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*Torture and coercive interrogation: A critical discussion*

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# **TORTURE AND COERCIVE INTERROGATION: A CRITICAL DISCUSSION**

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A thesis submitted in partial fulfilment of the requirements  
of Sheffield Hallam University for the degree of  
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## **Abstract**

This thesis aims to explore why torture, deemed illegitimate by the Western world for more than a century, has resurfaced as a topic of debate, and persists despite its formal prohibition. It also endeavours to shed light on the main issues involved in the 'torture debate'. To do so, it begins by exploring the history of torture; examining how it has developed over time, and how its uses have changed. Next, the thesis provides the context in which the modern torture debate exists in; mapping the change in legal and political dynamics that occurred in America as a consequence of 9/11 and the Iraq war, and analysing how this altered both public and institutional views towards the torture evidenced throughout the ensuing 'war on terror'.

Following this, the thesis critically examines the international and domestic legal prohibitions on torture and considers their effectiveness as a measure for preventing torture, before moving onto the main discussion on the justifiability of torture. The debate outlines the main moral, legal and practical arguments in favour and against torture with particular focus given to the 'torture memos', the 'ticking time-bomb' hypothetical, and the effects of torture, not only on the victim and torturer, but in a wider social and political context too. It is concluded that torture, despite its ineffectiveness and moral reprehensibility, will continue to be practised in response to events such as 9/11, the nature of which serve to blur the lines of what is and is not justifiable. The result being a perceived necessity of those who hold power around the world to act in desperate times, as is evidenced by the Bush administration.

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## Table of Cases

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HC 5100/94 *Public Committee against Torture in Israel v. The State of Israel* 53(4) P.D. 817 (1999)

HCJ 428/66 *Barzilai v. Government of Israel* 40(3) PD 505 (1986)

*Filartiga v Pena-Irala*, 630 F.2d 876, 883 (2<sup>nd</sup> Cir 1980)

*Secretary of State for the Home Department v JJ* [2007] UKHL 45

*Vacco v Quill* [1997] 521 U.S. 793

## **Table of Legal Instruments**

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984

Detainee Treatment Act 2005

Executive Order 13491: Ensuring Lawful Interrogations 2009

Executive order 13769: Protecting the Nation From Foreign Terrorist Entry Into the United States 2017

Geneva Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949

Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949

German Criminal Code 1998

H.R.1735 - National Defense Authorization Act for Fiscal Year 2016

International Covenant on Civil and Political Rights 1966

Prevention of Terrorism Act 2005

Rome Statute of the International Criminal Court 1998

S.J.Res.23: Authorization for Use of Military Force 2001

Statute of the International Criminal Tribunal for Rwanda 1994

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Terrorism Act 2000

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US Code

## Chapter One: Introduction

Torture, considered in a moral vacuum... is a palpable moral evil. Moral evils, however do not exist in a vacuum; they exist in collision with other evils, and sometimes we are forced to choose. Ask the average person if he opposes torture and the answer will surely be yes. But present him with a real-world scenario and the answer might well change.<sup>1</sup>

Here, McCarthy inadvertently poses the question that repeatedly surfaces when considering torture; could there exist a situation whereby a positive outcome produced by means of torture can justify the moral evil of its employment? In essence, is torture ever justifiable?

'The word 'torture' has no precise universally agreed meaning. It can range from the most unmitigated cruelty as a prelude to death, to the most antiseptic, nonlethal, and even nonphysical mind games that police play with suspects.'<sup>2</sup> Here-in lies the problem; torture means different things to different people.<sup>3</sup> The lack of clear definition or distinct threshold of what constitutes torture has inevitably caused extensive discussion regarding its use. For example, the legal prohibitions put in place to prevent torture as a practice have been interpreted in disparate ways by documents such as the 'Torture Memos'; a controversial and deeply scrutinised interpretation that ultimately contributed to its widespread use by the US post 9/11.<sup>4</sup> Examining the word 'torture' from a solely moral perspective further complicates attempts to define it. If you view torture as being iniquitous due to its immorality, then perhaps actions that technically constitute torture, but fail to cross the moral-immoral threshold, may not be inherently wrong. This begs the question; is it immoral to subject an individual to coercive interrogation in a situation whereby lives may be saved by doing so? If not, then perhaps the interrogation, albeit unsavoury, should not be considered to be unacceptable.

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<sup>1</sup>Andrew C. McCarthy, 'Torture: Thinking about the Unthinkable' in Karen J. Greenberg (ed), *The Torture Debate in America* (Cambridge University Press 2006) 106.

<sup>2</sup>Alan M Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (Yale University Press 2002) 124.

<sup>3</sup> This has caused concern internationally, see Chapter Five: Torture Across the World.

<sup>4</sup> The memoranda 'were crucial in building a legal framework for United States officials to avoid complying with international laws and treaties on handling prisoners'. Neil A. Lewis, 'Justice Memos Explained How to Skip Prisoner Rights' New York Times ([www.nytimes.com](http://www.nytimes.com), 21<sup>st</sup> May 2004) <<http://www.nytimes.com/2004/05/21/world/reach-war-geneva-conventions-justice-memos-explained-skip-prisoner-rights.html>> accessed 11 March 2016.

The question essentially being explored here, is whether morality is an absolute, or is dependent on the situation and the consequences?<sup>5</sup> In the current context, is torture always immoral? Or could there exist a situation in which it is morally justifiable? A dynamic the ticking-bomb theory explores in detail.

Though controversial, torture appears an inherent part of the modern world. The most recent examples being the widely reported atrocities carried out in the American run prisons of Abu Ghraib and Guantánamo Bay, displayed to the world through the haunting pictures publicised by the media.<sup>6</sup> As such, it must be examined and debated. Torture is a critical issue;<sup>7</sup> it not only affects politics, national security and human rights across the globe, but impacts on the public's day-to-day lives due to the considerable amounts of attention devoted to it by news reports and visual media such as '24'<sup>8</sup> and 'Zero Dark Thirty'.<sup>9</sup>

This thesis explores why torture, 'deemed illegitimate by the modern world for more than a century',<sup>10</sup> has resurfaced as a topic of debate, and persists despite its formal legal prohibition.<sup>11</sup> It also endeavours to shed light on the main issues involved in the modern 'torture debate' by examining and presenting in a balanced manner the moral, legal and practical arguments for and against the use of torture.

This thesis consists of a black letter, library based study using existing open source information drawn from an extensive range of sources. Books, journals, media sources, psychological research and studies, governmental information, speeches, NGO reports,

<sup>5</sup> Kennedy Ahenkora Adarkwa, 'Moral Absolutism Versus Moral Relativism' 22 February 2013 <<http://www.liberty.edu/divinity/index.cfm?PID=26955&id=653923>> accessed 28 November 2016.

<sup>6</sup> See for example, The Guardian, 'Torture scandal: The images that shamed America' (*The Guardian*, date not provided) <<http://www.theguardian.com/gall/0,8542,1211872,00.html>> accessed 10 April 2016.

<sup>7</sup> Department of Justice, Peace and Human Development Office of International Justice and Peace, 'Background on Torture' 2013 <<http://www.usccb.org/issues-and-action/human-life-and-dignity/torture/upload/2013-02-TortureBackgrounder-FINAL.pdf>> accessed 10 April 2016.

<sup>8</sup> The American television series 24 includes the use of beatings and injections by a medical professional.

<sup>9</sup> Zero Dark Thirty, a 2012 film directed by Katherine Bigelow, depicts the use of waterboarding, sleep deprivation and forcing of detainees into coffin-like boxes by American forces and agencies during the Iraq and Afghan wars.

<sup>10</sup> Alan Dershowitz, 'The Case for Torturing the Ticking Bomb Terrorist' in James E. White, *Contemporary Moral Problems: War, Terrorism, Torture and Assassination* (4<sup>th</sup> edn, Wadsworth Publishing Co Inc 2011) 65.

<sup>11</sup> Christopher J. Einolf, 'The Fall and Rise of Torture: A Comparative and Historical Analysis' (2007) 25(2) *Sociological Theory* 101, 101 and 109.

case law and legal instruments will all be drawn upon. Given the sensitive nature of the subject, certain closed sources, such as classified government reports, may not be accessible, this will somewhat limit access to verified information. Further, it should be noted that some of the sources referenced throughout this thesis will not be 'objective'. As is explained by Del Rosso, torture 'evidence is neither neutral nor complete; it provides a vantage on particular representations of reality and not others. To access the... 'experience' of torture... we must pass, first, through a selective witnessing of those experiences'.<sup>12</sup> For example, some documents are 'bureaucratic, replacing the lived experience of those who practiced or suffered torture with a stiff and, typically, euphemistic official vocabulary'<sup>13</sup> in order to justify or misrepresent governmental policies. Alternatively, NGOs and state opponents which scrutinise and criticise said policies, may skew statistics, overstate problems, or paint decisions badly whilst aiming to further their cause.

Motives and agendas aside, an additional problem lies in the initial recounting of abuse, and the inaccuracies in reporting to which this inevitably leads. As victims present testimony, elements of the scene of torture dissipate as many are unable or unwilling to fully recount the horrors they suffered. Thus, 'because our access to the reality of torture is always mediated by these sorts of partial accounts, our knowledge of it is always selective and incomplete.'<sup>14</sup> This thesis aims to address this issue by providing a variety of evidence both for and against each argument.

Chapter two explores the history of torture; its origins, uses, methods, justifications and eventual abolition. Chapter three aims to map the change in dynamics America underwent as a consequence of 9/11, and how this altered both public and institutional views towards torture. It provides a context for the modern torture debate and discusses some of the methods of torture used in the Iraq and Afghan wars. Chapter four sets out the international and domestic legal prohibitions on torture. Chapter five focuses on the efficacy of the legal

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<sup>12</sup> Jared Del Rosso, *Talking About Torture: How Political Discourse Shapes The Debate* (Columbia University Press 2015) 26.

<sup>13</sup> *ibid* 25.

<sup>14</sup> *ibid* 26.

prohibition of torture and offers explanations suggesting why certain states choose to break it. Allowing for a small amount of cross over, chapter six and seven respectfully examine the arguments for and against the use of torture. Finally, chapter eight consists of a review of the main discussion points, followed by my own conclusions on the justifiability of torture based on the arguments provided. The concept of a 'torture cycle' is explored here.

## Chapter Two: The Historical Dimension

Murphy alleges that '[t]he propensity for man to torture his fellow man is as old as civilisation itself'.<sup>15</sup> This statement appears to be accurate; according to the museum of torture, 'the systematic use of torture in criminal procedures dates back to the earliest civilisations with scenes depicting torture and corporal punishment being found on ancient Mesopotamian and Egyptian monuments.'<sup>16</sup>

Scott suggests that '[a]s society developed out of savagery into civilization, and as codes of laws and regulations were enacted, the torture which was inflicted by primitive man to satisfy his vengeance... crystallised itself into a definitive method of torture justified as a system of punishment.'<sup>17</sup> Under the newly established regulatory model, 'torture – in some greater or lesser form, as befits the crime - was usually practiced as a means of punishing wrongdoers.'<sup>18</sup> 'When a criminal or transgressor against the prevailing moral code, was whipped, crucified or otherwise horribly killed or maimed, it provided a graphic example that the law was being upheld and society was being kept safe'.<sup>19</sup> In this manner, torture existed as 'part of a workable system that kept the established powers securely in their place'<sup>20</sup> and sought to maintain order.

For the Roman jurist Ulpian, torture was a customary activity judges used 'to unearth crimes'<sup>21</sup> in addition to punishing them. Ulpian asserts that '[b]y quaestio, [that is, torture], we are to understand the torment and suffering of the body in order to elicit the truth.'<sup>22</sup> Yet the first evidence of the legally authorised application of torture to prove guilt or innocence

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<sup>15</sup> Michael Joseph Murphy, *Fiendish Ingenuity* (CreateSpace Independent Publishing Platform 2010) 8.

<sup>16</sup> The Museum of Torture, 'History of Torture' (2015) <<http://tortureum.com/history-of-torture/>> accessed 26 August 2017.

<sup>17</sup> George Riley Scott, *A History of Torture* (1995 edn, Senate 1940) 8.

<sup>18</sup> Mark P Donnelly and Daniel Diehl, *The Big Book of Pain* (The History Press 2008) 4.

<sup>19</sup> *ibid.*

<sup>20</sup> *ibid.* 6.

<sup>21</sup> Darius Rejali, *Torture and Democracy* (4th edn, Princeton University Press 2009) 35; Ulpian, 'Duties of Proconsul' in Edward Peters, *Torture* (2nd edn, Philadelphia: University of Pennsylvania Press 1996) 215.

<sup>22</sup> Darius Rejali, *Torture and Democracy* (4th edn, Princeton University Press 2009) 1.

predates the Romans; such proof can be found in the Sumerian Code of Ur-Nammu<sup>23</sup> and the Babylonian Code of Hammurabi.<sup>24</sup> Donnelly and Diehl suggest that evidence of torture can be found in all cultures; they state that over the millennia, thousands of civilisations have risen and fallen, but the use of torture has remained pretty much constant.<sup>25</sup> But the forms of torture used, and the motives driving them, have both evolved.

Historically, the methods of torture practiced were certainly more extreme than those which are seen today. For example, two of the most brutal tortures, castration and burning at the stake, have both been frequently used throughout history. The Egyptian, Alexander, for example, commonly used the punishment of castration as a means of deterring rape.<sup>26</sup> The use of burning at the stake as a form of torture, albeit torture as a means of execution, has also been evidenced in various cultures throughout history; '[It] was the favourite sentence for those found guilty of heresy by the Inquisition... It was also the preferred method throughout all the countries in Europe, regardless of their faith, for dealing with alleged sorcerers and witches.'<sup>27</sup> The antiquity of burning alive as a form of torturous execution is even established in the Bible; John 15:6 states that '[i]f a man abide not in me, he is cast forth as a branch, and is withered; and men gather, and cast them into the fire, and they are burned.'<sup>28</sup> Whereas the methods of torture most frequently practiced in the modern age, whilst horrific, lack the same degree of extremity.

Donnelly and Diehl further suggest that over the years the motives behind torture have 'evolved from simple punishment to the need to extract information.'<sup>29</sup> Classical tortures marked their victims' 'bodies as religion or custom required; they often branded or scarred in public, using bodies to advertise state power and deter others from similar behavior'.<sup>30</sup> By

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<sup>23</sup> 21<sup>st</sup> Century BC.

<sup>24</sup> 18<sup>th</sup> Century BC; The Museum of Torture, 'History of Torture' (2015) <<http://tortureum.com/history-of-torture/>> accessed 26 August 2017.

<sup>25</sup> Mark P Donnelly and Daniel Diehl, *The Big Book of Pain* (The History Press 2008) 5.

<sup>26</sup> Michael Joseph Murphy, *Fiendish Ingenuity* (CreateSpace Independent Publishing Platform 2010) 27.

<sup>27</sup> Michael Joseph Murphy, *Fiendish Ingenuity* (CreateSpace Independent Publishing Platform 2010) 38; Edward Ryan, 'Spanish Inquisition' (Encyclopaedia Britannica) <<https://www.britannica.com/topic/Spanish-Inquisition>> accessed 26 August 2017.

<sup>28</sup> *The Bible* John 15:6.

<sup>29</sup> Mark P Donnelly and Daniel Diehl, *The Big Book of Pain* (The History Press 2008) 5.

<sup>30</sup> Darius Rejali, *Torture and Democracy* (4<sup>th</sup> edn, Princeton University Press 2009) 35.

contrast, ‘modern torturers favour pains that intimidate the prisoner... apply[ing] physical pain in order to touch the mind or warp a sense of self, and thereby shape the self-understandings of prisoners and dispose them to willing, compliant action’<sup>31</sup> in order to force the disclosure of information. Rejali summarises that ‘some modern tortures have classical roots, and some classical torturers sought to convert minds with fear and pain, [but] there is no mistaking... how the emphasis has changed over time.’<sup>32</sup>

As Lightcap and Pfiffner explain, ‘[t]he use of torture under the auspices of the state has a long history in the Western legal tradition. Torture was prescribed in accord with Roman canon law to obtain confessions for serious crimes.’<sup>33</sup> Langbein suggests that states tortured in part because ‘[t]he prescribed standard of proof sufficiency was very demanding. Conviction of serious crime required either the testimony of two unimpeachable eyewitnesses or the defendant's confession before the judge.’<sup>34</sup> As a result of a lack of witnesses, *inter alia*, ‘the Roman-canon system turned to the practice of coercing confessions.’<sup>35</sup> For half a millennium, the law courts of continental Europe tortured suspects, acting openly and according to the law,<sup>36</sup> perhaps most famous in this regard was the Spanish Inquisition. Between 1478 and 1808, the Spanish Inquisition, headed by Thomas de Torquemada, burned alive more than 33,000 Spanish men, women and children, and tortured or imprisoned a further 290,000.<sup>37</sup>

However, over the centuries it became clear that torture produced unreliable evidence and inaccurate confessions. As early as 1764, jurists such as Beccaria denounced torture; declaring that it emanated from ‘the most barbarous [of] ages’ and describing its persistence as ‘an enduring monument to the ancient and savage legislation of an age when ordeals by

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<sup>31</sup> *ibid.*

<sup>32</sup> *ibid.*

<sup>33</sup> Tracy Lightcap and James P. Pfiffner, ‘Introduction’ in Tracy Lightcap and James P. Pfiffner (eds), *Examining Torture: Empirical Studies of State Repression* (Palgrave Macmillan 2014) 2-3.

<sup>34</sup> Mirjan Damaska ‘The Death of legal Torture’ (1978-9) 87 *The Yale Law Journal* 859, 861.

<sup>35</sup> *ibid.*

<sup>36</sup> John H Langbein, ‘The Legal History of Torture’ In Sanford Levinson (ed), *Torture: A Collection* (Oxford University Press, 2004) 93.

<sup>37</sup> Mark P Donnelly and Daniel Diehl, *The Big Book of Pain* (The History Press 2008) 83, 93.

fires and boiling water... were called 'judgement' of gods'.<sup>38</sup> 'In the end, the European states conceded that the long experiment with torture was a failure'<sup>39</sup> and they consequently 'abolished the system of judicial torture within about two generations.'<sup>40</sup> Between the years of 1740 and 1787, Prussia, Saxony, Denmark, Poland, Austria-Bohemia, France, Tuscany, Belgium and Sicily all disestablished the practice, and by the early nineteenth century, abolition had reached the last corners of the Continent.<sup>41</sup> Torture, as a practice, had gone 'from being an official part of the penal system to being considered beyond the pale of an enlightened nation'.<sup>42</sup>

Now, 'torture is generally... condemned in philosophy, scholarship and the law.'<sup>43</sup> However, '[t]he abolition of judicial torture... did not vanquish the practice.'<sup>44</sup> Over 100 years after its Europe-wide abolition, and 250 years after Beccaria's teachings, torture is still used across the globe. Yet, instead of the formally recognised judicial process torture previously represented, in its place an illegal and covert practice exists. Dershowitz makes the argument that it is the existence of an unrealistic absolute ban on torture that has driven torture 'beneath the radar screen of accountability'.<sup>45</sup> He suggests that enforcing a quixotic absolute prohibition has only ensured that torture is outwardly condemned, whilst it continues to be practised, often covertly, because states will always employ torture where they deem it to be necessary, as most recently evidenced during the Iraq and Afghan wars; the examination of which is the focus of the following chapter.

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<sup>38</sup> Cesare Beccaria, *On Crimes and Punishment* 1764, trans David Young (Hackett Publishing Co 1986) 30.

<sup>39</sup> John H Langbein, 'The Legal History of Torture' In Sanford Levinson (ed), *Torture: A Collection* (Oxford University Press, 2004) 93.

<sup>40</sup> *ibid* 61-64 and 177-179.

<sup>41</sup> *Ibid*.

<sup>42</sup> Jared Del Rosso, *Talking About Torture: How Political Discourse Shapes The Debate* (Columbia University Press 2015) 6.

<sup>43</sup> Tracy Lightcap and James P. Pfiffner, 'Introduction' in Tracy Lightcap and James P. Pfiffner (eds), *Examining Torture: Empirical Studies of State Repression* (Palgrave Macmillan 2014) 2-3.

<sup>44</sup> Jared Del Rosso, *Talking About Torture: How Political Discourse Shapes The Debate* (Columbia University Press 2015) 21.

<sup>45</sup> Alan M. Dershowitz, 'The Torture Warrant: A Response to Professor Strauss' (2004) 48 *New York Law School Law Review* 275, 278.

### Chapter Three: 9/11 and The Iraq War

Prior to 9/11, a terrorist attack in which Al-Qaeda, a group based in Afghanistan,<sup>46</sup> destroyed the Twin Towers, America publicly condemned states that tortured. The US Senate ratified the Convention Against Torture, Congress enacted anti-torture legislation, and judicial opinions spoke of 'the dastardly and totally inhuman act of torture'.<sup>47</sup> After 9/11, this rapidly changed; Al-Qaeda had demonstrated they that were capable of carrying out extreme violence in the heart of America whilst only using a group of minimally trained fanatics. This revelation forced those in positions of responsibility to rethink their notions of risk, and therefore rethink what needed to be done to combat that risk.<sup>48</sup> In response, '[t]he Bush administration seemingly determined that winning the war on terror required that the United States circumvent international law'<sup>49</sup> by justifying and practicing coercive interrogation. As Cofer Black, former director of the CIA's counterterrorist unit, summarised in testimony to Congress, 'There was a before-9/11 and an after-9/11... After 9/11 the gloves came off.'<sup>50</sup>

The events of September 11<sup>th</sup> had a profound effect on America; Al-Qaeda had struck at the heart of Western civilisation with devastating consequences, making it clear that the threat posed by terrorism was much greater than previously imagined.<sup>51</sup> As a result, there was an overwhelming sense of a need for retaliation; speaking in response to 9/11, George Bush stated: 'I want justice. There's an old poster out west, as I recall, that said, "Wanted: Dead or Alive."... All I want and America wants [Osama bin Laden] brought to justice.'<sup>52</sup> This

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<sup>46</sup> BBC News, 'Al-Qaeda's Origins and Links' 20 July 2004

<[http://news.bbc.co.uk/1/hi/world/middle\\_east/1670089.stm](http://news.bbc.co.uk/1/hi/world/middle_east/1670089.stm)> accessed 1 April 2016.

<sup>47</sup> *Filartiga v Pena-Irala*, 630 F.2d 876, 883 (2<sup>nd</sup> Cir 1980) and David Luban, 'Liberalism, Torture, and the Ticking Bomb' in Karen J. Greenberg (ed), *The Torture Debate in America* (Cambridge University Press 2006) 35.

<sup>48</sup> Philip Zelikow, 'Codes of Conduct For A Twilight War' 2012 49(1) *Houston Law Review* 1, 6.

<sup>49</sup> Human Rights Watch, 'The Road to Abu Ghraib' June 2004.

<sup>50</sup> John Barry, Michael Hirsh and Michael Isikoff, 'The roots of terror' (*Newsweek*, 24 May 2004).

<sup>51</sup> The severity of 9/11 undoubtedly raised the stakes, ultimately posing the question; could the increased threat from terrorism justify torture?

<sup>52</sup> George W Bush, 17 September 2001; Toby Harden, 'Bin Laden is Wanted: Dead or Alive, says Bush' (*The Telegraph*, 18 September 2001).

sentiment was met with the resounding approval of US voters, with 72% of American's supporting the Iraq invasion.<sup>53</sup> The 'war on terror' had begun.

In 2001, Vice-President Dick Cheney stated in an interview on Meet the Press, that the government might have to go to 'the dark side',<sup>54</sup> by this, he meant employing coercive interrogation. This attitude was mirrored by the American public. Less than a week after 9/11, in a quiz given in a university ethics class on responses to a terrorist attack, when given the options to (A) execute the perpetrators on sight, (B) bring them back to the US for trial, (C) subject them to international tribunal, or (D) torture and interrogate them; most students chose (A) and (D).<sup>55</sup> A national poll held by CNN and USA Today provides a broader picture of American public opinion towards torture in the wake of 9/11. It revealed that forty-five percent of those surveyed supported the use of torture when interrogating suspected terrorists.<sup>56</sup> Whilst the poll failed to show a majority favouring the use of torture, it must be remembered that torture is a supposedly barbaric, immoral, and legally prohibited practice. With this in mind, the fact that nearly half of the participants supported its use becomes significant and demonstrates an echoing of Cheney's comments.

Just three days after 9/11, Congress passed, by overwhelming margins (ninety-eight votes to zero), S.J.Res.23: Authorization for Use of Military Force 2001 s.2(a). This extraordinary measure authorised the use of 'all necessary and appropriate force'<sup>57</sup> against its perpetrators,<sup>58</sup> thus emphatically affirming and giving formal legal backing to Bush and

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<sup>53</sup> Frank Newport, 'Seventy-Two Percent of Americans Support War Against Iraq' 24 March 2003 <<http://www.gallup.com/poll/8038/seventytwo-percent-americans-support-war-against-iraq.aspx>> accessed 10 April 2016.

<sup>54</sup> Meet the Press, 'Interview with Dick Cheney' 16 September 2001 at 5 minutes 25 seconds.

<sup>55</sup> Amy Argetsinger, 'At Colleges, Students are Facing a Big Test' (*Washington Post*, 17 September 2001) <<https://www.washingtonpost.com/archive/local/2001/09/17/at-colleges-students-are-facing-a-big-test/b2195efd-8022-4b26-95bb-ce2b8404ee3f/>> accessed 21 March 2016.

<sup>56</sup> Paul Gronke and others, 'U.S. Public Opinion On Torture, 2001-2009' (Reed College, July 2010) <[http://www.reed.edu/poli\\_sci/faculty/rejali/articles/US\\_Public\\_Opinion\\_Torture\\_Gronke\\_Rejali.pdf](http://www.reed.edu/poli_sci/faculty/rejali/articles/US_Public_Opinion_Torture_Gronke_Rejali.pdf)> accessed 13 December 2016.

<sup>57</sup> S.J.Res.23: Authorization for Use of Military Force 2001 s.2(a).

<sup>58</sup> Passing by 98-0 in the senate and 420-1 in the House of Representatives <[http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?&congress=107&session=1&vote=00281](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?&congress=107&session=1&vote=00281)> accessed 11 April 2016.

Cheney's bellicose statements. 9/11, and America's reaction to it, catalysed the re-ignition of the torture debate; in the words of Alter, it was 'Time to Think About Torture'.<sup>59</sup>

During the wars in Iraq and Afghanistan, the use of torture by US forces and agencies became systematic, to a point, accepted as normative, and in some cases even encouraged, despite the fact it is clearly prohibited by various laws, both domestic and international.<sup>60</sup> An American official described as having supervisory control over suspected terrorists in Afghanistan stated in interview that, '[i]f you don't violate someone's human rights some of the time, you probably aren't doing your job.'<sup>61</sup> Such implicit recognition of the use of abuse speaks to its level of acceptance as a method of interrogation.

The list of abuses, as recorded by the 'Red Cross Torture Report',<sup>62</sup> range from the now infamous water-boarding,<sup>63</sup> beatings,<sup>64</sup> and sleep deprivation,<sup>65</sup> to more obscure forms of coercive interrogation, such as exposures to cold temperatures or water,<sup>66</sup> and confinement in boxes.<sup>67</sup> These techniques were not used in isolation; 'each specific method was in fact applied in combination with other methods, either simultaneously or in succession'<sup>68</sup> in order to break the detainee.

Waterboarding, formerly known as 'A-Selli', is thought to have originated during the times of the Spanish Inquisition.<sup>69</sup> It 'involves strapping down a detainee, covering their face with a cloth and then pouring water over the nose and mouth to create [the] terrifying sensation of

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<sup>59</sup> Jonathon Alter, 'Time to Think About Torture' (*Newsweek*, 5 November 2001)

<<http://europe.newsweek.com/time-think-about-torture-149445>> accessed 21 March 2016.

<sup>60</sup> Alex Bellamy, 'No Pain, no gain? Torture and ethics in the war on terror' (2006) 82(1) *International Affairs* 121, 123.

<sup>61</sup> Dana Priest and Barton Gellman, 'US Decries Abuse but Defends Interrogations' (*Washington Post*, 26 December 2002).

<sup>62</sup> International Committee of the Red Cross, 'ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody' February 2007.

<sup>63</sup> *ibid* 10.

<sup>64</sup> *ibid* 13.

<sup>65</sup> *ibid* 15.

<sup>66</sup> *ibid* 15-16.

<sup>67</sup> *ibid* 13-14.

<sup>68</sup> *ibid* 9.

<sup>69</sup> Samuel Clark, *A General Matyrologie, Containing a Collection of the Greatest Persecutions Which Have Befallen the Church of Christ* (1651) 210-211 offers an account of its use by the Spanish Inquisition.

drowning.<sup>70</sup> This description, however, fails to capture the truly hazardous nature of waterboarding. Malcolm Nance, national security expert, former member of US military and former SERE<sup>71</sup> Navy instructor, described his experience of waterboarding in front of the House Subcommittee on the Constitution.<sup>72</sup> Nance recounted:

Contrary to popular opinion, it is not a simulation of drowning. It is drowning. In my case, the technique was so fast and professional that I didn't know what was happening until the water entered my nose and throat. It then pushes down into the trachea and starts to process a respiratory degradation. It is an overwhelming experience that induces horror, triggers a frantic survival instinct. As the event unfolded, I was fully conscious of what was happening: I was being tortured.<sup>73</sup>

During the hearing, Arthur Davis asked Nance a series of questions regarding the possible outcomes of waterboarding. Davis queried whether if 'done in the wrong way' could waterboarding 'kill somebody,' 'cause someone to have a seizure,' and 'cause brain damage'? Nance answered in the affirmative to each question, adding that waterboarding could 'easily' kill someone.<sup>74</sup> Therefore, using Nance's experience for reference, waterboarding is much more than 'the sensation of drowning', which, whilst horrific, appears to be a physically 'safe' form of interrogation. Instead, the waterboard has the potential to not only cause brain damage, but also to kill someone.

Khalid Shaikh Mohammed, the self-professed planner of 9/11, was a victim of the waterboard 183 times during interrogations carried out by the CIA,<sup>75</sup> a shockingly high number given the very real threat waterboarding poses to its victims. The Senate Select Committee on Intelligence's study of the CIA's Detention and Interrogation Program revealed

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<sup>70</sup> Andrew Buncombe, 'What is waterboarding – and what did it do to CIA prisoners?' (*The Independent*, 10 December 2014) <<http://www.independent.co.uk/news/world/americas/cia-torture-report-what-is-waterboarding-9915001.html>> accessed 12 April 2016.

<sup>71</sup> Survival, Evasion, Resistance and Escape.

<sup>72</sup> Department of Justice to Guantànamo Bay (Part II), Before the House Subcommittee on the Commission on the Constitution, Civil Rights, and Civil Liberties, 110<sup>th</sup> Cong. 9 (2008).

<sup>73</sup> Malcolm Nance, 'Waterboarding is not simulated drowning – it is drowning' (www.salon.com 9 Nov) 2007 <<http://www.salon.com/2007/11/09/nance/>> accessed 28 July 2017.

<sup>74</sup> Jared Del Rosso, *Talking About Torture: How Political Discourse Shapes the Debate* (Columbia University Press 2015) 140.

