

TORTURE – CLOSING THE PANDORA’S BOX

The Refutation of the applicability of the Utilitarian Argument Regarding Torture
In light of the “Ticking Bomb” scenario

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Abstract

The recent emergence of the facts of torture has sparked the international debate on the permissibility of the torture as a tool in intelligence gathering. The proponents of such views rely on the utilitarian justification under the “Ticking Bomb” scenario.

In this thesis I consciously avoid criticizing the Utilitarian Justification as a standalone theory, but instead I focus on providing reasons why the Utilitarian theory is not applicable to the practice of using the torture during the interrogations at all.

The thesis takes extensive use of the literature concerning the theoretical background of the arguments forming the numerous views on torture presented in this work, thus establishing the theoretical framework of the different justifications of using torture as the interrogational practice.

For the better understanding of the utilitarian theory in the first chapter of this thesis a wide variety of sources are analyzed, focusing on the most frequently used example of the “Ticking Bomb” scenario.

The thesis continues by focusing on “Ticking Bomb” scenario as the quintessential tool in the arsenal of the proponents of using torture for intelligence gathering, stating the three fundamental reasons why the “Ticking Bomb” scenario is not applicable to the practice of torture as an interrogational tool.

For this the issue of the probability of the “Ticking Bomb” scenario and its utility as policy forming tool is extensively analyzed.

The next issue that is addressed in this thesis concerns the reliability of torture as the interrogational practice. For this the thesis makes use of the numerous declassified documents and witness reports to form a comprehensive view on the efficiency of torture.

Finally the thesis analyzes recent spike in occurrence of torture in U.S. interrogation facilities in Guantanamo and Abu Graib and by providing the reports and the witness accounts it addresses the difference between the regulations enacted the administration and their application into the practice. By such analyses the third concluding feature of torture, the self aggrandizing nature of violence is uncovered.

By addressing all of these issues I reach the conclusion that “Ticking Bomb” argument together with its theoretical underlying are not applicable to the practice of torture as an interrogational tool.

1. Introduction

1.1 Brief History of Torture

Michel de Montaigne wrote “*nature herself, I fear, attaches to man some instinct for inhumanity*”¹. Unfortunately that is true to some point. According to Nietzsche and Foucault, during the history of humanity there has been no real prohibition on torture in juridical context,² it has been applied by the victors to the defeated for the purposes to humiliate the loser and to demonstrate one's power. From the mid XIV Century to the end of the XIX Century torture was regularly practiced by armies and judicial systems and was accepted even by the churches³.

True as Nietzsche and Foucault have been, nowadays torture has been outlawed completely. The punishment by torture has ultimately been replaced by the imprisonment with the principle of “out of sight and out of mind.”⁴

Only recently the mankind has adopted a mostly united approach of prohibiting torture in all of its forms, in fact today the prohibition on torture is one of the most heavily

¹ Michel De Montaigne, *The Complete Essays of Montaigne* p.306, 316; (Stanford, California: Stanford University Press; 1st edition Donald M. Frame trans. June 1, 1958) ISBN-10: 0804704864 ISBN-13: 978-0804704861

² F. Nietzsche, *On the Genealogy of Morals*, *Basic Writings of Nietzsche* p. 439, 501–03 (Walter Kaufmann ed. & trans., 1968) (1887); M. Foucault, “Discipline and Punish: The Birth of the Prison” p.8 (Alan Sheridan trans., Vintage Books 1979) (1975) Most Recent publication in *Journal of Management & Governance*; Aug 2009, Vol. 13 Issue 3, p269-280, ISSN: 1385-3457 DOI: 10.1007/s10997-008-90807

³ R. Maran, *Torture: The role of ideology in the French-Algerian war*, (Praeger New York 1989) ISBN 0275932486

⁴ M. Foucault, *Discipline and Punish: The Birth of the Prison* p.8 (Alan Sheridan trans., Vintage Books 1979) (1975), p. 82–89. Most Recent publication in *Journal of Management & Governance*; Aug 2009, Vol. 13 Issue 3, p269-280, ISSN: 1385-3457 DOI: 10.1007/s10997-008-90807

enforced in the international law. Never the less it is reluctant to go away. Time and time again during the armed conflicts the torture manifests itself from the new perspective. The today's emergence of torture resulted from the so called "War on Terror."

2. Definition of Torture

Today there is no shortage of international legislation prohibiting torture.⁵ U.N. Convention against torture states - “No exception circumstances whatsoever whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture.” The torture has been also prohibited by each and every of the four Geneva conventions after the WWII. The Common Article 3 of the Geneva Conventions mandates that the prisoners are to be treated humanely, prohibiting “cruel treatment and torture... outrages upon personal dignity, in particular, humiliating and degrading treatment⁶.” Moreover, additional guarantees have been provided by the Third Geneva Convention to the persons considered prisoners of war⁷.

In light of such a robust legislation one would think that torture has been dealt with and as an occurrence it is done for. But the reality has been quite different. In the real world the torture has all but gone away, instead it took refuge in the twilight of intelligence gathering, the grey area of activities of the intelligence agencies, where Human Rights

⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms, (ETS 5), 213 U.N.T.S. 222, entered into force Sept. 3, 1953, Article 3; International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc.A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, Article 7; American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992), Article 5; African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986, Article 5

⁶ Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31, Art. 3; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85, Art. 3; Convention Relativ to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (“Third Geneva Convention”), Art. 3; Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, art. 3

⁷ Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (“Third Geneva Convention”), Arts. 4(A)(1), (3), (4) and (6)“

considerations meet with the interests of national security. The temptation to use a shortcut and “extract” the useful information has all but gone away.

The use of torture on the massive scale has always been attributed to the authoritarian states which used it for the reasons of terror and evidence gathering but the new emergence of torture is different since it is attributed primarily to the liberal states, which is in itself surprising, because in essence the torture is and should be fundamentally incompatible with liberal ideology.

Torture represents tyranny, a tyranny in microcosm, at its highest level of intensity⁸ and nothing stands further from the values of liberalism than torture.

Perhaps the answer to such reasoning is in that to some libertarians, the application of torture for the purposes of intelligence gathering does not appear as a carrier of state tyranny, but instead it is merely a “necessity,” motivated solely by the looming catastrophe. Under this justification comes the issue of the protection of vital state interests and national security, in fact for ones who view the issue of torture under this paradigm the using torture in intelligence gathering represents nothing more than a measure of self-defense⁹.

⁸ D. Luban “*Liberalism Torture and the Ticking Bomb*” p.1438 Virginia Law Review Vol. 91:1425 Available at <http://www.virginialawreview.org/content/pdfs/91/1425.pdf> Accessed 11/10/2009

⁹ Ibid, p. 1439

3. The Debate on Torture

3.1 The Theoretical Background

3.1.1 Consequentialist Reasoning

In this chapter I review the various justifications and refutations of torture for the reason to reach the conclusive view of underlying theoretical struggle that occurs whenever the issue of torture arises. This chapter lays a theoretical background for consideration of torture and “Ticking Bomb” scenario.

Under the reasons of justification of torture there is everlasting fundamental clash of ideas, of fundamental theories of thought and morality in which the Consequentialism and countering it, the Deontological reasoning take the main part.

The basic idea of Consequentialism as a theory is the dependence of the ethical status of the proposed action upon the actual consequences of the action disregarding other justifications,¹⁰ such reasoning is particularly strong in the Utilitarian Consequentialism which in itself is a cluster of moral theories based on principle of maximizing welfare.¹¹

Consequentialists view the morality aspect of the action through the practical consequences it might have. In light of the issue of torture, the good, particularly the saving of the lives of the innocent people is weighted against the negative drawbacks of the application of torture such as doing harm to the alleged terrorist.

¹⁰ D. Sosa “*Consequences of Consequentialism*” *Mind*, New Series, p.101 Vol. 102, No. 405 (Jan., 1993), pp. 101-122 Oxford University Press on behalf of the Mind Association <http://www.jstor.org/stable/2254174> Accessed on 11/10/2009

¹¹ R. Gillon “*Utilitarianism*” p. 1411 *British Medical Journal (Clinical Research Edition)*, Vol. 290, No. 6479 (May 11, 1985), pp. 1411-1413 BMJ Publishing Group Available at <http://www.jstor.org/stable/29519166> Accessed on 11/10/2009

The first work on Consequentialist reasoning and torture can be attributed to Cesare Beccaria in his work “On crimes and punishments,¹²” in which the author advances the argument that application of torture as a consequence favors strong victim over the weak.¹³

The recent proponents of the idea of utilitarianism include Michael Waltzer,¹⁴ and Michael Ignatieff, with the work, *The Lesser Evil: Political Ethics in an Age of Terror* and Sanford Levinson, ed., *Torture: A Collection*.

Michael Waltzer who is in essence a categorical moralist, mostly counters the determinations of the Consequentialism, since the theory in itself does not include the judgments that are based on the absolutist moral principles and values, but notes that in the case of exceptional circumstances such as “supreme emergency” in which the deepest values and the collective survival of the state is under imminent danger, one has to abandon the traditional moral reasoning and resort to Consequentialism¹⁵. Michael Waltzer is not alone in his position, similar views have been expressed also by Henry Shue.¹⁶

Michael Ignatieff takes more dissociated approach and argues that despite the reasoning of the proponents of “moral judgement” when the society is faced with the moral dilemma of torture under “supreme emergency,” the action is predetermined to be of utilitarian nature: “we have to face terrorists who control weapons of mass destruction ...

¹² C. Beccaria, *On crimes and punishments*. (Henry Paolucci, trans. New York: Bobbs- Merrill [1777] 1963.)

¹³ L. Wantchekon, A. Healy “*The "Game" of Torture*” p. 598 *The Journal of Conflict Resolution*, Vol. 43, No. 5 (Oct., 1999), pp. 596-609 Sage Publications, Inc. Available at <http://www.jstor.org/stable/174655> Accessed on 11/10/2009

¹⁴ Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977); Michael Walzer, *Arguing About War* (New Haven, CT: Yale University Press, 2004)

¹⁵ Michael Walzer, *Arguing About War* p.33 (New Haven, CT: Yale University Press, 2004)

¹⁶ H. Shue, *Torture*, p.17. S. Levinson (ed.), *Torture: A Collection* (Oxford: Oxford University Press 2004)

most bets—and gloves—would be off.¹⁷ Although he does not cite himself to this reasoning and reiterates this position as the probable course of action for the general public in his more recent publications¹⁸.

Some writers go a bit further like Jean Bethke Elshtain¹⁹, Richard A. Posner²⁰ and John T. Parry²¹ arguing the permissibility of torture in the situations that fall short of the “supreme emergency” argument of Michael Waltzer.

But nobody goes as far as the A. Dershowitz,²² who argues that torture is *necessary* for the proper functioning of the law enforcement agencies in cases of the ticking bomb scenario and should be regulated by the judiciary system issuing the torture warrants²³.

