

Interrogation and Torture

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1. INTRODUCTION

At present the United States is engaged in what it has termed the "Global War on Terror." In this effort many prisoners are taken by the US and its allies. Clearly some percentage of these prisoners may hold information which has the potential to: 1) prevent (or lessen the impacts of) terrorist acts against civilians; 2) prevent terrorist acts against military targets; 3) provide the means to break up the terrorist network(s); 4) provide the means to disrupt terrorist command and control activities. Similar situations may exist in many other areas of the world, such as Chechnya or Israel, where a recognized government is "at war" with terrorist organizations.

The governments or occupying powers hold an asymmetric relationship with the groups they are fighting. Decisions of the governments will be unilateral and any concessions toward humane treatment will not necessarily be reciprocated by the terrorist groups.

This paper does not directly examine issues of whether the detention of prisoners is justified, but rather the conduct of interrogation sessions and whether the use of torture in those sessions is ever justifiable.

1.1. Definitions

Dictionary definitions:

Interrogate:

*verb: 1 : to question formally and systematically*¹

Torture:

noun: 2 : the infliction of intense pain (as from burning, crushing, or wounding) to punish, coerce, or afford sadistic pleasure

*verb: 1 : to cause intense suffering to : TORTURE 2 : to punish or coerce by inflicting excruciating pain*²

¹ "Interrogate." Merriam-Webster Online Dictionary, <http://www.m-w.com/dictionary/interrogate>

² "Torture." Merriam-Webster Online Dictionary, <http://www.m-w.com/dictionary/torture>

Other definitions:

[from 18 USC 113C Section 2340 US Anti-Torture Act]

(1) "torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;

(2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from -

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality;

From the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment:

For the purposes of this Convention, the term "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.

The definition of *interrogate* yields very little sense of the fact that subjects of interrogation do not generally want to divulge information. Interrogators often utilize coercive techniques to cause the subject to cede the desired information. These coercive techniques exist on a continuum from "direct questioning" through "torture" and "death".³

³ Filarowski-Sheaks, Christina, Interrogation Policy & the Global War on Terrorism, Presentation to Terrorism Cybersecurity Class, Berkeley, California, 30-Nov-2005

2. HISTORY OF TORTURE

Torture as a tool of interrogation is not a new phenomenon. It has been used to coerce information from subjects at least since the first written law codes, and its use has, at various times in the past, been ubiquitous at least throughout Europe. The following survey traces its early use in Ancient Greece, follows its development in the Roman Empire, its revival in the 12th and 13th centuries for both secular and religious trials, its banning as an instrument of legal trials, and finally its revival as a tool of the state's power.

2.1. Greece: torture of slaves and (some) foreigners

From the 7th to the 5th century B.C., the Greeks codified laws to govern disputes between individuals, replacing the earlier tradition of settling arguments with blood feuds with a system in which the state had the power to arbitrate between parties. The law codes, most notably the set of laws written by Solon for the city of Athens in 594 B.C., set out the ways in which a victim of a crime could be recompensed by the perpetrator--most crimes, including murder, were punished as harming the property of another, and punished accordingly, by demanding payment of a similar amount from the perpetrator to the victim. (For murder, the "payment" was the banishment of the murderer.)⁴

Greek legal procedure placed great value upon the sworn testimony of a citizen, building much of their trial procedure upon the idea that the honor and status of a citizen would compel him to speak the truth. As an additional inducement to speak truth, citizens found to have perjured themselves could be declared infamous and banished from the city. However, when the testimony of a non-citizen, such as a slave or a foreigner, was required, no such

⁴ "Ancient Greek law." Wikipedia.org, http://en.wikipedia.org/wiki/Ancient_Greek_law

compulsion was recognized. Greek law therefore provided a means by which the word of a person without honor might be made acceptable as evidence in a trial: torture.

This type of judicial torture seems to have never been used on citizens, but rare examples do exist of citizens accused of deplorable crimes being subjected to torture. For example, in 411, an accomplice in the assassination of a member of the oligarchy of the Four Hundred in Athens was examined under torture.⁵

2.2. Rome: The torture of everyone but the powerful

Beginning around the 5th century B.C., the development of Roman law was strongly influenced by the body of Greek law and its practices, in much the same way that Rome adopted Greek gods and philosophies.

The Romans also used torture, and, like the Greeks, they placed restrictions on the class of people who could be subjected to torture. At first, the law absolutely prohibited the torture of freeborn citizens, and it provided greater protection to the slave than the Greek laws by allowing only slaves who had been accused of a crime to be tortured. Furthermore, torture of slaves was restricted to criminal, rather than civil, cases, again reducing the threat of torture to the slave. However, these protections were gradually stripped away, first by allowing slaves to be tortured over monetary disputes, then by allowing freemen of "low estate" to be tortured, and finally in allowing freemen of both humble and noble class to be tortured in cases of treason.⁶

It is notable that Roman legal writings, questions as to the validity of evidence obtained under torture had already been raised. For example Ulpian (died 228) wrote the following warning on the use of torture, which was included in Justinian's Digest of 529:

⁵ Peters, Edward, *Torture*. Basil Blackwell Inc., New York, 1985. p. 13-18.

⁶ Peters, p. 18-20

It was declared by the Imperial Constitutions that while confidence should not always be reposed in torture, it ought not to be rejected as absolutely unworthy of it, as the evidence obtained is weak and dangerous, and inimical to the truth; for most persons, either through their power of endurance, or through the severity of the torment, so despise suffering that the truth can in no way be extorted from them. Others are so little able to suffer that they prefer to lie rather than to endure the question, and hence it happens that they make confessions of different kinds, and they not only implicate themselves, but others as well. (quoted in Peters, p. 34)

Regardless of such warnings, torture remained part of the Roman law, which was later one of the formative influences on the canon law of the Roman Catholic Church. (http://en.wikipedia.org/wiki/Decretum_Gratiani)

2.3. Getting medieval: torture techniques

The only record of torture methods used by the Greeks comes from their comic playwrights. For example, in the "Frogs" of Aristophanes, a character offers his slave's testimony, extracted through torture, as proof of his innocence. When asked which methods should be used to torture the slave, the character replies:

*In any mode you please.
Pile bricks upon him: stuff his nose with acid:
Flay, rack him, hoist him; flog him with a scourge
Of prickly bristles: only not with this,
A soft-leaved onion, or a tender leek.⁷*

The methods described by Aristophanes continued to be used, some of them even to the present day.

The method of piling bricks upon the subject was notably still in use in England as the procedure of Peine forte et dure, used to coerce the defendant in a felony case into entering a plea of guilty or not guilty, until it was abolished in 1772. (In English law, a convicted felon's estate would be confiscated by the state, but no conviction was possible if the defendant refused to enter a plea of guilty or not guilty. English courts overcame this loophole by

⁷ Aristophanes, "The Frogs", written 405 B.C.E., translation available at <http://classics.mit.edu/Aristophanes/frogs.html>

pressing defendants with heavy weights until they either entered a plea or were crushed to death.)⁸

Flaying, as torture, involves the removal of a portion of the skin from the body. Flaying was also used as a method of execution, when a larger portion of skin was removed.⁹

The rack, a torture device used throughout Europe, consisted of a frame with a roller at both ends. The victim's hands were affixed by a chain to one roller, and his legs to the other, and the torture consisted of turning the rollers to pull the chains in opposite directions, thereby placing tension on the victim's body, especially his joints, which could be dislocated or even ripped apart by sufficiently strong tension. When equipped with ratcheting rollers, the rack was a very precise instrument for administering gradually increasing levels of pain to the subject.¹⁰

The process of "hoisting" a subject, more commonly known as "strappado" (or, in more modern usage, "Palestinian hanging"), consisted of binding the subject's hands together behind his back, and hoisting the subject into the air by a rope attached to his bound wrists. This technique causes intense pain, possible dislocation of the shoulder sockets, as well as long-term damage.¹¹

Flagellation, or "flogging", is any of a wide variety of methods of striking a victim with a flexible whip or switch, sometimes tipped with sharp ends to tear the victim's flesh.¹²

All of these tortures were clearly well-known from the time of Aristophanes. The Romans added their own inventions to the list: the *lignum* was a rack-like device to pull the legs apart, the *ungulae* consisted of flesh-ripping metal hooks, the *mala mansio* was the name given to imprisonment in a room too small for standing, sitting, or

⁸ "Peine forte et dure." Wikipedia.org, http://en.wikipedia.org/wiki/Peine_forte_et_dure

⁹ "Flaying." Wikipedia.org, <http://en.wikipedia.org/wiki/Flaying>

¹⁰ "Rack (torture)." Wikipedia.org, http://en.wikipedia.org/wiki/Rack_%28torture%29

¹¹ "Strappado.", Wikipedia.org, <http://en.wikipedia.org/wiki/Strappado>

¹² "Flagellation.", Wikipedia.org, <http://en.wikipedia.org/wiki/Flagellation>

lying.¹³

By the seventeenth century, new innovations such as the thumbscrew (a metal-studded vice for compressing the thumbs) and the legscrew (a larger variant of the thumbscrew to be applied to the legs) came into wide usage. Also, a wide variety of tortures involving water, such as the "water cure", a form a torture in which drowning is simulated either by pouring water over a wet cloth covering the face, or water is poured directly into the mouth and nose.¹⁴

2.4. Resurrection of torture: 12th-13th century Europe

In western Europe outside the Roman Empire, and in the formerly Roman territories as they were conquered by Germanic tribes, the formal legal traditions of Roman law were unknown. Rather than presenting evidence of guilt or innocence, parties in a trial (and their supporters) would give testimony under oath, with the outcome of the trial decided by the quality of the testimony (as measured by the number and reputation of supporters) for each party.

