



Law, Human Rights, Realism and the “War on Terror”

By J. Peter Pham

The Lesser Evil: Political Ethics in an Age of Terror by Michael Ignatieff. Princeton: Princeton University Press, 2004. 212 pp.

The riveting images of the Iraqi prisoners being forced by United States military personnel into simulated sexual poses or otherwise abused at Baghdad’s notorious Abu Ghraib prison have become one of the most enduring, ironic, and, some might add, iconic images of the America’s “war on terror.” However, even before the emergence of the photographs thrust the issue to the forefront of political discourse, a public debate was long overdue on the balance to be struck between the competing demands of civil liberties and national security and whether or not violent responses to violence render both sides morally indistinguishable. It is not that a few farsighted individuals on both sides of the political divide did not attempt to have a principled discussion over the post-9/11 flurry of executive decisions and legislative enactments—one thinks of concerns about the Patriot Act raised by figures as disparate as former House Majority Leader Dick Armey and American Civil Liberties Union executive director Anthony Romero. Nor is it the case that there have not been reports about some of the harsh interrogation techniques employed against captured terrorists—witness Mark Bowden’s cover story in the October 2003 issue of the *Atlantic Monthly* with its copious excerpts from an apposite Central Intelligence Agency manual. Nevertheless, by and large, public discourse has been hijacked by absolutist claims and generally consists of often partisan, almost always shrill, moral posturing. Consequently, it may be a small blessing—although poor consolation to the victims of the abuse—that the now-infamous photographs from Abu Ghraib have finally forced the American body politic to confront the question of the relationship between law, human rights, and the realities of the Bush administration’s global fight against terrorism. And it is even more fortuitous that the prisoner abuse revelations coincided with the publication of journalist and historian Michael Ignatieff’s timely The Lesser Evil: Political Ethics in an Age of Terror, a timely account of the challenges facing liberal democracies as they confront the phenomenon of international terrorism.

Searching for a Balance

When Ignatieff, director of the Carr Center for Human Rights Policy at Harvard University, was invited to deliver the Gifford Lectures at the University of Edinburgh in 2002-2003—becoming only

the seventh American scholar so honored in the 115 year history of the prestigious series¹—he opted for a presentation of applied ethics, rather than engaging in the speculative exercises that characterized the contributions of most of his predecessors. Ignatieff's lectures, now gathered together in *The Lesser Evil*, address some of the very questions raised by the American-led “war on terrorism.” Must terrorism be fought with terror, assassination with assassination, torture with torture? Must civil liberties be sacrificed to protect public safety? In the book's opening lines, its author acknowledges the challenge before him:

When democracies fight terrorism, they are defending the proposition that their political life should be free of violence. But defeating terror requires violence. It may also require coercion, deception, secrecy, and violation of rights. How can democracies resort to these means without destroying the values for which they stand (viii)?

The task that Ignatieff has set before himself is by no means *facile*. While many human rights and civil liberties groups have been outspoken in their condemnation of human rights violations committed in the post-9/11 war on terror, many—if not most—rights advocates have failed to fully face up to the reality of terrorism. No less a figure in the rights community than William Schulz, executive director of Amnesty International U.S.A., has acknowledged:

The human rights community has repeatedly pointed out that it is difficult to conduct a war in defense of the rule of law when you are shredding that rule yourself....But what about the protection of personal security? How well have we done in holding the feet of terrorists and their supporters to the fire for their human rights violations? In this respect, the record of human rights organizations is far more mixed (Schulz 2004: 20).

While not disagreeing with critiques of the defensive measures taken by liberal democracies, especially the United States, since September 11, 2001, Ignatieff adopts a realist stance when he faults many critics for dogmatically refusing to countenance that some liberties may have to be traded for security. Here, it would have been helpful if the author had entered into a discussion of what constitutes “security,” especially given the import of the concept for this discourse. Personal security—understood as an individual's freedom from threat, danger, or harm coming from other people—could be said to be a fundamental good, an essential condition *sine qua non* of successful and fulfilling human existence. As Thomas Hobbes pointed out, the *raison d'être* of the sovereign state was as a security arrangement. Thus national security is similar to personal security, albeit applicable to the populations of nation-states rather than just individuals and, consequently, representing a common political as well as a personal good. Thus the point of a security policy is to deter threats from others and, where deterrence fails, to thwart them. However, Ignatieff is careful to enjoin that “government for the people...is something more than government for the happiness and security of the greatest number” since “the essential constraint of democratic government is that it must serve majority interests without sacrificing the freedom and dignity of individuals who comprise the political community to begin with and who on occasion may oppose how it is governed” (5). Consequently he comes down against both democrats who believe that “rights are prudential limits on government action, revocable in times of danger” as well as civil libertarians for

¹ The other Americans to serve as Gifford Lecturers at Edinburgh (and their published lectures) were William James (1900-1902, *The Varieties of Religious Experience: A Study of Human Nature*), John Dewey (1928-1929, *A Quest for Certainty: A Study of the Religion of Knowledge and Action*), Reinhold Niebuhr (1938-1940, *The Nature and Destiny of Man: A Christian Interpretation*), Stanley Jaki (1974-1976, *The Road of Science and the Ways to God*), Martha Nussbaum (1992-1993, “Need and Recognition: The Emotions”), and David Tracy (1999-2000, “This Side of God”).

whom they are “foundational commitments to individual dignity that ought to limit government action in times of safety and danger alike” (6). Ignatieff favors what he construes to be the *via media* between the two opposing positions, one that ought to be debated in the open:

Necessity may require us to take actions in the defense of democracy which will stray from democracy’s own foundational commitments to dignity. While we cannot avoid this, the best way to minimize harms is to maintain a clear distinction in our minds between what necessity can justify and what the morality of dignity can justify, and never allow the justifications of necessity—risk, threat, imminent danger—to dissolve the morally problematic character of necessary measures. Because the measures are morally problematic, they must be strictly targeted, applied to the smallest possible number of people, used as a last resort, and kept under the adversarial scrutiny of an open democratic system (8).

