

International Human Rights Law and Ethical Implications for the Office of
Legal Counsel

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I. Introduction

Who can forget the German judge portrayed by Burt Lancaster and his defense counsel Maximilian Shell in the movie “Judgment at Nuremberg”? Lawyers have played a similarly crucial role in a nation’s history in The United States. An example of this critical role is lawyers who advise the President while protecting the national security interests of the United States.

Much of this advice provided to the President, however, has been predicated on incomplete ethical considerations. In particular, international human rights law is rarely considered when Administration lawyers are advising the President. Failure to do so is a violation of these attorneys’ ethical obligations under Model Rule of Professional Conduct 2.1.

Recently, however, Counselor to the President Kathryn Ruemmler weighed in on the use of military force in Syria by stating that the deployment of chemical weapons by President Assad was a “horrendous violation of the international norm against chemical weapons use”. President Obama also decried the lack of humanitarian intervention when there is no immediate pressure to act and the UN is blockedⁱ. This appeal to international human rights law by an American President and his legal advisor has not happened often enough in the context of protecting the United States’ national security interests. Much of this failure to consider international human rights law can be attributed to its lack of consideration by Administration lawyers advising the President.

II. Office of Legal Counsel and National Security

1. Office of Legal Counsel (OLC)

According to its “Best Practices for OLC Legal Advice Written Opinions” the OLC

...exercises the Attorney General's authority under the Judiciary Act of 1789 to provide the President and executive agencies with advice on questions of law. OLC's core function, pursuant to the Attorney General's delegation, is to provide controlling advice to Executive Branch officials on questions of law that are centrally important to the functioning of the Federal Government. In performing this function, OLC helps the President fulfill his or her constitutional duties to preserve, protect, and defend the Constitution, and to "take Care that the Laws be faithfully executed." It is thus imperative that the Office's advice be clear,

accurate, thoroughly researched, and soundly reasoned.ⁱⁱ

There are a number of issues to consider when reviewing the OLC's "Best Practices". Chief among them is what is meant by the terms "controlling advice" and "thoroughly researched". Although the President can overrule an OLC opinion, the OLC is usually the ultimate authority of legal interpretation in the Executive branch (iii). Thus, an OLC opinion is controlling on the Executive Branch. There are no court challenges to such an opinion. The importance of this is underscored by Professor Luban who stated "that when OLC lawyers write opinions, especially secret opinions, the stakes are high".^{iv} The term "thoroughly researched", particularly within the context of Model Rule of Professional Conduct (MRPC) 2.1, will be discussed further below.

2. National Security

The OLC has played a pivotal role in advising the President on various national security issues. The most recent example of this is the advice provided President Obama on using military force in Libya. The OLC opinion^v recited the international humanitarian law rationale that President Obama used in advocating the United States of taking "the lead in enforcing the no-fly zone and protecting civilians on the ground"^{vi}. The advice given in the opinion, however, justified the President's authority to use military force in Libya "because he could reasonably determine that such use of force was in the national (US) interest".^{vii} While one of the important national interests cited in the opinion dealt with "maintaining the credibility of the United Nations Security Council and the effectiveness of its actions to promote international peace and security"^{viii}, which can be described as complying with international humanitarian law and not international human rights law, the overriding thrust of the opinion is couched in how American interests were protected rather than the interests of Libyan citizens.

The same failure to emphasize or even consider international human rights law is seen in other OLC opinions dealing with national security. Perhaps the most famous OLC opinions are those dealing with torture^{ix}, military commissions^x and the use of drones against an American citizen^{xi}. In the case of military commissions, it took the application by the Supreme Court^{xii} of international humanitarian law to rebut one of the central arguments in the

torture memos, namely that Common Article Three of the Geneva Convention does apply to detainees at Guantanamo.

The “White Paper”^{xiii} produced in lieu of the OLC opinion on the use of drones (the OLC Opinion itself has not been released to the public) does deal with international humanitarian law, i.e. “the applicable law of war principles”. It does not, however, consider the implications of international human rights law. This distinction will be discussed more fully below.

There are also numerous other OLC opinions dealing with the use of force by the President. Virtually none of these opinions consider international human rights law. These opinions include questions dealing with the use of force in Haiti^{xiv} (international humanitarian law was discussed only within the context of the advancement of American interests by supporting the UN), the famous Yoo memo^{xv}.

III. Rule 2.1 and the OLC Lawyer

OLC lawyers are subject to the District of Columbia Rules of Professional Conduct (DCRPC) which reflect the Model Rules of Professional Conduct, pursuant to 28 USC 530(b). DRPC 2.1 states in relevant part “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice”. While much discussion has occurred regarding the “independent professional judgment” aspect of this Rule, little if any attention has been devoted to what law should be considered by an OLC lawyer in carrying out his or her ethical obligations to provide “candid advice”.

One author who has answered this question has argued that “at least for questions that are unlikely ever to come before a court, OLC lawyers should be obliged by Rule 2.1 to provide what they believe to be the best, rather than a merely plausible, view of the law.” The same author goes on to state in interpreting Rule 2.1 that “the advice that lawyers provide to their clients can have an effect on individuals outside of the lawyer-client relationship, and Rule 2.1 should be interpreted to prevent lawyers from harming third parties”^{xvi}. This interpretation is further reinforced by language from the OLC’s “Best Practices” which states in part “It is thus imperative that the Office's advice be clear, accurate, thoroughly researched, and soundly reasoned.”^{xvii} It goes without saying that in today’s world where a President’s

decision will often effect a third party that international human rights law must be considered by an OLC lawyer in order to thoroughly research the law regarding national security questions.

