

## Torture and High Coercive Interrogations: Is There A Line Under International Law?

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### INTRODUCTION

In 2004, three prisoners died in US custody at the Bagram airbase in Afghanistan.<sup>(1)</sup> Their bodies were covered with bruises. Reports about those incidents were vague but mentioned that “blunt force trauma” was a “contributing factor” to the three deaths.<sup>(2)</sup> In April 2004, the scandal at the Abu Ghraib prison in Iraq shocked the world: Besides the deaths of two Iraqi captives while under interrogation, the publication of photos of detainees being tortured showed what was really going on in those “ghost” prisons:<sup>(3)</sup> The photographs of torture and other mistreatments of detainees provided the most graphic evidence of abuse. Further investigations revealed that abuses against detainees were not limited to Abu Ghraib.<sup>(4)</sup> Recently, the British army released the first torture photos of prisoners at Camp Breadbasket in Basra. The practices may not have reached the Abu Ghraib

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*ISJ*, Vol. 2, No. 3, Winter 2006, pp. 67-94.

level; it is however still deeply disturbing.<sup>(5)</sup> Eventually during the trial of the US soldier Charles Graner, two victims of Abu Ghraib testified and described the soldier as a “primary torturer.”<sup>(6)</sup> He was found guilty of mistreating the detainees. There is however only one mention of the term torture in the report written by General Taguba about the abuses committed in Iraq.<sup>(7)</sup> Instead, he uses the word of abuses and ill-treatment.

The explanation to this rhetoric switch is the following: While the techniques utilized might be similar to those of the past, the discourse used to legitimate such techniques has changed. Since September 11, the discourse once categorized as torture has become “torture-lite” or high-coercive techniques.<sup>(8)</sup> For US officials, army and government, those methods will fall under the category of coercive interrogations or will fall short of torture, so they are not prohibited under international law. For human rights activists, the techniques used amount to torture and the US is responsible of war crimes. The shift in the discursive techniques is an attempt to legitimate certain military techniques used in interrogating detainees, which has traditionally been deemed as torture under international law.

As a result of the shift in discursive techniques, the line between high-coercive interrogation and torture has been blurred.<sup>(9)</sup> The blurring of the line begs the questions of whether there is a limit to the use of such techniques and whether high coercive interrogation methods are a cruel, inhumane or degrading treatment, prohibited under international law.

I will first present and describe the methods used and qualified as high coercive methods of interrogations. In the second part of the paper, I will see what the legal and moral differences are between torture and high coercive interrogations. In the third part I will see how courts and commissions qualify the methods described. Eventually, I will see if a line can be drawn under international law between torture and high coercive interrogations or if both are prohibited under international law. I will adopt a comparative stand throughout the paper.

## I. WHAT ARE HIGH COERCIVE METHODS OF INTERROGATION?

### A- HIGH COERCIVE TECHNIQUES

There are many methods labeled as high coercive interrogation methods. The United States did not invent them and they are used around the world. John McGuffin describes some in his book *The Guinea pigs*<sup>(10)</sup>: The Guinea pigs in the title were fourteen Irish political prisoners on whom the British Army experimented with sensory deprivation torture beginning in 1971. Some of the Irish cases were later inquired by the European Court of Human Rights: In the case *Ireland v. United Kingdom*, five techniques were identified:<sup>(11)</sup>

- ◆ Wall-standing: forcing the detainees to remain for periods of some hours in a "stress position", described by those who underwent it as being "spread-eagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers";
- ◆ Hooding: putting a black or navy colored bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation;
- ◆ Subjection to noise: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise;
- ◆ Deprivation of sleep: pending their interrogations, depriving the detainees of sleep;
- ◆ Deprivation of food and drink: subjecting the detainees to a reduced diet during their stay at the centre and pending interrogations<sup>(12)</sup>.

The Israeli Human Rights organization B'tselem issued a report in 1998 about the methods used by the Israeli security services, the Shin Bet. The later qualified those as high coercive methods of interrogation while it is clearly torture for the Israeli human rights organization.<sup>(13)</sup>

- ◆ Detention conditions: Palestinian detainees are held in complete isolation from the outside world, in cramped and filthy conditions.

They are not allowed to change clothes, even during interrogations that last months. They must eat with their hands in toilet stalls.

