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United States have interpreted our Constitution. For example, the ECHR has held that the so-called "death row effect"—the years of delay between the imposition of a death sentence and its execution arising from the petitioner's pursuit of his judicial remedies—itself constitutes "inhuman or degrading treatment or punishment." *See Soering v. United States*, 11 Eur. Ct. H.R. 439 (1989). The Supreme Court, by contrast, has routinely refused to entertain such claims, and lower federal courts have not found them to have merit. *See, e.g., Lackey v. Texas*, 514 U.S. 1045 (1995) (denying certiorari to review a decision rejecting such a claim over a dissent by Justice Stevens); *Allen v. Ornoski*, 435 F.3d 946, 959 (9th Cir. 2006) (The petitioner "cannot credibly argue that the evolving standards of decency that mark the progress of a maturing society, as evidenced by the decisions of state and federal courts, are moving toward recognition of the validity of *Lackey* claims."). The ECHR also has read the European Convention to grant that ourt authority to scrutinize prison conditions. For example, the ECHR has concluded that it is inhuman and degrading to confine two persons to one cell with only one exposed toilet between them. *Melnik v. Ukraine*, ECHR 722286/01 (2006). Amid such expansive decisions, the ECHR might well regard the proposed enhanced interrogation techniques, or even the existence of the CIA interrogation program itself, to constitute "cruel, inhuman, or degrading" treatment under the standards incorporated in the European Convention. Yet we do not regard the ECHR's interpretation of its own European Convention human rights standards to constitute persuasive eviden e as to whether the CIA techniques in question here would violate the Fifth Amendment, and thus the DTA.

The Supreme Court of Israel's review of interrogation techniques in *Public Committee Against Torture v. Israel*, HCJ 5100/94 (1999), similarly turned upon foreign legal issues not relevant here. There, the Israeli court held that Israel's General Security Service ("GSS") was not legally authorized to employ certain interrogation methods with persons suspected of terrorist activity—including shaking the torso of the detainee, depriving the detainee of sleep, and forcing the detainee to remain in a variety of stress positions. The court reached that conclusion, however, because it found that the GSS only had the authority to engage in interrogations specifically authorized by Israeli domestic statute and that, under the then "existing state of law," *id.* at 36, the GSS was "subject to the same restrictions applicable" to "the ordinary police investigator," *id.* at 29. *See id.* ("There is no statute that grants GSS investigators special interrogating powers that are different or more significant than those granted the police investigator."). Under that law, the GSS was permitted only to "'examine *orally* any persons supposed to be acquainted with the facts and circumstances of any offense'" and to reduce their responses to writing, and thus the statute did not permit the "physical means" of interrogation undertaken by the GSS. *Id.* at 19 (citing the Israeli Criminal Procedure Statute Art. 2(1)) (emphasis added). At the same time, the Israeli court specifically held open whether the legislature could authorize such techniques by statute, *id.* at 35-36, and determined that it was not appropriate in that case to consider special interrogation methods that might be authorized when necessary to save human life, *id.* at 32.[32]

[32] The Israeli court recognized that Israel had undertaken a treaty obligation to refrain from cruel, inhuman, or degrading treatment, *Public Committee Against Torture*, HCJ 5100/94 at 23, but the court specifically grounded its holding not in its interpretation of any treaty, but in Israeli statutory law. Indeed, the court recognized that the legislature *could* "grant[] GSS investigators the authority to apply physical force during the interrogation of suspects suspected of involvement in hostile terrorist activities," *id.* at 35, provided only that the law "befit[s] the values of

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As we have explained above in finding particular U.S. Supreme Court decisions to be distinguishable, it is not the law in the United States that interrogations performed by intelligence officers for the purpose proposed by the CIA are subject to the same rules as "regular police interrogation[s]." *Id.* at 29. Thus, the Israeli court addressed a fundamentally different question that sheds little light on the inquiry before us. Where the Israeli GSS lacked any special statutory authority with respect to interrogations, the CIA is expressly authorized by statute to "collect intelligence through human sources and any other appropriate means" and is expressly distinguished from domestic law enforcement authorities. 50 U.S.C. § 403-4a(d)(1). Indeed, beyond the CIA's general statutory authority to collect human intelligence, the Military Commissions Act itself was enacted specifically to permit the CIA interrogation program to go forward. *See infra* at 43-44. Thus, while the Israeli court rested its 1999 decision on the legislature's failure to grant the GSS anything other than ordinary police authority, we face a CIA interrogation program clearly authorized and justified by legislative authority separate from and beyond those applicable to ordinary law enforcement investigations. And the Israeli Supreme Court itself subsequently recognized the profound differences between the legal standards that govern domestic law enforcement and those that govern armed conflict with terrorist organizations. *Compare Public Committee Against Torture v. Israel (1999)* (stating that "there is no room for balancing" under Israeli domestic law), *with Public Committee Against Torture in Israel v. The Government of Israel*, HCJ 769/02 (Dec. 11, 2005), ¶ 22 (holding that under the law of armed conflict applicable to a conflict against a terrorist organization, "human rights are protected . . . but not to their full scope" and emphasizing that such rights must be "balance[d]" against "military needs").

Survival, Evasion, Resistance, and Escape ("SERE") Training. As we noted at the outset, variations of each of the proposed techniques have been used before by the United States, providing some evidence that they are, in some circumstances, consistent with executive tradition and practice. Each of the CIA's enhanced interrogation techniques has been adapted from military SERE training, where techniques very much like these have long been used on our own troops. Individuals undergoing SERE training are obviously in a very different situation from detainees undergoing interrogation; SERE trainees know that the treatment they are experiencing is part of a training program, that it will last only a short time, and that they will not be significantly harmed by the training.

We do not wish to understate the importance of these differences, or the gravity of the psychological trauma that may accompany the relative uncertainty faced by the CIA's detainees. On the other hand, the interrogation program we consider here relies on techniques that have been deemed safe enough to use in the training of our own troops. We can draw at least one conclusion from the existence of SERE training—use of the techniques involved in the CIA's interrogation program (or at least the similar techniques from which these have been adapted) cannot be considered to be *categorically* inconsistent with "traditional executive behavior" and "contemporary practice" regardless of context.

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the State of Israel, is enacted for a proper purpose, and [infringes the suspect's liberty] to an extent no greater than required," *id.* at 37.

The Enactment of the Military Commissions Act. Finally, in considering "contemporary practice" and the "standards of blame generally applied to them," we consider the context of the recent debate over the Military Commissions Act, including the views of legislators who have been briefed on the CIA program. In *Public Committee Against Torture*, HCJ 5100/94, the Israeli Supreme Court observed that in a democracy, it was for the political branches, and not the courts, to strike the appropriate balance between security imperatives and humanitarian standards, and it invited the Israeli legislature to enact a statute specifically delimiting the security service's authority "to apply physical force during the interrogation of suspects suspected of involvement in hostile terrorist activities." *Id.* at 35. In the United States, Congress in fact enacted such a statute, responding to the President's invitation by passing the Military Commissions Act to allow the CIA interrogation program to go forward. While the isolated statements of particular legislators are not dispositive as to whether specific interrogation techniques would shock the conscience under the DTA, we properly may consider the Military Commissions Act, taken as a whole, in coming to an understanding of "contemporary practice, and of the standards of blame generally applied to them," and what Americans, through their representatives in Congress, generally deem to be acceptable conduct by the executive officials charged with ensuring the national security. *Lewis*, 523 U.S. at 847 n.8; *cf. Roper*, 543 U.S. 551 (2005) (finding the passage and repeal of state laws to be relevant to contemporary standards under the Eighth Amendment); *Atkins*, 536 U.S. 304 (same).

The President inaugurated the political debate over what would become the Military Commissions Act in his speech on September 6, 2006, wherein he announced to the American people the existence of the CIA program, the nature of the al Qaeda detainees who had been interrogated, and the need for new legislation to allow the program to "go forward" in the wake of *Hamdan*. As the President later explained: "When I proposed this legislation, I explained that I would have one test for the bill Congress produced: Will it allow the CIA program to continue? This bill meets that test." Remarks of the President Upon Signing the Military Commission Act of 2006, East Room, White House (Oct. 17, 2006). Senators crucial to its passage agreed that the statute must be structured to permit the CIA's program to continue. *See* 152 Cong. Rec. S10354-02, S10393 (Sept. 28, 2006) (statement of Sen. Graham) ("Should we have a CIA program classified in nature that would allow techniques not in the Army Field Manual to get good intelligence from high value targets? The answer from my point of view is yes, we should."); *id.* at S 10414 (statement of Sen. McCain) ("[M]y colleagues, have no doubt—this legislation will allow the CIA to continue interrogating prisoners within the boundaries established in the bill."). Representative Duncan Hunter, the leading sponsor of the bill in the House, similarly described the legislation as "leav[ing] the decisions as to the methods of interrogation to the President and to the intelligence professionals at the CIA, so that they may carry forward this vital program that, as the President explained, serves to gather the critical intelligence necessary to protect the country from another catastrophic terrorist attack." 152 Cong. Rec. H7938 (Sept. 29, 2006). The Act clarified the War Crimes Act and provided a comprehensive framework for interpreting the Geneva Conventions so that the CIA program might go forward after *Hamdan*.

The Military Commissions Act, to be sure, did not prohibit or license specific interrogation techniques. As discussed above, Members of Congress on both sides of the debate expressed widely different views as to the specific interrogation techniques that might or might

not be permitted under the statute. *See supra* at n.13. Nonetheless, you have informed us that prior to passage of the Military Commissions Act, several Members of Congress, including the full memberships of the House and Senate Intelligence Committees and Senator McCain, were briefed by General Michael Hayden, Director of the CIA, on the six techniques that we discuss herein and that, General Hayden explained, would likely be necessary to the CIA detention and interrogation program should the legislation be enacted. In those classified and private conversations, none of the Members expressed the view that the CIA interrogation program should be stopped, or that the techniques at issue were inappropriate. Many of those Members thereafter were critical in ensuring the passage of the legislation, making clear through their public statements and through their votes that they believed that a CIA program along the lines General Hayden described could and should continue.

Beyond those with specific knowledge of the classified details of the program, all of the Members who engaged in the legislative debate were aware of media reports—some accurate, some not—describing the CIA interrogation program. Those media reports suggested that the United States had used techniques including, and in some cases exceeding, the coerciveness of the six techniques proposed here. The President's request that Congress permit the CIA program to "go forward," and the carefully negotiated provisions of the bill, clearly presented Congress with the question whether the United States should operate a classified interrogation program, limited to high value detainees, employing techniques that exceeded those employed by ordinary law enforcement officers and the United States military, but that remained lawful under the anti-torture statute and the War Crimes Act. There can be little doubt that the subsequent passage of the statute reflected an endorsement by both the President and Congress of the political branches' shared view that the CIA interrogation program was consistent with contemporary practice, and therefore did not shock the conscience. We do not regard this political endorsement of the CIA interrogation program to be conclusive on the constitutional question, but we do find that the passage of this legislation provides a relevant measure of contemporary standards.

* * *

The substantive due process analysis, as always, must remain highly sensitive to context. We do not regard any one of the contexts discussed here, on its own, to answer the critical question: What interrogation techniques are permissible for use by trained professionals of the CIA in seeking to protect the Nation from foreign terrorists who operate through a diffuse and secret international network of cells dedicated to launching catastrophic terrorist attacks on the United States and its citizens and allies? Nonetheless, we read the constitutional tradition reflected in the DTA to permit the United States to employ a narrowly drawn, extensively monitored, and carefully safeguarded interrogation program for high value terrorists that uses enhanced techniques that do not inflict significant or lasting physical or mental harm.

D.

Applying these legal standards to the six proposed techniques used individually and in combination, we conclude that these techniques are consistent with the DTA.

Dietary Manipulation. The CIA limits the use of dietary manipulation to ensure that detainees subject to it suffer no adverse health effects. The CIA's rules ensure that the detainee receives 1000 kCal per day as an absolute minimum, a level that is equivalent to a wide range of commercial weight loss programs. Medical personnel closely monitor the detainee during the application of this technique, and the technique is terminated at the prompting of medical personnel or if the detainee loses more than ten percent of his body weight. While the diet may be unappealing, it exposes the detainee to no appreciable risk of physical harm. We understand from the CIA that this technique has proven effective, especially with detainees who have a particular appreciation for food. In light of these safeguards and the technique's effectiveness, the CIA's use of this technique does not violate the DTA.

Corrective Techniques. Each of the four proposed "corrective techniques" involves some physical contact between the interrogator and the detainee. These corrective techniques are of two types. First, there are two "holds." With the facial hold, the interrogator places his palms on either side of the detainee's face in a manner careful to avoid any contact with eyes. With the attention grasp, the interrogator grasps the detainee by the collar and draws him to the interrogator in order to regain the detainee's attention, while using a collar or towel around the back of the detainee's neck to avoid whiplash. These two techniques inflict no appreciable pain on the detainee and are directed wholly at refocusing the detainee on the interrogation and frustrating a detainee's efforts to ignore the interrogation. Thus, the described techniques do not violate the requirements of substantive due process.

Second, the CIA proposes to use two "slaps." In the abdominal slap, the interrogator may begin with his hands no farther than 18 inches away from the detainee's abdomen and may strike the detainee in an area of comparatively little sensitivity between the waist and the sternum. The facial slap involves a trained interrogator's striking the detainee's cheek with his hand. Like the holds, the slaps are primarily *psychological* techniques to make the detainee uncomfortable; they are not intended, and may not be used, to extract information from detainees by force or physical coercion.

There is no question, however, that the slaps may momentarily inflict some pain. But careful safeguards ensure that no significant pain would occur. With the facial slap, the interrogator must not wear any rings, and must strike the detainee in the area between the tip of the chin and the corresponding earlobe to avoid any contact with sensitive areas. The interrogator may not use a fist, but instead must use an open hand and strike the detainee only with his open fingers, not with his palm. With the abdominal slap, the interrogator also may not use a fist, may not wear jewelry, and may strike only between the sternum and the navel. The interrogator is required to maintain a short distance between himself and the detainee to prevent a blow of significant force. Undoubtedly, a single application of either of these techniques presents a question different from their repeated use. We understand, however, that interrogators will not apply these slaps with an intensity, or a frequency, that will cause significant physical pain or injury. Our conclusion that these techniques do not shock the conscience does not mean that interrogators may punch, beat, or otherwise physically abuse detainees in an effort to extract information. To the contrary, the result that we reach here is expressly limited to the use of far more limited slap techniques that have carefully been designed to affect detainees

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psychologically, without harming them physically. Slaps or other forms of physical contact that go beyond those described may raise different and serious questions under the DTA.

