

## THE FAILURE OF THE UNITED STATES TO COMPLY WITH THE CONVENTION AGAINST TORTURE

### A. Reservations and Understandings of the United States to the Convention Against Torture

In May 2000, the Committee against Torture urged the United States to withdraw its reservations, interpretations and understandings to the Convention Against Torture.<sup>14</sup> In its 2005 submission to the Committee, the United States stated that it would not withdraw its reservations or any other conditions because “there have been no developments in the interim that have caused the United States to revise its view of the continuing validity and necessity of the conditions set forth in its instrument of ratification.”<sup>15</sup> Contrary to this position, U.S. understandings and reservations to Articles 1 and 16 at the time of ratification were invoked to justify violations of the Convention in the “global war on terrorism.”

At the time of ratification, the United States attached an understanding to what constitutes torture—“an act must be specifically intended to inflict severe physical or mental pain or suffering.”<sup>16</sup> The Convention, however, does not require an act of torture to be specifically intended. In 2002, the Office of Legal Counsel of the U.S. Department of Justice, in advising on interrogation tactics in the “global war on terrorism,” emphasized the narrowness of the U.S. definition of torture. A letter from the Department of Justice to the White House, dated August 1, 2002, stated that the U.S. “understanding” on torture “accomplished two things”:

First, it made crystal clear that the intent requirement for torture was specific intent. By its terms, the Torture Convention might be read to require only general intent. . . . Second, it added form and substance to the otherwise amorphous concept of mental pain or suffering. In so doing, this understanding ensured that mental torture would rise to a severity comparable to that required in the context of physical torture.<sup>17</sup>

The U.S. also included a reservation to Article 16, which prohibits cruel, inhuman or degrading treatment or punishment “in any territory under its jurisdiction.” The United States’ understanding provides that the U.S. “considers itself bound to prevent ‘cruel, inhuman or degrading treatment or punishment’” only to the extent such treatment or

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<sup>14</sup> U.N. Committee against Torture, *Concluding Observations concerning the United States* ¶180(a), U.N. Doc. No. A/55/44 (May 2000) (hereinafter “*Concluding Observations concerning the United States*”).

<sup>15</sup> U.S. Report, *supra* note 1, ¶ 156.

<sup>16</sup> U.S. Reservations and Understandings Upon Ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“U.S. Reservations”), available at <http://www.ohchr.org/english/countries/ratification/9.htm>.

<sup>17</sup> Letter from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel to Alberto Gonzales, Counsel to the President (Aug. 1, 2002), reprinted in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB, *supra* note 3, at 220.

punishment is prohibited “by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.”<sup>18</sup>

The August 2002 Department of Justice memorandum explains that the reservation “confirm[s] our view that the treaty . . . prohibits only the worst forms of cruel, inhuman or degrading treatment or punishment.”<sup>19</sup> A military lawyer in October 2002, noting the United States’ reservation to Article 16, recommended interrogation techniques, which were approved by Defense Secretary Donald Rumsfeld, such as stress positions, isolation, forced grooming, exposure to cold water or weather, and use of wet towel and dripping water to induce perception of suffocation.<sup>20</sup> In that memorandum the military lawyer noted, “The United States is only prohibited from committing those acts that would otherwise be prohibited under the United States Constitutional Amendment against cruel and unusual punishment.”<sup>21</sup>

### **Prohibitions Under the Constitution of the United States**

The Fifth Amendment’s due process clause, applicable to interrogation procedures, prohibit actions taken under color of law (acting with government authority) that are “so brutal and offensive to human dignity” that they “shock the conscience.”<sup>22</sup> The Eighth Amendment prohibition on cruel and unusual punishment is applicable only to convicted persons and to pretrial detainees.<sup>23</sup> The U.S. Supreme Court has held that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>24</sup> Its prohibitions include disproportionate punishments, non-physical forms of cruel and unusual punishment, and wanton or unnecessary infliction of pain.<sup>25</sup>

<sup>18</sup> U.S. Reservations, *supra* note 16. Finland, the Netherlands, and Sweden formally objected to the U.S. reservation to Article 16. *Id.*

<sup>19</sup> Bybee, August 2002 Memorandum, *supra* note 2.

