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Torture Redux: The Case for Robust Interrogation

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ABSTRACT

International law has established a set of conventions that in effect, ban the use of torture against prisoners, detainees and other non-combatants. Torture is morally illegitimate and repulsive to contemplate. Nevertheless, the threat posed by international terrorists is real. The means by which the western democracies can counter it must be appropriate, but still fall within the law. Setting in place a carefully structured and controlled framework with a graduated series of increasingly severe interrogation techniques for specific use against the most hardened captured terrorists is an effective means to counter the threat. Robust, but legal, interrogation works.

Torture Redux: The Case for Robust Interrogation

> "Torture is repulsive. It is deliberate cruelty, a crude and ancient tool of political oppression. It is commonly used to terrorize people, or to wring confessions out of suspected criminals who may or may not be guilty. It is the classic shortcut for a lazy or incompetent investigator. Horrifying examples of torturers' handiwork are catalogued and publicized annually by Amnesty International, Human Rights Watch, and other organizations that battle such abuses worldwide. One cannot help sympathizing with the innocent, powerless victims showcased in their literature. But professional terrorists pose a harder question. They are lockboxes containing potentially life-saving information. . . . But we pay for (their) silence in blood[1]

Introduction

The Laws of Armed Conflict (LOAC) were developed through the world's experience with conflict and war. Many were formally codified in the twentieth century in treaties such as the Geneva Conventions, the Charter of the United Nations, and more recently, the Anti-personal Mine Convention. Moreover, although written treaties between nations set the formal wording of the LOAC, in fact, it is actual state practices, especially the leading world powers state actions which give the laws their vigour and keep them relevant as the times and the technologies

associated with armed conflict develop. These principles were made explicit in the Nuremberg Judgement, which followed WW II:

> "The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts. This law is not static, but by continual adaptation follows the needs of a changing world." [2]

The LOAC do not prohibit war, nor do they impede any nation from taking action to protect its citizens whether by taking military action in the field, or by gathering critical intelligence in order to act. Necessity is the principle by which states act and necessity must always be tempered by proportionality for those state actions to fall within the LOAC. The tension and balance between these two competing principles are the substance of international law, and how it changes over time. This paper will advocate that while international law allows now for the interrogation of prisoners and detainees in order to gather intelligence to protect the nation and its citizens, it does not, nor should it, set the precise limits of permissible interrogatory methods. There is a difference between torture and robust, but permissible, interrogation. The problematic question for lawmakers is where, and how, to draw that fine line. As the circumstances of each detainee, or the nature of the threat they represent, vary, there too should be some flexibility, circumscribed and constrained by institutional control, available to the national authorities in order produce reliable accurate intelligence through interrogation.

Responding to International Terrorism

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[1] Mark Bowden, "The dark art of interrogation" *The Atlantic Monthly*, Vol. 292, Issue 3. (October 2003), 51
[2] L.C. Green, *The contemporary law of armed conflict* (Manchester University Press, 1993), p. 11.

> "The September 11 attacks were seen as a war-like attack undertaken by individuals from other states operating through a non-state actor, i.e. an organization lacking formal or legal status as a state or as an agent of a state. There is a consensus that Osama bin Laden and Al Qaeda mark a new and more dangerous form of 'sub-state terrorism' than has been seen hitherto."[3]

Kenya, Tanzania[4], Yemen[5], New York, Washington[6], Bali[7], Madrid[8], since 1999, these have all been the targets of international terror. Operating outside the usual paradigm of terrorism for territorial or political reasons, Al Qaeda and other terrorist groups have challenged the world to respond to the new threat they represent with innovative approaches. The United States has taken a strong leadership role in what it calls the War on Terror. Citing the principle of necessity, the U.S administration has initiated actions that advance the traditional thinking regarding Prisoners of War, the Geneva Conventions, and the Torture Convention[9]. The nature of the current war with what appear to be apocalyptic international terrorists on one hand, and the world's most technologically advanced nations on the other has given rise to the term asymmetric warfare. Stephen Metz, a leading scholar in this field has concluded that, "defending against asymmetric challenges demands bold new (intelligence) collection methods."[10] One collection issue in particular that has generated controversy is the difference between illegal torture and legal interrogation. In order to maintain the ban on torture as it exists within

