TORTURE[1]

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I. INTRODUCTION

I am deeply conscious of the fact, as I consider the subject of torture, that I have led a very sheltered life. I have never been tortured. I have never seen anybody being tortured. Nor have I ever met anyone who has undergone this dreadful practice. But I cannot say that I have never met anyone who has had anything to do with it. The Cyprus emergency was at its height during my period of national service. My attempt to persuade the military authorities that my knowledge of classical Greek was a suitable qualification for me to be sent to the island to act as an interpreter was unsuccessful. I was sent instead to serve with an infantry battalion in the British Army of the Rhine in West Germany. I did not think so at the time as we endured one of the coldest winters in living memory in Nordrhein-Westphalia, but I was to discover later that this may well have been the better option. When I went up to university I met someone who had indeed been sent to Cyprus. He had acted as an interpreter when Greek Cypriot members of the Eoka organization were being interrogated. Conscious of the constraints of the Official Secrets Act, he never revealed to me the details of what was done to them during this process. But I had the distinct impression, as we talked, that he had been revolted by it and that things were done which were and would always remain a scar on his memory.

It has to be said that we were much less conscious in the mid-1950s of where the dividing line lies between proper and improper conduct than we are now. Urban terrorism was unknown at home. But it had been a feature of service life during the past decade in Egypt and Palestine, and now in Cyprus it had reached such a point that the wives of servicemen were being shot in the street as they were out shopping. It would not have surprising if, in the heightened tension of those times, military interrogators went further than they ought

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to have done in an effort to extract information that might reduce the risk of violent attacks on them and their families. I am not in a position to say that torture was resorted to during this period. I must not be taken as alleging that it was. The practices which upset the interpreter may well have been the same as those which, when they were employed two decades later in Northern Ireland, were held by the European Court of Human Rights to be inhuman and degrading but not to constitute torture.[2] Nevertheless, I have to confess that I am uneasy, as I look back on that period. I see there, present on that island, the very same circumstances that undoubtedly led to the use of torture during other periods of our history. This experience forms the backcloth to this article, as I seek to explore some of the history of this sinister area of practice and to try to discover whether, and if so when, its use can ever be justified.

Everyone knows, in general terms at least, what the word 'torture' means. According to the *Shorter Oxford Dictionary* its primary meaning is 'the infliction of excruciating pain, as practised by cruel tyrants, brigands, etc in hatred or revenge, or as a means of extortion, etc'. It may be an end in itself, with no purpose other than to inflict pain on the victim and satisfy the desires of the torturer. Or it may be used as an instrument of coercion, to intimidate, on a large scale. That is a crime against humanity. The regime of Saddam Hussein in Iraq comes to mind. Or it may be used as part of the judicial process to obtain a confession or to extract information which is being withheld from the interrogator. That, briefly, is what torture is about. It must not be confused with the means used to punish those who have been convicted. Cruel and unusual punishment is unacceptable, but punishment which is imposed after conviction is not properly to be described as torture.[3] It is also well known that one of the most fundamental of human rights is the right not to be tortured, whatever may be the purpose of it.

But condemnation of the practice by human rights instruments to which almost all States have subscribed is one thing. Its elimination is quite another. Here, as so often where we make laws to control what people can and cannot do, we are faced with problems which are inherent in human nature. It is an inescapable fact of the human condition—we are animals, after all—that we feel pain. We fear pain. This is a fact which we can all turn to our advantage, as things that are painful often have much more damaging consequences. But the infliction of pain on others is a weapon too, especially in the hands of the unscrupulous. People can be controlled by fear, and torture is a means of instilling fear. Intimidation by this means is a fact of life in some countries. In others it is hidden away, an unseen and unsanctioned but nevertheless standard method of extracting confessions or information from those who are subjected

[2] *Ireland v United Kingdom* (1979–80) 2 EHRR 25, para 167.

[3] JH Langbein *Torture and the Law of Proof: Europe and England in the Ancien Regime* (University of Chicago Press 1977) at 3, asserts that no punishment, no matter how gruesome, should be called torture; see also Art 1(1) of the Convention against Torture 1984: 'It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.'

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to it. The matter is not made easier by the fact that the word 'torture' has no precise meaning.

In these circumstances the problems that lie in the way of those who would change the world are formidable. Writing about his early days in the Foreign Office during the years of the last great fogs in London, Douglas Hurd recalls that occasional wisps of fog were granted admission to the heart of the building to remind those in the office of the vanity of efforts to spread light in the world.[4] But if we cannot eliminate torture everywhere, we can at least face up to its existence and try to understand the circumstances that encourage its use. So this article aims to put the problem into some kind of a perspective, in the light of our own history.

I can leave on one side for this purpose the use of torture by cruel tyrants and brigands. The civilized world does what it can to assuage the horrors of tyranny and atrocities committed by brigands. We offer asylum to those who have a fear of persecution which can be shown to be well founded and, when we can find them, we bring brigands to justice. But torture which is perpetrated by the State in countries which are not ruled by tyrants—where the State chooses to use torture as an instrument in the judicial process or as a means of extracting information with a view to deterring rebellion or protecting its citizens against terrorism—gives rise to quite different practical and ethical problems. There are problems of definition. What may be seen by the victim as torture may be seen just as clearly by the authorities as a legitimate way of dealing with him. There are questions of degree. And there are problems as to whether in this field it can ever be right for its use to be permitted, in extreme circumstances, in the belief that information obtained by this means may avert a catastrophe.

II. JUDICIAL TORTURE IN ENGLAND

We may be tempted, in the comparative safety of our own times, to think that judicial, or State-authorized, torture has had no place in the history of our country. But it does not take much research to discover that this is not so. The dictionary tells us that the earliest known occurrence of the word in English usage in the judicial or quasi-judicial context was in 1551. In fact, records exist which demonstrate that warrants for torture were being issued by the English Privy Council from about 1540.[5] There is no recorded example before that date of the use in this country of torture as a means of extracting evidence from unwilling witnesses or obtaining a confession from a suspect. As for what happened in 1551, on 5 November in that year a warrant was sent from the Privy Council to the Constable of the Tower of London ordering him and

[4] D Hurd *Memoirs* (London Little, Brown 2003), at 91.
[5] Langbein op cit at 81.

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others to assist in the torturing of persons committed to the Tower on suspicion of being involved in the alleged treason of the Protector, the Duke of Somerset.[6] Their confessions and depositions were later used against the Duke at his trial.[7]

In that case the Duke was accused of treason—the violation of his obligation of allegiance to his sovereign. The concept of treason as a distinct offence against the authority of the State has fallen out of fashion today. But in its proper context treason has always been regarded as an extraordinary crime, to combat which extraordinary measures may be justified. Until very recently, after all, a conviction for treason attracted the mandatory death penalty.[8] But the use of torture was not permitted in any of the common law courts in England as part of the ordinary course of the administration of justice. Sir Edward Coke was able to assert that there was no law to warrant torture in this country. All the ancient authors, he said, were against the use of any pain or torment before attainder, and then only according to judgment.[9] Sir Thomas Smith said that, although torture was used according to the civil law and the custom of other countries, it was not used in England where, as he put it, 'it is taken for servile'.[10]

The practice in the civil law jurisdictions, to which Smith was referring, was of long standing.[11] Slaves were examined by torture in ancient Athens. Their evidence was regarded as more reliable than that of freemen because it had been extracted from them in this way. In Rome too during the period of the Republic slaves could be tortured, although as a general rule they could not be tortured to establish their master's guilt on the view that the master's welfare ought not to be subject to the judgment of their slaves.[12] Under the Empire torture was occasionally inflicted on freemen, as well as being much used in the examination of slaves. Evidence appears to be lacking of its use thereafter, until in 1252 a decree of Pope Innocent IV sanctioned this mode of examination in the case of persons accused of heresy.[13] The inquisitorial procedure was then gradually adopted by the continental States following the spread of Roman and canon law under the *ius commune*. According to the Roman-canonical theory of proof, capital crimes could only be proved by the defendant's confession or by the testimony of two reliable eyewitnesses. There was no room under this exacting system for circumstantial evidence, so there

[6] Langbein op cit at 94.

