

## TORTURE, TERRORISM, AND THE TICKING BOMB: A PRINCIPLED RESPONSE

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### I. INTRODUCTION

The terrorist menace has catalyzed a new threat to human rights that emanates from the very institution set up to protect us: the state. A worrying effect of this phenomenon is that American legal literature has adopted a new utilitarian approach to

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the right not to be tortured. This article<sup>1</sup> considers the following, now notorious, hypothetical scenario over which U.S. writers have begun to spill much ink:

*The FBI has captured a suspected terrorist in New York. As the door to his cell is closed by his captors, he declares, "It's too late. The bombs are already ticking. In a matter of hours, Chicago will be destroyed. Thousands will die. I know how to diffuse the bombs, but I would rather die than tell you." May the terrorist's captors use torture to extract the vital information from him and avert the disaster?*

In what follows, I am only interested in the legal response to interrogational torture where a bomb is ticking in the manner described in the preceding paragraph. I am unaware of any rational moral, religious, or political argument for the application of torture in any other situation. It shall be argued throughout that, though the use of torture may be considered morally justifiable to save Chicago in the ticking bomb scenario, torture is always a crime deserving punishment.

This article considers the problem of the ticking bomb and the various possible state responses posited by lawyers, judges and academics. Part I frames the ugly backdrop to this debate and deals with some preliminary issues relating to the definition of torture, the functioning of torture, and the validity of the debate itself. The final section of Part I presents the interests that are in play when an official is contemplating the coercion of a detainee. In Part II, center stage is given to the suggestions that have been made to solve this question. My preferred approach occupies Part III.

Up until Part III, this text is heavy with quotations. I have adopted this style because of the sensitive nature of the subject matter and a consequent wish to avoid the misrepresentation of any viewpoint. In any event, the writers criticized hereafter have expressed themselves eloquently. Hence, the heaviness of citation should not detract from the readability of what follows.

Let me be clear at the outset that I share Dorfman's sentiment that, "I can only hope and plead and pray that a day will come when the very question of torture will have been forever abolished from our midst."<sup>2</sup>

### **A. *The Ugly Backdrop***

*[T]orture mocks the law, using punishment to gather evidence to justify the punishment already inflicted, rather than using evidence already gathered to justify punishment. When torture becomes an official policy, the victims' suffering and pain lose legal relevance, and they become further isolated just when they most need the law's protections.<sup>3</sup>*

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<sup>1</sup> This article is situated in an international environment where the utilitarian justification for torture has taken root in U.S. legal thinking. That said, it has general international scope as all states face the fundamental question it addresses. Israel is an example of a state that has confronted the problem of legalizing torture head on.

<sup>2</sup> Ariel Dorfman, *The Tyranny of Terror: Is Torture Inevitable in Our Century and Beyond?*, in TORTURE: A COLLECTION 3, 17 (Sanford Levinson ed., 2004).

<sup>3</sup> John T. Parry, *Escalation and Necessity: Defining Torture at Home and Abroad*, in TORTURE: A COLLECTION 145, 153 (Sanford Levinson ed., 2004).

Hathaway has conducted a study of the Torture Convention,<sup>4</sup> the treaty confirming almost universal condemnation of torture. A glance at her findings is enough to corroborate the claim that many governments are guilty of ghastly hypocrisy. She holds that:

*First, countries that ratify treaties outlawing torture do not always have better torture practices than those that do not. Second, democratic countries are more likely overall to make the legal commitment not to use torture than non-democratic countries. Third, democratic nations that use torture more frequently are less likely to join the Convention against Torture than those that engage in less. Fourth, non-democratic nations that use more torture are more likely to join the Convention against Torture than those that use it less. Finally, and perhaps most surprising, not only does it appear that the Convention does not always have the intended effect of reducing torture in countries that ratify, but, in some cases, the opposite might even be true.*<sup>5</sup>

### **B. *The Terminology of Torture***

Throughout this article, the term “torture” is used as an umbrella term to refer to torture, inhuman and degrading treatment, or more literally, from nails hammered into the feet to slaps in the face. The choice to group these methods together reflects my preference for a total prohibition on any form of degrading treatment and also the fact that a detainee’s fear of escalating punishment by his captor can be worse than the punishment itself. Hence, it is arguably artificial to distinguish between types of coercion.<sup>6</sup> The torture is more prevalent in the fear, the subordination and the destruction of the detainee’s world, than it is in the physical aspect of the treatment. I assume that “coercive interrogation” is *officialese* for torture and use the terms interchangeably.

### **C. *Does Torture Work?***

The truth is that, “we really have no idea how reliable torture is as a way of obtaining information.”<sup>7</sup> Indeed, after extensive historical study, Langbein concludes that, “[h]istory’s most important lesson is that it has not been possible to make coercion compatible with truth.”<sup>8</sup> During the composition of this piece, *The New York Times* reported that:

The Bush administration based a crucial prewar assertion about ties between Iraq and Al Qaeda on detailed statements made by a prisoner

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<sup>4</sup> United National Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

<sup>5</sup> Oona A. Hathaway, *The Promise and Limits of the International Law of Torture*, in TORTURE: A COLLECTION 199, 201 (Sanford Levinson ed., 2004).

<sup>6</sup> The European Convention on Human Rights adopts this approach. It does not distinguish between torture, inhuman or degrading treatment for the purposes of its Article 3 prohibition. See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. 005.

<sup>7</sup> Sanford Levinson, *Contemplating Torture: An Introduction*, in TORTURE: A COLLECTION 23, 33 (Sanford Levinson ed., 2004).

<sup>8</sup> John H. Langbein, *The Legal History of Torture*, in TORTURE: A COLLECTION 93, 101 (Sanford Levinson ed., 2004).

while in Egyptian custody who later said he had fabricated them to escape harsh treatment . . . after he was secretly handed over to Egypt by the United States in January 2002, in a process known as rendition.<sup>9</sup>

That said, it shall be assumed that torture works at least in some cases as a method for extracting information. In any event, it is commonly accepted that, “torture enabled the French to gather information about future terrorist strikes and to destroy the infrastructure of terror in Algiers.”<sup>10</sup>

#### **D. *Don’t Talk About It?***

Zizek would condemn my current enterprise: “[E]ssays . . . which do not advocate torture outright, [but] simply introduce it as a legitimate topic of debate, are even more dangerous than an explicit endorsement of torture . . . . The mere introduction of torture as a legitimate topic allows us to entertain the idea while retaining a pure conscience.”<sup>11</sup> This serves to legitimize torture and “changes the background of ideological presuppositions and options much more radically than its outright advocacy.”<sup>12</sup> In a similar vein, Weisberg describes the “phenomenon of legal discourse that slips dangerously toward the known-to-be-wrong as ‘loose-professionalism’”<sup>13</sup> and tells us that the “postmodern apologist manages to forget history in an unwise and ironic rush to cloak the torturer’s brutality in the language of utilitarianism.”<sup>14</sup> He calls for lawyers to speak out “directly and forcefully against torture” lest the attritional process of rationalization helps the “aberrational” practice to thrive.<sup>15</sup> Personally, I am inclined to agree with the following sentiments of Gross:

By not discussing the practice of torture we do not make it go away; we drive it underground. . . . [W]e may as well make such choices in as informed a manner as possible, taking into account the widest panoply of relevant moral and legal considerations. It is in this context that public debate on torture is critical.<sup>16</sup>

The reality of the situation is that, “Pandora’s box is open. Although virtually everyone continues ritualistically to condemn all torture publicly, the deep conviction, as reflected in actual policy, is in many cases not behind the strong language.”<sup>17</sup> Levinson neatly

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<sup>9</sup> Douglas Jehl, *Qaeda-Iraq Link U.S. Cited Is Tied to Coercion Claim*, N.Y. TIMES, Dec. 9, 2005, at A1.

<sup>10</sup> Adam Shatz, *The Torture of Algiers*, THE NEW YORK REVIEW OF BOOKS, Nov. 21, 2002.

<sup>11</sup> SLAVOJ ZIZEK, WELCOME TO THE DESERT OF THE REAL: FIVE ESSAYS ON SEPTEMBER 11 AND RELATED DATES 103-04 (2002).

<sup>12</sup> *Id.*

<sup>13</sup> Richard H. Weisberg, *Loose Professionalism, or Why Lawyers Take the Lead on Torture*, in TORTURE: A COLLECTION 299, 300 (Sanford Levinson ed., 2004).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Oren Gross, *The Prohibition on Torture and the Limits of the Law*, in TORTURE: A COLLECTION 229, 249-50 (Sanford Levinson ed., 2004).

<sup>17</sup> Henry Shue, *Torture*, in TORTURE: A COLLECTION 47, 47 (Sanford Levinson ed., 2004).

sums up the matter: “We are staring into an abyss, and no one can escape the necessity of a response.”<sup>18</sup>

This discussion brings three points to mind. Firstly, an instinctive knee-jerk “moral” reaction to a problem often yields the wrong answer. However, the right answer can be arrived at through reflection and communicative discourse. Secondly, counterfactual analysis (i.e. the usage of hypothetical situations) is a valuable tool because it can help expose the weaknesses in an argument, distinguish acceptable from unacceptable, and tease out the correct answer. Thirdly, no legal reflection, discourse, or counterfactual analysis can be judged independently of the socio-political context in which it takes place. These principles tell us that the reaction that torture is abhorrent and unequivocally unjustifiable is no more or less valid than the intuitive reflex that torture is an acceptable means that can, in some circumstances, be justified by the avoidance of a disastrous end. Moreover, to discover the truth, we should rely on reflection and communicative discourse. Further, hypothetical examples, however gruesome or disturbing, may help us locate the pressure points of the debate or false foundations upon which certain standpoints are built. Lastly, the entire context of this endeavor must be thematized. That means that we should be aware of who is asking the questions, what kind of society that person lives in, what their interests are, and why they are asking the questions. If this inquiry results in the finding that the person asking the questions is a capitalist, Republican American whose world view has been shocked by a perceived “war” with terrorists, who is concerned to protect his core interests of money, well-being, stability, and cultural homogeneity, and who is deeply afraid of the unknown enemy destroying his fragile world, we should be mindful of that finding when reading his suggestions. If that person is a human rights activist, or a U.N. Commissioner, we ought to take their particular starting points into account in similar fashion.

