Answering for Torture

Conor Gearty

Unless human rights laws can be extended to cover Iraq, the killing and inhuman treatment of captives will continue to go unchecked and unpunished

ON WEDNESDAY 5 May, just as the facts about the torture of Iraqi detainees were becoming known, lawyers acting for the families of 14 Iraqis began what may prove to be one of the most important cases in the development of a global human rights law. They are challenging the refusal by the Ministry of Defence to consider any legal responsibility for the deaths of the 14, all allegedly killed by members of the British forces operating in their country. The case is not being started in Basra or even in Baghdad, but rather in London, before the ordinary administrative court.

The lawyers for the families say these deaths should have been investigated and action taken against those found to be culpably responsible; they point to the duty to protect life that is enshrined in the European Convention on Human Rights, a document made part of English law by the Human Rights Act, passed by the Blair Government in 1998.

The Ministry of Defence argues that English law can have no application overseas, and this is as true of the Human Rights Act as it is of any other, more routine law. With the true nature of many of the activities by coalition forces against detainees now beginning to emerge, the shadow of the even more vehement prohibition on torture and inhuman and degrading treatment that is also to be found in the Human Rights Act hangs over this case.

It is usually unarguably the case that events outside the jurisdiction should not excite any interest on the part of a judge from a different system of law: there would be no point to nationhood if any state that cared to could launch litigious raids on another country's legal system. So we have subjects like extradition and the conflict of laws in order to work out how to get different legal systems to work together.

But the Iraqi case is different, in two important respects. First, the country is occupied territory, not a separate state: there are no independent governmental organs to turn to for the enforcement of the law. So if the British forces are not answerable to this country's laws, they would seem to be answerable only to themselves, and that would mean we would have

(to use Lord Steyn's evocative phrase, about Guantanamo Bay) a "legal black hole", but one extending across the whole of British-occupied Iraq – to say nothing of the US portion.
Secondly, whatever the ministry might argue, the Human Rights Act certainly looks different from any ordinary law, a measure that by its very name seems to transcend state borders and have a universal effect. In fact the European Court of Human Rights, and following its lead the British courts, has given the European Convention on Human Rights a measure of extra-jurisdictional reach.

In an important case in 1989, the Strasbourg court insisted that a man should not be extradited to the United States if there were a chance that he would then be put on "death row" for his crime, a treatment of the individual that the court had no difficulty in characterising as inhuman or degrading. Then, some years later, the same principle led British courts to the view that it was wrong to order the return of someone to a country where there were substantial grounds for believing that he or she would face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment. Suspected "international terrorists" based in Britain are often able convincingly to point to such evidence, not least because of the unsavoury nature of the governments that want them back, and the inflammatory nature of their opposition to such regimes.

This aspect of our code of human rights has undoubtedly saved many people from torture and death, but that has not stopped the authorities here from presenting it as an unfortunate "lacuna" in our law, one that has been at least partly "filled" by the detention of such "suspected international terrorists" under the terms of the Anti-Terrorism, Crime and Security Act, passed in the immediate aftermath of the events of 11 September 2001.

It is an unsavoury but salutary fact that were a wanted Iraqi or escaped detainee to manage to get to Britain, his or her return to the control of coalition forces would be likely to be strongly opposed by his or her lawyers on the basis that torture or death awaited them; with the evidence now flowing out of occupied Iraq, who can say that such claims would not be well-founded?

The degree to which the Americans' torture of prisoners was planned and systematic is as yet unclear, but such outrages were almost inevitable given the context of this occupation: the moralistic rhetoric of the Bush regime, with its subliminal assumptions about the sub-human nature of all (suspected) terrorists; the deliberate rejection of all international codes that have hitherto regularised international aggression; the privatisation of security as part of

the commercialisation of war; and, above all, the apparent impunity with which prison guards and other American officers in Iraq have clearly believed that they have been able to act.
It is not so mysterious now why the United States did not sign up to the International Criminal Court; had it done so an array of senior soldiers, not to mention the egregious Donald Rumsfeld himself, would be urgently seeking legal advice.

Tony Blair and the Government he leads, together with the forces of his country, have no such easy, albeit immoral, escape clause. Human rights and the international rule of law are virtues to which the Prime Minister personally has loudly subscribed. The scheme of international criminal justice now in place requires that a proper investigation be initiated into the allegations of human rights infringements and war crimes that are being made against the British forces in Iraq. The spectre of an intrusive external investigation by the international prosecutor hovers in the background, requiring the authorities now to avoid bombast in their dismissal of claims of abuses on the ground.

In the long run, the Ministry of Defence might be well advised not to succeed in its argument that the European Convention has no application in Iraq and that it has as a result no need to investigate deaths (and by extension the alleged torture) on its watch; if it won't do it, there may well be a team of international public servants with the willingness and, more to the point, the legal capacity to take the job on.

Such investigators might also be interested in whether and to what extent British officials and forces have been implicated in US misconduct. It might be thought that there would be an unattractive aspect to such proceedings, like punishing a school squirt for the conduct of the playground bully whom he has cravenly assisted. What is clear is that an international prosecution of British officers for connivance in war crimes by American forces would be an indirect and in the circumstances perhaps not entirely ineffective way of holding the larger power to account. Doing time in some international prison for American war crimes would carry the special relationship onto a whole new level.

Professor Conor Gearty is Rausing Director of the Centre for Human Rights at the London School of Economics