



PO BOX 9576
Washington, D.C. 20016
info@velvetrevolution.us
August 8, 2009

Attorney General Eric Holder
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: The Convention Against Torture Requires the Investigation and Prosecution of Torture by an Independent Prosecutor Mandated to Investigate the Facts and Apply the Law. Selective Prosecution of Some Instances of Torture, or Limiting Prosecution to Low Level Officials, Will Not Satisfy the Requirements of the Convention Against Torture or Other Laws Proscribing Torture.

Dear Mr. Attorney General:

I am writing as the attorney for the Disbar Torture Lawyers Campaign, a coalition of more than 150 organizations representing over a million members, in order to request that you appoint a special prosecutor to fully investigate *all aspects of the torture issue*, and to then follow where the evidence leads. We are concerned, based on various media reports quoting anonymous sources in your office, that you will soon announce a very narrow probe focusing limited instances of torture rather than the full investigation required by law. If the Department of Justice is going to restore its credibility and America's reputation as a nation of laws, then it must even handedly apply the rule of law, especially in tough situations such as torture.

Our coalition has been involved with this issue for some time, and we recently filed disciplinary complaints against 15 lawyers who were instrumental in formulating and advocating the use of torture, including all those who prepared the now rescinded OLC memos. The critical law proscribing torture, which the United States must follow, is the Convention Against Torture ("CAT"), adopted by the United States and signed by President Ronald Reagan. CAT is written in *mandatory* language in order ensure that prosecutorial discretion does not come into play when dealing with state sponsored torture. I have attached a copy of CAT and highlight key portions in this letter.

In the Preamble, CAT notes that that it was enacted to "make more effective the struggle against torture...." Article 1 defines torture as "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.*" Emphasis added. Because torture under CAT requires "instigation, consent, or

acquiescence” of a government official, the selective prosecution of a few government employees who followed orders, while giving immunity for government officials who gave those orders, would undermine our bedrock rule of law that it applies equally, no matter what position a person holds.

Article 2(2) lays out our position in very clear terms: “*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.*” [Emphasis added.] In the case of torture by the United States, it has been said by various officials from both parties that, in light of the shock of 9/11, extreme means were necessary and that officials “were scared” and had to act to stop additional attacks. But CAT specifically prohibits such justifications.

Article 2(3) underscores our position: “*An order from a superior officer or a public authority may not be invoked as a justification of torture.*” The media is reporting that you do not intend to investigate and prosecute the public officials who created the torture policy of the previous administration, and that you do not intend to investigate or prosecute those who followed the OLC memoranda because they were complying with legal opinions and orders issued by the DOJ. But this type of justification is precisely what the CAT forbids. Indeed, the DOJ involvement with justifying torture is one reason why it is critical that the prosecutor be a special prosecutor independent of the DOJ. If legal memoranda could be used to change the definition of torture – which is quite clear under CAT – and justify torture, then the Convention would be meaningless because a government that wanted to use torture would merely have their legal officials provide memoranda to allow it.

Moreover, the “I was just following orders” defense, made famous in the Nuremberg trials after World War II, has been rejected for decades. [Nuremberg Principle IV](#) states: “*The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.*” This “defense of superior orders” is not a defense for war crimes, although it might influence a sentencing authority to lessen the penalty.

Article 4(1) states: “Each State Party shall ensure that all acts of torture are offences under its criminal law.” The United States has complied with this by enacting a criminal statute prohibiting torture under 18 USC 2340. This is clearly an enabling statute that cannot be ignored. Moreover, in order to comply with Article 4(2) to prohibit “complicity” to torture, the Patriot Act, passed during the same time period as much of the torture of detainees, added this language to Section 2340 under subsection (c): “**Conspiracy.**— A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.” Clearly, those who conspired to torture, such as those who used their official position to justify and order it, cannot be excused from the dictates of CAT Article 4 or Section 2340.

Article 5 requires the establishment of jurisdiction over persons covered under Article 4, including citizens of that country, and in cases where the persons are not extradited to face prosecution for torture in another country under Article 8. Clearly, this gives you jurisdiction to prosecute American citizens who committed torture and places the burden on you to do so unless you intend to rely on Article 8 to extradite Americans who may be indicted for torture by a foreign State Party.

Article 6 requires, “after an examination of information available,” that a person who committed torture be taken “into custody” and then that “a preliminary inquiry into the facts” be immediately undertaken. There have been vast amounts of information released, leaked and uncovered, which document who ordered and who committed torture. No doubt an independent investigation would find more evidence of who was responsible for committing these crimes. In our ethics complaints, we included over 600 pages of exhibits, including both the Senate and Red Cross detainee treatment reports and many of OLC memos. See www.DisbarTortureLawyers.com for copies of all exhibits filed. Clearly, this and your own internal “examination of information available” require that you take the known torturers into custody and conduct a more thorough investigation.