<sup>75</sup>United States Department of Justice Office of Legal Counsel, Office of the Principal Assistant Attorney General Washington DC 20530, 'Memoranda for John A Rizzo Senior Deputy General Counsel, Central Intelligence Agency Re: Application of United States Obligations Under-Article-16 of the Convention Against Torture to Certain Techniques that May Be Used in Interrogation of High Value Al-Qaeda Detainees' 30 May 2005, 37.

that Abu Zubaydah, a purportedly high ranking Al-Qaeda official, was also subjected to waterboarding. Zubaydah was reported as having ‘coughed, vomited and [suffered] ‘involuntary spasms of the torso and extremities’<sup>76</sup> before becoming ‘completely unresponsive, with bubbles rising through his open, full mouth.... [He] remained unresponsive until medical intervention, when he regained consciousness and expelled ‘copious amounts of liquid’.<sup>77</sup>

Not only was Zubaydah the subject of waterboarding, he was also forced to suffer ‘sleep deprivation’. This process ‘involve[s] keeping detainees awake for up to 180 hours, usually standing or in stress positions, at times with their hands shackled above their heads.’<sup>78</sup> Zubaydah alleged that ‘very loud ‘shouting music’ was constantly played on an approximately fifteen minute repeat loop twenty-four hours a day’; ‘if [he] started to fall asleep a guard would come and spray water in [his] face’.<sup>79</sup> Begin, a young man tortured in the Soviet Union, describes the hellish nature of sleep deprivation. The spirit of a sleep-deprived prisoner is ‘wearied to death, his legs are unsteady, and he has one sole desire to sleep, to sleep just a little, not to get up, to lie, to rest, to forget... Anyone who has experienced this desire knows that not even hunger or thirst are comparable with it.’<sup>80</sup>

The Senate report also provides evidence of the use of ‘rectal rehydration and feeding’ on five detainees.<sup>81</sup> The CIA subjected Khalid Shaikh Mohammed to rectal rehydration ‘without

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<sup>76</sup> Senate Select Committee on Intelligence, ‘Committee’s Study of the Central Intelligence Agency’s Detention and Interrogation Program: Executive Summary’ (2014), United States Senate, 113<sup>th</sup> Cong Executive Summary.

<sup>77</sup> Senate Select Committee on Intelligence, ‘Committee’s Study of the Central Intelligence Agency’s Detention and Interrogation Program: Executive Summary’ (2014), United States Senate, 113<sup>th</sup> Cong 43-44.

<sup>78</sup> Dominic Rushe and others, ‘Rectal rehydration and waterboarding: the CIA torture report’s grisliest findings’ (*The Guardian*, 11 December 2014)  
<<http://www.theguardian.com/us-news/2014/dec/09/cia-torture-report-worst-findings-waterboard-rectal>> accessed 29 March 2016.

<sup>79</sup> International Committee of the Red Cross, ‘ICRC Report on the Treatment of Fourteen “High Value Detainees” in CIA Custody’ February 2007 15.

<sup>80</sup> John Conroy, *Unspeakable Acts Ordinary People: The Dynamic of Torture* (New York: Knopf 2000) 34.

<sup>81</sup> Senate Select Committee on Intelligence, ‘Committee’s Study of the Central Intelligence Agency’s Detention and Interrogation Program (2014) 4.

a determination of medical need'<sup>82</sup> and administered 'rectal fluid resuscitation'<sup>83</sup> to Abu Zubaydah because he 'partially refus[ed] liquids'<sup>84</sup> despite its proven ineffectiveness as a medical procedure. The idea that the CIA would seek to justify the practice by claiming it was medically necessary is absurd given that the Journal of the American Medical Association states that the 'vogue of using nutritional enemas... has disappeared almost completely, largely because the human body does not effectively absorb nutrients through the colon',<sup>85</sup> making it useless from a nutritional standpoint. Vincent Iacopino, senior medical advisor for Physicians for Human Rights, described the practice as 'a form of sexual assault masquerading as a medical treatment'.<sup>86</sup>

As horrific as these examples may appear, for those who are religious, there perhaps exists a more terrifying prospect:

Notable in Abu Ghraib, was the despicable use of religion to humiliate. One Muslim was allegedly forced to eat pork [and] had liquor forced down his throat... He recounted in broken English: "They stripped me naked; they asked me 'Do you pray to Allah?' I said, 'Yes'. They said 'Fuck you' and 'Fuck him'".<sup>87</sup>

Dubensky opines that '[t]he straightforward pain of physical torture is impossible to fathom... torture that is designed to strip a man or woman of his or her identity, religion, and core beliefs seems somehow even more insidious.'<sup>88</sup> Exploration beyond the now renowned methods of torture reveals the extent to which all areas of the victim's life are accessible for abuse. Lazreg explains that '[b]ecause torture as a practice, attacks, in addition to its victims

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<sup>82</sup> Senate Select Committee on Intelligence, 'Committee's Study of the Central Intelligence Agency's Detention and Interrogation Program (2014) United States Senate, 113<sup>th</sup> Cong Executive Summary 82.

<sup>83</sup> *ibid* 584.

<sup>84</sup> *ibid*.

<sup>85</sup> William Collens and Louis Boas, 'The Rectal Administration of Sugar' (1932) 98(20) *The Journal of the American Medical Association* 1747.

<sup>86</sup> Physicians For Human Rights, 'Medical Professionals Denounce 'Rectal Feeding' as 'Sexual Assault Masquerading as Medical Treatment' December 2014 <[https://s3amazonaws.com/PHR\\_other/fact-sheet-rectal-hydration-and-retal-feeding.pdf](https://s3amazonaws.com/PHR_other/fact-sheet-rectal-hydration-and-retal-feeding.pdf)> accessed 10 July 2017.

<sup>87</sup> Andrew Sullivan, 'Atrocities in Plain Sight' (*New York Times*, 23 January 2005) <[http://query.nytimes.com/gst/fullpage.html?res=9C0CE0D81738F930A15752C0A9639C8B63&page\\_wanted=all](http://query.nytimes.com/gst/fullpage.html?res=9C0CE0D81738F930A15752C0A9639C8B63&page_wanted=all)> accessed 17 March 2016.

<sup>88</sup> Joyce S. Dubensky & Racheal Lavery, 'Torture: An Interreligious Debate' in Karen J. Greenberg (ed), *The Torture Debate in America* (Cambridge University Press 2006) 162.

bodies, their social worlds, ethnocentric, sexist, racist and religious beliefs and the sexuality of the victims frequently shape the practise of torture.<sup>89</sup>

One process, referenced in the US Senate Intelligence Committee's report into CIA torture,<sup>90</sup> has been referred to by psychologists Jessen and Mitchell, as 'learned helplessness'. In the context of torture, it can be best explained as the process of breaking down an individual's self-control until they are emotionally and psychologically unequipped to disobey,<sup>91</sup> and thus willing to cooperate.

The torture employed by the US during the 'war on terror' not only inflicted copious amounts of physical and mental pain on a large scale, but also sought to deprive victims of their beliefs, core personalities, and willpower. Its justification was twofold; first, empirical evidence suggested that jihadist motivated terrorism associated with the like of Al-Qaeda and its allies such as 9/11 and the 7/7 London bombings, appeared to be significantly more deadly than terrorism carried out by other groups.<sup>92</sup> Secondly, it was widely believed that Al-Qaeda were spreading '[t]housands of dangerous killers... throughout the world like ticking bombs, set to go off without warning'.<sup>93</sup> As a result of a combination of these factors, it was claimed that extraordinary measures, such as coercive interrogation, were necessary in order to find these individuals and prevent further terrorist attacks from happening. The initial 'appeal was that rare use of torture interrogation of key terrorists could thwart terrorist plans of mass destruction at minimal cost to civil liberties and democratic process.'<sup>94</sup>

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<sup>89</sup> Marnia Lazreg, 'Torture and the Twilight of Empire: From Algiers to Baghdad' (Princeton University Press 2007).

<sup>90</sup> Senate Select Committee on Intelligence, 'Committee Study of the Central Intelligence Agency's Detention and Interrogation Program' (2014) 11.

<sup>91</sup> Spencer Ackerman, 'Torture victims will bear psychological scars long after CIA report scandal fades' (*The Guardian*, 13 December 2014) <<http://www.theguardian.com/law/2014/dec/13/learned-helplessness-enduring-effects-torture-haunt-victims>> accessed 12 April 2016.

<sup>92</sup> James Piazza, 'Is Islamist Terrorism More Dangerous? An Empirical Study of Group Ideology, Organisation and Global Structure' (2009) 21 *Terrorism and Political Violence* 62-88.

<sup>93</sup> George W Bush, 'Speech from the White House' 26 September 2006.

<sup>94</sup> Jean Maria Arrigo, 'A Utilitarian Argument Against Torture Interrogation of Terrorists' (2004) 10(3) *Science and Engineering Ethics* 1, 2.

## **Chapter Four: The Legal Prohibitions on Torture**

Torture is expressly prohibited by a range of international conventions and is widely considered to be a 'crime against humanity'.<sup>95</sup>

Both torture and cruel and inhuman treatment are expressly forbidden by the United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT).<sup>96</sup> The US has been party to CAT since it became signatory to the UN as one of the original fifty-one countries in 1945, making all UN Conventions binding on it.

Article 1 of the Convention defines torture as:

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... information... 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.<sup>97</sup>

Article 2 states that 'Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.'<sup>98</sup> America fulfilled these obligations by codifying the Convention into US law via sections 2340-2340A of Chapter 113C, Title 18 of the US Code.

Section 2340(1) of the US Code defines torture as 'an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering... upon another person within his custody or physical control'.<sup>99</sup> Section 2340A contains the punishment for committing torture, stating: 'Whoever outside the United States commits or attempts to commit torture shall be fined... or imprisoned... or both, and if death

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<sup>95</sup> Rome Statute of the International Criminal Court, Article 7(f); Statute of the International Criminal Tribunal for the Former Yugoslavia, Article 5(f) and Statute of the International Criminal Tribunal for Rwanda, Article 3(f).

<sup>96</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984.

<sup>97</sup> *ibid* Part 1, Article 1.

<sup>98</sup> *ibid* Part 1, Article 2(1).

<sup>99</sup> 18 U.S. Code § 2340(1).

results to any person from [torture]... shall be punished by death or imprisoned for any term of years or for life.<sup>100</sup>

There is a further domestic prohibition contained in the US Bill of Rights, Amendment 8, which provides that 'cruel and unusual punishments shall not be inflicted'.<sup>101</sup> Although the focus of this thesis is placed on the abuses practiced outside America, meaning the 8<sup>th</sup> Amendment is not the key legal provision in the context of this analysis, it does clearly demonstrate that torture is prohibited both internationally and nationally under US law.

The Geneva Conventions, a set of 'international treaties that form the basis of modern humanitarian law governing the treatment of soldiers and civilians during conflict',<sup>102</sup> similarly prohibit torture.<sup>103</sup> The Third Geneva Convention, relevant to the Treatment of Prisoners in War, defines humanitarian protections for prisoners of war. Article 17 of the Convention states that 'No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war... Prisoners of war who refuse to answer may not be... exposed to any unpleasant or disadvantageous treatment of any kind.'<sup>104</sup>

Article 31 of the Fourth Geneva Convention, that relevant to the protection of Civilian Persons in Time of War, provides 'No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.'<sup>105</sup>

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<sup>100</sup> 18 U.S. Code § 2340A(a).

<sup>101</sup> US Bill of Rights, 8<sup>th</sup> Amendment 1473-4.

<sup>102</sup> British Red Cross, 'The Geneva Conventions' <http://www.redcross.org.uk/What-we-do/Protecting-people-in-conflict/Geneva-Conventions> accessed 13 April 2016.

<sup>103</sup> The Geneva Conventions enshrine principles with which individuals and States, one would hope, are happy to follow, yet it is suspected that most do not fully comply with the Conventions (please see section entitled 'Torture Across The world'). This raises the question; are the Conventions relevant today?

Wars are no longer fought between states, which is the purpose for which the rules were designed, but between states and individuals. It is therefore arguable that the Conventions are outdated and should be changed to more accurately reflect the nature of modern conflicts e.g. combating terrorist organisations. For more information regarding this see 'Just War Theory'.

<sup>104</sup> Geneva Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, Article 17.

<sup>105</sup> Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, Article 31.

The US became a signatory to the Geneva Conventions in 1949,<sup>106</sup> meaning it is bound under part 1, Article 1 of both Conventions to ‘respect and to ensure respect for the present Convention in all circumstances.’<sup>107</sup>

‘The legal prohibition of torture is widely understood as a peremptory rule, as derogation is considered impermissible.’<sup>108</sup> Article 4 of the International Covenant on Civil and Political Rights 1966,<sup>109</sup> a treaty that America is party to, and Article 2(2) CAT stipulate that derogation from the prohibition on torture is not possible, even in times of ‘public emergency which threatens the life of the nation’,<sup>110</sup> or a ‘state of war’.<sup>111</sup>

The past decade has seen further anti-torture legislation put in place within the US. First, President Obama’s 2009 Executive Order 13491: Ensuring Lawful Interrogations<sup>112</sup> was enacted in order to ‘improve the efficacy of interrogations, and to ensure that the U.S. respects domestic and international laws that prohibit torture and cruel, inhuman and degrading treatment’.<sup>113</sup> This was later followed by the 2015 McCain-Feinstein Amendment to the National Defense Authorisation Act for Fiscal Year 2016;<sup>114</sup> a measure ‘designed to strengthen the prohibition on torture and ensure that the United States never engages in torture again.’<sup>115</sup>

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<sup>106</sup> International Committee of the Red Cross, ‘Treaties, States Parties and Commentaries for Geneva Conventions of 12 August 1949’ (www.icrc.org)

<<https://www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=D6B53F5B5D14F35AC1256402003F9920>> accessed 10<sup>th</sup> March 2016.

<sup>107</sup> Geneva Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, Article 1 and Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, Article 1.

<sup>108</sup> Alex Bellamy, ‘No Pain, no gain? Torture and Ethics in the War on Terror’ (2006) 82(1) International Affairs 121, 126.

<sup>109</sup> Hereafter ICCPR.

<sup>110</sup> International Covenant on Civil and Political Rights 1966, Article 4 ss 1-2.

<sup>111</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, Article 2(2).

<sup>112</sup> Executive Order 13491: Ensuring Lawful Interrogations 2009.

<sup>113</sup> Scott Roehm, Senior Policy Council, Rule of Law Programme, ‘Five Years After Executive Order Ending “Enhanced Interrogations”, a Return to Torture is Still Possible’ 2014 <<http://www.constitutionproject.org/documents/five-years-after-executive-order-ending-enhanced-interrogations-a-return-to-torture-is-still-possible/>> accessed 22 June 2017.

<sup>114</sup> H.R. 1735 - National Defense Authorization Act for Fiscal Year 2016.

<sup>115</sup> The Centre for Victims of Torture, ‘McCain-Feinstein Anti-Torture Amendment: STRENGTHENS U.S. BAN ON TORTURE’ 2015

<[http://www.cvt.org/sites/cvt.org/files/attachments/u11/downloads/McCain-Feinstein%20Amendment%20Factsheet\\_November%202015.pdf](http://www.cvt.org/sites/cvt.org/files/attachments/u11/downloads/McCain-Feinstein%20Amendment%20Factsheet_November%202015.pdf)> accessed 22 June 2016.

This *jus cogens* prohibition on torture reflects the longstanding opposition to its practice founded substantially on the arguments against torture presented in chapter seven.

### Chapter Five: Torture Across the World

The 1984 UN Convention Against Torture,<sup>116</sup> arguably the most influential modern anti-torture prohibition:

offered a set of concrete steps to make the global ban on torture a reality; by establishing a set of measures, [protected by] law and specifically designed to prevent torture, punish perpetrators and ensure justice and redress to victims, these measures intended... to end torture and other ill-treatment.<sup>117</sup>

Amnesty International's first international study of torture found that the practice had 'developed a life of its own and become a social cancer'; torture was 'a practise encouraged by some governments and tolerated by others in an increasingly large number of countries'.<sup>118</sup> Today, 155 countries are state parties to the UN Convention, suggesting comprehensive support for the prohibition of torture. However, 'many governments are betraying their responsibility. Three decades on from the Convention – and more than 65 years after the Universal Declaration – torture is not just alive and well. It is flourishing.'<sup>119</sup>

Between January 2009 and May 2013, 'Amnesty International received reports of torture and other ill-treatment committed by state officials in 141 countries, and from every world region.'<sup>120</sup> According to a 2014 Amnesty International report, 'individuals are tortured because of their political views or because they use their freedom of expression. People belonging to a particular religious or other minority group, or targeted because of their identity, also face increased risk.'<sup>121</sup>

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<sup>116</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984.

<sup>117</sup> Amnesty International, *Torture in 2014 30 Years of Broken Promises* (2014) 5.

<sup>118</sup> Amnesty International, *Report on Torture* (Revised edn, Duckworth in association with Amnesty International Publications 1975) 9

<sup>119</sup> Amnesty International, *Torture in 2014 30 Years of Broken Promises* (2014) 6.

<sup>120</sup> *ibid* 10.

<sup>121</sup> *ibid* 11.

In Saudi Arabia, for example, public whippings, clearly a form of torture to many, are still used as a form of punishment. In 2014, Saudi blogger Raif Badawi was imprisoned and sentenced to 1,000 lashes to be performed over 20 weeks for 'insulting Islam through electronic channels'.<sup>122</sup> Further, in July 2014, a 24-year-old man was jailed for 3 years and sentenced to 450 lashes by a court in Saudi Arabia for arranging a date with a man on Twitter.<sup>123</sup>

Further, in Mexico:

reports of torture have increased since 2006 as violence has spiralled in the context of the government's fight against organized crime. Many detentions are made without a warrant, with suspects allegedly caught "red handed", even if they did not have any direct connection to a crime or crime scene. All too often, people arrested without evidence are from poor and marginalized communities.<sup>124</sup>

In America, Amnesty International reports that the US government has failed to 'ensure accountability for torture and enforced disappearances committed in the context of counter-terrorism operations'.<sup>125</sup> There exists plenty of evidence that these abuses took place. Human Rights Watch provides an account of Ridha al-Najjar and Lofti El Gherissi's experience. The two Tunisian nationals were sent to the notorious CIA black site, Cobalt, in Afghanistan after being arrested in Pakistan.<sup>126</sup> Once there, 'they usually went without food for days [or weeks] at a time... Al-Najjar said he lost 50 kilograms (110 pounds) during his detention at the CIA site'.<sup>127</sup> A secret report carried out by Major General Antonio Taguba in 2004 found that:

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<sup>122</sup> BBC News Beat, 'What You Can Be Flogged For in Saudi Arabia' 13 October 2015 <<http://www.bbc.co.uk/newsbeat/article/34513278/what-you-can-be-flogged-for-in-saudi-arabia>> accessed 26 July 2017; Richard Spencer, 'How Do You Survive 1000 Lashes' (*The Telegraph*, 16 January 2016) <<http://www.telegraph.co.uk/news/worldnews/middleeast/saudi-arabia/11349501/How-do-you-survive-1000-lashes.html>> accessed 21 August 2017.

<sup>123</sup> BBC News Beat, 'What You Can Be Flogged For in Saudi Arabia' 13 October 2015 <<http://www.bbc.co.uk/newsbeat/article/34513278/what-you-can-be-flogged-for-in-saudi-arabia>> accessed 26 July 2017; Richard Spencer, 'How Do You Survive 1000 Lashes' (*The Telegraph*, 16 January 2016) <<http://www.telegraph.co.uk/news/worldnews/middleeast/saudi-arabia/11349501/How-do-you-survive-1000-lashes.html>> accessed 21 August 2017.

<sup>124</sup> Amnesty International, *Torture in 2014 30 Years of Broken Promises* (2014) 35.

<sup>125</sup> *ibid* 32.

<sup>126</sup> Human Rights Watch, 'Interview: New CIA Torture Claims' 3 October 2016 <<https://www.hrw.org/news/2016/10/03/interview-new-cia-torture-claims>> accessed 30 December 2016.

<sup>127</sup> *ibid*

Other abuses... included pouring cold water on naked prisoners, beating inmates with a broom handle and chair, threats of rape, sodomy with a chemical light, using dogs to frighten and intimidate detainees, and forcing detainees to engage in sexually humiliating conduct, such as being arranged in "sexually explicit positions for photographing."<sup>128</sup>

Despite the emerging evidence, 'no one responsible for the use of interrogation techniques such as "water-boarding", prolonged sleep deprivation, and stress positions in Central Intelligence Agency run secret detention centres around the world has been brought to justice',<sup>129</sup> suggesting that the US does not take the prohibition of torture seriously. Even domestically, and prior to the 'war on terror', thus dispelling any terrorism-related justifications, 'the UN Committee on Torture claimed that American police officers and prison guards had engaged in various forms of torture and ill treatment on numerous occasions. Of particular concern being the use of electro-shock stun belts to restrain prisoners.'<sup>130</sup>

Evidence such as this demonstrates the scale of the problem, both domestically and internationally, in terms of the US, and on a wider scale, across the globe. Perhaps more importantly, it also begs the question; why have the Convention Against Torture, and other similar prohibitions, proven to be ineffective in signatory countries such as Pakistan, Mexico and America? One answer lies in the definitional problems surrounding torture.

Torture, as a concept, is hard to precisely define because it means different things to different people. For example, Human Rights Watch states that '[t]orture continues to be used routinely in Turkey' and reports a long list of tortures including 'dragging prisoners along the floor'.<sup>131</sup> In comparison, a report on abuse allegations at Abu Ghraib between 2001-2005 by the Mail Online includes a photograph of Lynndie England, one of the accused, dragging a prisoner along the ground attached to a dog lead. England was later

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<sup>128</sup> Mirko Bagaric and Julie Clarke, 'Not enough official torture in the world? The circumstances in which torture is morally justifiable' (2005) 39(3) *University of San Francisco Law Review* 581, 594; Major General Antonio Taguba, 'ARTICLE 15-6 INVESTIGATION OF THE 800th MILITARY POLICE BRIGADE' 2004 16-18.

<sup>129</sup> Amnesty International, *Torture in 2014 30 Years of Broken Promises* (2014) 32.

<sup>130</sup> Mirko Bagaric and Julie Clarke, 'Not enough official torture in the world? The circumstances in which torture is morally justifiable' (2005) 39(3) *University of San Francisco Law Review* 581, 594.

<sup>131</sup> Human Rights Watch, *Human Rights Watch World Report 1992: Events of 1991* (1991) 575.

convicted by a Court Martial of abusing inmates.<sup>132</sup> When discussing the matter, former army instructor, Tony Robinson, went as far as to say the prison photos did not even show torture; stating that '[f]rat hazing is worse than this'.<sup>133</sup>

The point being made is that in the first example 'dragging along the floor' was defined as 'torture', yet in the second example, the same offence is considered to be 'abuse', and even dismissed as 'hazing'. The question that must be answered here is '[a]t what point does physical abuse become torture?' If a prisoner were to be lightly pushed into a wall, few would define this as torture, although some would; but the fact is, they are being physically abused. With how much force does the victim need to be pushed for it to qualify as torture? The answer varies from person to person, making it almost impossible to clearly define.

Murphy states that, '[t]here is no rigid line between torture and the concept of punishment; it is largely dependent on the perception of the individual victim concerned and their physical and mental reaction to the suffering experienced, as to whether something can be described as torture or not.'<sup>134</sup> This is because pain thresholds vary from person to person; one individual may describe pain, another irritation, meaning torture is, in some sense, a subjective practice.

The discrepancy as to what constitutes torture extends beyond individual cases to the differences that exist between cultures. For example, public flogging in Saudi Arabia is viewed and widely accepted as a humiliating punishment for wrongdoing, no different to imprisonment or a fine, not as torture.<sup>135</sup> Whereas in the Western world, flogging is widely condemned<sup>136</sup> and classified as a form of torture. Disparities such as these have caused

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<sup>132</sup> David Jones, 'Why the hell should I feel sorry, says girl soldier who abused Iraqi prisoners at Abu Ghraib prison' (*The Daily Mail* 13 June 2009) <<http://www.dailymail.co.uk/news/article-1192701/Why-hell-I-feel-sorry-says-girl-soldier-abused-Iraqi-prisoners-Abu-Ghraib-prison.html>> accessed 4 January 2017.

<sup>133</sup> Frank Rich, 'The War's Lost Weekend' (*New York Times* 9 May 2004) 2.

<sup>134</sup> Michael Joseph Murphy, *Fiendish Ingenuity* (CreateSpace Independent Publishing Platform 2010) 8.

<sup>135</sup> BBC News Beat, 'What You Can Be Flogged For in Saudi Arabia' 13 October 2015 <<http://www.bbc.co.uk/newsbeat/article/34513278/what-you-can-be-flogged-for-in-saudi-arabia>> accessed 26 July 2017.

<sup>136</sup> Russell Goldman, 'Two Cases Show Light on Floggings in Muslim World' ([abcnews.go.com](http://abcnews.go.com) November 2007) <<http://abcnews.go.com/International/story?id=3927504&page=1>> accessed 30 August 2017.

concern internationally, as the more stringent definition followed by the majority of the Western world has often been perceived as westerners imposing their views in terms of what constitutes ‘torture’ on the rest of the world.<sup>137</sup>

‘In the case of psychological torture, a form of punishment considered relatively mild by one individual, might constitute a most horrible form of torture to another’.<sup>138</sup> Therefore, it may be argued that what constitutes torture cannot be objectively decided, but rather must be examined on a subjective basis, according to the effect on the individual. As such, establishing a comprehensive definition of torture is all but impossible.

Amnesty International suggests that governments often engage in torture because they ‘believe that they benefit from [it], and [due to] the persistence of a culture of impunity, that is, the failure to bring to justice those responsible for serious violations of human rights and international humanitarian law’.<sup>139</sup> Impunity often results from a ‘lack of political will, since the state itself – or a state arm such as the police or military – is frequently directly responsible or complicit in torture.’<sup>140</sup> Such immunity of action allows states to control and even oppress their citizens. For example, Chinese authorities have punished human rights activists by denying them life saving medical treatments. In 2014, Cao Shunli died from organ failure in a Beijing hospital after officials at the prison she was held in for five months repeatedly prevented her from receiving vital medical treatment.<sup>141</sup>

According to Amnesty International, ‘it continues to receive regular reports of torture and other cruel, inhuman or degrading treatment taking place in China’s “re-education through labor” camp facilities’,<sup>142</sup> which are used in part to oppress Falun Gong practitioners.<sup>143</sup>

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<sup>137</sup> Clancy Wright, ‘Western Human Rights in A Diverse World: Cultural Suppression or Relativism?’ (2014) paras 21-22 <<http://www.e-ir.info/2014/04/25/western-human-rights-in-a-diverse-world-cultural-suppression-or-relativism/>> accessed 4 July 2017.

<sup>138</sup> Michael Joseph Murphy, *Fiendish Ingenuity* (CreateSpace Independent Publishing Platform 2010) 8.

<sup>139</sup> Amnesty International, *Torture in 2014 30 Years of Broken Promises* (2014) 12.

<sup>140</sup> *ibid* 17.

<sup>141</sup> *ibid* 32.

<sup>142</sup> The Coalition to Investigate the Persecution of Falun Gong, ‘Torture Outside the Olympic Village: A Guide to China’s Labor Camps’ 2008 2 <<http://docplayer.net/6863087-Torture-outside-the-olympic-village-a-guide-to-china-s-labor-camps-contents-foreword-introduction.html>> accessed 4 January 2017.

Former prisoner of the regime, Zhao Ming, was held at in one such camp from July 2000 to March 2002. He recounts that '[t]en inmates, under orders by the police guards in the camp, once beat me together, which made... me unable to walk for two weeks after that. Two weeks before I was released, I was shocked with 6 electric batons by 5 policemen while tied up on a bed board.'<sup>144</sup> Falun Gong practitioner Wang Bingwen's story serves as further evidence; he 'was illegally detained at the Qingdao Forced Labor Camp over last two years.' Whilst detained, the police deprived Bingwen 'of sleep for 14 consecutive days, suffocated him with smoke, burned him, stabbed him with needles, and beat him.'<sup>145</sup>

States are able to employ such policies because, whilst 'the Convention Against Torture is... quite strong in substance, it is remarkably weak in enforcement.'<sup>146</sup> The central enforcement procedure for the Convention is a requirement that, under Article 19 of CAT, '[t]he States Parties shall submit to the Committee... [against torture] reports on the measures they have taken to give effect to their undertakings under this Convention.'<sup>147</sup> However, failure to abide by this commitment is frequently ignored; as of 2000, an average of 71 percent of all State parties to each treaty have overdue reports, whilst 110 states have five or more overdue reports.<sup>148</sup> Without an effective enforcement procedure, there is a limit to the usefulness of any convention; once states recognise that there are few negative consequences for failing to adhere to a prohibition, there is little incentive, beyond *pacta sunt servanda*,<sup>149</sup> to act in accordance with it.

Hathaway suggests that states 'join treaties like the Convention against Torture in no small part to make themselves look good. In doing so they may hope to attract more foreign

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<sup>143</sup> Amnesty International, 'The crackdown on Falun Gong and other so-called "heretical organizations"' 23 March 2000.

<sup>144</sup> *ibid* 5.

<sup>145</sup> Clearwisdom.net, 'Eyelids Pierced with Needles and Suffocated with Smoke: Tortures Practitioner Wang Bingwen Endures at Qingdao Forced Labor Camp' 1 April 2006 <<http://www.clearwisdom.net/emh/articles/2006/4/1/71436p.html>> accessed 4 January 2017.

<sup>146</sup> Oona Hathaway, 'The Promise and Limits of the International Law of Torture' in Sanford Levinson (ed), *Torture: A Collection* (Oxford University Press, 2004) 205.

<sup>147</sup> Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment 1984, Article 19, 'The States Parties shall submit to the Committee... reports on the measures they have taken to give effect to their undertakings under this Convention.'

<sup>148</sup> Anne Bayefsky, 'The UN Human Rights Treaty System: Universality at the Crossroads' (Ardley, N.Y.: Transnational, 2001) 8.

<sup>149</sup> Meaning 'agreements of the parties must be observed': Henry Black, *Black's Law Dictionary* (6<sup>th</sup> edn, Springer, 1990) 1109.

investment, aid donations, international trade, and other tangible benefits.<sup>150</sup> States are aware that they can reap the benefits signing such conventions provide, without actually having to adhere to their provisions because there is little to no risk of facing sanctions due to a breach.

When the evidence discussed above is considered, it becomes apparent that the use of torture is not limited to the intelligence gathering justifications provided during the Iraq and Afghan wars. Instead, some states employ torture as a means of oppressing certain sections of society, or in order to quell those who oppose or protest against their regime or practices.

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<sup>150</sup> Oona Hathaway, 'The Promise and Limits of the International Law of Torture' in Sanford Levinson (ed), *Torture: A Collection* (Oxford University Press 2004) 207.

## Chapter Six: The Torture Debate – The Case For

### The Torture Memos

The so called 'Torture Memos', originally drafted by Deputy Assistant Attorney General, John Yoo, and signed by Assistant Attorney General, Jay S. Bybee, in 2002, advised the CIA, the President and USDOD on the legality of the use of enhanced interrogation techniques and counselled that the 'humanitarian Geneva Conventions were inapplicable to Taliban detainees or persons suspected of links with Al-Qaeda.'<sup>151</sup>

Yoo and Bybee redefined torture as the infliction of physical pain 'equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function or even death',<sup>152</sup> or the infliction of mental pain which 'results in significant psychological harm of significant duration e.g. lasting for months or even years.'<sup>153</sup> By raising the threshold regarding what constituted and could therefore be punished as torture,<sup>154</sup> the memos sought to limit the application of the Convention's scope so as to enable US forces to carry out coercive interrogation 'lawfully' without fear of reprisal.

Yoo and Bybee came to the conclusion that the 'Treaty's text prohibits only the most extreme acts by reserving criminal penalties solely for torture and declining to require such penalties for "cruel, inhuman or degrading treatment or punishment"'.<sup>155</sup> This allowed them to justify the use of coercive interrogation by suggesting that it did not surpass the requisite altered threshold for torture, and as such, amounted to only 'cruel, inhuman or degrading treatment or punishment'. This meant that any sanctioned coercive interrogation carried out

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<sup>151</sup> Richard B. Bilder & Detlev F. Vagts, 'Speaking Law to Power: Lawyers and Torture' in Karen J. Greenberg (ed), *The Torture Debate in America* (Cambridge University Press 2006) 151.

<sup>152</sup> United States Department of Justice Office of Legal Counsel, Office of the Assistant Attorney General Washington DC 20530, 'Memoranda for Alberto R Gonzales Counsel to the president Re: Standards of Conduct for Interrogation under 18 U.S.C ss 2340-2340A' (2002) 1.

