Geneva Hub for Democracy

Highlights

No.6 / 2016

The U.S. Torture Memos and Democracy

by Steven J. Barela

Abstract

It has become widely known that after the terrorist attacks of 9/11 the United States initiated a program of torture and ill-treatment against al-Qaeda suspects. What is less discussed is how exactly the Bush Administration legally justified this ill-treatment in a democracy that was legally bound by an international prohibition of the highest order. As a result this piece will have two objectives: 1) it will be demonstrated that international law in fact had a direct impact on the justifications found in the "torture memos" drafted by administration lawyers; 2) even if it did not stop torture, the flawed legal interpretation points to an impact on the public reaction and the democratic processes that followed in its aftermath.

European Cultural Centre
40, Rue Le-Corbusier
CH - 1208 Geneva
Phone: +41 (0)22 710 66 00
Fax: +41 (0)22 788 04 49
Email: info@ceculture.org
Website: www.ceculture.org

The U.S. Torture Memos and Democracy

by Steven J. Barela

Steven J. Barela (@StevenJBarela), an assistant professor at the University of Geneva in the Global Studies Institute and is a member of the Law Faculty, specializes in interdisciplinarity.

In addition to teaching at the University of Geneva, he has taught at the Korbel School of Denver University, and lectured for l'Université Laval (Québec), Science Po Bordeaux, UCLA, and the Geneva Academy.

He published a monograph on counterterrorism with Routledge in 2014 and has an edited volume on armed drones with Ashgate in 2015. For an overview and excerpts of these books, please visit his website: Legitimacy as a Target.

A series of legal memoranda authored inside President Bush's administration have become known as the "torture memos" as they served to open the door to severely coercive interrogations of suspected members of al-Qaeda[1]. Even a cursory reading of these memos reveals the extent to which any discussion of torture demanded a reference to international legal norms and thus their impact on a functioning democracy. In other words, the Bush administration saw itself as obliged to analyze its policies through international legality since the specific human rights treaty on torture required this prohibition become a part of domestic law, intricately intertwining it with the rule of law and constraints on the legitimate use of force within a liberal democracy[2]. Hence, in this piece I will focus on one particular memo to outline the impact on U.S. institutional democracy, even if it did not actually stop torture.

To introduce this topic it is necessary to explain that a tightly woven web of illegality has been ponderously and methodically placed over torture in both human rights and humanitarian law. The Geneva Conventions[3], the Universal Declaration of Human Rights[4], the International Covenant on Civil and Political Rights[5] and regional human rights treaties[6] all provide for an absolute prohibition of the use of torture and other cruel, inhuman or degrading treatment.

Furthermore, this particular ban has been frequently found by human rights' courts to enshrine "one of the fundamental values of democratic societies"[7]. As a cornerstone of democracy it has become well understood that there are no exceptions to this prohibition; there can be no derogation from this protection "even having regard to the imperatives of a public emergency threatening the life of the nation or to any suspicion, however well-founded, that a person may be involved in terrorist or other criminal activities"[8]. In the simplest and most categorical terms, the prohibition of torture can be described as an absolute norm of *jus cogens*[9].

The U.S. and Torture Law

In addition to the humanitarian and human rights conventions cited above, this prohibition has its own particular status in treaty law as the UN General Assembly adopted the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) in December of 1984, which then entered into force in 1987[10]. Article 4 requires that, "[e]ach State Party shall ensure that all acts of torture are offences under its criminal law" and that such legislation "shall make these offences punishable by appropriate penalties which take into account their grave nature."[11] As it was explained in the infamous "Bybee Memo" (discussed below), the U.S. legislature passed specific legislation on torture (§§2340-2340A)[12] to meet this requirement: "Congress criminalized this conduct to fulfill U.S. obligations under the [CAT]" treaty[13]. Hence when speaking of torture, the domestic legal order was directly altered by international law by way of all the established democratic rules.

It was during the presidency of Ronald Reagan that the United States first signed this treaty in April of 1988. The Senate then passed the treaty in October of 1990, and when the U.S. officially ratified the CAT it registered a reservation highlighting a distinction made in the treaty between torture (Article 1) and cruel, inhuman and degrading treatment (Article 16).