Monitoring by medical personnel is also important. Medical personnel observe the administration of any slap, and should a detainee suffer significant or unexpected pain or harm, the technique would be discontinued. In this context, the very limited risk of harm associated with this technique does not shock the conscience.

Extended Sleep Deprivation. Of the techniques addressed in this memorandum, extended sleep deprivation again, as under the War Crimes Act, requires the most extended analysis. Nonetheless, after reviewing medical literature, the observations of CIA medical staff in the application of the technique, and the detailed procedures and safeguards that CIA interrogators and medical staff must follow in applying the technique and monitoring its application, we conclude that the CIA's proposed use of extended sleep deprivation would not impose harm unjustifiable by a governmental interest and thus would not shock the conscience.

The scope of this technique is limited: The detainee would be subjected to no more than 96 hours of continuous sleep deprivation, absent specific additional approval, including legal approval from this Office and approval from the Director of the CIA; the detainee would be allowed an opportunity for eight hours of uninterrupted sleep following the application of the technique; and he would be subjected to no more than a total of 180 hours of the sleep deprivation technique in one 30-day period. Notably, humans have been kept continuously awake in excess of 250 hours in medical studies. There are medical studies suggesting that sleep deprivation has few measurable physical effects. *See, e.g., Why We Sleep: The Functions of Sleep in Humans and Other Mammals* 23-24 (1998). To be sure, the relevance of these medical studies is limited. These studies have been conducted under circumstances very dissimilar to those at issue here. Medical subjects are in a relaxed environment and at relative liberty to do whatever keeps their interest. The CIA detainees, by contrast, are undoubtedly under duress, and their freedom of movement and activities are extremely limited. CIA medical personnel, however, have confirmed that these limited physical effects are not significantly aggravated in the unique environment of a CIA interrogation.

As described above, the CIA's method of keeping detainees awake—continuous standing—can cause edema, or swelling in the lower legs and feet. Maintaining the standing position for as many as four days would be extremely unpleasant, and under some circumstances, painful, although edema and muscle fatigue subside quickly when the detainee is permitted to sit or to recline.[33]

[33] We understand that during the use of the proposed extended sleep deprivation technique, the detainee would often wear a disposable undergarment designed for adults suffering from incontinence. The undergarment would be used to avoid the need regularly to unshackle the detainee for use of the toilet, and would be regularly checked to avoid skin irritation or unnecessary discomfort. The proposed use of the undergarment is justified not just for sanitary reasons, but also to protect both the detainee and the interrogators from unnecessary and potentially dangerous physical contact. We also understand that the detainee would wear additional clothing, such as a pair of shorts, over the undergarment during application of this technique.

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At the same time, however, the CIA employs many safeguards to ensure that the detainee does not endure significant pain or suffering. The detainee is not permitted to support his weight by ha ging from his wrists and thereby risking injury to himself. This precaution ensures that the detainee's legs are capable of functioning normally at all times—if the detainee cannot support his own weight, administration of the technique ends. In addition, the CIA's medical personnel monitor the detainee throughout the period of extended sleep deprivation. They will halt use of the technique should they diagnose the detainee as experiencing hallucinations, other abnormal psychological reactions, or clinically significant diminishment in cognitive functioning. Medical personnel also will monitor the detainee's vital signs to ensure that they stay within normal parameters. If medical personnel determine that the detainee develops clinically significant edema or is experiencing significant physical pain for any reason, the technique either is discontinued or other methods of keeping the detainee awake are used. These accommodations are significant, because they highlight that the CIA uses extended sleep deprivation merely to weaken a detainee's psychological resistance to interrogation by keeping him awake for longer than normal periods of time.

Combined Effects. We do not evaluate these techniques in isolation. To determine whether a course of interrogation "shocks the conscience," it is important to evaluate the effect of the potential combined use of these techniques. *See, e.g.*, *Williams v. United States*, 341 U.S. 97, 103 (1951) (evaluating a three-day course of interrogation techniques to determine whether a constitutional violation occurred). Previously, this Office has been particularly concerned about techniques that may have a mutually reinforcing effect such that the combination of techniques might increase the effect that each would impose on the detainee. *Combined Use* at 9-11. Specifically, medical studies provide some evidence that sleep deprivation may reduce tolerance to some forms of pain in some subjects. *See, e.g.*, B. Kundermann *et al.*, *Sleep Deprivation Affects Thermal Pain Thresholds but not Somatosensory Thresholds in Healthy Volunteers*, 66 Psychosomatic Med. 932 (2004) (finding a significant decrease in heat pain thresholds and some decrease in cold pain thresholds after one night without sleep); S. Hakki Onen *et al.*, *The Effects of Total Sleep Deprivation, Selective Sleep Interruption and Sleep Recovery on Pain Tolerance Thresholds in Healthy Subjects*, 10 J. Sleep Research 35, 41 (2001) (finding a statistically significant drop of 8-9% in tolerance thresholds for mechanical or pressure pain after 40 hours); *id.* at 35-36 (discussing other studies). Moreover, subjects in these medical studies have been observed to increase their consumption of food during a period of sleep deprivation. *See Why We Sleep* at 38. A separate issue therefore could arise as the sleep deprivation technique may be used during a period of dietary manipulation.

Nonetheless, we are satisfied that there are safeguards in place to protect against any significant enhancement of the effects of the techniques at issue when used in combination with sleep deprivation. Detainees subject to dietary manipulation are closely monitored, and any statistically significant weight loss would result in cessation of, at a minimum, the dietary manipulation technique. With regard to pain sensitivity, none of the techniques at issue here involves such substantial physical contact, or would be used with such frequency, that sleep deprivation would aggravate the pain associated with these techniques to a level that shocks the conscience. More generally, we have been assured by the CIA that they will adjust and monitor the frequency and intensity of the use of other techniques during a period of sleep deprivation. *Combined Use* at 16.

In evaluating these techniques, we also recognize the emotional stress that they may impose upon the detainee. While we know the careful procedures, safeguards, and limitations under the CIA's interrogation plan, the detainee would not. In the course of undergoing these techniques, the detainee might fear that more severe treatment might follow, or that, for example, the sleep deprivation technique may be continued indefinitely (even though, pursuant to CIA procedures, the technique would end within 96 hours). To the extent such fear and uncertainty may occur, however, they would bear a close relationship to the important government purpose of obtaining information crucial to preventing a future terrorist attack. According to the CIA, the belief of al Qaeda leaders that they will not be harshly treated by the United States is the primary obstacle to encouraging them to disclose critical intelligence. Creating uncertainty over whether that assumption holds—while at the same time avoiding the infliction (or even the threatened infliction, *see supra* at n.21) of any significant harm—is a necessary part of the effectiveness of these techniques and thus in this context does not amount to the arbitrary or egregious conduct that the Due Process Clause would forbid. When used in combination and with the safeguards described above, the techniques at issue here would not impose harm that constitutes "cruel, inhuman, or degrading treatment or punishment" within the meaning of the DTA.

IV.

The final issue you have asked us to address is whether the CIA's use of the proposed interrogation techniques would be consistent with United States treaty obligations under Common Article 3 of the Geneva Conventions, to the extent those obligations are not encompassed by the War Crimes Act.[34] As we explain below, Common Article 3 does not disable the United States from employing the CIA's proposed interrogation techniques.

[34] Through operation of the Military Commissions Act, the Geneva Conventions, outside the requirements of the War Crimes Act, constitute a judicially unenforceable treaty obligation of the United States. Under the National Security Act of 1947, properly authorized covert action programs need only comply with the Constitution and the statutes of the United States. *See* 50 U.S.C. § 413b(a)(5) (prohibiting the authorization of covert actions "that would violate the Constitution or any statute of the United States," without mentioning treaties). Nevertheless, we understand that the CIA intends for the program to comply with Common Article 3, and our analysis below is premised on that policy determination.

In addition, we note that the MCA provides another mechanism whereby the President could ensure that the CIA interrogation program fully complies with Common Article 3—by reasserting his pre-*Hamdan* conclusion that Common Article 3 does not apply to the armed conflict against al Qaeda. Section 6(a)(3) of the MCA provides the President with the authority to "interpret the meaning and *application* of the Geneva Conventions" through executive orders that "shall be authoritative in the same manner as other administrative regulations" (emphasis added). By specifically invoking administrative law, the MCA provides the President with at least the same authority to interpret the treaty as an administrative agency would have to interpret a federal statute. The Supreme Court has held that an administrative agency's reasonable interpretation of a federal statute is to be "given controlling weight" *even if* a court has held in a prior case that another interpretation was *better* than the one contained in the agency regulation. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967, 980-986 (2005). As the Court explained, the "prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference *only if* the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Id.* at 982. *Hamdan* did not hold that Common Article 3 was unambiguous. Rather, the Court held only that the *best* interpretation of Common Article 3 was that it applied to any conflict that was not a conflict between states. The Court did not address the fact that the President had reached the opposite conclusion in his February 7, 2002 order, and reduced that view to the

A.

Common Article 3 has been described as a "Convention in miniature." International Committee of the Red Cross, Jean Pictet, gen. ed., III *Commentaries on the Geneva Conventions* at 34 (1960). It was intended to establish a set of minimum standards applicable to the treatment of all detainees held in non-international armed conflicts.

1.

Our interpretation must begin "with the text of the treaty and the context in which the written words are used." *Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522, 534 (1987); *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 534 (1991); *see also* Vienna Convention on the Law of Treaties, May 23, 1969, 1144 U.N.T.S. Article 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."); *see also* Ian Brownlie, *Principles of Public International Law* 629 (1990) ("The language of the treaty must be interpreted in light of the rules of general international law in force at the time of its conclusion, and also in light of the contemporaneous meaning of the terms.").[35] The foundation of Common Article 3 is its overarching requirement that detainees "shall in all circumstances be treated humanely, without any adverse distinction based on race, color, religion or faith, sex, birth or wealth, or any other similar criteria." This requirement of humane treatment is supplemented and focused by the enumeration of four more specific categories of acts that "are and shall remain prohibited at any time and in any place whatsoever." Those forbidden acts are:

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) Taking of hostages;

"erroneous" litigating position of the Solicitor General. *See* 126 S. Ct. at 2795; *id.* at 2845-46 (Thomas, J., dissenting) (recognizing that the majority did not address whether the treaty was ambiguous or deference was appropriate).

Because the MCA expressly allows the President to interpret the "application" of Common Article 3 by executive order, he lawfully could reassert his pre-*Hamdan* interpretation of the treaty. While we need not fully explore the issue here, we have little doubt that as a matter of text and history, the President could reasonably find that an "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties" does not include an armed conflict with an international terrorist organization occurring across territorial boundaries. *See, e.g.*, Pictet, III *Commentaries*, at 34 ("Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities, in short, which are in many respects similar to an international war, but *take place within the confines of a single country.*") (emphasis added). Therefore, although we assume in light of *Hamdan* that Common Article 3 applies to the present conflict, we note that the President permissibly could interpret Common Article 3 not to apply by an executive order issued under the MCA.

[35] Although the United States has not ratified the Vienna Convention on the Law of Treaties, we have often looked to Articles 31 and 32 of the Convention as a resource for rules of treaty interpretation widely recognized in international law.

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(c) Outrages upon personal dignity, in particular, humiliating and degrading treatment;

(d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Of these provisions, two have no application here. The proposed CIA interrogation methods will involve neither the "taking of hostages" nor the "passing of sentences [or] the carrying out of executions." Thus, our analysis will focus on paragraphs 1(a) and 1(c), as well as Common Article 3's introductory text.

Where the text does not firmly resolve the application of Common Article 3 to the CIA's proposed interrogation practices, Supreme Court precedent and the practices of this Office direct us to several other interpretive aids. As with any treaty, the negotiating record—also known as the *travaux préparatoires*—of the Geneva Conventions is relevant. *See, e.g., Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996) ("Because a treaty ratified by the United States is not only the law of this land, but also an agreement among sovereign powers, we have traditionally considered as aids to its interpretation the negotiating and drafting history (*travaux préparatoires*) and the post-ratification understanding of the contracting parties."); *see also* Vienna Convention on the Law of Treaties Art. 32(a) (stating that "supplementary means of interpretation, including the preparatory work of the treaty," may be appropriate where the meaning of the text is "ambiguous or obscure"). With regard to the Geneva Conventions, an additional, related tool is available: In 1960, staff members of the International Committee of the Red Cross, many of whom had assisted in drafting the Conventions, published *Commentaries* on each of the Geneva Conventions, under the general editorship of Jean Pictet. *See* Jean Pictet, gen. ed., *Commentaries on the Geneva Conventions* (ICRC 1960) (hereinafter, "*Commentaries*"). These *Commentaries* provide some insight into the negotiating history, as well as a fairly contemporaneous effort to explain the ICRC's views on the Conventions' proper interpretation. The Supreme Court has found the *Commentaries* persuasive in interpreting the Geneva Conventions. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2796-98 & n.48 (2006) (citing the *Commentaries* ten times in interpreting Common Article 3 to apply to the armed conflict with al Qaeda and explaining that "[t]hough not binding law, the [ICRC Commentary] is, as the parties recognize, relevant in interpreting the Geneva Conventions").

In addition, certain international tribunals have in recent years applied Common Article 3 in war crimes prosecutions—the International Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"). Their decisions may have relevance as persuasive authority. *See* Vienna Convention on the Law of Treaties Art. 31(3)(b) (stating that "subsequent practice in application of the treaty" may be relevant to its interpretation). The Supreme Court recently explained that the interpretation of a treaty by an international tribunal charged with adjudicating disputes between signatories should receive "respectful consideration." *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2683 (2006); *see also Breard v. Greene*, 523 U.S. 371, 375 (1998) (per curiam). The Geneva Conventions themselves do not charge either ICTY or ICTR with this duty, leaving their views with somewhat less weight than

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such a tribunal otherwise might have. We do, however, find several decisions of the ICTY of use, and that our analysis aligns in many areas with the decisions of these tribunals provides some comfort that we have accurately interpreted the treaty's terms.

