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A Study Guide

Ethical Considerations: Law, Foreign Policy, and the War on Terror

ALBERTO J. MORA
Former General Counsel of the United States Navy

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170 East 64th Street, New York, NY 10021
www.CarnegieCouncil.org

Printed in the United States of America.
ISBN 0-87641-060-3

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The material presented in this Study Guide is based on the Twenty-fifth Morgenthau Memorial Lecture on Ethics & Foreign Policy, delivered on November 2, 2006, at the Carnegie Council in New York City.

Named for famed international relations scholar Hans Morgenthau, the annual Morgenthau Memorial Lecture series is the longest-running public education initiative of the Carnegie Council, showcasing today's most distinguished thinkers on ethics and international affairs.

A video, audio, and transcript of this talk, along with an interview, are available online at http://www.CarnegieCouncil.org

JOEL H. ROSENTHAL

Good evening. Welcome to the Twenty-fifth Annual Hans Morgenthau Memorial Lecture on Ethics and Foreign Policy. I am Joel Rosenthal, President of the Carnegie Council. This, as many of you know, is my favorite event of the year, and I am just delighted to be sharing it with all of you.

This year we have chosen to honor the memory of Professor Morgenthau by featuring a man who embodies and exemplifies ethics in public life, Mr. Alberto Mora.

Like Professor Morgenthau, Mr. Mora came to the United States to escape oppression and to fulfill a dream of freedom and opportunity. And, like Professor Morgenthau, he has spent a good deal of his life devoted to public policy—always speaking truth to power and providing a moral voice at a time when cynics and skeptics have held sway. Our Council is the voice for ethics in international policy, and tonight you will hear one of its most important voices in Mr. Mora.

Tonight you will also hear from another strong voice for ethics, Mr. Dan Rather. Mr. Rather is the world's journalist, a man whose moral compass was set in Wharton, Texas, and who has brought that solid, unwavering, hardworking, hometown virtue to the world.

Now, most of you have become used to the lights, cameras, and microphones that have become part of the furniture here. Our dream here at the Carnegie Council is becoming a reality. We are becoming an ethics studio for the world. People around the world now watch, listen, and read about what happens in this room through the magic of the web, podcasts, and the like. My sense is that most of them are looking for guidance, for ideas, for positive examples. Serving this worldwide audience is a great responsibility and a very large opportunity.

We are enormously grateful to Mr. Rather for being with us tonight to help us in this effort. This has been an especially busy time for him. His new show, "Dan Rather Reports," will premier on November 14 on HDNet, and we all look forward to tuning in to that.

I thank you all for coming, I thank Mr. Mora for giving us so much of his time and his energy, and I thank Mr. Rather for agreeing to preside with us this evening.

DAN RATHER

Thank you very much for that overly generous introduction of the introducer. I think most of you know what honest Abe Lincoln said about introductions such as that one. He said, "Never take time to deny it. The audience will find out the truth soon enough for themselves." And so it will be with you. It is an honor to be here.

Our speaker tonight is a man who faced a test of duty and was not found wanting. As U.S. Navy General Counsel, the Navy's chief civilian lawyer, Alberto J. Mora believed that his greatest allegiance was to the Constitution and laws of the United States. When he acted on this conviction, he found himself in a battle with superiors in our government.

Keep in mind that, as the General Counsel of the U.S. Navy, the equivalent rank in the military would be a four-star admiral. Keep that in mind as we talk about what happened and as you listen to Mr. Mora later.

In 2002 Mr. Mora learned from Navy investigators that detainees at Guantánamo Bay were being subjected to harsh treatment, beyond the bounds of what was allowed by regulations or law—or, at the very least, that there was a strong possibility that this was the case. As he pursued the matter further, he learned that the history of the abuse at Guantánamo included authorization of coercive interrogation techniques by the Secretary of Defense and what we'll call "novel legal interpretations" intended to buttress this new set of policies.

Our speaker is a Republican and a staunch supporter of the war on terrorism and the war in Iraq. As he told *The New Yorker* earlier this year, his attitude while working for the Navy was, "it's my administration too."

But Mr. Mora's understanding of the law, his appreciation of bedrock American values, and his conscience told him that what was happening in Guantánamo was not right and that, legally, the interrogation policy rested on a foundation of sand.

Mr. Mora was faced with a decision: go along or get along, or advocate forcefully for what he believed to be right. It cannot have been easy to have gone to his superiors with his objections, his suspicions, and his questions, and to keep going after he met resistance. Given his position and his feelings about the war, by far the

easiest thing may have been for him to defer judgment on the issue. But for Mr. Mora there was a question of what needed to be done. Nor did he fear reprisal. "It never crossed my mind," is what he told *The New Yorker*. "And besides," he added, his mother, who had endured life in Communist Hungary, would have—and I quote him here—"killed me."

I wonder how many of us, though, would have acted as he did. His vocal opposition to interrogation policy put him at odds not only with the top echelons of the civilian leadership at the Pentagon, but also with officials at the White House itself. For three years, Mr. Mora persisted in his struggle, trying to change a policy that he fervently believed cut away at the very fabric of American values, and that he feared might have very real and ruinous consequences for the war effort; for the Administration, which he supported politically; and, more importantly, for the country as a whole.

In recent years we have learned more about the current Administration's detainee policies in the war on terrorism, and we have seen treatment come to light at Abu Ghraib in Iraq and elsewhere, treatment that causes the hair on your forearms to stand up or your neck to swell.

Mr. Mora's beliefs and his concerns have been largely vindicated, though we still may not know enough about the degree to which they have been addressed by the White House and the Pentagon, and this is something he may want to address here tonight.

Mr. Mora shies away from the word "courage" to describe his actions, but earlier this year he resigned from his position in the Navy and the Kennedy Library honored Mr. Mora with a 2006 Profile in Courage Award. I quote from the Award. The Award was given to him for "his moral courage and his commitment to upholding American values."

Ladies and gentlemen, it is my honor to introduce to you Alberto Mora.

ALBERTO J. MORA

LAW, FOREIGN POLICY, AND THE WAR ON TERROR

Dan Rather, thank you very much for the overly generous introduction. I want to extend my thanks to the Council and to its President, Joel, for his introduction. I also want to acknowledge Joanne Myers, Director of Public Affairs Programs.

I am deeply honored to have been selected to give the Twenty-fifth Annual Hans Morgenthau Memorial Lecture. There is no more distinguished name in the field of international relations than Hans Morgenthau. Certainly, when I was a student at Swarthmore College many years ago studying international relations, I was required to read Hans Morgenthau. I trust that is still the case with contemporary students of international relations. I am very grateful to be included among the distinguished list of speakers who have been selected previously to give this lecture.

The Carnegie Council's mission is to be "the voice for ethics in international policy." In an era of conflict, this is a voice that always needs to be heard. But I think most of us would agree that in the context of our current war on terror the relevance of this voice carries particular currency.

In its website, the Council asks a very important question: "What does ethics have to do with international relations?" It answers this question, in part, as follows: "Today it is hard to conceive of international relations, or politics itself, without the notion of human rights somewhere near the center of our thinking." I think this is exactly right.

My own career in foreign policy, which now spans, with interruptions, close to thirty years, has led me to the same conclusion. And yet, as all of us are aware, certain policies adopted by our Administration during this war on terror, particularly those dealing with detainee treatment, evidence a contrary view. These policies embody the principle that human rights are not at the center of our foreign policy. Indeed, these policies implicitly marginalized human rights concerns or treated them as irrelevant to our conflict. At worst, these policies violated human rights, and senior officials defended these violations as being necessary for our protection. How this happened, what this means, and the consequences of what these policies would be, if maintained, are some of the issues I propose to address this evening.