[7] J Heath *Torture and English Law: An Administrative and Legal History from the Plantagenets to the Stuarts* (Crestport Connecticut Greenwood 1982) at 75.

[8] The death penalty for high treason was abolished by s 36 of the Crime and Disorder Act 1998.

[9] Sir Edward Coke *The Institutes of the Laws of England* Part 3 34–5.

[10] Sir Thomas Smith *Commonwealth of England* book 2.

[11] AL Lowell *The Judicial Use of Torture* (1897) Harvard Law Review 220.

[12] Digest 48.18.5.

[13] The Papal Bull *ad extirpanda* was designed to compel heretics by measures short of maim or danger to life to confess their own error and to accuse other heretics.

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was a strong incentive to procure confessions by whatever means. Torture by order of the court came to be adopted as a recognized part of the legal systems of most countries on the Continent.[14] It was still being practised in Germany in 1770, and it was part of the judicial systems of France until 1789, of the Netherlands until 1798 and of Greece until 1827.[15] The theory of evidence on which it rested was designed for a system under which all trials took place before professional judges. In England, under the common law, things were different. Circumstantial evidence could be used to establish guilt in the absence of a confession or eyewitnesses, and those suspected of serious crimes were tried by a jury drawn from their locality.[16] The common law accepted what Maitland[17] described as 'the rough verdict of the countryside'. So judicial torture never became part of English criminal procedure. As a result, as there was no need for it, torture was prohibited by the common law.

Nevertheless it is plain that torture came to be used in England, with official approval, during the sixteenth century as a means of extracting information from those who were accused of treason or other crimes against the State. Thumbscrews, pincers, and other tools were used to inflict pain in ways that require no explanation. One of the more elaborate instruments was an oblong horizontal frame known as the rack, to which the victim was attached by cords. He was gradually stretched by means of a lever or windlass until, at the ultimate extremity, the joints of his wrists and ankles were dislocated. This method was as old as the second century in southern Europe. But it was unknown in England until it was introduced into the Tower by the Constable, the Duke of Exeter. It was known as the 'Duke of Exeter's Daughter'. A lesser instrument, known as 'the Scavenger's daughter', was the invention of Sir William Skeffington, who was lieutenant of the Tower in the reign of Henry VIII.

The Privy Council assumed the power of issuing warrants to officers in the Tower to employ torture against State prisoners and occasionally against persons accused of other serious crimes. Warrants to employ torture were also issued occasionally under the sign manual. Among those named in commissions to examine particular suspects under torture were the same Sir Edward Coke and Sir Thomas Smith who, in carefully chosen words, had extolled its absence from England.[18] It has been suggested that its use began during the reign of Henry VIII,[19] although no warrants exist to document this—probably

[14] Examination under torture was permitted only where the court was satisfied that there were sufficient grounds for it: Langbein op cit at 4–5. The principles of the Roman-canonical law are described by Heath op cit at 30–1.

[15] A list of the dates when torture was abolished, State by State, by law in Europe is given by BP Levack *Judicial Torture during the Age of Mackenzie* (Edinburgh The Stair Society Miscellany IV 2002) at 187, n 20.

[16] J Fortescue *Be laudibus legume Anglie* (c1470).

[17] Maitland *The History of English Law before the Time of Edward I* II 660–1.

[18] Langbein op cit at 73.

[19] Ibid at 81 accepts that the inference is inescapable that some use of torture predates the commencement in 1540 of the issuing of warrants for its use by the Privy Council.

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because the authorization was given by the King personally or by senior officials acting on his direction. For example, in 1536 Mark Smeaton is said to have been tortured on the orders of the Master of the Rolls, Thomas Cromwell, who was soon to become the Earl of Essex and Lord Chamberlain in recognition of his services.[20] Cromwell invited Smeaton home to dinner and then ordered a rope which was full of knots to be tied around his head and twisted until he confessed to having committed adultery with Anne Boleyn. From 1540 onwards the practice was for the Privy Council to issue warrants for the use of torture in the examination of prisoners. Its use was carefully documented. Records exist of the 101 warrants for torture that were issued during the reigns of Henry VIII (3), Edward VI (6), Mary (11), and Elizabeth (81).[21] Those suspected of political offences were the most frequent victims. Torture was also used in the case of other serious crimes such as counterfeiting, embezzlement, robbery, and murder. But, measured against the thousands of investigations that must have been taking place every year, the number of recorded cases in which torture was used in England during this period was very small.

Torture was resorted to less often under the Stuart Kings. It was used in 1628 in the case of Felton, the assassin of the Duke of Buckingham, to discover the identity of his accomplices. But here, at last, there was a turning point. The judges held that evidence which was obtained in this way was inadmissible. Their courageous and enlightened approach led to the ending of the practice, and the last time examination by torture was inflicted in England was in 1640. In that year, after eleven years of personal rule, Charles I called the Long Parliament. The jurisdiction of the English Privy Council in matters regarding the estates and liberties of the subject was transferred to the ordinary courts, and it lost the right to issue torture warrants.[22] Torture played no part in the legal system of England after the Restoration.

III. JUDICIAL TORTURE IN SCOTLAND

Scotland shared the same monarch with England during this period. But it was still an independent State with its own Privy Council and its own Parliament. Torture was forbidden by the common law, and those suspected of serious crimes were tried by lay juries, as in England. So it never became a regular part of the judicial system, as on the Continent. Nevertheless it was employed in cases alleging crimes against the State, and occasionally in the case of ordinary crimes too, especially during the latter part of the seventeenth century

[20] He later fell out of favour, was charged with treason and executed at Tower Hill on 28 July 1540.

[21] Langbein op cit at 73.

[22] 16 Charles 1, c 10. The Bill, which abolished the Star Chamber, was introduced in March 1641 (according to the old calendar) and was passed later in the same year.

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after it had ceased to be available to the authorities in England. Its use continued until the removal of James II, the last of the Stuart Kings. Here again, as in England, its use was carefully documented. Between 1590 and 1690 a total of thirty-nine warrants for torture were approved by the Scottish Privy Council and the Scottish Parliament.[23] It was also much used, without much regard to the formalities of procedure, against witches.

This period was marked by a bitter religious conflict between the Presbyterians and the Episcopalians, and by fears that exiles in Holland were plotting (as indeed they were) to overthrow the government. In an attempt to meet growing resentment against the Crown a new ecclesiastical policy was devised by Charles I in 1636 with a view to assimilating the practices of the Church in Scotland with those of the Church in England. It has been said that only a man totally out of touch with the realities of Scottish feeling could have gone ahead with such a plan, and the King's decision to do so provided both a cause and the pretext for a general revolt.[24] A national protest, the National Covenant, was signed in Edinburgh in 1638 by which the signatories pledged themselves to defend their religion against all who came against it. A more extreme document, the Solemn League and Covenant, followed in 1643 to consolidate opposition to the King's religious and political policies. Not surprisingly, the King treated everyone who signed these documents as rebels.

Things went from bad to worse when the King declared the proceedings of a General Assembly of the Scottish Church as illegal and gathered an army to march into Scotland. An army of Covenanters marched in opposition into Northumberland in 1643 and joined up with the English Parliamentarians. This alliance was short-lived. Cromwell forced a measure of religious toleration on the Scots in 1653 and Charles II, when restored to the throne in 1660, was tolerant of puritan forms of worship although he brought back episcopacy. Nevertheless secret meetings, known as 'conventicles', of the Convenanters continued. The government regarded them as seditious and wanted them stopped. There was a rebellion in 1666 which ended at the battle of Rullion Green, where the Covenanters were defeated by a force led by General Tam Dalzell of the Binns. Twenty-one prisoners were executed, and many others were banished to Barbados. There was another rebellion in 1679, which began with the assassination of Archbishop Sharp at St Andrews. The rebels won a minor skirmish with the government forces at Drumclog. But on 22 July 1679 at the battle of Bothwell Bridge they were defeated by a much larger force led by the Duke of Monmouth. There were sixteen more executions, and an unprecedented volume of repression followed. In 1683 the Earl of Argyll, who had taken shelter in exile in Holland, sailed from Amsterdam, landed briefly in Orkney and made his way to Kintyre where he tried without success to raise

[23] Levack op cit at 191.
[24] TC Smout *A History of the Scottish People, 1560–1830* (London Collins 1969) at 66.