IV. International Humanitarian Law (IHL)

The term international humanitarian law refers to the law of armed conflict which tries to protect persons who have not or are not a part of hostilities by limiting how warfare is conducted by combatants. The Geneva and Hague Conventions are included in international humanitarian law. Two basic rules of IHL are the distinction between combatants and non-combatants, and the requirement that no attack can be directed against non-combatants.

The “White Paper” regarding using drones to kill an American citizen mentioned above does discuss Common Article 3 of the Geneva Conventions which protects non-combatants. The author of the paper reaches the conclusion that “An operation against a senior operational leader of al-Qa’ida or associated forces who poses an imminent threat of violent attack against the United States... would not constitute a ‘grave breach’ of Common Article 3”.^{xviii} This is questionable at best, but at least the OLC author has considered international humanitarian law. It is unknown what conclusion the author of the White Paper would reach if a different question had been posed by the President, namely whether he was authorized to conduct drone strikes against high value targets which might result in collateral damage.

V. International Human Rights Law

There are certain rights which individuals have irrespective of any treaty or agreement between state actors. Freedom from fear and torture are but two of these rights. Many of these rights have been codified in the Universal Declaration of Rights (UNDR) to which the US is a signatory. While many authors in international law ascribe the application of UNDR to the relationship between the state and its own citizens, UNDR and the underlying international human rights obligation pertain to the relations between the state and the citizens of another country as well. This can be seen in the prohibition of genocide in the UNDR.

One author in particular has argued for the application of international human rights law to the relationship between a state and the citizen of another country. He has written the following in this regard; “Human rights is ultimately about the quality of world order as was acknowledged, but ignored in Article 28 of the Universal Declaration of Human Rights. *Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.* It is late but not too late, to take this unnoticed promise seriously”.^{xix}

Applying international human rights laws during the research and writing of an opinion by an OLC lawyer can very well result in different opinions being rendered. This is especially true in regards to torture. For as one author has stated, “The absolute nature of the prohibition of torture means that the right to personal integrity and dignity cannot be balanced against any other right or concern, including national security interests. Its absolute nature is explicitly stated in Article 7 of the International Covenant on Civil and Political Rights (ICCPR)”^{xx}. It is therefore incumbent upon any Administration lawyer to comply with at the very least international human rights law as contained in the international treaty obligations that the United States is a party to.

VIII. Conclusion

Consideration of international human rights law in all opinions rendered by OLC lawyers dealing with national security will go a long way towards fulfilling their ethical obligations. It will also go a long way towards the United States’ compliance with its obligations to the international community and hopefully prevent a reoccurrence of mistakes made by the OLC in the past.

ⁱ Charlie Savage, The New York Times, September 9, 2013, “Obama Tests Limits of Power in Syrian Conflict”, page A1

ii OLC Best Practices
<http://www.justice.gov/olc/preparation-opinions.html>

- iii Dawn Johnson, *Faithfully Executing the Laws: Internal Legal constraints on Executive Power*, 54 *UCLA L. Rev.* 1559, 1557 (2007)
- iv Testimony of David Luban before the Senate Judiciary Committee, May 17, 2009
- v “Authority to Use Military Force in Libya”, *Opinions of the Office of Legal Counsel*, Volume 35, Caroline D. Krass, Principal Deputy Assistant General Counsel, April 1, 2011
- vi President Obama’s Address to the Nation of March 28, 2011 (<http://www.whitehouse.gov/the-press-office/2011/03/28/ra-afghanistan-address>),
- vii *Op. Cit. Authority to Use Military Force in Libya*
- viii *Ibid*, p. 12
- ix “*Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, Re: Application of 18 USC 2340-2340A to Obtain Techniques That May Be Used in the Interrogation of High Value al Qaeda Detainees*”, May 10, 2005, Jay S. Bybee, Assistant Attorney General
- x While no OLC opinion was issued concerning the usage of military commissions, John Yoo was an OLC lawyer and was instrumental in establishing the policy that the Geneva Conventions did not apply in the “war against terror” and thus military commissions did not violate any aspect of the Geneva Conventions—“*After Terror, a Secret Rewriting of Military Law*”, Tim Golden, *The New York Times*, October 24, 2004
- xi Department of Justice White Paper, *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is A Senior Operational Leader of Al-Qa ida or An Associated Force*
- xii *in Hamdan v Rumsfeld* 548 US 557
- xiii *Op. Cit. Department of Justice White Paper*
- xiv *Deployment of United States Armed Forces to Haiti*, Memorandum Opinion for the Counsel to the President, *Opinions of the Office of Legal Counsel* Volume 28, Jack Goldsmith III, Assistant Attorney General, March 17, 2004
- xv *The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them*, John Yoo, September 25, 2001
- xvi Steven Giballa, *Saving the Law from the Office of Legal Counsel*, 22 *Geo. J. Legal Ethics* 845 at p. 846
- xvii *Op. Cit. OLC Best Practices*
- xviii *Op. Cit. “White Paper”* at p. 16
- xix Richard Falk, *Achieving Human Rights*, Routledge, 2009

^{xx} Manfred Nowak, Moritz Birk and Tiphane Critten, *Human Rights and U.S. Standing Under the Obama Administration; The Obama Administration and Obligations Under the Convention Against Torture*, 20 *Transnat'l L. & Contemp. Probs.* 33, p. 2