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BOOK REVIEW

Reviewing:

Mahmoud Cherif Bassiouni, *The Institutionalization of Torture by the Bush Administration, Is Anyone Responsible?* (Antwerp, Intersentia, 2010) 301 pp., ISBN 987-94-000-0005-6.

I would like to dedicate this review to the memory of Charles Gittings, who initiated the Program to Enforce the Geneva Conventions (PEGC) in early 2002 and, until his untimely death in July 2010, provided the international legal community with detailed information of the many issues discussed in this book.

Once more, Professor Bassiouni demonstrates in this book his unequivocal, critical vision of the correct interpretation of international criminal law. It is astounding that he managed to produce, at the same time, two major treatises on international criminal justice, namely, *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization and Post-Conflict Justice*.[1] Indeed, the eulogies by experts in the field (on the back cover of the book) show that this book is the *primus inter pares* on the torture policy of the Bush administration.

The author, in his foreword, refers to former President Bush's State of the Union Address in 2006 in which he stated that "this administration would determine the character of our country" and correctly draws the conclusion that,

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[1] *M. Cherif Bassiouni (ed.), The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization and Post-Conflict Justice*, Volume 1 and Volume 2, (Antwerp, Intersentia, 2010).

"if the policy and practices described throughout this book have become the character of this nation then it is a betrayal of this nation's character, and those responsible for it should be investigated and prosecuted if probable cause exists".

It is the teacher at his very best, worried about total disregard for the US Constitution and misinterpretation of obligations under international law to which the US had committed itself. The author also shows an incredible mastery of US and international jurisprudence as is evident from approximately 900 footnotes.

The book is divided into seven chapters with several useful cross-references between the chapters. First, an initial chapter on the prohibition of torture under international and US law with an appendix on legal definitions. Chapter 2 "Interrogation Techniques" contains very useful indexes of interrogation methods and detention related abuses occurring across multiple locations as indeed the torture practices travelled from Guantanamo to Afghanistan, Iraq and the CIA "black sites". In addition, he cites a number of military responses to interrogation techniques by courageous military officers whose outcry against blatant abuses were simply overruled by the civilian leadership. Many had to bear the brunt and were demoted or, in disgust, tended their resignation. In this context it should be noted that Professor Bassiouni was forced to resign by the Bush administration as Independent Expert for the Commission on Human Rights on the human rights situation in Afghanistan for his candid views on the issues.

One response, listed in this chapter, from Mark Fallon described water-boarding as "shocking the conscience." The author laments that since the 1952 Supreme Court decision in *Rochin v. California*[2] nowhere in the decisions of US courts concerning these more recent practices have those words been used and he wonders what has changed since then, "our collective conscience or its absence".[3]

Chapter 3 discusses the torture-enabling policy and its trickle-down effects which was meant to insulate high-ranking officials from criminal responsibility and by the same token would create the desired socio-psychological effect on lower ranking officials, including military personal and civilian agents. In addition, punishing low ranking officials, especially after the scandal in the Abu Ghraib prison, would give the image that justice was being done. The author ponders that

[2] 342 U.S. 165 (1952).

[3] M. Cherif Bassiouni, *The Institutionalization of Torture by the Bush Administration, Is Anyone Responsible?* (Antwerp, Intersentia 2010), 180.

"so much which represents such clear violations of our social values and our legal order could be accomplished by so few in such a short period of time evidences how frail our legal order is, and perhaps how superficial our social values are, particularly at vulnerable times".[4]

Chapter 4, on the practice of "extraordinary renditions" and the use of "black sites" by the CIA, demonstrates the malicious intent by the Bush lawyers to exploit a gap in the jurisprudence of the Supreme Court which does not extend constitutional protections under the Fourth, Fifth, Six and Eighth Amendment extraterritorially. Consequently, if certain acts are committed outside the US and the persons seized and transferred for torture are not US citizens, then the acts in question are not crimes in the US. These lacunae in the law were instrumental in achieving results which are contrary to both the spirit and letter of the law without explicitly contravening the legal instruments governing torture.

