

“The Definition of Torture”

I The Conventional Definition of Torture

In Irving M. Copi and Carl Cohen’s Introduction to Logic, one of the best-selling American textbooks in philosophy, the chapter on definition distinguishes many kinds of definition, but strongly prefers only one kind. Among other distinctions, Copi and Cohen distinguish denotative and connotative definitions, and establish the inferiority of denotative definitions. This means that they recommend connotative definitions. They then distinguish three different senses of “connotation;” 1. the subjective, which is useless because it varies from individual to individual, 2. the objective, which is useless because it is known only to the extremely learned, and 3. the conventional. The conventional meaning and definition is recommended and preferred because it is the public and accepted meaning, the meaning which allows ordinary people to communicate with one another, the shared meaning. This is the definition and meaning important to the informed and engaged citizens and voters who have the responsibility, in a democracy, to try to guide their government to morally decent laws, policies and actions.(1) As citizens, we need to know the conventional definition of the word torture in order to follow, to judge and influence our government’s laws and policies concerning it. This is a matter both of our own rights as citizens and of our government’s respect for human rights in America’s foreign affairs.

The conventional definition of torture given in the ordinary, general dictionary that I keep at hand is this. Torture, as a noun, means: “1. Act or process of inflicting severe pain, esp. as a punishment, in order to extort confession, or in revenge. 2. Extreme pain; agony; torment. 3. Something that causes agony or pain. 4. A violent straining, distorting, etc., as of sense, thought, text, etc.” and, as a transitive verb, means: 1. To put to torture; to punish with torture; now, to inflict severe pain upon. 2. To subject to undue strain; to wrench or twist; to distort.”(2) Torturing any person is a violation of the law of the United States. In 1994, the United States accepted with reservations, as a treaty, the 1984 document, developed by the United Nations, named, “Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.”(3)

This Convention Against Torture is the law of the United States in virtue of Article VI, Section 2, of the U.S. Constitution. This section reads: “ 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 state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.”

The Convention Against Torture gives, in my judgment, a good statement of the conventional meaning and definition of torture, though more precise and detailed than that of my ordinary dictionary.

The Convention Against Torture defines torture this way in Part I, Article 1, Section 1.

“For the purposes of this Convention, the term “torture” means 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.”(4)

Not only is the U.S. bound to comply with the Convention Against Torture because it is a treaty which the U.S. has ratified, but this is also the case with other treaties. Among them is the “United Nations International Covenant on Civil and Political Rights (1966).” Its Article 7 (Laqueur & Rubin, p. 218) states exactly as does the Convention: “No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.” According to Amnesty International, such prohibitions abound in other “standards which have been adopted by the international community, but which are not in the form of treaties,” and these are standards which “the United States played a major part in drawing them up, and agreed that they should be adopted.”(5) One of these is the “Universal Declaration of Human Rights”, whose Article 5 (Laqueur & Rubin, p. 198) reads exactly the same as Article 7 above. So three major human rights documents share the same sentence denouncing torture. These are the Convention Against Torture, the International Covenant on Civil and Political Rights, and the Universal Declaration of Human Rights.

II The Bush Administration’s Definition of Torture

The Abu Ghraib torture scandal broke in the Spring of 2004, largely because of articles published in The New Yorker magazine by Seymour Hersch and because of the appalling pictures of sexual sadism which then became published in hard copy in many places and became readily available on the Internet. Though our military has prosecuted low-ranking soldiers for torturing Iraqi detainees, and removed the General in charge of the Abu Ghraib prison, it is widely alleged that the responsibility for the torture lies, ultimately, with President Bush and Secretary of Defense Donald Rumsfeld. Administration lawyers offered a definition of legally prohibited torture which was intended to justify the interrogation practices which the President and Secretary of Defense then ordered our military to use, especially on our Afghani and Iraqi detainees at the Bagram, Guantanamo Bay and Abu Ghraib military prisons. I agree with these allegations. I here state the Bush Administration definitions of torture and attempt to show their perversity by comparing them to the ordinary, conventional, dictionary meaning of torture, and that in the “Convention Against Torture” and similar documents.

The initial mischievous memo mis-defining torture is dated August 1, 2002. It is the work of Jay S. Bybee, Assistant Attorney General. It is titled “Memorandum for Alberto R. Gonzales Counsel to the President.” “Re: Standards of Conduct for Interrogation under 18 U.S.C. [sections] 2340-2340A” (The Torture Papers, pp. 172-217). The reference to the sections of the United States Code is necessary because our acceptance of the “Convention Against Torture” was written into federal law passed by Congress in these parts of the United States Code.

I am quoting Bybee’s definition of torture only from a few pages of his 45- page memorandum. He defends his conclusions as a lawyer would, citing legal precedents. And

he does allude to the reservations Congress stated as it accepted the Convention treaty. However, I criticize his conclusions as a responsible citizen should, stressing the conventional meaning and ordinary sense of the words and phrases in the Convention Against Torture. I hold that the original intention of the international drafters of the Convention Against Torture is best understood in this way. And it is this meaning which should have become our law and based our policies and practice. In what follows, I criticize seven aspects of Bybee's legal opinion.

