NEWSLETTER

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PREVENTING TORTURE
WITHIN THE FIGHT AGAINST TERRORISM

Framing the "ticking bomb" issue

Dear reader,

This special thematic edition of the newsletter focuses on a topic that is hotly debated in the media these days: the so-called "ticking bomb" scenario. While this hypothetical scenario takes many different forms, the basic storyline goes something like this: a suspected terrorist has been detained who possesses information regarding the whereabouts of an explosive device set to go off very soon and kill hundreds or thousands of people. The central argument revolves around the following question: should officials be permitted to torture the alleged terrorist in an effort to obtain information that will allow them to dismantle the ticking bomb and thereby save many innocent lives? Ignoring international laws and conventions that declare all persons deserve to be free from torture and inhumane treatment, the scenario suggests that torture can be used within a "greater good" approach aimed at protecting the lives of others.

The arguments supporting torture in ticking bomb scenarios are not new. Several centuries ago, utilitarian philosophers proposed that torture could be justified if it benefited more people than it harmed. In our own times, academics, lawyers and even the general public have begun to rethink the absolute prohibition against torture following devastating terrorist attacks in major metropolitan areas. One of the more outspoken voices on this issue is Harvard law professor Alan Dershowitz. Dershowitz has drawn criticism for stating that though he opposes torture from a moral standpoint, a system of "torture warrants" should exist to legally permit torture in extreme cases where the potential for loss of life is high.

We are pleased to have contributors to this special issue analyse these arguments from many different angles. Philosopher Catherine McDonald writes about the moral theory underlining the ticking bomb scenario, and some of the flawed assumptions that come with it. Dr. Jonathan David Farley, a mathematician, draws on the work of Soviet psychologist Vladimir Lefebvre to illustrate how mathematical models can be used to predict the consequences of permitting torture in exceptional cases.

Two contributors turn their eye on the military: Jessica Wolfendale, an expert on military ethics, focuses her attention not on the potential victims but on the torturers themselves, asking how a government, military or security force would train those to carry out the torture in these exceptional cases. Captain Lawrence Rockwood, who drew attention to U.S. indifference to human rights violations in Haiti when he was serving in the military there, looks at how current practices undermine the prohibition against torture in U.S. military doctrine.

Last but certainly not least, Louis Frankenthaler from the Public Committee against Torture in Israel describes how Israel's acquiescence to the ticking bomb excuse and the necessity defence has led to the institutionalisation of torture and negatively impacted Israeli society.

The newsletter closes with information about a brand new report on this issue – prepared by the Association for the Prevention of Torture (APT) and based on consultations with a number of anti-torture experts and organisations (including the IRCT) – and a bibliography of recently authored articles and books on the ticking bomb scenario. We hope that you enjoy this thematic issue, and encourage your comments and letters.

— The Editors

Inside this issue:

Defusing the ticking bomb

by Catherine McDonald

Briefly, the "ticking bomb" scenario asks us to consider a hypothetical case where a bomb has been planted somewhere where it will kill many people. We have the bomber in custody but he refuses to reveal its location. We have no other way of locating the bomb or safely removing people from its vicinity. First year philosophy students are then asked: "Are we morally permitted to torture the bomber to discover the bomb's whereabouts?"

Unfortunately, this scenario has recently become popular as a justification for torture. However, the notion that torture is justified in such a case is simply false. Pro-torture proponents use a moral theory that they don't fully understand. They rely instead on an appeal to the emotional prejudices of their readership and are in fact using a disguised form of special pleading.

Pro-torture uses of this argument are Consequentialist. That is, they justify torture under the principle that we may do whatever produces the best consequences. "Best" is understood as whatever produces the greatest amount of utility or satisfies the greatest number of interests.

The argument goes like this: torture is an efficient means of gaining information. The loss of benefit to the individual tortured is less than the loss of benefit to those who will die if we do not torture. Therefore, in circumstances where lives are at stake and we have no other means at our disposal, we may torture a person, if doing so produces information that would save lives.

The details of the scenario are contrived. We know the person we have in custody is the bomber and this person knows where the bomb is located. In reality this is a conceit. Even with the best intentions, we cannot avoid error. Sometimes innocent people would be tortured. But I am interested in the substantive argument, so I leave the problem of torturing the innocent to one side.

Pro-torture arguments only work, if in *fact* torture is an effective means of gaining information and if in *fact* gaining information under torture does produce a net benefit.

Contrary to "intuition", people do not always confess under torture. Indeed, the greater a person's ideological commitments, the less likely they are to confess. The Elizabethan Catholic Alexander Briant was tortured on the rack for the location of a printing press used for publishing "treasonous" material. Although ultimately executed, he didn't confess.

Actual empirical analysis of torture usage shows that the innocent are more likely to confess than the guilty, that the pool of potential torture victims tends to expand, and that torture is an effective form of political oppression. But as one researcher noted, as an interrogation technique, torture is less effective "than flipping coins or shooting randomly into crowds". Any "intuitions" we may have to the contrary are simply misguided. On the evidence, the first premise of the argument is false.

> If we measured only immediate interests when determining "best" outcomes, we would be justified in many actions otherwise considered harmful or immoral.
>
> —Catherine McDonald

Leaving aside the false premise, if we accept for the sake of argument that torture does reliably produce truthful information, even so, the argument will only work if in *fact* torture generates a net benefit.

Here pro-torture arguments rely upon what is known as an "immediate interest" account of benefit. That is, when weighing up net benefits against losses, they consider only the immediate participants of an action and only the immediate interests of those participants. In the case of the ticking bomb scenario, we are invited to simply count up the number of lives on each side of the equation. But as an interpretation of the Consequentialist principle, the "immediate interest" account is implausible.

