

## **Chapter 6**

### **Torture *Is* the Ticking Time-Bomb:**

#### **Why the Necessity Defense Fails**

***George Hunsinger***

Q Thank you, sir. A simple question.

THE PRESIDENT: Yes. It may require a simple answer.

Q What's your definition of the word "torture"?

THE PRESIDENT: Of what?

Q The word "torture." What's your definition?

THE PRESIDENT: That's defined in U.S. law, and we don't torture.

Q Can you give me your version of it, sir?

THE PRESIDENT: Whatever the law says.<sup>1</sup>

#### ***1. The current crisis***

Of all the scandals that currently beset us, there is one that history is likely to judge most harshly, namely, the authorization of torture and abuse by the Bush administration. Haunting Abu Ghraib photographs have seared into our minds that grievous violations of international law have occurred. There is every reason to believe that such violations continue to this day in secret CIA prisons and detention centers around the world. No one up the chain of command been held accountable while, significantly, many of those associated with authorizing torture have been promoted or politically rewarded.

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<sup>1</sup> Press Conference by the President, George W. Bush, October 18, 2007.

<http://www.whitehouse.gov/news/releases/2007/10/print/20071017.html> The precise legal definition is "severe mental or physical pain or suffering" to elicit information.

The terror detainee bill passed by Congress in the Fall of 2006 -- the Military Commissions Act (MCA) -- has implicitly condoned torture and effectively rendered it lawful. The MCA would seem to ensure that the resort to criminal means will define the Bush era for posterity. As if to confirm this grim prognosis, in July 2007 the administration then issued an Executive Order restarting a discontinued CIA program in which Gulag techniques<sup>2</sup> -- including waterboarding, extreme temperatures, stress positions and sleep deprivation -- have reportedly been authorized and used. Legalizing torture marks a milestone in the disintegration of American democracy.

Having passed the Senate by a 65-34 margin, with twelve Democrats voting in concert with the Republican majority, the MCA has not since been repealed nor is it likely to be any time soon. The most to be hoped for, it would seem, is the reversal of some of its worst provisions, especially the stripping of habeas corpus. But even many of its lesser evils are far from minor. Christopher Anders, legislative counsel for the American Civil Liberties Union, comments:

Nothing could be less American than a government that can indefinitely hold people in secret torture cells, take away their protections against horrific and cruel abuse, put them on trial based on evidence they cannot see, sentence them to death based on testimony literally beaten out of witnesses, and then slam shut the courthouse door for any habeas corpus petition. But that's exactly what Congress just approved.<sup>3</sup>

The administration claims to be against torture, and yet it refuses to renounce, without equivocation, the cruel, inhuman and degrading treatment of detainees. In the

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<sup>2</sup> See Andrew Sullivan, "Torture by any other name is just as vile," *The Sunday Times* (London), September 26, 2006.

<sup>3</sup> ACLU press release, "Senate Passes Dangerous Bush Military Commissions Bill, ACLU Says Legislation Upends the Rule of Law," September 28, 2006.

<<http://www.aclu.org/safefree/detention/26947prs20060928.html>>

authoritative documents of international law -- as represented by the Geneva Conventions (especially Geneva Common Article 3), the UN Universal Declaration on Human Rights, the Convention Against Torture, and other treaties binding on our government -- the ban against cruel, inhuman and degrading treatment is not separated from the ban against torture. The two proscriptions are one, a point to which we shall return.

The disquieting innovation of this administration has been to produce documents disrupting that unity. Extreme forms of abuse are disconnected from what counts as "torture" in order to make them permissible. When the president proclaims, as he often does, that "we do not torture," he is being less than straightforward. He has kept the word, but changed the dictionary.

The policy that results is radically inconsistent. Officially, our government opposes torture and advocates a universal standard for human rights. Yet at the same time, it has adopted methods that violate these standards. The methods include waterboarding (or simulated drowning), sleep deprivation, induced hypothermia, mock burials, stress positions, sexual humiliation and the desecration of religious objects. The president calls these extreme methods "alternative means of interrogation," a phrase reminiscent of Orwell. The vice president is more candid. He calls them "working the dark side."

"Enhanced interrogation techniques," Bush's euphemism for working the dark side, is a term with an interesting history. *Verschärfte Vernehmung*, the exact translation in German, was in fact a phrase invented by the Gestapo. It was used to describe what became known as the 'third degree.' It left no marks. It included hypothermia, stress positions, long-time standing and sleep deprivation.<sup>4</sup> "Our country for the first time in my life time has abandoned the basic principle of human rights," Jimmy Carter stated in the fall of 2007. "We've said that the Geneva Conventions do not apply to those people in Abu Ghraib prison and Guantanamo, and we've said we can torture prisoners and deprive them of an accusation of a crime." Carter

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<sup>4</sup> Frank Rich, "The 'Good Germans' Among Us," *The New York Times*, October 14, 2007.

indicated that the interrogation methods cited by the *New York Times*, including “head-slapping, simulated drowning and frigid temperatures,” constitute torture “if you use the international norms of torture as has always been honored – certainly in the last 60 years since the Universal Declaration of Human Rights was promulgated.”<sup>5</sup>

But the nominee to be the Attorney General, Judge Michael Mukasey, who was questioned in Congressional hearings, was evasive on this very point. He refused to state when pressed that waterboarding or simulated drowning was indeed a crime under international and domestic law.

