

## RESPONDING TO TORTURE: SOME RELEVANT OBSERVATIONS

By

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Policies must operate within the bounds of law. No exemptions are allowed to war, terrorism, or torture.

Effective military operations require the gathering of information on the enemy. The means, particularly with respect to prisoners of war, are not unlimited. The Third Geneva Convention of 1949, in Articles 3, 13, and 17 imposes constraints. In Article 3(c) there is a prohibition against "outrages upon personal dignity and degrading treatment." Article 13 states that prisoners of war "must at all times be humanely treated," their health not be "seriously endangered," and they must be "protected against acts of violence and intimidation." Article 17 recites that "No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever." Refusals to answer questions must not result in threats, insults, or exposure to unpleasant or disadvantageous "treatment of any kind."

The 1984 Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment refined the acts constituting torture. The Convention defined torture in Article 1 as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person..." This Article identifies the purposes for which the torture is applied, by whom, what is excluded, and limitations.

In the words of the agreement the purpose of a wrongful act is to obtain from the person "or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind..." This applies "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." Excluded from torture is "pain or suffering arising only from, inherent in or incidental to lawful sanctions." Article 1 also provides if both operative international instruments or instances of

national legislation exist that the terms having “wider application” are to prevail.

The Convention was signed by the United States on April 18, 1988. Following ratification by the President it entered into force for the United States on November 24, 1994. (NOTE: The Convention stems from General Assembly Resolution 39/46, Annex, December 10, 1984. It appears in U. S. Treaty Document 100-20 and in draft form in 23 ILM 1027 (1984).) By mid-year 2004 it had been signed by 131 countries. However, 17 States had attached reservations. These include Afghanistan, France, Israel, Ukraine, and the United States. Thirty-four States had filed declarations identifying special views. These include Bulgaria, Canada, Cuba, France, Turkey, Ukraine, United Kingdom, and the United States. States accepting the original document without qualifications include Belgium, Brazil, Germany, Japan, the Russian Federation, and Sweden. The United States in 1988 added a series of “understandings” further qualifying the original agreement. Iraq is not a party.

Every party is obliged to make all acts of torture offenses under its criminal law. The United States Code (NOTE: last updated January 8, 2004.) in Part I (Crimes), Chapter 113C (Torture), Section 2340 contains critical definitions. “Torture” is defined to mean “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.” Severe mental pain or suffering means “the prolonged mental harm caused by or resulting from (A) The intentional infliction or threatened infliction of severe physical pain or suffering; (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses of the personality; (C) the threat of imminent death; or (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.” The United States is defined to include “all areas under the jurisdiction of the United States including any of the places described in sections 5 and 7 of this title and section 46501 (2) of title 49.

Section 5 defines the United States in a territorial sense. Included are “all places and waters, continental or insular, subject to the jurisdiction of the United States, except the Canal Zone.” Section 7 spells out the “Special maritime and territorial jurisdiction of the United States.” Included in this category are ocean areas, vessels registered in the United States, guano islands, government and citizen owned aircraft operating in specified offshore areas, spacecraft registered in the United States, places outside the jurisdiction of any nation, foreign naval vessels scheduled to depart from or arrive in the United States when the offense is committed against a U. S. national, and U. S. diplomatic, consular, and military missions or entities. The Section also stipulates that jurisdiction extend to “Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof...” This would seem to include the U.S- Cuban leasehold relating to the Guantanamo Naval Station. Section 46501 (2) refers to aircraft. Section 46502 governs aerial piracy. The statute does not refer to areas under the “control” of the United States.

The jurisdictional status of the Guantanamo Bay Base was clarified in the Supreme Court case of *Rasul et al. v. Bush*, President of the United States on June 28, 2004 (NOTE: No.03-334). The petitioners, non-U. S. nationals, alleged they were being detained unlawfully following their capture in Afghanistan. They contended they had not been combatants and had not committed terrorist acts. They pointed to the fact they had been in custody since early 2002 and argued that they were entitled to the guarantees set out in the U. S. constitution. The February 23, 1903 Lease Agreement between the United States and Cuba states that “the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over [the leased areas]” while “the Republic of Cuba consents that during the period of occupation by the United States...the United States shall exercise complete jurisdiction and control over and within said areas.” The majority opinion relied on a 1973 Supreme Court holding that “the prisoner’s presence within the territorial jurisdiction of the district court is not an “invariable prerequisite” to the exercise of district court jurisdiction under the federal habeas corpus statute.” In a concurring opinion Justice Kennedy observed that the Naval Base “is in every practical respect a United States territory, and it is one far removed from hostilities.” In their dissent Justices Scalia and Thomas urged that access to the writ of habeas corpus was available to persons within the territorial borders of the United States. They concluded that Congress would have to amend

