

TORTURE: A FEASIBLE MEANS FOR NATIONAL SECURITY STRATEGY

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MASTER OF MILITARY ART AND SCIENCE  
Strategy

by

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## ABSTRACT

TORTURE: A FEASIBLE MEANS FOR NATIONAL SECURITY STRATEGY, by MAJ Nicole J. Stanford, 82 pages.

As a part of the response to the Al Qaida attacks on 11 September 2001, the United States found itself having to answer many difficult questions regarding its action in the Global War on Terrorism. One of the most contentious was the use of torture against captured enemy fighters. The United States, a strong proponent for humanitarian law, soon found itself criticized for its treatment of detainees. As a result, commentators and politicians have had endless debates about interrogation techniques and the legal applicability of international law and treaties to a nonstate enemy. The central research question derived from these issues is: Is torture a viable tool for use in achieving goals as outlined in the *2006 National Security Strategy*? Interrogational torture was examined from the following standpoints: legal, effectiveness, and ethical. Results showed that torture is wrong. The next step applied the analytical results against the ethical decision-making triangle and also concluded that from the three standpoints torture was wrong and not a feasible means of achieving the United States' national security objectives.

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## CHAPTER 1

### INTRODUCTION

In the wake of the eleventh of September terrorist attacks on America, many things the nation's leaders once took for granted changed. One of the major changes initiated as a result of these attacks was national security policy. President George W. Bush viewed the attacks on the World Trade Center and the Pentagon as an act of war. One particular problem the country faced with this was the fact that the organization that carried out these attacks was not a state but a group of Islamic terrorists receiving explicit support from the government of Afghanistan. As a part of his response, President Bush declared that the country was at war with Al Qaida and any government that supported them. In the wake of this declaration of the Global War on Terrorism (GWOT), the United States found itself having to answer many difficult questions. One of these questions that would eventually cause an international outcry was the use of torture against captured enemy fighters. The United States, a strong proponent for humanitarian law, soon found itself criticized for its treatment of detainees as well as its use of secret prisons. In short, the international community accused the United States of committing acts of torture. As a result of these accusations, commentators and politicians have had endless debates about torture warrants, the use of waterboarding, stress positions and other interrogation techniques, and legal applicability of international law and treaties to a nonstate enemy. In light of this controversy, the purpose of this study is therefore to examine the major arguments both for and against the use of torture, to examine these arguments against an ethical decision-making model, and to see if torture is really a

feasible resource for the United States to employ in pursuit of its goals as defined in the *2006 National Security Strategy*.

In the course of the debate on torture, many issues seem to exacerbate the torture issue. One of the main arguments deals with the application of international humanitarian law and the unconventional nature of Al Qaida and its associates. Al Qaida is not a state but has in the past received state support. Al Qaida, an organization calling for the return of the Caliphate and society based on fundamentalist Islamic law, is a decentralized organization with an unknown number of active and inactive operatives that cross international borders, often without the knowledge of the country's government. Its tactics include deliberately targeting and killing mass numbers of legal noncombatants, taking hostages, torturing them, and eventually killing them. It is also a master at manipulating the media, using news outlets, such as Al Jazeera, to showcase to the world their grisly successes. As a result of this, there are differing views on whether or not the fight against Al Qaida constitutes a war (as the United States believes) or that the fight against Al Qaida is a law enforcement mission, a tactic practiced by the Spanish and other European governments.

In accordance with President Bush's declaration that the United States must fight terrorism as though it were fighting a war, governmental organizations have conducted activities that at the very least can be called questionable and at the worst, torture. The United States runs a detention facility in Guantanamo Bay, Cuba, where many detainees from Iraq, Afghanistan, and other anti-terror operations have been held for interrogation indefinitely. There have been many questions that have arisen from this practice: What is the legal status of these detainees? Do the Geneva Conventions apply and if so how?

What interrogation practices are being used? And How are detainees' final status determined--military tribunals, Uniform Code of Military Justice, federal court? Reports from organizations, such as Amnesty International, Human Rights Watch, and the International Committee of the Red Cross (ICRC), say that torture is common in Guantanamo, not only in the form of interrogation techniques, but also in the form of indefinite confinement, no trials, and extraordinary rendition. European leaders as well as American political leaders have denounced these practices.

Other responses to the GWOT have incurred international objections. One of the first was the establishment of secret Central Intelligence Agency (CIA) run detention facilities designed to hold high-level terrorist suspects. Some believe the intent behind this was to evade United States' laws requiring that suspects have access to lawyers and to allow the use of special interrogation techniques that many claim amount to torture. Also considered torture is the secret nature of the detention; these prisoners have no ability to communicate their detention with the outside world. To many, this is a severe violation of international law and is not far from the abuses of rulers like Joseph Stalin and Augusto Pinochet. Several European and North American governments have opened inquiries regarding this practice (*The Washington Post* [Washington, D.C.], 2 November 2005). Many of these "ghost detainees" have since been sent to Guantanamo, but the debate on them and the facility continues.

Another incident that shocked the world and caused outrage among the Arab and the rest of the world was the photos showing United States' soldiers obviously abusing prisoners at the Abu Ghraib detention facility in Iraq. Although the United States has tried and convicted over fifty soldiers and one CIA contractor for crimes against

detainees (NPR All Things Considered 17 AUG 2006 Former CIA Contractor Guilty of Prisoner Abuse), many feel that these events have severely damaged not only the image, but also the reputation and the moral standing of the United States.

Another aspect of the torture question is the legality of the United States' actions in regards to international law and domestic law. Questions surround the Geneva Conventions: Do the conventions apply to a nonstate actor? and What is the requirement of the United States to act in accordance with the Geneva Conventions while engaging in the GWOT? Many organizations and governments claim that while parts of the Geneva Conventions may not be applicable in all scenarios of the GWOT, human rights law is always applicable and must be practiced. Many people have accused President Bush's legal advisors of attempting to redefine the Geneva Conventions in order to support the United States' actions.

United States' domestic law also has a part in this debate. Many argue that the current treatment of detainees would be unacceptable in a United States' criminal court and these actions violate United States' criminal code. The United States' Constitution calls for specific treatment of people accused of crimes which many claim is still applicable to terror detainees. Today in the United States, there is a heated debate between the President, Congress, and the Senate over issues surrounding the GWOT detainees. While these institutions debate over clarification of interrogation techniques, prosecution procedures of captured terrorists, and the impact of this on the Geneva Conventions, many in the media continue the debate on torture and its applicability in the United States' fight against terrorism. Many agree with Senator John McCain that

allowing torture would in the long run hurt United States' soldiers who get captured (*The New York Times*, 18 September 2006).

In addition to these legal questions are complex moral questions. World religious leaders and organizations, such as Pope Benedict XVI and the Catholic Church, condemn the use of torture. Others argue that torture is evil no matter how it is used and that if torture is allowed, it will lead to greater and more frequent abuses, not only in regards to GWOT detainees but to common criminals. On the other side of the argument are those who argue that the United States should not show mercy to an enemy that has no concern for innocent civilians and actually tells its fighters to use accusations of torture against their captors. Commentators, such as Charles Krauthammer, use the example of the "ticking-time-bomb" interrogation scenario to justify torturing one person to possibly save thousands. Still others, such as civil rights lawyer Alan Dershowitz, advocate the legalization of torture in the form of "torture warrants" in order to control and limit the use of torture.

Some final questions raised as a result of the torture debate are the effects of torture. Many are familiar with the effects of torture on Nazi prisoners, but what effect does torture have on those who carry it out? Is torture actually effective and can interrogators actually get intelligence or useless information? Finally, what is the effect of torture on the image of the United States? Many assert that torture has hurt the United States' world standing, given rogue states and dictatorships justification for the use of torture and played into the hands of Al Qaida in its effort to obtain the support of moderate Muslims against the West.

In summary, the problem that the United States faces today is the use of torture as a tool in the GWOT and its effectiveness in securing the *2006 National Security Strategy's* goals. The United States is facing an enemy which has no regard for the rules of war; it thinks nothing of attacking civilians and wants to destroy the western way of life. This enemy is happy to die for his cause. In response to this, the United States initiated its GWOT. Since the 9/11 attacks, the United States has come under attack from the international community for its policies on using torture for intelligence gathering, its terrorist justice system, and the actions of its soldiers fighting in Iraq and Afghanistan. Accusations of torture by terrorist detainees at the United States' detention center at Guantanamo Bay, pictures from Abu Ghraib, and secret CIA prisons have all contributed to calls for the United States to stop these practices. Many argue that this negative image hurts the United States' fight against terrorism, while others argue that everything must be done to gather the intelligence, even if it means using torture.

In light of this, the primary research question is: Is torture a viable tool for use in achieving goals as outlined in the *2006 National Security Strategy*? In order to answer this question, several other questions will need to be answered: What is torture? What are the possible ways torture can affect the national security strategy? Is torture actually effective? How is the use of torture viewed ethically, culturally, and religiously? What are the legal implications of the use of torture, both within United States' and international law? and What are the different arguments for and against the use of torture?

### Limitations and Delimitations

In researching this issue unclassified information will only be used in order to ensure widest dissemination. Research will end on 1 January 2007 in order to avoid having to consider major policy changes due to election results that may affect the premises as well as the results of the study. The use of torture will be assessed against the *2006 National Security Strategy* for the same reasons. Existing works on religious views on the use of terror will be the primary source for this area. Research on this topic will also depend on existing legal interpretations of things, such as the Geneva Conventions, United States' laws, and other international treaties. The definition of torture will come from the United Nations Convention Against Torture (CAT). While the Geneva Conventions serve as the basis for the Law of War, they do not contain a definition of torture. The CAT has been signed by the United States and is applicable in both war and peace. Due to time constraints and the scope of this work, Dr. Jack Kem's Ethical Triangle Ethical Decision-Making Model will serve as the ethical decision making model. In order to refine the scope of research, the study of torture will be limited to only the use of interrogational torture.

### Key Definitions

Below is a list of key terms and definitions as needed to help clarify the research.

Torture. "Any act by which sever 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 committing, 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 of other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions” (Elsea 2004, 9).

Geneva Conventions. International treaty adopted in 1949 which provides “a legal core that ensures protection for wounded combatants, sick and shipwrecked members of armed forces, medical personnel, prisoners of war, and civilians detained for security purposes in wartime, living in war zones, or under military occupation.” The Geneva Conventions “establish rules for lawful combatants and regulate interstate conflict. A set of sub rules, Common Article 3, apply during civil war.” (Hoffman 2005, 20).

International Humanitarian Law/Law of War/Law of Armed Conflict. “The rules which, in the times of armed conflict seek to protect people who are not or are no longer taking part in the hostilities, and to restrict the methods and means of warfare employed.” The International Committee of the Red Cross further defines it as “international treaty or customary rules which are specially intended to resolve matters of humanitarian concern arising directly from armed conflicts, whether of an international or non-international nature” (International Humanitarian Law: Answers to Your Questions [2004], 4).

Human Rights Law. Rules and treaties that protect individuals at all times. The primary goals of these laws are to protect citizens from their own governments. Some treaties allow for special derogations during armed conflict (International Humanitarian Law: Answers to Your Questions [2004], 36).

Customary International Law. “The Statute of the International Court of Justice defines customary international law as “a general practice accepted as law.” The International Committee of the Red Cross further states that in order for the law to be

customary, there must be state practice--*usus*, “and a belief that such practice is required, prohibited, or allowed...as a matter of law” (Henckaerts and Doswald-Beck 2005).

Convention Against Torture (CAT). The CAT is a treaty that bans torture under all circumstances to include external threats, states of emergency or orders from a superior officer or authority. The CAT forbids a country to return a refugee or prisoner to a country if there is a reasonable belief that he will be tortured. States must investigate and prosecute torture if it is believed that it was conducted within the states’ jurisdiction or extradite those suspects as required. Signatories are also required to provide prevention training to law enforcement and military personnel, review interrogation methods and investigate all allegations. Evidence obtained as a result of torture is forbidden. Cruel and degrading treatment is also against the CAT’s provisions. The CAT also established the United Nations Committee against Torture.

