SCHIZOPHRENIC VALUES:

The Use of Torture and Cruel-Inhuman-Degrading Treatment

by the United States, Post-9/11

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August 2009

INTRODUCTION

The concept of "human rights" is unique to the modern era. The United States was founded on principles of human rights that included "life, liberty and the pursuit of happiness" (the Declaration of Independence). While such rights were not fully available to women and people of color until late in the 20th century, America's cultural and military values dictated that the behavior of our military and the treatment of POWs adhere to a high standard. This can be traced back to policy established by Gen. George Washington for the treatment of POWs during the Revolutionary War, even though not emulated by the British.[1]

"'The very idea of humane warfare in modern times started here in the United States,' notes Scott Horton, an international law expert who is president of the International League for Human Rights. 'We set down the ground rules,' concurs David Rivkin, a contributing editor at the National Review and a former Justice Department lawyer under Presidents Ronald Reagan and George H.W. Bush. 'And the rest of the world followed.'"[2]

In 1863, President Abraham Lincoln signed General Orders No. 100, also known as the Lieber Code for the Columbia University law professor who drafted it. The Lieber Code "... defined minimum standards for treating prisoners of war and explicitly outlawed all forms of

1 Alex Markels, "Will Terrorism Rewrite the Laws of War?" NPR, http://www.npr.org/templates/story/story.php?storyId=5011464, accessed 7/31/09.
2 Ibid.

cruelty [specifically], 'the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions.'" Ruth Wedgewood, a law professor at Johns Hopkins University who sits on the United Nations' Human Rights Committee, says the code was groundbreaking "'because it guaranteed the right of enemy soldiers to surrender and be treated humanely, which was no small thing at the time.'... And it soon became a model for similar drives to codify the rules of war in Europe."[3]

Lincoln's General Orders No. 100 was followed by the Geneva Convention of 1864, the Hague Conventions (1899 and 1907), the Universal Declaration of Human Rights (1948), the Geneva Conventions (1949), the United Nations Convention Against Torture (1984), the Istanbul Protocol (UN, 1999), and various court decisions in the U.S. and abroad that have defined and proscribed torture and other kinds of "cruel, inhuman and degrading" (CID) treatment of captured enemy combatants and detainees alike.

In particular, from the beginning of the 20th century onward, American military codes of conduct continued our tradition of treating others (whether civilians or enemy combatants) with humanity and dignity. As the U.S. Army Training Manual (1992) specified:

> "The [Geneva Conventions] and U.S. policy expressly prohibit acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation. Such illegal acts are not authorized and will not be condoned by the US Army. Acts in violation of these prohibitions are criminal acts punishable under the UCMJ [Unified Code of Military Justice]."[4] (Emphasis added.)

The Manual also gives examples of physical and mental torture (both types of which are now known to have been used on detainees in the post-9/11 "war on terror"):

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3 *Ibid*.

4 Class handout from International Law and the War on Terror (Prof. Steven Barela), The Korbel Graduate School of International Studies, Denver University, June-July 2009.

Physical

- Electric shock.
- Infliction of pain through chemicals or bondage (other than the legitimate use of restraints to prevent escape).
- Forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time.
- Food deprivation.
- Any form of beating.

Mental

- Mock executions.
- Abnormal sleep deprivation.
- Chemically induced psychosis.

Nonetheless, torture and CID were allegedly used covertly by the CIA even before 9/11, according to University of Wisconsin-Madison history professor Alfred McCoy:

> "By failing to repudiate the CIA's use of torture, while adopting a UN convention that condemned its practice, the United States left this contradiction buried like a political land mine ready to detonate with such phenomenal force, just 10 years later, in the Abu Ghraib scandal."[5]

This "schizophrenic" failure, coupled with the advent of the "unitary executive" principle, set the stage for potential abuse. "Unitary executive" — an idea that became popular in the Reagan era — maintains that the executive branch has more authority than the other branches and, therefore, can issue "signing statements" that are fully authoritative on their own.[6]

In short, a solid body of international and domestic law prohibiting the use of torture and CID was overturned in the aftermath of the unprecedented terrorist attacks of Sept. 11, 2001. For the first time in U.S. history, loopholes in domestic (U.S.) law were sought so that the Presidency could issue orders allowing CID treatment toward detainees suspected of terrorist activity or con-

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5 "The U.S. Has a History of Using Torture," Alfred McCoy, Ph.D., 12/4/06, History News Network (George Mason Mason University), http://hnn.us/articles/32497.html, accessed 7/31/09.

