Applying the Rule of Law to All Heads of State

By Peter Erlinder

During the run-up to the 2008 Presidential election, legal developments not directly related to the historic McCain-Palin/Obama-Biden contest got little attention. Now that the election is over, several recent but little-reported criminal prosecutions, with potentially great significance for members of the outgoing and incoming administrations, deserve a second look, even though impeachment is a practical impossibility before Obama’s inauguration on January 20, 2009.

The recent “torture” conviction the son of Liberia's notorious former President Charles Taylor in Miami federal court has the potential to advance the Rule of Law, and to strengthen the concept that even vast power does not create impunity for the commission of great crimes, even by governmental figures claiming sovereign prerogative. And the arrest warrants sought by International Criminal Court Chief Prosecutor Luis Moreno-Ocampo for President Bashir of Sudan demonstrate that even the presidents of countries that have not ratified the ICC-Treaty of Rome can be called to account in international tribunals.

Presidential Legal Liability In Office, and Out

One important measure of any legal system, grounded in equality and due process before the law, is “equivalency before the law” for the privileged and powerful….as well as those less-favored by vagaries of birth and status. The recent conviction of Alaska Senator Stevens is only the most recent example of this principle in practice.

And, the various Clinton-era legal battles established that even a sitting president is not immune from civil liability arising before the presidential term and though even “high crimes and misdemeanors” may not be domestically-prosecuted during a presidential term, there is no established doctrine of immunity from domestic criminal liability following the end of a presidential term, or from international legal standards, either during or after a presidency.

The anticipatory pardon of Richard Nixon by the recently-elevated President Ford would not have been necessary if ex-presidents are not culpable under domestic criminal law for crimes committed during their presidency. It is not clear that even a blanket presidential pardon, ala “Scooter” Libby, can insulate executive branch members from potential international criminal culpability. Also, there is no obvious precedent for presidential power to grant an anticipatory pardon president’s own crimes.

Overseas Violation of the Convention Against Torture as a Domestic Crime

Earlier this month, “Chuckie Taylor”, the son of former Liberian President Charles Taylor, now facing trial at The Hague, became the first US citizen in history to be convicted under 18 USC §2340-2340A, a 1994 federal statute that criminalizes violations of the Convention Against Torture by any US citizen, anywhere in the world.[1] The Bush Justice Department was successful in arguing the constitutionality of §2340A and its applicability to a US citizen for crimes committed in Liberia between 1999 and 2003.

Ironically, this overlaps with the period during which the Bush executive branch itself was engaging in what the CIA’s George Tenet euphemistically called “enhanced interrogation techniques” in secret CIA overseas prisons and in places like Abu Ghraib and Guantanamo. The CIA apparently adopted
“waterboarding” and other “torture” tactics when their first high-level captive refused to cooperate in late 2001 or early 2002 [2], and the “torture stain” began to spread to other executive-branch services.

"Top Cover"

Tenet did not get written approval for “enhanced interrogations” from the White House until after the Abu Ghraib scandal erupted in June 2004. By then, CIA officials, apparently including the Office of General Counsel, demanded explicit proof of White House support for the CIA torture program.

But, according to Condoleezza Rice’s written Senate testimony last month, long before 2004 other executive branch agencies were so “uncomfortable” with CIA interrogation methods that she specifically asked then-Attorney General Ashcroft to “…advise the NSC principles whether the CIA program was lawful….under U.S. laws or international treaties.”[3] Apparently the result was the famous 2002 “torture memo” prepared for the Justice Department Office of Legal Affairs (OLA) by John Yoo, John Delahunty and other deputies.[4]

According to a Washington Post article, despite these misgivings in other executive-branch agencies “…[f]ormer and current CIA officials say no…reservations [regarding the legality of the CIA “torture” program] were voiced in their presence…”. [5] The major concern within the CIA was that the agency had political “top cover” in the event the torture program was ever discovered.

“[w]e don’t want to continue unless you tell us in writing that it is not only legal, but is the policy of the administration’…[t]he CIA understood that [the interrogation program] was controversial and would be widely criticized if it became public.”[6] According to the Post, no one in the CIA General Counsel’s Office expressed objections to the legality of the secret “enhanced interrogation” program.[7]

OLA’s Goldsmith: Crimes of the “Terror Presidency”

By 2004, after the exposure of torture at CIA “black sites” and “extraordinary renditions,” the CIA euphemism for kidnapping and outsourcing torture to foreign experts, as well as abuses at Abu Ghraib and Guantanamo, a new lawyer was brought in to head the OLA. Former University of Chicago law professor Jack Goldsmith was shocked to find the shoddy legal analysis that Yoo and his staff had used to justify violations of long-standing statutory, constitutional and treaty prohibitions against the use of torture by the United States government. As described in Goldsmith’s insider account, The Terror Presidency,[8] Bush’s Presidential Chief Counsel Addington, Yoo and his OLA deputies were responsible for the pre-2004 assurances that the CIA program was “lawful,” which were not challenged by the CIA General Counsel’s Office.