In this chapter, the problem of torture has been defined and several key issues that must be addressed in the course of researching the torture question have been identified. Limitations, delimitations, and key assumptions have been outlined. Finally, specific terms have been defined in order to ensure a common understanding of key ideas. Chapter 2, will consist of a literature review in which what has already been written on torture will be discussed. This chapter outline follows:

- I. Legal
  - a. International
  - b. United States domestic
- II. Ethical
  - a. Pro Torture
  - b. Against Torture
  - c. Others
- III. Religious Views
- IV. Effects

- a. Effectiveness
- b. Effects on tortured
- c. Effects on torturer

## CHAPTER 2

### LITERATURE REVIEW

In researching of the primary question, Is torture a viable tool for use in achieving goals as outlined in the *2006 National Security Strategy*, three main themes exist that are prevalent in the literature that has been written on the United States' use of torture. Most authors base their arguments on evidence pertaining to at least one of the following areas: legal considerations, ethical considerations, and the effects of torture.

#### Legal Considerations

There is large body of literature regarding the legal aspects of torture and the Global War on Terror. Existing legal literature can be divided into two areas: international law and domestic United States' law. Basic international law resources consist of the original source documents, such as the Geneva Conventions of 1949 (Geneva Conventions) and the Convention Against Torture (CAT). Both the United Nations Human Rights and International Law web sites provide legal background information regarding the provisions of the treaties and conventions. The ICRC also provides commentary on the Geneva Conventions which include historical reasons for the wording of certain provisions as well as their interpretation of the intent of the legislation.

The ICRC, along with United Nations Special Rapporteur on the question of torture, feel that it is the intent, rather than the letter, of these conventions that must be upheld. Both organizations question the United States' reasoning behind indefinite

detentions, President Bush's declaration that all GWOT detainees were illegal combatants, and many of the positions taken by his administration in the Torture Memos.

The United Nations web site, [www.un.org](http://www.un.org), provides the primary source for the original text of international humanitarian law and human rights treaties, to include the Geneva Conventions, their Additional Protocols and the CAT. The two most useful sections for researching torture are the human rights page and the international law page. The international law page provides the original text of the Geneva Conventions along with legal commentaries. The human rights page provides access to treaties, documents, meetings, and special reports relating to torture. In accordance with provisions of the CAT, there is a Committee Against Torture. The United Nations also has a Special Rapporteur on the question of torture. Member states are required to submit an initial report and then one every four years on what they have done to support the convention (Department of Public Information 1995-2007). The 23 December 2005 report *Civil and Political Rights, Including the Questions of Torture and Detention* provided an international perspective of what torture is and what the difference is between torture and cruel and degrading treatment (Nowak 2005, 1-15).

There are shortfalls within the international legal framework that is brought out in much of the literature. The most important is the failure of almost all documents to clearly define terms and thus provide a basic understanding. The CAT is the only document to define torture, but it, along with all of the other documents do not characterize interrogation methods as constituting torture or not. Another issue is the varied interpretations of many of the components of these treaties. Mr. Hoffman and others provide legal arguments on why Al Qaida should not be considered legal

combatants. The United States' Supreme Court has the opinion that they are legal combatants. Other articles argue that the Geneva Conventions imply that there should be another category that includes organizations such as Al Qaida. Another great difference in opinion is what acts constitute torture and how does this differ from cruel, inhumane and degrading treatment. The Bybee Memorandum says that torture should be equivalent to organ failure or death (Adams, Balfour and Reed 2006, 684). The European Court of Human Rights ruled that the British acts of placing hoods over Irish Republican Army prisoners and subjecting them to temperature extremes were cruel and degrading but did not constitute torture (Elsea 2004, 21). Organizations such as the United Nations and the ICRC both argue that indefinite detentions, the inability to communicate with family and not being allowed to practice their faith constitute torture. There were no instances where the authors use the argument that torture is not illegal; all agree that torture is forbidden within international humanitarian law and human rights law.

Information regarding a humanitarian perspective on the legal aspects of torture is the ICRC home page ([www.icrc.org](http://www.icrc.org)). The mission of the ICRC is to protect victims of war and violence as a neutral organization. As a result, the ICRC often conducts visits of both prisoners of war, and other detainees and makes recommendations to captors in regards to their level of care and treatment. The website contains the original texts of the Geneva Conventions along with legal commentaries. Also on this website are downloadable publications such as *International Humanitarian Law: Answers to Your Questions* which provide information referencing the Geneva Conventions and other instruments of international humanitarian law and human rights law (International Committee of the Red Cross 2004). Finally, the 26th International Conference of the Red

Cross and Red Crescent requested that the ICRC conduct a special study (*Customary International Law: Questions and Answers*) to identify and facilitate the application of customary international law. This article provides a short synopsis of some of the main points identified in the ICRC's eight year study. Explanations included are why is customary law binding and how is it enforced. Other items of interest on the website are speeches, publications and special reports dealing with international humanitarian law, human rights and other related issues (International Committee of the Red Cross 2005).

The second major component of legal arguments consists of United States' domestic law. Most authors and legal professionals on panels argue that the Torture Memos represent a very narrowed and flawed view of international law. All authors have found potential faults in domestic legislation enacted as a result of Abu Ghraib. The biggest argument is that the Detainee Treatment Act and the Military Commissions Act do not do enough to prevent non-military organizations from conducting torture or using cruel, inhumane and degrading interrogation methods. Many also see fault in military law in the fact that although *Field Manual 2-22.3: Human Intelligence Collector Operations* approves interrogation methods, these manuals are subject to change and may not always contain acceptable techniques. Most authors and legal panelists believe that the Bush Administration has made serious mistakes in its interpretation of international humanitarian law and human rights law and feel that something needs to be fixed. Only one author provides case studies of United States' actions regarding torture and cruel, inhumane and degrading treatment.

Two articles from the *Harvard Human Rights Journal* from 2001 and 2006 are helpful in researching legal aspects of torture. The first article "The International Law of

Torture: From Universal Proscription to Effective Application and Enforcement” provides not only an explanation of articles of human rights treaties and conventions, but also outlined international and United States’ case studies with their prevailing points of view on the subject of torture and international humanitarian law (Nagan and Atkins 2001, 87-121). Further analysis is found in another article “Recent Developments: Detainee Treatment Act of 2005” that provides an analysis with benefits and limitations from a human rights perspective of this piece of legislation (Suleman 2006, 257-265).

Further legal analysis can be found at the Center for Defense Information’s Law Project, which provides analysis of legal decisions made by the United States on torture-related issues, such as *Hamdan v. Rumsfeld*, a Supreme Court case in which the court declared that military commissions set up at the time by President Bush violated the Uniform Code of Military Justice (UCMJ) and the Geneva Conventions.

A different point of view is found in Michael Hoffman’s “Rescuing the Law of War: A Way Forward in an Era of Global Terrorism.” Mr. Hoffman contends that the legal issues regarding the GWOT are not really as difficult as they are sometimes portrayed. In the article, he explains the existing legal framework, presents problems in applying the laws and also provides analysis on the current legal interpretations. He recommends that the executive branch with congressional oversight adapt the customary laws of war for unlawful belligerents (Hoffman 2005, 18-35).

Several universities and colleges have hosted panels and symposiums in which legal aspects of torture are discussed. *UVA Lawyer* conducted a panel composed of law school professors which addressed the topic the role of international law in the GWOT. In it, the panelists discussed the use of international law precedents regarding detainees

from the GWOT. All agreed that the United States' approach was wrong and that international cooperation was important. As the world's only superpower, the panelists discussed the image of the United States and how that its actions serve as an important international model (*UVA Lawyer* 2005).

Case Western Reserve Law School hosted a symposium and published many of the speeches in its *Journal of International Law*. In his article "Torturing the Law," Jose E. Alvarez provides a detailed analysis of how lawyers misinterpreted applicable international and domestic law (Alvarez 2006, 175-223). Michael Newton discusses the legal aspect of contractors and interrogations in "War by Proxy: Legal and Moral Duties of "Other Actors" Derived from Government Affiliation" (Newton 2006, 249-265). Finally, Amos Guiora and Erin Page provide not only legal definitions of torture from current coalition partners but also discuss the effectiveness of torture in the ticking-time-bomb scenario in their article "The Unholy Trinity: Intelligence, Interrogation, and Torture" (Guiora and Page 2006, 428-447).

The final major legal resource on legality of torture is the Congressional Research Service which has published and regularly updates a series of articles regarding the issue of torture. *The War Crimes Act: Current Issues* provides an analysis on the content of the War Crimes Act of 1996, the effects of *Hamden v. Rumsfeld*, and also discusses amendments made to the War Crimes Act by the Military Commissions Act of 2006 (Garcia 2006a, 1-9). *United States Treatment of Prisoners in Iraq: Selected Legal Issues* provides a summary of applicable articles of the Geneva Conventions and other international agreements regulating human rights issues. It also provides a description of domestic United States' law which covers detainees and human rights and punishments

for violations. Legislation described includes the Uniform Code of Military Justice, 18 United States Code Section 7, and the Military Extraterritorial Jurisdiction Act. It also discusses the provisions and possible shortfalls of the antitorture provision of Public Law 109-13 (H.R. 1268) (Elsa 2005, 1-28). *U.N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques* describes the provisions of the CAT and how these work with existing United States' antitorture legislation (Garcia 2005, 1-20). *Interrogation of Detainees: Overview of the McCain Amendment* describes the provisions as well as strengths and weakness of the Detainee Treatment Act and how legislation of the Military Commissions Act of 2006 affects the legislation (Garcia 2006b, 1-10). All of these articles are updatable based on current events.

### Ethical Considerations

The next major group of writings on torture is those providing ethical arguments both for and against the use of torture. Included in this category are religious views on torture. The first and perhaps the largest group is authors arguing against the use of torture. Henry Shue argues against torture by refuting the reasoning that if killing is worse than torture, then some torture should be allowed. He reasons that torture can only happen after the victim has surrendered; therefore, torture is not analogous to just war and is worse than killing because it is an attack on the defenseless (Shue 2004, 52).

Other arguments echo themes contained in religious arguments against torture. Many authors argue that banning torture upholds the symbol of human dignity and that torture debases the victim as well as the torturer. Along these lines, others argue that the United States is a democracy and torture is against everything that democracies profess to

believe in. Also, banning torture shows that national security does not trump human rights and upholds existing United States' laws and international treaties.

Another argument against the use of torture is used in context of the ticking-time-bomb scenario. Many argue that this scenario is unrealistic because there is no way to be 100 percent certain that the suspect is knowledgeable and that he will even talk in time to avert the catastrophe. Also, questioned is how far the interrogator must go in torturing the subject; should he threaten the suspect's wife and children? Many say this use of torture will lead to a routine use of torture in nonemergency situations.

Setting the precedent for the routine use of torture is another argument against the use of torture. This argument, often called the "slippery-slope" argument, says that once torture is allowed, then it will become more common and society will fall down a "slippery slope" where torture is routine and commonly used for nonemergency situations.

A final argument against torture is that an absolute prohibition on torture is the best way to enforce the laws. If extremely coercive techniques were allowed, there would be no simple way to enforce their use. Some argue that torture warrants will not work due to the time required and also the precedent that they will lead down the slippery slope. Total prohibition is the easiest way to enforce the existing laws.

While a majority of the ethical discussions regarding torture is generally against the use of torture, there are some that argue in favor of limited use of torture in certain situations. In regards to the ticking-time-bomb scenario, many argue that the decision maker must choose to do the greatest good for the greatest number; leaders must choose the action which will produce a less-worse outcome. This goes hand in hand with the

theory that politicians must be willing to have dirty hands and sacrifice their personal morals in order to do the most good for the greatest number of people.

Other arguments in favor of torture say that it is a case of the rights of the victims versus the rights of the suspect. In the ticking-time-bomb scenario, the aggressor has created a situation in which someone must die. Many argue that the rights of the aggressor should not trump the rights of his victims and therefore the aggressor should be tortured if necessary.

### Religious Considerations

The next category of writings examined was religious arguments regarding torture. Religious laws and teachings are another major source of ethical arguments regarding terrorism. All major Western religions (Judaism, Christianity, and Islam) provided similar themes in arguing against the use of torture. No mainstream religious group argued that torture is applicable under its doctrine.

