

# Torture, Terror and Truth: On the Meaning of Guantánamo and the Future of Global Order

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## Abstract

How are we to grasp the transformation of law, authority, and border that is taking place through the current War on Terror? How are we to understand the return of public torture as a judicially sanctioned practice, presented as a just and necessary instrument to defend good society? What is the significance of Guantánamo for the future of global order? The article presents an analysis of the use of torture in the eternal War on Terror from the perspective of globalization theory, inspired in part by Agamben, Carl Schmitt, and a rereading of Foucault.

*Keywords: war on terror, torture, Michel Foucault, surveillance, sovereignty*

Guantánamo has become a condensed symbol of the ongoing War on Terror. While the gruesome photos of the sexualized torture rituals at Abu Ghraib may initially not have been intended for public consumption, selected journalists were invited to Guantánamo to take the pictures we are all familiar with. On display in the transparent cages of Camp X Ray are kneeling captives in orange overalls, blindfolded, gagged, ears plugged and their covered hands and feet chained. At the booted feet of uniformed US guards, these caged prisoners are reduced to dust by the regime to which they are forcibly subjected in a ritual manifestation of sovereign power.

Guantánamo signals the return of judicially sanctioned torture to the public sphere. Far from being the unauthorized excesses of a few 'bad apples', torture is inherent in the war strategy designed by the Bush Administration. Torture and what is judicially termed 'cruel, inhumane or degrading treatment' has been sanctioned by the legal experts of the Bush regime, authorized by President Bush's Executive Orders, regulated by bureaucratic documents, implemented at various sites in the US global prison archipelago, and ratified in legal texts such as the Military Commission Act

of 2006. How is the return of torture to be understood? This question will be explored and unfolded in four separate sections. Following a brief outline of the post-WWII American history of torture, I turn to the construction of the liberal ideology of torture as it has been outlined for domestic consumption by Administration lawyers and politicians. In the third section, I turn to Michel Foucault to present a perspective from which the return of torture might possibly be comprehended. The essay ends with a discussion of what Guantánamo suggests with regard to sovereignty, power and the future of global order.

### **American Torture Practices During the Cold War**

The United States now routinely tortures its prisoners, either directly – through personnel linked to the military, to the intelligence services or to private contractors – or indirectly, by sending prisoners to be tortured in Egypt, Ethiopia, Jordan, Morocco, Pakistan, Syria or Uzbekistan. In itself, torture is not a ‘new’ American practice. With the exception of two brief periods – following the end of World War II and the Cold War, respectively – when American administrations were a driving force in making the banning of torture a standard of international law via the Geneva Convention and the UN Convention Against Torture, torture has been a recurring feature of American judicial orders. Codified during slavery, it continued up to the Second World War in the form of extralegal practices in at least three separate contexts: in the judicial orders of the post-Emancipation southern regimes (Garland 2005); as a covert routine of US police handling of low-status or outcast citizens, until its exposure by the Wickersham Report in 1931 (Rejali 2007); and in the judicial orders of US colonies, not least in the Philippines (Miller 1984).

During the opening phase of the Cold War, the newly established Central Intelligence Agency (formed in 1947) was alarmed by information suggesting that the Soviet Union and Red China were developing a technique named ‘brainwashing’, by means of which they allegedly could gain complete mental control over their victims – a thesis that was strengthened during the Korean War, when captured American soldiers publicly criticized their own government. This was the beginning of a series of CIA projects aimed at catching up the Communist lead in what CIA Director A Dulles termed the ‘Brain War’. The work proceeded in two main directions: one experimenting with parapsychology and mind-altering substances such as LSD, the other focusing on conventional psychology and psychiatric research. Using front organizations, the CIA financed hundreds of university-based

projects which were intended to develop effective methods for breaking down human subjects (Gardell 2008; McCoy 2006).

The Canadian psychologist Donald Hebb at McGill University carried out a series of pioneering studies of sensory deprivation. In his experiments, subjects were put inside brightly lit boxes while wearing blindfolds, thick gloves, and padding around their heads. Hebb noted that the break-down process became very rapid. After just a few hours of isolation, the brain partly lost its capacity for normal functioning. After 48 hours it produced hallucinations and feelings of acute anxiety, fear, panic, despair, and apathy (Hebb et al. 1953; see Hebb 1955). Impressed by Hebb's results, the CIA refined its sensory deprivation technologies by financing a succession of projects at McGill, Harvard, Yale and Princeton. While some experiments used paid volunteers, others utilized hospitalized or incarcerated populations at mental hospitals, rehabilitation clinics or prisons as guinea pigs.<sup>1</sup>

In 1963, the CIA collated their findings in the interrogator's handbook *KUBARK Counterintelligence Interrogation*. 'The interrogation of a resistant source', the manual states, 'is one of the most exacting of professional tasks':

The intelligence service which is able to bring pertinent, modern knowledge to bear upon its problems enjoys huge advantages over a service which conducts its clandestine business in eighteenth century fashion [...] [American psychologists] have conducted scientific inquiries into many subjects that are closely related to interrogation: the effects of debility and isolation, the polygraph, reactions to pain and fear, hypnosis and heightened suggestibility, narcosis, etc. This work is of sufficient importance and relevance that it is no longer possible to discuss interrogation significantly without reference to the psychological research conducted in the past decade.