### E. *The Value of Values*

It is a salutary discipline when approaching a legal or moral puzzle to consider what values and interests are at stake and how those values are otherwise vindicated by particular solutions. The following paragraph flags up some of the more important values that appear to be relevant to the ticking bomb in Chicago.

Firstly, *the right to life* is at threat; many people may perish if we believe that our suspected terrorist’s claim is true. Secondly, *human dignity* is a major issue in this discussion. This involves the right not to be tortured and refers to the dignity, physical and mental integrity of our suspected terrorist. Thirdly, *the moral purity of society* is jeopardized by the possibility of torture; the self-understanding of individual citizens is affected by the actions of their government. Fourthly, *the moral purity* of the official is another factor. Since he knows that torture is “evil,” our agent may not want to torture, even though he considers it the “right” thing to do. His moral purity is also of relevance when we contemplate the rehabilitative purpose of punishment. Fifthly, we must be mindful of *international peacekeeping*. This refers to the preservation of friendly international relations that may be jeopardized if the terrorist subjected to torture is a member of an organized geopolitical group. Next, the *integrity and coherence of*

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<sup>18</sup> Sanford Levinson, *Contemplating Torture: An Introduction*, in *TORTURE: A COLLECTION* 23, 39 (Sanford Levinson ed., 2004).

*domestic and international law* should be at the forefront of our minds. It is desirable that international standards are referable to and compatible with domestic norms in individual states and vice versa. *Fair trial or due process* are of major importance too. These notions express the rule of law concept that our suspected terrorist should only be punished according to pre-existing norms only after a determination of guilt in a court of law. Then, we cannot afford to ignore the concept of *legal certainty*. This expresses the ideal that, in a paradigmatic legal system, the law is applied as it has been written, facilitating life-planning on the part of citizens. *The integrity of the democratic concept* is another variable in our experiment. Traditional democracy embodies a commitment to openness, participation and transparency of law-making so that the legitimacy of executive action is secured by the procedure that led to its creation. Finally, the *motivations of the terrorist* cannot be disregarded. It should not be forgotten that “a betrayal is no escape for a dedicated member of either a government or its opposition, who cannot collaborate without denying his or her highest values.”<sup>19</sup>

## II. RESPONSES

This section summarizes the positions that have been taken in the debate thus far and attempts to demonstrate the problems inherent in each proposed solution.

### A. *Moral Absolutism*

*Fiat justitia et pereat mundus.*

This school of thought holds that torture can never be justified morally, no matter what the circumstances. The European Court of Human Rights [ECHR] has clarified that the ECHR makes legal this moral ban on torture: “The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention *prohibits in absolute terms* torture or inhuman or degrading treatment or punishment, irrespective of the victim’s conduct.”<sup>20</sup>

In December 2005, the House of Lords handed down a judgment in which Lord Bingham affirmed that this is also the position in English law: “The prohibition of torture is an absolute value from which nobody must deviate.”<sup>21</sup>

#### PROBLEMS WITH MORAL ABSOLUTISM

Some believe that far greater moral guilt falls on a person in authority who permits the deaths of hundreds of innocents rather than choosing to *torture* one guilty or complicit person. According to Elshaint, “[t]he ban on torture must remain. But ‘moderate physical pressure’ to save innocent lives, ‘coercion’ by contrast to ‘torture,’ is not only demanded in certain extreme circumstances, it is arguably the ‘least bad’ thing

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<sup>19</sup> Henry Shue, *Torture*, in TORTURE: A COLLECTION 55 (Sanford Levinson ed., 2004).

<sup>20</sup> *Chahal v. United Kingdom*, 23 Eur. Ct. H.R. 413, 414 (1997) (emphasis added).

<sup>21</sup> *A v. Sec’y of State for the Home Dep’t*, [2005] UKHL 71, [2006] 2 A.C. 221 (absolute nature of pronouncement not intended to cover inhuman and degrading treatment).

to do.”<sup>22</sup> Similarly, Shue contends that, “[t]o allow the destruction of much of a great city and many of its people would be almost as wicked as purposely to destroy it.”<sup>23</sup> This is incorrect because the official does not *allow* the destruction by resisting the temptation (or the moral obligation) to torture. Rather, it is the detainee, aware that human disaster is imminent, who allows (by omitting to give the information) the massive loss of life. Whether or not one agrees with these views, there is undeniable merit in the contention that, “it seems *fanatical* to maintain the absoluteness of the judgment, to do right even if the heavens will in fact fall.”<sup>24</sup> In fact, “just beneath the surface . . . there is clearly a view, prevalent in many jurisdictions among security and police personnel, that torture, or means of physical or psychological pressure that we may term *near-torture*, may have to be resorted to in certain circumstances.”<sup>25</sup> This opinion has been enunciated on the bench: “There simply are cases in which those who are at the helm of the State, and bear responsibility for its survival and security, regard certain deviations from the law for the sake of protecting the security of the State, as an unavoidable necessity.”<sup>26</sup>

The brutal reality of the matter is that, “[i]f government agents perceive such use to be the only way to procure critical information that is deemed necessary to foil an imminent massive terrorist attack that would result in thousands of casualties, they are likely to resort to such measures, whether they are legally permissible or not.”<sup>27</sup> In summary, law and legal thinking *is* inadequate if it does not at least address the possibility of official deviation from the notionally absolute ban.

In terms of the values in Part II, moral absolutism appears to falter primarily because it does not accord sufficient value to the right to life. Elshtain makes this point emphatically: “Within Christian moral thinking . . . the statesman or stateswoman [who sanctions torture] has another chance. He and she can stand before God as a guilty person and seek forgiveness. There are no second chances for school-children blown to smithereens.”<sup>28</sup> In short, we cannot ignore the compulsion that many people feel that overriding importance must be attached to saving the people.

## **B. Necessity Defense**

*“The road to tyranny has always been paved with claims of necessity made by those responsible for the security of a nation.”*<sup>29</sup>

This solution holds that, if torture is the only way to save lives in our imaginary emergency, the official who takes this last resort, should be able to invoke a necessity defense. Parry neatly sums up this position:

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<sup>22</sup> Jean Bethke Elshtain, *Reflection on the problem of “Dirty Hands”*, in TORTURE: A COLLECTION, *supra* note 19, at 86-87.

<sup>23</sup> Shue, *supra* note 19, at 57.

<sup>24</sup> CHARLES FRIED, RIGHT AND WRONG 10 (1978)(emphasis added).

<sup>25</sup> MALCOLM D. EVANS & ROD MORGAN, PREVENTING TORTURE 54 (1998).

<sup>26</sup> Barzilai v. Government of Israel, 40(3) P.D. 505 (Ben-Porat, J.).

<sup>27</sup> Gross, *supra* note 19, at 235.

<sup>28</sup> Elshtain, *supra* note 19, at 83.

<sup>29</sup> Dershowitz, *supra* note 19, at 273.

[P]reventing terrorism has become one of the most significant tasks for modern governments . . . . Against this background, we cannot completely reject the evil of torture as a method of combating terrorism, regardless of what international law provides. If torture provides the last remaining chance to save lives in imminent peril, *the necessity defense should be available to justify the interrogators' conduct.*<sup>30</sup>

Remarkably, this view finds support even within human rights organizations:

If I as an interrogator feel that the person in front of me has information that can prevent a catastrophe from happening . . . . I imagine that I would do what I would have to do in order to prevent that catastrophe from happening. The state's obligation is then to put me on trial, for breaking the law . . . . I can evoke the defense of necessity, and then the court decides whether or not it's reasonable that I broke the law in order to avert this catastrophe.<sup>31</sup>

Furthermore, the idea of necessity has taken root in U.S. jurisprudence: In *Chavez v. Martinez*,<sup>32</sup> a majority of the Supreme Court expressly approved the nexus between the constitutionality or legality of coercive interrogation and the perceived necessity for extracting the information.<sup>33</sup>

#### PROBLEMS WITH A NECESSITY DEFENSE

The major problem with the necessity justification is that it is too pliable and positively invites political manipulation. Parry tells us that,

Even if torture could be justified in a specific case as a matter of criminal law, we still must ask if it is wise. The focus of the necessity defense is narrower than the focus of the policymaker, and using torture or cruel, inhuman, or degrading treatment may not be wise from that broader perspective even if it is justified as a matter of law.<sup>34</sup>

Indeed, “[w]hy in the world would we necessarily trust a highly politicized state elite, with its own potential political interests in creating a perception of danger, to be reliable in such declarations?”<sup>35</sup> To my mind, there is great wisdom in Dorfman’s warning that,

Every regime that tortures does so in the name of salvation, some superior goal, some promise of paradise. Call it communism, call it the free market, call it the free world, call it the national interest, call it fascism, call it the leader, call it civilization, call it the service of God, call it what you will,

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<sup>30</sup> Parry, *supra* note 19, at 158 (emphasis added).

<sup>31</sup> Mark Bowden, *The Dark Art of Interrogation*, ATLANTIC MONTHLY 51, October 1, 2003, at 76 (quoting Jessica Montell, executive director of a human rights advocacy group in Jerusalem).

<sup>32</sup> *Chavez v. Martinez*, 538 U.S. 760, 776 (2003).

<sup>33</sup> See Parry, *supra* note 3, at 151.

<sup>34</sup> Parry, *supra* note 3, at 159.

<sup>35</sup> Levinson, *supra* note 7, at 32.

the cost of paradise, the promise of some sort of paradise, says Ivan Karamov, will always be hell for at least one person somewhere, sometime.”<sup>36</sup>

It seems therefore that the necessity justification neglects the afore-mentioned values of human dignity; the integrity of society; international peace; the terrorist’s aims; and the coherence of international and domestic law.

### C. *Self-Defense*

This theory is similar to that of necessity. It maintains that an agent who uses torture and saves Chicago can, by way of an extension of the concept of self-defense, excuse or justify his conduct. Gur-Ayre suggests that the criminal law concept of self-defense can not only validate, but can also set useful limits on interrogative practices:

The use of force in interrogation, which severely violates the suspect’s human dignity and autonomy, may only be justified in limited cases of an imminent threat of a concrete terrorist attack - ticking bomb situations in its narrow sense - when it is impossible to turn to more general means of collecting information. Only in such cases can self-defense, the right to repel an unlawful concrete attack, justify the use of interrogational force. A pre-emptive use of force, as well as the use of force in the aftermath of the attack, cannot be justified by self-defense or by any other justification; nor should the use of force be justified against a bystander who happens to know the location of the bomb . . . .<sup>37</sup>

As Dershowitz points out,

There is a difference in principle, as Bentham noted more than two hundred years ago, between torturing the guilty to save the lives of the innocent and torturing innocent people. A system that requires an articulated justification for the use of no lethal torture and approval by a judge is more likely to honor that principle than a system that relegates these decisions to low-visibility law enforcement agents whose only job is to protect the public from terrorism.<sup>38</sup>

#### PROBLEMS WITH SELF-DEFENSE

Gur-Ayre tells us that “[t]he moral basis for self-defense is stronger than that of necessity. The use of force is not directed at the defenseless but rather at the person who has unlawfully created the danger and is able *to avoid the need to sacrifice her interests*

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<sup>36</sup> Dorfman, *supra* note 2, at 16.