For cases in which the crime was sufficiently heinous or the defendants reputation so poor, trial by ordeal could be invoked.¹⁵ In trial by ordeal, if the accused could accomplish a painful and injurious task, such as walking nine paces holding a red-hot iron in his hands, without injury (or with rapid healing), he was declared innocent, on the theory that only divine intervention on the behalf of an innocent man could have made the feat possible.¹⁶

These trials were given legitimacy by the presence and participation of members of the clergy. However,

¹³ Peters, p. 35.

¹⁴ "Water cure." Wikipedia.org, http://en.wikipedia.org/wiki/Water_cure

¹⁵ Peters, p. 42

¹⁶ "Trial by ordeal.", Wikipedia.org, http://en.wikipedia.org/wiki/Trial_by_ordeal

this clerical participation was abolished by the Fourth Lateran Council¹⁷, removing a key support from the practice and leading to the widespread adoption of Roman canon law in trying capital cases.

2.5. Roman canon law

In order to govern the organization of the Roman Catholic Church and its members, the Church developed its own code of laws, known as Roman canon law, or simply canon law. These laws have a number of sources, including the Bible, canons of ecumenical councils, and letters of the popes. One other important source of canon law is classical Roman law.¹⁸

Among the provisions of canon law was a law of proof for serious crimes, crimes in which a defendant found guilty could be put to death. According to the law of proof, conviction of a defendant was only possible under one of two circumstances: either two eyewitnesses to the crime must testify to the defendant's guilt, or the defendant himself must confess to the crime. Circumstantial evidence, even to the extent of the accused being seen fleeing the scene of a murder with a bloody dagger, was insufficient to convict him. However, if there was a "half-proof" of the defendant's guilt, such as a single eyewitness or sufficiently significant circumstantial evidence, the defendant could be examined under torture.¹⁹ In addition, if the defendant was found guilty, and therefore sentenced to death, the law allowed him to be tortured without limits (since his life was already forfeit) in order to extract the names of his accomplices, a process that was known in France as *torture préparatoire*.²⁰

¹⁷Medieval Sourcebook: Twelfth Ecumenical Council: Lateran IV 1215,
<http://www.fordham.edu/halsall/basis/lateran4.html>

¹⁸ "Canon Law." The Catholic Encyclopedia, <http://www.newadvent.org/cathen/09056a.htm>

¹⁹ Langbein, John H., *Torture and the Law of Proof: Europe and England in the Ancien Regime*. The University of Chicago Press, Chicago. 1977. p. 4

²⁰ Langbein, p. 17

Because lawmakers understood the danger of a tortured defendant admitting to crimes he did not commit, this examination was bounded by certain safeguards. The questioner was not permitted to ask "suggestive" questions that convey the details of the crime to the subject. Instead, the questioner was supposed to extract the details from the subject by torture, and those details would then be verified independently, thereby reducing the possibility of the subject's accession to leading questions in order to avoid further pain. The details revealed by the subject were supposed to include information that only the guilty party could know. Further, confessions made while under torture were not admissible in proving the defendant's guilt, and any confession was required to be repeated later without torture in order to be admissible.²¹

However, these safeguards were far from foolproof. The prohibition against suggestive questioning, especially when accidental, was difficult to enforce, and no saving provision for the defendant, such as the declaration of a mistrial, existed. The requirement for details knowable only by the guilty party was likewise problematic, as a witness to a crime could know the same information. Finally, the requirement for confession to occur after torture had ceased was largely made moot by the fact that confession under torture was considered circumstantial evidence sufficient to warrant another examination under torture.²²

This law of proof from canon law had great influence on the secular laws, and the use of judicial torture extended throughout Europe. The one notable exception to this universal adoption of torture was in the British Isles, where trials were decided by "the collective judgement of an ad hoc panel of the folk, uttered as the voice of the countryside, unanimously and without rationale." The lack of standards of proof for a jury (for such it was) to convict a defendant made the question of torture moot, as "an English jury can convict a defendant on less evidence

²¹ Langbein, p. 15

²² Langbein, p. 8-9

than was required as a mere precondition for interrogation under torture on the Continent."²³

2.6. The Inquisition

The best-known use of torture is the Inquisition. The Inquisition grew out of the Church's struggles against the spread of heresy, and in particular against beliefs that challenged the spiritual authority and doctrinal correctness of the Roman Catholic Church. At first, the Church's response to teachings and beliefs against its orthodox doctrine was in the form of persuasive measures, such as missionary activities, episcopal visitations, and the formation of the Mendicant Orders. Beginning in 1184, when Lucius III issued the papal bull *Ad abolendam*, the Church took a more active approach, by creating the institution of the Inquisition to prosecute heretics.²⁴

At first, heresy was not considered a capital crime, and thus trials of heretics were not subject to the use of torture. However, in 1254, Pope Innocent IV published *Ad extirpanda*, which included among its provisions:

*...the official or Rector should obtain from all heretics he has captured a confession by torture without injuring the body or causing the danger of death, for they are indeed thieves and murderers of souls and apostates from the sacraments of God and of the Christian faith. They should confess their own errors and accuse other heretics whom they know, as well as their accomplices, fellow-believers, receivers, and defenders, just as rogues and thieves of worldly goods are made to accuse their accomplices and confess the evils which they have committed.*²⁵

Also, although the Church prohibited its agents from taking human life, persons found guilty of heresy were turned over to secular authorities, who would punish the convicted by the laws of the land which gave a sentence of death

²³ Langbein, p. 77-78

²⁴ Peters, p. 53-54

²⁵ Peters, p. 65, quoting Lea, "Torture", p.188

to heretics. The uniformity of this punishment may be attributed to a provision of a canon from the Fourth Lateran Council in 1215, which stated:

*...if a temporal ruler, after having been requested and admonished by the Church, should neglect to cleanse his territory of this heretical foulness, let him be excommunicated by the metropolitan and the other bishops of the province. If he refuses to make satisfaction within a year, let the matter be made known to the supreme pontiff, that he may declare the ruler's vassals absolved from their allegiance and may offer the territory to be ruled lay Catholics...*²⁶

The Inquisition's reputation for mercilessness came in large part from its failure to observe the safeguards against false confession used by other courts. In particular, the fact that heresy was an intellectual crime made disproving the charge problematic. Other irregularities in the trials of the Inquisition were that the eyewitness testimony used to convict a person could come from criminals, convicted perjurers, and convicted heretics, that the names of the accusers and their testimony were withheld from the accused, and that no legal counsel of any kind was available to the accused.²⁷

Although, at its outset, the Inquisition had the eradication of heresy as its primary goal, it eventually became, at least at times, a tool by which a ruler might destroy his enemies without fear of repercussion, since the trial, torture, and pronouncing the verdict of heresy were all performed by the Church. One example of politically motivated torture of individuals by the state is the case of the Knights Templar. Originally a monastic military order founded in 1118, the Templars had expanded their sphere of activity to include international banking. In so doing, the organization became fabulously wealthy, with extensive holdings throughout Europe and the Middle East, including the entire island of Cyprus.²⁸ In 1307, after the being repeatedly refused in his requests and demands for a

²⁶ Medieval Sourcebook: Twelfth Ecumenical Council: Lateran IV 1215, <http://www.fordham.edu/halsall/basis/lateran4.html>

²⁷ Peters, p. 66-67

²⁸ "Knights Templar." Wikipedia.org, <http://en.wikipedia.org/wiki/Templars>

loan to his kingdom, Philip IV of France, had all of the Templars in France arrested on charges of heresy. After the Knights were tortured into signing confessions to the charges, they were executed, and the property of their order was seized by the French crown.²⁹

2.7. Abolition of judicial torture

Around 1750, the nations of Europe abandoned both the law of proof from canon law and the requirement for torture to support it, turning instead to the jury system of determining guilt. A form of jury trial had always existed within canon law, and from there spread to the rest of Europe, but it was originally limited to minor infractions and suits. However, it was perceived as being so crude and inexact that it was unsuited to cases in which a man's life was at stake.

This changed in the 16th and 17th centuries. First, new penalties for punishing persons convicted of capital crimes came into wide use, especially sentencing convicts to work as oarsmen in naval galleys, punitive imprisonment (which until then had been used only for the short-term holding of prisoners before trial, rather than as a punishment in itself), and transporting convicts to overseas colonies to work as indentured servants.³⁰ Second, judges made use of these non-fatal punishments to justify first bending the rules of conviction by sentencing (to such a less final sentence) a person with sufficiently strong evidence of guilt without first finding him guilty (a process termed *Verdachtstrafe*, or punishment for suspicion), and later using the existence of such nonfatal penalties rationalize using the jury trial system, as the formal system was required only in cases where death was the expected

²⁹ "Philip IV of France." Wikipedia.org, http://en.wikipedia.org/wiki/Philip_IV_of_France

³⁰ Langbein, p. 27-44

punishment.³¹

Even as the requirement for torture in criminal trials lessened, writers such as Voltaire and Montesquieu, in the spirit of the Age of the Enlightenment, condemned torture as barbaric, against the natural rights of man, and called for its abolition.³²

Both of these forces contributed to the spread of a ban on judicial torture across Europe, starting in the early 18th century, and encompassing most of Europe by the middle of the 19th century.³³

2.8.Survival of torture as an engine of state: then and now

As was mentioned in sections 2.1 and 2.2, the Greeks and Romans used torture on persons who would otherwise be exempt in cases such as assassination and treason, or what may be more broadly called crimes against the state. In addition, the practice of torturing a subject into revealing his co-conspirators or accomplices is one example of the use of torture in law enforcement, as opposed to in a judicial setting. Both of these practices emerged again in the 20th century, after being banned in the 18th and 19th centuries, as the meaning of treason shifted from being a crime against the person of the monarch, to being a crime against the much less concrete or well-defined good of the people or of the state.³⁴

The prime example of the use of torture against “enemies of the state” was in the U.S.S.R., as documented by Aleksandr I. Solzhenitsyn in *The Gulag Archipelago*. The interrogations that Solzhenitsyn describe strongly resemble those of the Inquisition, except that there is no judge, no trial, and the prisoner is already under a sentence

³² Peters, p. 76

³³ Peters, p. 91

³⁴ Peters, p. 105

of imprisonment and labor for a period of years. “Evidential standards were very low; a tip off by an anonymous informer was considered sufficient grounds for arrest. Usage of 'physical means of persuasion' was sanctioned by a special decree of the state...”³⁵ Solzhenitsyn documents numerous torture methods employed in questioning prisoners, including humiliation, tickling the inside of a bound prisoner's nose with a feather, cigarette burns on the prisoner's skin, extended periods of standing or kneeling, deprivation of water for periods of days, sleep deprivation, continuous interrogation for periods of days with relays of interrogators, starvation, and beatings of all kinds.³⁶ The goals of these tortures were to compel the prisoner to sign a confession, validating the state's act of imprisoning him and to get the prisoner to expose all of his possibly subversive accomplices or acquaintances.