Article 7 requires a State Party, unless it extradites a torturer to another country for prosecution, “to submit the case to its competent authorities for the purpose of prosecution.” Again, this is not discretionary. In order to follow the law you must investigate and prosecute all those involved with torture and not selectively prosecute certain low level officials involved in only some acts of torture. In the case of American torturers, despite the widespread torture of hundreds of individuals, including at least 98 deaths, not a single case has been submitted for prosecution.¹ “Command's Responsibility: Detainee Deaths in U.S. Custody in Iraq and Afghanistan” by Hina Shamsi and Edited by Deborah Pearlstein, Human Rights First, February 2006
http://www.humanrightsfirst.org/us_law/etn/dic/exec-sum.asp.

Article 8 states that torture is a required extraditable offense between State Parties. It may be that you do not intend to prosecute American citizens for torture in the United States because a foreign State Party has notified you of an impending indictment and you intend to extradite those indicted. If that is the case, please confirm that in writing. It has been widely reported that other countries are well on their way to initiating torture charges against Americans.

Article 9 requires each State Party to assist each other in connection with torture prosecutions, “including the supply of all evidence at their disposal necessary to carry out the proceedings.” The United States must therefore, once notified, provide all torture evidence in its possession to foreign State Parties working on torture prosecutions.

Articles 10 requires the education about the rules against torture of all persons involved with detainees, and Article 11 requires the review of all interrogation and custody rules for detainees “with a view to preventing any cases of torture.” This is another powerful reason why the “I was just following orders” defense cannot be used to provide immunity

to people who committed torture and why officials who created the torture policy must also be investigated and prosecuted.

Article 12 provides the strongest language for the appointment of a special prosecutor: “*Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.*” Clearly, in the case of torture by American citizens, there is indisputable evidence in various official reports and news articles to require an impartial investigation by a special prosecutor.

Article 13 requires a State Party to investigate all complaints of torture made by persons who have been tortured. Clearly, your office has received many complaints about torture either directly, such as in the case of Jose Padilla, or through proxies such as attorneys representing Guantanamo prisoners, the Red Cross, ACLU, Center for Constitutional Rights, and Amnesty International. Because victims have complained, you must appoint a special prosecutor with broad authority to investigate all acts of torture.

Mr. Attorney General, you have repeatedly stated, in your confirmation hearings and in public statements, that your Department of Justice “will follow the law.” That law, as specified by CAT, outlined above, not only prohibits the use of torture, but *requires* the investigation and prosecution of those who committed or conspired to commit torture. Applying the rule of law evenly is a key component of our American jurisprudence, and that is why the scales of justice should not be weighted in favor of those who hold positions of power. Our nation suffered a grievous blow to her reputation and moral standing when the previous administration intentionally violated the law by advocating and instituting wholesale torture of detainees. **You can restore our moral high ground and the Department of Justice’s reputation as an agency that follows the law by appointing a special prosecutor, independent of the Department of Justice, with the very clear mandate – investigate the facts and apply the rule of law wherever it leads – as required by the Convention Against Torture.**

American citizens who ordered and committed acts of torture should be prosecuted in the United States where they will be given the full panoply of legal protections under our Constitution. At trial, they should be allowed to present any defense under the law, and they should be able to argue whatever mitigating factors are applicable during sentencing. They should also be allowed to ask for a pardon or commutation from the President after conviction. However, they should not be granted immunity from prosecution, *tantamount to amnesty*, in advance of a complete criminal investigation.

Failure to hold those accountable for torture will have numerous repercussions. We believe that anything less than a full torture investigation mandated by your office will result in indictment of American citizens by other CAT State Parties, which will then require you to extradite those citizens and provide evidence against them. It is also likely to result in litigation requesting that the federal court compel your office to comply with

your duty to follow the dictates of CAT. We also believe that the failure to prosecute will embolden other Party States and non-party states to ignore international treaties and laws protecting Americans, resulting in future atrocities against our own citizens. Failure to prosecute will also create a de facto exception for future administrations that may decide that torture, or any other atrocity, should be U.S. policy.

In closing, we strongly urge you to quickly appoint a special prosecutor, independent of the DOJ, to investigate and prosecute torture wherever the facts lead, as required by CAT. If I can be of assistance in your investigations, please contact me.

Sincerely,



Kevin Zeese
Attorney at Law
[301-996-6582](tel:301-996-6582)