The reservation stated,

[t]hat the United States considers itself bound by the obligation under Article 16 to prevent 'cruel, inhuman or degrading treatment or punishment,' only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments *to the Constitution of the United States*[14].

As we will see, this reservation points to one of the ways, among others[15], that lawyers in the Bush administration attempted to argue for the legality of implementing abusive interrogation techniques against those suspected to be members of al-Qaeda.

When the U.S. officially ratified the Convention Against Torture, it registered a reservation highlighting a distinction made in the treaty between torture (Article 1) and cruel, inhuman and degrading treatment (Article 16).

The Bybee Memo

The bulk of the torture memos were written by the Office of Legal Counsel (OLC), an agency which provides interpretations of law that are legally binding on the Executive Branch[16]. Perhaps the most infamous in this series is known as the Bybee Memo (though it was largely drafted by John Yoo, and only signed by Jay Bybee)—*Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*[17].

It was the shocking photos of gross detainee abuse in the Iraq detention facility of Abu Gharib that drove the leak in June of 2004 of this particular memo[18]. After the appalling images of widespread prisoner abuse by U.S. soldiers and contractors hit the airwaves and newsstands, citizens of the United States began to piece together what had been reported in the nation's leading newspapers since late 2002, and at times on their front pages[19]. That is, a realization started to dawn that a different type of interrogation regime had been instituted and now governed the questioning of detainees in the global "war on terror". With this national wince towards prisoner abuse in the face of incontrovertible photographic evidence, someone inside the government leaked the Bybee Memo to the press which sent out a signal that the coincidence between the treatment of detainees in Iraq and other reports from the "war on terror" had a common thread.

Perhaps the most infamous in this series is known as the Bybee Memo. It was the shocking photos of gross detainee abuse in the Iraq detention facility of Abu Gharib that drove the leak in June of 2004 of this particular memo. The reaction from lawyers, law professors and others in the legal community was overwhelmingly critical.

The reaction from lawyers, law professors and others in the legal community was overwhelmingly critical of the professional work found in this memo[20]. Dean of the Yale Law School Harold Koh, a former member of the OLC during the Reagan administration and then the Legal Adviser of the Department of State in the Obama administration, stated in Congressional hearings, "in my professional opinion as a law professor and a law dean, the Bybee memorandum is perhaps the most clearly legally erroneous opinion I have ever read"[21]. In a *New York Times* article just after the leak a law professor at the University of Chicago said, "[i]t's egregiously bad. It's very low level, it's very weak, embarrassingly weak, just short of reckless"[22]. Perhaps best capturing the extent of alarm over this memo was a letter signed by nearly 130 lawyers, retired judges, law school professors and a former director of the FBI condemning the government lawyers for seeking to "circumvent

long established and universally acknowledged principles of law and common decency."[23]

The International Treaty on Torture

One of the most troubling components of this memo is the authors' reading of the CAT treaty. They argued that the negotiating history of the convention, along with the U.S. ratification history, clearly showed that the intention of the treaty was to apply to only the most heinous of abusive treatment. As we will see, this argument was flawed for several reasons.

As an attempt to demonstrate their point, Yoo and Bybee gave examples of how there was specific attention during the drafting of the treaty to distinguish torture as an aggravated form of cruel, inhuman and degrading treatment: 1) torture vs. 2) other ill-treatment. It is true that the commentary to the treaty shows that the *travaux préparatoires* included an effort by many states to distinguish between the two categories[24]. And while it was not the intention of the drafters of the Universal Declaration of Human Rights to draw this distinction[25] this difference was first recognized in the decision of the European Commission of Human Rights in the *Greek* case of 1969[26].

However, it is also true that the United States effort to entirely exclude the less severe forms of ill-treatment from this treaty was in fact defeated in negotiations. Thus cruel, inhuman and degrading treatment were explicitly included in Article 16 to create an "obligation to *prevent* other forms of ill-treatment"[27].

