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How to Legalize Torture, Turning to Israel for Inspiration: CIA Cites Israeli Court Ruling to "Justify" Its Torture Program

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The CIA repeatedly cited an Israeli high court decision to justify torture, according to the long-awaited US Senate report on the agency's torture program.

This latest disclosure comes just months after revelations that the Obama administration relied on an Israeli high court ruling to justify targeted killings of American citizens without trial.

Released Tuesday by the Senate Select Committee on Intelligence after months of stalling, the nearly 600-page report discloses new details about the atrocities that took place at the CIA's network of rendition and torture sites created in the aftermath of the 11 September 2001 attacks.

The CIA's torture techniques — which included water-boarding, sleep and sensory deprivation, sexual torture, threats to kill and rape loved ones, mock executions, electrocution and medically unnecessary "rectal feeding" — were far more gruesome and pervasive than the agency let on.

Furthermore, the report explicitly states that the CIA lied about the torture program's effectiveness, falsely claiming its techniques successfully extracted information that thwarted terrorist plots, including a fabricated attack "in Saudi Arabia against Israel."

As the CIA engaged in a deceptive propaganda campaign to mislead the American public about the program's lawfulness and effectiveness, it relied on Israeli precedent as a legal defense.

How to legalize torture

As early as November 2001, CIA officials began brainstorming possible legal justifications for torture techniques they were already employing at black sites around the globe, culminating in a draft memorandum described by the Senate report as follows:

> On 26 November 2001, attorneys in the CIA's Office of General Counsel circulated a draft legal memorandum describing the criminal prohibition on torture and a potential "novel" legal defense for CIA officers who engaged in torture. The memorandum stated that the "CIA could argue that the torture was necessary to prevent imminent, significant, physical harm to persons, where there is no other available means to prevent the harm," adding that

> "states may be very unwilling to call the US to task for torture when it resulted in saving thousands of lives."

According to the corresponding footnote, the November memo "cited the 'Israeli example' as a possible basis for arguing that 'torture was necessary to prevent imminent, significant, physical harm to persons, where there is no other available means to prevent the harm.'"

The "Israeli example" was invoked again the following year in an official memorandum to the White House Office of Legal Council to the President on 1 August 2002, which "include[d] a similar analysis of the 'necessity defense' in response to potential charges of torture."

Israeli loopholes

The "Israeli example" is a reference to the 1999 Israeli high court decision that supposedly outlawed the use of torture — the Israeli euphemism for which is "moderate physical pressure" — to extract confessions from Palestinian prisoners, a longstanding and widespread practice up until that time. The Israeli human rights group B'Tselemcelebrated the ruling at the time, declaring it a victory for democracy.

In reality, the decision was filled with obvious loopholes and merely limited the circumstances under which torture techniques could be legally employed. (Israel's high court is also known as its supreme court.)

Till this day Israeli torture of Palestinian prisoners remains widespread and no Palestinian is immune, not even children, who are systematically subjected to solitary confinement, sensory deprivation and stress positions in Israeli custody.

Last winter, Israeli cruelty reached new heights when its prison services placed Palestinian child detainees in outdoor cages during one of the most severe winter storms to strike the region in years.

As the Public Committee Against Torture in Israel (PCATI) has argued, not a great deal has changed since the 1999 ruling due in large part to the high court's inclusion of the "necessity defense" — a loophole that immunizes interrogators who use torture techniques from being held criminally liable based on the argument that they had to do it out of "necessity" to prevent loss of or harm to human life.

Such loopholes have led to absolute impunity for Israeli torturers. Of the more than 800 complaints of torture submitted by Palestinian prisoners since 2001, exactly zero have led to criminal investigations despite the state corroborating at least 15 percent of the torture allegations, according to PCATI.

It is also notable that even the CIA methods revealed in the Senate report bear striking similarity to long-standing Israeli torture techniques documented by human rights organizations, among them sleep deprivation, exposure to extreme cold, confinement in very small spaces and painful "stress positions." These are techniques that are thought to inflict maximum suffering while minimizing the risk that they will leave tell-tale signs of torture on the victim's body.

A ticking time bomb fiction

Strangely, even notable anti-torture liberals have been duped into believing that Israel banned torture.

US Supreme Court Justice Ruth Bader Ginsburg has cited the Israeli high court decision on torture as an exemplary ban the US should emulate.