Finally, we also recognize that the *practices* of other state parties in implementing Common Article 3 (as opposed to the statements of officials from other nations, unsupported by any concrete circumstances and conduct) may serve as "a supplementary means of interpretation." *See* Vienna Convention on the Law of Treaties Art. 31(3)(b). We have found only one country, the United Kingdom, to have engaged in a sustained effort to interpret Common Article 3 in a similar context, and we discuss the relevance of that example below.[36]

In addition, the Preparatory Committee for the International Criminal Court established under the Rome Statute has developed elements for crimes under Common Article 3 that may be tried before that court, and an accompanying commentary. *See* Knut Dörmann, *Elements of Crimes under the Rome Statute of International Criminal Court: Sources and Commentary* (Cambridge 2002). The United States is not a party to the Rome Statute, *see* Letter from John R. Bolton, Undersecretary of State, to U.N Secretary General Kofi Anan (May 6, 2002) (announcing intention of the United States not to become a party to the Rome Statute), but several parties to the Geneva Conventions are. Thus, while the Rome Statute does not constitute a legal obligation of the United States, and its interpretation of the offenses is not binding as a matter of law, the Statute provides evidence of how other state parties view these offenses. Like the decisions of international tribunals, the general correspondence between the Rome Statute and our interpretation of Common Article 3 provides some confirmation of the correctness of the interpretation herein.

2.

In addition to the guidance provided by these traditional tools of treaty interpretation, the Military Commissions Act substantially assists our inquiry.

The MCA amends the War Crimes Act to include nine specific criminal offenses defining the grave breaches of the Geneva Conventions, which we have discussed above. These amendments constitute authoritative statutory implementation of a treaty.[37] As important, by

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[36] The practice of many other state parties in response to civil conflicts appears to have been simply to violate Common Article 3 without conducting any interpretation. The Government of France, for instance, reportedly instituted torture as an official practice in seeking to suppress insurrection in the then-French territory of Algeria between 1954 and 1962. *See, e.g.*, Shiva Eftekhari, *France and the Algerian War: From a Policy of 'Forgetting' to a Framework of Accountability*, 34 Colum. Hum. Rts. L. Rev. 413, 421-22 (2003). More recently, Russia reportedly engaged in sustained violations of Common Article 3 in dealing with the internal conflict in Chechnya. We do not take such actions as a guide to the meaning of Common Article 3, and indeed many of the reported actions of these nations are condemnable. But these examples do reinforce the need to distinguish what states say from what they in fact do when confronted with their own national security challenges.

[37] Congress provided a comprehensive framework for discharging the obligations of the United States under the Geneva Conventions, and such legislation properly influences our construction of the Geneva Conventions. Congress regularly enacts legislation implementing our treaty obligations, and that legislation provides definitions for undefined treaty terms or otherwise specifies the domestic legal effect of such treaties. *See*,

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statutorily prohibiting certain specific acts, the amendments allow our interpretation of Common Article 3 to focus on the margins of relatively less serious conduct (i.e., conduct that falls short of a grave breach). Accordingly, we need not decide the outer limits of conduct permitted by certain provisions of Common Article 3, so long as we determine that the CIA's practices, limited as they are by clear statutory prohibitions and by the conditions and safeguards applied by the CIA, do not implicate the prohibitions of Common Article 3. For that interpretive task, the War Crimes Act addresses five specific terms of Common Article 3 by name—"torture," "cruel treatment," "murder," "mutilation," and the "taking of hostages." Although the War Crimes Act does not by name mention the three remaining relevant terms—"violence to life and person," "outrages upon personal dignity, in particular, humiliating and degrading treatment," and the overarching requirement of "humane[]" treatment—the Act does address them in part by identifying and prohibiting four other "grave breaches" under Common Article 3. Three of these offenses—performing biological experiments, rape, and sexual assault or abuse, *see* 18 U.S.C. §§ 2441(d)(1)(C), (G), (H)—involve reprehensible conduct that Common Article 3 surely prohibits. The Act includes another offense—intentionally causing serious bodily injury—which may have been intended to address the grave breach of "willfully causing great suffering or serious injury to body or health," specified in Article 130. This grave breach is not directly linked to Common Article 3 by either its text, its drafting history, or the ICRC *Commentaries*; nevertheless, the "serious bodily injury" offense in the War Crimes Act may substantially overlap with Common Article 3's prohibitions on "violence to life and person" and "outrages upon personal dignity."

Congress also stated in the MCA that the amended "provisions of [the War Crimes Act] fully satisfy the obligation under Article 129 of the Third Geneva Convention for the United States to provide effective penal sanctions for grave breaches which are encompassed in common Article 3 in the context of an armed conflict not of an international character." MCA § 6(a)(2). This statutory conclusion suggests the view of Congress that the terms "murder," "mutilation," "cruel treatment," "torture," and the "taking of hostages" in Common Article 3 are properly interpreted to be coterminous with the identically named offenses in the War Crimes Act. Article 130 of the Third Geneva Convention expressly states that two of these offenses—torture and murder ("willful killing" in Article 130)—are grave breaches. As explained below, international commentators and tribunals believe that a third offense—cruel treatment—is identical to the grave breach of "inhuman treatment" in Article 130. To criminalize only a subset of those acts would not be consistent with the obligation of the United States under Article 129 of GPW, and Congress believed it "fully satisf[ied]" that obligation in the MCA.[38] In any event, no legislative history indicates that Congress believed the War Crimes Act left a gap in coverage

e.g., 9 U.S.C. §§ 201-208 (addressing the scope of the Convention on the Recognition of Foreign Arbitral Awards); 18 U.S.C. § 1093 (implementing and defining terms of the Convention on the Prevention and Punishment of the Crime of Genocide); 17 U.S.C. § 116(a) (defining terms of the Convention for the Protection of Literary and Artistic Works); 18 U.S.C. § 2339C (defining terms of the International Convention for the Suppression of the Financing of Terrorism); 26 U.S.C. § 894(c) (interpreting the United States-Canada Income Treaty of 1980).

[38] We need not definitely resolve the question of Congress's intention as to the two other terms of Common Article 3 defined in the War Crimes Act—"mutilation" and the "taking of hostages"—neither of which appears expressly in Article 130 of GPW. These offenses are not implicated by the proposed CIA interrogation methods.

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with respect to any of its offenses that expressly address by name specific prohibitions in Common Article 3. Combining Congress's view in its implementing legislation with our own analysis of Common Article 3's relevant terms, including the alignment of Congress's definitions with interpretations of international tribunals, we conclude below that Congress's view is correct and that it has in the War Crimes Act fully and correctly defined the terms at issue, namely "torture" and "cruel treatment."

3.

Congress in the MCA also made clear, however, its view that the grave breaches defined in the War Crimes Act do not exhaust the obligations of the United States under Common Article 3. The War Crimes Act, as amended, states that "the definitions [in the War Crimes Act] are intended only to define the grave breaches of Common Article 3 and not the full scope of the United States obligations under that Article." 18 U.S.C. § 2441(d)(5). As to the rest, the Act states that the President may "promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions." MCA § 6(a)(3)(A).

Our inquiry with respect to the residual meaning of Common Article 3 is therefore confined to the three terms not expressly defined in the War Crimes Act—"violence to life or person," "outrages upon personal dignity," and "humane" treatment—to the extent those terms have meaning beyond what is covered by the four additional offenses under the War Crimes Act described above.[39] The President, Members of Congress, and even Justices of the Supreme Court in *Hamdan* have recognized that these provisions are troublingly vague and that *post hoc* interpretations by courts, international tribunals, or other state parties would be difficult to predict with an acceptable degree of certainty. *See, e.g.*, Address of the President, East Room, White House (Sept. 6, 2006) ("The problem is that these [e.g., 'outrages upon personal dignity, in particular, humiliating and degrading treatment'] and other provisions of Common Article Three are vague and undefined, and each could be interpreted in different ways by American and foreign judges."); 152 Cong. Rec. S10354-02, S10412 (Sept. 15, 2006) (Statement of Sen. McCain) ("Observers have commented that, though such 'outrages [upon personal dignity]' are difficult to define precisely, we all know them when we see them. However, neither I nor any other responsible member of this body should want to prosecute and potentially sentence to death any individual for violating such a vague standard."); *Hamdan*, 126 S. Ct. at 2798 ("Common Article 3 obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict; its requirements are general ones."); *id.* at 2848 (Thomas, J., dissenting) (characterizing provisions in Common Article 3 as "vague" and "nebulous").

They were not the first to remark on this uncertainty, nor is the uncertainty an accident. The *Commentaries* explain that the Conventions' negotiators found it "dangerous to try to go into too much detail" and thus sought "flexible" language that would keep up with unforeseen circumstances. Pictet, III *Commentaries*, at 39; *see* IV *Commentaries*, at 204-05 ("It seems

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[39] As we explain below, Congress correctly defined the content of Common Article 3's prohibitions on cruel treatment in the War Crimes Act's "cruel and inhuman treatment" offense. *See infra* at part IV.B.1.b.

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useless or even dangerous to attempt to make a list of all the factors which make treatment 'humane.'"); *see also* 2A *Final Record of Diplomatic Conferences of Geneva of 1949*, at 248 ("Mr. Maresca (Italy) thought that it gave greater force to a rule if he merely stated its fundamental principle without any comments; to enter into too many details could only limit its scope.").

The difficult task of applying these remaining terms is substantially assisted by two interpretive tools established in United States practice as well as international law. The first of these turns to more developed United States legal standards—similar to those set forth in Common Article 3—to provide content to Common Article 3's otherwise general terms. This approach is expressly recommended by Congress in the Military Commissions Act, which reaffirms the constitutional standards of treatment extended abroad and to aliens by the Detainee Treatment Act. The MCA further provides that any violation of the constitutional standards in the Detainee Treatment Act in connection with a Common Article 3 armed conflict constitutes a violation of Common Article 3. *See* MCA § 6(a)(1). The MCA thus both points us to particular domestic law in applying Common Article 3 and leaves open the possibility—advanced by many during the debate over the MCA—that compliance with the DTA as well as the specific criminal prohibitions in the War Crimes Act would fully satisfy the obligations of the United States under Common Article 3.

During the legislative debate over the Military Commissions Act, Secretary of State Condoleezza Rice explained why the State Department believed that Congress reasonably could declare that compliance with the DTA would satisfy United States obligations under Common Article 3:

> In a case where the treaty's terms are inherently vague, it is appropriate for a state to look to its own legal framework, precedents, concepts and norms in interpreting these terms and carrying out its international obligations. . . . The proposed legislation would strengthen U.S. adherence to Common Article 3 of the Geneva Conventions because it would add meaningful definition and clarification to vague terms in the treaties.
>
> In the department's view, there is not, and should not be, any inconsistency with respect to the substantive behavior that is prohibited in paragraphs (a) and (c) of Section 1 of Common Article 3 and the behavior that is prohibited as "cruel, inhuman, or degrading treatment or punishment," as that phrase is defined in the U.S. reservation to the Convention Against Torture. That substantive standard was also utilized by Congress in the Detainee Treatment Act. Thus it is a reasonable, good faith interpretation of Common Article 3 to state . . . that the prohibitions found in the Detainee Treatment Act of 2005 fully satisfy the obligations of the United States with respect to the standards for detention and treatment established in those paragraphs of Common Article 3.

Letter from Secretary of State Condoleezza Rice to the Honorable John Warner, Chairman of the Senate Armed Services Committee (Sept. 14, 2006) ("Rice Letter"). In enacting the MCA, ongress did not specifically declare that the satisfaction of the DTA would satisfy United States

obligations under Common Article 3, but Congress took measures to leave open such an interpretive decision. In particular, section 6(a)(3) of the MCA expressly delegates to the President the authority to adopt such a "reasonable, good faith interpretation of Common Article 3," and section 6(a)(1) provides that the prohibition under the DTA is directly relevant in interpreting the scope of United States obligations under Common Article 3.

It is striking that Congress expressly provided that *every* violation of the DTA "constitutes [a] violation[] of common Article 3 of the Geneva Conventions prohibited by United States law." MCA § 6(a)(1). Especially in the context of the legislative debate that accompanied the passage of the Military Commissions Act, this statement suggests a belief that the traditional constitutional standards incorporated into the DTA very closely track the humanitarian standards of Common Article 3. If the fit were loose, it would be difficult to foreclose the possibility that some violations of the DTA would not also be violations of Common Article 3, unless Congress were of the view that Common Article 3 is in all cases more protective than the domestic constitutional provisions applicable to our own citizens.

The manner in which Congress reaffirmed the President's authority to interpret the Geneva Conventions, outside of grave breaches, is consistent with the suggestion that the Detainee Treatment and War Crimes Acts are substantially congruent with the requirements of Common Article 3. The Military Commissions Act, after identifying both the grave breaches set out in the War Crimes Act and transgressions of the DTA as violations of Common Article 3, states that the President may "promulgate higher standards and administrative regulations for violations of treaty obligations which *are not grave breaches* of the Geneva Conventions." MCA § 6(a)(3)(A) (emphasis added). The provision does not mention the DTA. While the provision indicates that there are violations of Common Article 3 that are not grave breaches covered by the War Crimes Act, it also implies that the DTA may address those additional violations. *See also* 18 U.S.C. § 2441(d)(5), as amended by MCA § 6 (stating that "the definitions [in the War Crimes Act] are intended only to define the grave breaches of Common Article 3 and not the full scope of the United States obligations under that Article").

In applying the DTA's standard of humane treatment to Common Article 3, Congress was acting in accordance with a practice grounded in the text and history of the Geneva Conventions. The Conventions themselves recognize that, apart from "grave breaches," the state parties have some flexibility to consult their own legal traditions in implementing and discharging their treaty obligations. Although parties are obligated to prohibit grave breaches, with "penal sanctions," *see* GPW Art. 129 ¶¶ 1-2, the Conventions require parties "to take measures necessary for the suppression of other breaches of the Convention[s]," *id.* ¶ 3. The *Commentaries* also suggest such an approach when they explain that Common Article 3 was drafted with reference to the then-existing domestic laws of state parties: It "merely demands respect for certain rules, which were already recognized as essential in all civilized countries, and embodied in the national legislation of the States in question." Pictet, III *Commentaries*, at 36. Not only was the United States among the Conventions' leading drafters, but it was then (as it is now) among the leading constitutional democracies of the world. It is therefore manifestly appropriate for the United States to consider its own constitutional traditions—those rules "embodied in the national legislation" of the United States—in determining the meaning of the

general standards embodied in Common Article 3. The DTA incorporated constitutional standards from our Nation's legal tradition that predate the adoption of the Geneva Conventions.

