

**Issues raised by the alleged complicity of intelligence officials in
torture in post-9/11 counter-terrorism**

by

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Abstract

The 9/11 attacks on the World Trade Centre introduced a new era of counter-terrorism initiatives, seemingly to match the heightened terrorist threat. Amongst these initiatives was the controversial extraordinary rendition programme led by the US, assisted by the UK amongst other States, which centred on the torture of those suspected of contributing to Islamic terrorism. This programme signified that States are prepared to allow their agents to commit or be complicit in acts that are internationally prohibited.

There has been plenty of academic discussion into the use of torture on terrorist suspects since these revelations. This thesis will not just critically examine previous proposals for the use of torture in post-9/11 counter-terrorism, including torture warrants, torture lite, and ex-post defences, but it will go further by examining these proposals in the context of State complicity. This thesis will discuss complicity to mean receiving information from another State procured from torture, and/or enabling another State to commit torture.

It will critically discuss the morality of complicity in torture, how complicity in torture would improve counter-terrorism efforts, and how complicity would fit within the current legal framework. It will conclude that complicity in the use of torture is morally sound if it will directly prevent a terrorist attack from occurring, but that information obtained by torture would not be useful to a receiving State, because information obtained by torture is too unreliable to be used for both prevention and prosecution of terrorism. Therefore, it will argue that none of the previous proposals would be legally workable for the complicity of torture.

LITERATURE REVIEW & INTRODUCTION

There have been many arguments made about the State's attitude towards basic human rights in their quest to fight the threat of terrorism. These have included the mass-collection of information and surveillance,¹ the use of drones to target terrorist strongholds,² and the indefinite detention of suspects,³ amongst other concerns. This thesis will discuss what is debatably the most concerning: torture. Torture has been described as *'the calculated infliction of pain'*,⁴ which *'violates the physical and mental integrity of the person subjected to it, negates her autonomy, and deprives her of human dignity.'*⁵ Between the Second World War and 9/11, torture did not appear to be considered a particularly credible method of intelligence collection. Torture tends to be viewed as a medieval practise, or its modern day use limited to States headed by dictators, committed in filthy cells in States without a discernible justice system. Before the attacks on the World Trade Centre in September 2001, it could be said that *'no other practice except slavery is so universally condemned in law and human convention as torture.'*⁶ Times have however since changed, and it appears that since the 9/11 attacks, the idea of using torture has gained momentum, by heads of State, politicians and academics alike. George W.

¹ Owen Bowcott, 'Mass surveillance exposed by Snowden 'not justified by fight against terrorism'' (The Guardian, 08/12/2014) www.theguardian.com/world/2014/dec/08/mass-surveillance-exposed-edward-snowden-not-justified-by-fight-against-terrorism, Accessed: 27/06/2016

² The US received international criticism for attacks on two hospitals in Syria which resulted in many fatalities, including the deaths of three children – Spencer Ackerman, 'Doctors Without Borders airstrike: US alters story for fourth time in four days' (The Guardian, 06/10/2015) www.theguardian.com/us-news/2015/oct/06/doctors-without-borders-airstrike-afghanistan-us-account-changes-again, Accessed: 15/06/2016

³ Part 4 of the UK Anti-Terrorism Crime and Security Act 2001 allowed the indefinite detention of suspected international terrorist suspects without charge if they could not be deported from the country, before being rebuked by the House of Lords in 2004

⁴ Cohen (1991) in Lisa Hajjar (2009) Does Torture Work? A Sociolegal Assessment of the Practice in Historical and Global Perspective' 5(3) *Annual Review of Law and Social Science* 11, 312

⁵ Oren Gross (2007) 'Torture and an Ethics of Responsibility', 3 *Law, Culture and the Humanities* 35, 35

⁶ John Alan Cohan (2006-2007) 'Torture and the Necessity Doctrine' 41 *Valparaiso University Law Review* 1587, 1588

Bush's infamous speech in which he declared his 'war on terror'⁷ has arguably become synonymous as the moment torture became a more 'acceptable' practise. More recently, newly-elected President of the United States Donald Trump stated that he believes that waterboarding '*absolutely works*' and that '*we have to fight fire with fire.*' The justification for his positive stance on waterboarding as an interrogation method appears to be the more recent actions of terror group ISIS: '*they're chopping off the heads of our people and other people... Isis (IS) is doing things that nobody has ever heard of since Medieval times.*'⁸ Nevertheless, the UK-assisted brutality, and torture of detainees by US forces at the Abu Ghraib facility shocked the country, leading to further revelations of UK complicity in the US-led extraordinary rendition programme. With the UK being one of the US' top intelligence-sharing partners, US counter-terrorism initiatives can have a direct effect on the UK. Clearly this poses the question: is the current threat of terrorism sufficient enough to justify the complicity of torture, or the acceptance of information obtained by torture?

Torture post-9/11 has been discussed abundantly in counter-terror literature, particularly after the Abu Ghraib revelations. The post-9/11 US torture programme clearly indicates the importance of such academic discussion, due in part to its controversial nature, but particularly because of the very real dangers to the rights of individuals, and the possible reputational repercussions that the involvement of torture inflicts. Whereas some academics have focused on hypothetically discussing the absoluteness of the torture prohibition,⁹ or the morality of torture,¹⁰ others have instead chosen to discuss possible remedies of legal torture. One of the

⁷ The New York Times, 'President Bush's Speech on Terrorism' (The New York Times, 06/09/2006) www.nytimes.com/2006/09/06/washington/06bush_transcript.html?pagewanted=all& r=0, Accessed: 14/06/2016

⁸ BBC News, 'Donald Trump says he believes waterboarding works' (BBC News, 26/01/2017) www.bbc.co.uk/news/world-us-canada-38753000, Accessed: 14/02/2017

⁹ Ian Turner (2011) 'Freedom from Torture in the 'War on Terror': is it Absolute?' 23(3) *Terrorism and Political Violence* 419

¹⁰ David Luban (2005) 'Liberalism, Torture and the Ticking Bomb' 91 *Virginia Law Review* 1425; Alon Harel & Assaf Sharon (2008) 'What is Really Wrong with Torture?' 6 *Journal of International Criminal Justice* 241

first proposals for the re-introduction of torture within the legal system in post-9/11 discussion was Alan Dershowitz's 'torture warrants' proposal, which was swiftly condemned by a number of academics including Gross,¹¹ Strauss¹² and Allhoff.¹³ Despite this, other proposals including 'torture lite,' and the use of a defence to torture such as necessity,¹⁴ were also bolstered as a more palatable forms of torture law. The most infamous scenario for which torture is justified is the 'ticking bomb', with the debate being split between those that believe the threat of the ticking bomb scenario is real,¹⁵ and those that believe it will almost certainly never occur.¹⁶ The current alleged use of torture and the alleged complicity of other States means that despite (or perhaps because of) the lack of consensus on torture law proposals, the discussion around it is still very important.