3.1.2. Deontological Reasoning

¹⁷ M. Ignatieff, “*The Lesser Evil: Political Ethics in an Age of Terror*” p.10. Princeton, N.J.: Princeton University Press, ISBN-10: 0691117519 ISBN-13: 978-0691117515 (April 12, 2004)

¹⁸ Michael Ignatieff, “Moral Prohibition At a Price” in Roth, Worden, and Bernstein, eds., *Torture: Does It Ever Make Us Safer?*

¹⁹ Jean Elshtain *Just War Against Terror: The Burden Of American Power In A Violent World* Basic Books (August 3, 2004) ISBN-10: 0465019110 ISBN-13: 978-0465019113

²⁰ R.A. Posner, *Escalation and Necessity: Defining Torture at Home and Abroad* quoted in S. Levinson (ed.), *Torture: A Collection* (Oxford University Press, USA August 10, 2006) ISBN-10: 0195306465 ISBN-13: 978-0195306460

²¹ J.T. Parry, *Escalation and Necessity: Defining Torture at Home and Abroad* quoted in S. Levinson (ed.), *Torture: A Collection* (Oxford University Press, USA August 10, 2006) ISBN-10: 0195306465 ISBN-13: 978-0195306460

²² A.M. Dershowitz, “*Tortured reasoning*” p. 131. S. Levinson (ed.), *Torture: A Collection* (Oxford: Oxford University Press 2004);

²³ A.M. Dershowitz, “*Tortured reasoning*” p. 131. S. Levinson (ed.), *Torture: A Collection* (Oxford: Oxford University Press 2004); Also A.M. Dershowitz, “*Why Terrorism Works: Understanding the Threats, Responding to the Challenge*” (Haven, CT: Yale University Press, 2002)

Countering the utilitarian view is the deontological, non-consequential moral theory, which at its absolute states that some actions are wrong regardless of the consequences of them - "*Fiat justitia, pereat mundus*" "Let there be justice, though the world may perish". The objection lies in that in certain cases the theory dictates the actions that may be contrary to moral judgment, the proponents of which state that once principles have price all that is left is bargaining²⁴.

Deontology and in particular Kantian Deontology is an approach which seeks to create universal rules for the morality of human action. Kantian Deontology singles out two basic tenants of the deontology by which the essence of this theory is best portrayed. The first tenant of the deontology is to "Act as though the maxim of your action were by your will to become a universal law of nature" and the second is to "Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only²⁵."

In regards to torture the first tenant states that the torture cannot be justified as one would not want to make this principle universal and be used on ourselves. Under the second reason torture is wrong because it addresses the persons as a sole means for getting information. Thus, Deontological argument is not acceptable to the notion of torture and provides strong ground for moral argument.

²⁴ C. Kutz, "*Torture, Necessity and Existential Politics*" p. 255 California Law Review, Vol. 95 Issue 1, pp. 235-276 ISSN: 00081221 (Feb,2007)

²⁵ Gordon E. Michalson Jr Jr *Fallen Freedom: Kant on Radical Evil and Moral Regeneration* p. 32 Cambridge University Press (November 30, 1990) ISBN-10: 0521383978 ISBN-13: 978-0521383974

Naturally the debate on torture has a significant moral dimension. Under the debate whether to use or discard torture, there is also a fundamental clash of Moral theories. The aforementioned Deontological argument is countered by the considerations of Moral pluralism, the anti-monistic theory stating that any theory taken in isolation is a flawed one, and that no theory as good as it could ever be can't accommodate all the possible cases that can occur in the real world scenario and the only way to achieve a system comprehensible to every case is to add all of their features together. Thus we should adapt dualistic code and in cases of extreme urgency allow Torture.

It is this dichotomy – one between Absolutism and Consequentialism, human rights and national security, Deontology and Moral Pluralism, necessity and permissibility of torture that defines the modern dilemma facing the liberal democracies in fight against terrorism.

The most famous for the justification of torture and the use of the “Ticking Bomb” is the Utilitarian argument.

3.2 Utilitarian Theory

The most popular Consequentialist theory is Utilitarianism, which strives for long-term maximization of human happiness, the overall good, sometimes not excluding and even dictating the actions that may be harsh, cold-hearted and sometimes immoral. In essence of utilitarianism lays the cold minded calculation of possible outcomes, according to each individual situation. Regarding this Bernard Williams has noted, a hardcore utilitarian “will

have something to say even on the difference between massacring seven million, and massacring seven million and one.²⁶”

Utilitarian theories are further to be distinguished by the amplitude in difference of application of calculability and acceptable consequences.

The basis for Utilitarian Theory is simple and it lays within the slogan “The greatest happiness of the greatest number²⁷” which encapsulates all utilitarian theories which have been developed by English Utilitarian Philosophers Jeremy Bentham, Henry Sidgwick and John Stuart Mill in the 18th and 19th centuries.²⁸

The Utilitarian theory paves way for the “necessity” justification, by which it is justifiable in an emergency to break the law, if doing so will make possible to avoid a greater harm than in case of obeying it²⁹. It is precisely this view that is expressed in Bybee memo³⁰, which stated that under the extreme circumstances, the permissibility of enhanced interrogation cannot be doubted.

It is the same justification involved in Israeli court decision on the GSS investigations, which denied to sanction the torture, emphasizing that the judges should be committed not only to protection of democracy from the terrorists, but also to protection of the democracy from the means that the states want to use against terrorism,³¹ although also

²⁶ B. Williams, A critique of utilitarianism in J.J.C. Smart & Bernard Williams, *Utilitarianism: for and against* p.75, 93 (Cambridge University Press Jan 1, 1973). ISBN-10: 052109822X ISBN-13: 978-0521098229

²⁷ R. Gillon “*Utilitarianism*” p. 1411 *British Medical Journal* (Clinical Research Edition), Vol. 290, No. 6479 (May 11, 1985), pp. 1411-1413 BMJ Publishing Group Available at <http://www.jstor.org/stable/29519166> Accessed on 11/10/2009

²⁸ Ibid.

²⁹ P. A. Fairall “*Reflections on Necessity as a Justification for torture*” p. 27 *James Cook University Law Review* available at <http://www.austlii.edu.au/au/journals/JCULRev/2004/2.html> Accessed on 11/10/2009

³⁰ The memorandum prepared by United States Department of Justice's Office of Legal Counsel (OLC) dated August 1, 2002 signed by Jay S. Bybee, Assistant Attorney General regarding the interrogation practice by the U.S. Armed Forces.

³¹ A. Barak, “*Supreme Court, 2001 Term—Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*” p. 149 *Harvard Law Review* Vol. 16, Issue: 155 (2002). ISBN: 978-1-4008-2704-6

noting the possibility of the “necessity” defense for the interrogators post-factum,³² which essentially meant that interrogators had the possibility to fall back on “necessity” argument as the justification for their actions whenever they overstepped the limits of the law and engaged in torture.

The opinion expressed by the Israeli court is surprisingly similar to the M. Walzer’s “The Dirty Hands”³³ justification, which highlights the paradox of action that is justifiable, but at the same time is morally wrong³⁴. Under this justification what the interrogator does is “simply what has to be done” in order to bring the best outcome,³⁵ thus sometimes in defense of the democracy one has to take action that is not compatible with the democracy’s fundamental commitment to dignity³⁶ and the rule of law, taking the blame onto oneself and possibly being prosecuted for such conduct. In such cases the interrogator has to balance the risks to dignity and security to address a particular case of threat³⁷.

The so called “Dirty Hands” argument stems from the works of Jeremy Bentham,³⁸ which is by some called the purest of choice-of-evils utilitarian’s, who has stated the issue in rather straightforward manner:

“For the purpose of rescuing from torture a hundred innocents, should any scruple be made of applying equal or superior torture, to extract the requisite information from the mouth of one criminal, who having it in his power to make known the place where at this time the enormity was practicing or about to be practiced, should refuse to do so?”

³² Supreme Court of Israel: Judgment Concerning the Legality of the General Security Service’s Interrogation Methods, p. 1486 38 I.L.M. 1471 (1999) (H.C. 5100/94, Public commission Against Torture in Israel v. Government of State of Israel, 53(4) P.D. 817)

³³ M. Walzer, “Political Action and the Problem of Dirty Hands”, Philosophy and Public Affairs, Vol.2, No.2 (1973), Available at <http://academic2.american.edu/~dfagel/walzerDirtyHands.pdf> accessed 11/10/2009

³⁴ Ibid p.161

³⁵ S. Lukes, “Liberal Democratic Torture” p. 5 British Journal of Political Science Issue 36, pp. 1–16 (Cambridge University Press, 2005) DOI:10.1017/S0007123406000019

³⁶ M. Ignatieff, “The Lesser Evil: Political Ethics in an Age of Terror” p.8–9. Princeton, N.J.: Princeton University Press, ISBN-10: 0691117519 ISBN-13: 978-0691117515 (April 12, 2004)

³⁷ Ibid, p.12–13

³⁸ J. Bentham, (15 February 1748 – 6 June 1832) A. prominent English jurist, philosopher, and legal and social reformer.

To say nothing of wisdom, could any pretence be made so much as to the praise of blind and vulgar humanity, by the man who to save one criminal, should determine to abandon a 100 innocent persons to the same fate?”³⁹

The utilitarian argument has gained quite a lot of support to the point that some call it “fanatical” to deny this argument.⁴⁰

The supporters of this theory argue that those who suggest outlawing the torture in life or death situations are simply mistaken, some go as far as suggesting that the opponents of torture are obliged to take the responsibility themselves in extreme scenarios⁴¹ and that in rare cases⁴² the torture should be regarded as a lesser evil.⁴³ The argument as I mentioned before is further expanded by the suggestion that torture be authorized by torture warrants but in general must be prohibited.⁴⁴

On the other hand there is no shortage also of the criticism directed at utilitarian theory, as by many it is regarded as too permissive and in the same time too restrictive in the terms of possibilities one can actually encounter in the real world.⁴⁵

³⁹ W.L. Twining and P. E. Twining, Bentham on Torture, p.347. The Northern Ireland Legal Quarterly, Issue 3, (Autumn 1973)

⁴⁰ E. A. Postner, A. Vermeule, Terror in the Balance: Security, Liberty and the Courts p. 187 (Oxford University Press, USA. January 4, 2007) ISBN-10: 019531025X ISBN-13: 978-0195310252

⁴¹ E. A. Postner, The Best Offense, p.28 New Republic Vol. 227 Issue: 10, (September 2nd 2002)

⁴² H. Shue, p.17 quoted in S.Levinson (ed.), Torture: A Collection (Oxford University Press, USA August 10, 2006) ISBN-10: 0195306465 ISBN-13: 978-0195306460

⁴³ J.T. Parry, Escalation and Necessity: Defining Torture at Home and Abroad, p.60. quoted in S. Levinson (ed.), Torture: A Collection (Oxford University Press, USA August 10, 2006) ISBN-10: 0195306465 ISBN-13: 978-0195306460

⁴⁴ R.A. Posner, Escalation and Necessity: Defining Torture at Home and Abroad, p.298. quoted in S. Levinson (ed.), Torture: A Collection (Oxford University Press, USA August 10, 2006) ISBN-10: 0195306465 ISBN-13: 978-0195306460

⁴⁵ W. D Ross, The Right and the Good (1930). (Oxford: Clarendon Press Recent publication by Oxford University Press, USA; 2 edition , January 30, 2003) ISBN-10: 0199252645 ISBN-13: 978-0199252640; E. F. Carritt, Ethical and Political Thinking. p. 65 (Oxford: Clarendon Press, 1947) ISBN-10: 0837168260 ISBN-13: 9780837168265; J. Rawls, A Theory of Justice. p.158-159 (Cambridge: Harvard University Press, 1971) Recent publication by Belknap Press of Harvard University Press; Revised Edition (September 30, 1999) ISBN-10: 0674000781 ISBN-13: 978-0674000780

The core of the criticism is not surprisingly channeled at the “Ticking Bomb” argument as it is the argument most often used by the Utilitarians as the universal Swiss knife of justification of interrogational torture.

Numerous articles have been published on this issue, but in most cases the reviews start with “Ticking Bomb” scenario and end it there,⁴⁶ although with some notable exceptions. In the next chapter I am going to address what is the bulk of the utilitarian argument for torture - “The Ticking Bomb” scenario.

⁴⁶ D. Luban “*Liberalism Torture and the Ticking Bomb*” p.1440 Virginia Law Review Vol. 91:1425 Available at <http://www.virginialawreview.org/content/pdfs/91/1425.pdf> Accessed 11/10/2009

4. The Refutation of the Utilitarian Argument for Using Torture

4.1 The “Ticking Bomb” Scenario

4.1.1 The Notion of the Ticking Bomb Scenario

The core of the utilitarian argument on torture, or should I call it a spearhead of the reasoning allowing torture, is the so called “Ticking Bomb” scenario, where the person under interrogation is in possession of the valuable information concerning the location of the “Ticking Bomb,” which is about to explode in near future and if provided, the information about the whereabouts of the bomb could save thousands. The line of argument can be easily traced here, it’s simple, plain and logical and therefore easy to come under influence of.