SEPTEMBER 11 AND THE WAR ON TERROR

The al-Qaeda attacks of September 11th wounded our nation and served as a warning of continuing danger. Implicit in the attacks was the promise that they would attack us again, if they could. No longer, these attacks taught us, would the oceans and the distances that had so effectively shielded us from the murderous pathologies of the Middle East serve as sufficient protection. No longer would our risk be limited to isolated U.S. embassies or to warships like the USS COLE refueling in poorly policed foreign ports. Nor could we any longer take false comfort in the misleading belief that all terrorist attacks would be as amateurish as the first al-Qaeda attack against the World Trade Center in 1993—although that attack, we tend to forget, killed six and wounded more than a thousand people.

The manned cruise missiles launched at us by al-Qaeda in 2001 were horrifying and obscene because they carried cargoes of innocent Americans and were used to murder other innocent citizens; because as weapons they were cheap and lethally efficient; and because they demonstrated practice, perseverance, and a sophisticated imagination at work, dedicated to the task of killing Americans in quantity.

On September 11, history once again surprised us with the unforeseen or poorly understood threats. Once again, as it has so many times before, the essential truth in Leon Trotsky's dictum, that "you may not be interested in war but war is interested in you," had been borne out.

Once again the wisdom and necessity of maintaining vigilant and strong defenses had been demonstrated. Once again we turned for protection to those courageous and selfless men and women who wear the uniform of our nation. And once again our nation was at war.

This war on terror is not like other wars. This is not just because each of the wars has a measure of uniqueness. Nor is it because today's terrorists present an unprecedented type or level of threat, although the threat is complex and deadly. While the war is still in its early stages and its outcomes and consequences are still developing, whatever else may be said about it in the future, this war is distinctive and will be remembered because we as a nation, despite our laws, values, and traditions, consciously applied cruelty against captive individuals and sought to amend or reinterpret our laws to make this, which was illegal, legal.

THE USE OF CRUELTY

This evening I propose to address the issue of cruelty as viewed through the prism of our broad national interest. I shall discuss cruelty, not torture, because there is a legal distinction between the two, and cruelty is the lower level of abuse.

In my view, cruelty can be as effective as torture in destroying human dignity. And there is no moral distinction between one and the other. If cruelty is abolished, so is torture, but not vice versa.

How did our nation come to use cruelty in this war on terror? In the summer of 2002, at Guantánamo and elsewhere, U.S. authorities held in detention individuals thought to have information on another impending attack against the United States. Unless this information was obtained through interrogation, it was believed that more Americans, perhaps even many more Americans, would die.

In this context, our government made legal and policy decisions providing, in effect, that for some detainees labeled as "unlawful combatants," interrogation methods constituting cruel, inhuman, and degrading treatment could be applied. These authorizations rested on four basic assumptions or beliefs:

- First, that no law prohibited the application of cruelty. Thus, the government could direct the use of cruelty as a matter of policy, depending on the dictates of perceived military necessity.

- Second, the President's constitutional commander-in-chief authorities included the discretionary authority to order cruelty. Any existing or proposed law or treaty that would purport to limit this ability would be an unconstitutional abridgement of that authority.

- Third, the use of cruelty in interrogation of unlawful detainees held abroad would not implicate or adversely affect our values, our domestic legal order, our international relations, or our security strategy.

- Fourth, if this abuse were disclosed or discovered, virtually no one would care.

Each of these four beliefs or assumptions was profoundly mistaken. Each constitutes a legal policy or political blunder of massive proportions.

Although there is continuing debate as to the details of how, when, and why, we know cruel treatment was applied at Abu Ghraib, Guantánamo, and other locations. We know the treatment may have reached the level of torture in some instances, and may even have led to the deaths of several detainees.

But when we talk of cruelty, it is important that we not only dwell on the abstraction, but we also seek to understand what cruelty consists of in the flesh.

Here's how we treated Mohammed al-Qahtani, the detainee believed to be the twentieth hijacker, according to journalist Jane Mayer, writing in the February 27, 2006 edition of *The New Yorker* magazine,[1] and I quote:

> Qahtani had been subjected to a hundred and sixty days of isolation in a pen perpetually flooded with artificial light. He was interrogated on forty-eight of fifty-four days, for eighteen to twenty hours at a stretch. He had been stripped naked; straddled by taunting female guards, in an exercise called 'invasion of space by a female'; forced to wear women's underwear on his head, and to put on a bra; threatened by dogs; placed on a leash; and told that his mother was a whore. . . . [he] had been subjected to a phony kidnapping, deprived of heat, given large quantities of intravenous liquids without access to a toilet, and deprived of sleep for three days. . . . [At one point] Qahtani's heart rate had dropped so precipitately, to thirty-five beats a minute, that he required cardiac monitoring.

Not all unlawful combatants were mistreated, but it is enough to say that some were. Not all were treated as badly as Qahtani, but some were treated worse. Not all who were mistreated were abused as a result of official policy. Poor training, lack of discipline, and individual sadistic tendencies were also factors in some cases.

History will ultimately judge what the cause and level of abuse inflicted was, whether it was torture or some lesser cruelty, and whether it resulted from official commission, omission, or whether it occurred despite every reasonable effort to prevent the mistreatment. Whatever the ultimate historical judgment, however, it is established fact that documents justifying and authorizing the abusive treatment of detainees during interrogation were approved and distributed and that abuse occurred as a consequence. The resulting inescapable truth is that, no matter how circumscribed these policies were or how short their duration or how few the victims, for as long as these policies were in effect our government had adopted and practiced what could only be described as a policy of cruelty.

This is not an issue that would have been too seriously debated before 9/11. Before that date, there were not two opposing sides to the debate. The national consensus held that neither cruel treatment nor punishment could be applied to

[1] Jane Myer, "The Memo," full text available at:
http://www.newyorker.com/fact/content/articles/060227fa_fact?060227fa_fact

human beings. That was then a consensus cemented by the convergence of our national values, our laws, our foreign policy interests, our human rights principles, and military doctrine. But that was then.

Now there is no longer a consensus. Now many Americans—too many Americans—are of the view that cruel treatment, or even torture, may and should be applied against our enemies, or those who may possibly be our enemies, if doing so could make us safer. And many others who have not yet abandoned our traditional abhorrence of cruel treatment are asking: How much abusive treatment can be lawfully applied to these captives?

What was once unspeakable is now the subject of polite conversation. Cruelty, once held in disrepute, has been astonishingly rehabilitated. This is astonishing because even slight reflection on the price we have already incurred in the use of cruelty during the war on terror should bring us to the realization that the cost incurred and the damage caused to all we value, including our security, is too high. And even this high cost is nothing as compared to what we would pay if we were to institutionalize cruelty as a national policy.

Both as a matter of instinct and rational deliberation, we should be astonished that our nation has applied cruelty in the course of the war. We should be astonished that such cruelty should have been authorized at the highest levels, by how easily this authorization was obtained, and by how completely those legal and policy safeguards that should have prevented this abuse failed. We should be astonished by how much acceptance and support there appears to be in our country for its use and how negligent and casual this acceptance has been both on the part of officials and citizens. Most of all, perhaps, we should be astonished by how little understanding there is of the disastrous consequences that would necessarily ensue if we were to continue to apply cruelty as a national policy.

Cruelty harms our nation's legal, foreign policy, and national security interests. I can't put it any plainer than that. Domestically, cruelty is contrary to and damages our values and legal system, including our constitutional order. Internationally, the effects and consequences of cruelty are contrary to our long-term strategic foreign policy interests, including many of the principal institutions, alliances, and rules that we have nurtured and fought for over years, and even decades.

THE USE OF CRUELTY HAS WEAKENED THE UNITED STATES

From the national security standpoint, the use of cruelty has been demonstrably counterproductive to the effort to wage the war on terror successfully. Cruelty has made us weaker, not stronger. It has blunted our moral authority, sabotaged our ability to build and maintain the broad alliances needed to prosecute the war effectively, and imposed a political penalty on those leaders, such as Tony Blair and José María Aznar, who would stand with us in this war. By compromising those ideals we fight for, cruelty has handicapped our ability to compete successfully in the struggle for those hearts and minds of foreign individuals whose support we need, and need to have, in order to shorten this war, limit its costs, and prevail.

