

Trivializing Torture: The Office of Legal Counsel's 2002 Opinion Letter and International Law Against Torture

by Robert K. Goldman

IN LATE APRIL OF THIS YEAR, GRAPHIC PICTURES surfaced in the U.S. and foreign media depicting the ill-treatment of Iraqi detainees by U.S. military personnel at the Abu Ghraib prison near Baghdad. Shortly thereafter, excerpts of a leaked report prepared by Major General Antonio Taguba, who investigated these abuses in February 2004, appeared in the May 10 issue of the *New Yorker* magazine. In his report, Taguba confirmed that U.S. military police had punched, slapped, and kicked Iraqi detainees, forced them to strip and perform sex acts, and had used military dogs to intimidate them. Labeling such conduct “sadistic, blatant and wanton criminal abuse,” Gen. Taguba concluded that the U.S. personnel involved had committed “grave breaches of international law.”

The furor at home and abroad over the prison scandal was soon fueled by the publication of several leaked memoranda prepared by lawyers and other Executive branch officials concerning the interrogation of persons detained by the United States in the “war on terrorism,” including those held at Guantanamo Bay and elsewhere. Of these memos, the August 1, 2002, legal opinion prepared by the Department of Justice’s Office of Legal Counsel for Alberto Gonzales, counsel to President Bush, is the most revealing and dismaying in its argumentation. Written in response to a request from the CIA seeking authority to conduct more “vigorous” interrogations of terrorist suspects, the opinion has been harshly criticized for essentially authorizing and justifying torture in violation of international and U.S. law. Before examining that opinion, it might prove instructive to review the nature of the prohibition against torture and cruel, inhuman, and degrading treatment in international law, and to briefly survey the jurisprudence of key human rights bodies on the subject.

THE PROHIBITION OF TORTURE

BOTH TORTURE AND CRUEL, INHUMAN, OR DEGRADING treatment are absolutely prohibited by conventional and customary international human rights and humanitarian law. These proscriptions in human rights law are contained in the 1948 Universal Declaration of Human Rights, the 1948 American Declaration of the Rights and Duties of Man, the International Covenant on Civil and Political Rights (ICCPR), the 1984 UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment (Torture Convention), the American Convention on Human Rights (American Convention), the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), and the African Charter on Human and Peoples’ Rights. Each of these treaties (except for the African Charter) expressly made prohibitions of torture non-derogable, which means that they cannot be suspended for *any* reason, including war or any other emergency situation. Comparable prohibitions have evolved in the customary laws of

war since the mid-19th century and are codified in the four 1949 Geneva Conventions and their two Additional Protocols of 1977.

So extensive and well-established is the prohibition against torture in general international law that it imposes on states obligations *erga omnes*—that is, obligations that every state owes to all other members of the international community. Moreover, the proscription against torture is also widely regarded as having attained the status of *jus cogens*, or a peremptory norm embodying a fundamental standard that no state can contravene. Although cruel, degrading, or inhuman treatment is also clearly prohibited by customary law, its status as *jus cogens* remains unclear.

This universal condemnation of torture precludes any state not only from engaging in torture, but also from expelling, returning, “rendering,” or extraditing a person to another state where there are substantial grounds for believing that the person would be in danger of being tortured.

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THE DEFINITION OF TORTURE

ALTHOUGH VIRTUALLY EVERY MODERN international humanitarian law convention and human rights treaty dealing with civil and political rights proscribes torture, none of these instruments defines the term “torture” or indicates how it is to be differentiated from cruel, degrading, or inhuman treatment. The principal international instrument that contains such a definition is the Torture Convention. This treaty, to which the United States is a party, defines torture as

... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or with the consent or acquiescence of a public official or other person acting in an official capacity.

This definition, arguably, reflects a consensus that is representative of customary international law.

The treaty categorically declares that “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” In addition, it stipulates that “an order from a superior officer or public authority may not be invoked as a justification of torture.” The treaty also prohibits, but does not define the terms cruel, degrading, and inhuman treatment or punishment.

