Tosca and the ticking time bomb

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'Torture,' said Fortescue, a sixteenth-century English jurist, 'is something that is done by the French.' And it was, for centuries after 1641, the year parliament abolished the king's 'Star Chamber', with its brandings and pilloryings and ear-splittings. A proud tradition in England, but too good for the colonies, where the British army tortured relentlessly in Oman and Malaysia and Kenya, and later in Basra.

The US was worse after 9/11 with its secret rendition program, which ferried terrorist suspects to secret cells in client countries – Egypt, Morocco, Poland and Romania – where they were viciously beaten and mutilated. George W. Bush could dissemble – 'We don't do torture' – while CIA officials supervised torture outside the jurisdiction. (This equivocation was more deplorable than the one for which his predecessor is remembered, namely 'I did not have sexual relations with that woman.')

Wherever armies fight, and whenever 'terrorists' are suspected, the temptation to torture has proven irresistible. Pinochet was a prime example of a ruler who used the foulest tortures – not to discover information that might save lives, but to terrify his opponents. I acted for Human Rights Watch in the case that brought him to some kind of justice, and it taught me that torture can work – but at a price that only a scoundrel could ever believe to be worth paying. My arguments were set out in the introduction to a book titled Torture, published in 2005 by Human Rights Watch.

Before I became a human rights lawyer, my only encounter with torture came from attending performances of Tosca. In Act II, the judge gives a nod (it's a non-singing role) and the politically suspect painter is escorted to an off-stage torture chamber: his pain-wracked notes traumatise his girlfriend during her interrogation by Scarpia, chief of the secret police. To end the torture, Tosca reveals the hiding place of Andreotti, a republican, who is promptly located and killed by Scarpia's death squad. Meanwhile the tortured tenor, who has hobbled back to centre stage, overhears the news of Napoleon's victory over the royalists and lets out of his lungs that great operatic paean to liberty: 'Vittoria!' Its incandescent high C seemed a pretty convincing refutation of the case for state-approved torture, showing that it serves only to inspire defiance and martyrdom.

But not so fast. Let's update Puccini. Suppose Scarpia is 'one of us' (dress him as Donald Rumsfeld) while Andreotti is an 'enemy combatant' recently escaped from Guantanamo, and last seen being equipped in some way by a sacristan – sorry, mullah – in Act I, which is set in the local mosque. Are our sympathies now, ever so slightly, with the judge who – in a legal process advocated by Alan Dershowitz – nods for the torture to start and picks up his pen to record the expected confession? Put Tosca in a burqa, give Cavaradossi a few flying lessons in Florida, and the audience may wish, ever so faintly, to bring back Lynndie England and the alsatians fresh from Abu Ghraib. In real life, terrorists don't have girlfriends (more's the pity) and the female of the species (e.g. the 'black widow' suicide bombers from Chechnya) can be not only deadlier than the male but hold out longer under interrogation. Tosca, the tenderhearted but air-headed diva (today, she'd be a UN 'goodwill ambassador'), informed on Andreotti because she wanted to stop the suffering of the man she loved. In such cases, torture works.

English common law always refused to adopt the infliction of pain as a device for inducing admissions or proving guilt. There had been exceptions, of course, notably for treason: in the National Archives today you can see how the handwriting on Guy Fawkes's confession trails away after stretching on the rack leaves him too weak to hold the pen. But in the seventeenth century, the Star Chamber (the king's torture chamber) was abolished (1641); 'cruel and unusual punishments' were outlawed in the Bill of Rights (1689) and habeas corpus, the fundamental right to challenge state detention, was in 1679 given such statutory force that three centuries later it could still be applied by the US Supreme Court, when pointing out to the Bush administration that due process extended to offshore islands. These safeguards against torture, achieved at a time when it was an established and routine part of criminal justice throughout the continent of Europe, were a form of humanitarian constitutional progress in which we should take Anglo-American-Australian pride.