“Is waterboarding constitutional?” he was asked by Senator Sheldon Whitehouse, a Rhode Island Democrat, in one of today’s sharpest exchanges.

“I don’t know what is involved in the technique,” Mr. Mukasey replied. “If waterboarding is torture, torture is not constitutional.”<sup>6</sup>

Muksaey was sending a clear signal that nothing would change regarding the tolerance of torture in the Department of Justice, and that no higher-ups need fear being prosecuted for such crimes under his watch.

In 2005 the PBS program *Frontline* televised a report about how secretary of defense Donald Rumsfeld and General Geoffrey Miller “Gitmoized” the interrogations of detainees in Iraq. The program included many interviews including the story of US Army interrogator Spc. Tony Lagouranis (Ret.). The former military interrogator stated:

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<sup>5</sup> “Jimmy Carter: US Tortures Prisoners,” Associated Press, October 11, 2007.

<sup>6</sup> Philip Shenon, “Mukasey Faces Tough Questions on Interrogations,” *The New York Times*, October 18, 2007.

*Well hypothermia was a widespread technique. I haven't heard a lot of people talking about that, and I never saw anything in writing prohibiting it or making it illegal. But almost everyone was using it when they had a chance, when the weather permitted. Or some people, the Navy SEALs, for instance, were using just ice water to lower the body temperature of the prisoner. They would take his rectal temperature to make sure he didn't die; they would keep him hovering on hypothermia. That was a pretty common technique.*

*A lot of other, you know, not as common techniques, and certainly not sanctioned, was just beating people or burning them. Not within the prisons, usually. But when the units would go out into people's homes and do these raids, they would just stay in the house and torture them. Because after the scandal, they couldn't trust that, you know, the interrogators were going to do "as good a job," in their words, as they wanted to.<sup>7</sup>*

## **2. How to test torture's rationale**

Most of the recent scholarly writing on torture has been done by international lawyers and legal scholars. Some of them defend interrogational torture while others do not. Moreover, highly trained philosophers writing about torture are also divided in their opinions. As far as I can see, however, no Christian ethicist of any standing has endorsed the resort to torture. For example, David Gushee, a leading evangelical scholar, wrote a cover story for *Christianity Today*, entitled "Five Reasons Why Torture is Always Wrong."<sup>8</sup>

As a way of sorting out the existing range of scholarly disagreement, I propose to

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<sup>7</sup> Interview, PBS Frontline, September 25, 2005.

<<http://www.pbs.org/wgbh/pages/frontline/torture/interviews/lagouranis.html>>

<sup>8</sup> David Gushee, "Five Reasons Why Torture is Always Wrong," *Christianity Today* (February 2006). A longer version of this essay appears as Ch. 7 in this volume.

adopt a new modification of an old analytical scheme. The scheme comes from the just war tradition. Just as there are traditional criteria for determining whether a war can be justified, so similar criteria can be developed for assessing the justifiability of torture. Can something as intuitively repugnant as torture ever reasonably be justified? Is the resort to torture in an emergency situation anything like killing in a justified war? Proponents of torture seem to think that it is. I will follow the lead of others, however, in arguing that torture is uniquely different from killing in war. I will also argue that when just war criteria are modified to fit the case, torture comes to light as uniquely monstrous, and so beyond rational justification. When real-world contingencies are taken into account, the prohibition against torture emerges as a practical absolute or an exceptionless moral rule.<sup>9</sup>

In the just war tradition, as is well known, the criteria fall into two parts. *Ius ad bellum* assesses justifiable reasons for going to war, while *ius in bello* examines justifiable means by which a war may be conducted. The criteria in both parts must be met. A war conducted by criminal means, for example, would still be unjust even if going to war had been justified. On the other hand, even a war conducted in a permissible way would be unjust if the reasons for going to war were illegitimate to begin with. According to just war criteria, only a war undertaken for legitimate reasons and conducted in a tolerable way can be justified.

Can the resort to torture be analyzed according to a similar scheme? Might there be justifiable reasons for resorting to torture, *ius ad tormentum*? Since some thoughtful people suppose that there are, can the second step also be taken? Can torture be conducted in a justifiable manner, *ius in tormento*? Proponents of torture rarely confront this question, which *prima facie* seems to be absurd. As will be argued here, the unique practical differences between killing in war and torturing are very largely why torture fails of justification. The failure is compounded, however, because the warrants for resorting to torture in the first place

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<sup>9</sup> See Jeremy Waldron, "Torture and Positive Law," *Columbia Law Review* 105 (2005), pp. 1681-1750; esp. pp. 1717, 1735.

will also not bear scrutiny. For good reason, there is no such thing in our history as a just torture tradition.

### **3. *Ius ad tormentum***

Among the standard criteria for deciding whether it is justifiable to resort to war, three will be examined here. The tradition teaches that going to war is justified (1) to defend against aggression, (2) if carried out by legitimate authority, and (3) when there is a reasonable chance of success. When these criteria are modified to fit the case of torture, none of them can reasonably be met.

