



U.S. Department of Justice

Office of Legal Counsel

Office of the Deputy Assistant Attorney General

Washington, D.C. 20530

August 1, 2002

The Honorable Alberto R. Gonzales  
Counsel to the President  
The White House  
Washington, D.C.

Dear Judge Gonzales:

You have requested the views of our Office concerning the legality, under international law, of interrogation methods to be used during the current war on terrorism. More specifically, you have asked whether interrogation methods used on captured al Qaeda operatives, which do not violate the prohibition on torture found in 18 U.S.C. § 2340-2340A, would either: a) violate our obligations under the Torture Convention,<sup>1</sup> or b) create the basis for a prosecution under the Rome Statute establishing the International Criminal Court (ICC).<sup>2</sup> We believe that interrogation methods that comply with § 2340 would not violate our international obligations under the Torture Convention, because of a specific understanding attached by the United States to its instrument of ratification. We also conclude that actions taken as part of the interrogation of al Qaeda operatives cannot fall within the jurisdiction of the ICC, although it would be impossible to control the actions of a rogue prosecutor or judge. This letter summarizes our views; a memorandum opinion will follow that will more fully explain our reasoning.

I.

Section 2340A makes it a criminal offense for any person "outside the United States [to] commit[] or attempt[] to commit torture."<sup>3</sup> The act of torture is defined as an:

<sup>1</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 (entered into force June 26, 1987)

<sup>2</sup> U.N. Doc. A/CONF.183/9 (1998), reprinted in 37 I.L.M. 999 (1998) [hereinafter ICC Statute].

<sup>3</sup> If convicted of torture, a defendant faces a fine or up to twenty years' imprisonment or both. If, however, the act resulted in the victim's death, a defendant may be sentenced to life imprisonment or to death. See 18 U.S.C.A. § 2340A(a). Whether death results from the act also affects the applicable statute of limitations. Where death does not result, the statute of limitations is eight years; if death results, there is no statute of limitations. See 18 U.S.C.A. § 3286(b) (West Supp. 2002); *id.* § 2332b(g)(5)(B) (West Supp. 2002). Section 2340A as originally enacted did not provide for the death penalty as a punishment. See Omnibus Crime Bill, Pub. L. No. 103-322, Title VI, Section 60020, 108 Stat. 1979 (1994) (amending section 2340A to provide for the death penalty); H. R. Conf. Rep. No. 103-711, at 388 (1994) (noting that the act added the death penalty as a penalty for torture).

Most recently, the USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), amended section 2340A to expressly codify the offense of conspiracy to commit torture. Congress enacted this amendment as part of a broader

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.

18 U.S.C.A. § 2340(1); *see id.* § 2340A. Thus, to convict a defendant of torture, the prosecution must establish that: (1) the torture occurred outside the United States; (2) the defendant acted under the color of law; (3) the victim was within the defendant's custody or physical control; (4) the defendant specifically intended to cause severe physical or mental pain or suffering; and (5) that the act inflicted severe physical or mental pain or suffering. *See also* S. Exec. Rep. No. 101-30, at 6 (1990) ("For an act to be 'torture,' it must . . . cause severe pain and suffering, and be intended to cause severe pain and suffering."). As we have explained elsewhere, in order to violate the statute a defendant must have specific intention to inflict severe pain or suffering – in other words, "the infliction of such pain must be the defendant's precise objective." *See* Memorandum for Alberto R. Gonzales, Counsel to the President, from: Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A* at 3 (August 1, 2002).

Section 2340 further defines "severe mental pain or suffering" as:

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 or 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.

18 U.S.C. § 2340(2). As we have explained, in order to inflict severe mental or suffering, a defendant both must commit one of the four predicate acts, such as threatening imminent death, and intend to cause "prolonged mental harm."

## II.

You have asked whether interrogation methods used on al Qaeda operatives that comply with 18 U.S.C. §§ 2340-2340A nevertheless could violate the United States' obligations under the Torture Convention. The Torture Convention defines torture as:

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effort to ensure that individuals engaged in the planning of terrorist activities could be prosecuted irrespective of where the activities took place. *See* H. R. Rep. No. 107-236, at 70 (2001) (discussing the addition of "conspiracy" as a separate offense for a variety of "Federal terrorism offense[s]").

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.

Article 1(1) (emphasis added).