Just because we have laws against inhumane treatment does not mean they are always obeyed. Suspects are often beaten up in the cells, but at least the common law rules permit cross examination of police at trial and a rejection of any confession that cannot be proved voluntary. Those suspected of ordinary crime are now protected in Australia and the UK, by rules requiring tape recording (and even video recording) of police interviews.

Special regimes that have been enacted for detention of terrorist suspects, however, often do not afford these

protections, and it is in this context, when 'the gloves must come off', that infliction of pain is most tempting for interrogators. In Birmingham in 1974, a few hours after IRA bombs in crowded pubs had killed thirty young people, a number of Irishmen had confessions extracted through force, by police who believed them guilty and were thus consumed with righteous fury. After 'the Birmingham Six' had served almost two decades in prison, the wrongful convictions were finally overturned – but the damage that the case did to the reputation of British justice was incalculable.

Many governments approve the inhumane treatment of detainees 'in the interests of national security'. That was the case in Singapore's 'Marxist conspiracy' detentions in 1988, when the ISD (its secret police) rounded up a group of young lawyers, Catholic aid workers and women playwrights, detaining them for years without trial and subjecting them to what Home Affairs Minister (now Prime Minister) B. G. Lee admitted was 'psychological pressure to get to the truth of the matter . . . the truth would not be known unless psychological pressure was used during interrogation'.

This 'psychological pressure' was described by the detainees who became my clients: it amounted to sleep deprivation (for up to twenty hours), standing for interrogation in cotton pyjamas under sub-zero blasts from an air conditioner; being doused with cold water and enduring threats to have their loved ones arrested for similar treatment.

These 'psychological pressures' were cunningly chosen so that they would leave marks on the mind but not on the body. But what 'truth' did they elicit? My clients said what their paranoid interrogators told them to say: 'I am Marxist-inclined . . . my ideal society is a classless society . . . I was made use of by . . . [insert name of suspect that the ISD wanted an excuse to interrogate].' These 'confessions', made by frightened middle-class idealists to win respite from the deep freeze, were anything but the truth, because the truth in their case was of no interest to conspiracy-fixated interrogators.

We should not underestimate the effect of torture on the weak, the innocent or the mere sympathiser. It can produce amazing results – false admissions to crimes carrying life imprisonment or even death. In the 1930s, Stalin's show trials fooled the world because every defendant's confession was word-perfect. In Darkness at Noon, written in 1940, Arthur Koestler imaginatively attributed to these old Bolsheviks an urge to sacrifice themselves for communism, but the truth we now know to have been more mundane. Before the trial opened, they spent months on 'the conveyor', a disorientation technique in which denial of food and sleep produced suggestibility and acquiescence in the fantastical script written by the prosecutor. They were told at rehearsal that if they changed their lines in the public court room, their wives and children would be killed – and they knew that Stalin's willing executioners were not bluffing. 'The conveyor' has been followed, in the grim argot of state sadism, by 'the parrot's perch', 'the telephone', 'the airplane', 'waterboarding', 'the Liverpool', not to mention old standards like the cattle prod, the cigarette burn and the electrode attached to the genitals. Some years ago I had the privilege of representing Human Rights Watch in proceedings against General Pinochet, and I have kept a copy of his indictment. It contained thirty charges, of which the following are typical:

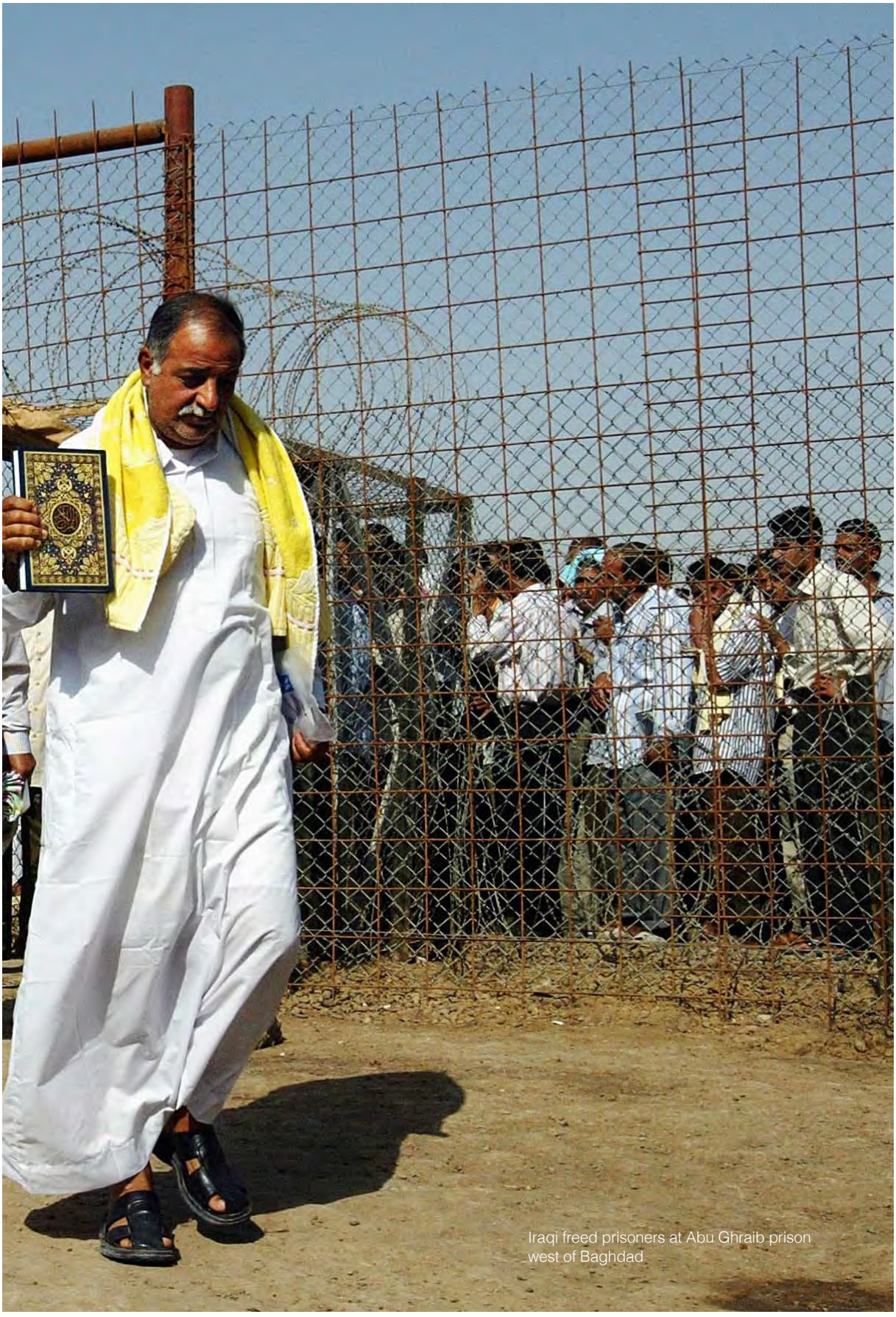
That you on or about 29th October 1976 being a public official, namely Commander-in-Chief of the Chilean Army, jointly with others intentionally inflicted severe pain or suffering on José Marcelino Gonzalez Malpu, by applying electric current to his genital organs, shoulders and ankles and pretending to shoot his captive naked mother in front of him, in purported performance of official duties.

That you jointly with others intentionally inflicted severe pain or suffering on Irma del Carmen Parada Gonzalez by:

- stripping her of her clothes;
- applying electric current to her mouth, vagina and breasts;
- subjecting her to rape by two men;
- putting her hands into chemicals and introducing them into a machine causing her to lose consciousness;
- forcing her to eat putrid food and the human remains of her dead fellow captives; in purported performance of official duties.

That you in 1974 being a public official, namely Commander-in-Chief of the Chilean Army, jointly with others intentionally inflicted severe pain or suffering on others by the employment of 'Papi', a man who had visible open syphilitic sores on his body, to rape female captives and to use on them a dog trained in sexual practices with human beings, in purported performance of official duties.