28 U.S.C. 2241 in order for the Court to expand the scope of jurisdiction beyond U. S. territory. While the facts in this case relate to the status of the petitioners as either combatants claiming prisoner of war status or “unlawful non-combatants” and alleged terrorists, it can be argued that it has application to aliens practicing acts of torture against U. S. citizens in areas beyond the jurisdiction or control of the United States. For U. S. citizens either the sections of the U. S. criminal code recited above and the federal Bill of Rights, notably the Fifth and the Eighth Amendments, as extended to state prosecutions by the 14<sup>th</sup> Amendment, or the Articles of War applicable to military personnel, are relevant to prosecutions.

Section 2340B, added on April 30, 1994 (NOTE: Pub. L. 103-236, title 506(a), 108 Stat. 464.) is entitled “Exclusive remedies.” It provides “Nothing in this chapter shall be construed as precluding the application of State or local laws on the same subject, nor shall anything in this chapter be construed as creating any substantive or procedural right enforceable by law in any civil proceeding.”

#### Key Provisions of the 1984 Convention

Among the important provisions of the agreement is the duty, set forth in Article 10, of a party to provide training on torture to all persons who may be involved in the holding of individuals for treatment or interrogation for involvement in torture. Under Article 11 each party is to engage in a systematic review of its rules and practices in order to prevent torture. Article 12 calls for all parties to engage in prompt and impartial investigations of acts of torture. Article 13 requires parties to hear claims of persons who assert they have been tortured. Article 14 obliges a party to establish within its legal system means for rehabilitation and compensation when torture has been practiced against a victim. In these articles reference is made to territory under the “jurisdiction” of a party. The same is true for Article 16 dealing with the critical role of a party to prevent torture. If the term “jurisdiction” is to be construed as not also extending to “control,” which would extend the territorial area in which a signatory would be allowed to impose its authority, including the application of relevant sanctions, the utility of the agreement will have been diminished.

#### The Senate and the 1984 Convention

The members of the Senate Committee on Foreign Relations traditionally have taken a deep and abiding interest in proposals for international agreements submitted by the executive department. This has resulted often in extensive hearings in which affected interests make careful presentations. Members of the Committee make a public record of their preconceptions and preferences. While unable to rewrite the terms of an agreement they are able to record partisan outlooks through the adoption of reservations and declarations as identified in the 1969 Vienna Convention on Treaties and through the further employment of understandings pursuant to customary international law. When a President ratifies an international agreement containing Senate-inspired preferences or interpretations he adopts the conditions sponsored by the Senate.

The Committee's prerogative, subject to the approval of the Senate, has often resulted in a considerable modification of the force of the agreement, as happened, for example, to the 1948 Genocide Convention. In both agreements some Senators feared that via the treaty process the federal government would usurp functions reserved by the Constitution to the states and also that U. S. sovereignty would be constrained.

### Senate Reservations

Initially three reservations to the Torture Convention were set forth. The first, which allowed for U. S. implementation only to the extent that it "exercises legislative and judicial jurisdiction over matters covered..." Further, taking into account the federal system of states, referred to as "constituent units," the Committee conditioned its acceptance for such units only to the extent that they "exercise jurisdiction over such matters," and subject to the announced purpose of the federal government to take action allowing state and subordinate governments to "take appropriate measures for the fulfillment" of the Convention. This formulation was rejected by the full Senate on October 27, 1990 when in reviewing the federal-state relationship it determined that "this Convention shall be implemented by the United States Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered by the Convention and otherwise by the state and local governments. Accordingly, in implementing Articles 10-14 and 16, the United States Government shall take measures appropriate to the Federal system to the end that the competent authorities of the

constituent units of the United States of America may take appropriate measures for the fulfillment of the Convention.” (NOTE: Amendment No. 3201, October 27, 1990).

