



Statewatch report

The UN Special Rapporteur on Torture criticises the undermining of the non-refoulement principle and the use of terrorism as a pretext to justify torture

In his interim report to the UN General Assembly on his activities in 2004 dated 1 September 2004, Theo van Boven, the Special Rapporteur on Torture, and Cruel, Inhuman and Degrading Treatment, issued an alarm call to remind governments of their obligation under international law to prevent and suppress torture. He focused on the use of terrorism as a pretext for justifying torture and inhuman treatment, and on the erosion of the non-refoulement principle, whereby States should not “expel, return ‘refouler’, or extradite a person to another State“ if there are “substantial” grounds for suspecting that they may be in danger of being subjected to torture or to cruel, inhuman and degrading treatment after their return.

The ‘war on terrorism’ and torture

The Special Rapporteur criticised attempts by governments to derogate and circumvent the “absolute, non-derogable nature” of the prohibition of torture and other forms of inhuman, cruel or degrading treatment (hereafter torture or ill-treatment) on the grounds of combating terrorism, particularly in relation to interrogation practices and the conditions of detention for prisoners suspected of terrorism. He dismissed “legal arguments of necessity and self-defense” put forward invoking domestic law to “exempt officials suspected of having committed or instigated acts of torture against suspected terrorists from criminal liability”. He stressed that “no circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, can be invoked as a justification of torture”. He notes that “the condoning of torture is, per se, a violation of the prohibition of torture” and of “international treaty obligations and customary international law”, which prevails over domestic law. Thus, any “executive, legislative, administrative or judicial measure”, including orders given by a superior or by a head of state to authorise the use of torture or ill-treatment is unlawful. Van Boven expressed “serious concern” with regards to efforts to narrow down the scope of the definition of torture contained in article 1 of the relevant Convention Against Torture and other Cruel, Inhuman or Degrading Treatment:

Article 1.

1. *For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.*

2. *This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.*

He dismissed suggestions that torture could be defined as inflicting “physical pain that is difficult to endure... equivalent to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function or even death”, or suggestions that permissible methods of interrogation include “the deprivation of essential human needs, suffocation with a wet cloth and death threats”. He stressed that the definition of torture is not subject to the whims of States, and that the absolute prohibition under international law “applies equally to torture and to cruel, inhuman or degrading treatment or punishment”. In pretty explicit reference to reports that have surfaced from detention facilities in Iraq and Guantanamo Bay, van Boven referred to a series of practices that have been “condoned or used to secure information from suspected terrorists”, such as:

“holding detainees in painful and/or stressful conditions, depriving them of sleep or light for prolonged periods, exposing them to extremes of heat, cold, noise and light, hooding, depriving them of clothing, stripping detainees naked, and threatening them with dogs”

He reminds authorities of the existence of international judicial precedents indicating that each of these practices is in violation of the prohibition of torture or ill-treatment, especially “where such methods are used in combination”. In response to reports of torture committed by private contractors, the Rapporteur reminded States that they must protect detainees from acts that infringe their rights, not only by its agents, but also “by private persons or entities”. Thus, “permitting, or failing to take appropriate measures to or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts”, would give rise to a violation by the state under international law.

The UN Special Rapporteur on Torture refers to a number of other concerns that pertain, at least in part, to the war on terrorism in his report, including the following:

1) The detention of “thousands” of terrorist suspects who have been “denied the opportunity to have their legal status determined and prevented from having access to lawyers”, including people held in solitary confinement which “in itself, may constitute a violation of the right to be free from torture”;

2) The maintenance of secret places of detention, which “should be abolished under law”, adding that “it should be a punishable offence for an official to hold a person in a secret and/or unofficial place of detention”.

3) Prolonged incommunicado detention, which “could facilitate the perpetration of torture” and could “constitute a form of cruel, inhuman and degrading treatment or even torture” in itself.

4) That prisoners should have the opportunity to challenge the lawfulness of their detention (through expeditious *habeas corpus* or *amparo* proceedings).

5) That some national authorities have deemed that evidence that may have been obtained under torture is admissible in judicial proceedings, undermining provisions in procedural law “on the inadmissibility of unlawfully obtained confessions and other tainted evidence”, which he describes as one of the “essential means of preventing torture”.