INTERNATIONAL LAW ON TORTURE AND OTHER ILL-TREATMENT

OVER THE YEARS, THE SUPERVISORY BODIES established by universal and regional human rights treaties have developed an extensive and rich body of jurisprudence on the subject of torture and ill-treatment. Many of their decisions, especially early ones, do not, however, make clear a distinction between torture and cruel, degrading, and inhuman treatment.

In a leading case, *Ireland v. the U.K.*, the European Court of Human Rights indicated that one basic distinction between torture and cruel, degrading, or inhuman treatment “primarily results from the intensity of the suffering inflicted.” Torture involves deliberate inhuman treatment causing very serious and cruel suffering. In the *Greek* case, the European Commission indicated that torture is generally an aggravated form of inhuman treatment perpetrated with a purpose, namely, obtaining information or a confession. In that case, the European Commission found that the practice of inflicting severe beatings to all parts of the body constituted torture and ill-treatment. More recently, the European Court in *Aksoy v. Turkey* found that suspending the victim, who was stripped naked, by the arms, which were tied behind his neck, for the purpose of obtaining information or admissions from him amounted to torture. In *Aydin v. Turkey*, the Court concluded that the rape of the victim during her detention, together with her having been blindfolded, paraded naked, and kept in a continuous state of physical pain and mental anguish, constituted torture.

When determining what constitutes torture under the American Convention, the Inter-American Commission on

Human Rights has generally looked to the definition of torture contained in the 1985 Inter-American Torture Convention, which is somewhat broader than the definition in the Torture Convention. The Inter-American Commission has indicated that torture must combine the following three elements: “1. it must be an intentional act through which physical and mental pain and suffering is inflicted on a person; 2. it must be committed with a purpose (such as personal punishment or intimidation) or intentionally (i.e. to produce a certain result in the victim); and 3. it must be committed by a public official or by a private person acting at the instigation of the former.”

Both the Inter-American Commission and Court have consulted decisions of the European Court and Commission to assess whether an act or treatment attains a minimum level of severity in order to be considered “inhuman or degrading.” The Inter-American Commission has said that “[t]he evaluation of this ‘minimum’ level is relative and depends on the circumstances in each case, such as the duration of the treatment, its physical and mental effects, and, in some cases, the sex, age, and health of the victim.” In the *Loayza Tamayo* case, the Inter-American Court, citing the European Court’s judgment in *Ribitsch v. Austria*, noted that degrading treatment is characterized by fear, anxiety, and inferiority induced for the purpose

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of humiliating and degrading the victim and breaking his physical and moral resistance. The Court also noted that the degrading aspect of treatment can be exacerbated by the vulnerability of a person who is detained unlawfully. Finally, the Court noted that the exigencies and difficulties associated with anti-terrorist struggles cannot justify restricting a person’s right to physical security.

Despite adopting the European Court’s formulation of the difference between torture and other ill-treatment, the Inter-American Commission and Court have found it difficult and usually unnecessary to distinguish clearly between the two. More specifically, they have found the following acts or measures to constitute torture or inhumane treatment in the context of interrogation and detention: prolonged *incommunicado* detention; keeping detainees hooded and naked in cells; interrogating them under the drug pentothal; imposing a restricted diet leading to malnutrition; applying electric shocks to a person; holding a person’s head in water until the point of drowning; standing or walking on top of individuals; cutting with pieces of broken glass; putting a hood over a person’s head and burning him or her with lighted cigarettes; rape; mock burials, mock executions, beatings, deprivation of food and water; threats of a behavior that would constitute inhumane

treatment; threats of removal of body parts; exposure to the torture of other victims; and death threats.

The UN Human Rights Committee has found similar acts or conduct to constitute torture and other inhumane treatment. These include beatings, electric shocks, and mock executions, forcing prisoners to remain standing for extremely long periods of time, and holding persons *incommunicado* for more than three months while keeping that person blindfolded with hands tied together, resulting in limb paralysis, leg injuries, substantial weight loss, and eye infection. In addition, the UN Committee against Torture, established under the Torture Convention, has indicated that the threat of torture, severe sleep deprivation, and forcing a person to sleep on a floor handcuffed after interrogation constitute torture and that physically restraining, in very painful conditions, and hooding a person can amount to cruel, degrading, or inhuman treatment.