Indeed, the United States previously has looked to its own law to clarify ambiguous treaty terms in similar treaties. A leading example is now embodied in the DTA itself. Faced with an otherwise undefined and difficult-to-apply obligation to refrain from "cruel, inhuman, or degrading treatment" in Article 16 of the CAT, the Senate turned to our Nation's constitutional standards and made clear in its advice and consent that the obligation of the United States under this provision would be determined by reference to the Fifth, Eighth, and Fourteenth Amendments of the U.S. Constitution. *See Executive Branch Summary and Analysis of the CAT* at 15-16; S. Exec. Rep. 101-30, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* at 25-26 (Aug. 30, 1990); *see also Samann v. Commissioner*, 313 F.2d 461, 463 (4th Cir. 1963) (looking to a more detailed definition of a term in a domestic U.S. tax statute to interpret a comparatively general treaty term). As with the Geneva Conventions, this approach was at least suggested by the treaty itself, which required state parties to "*undertake to prevent* . . . cruel, inhuman, or degrading treatment or punishment." CAT Art. 16 (emphasis added); *see Executive Branch Summary and Analysis of the CAT*, S. Treaty Doc. 100-20 at 15 (explaining that this language is "more limited" than a "stringent prohibition" and "embodies an undertaking to take measures to prevent" violations within the rubric of existing domestic legal structures).[40]

The second interpretive tool applicable here attempts to reconcile the residual imprecision in Common Article 3 with its application to the novel conflict against al Qaeda. When treaty drafters purposely employ vague and ill-defined language, such language can reflect a conscious decision to allow state parties to elaborate on the meaning of those terms as they confront circumstances unforeseen at the time of the treaty's drafting.

Like our first interpretive principle, this approach shares the support of Congress through the framework stablished in the Military Commissions Act. In that Act, Congress chose to keep the Geneva Conventions out of the courts, and recognized that the Executive Branch has discretion in interpreting Common Article 3 (outside the grave breaches) to provide good faith applications of its vague terms to evolving circumstances. The explicit premise behind the Act's comprehensive framework for interpreting the Geneva Conventions is that our Government needed, and the Conventions permitted, a range of discretion for addressing the threat against the United States presented by al Qaeda. As we discussed in the context of the DTA, Congress knew that a CIA interrogation program had to be part of that discretion, and thus a guiding objective behind the MCA's enactment was that the CIA's program could "go forward" in the wake of *Hamdan*. *See supra* at 43-44. This is not to say that the MCA declares that any conduct

[40] As a formal matter, the United States undertook a reservation to the CAT, altering United States obligations, rather than invoking domestic law as a means of interpreting the treaty. The United States made clear, however, that it understood the constitutional traditions of the United States to be more than adequate to satisfy the "cruel, inhuman or degrading treatment or punishment" standard required by the treaty, and therefore, it undertook the reservation out of an abundance of caution and not because it believed that United States law would fall short of the obligations under Article 16, properly understood. S. Exec. Rep. 101-30, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* at 25-26 (Aug. 30, 1990).

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falling under the auspices of a CIA interrogation program must be consistent with Common Article 3. To the contrary, Congress recognized that Common Article 3 establishes some clear limits on such a program. Nevertheless, the result of lingering imprecision in Common Article 3's terms should not be institutional paralysis, but rather discretion for the Executive Branch in developing an effective CIA program within those clear limits.

Common Article 3 certainly places clear limits on how a state party may address such challenges and absolutely bars certain conduct offensive to "all civilized nations." Pictet, III *Commentaries*, at 39. For instance, the provision prohibits "murder of all kinds," "mutilation," and "the taking of hostages"—terms that are susceptible to precise definition and that "are and shall remain prohibited at any time and in any place whatsoever." When it comes, however, to Common Article 3's more general prohibitions upon "violence to life or person" and "outrages upon personal dignity," it may become necessary for states to define the meaning of those prohibitions, not in the abstract, but in their application to the specific circumstances that arise.

Indeed, the ICRC *Commentaries* themselves contemplate that "what constitutes humane treatment" would require a sensitive balancing of both security and humanitarian concerns. Depending on the circumstances and the purposes served, detainees may well be "the object of strict measures since the dictates of humanity, and measures of security or repression, *even when they are severe*, are not necessarily incompatible." *Id.* at 205 (emphasis added). Thus, Common Article 3 recognizes that state parties may act to define the meaning of humane treatment, and its related prohibitions, in light of the specific security challenges at issue.

The conflict with al Qaeda reflects precisely such a novel circumstance: The application of Common Article 3 to a war against international terrorists targeting civilians was not one contemplated by the drafters and negotiators of the Geneva Conventions. As Common Article 3 was drafted in 1949, the focus was on wars between uniformed armies, as well as on the atrocities that had been committed during World War II. A common feature of the conflicts that served as the historical backdrop for the Geneva Conventions was the objective of the parties to engage the other's military forces. As the ICRC described the matter, "Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with *armed forces* on either side engaged in *hostilities*—conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country." Pictet, III *Commentaries*, at 37 (emphases in original).[41]

Al Qaeda in its war against the United States and its allies is not organized into battalions, under responsible command, or dressed in uniforms, although we need not decide whether these hallmarks of unlawful combatancy set al Qaeda into a class by itself. What is undoubtedly novel from the standpoint of the Geneva Conventions is that al Qaeda's primary

[41] Thus, although the Supreme Court rejected the President's determination that Common Article 3 did not apply to the conflict against al Qaeda, there can be little doubt that the paradigmatic case for the drafters of Common Article 3 was an internal civil war. 2B *Final Record of the Diplomatic Conference of Geneva of 1949*, at 121; *see also* Pictet, III *Commentaries*, at 29. A thorough interpretation of Common Article 3 must reflect that Common Article 3, at a minimum, is detached from its historical moorings when applied to the present context of armed conflict with al Qaeda.

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means of warfare is not to vanquish other uniformed armies but rather to kill innocent civilians. In this way, al Qaeda does not resemble the insurgent forces of the domestic rebellions to which the drafters and negotiators of Common Article 3 intended to apply long-standing principles of the law of war developed for national armies. Early explanations of the persons protected from action by a state party under Common Article 3 referred to the "party in revolt *against the de jure Government*." 2B *Final Record of the Diplomatic Conference of Geneva of 1949*, at 121 (emphasis added); *see also* Pictet, III *Commentaries*, at 29 (explaining that the historical impetus of Common Article 3 was bloody "civil wars or social or revolutionary disturbances" in which the Red Cross had trouble intervening because they were entirely within the territory of a sovereign state); *id.* at 32 (discussing the paradigm model of "patriots struggling for the independence and dignity of their country"). Al Qaeda's general means of engagement, on the other hand, is to avoid direct hostilities against the military forces of the United States and instead to commit acts of terrorism against civilian targets.

Further supporting a cautious approach in applying Common Article 3 in the present novel context, the negotiators and signatories of Common Article 3 were not under the impression that Common Article 3 was breaking new ground regarding the substantive rules that govern state parties, apart from applying those rules to a new category of persons.[42] They sought to formalize "principles [that had] developed as the result of centuries of warfare and had already become customary law at the time of the adoption of the Geneva Conventions because they reflect the most universally recognised humanitarian principles." *Prosecutor v. Delalic*, Case No. IT-96-21-A (ICTY Appellate Chamber 2001); *see also* Pictet, III *Commentaries*, at 36 (explaining that Common Article 3 establishes rules "which were *already recognized* as essential in all civilized countries") (emphasis added). Of course, the application of Common Article 3's general standards to a conflict with terrorists who are focused on the destruction of civilian targets, a type of conflict not clearly anticipated by the Conventions' drafters, would not merely utilize the axiomatic principles that had "developed as the result of centuries of warfare." Thus, we must be cautious before we construe these precepts to bind a state's hands in addressing such a threat to its civilians.

That a treaty should not be lightly construed to take away such a fundamental sovereign responsibility—to protect its homeland, civilians, and allies from catastrophic attack—is an interpretive principle recognized in international law. *See Oppenheim's International Law* § 633, at 1276 (9th ed. 1992) (explaining that the *in dubio mitius* canon provides that treaties should not be construed to limit a sovereign right of states in the absence of an express agreement); *cf. Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982) ("sovereign power" cannot be relinquished "unless surrendered in unmistakable terms").[43] The right to protect its

[42] As explained above, the innovation of Common Article 3 was not to impose wholly novel standards on states, but to apply the law of war to civil wars that largely shared the characteristics of international armed conflicts, while lacking a state party on the opposing side that could be a participant in a fully reciprocal treaty arrangement. *See* Pictet, III *Commentaries*, at 37. Although the drafters were innovating by binding states to law of war standards absent an assurance that the enemy would do the same, they believed that the general baseline standards that would apply under Common Article 3 were uncontroversial and well established.

[43] The canon of *in dubio mitius* (literally, "when in doubt, bring calm") has been applied by numerous international tribunals to construe ambiguous treaty terms against the relinquishment of fundamental sovereign

citizens from foreign attack is an essential attribute of a state's sovereignty. *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 266. To be sure, the states negotiating Common Article 3 clearly understood that they were disabling themselves from undertaking certain measures to defend their governments against insurgents seeking to overthrow those governments, which inarguably is an important part of sovereignty. We would, however, expect clarity, in the text or at least in the Conventions' negotiating history, before we would interpret the treaty provision to prohibit the United States from taking actions deemed critical to the sovereign function of protecting its citizens from catastrophic foreign terrorist attack. Crucial here is that the CIA's program is determined to be necessary to obtain critical intelligence to ward off catastrophic foreign terrorist attacks, and that it is carefully designed to be safe and to impose no more discomfort than is necessary to achieve that crucial objective, fundamental to state sovereignty. Just as the "Constitution [of the United States] is not a suicide pact," *Kennedy v. Mendoza-Martinez*, 374 U.S. 144, 159 (1963), so also the vague and general terms of Common Article 3 should not be lightly interpreted to deprive the United States of the means to protect its citizens from terrorist attack.

This insight informs passages in the ICRC *Commentaries* that some have cited to suggest that the provisions of Common Article 3—to the extent they are not precise and specific—should be read to restrict state party discretion whenever possible. The *Commentaries* indeed recognize that, in some respects, adopting more detailed prohibitions in Common Article 3 would have been undesirable because the drafters of the Conventions could not anticipate the measures that men of ill will would develop to avoid the terms of a more precise Common Article 3: "However great the care undertaken in drawing up a list of all the various forms of infliction, it would never be possible to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes." Pictet, III *Commentaries*, at 39. It is no doubt true therefore that Common Article 3's general prohibitions do establish *principles* that preclude a range of conduct, and that they should not be subject to a technical reading that parses among conduct. To the contrary, the principles in Common Article 3 are generally worded in a way that is "flexible, and at the same time precise," *id.*, and they call upon state parties to evaluate proposed conduct in a good faith manner, in an effort to make compatible both "the dictates of humanity" towards combatants and the "measures of security and repression" appropriate to defending one's people from inhumane attacks in the armed conflict at issue, *id.* at 205. We, therefore, undertake such an inquiry below.

B.

These interpretive tools inform our analysis of the three relevant terms under Common Article 3: paragraph 1(a)'s prohibition on "violence to life and person, in particular murder of all

powers. *See* W.T.O. Appellate Body, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R/ ¶ 165, n. 154, 1998 WL 25520, at *46 (Jan. 16, 1998) (explaining that the "interpretive principle of *in dubio mitius* is widely recognized in international law as a supplementary means of interpretation."). For example, the International Court of Justice refused to construe an ambiguous treaty term to cede sovereignty over disputed territory without a clear statement. *See Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan*, 2002 I.C.J. 625, 648.

kinds, mutilation, cruel treatment and torture"; paragraph 1(c)'s prohibition on "outrages upon personal dignity, in particular, humiliating and degrading treatment"; and Common Article 3's overarching requirement that covered persons "be treated humanely." Although it is first in the syntax of Common Article 3, we address the general humane treatment requirement last, as the question becomes the extent of any residual obligations imposed by this requirement that are not addressed by the four specific examples of inhumane treatment prohibited in paragraphs 1(a)-(d).

1.

Against those persons protected by Common Article 3, the United States is obligated not to undertake "violence to life and person, in particular murder of all kinds, cruel treatment and torture." GPW Art. ¶ 1(a). Paragraph 1(a) raises two relevant questions: Will the CIA program's use of the six proposed techniques meet Common Article 3's general requirement to avoid "violence to life and person," and will their use involve either of the potentially relevant examples of "violence to life and person" denoted in paragraph 1(a)—torture and cruel treatment?

a.

The proposed techniques do not implicate Common Article 3's general prohibition on "viol nce to life and person." Dictionaries define the term "violence" as "the exertion of physical force so as to injure or abuse." *Webster's Third Int'l Dictionary* at 2554. The surrounding text and structure of paragraph 1(a) make clear that "violence to life and person" does not encompass every use of force or every physical injury. Instead, Common Article 3 provides specific examples of severe conduct covered by that term—murder, mutilation, torture, and cruel treatment. As indicated by the words "in particular," this list is not exhaustive. Nevertheless, these surrounding terms strongly suggest that paragraph 1(a) is directed at only serious acts of physical violence. *Cf. Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1999) ("The traditional canon of construction, *noscitur a sociis*, dictates that words grouped in a list should be given related meaning.").

