

Torture and the War on Terror: Legal, Moral and Policy Implications – October 7, 2005

Case Western Reserve University School of Law

Well thank you Roger, Ellen. It's difficult to take the floor at such a late time of the day and especially after we have heard so much today. This was an extraordinary conference as I'm sure you will all agree. And the credit of course goes to the speakers, but it also goes to the person who thought of it, and conceptualized it, and invited the speaker and that's to Michael Scharf and I think we really should give him a big round of applause.

I must that tell you that I was absolutely fascinated by all of the interventions that I heard here. And I had prepared a fairly scholarly presentation but I've been wrestling all day with something which I shared with Amos before and I hope you will forgive me, but let me share with you the difficult feelings I've had as I heard some of the speakers. And my story starts as I came back from the Suez Canal War zone in 1956. I had been wounded in battle and I was given a cushy job in the middle of Cairo. I was a training officer and one night I was duty officer and I heard a commotion. There was nobody in the camp other than me and a detailed of ten men, guarding a load of military equipment. I went out to the gate and saw a few people running in a particular direction. [I] asked the guard what was happening and he said well somebody said that they sited a plane, an Israeli plane, had been shot down and a paratrooper had fallen right behind the camp. And obviously that crowd was not running there to greet him with open arms. I was nineteen and a half at the time. I had just returned from France where I had completed two years of law school. I came from a family of lawyers. And I will confess to you that it didn't take me more than a few seconds before calling alarm summoning my detail of ten men and running out in the street to try to beat the crowd to the Israeli pilot. It came instinctively. Fortunately, there were no planes shot down and no pilot we came back. And in the naivete of young second lieutenant, who's not a career army officer, I wrote down in the duty book, in the report book, that I had left my post and taken my entire detail outside the post. Next day, I was called back from home where I had gone after my tour and my commanding officer informed me that he had

no duty but to have my court-martialed. My argument to him was that it would look awfully bad on the prestige of the Egyptian military if an Israeli pilot would have been killed by the mob just behind an Egyptian military camp. And he was a career officer and he thought about it and the idea of dishonor was to him more compelling than anything else. And this so he called a sergeant, a technical sergeant, and he told him that there was something wrong with the book where you recorded this thing because apparently ink had fallen. And at which point he pulled out an old-fashioned pen and emptied the ink on it and it was illegible and the report was rewritten and I signed it as having had nothing occurring that evening. A few years later, I happened to be an adviser to President Sadat in connection with the Camp David agreements and shortly thereafter I made friendship with a general, who recently deceased, an Israeli general by the name of Abrasha Tamir and he was the director general of Prime Minister Begin's office. And one day as we were shooting the breeze, and we subsequently continued to work together until recently when I was leading a track II negotiating team of Israelis, Egyptians, Jordanians, and Egyptians on establishing a region free of weapons of mass destruction. Anyway, back in '78, I told him the story and he said well you know this is really why it was so easy for Egypt and Israel to have a peace agreement. At that time, the agreement wasn't signed it was just the Camp David. He said we could never do that with Syria. He said we have six of our Flyers who fell, three of them in the Golan Heights, who were tortured and killed. And he said it would be very difficult for us to overcome that. And after a while, we started discussing it, and it was quite surprising to me of the impact of torturing POWs and torturing people in terms of the counter productivity that it has in political terms. Well the part that gets a little more difficult for me is a few years later, that was in 1958, I had been selected or screened to serve in President Nasser's staff the presidency. It took a little bit of time to vet out people in the process, so as I was being vetted out and I was frequenting the office of the presidency at the time, it was a way for other people to evaluate me on the job, one of the officers there showed me a picture. And the picture was of a man who was strapped in a chair and he had a metal band around his head and it was, it had a screw, and as the screw turn the head burst out and you could see the brain coming out. And he said this was a leader of the Muslim Brotherhood who had been killed that way. And I have to tell you that at the time, the one thing that came to my mind, and I forgot who the author of it was, the prayer reportedly by a Protestant minister after World War Two and he said something to the effect that well they first came for the Communists and I wasn't a

