

TORTURE, CRIMINALITY AND THE WAR ON TERROR

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Torture and state criminality

Torture — hurting, injuring and maiming people, in cold blood, to get something from them, or for vengeance, or from sheer enmity — has occurred throughout human history. It has occurred on the undersides of society and also and more seriously on official and semi-official levels. Torturers have included not only thugs and gangsters but also, and more chillingly, agents working for the state, or acting in its name. In wars and military occupations torture has occurred not only incidentally, as a sort of wildcard atrocity, but also deliberately, as part of the planning of strategists and commanders. Torture can be a facet of state terrorism, both in wars and internal repressions.

Governments often believe they have a right and a duty to use any means necessary to defend their nations against external and internal enemies. They are therefore inevitably tempted, whenever they believe their national security is threatened, to resort to torture. Torture is a crime under international law and national legal systems, but is nevertheless quite often and mostly secretly carried out by state instrumentalities in the cause of national security. It is often state criminality that is surreptitiously approved or excused by high officials and political leaders.

Still, most ordinary citizens of the Western liberal democracies are disinclined to believe that their governments ever condone torture. They condemn any torture practised by other nations or people, and tend to think their own societies have reached a point of moral civilisation that precludes official torture. A moral consensus against torture has been a mark of late 20th century Western civilisation, even though the clandestine practices of governments have not perfectly matched the moral standards of their people. When we come to the early 21st century United States-led war on terror, however, the consensus of principle against torture seems to have frayed a little, while the practice of governments has worsened.

Torture and the war on terrorism

War on terrorism was declared by United States' President George W Bush immediately following the murderous September 11 attacks on the World Trade Centre in New York and the Pentagon in Washington. In pursuit of this war the US first attacked and overthrew the Taliban regime in Afghanistan, which had been sheltering the al-Qa'ida terrorist organisation responsible for the September 11 atrocities. Second,

it invaded Iraq and ousted the dictatorial regime of Saddam Hussein, on the pretexts of eliminating its presumed stockpiles of weapons of mass destruction and ending its alleged cooperative links with al-Qa'ida. Both pretexts for the latter invasion turned out to be comprehensively wrong. Still, on both the fronts, the US has been supported to varying degrees by other Western nations. Britain and Australia in particular, have provided enthusiastic political and military support. But despite its military strength and a measure of international support, the US has not been able to impose a stable new order on either front. Afghanistan is largely lawless and chaotic, with power held mainly by regional warlords, and US troops still hunting Taliban remnants in the mountains. In Iraq, elections notwithstanding, US and other coalition forces are still embroiled in fighting various insurgent groups. The country has been virtually ruined, and life for many Iraqis is more dangerous and insecure than it was under Saddam's tyranny. Coalition troops and Iraqi officials, police and civilians are still being killed and maimed nearly three years after the invasion. The scale of the civilian carnage, especially, is huge and growing.¹

In the course of these continuing conflicts, the US and its allies have been taking prisoners. Most of them are not enemy soldiers or officials but rather irregular fighters, suspected terrorists or sympathisers, or suspected criminals. Whoever they are, though, they are interrogated for what is called 'actionable intelligence'. Actionable intelligence is supposed to be information that can actually be used to hunt down terrorists, and to prevent further attacks on coalition forces abroad and civilian targets in Western countries. Since the September 11 attacks, the US has set up and still runs a number of special military prisons in various parts of the world, for the purpose of obtaining this sort of intelligence. In particular, many of the prisoners captured during the early Bush-declared war on terror in Afghanistan were transferred to a special facility in the US base at Guantanamo Bay in Cuba, deemed by the government to be outside the jurisdiction of American courts. There they remain, still being interrogated more than three years later, most destined to face extrajudicial trial and punishment by ad hoc military tribunals. More recent captives in Afghanistan are held in secret prisons at bases such as Bagram air base near Kabul. In Iraq, the coalition prison network extends far beyond the notorious Abu Ghraib. In all these locations, and others, techniques of physical and psychological pressure (in other words, torture)

REFERENCES

1. One estimate of Iraqi civilian deaths, in late 2004, by a team from Johns Hopkins University, was 100,000.

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have been systematically used in an effort to extract information and obtain confessions.

