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'Torture Degrades Us All'

International Day in Support of Victims of Torture,
Amnesty International & the NSW Service for the Treatment and Rehabilitation of Torture and Trauma Survivors

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Thank you to Amnesty International and STARRTS for the opportunity to speak about torture today, and thanks also to Professor Gaita for his elegant moral discussion of torture, which is so often lacking in lawyers.

In recent times, it has become fashionable to regurgitate old arguments in favour of torture, without fully thinking through the human implications of making such statements. Not only lawyers for the US government, but academics from Harvard Law School and Deakin Law School in our own country have argued for torture.

Torture is as old as law itself; it was used in ancient Rome as in medieval Europe, French Algeria and Northern Ireland, and now still in over 100 countries. It is not surprising that arguments for torture have reappeared in a time of crisis (or perceived crisis) for western countries, when some people instinctively reach for more legal powers, seemingly blind to the history of past emergencies where torture was deemed unnecessary.

For those who think we live in an age of terror, it is intuitively appealing to believe that torturing one person to save many is the right thing to do. Discussion of torture should not be taboo, but arguments for it must withstand moral scrutiny. The legal meaning of "torture" was drafted by human hands; it is therefore fallible and cannot merely be accepted as divine truth – particularly if the definition of torture definition is too weak.

More importantly, if we refuse to discuss torture, then we lose the opportunity to publicly explain the reasons why torture is so objectionable. The prohibition on torture cannot merely be accepted as a matter of faith; we must provide rational justifications for outlawing it.

Under international law, torture is a war crime, a crime against humanity, and an international crime in itself. Cruel, inhuman or degrading treatment is also forbidden. The prohibition on torture is absolute, and cannot be suspended even in times of public emergency. Despite this formidable legal architecture, since September 11, the use of torture has accelerated around the world. Let me give you some examples:

- HRW reports that at least 9 detainees are know to have died in US custody in Afghanistan, and 4 of these were murder or manslaughter.
- An internal US Army investigation revealed widespread abuse of detainees in Afghanistan by poorly trained and inexperienced soldiers, often out of boredom or cruelty, or for the pleasure of humiliating and inflicting pain on those in their power;
- Another US Army report in 2003 found there were numerous cases of "sadistic, blatant, and wanton criminal abuses" at Abu Graib in Iraq, including, for example, the case of Abed Hamed Mowoush, who was suffocated inside a sleeping bag by US soldiers. The International Committee of the Red Cross has taken the exceptional step of public revealing its concerns about torture;
- British servicemen have been disciplined for ill-treating detainees in Iraq;
- The US has "contracted out" interrogations and torture by informally rendering suspects to less scrupulous governments, such as Syria, Morocco, Jordan, Saudi Arabia, and Egypt), or to irregular armed forces in failed States (such as the Northern Alliance in Afghanistan). As Human Rights Watch observes, diplomatic assurances supposed to guarantee the treatment of returnees have frequently been found to be ineffective.
- One Australian citizen, Mamhdouh Habib, alleges that he was informally rendered from Pakistan to Egypt by the US, and tortured while in Egyptian custody. Another Australian citizen, Ahmed Aziz Rafiq has been detained without charge by US forces in Iraq for over a year, with no consular visits for 11 months. The Australian government has been conspicuously silent in representing the interests of its nationals to the US authorities;
- Last month, even Sweden was criticised by the UN Human Rights Committee for returning an Egyptian asylum seeker to probable torture in Egypt, based on secret evidence that he was a terrorist suspect. The Convention against Torture prohibits returning a person to torture.
- The UK courts have accepted that information obtained by torture may be used for security or intelligence purposes, such as to prevent a terrorist attack, as long as it is not used to criminally prosecute the person. Australian law similarly does not prevent the use of torture evidence for security reasons.

Some cases of abuse in custody may have been isolated acts by renegade individuals like Lindi England, who have since faced military discipline. Yet, it is also clear that parts of the US administration have pursued a calculated policy designed to push the law against torture to its limits.