The so-called "ticking time-bomb scenario" is analogous to the just war case of defending against aggression. It prompts some to invoke the maxim that "necessity makes that lawful which is otherwise unlawful." A recent example can be found in the *Stanford Encyclopedia of Philosophy*.<sup>10</sup> The scenario goes like this:

A small nuclear device has been planted in a major city and is about to go off. One of the terrorists has been captured, and a lot is known about him. He is a known terrorist, has been involved in past terrorist incidents, and knows where the device is hidden. He is even the leader of the group. The police also know that he will probably talk if tortured. All other sources of information have dried up. No time exists to evacuate the city. Torture is the means of last resort. The article sums up:

In this case torture . . . seems to be justifiable. Consider the following points: (1) The police reasonably believe that torturing the terrorist will probably save thousands of innocent lives; (2) the police know that there is no other way to save those lives; (3) the threat to life is imminent; (4) the thousands about to be murdered are innocent --

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<sup>10</sup> Seumas Miller, "Torture," *The Stanford Encyclopedia of Philosophy* (Winter 2006 Edition), ed. Edward N. Zalta. <<http://plato.stanford.edu/entries/torture/>>.

the terrorist has no good, let alone decisive, justificatory moral reason to murder them; the terrorist is known to be (jointly with the other terrorists), morally responsible for planning, transporting, and arming the nuclear device and, if it explodes, he will be (jointly with the other terrorists) morally responsible for the murder of thousands.

Indeed, given the way the case is set up by this article, it would seem that an even stronger conclusion cannot be avoided. Knowing everything the police know, and having no other recourse, they would be morally irresponsible themselves if they did not torture the terrorist until he talked. All those murders would be on their conscience.

Scenarios like this fail, however, for two main reasons. First, they are extremely hypothetical. In any actually existing situation, not all the conditions posited by the scenario are likely to be met. Indeed it is not unlikely that few if any of them would be met. The defenders of hypothetical torture never seem to ask about the justifiability of torture under real-life conditions.

Even more important, however, is the use to which this argument is commonly put. It is a hypothetical argument with real-life implications. Hypothetically, the scenario posits an abnormal situation, one that is said to be highly exceptional. It is suffused with all the pressure of an extreme emergency. The argument is used, however, to interpret the necessity defense so broadly as to justify the normalizing of torture.<sup>11</sup> The abnormal is normalized, the exceptional is regularized, and the state of emergency turns out to be endless. Declaring a permanent state of emergency in order to justify a systematic resort to criminal means is the well-known hallmark of dictatorship.<sup>12</sup>

This point is amply confirmed by revelations about the destruction of CIA videotapes

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<sup>11</sup> See especially David Luban "Liberalism, Torture, and the Ticking Bomb," *Virginia Law Review* 91 (2005), pp. 1425-61.

<sup>12</sup> See Giorgio Agamben, *State of Exception* (Chicago: University of Chicago Press, 2005).



depicting harsh interrogation. One terrorist suspect whose tapes were destroyed was Abu Zubaydah. According to the *Washington Post*:

Officials said harsh tactics used on him at a secret detention facility in Thailand went on *for weeks or, depending on the account, even months*. The videotaping of Abu Zubaida in 2002 went on day and night throughout his interrogation, including waterboarding, and while he was sleeping in his cell, intelligence officials said. "Several hundred hours" of videotapes were destroyed in November 2005, a senior intelligence officer said. The CIA has said it ceased waterboarding in 2003.<sup>13</sup>

Andrew Sullivan comments:

Notice what the Zubaydah case tells us about the key argument of torture advocates: that torture should only be used when we already know that someone has actionable information about an imminent catastrophic threat. We're five years into the Bush torture regime and despite hundreds - and possibly thousands - of torture sessions, this was never, ever the case. [The ticking bomb] argument has been rendered completely moot by the evidence of the past five years.

The United States made the decision to torture Zubaydah after he had already given helpful information - solely because they suspected he had more - and not in response to any knowledge of any imminent, catastrophic threat. In the beginning - not even in the end - torture became its own rationale, creating a need for torturers to justify their war crimes by finding more information through more torture, and unleashing the sadism and evil that exists in every human heart - even the most trained and professional. And then the war crimes created a need to destroy the evidence of war crimes, and so the criminality of the government

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<sup>13</sup> Dan Eggen and Walter Pincus, "FBI, CIA Debate Significance of Terror Suspect," *Washington Post*, December 18, 2007. Italics added

deepened, cloaked in the secrecy of national security.<sup>14</sup>

The question is not whether torture might work in some extremely hypothetical situation. The question is how hypothetical justifications end up normalizing torture, and how torture once normalized inevitably spreads – as shown by history and recent experience– like wildfire. "Once torture begins," writes Alfred McCoy, "it seems to spread uncontrollably, particularly during times of crisis, in a downward spiral of fear and self-empowerment."<sup>15</sup>

Many commentators have noted how the ticking bomb scenario becomes dubious when real life circumstances are admitted. There are at least five reasons for skepticism.