If we measured only immediate interests when determining "best" outcomes, we would be justified in many actions otherwise considered harmful or immoral. For instance, we would be justified in not paying taxes. The immediate benefit to ourselves outweighs the immediate loss to tax collectors. We would often be justified in framing the innocent, gains to numerous accusers outweighing the loss to the innocent individual. We would also be justified in killing healthy individuals to harvest their organs. The immediate loss to the individual who is killed is outweighed by the immediate gains to a greater number of individuals who could be saved with the organs. In short, pro-torture proponents wield a principle they don't really understand.

Consequentialism is only plausible when it operates over *foreseeable* consequences. In the case of the ticking bomb

there are many foreseeable consequences that arise from torture. We should in fact measure (a) the evil caused to the bomb victims, the grief caused to their relatives and increases in fear against (b) the corruption of key social institutions (including the practice of law and medicine), the ruination of torturers, the necessity of torture training, the likelihood that torture will generate still further bombings and the number of lives likely to be lost and adversely affected, the corruption of international laws and treaties, the evil of mistakenly torturing people who are innocent, increases in fear in the civilian population... and so on and so on.

Under plausible interpretations of this moral theory, torture could *never* generate a net benefit in the ticking bomb case. It simply generates too many adverse consequences that affect the interests of too many people. The second premise in the argument is also false and we are entitled to reject the argument entirely.

Why then would anyone take such an argument seriously?

One curious feature in all variations of this argument is that they adopt a perspective that is contrived to make it psychologically easier for us to accept the notion of "justifiable" torture.

Torture not only dehumanizes its victims but dehumanizing the victim makes torturing them psychologically easier. The less we recognise the victims as human, the weaker are the normal constraints of empathy and morality.

Some pro-torture arguments explicitly dehumanize the potential victim. One describes the victim as "kneeling on his hands and knees in his own urine" and "sneering and foaming at the mouth".[1] Often however, pro-torture arguments dehumanize the potential victims by simply describing him (and it is usually a "he") as a "terrorist".

That the potential victim is usually a "he" is significant. We are less inclined to empathise with males than females. The male pronoun also allows the "us" to avoid facing one of the implications of this argument. The favoured method of torturing females in the real world is rape. If the pro-torture argument actually worked, rape would seem to be justified if it produced information.

But the term "terrorist" is the most loaded term. Pro-torture arguments spend an inordinate amount of space defining torture in order to persuade us that torture comes in degrees. None, as far as I am aware, defines the term terrorist. They seem to assume that anyone who bombs civilians is a terrorist. But if this is the case, we would be obliged to concede that members of the French Resistance were terrorists.

It is easy to *imagine* torturing "terrorists", if the "terrorist" we have in mind is *our* enemy. It is less easy to imagine that the Gestapo were justified in torturing members of the French Resistance. Yet this is the logical implication of pro-torture arguments. So long as we think of ourselves as being incapable of evil, pro-torture arguments are merely forms of special pleading.

[1] See, for example, "Torture" by Seumas Miller in the Stanford Encyclopedia of Philosophy: http://plato.stanford.edu/entries/torture/

Catherine McDonald is an analytic philosopher based in Melbourne, Australia. This article is based on a lecture given to the Rationalist Society of Australia in March 2007, and later published in Australian Rationalist.

The professor and the time bomb

Former Soviet psychologist spars with Harvard Law Professor Alan Dershowitz on torture

by Dr Jonathan David Farley

You burst into the room. Sitting on a chair, blindfolded, his hands tied behind his back, is your prisoner. The room is dark, except for a lonely naked bulb hanging from the ceiling. He is sweating. He is afraid.

"Tell me where it is!" you scream. "Now!" You know there is little time left. Somewhere in your city, a time bomb ticks. Whether it spits sarin into the air, uranium into the water, or atomic fire into the heavens, you do not know.

He does. But he is not talking. Involuntarily, you raise your hand as if to strike. What you are about to do violates the law and your conscience. And yet...

Harvard law professor Alan Dershowitz has said that torture should be legalised. But mathematical psychologist Vladimir Lefebvre says otherwise. He has co-authored an article in a recent issue of the journal *Studies in Conflict and Terrorism* that suggests that the consequences of Dershowitz's proposal could be disastrous for the West. Lieutenant Colonel Timothy Thomas of the US Army's Foreign Military Studies Office, in his 2004 article from the *Journal of Slavic Military Studies*, calls Lefebvre one of the "giants" of "reflexive control", which is "one of [the Soviet Union's] most intriguing methods for managing information and getting people (or an opponent) to perform a certain action..."

Few citizens will ever be asked to torture. But, indirectly, all of us have to

The professor and the time bomb (cont.)

make a choice: to support, as citizens, those policymakers who back torture, or those who seek its prohibition.

The decision of an individual to support, or reject, torture seems at first to be a purely moral question. But what would be the long-term consequences to society if we were to make this radical break with the past? One cannot do experiments with societies, or predict the future, but, it turns out, one can attempt to address this issue using the cold hard tools of mathematics and logic.

> If Americans begin to accept the use of torture, America might turn into a society of individuals in conflict.
>
> —Jonathan David Farley

This story begins in 1963. America and the Soviet Union are on the perpetual brink of war, balanced like two sides of an equation. On the American side are "game theorists" like Thomas Schelling, recently awarded the Nobel Prize for his work on the strategy of conflict. On the Russian side there is Vladimir Lefebvre.