How do we know this? It's on the public record. The International Committee of the Red Cross has reported on the US-controlled prisons in Iraq and found the systematic use of such coercive methods as beatings with hard objects, hooding for prolonged periods, being paraded naked and subjected to various humiliations in front of other prisoners, exposure to loud noise and extremes of heat and cold, tight handcuffing to bars for long periods, and being forced to stand for hours in various stress positions.² Investigative articles in well-regarded newspapers have recorded American officials discussing the routine use of the same methods at prisons in Afghanistan and at Guantanamo.³ Some have recorded such barbarities as sodomising prisoners with chemical lights and broom handles. Most of these methods have been encouraged and condoned at the highest levels in the Defence Department and the CIA.⁴ Their use at prison coal-faces has resulted from downwards pressure from higher levels in the military hierarchy to soften prisoners up, and generally create conditions harsh enough to help interrogators extract useful information. The expectation from high in the governmental and military hierarchies has been that everything necessary to get results be done, while anything that appears wrong or excessive be officially deniable. In this way, higher authorities have officially repudiated torture they have sub-officially sanctioned.

Under the provisions of international law, the systematic torture that has gone on in the Bush-fabricated war on terror is both a war crime and a crime against humanity. In terms of the Just War tradition of moral thinking about warfare, it is a violation of the *ius in bello* principles prohibiting assaults on non-combatants and the abuse of captured and disarmed enemy fighters. Still, we need to understand a little more fully why torture is a moral wrong that ought to be criminalised, in order not to be too easily tempted, in the face of rising terrorist onslaughts around the world, to excuse or justify it.

The moral contours of the crime of torture

Torture (along with murder, assault, abduction, enslavement, and other maltreatment of individuals) is a type of act usually described in moral theory as intrinsically wrong, or wrong-in-itself, independent at least to some extent of its further good or bad consequences. Such acts can be seen as violations of

fundamental human rights. Intrinsic wrongs are the main focus of rights-based and deontological systems of ethics, but any ethical system must somehow accommodate our common intuitions about them. A central one is that murder and torture are moral evils by reason of their inherent nature, and we are therefore obliged to refrain from committing them even when not refraining would bring about some margin of better consequences overall. Torture, in particular, is not the sort of act that becomes right whenever it might prevent some worse things happening.

Let's accept, though, that torture is not absolutely wrong, something that cannot ever be justified in any conceivable circumstances. Those who want to excuse a little torture in Iraq are fond of constructing so-called 'ticking bomb' scenarios in which torture is arguably justifiable.⁵ They make up stories in which the limited torturing of a captured terrorist is the only possible way to locate a huge bomb that, if not disarmed, will kill thousands. In such circumstances, a little torture may well be considered a justifiable lesser evil. Moral absolutism is in general implausible; it would require us, at the extreme, to refrain from any lesser evil even at the cost of allowing the extermination of all human life. Anything less than absolutism, however, opens a chink of potential justification for torture and similar violations. But only a chink, and probably only a hypothetical one. Ticking bomb situations that perfectly combine all the elements necessary to make torture seem justifiable are only very rarely and exceptionally approached in reality. We may have to accept that some limited torture may be on-balance justifiable in some very rare and unusual circumstances where alternative courses of action involve much greater wrongs and much worse consequences. Admitting this, however, leaves intact the conception of torture as a moral crime in itself. It is consistent with maintaining that torture is an intrinsic wrong; a universal human wrong; a violation of individuals' human rights; an act that is virtually always unjustifiable, even when it produces more benefits than harms overall, compared with available alternatives; and something that is always wrong in itself, an evil, even in those very rare and extreme circumstances where it might be justifiable as the lesser evil.