This reservation was addressed to the possibility that prosecutions in the United States might be addressed in both Federal and state courts to the extent they possessed jurisdiction. This concern was based on the possibility that both levels of government in a torture case might attempt to prosecute a given defendant under their own laws.

When the accused is an alien it could result in a failure, as has occurred recently, to provide the notice of prosecution required under the 1963 Vienna Convention on Consular Relations. On June 27, 2001, a case was decided by the World Court brought by Germany alleging that Arizona had failed to provide notice, as required by Article 36(1) of the agreement, of the prosecution of German nationals who were subject to a death sentence. Finding that the notice of the prosecution had not been made the Court directed the United States to comply with the terms of the treaty and to pay compensation to the families of the prisoners. Arizona, and the United States being responsible for Arizona’s failure, were both at fault. A second case, Mexico v. United States of America, involving the failure of the U. S. to give notice to Mexican consular officials of the prosecution of 54 Mexican nationals on death row, was decided by the Court on March 31, 2004.

It involved state court proceedings in nine different states between 1979 and 2004. The Court held that the United States “by means of its own choosing” should engage in a “review and reconsideration of the convictions and sentences of the Mexican nationals...” Further, the Court accepted “the commitment undertaken by the United States of America to ensure implementation of the specific measures adopted in performance of its obligations,” and found “that this commitment must be regarded as meeting the request of the United States of Mexico for guarantees and assurances of non-repetition.” (NOTE: Case Concerning Avena and Other Mexican Nationals.” 43 ILM 581, 624 (2004).) One way to overcome the prospect of violations of the Vienna Convention would be for the United States to act promptly to bring the first prosecution, if that were possible, thus preempting the states from the consequences of failing to conform to the Convention. Another

would be for the United States to monitor more closely the manner in which the states engage in the administration of justice.

The second Senate reservation applied to Article 16 which created the duty of a party to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity. The United States conditioned this Article so that it would have application only to the “cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.”

The Senate’s third reservation applied to Article 30(2) which dealt with procedures for disposing of interpretations of the agreement, including a referral to the World Court. The United States rejected the jurisdiction of that tribunal but stated it would consider on a case by case basis a reference of a matter to arbitration or to the Court.

In the eight understandings announced by the Senate one dealt with the meaning to be assigned to torture as set forth in Article 1. “Torture” had to be “specifically intended to inflict severe physical or mental pain or suffering,” as set forth in the agreement, and further that such pain or suffering referred to “prolonged mental harm caused by or resulting from: (1) the intentional infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.” (NOTE: [thomas.loc.gov/cgi-bin/ntquery/D?trtys:./temp/-trtysinD8n1Z;;](http://thomas.loc.gov/cgi-bin/ntquery/D?trtys:./temp/-trtysinD8n1Z;;).) This understanding was adopted in Title 18, Section 2340 of the United States Code. (NOTE: Supra.)

This understanding was implemented by the statement that such acts of torture must apply only to acts “directed against persons in the offender’s custody or control,” that the term “sanctions” included “judicially imposed sanctions and other enforcement actions authorized

by United States law or by judicial interpretation of such law provided that such sanctions or actions are not clearly prohibited under international law.” On October 27, 1990 the Senate added: ”Nonetheless, the United States understands that a State Party could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture.” ( NOTE: Amendment No. 3202).

In an abundance of caution the Senate attached additional understandings to the agreement. In number four the term “acquiescence” appearing in Article 1 was interpreted to require “that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.”

Number five referred again to Article 1 where the United States indicated that “noncompliance with applicable legal procedural standards does not per se constitute torture.” The sixth understanding referred to the terms of Article 3 which provided “where there are substantial grounds for believing that he would be in danger of being subjected to torture” to depend on whether “it is more likely than not that he would be tortured.”

The seventh responded to the terms of Article 14 relating to rehabilitation and reimbursement. It requires “a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party.” The last of the understandings related to the imposition of the death penalty. It stated that the United States “understands that international law does not prohibit the United States from applying the death penalty consistent with the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States, including any constitutional period of confinement prior to the imposition of the death penalty.”

