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There's more than one way to skin a cat

Wed, 01/10/2018 - 12:43pm Field Notes From A Battleground [1] Opinion/Viewpoint [2]
By Charles R. Church

Part 1 of 2 — Both parts included in this PDF

Cat lovers take comfort. My title is just a turn of phrase, an adage that serves as a metaphor for what I wish to write about.

In 2009, Attorney General Eric Holder assigned John Durham as Special Prosecutor to examine whether CIA interrogations of suspected terrorists were illegal. But the catch should have been clear from the start: Holder stipulated that there would be no prosecutions of CIA personnel "who acted in good faith and within the scope of the legal guidance given by" Bush administration lawyers. That guidance consisted of the infamous Yoo/Bybee "Torture Memos," legal memoranda that later were withdrawn due to their indefensible tendentiousness and legal sleight of hand. Given that warning, perhaps no one should have been surprised when Durham declined to prosecute any cases, including two in which the CIA's captives died.

CIA contractors and agents perpetrated brutal and abusive treatment on its captives that plainly amounted to torture under federal and international law. Included in this treatment was: waterboarding, not "simulated drowning," as writers like to put it, but actual drowning of a strapped-down captive until the interrogators decided to stop (Abu Zubaydah [AZ] was waterboarded 83 times); "walling," slamming a defenseless victim into a wall by slinging him against it with a towel wrapped around his neck; confinement for long periods in a coffin-like box or a smaller "dog box," in which he could only be crammed when severely contorted; sleep deprivation, at times for as long as 180 hours; subjection to extreme cold while naked — the list could go on. Sometimes the torture continued around the clock.

At times, the CIA's torture was even more brutal than the techniques the government's legal memos approved. Finding and Conclusion #14 in the Senate Committee on Intelligence's authoritative "Study of the [CIA's] Detention and Interrogation Program" published in December of 2014, stated: "CIA detainees were subjected to coercive interrogation techniques that had not been approved by the Department of Justice (DOJ)..." in the belatedly disavowed "Torture Memos." For brevity's sake, I will mention only two examples, though there were many more. Government investigators who viewed videotapes of AZ's interrogations (which tapes were destroyed by the CIA in violation of multiple court orders, yet —incredibly — no one went to jail)

reported that, “unlike the (waterboarding) method described in the DOJ memorandum, which involved a damp cloth and small applications of water, the CIA interrogators continuously applied large volumes of water to the subject’s mouth and nose.” Further, an interrogator threatened AZ by stating: “If one child dies in America, and I find out that you knew something about it, I will personally cut your mother’s throat.”

Clearly, CIA contractors and agents exceeded the approvals in the DOJ “Torture Memos,” yet even they were not prosecuted. Game, set and match to the torturers? Wait a bit.

In 2015, the ACLU filed suit on behalf of three former detainees, one of whom died while in CIA custody. The plaintiffs sought relief under the Alien Tort Statute, which grants federal court jurisdiction for torts committed in violation of the laws of nations (international law), alleging that they had been subjected to an “experimental torture program ... designed, implemented, and personally administered” by the two defendants, James Mitchell and John “Bruce” Jessen, psychologists who had contracted with the CIA. Not long before trial, the case was settled. We will never know how much the plaintiffs were paid to convince them to forego a trial — the settlement agreement surely requires that such be kept confidential — but the outcome was unprecedented for U.S. courts. Surely, though, the dollar amount must have been significant.

But that was not the first time money damages were recovered by captives who were tortured in CIA black sites. On July 24, 2014, in “Husayn (Abu Zubaydah) v. Poland,” the European Court of Human Rights (ECHR) ruled that Poland had violated AZ’s right to be free from torture or inhuman or degrading treatment or punishment under Article 3 of the European Convention on Human Rights, and ordered the Polish government to pay him €130,000 (about $150,000). Poland knew, the Court found, that the CIA maintained a secret black site on its territory, where it interrogated and tortured prisoners, including AZ, and facilitated these activities. (In a companion case, the ECHR awarded Abd al-Rahim al-Nashiri, the suspected planner of the lethal attack on the USS Cole, €100,000, to be paid by Poland.)

AZ filed a similar suit at the ECHR against Lithuania, another country chosen by the CIA for a secret black site. The Court has not yet rendered a judgment in that case.

Charles Church is a human rights lawyer who lives in Salisbury. Next time, he will examine a potential avenue for criminal prosecution of U.S. torturers and those who authorized, aided and abetted them. Note: Church serves on two legal teams which represent AZ; any views Church expresses are his own, and not necessarily those of the teams.

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By Charles R. Church

Last time, Church described the disappointing refusal of Special Prosecutor John Durham to prosecute CIA contractors and agents who had tortured terrorism suspects at CIA black sites, while noting the unprecedented settlement in a suit brought against two psychologists who were major players in the torture of suspected terrorists. This week, he will explore the possible investigation by the International Criminal Court ("ICC") of torture by CIA contractors and agents, and an intriguing development in North Carolina.