The 'scientific' technologies favored by the CIA were methods of *clean torture*, i.e., physical methods that do not leave any marks: electric shocks, genital torture, sensory deprivation, waterboarding, fear, psycho-active drugs, stress positions, sexual humiliation, and beatings with paddles, sandbags, electric batons or other objects that when properly used caused pain without leaving marks. 'These techniques, which can succeed even with highly resistant sources, are in essence methods of inducing regression of the personality to whatever earlier and weaker level is required for the dissolution of resistance' (CIA 1963, 41). To the CIA the scientific approach had the dual advantage of being more effective and depriving the tortured subject of the means of communicating his or her experience: a torture tale requires visible scars for validation.

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<sup>1</sup> Assessment built on 197,340 previously classified CIA documents in the MKULTRA collection, National Security Archives, Washington DC.

The Vietnam War (1959–1975) offered the CIA an opportunity to test these methods. During the war around forty torture centers were set up, at which – according to Army statistics – 81,740 prisoners of war were ‘neutralized’ and 26,369 ‘others’ were killed by the combined efforts of US and South Vietnamese forces. With the retreat of British and French colonial power, the Cold War intensified. In order to prevent the newly independent states now entering the international arena from joining the Soviet power bloc, the United States launched a multifaceted program – ranging from aid to military intervention – that would fill the power vacuum created by the withdrawal of the European colonial powers. Some of the aid given to allied Third World regimes took the form of providing interrogation expertise that would help those in power to stifle domestic left-wing opinion. Using the Office of Public Safety, a department of USAID, the CIA initiated an aid program that supplied torture training to a total of one million police and military officers in 47 countries.

It was deemed particularly important to halt the advance of communism in Latin America. In the early 1960s, the CIA established Project X in order to transfer its counterinsurgency experience from Vietnam to various anti-communist regimes in Latin America. At its School of the Americas facilities in Panama and Georgia and through Mobile Training Teams touring the South, the CIA and Pentagon used Project X and similar programs to give training in interrogation techniques to military, paramilitary and police personnel from Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, El Salvador, Ecuador, Guatemala, Honduras, Mexico, Paraguay, Peru, Uruguay and Venezuela. (Gill 2004; Gardell 2008.) Textbooks such as the *Human Resource Exploitation Manual 1983* and *Manejo de Fuentes (Handling of Sources)* promulgated KUBARK-style techniques of ‘clean torture’. These programs, of course, did not introduce torture to Latin America; torture was practiced by Latin American regimes, to varying degrees, well before the CIA even existed. It contributed, however, to a shift towards clean techniques, and along with other avenues of US support was instrumental to the survival of the repressive regimes of Latin America throughout the Cold War era.

In the South-American cultures of torture, the clean techniques of electro-torture, waterboarding, stress positions, sexual humiliation and ‘disappearance’ were combined with another method favored by the CIA, known as ‘fear as a weapon’, which relied on the effectiveness of torturing the parents or children of those under interrogation. All these methods are still in use today. There is, however, a significant difference: *then*, during the Cold War, torture was a highly classified practice, which we learned about only

after the declassification of key documents. *Today*, the practice of torture is essentially a public routine that takes place in the global agora.

### **A Liberal Ideology of Torture**

Torture has been an integral part of systems of justice in the West for more than two thousand years, only falling into disrepute in the late eighteenth- and early nineteenth-century (Peters 1999; Silverman 2001). It has been an instrument of power and justice, a mode of punishment or revenge, and a tool for producing information and confessions. Torture, then, is something carried out by official bodies, by the legal system, by the police. *He who tortures claims jurisdiction. Torture is a legal practice.*

This aspect was not lost on the Bush Administration. Lawyers for the regime, recruited from the country's top law schools, used their professional talents to carve out a legal space where torture would be acceptable. A key role here was played by the legal reports written by the White House's Chief Counsel Alberto Gonzales, U.S. Attorney General John Ashcroft, Assistant Attorney General John Yoo, Chief Legal Officer of the Department of Defense William J. Haynes II, and Assistant Attorney General for the Office of Legal Counsel Jay S. Bybee. More than one American lawyer has likened Gonzales, Ashcroft, Yoo, Haynes, and Bybee to 'mafia lawyers' or 'corporate lawyers', who see their duty as finding loopholes and manipulating legislation so that their clients can get away with whatever they want. The issue, however, is mobilizing not only critics of torture but also lawyers who defend the practice.

Heather MacDonald, lawyer and researcher at The Manhattan Institute, a neoconservative think-tank, claims that 'the Islamic enemy is unlike any other which our military have faced'. Islamists are not soldiers under the protection of the Geneva Convention. They do not wear uniforms, do not bear arms openly, and do not themselves respect the rules of the Geneva Convention:

Our terrorist enemies and their State supporters have declared themselves enemies of the civilized order and its humanitarian rules. In fighting them, we must of course hold ourselves to our own high moral standards, without, however, succumbing to the utopian notion that we can prevail while immaculately observing every precept of the Sermon on the Mount. It is a necessity in this fallen world that we must stop evil with force. (MacDonald 2006, 96.)