It is easy to be seduced by the simplistic examples that may look compelling but actually misrepresent the world which we live in⁴⁷. Austrian-British philosopher Ludwig Josef Johann Wittgenstein once wrote that confusion arises when we become bewitched by a picture.⁴⁸ It is true that *“once the value of entertainment enters discussion, it too often drives out other values, especially reasonableness, relevance, and even understanding.”*⁴⁹,

Let’s have a look at the “Ticking Bomb” hypothetical more closely. The first thing that strikes me as astounding is the sheer number of key aspects that are tidier than in any such crisis that is likely to emerge in real world scenario. The core attribute of the

⁴⁷ Ibid, p. 1441

⁴⁸ L. Wittgenstein, *Philosophical Investigations*. p.47e–48e Translated by G.E.M. Anscombe., 3d ed. (New York, Macmillan 1958) Recent publication by Prentice Hall; 3 edition (March 11, 1973) ISBN-10: 0024288101 ISBN-13: 978-0024288103

⁴⁹ R. Hardin, *Morality Within the Limits of Reason* pp. 22–23 (Chicago, IL: University of Chicago Press, 1988) ISBN 0226316181, ISBN -13 9780226316185

“Ticking Bomb” scenario is that it rests of the several assumptions which taken together justify its outcome.

The first assumption of the “Ticking bomb” scenario is that there is the certain knowledge of ongoing plot of bombing. It also assumes that the suspect holds the necessary information. These are by far not the only assumptions on which the “Ticking Bomb” argument relies on, but even these two raise significant doubts about the likelihood of such scenario, since most of the torture is conducted precisely because there is very little or no knowledge about the information that the alleged terrorist may hold.

The third assumption is that not only that torture will work, but it will also result in the highly credible intelligence. This assumption tricks the viewer into thinking that the pain always results in confessions, but it ignores the complex intricacies of the human mind, the likelihood of deception, false confession and reluctance of succumbing to torture, which has been demonstrated numerous times. The Chapter 4 gives more insight about the reliability of the information gained under the interrogations using torture.

Finally the scenario states that the information provided will result in averting the looming catastrophe.

All of these assumptions render the chances of occurrence of the ticking bomb scenario non-existent. Here I could have written “low” or “next to non-existent,” but from my opinion what renders this scenario as impossible is the issue of the perfect knowledge on what it constantly relies on, since in the real world, there is no such thing as the perfect knowledge. “Perfect Knowledge” makes the “Ticking bomb” hypothetical too artificial to occur. Messy aspects of reality like uncertainty and probability in the “Ticking bomb” scenario are not taken into account and moreover, they are completely ignored.⁵⁰

⁵⁰ H. Shue, quoted in Case Western Reserve Journal of International Law, p.233 Vol. 37 Issue 2/3; ISSN 00087254 , AN 22005941 (2006)

Indeed, *“what makes the ticking bomb scenario improbable is the notion that in a world where knowledge is ordinarily so imperfect, we are suddenly granted the omniscience to know that the person in front of us holds this crucial information about the bomb’s whereabouts.”*⁵¹

4.1.2 The Alleged Cases of the “Ticking Bomb”

The proponents beg to differ and offer the examples of the cases to match the “Ticking Bomb” hypothetical.

In one such case Philippine agents have allegedly thwarted an al-Qaeda plot to bomb eleven U.S. airlines and assassinate the Pope,⁵² but the details of this case are pointing to another direction. It turns out that a Pakistani bomb maker involved in this case has been tortured for weeks, well before the police had the information about the plot: *“agents hit him with a chair and a long piece of wood, forced water into his mouth, and crushed lighted cigarettes into his private parts. . . . His ribs were almost that his captors were surprised that he survived...”*⁵³

This argument alone renders the above mentioned claim of attributing this case to the “Ticking Bomb” scenario quaint. Naturally the question arises, what if there was no al-

⁵¹ E. Scarry, Five Errors in the Reasoning of Alan Dershowitz. p. 284 in S. Levinson (ed.), *Torture: A Collection* (Oxford University Press, USA August 10, 2006) ISBN-10: 0195306465 ISBN-13: 978-0195306460

⁵² D. Struck et al., *“Borderless Network Of Terror: Bin Laden Followers Reach Across Globe”*, Washington Post, Sept. 23, 2001, at A1. Available at <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A10543-2001Sep22> (primary source no longer available) and <http://www.mail-archive.com/ctrl@listserv.aol.com/msg78713.html> (Secondary Source) Accessed on 11/10/2009

⁵³ M.D. Vitug, G. M. Gloria *Under the Crescent Moon: Rebellion in Mindanao*. p. 223 (Quezon City, Philippines: Ateneo Center for Social Policy & Public Affairs : Institute for Popular Democracy, c2000) ISBN 9719167971

Qaeda plot at all? Would they torture him to death? The sources indicate that actually the discovery of documents in suspect's home following the fire, was what actually tipped the police off⁵⁴ and the application of torture during the interrogation had nothing to do with it.

The proponents also point to the Landau commission⁵⁵ findings in 1995, which stated that torture was used to foil a massive terrorist attack over the Pacific, but what the proponents do not state is that Landau Commission did not itself investigate the matter itself and simply accepted the Israeli Security Forces Insistence that torture was actually an effective tool in such situations⁵⁶.

4.1.3 The refutation of the “Ticking Bomb” Scenario

The “Ticking Bomb” scenario is nothing more than a product of idealization and abstraction.⁵⁷ By idealization it omits the negative consequences of torture and with the abstraction, it disregards the numerous possibilities that can occur contributing to solving the problem, in short “Idealization adds sparkle, abstraction removes dirt.”⁵⁸

⁵⁴ D. Murphy, “*Filipino police uncover 1995 leads to September 11 plot*”, Christian Science Monitor, 14 Feb. 2002 Available at <http://www.csmonitor.com/2002/0214/p07s01-woap.html> Accessed on 11/10/2009; R. Owen, D. McGary, “*Al-Qaeda in plot to assassinate Pope*”, Times Online, 11 Nov. 2002 Available at <http://www.timesonline.co.uk/tol/news/world/article826923.ece> Accessed on 11/10/2009;

⁵⁵ The commission headed by the former Supreme Court President Moshe Landau enacted to investigate allegations of torture against the General Security Service (GSS) (Information available at <http://www.mfa.gov.il/MFA/Government/Law/Legal%20Issues%20and%20Rulings/Israel-s%20Interrogation%20Policies%20and%20Practices%20-%20De> Accessed on 11/10/2009

⁵⁶ M. D. Evans, R. Morgan, Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. p. 47. (Oxford University Press, USA. January 14, 1999), ISBN-10: 0198262574 ISBN-13: 978-0198262572

⁵⁷ O. O'Neill, “*Ethical Reasoning and Ideological Pluralism*”, p. 705, 711-12 Ethics: An International Journal of Social, Political, and Legal Philosophy; July 1988, Vol. 98 Issue: 4 (1988) ISSN: 00141704; 1539297X. Available at <http://www.jstor.org/pss/2380892> Accessed 11/10/2009

⁵⁸ H. Shue, *Torture in Dreamland: Disposing of the Ticking Bomb* p.1. Journal of International Law. (2006) Vol 37, numb 2/3 ISSN 0008-7254

The Ticking Bomb scenario gives a very misleading example to derive analogies concerning the reality. The whole idea of the permissibility of the torture discourages the viewer to think outside of the box and to explore alternative ways of gaining information which do not cause Human Rights violations. It gives the illusion that the success of the war on terror depends on the quality of intelligence, disregarding the fact that a lot more is dependent on political action and foreign policy considerations.⁵⁹

In fact I argue that the justification by the Ticking Bomb scenario actually undermines the war on terror. The war that should be waged by stepping outside the framework and exploring alternative ways of gaining information and establishing policies that will contribute to the overall development of the effected regions, rather than accepting the torture as “necessity,” which it obviously is not. Artificial cases make bad ethics and cases like this have the sole purpose to make the torture debatable.⁶⁰

In a world of uncertainty and imperfect knowledge⁶¹ the torture seeks to solve the problem by exercising violence. It also assumes that the information by resorting to torture will not only be certainly gained, but also will be of good value, but in fact the information extracted by torture is known to be at best unreliable.⁶²

⁵⁹ M. Ramsay, *Can the Torture of Terrorist Suspects Be Justified?* p. 117. The International Journal of Human Rights Vol. 10, No. 2 (June, 2006) ISSN:13642987 DOI: 10.1080/13642980600608384

⁶⁰ O. Gross, *The Prohibition on Torture and the Limits of the Law* quoting H. Shue in S. Levinson (ed.), *Torture: A Collection* (Oxford: Oxford University Press 2004)

⁶¹ D. Luban “*Liberalism Torture and the Ticking Bomb*” Virginia Law Review Vol. 91:1425 p.1444 Available at <http://www.virginialawreview.org/content/pdfs/91/1425.pdf> Accessed 11/10/2009

⁶² P. duBois, *Torture and Truth*. (New York and London: Routledge, 1991) ISBN:0415902134

4.2 Lost Knowledge - The Problem with the “Extracted” Intelligence

4.2.1 False Positives

The extraction of information by the use of torture is much harder than it may seem at first. Whereas the application the torture on some people results in immediate confession, although not necessarily a truthful one, there is also a counter reaction to torture - the rigid resistance to it, that is a rather complicating factor for the interrogator, constant humiliation and abuse rarely give a valuable intelligence.

An FBI former counter-terrorist interrogator Dan Coleman remarked about the interrogation of the naked Muslim fundamentalist detainee: *“He’s going to be ashamed, and humiliated, and cold. He’ll tell you anything you want to hear to get his clothes back. There’s no value in it”*⁶³ The claim of false confessions is further straightened by empirical evidence.⁶⁴

⁶³ J. Mayer, “*Outsourcing torture: the secret history of America’s “extraordinary rendition” program*”, p.3 New Yorker, 14 Feb. 2005. Available at http://www.newyorker.com/archive/2005/02/14/050214fa_fact6 Accessed on 11/10/2009,

⁶⁴ G. H. Gudjonsson, *The Psychology of Interrogations and Confessions: A Handbook* (Wiley, 1st edition. February 7, 2003) ISBN-10: 0470844612 ISBN-13: 978-0470844618; S. M. Kassin, G. H. Gudjonsson, “*The psychology of confession evidence: a review of the literature and issues*”. *Psychological Science in the Public Interest* 5, Whole No. 2 (2004) available at http://www.williams.edu/Psychology/Faculty/Kassin/files/Kassin_Gudjonsson_PSPI_05.pdf Accessed on 11/10/2009; S. M. Kassin, “*On the psychology of confessions: does innocence put innocents at risk?*” p.215–228, *American Psychologist* Volume 60, Issue 3 (2005) available at http://www.wcjsc.org/Kassin_article_American_Psychologist.pdf Accessed on 11/10/2009; S. M. Kassin, “*The psychology of confession evidence*”, p. 221–233 *American Psychologist* Volume 52 (1997): available at http://www.psychologicalscience.org/pdf/pspi/pspi5_2.pdf Accessed on 11/10/2009.

In the case the former British ambassador to Uzbekistan, Craig Murray reported that the detainees rendered to Uzbekistan by US and UK were making confessions under torture, namely the partial boiling and the information gained had no value what so ever - “We are selling our souls for dross” reported the ambassador, countering the claim of British Foreign and Commonwealth Office that it made use of this information⁶⁵.