I have asserted that our policy of cruelty has harmed our nation's legal, foreign policy, and national security interests. Let's examine how it has done so and what the damage has been. Each strand of this analysis begins with the starting point of our nation's valuation of the individual person, or the innate dignity that we accorded to all persons, and of the rights that naturally and consequentially flow from this.

Legally, the adoption of cruelty has damaged us in multiple ways, but I will focus on two. First, cruelty damages, and ultimately would transform, our constitutional structure because cruelty is incompatible with the philosophical premises upon which our Constitution is based.

Our forefathers, who permanently defined our civic values, drafted our Constitution inspired by the belief that law could not create, but only recognize, certain inalienable rights granted by God to every person—not just citizens and not just here, but everywhere. These rights form a shield that protects core human dignity.

Because this is so, due process is required, the equal protection of law is mandated, slavery is outlawed, coerced confessions are excluded, racial discrimination is forbidden, and men and women are to be treated equally, to cite just a few of the rights that flow from the concept of human dignity. And, most notably for purposes of today's discussion, the Eighth Amendment[2] prohibits cruel punishment

[2] The Eighth Amendment to the United States Constitution: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

and the constitutional jurisprudence of the Fifth[3] and Fourteenth Amendments[4] bars cruel treatment.

These rights, to be sure, have been enlarged and gained greater definition during the course of our history. Not all of these rights extend as a matter of law to those who are not citizens or residents. But to adopt and apply a policy of cruelty anywhere within this world is to say that our forefathers were wrong about their belief in the rights of man, because there is no more fundamental right than the right to be safe from cruel and inhuman treatment.

If we can lawfully abuse Qahtani the way he was abused, however reprehensible his acts may have been, it is because he did not have inalienable rights to be free from cruelty. If this is so, then the right is no longer inalienable or universal. And if that is the case, then the foundation upon which our own rights are based starts to crumble because it would then be ultimately left to the discretion of every state whether and how much cruelty may be applied. In these circumstances, there would no longer exist any obvious or necessary criteria or boundaries for the application of cruelty.

Second, the infliction of cruel treatment damages not only the foundation of our laws, it damages the law itself, and it does so in two ways. If cruelty is taken out of law's ambit and placed within the realm of policy, the scope of law by definition is diminished; it is trivialized.

In addition, cruelty violates an important policy of the law that Professor Jeremy Waldron of Columbia University terms "the principle of non-brutality." He writes:

> Law is not savage; law does not rule through abject fear and terror, or by breaking the will of those whom it confronts. . . . [There is an] enduring connection between the spirit of law and respect for human dignity—respect for human dignity even *in extremis*, . . . where law is at its most forceful and its subjects at their most vulnerable . . . [T]he rule against torture functions as an archetype of this very general policy. It is vividly

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[3] The Fifth Amendment states: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

[4] The Fourteenth Amendment provides a broad definition of national citizenship, and requires states to provide equal protection under the law to all persons (not only to citizens) within their jurisdictions.

emblematic of our determination to sever the link between law and terror, and between law and the enterprise of trying to break a person's will.[5]

By adopting a policy of cruelty, our nation has damaged our legal system by both diminishing it and creating a precedent for the disposal of the principle of non-brutality.

Internationally, the adoption of a policy of cruelty damaged our nation because it is contrary to our overarching foreign policy interests. America's substantial international influence stems from a confluence of factors: the strength of our example as a free nation and the ideals and values upon which we were founded; the strength of our economy; and the effectiveness of a foreign policy that has been successful, in large measure, because of its congruence with our national values.

The employment of cruelty not only betrayed our values, thus diminishing the strength of our example and our appeal to others; it impaired the execution of a foreign policy in ways inimical to its accomplishment, particularly the accomplishment of our traditional objectives of security, freedom, human rights, and the rule of law.

Our foreign policy mirrors our values, and this tendency developed rapidly and became more assertive after World War I, during the Wilson years, particularly during the negotiation of the Treaty of Versailles. It grew to maturity during the term of Franklin Roosevelt, during the articulation of the Four Freedoms[6] as the principal war aims of the Allied powers, and then the establishment of the United Nations. It was Jimmy Carter who culminated this process, by seeking to align our foreign policy with our values through the adoption of a human rights strategy and the restructuring of the State Department to ensure its institutionalization in the execution of our policy.

Thirty years ago, as a young foreign service officer stationed in Lisbon, Portugal, during the Carter presidency, Portuguese citizens would often come up to me, unsolicited, and state how much they admired our president and our country for our forceful and unprecedented human rights strategy. No one should doubt the power of the human rights ideal to inspire action around the world, or that it has done so.

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[5] Jeremy Waldron, "Torture and Positive Law: Jurisprudence for the White House," *Columbia Law Review,* 105 (2005), excerpted in Columbia Law School Faculty Forum, available at: http://www.law.columbia.edu/law_school/communications/reports/fall2005/facultyforum

[6] See the "Carnegie Council Study Guide to the Four Freedoms" (2005) http://www.cceia.org/resources/for_educators_and_students/four_freedoms/index.html

From World War II until today, American foreign policy has been grounded in a human rights strategy that pivots on the principle of human dignity. We fought tyranny and promoted democracy not only, or even primarily, because it was the right thing to do, but because the spread of democracy made us safer and protected our freedoms. Abroad, in ways that echoed the development of our legal system, we successfully promoted the development of a rules-based international order based on the rule of law. Across the world, human rights principles, treaties, laws, humanitarian laws, international criminal law, and the international law generally, and many domestic constitutions and legal systems owe their character, their acceptance, and their relevance to our inspiration, efforts, advocacy, and support. Let's look at three examples out of many.

The Nuremberg Trials, that triumph of American justice and statesmanship that launched the modern era of human rights and international criminal law, treated prisoner abuse as an indictable crime, helped cement the principle of command responsibility, and started the process whereby national sovereignty was no longer a potential shield to protect the sovereign or the perpetrator of crimes from the long arm of justice.

The Geneva Conventions, as do all the major human rights treaties adopted and ratified by our country during the last century, forbid the application of cruel, inhuman, and degrading treatment. Thousands of American soldiers have benefited from these treaties directly.

The German Constitution, Article I Section I states: "The dignity of man is inviolable. To respect and protect is a duty of all state authority." That this should be an element of the German Constitution today reflects credit not only on the German nation and its citizens. That it should have been adopted in 1949 by Germany reflects credit on American foreign policy and the fact that it had integrated our national values as an operational objective.

All of this has returned massive dividends to our nation. We are all the better for it. However imperfectly these rules may be observed or enforced, they have helped shape public and official opinion worldwide, created global standards of conduct, and formed the conduct of foreign individuals, groups, and nations in ways that are largely congruent with our own national interests. And when these rules fail to deter world behavior, American policymakers could be confident that significant international consensus supporting these standards would impose a cost on this outlawed behavior and, if need be, facilitate the assembly of international coalitions or the use of unilateral U.S. force.

From the foreign policy standpoint, our adoption of a policy of cruelty has been disastrous. Cruelty violated, of course, central elements of our human rights laws and principles and the culture of human rights observance that we have labored so hard to maintain and observe. The letter and spirit of the Geneva Conventions have been trampled, the Nuremberg principles of command responsibilities are not much in evidence, and the very fabric of human rights and international law has been damaged by the loosening of the requirement and fostering a spirit of noncompliance.

Cruelty has increased the incidence of prisoner abuse worldwide. Cruelty rendered incoherent, and ultimately untenable, those traditional elements of foreign policy based on the protection of human dignity through the rule of law. Cruelty created a deep legal fissure between ourselves and our traditional allies because none of them would follow the United States into the swamp of cruelty. And cruelty has exposed those U.S. policymakers and officials engaged in the practice to potential civil and criminal liability overseas. It has engendered a probability that litigation and prosecution overseas targeting U.S. officials will complicate our international relations for years to come.