Given these charges, it is interesting to recall the distinguished people who demanded that Pinochet should never face them. His freedom to live happily ever after was championed by Mrs Thatcher and Dr Kissinger (of course), by Jesse Helms and George Bush Snr (as you would expect) and regrettably by the pope and the pope-in-waiting (Cardinal Ratzinger). Even, and incredibly, by Pinochet's mortal enemy, Fidel Castro, who declared the arrest 'an affront to national sensibilities'. In Australia, John Howard was bewildered at how



Iraqi freed prisoners at Abu Ghraib prison west of Baghdad

Pinochet could be prosecuted: he evinced surprise that the law had changed so much since he had studied it. The law – international human rights law – has changed, to the extent that states now owe a duty to the international community to investigate and punish any breach of the absolute prohibition in Article 5 of the Universal Declaration of Human Rights: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'

The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has now (by the year 2013) been ratified by 153 states. It requires torture suspects to be put on trial or else extradited to a country that will put them on trial. Torture is defined by the Convention as the intentional infliction of severe pain or suffering, whether physical or mental, by or with the consent of a public official(excluding the imposition of lawful punishments). The Convention prohibits 'degrading treatment', and there have been several unsatisfactory attempts to draw a distinction with torture. The case most commonly quoted was brought in the European Court of Human Rights by the Republic of Ireland against the UK over 'in-depth interrogation' to which internees in Belfast in 1970 were subjected by the British army. They were hooded and forced to stand for several hours spread-eagled against a wall, while questioning was interspersed with discombobulation from sleep-deprivation and high-pitched noises. The Court held that this treatment was degrading although it did not amount to torture, which was defined as 'deliberate inhumane treatment causing very severe suffering'.

In cases brought against the fascist military junta in Greece, the court had no hesitation in finding that electric shocks, bastinado (beating of feet so as to produce pain and swelling), genital assault, burning with cigarettes and sticking pins under nails would all cause pain of sufficient cruelty and intensity to satisfy this definition. In 1999 it emphasised, in a case brought against France, that repeated beatings during police interrogation, causing severe pain over a period of time, amount to 'torture' rather than to 'inhuman treatment'.

For the purposes of the European Convention, the distinction between 'torture' and 'inhuman treatment' does not matter other than for calculation of damages. Both techniques are prohibited. But post-9/11 pronouncements from US officials seize upon the distinction, and declare that the war on terror justifies 'inhuman or degrading treatment' which does not amount to 'torture'. They claim that certain intentional forms of suffering, euphemistically called 'augmented techniques of coercive interrogation', may be inflicted upon terrorist suspects. But the Geneva Conventions, which protect prisoners of war, specifically prohibit 'outrages upon personal dignity', and the Convention prohibits 'cruel, inhuman and degrading treatment'. The US hides its outrages in military euphemisms: forced standing for hours on end; taking advantage of individualphobias; environmental manipulation (this may involve adjusting temperature – presumably as they do in Singapore); dietary manipulation (i.e. temporary starvation); deprivation of light and deprivation of auditory stimuli (blindfolding, or solitary confinement in a darkened cell); stress positions (painful shackling and contortions), forced nudity (especially in the presence of Alsatians); isolation (solitary confinement for thirty days); working dogs (one way of taking advantage of individual phobias, i.e. the Arab fear of dogs).

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The period of US occupation of Iraq will be worst remembered for the obscene pictures of American soldiers enjoying themselves by subjecting detainees at Abu Ghraib to violence and degradation. An army investigation found numerous instances of 'sadistic, blatant and wanton criminal abuses' and the 'sadists on the night shift' received prison sentences ranging from three years (Lynndie England) to ten (Charles Graner). Their behaviour mimicked the more juvenile obsessions of American pornography: victims were forced to masturbate and have sex with each other while leering GIs taunted and humiliated them. Even more serious were the torture pictures – of hooded men hanging from hooks and naked Arabs screaming as Alsatians growled at their genitals. More serious still were pictures of two corpses wrapped in cellophane and packed in ice, in cells plastered with blood.

