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The Prohibition of Torture: Absolute Means Absolute

Keywords

Torture, Law and Society, War, Regulation

THE PROHIBITION OF TORTURE: ABSOLUTE MEANS ABSOLUTE

NIGEL S. RODLEY*

I. INTRODUCTION

Our values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely¹

These seemingly encouraging words, purporting to reaffirm the best humane traditions of the United States and other nations, are in fact, a high-profile representation of a serious and sustained assault on basic legal values previously asserted by the United States and many other nations. For the words unmistakably assert a legal right *not* to treat at least *some* detainees humanely. If that is so for the United States, it is also the case for other nations, whether or not they share the United States' values as a nation.

The statement was made on the basis of legal opinions emanating from, and signed by, political appointees in the Department of Justice's Office of Legal Counsel (OLC), opinions at least partly contested by the Department of State's Legal Adviser's office.² Several subsequent opinions from the OLC continued the legal construct that was calculated to allow the military and/or the Central

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1. Memorandum from President Bush to Vice President Cheney (Feb. 7, 2002), reprinted in MARK DANNER, TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR 106 (2004) [hereinafter DANNER].

2. See Memorandum from Alberto Gonzales to President Bush (Jan. 25, 2002), reprinted in DANNER, *supra* note 1, at 83; Memorandum from William H. Taft IV to Albert Gonzales (Feb. 2, 2002), reprinted in DANNER, *supra* note 1, at 94; Memorandum from Jay S. Bybee to Alberto R. Gonzales (Feb. 7, 2002), reprinted in DANNER, *supra* note 1, at 96. The Secretary of State and the Attorney General were themselves part of the correspondence. Memorandum from Colin Powell to Alberto Gonzales (Jan. 26, 2002), DANNER, *supra* note 1, at 88; Letter from John Ashcroft to President Bush (Feb. 1, 2002), reprinted in DANNER, *supra* note 1, at 92. Note, the memoranda in question are also reproduced in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter TORTURE PAPERS].

Intelligence Agency (CIA), or similar bodies, to take off the proverbial gloves.³ The most notorious of these was an OLC memorandum of August 1 2002, specifically dealing with interrogation practices (2002 Interrogation Memorandum).⁴ They were supplemented by a 2003 Department of Defense (DoD) Working Group Report, also apparently finalized by politically appointed lawyers over the strenuous objections of the career lawyers, notably in the various Judge Advocate General's offices.⁵ There was a partial attempt to undo the damage created by the 2002 Interrogation Memorandum; it was replaced by a December 30, 2004 memorandum (2004 Interrogation Memorandum).⁶ It is not clear how valid the DoD Working Group Report remains now that its chief legal inspiration has been withdrawn.⁷

In this paper, I shall set out the legal arguments according to which humane treatment of all detainees is indisputably required by international law, both international humanitarian law applicable in armed conflicts and international human rights law.⁸ In the process, I shall seek to refute what I take to be the key arguments raised by the U.S. government's lawyers. These arguments will apparently follow a strategy, according to which, either the relevant treaty does not apply to these detainees, or the practices at issue do not constitute torture.

I must make two preambular points. Unlike some, I do not view the atrocities of September 11, 2001 as just another set of terrorist acts of the sort much of the world has had to endure in recent decades. The images and reality behind them will haunt us for decades, maybe centuries. They are the stuff of evil. The scale of the attacks, their enormity, places them on a substantially different scale from prior situations characterized by terrorism. Yes, other societies may have lost more people in facing ruthless terrorist enemies—internal or external—over a protracted period, but precisely the fact that the perpetrators of 9/11 could destroy in a single

3. Mark Danner quotes an email from an unnamed captain in Military Intelligence: "The gloves are coming off gentlemen regarding these detainees, Col. Boltz has made it clear that we want these individuals broken." DANNER, *supra* note 1, at 33.

4. See generally Memorandum from Jay S. Bybee to Alberto Gonzales (Aug. 1, 2002), reprinted in DANNER, *supra* note 1, at 115 [hereinafter 2002 Interrogation Memorandum].

5. See DEPARTMENT OF DEFENSE, WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY, AND OPERATIONAL CONSIDERATIONS (Apr. 2, 2003), reprinted in TORTURE PAPERS *supra* note 2, at 286; 151 CONG. REC. S8772, S8794-96 (daily ed. July 25, 2005) (statement of Sen. Lindsey Graham), available at www.humanrightsfirst.org/us_law/etn/pdf/jag-memos-072505.pdf (noting the OLC opinion does not incorporate concern for military service members).

6. See Memorandum from Daniel Levin to James B. Comey (Dec. 30, 2004), available at <http://www.usdoj.gov/olc/18usc23402340a2.htm> [hereinafter 2004 Interrogation Memorandum].

7. It is reported that the Department of Defense is revising its army field manual in respect of interrogation methods. See Eric Schmitt, *Army, In Manual, Limiting Tactics In Interrogation*, N.Y. TIMES, April 28, 2005, at A4.