Communist so it didn't matter to me, I didn't speak up. And then, then they came for and he kept going on and on and they came for the Jews and I wasn't a Jew and then they came for the Catholics and I wasn't a Catholic and then finally when they came for me there wasn't anybody left to speak up. And the first thing that came to my mind, I'm not a Muslim brother. I've never been part of it, have no sympathy for it. And I talked to myself well somebody has to speak on his behalf. And I decided to find a way to crash what I knew was to be a cabinet meeting that day. The cabinet meeting was not presided by Nasser, as was planned, but by the Vice President. And I walked in and introduced myself and one of those extraordinary quirks of fate, the Vice President was the sort of titular commander of the canal zone area in '56. and after I came back from the front, I was awarded the Egyptian medal of honor and he was present. And so as it frequently happens when you have a senior person and a young second lieutenant as I was the case, I was immediately my son and all of that. And so, he remembered me and, of course, took great pride in introducing me to some of the cabinet members as the fellow who commanded the first Egyptian line of defense outside Port Said to greet the Brits. Anyway, strong with that background, I pulled out the picture and I said do you know that this has happening, and do you know this is being done in the name of the government, and in the name of the revolution and this is illegal etc. etc. At which point I got into an altercation with the deputy chief of intelligence, who was sitting behind the chief of intelligence, and the bottom line is within a matter of fifteen minutes I was arrested. I was told for a period of time, in which I was kept in a room, that the decision wasn't made whether I'd be shot or taken to one of those places and tortured exactly in the same way as I had protested the torture of others. I must have died a thousand times during those six hours. I was then taken to my apartment and I was kept for seven months in house arrest, not knowing what my fate would be. The shutters were nailed, the telephone lines were cut off, I had no radio, no contact with the outside world. Somebody brought food and left it somewhere on the table. And that was it. And so, for seven months I didn't know what would be my fate. And my whole universe became my bed. I didn't even move out of my bedroom, let alone into my apartment, for the fear of what it would do to me. I don't think I've ever recovered from that trauma and as years went by and I chaired the commission of experts in the former Yugoslavia I sort of relived all of that by interviewing and talking to people who had been tortured. And it's indescribable how you would be sitting with somebody who would show you their scars or women who had been raped, and we interviewed 223 women who

had been raped and tortured by the rape for months on end. And I have seen people who have been cut to pieces. Frankly, it's very hard to sit and listen to dispassionate arguments about the merits of torture, about the justification for torture, when you have seen what it does, when you have yourselves suffered from it. In the final analysis, you know, it really boils down to one very simple thing. It's values, it's about values, it will always be about values. And those values are simply the very basic, the very basic human values, the values of a mesh you either are or you aren't. And if you are you, cannot tolerate, justify, rationalize, accept torture in any fashion. And once you cross that line, you have crossed it. You cannot cross it mildly, you cannot cross it partially, you cannot say some torture is justified and some isn't. There is no way after you get on that slippery slope to try to stop it in any way. Now this is not new. What we see now is what we have seen for centuries throughout history. If you look back at the forty or so major civilizations in the last seven thousand years, you will find torture associated with almost every one of these civilizations. Torture in the context of war, torture for purposes of extracting information, torture for purposes of gaining some type of superiority, torture for purposes of inflicting humiliation upon those who are defeated. You will see that throughout history and the criminal justice system for purposes of general investigation, for purposes of obtaining evidence, torture as means of punishment. And you see throughout all of that, the same lines of justification which you hear today. Plus ça change, plus c'est la même chose. The justification. Necessity, just desert, liability. These are the three main arguments that you have. Counter-argument on the policy level. Reliability: physical torture is unreliable. How about chemical torture, how about truth serums, how about other techniques? Or maybe it's somewhat reliable, that it is counterproductive. And you have exactly the same arguments. What are the assumptions? Are the assumptions that public values are better uphold when it's done by government officials or can we outsource our public value policies and other legal obligations to what we call non-state actors or privatization? What is the derivative impact on social values? Are we going to impart now the notion that torture is permissible, that it's a practice that we can emulate, that it's something that demonstrates the power that one human being has on another? How will that devolve within our society? For those who are interested in on the military side, think a little bit about the notion of chain of command and control that we've heard so much. Will any officer be able to admonish any soldier after that officer had looked the other way when that soldier engaged in torture? Will you be able to give a direct order to a soldier not to steal