Roman Catholic views on torture can be found in encyclicals (Pope's letters to the Bishops), World Day of Peace Messages, and in the 2nd Vatican Ecumenical Council writings. The major theme running through these works is that torture is a violation of human dignity and is therefore always wrong. Pope John Paul II counters the ticking-time-bomb theory by saying that good intentions can diminish evil, but not remove it; civil authorities and individuals never have the right to violate human rights (Paulus 1993). Pope Benedict XVI shares this view and upholds the concept of international humanitarian law and actually calls for it to be updated to ensure that the current operating environment is reflected in its protections (Benedict 2006). Applicable documents include *Message of His Holiness Pope Benedict XVI for the Celebration of the*

*World Day of Peace, 1 January 2007; The Human Person; The Heart of Peace for the Celebration of the World Day of Peace, 1 January 2006; In Truth, Peace; and Veritatis Splendor: Regarding Certain Fundamental Questions of the Church's Moral Teaching.*

Protestant teachings continue the theme of torture as an affront to human dignity. The National Council of Churches, a coalition of Christian churches including Protestant, Anglican, Orthodox, and Evangelical, outline this in their *A Statement on the Disavowal of Torture* when they state that the use of torture does not uphold the Golden Rule; it not only debases man, who was created in God's image, but also destroys peace and the prospects of peace (National Council of Churches, 2006).

A similar theme of the protection of human dignity is found in Jewish writings. There are two areas where Jewish thought derives its logic: Jewish law and Jewish tradition. Jewish law says that under some circumstances, torture for the purpose of saving lives could be justified (Weintraub 2005). Jewish tradition counters this argument with the fact that humans are created in God's image, thus the humiliation of the living is a direct affront to God; the use of torture destroys dignity of the tortured and the torturer (Rosen 2006).

The Central Conference of American Rabbis (Reform movement) and the Rabbis for Human Rights--North America (all movements), both have denounced the use of torture in the form of letters of protest to the current United States' administration. Rabbis for Human Rights has published a booklet entitled *A Rabbinic Resource on Jewish Values and the History of Torture*. This booklet contains several articles regarding Jewish law, tradition, and the application of Jewish law in Israel regarding torture (Rabbis for Human Rights--North America 2005, 1-30).

## Effectiveness of Torture

The final category of examined works on torture includes the effects of torture. The effects of torture are best examined in four categories: the effects of torture on the person being tortured, the effects of torturing on the torturer, other effects of torture, and the overall effectiveness of torture.

The first category, the effects of torture on the victim comprises a majority of the documents on this aspect of torture. Most of what has been written has been done by professional medical organizations and deals with psychological, as well as physical considerations of treating torture survivors. Effects illustrated include depression, suicidal tendencies, anxiety, phobias, flashbacks, inability to trust medical personnel, posttraumatic stress disorder, as well as physical pain from beatings, shock, and broken bones. No article differentiated between the types of torture victims: were the patients victims of interrogational torture or other forms of torture.

The second category is the effects of committing torture on the interrogators. Little was found on this in the studies of physicians who treated torture victims; most of the evidence presented was incidental to the authors' overall arguments against torture. Common effects cited were the fact that the torturers would be morally and socially sacrificed in order to use torture and a higher incidence of more intense symptoms of posttraumatic stress disorder.

The third area of effects of torture consists of other effects that torture may have on things besides its victims. Dr. Jean Arrigo examined what would be required for the establishment of torture and the effects that required actions would have on existing institutions. Among the changes required was a torture training program and medical

personnel participation (Arrigo 2006). Several others provide the slippery slope argument as an effect of torture on society. Others have also presented the French experience in Algeria as an example of what can happen to a society that allows torture (DiMarco 2006,63-76).

The final category is the actual effectiveness of torture as an interrogation technique. Many articles will say that it either works or 'work, but will not cite specific studies that back up these assertions. A few authors do back up their assertions that it does not work with case studies and other documentation. The first argument that torture does not work is historical precedent. John H. Langbein uses Continental European medieval law to show that torture does not. Torture was used to add to the proof of someone's guilt. Torture would have to be based on some existing proof and the words of the tortured would be followed. In reality, confessions were rarely investigated and the victim often recanted his confession on the stand and would then have to be retortured (Langbein 2004, 93). Other authors use the example of Lieutenant Colonel West in Iraq and the soldiers of Abu Ghraib as proof that torture does not result in useful intelligence.

In examining the existing literature on torture, there are three categories of information: legal considerations, ethical considerations, and the effects of torture. Legal considerations consist mainly of international and domestic laws prohibiting the use of torture, but do not clearly define what actually constitutes torture. Legal commentaries support either a letter of the law approach to antitorture enforcement or a spirit of the law approach. Many feel that much of the legislation is vague and open to different interpretations. Ethical considerations consist of major Western religious laws and teachings, all of which claim that torture degrades the human body which was made in

God's image and therefore is against God. Other ethical arguments consist of the slippery slope argument, the politician with dirty hands argument, and do what produces that best result for the most people. Literature on effects covered effects on victims, torturers, other victims, such as society, and overall effectiveness of torture in gathering intelligence. All of the effects indicated that there were no good effects of using torture other than the possibility of obtaining information and saving lives; this was, however, shown by many authors to be a rare event.

The next chapter will discuss the research methodology used in answering the question, Is torture a viable tool for use in achieving goals as outlined in the *2006 National Security Strategy*?

## CHAPTER 3

### RESEARCH METHODOLOGY

The torture debate in the United States has generated controversy, first with the establishment of the detention facility at Guantanamo Bay, Cuba and later with the publications of photos of prisoner abuse at Abu Ghraib. Other issues such as the Central Intelligence Agency's use of secret prisons and the practice of extraordinary rendition have also fueled the torture debate. The fifth anniversary of the establishment of Camp X Ray at Guantanamo brought the question to the public once again as the United Nations called on the United States to close the facility.

In response to these accusations, many newspapers and television stations have published opinion/editorial pieces supporting or denouncing the use of torture. Meanwhile, different professional journals and organizations have done the same based on their specific area of study and expertise. Most authors give their opinions based on one thing such as their ethical beliefs, current laws, and medical analysis. Very few authors have actually put personal beliefs aside and held up the torture dilemma to the scrutiny of an ethical decision making model. This chapter will describe a two part research methodology. The first part will provide a description of the ethical decision making model and the required steps necessary to analyze the torture dilemma in the context of this model. The second section will explain how the results from the decision making model will be applied to the *2006 National Security Strategy*.

In order to obtain the required information, a meta analysis of existing literature has been conducted. Resources included international organizations, professional journals and associations, and writings of ethical philosophers as well as religious officials and

scholars where available. Subject matter expertise was used to explain concepts when appropriate and available. In answering questions regarding medical effectiveness, sources were used that either based observations on their personal clinical experience or on documented clinical observations. In order to answer questions regarding the religious view of torture, official church documents and national level religious decrees were the primary sources. When applicable, articles on religious law from different authors were used. In the case of Jewish thoughts on torture, an attempt was made to find information written by different sects (Reform, Orthodox, etc.). Finally, in researching the effectiveness of torture, sources that actually cited historical examples as well as subject matter experts provided primary references. An author that stated simply that torture was not proven to work was not included in arguments regarding the effectiveness of torture.

In order to answer the research question, analysis is broken down into two parts. The first part will consist of taking the results of the research and analyzing them in accordance with Dr. Jack Kem's Ethical Decision Making model. The first question to answer is: is the use of torture an ethical dilemma or is it a case of having the fortitude to do what is right. If deciding whether or not to use torture is not an ethical decision, then the ethical decision making model will not be a feasible comparison. If it does fit the criteria of an ethical dilemma, then analysis will continue with the use of torture in regards to national security objectives. The next step in the analysis is to determine the courses of action available to the United States in regard to torture based on the existing literature.

Once courses of action have been outlined, analysis based on the three approaches to ethical decision making (principles based, consequences based, and virtues based) will

be conducted (Kem 2006, 27). In the principles based analysis, one must look at the courses of actions based on not only what rules exist, but also on what rules should exist (Kem 2006, 27-28). The legal portion of the research will form the bulk of the answer to this question. It will however, be influenced to a degree by the religious outlook on torture, especially if a particular religion has rules, laws or declarations regarding torture.

The courses of action will then be examined in terms of their consequences. The questions that will be answered in this section are: What are the results and consequences of using torture? and What produces the greatest good for the greatest number? (Kem 2006, 29-30). Information gathered on ethical arguments regarding torture as well as the effectiveness and effects of torture will provide the basis of the analysis.

Finally, courses of action will be examined against the virtues based approach. In this analysis, the courses of action will be examined and then compared to the results of research on the effects of torture, religious views of torture and ethical views of torture. After the best course of action has been determined, that course of action will be examined against the main principles that President George W. Bush outlined in his *2006 National Security Strategy*.

In summary, the goal is to arrive at an answer to the torture question that is based on several different aspects to include legality, religious opinion, ethical belief, effects and effectiveness. Very little has been done to actually hold this question to the light of ethical decision making. The chosen model requires that the problem be defined, the courses of action determined, and the question examined in regards to three different aspects: principles, consequences and virtues. The answers to the secondary questions will provide the answers to each approach. Once answers for each course of action have

been formulated, the results will be compared and the course of action that best answers the three aspects will be chosen. Once this is complete, the course of action will be analyzed in regards to the goals in the *2006 National Security Strategy*.

Chapter 4 will present the findings on the views on torture organized into the following three sections: legal considerations, ethical considerations, and the effectiveness of torture. Once these findings are presented, the ethical decision-making model will be discussed and the use of torture within this model and against the components of President Bush's *2006 National Security Strategy* will be analyzed.

## CHAPTER 4

### ANALYSIS

Much has been written about torture in the last several years, especially in relation to the GWOT. Opinion pieces and letters to the editor abound whenever a detainee trial takes place or an anniversary dealing with key GWOT events approaches. In order to make an informed decision however, one must examine this issue in several different contexts to understand the full impact of the issue of torture; reading one person's opinion does not provide a sufficient knowledge base in which to answer the question of is torture a viable tool for use in achieving goals as outlined in the 2006 National Security Strategy. Existing literature can be broken down into three main categories into which all arguments can be placed: legal considerations, ethical considerations, and the effects of torture.

The following pages will present a summary of these three key themes present in current literature on torture. This information will cover both pro- and anti- torture positions. The first section, Legal Considerations, consists of international law and treaties as well as United States' domestic law regarding the use of interrogational torture. The section on ethical considerations consists not only of types of reasoning regarding torture, but also includes religious views, teachings and laws regarding the use of torture. The final theme, the Effects of Torture, consists of information regarding the effects of torture on the victim, the torturer, other effects, as well as the overall effectiveness of the use of torture. The summaries and conclusions from these three key themes will then be examined against an ethical decision making model. These ethical

conclusions will then be compared to the *2006 National Security Strategy* to see how the support or restrict the goals outlined in the document.

### Legal Considerations

Legal arguments regarding the use of torture span a wide range of topics and areas from international treaties and conventions to domestic legislation. The intricate details of these legislative instruments are not simple; although they were meant to protect human rights and dignity, these laws are often interpreted many different ways by the different nations that have signed onto them. While their details may often only seem clear to experts in international law, it is essential to examine the legal basis when discussing the issue of torture. The following sections will deal with not only international and domestic legislation, but also historical case law as well as issues regarding the interpretations of these documents.

The first step in the legal discussion on torture is to define certain key terms. Perhaps the most important and most controversial term is the definition of torture itself. The Geneva Conventions of 1949 do not define torture. A majority of the legal analysts use the following definition from the Convention Against Torture:

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 committing, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. (United Nations High Commissioner for Human Rights 1984)

The next key term required for understanding the legal framework is international humanitarian law. International humanitarian law is often defined as the law of armed

conflict and is the primary body of international law that guides the treatment of prisoners of war (Hoffman 2005, 20). Customary law of war is considered a subset of international humanitarian law. Customary law of war results from widely accepted battlefield practice and may or may not be written down. Examples include the illegality of ordering troops to take no prisoners and the fact that blanket applications of the laws of war do not apply when nations deploy armed forces as a part of United Nations operations (Hoffman 2005, 26-27).

Human rights law is the final legal area that pertains to torture. Human Rights Law is considered by some to be rules and treaties that protect human rights in peacetime. Previously, human rights law was considered a separate body of law from international humanitarian law. Others believe that both human rights law and international humanitarian law apply in wartime (Hoffman 2006, 28).