This “lesser evil” ethic holds that neither the moralists nor the consequentialists ought to be allowed exclusive run of the polity’s decision making process. There will be times when what works is not right and what is right will not work. As its name implies, the “lesser evil” approach agrees with the moralists that some actions are always wrong, even if they are effective. However, with the consequentialists, it maintains that there are circumstances in which consequences matter so much—say, for example, saving the lives of innocent people from a terrorist attack—that necessity may require that a liberal democracy’s principle of self-defense compels it to take a course of action that strays from its own foundational commitments. In such an emergency, the body politic may opt for a morally problematic measure—doing so as a last resort and keeping it under the close scrutiny. On the face of it, the proposition appears reasonable, especially as the objective evidence of the National Commission on Terrorist Attacks Upon the United States (the 9/11 commission) and other post-9/11 investigations suggested. They concluded that the well-meaning “firewall” between the American government’s intelligence and law enforcement organs, as well as the post-Vietnam War restraints on the activities of intelligence agencies, had catastrophic consequences: the failure to communicate available foreign intelligence to relevant domestic security agencies and the misjudgment made by the U.S. regarding Saddam Hussein’s weapons of mass destruction. However, if the war on terror requires lesser evils, what will keep them from sliding inexorably into the greater evil?

Ignatieff argues that the institutions of liberal democracy are designed to handle such moral hazards, “The ultimate safety in a democracy is that decisions filtered down through this long process stand less a chance of being wrong than ones decided, once and for all, at the top” (11). Adversarial review—not only between the branches of government but within each—as well as a free press and other institutions of civil society can restrain the pernicious effects of the moral evils accepted in the war on terror. If the war waged against terrorism since September 11 has been a strain, it is so insofar as much of it has been waged in the shadows with little guidance from law and ethics.

Where the exercise of power *in the shadows* has been subject to adversarial review *in the open*, the anecdotal evidence has been encouraging thus far. The Israeli Supreme Court, for example, has shown remarkable independence from the majority preferences of the Israeli electorate, not only with regard to aggressive interrogation techniques, but by recently ordering a change in the planned route of the security barrier being constructed along the border with the West Bank. The Israeli Court ruled that the army command had a duty to balance properly between security considerations and humanitarian ones. The U.S. Supreme Court, while acknowledging executive authority to detain

individuals as enemy combatants, has ruled that those held nonetheless have a right to a legal hearing where they may challenge the designation that is the basis for their detentions. After the initial deference to the president following the terrorist attacks of 2001, the U.S. Congress has held spirited, even bitterly partisan, debates. The 9/11 commission hearings have been rancorous at times. The American press has certainly not been silent; among the examples that could be cited: the handover of terrorist suspects to foreign governments for possible torture was uncovered by Barton Gellman and Dana Priest of the *Washington Post*; the techniques used in interrogation, including the CIA's so-called *Kubark Manual* were exposed by Mark Bowden in the *Atlantic Monthly*; and the abuses at Abu Ghraib were brought to the world's attention by Seymour Hersh in the *New Yorker*. Various human rights and civil liberties groups, including Amnesty International, Human Rights Watch, and the American Civil Liberties Union, have been unsparing in their criticism of perceived abuses. Even within the executive branch, there have been vigorous discussions: it was a report of the U.S. Department of Justice Inspector General, after all, that forced changes with procedures regarding administrative detainees.

Even if the inherently adversarial political process has worked well enough to date, is a free society willing to risk everything on the faith that *praeterita futura praedicat* will always hold true? And even if it does, the lesser evil principle offers little guidance to ethical discernment with some of the most vexing issues, including the indefinite detention of unlawful combatants, torture, and targeted killing. Ignatieff argues that “foundational commitments” to human dignity would place indefinite detentions, torture, and extrajudicial executions beyond the pale, citing the “moral check” of international standards, including internationally ratified human rights instruments (23). Ironically enough, however, for a book whose subtitle appeals to “ethics,” the author advances an argument that seems far more positivist than it is ethical: there is no answer to the question of “Why?” other than an appeal to “standards.” In a war on opponents as cunning and elusive as terrorists, public opinion shifts and political conventions may be subject to change. There is no reason why the adversarial process cannot be likewise at work here, lowering as well as raising the barriers of what is permissible.² There are no easy answers, and in his volume Ignatieff wisely does not proffer anything beyond proposing four general tests for policy makers to examine in the adversarial process: Do the coercive measures violate individual dignity? Do they unnecessarily depart from existing due process standards? Will they make citizens more secure in the long run? Have less coercive measures been tried?

² An example was Human Rights Watch executive director Kenneth Roth's December 26, 2002, letter to President George W. Bush on the al-Qaeda detainees at Guantánamo, at www.hrw.org/press/2002/12/us1227.htm. Roth warned that the treatment of the prisoners would place the U.S. in violation of the 1977 Additional Protocol I to the Geneva Conventions. The U.S. is not a signatory to the protocol, its non-ratification absolving the U.S. from being legally bound by it under the Vienna Convention on the Law of Treaties, Roth's deft attempt to declare it “recognized as restating customary international law” notwithstanding. President Ronald Reagan's January 29, 1987, letter of transmittal of Protocol II for Senate's ratification explicitly stated that the reason was that it “would grant [lawful] combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves” (Reagan 1987: 911). In the current circumstances, the ratification of Protocol I is even less likely, given considerations of electoral politics.