- ◆ **Shabeh Combination:** Shabeh is the combination of methods used for prolonged periods entailing sensory isolation, sleep deprivation, and infliction of pain. Regular shabeh entails shackling the detainee's hands and legs to a small chair, angled to slant forward so that the detainee cannot sit in a stable position.
- ◆ **Threats and curses:** Interrogators threaten to murder the subject, mentioning detainees who died during interrogation or detention, and to harm his relatives. Some of these threats are of a sexual nature
- ◆ **Qas'at a-Taweh:** (Painful Stretching using a Table and Direct Pressure). The method combines a painful position with the application of direct violence by the interrogator, and is used during the interrogation itself.
- ◆ **Qambaz:** (The "Frog Position") The interrogator compels the interrogated to kneel on his toes, his arms tied behind him. If the interrogated falls, the interrogator forcefully compels him to return to the position, at times by beating and kicking him.
- ◆ **Violent Shaking, Slapping, Beating, Kicking and Causing Direct Pain by Use of Shackles**

The same methods were used in the Abu Ghraib detention facility: The Taguba report speaks of violence during arrests with physical pain; Physical constraints and psychological pressures were used during interrogations: prisoners were hooded, stripped naked and then interrogated to be "softened". They were held in secret detention in dark place and detainees were exposed to bombings. According to the International Red Cross Committee (ICRC), there were insults, threats, ill-treatment, humiliations, psychological pressures that are "likely" to amount torture.<sup>(14)</sup> Some important detainees were put in dark cells for 23 hours, which is a violation of the Geneva Conventions. Firearms were used against detainees with real bullets, in order to frighten the detainees. There were casualties and deaths. According to the Committee, those cases are not isolated but are a part of a vast system of torture.

The aim of those high coercive methods is to break down a person, to pierce his resistance, to show him that he is nothing.<sup>(15)</sup> These stressful methods are justified by US officials as necessary and just:<sup>(16)</sup>

There is a wide range of methods that are considered as high coercive methods of interrogation. For human rights organizations, there is no difference between those methods and torture or other cruel, inhuman or degrading treatment or punishments.

### **B- TORTURE-LITE**

A new form of torture was used in Guantanamo: It is called torture-lite.<sup>(17)</sup> The techniques used fall short of torture. According to officials, torture-lite is not quite torture but as close as you can get to it. It entails the use of interrogation techniques such as “duress and stress” tactics.<sup>(18)</sup> It allows the interrogators to exploit what they see as the grey areas between high coercive interrogations and torture.

The US Defense Department has adopted a 72-point “matrix” of types of stress to which detainees can be subjected. These include stripping detainees naked, depriving them of sleep, subjecting them to bright lights or blaring noise, hooding them, exposing them to heat and cold, and binding them in uncomfortable positions. The more stressful techniques must be approved by senior commanders, but are permitted. And nearly all are being used, according to testimonies taken by Human Rights Watch from post-September 11 detainees released from U.S. custody.<sup>(19)</sup>

When human rights organization accuse US officials of using torture or “stress or duress” methods resembling to cruel, inhuman or degrading treatment or punishments, the US administration fails to address the issue. In a letter to Human Rights Watch, the senior lawyer of the Department of Defense, William Haynes stated that the use of torture is condemned by the United States.<sup>(20)</sup> He added that when questioning the prisoners, the agents respected the prohibition of torture and the laws applicable. He did not address the issue of US agents questioning using cruel or inhumane treatment, or practicing “stress and duress” techniques.

Is there a grey area under International Law as claimed by US officials? Human Rights activists don't see the difference between torture-lite and torture.<sup>(21)</sup> According to Human Rights Watch all the techniques described as high coercive and as torture-lite are illegal.<sup>(22)</sup> The United Nations' top human rights official Bertrand Ramcharan said that the mistreatment of Iraqi prisoners by American soldiers could constitute a war crime: "willful killing, torture and inhuman treatment" represents a grave breach of international law and "might be designated as war crimes by a competent tribunal."<sup>(23)</sup> The US itself has categorized sleep deprivation as torture.<sup>(24)</sup>

The lines between torture and torture-lite seems to be difficult to trace.