There is however one major strand of Western philosophy which can, at least in its more simplistic versions, make torture seem fairly easily justifiable. This is utilitarianism. Unqualified, it says that acts are morally justified (right) if and only if they produce the best

2. Report of the International Committee of the Red Cross on the treatment by the Coalition Forces of Prisoners of War and other Protected Persons by the Geneva Conventions in Iraq during Arrest, Internment and Interrogation. (February, 2004).

3. See, eg, Dan Van Natta Jr 'Questioning terror suspects in a dark and surreal world' *New York Times* 9 March 2003.

4. See, eg, Anthony Lewis, 'The US Case for Torture' *New York Review of Books*, 15 July 2004.

5. See, eg, Alan Dershowitz *Why Terrorism Works* (2002).

possible consequences for overall human happiness and satisfaction, compared with all available alternatives. On this principle, unmodified, torture is justified whenever it would result in some better overall consequences, however slight or marginal. So it would be justified to torture one person with extreme cruelty in order to prevent two other people being tortured a little more than half as severely. And if the overall results are the same, it would make no moral difference whether we torture actual wrongdoers or innocent parties. You would think that a moral principle with these sorts of repellent implications would not attract many adherents. In fact most utilitarians, the more reflective ones, do modify or elaborate the basic principle in ways that try to accommodate our entrenched intuitions about intrinsic wrongdoing. Not everyone, though; not when torture is in the air.

Earlier this year two Australian academics (Mirko Bagaric and Julie Clarke, of the Deakin Law School) wrote an essay, quickly summarised in major newspapers, claiming that torture can be morally justified and should be legally permitted in certain circumstances. (The publication of the complete essay is still forthcoming.) They argue, from an extreme hypothetical 'ticking bomb' scenario: a bomb planted by terrorists on an airliner carrying three hundred passengers, timed to explode in thirty minutes, one of the terrorists captured and refusing to talk. Although they claim that in these sorts of cases torture is also arguably justifiable from a rights-based perspective, their main line of argument is straightforwardly utilitarian. What they are doing, really, is trading on the non-absoluteness of the wrongness of torture to suggest that it is more generally justifiable, whenever it can be put to some overall beneficial use as an 'information gathering device'. In the end they accept the utilitarian implication that torturing the innocent can be justified by a positive balance of good over bad consequences. In treading this simplistic utilitarian path, they ride roughshod over our moral consciousness, our intuitions about the intrinsic wrongness of murder, torture, abduction and other mistreatments of individuals.

What is there about torture and similar acts of maltreating others that makes them intrinsic wrongs that ought to be prohibited by law? The crucial point, for moral and legal theory, is that they are intentional or deliberate harmings or violations of other individuals who are not active and present threats to those carrying out the harming. To torture is to aim at evil for

another, either as a means or an end. The American philosopher, Thomas Nagel, explains the deontological aspect of the wrongness in this way. 'To aim at evil, even as a means, is to have one's action guided by evil. One must be prepared to adjust it to insure the production of evil: a falling-off in the level of desired evil becomes a reason for altering what one does so that the evil is restored and maintained. But the essence of evil is that it should repel us. If something is evil, our actions should be guided, if they are guided by it at all, towards its elimination rather than its maintenance. This is what evil means. So when we aim at evil, we are swimming head-on against the normative current'.⁶

Torture is intrinsically wrong because it is intentionally contoured to the suffering of others. It is the deliberate infliction of harm on others, and therefore a wrong even when (within limits for non-absolutists) it is a means to greater good. In liberal societies, ever since John Stuart Mill wrote in *On Liberty* about the proper limits to legal prohibition, a fundamental point of the criminal law has been to prevent individuals and groups, including agents of the state, acting in a manner contrary to just legal order, from deliberately inflicting harm on people other than themselves, for any non-defensive purpose. It is no defence against a charge of murder, for example, that the victim's demise was likely to be, and was meant to be, an on-balance good thing for a lot of other people. The same goes for torture. In times of war, torture is a crime because it is the deliberate harming of people who are not active enemy combatants. In the terms of the Just War tradition, the 'ius in bello' principle of discrimination forbids any direct assault on civilians, either as an end or as a means to military or political advantages that further the putative just cause of the war. This non-combatant immunity extends to prisoners-of-war because they are, once neutralised, no longer combatants. So for the Just War tradition, the torturing of either captives or civilians, whether instrumental or simply vengeful, is a war crime.