This thesis will take a different approach to that of the prevailing academic discussion on the use of torture, and will instead focus on State complicity in the use of torture for the purpose of gaining information. State complicity in torture has not attracted a great deal of academic fanfare in the torture debate. Although there has been plenty of thought given to the validity and the effectiveness of these proposals, this thesis aims to determine if any of these previous proposals for the direct use of torture would work in the context of assistance in the use of torture, or the acceptance of information from foreign agencies.

This will be split between the moral concerns of accepting 'fruit from the poisonous tree', and how, if at all, these proposals would work within the current legal framework. Although many

¹¹ Oren Gross (2004) 'Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience' University of Minnesota Law School, Research Paper No.04-6

¹² Marcy Strauss (2005) 'The Lessons of Abu Ghraib' 66 *Ohio State Law Journal* 1269

¹³ Fritz Allhoff (2012-2013) 'Torture Warrants, Self-Defense and Necessity' 11 *Cardozo Public Law Policy & Ethics Journal* 421

¹⁴ John T. Parry (2008) 'Torture Warrants and the Rule of Law' 71 *Albany Law Review* 885

¹⁵ Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge*, Yale University Press: London, 2003

¹⁶ Chanterelle Sung (2003) 'Torturing the Ticking Bomb Terrorist: An Analysis of Judicially Sanctioned Torture in the Context of Terrorism' 23 *Boston College Third World Law Journal* 193; Henry Shue (2005-2006) 'Torture in Dreamland: Disposing of the Ticking Bomb' 37 *Case Western Reserve Journal International Law* 231

different proposals and ideas have circulated, there has not yet been a compromise between those that refute the idea of torture ever again being legally justified, and those that insist that, although undesirable, the current terror threat insists that such measures are a necessity. This thesis will therefore revisit some of the previous concerns and justifications used within the torture debate, but propose those concerns to complicity.

What appears to be missing thus far in the torture debate is a detailed discussion that is focused on the legal issues and principles of complicity in torture, including - but not restricted to - extraordinary rendition, and the exchange of information within intelligence circles that may have been procured from torture. Assessing how previous proposals of the use of torture would work in the context of being complicit, and assisting in the act of torture, poses a further question: could the assistance of torture, or the acceptance of information obtained by torture, be accountable? This question is not concerned with discussing the legality of torture, but assessing whether those that use or assist in using torture within a legal framework would be accountable in practise.

For many years there has been theoretical discussion as to the effectiveness of torture as a way of obtaining accurate information, and much of this discussion appears to conclude that information obtained by torture, in and of itself, cannot be trusted. However, would information obtained by torture enhance current methods of intelligence collection and aid counter-terrorism? Of course, this question cannot be answered by simply assessing the effectiveness of the information gleaned by torture. This question also needs to consider how this information would improve upon other methods of intelligence collection. Examining current methods of intelligence collection, and the ways in which intelligence can be communicated between States, would allow discussion of how information acquired by torture or complicity would give intelligence agencies useable intelligence that they would otherwise not be able to acquire.

The first chapter of this thesis will begin by discussing the threat posed by international terrorism both at home and abroad, so as to establish how severe the threat of terrorism is. It will then analyse the different methods of communication and intelligence exchange between foreign agencies, which will demonstrate how the information pertaining from torture can unwittingly spread from State to State. This will develop into a discussion of different forms of intelligence collection, focusing on methods of electronic surveillance (SIGINT) and human intelligence (HUMINT), whilst also analysing the effectiveness of current collection methods in counter-terrorism. Lastly, it will examine the uses of intelligence, namely operational, evidential and anti-terror measures, to further identify the potential issues the strict prohibition of torture can cause in countering terrorism.

CHAPTER ONE – ISSUES AFFECTING INTELLIGENCE

AGENCIES

The Terrorist Threat

Assessing the terrorist threat is important for the State and their intelligence agencies, because failing to accurately calculate the risk terror groups pose could potentially result in the successful execution of an attack, where innocents lose their lives. Hence the State has imposed various legislative measures that enable the police, the military, and intelligence services to counter the threat that terrorism poses. The 9/11 attacks could almost be seen as the catalyst to numerous counter-terrorism measures in various States, including the US extraordinary rendition programme. Despite extensive counter-terrorism tactics employed by the UK, the UK's current terrorism threat is currently set as 'severe', meaning the likelihood of an attack is judged high,¹⁷ with a particular threat from Islamic extremism. It has been estimated that more than 40 terrorist plots have been prevented by British security services since 7/7.¹⁸ In November 2015 it was alleged that MI5 had foiled at least 7 planned terrorist attacks in the UK in the previous 12 months alone.¹⁹ In 2014 there was 32,685 terror-related deaths across the globe, up from 18,111 the year before.²⁰ This shows that despite current efforts to counter the threat, terrorism is still escalating at an extraordinary rate.

¹⁷ Mi5 Security Service, 'Threat Levels', www.mi5.gov.uk/home/the-threats/terrorism/threat-levels.html, accessed: 13/07/2015

¹⁸ Loulla-Mae Eleftheriou-Smith, 'Theresa May: British security services foiled 40 terror plots since 7/7 attacks' (The Independent, 24/11/2014) www.independent.co.uk/news/uk/crime/theresa-may-british-security-services-foiled-40-terror-plots-since-77-attacks-9879712.html, accessed: 13/07/2015

¹⁹ Matt Dathan, 'UK terror plot foiled by spies in the last three weeks' (The Independent, 16/11/2015) www.independent.co.uk/news/uk/politics/spies-foiled-a-uk-terror-plot-in-the-last-three-weeks-a6736286.html, Accessed: 22/11/2015

²⁰ Global Terrorism Index, 2015, Institute for Economics & Peace, Available: www.economicsandpeace.org/wp-content/uploads/2015/11/Global-Terrorism-Index-2015.pdf, page 9

Some of the most commonly known Islamic extremist groups include Al Qaeda, Al-Shaabab, Boko Haram, and most recently the Islamic State (ISIS). Some of the tactics these groups employ have previously included the use of explosives, firearms, or other handheld weapons such as knives, to kill and injure as many people as possible. Targets may include famous landmarks (such as 9/11), government buildings and aircraft, but attacks are almost always staged in busy areas of public use, such as a high-street, or typical holiday destinations popular with Western tourists, such as Tunisia or Egypt. It has been suggested by Cole that terrorist groups with a religious ideology (such as Islamic extremists) aim for such large-scale devastation, not only because the act itself is religiously legitimized, but because they want to demonstrate the ‘wrath of God’.²¹ Religious texts have been quoted out of context to justify such atrocities as ‘duty’, a tactic used by both Islamic and some right-wing Christian groups in the US.²²