### C. PSYCHOLOGICAL METHODS

As there are protests about the coercive methods that many consider as torture and prohibited under international law, sophisticated and refined psychologically-oriented interrogation techniques were developed. Descriptions of these interrogation techniques appear in police interrogation manuals. The Inbau Manual has been the most widely used and influential.<sup>(25)</sup> The idea is to "destroy the detainee capacity to resist".<sup>(26)</sup> Physical and psychological harassment combined with manipulation of time (that method is nicknamed *Alice in Wonderland*) are used to break the subject's will to resist: it is "designed not only to obliterate the familiar but to replace it with the weird".<sup>(27)</sup> The pressure is generated inside the detainee. His resistance is sapped; his urge to yield is fortified, until in the end he defeats himself.<sup>(28)</sup> The aim is to disrupt the detainee psychologically, to shatter him deep inside, as to weaken him so that he will answer to the interrogators' questions. The interrogators try to "get into the detainees minds and learn what is there."<sup>(29)</sup>

Another method used is the violation of man's dignity. The goal is to humiliate the detainee in order to soften him and prepare him for the interrogation. It is still considered as high coercion. There are several methods to violate someone's dignity. Truth serums can be administered: the subject loses control of his brain and body. He can reveal his deepest secrets and fears could be exploited against him. A way to violate dignity is find a

cultural weakness. In Islam, dogs are not welcomed in man's life. Dogs were used in all the military bases in Iraq, Afghanistan or Guantanamo to frighten and intimidate detainees with threats of attack, and in one instance actually bit a detainee.<sup>(30)</sup> There is also sexual humiliation and sexual insecurity. The CIA manual authorizes it and calls it a non-coercive method. It causes a traumatic or sub-traumatic experience that softens the subject.<sup>(31)</sup> Another way is to deny the detainees an identity. They are called the "ghost detainees". Their guards do not know their identities, or even the reason for their detention. They are phantom captives, moved often to that the Red Cross can't find them.<sup>(32)</sup>

Many of the tactics labeled "non-coercive" are nonetheless quite cruel. Academics called it "clean torture" as it does not leave any marks on the body.<sup>(33)</sup>

Are those methods we have analyzed torture or cruel, inhuman and unusual punishment? As it leaves marks, creates mental injuries and suffering, it should be associated with cruel, inhuman and unusual punishment. However US officials label this as high coercive techniques of interrogations. What are therefore the differences between torture and cruel, inhuman and unusual punishment on the one hand, and high coercive methods on the other hand?

## **II. DIFFERENCES BETWEEN HIGH COERCIVE INTERROGATIONS AND TORTURE**

The United States shields itself from using torture and says it uses coercive methods instead.<sup>(34)</sup> However facts seem to contradict this assertion: The detainees at Guantanamo and the other camps are said to be kept standing or kneeling for hours, in black smelly hoods or spray-painted goggles. They are held in awkward and painful positions, deprived of sleep alternated with bombardment of light. The U.S. officials confirmed the existence of a list of approved interrogation techniques dated from April 2003 that included reversing sleep patterns, exposing prisoners to hot and cold, and "sensory assault" including use of bright lights and loud music. The treatment of

prisoners in the Afghan camps and on the islands has received less public attention.<sup>(35)</sup> Testimonies of former detainees' state detention for weeks, continuously shackling, sleep deprivation and kneeling for extended periods. Some were kicked or beaten during the arrest. Some say they were doused with freezing water in the winter.<sup>(36)</sup> Those are the techniques assimilated to high coercive interrogations. US officials say those techniques are consistent with international law and are limited by a legal and medical monitoring. In other words, the methods are pushed as far as possible, without being torture. How can US officials be so certain that they have not crossed the line and that the methods are not assimilated to torture? How do they know their interrogations methods are not prohibited under international law?

#### **A-IS THERE A DIFFERENCE BETWEEN HIGH COERCIVE INTERROGATIONS AND TORTURE?**

We have to define torture first to know what high coercive interrogation techniques are. According to Article 1 of the Convention against Torture:<sup>(37)</sup>

The term "torture" means 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

What is high coercive interrogation? Interrogation is aimed at compelling someone to speak. The methods used during the interrogations will therefore be compelling. There is no use of force. For some people, coercive interrogation is not only a possibility but also a necessity.<sup>(38)</sup> It is the only alternative to torture. Experts and veterans say that torture does not work as

it causes a trauma and people lie just to stop the pain. The threats of torture are more efficient to get information: One of the Abu Ghraib images showed a hooded man standing on a box, with wires attached to him. He was told he would be electrocuted if he moved. According to the CIA manual, threatening him with electrocution is better than electrocuting him to have information.<sup>(39)</sup> The CIA manual explains that intense pain produces false confessions. In our case, the man has to stand there for hours and the goal is to sap his resistance.