Assistant U.S. District Attorney Andrew McCarthy, who led the prosecution against Omar Abdel Rahman, emphasizes that the Hague Convention, the Geneva Convention, and the United Nations Convention Against Torture were devised as a means of regulating wars between states, and that its signatories could hardly have imagined something like militant Islam. Rather than either upholding or circumventing its regulations, McCarthy believes that the situation invites us to rationally consider the use of torture. McCarthy rejects the arguments of opponents of torture: that information gained through torture is unreliable or that torture is morally reprehensible. Although it may not be 'foolproof', McCarthy (2006, 108) claims that torture is a 'very effective method to get at truth'. Moral arguments do not hold up, since 'we already permit far worse' methods such as capital punishment – 'which, unlike torture, is forever' – or aerial bombing. 'Is torture with just cause and creating far less devastation morally worse just because it is inflicted in a room looking the victim in the eye rather than from thousands of feet in the air where victims are unseen?'

McCarthy (2006, 106) imagines that many people who consider themselves opposed to torture on principle would revise their position if they were faced by a 'real-world scenario': 'Let us posit a terrorist credibly believed to have murdered thousands of people. Suppose this terrorist is aware that a radiological bomb will be detonated momentarily in the heart of a major metropolis, but is refusing to impart the details to interrogators. Now, suddenly, black and white becomes grey; perhaps there are worse evils than torture.' McCarthy endorses the proposal by star Harvard lawyer Alan M. Dershowitz (2002), according to which prosecutors should be given the right to issue special 'torture warrants'; these would allow interrogators legally to use 'humane' torture techniques, such as sticking sterilized needles under the fingernails of the person being interrogated or drilling the person's teeth without anesthetics.

As with McCarthy, the starting point for Dershowitz's argument is the ticking-bomb scenario. Opinion polls show that a substantial part of the American public approves of the use of torture under such special circumstances – possibly influenced by the Golden Globe and Emmy-winning TV series *24*, which is based precisely on the idea that torture is a means of protecting the innocent public. Even after Abu Ghraib, fully 43 percent of those polled thought that torture might be justified in order to obtain key information. As the legal philosopher David Luban notes (2006), the ticking-bomb scenario is the cornerstone of the 'liberal ideology of torture' which was developed after September 11. It allows 'good liberals' to accept

the practice of torture while simultaneously denouncing torture practiced in illiberal societies. Here the reason for torture is not inhumanity, pleasure or revenge. Torture is not practiced in order to extract confessions or to terrify a population into subservience. It is carried out by good-hearted people who altruistically overcome their scruples in order to protect an innocent population. The purpose of torture is not to inflict pain. Rather, pain is the byproduct of a method used for obtaining important information.

All the above arguments feature prominently in the legal memos prepared by the Bush Administration's lawyers: the idea that Islamists constitute a 'completely new' enemy, of a kind not anticipated by the parties who signed the conventions making torture illegal under international law (for which reason these conventions cannot be applied); the notion that torture is a legitimate form of self-defense; and the idea that torture is not torture if the 'specific intent' is not to inflict pain but to defeat terrorists. To this was added the innovative thesis that the President, as Commander-in-Chief, has the right to suspend both American and international law, along with creative reinterpretations of specific phrases in the legal texts banning torture.

A key instance of such reinterpretation is the legal memo produced in 2002 by Jay S. Bybee, Assistant Attorney General for the Office of Legal Counsel. This fifty-page report was produced in response to the White House's question as to how the treatment of those held prisoner at Guantánamo relates to American law as based on the UN Convention Against Torture. One of Bybee's lines of argument begins with Article I of the Convention Against Torture: 'For the purposes of this Convention, torture means 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.' Bybee seized on the concept of *severe pain* inflicted *intentionally*. In a federal statute defining medical emergency, Bybee found that such a condition may be caused by life-threatening organ failure and that a symptom of organ failure was severe pain. Hence Bybee concluded that the federal definition of severe pain was the kind of pain that indicated life-threatening organ failure; thus any interrogation method causing intense pain but not organ collapse was not 'severe' and hence could not be torture. In addition, severe pain so defined had to be 'intentionally' inflicted upon the person being interrogated. If the 'specific intent' was rather to produce information for the purposes of anti-terrorism, the treatment could not be classified as torture.

In a similarly evasive move, Bybee found a way around the ban on psychological torture. Statute (18 U.S.C. §§ 2340–2140-A), which makes the

UN ban on torture a law of the United States, defines 'severe mental pain and suffering' as 'prolonged' mental harm. Invoking Webster's dictionary, Bybee found that 'prolonged' meant 'of extended duration' and 'long-lasting', which he chose to interpret as meaning that in order to be counted as torture the suffering caused by torture must last for months, years, or indeed a lifetime. If a suspected torturer had reason to believe that his actions would not cause long-lasting psychological trauma, he cannot be found guilty of torture.

Bybee's line of argument was accepted by the White House as a legal foundation. It then passed into a series of bureaucratic regulations. In her memo, Lieutenant Colonel Diane E. Beaver seized directly upon Bybee's argument: third-degree methods that cause the person being interrogated to be convinced of his immediate impending death – for example by waterboarding – 'are not illegal unless they are applied sadistically for the very purpose of causing lasting mental harm'. Similarly, this line of reasoning is reflected in the policy document *Detainee Interrogations in the Global War on Terror* (2004), which approves the use of the 'exceptional [interrogation] techniques' with which we are familiar from Guantánamo and Abu Ghraib. The only objection made by the White House was that the techniques were not exceptional enough.