<sup>37</sup> Miriam Gur-Arye, *Can the War Against Terror Justify the Use of Force in Interrogations?*, in TORTURE: A COLLECTION 195 (Sanford Levinson ed., 2004).

<sup>38</sup> Dershowitz, *supra* note 29, at 272.

by ceasing the attack.”<sup>39</sup> There are two main problems with this superficially attractive solution.

Firstly, as has already been stated, a terrorist does not simply “avoid the need to sacrifice her interests by ceasing the attack.” On the contrary, the terrorist must do *precisely* that. Divulging the information as to the whereabouts of the bomb betrays the highest values motivating the terrorist. As such, self-defense undervalues the terrorist’s ideological values. Secondly, the mechanics of self-defense dictate that if a bystander and the culprit both mockingly state that they are aware of the whereabouts of a bomb, only the terrorist can be tortured. Indeed, if, in the heat of the moment, two officials make a snap decision that, to discover the location of the Chicago bomb, one of them will torture the bystander and the other the terrorist, the defense will only be available to the official who tortures the terrorist, even if the disaster is averted by information obtained from the bystander. If it is known with absolute certainty that the bystander knows of the bomb, and is tortured, does the Benthamite logic hold water? Is the interrogator of this person less culpable than the interrogator of the actual culprit? Why is the defense open to one official and not the other simply because of a twist of fate; a snap decision? In this example, it turned out that the torture of the bystander was necessary and that the torture of the terrorist was ineffective. Therefore, it seems that the mechanics of self-defense would produce odd results if it were put into practice.

In summary, the self-defense solution pays scant regard to the values of the terrorist; human dignity; the right to life; the moral purity of the official; international peacekeeping and fair trial. Furthermore, in light of the goal of the maintenance of the coherence of domestic and international law, it is undesirable for states to begin to provide for self-defense justifications for torturers. This could lead to a situation where some states contemplate justifications or excuses and others maintain a strict prohibition. Such incoherence is undesirable in the international legal system, particularly as it is only recently that the ban on torture has acquired the status of *jus cogens*.

#### **D. Political Absolution**

*Torture is “an engine of state, not of law.”*<sup>40</sup>

This approach entails that someone who tortures in circumstances such as those set out in our ticking bomb example, should be politically absolved for their crime after the event. Posner realizes that civil libertarians are concerned that, once torture is sanctioned *ex ante* or approved of *ex post*, a general erosion of civil liberties will occur. In light of this consideration, and the fact that any cost-benefit analysis of the application of torture is necessarily a “nebulous” venture, he thinks that it is better to “stick with overly strict rules, trusting executive officials to break them when the stakes are high enough to enable the officials to obtain *political absolution* for their illegal conduct.”<sup>41</sup>

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<sup>39</sup> Gur-Arye, *supra* note 29, at 194 (emphasis added).

<sup>40</sup> WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 321 (1765—1769).

<sup>41</sup> Richard Posner, *Torture, Terrorism, and Interrogation*, in TORTURE: A COLLECTION 298 (Sanford Levinson ed., 2004) (emphasis added).

PROBLEMS WITH POLITICAL ABSOLUTION

Firstly, if such a system were in place, it is not clear to me how it would function. Would absolution be extended only to those officials who managed to unravel terrorist plots while those officials who fail to find the detonator and save the city are dealt with by normal process of law?

Secondly, and perhaps most fundamentally, law that is not enforced loses its character as law. Moreover, law that is not a transmogrification of contemporary political morality does not fulfill its *raison d'être*. The result of having a law that is not applied is to undermine society's respect for the law, unpicking the constitutional fabric that holds us together. Furthermore, if we accept that law as applied does not correspond to law as written, and turn a blind eye to torture, the inherent quality of law deteriorates and with it, society's respect for law.<sup>42</sup>

Thirdly, as Levinson suggests, "[o]ne might well believe in a 'contagion affect.' If the United States is widely believed to accept torture as a proper means of fighting the war against terrorism, then why should any other country refrain?"<sup>43</sup> Levinson further argues that,

Part of the responsibility attached to being a colossus may be the need to accept certain harms that lesser countries need not accept. Our very size and power may require that we limit our responses in a way that might not be true of smaller countries more "existentially" threatened by their enemies than the United States has been . . . . At the very least . . . the United States must be willing to bear significant costs—greater than many other countries—before it accepts the possibility of torture.<sup>44</sup>

To conclude, any *de post facto* system of political absolution derogates unacceptably from the principles of international peacekeeping; human dignity; fair trial (of both the terrorist and the torturer); legal certainty; the ideological values of the terrorist and the moral purity of the official.

**E. *Trial on the Morality of the Act***

*"I have dirty hands right up to the elbows. I've plunged them in filth and blood. Do you think you can govern innocently?"*<sup>45</sup>

This proposal posits that an official who metes out torture in order to save Chicago should face trial, where a jury must decide on the morality of his actions. If they think he was right, he is set free. If not, he goes to jail. Shue tells us that,

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<sup>42</sup> Amnesty for criminal activity has been granted to members of criminal organizations, such as the Mafia, in order to pursue what is often perceived as the higher good of dismantling the larger illegal network. In my view, this admittedly useful law enforcement device involves a perversion of the law and a betrayal of the *Rechtsstaat*.

<sup>43</sup> Levinson, *supra* note 7 at 39.

<sup>44</sup> Levinson, *supra* note 7 at 39.

<sup>45</sup> JEAN-PAUL SARTRE, *Dirty Hands*, in *NO EXIT, AND THREE OTHER PLAYS* 201 (Lionel Abel trans., 1949).

[a]n act of torture ought to remain illegal so that anyone who sincerely believes such an act to be the least available evil is placed in the position of needing to justify his or her act morally in order to defend himself or herself legally . . . . Anyone who thinks an act of torture is justified should have no alternative but to convince a group of peers in a public trial that all necessary conditions for a morally permissible act were indeed satisfied. If it is reasonable to put someone through torture, it is reasonable to put someone else through a careful explanation of why. If the situation approximates those in the imaginary examples in which torture seems possible to justify, a judge can surely be expected to suspend the sentence.<sup>46</sup>

#### PROBLEMS WITH A MORALITY TRIAL

Shue's submission clearly involves the acquiescence and therefore arguably the complicity, of four additional people. Does the prime minister then also go to court to justify himself? What court does he go? He surely won't be found guilty in any meaningful sense of the word by a judge in his home country. Further, it doesn't seem very likely that the torturer's home state would turn him over for trial in a neutral jurisdiction, let alone for trial in the home state of the suspected terrorist. What is the official's status in *international law* if he is wrong and the person wasn't the perpetrator?<sup>47</sup> Who sits in the jury of peers who are to deem the official's conduct 'morally permissible' or otherwise? Surely, someone who has to make such a sacrifice in such a scenario is truly peerless. Perhaps, he can be judged before St. Peter's gate if that is your religious persuasion. The recent House of Lords judgment shows how distant Shue's proposal is from current judicial thought in the United Kingdom. According to the Law Lords, if Tony Blair were to oversee torture in the way Shue describes, he would be considered *hostis humanis generis*.<sup>48</sup>

In short, Shue's suggestion is very valuable but strikes me as a tad myopic. The questions above highlight the multiple of problems with his proposal. The option of a trial to decide whether or not the torture was moral does not respect the values of coherence of international and domestic law or legal certainty.

#### **F. *Ex post Ratification***

*"It is far pleasanter to sit comfortably in the shade rubbing red pepper into some poor devil's eyes than to go about in the sun hunting up evidence."*<sup>49</sup>

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<sup>46</sup> Henry Shue, *Torture*, in *TORTURE: A COLLECTION* 47, 58–59 (Sanford Levinson ed., 2004) (emphasis added). Shue envisages very clinical, official torture: "[T]he prime minister and chief justice are being kept informed; and a priest and a doctor are present . . . . [T]he antiseptic pain will carefully be increased only up to the point at which the necessary information is divulged, and the doctor will then immediately administer an antibiotic and a tranquilizer. The torture is purely interrogational." *Id.* at 58 (Shue's imaginary scenario involving the prime minister is reminiscent of Achilles mockery of Agamemnon: "Imagine a king who fights his own battles. Wouldn't that be a sight?").

<sup>47</sup> This is imaginable where a collaborator with the perpetrator lies about his identity in order to protect the true mastermind. Greater sacrifices are expected of terrorists almost every day in suicide campaigns.

<sup>48</sup> *A v. Sec'y of State for the Home Dep't*, [2005] UKHL 71, [2006] 2 A.C. 221.

<sup>49</sup> 1 James Fitzjames Stephen, *A History of the Criminal Law of England* 508 (William S. Hein & Co., Inc.

The solution postulated by Gross is as follows:

[T]ruly exceptional cases may give rise to official disobedience: public officials may step outside the legal framework, that is, act extralegally, and be ready to accept the legal ramifications of their actions. However, there is also the possibility that the extralegal actions undertaken by those officials will be legally (if not morally) excused *ex post*.<sup>50</sup>

He continues:

A categorical prohibition on the use of torture is also desirable in order to uphold the symbolism of human dignity and the inviolability of the human body . . . . [T]he more entrenched a norm is—and the prohibition on torture is among the most entrenched ones—the harder it will be for government to convince the public that violating that norm is necessary.<sup>51</sup>

Hence, Gross' proposal

calls on public officials having to deal with the catastrophic case to consider the possibility of acting outside the legal order while openly acknowledging their actions and the extralegal nature of such actions . . . . *Society retains the role of making the final determination whether the actor ought to be punished and rebuked or rewarded and commended for her actions* . . . . The people may determine that the use of torture in any given case, even when couched in terms of preventing future catastrophes, is abhorrent, unjustified, and inexcusable . . . . She may, for example, need to resign her position, face criminal charges or civil suits, or be subjected to impeachment proceedings. Alternatively, the people may approve the actions and ratify them.<sup>52</sup>

Apparently Gross sees it as a positive feature of his theory that,

[b]y separating the issues of action (preventive interrogational torture) and public ratification, and by ordering them so that ratification follows, rather than precedes, action, *the proposed solution adds a significant element of uncertainty to the decision-making calculus of state agents*. This prudent obfuscation raises both the individual and national costs of pursuing an extralegal course of action and, at the same time, reinforces the general ban on torture.<sup>53</sup>

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<sup>50</sup> Oren Gross, *The Prohibition on Torture and the Limits of the Law*, in *TORTURE: A COLLECTION* 229-31 (Sanford Levinson ed., 2004).