Al-Qaida is most infamous for the coordinated attacks on the World Trade Centre in September 2001, and for the ‘7/7’ attacks on the London transport system in 2005.²³ Despite the death of its leader in 2011,²⁴ and the emergence of ISIS in the wake of Syrian unrest, al-Qaida still poses a threat to the UK and elsewhere.²⁵ Boko Haram has been named as the world’s deadliest terrorist organisation, responsible for over 15,000 deaths between 2009 and 2015.²⁶ It renamed itself the ‘Islamic State’s West Africa Province’ in March 2015, in a show of solidarity with

²¹ Benjamin Cole, *The Changing Face of Terrorism: How Real Is the Threat from Biological, Chemical and Nuclear Weapons?*, I.B.Tauris & Co Ltd: New York, 2011, 114

²² Benjamin Cole, *The Changing Face of Terrorism: How Real Is the Threat from Biological, Chemical and Nuclear Weapons?*, I.B.Tauris & Co Ltd: New York, 2011, 115 - 119

²³ BBC News, ‘7 July London bombings: What happened that day?’ (BBC News, 03/07/2015) www.bbc.co.uk/news/uk-33253598, Accessed: 23/11/2015

²⁴ BBC News, ‘Osama Bin Laden, al-Qaeda leader, dead - Barack Obama’ BBC News (02/05/2011) www.bbc.co.uk/news/world-us-canada-13256676, Accessed: 23/11/2015

²⁵ Hardeep Matharu, ‘Isis planning ‘mass casualty’ terror attacks in UK, head of MI5 warns’ (The Independent, 30/11/2015) www.independent.co.uk/news/uk/isis-planning-mass-casualty-terror-attacks-in-britain-head-of-mi5-warns-a6712946.html, Accessed: 29/10/2015

²⁶ Dionne Searcey, ‘Boko Haram Ranked Ahead of ISIS for Deadliest Terror Group’ (The New York Times, 18/11/2015) www.nytimes.com/2015/11/19/world/africa/boko-haram-ranked-ahead-of-isis-for-deadliest-terror-group.html?_r=0, Accessed: 20/11/2015

ISIS with whom it has now affiliated itself with.²⁷ Despite the main focus of Boko Haram being the introduction of a certain form of Islam in Nigeria, its recent alliance with ISIS makes them a potential threat to Western interests. The current disruption in Syria and Iraq has allowed ISIS to flourish, gaining swathes of territory within both countries.²⁸

Subsequently, it has been assessed that at present there is now a three-dimensional threat – at home, abroad, and online.²⁹ Though an attack within the UK and abroad is and has always been a threat to the population, the threat of a cyber-attack is a relatively new concept that has emerged with the internet age.³⁰ Cyberterrorism may be defined as ‘*deliberate actions to alter, disrupt, deny, deceive, degrade, or destroy computer systems and services*’³¹ that results in non-virtual harm that has a significant effect in the real world.³² The use of automated systems control various aspects of everyday life, including banking, transport and healthcare – even an individual’s smartphone or smart TV is vulnerable, where it can be manipulated into a microphone,³³ for example. A cyber-attack on any of these aspects, although not a direct form of physical harm, is a significant threat to critical infrastructure. One of the aims of former al-Qaida leader Osama Bin Laden was to affect the economic stability of its enemies (such as the US), its targets being primarily State-owned facilities, the idea being that if the State is financially drained, they are less able to defend themselves from whatever attack is posed on it

²⁷ Global Terrorism Index, 2015, Institute for Economics & Peace, Available:

<http://economicsandpeace.org/wp-content/uploads/2015/11/Global-Terrorism-Index-2015.pdf>, page 2

²⁸ BBC News, ‘What is ‘Islamic State’?’ (BBC News, 14/11/2015) www.bbc.co.uk/news/world-middle-east-29052144, Accessed: 23/11/2015

²⁹ Hardeep Matharu, ‘Isis planning ‘mass casualty’ terror attacks in UK, head of MI5 warns’ (The Independent, 30/11/2015) www.independent.co.uk/news/uk/isis-planning-mass-casualty-terror-attacks-in-britain-head-of-mi5-warns-a6712946.html, Accessed: 29/10/2015

³⁰ Terrorism Act 2001, section 1(2)(e) includes this within its definition of terrorism and is where action ‘*is designed seriously to interfere with or seriously to disrupt an electronic system*’

³¹ Martin Rudner, ‘Cyber-Threats to Critical National Infrastructure: An Intelligence Challenge’ [2013] 26(3) *International Journal of Intelligence and CounterIntelligence* 453, 454

³² Lee Jarvis & Stuart Macdonald, ‘What Is Cyberterrorism? Findings From a Survey of Researchers’ [2015] 27(4) *Terrorism and Political Violence* 657, 660

³³ Emma Graham-Harrison, ‘Could Isis’s ‘cyber caliphate’ unleash a deadly attack on key targets?’ (The Guardian, 12/04/2015) www.theguardian.com/world/2015/apr/12/isis-cyber-caliphate-hacking-technology-arms-race, Accessed: 30/01/2016

next.³⁴ Vulnerable aspects include, but are not limited to, online financial services, transport, government facilities and energy firms.³⁵ Energy and utility facilities are a target because it is possible to restrict energy supply,³⁶ whilst transport systems are similarly vulnerable because transportation signals have the potential to be manipulated.³⁷ Furthermore, a lot of people and corporations now store a considerable amount of sensitive information online, particularly financially-related information, which may also be subject to hacking.³⁸

Aside from using technology as a further form of attack, Islamic extremist groups are using the internet to spread propaganda, provide online training facilities, to recruit others to the jihadi cause, to provide instruction on network security and hacking, and glorifying violent acts.³⁹ ISIS in particular has caused concern because it appears to be much more technology-savvy than other Islamist extremist groups, and has been known to appeal to and recruit hackers that are already known to the authorities.⁴⁰ Subsequently, it can only be assumed that their intention is to utilise their skills. Whereas current hacking manoeuvres on the social media accounts of US Central Military Command have been labelled as ‘vandalism,’ merely causing ‘inconvenience,’⁴¹ that does not mean that ISIS will not attempt something more serious in the near future.

