

# Torture: An unwarranted case

Neil James

## Tortured logic

As Amnesty International Reports continually record, actual use of torture is widespread among the world's less savoury dictatorial regimes. In such cases the only debate about it occurs among the regime's victims and those citizens still uncowed by its use. In such countries torture is often used more as a means of repression than to obtain information.

Until recently Australia could largely ignore calls for rethinking the prohibition against torture as a method of obtaining information in emergencies. After all, such debates were being conducted only among foreigners, especially eccentric American jurists and intellectuals. Until now we were able to preserve a sense of moral distinction.

We can dismiss the judicial torture debate as American eccentricity no longer. Two senior Australian legal academics and a former holder of significant office in our criminal justice system have come out with arguments for the controlled use of torture by warrant. A torrent of public commentary has fallen swiftly upon them.

One interesting aspect has, however, gone virtually unnoticed in the clamour. All the calls for rollback of the absolute prohibition against torture have come from lawyers, and predominantly academic ones at that. Such calls have not come from the ranks of those professions which involve the systematic questioning of often unco-operative individuals in order to gain information for legally prescribed purposes. This latter group essentially comprises two categories:

- officers of police, other law enforcement and security intelligence agencies who are required to question people as authorised by domestic law; and
- professional interrogators within our defence force who could be called upon to practise their profession, primarily under the strictures of international law in circumstances of armed conflict.

Three factors are important in any genuine discussion of torture: what is it, does it ever work and can it ever be justified? Professional interrogators have much to offer such discussion, especially with regard to the far from simple matter of what constitutes torture as opposed to mere hardship, discomfort or annoyance. They also have much to contribute on whether torture works or is necessary. The profound silence from interrogators in support of the idea of torture by warrant clearly indicates where professional opinion lies.

All participants in such discussions can gain some perspective, and draw some interesting lessons, from a brief

examination of the law and practice of torture under warrant when it was last used within our criminal justice system.

## Gunpowder, treason and plot

As any good academic lawyer no doubt knows, in 1215 torture was expressly forbidden by the *Magna Carta*. Torture was not, however, defined. In an age where you had a right at trial to demonstrate your innocence by appeal to supernatural means, trial by ordeal or judicial combat, and when an indicted person who 'stood mute in malice' (refused to answer) could be starved or pressed to death, the express prohibition of the Great Charter was problematic in practice.

There was also the issue of the legal jurisdiction of the King's Council. For centuries this body claimed the authority to supersede other courts, and argued it could in some circumstances employ methods otherwise banned by statute. An evolving parliamentary system sought to limit this jurisdiction by various statutes from 1331 onwards. Under Edward IV, around 1468, torture although regarded as 'foreign to the law' was claimed as a royal prerogative for offences brought before the King's Council. In 1487 Parliament effectively agreed to the Council, operating as the Court of the Star Chamber, investigating and trying those accused of certain heinous offences such as treason.

Excluding physical marking punishments such as branding, or those forming part and parcel of a graduated execution process when sentenced to death – such as being hung, drawn and quartered or burnt at the stake – torture was limited to the questioning of those under indictment. After developments under the Tudors, the mature legal and procedural bases for torture at the time of the Gunpowder Treason in 1605 are worth noting. These theoretically embodied a range of moral, legal and practical controls in keeping with community standards of the time (and with those apparently held among some academic lawyers today).

- First, torture was practically distinguished from physical punishments in that it was commonly accepted as constituting the deliberate and direct application of extreme pain, however gradually, rather than indirect practices such as 'pinching' whereby prisoners under indictment could be incarcerated without food and water until they co-operated with their investigators.
- Second, torture could only be used in exceptional circumstances and for the most serious crimes, such as

treason where speed of investigation was essential to protect the realm.