None of this is to our benefit if these are precisely the costs we suffered when we adopted a policy of cruelty in this war. These are the harms we cause to ourselves when we abused Qahtani and adopted policies that permitted his abuse and that of others.

The most sobering and shameful moment I experienced as Navy General Counsel was when I was told by International Red Cross officials and representatives from senior military services from around the world that U.S. detainee practices had led to an increase in prisoner abuse in many nations, were damaging the fabric of international human rights, and were making it increasingly difficult, for legal and political reasons, to sustain the allies' cooperation with the United States on the war on terror.

From the standpoint of national security, and for some of the reasons that I have already mentioned, I maintain that our nation's security and defenses have been materially weakened—not strengthened—by our policy and practice of cruelty.

THE TRUE NATURE OF THE WAR ON TERROR

The three thousand deaths we suffered on September 11 amply justify the president's decision to respond with military force and the labeling of this as a war on terror. But the use of the term "war" should not mask the operational nature of this conflict or its essential political nature, or serve to dictate the legal regime to be applied in its prosecution. This conflict spans the gamut of force, from traditional force-on-force

engagement, as in Afghanistan and Iraq, to intelligence or police operations directed against individual suspects in countries.

The geography of the war also varies widely. Terrorists are reported active in several dozen countries, ranging from Europe and its sophisticated legal systems to relatively lawless and ungoverned areas of western Pakistan and Yemen. This conflict does not have the military or political simplicity of our incursions in Panama and Grenada, for example.

Our use of the term "war" should not confuse us into thinking that this conflict will be won primarily by military means. The geographic dispersion of our enemies, the difficulty in locating them, and the underlying ideological nature of our adversaries' actions—all point to a conflict in which our military actions must necessarily be subordinated to our political strategy.

This political strategy should be geared to building and maintaining large, unified alliances capable of cooperating across this spectrum of conflict. We will not be able to build this alliance unless we are able to articulate a set of consistent political objectives, and prosecute the war using methods consistent with these objectives. We will not be able to build the alliance either, unless we construct a common legal architecture with our traditional allies.

The attacks on the World Trade Center, the Madrid railway station, and the London buses, among many others, evidence a terrorist ideology of nihilism that obliterates human dignity. Today, in parts of the world there are others who fully adhere to this dark vision, or who sympathize with it. There are boys and girls aspiring to be suicide bombers, fathers taking pride in these aspirations, mothers sewing suicide vests, schools teaching ignorance, clerics preaching hate, and nations powerless to intervene, unwilling to do so, or even supportive of the cycle.

THE BEST DEFENSE IN THE WAR ON TERROR

Our defense against this phenomenon cannot only be military, for we recognize that these acts are themselves born in specific ideas that are held by many, are taught and transmitted, and are ultimately adopted by others who profligate this cycle of hate. These ideas must be defended also by our ideas and ideals.

Our defense must also consist of rallying to us and to our mutual defense those who share our values and our vision of a human civilization, at the same time that we seek to convince others who don't agree with us that our ideals are superior to those of our enemies. To their murderers we offer life. To their savagery we offer justice. We will defend and we will attack, but as we prosecute this war we should do so with a clear vision of the world we wish to emerge from this conflict.

When our nation adopted a policy of cruelty, we compromised our ability to draw the sharpest possible distinction between these two antithetical ideals and to prosecute this aspect of the war, the war of ideas, from a position of full moral authority. Our abuses at Abu Ghraib and Guantánamo and elsewhere perversely generated sympathy for those terrorists and eroded the international goodwill and political support that we had enjoyed after September 11th.

Almost every European politician who sought to ally himself and his country with the United States in the war on terror incurred a political penalty—or experienced political difficulties, as Blair and Aznar demonstrated—as a result of that allegiance. And, because cruel treatment of prisoners constituted a criminal act in every European jurisdiction, there must be few European government officials, including military intelligence or police officials, who do not ask themselves at some point whether cooperating with the United States in the war on terror might not make them accomplices or abettors in criminal activity or expose them to civil liability.

All of these factors contributed to the difficulties our nation has experienced in forging the strongest possible alliance in this war. Because this is so, we consequently weakened our defenses. Whatever intelligence we obtain through the use of harsh interrogation tactics, on the whole these policies and practices greatly damaged our overall effectiveness and impaired our military intelligence capabilities in the war on terror.

Our adoption of cruelty will either be catalogued by history as an aberration, nothing more than a passing flirtation, or something more permanent, intimate, and lasting. We have reason to believe that the policy is no longer in effect. The Abu Ghraib abuses have been exposed. The Justice Department memoranda justifying cruelty, and even torture, have been rescinded. The authorizations for the application of extreme interrogation techniques have been withdrawn. The Detainee Treatment of 2005, which prohibits cruel, inhuman, and degrading treatment, has been enacted. And the Army Field Manual governing detainee treatment, which fully adopts Common Article 3 of the Geneva Conventions, has been adopted.

But we also know that there are those in government, and in the general public, who are still of the belief that the use of cruelty is a necessary tool in this conflict. There are some, for example, who see nothing wrong with inducing the sensation of drowning in a detainee, even though most of us would call that practice torture.

If there is another terrorist attack, these people will be heard from again. Once again, they will press the case that the national security requires harsh interrogation and demand that our views yield to their purported dictates of the threat.

If that moment comes—and it probably will—we will need to understand these issues clearly and we will need to be prepared to give the answer we would give today if asked that question.

We will answer that we shall not repeat the mistakes. We will answer that cruelty disfigures our national character and debases our heritage. We will answer that it is incompatible with our constitutional order, with our laws, and with our most prized values. And we will answer that cruelty weakens our defenses and national security.

Thank you once again for the opportunity to be here with you.

DAN RATHER: First of all, thank you very much for a most thought-provoking talk.

Before we turn to the audience for questions, let me lead off by saying that I think we are all slightly—well, let me speak for myself. There is an outrage factor here. But following behind that is—what to do? You have lived this. Where can we build in a better system of checks and balances that might prevent this kind of thing from happening again?

ALBERTO MORA: I think it starts with a recognition of the damage that cruelty creates. This was the purpose of my presentation. It is not just the damage created to the individual detainee; it is not isolated to that. Certain necessary effects occur if we are to institutionalize a policy of cruelty.

As we discussed in private, my view is that there is a high possibility, even a probability, that there will be other terrorist attacks in the future. I think the greatest danger to our freedoms, our constitutional order, comes precisely from these attacks, because if that occurs, then this kind of debate will become a moot point. I think the popular demand for the authority to engage in and apply cruel treatment will become overwhelming. If that happens, we will have incurred a high cost to our nation.

When you look back through American history, every time that we have been in danger and fear—the Civil War, World War I, World War II, the internment of 130,000 Japanese citizens—you see that when fear and anger converge, we do things that later are seen to have violated our constitutional order. That could happen again, and I think will happen again, if there are further terrorist attacks.

We need to reflect on these issues now, when we're not mourning the deaths of American citizens, and reach the conclusions we need to reach as to what we will do if that moment ever comes again, as the starting point for ensuring that this doesn't happen again.

QUESTION: Thank you very much for your presentation.

You mentioned the Europeans, in particular, yet a number of countries participated in the secret prisons. Was there any reflection, as far as you know, with their national governments on this, or was this strictly an intelligence operation from one intelligence service to another?

ALBERTO MORA: I don't have any direct knowledge of these kinds of events. But I think that we in this country are not sufficiently aware of the massive impact that these policies of cruelty and our detainee treatment policies generally have caused on European governments.

As I described in my presentation, the cruel treatment of any detainee, whether at home or abroad, in Europe is a *per se* criminal act. This was established through many precedents. For example, in the case of the United Kingdom, there is a case, entitled Ireland v. United Kingdom, which took place both in the European Commission of Human Rights and then the European Court of Human Rights, in which precisely the same interrogation techniques that were applied in Guantánamo were found to be illegal acts, and the British government foreswore their activities.

