a trendsetter, the world will become a far more barbaric place than it is today.
Recent studies have shown that torture has been reported in 141 countries, three-quarters of the world. Which evidently means that torture is thriving. Torture is thriving because, rather than respecting the law, many governments are either actively using torture or turning a blind eye to its practice. With torture being so widespread we have to accept that we too often wrongly and mistakenly only associate torture to non-democratic states, which is clearly far from the truth.

For many of the countries I have worked in, such as Kenya and the Philippines, torture is a widespread and routine practice in police stations. In Morocco and Egypt, courts often rely on confessions people have given while being tortured. In Uganda and Bangladesh, beatings and mock executions are just some of the treatments people face in detention.

Forced confessions are used to meet the demanding requirements for a high detection rate and because the police have not learned new methods of investigation. Routine torturing by the police is used to show authority and instil fear amongst both potential criminals and the public in general. This is especially prevalent in Asia, Africa, Latin-America and the Middle East. In other places torture is used as a threat for extortion purposes. We see this in many democratic countries around the globe, from Tanzania and Jordan to Liberia and Bangladesh — where almost 70% of the torture committed is by police.

Almost anyone taken in to custody is at risk of torture — regardless of age, gender, ethnicity or politics. But it is clear that some of us are in more danger than others. As with all human rights abuses, if you are poor, or belong to a group suffering discrimination it is more likely you will face torture and you will have fewer
ways of defending yourself. This is also why slums and poor urban areas are increasingly becoming hubs for violence, ill-treatment, threats and extortion, often coming from state authorities.

Despite all this, I often hear that torture is justifiable, and that it is primarily terror-suspects that risk torture. That is an association that has no relation to reality. From both research and my own international work, I find again and again that torture affects the most vulnerable groups — some of which are politically active or belong to a persecuted minority. But the majority of them are just poor people living in slums — often innocent or in the wrong place at the wrong time.

Still, torture is legitimised as a tool in “The War on Terror” despite research studies and evidence-based facts clearly indicating that torture is not a more efficient form of intelligence gathering than other legal interrogation techniques and frequently leads to false confessions. In other words, torture as an interrogation technique does not work and its supposed positive consequences are not substantiated in reality. On the contrary, torture triggers a series of negative long-term effects. It has a devastating impact on the victims, leads to further radicalisation and has a negative impact on society as a whole. Torture is immoral and promoting the use of torture is illegal as well as counter-productive on so many levels.

These pro-torture arguments are increasingly coming from legislators, policymakers and politicians around the world in the post 9/11 environment where our societies have been consumed by the question of whether torture is acceptable under extreme circumstances. The “ticking bomb” metaphor has regularly been employed by various figures in the US as an argument to justify the use of torture in interrogations. It is an argument that has been used to justify torture in a set of very extreme and detailed circumstances. An example of a “ticking time bomb” scenario could look like this:

A terrorist group has planted a small nuclear device with a timing mechanism in London and it is about to go off. If it does it will kill thousands and make a large part of the city uninhabitable for decades. One of the terrorists has been captured by the police, and he has the info on location of the device then the police can disarm it and thereby save the lives of thousands. There is no other way to avoid catastrophe; evacuation of the city, for example, cannot be undertaken in the limited time available.

The “ticking bomb scenario” is an unrealistic hypothetical and wholly unconvincing argument in favour of torture that relies on assumptions that do not stand up to scrutiny in the real world.

Still, torture is an ever remerging subject for debate. In the United States recently the republican candidate Donald Trump stated that torture works and, “I will bring back waterboarding, and I would bring back a hell of a lot worse than waterboarding”.

I doubt that Trump has ever been waterboarded himself, nor has even witnessed the technique. Sadly, but not surprisingly, Trump has a lot of supporters and like-minded sympathisers all over the world. The remaining question is: when will morality, research and facts conquer fear, ignorance and war-mongering?
IT NEVER GOES AWAY: a state’s imperative to torture. What seems to matter is the degree of honesty officials have in terms of whether its deployment is secretive, incidental or central to the policy of obtaining information. Under the Obama administration, a degree of moral abhorrence for its use has prevailed. Republicans have not been so sure.

US political debate has never quite banished the bogey of torture, which tends to find form in what are termed techniques of interrogation. This is despite the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (1984) that deems illegal any act that causes “severe pain or suffering, whether physical or mental” and is intended to obtain a confession, gather information, punish a subject, pressure the subject or someone else into behaving in certain ways, or “for any reason based on discrimination of any kind.”

As Matthew H. Kramer posits in a University of Cambridge Faculty of Law Research Paper (No. 2, 2015), “punitive torture” may no longer be practiced in any liberal democracy but “the matter of interrogational torture is still a live point of contention.” Such temptations have been hard to resist, dragging and stretching legal arguments to the point of breaking.

Indeed, there is much to suggest that the legalism that often arises in such debates tends to find form in odious proposals that legitimise, rather than outlaw, torture. Something as blatantly contradictory as Alan Dershowitz’s torture warrants are shining examples of that tendency. This is despite Dershowitz’s own admission that torture is a “horrible practice that we all want to see ended”.