The Rights and Wrongs of Lawful and Unlawful Combatants

If, as is often said, the first casualty in war is the truth, then the second is the law. While, in the present conflict, it might be an exaggeration to declare that *silent leges inter arma*, the law has certainly been used as an instrument by all sides in the debate, its clarity becoming obfuscated in the process. Nevertheless, as Hedley Bull once asserted, “war is unimaginable apart from the rules by which human beings recognize which behavior is appropriate to it and define their attitudes toward it” (Bull 1979: 595). Consequently, it would be useful to clarify what international law and U.S. law actually say about rights and obligations before returning to a discussion of the balance these competing claims.

At least part of the recent confusion is attributable to the now-widespread use of the term “humanitarian law” for what used to be known as the *ius in bello* (generally rendered in English as the “laws of war”)—the former term being easily confounded with that of “human rights law.” While the realities to which humanitarian law and human rights law refer are related, they have different historical origins and are supported by distinct philosophies. The philosophical basis of human rights is that by virtue of an individual’s belonging to the human race, he or she possesses rights that, at a certain core level, are always applicable. In contrast to the universal object of the human rights law, humanitarian law has a more limited scope: to “civilize” warfare according to the basic principles of military necessity, humanity, and chivalry, as understood by the signers of the first Geneva Convention (1864) and its revision (1906), and the Hague Conventions (1899 and 1907)—the body of law out of which arose the modern-day Geneva Conventions (1949) and the Additional Protocols to the Geneva Conventions of 1949 (1977). The earlier codifications were based on two assumptions: that recourse to force was a legitimate instrument of policy for nation-states (*ius ad bellum*) and that during honorable conflict modern professional armies were expected to exercise restraint (*ius in bello*). Thus conventional war between states is tempered by what Ignatieff, in an earlier work, described as “codes of a warrior’s honor” (Ignatieff 1997: 116). These served to channel the violence, protecting civilian bystanders from attack and keeping the use of force proportional and limited to military necessity. These martial codes—which varied from culture to culture and ranged from Western Christendom’s code of chivalry to the *bushido* of the Japanese samurai—seem to have existed in all cultures and shared many common features, including sharp distinctions between combatants and non-combatants, legitimate and illegitimate targets, honorable and dishonorable weapons and tactics, and civilized and barbarous treatment of prisoners. In short, they were ethical systems

...primarily concerned with establishing the rules of combat and defining the system of moral etiquette by which warriors judged themselves to be worthy of mutual respect. Warrior’s honor implied an idea of war as a moral theatre in which one displayed one’s manly virtues in public. To fight with honor was to fight without fear, without hesitation, and, by implication, without duplicity. The codes acknowledged the moral paradox of combat: that those who fight each other bravely will be bound together in mutual respect; and that if they perish at each other’s hand, they will be brothers in death (Ignatieff 1997: 117).

Hence the “Lieber Code,” promulgated during the American Civil War by President Abraham Lincoln as General Orders No. 100 of April 24, 1863, and formally entitled *Instructions for the Government of Armies in the Field*, which were used as the primary basis for the Hague Conventions that defined military necessity in terms of what was necessary to defeat the enemy without resulting in unnecessary cruelty.

Military necessity admits all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; it allows for the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows for all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and for all withholding of sustenance or means of life from the enemy; for the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and for such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God (Article 15).

Military necessity does not admit cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor maiming or wounding except in fight, not torture to extort confessions. It does not admit the use of poison in any way, nor wanton destruction of a district (Article 16).

In view of these considerations, the Lieber Code specifically prescribed the protection of civilians and the decent treatment of POWs:

Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit (Article 22).

A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity (Article 56).

Honorable men, when captured, will abstain from giving to the enemy information concerning their own army, and the modern law of war permits no longer the use of any violence against prisoners in order to extort the desired information (Article 80).

Consequently, the balance between military necessity and humanity was achieved by the creation of humanitarian law. This balance was achieved in four ways. First, actions without military value were simply prohibited, for example, the type of looting common in post-medieval warfare. Second, some actions having military value were nevertheless prohibited due to overriding humanitarian considerations, such as the ban on the use of poison. Third, the rule of proportionality was implemented as the test when considering any given military action—“incidental” harm to civilians must not be excessive in relation to military objectives. Finally, military necessity and the realities on the ground may override humanitarian rules. This is recognized in Article 53 of the Fourth Geneva Convention of 1949, which, while generally prohibiting occupying powers from destroying property, also provides an exception, “where such destruction is rendered absolutely necessary by military operations.”

This system, however, relied on an implicit moral contract—and, in modern times, an explicit juridical accord solemnized by treaty—between “honorable men” whom circumstances rendered enemies to play by the same rules. Both sides understood that without these restraints, war would turn into a simple slaughter. Hence, when combatants departed from the “way of the warrior,” they and their victims expected them to be punished. During the Vietnam War, when Lieutenant William

Calley “secured” the hamlet of My Lai in the Viet Cong-controlled Son My district, he was brought before a court martial, not decorated. In Iraq, it should be noted, the goings-on at Abu Ghraib were first exhaustively documented by an internal military investigation headed by Major General Antonio Taguba.