Just as mathematics could be used to describe logical reasoning, Lefebvre saw that mathematics could be used to describe *ethical* reasoning. If something was good—for instance, "synagogue", "democracy", "prosperity", "kindness"—it had value 1. If something was evil—"earthquake", "famine", "military defeat", "murder"—it had value 0. But rarely were ethical situations so simple. For instance, "killing" is bad (0) but protecting one's country is good (1)—so what is war? 1 or 0?

Lefebvre saw that, at the crudest level, there were essentially two types of ethical systems: those that held that employing evil means to attain just ends was good, and those that saw that employing evil means to attain good ends was wrong. There were also, crudely put, two types of relations between individuals: those entailing compromise (or cooperation), and those entailing confrontation.

Of course, evil persons rarely see themselves as evil. So Lefebvre had to incorporate in his model of human nature the capacity of human beings to judge—correctly or incorrectly—the goodness or evil of their own acts, and to *reflect* upon their own judgments, and others'. "Reflexive theory" was born.

It quickly became a paradigm within the Soviet military establishment, with books published like *Mathematics and Armed Conflict*. Nothing like it was known in the West.

With very simple assumptions—for instance, assume that an individual who correctly sees his actions to be good when they are good, and evil if they are evil, is more highly regarded by society than an individual who incorrectly sees himself—Lefebvre showed that in a society that accepted the compromise of good with evil, individuals would more often seek the path of confrontation with each other. Lefebvre's insights were called upon by the U.S. State Department during negotiations with Gorbachev in Reykjavik. (And perhaps Lefebvre's model could be reenlisted to help U.S. officials understand and negotiate with Arab and Muslim heads of state, who must also negotiate with their people.)

In support of Lefebvre's revolutionary new theory, a survey was conducted of Soviet émigrés and Americans in the 1970s. They were asked questions like, "Should a doctor conceal from a patient that he has cancer, in order to diminish his suffering?" Overwhelmingly, the Americans would say *No*, and overwhelmingly, the Soviets said *Yes*. The Soviets accepted the compromise of good with evil; the Americans rejected it.

What does this mean? If Americans begin to accept the use of torture, America might turn into a society of individuals in conflict. Not uniformly—thanks to something called free will—but generally, with harmful consequences: imagine two roads, with a stream of cars moving along each one. Each driver wants to reach his destination as quickly as possible; on occasion, drivers will impede each other. On the first road, drivers rise in their own and in other drivers' estimation if they yield. Drivers on the second road lose face when they yield. It is clear that traffic will move faster on the first road than on the second.

It can be argued that repressive states like Saudi Arabia, which bred most of the September 11 hijackers, are on the second road. If America moved along Dershowitz's path to accepting torture, it could veer toward the second road as well—the road of the Soviet Union. And we know where that road ends.

The Soviet Union no longer exists.

Dr Jonathan David Farley (lattice.theory@gmail.com) is a mathematics professor at the California Institute of Technology. Seed *magazine has named Dr. Farley one of "15 people who have shaped the global conversation about science in 2005". A version of this essay was published by the* San Francisco Chronicle.

The ticking bomb torturer

by Dr Jessica Wolfendale

"...suppose a fanatic, perfectly willing to die rather than collaborate in the thwarting of his own scheme, has set a hidden nuclear device to explode in the heart of Paris. There is no time to evacuate innocent people or even the movable art treasures – the only hope of preventing tragedy is to torture the perpetrator, find the device, and deactivate it." – Henry Shue, "Torture"

The war against terrorism has reignited the debate about torture. Once again, variations of the "ticking bomb" argument are being used to support the claim that the torture of terrorism suspects is justified because of the threat that terrorism poses to lives and security.

Yet despite the frequent use of the ticking bomb argument, there is one aspect of the ticking bomb scenario that is almost never discussed: the fact that torture requires torturers. Who would the torturers be? What kind of training would they need? The ticking bomb scenario requires a very particular kind of torturer. In the standard scenario, the suspect definitely knows where the bomb is, it is only hours before the bomb will explode, and there is no other way to find out the information. Given these constraints, the ticking bomb torturer must be able to extract the required information in the shortest time possible without killing the suspect. He should therefore be an expert in interrogational torture, and he must be able to torture whoever is placed in front of him without hesitation – he cannot be hampered by feelings of sympathy for the suspect. He must also be reliable, exceptionally discreet, and willing to obey without hesitation.

What kind of training would such a torturer need? To gain an understanding of what this training would involve, we can usefully look at how real torturers are trained.

In the real world, most torturers are soldiers or military policemen trained in elite military units. In South America, Greece, South Africa and Ireland torturers were part of elite military units charged with intelligence gathering and other covert operations. These units train soldiers to be obedient, loyal, disciplined and discreet – it would be plausible, therefore, that the ticking bomb torturer would come from such a unit.

What is the training regime of these units? Soldiers in Special Forces units are often trained in interrogation skills, as well as undergoing what is known as resistance or stress inoculation training in which they are subjected to the experience of being imprisoned and interrogated, sometimes in ways that are tantamount to torture. Soldiers in the British SAS, for example, are blindfolded, put in stress positions, subjected to noise bombardment and interrogated for 48 hours. Alongside such training, Special Forces trainees often undergo unofficial group bonding and bullying rituals – in Greece, for example, trainees in the Army Police Corps were brutalised, denied toilet facilities, and refused food. These experiences desensitise trainees to the infliction and endurance of suffering and teach them practical skills in interrogation. This desensitisation is essential if torturers are to be able to torture their victims without hesitation.