What is the difference between torture and high coercive methods then? Isn't it torture to attach someone to wires and tell him not to move in order not be electrocuted? Does it reside on how much physical pressure you put on the detainee's body? Or how distressful the method is? Who will judge the method is associated to torture of high coercion? Who is competent enough to know when the border is crossed? Is it a case-by-case situation? One of the Guantanamo techniques is to put music aloud. It creates pain, physical and mental. But it is not severe. Would it be if the hearing of the detainee is impaired? It is on the field that the answers are found, leading to abuses such as the ones in Abu Ghraib prison.

If we accept that the difference is supposed to be clear: there is torture on one side, characterized by severe violence and pain, then cruel, inhuman or degrading treatment or punishments, both prohibited and high coercion on the other side. But the frontier that separate light pain from severe pain is not always easy to find. However it seems that the difference between torture and high coercive methods are far from being different and both seem to be prohibited under international law. We will however try to go on finding the differences between torture and high coercive methods of interrogation as to understand why officials deny the use of torture.

### **B-THE LEGAL CHALLENGE: HOW AND WHERE TO DRAW THE LINE?**

When do one knows he has crossed the line between what is legally acceptable and non acceptable? There are no international manuals about interrogations. The references of the interrogators in Guantanamo, Abu

Ghraib and the others camps are the military manual, the CIA manual and international law.

- International humanitarian law and the 1949 Geneva Conventions provide guidelines as how to treat prisoners. Common article 3 to the four Conventions prohibits the use of violence, mutilation, cruel treatment and torture, outrages upon personal dignity, in particular, humiliating and degrading treatment. So torture is prohibited.

- International law rules lies in the Convention against Torture that prohibits the use of it as well as cruel, inhuman or degrading treatment of punishment. Torture is also prohibited in the 1948 Universal Declaration of Human Rights and the ICCPR. The right not to be tortured is also considered as a fundamental right, which means no derogation is possible, even in time of emergency. There is no mention of high coercive methods.

- US military manual: On the last few pages of Army Field Manual 34-52, the American military lists 20 acceptable tactics for interrogations of prisoners, ranging from “emotional love” and “emotional hate” to “pride and ego”. The most effective of all, however, is the direct questioning of a prisoner without resorting to coercion of any kind, according to the last military intelligence manual to be made public.<sup>(40)</sup> But during the American campaigns, military intelligence experts say that the direct approach has often been met with resistance, leaving interrogators use other means responses that cannot be found in Field Manual 34-52. They declared the manual to be obsolete.<sup>(41)</sup>

- CIA manuals:<sup>(42)</sup> The manuals were partly made public in 1987. The tactics laid down in the manuals are divided in two, coercive and non-coercive. The CIA general counsel's office developed a new set of interrogation rules of engagement 9/11 attacks. It was approved by the Justice Department and by the National Security Council's general counsel, according to U.S. intelligence officials. The new methods could cause temporary physical or mental pain but are described as “legal.”<sup>(43)</sup>

- April 2003 guidelines: The guidelines were the product of discussions between military lawyers, medical personnel and psychologists. They were set up after reports of abuses at the Guantanamo prison. The officials wanted

to avoid having to make the rules as they went along.<sup>(44)</sup> Rumsfeld said all authorized methods had been confirmed by Pentagon lawyers as complying with the Geneva Conventions on treatment of detainees.<sup>(45)</sup> Kenneth Roth, executive director of Human Rights Watch, said the tactics outlined in the U.S. document amount to cruel and inhumane treatment and that the US courts have declared them illegal. Some officials have declared it was not their priority to know if their techniques amounted to torture as their missions was to gather information in time of war.<sup>(46)</sup>

- The May 2004 list: The list appeared after the disclosure of the Abu Ghraib scandal. The list showed two categories of measures - those approved for all detainees and those requiring special authorization. Among the items in the second category are sensory deprivation, stress positions, dietary manipulation, and forced changes in sleep patterns, isolated confinement and use of dogs. Some officials said some procedures requiring special approval go far beyond the Geneva Conventions.<sup>(47)</sup>

It is striking to notice that where international law texts prohibit torture and cruel, inhuman or degrading treatment or punishments without mentioning coercive methods, army manuals and guidelines draw a line between coercive and non-coercive methods. Can we say that international law is not covering the issue? Is there really a grey area under international law? However the fact that in the May 2004 guidelines, lawyers and officials tried to stick to the Geneva Conventions demonstrates that no one is so certain about the existence of this grey area.

