

LAW AND LIBERTY IN THE WAR ON TERROR

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FOREWORD

The Hon Sir Gerard Brennan AC KBE

THE FEDERATION PRESS
2007

Published in Sydney by:

The Federation Press
PO Box 45, Annandale, NSW, 2038
71 John St, Leichhardt, NSW, 2040
Ph (02) 9552 2200 Fax (02) 9552 1681
E-mail: info@federationpress.com.au
Website: www.federationpress.com.au

National Library of Australia
Cataloguing-in-Publication entry

Law and Liberty in the war on terror
Editors: Andrew Lynch; George Williams; Edwina MacDonald.

Includes index.
Bibliography
ISBN 978 186287 674 3 (pbk)

Judicial power – Australia. Criminal Law – Australia. War on Terrorism, 2001-
Terrorism – Prevention. Terrorism. International offences.

347.012

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Text printed on
100% recycled paper

Typeset by The Federation Press, Leichhardt, NSW.
Printed by Ligare Pty Ltd, Riverwood, NSW.

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Torture: What is it, Will it Work and Can it be Justified?

Neil James

The terms interrogation and torture are often wrongly confused or conflated in public discourse, due in part to commonplace fears about learning enough detail to tell them apart. A failure to adequately distinguish between the two has detrimental consequences for the legitimacy, authorisation and control of effective interrogation and indeed for the outlawing of torture. Most importantly, this failure needlessly hampers practical attempts to enforce the universal prohibition of torture embodied in the United Nations *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Almost as importantly it complicates effective discussion as to whether the universal prohibition could or should ever be relaxed in certain circumstances.

Many of the moral, legal and practical issues involved when discussing torture and its perceived role in questioning, if any, are not new and debating them is assisted by some general observations from history. But first, we need to examine the background to contemporary calls for relaxing the universal prohibition in dire emergencies such as large-scale terrorist attacks, not least because they seem to be largely based on three unspoken, and highly questionable, assumptions.

The first assumption is that torture is technically possible in the circumstances described, is necessarily effective in obtaining the specific information desired within the time constraints supposedly justifying its special use, and incurs no countervailing factors. The second assumption is that interrogation not involving torture is less effective, or is so less effective that torture should be used instead during dire emergencies. The final assumption is that the dire emergency scenarios used in arguments to relax the universal prohibition on torture are realistic, or likely, enough to justify such a step.

Questioning the assumptions

The last assumption is worth examining first as the other two depend on it completely and objections on both moral and practical grounds readily spring to mind. A commonly cited example to justify torture is the so-called ‘ticking bomb’ scenario where a captured terrorist, almost invariably described as a fanatic, supposedly knows where the bomb in question is located. There is said to be no time for other methods to extract the information and the consequences are inevitably pronounced in terms of casualties. A moment’s reflection on the variables and methodologies involved raises obvious doubts about such scenarios, including:

- How can we know or confirm there is actually a bomb, and with such a short timescale, or that the captured terrorist knows where the bomb is?
- How can we know or confirm that only this particular terrorist can provide all the information needed? Can the bomb be disarmed or the area evacuated in time anyway?
- How can we assess, and do so with the urgency supposedly required, whether this particular terrorist will succumb to torture?
- How can we know or confirm that his or her apparent confession under torture will be accurate enough to use, and not just a stratagem to delay proceedings until the bomb detonates or searchers are led into a trap?
- How can we know or confirm the number of potential casualties with enough certainty to justify torture in order to help prevent them?

The overall problem with such ticking bomb scenarios is that they are generally simplistic even for the thin plots of lawyer-led television programs posing idealistic hypothetical dilemmas. They usually preclude, for example, the alternative or even contemporaneous use of other forms of intelligence gathering or criminal investigation. They also tend to pose a sequential chain proposition of events (such as only one terrorist knowing all the information needed and then being captured) where the breaking of any one link renders the whole scenario highly unlikely at best and usually quite unrealistic.

When the first assumption is also examined the above questions from the third one become even starker. How could we be certain, for example, that torture would work and work in time, or that it might not result in the person being tortured saying anything to avoid further severe pain? Or, to the contrary, how could we determine that they were not just deliberately lying in reaction to the torture and the hatred and contempt it would naturally engender? Moreover, just in terms of the time constraints there are obvious problems. Is a ‘suitably qualified’ torturer available, and with the right tools

and conditions? If not, might an ‘amateur’ torturer only make things worse by either killing the prisoner, rendering them unconscious and unable to answer questions or, conversely, by inadvertently strengthening their will to resist?