<sup>153</sup> Ibid.

<sup>154</sup> Andy Worthington, 'Ten Terrible Truths about the CIA Torture Memos (Part One)' ([www.andyworthington.co.uk](http://www.andyworthington.co.uk), 21<sup>st</sup> April 2009) <<http://www.andyworthington.co.uk/2009/04/21/ten-terrible-truths-about-the-cia-torture-memos-part-one/>> accessed 10<sup>th</sup> March 2016.

<sup>155</sup> United States Department of Justice Office of Legal Counsel, Office of the Assistant Attorney General Washington DC 20530, 'Memoranda for Alberto R Gonzales Counsel to the president Re: Standards of Conduct for Interrogation under 18 U.S.C ss 2340-2340A' (2002) 1-2.

by US forces would not be severe or extreme enough to constitute torture, thus making it legal.

The ability to construct a somewhat tortuous legal case, permitting the use of coercive interrogation within the confinements of the aforementioned legislation,<sup>156</sup> suggests that coercive interrogation, from a legal standpoint, may technically be acceptable provided it does not exceed a certain degree of severity.

These memos, however, have perhaps unsurprisingly come under severe criticism and intense scrutiny, with some critics charging ‘that the memoranda focused less on a responsible analysis of the legal and policy issues involved than on proposing arguments to protect those involved in coercive interrogation techniques from potential prosecution under US law.’<sup>157</sup> *Prima facie*, this criticism detracts from the value of Yoo and Bybee’s arguments; if the memoranda were fixated on protecting US forces from prosecution, perhaps they had neglected to consider the bigger legal and political issues involved?<sup>158</sup>

It is however arguable that, in examining the potential prosecution of US forces, the memoranda were actually exploring the most important legal issue; law only operates where crimes have actually been committed. By definition, crime is ‘an action or omission which constitutes an offence and is punishable by law’.<sup>159</sup> In order to be punishable, the act, in this case coercive interrogation, must ‘constitute an offence’ under law; if it does not, then it is clearly not illegal. So, in demonstrating that the use of coercive interrogation did not constitute an offence under US and international law, Yoo and Bybee were actually tackling the key legal issue; is ‘torture’ legal? If a viable legal framework is enacted, this would provide legal justification for its use. Therefore, as coercive interrogation

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<sup>156</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, codified in US law by sections 2340-2340A of title 18 US Code Chapter 113C.

<sup>157</sup> Richard B. Bilder & Detlev F. Vagts, ‘Speaking Law to Power: Lawyers and Torture’ in Karen J. Greenberg (ed), *The Torture Debate in America* (Cambridge University Press 2006) 152.

<sup>158</sup> The torture memos seemed to have focussed entirely upon the legal analysis of what America could do, and completely neglected to undertake any policy analysis considering what they should do. For example, little consideration was given to how the use of torture would reflect on America as a nation that previously upheld human rights.

<sup>159</sup> Oxford Dictionaries, ‘Definition of *crime* in English’ (Oxford Dictionaries)

<<http://www.oxforddictionaries.com/definition/english/crime>> accessed 23 March 2016.

fails to constitute a crime, it could be suggested that it is not in all instances the abhorrent practice depicted in chapter seven.

Yoo and Bybee also attempted to nullify the concept of 'specific intent' through the use of case law. This was based on the idea that in order to breach section 2340A, the 'severe pain or suffering' must have been inflicted with specific intent; that is to say, the accused must have expressly intended to achieve the forbidden act.<sup>160</sup> If the defendant acted knowing severe pain was reasonably likely to result from his actions, but no more, he only had general intention, not specific intent. As a theoretical matter, knowledge alone that a particular result is certain to occur does not constitute specific intent. As stated in *Vacco v Quill*,<sup>161</sup> the law distinguishes between 'actions taken 'because of' a given end, from actions taken 'in spite of their unintended but foreseen' consequences.'<sup>162</sup> Thus, even if the defendant knows severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent. Instead, a defendant is guilty of torture only if he acts with the express purpose of inflicting severe pain or suffering.<sup>163</sup> Therefore, if an interrogator inflicts severe pain on a detainee, but it was not his objective, that instead being the obtaining of information, they lack the specific intent required to commit a crime. As such, any 'torture' committed under such circumstances fails to constitute an offence, bringing the discussion back to the previously drawn conclusion; torture is not legally prohibited.

In seeking to justify a potential breach of section 2340A, Yoo and Bybee discuss a 'choice of evils'<sup>164</sup> as a defence for troops acting in 'good faith'.<sup>165</sup> The defence, commonly known as the 'necessity defence', permitted conduct that the actor believed to be necessary to avoid a

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<sup>160</sup> United States Department of Justice Office of Legal Counsel, Office of the Assistant Attorney General Washington DC 20530, 'Memoranda for Alberto R Gonzales Counsel to the president Re: Standards of Conduct for Interrogation under 18U.S.C ss 2340-2340A' (2002) 3.

<sup>161</sup> (1997) 521 U.S. 793.

<sup>162</sup> *ibid* 802-3.

<sup>163</sup> United States Department of Justice Office of Legal Counsel, Office of the Assistant Attorney General Washington DC 20530, 'Memoranda for Alberto R Gonzales Counsel to the president Re: Standards of Conduct for Interrogation under 18U.S.C ss 2340-2340A' (2002) 3-4.

<sup>164</sup> *ibid* 39.

<sup>165</sup> Andy Worthington, 'Ten Terrible Truths about the CIA Torture Memos (Part One)' ([www.andyworthington.co.uk](http://www.andyworthington.co.uk), 21<sup>st</sup> April 2009) <<http://www.andyworthington.co.uk/2009/04/21/ten-terrible-truths-about-the-cia-torture-memos-part-one/>> accessed 10<sup>th</sup> March 2016.

harm or evil, provided that the harm sought to be avoided was greater than that sought to be prevented by the law defining the offense charged.<sup>166</sup>

### **The Necessity Defence**

The purpose underlying this argument is one of public policy. LaFave argues that 'the law ought to promote the achievement of higher values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law.'<sup>167</sup> This line of thinking is reflected in the torture memos, where Yoo and Bybee suggest that 'any harm that might occur during an interrogation would pale to insignificance compared to the harm avoided by preventing [an attack].'<sup>168</sup>

Essentially, in such a situation, 'the evil involved in violating the terms of the criminal law may be less than that which would result from literal compliance with the law.'<sup>169</sup> The Landau Commission found that the decisive factor in determining whether the necessity defence can be raised is 'the comparison between... the evil of contravening the law as opposed to the evil which will occur sooner or later',<sup>170</sup> from an attack. Therefore, as a matter of public policy, in circumstances where the lives saved hold greater importance than adhering to the law, it is argued that torture should be acceptable, and in some instances even promoted.

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<sup>166</sup> *ibid* 39-40.

<sup>167</sup> Wayne R. LaFave & Austin Wakeman Scott, *Criminal Law* (5th edn, West Academic Publishing 2010) 629.

<sup>168</sup> United States Department of Justice Office of Legal Counsel, Office of the Assistant Attorney General Washington DC 20530, 'Memoranda for Alberto R Gonzales Counsel to the president Re: Standards of Conduct for Interrogation under 18U.S.C ss 2340-2340A' (2002) 41.

<sup>169</sup> Wayne R. LaFave & Austin Wakeman Scott, *Criminal Law* (5th edn, West Academic Publishing 2010) 629.

<sup>170</sup> 'Experts of the Report of the Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity' (1989) 23 *Israel Law Review* 146, 174; Miriam Gur-Arye, 'Can the War against Terror Justify the Use of Force in Interrogations? Reflections in Light of the Israeli Experience' in Stanford Levinson (ed), *Torture: A Collection* (Oxford University Press 2004) 184.

### **The Torture Memos (Revisited)**

The Levin memo, the replacement for the retracted Bybee memo, opens with the statement: ‘Torture is abhorrent both to American law and values and to international norms.’<sup>171</sup> This suggests a ringing affirmation of US opposition to torture, however, the Levin memo does not substantially broaden its scope. All of the examples of ‘the nature of the extreme conduct that falls within the statutory definition’<sup>172</sup> of torture fall on the upper end of the spectrum of barbarism,<sup>173</sup> for example, severe beatings with metal pipes or the pulling out of fingernails.<sup>174</sup> Levin includes no indication that any form of torture ‘lighter’ than these are prohibited by Law.

Luban describes it as ‘the minimum possible retraction...: it retracts only the portions that journalists had criticised harshly... and retains a conception of torture as atrocity fully in line with the liberal ideology of torture.’<sup>175</sup> Although taken at face value the memo appears to condemn torture, in actual fact it does little to retract from the controversial Bybee memo, demonstrating a behind-the-scenes acceptance of torture at the highest levels of US government and a reluctance to take torture off the board completely. This therefore clearly represents a maintaining of the stance that torture can still be deemed legal if it fails to reach the requisite ‘extreme conduct’ threshold necessary for committing an offence.

### **Other Types of Intelligence**

As will be discussed in ‘The Questionable Efficacy of Torture’ section below,<sup>176</sup> there are few cases in which ‘ticking bomb’ intelligence, that is to say information relating to immediate threats, has been disclosed as a result of torture. However, there is evidence to suggest that

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<sup>171</sup> United States Department of Justice Office of Legal Counsel, Office of the Assistant Attorney General Washington DC 20530, ‘Memoranda for James B. Comey Deputy Attorney General Re: Legal Standards Applicable under 18 U.S.C ss 2340-2340A’ (2004) 1.

<sup>172</sup> *ibid* 10.

<sup>173</sup> David Luban, ‘Liberalism, Torture, and the Ticking Bomb’ in Karen J. Greenberg (ed), *The Torture Debate in America* (Cambridge University Press 2006) 72.

<sup>174</sup> United States Department of Justice Office of Legal Counsel, Office of the Assistant Attorney General Washington DC 20530, ‘Memoranda for James B. Comey Deputy Attorney General Re: Legal Standards Applicable under 18 U.S.C ss 2340-2340A’ (2004) 10.

<sup>175</sup> David Luban, ‘Liberalism, Torture, and the Ticking Bomb’ in Karen J. Greenberg (ed), *The Torture Debate in America* (Cambridge University Press 2006) 72.

<sup>176</sup> Please see the section entitled ‘The Questionable Efficacy of Torture’.

coercive interrogation has helped to build a picture of the inner workings and operational habits of terrorist organisations; this information is known as ‘infrastructure intelligence’. Sritzke states that ‘[i]nfrastructure intelligence is the picture of the human and physical resources of terrorist groups’;<sup>177</sup> it ‘concerns such things as information relating to group organisation, cell membership, expertise, finances, and recruiters, arms dumps, trainers, safe houses, ideology, as well as plans for future terrorist attacks.’<sup>178</sup>

Both ticking-bomb intelligence and infrastructure intelligence can prevent attacks and undermine the ability of terrorist groups to function effectively, meaning that both can save lives. Rumney explains that the main difference exists in the way they are able to do so; ‘ticking bomb intelligence may frustrate an imminent attack’,<sup>179</sup> whereas ‘infrastructure intelligence will assist authorities in undermining the ability of terrorist groups to recruit, finance their activities and generally operate in the longer term.’<sup>180</sup> Thus infrastructure intelligence may save lives in the longer term, but ‘is very unlikely to prevent an imminent attack because it is more concerned with the organisational structure and the inner workings of terrorist groups’.<sup>181</sup>

But is a life saved in the ‘longer term’, still not a life saved? What does it matter whether the threat posed is immediate or delayed; a threat is still a threat, both can cause the loss of life. ‘Evidence from the CIA’s evaluation suggests that it uncovered from senior Al-Qaeda operatives, as well as lower functionaries, considerable infrastructure intelligence’,<sup>182</sup> allowing them to disrupt terrorist plots and capture fugitives, saving countless lives in the process. On this basis, it is possible to suggest that interrogational torture could, and perhaps should be employed with the intention of obtaining infrastructure intelligence.

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<sup>177</sup> Werner Sritzke and others (eds), *Terrorism and Torture: An Interdisciplinary Perspective* (Cambridge University Press 2009) 70.

<sup>178</sup> Philip Rumney, *Torturing Terrorists* (Routledge 2015) 54.

<sup>179</sup> *ibid.*

<sup>180</sup> *ibid.*

<sup>181</sup> *ibid.* 199.

<sup>182</sup> *ibid.* 146; Central Intelligence Agency Directorate of Intelligence, ‘Detainee Reporting Pivotal for the War against Al Qaeda’ 2005.

However, an argument can be made that if ‘the case for torture is simply expanded to allow for its use to gather infrastructure intelligence then it can no longer be seen as an emergency power’.<sup>183</sup> This is because most, if not all, members of a terrorist organisation will possess at least some knowledge, however minor, of how the organisation is run. This would mean that each and every suspected member of a terrorist organisation could be subjected to coercive interrogation on the basis that any infrastructure intelligence that they revealed would aid in fighting terrorism. Any pre-existing selective torture power would immediately become expansive beyond all parameters.

Whilst undoubtedly accurate, Rumney’s warning does not detract from the value of infrastructure intelligence itself; an expansive torture power would clearly have a disastrously negative effect, but that does not mean that such intelligence gained through other means, perhaps whilst seeking ticking-bomb intelligence, is not valuable. It is possible to benefit from infrastructure intelligence without using it as a justification for a widespread torture power. Further, it demonstrates that torture serves a purpose beyond the prevention of imminent threats by obstructing terrorist groups in general.

### **Terrorists Don't Play by the Rules, Why Should We?**

We live in a world where regimes like those previously in place in Iraq and Afghanistan do not comply with international laws such as CAT,<sup>184</sup> but instead carry out atrocities; gassing children and hanging adulterous women.<sup>185</sup> A world where Islamic extremists bomb railways and fly planes into buildings filled with civilians.<sup>186</sup>

In combating terrorism in a world as perilous as this, it is necessary to ensure that society does not 'succumb to the utopian illusion that we can prevail while immaculately observing every precept of the Sermon on the Mount. It is the necessity of this fallen world that we

<sup>183</sup> Philip Rumney, *Torturing Terrorists* (Routledge, 2015) 111.

<sup>184</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

<sup>185</sup> Ruth Sherlock, ‘Syria: the children killed by Assad's chlorine gas bombs’ (*The Telegraph*, 25 April 2014)

<<http://www.telegraph.co.uk/news/worldnews/middleeast/syria/10789298/Syria-the-children-killed-by-Assads-chlorine-gas-bombs.html>> accessed 3 April 2016.

<sup>186</sup> A reference to the London 7/7 bombings and 9/11.

must oppose evil with force'.<sup>187</sup> Surely, where even the remotest of chances exists, that by fighting evil with torture, lives could be saved, it becomes acceptable to relax the absolutist moral position adopted by many.

Dratel holds a differing opinion, he proposes that the use of torture degrades society's morals to the point where we are little better than the terrorists whose actions we condemn. He maintains that in implementing methods of conquering the threat posed by terrorism, 'we must always be mindful of what differentiates us from the terrorists, and careful to safeguard those principles not only in word but in deed. Only fidelity to that doctrine will assure us that we are fighting for something worth preserving.'<sup>188</sup> Senator John McCain summarises this assertion aptly; stating that '[t]his is a moral debate. It is about who we are', not who they are.<sup>189</sup>

Is it not arguable, however, that states owe their citizens the duty of doing everything in their power to protect them; it does not particularly matter 'who we are' once your life has been destroyed. Rumney responds to this, stating yes, '[s]tates have a responsibility to protect their own citizens from the threat of terrorist violence... but measures that are either unlawful or actually worsen the security situation should... be viewed as unacceptable.'<sup>190</sup> Lines must be drawn somewhere, otherwise states risk encouraging boundaryless societies in which laws are simply viewed as guidelines. The Committee against torture in Israel declare that '[t]his is the destiny of a democracy—it does not see all means as acceptable, and the ways of its enemies are not always open before it. A democracy must sometimes fight with one hand tied behind its back.'<sup>191</sup>

This line of argument, however, arguably falls apart when the abhorrent actions of terrorists described above are compared with those associated with the use of torture. Yes, torture is

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<sup>187</sup> Heather Macdonald, 'How to Interrogate Terrorists' in Karen J. Greenberg (ed), *The Torture Debate in America* (Cambridge University Press 2006) 96.

<sup>188</sup> Joshua Dratel, 'The Curious Debate' in Karen J. Greenberg (ed), *The Torture Debate in America* (Cambridge University Press 2006) 117.

<sup>189</sup> John McCain, 'Bin Laden's death and the debate over torture' (*The Washington Post*, 11 May 2011).

<sup>190</sup> Philip Rumney, 'Making Things Worse? Interrogational Torture and Counter-Terrorism Policy' (2013) 12(4) *Contemporary Issues in Law* 339, 344.

<sup>191</sup> HC 5100/94 *Public Committee against Torture in Israel v. The State of Israel* 53(4) P.D. 817 (1999) para 39.

an abhorrent practise, but in no way is it comparable to incidents like 9/11 in which 2,997 innocent people were killed.<sup>192</sup> The two simply cannot be equated. Care should be taken in order to ensure society is not left in a position whereby an attack that there was a possibility of preventing occurs because we were overly obdurate in our morals.

### **A Right to Life?**

Reflect upon the following question; certainly, it is immoral to torture someone, but what if it was more immoral not to? This proposal can be explored by examining the ticking-bomb scenario from a human rights perspective. Article 3 of the Universal Declaration of Human Rights 1948,<sup>193</sup> provides that 'Everyone has the right to life'. ICCPR, Article 6 states that 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'<sup>194</sup> These instruments prescribe that all humans possess a legally recognised right to life.<sup>195</sup>

It could be argued that if a situation such as the ticking-bomb were allowed to occur, killing thousands of people because of a refusal to degrade our morals, that this would entail a breach of the right to life of the victims. In order to prevent that from happening, it could be suggested that states have a positive obligation to torture a suspect in an attempt to save those lives.

However, the suspect's human rights must also evidently be considered. Article 5 UDHR and Article 7 ICCPR both state that 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'<sup>196</sup> It therefore becomes necessary to weigh one set of rights against another.

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<sup>192</sup> Kevin McCoy '9/11 death and injury toll still rising' (*USA Today*, 9 September 2015) <<http://www.usatoday.com/story/news/2015/09/09/911-death-and-injury-total-still-rising/71943340/>> accessed 24 March 2016.

<sup>193</sup> Hereafter UDHR.

<sup>194</sup> International Covenant on Civil and Political Rights, Article 6.

<sup>195</sup> See also, Article 2 of the European Convention on Human Rights.

<sup>196</sup> Universal Declaration of Human Rights Article 5; International Covenant on Civil and Political Rights Article 7.

In choosing not to torture the suspect, a country would be implicitly admitting they considered the detainee's Article 5 and 7 rights more valuable than the people's Article 3 and 6 rights. As such, they would have neglected their positive obligations under the Declaration and Covenant set out above. Krauthammer describes the choice as 'weighing the lesser of two evils: the undeniable inhumanity of torture versus the abdication of the duty to protect the victims of a potentially preventable mass murder.'<sup>197</sup>

The fictional case of Dirty Harry exemplifies the making of a choice such as this. In this case a young girl is kidnapped, buried alive and will suffocate to death if not saved. Police officer 'Dirty Harry' tortures the kidnapper; shooting him in the leg and proceeding to step on the wound in order to obtain information regarding the girl's location. Steinhoff opines that '[t]he Dirty Harry case... is a case of morally justified torture.'<sup>198</sup> The kidnapper has created a situation in which either he himself is tortured, or a young girl will be tortured until death.<sup>199</sup> 'It is only just and fair that this harm befalls the person responsible for the situation — the kidnapper.'<sup>200</sup>

But what of the kidnapper's right not to be tortured? In most circumstances, yes, the kidnapper certainly has this right, but not here. His Article 5 and 7 rights, and even his right to life, weigh 'less than the innocent defender's right to life. The aggressor culpably brings about a situation where one of the two — he or the defender — will'<sup>201</sup> have their rights infringed upon. In situations such as this, it is just that the harm created befall the one who is responsible for it; the aggressor. To put it another way, '[b]reaking the laws of war and abusing civilians are what, to understate the matter vastly, terrorists do for a living.'<sup>202</sup> They

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<sup>197</sup> Charles Krauthammer, 'The Truth about Torture: It's time to be honest about doing terrible things.' (*The Weekly Standard*, 5 December 2005) <<http://www.weeklystandard.com/the-truth-about-torture/article/7589#!>> accessed 23 February 2017.

<sup>198</sup> Uwe Steinhoff, 'Torture — The Case for Dirty Harry and against Alan Dershowitz' (2006) 23(3) *Journal of Applied Philosophy* 337, 342.

<sup>199</sup> Being slowly suffocated in a small hole is torture until death is certainly a form of torture.

<sup>200</sup> Uwe Steinhoff, 'Torture — The Case for Dirty Harry and against Alan Dershowitz' (2006) 23(3) *Journal of Applied Philosophy* 337, 342.

<sup>201</sup> Uwe Steinhoff, 'Torture — The Case for Dirty Harry and against Alan Dershowitz' (2006) 23(3) *Journal of Applied Philosophy* 337, 342.

<sup>202</sup> Charles Krauthammer, 'The Truth about Torture' in Stanford Levinson (ed), *Torture: A Collection* (Oxford University Press, 2004) 308.

do not wear uniforms, they hide among civilians, and they deliberately target the innocent. As such, 'they are entitled to no protections whatsoever';<sup>203</sup> they have forfeited their rights.

The core of the matter rests in the idea that it is 'not about just anybody's liberty. It is about the liberty of the innocent... The core value of the liberal state is the protection of the liberty and... rights of innocent individuals against aggressors',<sup>204</sup> this is a state's *raison d'être*. By preventing Dirty Harry from torturing the kidnapper, a state would be aiding the aggressor, and ignoring the victim; 'it would help the aggressor's tyranny over the innocent, therefore abetting the relationship it hates the most.'<sup>205</sup>

One advantage of maintaining a utilitarianist outlook in situations such as these, is that 'it provides a mechanism for ranking rights and other interests. In the event of a clash, the victor is the right that will generate the most happiness.'<sup>206</sup> For example, based on utilitarian morals, the right to life of hundreds of innocents weighs more than a terrorist's right not to be tortured, or even their right to life. This 'balancing aspect of utilitarianism is the reason that it is particularly apposite to determining the circumstances in which torture is appropriate.'<sup>207</sup>

When faced with the harrowing duty of having to choose between two evils, it is far better to use utilitarianism as a balancing system; choosing the course of action that will protect the lives of the greater number of individuals,<sup>208</sup> than to observe the teachings of deontology or absolutism; as doing so would result in a lack of action because neither provide a means of balancing rights.

In summary, it is certainly unethical to torture someone, terrorist or not. However, it is arguably also unethical to let moral principles condemn thousands of others to a potentially avoidable death, especially when the terrorist in question has deliberately brought about the situation they find themselves in. In balancing the two, only absolutists find torture

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<sup>203</sup> *ibid.*

<sup>204</sup> Uwe Steinhoff, 'Torture — The Case for Dirty Harry and against Alan Dershowitz' (2006) 23(3) *Journal of Applied Philosophy* 337, 344.

<sup>205</sup> *ibid.*

<sup>206</sup> Mirko Bagaric and Julie Clarke, 'Not enough official torture in the world? The circumstances in which torture is morally justifiable' (2005) 39(3) *University of San Francisco Law Review* 581, 611.

<sup>207</sup> *ibid.*

<sup>208</sup> Harold Rudolph, *Security, Terrorism, Torture: Detainees' Rights in South Africa and Israel: A Comparative Study* (Cape Town: Juta 1984) 19.

inadmissible. As paradoxical as it may appear, it may be posited that forgoing the individual's rights in favour of those of the many is actually the most ethical option.

### **The Case Against Moral Absolutism**

'Moral absolutism is the meta-ethical view that some forms of human conduct are right or wrong (alternatively, good or evil) in any context. Even for the purpose of doing good, bad actions are always bad and cannot be justified'.<sup>209</sup> Ariel Dorfman's unconditional support of the absolute prohibition on torture provides a stereotypical example of moral absolutism. He states:

'I can only pray that humanity will have the courage to say no, no to torture, no to torture under any circumstances whatsoever, no to torture, no matter who the enemy, what the accusation, what sort of fear we harbour; no to torture no matter what kind of threat is posed to our safety; no to torture anytime, anywhere; no to torturing anyone; no to torture.'<sup>210</sup>

This view, however, has come under severe criticism from the judiciary and philosophers alike. Steinhoff and Ginbar respectively opine that '[m]oral absolutism is a dangerous and mistaken view';<sup>211</sup> 'even in its minimal version, is not easy to defend. It brings to mind... the refusal of the Catholic Church to recommend the use of condoms in sub-Saharan Africa, even between spouses, as a means of slowing down the catastrophic spread of HIV/AIDS.'<sup>212</sup> Here, the Catholic Church limited the effectiveness of a widespread, life saving measure, based upon the absolute belief that using contraception is sinful. Clearly such teaching is dangerous and life threatening.

Steinhoff explains his belief by way of example; asserting that '[i]f, for example, humanity would face the choice... between being exterminated or torturing one particularly bad man... it is far from clear why any person in his right mind, both intellectually and morally, should

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<sup>209</sup> Philosophy Index, 'Moral Absolutism' (Philosophy-index.com 2017) <<http://www.philosophy-index.com/ethics/meta-ethics/absolutism.php>> accessed 26 July 2017; Joram Haber (ed), *Absolutism and its Consequentialist Critics* (Lanham, MD: Rowan and Littlefield 1994) 1-14.

<sup>210</sup> Ariel Dorfman, 'Foreword - The Tyranny of Terror: Is Torture Inevitable in Our Country and Beyond?' in Stanford Levinson (ed), *Torture: A Collection* (Oxford University Press, 2004) 17.

<sup>211</sup> Uwe Steinhoff, 'Torture — The Case for Dirty Harry and against Alan Dershowitz' (2006) 23(3) *Journal of Applied Philosophy* 337, 346.

<sup>212</sup> Yuval Ginbar, *Why Not Torture Terrorists?* (Oxford University Press 2008) 31; Jonathon Freedland, 'Use Brains, not Brawn' (*The Guardian*, 4 December 2002).

pray that humanity said ‘no to torture’<sup>213</sup> As such, Posner describes Dorfman’s rejection of torture as ‘not only overwrought in tone but irresponsible in content’.<sup>214</sup> Moral absolutism, as a concept, is flawed for the simple reason that ‘[c]onsequences count; they cannot simply be ignored for the benefit of some allegedly absolute rule, especially if they might be catastrophic.’<sup>215</sup>

Gross makes the point, that ‘[t]o be a true moral absolutist, one must support a ban on torture no matter what, that is, no matter how likely the harm and no matter how great the magnitude of that harm.’<sup>216</sup> However, when this principle is applied to real life, ‘[m]any who support absolute, categorical rights... realize that their position is untenable, not only practically but also morally speaking, when applied to such catastrophic cases.’<sup>217</sup> Fried, a professed anti-utilitarian and human rights professor, suggests that this is perhaps because they realise that ‘it seems fanatical to maintain the absoluteness of the judgement, to do right even if the heavens will in fact fall.’<sup>218</sup> Here, Fried recognises what might be referred to as a ‘catastrophic exception’ to any general anti-torture argument.

Moore, a self professed ‘threshold deontologist’, supports the notion of catastrophic exceptions. He suggests that ‘deontological norms govern up to a point despite adverse consequences; but when the consequences become so dire that they cross the stipulated threshold, consequentialism takes over’.<sup>219</sup> Moore holds, that ‘consequentialist considerations can override deontological judgements under the condition that extremely harmful outcomes are inevitable consequences of enacting the alleged duty.’<sup>220</sup> That is to

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<sup>213</sup> *ibid*; Ariel Dorfman, ‘Foreword - The Tyranny of Terror: Is Torture Inevitable in Our Country and Beyond?’ in Stanford Levinson (ed), *Torture: A Collection* (Oxford University Press, 2004) 17.

<sup>214</sup> Richard A Posner, ‘Torture, Terrorism and Interrogation’ in Stanford Levinson (ed), *Torture: A Collection* (Oxford University Press 2004) 295.

<sup>215</sup> Uwe Steinhoff, ‘Torture — The Case for Dirty Harry and against Alan Dershowitz’ (2006) 23(3) *Journal of Applied Philosophy* 337, 346.

<sup>216</sup> Oren Gross, ‘The Prohibition on Torture and the Limits of Law’ *Torture* in Stanford Levinson (ed), *Torture: A Collection* (Oxford University Press, 2004) 233.

<sup>217</sup> *ibid*.

<sup>218</sup> Charles Fried, *Right and Wrong* (Cambridge, Mass: Harvard University Press 1978) 10.

<sup>219</sup> Michael Moore, *Placing blame: A General Theory of the Criminal Law* (Oxford University Press 1997) 722-725.

<sup>220</sup> William O’Donohue et al, ‘The Ethics of Enhanced Interrogations and Torture: A Reappraisal of the Argument’ (1997) 27(2) *Ethics and Behaviour* 109, 116.

say, whilst torture is generally prohibited, when ‘innocent lives are at stake, torturing a terrorist is deontologically justified and even morally required.’<sup>221</sup>

Cocks, a contributor to a draft of the European Convention of Human Rights, declares that ‘[a]ll forms of torture, whether inflicted by policy, military authorities [or] members of private organisations... are inconsistent with civilised society, are offences against heaven and humanity and must be prohibited.’<sup>222</sup> Cocks’ moralistic ideal, is to a certain extent accurate; torture is without a doubt ‘inconsistent with society’, and it is certainly an ‘offence against humanity’, however this does not automatically prohibit it in all circumstances. Herein lays the crux of the issue upon which moral absolutism is based; the theory assumes that because something is wrong, it absolutely cannot be done, but this is simply not the case.

For example, it is possible to give an account of the inherent wrongness of torture; it ‘instrumentalizes the pain and terror of human beings; it involves the deliberate, studied, and sustained imposition of pain to the point of agony on a person who is utterly vulnerable... and it aims to use that agony to shatter and mutilate the subject’s will’.<sup>223</sup> However, giving an account which shows that what is inherently wrong may never in any circumstances be done is another. ‘Inherently’ does not mean the same as ‘absolutely’.<sup>224</sup> Therefore, it is arguable that acts classified as ‘inherently wrong’, may still be permissible in specific situations.

Elshtain, a modern moral philosopher, asserts that a refusal to approve the use of these techniques in the aforementioned situations, amounts to ‘a form of moral laziness,’ ‘a moralistic code-fetishism,’ or ‘a legalistic version of pietistic rigorism in which one’s own moral purity is ranked above other goods.’<sup>225</sup> Elshtain paints a self-righteous and egotistical picture of the absolutist position. This, however, is an unfair portrayal; the absolutist position is dictated by law and convention. The international legal instruments which forbid torture ‘are public documents; they are not treaties of personal ethics but conventions establishing

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<sup>221</sup> *ibid.*

<sup>222</sup> Edward Peters, *Torture* (Expanded edn, University of Pennsylvania Press 1996) 146.

<sup>223</sup> Jeremy Waldron, *Torture, Terror and Trade-Offs* (Oxford University Press 2010) 5.

<sup>224</sup> David Sussman, ‘What’s Wrong with Torture?’ (2005) 33(1) *Philosophy and Public Affairs* 1, 2-3.

<sup>225</sup> Jean Elshtain, ‘Reflection on the Problem of “Dirty Hands”’ Stanford Levinson (ed), *Torture: A Collection* (Oxford University Press 2004) 86-8.

minimum legal standards for the exercise of state power. As such, they prohibit torture categorically and absolutely'.<sup>226</sup>

This is certainly the case; the absolutist position is based upon the laws and conventions from which the prohibition on torture is formed. Herein lies the problem; 'a legal prohibition is only as strong as the moral and political consensus that supports it'<sup>227</sup> and '[i]t is not hard to make the idea of an absolute prohibition on torture... look silly as a matter of moral philosophy.'<sup>228</sup> The ticking-bomb theoretical, morally speaking, achieves this comprehensively. Once it has been shown that a situation may exist whereby torture can be justified, however unrealistic it may be, supporting a morally absolutistic ideal becomes somewhat harder.