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[3] Sabine von Schorlemer.. "Human Rights: Substantive and Institutional Implications of the War Against Terrorism," *European Journal of International Law* 14, no.2 (2003): 269.
[4] Mudasir Butt. "FBI's most wanted held" *The Nation*, July 30, 2004.
[5] Jim Bittermann and Barbara Starr. "Yemen probes French tanker blast" *CNN Online* October 6, 2002.
[6] Charles Babington. "Bush to Address Nation" *Washington Post* September 11, 2001.
[7] Dr. Stephen Sherlock. "The Bali Bombings: Looking for Explanation" Parliament of Australia Parliamentary Library E-Brief October 14, 2002
[8] Lawrence Wright. "The Terror Web: Were the Madrid bombings part of a new far-reaching jihad being plotted on the Internet?" *The New Yorker*, September 2, 2004.
[9] Richard L. Armitage. "Interview by Maxine McKew Of Australian Broadcasting Corporation's Lateline" June 9, 2004.
[10] Stephen Metz "Strategic Asymmetry" *Combined Arms Center Military Review* www.leavenworth.army.mil/milrev/English/JulAug01/met.htm Internet: accessed Oct 2004.

international law, yet allow for sometimes necessary robust interrogation, there is a need to establish a more flexible framework within the law.

The Case Against Torture

A clear link can be made between acts of terrorism committed against a state and the ability of the population to enjoy the full freedoms and human rights normally permitted by that state. A state's response to being attacked by terrorists can lead to its adopting policies and practices which exceed the limits permissible under international law, such as the presumption of innocence or the freedom from torture.[11] Torture is against the law, internationally, as well as nationally in North America and Europe. The UN Convention Against Torture was adopted by the United Nations General Assembly in 1984. Although implicit in previous treaties[12], the convention makes clear that torture is banned altogether in the world. The essence of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to give it its full name, is Article 1, paragraph 1, which states:

> For the purposes of this convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[13]

[11] Sabine von Schorlemer, 274.
[12] United Nations General Assembly, *Universal Declaration of Human Rights* (New York: UN, 1948) 4.

Unfortunately, torture has existed throughout the history of humankind from the passion of the Christ in Roman times, to the dungeons of medieval Europe in the Middle Ages to the chambers of horror in Saddam's Iraq. The subject has become newsworthy again recently.[14] Torture has been used to punish, to coerce, to deter, to extract information, or its most base, for the torturer's own criminal pleasure. It is a subject with which no one is fully comfortable, touching as it does directly on people's fears and moral outrage over its continued existence. One of the most compelling arguments against torture would be simply that it does not work. Is this assertion true?

As a means of punishment, the use of torture could arguably be considered effective. Being tortured, then executed for example, would certainly be worse than simply being executed.

punishment, or employing it as the punishment alone would be clear violations of human dignity as set out in the torture convention and therefore could not be morally legitimate.[15]

As a means to gain a confession of guilt, common sense suggests that a person will eventually say anything to stop the pain of physical or psychological torture. Could it be therefore concluded that everything they say under torture would be false? It is the determination of just what is credible and accurate from all the information extracted that makes the use of torture problematic from a strictly efficacy perspective. How can a torturer know what is true from what their victim has invented? The reliability of any information gained from interrogatory torture would be sufficiently weak that other means would be required to verify it. Those means may or may not be available to the state, and even if they were, employing them would take valuable time and would have the effect of possibly alerting the victim's co-conspirators. The information may have been correct, but of no practical use, making the act of torture useless to the state. Taking a longer point of view, however, the use of interrogation techniques that are within the law and exercised under careful control can yield reliable and accurate information.[16]

Information gained through torture for the purposes of extracting a confession is almost certainly of limited value, at least in a democratic legal system. Such information would fail the reasonability test, namely any competent authority such as a judge or jury would conclude that there is a high degree of reasonable doubt associated with a torture-based confession. Information gained from torture would not meet the usual rules of evidence. Therefore, even if the confession were true, the law would preclude a conviction.

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[15] Robert G. Kennedy. " Can Interrogatory Torture Be Morally Legitimate?" University of St. Thomas,Available from www.usafa.af.mil/jscope/JSCOPE03/kennedy03.html; Internet; accessed October 2004.