The difficulty arises when the “warrior’s honor” meets a terrorist militancy that recognizes neither limits nor reciprocity. Since fighting began in Afghanistan, there has been no shortage of denunciations regarding the Bush administration’s denial of prisoner-of-war (POW) status to al-Qaeda and other fighters captured in Afghanistan and held at the U.S. naval base in Guantánamo Bay, Cuba. Some of this criticism has been particularly aimed at the decision to classify two American citizens, Yaser Esam Hamdi and Abdullah al-Muhajir, *né* José Padilla, presently held at the naval brig in Charleston, South Carolina, as “enemy combatants” (see Roth 2004). More recently, a secondary body of literature has emerged attempting to prove a causal link between the “unlawful combatant” designation of the al-Qaeda-linked detainees and the abuses in Iraq. While one would not draw the inference from the polemics, the question of who is or who is not a POW is a fairly settled matter of international law when understood in the context of humanitarian law’s attempt to balance the competing demands of military necessity and humanity. Legal scholars David Rivkin and Lee Casey have summarized the rules long accepted by “civilized states” as follows: (1) only sovereign states have the right to make war; (2) civilians cannot be deliberately attacked; (3) combatants can be attacked either *en masse* or individually; (4) quarter is to be granted when requested; (5) lawful combatants, when taken prisoner or otherwise incapacitated by wounds, are to be accorded the respect and privileges of prisoners of war (POWs); and (6) while all forms of force can be deployed in combat, certain weapons designed to cause unnecessary suffering are proscribed. (Rivkin and Casey 2003: 60)

Article 4 of the Third Geneva Convention prescribed specific protections to “lawful combatants,” that is, members of the armed forces of nations in conflict or members of militias and organized resistance movements of nations in conflict provided they are (1) part of an organized command structure; (2) wear fixed insignia recognizable at a distance; (3) carry their weapons openly, and; (4) conduct their operations in accordance with “the laws and customs of war.” Those prisoners who meet these criteria are entitled “in all circumstance to respect for their persons and their honor” as POWs (Article 14). The state of Iraq is a party to the Geneva conventions and the military personnel of the fallen Iraqi regime were entitled to POW status. Consequently, the abuses at Abu Ghraib were violations of international humanitarian law insofar as those subject to abuse were legitimate POWs. On this much the law is clear.

The case of members of al-Qaeda and other terrorists is more complicated. The Islamist terrorists of al-Qaeda and other groups represent no nation-states that are signatories to the Geneva Conventions. By and large, they do not even belong to the “national liberation movements” that were accorded some recognition by the signatories of the 1977 Additional Protocol I. They wear no distinctive uniforms and generally do not carry weapons openly. They deliberately target civilians and, where possible, do so in ways that maximize, rather than minimize, injury. They behead and mutilate prisoners, rather than accord them honorable POW status. In short, their *modus operandi* represents the antithesis of the “way of the warrior,” even as they exploit the rules of their opponents in order to carry out their apocalyptic schemes. Consequently, it would seem that they are not the “honorable men” who qualify for the protected status of POWs because they do not satisfy

any—much less all four—of the requirements of the Geneva Convention. While the U.S. Supreme Court recently ruled in two suits brought on behalf of some of the detainees at Guantánamo—*Rasul v. Bush*³ and *Hamdi v. Rumsfeld*⁴—that these prisoners have a right to petition for a writ of *habeas corpus* and an independent review of their status, it did not question the law underlying their classification as unlawful enemy combatants and the denial of POW status.⁵ The rationale behind the lawful/unlawful combatant distinction is clear from the philosophy motivating the laws of conflict.⁶ If professional armed forces are to achieve military objectives with the minimum of incidental damage to the protected status of civilians, they must be able to easily distinguish the enemy from a bystander. The possibility of protected status as a POW in the event of capture is the incentive for military personnel to play by these rules, without which it would be impossible to balance military necessity and humanitarian imperatives.

But what of those who, being unlawful combatants, are denied POW status once they are captured? Might they be subjected to the indignities and aggressive interrogation tactics—amounting even to torture—that are expressly prohibited with regard to captured military personnel? Here, the general norms are relatively clear. The United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, adopted in 1984, barred torture, which it defined in its first article 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.

The very next article of the Convention explicitly rules out any exigent circumstances: “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” Furthermore,

³ 124 S. Ct. 2686 (2004).

⁴ 124 S. Ct. 2633 (2004).

⁵ It should be noted that the Supreme Court rulings in *Rasul* and *Hamdi* were rather narrow in scope, leaving unanswered a number of significant questions. What would constitute sufficient review of the prisoners’ status? Would military commissions suffice or must the hearings be before federal courts? Can the unlawful combatants be tried by military tribunals? May American citizens be tried by military tribunals? What right do enemy combatants, U.S. nationals or otherwise, have to counsel? In short, the Court rejected the administration’s argument that fair procedures were not required, but declined to say what those fair procedures were. In the third case, *Rumsfeld v. Padilla* (124 S. Ct. 2711 [2004]), the court refused to rule on the legality of the prisoner’s detention on the grounds that the *habeas corpus* petition should not have been filed in New York against the secretary of defense, but against the commander of the naval brig where he is being held in South Carolina.