These torture pictures proved a disastrous own goal for the war on terror, because they became recruiting posters for Al-Qaeda throughout the Middle East. The pretense that they merely depicted the doings of a few rotten apples in an otherwise wholesome US military barrel was soon belied – not only by the official 2004 Schlesinger Report into Defense Department operations, but by a paper trail that showed first how Bush administration lawyers had willfully misinterpreted the law to approve the use of inhumane interrogation techniques for Guantanamo detainees, and secondly how these techniques had 'migrated' to Iraq, borne by military intelligence officers who naturally assumed that they could get away in Abu Ghraib with what had been approved in Guantanamo. Although the inhumane techniques they had been taught did not extend to forcible sex or harsh beatings, the lessons had left an expectation that the Geneva Conventions were irrelevant and that prisoners could be cruelly treated so long as they were not caused permanent physical injury.

Bush lawyers have in this respect proved bush lawyers. Jay Bybee (now a federal judge) assisted by John Yoo (a Berkeley law professor) defined torture so tightly ('extreme acts of an intensity akin to that which accompanies serious physical injury such as death or organ failure') that pulling fingernails would not qualify. Alberto Gonzales (the US attorney-general in 2005) thought that Islamist jihad 'renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions', and advised that Guantanamo was beyond the reach of habeas corpus. They turned a blind eye to international law, and believed the US government was entitled to withhold due process from men who are not American citizens and are not imprisoned in the US, and to subject these non-Americans, once located in an offshore limbo land, to treatment that could qualify as inhuman or degrading. This approach is not merely provincial, it is counterproductive because, as Senator John McCain points out, it sets an unhappy precedent for captured US servicemen in future wars whose lives may depend upon strict compliance by their captors with the Geneva Conventions.

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It puts British and Australian soldiers in peril, too. Those of our fathers and grandfathers held prisoner in Nazi Germany were treated with some dignity, thanks to the Geneva rules relating to POWs. Many were maltreated by the Japanese (who, contrary to myth, were well aware of the rules) but at least some of their captors were punished after the war. Later, in Korea and Vietnam, patchy compliance with the Conventions saved at least some Australian – and many US – lives. That is why we dishonour and diminish the Geneva Conventions at our peril. 'Obsolete' they may be in part (the right of prisoners to smoke cigarettes is certainly outdated and the privileges for officers reflects an antiquated British class system). 'Quaint' they may seem, but only to those ignorant of how they were influenced by the Holocaust. 'The American people are never going to pay for Taliban prisoners to have a musical instrument!' fumed a White House spokesman, failing to appreciate that this rule a) came about because of the importance of orchestras in Jewish ghettoes like Terezin and b) that the Taliban hate music.

The rationale for the rule against torture is not only that it dishonours the state and the legal system that permits it, but that it is counter-productive: much of the evidence elicited will be unreliable, and public sympathy will swing behind victims and their cause. Why then was the Bush administration so keen to permit it and so insouciant about criticism – which Donald Rumsfeld dismissed as 'isolated pockets of international hyperventilation'? There was certainly a post-9/11 feeling that the Geneva Conventions were obsolete in this 'new' war on terror, during which information might have to be obtained quickly from captured suspects in order to foil bombings and other atrocities. The 'ticking time bomb' scenario was always quoted, involving a suspect who knows where the bomb is hidden and is not prepared to give the vital information voluntarily. Is it justifiable to torture it out of him in order to save lives – a moral end that would justify unlawful means?

