

Full Name: Guillaume Nicaise
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How satisfactory is the use of international law sources in the legal analysis of torture in the *Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*, 1 August 2002?

The 1st August 2002 Jay S. Bybee Memorandum to Alberto R. Gonzales is part of the so called “Torture Papers”¹, and has been characterized by the dean of Yale Law School as “the most clearly erroneous legal opinion I have ever read”.

This essay will try to understand what can justify a so harsh critic for a memorandum, analyzing the international law references employed by the Attorney General Bybee to justify its legal analysis of Torture.

In this dissertation, we will analyze first of all the Bybee’s interpretation of the Torture legal definition as stated by international settlements. Secondly, the attention will be focus on the integration of international law arrangements for torture into the US domestic legal system. Finally, we will oppose the ideals of international law agreements on torture and the self defense policy of the Bybee’s memo. To conclude, a negative judgment will be formulated on the adequate use of international law sources by Bybee in his memo.

1. The Bybee’s interpretation of the Torture legal definition

“While torture is universally prohibited, the definition of what constitutes torture remains very controversial”². The United Nations Convention Against Torture (UNCAT) defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person [...]”³. In his Memo, Bybee affirmed the obligation for his country to fulfill the UNCAT⁴, as USA ratified the Covenant in 1994⁵.

Nevertheless, Bybee established that acts of torture “must be of an extreme nature to rise to the level of torture within the meaning of Section 2340A and the UNCAT”⁶. He therefore states that the UNCAT prohibits only the most extreme acts⁷, getting this argument from the UNCAT’s text, ratification history and negotiating history, confirming that “Section 2340A reaches only the most heinous acts”⁸. But the ratification history of UNCAT Art. 1 demonstrates that “the UK and US proposals to qualify the intensity as extremely severe pain or suffering” were defeated⁹.

¹ **Greenberg** Karen J., **Dratel** Joshua L., *The torture papers: the road to Abu Ghraib*, University Press, Cambridge, 2005.

² **Rouillard** Louis-Philippe F., *misinterpreting the prohibition of torture under international law: the office of legal counsel memorandum*, 2006, p.12.

³ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. <http://www.hrweb.org/legal/cat.html> (10/01/10).

⁴ **Bybee** Jay S., *Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*, 1 August 2002, p.12.

⁵ **Waldron** Jeremy, *Torture and Positive Law: Jurisprudence for the White House*, Columbia Law Review Association Columbia Law Review, Vol. 105, No. 6 October 2005, p.1688.

⁶ **Bybee** Jay S., *Memorandum for Alberto R. Gonzales*, *ibid*, p.1.

⁷ **Greenberg** Karen J., **Dratel** Joshua L., *The torture papers: the road to Abu Ghraib*, University Press, Cambridge, 2005, p. xxvi.

⁸ **Bybee** Jay S., *ibid*, p.22.

⁹ **Nowak** Manfred, *What Practices Constitute Torture? US and UN Standards*, *Human Rights Quarterly*, Vol. 28, No. 4, 2006, p.821.

The Committee against Torture established that the integration of the UNCAT torture definition into the domestic legislation does not require a verbatim translation, but “must cover at minimum the same conduct covered by the UNCAT definition”¹⁰. However, for Ellis¹¹ and many scholars, Bybee diminishes the significance of the Torture definition, reducing the range of acts raising the level of torture. Bybee delineates torture so precisely that only conducts resulting in “death, organ failure or the permanent impairment of a significant body function” qualify¹².

As the Memo asserts it, the UNCAT (Preamble and Art. 16 of the UNCAT) established a distinction between torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CIDTP). Nevertheless, Bybee omitted to notify that both notions are illegal under international law¹³. Moreover, the formulation “which do not amount to torture” in Article 16 CAT specify that torture is a particularly serious and reprehensible form of CIDTP, but “does not necessarily mean that the intensity of the pain or suffering inflicted is the decisive criterion distinguishing torture from CIDTP”¹⁴.

Additionally, Bybee also forgot to mention the binding International Covenant on Civil and Political Rights (Article 7 and 9) and the third (Art. n°3, 17, 87, 130) and fourth (Art. n°3, 32, 147) Geneva Convention, or non-binding international instruments providing moral force and practical guidance to States, such as the Body of Principles for the protection of all persons under any form of detention or Imprisonment (principle 6), or the Basic Principles for the treatment of prisoners.

Bybee refers to the Ireland v. the United Kingdom case as the leading European Court of Human Rights to assert the difference between torture and CIDTP. However, this reference is anachronistic, as the case is dated from 1978 and defines Torture in reference to the United Nations Declaration on Torture (1975), “which is far different from the contemporary and applicable definition contained in the CAT”¹⁵. Referring to the Public Committee Against Torture in Israel v. Israel Case, Bybee omitted to mention that the Israeli Supreme Court did not intend to define the techniques used by the General Security Services as torture or not, but only the right to establish “directives regarding the use of physical means during interrogations” of terrorists suspects¹⁶.

2. The Bybee’s conception of the American legal commitments toward international obligations.

¹⁰ **Rodley Nigel, Pollard Matt**, *Criminalisation of torture: state obligations under the United Nations Convention against torture and other cruel, inhuman or degrading treatment or punishment*, European Human Rights law review, 2006, 119.

¹¹ **Ellis John Moon** van Courtland, *The Death of Distinctions: From 9/11 to Abu Ghraib*, Politics and the Life Sciences, Vol. 23, No. 2, September 2004, p.7.