⁶ Even though it does not use the terminology of “lawful” and “unlawful” with respect to combatants, the International Committee of the Red Cross, official custodian of the Geneva Conventions, defines “combatant” as to mean “lawful combatant” and exclude, implicitly, the “unlawful”: “In international law, members of the armed forces of a party to the conflict, except medical and religious personnel, are combatants, that is they are entitled to take a direct part in hostilities. It is prohibited to recruit into the armed forces persons under the age of fifteen years. Combatants are under the obligation to distinguish themselves from the civilian population in accordance with the international law of armed conflict, and to respect that law. If they fall into the hands of the enemy Power, they are entitled to prisoner-of-war status” (Verri 1992: 32).

all states-parties to the convention oblige themselves to “undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman, or degrading treatment or punishment,” including those that might not be so severe as to “amount to torture as defined in article 1” (art. 16). The United States is a signatory of the Convention, which was ratified by the U.S. Senate in 1994, and implemented it with the adoption of Section 2340 of Title 18 of the United States Code. In fact, the American legislation actually adopts a more open definition than the UN Convention, defining it as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control” and omitting the international accord’s restriction of torture to acts motivated by a desire to obtain information, punish, or intimidate. Furthermore, U.S. law does not delineate distinctions based on where the torture takes place: a U.S. citizen accused of torture may be prosecuted in a domestic jurisdiction regardless of where the alleged offense took place as may any foreign nationals who come unto American soil.⁷ The controversy that erupted over the release of U.S. Department of Justice guidance documents for these laws—one memorandum concluded that “acts must be of an extreme nature to rise to the level of torture” (Bybee 2002: 1)—was occasioned in no small part by the fact that the memorandums ran counter to legislative intent (Engle 2003: 502-503).⁸

An Exception? The Case of the Ticking Time Bomb

If the norm of the law is clear,⁹ even with regard to unlawful combatants, its ethical application in some cases is perhaps more ambiguous. In a chapter entitled “Should the Ticking Time Bomb Terrorist Be Tortured?” in his provocative book Why Terrorism Works: Understanding the Threat, Responding to the Challenge, Harvard Law School professor Alan Dershowitz, a noted advocate of civil liberties, presents the case of Zacarias Moussaoui, the so-called twentieth hijacker who was arrested before 9/11, after flight instructors reported suspicious statements he made while taking flight lessons. On this case, Dershowitz notes:

The government decided not to seek a warrant to search his computer. Now imagine they had, and that they discovered he was part of a plan to destroy large occupied buildings, but without any further details. They interrogated him, gave him immunity from prosecution, and offered him large cash rewards and a new

⁷ The legislation in question, the Torture Victim Protection Act of 1991, is codified under Title 28 of the U.S. Code, Section 1350, note.

⁸ Interestingly, on the subject of the treatment of prisoners and what amounts to torture, European legislation is much more permissive than the American. The European Convention on Human Rights of November 4, 1950 (available at www.hri.org/docs/ECHR50.html), distinguishes between “torture” and “inhuman or degrading treatment” (art. 3). In one case before the European Court of Human Rights, *The Republic of Ireland v. The United Kingdom*, the majority held that the difference between these two categories ensued from the intensity of the suffering. Torture was defined as the deliberate use of inhumane treatment that causes severe and cruel pain and suffering, while anything short of that was left to the determination of the parties involved. See 2 Eur. Ct. H.R. 25 (1978).

⁹ Not all jurists concur on the clarity of the law regarding torture, citing the U.S. Senate’s reservation limiting the acceptance of the UN Convention’s proscriptions against “cruel, inhuman, or degrading treatment or punishment” to the understanding in the American constitutional jurisprudence of the “Fifth, Eighth, and/or Fourteenth Amendments to the Constitution.” Consequently, Alan Dershowitz, for example, asserts: “Decisions by U.S. courts have suggested that the Eighth Amendment may not prohibit the use of physical force to obtain information needed to save lives; so if the United States chose to employ non-lethal torture in such an extreme case it could arguably remain in technical compliance with its treaty obligation” (Dershowitz 2002: 136).

identity. He refused to talk. They then threatened him, tried to trick him, and employed every lawful technique available. He still refused. They even injected him with sodium pentothal and other truth serums, but to no avail. The attack now appeared to be imminent, but the FBI still had no idea what the target was or what means would be used to attack it. An FBI agent proposes the use of non-lethal torture—say, a sterilized needle inserted under the fingernails to produce unbearable pain without any threat to health or life... The simple cost-benefit analysis for employing such non-lethal torture seems overwhelming: it is surely better to inflict non-lethal pain on one guilty terrorist who is illegally withholding information needed to prevent an act of terrorism than to permit a large number of innocent victims to die. Pain is a lesser and more remediable harm than death; and the lives of a thousand innocent people should be valued more than the bodily integrity of one guilty person. (Dershowitz 2002: 143-144)

In response to the near-hysterical tenor of the criticism with which his proposal was greeted by some exponents of both the political left and right, Dershowitz appealed to, among other authorities, Jeremy Bentham, who argued from his utilitarian perspective that happiness can be calculated and quantified and it is consequently acceptable to inflict pain and suffering on the few to serve the wants and needs of the many (see Dershowitz 2003: 275-276). Dershowitz went on to resolve the dilemma between the demands of public safety and security on the one hand and civil liberties and human rights on the other by appealing to a third value: accountability and visibility. He advocates revised legislation to accommodate torture in the “ticking bomb case” through the use of judicial “torture warrants” that would authorize the administration to employ a predetermined amount of non-lethal pressure. While these reassurances are hardly comforting to many civil libertarians and other human rights advocates, these critics would do well to consider the moral weakness of the current idealist system whereby everyone professes opposition to aggressive interrogation techniques while knowing full well that it is occurring, and, in many cases, tacitly approving of them. As Dershowitz asserts, “it seems logical that a formal, visible, accountable, and centralized system is somewhat easier to control than an ad hoc, off-the-books, and under the radar-screen system” (Dershowitz 2002: 158). In fact, he argues that imposing a ban while knowingly avoiding evidence of torture’s occurrence only promotes disrespect for the rule of law in general and may even have the effect of increasing the instances of unjustifiable abuse in particular.