The author also considers diplomatic assurances, that the persons in question would not be subjected to torture, to be a transparent fig leaf.[5] First and foremost the author is concerned that other states might emulate the way the Bush administration conducted its policy, especially in view of the fact that the US Annual Reports on Human Rights Practices, condemn these acts in other countries.

During the consideration of the United States' reports before the Committee Against Torture and the Human Rights Committee in May and July 2006, respectively, these issues were hotly debated. Despite a meticulous analysis by the committee members, in line with the one expounded in this book, it was my personal impression that the delegation would not yield to return to the correct interpretation of international law. The written replies subsequently given to the questions by the committee members confirm this position.

Chapter 5 on "Responsibility: Political, Legal and Ethical Considerations", is in my view the central chapter in the book, because the total absence of political, legal and ethical responsibility were the motives behind the torture policy. Any careful reader of the book would come to the conclusion that these were intentionally absent. The author correctly points out that Congress shirked its political responsibility by adopting the Detainee Treatment Act (2005) and the Military Commission Acts (2006 and 2009) precluding the exercise of rights granted by the Supreme Court in *Rasul* et al. *v. Bush,*[6]

[4] *Ibid.,* 140.

[5] *Ibid.,* 164.

[6] 542 U.S. 466 (2004).

Hamdi v. Rumsfeld,[7] *Hamdan v. Rumsfeld*[8] and *Boumediene v. Bush*.[9] It is really doubtful whether there will be any progress under the Obama administration as is shown in the case *Kiyemba* et al. *v. Obama* et al.[10] where the Supreme Court on 1 March 2010 *per curiam* had granted *certiorari*. The question considered whether a federal court exercising *habeas corpus* jurisdiction has the power to order the release of prisoners held at Guantánamo where the executive detention is indefinite and without authorization in law, and where release into the continental US is the only possible effective remedy. The Supreme Court vacated the judgment and remanded the case to the US Court of Appeals of the District of Columbia. Subsequently on 18 April 2011, the Supreme Court allowed an additional brief, but denied the writ of *certiorari*.[11]

The author describes in detail that the legal responsibility of those who established and implemented the policy of torture was protected by all available means. For example he discusses whether the lawyers in the Office of Legal Counsel intentionally distorted the applicable law. In particular John Yoo, then Deputy Assistant Attorney General of the Department of Justice, in various memoranda stated that the Geneva Conventions and customary international humanitarian law did not apply to "enemy combatants". This is because it had no binding effect on either the President or the military and because it is not federal law recognized in the Constitution.[12]

His memorandum dated 14 March 2003 to William Haynes II, then General Counsel of the Department of Defense remained classified until 31 March 2008 and makes a mockery of the obligations of the US under international law. It deals with military interrogations of alien unlawful combatants held outside of the US. It states that the

[7] 542 U.S. 507 (2004).

[8] 126 U.S. 2749 (2006).

[9] 128 S.Ct 2229 (2008).

[10] 555.F.3rd.1022 D.C. Circuit (2009).

[11] (563 U.S. 2011). See further; *Al Bihani v. Obama* No. 1.05-CV-01312 where the Circuit Court on 5 January 2010 confirmed an earlier decision by the district court to deny the right of habeas corpus.

[12] See, K. Greenberg and J. Dratel (eds.), *The Torture Papers: The Road to Abu Graib* (Cambridge, Cambridge University Press, 2005), in particular Yoo's Memo dated 9 January 2002; see also his article 'The Status of Soldiers and Terrorists under the Geneva Conventions', (2004) 3 Chinese Journal of International Law 135–150; and my reply '*A Response to John C. Yoo: The Status of Soldiers and Terrorists under the Geneva Conventions*', (2005), 4 Chinese Journal of International Law, 167–181.

Fifth and Eighth Amendments to the Constitution are not applicable to alien enemy combatants outside the US; that federal criminal laws do not apply to properly authorized military interrogations of enemy combatants; that US obligations under the Convention Against Torture extend only to conduct that is "cruel and unusual" under the Eighth Amendment or which "shocks the conscience" under the Fifth and Fourteenth Amendment. It further states that customary international law does not impose obligations beyond the Convention Against Torture and may be overridden by the President who is advised to claim necessary self-defense in response to possible criminal prosecutions for using abusive and unlawful interrogation techniques.[13] Even a layman would wonder whether he had ever studied US and international law.