There are modern historical examples in which western democracies have employed torture, and in almost every case, it has proved strategically counterproductive. The classic example is the French struggle in Algeria from 1954 to 1962. Torture was not legal in France. In 1949 and later in 1955, French officials publicly disavowed "strong-arm techniques" and other "excesses"[17]. That being said, the use of torture by the police, and increasingly so by the army, was becoming commonplace. In 1955, a senior French civil servant by the name of Wuillaume, prepared a report on the Algerian situation in which he suggested that: "like the legalizing of a rampant black market, torture should actually be institutionalized because it had become so prevalent, as well as proving effective in neutralizing dangerous terrorists."[18]

The French government did not change the law and, torture remained illegal. Although Wuillaume's pragmatic recommendation was rejected, the use of torture to gather information continued outside the legal framework. Despite the perceived value of the results of the torture to some in the police and army, there were many problems. The methods for applying torture were crude and many suspects were killed in the process. Because torture was officially illegal, some police, army and even political authorities were involved in the cover up of these murders and other abuse.

The case of General Jacques de Bollardiere, speaks to the highly charged climate of the times. He was a respected wartime commander who asked to be relieved from his appointment in Algeria,. He wrote letters first to his Commander, and once back in France, to the press. For his

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[16] Bruce Hoffman, "A Nasty Business" *The Atlantic Monthly* Vol. 289, Issue 1 (January 2002): 52.
[17] Alistair Horne, *A Savage War of Peace Algeria 1954-1962* (New York: Viking, 1978), 197.

actions in not only refusing to be a party to torture, but worse to admit publicly that it was taking place, he was convicted and sentenced to 60 days of fortress arrest.[19] General Bollardiere could see how the effects of the use of torture were dehumanizing his soldiers and corrupting the army. That it was he who was convicted and not the torturers speaks to the extent of how far the corruption had reached into the state.

Before any nation or person in authority could take the momentous decision to employ torture, they would have to believe there was some extreme necessity. Under which extraordinary circumstances could a democratic nation sanction torture? There are historical examples where torture was considered, but not selected. The respected legal scholar Alan Dershowitz gives one, taken from an *Atlantic Monthly* article by Elizabeth Fox about the 1978 kidnapping and subsequent murder of a former Italian Prime Minister.

> "During the hunt for the kidnappers of Aldo Moro, an investigator for the Italian security services proposed to General Carlo Della Chiesa (of the State Police) that a prisoner who seemed to have information on the case be tortured. The General rejected the idea, replying 'Italy can survive the loss of Aldo Moro, but it cannot survive the introduction of torture."[20]

The second example comes from all places, the French-Algerian conflict. In November 1956, a communist operative named Fernand Yveton was caught setting a bomb in the gas generating station. There was however, a second bomb, and Yveton would not say where it was. The risk was real for potentially thousands of innocent people across the city. The secretary – general of the Prefecture, Paul Teitgen, himself once a victim of torture by the Gestapo, denied

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[18] *ibid.,* 197.
[19] *Ibid*., 203

the Chief of Police's demand that torture be applied. He stated: " But I refused to have him tortured. I trembled the whole afternoon. Finally, the bomb did not go off. Thank God I was right. Because if you once get into this torture business, you're lost."[21]

The Nobel Prize winning writer Albert Camus, writing about Algeria summed up the futility of the use of torture:

> "torture has perhaps saved some at the expense of honour, by uncovering thirty bombs, but at the same time it has created fifty new terrorists who, operating in some other way and in another place, would cause the death of even more innocent people." and "it is better to suffer certain injustices than to commit them, … such fine deeds would inevitably lead to the demoralization of France and the loss of Algeria."[22]

France had won the battles, but lost the war largely through losing its legitimacy in the eyes of world opinion.

Having committed torture, and violated international law (and probably national law too), a state would now be open to all the risks and negative consequences that would inevitably follow. One possible negative effect would be "the likely reciprocity that will ensue from other nations' military and intelligence agents against (the state's) troops and civilians. . .When (the state's) troops and civilians are captured overseas, will the Geneva Conventions and international human rights law protect them?"[23] In the case of the United States, especially in light of the recent Abu Gharib incident, "the U.S. civilian leadership's approval of and the U.S. military's

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[20] Elizabeth Fox. "A Prosecution in Trouble" *The Atlantic Monthly*, Vol. 3 (1985), 38.
[21] Horne, 262
[22] *Ibid* 262.
[23] Advocates for Human Rights. . ., 4.

use of torture, humiliation and degradation undercuts U.S. leadership in the world community. [24] Does this necessarily apply in every case? Do terror attacks have to provoke states into committing atrocities?[25] No, there is a difference between the abuses at Abu Gharib and effective interrogation and it is based upon disciplined control.