His point, rather, is that of a psychologist preaching about the inherent brutality of his subject, eternally aggressive. Cruelty is ineradicable in state conduct – why, therefore, resist the calling of nature?

The US electoral atmosphere is filled with grim promise of revived regimes of torture. This threatens to effectively overturn the Executive Order made by President Barack Obama in 2009 banning the use of waterboarding, sleep deprivation and sexual humiliation. The National Defense Authorization Act for 2016 also imposes restrictions on abusive interrogations.


The GOP presidential frontrunners seemed reluctant from the start to rule out the use of such techniques as waterboarding. Executive orders are, after all, rescindable matters, revocable at a moment’s crisis. Chris Christie argued while still in the race that such methods could hardly make the grade as torturous. “We should do whatever we need to do to get actionable intelligence that’s within the Constitution.”

Ben Carson, speaking to ABC’s This Week in November, argued that, “There’s no such thing as political correctness when you’re fighting an enemy who wants to destroy you.”

Marco Rubio insisted on opposing an amendment in 2015 enshrining a torture ban into US law, claiming that it was important that future presidents have “important tools for protecting the American people.”

Trump, as ever, promised with bravado that he would “bring it back”. After the Brussels attacks, the front runner drummed up the rhetoric of waterboarding as necessary and useful. “I’m not looking for breaking news on your show but frankly, the waterboarding, if it was up to me, and if we changed the laws and – or have the laws, waterboarding would be fine.”

What of Ted Cruz, the only other GOP rival Trump really has to be concerned about? For one, Cruz describes the experiences of his father, Rafael Bienvenido Cruz, who had fought for Fidel Castro in his teenage years against the Battista regime. “When you grow up in the home of an immigrant who’s seen prison and torture, who’s seen freedom stripped away, you grow up with an acute appreciation for how precious and fragile our liberty is.”

Initially, commentators noted his stance against torture as “legally” defined. But in so doing, he was invariably going to be excluding certain acts such as “vigorous interrogation” or “enhanced interrogation”.

Waterboarding was exactly one such technique. “Well under the definition of torture,” he claimed in February, “no it’s not. Under the law, torture is excruciating pain that is equivalent to losing organs and systems.” This odd, not to say daft qualification, provides Cruz with the excuse to then operate with impunity as a potential commander-in-chief.

Were he to squeeze into the White House, he would still insist on the “inherent constitutional authority to keep this country safe”. In facing an “imminent terrorist attack,” a Cruz presidency would insist on “whatever enhanced interrogation methods we could to keep this country safe.” These become distinctions without relevance.

Such statements go to show that under a Cruz or Trump presidency, the doors of torture will remain open with various degrees of enthusiasm (the former less than the latter), with flashing green lights to interrogators to make their quarry talk. And who can blame them? Even by Obama’s weak admission, “we tortured some folks” – but that was hardly a reason to prosecute officials.

Forced confessions are used to meet the demanding requirements for a high detection rate and because the police have not learned new methods of investigation.

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UNRAVELING THE TERROR
ADVOCATING FOR ALTERNATIVES AS A TOOL
‘NECESSITY’ OF ALTERNATIVES TO TORTURE AS A TOOL OF INTERROGATION
The prevalence of torture globally generates a cornucopia of questions in the anti-torture activist – why is torture a part of state policy (albeit denied) in so many countries around the world? Why do so many liberals justify the use of torture as an act of necessity? Why has the ticking bomb scenario, an impossible thought experiment in philosophy, become the mantra of choice for governments around the world and especially post 9/11 USA?

Torture is abolished by international law and its prohibition is *jus cogens*, absolute and non-derogable. As per art.2 (2) of the Convention Against Torture,

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

The ticking bomb scenario has been made explicitly illegal by international law. No exceptional circumstances can be used to justify the use of torture. But what if these exceptional circumstances are to save hundreds of innocent lives? Can states then justify the use of torture on one person? The use of abhorrent, dehumanising practices such as water boarding, sodomising with sticks and lights, rape and sexual assault, the use of dogs to threaten and scare detainees, sleep deprivation, wailing, confinement in a box, making detainees defecate and stand in their own excreta… the list of common practices goes on and it is heart-wrenching, difficult to read about, much less imagine. The scale of brutality and the international scale of torture post 9/11 is terrifying – the United States was able to co-opt many countries around the world, many of them liberal democracies like Canada, Denmark and Sweden, to facilitate torture.

This was utilitarianism in action. The universality of human rights destroyed. Dirty hands no longer dirty… because they were filthy beyond comprehension. For practical policy students against torture, the philosophical study of utilitarianism appears as a removed thought experiment rather than a theory of real-world value. But the oft-cited justification of

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1 These practices were used by the US post 9/11 to terrorise and interrogate detainees in prisons and black sites around the world. Torture practices such as these are not unique or confined to the US alone – many countries around the world use them in varying degrees as a tool of punishment, as a tool of interrogation and as a tool to control and terrorise. There is evidence that many countries around the world served as CIA torture sites to facilitate the extraordinary rendition program of the CIA.