- The first is the reliability factor. How likely is it that the desired information would actually be obtained? Is not torture notoriously ineffective under any circumstances in obtaining reliable information? While the clock ticks on, what is to prevent the hardened terrorist simply from holding out, or at least from providing false leads until it is too late?
- Second is the uncertainty factor. Suppose the police know less about the captured person than is built into the scenario. How certain would they have to be in an emergency to justify resorting to torture? The larger the permissible range of uncertainty, the greater the warrant for normalizing torture.
- Closely related is the slippery slope factor. Torturing the suspect is thought to be justifiable because he might have knowledge of a ticking bomb. Would there not be hundreds or even thousands of suspects who might have dangerous knowledge? To

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<sup>14</sup> Andrew Sullivan, "The Torture Of Abu Zubaydah," *The Daily Dish/The Atlantic online*, December 18, 2007. < [http://andrewsullivan.theatlantic.com/the\\_daily\\_dish/2007/12/the-torture-of.html](http://andrewsullivan.theatlantic.com/the_daily_dish/2007/12/the-torture-of.html)>

<sup>15</sup> Alfred McCoy, *A Question of Torture* (New York: Metropolitan Books, 2006), p. 209.

justify torturing them, how immediate would the emergency need to be? Again we are on the slide toward normalization.

- Then, fourthly, there is the accountability factor. Suppose the police are wrong about key matters of fact? What happens to a society when torture can be carried out with impunity? When there is no accountability, there is no bright line that in practice will not be crossed. When there is no accountability, the legitimacy of the torturing authority is very much in doubt.
- Finally, there is the corruptibility factor. The ticking bomb scenario assumes a case that is confined, and that can be kept confined. However, as the philosophers Bufacchi and Arrigo point out: "The accuracy and speed of virtuoso torture interrogation dictate long advance preparation and coordination, and ultimately corruption, of many key social institutions." This observation is relevant, because just war stipulations require a reasonable chance of success. The preparations needed for success in a ticking time-bomb emergency would profoundly corrupt the culture of medical, scientific, police, military and legal institutions.<sup>16</sup> The real choice is not between an isolated case and catastrophe, but between refraining from criminal means and corrupting the society. In this sense Elaine Scarry is correct: "Torture is itself a ticking bomb."<sup>17</sup>

In short, the ticking time-bomb scenario would appear to meet *ius ad tormentum* conditions only under rarified circumstances that are highly unlikely in the real world.<sup>18</sup> The

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<sup>16</sup> For a detailed discussion of this corruptibility factor, see Vittorio Bufacchi and Jean Maria Arrigo, "Torture, Terrorism and the State: A Refutation of the Ticking-Bomb Argument," *Journal of Applied Philosophy* 23 (2006), pp. 355-73; on pp. 363-67.

<sup>17</sup> Elaine Scarry, "Five Errors in the Reasoning of Alan Dershowitz," in *Torture: A Collection*, ed. Sanford Levinson (New York: Oxford University Press, 2004), p. 288.

<sup>18</sup> Among many discussions, see Kim Lane Schepple, "Hypothetical Torture in the War on Terrorism," *Journal of National Security Law and Policy* 1 (2005), pp. 285-331.

*Stanford Encyclopedia* posits a scenario which is highly unusual, as it admits, and which is said to include prior structures of accountability. The discussion fails to consider how unlikely those circumstances actually are, and how contrary to fact are the posited structures. More precisely, it fails adequately to consider the great likelihood of unreliable confessions, the real-world uncertainties surrounding a detainee's actual innocence, the slippery slope of permitting persons to be tortured on mere suspicion, the lack of real-world accountability commensurate to the enormity of the deed, and, finally, the moral certainty that any attempt to institutionalize torture would corrupt the very society it intends to defend.

#### **4. *Ius in tormento***

The failings of *ius ad tormentum* only metastasize when we turn our attention to torture as a practice in itself (*ius in tormento*). Torture is not like killing in war. The relationship of the torturer to the tortured is, in important respects, unlike that between military combatants. From an ethical standpoint, it is uniquely abhorrent.<sup>19</sup>

- In a military conflict, a form of reciprocity exists among the combatants; both sides subject themselves to more or less equal risks. Torture, by contrast, is more like killing the defenseless.
- In combat honor can be a motive for making sacrifices, and military discipline is important to prevent atrocities.<sup>20</sup> But there is no honor in the practice of torture, no courage in the infliction of pain, no discipline not undercut by inducements to escalate.
- In combat both sides have room to maneuver and to outwit the adversary's strategies.

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<sup>19</sup> See David Sussman, "What's Wrong with Torture?" *Philosophy and Public Affairs* 33 (2005), pp. 1-33.

<sup>20</sup> See Peter Olsthoorn, "Honor as a Motive in Making Sacrifices," *Journal of Military Ethics* 4 (2005), pp. 183-97.

The torturer, by contrast, has unchecked power to inflict degrees of pain that are utterly indescribable upon a victim who is totally helpless.

- The *in bello* condition implies that in military combat acts of cruelty, though possible, are not necessary, and in any case are impermissible. Torture, by contrast, is based on extreme cruelty and humiliation. It is less like combat and more like mutilation or rape. It systematically violates what should be most intimate to a person.
- The *in bello* condition also requires a measure of restraint in the conduct of hostilities. It assumes that a primary purpose of the war is to preserve certain cherished values and institutions. By contrast, torture undermines legitimate values and institutions. It involves a relationship of extreme domination, in which the tortured is tyrannized by the torturer. The victim lies completely exposed, while the power of the torturer is absolute.
- The *in bello* condition also requires an irreducible measure of respect for life in the conduct of hostilities. Respect for life is entailed in the requirements of proportionality and noncombatant immunity. Torture, by contrast, systematically dehumanizes its victim by attacking the center of her personality. It uses pain, deprivation and humiliation to shatter a person, forcing her to act against felt loyalties, against conviction, and against conscience. Torture violates a person's body, and terrorizes her mind, in order to destroy her will. Torture survivors, who afterwards will never be the same, are psychologically and emotionally maimed. They suffer from an inability to establish bonds of trust, from deadened emotional lives, and from the urge to commit suicide, to which many of them tragically succumb.<sup>21</sup>

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<sup>21</sup> The name of Jean Amery, a torture victim at the hands of the Nazis, may be mentioned here along with that of Primo Levi, who described torture by the Nazis as he had witnessed it. Both Amery and Levi committed suicide. See Amery, "Torture" in *Art from the Ashes*, ed.