after you've looked the other way when he has engaged in torture? What type of a discipline will you have in your armed forces? All these falls in the types of arguments of reliability, justification, counter-productivity, legal assumptions, etc. But as you go through the range of arguments, as you go through the range of experience, and you go through the historical experiences of all of our civilizations, in the context of war and in the context of peace, you ultimately come down in the end to that essential question. It's all about human values. And the problem is that to paraphrase George Santayana, those who forget the lessons of the past are condemned to repeat their mistakes. And how could we have forgotten the lessons of the past when it comes to torture, when it comes to such a fundamental human notion? How could we have forgotten the lessons of history, which have shown at all levels what that means. And yet we seem to have given that up. And we did that ignoring also what a great American patriot once said, Ben Franklin, something to the effect, that those who give up liberty for security, deserve neither liberty nor security. And so here it is, we not only forget the lessons of history, the lessons of other societies, we also forget our own lessons. And we forgot the lesson also that history teaches us and that this country's war of independence as well has taught us. And that is, that a nation's force makes it mighty, but it doesn't make it great. It's the values pursued by a nation that makes it a great nation, and not its might or its force. And yet somehow, we seem to pursue not only these same arguments, but we seem to pursue them in a manner awfully reminiscent of what we have seen almost every dictatorship do at the initial stages of these dictatorships. How reminiscent is that entire legal structure that we have developed in relationship to the president's power, the president is beyond question, he is the commander-in-chief, he has the right to decree everything, including decide what is and what is law and whether the United States apply to it. Hasn't anybody read about the furor Führerprinzip during World War Two? Isn't that exactly the notion that Hitler sold to a very professional Wehrmacht at the beginning? Swear to me allegiance, I will assume all responsibility. You do not have to assume command responsibility, your complete obedience to superior orders because I will assume full responsibility. And here we are. And yes, as somebody said during the discussion, isn't there a responsibility for Congress as well? No doubt about it. And then we ask ourselves a question, but look a little bit again at the experience and the Justice case has been mentioned, and may I also remind you, of the case also that happened in the subsequent proceedings about the medical experimentations, the doctors case undertaken by the Nazis. The doctor's cases were cases of

torture. And the Justice case was precisely the type of case that needs to be illustrated here. What is the professional responsibility of lawyers? As Professor Sadat said here in the Louis the Twelfth quote, are the lawyers really the maker of leather shoes? Or because of their standing as a profession, they have a higher professional, ethical, moral, legal responsibility? It was fascinating to me, in a way shocking, and may be hurting, to hear of some arguments about maybe the speakers were somewhat too harsh on Jack Goldsmith or others. And I can't help think of the very artful compartmentalization of how the entire sequence of event took place. At first the question was posed to the JAGs, and then when the JAGs position was not satisfactory, it moved to the civilians. When it was moved to the civilians, each one was responsible for a separate memo on a separate legal issue. So, you had Yoo, Bybee, Goldsmith and then Gonzales. Each one of them produced a separate document. Now what is missing in the link here, ladies and gentlemen, is that these memos went to the White House. They went to the President's Council and to the National Security Council. Please do not overlook that link. When these memos went to the NSC there was, and there is, as always, a legal advisor. [The] legal advisor, to the best of my recollection at the time, was John Bloomfield I think or something like that. He received those memos and he summarized them. He was very careful and summarized them, summarizing what their contents. The summary went to the National Security Advisor Condoleezza Rice and to Mr. Gonzales. Gonzales had already expressed himself on it, so there was no comment or response by him. Condoleezza Rice is reported to have said that it was too legal for her and she couldn't say anything. So, the matter was referred to the NSC advisor in charge of democracy and human rights, Mr. Elliott Abrams, who some of you may recall, had been formerly convicted and pardoned for engaging in practices involving torture as well. Mr. Abrams found nothing wrong with that and it passed. Now the objective of that was to be able for someone, I don't know who it is my suspicion is it's the vice president, who went to the president and convinced him to take a position and say here are different legal positions supporting it. The President took the position. The president is known to be a very stubborn man. The matter was then put on the agenda of the National Security Council, not to be discussed because the president had already made the decision. That's when Secretary Powell knew of it. Again, based on my information, Secretary Powell had a face-to-face meeting with the President, couldn't change the President's mind and he then wrote a memo saying that he disagreed with that and that this was his understanding as a soldier and not as a lawyer of the applicability of

