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Righting Past, Present and Future Wrongs

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Righting Past, Present and Future Wrongs

Abstract

Three legal issues are raised by the centerpiece of this month's Roundtable: Does the legal definition of torture include "enhanced interrogation techniques"? What are the legal responsibilities of a State when torture is committed by its agents? and What should the State do now to prevent future violations of human rights? In other words, one must characterize the actions of the past, ameliorate the damage in the present, and prevent a recurrence in the future.

Keywords

Human rights, Torture, War on terror, National security

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Righting Past, Present and Future Wrongs

by Rhona Smith

Three legal issues are raised by the centerpiece of this month's Roundtable: Does the legal definition of torture include "enhanced interrogation techniques"? What are the legal responsibilities of a State when torture is committed by its agents? and What should the State do now to prevent future violations of human rights? In other words, one must characterize the actions of the past, ameliorate the damage in the present, and prevent a recurrence in the future.

Many of the interrogation techniques deployed during the so-called "war on terror" are not disputed. The techniques are detailed extensively and analysed in Danner's reviews of the situation and of the report of the International Committee of the Red Cross report in the *The New York Review of Books*. Are these techniques tantamount to torture? The Red Cross, many commentators and politicians seem to think so and now President Obama has banned such methods. International human rights treaties are normally regarded as "living instruments," subject to refinement as they mature. The United Nations defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" ([Article 1, UN Convention Against Torture](#)). Jurisprudence in the United Nations Treaty Bodies and the European Court of Human Rights have increasingly included interrogation techniques in torture, albeit earlier European decisions such as *Ireland v UK* concluded that interrogation treatments fell within inhuman and degrading treatment, just below the severity threshold for torture. That case is now thirty years old and times have changed, though of course the International Covenant on Civil and Political Rights includes these categories in its prohibition on torture ([Article 7](#)). There is thus clear evidence for supporting a contention that the mental stress and physical endurance regimes imposed on the detainees constitutes torture in international human rights. Is torture ever justified? This argument was revisited by [Alan Dershowitz](#) expounding his "ticking bomb" theory, but in strict legal terms, the prohibition on torture is absolute, and it is a non-derogable right.

"[In Torture We Trust](#)" no more. Having established that torture may have occurred, as Danner notes, "it is not what we did but what we are doing." As [President Obama](#) stated, "[i]nstead of strategically applying our power and our principles, too often we set those principles aside as luxuries that we could no longer afford. And during this season of fear, too many of us—Democrats and Republicans, politicians, journalists, and citizens—fell silent." Accountability is now key. Later in his speech on May 21, Obama acknowledged this: "there are ongoing inquiries by the Congress into matters like enhanced interrogation techniques. The Department of Justice and our courts can work through and punish any violations of our laws or miscarriages of justice...The United States is a nation of laws." International human rights law imposes a positive obligation on States to achieve the prohibition on torture. Thus the State must go beyond mere passive prohibition of torture to seek out and prosecute perpetrators, actively discharging this positive obligation. Accountability under international human rights should first and

foremost lie with the State, here the United States of America, though proceedings can be instituted in other jurisdictions, eg [Spain](#) or [Germany](#), as torture is a “universal crime” and any State can have jurisdiction over perpetrators. A number of people have been prosecuted for abuse of detainees in Iraq and the matter is not only under investigation in Congress, but also in the [United Kingdom](#). Furthermore evidence is being assimilated by a number of public and private bodies (eg. [The Centre for Torture Accountability](#)). The wheels of justice grind slowly.

So to the future. As [Keith Olbermann](#) states “ It is good to say ‘we won’t do it again.’ It is not, however...enough.” A positive obligation to prevent abuse of detainees means that the United States of America must comply with [President Obama’s Executive Order](#) ensuring the Army Field Manual complies with the Geneva Conventions. Appropriate training must be undertaken by all those involved with detainees, and appropriate chains of responsibility must operate to pre-empt potential abuse. No one should be above the law in a country championing the rule of law.

The old adage rings true—it is not enough to say sorry, the apology must be sincere. In law, torture at the hands of the State must be acknowledged, remedied and its recurrence prevented.

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