The basis of the methods used goes back to KUBARK: sensory deprivation, electro-shocks, alternation of extreme cold and heat, excruciatingly loud music played twenty-four hours a day, simulated murder, waterboarding and stress positions. As in Vietnam, methods of humiliation were devised using anthropological research. A key text was Raphael Patai's *The Arab Mind* (2002/1973), which deals with shame and honor in Arab culture. Patai's depiction of the taboo nature of public nudity, sexuality, and masturbation formed the basis for the sexual humiliation rituals made infamous by Abu Ghraib. Patai's work provided the inspiration for scenarios in which men were dressed in women's clothing, bound naked with pantyhose on their heads, forced to masturbate in public and take part in homosexual practices, or raped anally with batons – whenever possible in front of other prisoners, preferably a relative such as a son who was forced to witness his father's humiliation.

It is at this point that photographs enter the picture. Being photographed increases the victim's sense of objectification and humiliation. Pictures were also used for the purpose of blackmail, in order to create informers and terrify other prisoners into cooperating. These photographs were – presumably – not initially intended to reach a global audience. It is reasonable to assume,



however, that the White House controlled which pictures were broadcast. It is now clear that we have only been allowed to see a selection. We know from testimony by members of Congress and others, who have seen more photographs, that both video films and still photographs showing the sexually humiliating torture of female prisoners have been filed as classified.

Along with sexual humiliation, religion too was seen as a weak point that could be exploited. Prisoners were forced to eat pork, drink alcohol, urinate on the Koran, watch the Koran being chewed by dogs, curse the Koran, and give thanks to Jesus. Sometimes rituals were combined. At Guantánamo, prisoners were 'baptized' by being smeared with (alleged) menstrual blood by prison guards dressed as priests before being left manacled on the ground, soaked in urine and blood, and covered by the Israeli flag. (FBI 2003, 2004a, 2004b.)

With the Military Commission Act of 2006 (MCA 2006), it became legal for the military to hold illegal combatants for an unlimited period of time. The law also replaced an earlier regulation in American military law which gave those arrested the right to be informed of the basis for their arrest. Furthermore, the law applied retroactively, claiming jurisdiction over all non-American and (directly or indirectly) illegal combatants who had acted in a hostile fashion towards the United States during, after or *before* September 11, 2001. With MCA 2006, the President's right to uphold, reinterpret, or ignore the Geneva Convention also became the law of the land: 'the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions.' An interpretation formulated as an 'Executive Order' shall be 'authoritative [...] as a matter of United States law'. It also emphasizes – on two occasions – that no person may invoke the Geneva Convention as a source of their rights. Nor can any member of the American military or person contracted by the state be sued for breach of the Geneva Convention.<sup>2</sup>

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<sup>2</sup> As with the legal reports described previously, a great deal of attention was devoted to the precise phrasing of the ban against torture in international law. In MCA's treatment of the American law banning torture (18 U.S.C. §§ 2340–2340-A), 'severe pain' was replaced with 'serious pain' – although without explaining what exactly this difference was supposed to be. Likewise, the phrase 'prolonged mental harm' in the definition of psychological torture was replaced with 'serious and non-transitory mental harm (which need not be prolonged)'. Once again, without any explanation as to what distinguishes 'prolonged' from 'non-transitory'. 'Specific intent' remains. The problem of definition is crucial, since MCA 2006 states that testimony provided under 'torture' cannot be admitted. A grey zone was therefore needed. In uncertain cases, when 'the degree of coercion is disputed', such testimony can still be accepted 'if the interests of justice would best be served by admission of the statement into evidence'. The law is less ambiguous in those cases where the accused claims that he or she has been tortured, namely that testimony obtained during 'alleged coercion' is not to be excluded. The law thereby opens the door to evidence obtained under circumstances that international law would define as 'torture'. Why else give interrogators a guarantee of immunity for crimes against the ban on torture under international law?

In his Presidential address presenting MCA 2006 to the public, Bush with great rhetorical skill outlined a liberal ideology of torture. The world faces an entirely new kind of enemy, who cannot be fought using conventional methods. For this reason the government has given the military and the intelligence services new 'tools' of war. The 'most important source' of vital military information 'is the terrorists themselves'. They possess 'unique knowledge' about future attacks. 'Our security depends on getting this kind of information.' In order to 'win the war on terror' it is 'necessary to move these individuals to an environment where they can be held secretly [sic], questioned by experts, and – when appropriate – prosecuted for terrorist acts'.<sup>3</sup> Bush explained that, in order to protect innocent Americans, he had authorized interrogation personnel to use 'an alternative set of procedures', which security reasons prevented him from making public. At the same time that Bush gave assurances that 'the United States does not torture', he emphasized that the Geneva Convention's ban on torture was 'vague and undefined' and therefore 'could be interpreted in different ways by American or foreign judges'. As a result, 'our military and intelligence personnel involved in capturing and questioning terrorists could now be at risk of prosecution under the War Crimes Act – simply for doing their jobs in a thorough and professional way. This is unacceptable.' 'The men and women who protect us should not have to fear lawsuits filed by terrorists because they're doing their jobs.' And Bush concludes: 'We're fighting for the cause of humanity, against those who seek to impose the darkness of tyranny and terror upon the entire world.' (Bush 2006.)

