

Torture and Evidence

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One essential component of effective counter-terrorism is the criminal prosecution of perpetrators of terrorist acts.¹ No matter how much emphasis is placed on the importance of this measure, it can only be effective provided that sufficient evidence can be collected and handed to the courts that are assigned to prosecute and punish those who are responsible for these acts.² The issue of how to improve the capacity of producing evidence for the purpose of prosecution takes on renewed importance in the light of the few trials that have taken place in response to the 9/11 in the US and elsewhere. Indeed, none of them have wielded any significant results.³

It is against this background some might consider whether the use of torture should be permissible in the interrogation of captured and detained terrorist suspects in spite of a universal prohibition against torture (and cruel and inhumane treatment). Should torture be allowed? Is it effective? Is it necessary? Will it give more satisfactory results in terms of terrorist trials? Disturbingly enough, these questions are subject to real debate among US academics some of who, indeed, support the claim that torture can and should be allowed in the 'war on terrorism'.⁴ The debate is fuelled by persistent convictions among leading figures in the US administration that fighting terrorism necessitates the legalization of torture.⁵

One complicating factor for those who believe in torture as an effective method of extracting intelligence and evidence about terrorist attacks is that torture and 'other cruel, inhuman or degrading treatment or punishment' are outlawed, categorically and absolutely, as permissible acts of state officials, whether in times of peace or war. The prohibition is enshrined in an impressive range of international human rights documents, including the Universal Declaration of Human Rights (1948) (article 5); the International Covenant on Civil and Political Rights (1966) (article 7),⁶ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), the Inter-American Convention on Human Rights (1969) (article 5.2), the European Convention on Human Rights (1950) (article 3), and the African Charter on Human and Peoples' Rights (1981) (article 5). Indeed, the torture prohibition extends to situations of armed conflict (international or domestic). It is enshrined in the four Geneva Conventions (1949) (article 3.1.a) as well as in the First and Second Additional Protocols to these Conventions (1977) (articles 75.2.ii. and 4.2.a. respectively). Furthermore, torture amounts to a crime against humanity if it is 'part of a widespread and systematic attack directed against any civilian population' (Rome Statute of the International Criminal Court, 1998, article 7.1.f).

The US has accepted the torture prohibition as laid down in the four Geneva Conventions (in August 1955), the International Civil and Political Covenant (in June 1992) and the

¹ See UN Security Council resolution 1373 (2001), para. 2(e).

² With respect to evidence, the UN Security Council resolution 1373 (2001) obliges states to 'afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings' (para. 2.f).

³ The Center on Law and Security, NYU School of Law, *Terrorist Trials: A Report Card* (Feb. 2005). See, however, the judgment of the Audience Nacional in Spain in the case concerning the 9/11 attacks. Sentencia num. 36/2005, Audiencia Nacional, Madrid, 26 September 2005. Whether the outcome in the Spanish case is best considered as a success or failure are subject to debate in Spain and elsewhere.

⁴ For an overview of this debate and an impressive criticism of those academics who seek to shake the convictions about the universal prohibition of torture, see Jeremy Waldron, 'Torture and Positive Law: Jurisprudence for the White House', pp. 5-9. The paper is available online at: <http://www.columbia.edu/cu/law/fed-soc/otherfiles/waldron.pdf>

⁵ See *infra* note 14 and related text in this comment.

⁶ For the non-derogable nature of the prohibition, see article 4(2) of the International Covenant on Civil and Political Rights.

Convention against Torture (in October 1994). It is also bound by the torture prohibition as a matter of *ius cogens* and customary international law. However, instead of simply disregarding its obligations under international (and domestic) law, the US has had recourse to a range of strategies to evade accountability for its torture practices, among them:

1. Excluding captured persons defined as 'illegal enemy combatants' (a category of terrorist suspects) from their right to international legal protection as prisoners of war.
2. Narrowing down the definition of 'torture' so that some 'interrogation techniques' would not qualify as unlawful.
3. Detaining terrorist suspects in facilities located on territories where the law, at least not American law, does not seem to reach. One notorious example of such territorial location is Guantanamo Bay.
4. Transporting terrorist suspects to countries that are known to maintain its torture practices in spite of their status as a violation of, and a crime under, international law ('extraordinary renditions').