In the first place, some US government lawyers have argued that aggressive interrogation techniques do not amount to torture and are therefore permissible. These arguments take advantage of ambiguity in the legal definition of torture, which does not list prohibited acts but instead prohibits 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.

This general definition invites argument about whether a particular method causes 'severe' pain and suffering, or a lesser degree of discomfort that can expected in ordinary police interrogations. Thus the US Attorney-General, Alberto Gonzales, contrives that the pain of torture:

> "must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."

Lawyers in the US Departments of Defence and Justice issued equally extraordinary legal opinions approving coercive methods supposedly not causing severe pain. These techniques are known by a range of euphemisms: "counter-resistance strategies"; "stress and duress"; "professional interrogation techniques"; "highly coercive interrogation"; "cruel, inhuman and degrading"; and – my favourite – "torture lite" (why does everything American have to be related to food and dieting?)

Some of these include sleep or light deprivation, continuous light or noise exposure, withholding food and water or medical treatment, prolonged solitary confinement, exposure to temperatures, forced standing in painful positions, hooding or blindfolding, shackling, and forced nudity.

US Secretary of State Donald Rumsfeld has also been pushing the legal boundaries. On one opinion recommending forced standing for 4 hours, Rumsfeld wrote: "I stand for 8-10 hours a day. Why is standing limited to 4 hours?" Of course, there is no difference between standing in the White House and standing in a military prison in front of an enemy soldier.

In the past, such techniques have been condemned as torture or ill-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 terrorising naked prisoners with attack dogs, are also obviously unlawful.

What is striking about these US legal opinions is their selective manipulation of international law, and their deference to the supreme power of the US President. They reflect a belief that the protection of American lives prevails over any other interests, even if the danger to Americans is marginal, remote or speculative and the impact of US measures on foreigners is severe, indiscriminate and disproportionate.

As for CIA, the rules governing interrogations remain secret, and given that they have been authorised to assassinate suspected terrorists, it would be surprising if they had not been authorised merely to torture suspects.

Even more worrying than outright breaches of the law, or attempts to define torture narrowly, is the frontal assault on the prohibition of torture itself – from academics rather than governments. Some academics like Alan Dershowitz and Mirko Bargaric have argued, in a rather cavalier fashion, that terrorist suspects should be tortured to obtain information.

Dershowitz has a particularly morbid fascination with his preferred torture techniques – such as inserting nails under a person's fingernails – and claims that such techniques should be allowed because they cause no permanent damage. He conveniently ignores the example of the Tamil man in the 1980s, who, having been tortured by the Sri Lankan security forces in precisely this way, soon lost of the power of speech, suffered impaired motor coordination, and committed suicide within two weeks of his release.

Whether one tortures to save one life or a thousand lives, the argument for torture is indefensible due to insurmountable legal, moral and practical problems.

First, it is impossible for interrogators to know with any reasonable degree of certainty that a suspect possesses information about the threat. There are numerous unknown variables, such as the existence of the threat, its extent, location and duration, whether it can be averted, and the identity and knowledge of the suspect.

This means that a person may be tortured based on speculation and untested pre-trial evidence, and it is inevitable that innocent people will often be tortured. We know that even after exhausting all levels of appeal in one of the world's most advanced legal systems, many innocent people in the US have been wrongly executed. The risk of error is multiplied by the climate of crisis and urgency surrounding terrorist incidents, and the public pressure on interrogators to produce speedy results.

It also means that the torture of an innocent person might only stop when the person is dead. If interrogators are wrongly convinced that a person has information, they will apply increasingly savage torture methods in the hope of extracting the information. Interrogators may believe that the person is simply holding out, rather than innocent.

The problem of torturing the innocent is very real considering that, according to US investigations, two-thirds of detainees at Abu Graib in Iraq were found innocent of any terrorist links, and 40% at Guantanamo. Similarly, the Public Committee against Torture in Israel reports that torture of Palestinians detainees since the second intifadah is routine, even though few are ever charged with terrorist offences.

Second, licensing torture would undoubtedly encourage its abuse, since the legal and moral stigma attaching to torture is removed. Even if torture saves lives in rare cases, the escalation and abuse of torture in the majority of other cases would undoubtedly cause greater suffering than it prevents.