This reading is supported by the ICRC *Commentaries*, which explain that the prohibitions in paragraph 1(a) "concern acts which world public opinion finds particularly revolting—acts which were committed frequently during the Second World War." Pictet, III *Commentaries*, at 39. International tribunals and other bodies similarly have focused on serious and intentional instances of physical force. At the same time, these bodies have had difficulty identifying any residual content to the term "violence to life and person" beyond the four specific examples of prohibited violence that Common Article 3 enumerates. The ICC's Elements of Crimes does not define "violence to life or person" as an offense separate from the four specific examples. The ICTY similarly has suggested that the term may not have discernable content apart from its four specified components. The tribunal initially held that "violence to life or person" is "defined by the accumulation of the elements of the specific offenses of 'murder, mutilation, cruel treatment, and torture,'" and declined to define other sufficient conditions for the offense. *Prosecutor v. Blaskic*, IT-95-14-T, ¶ 182 (Trial Chamber). In later cases, the tribunal put a finer point on the matter; at least for purposes of imposing criminal sanctions, the court could not identify a residual content to the term "violence to life and person" and dismissed charges that the

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defendant had engaged in "violence to life or person" that did not constitute torture, cruel treatment, murder, or mutilation. *See Prosecutor v. Vasiljevic*, Trial Chamber, ¶¶ 194-205 (2003). Even when prosecutors attempted to proffer elements of the "violence to life and person" violation as a freestanding offense, they argued that the offense required the imposition of "serious physical pain or suffering," which would make it duplicative of the prohibition on "cruel treatment." *Id.*

We conclude that the proposed CIA techniques are consistent with Common Article 3's prohibition on "violence to life and person." As we explained above, Congress strictly prohibited several serious forms of violence to life and person, and the techniques do not involve any of these. The ICRC *Commentaries* have suggested that "performing biological experiments" would be a type of "violence to life and person" that, although not explicitly listed as an example, is also prohibited by paragraph 1(a). *See, e.g.*, Pictet, III *Commentaries*, at 39. The CIA techniques do not involve biological experiments, and indeed the War Crimes Act absolutely prohibits them. *See* 18 U.S.C. § 2441(d)(1)(C). Whether or not those grave breach offenses exhaust the scope of "violence to life and person" prohibited by Common Article 3, we are confident that "violence to life and person" refers to acts of violence serious enough to be considered comparable to the four examples listed in Common Article 3—murder, mutilation, torture, and cruel treatment. The CIA techniques do not involve the application of physical force rising to this standard. While the CIA does on occasion employ limited physical contact, the "slaps" and "holds" that comprise the CIA's proposed corrective techniques are carefully limited in frequency and intensity and subject to important safeguards to avoid the imposition of significant pain. They are designed to gain the attention of the detainee; they do not constitute the type of serious physical force that is implicated by paragraph 1(a).

b.

The CIA interrogation practices also do not involve any of the four more specific forms of "violence to life or person" expressly prohibited by paragraph 1(a). They obviously do not involve murder or mutilation. Nor, as we have explained, do they involve torture. *See Section 2340 Opinion* and *supra* at 14.[44]

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[44] In this opinion and the *Section 2340 Opinion*, we have concluded that the enhanced interrogation techniques in question would not violate the federal prohibition on torture in 18 U.S.C. § 2340-2340A or the prohibition on torture in the War Crimes Act, *see* 18 U.S.C. § 2441(d)(1)(A). Both of those offenses require as an element the imposition of severe physical or mental pain or suffering, which is consistent with international practice as reflected in Article 1 of the Convention Against Torture and the ICC's definition of Common Article 3's prohibition on torture. *See* Dörmann, *Elements of Crimes* at 401 (requiring the element of inflicting "severe physical or mental pain or suffering" for torture under Common Article 3). The War Crimes Act and the federal prohibition on torture further define "severe mental pain or suffering," and this more specific definition does not appear in the text of the CAT or in the Rome Statute. Instead, the source of this definition is an understanding of the United States to its ratification of the CAT. *See* 136 Cong. Rec. 36,198 (1990). Torture is not further defined in Common Article 3, and the United States did not enter an understanding to that instrument. That the more detailed explanation of "severe mental pain or suffering" is cast as an "understanding" of the widely accepted definition of torture, rather than as a reservation, reflects the position of the United States that this more detailed definition of torture is consistent with international practice, as reflected in Article 1 of the CAT, and need not have been entered as a reservation. *Auguste v. Ridge*, 395 F.3d 123, 143 n.20 (3d Cir. 2005); *see also* Vienna Convention on the Law

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The remaining specifically prohibited form of "violence to life or person" in Common Article 3 is "cruel treatment." Dictionaries define "cruel" primarily by reference to conduct that imposes pain wantonly, that is, for the sake of imposing pain. *Webster's Third Int'l Dictionary* at 546 ("disposed to inflict pain, *especially* in a wanton, insensate, or vindictive manner"). If the purpose behind treatment described as "cruel" is put aside, common usage would at least require the treatment to be "severe" or "extremely painful." *Id.* Of course, we are not called upon here to evaluate the term "cruel treatment" standing alone. In Common Article 3, the prohibition on "cruel treatment" is placed between bans on extremely severe and depraved acts of violence—murder, mutilation, and torture. The serious nature of this list underscores that these terms, including cruel treatment, share a common bond in referring to conduct that is particularly aggravated and depraved. *See S.D. Warren Co. v. Maine Bd. of Environmental Protection*, 126 S. Ct. 1843, 1849-50 (2006) (the *noscitur a sociis* canon "is no help absent some sort of gathering with a common feature to extrapolate"). In addition, Common Article 3 lists "cruel treatment" as a form of "violence to life and person," suggesting that the term involves some element of physical force.

International tribunals and other bodies have addressed Common Article 3's prohibition on "cruel treatment" at length. For purposes of the Rome Statute establishing the International Criminal Court, the U.N. preparatory commission defined "cruel treatment" under Common Article 3 to require "severe physical or mental pain or suffering." Dörmann, *Elements of Crimes* at 397. The committee explained that it viewed "cruel treatment" as indistinguishable from the "inhuman treatment" that constitutes a grave breach of the Geneva Conventions. *See id.* at 398; *see also* GPW Art. 130 (listing "torture or inhuman treatment" as a grave breach of the Geneva Conventions). This view apparently also was embraced by Congress when it established the offense of "cruel and inhuman treatment" in the War Crimes Act as part of its effort to criminalize the grave breaches of Common Article 3. *See* 18 U.S.C. § 2441(d)(1)(B); *see also* MCA § 6(a)(2). Construing "cruel treatment" to be coterminous with the grave breach of "inhuman treatment" further underscores the severity of the conduct prohibited by paragraph 1(a).

Aligning Common Article 3's prohibition on "cruel treatment" with the grave breach of "inhuman treatment" also demonstrates its close linkage to "torture." *See* GPW Art. 130 (stating that "*torture or inhuman treatment*, including biological experiments," is a grave breach of the Conventions) (emphasis added). This relationship was crucial for the ICTY in defining the elements of "cruel treatment" under Common Article 3. The tribunal explained that cruel treatment "is equivalent to the offense of inhuman treatment in the framework of the grave breaches provision of the Geneva Conventions" and that both terms perform the task of barring "treatment that does not meet the purposive requirement for the offense of torture in common article 3." *Prosecutor v. Delalic*, Case No. IT-96-21-T, ¶ 542 (Trial Chamber I, 1998). The International Criminal Court stopped at achieving this end, defining the offense of "cruel

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of Treaties Art. 2.1(d) (a reservation "purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State"). There is no reason to revisit that long-standing position here; with regard to torture, Common Article 3 imposes no greater obligation on the United States than does the CAT, and thus conduct consistent with the two federal statutory prohibitions on torture also satisfies Common Article 3's prohibition on torture in armed conflicts not of an international character.

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treatment" under Common Article 3 *identically* to that of torture, except removing the requirement that "severe physical or mental pain or suffering" be imposed for the purpose of "obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind." Dörmann, *Elements of Crimes*, at 397, 401. The ICTY went further, suggesting that there may be another difference from torture—that cruel treatment is directed at "treatment which deliberately causes serious mental or physical suffering that falls short of the severe mental or physical suffering required for the offence of torture." *Delalic*, ¶ 542.

In the War Crimes Act, Congress, like the ICTY, adopted a somewhat broader definition of "cruel treatment," prohibiting the relevant conduct no matter the purpose and defining a level of "serious physical or mental pain or suffering" that is less extreme than the "severe physical or mental pain or suffering" required for torture. In this way, Congress's approach to prohibiting the "cruel treatment" barred by Common Article 3 is consistent with the broader of the interpretations applied by international tribunals.[45] Congress, however, provided a specific definition of both "serious physical pain or suffering" and "serious mental pain or suffering." The ICTY found it impossible to define further "serious physical or mental pain or suffering" in advance and instead adopted a case-by-case approach for evaluating whether the pain or suffering imposed by past conduct was sufficiently serious to satisfy the elements of "cruel treatment." *Delalic*, ¶ 533. This approach, however, was tailored to the ICTY's task of applying Common Article 3 to wholly past conduct. Congress in amending the War Crimes Act, by contrast, was seeking to provide clear rules for the conduct of future operations. Congress's more detailed definition of "serious physical pain or suffering" and "serious mental pain or suffering" cannot be said to contradict the requirements of Common Article 3.

We conclude, with Congress, that the "cruel treatment" term in Common Article 3 is satisfied by compliance with the War Crimes Act. As we have explained above, the CIA techniques are consistent with Congress's prohibition on "cruel and inhuman treatment" in the War Crimes Act, *see supra* at 14-24, and thus do not violate Common Article 3's prohibition on "cruel treatment."

2.

Paragraph 1(c) of Common Article 3 prohibits "outrages upon personal dignity, in particular, humiliating and degrading treatment." Of the terms in Common Article 3 with uncertain meaning, the imprecision inherent in paragraph 1(c) was the cause of greatest concern among leaders of the Executive and Legislative Branches. *See supra* at 53-54 (citing statements by the President and Senator McCain).

[45] The ICTY defines "cruel treatment" as "treatment that causes serious mental pain or suffering *or constitutes a serious attack on human dignity*." *Delalic*, at ¶ 544 (emphasis added). The tribunal never has explained its reference to a "serious attack on human dignity." Common Article 3 has an express provision addressing certain types of affronts to personal dignity in its prohibition of "outrages upon personal dignity, in particular, humiliating and degrading treatment." GPW Art. 3 ¶ 1(c). The structure of the Geneva Conventions suggests that attacks on personal dignity should be analyzed under paragraph 1(c), the requirements of which we analyze below.

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Despite the general nature of its language, there are several indications that paragraph 1(c) was intended to refer to particularly serious conduct. The term "humiliating and degrading treatment" does not stand alone. Instead, the term is a specific type or subset of the somewhat clearer prohibition on "outrages upon personal dignity." This structure distinguishes Common Article 3 from other international treaties that include freestanding prohibitions on "degrading treatment," untethered to any requirement that such treatment constitute an "outrage upon personal dignity." *Compare* CAT Art. 16 (prohibiting "cruel, inhuman or degrading treatment or punishment which does not amount to torture") *with* European Convention on Human Rights Article 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment."). Thus, paragraph 1(c) does not bar "humiliating and degrading treatment" in the abstract; instead, it prohibits "humiliating and degrading treatment" that rises to the level of an "outrage upon personal dignity." This interpretation has been broadly accepted by international tribunals and committees, as it has been adopted both by the ICC Preparatory Committee and the ICTY. *See* Dörmann, *Elements of Crimes*, at 314 (stating, as an element of the ICC offense corresponding to paragraph 1(c) of Common Article 3, that "the severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity"); *Prosecutor v. Aleksovski*, Case No. IT-95-14/1 at ¶ 56 (Trial Chamber I 1999) (requiring that the conduct rise to the level of an outrage upon personal dignity).

The term "outrage" implies a relatively flagrant or heinous form of ill-treatment. Dictionaries define "outrage" as "describ[ing] whatever is so flagrantly bad that one's sense of decency or one's power to suffer or tolerate is violated" and list "monstrous, heinous, [and] atrocious" as synonyms of "outrageous." *Webster's Third Int'l Dictionary* at 1603. In this way, the term "outrage" appeals to the common sense standard of a reasonable person's assessing conduct under all the circumstances. And the judgment that term seeks is not a mere opinion that the behavior should have been different—to be an outrage, a reasonable person must assess the conduct as beyond all reasonable bounds of decency. This reaction is not to leave room for debate, as the term is directed at "the few essential rules of humanity which *all civilised* nations consider as valid *everywhere and under all circumstances and as being above and outside war itself*." Pictet, III *Commentaries*, at 32 (emphases added). Accordingly, in applying the "outrage upon personal dignity" term, the ICTY has recognized that it does not provide many clear standards in advance, but that it is confined to extremely serious misconduct: "An outrage upon personal dignity within Article 3 . . . is a species of inhuman treatment that is *deplorable, occasioning more serious suffering than most prohibited acts within the genus*." *Aleksovski*, at ¶ 54 (emphasis added).

The ICRC *Commentaries* on the Geneva Conventions underscore the severity of the misconduct paragraph 1(c) addresses. *See* Pictet, III *Commentaries*, at 39 (linking paragraph 1(c) to the prohibitions on torture, cruel treatment, murder, and mutilation in paragraph 1(a) and explaining that both paragraphs "concern acts which world opinion finds particularly revolting—acts which were committed frequently during the Second World War"). The ICTY similarly looks to a severe reaction from a reasonable person examining the totality of the circumstances. *See Aleksovski*, at ¶ 55-56 (to violate paragraph 1(c), the humiliation and degradation must be "so intense that the reasonable person would be outraged"). An examination of purpose also informs paragraph 1(c)'s focus on "humiliating and degrading treatment" that rises to the level of

an "outrage upon personal dignity." The same international tribunal has explained that paragraph 1(c) requires an inquiry not only into whether the conduct is objectively outrageous, but also into whether the purpose of the conduct is purely to humiliate and degrade in a contemptuous and outrageous manner. Thus, the ICTY has looked to the *intent* of the accused—it is not enough that a person feel "humiliated," rather the conduct must be "animated by contempt for the human dignity of another person." *Id.* at ¶ 56 (emphasis added). For the Yugoslavia tribunal, paragraph 1(c) captures a concept of wanton disregard for humanity, of recklessness, or of a wish to humiliate or to degrade for its own sake.

