

## Torture

### A few facts

- 1 Susan Crawford, former general counsel for the US Army and convening authority of military commissions, reviewed the case of Mohammed al-Qahtani and found that he was subjected to interrogation “techniques that included sustained isolation, sleep deprivation, nudity and prolonged exposure to cold, leaving him in a ‘life-threatening condition.’” “We tortured Qahtani” she said, “his treatment met the legal definition of torture.”<sup>1</sup>
- 2 The International Committee of the Red Cross reviewed several aspects of the CIA’s detention plan such as: continuous solitary confinement and incommunicado detention, suffocation by water, prolonged stress standing, beatings by use of a collar, beating and kicking, confinement in a box, prolonged nudity, sleep deprivation and use of loud music, exposure to cold temperature or cold water, prolonged use of handcuffs and shackles, threats, forced shaving, and deprivation or restricted provision of solid food. They concluded that, “in many cases, the ill-treatment to which they [the fourteen detainees] were subjected while held in the CIA program, either singly or in combination, constituted torture.”<sup>2</sup>
- 3 Ali Abdul Aziz al-Fakhiri, also known as Ibn al-Shaykh al-Libi, was turned over to the FBI. He gave them “actionable intelligence” about a plot to blow up the US embassy in Yemen. Then he was taken by the CIA, sent to Egypt, tortured, and asked repeatedly about connections between Al Qaeda and Iraq. Eventually, he fabricated a story of how Iraq trained Al Qaeda operatives to use weapons of mass destruction. This story, in turn, helped convince Secretary of State Powell to support war against Iraq and appeared in Powell’s famous speech to the United Nations.<sup>3</sup>

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<sup>1</sup> Bob Woodward, “Detainee Tortured, Says U.S. Official,” *Washington Post* January 14, 2009, p. A1.

<sup>2</sup> Mark Danner, “US Torture: Voices from the Black Sites,” *New York Review of Books* April 9, 2009.

<sup>3</sup> Jane Mayer, *The Dark Side*, (Doubleday, 2008), pp. 105, 134–8.

- 4 “There was no consideration within the National Security Council that the planned techniques stemmed from Chinese communist practices and had been deemed torture when employed against American personnel, the former administration official said. The U.S. military prosecuted its own troops for using waterboarding in the Philippines and tried Japanese officers on war crimes charges for its use against Americans and other allied nationals during World War II.”<sup>4</sup>
- 5 “‘Nobody with expertise or experience in interrogation ever took a rigorous, systematic review of the various techniques - enhanced or otherwise - to see what resulted in the best information,’ said a senior U.S. intelligence official involved in overseeing the interrogation program.”<sup>5</sup>

### The Landau Commission

This is the crux of the problem. It may be clear that coercion is sometimes the right choice, but how does one allow it yet still control it? Sadism is deeply rooted in the human psyche. Every army has its share of soldiers who delight in kicking and beating bound captives. Men in authority tend to abuse it—not all men, but many. As a mass, they should be assumed to lean toward abuse. How does a country best regulate behavior in its dark and distant corners, in prisons, on battlefields, and in interrogation rooms, particularly when its forces number in the millions and are spread all over the globe? In considering a change in national policy, one is obliged to anticipate the practical consequences. So if we formally lift the ban on torture, even if only partially and in rare, specific cases (the attorney and author Alan Dershowitz has proposed issuing “torture warrants”), the question will be, How can we ensure that the practice does not become commonplace—not just a tool for

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<sup>4</sup> Peter Finn and Joby Warrick, “In 2002, Military Agency Warned Against ‘Torture,’” *Washington Post* April 25, 2009.

<sup>5</sup> Greg Miller, “CIA reportedly declined to closely evaluate harsh interrogations,” *Los Angeles Times*, April 26, 2009.

extracting vital, life-saving information in rare cases but a routine tool of oppression?

As it happens, a pertinent case study exists. Israel has been a target of terror attacks for many years, and has wrestled openly with the dilemmas they pose for a democracy. In 1987 a commission led by the retired Israeli Supreme Court justice Moshe Landau wrote a series of recommendations for Michael Koubi and his agents, allowing them to use "moderate physical pressure" and "nonviolent psychological pressure" in interrogating prisoners who had information that could prevent impending terror attacks. The commission sought to allow such coercion only in "ticking-bomb scenarios"—that is, in cases like the kidnapping of Jakob von Metzler, when the information withheld by the suspect could save lives.

Twelve years later the Israeli Supreme Court effectively revoked this permission, banning the use of any and all forms of torture. In the years following the Landau Commission recommendations, the use of coercive methods had become widespread in the Occupied Territories. It was estimated that more than two thirds of the Palestinians taken into custody were subjected to them. Koubi says that only in rare instances, and with court permission, did he slap, pinch, or shake a prisoner—but he happens to be an especially gifted interrogator. What about the hundreds of men who worked for him? Koubi could not be present for all those interrogations. Every effort to regulate coercion failed. In the abstract it was easy to imagine a ticking-bomb situation, and a suspect who clearly warranted rough treatment. But in real life where was the line to be drawn? Should coercive methods be applied only to someone who knows of an immediately pending attack? What about one who might know of attacks planned for months or years in the future? ...

She [Jessica Montell, director of B'Tselem, a human rights advocacy group] knows that the use of coercion in interrogation did not end completely when the Israeli Supreme Court banned it in 1999. The difference is that when interrogators use "aggressive methods" now, they know they are breaking the law and could potentially be held responsible for doing so. This acts as a deterrent, and tends to limit the use of coercion to only the most defensible situations.

“If I as an interrogator feel that the person in front of me has information that can prevent a catastrophe from happening,” she says, “I imagine that I would do what I would have to do in order to prevent that catastrophe from happening. The state’s obligation is then to put me on trial, for breaking the law. Then I come and say these are the facts that I had at my disposal. This is what I believed at the time. This is what I thought necessary to do. I can evoke the defense of necessity, and then the court decides whether or not it’s reasonable that I broke the law in order to avert this catastrophe. But it has to be that I broke the law. It can’t be that there’s some prior license for me to abuse people.”

In other words, when the ban is lifted, there is no restraining lazy, incompetent, or sadistic interrogators. As long as it remains illegal to torture, the interrogator who employs coercion must accept the risk. He must be prepared to stand up in court, if necessary, and defend his actions. Interrogators will still use coercion because in some cases they will deem it worth the consequences. This does not mean they will necessarily be punished. In any nation the decision to prosecute a crime is an executive one. A prosecutor, a grand jury, or a judge must decide to press charges, and the chances that an interrogator in a genuine ticking-bomb case would be prosecuted, much less convicted, is very small. As of this writing, Wolfgang Daschner, the Frankfurt deputy police chief, has not been prosecuted for threatening to torture Jakob von Metzler’s kidnapper, even though he clearly broke the law.

The Bush Administration has adopted exactly the right posture on the matter. Candor and consistency are not always public virtues. Torture is a crime against humanity, but coercion is an issue that is rightly handled with a wink, or even a touch of hypocrisy; it should be banned but also quietly practiced. Those who protest coercive methods will exaggerate their horrors, which is good: it generates a useful climate of fear. It is wise of the President to reiterate U.S. support for international agreements banning torture, and it is wise for American interrogators to employ whatever coercive methods work. It is also smart not to discuss the matter with anyone.<sup>6</sup>

<sup>6</sup> Mark Bowden, “The Dark Art of Interrogation,” *The Atlantic*, October 2003. See also Henry Shue, “Torture,” *Philosophy & Public Affairs*, 7 (1978), p. 143.