Alongside this desensitisation process, torturers are encouraged to develop an extreme form of professional detachment – to see themselves as professionals doing a job that needs to be done. As one torturer put it, "I don't use violence outside the standard of my conscience as a human being...I'm a conscientious professional. I know what to do and when to do it." Appeals to professionalism enable torturers to feel that their work serves an important moral good and yet allows them to abdicate responsibility for the use of torture – as professionals, their focus is on carrying out their role efficiently, but the morality of torture itself is beyond their professional jurisdiction. The professionalisation of torture also enables torturers to see their work as routine – as "standard operating procedure", as one torturer put it. The language of professionalism aids this process by masking the violence of torture behind morally neutral phrases and euphemisms. Torture, for example, is always "interrogation". This enables torturers to develop an extreme form of professional detachment from the emotional and physical distress that torturing can cause, and also from any moral doubts that might occur.

There are good reasons why such training would be best for the ticking bomb torturer. The ticking bomb torturer cannot waste time questioning the morality of torture or the suspect's guilt. Instead, he must obey orders without hesitation, and he must be able to rest assured that the burden of responsibility lies with the authorities. He should be a true professional, who can detach his personal feelings from the work at hand, and such a professional is best produced through the training that I have described.

But should we be concerned about the need for such training? Surely the stakes in the ticking bomb scenario are so high that they outweigh quibbles about the training of the torturer. What's

The ticking bomb torturer (cont.)

wrong with training torturers?

The training of torturers works by desensitising torturers to the emotional and moral qualms that can arise in the use of torture. Torturers are trained to abdicate responsibility for the morality of torture, and encouraged to focus on carrying out their orders as professionally as possible. While this training produces very efficient torturers, it also has extremely troubling consequences. By encouraging torturers not to concern themselves with the morality of torture, this training instils the dispositions of unreflective obedience. Torturers are encouraged to assume that the use of torture is justified by their superiors, and so they will be very unlikely to question whether a particular order is justified. As a consequence, they are unlikely to restrict their talents only to cases that meet the stringent criteria of the ticking bomb scenario. This is not a merely hypothetical possibility – it has occurred frequently in the past and it is occurring now. In real life, most torture is what the sociologist Herbert Kelman called a "crime of obedience". Torturers worldwide obey illegal and immoral orders to torture because that is what they are trained to do.

However, supporters of the ticking bomb argument might agree that most torture in the real world cannot be justified. But, they might claim, in the ticking bomb case the torturer would only be given an order to torture when a case fitting the ticking bomb scenario arose. The problem with this objection is straightforward – the illegal and immoral use of torture is not an accidental by-product of training torturers; it is a direct and foreseeable consequence of how they are trained. The ticking bomb argument relies on the assumption that the order to torture would only be given in highly unusual circumstances, and that the torturer would know – somehow – that his orders were just. Yet we have absolutely no evidence to support this claim, and much evidence that torture is frequently used for purposes that would never fit the ticking bomb criteria. In many years of research I have not found a single example of authorities who used torture only in ticking bomb cases. We therefore have every reason to doubt that military and political authorities will use torture only in cases that meet the ticking bomb criteria.

Even if it were possible to construct an even more detailed hypothetical scenario that took into account the consequences of training torturers (and I strongly doubt that a plausible scenario could be constructed), the permissibility of torture in an extremely far-fetched hypothetical scenario has no bearing on the question of when and if torture should be permitted in the real world. Because the ticking bomb argument is used in debates about torture in *this* world, supporters of this argument cannot rely on merely hypothetical cases to justify their claims; they must take into account what permitting torture involves in reality, not in a merely hypothetical example. That torture might be justifiable in a hypothetical example in a hypothetical world gives us absolutely no reason to think that it can be justified in this world. In this world torture has caused far more suffering than it has ever prevented. The mere possibility of a ticking bomb scenario is simply not sufficient to justify such massive suffering.

Dr Jessica Wolfendale (jwo@unimelb.edu.au) is a Postdoctoral Research Fellow at the Centre for Applied Philosophy and Public Ethics at the University of Melbourne and has published on military ethics, the ethics of torture and moral philosophy. She is the author of the forthcoming book Torture and the Military Profession *(Palgrave-Macmillan). This article is based on a longer piece entitled "Training Torturers: A Critique of the 'Ticking Bomb' Argument", published in* Social Theory and Practice *32(2): 269-287.*

The prohibition against torture in U.S. military doctrine

by Dr Lawrence P. Rockwood

The propagation of the ticking bomb scenario by prominent legal scholars, academics and journalists highlights a problematic shift in societal attitudes toward torture in reaction to the 9/11 attacks. Related to this phenomenon is the gulf that has arisen between what U.S. military doctrine says about torture and the standards of treatment of detainees contained in executive orders of the second Bush administration. This lack of convergence between historically developed professional military standards and reactive political policy helps explain why the most consistent and credible condemnation of the U.S. detainee policies has originated not from the pens of lawyers or journalists, but from current and retired members of the American armed forces.[1] It also pro-

vides a good point of departure to briefly summarise the historical relationship between military doctrine and torture.

Before we can document the history of military doctrine, we must first ask what is military doctrine and how it is distinct from official government policy resulting either from legislation or executive orders. JCS (Joint Chiefs of Staff) Pub 1, which delineates official U.S. military terminology, defines doctrine as "fundamental principles by which military forces or elements thereof guide their actions in support of national objectives". Doctrine is distinct from law and state/executive policy. It is authoritative, but a violation of doctrine does not necessarily involve a violation of law. Although doctrine often results in law/policy and law/policy often underpins doctrine, doctrine calls for judgment in its application (as against rote compliance). Unlike positive law based on legal jurisdiction or state/executive policy, which is also legally binding on soldiers, doctrine is based on professional consensus, even though the foundation of that consensus derives from an internal institutional validation that is hierarchical and relatively narrow.

