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Terrorism, Defensive Torture and the Crisis in International Rights Law

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TERRORISM, DEFENSIVE TORTURE AND THE CRISIS IN INTERNATIONAL RIGHTS LAW

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If torture can be differentiated into types according to the intention of the torturer, there seem to be three types of torture: sadistic, judicial, and defensive.[1] Sadistic torture aims at nothing other than hurting the victim. Judicial torture aims at ascertaining guilt, forcing a confession, or using an unusual and cruel punishment for the sake of deterrence. Defensive torture seeks to elicit information that prevents harm in various ticking bomb scenarios. International law makes no formal divisions into types of torture.[2] It simply declares that torture is forbidden and that it remains forbidden even when the survival of a nation is at stake.[3] The right not to be tortured is thereby held as inalienable by international law.

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1. *Cf.* Robert G. Kennedy, who divides torture into two generic types: punitive and interrogatory. He then subdivides interrogatory torture into three categories: judicial, probative and defensive. *See* Robert G. Kennedy, Paper presented at the Joint Services Conference on Professional Ethics, *Can Interrogatory Torture Be Morally Legitimate?* (Washington, D.C., Jan. 31, 2003) *available at* http://www.usafa.edu/isme/JSCOPE03/ jscope03.html).

2. Article I of *The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* defines torture as:

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

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1 (June 26, 1987), 1465 U.N.T.S. 85. This Convention was ratified by the United States in October of 1994.

3. *Id.*, at Article II: "No exceptional circumstances whatsoever, whether a state of war or a

But, in this age of terrorism, it may seem unreasonable to identify the right not to be tortured as inalienable. Indeed, it may seem reasonable to argue that survival requires differentiating defensive torture from the sadistic and judicial forms of torture and identifying the former as morally and legally permissible. This argument joins forces with the increasingly popular utilitarian view that rights are conventions or liberty interests that must be subordinated to the survival of the community.[4]

Such arguments are fostering a crisis in International Human Rights Law by attacking the post World War II consensus that made inalienable rights conceivable. This consensus was centuries in the making. Indeed, its philosophical and legal cornerstones were laid by the ancient philosophers Aristotle[5] and Cicero,[6] who agreed that there was a natural justice that bound everyone, and by the ancient Roman jurists Gaius[7] and Ulpian,[8] who

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threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." Also, Article Four of the *International Covenant on Civil and Political Rights* states that while derogation from some obligations is possible for a "public emergency which threatens the life of the nation," there is no derogation from the prohibition of torture in Article Seven. *International Covenant on Civil and Political Rights* art. 4 (March 23, 1976), 999 U.N.T.S. 171.

4. This reduction of rights to liberty interests is not new, it can be found in the writings of Thomas Hobbes, insofar as he opposed liberty and law. In the *Leviathan* he wrote: "Right consisteth in liberty to do, or to forbeare; whereas law, determineth, and bindeth to one of them: so that law and right differ as much as obligation and liberty; which in one and the same matter are inconsistent" [sic]. Thomas Hobbes, *Leviathan* ch. 13, 189 (1985). The utilitarian John Stewart Mill modified this notion of rights by shifting its paradigmatic case from nature to life in society:

> [E]very one who receives the protection of society owes a return for the benefit . . . [and is] bound to observe a certain line of conduct . . . [that] consists, first, in not injuring the interests of one another . . . which . . . ought to be considered as rights.

John Stewart Mill, *On Liberty* 75 (Alburey Castell ed., Appleton-Century-Crofts 1947). For an excellent history of rights see Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law*, EMORY UNIVERSITY STUDIES IN LAW AND RELIGION 1150-1625 (1991). *See also* MICHAEL BETRAM CROWE, *The Changing Profile of the Natural Law* (The Hague: Martinus Nijhoff 1977) and JOHN FINNIS, *Natural Law and Natural Rights* (Oxford University Press 1980).

5. Aristotle, *Nicomachean Ethics*, in THE BASIC WORKS OF ARISTOTLE, ch. 7, 1134b19-26 (W. D. Ross trans., Random House 1941).

> Of political justice, part is natural, part legal—natural, that which everywhere has the same force and does not exist by people's thinking this or that; legal, that which is originally indifferent, but when it has been laid down is not indifferent . . . that which is by nature is unchangeable and has everywhere the same force.