### **A Dual Disciplinary Model**

It should be stressed that the liberal torture ideology was primarily constructed for domestic consumption. As we move from the ideology of torture to its practice, we must reflect upon the difference between the ticking-bomb scenario and what we know about those actually being tortured. A CIA investigation of prisoners at Guantánamo submitted in September 2002 remarked that the majority were low-ranking Taliban recruits or completely 'innocent people swept up in the chaos of war'. A great number of them had

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<sup>3</sup> Of the thousands of prisoners captured during the war, only a few individuals have been taken to Guantánamo. Said Bush (speech 2006): 'It's important for Americans and others across the world to understand the kind of people held at Guantánamo. These aren't common criminals, or bystanders accidentally swept up on the battlefield – we have in place a rigorous process to ensure those held at Guantánamo Bay belong at Guantánamo. Those held at Guantánamo include suspected bomb makers, terrorist trainers, recruiters and facilitators, and potential suicide bombers. They are in our custody so they cannot murder our people.'

been sold by Afghan and other bounty hunters, who received 5,000 dollars for every 'terrorist' they could deliver. 'Only a few are al-Qaida.' 'The rest are unimportant.' This information about the large number of innocent people at Guantánamo merely resulted in the report being classified. It first became public knowledge when the report was leaked to the *New York Times* in June 2004 (Rose 2004; Golden & Natta 2004).

In 2004 and 2005, the Pentagon published details about the 759 prisoners at Guantánamo. The details included suspected ties to al-Qaida and the Taliban, what the prisoners were suspected of having done, and how the prisoners had been captured. The Pentagon distinguishes between 'combatant' for, 'member' of, and 'associated' with each of the organizations branded as terrorist by the United States. The figures show that *only eight percent* of the prisoners were suspected of being al-Qaida combatants; 30 percent were suspected of being 'members' of an organization, mainly low-ranking Taliban recruits; and 60 percent were suspected only of being 'associated' with some group. According to the Pentagon, 55 percent of the prisoners at Guantánamo had definitely not taken part in any hostile actions against the United States or its allies. Only five percent of the prisoners had been arrested by the American military. A colossal 95 percent had been delivered by bounty-hunters from Pakistan or the Northern Alliance (Denbeaux & Denbeaux 2006). Comparable figures are seen at Abu Ghraib. The Pentagon's own investigation, carried out by General Fay and General Jones (2004) reckoned that '85–90 percent of the prisoner population had no intelligence value'. The International Red Cross' report (2004) states that between 70 and 90 percent of the prisoners 'have been arrested by mistake'.

These discrepancies between the claims of Bush and other proponents of the liberal ideology of torture with regard to the captives going through alternative interrogation and what we now know the Pentagon and the CIA knew about the prisoners they tortured prompt a crucial question: *If prisoners are not tortured to gather military relevant information – then what kind of knowledge does the torture produce?*

In *Discipline and Punish*, Michel Foucault (1991) describes the culture of torture of the seventeenth and eighteenth century as a political ceremony whereby power was made manifest. Since the law was considered an extension of the ruler's will, all crimes contained an element of rebellion against the sovereign. He who attacks the law attacks the Majesty personally. Public torture was a ritual of armed law in which the Prince showed himself in his dual functions as head of justice and head of war. Royal justice was shown to be an armed justice. The sword that punished the subject who dared to

violate the Law was also the sword that destroyed enemies. Torture did not reestablish justice; it reactivated the power of the momentarily injured sovereign. It restored sovereignty by making everyone aware, through the tormented body of the offender, of the unrestrained presence of the sovereign. The suffering body of the condemned became an anchoring point for a ritual manifestation of power, revealing both the truth of the crime and the might of the sovereign. The excess of violence made manifest the disproportion of power of the triumphant sovereign over those whom he had reduced to impotence. Trials were held in secret. The accused had the right to know neither the charge nor the evidence against him. Knowledge was the absolute privilege of the prosecution. Only the punishment was public. It was the task of the guilty man to bear openly his condemnation and the truth of the crime that he had committed. His tormented body, upon which the Prince had inscribed his authority, was put on public display, tortured, exhibited in procession, announced to the world.

In the eighteenth and nineteenth century the political drama of ceremonial torture was gradually replaced by a regulated, detailed and expanded penal code based on reason. A criminal offence was no longer treated as a personal attack on the sovereign but as a crime against society, a breach of the contract whereby every citizen was regarded as having accepted the laws of society – the same laws by which the offender would now be tried. The opposition between secrecy and publicity was reversed: previously the trial had been secret and the punishment public, now the trial became a public political ceremony and the punishment was concealed behind prison walls. As the Law expanded to regulate life in minute detail, a Linnaean-like system of classification emerged: a *flora* of crime and punishment made up of exact correspondences, with the punishments becoming less violent but also more numerous. With the calculated economy of the power to punish came a shift in its application: power aimed not at the body but at the mind. A new microphysics of power traded in details, where all aspects of social life were everywhere standardized, regulated, monitored, disciplined, controlled – in workplaces, factories, barracks, schools, public spaces – in a process through which all citizens internalized the Law and became their own supervisors. The soul, writes Foucault, became the prison of the body.