Incidentally, Solzhenitsyn also describes a type of incident by which “stoolies,” prisoners in the employ of the state as spies, propagandize in favor of torture, as well as in favor of confession:

If you are an orthodox Communist, then another orthodox Communist will sidle up to you, peering about with hostile suspicion, and he'll begin to whisper in your ear so that the uninitiated cannot overhear:

“It's our duty to support Soviet interrogation. It's a combat situation. We are ourselves to blame. We were too softhearted; and now look at all the rot that has multiplied in the country. There is a vicious secret war going on. Even here we are surrounded by enemies. Just listen to what they are saying! The Party is not obliged to account for what it does to every single one of us—to explain the whys and wherefores. If they ask us to, that means we should sign.”³⁷

2.9. Getting medieval again: modern torture techniques

Modern interrogators still make use of medieval torture techniques, and, since the human body hasn't

³⁵ “NKVD.” Wikipedia.org, <http://en.wikipedia.org/wiki/NKVD>

³⁶ Solzhenitsyn, Aleksandr I., *The Gulag Archipelago*. Harper & Row, New York, 1973. p. 103-117.

³⁷ Solzhenitsyn, p. 128-129.

changed in the past thousand years, they remain effective. Additionally, the techniques listed by Solzhenitsyn have been reported in use around the world, as have a variety of new methods of causing physical or psychological distress during an interrogation. Among these methods are:

- Applying electrical shocks using a cattle prod or mains current, frequently to the genitals and nipples.
- Sensory deprivation
- Psychoactive drugs
- Rape (though not a new phenomenon, its use in interrogation is apparently new)³⁸

One other modern innovation in interrogation was made possible by the advent of the long-term prison facilities required by the shift in the 18th century from capital punishment to less final punishments. Given a modern prison facility, it is a simple matter to hold a prisoner indefinitely, inflicting any kind of torture desired over the course of many years. The sheer hopelessness of being held at the mercy of the torturers, with no hope of ever being released, or even killed, must rank as one of the most devastating tortures ever imagined.

3. TORTURE LEGISLATION OR LAW

From the 18th century through the late 20th century, torture has generally waned (with some notable exceptions mentioned in our brief history section, and very current events) as an accepted practice in interrogations.

The body of international law during this time has also moved dramatically closer to a human rights perspective, which denounces torture. In this section of the paper, we briefly survey some relevant international law (treaties,

³⁸ Forrest, Duncan (editor), for Amnesty International United Kingdom, *A Glimpse of Hell: Reports on Torture Worldwide*, p. 107-114

conventions, etc.), as well as United States law. We also examine Israel's Landau Commission, which attempted to codify what forms of torture were acceptable. The international laws examined here, at first glance, seem unequivocally intolerant of torture. As the United States and other nations confront a new enemy—global terrorism—they are confronted with new choices, and at least the US has restricted its interpretation of these treaties and laws as a result of these choices. These interpretations make the United States far less accountable for its treatment of captives than a superficial examination indicates.

3.1. The Geneva Conventions and Protocols

The Geneva Conventions comprise a set of four treaties and two protocols governing humanitarian treatment during the course of war. They are considered by many the basis of international law relating to humanitarian issues. The treaties were last revised in 1949 in Geneva. The first Convention³⁹ deals with humanitarian concerns for armed force members wounded in wars and dates originally to 1864. The second Convention⁴⁰ deals with concerns of "shipwrecked" casualties in wars and is rooted in the 1907 Hague Convention X. The third Convention⁴¹ is concerned with the treatment of prisoners of war, and was originally drafted in 1925 and adopted in 1929. The fourth Convention⁴² relates to the humane treatment of "civilian persons" in times of war and dates originally to the 1907 Hague Convention IV. In 1977 two additional Protocols (I and II) were established

³⁹ Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 12 August 1949.

⁴⁰ Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949.

⁴¹ Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949.

⁴² Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949.

addressing protection of victims of international⁴³ and non-international⁴⁴ wars respectively. The third and fourth Conventions and additional protocols are of most interest with respect to this paper.

The third Geneva Convention states in Part III, Section 1, Article 17 (emphasis added):

No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.

The fourth Geneva Convention states in Part III, Section 1, Article 32 (emphasis added):

*The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to **murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person but also to any other measures of brutality whether applied by civilian or military agents.***

Protocol I states in Part IV, Section 3, Chapter 1, Article 75 (emphasis added):

1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.

2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:

(a) Violence to the life, health, or physical or mental well-being of persons, in particular: (i) Murder; (ii)

Torture of all kinds, whether physical or mental; (iii) Corporal punishment; and (iv) Mutilation;

(b) Outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;

(c) The taking of hostages;

(d) Collective punishments; and

(e) Threats to commit any of the foregoing acts.

⁴³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

⁴⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

It is interesting to note this quotation from Protocol I applies to all individuals “who do not benefit from more favourable treatment...” In this sense, there are no exceptions allowing for any individual to be subject to any of the maltreatments (including but not limited to torture) defined in paragraph 2 of Article 75. The United States goes to great care to claim that by presidential designation of Afghan and Al Qaeda detainees as "unlawful combatants," the Geneva Conventions do not apply,⁴⁵ but that the detainees are to be treated "humanely" and "in a manner consistent with the principles of the Geneva Conventions...."

Protocol II states in Part II, Article 4 (emphasis added):

1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.

2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph I are and shall remain prohibited at any time and in any place whatsoever:

(a) Violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) Collective punishments;

(c) Taking of hostages;

(d) Acts of terrorism;

(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) Slavery and the slave trade in all their forms;

(g) Pillage;

(h) Threats to commit any of the foregoing acts.

⁴⁵ Memorandum for the General Counsel for the Department of Defense, Subject: Detainee Interrogations, Jan 15 2003, "Working Group Report: Detainee Interrogations in the Global War on Terrorism....", Section II, part A.

Taken as a whole, the Geneva Conventions and Protocols protect human beings against inhumane treatment (including torture). No where in the documents is torture explicitly authorized for any purpose whatsoever under any condition. The conventions bind their parties to humane treatment in all situations of armed conflict.

In this light, at least a portion of the interrogation techniques reportedly legal under FM 34-52⁴⁶⁴⁷⁴⁸, may be illegal, however the US believes them to be legal. The additional interrogation techniques⁴⁹⁵⁰ granted, then rescinded⁵¹ 6 weeks later, included "Use of stress positions," "Removal of clothing," "Use of phobias to induce stress," and "Use of mild, non-injurious physical contact." Whether those techniques actually constitute torture is another matter entirely, but many of the additional techniques, infringe upon the "Outrages upon personal dignity, in particular humiliating and degrading treatment...." clauses of Protocols I and II.

In the conduct of the Global War On Terror, the United States has, perhaps, adopted a selective interpretation of the Geneva Conventions, and may have transgressed the spirit if not the letter of the Conventions. To be fair, the United States claims their opponents are not High Parties to the Conventions, and are thus not protected by them. Others, both in the United States and abroad, differ on this interpretation. Does this make the conventions any less important? Are we better off if there are no Geneva Conventions at all? The answer to both of

Terrorism Cybersecurity Class, Berkeley, California, 30-Nov-2005

⁴⁸ US Dept. of Defense, Joint Task Force 170, Memorandum for Commander, 11 October 2002, "Subject: Request for Approval of Counter-Resistance Strategies"

⁴⁹ General Counsel of the US Dept. of Defense, Action Memo, November 27, 2002. "Subject: Counter-Resistance Techniques". Includes Secretary of Defense, Donald Rumsfeld's approval and annotation "However, I stand for 8-10 hours a day. Why is standing limited to 4 hours?"

⁵⁰ Filarowski-Sheaks, Christina, *ibid.*

⁵¹ US Secretary of Defense, Memorandum for Commander USSOUTHCOM, January 15, 2003, "Subject: Counter-Resistance Measures"

these questions is clearly no. At least some benefit is provided from those protections, and George Bush has clearly stated:

*Our country is at war and our government has the obligation to protect the American people. Any activity we conduct is within the law. We do not torture.*⁵²

At least, this statement is unequivocal. The definition of torture is omitted, and the actual effect on individuals conducting interrogations is not confirmable by neutral parties outside the actual interrogation sessions. Other evidence that the Conventions and external pressure to comply with them are having an effect includes the following excerpt from DoD directive 3115.09:

It is DoD policy that:

*3.1. All captured of detained personnel shall be treated humanely, and all intelligence interrogations, debriefings, or tactical questioning to gain intelligence from captured or detained personnel shall be conducted humanely, in accordance with applicable law and policy. [...] Acts of physical or mental torture are prohibited*⁵³.