<sup>20</sup> Memorandum from Diane E. Beaver, Staff Judge Advocate to Commander, Joint Task Force 170, *Re: Legal Brief on Proposed Counter-Resistance Strategies* (Oct. 11, 2002) (hereinafter “Beaver, Oct. 2002 Memorandum”), *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB, *supra* note 3, at 234-235.

<sup>21</sup> *Id.* at 230.

<sup>22</sup> *Rochin v. California*, 342 U.S. 165, 172-173 (1952) (finding the illegal break-in of the petitioner’s home by government agents, the struggle to force open petitioner’s mouth, and the forcible extraction of his stomach’s contents to retrieve pills “shock[ed] the conscience” and violated Rochin’s due process rights).

<sup>23</sup> See, e.g., *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983); *County of Sacramento v. Lewis*, 523 U.S. 833, 849-50 (1998) (affirming that due process rights of pretrial detainees are “at least as great as the Eighth Amendment protections available to a convicted prisoner”).

<sup>24</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

<sup>25</sup> The following cases, although not exhaustive, illustrate what conditions U.S. courts have found to constitute torture or cruel and unusual treatment. See, e.g., *Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (finding “gratuitous infliction of ‘wanton and unnecessary’” pain when officers made inmate take his shirt off, attached him to a hitching post in the sun for seven hours, given no bathroom break, given water only once or twice and at least one guard taunted Hope for being thirsty); *Estelle v. Gamble*, 429 U.S. 97 (1976) (failure to provide essential medical treatment constitutes cruel and unusual punishment); *Simpson v. Socialist People’s Libyan Arab Jamahriya*, 326 F.3d 230, 234 (D.C. Cir. 2003) (to assess whether an act is cruel or degrading treatment a court must look at the victims’ suffering which depends upon the totality of circumstances. “[T]orture is a label ‘usually reserved for extreme, deliberate and unusually cruel practices, for example . . . tying up or hanging in positions that cause extreme pain’”); *Abebe-Jiri v. Negewo*, 72 F.3d 844, 845 (11th Cir. 1996) (finding that the victim suffered severe pain constituting torture when she was

High-level United States government officials have sought to actively undermine the extraterritorial application of prohibitions against torture and abuse. In January 2005, then Attorney General-designate Alberto Gonzales and White House counsel, in a written response during his confirmation hearings asserted that the Convention's prohibition on cruel, inhuman or degrading treatment does not apply to U.S. personnel in the treatment of non-citizens abroad.<sup>26</sup> He wrote:

[T]he only legal prohibition on cruel, inhuman or degrading treatment comes from the international legal obligation created by the CAT itself. The Senate's reservation, however, limited Article 16 to requiring the United States to prevent conduct already prohibited by the Fifth, Eighth, and Fourteenth Amendments. Those amendments, moreover, are themselves limited in application. The Fourteenth Amendment [right to equality before the law] does not apply to the federal government, but rather to the States. The Eighth Amendment [prohibition on cruel and unusual punishments] has long been held by the Supreme Court to apply solely to punishment imposed in the criminal justice system. Finally, the Supreme Court has squarely held that the Fifth Amendment [right to due process] does not provide rights for aliens unconnected to the United States who are overseas. Thus, as a direct result of the reservation the Senate attached to the CAT, the Department of Justice has concluded that under Article 16 there is no legal obligation under the CAT on cruel, inhuman or degrading treatment with respect to aliens overseas.<sup>27</sup>

In disregard for the Convention's absolute prohibition on torture even in "state of war or public emergency," the Department of Defense specifically relied on the United States' declaration at the time of ratification that the treaty is not self-executing to abdicate from the non-derogable provision of Article 2 of the Convention in determining interrogation techniques for detainees held in Guantánamo. In that memorandum, the Department of Defense states:

Article 2 also provides that acts of torture cannot be justified on the grounds of exigent circumstances, such as state of war or public

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hung from a pole, naked and with her arms and legs bound, and was severely beaten); *Doe v. Qi*, 349 F.Supp.2d 1258, 1318 (N.D. Cal. 2004) (finding that a victim who had been beaten and "hung from pipes for three days, handcuffed to other prisoners and not allowed to sleep" had been tortured); *Mehinovic v. Vuckovic*, 198 F.Supp.2d 1322, 1346 (N.D. Ga. 2002) (finding torture where a victim who was beaten, kicked in the face and torso, and subjected to a "long and nightmarish beating that included being hit while hanging upside down from a rope until he almost lost consciousness;" finding that the "threat of imminent death; or the threat that another person will imminently be subjected to death, [or] severe physical pain and suffering" can constitute mental torture).

<sup>26</sup> Lichtblau, *Gonzales Says Humane-Policy Order Doesn't Bind C.I.A.*, *supra* note 4.

<sup>27</sup> Responses from Alberto R. Gonzales (then Nominee for Attorney General) to the written questions of Senator Dianne Feinstein, *supra* note 4.

emergency, or on orders from superior officer or public authority. The United States did not have an Understanding or Reservation relating to this prohibition (however, the U.S. issued a Declaration stating that Article 2 is not self-executing).<sup>28</sup>

Although the U.S. Report reaffirms U.S. policy against torture, the report does not disavow the statements made by Attorney General Gonzales during the Senate confirmation process that the U.S. is free to subject non-citizens to cruel, inhuman or degrading treatment when it acts outside of U.S. territory. In fact, recent statements by the Department of Justice reaffirmed the views of Attorney General Gonzales. On December 7, 2005, U.S. Secretary of State Dr. Condoleezza Rice stated that, “[a]s a matter of U.S. policy, the United States obligations under the CAT, which prohibits, of course, cruel and inhumane and degrading treatment, those obligations extend to U.S. personnel wherever they are, whether they are in the United States or outside of the United States.”<sup>29</sup> However, on that same day, the U.S. Department of Justice contradicted Rice’s statement by reaffirming Attorney General Gonzales’ January 2005 position limiting the extraterritorial prohibition of cruel, inhuman or degrading treatment.<sup>30</sup>

Efforts to close the loopholes between law and policy on the prohibition of torture and cruel, inhuman or degrading treatment were the subject of considerable debate between Congress and the White House in 2005. In December 2005, Congress approved the Detainee Treatment Act, which prohibits cruel, inhuman or degrading treatment or punishment of persons in the custody of the U.S. government without any regard to geographical limitations.<sup>31</sup> Before it passed, however, Vice President Dick Cheney and CIA Director Porter Goss proposed a waiver which stated that the prohibition of cruel, inhuman or degrading treatment “shall not apply with respect to clandestine counterterrorism operations conducted abroad, with respect to terrorists who are not citizens of the United States, that are carried out by an element of the United States government other than the Department of Defense. . . if the president determines that such operations are vital to the protection of the United States or its citizens from terrorist attack.”<sup>32</sup> President George W. Bush also threatened to veto the bill.

The Detainee Treatment Act states that “[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman or degrading treatment or punishment.”<sup>33</sup> The legislation specifically states that there shall be no “geographical limitation on the applicability of the prohibition against cruel, inhuman or degrading treatment or punishment.”<sup>34</sup> At the time of signing the law, President Bush, however, wrote that that

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<sup>28</sup> Dept. of Defense, Working Group Report *supra* note 3, at 289.

<sup>29</sup> Condoleezza Rice, Secretary of State, *Press Availability With Ukrainian President Viktor Yushchenko* (Dec. 7, 2005), available at <http://www.state.gov/secretary/rm/2005/57723.htm>.