The problem with the hypothesis, of course, is its unreality: fanatics privy to such knowledge either stay silent because they welcome torture and death as martyrdom, or are sufficiently hardened or pain-wracked

A detainee in an outdoor solitary confinement cell talks with a military policeman at the Abu Ghraib prison

Australian Human Rights barrister Geoffrey Robertson QC (AAP Image/Lukas Coch)

to supply false information, which distracts police while the time ticks away. The official who orders the torture may think his judgment is moral when in reality it is perverse. James Schlesinger posited a 'minimum harm rule' for the interrogator: do not inflict more pressure than is necessary to get the desired information, but never cause permanent damage and always be prepared to take the consequences. The danger of a minimum harm rule, however, is that interrogators will always ratchet up the pain if they do not get the desired answers. Schlesinger recommended a professional ethics program to equip military leaders with a 'sharper moral compass for guidance in situations often riven with conflicting moral obligations'. While ethics education is always welcome, an education in legal obligations, explaining why the law prohibits torture and cruel and inhuman treatment, would be more appropriate.

Certain forms of torture often work, especially the kind practised by Pinochet and Hussein where spouses, parents and even children were maimed and violated within the sight and hearing of suspects with information their interrogators wanted to extract. But torture of this kind is so bestial that a Western state could never sanction it: the only torture that US officials could authorise – 'stress positions', exploitation of dog phobias, and Category III techniques (to use the US government's terminology) – will not terrify the real terrorist, and top commanders in Iraq have admitted that they learned little about the insurgency by using these techniques.

The Red Cross estimated that seventy-five to ninety per cent of the detainees had no connection with the insurgency and no useful information to offer in any event. Yet every Iraqi subjected to ill-treatment had a dozen or so relatives – sisters, brothers, parents, wives and children – who became in consequence committed to a blood feud against 'the invaders'.

Multiply this number by the number of prisoners ill-treated and the number of Iraqi civilians shot accidentally or through 'pre-emptive' action in Fallujah and other flashpoints, and the reason why so many Iraqis who were well disposed to the overthrow of Saddam came to oppose the US military can readily be appreciated. The most significant intelligence tip-off – the whereabouts of Saddam Hussein – came from treating an internee kindly.

Abu Ghraib may have been characterised by James Schlesinger as 'Animal House on the night shift', but on the day shift, in interrogation rooms, it was institutionalised illtreatment, approved at the very top by the US Secretary of Statefor Defense. The Americans may have learned little about the insurgency, but would-be insurgents certainly learned something about Americans. As one popular (and initially pro-US) Shia preacher put it in mid-2004, at Friday prayers:

It was discovered that freedom in this land is not ours. It is the freedom of the occupying soldiers in doing what they like . . . abusing women, children, men and the old men and women who they arrested randomly and without any guilt. They express the freedom of rape, the freedom of nudity and the freedom of humiliation.

The rhetoric was provocative, but it drew corroboration from the torture pictures from Abu Ghraib, ironically supporting the message that Iraqis had to fight for their own freedom, against their own liberators. President Bush rightly said that the Abu Ghraib photographs 'do not represent America', but they caused America a massive loss of respect and moral authority. (In Iraq, they fuelled a bloodbath that continues today, almost every day.) The Schlesinger Report explained how the ill-treatment permitted for Afghan detainees in Guantanamo Bay where the Geneva Conventions were claimed not to apply had 'migrated' to Iraq, where the Geneva Conventions applied with full force. The 'message in the field' was that no distinction should be drawn on grounds of geography: intelligence personnel trained to terrify Arabs in Guantanamo used the same techniques to terrify Arabs in Iraq.

But the Schlesinger Report never grappled with the real problem, which was why it had been necessary to depart from the Geneva Conventions at Guantanamo in the first place. It must have been obvious to those Bush lawyers who recommended this course to the president (mis-stating legal doctrine in the process) that military intelligence officers trained to use inhumane techniques in one war would use them in the next. The Schlesinger Report frankly admitted that the 'brutality and purposeless sadism' extended beyond ordinary soldiers to military

intelligence personnel and occurred during interrogation sessions and not only at Abu Ghraib. There was 'both institutional and personal responsibility at higher levels', although the person most responsible – Donald Rumsfeld – had his resignation offer refused by President Bush.