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a Protestant revolt. At last, on 5 November 1688 William of Orange landed in Torbay and on 23 December James II fled from the throne. In the following year the Protestant Reformation in Scotland was complete. The religious revolution came to an end, and so too did the practice of torture. Torture 'without evidence or in ordinary crimes' was declared contrary to law by the Claim of Right in 1689. This form of words, no doubt carefully chosen, appeared to sanction the use of torture if there was evidence to justify resort to it.[25] But by the Treason Act 1709,[26] an Act of the United Kingdom Parliament, it was at last enacted that no person accused of any crime could be put to torture.[27]

Baron Hume, in his *Commentaries on the Criminal Law of Scotland*, provides us with a description of the practice of torture in Scotland during this period.[28] His account appears in a chapter where he deals with proof of the accused's guilt by confession. The seeds of the temptation for the authorities to resort to torture lay in the extent to which reliance was placed on a confession to establish the accused's guilt. Scots law now insists that evidence of the accused's confession which is made extrajudicially, when he is being interviewed by the police for example, must be corroborated by independent evidence.[29] A confession is conclusive only if it is made in the presence of the court at the trial.[30] But in the seventeenth century it was the practice for 'entire credit'[31] to be given at the accused's trial to confessions made by him previously before a justice or members of the Privy Council. A written record of his admissions, signed by him or on his behalf, was read over in court. He was then invited to acknowledge it. In at least two cases it was held that a confession which had been made in this way was judicial and could not be retracted.[32] So in cases concerning the State, or in which the State itself had a particular interest, it was not uncommon for the suspect to be interrogated on oath before the Council or the justices. But that was not all, as Hume explains:

> As this sort of confession was procured by means of violence to the conscience of the prisoner; so here, as in most other countries of Europe, confession was sometimes extorted by the suffering and torture of the body. This, however, seems chiefly to have been done by the orders and under the direction of the Privy Council; for I do not find that torture ever became an ordinary instrument

[25] In December 1690 Henry Neville Payne, an Englishman, was taken from England to Scotland, under pressure from London, to be tortured there: see C Jackson *Judicial Torture and the Liberties of the Subject in Restoration Scotland* (n 1 above) for a detailed account of this incident.

[26] 7 Anne c 21, para viii.

[27] BP Levack op cit at 187 n 20, points out that by this statute Scotland became the first country in Europe in which torture was abolished by law.

[28] Hume *Commentaries on the Law of Scotland respecting Crimes* (Edinburgh Bell & Bradfute 1844) vol 2 at 319–23.

[29] Ibid at 383. The safeguards which were introduced for the protection of the accused during the eighteenth century are described by ID Willock *The Jury in Scotland* (Edinburgh The Stair Society 1966), at 199; see also *Smith v Lees*, 1997 JC 73.

[30] Hume op cit vol 1 at 541–2.

[31] Ibid vol 2 at 321.

[32] Willock op cit at 198.

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> of inquisition, or one which the Court of Justiciary, and much less any of the inferior courts, could presume to employ, without the warrant of a previous consultation with that supreme and superintending Chamber. Moreover, to make way for the use of this barbarous expedient, it seems to have been required in our practice (herein conformable to the known foreign authorities on such questions) that there should at least be grounds of presumption (but these could not well be reduced to any rule) against the suspected person.

It appears from this, and from other accounts of the practice,[33] that torture was never used on a regular basis in Scotland as it was on the continent of Europe. But it was resorted to with great brutality after the Restoration in the persecution of Convenanters and in the prosecution of treason – an expression which was liberally interpreted in the Crown's favour.

One of the instruments of judicial torture in use in Scotland during this period was the boot.[34] The legs of the person to be tortured were put into a case made of pieces of wood nailed together, and wedges were then hammered down into the space between the wood and the victim's legs one by one as questions were put to him until he gave the desired information or fainted from the extreme pain as his legs were crushed inside the casing. If he was obstinate, and declined to say what was expected of him, this was simply an indication that the torture was not severe enough.[35] James II is thought to have taken particular pleasure in watching men being tortured in this way.[36] Another method of torture that was used, particularly in the prosecution of witchcraft, was pricking. The witch was pricked repeatedly with long pins or 'brods' thrust into her body to discover the spot, known as the devil's mark, which was given to her when she made her pact with the devil and was believed to be insensitive to pain.[37] Torture by this and other means was often resorted to by officials in witchcraft cases without any warrant for it having been issued.

Torture was not restricted to the extraction of a confession from the suspect. Sir John Lauder of Fountainhall, who practised as an advocate and was later one of the judges of the Court of Session, kept a journal[38] in which he recorded the decisions of the Court during this period. In his journal Fountainhall gives a graphic account of the treatment which was meted out in

[33] Levack op cit at 185.

[34] It seems to have been unique to Scotland: see *Chambers Encyclopaedia*, vol 2, *Boot, Boots or Bootikin*.

[35] Willock op cit at 199.

[36] RD Blackmore *Lorna Doone* ch xxxvi, refers to the Duke of York, as he then was, 'trying boots in Scotland'.

[37] Hume op cit vol 1 at 591–2; Levack op cit at 195.

[38] Entitled *Decisions of the Lords of Council and Session from June 6th 1678 to July 30th 1712, containing also the Transactions of the Privy Council, of the Criminal Court and Court of Exchequer, and interspersed with a Variety of Historical Facts and many curious Anecdotes* published from the original manuscript in the Library of the Faculty of Advocates (Edinburgh 1759).

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1684 to the unfortunate William Spence, a former servant of the Earl of Argyll[39] and of its consequences.[40]

Spence was arrested with others in London in October 1683 on suspicion of being involved in plotting a rebellion against Charles II's government[41] and taken to the castle in Edinburgh. He was uncooperative when he was interviewed by several Scots Privy Counsellors, so it was decided to put him to torture. The treatment which he received was prolonged, and it was brutal:

> Jul 26 *et dieb. seq.* 1684. Mr William Spence, late servant to the Earl of Argyle by order of the Privy Council is tortured and put in the boots, to force him to reveal what he knows of the Earl's, and other persons', accession to the late English fanatic plot, and the association and design of rising: and in regard he refused to depone upon oath, if he had the key whereby he could read some letters of the Earl's, produced by Major Holmes, written in cyphers; and seeing he would not say upon oath that he could not read them, and that they offered to secure him a pardon for his life, it rendered him very obnoxious and suspect of prevarication; so that after torture, he was put in General Dalziell's hands; and it was reported that by a hair-shirt and pricking (as the witches are used) he was five nights kept from sleep, till he was turned half distracted. He eated very little, of purpose, that he might require less sleep; yet all this while he delivered nothing, and tho' he had done it, yet little credit was to be given to what he should say at such a time. *Vid.* 7th August 1684.
>
> August 7. 1684. At Privy Council, Spence (mentioned 26 July) is again tortured, and his thumbs crushed with thumbkins. It is a new invention used against the Coliers when transgressors; and discovered by General Dalziell and Drummond, they having seen them used in Muscovy. After this, when they were about to put him again in the boots, he being frighted, desired time and he would declare what he knew; whereupon they gave him some time and sequestered him in the Castle of Edinburgh, as a place where he would be free from any bad advice or impression, to be obstinate in not revealing. *Vid.* 22d current.
>
> August 22. 1684. William Spence, mentioned 7th current, to avoid any farther torture, reads these hieroglyphic letters; and agrees with Mr Holme's declaration that Argyle, Loudon Campbell, the late President Stair, Sir John Cochran and others, had formed a desire to raise an army in Scotland, and to land at such convenient place as they hoped the people would join them, and hoped, if they once gave the King's forces a foil, they would get many to flock in to them; and had advanced money to this purpose; . . . and they expected help from England.