6 Class notes, International Law & the War on Terror.

nections; and, in some cases, outright torture (as defined by international law). These loopholes were found by creating a third category of persons — neither civilians nor enemy combatants — who were allegedly outside of the protections of the law.

But in order to understand those alleged loopholes and the egregious practices that followed, a review of the pertinent law is in order.

A Legal Definition of Torture

Until the horrors of World War II were fully revealed, there seemingly was little concern about, much less motivation for, creating a legal definition of torture. But all that changed with the founding of the United Nations and the codification of a body of international law (along with, increasingly, its ratification domestically by various nation-states). Article 1.1 of the United Nations Convention Against Torture defines torture as:

> "Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or 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."[7]

Domestic (U.S.) and International Law on the Use of Torture

U.S. Constitution

Article I, paragraph 9(2), of the Suspension Clause says: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion, the public safety shall require it."

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7 United Nations Convention Against Torture, Article 1.1.

The following amendments to the Constitution contained in the Bill of Rights clearly prohibit cruel, degrading and inhuman treatment along with any form of torture:

- "4th Amendment -- ... specifically requires search and arrest warrants be judicially sanctioned and supported by probable cause.
- 5th Amendment -- no person shall 'be deprived of life, liberty, or property without due process of law'
- 8th Amendment -- bars use of 'cruel and unusual punishment' as a form of criminal penalty under any and all circumstances."[8]

And Article VI (2) explains the applicability of international law to the U.S.:

> "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every States shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding."

Therefore, historically, there has been a recognition of the validity of international law when incorporated into U.S. law by Congress (as the United Nations Convention on Torture was).

Ex Parte Quirin, 317 U.S. 1 (1942)

This decision introduced the term "unlawful combatant" — especially in regard to spies and lone enemy combatants who cross lines to destroy life or property. They can be tried and punished by military tribunals only. This legal precedent should have been (but was not) applied to the foreign nationals detained after September 11, 2001, on suspicion of terrorist activity against the United States.

International Law — a Four-Part Framework

- International Humanitarian Law (the Law of War: the Geneva Conventions, 1949).[9]

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8 Powerpoint presentation by Prof. Steven Barela, International Law and the War on Terror.

9 3rd Geneva Convention—protections for prisoners of war; 4th Geneva Convention—protections for civilians; and Common Article 3 — which defines the baseline of minimum protection for all persons in any conflict and specifically prohibits "cruel ... humiliating and degrading treatment."

- The United Nations has universally applicable standards prohibiting torture: the Universal Declaration on Human Rights (UDHR), the ICCPR[10], the Convention Against Torture (CAT), and Standard Minimum Rules for the Treatment of Prisoners (SMRTP) — along with state obligations and UN bodies and mechanisms to ensure protection against torture.
- Regional Organizations (Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, European Court of Human Rights, African Commission on Human Rights, European Committee for the Prevention of Torture).
- The International Criminal Court (established by the Treaty of Rome, 1998).[11]

Nigel Rodley, the U.N. Special Rapporteur on Torture, has said of the existing body of law:

> "The prohibition of torture or other ill-treatment could hardly be formulated in more absolute terms.... No possible loophole is left; there can be no excuse, no attenuating circumstances. In the words of the official commentary on the text by the International Committee of the Red Cross (ICRC), no possible loophold is left; there can be no excuse, no attenuating circumstances."[12]

Late 20th-Century Legal Decisions and Their Implications

- Ireland v. United Kingdom, Case No. 5310/71, Judgment of the European Court of Human Rights, 1978. Prohibits torture and "cruel, inhuman and degrading treatment" (CID) — specifically, wall standing, hooding, subjection to noise, sleep deprivation, and deprivation of food and drink.[13]
- The Istanbul Protocol (U.N.), 1999.[14]
- Selmouni v. France, 1999 — The Court characterized the Torture Convention as a "living instrument which must be interpreted in light of present-day conditions." It repudiated the previous threshold of "severity" for defining torture, stating, "... certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in the future."[15]

Post-9/11: Executive Branch Run Amok

The decision to abandon conventional interpretations of the applicable laws on torture and CID post-9/11 was based on the belief that there was a grave and immediate threat of more

10 Article 9, esp. paragraph 4 — Prohibition of Arbitrary Arrest or Detention. If you are holding someone against their will, they have the right to a judicial review. A state of emergency does not allow you to suspend habeus corpus indefinitely.