In another case three British officers have made the confession under torture that they were trained in Al-Qaeda camps, however the British intelligence produced conclusive evidence that at that time, there when they were supposed to be in Afghanistan, they actually never left the British soil.⁶⁶

Similarly the soviet historians estimate that during the period of 1936-1939 the Soviet regime arrested 5% to 10% of the entire population. Under torture, sleep deprivation and isolation almost everyone confessed, thereby providing justification for such actions⁶⁷. On the same issue of false confessions U.S. Senator John McCain has argued: “If you inflict enough physical pain on someone, they will tell you anything they think you want to know” and that may not be necessarily the truth⁶⁸”.

The reason behind this phenomena is the known as the “*cognitive failure model of truth telling*” in case of which, overwhelming physical and mental stress create a state of disorientation, under which the subject is unable to maintain self-interest and becomes suggestible or overly compliant under stress to the point of omitting the true cascade of events.⁶⁹

⁶⁵ Cited by R. Gedye in “*British torture row envoy loses clearance for Uzbekistan post*”, Daily Telegraph, 12 Oct. 2004 Available at <http://www.telegraph.co.uk/news/worldnews/asia/uzbekistan/1473968/British-torture-row-envoy-loses-clearance-for-Uzbekistan-post.html> Accessed on 11/10/2009

⁶⁶ W.D. Rose, “*Revealed: the full story of the Guantanamo Britons*”, Observer, 14 March 2004 Available at <http://www.guardian.co.uk/uk/2004/mar/14/terrorism.guantanamo> Accessed on 11/10/2009

⁶⁷ G. Gudjonsson, *The psychology of interrogations, confessions, and testimony*. (John Wiley & Sons. April 22, 1999) ISBN-10: 0471961779 ISBN-13: 978-0471961772

⁶⁸ John McCain Quoted in *Washington Monthly*, January/February/March 2008 available at <http://www.washingtonmonthly.com/features/2008/0801.cheney.html>

⁶⁹ Ibid, p. 217-218

Unreliable intel was the cause of the detention of British citizen Martin Mubanga, who was subjected to sensory deprivation, stress positions and was racially and sexually abused⁷⁰. All of this happened because an Australian prisoner, David Hicks incriminated him under interrogation.⁷¹

4.2.2 Sturdy Negatives - Resistance to Torture During the Interrogation

Interestingly there are lots and lots of completely opposite reports that the persons under interrogation did not confess even after repeated drowning, crushing of joints and such⁷².

The reason for such behavior lies within psychology of the human behavior. There are several issues take into account. Naturally people react hostilely against those who constrain their freedom (Reactance Theory),⁷³ they become more hardened and dogmatic when are confronted with the possibility of their mortality (Terror Management Theory)⁷⁴ and they may even dissociate and distance themselves from the reality to protect themselves from pain and awareness of their situation (Traumatic Stress Theory).⁷⁵

⁷⁰ W.D. Rose, "How I entered the hellish world of Guantanamo Bay", *Observer*, 6 Feb. 2005 Available at <http://www.guardian.co.uk/uk/2005/feb/06/world.guantanamo> Accessed on 11/10/2009

⁷¹ Ibid.

⁷² L. Silverman, Tortured subjects: pain, truth, and the body in early modern France p. 182 (University Of Chicago Press May 15, 2001) ISBN-10: 0226757544 ISBN-13: 978-0226757544

⁷³ S. Oskamp, P.W. Schultz Applied social psychology (2nd ed.) p. 34. (Prentice Hall, Englewood Cliffs, NJ. 1998)

⁷⁴ J. Greenberg, V. Solomon, P. Mitchell, A. Rosenblat, S. Kirland and D. Lyon, *Evidence for terror management theory II: the effects of mortality salience on reactions to those who threaten or bolster the cultural worldview.* p. 308-318. *Journal of Personality and Social Psychology* Vol. 58 Issue: 20 (1990)

⁷⁵ B.A Van der Kolk, O. Van der Hart and C.R Marmar, Dissociation and information processing in posttraumatic stress disorder in: B.A Van der Kolk, A.C. McFarlane and L. Weisaeth. eds. *Traumatic stress: the effects of overwhelming experience on mind, body and society.* p. 307 (The Guilford Press, 1st edition May 3, 1996) ISBN-10: 1572300884 ISBN-13: 978-1572300880

All of these factors are natural reactions of the human being to torture and intensive pain stimuli that severely complicates the process of interrogation and impairs the possibility to extract credible intelligence.

During the years of North Vietnamese torture of American POW's, Commander James Stockdale estimated that only under 5% of his 400 fellow airman who were captured by the North Vietnamese forces have succumbed to torture⁷⁶. This is by far not the only case.

The process of the decolonization of Algeria from France was marked by the bloody conflict – The Algerian War (1952-1962), which was one of the most merciless colonial struggles known to happen in 20th Century. Today it is with the domain of public knowledge that French forces extensively utilized torture on members of Algerian Armed Forces.

A French General Paul Aussaresses, the chief intelligence officer in the Battle for Algiers (1955-1957) in his memoirs described the terrorists dying under torture with the secrets or either exasperating him to the point of murdering them himself.⁷⁷

General Jacques Masu, the commander of French forces and at the time a fierce proponent of using torture during the interrogations in 1992 stated that torture in Algeria served no “necessary or useful purpose.”⁷⁸

The U.S. Air Force interrogator Paul Copher commented regarding this fact that he preferred to interview terrorist suspects “before any heavy handed ex-Turkish farmer slapped them around.”⁷⁹

⁷⁶ J.B. Stockdale, “*Courage under fire*” p.328 in: Department of Philosophy and Fine Arts, United States Military Academy eds, *Moral dimensions of the military profession* (5th edn.): p.321-334. (2001)

⁷⁷ P. Aussaresses, *The Battle of the Casbah: Terrorism and Counter-Terrorism in Algeria 1955-57* (Enigma Books February 1, 2004) ISBN-10: 1929631308 ISBN-13: 978-1929631308

⁷⁸ N. MacMaster, *The torture controversy (1998–2002): towards a “new history” of the Algerian war?* p. 449–59 *Modern and Contemporary France* Vol.10 Issue:4 (2002)

⁷⁹ P. Copher quoted by J.M. Arrigo in *A Consequentialist Argument against Torture Interrogation of Terrorists*. Joint Services Conference on Professional Ethics January 30-31, 2003, Springfield, Virginia. Later in *A Utilitarian Argument Against Torture Interrogation of Terrorists* p.549 *Project on Ethics and Art in Testimony*, Irvine, California, USA *Science and Engineering Ethics* vol. 10 (2004)

Similarly FBI personnel stationed in Guantanamo were of the opinion that the military's so called enhanced interrogation methods "were not effective or produced the intelligence that was unreliable."⁸⁰ FBI agents further noted that such actions severely complicated their task and would have a distinct negative impact on investigations and intelligence gathering to be conducted by them⁸¹.

There is no strong evidence of the widespread utility of torture for the extraction of the intelligence⁸² and in fact some reportedly "successful" cases run counter to the time constraints that "Ticking Bomb" argument prescribes. The declassified memo from the FBI official in Guantanamo states the coercion did not produce any different result as regular interrogation: "nothing more than what FBI got using simple investigative techniques"⁸³,

For example the case Mohamed al-Kahtani reportedly the twentieth hijacker, who was turned away by customs agent at Orlando airport and later captured in Afghanistan had resisted the harsh interrogation techniques that were administered on him with the assistance of military doctors. Only after months of almost daily torture he allegedly gave the information about his meetings with Osama Bin Laden⁸⁴.

⁸⁰ FBI e-mail re instructions to GTMO interrogators, May 10, 2004. FBI personnel raised their concerns in weekly meetings with senior officials at the Criminal Division of the Justice Department. Quoted by J. Jaffer, A. Singh "Administration of Torture. A Documentary Record from Washington to Abu Ghraib and Beyond" Columbia University Press (September 18, 2007) ISBN-10: 0231140525 ISBN-13: 978-0231140522

⁸¹ FBI electronic communication re BAU concerns, May 30, 2003. Quoted by J. Jaffer, A. Singh "Administration of Torture. A Documentary Record from Washington to Abu Ghraib and Beyond" Columbia University Press (September 18, 2007) ISBN-10: 0231140525 ISBN-13: 978-0231140522

⁸² R. Blakeley "Why torture?" p.380 Review of International Studies Vol. 33 British International Studies (2007), DOI:10.1017/S0260210507007565

⁸³ N. Klein "The true purpose of torture Guantánamo is there to terrorize - both inmates and the wider world" The Guardian, Saturday 14 May 2005 available at <http://www.guardian.co.uk/world/2005/may/14/guantanamo.usa> Accessed on 11/10/2009

⁸⁴ Editorial, "Towards a realistic interrogation policy", Washington Times March 11, 2005 available at <http://www.washingtontimes.com/news/2005/mar/10/20050310-085559-9164r/> Accessed on 11/10/2009

One of the notorious facts about the war on terror was the unreliable intelligence that has plagued the company for years and was the biggest contributor to starting it in the first place.

Al-liby, an al-Qaeda operative, was interrogated by both the U.S. and Egypt, in the latter he was subjected to torture,⁸⁵ under which he made a confession that Iraq has been training the members of al-Qaeda in chemical and biological warfare. This “groundbreaking” testimony was used as the basis of allegations that Iraq was preparing to provide al-Qaeda with weapons of mass destruction, the claim that the recent history has showed was remarkably off point.

His confession has even been emphasized in the speech of Colin Powell at the U.N. Security council which justifying the military operation in Iraq⁸⁶.

It is astounding how much of the damage was done by the unreliable intelligence in this single case alone.

In the January of 2004 Al-libi has recanted his statement, stating that the sole reason he made the confession was that he was too afraid to be further abused by the interrogators⁸⁷.

Moreover the theory of “prompt confession under torture” runs counter to everything known about the interrogation. Any interrogation starts well before the actual encounter of the detainee with the interrogator. In fact the actual result is fully dependent on the critical phase of the interrogation - the information gathering, that is conducted before the interrogation.

⁸⁵ “No torture no Exeptions” article available at <http://www.washingtonmonthly.com/features/2008/0801.torture.html>

⁸⁶ Ibn al-Shaykh al-Libi May 13, 2009 Available at http://topics.nytimes.com/topics/reference/timestopics/people/l/ibn_alshaykh_al_libi/index.html

⁸⁷ “No torture no Exeptions” article available at <http://www.washingtonmonthly.com/features/2008/0801.torture.html>

The cultural factor, motivation, counter-interrogation training and the psychology of the terrorist all have to be taken into account in that the detainees are all diverse⁸⁸.

It is well documented that in the war with terror, some of the most interesting and productive interrogations were conducted without torture under the free will of the detainees. The interesting part is that such information was gathered from multiple sources including both high and low of the structure of terrorist network.

One of the more interesting cases was of Khalid Sheikh Mohammed the alleged mastermind of the attack on the World Trade Center⁸⁹.

Just before his apprehension by the U.S. Forces, Khalid Sheikh Mohammed gave an extensive interview to the Al-Jazeera correspondent, in April 2002 in which he shared with the answers to some of the key questions that the U.S. intelligence still had about the plot of 9/11⁹⁰ such as the destination of the third plane, the one that crashed in a field in the Pennsylvania, the park of the terrorists in that case turned out to be the Capitol building. He also shared with the abandoned plan to crash the airliners into the American nuclear facilities and explained how they communicated with Osama Bin Laden while he was hiding in Afghanistan.⁹¹

Interestingly enough after the apprehension he was still tortured by waterboarding many times. The CIA has presented their own summary of his interrogation to 9/11 commission. The report matched almost exactly with the information that was provided during the interview voluntarily.