¹² **Dean John W.**, *The torture memo by judge Jay S. Bybee that haunted Alberto Gonzales’s confirmation hearings.*, 2005. <http://writ.news.findlaw.com/dean/20050114.html>

¹³ **Rouillard Louis-Philippe F.**, *misinterpreting the prohibition of torture under international law: the office of legal counsel memorandum*, 2006, p.22.

¹⁴ **Nowak Manfred**, *What Practices Constitute Torture? US and UN Standards*, Human Rights Quarterly, Vol. 28, No. 4, 2006, p.818.

¹⁵ **Rouillard Louis-Philippe F.**, p.26.

¹⁶ *Ibid*, p.29.

For Bybee, the USA president is free to display its authority and, as Commander in Chief, can determine the interrogation and treatment of enemy combatants¹⁷. Bybee sustains that “the executive’s interpretation is to be accorded the **greatest** weight in ascertaining a treaty’s intent and meaning”¹⁸. Waldron corroborates that position, as the force and interpretation of international treaties for USA is entitled by the President of the United States, as a matter of U.S. constitutional law, and cannot be interpreted by non-US authorities¹⁹.

However, the United States is a party to the UNCAT and, as it is an international legal binding treaty, whether being or not self-executing, it affects the interpretation of U.S. law²⁰. Moreover, for Luban, “the Bybee Memo’s argument that the President ‘s commander-in-chief power allows him to authorize interrogation by torture regardless of the Torture Convention and the federal criminal statute against official torture [...] is a constitutional distortion”²¹. In fact, following Bybee’s reasoning, if “Congress may no more regulate the President’s ability to detain and interrogate enemy combatants [...]”²² it would mean that the President Commander in Chief does not have to follow neither treaties ratified by the Congress and that United States is no more regulated by the rule of law.

Furthermore, torture is part of peremptory norms that form *jus cogens*²³ and must be respected by all nations, even by the United States.

3. The dialectic between the ideals of international law and the self defense vision of Bybee’s memo.

According to article 18 of the Vienna convention on the law of treaties, “a state is obliged to refrain from acts which would defeat the object and purpose of a treaty when [...] it has expressed its consent to be bound by the treaty”²⁴. The United States ratified the UNCAT. The Article 2 (2) of the UNCAT stipulates 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 a justification of torture”²⁵. As The United States entered no reservations to Article 2(2) when it ratified the UNCAT, no “defense of a necessity”²⁶ can be invoke for legitimizing torture. Then, the argument that “Congress did not incorporate CAT article 2(2) into

¹⁷ **Bybee** Jay, *Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*, 1 August 2002, p.35.

¹⁸ *Ibid*, p.16.

¹⁹ **Waldron** Jeremy, *Torture and Positive Law: Jurisprudence for the White House*, Columbia Law Review Association Columbia Law Review, Vol. 105, No. 6 October 2005, p 1804.

²⁰ **Office of The United Nations High Commissioner for Human Rights**, *Combating Torture*, Human Rights fact sheet no. 4 (rev.1), Geneva, 2002, p.64.

²¹ **Greenberg** Karen J, *ibid*, *The torture debate in America*, Cambridge University Press, Cambridge, 2006, p.65.

²² **Jay S.**, *Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*, 1 August 2002, p.35

²³ *Al-Adsani v United Kingdom*, App. No. 35763/97, 2001, part 64.

²⁴ **Vienna Convention on the Law of Treaties**

http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

²⁵ **Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**. <http://www.hrweb.org/legal/cat.html>

²⁶ **Bybee** Jay, *ibid*, p.39.

section 2340²⁷, permitting then the defense principle, is not convincing. In fact, the General Comment No.24 highlights the importance of non-derogable rights, as the prohibition of torture, even in case of national emergency²⁸.

The Memo's necessity argument does not rely on regulations or statutes to justify its positions and only a few cases are cited but no one in support of its main points.

Conclusions

In conclusion, The Bybee Memorandum is biased, as the choice and interpretation of international law references is balanced towards a certain understanding of the torture definition. Moreover, the Bybee's emphasize on the strong constitutional powers attributed to the President of the USA in time of war, does not take enough consideration of international legal obligations. Furthermore, the idea of the necessity of defense is privileged over the principles of international law.

As Bilder underlines, foreign policy decisions are often highly political and there may be strong pressures on government lawyers to diminish the relevance of international law²⁹. However, the reasoning remains erroneous and Bybee failed to give candid legal advice and to inform their client about the state of the law of torture³⁰. Then the use of international law sources in this legal analysis is not satisfactory.

"The means may be likened to a seed, the end to a tree: and there is just the same inviolable connection between the means and the end as there is between the seed and the tree." P.26.for pacifists, M.K. Gandhi.2008. Hesperides Press

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²⁷ Ibid, p.41, footnotes.

²⁸ **General Comment** No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant: CCPR/ C/ 21/ Rev. 1/ Add.6, General Comment No.24 (General Comments), 1994, par. 10.

²⁹ **Bilder** Richard B., **Vagts** Detlev F., Speaking Law to Power: Lawyers and Torture, American Society of International Law, The American Journal of International Law, Vol. 98, No. 4, October 2004, par. 27.

³⁰ **Clark** Kathleen, Ethical Issues Raised by the OLC Torture Memorandum (*I J. Nat'l Sec. Law & Pol'y* 455, Paper no. 06-05-02, May 24, 2006, p.468.

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