In a discussion regarding the legal aspects of torture, one sees these different types of laws present in international as well as domestic legislation. International treaties and agreements often drive domestic policy as well as laws to support the treaties. The first and perhaps most obvious area to examine is international law and treaties. Prohibitions against torture are found in several areas of international law. There are several treaties, instances of international case law, as well as customary international law which provide a framework for the prohibitions of torture. Applicable treaties include the Geneva Conventions of 1949, their Additional Protocols, and the Convention Against Torture. The United States ratified the Geneva Conventions of 1949, but not the Additional Protocols. They also ratified the Convention Against Torture, but with reservations.

The most famous instrument of international humanitarian law is the Geneva Conventions. The Geneva Conventions of 1949 are a series of four conventions, adopted in 1949, that provide “a legal core that ensures protection for wounded combatants, sick and shipwrecked members of armed forces, medical personnel, prisoners of war, and civilians detained for security purposes in wartime, living in war zones, or under military occupation” (Hoffman 2005, 20). Two sections of the Geneva Conventions are relevant to the torture discussion: the Third Geneva Convention and Common Article III. The Third Geneva Convention, the Geneva Convention Relative to the Treatment of Prisoners of War, applies to prisoners of war in international conflicts: “the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties” (Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War 1949). Under this Convention, combatants are entitled to prisoner of war status unless the detaining power formally declares them illegal combatants. In the past, the United States has interpreted this to mean that each detainee’s status must be reviewed before prisoner of war status could be revoked. This convention also states that each prisoner is entitled to adjudication of his claim if it is disputed and that a detainee who claims to be an innocent civilian also has the right to adjudication of his status (Elsea 2006, 35).

In regards to torture of prisoners of war, the Geneva Conventions of 1949 state that “No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatsoever. Prisoners of war who refuse to answer may not be threatened, insulted or exposed to unpleasant or disadvantageous treatment of any kind” (Elsea 2004, 2). Several articles within the Third

Geneva Convention address issues of prisoner of war treatment. Issues covered include prohibition on the use of coercion be used to obtain information used against a prisoner during trial, singling out prisoners for special treatment based on perceived special knowledge, and conditions of detention to include separation from other prisoners from their armed forces (Elsea 2004, 4).

The Third Geneva Convention also defines a legal combatant in relation to interstate conflicts and intrastate conflicts. Lawful groups include organized armed forces of sovereign states, volunteer corps, organized resistance movements whose members carry arms openly and follow laws and customs of war, and civilians who take up arms as the enemy approaches and follow the laws of war. These people can not be punished for their actions and are instead provided with special rights. Those who do not meet the criteria covered are considered illegal combatants and are not afforded the same rights as legal combatants and may be punished for offenses that legal prisoners of war may be punished for (Hoffman 2005, 23; Elsea 2006, 5).

Within the Third Geneva Convention a special category exists for protected persons which include civilians detained for security reasons. This Convention forbids actions resulting in physical suffering and death to include murder, torture, corporal punishment, mutilation, and scientific experiments. Persons detained as spies, saboteurs, or as persons hostile to the occupying power actually forfeit their right to communication but are still afforded a fair trial and must have their rights restored as soon as permissible. Protected persons may not be subjected to physical or moral coercion during interrogation and can not be held as hostages. Also, certain punishments such as prolonged standing and reduced food rations are prohibited (Elsea 2004, 6-7).

Article Three, often called Common Article Three, is the same throughout all four Conventions and provides provisions for persons not involved in the hostilities or those rendered hors de combat during a non international conflict in the territory of one of the High Contracting Parties (Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War 1949). Considered to be customary international law, Common Article Three prohibits certain types of behaviors directed against prisoners of war: “The following acts are and shall remain prohibited at any time and in any place whatsoever. . . violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture” (Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War 1949). Article Three also declares that if a detainee does not qualify as a belligerent under international law then he must be held and tried in accordance with domestic law. These laws must be in compliance with the Article Three and any other human rights obligations to which the state has committed (Elsea 2006, 41).

Other legal instruments that cover non-international conflicts include applicable rules contained in the customary law of war and applicable human rights treaties. The United States has not ratified Additional Protocol I to the Geneva Conventions but has in the past said that many of its provisions fall under customary international law. This protocol prohibits violence directed against the physical and mental health of the prisoner to include physical and mental torture. It also prohibits humiliating and degrading treatment, forced prostitution and indecent assault (Elsea 2006, 43).

Human Rights law is another area that governs the treatment of prisoners. One of the most influential of these documents is the Convention Against Torture and Other

Cruel, Inhuman or Degrading Treatment (Convention Against Torture). The United States signed this treaty with reservations on 18 April 1988 (Office of the High Commissioner for Human Rights 2006). The Convention Against Torture says that each party will take necessary measures to prevent torture in territories under its jurisdiction; there are no circumstances that justify torture and an order from a superior does not constitute justification for torture (United Nations High Commissioner for Human Rights 1984). It also prohibits cruel, inhumane and degrading treatment but does not define these terms and does not require states to criminalize these actions (Garcia 2005, 4).

The United States' Senate reservations required additional domestic legislation which will be discussed in the Domestic Law section. The Senate defined its understanding of mental torture, a definition not provided in the Convention Against Torture, as

prolonged mental harm caused or resulting from (1) the intentional infliction or threatened infliction of severe physical pain and suffering; (2) the administration of mind-altering substances or procedures to disrupt the victim's senses; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality. (Garcia 2005, 6)

The Senate also stated that for an official to condone an act of torture, he must have been aware of the activity before it is actually committed and then not intervene to stop the action. The United States bound itself to the Convention Against Torture in regards to cruel, inhuman and degrading treatment to the extent that it is prohibited by the 5th, 8th and 14th Amendments of the United States' Constitution. The United States also did not consent to dispute settlement provisions but has reserved the right to agree to

arbitration rulings regarding disputes on the application of the Convention Against Torture (Garcia 2005, 6-8).

Other international human rights documents address torture as well. Article 5 of the Universal Declaration of Human Rights states that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment” (Nagan and Atkins 2001, 95). Similar statements are included in Article 7 of the International Covenant on Political and Civil Rights, Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 5 of the African Charter on Human and Peoples’ Rights and Article 5 of the American Convention on Human Rights (Nagan and Atkins 2001, 96-97).

International case law provides some insight into how torture is viewed in other countries. In 1976 a lawsuit was brought against Great Britain’s use of sensory deprivation and other questionable interrogation practices in Northern Ireland against the Irish Republican Army. The European Court of Human Rights eventually ruled that the interrogation practices were not torture but inhumane and degrading treatment (Elsea 2004, 21). The court further defined torture as an “aggravated and deliberate form of cruel, inhuman, or degrading treatment or punishment” (Nagan and Atkins 2001, 115).

Another international ruling comes from the Israeli Supreme Court. Israel was using “psychological pressure” and “moderate physical pressure” to obtain information from suspected Palestinian terrorists. In reaction, the former Israeli Supreme Court President Justice Moshe Landau investigated the General Security Service. The Landau Commission said that the use of physical pressure was justified as a necessary interrogation technique. Landau recommended that the government acknowledge that

some coercion is permissible, and to codify and monitor the use of such pressure. The Knesset endorsed these results and enacted a law adopting the recommended guidelines (Elsea 2004, 21).

The United States' legal code is another area to look for legal stipulations on the use of torture. The Joint Resolution Regarding Opposition of the United States to the Practice of Torture by Foreign Governments (1984) states the following regarding the United States' views on torture: it is policy to oppose torture by foreign governments through public and private diplomacy; the United States opposes acts of torture without regard to ideological and/or regional considerations, and the United States must work with other governments and non-governmental agencies to eliminate torture. It also urged the Executive branch to ask the Permanent Representative of the United States to the United Nations to continue to raise the issue of torture, declared that the President would be actively involved in the prescription of the Convention Against Torture, asked the United States' Secretary of State to issue formal instructions to United States' missions that chiefs of mission examine allegations of torture in that state. It also instructs the Secretary of State to send United States observers to trials where torture is suspected (Nagan and Atkins 2001, 107-108).

The Torture Victim Protection Act of 1991 was intended to mitigate effects of torture and states that the torturer may be liable in civil action. This legislation uses the Convention Against Torture definition of torture and states that claims made under this legislation are not barred by the Foreign Sovereign Immunities Act. The Torture Victim Relief Act of 1998 and Torture Victim Relief Reauthorization Act of 1999 appropriated more funds to the anti torture campaign (Nagan and Atkins 2001, 109-110).

President Clinton issued Executive Order 13,107 which reiterated the United States' commitment to the protection and promotion of Human Rights and fundamental freedoms, and to work bilaterally and through international and regional organizations. It created an Interagency Working Group on Human Rights Treaties that included the Departments of State, Justice, Defense and the Joint Chiefs of Staff under a chair who is the Assistant to the President for National Security Affairs (Nagan and Atkins 2001, 110).

The Detainee Treatment Act of 2005 was enacted in the wake of Abu Ghraib detainee abuse and established Field Manual 2-22.3, *Human Intelligence Collector Operations*, as the source for approved interrogation techniques for Department of Defense detainees. Other provisions include the prohibition of cruel, inhumane and degrading treatment by any government agency regardless of location of detention, establishment of legal defenses for United States' personnel accused of detainee abuse, establishment of procedures for status review of detainees held outside of the United States, and required detainee treatment training for Iraqi forces. Cruel, inhumane, and degrading treatment is defined as it was in the Senate's reservations regarding ratification of the Convention Against Torture, any treatment that would violate the 5th, 8th and 14th Amendments to the Constitution. The Detainee Treatment Act does not allow the courts to hear challenges of treatment and living conditions of detainees held at Guantanamo Bay. Finally, the Department of Defense is required to provide the Senate Armed Services and Judiciary Committees procedural rules for determining detainee status. The tribunal must also assess if evidence against the detainee was obtained by coercion and the ultimate value of the statement (Elsea 2006, 54; Suleman 2006, 259-260; Garcia

2006a, 54-55). Critics of the Detainee Treatment Act claim that governmental agencies can circumvent the legislation by transferring detainees to non-Department of Defense agencies. They also claim that detainees held in a facility that is controlled by both the Defense Department and a non-Defense Department agency will cause confusion and that the United States' Army Field Manual is always subject to change and could be changed with the intent to circumvent the Detainee Treatment Act (Suleman 2006, 260-261).

The War Crimes Act was enacted in 2005 in order to implement penal requirements as specified in the Geneva Conventions of 1949. The War Crimes Act enacts penalties against persons who commit certain offenses of the laws of war. This legislation covers instances where the offenses are committed by or against a United States' national or military serviceman, regardless of location and allows for life sentences and death sentences if a death was involved (Garcia 2006a, 1).

The Military Commissions Act of 2006 amended the War Crimes Act. Under the Military Commissions Act, only specified violations of Common Article Three are punishable. Torture and certain less severe forms of cruel treatment is criminalized and the legal defense was made retroactive to cover United States' persons charged with a war crimes act between 11 September 2001 and 31 December 2005 (Garcia 2006a, 16; Garcia 2006b, 8). The Military Commission Act also sets detailed definitions of grave breaches of Common Article Three, gives the president the authority to interpret the Geneva Conventions of 1949, and revokes courts' jurisdiction to hear *habeas corpus* petitions by aliens in United States' custody, regardless of location of detention. It also precludes the application of the Geneva Conventions to *habeas corpus* and civil proceedings (Elsa 2006, 55-56).

While there are many international treaties and conventions as well as domestic United States' law aimed at preventing and eliminating torture, there are still many legal issues that routinely surface regarding the torture question. Some of the biggest arguments are often made in regards to the Geneva Conventions of 1949. The Geneva Conventions never define torture or coercion. Debates continue as to what constitutes torture within the realms of physical and mental suffering; what happens when several interrogation techniques are used together. Some argue that these combinations can result in torture even though the techniques individually are not considered torture (Elsea 2004, 8, 12-13). Another argument made in relation to the Geneva Conventions of 1949 is who does it apply to and during what types of conflict. Hoffman argues that the Geneva Conventions do not apply to all types of war and that the Geneva Conventions should not be applied to the GWOT as this action would re-legitimize privatized warfare and could even encourage the export of internal rebellions to other countries in order to legitimize the specific cause (Hoffman 2005, 24). At the beginning of the GWOT, President George Bush declared all detainees illegal combatants and said that the protections of the Geneva Conventions did not apply to the detainees. He eventually changed his position and stated that the Taliban is afforded protection under the Geneva Conventions, but is not afforded prisoner of war status as it fails to meet international standards. Al Qaida was not to be covered under the Geneva Conventions as the organization is not a state and not a party to the conventions. United States' military policy, as outlined in a memorandum in February 2002, stated that the armed forces would continue to treat all detainees in accordance with the principles of the Geneva Contentions (Elsea 2006, 2-3). This illustrates that belief that there is third category of persons implied within the Geneva

Conventions: combatants from militias that are not considered prisoners of war and fall outside the special protections accorded civilians. These combatants would not receive protection from criminal liability for engaging in combat (Elsea 2006, 9). More extreme views of torture are illustrated in what is known as the Bybee memo which defined torture as consisting of treatment causing organ failure or death.