<sup>51</sup> *Id.* at 234-35.

<sup>52</sup> *Id.* at 240-41 (emphasis added).

<sup>53</sup> *Id.* at 244 (emphasis added).

PROBLEMS WITH *EX POST* RATIFICATION

There are three major flaws with *ex post* ratification.

Firstly, to what society is Gross referring, to which court or jury? If an official saves members of a society by torturing a nameless Muslim, what Western society will punish or even require an official to resign? Certainly not the society that re-elected George W. Bush. How hard is it really to convince a frightened U.S. public that coercive interrogation is necessary to protect their freedoms? Where is this incredibly discerning, ethically sagacious society that is able to suppress its nationalism and look at the facts objectively while knowing that this official just saved Chicago? I know no such society. I'm certain it doesn't exist in the United States, perhaps in the corridors of Yale Law School. In the UK, what is more likely is that the official will be seen as a soldier fighting the *war against terror* and his acts (whether reasonably based on an imminent threat or not) will be white-washed by a brain-washed public comprising largely of *Sun* readers.

Conversely, the terrorist will represent a body of thought and will be viewed by more people than one might care to imagine as a freedom fighter. These people, perhaps not assembled into a state but perhaps even more numerous than those of the target state would surely condemn the official's actions and may even want his head on a stick for impeding what they see as a just war by violating human dignity.

Secondly, and conclusively in my view, if, "[o]nce the torturer extracted the information required . . . he at once [had to] resign to await trial, pardon, and/or a decoration, as the case might be,"<sup>54</sup> the important rule of law principle of legal certainty is totally neglected. To make matters worse, Gross tells us that,

[e]ven if the use of torture in any given case is domestically excused *ex post*, it may be subject to a different judgment on the international plane. This may have significant consequences, for the individual actor (the interrogator) as well as her government. First, torturers may be subject to criminal and civil proceedings in jurisdictions other than their own, and may also be subject to international criminal prosecution. Second, the ban on torture is nonderogable under the major international human rights conventions, that is, it cannot be abrogated or derogated from whatever the surrounding circumstances may be . . . . State agents who engage in acts of preventive interrogational torture implicate their government in violation of the nation's international obligations and expose it to a range of possible remedies under the relevant international legal instruments.<sup>55</sup>

My question is: Would this not lead to an unacceptable never-ending state of uncertainty for the official? Would it not be far more humane if the official knew precisely what she was putting on the line? An additional problem, of course, is that, if the torturer's home

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<sup>54</sup> Charles L. Black, Jr., *Mr. Justice Black, The Supreme Court, and the Bill of Rights*, Harper's, Feb. 1961, at 63, reprinted in *The Occasions of Justice: Essays Mostly on Law* 89, 99 (1963).

<sup>55</sup> Oren Gross, *The Prohibition on Torture and the Limits of the Law*, in *TORTURE: A COLLECTION* 229, 246-47 (Sanford Levinson ed., 2004).

state does not put her in prison, the state necessarily is harboring an international criminal.

In short, Gross' suggestion strikes me as unworkable by dint of its disproportionate effect on the official's legal certainty. As Dershowitz correctly reminds us, "interrogators should not have to place their liberty at risk by guessing how a court might ultimately decide a close case. They should be able to get an advance ruling based on the evidence available at the time."<sup>56</sup> *Ex post* ratification is problematic in the further sense of the coherence of domestic and international law and it seems to severely undervalue the official's right to a fair trial.

### G. *The Warrant*

The current situation

[T]olerates torture without accountability and encourages hypocritical posturing . . . . [I]f torture is being or will be practiced, is it worse to close our eyes to it and tolerate its use by low-level law enforcement officials without accountability, or instead to bring it to the surface by requiring that a warrant of some kind be required as a precondition to the infliction of any type of torture under any circumstances?<sup>57</sup>

Dershowitz is troubled by governmental smoke screens that shroud the practice of torture. Responding to photographic evidence of the abominable treatment of Abu Ghraib detainees, he claims that,

If a warrant requirement of some kind had been in place, the low-ranking officers on the ground could not plausibly claim that they had been subtly (or secretly) authorized to do what they did, since the only acceptable form of authorization would be in writing. Nor could the high-ranking officials hide behind plausible deniability, since they would have been required to give the explicit authorization . . . . [T]he requirement of securing advanced written approval would reduce the incidence of abuses, since it would be a rare case in which a high-ranking official, knowing the record will eventually be made public, would authorize extraordinary methods – and never the methods of the kind shown in the Abu Ghraib photographs.<sup>58</sup>

He suggests that a judicial officer should be responsible for vetting *torture applications*.

It is a traditional role for judges to play, since it is the job of the judiciary to balance the needs for security against the imperatives of liberty. Interrogators from the security service are not trained to strike such a

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<sup>56</sup> Alan Dershowitz, *The Prohibition on Torture and the Limits of the Law*, in TORTURE: A COLLECTION 229, 263 (Sanford Levinson ed., 2004).

<sup>57</sup> *Id.* at 257.

<sup>58</sup> *Id.* at 276-77.

delicate balance . . . . The essence of a democracy is placing responsibility for difficult choices in a visible and neutral institution like the judiciary.<sup>59</sup>

Building on the Dershowitzian suggestion, Levinson suggests ways in which the torture warrant system could avoid triggering a normalization of torture.

First . . . all torture warrants should be public, with written opinions that can be subjected to analysis . . . . Second, the person the state proposes to torture should be in the courtroom, so that the judge can take no refuge in abstraction. The judge should be fully aware of his or her personal complicity in the act of torture . . . . He should know that he is . . . potentially at risk if a later court finds the grant of the warrant to have been unreasonable.<sup>60</sup>

#### PROBLEMS WITH PRIOR JUDICIAL APPROVAL

As much as I admire (and share) Dershowitz's aims, there are many fundamental flaws in his analysis. Firstly, the idea of authorizing the derogation from a right as fundamental as freedom from torture strikes me as just as inimical to the concept of developed democracy and, for that matter, international law as the current fog of hypocrisy that envelops its actual practice. If a judge gives *ex ante* approval to torture in a system that condones torture and the official subsequently tortures, the judge, the official and potentially every member of the administration are complicitors in the violation of one of the most fundamental norms of international law. Accordingly, Dershowitz's warrant idea, although presented as a solution, in fact, creates more problems than it solves. The legalization of torture, even in such extreme circumstances, creates what I regard as insurmountable problems for the international system. Is torture by a dictator also legitimate because it has been warranted by the powers-that-be? If the United States openly engaged in torture, what would stop Saddam Hussein from harnessing the media in his defense against the charge of torture in his current trial in Baghdad with the remark: "My regime used torture, so does the U.S. administration. What's the difference?". How is it legitimate for an occupying force to torture to extract information about future terrorism or current local resistance if it is not legitimate for a regime to torture its own people to prevent an uprising? The domestic legal legitimization of torture sets states up in opposition to freedom fighters, terrorist groups, insurgents, and, in the worst case scenario, to one another.<sup>61</sup> In this way, the legalization of torture of foreign nationals (let's face it, they are the subjects of many modern instances of torture) is a catalyst for the clash of civilizations. Is the loss of human life that may occur less bad or more acceptable than the catastrophe that may have been averted by the torture? In short, domestic legitimization of torture holds the potential to cause a clash of state interests and world war. Wars have been fought over far less important issues than

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<sup>59</sup> *Id.* at 263-64.

<sup>60</sup> Sanford Levinson, *Contemplating Torture*, in TORTURE: A COLLECTION 23, 37 (Sanford Levinson ed., 2004).

<sup>61</sup> We have recently seen controversy surrounding the detention by U.S. forces of a German man for questioning. It is appalling that the political impact of the detention of one German is greater than that of countless Iraqis.

human dignity. More generally, it may not be clear how a coherent system of international law can put Saddam Hussein on trial for torture in Baghdad without also putting George W. Bush on trial in Washington, D.C. Hussein didn't dirty his own hands, neither does Bush. Torture conventions do not distinguish between valid or invalid purposes of torture, so this cannot provide the justification. Equally, there is an inherent circularity in the argument that torture can be practiced by a legitimate regime but not by an illegitimate regime when the practice of torture was used as a justification for the deposition of the leader of the illegitimate regime or as an indicator of the illegitimacy of that regime.