On this Campbell of Kinlas was apprehended, by John McNaughtan in Inverary: Spence got the liberty of the Castle and his remission was recom-

[39] The ninth Earl of Argyll was opposed to the Stuart rule in Scotland. He had been sentenced to death in 1681 for treason but fled to the Netherlands. He launched a rebellion from there and invaded Scotland with about 3000 men in 1685. But he was unable to obtain sufficient support, was captured and executed.

[40] Fountainhall's *Decisions* vol I 299-301; Hume op cit vol I, at 542.

[41] See n 39.

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mended to be put by the King, and Gordon of Earlston was sent from the Bass, not to be executed (as some said), but to be tortured and confronted with Spence. They resolved not to admit of his madness for an excuse, which they esteemed simulate; as the late Chancellor had done.

We know from other records[42] that Spence was given eighteen knocks with the mallet on the wedge in the boots, it being normal to give only seven or eight. He was kept from sleeping for several days until medical advice was received that if he was not allowed to sleep he would go mad. Permitted to sleep, he remained obdurate. So he was again tortured, this time by the use of thumbscrews. The screws were turned until broken bone appeared through his skin. He still did not give in. But on being threatened again with the boot he agreed to decipher two encoded letters sent by the Earl from the Netherlands which the King's agents had intercepted. In exchange for his cooperation he was granted a royal pardon for any treasonable activity he might have been involved in and assured that neither the contents of the letters nor his own testimony would be used as evidence against himself or any person whom he might implicate. This promise was not kept.

One of the persons whom Spence identified was a co-accused named William Carstairs.[43] Carstairs too was tortured by the use of thumbscrews. He remained silent, but when threatened with the boot he gave in. Fountainhall gives the following description of what happened to him:[44]

> September 5. & 6. 1684. Mr William Carstairs, son to Mr John Carstairs, once Minister at Glasgow, is brought before the secret Committee of Council, and is tortured with the thumbikins. He confessed that there has been a current plot in Scotland these ten years past: Some were for raising forces; other were only for associating with the English, for holding out the Duke of York from succeeding, and to preserve the reformed religion: He named many that were upon the knowledge of it . . .

Such of them as could be got hold of were apprehended and put in prison. The first two to be examined denied their involvement, so they were threatened with the boots. Not everyone approved of what was being done, and there was a debate on the issue:

> Duke of Hamilton opposed their torturing much; and alledged that, at this rate, they might, without accusers or witnesses, take any person off the street, and torture him; *et nemo in aliorum caput est torquendus*; and he retired, and refused to be present, on this ground, that if the party should die in the torture, the Judges were liable for murder, at least were severely censurable.
>
> It was doubted, how far their testimonies extorted *per torturam* can be probative against third parties, seeing witness should be so far voluntary and spontaneous

[42] See Jackson op cit for a detailed account.

[43] His name is spelt 'Carstares' in other records: eg APS, vol ix at 192a; see Levack op cit at 191 n 41 and Jackson op cit. I have adopted the spelling which was used by Fountainhall.

[44] Fountainhall's *Decisions* vol I 302–3.

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> as to be under no impressions, or terrors of fear of life or limb; others judge then best to be credited then. Some thought our Privy Council would have been at some loss, and contracted some tash[45] by this cruel torture, had they suffered it as they did the boots (which they regarded not, their legs being small,) without discovering or revealing this conspiracy; but their confessing tends to justify the Privy Council's procedure.

The information which Carstairs gave prompted a further series of arrests. He had been persuaded to swear on oath to its accuracy by assurances that his testimony would be used for information only and not as evidence. This promise too was not kept. One of the persons whom Carstairs had named was Robert Baillie of Jerviswood, whose trial began the next day. The authorities were determined to use this trial to head off the threat of the conspiracy. Although Carstairs was not called on to give evidence, others named by him under the threat of torture were compelled to do so and his deposition was cited as supporting evidence. The Lord Advocate, Sir George Mackenzie of Rosehaugh ('Bluidy Mackenzie', as he was known), told the jury in his speech for the prosecution that Spence's deciphering of the Earl's letters and Carstair's sworn deposition were the two surest proofs that the law ever invented or the nature of human affairs could allow. Baillie was convicted by the jury the following day and, there being no provision for any appeal, he was sentenced to be executed immediately.

Fountainhall gives a detailed description of the trial, in which he was instructed to appear as counsel to assist the Lord Advocate, and of its aftermath.[46] It was a trial by jury, but there are grounds for doubting its impartiality. The appointment of the judges was in the prerogative of the Crown, and during this period the lawyers were instinctively behind the King.[47] The selection of the jury was in the hands of the judge, and jurors could only be challenged on cause shown. The chancellor at Baillie's trial, as the foreman of the jury was known at that time, was the Earl of Strathmore,[48] who was himself a Privy Counsellor. The picking of jurors by a bench subservient to the Crown, and later by a politically biased bench, characterizes many of the trials for political and religious offences during this period.[49]

Fountainhall's account of what happened to Robert Baillie makes grim reading:

> December 23. & 24. 1684. The trial, condemnation and execution of Robert Baillie of Jerviswood was upon thir [those] days. On the 23d, he was brought to the Criminal Court, and pannelled as art and part [acting in concert] of the treasonable conspiracy of joining with the discontented country-party in England, viz

[45] 'A blot on one's character, slur, stigma': *The Concise Scots Dictionary* (Aberdeen University Press 1985).
[46] Fountainhall's *Decisions* vol I 324–6.
[47] TC Smout *A History of the Scottish People, 1560–1830*, at 108.
[48] Ibid, at 326. This was the 3rd Earl, who was appointed a Privy Counsellor in 1682.
[49] *Introduction to Scottish Legal History* (Edinburgh The Stair Society 1958), at 441.

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> Shaftesbury, Lord Russell etc. to persuade or force the King to redress their grievances, and to call a Parliament, and pass the bill of seclusion against the Duke of York,[50] for securing the Protestant religion; and of carrying on this rebellious design of rising with England, under the blind and pretence of the Carolina Company, and for his knowledge and accession thereto, which he had presumed to conceal, and did not reveal the same: As also, he was an Agent for getting the L 10,000 Sterling from the English to my Lord Argyle in Holland, to buy arms and raise dragoons and horses, to land in the West-highlands, where others were to join with him.—*vid. supra* Spence and Carstair's declarations, p. 301, 302.

Objection was taken at the outset of the trial to the shortness of the citation, which was little more than 24 hours, whereas the usual period was 15 days to allow time for the defence to be prepared and defence witnesses to be cited. This objection was repelled, as also was an objection to the jurisdiction of the court on the ground that Baillie, who had had been arrested in England, was now being accused in Scotland of crimes alleged to have been committed in England. An objection to the evidence of one of the principal witnesses on the ground that when he had emitted his declaration he had been threatened with torture and promised his life in exchange for it was repelled also. Then came the evidence of Mr Carstairs:

> The King's Advocate further adduced to the assize, *in modum probationis*, a printed double of Mr. William Carstair's deposition, owned and adhered to by him on the 22d of December last, in presence of the whole Privy Council; whereon the two Clerks of Council were adduced as witnesses, to supply his absence; for he scrupled to appear as a witness against his friends, whom he had insnared in the plot and he had capitulated with the Secret Committee, before he would reveal anything: 1*mo*, To secure his life. 2*do*, That he should not be made use of as a witness.
>
> — The Criminal Court refused to sustain them as a full probatio *per se* (for that were a very dangerous preparative), but referred them to the assize to be received by them, *in modem adminiculi*.
>
> The jury retired at about midnight to consider their verdict, which was returned at three in the morning. Baillie was found guilty of being art and part in the conspiracy to take part in an armed rebellion.
>
> The verdict was read the next morning, the 24th of December, and sentence pronounced against him, *viz*, that he should be taken that afternoon to the market-cross of Edinburgh, and there hanged on a gibbet till he be dead; his head to be affixed on the Nether-bow-port of Edinburgh, and his body to be cut in four quarters, to be set on the Tolbooths of Jedburgh, Lanerk, Air and Glasgow; his lands and moveables declared forfeited to the King, his blood tainted, his posterity declared ignoble, and incapable of all offices; his arms reversed, and so affixed on the cross, and also to be delete and razed out of all the books of Heraldry. . . He carried all this with much calmness and composure of mind; only he complained that the time he had been given to prepare himself for death was too

[50] Brother of Charles II, who became King James II in 1685.