By taking torture to be the intentional harming of others, I do not mean to suggest that only hands-on torturers and their immediate commanders can be morally responsible and blameworthy for it. High officials who encourage it, condone it, allow it, go along with it, or fail to try to stop it, are also to blame. Moral responsibility for torture encompasses intentionally encouraging or permitting or facilitating it. So those officials and commanders who exert pressure on subordinates to produce 'actionable' intelligence by

6. T Nagel, *The View from Nowhere* (1989), 181-2.

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giving imprisoned suspects an undefined 'hard time' deserve blame for torture. So do those higher officials and political leaders who keep on pursuing particular military and security policies in an unmodified way while knowing that they involve the systemic use of 'coercive measures' on prisoners. Indeed, one corrupt aspect of the US response to the recent revelations of torture in its military prisons has been the confining of prosecutions to a few low-level guards and soldiers, while exonerating complicit commanders and officials. When victorious armies are left alone to punish their own war criminals, they tend to protect their senior officers and civilian officials, and cover-up the complicity of those higher up. One good reason for establishing an International Criminal Court with jurisdiction across all nations is precisely to counteract this tendency.

Torture and a second look at the war on terror

Ever since September 11 the US and its key allies have been enacting harsh new security laws that threaten established civil liberties. But at least these new laws are laws (although of course subject to judicial review). Ever since the post-September 11 invasion of Afghanistan, the US has also been torturing foreigners, in clear violation of its own laws, military rules and codes, and the provisions of international treaties it has signed. This illegal torturing, we know, has been systematic, and encouraged and condoned at the highest levels of the US government. At the same time as US spokespeople have been publicly disavowing the use of torture, administration lawyers have been searching for legalistic ways in which those who put 'physical pressure' on captives can avoid prosecution and punishment in US courts according to US law.

Perhaps the most disturbing development along these lines has been the argument deployed in various memoranda and reports that, in times of war and national emergency, the power of the US President is not limited by US statutes or by international treaties.⁷ It is virtually unlimited. On this view, the President is above the law; he can do whatever he likes in defence of the country. He (or those to whom he has delegated authority) can order the torture of prisoners, in violation of US laws, if this is deemed necessary for national security. Any time he declares war on someone or something, he is no longer subject to the law; whatever he decrees is the law.

This line of reasoning, however, cannot coherently be found legally acceptable, for it contradicts the

nature of legality, the rule of law, itself. The essence of the rule of law is that everyone is subject to the law — kings, queens, princes, lords, presidents, prime ministers, judges, as well as ordinary citizens. In a well-fashioned legal system, laws define who can make laws, who can administer them, the powers of elected and appointed officials, and who can interpret the laws and decide when they have been broken. For the rule of law the separation of judicial power from legislative and executive power is particularly important. If the power to determine what the law is rests in the same hands as the power to make and implement laws, then, those hands can do virtually anything they want. However, the rule of law as it has developed in modern liberal democracies subjects political and administrative authorities to judicial scrutiny and determination. Certainly, the legal systems of democratic societies usually allow their governments to cede themselves sweeping powers in times of national emergency, but emergency provisions never entirely abolish judicial oversight, and certainly do not allow governments unrestricted power over absolutely everything. In national emergencies the political leaders of law-governed societies remain subject to law, including laws about emergency powers, and to the rulings of courts. If it were otherwise, the rule of law would not obtain. So, if the US is to remain law-governed, the President cannot in a self-declared emergency unilaterally abrogate the laws against torture, or remove himself or any of his officials from judicial purview. Legal argument to the contrary is inconsistent with the rule of law; it is self-contradictory and self-defeating.