Notwithstanding the inevitability of governmental resort to torture in today's political climate,

[I]t still makes good sense to say an absolute no to the use of torture. As Fred Schauer argues, '[r]esisting the inevitable is not to be desired because it will prevent the inevitable, but because it may be the best strategy for preventing what is less inevitable but more dangerous.' What is '*less inevitable but more dangerous*' is', for example, the expanded use of interrogational torture to less-than-catastrophic cases. Once we authorize state agents to use interrogational torture in one set of cases, it is unlikely that we will be able to contain such use to that limited subset of cases. Rather, such powers and authority are likely to expand far beyond their original intended use. Moreover, the insistence on an absolute ban on torture may slow down the rush to resort to torture practices even in truly exceptional cases. Such an absolutist position not only imposes moral inhibitions on government officials but also raises the specter of public exposure if a measure is later considered to have been unnecessary, and the (albeit remote) possibility of criminal proceedings and civil suits brought against the perpetrators.<sup>62</sup>

Secondly, and relatedly, notwithstanding the fact that human dignity has been sacrificed on the altar of national security by several Western governments in the last half-century, the international quest to eradicate torture was clipping along at a fair pace. Let us not forget that an apparatus had been set up to investigate torture, states (however hypocritically) have declared their aversion to the practice, everything was moving in the right direction (even if every two steps forward were accompanied by one backwards). If the *new Rome* legalized torture, a phenomenally dangerous message would be sent out to the rest of the world. Do we really want to open a door that we collectively have been trying to force shut since the Enlightenment? Further, what aberrations on the general theme of judicial warrants could we expect? The mind boggles at the possible legislative measures and executive action in violation of fundamental human rights that would take place in countries that have less developed systems of rights protection than those boasted by the United States and the United Kingdom. Dershowitz's radical proposal would throw an enormous cat amongst the pigeons of the international community. How would the world deal with the fact that the leading power was derogating from an almost

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<sup>62</sup> Oren Gross, *The Prohibition on Torture and the Limits of the Law*, in *TORTURE: A COLLECTION* 229, 235 (Sanford Levinson ed., 2004).

universally accepted ban? The sad truth is that some countries would follow suit, treating the U.S. legalization as *carte blanche* to resume practices that had tainted their reputations and impeded their development as legitimate states in the past. In addition, the few states that have resisted the utilitarian temptation to use torture thus far might succumb to that temptation. Langbein informs us that, “[a]nother insight from history is the danger that, once legitimated, torture could develop a constituency with a vested interest in perpetuating it.”<sup>63</sup> Gross echoes this view: “It is extremely dangerous to provide for such eventualities and such awesome powers within the framework of the existing legal system because of the large risks of contamination and manipulation of that system and the deleterious message involved in legalizing such actions . . . .”<sup>64</sup>

Thirdly, Dershowitz claims that a system of judicial warrants would, by introducing judicial scrutiny and providing a documentary record, reduce the number of incidents of torture that take place and increase the accountability of those employing such methodology.<sup>65</sup> However, Scarry correctly remarks that it is not clear how the torturer becomes accountable since we remove his legal culpability by giving him a warrant.<sup>66</sup> In addition, by analogy with search warrants, she claims that a system of licenses to torture would tend to close the door to review rather than facilitating scrutiny of the decision.<sup>67</sup> Posner also maintains that Dershowitz exaggerates the significance of his judicial warrant as a check on executive discretion. The judge criticizes the suggested system of prior approval for three reasons.<sup>68</sup> Firstly, a warrant is issued in *ex parte* proceedings in which the applicant may have a choice of judges to which to apply.<sup>69</sup> Hence, no effective screening takes place. Secondly, the judicial officers chosen for such a role are likely to be chosen on the basis of their sensitivity to national security, leading to a biased hearing.<sup>70</sup> Thirdly, the entire procedure is likely to remain secret for security reasons.<sup>71</sup> A non-transparent procedure does not promote truthfulness, administrative standards, or candor. Posner concludes therefore that a warrant might “operate merely to whitewash questionable practices.”<sup>72</sup> As Shue argues, “[t]orture is the ultimate shortcut. If it were ever permitted under any conditions, the temptation to use it increasingly would be very strong.”<sup>73</sup> Parry also voices this concern,

In theory, we can admit an exception to an otherwise universal prohibition without undermining the values that gave rise to that prohibition. But what

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<sup>63</sup> John H. Langbein, *The Legal History of Torture*, in *TORTURE: A COLLECTION* 93, 101 (Sanford Levinson ed., 2004).

<sup>64</sup> Oren Gross, *The Prohibition on Torture and the Limits of the Law*, in *TORTURE: A COLLECTION* 229, 240 (Sanford Levinson ed., 2004).

<sup>65</sup> Alan Dershowitz, *Tortured Reasoning*, in *TORTURE: A COLLECTION* 257, 257 (Sanford Levinson ed., 2004).

<sup>66</sup> Elaine Scarry, *Five Errors in the Reasoning of Alan Dershowitz*, in *TORTURE: A COLLECTION* 281, 282-83 (Sanford Levinson ed., 2004).

<sup>67</sup> *Id.* at 284-85.

<sup>68</sup> Richard A. Posner, *Torture, Terrorism, and Interrogation*, in *TORTURE: A COLLECTION* 291, 296 (Sanford Levinson ed., 2004).

<sup>69</sup> *Id.* at 296.

<sup>70</sup> *Id.* at 296.

<sup>71</sup> *Id.* at 296.

<sup>72</sup> *Id.* at 296.

<sup>73</sup> Henry Shue, *Torture*, in *TORTURE: A COLLECTION* 47, 57 (Sanford Levinson ed., 2004).

of practice - is there such a thing as principled torture? Even if such a thing exists, reports of U.S. practices suggest that adhering to those principles is difficult indeed.<sup>74</sup>

Let us resist opening the gates to hell.

Fourthly, as Scarry shrewdly observes, any system of prior approval of torture presupposes a “population [that] lacks the simple attribute of courage”.

It is a peculiar characteristic of such hypothetical arguments on behalf of torture that the arguer can always “imagine” someone large-spirited enough to overcome . . . his aversion to torture, but not so large-spirited that he or she can also accept his or her own legal culpability and punishment.<sup>75</sup>

Why can't a torturer stand trial for his crime?

Finally, it seems that the likelihood of extracting information must be inversely indexed to the importance of the cause in the terrorist's psyche and the amount of energy, time, and money the terrorist has invested in his evil plot. Hence, the more grandiose the plan and the more important the cause, the less likely it is that the terrorist will give up information under torture. This means that if, in the doomsday scenario that Posner describes, the perpetrator or his accomplice is caught, the likelihood of obtaining the information through torture is reduced dramatically by the enormous scale of the plan and the terrorist's level of dedication to his cause. All this begs the question of whether there is any point in taking a Dershowitzian approach and instituting a system of warrants for torture in the first place.

In short, the warrant does not sufficiently protect the values of human dignity, fair trial, the ideals of the terrorist, the moral purity of society and the official, or international peacekeeping, and it flies in the face of the desideratum of coherent international and domestic law.

#### **H. *Nelsonian Blindness***

*In the U.S. context, the collective horror from the September 11 attacks fosters indifference toward detainees captured outside the United States who are of a different culture than our dominant cultures and who share the Middle Eastern origin of the September 11 terrorists (and, of course, who may themselves be terrorists).<sup>76</sup>*

Dorfman has commented on the sad state of society:

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<sup>74</sup> John T. Parry, *Escalation and Necessity: Defining Torture at Home and Abroad*, in TORTURE: A COLLECTION 145, 160 (Sanford Levinson ed., 2004).

<sup>75</sup> Elaine Scarry, *Five Errors in the Reasoning of Alan Dershowitz*, in TORTURE: A COLLECTION, 281, 282-83 (Sanford Levinson ed., 2004).

<sup>76</sup> John T. Parry, *Escalation and Necessity: Defining Torture at Home and Abroad*, in TORTURE: A COLLECTION, 145, 156 (Sanford Levinson ed., 2004).

We live in times where people, in [the USA] and in so many other supposedly “civilized” nations, are so filled with primal fear that they look on with apparent indifference at the possibility of extreme maltreatment of their presumable enemies-indifference, indeed, at the evidence and televised images of this sort of maltreatment.<sup>77</sup>

#### PROBLEMS WITH NELSONIAN BLINDNESS

Nelsonian blindness to torture reflects a societal sickness, diagnosed by Dershowitz in the following terms:

A sort of “don’t ask, don’t tell” policy has emerged, enabling our president and attorney general to close their eyes to its use while being able to deny it categorically-the kind of willful blindness condemned by the courts in other contexts. With no limitations, standards, principles, or accountability, the use of such techniques will continue to expand.<sup>78</sup>

I agree with him that this position is entirely unsatisfactory and without appropriate and considered legal and political intervention, is likely to worsen. To my mind the following excerpt from an essay by Dorfman shows how turning a blind eye to torture involves a denial of self:

Torture does not . . . only corrupt those directly involved in the terrible contact between two bodies . . . [t]orture also corrupts the whole social fabric because it prescribes a silencing of what has been happening between those two bodies, it forces people to make believe that nothing, in fact, has been happening, it necessitates that we lie to ourselves about what is being done not far from where we talk, while we munch a chocolate bar, smile at a lover, read a book, listen to a concerto, exercise in the morning. Torture obliges us to be deaf and blind and mute. Or we could not go on living. With that incessant awareness of the incessant horror, we could not go on living.<sup>79</sup>

As Scheuerman argues:

The only sensible response to this harsh reality is . . . to . . . force the United States to rethink its disastrous - and thus far counterproductive - legal and political positions about the “war on terrorism.” If we hope to preserve our basic political and legal ideals, and not allow the downward

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<sup>77</sup> Ariel Dorfman, *The Tyranny of Terror: Is Torture Inevitable in Our Century and Beyond?*, in TORTURE: A COLLECTION, 3, 5 (Sanford Levinson ed., 2004).

<sup>78</sup> Alan Dershowitz, *Tortured Reasoning*, in TORTURE: A COLLECTION, 257, 265 (Sanford Levinson ed., 2004).

<sup>79</sup> Ariel Dorfman, *The Tyranny of Terror: Is Torture Inevitable in Our Century and Beyond?*, in TORTURE: A COLLECTION, 3, 9 (Sanford Levinson ed., 2004).

spiral of terror and counter-terror to destroy them, we will need to reestablish a legal universe without black holes.<sup>80</sup>

In sum, Nelsonian blindness does not solve the problem because it does not accord sufficient weight to the values of the moral integrity of society, the democratic concept, fair trial, the values of the terrorist, or the moral purity of the official, it shows a blatant disregard for human dignity and, in my view, is a time bomb of international conflict.

### I. *Conclusion*

I shall not rehearse any of the foregoing. Suffice to say that it is not considered that any of the above solutions reconcile the different values at stake satisfactorily.

### III. A PRINCIPLED RESPONSE

In the spirit of creating the legal universe that Scheuerman speaks of, I would like to argue for a different response to the ticking bomb question. The reader should be mindful that those who reject a legal ban on torture often cast themselves as pragmatists, while those who argue for moral absolutism are variably labelled soft, naïve, fanatical or impractical. In what follows, I give *practical and moral* reasons for an absolute domestic and international legal ban on torture.