³⁴ Martin Rudner, ‘Cyber-Threats to Critical National Infrastructure: An Intelligence Challenge’ [2013] 26(3) *International Journal of Intelligence and CounterIntelligence* 453, 455 - 456

³⁵ Martin Rudner, ‘Cyber-Threats to Critical National Infrastructure: An Intelligence Challenge’ [2013] 26(3) *International Journal of Intelligence and CounterIntelligence* 453, 455

³⁶ Mohamed Abomhara and Geir M. Kjøien, ‘Cyber Security and the Internet of Things: Vulnerabilities, Threats, Intruders and Attacks’ [2015] 4 *Journal of Cyber Security* 65, 68

³⁷ Martin Rudner, ‘Cyber-Threats to Critical National Infrastructure: An Intelligence Challenge’ [2013] 26(3) *International Journal of Intelligence and CounterIntelligence* 453, 456

³⁸ Mohamed Abomhara and Geir M. Kjøien, ‘Cyber Security and the Internet of Things: Vulnerabilities, Threats, Intruders and Attacks’ [2015] 4 *Journal of Cyber Security* 65, 69

³⁹ Martin Rudner, ‘“Electronic Jihad”: The Internet as Al Qaeda’s Catalyst for Global Terror’ [2016] *Studies in Conflict & Terrorism*, DOI: 10.1080/1057610X.2016.1157403, 3

⁴⁰ Emma Graham-Harrison, ‘Could Isis’s ‘cyber caliphate’ unleash a deadly attack on key targets?’ (The Guardian, 12/04/2015) www.theguardian.com/world/2015/apr/12/isis-cyber-caliphate-hacking-technology-arms-race, Accessed: 30/01/2016

⁴¹ Emma Graham-Harrison, ‘Could Isis’s ‘cyber caliphate’ unleash a deadly attack on key targets?’ (The Guardian, 12/04/2015) www.theguardian.com/world/2015/apr/12/isis-cyber-caliphate-hacking-technology-arms-race, Accessed: 30/01/2016

Conversely, ISIS may also stick to 'traditional' methods and objectives used by other terror groups to achieve their aim. There has been some concern over the possibility of terrorist groups acquiring chemical, biological, radioactive or nuclear (CBRN) materials as a weapon to use against its adversaries - It has recently been reported for example that ISIS may have enough radioactive material to build a 'dirty bomb.'⁴² The internet and other forms of open sources can be a valuable tool for terrorists wishing to obtain and manipulate CBRN materials, something which was previously a more specialised area of expertise.⁴³ Clearly these suspicions are concerning, as the use of any CBRN materials in a highly populated city such as London or New York, both of which are and have already been targeted on numerous occasions, would be catastrophic, as it has the potential to cause an unknown number of fatalities. Furthermore, there would be a significant effect on the economy, and the clean-up after such an attack would be both lengthy and expensive.⁴⁴

Moreover, attacks on passenger aircraft are not an uncommon objective by terrorist groups due to their shock impact and fear that they inspire in the public. A further aim of attacks on aircraft is the damaging effect they perceive it can have on a State's economy.⁴⁵ In the case of 9/11, al-Qaida ensured maximum impact by flying the planes into significant American landmarks whilst simultaneously killing almost 3000 people. Attacks on airlines are a continued threat, an example of which is the take down of a Russian flight in the Sinai Province, which was allegedly targeted by ISIS in October 2015⁴⁶ when an explosion was detonated whilst the

⁴² Adam Withnall, 'Isis's dirty bomb: Jihadists have seized 'enough radioactive material to build their first WMD'' (The Independent, 10/06/2015) www.independent.co.uk/news/world/middle-east/isiss-dirty-bomb-jihadists-have-seized-enough-radioactive-material-to-build-their-first-wmd-10309220.html, Accessed: 31/01/2016

⁴³ Benjamin Cole, *The Changing Face of Terrorism: How Real Is the Threat from Biological, Chemical and Nuclear Weapons?*, I.B.Tauris & Co Ltd: New York, 2011, 34

⁴⁴ Ian Turner, 'Human Rights and Antiterrorism: A Positive Legal Duty to Infringe Freedom from Torture?' [2012] 35 *Studies in Conflict & Terrorism* 760, 761

⁴⁵ Martin Rudner, 'Cyber-Threats to Critical National Infrastructure: An Intelligence Challenge' [2013] 26(3) *International Journal of Intelligence and CounterIntelligence* 453, 456

⁴⁶ Adam Withnall, 'Isis releases audio message claiming it downed Russian plane in Sinai, says it will reveal method 'soon'' (The Independent, 12/11/2015) www.independent.co.uk/news/world/middle-east/isis-

aircraft was in flight. This followed the recent admissions that Thomson airline flight dodged an Egyptian missile in several months earlier⁴⁷. Although it was suspected to be part of a training exercise conducted by the Egyptian military, the incident certainly highlighted how vulnerable aircraft can be, particularly when flying over certain territories. Aside from the mass death and injury such an attack can cause if successful, it can certainly be presumed possible that it could have a substantial effect on tourism, and have a negative impact on the population's faith that the State will keep them safe.

It could be contended that there are two main groups that decide what constitutes a security threat and who a terrorist is, the first of these being the government. The government has control over the laws that are passed, and deciding what constitutes threats and how a terrorist is defined. The State has a vested interest in defining terrorism for several reasons, the main reason being due to the threat terrorism can have to its sovereign power, an example of which could include Northern Ireland and the IRA. The IRA was (and still is) considered a terrorist organisation due to its attacks on State officials and civilians. However, it could be suggested that the IRA was a threat to its (the States) power, due to its focus on the reunification and independence of Ireland, and because there were some that viewed the IRA less as rebels or terrorists, but more as to 'freedom fighters'.⁴⁸

There are some States⁴⁹ that may actually sponsor certain forms of terrorism because the terrorist's aims are of benefit to the State in question. Subsequently, these States have attempted

releases-audio-message-claiming-it-downed-russian-plane-in-sinai-and-says-it-will-reveal-method-a6720696.html, Accessed: 20/11/2015

⁴⁷ Isabelle Fraser, 'British plane 'dodged missile above Sharm el-Sheikh' - as it happened on Friday November 6' (The Telegraph, 07/11/2015) www.telegraph.co.uk/news/worldnews/europe/russia/11981249/Russian-plane-crash-sharm-el-sheikh-stranded-British-tourists-as-it-happened.html, Accessed: 20/11/2015

⁴⁸ BBC News 'IRA 'freedom fighters' says MP' (BBC News, 30/12/2001) www.news.bbc.co.uk/1/hi/northern_ireland/1733091.stm, Accessed: 26/06/2016

⁴⁹ The US for example has accused Iran of assisting Iraqi Shia militias, which resulted in the US not inviting Iran to the UN summit on combatting ISIS - David Borger, 'Iran's state sponsor of terrorism label excludes it from UN summit on Isis' (The Guardian, 28/09/2015) www.theguardian.com/world/2015/sep/28/un-summit-isis-iran-not-invited-state-sponsor-terrorism-label, Accessed: 16/06/2016. A further example is that of Libya's

to dissuade an international definition of terrorism that would include the forms of terrorism they sponsor.⁵⁰ It could be argued that this is similar to when the US government changed its own definition of torture so that its ‘enhanced interrogation techniques’ would not fall within the new definition of torture.⁵¹ Essentially, the argument could be made that States will define who and what is a terrorist to suit what happens to be convenient to them at the present time. It is however disputable that the State is the most influential, as the State takes advice on security threats from the second group, the intelligence agencies. It is arguable that it is in the interest of intelligence agencies to inflate the current threats to national security, firstly because the government will make more funding available when the threat is higher, and secondly because the State will pass laws that make it easier for intelligence agencies to collect information i.e. the Investigatory Powers Bill, otherwise known as the ‘snoopers charter.’⁵²