- Third, the employment of torture could only be authorised by warrant of the King or the Privy Council (in practice it was usually a King-in-Council decision) once a strong prima facie case had been made.
- Fourth, torture could be undertaken only on prisoners detained in the Tower of London, although other physically coercive practices such as ‘pinching’ were more widespread.
- Fifth, the methods of torture authorised at the Tower were prescribed and limited, and chiefly comprised the Manacles and the Rack (described below).
- Sixth, prisoners had to be given ample opportunity to answer questions truthfully first before torture could be used.
- Seventh, the application of torture had to be graduated. In practice this usually meant starting off with the Manacles before progressing to the Rack.
- Eighth, prisoners were not meant to be tortured to death.
- Ninth, crippled, maimed and mutilated people were not meant to be tortured because it was thought they might be so weak that torture risked killing them.
- Finally, a prisoner under investigation was meant to be tortured only once for the same information. The principle here was that to torture someone over and again in pursuit of the same information meant someone telling the truth under torture had no means to end their suffering. This was considered both unjust and inefficient, and likely to lead to those being tortured agreeing with mistaken or false accusations merely to end the torture. Exceptions to this precept were made in serious cases, as with Guy Fawkes and some of his co-conspirators, but this had to be explicitly authorised by the King.

The Manacles was a method whereby the prisoner was stood against a wall, atop wooden blocks, and hung up by their wrists using a form of iron glove which could be tightened. The blocks were then removed until the prisoner was hanging by the wrists and they were left there for several hours at a time. The Rack in the Tower was the only one in England. It comprised a large oak frame resembling a double bed without a base. The prisoner (facing upwards) was tied with cords around the hands and ankles to rollers at each end. These could then be rotated to stretch the arms, legs and finally the torso. Dislocation of limbs was common and permanent damage virtually inevitable. The reputation of the Rack was such that it was often shown to those accused of crimes serious enough to merit its use as the next step in their questioning. This often elicited co-operation by the threat alone.

The reign of James I was effectively the end of the period where torture was commonly authorised. Three main factors led to the decline. First, general constitutional, legal and political developments, and the increased powers of Parliament after the civil war and the revolution of 1688, meant a consequent decline in both the incidence of treason and in the royal prerogative that underwrote the use of torture

in such circumstances. Second, the simple fact that torture tended to elicit incorrect information as much as it resulted in the truth coming out was widely accepted. Third, it is believed that many academic lawyers had been killed in the civil war, were Jacobite exiles in Europe, or had emigrated to the new colonies in America as part of the utopian plan (codename “Justinian”) to create a lawyer’s paradise.

This historical account of law and practice concerning judicial torture illustrates most of the key issues that would need debating today were the debate really serious. The first point to consider is that even in the early 17th Century the moral justification for torture warrants was very shaky and not popularly accepted. A second point is that the procedures for using torture by warrant would need to be quite complex. The third, and most important, is that even if all the other problems could somehow be surmounted, judicially approved torture is simply an impractical, unreliable and unnecessary means of discerning the truth.

## Law and reason

In domestic law numerous legal precedents over many years have established what can and cannot be done during the incarceration and questioning of those arrested. Often referred to as the ‘Judges Rules’ they can be summarised as the criteria that govern questioning, and which exclude the use or threat of force, or dishonest trickery, to coerce confessions or other admissions from those being questioned.

In terms of international law, Australia is a signatory to the four Geneva conventions of 1949 and their two Additional Protocols of 1977 which cover, among other things, the treatment of people during armed conflict. In August 1989 we ratified the 1984 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, whose definition of torture is: *the infliction on an individual of severe physical or mental pain, either for punishment or to extract information.*

## Problems of polemic and definition

The above prohibitions and definitions seem clear enough but, as with debate about the definition of genocide, there is always someone (often an academic lawyer) trying to stretch the definition beyond its genuine and useful limits.

An unfortunate irony in the debate is that the moral and practical arguments against torture are frequently frustrated by too wide a definition being applied by some of those seeking to stamp it out. This does little to help eliminate real torture as it causes confusion and dissipates effort. It also demeans the victims of genuine torture by needlessly belittling the horrific experiences they have endured.

A further irony of the torture debate in this regard is that while some academic lawyers are advocating a return to torture by warrant, some ‘human rights lawyers’ are helping them, however unintentionally. The latter achieve this by wrongly branding legitimate and morally justifiable

interrogation methods and techniques as somehow falling within the legal definitions of torture.

The common working definition of interrogation is the systematic extraction of information from an individual, either willing or unwilling, by the use of psychological attack only. It is essentially an intellectual process not a physical one. The subject is convinced to co-operate.