Two principles of the law of war are supported by United States' case law. The first is that unlawful belligerents are not entitled to the status and protection given to members of national armed forces. As a result of the undeclared naval war with France shortly after the American Revolution, United States' courts declared that there were different rules of treatment for the different parties involved in this war. In another case where the Canadians captured Fenians coming into Canada from the United States during the Civil War, the United States' courts declared that these were unlawful combatants. Francisco Villa was not granted lawful belligerent status after he crossed into the United States from Mexico and was tried by the United States' military. The second principle upheld by United States' case law is that detainees are entitled to legal protection, but the Executive Branch has the last word on whether their detention is based on the rules of war or rules of law enforcement. This is based on opinions written regarding military operations in the 1820s in the West Indies against private maritime forces as well as cross border (United States and Mexico) Indian raids in the 1870s and 1880s (Hoffman 2005, 28-31).

In summary, the prohibition against torture is clearly defined in international humanitarian law documents that the United State has helped to create and enforce throughout history. This prohibition is also reflected in human rights law with documents,

such as the Convention Against Torture which the United States has not only ratified but also denounced other countries for violating. United States' domestic law is also quite clear in its opposition to the use of torture. What is not clear from much of this legislation, however, is what acts constitute torture.

### Effectiveness of Torture

You want a good interrogator? Give me somebody who people like, and who likes people. Give me somebody who knows how to put people at ease. Because the more comfortable they are, the more they talk, and the more they talk, the more trouble they're in - the harder it is to sustain a lie. (Bowden 2003)

Jerry Giorgio, *The Dark Art of Interrogation*

There were times when I would actually go inside and sleep inside of the cell where they were being held, and sit there with them, and I could pump more information than anybody could pump under force or pain. . . . What you do is first you work on their confidence, gaining their confidence, You make them believe that you're in the same boat that that you are. That you yourself have been a victim of the world. And tell them how dissatisfied you are with the system. It's very easy to do that because you're actually dissatisfied with the system. (Arrigo 2003).

Ernest Garcia

Torture has been used almost constantly throughout history. Western legal tradition used torture until its use was banned in the eighteenth century (Langbein 2004, 93). People then, as they do now, often question the effectiveness of using torture for interrogation and what are the lasting effects on the tortured as well as the torturer.

Designed to eliminate the requirement for conviction of testimony of two eyewitnesses, torture was used in Europe until the eighteenth century. Torture was intended to be permitted when a half proof (one eyewitness testimony) was established. Evidence obtained by torture was then supposed to be verified. Unfortunately, the

intentions fell far short of actual practice. In the end, suggestive questions were often used, verification of information was not completed, many innocent persons often appeared guilty, and those who confessed under torture often recanted while in court and then had to be retortured. In short, torture did not provide reliable information, and the practice was abandoned (Langbein 2004, 93).

The debate of effectiveness continues today. Those against the use of torture say that it is not an effective method for various reasons and cite CIA, FBI, and United States' military sources for reasons why interrogation does not work.

The CIA's 1963 *Counterintelligence Interrogation Manual* stated that threatening to kill the detainee was useless; the assumption that lowering physical resistance will lower psychological resistance is false. Detainees adapt to prolonged exertion and loss of sleep and are therefore more likely to not submit when faced with pain. The manual also states that fear is more effective than pain; those who have suffered more pain throughout their lives to include child abuse and severe illness may adapt far quicker to its use and not fear it. Fear of pain is more effective than the actual infliction as the infliction comes as a release and the subject may be strengthened in his resistance (Bowden 2003). The 1983 *Human Resource Exploitation Manual* confirmed these assertions. The same manual also states that in order to effectively use coercive interrogation techniques a psychological profile is required which can take days to develop. Without the profile, these methods may or may not work (Rejali 2004). Another CIA document cited is the results from Project MK-ULTRA and Project MK-Search. These studies were conducted in the 1960s in order to develop training methods for United States' personnel to resist interrogation and to determine whether or not people could actually be brainwashed.

Researchers studied Korean, Chinese, and Soviet interrogations, as well as conducting over 200 studies with sensory deprivation, stress, and hypnosis. Results as presented during testimony to Congress were unproductive and inconclusive (Miles 2006, 14).

FBI sources provide similar information. FBI agents complained about the use of interrogation techniques used at Guantanamo Bay in 2003. The interrogator Joe Navarro said that threats of torture taint the information; there are never any guarantees that the detainee will tell the truth. Other interrogators and agents expressed similar doubts as to the truth of statements obtained using harsh methods during this time frame (Miles 2006, 15). The FBI favors a slow approach in which personal relationships are first established between the interrogator and his subject. An example is the case of Ibn al-Sheikh al-Libbi, who was first interrogated by the FBI, but was then taken over by the CIA who turned him over to the Egyptians. Information he provided was used to help make the case against Iraq and its weapons of mass destruction program. Al-Libbi later recanted and said that he made up the information in order to stop the torture (Thomas 2006).

Many within the United States' military have voiced opinions that torture is not an effective interrogation method. A research seminar composed of former military interrogators with experience ranging from Vietnam to Kosovo conducted at Georgetown in November 2006 found that torture is not an effective method for gathering reliable information and is actually counterproductive. Harsh techniques are indicative of inexperienced or untrained interrogators and often create anger within the subject leading the interrogator to lose control. They also found that the most effective interrogation techniques do not use torture but rather rely on the subject's cooperation to obtain the desired information. They also found that torture is counter to what is considered the

fundamental tenets of psychology. Previous human behavior concepts held that human behavior is controlled by external rewards and punishments; current research suggests that people often act counter to rewards and punishments. Participating interrogators also stated that they had never experienced a case of a ticking time bomb; the consensus reached was that the terrorist would know how long he could hold out for and would most likely give false information routing searchers to remote hard to access areas in order to buy time for the device to detonate (Psychologists for Social Responsibility 2006).

United States' interrogators have stated in interviews that there is little evidence that any useful intelligence has been gained by using harsh interrogation techniques. While some cite successful use of torture in the case of Khalid Sheikh Mohammed who provided names of Al Qaida operatives, others claim that he shrugged off threats of violence to his family saying that he would see them later in heaven. Information he provided in addition to names included a plan to cut down the Brooklyn Bridge using blow torches (Thomas 2006; Bowden 2003). Another example cited as a successful use of torture is the case of Lieutenant Colonel West, who was able to get information on people planning to attack United States' forces in Iraq in August 2003 from an informant by firing a weapon into a clearing barrel near the informant's head. The informant provided names, the accused were detained and then released without charges. The informant later told Army investigators that he lied and there was no planned attack (Miles 2006, 9-10).

Other arguments used against the effectiveness of torture stem from historical documents, memoirs and case studies. An historical study of court records regarding

torture in France from the sixteenth century through the mid-eighteenth century showed an error rate of 67-95 percent in a total of 625 cases (Arrigo 2003). There were several examples where torture was not effective during World War II. Hans Joachim Scharff, a Luftwaffe interrogator, reportedly received information from every British and American pilot he interrogated without resorting to violence (Milavic 2004). A Japanese interrogation manual warns against the use of torture: “as it will result in his telling falsehoods and making a fool of you. [Torture] is only to be used when everything else has failed as it is the most clumsy [method]” (Rejali 2004a). British interrogators in Malaya had similar experiences; Peter Hamilton, a British interrogator said that while they were free to interrogate prisoner without giving them a break and they were able to use sleep deprivation, they did not usually have to use these tactics. He felt that it was more important to convince the subject to switch to your side and not make him more of an enemy; brutality simply served to harden the subject’s will against you (Deeley 1971, 177).

The French in Algeria in 1955-1957 provide another example of the ineffectiveness of torturous interrogation techniques. The French commander Major General Aussaresses states in his memoirs that torture was essential in defeating the insurgents. He does also mention that many of those insurgents hid in the mountains and returned to fight again in 1962. He also admits in the same book that “most of the time I didn’t need to resort to torture but only talk to people” (Milavic 2004). Others still claim that the Battle of Algiers provides an example of successful use of torture as the French defeated the FLN and re-established their authority in only seven months. Counter to this is the argument that the French succeed due to the application of overwhelming military

force in an extremely constrained area; they never secured the Algerian countryside. Also contributing to French success in Algiers was the informant system they developed in which each block had a warden who reported suspicious activity. Exits to the Kasbah were also controlled and informants identified suspects. Those subjected to torture often provided names of dead people, rivals, and old hiding locations. Another incident cited in which torture was used was in the case of a locksmith who was tortured for three days. The torturers had overlooked the bomb blueprints and factory address that he had in his pocket. As a result, the bomb makers had enough time to escape (Rejali 2004b).

A critical component of the effectiveness of torture that must be considered is the overall effects that the use of torture has on not only its victims, but on the torturers and society as well. The easiest place to start is with the effects of torture on the subject. Much has been written on medical and psychiatric effects of those who have been tortured. Medical conditions resulting from torture include: post-traumatic stress disorder (PTSD), nightmares, flashbacks, depression, apathy, anxiety, phobias, impaired concentration, impaired memory, difficulties in establishing trust and intimate relationships, increased risk of suicide, and fear of the medical profession if doctors were involved in the torture (Miles 2006, 36). The biggest side effects of torture result not from the physical aspects of the torture, but from the mental and emotional torture in which victims were subjected to mock trials and executions, forced to watch executions of family members or forced to defile the dead by walking on corpses (Milne 2005, 13). Other medical considerations affecting torture include the effects of pain on people. Clinical psychologists have discovered in studies that injury does not always produce pain immediately; the ability to endure pain differs widely among individuals. Another

factor is that individuals are able to use past experiences or cultural beliefs to endure extreme pain; these beliefs help the victim define the pain and their reaction to it. Types of pain include punitive pain, military pain, medical pain and sacrificial pain (Arrigo 2003). Others have been able to endure pain through dissociation (Arrigo 2003). Pain is also not a constant; as the body experiences more and more damage, the sensitivity to pain decreases (Rejali 2004a). Also, any techniques that impair the subject's brain function will also impair his ability to talk as the brain functions within the same range of physical and chemical conditions of other organs (Arrigo 2003).

In 2003, the International Committee of the Red Cross warned the United States that the current system of indefinite detention would lead to mental health problems in the detainees. After a visit to Guantanamo in 2004, officials found high incidence of mental illness as a result of stress caused by solitary confinement. Some witnesses have reported that the sensory deprivation, as well as over stimulation, were causing spatial and temporal disorientation resulting in self-harm and suicide attempts (Borchelt and Pross 2005, 10).

There are also incidents where the use of torture or harsh interrogation techniques actually has the opposite effect. This is most evident in studies of Israeli detained Palestinians. Many of those exposed to the harsh techniques came to see torture as a rite of passage which proved their trustworthiness. The Israeli practices also cemented within Palestinians the confirmation of the evilness of the Israeli system (Miles 2006, 16-17). Within studies of Palestinian prisoners, researchers identified up to seven distinct meanings of their abuse which included a struggle between strength and weakness, the

heroic fulfillment of their role as liberators of the Palestinians, and a return to religion (Arrigo 2003).

Dr. Jean Arrigo, an ethicist specializing in intelligence ethics, proposes three different models of the use of torture: animal instinct, cognitive failure and data processing. In the animal instinct model, there is a “ticking time bomb” scenario in which the subject talks to escape pain or death. Her analysis indicates that this fails when the damage done by interrogation methods impairs the subject’s ability to convey the truth and also when the interrogator fails to interpret the subject’s perception of the type of pain he is suffering. In order to achieve success in this model, interrogators would need a physician’s assistance which is counter to the medical ethics code.