This has been the standard in Europe. That is why I say now that participation with the United States in these kinds of acts creates civil and political liability in Europe and makes it almost impossible—I would say makes it impossible—for these governments to be fully cooperative with us in the war on terror.

This is why the enactment of a common legal architecture between ourselves and our allies, so that when a detainee is apprehended anywhere in the world there is no debate or confusion as to how this person should be treated, is a necessary political foundation stone for the effective prosecution of a war on terror.

In Europe, there are continuing investigations—and this will last for years—concerning the complicity of European police, military, and intelligence services in potential illegal acts, and there will certainly be prosecutions throughout Europe as a result of those investigations.

QUESTION: Thank you. First of all, I want to add my appreciation to that which others have indicated for your lawyerly, scholarly, and humanistic presentation. Very striking.

ALBERTO MORA: Thank you.

QUESTIONER: I personally don't think that the policy of cruelty has ended, as you seem to, but that is not an issue that I am going to raise.

My issue is: Where did that policy come from, whether it continues, or whether it ended? Does it not, in fact, come from the Vice President's view that if there's a one percent possibility that something like 9/11 could happen, we have to use every dark art to deal with it? I'm not quoting him, obviously, but that's what he said in paraphrase.

And what about Secretary Rumsfeld's views, stated almost offhandedly, that he stands behind his desk—he doesn't sit, apparently—for hours and hours, and so why shouldn't they? And other actual comments that apparently he has made in the margins of various directives that have gone down to people charged with the policy.

Do these gentlemen become responsible, then, for what you have described so eloquently, and which is so deleterious to our national interest? Should they be held accountable; and, if so, in what way? And, since the President has chosen, at least in the case of Rumsfeld, to retain him—I don't know if he can do anything about the Vice President—is he not also responsible, accountable, for the policy of cruelty?

ALBERTO MORA: Cruelty occurred for a series of reasons. It wasn't only the policy of cruelty. To try to schematize it, some abuse occurred as a direct result of a policy of cruelty. Some of the cruelty, I think, is attributable to the fact that there were mixed messages or confusing messages—inadequate leadership in our military and intelligence chains—so confusion generated within the ranks. And I think a third category of abuse occurred contrary to orders, despite efforts to avoid cruelty. In every conflict, you are going to have the sadist, the pathological person who, despite all orders, all instruction, and all training, will be inflicting cruelty on captive individuals. It occurs universally in all conflicts. You find it, despite all our training, throughout the history of the American military.

I think to some extent it is too early to judge where every specific case of cruelty falls or how it will be apportioned among these various categories. My personal view is that those who were subjected to abuse as a direct result of official policy probably are very few, maybe a couple of dozen. But who knows? I certainly couldn't tell you.

To give you an example of why this is the case in Iraq, for example, the American policy doctrine has been that all detainee operations are to take place under the governing principles of the Geneva Conventions, which forbid the application of cruel, inhuman, or degrading treatment, or should have forbidden that kind of abuse.

So I think it is unclear what history will ultimately conclude is the specific cause of abuse that every individual abused was subject to. As I said in my speech, it doesn't matter how few individuals were abused, or how short the duration, or how brief the period in which we had an enacted policy of abuse may have lasted. The fact that we adopted it is enough. It is, in itself, a damning combination that should cause us all to reflect on how this came about, what the consequences of that are, what the necessary effects of that are, and how we can prevent it—which was Dan Rather's original question—from occurring in the future.

Yes, there are issues of responsibility associated with this thing. I've talked about the Nuremberg principles and so forth. One of the ironies of the situation is that we have placed ourselves in a very difficult situation, because any in-depth examination of these kinds of principles is certain to be very, very painful for our country, is certain to be very difficult politically, is certain to be a dislocating sort of exercise for the nation.

But yet, at the same time, however painful this may be, do we as a nation really wish to abandon the principles of Nuremberg? The advantages to our nation in the long term are so obvious that we can't really walk away from the principles of command responsibility, the Nuremberg principles, that we established after World War II. So I think we should clearly see what the long-term interest of the nation is, even if there might be short-term pain associated with the imposition of responsibility.

I know I'm dodging your question to some extent, but that's where I feel most difficulty. It is very difficult for me to talk about the individuals I work with personally, for example, at the Pentagon, and who are actually friends.

QUESTION: Alberto, it would be wonderful to add to your beautifully reasoned humanistic and legal argument against cruelty that it doesn't work as well. Does it; and, if it does, how do you counter that specific argument?

ALBERTO MORA: I have always accepted as an operating principle that cruelty works, meaning that cruelty is effective in eliciting information from individuals. I say that, even though the overwhelming literature on the subject and every interrogator you talk to, whether civilian or military, will tell you that the most effective interrogation technique is a relationship-based approach that does not rely on cruelty at all, but is really based on decent treatment of the individuals.

I've talked to several interrogators who have said that, in a lifetime of interrogating suspects, nobody cracked under abusive treatment, but that many individuals said, in effect, "Oh, you're going to treat me nicely? Well, let me tell you this," and started to spill the beans. In fact, that has occurred, to my knowledge, with several cases in Yemen, in which NCIS [Naval Criminal Investigative Service] was involved in interrogating individuals.

In fact, I'll mention this anecdote. There was one hardened al-Qaeda operative responsible for the USS COLE bombing who had knowledge of al-Qaeda deploy-

ments around the world. This was after 9/11. So he had information, we were certain, that would be useful from the standpoint of operational activities in the war on terror. This individual simply would not talk to American interrogators or others. But then, after several weeks of this treatment, the interrogators left several newspapers in Arabic in the cell, and these outlined how many Muslims lost their lives as a result of the 9/11 attacks. When they came back to the cell, this individual was personally shattered. As he told the interrogators, "Look, I'm a believer in jihad, I'm a believer in killing Americans, but I'm not a believer in killing other Muslims." Then he started to provide information as to al-Qaeda dispositions. That is an example of how this relationship-based technique can work.

But I think, for purposes of discussion, it is overly simplistic and it is cowardly for us to assume that cruelty and torture never work. That is unsubstantiated and is to dodge the question to stake our position and our analysis of this very complicated issue on that too-comforting position.

I think it does work in situations. But my thesis is that even though it does work, it is not, for all the reasons I mentioned, in our short- or long-term interests and it is counterproductive in the war on terror.

QUESTION: The 2005 legislation and the Department of Defense Directive 2310 and the Army Field Manual[7] don't on their face seem to cover U.S. intelligence officers or private contractors, to whom a great deal of interrogation has been delegated, or foreign nationals who act as agents of the U.S. government. Are you convinced, in fact, given that, that the practice of cruelty or degrading treatment has been substantially reduced, ended? How would we know that?

ALBERTO MORA: This is speculation, needless to say, but the McCain Amendment to the Detainee Treatment Act of 2005, of course, does bar the application of cruel, inhuman, and degrading treatment to all detainees, regardless of who holds them and where they are held. So it is comprehensive with respect to the entire U.S. government and its agents. That Act is in effect, and that is the basis for my representation.

Beyond that—and I'll get back to the legal issue in a second—I think there is a practical dynamic occurring in Washington. *The Washington Post* reported on the front page a couple weeks back that there is now a rush towards the acquisition of

[7] Both were revised and re-issued in September 2006 to prevent further detainee abuse.

legal insurance by many officers in the intelligence services, including lawyers in the intelligence services, because there is an anticipation of potential continuing litigation on all these kinds of matters.

You'd have to be a rash individual if you are serving in the U.S. military, engaged in these kinds of operations, and do not have either in the forefront or the back of your mind that you may be incurring some liability as a result of these actions.

Take, for example, these truly bad al-Qaeda guys who have been transferred to Guantánamo. There is no question that the defense attorneys will seek to put into the record, in graphic detail, every element of abusive treatment they were subjected to. And there is no question that there will be attorneys seeking to impose civil, and potentially even criminal, liability for these acts.