Intelligence Cooperation

Modern intelligence cooperation originally began with the Cold War, and other intelligence networks emerging after the fall of the Soviet Union.⁵³ The main reason intelligence agencies began cooperating within networks is because of the increase of organised crime spanning

alleged support of the IRA, which allegedly resulted in the 1987 Enniskillen bomb massacre – Henry McDonald, ‘Gadaffi sued by 160 victims of IRA’ (The Guardian, 23/04/2006) www.theguardian.com/politics/2006/apr/23/uk.northernireland, Accessed: 16/06/2016

⁵⁰ Boaz Ganor, ‘Defining Terrorism: Is One Man’s Terrorist another Man’s Freedom Fighter?’ [2002] 3(4) *Police Practice and Research* 287, 288

⁵¹ The US appeared to narrow its definition of torture so that only acts where “*serious physical injury, such as organ failure, impairment of bodily function, or even death,*” or *mental pain that resulted in “significant psychological harm of significant duration, e.g., lasting for months or even years.”* Heather MacDonald, ‘How to Interrogate Terrorists’, Karen Greenberg (ed), *The Torture Debate in America*, New York: Cambridge University Press, 2005, pages 84 - 97, 93

⁵² The Investigatory Powers Bill was criticised by Amnesty International, who likened the bill to ‘mass surveillance.’ – Amnesty International, ‘Urgent: Stop the new Snoopers’ Charter annihilating our rights’ (Amnesty International, 11/03/2016) www.amnesty.org.uk/blogs/yes-minister-it-human-rights-issue/urgent-stop-ipb-investigatory-powers-bill-snoopers-charter-human-rights, Accessed: 16/06/2016

⁵³ Elizabeth Sepper, ‘Democracy, Human Rights and Intelligence Sharing’ [2010-2011] 46 *Texas International Law Journal* 151, 154

across borders,⁵⁴ exemplified by modern terrorist methods since 9/11. The relationships formed by intelligence services are often very complicated, with a single agency potentially having hundreds of intelligence-sharing agreements globally at any one time.⁵⁵ Intelligence agencies can gain huge benefits by creating international arrangements via liaisons, groups or ‘clubs’ with other foreign agencies. These alliances can be multilateral, plurilateral or bilateral.

A multilateral alliance is a formal arrangement between close allies, who together share the responsibilities of operational duties, whilst sharing in full the intelligence gained from such duties.⁵⁶ An example of a multilateral arrangement is the UKUSA agreement formed by the UK and the US in the face of the Cold War. Australia, Canada and New Zealand, who joined at a later date, could be referred to as ‘secondary partners’, and it is suggested that there are other States that have bilateral arrangements with the UK/US, that may therefore be considered ‘third partners’. Whereas the first and second parties have quite a close relationship to one another in terms of available resources, third partners are limited in what they can derive from the arrangement. The agreement began life in 1945 so as to continue SIGINT collaboration, yet the UKUSA Security Agreement was only formally agreed in 1948. It is now suggested that the respective agencies that act out this agreement for both the UK and the US are the Government Communication Headquarters (GCHQ) and the National Security (NSA). The main partners are discouraged from collecting general intelligence on each other, and to instead work together to collect intelligence on shared targets. The ‘five eyes’ share their resources, and one will often be stronger at a certain aspect of intelligence collection than the others – the

⁵⁴ Elizabeth Sepper, ‘Democracy, Human Rights and Intelligence Sharing’ [2010-2011] 46 *Texas International Law Journal* 151, 154 - 155

⁵⁵ Elizabeth Sepper, ‘Democracy, Human Rights and Intelligence Sharing’ [2010-2011] 46 *Texas International Law Journal* 151, 155

⁵⁶ Martin Rudner, ‘Hunters and Gatherers: The Intelligence Coalition Against Islamic Terrorism’ [2004] 17(2) *International Journal of Intelligence and CounterIntelligence* 193, 195

US for example is known for having a large security budget (one of the largest in the world).⁵⁷

A further example of a multilateral arrangement is the European Alliance initiated by France, whose partners include Germany and Italy.⁵⁸

A plurilateral arrangement is less formal than multilateral arrangements and typically shares intelligence through groups and 'clubs'. These arrangements may involve a large number of allies whose relationships are not particularly close or strong, resulting in a more wary exchange of information limited to a focus on common threats.⁵⁹ A bilateral arrangement is also a form of liaison less formal than a multilateral agreement, and are considered to be the most beneficial of the three main liaison types.⁶⁰ They can be set up either formally, via a memorandum of understanding (MOU) or by the less formal verbal agreement.⁶¹ They are concerned with the regular exchange of raw information relating to specific threats,⁶² whilst sharing training facilities and operational duties.⁶³

A liaison agreement is often made between allied States to exchange information that relates specifically to the allied States national security. There are several different types of these liaisons, including symmetrical, asymmetrical, and adversarial. A symmetrical liaison is most simply described as a relationship between two agencies where information is traded equally between the two – they are in essence 'balanced' exchanges. Conversely, an asymmetrical liaison is where one agency benefits more from the relationship than the other, resulting in an

⁵⁷ Martin Rudner, 'Hunters and Gatherers: The Intelligence Coalition Against Islamic Terrorism' [2004] 17(2) *International Journal of Intelligence and CounterIntelligence* 193, 196 - 204

⁵⁸ Martin Rudner, 'Hunters and Gatherers: The Intelligence Coalition Against Islamic Terrorism' [2004] 17(2) *International Journal of Intelligence and CounterIntelligence* 193, 196

⁵⁹ Martin Rudner, 'Hunters and Gatherers: The Intelligence Coalition Against Islamic Terrorism' [2004] 17(2) *International Journal of Intelligence and CounterIntelligence* 193, 195

⁶⁰ Stephane Lefebvre, 'The Difficulties and Dilemmas of International Intelligence Cooperation' [2003] 16(4) *International Journal of Intelligence and Counter Intelligence* 527, 529

⁶¹ Stephane Lefebvre, 'The Difficulties and Dilemmas of International Intelligence Cooperation' [2003] 16(4) *International Journal of Intelligence and Counter Intelligence* 527, 533

⁶² Martin Rudner, 'Hunters and Gatherers: The Intelligence Coalition Against Islamic Terrorism' [2004] 17(2) *International Journal of Intelligence and CounterIntelligence* 193, 195

⁶³ Stephane Lefebvre, 'The Difficulties and Dilemmas of International Intelligence Cooperation' [2003] 16(4) *International Journal of Intelligence and Counter Intelligence* 527, 533

unbalanced arrangement. A liaison may be considered adversarial when the agreement between the involved parties involves the treachery of other State partners, or when an asymmetrical liaison is 'forced' upon one or both parties. This could happen when States make an agreement because there is a need for political or military expectation/symmetry between the States, and intelligence collection is more of a secondary intention.