11 Class notes, International Law and the War on Terror.

12 Barela Powerpoint presentation, International Law and the War on Terror.

13 Tom Farer, Confronting Global Terrorism and American Neo-Conservatism, footnote 90, pp. 105-106.

14 A manual on the effective investigation and documentation of torture and other CID treatment.

15 Farer, p. 107.

such events. The urgent need for actionable intelligence led to the question of allowable interrogation methods.[16] Whatever the motivation(s) of those in the Executive Branch (fear? — as Tom Farer maintains?[17]), they promoted the idea of a "ticking time bomb" that needed to be defused at any cost. As the Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights points out:

> "Terrorism sows terror, and many States have fallen into a trap set by the terrorists. Ignoring lessons from the past, they have allowed themselves to be rushed into hasty responses, introducing an array of measures which undermine cherished values as well as the international legal framework carefully developed since the Second World War. These measures have resulted in human rights violations, including torture, enforced disappearances, secret and arbitrary detentions, and unfair trials."[18]

However, when we examine the theoretical "ticking time bomb" scenario versus "torture on suspicion" (the latter that is really the issue, not the former), we see that the TTB is dangerously flawed because we are given only two choices: (1) torture or (2) allow many to die. The assumption is that all factors are completely knowable,[19]whereas the reality is that this scenario is never reducible to a knowable outcome. Free will operates with human beings, no matter what. And there are other laws of the universe that can suddenly change the seemingly certain outcome of a ticking bomb, an incubating disease, a lethal poison, or a hijacked vehicle.

So, the terrorist attacks had their intended purpose, and an appalling over-reaction to them on the part of the Executive Branch brought tremendous harm to the lives of detainees, their families and even those who served as prison guards and interrogators.

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16 Ibid., p. 84.
17 Ibid., p. 84.
18 From the cover of the Report.
19 Class notes, International Law and the War on Terror.

By November 2001, former Vice President Dick Cheney had Administration attorneys draft an internal memo that created the military commissions — "Detention, Treatment and Trial of Certain Non-citizens in the War Against Terrorism" — and persuaded then-President Bush to sign it during a one-on-one lunch (Nov. 16, 2001, military order). This memo gave judicial review authority exclusively to military commissions and effectively eliminated the role of the judicial branch of government.[20]

But there was a big obstacle in the way: the Convention on Torture had been incorporated by Congress into U.S. law. So the Administration had the Department of Justice look for loopholes. As Tom Farer points out in Confronting Global Terrorism and American Neo-Conservatism, "The first formal statement of the Bush Administration's interpretation of the Torture Convention as incorporated into American law [was] contained in a memorandum addressed to the President's Counsel by the Department of Justice (Jay S. Bybee, Re: Standards of Conduct for Interrogation under 18 US C 2340-2340A, August 1, 2002). It defines torture as:

> 'Physical pain ... equivalent in intensity to the pain accompanying serious physical injury, such a organ failure, impairment of bodily functions, or even death. For purely mental pain or suffering to amount to torture ... it must result in significant psychological harm of significant duration, e.g. last for months or even years. [In sum], we conclude that the statute, taken as a whole, makes plain that it prohibits only extreme acts.' (Emphasis added.)[21]

Using the Bybee memo, the Bush Administration made a dramatic departure not only from long-established statutes of international law but, also, of clear prohibitions against torture and CID as codified in U.S. law and the Unified Code of Military Justice.

Why did the Bush Administration feel it was justified in doing so? Berkeley Law professor John Yoo's memo for the Defense Department in March 2003 said that the president's author-

20 Ibid.
21 Farer, p. 99.

ity is unlimited (and solitary) as to determining terrorist threats, the amount of military force to be used in response, or the method, timing and nature of the response. In other words, now it was the role of the legislative branch that was being eliminated while greatly enlarging the "unitary executive" principle established by previous administrations.[22]

