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Christina M. Cerna on The Torture Papers: The Road to Abu Ghraib. Edited by Karen J. Greenberg and Joshua L. Dratel. Cambridge, MA: Cambridge University Press, 2005. 1249 pp.

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This important compilation of memos in The Torture Papers: The Road to Abu Ghraib (hereinafter the Papers) consists of the full texts of 28 memoranda and additionally, nine reports, prepared primarily by U.S. government officials, from September 25, 2001 until August 9, 2004. The memoranda attempt to legitimize coercive interrogation and torture techniques in Afghanistan, Guantanamo, and Abu Ghraib as a necessary prerogative of the Executive in the Bush administration's "War on Terror."

Anthony Lewis warns, in his introduction to the Papers, that the texts of these legal memoranda "are an extraordinary paper trail to moral and political disaster: to an episode that will soil the image of the United States in the eyes of the world for years to come" (xiii). He adds his view that these memoranda provide powerful insight into how lawyering skills can be misused in the cause of evil, revealing a civil libertarian's bias that law exists to serve the greater good.

Defining Torture

One of the memoranda, Memo 6, dated January 22, 2002, written by Assistant Attorney General, Jay S. Bybee, and addressed to Alberto Gonzales, the then Counsel to the President, defines torture as: "[P]hysical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury such as organ failure, impairment of bodily function or even death" (172). This definition is not found in any international human rights treaty on the subject.

The acceptance of this definition by the Bush administration opened the door to the employment of interrogation practices that led to the "stress and duress" interrogation "techniques" reportedly practiced by the U.S. Department of Defense (DOD) and Central Intelligence Agency (CIA) as listed in the April 2004 New York City Bar Association Report (hereinafter referred to as the NYC Bar Association Report) (558-559). These techniques include: forcing detainees to stand or kneel for hours in black hoods, withholding painkillers from wounded detainees, binding detainees in painful positions, subjecting them to loud noises and sleep deprivation, etc. Memo 14 contains the definition of torture currently used by the U.S. Department of Justice (DOJ). In this memo, also written by Jay S. Bybee and addressed to Attorney General Alberto Gonzales, reference is made to the "leading" European Court of Human Rights case, *Ireland v. the United Kingdom* (1978). U.S. officials, such as Secretary of State Rice on her recent trip to Europe (during the week of December 5, 2005) repeatedly employed the word "torture" in her remarks, but it is clear that for her the word has a different meaning from that given to it by the European Court.

The European Court's jurisprudence has evolved since 1978, however, and the leading European case on torture today is the *Selmouni v. France* judgment of July 28, 1999. In that case, the European Court noted that a change in its jurisprudence was required because "the Convention is a living instrument which must be interpreted in the light of present-day conditions" (*Selmouni v. France*: para. 101). It expressly noted that certain acts that were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in the future. The European Court found that the acts complained of in *Selmouni* "were such as to

arouse in the applicant feelings of fear, anguish and inferiority capable of humiliating him and possibly breaking his physical and moral resistance" (*Selmouni v. France*: para. 101) and held France to be in violation of the prohibition on torture because of its treatment of Selmouni (i.e., he was dragged along by his hair; he was made to run along a corridor with police officers positioned on either side to trip him up; he was made to kneel down in front of a young woman to whom someone said "Look, you're going to hear somebody sing"; one police officer then showed him his penis, saying "here, suck this," before urinating over him; he was threatened with a blow lamp and then a syringe) (*Selmouni v. France*: supra note 5, para. 82). The *Selmouni* case and the fact that the European Court's jurisprudence has changed since 1978 is not mentioned in Mr. Bybee's memo.