### **C-THE MORAL AND HUMAN CHALLENGE: HOW TO DRAW THE LINE?**

How do you know you have cross the traditional lines between rights and wrong, human and inhuman? Morality plays an important role: when officials decide to deny prohibitions under international law, moral can be the last barrier. However most officials think they are leading a just war, so they put their morals beliefs about torture aside.

When questioned at a meeting of the Harvard Law School Forum about torture in Northern Ireland, Sir Norman Skelhorn who was the Director of Public Prosecutions in Northern Ireland in the seventies, claimed that “when

dealing with “Irish terrorists” any methods were justified” because the police was dealing with the bad guys.<sup>(48)</sup> Some even justify the use of those methods as legitimate in times of War on Terrorism.<sup>(49)</sup> “If you don’t violate someone’s human rights some of the time, you probably aren’t doing your job.<sup>(50)</sup>” Or “There was a before 9/11 and there was an after 9/11. After 9/11, the gloves came off.<sup>(51)</sup>” The interrogators say they use “acceptable techniques” like sleep deprivation and temporary withholding of food, water, medical cares.<sup>(52)</sup> For example, Khalid Shaikh Mohamed was shot in the groin during his capture in Afghanistan. Later, while in captivity, he was denied painkillers till his resistance broke.<sup>(53)</sup> Interrogators label this “high coercive methods”. It is a moral issue to deny medications.

The journalist Mark Bowden tries to understand and give a definition of torture.<sup>(54)</sup> According to him, opposition to all forms of torture is very noble but “few moral imperatives make such sense on a large scale but break down so dramatically in the particular”. Is it morally right to protect a terrorist from torture if “we pay for his silence in blood”? How can the United States extract information from captured terrorists while maintaining individual rights? His argument is that “the most effective way to gather intelligence and thwart terrorism can also be a direct route into the morally repugnant terrain”.

There is also the feeling that the American people will understand the use of radical methods of interrogation, even torture. There is a war and every American citizen is expected to be behind the government. Americans have asserted since the attacks that the war against terrorism is a new kind of battle that must be fought with new methods, including coercive techniques.<sup>(55)</sup> However, the scandal that erupted after the Abu Ghraib prison shows that the American people do not agree with the use of torture.

However as the Parker Report on Northern Ireland underlines:

The Directive moreover merely sets out the limits beyond which action may not go, and does not attempt to define the limits to which it is morally permissible to go. Accordingly a second and more difficult question arises as to whether, even if the use of these

techniques complies with the Directive, their application by a civilized and humane society can be morally justified. Some of the witnesses who appeared before us urged that this Country should set an example to the World by improving on the standards in the Geneva Convention and applying what were described as the basic principles of "humanitarian law". They took the line that, even though innocent lives could be and had been saved by the use of the techniques described in the Compton Report, a civilized society should never use them. They argued that, once methods of this character were employed on people in detention in order to obtain information from them, the society that employed them was morally on a slippery slope leading to the deliberate infliction of torture.<sup>(56)</sup>

Torture and high coercion became an issue after 9/11. Newspapers and magazines titled: Should we torture? The moral border seemed to be crossed the moment those types of questions were asked.

Now that we have seen that the lines between torture and high coercive interrogations hardly seem to exist, we are left with this haunting question: are high coercive methods of interrogations amount to torture?

### **III. COURT DECISIONS AND THE DIFFERENCE BETWEEN HIGH COERCIVE INTERROGATIONS AND TORTURE**

How do courts decisions and reports deal with the issue of high coercive interrogations? Can we learn from the way they treat the prohibition of torture under international law to extend it to high coercive methods?

#### **A-COURT DECISIONS**

The most famous case is the European court of Human Rights decision in Ireland v. United Kingdom.<sup>(57)</sup> The state of emergency was declared in Northern Ireland and from 1971 till 1974 the authorities took a series a series of extrajudicial powers of arrest, detention and internment regarding alleged terrorists. Several people interned accused the officials of violation of Article 3 of the European Convention on Human Rights. According to this article

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment”.