1. Bybee begins by stating that this memo is "our Office's views regarding the standards of conduct under the Convention...as implemented by...the United States Code..." He gives this memo as answer because "this question has arisen in the context of interrogations outside of the United States" (The Torture Papers, p. 172). Here in the very first sentences of the document is the first red flag for me. Bybee suggests that the standards for interrogations outside of the U.S. are more permissive than standards for interrogations inside of the U.S. That is, it might be permissible for Americans to torture foreign persons if we do it on foreign soil. This, we learn from earlier documents in The Torture Papers, is the reason why Afghanistan war prisoners were taken to Guantanamo Bay, Cuba. Outside the territorial United States, the legal opinion was, the detainees are, purportedly, outside the protections of the U.S. Courts (The Torture Papers, p. xxi).

But the plain language of the Convention Against Torture was intended to block this move. Its Article 4 states that "each State Party shall ensure that all acts of torture are offenses under its criminal law." Article 5 then says that "each State Party shall take such measures as may be necessary to establish its jurisdiction over the offenses referred to in article 4 in the following cases: a. When the offenses are committed in any territory under its jurisdiction..." Bagram prison and Guantanamo Bay prison and Abu Ghraib prison are territories under U. S. jurisdiction. Therefore, the U.S. is bound not to employ the looser standards there that would allow torture.

Not only that, the idea of different standards for inside and outside the United States is contrary to the whole idea of torture violating its victim's human rights. Human rights are universal, to be respected in every human being, not just citizens of your own state. This is why the Universal Declaration of Human Rights, also a treaty which has become U.S. law, in its Article 7, reads exactly as the Convention Against Torture's introduction: "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" (Laqueur & Rubin), pp.218, 281).

2. Bybee then quotes the words in Section 2340A of the U.S. Code which are themselves a fair rearrangement of the words defining torture in Article 1 of the "Convention." That Section prohibits or "proscribes acts inflicting, and that are specifically intended to inflict, severe pain or suffering, whether mental or physical" (The Torture Papers, p. 172). Especially, the phrase "severe pain" is in the "Convention," and the phrases "severe pain" and "extreme pain" are in the Webster's ordinary definition given above.

One wonders at the phrase, "specifically intended." It would seem to allow an interrogator to inflict severe pain or punishment in a careless, depravedly indifferent and negligent manner as long as one did not specifically intend it. If so, this would not be the crime of torture according to Bybee.

3. However, so far, Bybee's words are mostly unobjectionable. Handcuffing a

detainee is uncomfortable and thus painful but ordinary language would only consider it torture if the handcuffs were deliberately so tight and left on so long that they caused constant pain and injury.

Bybee thus seems still to be fair as he continues: If they inflict pain, "those acts must be of an extreme nature to rise to the level of torture within the meaning of Section 2340A and the Convention."

Which acts are of this extreme nature? Bybee tells us in his next paragraph.

"...For an act to constitute torture as defined in Section 2340, it must inflict pain that is difficult to endure. Physical 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."

There are actually three different characters given so far. 1) Bybee seems to be saying that the physical pain inflicted amounts to torture only if it is difficult to endure. 2) That pain must be severe, extreme, intense. 3) That pain must result in serious physical debility or death. Presumably, he means that a way of treating someone must be all three to be torture. However, the conventional use of language would say that some acts are torture even if: it was only 1) e.g. forcing one to stand on only one leg for a long time; or it was only 2) e. g. forcing one to bear the pain of sitting on a tack; or it was only 3) e.g. administering to a non-consenting subject incremental doses of a drug which slowly but painlessly destroys kidney or other organ function, while telling the subject that the interrogator will continue to inject the drugs until the person confesses.

4. Also, "severe" or "extreme" pain can be pain of very different sorts. The classic tortures of the rack, or splinters driven under one's fingernails, generate intense immediate pain, pain so extreme that they might cause one to lose consciousness. This is torture in the most dramatic sense. But mild pain continued for an extended period can be torture. Thus it would be torture to require one to assume a comfortable position which becomes uncomfortable and painful if one is forced to maintain it for many hours. Standing is a normal, natural position but not standing in the same spot and posture for four hours. Yet this torture was approved for detainees at Guantanamo Bay in December, 2002 (The Torture Papers, p. 1239).

Bybee is silent about the enormous difference that extending the time can make to something which is comfortable or only mildly uncomfortable at the moment it begins. Even too much pleasure can be painful if forced to continue for a long duration. This extreme suffering generated by lengthy continuance is the basis of several tortures approved for Guantanamo Bay. These include "isolation up to 30 days," "deprivation of light and auditory stimuli," "hooding during transport and interrogation," and the "use of 20-hour interrogations" (p. 1239).