Absent a new wave of attacks on the American homeland on the scale of 9/11—and then probably only if another Moussaoui is arrested—it is highly unlikely that Dershowitz’s controversial proposal will be enacted.. However, this does not mean that torture and the “moderate physical pressure” that some writers refer to as “coercion” or “torture lite” (Bowden 2003: 54) do not occur; it simply means that when these methods are employed, they are beyond the legal pale and, consequently, without restraint.

To date, the only country in the world to publicly acknowledge the use of coercive techniques against suspected terrorists is, not surprisingly, the state of Israel, which has not only been a target of terrorist attacks since its foundation, but is also the only functional democracy in its neighborhood. As a consequence, the citizens of the Jewish state had an opportunity to thresh out some of the dilemmas that such attacks pose for a democratic polity. In 1987, following two well-publicized cases of alleged torture—including that of an Israeli army lieutenant accused of treason and espionage—a commission headed by retired Israeli Supreme Court Justice Moshe Landau articulated a series of guidelines for the use of “moderate physical pressure” and “non-violent psychological pressure” in the interrogation of prisoners withholding information about impending acts of terrorism, when the knowledge obtained could save lives (see Gross 2002: 1173-1174). The

techniques employed by Israel's General Security Service (GSS), also known as Shin Bet, included shaking the prisoners, depriving them of sleep, and placing them in various positions including the "Shabach" (where the prisoner is seated on a low stool or chair, tilted forward, with his or her hands tied behind the back and head covered by a sack, while loud music is played), the "Kasa'at at-tawlah" (where the prisoner is painfully stretched, using a table and direct pressure), and the "Qumbaz" or "frog crouch" (where the prisoner is forced to crouch on tiptoe with his or her hands tied behind his back). There is considerable evidence—albeit much contested by opponents of the techniques used—that these methods have saved a number of lives by preventing terrorist attacks. In 1999, however, writing for the Israeli Supreme Court in *Public Committee Against Torture v. Government of Israel*, the tribunal's president, Aharon Barak, prohibited the use of physical pressure since it was never authorized by the Knesset. Barak's judgment came even as he acknowledged:

The facts presented before this Court reveal that one hundred and twenty people died in terrorist attacks between 1.1.96 and 14.5.98. Seven hundred and seven people were injured. A large number of those killed and injured were victims of harrowing suicide bombings in the heart of Israel's cities. Many attacks—including suicide bombings, attempts to detonate car bombs, kidnappings of citizens and soldiers, attempts to hijack buses, murders, the placing of explosives, etc.—were prevented due to the measures taken by the authorities responsible for fighting the above described hostile terrorist activities on a daily basis. (Supreme Court of Israel 1999: 1473)

Nonetheless, the court held that the GSS interrogations violated Basic Law because human dignity and liberty clauses guaranteeing freedom from violation of an individual's body or dignity were rights that could be infringed upon only "by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required." Consequently, the tribunal granted an absolute order *nisi* declaring that the security agency "does not have the authority to 'shake' a man, hold him in the 'Shabach' position...force him into a 'frog crouch' position and deprive him of sleep in a manner other than that which is inherently required by interrogation" (Supreme Court of Israel 1999: 1489). If the aggressive interrogation techniques of its security services fail to pass this juridical muster, one is left wondering about the Israeli Supreme Court's opinion concerning the "targeted killing," usually by conventional military means carried out by the Israeli Defense Forces, of individuals who pose a terrorist threat or have been determined to have been culpable of a previous attack. Johns Hopkins University Professor Steven David described the elaborate decision making process, whose specific procedures have never been officially published:

Typically, Israeli intelligence agencies, often relying on the testimony of collaborators, will identify individuals who pose a terrorist threat. The agencies prepare a report detailing the past activities of the suspect and assess the potential for him or her to engage in future attacks. This information is evaluated by a group in the Israeli Defense Forces that includes the commander of the region and military lawyers. A recommendation is then made to the chief of staff. If the recommendation is to target the individual, the Israeli cabinet is brought in to approve or disapprove of the action. Once approval is given, the IDF usually does not seek additional approval to make the strike. However, if innocent casualties could occur as a result of the operation, the IDF will again seek the approval of the minister of defense and the prime minister before launching the attack. (David 2003: 117).

This policy, of course, is ethically—and legally—defensible only if it is carried out strictly against combatants in the juridical sense previously outlined. The Western just war tradition is based on the requirement that, in order to be moral, the use of force in armed conflict needs to be discriminate

and proportionate. In the case of targeted killing, the action against the unlawful combatants must be discriminate insofar as it upholds the immunity of noncombatants and minimizes collateral damage, and proportionate in that no more force is used than necessary to carry out the mission. Even where the policy has been applied to those carrying out—or at least assisting in—terrorist attacks against civilians, it still raises disturbing moral and political issues since it effectively involves a state decision to deprive someone of life without the benefit of judicial proceedings. As the example of the death penalty in the United States has eloquently shown, even the judicial process is no guarantee that a mistake will not be made (see Stein 2003: 134). Where mistakes have come to light, they have usually been uncovered as a result of an adversarial process—a zealous defense attorney or perhaps a critical judge—rather than through a change of heart on the part of the prosecutor. Even this minimal procedural safeguard of judicial review, however, is not afforded to the would-be objects of targeted killing mandates.