The Commission agreed with the plaintiffs and said that the methods used, qualified as “in depth interrogations methods.”<sup>(58)</sup> It declared Article 3 had been violated and those in depths interrogation methods, labeled high coercive methods nowadays, amounted to inhuman treatment and torture. The Court declared on the contrary that while violence had been used, it did not amount to torture. According to the Court, Article 3 makes a difference between torture and inhuman or degrading treatment. To the first a special stigma is attached with a deliberate inhuman treatment causing very serious and cruel suffering. “Although the five techniques as applied *in combination* amounted to inhuman and degrading treatment contrary to Article 3 of the Convention, they did not occasion sufferings of a particular intensity and cruelty implied by the word torture.”<sup>(59)</sup>

So the “in depth interrogations” were judged illegal because they amounted to cruel, inhuman and degrading treatment or punishment. Though the word coercion does not appear here, one can understand that coercive interrogations would be considered illegal as well as cruel, inhuman and degrading treatment or punishment.

The Court referred in later cases to its distinction. In the Selmouni case, it goes further by qualifying what form of ill-treatment should be qualified as torture.<sup>(60)</sup> The court acknowledges the necessity to interpret the convention as a living instrument and “certain acts which were classified in the past as inhuman and degrading treatment as opposed to torture could be classified differently in future”. If the Court had to determine the situation at Guantanamo and Abu Ghraib, it might consider the interrogations as acts of torture.

The Israeli Supreme Court issued a judgment in 1999 that is often referred to.<sup>(61)</sup> The Israeli government had issued a directive regulating interrogation methods that authorize its General Security Service (GSS) to engage in torture when interrogating individuals suspected of endangering security. In 1999, an Israeli Supreme Court condemned these practices.<sup>(62)</sup> Justice Barak declared that torture harmed dignity and democracy.

According to this decision, the prohibition of the use of force during the interrogations is absolute. The Court forbids the use of physical means to extract confessions. However the Court did not make a difference between torture and high coercive techniques. It just prohibited the use of unlawful physical means. Human rights organization can refer to this decision as actually meaning that high coercive methods are unlawful physical means. It would not be enough however as most of the methods used involved a psychological component.

## **B- REPORTS AND COMMISSIONS**

In general, reports are not keen on using the word of torture and rather speak of coercive interrogations. The Taguba report speaks only of ill-treatment and abuses.<sup>(63)</sup> There is a denial to acknowledge torture and a trend to qualify every act as high coercive.

The Compton report on Northern Ireland was very much criticized because it does not clearly condemn torture and does not draw a line between torture and coercive techniques.<sup>(64)</sup> The findings of the Commission about physical ill-treatment did raise questions about the application of the general rules governing interrogation. The Commission considered it was imperative to obtain all available intelligence in order to save the lives of civilians so the interrogation of suspects was legal. However the Commission considered that posture on the wall, hooding, noise, deprivation of sleep, diet of bread and water, deception, course obstacles were ill-treatments. The report basically draws 7 years before the European Court of Human Rights the difference between torture and cruel, inhuman or degrading treatment or punishments.

The Parker Commission was appointed in 1972 to consider authorized procedures for the interrogation of persons suspected of terrorism in Northern Ireland.<sup>(65)</sup> It prohibits the use of torture during interrogations but agrees with coercive techniques though it had some doubts as where does coercive techniques stop and where torture starts:

There is a wide spectrum between discomfort and hardship at the one end and physical or mental torture at the other end. Discomfort and hardship are clearly matters which any persons suspected of crime, under ordinary conditions, will suffer and that is accepted as not only inevitable but permissible. Equally, everyone would agree that torture, whether physical or mental, is not justified under any conditions. Where, however, does hardship and discomfort end and for instance humiliating treatment begin, and where does the latter end and torture begin?