Extraordinary rendition is defined as an 'extra-judicial procedure that sends criminal suspects, generally suspected terrorists, to (or between) third countries'.⁷ At the moment, the CIA is accused of rendering suspects to other countries, including in Europe, in order to avoid US laws prohibiting torture. While Egypt is the most common destination, terrorist suspects have also been rendered to other countries, such as Jordan, Syria, Morocco and Uzbekistan. Recent media reports of US secret detention centers in Poland and Romania to which terrorist suspects are allegedly rendered have forced the Council of Europe to make immediate inquiries into the truth of the allegations made against its member states.⁸ It has also called on the US Congress to ensure that US laws and practices conform to international legal standards.⁹

[Amnesty International](#) claims to have documented no less than 800 CIA flights into and out of European airspace, including 50 landings at Shannon airport in Ireland, with terrorist suspects aboard. In response to these allegations, Condoleezza Rice, US Secretary of State, while on a 4-day visit to Europe, at first argued that rendition—transferring prisoners without legal process from country to country—was permissible under international law. She also asserted that the US government seeks assurances from receiving countries on humane treatment of prisoners. Nevertheless, international human rights institutions have made it clear that 'diplomatic assurances' do not relieve states of their obligations under international law to guarantee that persons under their jurisdiction are not subjected to torture:¹⁰ the torture prohibition forbids states to return a person to a place where he or she would be at risk of torture or ill-treatment.¹¹ The continued criticism forced Mrs Rice to make a further clarification: 'As a matter of policy, the United States obligations under the CAT [Convention against Torture] which prohibits, of course, cruel and inhumane and degrading treatment, extend to US personnel, wherever they are, whether they are in the United States or outside the

⁷ See *Wikipedia Encyclopedia*, available online at: http://en.wikipedia.org/wiki/Extraordinary_rendition.

⁸ Council of Europe, 'Alleged existence of secret detention centers in Council of Europe member states: statement by Dick Marty, Rapporteur of the Committee on Legal Affairs and Human Rights', 13 December 2005, available online at: [http://press.coe.int/cp/2005/690a\(2005\).htm](http://press.coe.int/cp/2005/690a(2005).htm); and Council of Europe, 'Secretary General sets the parameters of the Council of Europe inquiry into alleged CIA activities in Europe', 15 December 2005, available online at: [http://press.coe.int/cp/2005/703a\(2005\).htm](http://press.coe.int/cp/2005/703a(2005).htm).

⁹ Council of Europe, 'PACE (President of the Parliamentary Assembly of the Council of Europe) President calls on US Congress to ensure US laws conform to international legal standards', 15 December 2005, available online at: http://www.coe.int/T/E/Com/Press/News/NoteRedac2005/20051215_usa.asp.

¹⁰ See e.g. Human Rights Watch, "Empty Promises": Diplomatic Assurances No Safeguard against Torture', vol. 16, no 4, April 2004, available online at: <http://hrw.org/reports/2004/un0404/diplomatic0404.pdf>. See also Louise Arbour, 'No Exception to the Ban on Torture', *The San Diego Union Tribune*, 7 December 2005.

¹¹ Human Rights Watch defines 'return' as referring to any process leading to the involuntary return of a non-national either to his or her country of origin, or to a third country, including by deportation, expulsion, extradition and rendition. See *ibid* p. 3.