The UN Special Rapporteur on Torture has listed several acts that involve the infliction of suffering severe enough to constitute torture. These include, for example, beating; extraction of nails, teeth, etc.; burns; electric shocks; suspension; suffocation; exposure to excessive light or noise; sexual aggression; administration of drugs in detention or psychiatric institutions; prolonged denial of rest or sleep, food, sufficient hygiene, or medical assistance; total isolation and sensory deprivation; being held in constant uncertainty in terms of space and time; threats to torture or kill relatives; and simulated executions. For its part, the International Criminal Tribunal for the Former Yugoslavia has found rape to constitute torture and noted that keeping someone in solitary confinement may amount to torture “to the extent that the confinement ... can be shown to pursue one of the prohibited purposes of torture and to have caused the victim severe pain and suffering.”

As previously noted, torture and inhumane treatment are absolutely prohibited in all armed conflicts by customary and conventional rules of international humanitarian law. In situations of international armed conflict, including occupation, the Third and Fourth Geneva Conventions mandate that prisoners of war and civilian detainees, respectively, must at all times be treated humanely. The Third Convention provides that “no physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatsoever.” The Fourth Convention similarly enjoins the use of any “physical or moral coercion” against protected civilians “in particular to obtain information from them or from third parties.” Both treaties make the willful killing, torture, or inhuman treatment of, or causing great suffering or serious injury to, protected persons “grave breaches,” meaning very serious war crimes.

Furthermore, persons held as unprivileged combatants in international hostilities, but who are denied protection under the Third or Fourth Geneva Conventions (which includes the Guantanamo Bay detainees), are not without rights and protection under international law. They are entitled, as a matter of customary law, to the minimum guarantees enumerated in the Geneva Conventions’ Common Article 3 and Article 75 of Additional Protocol I. These provisions prohibit at any time and in any place the infliction of torture or cruel, humiliating, and degrading treatment. Common Article 3’s fundamental guarantees also apply in all non-international armed conflicts to all persons who do not, or who no longer, actively participate in the hostilities when they are in the hands of a party to the conflict.

THE OFFICE OF LEGAL COUNSEL MEMO: TRIVIALIZING TORTURE

SUBSEQUENT TO ITS INVASION OF IRAQ, the United States formally recognized that it had become an occupying power under the Geneva Conventions and the 1907 Hague Regulations. As such, international humanitarian law was applicable throughout occupied Iraq and was binding on the nationals, both civilian and military, of the occupying powers. In the case of the United States, the law applied not only to members of the U.S. armed forces, but to CIA employees and private contractors as well. Under this law and customary human rights law, the United States was obliged to refrain from mistreating, much less torturing, any persons detained or interrogated by its armed forces and other agents. Indeed, the U.S. Army’s Field Manual 34-52, echoing these international proscriptions, categorically provides that the “use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind is prohibited by law and is neither authorized or condoned by the U.S. Government.” Despite this policy, it is now well established that U.S. military police and interrogators subjected the Iraqi detainees at Abu Ghraib, who were *de jure* protected persons under the Third and Fourth Geneva Conventions to acts constituting torture and other ill-treatment under any fair reading of the Torture Convention.

But this conduct—that General Taguba termed “wanton criminal abuse”—would not amount to torture under the Office of Legal Counsel’s legal opinion. By narrowly interpreting, or more precisely, distorting the definition of torture contained in the 1994 federal law implementing the Torture Convention, the opinion states that “physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.” For mental pain and suffering to amount to torture, the opinion adds, “it must result in significant psychological harm of significant duration, lasting for months or even years.” The opinion also argues that a defendant is guilty of torture under the statute “only if he acts with the express purpose of inflicting severe pain or suffering.” Accordingly, if the defendant’s purpose is to obtain information, even though he knows that “severe pain will result from his actions,” he lacks the requisite “specific intent” to violate the statute. Reflecting its concern about this particular interpretation, the American Bar Association recently urged that the statute implementing the Torture Convention be amended “to encompass torture wherever committed, and regardless of the underlying motive or purpose.”