This inquiry into a reasonable person's evaluation of context, purpose, and intent with regard to the treatment of detainees is familiar to United States law. In the context of persons not convicted of any crime, but nonetheless detained by the Government, this same inquiry is demanded by the DTA, and the Fifth Amendment standard that it incorporates. As we have explained above, the DTA prohibits treatment, and interrogation techniques, that "shock the conscience." *Rochin v. California*, 342 U.S. 165, 172 (1952); *see also County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) ("To this end, for half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience."). Much like the test contemplated by the term "outrage," the "shocks the conscience" test looks to how a reasonable person would view the conduct "*within the full context in which it occurred.*" *Lewis*, 523 U.S at 849 (emphasis added); *see id.* (requiring "an exact analysis of circumstance"); *Wilkins v. May*, 872 F.2d 190, 195 (7th Cir. 1989) (With regard to pre-conviction treatment, the test is whether there was "misconduct that a reasonable person would find so beyond the norm of proper police procedure as to shock the conscience."). Indeed, our courts in applying the substantive due process standard have asked "whether the behavior of the government officer is so egregious, so *outrageous*, that it may fairly be said to shock the contemporary conscience." *Lewis*, 523 U.S. at 848 n.8 (emphasis added). Because a reasonable person would look to the *reason* or *justification* for the conduct, the "shocks the conscience" test under the DTA also contemplates such an inquiry. *Id.* at 846 (asking whether the conduct amounts to the "exercise of power without any reasonable justification in the service of a legitimate governmental objective").

For these reasons, we conclude that the term "outrages upon personal dignity" invites, not forbids, an inquiry into the justification for governmental con uct, as the term calls for the outrageousness of the conduct to be evaluated in the manner a reasonable person would. To be sure, the text of Common Article 3 introduces its specific prohibitions, including its reference to "outrages upon personal dignity," by mandating that such acts "are and shall remain prohibited *at any time and in any place whatsoever*." This text could be read to disapprove any evaluation of circumstance, or the considerations behind or justifications for specifically prohibited conduct. *See, e.g.*, Pictet, IV *Commentaries*, at 39 ("That is the method followed in the Convention when it proclaims four absolute prohibitions. The wording adopted could not be more definite. . . . No possible loophole is left; there can be no excuse, no attenuating circumstance.").

Nevertheless, this introductory text does not foreclose consideration of justifications and context in determining whether a particular act itself would constitute an outrage under the treaty. This conclusion is supported by other terms in Common Article 3. For example, Common Article 3 prohibits "murder," but murder by definition is not simply any homicide, but

killing without lawful justification. Common Article 3 may not permit a "murder" to be justified, but committing a homicide in self-defense simply would not constitute a "murder." Similarly, the term "outrage" seeks to identify conduct that would be universally considered beyond the bounds of decency, as transcending "the few essential rules of humanity which all civilised nations consider as valid everywhere and under all circumstances." Pictet, III *Commentaries*, at 32. An approach that foreclosed consideration of purpose throughout Common Article 3 cannot be squared with the ICRC *Commentaries* in evaluating whether conduct is humane—a requirement of Common Article 3 that the "outrage upon personal dignity" term is expressly stated to advance. The humane treatment requirement is said to prohibit "any act of violence or intimidation, *inspired not by military requirements or a legitimate desire for security, but by a systematic scorn for human values.*" Pictet, IV *Commentaries*, at 204 (emphasis added).

An evaluation of circumstance therefore is inherent in the plain meaning of the term "outrage." It is a concept, following relatively clear prohibitions on particularly grave acts, that turns to the objective judgment of reasonable people and proscribes conduct that is so vile as to be universally condemned under any standard of decency. Because it relies on such common judgment, the term "outrage" must evaluate conduct as reasonable people do, by weighing the justifications for that conduct. As the Supreme Court of Israel recently explained in applying the "rules of international law" to Israel's "fight against international terrorism," the principles of the law of war in this context "are not 'all or nothing.'" *Public Committee Against Torture in Israel v. Government of Israel*, HCJ 769/02, at 34 (Sup. Ct. Israel, Dec. 13, 2006).

That the prohibition of "outrages upon personal dignity" looks behind conduct for its justifications illuminates the decisions of the ICTY interpreting this term. For example, in *Prosecutor v. Kovac*, IT-96-238 (Appeals Chamber, June 12, 2002), the tribunal held that forcing a teenage girl in detention to dance naked on a table was an "outrage upon personal dignity." *Id.* ¶ 160. These facts involved clearly outrageous conduct undertaken for no purpose other than the prurient gratification of the defendant. None of the CIA's proposed techniques bears a passing resemblance to the prurient and outrageous conduct at issue in *Kovac*.

The proposed techniques also contrast sharply with the outrageous conduct documented at the Abu Ghraib prison in Iraq. As General Antonio Taguba's official investigation reported, the detainees at Abu Ghraib were subjected to "sadistic, blatant, and wanton criminal abuses." *See* General Antonio M. Taguba, *Article 15-6 Investigation of the 800th Military Policy Brigade* 16 (May 4, 2004) ("Taguba Report"). The report charged the offending military personnel with "forcibly arranging detainees in various sexually explicit positions for photographing"; "forcing naked male detainees to wear women's underwear"; "forcing groups of male detainees to masturbate themselves while being photographed and videotaped"; "arranging naked male detainees in a pile and then jumping on them"; "positioning a naked detainee on a MRE Box, with a sandbag on his head, and attaching wires to his fingers, toes, and penis to simulate electric torture"; "placing a dog chain or strap around a detainee's neck and having a female soldier pose for a picture"; and "sodomizing a detainee with a chemical light and perhaps a broom stick." *Id.* at 16-17. These wanton acts were undertaken for abusive and lewd purposes. They bear no resemblance, either in purpose or effect, to any of the techniques proposed for use by the CIA, whether employed individually or in combination.

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The contrast with *Kovac* and the acts at abu Ghraib goes some way to highlighting the conduct that paragraph 1(c) does reach. As the ICRC *Commentaries* have explained, paragraph 1(c) is directed at "acts which world public opinion finds revolting—acts which were committed frequently during the Second World War." Pictet, III *Commentaries*, at 39. World War II was typified by senseless acts of hatred, and humiliation or degradation, for no reason other than to reinforce that the victims had been vanquished or that they were viewed as inferior because of their nationality or their religion. Needlessly exposing prisoners to public curiosity is part of this dark history, *see* GPW Art. 13, and commentators cite as a paradigmatic example of such conduct the parading of prisoners in public. *See* Dörmann, *Elements of Crimes*, at 323 (referring to the post-World War II prosecution of Maezler for marching prisoners through the streets of Rome in a parade emulating the tradition of ancient triumphal celebrations). In another case, Australian authorities prosecuted Japanese officers who tied Sikh prisoners of war "to a post and beat them with sticks until they lost consciousness." *Trial of Tanaka Chuichi and Two Others (1946)*, XI Law Reports of Trials of War Criminals: United Nations War Crimes Commissions 62. In addition, they shaved the prisoners' beards and forced them to smoke cigarettes, in deliberate denigration of the Sikhs' religious practices requiring facial hair and forbidding the handling of tobacco, all as *post hoc* punishment for minor infractions of the rules of the prison camp. *Id.*[46]

These acts were *intended to humiliate*, and nothing more—there was no security justification, no carefully drawn plan to protect civilian lives. These were part of a panoply of atrocities in World War II meant to "reduce men to the state of animals," merely because of who they were. *See* Pictet, III *Commentaries*, at 627. These acts were undertaken for wholly prurient, humiliating, or bigoted ends, and that feature was an inextricable part of what made them "outrageous."[47]

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[46] In this way, acts intended to denigrate the religion of detainees implicate Common Article 3. Although pursuant to a different standard applicable to prisoners of war under the 1929 Geneva Convention, the Australian war crimes prosecution suggests that some consideration of the cultural sensitivities of detainees may be relevant when determining whether there has been a subjective intent to humiliate. There, the Japanese defendants sought out the features of the Sikh religion and sought to exploit those in particular, with no purpose other than to humiliate the detainees. This is not what occurs in the CIA program. It should be noted that, upon intake into custody, the CIA does trim the hair and shave the beards of detainees to prevent the introduction of disease and weapons into the facility. After this initial shaving, detainees are permitted to grow their hair to any desired length. We have already concluded that such limited use of involuntary grooming by the CIA is consistent with Common Article 3. *See* Letter to John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, at 12-13 (Aug. 31, 2006). Again, the difference here is that the purpose is not to humiliate the detainee, or to exploit any particular sensitivity, but to serve legitimate security and hygiene purposes.

[47] Our interpretation here is also consistent with the fact that paragraph 1(c) is not a prohibition on "outrages" *simpliciter*, but instead proscribes "outrages *upon personal dignity*." (Emphasis added.) The words "upon personal dignity" may be read to specify the injury that must occur before we evaluate whether the causing conduct constitutes an "outrage." Put differently, paragraph 1(c) is not a free-floating inquiry into the justifications for state party conduct during an armed conflict not of an international character. Instead, there must be some affront to "personal dignity" before that inquiry is triggered. The words "upon personal dignity" may also be read to constrain the considerations that may be brought to bear in determining whether an "outrage" has occurred. In this regard, the term may be designed to focus paragraph 1(c) on the person subjected to state party conduct, and his

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With these principles in mind, we turn to whether the proposed CIA techniques are consistent with Common Article 3's prohibition on "outrages upon personal dignity, in particular, humiliating and degrading treatment." We already have determined that the CIA program does not "shock the conscience," or thereby violate long-standing principles of United States law founded in the Fifth Amendment to our Constitution and incorporated into the DTA. Especially regarding a term that, in many ways, provides a protective buffer around the comparatively specific prohibitions in Common Article 3, it is appropriate for the United States to turn to its domestic legal tradition to provide a familiar, discernable standard for the inquiry that paragraph 1(c) requires. As we explained above, the MCA reflects a considered judgment by Congress that the DTA tightly fits the requirements of Common Article 3, and this congressional judgment is important in determining the proper interpretation of Common Article 3 for the United States. The DTA asks whether conduct "shocks the contemporary conscience," it evaluates the judgment of the reasonable person, and it tracks the inquiry that the plain meaning of the term "outrages" invites. Thus, our conclusion that the program is consistent with the DTA is a substantial factor in determining that the program does not involve "outrages upon personal dignity" under Common Article 3.[48]

But consistency with the DTA is not the only basis for our conclusion. In the limited context at issue here, the CIA program's narrow focus, and its compliance with the careful safeguards and limitations incorporated into the program, provide adequate protection against the "outrages upon personal dignity" prohibited by Common Article 3. Of particular importance is that the interrogation techniques in the CIA program are *not* a standard for treating our enemies wherever we find them, including those in military custody. Instead, the CIA program is narrowly targeted at a small number of the most dangerous and knowledgeable of terrorists, those whom the CIA has reason to believe harbor imminent plans to kill civilians throughout the world or otherwise possess information of critical intelligence value concerning the leadership or activities of al Qaeda. For those few, the United States takes measures to obtain what they know,

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dignity, rather than the intention of the state actor or the reasons for the actor's conduct. This latter interpretation would constitute a point of departure from international practice, which has looked to the intention and purpose of the state actor, as well as the context of and justifications for the conduct. In any event, the foregoing historical examples demonstrate that we need to know *why* the conduct is undertaken to determine whether it is an "outrage upon personal dignity." Marching captured prisoners as a means of transport does not evoke the same reaction, rising to the level of an "outrage," as the senseless parading of prisoners to humiliate them. In this way, the words "upon personal dignity" cannot be read to confine paragraph 1(c) to demarcating an absolute level of hardship that will not be tolerated. Instead, whether an affront to "personal dignity" occurs depends to some degree on the reason why a hardship is being imposed. The term is best read as a prohibition on the arbitrary, the wanton, or the prurient discomforting of persons protected by Common Article 3, as well as, in some cases, unnecessary or careless mistreatment, even when the overarching justification is legitimate. As we explain below, these principles do not describe the carefully drawn and limited CIA interrogation techniques.

[48] As we did with the DTA, we believe it appropriate to evaluate not just each technique in isolation, but the effects of the techniques in combination. *See, e.g., Aleksovski*, ¶ 57 ("Indeed, the seriousness of an act and its consequences may arise either from the nature of the act *per se* or from the repetition of the act or from a combination of different acts which, taken individually, would not constitute a crime within the meaning of Article 3 of the" Geneva Conventions.). We have concluded that the techniques in combination would not violate the constitutional standards incorporated in the DTA, *see supra* at 47-48, and we again conclude that paragraph 1(c) would not be violated by the techniques, used either individually or in combination.

but each technique is limited to keep the detainee safe and its application is circumscribed by extensive procedures and oversight. Those who implement these techniques are a small number of CIA professionals trained in the techniques' careful limits, and every interrogation plan is approved by the Director of the CIA.

In addition, as we have emphasized throughout this opinion, the CIA's detailed procedures and safeguards provide important protections ensuring that none of the techniques would rise to the level of an outrage upon personal dignity. With regard to the corrective techniques, the CIA has assured us that they would not be used with an intensity, or a frequency, that would cause significant physical pain or injury. *See Aleksovski*, ¶ 57. With all the techniques, the CIA would determine in advance their suitability and their safety with respect to each individual detainee, with the assistance of professional medical and psychological examinations. Medical personnel further would monitor their application. CIA personnel, including medical professionals, would discontinue, for example, the sleep deprivation technique if they determined that the detainee was or might be suffering from extreme physical distress. Each detainee may react differently to the combination of enhanced interrogation techniques to which he is subjected. These safeguards and individualized attention are crucial to our conclusion that the combined use of the techniques would not violate Common Article 3. *See supra* n.50.

As such, the techniques do not implicate the core principles of the prohibition on "outrages upon personal dignity." A reasonable person, considering all the circumstances, would not consider the conduct so serious as to be beyond the bounds of human decency. The techniques are not intended to humiliate or to degrade; rather, they are carefully limited to the purpose of obtaining critical intelligence. They do not manifest the "scorn for human values" or reflect conduct done for the purpose of humiliating and degrading the detainee—the dark past of World War II, against which paragraph 1(c) was set. As we explain above, a reasonable person would consider the justification for the conduct and the full context of the protective measures put in place by the CIA. Accordingly, the careful limits on the CIA program, the narrow focus of the program, and the critical purpose that the program serves are important to the conclusion that the six techniques do not constitute conduct so serious as to be beyond the bounds of human decency.