Some academics counter the slippery slope argument by asserting that torture already happens and it is better to regulate it than prohibit it. That is perversely like arguing that because murder and terrorism happen, they too should be decriminalized. Torture cannot be trivially treated like alcohol or marijuana, where regulation may reduce harm. Torture is not a social problem; it is a different kind of violent harm. In medieval Europe, torture was regulated by detailed rules, yet codification failed to control the reckless and expanding use of torture.

Further, if torture currently happens despite prohibition, then why would interrogators obey the limits imposed by any regulatory scheme? Interrogators would still torture if they think it is in the interests of public safety. It is preferable to hold the line at

prohibition, but better implement it through training police and military forces, and closer judicial supervision of interrogations.

Third, torturing anyone who may have information, and not just wrongdoers, casts collective suspicion on whole groups of people, such as the family, friends and colleagues of a suspect, who may happen to know something about the threat. There is no clear limit to the range of people who could be exposed to torture.

Fourth, if torturing terrorists aims to protect public safety, it is hard to see why other threats should not be combated by torture. Why not torture those planning genocide, war crimes, crimes against humanity, murder or rape, even a child kidnapper, as well as those who might know of others planning such crimes? Again, there is no obvious limit to torture once the door to it is opened.

Sixth, torture does not work. Debating the effectiveness of torture immediately concedes that torture may be morally permissible if it works. Nonetheless, since arguments for its effectiveness continue to be loudly voiced, it is necessary to combat such arguments, even if it means getting our hands dirty in the process.

Experienced interrogators know that torture produces misinformation rather than information, since victims of torture will confess to anything to make it stop. This could jeopardize rather than protect public safety, as investigators waste precious time chasing up false leads. Torture fell into disuse historically because it didn't work.

Interrogators have sophisticated techniques for gathering reliable information: the shock of capture and disorientation of detention; offering rewards (like cigarettes, or as US Department of Defence lawyer charmingly wrote, cookies), or withholding privileges; surveillance; psychological pressure; deception (including informants); plea bargaining; and gaining the detainee's trust. Most detainees are soon worn down by the sheer exhaustion of resisting interrogators. The struggle against terrorism will be won by meticulous and time-honoured police work, not cutting corners through torture.

Finally, torture corrupts our institutions and professions. Requiring interrogators to torture degrades and brutalizes them as human beings, and society cannot demand this of them. (I am trying to imagine what the job description would look like in ***The Sydney Morning Herald***: "Experienced torturers only need apply. Former Taliban welcome.")

Since torture would likely be supervised by doctors, it would also implicate medical professionals in serious breaches of medical ethics. Nazi medical experiments on concentration camp inmates, and forced sterilisation programs, illustrate the willing complicity of some doctors in implementing and legitimising State sanctioned violence.

Further, some international and government lawyers have not covered themselves in professional glory by pursuing highly artificial and literal interpretations of legal provisions, contrary to the spirit and purpose of those provisions, and against the ideals of their profession. It is one thing for lawyers to search for loopholes in tax laws, but quite another to evade or avoid a law against inflicting pain and suffering on a person.

Conclusion

Terrorism does not demand that we torture to defend ourselves. To the contrary, the threat of terrorism reminds us of the importance of protecting human dignity, even of terrorists. Law necessarily draws moral lines in the sand which cannot be crossed; the inevitability of torturing the innocent is a price too high to pay to save the lives of others. In 1999, in an Israeli Supreme Court case declaring that the torture of Palestinians by the Israeli security service was unlawful, Chief Justice Barak wrote:

> Although a democracy must fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of they day, they strengthen its spirit and its strength and allow it to overcome its difficulties.

As a citizen of Israel, Chief Justice Barak well understands the seriousness of the terrorist threat to innocent people, yet deliberately rejected resort to torture. Arguments against torture are not based on alarmism, moral absolutism or rhetoric. The consequences of forcibly violating the body and the mind are profound and signal an unnecessary return to the blunt techniques of medieval justice. Torture irreparably damages human dignity, devalues human life, and corrupts the institutions of our democracy.

Thank you.