the Geneva Conventions. If you look at these events and you look at the sequence of it and you assume a number of facts which are not publicly known and documents not publicly available, I think you'll come to the conclusion that the compartmentalization was done purposely. That if it was not done purposely, it was done at least with the intention of having plausible deniability. That the whole thing was done in a way so as to get the President to take a position, and knowing the President was a very stubborn man, that the President was not going to change, and it didn't matter afterwards if all of the JAGs in the world would get together and say oops this is a mistake. The president will never change his position and on it went.

Now I happened to have had two additional dimensions to my human experience relating to that. One of them is the fact that that I served as the United Nations Independent Expert for Human Rights in Afghanistan and I talked to people who were tortured. And I did see reports of people who were killed under torture in Bagram, in other places, and I've talked to people at the ICRC who were prevented from going to fourteen firebases in which torture was going on. And I have tried to be able to stop the practice. And the result was the US was successful in getting a few European allies and others not to renew the mandate issued by the Commission on Human Rights for me to continue my work. And sooner there after it was announced that the U.S. was going to move a large number of detainees from Guantanamo to Afghanistan and then move them to the custody of the military forces in Afghanistan, which are under the command of the US military and not under the control of the judiciary, so that they can still keep control of the people who may have been tortured or who have been mistreated so that that information does not go out. I can assure you that there is no way, based on what I have seen, that all of that is done either by mistake, inadvertently, by negligence, or by low-level people. Everything that is done is done in a way to literally coerce senior officers to look the other way around. And if some of you have any doubt please review the situation when Secretary of the Army White was dismissed, General Shinseki was dismissed and close to thirty officers from second at two to four-star generals were dismissed within a matter of three months, all because they disagreed with the Office of the Secretary of Defense. Now if that doesn't send a chilling message down the chain of command, I don't know what does. I have spoken to the commanding general of Central Command and to his deputies and I can assure you that these are honorable officers but they know their careers are on the line and they had better look the other way. And so here it is, everybody is looking the other way. Now for those of you who read a little bit of history, tell me

when it was, that a dictatorship occurred anywhere in the world in which it didn't start by having everyone who had a responsible position look the other way. And then as enough looked the other way, you find that it is very difficult to get back control of the ship of state from those who have exercised these extraordinary powers and who invariably claim they're doing that because of national security, they're doing that because they have a duty to protect us, they're doing that because they're patriots and those of us who criticize them in the names of our higher principles of constitutionality, democracy and human rights are the ones who are unpatriotic. So, the bottom line is, that as we look at the question of torture, I think that we should look at it in a much broader context than the way we have looked at it. This is not only a question of how bad are good and how useful or unuseful torture is. It reminds me of somebody was mentioning John Dean today, but it reminds me of I think it was John Dean, who spoke of a cancer growing on the presidency. We do have a cancer that's growing on our nation and that is the erosion of our democratic values of our Constitution, the erosion of our human values, and the erosion of our adherence to the rule of law, nationally and internationally. And if we truly want to regain the greatness of this nation, we have to regain the high moral road and give up the low moral road, which will certainly result in much greater dangers to the security of this country, in much greater dangers to the freedom of its citizens and others in this country, and to many other consequential losses such as the social losses that that you have referred to in your question. And so it finally comes down to this, it behooves us who are members of the legal profession to take a position because if not us, then who?