Torture could also be employed for the purposes of gaining information, other than that of a confessional nature. Police and military intelligence officials routinely gain information from unwilling suspected criminals, or captured enemy combatants through forms of legal interrogation. This information is collated with that obtained through all other means and is used to generate evidence, in the case of the police, and intelligence in the military context. What then if the delineation between legal interrogation means and illegal torture was compressed or even eliminated altogether? Would good intelligence be necessarily acquired, and would it be sufficiently accurate to be meaningful in an evidentiary or actionable sense? The answer is probably yes.[26] If that is so, then the case against torture cannot rest simply on the belief that it does not work. There must be more compelling reasons why the nations of the world should eschew torture, yet retain the flexibility to acquire intelligence through robust legal interrogation.

The Case For Robust Interrogation

> "I have dirty hands right up to the elbows. I've plunged them in filth and blood. Do you think I could govern innocently?" says the Sartre character Hoerderer, a communist leader in the play *Dirty Hands*. [27]

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[24] *Ibid*.
[25] Michael Ignatieff. *The Lesser Evil: Politics in an Age of Terror* (Toronto: Penguin Group, 2004), 62.
[26] Hoffman . . . 53.
[27] Jean-Paul Sartre, *Dirty Hands, in No Exit and Three Other Plays*, trans. Lionel Abel (New York, n.d.), 224.

Sometimes, in order to preserve the well being of the state and its citizens, the leadership must take difficult, even extreme measures, in fact we demand that they do as citizens. Hoffman cites a case where the authorities were faced with a ticking bomb scenario. 'Thomas' is the pseudonym used by a Sri Lankan Army Officer engaged in the anti terrorist campaign against the Liberation Tigers of Tamil Eelam. Hoffman described the case as follows:

> "his unit had apprehended three terrorists who, it was suspected, had recently planted somewhere in the city a bomb that was then ticking away, the minutes counting down to catastrophe. The three men were brought before Thomas. He asked them where the bomb was. The terrorists – highly dedicated and steeled to resist interrogation – remained silent. Thomas asked the question again, advising them that if they did not tell him what he wanted to know, he would kill them. They were unmoved. 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.[28]

Can leaders continue to govern innocently in the face of such decisions? How far do they have to go in order to protect the state and the lives of its citizens? Should they go further still?

The concept that political leaders must take action even if it means getting their hands dirty is a venerable one. Machiavelli wrote about it in the fifteenth century[29]. Other writers have addressed the question in modern times. Michael Walzer in 1972 wrote *Political Action: The Problem of Dirty Hands*, from which the Sartre quotation above was drawn. Specifically, Walzer takes a hypothetical ticking bomb scenario and draws the conclusion that despite the abominable nature of the decision taken to resolve it, the politician who ordered it would be morally justified

[28] Hoffman, 53.

in doing so. In effect, he endorses the actions taken by 'Thomas' above and his like. It would be irresponsible to not assume the moral burden of public office and get one's hands dirty.[30]

Torture and murder are extreme cases, and fortunately for our elected officials and army officers, are extremely rare. So rare, that I believe policy should not be set by these sorts of emergency based scenarios. Article 2 of the Torture Convention goes so far to state that: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."[31] [32] Instead, responsible governments should set policies to establish the means within the law, which would empower police and army authorities to use controlled robust interrogation techniques to protect the populace from terror attacks. The Torture Convention itself leaves the door open to interrogation short of torture by the final sentence in Article 1: "It does not include pain or other suffering arising only from, inherent in or incidental to lawful sanctions".[33]

Striking an appropriate balance between the requirement to take effective action against terror and yet not go so far as to take the solution beyond the law is achievable. Canadian writer Michael Ignatieff, suggests a kind of middle ground for governments to navigate their decision-making processes when all options available to them are bad. Dirty hands will be necessary. Ignatieff says:

> "A lesser evil position holds that in a terrorist emergency, neither rights nor necessity should trump. A democracy is committed to both the security of the

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[29] Specifically the quote "when the act accuses, the result excuses" in *The Discourses*, bk. I, chap. IX, 139: quoted in Michael Walzer, "Political Action: The Problem of Dirty Hands", *Philosophy and Public Affairs*, Vol. 2, No. 2 (Winter 1973): 175.
[30] Walzer, 167.
[31] UN Convention Against Torture. . ., 2.
[32] Alisa Solomon. "The Case Against Torture", *The Village Voice*, November 28 – December 4, 2001.
[33] UN Convention Against Torture,. . 1.

> majority and the rights of the individual. Neither can be allowed exclusive domain in public policy decisions. . . what works is not always right. What is right doesn't always work."[34]

Interrogation has proven successful in the past. The case of Nguyen Tai, the most senior North Vietnamese officer captured in during the Vietnam War is an example. He had run intelligence and terrorist operations in Saigon for years. He was a sophisticated, intelligent and well-educated member of the Communist Party. Yet after his capture he eventually broke, not through the use of crude torture, though that was at first used by the South Vietnamese forces.

> it was of a nature that he in his wildest moment of panic and fear had never imagined. A large plate of steaming hot curry and rice and a cup of tea were laid on the table before him and he was invited to eat. . .Kindness, in fact, was the wholly unexpected sort of shock in store for the newly surrendered (terrorist), and in that first flush of relief he responded like a man coming out of a bad nightmare."[36]

What constitutes legally sanctioned interrogation and how does it differ from torture? Should 'truth serums' or other drugs be considered legal for interrogation purposes?[37] Would withholding pain medication from a prisoner for example, be a step too far? Robust interrogation is more a way of thinking than a list of dos and don'ts. There are no easy replies to these questions. Mark Bowden has attempted to derive a working definition for what he calls 'coercion' or 'torture lite'.

> "Then there are methods that, some people argue, fall short of torture. Called "torture lite", these include sleep deprivation, exposure to heat or cold, the use of drugs to cause confusion, rough treatment (slapping, shoving, or shaking), forcing a prisoner to stand for days at a time or to sit in uncomfortable positions, and playing on his fears for himself and his family. Although excruciating for the victim, these tactics generally leave no permanent marks and do no lasting physical harm. A method that produces life-saving information without doing lasting harm to anyone is not just preferable; it appears to be morally sound. Hereafter I will use "torture" to mean the more severe traditional outrages, and "coercion" to refer to torture lite, or moderate physical pressure."[38]

If the use of such coercive methods were permissible, a state could permit their use generally by the security forces, or control it in a more restrictive manner to specific subjects. Given the high risks associated with the perception that state-sponsored torture is being conducted, the state should exercise very tight control over how any coercion would be administered. One method of control is to establish a scale of graduated interrogation

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[36] Lieutenant-Colonel Richard Miers. *Shoot to Kill* (London: Faber and Faber, 1959), 78/79.
[37] Kevin Johnson and Richard Willing. "Ex-CIA chief revitalizes 'truth serum' debate" *USA Today*, April 26, 2002.
[38] Bowden. . .p. 55.

techniques, each with a higher severity level of coercion, and each tied to a higher approval authority. A specific case in point is the US Army military prison at Guantanamo Bay, Cuba where three categories of special interrogation techniques were established to permit the military interrogators to "counter advanced resistance". Category I techniques are at the discretion of individual interrogators and include deception and implied threats such as identifying the interrogator as being from a nation where torture is known to be common. Category II techniques require approval from the Officer Commanding the Interrogation Section and include the use of stress positions or long stays in isolation, or using detainees phobias, such as fear of dogs to induce stress. Category III techniques require approval by the Commanding General and include use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him or his family, or exposure to cold weather or water with appropriate medical monitoring.[39] After his own and an official legal review, US Major General Michael Dunlavey, Commanding General of Joint Task Force 170 stated:

> "I am fully aware of the techniques currently employed to gain valuable intelligence in support of the Global War on Terrorism. Although these techniques have resulted in significant exploitable intelligence, the same methods have become less effective over time. Based on the analysis provided by the Joint Task Force 170 Senior Judge Advocate, I have concluded that these techniques do not violate U.S. or international laws.[40]

The USA have in effect carefully defined new robust interrogation techniques which by close monitoring and graduated levels of control meet Ignatieff's balanced "lesser evil" position of being effective yet precise.