6) He requests that UN Rapporteurs in the areas of the independence of judges and lawyers, arbitrary detention, physical and mental health and torture be given access to “persons detained on grounds of alleged terrorism or other violations in Afghanistan, Iraq and the military base in Guantanamo Bay”. Van Boven also calls for the “prompt and exhaustive” investigation and, if proven, prosecution, of any alleged case of torture, in order to guarantee that there is no “impunity... regardless of position or rank”, claiming that a “comprehensive review of interrogation methods” is required to ensure that “they comply with international human standards prohibiting torture and ill-treatment”.

Non-refoulement

The report also focuses on the principle of non-refoulement, which van Boven describes as “an integral part of the overall absolute and imperative nature of the prohibition of torture other forms of ill-treatment”, that he claims “risks being eroded”. After a review of the legal provisions that make this principle “firmly anchored in international human rights law”, he notes that States’ responsibility to prevent individuals from being tortured does not merely apply within their jurisdiction, but also involves not “bringing them under the control of other States if there are substantial grounds for believing that they would be in danger of being subjected to torture”. Referring back to an expulsion case heard by the European Court of Human Rights, *Chahal v. the United Kingdom*, he goes on to stress that regardless of the activities, “however undesirable or dangerous”, of an individual who is undergoing

expulsion proceedings, if this risk exists, such activities “cannot be a material consideration”.

Van Boven also pointed to an increase in practices that undermine the non-refoulement principle, such as when “police authorities in one country hand over persons to their counterparts in other countries without the intervention of a judicial authority, or the possibility of contacting their families and lawyers”. This practice was found by the UN Commission on Torture to be in breach of the prohibition of torture or ill-treatment and to the right to due process. Another practice that was deemed by the Special Rapporteur to be undermining the principle of non-refoulement, is that of relying on diplomatic “assurances” from the receiving country that transferred suspects will not be subjected torture or cruel, inhuman or degrading treatment. In the light of Security Council Resolution 1373 (2001), which instructs States to deny safe haven “to those who finance, plan, support or commit terrorist acts”, although van Boven expresses his “reticence” with regards to the practice of seeking diplomatic assurances, he does not rule this practice out completely. Nonetheless, he reminds States that Security Council Resolution 1456 (2003) notes that any measures taken to combat terrorism must also comply with their obligations under international law, particularly “human rights, refugee and humanitarian law”, suggesting that if such “unequivocal guarantees” were to be sought and used, a system to monitor the treatment of transferred persons would need to be in place beforehand. The Special Rapporteur also claims that he has come across “a number of instances where there were strong indications that diplomatic guarantees were not being respected “ and asks whether:

“the practice of resorting to assurances is not becoming a politically inspired substitute for the principle of non-refoulement, which, it must not be forgotten, is absolute and non-derogable”.

The Rapporteur’s visit to Spain

Reporting back on his year’s activities, van Boven also mentioned his visit to Spain from 5 to 10 October 2003, stating that:

“Point 4. The Special Rapporteur concluded that torture or ill-treatment is not systematic in Spain, but that the system as it is practised allows torture or ill-treatment to occur, particularly with regards to persons detained incommunicado in connection with terrorist-related activities. Accordingly, he recommended a number of measures to be adopted by the Government in order to comply with its commitment to prevent and suppress acts of torture and other forms of ill-treatment.”

The report by the Special Rapporteur on Torture on his visit to Spain, published in February 2004, was critical, and included allegations that torture was practiced “more than sporadically” by State security and police forces, and that safeguards and the investigation of torture allegations were “ineffective”.

The report examines three main issues:

- a) the legal framework and safeguards for the protection of detainees from torture or ill-treatment, in particular with regards to detainees held in connection with counter-terrorism measures;
- b) the occurrence and extent of the practice of torture or ill-treatment;
- c) the investigation and punishment of acts of torture, and the right to fair and adequate compensation and rehabilitation for victims of torture.

Van Boven deems that his mission is an effort towards identifying possible approaches to be adopted in other countries trying to “fight terrorism whilst respecting human rights”. While he acknowledges the difficulties and violence suffered by countries confronted by terrorism, and in the case of Spain by terrorist acts committed by ETA, he stresses that States may never be granted “a margin of appreciation”, when a “non-derogable right” is at stake, “such as the prohibition of torture, inhuman or degrading treatment”.