However, the memo's conclusion that the use of certain CID procedures would be legally permissible in interrogations of detainees was not entirely without merit. In the Ireland v. United Kingdom case adjudicated by the European Court of Justice in 1978, the Court held that various CID procedures did not, individually, constitute torture but only when used collectively as part of a systematic program of coerced interrogation.[23] In any case, "in the months that followed, Administration attorneys translated their president's otherwise unlawful orders into U.S. policy into three controversial, neo-conservative legal doctrines: (1) the president is above the law, (2) torture is legally acceptable, and (3) the US Navy base at Guantanamo Bay is not US territory."[24]

A kind of moral and legal schizophrenia ensued as Americans watched "... the United States Congress make legal that which in WWII the United States heroically fought to make immoral ...."[25]

Moreover, military officers and military interrogators have consistently maintained that torture does not work, produces highly compromised, unreliable results, and is likely to backfire:

> "Experience indicates that the use of prohibited techniques is not necessary to gain the cooperation of interrogation sources. Use of torture and other illegal methods is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the interrogator wants to hear.... Revelation of use of torture by US personnel will bring discredit

22 Class notes, International Law and the War on Terror.
23 Farer, p. 106.
24 Alfred McCoy, "The U.S. Has a History of Using Torture."
25 Larisa Alexandrovna, "Republican Torture Laws Will Live in History," 10/2/06, Alternet, http://www.alternet.org/rights/42414, accessed 7/31/09.

> upon the US and its armed forces while undermining domestic and international support for the war effort. It also may place US and allied personnel in enemy hands at a greater risk of abuse by their captors."[26]

SERE training (Survival Evasion Resistance and Escape training) for U.S. military personnel is based on the illegal exploitation of prisoners (primarily by Vietnamese Communists and North Koreans) in the past 50 years to get false confessions. More recently, Ibn al-Shaykh al-Libi was tortured after being captured in Pakistan, delivered to the CIA, and then taken to Egypt. He provided information cited by Bush and Powell that al-Qaeda members received biological weapons training in Iraq. But this later proved to be false information.[27] And just a few months ago (May 13, 2009), State Department official Philip Zekilow testified at a Senate Judiciary Committee hearing about the inefficacy and long-term counter-productivity of using torture to elicit information.[28] After all, we are not dealing with a mathematical equation. Torture on the basis of suspicion alone is not enough. And even when detainees who have a high probability of guilt are tortured, it often leads to cases that cannot be prosecuted.[29]Misuse of "probable cause" infects and corrupts the whole system of justice.

The following timeline gives the progression of key events in the U.S. post-9/11:

- 9/18/01: Authorization for Use of Military Force (to go into Afghanistan) is issued.
- 1/16/02: The first detainee arrived in Guantanamo.
- January 2002: Military officers in the field, FBI agents observing practices at Guantánamo, and military attorneys began to speak out about the abhorrent practices they were observing.[30]
- 6/24/04: The Rasul and Hamdi decisions (dealing with domestic law) were handed down by the Supreme Court.

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26 U.S. Army Training Manual, 1992.

27 Class notes, International Law & the War on Terror.

28 Carolyn Lockhead, "Interrogation Memos: Senators Hear Gripping Testimony."

29 "'We tortured [Mohammed al-] Qahtani [a Saudi national who allegedly was planning to participate in the 9/11 attacks]," said Susan Crawford. 'His treatment met the legal definition of torture. And that's why I did not refer the case' for prosecution." (Jan. 14, 2009, The Washington Post.)

30 Annotated Transcript of Torturing Democracy, Washington Media Associates, 2008.

- 7/7/04: In response, Executive Branch implemented the Combat Status Review Tribunals.
- 2005: Sen. John McCain (R-Arizona) sponsored legislation that became the Detainee Treatment Act, which prohibits not only torture but CID also.
- 6/30/06: Hamdan v. Rumsfeld — The issue before the Court was whether there was international law applicable to detainees in Guantánamo. The Supreme Court chose to interpret Common Article 3 according to the international interpretation (protection for all, regardless of the nature of armed conflict).[31]
- 2006: A Defense Department report conducted by Gens. Anthony Jones and George Fay found "highly probable" violations of the Geneva Conventions and the Torture Convention in Iraq, post-invasion.[32]
- August 2006: Fourteen detainees were transferred to Guantánamo — where they were interviewed by representatives of the International Red Cross — from overseas "black sites."
- 9/6/06: The Defense Department repudiated several interrogation techniques currently in use and forbade the U.S. troops to use them.[33]
- 10/17/06: President Bush asked Congress to pass a law giving legal congressional authorization to his military commissions (Military Commissions Act, MCA), which essentially stripped the courts of habeus corpus jurisdiction and forbade them to use foreign sources of law.
- 6/16/08: In the Boumediene decision (issue of constitutional law), the Supreme Court ruled that Congress violated the separation of powers when it enacted the MCA without providing adequate substitution for habeas corpus claims by foreign detainees.[34]