According to Goldsmith, the legal reasoning was so transparently inadequate that a complete re-writing of the OLA Opinion defining the “torture options” available to executive branch was undertaken. In was not until 2004 that Goldsmith was able to force through the new standards that were much, much closer to the requirements of the Convention Against Torture and the terms of 18 USC §2430A, by threatening to resign if the Bush Justice Department did not replace the John Yoo 2002 OLA opinion [9], an extraordinary event according to OLA protocols.[10]

The Goldsmith book and recent disclosures reported in the Washington Post [11] have revealed that even high-ranking CIA lawyers were less interested in stopping the torture than in getting political “top cover” (approval from the White House).[12] In context, “top cover” carries the stench of the “plausible
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Much of the “human rights” world cheered when the International Criminal Court indicted Sudan’s sitting President Bashir for crimes allegedly committed in Darfur.[15] This was only the third indictment of a sitting president by an international tribunal [16], and the only the fourth in history. Like Slobodan Milosevic, Charles Taylor, the ICC indictment of President Bashir asserted the commission of genocide, war crimes and crimes against humanity.[17] INTERPOL warrants have also been issued for a fourth sitting-president. President Paul Kagame of Rwanda has also been indicted for genocide, under international law, by the courts of Spain. French courts have also indicted many of his followers. INTERPOL warrants issued for Kagame and his followers in February 2008[18] and the first member of Kagame’s government was arrested in Germany on November 10, 2008.[19]

Bashir was indicted by the ICC, even though Sudan, like the U.S., is not a party to the Treaty of Rome which established the Court and granted jurisdiction over heads of state of ratifying nations.[20] Most U.S. allies have ratified the treaty, but shortly after taking office George Bush renounced Bill Clinton’s signature and never submitted the treaty for ratification.[21] But the Bashir case shows it is possible for the ICC to indict and potentially seek the arrest the heads of both parties to the treaty, and non-party states, too.

The ICC accepted the argument of the ICC Prosecutor, Luis Moreno-Ocampo, that the issue of the court’s jurisdiction over President Bashir should be argued before the Court, once Bashir is in custody and has appeared before the Court.[22]

In light of the Bashir precedent, the question is whether the leaders of powerful non-party nations will be treated the same as the heads of state of less-powerful non-party nations? If not, international criminal tribunals and theorists will have to face the anomaly that, presidents of non-party states that charged with crimes committed within their own territory can be held accountable to international justice, while presidents of non-party states that initiate wars of aggression and commit crimes on the territory of other states are treated with impunity.[23]

The international “Rule of Law” will have been exposed as merely a thinly disguised “rule of the powerful” being carried out with great pomp on an international stage.

Equality Before the Law and the “Rule of Law” - or Power-Politics as Usual?

The Bush Justice Department’s success in convicting the son of an alleged “criminal president” establishes clear precedent for prosecuting other citizens who are complicit in overseas acts of “torture”. The question for the Obama Justice Department will be whether Mr. Bush, Mr. Cheney, Mr. Addison, Mr. Tenet, Mr. Yoo, Mr. Bybee, and others who have complicit in violations of the Convention Against Torture and 18 USC 2430A [24], will be held criminally liable by the Obama Justice Department the same way Bush’s Justice Department has convicted the junior Mr. Taylor?

In the international arena, the question for the ICC Prosecutor and the Court, itself, is whether all non-party heads-of-state are equal before the law or not. If not, the Court will be seen as being no more just than the “victor’s justice” tribunals at Nuremberg and Tokyo.
The question for the 21st Century is whether the Rule of Law actually does apply with the same force to the powerful, as well as those the powerful choose to target. In that regards, it is necessary to recall the debt of gratitude we owe to the majority opinion in *Bush v. Gore*, which taught both conservatives and liberals, once-and-for, all that “law” is not necessary immune from other considerations.[25]

But if the Rule of Law does mean something different for ex-presidents and other citizens, or, for presidents of powerful and less-powerful nations, it might be preferable to put that reality clearly on the table for the people of the United States, and the world, to see. The conviction of “Chuckie” Taylor suggests that President Obama has a chance to demonstrate, by example, what the Rule of Law and “equality before the law,” means to the new administration - and to him.

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Notes

1. Almanzar, Yolanne, “Son of Ex-President of Liberia Is Convicted of Torture,” New York Times, October 31, 2008. [18 USC 2430A was enacted about six months before the Senate ratified the Convention Against Torture which, by definition, becomes part of domestic law pursuant to the Treaty Clause].


3. Id.


5. Id.

6. Id.

7. According to the Washington Post article, A. John Radsan, the CIA general counsel’s office did not object to the substance of the “enhanced interrogation” program, and that “[t]he question was whether we had enough ‘top cover.’” (i.e. written White House approval)


9. Id.

10. Id.

12. Washington Post: A. John Radsan, a lawyer in the CIA general counsel’s office until 2004, remembers the discussion but did not personally review the memos the agency got in response to its concerns. “The question was whether we had enough ‘top cover,’” Radsan said.

13. Convicted Iran-Contra co-conspirators, Oliver North and Admiral John Poindexter and others were pardoned by President Reagan and continued to deny that Reagan was aware of the plot, after Reagan left office.


18. International Herald Tribune, February 6, 2008. The charges against Kagame include the alleged assassination his predecessor, Juvenal Habyarimana; the murder of Spanish citizens in Rwanda; and the massacre of the entire Catholic leadership during the 1994 Rwanda war. INTERPOL warrants have been also issued for the Rwandan leadership by both France.


23. UK Guardian, September 16, 2002. Former UN Secretary General Kofi Annan described the U.S. invasion of Iraq as an illegal war of aggression. [International law also accepts “customary law” that has developed through usage, which is slowly building as more Presidents, and former Presidents, are held to account. Jus cogens, holds that some acts, by their very nature are governed by a higher law. These principles arguably include prohibitions against: “torture” (prohibited by the U.S-ratified Convention Against Torture); acts of “aggressive war” (long-prohibited following the U.S.-run Nurember and Tokyo Tribunals); and “preemptive war” by powerful nations, the heart of the “Bush Doctrine” (outlawed since Hugo Grotius invented the law-between-nations 400 years ago).]

24. For a graphic account of the CIA torture techniques and its justifications, see Jane Myer, The Dark Side (2008) and Goldsmith, infra