A morally absolute outlook on the prohibition of torture would be a desirable ideal if, and only if, torture never worked. This, however, is not the case; the horrifying thing about torture is that sometimes it does work. 'In 1994... Israeli corporal Nachshon Waxman was kidnapped by Palestinian terrorists. The Israelis captured the driver of the car used in the kidnapping and tortured him in order to find where Waxman was being held.'<sup>229</sup> Yitzhak Rabin, then Prime Minister admitted that 'if the security services had acted according to the guidelines of the Landau Report in interrogating Hamas people, they would not have found out the location of the kidnappers of Nachshon Waxman.'<sup>230</sup>

Krauthammer suggests that any politician who finds themselves in a similar position of responsibility owes the same obligation as Rabin. To allow the soldier to die would be considered a 'deeply immoral betrayal of soldier and countryman... it [amounts to] a case of

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<sup>226</sup> Jeremy Waldron, *Torture, Terror and Trade-Offs* (Oxford University Press 2010) 267.

<sup>227</sup> *ibid* 216.

<sup>228</sup> *ibid*.

<sup>229</sup> Charles Krauthammer, 'The Truth about Torture: It's time to be honest about doing terrible things.' (The Weekly Standard, 5 December 2005) <<http://www.weeklystandard.com/the-truth-about-torture/article/7589#!>> accessed 23 February 2017; Ami Pedahzur, *The Israeli Secret Services and the Struggle Against Terrorism* (2009) 97-100.

<sup>230</sup> Amnesty International, 'Human Rights: A Year of Shattered Hopes' May (1995) 14.

moral abdication.’<sup>231</sup> There is much to admire of those whom on principle refuse to torture, regardless of the conditions, ‘[b]ut that does not make... no-torture absolutism, any less a form of moral foolishness, tinged with moral vanity. Not reprehensible, only deeply reproachable and supremely impracticable.’<sup>232</sup>

Krauthammer, like Posner,<sup>233</sup> believes that ‘[p]eople who hold such beliefs... [should] not to be put in positions of authority. One should be grateful for the saintly among us. And one should be vigilant that they [do] not get to make the decisions upon which the lives of others depend’.<sup>234</sup> There comes a point beyond which blind faith in any absolutist belief is simply dangerous; ‘[f]iat justitia, pereat mundus’<sup>235</sup> is an irrational, and in some cases, immoral maxim.’<sup>236</sup>

### **Jus bellum iustum (Just War Theory)**

The doctrine of *Jus bellum iustum*, or Just War theory, aims to ensure that war is morally justifiable by providing a series of criteria, all of which must be met for a war to be considered just.<sup>237</sup> Traditional just war theory divides into three parts: *jus ad bellum* – the justice of resorting to war; *just in bello* – just conduct in war, and *jus post bellum* – justice at the end of war.<sup>238</sup>

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<sup>231</sup> Charles Krauthammer, ‘The Truth about Torture: It’s time to be honest about doing terrible things.’ (*The Weekly Standard*, 5 December 2005) <<http://www.weeklystandard.com/the-truth-about-torture/article/7589#!>> accessed 23 February 2017.

<sup>232</sup> *ibid.*

<sup>233</sup> Richard A Posner, ‘Torture, Terrorism and Interrogation’ in Stanford Levinson (ed), *Torture: A Collection* (Oxford University Press, 2004) 295.

<sup>234</sup> Charles Krauthammer, ‘The Truth about Torture: It’s time to be honest about doing terrible things.’ (*The Weekly Standard*, 5 December 2005) <<http://www.weeklystandard.com/the-truth-about-torture/article/7589#!>> accessed 23 February 2017.

<sup>235</sup> Let justice be done, though the world perish.

<sup>236</sup> Uwe Steinhoff, ‘Torture — The Case for Dirty Harry and against Alan Dershowitz’ (2006) 23(3) *Journal of Applied Philosophy* 337, 346.

<sup>237</sup> Charles Guthrie and Michael Quinlan, *Just War: The Just War Tradition: Ethics in Modern Warfare* (Bloomsbury 2007) 11-15.

<sup>238</sup> Michael Lacewing, ‘Just War Theory’ (Routledge: Taylor & Francis Group) <<http://documents.routledge-interactive.s3.amazonaws.com/9781138793934/A2/Political/JustWarTheory.pdf>> accessed 9 August 2017.

The use of torture primarily relates to the second of these criteria; *just in bello*, which traditionally has been concerned with the treatment of the enemy. It consists of two criteria; discrimination and proportionality. The discrimination criterion requires that killing of non-combatants must be avoided, whilst the proportionality criterion dictates that each action must be judged according to the level of force required.<sup>239</sup> Majima applies these principles to torture, providing a modern perspective. He states that with regard to discrimination:

Perpetrators, suspects and innocents must be distinguished - torture of the first two groups of people is not unconditionally forbidden, although torture of suspects should be subject to much stricter conditions and qualifications than that of confirmed perpetrators. However, the last group... should be protected and immune from torture under any circumstances.<sup>240</sup>

This principle ensures that only confirmed perpetrators, or suspects in extreme circumstances, may be subjected to torture, thus safeguarding the innocent from such practices. Regarding proportionality, Majima explains that the means used must be proportional, that is to say, 'the specific advantage brought by torture must be proportionate to the specific harm caused; appropriate means, methods, duration, intensity, and degree of pain, suffering and stress applied must be chosen.'<sup>241</sup> This guarantees that only the minimal amount of pain necessary is inflicted in order to obtain the required information.

Majima posits that if, along with a few other conditions he discusses, such as 'just cause', 'right intention' and 'last resort', 'a certain kind of torture satisfied [the above mentioned] principles, then that kind of torture, could be called 'just torture'.<sup>242</sup> Such torture would not only be justifiable, but in the right conditions, desirable. For example, if proportionate and discriminatory<sup>243</sup> torture was employed in order to save lives, and as a last resort in a ticking-bomb scenario, then said torture would undoubtedly be just and certainly preferable to not acting.

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<sup>239</sup> Naomi Malone, 'From Just War To Just Peace: Re-Visioning Just War Theory From A Feminist Perspective' (2004) 19.

<sup>240</sup> Shunzo Majima, 'Just Torture?' (2012) 11(2) Journal of Military Ethics 136, 142.

<sup>241</sup> *ibid.*

<sup>242</sup> *ibid* 136, 146.

<sup>243</sup> In the context discussed above.

Johnson provides a differing opinion, aligning himself with, and arguing for, a traditionalist's 'just war' perspective on torture. He opines that 'most of those making just war claims in relation to torture have relied heavily on consequentialist moral reasoning to do so,'<sup>244</sup> leaning on criteria such as last resort and proportionality - which Johnson claims have been affixed to the theory only recently<sup>245</sup> - to justify torture. Johnson criticises this misuse of the theory; explaining that traditional just war ideology:

yields two very basic and important pieces of moral wisdom... First, there are some things that are never to be done; the rules prohibiting direct, intended attacks on those not taking part in the use of force extend to the prohibition of torture of prisoners. Second, there are some things that a good person may never do; torturing involves intentions that are directly contrary to what it means to be a good human person.<sup>246</sup>

Johnson concludes that, '[t]ogether, these implications of just war tradition tell us that torture should never be morally allowed', because it fails to satisfy the condition of *jus in bello*; that is to say, war should be conducted in an ethical manner. It can, however, be argued that this is a deontological argument proffered in an era dominated by consequentialist and utilitarian opinions, one that has little patience for such deontological absolutes.<sup>247</sup>

It is precisely because we live in a modern age that new criteria have been attached to its meaning. Wars are no longer fought in the same manner as they were in the eleventh and twelfth centuries (the most recent examples that Johnson cites); states must now contend with terrorist organisations and the targeting of civilians, as opposed to fighting other states on battlefields. Therefore, wars cannot be fought under the same rules just war theory was founded and developed upon; as such, it arguably becomes possible to justify torture as a method in war. The version of just war ideology that Johnson extensively criticises is simply a contemporary adaption of an old theory to new circumstances; a revisionist's perspective.

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<sup>244</sup> David P. Gushee, 'The Contemporary U.S. Torture Debate In Christian Historical Perspective' (2011) 39(4) *Journal of Religious Ethics* 589, 594.

<sup>245</sup> *ibid.*

<sup>246</sup> James Turner Johnson, 'Torture: A Just War Perspective' (2010) 5(2) *The Review of Faith & International Affairs* 29, 31.

<sup>247</sup> David P. Gushee, 'The Contemporary U.S. Torture Debate In Christian Historical Perspective' (2011) 39(4) *Journal of Religious Ethics* 589, 594.

### An Entirely Different Justification for Torture

If it is accepted that torture is not legal and does not work,<sup>248</sup> it raises the question; why do states do it?

Holmes suggests that in some cases governments torture 'precisely because it defies the law';<sup>249</sup> torture is committed not to gain information, but to send a message. States show their citizens that they 'will not be hamstrung by legalisms',<sup>250</sup> that they are prepared to do what is 'necessary' in order to ensure the public's safety whilst fighting terrorism.

This has the additional effect of demonstrating to a state's enemies that they are willing to do anything; it shows them that they are not protected by international laws or civilised conventions and thus they fear the state. The January 2002 edition of *The Atlantic Monthly* provides a brutal, yet telling, example of the effectiveness of extreme measures as a means of inducing fear, and the positive results this can yield. It contained an account from a Sri Lankan army officer, 'Thomas':

Thomas's unit had apprehended three terrorists who, it suspected, had recently planted somewhere in the city a bomb that was then ticking away.... The terrorists—highly dedicated and steeled to resist interrogation—remained silent.... So Thomas took his pistol from his gun belt, pointed it at the forehead of one of them, and shot him dead. The other two, he said, talked immediately; the bomb, which had been placed in a crowded railway station and set to explode during the evening rush hour, was found and defused, and countless lives were saved.<sup>251</sup>

In interview, Thomas explained that 'By going through the process of laws... you cannot fight terrorism.'<sup>252</sup> But by working outside of the law, by employing extreme measures, he had prevented a catastrophe; the fear of death Thomas had induced in the perpetrators outweighed any dedication to their cause and brought about a positive result. It is possible to apply this principle to torture; it is entirely likely that when faced with the options of being tortured or cooperating, terrorists would choose the latter out of fear of the former, allowing

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<sup>248</sup> Both discussed in the following chapter.

<sup>249</sup> Stephen Holmes, 'Is Defiance of Law a Proof of Success? Magical Thinking in the War on Terror' in Karen J. Greenberg (ed), *The Torture Debate in America* (Cambridge University Press 2006) 131.

<sup>250</sup> *ibid* 132.

<sup>251</sup> Bruce Hoffman, 'A Nasty Business' (*The Atlantic Monthly*, January 2002) 52.

<sup>252</sup> *ibid*.

crisis to be averted in ticking-bomb situations. Further, torture can act as a deterrent, preventing potential terrorists from actually committing acts of terrorism.

Posner and Vermeule argue that the 'West must project an image of strength as well as virtue; undecided Muslims and Arabs will not cast their lot with governments that cannot protect themselves and their people'.<sup>253</sup> Torture goes a way to presenting this image; it demonstrates that governments shall not be restrained by laws or conventions; terrorists will not receive protections, or simply be imprisoned after killing the innocent, instead, the state will extract what information it deems necessary in order to protect its citizens.

However, 'if one were to follow the logic of [this] argument, it could be [suggested] that *any* restraint shown by the state could be seen as weakness',<sup>254</sup> and should therefore be avoided. This represents a dangerous thought, for restraint is the defining factor between terrorists and those they target, an eroding of the restraints liberal democracies are regulated by risks subverting the rule of law; how long before Thomas' actions are echoed on a regular basis. Therefore, states must ensure that they maintain a degree of restraint when pursuing high-risk policies such as the use of torture.

Torture is also seen to offer the opportunity to satiate those who desire revenge; followers of retributivism argue that torture's 'efficacy, and likewise its popularity, rest in the fact that it invariably provides the persecutors with a means of satisfying their call for vengeance'.<sup>255</sup> As Holmes suggests, this ethos can arguably be seen in the widespread torture employed by US forces in retaliation for September 11<sup>th</sup>: 'On 9/11, Al-Qaeda gave Americans a burning inferno, a taste of Hell. In the torture chambers of Guantánamo Bay and Abu Ghraib, the United States returned the favour'.<sup>256</sup>

The use of torture, a recognisably barbaric practise, not only reassures a state's citizens as to their resolve, but also strikes fear into the hearts of its enemies and appeases those who

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<sup>253</sup> Eric Posner and Adrian Vermeule, 'Terror in the Balance: Security, Liberty, and the Courts' (Oxford University Press 2007) 206.

<sup>254</sup> Philip Rumney, 'Making Things Worse? Interrogational Torture and Counter-Terrorism Policy' (2013) 12(4) *Contemporary Issues in Law* 339, 366-367.

<sup>255</sup> George Riley Scott, *A History of Torture* (1995 edn, Senate 1940) 32.

<sup>256</sup> Stephen Holmes, 'Is Defiance of Law a Proof of Success? Magical Thinking in the War on Terror' in Karen J. Greenberg (ed), *The Torture Debate in America* (Cambridge University Press 2006) 132.

demand retribution. For those that hold the above discussed views, such effects lead to positive outcomes in the war on terror and thus support its use in this context.

### **Torture as a Last Resort**

Derk Roeloffsma, editor of the newsletter of the Association of Former US Intelligence Officers, states that '[t]here is a tragic conflict between the principles by which we wish to live together, "with liberty and justice for all," and the duty and conscience of those who bear responsibility for protecting the lives of others.'<sup>257</sup> That is to say, whilst in an ideal world torture would not be necessary, '[e]xtracting information from the enemy is [sometimes] vital to the fulfilment of that responsibility'<sup>258</sup>

This is why torture, when employed as a last resort, arguably delivers the 'best of both worlds'. Before engaging in coercive practices, all other available methods of obtaining the information must be exhausted, thus allowing 'liberty and justice' their opportunity to take affect and resolve the situation. If, however, they fail, then the 'duty' of and 'responsibility' for protecting the innocent owed by the state replaces these ideals and torture becomes permissible.

Venning takes an opposing position, he believes that 'God will not allow us to do evil that good may come... As pleasing a thing as good is to God, he will not allow us to do the least evil for the greatest good... Indeed, it is a damnable doctrine to teach that we may do evil for a good end, or that good may come of it.'<sup>259</sup> Torture is undoubtedly evil; it 'is abhorrent. It is barbaric and inhumane... It is wrong, self-defeating and poisons the rule of law, replacing it with terror.'<sup>260</sup> Therefore, regardless of the seriousness of the situation, the potentially catastrophic consequences associated with choosing not to act, or the likelihood of coercion providing a positive outcome, torture remains prohibited.

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<sup>257</sup> Derk Roeloffsma, 'Torture, an ugly, perennial question' (2004) Association of Former Intelligence Officers Weekly Intelligence Notes, WIN #14-04.

<sup>258</sup> *ibid.*

<sup>259</sup> Ralph Venning, 'The Sinfulness of Sin' 48. Originally published in 1669 as "SIN, THE PLAGUE OF PLAGUES" <<http://www.apuritansmind.com/wp-content/uploads/FREEBOOKS/TheSinfulnessofSin-RalphVenning.pdf>> accessed 20 July 2017.

<sup>260</sup> Amnesty International, 'Torture in 2014 30 Years of Broken Promises' May 2014 5-6.

The German Criminal Code, however, suggests differently. The Code offers protection for persons who commit unlawful acts in defence of legal interests during extreme circumstances and for justifiable reasons. Section 34 reads as follows:

A person who, faced with an imminent danger to life, limb, freedom, honour, property or another legal interest which cannot otherwise be averted, commits an act to avert the danger from himself or another, does not act unlawfully, if, upon weighing the conflicting interests, in particular the affected legal interests and the degree of the danger facing them, the protected interest substantially outweighs the one interfered with. This shall apply only if and to the extent that the act committed is an adequate means to avert the danger.<sup>261</sup>

In summary, there are situations in which illegal actions can be accepted as instrumentally adequate reactions. When specifically protected moral or legal interests substantially outweigh those infringed upon, and the only means to safeguard these interests from certain danger is to act outside of the law, those who do, do not act illegally provided the act committed is an acceptable means of averting the danger. When applying this principle to torture, it becomes apparent that if the odds are high enough; for example, where a danger is 'imminent' and 'cannot otherwise be averted', any torture employed is done so as a last resort measure, and is therefore both legal and justified.<sup>262</sup>

Rumney however, warns of the risks involved in using torture on suspected terrorists, even as a last resort. 'What if torture is used and does not work? Is that the end?'<sup>263</sup> Or should the suspect's family be tortured? Or even killed? Surely those few lives are not worth more than the potential thousands that hang in the balance? He highlights the fact that '[t]alk of torture, should not be blind to such possibilities. Why would torture of a terrorist suspect be only the end and not the beginning of more desperate barbarous acts?'<sup>264</sup>

This is an interesting line of reasoning, one designed to induce thought on a 'what if?' basis. 'What if' contentions, however, often lack empirical evidence: Rumney's argument is no different; he offers no proof in support of his assertion. Quite the contrary in fact, multiple examples of torture's employment in 'last resort' scenarios exist, but not a single one that I

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<sup>261</sup> German Criminal Code 1998 (amended in 2009) s.34.

<sup>262</sup> Uwe Steinhoff, 'Torture — The Case for Dirty Harry and against Alan Dershowitz' (2006) 23(3) *Journal of Applied Philosophy* 337, 345.

<sup>263</sup> Philip Rumney, *Torturing Terrorists* (Routledge 2015) 202.

<sup>264</sup> *ibid.*

have come across gives any mention of coercion extending beyond the initial subject.<sup>265</sup> This suggests that Rumney's warning is unfounded, a precautionary prediction at best. Further, if viewed from a utilitarian perspective, it changes nothing; if necessary, then sadly yes, an argument may be presented for the terrorist's family to be tortured, and yes, they should be killed, a few lives are simply not worth more than those of the thousand, innocent or not.

Richard Posner, United States Court of Appeals Judge, explains that '[o]nly the most doctrinaire civil libertarians... deny, that if the stakes are high enough, torture is permissible.'<sup>266</sup> He continues, stating that '[n]o one who doubts that should be in a position of responsibility'.<sup>267</sup> This is perhaps why '[e]ven Senator John McCain, the most vocal of the advocates of the recent 'torture ban,'<sup>268</sup> has acknowledged that scenarios such as [those] described above constitute an exception to the ban he advocates'.<sup>269</sup> He, like Posner, holds a position of responsibility, and therefore cannot afford to exhibit ideals such as those shown by Venning, even if he himself believes them to be true. Instead, both McCain and Posner must represent the middle ground; acknowledging the abhorrent nature of torture, and thus campaigning against its use as a general measure, but accepting that in extreme situations, torture may need to be employed as a last resort.

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<sup>265</sup> Please see the section entitled 'The Case against Moral Absolutism' for the story of Israeli army corporal Nachshon Waxman, and the section entitled 'The Questionable Efficacy of Torture' for an account of the 1995 Al-Qaeda bomb plot that was prevented by Philippine intelligence agents.

<sup>266</sup> Richard A Posner, 'Torture, Terrorism and Interrogation' in Stanford Levinson (ed), *Torture: A Collection* (Oxford University Press, 2004) 295.

<sup>267</sup> *ibid.*

<sup>268</sup> H.R. 1735 - 2015 McCain-Feinstein Amendment to National Defense Authorization Act for Fiscal Year 2016.

<sup>269</sup> Jeremy Wisniewski, 'It's About Time: Defusing the Ticking Bomb Argument' (2008) 22(1) *International Journal of Applied Philosophy* 103, 104; McCain's claim is cited in Philip Zimbardo, *The Lucifer Effect: Understanding How Good People Turn Evil* (New York: Random House, 2007) 433.

## Chapter Seven: The Torture Debate - The Case Against

### Torture, Trials and Punishment

The use of torture as a method of trying the accused has long been abandoned in much of the world because ‘torture tests endurance, rather than veracity’,<sup>270</sup> as such, ‘innocent persons might, as one sixteenth-century handbook on criminal procedure warned, yield to “the pain and torment and confess things that they never did.”’<sup>271</sup> Beccaria’s 1764 work *An Essay on Crimes and Punishment* evidences the author’s bewilderment in relation to the idea that ‘pain should be the test of truth, as if truth resided in the muscles and fibres of a wretch in torture.’<sup>272</sup> Beccaria explains that ‘[b]y this method, the robust will escape, and the feeble be condemned. These are the inconveniences of this pretended test of truth’.<sup>273</sup> Further, it is impossible for the persecuted individual to be proved innocent, or it be confirmed that they do not possess the desired information as a result of torture,<sup>274</sup> meaning that the process can go on indefinitely without producing any results. It is therefore not unreasonable to draw the conclusion that torture, when used in the context of trials, is not only ineffective in revealing the truth, but lacks the capability to differentiate between the innocent and guilty. This is arguably why torture is no longer used during trials.

Torture, however, is sadly still used as a form of punishment.<sup>275</sup> Scott suggests that punishing ‘brutality with an equal measure of brutality is indefensible. It is always evil. it cannot have anything but evil effects’,<sup>276</sup> for ‘[t]he moment punishment becomes excessive it leads to an extension of crime rather than to its suppression.’<sup>277</sup> If a criminal knows that they will face torture as a form of punishment if found guilty of a crime, they may go to greater lengths to avoid capture; they may commit further crimes, potentially ones far graver than

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<sup>270</sup> John H Langbein, ‘The Legal History of Torture’ in Stanford Levinson (ed), *Torture: A Collection* (Oxford University Press 2004) 93; see also Joost Damhouder, *Practique iudiciaire es causes criminelles [Praxis Rerum Criminalium]* (Antwerp 1564) 44.

<sup>271</sup> *ibid* 44.

<sup>272</sup> Cesare Beccaria, *An Essay on Crimes and Punishment* (1764) Chapter 16.

<sup>273</sup> *ibid*.

<sup>274</sup> George Riley Scott, *A History of Torture* (1995 edn, Senate 1940) 31.

<sup>275</sup> Please see ‘Chapter Four: Torture Across the World’.

<sup>276</sup> George Riley Scott, *A History of Torture* (1995 edn, Senate 1940) 33.

<sup>277</sup> *ibid* 398.

that originally perpetrated. Thus, because torture is an excessive punishment, its employment may inadvertently lead to additional criminal activity.

So far, the discussion in this section has focussed upon the use of torture during the trials and punishment of suspected terrorists. However, those who administer torture, and the officials and executives that authorise it, may also face trial in order to ensure that their actions are justified. Levinson states that '[i]f one is truly committed to the absolutism set forth in the United Nations Convention, torture would... have to be a strict liability offence; any variation on punishment, based on level of culpable evil, takes away from the element of strict liability'<sup>278</sup> embodied in the Convention.

Therefore, any breach must be punished in strict accordance with the Convention, that is to say, '[n]o 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.'<sup>279</sup> Regardless of circumstance, and irrespective of justification, those found guilty will be held strictly liable for their actions.

An argument could be made that the Convention represents an excessively stringent and unreasonable approach to punishing the use of torture; mitigating circumstances are taken into account in other areas of law, why is torture any different? Yes, officials should be held accountable and brought to trial where necessary, but circumstances, justifications and consequences should not be ignored in any situation. If this were to be allowed to happen, it is entirely possible that a ticking-bomb-like scenario could occur, in which a well-meaning and arguably justified torturer ends up being punished for saving thousands of lives; few would describe this as fair.

Levinson, however, details the logic behind maintaining a strict liability status for torture. He explains that '[o]nce one decides to listen to the torturer's story, as well as that of the person

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<sup>278</sup> Stanford Levinson, 'Contemplating Torture' in Stanford Levinson (ed), *Torture: A Collection* (Oxford University Press 2004) 36.

<sup>279</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, Article 2, Part 2.

tortured, one enters into a far more complicated moral and legal universe.<sup>280</sup> But this is precisely the point; the world is, morally and legally speaking, already complex. As such, it is more reasonable and pragmatic to take into account *all* factors when determining guilt in court, than to cultivate a system governed by black or white absolutes, that disregards highly significant determinants, in vitally important cases.

In *Barzilai v Government of Israel*,<sup>281</sup> Justice Ben-Porat of the Israeli Supreme Court states that '[t]here simply are cases in which those who are at the helm of the state, and bear responsibility for its survival and security, regard certain deviations from the law for the sake of protecting the security of the state, as an unavoidable necessity.'<sup>282</sup> If one were to adhere to the strict liability embodied in the Convention, officials acting in defence of their citizens would not be able to make the deviations necessary in order to maintain security without fear of the ramifications. Even in situations where they are certain beyond reasonable doubt that their actions are justified, where lives will be saved as a result of their conduct, officials must account for the fact that they will face incarceration as a consequence of their choice, such is the nature of strict liability. It is somewhat absurd to knowingly place an individual in this position; one in which they are damned if they do, and damned if they do not.

Posner suggests that 'trusting executive officials to break [the rules when] the stakes are high enough to enable the officials to obtain political absolution for their illegal conduct'<sup>283</sup> could provide a working solution. Doing so would allow those in positions of responsibility to make the rare but unavoidable decisions where necessary, such as employing torture when justified, without fear of being imprisoned, but would still hold them accountable for their decisions.

This concept, however, presents its own set of problems. Those who torture, especially in the name of the state, are rarely punished. They 'cannot be reduced to the obvious 'sadists'

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<sup>280</sup> Stanford Levinson, 'Contemplating Torture' in Stanford Levinson (ed), *Torture: A Collection* (Oxford University Press 2004) 36.

<sup>281</sup> HCJ 428/66 *Barzilai v. Government of Israel* 40(3) PD 505 (1986).

<sup>282</sup> *ibid* 82.

<sup>283</sup> Richard A Posner, 'Torture, Terrorism and Interrogation' in Stanford Levinson (ed), *Torture: A Collection* (Oxford University Press 2004) 298.

one would, for moral clarity's sake, like them to be<sup>284</sup> because they believe what they are doing is justified. Torturers often 'view themselves as servants of a state fighting a just war... the alleged torturers will often be able to sincerely argue – in front of jurors or judges far more inclined to identify with them than with the tortured<sup>285</sup> – that they believed they were acting to protect society.'<sup>286</sup> Few judges or juries would find those who they understand to be acting in the interests of their state guilty. Therefore, allowing any deviation from the strict liability expressed in the Convention undermines its purpose; it allows the potential for those who commit or order torture to avoid justice in situations where their actions were not justified.

### **A Legal Context**

Luban, like Bilder,<sup>287</sup> also criticises the Bybee memo, stating:

Office of Legal Counsel lawyers simply discarded the project of providing an impartial analysis of the law... Instead they substituted a rethinking of standard legal doctrines based on the liberal ideology of torture – the idea that torture to obtain information useful for national defence is not impermissible.<sup>288</sup>

This is at odds with the role the Office of Legal Counsel (OLC)<sup>289</sup> are supposed to fulfil; they exist to advise the government by providing a nonpartisan evaluation of the relevant law, not, to formulate legal justifications safeguarding a policy the Bush administration wished to implement. Dorf accuses the OLC of 'turning intellectual somersaults to find loopholes and excuses for the commission of what a lay observer would surely consider torture.'<sup>290</sup> He, like Luban, is of the opinion that instead of taking a nonbiased approach in assessing the legality

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<sup>284</sup> Stanford Levinson, 'Contemplating Torture' in Stanford Levinson (ed), *Torture: A Collection* (Oxford University Press 2004) 36

<sup>285</sup> Because the torture is carried out by the state it is likely that those falling victim to it are the state's perceived enemies. As such, jurors and judges who are members of the state, are far more likely to support those carrying out the torture, those acting in the interest of the state, than support the victims who were acting against the state.

<sup>286</sup> Stanford Levinson, 'Contemplating Torture' in Stanford Levinson (ed), *Torture: A Collection* (Oxford University Press 2004) 36

<sup>287</sup> See 'The Torture Memos' section at the beginning of this chapter.

<sup>288</sup> David Luban, 'Liberalism, Torture, and the Ticking Bomb' in Karen J. Greenberg (ed), *The Torture Debate in America* (Cambridge University Press 2006) 54-55.

<sup>289</sup> Hereafter OLC.

<sup>290</sup> Michael Dorf, 'Renouncing Torture' in Karen J. Greenberg (ed), *The Torture Debate in America* (Cambridge University Press 2006) 247.

of torture, the OLC adopted the mindset that torture was a necessity and aimed their advice at justifying it, clearly serving the Administration's objectives; 'In effect, they were writing an advocacy document for a pro-torture conclusion, in order to give those who order or engage in torture legal cover.'<sup>291</sup>

In failing to provide an impartial evaluation, the OLC only considered the legal arguments supporting torture. Zelikow opines that '[w]here there should have been detailed papers of policy analysis, there were detailed papers of legal analysis.'<sup>292</sup> The OLC chose to debate the issue of what 'could' be done as a matter of law, instead of carefully inventorying prior US and foreign experience in detention practices and interrogations, to allow the answering of the question, what 'should' be done.<sup>293</sup> This therefore brings into questions the legitimacy of the Bybee memo and perhaps explains why it was replaced with the Levin memo.

Torture breaches the Geneva Conventions, CAT, the US Code,<sup>294</sup> UDHR, ICCPR,<sup>295</sup> and pursuant to Article 2(2) CAT,<sup>296</sup> is illegal in all circumstances. Beneath these explicit legal prohibitions against torture there lay more intricate legal assertions opposing its use.

When considered as a corporal principle, pain is linked directly with punishment.<sup>297</sup> The act of torture clearly inflicts pain and thus can be considered a punishment. The longstanding principle of law, 'the presumption of innocence', dictates that 'Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.'<sup>298</sup>

Cesare Beccaria outlines this axiom in his 1794, *Crimes and Punishment*. He warns that '[n]o man can be judged until he is found guilty; nor can society take from him the public

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<sup>291</sup> David Luban, 'Liberalism, Torture, and the Ticking Bomb' in Karen J. Greenberg (ed), *The Torture Debate in America* (Cambridge University Press 2006) 55.

<sup>292</sup> Philip Zelikow, 'Codes of Conduct For A Twilight War' (2012) 49(1) *Houston Law Review* 1-52, 5.

<sup>293</sup> *ibid.*

<sup>294</sup> As set out in chapter 2.

<sup>295</sup> As discussed in 'A Right to Life'.

<sup>296</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, Article 2(2).

<sup>297</sup> Encyclopaedia Britannica, 'Corporal Punishment' ([academic.eb.com](http://academic.eb.com))

<<http://academic.eb.com.lcproxy.shu.ac.uk/EBchecked/topic/138384/corporal-punishment> accessed> 26 March 2016.

<sup>298</sup> International Covenant on Civil and Political Rights 1976, Article 14(2).

protection, until it have been proved that he has violated the conditions on which it was granted... in the eye of the law, every man is innocent, whose crimes have not been proved.<sup>299</sup> Applying this, it becomes clear that the state can only punish someone after first proving that they have committed a crime. However, in many cases, such as those in Abu Ghraib, the detainees being tortured had not been charged with a crime, let alone found guilty of one.

The use of torture in such a manner amounts to an assumption of the suspect's guilt, or their possession of knowledge; the individual is being punished by the state in absence of any legal process, without a trial, and without being given the opportunity to mount a defence. Rather than using evidence that has already been gathered to justify punishment, punishment is instead used to gather evidence to justify the punishment already inflicted. The performance of such sanctions without confirmation of guilt demonstrates the application of an anti-legal principle that quite flagrantly jettisons the rule of law.<sup>300</sup>

In the aftermath of the Abu Ghraib scandal, legislation establishing US opposition to torture was approved, with 'Congress attempt[ing] to legislate a solution to the issue of detainee abuse and torture by passing the Detainee Treatment Act 2005.'<sup>301</sup> The Act affirmed the legal prohibitions on torture by confining interrogators to methods listed in the US Army Field Manual;<sup>302</sup> as such it confirmed the legal restrictions on torture.