⁸⁸ V. Bufacchi, J. M. Arrigo *Torture, Terrorism and the State: a Refutation of the Ticking-Bomb Argument* Journal of Applied Philosophy, Vol. 23, Issue: 3 (2006)

⁸⁹ A. Danchev "Like a Dog!": *Humiliation and Shame in the War on Terror* p.266. Available at <http://www.polisci.upenn.edu/theoryworkshops/danchevpaper.doc> Accessed on 11/10/2009

⁹⁰ Editorial "No torture no Exceptions," available at <http://www.washingtonmonthly.com/features/2008/0801.torture.html> Accessed 10/11/2009

⁹¹ Ibid

The new information included the several new plots such as getting control of a plane over the pacific to crash it into a skyscraper, a plan to send al-Qaeda operative to conduct attacks in U.S, a plot to smuggle explosives into New York to target gas stations, railroad tracks and a bridge in New York⁹².

While at first all of this may sound convincing, actually there is no indication that it was more than just a regular chitchat at the table among the local terrorist brotherhood. From all of these confessions only one had been verified to have a shade of credibility of being actually developed, was a plan of bringing down Brooklyn Bridge with the gas cutter in 2002. The investigation has uncovered that an Ohio trucker Iyman Faris, who worked for Khalid Sheikh Mohammed had actually investigated such possibility, but to grasp the importance of this endeavor one only needs to say that it is similar to trying to demolish the Empire State Building with a firecracker. It is of high possibility that such high profile terrorist as Khalid Sheikh Mohammed would have probably never remembered this single case during the interview.

Although one aspect of what he remembered puzzled the investigators. The detainee supposedly has made the confession under torture about murdering Wall Street Journal reporter Daniel Pearl in Pakistan in 2002, but according to other sources there is no evidence in this case even remotely points to Khalid Sheikh Mohammed, nor did he mention anything about it in the interview with al-Jazeera which was conducted within three month period. What is more probable is that knowing that evidently he was going to be sentenced to execution, he decided to put the blame on himself thereby freeing some of the militants jailed in Pakistan.

⁹² Ibid

In another example Ali Abdul Saoud Mohamed, an al-Qaeda operative, who took part in 1998 bombings of the U.S. embassies in Kenya and Tanzania was apprehended by the FBI's special unit dedicated to prosecution of the Osama Bin Laden.

Ali Mohamed was fully expecting to be tortured at once. Instead he was assured that he would not be hurt and was offered the protection for the family⁹³. As a result, Ali Mohamed has provided as Jack Cloonan the special agent assigned to the team notes "a gold mine" of information about al-Qaeda's operatives⁹⁴. He reiterates that this was not by far the isolated case, in every case in which this the suggestion was raised it "stunned" the detainees and they were more obliged to cooperate.⁹⁵

The information mounted and soon the FBI agents were even in hold of the information about many of the ongoing operations of al-Qaeda, including the surveillance on embassies in London and around the world, also about the key figures of the terrorist network⁹⁶. Still, those terrorists who were won over with humane methods in 90's, even to this day supply the law enforcement forces with reliable intelligence that is used to counter al-Qaeda.

Similarly, in 1943 Military interrogator Marine Major Sherwood F. in his report about the interrogation of Japanese prisoners of war has stated, that despite as some may think that only the sternest measures would make the detainees from the hardened Japanese military talk, but in fact it was not the case, as the aggressive methods often backfired and "made the prisoner " so conscious of his present position and that he was a captured soldier vs. enemy

⁹³ Ibid

⁹⁴ Ibid

⁹⁵ Ibid

⁹⁶ Ibid

intelligence” that it “played right into the hands” of those who were determined not to give away anything of military importance.”⁹⁷

The striking irony of the happening is that this simple truth is outlined in bold in the US Army Intelligence field Manual, (FM35-52) which states that the “experience indicates the use of prohibited torture is not necessary to gain the cooperation of interrogation sources” and that it is a poor technique that gives unreliable results⁹⁸, but the fact is that military interrogators in Guantanamo and Abu Graib have been instructed to disregard the manual and act under different rules. The new legal paradigm that has been emplaced instead rendered quaint the “old” reasoning of not engaging in torture. That is how the simple truth outlined in the manual became a lost knowledge of the past.

The next chapter will demonstrate the essence of torture. The most extreme and inherent characteristic of it, which renders the whole endeavor of tinkering with it meaningless and a very dangerous undertaking: The notion that once it is applied, it becomes a downward spiral with no going back

⁹⁷ R. Evans “*The Ethics of Torture, Torture: Does It Make Us Safer? Is It Ever OK? A Human Rights Perspective*”. Edited by K. Roth and M. Worden, p.61 New York: The New Press, 2005 Available at <http://www.du.edu/korbel/hrhw/volumes/2007/evans-2007.pdf> Accessed on 11/10/2009

⁹⁸ M. Ramsay *Can the Torture of Terrorist Suspects Be Justified?* p. 114. The International Journal of Human Rights Vol. 10, No. 2, 103–119, June 2006 ISSN:13642987 DOI: 10.1080/13642980600608384

4.3 Torture Spreads

4.3.1 The new era of the War of Terror

Amnesty international in its report points out that torture is never limited to single isolated case:

“We have not found a single state which tortures ‘only once’, or only in a few extreme cases. Whenever and wherever torture and cruelty are accepted as legitimate tools of government ‘in extreme circumstances’ they become widespread – the means used become increasingly extreme and the circumstances in which they are used increasingly less so”⁹⁹

We have all seen the dehumanized images of the torture victims from the Guantanamo and Abu Graib bases, the piles bodies of the living humans being stuck on top of each other in agony, but what we are about to look into are the actual events that took place earlier, the developments that ultimately lead to the incidents in interrogation bases that were so widely publicized.

The gruesome images of the September 11 2001 marked a new era in the history. The tragedy of the massive loss of life on the scale that the world has never seen before has marked the beginning of the new era.

⁹⁹ Amnesty International, *“Torture and Ill-Treatment: The Arguments”*, Amnesty International, 2006, Available at <http://asiapacific.amnesty.org/pages/stoptorture-arguments-eng>. Accessed on 11/10/2009

The shocked and enraged public demanded swift action against the threat from the government and thus the so called era of “War on Terror” began. This war was different from all others. There was no regular army to fight with and the U.S. Army had to counter an immensely strong and well financed hidden networks and cells of terrorists having a worldwide reach.

Such kind of effort required robust intelligence. In fact the outcome of this war was entirely dependent on the value and amount of intelligence thus the focus shifted to locating such sources.

The U.S. government instituted the system of the interrogation techniques called sarcastically the “Torture Lite”, the 3 tier system of measures that were designed to stress and coerce the detainees.

4.3.2 Establishing a New Legal Framework - “When the gloves came off”

“All I want to say is that there was before 9/11 and after 9/11. After 9/11 the gloves came off” - State Department official Cofer Black¹⁰⁰.

As early as December 2002, the Washington Post reported that US agents at Bagram military detention facility used interrogation techniques euphemistically named ‘Stress and Duress’ and ‘Torture Lite.’¹⁰¹ The same has been reported by other human rights

¹⁰⁰ E.Thomas, M. Hirsh, “*The Debate Over Torture*” By Newsweek Nov. 21, 2005 issue Available at <http://www.msnbc.msn.com/id/10020629/site/newsweek/print/1/displaymode/1098/> accessed 11/10/2009

¹⁰¹ A. Priest, B. Gellman “*U.S. Decries Abuse but Defends Interrogations*” ‘*Stress and Duress*’ Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities The Washington Post December 26, 2002 Available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/09/AR2006060901356.html> accessed 11/10/2009

groups such as “International Committee of the Red Cross (ICRC).¹⁰²” The U.S. administration at that time stated that these incidents were very rare and were rather isolated from the common practice although numerous investigations conducted by both the government and NGO’s have proven that this in fact was an authorized practice.¹⁰³

Naturally the so called enhanced interrogation could not have started without the appropriate legal background. The application of numerous international treaties and conventions of which the U.S. was the signatory had to be diminished, with the new legal framework in order for the interrogations to commence.

It all began with the January 25, 2002 memo of the Attorney General Alberto Gonzales to U.S. president G.W. Bush that stated that “The war on terror is a new kind of war . . . this new paradigm ...that... renders obsolete Geneva’s strict limitation on questioning of enemy prisoners and renders quaint some of its provisions¹⁰⁴.”

Gonzales noted that Geneva Conventions did not apply to the members of the Al-Qaeda and the Taliban since they were determined as “unlawful combatants.” According to the memo this would make the interrogations conducted by the U.S. military much more effective and would lessen the possibility of their prosecution of the interrogators.

Reprinted in M. Danner, “*Torture and Truth: America, Abu Ghraib and the War on Terror*” pp.241–270 (London: Granta Books 2005). ISBN 186207772X

¹⁰³ Report of the International Committee of the Red Cross (ICRC) reprinted in M. Danner, “*Torture and Truth: America, Abu Ghraib and the War on Terror*” (London: Granta Books 2005 ISBN 186207772X); K.J. Greenberg and J.L. Dratel, “*The Torture Papers: The Road to Abu Ghraib*” Cambridge University Press 2005 ISBN-10: 0521853249 ISBN-13: 978-0521853248; S. Strasser (ed.), *The Abu Ghraib Investigations* (USA: Public Affairs LLC, Perseus Book Group 2004 ISBN 978-1-58648-319-7); Human Rights Watch Report, “*The Road to Abu Ghraib*”, June 2004, available at <http://www.hrw.org/en/reports/2004/06/08/road-abu-ghraib> accessed 11/10/2009; Amnesty International Report, “*Human Dignity Denied: Torture and Accountability in the War on Terror*”, 27 October 2004, available at <http://www.amnesty.org/en/library/info/AMR51/145/2004> accessed 11/10/2009)

¹⁴ N. A. Lewis “*Justice Memos Explained How to Skip Prisoner Rights*” Friday, May 21, 2004, NY Times available at <http://www.nytimes.com/2004/05/21/politics/21MEMO.html> accessed 11/10/2009

¹⁰⁴ A. R. Gonzales. Memorandum for the President. “*Decision RE application of the Geneva Convention on Prisoners of War to the Conflict with Al-Qaeda and the Taliban*”. January 25, 2002 available at http://www.hereinreality.com/alberto_gonzales_torture_memo.html accessed 11/10/2009

In a memo dated February 6th 2002¹⁰⁵ then the U.S. President George W. Bush has endorsed the prohibitions of Geneva Conventions, although mentioning wrongly as the U.S. Supreme Court held 4 years later,¹⁰⁶ that Taliban and al-Qaeda prisoners were not entitled to such protections of Common Article 3.¹⁰⁷

The memo regarding the enhanced interrogations written by Assistant Attorney General Jay S. Bybee to House Counsel Alberto Gonzales regarding that practices under consideration specifically mentioned that they did not amount to torture¹⁰⁸. The memo defined torture only as the pain that is equivalent to the “serious physical injury such as an organ failure impairment of a bodily function.”¹⁰⁹ He also argued that the prohibition of torture could be overridden and if it was authorized by the president in a status of the commander in chief. The president in this way would also avoid the prosecution by the justice department. Referring to and contradicting this document, the UN High Commission for Human Rights stressed that ‘there can be no doubt that the prohibition on torture and cruel, inhuman and degrading treatment is non-derogable under international law.’¹¹⁰

The final step for the abolishment of the prohibition of torture and the enactment of the new legal framework was made in a memorandum of by Defense Secretary Donald H. Rumsfeld.¹¹¹

¹⁰⁵ Memorandum from President G.W. Bush to the vice president et al., February 7, 2002. Available at http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf accessed 11/10/2009

¹⁰⁶ *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2795–96 (2006).

¹⁰⁷ Memorandum from President Bush to the vice president et al., February 7, 2002. Available at http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf accessed 11/10/2009

¹⁰⁸ Bybee, Jay S. "Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§2340-2340A." United States Department of Justice. (August 1, 2002). Available at <http://news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf>. Last Accessed March 19, 2009.