United States'. But the accuracy of this latest US response was immediately put into doubt.¹²

Criticism against the US allowance of torture comes at a moment where the courts of one of its prime allies, the United Kingdom, have determined that evidence produced by torture inflicted by officials of a foreign state can never be used as evidence in a court of law. On 8 December 2005, the [House of Lords](#) ruled that such evidence is inadmissible under British law. Thus, it decided to allow an appeal by eight detainees who are being held without charge on suspicion of being involved in terrorism, against a contentious Court of Appeal judgment passed in August 2004. Besides international and domestic legal prohibitions, among the cited reasons for arriving to this conclusion were the unreliability of involuntary confessions and that a court's reliance on such confessions would be an affront to the public conscience and an abuse of its process.¹³

The condemnation of torture as a permissible interrogation technique also finds support in the US Senate. In response to President Bush's initial threat to reject the defense bill if it contained a torture ban, and to Vice President Cheney's plea to Congress to at least exempt the CIA from such a ban, US Senator John McCain issued his [anti-torture amendment](#). Except for establishing the Army Field Manual as the uniform standard for the interrogation of Department of Defense detainees, the amendment upholds an absolute ban on cruel and inhumane treatment when conducting covert operations abroad. The House of Representatives gave the amendment overwhelming support.¹⁴

Interestingly enough, the amendment has backing from retired professional intelligence and interrogator experts. In a [letter](#) dated 9 December 2005 addressed to Senator McCain and signed by 30 such experts, the claim that reliance on torture is not only shameful and wrong, but also irrational becomes clear:

Serious efforts to extract intelligence from captured prisoners ... requires research, native language skills, and developing sustained relationships with the targets of interrogation. Abusive tactics make developing these relationships more difficult; instead, they tend to induce a subject to tell an interrogator whatever he or she thinks the interrogator wants to hear. Once these barriers are built up, opportunities for obtaining reliable information from a target usually all but disappear, and vital information is permanently lost.

In the first weeks and months following the 9/11 terrorist attacks, the world showed an impressive solidarity with the US in its determination to eliminate the threat to international security and peace that transnational (or global) terrorism poses. This solidarity was manifested most clearly in the rapid decision of the UN to take global action against terrorism and, in particular, the Security Council's creation of a Counter-Terrorism Committee to take the lead in this fight. Four years on, the initial support for the US to fight terrorism is on the wane. One explanation is its continued reliance on torture. The use of torture, no matter what the reasons are, or who is doing it, is simply too disturbing, shocking and terrible to accept. It also fails to produce reliable evidence for the courts for the purpose of criminal prosecution.

A [Global Strategy for Fighting Terrorism](#) is needed to improve the capacity of collecting evidence for the purpose of criminal prosecution. The working out of such a strategy provides a useful moment to bring diplomats, human rights and security experts together to address the real obstacles involved in producing reliable evidence and how to tackle them in an effective and acceptable manner. The developers of such a strategy should

¹² For a follow-up to this statement, see e.g. Human Rights Watch, 'Fifteen Questions to the US Government', 7 December 2005, available online at: <http://www.hrw.org/english/docs/2005/12/08/usdom12179.htm>.

¹³ The judgment of the House of Lords conforms with the statement on the prohibition of torture-induced evidence for the purpose of criminal prosecution in the Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to the United Kingdom, 4-12 November 2004, for the attention of the Committee of Ministers and the Parliamentary Assembly, Council of Europe, Strasbourg, 8 June 2005 (CommDH(2005)6), available online at: http://www.coe.int/T/E/Commissioner_H.R/Communication_Unit/CommDH%282005%296_E.doc#_Toc105986829.

¹⁴ House Backs Anti-Torture Amendment, *Reuters*, 14 December 2005, available online at: <http://go.reuters.com/newsArticle.jhtml?type=topNews&storyID=10591878&src=eDialog/GetContent>.

consider common wisdoms embedded in countries with longstanding experience of how to overcome these obstacles. The US could be at the forefront in recognizing the need for a comprehensive global strategy related to intelligence and evidence based on principles of human rights and international cooperation. Such engagement may be seen as a first modest attempt of the US towards the initiation of a much needed justice process in relation to all the persons who are victims of torture and other unlawful counter-terrorism measures, and a reaffirmation of its constitutional and historical commitment to human rights.¹⁵ It would also offer an ample moment for the US to rebuild the trust of European and other countries about its willingness to fight global terrorism within the bounds of international law.

¹⁵ For a comment on the incompatibility of torture and the US legal tradition, see Robert F Kennedy Jr, 'Americas Anti-Torture Tradition', *Los Angeles Times*, 17 December 2005.

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