Two declarations were added to the foregoing. The first stated that Articles 1-16 inclusive were not self-executing. A significant provision of the Convention called for the creation of a Committee consisting of impartial persons to receive complaints respecting the existence of torture. On this subject the United States declared pursuant to Article 21 (1) that it “recognizes the competence of the Committee against torture to receive and consider communications to the effect that

State Party claims that another State Party is not fulfilling its obligations under the Convention. It is the understanding of the United States that pursuant to the above mentioned article, such communications shall be accepted and processed only if they come from a State which has made a similar declaration.”

As a further reflection of the Senate’s involvement and participation in the treaty process it directed the President not to “deposit [with the UN Secretary-General] the instrument of ratification until such time as he has notified all present and prospective ratifying parties to this Convention that nothing in this Convention requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.” (NOTE: Amendment 3203). This condition has resulted from U. S. membership in international organizations vested with taking administrative decisions, having universal operation, by a majority vote. This procedure is considered by the United States to violate the treaty-making process set forth in the Constitution. The foregoing directive was to be included in the instrument deposited with the United Nations. The “as interpreted by the United States” provision reflects the longevity of the Senate’s concern, voiced after World War II at the time of the debate over America’s acceptance of the compulsory jurisdiction of the International Court of Justice respecting the authority of that international tribunal. At that time the Connally Reservation or amendment was adopted to prevent the United States from being subject to the entire jurisdiction of the Court.

Treaty subjects which do not excite differences between the negotiating parties may not call for national reservations, interpretations, or declarations. On some topics States have agreed that there are to be no exceptions or qualifications. But, where States intent on preserving patterns of conduct imposed by their own laws, or where their concerns for national sovereignty are considered to be non-negotiable, in order to obtain the maximum amount of agreement, it is practical to allow for identified exceptions. When viewed in this light the conditions set forth by the United States may be considered reasonable. They tied the treaty terms to existing Federal legislation thereby clarifying the meaning to be given to critical provisions. In light of America’s federal system of government it was particularly important to identify the responsibilities of the constituent units with both the central government and the units supportive of the death penalty These considerations were

not allowed to produce an inconsequential agreement. Though short on procedures to prevent the practice of torture, this was soon to be corrected.

### The Optional Protocol of December 18, 2002

Resonating demands for the protection of Human Rights have emphasized the need for effective procedures to maximize this goal. The 1993 World Conference on Human Rights declared if torture is to be eliminated the first objective of States must be its prevention. On December 18, 2002, the UN General Assembly adopted Resolution 57/199 entitled "Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment." Protection of persons, would, in the terms of the Resolution, be "strengthened by non-judicial means of a preventive nature, based on regular visits to places of detention."

The Resolution, drafted as an international agreement, made provision for a Subcommittee to carry out the Protocol's objectives. To achieve these goals each signatory is to create a national preventive mechanism consisting of one or more visiting bodies. They are to inspect places of detention in signatory States to ascertain if detainees are or may be deprived of their liberty either by an official act, by the instigation of a public authority, or "with its consent or acquiescence."

The Protocol in Article 3 (2) defines deprivation of liberty. It "means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will or by order of any judicial, administrative or other authority."

The agreement makes provision for the composition of the Subcommittee, method of selection, and terms of office. It is authorized to act on behalf of the UN General Assembly. It will visit places where persons are believed to have been deprived of liberty under the above circumstances. It is empowered to publish restricted private and public annual reports. Parties must create one or more independent national preventive mechanisms. Federal systems of government may establish "decentralized units" to implement the national mechanisms.

Only those States which are parties to the 1984 Convention can become signatories. No reservations may be made. Twenty ratifications

are required for the agreement to enter into force. At the end of April, 2004, it had been ratified by three countries and signed by an additional twenty-two. They consist principally of English speaking and Nordic countries.

The agreement failed to identify the source for the funding of the Subcommittee. On September 8, 1992, the Conference of States Parties adopted an amendment providing that the members were to “receive emoluments from United Nations resources...” as decided by the General Assembly. The amendment, which contained the request that the Secretary-General “take appropriate measures to provide for the funding” of Subcommittee costs from the “regular budget” of the UN was adopted by General Assembly Resolution 47/111 on December 16, 1992.

