



A debate on
Torture

What is it?

Who carries it out?

Who gets away with it?

Who gets punished?



Can it ever be morally acceptable?

Exactly how far would you go if your entire family was in imminent danger?

So how far should the state go to prevent a terrorist attack?

And have our collective views on the matter shifted since 9/11?

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Program Transcript

Damien Carrick: As you're no doubt aware, last Sunday on 60 Minutes Mamdouh Habib claimed he was the victim of torture while imprisoned by Egyptian, Pakistani and US authorities, and on one occasion, Habib claims, an Australian official was present.

And last night on 4 Corners a former officer with the Defence Intelligence Organisation claimed while in Iraq he was aware of prisoner abuse.

So today on The Law Report: Torture, what is it, when does it happen, what can victims do about it and controversially, is it ever justified?

Jumana Musa is Amnesty International's official observer of the Military Commission trials at Guantanamo Bay. In about 15 minutes' time, at 8.45, Jumana Musa will walk into a meeting with Attorney-General, Philip Ruddock. So why has she come all the way from Washington DC, and what does she want to tell our Attorney-General?

Jumana Musa: There's no secret about the fact that Amnesty International has from the very beginning, from the inception of the executive order that set up the

Military Commission, stated that these commissions can't in any way provide any type of fair process. What we've seen since then in the way that these commissions have developed, has made it clear that nothing amounting to justice or a fair trial can come out of them. And so I'm going to discuss some of our specific concerns about these commissions and the way they've progressed in the case of David Hicks, as well as some of the other problems we've seen in regards to the other three detainees who have been charged before the commission.

I'm also going to talk about our larger concerns about Guantanamo, and the US policy on detention and interrogation, which has really led to a breakdown in the fundamental understandings of international law, and the absolute ban on torture and cruel and human degrading treatment.

Damien Carrick: Well, on that point about interrogation and torture, last Sunday on 60 Minutes, Mamdouh Habib made a number of allegations about being tortured both physically and psychologically at the hands of US, Pakistani and Egyptian authorities. What's your response to those claims? Did you see the Mamdouh Habib interview?



Jumana Musa: I did watch it, and I'm not going to claim to be personally familiar with Habib himself, but what I can say is that what he had to say does not at all sound strange, it echoes what we've heard from a lot of detainees who have been released from Guantanamo. It echoes what we've seen in court filings from detainers who are currently in Guantanamo, and also people who have been released from custody in Afghanistan and Iraq as well. We've also seen similar charges emerge in FBI documents that were recently obtained through a Freedom of Information Act lawsuit once they were handed over, which echoed a lot of the types of particular techniques that Habib and others have talked about. The ground is right. I mean, at that point we know that although for a long time the US government has said: "Well, we may have had some problems at Abu Ghraib but people in Guantanamo are being treated humanely, and all these allegations aren't true." And then it came out that a guard who had participated in a training exercise in Guantanamo, dressed in an orange jumpsuit, was beaten so badly that he developed a seizure disorder. That one sort of got slipped under the rug, but at this point, with all the FBI documents coming out and the various allegations coming to light, even the US government had to concede that they now are doing an internal investigation in terms of how detainees are being treated in Guantanamo.

And then the larger issue of course, we've already seen many deaths in custody and a number

of both allegations and investigations into torture and ill treatment of detainees in Afghanistan, and Iraq as well.

Damien Carrick: Have we seen deaths in custody in Guantanamo Bay?

Jumana Musa: Not that we're aware of, and the government has stated publicly that there have been no deaths in custody, but of course Guantanamo Bay is very difficult to track, it's a place where many times the government puts out approximate numbers, it's an extremely controlled location, and there's absolutely no way in which they don't know how many people are being held in Guantanamo. The numbers that come out usually say 'approximately 545 people are being held in Guantanamo', and if you look at the numbers over time, they're approximate numbers, and their announced releases don't always add up.

