

Beyond apologies

Neither the United States nor the United Kingdom is untouchable on the issue of torture. [Curtis Doebbler*](#) reviews what may be done now to end the inhuman treatment of Iraqi prisoners, bringing those responsible, including at the highest levels, to justice

British Prime Minister Tony Blair has apologised for the mistreatment of prisoners by British soldiers. American President George W Bush has apologised for the mistreatment of prisoners. They think that this is enough, but both international law and past practice by both countries indicate they are wrong, ignorant of the law, or merely liars.

The treatment they are apologising for includes stripping male prisoners in front of women guards, sexual abuse, sensory deprivation, mock executions, beatings, sleep deprivation, the use of drugs on prisoners, and probably many other horrors soon to emerge. These actions cumulatively and severable constitute torture according to the precedents of several leading international human rights tribunals. Moreover, the treatment according to reliable sources, such as Western NGOs, is not isolated but widespread and even based on state policy. This increases the severity of the violations and emphasises the nature of the action that must be taken to end them.

It is beyond doubt that the treatment caught on film and dished out to Iraqis by their British and American captors constitute serious violations of international law. They constitute, among other things, torture, cruel, inhuman and degrading treatment and punishment. All of these forms of treatment are absolutely prohibited by international law. They are not only prohibited, but there can never be an excuse or justification for such actions. They are, therefore, in legal jargon, non-derogable.

The first and foremost of these prohibitions is found in international human rights law. Both the United States and the United Kingdom have undertaken solemn legal obligations to ensure that torture does not take place. Both countries have voluntarily ratified the International Covenant of Civil and Political Rights. This treaty in article 7 prohibits all forms of torture, cruel, inhuman and degrading treatment and punishment. A violation of this treaty is perhaps one of the most serious violations of international law. This is the case despite the fact that neither country has ratified the Optional Protocol to the Covenant allowing individual petitions against their countries.

Individual petitions or communications against both countries are, however, allowed under regional mechanisms. The United Kingdom can be brought before the European Court of Human Rights, which can issue a legally binding decision against it. The United States can be brought before the Inter-American Commission on Human Rights. Both these international human rights mechanisms have found that each of these countries have violated international human rights law before. Both these bodies have recognised that a state is responsible for human rights abuses committed by their authorised actors outside their own countries.

It is true that one must exhaust domestic remedies in order to bring a case against either country in either forum, but these domestic remedies must be available and adequate. It is unreasonable to expect that prisoners who do not speak English, are denied access to lawyers, do not have access to courts, do not have access to law books, and are completely at the mercy of their captors have reasonable opportunities to challenge their treatment through domestic legal means.

There is therefore no legal obstacle blocking either of these human rights bodies from issuing judgements condemning the actions of the United States and the United Kingdom, but there may be some political obstacles. More than two years ago a case was filed against the United States because of its treatment of Iraqis, both whom it was attacking and whom it had captured. To date the Inter-American Commission has refused to consider this complaint. It has said it cannot address the case because it does not have time and because, well, it just cannot.

In time of war there are even special protections of prisoners. One of the four Geneva Conventions ratified by almost every country in the world, including both the United Kingdom and the United States, was especially created to protect prisoners of war. And if a person is not a prisoner of war he or she is protected as a civilian. In other words, just like the non-derogable nature of international human rights law, international humanitarian law provides an airtight protection for individuals against torture.

It also goes further and provides strong obligations for implementing such responsibilities. These obligations apply to the types of treatment that British and American soldiers have meted out to Iraqi prisoners because their actions are considered "grave breaches". The Geneva Conventions include articles that make it incumbent upon state parties to ensure the punishment of any individual involved in committing a grave breach. This means not only the soldier who is violating international law by torturing prisoners must be punished, but also his superiors, if necessary all the way up to the commander-in-chief.

The international legal obligations to prevent torture are both personal and apply to states. In other words, if an individual violates this law they must be punished, even if they are the leader of a country. Furthermore, the obligation to investigate, bring to trial and punish perpetrators of grave breaches is one that every state has.

It is true that if states themselves fail to implement these obligations there is little that private individuals can do to force them, but the lack of a remedy does not remove the scare of a grave breach. It is a black mark that hangs over a country's armed forces, that reflects on the humanity of a country's people, and that encourages extralegal actions by others to remove the occupiers of their country.

In light of these legal obligations, is saying "sorry" sufficient, or do Mr Blair and Mr Bush have to do more?

According to international law, the first and foremost obligation of a torturer is to end his or her inhumane actions. Each state whose soldiers or other personnel under its authority have been accused of torture must take verifiable and demonstrable steps to ensure that the alleged actions are ended and not repeated. To date we do not know if

such steps have been taken because despite saying they are sorry no particulars have been made available about what action is being taken. In fact, given the past record of denial and failure to act, it is safe to assume that both states are continuing their torture of prisoners unless the opposite can be proven. Even the usually low key and secretive International Committee of the Red Cross admits that while some steps have been taken, the problem remains.