Yet, undue attention was put on this distinction by the authors of the Bybee memo:

CAT thus establishes a category of acts that are not to be committed and that states must endeavor to prevent, but that states need not criminalize, leaving those acts without the stigma of criminal penalties. CAT reserves criminal penalties and the stigma attached to those penalties for torture alone. In doing so, CAT makes clear that torture is at the farthest end of impermissible actions, and that it is distinct and separate from the lower level of "cruel, inhuman, or degrading treatment or punishment."[28]

Their analysis was that for the U.S. lesser forms of maltreatment were not governed by Article 16 of the CAT treaty, but rather U.S. constitutional jurisprudence (an absurd interpretation later denounced because it would mean that such treatment could "be inflicted on American citizens in a county jail")[29]. By explaining there to be a notable space between the two forms of ill-treatment, and then claiming that the United States was not treaty bound to refrain from the lesser forms of abuse, these attorneys supposedly made space for ill-treatment.

Perhaps most problematic is that the legally binding convention was twisted to oddly permit certain forms of violence against detainees—a clear transgression of the treaty's object and purpose[30]. Just because torture can and should be categorized into its own class of ill-treatment does not mean that somehow this creates a gap between it and the less egregious forms of ill-conduct. It is natural and necessary that the drafters of the CAT distinguished the behavior of torture (defined for the first time in Article 1); this is the only way to criminalize torture as a specific act.

In addition, the memo put an inapposite focus on the Reagan administration's submission to the Senate in 1988 which equated "severe pain" with that which is "excruciating and agonizing". This language was specifically removed before ratification of the treaty largely due to the fact that the first Bush administration, along with the voting Senate, was responding to criticism that the U.S. would be raising the standard to one that is different than the international definition and could be seen as establishing a higher threshold. Yet, the importance of this change was downplayed by the memo's authors as merely rhetorical, and they inexplicitly maintained that it was legally proper to continue to present "severe" and "excruciating and agonizing" as substantially equivalent despite its explicit removal. This misreading of treaty history led to a distortion of the law that was overtly criticized by the Office of Professional Responsibility[31].

As a result of all this, the memo infamously concluded:

[t]he victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result.[32]

The treaty uses the term "severe", but we see here an increased threshold to "so severe that". In addition, severe pain is certainly something understood without legal interpretation by anyone who has given birth, broken a bone or been kicked in the groin—even if very few have actually

experienced organ failure and no one can explain how death feels.

Conclusion

This manufactured standard of death or organ failure rippled through the public sphere and caused such a political uproar that this memo was retracted within a week after being leaked, and was later replaced with one meant for public consumption[33]. Since that time, the most significant abuse has been acknowledged by the succeeding President[34] and documented in a reduced form released to the public[35].

Additionally, it should not be forgotten that this policy helped usher into office a president that signed an executive order on his second day limiting interrogation to only techniques found in the Army Field Manual. Of even more consequence, in November of 2015 President Obama signed into law a provision that codifies this advancement[36].

The first pertinent point for our purposes is that international law was the standard used to scrutinize the work of this torture memo because it was the precise yardstick with which the memo was meant to be complying as per the constitutional democratic process. Secondly, even if we know that this legal prohibition did not stop torture, we can see very clearly that the legal back-flips taken to attempt to explain compliance were only successfully landed while the analysis remained hidden from the voting public.

2 août 2016

Since that time, the most significant abuse has been acknowledged by the succeeding President and documented in a reduced form released to the public.

Le *Geneva Hub for Democracy* est une initiative du Centre Européen de la Culture, développée grâce au soutien de la Confédération suisse (DFAE).
Responsable du projet: Dr François Saint-Ouen
Assistante de recherche: Alexandrina Iremciuc.

Notes

[1] See e.g. COLE, D., ed., *The Torture Memos* (New York, The New Press, 2009) 304 pp; and GREENBERG, K., and DRATEL, J. *The Torture Papers: The Road to Abu Ghraib* (Cambridge, Cambridge University Press, 2005) 1242 pp.

[2] For a valuable work on the vital link between the rule of law and terrorism see BERNARD, F., *L'Etat de droit face au terrorisme* (Genève, Schulthess Médias Juridiques SA, 2010); see also my *International Law, New Diplomacy and Counterterrorism: An Interdisciplinary Study of Legitimacy* (New York, Routledge, 2014).