On the basis of interviews conducted in Madrid and in the Basque Country (in Vitoria and Bilbao), he confirms the existence of a:

“dichotomy between the assertion of the State party that, isolated instances apart, torture and ill-treatment did not occur in Spain and the information received from non-governmental sources which revealed repeated instances of torture and ill-treatment by the State security and police forces”

previously noted by the UN Committee against Torture in November 2002. He expresses concern over the “polarisation” of relations between the central authorities and the Basque nationalist parties and movements, noting that there is a need for “a democratic and public space” to discuss “fundamental human rights issues such as those falling within his mandate”. The Special Rapporteur noted that certain persons or NGOs that had filed torture claims had been “accused of supporting ETA and terrorism”.

Van Boven reports that government authorities present the “continued and repeated” allegations of torture and ill-treatment in Spain as a “ploy” to discredit the country through “false and fabricated” claims, whereas “some non-governmental groups and individuals claim that torture and ill-treatment by State security and police forces is systematically used”. He notes that there have been occasions when torture allegations have been treated as corroborating evidence of a suspect’s membership of ETA - all the more so after a document was reportedly found in the residence of an ETA cell when its members were arrested in March 1998, which outlined instructions for filing torture allegations. In the case of Martxelo Otamendi, editor of the *Egunkaria* Basque-language newspaper which was shut down accused of being financed and directed by ETA in February 2003, his claims that he (and other colleagues) were tortured during incommunicado detention resulted in additional charges being filed against him by the government in March 2003,

accusing him of “collaborating with an armed band” by making torture allegations to discredit the institutions.

Van Boven cites a response by the then-Interior Minister, Mr Acebes, to a question about press freedom and torture allegations, to the effect that

“if there was a credible complaint of torture it would be discussed publicly; however in counter-terrorism cases it was standard for a person who has been detained systematically to allege that he/she has been tortured. Consequently, most press agencies did not report the case as they knew the claim to be false, except for those newspapers linked to terrorism”

[not quoted in the original, it is a quote of van Boven’s account of what Acebes said].

Van Boven concludes that some Basque militants may “use as a tactic the systematic practice of trumped-up allegations of torture and ill-treatment” but, at the same time, that “security and law enforcement agents... resort more than sporadically” to practices constituting torture or cruel, inhuman or degrading treatment, particularly in their anti-terrorist activities. Van Boven referred to interviews with “persons who had been arrested, detained and interrogated by the State security and police forces”, whose testimonies alleged the use of practices such as “beatings, exhausting forced physical exercises, asphyxiation by placing plastic bags over the head (“*bolsa*”) and humiliating sexual harassment”. According to the Special Rapporteur, the “internal consistency” and “precision of the factual details” in the testimonies rule out the dismissal of these allegations as “fabrications”, although he “does not conclude” that these forms of treatment represent a “regular practice”, although “their occurrence is more than sporadic and incidental”.

With regards to the investigation of torture claims, van Boven considers that the Spanish legal system provides “investigation mechanisms and procedures”, but these are “underutilised and often ineffective”, as a result of denial that torture or ill-treatment occur, the countering of torture claims with charges of defamation, and the “questionable impartiality and independence of internal accountability mechanisms with regard to law enforcement officials”. The Special Rapporteur calls for “effective” safeguards to be in place in the period immediately after detention, when detainees are likeliest to suffer physical ill-treatment or intimidation, and all the more so in cases of incommunicado detention. Incommunicado detention allows police and State security forces to detain someone arrested on suspicion of terrorism for up to five days (subject to judicial authorisation, which may be renewed for two days after the first three days), denying them access to a lawyer or doctor of their choice, and not allowing them to contact their relatives. Van Boven notes that incommunicado detention has been repeatedly denounced by international human rights bodies as “a condition that facilitates the practice of torture or that may constitute torture in itself”, but that in spite of this, recent developments in Spain “tend to go in the opposite direction”, through the consolidation and extension of the

regime. The legal guarantee of judicial control over this detention regime is described by the Special Rapporteur as “more often of a formal and administrative nature than substantive and scrutinising”.