Soldiers and their commanders, under pressure and under deadly threats, will always be tempted to break rules to get results. This 'stuff' always happens in wars and in countries where the occupiers are resented. The only satisfactory deterrent is to prosecute those with 'command responsibility', or at minimum to require their resignation, although the only senior officer prosecuted over Abu Ghraib was Janis Karpinski, who was in charge of the prison. Charges against interrogators should have followed, but they did not. Charges against the 'Bush lawyers' – for permitting or at least bending the law – should have been levelled, as they were at Nuremberg against the Nazi judges, but they were not. International human rights law can lay down rules but it cannot at this juncture require their enforcement against an occupying power.

Torture is not confined to the application of pain to induce a suspect to confess. I first encountered it in real life in the atmosphere of death row in Trinidad, when visiting black power radical Michael X after he had been sentenced to hang. There were about thirty men in monkey cages, sweating in the heat, fingers scratching through the wire, screeching and shouting at each other and at the warders. They were allowed neither education nor exercise as they waited in torment for their death warrant to be read. The victim would then be weighed and measured for the drop; the sound of his family wailing and screaming would be interspersed with the sound of the hangman loudly testing 'the trap'.

After spending a few hours on death row, it struck me that men stuck here for years were effectively being tortured, and were certainly subjected to 'cruel and inhuman treatment or punishment', contrary to the 1689 Bill of Rights and to the Trinidadian constitution. Most condemned men in the Caribbean – as well as in the US – stay on death row for many years before their eventual execution, and this prolonged emotional and psychological suffering is of a different – a more extreme – dimension of inhumanity than the actual hanging. Although the death penalty itself is carefully protected from constitutional challenge, the Privy Council in the case of my clients Earl Pratt and Ivan Morgan v Jamaica held in due course that a prolonged stay on death row amounted to inhuman or degrading treatment and prevented the state of Jamaica from executing them. As a consequence, hundreds of death sentences have had to be commuted.

I believe it is necessary to improve the existing Geneva provisions for monitoring the treatment of persons detained in the wake of war, whether as POWs, 'enemy combatants', or as suspected spies or terrorists. Most are at risk of torture, and the only safeguard is the International Committee of the Red Cross. Article 3 gives Red Cross representatives a legal right to enter the prisons and police cells of all belligerents, to monitor conditions and compliance. This is a task that the Red Cross has courageously and punctiliously performed, but under a procedure that has one fatal flaw. It is utterly confidential: Red Cross reports are secretly sent to a country's high commanders and are never made available to the public. The mistreatment at Abu Ghraib was first detected early on by the Red Cross, but its report to the US Department of Defense was completely ignored until it was leaked by some 'deep throat' in the department to the Wall Street Journal. In how many other prisons has the Red Cross found evidence of torture, yet cannot disclose it or speak out when the torturers are permitted to continue?

This confidentiality seems unconscionable. If torture is a crime against humanity (and it is), then covering it up must always be ethically questionable. The Red Cross justifies secrecy on the basis that if its reports were published, many governments would not allow it access to their prisons. The argument is overstated: the Geneva Conventions give it access by right and countries that refuse would suffer aid and trade sanctions and turn the human rights spotlight on themselves, since the refusal would signify that they had something – namely torture to hide. But the Red Cross is adamant, with the result that its monitoring can never be a satisfactory safeguard. There are, no doubt, a few governments that would deny it access if its reports were to be made public, but surely it is time for countries like Australia, which both condemn torture and maintain that they have nothing to hide, to take the lead by waiving their right to confidentiality in Red Cross reports. Australia should have nothing to hide, although I suspect that we do – in Woomera, Christmas and Manus Islands and Nauru.

The paradox of torture is that all states pay lip-service to its illegality yet many – seventy-three at Amnesty International's last count – still secretly permit the practice. It will never end for terrorist suspects and prisoners of war, unless states are prepared not only to allow independent observers into their prisons, but to suffer publication of their findings. That time may be far off, but the work of organisations like Human Rights Watch brings it closer. ℞