8. See, e.g., Mary Ellen O'Connell, *Affirming the Ban on Harsh Interrogation*, 66 OHIO ST. L.J. 1231, 1235 (2005); Amos N. Guiora & Erin M. Page, *The Unholy Trinity: Intelligence, Interrogation and Torture* 6 (Case Western Reserve University Research Paper Series in Legal Studies Working Paper 05-13, July 2005), available at <http://ssrn.com/abstract=758444>.

hour lives and property that other terrorist movements have taken years to destroy makes them an enemy requiring maximum resistance, provided that the resistance is within the law.

My second preambular point relates to the interrogation practices that have been the subject of national and international concern. It would not be appropriate for me, as a member of the Human Rights Committee established under the International Covenant on Civil and Political Rights, to address contested matters of fact. Nor is it necessary to my purpose, which is to elucidate the relevant legal norms. So I shall not comment on how aberrant or otherwise were the scandalous violations of Abu Ghraib, in respect of which some courts martial have taken place.⁹ But a number of hitherto unauthorized techniques approved by the Secretary of Defense for possible use by interrogators would be capable of constituting torture and/or cruel or inhuman treatment, namely:

- Hooding
- Sleep adjustment (e.g., reversing sleep cycles from day to night. We are told 'this technique is *not* sleep deprivation)
- False flag (convincing the detainee that individuals from a country other than the United States are interrogating him)
- Threat of transfer (threatening to transfer the subject to a third country that subject is likely to fear would subject him to torture or death. The threat would not be acted upon, nor would the threat include any information beyond the naming of the receiving country)
- Isolation for up to 30 days
- Forced grooming (consider the effect of forced shaving on a devout Muslim)
- Use of stress positions such as prolonged standing (up to 4/24 hours)
- Sleep deprivation
- Removal of clothing
- Increasing anxiety by the use of aversions e.g. presence of dogs
- Deprivation of light/auditory stimuli (i.e., sensory deprivation techniques)¹⁰

9. Albeit only of those at the lowest level, caught on camera. The extent of the practices has been documented in three official reports: MAJOR GENERAL ANTONIO M. TAGUBA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE (2004), *reprinted in* DANNER, *supra* note 1, at 290-96; LIEUTENANT GENERAL ANTHONY R. JONES, AR 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE 4-6 (2004), *reprinted in* DANNER, *supra* note 1, at 412-14; MAJOR GENERAL GEORGE R. FAY, AR 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE 68-137 (2004), *reprinted in* DANNER, *supra* note 1, at 504-73; FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DEPARTMENT OF DEFENSE DETENTION OPERATIONS (2004), *reprinted in* DANNER, *supra* note 1, at 363-73 [hereinafter SCHLESINGER REPORT].

10. See SCHLESINGER REPORT, *supra* note 9, at app. E, *reprinted in* DANNER, *supra* note 1, at 393 (providing a list of approved interrogation techniques).

I refer to these as they must be presumed to be illustrative of the kinds of interrogation techniques that the authors of the legal memoranda were concerned should pass legal muster. Any combination of them, especially over a protracted period of time would certainly 'amount to' torture. Many of these techniques have been used at Guantánamo. The sin apparently committed at Abu Ghraib is that they were used without the appropriate safeguards (and on camera?). It was not done by the book, even if it was contemplated by the book. And it is a book approved by people with legal credentials. I am not aware of the case for the following not to constitute torture or cruel or inhuman treatment: Seizing and transferring people to the other side of the world for months or years without end;¹¹ holding them isolated from the outside world, sometimes hidden from the ICRC ("ghost detainees"); "extraordinary renditions" to countries where the rendered person faces torture. That case would make for interesting reading.

II. INTERNATIONAL HUMANITARIAN LAW

To start with international humanitarian law, since that is where the Presidential Directive starts, it always seemed reasonably straightforward. As far as *international* armed conflict is concerned, several provisions of each of the Geneva Conventions demand humane treatment. For example, the Third Geneva Convention on the Protection of Prisoners of War provides in article 17:

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 whatever. Prisoners of war who refuse to answer may not be threatened, insulted or exposed to any unpleasant or disadvantageous treatment of any kind.¹²

Similarly, the Fourth Geneva Convention on the Protection of Civilian Persons stipulates in article 32:

11. One OLC memorandum argues that the United States:

[M]ay, consistent with article 49 [of the Fourth Geneva Convention], (1) remove "protected persons" who are illegal aliens from Iraq pursuant to local immigration law; and (2) relocate "protected persons" (whether illegal aliens or not) from Iraq to another country to facilitate interrogation, for a brief but not indefinite period, so long as adjudicative proceedings have not been initiated against them.

Memorandum from Jack I. Goldsmith III to Alberto Gonzales (Mar. 19, 2004), *reprinted in* TORTURE PAPERS, *supra* note 2, at 367-68. Article 49, first paragraph, states that "[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive." Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 49, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Convention]. The reader is invited to consult the memorandum to discover by what juridical alchemy its author can assert that even protected persons who are not illegal aliens may be removed, albeit "for a brief, but not indefinite period." Memorandum from Jack I. Goldsmith III to Alberto Gonzales, (Mar. 19, 2004), *reprinted in* TORTURE PAPERS, *supra* note 2, at 368.

12. Geneva Convention Relative to the Treatment of Prisoners of War art. 17, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Convention].