Liaisons can also be simple or complex. An example of a simple liaison could be where State (A) will share a method of data collection with State (B), in exchange for State (B) sharing an alternative method of data collection with State (A) – data for data. A complex liaison could be where State (A) will share intelligence or a data collection method with State (B), in exchange for political, military, intelligence, or any mixture of favours.⁶⁴ Although more than two States can be privy to a liaison arrangement, the value of the arrangement itself decreases when there are too many States involved. This is firstly because the worth of the exchange is dependent on the State that is least trustworthy, and secondly because it is difficult to keep the necessary element of secrecy when there are so many parties.⁶⁵ The secrecy of its methods and capabilities is a strong characteristic within an intelligence agencies cooperation practises, even with States it considers its allies or 'friends': "*intelligence communities of even friendly countries tend to be... secretive... lest disclosure militate against any future strategic requirement or operational tasking.*"⁶⁶ In 2010, the Court of Appeal ordered the release of documentation detailing the UK involvement in the torture of Guantanamo Bay detainee Binyam Mohamed,⁶⁷ despite objections from the Foreign Secretary that the release of the information would be contrary to the 'control principle,' that intelligence-allied States rely on

⁶⁴ Jennifer E. Sims, 'Foreign Intelligence Liaison: Devils, Deals, and Details' [2006] 19(2) *International Journal of Intelligence and Counter Intelligence* 195, 197

⁶⁵ Jennifer E. Sims, 'Foreign Intelligence Liaison: Devils, Deals, and Details' [2006] 19(2) *International Journal of Intelligence and Counter Intelligence* 195, 202

⁶⁶ Martin Rudner, 'Hunters and Gatherers: The Intelligence Coalition Against Islamic Terrorism' [2004] 17(2) *International Journal of Intelligence and Counter Intelligence* 193, 195

⁶⁷ R (Binyam Mohamed) v Secretary of State for Foreign & Commonwealth Affairs [2010] EWCA Civ 65

to keep intelligence secret.⁶⁸ Cases like this can cause friction between allied States because there is the possibility that a States intelligence methods may be revealed.

Strategy is an important factor in intelligence cooperation because an agency may struggle to create a sharing arrangement if the agency has nothing to ‘bargain’ with – if all its secrets are known, what does it have to persuade States to part with their information? It is these situations in which a State may find itself in the position where the only thing it has to exchange is political favours, which may be considered the unfavourable option. Intelligence agencies may seek to ensure that information exchanged with a second agency remains secret via two ways – firstly by only exchanging information on a ‘need-to-know’ basis, and secondly by ‘user control’, where the information remains the property of the one that gave the information, not the one that receives it.⁶⁹

The most common form of intelligence sharing is done via a Memorandum of Understanding (MOU), commonly used within formal bilateral arrangements⁷⁰ which do not require State or minister approval. Other flexible agreements made may be based upon personal relationships⁷¹:
*“Generally speaking, they govern information exchanges in the absence of an MOU, supplant existing MOUs, and characterize ad hoc contacts during crises. Frequently operating below the level of official control, informal cooperative arrangements also allow contact even when interaction with a certain intelligence agency (or state) is officially disfavoured.”*⁷² Although there are occasions where Heads of States specifically create intelligence-sharing arrangements

⁶⁸ Richard Norton-Taylor, ‘Binyam Mohamed torture evidence must be revealed, judges rule’ (The Guardian, 10/02/2010) www.theguardian.com/world/2010/feb/10/binyam-mohamed-torture-ruling-evidence, Accessed: 06/05/2016

⁶⁹ Elizabeth Sepper, ‘Democracy, Human Rights and Intelligence Sharing’ [2010-2011] 46 *Texas International Law Journal* 151, 160 - 161

⁷⁰ Stephane Lefebvre, ‘The Difficulties and Dilemmas of International Intelligence Cooperation’ [2003] 16(4) *International Journal of Intelligence and Counter Intelligence* 527, 533

⁷¹ Elizabeth Sepper, ‘Democracy, Human Rights and Intelligence Sharing’ [2010-2011] 46 *Texas International Law Journal* 151, 158

⁷² Elizabeth Sepper, ‘Democracy, Human Rights and Intelligence Sharing’ [2010-2011] 46 *Texas International Law Journal* 151, 158 - 159

with other states⁷³, the most famous of which is the agreement between the UKUSA, this is in itself unusual and highly secret. Because communications do not require official approval, it can make it very difficult to regulate where that information has originated.

Therefore, it is perhaps preferable that although the lack of structure for intelligence agencies can in some cases be an advantage, the communications themselves are not subject to legal accountability, which could prove to be a hindrance at a later date, particularly considering the cross-breed of intelligence and evidence that information can be. Although this may not be such an issue for intelligence purposes, it could prove problematic if such information was to later be used as evidence in a Court, which will be discussed in more detail later in this chapter. However one of the biggest advantages to such a relaxed system is that intelligence networks are transgovernmental, meaning that those involved have specialist knowledge, as opposed to ministers.⁷⁴ This can be advantageous because ministers and heads of State are not (necessarily) experts in national security, neither are they specially trained to filter intelligence, collect intelligence, or assess the threat to the State – that’s what intelligence officials are trained to do and should therefore, arguably, be able to do their job without an untrained minister officiating their work.

Although sharing arrangements can be advantageous, they do have their limitations. The threat of Islamic extremism has united many States, however individual States also have domestic threats to contend with – In the UK for example, 18% of MI5 resources are spent on countering terrorism relating to Northern Ireland.⁷⁵ Additionally, a State may perceive the threat

⁷³ Elizabeth Sepper, ‘Democracy, Human Rights and Intelligence Sharing’ [2010-2011] 46 *Texas International Law Journal* 151, 157

⁷⁴ Elizabeth Sepper, ‘Democracy, Human Rights and Intelligence Sharing’ [2010-2011] 46 *Texas International Law Journal* 151, 156

⁷⁵ Mi5 Security Service, ‘People and Organisation’, www.mi5.gov.uk/people-and-organisation, Accessed: 22/03/2016

differently to another.⁷⁶ Moreover, a State's sharing partners may be less experienced, reducing the quality of information - The UK is experienced in terrorist related intelligence collection after dealing with more than 30 years of IRA related movement, which puts its counter-terror experience ahead of other States, such as the US, one of its top sharing partners.⁷⁷ However, arrangements are potentially at their most problematic when a States intelligence agencies create arrangements with foreign agencies from States that have an undesirable history with the abuse of human rights, which can have a direct impact on the information that is exchanged between them.⁷⁸ The current UK Prime Minister David Cameron addressed relationships with States that have an uncomfortable human rights reputation in an interview with Channel 4 News, where he was questioned over the UK's seemingly close relationship with Saudi Arabia, known for its oppressive regime. David Cameron claimed that:

*"We have a relationship with Saudi Arabia... because we receive from them important intelligence and security information that keeps us safe. The reason we have the relationship is our own national security. There was one occasion since I've been prime minister where a bomb that would have potentially blown up over Britain was stopped because of intelligence we got from Saudi Arabia... it would be easier for me to say: 'I'm not having anything to do with these people' ... For me, Britain's national security and our people's security comes first."*⁷⁹

There is current academic discussion over the apparent 'conflict' between human rights and national security in the context of counter-terrorism - After all, *'it is the first responsibility of*

⁷⁶ Stephane Lefebvre, 'The Difficulties and Dilemmas of International Intelligence Cooperation' [2003]16(4) *International Journal of Intelligence and Counter Intelligence* 527, 534

⁷⁷ Adam D. M. Svendsen, *Intelligence Cooperation and the War on Terror: Anglo-American Security Relations After 9/11*, Routledge: New York, 2010, 46

⁷⁸ Stephane Lefebvre, 'The Difficulties and Dilemmas of International Intelligence Cooperation' [2003] 16(4) *International Journal of Intelligence and Counter Intelligence* 527, 535

⁷⁹ Nicola Slawson, 'David Cameron insists UK must have close ties with Saudi Arabia' (The Guardian, 06/10/2015) www.theguardian.com/politics/2015/oct/06/david-cameron-insists-uk-ties-saudi-arabia, Accessed: 06/11/2015

*government in a democratic society to protect and safeguard the lives of its citizens.*⁸⁰ It would appear however that the State has been using this argument to sacrifice certain human rights and justify the prioritisation of national security. Conversely, Feinberg appears to question why there is a conflict at all, suggesting that State lawmakers and authorities have assumed that one must be placed above the other, and have therefore prioritised security.⁸¹ David Cameron's words to Channel 4 certainly seems to correspond with Feinberg's thoughts. It could be argued that prioritising national security over individual freedoms is an odd position for a State to take considering that national security and the counter-terrorism effort is about keeping people safe from harm and protecting their human rights. To then potentially sanction the abuse of human rights, in the name of protecting its citizens (i.e. national security) seems peculiar.

Subsequently, arrangements with foreign States that are known for limiting individual freedoms appears to be one of the ways that British officials have directly or indirectly become involved in the use of torture, and have intentionally or unintentionally received information that has been obtained by torture. David Cameron is not the first UK Prime Minister to oversee close ties with a State known for human rights abuses. In early 2015, it came to light that both MI5 & MI6 had close ties with Libya's Colonel Gaddafi under former UK Prime Minister Tony Blair's government in 2006 and 2007⁸². In papers found during the Libyan revolution by the Human Rights Watch in 2011, it is alleged that *'UK intelligence agencies sent more than 1,600 questions to be put to the two opposition leaders, Sami al-Saadi and Abdul Hakim Belhaj, despite having reason to suspect they were being tortured.'*⁸³ It was also alleged from these

⁸⁰ Lord Hope in Nick Taylor, 'To find the needle do you need the whole haystack? Global surveillance and principled regulation' [2014] 18(1) *The International Journal of Human Rights* 45, 45

⁸¹ Myriam Feinberg, 'International counterterrorism – national security and human rights: conflicts of norms or checks and balances?' [2015] 19(4) *The International Journal of Human Rights* 388, 389 - 391

⁸² Iain Cobain, 'Cooperation between British spies and Gaddafi's Libya revealed in official papers' (The Guardian, 22/01/2015) www.theguardian.com/uk-news/2015/jan/22/cooperation-british-spies-gaddafi-libya-revealed-official-papers, Accessed: 06/11/2015

⁸³ Iain Cobain, 'Cooperation between British spies and Gaddafi's Libya revealed in official papers' (The Guardian, 22/01/2015) www.theguardian.com/uk-news/2015/jan/22/cooperation-british-spies-gaddafi-libya-revealed-official-papers, Accessed: 06/11/2015

documents that *'Five men were subjected to control orders in the UK, allegedly on the basis of information extracted from two rendition victims.'*⁸⁴ This eventually led to an investigation by the Metropolitan Police called Operation Lydd, aimed at discerning MI6's involvement with the CIA in the alleged rendition of Abdul Hakin Balhaj and his wife, and the use of Diego Garcia as a site for a secret prison.⁸⁵ Despite potential problems such as the actions of partners States affecting the collection and use of shared intelligence (as above), liaisons can have huge advantages. Because terrorism is far-reaching across a number of different States, having a number of intelligence partners in States that terrorists are based in, that speak the same language and better know the terrain, can be incredibly beneficial⁸⁶. Furthermore, having a high number of partnerships can also relieve strain on an agencies financial budget and resources, allowing each State to direct its focus, as opposed to trying to balance a large number of individual projects across various operational disciplines.

How is Intelligence Collected?

Aside from inter-governmental agreements, the UK has its own methods of intelligence collection – similarly, each State has its own methods of intelligence collection, working within their own strengths and budget capabilities. This is because no State has the financial means to pursue every strategy, hence the exchange of information with other States is as important. It could be suggested that this likely adds extra pressure on personnel to obtain important information. The UK government for example would seek information that would be useful to

⁸⁴ Iain Cobain, 'Cooperation between British spies and Gaddafi's Libya revealed in official papers' (The Guardian, 22/01/2015) www.theguardian.com/uk-news/2015/jan/22/cooperation-british-spies-gaddafi-libya-revealed-official-papers, Accessed: 06/11/2015

⁸⁵ Iain Cobain & Richard Norton-Taylor, 'Files on UK role in CIA rendition accidentally destroyed, says minister' (The Guardian, 09/07/2014) www.theguardian.com/world/2014/jul/09/files-uk-role-cia-rendition-destroyed-diego-garcia-water-damage, Accessed: 04/05/2016

⁸⁶ Daniel Byman, 'The Intelligence War on Terrorism' [2014] 29(6) *Intelligence and National Security* 837, 850

others States, such as the US, because we have a close relationship with US intelligence services, and would like to continue the exchange for information that may prove important to UK interests.

One of the most obvious ways of collecting information is through various forms of SIGINT, which can most prove useful in tracing the finances of terror organisations and recording its communications. Communications can be monitored by ‘wiretapping’, where the exchanges between a limited number of individuals can be captured, or ‘metadata’ which is the large-scale collection of records from Telephone providers⁸⁷. Documents exposed by former CIA employee Edward Snowden in 2013 suggest that both the National Security Agency (NSA) and GCHQ had extensive surveillance programmes producing vast amounts of data⁸⁸. The surveillance programme created in 2007 was known as Prism, and allowed the NSA to gain huge amounts of data (such as emails and login-in details) from a number of social media sites.⁸⁹ In addition to Prism, the NSA also had a court ordered arrangement with a telecommunications company called Verizon, whereby it had to transfer all its data to the NSA.⁹⁰ GCHQ had its own operation known as Tempora, which obtained internet and telephone communications by monitoring fibre optic cables.⁹¹ From these revelations it is safe to assume that surveillance is a significant and far-reaching tool for an intelligence agency in collecting information. SIGINT has had a more important role in the years previous to 9/11, when other tools, such as interrogation and the acquisition of documents, were less evolved.