In short, traditional *in bello* stipulations cannot meaningfully be translated into the torture chamber. They cannot be adapted to fit conditions *in tormento*. The very enormity of torture prevents it. In the torture chamber there is, comparatively speaking, no reciprocity of risks, no possibility of honor for the torturer, no self-defense for the victim, no meaningful constraints upon cruelty, no preservation of the values supposedly being defended, and no minimal respect for the inalienable personhood of the victim.

At least one point needs to be stressed before moving on. The difference between military conflict and torture is of course merely relative. Military conflict also produces dishonor, trauma, abuse, violation and atrocity. Nevertheless, the paradoxes of war differ from those of torture. War can call forth courageous behavior in the defense against aggression in a way that torture cannot. It is not for nothing that like the pirate and the slave trader before him, the torturer is called *hostis humani generis*, the enemy of all humankind.<sup>22</sup>

### **5. Torture: what is it good for?**

To understand further why torture should not be made lawful, its purposes need to be examined. It is not self-evident that torture is always merely about interrogation. The purposes of torture are relevant to an assessment of its legal and ethical legitimacy. Although it is common to distinguish interrogational torture from terroristic torture,<sup>23</sup> this distinction is arguably insufficient to capture the full spectrum of torture's purposes. For the sake of completeness, and for lack of a better term, the interrogational and the terroristic forms of

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Lawrence L. Langer (New York: Oxford University Press, 1995); Levi, *The Drowned and the Saved* (New York: Vintage, 1989).

<sup>22</sup> For a classic discussion of the paradoxes of war see J. Glenn Gray, *The Warriors: Reflections on Men in Battle* (New York: Harper & Row, 1970).

<sup>23</sup> Henry Shue, "Torture," in *Torture: A Collection*, pp. 47-60; on p. 53 [n. 9].

torture need to be seen in relation to torture under the aspect of the demonic.<sup>24</sup>

**a. Interrogational torture**

The deepest puzzle about interrogational torture is that it is notoriously ineffective.<sup>25</sup> Aristotle already knew in the 4th c. BC, for example, that no trust can be placed in evidence obtained by torture. Under the compulsion of torture, he observed, people "tell lies quite as often as they tell the truth -- sometimes persistently refusing to tell the truth, sometimes recklessly making a false charge in order to be let off sooner." Evidence under torture, he concluded, is unreliable. Shrewdly, he also observed that contending parties will often accept or reject such evidence for merely cynical reasons, depending on whether it suits their case.<sup>26</sup>

Aristotle's viewpoint has not disappeared in the current climate of concern about how to treat terror suspects. Let me give an example from Great Britain. In 2004 a Court of Appeals laid down a controversial ruling. Evidence obtained under torture abroad, it was decided, would be admissible under certain circumstances in court. Some months later a panel of Law Lords voted unanimously against this decision. Lord Bingham of Cornhill, the former Lord Chief Justice who headed the panel, explained their reasoning in words that Aristotle himself could have written. Lord Bingham stated:

First of all, it is clear that a statement made under torture is often an unreliable statement, and it could therefore be contrary to the principle of fair trial to invoke such a statement as evidence before a court. Even in countries whose court

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<sup>24</sup> A fourth form of torture would be "confessional," where the purpose is to coerce the victim into pleading guilty to a past event. See Darius Rejali, *Torture and Democracy* (Princeton: Princeton University Press, 2007), p. 531.

<sup>25</sup> That torture is indeed ineffective as a means of interrogation is confirmed by Rejali's definitive study. See *Torture and Democracy*, pp. 446-79, 576-77.

<sup>26</sup> Aristotle, *Rhetoric*, Book I, chapter 15, 1376b-1377a.

procedures are based on a free evaluation of all evidence, it is hardly acceptable that a statement made under torture should be allowed to play any part in court proceedings.

Consequently, if a statement made under torture cannot be invoked as evidence, an important reason for using torture is removed and the prohibition against the use of such statements as evidence before a court can therefore have the indirect effect of preventing torture.<sup>27</sup>

Relying on evidence obtained by torture can not only be unfair and misguided but sometimes even catastrophic. In his widely acclaimed address to the UN on February 5, 2003 -- the speech that took the U.S. into war -- Colin Powell cited evidence that turned out to be acquired under torture. Ibn al-Libi has been identified as the primary source of the flawed prewar intelligence that al Qaeda was being trained by Iraq in bomb making and poisonous gasses. Al-Libi, who had been captured in the aftermath of September 11 and flown by extraordinary rendition to Egypt -- where he was severely tortured -- was the high-value source of much of the false intelligence that Powell invoked.<sup>28</sup>

Here are Powell's exact words: "My colleagues, every statement I make today is backed up by sources, solid sources. These are not assertions. What we are giving you are

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<sup>27</sup> Opinions of the Lords of Appeal for Judgment in the Case A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) UKHL 71; no. 39 [December 8, 2005].