The US government may be approaching the intent of the more commonly understood interpretations of the Conventions. However, as Senator John McCain argues⁵⁴, our reputation suffers when we do not fully embrace the principles. He argues when our nation observes and respects the Geneva Conventions, this has a positive effect on the willingness of other nations to do the same. In asymmetric situations, he claims, due to our heritage as a nation of laws, we must hold ourselves to a higher standard than our opponents (terrorists in this case), rather than degrade our standards.

3.2. UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

⁵² Bush, George W, Address to the Press, Panama City, Panama, 07-Nov-2005.

⁵³ US Dept. of Defense, Directive Number 3115.09, November 3, 2005.

⁵⁴ McCain, John, Respecting the Geneva Conventions, Wall Street Journal, June 1, 2004.

This convention was adopted 10 December 1984 and entered into force 26 June 1987. It was signed by the US 18 April 1988 and ratified by the US Senate 21 October 1994 with reservations.

This Convention forms the most extensively and clearly stated agreement that torture is not to be tolerated in any form by agreeing parties. There is a clear definition (see definitions section in the introductory paragraphs of this paper), and a directive that "Each State Party shall take legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction." There is a clear statement that "No exceptional circumstances whatsoever, whether a state of war or a threat of war, ... , may be invoked as a justification of torture. Additionally there is a clear statement that "*refouler*" (extraditing an individual to a state where he would be in danger of subjection to torture) is prohibited.⁵⁵ Finally there is a statement "Each State Party shall ensure that all acts of torture are offences under its criminal law...." However, in actual fact the US signed the Convention subject to quite a number of declarations and reservations effectively crippling its agreement to most of the mentioned provisions:

"(1) That the United States considers itself bound by the obligation under article 16 to prevent 'cruel, inhuman or degrading treatment or punishment', only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."

"The United States declares, pursuant to article 21, paragraph 1, of the Convention, that it recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention. It is the understanding of the United States that, pursuant to the above-mentioned article, such communications shall be accepted and processed only if they come from a State Party which has made a similar declaration."

"(1) (a) That with reference to article 1, the United States understands that, in order to constitute torture, an act

⁵⁵ Memorandum for the General Counsel fo the Department of Defense, Subject: Detainee Interrogations, Jan 15 2003. "Working Group Report: Detainee Interrogations in the Global War on Terrorism...." This document indicates this provision is to be interpreted in a considerably more restricted way: "The U.S. understanding relating to this article is that it only applies if it is more likely than not that the person would be tortured."

must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality."

'On 3 June 1994, the Secretary-General received a communication from the Government of the United States of America requesting, in compliance with a condition set forth by the Senate of the United States of America, in giving advice and consent to the ratification of the Convention, and in contemplation of the deposit of an instrument of ratification of the Convention by the Government of the United States of America, that a notification should be made to all present and prospective ratifying Parties to the Convention to the effect that: "... nothing in this Convention requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States." '

3.3. UN International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights⁵⁶ is a legally binding document containing a straight forward statement about torture:

Part III, Article 7

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

This statement is rooted in the Universal Declaration of Human Rights⁵⁷: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

The United States had a number of declarations and reservations included with its adoption of the Covenant. Germane to this discussion is the following:

(3) That the United States considers itself bound by article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

This reservation restricts the applicability of the Covenant to criminal proceedings in the US. It is unclear, in the case of its global war on terror, whether the US is bound by article 7. Clearly an argument can be made by the US Government that this article does not apply to its detention and interrogation of GWOT detainees.

3.4. US Constitution and Amendments (Includes Bill of Rights)

The Constitution of the United States and its amendments apply to the residents of the United States. The Constitution is largely silent on the topics of detention, interrogation, torture. However several amendments to the Constitution speak at least peripherally to this topic:

The Fourth Amendment guarantees "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated" without a warrant issued on "probable cause." The Fifth Amendment⁵⁸ includes the infamous provision against self-incrimination, as well as a guarantee

⁵⁸ The right to not self-incriminate may not be as clearcut as the American public believes. In the case of *Leon v. Wainright* heard by the 11th Circuit Court in 1984, a group of policemen beat a kidnapper into revealing the location of his captive. The kidnapper later on confessed to the crime, but in court argued the confession was obtained through the beating. The court sided with the prosecution in this case drawing the distinction between the victim location information extracted forcefully, and the confession which was ruled voluntary and thus admissible as evidence in court.

"nor be deprived of life, liberty, or property, without due process of law;" The provision requiring indictment of a Grand jury to hold an individual for serious crimes guarantees that individuals must be charged with a crime to be held for that crime.

The Sixth Amendment guarantees that for criminal matters, accused individuals have the right to a speedy trial by jury, and access to counsel. The Eighth Amendment⁵⁹ protects against the infliction of cruel and unusual punishments. The Fourteenth Amendment guarantees "... nor shall any State deprive any person of life, liberty, or property, without due process of law;"

The effect of these amendments to the Constitution on detention may be muddled because the US government believes it has the right to detain individuals in times of war, as long as they are not actually charged with a crime. This was the sense of the the Department of Justice's argument in the Jose Padilla case until they charged him with a crime. Prior to that time Padilla was held as an "enemy combatant" under orders from the US President. James Comey (Deputy US Attorney General) stated:

"Two years ago, the president of the United States faced a very difficult choice. After a careful process, he decided to declare Jose Padilla for what he was: an enemy combatant, a member of a terrorist army bent on waging war against innocent civilians. And the president's decision was to hold him to protect the American people and to find out what he knows."⁶⁰

This is at odds with at least the rights to not incriminate oneself and the speedy trial provisions. The U.S.

Department of Justice treads a fine line though they have not charged Padilla with a crime based on the original

⁵⁹ The US Supreme Court ruled on the Eighth Amendment in a Corporal Punishment case (Ingraham v. Wright, 1977): "An examination of the history of the Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes." The case involved two Florida students who were paddled, then sued, claiming "cruel and unusual punishment."

⁶⁰ Comey, James, *Remarks of Deputy Attorney General James Comey Regarding Joes Padilla, Tuesday, June 1, 2004.*

reason for his arrest and detention. Any attempt to prosecute him based on the information he provided under interrogation in custody will likely result in legal challenges based upon the rights to legal representation and against self-incrimination. No reliable information was available to determine what methods of interrogation were used to obtain the extensive information Comey released on June 1, 2004.⁶¹

3.5. US Anti-Torture Act (18 USC 113C Section 2340)

This Act clearly defines "torture" (see introductory definitions above) and sets forth what constitutes an offense and its punishability under terms of the act.

Section 2340A. Torture

(a) Offense. - Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

(b) Jurisdiction. - There is jurisdiction over the activity prohibited in subsection (a) if -

(1) the alleged offender is a national of the United States; or

(2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.

(c) Conspiracy. - A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.

It is interesting to note this act applies to offenses committed outside the United States⁶², whether the alleged offender is a national of the US or not. It includes language allowing the US to pursue convictions against offenders

⁶¹ Comey, James, *ibid.*

⁶² A provision in the Patriot Act specifically considers "the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign states..." to be under the jurisdiction of the US. Under this reasoning, the Memorandum for the General Counsel for the Department of Defense, Subject: Detainee Interrogations, Jan 15 2003, states "As such the Torture Statute does not apply to the conduct of U.S. personnel at GTMO."

who set foot in the United States. It seems apparent the act applies in the case of interrogations occurring in Iraq and Afghanistan, but not those at Guantanamo. This act may also temper some of the US acceptance of Conventions and Treaties, particularly with regards to a somewhat more restricted definition of the word "torture".

3.6. The Rise and Fall(?) of Israel's Landau Commission:

Israel's Landau Commission⁶³ of Inquiry was initially charged to "examine the General Security Service's methods of interrogation of terrorist suspects. The commission looked at then present Israeli and International law and standards relating to human rights and torture. It also examined the guidelines, laws and regulations of other "democracies" germane to these areas.

The Commission set forth to define (in the translated words of the Commission) "...with as much precision as possible, the boundaries of what is permitted to the interrogator and mainly what is prohibited to him." The Commission then approved for interrogation of terrorists, "...the use of a moderate degree of pressure, including physical pressure, in order to obtain crucial information...." This was to be used in cases where the information could be used to prevent murder or the suspect was believed to have information about a terrorist organization (plans, locations or armaments, etc.) which could not otherwise be determined.

The Commission recommended use of "psychological forms of pressure....," and "only moderate physical pressure." They examined the use of force in interrogations by the British in Northern Ireland, and felt the European Human Rights Court Ruling under Article 3 of the European Convention on Human Rights justifying the distinction between "torture" and "inhuman and degrading treatment" was in line with the Commission proposals.

The Commission went further to ensure disproportionate pressure not be abused or overused by establishing several measures of oversight intended to provide safeguards. The second section of the report actually detailed the exact forms of permissible pressure. The details section was classified secret and thus not open to outside inspection. Some media and human rights groups reported based on interviews with, and statements from released interrogation suspects⁶⁴, that: 1) torture occurred; 2) the torture was systematic, even routine; 3) the torture was considerably more widespread than allowed in the publicly available Commission guidelines, and; 4) the oversight was less stringent than required. Eitan Felner reports⁶⁵:

Justice Landau himself publicly said that he felt betrayed by the GSS for regularly exceeding the constraints on the use of force imposed by his commission. "Apparently, there were double messages once again. There was the written code—the Landau Commission—and another, oral code in the field. And this is a terrible thing."