5. Bybee writes that "certain acts may be cruel, inhuman or degrading, but still not produce pain and suffering of the requisite intensity to fall within Section 2340A's proscription against torture" (p. 172).

That is, these acts do not satisfy his definition of torture. But they almost certainly do satisfy the Convention's definition of torture. The Convention says, as does the Universal Declaration of Human Rights, "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" (L & R, p. 281). I take the "or" after "torture" to mean "which is ordinarily defined as." Even if "cruel, inhuman, or degrading treatment or punishment" is not intended here to be the definition of "torture", it still falls under the Convention's proscription, for the sentence says

that “no one shall be subjected to” it.

Claiming that cruel, inhuman or degrading treatment is not torture is a likely source of the belief of the American guards, especially at Abu Ghraib, that sexual and religious humiliation was authorized and even encouraged for them and was not torture. Many of the most shocking photographs attest to torture of this kind.

6. The standard Bybee offers for torture as causing mental pain or suffering is this:

For purely mental pain or suffering to amount to torture under Section 2340, It must result in significant psychological harm of significant duration, e.g. lasting for months or even years. We conclude that the mental harm also must result from one of the predicate acts listed in the statute, namely: threats of imminent death; threats of infliction of the kind of pain that would amount to physical torture; infliction of such physical pain as a means of psychological torture; use of drugs or other procedures designed to deeply disrupt the senses, or fundamentally alter an individual’s personality; or threatening to do any these things to a third party. (The Torture Papers, p. 172)

Bybee later explains that, to be torture, the “severe mental pain requires suffering not just at the moment of infliction but it also requires lasting psychological harm, such as seen in mental disorders like post-traumatic stress disorder.” (The Torture Papers, p. 214).

Torture to Bybee, then, “covers only extreme acts.” For the act to be mental torture, there must be both an extreme act and lasting, severe psychological harm. However, the interrogator could, on this reasoning, perform the extreme act if he or she believed it would not have the consequence of lasting, severe psychological harm. So believing, one could threaten the detainee with death, threaten electric shock, threaten to kill the detainee’s children. All these acts have been used in recent years by American interrogators.

Bybee claims that only if lasting mental harm did result from one of these acts, it would be torture. But, surely, most of us believe that it is highly probable that these acts would normally have these consequences, so that they would always be torture. That is why we would consider them extreme acts, for they would usually have these consequences. We would thus consider the acts, even without the actual consequences, torture and prohibited. Smoking a cigarette while pumping gas at a gas station is foolish and prohibited even if one does it without the expected resulting explosion. Ordinary experience has taught us its normal disastrous results. So it is with extreme acts.

7. Finally, Bybee holds that some “interrogation method might violate the statute” but should still be used. This is because, “under the current circumstances, necessity or self-defense may justify interrogation methods that might violate Section 2340A” (The Torture Papers, p. 173). These defenses “would eliminate any criminal liability.” (The Torture Papers, p. 214)

However, the Convention had anticipated this claim of emergency and rejects it. Article 2, Section 2 of the Convention reads: “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” (Laqueur & Rubin, p. 282). Once again, Bybee’s and the Bush Administration’s position flaunts the plain sense

of the treaty which is our law.

III Conclusion

This paper began by arguing that it is the conventional, dictionary definition of a term that is important to the citizen and maker of moral judgments. It then gives a conventional definition of torture taken from an ordinary dictionary. It shows that the definition of torture in the Convention Against Torture is very adequate and precise although still thoroughly conventional and ordinary. It reflects the enlightened moral sense of the friends of mankind as any international human rights-protecting treaty should. This paper then examines the August, 2002 legal opinion of Bush Administration Assistant Attorney General Jay S. Bybee on permissible standards for interrogating foreign detainees. Much of Bybee's legal and moral advice is in violation of the Convention and other international standards, and these, through our acceptance of treaties, and of international customary law, are the laws of the United States. Accepting Bybee's opinion, President Bush and Secretary Rumsfeld and our military chiefs ordered or allowed most of the most terrible recent tortures of Afghans and Iraqis at Bagram Air Force Base, Guantanamo Bay or Abu Ghraib prisons.

Endnotes

Irving M. Copi & Carl Cohen, Introduction to Logic, 8th ed., (New York, Macmillan: 1990), p. 147.

2. Webster's New Collegiate Dictionary, (Springfield, Mass., G. & C. Merriam Co.: 1961), p. 897.

Karen J. Greenberg & Joshua L. Dratel, eds., The Torture Papers: The Road to Abu Ghraib (New York, Cambridge University Press:2005), pp, 230, 241. Hereafter, I will give references to this work in parentheses in my text in the form (The Torture Papers, p.____).

"Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (1984)," in Walter Laqueur & Barry Rubin, eds., The Human Rights Reader (New York, Meridian: New York, 1998), p. 281-285. I will hereafter give references to this work in parentheses in my text in the form (Laqueur & Rubin, p.____).

Amnesty International, United States of America: Rights for All (Amnesty International Publication, 1990), p. 282.

September, 2005
Joseph Betz