The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents.¹³

Indeed, all the Geneva Conventions consider as grave breaches “torture or inhuman treatment” and “willfully causing great suffering or serious injury to body or health.”¹⁴ Grave breaches are a species of war crime. They are subject to jurisdiction by any state party “regardless of their nationality.”¹⁵

Meanwhile, Article 3 common to all the Geneva Conventions, which applies in *non-international* armed conflict, requires that “[p]ersons taking no active part in hostilities, including . . . those placed *hors de combat* by . . . detention . . . shall in all circumstances be treated humanely”¹⁶ Among certain acts “prohibited at any time and in any place whatsoever” are “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture” as well as “outrages on personal dignity, in particular humiliating and degrading treatment.”¹⁷ Violations of these provisions have been considered war crimes by the International Criminal Tribunal for the Former Yugoslavia.¹⁸ They are so considered by article 8 of the Statute of the International Criminal Court (ICC).¹⁹ It is worth noting that the only legislative definition in international humanitarian law of terms such as “torture” and “cruel or inhuman treatment” are to be found in the Elements of Crime agreed by signatories to the ICC, including the United States.²⁰ Thus both “inhuman” (international armed conflict) and “cruel” (non-international conflict) are defined as the infliction of “severe physical or mental pain or suffering.”²¹ There is no

13. Fourth Convention, *supra* note 11, art. 32. *See also*, Fourth Convention arts. 27, 31, 37, 118, 119; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 12, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 12, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Convention] art. 12; Third Convention, *supra* note 12, arts. 13, 14, 87, 89, 99.

14. First Convention, *supra* note 13, art. 50; Second Convention, *supra* note 13, art. 51; Third Convention, *supra* note 12, art. 130; Fourth Convention, *supra* note 12, art. 147.

15. First Convention, *supra* note 13 art. 49; Second Convention, *supra* note 13, art. 50; Third Convention, *supra* note 12, art. 129; Fourth Convention, *supra* note 11, art. 146.

16. *See, e.g.*, First Convention, *supra* note 13, art. 3.

17. *Id.*

18. Prosecutor v. Tadić, Case no. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 134 (Oct. 2, 1995).

19. Rome Statute of the International Criminal Court art. 8, July 17, 1998, 2187 U.N.T.S. 90.

20. *See* Elements of Crimes, Int’l Crim. Ct. Doc. ICC-ASP/1/3 at 126 (Sept. 9, 2002), available at http://www.un.org/law/icc/asp/1stsession/report/english/part_ii_b_e.pdf [hereinafter Elements of Crimes].

21. Pursuant to article 9 of the Rome Statute of the ICC, signatory states met to formulate the crimes contemplated by the Statute in precise terms in a document entitled “Elements of Crime.” *See id.* As a participant in the Rome Conference the United States participated in the Preparatory Commission

distinction between them. The only element that distinguishes each of these from torture is that torture has the additional element of purpose: the pain or suffering must be inflicted "for a purpose such as obtaining information or a confession, punishment, intimidation or coercion, or for any reason based on discrimination of any kind."²²

What then could possibly be the basis for denying the legal obligation of humane treatment? The strategy is to argue that the treaties do not apply. The OLC has asserted that the war in Afghanistan (and presumably by extension the war against Al-Qaeda) was an international armed conflict.²³ So, according to the argument, first, the benefits of the guarantees were vouchsafed only to "protected persons."²⁴ The Taliban are not covered as protected persons because they are apparently "unlawful combatants" (a category unknown to the Conventions) and Al-Qaeda are not covered because they were unlawful combatants and they do not belong to a contracting party (i.e. a state) that is also a party to the conflict.²⁵ Second, the protection of common article 3 which would cover *anyone* in the hands of any party to a non-international armed conflict, do not apply because it is an *international* armed conflict.²⁶

This view that Professor Wedgwood and James Woolsey have described as "captious"²⁷ may come as a surprise to anyone brought up on the observation about common article 3 in the great commentary on the Geneva Conventions compiled by Jean Pictet: "Representing, as it does, the minimum which must be applied in the least determinate of conflicts, its terms must *a fortiori* be respected in the case of international conflicts proper, when all the provisions of the Convention are applicable."²⁸

Nevertheless, let us allow, for the purposes of argument, that the guarantee articulated in common article 3, although applicable to anyone in the hands of a party to a non-international conflict, does not apply to such a person in international armed conflict if they are not "protected persons." There is still the little matter of customary or general international law.

that drafted the text that was adopted by the Assembly of States Parties. *See id.* at arts. 8(2)(a)(ii)-2 (international armed conflict) and 8(2)(c)(i)-3 (non-international armed conflict).

22. *See id.* at art. 8(2)(c)(i)-4.

23. *See* Memorandum from John Yoo to William J. Haynes II at 1-2, 7, 10 (Jan. 9, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf>.

24. *See* Fourth Convention, *supra* note 11, art. 4.

25. *See* Memorandum from Jay S. Bybee to Alberto Gonzales at 9-11 (Jan. 22, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf>. For the ICRC and many others, the Taliban, if not prisoners of war, must be protected civilians. There is no third category. Of course, persons in either category may be tried for criminal activity.

26. *Id.* at 10.