In 1999, the Israeli Supreme Court overturned the Commission's guidelines:

"On 6 September 1999, a nine-judge panel of the Supreme Court unanimously outlawed methods of physical force that were routinely used in interrogations by the General Security Service (GSS). This decision voided the interrogation guidelines previously in effect, which included the use of interrogation methods that constituted torture, including violent shaking, holding and tying the interrogee in painful positions, sleep deprivation,

⁶⁴ However, the Public Committee Against Torture in Israel (<http://www.stoptorture.org.il/eng/background.asp?menu=3&submenu=1>) reports these methods included: 1) Typing up detainee in painful positions for hours or days on end; 2) Solitary Confinement; 3) Confinement in tiny cubicles; 4) Beatings; 5) Violent "shaking"; 6) Deprivation of sleep and food; 7) Exposure to cold or heat; 8) Verbal, sexual and psychological abuse; 9) Threats against the individual or the individual's family; 10) lack of adequate clothing or hygiene.

⁶⁵ Felner, Eitan, *Torture and Terrorism, Painful Lessons from Israel*, pp. 28-43, Chapter 3 of: *Torture a Human Rights Perspective*, New York, Human Rights Watch, 2005.

covering the interrogee's head with a sack, and playing of loud music.”⁶⁶

Once the Commission's guidelines are thrown out, the GSS either stopped the practices, or continued them but with no oversight mechanisms or other guards. There is no way to ascertain which occurred. An interesting quote from the CNN coverage⁶⁷ of the ISC decision states:

...the nine Supreme Court justices noted that the state still has the right to defend itself. If the Shin Bet believes it must torture a suspect to reveal the location of a "ticking bomb," the torturer would be put on trial, but a court might accept the argument that physical force was necessary. This appears to provide a back door, but on a very limited scale.

The concern expressed in the quotation is one of protection for the torturers. What if the interrogator uses torture, but does not gain the desired information because the suspect does not know it? How might the court "accept the argument that physical force was necessary"? Is this after the fact determination acceptable for a democracy? Must we now accept the torturer's determination of necessity? The review in a criminal proceeding might actually drive the abuse even more underground.

4. ORGANIZATIONAL USE OF TORTURE

Despite the implementation of international laws banning the use of torture under any circumstance, as discussed in section 3,above, state-sponsored organizations around the world still induce physical and psychological harm on criminals, suspects, and other types of detainees, both in interrogation and in other contexts. If cruel and unusual harm is committed and/or acknowledged by various security departments, committed and/or acknowledged

http://www.btselem.org/english/Torture/Torture_by_GSS.asp

⁶⁷ <http://edition.cnn.com/WORLD/meast/9909/06/israel.torture/>

by various ranks, and goes unpunished or hardly punished after judicial review, then the use of torture is *de facto* an organized and systematic policy (though possibly unwritten), regardless of whether the country admits that it used torture.

4.1. Russia

From 1999 to 2000, ten thousand Chechens were arrested by Russian authorities to regain control over Chechnya. Detainees at the Russian Chernokozovo "filtration" camp "suffered systematic beatings, rape, and other forms of torture"⁶⁸ (Human Rights Watch). For example, when detainees arrived at the camp, they were forced to walk down a row of guards who struck them with batons. According to the testimony of one former detainee, the guards beat him unconscious, and when he awoke, began to beat him again. It should be noted that, by the time journalists and international monitors visited the site, most of the evidence of prisoner abuse had been removed.

On November 18, 2005, Russian law enforcement allegedly used ill-treatment to coerce confessions out of suspects involved in an armed attack on police and security forces in Nalchik. Rusal Kudaev, a former prisoner from Guantánamo Bay, was arrested by Russian authorities ten days after the attack. On October 26, his lawyer said that she saw him beaten so severely that he needed assistance walking. This evidence points to the possibility that the United States government is willing to commit extraordinary rendition.

4.2. China

On December 2, 2005, an envoy of the United Nations Commission on Human Rights who had

⁶⁸ "Russia: Suspects in Caucasus Attack Ill-Treated." Human Rights Watch. 18 Nov. 2005. 5 Dec. 2005. <<http://hrw.org/english/docs/2005/11/18/russia12053.htm>>

investigated Chinese prisons and detention centers reported that torture was still a widespread practice in China.

Authorities in these prisons and detentions centers are encouraged to extract admissions of guilt from detainees through inhumane treatment. Such treatment included “electric shocks, sleep deprivation and submersion in water or sewage”.⁶⁹

A political prisoner in China told the envoy that prison guards forced him to remain on his bed in one position for eighty-five consecutive days and that the guards would wake him up if he ever moved out of position while sleeping. Some prisoners detained in Beijing sentenced to death were handcuffed twenty-four hours a day, relying on fellow inmates to feed them and help them use the toilet.⁷⁰ Other forms of torture included hooding, beating by fellow inmates, “stress positions,” and denial of medical treatment. These abuses by Chinese officials are allowed to occur because the Chinese government only bans a narrow definition of violent punishment where physical harm leads to visible scars or disability. The nation’s “powerful security apparatus” has challenged demands to expand rights for detainees to ensure “stability” and prevent dissent.

The envoy claimed that although torture still pervaded the country, the violence against prisoners in China had declined since it signed an international covenant in 1988. The country also issued regulations in 2004 that “prohibit torture and threats to gain confessions”.⁷¹

4.3. Israel

⁶⁹ Kahn, Joseph. "Torture Still 'Widespread' in China, Says U.N. Envoy." The New York Times 2 Dec. 2005. 4 Dec. 2005 <<http://www.nytimes.com/2005/12/02/international/asia/02cnd-china.html?pagewanted=1&ei=5094&en=b7887ab2a46b2102&hp&ex=1133586000&partner=homepage>>.

⁷⁰ *ibid*

⁷¹ *ibid*

Israel is the only democratic country in the world that has openly admitted “moderate physical pressure” is permissible to extract information from prisoners. A report released in 2000 by the then Israeli state comptroller, Miriam Ben-Porat, stated that Shin Bet tortured Palestinians involved in the Intafada from 1988 to 1992. B’Tselem, an Israeli human rights organization, estimated that 85% of all Palestinian detainees, numbering in the thousands, had been tortured⁷². It has been reported that Shin Bet security agents tied the hands of suspects behind their backs and placed them under air conditioners. In another technique, Shin Bet violently shook Palestinians, which led to at least one death. In yet another common practice of torture, Palestinians are forced into the “shabeh” position, where they are “bent backward over chairs, hands and legs shackled beneath”⁷³. The method “Palestinian hanging” (or strappado) has already been mentioned in the context of medieval torture in section 2.3.

A former detainee who had been arrested 14 times since 1983 claimed that Israeli interrogators had become “more clever and more experienced” over the years.⁷⁴ He also cited a difference between torture committed by soldiers and torture committed by actual interrogators. According to the detainee, Israeli soldiers casually beat and humiliated prisoners, similar to the way the US military had tortured prisoners in Abu Ghraib, while interrogators’ actions were more calculated, relying on psychological methods to break prisoners.

In 1999, the Israeli Supreme Court banned “all forms of physical abuse”.⁷⁵ However, it also created loopholes which allowed interrogators to continue practicing the same inhumane treatment it had traditionally relied

⁷² Borger, Julian. "Israeli Government Report Admits Systematic Torture of Palestinians." Guardian Unlimited. 11 Feb. 2000. 5 Dec. 2005 <<http://www.guardian.co.uk/israel/Story/0,2763,193466,00.html>>.

⁷³ "Israel Supreme Court Bans Interrogation Abuse of Palestinians." CNN. 6 Sept. 1999. 3 Dec. 2005 <<http://www.cnn.com>>

⁷⁴ Frankel, Glenn. "Prison Tactics a Longtime Dilemma for Israel." Washington Post 16 June 2005. 3 Dec. 2005 <<http://www.washingtonpost.com/wp-dyn/articles/A44664-2004Jun15.html?nav=headlines>>

⁷⁵ *ibid*

upon if an imminent terrorist attack was suspected. Even so, Shin Bet agents responded to the new law by administering a new host of torture techniques on suspects, including “prolonged detention in subhuman conditions”.⁷⁶ Security officials often argue that Israel is a unique case in the democratic world, where terrorism occurs every day and such practices are necessary to protect the people.

4.4. United States

The abuses practiced by US Military soldiers in the One-Alpha cell block of Abu Ghraib prison were both physical and psychological. The soldiers forced Iraqis into simulated sexual positions, stripped them naked, and forced them to masturbate. The officer in charge of these torture sessions, Charles Graner, reportedly hit prisoners with his fists and iron rods. He made the prisoners eat food from a toilet. In another technique, the US soldiers confronted the Iraqis with police dogs. Yet another instance of inhumane treatment had a prisoner’s neck tied to a dog’s leash, forcing him to walk on all fours.⁷⁷ Many of these tortures, including the act of taking pictures of the them, put Iraqi prisoners to shame because of established Iraqi custom. Such kind of public embarrassment could be considered as the highest form of dishonor for Iraqis.

It should be noted that the Iraqi government was a high-contracting player which agreed to the Geneva Conventions. Therefore, Iraqi military personnel possessed POW status, so there is no question as to whether or not the torture committed at Abu Ghraib broke international laws against torture.⁷⁸

Similar abuses were committed on a group of Iraqi journalists by different soldiers at a different base in

⁷⁶ *ibid*

⁷⁷ Curtiss, Richard H. "The midnight shift at Abu Ghraib." Washington Report on Middle East Affairs 24 (2005): 28-29.

⁷⁸ McCarthy, Andrew C. "Torture: Thinking about the Unthinkable." Commentary 118 (2004): 17-24.