¹⁰⁹ Ibid

¹¹⁰ Louise Arbor "Security under the Rule of Law", UN High Commission for Human Rights to the Bienn. Conf of the Int. Comm of Jurists (Berlin), 27 August 2004.

¹¹¹ P. Sands, "Torture Team Deception, Cruelty and the Compromise of Law locations" Penguin Group (acquired Via Amazon Kindle software application). Locations 270-79 Hardcover version ISBN-10: 0230603904 ISBN-13: 978-0230603905 published by Palgrave Macmillan (May 13, 2008)

Attached to the memorandum were a legal opinion by a staff judge advocate in Guantanamo Lieutenant Colonel Diane Beaver, the request for approval of the new methods by the army head of interrogation in Guantanamo Major General Mike Dunlavey, the memorandum from the commander of the U.S. Southcom¹¹² General Tom Hill and the last but not least was the list of eighteen techniques of interrogation in three page memorandum written by Lieutenant Colonel Jetal Phifer.¹¹³

On the basis of Donald Rumsfeld's approval, the alleged twentieth hijacker, al-Qahrani was subjected to almost around the clock interrogation, which destroyed him both mentally and physically. At times his heartbeat fell to 35 beats per minute and he had to be revived in prison's hospital¹¹⁴, moreover his behavior gave out the symptoms of psychological trauma. He was reported to be talking to non existing people, hearing voices and being in the corner for hours on end.¹¹⁵

The abovementioned techniques of interrogation were revised in 2003 January 15 and finally in April of 2003, a memo was issued by the office of the U.S. Defense Secretary, which stated that additional methods of the interrogations were allowed and they should be requested and authorized on case by case basis¹¹⁶. More specifically, the use of stress positions, deprivation of light, hooding and exploitation of individual phobias (such as the fear of dogs) were no longer out of bounds.¹¹⁷

¹¹² The department that is responsible for all U.S. military activities in Central America

¹¹³ P. Sands, *"Torture Team Deception, Cruelty and the Compromise of Law locations"* Penguin Group (acquired Via Amazon Kindle software application). Locations 270-79 Hardcover version ISBN-10: 0230603904 ISBN-13: 978-0230603905 published by Palgrave Macmillan (May 13, 2008)

¹¹⁴ B. Dedman, *"Can '20th hijacker' ever stand trial?"* Msnbc.com, October 26, 2006. Available at <http://www.msnbc.msn.com/id/15361462/> accessed 11/10/2009

¹¹⁵ Supra (Note 61) A-128: Letter from T. J. Harrington, deputy assistant director, FBI Counterterrorism Division, to Maj. Gen. Donald J. Ryder, Department of the Army, July 14, 2004.

¹¹⁶ Dana Priest and R. Jeffrey Smith *"Memo Offered Justification for Use of Torture"* The Washington Post Tuesday, June 8, 2004 available at <http://www.washingtonpost.com/wp-dyn/articles/A23373-2004Jun7.html> accessed 11/10/2009

¹¹⁷ Supra (Note 61) A-83: Action memorandum endorsed by Secretary of Defense Donald Rumsfeld, November 27, 2002; Supra (Note 61) A-96: Memorandum from LTC Jerald Phifer to Maj. Gen. Michael Dunlavey, October 11, 2002.

The approval caused the international backlash. The UN Special Reporter on Torture condemned the use the methods approved, sighting that “*the jurisprudence of both international and regional human rights mechanisms is unanimous in stating that such methods violate the prohibition on torture and ill treatment.*”¹¹⁸ The Human Rights Watch reported that the U.S. had itself denounced the same methods when they were used by other countries.¹¹⁹

Despite the criticism the foundation of the new legal framework was laid and investigators quickly started to turn it what later became gruesome reality. The important and interesting part here is that the Bush administration had taken a different approach to the problem. Instead of authorizing outright torture, the U.S. Government decided to take the “middle ground” and authorize the measures using which it regarded as not constituting torture.

4.3.3 Putting the Theory Into the Action

The establishment of favorable legal framework went hand in hand with the actual development of the methods of “Torture Lite”. As a starting point the investigators turned their attention to the Joint Personnel Recovery Agency’s (JPRA) run program code named SERE (Survival, Evasion, Resistance and Escape), a program being under careful monitoring and considered highly dangerous.

¹¹⁸ Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment, Forty-ninth Session of the General Assembly, UNDoc A/59/3249, 23 August 2004. Available at <http://www1.umn.edu/humanrts/resolutions/47/113GA1992.html> Accessed 11/10/2009

¹¹⁹ A Human Rights Watch Backgrounder report “*US State Department Criticism of “Stress and Duress” Around the World*” April 2003, quoted in M. Ramsay, *Can the Torture of Terrorist Suspects Be Justified?* p. 117. The International Journal of Human Rights Vol. 10, No. 2 (June, 2006) ISSN:13642987 DOI: 10.1080/13642980600608384

The main goal of this program was to train the personnel to withstand humiliation, stress positions, mental duress to prepare them of what to expect from being captive by the enemy. From the experience accumulated the investigators came up with the “JTF GTMO Standard Operating Procedure¹²⁰”.

As we can see as the time went by the administration allowed harsher and harsher methods to extract the intelligence from the detainees, paying less attention to the Human Rights point of view every time. In the end, the methods authorized became numerous and were classified by the severity:

- Category I methods involved mostly yelling and deception.
- Category II included twelve techniques. Those were humiliation and sensory deprivation, stress positions, document falsification, isolation up to 30 days, interrogation outside of interrogation booth, deprivation of light and auditory stimuli, hooding during the transportation, twenty hour interrogations, removal of religious and other comfort items, switching away from hot rations to meals ready to eat (MRE), removal of clothing, forced grooming, using of individual phobias such as fear of dogs.
- Category III included mild non injurious physical contact, use of scenarios to convince the detainee of imminent death, exposure to temperature

¹²⁰ The Defense Department continues to withhold this document, but it is referenced in a December 2002 memorandum written by the special agent in charge of the Defense Department’s Criminal Investigation Task Force at Guantánamo in J. Jaffer, A. Singh “*Administration of Torture. A Documentary Record from Washington to Abu Ghraib and Beyond*” Columbia University Press (September 18, 2007) ISBN-10: 0231140525 ISBN-13: 978-0231140522 Appendix Document A-18: Memorandum, December 17, 2002.

variations and waterboarding, which involves placing the victim on the flat surface with the head tilted to the floor and putting the soft tissue on the face of the victim to constrain the vision and breathing. After this the water in large quantities was poured on the head of the victim creating the sense of suffocation. The victim experiences the sensation of drowning, struggle, breath-holding, panic, swallowing vomiting and taking water into the lungs and is unable to breathe¹²¹.

Regarding the practice of waterboarding the director of the Bellevue Hospital Center/New York University Program for Survivors of Torture Allen S. Keller emphasized at the confirmation hearing, that when using this technique there was a serious risk of death from drowning and also a high risk of heart attack or of causing the damage to the lungs.¹²²

On November 8, 2007 Malcolm W. Nance a former US Navy survival instructor and a counter-terrorism specialist, who taught at the Navy's abovementioned Survival, Evasion, Resistance and Escape (SERE) program testified to members of Congress that the method constituted torture and was harsh to the point to be useless, as the detainees would say anything to stop it.

On one occasion he has voluntarily subjected himself to this technique, on which he commented afterwards:

“In my case, the technique was so fast and so professional that I didn’t know what was happening until the water entered my nose and throat. It then pushes down into the trachea and starts the process of respiratory degradation. It is an overwhelming experience

¹²¹ Former Judge Advocate General Evan Wallach quoted in “*Torturous Debate Over Waterboarding*” by E. Alterman, G. Zornick The Huffington Post, November 8, 2007 available at http://www.huffingtonpost.com/eric-alterman/torturous-debate-over-wat_b_71782.html accessed 11/10/2009

¹²² Allen S. Keller, director of the Bellevue Hospital Center/New York University Program for Survivors of Torture quoted in quoted in “*Torturous Debate Over Waterboarding*” by E. Alterman, G. Zornick The Huffington Post, November 8, 2007 available at http://www.huffingtonpost.com/eric-alterman/torturous-debate-over-wat_b_71782.html accessed 11/10/2009

*that induces horror and triggers frantic survival instincts. As the event unfolded, I was fully conscious of what was happening: I was being tortured*¹²³

Despite of its harshness or perhaps for the reason of it, the method received a warm welcome in the detention facilities. The C.I.A interrogators have used it extensively. The reports indicate that in one separate scenario waterboarding was used 266 times on two detainees presumed to be members of Al-Queda.¹²⁴ In the single month of the August 2002 according to Justice Department legal memorandum waterboarding was put to use 83 times against Abu Zubaydah, but even this shocking number bleaks with the comparison to Khalid Shaikh Mohammed case, who has been tortured with waterboarding exactly 183 times¹²⁵.

The details provided above are no doubt gruesome, but they do not portray the actual chaos and the gruesome details of what was going on in the U.S. Interrogation facilities. Unfortunately there is no other way to portray what happens when one unleashes torture. The reader has to excuse of the graphic details provided in the next chapter.

4.3.5 Through the Looking Glass... is the Reality of Torture

Abuses at the U.S. detention facilities were rampant. The torturers were overstepping the “Torture Lite” guidelines on regular bases. The instances of withholding the pain medications¹²⁶, putting lit cigarettes in detainee’s ears and daily beatings were a regular

¹²³ Malcolm W. Nance a former US Navy survival instructor and a counter-terrorism specialist quoted by J.White in “*Waterboarding Is Torture*” The Washington Post Friday, November 9, 2007 available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/08/AR2007110802150.html> accessed 11/10/2009

¹²⁴ Scot Shane “*Waterboarding Used 266 Times on 2 Suspects*” The NY Times April 19, 2009 Available at <http://www.nytimes.com/2009/04/20/world/20detain.html> Accessed 10/11/2009

¹²⁵ Ibid

¹²⁶ D. Jehl & D. Johnston, “*C.I.A. Expands Its Inquiry Into Interrogation Tactics*”, N.Y. Times, Aug. 29, 2004, Available at <http://www.nytimes.com/2004/08/29/world/cia-expands-its-inquiry-into-interrogation-tactics.html>

occurrence. On one occasion the FBI agent who was present at one of the interrogations wrote:

“The A/C had been turned off, making the temperature in the unventilated room probably well over 100 degrees. The detainee was almost unconscious on the floor, with a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night¹²⁷”.

In some cases the interrogators have shown remarkable “creativity” in designing new ways of torture. For example the interrogation log released under the FOI Act of the detainee number 063,¹²⁸ Mohammed al-Qahtani, the alleged twentieth hijacker, describes in detail the daily horrors of detention at Guantanamo base from which it is evident that behind the sadistic acts committed by the interrogators stood more than just the desire to extract information from the detainees:

11 December 2002

“Detainee was reminded that no one loved, cared or remembered him. He was reminded that he was less than human and that animals had more freedom and love than he does. He was taken outside to see a family of banana rats. The banana rats were moving around freely, playing, eating, showing concern for one another. Detainee was compared to the family of banana rats and reinforced that they had more love, freedom, and concern than he had. Detainee began to cry during this comparison”.