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[39] Memorandum For Commander, Joint Task Force 170, *Counter Resistance* Strategies, 11 October 2002

[40] Memorandum For Commander, *Counter Resistance Strategies*, United States Southern Command, 3511 NW 91st Avenue, Miami, Florida, October 11, 2002.

Some would say the state should go further still. Alan Dershowitz has proposed that if there is a bona fide requirement to acquire timely intelligence from hard core terrorists, then the state should have a legal means to go all the way, up to and including non-lethal interrogatory torture to obtain it. He suggests that instead of having Army Officers or Intelligence agents decide when and how coercion will be applied, that it be given over to judges to determine. He introduces the term torture warrant and indicates that in practice obtaining one would be similar to that for a search warrant. He writes:

> it seems logical that a formal, visible, accountable, and centralized system is somewhat easier to control than an ad hoc, off-the-books, and under-the-radar-screen non-system. I believe, though I certainly cannot prove, that a formal requirement of a judicial warrant as a prerequisite to non-lethal torture would decrease the amount of physical violence directed against suspects. In every instance in which a warrant is requested a field officer has already decided that torture is justified and, in the absence of a warrant requirement, would simply proceed with the torture. Moreover, I believe that most judges would require compelling evidence before they would authorize so extraordinary a departure from our constitutional norms, and law enforcement officials would be reluctant to seek a warrant unless they had compelling evidence that the suspect had information needed to prevent an imminent terrorist attack. A record would be kept of every warrant granted, and although it is certainly possible that some individual agents might torture without a warrant, they would have no excuse, since a warrant procedure would be available. They could not claim "necessity," because the decision as to whether the torture is indeed necessary has been taken out of their hands and placed in the hands of a judge.[41]

Despite its logical clarity, and visceral appeal [42]adopting this proposal would mean abrogating or amending the various conventions, treaties and laws that underpin most of the international law in this field. Moreover, any state that did implement the torture warrant concept would no doubt be liable to all the negative consequences of state-sponsored torture mentioned previously even if

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[41] Alan Dershowitz. *Why Terrorism Works: Understanding the Threat, Responding to the Challenge.* (New Haven: Yale University Press, 2002), 158/9.

[42] Steve Chapman writing in the *Washington Times* and quoted by Dershowitz " No one could possibly justify sacrificing millions of lives to spare a murderous psychopath a brief spell of intense pain, which he can end by his

taking such an open approach would avoid the mistakes made by the French in Algeria. A policy that permits robust interrogation does not require torture, with or without a warrant.

Besides the United States, there is some evidence taken from recent press reports that other western states are adopting a broader interpretation of the concepts of interrogation, coercion and torture in the context of the terror threat. French judges have been actively using a provision in the legal system that allows for search warrants, wiretaps, arrest and interrogation of citizens based on suspicion of 'conspiracy in relation to terrorism'. Jean-Paul Bruguiere, a senior French judge has stated about terrorism,

> "it is a very new and unprecedented belligerence, a new form of war and we should be flexible in how we fight it. When you have your enemy in your own territory whether in Europe or in North America, you can't use military forces because it would be inappropriate and contrary to the law. So you have to use new forces, new weapons."[43]

In the United Kingdom, "the use of torture to obtain evidence against suspected terrorists was endorsed by the (British) Court of Appeal in a ruling that has brought Britain into conflict with international human rights campaigners."[44] In Canada, the Supreme Court, in Suresh versus Canada (Minister of Citizenship and Immigration) ruled that, "there is a possibility that exceptional circumstances may arise where it is appropriate to rule for deportation to face torture and in those circumstances it falls to the discretion of the Minister to decide."[45] With state action such as these examples show, international law could be seen to be in the process of changing to

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own choice. When the threat is so gigantic and the solution so simple, we are all in the camp of the Shakespeare character who said 'There is no virtue like necessity.'" Ibid, 105.

[43] Craig Whitlock. "French Push Limits in Fight On Terrorism" *Washington Post*, November 2, 2004.