If such activities continue then action can and should be taken by the international community, or any other actor in a position to end the torture. The first article in the four Geneva Conventions makes it a legal obligation of all states to implement the conventions by all necessary means. The law thus requires effective action be taken to end torture and to punish those responsible for torture. If the states concerned have not demonstrated that they have done this themselves then other state parties are entitled to act to ensure it is done. Actions could include monitoring Iraqi prisons themselves. Although the ICRC is the mandated body for this task, their mandate is not exclusive and certainly does not alleviate the responsibility of state parties. In other words, a state party cannot claim that it has not taken action to ensure respect of the Geneva Conventions because it thought someone else was taking care of the matter. Nor can a state party exculpate itself from responsibility by claiming that others are acting, unless it can be proven that the actions being taken are having the desired and required results.

And this brings us to past practice.

The United States and the United Kingdom do not have good records of prosecuting their own soldiers and they have particularly poor records of prosecuting their commanders.

Yes, the United States once conducted the famous My Lai trials of some soldiers who slaughtered at least 300 defenceless Vietnamese in 1968. One soldier was even convicted of murder, although his commander, who he claimed ordered the massacre, was never even charged. And even the convicted murderer, who had been sentenced to life in prison, walked free within a few years of his sentencing with little more than a reprimand and being relieved from the military. Is this what Bush's "sorry" means? If so, it is grossly inadequate.

Britain has just as striking examples of the failures of its own justice system. For example, in 1974, 13-year-old Kevin Heatley was shot in the head and killed by members of the British Army's Royal Hampshire Regiment in Ireland where Britain claimed to be fighting terrorism. The only soldier to be tried for the shooting was sentenced to three years for the unlawful killing, but released after his appeal was allowed on a procedural technicality. Again, this is grossly inadequate action that does not satisfy the obligations stated in the Geneva Conventions.

Yes, there are other examples, but not enough to convince the citizens of a country that is illegally occupied that either the United States or the United Kingdom will adequately investigate themselves. Instead, an independent, impartial investigation conducted by an outside body that is neither connected to the military establishments or the governments of the United States or the United Kingdom is needed. The International Committee of the Red Cross -- which bears responsibility for the 1977

Protocols to the four Geneva Conventions that call for investigative committee in case of abuses of prisoners of war -- might be in position to conduct such an investigation, but only if it adheres at least to the following conditions.

First, the investigation must be generally public and transparent. These are basic constituents of the right to fair trial and should be basic features of any investigation of the treatment of prisoners in Iraq unless we want to send the message to the Iraqis that they are to be treated as second class citizens, as the subjects of colonial occupiers rather than equal to other individuals in the world and entitled to basic human rights.

Second, such a tribunal must be able to visit the prisons without notice and to be able to take evidence in confidence from any source. These necessary powers are already recognised as essential to the work of international human rights bodies such as the United Nations' and European Unions' committees against torture.

Third, such a body must include notable Iraqi, Arab and Islamic jurists and forensic experts who will be able to verify the veracity of any claims. These experts will need to be able to examine the claims of both the victims and the United States and the United Kingdom in the context of, and with respect for, the values of Iraqis. Indeed, torture is often connected to the very nature of the victim, and redressing such atrocities must also be related to victims' needs.

Fourth, the investigators must include experts on international human rights and international humanitarian law. Most American and British lawyers in these fields have proven themselves too biased to be permitted to participate impartially. Other European, Asian, South American and African lawyers are needed. In fact, some of the world's leading experts in these fields hail from these other regions of the world. They should be chosen for their expertise and their critical views. If the United States and the United Kingdom are serious about combating their offensive practices in Iraq they must select the lawyers who have been most critical of their activities in Iraq to date.

Finally, because there is sufficient evidence that the American and British activities are endemic such an investigation should have the competence and ability -- including the funds -- to investigate American and British action in other contexts such as in Afghanistan and at the Guantánamo Bay Naval Base where the United States has been accused of torturing prisoners.

While mechanisms already exist to carry out such investigations, these mechanisms have not functioned adequately to date. They are not impartial. And perhaps most importantly these mechanisms will not reliably prove to the Iraqi people that the United States and the United Kingdom are not still torturing their sons and daughters, their grandmothers and grandfathers.

The above are the minimum steps that Mr Bush and Mr Blair must take to ensure fulfilment to their obligations. Anything short of these steps justifies all necessary actions by other states and non-state actors to end and prevent the torture of Iraqi prisoners.