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> short, and huffed a little that he should be esteemed guilty of any design against the life of the King, or his brother, of which he purged himself, as he hoped to find mercy; as also he denied any purpose of subverting the monarchical government, only he had wished that some grievances in the administration of our affairs might be rectified and reformed. . .
>
> The sentence was accordingly executed in the afternoon; so that there was not above five hours between his sentence and his death, which was much complained of; but the holy days of Zuile[51] approaching, they would not delay him till they were ended.

Fountainhall brings his account of this show trial to an end with these comments, which reveal some of the motives that lay behind it:

> . . . their reputation in discovering this Scots plot was much concerned in finding him guilty of it; for if it had miscarried, it would have made the people believe it was but a sham forged plot . . . The beginning of discontent, tho' small, if cherished, will transcend all bounds, and keep to no measure.—He died regretted by many, and with much resolution.
>
> What Carstairs and the rest have said, is but an imperfect narrative of this plot; for they have concealed many circumstances of it, and told no more than was squeezed out of them by special interrogators, torture, and fear of more; but sober persons do not doubt that these foolish rash thoughts of winding themselves into the government were in their heads, though very impracticable. The reputation of our Governors lay deeply at the stake, in convincing the world of the truth and reality of this plot discovered by them; so they were hugely concerned to obviate any thing that seemed in the least to infringe, invalidate, or take off the credibility of the plot in the minds of the people.

There is a disconcerting similarity between what happened to Robert Baillie of Jerviswood and the events of our own time. It was an issue of homeland security. There was a network of dissidents—a spider's web, an al-Qaeda, one might say. Its members communicated with each other in secret, by the use of coded messages. There was an urgent need for the authorities to gather intelligence. Promising sources were found in England. They could have been interrogated there, but the information which they were unwilling to give could not be extracted from them by torture in that country. So they were removed to a jurisdiction which did use torture. Having got the information they wanted, the authorities put one of the ring-leaders on trial. Everyone, including the judges, was aware that this was a trial that had to succeed. It was urgent, and there had to be a conviction. As soon as the conviction was obtained, no time was lost in giving the event as much publicity as possible. There was no television, so parts of the body of the executed terrorist were distributed around the country to be displayed to the public in all their gory detail. The authorities were not willing to wait until after Christmas.

[51] This is a reference to the festival of Christmas.

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Spence and Carstairs, who were not put on trial, were perhaps fortunate. Torture under this system was usually a one-way street, as far as the suspect was concerned. Under the continental system, a suspect who denied his involvement in the crime which was alleged against him and withstood judicial torture was usually acquitted and then liberated. But in Scotland, as Hume points out,[52] though a confession of guilt, extorted in this extreme way, was received as an article of evidence against the unhappy prisoner at his trial, he was not held to have purged himself of suspicion, or to have purchased immunity from further question or prosecution, even by the firmest and most invariable assertion of his innocence. In one case, the finding in favour of an accused who had been uniform in his denial of the charge was that he was not entitled to an acquittal but that he could not be tried unless fresh evidence was produced against him.[53] In three others, the charges were found competent and convictions were obtained notwithstanding the fact that the accused had previously endured torture without confessing.[54]

A typical case was that of John Spreul, of whose treatment at the hands of the authorities Sir John Lauder of Fountainhall gives the following account:[55]

> June 10, 1681. Criminal Court. John Spreul being pannelled for treason – for being with the rebels at Bothwel Bridge (tho' he produced certificates that he was in Ireland all that time) . . . and it being alleged for him, that being put to the torture, and having persevered therein without confession of the crimes laid to his charge, the same purged all the preceeding *indicia et praesumptiones* that urged him, so that he can never be questioned on these again, except new presumptions should emerge against him; as was found in 1632, in the case of Toshack of Monivaird, accused of burning the Tower of Frendraught. It was answered by the Advocate, that there were farther presumptions *quae eum gravabant*, which are *noviter venientes ad notitiam*: 2do, his denial in the torture could never purge, because those who had examined him in the torture had no power nor commission from the Privy Council to ask these questions at him, and he was not bound to have answered beyond their warrant; (and yet it would have been thought presumption enough in him to have sought to limit them to their commission). The Criminal Lords repelled the defence, and found the torture purged not the preceding *indiciae*.
>
> On the 13th June the said John Spreul was tried at the Criminal Court, and probation led against him, who deponed that they saw one called John Spreul at Bothwel Bridge, but they knew not if the pannell was he, and there being another of the same name present in the Court (who confessed his being at Bothwel Bridge, and had taken the benefit of the indemnity,) to whom all the tokens and descriptions they gave agreed more than to the pannel, as the colour of his horse, his having a cap and not a hat, a black peruke, etc. The assize, upon this, cleansed and assoilzied him; notwithstanding whereof the Kings' Advocate procured an order, from the Privy Council, to detain him still in prison, till he got a new

[52] Hume op cit vol 2 at 323.
[53] *Tosoch* (1634), Hume op cit vol 2 at 323.
[54] *Sprott* (1608), *Maxwell* (1619), and *Muir* (1611), Hume op cit vol 2 at 324.
[55] Fountainhall's *Decisions* vol I at 141; Hume op cit vol 1 at 542, vol 2 at 324.

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> indictment, which was the 3d, to wit for treasonable expressions uttered by him before the Council, such as refusing to call Bothwel Bridge a rebellion, or the assassinating and killing the Archbishop[56] murder: which last is no treason, though it be a very perverse opinion.
>
> On the 14th June, the King's Advocate having complained to the King's Council that the witnesses led against Spreul had prevaricated and deponed falsely, at least did conceal their knowledge. It was moved by my Lord Haddo, and approven of by the King's Advocate, that witnesses in such a case might be tortured when they vary, as well as the parties. This is indeed agreeable to the R[oman] law, but does not suit the genius of our nation, which looks upon the torture of the boots as a barbarous remedy; and yet of late it has been frequently used among us. I think, however these witnesses deserve to be punished, yet the assize should not look upon the testimonies of such witnesses as a full probation, not being spontaneous and voluntary, where they either are threatened with the boots, or tortured.
>
> After all this, on the 14th July1681, Spreul is brought before the Privy Council, and fined on 9,000 merks, for refusing to depone anent his presence at Conventicles, the same being referred to his oath to the 2d act of Parl of 1670; and he was ordained to be sent to the Bass[57] till he paid it.

I have already mentioned one case where torture was used to obtain evidence against someone else. Hume says that Scots practice came to be stained during this period by the more frequent use of 'this barbarous engine', as he described it, for the discovery of transgressors. And if those who were tortured were persuaded to confess, their confessions were used as evidence to obtain the conviction of third parties.[58] There are echoes during this period of the Athenian view that, far from being rendered inadmissible by the use of torture, evidence obtained by this means was all the more reliable and convincing because it was not voluntary.[59] The flaw in this argument was pointed out by Erskine:[60]

> Torture was formerly accounted by us, as it is to this day by many other states, a justifiable as well as effectual method of drawing truth from the pannel[61] by his own confession; but its effect depends almost entirely on the pannel's natural constitution. If he have an uncommon resolution and firmness of mind, he will stand the torture and persist in his denial though he be guilty; but if he be not possessed of a degree of fortitude beyond the common run of mankind, he will, though innocent, be soon brought to take upon himself the guilt he is charged with. Torture was therefore declared contrary to law by the Claim of Right in

[56] James Sharp, Archbishop of St Andrews, was assassinated by Covenanters in 1679.