#### Torture and the Federal Alien Tort Claims Act of 1789

The foregoing international agreements, the Federal statute defining torture and making it an offense, and the statutes of the International Criminal Tribunal for the Former Yugoslavia and of the International Criminal Tribunal for Rwanda in establishing crimes for which the courts have jurisdiction in which reference is made to torture, identify the importance of the crime and signal significant attention in the future. Particular focus will be placed on events occurring during armed conflict.

The statute of the Yugoslavian tribunal in which Article 2 dealt with grave breaches of the Geneva Conventions of 1949 made reference to torture or inhuman treatment and willfully causing great suffering or serious injury to body or health. Article 5 set forth a long list of crimes against humanity including murder, torture, and other inhuman acts. The jurisdiction of the Rwanda tribunal was more restricted, but it included crimes against humanity. It was not given jurisdiction respecting violations of the laws or customs of war.

One of the most pressing and sustained questions confronting American international lawyers is the meaning to be accorded to the 1789 statute. It allows claimants to sue in U. S. federal courts “for a tort only committed in violation of the law of nations or a treaty of the United States.” Much of the debate has centered on the term “law of nations,” and whether this applies only to the status of international law in 1789,

or whether it can include the expansion of international law since that date via customary processes and procedures. The Human Rights movement, with the incorporation into international law of many Human Rights principles and concepts, has resulted in legal proceedings on the part of individuals who contend that governmental action has been criminal as well as constituting a tort.

In the Alvarez-Machain case decided by the United States Supreme Court on June 29, 2004 involving a claim for damages resulting from an extraterritorial kidnapping the Court refused to extend the statute to cover this conduct since Congress had not adopted a statute or endorsed a procedure allowing for damages for such conduct. The holding has been construed by government lawyers as allowing for such action if the crime had been clearly identified by Congress. Opposing this outlook there is substantial support for the view that 18<sup>th</sup> century violations of customary international law, such as slave trading or torture, do meet the tests set forth in the opinion. These proponents also have included genocide, apartheid, and other widespread challenges to Human Rights as within the scope of the opinion. On the other hand, Justice Souter opined that the practical implications of the 1789 statute would allow only for a “modest” number of actions where the violations of international law are most evident. He stated that “other considerations persuade us that the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping.” This was addressed to the view of Justice Scalia that courts were not well-equipped to perform judicial functions in such matters. Since proof of torture and other inhuman acts has not presented difficulties to the Yugoslav and Rwanda courts it should not constitute a problem in the U. S. Federal courts.

With respect to claims stemming from torture it should be evident that they may be filed in United States federal courts based on existing federal legislation. Whether complaints based on the 1789 statute are to be allowed remains to be seen. Torture is by all means a more serious crime than kidnapping and the 1984 Convention could be read as confirming preexisting customary international law dating back to 1789. Litigation will provide the answer on how far ajar the door really is.

In these circumstances persons, including both U. S. citizens and aliens, held as detainees by the United States following their capture in Afghanistan or their arrest in the United States as terrorists, if they can

state a cause of action for torture, will undoubtedly sue the perpetrators and the U. S. government under existing tort law. In the recently decided U. S. Supreme Court case of Hamdi v. Rumsfeld a U. S. citizen obtained a ruling he was entitled to have access to the federal judicial process to challenge his detention. In the face of the President's decision that alleged terrorists could be held for interrogation without fixed time limits, Justice O'Connor held "It would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his government."

### Torture and Inhuman Treatment of Detainees and Prisoners of War

The relevance of the 1949 and the 1984 Conventions to Al Qaeda, Taliban detainees, and to Iraqi prisoners of war has been acknowledged by President Bush. In a February 7, 2002 Memorandum to U. S. officials he stated: "I hereby reaffirm the order previously issued by the Secretary of Defense to the United States Armed Forces requiring that detainees be treated humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva." On June 2, 2004 in a statement to NATO leaders, in which they joined, the promise was made by the President to accord "full respect" to the Geneva Convention for prisoners of war in Iraq.