27. Ruth Wedgwood & R. James Woolsey, *Law and Torture*, WALL ST. J., June 28, 2004, at A10.

28. JEAN PICTET, GENEVA CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, COMMENTARY, at 38 (1960), available at <http://www.icrc.org/ihl.nsf/COM/375-590006?OpenDocument> (emphasis added).

In a long-awaited, recently published study, the International Committee of the Red Cross includes the following rule of customary international humanitarian law: “Rule 90: Torture, cruel or inhuman treatment and outrages on personal dignity, in particular humiliation and degrading treatment, are prohibited.”²⁹

One of the sources cited for the proposition is Article 75 of Additional Protocol I (1977) to the Geneva Conventions.³⁰ That article closes the “gap,” if there ever was one. It covers “persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the [Geneva] Conventions”³¹ Such persons are to be “treated humanely in all circumstances”³² The article goes on to prohibit “torture of all kinds, whether physical or mental,” “outrages upon personal dignity, in particular humiliating and degrading treatment . . . and any form of indecent assault,” as well as “threats to commit any of the foregoing acts.”³³ Since the United States is not a party to the Protocol, for reasons having nothing to do with article 75, it is not bound by it as a matter of treaty obligation. However, like common Article 3, which the World Court has already considered as articulating “fundamental general principles of humanitarian law” and “a minimum yardstick” even for international conflicts,³⁴ Article 75 is generally considered as on par with common article 3. Indeed, the United States Army Judge Advocate General’s own Operational Law Handbook (2003) has taken the view that Article 75 is one of a large number of articles that are “either legally binding as customary international law or acceptable practice though not legally binding.”³⁵ It cites an article by the Department of State’s Michael Matheson that includes Article 75 among a number of provisions that are already, or should be recognized as binding.³⁶

The OLC memorandum has the following to say about the customary international law dimension:

29. INT’L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL LAW VOLUME I at 315 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

30. Protocol Additional to the Geneva Conventions of Aug. 12, 1949 art. 75, June 8, 1977, 1125 U.N.T.S. 3. The 1949 Geneva Conventions were supplemented by two Additional Protocols adopted in 1977 by Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict; Additional Protocol I applies to international armed conflict, while Additional Protocol II applies to non-international armed conflict.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 113-14.

35. COL. TIA JOHNSON, OPERATIONAL LAW HANDBOOK 11 (2003), *available at* <https://www.jagcnet.army.mil>.

36. Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM.U. INT’L L. REV. 419, 420 (1987); *See also* Department of Defense Memorandum from W. Hays Parks, Chief, Int’l Law Branch, DAJA-IA, Lt. Commander Michael F. Lohr, JAGC, USN, Lt. Col. Dennis Yodek, USAF-AF/JACI, and William Anderson (USMC/JAR) to John J. McNeill, Assistant General Counsel (International), OSD (May 8, 1986) (on file with author). This document states the joint view of the legal branches of the four armed services that certain provisions of Protocol I, including Article 75, “are already part of customary international law.”

Some may take the view that even if the Geneva Conventions, by their terms, do not govern the treatment of al Qaeda and Taliban prisoners, the substance of these agreements has received such universal approval that it has risen to the status of customary international law. Customary international law, however, cannot bind the executive branch under the Constitution, because it is not federal law.³⁷

There is nothing more. But there one can probably see, leaping out of the bag with a grin as wide as it is long, the cat. For the relevant federal law is the War Crimes Act which incorporates, not customary international law, but the Geneva Conventions.³⁸ If the Geneva Conventions fail to protect the Taliban and Al-Qaeda detainees, then those who ill-treat them will not be committing offences under the War Crimes Act. The fact that the victims are entitled to protection under customary international law is of no concern, any more than is the fact that the perpetrators may be committing war crimes under customary international law.³⁹ What a far cry this is from the humane vision of ICRC member Daniel Thürer, for whom international humanitarian law could be seen as the basis of a constitutional system of public international law.⁴⁰

III. INTERNATIONAL HUMAN RIGHTS LAW

Article 5 of the Universal Declaration of Human Rights states simply, "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."⁴¹ The prohibition is found in the International Covenant on Civil and Political Rights,⁴² the American Convention on Human Rights,⁴³ and the European Convention on Human Rights.⁴⁴ None of the pertinent provisions can be derogated from, even in time of war or other public emergency threatening the life of the nation.⁴⁵ It is also prohibited by article 5 of the African Charter on Human and People's Rights, which has no derogation provision.⁴⁶ It is the practice of the

37. Bybee Memorandum, *supra* note 25, at 32.

38. War Crimes Act, 18 U.S.C. § 2441 (1996).

39. *Tadić*, *supra* note 18, paras. 128-137.

40. Thuerer, 'International Humanitarian Law as a Core of a "Constitutional System" of Public International Law?', in: Stefania Baldini/Guido Ravasi (eds.), *Humanitarian Action and State Sovereignty International - Congress on the Occasion of its XXXth Anniversary, San Remo 31 August - 2 September 2000*, International Institute of Humanitarian Law, Milano 2003, p. 46-58.

41. Universal Declaration of Human Rights, art. 5., G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948).

42. International Covenant on Civil and Political Rights, art. 7, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (1966) [hereinafter ICCPR].