To understand the return of torture as a political ceremony whereby a temporarily shaken sovereignty reconstitutes itself, we must shift our analytical perspective from the modernizing regimes of the territorially-defined national states, described by Foucault, to the gradually emerging regime of global society. Like Michael Hardt and Antonio Negri (2000, 2004), I sug-

gest that the end of the Cold War marked the point at which the processes of globalization entered their current – and far from completed – phase, characterized by the fact that there is no longer any society outside of the global one. This means that war can no longer be fought against an enemy on the other side of a border, only against The Enemy Within. War is thereby transformed from an affair between two or more sovereign states into the task of policing the territory of the global society, a mission for which the ‘global war on terror’ has served as a unifying force.

We ought perhaps to remind ourselves once again that the process is still in its initial phase: states continue to play important roles as political actors and arenas. The shift, however, has begun. Global society is increasingly becoming the broader context within which every system of social organization in the world will become a subset, with all that this entails in the way of overlapping, shifting, and crossable borders. This shift should not be interpreted as a fundamental break from the known to the unknown, but rather as a process of transformation in which the colonial world order of the past seeks to recreate itself under new conditions and with new horizons in view.

During the bipolar dichotomy of the Cold War there was always an alternative, and different ideological agendas competed to shape the world of the future. With the collapse of the Soviet Union this goal began to glow with new intensity. A concrete opportunity to reach the horizon presented itself: the globe as One World. The Cold War victory gave rise to a certain amount of hubris, with triumphant proclamations that we now stood at the End of History and the Last Man (Fukuyama 1992), the apex of humanity, characterized by a worldwide consensus on the capitalist world order rooted in the post-political condition. Reading the global security strategies produced by the United States after the end of the Cold War, the *Defence Planning Guide* (1992) and the *National Security Strategy* (2002), it is impossible not to be struck by the underlying aim of remaining the world’s only superpower and the desire to use tax-financed military power to underscore the fact that ‘the world order is ultimately backed by the U.S.’ (US Dept of Def 1992.) Under Clinton the United States increased its global military capacity and discreetly expanded a worldwide network of 725 bases beyond its own borders. Just as the British were once able to boast that the sun never set on the British Empire, the Pentagon can now declare that somewhere in the world the sun is always shining on the American military.

It should be stressed that the declaration of global sovereignty was formulated in terms of a ‘world civilization’ of which the United States was merely

an instrument. As lyrically expressed by Bush (2003): 'As our nation moves troops and builds alliances to make our world safer, we must also remember our calling as a blessed country is to make this world better [...] The liberty we prize is not America's gift to the world, it is God's gift to humanity.'

This ambition of defining global society in the name of world civilization, and establishing a global police authority with global jurisdiction for its defense, is well illustrated by the neologisms which characterize conversation among the global elite. Targets for military intervention are criminalized as 'rogue states' and 'international criminals', military occupations are labeled 'peace-keeping missions', and opponents become 'insurgents' and 'illegal combatants'.

In this context, militant Salafi jihadism is making its appearance as the Radical Other of the New World Order. By their very presence, radical Islamists negate the image of a universally accepted Law. Quite the contrary: they claim adherence to an alternative Law – Divine law, the law of God. As the New Barbarians of the new world order, jihadists appear particularly undisciplined. They defer neither to Bush nor to Mammon, but instead declare their allegiance to another sovereign with universal ambition: God.

If the United States and the Bush Administration saw September 11 as a personal attack on the Sovereign, public torture returned as a political ceremony by which a momentarily shaken sovereignty seeks to re-constitute itself and demonstrate to the world the invincible force of the sovereign. As under the *ancien régime*, evidence, accusations and trials remain secret – only the punishment is public. In this context, whether or not the victimized prisoners had any ties to September 11 is unimportant. Their bodies have become the site of a political ritual whereby sovereignty inscribes its superiority and the truth of the offender's guilt. This is why it must take place in *Camp X-ray*, in transparent animal cages, before invited photographers; this is why the images from Guantánamo and Abu Ghraib are broadcast around the world for the public to watch.

In the public ceremony, the sovereign's power appears in all its glory and citizens are reminded that every violation constitutes a rebellion. It is not just a question of setting an example, a display of frenzied violence to deter other potential rebels from taking action. The meaning of torture extends well beyond the community of radical jihadists. It erodes and consumes the minds of those to whom torture is displayed. As Foucault (1991, 58) writes: 'Not only must people know, they must see with their own eyes. Because they must be made to be afraid; but also because they must be the witnesses, the guarantors, of the punishment, and because they must to a

certain extent take part in it.' And *we all do. We are all witnesses.* We are all participants. To a certain extent, therefore, we are all guilty. We can never say that we didn't know.

The flinching gaze of the partner in crime is becoming part of contemporary political vision and contributes to the deafening silence surrounding Guantánamo. We don't get involved, we are not Islamists, perhaps not even Muslims. And, you never know. They probably are guilty. At least they *look* guilty, because they are treated as guilty. Thus the punishment reveals the nature of the prisoners, confers upon them the status of terrorists, non-humans, evil fanatics.

For the rest of us – disciplined citizens of the world, who belong to the civilized world, who have internalized the Law and get on with our lives – the Sovereign is constructing a gigantic *Panopticon*, whose field of vision is our social communication in its entirety, in all its minute detail. This was Jeremy Bentham's architectural solution for the surveillance of a prison's inmates: at the periphery a circular building of cells, with windows facing inward; at the centre of the circle stands a tower, from the top of which a supervisor can see inside the cells – without the prisoners being able to see him or each other. As Foucault (1991, 205) underscores, the Panopticon was destined to spread throughout society, and its vocation was to become a generalized function. Far from being a dream building, the Panopticon was 'the diagram of mechanism of power reduced to its ideal form'.