#### A. *Torture as Crime*

*“A man doesn’t lose his soul one day and find it the next.”*<sup>81</sup>

Torture is an international crime. Torturers are *hostis humani generis*.<sup>82</sup> Terrorists, however despicable, have the same rights as the rest of us.<sup>83</sup> In developed Western democracies, anyone who uses torture for whatever purpose should go to prison for their crime. Interrogators should be given clear, hard legal rules to follow and know that they are sacrificing their liberty if they break them. Liability for torture should be strict and sentences should be fixed. The only question for the jury in the criminal trial of the official should be, “did this man use torture?” Questions of necessity or self-defense or the morality of the official’s act are not to be placed before the jury. Any information obtained using torture is not admissible in a court of law.<sup>84</sup>

This proposal shall now be assessed in light of the values that are in play in the Chicago scenario.

First, in the ticking bomb scenario, it is likely that our security officer would not rank his own liberty as more important than the lives of millions of people if he were certain he had the terrorist in his custody and could extract the information using coercive

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<sup>80</sup> William E. Scheuerman, *Carl Schmitt and the Road to Abu Ghraib*, 13 *Constellations J.* 108, 122 (2006).

<sup>81</sup> Michael Walzer, *Political Action: The Problem of Dirty Hands*, in *TORTURE: A COLLECTION*, 61, 71 (Sanford Levinson ed., 2004).

<sup>82</sup> *See A v. Sec’y of State for the Home Dep’t*, [2005] UKHL 71, [2006] 2 A.C. 221 (endorsing two propositions).

<sup>83</sup> *See Chahal v. United Kingdom*, [1996] Eur. Ct. H.R. 54.

<sup>84</sup> *See A v. Sec’y of State for the Home Dep’t*, [2005] UKHL 71, [2006] 2 A.C. 221.

interrogative techniques. If he uses torture, extracts the information and diffuses the bomb, the *right to life* is valued because the massacre is forestalled.

Second, what of *human dignity*? Simply put, the retributive function of punishment is fulfilled. The victim of the torture knows that his rights have been vindicated, albeit post facto. Although his liberty was violated in a distinctly non-Kantian fashion and subordinated to the right to life of many citizens of the society he attacked, he knows that society regrets the official's actions. He knows that although some in the society (depending on individual moral standpoints) may be grateful for the official's actions, such conduct can never be endorsed by a community that purports to live under the twin principles of democracy and the rule of law. By punishing the officer we take the terrorist's dignity out of the equation because the terrorist and the officer know full well that the officer will pay for his crime. In short, the terrorist's dignity is bought at the price of the torturer's liberty.

Third, the *moral purity of society* is protected. It is arguable that, in the awful moment that society uses torture to save itself, it becomes evil, bases itself on evil and is doomed to succumb to evil. "[T]he punishment of the perpetrator, however symbolic it may be, can help to heal the world, overcome that paralysis, and challenge apathy and silence."<sup>85</sup> There is no doubt that "[t]he self-awareness of the tragic hero is obviously of great value . . . . But sometimes the hero's suffering needs to be socially expressed (for like punishment, it confirms and reinforces our sense that certain acts are wrong)."<sup>86</sup> The moral equilibrium of the democratic society is restored over the course of the official's sentence; the sentence serves as an expression of the society's regret that one of its members resorted to such a despicable act in order to preserve that society.

Fourth, in the same way, through punishment, the *moral purity of the official* is restored. "We don't want to be ruled by men who have lost their souls."<sup>87</sup> Can we ever say that a torturer is innocent? In my opinion we cannot. We can never justify torture. It is wrong and that is the end of the matter. Can a torturer provide an excuse for his actions? I submit that a legal excuse may never exist for what is a crime against humanity and a flagrant denial of human dignity. This does not detract from the fact that we understand the torturer's actions. Indeed, in the same position, we may have made the same choice. However, simply because we understand the torturer's actions does not mean that we condone them, nor does it mean that we would have wanted to be in his shoes. It is precisely because we sympathize with the torturer that we should bless him with a term in prison. We must be cruel only to be kind. Walzer realizes this point and makes a poignant reference to Albert Camus' *Just Assassins*:

The heroes are innocent criminals, and just assassins, because having killed, they are prepared to die - *and will die*. Only their execution, by the same despotic authorities they are attacking, will complete the action in which they are engaged: dying, they need make no excuses. That is the end of their guilt and pain. The execution is not so much punishment as

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<sup>85</sup> Ariel Dorfman, *Forward to Torture*, in *TORTURE: A COLLECTION 9* (Sanford Levinson ed., 2004).

<sup>86</sup> Michael Walzer, *Political Action: The Problem of Dirty Hands*, in *TORTURE: A COLLECTION 61, 71* (Sanford Levinson ed., 2004).

<sup>87</sup> *Id.* at 72.

self-punishment and expiation. On the scaffold they wash their hands clean and, unlike the suffering servant, they die happy.”<sup>88</sup>

In similar fashion, through punishment, the moral purity of the official is (at least partially) restored. Though he exchanged the quality of his soul, or his soul itself by employing evil, when he sits in prison, he knows why he is there and can reflect upon it. This suggestion is neither fanatical nor strictly libertarian. Let us not forget that greater sacrifices have been made by men for mankind. If he is a hero, a man of principle who has made a personal sacrifice for others, our official will accept his punishment for the greater goods that I have outlined herein. When he is set free, he knows that he is square with the house. That is, he is square with the domestic legal, the international legal, the moral and whichever spiritual house he may have chosen. And he is a hero.

Fifth, the adoption of a torture as crime approach serves *international peace*. A clash of civilizations and possibly a war is avoided because an individual is made accountable. The democracy is able to stand up and say, *precisely because we are a democracy and precisely because we value the terrorist’s rights as highly as we do our own, we have incarcerated the official who violated that poor man’s rights*.

Next, the *integrity of domestic and international law* is secured because, although there may have been an *ultra vires* exercise of official discretion, that discretion has been condemned as an illegitimate executive act and, indeed, criminal. In turn, the punishment of the official not only upholds and speaks to the international legal prohibition and the (presently hypocritical) international diplomatic condemnation of torture, but his punishment also helps to reinforce that international prohibition and strengthens the international community’s position on torture. Moreover, the punishment of the official serves to preserve and further the integrity of the international courts that are presently punishing and hunting war criminals for crimes of torture. As Cassese states it, “good and evil should not vary according to latitude and longitude.”<sup>89</sup> The maxim is ‘torture is wrong and you will be punished’ not ‘torture is wrong if you are a leader whose seat of power is west of Washington.’

Further, the strict view argued for protects *the right to fair trial* of both the terrorist and the official. The terrorist is assaulted and punished before his trial. However, this evil is punished according to my formulation. His natural law right to a fair trial or due process is protected by the fact that the information obtained using torture is not admissible in a court of law. The official’s right to a fair trial is also respected. He must be tried according to settled legislation.

Additionally, the value of *legal certainty* is also a major aspect of this argument. There are several reasons why this paradigm of law is respected. First, the official knows what he can expect if he breaks the law. If for example, the torture occurs in a democracy such as the United Kingdom, and the United Kingdom has provided in legislation that torture is absolutely prohibited, there can be a fixed sentence. This does not, however, apply on the international level. In less settled war-torn states, where torture is used to suppress a population, if those who are brought to justice in an international tribunal were operating under significant ideological, military, or

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<sup>88</sup> *Id.* at 72.

<sup>89</sup> ANTONIO CASSESE, *TERRORISM, POLITICS AND LAW: THE ACHILLE LAURO AFFAIR* 64 (1989).

ecclesiastical pressure, these factors should be taken into account in mitigation.<sup>90</sup> Secondly, the absoluteness of domestic determination of the criminality of torture and the enforcement of punishment for transgression of that rule allow for integrity of the international system. The official knows that if he flees, he is at the mercy of other state/nonstate actors, international police forces and tribunals.

Moreover, *the integrity of democracy* is vindicated:

‘Off the book actions below the radar screen’ are antithetical to the theory and practice of democracy. Citizens cannot approve or disapprove of governmental actions of which they are unaware . . . . A good test of whether an action should or should not be done is whether we are prepared to have it disclosed – perhaps not immediately, but certainly after some time has passed.”<sup>91</sup>

Pursuant to my proposal, the democratic government needs make no clandestine concessions to the exigencies of a security threat. It may rely on the courage of a single citizen to sacrifice his liberty to preserve not only the lives of many innocents but also accept his punishment for transgressing a fundamental principle of international law.

Finally, we should be wary of regarding the *ideological or political aims that motivate the terrorist* as inferior to our own. Terrorist activity should be condemned because it involves the choice of unacceptable means. However, the goals of terrorist organizations are often disturbingly similar to those of settled governments.<sup>92</sup>

In sum, whichever way one wishes to view the ticking bomb scenario, it is argued that this position goes further than any other in reconciling the many competing values at stake.

## **B. Critique and Response**

Having subjected the work of other theorists to critical analysis, it is only fair that I expose the possible weaknesses of my own proposal. I anticipate five main criticisms and respond to them below.

### **1. YOU CAN’T PUNISH HEROES**

There may be those that, upon contemplation of the Chicago situation, consider that the act (the torture) accuses but the result (the saving of lives) excuses; that you can’t punish heroes. Two responses spring to mind.

First, there is no contradiction in punishing those who choose to break the law to protect the state. The punishment of an official who transgresses a legal norm vindicates the separation of powers. A member of the executive may decide to defend the state using coercive interrogation. The role of the judiciary is to punish that decision-maker

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<sup>90</sup> See *infra* section “Punishment in International Tribunals.”

<sup>91</sup> Alan Dershowitz, *Political Action: The Problem of Dirty Hands*, in TORTURE: A COLLECTION 61, 73 (Sanford Levinson ed., 2004).

<sup>92</sup> CHRISTOPHER M. BLANCHARD, *AL QAEDA: STATEMENTS AND EVOLVING IDEOLOGY*, CRS REPORT FOR CONGRESS, CRS RL 32759 (June 20, 2005).

for having broken the law. The official defends the state, the judges defend the *Rechtsstaat*. This is a simple expression of the importance of the rule of law in a democratic society. In fact, there is a compelling logic to this proposal.<sup>93</sup> The official protects the state because he believes in its values. If he derogates from one of those values, namely, human dignity, then his punishment has a restorative effect on constitutional logic. If he remains unpunished, the nature of the state changes and the state he protected no longer exists in its original form. There is historical evidence of this kind of logic *mutatis mutandis* in the treatment of war heroes: Arthur ‘Bomber’ Harris, the famous British pilot, was seen as having “done what his government thought necessary, but what he had done was ugly, and there seems to have been a conscious decision not to celebrate the exploits of Bomber Command or to honor its leader.”<sup>94</sup> Furthermore, there is nothing inconsistent about punishing our official though he saved Chicago because he isn’t a hero unless he *sacrifices something*. True, he may have sacrificed part of his morality, he may have departed from an important personal moral code. But this is scant consolation for those that view the terrorist as a legitimate freedom fighter and it provides little solace to the terrorist who has had his rights violated in the most awful way.