[3] A detainee who qualifies for prisoner of war status in international armed conflict is required under Article 17 of the Third Convention, "to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information … [n]o 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.": *Geneva Convention relative to the Treatment of Prisoners of War* (signed 12 Aug 1949, entry into force 21 Oct 1950) 75 UNTS 135, Article 17. As for non-international armed conflict, Common Article 3 of the same treaty requires that all those placed *hors de combat* are free from "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; … [and] outrages on personal dignity in particular, humiliating and degrading treatment".

[4] UN General Assembly Resolution 172A (III) (10 Dec 1948).

[5] *International Convention on Civil and Political Rights* (adopted 16 Dec. 1966, entered into force 23 March 1976) 999 UNTS 171, Art. 7.

[6] *American Convention on Human Rights* (adopted 22 November 1969, *entered into force* 18 July 1978) O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, Art. 5 (of note, the U.S. signed the treaty in 1977 but has not ratified it); *European Convention for the Protection of Human Rights and Fundamental Freedoms* (adopted 20 March 1952, entered into force 18 May 1954) European Treaty Series No. 5, 213 U.N.T.S. 221, Art. 3; *African Charter on Human and Peoples' Rights* (adopted 27 June 1981, entered into force 21 Oct 1986) OAU Doc. CAB/LEG/67/3 rev. 5; 1520 U.N.T.S. 217, Art. 5; *Revised Arab Charter on Human Rights* (adopted 22 May 2004, entered into force 15 March 2008) reprinted in 12 Int'l Hum Rts Rep 893 (2005), Art. 8.

[7] See *Aydin v. Turkey* (25 Sept 1997) 57/1996/676/866 at §81.

[8] *Idem.*

[9] RODLEY, N. with POLLARD, M., *The Treatment of Prisoners under International Law*, 3rd ed. (Oxford, Oxford University Press, 2009) at 81.

[10] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (*CAT* Treaty) (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

[11] *Idem*, Article 4(1) and (2) respectively.

[12] 18 U.S.C. §§ 2340-2340A.

[13] Memorandum from Jay Bybee, Assitant (Bybee Memo hereinafter) Attorney General, to Counsel to the President (1 Aug 2002) *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*, reprinted in *The Torture Papers*, note 1 above, 172-217, at 182.

[14] U.S. reservations, declarations, and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. I(2), Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990), available at: The Library of Congress, THOMAS < http://thomas.loc.gov/cgi-bin/ntquery/z?trtys:100TD00020>.

[15] The other primary argument was "specific intention", which will not be treated in this work.

[16] For a comprehensive accounting and legal analyses of these memos see the report by Justice Department's Office of Professional Responsibility (OPR) released February of 2010: U.S. Department of Justice, Office of Professional Responsibility (Final) Report, *Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists* (July 29, 2009) available at: <http://judiciary.house.gov/issues/issues_OPRReport.html>. This report was the product of a five year investigation into the memos produced by the OLC concerning "enhanced interrogation techniques" (EITs). Their task at the OPR was to assess whether the lawyers involved failed in their professional duties. The OPR concluded that the legal work by John Yoo demonstrated, "intentional professional misconduct when he violated his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice" (at 260). However, this conclusion was not accepted by the Assistant Attorney General, David Margolis.

[17] Bybee Memo, Re: Standards of Conduct for Interrogation, note 13 above.

[18] PRIEST, D., 'Justice Dept. Memo Says Torture "May Be Justified"' *The Washington Post* (13 June 2004) available at : <http://www.washingtonpost.com/wp-dyn/articles/A38894-2004Jun13.html>. This was the first public disclosure of the full OLC memo, just six weeks after the first broadcast of the photos of abuse: LEUNG, R., 'Abuse Of Iraqi POWs By GIs Probed : 60 Minutes II Has Exclusive Report On Alleged Mistreatment' (28 April 2004) available at <http://www.cbsnews.com/news/abuse-of-iraqi-pows-by-gis-probed/>.

[19] See PRIEST, D., and GELLMAN, B., 'US Decries Abuse but Defends Interrogations: 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities' The Washington Post (26 Dec 2002) pg. A01, available at : <http://www.washingtonpost.com/ac2/wp-dyn/A37943-2002Dec25?language=printer>; and VAN NATTA, D., 'Questioning Terror Suspects in Dark and Surreal World' New York Times (9 March 2003) available at : <http://www.nytimes.com/2003/03/09/world/threats-responses-interrogations-questioning-terror-suspects-dark-surreal-world.html?pagewanted=1>.