Damien Carrick: Presumably you'll be, in your discussions with the attorney-general, talking about what you regard as the obligations of the Australian government towards its own citizens; what will you be telling the attorney-general?

Jumana Musa: Well just to speak on the meeting generally because at this point obviously, I can't predict what we may or may not discuss. But to talk on that generally, it's always been clear that for citizens of any state, whether it's Australia, the United States or anywhere else, their only protection against abuses by foreign states is to have their government stand up for them, and in this case, without your government standing up, at least, it doesn't have to mean – I think one of the things from the 60 Minutes interview was the idea that well was he really involved in these alleged terrorist acts or allegedly supporting

terrorism, or not? The issue is not whether Habib was ever actually involved in supporting some type of criminal activity or not, the issue is that this type of treatment is prohibited at all times in all circumstances. It has nothing to do with whether or not someone may be guilty; it has nothing to do with whether or not you may think they supported something. It's an absolute prohibition. And in that light, any government is obligated to take up on behalf of its citizens to at the very least ask the hard questions, to do some investigating and find out the truth. And I think there would be a lot less concern if the Australian government, rather than saying, well the US assured us they're not torturing. I can say for us who live in the United States that the government has constantly assured us that they don't torture. The pictures and the memos and all the documents that have come out suggest otherwise. So rather than taking this word at face value, which again these kind of words from the US government at this point really ring hollow, the only way the citizens of nations can be protected is when their governments push us for an investigation and to get clear answers to the questions.

Damien Carrick: What do you know about the treatment of David Hicks, the Australian detainee who is still in Guantanamo Bay and who will be facing the Military Commission hearing?

Jumana Musa: Well, David has filed an affidavit in this case alleging torture and ill-treatment, but at the same time we also know beyond the physical torture and ill-treatment, that people report I think part of what gets lost and came out in a Red Cross report, and certainly Amnesty agrees with, is the fact that prolonging indefinite detention in and of itself is a form of torture, as is prolonged solitary confinement. And David

was held for months on end in solitary confinement with very little contact with other people. He was held for 8 months without even being able to see sunlight.

Damien Carrick: Since September 11 there have been a number of reports of human rights abuses by US personnel.

And while Amnesty International does not have official views on particular appointments to the new US administration, Jumana Musa does have enormous reservations about the new attorney-general, Alberto Gonzales.

She's particularly concerned with a memo he drafted back in 2002, outlining what he regarded as acceptable interrogation and blurring widely accepted definitions of torture.

Jumana Musa: Alberto Gonzales served as a White House counsel while all of these policies were being developed. His name is on a number of these policies, including the fact that he's thought to be really the architect of this whole Military Commission process, which was set up outside of the bounds of any kind of existing and recognised law, whether it's international law, military law, or US federal law. He was also responsible for writing a memo to the President that counselled him on a number of issues, including advising him that a presidential determination that the Geneva Conventions didn't apply to Afghanistan, could help our soldiers avoid prosecution under the War Crimes Act. This was a huge concern of ours, when you look at the fact that he is now the top law enforcement agent of the United States as attorney-general, and he was essentially counselling the president on how people could avoid prosecution under the law. That's not the type of thing that you tend to look for in an attorney-general.

Damien Carrick: Things like I understand, mock drowning, or sleep deprivation, what kind of things might be torture in the USA but not torture outside the USA?

Jumana Musa: Well I think he was to some degree trying to distinguish between torture and cruel and human degrading treatment, but there are two things happening here. One being, and this was a huge concern of ours, the fact that when asked directly and on more than one occasion whether or not he would consider waterboarding, which is the practice of binding a detainee and putting him under water until he believes he's drowning, he couldn't recognise that as torture. His response was constantly, "well I can't speak on specific methods," "we don't want to tip the other side in terms of what we're using in interrogation techniques." But that in itself is a concern, the fact that you can't recognise this practice as clearly torture.