Id.

6. CICERO, *De Re Publica*, *in* DE RE PUBLICA, DE LEGIBUS ch. 22, 211 (Clinton Walker Keyes trans., Harvard University Press 1966).

> True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. . . . It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people. . . . Whoever is disobedient is fleeing from himself and denying his human nature.

Id.

7. Gaius wrote commentaries on Roman law around 180 A.D. In these commentaries Gaius noted that although laws were generally particularized to localities, some laws were common to

introduced elements of natural law into a legal system that already approved judicial torture. The bulwarks for inalienable rights were then gradually built primarily, but not exclusively, by: Thomas Aquinas and his systematic exposition of natural law, just war theory, and natural rights as the naturally commensurate;[9] Hugo Grotius and his three volume tome on international law, *On Law of War and Peace* (1625); John Locke and his revolutionary principles;[10] William Blackstone and his *Commentaries on the Laws of England* that subordinated human law to natural law and divine law;[11] the American revolutionists and their declaration of 1776 that law is to be subordinated to three God-given rights: life, liberty and the pursuit of happiness; and, Abraham Lincoln and his Emancipation Proclamation, defense of the perennial relevance of the *Declaration of Independence*,[12]

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diverse cultures. He called those universal laws the *ius gentium* and held that they were warranted by the dictates of natural reason.

> The laws of every people governed by statutes and customs are partly peculiar to itself, partly common to all mankind. The rules enacted by a given state for its own members are peculiar to itself, and are called civil law [*ius civile*]; the rules prescribed by natural reason [*naturalis ratio*] for all are observed by all nations alike, and are called gentile law [*ius gentium*].

Gaius, *Institutionum Iuris Civilis Commentarii Quattuor*, *in* ELEMENTS OF THE ROMAN LAW 25 (Edward Poste trans. and commentary, Clarendon Press 1890). Thus, for Gaius, the dictates of natural reason are legally enforceable. Herein lies the natural law foundation of International Law.

8. Ulpian rejected Gaius's twofold division of law into civil and natural (*ius gentium*) in favor of a tripartite division: civil law, *ius gentium* as "those rules prescribed by natural reason for all men are observed by all peoples alike" dealing with war, slavery and contracts; and natural law as "that which nature has taught all animals" such as "the union of male and female, which we call marriage; hence the procreation and rearing of children, for this is a law in the knowledge of which we see even the lower animals taking pleasures." It should be noted that Ulpian identified slavery as a specification of the *ius gentium* due to war that is "contrary to the law of nature; for by the law of nature all men from the beginning were born free." Ulpian, *Institutes of Justinian* Book One, 4 (J. B. Moyle trans., 2d ed., Clarendon Press 1889). For a detailed explication of the controversies caused by this tripartite division of law see the magisterial tome of Michael Bertram Crowe, *supra* note 4.

9. Aquinas, *Summa Theologica* prima secundae, questions 90-100 (treatise on law); Aquinas, *Summa Theologica* secunda secundae, q. 40, 41, 42 (on war, strife and sedition) and q. 57 (on rights) (English Dominican Province trans., Benzinger Brothers Inc. 1920). "The natural right or just is that which by its very nature is adjusted to or commensurate with another person." Aquinas, *Summa Theologica* secunda secundae q. 57, art. three, *available at* http://www.newadvent.org/summa/3057.htm (last visited June 19, 2009).

10. John Locke, *Two Treatises of Civil Government*, Book Two, ch. XIII, 193 (E. P. Dutton & Co. In., Everyman Library 1955).

> [T]here remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them. . . . For . . . they will always have a right to preserve what they have not a power to part with, and to rid themselves of those who invade this fundamental, sacred, and unalterable law of self-preservation for which they entered into society.

Id. For a concise explication of Locke's natural law and its influence, see Paul E. Sigmund, NATURAL LAW IN POLITICAL THOUGHT 81-98 (Winthrop Publishers Incorporated 1971).

11. Greg Bailey, *Blackstone in America*, 1 EARLY AM. REV. 1, 4 (1997), *available at* http://www.earlyamerica.com/review/spring97/blackstone.html (last visited May 21, 2009).