The most difficult part to digest is the lackluster attitude by the American Bar Association (ABA) and State Bar Associations to call on those legal professionals in the Bush administration affiliated with the Bars and admonish them for their immoral and unethical behavior. The ABA considered that the 2002 governmental memoranda violated the balance of power by attempting to craft an overall insulation from liability by arguing that the President has the authority to ignore any law or treaty he believed interfered with the President's Article 2 power as Commander-in-Chief.[14]

It also distanced itself from the Executive Order No.13440 dated 20 July 2007 which authorized the CIA's "extraordinary rendition program", claiming that it was inconsistent with US obligations under Article 3 of the Geneva Conventions.[15] This executive order was subsequently revoked by President Obama in Executive Order No. 13491 dated 22 January 2009.

The author refers to the famous *Justice Case*[16] where 16 defendants were accused of judicial murder and other atrocities committed by destroying law and justice during the Third Reich. He concludes

[13] A detailed report by the US Department of Justice containing a review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantanamo, Afghanistan and Iraq was released on 31 May 2008. See my article; 'The Consequences of Unlawful Preemption and the Legal Duty to Protect the Human Rights of its Victims', (2009) 42 Case Western Reserve Journal of International law. 21–89.

[14] ABA Report to the House of Delegates adopted on 9 August 2004.

[15] ABA. Recommendation adopted on 13 and 14 August 2007.

[16] *United States v Alstoetter* et al., 14 Annual Digest of International Law Cases [1948], 278.

that unfortunately lessons from the post Nuremberg period were lost on the Bush administration.[17]

With respect to medical ethics, Professor. Bassiouni refers to another famous case during the Second World War.[18] At Guantánamo he singles out in particular the Behavioral Science Consultation Team where psychiatrists and psychologists were part of a team to prepare psychological profiles for interrogators. This runs counter to the American Medical Association Code of Medical Ethics. He concludes that medical personnel in Guantánamo were active participants in the conspiracy to mistreat detainees in conjunction with members of the Bush administration.[19]

His overall assessment leaves a bad taste, because only one investigation had taken place in the Department of Justice concerning Yoo's memo, also covering the conduct of signatories such as Jay Bybee. The investigation resulted in their exoneration for professional misconduct, with the legal memoranda considered to be "poor judgment".

Chapter 6 surveys the first 18 months of the Obama Administration. The initial three executive orders signed on 22 January 2009 did raise many expectations. It halted for a period of six months the trials before military commissions, promised to close down Guantánamo within a year and also provided for lawful interrogations of "enemy combatants" in accordance with international humanitarian law. As an indication of the changed emphasis, the new Attorney General, Mr. Holder proposed to move Guantánamo prosecutions from military commissions to civilian criminal trials which would entail the application of constitutional rights.

However, the situation remains confused as he later announced that five detainees would be tried by military commissions, an option retained in a preliminary report published in July 2009 by the Obama administration.[20] Politics also interfered. Senator Graham introduced an amendment to Human Rights Bill 2487 preventing terrorist suspects from entering the United States and calling for military trials at

[17] Bassiouni (n. 3), 220.

[18] The 'Nazi Doctors' Case' *United States v Brandt*, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Volume 2 (1947), 171–297.

[19] Bassiouni (n. 3), 234.

[20] Detention Policy Task Force, Memorandum to the Attorney General and Secretary of Defence, Preliminary Report dated 20 July 2009.