I think the other issue that we have is that by trying to set up this sort of parallel reality, where cruel and human degrading treatment is happening outside US borders. What it seems in many cases Alberto Gonzales is counselling, and if you look at that in context, with the very restrictive definition that the Office of Legal Counsel in the Department of Justice put out for torture -back in the summer of 2002. You put those two together and what it allows one to do is redefine things that were traditionally understood to be torture, and have many times been listed in the State Department report on human rights abuses in other countries as torture, to then reclassify them as cruel and human degrading treatment, which under the Gonzales framework would make it okay to do overseas. And that in and of itself is a concern.

Damien Carrick: And of course Mamdouh Habib's allegations relate not just to his treatment in Guantanamo Bay, they also relate to his treatment in Pakistan and Egypt.

Jumana Musa: The fact is that the United States doesn't get out of its obligation not to torture people by having somebody else do their dirty work for them. So in that sense, the US is no less culpable in those cases. And it's already been clear in the case of Maher Arar, the Syrian-born Canadian citizen who when picked up in the airport in New York made it quite clear that he feared torture in Syria. However he was sent there, held for months on end, reports all kinds of torture, and he's suing the US government, not the Syrian government. It doesn't leave the United States with clean hands, and it doesn't make it legal to say: "Well, somebody else did it, not us."

I think the other issue at play here is the fact that it's just yet another place where the US is seeking to skirt their obligations under the Convention Against Torture under US law and under international law.

Damien Carrick: Jumana Musa from Amnesty International's Washington office, who right now is walking into a meeting with Attorney-General Philip Ruddock. Wouldn't you love to be a fly on the wall?

When it comes to torture, how far should the legal net extend? Just a moment ago, Jumana Musa spoke about a legal action in the USA involving torture in Syria. In fact, American civil rights lawyers have been at the forefront of moves by torture victims to obtain compensation, wherever in the world the abuse took place. And in recent years, American lawyers have been increasingly using the 1789 US Alien Tort Claims Act.



Since 1980 a large number of claims have been lodged in the USA using that Act. And the first involving a corporation looks set to settle in about two weeks' time.

Villager: Usantee was already old and very tired, and as he couldn't carry his load as well as he couldn't follow us, the soldiers beat him because they thought that he was just putting up a sham, and that he was pretending to be tired. He was beaten by a bamboo, about six feet long, and all the men were shouting for help. He was calling out his mother's name 'Mother', 'Please help me God', 'Please help me', that was the way he shouted. And finally the voices who were asking for help died down, and then he died, too.

Damien Carrick: A Burmese villager telling National Public Radio in the USA about the abuses suffered at the hands of the Burmese military.

Professor Sarah Joseph is the director of the Castan Centre for Human Rights Law at Monash University. She says alleged abuses like those we just heard formed the basis of litigation against a US-based resources company.

Sarah Joseph: Unocal is part of a consortium which is building a pipeline in Burma, in Southern Burma, an oil pipeline. And most of the allegations relate to Unocal and its partners, and those partners in fact include the Burmese government. Engaging the military to I suppose assist on the project, and in doing that that

the Burmese military has forced people to work on the pipeline. So most of the allegations relate to forced labour, other allegations again associated with forced labour, like complicity, enforced labour and torture, and other human rights abuses.

The Unocal case was the first case where a court decided that alien tort liability could lie against a corporation, and being the first case, there has been other cases against companies, but it was the most advanced. And so the Unocal case has been, I'm not quite sure when it was issued, but the first decision was issued in 1997, so it's been going for a long time.

Damien Carrick: Saying that the action could go ahead, not that liability was established?

Sarah Joseph: Yes, saying that the action could go ahead. It's very much accepted the actual abuses were perpetrated by the Burmese military. Whether there's, and I guess in the interim cases, there've been arguments about what is the appropriate test for establishing Unocal the company's link to the abuses which were happening in Burma.