<<http://hei.unige.ch/~clapham/hrdoc/docs/Aandothers2005HoL.htm>>

<sup>28</sup> Michael Isikoff, "Iraq and Al Qaeda: Forget the 'Poisons and Deadly Gases'," *Newsweek*, July 5, 2005.



facts and conclusions based on solid intelligence. I will cite some examples, and these are from human sources."<sup>29</sup>

A former top aide to Colin Powell, Col. Lawrence Wilkerson, describes his participation in this fiasco. "I wish I had never been involved in it," he says. "I look back on it, and say it was the lowest point in my life."<sup>30</sup> Al-Libi's statements, he explained, "were obtained through interrogation techniques other than those authorised by the Geneva conventions."<sup>31</sup>

### ***b. Terroristic torture***

The dubious value of information obtained by interrogational torture raises disturbing questions. If low-grade intelligence is all that can be extracted from high-value detainees, why is torture used at all?<sup>32</sup>

The first to admit that torture is an ineffective tool of interrogation are professional interrogators themselves. Consider a few statements.

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<sup>29</sup> Secretary Colin L. Powell, "Remarks to the United Nations Security Council," New York City, February 5, 2003.

<<http://www.state.gov/secretary/former/powell/remarks/2003/17300.htm>>

<sup>30</sup> "Former aide: Powell WMD speech 'lowest point in my life,'" CNN.com, August 23, 2005.

<<http://www.cnn.com/2005/WORLD/meast/08/19/powell.un/>>

<sup>31</sup> Simon Jeffery, "Prewar claims 'sourced from rendition detainee,'" *Guardian Unlimited*, December 9, 2005. <<http://www.guardian.co.uk/Iraq/Story/0,2763,1663743,00.html>>

<sup>32</sup> There is at least one important exception to the maxim that torture produces only unreliable results. Historical examples show that torture on a massive scale can be effective. "Torture of the few yields little useful information," writes Alfred McCoy. ". . . But mass torture of thousands of suspects, some guilty, most innocent, can produce some useful intelligence;" yet it does so only at "a prohibitively high political cost." See McCoy, *A Question of Torture*, pp. 196, 198; cf. pp. 190-206. [n. 15]

- "Any professional interrogator you speak with, uniformed or otherwise, will tell you that torture doesn't work. . . . I don't even like putting 'interrogation' and 'torture' in the same line." -- Mark Jacobson, former planning officer for Guantanamo in the Department of Defense.<sup>33</sup>
- "I, and everyone I know with any experience in the field, am disgusted. It is illegal to torture or humiliate. Illegal, immoral, dishonorable and ineffective. It is not why we're there." --Philip Gold, writing in the wake of the Abu Ghraib revelations. From 1977 to 1979, he commanded a Marine Corps interrogation team.<sup>34</sup>
- "No one has yet offered any validated evidence that torture produces reliable intelligence. . . . While torture apologists frequently make the claim that torture saves lives, that assertion is directly contradicted by many Army, FBI, and CIA professionals who have actually interrogated al Qaeda captives." -- Brigadier General David R. Irvine, retired Army Reserve strategic intelligence officer. For 18 years he taught prisoner interrogation and military law at the Sixth Army Intelligence School.<sup>35</sup>

The point is confirmed, from another perspective, by Douglas A. Johnson, executive director of The Center for Victims of Torture. In testimony before the Senate Judiciary Committee, he stated:

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<sup>33</sup> Mark Jacobson, PBS Frontline Interview, July 13, 2005.

<<http://www.pbs.org/wgbh/pages/frontline/torture/interviews/jacobson.html>>

<sup>34</sup> Philip Gold, "The ABCs of Interrogation, *The Seattle Post-Intelligencer*, May 12, 2004.

[http://seattlepi.nwsourc.com/opinion/172852\\_interogate12.html](http://seattlepi.nwsourc.com/opinion/172852_interogate12.html)

<sup>35</sup> Brig. Gen. David R. Irvine, "Why Torture Doesn't Work," AlterNet, November 22, 2005. <<http://www.alternet.org/rights/28585/>>

Torture does not yield reliable information. Well trained interrogators, within the military, the FBI, and the police have testified that torture does not work, is unreliable and distracting from the hard work of interrogation. Nearly every client at the Center for Victims of Torture, when subjected to torture, confessed to a crime they did not commit, gave up extraneous information, or supplied names of innocent friends or colleagues to their torturers.<sup>36</sup>

The question becomes acute. If torture is as futile as professional interrogators testify, what is it really about?

Perhaps one clue lies in the nature of state power. The logic of torture is the logic of domination. It is a logic that begins in the torture chamber and extends to the outside world. When torture is practiced on an administrative basis, the victim is shattered, but the society is terrorized. Torture is a means of communication. It sends a terrifying message that the state will stop at nothing to secure its perceived interests and ensure its own survival. Torture functions as an instrument of general intimidation. It demonstrates that those in power are above the law and cannot be held to account.