Iraq. This seems to refute the US Military's argument that torture was only practiced by a few low-ranking soldiers in an isolated incident. Indeed, it appears as if "a clear program had been purposely devised and methodically distributed with the intention, in the words of General Sanchez's October 12 memorandum, of helping American troops 'manipulate an internee's emotions and weaknesses' ".⁷⁹

Then there's the case of "extraordinary rendition." An article in the February 2005 issue of *The New Yorker* stated that:

*This program had been devised as a means of extraditing terrorism suspects from one foreign state to another for interrogation and prosecution. Critics contend that the unstated purpose of such renditions is to subject the suspects to aggressive methods of persuasion that are illegal in America—including torture.*⁸⁰

A report on renditions estimated that "one hundred and fifty people had been rendered since 2001".⁸¹ There are a few reasons why the CIA practices this act, which is potentially illegal by both international and US law. First, it has been said that through extraordinary rendition, the CIA is returning terrorist suspects to their home countries and making the corresponding governments take responsibility for their own people. The US administration has assured the public that people are not rendered to a foreign country if the US believes that the person will more likely than not be tortured in the foreign country. Yet, Maher Arar was a man who lived in Canada and he was rendered to Syria where he was tortured.⁸² More likely, extraordinary rendition is used by the US when the CIA or another federal department suspects a person is privy to actionable information regarding terrorist attack. The department believes that if the person is subject to torture in another country where such an act is legal, the person will "loosen

⁷⁹ Danner, Mark. "The Logic of Torture." *The New York Review of Books* 51 (2004). 5 Dec. 2005
<<http://www.nybooks.com/articles/17190>>

⁸⁰ Mayer, Jane. "Outsourcing Torture." *The New Yorker: Fact* 7 Feb. 2005. 5 Dec. 2005
<http://www.newyorker.com/fact/content/?050214fa_fact6>.

⁸¹ *ibid*

⁸² *ibid*

his tongue.”

5. ORGANIZATIONS MONITORING TORTURE

In response to the growing awareness of the widespread use of torture and other human rights violations, many organizations have developed. These organizations include the United Nations Commission on Human Rights and its Committee Against Torture, Amnesty International, Human Rights Watch, the World Organization against Torture, and the Association for the Prevention of Torture. There have also been responses made and investigations conducted by other groups such as the American Civil Liberties Union.

Many of these organizations came about due to 'official' silence and lack of investigation from governments regarding human rights issues and allegations of torture and abuse. Some of these groups conduct their own fact-finding missions and present their reports on what goes on within countries around the world. Their findings inform the public, governments, and other organizations of human rights abuses and violations of international treaties, which would otherwise go unnoticed. It is a part of their work to build mass movements around these humanitarian issues and to make those in power accountable to the public they serve for what goes on.

5.1. United Nations Commission on Human Rights (UNCHR) and the Committee Against Torture (CAT)

The United Nations is a broad coalition of countries whose members who work towards following international law and guidelines. Its charter was officially ratified on October 23, 1945 and there were 51 original member states that approved it. The United Nations states purpose is “to maintain international peace and security;

to develop friendly relations among nations; to cooperate in solving international economic, social, cultural and humanitarian problems and in promoting respect for human rights and fundamental freedoms; and to be a centre for harmonizing the actions of nations in attaining these ends.”⁸³ As such, the United Nations sets the standards for international law, including the Universal Declaration of Human Rights (UDHR) and its legally binding derivative, the International Covenant on Civil and Political Rights. Its funds come from its member states.

The United Nations Commission on Human Rights (UNHCR) was established in 1946. The Commission’s mandate is “...to promote and protect the enjoyment and full realization, by all people, of all rights established in the Charter of the United Nations and in international treaties.”⁸⁴ The Commission extensively examines, monitors, and publicly reports on human rights conditions around the globe. They work to integrate the human rights perspective into all work carried out by UN agencies. Starting in 1985, the UNHCR appoints a Special Rapporteur on Torture. It is this person’s duty to investigate human rights conditions in all countries, regardless of whether or not the country has ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Special Rapporteur appeals to the member states for those at risk for torture or in regards to past instances of torture, conducts fact-finding missions, and submits annual reports⁸⁵.

The Committee against Torture (CAT) is made up of independent experts that “monitor the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in State parties.”⁸⁶ It was created by the Convention in 1984 and they hear complaints both from States

⁸³ “Basic Facts About the United Nations.” United Nations Website.

<http://www.un.org/aboutun/basicfacts/unorg.htm>

⁸⁴ <http://www.ohchr.org/english/about/index.htm>

⁸⁵ <http://www.ohchr.org/english/issues/torture/rapporteur/index.htm>

⁸⁶ “Committee Against Torture.” Office of the United Nations High Commissioner for Human Rights website.
<<http://www.ohchr.org/english/bodies/cat/index.htm>>

and individuals. States are required to send yearly reports to CAT and to allow them to conduct inquiries and visits if need be. However, if they receive complaints from individuals, they cannot hear and pass judgement on them unless the State of the party concerned has previously recognized the power of CAT to do so.

The United Nations has often been criticized for the human rights abuses of its member states. Countries such as the US, with its use of extraordinary rendition, have violated the UDHR and the Geneva Conventions, using selective interpretations of those instruments. Furthermore, as the President of the board of the Bill of Rights Defense Committee (BORDC) and past chair of Amnesty International USA, Chip Pitts states, “the international legal mechanisms remain weak” and that they “have been weakened by powerful nations... especially the United States”⁸⁷ The United Nations is mired in too much bureaucracy in order to move effectively, especially when some countries decide to act out on their own and push their own agendas.

5.2. Amnesty International (AI)

An international, non-governmental organization, Amnesty International was founded by British lawyer Peter Peter Benenson in 1961.⁸⁸ It does not accept money from governments or governmental organizations. They handle human rights both on an individual case and general policy basis. Today there are about 7,500 AI groups around the world. AI was awarded the Nobel Peace Prize in 1977 for their work with human rights. AI bases its work on the human rights outlined in the Universal Declaration of Human Rights and other international standards. Their campaigns have related to the following:

⁸⁷ Fisher, William. “Human Rights Day: A Wavering Flame Amid the Darkness.”
<<http://www.ipsnews.net/news.asp?idnews=31299>>

⁸⁸ “Amnesty International” Wikipedia.org <http://en.wikipedia.org/wiki/Amnesty_International>

1. to free all prisoners of conscience
2. to ensure a prompt and fair trial for all political prisoners
3. to abolish the death penalty, torture and other cruel, inhuman or degrading treatment or punishment
4. to end extra judicial executions and "disappearances"
5. to fight impunity by working to ensure perpetrators of such abuses are brought to justice in accordance with international standards ⁸⁹

Furthermore, their work has gone beyond these points and now cover wrongs by non state actors, armed political groups that engage in inhumane practices such as torture, and even those done in domestic spaces within the home.

Amnesty International gathers information by contacting victims, attending trials, interviewing, and reading and contacting reliable media outlets and sources. They currently have a specific campaign against the “war on terror,” bringing in to focus the human rights violations, including torture, that the United States has committed thus far in the name of anti-terrorism and democracy. Their three main demands are to stop, investigate, and prosecute. These demands pertain to the U.S.’s break with international standards. AI has called upon the U.S. to stop things such as extraordinary rendition, coercive interrogation, and close down Guantanamo Bay and other detention centers. Amnesty advocates for the U.S. to have an independent commission charged with investigation of all U.S. agencies in regards to detention, interrogation and the “war on terror” and the U.S. must prosecute human rights violators⁹⁰.

Amnesty International has come under fire because of its stands against the United States government,

⁸⁹ Amnesty International Website <<http://web.amnesty.org/pages/aboutai-faq-eng>>

⁹⁰ “Our statement against torture and ill-treatment and our demands.” Amnesty International Stop Torture Website. <<http://web.amnesty.org/pages/stoptorture-260605-statement-eng>>

especially due to the charge that the U.S. maintains “an archipelago of prisons around the world, many of them secret prisons, into which people are being literally disappeared, held in indefinite incommunicado detention without access to lawyers or a judicial system or to their families.”⁹¹ President Bush and Vice President Cheney both attacked and vilified AI for its report and comments and others have spoken out and called Amnesty International anti-American and left-wing. AI has also been attacked with biased coverage and misinformation⁹².

Still, Amnesty International has been hailed for its honesty and its continuing work ensuring that human rights violations are being exposed and its perpetrators brought to justice. Just recently AI held a conference called “The Global Struggle Against Torture: Guatánamo Bay, Bagram, and Beyond”⁹³. Those who spoke included activists, former detainees and family members. The conference called for people to continue the fight and push on.

5.3. Human Rights Watch (HRW)

Human Rights Watch is an independent, international nongovernmental organization that receives funds from foundations and private individuals . HRW does not receive funds from the government or any government-funded agency. Back in 1978, HRW began under the name Helsinki Watch. Helsinki Watch was meant to monitor the Soviet Union’s Compliance with the Helsinki Accords,⁹⁴ which was the Final Act of the Security and Cooperation in Europe. It called for the party States to “respect human rights and fundamental freedoms” and conform to the United Nations Charter and the UNDHR. Later, other “watches” were formed to monitor other

<http://www.cnn.com/2005/US/06/05/amnesty.detainee/>

⁹² “Amnesty International.” Wikipedia.org <http://en.wikipedia.org/wiki/Amnesty_International>

⁹³ “Guatánamo Bay, Bagram, and Beyond.” Amnesty International. < <http://web.amnesty.org/pages/stoptorture-301105-news-eng>>

⁹⁴ “Helsinki Accords” Wikipedia.org <http://en.wikipedia.org/wiki/Helsinki_Accords>

countries.

In 1988, all the watches grouped under the name Human Rights Watch and the group is now based in New York City. HRW is the largest US-based human rights organization. Their work mainly includes the production of research reports exposing human rights conditions and abuses, the sending of fact-finding missions to investigate violations, and the placement of international pressure on governments and other organizations to stop abuse⁹⁵.