43. American Convention on Human Rights art. 5, Nov. 22, 1969, 1144 U.N.T.S. 123.

44. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Nov. 4, 1950, 213 U.N.T.S. 222 (note the word "cruel" is absent) [hereinafter European Convention on Human Rights].

45. General human rights treaties allow States Parties to suspend or derogate from some of their provisions, when confronted by a state of emergency such as internal or external conflict, but some of their provisions are insulated from being so suspended. See ICCPR, *supra* note 42, art. 4; European Convention on Human Rights, *supra* note 44, art. 15; American Convention on Human Rights, *supra* note 43, art. 27.

46. African Charter on Human and Peoples' Rights, art. 5, June 27, 1981, 21 I.L.M. 58.

bodies set up under the treaties (the Human Rights Committee under the ICCPR and the European and Inter-American Courts of Human Rights) to consider that states parties are obliged to investigate allegations of torture *and* the graver forms of other prohibited ill-treatment with a view to prosecuting the perpetrators.⁴⁷ All victims of a violation of the pertinent provision are expected to be compensated.⁴⁸ Moreover, where there are substantial grounds for believing that there is a real risk of any violation of the prohibition, no one should be sent to a country where they would be exposed to that risk.⁴⁹ The difficult problem with the treaties is that, like the Geneva Conventions, they do not offer a definition of torture or other forms of prohibited ill-treatment. I shall return to this point.

In addition, there are the United Nations (UN) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Inter-American Convention to Prevent and Punish Torture. I shall focus on the UN Convention since, although the Inter-American Convention is generally more embracing in its protection, especially in its definition of torture, the UN Convention may, at present, be a better guide to the relevant general international law; and it has also been ratified by the United States.

CAT, having defined torture (see below), makes it clear that “[n]o 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.”⁵⁰ It rules out the defense of obedience to superior orders.⁵¹ It establishes criminal responsibility by requiring criminalization, not only of the infliction of the torture, but also the instigation of, consenting to or acquiescence in torture,⁵² as well as complicity or participation in torture.⁵³ It requires submission of the case for prosecution, or extradition to another country having jurisdiction, of any person present in the territory against whom there is information that the person has committed torture (i.e., (quasi)-universal jurisdiction).⁵⁴ It requires redress and compensation for victims⁵⁵ and incorporates the common law idea of inadmissibility in legal proceedings of statements made under torture.⁵⁶ It prohibits the sending of a person to a country in which there are substantial grounds for believing that the person would be in danger of being subjected to torture.⁵⁷ It also requires states to prevent “other acts of cruel, inhuman or

47. See NIGEL S. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 110-112 (2nd ed. 1999).

48. *Id.* at 114-115.

49. *Id.* at 116-120.

50. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, art. 2, para. 2, U.N. Doc A/39/51, 1465 U.N.T.S. 85 (June 26, 1987) [hereinafter CAT].

51. *Id.* at art. 2, para. 3.

52. *Id.* at art. 1.

53. *Id.* at art. 4.

54. *Id.* at arts. 4-7.

55. *Id.* at art. 14.

56. *Id.* at art. 15.

57. *Id.* at art. 3.

degrading treatment or punishment which do not amount to torture.”⁵⁸ This, “in particular,” means that certain provisions of the Convention apply both to torture and to cruel, inhuman or degrading treatment or punishment. These do *not* include the provisions I have referred to. Those embraced are the obligation to train relevant personnel,⁵⁹ the obligation to keep interrogation practices under review “with a view to *preventing* any cases of torture”⁶⁰ and the obligation to investigate not only specific allegations of torture⁶¹ but also *ex officio* whenever there is reasonable ground to believe that an act of torture has occurred.⁶² However, the failure to include other provisions does not necessarily mean that the principles contained in the other provisions cannot apply to ill-treatment not amounting to torture, for the provisions of the Convention are expressly “without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment.”⁶³

How, then, does the OLC instruct us on these matters? It focuses on the CAT rather than the ICCPR, which was totally ignored in the withdrawn 2002 Interrogation Memorandum and has graduated to a “see also” reference in a footnote to the 2004 Interrogation Memorandum.⁶⁴ Having in the 2002 Interrogation Memorandum asserted a number of ways of avoiding responsibility for torture—the President’s Commander-in-Chief powers and claimed defenses of necessity and self-defense—the 2004 Interrogation Memorandum refrains from addressing these on the grounds that they are “unnecessary” in the light of “the President’s unequivocal directive that U.S. personnel not engage in torture.”⁶⁵ I have difficulty following how the President’s policy makes understanding of the legal responsibility of U.S. personnel involved in interrogations unnecessary. But, since this is the official position now, I shall refrain from dealing with these disturbing doctrines, doctrines that have not been retracted and were evidently approved, if not encouraged, by the present Attorney General of the United States.⁶⁶

What is common to both of the OLC memoranda is the central reliance on a theory according to which torture is at the top end of a pyramid of pain or suffering. This theory is based on the practice of the organs of the European Convention on Human Rights.

The *locus classicus* is the case of *Ireland v. UK*, in which the European Court of Human Rights found five interrogation techniques used in 1972 by the British security forces against IRA suspects to be inhuman and degrading, but not

58. *Id.* at art. 16, para. 1.