The Act has, however, come under criticism. Sulemen labels it a 'feeble and incongruous attempt to restore America's credibility as a country that does not practice or condone torture'.<sup>303</sup> Be that as it may, the enactment of such legislation clearly demonstrates an attempt to recapitulate the fact that torture is illegal above and beyond the existing legal prohibitions and therefore should not happen.

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<sup>299</sup> Cesare Beccaria, *Crimes and Punishments* (1764) Chapter 16.

<sup>300</sup> Franz Kafka, 'In the Penal Colony' in *The Complete Series* trans, Willa Muir and Edwin Muir (New York: Schocken, 1976) 140.

<sup>301</sup> Arsalan M Sulemen, 'Detainee Treatment Act 2005' (2006) 19 *Harvard Human Rights Journal* 257, 264.

<sup>302</sup> Detainee Treatment Act 2005, s.1002(a).

<sup>303</sup> Arsalan M Sulemen, 'Detainee Treatment Act 2005' (2006) 19 *Harvard Human Rights Journal* 257, 265.

### **The Ticking Time-Bomb**

The 'ticking time-bomb' hypothetical involves posing an ethical quandary: 'suppose that a perpetrator of an imminent terrorist attack, that will kill many people, is in the hands of the authorities and that he will disclose the information needed to prevent the attack only if he is tortured. Should he be tortured?'<sup>304</sup>

The theory creates 'doubt about the wisdom of the absolute prohibition of torture',<sup>305</sup> if a prohibitionist concedes that the perpetrator should be tortured then they have accepted that there is an exception to the legal prohibition and that their opposition to torture is not based on principle.<sup>306</sup> On a broader basis, demonstrating that torture is acceptable in 'ticking-bomb' scenarios changes the discussion from 'is torture justifiable?' to 'in what circumstances is torture justifiable?' By acknowledging an exemption from the prohibition, a prohibitionist has already established that torture is justifiable in some circumstances, to paraphrase George Bernard Shaw; all that's left to do is haggle over the price.<sup>307</sup>

The obvious answers, to a utilitarian at least, would be 'yes' and in ones such as this; inflicting pain on one man is clearly justifiable in order to save thousands of lives. However, this view is not shared by the public. A study carried out by the BBC World Service in 2006 found that when faced with the 'time-bomb' problem, 59%<sup>308</sup> of the world's citizens said 'no' to compromising on the protection of human rights.<sup>309</sup> This demonstrates the public's stance against torture, even where hypothetically guaranteed to produce results. As the public are unwilling to support the use of torture, it suggests that it cannot be justifiable.

It is, however, intriguing to consider what percentage of the participant's actions would reflect their answers when placed into a real life situation, one in which people's lives were at stake. It is often easy to take the moral high ground when merely faced with hypothetical

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<sup>304</sup> The Association for the Prevention of Torture, 'Defusing the Ticking Bomb Scenario: Why we must say No to torture always' (2007) 1 <[http://www.apt.ch/content/files\\_res/tickingbombscenario.pdf](http://www.apt.ch/content/files_res/tickingbombscenario.pdf)> accessed 27 March 2016.

<sup>305</sup> *ibid* 2.

<sup>306</sup> David Luban, 'Liberalism, Torture, and the Ticking Bomb' in Karen J. Greenberg (ed), *The Torture Debate in America* (Cambridge University Press 2006) 44.

<sup>307</sup> George Bernard Shaw 1856-1950.

<sup>308</sup> Of the 27,000 participants that were questioned.

<sup>309</sup> BBC, 'The ticking-bomb problem' (bbc.co.uk, 2006) <[http://www.bbc.co.uk/ethics/torture/ethics/tickingbomb\\_1.shtml](http://www.bbc.co.uk/ethics/torture/ethics/tickingbomb_1.shtml)> accessed 3<sup>rd</sup> March 2016.

situations. This is exactly the point though; the poll asked whether the government should be authorised to use some degree of torture in general ticking-bomb scenarios, not on whether, given extreme and personalised circumstances, they themselves would resort to torture. The laws surrounding torture should be made and enforced by those distanced from the events precisely because they have the ability to remain impartial; their judgements have not been affected by external factors, allowing them to make morally sound choices. It has been objectively determined that torture is illegal by state officials and it is on this basis that the public voted.

Interestingly, the BBC's study also found that 'support for using torture is generally greatest in those countries that see themselves as actively engaged in a struggle against political violence'.<sup>310</sup> For example, 36% of Americans believed that some degree of torture should be allowed,<sup>311</sup> perhaps reflecting the 'pro' torture mentality adopted by the Bush administration in the wake of 9/11.

Jeremy Bentham, widely regarded as the founder of modern utilitarianism, offers a rather different viewpoint. Bentham states: 'To say nothing of wisdom, could any pretence be made so much as to the praise of blind and vulgar humanity, by the man who to save one criminal, should determine to abandon a 100 innocent persons to the same fate?'<sup>312</sup> From a utilitarian's perspective, and presumably many others whom would not label themselves as such, this quote rings true; it makes no sense, morally or logically, to value the life of one criminal over the lives of one-hundred innocents, arguably making the choice to torture the criminal, an obvious one for an individual to make.

This, however, is precisely the point, the state is not any one man; it represents the nation, and as such, does not have the luxury of making private morality decisions, however logical they may appear to be. Instead, the state must make decisions based upon public morality applied on a wide-scale basis, and taken from predetermined laws. There is a key difference

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<sup>310</sup> *ibid.*

<sup>311</sup> *ibid.*

<sup>312</sup> Jeremy Bentham, Mss Box 74.b 429 (27 May 1804), reprinted in WL Twining and E Twining, 'Bentham on Torture' (1973) 24(3) *Northern Ireland Quarterly* 305, fn 3.

between an individual exercising private morality by making a choice they deem to be right; torturing the ticking-bomb terrorist, and a state torturing the ticking-bomb terrorist. An individual can make private morality decisions because they are not responsible for, and held accountable to, the public at large, whereas the state is. 'The distinction is not between what is moral and what is lawful, but between what is moral for a state to do and what is moral for an individual to do.'<sup>313</sup> As such, leaders confronting a ticking-bomb situation must work within the boundaries set by society through its institutions, rather than stepping outside any boundaries in such situations. To do so would be to endorse torture.<sup>314</sup>

In summary:

[i]ndividuals, even individuals who happen to be state officials, may take it upon themselves to use [coercive] methods, and they may turn out to have been morally justified. But the state itself in what it legally authorizes, in contrast to what individual officials may take upon themselves to do, may not.<sup>315</sup>

This is because public morality must be based entirely upon what is legal; by torturing the terrorist, the state is exercising private morality in a public sphere; it is choosing to do what it deems to be right, instead of adhering to the laws it exists to uphold. In making decisions based upon private morality, the state is not only failing to uphold the standards set by the law,<sup>316</sup> but ultimately precipitating the corruption of the rule of said law.<sup>317</sup>

Steinhoff submits that, '[w]hat is [most] frightening about such a brutalisation of the legal system is that it is also the brutalisation of its enforcer — which, [here] is the state.'<sup>318</sup> Indeed, '[t]orture is seen as characteristic not of free, but of tyrannical governments',<sup>319</sup> therefore, allowing the state to legally institutionalise torture in certain circumstances undermines trust in the government; those institutions that previously represented safety and protection, instead serve to administer pain and suffering.

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<sup>313</sup> Sanford Kadish, 'Torture, the State and the Individual' (1989) 23 *Israeli Law Review* 345, 354.

<sup>314</sup> Yuval Ginbar, *Why Not Torture Terrorists?* (Oxford University Press 2008) 99-100.

<sup>315</sup> Sanford Kadish, 'Torture, the State and the Individual' (1989) 23 *Israeli Law Review* 345, 354.

<sup>316</sup> Setting a precedent that law may be broken when it is deemed necessary.

<sup>317</sup> If it were perceived that the law, a law that flatly prohibits torture, may be broken under certain circumstances, a de-valuing of the law as a means for keeping order could follow.

<sup>318</sup> Uwe Steinhoff, 'Torture — The Case for Dirty Harry and against Alan Dershowitz' (2006) 23(3) *Journal of Applied Philosophy* 337, 350-1.

<sup>319</sup> Jeremy Waldron, *Torture, Terror and Trade-Offs* (Oxford University Press 2010) 224.

On the other hand, it can be argued that 'states have a positive moral duty to protect their citizens – this is perhaps the modern democratic state's *raison d'être*.'<sup>320</sup> If a state exists primarily for the purposes of protecting and serving its people, then perhaps it is obligated to adopt the policy that helps the most people,<sup>321</sup> regardless of any breach in law this may lead to. The state may be required to abandon its deontological rules-based system, and instead make decisions based upon the consequences the actions affect, rather than on the actions themselves.

Regardless of the moral and ethical reasoning that surrounds the ticking-bomb scenario, there exists several empirical flaws with the hypothetical. The scenario creates an impression of certainty. This is misleading;<sup>322</sup> the world of torture operates on imperfect knowledge and ambiguity, it can never be known with certainty, for example, that torturing a suspect would be guaranteed to stop the explosion. Such criticisms are largely referred to as 'Artificial Cases Objections'.

This line of argument 'typically involves pointing out how deeply artificial the case is'.<sup>323</sup> Shue 'argues that the hypothetical is misleading because it is 'idealized', in that it assumes *inter alia* that authorities have detained a terrorist with life saving information and that [torture will provide] a timely disclosure of this information.'<sup>324</sup> In the hypothetical, '[t]he proposed victim of our torture is not someone we suspect of planting the device: he is the perpetrator... The wiring is not backwards, the mechanism is not jammed: the device will destroy the city if not

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<sup>320</sup> Yuval Ginbar, *Why Not Torture Terrorists?* (Oxford University Press 2008) 158.

<sup>321</sup> In this context; torturing the terrorist.

<sup>322</sup> Jamie Mayerfeld, 'In Defense of the Absolute Prohibition of Torture' (2008) 22(2) *Public Affairs Quarterly* 109, 114.

<sup>323</sup> Jeremy Wisnewski, 'It's About Time: Defusing the Ticking Bomb Argument' (2008) 22(1) *International Journal of Applied Philosophy* 103, 106.

<sup>324</sup> Philip Rumney, *Torturing Terrorists* (Routledge 2015) 64; Henry Shue, 'Torture in Dreamland: Disposing of the Ticking-Bomb' (2005) 37(2) *Case Western Reserve Journal of International Law* 231, 233.

deactivated.<sup>325</sup> In addition to the above problems, 'we must also know how to torture the perpetrator, that torture will be effective, that it will not take more time than is available'.<sup>326</sup>

The hypothetical presents an overly simplistic set of circumstances by creating the illusion that these elements are certain, in doing so, it aims to convince its readers that making a pro-torture choice is justifiable. However, when the hypothetical is considered logically, it becomes clear that these elements are far from certain. How is it possible to know that the bomb is wired correctly, and that the detainee is guilty of placing it? Further, given the questionable efficacy of torture, there is no guarantee that torture will even work, yet the hypothetical assumes these aspects are fact. Wisnewski makes the point, that if the authorities possessed this knowledge, it must have been acquired in some way. After all, '[h]ow could we have the knowledge in question... unless we saw the bomb being wired, and then saw the perpetrator place it? If we have seen these things... there would be no need to torture.'<sup>327</sup> It is therefore not only arguable that the assumptions upon which the hypothetical is based are 'empirically impossible',<sup>328</sup> but that these same assumptions defeat it by the means of basic logic.

The fact of the matter is, the Ticking-Bomb Hypothetical, or as Mathews describes it, 'The Unreality Thesis',<sup>329</sup> fails to recognise the reality of the world in which it exists; certain knowledge of the above discussed factors is impossible, and if it were possible, as the hypothetical seems to suggest, torture would not be necessary. As such, Shue contends that the choice presented in the hypothetical is so unlike the circumstances of an actual choice as to make it a 'disastrously misleading analogy from which to derive conclusions about reality.'<sup>330</sup>

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<sup>325</sup> Jeremy Wisnewski, 'It's About Time: Defusing the Ticking Bomb Argument' (2008) 22(1) *International Journal of Applied Philosophy* 103, 106; Henry Shue, 'Torture' In Stanford Levinson (ed), *Torture: A Collection* (Oxford University Press, 2004) 47-60.

<sup>326</sup> Jeremy Wisnewski, 'It's About Time: Defusing the Ticking Bomb Argument' (2008) 22(1) *International Journal of Applied Philosophy* 103, 106.

<sup>327</sup> *ibid.*

<sup>328</sup> Richard Matthews, *The Absolute Violation: Why Torture Must Be Prohibited* (McGill-Queen's University Press 2008) 96.

<sup>329</sup> *ibid.*

<sup>330</sup> Henry Shue, 'Torture in Dreamland: Disposing of the Ticking-Bomb' (2005) 37(2) *Case Western Reserve Journal of International Law* 231, 231.

Elsewhere Shue asserts that,

there is a saying in jurisprudence that hard cases make bad law, and there might well be one in philosophy that artificial cases make bad ethics. If the example is made sufficiently extraordinary, the conclusion that torture is permissible is secure. But one cannot easily draw conclusions for ordinary cases from extraordinary ones, and as the situations described become more likely, the conclusion that torture is permissible becomes more debatable.<sup>331</sup>

The situation presented by the hypothetical is certainly extraordinary, one carefully designed in such a manner as to ensure that a pro-torture conclusion is reached. Yet one cannot expect a verdict that is arrived at as a result of facts that are ‘completely divorced from reality’,<sup>332</sup> to be applied to normalised cases.

Gross, however, suggests differently; he explains that the problem with such lines of thinking ‘lies in the fact that ticking-bomb cases are not ‘artificial’. They are real, albeit rare. Ignoring them completely, by rhetorically relegating them to the level of ‘artificial,’ is utopian or naive, at best.’<sup>333</sup> Gross highlights the difference between ‘ignoring completely the truly catastrophic cases and focusing our attention elsewhere when designing general rules and policies.’<sup>334</sup> It is possible to acknowledge, consider and prepare for rare and extreme cases, without tainting the more general approach taken to torture policy.

Like Gross, Wisnewski and O’Donohue et al, contend that the purpose of the ticking-bomb hypothetical, ‘is not to justify a national program of torture but to emphasize that there are exceptions to every general rule.’<sup>335</sup> In this way, the hypothetical acts as an ‘intuition pump; something that allows us to assess whether or not we actually believe that torture is impermissible.’<sup>336</sup> If it is established that this is not the case, the conditions under which torture is acceptable may be discussed. Put simply, it is not possible to ‘convincingly argue

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<sup>331</sup> Henry Shue, ‘Torture’ In Stanford Levinson (ed), *Torture: A Collection* (Oxford University Press, 2004) 57.

<sup>332</sup> Richard Matthews, *The Absolute Violation: Why Torture Must Be Prohibited* (McGill-Queen’s University Press 2008) 207.

<sup>333</sup> Oren Gross, ‘The Prohibition on Torture and the Limits of Law’ *Torture* in Stanford Levinson (ed), *Torture: A Collection* (Oxford University Press, 2004) 234.

<sup>334</sup> *ibid.*

<sup>335</sup> William O’Donohue et al, ‘The Ethics of Enhanced Interrogations and Torture: A Reappraisal of the Argument’ (1997) 27(2) *Ethics and Behaviour* 109, 113; Jeremy Wisnewski, ‘Hearing a still-ticking bomb argument: A reply to Bufacchi and Arrigo’ (2009) 26 *Journal of Applied Philosophy* 205–209.

<sup>336</sup> Jeremy Wisnewski, ‘It’s About Time: Defusing the Ticking Bomb Argument’ (2008) 22(1) *International Journal of Applied Philosophy* 103, 107.

that torture in general is morally permissible. The ticking-bomb dilemma is merely a thought exercise designed to demonstrate that these exceptions [can] occur, even in relation to such fundamental values as those protecting the rights of the detainee.<sup>337</sup> Thus, even if a situation identical to that of the ticking-bomb hypothetical never arises, exploring such a possibility is beneficial because it allows for a better understanding and expression of our intuitions regarding torture.<sup>338</sup>

On a different note, the argument can be made that torture should not be viewed as a one-off decision as depicted in the ticking-bomb example. It cannot simply be decided to torture someone once and expect to be rewarded with the information desired. Torture goes on for weeks, months and varies in degrees of brutality. There is no one-off decision; decisions are made at every juncture regarding duration and severity. Torture must be treated, and thus presented, as the practice it is, rather than the one some may like it to be.

As such, instead of weighing one guilty man's pain against hundreds of innocent lives, the certainty of anguish produced by torture with the mere possibility of learning something vital from it should be compared.<sup>339</sup> Upon doing this, it becomes very hard to consider the ticking-bomb scenario a viable justification for the use of torture.

Dratel makes the additional point that in a more realistic context, that of the Iraq and Afghan wars, 'the "ticking time-bomb" rationale ignores the fact that the torture approved occurred well after the detainees' apprehension, and continued for months, if not years, thereafter';<sup>340</sup> meaning any time-bomb would have detonated long before any torture occurred, or intelligence extracted, thus making any torture performed entirely pointless.

Even if a situation such as that described in the hypothetical were to arise, there is evidence to suggest that torturing the terrorist would not elicit the information necessary in order to

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<sup>337</sup> William O'Donohue et al, 'The Ethics of Enhanced Interrogations and Torture: A Reappraisal of the Argument' (1997) 27(2) *Ethics and Behaviour* 109, 113; Jeremy Wisnewski, 'Hearing a still-ticking bomb argument: A reply to Bufacchi and Arrigo' (2009) 26 *Journal of Applied Philosophy* 205–209.

<sup>338</sup> Jeremy Wisnewski, 'It's About Time: Defusing the Ticking Bomb Argument' (2008) 22(1) *International Journal of Applied Philosophy* 103, 107.

<sup>339</sup> David Luban, 'Liberalism, Torture, and the Ticking Bomb' in Karen J. Greenberg (ed), *The Torture Debate in America* (Cambridge University Press 2006) 46-7.

<sup>340</sup> Joshua Dratel, 'The Curious Debate' in Karen J. Greenberg (ed), *The Torture Debate in America* (Cambridge University Press 2006) 112.

stop the attack. Jose Rodriguez, former director of the CIA's Clandestine Service, revealed that the application of EITs took 'as little as seven to at most less than thirty days'<sup>341</sup> to produce useful information. This 'demonstrates that EITs did not elicit valuable information quickly... [therefore] the ticking bomb scenario of a threatened imminent attack loses much of its justification.'<sup>342</sup>

Opponents of legalisation point out that the ticking-bomb hypothetical assumes that torture will work in eliciting life-saving intelligence, but such an assumption 'is both over-simplistic and over-optimistic',<sup>343</sup> primarily because there is little evidence to suggest that torture is effective.

### **The Questionable Efficacy of Torture**

Many of the arguments outlined in the 'Torture: The Case For' section above assume that coercive interrogational practices are guaranteed to produce results; they focus upon the moral and legal aspects of the debate, whilst ignoring those based upon logic and empiricism; they overlook what is arguably the most important factor; whether torture actually works. If it could be demonstrated that it does not, then the majority of the arguments supporting torture may be rendered obsolete. Goldman summarises that the issue of the effectiveness of enhanced interrogation is central to public debate on torture, because 'apologists often assume that torture works, and all that is left is the moral justification. [However] If torture does not work, then their apology is irrelevant',<sup>344</sup> as the practise is, from a practical perspective, pointless.

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<sup>341</sup> Jose Rodriguez, *Hard Measures: How Aggressive CIA Actions after 9/11 Saved American Lives* (Ney York: Threshold Editions 2012) 234.

<sup>342</sup> James Pfiffner, 'The Efficacy of Coercive Interrogation' in Tracy Lightcap and James Pfiffner (eds), *Examining Torture: Empirical Studies of State Repression* (Palgrave Macmillan 2014) 150.

<sup>343</sup> Vittorio Bufacchi and Jean Maria Arrigo, 'Torture, Terrorism and the State: a Refutation of the Ticking Bomb Argument' (2006) 23 *Journal of Applied Philosophy* 355, 361; Philip Rumney, *Torturing Terrorists* (Routledge 2015) 57.

<sup>344</sup> Adam Goldman and Matt Apuzzo, 'Ex-Spy: Destroying CIA Tapes Purged 'Ugly Visuals'' (Yahoo News 2012) <<http://news.yahoo.com/ex-spy-destroying-cia-tapes-purged-ugly-visuals-212042971.html>> accessed 20 August 2017.

In general, coercive interrogation is not effective, nor does it produce positive results. By way of example, James Corum, a professor at the US Army Command and General Staff College states, 'the torture of suspects [at Abu Ghraib] did not lead to any useful intelligence information being extracted.'<sup>345</sup>

The main criticisms regarding torture's ineffectiveness date back to the time of Aristotle.<sup>346</sup> He opined that those tortured 'are as likely to give false evidence as true, some being ready to endure everything rather than tell the truth, while others are equally ready to make false charges against others, in the hope of being sooner released from torture.'<sup>347</sup> Langbein goes as far as to say that '[h]istory's most important lesson is that it has not been possible to make coercion compatible with truth.'<sup>348</sup> For example, someone experiencing the extreme pain of torture is likely to fabricate information simply to put a stop to the pain.<sup>349</sup> Alternatively, they may deliberately reveal false information in order to mislead the interrogator. Cicero summarised that 'examination under torture is... tainted by hope, invalidated by fear... [with] no room left for the truth.'<sup>350</sup>

This opinion is shared by Rowell, a C.I.D. agent with 36 years experience. He believes that 'the use of force or humiliation with prisoners is invariably counterproductive. "They'll tell you what you want to hear, truth or no truth... You don't get righteous information,"'<sup>351</sup> demonstrating that this criticism remains relevant today.

Rowell's views are mirrored in the CIA's Human Resources Exploitation Training Programme. According to the programme, '[e]xperience indicates that the use of force is not

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<sup>345</sup> Stephen Budiansky, 'Intelligence: Truth Extraction' (*The Atlantic Monthly*, June 2005) <<http://www.theatlantic.com/magazine/archive/2005/06/truth-extraction/303973/>> accessed 27 March 2016.

<sup>346</sup> 384-322 BC.

<sup>347</sup> Aristotle, *Aristotle: Art of Rhetoric* (John Henry Freese tr, Harvard University Press 1926) 163.

<sup>348</sup> John Langbein, 'The Legal History of Torture' In Stanford Levinson (ed), *Torture: A Collection* (Oxford University Press 2004) 101.

<sup>349</sup> John Conroy, 'Unspeakable Acts, Ordinary People: The Dynamics of Torture' <<https://www.nytimes.com/books/first/c/conroy-unspeakable.html>> accessed 3 April 2016.

'I admitted to being in everything... because I was just so frightened that I had no fear of anything other than what they were doing to me... it [was] all lies and desperation'.

<sup>350</sup> Cicero, *Cicero: In Catilinam 1-4. Pro Murena. Pro Sulla. Pro Flacco. B. Orations* (C. MacDonald tr, Harvard University Press; Revised edition 1976) 391.

<sup>351</sup> Seymour M Hersh, 'Torture at Abu Ghraib: *American soldiers brutalized Iraqis. How far up does the responsibility go?*' (*The New Yorker* 10 May 2004) <<http://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib>> accessed 27 March 2016.

necessary to gain cooperation of sources, use of force is a poor technique, yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the interrogator wants to hear.<sup>352</sup> Further, CIA documentation teaches that '[i]ntense pain is quite likely to produce false confessions, concocted as a means of escaping from distress. A time-consuming delay results, while investigation is conducted and the admissions are proven untrue.'<sup>353</sup>

If the notion that torture is performed with the aim of obtaining information, rather than serving a more worryingly sadistic purpose, is accepted, then the acquiring of accurate information becomes its key objective. However, following the evidence presented above, torture often produces unreliable intelligence, suggesting that it fails to fulfil its most important and arguably only justifiable function; thus rendering it pointless.

However, Rumney explains that '[t]here can be little doubt that interrogational torture does sometimes work to produce disclosures. To suggest otherwise indicates an unwillingness to seriously engage with the evidence provided by the historic and contemporary literature.'<sup>354</sup>

As Krauthammer notes, 'It may indeed be true that torture is not a reliable tool. But that is very different from saying that it is *never* useful.'<sup>355</sup>

A real life example of the effective use of torture was evidenced in 1995, when an Al-Qaeda plot to bomb 11 US planes was prevented using information extracted through torture from a Pakistani suspect. 'For weeks, agents hit him with a chair and a long piece of wood, forced water into his mouth, and crushed lighted cigarettes into his private parts... His ribs were almost totally broken and his captors were surprised he survived.'<sup>356</sup>

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<sup>352</sup> Central Intelligence Agency, 'Human Resources Exploitation Training Programme' 1983 Section titled 'Prohibition Against Use of Force'.

<sup>353</sup> Central Intelligence Agency, 'KUBARK Counterintelligence Interrogation Manual' (1963) 94.

<sup>354</sup> Philip Rumney, *Torturing Terrorists* (Routledge, 2015) 109.

<sup>355</sup> Charles Krauthammer, 'The Truth about Torture: It's time to be honest about doing terrible things.' (*The Weekly Standard*, 5 December 2005) <<http://www.weeklystandard.com/the-truth-about-torture/article/7589#!>> accessed 23 February 2017.

<sup>356</sup> Doug Struck et al, 'Borderless Network of Terror' (*Washington Post*, 23 September 2003) <<https://www.washingtonpost.com/archive/politics/2001/09/23/borderless-network-of-terror/843d68f7-9c5c-441b-8963-e9876b49d321/>> accessed 22 March 2016.

Taken at face value, this example clearly appears to support the argument that torture can produce results, making it justifiable in extremes. However, if the situation is examined a little closer; 'The... agents were surprised he survived – in other words they came close to torturing him to death *before* he talked.'<sup>357</sup> What if he had not known about the plot or if it had not even existed? They could have tortured him to death for nothing. As Luban asserts, '[y]ou can't use the argument that preventing the Al-Qaeda attack justified the decision to torture, because *at the moment the decision was made* no one knew about the... attack.'<sup>358</sup>

It may therefore be submitted that one exceptionally rare example of torture producing a positive result cannot be used to justify its widespread use, especially when there is no way of knowing beforehand whether torture will result in a positive outcome.

Neurologist Lawrence Hinkle offers an alternate criticism; he details the frailty of the mind under bodily assault. He states:

The human brain, the repository of the information that the interrogator seeks, functions optimally within the same narrow range of physical and chemical conditions that limit the functions of human organs in general.... Any circumstance that impairs the function of the brain potentially affects the ability to give information as well as the ability to withhold it.<sup>359</sup>

Therefore, torture, clearly a practice that impairs the function of the brain due to its effect on the body, may be as likely to prevent information being provided, as to yield it. If this is true, then coercive interrogation may actually work contrary to its supposed purpose.

The CIA's KUBARK manual suggests that this is certainly the case, but for different reasons. It states that 'most people underestimate their capacity to withstand pain... In general direct physical brutality creates only resentment, hostility, and further defiance.'<sup>360</sup> This echoes Bentham, who observed that, 'anger mixing itself with the sensation of pain will have a

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<sup>357</sup> David Luban, 'Liberalism, Torture, and the Ticking Bomb' in Karen J. Greenberg (ed), *The Torture Debate in America* (Cambridge University Press 2006) 45.

<sup>358</sup> *ibid.*

<sup>359</sup> Lawrence Hinkle, 'The Physiological State of the Interrogation Subject As it Affects Brain Function' in Albert Biderman and Don Zimmer (eds) *The Manipulation of Human Behavior* (Wiley, New York 1961) 19.

<sup>360</sup> Central Intelligence Agency, 'KUBARK Counterintelligence Interrogation' (1963) 90.

peculiar tendency to give force to obstinacy',<sup>361</sup> thus resulting in the withholding of information, rather than the offering of it.

Farrall notes that coercive interrogation may be of limited use in the case of Al-Qaeda because it 'is not a traditional hierarchical organisation... and it does not exercise full command and control over its branch and franchises'.<sup>362</sup> Instead, Al-Qaeda 'operates a devolved network hierarchy', whereby 'Al-Qaeda's core members focus on exercising strategic command and control to ensure the centralization of the organization's actions and message, rather than directly managing its branch and franchises'.<sup>363</sup> As a result, the various branches of Al-Qaeda operate largely independently, meaning very few Al-Qaeda operatives possess knowledge beyond that which is immediately relevant to them. Therefore, irrespective of torture's effectiveness, in the case of Al-Qaeda, the potential to gain intelligence via the use of torture is somewhat limited because most members simply will not possess the sought after knowledge.

Given the overwhelming degree of criticism made regarding the effectiveness of torture, both ancient and modern, and from a wide range of sources, the few rare cases in which coercive techniques have resulted in the timely obtaining of genuinely valuable information do not serve to justify its use. In general, as means of obtaining information, torture is ineffective.

### **Other Methods of Interrogation are More Effective**

Whilst it may be true that coercive interrogation has produced actionable intelligence on occasion, this does not mean that alternative interrogational methods could not have been just as, or more, effective. Proponents of coercive interrogation 'have not provided a shred of evidence that physical force is the only or the most effective means to prevent attacks'.<sup>364</sup> It is not enough to represent a few isolated cases in which the Security Services, after using

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<sup>361</sup> William Twining and P E Twining, 'Bentham on Torture' (1973) 24 Northern Ireland Legal Quarterly 305, 315.

<sup>362</sup> Leah Farrall, 'How al Qaeda Works: What the Organization's Subsidiaries Say About its Strength' (Foreign Affairs 2011) 133-4.

<sup>363</sup> *ibid.*

<sup>364</sup> B'Tselem, *Legislation Allowing the Use of Physical and Mental Coercion in Interrogations by the General Security Service* (2000) 49.

force during interrogations, succeeded in preventing terrorist attacks, because we do not know what the results would have been had other methods been used instead.<sup>365</sup>

Alexander Mathew, a US army interrogator who served seventeen years, provides the perfect example of the efficacy of alternative methods of interrogation. Mathew was tasked with obtaining intelligence allowing US forces to ‘find Abu Musab al-Zarqawi<sup>366</sup> and kill him’.<sup>367</sup> By employing traditional interrogational techniques, Mathew was successful; using ‘respect, rapport, hope, cunning and deception’ to find Zarqawi’s location.<sup>368</sup> The fact that this was possible *without* the use of torture, demonstrates that traditional interrogational methods can be effective, this therefore begs the question; why is torture necessary?

Former FBI interrogator Ali Soufan insists that it is not. He states, by way of example, that the actionable intelligence provided by Abu Zubaydah was the result of traditional interrogation methods. ‘There was’, he concluded, ‘no actionable intelligence gained from using enhanced interrogation techniques on Zubaydah that wasn’t, or couldn’t have been, gained from regular tactics.’<sup>369</sup> If this is the case, then why was Zubaydah subjected to copious amounts of waterboarding and sleep deprivation,<sup>370</sup> the infliction of pain and suffering served no purpose and perhaps delayed the obtaining of what information he did provide. To this end, the torturing of Zubaydah was nothing but counterproductive.

Mathew supports this suggestion, stating that abuse and torture ‘slows the progress of the interrogation or results in bad information’.<sup>371</sup> He instead proposes the use of non-coercive techniques, such as the rapport building method. The Intelligence Science Board details that:

Rapport usually begins to develop during conversation — maybe even “small talk” — and serves at least two functions. First, research studies say, it helps to “induce”

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<sup>365</sup> *ibid.*

<sup>366</sup> A Jordanian jihadist who masterminded the deaths of many Iraqis through suicide bombing and executions.

<sup>367</sup> Alexander Mathew, *How to Break a Terrorist* (New York: Free Press 2008) 17.

<sup>368</sup> *ibid* 6.