12. Abraham Lincoln, *Speech on the Dred Scott Decision*, *in* AMERICAN POLITICAL THOUGHT 296 (Kenneth M. Dolbeare ed., Chatham House Publishers, Inc. 1989).

and promulgation of the 1863 Lieber Code,[13] which provided much of the material for the Hague Conventions of 1899 and 1907.[14] Also influential was the horror produced by the Nazi genocide machine and the realization that "the inherent dignity and . . . the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world," as put by the preamble of the *Universal Declaration of Human Rights*.[15] These rights "derive from the inherent dignity of the human person" as put by the preambles of the *International Covenant on Civil and Political Rights*,[16] and the *International Covenant on Economic, Social and Cultural Rights*.[17]

The soundness of International Rights Law hinges on whether an inherent human dignity exists and whether inalienable rights can be objectively known. These questions are settled by the fact that human beings are a distinctive species, as proven by their characteristic activities. From this it necessarily follows that only certain activities and objects of pursuit can promote the survival and flourishing of individuals and, thereby, the species. It also necessarily follows that whatever truly promotes human survival and flourishing is objectively good and that whatever destroys human life and flourishing is objectively evil. Some objective goods (but not all) are indispensable for human life and flourishing; these constitute rights that cannot be alienated or abrogated by law. For this reason, life, liberty and the pursuit of happiness are correctly identified as inalienable rights by the *Declaration of Independence*. Without these, humans can neither survive nor flourish.

> I think the authors of that notable instrument intended to include all men, but they did not intend to declare all men equal in all respects. They defined . . . in what respects they did consider all men created equal—equal in 'certain inalienable rights.' . . . They meant simply to declare the right, so that the enforcement of it might follow as fast as circumstances should permit. They meant to set up a standard maxim . . . which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere.

Id.

13. *See* E.D. Townsend, The Lieber Code of 1863, *available at* http://www.civilwarhome.com/liebercode.htm (last visited June 19, 2009) (proclaiming that war does not nullify moral responsibilities in Art. Five and forbidding torture for extorting confessions in Art. 16).

14. Telford Taylor, *Forward* to 1 THE LAW OF WAR: A DOCUMENTARY HISTORY xiii-xxv (Leon Friedman ed., Random House 1972).

15. Universal Declaration of Human Rights, G.A. Res. 217A (Dec. 12, 1948), *available at* http://www2.ohchr.org/english/law/ (last visited June 19, 2009). For the philosophical background of the drafters see MARY ANN GLENDON, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House 2001).

16. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI) (Dec. 16, 1966), *available at* http://www2.ohchr.org/english/law/ (last visited June 19, 2009).

17. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI) (Dec. 16, 1966), *available at* http://www2.ohchr.org/english/law/ (last visited June 19, 2009).

The reliance of the rights tradition on objective truths about human nature suffices to show the errors of those who oppose this tradition. For this tradition cannot be denied without also denying that humans exist as their own unique species in such a way that suffices for establishing not only human dignity but also objective and inalienable rights. For example, consider the attack of Peter Singer on inalienable human rights. He begins by arguing that "any satisfactory defense of the claim that all and only humans have intrinsic dignity would need to refer to some relevant capacities or characteristics that all and only humans possess."[18] He then argues that there is no such relevant capacity or characteristic because some humans "quite clearly are below the level of awareness, self-consciousness, intelligence, and sentience, of many non-humans."[19] Singer's argument here is that the mental incapacitation of some humans proves that no mental act can be identified as uniquely human to serve as the basis of an intrinsic human dignity and inalienable rights. Singer is thereby assuming that the inability of some humans to act a certain way suffices to prove that action cannot be species specific. But if this were so, no mental act that sets us apart from animals could be identified as uniquely human–not the diversity of our languages, nor the programming of computers, space walks, or religious rituals. The fact that such acts are unique to humans shows the falsity of Singer's assumption.

Moreover, if Singer were right that the impairment of an act in some suffices to prove that the unimpaired act in others cannot be properly human, then the impairment of speech caused by partial deafness or the mental confusion caused by dehydration, for instance, would suffice to prove that neither speaking nor thinking are characteristic of human nature. And if this were the case, then knowing how humans flourish would be useless in remedying speech impairments or mental confusion. And neither physicians nor psychiatrists would need to understand human physiology.