Damien Carrick: In other words, their employees weren't actually carrying out the abuse, but the military who were somehow assisting the project, perhaps were.

Sarah Joseph: Yes, that's the case. The various tests used, there've been arguments regarding vicarious liability, aiding and abetting, just tort liability, creating a situation where the abuses were likely or were almost inevitably going to occur. You mentioned that Unocal employees did not actually perpetrate the abuses, that's true, but there've also been arguments about the extent to which the Burmese military were in fact the agents of the company. They're quite complicated tests, and then

as you mentioned, it now looks like the case might settle.

Damien Carrick: So in other words, Unocal is going to cough up some money?

Sarah Joseph: Well, the terms of the settlement are not public and the settlement hasn't been absolutely finalised. But I would guess that's what's going to happen. At the moment I guess I'm fairly confident that it will settle, and it will officially settle in the next couple of weeks. I'm not sure that the terms of the settlement are going to be made public.

Damien Carrick: But that will be, if you like, an important milestone for this Act and its usefulness for human rights advocates.

Sarah Joseph: Yes, one could say that.

Damien Carrick: Does it offer any prospects for people who have made allegations about torture who have been inmates of Guantanamo Bay? People like, say, Mamdouh Habib?

Sarah Joseph: I think it would. I would be surprised if public interest lawyers in the United States were not considering a class action in this respect. There are a number of detainees at Guantanamo Bay, including Mamdouh Habib, who have raised allegations of torture. I don't know the exact evidence in that regard, but torture does give rise to causes of action under the Alien Tort Claims Act, so I see no reason why Mamdouh Habib as an individual could not sue. I suspect it's possible that a class action could be being planned in that regard.

Damien Carrick: Professor Sarah Joseph, director of the Castan Centre for Human Rights Law at Monash University.

Well, is torture always a bad thing? Are there extreme situations when it might be considered acceptable?

Julie Clarke, a lecturer in law at Deakin University in Geelong, says yes. In extremely limited cases, torture that doesn't inflict long-term physical harm should be allowed.

Julie Clarke: Well, correct. I mean the classical sort of example is that ticking time bomb scenario, where a leader of a terrorist organisation announces that a bomb's been planted on a plane that will detonate in 30 minutes and everyone will die, and you're somehow able to apprehend him, perhaps he's been under surveillance and so on, and you pick him up after the announcement's made, and he refuses to give information about the plane or the location of the bomb and so on, and says everyone's going to die. In those circumstances I think it would be difficult to argue that it's not morally justifiable to torture that person in order to extract the necessary information to try and save the passengers.

Damien Carrick: What about an innocent bystander who knows something but isn't actually carrying out an attack? Maybe it's someone's parents, maybe it's someone's child. Should we torture a child who won't tell us what plane, bus, train his Dad is currently riding on?

Julie Clarke: Well my answer to that would be no. I think you would restrict I think to adults who are more capable of making an informed decision about whether to provide information or not.

Damien Carrick: Even if we're going to save 300, 400 lives?

Julie Clarke: Well I think there are a number of other factors

with a child, and the level of the wrongdoing of the person involved is relevant. I would say that there are some circumstances in which the person not directly involved could be tortured to extract that information, I would generally restrict that to an adult who's made a conscious decision that they won't reveal that information, and so while they're innocent in actually engaging in the act themselves, they have some complicity in it by holding the information and being of an age to be able to make that choice to withholding the information.

Damien Carrick: So say somebody's mother whose son is currently riding around on a bus, a train, a plane, with a bomb strapped to them?

Julie Clarke: In those circumstances I think again you need to look at all the other factors. Let's say there was immediate harm, the bomb was to go off in half an hour or so, and there was no other way to acquire the information, then yes, I consider torture would be justifiable.

Damien Carrick: I understand there was a recent example in Germany where that kind of ticking bomb situation was a real concrete reality. Tell me about that.