Terroristic torture usually includes a punitive element. It retaliates against the hated enemy, whom it does not regard as truly human. Because the enemy is less than human, subjecting even mere suspects to excruciating forms of pain, degradation and abuse is thought to be permissible. The punitive aspect becomes a part of the message. No due process, to say nothing of mercy, will be shown to enemies of the state.<sup>37</sup>

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<sup>36</sup> Testimony of Douglas A. Johnson before Judiciary Hearing on the Nomination of The Honorable Alberto R. Gonzales to be the Attorney General of the United States (January 6, 2005). <[http://Judiciary.senate.gov/testimony.cfm?id=1345&wit\\_id=3939](http://Judiciary.senate.gov/testimony.cfm?id=1345&wit_id=3939)>

<sup>37</sup> As Luban points out, punishment has sometimes been the sole purpose of torture. See Luban, "Torture," pp. 1433-35 [n. 6].

Terroristic torture becomes increasingly hard to distinguish from what it purports to hate. To fight terrorism by resorting to torture, for example, is finally to fight terrorism by terrorism, because torture with no interrogational value is little more than terrorism itself. The state that fights terrorism by torture continually generates new enemies. It takes on the features of a protection racket, producing precisely the enemies it needs to justify itself as the defender of society against the threat that it has itself created.<sup>38</sup>

At the same time, its strategy becomes self-defeating. Torture without interrogational value, when practiced on an administrative basis, inevitably leads at some point to a legitimation crisis. Iran under the Shah, the Philippines under Marcos, and Chile under Pinochet are only a few examples of states whose terroristic torture contributed to their demise.<sup>39</sup>

Terroristic torture would seem to be a noxious amalgam compounded of ruthlessness, hubris, resentment and fear. It is as short-sighted as it is virulent. It grossly underestimates the corrupting power that torture effects upon everything with which it comes into contact. This uncanny power of corruption needs to be looked at in its own right. The conclusion of this section, however, pertains to the failure of the necessity defense.

The necessity defense consistently underestimates the costs of resorting to torture while tragically exaggerating any supposed benefits. Although interrogational torture and terroristic torture both appeal to necessity as a sufficient justification, the justification fails. It fails, because torture has no interrogational value, and because terrorism has no possible legitimacy. Interrogational torture is always tinged with the tincture of terror, and terroristic torture is usually wrapped in the mantle of intelligence gathering. Torture is a crime -- an

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<sup>38</sup> This theme is developed at length by William T. Cavanaugh, *Torture and Eucharist* (Oxford: Blackwell, 1998).

<sup>39</sup> See McCoy, *Question of Torture*, pp. 74, 85, 91; cf. 190, 199. [n. 15]

internationally recognized crime -- which cannot be made lawful by necessity. Whether in its interrogational or its terroristic form, it is a crime without a defense.

***c. Demonic torture***

Just as the persistence of torture is unnerving, so the costs of torture are incalculable. Torture corrupts. It corrupts everything and everyone it touches. It corrupts them profoundly and often irreversibly. There is a political level to this corruption, but the category of the political is not sufficient. Likewise, there is a moral level to it, but neither does the moral suffice to capture what is at stake. At its deepest level the corruption represented by torture is spiritual.

The category of the spiritual is descriptively required, because, as many have observed, torture tends toward becoming an end in itself. That is the deepest horror. As if by some invisible yet inexorable force, torture seeks and creates domination for its own sake, even as it also seeks and creates cruelty for its own sake. It seeks and creates cruel dominion and wanton cruelty toward another in disregard of the other's inherent dignity as a human being.

In its lust for absolute domination -- what St. Augustine called *libido dominandi* -- as joined with a corresponding lust for unrestrained cruelty as expressed by the infliction of excruciating humiliation, deprivation and pain -- which might in turn be called *libido crudelitatis* -- torture assumes the spiritual form of the demonic. There seems to be, as is often remarked, an erotic aspect to torture. Cruelty and subjugation become forms of pleasure for the perpetrator. But even this perverse eroticism -- which can be seen in the explicitly sexual aspects of many Abu Ghraib photographs -- has tendrils sunk deeply in the soul.<sup>40</sup>

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<sup>40</sup> Cf. Susan Sontag, "Regarding the Torture of Others," *New York Times Magazine*, May 23, 2004, pp. 24-29, 42.

For something to become an absolute end in itself means that it has usurped a status that does not belong to it. The place belonging to God and God alone can be only seized by the human creature in the form of a monstrous caricature. The power of love is replaced by loveless power, compassion for the weak by sadistic cruelty, fair treatment by demonic subjugation, respect for life by the meanest contempt. Demonic torture is essentially destructive in its brutal self-elevation and self-justification. It proceeds at the expense of all legitimate obligations and norms. Its needs, its pleasures and its purposes are carried out by shattering the essential humanity of another.

When Christians appeal to the image of God in their arguments against torture, they are not, properly speaking, merely adding a religious patina to the concept of human dignity. They are pointing to the ultimate meaning of human life. From Bonhoeffer through Barth to recent Catholic theology, the doctrine of the *imago dei* has been reconceived in terms of relationality instead of the traditional rationality. It is human relationality as such that stands in analogy to the Holy Trinity, and therefore to the ultimacy of community. For the Trinity is itself a holy communion of love and freedom, joy and peace. Human creatures receive the vocation and the gift of living with God and one another on these terms.

