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Torture—And Our Broader Understanding of Human Rights

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Torture—And Our Broader Understanding of Human Rights

Abstract

Like most other human rights scholars, I am appalled at the idea that those people in the Bush White House who designed the administration's policy on torture (but calling it something else) will in all likelihood go unpunished. In my view, the law is clear on this matter: those who directed and/or carried out torture must be held accountable for their actions. However, rather than focusing on the issue of accountability, I will use the issue of torture to make a broader point about how we have come to conceptualize the extent and scope of a state's human rights obligations.

Keywords

Human rights, Torture, War on terror, National security

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Torture—And Our Broader Understanding of Human Rights

by Mark Gibney

Like most other human rights scholars, I am appalled at the idea that those people in the Bush White House who designed the administration's policy on torture (but calling it something else) will in all likelihood go unpunished. In my view, the law is clear on this matter: those who directed and/or carried out torture must be held accountable for their actions. However, rather than focusing on the issue of accountability, I will use the issue of torture to make a broader point about how we have come to conceptualize the extent and scope of a state's human rights obligations.

While the Bush administration was responsible for carrying out torture, they were generally quite careful about where this took place. Thus, when President Bush would (repeatedly) say that the United States "does not torture," perhaps what he really meant to say is that "the United States does not torture—within the territorial boundaries of the United States." And with the exception of the period immediately following September 11 when hundreds of Muslim men were rounded up and disappeared (at least for some period of time) and many of these individuals were tortured, by and large this seems to be true.

This, of course, does not mean that the United States did not torture at Guantanamo Bay, Cuba, or at [Abu Ghraib](#), or at [Bagram Air Base in Afghanistan](#). This also does not mean that the US was not the moving force behind a series of extraordinary renditions where individuals would be kidnapped in one country and flown to some other state where they would be tortured. And to add a second layer of insurance against having any kind of responsibility for these acts, these individuals would be tortured by foreign nationals and not American service personnel.

The Bush administration operated under the premise that the prohibition against torture only applied within the territorial boundaries of the United States. It is for this reason more than any other that less than a handful of "enemy combatants" have been detained on American soil. It is also the reason why no extraordinary rendition flights ever ended in the United States. And finally, it is also the reason why [Maher Arar](#), the Syrian-Canadian national who was stopped at Kennedy Airport in New York during a changeover, was almost immediately flown out of the United States—first to Italy, then to Jordan, and then driven to Syria, where he was subjected to months of endless torture (by Syrian personnel).

I believe that most people can see right through this ruse and would conclude that torture is torture—and that a state would be equally responsible whether it tortured a person within its territorial boundaries, outside its territorial boundaries, or whether it simply engaged another country (like Syria) to carry out torture for it.

I certainly share this view. However, what is easily lost in all this discussion about what is (or is not) torture is the extent to which the Bush administration's approach to human rights was not nearly as far out of the mainstream as it might otherwise appear. They worked under the premise that a state's human rights obligations are territorial in nature. Unfortunately, this has come to be the dominant approach to human rights.

Thus, in its *Sale* decision involving the forcible return of [Haitian boatpeople](#), the US Supreme Court held that the prohibition against sending a person back to a country where her life or freedom would be threatened (*nonrefoulement*) only applied after a person arrived on US soil. According to the Supreme Court at least, American obligations under international and domestic refugee law differed substantially depending on whether a person was within the territorial boundaries of the United States—or just a few, cruel feet away. Like the Bush administration, the Court believed that in terms of a country's human rights obligations, territory matters.

But it is not simply the United States that takes a territorial approach to human rights. In a study of Sweden, [Paul Hunt](#), the former UN Special Rapporteur on the Right to Health, asked government officials whether as a state party to the International Covenant on Economic, Social and Cultural Rights (ICESCR), Sweden has a *legal* obligation to provide foreign aid. The answer was no. The rationale, once again, is that Sweden's human rights obligations do not extend outside the country's territorial borders.

I will close by asking this question. In what way is the US Supreme Court's interpretation of refugee law, or Sweden's understanding of the ICESCR, really any different from the Bush administration's approach to torture? In each instance a (purportedly) universal human right has come to be limited by territorial considerations.

*Mark Gibney is the Belk Distinguished Professor at the University of North Carolina-Asheville. His most recent book publications include *International Human Rights Law: Returning to Universal Principles* (Rowman & Littlefield, 2008) and the edited volume *The Age of Apology: Facing Up to the Past* (University of Pennsylvania Press, 2007). He also has two forthcoming books. The first (with Sabine Carey and Steve Poe) is *The Politics of Human Rights* (Cambridge) and the second is an edited volume (with Sigrun Skogly) *Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press).*