Guantánamo.[21] In addition, Secretary of Defense Gates lifted the suspension on new charges in military commissions which was issued pending review of the status of each detainee in accordance with Executive Order No. 13492. The final report of the Review Task Force was issued on 22 January 2010 with the following dispositions: 126 detainees were approved for transfer outside United States; 44 detainees were referred for prosecution either in federal court or in military commissions and 36 of these detainees remain the subject of active cases or investigations and 48 detainees were determined to be too dangerous to be transferred, but not feasible for prosecution and were approved for continued detention under the Authorization for Use of Military Force (2001).[22]

In a statement before the House Armed Services Committee, Hearing on Detainees, on 17 March 2011, the Deputy Secretary of Defense, under reference to Executive Order No. 13567,[23] stated that President Obama and his administration disagreed with the restrictions Congress had imposed on transferring Guantánamo detainees to the United States for the purpose of prosecuting them in federal courts. ''Bringing detainees to justice is an essential part of our arsenal in the war against Al Qaeda and its affiliates, and the executive branch must be able to draw on all aspects of our justice system, including article III courts''.[24] Nevertheless, section 10 (d) of the Executive Order states ''nothing in this order, and no determination made under this order, shall be construed as grounds for release of detainees covered by this order into the United States''. This squarely contradicts what the Deputy Secretary of Defense stated in explanation of the order.

The periodic review established by this order follows the line of the Administrative Review Boards and the Combat Status Review Tribunal which periodically reviewed detainees between 2002 and 2009 as a consequence of which 540 detainees were transferred to other countries. The author makes a strong point when he criticizes

[21] Amendment to Human Rights Bill 2487 dated 5 November 2009.

[22] Memorandum from the Attorney General to the Secretary of Defense, the Secretary of the State, the Secretary of Homeland Security, the Chairman of the Joint Chiefs of Staff, Assistant to the President for the National Security Affairs and the Counsel to the President dated 22 January 2010.

[23] 'Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to the Authorization for Use of Military Force' dated 7 March 2011.

[24] See, http://www.defense.gov/speeches/speech.aspx?Speechid=1548 accessed 1 March 2012.

President Obama for opposing litigation by former Guantanamo detainees in pursuit of legal remedies under US law for having been subjected to torture and other degrading and inhumane treatment.[25]

It is a bad omen that Judge Hogan determined a class action by 105 former detainees to be ''moot'' in April 2010.[26] Regional human rights courts are in the process of creating a large amount of jurisprudence on this subject matter and opposing litigation is in opposition to the accepted maxim, ''where there is a right, there is a remedy''. The chapter closes with Appendix 5, containing the status of cases before the military commissions up to July 2010.

In his final assessment in Chapter 7 the author calls for research into why Congress failed to exercise its constitutional duty of ''checks and balances,'' why the judiciary and in particular the Supreme Court shied away from the traditional role of guaranteeing due process of law and why Bar and Medical Associations remained silent.[27] The declaration by former chief of staff to then Secretary of State Colin Powell, Colonel Wilkerson, cited at the end of the book, shows that he and others, who abided by their professional obligations, may be a shining path in the struggle back to the rule of law and due process in the American system.[28] It takes courage to confront the American administration as the case of Judge Balthazar Garzon proves. In January 2010 he initiated a criminal investigation against six members of the Bush administration based on the principle of universal jurisdiction (Gonzales, Addington, Haynes, Bybee, Yoo and Flanigan). Subsequently, the US pressured Spain over CIA rendition practices and Guantánamo torture claiming that eventual prosecutions would have an enormous impact on bilateral relations.

The book gives a complete picture, in addition to the appendices it details the key actors in the torture policy, provides a useful timeline and a 24 page table of authorities containing books, journal articles, newspaper articles and press releases, US government documents, and US and non-US case law.

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[25] Bassiouni (n. 3), 258.

[26] In *Re: Petitioners Seeking Habeas Corpus Relief in Relation to get prior Detention at Guantánamo*, (2010) WL 1252448 (DDC 2010).

[27] Bassiouni (n. 3), 271.

[28] Declaration of Colonel Wilkerson, 24 March 2010, in *Adel Hassan Hamad v. George Bush, Donald Rumsfeld, Donald Rumsfeld, Jay Hood and Brice Gyurisko*, CV05-1009 JDB (D.D.C. 2010).

The book, finally, is an outstanding tool for use in international criminal law courses, academic study, but also should be a guide to practicing lawyers in the US and elsewhere.