Accessed 11/10/2009; D. Priest, “CIA Puts Harsh Tactics on Hold”, Wash. Post, June 27, 2004, Available at <http://www.washingtonpost.com/wp-dyn/articles/A8534-2004Jun26.html> accessed 11/10/2009; S.Schmidt, “Disclosure of Authorized In-terrogation Tactics Urged”, Wash. Post, July 3, 2004, Available at <http://www.washingtonpost.com/wp-dyn/articles/A24875-2004Jul2.html> accessed 11/10/2009

¹²⁷ N.A. Lewis and D. Johnston, “New F.B.I. Files Describe Abuse Of Iraq Inmates”, N.Y. Times, Dec. 21, 2004, Available at <http://www.nytimes.com/2004/12/21/politics/21abuse.html> accessed 11/10/2009

¹²⁸ The freedom of information legislation act of the United States. Signed into law on September 6th, 1966

20 December 2002

“Detainee offered water—refused. Corpsman changed ankle bandages to prevent chafing. Interrogator began by reminding the detainee about the lessons in respect and how the detainee had disrespected the interrogators. Told detainee that a dog is held in higher esteem because dogs know right from wrong and know to protect innocent people from bad people. Began teaching the detainee lessons such as stay, come, and bark to elevate his social status up to that of a dog. Detainee became very agitated.”¹²⁹”

The FBI personnel that was stationed in Guantanamo base has numerous times appealed to the decisions of the interrogators. One such email released under the FOIA states:

“On a couple of occasions, I entered interview rooms to find a detainee chained hand and foot in a fetal position to the floor, with no chair, food, or water. Most times they had urinated and defecated on themselves and had been left there for 18–24 hours or more. On one occasion, the air conditioning had been turned down so far and the temperature was so cold in the room, that the barefooted detainee was shaking with cold. When I asked the MP’s what was going on, I was told that interrogators from the day prior had ordered this treatment, and the detainee was not to be moved.”¹³⁰

The other email states:

“The interrogator then shouted “down” and the two detainee escorts pushed the detainee to the floor. When I say pushed to the floor I mean they pushed in the back of the detainee’s knees with their knees, taking the detainee to his knees. Then holding the detainee by his upper arms they slammed his upper body to the floor. This series of motions was all

¹²⁹ A. Zagorin and M. Duffy, “Inside the Interrogation of Detainee 063,” Time, June 20, 2005. The full interrogation log for the period November 23, 2002 to January 11, 2003 Available at <http://www.time.com/time/2006/log/log.pdf> accessed September 4, 2009.

¹³⁰ Supra (Note 61) A-154: FBI e-mail describing interrogations at Guantánamo, August 2, 2004.

*done in one swift movement, so that the detainee went from a standing position to a prone position all at once. The detainee was slammed to the floor in this manner seven or eight times. The detainee was being slammed to the floor so hard that I was concerned for his safety. The force with which the detainee hit the floor was, in my estimation, adequate to cause severe internal injury”*¹³¹

The incidences of torture were in some cases so gruesome that it resulted in fatalities. Detainee number 28, Manadel al-Jamadi, notoriously dubbed by the military personnel as the “Ice Man,” the alleged supplier of the explosives involved in Bagdad bombings, has died in custody from “blunt force injuries to the torso complicated by compromised respiration.”¹³² The death came shortly after his arrival, apparently in shower room. The body was left packed with ice in showers overnight. The following morning it was removed via stretcher, but during the night the corpse was discovered by two members of the Military Police, namely Corporal Charles Graner and Specialist Sabrina Harman, who did not miss the “opportunity” to photograph themselves with the mutilated corpse.¹³³ This fact alone tells tales about the conduct and the degradation of the mental state of the interrogators of the facility who considered the detainees as mere vegetables, particularly “carrots,” which they were called for their orange jumpsuits.¹³⁴ The instances of death of the detainees were not limited to this case alone.

In December of 2002 the interrogators at Bagram Collection Point in Afghanistan killed one of the prisoners by attaching him by his wrists to the wire ceiling above his cell and

¹³¹ Supra (Note 61) A-155: FBI memorandum describing interrogations at Guantánamo, July 13, 2004.

¹³² MG G.R. Fay, LTG A. R. Jones Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade, “Abu Ghraib Files,” chap. 5. “*Torture Papers*”, pp. 1056–1058 Cambridge University Press 2005 ISBN-10: 0521853249; ISBN-13: 978-0521853248;

¹³³ Ibid

¹³⁴ R. Gordon “*Torture Comes Out of the Closet*”, page 453 Peace Review: A Journal of Social Justice, 18:447–454 ISSN 1040-2659

beating his legs repeatedly.¹³⁵ The investigation concluded that the death resulted from multiple injuries to head neck arms and leg cause by a blunt object.¹³⁶

Six days later the interrogations resulted in death of another prisoner, the autopsy's result was the same as in the previous case.¹³⁷ Notably, this time one of the interrogators believed that the person was innocent.¹³⁸

The same fate was shared by Abed Hamed Mowhoush, whose death resulted from the application of the "sleeping bag technique" and a "stress position."¹³⁹ The documents release under the Freedom of Information Act describe one "substantiated" incident in which interrogators in Al-Mahmudiya, Iraq, electrocuted one prisoner and set another's hands on fire.¹⁴⁰ In all, eight people have been tortured to death in U.S custody¹⁴¹.

Considering all these atrocities, in the environment where each individual action was authorized from the top and strict subordination standards of the military such mode of conduct clearly does not fit. The question of how the military personnel at Abu-Ghraib came to use these methods is one that, even after more than three years after the publication of the photographs, has still not been answered.¹⁴² Uncovering the real reason behind the Human Rights violations in the detention facilities is specifically the purpose of the next chapter.

¹³⁵ T. Golden, "In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths," New York Times, May 20, 2005. Available at <http://www.nytimes.com/2005/05/20/international/asia/20abuse.html?pagewanted=all> Accessed on 11/10/2009

¹³⁶ Supra (Note 61) A-185–186: Final report of postmortem examination, December 8, 2002.

¹³⁷ Supra (Note 61) A-187: Excerpt of autopsy report, February 25, 2003.

¹³⁸ T. Golden, "In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths," New York Times, May 20, 2005. available at <http://www.nytimes.com/2005/05/20/international/asia/20abuse.html?pagewanted=all> Accessed on 11/10/2009

¹³⁹ J. Jaffer, A. Singh "Administration of Torture. A Documentary Record from Washington to Abu Ghraib and Beyond" p. 27 Columbia University Press (September 18, 2007) ISBN-10: 0231140525 ISBN-13: 978-0231140522

¹⁴⁰ Supra (Note 61) A-273–274: USMC alleged detainee abuse cases, June 16, 2004.

¹⁴¹ A. Danchev "Like a Dog!": Humiliation and Shame in the War on Terror" p.274. Available at <http://www.polisci.upenn.edu/theoryworkshops/danchevpaper.doc> Accessed on 11/10/2009

¹⁴² Jameel Jaffer and Amrit Singh "Administration of Torture. A Documentary Record from Washington to Abu Ghraib and Beyond" p.19 Columbia University Press (September 18, 2007) ISBN-10: 0231140525 ISBN-13: 978-0231140522

4.3.6. The Reason Behind

In late 2002 Al-Qahtani was stripped naked, paraded in front of women interrogators, was made to wear women's underwear on his head, led around on a leash, and forced to perform a series of "dog tricks."¹⁴³ As surprising as it might seem during the whole ordeal the interrogators believed that they were acting within existing guidance.¹⁴⁴

When the boundary to the forbidden turns invisible it is being exploited to the utmost and yet "how does one allow it, yet still control it?"¹⁴⁵ Every army has its share of people who tend to be more cruel and abusive than others and loosening the restrictions risks the dehumanization of not just the tortured, but the torturers. Martin Luther King Jr. frequently said that the greatest victims of segregation were the white people, whose souls were deformed by their own hatred.¹⁴⁶

What in theory can be the carefully calibrated interrogation technique may become outright sadistic torture in the real world scenario. Not many can realistically make a distinction between permitted "grabbing, poking, and pushing" and the banned "punching slapping and kicking." One cannot hope that people involved in such borderline actions will exercise perfect self control and restraint.

In fact it turns out to be just the opposite, quite surprising even for the Defense Secretary Donald H. Rumsfeld. When asked by Lt. Gen. Schmidt about the permitted methods, he reiterated "My God, you [want to] know did I authorize putting a bra and

¹⁴³ Supra (Note 61) A-116: Schmidt-Furlow Report.

¹⁴⁴ Supra (Note 61) A-117: Schmidt-Furlow Report.

¹⁴⁵ M. Bowden, *The Dark Art of Interrogation* p.74 Atlantic Monthly (10727825); Oct2003, Vol. 292 Issue 3, p51-76, ISSN:10727825

¹⁴⁶ Martin Luther King Jr, C. Carson The Autobiography of Martin Luther King, Jr. p.332 (Grand Central Publishing January 1, 2001) ISBN-10: 0446676500 ISBN-13: 978-0446676502

underwear on this guy's head?¹⁴⁷ Lt. Gen. Schmidt answers: "No, you didn't say it Sir. But just under that broad technique that was the application. Well, where in there was the throttle?"¹⁴⁸,

The files obtained by the New York Times describing the interrogation policies indicate the failure of the command structure to teach the interrogators what actions were permissible or prohibited regarding the treatment of the detainees.¹⁴⁹ The documents show that despite numerous requests for clarification from the Guantanamo Staff Judge Advocate regarding the interrogation practices, no training was offered.¹⁵⁰

The interrogators were simply left without guidance and under pressure to produce the evidence and use even more aggressive measures.¹⁵¹ But the problem is that the decision maker and the torturer are not the same person. In fact the decision about the ticking bomb scenario is made a lot higher in the chain of command. It would be gullible to presuppose that the interrogators inhabit a world of loving kindness or equal concern and respect for all human beings. Without the clear guidelines the tyranny is innate to the interrogators' job with nothing to hold it under control.¹⁵²

One example discussed in Schlesinger Commission report¹⁵³ fits the Guantanamo base example perfectly. The experiment which took place in Stanford prison became famous primarily for its outcome.

¹⁴⁷ J. Jaffer, A. Singh "Administration of Torture. A Documentary Record from Washington to Abu Ghraib and Beyond" p.9 Columbia University Press (September 18, 2007) ISBN-10: 0231140525 ISBN-13: 978-0231140522 Appendix Document A-18: Memorandum, December 17, 2002.

¹⁴⁸ Supra (Note 61) A-52: Sworn statement of Lt. Gen. Randall Schmidt, August 24, 2005.

¹⁴⁹ Tim Golden, "Army Faltered in Investigating Detainee Abuse", N.Y. Times, May 22, 2005, available at <http://www.nytimes.com/2005/05/22/international/asia/22abuse.html> accessed 11/10/2009; Tim Golden, "In U.S. Report. Brutal Details of 2 Afghan Inmates' Deaths", N.Y. Times, May 20, 2005, available at <http://www.nytimes.com/2005/05/20/international/asia/20abuse.html> accessed 11/10/2009.

¹⁵⁰ Ibid

¹⁵¹ Supra (Note 61) A-196: Sworn statement of Capt. Carolyn Wood, May 21, 2004.

¹⁵² D. Luban "Liberalism, Torture and the Ticking Bomb" p.1447 Available at <http://www.virginialawreview.org/content/pdfs/91/1425.pdf> Accessed 11/7/2009

¹⁵³ Final Report of the Independent Panel To Review DOD Detention Operations (Aug. 2004), in *Torture Papers*, at 908, 970–71 Cambridge University Press 2005 ISBN-10: 0521853249 ISBN-13: 978-0521853248

In the experiment the two groups of males were instructed to simulate the prison guards and inmates in a mock prison. Interestingly in a few days the persons involved began acting as they indeed were the actual prisoners, being depressed and enraged.

As for the second group who at first were totally aware that their power was given to them in arbitrary manner began have changed their conduct dramatically over the few days. Subsequently the second group started ignoring the arbitrary nature of their guardsmanship. Soon after the first abuses began to manifest themselves and over time they became more severe and frequent.¹⁵⁴

It took only five days before a guard who initially described himself as a pacifist to resort to shoving greasy sausages down the throat of a prisoner who refused to eat.¹⁵⁵

In less than a week the guards were placing bags over the prisoner's heads making them strip and sexually humiliating them in ways reminiscent of the Abu Graib.¹⁵⁶ Only seven days into the experiment the organizers had to halt the project because of the rampant and severe abuses of the prisoners. The persons involved in this experiment told later the use of the power was self-aggrandizing and self-perpetuating.