This is where the weaknesses of the second assumption also come into play. How can we be certain that legitimate interrogation might not be just as effective or even more effective in the circumstances? Understanding what interrogation is and how it differs from torture is therefore vital in both philosophy and practice.

Questioning the universal prohibition on torture

Recent calls for relaxing the universal prohibition on torture essentially fall into two schools of thought. Both deplore the use of torture but are prepared to sanction its use in specific dire emergency situations such as where mass-casualty terrorism results in a ticking bomb scenario.

The first school, led by an American lawyer and academic, Alan Dershowitz,¹ basically argues that while torture is always abhorrent, the pressures of a ticking bomb scenario, especially in a situation of mass-casualty terrorism, would mean torture would probably be used anyway on the ground. It is therefore less destructive to the rule of law to regulate its non-lethal use rather than pretend it will not occur in any circumstances. A variation of this school is the belief that torture should remain illegal but that the relevant Head of State could subsequently pardon the torturers if they prevent a dire mass-casualty catastrophe.

The second school of thought is not necessarily in complete or partial contradiction to the first, but tends to argue for the moral legitimacy and practicality of torture on first principles. As advanced, for example, by Australian academics Mirko Bagaric and Julie Clarke in their book *Torture: When the Unthinkable Is Morally Permissible*,² five factors are cited as justifying investigative torture under what they term ‘controlled conditions’:

- the number of lives at risk;
- the immediacy of the harm threatened;
- the possibility of acquiring the life-saving information sought by alternative means;
- the level of wrongdoing of the person to be tortured; and
- the likelihood that the person to be tortured does possess the information needed.

The arguments of both schools are obviously controversial.³ One interesting aspect has, however, gone virtually unnoticed in the clamour. In Australia, and largely across the globe, 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 uncooperative 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 a defence force who could be called upon to practise their profession, primarily under the strictures of international law in circumstances of armed conflict.

The reasons for this apparent stark juxtaposition of professional as well as moral opinion are worth exploring.

Now a confirmed cynic might argue that the reason why police or military interrogators might not be arguing for the use of torture by warrant is because they do not know it is banned. Those with less of a cynical disposition, but perhaps still with somewhat of a suspicious mind, might even believe that interrogators and police know torture is illegal but reckon they can get away with it, at least from time to time. Those honestly interested in the truth instead should listen to what professional interrogators are saying.

Three factors are important in any informed discussion of torture: what is it, will it 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 genuine torture as opposed to questioning that exploits mere hardship, discomfort or annoyance. They also have much to contribute to debates on whether torture works or can ever be necessary. The profound silence from interrogators in support of the idea of torture by warrant clearly indicates where professional opinion lies.

Torture by warrant in the 17th century

Some perspective and practical lessons can also be gained from a brief examination of the law and practice of torture by warrant when it was last used within our criminal justice system.⁴ This provides useful insights into the potential nature of the ‘controlled conditions’ specified by advocates of a modern version of torture by warrant.

In 1215 torture was expressly forbidden in the *Magna Carta* but not defined. In an age where you had a right at trial to demonstrate your innocence by appeal to supernatural means, where there was 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 (a body with constitutional roots before the Norman Conquest). For centuries this body constituted a court, 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, by then operating as the Court of the Star Chamber, investigating and trying those accused of certain heinous offences such as treason.

Excluding physical 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 embodied a range of moral, legal and practical controls in keeping with community standards of the time:

- 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 cooperated with their investigators.
- 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.
- 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.
- Torture could be undertaken only on prisoners detained in the Tower of London, although other physically coercive practices such as 'pinching' were more widespread.
- The methods of torture authorised at the Tower were prescribed and limited, and chiefly comprised the Manacles and the Rack.⁵
- Prisoners had to be given ample opportunity to answer questions truthfully first before torture could be used.

- The application of torture had to be graduated. In practice this usually meant starting off with the Manacles before progressing to the Rack.
- Prisoners were not meant to be tortured to death.
- 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.
- 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 over 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 reign of James I was effectively the end of the period where torture was commonly authorised. Two principal 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.

This summary of law and practice concerning judicial torture, the last time English-speaking peoples used it extensively, illustrates most of the key issues that would need debating today were the debate on resurrecting torture by warrant 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 reintroducing torture by warrant would need to be quite complex. The third, and most important, however, is that even if all the other problems could somehow be surmounted, 'investigative torture' is simply an impractical, unreliable and unnecessary means of discerning the truth.