HRW have offices in over ten cities worldwide and they also set up temporary offices where they have fact-finding missions. HRW tracks developments in over 70 countries. They hold an International Film Festival and give grants to writers that have been politically persecuted.

Current work in the area of torture and abuse include the release of a list of “ghost prisoners” being held by the CIA and exposing the US’s use of torture against suspects and detainees⁹⁶. Their website provides materials that cover the unlawfulness of torture, according to both US and international law. They have letter-writing campaigns to governments and companies that partake in human rights violations whether through direct action or by indirect support (such as supplying machinery or funds to violating governments).

HRW has been criticized, mainly by the governments whose human rights violations they expose. A Chinese foreign minister accused HRW of slander and malicious attacks after a report on the Chinese government’s abuse of Falungong members back in 2000. However, like many of the other groups, Human Rights Watch’s work has been lauded as well. Their past exposés and campaigns have help make strides in changing governmental policies and have helped gain media and public attention and support for the issues they raise.

⁹⁵ “About HRW.” Human Rights Watch. <<http://hrw.org/about/whoweare.html>>

⁹⁶ “Torture and Abuse” Human Rights Watch <<http://hrw.org/doc/?t=torture>>

5.4. World Organisation Against Torture (OMCT)

OMCT is “the world’s largest coalition of non-governmental organisations (NGOs) fighting against arbitrary detention, torture, summary and extra judicial executions, forced disappearances and other forms of violence⁹⁷.” They work towards ending such human rights abuses and furthering the movement towards the prevention of violence. OMCT actively supports and protects its member organizations.

World Organisation Against Torture began in 1986. The group has grown from 48 initial member organisations to 266 at 2003’s end. OMCT is designed for rapid mobilization and action initiation and supplies information for the United Nations and other groups.

OMCT has done recent work on the correlations between poverty, inequalities, and violence. OMCT initiated a joint program with International Federation Human Rights called the Observatory for the Protection of Human Rights Defenders that works to find justice for human rights workers who have been imprisoned or wrongfully punished. They have spoken out about the violent situation of defenders in Africa⁹⁸ and Israel⁹⁹.

5.5. Association for the Prevention of Torture (APT)

Another NGO, the Association for the Prevention of Torture was founded in 1977 and has Geneva as its

⁹⁷ World Organisation Against Torture

<<http://www.omct.org/base.cfm?page=omct&consol=OPEN&cfid=2758704&cftoken=22216627>>

⁹⁸ ¹⁵ OMCT. “ACHPR: Contribution on the situation of defeders in Africa.” ReliefWeb.int

<<http://www.reliefweb.int/rw/RWB.NSF/db900SID/KKEE-6JKPGJ?OpenDocument>>

⁹⁹ HR Organization Calls for Releasing HR Fieldworker Held under Administrative Detention

<<http://english.wafa.ps/body.asp?id=4673>>

base. APT's main goal is, as its name implies, to prevent torture. It does so by watching over detention centers, pushing legal standards against torture, and to empower people to prevent torture through training.

APT differs from all the other organizations in that it does not publicly speak up against particular countries in order to more effectively work with them, by not causing contention and instead being diplomatic. Also, APT receives funding from a variety of sources including other NGOs, governments, individuals, and foundations.

APT has come up with the Optional Protocol to the UN Convention Against Torture and is actively trying to get countries to ratify them. OPCAT lists preventive measures in order to stop violence within detention centers¹⁰⁰.

However, it needs the states who ratified the UN Convention Against Torture to ratify this also.

5.6. American Civil Liberties Union (ACLU)

Founded in 1920, the ACLU has been working to uphold the Bill of Rights and respect for civil liberties.

The ACLU also fights for equality and justice within the courts, legislative system, and in specific communities.

They handle 6,000 cases per year and have offices in almost every state. They do not receive government funding¹⁰¹.

On October 7, 2003, the ACLU requested the release of government documents relating to detainees held abroad by the United States. The ACLU did so under the Freedom of Information Act (FOIA). From these documents, the ACLU was able to bring light upon inhuman conditions that detainees were kept under and the torture and ill-treatment that they received.

Since the release of these documents, the ACLU has continued to expose the injustices and acts of torture

¹⁰⁰ Association for the Prevention of Torture

<<http://www.indymedia.org.uk/en/regions/london/2005/05/310748.html>>

¹⁰¹ "About Us" American Civil Liberties Union. <<http://www.aclu.org/about/index.html>>

that the US and the CIA have committed. The ACLU is currently helping German Khaled al-Masri sued the federal government over extraordinary rendition¹⁰².

6. THE PRACTICE OF TORTURE

Much of the debate over whether or not torture should be permitted simply accepts without any examination the assumption that an uncooperative subject can always be made to reveal useful information under torture. This section examines the reasons why a state might wish to torture a subject, and the practical difficulties in obtaining any useful information in this manner.

There are many possible motivations for a state to resort to using torture in interrogations. Here, we will focus on the three motivations most relevant to the fight against international terrorism. First, a prisoner may have information about imminent terrorist attacks. This is the basis for the “Ticking Bomb” scenario outlined in the next section. Second, a prisoner may have useful information about the operations and communications of a terrorist group, such as how orders from the leaders of a terrorist organization are communicated to the “foot soldiers” of the organization who carry out the ordered attacks. Third, a prisoner may be part of a terrorist cell or other group, and he may be able to identify his accomplices. This motivation should be familiar from instances discussed in the history section, particularly torturing a subject to force him to name his accomplices, as in the *torture préparatoire* mentioned in section 2.5.

In attempting to extract any information at all from a subject, the most insurmountable barrier that the state

may encounter is that the subject actually has no information, as when an innocent person is apprehended and held for questioning. When the interrogation is part of a police or military procedure, rather than in the medieval context of a trial in which strong circumstantial evidence has already been presented, the danger of torturing the wrong person is high. The most recent example of this is seen in the case of Khaled al-Masri, a German citizen allegedly detained by U.S. agents in Macedonia, transported to Afghanistan, subjected to torture, and released several months later when it was discovered that he was not the right person.¹⁰³

When attempting to discover details of upcoming terrorist attacks, interrogators face other difficulties. First, while interrogating subjects under torture, it is rare to find one who will not eventually yield¹⁰⁴, but given that most terrorist plots do not have long development phases (e.g. it takes very little lead-up time to tell a suicide bomber where he should strike), the subject's knowledge of plots may be moot by the time he talks. Another difficulty is that, unlike the case of a trial, where a subject could be held until he gave testimony that could be verified, a subject can foil interrogators by inventing details of an imaginary plot. Furthermore, the leaders of the terrorist group can spread false rumors of their plans, or even use counterintelligence tactics and spread different rumors to different terrorist cells if they wish to locate moles in their organization. These last tactics, of deliberate disinformation by the leaders, are also effective against interrogators attempting to learn operational details of the group or to identify group members.

One other difficulty that interrogators face in getting information about members of terrorist groups is the “covert cell” organization adopted by many such groups. This type of organization severely restricts the contact

¹⁰³ “German citizen held in secret prison sues ex-CIA director.” San Jose Mercury News, December 6, 2005.
<http://www.mercurynews.com/mld/mercurynews/news/politics/13343535.htm>

¹⁰⁴ Solzhenitsyn, p. 130

between members of the group, such that no one person can identify more than a small number of other members of the group.

Thus, there is truly no guarantee that torture will reveal any relevant information at all, and even if it does, the information gained may not be timely or actionable. The knowledge of such practical limitations is essential in creating informed policy about the issue.

7. SIDE EFFECTS OF TORTURE

Regardless of whether or not torture satisfies the immediate requirement of extracting information from a prisoner, the act of torturing the prisoner does not occur in isolation. The act's repercussions reach far beyond the torture chamber, into the future well-being of the victim, the mental health and stability of the interrogator, and the dynamics of the victim's society.

The effects of torture on the victim can be either temporary or long-lasting, depending on numerous factors, including the type of torture performed, the physical, mental, and/or spiritual state of the torture victim, and the treatments, if any, given to the torture victim after the act. Obviously, if the victim suffered mutilation or some other type of torture that results in long-term physical injury, such as the damage that can be done to ligaments and tendons by prolonged infliction of techniques that use great stress on the joints to inflict pain (e.g. strappado), then the physical pain can remain with the victim for the rest of his life. Also, if the type of torture done caused unbearable physical or mental pain to the victim, then this act is likely to permanently affect the victim's psyche, even if his body is undamaged. Permanent effects can include a lifetime of nightmares or a reaction to external

stimuli that reminds the victim of the act, such as the panic attacks suffered by some victims of the “water cure” (see section 2.3) when they are dampened by the rain or a shower.

Another effect, as Douglas Johnson suggests in “The Effects of Torture Q&A”¹⁰⁵, is that torture can provide a ‘systematic silencing of dissent’ and can ‘strip communities of their leaders.’ A person who was once an efficient leader in their community can easily and permanently be affected so that they no longer function in the same way.