Within the cognitive model the stress of torture makes the subject unable to deceive himself or maintain his interpretations of the pain. Points of failure in this model include the fact that the subject can buy time for his partners to escape while he resists talking and the interrogators inability to distinguish, truth, deceit and delirium. Success in this model would require research into new interrogation methods and the establishment of a torture interrogation unit.

The data processing model consists of both true and false information provided by the subjects which require a comprehensive analysis. This model will fail when analysts can not keep up with the analysis of the information and dragnet arrests occur increasing the number of required interrogations of guilty and innocent people. Success in this model would require coordination with the police and judiciary system as well as accommodations within the military and other governmental agencies (Arrigo 2003)

Torture subjects are not the only who suffer ill effects from torture. Torture psychologically damages those who carry it out; passive and active witnesses and participants both suffer more severe forms of PTSD than those who kill enemy forces in legitimate combat (Miles 2006, 18). Torturers are vulnerable to severe social stigma and mental turmoil. In interviews conducted with former torturers from Greece Argentina, Brazil, Chile, Uruguay, Nicaragua and Israel, the following composite picture was made of the effects of the torturer training system. Trainees were generally selected on their ability to endure hardship, their political beliefs and their trustworthiness and obedience. They next underwent brutal training to desensitize them to their pain and humiliation. Coupled with the training were confinement and initiation rites which would also further isolate them from pre-existing relationships. In the next phase, trainees would learn through playing witnesses and guards. The tension created between the new expectations and their old values drove many to psychological dissociation and alcohol and drug use. Many sexually oriented shame tactics led to the use of sexual torture, further stigmatizing and corrupting the torturers. In one case, a European police inspector was found guilty of torturing his wife and children; he claimed it was a reaction to his role in torturing Algerian suspects. In the end, the torturers will also be sacrificed (Arrigo 2003).

The final group that torture affects is the society that condones its use. A 1983 CIA manual says that torture lowers the moral caliber of the organization that uses it and that people will often resort to torture as the quick and easy way. Along the same lines of reasoning, a 2003 Working Group on Detainee Interrogations warned that military involvement in harsh interrogation techniques would be a significant departure from

traditional military norms and would adversely impact the cultural self image of military forces (Miles 2006, 18).

Historical precedence shows at least three cases where torture destabilized the military and the government: Germany during World War II, Brazil in the 1970s and France during the Algerian War. The commander of the Nazi Death Head SS gradually gained special powers as the use of torture increased. This increased the elite status of the group and drove a wedge between it and other military organizations. The Brazilian military eliminated the use of torture for similar reasons. The torturers became an elite group which scorned the chain of command. This essentially created two factions within the army and led to great destabilization (Arrigo 2003).

The French case study provides the most comprehensive analysis of the effects of the use of torture. The French officer corps split into two factions over whether or not to allow torture. Many were forced to resign when they voiced concern over the treatment of prisoners. The prefect of Algiers in 1957 resigned over his views against the use of torture and was imprisoned for criticizing the army. This eventually led to the erosion of popular support for the mission and by 1961 there were widespread protests over the war, the army and the use of torture (DiMarco 2006, 73).

In reviewing the effectiveness as well as the effects of torture one can conclude that while there are some instances of success, the overall effects of the use of torture are detrimental to its victims as well as society and that torture is not the most effective means of interrogation. Historically, torture has not proven to be an effective method in gaining information. Agencies that deal with interrogations, such as the CIA, the FBI, and the United States' military all say that torture is not an effective questioning

technique. While some authors cite success in the effectiveness of harsh questioning on certain key terrorist suspects, there was no evidence that professional interrogators supported this argument.

In looking at the effects of torture, evidence shows a great physical and an even greater mental effect on its victims and even on those who commit torture. Other evidence points to the negative effects that torture can have on society such as normalization of the practice, the divisiveness of the practice on military and government organizations and the sometimes strengthening effect that torture can have on those fighting against the government. In all, written evidence leads to the conclusion that the negative effects outweigh the potential benefits of the use of torture.

### Ethical Arguments

The final category of information to consider when discussing the torture question is the ethical arguments for and against its use. Many of these arguments incorporate previously discussed topics in the arguments either for or against. Ethical arguments made regarding torture cover a spectrum of viewpoints that range from completely banning its use to legally regulating its use. Figure 1 presents an illustration of where the examined authors fall on this scale.

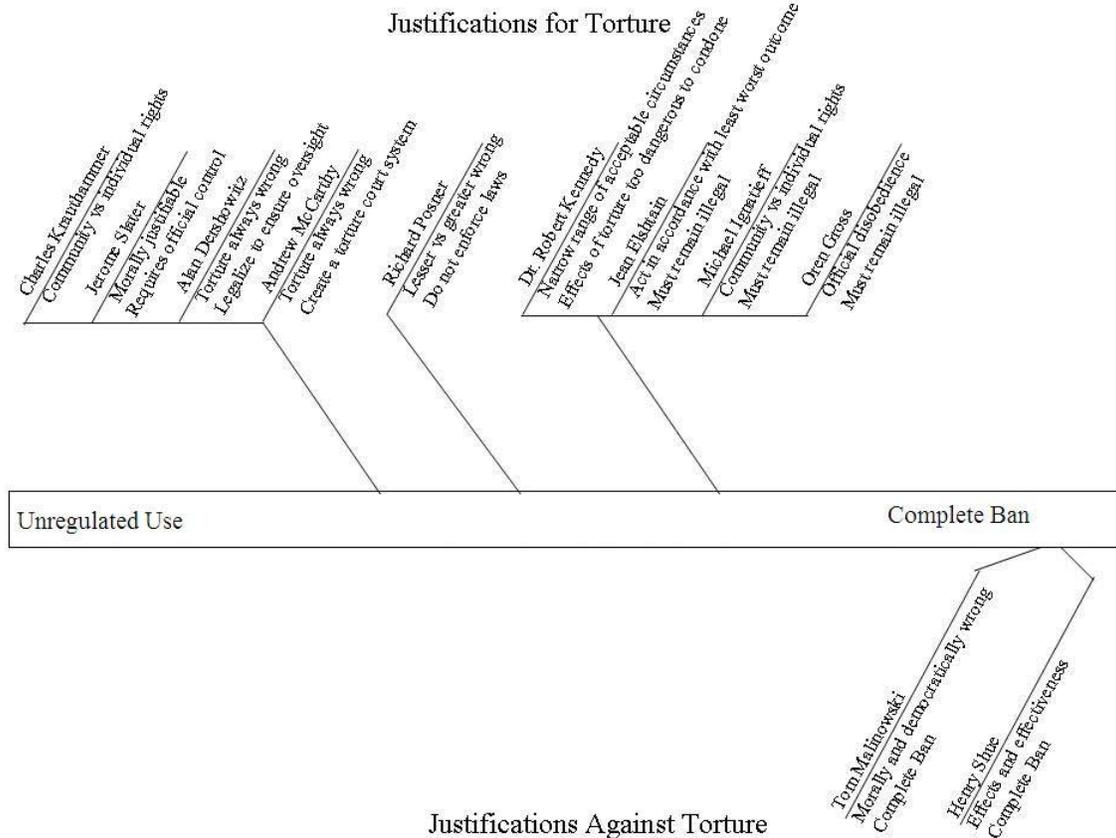


Figure 1. Scale of Torture Arguments

The first group examined consists of those who argue for the use of torture. These include Charles Krauthammer and Richard Posner. Charles Krauthammer is one of the most prominent proponents of the use of torture in certain cases. Although rare, there are conditions where he feels torture would be the right thing to do based on the potential outcome of not torturing a terrorist. He believes that the argument should be what circumstances dictate the use of torture. Krauthammer acknowledges that it is a moral dilemma--the rights of the individual versus the rights of the community. He also acknowledges that torture can be corrupting but also cites the dirty hands concept that it is a politician's duty to do what is best for his constituents. He would only use torture in

two cases: the ticking time bomb scenario and for very high level terrorists, such as Khalid Sheikh Mohammad (Krauthammer 2005).

Richard Posner takes the stance that a lesser wrong often needs to be committed in order to prevent a greater wrong. He believes that there needs to be a balance between the costs and benefits of specific interrogation techniques; the United States' Constitution needs to be interpreted so that as much pressure as is needed to make terrorists talk can be applied. The Constitution does not entitle terrorists to remain silent. Contrary to other authors who argue that torture almost destroyed French society during the battle for Algeria in the 1950s and 1960s, Posner uses not only France but Israel and Britain as examples. Legalization of torture would actually erode civil liberties and eventually lead to the legalization of torture. In his opinion, the best course is to not enforce the laws prohibiting torture in the case of extreme circumstances (Posner 2004, 293).

Dr. Robert Kennedy examined the use of torture in light of the human rights argument and found that there is a very narrow range of events where the use of torture would be justified but also poses many reasons why society should not resort to torture. He submits that many of the arguments against the use of torture involve the argument that it violates human dignity. The problem that he sees is that the requirements to maintain human dignity are ill defined and current arguments do not differentiate between the existence of human rights and the extent that people are entitled to these rights. He argues that human rights must be respected, but are not to be considered absolute such as in the case when a criminal must forfeit some form of his human rights (i.e., freedom) as punishment. If this penalty is proportionate, then there is no violation.

He further argues that the use of force is justifiable if the following conditions are met: the person using force must have the responsibility to protect by use of force; a sound reason to act must exist; the right intention (the intent to prevent harm) must exist; and the use of force must consider discrimination, necessity, proportionality and prospect for success. Defensive torture, the effort to compel a person to cooperate in stopping a harmful act, meets these standards, but there are very few incidents where this is applicable. Counter to this, Dr. Kennedy feels there are reasons not to resort to torture such as existing international agreements, effects on restraint of other countries, the effects on the interrogators and the character of the nation, as well as the danger that torture may not even work (Kennedy 2003).

Jerome Slater argues that torture is justifiable from both a national security and a morality point of view but that the risks that torture is being used are so great that institutional controls over the use of torture must be established (Slater 2006, 193). Slater feels that the concept of just war in which innocent people are sometimes killed should also apply to torture. He believes that torture worked in Algeria, Northern Ireland and Sri Lanka. He does feel though that in the end the use of torture causes hatred against those who use it, and has already caused an increased number of terrorist attacks against the United States and has caused a high political cost in arguments with our allies. Official justification and control would help mitigate this issue along with the potential of collateral damage of torturing innocent people. In the long run, he feels that some accountability is better than none (Slater 2006, 212).

Further along the scale of the approval of torture is Jean Elshtain who believes that torture falls into the realm of Walzer's politician with dirty hands. This philosophy

believes that while rules are made to be moral guidelines, there are some situations that are so dire that the rules must be overridden. The politician that makes the decision to break the rule must acknowledge that he broke the rule and offer his compelling reasons why he was forced to act. In short, the politician has committed a moral wrong that brought about a “least-worst” outcome (Elshtain 2004, 82). The use of torture, especially in the ticking time bomb scenario is one of these cases where the greater moral guilt would fall on the person who fails to stop the deaths of the terrorist’s victims. Elshtain does not say that torture must be legalized but rather it must remain illegal and moderate physical pressure and coercion are the least bad thing. She also claims that laws discriminate between accidental death, manslaughter and murder and degrees of assault; the use of coercion and torture should be no different.

Michael Ignatieff agrees with Elshtain. He believes that the United States needs to uphold the ban on torture for several reasons. The United States is a democracy and torture is against the very foundations of democracy. There is also no apparent way to manage coercive interrogation in a manner which will not allow it to degenerate into torture; Abu Ghraib illustrates that prohibition is the best course of action. Ignatieff argues that human rights advocates want to prevent coercive interrogation from turning into torture, but they do this by removing the distinction between coercion and torture and maintain that physical and psychological coercion during interrogation should be banned. He feels that while both of these practices are distasteful, they are not the same thing. Also he fails to see the validity in making the subject’s rights to human dignity more important than the security interests of the country and the right to life of his potential victims. However, the threat of the ticking time bomb cannot be ignored; the

ban on torture will force people to break the law in this scenario, but this is a small price to pay (Ignatieff 2005, 23).