Second, who says the ideology of the state is *right* or *good* as opposed to that of its attackers? It seems to me that no authority on this earth (at least no authority that derives its superiority from anything other than advanced military power) can have the final say on that question. For that reason, the view that the torturer is some kind of hero in a transcendental sense is overly nationalistic, populist and blinkered. What is best for an individual state is not always what is best for humanity as a whole. At least by referring back to universal human rights principles, courts all over the world can develop a jurisprudence that overreaches national boundaries and such sanctimony. Again, this is a function of the judicial imprimatur to protect the individual against the over-mighty state. Until now, juridical emphasis has been on the internal sovereignty of states but terrorism raises questions of an international nature and it is simply not good enough in an increasingly globalized society for judges to bow unquestioningly to princely fiat.

## 2. THERE ARE NO TRIBUNALS COMPETENT TO PUNISH THE OFFICIALS

Walzer, in his brilliant article, favors the afore-mentioned conception of morality and duty proffered by Camus, but in my view, concedes an unnecessary defeat. He sees:

[N]o way to establish or enforce the punishment. Short of the priest and the confessional, there are no authorities to whom we might entrust the task . . . . There is no one to set the stakes or maintain the values except ourselves, and probably no way to do either except through philosophic reiteration and political activity.”<sup>95</sup>

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<sup>93</sup> Indeed, it informed the House of Lords in the foreign torture evidence case: *A v. Sec’y of State of the Home Dep’t*, [2005] UKHL 71, [2006] 2 A.C. 221.

<sup>94</sup> MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 324 (2d ed. 1992).

<sup>95</sup> Michael Walzer, *Political Action: The Problem of Dirty Hands*, in *TORTURE: A COLLECTION* 61, 73 (Sanford Levinson ed., 2004).

I disagree. We have tribunals for trials and prisons for punishment.

3. STRICT LIABILITY IS TOO HARSH—WHAT ABOUT MENS REA?

Osiel has argued that law must take account of the torturer's mental state:

There are many torturers, and other perpetrators of mass atrocity, who remain unaware of the criminal nature of their actions and who believe them to be legally permissible, even required . . . . This was the case with Adolph Eichmann and is also true of Argentina's 'dirty warriors,' such as navy captain Alfredo Astiz, in their self-descriptions. In fact, where torture by military personnel occurs today, there is reason to believe its perpetrators continue to think their conduct justified or excused, in ways that courts should acknowledge. They generally believe their legal defense to rest on obedience to superiors' orders and on likely judicial acknowledgement of the threat to their country's security posed by violent opponents . . . . If this is true - if many torturers hold such beliefs - the presumption that their wrongdoing is knowing (and therefore culpable) cannot remain conclusive; it must be made rebuttable, so that evidence to the contrary might be admitted . . . . The conclusiveness of the presumption prevents criminal law even from entertaining the possibility that torture, like other atrocities, is often committed by people who are not vicious, insane, malicious, disconnected interpersonally, or coerced by a totalitarian state.<sup>96</sup>

Dorfman has also shed light on the official mindset: "[T]orturers do not generally think of themselves as evil but rather as guardians of the common good, dedicated patriots who get their hands dirty and endure perhaps some sleepless nights in order to deliver the blind ignorant majority from violence and anxiety."<sup>97</sup>

However useful these considerations may be from a psychological and international law perspective, from a *domestic* legal point of view in developed democracies, this kind of question is counter-productive in the fight against torture. Torture must be outlawed and a clear message must be sent to the international community that it will not be tolerated, nor will mercy be extended to those who authorize it or engage in it. Furthermore, part of the role of punishment is deterrence of future criminality. What kind of signal do we give if we allow torturers to slip through the fingers of the law because they say they were acting on a higher authority? No doubt Osama bin Laden believes he is acting on a higher authority. Does that excuse his conduct? No, the determination of substantive liability for torture should not involve any mental element. In my view, in less developed countries, the mental state of the perpetrator and the circumstances surrounding his conduct may go to mitigate the crime,

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<sup>96</sup> Mark Osiel, *The Mental State of Torturers: Argentina's Dirty War*, in TORTURE: A COLLECTION 129, 131 (Sanford Levinson ed., 2004).

<sup>97</sup> Ariel Dorfman, *The Tyranny of Terror: Is Torture Inevitable in Our Century and Beyond*, in TORTURE: A COLLECTION 3, 16 (Sanford Levinson ed., 2004).

but nothing can detract from the fact that torture is (at least legally) wrong in every circumstance. It is a crime against humanity.

4. FIXED SENTENCES ARE TOO INFLEXIBLE—  
WHAT ABOUT VARYING LEVELS OF CULPABILITY?

My position is simple. Torture is a crime and must be punished as such. However, it could be argued that, in the face of such draconian legal measures, no official would risk losing their liberty. I reject this criticism. There are monuments all over London and Washington, D.C., that serve as eternal testimony to those who have made much greater sacrifices for the United Kingdom's freedom and for that of the United States. Let us not erode that freedom to the extent that these countries are no longer worth fighting for. To allow such erosion would be to concede a victory to terrorist actors. Let us stand up as men to the challenges of a new kind of threat instead of acting with cowardice behind the bars of centers of depravity and wrong-doing.

5. THE WHOLE PROPOSAL IS UNREALISTIC AND NAÏVE

I suspect that Dershowitz might denounce my proposal as naïve because, if the torturer managed to extract the information and diffuse the bomb, “no prosecutor would prosecute and no jury would convict.”<sup>98</sup> Indeed, he makes this criticism of Scarry's suggestion that a jury of peers should be left to determine whether the official struck the appropriate balance. However, my suggestion avoids this criticism because it is different to that of Scarry in one important way. As I stated earlier, my jury would only have to decide whether or not the official used torture *in fact*. Before the trial, the judge would inform the jury, in a special direction, that, given the international condemnation of torture and the absolute domestic prohibition on its use, the only question that they had to decide was whether or not the official employed torture. He would also have to explain the expressive, retributive, deterrent, and curative purposes of the punishment in the terms set out above. If they were satisfied of the fact of torture by the individual *on trial*, the liability is strict.

Dershowitz might say that his criticism still holds true because no prosecutor would prosecute an official who had saved Chicago, even if they did use torture. The problem with this criticism is that it refers not to any inherent flaw in the logic of my suggestion but to the failings of the American criminal justice system.

Dershowitz may be correct that there could be reluctance to prosecute the torturer who saved the city. However, in my view that is a symptom of the infancy of this debate and of the current inability of the prohibition on torture to accompany its bark with a bite. To reject a suggestion on these weak grounds is to allow *bad legal systems to make bad law*. Increased diplomatic, parliamentary, and judicial effort on the part of domestic and international actors *can* change the currently unsatisfactory situation. In particular, within all branches of security services, armed forces, and the ranks of domestic police, the moral ethic needs to be engendered that torture is unconditionally banned. If this process is successful, a low-level officer in our imaginary situation will be fully aware of

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<sup>98</sup> Alan Dershowitz, *Tortured Reasoning*, in *TORTURE: A COLLECTION* 257, 274 (Sanford Levinson ed., 2004).

the ethical gravity of the situation and the legal repercussions of coercive interrogation and he will defer to a superior officer to make the call.

### **C. *International Politics and Law***

#### **1. THE INTERNATIONAL PROHIBITION ON TORTURE**

The solution suggested in this piece enjoys the advantage that it is congruent with existing international treaty law on torture. Articles 4(1) and (2) of the United Nations Convention Against Torture, 1984, provide that each state party shall ensure that all acts of torture are offenses under its criminal law and that they shall be punishable by appropriate penalties which take into account their grave nature.<sup>99</sup>

The present proposal enjoys the further advantage that it is compatible with international judicial statements on torture. In *Prosecutor v. Furundzija*,<sup>100</sup> the following excerpts are of particular relevance:

States are obliged not only to prohibit and punish torture, but also to forestall its occurrence . . . . [I]nternational law intends to bar not only actual breaches but also potential breaches of the prohibition against torture (as well as any inhuman and degrading treatment).<sup>101</sup>

Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate . . . . At the interstate level, it serves to internationally de-legitimize any legislative, administrative or judicial act authorizing torture.<sup>102</sup>

Consequently, any act of any state organ authorizing torture *ex ante* or excusing it *de post facto* would run aground on this authoritative explanation of the content of the *jus cogens* rule. The proposal in this paper is free of such encumbrances.

#### **2. PUNISHMENT IN INTERNATIONAL TRIBUNALS**

In this short section, I address the question of whether or not there should be strict liability and fixed sentencing for torture in international tribunals. There is support for the view that the anvil of strict liability may not be appropriate in particular historical contexts:

We allowed the due-obedience defense with torture. While it is true that due obedience is not a viable excuse when referring to abhorrent acts such as torture, we acknowledged that in this particular

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<sup>99</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, 1465 U.N.T.S. 85

<sup>100</sup> *Prosecutor v. Furundzija*, Case No. IT-95-17/I-T (Dec. 10, 1998).

<sup>101</sup> *Id.* at 148.

<sup>102</sup> *Id.* at 155.

historical context, an exception should be made. Such abhorrent acts were being committed within a climate of . . . an intense propaganda campaign that aimed to legitimate the violence.<sup>103</sup>

Similarly, Osiel explains that the situation in Argentina does not call for a broad brush approach to liability:

Article 19 expressly proclaims that God is the supreme legislator and that therefore formal, positive law should be treated as valid only insofar as it remains consistent with natural law . . . The counsel offered by churchmen apparently suggested that officers could expect such “proper” interpretation from the regime’s courts, if evidence of their activities were ever brought to light . . . . A soldier who intends to “obey the law” in such a legal system *necessarily* also intends to obey codified enactments only to the extent that they comport with “higher” moral-religious doctrine. Moreover, he reasonably expects his nation’s courts to interpret “the law” in exactly this same fashion, since natural law plays a prominent part in the doctrinal development and interpretive practice of positive law.<sup>104</sup>

I do not deny (and to do so would be to ignore the results of Milgram’s classic experiment) the collapsibility of moral standards under the pressure of a superior authority. In this respect, it is wrong not to sympathize with those who fought the dirty war in spite of their despicable methods because they were operating under the commands of military superiors and thought that they were doing God’s will, as reinforced by religious counsel. In light of these considerations, Osiel maintains that, “if criminal law - national and international - is ever to grapple satisfactorily with torturers, it must confront these disconcerting facts about their actual motivations and mental states.”<sup>105</sup> This is correct insofar as it applies to unstable states or regimes where democratic ideals have not yet taken root. However, there is no place for such considerations in so-called civilized countries such as the United States. Torture is wrong. Everybody knows that and anyone who uses it must be aware of the fact that they are transgressing a fundamental legal standard. Sentencing should reflect this knowledge in its stringency and inflexibility.