59. *Id.* at art. 10.

60. *Id.* at art. 11.

61. *Id.* at art. 13.

62. *Id.* at art. 12.

63. *Id.* at art. 16, para. 2.

64. 2004 Interrogation Memorandum, *supra* note 6, at 1.

65. *Id.* at 2.

66. David Johnston & Neil A. Lewis, *Bush’s Counsel Sought Ruling on Torture*, N.Y. TIMES, Jan. 5, 2005, at A1.

torture.⁶⁷ The five techniques were: hooding, wall-standing, deprivation of food and drink, deprivation of sleep and subjection to loud noise, in combination, but for less than 24 hours.⁶⁸ According to the Court, these practices did not deserve the “special stigma” of torture.⁶⁹ It invoked the recently adopted 1975 UN Declaration against Torture, according to which torture constituted “an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.”⁷⁰ Over the years the Court has maintained its insistence on the torture being at the top of a pyramid of suffering. However, it should be noted that it has manifestly adjusted downward the line between torture and inhuman treatment. It did this in *Selmouni v. France* (1999).⁷¹ In that case, the applicant had been subjected to sustained beatings, leaving medically certified trauma on various parts of the body. In a series of similar cases, going back to the Northern Ireland case (which involved more than just the five interrogation techniques), the Court had considered such treatment as inhuman and degrading, but as not deserving what it called the “special stigma” attaching to torture.⁷² This time it announced that it was changing track. Invoking its doctrine of the Convention being a “living instrument,” the Court said it:

[C]onsiders that certain acts which were classified in the past as “inhuman and degrading treatment” as opposed to “torture” could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.⁷³

It has generally been assumed that the Court’s language of acknowledging change in what constitutes torture applies not just to physical brutality, but also to the mixed physical and psychological pressures involved in the five interrogation techniques used in Northern Ireland.

Why is this regional case law relevant to our concerns? Because the pyramid approach is being used to interpret the CAT. CAT Article 1 defines torture as follows:

For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an

67. *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at para. 246 (1978).

68. *Id.* at para. 96.

69. *Id.* at para. 167.

70. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452 (XXX), art. 1, para. 2, U.N. Doc. A/10034 (Dec. 9, 1975).

71. *See Selmouni v. France*, 1999-V Eur. Ct. H.R. at 16.

72. *Id.* at 29; *Ireland*, 25 Eur. Ct. H.R. at 59. *See also Tomasi v. France*, 241 Eur. Ct. H.R. (ser. A) at 22 (1992); *Ribitsch v. Austria*, 336 Eur. Ct. H.R. (ser. A) at 21 (1995).

73. *Selmouni*, 1999-V Eur. Ct. H.R. at 31.

act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.⁷⁴

Like the 2002 Interrogation Memorandum, the 2004 Interrogation Memorandum stresses the distinction the CAT makes between torture and other cruel, inhuman or degrading treatment or punishment.⁷⁵ It footnotes the definition contained in the CAT's predecessor, the UN Declaration against Torture, which defined torture as "an aggravated and deliberate form" of other ill-treatment.⁷⁶ Yet it does not ask *why* that language about aggravation is missing from the CAT. The reason that appears from the record is that there was a desire to leave the matter less certain. This can be inferred from the fact that compromise language was used in article 16.⁷⁷ Article 16, it should be recalled, refers to acts of ill-treatment "not amounting to torture."⁷⁸ Those, led assiduously by the United Kingdom (UK), who wanted to place torture at the top end of pain or suffering, pressed for the formula: "which are not sufficient to constitute torture." Others, wishing to avoid the pyramid approach, urged the formula: "which do not constitute torture." The result was a stand-off, but a stand-off in which the Declaration's reference to aggravation is missing. This is part of an argument I have developed elsewhere, proposing that, European Convention practice notwithstanding, the better approach is that taken by the "Elements of Crime" for war crimes under the ICC Statute (that is, that the element of purpose be understood as the distinguishing factor).⁷⁹ None of this appears in the 2004 Interrogation Memorandum. Nor does it refer to the watershed *Selmouni* case.

What is clear is that the pyramid theory was present in documentation before the Senate when it was deliberating on its advice and consent to ratification of CAT. So this point may be perceived as relevant to the interpretation of U.S. legislation giving effect to CAT. And, again, here we may have the nub of the matter. The issue is what action may the U.S. courts be expected to take vis-à-vis U.S. personnel involved in interrogation.

This leads to the question of what U.S. courts would consider to be "cruel, inhuman or degrading treatment or punishment." At the time of the deposit of the U.S. instrument of ratification, the United States stipulated its understanding that the term would mean "the cruel, unusual and inhumane treatment or punishment

74. CAT, *supra* note 50, art. 1(1).

75. 2004 Interrogation Memorandum, *supra* note 6, at 6.

76. *Id.* at 6 n.14.