The CIA has determined that the interrogation techniques proposed here are the minimum necessary to maintain an effective program for this small number of al Qaeda operatives. That the CIA has confined itself to such a minimum, along with the other limitations the CIA has placed on the program, does not reflect the type of wanton contempt for humanity—the atrocities animated by hatred for others that "were committed frequently during the Second World War" and that "public opinion finds particularly revolting"—at which the prohibition on "outrages upon personal dignity" is aimed. *See* Pictet, III *Commentaries*, at 39.

3.

Overarching the four specific prohibitions in Common Article 3 is a general requirement that persons protected by Common Article 3 "shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or

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any other similar criteria."[49] The text makes clear that its four specific prohibitions are directed at implementing the humane treatment requirement. *See* GPW Art. 3 ¶ 1 (following the humane treatment requirement with "[t]o this end the following acts are and shall remain prohibited"). As we have discussed above, those specific provisions describe serious conduct, and the structure of Common Article 3 suggests that conduct of a similar gravity would be required to constitute inhumane treatment.

The question becomes what, if anything, is required by "humane treatment" under Common Article 3 that is not captured by the specific prohibitions in subparagraphs (a)-(d). We can discern some content from references to "humane treatment" in other parts of the Geneva Conventions. For example, other provisions closely link humane treatment with the provision of the basic necessities essential to life. Article 20 of GPW mandates that the "evacuation of prisoners of war shall always be *effected humanely* . . . . The Detaining Power shall supply prisoners of war who are being evacuated with sufficient food and potable water, and with the necessary clothing and medical attention." *See also* GPW Art. 46. This theme runs throughout the Conventions, and indeed Common Article 3 itself requires a subset of such basic necessities, by mandating that the "wounded and sick shall be collected and cared for." GPW Art. 3 ¶ 2. Given these references throughout the Conventions, humane treatment under Common Article 3 is reasonably read to require that detainees in the CIA program be provided with the basic necessities of life—food and water, shelter from the elements, protection from extremes of heat and cold, necessary clothing, and essential medical care, absent emergency circumstances beyond the control of the United States.

We understand that the CIA takes care to ensure that the detainees receive those basic necessities. You have informed us that detainees in CIA custody are subject to regular physical and psychological monitoring by medical personnel and receive appropriate medical and dental care. They are given adequate food and as much water as they reason bly please. CIA detention facilities are sanitary. The detainees receive necessary clothes and are sheltered from the elements.

For certain detainees determined to be withholding high value intelligence, however, the CIA proposes to engage in one interrogation technique—dietary manipulation—that would adjust the provision of these resources. The detainee's meals are temporarily substituted for a bland liquid diet that, while less appetizing than normal meals, exceeds nutrition requirements

[49] This language does not create an equal treatment requirement; instead, it provides that the suspect classifications in question may not justify any deviation from Common Article 3's baseline standard of humane treatment. The Geneva Conventions elsewhere impose equal treatment requirements. *See* GPW Art. 16 ("[A]ll prisoners of war shall be *treated alike* by the Detaining Power, without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria.") (emphasis added). Article 16 also provides specific exceptions to its equal treatment requirement with regard to prisoners of war, which we would expect to find in Common Article 3 if it were also an equal treatment requirement. The contrast with the text of Article 16 demonstrates the linkage of Common Article 3's anti-discrimination principle to the provision of humane treatment. The *Commentaries* further explain that distinctions, even among the listed criteria, may be made under Common Article 3, so long as the treatment of no covered person falls below the minimum standard of humane treatment. Pictet, III *Commentaries*, at 40-41. Thus, we turn to determining the basic content of Common Article 3's humane treatment requirement.

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for safe and healthy medically approved diet programs in the United States. During application of the technique, the detainee's weight is monitored, and the technique would be discontinued should the detainee lose more than 10 percent of his starting body weight. The element of humane treatment that we can glean from the structure of the Geneva Conventions is one of "sufficient food." GPW Art. 46. Because the food provided during the temporary application of the dietary manipulation technique is sufficient for health, we conclude that it does comply with the "sufficient food" element of Common Article 3's humane treatment requirement. *Cf. Aleksovski*, Case No. IT-95-14/1, ¶ 108 (dismissing Common Article 3 charges against prison warden who provided only two meals a day to all detainees over a period of months and where some detainees lost over thirty pounds).

We also find it relevant that the CIA's interrogation and detention program complies with the substantive due process requirements of the Fifth Amendment, which under most circumstances require "safe conditions," including "adequate food, shelter, clothing, and medical care" and which are incorporated into the DTA. *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982). Requiring the provision of basic necessities is another example of how the constitutional standards incorporated in the DTA themselves provide a "humane treatment" principle that can guide compliance with Common Article 3. Congress recognized as much in the DTA, given the statute's explicit premise that the Fifth, Eighth, and Fourteenth Amendments are directed against a concept of "inhumane treatment or punishment." MCA § 6(c)(2).

The CIA program—under the restrictions that we have outlined—complies with each of the specific prohibitions in Common Article 3 that implement its ove arching humane treatment requirement. Outside those four prohibitions, and the additional concept of basic necessities that we have discerned from the structure of the Conventions, we confront another situation where the content of the requirement is underspecified by the treaty. *See* Pictet, IV *Commentaries*, at 38-39 ("The definition [of humane treatment] is not a very precise one, as we shall see. On the other hand, there is less difficulty in enumerating things which are incompatible with humane treatment. That is the method followed in the Convention when it proclaims four absolute prohibitions."). Again, this is a situation where the generality was intentional: To the negotiators, "it seem[ed] useless and even dangerous to attempt to make a list of all the factors that would make treatment 'humane.'" *Id.* at 204. The *Commentaries* emphasize that "what constitutes humane treatment" requires a balancing of security and humanitarian concerns. The detainees may well be "the object of *strict* measures," as the "measures of security or repression, even when they are severe," may nonetheless be compatible with basic humanitarian standards. *Id.* at 205 (emphasis added). Given the deliberate generality of the humane treatment standard, it is reasonable to turn to our own law, which establishes a standard of humane treatment that similarly requires a balance between security and humanitarian concerns, to provide content to otherwise unspecified terms in the Conventions. Because the CIA program complies with the standard of humane treatment provided in the Detainee Treatment Act, and the U.S. constitutional standards that it incorporates, and because it provides detainees with the necessary food, shelter, clothing, and medical care, the CIA program satisfies Common Article 3's humane treatment requirement.

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C.

We also recognize that the *practices* of other state parties in implementing Common Article 3—as opposed to the statements of other states unsupported by concrete circumstances and conduct—can serve as "a supplementary means of interpretation." *See* Vienna Convention on the Law of Treaties Art. 31(3)(b). We have searched for evidence of state parties, seeking to implement Common Article 3 in a context similar to that addressed herein. The one example that we have found supports the interpretation of Common Article 3 that we have set forth above. In particular, the United Kingdom from the time of the adoption of Common Article 3 until the early 1970s applied an interrogation program in a dozen counter-insurgency operations that resembles in several ways the one proposed to be employed by the CIA.

Following World War II and the adoption of Common Article 3, the United Kingdom developed and applied five "in depth interrogation" techniques "to deal with a number of situations involving internal security." *Report of the Committee of Privy Counsellors Appointed to Consider Authorized Procedures for the Interrogation of Persons Suspected of Terrorism*, 1972, Cmnd. 4901, ¶ 10 (HSMO 1972) ("Parker Committee Report"). The five techniques involved (i) covering a detainee's head at all times, except when the detainee was under interrogation or in an room by himself; (ii) subjecting the detainee "to continuous and monotonous noise of a volume calculated to isolate [him] from communication"; (iii) depriving the detainee of sleep "during the early days" of the interrogation; (iv) restricting a detainee's diet to "one round of bread and one pint of water at six-hourly intervals"; and (v) forcing a detainee to face—but not touch—a wall with his hands raised and his legs spread apart for hours at a time, with only "periodical lowering of the arms to restore circulation." Lord Gardiner, Minority Report, Parker Committee Report, ¶ 5 ("Gardiner Minority Report"); *see also* Parker Committee Report ¶ 10. Broadly speaking, the techniques were designed to make the detainee "feel that he is in a hostile atmosphere, subject to strict discipline, . . . and completely isolated so that he fears what may happen next." *Id.* ¶ 11. From the 1950s through the early 1970s, the British employed some or all of the five techniques in a dozen "counter insurgency operations" around the world, including operations in Palestine, Kenya, Cyprus, the British Cameroons, Brunei, British Guiana, Aden, Malaysia, the Persian Gulf, and Northern Ireland. *See id.*

In 1971, after the public learned that British security forces had employed these techniques against Irish nationals suspected of supporting Irish Republican Army terrorist activities, the British Government appointed a three-person Committee of Privy Counselors, chaired by Lord Parker of Waddington, the Lord Chief Justice of England, to examine the legality of using the five interrogation techniques against suspected terrorists. *See* Parker Committee Report ¶¶ 1-2. Among other things, the committee considered whether the techniques violated a 1965 directive requiring that all military interrogations comply with "Article 3 of the Geneva Convention Relative to the Treatment of Prisoners of War (1949)." *See id.* ¶¶ 4-6 & Appx. A majority of the committee, including the Lord Chief Justice, concluded that the "application of these techniques, subject to proper safeguards, limiting the occasion on which and the degree to which they can be applied, would be in conformity with the Directive [and thus with Common Article 3]." *Id.* ¶ 31.

In reaching this conclusion, the Parker Committee rejected the notion that "the end justifies the means." *Id.* ¶ 27. It repeatedly stressed that aggressive interrogation techniques "should only be used in cases where it is considered vitally necessary to obtain information." *Id.* ¶ 35. It also emphasized that interrogators should be properly trained and that clear guidelines should exist "to assist Service personnel [in deciding] the degree to which in any particular circumstances the techniques can be applied." *Id.* Similarly, it recognized the importance of obtaining approval from senior government officials before employing the five techniques, *id.* ¶ 37, and it recommended that aggressive interrogations occur only in the presence of a "senior officer" with "overall control and . . . personal responsibility for the operation." *Id.* ¶ 38. The committee also concluded "that a doctor with some psychiatric training should be present at all times at the interrogation centre, and should be in the position to observe the course of oral interrogation," so that he could "warn the controller if he felt that the interrogation was being pressed too far" (although, in contrast with the CIA program, the doctor would not have the actual authority to stop the interrogations). *Id.* ¶ 41.

The Parker Committee emphasized, however, that its rejection of a pure "ends-means" analysis did not mean that Common Article 3 barred countries from giving some weight to the need to protect their citizens against the harm threatened by terrorist or insurgent operations. The committee, for example, emphasized that, when properly administered, the five interrogation techniques posed a "negligible" "risk of physical injury" and "no real risk" of "long-term mental effects." *Id.* ¶¶ 14-17. Yet they had "produced very valuable results in revealing rebel organization, training and 'Battle Orders.'" *Id.* ¶ 18. In Northern Ireland, the Committee observed, use of the techniques after "ordinary police interrogation had failed," led to, among other things, the identification of more than 700 I.R.A. members, details about "possible I.R.A. operations" and "future plans," and the discovery of large quantities of arms and explosives. *Id.* ¶¶ 21-22. The Committee emphasized that the techniques were "directly and indirectly . . . responsible for the saving of lives of innocent citizens." *Id.* ¶ 24.

More broadly, the Parker Committee explained that the meaning of Common Article 3's restrictions must be interpreted based on the *nature* of the conflict. *See id.* ¶ 30 (explaining that terms such as "'humane,' 'inhuman,' 'humiliating,' and 'degrading' fall to be judged by [a dispassionate] observer in the light of the circumstances in which the techniques are applied"). Accordingly, the committee concluded that Common Article 3 must be interpreted in light of the unique threats posed by terrorism. Although "short of war in its ordinary sense," terrorism is "in many ways worse than war." *Id.* ¶ 32. It occurs "within the country; friend and foe will not be identifiable; the rebels may be ruthless men determined to achieve their ends by indiscriminate attacks on innocent persons. If information is to be obtained, time must be of the essence of the operation." *Id.* Moreover, factors that might facilitate interrogation in traditional war—such as "ample information" to assist interrogators and "a number of prisoners who dislike the current enemy regime and are only too willing to talk"—are often absent "in counter-revolutionary operations." *Id.* ¶¶ 25-26. *See also id.* (noting difficulty in obtaining information "quickly"). Consequently, the Parker Committee concluded that in light of the nature of the terrorist threat, the interrogation techniques employed by the United Kingdom were consistent with Common Article 3.

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Shortly after the Parker Committee issued its report, Prime Minister Edward Heath announced that, as a matter of policy, Britain would not use the five techniques in future interrogations. *See* Debate on Interrogation Techniques (Parker Committee Report), 832 Parl. Deb., H.C. (5th Ser.) 743-50 (1972); *see also* Roger Myers, *A Remedy for Northern Ireland: The Case for United Nations Peacekeeping Intervention In An Internal Conflict*, 11 N.Y.L. Sch. J. Int'l & Comp. L. 1, 52 n.220 (1990). The Prime Minister did not, to o r knowledge, take issue with the Lord Chief Justice's interpretation of the United Kingdom's treaty obligations under Common Article 3, however. Indeed, in announcing what he stated was a change in policy, the Prime Minister emphasized that the majority of the Committee "conclude[d] that use of the methods could be justified in exceptional circumstances," subject to safeguards. *Id.* at 743.

That for more than two decades following the enactment of Common Article 3, one of the world's leading advocates for and practitioners of the rule of law and human rights employed techniques similar to those in the CIA program and determined that they complied with Common Article 3 provides strong support for our conclusion that the CIA's proposed techniques are also consistent with Common Article 3. The CIA's proposed techniques are not more grave than those employed by the United Kingdom. To the contrary, the United Kingdom found stress positions to be consistent with Common Article 3, but the CIA currently does not propose to include such a technique. Consistent with recommendations in the Parker Committee's legal opinion, the CIA has developed extensive safeguards, including written guidelines, training, close monitoring by medical and psychological personnel, and the approval of high level officials to ensure that the program is confined to safe and necessary applications of the techniques in a controlled, professional environment. While the United Kingdom employed these techniques in a dozen colonial and related conflicts, the United States proposes to use these techniques only with a small number of high value terrorists engaged in a worldwide armed conflict whose primary objective is to inflict mass civilian casualties in the United States and throughout the free world.