The same theme is echoed by Oren Gross in his essay “The Prohibition on Torture and the Limits of the Law,” where he argues that the absolute ban on torture must remain but argues that scenarios like the ticking time bomb may give rise to official disobedience. Public officials who break the law must be ready to accept the legal consequences of their actions.

Gross maintains that writing laws based on the rare possibility of the ticking time bomb will result in bad laws. Maintaining the ban upholds human dignity and the importance of individual rights while maintaining requirements of international law. The ban prevents the slippery slope argument that claims that once torture is allowed in certain cases, then it becomes easier to permit in less serious cases until it is eventually commonplace (Gross 2004, 236).

Alan Dershowitz is a civil rights lawyer who is opposed to torture but favors the legalization of it under a program that would create torture warrants. He feels that all countries engage in torture and that current conditions in the United States tolerate torture with no form of accountability. He also believes that in the long run there would be less torture and more accountability with the requirement of torture warrants. The warrants would allow a neutral and detached assessment of the requirement to use torturous techniques, similar to the practice of having to get orders for wiretaps. He feels this course of action provides more open accountability and visibility that are more in keeping with the democratic tradition (Dershowitz 2004, 257- 272).

Andrew McCarthy agrees with Dershowitz and takes his ideas a step further and proposes a national security court much like the Foreign Intelligence Surveillance Court that would monitor terrorist detention, conduct terrorism trials, and monitor and approve torture warrants (McCarthy 2006, 109).

Moving further to the right of the scale are those who argue outright against the use of torture. Tom Malinowski argues that the United States is currently using practices which it has denounced when used by other countries. The results of this diminish the United States' moral authority. If America wants to promote democratic change then its practices must be in line with its principles; America is a nation of laws which holds itself to a higher standard (Malinowski 2005, 141-156).

Henry Shue refutes the argument that torture is similar to just war. He argues that in just war, it is a kill or be killed scenario. In the torture scenario, the victim has already surrendered or been captured and this makes torture worse than killing in war (Shue 2004, 52). In addition, torture will not always be held to the minimal necessary amount. There is also the danger of torturing the wrong person who has no information to give. The true believer will not betray his side as this will not help him escape the torture. Finally while torture may be permissible in the case of a ticking time bomb, it would be wrong to base the ordinary on the extraordinary (Shue 2004, 52). The ticking time bomb presents idealized circumstances. He likens the ticking-time-bomb scenario to the idea of an alcoholic that only drinks on occasion; there are no historical examples where torture was used sparingly. He also says that in the case of the ticking time bomb that an inexperienced torturer would be used; otherwise experience implies the existence of a torture network. Torturers must be trained (Shue 2006, 233-234).

In addition to the secular arguments regarding torture, religious views must also accompany any study of torture as these often serve as the guide for many people's decisions on ethical decisions. Religion and torture have a long history. Self-torture is a traditional way to show one's spirituality. Torture has also been used to not only save souls but to also preserve the greater good (Dubensky and Lavery 2006, 165). Modern Western religions no longer employ torture as they once had. All the major Western religions to include Christianity, Judaism, and Islam, all have positions regarding the use of torture. As a generalization, these religious movements are against the use of torture. All three religions share a common belief that since man is created in the image of God, torture must therefore desecrate the Divine Image (Dubensky and Lavery 2006, 170).

Within the Catholic Church, Pope John Paul II wrote that there are certain acts that are always seriously wrong, regardless of the circumstances and the intent of the person committing them; these acts will always be sins. The Second Vatican Council includes the following in this category: "Whatever is hostile to life itself, such as any kind of homicide, genocide, . . . whatever violates the integrity of the human person, such as mutilation, physical and mental torture and attempts to coerce the spirit" (Pope John Paul II 1993). They dishonor God as they affect man which is made in God's image.

The Second Vatican Council also declared that "not everything automatically becomes permissible between hostile parties once war has regrettably commenced" (Pope Benedict XVI 2006). Pope Benedict XVI supports this and further explains in his message celebrating the World Day of Peace in 2006 that the Holy See supports existing international humanitarian law and says that it must be considered binding on all and must be updated to meet today's current environment.

Other Christian denominations use teachings from the Gospels as justification to not to torture. Jesus was tortured and therefore torture is wrong. The Book of Matthew also says that nations will be judged by the way they treat their prisoners (Dubensky and Lavery 2006, 174). Many Christian denominations also point out that Jesus called people to love our enemies and blessed those who worked for peace. Also important is the teaching that we must do unto others as we would have them do to us (National Council of Churches 2006).

Judaism also has a strong tradition against the use of torture. Jewish law derives in large part from the Talmud. Jewish law authorizes a pre-emptive strike in the event that someone is going to kill you (Rosen 2006). In the case of a ticking time bomb, some Jewish thinkers believe that it may be acceptable within Jewish law to torture if a great number of people were saved. Reasonable physical pressure may be justified in these cases but only if very accurate information existed that the subject did know about the bomb (Dubensky and Lavery 2006, 166). Most of the laws regarding retribution come from the book of Exodus. Most of these laws mandate monetary compensation as opposed to physical retribution (Dubensky and Lavery 2006, 169). Other Jewish scholars cite the fact that the prohibition on oppressing others is based on Jewish historical memories best summed up in the quote from ibn Ezra on Exodus 22:20 “Do not oppress him in your land when you are stronger than him. Remember, you were strangers like him” (Weintraub 2005b, 1-2). Rabbi Weintraub also points out that this prohibition against oppression recurs more often than any commandment in the Torah including the command to love God.

The other category of Jewish prohibition of torture falls under the argument of human dignity or “kvod ha-briot” (Weintraub 2005c, 11). This, like in Christianity, argues that God is the creator of humans and desecration of the body affronts God. Some authorities saw that the body is the direct representation of God while others see the soul and intellect as the presence of God (Weintraub 2005c, 11).

The final religion examined is Islam. Islamic views on torture come from the Koran, the sayings of Mohammad and Islamic legal scholars. Some assert that Mohammed prohibited mutilations in all situations and opposed the use of coerced confessions (Dubensky and Lavery 2006, 174). Islam has a similar believe to that of Judaism and Christianity in that it preaches that dignity is the essence of humanity; torturers loose their dignity and humanity. The animal qualities overwhelm the human ones (Dubensky and Lavery 2006, 173).

The ethical question on torture is not as easily answered as the legal questions and the effectiveness questions. No author unequivocally supported the random use of torture; all authors agreed that that course of action is unacceptable. Arguments in favor of the use of some form of torture include the idea that the course of action must suit the majority, not the minority; that politicians have the obligation to do what is best for the majority of their constituents, regardless of legality; and that torture unregulated is far worse than regulated torture.

Arguments against the use of torture include the slippery slope argument, the overall negative effects of torture, the negation of human dignity, and the fact that torture does not support the democratic ideals of the United States. In conclusion, interrogational

torture is seen by most authors to be a wrongful act; specific circumstances are the only things that can mitigate the wrongfulness of the action.

The next section will take the conclusions drawn in each of these preceding sections and examine the overall question, Is torture a viable tool for use in achieving goals as outlined in the *2006 National Security Strategy*? The results of the analysis of the last three sections are illustrated in table 1.

Table 1. Initial Conclusions	
Legal Considerations	Torture is against both international and domestic law.
Effectiveness Conclusions	Torture is not an effective interrogation method; the potential negative effects on the victim, the torturer and society outweigh potential benefits.
Ethical Conclusions	The act of torture is ethically wrong.

### Torture and the Ethical Triangle

Dr. Jack Kem provides an ethical decision-making model. The required analytical steps can be summarized as follows: define the problem, consider the possible courses of action, examine the courses of action against the three components of the ethical triangle (principles, consequences and virtues), consider alternative courses of action, and choose and implement the course of action the best represents the virtues (Kem 2006, 32-33).

In defining the ethical dilemma presented by the question of torture, several instances of right versus right are evident based on research. These include individual versus community, short term versus long term, law versus justice, and law versus loyalty. In short, the main argument is, Should the United States' adhere to existing laws

and the rights of individuals or should national security interests and the potential rights of the community be the priority?

This presents two obvious courses of action: the United States either participates or does not participate in torture. There are several other variants of these courses which include legalize some forms of torture under governmental guidance in special situations and continue to ban torture but fail to uphold the laws and deny official knowledge of the act.

In a principles-based examination of torture, one must consider the rules that currently exist as well as the rules that should exist (Kem 2006, 28). Internationally, there are many laws and treaties aimed at the defense of human rights and the prevention of torture. The Geneva Conventions of 1949 deal specifically with the treatment of prisoners of war and certain categories of protected persons. The Convention Against Torture aims to eliminate governmental use of torture against its populations. United States' domestic law also prohibits torture and gives victims certain venues in which to address their grievances. These include the Torture Victim Protection Act, Executive Order 13,107 the Detainee Treatment Act, the War Crimes Act as well as the Constitution of the United States.

If one uses the *2006 National Security Strategy* to define what actions should be taken, the use of torture seems to counter some of these goals. President Bush states that the main obligation of the strategy is to protect the security of the American people by fighting the war on terror and promoting freedom (*2006 National Security Strategy*, i). Within the strategy, President Bush outlines that the United States' need to shape the world and influence events for the better. He also claims that the United States' strength

rests in part on alliances, friendships, and international institutions (2006 National Security Strategy, ii). The two main pillars of the strategy include the promotion of freedom, justice and human dignity with the understanding that free governments do not oppress people and confronting challenges by leading a community of democracies which require multi-national efforts (2006 National Security Strategy, ii). Championing aspirations for human dignity is President Bush's first critical task. Claims are made that governments that respect human rights and are not brutal are generally more responsible state actors than those who ignore human rights.

In addition to secular legal documents, many major western religions have laws or edicts that prohibit torture. Judaism has a set of laws from the Talmud and the Torah which outline criteria in which self defensive actions may be used, but which also place a great emphasis on human dignity and its connection as a symbol of God. Catholic Church teachings, such as the Second Vatican Council and Papal edicts call for increased attention and emphasis placed on human rights as well as uphold the belief that even if an evil act, such as torture, is committed with the best of intentions (i.e., to save lives in the event of a terrorist attack) the act itself is still evil.

Finally, there are certain moral obligations that should be met by society when thinking about torture. Balance must be made in upholding individual rights as well as societal rights; this not only includes the rights of the terrorist versus the rights of his potential victims, but also the rights of society, the rights of those required to commit and to decide to commit to torture, and the rights of the mistakenly accused. There are also moral obligations inherent to every democratic government and society. These include a responsibility to govern with the people's consent and to have as transparent a process as

possible. Ignoring laws on torture is counter to this belief. Democracies must also uphold all person's rights, including human rights in accordance with existing laws.

In summary, in a principles-based approach to torture neither legal arguments, religious laws, nor precepts and existing moral norms allow for the use of torture or even for official disregard for antitorture legislation.

The next approach to ethics is consequences based actions, which basically demand that the action taken is the action which produces the most good for the most people (Kem 2006, 30). Arguments of those favoring some form of torture claim that this is an argument regarding the rights of one person versus the rights of his potential victims. Based on consequences, torturing one or a select few people in the long run can save hundreds if not thousands of innocent lives. Similar arguments are made with references to the politician with dirty hands. In this argument, politicians ignore what is best for society as a whole when they decide to act in keeping with their moral beliefs and refuse to put these beliefs aside in order to do what is right for the majority of his constituency.

In arguments against the use of torture several consequential arguments are made. One of the more obvious is that the United States' use of torture has an international impact. First of all, the use of torture violates treaties that the United States has signed and often accuses other countries of breaking. This has caused many to see the United States as being heavy handed and dictatorial. Others say that the United States' actions regarding torture have given precedents for other less reputable countries to employ similar methods and reasoning. In this argument, the entire country loses its moral standing when a select few are tortured for knowledge they may or may not have.

Others argue that establishing a legal method of torture will give rise to a torture culture which at the least may cause harm to those required to torture and at worst will lead the United States down the slippery slope into a culture that routinely applies torture and disregards other methods of intelligence gathering. Add to this the effects of mistakenly torturing innocent people and several million are negatively affected.