Despite the apparent differences in language between the Convention and § 2340, international law clearly could not hold the United States to an obligation different than that expressed in § 2340. When it acceded to the Convention, the United States attached to its instrument of ratification a clear understanding that defined torture in the exact terms used by § 2340. The first Bush administration submitted the following understanding of the treaty:

The United States understands that, in order to constitute torture, an act must be *specifically intended* to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental pain caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) 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.

S. Exec. Rep. No. 101-30, at 36. The Senate approved the Convention based on this understanding, and the United States included the understanding in its instrument of ratification.<sup>4</sup>

This understanding accomplished two things. First, it made crystal clear that the intent requirement for torture was specific intent. By its terms, the Torture Convention might be read to require only general intent although we believe the better argument is that that the Convention's use of the phrase "intentionally inflicted" also created a specific intent-type standard. Second, it added form and substance to the otherwise amorphous concept of *mental* pain or suffering. In so doing, this understanding ensured that mental torture would rise to a severity comparable to that required in the context of physical torture.

It is one of the core principles of international law that in treaty relations a nation is not bound without its consent. Under international law, a reservation made when ratifying a treaty validly alters or modifies the treaty obligation, subject to certain conditions that will be discussed below. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980); 1 Restatement of the Law (Third) of the Foreign Relations Law of the

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<sup>4</sup> See [http://www.un.org/Depts/Treaty/final/ts2/newfiles/part\\_boo/iv\\_boo/iv\\_9.html](http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_9.html).

United States § 313 (1987).<sup>5</sup> The right to enter reservations applies to multilateral international agreements just as in the more familiar context of bilateral agreements. *Id.* Under international law, therefore, the United States thus is bound only by the text of the Torture Convention as modified by the first Bush administration's understanding.<sup>6</sup> As is obvious from its text, Congress codified the understanding almost verbatim when it enacted § 2340. The United States' obligation under the Torture Convention is thus identical to the standard set by § 2340. Conduct that does not violate the latter does not violate the former. Put another way, so long as the interrogation methods do not violate § 2340, they also do not violate our international obligations under the Torture Convention.

Although the Vienna Convention on Treaties recognizes several exceptions to the right to make reservations, none of them apply here.<sup>7</sup> First, a reservation is valid and effective unless it purports to defeat the object and purpose of the treaty. Vienna Convention, art. 19. Our initial research indicates that international law has provided little guidance regarding the meaning of the "object and purpose" test. Nonetheless, it is clear that here the United States had not defeated the object and purpose of the Torture Convention. The United States nowhere reserved the right to conduct torture; in fact, it enacted Section 2340 to expand the prohibition on torture in its domestic criminal law. Rather than defeat the object of the Torture Convention, the United States simply accepted its prohibition and attempted, through the Bush administration's understanding, to make clear the scope and meaning of the treaty's obligations.

Second, a treaty reservation will not be valid if the treaty itself prohibits states from taking reservations. The Torture Convention nowhere prohibits state parties from entering reservations. To be sure, two provisions of the Torture Convention – the competence of the Committee Against Torture, art. 28, and the mandatory jurisdiction of the International Court of Justice, art. 30 – specifically note that nations may take reservations from their terms. Nonetheless, the Convention contains no provision that explicitly attempts to preclude states from exercising their basic right under international law to enter reservations to other provisions. Without such a provision, we do not believe that the Torture Convention precludes reservations.

Third, in regard to multilateral agreements, a treaty reservation may not be valid if it is objected to in a timely manner by other states. Vienna Convention art. 20. If another state does not object within a certain period of time, it is deemed to have acquiesced in the reservation. Even if, however, another nation objects, that only means that the provision of the treaty to which the reservation applies is not in force between the two nations – unless the objecting nation opposes entry into force of the treaty as a whole between the two nations. *Id.* art 21(3). Here, no nation appears to have objected to the United States' further definition of torture. Only

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<sup>5</sup> Although, under domestic law, the Bush administration's definition of torture was categorized as an "understanding," it was deposited with the instrument of ratification as a condition of the United States' ratification, and so under international law we consider it to be a reservation if it indeed modifies the Torture Convention standard. *See* Restatement (Third) at § 313 cmt. g.

<sup>6</sup> Further, if we are correct in our suggestion that the Torture Convention itself creates a heightened intent standard, then the understanding attached by the Bush Administration is less a modification of the Convention's obligations and more of an explanation of how the United States would implement its somewhat ambiguous terms.