The United Kingdom's determination under Common Article 3 also sheds substantial light on the decisions of other international tribunals applying legal standards that fundamentally differ from Common Article 3. As discussed above, the European Court of Human Rights later found that two of the interrogation techniques approved by the Committee—diet manipulation and sleep deprivation—violated the stand-alone prohibition on "degrading treatment" in the European Convention on Human Rights, to which the United States is not a party. *Ireland v. United Kingdom*, 2 EHRR 25 (1980). The court explained that "degrading treatment" under the ECHR included actions directed at "breaking [the] physical or moral resistance" of detainees. *Id.* ¶ 167. The court's capacious interpretation of the European Convention's prohibition on "degrading treatment" is not well-suited for Common Article 3.[50] Indeed, the European Court

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[50] The Israeli Supreme Court in *Public Committee Against Torture v. Israel*, HCJ 5100/94 (1999), also cited the ECHR decision and observed that a combination of interrogation techniques might constitute "inhuman and degrading" treatment. *See id.* at 27-28. As discussed above, *see supra* at 41-42, the Israeli decision turned primarily upon that nation's statutory law and did not specifically purport to define what constitutes "inhuman and degrading" treatment under any particular treaty, much less what rises to an "outrage upon personal dignity" or other violation of Common Article 3. Six years later, the same court recognized that the international law applicable to domestic criminal law enforcement and that applicable to an armed conflict fundamentally differ. While the former places "absolute" restrictions on degrading treatment generally, the law of armed conflict requires a balancing against

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has interpreted that provision not only to impose detailed requirements on prison conditions, but also to prohibit any action that drives an individual "to act against his will or conscience," a standard that might well rule out any significant interrogation at all. *See Greek Case*, 12 Y.B. ECHR 186. Those decisions reflect that the European Convention is a peacetime treaty that prohibits any form of "degrading treatment," while Common Article 3 prohibits only "humiliating and degrading treatment" that rises to the level of an "outrage upon personal dignity." Common Article 3 is a provision designed for times of war, where the gathering of intelligence, often by requiring a captured enemy "to act against his will or conscience" or by undermining his "physical or moral resistance," is to be expected. Furthermore, it is unclear that the ECHR in *Ireland v. U.K.* was confronted with techniques that provided adequate food and that were carefully designed to be safe, such as those proposed by the CIA.

It is the United Kingdom's interpretation of Common Article 3 in practice that is relevant to our determination, not the ECHR's subsequent interpretation of the legality of the United Kingdom's techniques under a different treaty. The practice of the United Kingdom in implementing the interpretation of Common Article 3 supports the interpretation set forth above.

D.

For these reasons, we interpret Common Article 3 to permit the CIA's interrogation and detention program to go forward. Part of the foundation of this interpretation is that Congress has largely addressed the requirements of Common Article 3 through the War Crimes and Detainee Treatment Acts. These provisions include detailed prohibitions on particularly serious conduct, in addition to extending the protection of the Nation's own constitutional standards to aliens detained abroad in the course of fighting against America, persons whom the Constitution would not otherwise reach. And the CIA's interrogation program, both in its conditions of confinement and with regard to the six proposed interrogation techniques, is consistent with the War Crimes and Detainee Treatment Acts. To the extent that Common Article 3 prohibits additional conduct, unaddressed by the War Crimes and Detainee Treatment Acts, the CIA program is consistent with those restrictions as well.

Just as important is the limited nature of this program. This program is narrowly targeted to advance a humanitarian objective of the highest order—preventing catastrophic terrorist attacks—and indeed the CIA has determined that the six proposed techniques are the minimum necessary for a program that would be effective in obtaining intelligence critical to serving this end. It is limited to a small number of high value terrorists who, after careful consideration, professional intelligence officers of the CIA believe to possess crucial intelligence. The program is conducted under careful procedures and is designed to impose no pain that is unnecessary for the obtaining of crucial intelligence. At the same time, it operates within strict limits on conduct, including those mandated by the War Crimes Act and the prohibition on torture regardless of the motivation of the conduct. Common Article 3 was not drafted with the threat posed by al Qaeda in mind; it contains certain specific prohibitions, but it also contains some general principles with

legitimate military needs. *Public Committee Against Torture in Israel v. The Government of Israel*, HCJ 769/02, ¶ 22 (Dec. 11, 2005).

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less definition. The general principles leave state parties to address the new eventualities of war, to mold the interpretation of the Geneva Conventions by their conduct. We will not lightly construe the Geneva Conventions to disable a sovereign state from defending against the new types of terrorist attacks carried out by al Qaeda.

The interpretation in this memorandum reflects what we believe to be the correct interpretation of Common Article 3. Because certain general provisions in Common Article 3 were designed to provide state parties with flexibility to address new threats, however, the nature of such flexibility is that other state parties may exercise their discretion in ways that do not perfectly align with the policies of the United States. We recognize Common Article 3 may lend itself to other interpretations, and international bodies or our treaty partners may disagree in some respects with this interpretation.[51]

Just as we have relied on the War Crimes and Detainee Treatment Acts, other states may turn to treaties with similar language, but drafted for dissimilar purposes, as a source of disagreement. As discussed above, for example, the European Court of Human Rights determined that certain of the interrogation techniques proposed for use by the CIA—diet manipulation and sleep deprivation—violated the European Convention's stand-alone prohibition on "degrading treatment." *Ireland v. United Kingdom*, 2 EHRR 25 (1980). For reasons we have explained, the ECHR decision does not constitute the basis for a correct reading f Common Article 3 in our view, but the openness of "humiliating and degrading treatment" might not prevent others from, incorrectly, advocating such an interpretation, and the State Department informs us that given the past statements of our European treaty partners about United States actions in the War on Terror, and notwithstanding some of their own past practices, *see supra* at n.36, the United States could reasonably expect some of our European treaty partners to take precisely such an expansive reading of the open terms in Common Article 3.

Recognizing the generality of some of Common Article 3's provisions, Congress provided a mechanism through which the President could authoritatively determine how the United States would apply its terms in specific contexts. The Military Commissions Act ensures that the President's interpretation of the meaning and applicability of the Geneva Conventions would control as a matter of United States law. Section 6(a) of the MCA is squarely directed at the risk that the interpretations that would guide our military and intelligence personnel could be cast aside after the fact by our own courts or international tribunals, armed with flexible and general language in Common Article 3 that could bear the weight of a wide range of policy preferences or subjective interpretations. To reduce this risk, Congress rendered the Geneva Conventions judicially unenforceable. *See* MCA § 5(a). The role of the courts in enforcing the Geneva Conventions is limited to adjudicating prosecutions under the War Crimes Act initiated by the Executive Branch and, even then, courts may not rely on "a foreign or international source

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[51] This flexibility extends only to *reasonable* interpretations of unclear terms of Common Article 3. Where Common Article 3 is clear, state parties are obliged as a matter of international law (though not necessarily their own domestic laws) to follow it, and states have no discretion under international law to adopt unreasonable interpretations at odds with the language of the provision.

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of law" to decide the content of the statutory elements in the War Crimes Act. *See id.* § 6(a)(2). Congress also expressly reaffirmed that the President has authority for the United States to interpret the meaning and applicability of the Geneva Conventions. *See id.* § 6(a)(3)(A). Should he issue interpretations by executive order, they will be "authoritative . . . as a matter of United States law in the same manner as other administrative regulations." *Id.* § 6(a)(3)(C).[52]

We understand that the President intends to utilize this mechanism and to sign an executive order setting forth an interpretation of Common Article 3. That action would conclusively determine the application of Common Article 3 to the CIA program as a matter of United States law. We have reviewed the proposed executive order and have determined that it is wholly consistent with the analysis of Common Article 3 set forth above. *See* Proposed Order Entitled *Interpretation of the Geneva Conventions Common Article 3 As Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency* (Executive Clerk final draft, presented to the President for signature, July 20, 2007) ("Draft Order"). Because the executive order would be public, it cannot engage in the detailed application of Common Article 3 to the six proposed techniques embodied in this opinion. Instead, the executive order sets forth an interpretation of Common Article 3 at a higher level of generality that tracks the analysis in this opinion and, thereby, conclusively determines that the CIA's proposed program of interrogation and detention, including the six proposed interrogation techniques, complies with Common Article 3.

The executive order would prohibit any technique or condition of confinement that constitutes torture, as defined in 18 U.S.C. § 2340, or any act prohibited by section 2441(d) of the War Crimes Act. *See* Draft Order § 3(b)(i)(A)-(B). This Office has concluded that the six proposed techniques, when applied in compliance with the procedures and safeguards put in place by the CIA, comply with both the federal anti-torture statute and the War Crimes Act. *See Section 2340 Opinion* and Part II, *supra*.

To ensure full implementation of paragraph 1(a) of Common Article 3, the executive order also would prohibit "other acts of violence serious enough to be considered comparable to murder, torture, mutilation, and cruel or inhuman treatment, as defined in" the War Crimes Act. Draft Order § 3(b)(i)(C). As explained above (*see* part IV.B.1.a, *supra*), the six proposed techniques do not involve violence on a level comparable to the four enumerated forms of violence in paragraph 1(a) of Common Article 3—murder, mutilation, torture, and cruel

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[52] The Constitution grants the President great authority—as our Nation's chief organ in foreign affairs and as Commander in Chief—to interpret treaties, particularly treaties regulating wartime operations. Those interpretations are ordinarily entitled to "great weight" by the courts. *See, e.g., Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2685 (2006). Congress, however, determined in the MCA that it was appropriate to affirm that the President's interpretations of the Geneva Conventions are entitled to protection. It is apparent that Congress was reacting to the Supreme Court's decision in *Hamdan*, which adopted an interpretation of the applicability of the Geneva Conventions contrary to that of the President, without taking account of the President's interpretation. *See Hamdan*, 126 S. Ct. at 2795-98; *id.* at 2847 (Thomas, J., dissenting). The MCA therefore reflects a congressional effort to restore the principal role that the President has traditionally played in defining our Nation's international obligations. In this regard, presidential orders under the MCA would not be subject to judicial review. *See Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992) (holding that presidential action is not subject to judicial review under the Administrative Procedure Act, or any other statute, absent "an express statement by Congress").

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treatment. The limitations on the administration, frequency, and intensity of the techniques—in particular, the corrective techniques—ensure that they will not involve physical force that rises to the level of the serious violence prohibited by the executive order.

The executive order would prohibit any interrogation technique or condition of confinement that would constitute the "cruel, inhuman, or degrading treatment or punishment" prohibited by the Detainee Treatment Act and section 6(c) of the Military Commissions Act. Draft Order § 3(b)(i)(D). We have concluded that the six proposed techniques, when used as authorized in the context of this program, comply with the standard in the DTA and the MCA. *See* Part III, *supra*.

To address paragraph 1(c) of Common Article 3 further, the executive order would bar interrogation techniques or conditions of confinement constituting "willful and outrageous acts of personal abuse done for the purpose of humiliating or degrading the individual in a manner so serious that any reasonable person, considering the circumstances, would deem the acts to be beyond the bounds of human decency, such as sexual or sexually indecent acts undertaken for the purpose of humiliation, forcing the individual to perform sexual acts or to pose sexually, threatening the individual with sexual mutilation, or using the individual as a human shield." Draft Order § 3(b)(i)(E). This provision reinforces crucial features of the interpretation of paragraph 1(c) of Common Article 3 set forth in this opinion: To trigger the paragraph, humiliation and degradation must rise to the level of an outrage, and the term "outrage" looks to the evaluation of a reasonable person that the conduct is beyond the bounds of human decency, taking into consideration the purpose and context of the conduct.[53] As explained above, the six proposed techniques do not constitute "outrages upon personal dignity" under these principles; thus, the techniques also satisfy section 3(b)(i)(E) of the executive order.

Also implementing paragraph 1(c) of Common Article 3, the executive order would prohibit "acts intended to denigrate the religion, religious practices, or religious objects" of the detainees. Draft Order § 3(b)(i)(F). The six techniques proposed by the CIA are not directed at the religion, religious practices, or religious objects of the detainees.

The techniques and conditions of confinement approved in the order may be used only with certain alien detainees believed to possess high value intelligence (*see* Draft Order § 3(b)(ii)), and the program is so limited (*see* Part I.A, *supra*). The CIA program must be conducted pursuant to written policies issued by the Director of the CIA (*see* Draft Order § 3(c)), and the CIA will have such policies in place (*see* Part I.A.1, *supra*). In addition, the executive order would require the Director, based on professional advice, to determine that the techniques are "safe for use with each detainee" (*see* Draft Order at § 3(b)(iii)), and the CIA intends to do so (*see* Parts I.A.3 and I.B, *supra*).

Under the proposed executive order, detainees must "receive the basic necessities of life, including adequate food and water, shelter from the elements, necessary clothing, protection

[53] Nor do the techniques involve any sexual or sexually indecent acts, much less those referenced in section 4(b)(i)(E) of the executive order. The techniques also do not involve the use of detainees as human shields.

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from extremes of heat and cold, and essential medical care." *See* Draft Order § 3(b)(iv). This requirement is based on the interpretation of Common Article 3's overarching humane treatment requirement set forth above, and we have concluded that the proposed techniques comply with this basic necessities standard. *See* Part IV.B.3, *supra*. Should the President sign the executive order, the six proposed techniques would thereby comply with the authoritative and controlling interpretation of Common Article 3, as the MCA makes clear.

V.

The armed conflict against al Qaeda—an enemy dedicated to carrying out catastrophic attacks on the United States, its citizens, and its allies—is unlike any the United States has confronted. The tactics necessary to defend against this unconventional enemy thus present a series of new questions under the law of armed conflict. The conclusions we have reached herein, however, are as focused as the narrow CIA program we address. Not intended to be used with all detainees or by all U.S. personnel who interrogate captured terrorists, the CIA program would be restricted to the most knowledgeable and dangerous of terrorists and is designed to obtain information crucial to defending the Nation. Common Article 3 permits the CIA to go forward with the proposed interrogation program, and the President may determine that issue conclusively by issuing an executive order to that effect pursuant to his authority under the Constitution and the MCA. As explained above, the proposed executive order accomplishes precisely that end. We also have concluded that the CIA's six proposed interrogation techniques, subject to all of the conditions and safeguards described herein, would comply with the Detainee Treatment Act and the War Crimes Act.

Please let us know if we may be of further assistance.

Steven G. Bradbury
Principal Deputy Assistant Attorney General