The Landau Commission of Inquiry was appointed following a decision of the Government of Israel in 1987 to examine the General Security Service's methods of interrogation of terrorist suspects.<sup>(66)</sup> The Landau Commission examined international human rights law standards, the Israeli legislation prohibiting torture and cruel, inhuman or degrading treatment or punishments and guidelines of other democracies confronted with the threat of terrorism. The mission of the commission was to define the boundaries of what is permitted during the interrogation. The Commission concluded that it was all right for the interrogators to use a moderate degree of pressure when it came to terrorist and in circumstances where there are no other ways to obtain crucial information. There is an express authorization to use high coercion during interrogations, but not torture. The Commission acknowledges the danger of agents abusing their power and using unnecessary harsh forms of pressure. So the Commission recommended the use of psychological forms of pressure should be predominant, in accordance with international law. The details of accepted high coercive interrogation methods are given in the second part of the report. This section has been kept secret. As for the difference between high coercive interrogation and torture, the commission refers to the European Court case, Ireland v. United Kingdom

Those cases and reports are important: first of all they show that the issue of tracing a line between torture and high coercive interrogations is not new. It also demonstrates that high coercive methods are often assimilated to

cruel, inhuman or degrading treatment or punishments. Those conclusions are a beginning for human rights to prove that high coercive methods are prohibited under international law, if not as torture, at least as cruel, inhuman or degrading treatment or punishments.

#### **IV. PROHIBITION OF HIGH COERCION UNDER INTERNATIONAL LAW**

##### **A-FROM CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT TO TORTURE**

US officials drew the line between torture and high coercive interrogations by putting on one side of the line torture and other cruel, inhuman or degrading treatment or punishments and on the other side high coercive methods. However for human rights activists, basing their claims on court decisions and reports, there are no doubt that high coercive methods are prohibited under international law as it is cruel, inhuman or degrading treatment or punishment.

Kenneth Roth, director of Human Rights Watch, said the April 2004 U.S. interrogation rules for Iraq “look like someone tried carefully to avoid torture but forgot about the parallel rule against cruel and inhumane treatment”. He called those U.S. techniques that require special approval “blatantly illegal”. An official said the Pentagon was trying to draw lines within the gray area between torture and benign treatment.<sup>(67)</sup>

The prohibition against torture as well as cruel, inhuman or degrading treatment is not limited to acts causing physical pain or injury. It includes acts that cause mental suffering. As the U.S. Supreme Court has recognized “coercion can be mental as well as physical...the blood of the accused is not the only hallmark of an unconstitutional inquisition.”<sup>(68)</sup> The use of mind-altering drugs to compel a person to provide information, the stripping or the sexual humiliation would at least amount to inhuman or degrading treatment under the Convention against Torture.

There is therefore no doubt for human rights activists that high coercive methods would be declared illegal by a court. Another argument of human rights organizations is that there are other techniques than high coercion or

even coercion that work: A technique used in Saudi Arabia is to bring radical imams to the sessions to build a rapport with detainees, who are later passed on to more moderate imams. Working in tandem with relatives of the detainees, the clerics try to convince the subjects that terrorism violates tenets of the Koran and could bar them from heaven. “According to our guys, almost all of them turn”, the Saudi official said. “It’s like deprogramming them. There is absolutely no need to put them through stress. It’s more of a therapy.” The Saudis also used their knowledge of Arab culture and tribal relations: “We know where they grew up. We know their families. We know the furniture in their home.”<sup>(69)</sup>

#### **B- HIGH COERCIVE METHODS AMOUNT TO TORTURE.**

The struggle is taking another shift for human rights activists: they would high coercive methods to be considered as torture. Human rights activists and even experts in military law or US officials have argued that some of the authorized U.S. methods are cruel, inhuman or degrading treatments or punishments and sometimes amount to torture. Even within the military, some lawyers have expressed unease with the interrogation rules. In 2003, several military lawyers appealed to a senior representative of the New York State Bar Association to try to persuade the Pentagon to revise its practices.<sup>(70)</sup>

It seems that in their efforts to discover information, US officials began to use torture on a systematic basis.<sup>(71)</sup> They still deny the use of torture: “Torture does not occur in the United States except in aberrational situations and never as a matter of policy.”<sup>(72)</sup> However the photos taken at the Abu Ghraib prisons are evidences of the contrary. The stress and duress methods used in Abu Ghraib amounted for many to torture. Torture is a crime against humanity. The US will have to answer to those accusations, as it ratified the Convention against Torture.<sup>(73)</sup>

Nothing can justify the use of torture or ill-treatment under high coercion: the European Court of Human Rights said in a decision: “The Court is well aware of the immense difficulties faced by the States in modern times in protecting their communities from terrorist violence. However even in these

circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct.<sup>(74)</sup>

The United Nations Committee against Torture declared "The Committee acknowledges the terrible dilemma that Israel confronts in dealing with terrorist threats to its security but as a State party to the Convention Israel is precluded from rising before this Committee exceptional circumstances as justification for prohibited acts."<sup>(75)</sup>