<sup>369</sup> Ali Soufan, ‘My Tortured Decision’, *New York Times* 23 April 2009 89; Dr. Jason Ralph, *Torture, Extraordinary Rendition and the Civilised State* 18 February 2010.

<sup>370</sup> Please see the section entitled ‘9/11 and the Iraq War’ in chapter three for information on Abu Zubaydah’s interrogation

<sup>371</sup> Alexander Mathew, *Kill or Capture* (New York: St Martin’s Press 2011) 273.

or facilitate compliance with subsequent requests — and gets the source talking. Second, it allows the educer to identify and assess potential motivations, interests, and vulnerabilities.<sup>372</sup>

It could be argued that, due to the reactions that torture generates in those subjected to it, in that pain alone often makes them numb and unresponsive, techniques such as rapport building that build a relationship with the detainee and engage their minds,<sup>373</sup> are much more likely to produce accurate information.

However, Rumney explains that ‘there are fundamental problems with such comparative claims.’<sup>374</sup> He states that ‘[t]here are no scientific studies in which such techniques have been compared’;<sup>375</sup> perhaps due to the fact that claims of success ‘can rarely be tested in a controlled environment’ due to the nature of torture.<sup>376</sup> Therefore, claims such as these must be treated with caution; although they may appear accurate, following patterns of logic, there is no empirical evidence to support them. It must also be noted that, even if it were possible to accurately test these claims, the results would not yield the answer to the underlying moral and legal question being asked; ‘what should be done where non-coercive techniques have been tried, have failed and interrogational torture is the last remaining option for interrogators.’<sup>377</sup> At some point, this question must be answered; simply arguing that non-coercive techniques are more effective than coercive ones serves no purpose in this regard.

Suedfeld states that ‘[i]t is true that information elicited under torture may not be truthful; but that is true of all information provided by suspects. There is no evidence that torture results in less truthful confessions than other methods of interrogation.’<sup>378</sup> Whilst this may be accurate, other methods of interrogation do not give rise to the same negative ramifications as torture. Sullivan suggests that, ‘[w]hat miniscule intelligence we might have plausibly

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<sup>372</sup> Intelligence Science Board, *Educating Information Interrogation: Science and Art* (Washington: National Defense Intelligence College Press, December 2006) 22.

<sup>373</sup> Don Van Natta Jr, ‘Questioning Terror Suspects in a Dark and Surreal World’ (New York Times, 9 March 2003) A1.

<sup>374</sup> Philip Rumney, *Torturing Terrorists* (Routledge 2015) 106.

<sup>375</sup> *ibid.*

<sup>376</sup> David Cole, *Enemy Aliens: Double standards and Constitutional Freedoms in the War on Terrorism* (The New Press 2005) 184.

<sup>377</sup> Philip Rumney, *Torturing Terrorists* (Routledge 2015) 106.

<sup>378</sup> Peter Suedfeld, ‘Torture, Interrogation, Security, and Psychology: Absolutistic versus Complex Thinking’ (2007) 7(1) *Analyses of Social Issues and Public Policy* 55, 60.

gained from torturing and abusing detainees is vastly outweighed by the intelligence we have forfeited by alienating many otherwise sympathetic Iraqis and Afghans'.<sup>379</sup> The fact of the matter is, rapport building and other non-coercive interrogational techniques, regardless of their debatable effectiveness, do not inflict irreparable damage on those involved, do not undermine trust in the West resulting in violent backlashes, and do not breach any of the numerous prohibitions on torture. Coercive interrogation on the other hand, most certainly does. As such, when the overall effects are considered; both immediate and lasting, it is possible to argue that due to their law of drawbacks, non-coercive techniques are more effective than coercive ones.

### **The Wrong Man Problem**

'If the suspect is indeed the terrorist who has endangered innocent peoples' lives, fairness dictates that he will be the one to pay the costs for dealing with that danger.'<sup>380</sup> But what if he is not? The 'wrong man problem' is self explanatory; what if the suspect being tortured is not a terrorist, or is, but does not possess the sought-after knowledge? In cases such as these, the wrong man is being tortured; this mistake not only gives effect to the numerous adverse affects of torture, but fails to deliver results whilst doing so.

Rodriguez has suggested that this dilemma could be avoided by restricting the use of enhanced interrogational techniques to situations in which the detainee was not cooperating, and was lying. However, it is difficult to detect lying if the interrogator does not know the answer to the question they are asking. Pfiffner points out that this could easily lead to the infliction of EITs on people who genuinely do not know the answers to the questions they are asked.<sup>381</sup> For example, the CIA thought that Abu Zubaydah was the number three leader in

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<sup>379</sup> Andrew Sullivan, 'The abolition of Torture' in Stanford Levinson (ed), *Torture: A Collection* (Oxford University Press, 2004) 326.

<sup>380</sup> Michael Moore, 'Torture and the Balance of Evils' in Michael Moore, *Placing Blame: a General Theory of Criminal Law* (Oxford University Press, 1989); Miriam Gur-Arye, 'Can the War against Terror Justify the Use of Force in Interrogations? Reflections in Light of the Israeli Experience' in Stanford Levinson (ed), *Torture: A Collection* (Oxford University Press, 2004) 193.

<sup>381</sup> James P. Pfiffner, 'The Efficacy of Coercive Interrogation' in Tracy Lightcap and James P. Pfiffner (eds), *Examining Torture: Empirical Studies of State Repression* (Palgrave Macmillan 2014) 151.

Al-Qaeda, but he turned out to be a travel co-ordinator.<sup>382</sup> Zubaydah would have been interrogated on the assumption that he possessed more information than he in fact held; asked questions to which he did not know the answers. Thus, he may have been waterboarded based on the belief that he was lying, when in fact he was cooperating, making the entire process pointless.

Bagaric and Clarke state that '[t]he main general argument against utilitarianism is that because it prioritizes net happiness over individual pursuits, it fails to safeguard fundamental individual interests. As a result, it has been argued that in some circumstances utilitarianism leads to horrendous outcomes',<sup>383</sup> such as the torturing of innocents in wrong man scenarios. However, it is also arguable, that '[t]he interests of the society may sometimes be so deeply involved as to make it right to punish an innocent man 'that the whole nation perish not'.<sup>384</sup> That is to say, there are situations where the general interests of society outweigh the duty to respect individual rights; conditions in which it is necessary to risk torturing the innocent in order to protect the general public.

Yet the trade-off being made is not quite that simple. Certainly, if torturing the innocent were *guaranteed* to protect society; to stop the ticking-bomb as it were, a strong case could be made on utilitarian grounds that pursuing such courses of action were justified. But that is precisely the point, the outcome is not guaranteed; torture does not always work. Utilitarian beliefs such as these not only risk torturing the innocent, but do so based on the knowledge and understanding that torture *may not* be effective. Thus, justifications based on utilitarian morals often overlook the uncertainty of torture, portraying its use as a simple trade-off, when in reality, such justifications are founded on the mere chance that torture is successful; the image that should be depicted is that of a gamble.

Both objectively and subjectively, torture is an atrocious practice. As such, torture should not be used unless there is 'a very good chance indeed of knowing what you are doing. But in

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<sup>382</sup> Soufan Ali H, *The Black Banners* (New York: Norton 2011) 412, 423.

<sup>383</sup> Mirko Bagaric and Julie Clarke, 'Not enough official torture in the world? The circumstances in which torture is morally justifiable' (2005) 39(3) *University of San Francisco Law Review* 581, 605.

<sup>384</sup> David Ross, *The Right and the Good* (Oxford: Clarendon 1930) 61.

any real case where torture is in question, you cannot have a good chance of knowing what you are doing.<sup>385</sup> Based on this analysis, torture should never be used. Consequentialists, however, argue 'that at least where the question is one of policy and the stakes are high, a state may justifiably do 'terrible things' even *without* a good chance of knowing whether each one of them is justified, as long as the overall result is that thousands of lives are saved.'<sup>386</sup> Therefore, in circumstance such as those described above, torture would be justified, so long as it saved the lives of innocents.

Ginbar identifies this as 'an admission... that unjustified torture is inherent in the very decision to adopt torture as a matter of policy, so that even strict adherence to instructions and restrictions would result in a toss-of-the-dice mixture of unjustified and justified torture.'<sup>387</sup> By adopting a policy such as this, states essentially acknowledge that the justifiability of torture is determined on a case-by-case basis by its effectiveness. Torture that is effective and saves lives is justified, but torture that is not effective is not justified, even if the terrorist did possess the vital life saving information. By this reasoning, if a situation was to arise, whereby the detainee is without a doubt the terrorist who planted the bomb, if they did not break under torture, giving up the bomb's location and thus allowing it to be defused, the torture would not be justified, because the overall result is not the saving of thousands of lives. The torture would be unjustified, despite the fact that that it would defy all logic not to torture the individual, because it is certain that they are in possession of life saving information. In this instance, the effectiveness of torture, and in turn the ability of the terrorist to resist it, dictates its justifiability.

On these bases, justifiability is dictated by chance; the chance that the detainee possesses the necessary information, and the chance that they will divulge it when tortured. Any policy whose justifications rest in the cast of a dice, represents a deeply flawed legislative process that should not be followed by any respectable government.

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<sup>385</sup> Barrie Paskins, 'What's Wrong With Torture?' (1976) 2 *British Journal of International Studies* 138, 144; Please also see the section entitled 'The Questionable Efficacy of Torture'.

<sup>386</sup> Yuval Ginbar, *Why Not Torture Terrorists?* (Oxford University Press 2008) 118.

<sup>387</sup> *ibid.*

### **We Kill People in War, Why Not Torture? The Effect on the Victim**

When juxtaposed with the atrocities and collateral damage evidenced in the Iraq war, the scale of the abuse of detainees in places such as Abu Ghraib simply does not compare. Thus, if society is prepared to accept the indiscriminate deaths, maiming, and suffering inevitably caused by bombing as part of war, what is so unacceptable about torture? Why is it so different?<sup>388</sup>

The answer becomes apparent upon examination of the relationship that exists between torturer and victim. The torturer 'inflicts pain one-on-one, up close and personal, in order to break the spirit of the victim... to tyrannise and dominate [them].'<sup>389</sup> The act of torture is intimate. Luban likens it to that shared between lovers, describing it as a 'perverse parody of friendship and intimacy'<sup>390</sup> whereby the focus is aggrandised upon 'causing pain and tyrannising the victim's spirit'.<sup>391</sup>

Falk explains that torture is distinguished from violence in war because of the 'contrast between the helplessness of the victim and the total control of the perpetrator.'<sup>392</sup> During combat, members of both sides have a chance of winning the fight; neither side is helpless, nor in total control. However, '[t]orture begins only after the fight is – for the victim - finished'.<sup>393</sup> Their surrender is followed by new attacks by now unrestrained conquerors, they have no chance to defend themselves, they are helpless. 'In this respect torture is indeed not analogous to the killing in battle of a healthy and well armed foe; it is a cruel assault upon the defenceless.'<sup>394</sup>

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<sup>388</sup> David Luban, 'Liberalism, Torture, and the Ticking Bomb' in Karen J. Greenberg (ed), *The Torture Debate in America* (Cambridge University Press 2006) 38.

<sup>389</sup> *ibid* 38-9.

<sup>390</sup> *ibid* 39.

<sup>391</sup> *ibid*.

<sup>392</sup> Richard Falk, 'Torture, War, and the Limits of Liberal Legality' in Marjorie Cohn (ed) *The United States and Torture* (New York University Press 2011) 122.

<sup>393</sup> Henry Shue, 'Torture' in Stanford Levinson (ed), *Torture: A Collection* (Oxford University Press 2004) 51.

<sup>394</sup> *ibid*.

Shue offers the suggestion that, once a soldier has been captured, they can no longer be classified as an enemy combatant because they are 'no longer a threat; they are entirely at the torturers mercy.'<sup>395</sup> *Prima facie* this appears to be accurate; the detainee is unarmed and helpless. This, however, fails to account for any plans that they have already put into motion; a terrorist who has planted a bomb does not suddenly become harmless upon capture because the bomb is still ticking away somewhere. In this case, '[t]he information withheld from the interrogators might be construed as an ongoing threat, often more deadly than, and at times as immediate as, that of a fully armed opposing soldier.'<sup>396</sup> It could be argued that 'there is something beyond the initial surrender which the torturer wants from the victim';<sup>397</sup> their cooperation. Therefore '[t]he victim is not, on this view, utterly helpless... as long as he or she holds in reserve an act of compliance which would satisfy the torturer and bring the torture to an end.'<sup>398</sup>

However, it must be remembered that the torturer faces no personal risk unlike on the battlefield; they inflict 'unspeakable pain while facing no risk of retaliation'.<sup>399</sup> This cannot be justified by the simple reason that their victim will not cooperate. Further, given the chaotic and imprecise nature of conflict, a very real possibility exists that the person under interrogation might only possess partial information, or none at all, making it impossible for them to cooperate in order to stop the torture. 'Even [if they] reveal all the information [they] have... the interrogator might not be persuaded that they do not hold more useful details. In such cases there is nothing they can do to avoid [being tortured]. They are defenceless, and are entirely at the interrogator's mercy.'<sup>400</sup>

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<sup>395</sup> *ibid.*

<sup>396</sup> Tamar Meisels 'In Defence of the Defenceless: The Morality of Laws of War' (2012) 60 *Political Studies* 919, 928.

<sup>397</sup> Henry Shue, 'Torture' in Stanford Levinson (ed), *Torture: A Collection* (Oxford University Press, 2004) 52.

<sup>398</sup> *ibid.*

<sup>399</sup> Richard Falk, 'Torture, War, and the Limits of Liberal Legality' in Marjorie Cohn (ed) *The United States and Torture* (New York University Press 2011) 122.

<sup>400</sup> Miriam Gur-Arye, 'Can the War against Terror Justify the Use of Force in Interrogations? Reflections in Light of the Israeli Experience' in Stanford Levinson (ed), *Torture: A Collection* (Oxford University Press, 2004) 192.

When considered thus, it becomes easy to differentiate between the unfocused damage produced by the confusion of war and the concise and deliberate nature of that caused by torture. As Scarry explains, the world of a man in great pain makes little sense, 'as in dying and death, so in serious pain the claims of the body utterly nullify the claims of the world.'<sup>401</sup> In the victim's world, one where torture such as waterboarding is quite literally designed to replicate the feeling of dying, 'the human soul finds no home and no repose',<sup>402</sup> there exists only pain.

When faced with the abhorrent reality of torture depicted above, how can anyone with an estimable moral compass possibly advocate torture? Imagine being forced into a Palestinian chair, your hands and ankles tied together, the chair forcing you to lean forward in a crouch, placing all of your weight on your thighs. Now imagine being left there for hours at a time, 'The physical pain is excruciating, but the mental and sort of emotional strain of knowing that... there's simply no way to recover', it was torture.<sup>403</sup> Alternatively, picture having your hands tied behind your back, then being winched to the ceiling and electrocuted until you faint.<sup>404</sup> The physical pain caused by certain forms of torture is inconceivable.

Worse than the physical effects, however, are the psychological ones. Envisage being unable to bathe or shower ever again, instead being reduced to washing with a cloth, or being incapable of pulling a jumper over your head for fear of bringing back the memories.<sup>405</sup> These are but a few of the long-lasting psychological effects of waterboarding alone.

Basoglu and others report that the psychological problems most commonly described by torture survivors in research studies<sup>406</sup> include psychological symptoms such as anxiety,

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<sup>401</sup> Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* (1985) 33.

<sup>402</sup> David Luban, 'Liberalism, Torture, and the Ticking Bomb' in Karen J. Greenberg (ed), *The Torture Debate in America* (Cambridge University Press 2006) 39.

<sup>403</sup> Eric Fair, 'Ex-Abu Ghraib Interrogator: Israelis Trained U.S. to Use "Palestinian Chair" Torture Device' 7 April 2016 <[http://www.democracynow.org/2016/4/7/ex\\_abu\\_ghraib\\_interrogator\\_israelis\\_trained](http://www.democracynow.org/2016/4/7/ex_abu_ghraib_interrogator_israelis_trained)> accessed 10 April 2016.

<sup>404</sup> Amnesty International, 'Beyond Abu Ghraib: detention and torture in Iraq' March 2006.

<sup>405</sup> Spencer Ackerman, 'Torture victims will bear psychological scars long after CIA report scandal fades' (*The Guardian*, 13 December 2014) <<http://www.theguardian.com/law/2014/dec/13/learned-helplessness-enduring-effects-torture-haunt-victims>> accessed 22 March 2016.

<sup>406</sup> Basoglu et al, 'Torture and mental health: A research overview' in Ellen Gerrity et al (eds), *The Mental Health Consequences of Torture* (Springer, 2001) 35-48.

depression, aggression, emotional lability and self-isolation. Cognitive symptoms like confusion or disorientation, impaired memory and concentration, and neurovegetative symptoms such as insomnia, nightmares and sexual dysfunction.<sup>407</sup>

Parry explains that part of the reason torture is so damaging from a psychological perspective, lies 'in its ability to invert and degrade the ideas of... consent, and responsibility. Once torture begins, the result is always the product of the victim's choice. If the victim provides information, then she or she is weak, perhaps even a betrayer.'<sup>408</sup> 'If, on the other hand, the victim resists, then he or she will be tortured again... According to the logic of torture, if the victim talks, the pain will cease; by failing to talk, the victim consents to more torture.'<sup>409</sup>

The point is; torture presents the illusion that the victim makes a 'choice' as to what shall transpire; they either provide the requested information, or give their 'consent' for the torture to continue. As such, they are responsible for the outcome. The idea that the victim could be held responsible for such an egregious violation of their mind and body is entirely perverse. Yet this is the world torture operates in; it warps the fabric of the victim's reality, twisting the narrative to lay blame on the victim themselves. In such a confusing and pain riddled situation, it may not be possible to preserve the idea that they, the victim, are not to blame; they are not consenting to be tortured; the torturer is choosing to torture them, and therefore *they* are completely responsible.

As a further point, Shue claims that the mistake most make when discussing torture, 'is to assume that the only consideration relevant to moral permissibility is the amount of harm done.'<sup>410</sup> However, 'even if one grants that killing someone in combat is doing [them a]

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<sup>407</sup> Ellen Gerrity, 'The Effects and Effectiveness of Using Torture as an Interrogation Device: Using Research to Inform the Policy Debate' (2009) 3(1) *Social Issues and Policy Review* 172, 190.

<sup>408</sup> John Parry, 'Escalation and Necessity: Defining Torture at Home and Abroad' in Stanford Levinson (ed), *Torture: A Collection* (Oxford University Press, 2004) 153.

<sup>409</sup> *ibid.*

<sup>410</sup> Henry Shue, 'Torture' In Stanford Levinson (ed), *Torture: A Collection* (Oxford University Press, 2004) 48-49.

greater harm than torturing [them],<sup>411</sup> it by no means follows that there could not be a justification for the greater harm that was not applicable to the lesser harm.<sup>412</sup>

Killing a soldier during war may be justifiable in order to minimise overall harm, for example in self defence or the defence of others; but the same may not hold true for torturing that same person, because the reality of torture is so abundantly different from killing in war. Thus, in this context, killing, a 'more' harmful action, is justified and therefore morally permissible, whilst torture, a 'less' harmful action, is not.

Overall, the effects on the victim are often so incomprehensibly damaging, both immediately and long-term, physically and mentally, that it becomes near impossible to justify the use of torture in any circumstance, as psychologist Anthoine-Milhomme describes: 'I don't think you can be totally healed. You're just different.'<sup>413</sup>

### **The Effect on the Torturer**

It is also worth considering the impact of torture on the torturer. Gerrity reports that the 'resulting psychological symptoms are very similar to those of victims, including anxiety, intrusive traumatic memories, and impaired cognitive and social functioning.'<sup>414</sup> These symptoms are incredibly detrimental to the torturer and further represent the negative impact torture can have.

Because torture often involves violence, studies focusing on the perpetrators of violent crimes have additional relevance for understanding the impact of torture on the torturers themselves.<sup>415</sup> Evans and others examined the development of intrusive memories of their actions in perpetrators of violent crime. They found that 46% of respondents reported

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<sup>411</sup> Dependent on the length and severity of the ordeal, one can make an argument this may not be the case.

<sup>412</sup> Henry Shue, 'Torture' In Stanford Levinson (ed), *Torture: A Collection* (Oxford University Press, 2004) 48-49.

<sup>413</sup> Denise Grady, 'Tugging at Threads to Unspool Stories of Torture' (*The New York Times*, 2 May 2011) <[http://www.nytimes.com/2011/05/03/health/03torture.html?\\_r=0](http://www.nytimes.com/2011/05/03/health/03torture.html?_r=0)> accessed 22 March 2016.

<sup>414</sup> Ellen Gerrity, 'The Effects and Effectiveness of Using Torture as an Interrogation Device: Using Research to Inform the Policy Debate' (2009) 3(1) *Social Issues and Policy Review* 172, 194

<sup>415</sup> *ibid.*

distressing intrusive memories.<sup>416</sup> This is a worryingly high percentage. If extrapolated to the context of Iraq and Afghan wars; it is conceivable that there are not only tens-of-thousands of psychologically damaged victims, but also thousands of mentally unstable interrogators.

The unstable psyche and impaired cognitive functioning often associated with exposure to violence is perhaps apparent in the case of Rafael Perez, a CRASH<sup>417</sup> Unit policeman in Los Angeles Police Department's Rampart Division convicted of shooting and then framing an unarmed gang member. Perez proffered a variation of Friedrich Nietzsche's thought-provoking quote whilst making his statement to court. He advised that '[w]hoever chases monsters should see to it that in the process he does not become a monster himself.'<sup>418</sup> Here, Perez essentially concedes that in attempting to do the right thing by pursuing a 'monster', he violated the laws that he had promised to uphold, becoming the monster himself.

It is possible to draw parallels between Perez's situation and the torture practiced during the Iraq and Afghan wars. It is arguable that the majority of the torture carried out, especially on high value detainees, was carried out with 'good intentions'; with the aim of capturing or killing the 'monsters' responsible for running Al-Qaeda. However, there may come a point whereby the exposure to violence experienced by interrogators, amplified by the intimate nature of torture, could turn a 'well meaning' torturer into the very monster that they are chasing, and in doing so, corrupt the purpose for which the torture was first embarked on.

Having considered the effects on both parties concerned in torture, it becomes apparent that, as Mokhtar observes, the practice 'is an atrocious violation of human dignity because it inflicts individual suffering and dehumanizes both the victim and the perpetrator.'<sup>419</sup>

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<sup>416</sup> Ceri Evans et al, 'Intrusive Memories in Perpetrators of Violent Crime: Emotions and Cognitions' (2007) 75(1) *Journal of Consulting and Clinical Psychology* 134, 134.

<sup>417</sup> Community Resources Against Street Hoodlums.

<sup>418</sup> Rafael Perez, 'Rafael Perez's Statement to the Court' (2001) <<http://www.pbs.org/wgbh/pages/frontline/shows/lapd/scandal/statement.html>> accessed 21 June 2017.

<sup>419</sup> Khairil Azmin Mokhtar, 'Right to Life and Freedom from Torture' in Abdul Ghafur Hamid and Khin Maung Sein (eds) *Human Rights Law: International, Malaysian and Islamic Perspectives* (Sweet & Maxwell Asia 2012) 78.

### **Terrorists: The Political Cost and the Risk to Allied Troops**

'Given the compelling need to protect the nation's security, governments experience considerable pressure to place the interrogation of suspected terrorists in "the twilight shadows of the law"<sup>420</sup> — especially given terrorists' propensities, much demonstrated, to exploit the laws and sensitivities of others but to observe few limits on their own behaviour.'<sup>421</sup>

The temptation to do so, however, must be avoided at all costs because of the extensive negative effects associated with the use of torture. 'Torture costs American lives... I learned in Iraq that the No. 1 reason foreign fighters flocked there to fight were the abuses carried out at Abu Ghraib and Guantánamo. Our policy of torture was directly and swiftly recruiting fighters for Al-Qaeda'.<sup>422</sup> Here, Matthew Alexander, leader of an interrogations team in Iraq, supplies perhaps the most convincing argument against the use of torture; its political cost.

As the Roman jurist Ulpian once said, torture is a 'risky business'.<sup>423</sup> The US' own Army Field Manual states as much: 'Revelation of use of torture by US personnel will bring discredit upon the US and its armed forces while undermining domestic and international support for the war effort.'<sup>424</sup> Mackey, an army interrogator who served in Afghanistan, experienced this first hand. He believes that Abu Ghraib's 'images of depravity will inflame anti-American sentiment in the Muslim world for a generation, driving who knows how many would-be jihadists into the ranks of Al-Qaeda'.<sup>425</sup> By advocating torture, the US undermined its political and public standing, its only justification being the extraction of useful information.

Levinson explains that '[t]here is a special reason for the United States, among all countries, to choose adherence to the no-torture "taboo".'<sup>426</sup> He suggests that '[o]ne might well believe

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<sup>420</sup> H.C. 5100/94, *Public Committee against Torture in Israel v. The State of Israel* 53 (4) P.D. 817 (1999) para 40.

<sup>421</sup> Intelligence Science Board, *Educating Information Interrogation: Science and Art* (Washington: National Defense Intelligence College Press, December 2006) 11.

<sup>422</sup> Mathew Alexander, 'I'm Still Tortured by What I Saw in Iraq' (*The Washington Post*, 30 November 2008) <<http://www.washingtonpost.com/wp-dyn/content/article/2008/11/28/AR2008112802242.html>> accessed 27 March 2016.

<sup>423</sup> Stephen Holmes, 'Is Defiance of Law a Proof of Success? Magical Thinking in the War on Terror' in Karen J. Greenberg (ed), *The Torture Debate in America* (Cambridge University Press 2006) 121.

<sup>424</sup> Washington DC: Department of the Army, 'FM 34-52: Intelligence Interrogation' 28 September 1992 1-8.

<sup>425</sup> Chris Mackey and Greg Miller, *The Interrogators: Inside the Secret War against Al-Qaeda* (Little, Brown and Company 2004) 472.

<sup>426</sup> Stanford Levinson, 'Contemplating Torture' in Stanford Levinson (ed), *Torture: A Collection* (Oxford University Press 2004) 38.

in a “contagion affect.” If the US is widely believed to accept torture as a proper means of fighting the war against terrorism, then why should any other country refrain?’<sup>427</sup> For example, ‘when a recent [US] State Department annual report on human rights criticized China... for human rights violations, China peremptorily dismissed the criticisms, taking the United States to task for using a “double standard” in judging other countries’ behaviour.’<sup>428</sup> The US cannot effectively criticise, or hold to account, other countries for violating international treaties whilst violating them themselves, doing so holds neither weight nor conviction and represents a highly hypocritical way of thinking. Dennis Blair, former Director of US National Intelligence, summarises that ‘[t]he bottom line is these techniques have hurt our image around the world, the damage they have done to our interest far outweighed whatever benefit they gave us’,<sup>429</sup> and consequently concludes that enhanced interrogational techniques ‘are not essential to our national security’.<sup>430</sup>

Rumney asserts, that ‘[t]he targeting of the innocent by the state... may lead to anger and a greater willingness to support or engage in terrorist activity.’<sup>431</sup> Further, ‘[i]t may also lead to a sense of alienation and destruction of mutual respect that destroys the trust necessary for people to disclose meaningful intelligence to state authorities.’<sup>432</sup> Therefore, intelligence gained through the use of coercive techniques must ‘be considered in light of a wider body of evidence suggesting that negative effects may, to some degree, undercut apparent gains.’<sup>433</sup> However, Yoo has argued that the claim that using coercion will ‘prove to be an added incentive for the enemy to fight all the harder’ is a ‘highly speculative and empirically unsupported assumption’.<sup>434</sup>

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<sup>427</sup> *ibid.*

<sup>428</sup> Intelligence Science Board, *Educating Information Interrogation: Science and Art* (Washington: National Defense Intelligence College Press, December 2006) 14-15; Edward Cody, ‘China, Others Criticize U.S. Report on Rights: Double Standard at State Dept. Alleged’ (*Washington Post*, 4 March 2005) A14.

<sup>429</sup> John Warrick and Peter Finn, ‘Effectiveness Of Harsh Questioning Is Unclear’ (*Washington Post*, 26 April 2009).

<sup>430</sup> *ibid.*

<sup>431</sup> Philip Rumney, *Torturing Terrorists* (Routledge, 2015) 22.

<sup>432</sup> *ibid.*

<sup>433</sup> Philip Rumney, ‘Making Things Worse? Interrogational Torture and Counter-Terrorism Policy’ (2013) 12(4) *Contemporary Issues in Law* 339, 343.

<sup>434</sup> *ibid.*

Rumney suggests using the context of Guantánamo Bay as a way of ‘testing the claim that the use of torture and other forms of harsh treatment during interrogation led to terrorist mobilisation.’<sup>435</sup> He explains that ‘[i]f the claim has validity, one would expect a significant number of former detainees who have been the subject of coercion either to engage in acts of terrorism and insurgency... on their release.’<sup>436</sup> However, statistics released by the US Defense Intelligence Agency in January 2013<sup>437</sup> suggested that only twenty-seven percent of six-hundred former Guantánamo detainees have been confirmed (97), or suspected (72) of having ‘reengaged’ in terrorist or insurgent activity.<sup>438</sup> Considering that, as a conservative estimate, at least some the Guantánamo detainees were involved in terrorist activity prior to their detainment, and were therefore likely to reengage upon release, regardless of treatment, 27 percent is not a high enough percentage to suggest a correlation. Rumney concludes that ‘[t]hese statistics do not provide reliable evidence of detention or harsh interrogation at Guantánamo having the effect of mobilising active involvement in terrorism or insurgency.’<sup>439</sup>

Statistics such as these are problematic because ‘they do not provide an explanation as to *why* some detainees engage in terrorism or insurgency following release’;<sup>440</sup> they only supply the raw data. Even if the percentage of ‘reengaging’ detainees were higher, enough to suggest a correlation for example, because we do not know the exact motivations for their actions, causation cannot be claimed. Therefore, reengagement in terrorist activity cannot be attributed to detainment at Guantánamo without the provision of further evidence.

It must be noted, however, that these statistics do not prove that the opposite is true; it is still possible that coercive interrogation may result in engagement with terrorist activity. Yet demonstrating that this is the case is problematic, because the only way to prove so would involve interviewing those who have engaged in terrorist activity, having first been tortured,

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<sup>435</sup> *ibid* 358.

<sup>436</sup> *ibid*.

<sup>437</sup> Defence Intelligence Agency, *Summary of the Reengagement of Detainees Formerly Held at Guantánamo Bay, Cuba* (2013) 1.

<sup>438</sup> *ibid* 2.

<sup>439</sup> Philip Rumney, ‘Making Things Worse? Interrogational Torture and Counter-Terrorism Policy’ (2013) 12(4) *Contemporary Issues in Law* 339, 359.

<sup>440</sup> *ibid*.

in order to discern their motivations. Such a task is practically impossible as no terrorist would agree to be interviewed. As a matter of logic, if an individual already held extremist views, but had not yet taken the step of engaging in acts of terrorism, and then they, or a family member were tortured, it is foreseeable that such an event could act as a catalyst; ultimately creating a terrorist of them.

In the absence of empirical proof, anecdotal evidence serves as a useful tool for demonstrating the effects of coercive interrogation. McKearney, a former member of the IRA, argues that while the use of illegal interrogation methods may have short-term benefits: 'in the long term it is destructive to the aims of those who are using it, because it thoroughly alienates those against whom it is perpetrated... their communities feel the pain as well... It drives people to greater excesses than they might have originally contemplated.'<sup>441</sup> Imagine being tortured, how is someone, especially if they are innocent, expected to feel after being violated in such a way? Angry certainly, mistrusting of authority, definitely, even vengeful; these are normal reactions to such an ordeal. It is only logical that those communities against whom torture is perpetrated feel disaffected. The process destroys any chance of cooperation from the community, as well as increasing willingness to engage with terrorism.