Like law and policy, doctrine is hierarchal. In fact, no two sets of doctrinal publications can be equal in any given circumstance or contingency. Current official policy places such doctrine into two major groups:

(1) capstone doctrine, the highest category in the "hierarchy of publications" that link doctrine to national strategy and the guidelines of other government agencies to include other members of international alliances and coalitions; and

(2) keystone doctrine, the foundation for a series of doctrine publications in a specific subject area or discipline.

The historical and contemporary doctrinal position on torture in the U.S. military consists of the following:

Capstone doctrine

The original capstone doctrine for the U.S. military was the U.S. Civil War–era document *U.S. General Order No. 100*, also known as the Lieber Code, which incorporated all of the major principles of just war doctrine. While the Lieber Code's numerous distinctions of unlawful combatancy and liberal resort to the death sentence may give contemporary human rights activists pause, its prohibition against torture was categorical. The central operative principle was the concept of military necessity. Military necessity is defined "as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war" (Article 14). Military necessity is always accompanied by one categorical prohibition regardless of the combatant status of the enemy in that it "does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor for torture to extort confessions" (Article 16).

The current capstone document regarding torture is Field Manual (FM) 27-10, the *Law of Armed Conflict* (1956), which incorporated the standards utilised in the American war crimes programme that included the International Criminal Tribunal at Nuremberg and subsequent war crimes trials following the end of World War II. FM 27-10 also posits a categorical prohibition against torture regardless of the combatant status of the enemy in that it incorporates the exact text of the four Common Articles of Geneva Conventions of 1949 proscribing any act deemed to be "cruel treatment and torture" or the prohibition from Article 3 of the Third Geneva Convention against "humiliating and degrading treatment".

Keystone doctrine

Until the publication of FM 2-22.3 (*Human Intelligence Collector Operations*) on 6 September 2006, the keystone doctrinal manual in reference to interrogations was FM 34-52, *Intelligence Interrogation*. On 25 July 2005 Senator John McCain, a former prisoner of war, introduced an amendment to a military spending bill to prohibit all interrogators from using any interrogation method not authorised by FM 34-52. McCain's amendment passed. The effect of this Detainee Treatment Act of 2005 was to overrule the executive policy contained in both the Gonzales Memo of 25 January 2002, which made a presidential decision stating that captured members of Al Qaeda and the Taliban were unprotected by the Geneva Conventions and the subsequent Rumsfeld Order of 19 January 2002 making the decision legally binding on the armed forces. The effect of the act was to make military doctrine a law and state policy in order to override an existing policy.

Thus far, it does not appear that the new Field Manual (FM 2-22.3) is the major humanitarian setback many feared it would be. While affirming that so-called "unlawful enemy combatants are persons not entitled to combatant immunity", it mandates that "all captured or detained personnel, regardless of status, shall be treated humanely, and in accordance with the Detainee Treatment Act of 2005… and no person in custody or under control of DOD, regardless of nationality or physical location, shall

The prohibition against torture in U.S. military doctrine (cont.)

be subject to torture or cruel, inhuman, or degrading treatment or punishment, in accordance with and defined in US law".

Nevertheless, the devil (criminal acts of torture of the present or previous presidential administrations) is in the details (of executive policy) and does not now nor has ever had the sanction of military doctrine. The Final Report of the Mental Health Advisory Team (MHAT) IV Operation Iraqi Freedom 05-07 that indicated that only 38% of U.S. soldiers and 47% of Marines believed that "all non-combatants should be treated with and respect" and that 39% of soldiers and 36% of Marines believed that "torture should be allowed if it will save the life of a soldier/Marine" documents the gulf that can occur between official norms such as doctrine and actual values of military personnel.

The gulf between culture and policy

However, it must be noted that the other shore of this gulf reflects the culture and the actual legally binding policies of the United States of America. The greatest institutional failing of the American military is its historical failure to hold its own personnel to the same standard of command responsibility as it once held out to commanders of the military forces it helped to defeat. In his opening statement as the American chief counsel for the prosecution at the International Military Tribunal at Nuremberg, U.S. Supreme Court Justice Robert H. Jackson addressed the issue of whether the legacy of that tribunal would be simple "victor's justice" or the establishment of principles of international reciprocity in holding individuals accountable for war crimes: "We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well."

The United States failed to hold its own military commanders responsible for dereliction in preventing and suppressing breaches of international humanitarian law during the Vietnam War. The standards applied to American defendants involved in the perpetration and cover-up of the My Lai massacre, in particular, fell short of the standards that Jackson and his contemporaries held up to German and Japanese officers immediately following World War II. For example, in the My Lai case of Capt. Ernest Medina, the military judge instructed the jury that they must establish that Medina possessed actual knowledge that his subordinates were committing human rights violations in order for him to be held criminally liable as commander. That standard, referred to as the "must have known" standard, contrasts both with the "should have known" standards established in post–World War II war crimes tribunals and with contemporary standards on command responsibility found in a variety of recognised sources, such as the 1977 Additional Protocol I to the Geneva Conventions, the statutes of the international tribunals for Rwanda and the former Yugoslavia, and the Rome Statute for the International Criminal Court (ICC).

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>
> —Lawrence Rockwood

In the direct aftermath of the U.S. failure to apply the Nuremberg-era standards of command responsibility in the trials following the disaster at My Lai, the United States took the lead fighting to defeat the international consensus to extend the provisions of enforcement of international humanitarian law contained in the 1977 Protocol I of the Geneva Conventions. This American action documented a conservative trend toward limiting the applicability of international humanitarian law for which a commander could be held liable. After it supported the incorporation of Nuremberg-like standards of affirmative command responsibility into Article 6 of the statute of the International Criminal Tribunal for Rwanda (ICTR) and Article 7 of the statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), America fought to defeat the Rome treaty that created the ICC that would have subjected its own commanders and officials to the same standard.