[57] The Bass Rock, in the Firth of Forth, was used as a prison during this period.

[58] *Baillie* (1684), Hume op cit vol 2, 324, who was convicted on the confession of William Carstairs.

[59] *Baillie*, Fountainhall's *Decisions* vol I at 324.

[60] Erskine *An Institute of the Law of Scotland* (Edinburgh Bell & Bradfute Nicolson's edn 1871) ii, iv, 96.

[61] The 'pannell', in Scots legal terminology, was the place of arraignment in a court; the word came to be used to refer to the prisoner at the bar, the accused.

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1689; and by the foresaid 7 Anne, c 21, section 5, no person accused of any crime can be put to torture.

The foresaid 7 Anne, c 21, was the Treason Act 1709. The turbulent period which characterized the reigns of the last two Stuart Kings was over. Here we see the door closed at last on its use in the United Kingdom, irrespective of whether it was to be used to extract a confession or to gather evidence. As Hume puts it,[62] with perhaps just a touch of hyperbole, the Act disposed of the last vestige of barbarity with respect to all crimes and in all cases whatsoever. As judicial torture was never recognized by the common law of England, Scotland can claim the distinction of being the first European country where its use was abolished by law.[63]

IV. TORTURE IN INTERNATIONAL LAW

Following the lead which was given by the United Kingdom, the position which the law takes is not now in doubt. Evidence which has been obtained by the use of any form of inducement or pressure is inadmissible. There are no exceptions to this rule. This has been part of the common law of England for centuries and its use in Scotland, as I have said, was abolished long ago by statute. The position has been reinforced by the prohibition of the use of torture in Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[64] Article 3 is in absolute terms. It declares that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. The qualifications that apply to other Convention rights such as the right to freedom of expression and to freedom of assembly, in the interests of such considerations as national security or public safety, are absent from this article. Its wording follows that of Article 5 of the Universal Declaration of Human Rights, which was adopted by the General Assembly of the United Nations on 10 December 1948.[65]

That article set the pattern for a wide a variety of modern Constitutions, Conventions and Declarations. Article XXV of the American Declaration of the Rights and Duties of Man[66] states that every individual who has been deprived of his liberty has the right to humane treatment during the time he is in custody. Article 7 of the International Covenant on Civil and Political Rights[67] and Article 5.2 of the American Convention on Human Rights[68] both state that no one shall be subjected to torture or to cruel, inhuman or degrading

[62] Hume op cit vol 1 at 543.
[63] Levack op cit at 187 n 20.
[64] (1953) (Cmnd 8689), now incorporated into domestic law by s 1 of the Human Rights Act 1998.
[65] Resolution 217A(III) (Cmd 7662).
[66] Adopted by the Ninth International Conference of American States on 2 May 1948.
[67] Adopted by a resolution of the General Assembly of the United Nations on 16 Dec 1966.
[68] Signed at San Jose, Costa Rica on 22 Nov 1969.

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punishment or treatment. Article 12(1)(d) of the Bill of Rights in the Constitution of South Africa of 1996 states that everyone has the right to freedom and security of the person, which includes the right to not be tortured in any way. Curiously, the 1982 Canadian Charter of Rights and Freedoms[69] does not mention torture by name. There is no express prohibition of torture as such. But section 11(c) provides that any person charged with an offence has the right not to be compelled to be a witness against himself in proceedings in respect of that offence, and section 12 provides that everyone has the right not to be subjected to cruel and unusual punishment. These provisions appear to have been modelled on the Constitution of the United States, which states that no person shall be compelled in any criminal case to be a witness against himself and prohibits the infliction of cruel and[70] unusual punishments. Torture as such is not mentioned. The concept is not embraced by the phrase 'cruel and unusual punishment', as the purpose of those words is to protect those who have been convicted of crimes.[71] So, while it may not be used to obtain a confession to be used against the victim as evidence, torture for the purposes of obtaining information by interrogation is not in terms prohibited. Limited however by its treaty obligations, the official position of the United States is that it does not practice torture.

It is now the duty of governments and courts in every civilized State, as Lord Cooke of Thorndon has observed,[72] to exercise vigilance to guard against the fundamental right not to be tortured. On 9 December 1974 the General Assembly of the United Nations adopted the Declaration on the Protection of All Persons from being Subject to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In 1980 Circuit Judge Irving R Faufman, sitting in a United States Federal Court of Appeals, said that among the rights universally proclaimed by all nations is the right to be free of physical torture and that for the purposes of civil liability the torturer has become an enemy of all mankind.[73] There then followed the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984[74] which was incorporated into the law of the United Kingdom by section 134 of the Criminal Justice Act 1988. The effect of section 134 of the 1988 Act, as required by the Torture Convention, was that all torture inflicted by or at the instigation of or with the consent or acquiescence of a public official, whether physical or mental, wherever committed worldwide was made criminal in the United Kingdom—as Senator Pinochet was to find out when he came to this country for medical treatment in 1998.[75]

[69] Enacted by the Constitution Act 1982, Part I.

[70] Note the use of the word 'and' in the US and Canadian documents. The word 'or' is used in the Universal Declaration and in the European Convention.

[71] *Ingraham v Wright* 430 US 651, 664 (1977).

[72] *Higgs v Minister of National Security* [2000] 2 AC 288, 261.

[73] *Filártiga v Peña-Irala* 630 F 2d 876 (2nd Cir 1980).

[74] Cm 1775.

[75] See *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147.

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So much for the question of principle. But in law we use words to define what people can and cannot do. So the first step is to understand what the word 'torture' means. The word itself is in common usage, but it is imprecise. There is room for debate, as methods of interrogation become more sophisticated, about what does and what does not constitute torture. The first instrument to provide a definition was the UN Declaration of 1974. Article 1 of the Declaration is in these terms:

> 1. For the purposes of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third party information or confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Rules for the Treatment of Prisoners.
> 2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.

This definition has been analysed as containing three pillars: the relative intensity of pain or suffering inflicted, the purpose for which it is inflicted and the status of the perpetrator.[76] The reference to mental torture makes it clear that it is as much torture to inflict severe mental distress on the victim by psychological means as it is to subject him to physical violence. But this does not remove the scope for argument. The threshold between what is and what is not torture must always be a matter of judgment, as to which reference must be made to case law. Unfortunately, even the judges do not speak with one voice on this matter. Decisions by courts in the United States have suggested that the use of physical force is not prohibited by the Eighth Amendment if its purpose is to save lives and that, notwithstanding what the Declaration says, mental or psychological torture is permissible in that country.[77]

Much of the language of Article 1 of the Declaration is repeated in Article 1 of the 1984 Torture Convention. The main differences are that the definition in the Convention has added the infliction of severe pain or suffering 'for any reason based on discrimination of any kind' and it has excluded the declaration in paragraph 2 that torture is an aggravated form of other kinds of treatment or punishment. The European Court of Human Rights, on the other hand, has emphasized repeatedly that it was the intention of the Convention to distinguish between torture on the one hand and cruel or

[76] NS Rodley 'The Definition(s) of Torture in International Law' (2002) 55 Current Legal Problems 467, 468.

[77] AM Dershowitz *Why Terrorism Works* (Yale University Press 2002) at 136. Amendment VIII (1791) provides that cruel and unusual punishment shall not be inflicted.