Waldron criticises the use of torture from a different perspective, he states that '[t]orture of prisoners threatens to undermine the integrity of the surrender/incarceration regime: if we can torture prisoners, then we can do anything to them, and if we can do anything to them, then the willingness of defeated soldiers to surrender will be quite limited.'<sup>442</sup> This has an unfavourable knock-on effect; for example, '[a] lack of humane treatment may induce an enemy to fight to the death rather than surrender, thereby leading to increased friendly casualties.'<sup>443</sup> Whereas, if enemies recognise that surrender and incarceration is better than death in combat because they are aware that they will be humanely treated, they may be more likely to surrender.

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<sup>441</sup> Ibid; Ian Cobain, *Cruel Britannia: A Secret History of Torture* (Portobello Books Ltd 2012) 203.

<sup>442</sup> Jeremy Waldron, *Torture, Terror and Trade-Offs* (Oxford University Press 2010) 253.

<sup>443</sup> Hays Parks, 'Teaching the Law of War' in James Gaston, *Ethics and National Defense: The Timeless Issues* (Diane Publishing 1993) 150.

However, the point must be made that '[c]oncern about reciprocity is based on the empirical assumption that terrorists will observe fewer rules if we observe fewer rules.'<sup>444</sup> Yet this 'assumption may not be true. In a world where terrorist adversaries behead captives, it is at least arguable that terrorists assume they will receive harsh treatment no matter what we do.'<sup>445</sup> This argument, however, appears to be somewhat defeatist; it criticises a theory on the basis that it is derived from assumption, and so *may* not be accurate, but offers only a counter theory, based upon similar assumptions, to disprove the initial hypothesis. There exists a lack of empirical evidence for both claims, the difference is; the former provides a potential solution, which if effective will save lives, whereas the later offers only a fatalistic outlook on the issue, making the former inherently more valuable.

Speaking in 2009 on America's use of enhanced interrogation techniques, President Obama summarised that EITs:

Serve as a recruitment tool for terrorists, and increase the will of our enemies to fight us, while decreasing the will of others to work with America. They risk the lives of our troops by making it less likely that others will surrender to them in battle, and more likely that Americans will be mistreated if they are captured. In short, they did not advance our war and counterterrorism efforts -- they undermined them.<sup>446</sup>

Based on the weighing of these factors, there exists a contradiction between stopping a terror plot, versus stopping terrorism; the government may prevent a single attack through torture, but in doing so it may generate support for the terrorists' cause. 'In effect, the use of torture to stop terrorism has, paradoxically, created more terrorists.'<sup>447</sup> Thus, measured in these terms, torture is inherently ineffective and should not be utilised.

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<sup>444</sup> Intelligence Science Board, *Educating Information Interrogation: Science and Art* (Washington: National Defense Intelligence College Press, December 2006) 13; Sabrina Tavernise, 'Iraqis Found in Torture House Tell of Brutality of Insurgents' (New York Times, 19 June 2005).

<sup>445</sup> Intelligence Science Board, *Educating Information Interrogation: Science and Art* (Washington: National Defense Intelligence College Press, December 2006) 13

<sup>446</sup> Barak Obama, 'Obama's remarks on US national security as prepared for delivery' (The Guardian 21 May 2009).

<sup>447</sup> Alfred W McCoy, *A Question of Torture* (Holt Paperbacks 2007) 200-201.

### Torture Warrants: A 'Case' for Torture?

Ackerman states that '[s]ecurity services can panic in the face of horrific tragedy. With officials in disarray, with rumours of impending attacks circulating, and with an outraged public demanding instant results, there will be overwhelming temptations to use indecent forms of interrogation.'<sup>448</sup> In acknowledgment of this point, some torture advocates suggest employing a 'torture warrants' system. Applying such a system would provide a framework within which officials could work, potentially preventing any extralegal forms of interrogation from occurring in times of crisis.

Under torture warrants, coercive interrogational practices would become acceptable, when, and only when, performed under close supervision from the judiciary; before coercive interrogation could take place, permission from a judge would have to be obtained. From a humanitarian perspective, this would clearly be beneficial; it would potentially 'reduce the use of torture to the smallest amount and degree possible, while creating public accountability for its rare use.'<sup>449</sup> Proponents suggest that this would go a long way to 'justifying' the use of torture.

Rumney, however, is of the opinion that 'while the use of a law-based regulatory arrangement might give the impression of precision and control, the reality of interrogational torture and emergency powers generally suggests that regulation would lead to significant regulatory difficulties.'<sup>450</sup> Before such an arrangement could come into force, when and to what degree the power could be used must be precisely defined, and who can use the power must also be determined. What is the level of threat necessary before torture is permitted? How many lives must be at risk?<sup>451</sup> Must the threat be immediate? At what point is the line drawn beyond which any torture must stop? These are issues that cannot be

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<sup>448</sup> Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (New Heaven: Yale University 2006) 108-9.

<sup>449</sup> Alan Dershowitz, 'Torture and Democratic Accountability: An Oxymoron?' in John Yoo & Dean Reuter (ed), *Confronting Terror 9/11 and the Future of American National Security* (Encounter Books 2011) 109.

<sup>450</sup> Philip Rumney, *Torturing Terrorists* (Routledge 2015) 124.

<sup>451</sup> How does one even go about placing a value on how many lives must be at risk in order to justify torture, or at what point a threat is no longer immediate. Is it a day? Two days? These issues could be debated endlessly without any meaningful conclusions being drawn.

easily dealt with due to their sensitive and complex nature, yet they must be resolved in an exceptionally precise manner before any system could be put in place. Beyond these initial legislative difficulties, ensuring use of the power does not spread beyond its limited scope, especially in circumstances of urgency, may prove to be impossible.

The torture warrants proposal 'asks us to assume that the power to authorise torture will not be abused, that intelligence officials will not lie about what is at stake or about the availability of information'<sup>452</sup> in order to use torture in situations where it is not necessary or legally justified. But the fact of the matter is, '[t]here will always be individuals who act in a way that is simply abusive relative to whatever authorisation is given them.'<sup>453</sup> For example, '[s]ome officials will tend to view their legally permitted scope of action as the starting point from which to push the envelope in pursuit of their appointed task... The wider the scope of legally permitted action, the wider the resulting expansion of extralegal physical pressure.'<sup>454</sup> By allowing a small amount of torture in specific circumstances, we not only expand the parameters of what is legally possible, but also the limits to which lawbreakers are willing to push beyond that which is permitted.<sup>455</sup>

Setting up a framework for judicially approved torture is one thing, ensuring people adhere to it is another entirely. Waldron states that we are not asking whether motives like retribution,

sadism, sexual sadism, the pleasure of indulging brutality [and] the love of power... can be judicially regulated in the abstract. We are asking whether they can be regulated in the kind of circumstances of fear, anger, stress, danger, panic, and terror in which, realistically, the hypothetical case must be poised.<sup>456</sup>

A soldier who has just lost several comrades, or a police chief serving in the wake of a 9/11 type event, may not be capable of maintaining strict accordance with a torture warrants

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<sup>452</sup> Jeremy Waldron, *Torture, Terror and Trade-Offs* (Oxford University Press 2010) 220.

<sup>453</sup> *ibid* 221.

<sup>454</sup> Seth Kreimer, 'Too Close to the rack and the Screw: Constitutional Constraints on Torture in the War on Terror' (2003) Penn Law: Legal Scholarship Repository 322-3.

<sup>455</sup> A similar affect can be seen in the use of speed limits; where the limit is set at 50 mph, drivers often push beyond it to 55 mph. On roads where the limit is set at 80 mph, drivers push to 85 mph. People push these boundaries to a degree that they feel they can get away with; it is rare that an individual drives at 85 mph in an area where the speed limit is 50 mph because, relatively, this is a far greater breach of law than doing so in an 80 mph zone. Thus, the degree to which people push boundaries is directly governed by where the boundaries themselves are set; the higher a limit, the further people will go.

<sup>456</sup> Jeremy Waldron, *Torture, Terror and Trade-Offs* (Oxford University Press 2010) 221

system. The above mentioned factors may, understandably so, cloud their judgement; influencing them to forgo the judicial checks and balances designed to prevent the very actions they are at risk of performing.

Dratel offers a further criticism; he explains that in situations such as the ticking-bomb scenario the warrant may arrive too late to be of use: 'By the time judicial imprimatur were obtained, any ticking time-bomb would have already exploded – rendering the process entirely ineffective in addressing an emergency.'<sup>457</sup> This principle applies to any time-limited situation, which in war, occur on a daily basis; decisions are continuously made based on the information available at that point in time, meaning any delay in obtaining said information may cost lives. Certainly, the implementation of torture warrants could reduce the amount of extraneous torture, but this would come in exchange for a delay in obtaining vital information, somewhat contradicting the frequently claimed urgency of torture and potentially rendering the process pointless.

Some of those who argue against the use of torture warrants, or any legalisation of torture for that matter, still support the use of torture if it could save multiple lives.<sup>458</sup> Yet, by providing no legal framework for such situations, they 'leave the initial decision to the ex ante decision of the torturers and then leave the post facto decision about whether the torturer did the right thing to a jury of peers.'<sup>459</sup>

Such thinking hints at a certain level of naivety, or at least a degree of blind confidence in the legal system. For no prosecutor would prosecute, nor 'jury convict, if it turned out that the torturer was right, even if the basis on which he acted was weak or bigoted. But some juries might well convict if the torturer turned out to be wrong, even if he or she had a very strong basis on which to act.'<sup>460</sup> Without a clear system, unjustified torture that happened to save lives would go unpunished, yet justified but unsuccessful torture may result in penalisation.

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<sup>457</sup> Joshua Dratel, 'The Curious Debate' in Karen J. Greenberg (ed), *The Torture Debate in America* (Cambridge University Press 2006) 112.

<sup>458</sup> See Richard A Posner, 'Torture, Terrorism and Interrogation' in Stanford Levinson (ed), *Torture: A Collection* (Oxford University Press, 2004).

<sup>459</sup> Alan Dershowitz, 'Tortured Reasoning' in Stanford Levinson (ed), *Torture: A Collection* (Oxford University Press 2004) 274

<sup>460</sup> *ibid.*

Thus, the standards upon which a legal system is based are held in disregard; the only point considered is the end result.

Dershowitz makes a further point, suggesting that the person who makes the final decision on whether to torture or not should be 'the highest ranking public official capable of doing so – someone with accountability and responsibility... 'We don't want individual savours to be taking ad-hoc, secret, unaccountable, decisions whether to inflict torture.'<sup>461</sup> Without a regulatory system for torture, it is entirely possible that individuals in certain circumstances may be forced to make a decision on whether to employ torture whilst lacking the experience or qualification to do so. In addition, it is far harder to hold people accountable for their actions without knowledge how, why and concerning who they are made.

As a justification for torture, albeit the limited use of it, torture warrants are criticised by both opponents and proponents of torture, indeed they founder for many reasons. Firstly, there is no guarantee that the power would not spread beyond its initial function, being abused and having its boundaries expanded in dire situations. Secondly, they place allied lives at risk by creating a potentially lethal delay in attaining information. Lastly, they fail to protect everyone from torture, still allowing those deemed 'worthy' of torture to be subjected to it. This criticism contains within it a political dimension. Because 'once legitimated, torture [can] develop a constituency with a vested interest in perpetuating it',<sup>462</sup> there is a possibility that the torture warrants power could be used by one part of society to label another as terrorists in order to abuse or oppress them. Such an abuse of power would serve to corrupt the system's purpose; twisting its intentions from good to malevolent. It is tempting to support extreme measures such as these whilst far removed from the members of society that they will affect. In order to ensure they are just, measures such as these must be considered from the point of view of those likely to be exposed to the negatives they bring; in the current climate, this is Muslims. Muslims are far more likely to fall victim to terrorism related law enforcement, than for example a white middle-aged man, due to the ethnic background to which previous

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<sup>461</sup> *ibid* 275.

<sup>462</sup> John H Langbein, 'The Legal History of Torture' in Stanford Levinson (ed), *Torture: A Collection* (Oxford University Press, 2004) 100.

terrorists have belonged. It is therefore important to acknowledge, and examine from different perspectives, the potentially disastrous effects on certain sections of society that the introduction of torture warrants could have.<sup>463</sup>

It cannot, however, go without mention, that by neglecting to put in place some form of regulation, states risk torture being ordered and carried out under the radar and without accountability. Be that as it may, when considered as a whole, it is arguable that torture warrants represent an unsatisfactory middle ground, and set a dangerous precedent, as 'any effort to regulate torture ends up legitimising it and inviting its repetition'<sup>464</sup> as will become apparent in the 'Torture: What Comes Next' and 'The Absolute Prohibition as an Archetype – A Road to Slippery Slopes' sections below.

### **Security and Liberty: Intra-Personal Trade-Offs vs Inter-Personal Trade-Offs**

When discussing legislation related to terrorism, proponents often cite the relationship between security and liberty. They suggest that by sacrificing a small degree of liberty, each member of society will be rewarded with an increased amount of security.<sup>465</sup> *Prima facie*, such a trade-off appears to be not only reasonable, but beneficial. This, however, is not always the case; whilst in this context, both types of trade-off, intra-personal and inter-personal, involve the gain or loss of security and liberty, there exists a glaring distinction between them.

The simplest example of an intra-personal trade-off is the burden of a legal requirement to wear a seatbelt. The public restrict their freedom to sit in their cars as they like, because they are convinced that it will make everyone safer and less liable to injury or death. They are all happy to do this because they collectively gain safety at the cost of losing a small amount of

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<sup>463</sup> For further discussion please see the section entitled 'Intra-Personal Trade-Offs vs. Inter-Personal Trade-Offs' below.

<sup>464</sup> Kenneth Roth, 'Justifying Torture' in Kenneth Roth and Minky Worden (eds) *Torture: Does It Make Us Safer? Is It Ever Ok? A Human Rights Perspective* (The New Press 2005) 198.

<sup>465</sup> Jeremy Waldron, 'Security and Liberty: The Image of Balance' (2003) 11(2) *The Journal of Political Philosophy* 191, 192.

freedom. This trade-off is categorised as intra-personal because it is mutually beneficial: each member of society bears the cost and each member reaps the benefits.<sup>466</sup>

In contrast, inter-personal trade-offs sacrifice the liberty of the few, in order for the majority to be, or at least feel, more safe. For example, members of a minority are detained without trial,<sup>467</sup> have restrictive obligations imposed upon them,<sup>468</sup> or are beaten during interrogation,<sup>469</sup> in order to allegedly make the majority more secure.

The difference is, the person who gains the security is not the person who loses their liberty, meaning there is no collective 'security gain - liberty cost' balance. Rather, those individuals or groups who are labelled as threats shoulder the cost, often having their rights restricted, whilst the rest of society reap the supposed benefits.<sup>470</sup>

President Trump's recent 'Muslim ban' exemplifies this principle; Mr Trump's Executive Order 13769: Protecting the Nation From Foreign Terrorist Entry Into the United States,<sup>471</sup> 'bar[ed] citizens of seven Muslim-majority countries from entering the US for a period of 90 days'<sup>472</sup> in the hope that the new 'extreme vetting system w[ould] help keep radical Islamic terrorists out of the US.'<sup>473</sup> In essence, Muslims had their movement, and thus liberty, restricted, in order to provide security for the majority of America's citizens.

It is possible to apply the precedent this example provides to the legalisation of torture. If torture were to be legalised, individuals belonging to the minorities associated with terrorism would bear the cost, whilst the majority of America's citizens enjoyed the security the laws

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<sup>466</sup> Jeremy Waldron, *Torture, Terror and Trade-Offs* (Oxford University Press 2010) 12.

<sup>467</sup> See for example, the reintroduction of 'Detention Without Trial' in the UK under the Anti-terrorism, Crime and Security Act 2001, Part 4 and its challenge under Article 14 ECHR in *A and Others v Secretary of State for the Home Department* [2004] UKHL 56.

<sup>468</sup> See for example, the introduction of 'Control Orders' in the UK under the Prevention of Terrorism Act 2005 s.1(1) and its challenge under Article 5 ECHR in *Secretary of State for the Home Department v JJ* [2007] UKHL 45.

<sup>469</sup> Ian Cobain, 'Inside Castlereagh: We Got Confessions by Torture' (*The Guardian*, 11 October 2010) <<https://www.theguardian.com/uk/2010/oct/11/inside-castlereagh-confessions-torture>> accessed 13 July 2017.

<sup>470</sup> Jeremy Waldron, *Torture, Terror and Trade-Offs* (Oxford University Press 2010) 12-13.

<sup>471</sup> Executive order 13769: Protecting the Nation From Foreign Terrorist Entry Into the United States 2017.

<sup>472</sup> James Rothwell and Charlotte Krol, 'Everything You Need to Know About Donald Trump's Muslim Ban' (*The Telegraph*, 31 January 2017) <<http://www.telegraph.co.uk/news/2017/01/29/everything-need-know-donald-trumps-muslim-ban/>> accessed 13 July 2017.

<sup>473</sup> *ibid.*

offered. This not only constitutes an inter-personal trade-off, but also represents an imbalance; without having to sacrifice any liberty, most US citizens stand to gain a degree of perceived security, whilst members of the Islamic community live at risk of being detained and tortured, thus suffering a potentially deadly reduction in liberty.<sup>474</sup>

Christian teaching offers a further criticism of inter-personal trade-offs. Waldron explains that most justifications of torture rest 'upon an apprehension that certain goods can be attained by problematic means and that whatever else we might say about a particular means being prohibited, we cannot deny the value of what its violation might secure.'<sup>475</sup> For example, if through the use of torture, safety can be secured, then the use of this means might be objectionable, but the value of the safety cannot be denied.

However, Christianity teaches that 'certain goods might be objectively tainted on account of the methods that were used to achieve them.'<sup>476</sup> The Bible poses the question '[f]or what shall it profit a man, if he shall gain the whole world, and lose his own soul?'<sup>477</sup> The answer, to a Christian at least, is not at all. The safety provided via the use of inter-personal trade-offs is objectively tainted due to the cost it is purchased at. Thus, when applied to torture, it becomes apparent that the beneficial aspects that security and safety provide are 'ultimately not worth having – if the price of our security is torture.'<sup>478</sup>

Considered as a whole, policies such as these are inherently unfair and incredibly dangerous. By passing pro-torture legislation such as torture warrants, states disregard the burden of protection that they owe to all citizens, regardless of their status as suspected terrorists.<sup>479</sup> Further, states risk disenfranchising the minority communities who would fall victim to them, this in turn may result in increased support for terrorist groups and even

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<sup>474</sup> They are at risk of being subjected to torture because of their ethnic background. In addition, the psychological stress affected by the knowledge that there is a possibility of this occurring must also be considered.

<sup>475</sup> Jeremy Waldron, *Torture, Terror and Trade-Offs* (Oxford University Press 2010) 270.

<sup>476</sup> *ibid.*

<sup>477</sup> 'Holy Bible' Mark 8:36.

<sup>478</sup> Jeremy Waldron, *Torture, Terror and Trade-Offs* (Oxford University Press 2010) 271.

<sup>479</sup> Fionnuala Ni Aolain, 'The European Convention on Human Rights and Its Prohibition on Torture' in Stanford Levinson (ed), *Torture: A Collection* (Oxford University Press, 2004) 224.

radicalisation of the nation's citizens, ultimately leading to a greater threat than was originally faced, thus defeating the initial purpose of the legislation.<sup>480</sup>

Considering the adverse effects associated with repressive counter-terrorism measures discussed above, the question must be asked; why do states still choose to employ them?

Rumney suggests that:

the notion of imminent threat can subdue political opposition to such measures because legislators do not want to be seen to be failing to protect the innocent from terrorist violence. In such circumstances, security is often seen as an interest more important to protect than liberty.<sup>481</sup>

Are measures such as these not appropriate though; they clearly have their drawbacks, but when all things are considered, is security not intrinsically more important than liberty. Although abominable as a practice, people can be compensated for, and recover from torture, this of course does not hold true for those who die from a terrorist attack. No one wants to be responsible for a potentially unavoidable 9/11 type event, legislators' fears are well founded in this regard.

The question essentially being asked here, is whether 'there are times where the rights-based model of democracy [should be] supplanted by... a siege mode of democracy.'<sup>482</sup> In times of crisis, can states value collective security over individual rights and should they? Cole opines that 'the question of what is legal and the question of what is the right thing to do as a policy matter are not identical.'<sup>483</sup> Just because something can be done legally, does not mean it should be done. In terms of policy making, pursuing repressive measures may, despite being possible and even appealing, be the wrong course of action.

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<sup>480</sup> Please see the section entitled 'Torture Creates Terrorists: The Political Cost' for more information.

<sup>481</sup> Philip Rumney, *Torturing Terrorists* (Routledge 2015) 45.

<sup>482</sup> Dora Kostakopoulou, 'How to do Things with Security Post 9/11' (2008) 28 *Oxford Journal of Legal Studies* 317, 321.

<sup>483</sup> David Cole, 'The Taint of Torture: The Roles of Law and Policy in Our Descent to the Dark Side' (2012) 49(1) *Houston Law Review* 53, 55.

The fact of the matter is 'harsh' 'counter-terrorism strategies do not necessarily improve security'.<sup>484</sup> For example, '[i]t has been argued that counterterrorism policies and their implementation can promote a sense of victimisation within particular communities through the creation of what have been termed 'suspect communities'.<sup>485</sup> Here, whole communities are treated as suspects and targeted by policing techniques.<sup>486</sup> Rumney argues that hard repression such as this, 'may undermine the effectiveness of counterterrorism measures by hardening attitudes, encouraging people to join terrorist groups and leading to acts of terrorism.'<sup>487</sup> This is not to say that the use of repression cannot 'achieve increased security, but [that it] can actually make things worse by creating a backlash and enabling terrorist groups to exploit abuses and mistakes by the state.'<sup>488</sup>

The introduction of legalised torture may well have a similar effect; Muslims may be treated as suspect communities, more so than they arguably already are, leading to them being unduly subjected to the measure. This in turn, 'may provoke the kind of 'moral outrage' and personalisation of events which... may be a pathway into terrorism.'<sup>489</sup> Further, '[t]he use of torture may also serve to undermine faith in the democratic state which jihadists and Islamists already seek to portray as anti-Muslim.'<sup>490</sup>

In times of crisis, legislators often feel pressured to act in order to maintain security. In such circumstances, harsh counter-terrorism measures may become superficially attractive because they give the appearance of strength and control, this can result in states wrongly adopting siege modes of democracy. Instead, states should preserve rights based models of democracy, not only because the rights themselves are of vital importance, but because the negative impacts oppressive measures have.

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<sup>484</sup> Philip Rumney, *Torturing Terrorists* (Routledge, 2015) 16; Kent Roach, 'Must we Trade Rights for Security? The Choice Between Smart, Harsh, or Proportionate Security Strategies in Canada and Britain' (2006) 27(5) *Cardozo Law Review* 2151, 2154.

<sup>485</sup> Philip Rumney, 'Making Things Worse? Interrogational Torture and Counter-Terrorism Policy' (2013) 12(4) *Contemporary Issues in Law* 339, 346.

<sup>486</sup> *ibid*; See also Paddy Hillyard, 'Political and Social Dimensions of Emergency Law in Northern Ireland' in Jennings, A, *Justice Under Fire: The Abuse of Civil Liberties in Northern Ireland* (London: Pluto Press, 1990) 194.

<sup>487</sup> Philip Rumney, 'Making Things Worse? Interrogational Torture and Counter-Terrorism Policy' (2013) 12(4) *Contemporary Issues in Law* 339, 371.

<sup>488</sup> *ibid*.

<sup>489</sup> *ibid* 364-5.

<sup>490</sup> *ibid*.

### **Torture: What Comes Next?**

Social psychology provides the theory that ‘We judge right and wrong against the baseline of whatever we have come to consider “normal” behaviour, and if the norm shifts in the direction of violence, we will come to tolerate and accept violence as a normal response’.<sup>491</sup>

In accepting torture and allowing its practice, there is a danger that a ‘torture culture’ could be created in which its use is considered the norm. Abu Ghraib, for example, illustrates a fully predictable image of what a torture culture would look like. The flagrant and systematic abuse of detainees carried out by agencies such as the CIA within the prison ‘led to a loss of accountability’,<sup>492</sup> which ultimately bred the ‘anything-goes green light’<sup>493</sup> mentality displayed by the forces stationed there.

In such a culture, ‘you cannot reasonably expect that interrogators... will be the fastidious and well-meaning torturers’<sup>494</sup> imagined in the torture memos or ticking-bomb theory; they will not always act in ‘good faith’. Instead, there is a risk of creating a system which cultivates the idea that there are no rules, no limits, one in which detainees are tortured simply because they can be. This ‘liberal ideology of torture, which assumes that torture can be neatly confined to exceptional ticking time-bomb cases and surgically severed from cruelty and tyranny, represents a dangerous delusion.’<sup>495</sup>

A worrying question emerges: If such a culture were allowed to exist; where does it stop? For example, can security services legally kill a prisoner? In ‘A Deadly Interrogation’, Mayer describes this exact event. Manadel al-Jamadi, a detainee at Abu Ghraib, died from

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<sup>491</sup> David Luban, ‘Liberalism, Torture, and the Ticking Bomb’ in Karen J. Greenberg (ed), *The Torture Debate in America* (Cambridge University Press 2006) 50-51.

<sup>492</sup> George R Fay, ‘Fay Report: Investigation of 205th Military Intelligence Brigade's Activities in Abu Ghraib Detention Facility’ (2004) 53.

<sup>493</sup> Karen J Greenberg, ‘The Road From Abu Ghraib: A Torture Story Without a Hero or an Ending’ (The Nation 2014).

<sup>494</sup> David Luban, ‘Liberalism, Torture, and the Ticking Bomb’ in Karen J. Greenberg (ed), *The Torture Debate in America* (Cambridge University Press 2006) 51.

<sup>495</sup> *ibid* 73.

asphyxiation whilst 'shackled in a crucifixion-like pose',<sup>496</sup> his head covered with a plastic bag. Despite Jamadi's death being classified as a homicide, a death that resulted from unnatural causes, Swanner, Jamadi's interrogator, has not been charged and continues to work for the CIA. Further, no-one has been convicted in relation to the death.<sup>497</sup>

The question must therefore be asked; would people feel safe living in a society that permits our security forces to detain and torture suspects to death without consequence? 'We risk establishing a precedent that would inevitably be extended beyond its limited utilitarian case justification'.<sup>498</sup> For the

incorporation of any form of torture in a penological system... inevitably leads to its acceptance as a justifiable procedure by society generally, and involves a danger of its extension under suitable conditions. Just as familiarity with torture leads to approval of torture, so does the acceptance or ratification of torture lead to its justification.<sup>499</sup>

The Israeli Landau Commission of 1987, provides a perfect example of how this might happen. It authorised the use of 'moderate physical pressure' in exceptional situations, which, unsurprisingly, gradually became standard procedure, with 80-90% of Palestinian security detainees being tortured.<sup>500</sup>

Ex US army interrogator, Tony Lagouranis' first-hand account of his time at Abu Ghraib provides a modernised example of 'torture's metastatic tendency'.<sup>501</sup> Lagouranis confesses to using enhanced interrogational techniques, he admits that '[o]nce I got started, it seemed pointless to stop, and each escalation appeared seamless, natural, and justified.'<sup>502</sup> He continues, explaining that torture used on one category of prisoners soon spread to all

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<sup>496</sup> Jane Mayer, 'A Deadly Interrogation' (*The New Yorker*, 14 November 2005) <<http://www.newyorker.com/magazine/2005/11/14/a-deadly-interrogation>> accessed 24 March 2016.

<sup>497</sup> *ibid.*

<sup>498</sup> Alan M Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (Yale University Press 2002) 146.

<sup>499</sup> George Riley Scott, *A History of Torture* (1995 edn, Senate 1940) 10.

<sup>500</sup> Kenneth Roth, 'Justifying Torture' in Kenneth Roth and Minky Worden (eds) *Torture: Does It Make Us Safer? Is It Ever Ok? A Human Rights Perspective* (The New Press 2005) 198.

<sup>501</sup> Henry Shue, 'Torture' (1978) 7(2) *Philosophy and Public Affairs* 124, 143.

<sup>502</sup> Tony Lagouranis, *Fear Up Harsh* (New York: Caliber 2007) 146.

prisoners and that the purpose behind the interrogations changed, '[w]e moved from seeking intelligence, our original justification, to seeking confessions'.<sup>503</sup>

The current context is no different. It would not be long before the limited use of torture reported during the conflicts in Iraq and Afghanistan spread beyond the confinements of incarceration to broader application on US soil. In fact, there is some evidence of this already; in Chicago between 1970 and 1990, 90 criminal suspects complained of physical abuse at the hands of a 'police torture ring' that forced confessions. 'The abuse tactics described by the suspects included plastic bags placed over the head for the purpose of suffocation, electric shocks to the face and genitals, severe beatings, burning with... and putting the barrel of a gun in the mouth or against the head.'<sup>504</sup> It is therefore not inconceivable that the use of interrogational torture could extend beyond its current parameters to use on suspects across the US. In the enduring words of Montesquieu; 'An injustice committed against anyone is a threat to everyone.'<sup>505</sup> The acceptance of torture not only affects its victims, but also threatens the general population's civil liberties.

As such, before pursuing pro-torture policies, states should consider the adverse effects they may have. 'Stated most starkly, the damaging social consequences of a program of torture interrogation evolve from institutional dynamics that are independent of the original moral rationale.'<sup>506</sup> That is to say, while the intentions behind the implementation of a programme may be virtuous, draconian-esque policies may well lead to slippery slopes and unintended consequences. O'Donohue et al summarise that employing torture only serves to undermine trust in key social institutions; the 'misuse of medical professionals,<sup>507</sup> misapplication of scientific knowledge... and compromised integrity of the legal system<sup>508</sup> lead[s] to a view of

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<sup>503</sup> *ibid* 246.

<sup>504</sup> Mark Costanzo and Allison Redlich, 'Use of Physical and Psychological Force in Criminal and Military Interrogations' abstract 2; See also Susan Bandes, 'Patterns of Injustice: Police Brutality in the Courts' (1999) 47(3) *Buffalo Law Review* 1275, 1275-1341.

<sup>505</sup> Douglas Philips, *Human Rights* (Chelsea House Publishers 2009) 110.

<sup>506</sup> Jean Maria Arrigo, 'A Utilitarian Argument Against Torture Interrogation of Terrorists' (2004) 10(3) *Science and Engineering Ethics* 22.

<sup>507</sup> Please see section entitled 'Torture and the Medical Community'.

<sup>508</sup> Please see section entitled 'The Absolute Prohibition as an Archetype – A Road to Slippery Slopes'.

these institutions as corrupt and corruptible.<sup>509</sup> This ultimately causes irreparable damage within societies that condone torture.<sup>510</sup>

### **The Absolute Prohibition as an Archetype - A Road to Slippery Slopes**

The absolute prohibition on torture represents far more than a preventative measure; it underpins countless other laws, making it an archetype. 'Thus, by undermining the archetype of the prohibition of torture one also undermines the prohibition of lesser forms of brutality. The whole set of injunctions against brutality would unravel and the character of the legal system would be corrupted.'<sup>511</sup>

Waldron poses the question, '[w]hy does the prospect of authorising torture... shock the conscience of a scrupulous lawyer?'<sup>512</sup> He suggests that the answer lies in the 'specific effect on law' it would have; the 'systematic corrupting effect of [torture] becoming one of the normal items on the menu of practical consideration'.<sup>513</sup> In order to demonstrate his concerns regarding this, Waldron offers an analogy:

Suppose an individual, previously honest, is offered a bribe. Friends warn him against the first act of dishonesty, not just for itself, but because of what it is likely to do to his character. Part of that is concern about the effect on future decisions of this man via the change in his character that this decision has led to. But corruption is more than just an enhanced probability of future dishonest acts. It involves a present inherent loss: now the man no longer has the sort of character that is set against dishonesty; he is no longer has the standing to condemn and oppose dishonesty that an honest man would have.<sup>514</sup>

This analogy can be applied to the prohibition on torture; not only does a state's choice to employ torture effect its future decisions, making the state more likely to utilise the practise again, but worse, now the state cannot condemn with conviction or effectiveness the actions

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<sup>509</sup> Vittorio Bufacchi and Jean Marria Arrigo, 'Torture, terrorism and the state: A refutation of the ticking-bomb argument' (2006) 23 *Journal of Applied Philosophy* 355–373; William O'Donohue et al, 'The Ethics of Enhanced Interrogations and Torture: A Reappraisal of the Argument' (1997) 27(2) *Ethics and Behaviour* 109, 113.