The opinion also contends that interrogators could justify breaching U.S. law and treaties prohibiting torture by invoking the doctrines of necessity and self-defense in the prosecution of the “war on terrorism.” It reasons that if a U.S. interrogator tortured an enemy combatant during an interrogation, “he would be doing so in order to prevent future attacks on the United States by the Al Qaeda terrorist network.” The interrogator’s actions could also be “justified by the executive branch’s constitutional authority to protect the nation from attack.” In short, the opinion concludes that the president, as commander-in-chief, is above international and domestic law and so, too, are those who act under his authority.

Apart from ignoring Supreme Court decisions rejecting such exorbitant claims of executive powers, the Office of Legal Counsel’s arguments reflect either an appalling ignorance of, or sheer contempt for, international law. The Torture Convention,

the Geneva Conventions, and the ICCPR, all treaties ratified by the United States, absolutely prohibit torture in all circumstances, including wars, whatever their motive or kind. The contention that the “war on terrorism” can justify violating absolute prohibitions in international law resurrects a defense that was resoundingly rejected by various tribunals in war crimes prosecutions after World War II. In the German High Command Trial, *In re Von Leeb and Others*, the U.S. Military Tribunal observed that were military necessity to confer on a belligerent the right to do anything that contributed to winning the war, “it would eliminate all humanity and decency and all law from the conduct of war and it is a contention which the Tribunal repudiates as contrary to the accepted usages of civilized nations.”

It would be difficult to construct legal arguments that could be more exquisitely antithetical to and utterly destructive of the underlying object and purpose of the Torture Convention than those contained in the Office of Legal Counsel’s opinion. By virtually sanctioning conduct equivalent to torture under the treaty and effectively laying out a roadmap of how to shield torturers from criminal prosecution, the legal opinion virtually renders meaningless the United States’ adherence to that instrument.

THE AFTERMATH

IN JUNE 2004, FACED WITH A FIRESTORM OF CRITICISM over the content of this opinion and other leaked memos, Bush Administration officials indicated that it was reviewing the Office of Legal Counsel’s opinion and that decision makers had not relied on it. A leaked confidential March 2003 report prepared by a Pentagon working group on detainee interrogation for Secretary Rumsfeld, however, belies that assertion, as that report repeats many of the same arguments made by the Office of Legal Counsel’s 2002 opinion letter. Moreover, it has been reported that after he received the working group’s report, Secretary Rumsfeld approved a series of interrogation techniques, some of which were first used on the Guantanamo detainees and later on Iraqis held at the Abu Ghraib prison.

One of the few pieces of encouraging news in this still unfolding scandal is that, according to press reports, senior military lawyers in the Army, Navy, Air Force, and Marines, as well lawyers for the Joint Chiefs of Staff, either objected to, or expressed concerns over the aggressive interrogation techniques favored by political appointees at the Justice and Defense Departments. These military lawyers reportedly argued rather presciently that not only would such techniques violate longstanding military policy and practice, but “were subject to abuse that could haunt U.S. policymakers and endanger U.S. military personnel detained by other countries” and “provoke a storm of public criticism if the tactics became known.”

The lawyers in the Office of Legal Counsel who prepared the August 2002 opinion letter not only poorly served the president and damaged the nation’s credibility overseas, but also undercut over fifty years of efforts to establish effective international safeguards on the treatment of wartime detainees, compromised the moral and legal basis for this country to denounce torture practiced elsewhere, and placed U.S. citizens who are captured abroad at greater risk. The administration should unequivocally disavow the content of this opinion and reaffirm our nation’s commitment to treat all detainees humanely in accordance with U.S. and international law.

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