Part 2 of 2

The civil cases I described last week, important as they are, sought only money damages. Will no torturer stand before the bar charged with any criminal offense? We shall see. On Nov. 20, 2017, the Prosecutor of the ICC requested authority from the Court's judges to investigate alleged war crimes and crimes against humanity committed in connection with the armed conflict in Afghanistan. Pursuant to the Rome Statute, the Prosecutor has determined there is a reasonable basis to believe that the following categories of crimes within the Court's jurisdiction have occurred:

• Crimes against humanity and war crimes by the Taliban and its affiliate, the Haqqani Network;

• War Crimes by the Afghan National Security Forces; and

• War crimes by members of the U.S. armed forces in Afghanistan, and by members of the CIA in secret detention facilities in Afghanistan and in other States Parties to the Rome Statute, principally during the period 2003 to 2004.

The U.S. is one of the few nations that is not a State Party to the Rome Statute, but its citizens nonetheless can be charged for relevant crimes in member states. So the Court claims. On Dec. 8, 2017, the U.S. replied, but fortunately not with the words suggested publicly by the lamentable John Bolton: "You are dead to us." In more diplomatic language, our statement warned: "[The U.S.] will regard as illegitimate any attempt by the Court to assert the ICC's jurisdiction over American citizens."

Assuming the judges approve the Prosecutor's request and the ICC case proceeds, expect a street brawl not only over the ICC's power to investigate and adjudicate the potential criminality of U.S. citizens, but in at least one other respect. In deciding whether to initiate an investigation,

the Prosecutor must consider whether the case would be admissible under Article 17 of the Rome Statute. Under that provision, the Court would consider that a case is inadmissible for prosecution, among other reasons, if a State with jurisdiction over the offenses "has decided not to prosecute... unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute."

Passing over matters less central to me, the Prosecution examined the Durham investigation, and noted that it resulted in only two criminal investigations relating to deaths in CIA custody, which as seen resulted in no action. "By contrast, there appears to have been no criminal investigation or prosecution of any person who devised, authorized or bore oversight responsibility for the implementation" by the CIA of the torture techniques. Imagine Yoo, Bybee, Mitchell, Jessen, Acting CIA Deputy General Counsel John Rizzo, George Tenet and perhaps even George W. Bush, Dick Cheney, and Donald Rumsfeld being brought before the bar. Depending on the result of any investigation, Americans who until now have enjoyed impunity they didn't deserve may find themselves being charged and prosecuted, even if the ICC's authority is not recognized by the U.S.

Lastly, let's return to North Carolina (NC), where a private 11-member group of citizens founded the NC Commission of Inquiry on Torture (NCCIT) to conduct a public investigation of their state's role in facilitating the U.S. Rendition, Detention and Interrogation (RDI) program carried out from 2001 to 2006. If you've stayed the course in these two columns, you've read about secret CIA black sites in Poland and Lithuania, but there were a number of others in such countries as Thailand, Morocco and Romania, and even one situated in the hills above the military base at Guantanamo Bay, called "Strawberry Fields" by some and "Camp No" by others. These countries and Gitmo were part of the RDI circuit, around which prisoners were moved from black site to black site.

While the NCCIT became active around the time when Donald Trump became president, it grew out of more than a decade of campaigning by Raleigh-area activists against Aero Contractors, Ltd., a private air-carrier operating out of a nearby taxpayer-supported county airport that has delivered suspected terrorists to CIA black sites around the world. NCCIT'S newest data show that 34 of the 119 prisoners mentioned in the Senate Intelligence Committee Executive Summary were rendered by Aero planes taking off and landing in North Carolina. Various reports also make it clear that Aero carried AZ, at least once.

At a recent conference I attended, such aircraft were referred to as "torture taxis." From the testimony of witnesses and a first-rate website I found, www.therenditionproject.org.uk [3], I learned even more about how sordid and complex the RDI program was: CIA-front air carriers; dummy flight plans; multiple levels of brokers; a plane that taxied into a hangar bearing one set of numbers on its tail, then emerged with another set, etc.

It remains to be seen what the NCCIT, a private, non-judicial entity, can contribute. So far, it has publicly implicated state and local officials, showing how they provided the state's public airports for RDI flights, built a hangar for RDI aircraft, and turned deaf ears even when confronted with these facts. But, so far anyway, this has provided no benefit. Captives "disappeared" to CIA black sites where they were tortured have yet to have their day in court in America. Aero has been named in a suit at least once, but the case was dismissed. Will Aero and other private companies that allied themselves with the CIA in these sad ventures ever be called to account? Let us see.

As a former NBA coach used to say decades ago, "The game ain't over 'til the fat lady sings." (The reference, incongruously, was to operas.) She hasn't sung yet.

Charles Church is a human rights lawyer who lives in Salisbury. Note: he serves on two legal teams that represent AZ; any views Church expresses are his own, and not necessarily those of the teams.