This example demonstrates the corrupt nature of violence is that it generates to even more violence over time.

¹⁵⁴ C. Haney et al., "*Interpersonal Dynamics of a Simulated Prison*", 1 Int'l. J. Criminology & Penology 69, 94 (1973) available at <http://www.angelfire.com/or/sociologyshop/spe.html> accessed 11/10/2009; see also P. G. Zimbardo et al., "*The Mind is a Formidable Jailer: A Pirandellian Prison*", N.Y. Times Mag., Apr. 8, 1973, at 40-42 and the remarkable internet slide-show of the experiment available at <http://www.prisonexp.org/pdf/pirandellian.pdf> accessed 10/11/2009, P.G. Zimbardo, Stanford Prison Experiment: A Simulation Study of the Psychology of Imprisonment Conducted at Stanford University (1999).

¹⁵⁵ C.Haney & P.G. Zimbardo, "*The Socialization into Criminality: On Becoming a Prisoner and a Guard*, in Law, Justice, and the Individual in Society: Psychological and Legal Issues p.198, 209 (June Louin Tapp & Felice J. Levine eds., 1977).

¹⁵⁶ J. Schwartz, "*Simulated Prison in '71 Showed a Fine Line Between 'Normal' and 'Monster,'*" N.Y. Times, May 6, 2004, Available at <http://www.nytimes.com/2004/05/06/international/middleeast/06PSYC.html> Accessed 11/10/2009; Zimbardo, et al., "*The Mind is a Formidable Jailer: A Pirandellian Prison*", N.Y. Times Mag., Apr. 8, 1973, at slides 8, 18, 21, 28, 33. Available at <http://www.prisonexp.org/pdf/pirandellian.pdf> Accessed 10/11/2009

Mark Osiel writes about the Argentinean military in the Dirty war, that many of the interrogators initially had doubts about using their methods until they were assured by the priests that they were going the “right thing,”¹⁵⁷ but by the end of the war hardened young officers were placing bets about who would be most proficient in their skill.¹⁵⁸ In case of torture usually the escalation is the rule not the aberration.¹⁵⁹

To counter this phenomenon an American lawyer Alan Dershowitz has suggested the system of torture warrants.¹⁶⁰ The next chapter analyzes the proposal and demonstrates the argument of torture warrants suffers from the same human factors that accompany the use of violence and torture described in previous chapter.

4. 3.7 Countering the Spread of Torture: Torture warrants

The theory of the “Ticking Bomb” seems even more attractive when it is subsidized by the suggestion to authorize torture by the torture warrants.

The proponents of using torture recognize the possibility of the slippery-slope with using torture as an interrogation method.¹⁶¹ It is argued¹⁶² that since there is supposedly no way to avoid torture,^{163[164]} it should be regulated in as detailed way as possible.

¹⁵⁷ M. J. Osiel, *Mass Atrocity, Ordinary Evil, and Hannah Arendt: Criminal Con-sciousness in Argentina’s Dirty War* p. 120–21 New Haven: Yale University Press, 2001, VIII, (2002)

¹⁵⁸ J.Simpson, J.Bennett, *The Disappeared and the Mothers of the Plaza: The Story of the 11,000 Argentines Who Vanished*. p. 109 (St. Martins Press December 1985) ISBN-10: 0312212291 ISBN-13: 978-0312212292

¹⁵⁹ M. Ignatieff, “*The Torture Wars*” p.42 New Republic, (Apr. 22, 2002, at 42)

¹⁶⁰ A.M. Dershowitz, “*Tortured reasoning*” p. 131. S. Levinson (ed.), *Torture: A Collection* (Oxford: Oxford University Press 2004); Also A.M. Dershowitz, “*Why Terrorism Works: Understanding the Threats, Responding to the Challenge*” (Haven, CT: Yale University Press, 2002)

¹⁶¹ Ibid

¹⁶² Ibid

As an exception, with the underlying reasoning, the regulation of the field by the permissive law is better than being left uncontrolled or under the supervision of the executive branch or the military involved in committing such acts.¹⁶⁵ The decision making part is left to the judiciary,¹⁶⁶ which authorizes the practice by issuing the “Torture Warrants.”¹⁶⁷

The argument seems interesting because it essentially claims to be the counter to the expansion of the practice of torture, but there are lots of reasons for doubt.

The main problem of the proposition of the “Torture Warrant” concept is that it is not devoid of the same issues that accompany the “Ticking Bomb” scenario in general. As in the case of the former it is expected that interrogators will refer to this sinful shortcut more and more over time.¹⁶⁸ There is a notion of willingness of officers to lie and serve what they think is a public good.¹⁶⁹

The current practice is that the officials who provide the judges with the information are employing measures not always being in coherence with the word of law. It is done to persuade the court by trying to aggregate the actual cases in order to reach the guilty verdict. It is surely to be expected that the people who will be in charge of the highest profile cases will do the same only with possibly one exception of making the cases look even

¹⁶³ O. Gross, *The Prohibition on Torture and the Limits of the Law*, p.238 in S. Levinson (ed.), *Torture: A Collection* (Oxford: Oxford University Press 2004).

¹⁶⁴ H. Shue, *Torture*, p.17. S. Levinson (ed.), *Torture: A Collection* (Oxford: Oxford University Press 2004)

¹⁶⁵ R.A. Posner, *The Best Offense* p.28, Vol. 227 Issue: 10 (September 2nd, 2002)

¹⁶⁶ A. Dershowitz, *Tortured reasoning* S. Levinson (ed.), *Torture: A Collection* (Oxford: Oxford University Press 2004) op. cit., pp. 257–280, at p. 257; A.M. Dershowitz, *Why Terrorism Works: Understanding the Threats, Responding to the Challenge* p. 131. (New Haven, CT: Yale University Press, 2002)

¹⁶⁷ Ibid

¹⁶⁸ M. Ramsay, *Can the Torture of Terrorist Suspect be Justified*. p. 113 University of Leeds, UK The International Journal of Human Rights Vol. 10, Issue: 2, 103–119, (June 2006)

¹⁶⁹ S.F. Kreimer, “*Too Close to the Rack and Screw: Constitutional Constraints on Torture in the War on Terror*”, University of Pennsylvania Journal of Constitutional Law, Volume 6 (2003) p.319 (citing Alan M. Dershowitz, “*Reasonable Doubts*” p.60-61 (1996); Available at <http://www.law.upenn.edu/journals/conlaw/articles/volume6/issue2/Kreimer6U.Pa.J.Const.L.278%282003%29.pdf> Accessed on 11/10/2009

grimmer than regular for the accused.¹⁷⁰ Moreover, the judges can come under public pressure to issue such warrants for the reasons of public safety,¹⁷¹ the courts may turn out to be reluctant to contradict to the executive branch as it happened for example in the cases of Algerian prisoners.¹⁷²

The argument that the use of the torture warrants will also raise the accountability of interrogators is also doubtful. The reason behind this is the policy within the army, the sheer notion of the leniency and military impunity that traditionally surrounds such institutions. Given the current situation, despite the rising number of accuracies of acts of torture only a small fraction of the people involved in such action have been actually brought to justice and even in those cases they well rather low ranking officials 70% of which did not even get sentenced.¹⁷³

In the end the “Torture Warrant” argument runs counter to the paradigm under which it is offered. The judicial decision, given a proper review, takes time and it is exactly what the enforcement agencies supposedly do not have in hypothetical “Ticking Bomb” situations.

¹⁷⁰ S.F. Kreimer, “*Too Close to the Rack and Screw: Constitutional Constraints on Torture in the War on Terror*”, pp.146–147 University of Pennsylvania Journal of Constitutional Law, Vol. 6 (2003) Available at <http://www.law.upenn.edu/journals/conlaw/articles/volume6/issue2/Kreimer6U.Pa.J.Const.L.278%282003%29.pdf> Accessed on 11/10/2009 ; E. Scarry, *Five Errors in the Reasoning of Alan Dershowitz* p.286 in S. Levinson (ed.), *Torture: A Collection* (Oxford: Oxford University Press 2004).

¹⁷¹ S.F. Kreimer, “*Too Close to the Rack and Screw: Constitutional Constraints on Torture in the War on Terror*”, University of Pennsylvania Journal of Constitutional Law, Volume 6 (2003) p. 320 Available at <http://www.law.upenn.edu/journals/conlaw/articles/volume6/issue2/Kreimer6U.Pa.J.Const.L.278%282003%29.pdf> Accessed on 11/10/2009

¹⁷² P. Vidal-Naquet, *Torture: cancer of democracy* p. 120–134. (Harmondsworth: Penguin, 1963) ASIN: B0000CLOMS

¹⁷³ Amnesty International Report, *Guantanamo and Beyond?* AMR 5/1063/2005, 13 May 2005, available at <http://www.web/amnesty/org/library/Index/ENGAMR510632002>, Appendix 3.

The torture that took place in Guantanamo and Abu-Graib bases was not the coincidence, the Bush administration has downplayed what has happened at the interrogation facilities, by stating that the atrocities committed in Guantanamo and Abu Graib prisons were committed by a “few bad apples,”¹⁷⁴ but for all I know that is not true. Abu Ghraib is not a few bad apples—it is the apple tree.¹⁷⁵ The practice of routinely pushing and pressuring the investigators for swift extraction of the intelligence, the lack of the clear guidelines of what constitutes torture and the inherent intricacies of the nature of the human bear the responsibility.

¹⁷⁴ R. Evans “*The Ethics of Torture*”, p.55 “*Torture: Does It Make Us Safer? Is It Ever OK? A Human Rights Perspective*”. Edited by Kenneth Roth and Mindy Worden. New York: The New Press, 2005. 201 pp. Available at <http://www.du.edu/korbel/hrhw/volumes/2007/evans-2007.pdf> accessed 11/10/2009

¹⁷⁵ D. Luban “*Liberalism Torture and the Ticking Bomb*” p. 1452 *Virginia Law Review* Vol. 91:1425 Available at <http://www.virginialawreview.org/content/pdfs/91/1425.pdf> Accessed on 11/10/2009

Conclusion

The main goal of this thesis was to demonstrate the deeply rooted flaws of the “Ticking Bomb” argument, which effectively render the notion of the utilitarian argument pointless. Despite of the robust nature of the underlying theoretical reasoning of the “Ticking Bomb” scenario it is not applicable to the interrogation practice.

There is a difference between ignoring the truly catastrophic case and focusing our attention elsewhere designing general rules and policies. The argument of the “Ticking Bomb” is provided precisely for the reason to deter the Human Rights advocate from such reasoning and fortunately it is flawed in many ways.

Being based on the assumptions that simply can’t exist in the real world, it demonstrates its inapplicability as a policy forming tool in the intelligence gathering practice. It ignores the notion of torture as an ineffective tool for gaining the credible intelligence, which results either in false confessions or in the outright pointless torture, by assuming that the torture can be isolated by torture warrants the ticking bomb argument contradicts to the basic tenants of the human behavior of exercising violence as I have demonstrated by the example of comparing the enacted policy of “enhanced interrogation” to the actual practice at the U.S. interrogation facilities.

The violence by its definition cannot be isolated to a few cases as it is claimed by the proponents of the “Ticking Bomb” scenario as it ignores the fact that the use of violence is a downright spiral and if allowed to exist it tends to spread and aggravate itself to form the horrific pictures of Abu Graib, Guantanamo and many others.

Despite the flaws of the “Ticking Bomb” scenario I think that for a Human Rights oriented person it actually may be of a good value in that it profoundly demonstrates the limits of the values and Human Rights principles that we so dearly hold on to. By its very divergence from the real world, it provides us with the knowledge that we have not reached its imagined limits in reality. Given a proper thought “Ticking Bomb” scenario is not to weaken should straighten the commitment in protection of the Human Rights principles.

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