Nonetheless, in at least one instance that has been officially acknowledged, the U.S. government has apparently emulated the Israeli practice of targeted killing: in November 2002, the U.S. used an unmanned Predator aircraft to launch a missile that killed a senior al-Qaeda operative as well as five companions as they were traveling by car in a remote part of Yemen. However, critics of the policy note that, at least in Israel, there has yet to be a judicial determination of its legality (see Stein 2003: 133-132), much less evidence of its effectiveness in diminishing terrorist attacks. In any event, given the current political climate, and the not inconsiderable international scrutiny to which the state is subject, it is extremely unlikely that any legislation authorizing Shin Bet's erstwhile interrogation techniques could be passed, much less the policy of targeted killing given formal codification in law.

Understandably, the Abu Ghraib prison abuse scandal has occasioned its share of righteous indignation, rendering anything remotely similar to Dershowitz's proposed "torture warrants" or formalization of Israel's interrogation and targeted killing tactics *verboten* for the foreseeable future, especially for the United States. Figures as disparate as liberal philanthropist George Soros and the Vatican's secretary for relations with states Giovanni Lajolo have even compared it with the September 11, 2001, terrorist attacks. While perhaps satisfying, such talk falls into the trap of moral equivalency. On the opposite side, others, while embarrassed by the abuse, talk about a "new kind of war" requiring different methods, without providing the least bit of guidance as what those assertions really mean—the Dershowitz proposal a notable exception that proves the rule. Caught between these two contending sides is what one suspects to be the position of the overwhelming majority of Americans and, indeed, perhaps of ordinary men and women throughout the world. While these centrists recognize that the only way to defeat terrorist militants is to use force, by and large they prefer not to think about the consequences implied by that affirmation. As a result, both leaders and citizens essentially abdicate moral responsibility, a burden that Ignatieff seeks to restore with his option for a willfully chosen "lesser evil" approach to combating terrorism.

Back to Reality

According to Ignatieff, the greatest challenge that terrorists present to a free society, its ultimate "logic," is *la politique du pire*:

They believe that by provoking the United States and its Arab allies into indiscriminate acts of oppression, they will turn them, as it were, into recruiting sergeants for their cause. They have understood that the impact of terrorism is dialectical. Success depends less on the initial attack than on instigating an escalatory spiral,

controlled not by the forces of order but by the terrorists themselves. If terrorists can successfully draw democracies into this spiral and control its upward acceleration, they will begin to dictate the terms of the encounter. Success becomes a matter of inflicting losses, enduring harms, and gambling that the enemy has less endurance than they do. Since a state will always be too strong for a cell of individuals to defeat in open battle, it must defeat itself. If terrorists can provoke the state into atrocity, this will begin to erode the willingness of a democratic public to continue the fight. Democracies may have the stomach for the occasional atrocity, but over the long term a policy of atrocity is unsustainable (61-62).

It is not by mere coincidence that it is the French who coined the expression *la politique du pire*—literally, “the politics of the worst.” In addition to a rich language, the French had the experience of Algeria where, in the 1950s, terrorists fighting the French colonial government provoked it into a downward spiral of repression and atrocities so severe that the Algerian populace eventually joined the insurgents while the citizens of metropolitan France abandoned the North African territory in disgust. American policy analysts would do well to recall this history when they confront images of contractors dragged from cars and set afire and dismembered, and ask themselves if they are really prepared to play the game to the finish.

In the current debate, what is needed is a recovery of the realistic Hobbesian viewpoint: one ought not construct abstract ethical systems that are out of line with the human moral and political capacities and the circumstances of war. For Hobbes, a primary condition of any ethic is that individuals and groups be able consistently to follow it. Otherwise, such laws threaten obsolescence because they have little or no relationship to social realities, and are thus unreasonable (see Kavka 1986: 29-83). This realist vision does not so much hold that individuals and states should ignore the demands of morality when placed in extreme situations. Rather they redefine those demands so that individuals and groups, including states, have an affirmative right to take extreme measures in self-defense of the basic foundation for human existence: physical security itself. As Robert Jackson affirms, “the laws and ethics of war are only realistic to the extent that they are within the moral reach of average people in their concrete circumstances” (Jackson 2000: 218). Standards of conduct tailored to saints have no place in war and peace—or any other human endeavor for that matter.

On the other hand, neither should standards be set too low, lest one is swept into the whirlpool of *la politique du pire*. There is a slippery slope descending from civilization—governed by laws and valuing human dignity—to barbarism—governed by passions and valuing nothing. Consequently, as Ignatieff argues convincingly, it is the procedural requirements and prudential maxims of a democratic polity that point the way to a possible resolution, one that is desperately needed if free societies are to continue confronting “an enemy whose demands cannot be appeased, who cannot be deterred, and who does not have to win in order for us to lose” (153). After all, as Walter Laqueur concluded somberly at the end of his study on the future of terrorism, there is little likelihood that the threat will diminish in the foreseeable future:

Even in the unlikely case that all global conflicts will be resolved—that all political, social, and economic tensions of this world will vanish—this will not necessarily be the end of terrorism. The combination of paranoia, fanaticism, and extremist political (or religious) doctrine will find new outlets. It is the reservoir from which the terrorism of today and tomorrow attracts its followers. Perhaps it is not part of the human condition, but it certainly is part of the condition of certain sections and individuals. There are bound to be ups and downs as far as the frequency and the political impact of terrorism is concerned. But there is a huge

reservoir of aggression, and for this reason terrorism will be with us as far as one can look ahead (Laqueur 2003: 231).