In addition, according to The Center for Victims of Torture, an organization dedicated to the healing of torture survivors, torture has ‘a corrupting effect on the perpetrator.’¹⁰⁶ In order for the interrogator to treat a detainee so harshly and still be able to sleep at night, he needs to learn to see the victim as less than human—i.e. to dehumanize the detainee. Dehumanization tactics can include identifying the detainee only by a number, putting a hood over his face, or exerting the interrogator’s power over the detainee by forcing the detainee to perform some humiliating act. According to Dr. Allen S. Keller¹⁰⁷, an expert in the treatment of torture victims, interrogators that do not dehumanize the detainees may ‘experience some long-term effects of guilt which corrodes their consciousness. They constantly are replaying the acts which they enforced.’¹⁰⁸ As a result some interrogators self-mutilate their bodies, to signify externally the conflict within. ‘By torturing others, interrogators are in turn torturing themselves.’¹⁰⁹

¹⁰⁵ The Effects of Torture Q&A: Douglas Johnson. <http://www.osce.org/item/44.html>

¹⁰⁶ The Center for the Victims of Torture - Eight Lessons on Torture
<http://www.cvt.org/main.php/Advocacy/TheCampaignToStopTorture/WhatCVTknowsaboutTorture>

¹⁰⁷ Man’s Inhumanity to Man – Interview with Dr. Allen Keller
http://www.med.nyu.edu/communications/nyuphysician_winter0405/assets/P36-37.pdf

¹⁰⁸ U.S Interrogation Policy – Policy studies at Dickinson College
<http://www.dickinson.edu/departments/law/policy/360Torture.pdf>

¹⁰⁹ *ibid*

8. Moral and Ethical Considerations

A principal concern about the use of torture is that laws alone are fallible, and laws can be interpreted differently by various nations, governments, and individuals. In the 18th through 20th centuries, the body of law (national and international) has become far less tolerant of torture, but the we, as members of the world's civilized societies, are now confronted with an enemy who doesn't play by our established rules of engagement, doesn't recognize our treaties, and is intent on destroying us. We also know the willful infliction of pain is not something to be taken lightly. Wrongfully inflicted (or "rightfully" if that is possible), torture destroys lives. Our new enemies are willing to use torture against us, and have trained to our unwillingness to use torture against them, as codified in the body of international law we subscribe to. We have international governmental bodies and organizations which monitor adherence to human rights standards. So we are left with a moral and ethical dilemma of whether the historical pendulum must now swing back and legitimize (or condone or allow) torture to meet our current enemies. The trace of the pendulum's swing is written in the body of law, both international (e.g. Geneva Conventions, CAT, etc.) and national (e.g. US Anti-Torture Act). We have already witnessed a failed experiment (see earlier discussion of the Landau Commission) with the legitimization of torture. If we do not legitimize torture, are we turning our back on the practice and allowing it to occur outside the legal framework? Or is it better to use it under very strict guidelines? Is it even possible to infallibly legalize torture?

In this section we examine and postulate upon the arguments and discussions posited by Dershowitz in "Should the Ticking Bomb Terrorist Be Tortured?"¹¹⁰ In the Ticking Bomb Scenario¹¹¹:

¹¹⁰ Dershowitz, Alan, *Why Terrorism Works*, Chapter 4, 2002, Yale University Press, pp. 131-163.

¹¹¹ Dershowitz credits this description to Michael Walzer's article "Political Action: The Problem of Dirty Hands."

... a decent leader of a nation plagued with terrorism is asked "to authorize the torture of a captured rebel leader who knows or probably knows the location of a number of bombs hidden in apartment buildings across the city, set to go off within the next twenty-four hours. He orders the man tortured, convinced that he must do so for the sake of people who might otherwise die in the explosions—even though he believes that torture is wrong, indeed abominable, not just sometimes, but always.

Dershowitz subtitles his discussion "a case study in how a democracy should make tragic choices." Indeed we are presented with tragic choices few humans want to make. In this case either possible choice has tragic consequence. If the leader makes the choice to not torture the suspect (based on national principles) many people will die. Conversely, if he chooses to torture, then he has violated those national principles, and further¹¹² if the suspect still does not divulge the information under pressure of torture, he has not saved any lives either. Two other interesting possibilities arise: 1) The suspect does not have the information¹¹³, but the interrogator believes he does, the suspect then tells the interrogator something to stop the torture, and again no lives are saved; 2) The suspect knows the correct information, but he also knows he can stop the torture by providing any information even though false, and again no lives are saved. Distinguishing among the possibilities is suddenly very difficult. Given the quality of strategic intelligence in the real world, how can we know with certainty the suspect actually knows the information desired? The very legitimization of the single case could open the door both within the country and abroad to more use of torture. Indeed there are tragic consequences to all the options in this hypothetical case.

So how do we resolve this dilemma? The decision is clear for Dershowitz' straw man¹¹⁴, but more difficult for others. The September 11th attacks have, perhaps, made the decision to use non-lethal torture (in the ticking bomb case) more palatable to Americans. Most Americans dearly treasure their freedoms, yet a significant fraction

¹¹² The case that torture does not work is not addressed in Dershowitz' analysis of the possible tragic consequences, and it is the one doubly tragic.

¹¹³ Recall "... captured rebel leader who knows or **probably** knows..."

¹¹⁴ "The case against torture, if made by a Quaker who opposes the death penalty, war, self-defense, and the use of lethal force against fleeing felons, is understandable."

(35%)¹¹⁵ feel the need to compromise those freedoms (authorizing torture of terrorism suspects) in some case(s) for the greater good. Will the police, the FBI, the military and the CIA use these techniques off-the-record, and in an unregulated, non-transparent, non-accountable, non-democratic manner when situations arise? Or is it better to create a legislative framework to authorize torture, in very limited circumstances, under a "torture warrant," with strict judicial oversight?

Dershowitz argues that the rights of the suspect are better protected with the torture warrant, and that suspects might be more amenable to providing information if they know torture is in the realm of possibility. Ultimately, he believes there will be less torture because to use torture, an official would have to apply for a torture warrant through an official procedure with accountability, rather than do it off-the-books and deny it occurred. One danger Dershowitz discounts is that judicial authorization of torture could set precedents.

Still troubling in all of this is that our criminal justice system is based on presumption of innocence. There is no presumption of innocence for those to be tortured. Dershowitz provides, in part, for that with immunity from criminal prosecution. But even immunity, may not compensate if the suspect has done nothing wrong. The difficulty arises that a person to be tortured may not actually know the information or may simply be the wrong person due to faulty intelligence.¹¹⁶ The scenario does not allow for all the possibilities, some of which could have "tragic" consequence. Supposedly the information is to be extracted for the good of our society, but there remains the

¹¹⁵ In an ABC News Poll (http://abcnews.go.com/sections/us/Polls/torture_poll_040527.html) conducted in the aftermath of the Abu Ghraib scandal, 35% of Americans felt torture of terrorism suspects was acceptable in some cases. This is clearly smaller than the near unanimity Dershowitz reports for his speaking audiences. But, 35% is still a large percentage of the American populace.

¹¹⁶ Recall that US Senator Ted Kennedy was on a no-fly list because of same or similar name. Granted this was a procedural error with trivial consequence, but we have no guarantees such procedural errors will not occur with tragic consequence.

possibility of error.

In the instance of the Landau Commission, legalization arguably led to the point where the GSS entered the slippery slope on the continuum of coercive techniques. Legitimation of torture, even under a very prescribed set of conditions would be a tragic choice, but is the alternative any less tragic? Dershowitz's straw man (the Quaker) knows his answer unequivocally. The Faustian bargain to legalize torture has no guarantees of success, nor can it be securely safeguarded. The loss to the suspect might be estimable after the fact, but, abstractly, in advance we do not know enough about the components to quantify their costs. Even the benefits side is difficult to measure in advance. Consider the question, what is the probability of successful extraction of information (we must factor in the time the information is required, the skill of the interrogator, the resistance of the suspect, not to mention the probability the suspect is the correct person). It is more than ironic that if by legitimizing torture, we collectively lose a little bit of each of our freedoms. Here, it is easy to fall into the trap of dividing the cost over the population, thereby generating a very small per capita number. But, the moral high ground abhors economic analysis, so we come around again to whether we allow our enemy's moral level to establish our own. If we lower our bar, then what is to prevent our adversary from going even lower?

9. CONCLUSION

Torture as a means of coercing information from human beings in interrogation has a long history. Until the 18th century it was widely condoned and used for interrogation as well as for punishment. Since then, the use and acceptance of torture has declined (at least officially) until very recently. The 19th and 20th centuries heralded

the establishment of organizations such as the Red Cross and the United Nations. These organizations have emphasized the humane treatment of prisoners and all human beings in general. This has resulted in a body of international law (conventions, treaties, protocols, declarations) increasingly protective of human rights. During the 20th century, governments have gradually come to accept the human rights mantle, at least in part, due to the presence of watchdog organizations (Amnesty International, Human Rights Watch, ACLU, et al) and committees of the Red Cross and UN. This monitoring activity has greatly reduced the "official" use of torture.

As the nations of the world meet their newest enemy—global terrorist organizations—with different moral values, there has been a renewed usage of coercive techniques, including torture, by these nations. The nations do not necessarily admit they engage in torture, but evidence persists and points to its existence, even if we do not agree on the exact magnitude of the problem. There has been a call for legitimization (if not legalization) of torture in the war on terrorism. This call has been loudest in those nations most effectively targeted by the terrorist organizations, namely the United States, Russia, and Israel. In the US, there has been a moderately resonant response from the public, while in Europe and Britain, our allies have seen a markedly less positive response.

It is too soon to tell if the pendulum will swing back toward more acceptance of torture in interrogations, and if it is accepted, whether it will be effective. If accepted, we have a premonition based on recent events, that it may be overused or abused. Our examinations of its nature, history, usage, and of the case for legitimization did not identify compelling arguments for its continued use or legalization, thus we conclude the usage is not justifiable. The use of torture in interrogations is a complex topic, and others hold different opinions and interpretations of the same information. Some nations up against the juggernaut of terror may find compelling arguments for its use in the ticking bomb scenario or as a reaction to massive or continuing terrorist attacks. Yet other nations will reject torture

on ethical and moral grounds. There is certainly a lack of international cohesiveness and agreement surrounding the use of torture and other human rights violations. At the moment, it is clear that nations simply do not agree about the issue and only time will show if they ever will.