Julie Clarke: Yes, well, in Germany a couple of years ago, there was a good example of this that was fairly widely publicised. An 11-year-old boy was kidnapped and a ransom was demanded, and the ransom was paid and the person who collected the ransom was apprehended while collecting it. So there was fairly strong evidence that this was the person that was involved, or at least had knowledge of this kidnapping. The man that was apprehended was interrogated for a number of hours by the police in Germany, and toyed with them a bit and led

them to location after location that was false. Eventually the Deputy Police Commissioner instructed his officers in writing to try to extract the information by means of infliction of pain under medical supervision and subject to prior warning. Now this sort of thing would constitute torture under the United Nations Convention. Ten minutes after the warning, the suspect told the police where the boy was located and they found him.

Damien Carrick: Was he alive?

Julie Clarke: He was actually dead at that point. But nevertheless the police had obviously no knowledge he was dead, believed him to be alive, the man who they had apprehended had suggested that the boy was still alive, and I suppose it demonstrated that this is a circumstance where you pretty much know you've got the right guy, you know you've got the guy that has the information that could possibly save a life. And the threat of torture alone was sufficient to cause this person to confess, he did in fact have the information, and the boy was located. And even though he was dead, he was at least located so that eventually there was I suppose some closure for the family.

Damien Carrick: So in Germany, as we speak, there is a kind of mechanism which you're talking about where in extreme circumstances somebody can sign a piece of paper and say torture under these circumstances can proceed.

Julie Clarke: No, there's no country that actually condones torture at the moment. The United Nations Convention prohibits it absolutely. It's prohibited absolutely in Germany. The Police Commissioner got himself into a bit of trouble with this; there was a lot of debate in Germany at the time about whether he'd done the right thing or not. A



number of people saying he had, and a number of people saying: “No, you can’t do that sort of thing.” I’m not actually sure what happened to him after that, but certainly what he did, at the time, and now, would be contrary to German law and international law.

Damien Carrick: What about the idea that you might save a few lives now, you might save many lives now, but you create a climate in which worse crimes will happen in the future, presumably the photos from the Abu Ghraib Jail have fuelled the hatred of foreigners inside Iraq by many, and perhaps has created a climate in which more kidnappings, more bombings, more murders have taken place.

Julie Clarke: That’s a situation going beyond what I would condone or recommend in relation to legalising torture. One of the problems with Abu Ghraib is that most of the instances seem to have been instances in which torture would not have been justified pursuant to the elements that I set out earlier. Not having torture legalised means that it’s sort of been driven underground a little bit, beyond accountability. You have all these cases of torture again being carried out by what appear to be very, very junior officers, and so on, and very publicly, in terms of the photos and so on and so forth, but with no real accountability at all. So it’s already happening; the idea of making it accountable would be to try to reduce the instances of

torture that actually take place, and to be able to demonstrate publicly why they are taking place, and again, maybe once a year you might have a circumstance so severe as to justify torture.

Damien Carrick: But I guess what you’re saying is that we should professionalise torture. But if you professionalised and institutionalised torture, it doesn’t necessarily mean you’d get more accountability, you could just kind of introduce a new world where people kind of openly learn it, and perhaps not openly use it.

Julie Clarke: Well it could, but I think still that’s perhaps better than the circumstance where we have people that are not trained perhaps, using torture. But I don’t think that legalising it necessarily leads to that, and I think that there would still be more accountability because if you did have people trained like this, the idea is that the legal aspect of torture, you I think still no doubt have unlawful torture taking place, but we already do, and the hope would be that that would be reduced. In relation to lawful torture there would be that accountability, there would be that process of having to demonstrate why torture was necessary in these circumstances, there would be process by which the torture itself would need to be filmed to ensure that it was carried out in accordance with the various legal requirements, and so there would be that accountability, more so certainly than there is now.

Damien Carrick: Julie Clarke, from Deakin University Law School in Geelong.