77. CAT, *supra* note 50, art. 16.

78. *Id.*

79. Nigel S. Rodley, *The Definition(s) of Torture in International Law*, in 55 CURRENT LEGAL PROBLEMS 467, 470, 475 (M.D.A. Freeman ed., 2002); Elements of Crime, *supra* note 20, at art. 8(2)(c)(i)-4.

prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.”⁸⁰ This led the authors of the 2002 Interrogation Memorandum to assert that torture could not be found if the behavior did not rise to that level.⁸¹ The DoD Working Group Report followed suit. The point is not made in the 2004 Interrogation Memorandum. I find it difficult to follow whether U.S. judicial practice interpreting these constitutional provisions would be substantially at variance with the practice of international bodies.

It must be acknowledged that the tone of the December 2004 memorandum is altogether more consistent with mainstream legal discourse on the issue than its 2002 predecessor. Particularly welcome is its explicit rejection of the lurid threshold of severity for torture expressed by the earlier document, namely, that the pain would have to be “excruciating and agonizing” or “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.”⁸² Also welcome is the re-examination of the notion of specific intent, especially the affirmation that “[t]here is no exception under the statute permitting torture to be used for a ‘good reason,’” such as with the motive of protecting national security.⁸³

Nevertheless, we are left with the uncomfortable feeling that the Humpty Dumpty doctrine of verbal strategy remains operative: “‘When *I* use a word,’ Humpty Dumpty said in rather a scornful tone, ‘it means just what I choose it to mean – neither more nor less.’”⁸⁴ It is, after all, worth noting the statement in the December 2004 OLC memorandum, according to which “we have reviewed this Office’s prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum.”⁸⁵

There can be no serious doubt that the prohibition of torture and cruel, inhuman or degrading treatment or punishment is not only a rule based on treaties, but also a rule of general or customary international law. While this is not the place to give extensive justification for this assertion, a few specific elements may

80. U.S. Declarations and Reservations: Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. I, (1) 136 CONG. REC. S17486-01 (daily ed. Oct. 27, 1990).

81. 2002 Interrogation Memorandum, *supra* note 4, at 12-13.

82. 2004 Interrogation Memorandum, *supra* note 6, at 1-2 (quoting 2002 Interrogation Memorandum).

83. *Id.* at 17.

84. Lewis Carroll, *Alice Through the Looking Glass* (1940 edn., London, Macmillan) 125. As Professor Paust has it, “moderate coercion to extract information from unwilling human beings and to create a sense of hopelessness in the minds of detainees is as lawful as moderate rape.” Jordan J. Paust, *After 9/11, “No Neutral Ground” with Respect to Human Rights: Executive Claims and Actions of Special Concern and International Law Regarding the Disappearance of Detainees*, 50 WAYNE L. REV. 79, 81-82 (2004).

85. 2004 Interrogation Memorandum, *supra* note 6, at 2 n.8. Even as he rescinded the list of approved techniques referred to in the text accompanying note 10 *supra*, the Secretary of Defense reinstated some of them, including sleep adjustment, false flag and isolation for up to 30 days or more and indicated that others could be authorized on an ad hoc basis: Memorandum from Department of Defense to Commander, U.S. Southern Command, *Counter-Resistance Techniques in the War on Terrorism* (Apr. 16, 2003), *reprinted in* DANNER, *supra* note 1, at 199-204.

serve to elucidate the issue. First, the fact that all the human rights treaties make the prohibition non-derogable is telling, as is the fact that torture and cruel or inhuman treatment are war crimes under international humanitarian law. Second, the UN General Assembly resolution by which the CAT was adopted spoke of the desire for “a more effective implementation of *the existing prohibition under international and national law of the practice of torture and other cruel, inhuman or degrading treatment or punishment.*”⁸⁶ (emphasis added). Third, states do not claim a right to engage in activity contemplated by the prohibition; rather, they deny the facts, or claim that the acts do not fall within the prohibition. Fourth, the relevant practices are usually unlawful under domestic law. Fifth, national and international courts have considered the prohibition one of general international law, if not *jus cogens*.⁸⁷ Sixth, the teaching of the most highly qualified publicists overwhelmingly concurs.⁸⁸

As far as the prohibition of torture is concerned, it can now safely be said that the United States' position is unequivocally consistent with this understanding of the law. The 2004 Interrogation Memorandum, in its first paragraph, affirms that the prohibition is one of customary international law. Indeed, in a footnote, it cites cases from the United States and United Kingdom, as well as the Restatement (Third) of Foreign Relations Law of the United States, in support of the suggestion that the prohibition is one of *jus cogens*.⁸⁹

The memorandum is silent as to whether the analysis applies also to other prohibited ill-treatment. Certainly, all the international authorities for the proposition that torture is prohibited by a rule of international law (possibly *jus cogens*) apply *pari passu* to other prohibited ill-treatment. It is hard to know how to interpret the silence, because the memorandum does not draw any conclusions from the acknowledgement of the customary law nature of the prohibition of torture.

The 2002 Interrogation Memorandum did not refer to customary international law. However, it will be recalled that the January 22, 2002 memorandum on the Geneva Conventions did acknowledge the possible customary international law status of the substance of the Geneva Conventions, but that “[c]ustomary international law . . . cannot bind the executive branch under the Constitution

86. G.A. Res. 39/46, U.N. Doc. A/RES/39/46 (Dec. 10, 1984) (emphasis added).

87. Prosecutor v. Furundzija, Case No. ICTY IT-95-17/1-T, Judgment, ¶ 144, 153-156 (Dec. 10, 1998); Regina v. Bow Street Metropolitan Stipendiary Magistrate, *ex parte Pinochet Ugarte* (No 3), [2000] 1 A.C. 137, 198; Siderman de Blake v. Republic of Arg., 965 F.2d 699, 714 (9th Cir. 1992). A rule of *jus cogens* is a rule of general international law that is considered peremptory and incapable of being varied even by treaty.