Despite changing currents in both the internal, military sphere and the external, political sphere, the 1956 FM 27-10, with its affirmative, Nuremberg-era standard of command responsibility, remains the official keystone doctrine concerning the law of armed conflict. Minimalist standards of command responsibility, in line with those used in the case of My Lai and subsequently, have yet to be formally incorporated into American keystone doctrine. Rather, the rigorous definition of command responsibility remains doctrinally authoritative even as other documents reveal a subtle trend toward the acceptance of a more relaxed standard.

The only way to end attitudes of impunity concerning torture and other war crimes among American military personnel is by adhering to the simple and commonsense military principle: military commanders have an affirmative duty to protect the civilians and prisoners in the territory occupied or controlled by their forces, and this duty extends to all military operations.

[1] See the *Washington Post* editorial by four-star generals Charles C. Krulak and Joseph P. Hoar that denied efficacy of torture in achieving any legitimate end of state. Available at: http://www.washingtonpost.com/wp-dyn/content/article/2007/05/16/AR2007051602395_pf.html

Dr. Lawrence P. Rockwood is a former U.S. Army counterintelligence officer and an international authority on the human rights aspects of military doctrine. He is the author of Walking Away From Nuremberg, Just War and Command Responsibility*, to be released by the University of Massachusetts Press in October 2007.*

Torture and imminent threats: the Israeli example

by Louis Frankenthaler

"The police have in custody a person who they are absolutely certain has planted a massive bomb somewhere in a bustling shopping mall. The bomb may go off at any moment, and there is not enough time to evacuate the building. Thousands of casualties are expected should the bomb go off. The only lead that the police have to locate the bomb is the person in custody, but he refuses to reveal the location of the bomb. Police investigators are certain… that the only way of getting the information from him is by employing torture. They are also confident that if torture is applied, the suspect will divulge correct information about the location of the bomb, thus giving the bomb squad a better chance of disarming it in time." – Oren Gross, "Torture and an Ethics of Responsibility"

Israel is a fitting forum for discussing the "ticking bomb" scenario and finally repudiating it as an excuse or justification for using torture. Although the argument is intellectually dishonest and little more than a pretext, it continues to serve as Israel's basic justification for the torture and ill-treatment of security suspects during interrogation. Far too often the Israeli authorities justify the torture of the Palestinian security suspects as necessity. The suspect is presented as an imminent threat, a "ticking bomb" that can be neutralised only by interrogation that violates the prohibition against torture and cruel, inhuman and degrading treatment.

Torture is a part of Israel's history and it seems to be an integral part of its security strategy. In 1987 an official commission headed by former Supreme Court Chief Justice Moshe Landau confirmed the legality of torture (or as it is euphemistically referred to, "moderate physical pressure") as far as Israeli interrogations of security detainees were concerned. In practice torture became official policy following the publication of the Commission's report and it was rampant, especially in the course of Israel's suppression of the first Intifada. Following a 1999 landmark decision by Israel's High Court of Justice (HCJ), *The Public Committee Against Torture in Israel et. al. v The Government of Israel et. al.* HCJ 5100/94, the level of torture was significantly reduced. This is an important point because prior to the decision the General Security Services (GSS) neither required nor sought any pretext to engage in violent interrogations. However, the HCJ confirmed in its decision that

"…the 'necessity' exception is likely to arise in instances of 'ticking time bombs', and that the immediate need… refers to the imminent nature of the act rather than that of the danger. Hence, the imminence criteria is satisfied even if the bomb is set to explode in a few days, or perhaps even after a few weeks" (Paragraph 34).

With this, the High Court essentially enshrined the ticking bomb scenario in Israeli law and jurisprudence and institutionalised torture in Israel. Although the Court clarified that necessity should not serve as ex-ante legal authorisation for using torture it was prepared to assume that necessity can serve as a defence if a torturer is criminally charged. Further, the Court expanded the time frame of the ticking bomb. Instead of ticking for an hour or so as in many classic bomb scenarios, the detainee can tick for a "few days, or perhaps even… a few weeks". The consequences of this are clear: the Public Committee against Torture in Israel (PCATI) has handled cases in which so called "ticking bombs" were tortured after being officially determined to present imminent threats and also cases in which those not deemed to be ticking bombs have been abused. PCATI is convinced that interrogators receive prior approval to use "special interrogation methods" under certain circumstances and that this prior approval is supported by the ticking bomb excuse. Calls for investigation and prosecution by the victim or by PCATI are either ignored or unceremoniously brushed aside, with a claim of necessity, while impunity becomes further entrenched in the Israeli

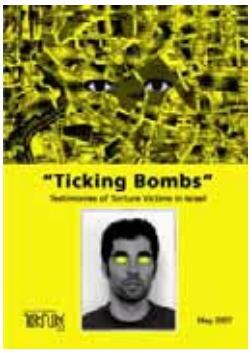
Smashing the ticking bomb idol (cont.)

legal and political ethos. In this way a sort of ritual has developed in which complaints are made and the GSS investigates itself and finds neither fault nor culpability in their actions.

The fact that there is no sufficient investigatory process or criminal and judicial review of instances of torture runs counter even to the methodology discussed by a legal scholar like Oren Gross[1], who insists that torture should remain absolutely prohibited but that there should be room to account for "the necessities of catastrophic cases…through official disobedience". Gross recognises the problem of *a priori* authorisation for torture, but if the official sees adhering to the ban on torture as "irrational or immoral" he should break the law, violate the ban, torture the suspect and then face the consequences, knowing that the act was "extralegal" and that he is subject to prosecution. The ensuing consequences would be determined by society. Society may choose to punish the torturer or, via the application of "prosecutorial discretion not to bring criminal charges", accept the act.

