



human rights *first*

December 6, 2005

Dear Secretary Rice:

I write to reiterate Human Rights First's concern about the continued U.S. insistence that it is not bound by the obligations of Article 16 of the Convention Against Torture, which prohibits cruel, inhuman, and degrading treatment, with respect to detainees in U.S. custody who are being held outside of the United States. Your statements this week exacerbate these concerns, and we urge you to clarify – and correct – the Administration's position on this important issue.

Yesterday, when you spoke to reporters before leaving for Germany you stated: "The United States Government does not authorize or condone torture of detainees.... It is also U.S. policy that authorized interrogation will be consistent with U.S. law and treaty obligations under the Convention Against Torture, which prohibit cruel, inhuman or degrading treatment." These remarks seem designed to create the impression that the United States accepts the obligations it undertook when it ratified the treaty, and to reassure European allies that current U.S. policy prohibits conduct – such as mock drowning (also known as "waterboarding") – that would clearly violate the law.

In reality, however, under the Administration's interpretation of the Convention Against Torture, stated elsewhere, the U.S. Government would have no such obligation with respect to detainees in U.S. custody anywhere outside the United States, but rather that the treaty's protections apply *only as a matter of discretion* to those being held clandestinely by the U.S. Government in Europe or elsewhere. Several Administration officials have now stated that this strained reading of the treaty's applicability is not intended to encourage cruel treatment in these places, but merely to allow U.S. agents greater "flexibility," and to protect U.S. officials from civil or criminal charges if they do engage in such acts. This was the position Attorney General Alberto Gonzales took at his confirmation hearings earlier this year. And it is the position that has been taken consistently by other senior administration officials in recent months. Based on your ambiguous remarks, it appears to continue to be the Administration's position today.

We believe this position is wrong as a matter of law – and inconsistent with the bipartisan history of the treaty and its ratification. As you know, the Convention Against Torture was drafted in the 1980s with significant U.S. involvement and

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support. It now has been ratified by 140 countries, including the United States. Article 16 of the Convention imposes on every state an obligation to prevent cruel inhuman and degrading treatment in any “territory under its jurisdiction.” This obligation had the full support of Presidents Reagan, George H.W. Bush, and Clinton.

When the treaty was ratified by the United States in 1994, the United States added a reservation asserting that the phrase “cruel, inhuman and degrading” would be limited to those actions that are prohibited under the Fifth, Eighth, or Fourteenth amendments to the U.S. Constitution. This reservation referred to the meaning of these terms and the conduct prohibited. It was not intended to limit geographically the applicability of the obligation.

Indeed, former legal advisor to President G. H. W. Bush Abraham Sofaer recently wrote an article in the *Wall Street Journal* in which he emphatically rejects the current Administration’s view. Mr. Sofaer’s views demand attention, as he presented the Torture Convention to the Senate in 1990 for its assent to ratification and introduced the reservation limiting the scope and meaning of the terms cruel, inhuman or degrading in Article 16 to make the treaty language consistent with U.S. Constitution. He writes:

Any exception to the treaty’s requirement is understandably seen as an effort to allow illegal acts, undermining our diplomatic initiative to change America’s image abroad. Actually a territorial limitation for Article 16 creates risks for officials who might violate the provision. No other state party is likely to accept the U.S. view, and all of them are obliged to enforce the treaty if the U.S. fails to do so.... The notion that the conduct of the enemies we face is so lawless that we should make exceptions to the normal rules is a formula for subjectivity and lawlessness.... Restricting enforcement of Art. 16 to U.S. territory would fundamentally undermine the treaty’s purpose of preventing ‘cruel, inhuman or degrading’ treatment by any State in any place it has ‘jurisdiction.’

In the context of your meetings this week, and in your consideration of the manner in which U.S. detainees are treated at Guantanamo, as well as in Iraq, Afghanistan, and elsewhere, we strongly urge the U.S. Government to abide by its legal obligations under the Convention Against Torture and refrain from subjecting anyone in its custody to torture or other cruel, inhuman, or degrading treatment. Moreover, it is critical to make clear that conduct such as mock drowning, or “waterboarding,” and other such abuses violate U.S. treaty obligations and will not be authorized or tolerated. To do so would reaffirm the U.S. commitment to the rule of law. It would also help restore the U.S. Government’s moral leadership, essential to its efforts to create a more secure world.

We would welcome the opportunity to discuss this issue with you further.

Sincerely,



Michael Posner