When torture is conducted as an end in itself, and is therefore become demonic -- when the purpose of power is power, and the purpose of cruelty is cruelty, when torture's purpose is tyrannical subjugation and sadistic degradation -- then the divinely given meaning of life is unspeakably distorted and destroyed. The relation of the torturer to the tortured, and of the tortured to the torturer, makes a travesty of the most basic relations given by heaven to earth. In so degrading the human being and human community, torture blasphemes against God, neighbor and self.

The mystery of torture is the mystery of this demonic aspect. The urge to humiliate, torment and degrade lurks deep within the human breast.<sup>41</sup> Under conducive circumstances no one can entirely withstand it.<sup>42</sup> Sadism is not born but made. That is why torture, once chosen, cannot readily be contained, and is soon preferred. Torture, once chosen, both proliferates and corrupts. Proliferation is its dimension of breadth, and corruption its dimension of depth. Torture undermines victim and torturer alike.<sup>43</sup> It corrodes the society that permits it. It overthrows the rule of law, and then destroys the tyrannies that it spawns. Corrupting the soul, it eventually corrupts everything in its path. Torture is itself the ticking bomb.

The Military Commissions Act represents this very corruption. It does not come out of the blue. It has its roots in the fifty-year history of CIA and military involvement in torture. It brings to fruition a sinister past that includes CIA funding for academic research in torture techniques, military torture training programs for Latin American regimes and other dictatorships around the globe, the publishing of torture manuals, onsite U.S. supervision of

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<sup>41</sup> Cf. Jonathan Glover, *Humanity: A Moral History of the Twentieth Century* (New Haven, CT: Yale University Press, 2001). Jane Mayer quotes a former CIA officer: "When you cross over that line of darkness, it's hard to come back. You lose your soul. You can do your best to justify it, but . . . you can't go back to that dark a place without it changing you." Jane Mayer, "The Black Sites," *The New Yorker*, August 13, 2007. A French interrogator during the Algerian conflict commented: "I realized that torture could become like a drug. I understood then that it was useless to claim to establish limits and forbidden practices. . . . In this domain too, it was all or nothing." Quoted by Rejali, *Torture and Democracy*, p. 485. [n. 24]

<sup>42</sup> Philip Zimbardo, *The Lucifer Effect: Understanding How Good People Turn Evil* (New York: Random House, 2007); C. Haney, W. C. Banks, and P. G. Zimbardo, "Interpersonal dynamics in a simulated prison," *International Journal of Criminology and Penology*, 1 (1973), pp. 69-97.

<sup>43</sup> For the effects of torture on the torturers, see Rejali, *Torture and Democracy*, pp. 524-26. [n. 24]

client-state torture chambers, the outsourcing of torture to private contractors, and more.<sup>44</sup> What was once condoned in the shadows is now made lawful at home. The stripping of habeas corpus, the establishment of secret prisons, the arbitrary power to declare U.S. citizens as "unlawful enemy combatants," the legalizing of indefinite detention, the admission of evidence obtained by abuse, the immunization of human rights violators from prosecution -- these and other provisions of the Military Commissions Act compromise our commitment to the basic dignity of all human beings.<sup>45</sup>

The Military Commissions Act demonstrates that a government which takes off its gloves will not soon put them on again. It demonstrates that torture is not just one issue among others, but that, as Jeremy Waldron contends, the prohibition against torture is archetypal, containing the rule of law within itself, being an "icon of the whole," so that it marks the line between civilization and barbarism, between constitutional government and dictatorship.<sup>46</sup> Above all, the Military Commissions Act, along with similar policies and legislation, demonstrates the uncanny corruption that is torture; for torture, once tolerated, is not easily contained, and has today become the bomb ticking at the heart of our democracy.

## **6. Conclusion**

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<sup>44</sup> See McCoy, *Question of Torture* [n. 15]; Jennifer Harbury, *Truth, Torture and the American Way: The History and Consequences of U.S. Involvement in Torture* (Boston: Beacon Press, 2005); Lesley Gill, *The School of the Americas: Military Training and Political Violence in the Americas* (Durham, NC: Duke University Press, 2004); Michael McClintock, *Instruments of Statecraft: U.S. Guerrilla Warfare, Counterinsurgency and Counterterrorism, 1940-1990* (New York: Pantheon, 1992); Noam Chomsky and Edward S. Herman, *The Political Economy of Human Rights*, 2 vols. (Boston: South End Press, 1979).

<sup>45</sup> See Joan Mariner, "The Military Commissions Act of 2006: A Short Primer," FindLaw, October 6, 2006. <<http://writ.news.findlaw.com.mariner/20061009.html>>

<sup>46</sup> Waldron, "Torture and Positive Law," pp. 1718-30, 1734-39 (quoted phrase, p. 1722) [n. 4].



Torture is a form of lawlessness that cannot rightfully be made lawful. It cannot be made lawful, because it tends toward wanton cruelty, lawless power, and dictatorship. It is morally wrong, because cruelty, degradation and bondage are morally wrong. Torture is a subcategory under cruelty, as its most extreme form, not an independent category alongside it. It is an international crime without defense, because cruel, inhuman and degrading treatment is a crime without defense. To reject torture while permitting cruel, inhuman and degrading treatment is either disingenuous or incoherent -- the work of a knave or a fool.

Interrogational torture is a delusion, terroristic torture is an abomination, and demonic torture devours its children. Torture admits no necessity by which it can be justified.