<sup>30</sup> Guy Dinmore and Demetri Sevastopulo, *Nato Ministers Welcome US Shift on Interrogation*, FINANCIAL TIMES, Dec. 8, 2005.

<sup>31</sup> Detainee Treatment Act, *supra* note 5.

<sup>32</sup> Eric Schmidt, *Exception Sought in Detainee Abuse Ban*, N.Y. TIMES, Oct. 24, 2005, at A16.

<sup>33</sup> Detainee Treatment Act, *supra* note 5.

<sup>34</sup> *Id.*

he would construe the ban “in a manner consistent with the constitutional authority of the president” and his powers as commander-in-chief, implying that he may authorize acts prohibited by the law.<sup>35</sup>

## **B. Deliberate Circumvention of Human Rights Law in the “Global War on Terrorism” (Articles 1, 2, 16)**

The U.S. government, in the aftermath of the 9/11 attacks, decided to fight terrorism by picking and choosing what principles of humanitarian and human rights law to apply. “There was a before-9/11 and an after-9/11. After 9/11 the gloves came off,” testified Cofer Black, former director of the CIA’s counterterrorist unit, in prepared testimony to Congress in 2002.<sup>36</sup> The declassification of a series of legal memoranda by high-ranking legal officials in the executive branch made it clear that the gloves did come off in the government’s response to terrorism.

The torture and abuse of detainees described below was carried out pursuant to policies and practices devised at the highest levels of the U.S. government.<sup>37</sup> The abuse of detainees in U.S. custody was facilitated by the government’s decision not to apply the Geneva Conventions. The government further ignored the fact that, irrespective of the Geneva Conventions, all detainees are protected by analogous provisions in the Convention Against Torture, the International Covenant of Civil and Political Rights, and by customary international law.

Torture and cruel, inhuman or degrading treatment or punishment are prohibited at all times under human rights law, even in war or when fighting terrorism. Article 2(2) of the Convention Against Torture specifically states 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 justification of torture.” The International Covenant of Civil and Political Rights similarly prohibits a state party to derogate from its obligations not to engage in acts of torture and other cruel, inhuman or degrading treatment or punishment even “in times of public emergency which threatens the life of the nation.”<sup>38</sup> The prohibition of cruel, inhuman or degrading treatment at all times is

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<sup>35</sup> Edward Alden, *Bush statement appears to contradict anti-torture pledge*, FINANCIAL TIMES, Jan. 6, 2006, at 6.

<sup>36</sup> *Pre 9/11 Intelligence Failures: Hearing before the U.S. House and Senate Intelligence Committees*, 107th Congress (2002) (statement of Cofer Black, former Director of the CIA's Counterterrorist Center).

<sup>37</sup> *A Guide to the Memos on Torture*, NY TIMES, [www.nytimes.com/ref/international/24MEMO-GUIDE.html](http://www.nytimes.com/ref/international/24MEMO-GUIDE.html); see also Annex B.

<sup>38</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), Art. 4, 21 UN GAOR, 21st Sess., Supp. No. 16, at 52, UN Doc. A/6316 (1966) (entered into force Jan. 3, 1976) (hereinafter “ICCPR”), available at <http://www.ohchr.org/english/law/pdf/ccpr.pdf>. The U.N. Human Rights Committee has said that the prohibition on torture and cruel, inhuman or degrading treatment is a peremptory norm of international law, non-derogable and binding on all states. U.N. Human Rights Committee, *General Comment 29 (States of Emergency, Article 4) in Compilation of General Comments and General Recommendations Adopted By Human Rights Treaty Bodies*, 13, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001), available at <http://www.hri.ca/fortherecord2001/documentation/tbodies/ccpr-c-21-rev1-add11.htm>; U.N. Human Rights Committee, *General Comment 20 (Article 7)*, available at [http://www.unhchr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/\\$FILE/G0441302.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/$FILE/G0441302.pdf).