The Special Rapporteur’s recommendations called on the Spanish authorities to ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which, among other things, provides for the creation of independent national control and inspection mechanisms for the prevention of torture. It recommends that the government should put into place “a comprehensive plan to prevent and suppress torture and other forms of cruel, inhuman or degrading treatment or punishment”, including the following:

- the abrogation of the incommunicado detention regime;
- the guarantee of the right for detainees to have access to a lawyer, to be visited by a doctor of their choice and for their relatives to be informed of their arrest and place of detention;
- the recording (preferably video-recording) of interrogations, and the identification of all the persons who are present, with practices such as hooding and blindfolding explicitly forbidden;
- the prompt and effective investigation, “independent from the perpetrator and from the agency they serve”, of allegations of torture or ill-treatment, with legal action taken and the suspension of the alleged perpetrators from service during the investigation;
- the adoption of legal provisions to ensure that victims of torture get compensation.

In reference to the practice of dispersal, which he described earlier as “apparently” having “no grounding in law” and being “applied arbitrarily”, van Boven recommends that “due consideration should be given to maintaining social relations between the prisoners and their families, in the best interest of the family and the prisoners’ own social rehabilitation”.

The Special Rapporteur on Torture’s report on his visit to Spain drew a categorical denial of the findings by the then Spanish government. First in a series of verbal notes transmitted by the Permanent Mission of Spain to the United Nations Office in Geneva in January and February 2004, and subsequently in a report dated 4 March 2004, which deemed that the report is “invalid” for several reasons, including the lack of “an objective or well-founded analysis”, its being “full of mistakes” and the Special Rapporteur’s “total lack of knowledge of both the reality of Spain and the bases and functioning of our legal system”. Van Boven’s examination of the incommunicado detention regime is dismissed as “distorted”, and he is likewise accused of “twisting” the statements made to him by the Spanish interior minister (*see above*). The shortcomings of the report alleged by the Spanish government include the failure to identify sources of information

resulting in his allegations, which results in the Spanish government dismissing the claims as “neither credible nor reliable” and impossible to investigate, and the failure to take documentation provided by the authorities into sufficient account. An accusation is also levelled at the Special Rapporteur for having allowed himself to be “manipulated” by the *abertzale* (Basque left-nationalist) international propaganda network in its strategy (which human rights groups working on torture, such as *Behatokia* and *TAT*, are accused of being part of) to discredit the Spanish institutions, and of relying on information from individuals suspected of terrorism. It provided a detailed, point-by-point rebuttal of any criticism voiced by the Special Rapporteur, highlighting the danger posed by ETA to prison officers and to prisoners who cut ties with the organisation, and labelling the suggestion that an independent body to investigate torture should be set up as “incomprehensible”.

Sources

UN Doc. A/59/324, 1 September 2004; Report of the Special Rapporteur on torture and other cruel inhuman or degrading treatment and punishment: <http://www.statewatch.org/news/2004/nov/un-torture-doc1.pdf>

UN Doc. E/CN.4/2004/56/Add.2, 6 February 2004; Report of the Special Rapporteur on the question of torture, visit to Spain from 5 to 10 October 2003: <http://www.statewatch.org/news/2004/nov/un-torture-doc2.pdf>

UN Doc. E/CN.4/2004/G/19, “Verbal notes dated 20 January and 2 and 11 February 2004 from the Permanent Mission of Spain to the United Nations Office in Geneva addressed to the Office of the United Nations High Commissioner for Human Rights”; Annex 1 on “Factual errors detected in the report on Spain by the Special Rapporteur on Torture, Mr. Theo van Boven” (in Spanish); Annex 2, “Remarks of the Government of Spain on the Report of the Special rapporteur on Torture”:
<http://www.statewatch.org/news/2004/nov/un-torture-doc3.pdf>

See also by way of examples:

Statewatch Special Report: UK: Egyptian national “unlawfully detained” after intervention by Prime Minister (16.11.04):
<http://www.statewatch.org/news/2004/nov/03blair.htm>

and Target of Blair deportation intervention gets substantial compensation (18.11.04)
<http://www.statewatch.org/news/2004/nov/03blair2.htm>

UK: Belmarsh prisoners: report on indefinite detention and mental health:
<http://www.statewatch.org/news/2004/nov/01belmarsh-mental-health.htm>

Update: Sweden: Expulsions carried out by US agents, men tortured in Egypt
<http://www.statewatch.org/news/2004/oct/05sweden-us-abduction.htm>

- second Swedish TV4 transcript with more details on the US abduction
- Shannon airport on west of Ireland used as stop-over for US plane

Sweden: Expulsions carried out by US agents, men tortured in Egypt
<http://www.statewatch.org/news/2004/may/12sweden.htm>

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