A part of the analysis of consequences is looking at who the winners and losers would be. If torture were to be legalized in one form or another, the winners could be the intelligence collectors and the nation as a whole provided that the subject actually provides reliable intelligence in a timely manner which prevents attacks and this can be proven. Potential losers include the innocent bystanders who are in the wrong place at the wrong time and get swept up in the net. While the intelligence collectors may win, they may still lose as they now have even more information to analyze and verify, possibly causing them to miss credible information. In this case, the losers would also include the victims of the terrorists who die because the intelligence professionals are on a wild goose chase caused in part by the unreliable information gathered from torture. Other victims in this scenario would be United States' society as a whole. The United States would most certainly lose much of its moral standing; many of the goals of the National Security Strategy may no longer be achievable as the United States no longer serves as the role model for democratic principles and reform. Once staunch allies may distance themselves from United States' operations due to the use of torture and the stigma it leaves on any associated with it. Another set of potential victims include those politicians with dirty hands who have made the call to torture and no usable information is received.

Not only has he repudiated his moral beliefs, but he has ruined his professional and possibly even his personal life.

In the reverse scenario in which torture is not officially or unofficially supported, the winners would include the terrorists that could have been tortured, but more importantly, those in the wrong place at the wrong time would not be tortured. Innocent people may lose their lives, but not necessarily due to the fact that the incident occurred because intelligence analysts were too busy verifying torture related information to analyze other sources. United States foreign policy and security goals would still have a strong position in the international community; moral democratic principles would be upheld and the heavy handed image may be mitigated to a certain degree. Overall, torture's negative consequences will outweigh the slight chance of any positive outcome from the use of torture.

In summary, in a consequences based approach to torture, the use of torture may result in the following negative outcomes: degradation of society, degradation of the image of those who conduct/authorize its use, establishment of the precedence for routine use, and negation of the human rights and dignity of the torturers, the victims and the politicians who authorize its use. Negative consequences outweigh potential positive outcomes.

The final leg of the triangle consists of virtue related outcomes. Virtue is something that is not innate and must be taught. Key considerations in this area would include what would people think if this were on the front page of the newspaper (Kem 2006, 31-32). If torture is allowed, there are several possible virtue related results. If the torture is successful and this is proven without a doubt and can be published without

damaging national security interests, then the torturer and those who authorized torture may appear to society as heroes. More likely is the fact that the information may never be verifiable or even received in time to prevent attacks, let alone be releasable to the general public. In this case, those who authorize and commit it may be seen as sadistic brutalizers. Also, the use of torture goes against the majority of western religious teachings and the torture condoner would definitely not fair well in this area. This also goes against existing laws and treaties and will cause an even greater international uproar than it has so far.

If torture is repudiated, those who refused to allow it may in some cases be seen as traitors for not doing everything to stop the terrorists. On the other hand, those people will retain their moral standing and will not have to worry about public condemnation in the event that the wrong person was tortured or that torture yielded no results. They have still acted within religious norms and have not contributed to failure of national security objectives due to moral perceptions. Basically, the virtuous person will not resort to torture because it is illegal and against most religious and moral teachings.

In summary, in a virtues based approach to the issue of torture, the use of torture is against most moral norms and should not be practiced.

In examining the ethical decision making triangle in relation to the use of interrogational torture, one can conclude that the United States should not participate in the use of interrogational torture. From a principles based perspective, neither legal arguments, religious laws, nor precepts and existing moral norms allow for the use of torture or even for official disregard for antitorture legislation. Consequences also do not allow for the use of torture for several reasons to include the fact that torture will degrade

United States' society in the long run, provide a negative image of the United States' virtues, establish precedence for the routine use of torture, and negate the human rights and dignity of many innocent victims. In short, while torture may save thousands of lives once, it has the potential to also negatively affect millions. Finally, from a virtues based argument, torture is against most moral and religious norms and should not be conducted. These conclusions are illustrated in table 2.

Table 2. Ethical Decision-Making Triangle Conclusions	
Principles	Legal arguments, religious laws, existing moral norms and democratic principle do not allow for the use of torture or official disregard for anti-torture legislation
Consequences	Torture degrades society, presents a negative image, establishes precedence for the routine use of torture, and negates the human rights and dignity of many. Negative consequences outweigh potential positive outcomes.
Virtues	Torture is against most moral and religious norms and should not be conducted.

This chapter has examined the existing evidence on the use of torture in a legal context which included both international and domestic legislation regarding torture. The effectiveness of torture which also included the overall effects of torture on the different parties involved as well as ethical arguments both for and against the use of torture was analyzed. In all categories, the conclusion can be made that torture in that particular context was wrong. Legally, torture is prohibited in international humanitarian law, human rights law and United States' domestic law. Torture is not an effective

interrogation method; its negative effects on not only the victim but the torturer and society far outweigh the potential benefits. Finally, torture is ethically wrong both from a religious view and from a secular view. While many argued that torture should be used, no one argued that torture was right; torture was considered the lesser of two evils.

These results were next analyzed in the context of the ethical decision making triangle which examined the use of torture from the following viewpoints: principles, consequences, and virtues. In all three categories, it was concluded that torture is wrong. In a principles based context, legal arguments, religious laws, existing moral norms and democratic principle do not allow for the use of torture or official disregard for anti-torture legislation. Consequences based analysis shows that torture degrades society, presents a negative image, establishes precedence for the routine use of torture, and negates the human rights and dignity of many. Negative consequences outweigh potential positive outcomes. Finally virtues based conclusions show torture is against most moral and religious norms and should not be conducted. Chapter 5 will examine these conclusions and make recommendations for future actions and research.

## CHAPTER 5

### CONCLUSIONS AND RECOMMENDATIONS

#### Conclusions

This thesis set out to answer the question: Is torture a viable tool for use in achieving goals as outlined in the *2006 National Security Strategy*. Related questions included: What is torture? What are the possible ways torture can affect the National Security Strategy? Is torture actually effective? How is the use of torture viewed ethically, culturally and religiously? What are the legal implications of the use of torture, both within U.S. and international law? and What are the different arguments for and against the use of torture? The final question was, How do the answers to these questions stand up when examined under an ethical decision-making model. Existing information was analyzed in the following three categories: legal considerations, effectiveness, and ethical considerations, and the following conclusions were drawn:

#### Legal Conclusions

The prohibition against torture is clearly defined in international humanitarian law that the United States has helped to create and enforce throughout history. This prohibition is also reflected in human rights law with documents such as the Convention Against Torture which the United States has not only ratified but also denounced other countries for violating. United States' domestic law is also quite clear in its opposition to the use of torture. Torture is therefore against international as well as United States' domestic law. Torture is not supported within and does not support the legal objectives and goals that President Bush outlined in the *2006 National Security Strategy*.

## Effectiveness

While there are some instances of successful interrogational torture, the overall effects of the use of torture are detrimental to its victims as well as society, and torture is not the most effective means of interrogation. Historically, torture has not proven to be an effective method in gaining information. Agencies that deal with interrogations, such as the CIA, the FBI, and the United States' military, all say that torture is not an effective questioning technique. While some authors cite success in the effectiveness of harsh questioning on certain key terrorist suspects, there was no evidence that professional interrogators supported this argument.

In looking at the effects of torture, evidence shows a great physical and an even greater mental effect on its victims and even on those who commit torture. Other evidence points to the negative effects that torture can have on society, such as normalization of the practice, the divisiveness of the practice on military and government organizations, and the sometimes strengthening effect that torture can have on those fighting against the government. While most do not question the validity of the possibility of the ticking-time-bomb scenario, legislation based on this extreme and very rare case would make for bad policy. Even though lives could potentially be saved in the short term, the longer term effects of the routine use of torture would endanger more people, and degrade the democratic nature of society as a whole. Arguments regarding the effectiveness of torture as a method of gaining intelligence lead to the conclusion that though there may be some controversial success such as in the case of Khalid Sheikh Mohammad, most instances of torture will not yield the anticipated results. In all, written evidence leads to the conclusion that the negative effects outweigh the potential benefits

of the use of torture and those effects will negatively impact the United States both at home and abroad and pose a stumbling block to the *2006 National Security Strategy* goals.

### Ethical Considerations

No author unequivocally supported the random use of torture without some form of constraint; all authors agreed that that course of action is unacceptable. Arguments in favor of the use of some form of torture include the idea that the course of action must suit the majority, not the minority; that politicians have the obligation to do what is best for the majority of their constituents, regardless of legality; and that torture unregulated is far worse than regulated torture. Arguments against the use of torture include the slippery slope argument, the overall negative effects of torture, the negation of human dignity, and the fact that torture does not support the democratic ideals of the United States. In a religious context, all major western religions (Christianity, Judaism, and Islam) uphold the concept of human dignity and claim in some way that human beings are a representation of God and the desecration of humanity is a desecration against God. No person following the laws or edicts of his religion could claim religious support for the use of interrogational torture. In conclusion, interrogational torture is a morally wrong act and goes against the moral foundations and democratic principles of the United States.

### Ethical Decision-Making Model

In examining the ethical decision-making triangle in relation to the use of interrogational torture, one can conclude that the United States should not participate in the use of interrogational torture. In a principles-based approach to torture, neither legal

arguments, religious laws, nor precepts and existing moral norms allow for the use of torture or even for official disregard for antitorture legislation. Torture's negative consequences on United States' society as well as moral image abroad will outweigh the slight chance of any positive outcome from the use of torture. Finally, the virtuous person will not resort to torture because it is illegal, it is against most religious and moral teachings, and is against the democratic principles espoused and enforced in United States' foreign policy.

### Recommendations

There are many outstanding issues regarding the question of torture. Recommendations for future research or action include several topics to include: a standardized legal definition of torture to include what actions constitute torture; update and refine the Geneva Conventions of 1949; develop a torture over watch model and a torture training model; and study the effects of interrogational torture in relation to the effects of other forms of torture.

### Standardized Definition of Torture

The most commonly used definition of torture is found in the Convention Against Torture but contains many holes, such as what practices constitute torture and where is the line between torture and coercion. For this study, torture was examined only as it related to interrogational practices, but the question remains of where do practices, such as extraordinary rendition and unlimited detention, fall in the torture spectrum. Torture must be clearly defined both in international law as well as domestic law. The United

States must also make it clear to its officials what will be considered torture and what will be considered coercion.

#### Update and Refine the Geneva Conventions of 1949

Another possible area of research and examination would be the Geneva Conventions of 1949. Do they need to be updated to reflect changing world views on human rights and to also reflect the rise in nonstate-sponsored terrorism? Are the Geneva Conventions doing enough to ensure the conduct of legitimate war as well as ensuring that war continues to be used as a tool of legitimate states? Do the Geneva Conventions provide legitimate states the proper tools to use against transnational terrorists?

#### Torture Models

Another area of research would be based on the legalization of torture. If one were to take the recommendations of Alan Dershowitz, Alan McCarthy and Charles Krauthammer, there are significant questions concerning the form that a legalized system of torture would take. In addition, there are a number of other related questions:

1. What does the scale of interrogation techniques look like?
2. Which practices walk the fine line between torture and coercion?
3. Which techniques have been ruled on as torture in the past?

Another model to explore would be the training required to develop competent interrogators authorized to use torture. Questions that would arise in developing this model would consist of the following:

1. What would torture training look like?
2. What is the screening process?

3. What kind of physical and psychological treatments would be necessary in the event that torturing proved too traumatic for the interrogators?
4. What would a compensation model look like for those wrongly tortured?
5. Can this be done without the medical community's participation?

### Effects of Interrogational Torture

Much of the medical testimony of the effects of torture dealt with victims that were not necessarily victims of pure interrogational torture; many were tortured for confessions, not information. Is there a difference in the lasting effects of torture in these populations? Are there any different effects on those who were tortured and actually had the desired information?

In summary, one can conclude that torture is illegal, not effective, and amoral by Western standards. When held up to an ethical decision-making model, it also fails to be an appropriate ethical decision. In answering the question of is torture a viable tool for use in achieving goals as outlined in the *2006 National Security Strategy*, one can clearly see that the answer is no, torture is not a viable tool and in the end cause more harm than good.

Imagine that you are creating a fabric of human destiny with the object of making men happy in the end, giving them peace and rest at last, but that it was essential and inevitable to torture to death only one tiny creature--that baby beating its breast with its fist, for instance--and to found that edifice on its unavenged tears, would you consent to be the architect on those conditions? (Dostoevsky 1879, 227)

Fyodor Dostoevsky, *The Brothers Karamatzov*

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