Lastly, but very significantly, military dissent at the highest levels (a very rare occurrence) escalated in the last two years of the Bush Administration[35]:

- "You continue to pursue a failed strategy that is breaking our great Army and Marine Corps. I left the Army in protest in order to speak out. Mr. President, you have placed our nation in peril." (Maj. Gen. John Batiste, 2007)
- Lt. Gen. Sanchez spoke of "a crisis in national political leadership." (2007)
- "There is no longer any doubt as to whether the current administration has committed war crimes." (Maj. Gen. Antonio Taguba, 2009)

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31 Class notes, International Law and the War on Terror: The commentary to the Geneva Conventions says: "Every person in enemy hands must have some status under international law. There is no intermediate status. No one can be outside the law." (Emphasis added.)

32 Farer, p. 103.

33 Farer, p. 101.

34 Class notes, International Law and the War on Terror. NOTE: The commonalities with the Rasul, Hamdan and Boumediene cases are: They all addressed foreign nationals who are not U.S. citizens; involved habeus corpus to some degree; and represented the judiciary trying to check executive branch power in regard to human rights violations.

35 Class notes.

Where Do We Go From Here?

Men wrongfully detained at Guantánamo and elsewhere have legal redress under the Convention Against Torture. There are others who are probably guilty, but they cannot be tried without betraying intelligence resources. Then there are some who are guilty, but information was obtained through illegal means. U.S. President Barack Obama may have to create a third category of persons who will be held long-term until hostilities cease. And hopefully Congress will strike down the body of Bush Administration legislation (the MCA and Detainee Treatment Act) on the basis of constitutional law.[36]

Notwithstanding spotlight on the recent transgressions of the Bush Administration, we are not alone. It is highly troubling that more than half of the world's nations and 80 percent of the G20 nations have practiced torture — and it must stop. All nation-states need to develop ways to protect individuals from torture and CID. Tools for doing so include:

- Relevant international legal standards
- Relevant ethical codes
- Legal investigation of torture
- General considerations for interviews
- Physical evidence of torture
- Psychological evidence of torture[37]

Conclusion

The fact that domestic U.S. law was successfully changed in order to accommodate CID treatment and torture does not excuse the Executive Branch "cowboys" who used vigilante tactics after America's 9/11 trauma. No one should be outside of the protections—or the consequences—of the law.[38] While the transgressors in the Bush Administration will be able to avoid

36 Ibid.

37 Class notes, International Law and the War on Terror.

38 Right after his public address to a shaken nation on September 11, 2001, President Bush gave his White House staff wide secret orders, saying, "I don't care what the international lawyers say, we are going to kick some ass."

domestic charges of criminal conduct, they're not off the hook in regard to international law, because the U.S. is and was a signatory to Geneva and other treaties when those laws were violated by the Executive Branch.

Since many, if not most, U.S. presidents before George W. Bush and his father, George H.W. Bush, served in the military before taking office; and since most of the "whistle blowers" about human rights abuses post-9/11 were military officers and JAGs, one has to wonder if the decisions made by President G.W. Bush and his direct reports would have been more humane and less reactionary had they had the benefit of having served under a military code of honor.

What happened in the first decade of the 21st century will be a stain on U.S. history and credibility. But, hopefully, the United States will own up to what was done during one Administration, learn from it, and take steps to ensure that it never happens again. In the meantime, terrorism and terrorist methods will continue to challenge the world for years to come. But we have a framework already in place to deal with both:

> "Seven years after 9/11, and sixty years after the adoption of the Universal Declaration of Human Rights, it is time for the international community to re-group, take remedial action, and reassert core values and principles of international law. Those values and principles were intended to withstand crises, and they provide a robust and effective framework from within which to tackle terrorism."[39]

(Alfred McCoy, "The U.S. Has a History of Using Torture.")

39 Cover of the Executive Summary of Assessing Damage, Urging Action: An initiative of the International Commission of Jurists, Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights.)

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