And there is no question that there are independent prosecutors all over Europe who are at this moment building dossiers of these activities because, much like Pinochet, if torture is applied to any individual, there is universal jurisdiction throughout Europe. You will have prosecutions being brought forward in European countries for years to come on these kinds of matters. These are all phenomena that would tend to put a chill on things.

Now, returning to the legal question, one of the underlying bases that I think permitted the belief that the application of cruelty would be constitutional, is the notion of unlimited commander-in-chief authorities. This is the notion propagated by then-officials at the Office of Legal Counsel, Department of Justice, which suggested that in the exercise of constitutional commander-in-chief powers there is literally no limit, including statutory limits, which can apply to hinder the presidential exercise of those powers.

So the question would be: Does anybody still believe in that extreme notion? It would, of course, be a notion that essentially abrogates our system of checks and balances. If you think that the commander-in-chief authority is at the pinnacle of constitutional authorities and every other authority is subordinate to that, then, by definition, we no longer have a system of checks and balances. We have a system of presidential authority. I don't think that is still in effect, but that is speculation.

QUESTION: I too want to thank you very much for your courage. I wish there were more people like you in our country today. I think that you have established a model of courage that I hope many other people will follow, and I thank you very much for it.

The almost universal antipathy for our country's policies is really quite stunning and, in my judgment, entirely justifiable. My question is this. You have stated, and others have stated, that we have lost our moral authority in the world—and, indeed, we have. When this administration is booted out, and I hope that will occur—forgive me; I know you are a Republican; maybe I can win you over to our side—do you think that the fact that we will have a new administration, with new policies, will ameliorate this antipathy that exists for us, or do you think that the damage to our reputation and to our moral authority is so severe that it will take many, many years to recover from this?

ALBERTO MORA: First of all, thank you for your kind words about me personally.

I think it is going to take many years for us to fully recover. One can never, of course, discount the possibility of redemption. And the irony of all this is that there is no other country that has done nearly as much as the United States has done historically to promote the cause of human rights and to better the condition of individuals and societies around the world. It is as Christopher Hitchens once wrote, that, notwithstanding the abuses of Abu Ghraib inflicted by our own guards, at the end of the day the historical judgment on Abu Ghraib will be that conditions improved after the United States took over that prison, as on a purely objective basis it, of course, has.

Let me touch on a point that you obliquely touched in your question. Too much of the debate about detainee abuse has centered on the legal interpretation of this. I say "too much" not to belittle the importance of legal analysis and the need to comply with the law, but my thesis, and what I have tried to do in this presentation, is to say, "Okay, let's leave the legal aside for a second. Let's analyze this purely from a policy standpoint." This is where, I think, among the areas where we went wrong in Washington in the decision to apply cruelty; there was a failure to subject it to a rigorous policy analysis.

Among the questions we should have asked ourselves is, "Does cruelty support our overarching foreign policy or national security objectives, or doesn't it?" I've discussed how it has helped destroy alliances. It has impeded the construction of alliances. It has had an operational consequence on a daily basis in fighting the war on terror. And, of course, it has abrogated our policy of human rights. It has made it impossible for us to pursue that kind of long-term foreign policy objective, which has been the basis and the backbone of our foreign policy at least since World War II. There are all these necessary consequences from adopting a policy of cruelty, each of which is profoundly contrary to the foreign policy interest.

I believe that, upon reflection, we will all come back to an understanding of why there is a utilitarian as well as a moral basis for never engaging in a policy of cruelty. I think that is bound to happen.

QUESTION: We have done so much to help foreign policy, but yet, because of the latest abuses, we have been put back two centuries. But maybe we can go forward from here, just as what we have learned from Northern Ireland, where many abuses have been turned over, and maybe we can go forward from how they learned from the wrongs that were done there.

ALBERTO MORA: I think that's exactly right. I think if there is a silver lining to all of this, it is that it has forced us to look at these things anew.

Once I first heard about the abuse going on in Guantánamo, my staff and I engaged in the process of researching these things, and I had not worked in this area of the law before. What's astonishing is how much of everything that's important to us, both in a legal as well as foreign policy and national security sphere, is touched by a policy of cruelty.

So it is a foundational event. These are foundational acts. It causes us to explore the nature between moral and ethics, our system of laws, our foreign policy, the Carnegie Council's very purposes—all are examined through the examination of these kinds of issues. That has been the benefit, the reexamination of first principles.

QUESTION: Apparently I am a minority in this room—I may be a minority of one—but ultimately I don't find your arguments convincing. Your assumption is that it is in essence a slippery slope, we're going to disintegrate our own constitutional rights if we allow cruelty to happen in the larger world, and differentiate between citizens and enemy combatants. Yet it has happened in the past, as you noted, that civil rights have been abridged, and we've come back to the straight and narrow as it were.

You also talked about the original interpretation of the Constitution, where the Founding Fathers would say that these are inalienable rights. But at the same time, the Founding Fathers engaged in a great number of these abuses themselves—owning slaves, no rights for women, and so forth.

You also talked about Nuremberg and the command responsibility. I don't remember the exact number—I think that twenty-three or twenty-four people were tried. Not all of them were convicted. In Japan, the war crimes trials were less

effective. And people who were sentenced, their sentences were cut short frequently. So that is of limited value as well.

DAN RATHER: Excuse me would you ask your question?

QUESTIONER: Well, it was more of a comment. The final thing I will say is that your idea for a common legal framework is probably the most interesting thing I found here, although the real question I would have is how would you go about creating such a thing. Sorry about the longwinded question.

ALBERTO MORA: Let me just touch on a couple of these points.

On the effect on the constitutional framework, reflect for a second on the fact that the constitutional jurisprudence of the Fifth and Fourteenth Amendments concerning cruel treatment—not the cruel punishment of the Eighth Amendment, but the Fifth and Fourteenth—cruel treatment is premised on a "shock the conscience" analysis.

As a lawyer, you would know that if we were legally free to apply cruelty to detainees overseas, there is no criminal defense lawyer defending a police officer for the imposition of cruel treatment who would not say, "Judge, this doesn't shock the conscience any longer. This is no worse than what we are doing in Guantánamo Bay. How can it shock the conscience any longer since we are adopting these kinds of techniques?" It is an argument that would necessarily be deployed in every case seeking to sanction a police officer for the imposition of cruel treatment against a detainee—by necessity, just the way our legal system operates.

With respect to the other examples you mentioned, I will agree with you that the international legal order is rife with non-application of these foundational principles; there is no question about that. But I think if you look at the historical trend, despite the lapses or the outright violations of these kinds of principles routinely, all over the world, the trend has been to a greater acceptance of these as international norms—not only international norms, but national norms in almost all these particular countries.

So what you are seeing is the slow and painful progress towards an international order that is more akin to the one that we have espoused and is reflected by our domestic legal order than in the past. It is a slow process, but I think we are making gains. To adopt a policy of cruelty would be to reverse all of that, because all of that would be inconsistent with the gains that we have made.

You know, it's like the UN Charter. These are wonderful words. A lot of the countries in the United Nations simply don't abide by the Charter. But are we better for having a Charter? Are we better for having a standard of conduct? Are we driving towards that common destiny? I think we are and we're all better for it. We are a safer country as a result.

DAN RATHER: I'm sorry to disappoint others with questions, but we are out of time.

Thank you very much for being here.

ABOUT ALBERTO J. MORA

Alberto J. Mora was born in Boston and lived in Cuba until he was eight years old. His family fled to the United States when Fidel Castro came to power. Mora's father is Cuban and his mother's parents are Hungarians who left Hungary to escape the Nazis.

After graduating from Swarthmore College in 1974, Mora joined the State Department and was posted to the U.S. embassy in Lisbon, Portugal, where he worked from 1975 to 1978. Next he attended the University of Miami School of Law, receiving his J.D. in 1981 and went on to work for a number of law firms over the next few years.