In a situation of armed conflict, under the Geneva Conventions and Protocols, a variety of safeguards necessarily apply to the interrogation process. In domestic law a similar situation applies. In the UK in the early 1970s, for example, a series of higher court decisions concerning security force operations against terrorists in Northern Ireland, reinforced an important legal principle. This is that a reasonable degree of temporary hardship involving no application of force is not torture or illegal coercion.

It is normal and reasonable for those being questioned in such circumstances to experience degrees of discomfort and annoyance, and that detention and questioning methods that result in discomfort or annoyance are not necessarily abusive of a prisoner's human rights. Furthermore, measures or conditions of discomfort or annoyance designed to encourage co-operation during questioning, such as the strictly controlled and temporary use of isolation, or sensory or sleep deprivation, are not unreasonable in the circumstances. Such factors, if not prolonged or carried to extremes do not constitute severe pain or suffering, or have long-term effects, and in many cases occur naturally or are not intentionally inflicted anyway.

## The problem of the enemy

The debate on torture by warrant is also complicated by the moral and political positions of the enemy. Much heat but little light is generated during many public debates on the detention and interrogation aspects of the campaign against trans-national Islamist terrorism. One key problem involved (excluding the subjectivity of many participants on both sides) is that international law tends to lag well behind the circumstances of international conflict. In the so-called 'war on terrorism', virtually everyone knowledgeable on the relevant issues agrees that the terrorists are not covered by the Geneva Conventions for a variety of reasons, and that captured terrorists are not prisoners of war.

They are, of course, normally detained in a manner conforming to the Geneva Conventions as much as possible, but this is a moral choice made by the particular captors not a legal requirement. They are covered by the Convention Against Torture. In international law armed conflict is also a material fact and does not require 'declarations' of its presence or conditions. Members of trans-national terrorist organisations are therefore combatants, whether they are also criminals or not. The crux of the issue is that we know what types of prisoner they are not, but cannot agree on what they are. This complicates many matters, not least how they can be questioned, whether they should or even can be 'tried', and if so, how and by whom.

The other key problem in the struggle with Islamist terrorism is the perennial paradox the democracies have

faced over the last century. Once again we are fighting an enemy who does not, and will not, abide by international law. As in our previous wars these enemies fully understand their immoral advantage in this regard and are quite willing to exploit it.

In case of capture, for example, terrorists know their questioning will not involve torture and that we will bend over backwards to act honourably. They also know that if they make false claims that they have been tortured or abused then a whole raft of oversight processes will swing into effect, however imperfectly at times. We know from Al Qa'eda training manuals captured in Afghanistan that extensive use of false claims of torture is highly recommended. As icing on the terrorist cake, the terrorists now know there are plenty of gullible people in Western societies only too willing to criticise subjectively the way their own governments detain and interrogate captured terrorists or terrorist suspects.

## Going forwards not backwards

Any professional interrogator, after noting that torture is both illegal and immoral, and that this is just a 'given', will go on to stress that it is also unnecessary. It is unnecessary for the three principal reasons that it is generally counter-productive, that given the right conditions the same information can almost invariably be gained by legal and morally acceptable means, and that the theoretical scenarios cited as justifying the use of torture are generally so unrealistic and unlikely as to not warrant serious consideration. After a moment's thought, professional interrogators are also likely to add further objections, such as where would you find people willing to become torturers, how would you train them, and how could you control or eventually halt an institutionalised process of judicially approved torture.

Any member of the profession of arms, after noting the same legal, moral and practical objections to torture is likely to add one further strong objection. The international law intended to ameliorate the suffering of those captured in combat is too often ignored by the types of regimes and groups we have had to fight. In the last 65 years the examples of the Japanese in World War II, the Chinese and North Koreans in the Korean War, the North Vietnamese in the Vietnam War, and now various types of Islamist terrorist in Afghanistan, Iraq and elsewhere, present a clear trend — pluralist liberal democracies often have to fight quite unsavoury, immoral and ruthless enemies who ignore international law. We should give no enemy, actual or potential, any excuse to mistreat Australian prisoners of war on the ostensible grounds that our adherence to international humanitarian law in general, and the laws of war in particular, are somehow questionable.

The arguments against torture by warrant are not just legal and moral. They are also practical in that professional interrogators know that torture is both unlikely to work and unnecessary as a purported form of intelligence gathering. ♦

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