Against these statements must be weighed the facts and allegations relating to prisoners in U. S. custody in Abu Ghraib, other prisons in Iraq, and at the Guantanamo Naval Base (NOTE: I wish to express my thanks to Charles B. Gittings for calling to my attention the article in U.S. News and World Report of July 19, 2004 on conditions in the prison). In order to maximize the amount of information supplied in these places policy memos to offer guidance in the conduct of interrogations were prepared at high levels in Washington. They focused on proposed methods, including "tough procedures," or "harsher methods," which would be both effective and lawful. Conduct was identified considered to be border line or which crossed into areas of prohibited conduct.

When leaked to the press it became evident that the proposals were ambiguous and contradictory. One White House lawyer called for strict compliance with the Geneva requirements in Iraq because the war was against a traditional State. This was followed by the release on June 22, 2004 by the White House and the Department of Defense of detailed,

but not necessarily complete documents relating to current interrogation procedures. It was reported, for example, that a letter from the Department of State legal adviser to the Department of Justice containing highly critical comments on views expressed relating to the relevance of the Geneva Convention was omitted. (NOTE: Washington Post, AO7, June 24, 2004).

One of the released memos, authored in part by John C. Yoo, a Department of Justice lawyer, dated August 1, 2002, dealt with the definition of torture under federal laws. The analysis focused on the different views contained in the position paper and the definition of torture contained in the 1984 Convention. At issue was the meaning to be given to “specific intent” to inflict “severe physical or mental pain or suffering.” In his view there was a need for analysis of these terms since the words were “rare in the federal code, no prosecutions have been brought under it, and it has never been interpreted by a court.” (NOTE: “A Crucial Look at Torture Law,” Los Angeles Times, B11, July 6, 2004.) Following his research he concluded that “the United States intentionally [had] defined torture strictly” and that this was consistent with the policies adopted by the Reagan and first Bush administrations.

Despite the need for a strict interpretation Professor Woo observed that Congress had not precluded a country’s right to rely on “self-defense and necessity” despite the language of the Torture Convention “to the contrary.” Supporting this observation was the assertion of the highly disputed claim that in extreme wartime situations a Chief Executive can take actions going beyond the terms of national statutes. In his view his memo identified constitutional options open both to the Congress and to the President. His own outlook was expressed: “A lawyer must not read the law to be more restrictive than it is just to satisfy his own moral goals, to prevent diplomatic backlash or to advance the cause of international human rights.”

Concern for interrogation practice was reflected in a Department of Defense draft “Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal Historical, Policy, and Operational Considerations” prepared in 2003. (NOTE: [wsj.com/public/resources/documents/military\\_0604.pdf](http://wsj.com/public/resources/documents/military_0604.pdf).) The cumulative effect of the memos prepared by the Departments of Justice and Defense and in the White House created uncertainty as to the meaning of the Geneva and Torture Conventions and federal laws. This led to

equivocal statements within the Department of Defense which in turn produced a less than strict mental framework for the highest and lower level U. S. military personnel.

At the time of the June 22, 2004 release of the governmental memos President Bush stated: "I have never ordered torture," and that the practice of torture was inconsistent with American values. Nevertheless, at the bottom of the operational command structure, possibly resulting from a seeming indifference or confusion on the part of higher leaders, and more in evidence in Iraq and in Afghanistan than at Guantanamo, there were numerous instances of shockingly cruel, degrading and inhumane conduct by Americas acting in official capacities. More difficult to determine is whether such conduct may be characterized as U. S. policy.

In light of the prosecutions of the personnel who engaged in the prohibited conduct it is evident that their actions have been perceived of as contrary to both law and policy. Any culture providing rewards for the use of torture or brutal interrogation procedures to obtain withheld military information, like the "body count" culture of the Vietnam War, having transgressed legal boundaries, inevitably must lead to prosecutions. Absent a firm understanding of the illegality of torture, however defined, the moral grounds or the prosecution of Saddam Hussein, and all others who entertain similar outlooks, would be effectively eliminated.

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Dr. Christol's INTERNATIONAL LAW AND U.S. FOREIGN POLICY will be published at the end of August. The Chapter on "International Criminal Tribunals" deals extensively with the International Criminal Tribunal for the Former Yugoslavia including the charges of torture. His professional background is recorded at aol, Carl Q. Christol, search.

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