

Torture Convention Needs Refining

By Ben Saul | June 20, 2005

The torture scandal rocking the US and British militaries in the “war on terror” is shocking because of the serious breaches of international law involved. But it also exposes serious flaws and ambiguities in the international legal framework prohibiting and criminalizing torture.

In the first place, in defining terrorism, the Convention against Torture does not list individual acts of torture, but merely provides a general definition. Torture is defined as the intentional infliction of severe pain or suffering, by a public official, for one of four purposes: to obtain information or a confession, to punish, to intimidate or coerce, or to discriminate against a person.

The failure of the convention to name and shame specific acts as torture allows unscrupulous government lawyers to claim that certain acts are merely aggressive, but permissible, interrogation techniques. The U.S. Departments of Defense and Justice issued extraordinary guidelines to this effect, approving a variety of “stress and duress” techniques such as sleep or light deprivation, continuous light or noise exposure, withholding food and water or medical treatment, prolonged solitary confinement, exposure to high or low temperatures, forced standing in painful positions, hooding or blindfolding, and shackling.

It remains to be seen how high up the chain of military and political command these techniques were authorized, and the U.S. Justice Department has since recanted its defense of these methods. Yet, it is clear that torture in U.S. custody was not merely the result of isolated acts by renegade individuals, but was part of a calculated and conscious policy designed to push the law to its limits.

Some of these techniques were used by the French in Algeria, the British in Northern Ireland, and the Israelis against Palestinians. Most of them were condemned as torture or cruel treatment by the UN Human Rights Committee, the European Court of Human Rights, and the Israeli Supreme Court. The more extreme or vicious acts, such as sexual humiliation of Muslim men, and terrorizing naked prisoners with attack dogs, are also obviously unlawful. But because they are not expressly prohibited in the Torture Convention, there is room for creative legal argument, even of the rather twisted kind used by Alberto Gonzales, the new US attorney-general, in his infamous torture memorandum.

The second problem with the definition of torture is that it only covers acts perpetrated by public officials, thus

excluding violence committed by private groups such as terrorist organizations, organized criminal gangs, and some kinds of armed rebel groups.

A third difficulty is that an act only qualifies as torture if it is committed for one of the four purposes listed in the definition of torture: to obtain information or a confession, to punish, to intimidate or coerce, or to discriminate. The International Criminal Tribunal for the former Yugoslavia has found, for example, that inflicting severe pain or suffering to humiliate a person is not torture, even though it is a common practice.

In addition to prohibiting torture, the Torture Convention also prohibits cruel, inhuman or degrading treatment or punishment. Governments are required to criminalize torture, compensate its victims, prevent returning persons to a place where they are at risk of torture, and to protect persons from self-incrimination by information obtained under torture. In contrast, a fourth problem with the Torture Convention is that none of these protections apply in the case of cruel, inhuman or degrading treatment.

This allows governments to “contract out” cruel or inhuman interrogations by sending detainees to countries that are less scrupulous about human rights (such as Syria, Morocco and Egypt), or by sending them to irregular armed forces in failed or failing States (such as the Northern Alliance in Afghanistan). One Australian citizen, Mamhdouh Habib, alleges that he was informally rendered from Pakistan to Egypt by the U.S., and mistreated in custody. Egypt can deny committing torture, claiming instead to have used aggressive (but permissible) interrogation techniques. At the same time, the US can argue that even if such interrogations are cruel, it is not barred from returning Mr. Habib to cruel, inhuman or degrading treatment.

The final problem with the convention is that its protection against self-incrimination, based on information obtained by torture, only applies to criminal cases. Consequently, a UK tribunal has accepted that information obtained by torture may be used for security or intel-



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ligence purposes, such as to prevent a terrorist attack, as long as it is not used to prosecute the person. Australian law similarly does not prevent the use of torture evidence for security reasons. Plainly, this encourages governments to torture to prevent terrorist acts, and encourages the 'contracting out' of interrogations to other countries in return for information.

The struggle against terrorism will be won by meticulous and time-honored police work, not by cutting corners through torture. Terrorism does not demand that we torture to defend ourselves. To the contrary, the threat of terrorism is a reminder of the importance of protecting human dignity, even of terrorists. Reforming flaws in the Torture Convention is one small but necessary step in that direction.

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