But if the fate of free societies is to be perpetually tested in the forge of unrelenting, asymmetrical, non-reciprocal warfare, then Ignatieff's counsels are indeed prudent, even if his specific policy prescriptions are contestable. A "lesser evil" approach to ethics permits the necessary flexibility that the circumstances of the war on terror require—including, perhaps including among other difficult choices, prolonged preventative detention, aggressive interrogation, preemptive strikes and targeted killings—while the vigorous scrutiny of the adversarial process in democratic polities can keep flexibility from becoming license. As the Israeli Supreme Court acknowledged in summarizing its ruling outlawing Shin Bet's interrogation techniques:

This decision opens with a description of the difficult reality in which Israel finds herself security wise. We shall conclude this judgment by readdressing that harsh reality. We are aware that this decision does not ease dealing with that reality. This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties. (Supreme Court of Israel 1999: 1489).

However, if it is to successfully steer the realistic middle course between an absolutist human rights/civil liberties position that does not accept that rights violations can ever be justified, and an equally purist consequentialist position that judges actions solely on their effectiveness, this process must be driven by truth rather than lies, openness rather than denial. Policy mechanisms must be artfully constructed with procedural safeguards including, for example, independent review of detentions, clearly delineated parameters for interrogation, and well-understood strategic goals and accountability for preemptive actions. In his dissent to the U.S. Supreme Court's *Hamdi* decision (one in which he was joined by Justice John Paul Stevens), Justice Antonin Scalia professed that it was beyond his competence to know which "tools are sufficient to meet the government's security needs, including the need to obtain intelligence through interrogation." He nonetheless asserted, "[i]f civil liberties are to be curtailed during war time, it must be done openly and democratically, as the Constitution requires, rather than by silent erosion." Of course, the democratic process, no matter how open or inclusive, offers no guarantees concerning the virtue or even justice of its public policy choices: after all, choices, even erroneous ones, as well as their attendant consequences are unavoidable elements of the human experience. However, while the adversarial dynamics of democratic proceedings are fallible, they do allow for the possibility of correcting errors. Consequently, in democratic societies, it is always preferable to decide controversial issues after open debate and due deliberation, rather than to make them hastily when impassioned and under duress. This is especially true where the choice that has to be made is tragic: balancing liberty with security.

References

- Bowden, Mark. 2003. "The Dark Art of Interrogation." *Atlantic Monthly* (October): 51-76.
- Bull, Hedley. 1979. "Recapturing the Just War for Political Theory." *World Politics* 31: 588-599.
- Bybee, Jay S. 2002. Memorandum for Alberto R. Gonzalez, Counsel to the President. Washington: Department of Justice, Office of the Assistant Attorney-General.
- David, Steven R. 2003. "Israel's Policy of Targeted Killing." *Ethics & International Affairs* 17, no. 1: 111-126.
- Dershowitz, Alan M. 2003. "The Torture Warrant: A Response to Professor Strauss." *New York Law School Law Review* 48: 275-294.
- _____. 2002. Why Terrorism Works: Understanding the Threat, Responding to the Challenge. New Haven: Yale University Press.
- Engle, Eric. 2003. "The Torture Victim's Protection Act, the Alien Tort Claims Act, and Foucault's Archaeology of Knowledge." *Albany Law Review* 67: 501-525.
- Gross, Emanuel. 2002. "Democracy in the War Against Terrorism—The Israeli Experience." *Loyola of Los Angeles Law Review* 35: 1161-1216.
- Ignatieff, Michael. 1997. The Warrior's Honor: Ethnic War and the Modern Conscience. New York: Henry Holt.
- Jackson, Robert. 2000. The Global Covenant: Human Conduct in a World of States. Oxford: Oxford University Press.
- Kavka, Gregory S. 1986. *Hobbesian Moral and Political Theory*. Princeton: Princeton University Press.
- Laqueur, Walter. 2003. No End to War: Terrorism in the Twenty-First Century. New York: Continuum.
- Reagan, Ronald. 1987. "Letter of Transmittal of Protocol II to the Geneva Conventions of 1949." *American Journal of International Law* 81: 910-912.
- Rivkin, David, Jr., and Lee A. Casey. 2003. "Leashing the Dogs of War." The National Interest (Fall): 57-69.
- Roth, Kenneth. 2004. "The Law of War in the War on Terror: Washington's Abuse of 'Enemy Combatants.'" *Foreign Affairs* 83, no. 1 (January-February): 2-7.
- Schulz, William F. 2004. "Security is a Human Right, Too." *New York Times Magazine* (April 18): 20-21.

Stein, Yael. 2003. "By Any Name Illegal and Immoral." *Ethics & International Affairs* 17, no. 1: 127-137.

Supreme Court of Israel. 1999. "Public Committee Against Torture v. Government of Israel." *International Legal Materials* 38, no. 6: 1471-1490.

Verri, Pietro. 1992. Dictionary of the International Law of Armed Conflict. Translated by Edward Markee and Susan Mutti. Geneva: International Committee of the Red Cross.

*J. Peter Pham, Assistant Professor of Justice Studies at the Center for Liberal and Applied Social Sciences of James Madison University, served as an international diplomat in Liberia, Sierra Leone, and Guinea, from 2001 through 2002. His research interest is the intersection of international relations, international law, political theory, and ethics. Among Dr. Pham's recent publications are Liberia: Portrait of a Failed State (Reed Press, 2004), "The Perils of 'Consensus': Hans Kelsen and the Legal Philosophy of the United Nations" (*Indiana International & Comparative Law Review* 14, no. 3, 2004), and Child Soldiers, Adult Interests: Global Dimensions of the Sierra Leonean Tragedy (forthcoming).*

© 2004, Graduate School of International Studies, University of Denver.