Paris Aristotle is the Director of the Victorian Foundation for the Survivors of Torture. He understands why an individual might approve of torture to save a

loved one. But he says a government, whatever its motivation, can’t think like the parent of a kidnapped child.

Paris Aristotle: I have real problems with the ticking bomb theory, in part because I think there are so many aspects to that theory, that are very difficult to prove or substantiate. And it’s also, is it real? How often is that actually real? So I understand the emotive and the emotional reason why people would say: “Yes, in these circumstances if there was a bomb to go off in a primary school, what would you be prepared to do to get that information,” I understand that. I particularly understand it if my kids were going to be at that school, or anyone’s for that matter.

The question you have to ask yourself is: “Does it work anyway? And how do you control it? How do you in the end stop it?” Does anyone really think that people who are prepared to torture are really that concerned about having to get a warrant before they participate in that sort of activity? So I think it’s a very, very slippery slope, and I think that morally, the consequences for a society saying: “Yes, we’re going to legalise the use of torture, even though we don’t know if it’s going to work, or if it will be effective,” it’s a huge problem I think for the community. And, I would ask, where do you draw the line? If you had someone and the sleep deprivation hadn’t been working, what would the next step be? Would you tear out his fingernails?

Damien Carrick: I think the idea is, if I’m representing these people correctly, is that it would be infliction of pain with no long-term consequences.

Paris Aristotle: Well that just displays ignorance about what the infliction of pain in those circum-

stances achieves. We've seen clients today who were tortured 20 years ago, so the psychological ramifications for somebody is always going to be quite extreme in those circumstances, so I think there's a level of ignorance about short-term pain. But the point about trying to prevent that sort of thing from occurring is a valid one.

Of course we want to prevent those things from occurring, but is the use of torture going to achieve that? And in my view it doesn't. It hasn't in years gone by, and I doubt it will in this, and if we turn our minds to things like should we legalise torture? Rather, should we deal with the root causes of why these conflicts are occurring, or why these acts of terrorism take place? Unless we turn our attention to that and deal with them, no amount of torture is going to protect us in the long run. And I guess part of the thing for me around what happened at Abu Ghraib prison and obviously what I believe is happening in places like Guantanamo, is that most of those people won't have very sophisticated information, it certainly won't be current any more. And therefore you have to ask the question of whether or not it's appropriate at all. And part of what I think is the problem with this discussion is that once you open up that box and place it into a bureaucracy where people move from one area to another and take their impressions of what happened in one area to another, you start to lose control of it. And it becomes very dangerous because the safety checks that you think you can put in place inside those bureaucratic systems in fact begin to break down very quickly.

Damien Carrick: Well it's interesting because that's one of the justifications made for this approach, that if you honestly acknowledge

that torture does take place and on very, very rare occasions should take place, then you'll have a better institutional understanding of the issues, and hopefully less abuse will take place, at Abu Ghraib or Guantanamo Bay or wherever.

Paris Aristotle: I just think people are being fanciful when they mount those sorts of claims. I mean it's never been the case in the past. If you sat down and speak to some of our clients who are absolutely confident that when they were tortured in Chile or in El Salvador, there were US officials present assisting in those interrogations. You'd know that it's been going on for a long, long time. The view that this will somehow control it is a fallacy, because in those circumstances, people will, if they're given the power, and the opportunity, will basically take matters into their own hands anyway. The question we have to ask is: Do we want as a society to establish a moral base that says: "That kind of violation of human dignity is acceptable," or not.

Damien Carrick: Paris Aristotle, Director of the Victorian Foundation for the Survivors of Torture. And of course, apart from acceptable or not, there's also the question of whether a confession or admission produced under torture is admissible or not in a court of law.

The Attorney-General says any confession extracted using torture would not be admissible in an Australian court. In the American system, which evidence might be admissible, but its probative value is open to question.

That's The Law Report for this week. A big Thank You to producer Anita Barraud and also to technical producer, Paul Penton. ●

Guests on this program

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