Also see: Committee study of the Central Intelligence Agency’s detention and interrogation program: findings and conclusions: executive summary. United States Senate Select Committee on Intelligence (2014)

torture, “the greatest good for the greatest number” changes such assumptions. Because this utilitarian concept is the excuse given for violating international law and universal principles of human rights, for getting your hands ‘dirty’, for establishing official state policy to brutally infringe the basic dignity of a human being.

Then why do states believe that torture is a ‘necessity’, a tool that could save lives? This is something that human rights activists and the media do not focus enough on.

The big missing link, one that could make the UN Committee against Torture more effective, is the fact that it does not dialogue with the states parties on the instrumentality of torture. States use torture because they believe it to be effective; an effective tool of interrogation, of punishment, of control. The interrogative value of torture seemed to be accepted as truth, a given, an uncomfortable inevitability. But, this aspect of torture is never discussed by the Committee, either via the Constructive Dialogue or via the List of Issues and Concluding Observations. If the Committee does not deal with this inherent aspect of torture, the fact is that states will continue to torture, irrespective of however many lofty recommendations are provided.

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The absence of a framework and a set of standards on non-coercive methods of investigation and

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**Seminar: Can we prevent torture in war?**

Preventing torture in war is the ultimate challenge for the anti-torture movement! Research suggests that torture is inevitable during wars, that torture complicates war-fare and is generally undesirable, and that we possess incomplete knowledge about how best to prevent torture during wars. What knowledge do we need to prevent torture? Can torture be prevented during wars?

In this public lecture Professor Darius Rejali will explore these issues through a presentation of the preliminary results of an extensive research project on torture and torture prevention in Iraq since 1979.

**Presentation: Professor Darius Rejali**

Darius Rejali, professor of political science at Reed College, is a nationally recognized expert on government torture and interrogation. Iranian-born, Rejali has spent his scholarly career reflecting on violence, and, specifically, reflecting on the causes, consequences, and meaning of modern torture in our world. His work spans concerns in political science, philosophy, sociology, anthropology, history, and critical social theory.

He published Torture and Modernity: Self, Society and State in Modern Iran in 1994, and Torture and Democracy in 2007, which won the 2007 Human Rights Book of the Year Award from the American Political Science Association, and also the biennial 2009 Raphael Lemkin Award from the Institute for the Study of Genocide.
interrogation make it extremely difficult to eradicate torture. Is there a viable alternative to torture that police and investigation authorities know of?

- Recent research on the efficacy on interrogation methods based on interviews with interrogators and high-value detainees\(^3\), has concluded that:
- Non-coercive, information gathering interview approaches were perceived to be the most effective and efficient in securing meaningful information\(^4\)
- Social strategies like rapport building and procedurally fair elements reportedly prompted earlier disclosures\(^5\)

Coercive techniques were inefficient and counterproductive, giving fewer disclosures and less meaningful information.\(^6\)

The UNCAT must begin to engage with this aspect of torture, and advocate for establishing universal standards for non-coercive methods of interrogation. An alternative tool-kit should be developed, recommending investigation and interrogation methods that do not involve torture but are able to obtain information through more subtle and creative non-violent methods. The UN should also begin to encourage research on non-coercive methods of interrogation.

To be able to realistically envisage a world without torture, we must first envisage a world where this a clear, practical alternative to torture.

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“Take the right not to be tortured, for example. In most countries torture is not a matter of official policy. As in Brazil, local police often use torture because they believe that it is an effective way to maintain order or to solve crimes. If the national government decided to wipe out torture, it would need to create honest, well-paid investigatory units to monitor the police. The government would also need to fire its police forces and increase the salaries of the replacements. It would probably need to overhaul the judiciary as well, possibly the entire political system. Such a government might reasonably argue that it should use its limited resources in a way more likely to help people – building schools and medical clinics, for example. If this argument is reasonable, then it is a problem for human rights law, which does not recognise any such excuse for failing to prevent torture”

Eric Posner, renowned scholar of international law and human rights, in his essay, *The case against human rights*, takes a vehement stance that the current international human rights regime has failed.\(^7\) According to him, human rights law as we know it today is a gargantuan project of vacuous, meaningless and impotent provisions that countries can simply sign up to or ratify but that which they can continue to — blatantly or covertly — violate the norms of. Indeed, the current international law regime is ill-equipped to deal with violations to human rights and dignity. The UN and organisations fighting against human rights violations need to begin examining issues from the vanguard of root causes for a violation, and not simply from the position that it is against human rights and international law. It is time for the international law establishment to re-examine the tools they use – systems that are not designed to deliver justice and protect human rights are not broken, such that they can be ‘fixed’ by the human rights agenda.

They were never intended to deliver justice. They need to re-hauled and redesigned.

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\(^4\) Ibid.

\(^5\) Ibid.

\(^6\) Ibid.

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