Despite this, arguments along sweeping torture-permitting lines have found their way into the higher legal counsels of the Bush government, signalling a greater willingness to sanction officially the use of torture. Probably all the coalition governments believe that their citizens can be brought to accept at least limited torture when it is packaged as 'force' or 'pressure' necessary for the effective waging of war on terror. They are likely to be right about this, for people certainly feel threatened by terrorism. And the threat is real enough, even though it has been inflated by governments anxious to justify their cooperation in Bush's war.

Growing acceptance of torture would be more understandable, if not more justifiable, if the use of it had actually proved useful in the war on terror. However the torturing that has gone on has not been particularly helpful to Bush's cause. It has not lead to

7. See Lewis, above n 4; K Greenberg and J Dratel (eds) *The Torture Papers: the Road to Abu Ghraib* (2005); M Danner, *Torture and Truth* (2005).

breakthroughs against terrorist organisations or foilings of major terrorist plots. It has not lead to much in the way of 'actionable intelligence' at all. In Iraq or Afghanistan or elsewhere. Most of the mistreated have had no connection with terrorist or resistance groups. In cases where they have had some connection, it has usually been low-level and indirect, not of a kind that could yield valuable current security information. The Red Cross report on the treatment of prisoners in Iraq revealed that 95% of those subjected to 'coercive measures' did not have any links with organised resistance or crime.

In US military prisons torture has mainly been used to trawl for information that might possibly be useful in curtailing the activities of terrorist groups and irregular resistance forces. Since the trawl has been conducted on people merely suspected of mostly low-level involvement in anti-Western activity, it has inevitably swept into the embrace of the torturers large numbers

of entirely innocent victims. It has been largely futile torture of the mainly innocent. Objectively, it has functioned not so much as a way of procuring valuable intelligence but more as a means of intimidating or punishing people who have upset or aroused the suspicions of Western military forces in foreign lands.

Looking at the role torture has actually played in the Bush-pushed war on terror reveals only moral evil compounded by futility. Torture may not be an absolute wrong, but it can have no justification outside rare and highly unlikely circumstances. To make routine use of the sort of pre-emptive trawling torture condoned by the US government and its allies in response to anti-Western terrorism only adds evil to evil, atrocity to atrocity, war crime to war crime.

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in 2003), but because of what they are suspected of intending to do in the future.

An array of ASIO and police powers will be boosted, including to use closed circuit television surveillance, secretly enter and search premises, intercept communications and seize material. It will also be easier to call out the military to deal with 'domestic violence'.³⁹

How such a vast expansion of the government's powers can be readily used for political purposes has

been demonstrated by the detention and removal of an American anti-war activist Scott Parkin. After three months in Australia, his visa was revoked on 'security' grounds after participating in protests against the war on Iraq and the activities of corporations such as Halliburton.⁴⁰

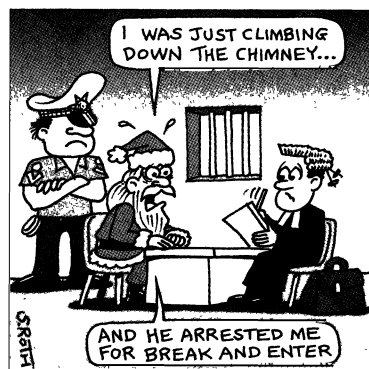
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39. See Council of Australian Governments Communiqué, 27 September 2005 <<http://www.coag.gov.au/meetings/270905/index.htm>> at 14 October 2005.

40. For the facts of Parkin's removal see M Wilkinson and D Marr, 'Rough justice', *Sydney Morning Herald*, 17 September 2005.



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