Problems of polemic and definition

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 of force,

threats 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 Australia also ratified the Convention Against Torture, which defines torture in art 1 as:

any act by which severe pain and suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The prohibitions and definitions seem clear enough but, as with debate about the definition of genocide, there is always someone (often an academic or activist lawyer) trying to stretch the definition beyond its genuine and useful limits. This results in an unfortunate irony in the debate against torture. The moral and practical arguments against it are frequently frustrated by too wide a definition of torture 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 unintentionally helping them. 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 essential element in the convention definition of severity, and the specific exclusion of inherent or incidental pain or suffering, are too often forgotten or discounted.

Among professional interrogators in countries abiding by the rule of law 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'.⁶

Thus, interrogation is essentially an intellectual process not a physical one. No physical or mental pain or severe suffering is involved. The subject is convinced to cooperate by reasoning and by overcoming their will to resist. Many variables are involved but the time available, the professional skill of the

interrogator and the condition, intelligence, education and willingness to cooperate or otherwise of the subject are important.

One or both of two legal regimes govern interrogation depending on whether it occurs during an international armed conflict or is a criminal or protective security matter covered by domestic law. An additional consideration, especially in terms of counter-terrorism, is the object of the information sought. Does the questioning concern a crime already committed, with the purpose of gaining evidence to be tested in a court of law, or is it for the purposes of general intelligence gathering to deter or prevent future terrorist activities? In practical terms, interrogations to gather intelligence are generally less onerous procedurally and quicker than ones undertaken to collect evidence.

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

This principle is important because it confirms that it is normal and reasonable for those being questioned in such circumstances to experience degrees of discomfort, annoyance or other hardship, and that detention and questioning methods that result in such hardships are not necessarily abusive of a prisoner's human rights. Furthermore, measures or conditions of discomfort or annoyance designed to encourage cooperation during questioning are not unreasonable in the circumstances and in many cases are inherent in the circumstances of capture, arrest or detention anyway.

With obvious safeguards such conditioning may, for example, legally include the strictly controlled and temporary use of measures such as isolation, sensory deprivation or sleep deprivation. Such factors, if not prolonged or otherwise carried to extremes, do not constitute severe pain or suffering, or have long-term effects.

The problem of the enemy

The debate on torture by warrant in cases of terrorism is also complicated by the moral and political positions of the terrorist enemy. Much heat but little light is generated during many public debates on the detention and interrogation aspects of the campaign against transnational Islamist terrorism. One key problem involved is that international law tends to lag well behind the circumstances of international conflict. In the conflict with internationally pro-

scribed terrorist groups, for example, the terrorists are covered by art 3 of all four Geneva Conventions (and perhaps art 75 of Additional Protocol 1). But they do not qualify for full prisoner-of-war status under the Third Geneva Convention because they do not abide by wider international humanitarian law in their prosecution of conflict. They are, of course, fully covered by the Convention Against Torture.

The other key problem in the struggle with Islamist terrorism, in particular, is the perennial paradox the liberal democracies have faced over the past century. Once again we are fighting an enemy who does not, and will not, abide by international law. As in our previous conflicts, 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 or maltreatment and that liberal democracies will bend over backwards to act honourably. The isolated and infrequent instances where some maltreatment has illegally occurred do not alter this overall situation. Captured terrorists 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 first. We know from Al-Qa'ida training manuals captured in Afghanistan in 2001 and 2002 that extensive use of false claims of torture is highly recommended. The terrorists also know there are now plenty of gullible people in Western societies only too willing to believe the worst and criticise the way their own governments detain and interrogate captured terrorists or terrorist suspects.

The perspective of the professional interrogator

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 of investigation and interrogation, 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. These might include, for example, the problem of where would you find people educated and capable enough to be interrogators but who would be somehow also willing to become torturers. And in any case, how would you train them and how would occupational health and safety standards be set and monitored? Another key moral and practical matter, even ignoring the overall slippery-slope risk, is how could you really control or

eventually halt an institutionalised process of judicially sanctioned torture, or even be able to recognise when you should do so?

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 or otherwise affected by it is too often ignored by the types of regimes and groups Australia has had to fight. In the past 70 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.

Notes

- 1 Alan M Dershowitz, 'Want to torture? Get a warrant', *San Francisco Chronicle*, 22 January 2002, A19.
- 2 Mirko Bagaric and Julie Clarke, *Torture: When the Unthinkable Is Morally Permissible* (2007).
- 3 For further discussion of these arguments see Chapter 14 in this book.
- 4 Frederic William Maitland, *The Constitutional History of England* (1926).
- 5 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 then 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 cooperation by the threat alone.
- 6 Australian Defence Force, *Interrogator's Handbook*. Most NATO countries employ the same or similar definitions. A related definition is the difference between an interview and an interrogation. In the latter the person being questioned is under some form of legal and physical constraint (such as arrest or capture in war) and is not free to end the questioning by simply leaving.