[44] Robert Verlick. "Evidence gained by torture allowed by British judges" *The Independent*, August 12, 2004.

[45] Case Studies from Canadian Jurisprudence: Applying International Law Domestically. "Case Studies from the Supreme Court of Canada: Suresh v. Canada (Minister of Citizenship and Immigration)" *For the Record* Vol. 3 Canada (1997-2003) www.hri.ca/fortherecordCanada/vol3/casesuresh.htm Internet: accessed October 21 2004.

reflect the times. Any changes should be gradual and, as Ignatieff states, be subject to careful scrutiny. "Because (such) measures are morally problematic, they must be strictly targeted, applied to the smallest possible number of people, used as a last resort, and kept under the adversarial scrutiny of an open democratic system."[46]

Guarding Against Abuses

> "As the international furor grew, senior military officers, and President Bush, insisted that the actions of a few did not reflect the conduct of the military as a whole. (General) Taguba's report, however, amounts to an unsparing study of collective wrongdoing and the failure of Army leadership at the highest levels. The picture he draws of Abu Gharib is one in which Army regulations and the Geneva conventions were routinely violated, and in which much of the day-to-day management of the prisoners was abdicated to Army military-intelligence units and civilian contract employees. Interrogating prisoners and getting intelligence, including by intimidation and torture, was the priority."[47]

Robust interrogation in whatever form it takes carries with it many of the same risks to the state that torture would have. Any loss of control can result in the ill-discipline that manifested itself at Abu Gharib. In the prison at Guantanamo Bay, there had been a policy of careful and graduated escalation of interrogation techniques based on individual cases. At Abu Gharib on the other hand, U.S. Army officers allowed the situation to degenerate into a general free for all approach where even the most junior and untrained soldiers were allowed to let their imaginations and perversions have full expression. If elected political officials and Army senior leadership must have dirty hands by the nature of the war that is being fought, then these same officials must insist that the necessary intelligence gained comes from a disciplined and professional approach. The quick reaction of the Army leadership and the President to re-

[46] Ignatieff. 8.
[47] Seymour Hersh. "Torture at Abu Gharib" *CondeNet*, September 25, 2004.

establish control and to lay charges and/or take administrative action against the offenders was necessary in order to permit the more focused interrogation program against the most valuable, from an intelligence point of view, terrorists to continue. Any state that allows for the kind of robust interrogation advocated by this paper must also have a close control system in place to maintain the democratic principles it is fighting for.

Conclusion

> "Naturally one worries – after all, one is inflicting pain and discomfort and indignity on other human beings. . .(but) society has to find a way of protecting itself . . . and it can only do so if it has good information. If you have a close-knit society which doesn't give information then you've got to find ways of getting it. Now the softies of the world complain but there is an awful lot of double talk about it. If there is to be discomfort and horror inflicted on a few, is this not preferred to the danger and horror being inflicted on perhaps a million people?"[48]

Al Qaeda is one manifestation of the new face of international terror. Committed, close knit and undeniably deadly, they and their imitators represent a threat to the democratic nations of the world. Responding effectively against them, yet keeping that response within the rule of law requires careful control and maintaining a fine balance. International law is continuously adapting to the actions taken by the states of the world. The responses to the September 11 terror attacks have generated controversy especially so regarding the use of robust interrogation techniques against captured terrorists. The Torture Convention and other international laws have been challenged by Alan Dershowitz and his supporters. Stopping short of torture, the United States have established a graduated, disciplined process of increasingly coercive interrogation techniques with an aim to bringing the full range of legal pressure onto the most hardened of the captured terrorists, yet maintaining what Ignatieff calls a position of lesser evil. The interrogation techniques used at Guantanamo Bay and elsewhere within the United States intelligence community have resulted in valuable information that has been used to protect the population. Establishing a robust interrogation framework the same or similar to that pioneered by the U.S. Army is a means for policy makers in other western nations to generate the intelligence required to fight the terrorists and to keep a close watch on the interrogators at the same time. There is no

[48] Desmond Hamill. *Pig in the Middle: The Army in Northern Ireland.* (London: Metheun London Ltd, 1985), n.p.

need to descend to torture, or to hide the policy from the international human rights organizations if such a professional, results based approach is adopted. Robust interrogation works.

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