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unusual treatment or punishment on the other and to attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.[78]

Inevitably therefore decisions in this field are findings of fact and degree. On this view the question of what constitutes torture is one of assessment—one not of law or of legal principle, but of evaluation. It is doubtful whether, when the prisoner is subjected to what is known in the United States as the third degree,[79] it can be said, simply on that account, that he is being tortured. The mere fact of being cross-questioned is not torture. But the whole circumstances in which the questioning takes place must be examined. After all, it may be quite easy for the questioner in the third degree to apply pressure in other ways than simply by the force and severity of the questioning. The prisoner may be exposed to psychological pressure in variety of subtle ways which may in total amount as much to torture as the use of physical violence.

The interrogation techniques which were used on IRA suspects by the British security forces in Northern Ireland—being forced to stand for long periods in a stress position against a wall, being kept hooded, being subjected to continuous noise, deprivation of sleep and deprivation of food and drink—were held by the Court to be inhuman and degrading but not to constitute torture.[80] More recently, indicating that increasingly high standards and greater firmness are required in this area, the Court held that torture had been established where the applicant had sustained injury to various parts of his body as a result sustained beatings involving punches, kicks and blows with a truncheon and a baseball bat.[81] It seems likely that the mixture of physical and psychological pressures that were used in the case of the IRA suspects would now be regarded as torture within the meaning of Article 3 of the Convention.[82] It may now be possible to maintain the distinction between what amounts to inhuman and degrading treatment on the one hand and torture on the other which was based solely on severity. It has been suggested that the sole element for distinguishing torture from inhuman and degrading treatment should be the purposive element.[83] On this view, any inhuman and degrading treatment which is used for the purpose of extracting information or a confession will constitute torture.

[78] Eg *Ireland v United Kingdom* (1979–80) 2 EHRR 25, para 167; *Selmouni v France* (1999) 29 EHRR 403, para 96; *Akko v Turkey* (2001) 35 EHRR 51, para 115.

[79] 'The third degree' is an expression which is applied to the severe and prolonged cross-questioning of the suspect. It was coined in the United States. According to Wigmore, an officer of the law administers the first degree when he makes the arrest, the second degree when the prisoner is taken to a place of confinement and the third degree when he is taken to private quarters and interrogated.

[80] *Ireland v United Kingdom* (1979–80) 2 EHRR 25.

[81] *Selmouni v France (*1999) 29 EHRR 403, para 10.

[82] Rodley op cit at 477.

[83] Ibid at 489–90.

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V. WHAT IS HAPPENING IN PRACTICE

Sadly, recent experience tells us that fine words in international instruments mean nothing unless there is a will to respect them. Those who do not care about international opinion are not deterred by them. In the words of Alan Dershowitz:[84]

> Torture is a staple in tyrannical regimes. Enemies are tortured mercilessly for information and then killed. Political opponents are tortured to death to send a powerful deterrent message. For understandable reasons, torture has become a symbol of tyranny.

The fact is that torture has not gone away. In many parts of the word including, it appears, some parts of our own continent it is still practised in prisons and detention centres. It is used as a weapon against ethnic or social groups. It is used to suppress opposition in times of civil war and armed conflict. The UN Special Rapporteur on Torture receives reports on acts of torture from more than sixty countries every year. There are indications that government-sanctioned torture is committed in more than 130 countries.[85] Her Majesty's Government does what it can to intervene in such cases, by raising concerns with these countries bilaterally and in conjunction with partners in the EU.[86] But the exercise of diplomacy in these matters is slow and difficult, and its ability to do anything to eliminate the practice is very limited.

The following examples of this phenomenon will suffice. I have already mentioned Senator Pinochet, the former Head of State of the Republic of Chile. He came to power as a result of a coup on 11 September 1973 by which the left-wing regime of President Allende was evicted. Pinochet remained in office as President of Chile until 11 March 1990. Two provisional warrants were issued for his extradition to Spain while he was visiting the United Kingdom in 1998 by the metropolitan stipendiary magistrate at the request of the Spanish Government. By the time of the second hearing of his case by the House of Lords in January 1999,[87] further particulars had been drafted by the Spanish prosecutor. It fell to me, as one of the members of a Committee of seven Law Lords, to examine these particulars as part of the background to the issues of law raised in the appeal. It was not our function to investigate the facts which lay behind these allegations. What I did was to examine the nature and content of them, on the assumption that they were supported by the information which the Spanish judicial authorities had made available.[88]

[84] Dershowitz op cit at 124.

[85] These facts are taken from the brochure 'A World without Torture . . .' published by the International Rehabilitation Council for Torture Victims, Copenhagen, Denmark.

[86] See, eg, Written Answer, *Syria: Human Rights*, 15 Jan 2004 (Hansard, vol 656, HL Debates, col WA 100).

[87] *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147.

[88] [2000] 1 AC 147, 226–9.

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The material which the Spanish authorities had put together was a catalogue of violence on a massive scale. It was alleged that Pinochet was party to a conspiracy to commit widespread murder, torture and hostage-taking. This was at its most intense in 1973 and 1974, as the regime was seeking to establish itself. Premises were set aside for the process of torturing, and torturing equipment was requisitioned and distributed. Plans had been drawn up for the simultaneous seizure and torture of the proposed victims in the event of a coup, and they were put into effect as soon as the coup occurred. The purpose of the campaign was not just to inflict pain. Some of those who were tortured were to be released so that they would spread words of the steps that would be taken against those who opposed the conspirators. Many of those who were to be tortured were to be subjected to various other forms of atrocity, and some of them were to be murdered. Many of those who were taken were never seen or heard of again. Put simply, they disappeared.

The magnitude of the horror of this period was impressed on me when those who had kept vigil at Westminster during the hearing placed crosses in Parliament Square on the last day in memory of those who had been eliminated. There were over three thousand crosses—one for each of the persons of many nationalities who had disappeared or been murdered in Chile and in various other countries outside Chile. But the victims of torture alone were many times that number. It was said that there were hundreds of thousands of them. If the allegations were true—and they were so well documented that it was hard to believe that they were not—Chile would have been in breach of the United Nations Convention against Torture of 10 December 1984 by which torture was made an international crime, had it been in force at the time. Chile ratified the Convention with effect from 30 October 1988. Pinochet was charged with an act of torture which was alleged to have been committed on 24 June 1989 and with a continuing conspiracy to commit torture extending over a long period which was said not to have ended until 1 January 1990. For reasons that I do not need to go into in this article, these allegations have never been proved against him. But the picture which they paint is of a tyrannical regime of the most brutal kind. The way torture was used in England and Scotland, on the authority of the Privy Council except in cases of witchcraft—a handful of cases, spread over many years[89]—pales into insignificance in comparison. On 12 August 2003 President Ricardo Lagos of Chile acknowledged to the nation that torture had been practised during the dictatorship and apologized to the victims. A proposal has been presented for their reparation to the legislature.

In March 2001 six British citizens were arrested in Riyadh by the Saudi authorities following a series of bomb attacks on Westerners, in one of which

[89] Between 1540 and 1640 it was administered 101 times in England, and there were thirty-nine Privy Council warrants for its use in Scotland between 1590 and 1690: Levack op cit at 191, 194.

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a British engineer was killed. It was alleged that these attacks were part of a war that was being conducted in that country between expatriate bootleggers. One of those who were arrested was Sandy Mitchell. He had been chief anaesthetic technician at the King Fahd hospital. He appeared on State television and confessed to having been part of a plot which was masterminded by the British embassy. He was convicted and sentenced to be partially beheaded and crucified. He later retracted his confession. Last August he and all the others were released following the intervention of the Prince of Wales and the British government. He alleges[90] that the charges against him were trumped up and that the only evidence against him was a confession which was extracted from him by the Saudi police by torture. He claims that the torture lasted for 67 days, for nine of which he was forced to stand, chained with his hands above his head and prevented from sleeping. Each day his hands and feet were tied and he was suspended with a metal bar behind his legs to expose his buttocks and the soles of his feet. The soles of his feet and the palms of his hands were beaten with axe handles and metal bars, and he was punched and kicked. The mental and physical trauma which he suffered has left him with pain in his lower back, the soles of his feet and the backs of his legs, and he has nightmares. Three of his companions, Bill Sampson, Les Walker, and Ron Jones, have made similar allegations.