### 3. INTERNATIONAL POLITICS, THE MEDIA AND THE LAW

What of the Torture Convention? In light of Hathaway’s findings (*supra*), one might argue that the Convention is a big well-meaning dog whose pathetic bite involves states submitting reports to the Committee against Torture, or (optionally) allowing states and individuals to file complaints against them with the Committee. Furthermore, the ratification of the Convention becomes meaningless as a matter of practice and seems to

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<sup>103</sup> CARLOS SANTIAGO NINO, *RADICAL EVIL ON TRIAL* 64 (1996).

<sup>104</sup> Mark Osiel, *The Mental State of Torturers: Argentina’s Dirty War*, in *TORTURE: A COLLECTION*, at 129 (Sanford Levinson ed., 2004).

<sup>105</sup> *Id.* at 140

operate only as a hollow statement of political intention, designed to give more legitimacy to a state/regime. Worse still, the list of signatories begins to read like a list of the usual suspects of crimes against humanity.

Hathaway offers us three important lessons for the future: Firstly, enforcement of international law by international actors is an important factor in creating effective norms. Secondly, strong domestic institutions are essential to the domestic and to international rule of law (see, for example, the Law Lords in *Pinochet*<sup>106</sup> and the role of the Italian judiciary in the *Achille Lauro* affair<sup>107</sup>). Thirdly, since reputation plays such a leading role in state motivation to ratify treaties, even if policing cannot be achieved the monitoring of state activity and publicity of transgressions of Convention standards could substantially improve levels of compliance. On a positive note, Hathaway reminds us that, '[a]lthough the Convention has not achieved its lofty goals, it has contributed to the now almost universal view that torture is an unacceptable practice.'<sup>108</sup> It seems that only a concerted effort by all the little piggies will ensure that the big, bad wolf of utilitarian nationalism doesn't blow the rickety torture prohibition down.

The power of the media must be used wisely. Danner, commenting on the Iraq war, tells us, that the insurgents,

[C]annot defeat the Americans militarily but they can defeat them politically. For the insurgents, the path to such victory lies in provoking the American occupiers to do their political work for them; the insurgents ambush American convoys with "improvised explosive devices" placed in city neighbourhoods so the Americans will respond by wounding and killing civilians, or by imprisoning them in places like Abu Ghraib. The insurgents want to place the outnumbered, overworked American troops under constant fear and stress so they will mistreat Iraqis on a broad scale and succeed in making themselves hated.'<sup>109</sup>

There is truth in the contention that, "[t]he printing press is the greatest weapon in the armoury of the modern commander."<sup>110</sup>

The media is the filter through which the world observes the precarious inter-relationship between international politics and law. Ní Aoláin argues that *Ireland v. United Kingdom*<sup>111</sup>

[N]eeds to be read in the context of its time as a highly sensitive political case - a leading Western democracy being accused of systematic torture,

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<sup>106</sup> Regina v. Bow Street Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3), [2000] 1 A.C. 147 (H.L. 1999).

<sup>107</sup> Discussed in ANTONIO CASSESE, TERRORISM, POLITICS AND LAW: THE ACHILLE LAURO AFFAIR (1989).

<sup>108</sup> James C. Hathaway, *The Promise and Limits of the International Law of Torture*, in TORTURE: A COLLECTION 210 (Sanford Levinson ed., 2004).

<sup>109</sup> Mark Danner, *Torture and Truth*, in ABU GHRAIB - THE POLITICS OF TORTURE (Barbara Ehrenreich et al. eds., 2004).

<sup>110</sup> T. E. Lawrence (Lawrence of Arabia), *The Science of Guerrilla Warfare*, in ENCYCLOPAEDIA BRITANNICA 951 (14th ed.).

<sup>111</sup> (1978) 2 EHRR 25.

in the context of a fraught internal conflict in Northern Ireland to which the British government had committed its military forces. In such a context, the decision needs to be read as much in terms of its political weight as the practices being examined.<sup>112</sup>

This makes satisfying reading for any human rights activist. However, on further reflection, if the court is willing to be sensitive to such political considerations, or in other words, take the political *ends* of the illegitimate means into account, could the pendulum not swing back the other way? Worse still, might it gather momentum and swing past *Ireland*?<sup>113</sup> Punishment by prison sentence of one brave official of a Western democracy, an official who knowingly and willingly risks his liberty by torturing a detainee in the highly unlikely event of an actual ticking bomb scenario must be preferable to the internment and torture of thousands of ‘suspects.’ Is it not disgusting that the detention of one German is politically much more powerful than the detention of a thousand Iraqis? If we are bent on cost-benefit analysis, is it not better to detain one man on a substantive charge of torture in spite of him having saved a city, than to detain thousands of men *without* charge who are tortured on the off-chance that they might know and divulge something that might lead to the prevention of the destruction of that city?

Imagine the improvement in East-West relations if mass internment and torture did not take place. Imagine the profound diplomatic message that would be relayed around the world if a U.S. official who broke the law and used banned methods was *really* punished. Imagine if that officer was not just a sacrificial lamb but if that punishment represented a policy of integrity on the part of developed democracy that human dignity is inviolable. The perception of the Western ‘liberators’ as megalomaniac oppressors prepared to stop at nothing to homogenize and conquer Eastern lands would no longer hold water. On the contrary, they would be regarded as men of principle who act accountably even when under attack. This tactic would begin to dry up the sensationalist water in which terrorist fish swim.

When we detain and mistreat members of the Islamic faith, we concede a victory to the terrorists. We send them the message that our intelligence is not so intelligent and that our security is not so secure; that they can attack us at will. More disturbingly, we make heroes of the few real terrorists that we detain and enemies of the families, friends and associates of the innocents that we strip of their liberty, pushing them ever closer to the ‘fanatical’ organizations that use reprehensible methods to campaign for the release of those detainees. The policy of some Western states is driving an explosive wedge between the East and the West.

[T]he downward spiral of terror and counter-terror in Iraq . . . has played a significant role, as U.S. forces respond to suicide bombings and indiscriminate acts of insurgent violence by themselves killing and abusing civilians. This spiral . . . has worked to fan the flames of

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<sup>112</sup> Fionnuala Ní Aoláin, *The European Convention on Human Rights and Its Prohibition on Torture*, in TORTURE: A COLLECTION 216 (Sanford Levinson ed., 2004).

<sup>113</sup> (1978) 2 EHRR 25.

burgeoning anti-Americanism - in other words, precisely what Al Qaeda needs in order to thrive.<sup>114</sup>

The more we incarcerate and torture innocent people from the Eastern world, the more free propaganda we give to terrorist organizations who are fighting for the liberation of the East from Western oppression; the more we expose ourselves to and positively *invite* terrorist attack. When will the reign of the stupid white man end? When will we stop playing into the hands of those we fear so much? The onus is on national legislatures and executives to lead us out of the path of temptation and, in so doing, create an international norm that is actually respected and viewed by states not only as written law, but as law that is positive, compulsory and enforced. The only way to do that is international legislative, judicial and diplomatic cooperation. We must extinguish the flickering flame of torture; making it a crime against all humanity punishable in *any* court of any legitimate state.

#### **D. State Liability for Torture**

The subject of this article has been on the criminal liability of individuals for mistreatment of persons in their custody. However, the question remains whether or not a state can be liable for the acts of one of its citizens. On the one hand, we are discussing the violation of a *jus cogens* norm and if an official tortures to protect the state, then surely his responsibility is indivisible from that of the state. On the other hand, why should a state be held responsible for the errant acts of an official who exceeds his authority and breaks the law of the land by mistreating a detainee?

The position taken in this article is that torture must always be a crime, punishable by the state in which it occurs, under the established criminal law. Hence, it is inconsistent to talk about criminal responsibility of the state. The state's legal responsibility is two-fold: firstly, to punish the breach of the law and secondly, in civil law. In adopting this position, I align myself with the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 2001<sup>115</sup>.

The combined effect of Articles 4 and 5 of that document is that a person exercising state authority engages the responsibility of the state. Article 7 provides that, even if that person exceeds his authority or contravenes instructions, his acts shall be considered an act of the state if he acts in his capacity as an official. However, Article 25 seems to allow a defense if, in a situation of distress, the official has no other reasonable way of saving the lives of persons entrusted to his care. This apparent get-out clause is scuppered by Article 26 which asserts the primacy of peremptory norms of international law, a category which includes the prohibition on torture. According to Articles 36 and 37, the state has a duty to compensate the victim of the breach for any financially assessable damage and to give satisfaction, in the form of an expression of regret or a formal apology, to the extent that the injury cannot be made good by compensation. In the present case, if our official mistreated a detainee in order to extract information

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<sup>114</sup> William E. Scheuerman, *Carl Schmitt and the Road to Abu Ghraib*, 13 *Constellations* (forthcoming 2006).

<sup>115</sup> Draft Articles on the Responsibility of States for Internationally Wrongful Acts, U.N. GAOR, Int'l Law Comm'n, 53d Sess., U.N. Doc. A/CN.4/L.602/Rev.1 (2001)

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necessary to diffuse a ticking bomb, he would trigger the civil responsibility of the state to make reparation to the victim for the mental and physical injuries suffered. This matter is quite separate from the criminal responsibility of the official. It is submitted that the damages to be paid to the victim of executive coercion should come from the public purse, not the perpetrator's pocket.<sup>116</sup>

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<sup>116</sup> Much work has been dedicated to tortious liability for torture. For a good starting point, see TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION (Craig Scott ed., Oxford Portland Oregon: Hart Publishing, 2001).