The problems with this approach are numerous. If we put it in terms of the Israeli situation it is clear that Israel claims to uphold the ban on torture and has set up a (fatally flawed) mechanism to check complaints. This mechanism, though, is a classic manifestation of a primary problem with Gross' reasoning: very often the prosecutors and the investigators cannot be relied upon to uphold the integrity of the investigative process because they are effectively in collusion with the torturers. In Israel, the High Court even declared that "the Attorney-General can establish guidelines regarding circumstances in which investigators shall not stand trial, if they claim to have acted from 'necessity'." Furthermore, in most places where torture exists it is systematic. Gross' solution seems to turn the issue of institutionalised torture into a matter of individual compliance or non-compliance with the law. The absolute ban in such a case essentially evaporates into the air, and, as discussed below, the logic of employing this methodology would require an infrastructure to facilitate torture on those "rare" "catastrophic" occasions when torture would be "needed". After all, if we need to torture then we better send someone who knows how to do it…

Of the most important societal conclusions that one can draw from a discussion of the ticking bomb scenario is that with the institutionalisation of torture comes the need to employ a force of well trained and efficient torturers. Jessica Wolfendale makes these very observations (see page 5). Drawing on the works of Crelinsten, Kelman and Arrigo, she makes it clear that in order for the scenario to be plausibly applied to extract "usable" information it requires torture of a far more sophisticated variety than when torture is used to terrorise individuals and populations. She writes that this type of torture "requires finesse, skill, and discipline…the ticking bomb torturer needs to be already trained…". This requires a corps of professional torturers to be developed, trained and their skills maintained over time. They need to learn and they need practice. Our question must be: what does this mean for us? It means that in Israel there is an elite group of professionals who are necessarily desensitised to the pain they inflict while skilfully dehumanizing the victim. But even more troubling is the fact that in order to train/educate the torturer one must develop pedagogy, a pedagogy of torture. Further, Wolfendale argues the training involved in preparing the torturer for the ticking bomb scenario precludes the containment of torture to the "parameters of the… [ticking bomb] scenario" precisely because being prepared for the scenario means being prepared to torture, at all times, and to uncritically obey an order to torture.[2]



More information on the case of Israel can be found in the PCATI report Ticking Bombs: Testimonies of Torture Victims in Israel.

Unfortunately the case of Israel is a case in which Shue's 1978 forecast is realised: "torture" is seen as "the ultimate shortcut. If it were ever permitted under any conditions, the temptation to use it increasingly would be very strong." Israel, like other modern nation states, has succumbed to what David Luban referred to as

"a set of assumptions that amount to intellectual fraud. Ticking-bomb stories depict torture as an emergency exception, but use intuitions based on the exceptional case to justify institutionalized practices and procedures of torture. In short, the ticking bomb begins by denying that torture belongs to liberal culture, and ends by constructing a torture culture."

The ticking bomb scenario has become an idol to which security forces and academics pay homage. It is also one of the last remaining threads (though not the only) that remain unbroken and which continue to legiti-

mise interrogation methods that are obviously torture and cruel, inhuman and degrading treatment. In his article Shue seemed to claim that torture, while remaining absolutely prohibited, may be excusable under the direst of circumstances in which every hypothetical fact of the hypothetical time bomb case is absolutely known to be perfectly correct: the prisoner *is* the terrorist who *did* plant the bomb and he *will* talk in time and he *will provide* accurate and sufficient information *in time* to neutralise the bomb. In a later article, Shue clarifies his position and states that he "misguidedly" left a loophole for a "conscientious offender" – that is, a torturer who would later claim that his action was justified by necessity – and that this loophole has essentially led to a situation in which torture has metastasised and cannot be contained. Luban perhaps put it best: "The limitation of torture to emergency exceptions, implicit in the ticking-bomb story, now threatens to unravel, making torture a legitimate instrument...And then the question becomes inevitable: Why not torture in pursuit of any worthwhile goal?" These are lessons that Israel has failed to internalise.

Israel is far too often held up as example in which terrorism can be resisted within the law and while respecting human rights. The Israeli Court, in offering legitimacy to this argument and by seemingly limiting the use of illegal interrogation methods to such extraordinary situations is essentially making the problematic claim that the State is capable of remaining democratic even while using torture. But Luban writes: "...the liberal ideology of torture, which assumes that torture can be neatly confined to exceptional ticking-bomb cases and surgically severed from cruelty and tyranny, represents a dangerous delusion." It seems clear that the case of torture and Israel serves to contradict such claims.

Two recent Israeli human rights reports, one by PCATI and another joint report by Hamoked, the Center for the Defense of the Individual and B'tselem, (www.btselem.org), the Israeli Information Center for Human Rights in the Occupied Territories, demonstrate that even in the face of international criticism and the absolute affront to both morality and law, torture in Israel continues to be systematically applied. Victims are denied proper sleep, nutrition and hygiene while being held between interrogation sessions; they are abused – kicked, beaten, and blindfolded – after being arrested by soldiers. Palestinians are forced to sit in painful positions, endure intentionally painful shackling as well as beatings. They suffer sensory abuse, threats against self and their family members. The case of Israel demonstrates that Israel's course of action in its broad "war against terror" is not limited to torture and is not particularly democratic.