John Yoo (Former Deputy Assistant Attorney General, DOJ), Alberto Gonzales, William J. Haynes II (General Counsel, DOD) and Jack Goldsmith (Former Deputy Assistant Attorney General, DOJ), the authors of the most important memos in the Papers, all studied law at either Harvard or Yale Universities and demonstrate a striking deference to Presidential power and an alarming indifference to international law. The NYC Bar Association Report points out that in contrast to earlier conflicts, such as Vietnam and Korea, during which it was U.S. policy to presume that military prisoners were entitled to Prisoner of War (POW) status, from the very outset of the War in Afghanistan, U.S. officials labeled captured al-Qaeda and Taliban prisoners "unlawful combatants," and stated that the Geneva Conventions were inapplicable to them (584). Similarly, when the Inter-American Commission on Human Rights issued precautionary measures in response to a petition challenging the Guantanamo Bay detentions, and called upon the U.S. to have the legal status of the detainees determined by a competent tribunal, the U.S. responded that neither international humanitarian law nor international human rights law applied to these detainees, leaving them in the legal equivalent of a "black hole" (595-597).

A December 28, 2001 memo (Memo 3) from the DOJ to the General Counsel of the DOD, shortly before the transfer of the first detainees to Guantanamo Bay, Cuba in January 2002, asserts that a federal district court would not have jurisdiction to entertain a petition for a writ of *habeas corpus* filed on behalf of an alien detainee (29). Although the memo recognizes that a detainee might challenge his detention under article 9(4) of the U.N. Covenant on Civil and Political Rights, which grants "anyone" who has been detained, the right to *habeas corpus*, there is no analysis of this provision or of international human rights law at all. Despite the rulings of the several U.S. Courts of Appeal in support of the Administration's view, the U.S. Supreme Court, in *Rasul v Bush* on June 28, 2004, held that these detainees did have the right to *habeas corpus*. In most countries, a writ of *habeas corpus* serves to challenge the legality of a detention and consequently, must be decided promptly, normally within 24 or 48 hours. Although hundreds of writs have been filed on behalf of the Guantanamo detainees, despite the landmark Supreme Court decision, the issue continues to be tied up in U.S. Courts and not one detainee has been freed from Guantanamo as a result of filing a writ of *habeas corpus* with a U.S. Federal District Court.

Memo 25, a "draft" dated March 6, 2003 and classified by Secretary of Defense Donald Rumsfeld, ostensibly "addresses the requirements of international law as it pertains to the Armed Forces of the United States, as interpreted by the United States" (241). This memo dismisses all international and national law regulating the treatment of detainees and states that the President

has complete discretion, as Commander in Chief, to conduct hostilities. This memo defends the view that "criminal statutes are not read as infringing on the President's ultimate authority in these areas."

Memo 25 dismisses the applicability of the Third Geneva Convention to al Qaeda detainees, "because al Qaeda is not a High Contracting Party to the Convention" and to the Taliban because the "Taliban detainees do not qualify as prisoners of war under Article A of the Geneva Convention" (241). Further, it notes that the DOJ has opined that the Fourth Geneva Convention does not apply to unlawful combatants (241). The memo then proceeds to give no weight to the U.N. Torture Convention, arguing that the U.S. ratified the Convention with a variety of Reservations and Understandings that both redefine torture and cruel, inhuman and degrading treatment and punishment to fit within the parameters of the U.S. Constitution, leading to the conclusion that if our courts do not consider the conduct to be torture then it cannot be torture. The authors of Memo 25 ignore article 27 of the Vienna Convention on the Law of Treaties, which prohibits a party from invoking the provisions of its internal law as justification for its failure to perform a treaty (243). In addition, Memo 25 states that both Congress and the Courts are to avoid interfering with the President's war powers and conduct of foreign affairs, and argues that Congress "lacks authority" to make laws regarding the interrogation of detainees ("Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield") (256-257) despite the provision in article 1 §8 of the U.S. Constitution that provides that Congress shall " make Rules concerning Captures on Land and Water."

Iraq

Initially, in response to the Abu Ghraib scandal in April 2004, U.S. Government officials claimed that prisoner abuse was committed only by a few, poorly trained, low-level personnel. The President and his Administration have repeatedly maintained that U.S. policy condemns and prohibits torture. The Mikolashek, Fay/Jones and Taguba reports are contained in the Papers; the longest report (over 250 pages) is the Mikolashek Report issued by the Inspector General's Office of the Army. The Mikolashek report echoes the DOD's repeated position that the abuses are

unauthorized actions taken by a few individuals, and in some cases, coupled with the failure of a few leaders to provide adequate supervision and leadership. These actions, while regrettable are aberrations when compared to the actions of fellow soldiers who are serving with distinction (633).