88. E.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987). *Id.* at 6 n.5.

89. 2004 Interrogation Memorandum, *supra* note 6, at 1 n.2. In December 2005, the Detainee Protection Act (the McCain Amendment), section 1403, expressly prohibited all U.S. personnel from engaging in cruel, inhuman or degrading treatment or punishment, as reflected in the U.S. reservations, declarations and understandings to the CAT. However, it created no new crime or civil cause of action, but it did provide a new defense to any criminal charge or civil suit (section 1404).

because it is not federal law.”⁹⁰ As far as I am aware, this memorandum has not been withdrawn, and it may reasonably be inferred that the philosophy behind the statement applies also to the prohibition of torture or other ill-treatment in international human rights law. Indeed, the April 2003 DoD Working Group Report, considering both international humanitarian law and international human rights law, quoted the January 2002 OLC memorandum for both this proposition and that “any presidential decision in the current conflict concerning the detention and trial of al-Qaida or Taliban militia prisoners . . . would immediately and completely override any customary international law.”⁹¹

IV. CONCLUSION

As far as concerns obligations under the Geneva Conventions requiring humane treatment of any detainee and, in particular, avoidance of torture and cruel, inhuman or degrading treatment or punishment, the OLC memoranda have maintained that certain detainees are not protected by them. In so doing, they have induced the President of the United States to deny a legal obligation of humane treatment. Later memoranda, including the controversial August 2002 memorandum, subsequently withdrawn, and the replacement December 2004 memorandum, have not challenged the applicability of the CAT. Rather, the accent has been on torture as treatment at the apex of prohibited cruel, inhuman or degrading treatment or punishment, in terms of the pain or suffering inflicted. The legislation giving effect to the CAT only criminalizes torture (committed abroad), not other prohibited ill-treatment. Customary international law seems to be dismissed as unenforceable (at least through the criminal law) in U.S. courts.

In sum, the approach can be summarized by a modified version of the famous definition of law given by the great American jurist, Oliver Wendell Holmes, Jr.: a prediction of what the American courts will do in fact, and nothing more pretentious, is what we mean by international law.⁹² Such an approach to international law does a disservice to the values of the United States and the world community, just as the practices at Abu Ghraib and elsewhere, as found in the Taguba, Fay and Schlesinger reports, have done to their image.⁹³

As early as two months after the September 11, 2001 atrocity, in my capacity as UN Special Rapporteur on Torture, I made a valedictory statement to the UN General Assembly. I there said:

However frustrating may be the search for those behind the abominable acts of terrorism and for evidence that would bring them to

90. Bybee Memorandum, *supra* note 25, at 32.

91. WORKING GROUP REPORT, *supra* note 5, at 6.

92. In *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897), reprinted in *THE PATH OF THE LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES, JR.* 336 (Steven J. Burton ed., Cambridge Univ. Press 2000), he states, “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”

93. See reports cited *supra* note 9. In the words of the SCHLESINGER REPORT, “The damage these incidents have done to U.S. policy, to the image of the U.S. among populations whose support we need in the Global War on Terror and to the morale of our armed forces, must not be repeated.” SCHLESINGER REPORT, *supra* note 9, at 18-19.

justice, I am convinced that any temptation to resort to torture or similar ill-treatment or to send suspects to countries where they would face such treatment must be firmly resisted. Not only would that be a violation of an absolute and preemptory rule of international law, it would be also responding to a crime against humanity with a further crime under international law. Moreover, it would be signaling to the terrorists that the values espoused by the international community are hollow and no more valid than the travesties of principle defended by the terrorists.⁹⁴

That lawyers at the highest level of U.S. officialdom were already about to provide opinions contemplating precisely what I was warning against is a challenge to the world community's most deeply held legal values. It can only be hoped that serious efforts will be made to try to put the genie back in the bottle. Measures the United States could take to help restore its traditional reputation for adherence to the legal principle that every person in the hands of a state or any party to an armed conflict is entitled to humane treatment and, in particular, not to be subjected to torture or cruel, inhuman or degrading treatment or punishment, within the meaning of general international law would include: replacing the 2002 Presidential directive with a new one that accepts the *legal* right of everyone not to be subjected to torture or cruel, inhuman or degrading treatment or punishment; amending the law to ensure that all war crimes under international law involving torture or cruel, inhuman or other inhumane treatment are war crimes under U.S. law; ensuring that all agencies of the U.S. government are subject to that law; ensuring that they obey it; and, producing any remaining 'ghost detainees' to the ICRC, giving them substantial compensation and never again resorting to the practices that created them.

94. The Special Rapporteur, *Statement by the Special Rapporteur*, 14, delivered to the Third Committee of the General Assembly, U.N. Doc. E/CN.4./2002/76 (Nov. 8, 2000).