<sup>510</sup> William O'Donohue et al, 'The Ethics of Enhanced Interrogations and Torture: A Reappraisal of the Argument' (1997) 27(2) *Ethics and Behaviour* 109, 113.

<sup>511</sup> Uwe Steinhoff, 'Torture — The Case for Dirty Harry and against Alan Dershowitz' (2006) 23(3) *Journal of Applied Philosophy* 337, 350.

<sup>512</sup> Jeremy Waldron, *Torture, Terror and Trade-Offs* (Oxford University Press 2010) 222.

<sup>513</sup> *ibid.*

<sup>514</sup> *ibid* 245.

of other states that choose to torture, it can no longer assert those principles<sup>515</sup> which were previously important to it.<sup>516</sup> By permitting torture, or defining what most would regard as 'torture' as 'not really torture', states abandon their commitments to the prohibition on torture, they move from a situation in which their law had a certain character, a general virtue of non-brutality, to a situation in which that character would be compromised or corrupted by the permitting of this most brutal of practices.<sup>517</sup>

However, Dershowitz explains that we have no such commitment to an unwavering prohibition on torture. Stating that 'our commitment instead is to the way of the hypocrites: [our governments] declare that they abide by the rule of law, but turn a blind eye to what goes on beneath the surface.'<sup>518</sup> While this statement may be true - there is certainly plenty of evidence of America employing torture whilst claiming to abide by its prohibition - it misses the point; the issue at discussion here is that of legalising torture, and doing so is very different from using it covertly.

Lode warns that legalising torture may lead to a corrupting of the decision-making process; 'by allowing each successive case on a slope, judges' views on the law may begin to change in ways that lead them to neglect their possible hesitancy to step on the slope in the first place,'<sup>519</sup> even going through the process of considering a legal basis for torture may alter our views of the practice.<sup>520</sup> Therefore, arguments such as the ticking-bomb hypothetical can be dangerous; they expose the possibility of justifiable torture, and in doing so 'decrease torture's deplorability in the minds of others, lending it a veil of legitimacy.'<sup>521</sup>

As such, Wisnewski labels the Ticking Bomb theoretical, 'a wedge argument. It is the first step in defending a more general policy allowing torture in some instances, even if these

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<sup>515</sup> Such as anti-torture and abuse etc.

<sup>516</sup> Please see section entitled 'Torture Creates Terrorists: The Political Cost and the Risk to Allied Troops'.

<sup>517</sup> Jeremy Waldron, *Torture, Terror and Trade-Offs* (Oxford University Press 2010) 246.

<sup>518</sup> Alan Dershowitz, 'Tortured Reasoning' in Stanford Levinson (ed), *Torture: A Collection* (Oxford University Press 2004) 274.

<sup>519</sup> Eric Lode, 'Slippery Slope Arguments and Legal Reasoning' (1999) 87(6) *California Law Review* 1469, 1516.

<sup>520</sup> *ibid.*

<sup>521</sup> Jeremy Wisnewski, 'It's About Time: Defusing the Ticking Bomb Argument' (2008) 22(1) *International Journal of Applied Philosophy* 103, 106.

instances are strictly supervised and quite exceptional.<sup>522</sup> He suggests that it is easy for many to respond to such arguments with a slippery slope objection.<sup>523</sup> Slippery slope arguments caution that 'if you perform act A<sub>1</sub>, justifying it by its desirable result R<sub>1</sub>, you will also, inevitably, bring about undesirable results R<sub>2</sub>, R<sub>3</sub>, R<sub>4</sub> etc'.<sup>524</sup> Lode submits that '[s]uch arguments generally hold that we should resist a particular... policy, either on the grounds that allowing it could lead us to allow another practice or policy that is clearly objectionable, or on the grounds that we can draw no rationally defensible line between the two.'<sup>525</sup> In the current context, in order to avoid torture and other similar practices becoming pervasive, we must adopt a strict no tolerance policy for them.<sup>526</sup>

However, Bagaric and Clarke contend that this line of argument is somewhat fallacious. They point out that 'laws that permit citizens to use self-help measures to inflict... harm such as self-defense... have not resulted in significant abuses. This is despite the fact that such laws are 'gray' in application and the lawfulness of the conduct is generally evaluated after that fact'.<sup>527</sup> On this basis, it is arguable that '[p]ermitting torture in extreme cases [would] not amount to permitting it in all cases.'<sup>528</sup> It is 'insufficient to simply point out that a current policy might lead to one that is substantially worse.'<sup>529</sup> Wisnewski asserts that '[t]his 'might', merely expresses a worry; it does not constitute an argument... slippery slope arguments are objections only when they are based on evidence (like historical precedent). They cannot simply be invented.'<sup>530</sup>

Lode suggests that slippery slopes are dangerous because they 'often take the form of a continuum: Each case on the slope will tend to differ from its successive case only

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<sup>522</sup> *ibid* 105.

<sup>523</sup> *ibid*.

<sup>524</sup> Yuval Ginbar, *Why Not Torture Terrorists?* (Oxford University Press 2008) 38.

<sup>525</sup> Eric Lode, 'Slippery Slope Arguments and Legal Reasoning' (1999) 87(6) *California Law Review* 1469, 1469.

<sup>526</sup> Jeremy Wisnewski, 'It's About Time: Defusing the Ticking Bomb Argument' (2008) 22(1) *International Journal of Applied Philosophy* 103, 105.

<sup>527</sup> Mirko Bagaric and Julie Clarke, *Torture* (New York Press, 2007) 46.

<sup>528</sup> Jeremy Wisnewski, 'It's About Time: Defusing the Ticking Bomb Argument' (2008) 22(1) *International Journal of Applied Philosophy* 103, 108.

<sup>529</sup> *ibid* 105.

<sup>530</sup> *ibid*.

incrementally.<sup>531</sup> This is particularly problematic because the notion of precedent plays a large role in most legal systems. 'If a court is confronted with a succession of cases, each of which differs from the previous case only incrementally, the court may take its decision to allow L as a precedent for allowing M; it may then take its decision to allow M as a precedent for allowing N',<sup>532</sup> and so on until you reach Z.

Machiavelli famously stated: 'Everyone sees what is happening but not everyone feels its consequences.'<sup>533</sup> This assertion can be applied to the context of slippery slopes. It is possible to see that judgment M has been reached because of precedent L, however, what is not clear, are the lasting consequences of this decision. It is perhaps predictable that judgment N is made as a result of precedent M, but the idea that this may eventually lead to ruling Z, is often beyond consideration. In this manner, slippery slopes go undetected; courts approve the use of torture in increasingly less appropriate circumstances, based upon the judgements made in previous cases because they are not aware of the lasting effects their decisions may have.

In spite of this, it is possible to argue that '[e]ven if legalising torture puts us on a slippery slope, could we not stop the slide downwards? Dershowitz proposes a 'principled break':<sup>534</sup> suggesting that a strict set of rules regulating the use of torture could prevent any slide occurring. For example, 'if nonlethal torture were legally limited to convicted terrorists who had knowledge of future massive terrorist acts, were given immunity, and still refused to provide the information',<sup>535</sup> then not only would any torture be justified, but confining the use of torture would be possible as a clear line had been drawn. The point is, there are morally relevant differences between employing torture in the circumstances Dershowitz suggests and using it in other cases, these can be appealed to in order to distinguish between the two.

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<sup>531</sup> Eric Lode, 'Slippery Slope Arguments and Legal Reasoning' (1999) 87(6) *California Law Review* 1469, 1506.

<sup>532</sup> *ibid.*

<sup>533</sup> David Wootton, *Modern Political Thought: Readings from Machiavelli to Nietzsche* (Indianapolis, Ind; Hackett Pub 1996) 41.

<sup>534</sup> Uwe Steinhoff, 'Torture — The Case for Dirty Harry and against Alan Dershowitz' (2006) 23(3) *Journal of Applied Philosophy* 337, 350.

<sup>535</sup> Alan Dershowitz, *Why Terrorism Works: Understanding the Threats, Responding to the Challenge* (Yale University Press, 2002) 147.

Therefore, we are not logically committed to accepting torture in every case merely because it was approved in one set of circumstances.<sup>536</sup>

However, Dershowitz's talk of 'principled breaks' does nothing to address the 'symbolic setback in the world-wide campaign against human rights abuses'<sup>537</sup> that legitimising torture would result in. Such an undermining of the absolute prohibition on torture 'cannot be compensated, probably not even mitigated, by recourse to alleged "principled breaks".'<sup>538</sup> As such, the risks associated with legalising any degree of torture, both immediate and future, far outweigh the limited potential for positive results.

### **Torture and the Medical Community**

Arrigo submits that 'Government-sponsored torture generates deep conflicts within medical communities and between governments and their medical communities'<sup>539</sup> because it routinely involves the participation of medical personnel. 'Medical professionals determine the types of torture a person can endure, monitor the person for endurance under torture, resuscitate the person, treat the person to prepare for further torture, and administer non-therapeutic drugs.'<sup>540</sup> Further, '[t]o cover up torture physicians [even] falsify health certificates, autopsy reports, and death certificates.'<sup>541</sup> This creates tension within medical communities, as many of those working in the profession view any participation in torture as antithetical to the ideals that they are supposed to uphold and represent. For example, in response to Turkish physicians establishing torture treatment centres, Turkish 'authorities demanded their patient lists and brought [them] to trial, accusing them of criticizing the

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<sup>536</sup> James Rachels, 'Euthanasia', in Tom Regan (ed), *Matters of Life And Death* (McGraw-Hill 1986) 69-70.

<sup>537</sup> Uwe Steinhoff, 'Torture — The Case for Dirty Harry and against Alan Dershowitz' (2006) 23(3) *Journal of Applied Philosophy* 337, 350.

<sup>538</sup> *ibid.*

<sup>539</sup> Jean Maria Arrigo, 'A Utilitarian Argument Against Torture Interrogation of Terrorists' (2004) 10(3) *Science and Engineering Ethics* 5-6.

<sup>540</sup> *ibid* 5; See also Vesti P. and Somnier FE, 'Doctor Involvement in Torture: A Historical Perspective' (1994) 82-89.

<sup>541</sup> Jean Maria Arrigo, 'A Utilitarian Argument Against Torture Interrogation of Terrorists' (2004) 10(3) *Science and Engineering Ethics* 5.

government.<sup>542</sup> Shockingly, 'Turkish physicians have also been harassed, arrested, and even tortured'.<sup>543</sup>

It has, however, been argued by some that '[i]f torture becomes inevitable it is necessary to humanise it and have an attending physician to moderate it, and even stop it if, in his medical opinion, it becomes physically dangerous'.<sup>544</sup> In order for this to be possible, the involvement of medical personnel is undoubtedly crucial, as without it, the practise risks irreversibly damaging those subjected to it.

This line of argument is, however, somewhat self-defeating; torture damages its victims regardless of the presence or absence of medical professionals to oversee it, its very nature causes physical or psychological harm, and it is for this reason that disagreements and hostilities have arisen.

The CIA's post 9/11 torture programme provides a modern illustration of the conflict caused by the involvement of medical staff in enhanced interrogation. '[H]uman-rights-minded physicians say [Office of Medical Staff]<sup>545</sup> violated a fundamental obligation of medical ethics – to do no harm – and instead provided agency torturers with a physiologically informed blueprint for inflicting pain.'<sup>546</sup> They criticise the OMS for providing 'precise specifications for enforcing sleep deprivation, limiting the caloric intake of detainees' food, and the proper positions for waterboarding, as outlined in a 2004 document providing 'guidelines on medical and psychological support' for torture.<sup>547</sup>

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<sup>542</sup> *ibid* 6; See also Döcker H, 'Turkey continues harassment, arrests, and torture of medical doctors' (2002) 53.

<sup>543</sup> Jean Maria Arrigo, 'A Utilitarian Argument Against Torture Interrogation of Terrorists' (2004) 10(3) *Science and Engineering Ethics* 6; See also Döcker H, 'Turkey continues harassment, arrests, and torture of medical doctors' (2002) 53

<sup>544</sup> Lionel Wilson, 'Torture, doctors and the World Medical Association' (1983) 2(5) *Medical Journal of Australia* 236-239.

<sup>545</sup> Hereafter OMS.

<sup>546</sup> Spencer Ackerman, 'CIA medical staff gave specifications on how to torture post-9/11 detainees' (*The Guardian*, 15 June 2016) <<https://www.theguardian.com/us-news/2016/jun/15/cia-torture-program-september-11-medical-staff-instructions-details>> accessed 30 December 2016.

<sup>547</sup> *ibid*; Central Intelligence Agency, 'OMS Guidelines On Medical And Psychological Support To Detainee Rendition, Interrogation, And Detention' 1 December 2014 <<https://www.cia.gov/library/readingroom/document/6541536>> accessed 30 December 2016.

By resisting the use of torture, the medical community demonstrates that professionals within their field will not blindly follow government policies that are contrary to their principles simply because the state declares it necessary. Vincent Lacopino, medical director of Physicians for Human Rights, states '[t]he guidelines are an affront to my profession, the medical and mental-health professions, and health professionals should know better and be ashamed of defending a document like this'.<sup>548</sup>

Lacopino's vehement condemnation of the OMS' guidelines indicate that the national security justification for torture does not suspend the ethics codes of professionals whose participation is required.<sup>549</sup> Therefore, in order to avoid conflict, proponents of coercive interrogation must consider the negative effects that the involvement of health care professionals in torture can have.<sup>550</sup>

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<sup>548</sup> Spencer Ackerman 'CIA medical staff gave specifications on how to torture post-9/11 detainees' (*The Guardian*, 15 June 2016) <<https://www.theguardian.com/us-news/2016/jun/15/cia-torture-program-september-11-medical-staff-instructions-details>> accessed 30 December 2016

<sup>549</sup> Jean Maria Arrigo, 'A Utilitarian Argument Against Torture Interrogation of Terrorists' (2004) 10(3) *Science and Engineering Ethics* 6.

<sup>550</sup> This extends beyond the medical profession, to psychologists, lawyers and any professional whose participation in torture may be required.

## Chapter Eight: Conclusion

'The history of torture seems as long as the history of man.'<sup>551</sup> The first people to use torture as a definitive military policy were the Assyrians,<sup>552</sup> a people dating back to 1900 BCE<sup>553</sup> who used torture to intimidate, control and execute their enemies.<sup>554</sup> Whilst the motives driving torture as a practice may arguably have changed; for example the Spanish Inquisition sought confessions, not information, the actual 'use of torture follows the same patterns in contemporary times as it has in earlier historical periods'.<sup>555</sup>

A 1976 CIA observation of Soviet leaders in times of stress found that 'When feelings of insecurity develop within those holding power',<sup>556</sup> they 'become increasingly suspicious and put great pressures upon the secret police to obtain arrests and confessions. At such times police officials are inclined to condone anything... and brutality may become widespread.'<sup>557</sup>

This theory can be applied to the actions of the Bush administration post-9/11. America had just suffered a large-scale terrorist attack, leaving the administration feeling threatened. As a consequence, they entered a state of crisis, passing legislation authorising 'all necessary and appropriate force'<sup>558</sup> to bring the perpetrators of 9/11 to justice. This mentality, based on a perceived need to act in order to regain control, led to pressure being placed on American agencies to quickly obtain intelligence beneficial to the 'war on terror'. Arguably, this led to the acquisition of intelligence being prioritised over the moral and legal constraints on torture.

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<sup>551</sup> Amanda Clinton and others, 'Perspectives on Torture in Latin America' in Kathleen Malley-Morrison and others (eds), *International Handbook of War, Torture, and Terrorism* (Springer 2013) 619.

<sup>552</sup> Daniel Mannix, *The History of Torture* (eNet Press 2014) 24.

<sup>553</sup> Ancient History Encyclopaedia, Joshua J. Mark, 'Assyria' 2014 <<http://www.ancient.eu/assyria/>> accessed 12 April 2016.

<sup>554</sup> Daniel Mannix, *The History of Torture* (eNet Press 2014) 24.

<sup>555</sup> Christopher J. Einolf, 'The Fall and Rise of Torture: A Comparative and Historical Analysis\*' (2007) 25(2) *Sociological Theory* 101, 101.

<sup>556</sup> Lawrence E Hinkle and Harold G Wolff. 'Communist interrogation and indoctrination of "enemies of the states"; analysis of methods used by the Communist state police (a special report)' (1956) 76(2) *A.M.A. Archives of Neurology & Psychiatry* 115, 135.

<sup>557</sup> *ibid.*

<sup>558</sup> S.J.Res.23: Authorization for Use of Military Force 2001 s.2(a).

McCoy summarises that, 'the powerful often turn to torture in times of crisis, not because it works but because it salves their fears and insecurities with the psychic balm of empowerment.'<sup>559</sup> As the justification of torture is not based upon legality or effectiveness, but rather the perceived necessity to act in times of crisis, it is foreseeable that torture will continue to be used in response to events such as 9/11, the nature of which serve to blur the lines of what is and is not justifiable, thus perpetuating the cycle the torture debate exists in.

Evidence suggests that the present 'torture cycle' continues to threaten the absolute prohibition on torture. Current American national poll statistics<sup>560</sup> indicate that there exists more support for torture than ever before; 60 percent of those surveyed agreed that the military should be allowed to use some<sup>561</sup> enhanced interrogational techniques to gain information from suspected terrorists. As significant as these statistics are in and of themselves, when compared with the 2006 BBC poll, in which 36 percent of participants agreed that 'some' degree of torture was acceptable,<sup>562</sup> and a 2014 public opinion poll run by Washington Post-ABC News,<sup>563</sup> which revealed that 58 percent of participants thought torture of suspected terrorists was 'sometimes or often' justified,<sup>564</sup> they become all the more significant; it becomes possible to suggest an upward trend in the public's support of torture. Given the tough anti-torture stance adopted by President Obama over the last ten years, this is surprising; the 24 percent increase in public support for torture over this period fails to reflect the additional legislation passed by the Obama administration<sup>565</sup> and represents a significant threat to the prohibition on torture.

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<sup>559</sup> Alfred W McCoy, *A Question of Torture* (Holt Paperbacks 2007) 206.

<sup>560</sup> I Side With, 'Should the military be allowed to use enhanced interrogation techniques, such as waterboarding, to gain information from suspected terrorists?' (ISideWith.com, Ongoing Poll, starting on 9 March 2016) <<https://www.isidewith.com/poll/2121995048>> accessed 9 July 2017.

<sup>561</sup> From a total of 2,178,118 participants, 47% answered 'Yes'; 6% answered 'Yes, but only as a last resort'; 3% answered 'Yes, but only if they are convicted terrorists'; 2% answered 'Yes, allow the use of psychological but not physical tactics'; 2% answered 'Yes, we must use any means necessary to prevent terrorism; with 40% giving answers categorized under 'No'.

<sup>562</sup> BBC, 'The ticking-bomb problem' (bbc.co.uk, 2006) <[http://www.bbc.co.uk/ethics/torture/ethics/tickingbomb\\_1.shtml](http://www.bbc.co.uk/ethics/torture/ethics/tickingbomb_1.shtml)> accessed 3 March 2016.

<sup>563</sup> The Washington Post, 'CIA Interrogations: The Ends Justify the Means' December 2014 <<http://apps.washingtonpost.com/g/page/politics/washington-post-abc-news-poll/1514/>> accessed 11 July 2017.

<sup>564</sup> From a total of 1000 participants, 40% answered 'Justified' and 17% answered 'Often', when combined equalling 58%.

<sup>565</sup> See Chapter Three.

What is perhaps more worrying than the seemingly inescapable nature of torture, in both its historical prevalence and current public support, is US President, Donald Trump's recent comments on the subject. President Trump showed his support for waterboarding and other barred interrogation techniques at a campaign event in February, saying '[d]on't tell me it doesn't work — torture works... Half these guys [say]: 'Torture doesn't work.' Believe me, it works.'<sup>566</sup> The fact that the most powerful man in the world is an advocate of torture and perhaps worse; Trump acknowledged that he would 'bring back waterboarding and... bring back a hell of a lot worse than waterboarding,'<sup>567</sup> in an interview on 'This Week' with George Stephanopoulos, is extraordinarily concerning.

The support displayed for torture at both public and governmental levels make the continued practice of torture seem almost inevitable. This, however, does not render obsolete the perspectives against torture examined throughout this thesis. The absolute prohibition on torture represents an intolerance of the degradation of rights and personal securities of individuals, which should be upheld regardless of adherence to it.

The case opposing torture can be categorised into three main tenets; moral, legal, and practical.

In *Veritatis Splendor*, John Paul II decrees: 'Whatever violates the integrity of the human person, such as mutilation, physical and mental torture and attempts to coerce the spirit...: all these... are a disgrace...'<sup>568</sup> This statement aptly portrays the immorality of torture; it not

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<sup>566</sup> Jenna Johnson, 'Trump says 'torture works,' backs waterboarding and 'much worse' (*The Washington Post*, 17 February 2017) <[https://www.washingtonpost.com/politics/trump-says-torture-works-backs-waterboarding-and-much-worse/2016/02/17/4c9277be-d59c-11e5-b195-2e29a4e13425\\_story.html?utm\\_term=.730bda839d20](https://www.washingtonpost.com/politics/trump-says-torture-works-backs-waterboarding-and-much-worse/2016/02/17/4c9277be-d59c-11e5-b195-2e29a4e13425_story.html?utm_term=.730bda839d20)> accessed 6 March 2017.

<sup>567</sup> Chris Cillizza, 'Donald Trump's Answer on Torture is Really Out There – Even for Trump' (*The Washington Post*, 8 February 2017) <<https://www.washingtonpost.com/news/the-fix/wp/2016/02/08/donald-trumps-answer-on-torture-is-really-out-there-even-for-trump/>> accessed 5 July 2017.

<sup>568</sup> John Paul II, *Veritatis Splendor* (echoing *Gaudium et spes* 27) (1993) 80 <[http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf\\_jp-ii\\_enc\\_06081993\\_veritatis-splendor.html](http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_06081993_veritatis-splendor.html)> accessed on 10 April 2016.

only violates the integrity of the torturer, potentially scarring them for life,<sup>569</sup> but also mutilates the victim's body and mind to the point where recovery can take a lifetime.<sup>570</sup>

The legal instruments discussed in chapter three make clear the domestic and international law's opposition to torture. Any deviation plainly undermines them and risks the first step onto a slippery slope.<sup>571</sup> MacMaster asserts that 'Torture invariably [goes] hand-in-hand with a fatal corruption... of the rule of law';<sup>572</sup> as torture is so obviously prohibited by numerous legal instruments, any practice of it disregards the rule of law, thus lessening its value. In the words of Alberto Mora, 'Where cruelty exists, law does not.'<sup>573</sup>

The main practical argument against torture is simple; it often does not work.<sup>574</sup> If, as demonstrated by the Senate report on CIA torture,<sup>575</sup> torture is ineffective, it cannot be justifiable, and as such, should not be practised. Moreover, there is evidence to suggest torture actually heightens the threat posed by terrorism;<sup>576</sup> creating terrorists and risking allied lives via 'the mobilisation of a violent backlash.'<sup>577</sup> With regards to the proposed limited use of torture, for example where controlled through torture warrants, the 'historical record suggests that legitimising torture normalises it, making it more, not less frequent.'<sup>578</sup> As such, any concession made on the absolute prohibition of torture would inadvertently lead to its wider use.<sup>579</sup> Further, it has been suggested that 'the legitimisation of torture by the world's

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<sup>569</sup> Please see the section entitled 'The Effect on the Torturer' in chapter six of this thesis.

<sup>570</sup> U.S. Government Publishing Office, 'EXPRESSING SENSE OF CONGRESS IN SUPPORT OF VICTIMS OF TORTURE' Congressional Record (Bound Edition), Volume 147 (2001), Part 9 12721 <<https://www.gpo.gov/fdsys/pkg/CRECB-2001-pt9/html/CRECB-2001-pt9-Pg12721.htm>> accessed 15 April 2016.

<sup>571</sup> Please see section entitled 'The Absolute Prohibition as an Archetype - A Road to Slippery Slopes' in chapter six of this thesis.

<sup>572</sup> Neil MacMaster, 'Torture: from Algiers to Abu Ghraib' (2004) 46(2) *Race and Class* 1, 6.

<sup>573</sup> Alberto Mora, former General Counsel of the United States Navy 'Profile in Courage Award Acceptance Speech' JFK Library 2006 <<http://www.jfklibrary.org/Events-and-Awards/Profile-in-Courage-Award/Award-Recipients/Alberto-Mora-2006.aspx?t=3>> accessed 15 April 2016.

<sup>574</sup> Patrick Cockburn, 'CIA torture report: It didn't work then, it doesn't work now' (*The Independent*, 14 December 2014) <<http://www.independent.co.uk/voices/comment/torture-it-didnt-work-then-it-doesnt-work-now-9923288.html>> accessed 15 April 2016.

<sup>575</sup> Spencer Ackerman and others, 'Senate report on CIA torture claims spy agency lied about 'ineffective' program' (*The Guardian*, 9 December 2014) <<http://www.theguardian.com/us-news/2014/dec/09/cia-torture-report-released>> accessed 15 April 2016.

<sup>576</sup> Please see section entitled 'Torture Creates Terrorists: The Political Cost and the Risk to Allied Troops' in chapter six of this thesis.

<sup>577</sup> Philip Rumney, *Torturing Terrorists* (Routledge 2015) 198.

<sup>578</sup> Alex Bellamy, 'No Pain, no gain? Torture and ethics in the war on terror' (2006) 82(1) *International Affairs* 121, 148.

<sup>579</sup> Please see section entitled 'Torture: What Comes Next' in chapter six of this thesis.

leading democracy would provide a welcome justification for its more widespread use in other parts of the world.<sup>580</sup> The political consequence of such a legitimisation would strip America of the moral standing to object to, and sanction against, human rights violations made by other nations. This would represent a serious blow to the international human rights system and the global effort to eradicate torture.<sup>581</sup> By way of evaluation, Gross asserts that a correctly calibrated cost-benefit analysis must always lead to the same conclusion; ‘that torture should not be allowed regardless of any specific context.’<sup>582</sup> He suggests that any contrary conclusion ignores the long-term and systemic implications summarised above, and instead, ‘results from a distorted focus on isolated cases’.<sup>583</sup>

Proponents of torture seek to legitimise its practice through citing the necessity defence, the ticking-bomb theory linked with citizens’ rights to life, or though proffering the justifications provided by the torture memos. Torture advocates further assert that in the case of terrorism, states should not be restricted by conventions such as CAT; by choosing to engage in terrorism, terrorists have forfeited their rights, and any rights that they have retained, are not equal to those of who they threaten.<sup>584</sup>

The case supporting torture is, as it is submitted, much weaker than that against it, but that is not germane. ‘The fact is, that every democracy confronted with a genuine choice of evils between allowing many of its citizens to be killed by terrorists, or employing some forms of torture to prevent such multiple deaths, will opt for the use of torture’<sup>585</sup> as a last resort. Here, Dershowitz cuts straight to the point; regardless of arguments against its use, torture will always be employed in dire situations, making it arguably justifiable.

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<sup>580</sup> Alan Dershowitz, ‘The Case for Torturing the Ticking Bomb Terrorist’ in James E. White, *Contemporary Moral Problems: War, Terrorism, Torture and Assassination* (4<sup>th</sup> edn, Wadsworth Publishing Co Inc 2011) 65.

<sup>581</sup> UN Human Rights Council, ‘New call from national and international rights groups on the need to ensure accountability for the U.S. CIA Torture Program’ 15 June – 3 July.

<sup>582</sup> Oren Gross, ‘The Prohibition on Torture and the Limits of Law’ Torture’ in Stanford Levinson (ed), *Torture: A Collection* (Oxford University Press, 2004) 230.

<sup>583</sup> *ibid.*

<sup>584</sup> Please see sections entitled ‘Terrorists Don’t Play By the Rules, Why Should We?’ and ‘A Right to Life?’ in chapter six of this thesis.

<sup>585</sup> Alan Dershowitz, ‘The Case for Torture Warrants’ 7 December 2011

<<http://blogs.reuters.com/great-debate/2011/09/07/the-case-for-torture-warrants/>> accessed 14 April 2016.

Whilst Dershowitz believes that torture is inevitable, and therefore that the absolute ban is, as a matter of practicality, unrealistic, 'there is independent value in upholding the myth that torture is absolutely prohibited.'<sup>586</sup> Schauer explains that '[r]esisting the inevitable is not to be desired because it will prevent the inevitable, but because it may be the best strategy for preventing what is less inevitable but more dangerous';<sup>587</sup> for example, 'the expanded use of interrogational torture to less-than-catastrophic cases... [Further,] the insistence on an absolute ban on torture may slow down the rush to resort to torture practices even in truly exceptional cases.'<sup>588</sup> Based on this logic, I, like Posner, believe that it is better 'to leave in place the customary legal prohibitions, but with the understanding that of course they will not be enforced in extreme circumstances.'<sup>589</sup>

I conclude by drawing attention to a passage from Robert Bolt's, *A Man for All Seasons*: In response to his son-in-law's urging to 'cut down every law in England' to get after the devil. Sir Thomas Moore replied 'if you cut them down... d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the devil the benefit of law, for my own safety's sake.'<sup>590</sup>

My response: torture may be justified, not to 'get after the devil', not for retribution or justice, but in an attempt to save innocent lives. It is hard to imagine that most, with perhaps the exception of ultra strict pacifists, would not support torture as a last resort. For example, if thousands of lives hung in the balance, with only a remote chance that torture would result in them being saved, I believe that the overwhelming majority of people would adopt a utilitarian perspective in taking those odds over choosing to do nothing.

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<sup>586</sup> Oren Gross, 'The Prohibition on Torture and the Limits of Law' Torture' in Stanford Levinson (ed), *Torture: A Collection* (Oxford University Press, 2004) 234-235.

<sup>587</sup> Frederick Schauer, 'May Officials Think Religiously?' (1986) 27 William and Mary Law Review 1075, 1085.

<sup>588</sup> Oren Gross, 'The Prohibition on Torture and the Limits of Law' Torture' in Stanford Levinson (ed), *Torture: A Collection* (Oxford University Press, 2004) 235.

<sup>589</sup> Richard A Posner, 'Torture, Terrorism and Interrogation' in Stanford Levinson (ed), *Torture: A Collection* (Oxford University Press, 2004) 296.

<sup>590</sup> Robert Bolt, *A Man for All Seasons* (Heinemann 1960).

It seems, therefore, implausible to support the absolutist notion that torture should not be used in any circumstance.<sup>591</sup> Montaigne wrote: 'Nature, I fear, attaches to man some instinct for inhumanity'.<sup>592</sup> Perhaps this is the 'inhumanity' Montaigne spoke of; a predisposition to act in desperate times, as the Bush administration and Israelis did before them.

We too might choose to act, placing us pertinently into the category described by McCarthy;<sup>593</sup> we might oppose the legitimisation of torture, recognising its abhorrent nature, but presented with a scenario as just discussed, would condone its use. As such, it is arguable that torture may be viewed as morally justifiable in certain circumstances. Does opting for the lesser of two evils label us villains? Is it so despicably inhuman to torture when confronted with such a situation? Perhaps not.

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<sup>591</sup> Please see section entitled 'The Case Against Moral Absolutism' in chapter six of this thesis.

<sup>592</sup> Michel Montaigne, *Of Cruelty The Complete Dissertations of Montaigne* (Donald M. Frame trans 1958) 316.

<sup>593</sup> The opening quote of the 'Introduction'.

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