The major effect of the Panopticon is to induce in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power. By this arrangement, surveillance becomes permanent, even if it is actually discontinuous. The system is simultaneously visible and unverifiable. The silhouette of the tower from which he is being watched is in front of the prisoner's gaze but at any given moment he cannot know for certain if he is being watched or not: the important thing is that the prisoner knows for sure that he always *may* be watched. The Panopticon is a visibility machine which disassociates the see/being seen dyad: in the outer circular building one is totally seen without ever seeing; in the central tower one sees everything without ever being seen.

The prisoners are caught up in a power situation of which they are themselves the bearers: a real subjugation arises mechanically from a fictitious relation. The guard does not have to use violence to make the person being watched behave in the desired manner.

Today's Panopticon consists of laws, surveillance programs, and institutions such as the Patriot Act, the Protect America Act of 2007, Echelon, EU

Directive 2006/24/EC, and FISA. A defining feature of this complex and globally integrated visibility machine is its all-embracing reach. Wheeled out as anti-terrorism and fuelled by our fear of what are very small numbers – the minuscule groups of radical jihadists out there, the few Muslims who walk our streets – this program of surveillance totally saturates all communication. Laws give the authorities the right to eavesdrop on and document every citizen's slightest movement, regardless of whether there is any suspicion of terrorism. 'For the sake of security', as it is ambiguously called, every telephone call, every electronic message, and every move made in cyberspace is processed by gigantic computers and stored for possible future use. Our actions and movements are captured by an increasingly dense network of video cameras. Satellite cameras are able to follow every movement on earth; our cell phones are portable transmitters that can be tracked; we freely install GPS in our cars; anything we buy with a credit card is digitally stored, every library loan and film rental registered, every trip recorded.

The sheer amount of information is too vast for every conversation to be bugged, every letter read, and every movement followed; but, like Bentham's Panopticon, it serves the function of making us permanently aware that at any given moment we may be observed by invisible representatives of the Law. We are seen but cannot see. The All-Seeing Eye is omnipresent. At any time, its piercing gaze can be turned upon any of our activities, with the result that we monitor ourselves: we become the agents of our own subjugation.

The present time is characterized, then, by a dual disciplinary model: on the one hand a discipline by exception applied to the unruly Other, whose presence represents a challenge which the Sovereign eliminates by inscribing the truth of his right to rule and the truth of the nature of the crime on the tortured body of the offender, which is put on public display; on the other a discipline by surveillance operated by the logic of Panopticism, with the all-seeing eye recording every expressed thought, action, and communication of civilized (world) citizenry, down to its most elementary, mundane, and private aspects; a visibility machine which reinforces our 'free will' to conform, and transforms us into useful and eager reproducers of the System.

### **Sovereignty, Bio-politics and Global Order**

The rise of this dual disciplinary model is connected with the struggle for sovereignty and the definition of global order. Like any other police authority, the emerging global police authority is dependent on its ability



to present its use of violence as legitimate. In this context the Evil Islamic Terrorist presents a Perfect Enemy, insofar as it fuses different strands within our historical geography of fear. The Anti-Christ. The Muslim. The Turk. The Savage. The Criminal. The Madman. The Demon. The Lord of Chaos. Now, the function of a chaos figure is always to legitimate Cosmos. Confrontation with so exceptional an enemy authorizes representatives of the Law to assume exceptional powers.

In his *Critique of Violence*, Walter Benjamin (1996/1921) distinguishes between 'law-preserving' and 'lawmaking' violence. The ongoing war on terror is repeatedly justified as law-preserving violence, as a means of preserving the existing legal order within the territory of global society. In fact, the violence enacted – and particularly its most spectacular display – tends to be a means of making law. Current international law explicitly prohibits wars of aggression. Only defensive wars are permitted. The 'preventative war' against Iraq in 2003 was unquestionably a breach of international law as well as of the Charter of the United Nations. Torture, preventative mass arrests, kidnapping, indefinite incarceration without trial, surveillance of individuals not suspected of any crime, and the use of classified evidence in trials were all violations of the law – American, European, and international – when they were introduced as law-preserving measures during the War on Terror. In retrospect, however, with the adoption of the Patriot Act, the Military Commissions Act of 2006 and the Protect America Act of 2007, these extrajudicial measures have become the new law. Although its purpose is represented as identical to the established legal system, the world police authority puts itself at the disposal of a legal order of its own making, legitimizing its extraordinary powers by referring to the state of exception necessitated by the War on Terror.

We begin now to approach the fundamental constituents of sovereignty. As the German legal theorist Carl Schmitt (2006/1922) has argued, the authority of the sovereign is manifested in its purest form by its ability to declare a state of exception. The rule proves nothing, the exception proves everything: the exception not only confirms the rule, it creates the very space which makes the rule possible. Law cannot be abolished by reference to law. Nor can law be proclaimed by reference to itself. The sovereign thus is simultaneously both outside and within the legal order. The sovereign is he who stands outside the law and declares that there is nothing outside the law. The sovereign reveals himself in the act of will that proclaims the principle of order. For Schmitt, it is the very Act itself that is of interest; its actual content is secondary.