None of those techniques are legal under strict readings of international law. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is perhaps the most relevant legal document. The Geneva Conventions are also quite clear. Since 9/11 the U.S. has ignored the Conventions. One of the guards at Abu Ghraib said: "The Geneva Convention was never posted, and none of us remember taking a class to review it [...] the first time reading it was two months after being charged. I read the entire thing highlighting everything the prison is in violation of. There's a lot."<sup>(76)</sup>

It is argued that those laws and conventions don't provide military or intelligence officers with specific direction on the pressure techniques that are allowed, leaving wide grey areas in what is legal. It is interpreted as leaving it to individuals to make decisions.

A class taught at the Army's interrogation school at Fort Huachuca gives some guidelines when a situation arises when they approach a line between lawful and unlawful actions: In such cases, militaries are instructed to ask themselves two questions:<sup>(77)</sup>

- Would a reasonable person feel their rights are being violated?
- If the actions were against American prisoners of war, would I think the actions violated international or U.S. law?

If the answer to either question is affirmative, soldiers are not to use the technique. But, if doubt remains, they are told to seek direction from military legal authorities.

According to Amnesty International:

It is because we regard the deliberate destruction of a man's ability to control his own mind with revulsion that we reserve a special place in our catalogue of moral crimes for techniques of thought control and brainwashing. Any interrogation procedure which has the purpose or effect of causing a malfunction or breakdown of a man's mental processes constitutes as grave an assault on the inherent dignity of the human person as more traditional techniques of physical torture.<sup>(78)</sup>

## CONCLUSION

The definition of torture in international law is allegedly too broad to rule out even normal interrogation methods widely accepted in democracies, or is vague enough to allow some practices that might seem harsh. That is interpreted as a grey area.

Besides, how can we know we have crossed the line? To use force against someone is torture. But when a subject is forced to sit in a small chair, on his hands for hours, is that torture? Or does torture start when the interrogator presses weight on the subject's shoulders, as the hands of the person being under interrogation are crushed by his own weight? What amount of weight is torture?

Judges have had opportunities to draw clear lines about what is, or is not, allowed under international treaties. The European Court of Human Rights decision on the treatment of suspected IRA prisoners by the British authorities is still the reference. The recent events would probably lead the Court to reverse its jurisprudence if ever such a case arises under its jurisdiction.

The problem is still unsolved and the matter of deciding what is legal under international law is left to field actors, such as the officials working in the prisons.

The US behavior towards prisoners and coercive interrogations changed after the Abu Ghraib scandal: top commanders decided to stop using coercive methods during interrogations. With the new rules established in

May 2004 are under strict control and the coercive techniques admissible under the Geneva Conventions can be used only if agreed by a superior.<sup>(79)</sup> There is also a list of forbidden techniques, which is new, as before the list was made up only of methods allowed. It is now prohibited to alter the food given to the detainees, to starve them, to deprive them from sleep for more than three days in a row, to force them to adopt painful position for more than 45 minutes, to use dogs or to put a hood on a detainee's head. The officials have not acknowledged that under the cover of coercive interrogations, they were torturing prisoners.

One issue is the consequences of the US attitude: with this new US behavior of practicing torture during interrogations and pretending to use only high coercive methods, the lines have melted. The Convention against Torture has been trampled. Will that create a new trend in international law? States do not need international law or treaties if they see a major country such as the United States violating the prohibition of torture: they might as well follow that example. It is then the entire international community values that are at stake. As McGuffin said:

“Those who would see to justify [torture] because of the acts of violence of those who oppose the state generally see themselves as strong supporters of “law and order”. The demand that everyone must respect and obey the law, but they tend to fall into the fatal error of the American general who said of the Vietnamese village of Ben Tre “in order to save the village, we had to destroy it”. Similarly the apostles of law and order destroy that very concept when they violate the law by torturing and brutalizing the opponents of the states.<sup>(80)</sup>”

The issue of the difference between high coercive interrogation methods and torture might sound very academic. It is a misperception as it has real consequences for detainees. Besides, as Congress gets ready to legislate on interrogation techniques, it is important to tackle the issue and make sure this

problem is addressed keeping in mind that high coercive methods are covered by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and therefore are prohibited. ❖

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