“The police think that a suspect they have apprehended knows where and when a bomb is going to go off,” Ginsburg told *The New York Times*. “Can the police use torture to extract that information? And in an eloquent decision by Aharon Barak, then the chief justice of Israel, the court said: ‘Torture? Never.’”

According to Ginsburg, the Israeli ruling sent the message “that we could hand our enemies no greater victory than to come to look like that enemy in our disregard for human dignity.”

Ginsburg’s takeaway from the Israeli decision is as erroneous as her racist portraryal of a Palestinian “enemy” lacking in “human dignity.”

Far from banning torture altogether, the Israeli decision includes an unambiguous exemption for the hypothetical scenario Ginsburg lays out.

In the event of a “ticking time bomb” scenario, the Israeli decision states that “necessity defense” gives Israeli interrogators discretion to employ torture to extract information to stop an explosive from detonating.

It should be noted that even the Senate report concedes that the “ticking time bomb” so often invoked by torture enthusiasts has no basis in reality.

But even if it did, Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment states: ”No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”

Turning to Israel for inspiration

In a desperate bid to keep the torture program alive amid growing (albeit weak) pressure from Congress in 2005, a CIA official once again turned to Israel for inspiration and a legal rationale:

> The CIA attorney described the “striking” similarities between the public debate surrounding the McCain amendment [a proposed ban on torture] and the situation in Israel in 1999, in which the Israeli Supreme Court had “ruled that several … techniques were possibly permissible, but require some form of legislative sanction,” and that the Israeli government “ultimately got limited legislative authority for a few specific techniques.”

The corresponding footnote adds:

> The CIA attorney also described the Israeli precedent with regard to the “necessity defense” that had been invoked by CIA attorneys and the Department of Justice in 2001 and 2002. The CIA attorney wrote that the Israeli Supreme Court “also specifically considered the ‘ticking time bomb’ scenario and said that enhanced techniques could not be pre-approved for such

> situations, but that if worse came to worse, an officer who engaged in such activities could assert a common-law necessity defense, if he were ever prosecuted."

This suggestion was adapted into a 20 July 2007 memorandum authored by then Principal Deputy Assistant Attorney General for the Office of Legal Counsel Steven G. Bradbury, who argued that based on the Israeli court case, CIA torture is "clearly authorized and justified by legislative authority."

Sharing values

It should come as no surprise that the US is following Israel's lead on torture given that the two nations feed off of one another's atrocities.

When Palestinian prisoners launched a hunger strike earlier this year to protest their indefinite detention, Israeli Prime Minister Benjamin Netanyahu attempted to push through the Knesset, Israel's parliament, a bill that would permit the force-feeding of prisoners. According to human rights groups, force-feeding amounts to cruel and inhumane punishment.

To excuse his demand for the implementation of the excruciatingly painful technique, wherein a tube is shoved through the nostril into the stomach, Netanyahu pointed to US force-feedings at Guantanamo Bay.

When it comes to torture, few people understand the shared values that unite the US and Israel better than Rasmea Odeh.

The 67-year-old Palestinian American activist was convicted last month of immigration fraud for failing to disclose a 1969 Israeli military court conviction based on a confession extracted under weeks of Israeli sexual torture.

At the behest of the Obama administration's Justice Department, the trial judge barredthe jury from hearing evidence about Odeh's torture, protecting and ultimately legitimizing Israel's system of abuse. Meanwhile, Odeh was subjected to further torture, this time at the hands of the US government, which placed her in solitary confinement for twelve consecutive days for no apparent reason until a judge ordered on Mondaythat she could be released on bail.

While the depth of collusion between the US and Israeli torture programs has yet to be fully unearthed there is reason to suspect that some US methods were modeled on Israel's.

Since the 11 September 2001 attacks, the US has fashioned much of its counterterrorism strategy on Israel's decades-long suppression of Palestinian resistance to its colonial ambitions.

Invented by Israel for use against Palestinian leaders, extrajudicial targeted killings are now the centerpiece of the Obama administration's counterterrorism policy.

Like its targeted killing policy, Israel has spent decades perfecting torture techniques on Palestinian prisoners, designed to maximize the suffering while leaving behind few visible scars.

So, how much did Israel influence the CIA? Perhaps the answer can be found in the original 6,000-page, still-classified Senate torture report that Tuesday's release is based on. It makes one wonder what is being left out of the public record.

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