If we accept Schmitt's argument, the state of exception declared during the War on Terror is a cosmogonic act. The global order in whose name it has been declared is only preserved in its cancellation; the declaration of a state of exception creates a space in which Order can be reconstituted as a new order. Here the Terminator of order appears in all his glory as the Guarantor of order.

At Guantánamo the claim to be the definer of the new order transpires in its most concentrated form. This territory, it has been declared, lies outside the jurisdiction of international law. At the same time that Guantánamo is excluded from the world, it has been resituated at the centre of the world by global media flows. Within this absolute space of exception, prisoners are stripped of every human right; bare Life stands, naked, before the principle of sovereignty in its absolute purity – the decision of the sovereign determines life itself. At Guantánamo, the exception is the rule: that is to say, Guantánamo is a place which came into being through exception and in which the exception has been made the norm. Since the emergency that created Guantánamo is connected to the War on Terror, i.e. a policing war which, like the war on crime, cannot be fixated in time and space but on the contrary encompasses all time and has the whole world as its arena, the space opened up by the declaration of a state of emergency is being extended: the state of exception is being transformed into the defining state of global society.

So far, this perspective has echoed Giorgio Agamben's analysis in *Homo Sacer* (1998), in which he argues that the concentration camps make visible the hidden paradigm of modernity: the politicization of bare life. While National Socialism was strictly a biopolitical movement, Agamben reminds us that the first concentration camps were actually the products of Western democracies. Biopolitics becomes the bridging concept that explains the speed and ease with which European democracies could be transformed into totalitarian states.

When the democratic revolution declared that certain inalienable rights were universally bestowed on every human being at the moment of birth, it simultaneously inaugurated the biopolitics of modernity. Natural life, biological life, naked life – was made into a political object; in other words, the cultivation of life was made the object of politics and the modern state became the administrator of a biopolitical project. Paradoxically, modern citizens thereby became both free and subjugated: an inherent systemic contradiction manifested in the modern concept of human beings as *autonomous subjects*.

Agamben's perspective leads to a profound dystopia: there is no way out. There is no resistance that will not inevitably strengthen the system. The only resistance figure which Agamben points to is *Der Muselmann* – the camp prisoner who made himself invulnerable to power by retreating into a state of unreachable apathy. A contemporary equivalent – the post-political 'Muselmann' – entered the arena on September 11: the suicide bomber who made himself invulnerable by turning his sacred life into a lethal weapon, without, however, accomplishing much more than accelerating the transformation of American democracy by legitimating the transfer of power from Congress to the Executive Office of the Presidency, and providing the world police authority with the perfect enemy. (Sassen 2006.)

However, the consequences of the system's inherent paradoxes are not limited to the subjugation of modern man as an autonomous subject. The internal contradictions of any system produce fissures which can be used as a leverage-point for resistance, as they did during the Algerian war of liberation when the promises of the French Revolution were used against the French colonial authority (Azar 2001). When the foundation of the Declaration of the Universal Human Rights evaporates into the air, as it does every time we encounter bare life – in such figures as the stateless refugee, the illegal immigrant, or the prisoner at Guantánamo – we do not have to halt with Hannah Arendt (1973) and dismiss the notion of inalienable human rights as devoid of meaning. Adopting a certain degree of *tactical naïveté*, the Declaration of Human Rights may perfectly well be used politically by claiming that these inalienable rights have been violated and insisting on the restoration of universal human rights in practice.

In the public executions discussed by Foucault, the role of the people was an ambiguous one. They were invited as spectators to the ritual reactivation of power by a public punishment intended to demonstrate the repulsiveness of the offender and the justice of the prince. The ceremony sometimes achieved the opposite effect, exposing the sovereign's hideous injustice. On some occasions, the people drawn to the spectacle intending to terrorize them could reject the legitimacy of the punitive power of the sovereign, snatch the tortured victim from the hands of the executioner and start a general uprising. We citizens of the world, who have been invited to witness the public torture of our own time and to participate in the revitalization of power, similarly have a key role to play in this global-political drama. At Guantánamo, it is not just the sovereign's superiority that is being revealed – so are the fractures in the very foundation of a system which claims to sustain the universal rights of man. The discourse of world civilization and

the talk of global law and order can be turned against the current elites if we raise the demand that all states follow the global legal framework which has been developed by the United Nations and the International Criminal Court at the Hague. True universalism knows no exception, and cannot stand if confronted with double standards. Either justice is for all, or there is no universal justice. As Immanuel Wallerstein (2006) remarks: building up a worldwide legal system to punish crimes against humanity has little value if it cannot be used to put powerful actors on trial to the same extent as it convicts their victims. Even though Guantánamo reveals a claim to sovereignty, it does not have to be accepted. It can in fact be rejected. Calls for Bush, Cheney, Rumsfeld and Wolfowitz to be brought before the International Criminal Tribunal at The Hague, just like any other suspected war criminals, could become part of a political ceremony in which the currently shaken International Law might reactivate its claim to global jurisdiction. For all its tactical naiveté, then, asserting the equality of all before the law offers a tool in the ongoing struggle to create a global society – a struggle whose outcome remains anything but settled.

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