[20] *Cf.* one of the few articles supporting the legal analysis found in the Bybee Memo, POSNER, E. and VERMEULE, A., 'A "Torture" Memo and Its Tortuous Critics' *Wall Street Journal* (Eastern edition)(6 Jul 2004) pg. A.22, available at : <http://www.ericposner.com/torturememo.html>.

[21] Cited n DEAN, J., "The Torture Memo By Judge Jay S. Bybee That Haunted Alberto Gonzales's Confirmation Hearings" Find Law (14 Jan 2005) available at: http://writ.news.findlaw.com/dean/20050114.html

[22] LIPTAK, A., 'Legal Scholars Criticize Memos on Torture' *New York Times* (25 June 2004) available at : <http://www.nytimes.com/2004/06/25/politics/25LEGA.html ?pagewanted=1>.

[23] HIGHAM, S. "Law Experts Condemn US Memos on Torture" *Washington Post* (5 Aug 2004) pg. A04.

[24] NOWAK, M., and McARTHUR, E., *The United Nations Convention Against Torture: A Commentary* (Oxford, Oxford University Press, 2008) at 539-40.

[25] RODLEY & POLLARD, note 9 above, at 82.

[26] *Greek Case* (5 Nov 1969) Application no. 3321/67-Denmark v. Greece; Application no. 3322/67-Norway v. Greece; Application no. 3323/67-Sweden v. Greece; Application no. 3344/67-Netherlands v. Greece.

[27] NOWAK, and McARTHUR, *The UN CAT: A Commentary*, note 24 above, at 539.

[28] Bybee Memo, *Re: Standards of Conduct for Interrogation*, note 13 above, at 185.

[29] Philip Zelikow, the policy representative to the National Security Council Deputies Committee on intelligence/terrorism issues for Secretary of State Condoleezza Rice, famously denounced this argumentation because the legal question became directly intertwined with domestic constitutional law: "The underlying absurdity of the administration's position can be summarized this way. Once you get to a substantive compliance analysis for 'cruel, inhuman, and degrading' you get the position that the substantive standard is the same as it is in analogous U.S. constitutional law. So the OLC must argue, in effect, that the methods and the conditions of confinement in the CIA program could constitutionally be inflicted on American citizens in a county jail": "The OLC 'Torture Memos': Thoughts from a Dissenter", Foreign Policy Magazine (21 April 2009) available at: <http://shadow.foreignpolicy.com/posts/2009/04/21/the_olc_torture_memos_thoughts_from _a_dissenter>.

[30] *Vienna Convention on the Law of Treaties* (adopted 23 May 1969, entered into force 27 Jan 1980) 1155 UNTS 331, Art. 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 the light of its object and purpose".

[31] Final OPR Report, *Investigation into the Office of Legal Counsel's Memoranda…*, note 16 above, at 184-6.

[32] Bybee Memo, *Re: Standards of Conduct for Interrogation*, note 13 above , at 213-4.

[33] It was replaced with Memorandum from Dan Levin, Acting Assistant Attorney General to James B. Comey, Deputy Attorney General (30 Dec 2004) *Re: Legal Standard Applicable Under 18 U.S.C. §§2340-2340A*.

[34] President Obama,"…we tortured some folks": The White House, Office of the Press Secretary, "Press Conference by the President" (Aug 1, 2014) available at: <https://www.whitehouse.gov/the-press-office/2014/08/01/press-conference-president>.

[35] Senate Select Committee on Intelligence, "Study of the CIA's Detention and Interrogation Program, Findings and Conclusions, Executive Summary" (2014) Approved 13 December 2012, Updated for Release 3 April 2014, Declassification Revisions 3 December 2014, available at <http://www.intelligence.senate.gov/study2014 /sscistudy1.pdf> accessed Dec 2014.

[36] For a discussion of this development see my post, "The New US Anti-Torture Law: A Genuine Step Forward" *Just Security* (Feb 12, 2016) available at https://www.justsecurity.org/29273/anti-torture-law-genuine-step/>.