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Points of View

Still Trapped On Torture

The attorney general's decision not to prosecute CIA officials doesn't solve America's problem.

Legal Times

Pamela B. Stuart

April 20, 2009

Ever since the February 2007 report of the International Committee of the Red Cross about the treatment of 14 “high-value” detainees in CIA custody was published this spring, it was a foregone conclusion that some investigative body in some nation would look into the charges of torture and degrading treatment.

Apparently, Attorney General Eric Holder Jr. has decided that the prosecution of acts of torture by CIA officials who acted reasonably and in good faith will not be done by the United States.

In an April 16 statement, Holder said that intelligence officials who acted reasonably and relied in good faith on authoritative legal advice from the Justice Department that their conduct was lawful and conformed their conduct to that advice would not face federal prosecutions for that conduct. The department will provide counsel for any CIA employees subjected to investigation and prosecution in any federal, state, or administrative proceeding, including congressional investigations.

Holder also said that the United States would take “measures to respond” to any proceeding initiated in any foreign or international tribunal, including the appointment of counsel and assertion of immunities and defenses.

Holder’s statement did not reveal whether the decision to pass on prosecution will apply to those who do not meet his announced standard.

If the United States were to take the lead, as it should, in the investigation of torture committed by U.S. nationals or on territory under U.S. jurisdiction, the key question becomes: Who should conduct the probe—a fact-finding commission appointed by Congress or the president, or a federal grand jury?

The better course, even in light of his decision to forego prosecution, is for the attorney general to convene a grand jury. Initiating a criminal investigation would both honor our obligations under international law and grant full protection to the rights of those who may be accused.

HORRIFYING DETAIL

Unfortunately, the ICRC uncovered a great deal of evidence that intelligence community members did not act reasonably under long-accepted standards of international law. It would be difficult to demonstrate “good faith” under such circumstances, and the U.N. Convention Against Torture does not permit the defense of obeying orders of a superior.

The ICRC report illuminated in horrifying detail the treatment inflicted upon prisoners at CIA “black sites” who were transferred to Guantánamo in 2006. The ICRC, authorized to conduct such interviews by the Third Geneva Convention on the Treatment of Prisoners of War, concluded that the treatment constituted “torture” in many instances and that other aspects amounted to “cruel, inhuman or degrading treatment.”

These are not mere words from a humanitarian organization. The ICRC’s conclusion that torture occurred has legal consequence under international law. Under the U.N. Convention Against Torture, any nation such as the United States that ratified the Convention and whose nationals are alleged to be torturers is obliged, if there is “reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction,” to investigate the matter promptly and impartially.

If the investigation determines that acts of torture were committed, then the Convention requires the prosecution of those who committed, attempted to commit, or were complicit or otherwise participated in acts of torture.

Thus, legally, the United States does not seem to have much choice. Although the Obama administration clearly wishes to avoid such an investigation that might focus on the intelligence community and the military, the United States, under its treaty obligations, is required in light of the ICRC’s findings to bring the alleged torturers under the jurisdiction of its criminal process.

A COMMISSION?

So, in light of this specific treaty obligation, what should we do?

Establishing a commission has been a popular answer. After excerpts from the Red Cross report were published, *The Washington Post* editorialized in favor of an independent commission. Sen. Patrick Leahy (D-Vt.), chairman of the Senate Judiciary Committee, held hearings even before the report became public to explore the idea. Former U.N.

Ambassador Thomas Pickering and former FBI Director William Sessions have proposed a nonpartisan commission. Stuart Taylor Jr., in *Legal Times* (“The Mess We Made,” April 6, Page 36), proposes a commission headed by Sen. John McCain (R-Ariz.).

But an independent commission would not meet U.S. obligations under international law; it would require granting witnesses immunity to secure testimony; and its final report might be compromised for partisan reasons. Other nations would remain free to open their own investigations—probes that could seriously damage U.S. interests.

A federal grand jury investigation would better protect U.S. interests and classified information. Secrecy rules would apply, and the full array of rights and defenses under U.S. law would be available. It would also preclude foreign nations from conducting investigations of our nationals under their own laws pursuant to the Convention.

NOT GOING AWAY

Grand jury procedures are far preferable to the alternative foreign investigations of U.S. government officials. In civil law countries such as France, Germany, or Spain, investigations and trials may be conducted based upon written, often hearsay, statements of witnesses, and no right against self-incrimination may be available.

If the United States initiated a criminal prosecution of an individual, extradition treaties would bar his or her extradition for the same offense under the principle of *non bis in idem*—the international version of our principle of double jeopardy. The United States could assert the same principle if it investigated but did not charge an individual with a crime.

The possible prosecution of Bush-era officials before foreign courts is not just a bad dream. As one recent example, on March 17 a Spanish attorney filed a complaint asking Baltasar Garzón, chief judge of a court in Madrid, to initiate a preliminary criminal investigation of six former high officials of the Bush administration, including former Attorney General Alberto Gonzales, on charges of torture and other criminal acts.

On April 16, the Spanish attorney general said he does not favor such a prosecution in Spain, making it unlikely in this particular case.

Yet the possibility of a prosecution of and litigation against Bush-era officials for torture is unlikely to go away. Similar complaints to the Spanish one were filed in 2004 and 2006 in Germany by human rights groups. On April 2, a complaint against former Supreme Allied Commander John Craddock was lodged with the U.N. Special Rapporteur on Torture and two other special rapporteurs with responsibility for physical and mental health and human rights.



So what is it going to be? Does the United States want foreign courts to delve into these shameful matters? Or would both the United States' strategic interests and its moral and legal commitment to international law, be better served by sending this problem to a grand jury?

In his confirmation hearings, Attorney General Holder stated his view that waterboarding was torture. He also said that the president, as commander in chief, is not empowered to circumvent the law. He should now take the appropriate action to show America's commitment to the rule of law and to honor its obligations under international law.

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