While some may argue that we may be forced to pay a heavy price for maintaining our deontological opposition to torture we remain confident that the path of torture, chosen by too many, is extracting as heavy a price as can be imagined by reasonable persons committed to democracy and human rights.

[1] For full bibliographic information on all the citations in this and other articles, see page 12.

[2] Thanks to Dr. Jessica Wolfendale for her input on this paragraph.

Louis Frankenthaler (louis@stoptorture.org.il) *is Director of Development and Education at the Public Committee Against Torture in Israel (PCATI). PCATI's recent report,* Ticking Bombs: Testimonies of Torture Victims in Israel, *can be downloaded from www.stoptorture.org.il/eng.*

Responses to the ticking bomb scenario

In June 2007, the Association for the Prevention of Torture (APT) convened a meeting in Geneva, bringing together member organisations of the Coalition of International NGOs against Torture (CINAT), which includes the IRCT, with other leading experts, professionals and academics from a range of backgrounds and organisations. The goal was to discuss effective arguments and strategies to reinforce the absolute and non-derogable prohibition of torture, against the corrosive effect of the increasing prevalence of the ticking bomb scenario's implicitly (or sometimes explicitly) positive portrayal of torture and torturers.

Based on those discussions, in September the APT published a brochure, "Defusing the Ticking Bomb Scenario: Why we must say no to torture, always" available at www.apt.ch/tbs. The document sets out reasons why, on practical, legal and philosophical grounds, any "ticking bomb" exception to the absolute prohibition of torture must be absolutely rejected.

The APT anticipates further materials and actions by a wide variety of individuals and organisations, and looks forward to continuing to work with the IRCT and other CINAT members to coordinate responses to the grave threat to the struggle against torture that is posed by the ticking bomb scenario.

International Rehabilitation Council for Torture Victims (IRCT)
Borgergade 13 · P.O. Box 9049
1022 Copenhagen K
DENMARK
Phone: +45 33 76 06 00
Fax: +45 33 76 05 00
Email: irct@irct.org
www.irct.org

FIDH
17, passage de la main d'or
75011 Paris
FRANCE
Phone: +33 1 43 55 25 18
Fax: +33 1 43 55 18 80
www.fidh.org

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For more information...

The "Preventing Torture within the Fight against Terrorism" newsletter is published bimonthly as part of a joint FIDH-IRCT project aimed at reinstating respect for the prohibition against torture in counterterrorism strategies both globally and in ten target countries: Bangladesh, Colombia, Egypt, Indonesia, Jordan, Kenya, Mauritania, the Philippines, Russia and Syria.

The newsletter editors welcome submissions of content for future issues, including articles (send query first), comments, letters to the editor (up to 250 words) and suggestions for recommended reading. To submit content or make enquiries, email Brandy Bauer, IRCT Communications Officer, at tortureandterrorNL@irct.org

For more information about the "Preventing Torture within the Fight against Terrorism" project, please visit the IRCT web site (www.irct.org) or contact: Sune Segal, Head of Communications, IRCT, +45 20 34 69 14, sse@irct.org or Isabelle Brachet, Director of Operations, FIDH, +33 1 43 55 25 18, ibrachet@fidh.org

Recommended reading

Though not an exhaustive list, this section presents some of the literature most frequently cited in relation to the ticking bomb scenario. Links are included for those texts available for free online.

** Bufacci, V. and J.M. Arrigo, "Torture, terrorism and the state: a refutation of the ticking-bomb argument," in *Journal of Applied Philosophy*, 2006.

**Card, C., "Ticking bombs and interrogations" online in *Criminal Law and Philosophy*, 12 July 2007. An earlier draft is available at: http://www.britac.ac.uk/events/2007/crimlaw2007/papers/card.pdf.

**Crelinsten, R., "The world of torture: a constructed reality" in *Theoretical Criminology*, 2003.

**Dershowitz, A., *Why terrorism works: understanding the threat, responding to the challenge*, Yale University Press, 2002. See also: http://edition.cnn.com/2003/LAW/03/03/cnna.Dershowitz/.

**Gross, O., "Torture and an Ethics of Responsibility" in *Law, Culture and the Humanities,* February 2007. Available at: http://lch.sagepub.com/cgi/content/abstract/3/1/35.

**Hannah, M., "Torture and the ticking bomb: the war on terror as a geographical imagination of power/knowledge" in *Annals of the Association of American Geographers*, 2006.

**Kelman, H., "The policy context of torture: a social-psychological analysis" in *International Review of the Red Cross*, 2005. Available at: http://www.icrc.org/Web/eng/siteengo.nsf/html/review-857-p123.

**Lefebvre, V. and J.D. Farley, "The torturer's dilemma: a theoretical analysis of the societal consequences of torturing terrorist suspects" in *Studies in Conflict & Terrorism*, 2007. Available at: http://www.rit.edu/~cmmc/conferences/2007/literature/Lefebvre_Farley_2007.pdf.

**Levin, M., "The Case for Torture" in *Newsweek*, 1982. For the full text, see: http://people.brandeis.edu/~teuber/torture.html.

**Luban, D., "Liberalism, torture and the ticking bomb" in *Virginia Law Review*, 2005. Available at: http://www.virginialawreview.org/content/pdfs/91/1425.pdf.

**Shue, Henry, "Torture in dreamland: disposing of the ticking bomb," in *Case Western Reserve Journal of International Law*, 2006. Available at: http://www.case.edu/orgs/jil/archives/vol37no2and3/Shue.pdf

**Shue, Henry, "Torture" in *Philosophy and Public Affairs*, 1978.

**Steinhoff, Uwe, "Torture—the case for Dirty Harry and against Alan Dershowitz" in *Journal of Applied Philosophy*, 2006.