Thus, it is not the case that an inability of some to act in a certain way alienates that action from human nature or suffices to disprove the existence of human nature. Accordingly, what is good and right for the mentally competent remains good and right for the incapacitated, and a goal of the healing professions. This means that human rights are predicated on the uniqueness of human nature rather than on the realization of personal abilities. Consequently, even those who are too mentally incapacitated to perform the activities identified as the grounds for human dignity and rights remain human beings and retain their inalienable rights.

Another objection against the tradition of inalienable rights is that it would be coherent only if all killing would be impermissible–even in self-

18. Peter Singer, *All Animals Are Equal,* in ANIMAL RIGHTS AND HUMAN OBLIGATIONS 73-86 (Tom Regan and Peter Singer eds., Prentice Hall 1989).

19. *Id.* at 83.

defense or during war. But the rights tradition is not incoherent in holding that it is permissible to kill while defending oneself or one's country from lethal attacks. For it is not incoherent to hold that the inalienable right to life permits the protection of that right: for otherwise, this right would be abrogated by any lethal attack. This means not only that the inalienable rights of human nature can be abrogated neither by government nor by aggressors, but also that defense warrants acts against aggressors that would otherwise be immoral. In other words, a lethal blow in defense of one's life is not a violation of the aggressor's right to life, but rather is the refusal to allow the aggressor to abrogate one's right to life. Nevertheless, the permissibility of defensive killing is underpinned by the absence of alternatives: if one kills an attacker when there are other known and viable alternatives, then defense is not the reason for the killing.

The permissibility of defensive killing gives traction to the argument that torture ought to be divided into types and that defensive torture ought to be permissible. Here's how this argument proceeds–if it is permissible to kill someone in defense of another, as in cases where the life of a hostage is being threatened, then it is permissible to do less drastic acts. Killing someone is worse than torturing them. Thus, if the worst act (defensive killing) is morally and legally permissible, then the lesser act (defensive torture) should be permissible as well. This analogous argument from defensive killing makes some dramatic assumptions: that torture would not be used against those ignorant of the life-saving information, that torture would guarantee the accuracy of the information, that the acquisition of this information would actually save lives, that the morality of defensive killing is analogous to that of defensive torture, and that torture itself is not intrinsically immoral. Although each of these assumptions is seriously flawed, let us assume for the sake of argument that defensive torture can be a highly effective way to save lives, and consider whether defensive killing and defensive torture are analogous cases and whether defensive torture need not be intrinsically evil in all cases.

If it were true that the moral and legal permissibility of defensive killing provides a warrant for defensive torture, then not only would the two cases have to be alike, but torture could not be worse than death. Suicide, however, proves that it is possible for death to be preferred to suffering. Perhaps, then, death is not the worst evil and defensive killing cannot warrant the permissibility of defensive torture. On the one hand, it seems possible to construct cases where the acts seem substantially the same. Consider, for instance, the similarities between a hostage-taker threatening to kill his prisoners and a terrorist holding information about a ticking bomb. Either way, if nothing is done, people are likely to die. Either way, the intention of the sharpshooter who kills the hostage-taker or the torturer who gets the needed information is to save lives.

But, such similarities are outweighed by a significant difference: the bullet that ends the life of the hostage-taker is also the bullet that frees his prisoners, while the act of torture is not also the act that defuses the ticking bomb. Rather, torture produces the information that can then be used to locate and defuse the bomb. As a result, defensive killing and defensive torture differ in their ability to instantiate the classic principle of double effect; this principle applies only in those cases where good and bad effects result from a single act and where the bad effect is neither intended nor the means to the good effect. Since in the case of defensive torture, torture becomes the means of producing the good effect, any similarities between the cases of defensive torture and defensive killing are not morally significant. The morality of defensive torture thus hinges on whether or not it is intrinsically evil.

At this point, the nature of defensive torture makes it clear that the point of torture is to coercively obtain information. The ideal torturer would be one who could cause such suffering as to force the tortured to release the desired information against his will. Effective defensive torture thus consists of so overwhelming the reason and the will of the tortured individual that he is forced to speak against his convictions. In brief, effective torture turns a free being into a puppet with strings pulled by the torturer. Defensive torture thus subverts personhood and the distinctly human nature whereby we freely act according to our own convictions. In essence, effective torture achieves the torturer's intention, the here and now destruction of human freedom and rationality, that is, the here and now destruction–however temporary–of the person. This is quintessentially evil. Thus, defensive torture is intrinsically evil and always immoral.