From 1989 to 1993, he served in the administration of President George H.W. Bush as General Counsel to the United States Information Agency. Later, President Clinton appointed him three times to the Broadcasting Board of Governors, which oversees the Voice of America and other U.S. information services. He also worked as an Of Counsel attorney with the law firm of Greenberg Traurig, at their Washington office, focusing on matters of international law.

From July 2001 to December 2005, Alberto Mora served as General Counsel to the Department of the Navy in Washington, D.C. Alerted by Navy investigators to reports that detainees at Guantánamo Bay were being subjected to cruel and unlawful interrogation practices, he tried to halt policies authorizing cruelty toward terror suspects.

In January 2006, he joined Wal-Mart Stores, Inc., as Vice President and General Counsel for the International Division. He was awarded the 2006 Profile in Courage Award for his moral courage and his commitment to upholding American values.

SEPTEMBER 2001
Within weeks of 9/11, an internal White House debate begins on how to handle Taliban and al-Qaeda prisoners.

OCTOBER 2001
The U.S. attacks Taliban installations and al-Qaeda training camps in Afghanistan and starts taking prisoners.

NOVEMBER 13, 2001
President Bush's military order authorizes the use of military commissions to try non-U.S. citizens who are or were members of al-Qaeda, who engaged in acts of international terrorism, or who knowingly harbored such persons. However, it orders that those individuals be "treated humanely," "afforded adequate food, drinking water, shelter, clothing, and medical treatment," and "allowed the free exercise of religion."

JANUARY-FEBRUARY 2002
The Bush administration battles internally over the treatment of detainees, with objections from Secretary of State Colin Powell and others to the position taken by Deputy Assistant Attorney General John Yoo and Secretary of Defense Donald Rumsfeld.

JANUARY 9, 2002
John Yoo and Special Council Robert Delahunty write a memo arguing that the Geneva Conventions governing the treatment of prisoners of war do not apply to al-Qaeda and Taliban suspects, since al-Qaeda is a "non-state actor" while the Taliban are not a legitimate government as Afghanistan is a "failed state," and in any case, they are closely entwined with al-Qaeda.

JANUARY 19, 2002
Donald Rumsfeld issues an official directive to the army stating that, "al-Qaeda and Taliban individuals...are not entitled to prisoner of war status for purposes of the Geneva Conventions of 1949."

JANUARY 25, 2002

In a memo to President Bush, White House Counsel Alberto Gonzales makes a distinction between "legal combatants" and "enemy combatants," placing Afghan prisoners outside the protections of the Geneva Conventions. Calling the war against terrorism "a new kind of war," Gonzales concludes that, "In my judgment, this new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions."

FEBRUARY 7, 2002

President Bush issues a memo accepting the arguments of the Yoo and Gonzales memos and validating the January 19 Rumsfeld Order. The White House declares that it will treat Afghan detainees "humanely," although they will not be given prisoner-of-war status. Detainees are considered "unlawful combatants."

AUGUST 1, 2002

Assistant Attorney General Jay S. Bybee's "torture memo" to Gonzalez narrows the definition of cruel and inhumane treatment. This secret document authorizes extreme interrogation techniques stopping only at "organ failure or death." (It was leaked to the press two years later and published by *The Washington Post* in June 2004.)

OCTOBER 11, 2002

Major General Michael Dunlavey requests approval for harsher interrogation techniques at Guantánamo, dividing them into three categories. Category I includes "yelling" and "mild deception"; II includes isolation for up to a month, use of stress positions, sensory deprivation, and "hooding"; and III, reserved for a "very small percentage of the most uncooperative detainees," includes exposure to cold weather or water and also mild, non-injurious physical contact like grabbing or poking.

NOVEMBER 27, 2002

After reviews at various levels, William Haynes, General Counsel, Department of Defense, sends the request to Rumsfeld.

DECEMBER 2, 2002

Rumsfeld approves the use of Category I and II techniques, as well as the use of non-injurious contact as listed in Category III.

DECEMBER 17-20, 2002

Alberto Mora receives information about detainee abuse in Guantánamo and gains access to military documents containing Rumsfeld's formal approval for harsh interrogation techniques. The documents do not specify any limitations on treatment. He meets with Haynes to protest.

JANUARY 2003

When nothing is done, around January 15 Mora presents a draft memo to Haynes stating that activities authorized earlier by Rumsfeld constitute torture, and threatens to make it an official document. Haynes tells him later the same day that Rumsfeld is suspending authorization of harsh interrogation techniques and is convening a working group to develop new interrogation guidelines.

A week later, as requested by Haynes, John Yoo bypasses the working group and writes an opinion. To Mora's dismay, Yoo concludes that the President has the legal authority to order cruel, degrading, and inhuman treatment of detainees, with few restrictions.

MARCH, 2003

Jack Goldsmith replaces Bybee as Assistant U.S. Attorney General.

MARCH-APRIL, 2003

Based on Yoo's legal opinion, the working group issues a draft report (March 6, 2003) and then a very similar final report (April 4, 2003) which recommends the use of 35 specific interrogation techniques, including some that had not been authorized before.

Although Mora is shown the draft report, which he tells Haynes is "deeply flawed," he and other dissenting parties are never shown the final report, which Rumsfeld signs on April 16, 2003, approving 24 of the 35 techniques.

JUNE 25, 2003

In a response letter to Senator Patrick Leahy, Haynes writes that it is U.S. policy "to treat all detainees and conduct all interrogations, wherever they may occur" in a manner consistent with U.S. obligations under the Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment.

DECEMBER 3, 2003

Jack Goldsmith withdraws Yoo's opinion.

APRIL 28, 2004

The exposure of prisoner abuse in Abu Ghraib shocks the world. It is only now that Mora finds out about the working group final report of a year earlier.

JULY 7, 2004

Mora submits a 22-page memo to Vice Admiral Church, which documents his findings and his attempts to stop the administration's policies towards detainees, going back to 2002. He describes these policies as unlawful and dangerous, and warns that they could leave U.S. personnel open to criminal prosecution. (The memo was made public in February 2006.)

MARCH 2005

The Pentagon declares the working group report a non-operational, historical document.

OCTOBER 2005

The Senate passes the McCain Detainee Amendment by 90—9 votes, which prohibits inhumane treatment of prisoners and limits interrogation techniques to those in the Army Field Manual.

DECEMBER 30, 2005

The Detainee Treatment Act of 2005, incorporating the McCain Amendment and the Graham-Levin Amendment on detainees, is agreed to by the U.S. House and Senate and signed by President Bush, after months of opposition. It is later included in the Department of Defense Appropriations Act, 2006.

The Act prohibits the "cruel, inhuman, or degrading treatment or punishment" of detainees anywhere in the world and cites the Army Field Manual as the authoritative guide to interrogation techniques. Yet, according to a December 14, 2005 article in *The New York Times*,[8] the Manual has been rewritten and parts of the interrogation technique section are now classified.

In addition, the Graham-Levin Amendment, which passed at the same time (attached to the Defense Budget Bill), removes the federal courts' jurisdiction over detainees wishing to challenge the legality of their detention, thus depriving them of any real legal recourse in torture cases, and also authorizes the use of evidence obtained through torture if it is "probative" (useful or relevant).

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[8] "New Army Rules May Snarl Talks with McCain on Detainee Issue," available at: http://www.nytimes.com/2005/12/14/politics/14detain.html?ex=1174795200&en=20704de1c78e30d2&ei=5070

SEPTEMBER 5, 2006

The DoD Directive 2310 entitled "The Department of Defense Detainee Program," along with the Army Field Manual (which falls under this Directive) are revised and reissued in response to concerns about inhumane treatment of suspected al-Qaeda terrorists.

OCTOBER 17, 2006

President Bush signs the Military Commissions Act of 2006,[9] which aims to "facilitate bringing to justice terrorists and other unlawful enemy combatants through full and fair trials by military commissions, and for other purposes." Section 948b (g) of the Act states that, "No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights."