<sup>7</sup> It should be noted that the United States is not a signatory to the Vienna Convention, although it has said that it considers some of its provisions to be customary international law.

one nation, Germany appears to have commented on the United States' reservations, and even Germany did not oppose any U.S. reservation outright.

Thus, we conclude that the Bush administration's understanding created a valid and effective reservation to the Torture Convention. Even if it were otherwise, there is no international court to review the conduct of the United States under the Convention. In an additional reservation, the United States refused to accept the jurisdiction of the ICJ (which, in any event, could hear only a case brought by another state, not by an individual) to adjudicate cases under the Convention. Although the Convention creates a Committee to monitor compliance, it can only conduct studies and has no enforcement powers.

### III.

You have also asked whether interrogations of al Qaeda operatives could be subject to criminal investigation and prosecution by the ICC. We believe that the ICC cannot take action based on such interrogations.

First, as noted earlier, one of the most established principles of international law is that a state cannot be bound by treaties to which it has not consented. Although President Clinton signed the Rome Statute, the United States has withdrawn its signature from the agreement before submitting it to the Senate for advice and consent – effectively terminating it. The United States, therefore, cannot be bound by the provisions of the ICC Treaty nor can U.S. nationals be subject to ICC prosecution. We acknowledge, however, that the binding nature of the ICC treaty on non-parties is a complicated issue and do not attempt to definitively answer it here.

Second, even if the ICC could in some way act upon the United States and its citizens, interrogation of an al Qaeda operative could not constitute a crime under the Rome Statute. Even if certain interrogation methods being contemplated amounted to torture (and we have no facts that indicate that they would), the Rome Statute makes torture a crime subject to the ICC's jurisdiction in only two contexts. Under article 7 of the Rome Statute, torture may fall under the ICC's jurisdiction as a crime against humanity if it is committed as "part of a widespread and systematic attack directed against any civilian population." Here, however, the interrogation of al Qaeda operatives is not occurring as part of such an attack. The United States' campaign against al Qaeda is an attack on a non-state terrorist organization, not a civilian population. If anything, the interrogations are taking place to elicit information that could prevent attacks on civilian populations.

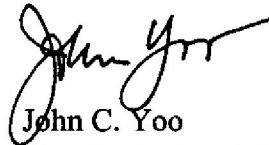
Under article 8 of the Rome statute, torture can fall within the ICC's jurisdiction as a war crime. In order to constitute a war crime, torture must be committed against "persons or property protected under the provisions of the relevant Geneva Conventions." Rome Statute, art. 8. On February 27, 2002, the President determined that neither members of the al Qaeda terrorist network nor Taliban soldiers were entitled to the legal status of prisoners of war under the Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3517 ("GPW"). As we have explained elsewhere, members of al Qaeda cannot receive the protections accorded to POWs under GPW because al Qaeda is a non-state terrorist organization that has not signed the Conventions. Memorandum for Alberto R. Gonzales, Counsel to the President and William J.

Haynes, II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees* at 8 (Jan. 22, 2002). The President has appropriately determined that al Qaeda members are not POWs under the GPW, but rather are illegal combatants, who are not entitled to the protections of any of the Geneva Conventions. Interrogation of al Qaeda members, therefore, cannot constitute a war crime because article 8 of the Rome Statute applies only to those protected by the Geneva Conventions.

We cannot guarantee, however, that the ICC would decline to investigate and prosecute interrogations of al Qaeda members. By the terms of the Rome Statute, the ICC is not checked by any other international body, not to mention any democratically-elected or accountable one. Indeed, recent events indicate that some nations even believe that the ICC is not subject to the authority of the United Nations Security Council. It is possible that an ICC official would ignore the clear limitations imposed by the Rome Statute, or at least disagree with the President's interpretation of GPW. Of course, the problem of the "rogue prosecutor" is not limited to questions about the interrogation of al Qaeda operatives, but is a potential risk for any number of actions that have been undertaken during the Afghanistan campaign, such as the collateral loss of civilian life in the bombing of legitimate military targets. Our Office can only provide the best reading of international law on the merits. We cannot predict the political actions of international institutions.

Please let us know if we can be of further assistance.

Sincerely,



John C. Yoo  
Deputy Assistant Attorney General