Saudi Arabia is a party to the United Nations convention against torture. Claims that the men were tortured have been denied by the Saudi authorities. Where does the truth lie? We may never know the answer to this question. There appears to be no effective way in which allegations of torture can be brought before the courts in that country. Mitchell's case was referred to the Parker Institute in Copenhagen which specializes in the field of imaging analysis and the use of ultrasound. It is claimed that evidence that a person has been tortured can be detected by the use of these techniques. Preliminary tests performed on Mitchell by the Institute are said to have revealed lesions which are consistent with the account which he has given. He is now seeking in the courts of this country an apology, the quashing of his conviction, and damages for the trauma of his ordeal in the courts from the Saudi Government. But the torture of which he complains is said to have been perpetrated in Saudi Arabia, not the United Kingdom. The Saudi government is claiming State immunity, and the European Court of Justice has held that a claim by a foreign State to immunity to allegations of torture under the State Immunity Act 1978 does not violate Article 3 of the Convention.[91]

The official position of the United States, in response to criticisms of what has been happening at Guantanamo Bay, is that the techniques that it uses adhere to international accords that ban the use of torture and that 'all appropriate measures' are used in interrogation. I have no doubt that these words

[90] Redress *The Reparation Report* Issue 2, Nov 2003; see also *Sunday Times* 7 Dec 2003.
[91] *Al-Adsani v United Kingdom* (2002) 34 EHRR 11.

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have been carefully chosen. But they are, and are designed to be, inscrutable. My colleague Lord Steyn has drawn attention in a recent lecture to the arbitrary nature of what is being done there.[92] At present we do not know, and we are not meant to know, what is going on. The place where the detainees are being held is beyond the rule of law. Unless and until the US Supreme Court decides otherwise,[93] they do not have the protection of any court. It is no understatement to say, as Lord Steyn has done,[94] that they are at the victors' mercy.

Lord Steyn was cautious about drawing the conclusion that the treatment to which detainees are being subjected at Guantanamo Bay amounts to torture.[95] I too am not in a position to know, and I must not be taken as alleging, that this is happening. But the problem is this. Silence breeds suspicion, and grounds for suspicion thrive when the rule of law is absent. We can assume that whatever has been and is being done to the prisoners has and is being done with the cold and ruthless efficiency that characterizes the actions of officials who are determined to obtain results and whose actions are not subject to international inspection or to the control of any independent and impartial judicial authority. If we are suspicious when we have no means of testing the assurances that are being given, we have every right to be.[96] Douglas Hurd, whom I mentioned earlier, recalls writing angrily to his friend Tony Lloyd[97] from the British Embassy in Peking in November 1954:[98]

> A French journalist wrote that he had come to the definite conclusion that there were no concentration camps or evil practices in Chinese prisons. Words probably written within a few hundred yards of the prison where recalcitrant Americans eat their food off the floor with their hands chained behind their backs. Of the facts there is no doubt because the many prisoners recently departed have been carefully and thoroughly interviewed in Hong Kong. But the people who came here are not in the mood for that particular brand of fact, which they consider old fashioned and unreal when they see the smiling charming faces of their hosts.

[92] *Guantanamo Bay: The Legal Black Hole*, 27th FA Mann Lecture, 25 Nov 2003: (2004) 53 ICLQ 1.

[93] On 28 June 2003 the Supreme Court held that United States courts have jurisdiction to consider challenges to the legality of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay: *Rasul et al v Bush, President of the United States, etc* (*Rasul v Bush* 321 F 3d 1134, reversed).

[94] Ibid at 8.

[95] Ibid.

[96] On 9 Mar 2004 five of the nine British subjects who were detained at Guantanamo Bay arrived back in the United Kingdom. They were taken to Paddington Green police station but were later released without charge. They have alleged that they were subjected to psychological torture and chained to a metal ring on the floor while they were being interrogated. A spokesman for the US authorities has stated that the detainees are being treated in a fair way according to the Geneva Convention.

[97] He was later to become Lord Lloyd of Berwick on his appointment as a Lord of Appeal in Ordinary.

[98] D Hurd *Memoirs* (London Little, Brown 2003) at 111.

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We must not allow the smiling charming faces of our American allies to divert us from seeking to discover the reality of what is being done by their interrogators. History tells us that we must lead by example if we wish to root out evil practices. That example must be shown on both sides of the Atlantic. How can we expect to eliminate torture elsewhere if there is no sure way of knowing whether or not it has been practised at Guantanamo Bay by the Americans?

VI. CONCLUSION

The London fog that was allowed to spill into Foreign Office in the 1950s[99] is still with us. Efforts to spread light around the world appear vain, in the face of the determined adherence by some States to adhere to the practice of centuries and the equal determination of others to seek out and destroy terrorism. But no modern democratic country in modern times has been more exposed to the tensions that occur where terrorism stalks the streets and fetters are placed on the interrogation methods that may be used by the authorities than the State of Israel. We can drawn particular comfort therefore from the way the Supreme Court of Israel faced up to this issue in September 1999.[100] If ever there was a case of a court seeking to lead by example, this is it.

The question before the Court was whether directives authorizing the use of the interrogation methods used by the General Security Service, which involved physical means including repeated and forceful shaking, sleep deprivation and being kept in positions of extreme discomfort for prolonged periods, were in accordance with law. The principal argument that was used to defend these practices was necessity. It was said that this was being done to prevent serious harm to human life—that these were deeds that should be deemed to be proper in the circumstances. The Supreme Court was prepared to accept that, in the appropriate circumstances, the investigators might avail themselves of the necessity defence if criminally indicted. But it rejected the argument that it was possible to infer from necessity that permanent directives could be established to authorize what was being done in advance. It held that the nature of the defence was inconsistent with that approach. It was a defence dealing with a person's reaction to a given set of facts, not the source of general administrative power. The Court was well aware that its decision would make it harder to deal with the harsh reality of the situation facing Israel. But, as Chief Justice Barak said in his judgment,[101] this is the destiny of democracy. Not all the practices that are available to its enemies are available to it. Nevertheless, in the final analysis, it has the upper hand. It has a choice. In a democracy the decision whether means which the ordinary law

[99] See n 4.
[100] Supreme Court of Israel, sitting as the High Court of Justice, HC 5100/94 and Others, 6 Sept 1999.
[101] Para 39.

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does not permit may be sanctioned for use in extreme circumstances lies with the legislature. 'We do not take any stand on this matter at this time', said the Chief Justice: 'It is there that the various considerations must be weighed. The pointed debate must take place there.'

Whether it was permissible to use torture, in the generally accepted sense of that word, was not the issue in that case. Its reach was wider. It was enough that the methods used, because they were excessively violent, did not form part of a legal investigation.[102] But the importance of the decision lies in the assertion that, if the use of unusual methods is to be sanctioned in a democracy, the choice lies not with the officials, nor even with the judges, but with the legislature which in the final analysis is answerable to the electorate.[103]

The choice was made for us three centuries ago by our own Parliament. With us the prohibition against the use of torture is absolute. Those who were responsible for the enactment were well aware of what they were doing. The use that was made of the Privy Council warrant system, and its abuse, was a recent memory. They knew that the involvement of the Privy Council did not answer the moral question of whether such brutality could ever be justified. It provided the appearance of legality, but in practice it gave uncontrolled power to the executive. There is a lesson here for all of us. If we were to change course now, depart from our international obligations and seek to create a legal structure for authorizing or permitting officials to use torture—even if only in the face of the most urgent threat and in most extreme circumstances, our principled opposition to its use would be lost. The moral authority that enables us to seek to persuade others to abandon the practice would be extinguished. But that is not all. If we were to cross the line, there would be no clear stopping place. I am sure that Fountainhall, Erskine, and Hume, who knew the dangers, would agree that we should not go down that road.

[102] Para 23.

[103] Unfortunately there is little sign so far that the legislature is willing to take the initiative that the Supreme Court entrusted to it.

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