According to President Bush, this Act will save American lives. According to critics, the bill strips detainees of their rights to habeas corpus, gives the U.S. the right to detain anyone (including U.S. citizens) indefinitely, and gives U.S. officials immunity from prosecution for torturing detainees that were captured before the end of 2005.

This timeline is a broad overview. For more detailed information and where to find many of the original documents, see the Recommended Resources section.

[9] Full text of the Military Commissions Act of 2006, available at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:s3930enr.txt.pdf

1. As a result of September 11, says Alberto Mora, the national consensus on the prohibition of cruel treatment to prisoners has been broken. Do you agree with his implication that such a consensus existed prior to 9/11? Can a national consensus on this issue be rebuilt, and how should that be done?

2. The Geneva Conventions forbid not only torture, but also "cruel treatment" and "humiliating and degrading treatment" for prisoners of war. Mora agrees, holding that there should be no difference between the way we treat U.S. citizens and non-citizens, since our nation's values uphold the dignity of the individual. Do you agree? If not, how do we draw the line between cruel or punishing treatment and torture, as some in the government have tried to do? How would you make distinctions about treatment of citizens versus non-citizens? Who should be responsible for making these decisions?

3. Should torture be permissible under certain circumstances? Those who believe that torture is justifiable often cite what's known as "the ticking bomb scenario": What if a detainee's knowledge—only obtainable through torture—meant the difference between life and death for innocent people?

In the Carnegie Council/New York Public Library debate on torture,[10] author Mark Bowden argues that although torture should always be illegal, we should accept that it will be used in extreme situations. However, the torturers would then be held liable for their actions. But Mora argues that torture should never be used. Even though it sometimes works, he says, the long-term damage it does to our goals overall is much greater than any short-term benefits it may bring. What is your opinion?

4. Mora lists three vital interests—legal, foreign policy, and national security—that have been negatively affected by the policy of cruelty. In what specific ways have these been affected? Can you think of additional negative fallouts of this policy?

[10] The Question of Torture, June 2005, http://www.cceia.org/resources/transcripts/5207.html

5. As David Luban points out in a March 2007 *New York Review of Books* review[11] of John Yoo's book *War by Other Means*, "while he [Yoo] insists that the U.S. is fighting a new kind of war, he also insists that it should be fought with the full panoply of traditional presidential war powers. But these war powers were designed for conflicts in which the enemy is in uniform and belongs to an identifiable foreign government, and whose duration and conclusion are defined by victories, surrenders, and peace treaties."

Thus in a traditional war, captured enemy combatants, while not entitled to trial, are entitled to fair treatment under the Geneva Conventions. In this "global war on terror," the Bush administration has labeled detainees "unlawful combatants." According to the government, they are not subject to the Geneva Conventions, yet neither are they eligible for trial as civilians would be, and they can be held indefinitely, as the "war on terror" has no clear ending.

Does this "global war on terror" qualify as a new kind of war that requires new rules, as John Yoo, Alberto Gonzales, and others have claimed? If so, what should these rules be and how would they differ from the rules for traditional wars of state against state?

6. What is the current U.S. legal position on torture and cruelty for U.S. and for non-U.S. citizens? How does it differ from that of some of its closest allies?

[11] David Luban, "The Defense of Torture," *New York Review of Books*, March 15, 2007, pp 37-40.

RENDITION (also known as extraordinary rendition) is a procedure by which captured terrorist suspects are transferred to third-party states where they may be detained under less humane conditions than those permitted under the Geneva Conventions and interrogated outside of any national or international jurisdiction. Rendition has also been called a euphemism for "torture by proxy," since detainees are often sent to countries known to use torture.[12]

GHOST DETAINEE refers to a person who is unaccounted for and has no official existence in the detention system. As a result, the anonymous and unregistered detainee is in a legal and bureaucratic limbo where there are no limits placed on what can be done to them. The issue of these "ghost detainees" gained widespread notice with the abuses at Abu Ghraib prison.[13]

UNLAWFUL COMBATANTS are people denied "prisoner of war" status and related protections under the terms of the Geneva Conventions. The International Red Cross Committee defines the term as "all persons taking a direct part in hostilities without being entitled to do so and who therefore cannot be classified as prisoners of war on falling into the power of the enemy."[14] According to some interpretations of U.S. law, unlawful combatants can be held indefinitely without due process.[15]

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12 See: David Ignatius. "'Rendition' Realities." *The Washington Post*. 9 March 2005, A21, http://www.washingtonpost.com/wp-dyn/articles/A18709-2005Mar8.html; and Mayer, Jane. "Outsourcing Torture: The Secret History of America's 'Extraordinary Rendition' Program." *The New Yorker*. 14 February 2005, http://www.newyorker.com/archive/2005/02/14/050214fa_fact6?currentPage=1.

13 See: Human Rights Watch Backgrounder. "III. The Central Intelligence Agency: 'Ghost Detainees' and 'Disappearances,'" http://www.hrw.org/backgrounder/usa/us1004/3.htm; and White, Josh. "Army, CIA Agreed on 'Ghost' Prisoners," *The Washington Post*. 11 March 2005 A16, http://www.washingtonpost.com/wp-dyn/articles/A25239-2005Mar10.html.

14 Knut Dormann. "The Legal Situation of 'unlawful/unprivileged combatants,'" http://www.icrc.org/web/eng/siteeng0.nsf/html/5LPHBV.

15 See also: Daniel Kanstroom. "'Unlawful Combatants' in the United States: Drawing the Fine Line Between Law and War," *Human Rights Magazine*. Winter 2003, http://www.abanet.org/irr/hr/winter03/unlawful.html; and Michael C. Dorf. "What Is an 'Unlawful Combatant,' and Why It Matters." 23 January 2002, http://writ.news.findlaw.com/dorf/20020123.html.

MILITARY OUTSOURCING refers to the role of private military companies and the services that they provide. Although this is not a new phenomenon, the use of private military companies has soared in the Iraq War. Private companies are now offering functions that were once the responsibility of state militaries, such as training and advising forces, providing logistical support with equipment, supplies, and technology assistance, and security detail. Private companies also provided transcribers, translators, and interrogators.

Contractors working for private military firms allegedly have been involved in incidents of abuse, assault, and torture. According to Peter Singer in 2005, at Abu Ghraib prison *all* of the interpreters and half of the interrogators were private military contractors. Singer reported that there were more than eighty private military firms operating in Iraq and, according to some estimates, over 20,000 individual contractors.[16] This is a "self-regulating," international industry and individual firms are responsible for recruiting, training, managing, and reprimanding the individual contractors. Contractors are not held accountable to the Pentagon; and the Pentagon neither includes them in statistics on the number killed in action nor do they know how many are actually working in Iraq.[17]

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[16] Singer, P.W. "Corporate Warriors: The Privatized Military in Iraq," http://www.cceia.org/resources/transcripts/5287.html.

[17] See also: Amnesty International. Annual Report: Outsourcing Facilitating Human Rights Abuses, 2006, http://www.amnestyusa.org/annualreport/2006/overview.html
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Morgenthau was born in Coberg, Germany, and enrolled first at the University of Frankfurt and then at the University of Munich, where he studied law. He did postgraduate work at the Graduate Institute of International Studies in Geneva and then returned to Frankfurt, where he became acting president of the labor law court. He went on to teach law at the University of Geneva from 1932-1935 and in Madrid from 1935-1936. In 1937, he came to the United States and taught at a series of universities, including the University of Chicago (1943-1971), the City College of New York (1968-1975), and finally the New School for Social Research, from 1975 until his death.

In addition to *Politics Among Nations*, Hans Morgenthau's books include *In Defense of the National Interest* (1951), *The Purpose of American Politics* (1960), and *Principles and Problems of International Politics* (1981), with Kenneth W. Thompson.

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