But perhaps the age of terrorism renders morality a luxury and requires that International Human Rights Law be amended to permit defensive torture, even if it is intrinsically evil. After all, survival is on the line. However, there are several reasons to resist the legalization of defensive torture. First, the legalization of torture would adopt the same principle that justifies terrorism, namely, that some should be sacrificed for others. This would be to deny that human beings have an "inherent dignity" that cannot be alienated by the needs or the desires of others. It would reject the argument of John Locke that government cannot override the dignity and rights of individuals.[20] To reject Locke's argument is to reject a key bulwark of the rights tradition that is so integral to western civilization and, thereby, advance the goal of those terrorists seeking to undermine western civilization.

Secondly, the legalization of defensive torture would not only legalize the destruction of some human beings for the sake of other human beings but would also nurture the instrumental view of the human being both

20. Locke, *supra* note 10.

within the legal system and the culture. If the instrumental view were to become as dominant in contemporary democracies as it did in the communist states of Eastern Europe during the last century, it would undermine–if not destroy–the ability of individuals to work together to establish the common weal. For the common weal cannot be established when individuals view each other as nothing but fodder for their personal ambitions. As Václav Havel, the former president of Czechoslovakia and the Czech Republic pointed out, "The former [communistic] regime systematically mobilized the worst human qualities, like selfishness, envy, and hatred."[21] Accordingly, the instrumental view of human beings is incompatible with the goodwill that is indispensable for communal flourishing. Nevertheless, this view continues to fester within western democracies. For this reason, it is becoming more imperative to foster the realization that those united by a constitution—or by International Laws—protective of inalienable rights are united by, what Michael Pakaluk calls, "a scheme of cooperation" whereby individuals can achieve more in community than separately and can relate to each other as civic friends, rather than as threats or as tools to be exploited.[22]

Thirdly, the legalization of defensive torture as the legalization of what is intrinsically evil would compromise the law's ability to appeal to the consciences of its citizens for compliance. Law would then need to rely on the fear of sanctions to inspire compliance. Yet, as the common adage states: there can be neither enough police officers nor jails to force citizens to be law-abiding. And, even if there were, fear cannot rule a free people. No free people can thus afford to compromise the moral integrity of their laws.

Finally, it is not the case that an evil means can produce a good end. Nor is it the case that the destruction of the body is the worst evil: far worse is the destruction of the human spirit that occurs through serious wrong-doing. For this reason, Socrates argued in the *Gorgias*, that it is worse to do wrong than to suffer wrong.[23] That this has long been a conviction of the human race can be seen by the perennial placement of war within the parameters of morality and human dignity. As Leon Friedman pointed out: "Virtually every civilization of which we have record placed some limitations on the conduct of its own warfare. As early as the Egyptian and Sumerian wars of the second millennium B.C., there were rules."[24] Such acknowledgment of morality's primacy shows that survival does not need to be considered worth any cost. Indeed, the human spirit transcends time and space and yearns for an immortality that presupposes being moral.

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21. Václav Havel, *Summer Meditations* 4 (Paul Wilson trans., Vintage 1992).

22. Michael Pakaluk, *Political Friendship*, in THE CHANGING FACE OF FRIENDSHIP, 197-213 (Leroy S. Rouner ed., Notre Dame: University of Notre Dame 1994).

23. Plato, *Gorgias* 509d (Benjamin Jowett trans., Biblio Bazaar 2007).

24. Taylor, *supra* note 14, at 3.

Now is not the time to set aside the wisdom of centuries and deepen the international rights crisis by discarding morality for the sake of security. The legalization of defensive torture would not help humanize our world nor advance the cause of peace. Thus, the nations of the world that placed the International Covenants on Rights and the Convention Against Torture into force were correct not only in proclaiming that some rights are inalienable, but also in identifying freedom from torture to be an inalienable right. For in doing so, they stated that no human being has merely an instrumental value, that human nature suffices to identify every human being as the dignified subject of inalienable rights, and that security ought not be purchased at the cost of the human spirit. After all, we live more fully when we live to make ourselves and the world more humane.