The Mikolashek report indicates that some "50,000 individuals were detained for at least some period of time by U.S. Forces" (632), and human rights groups estimate that some 10,000 suspects are currently being held by U.S. forces.

Another significant report is that of the International Committee of the Red Cross (ICRC) which deals with the situation of detainees in custody in Iraq between March and November 2003. The report concludes that the practices, described therein are prohibited under international humanitarian law (404). The ICRC considers the Geneva Conventions to be applicable to the individuals in U.S. custody in Iraq. ICRC reports are strictly confidential but may be made public

by the respondent Government. The report criticized the "brutality" against protected persons upon capture and initial custody, sometimes causing death or serious injury, as well as the "excessive and disproportionate use of force" against persons deprived of their liberty resulting in death or injury during their period of internment (384). The ICRC reported that military intelligence officers told the ICRC than "in their estimate between 70% and 90% of the persons deprived of their liberty in Iraq had been arrested by mistake" (388). The report notes that the ill-treatment upon custody would "normally stop by the time the persons reached a regular internment facility, such as…Abu Ghraib" (390).

Rendition

Another aspect of the torture issue is the rendition by the U.S. Government of detainees to third party countries, where there are allegations of torture, and the detention of a number of detainees in secret prisons apparently operated by the CIA in Poland and Romania. Memo 28 from Jack Goldsmith, Assistant Attorney General at DOJ to Alberto Gonzales, dated March 19, 2004, argues for the legality of relocating certain "protected Persons," who are "illegal aliens" from occupied Iraq to places outside that country, under the Fourth Geneva Convention (367-368). Memo 28 concludes that other protected persons (illegal aliens or not) who have not been accused of an offense may be temporarily relocated from occupied Iraq to another country for a brief but not indefinite period "to facilitate interrogation" (380). Recently, the U.S. Secretary of State traveled to Europe to respond to alarm voiced by the European Union over allegations of secret detention camps and the transport of terror suspects to Europe.

Conclusion

The report of Lieutenant General Randall Mark Schmidt (which can be found at: http://www.humanrightsfirst.org/us_law/detainees/schmidt-army-reg-150605.pdf) was released after the Papers went to press. Although not included in the Papers, his report makes clear that almost all of the practices reported in Abu Ghraib were, in fact, specifically authorized practices under existing interrogation procedures.

As the prisoner abuse scandal widened in the early months of 2006, in response to the exposure of aggressive, even violent, interrogation techniques, and information has been leaked to the press regarding a number of deaths in U.S. controlled detention facilities in Abu Ghraib, Guantanamo Bay and Bagram Air Base in Afghanistan, Congress has responded to the need to curb this view of unfettered presidential power. Senator John McCain, himself a former torture victim in Vietnam, introduced a bill to Congress that would require Americans holding detainees abroad to follow standards of humane treatment required by the U.S. Constitution. Despite the attempt of Vice President Cheney, together with Porter Goss, the CIA Director, to add an exemption to McCain's bill (the bill "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 and are consistent with the Constitution and laws of the United States and treaties to which the United States is a party, if the president determines that such operations are vital to the protection of the United States or its citizens from terrorist attack."), permitting the employment of illegal methods by members of the CIA, the bill was passed by the Congress and recently was signed by the President. President Bush included a "signing statement" along with his signature

in an attempt to impose his own understanding of the bill and not that of Congress (the full statement may be found at: http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html).

Many of these memoranda only existed in censored piecemeal versions on various web sites before being organized in The Torture Papers: The Road to Abu Ghraib, which is an indispensable tool for anyone interested in understanding and participating in the "torture" discourse in the United States today, and since that debate is still raging (this volume only includes documents produces until August 2004), it can be hoped that a follow-up volume is in the works.

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