⁸⁷ Patrick F. Walsh & Seumas Miller, ‘Rethinking ‘Five Eyes’ Security Intelligence Collection Policies and Practice Post Snowden’ [2015] *Intelligence and National Security*, DOI: 10.1080/02684527.2014.998436, 5 - 6

⁸⁸ BBC News, ‘Edward Snowden: Leaks that exposed US spy programme’ (BBC News, 17/01/2014) www.bbc.co.uk/news/world-us-canada-23123964, Accessed: 01/03/2016

⁸⁹ BBC News, ‘Q&A: NSA’s Prism internet surveillance scheme’ (BBC News, 25/06/2013) www.bbc.co.uk/news/technology-23027764, Accessed: 01/03/2016

⁹⁰ BBC News, ‘Edward Snowden: Leaks that exposed US spy programme’ (BBC News, 17/01/2014) www.bbc.co.uk/news/world-us-canada-23123964, Accessed: 01/03/2016

⁹¹ BBC News, ‘Q&A: NSA’s Prism internet surveillance scheme’ (BBC News, 25/06/2013) www.bbc.co.uk/news/technology-23027764, Accessed: 01/03/2016

Subsequently, its use has since decreased.⁹² The main disadvantage to SIGINT is that terrorists are aware of its use, and therefore enact counter-measures to avoid falling into its detection.⁹³

There are several forms that HUMINT can take, including human spies, document exploitation and interrogation.⁹⁴ The use of ‘human spies’ is where a person involves themselves with the targeted person/group, and reports any useful information or documentation they gain back to their agency.⁹⁵ The idea is that they will remain in this position for as long as possible, or as long as they are needed to be, hence any information they report will be guarded so as not to arouse the suspicion of the target/s.⁹⁶ Because of this, it can be presumed that the quality of information they have access to will increase overtime. However, the use of spies in counter-terrorism poses challenges to this traditional method, because if the spy was to find out about an imminent terrorist plot, intelligence officials may have to expose the information so as to prevent the event from occurring.⁹⁷ In addition, terrorist groups may be based in countries that speak a different language or have a different ethnic profile, which may be difficult for an agency in the recruitment of local informants or ‘assets’ that are not based in that State. However, this can possibly be solved by the use of ‘diversified cover officers’ who may be more likely to mimic the ethnic profile needed to fit in more conspicuously.⁹⁸ Subsequently, its use can be potentially limiting, hence other forms of HUMINT and SIGINT are considered needed to fill in the gaps.

⁹² Daniel Byman, ‘The Intelligence War on Terrorism’ [2014] 29(6) *Intelligence and National Security* 837, 847

⁹³ Daniel Byman, ‘The Intelligence War on Terrorism’ [2014] 29(6) *Intelligence and National Security* 837, 847 - 848

⁹⁴ Daniel Byman, ‘The Intelligence War on Terrorism’ [2014] 29(6) *Intelligence and National Security* 837, 843 - 846

⁹⁵ Loch Johnson, ‘Evaluating “Humint”: The Role of Foreign Agents in U.S. Security’ [2010] 29(4) *Comparative Strategy* 308, 309

⁹⁶ Daniel Byman, ‘The Intelligence War on Terrorism’ [2014] 29(6) *Intelligence and National Security* 837, 844

⁹⁷ Daniel Byman, ‘The Intelligence War on Terrorism’ [2014] 29(6) *Intelligence and National Security* 837, 844

⁹⁸ Loch Johnson, ‘Evaluating “Humint”: The Role of Foreign Agents in U.S. Security’ [2010] 29(4) *Comparative Strategy* 308, 310

A further method of HUMINT is document exploitation (DocEx). Larger terrorist groups, despite their best efforts, leave a paper trail, detailing its training records, communications with its members, organising plans for future actions etc.⁹⁹ Obtaining these documents may occur when the State causes some sort of disruption to an organisation e.g. a raid, and clear out an documental evidence that is left behind, including computer files, photographs, and mobile phones.¹⁰⁰ This type of intelligence can prove most useful in understanding how the organisation works and communicates with itself.¹⁰¹ The biggest issue with DocEx, is that this sort of information will not be available on a regular occurrence. Furthermore, although this type of intelligence can be useful for larger terrorist groups, it is perhaps not particularly useful when it concerns ‘lone wolf’¹⁰² terrorists, because by the time this type of information becomes available, the damage may already be done.

Social Media Intelligence (SOCMINT) however, might prove itself to be useful in identifying lone wolves. SOCMINT is another form of SIGINT,¹⁰³ which involves the analysis of social media accounts such as Facebook and Twitter (amongst others) that have become popular in recent years, even amongst terrorist organisations such as ISIS or Al Shabaab.¹⁰⁴ People and locations can be identified quickly, with intelligence agencies and the police being immediately informed of any unfolding events.¹⁰⁵ For example, if an individual was to express an interest

⁹⁹ Daniel Byman, ‘The Intelligence War on Terrorism’ [2014] 29(6) *Intelligence and National Security* 837, 845 - 846

¹⁰⁰ Daniel Byman, ‘The Intelligence War on Terrorism’ [2014] 29(6) *Intelligence and National Security* 837, 845 - 846

¹⁰¹ Daniel Byman, ‘The Intelligence War on Terrorism’ [2014] 29(6) *Intelligence and National Security* 837, 845 - 846

¹⁰² ‘Lone wolf terrorists are individuals or a small number of individuals who commit an attack in support of a group, movement, or ideology without material assistance or orders from such group’ - Global Terrorism Index, 2015, Institute for Economics & Peace, Available: <http://economicsandpeace.org/wp-content/uploads/2015/11/Global-Terrorism-Index-2015.pdf>, 54

¹⁰³ Patrick F. Walsh & Seumas Miller, ‘Rethinking ‘Five Eyes’ Security Intelligence Collection Policies and Practice Post Snowden’ [2015] *Intelligence and National Security*, DOI: 10.1080/02684527.2014.998436, 10 - 12

¹⁰⁴ James P. Farwell (2014) ‘The Media Strategy of ISIS’ 56(6) *Survival: Global Politics and Strategy* 49

¹⁰⁵ Sir David Omand, Jamie Bartlett & Carl Miller, ‘Introducing Social Media Intelligence (SOCMINT)’ [2012] 27(6) *Intelligence and National Security* 801, 805 - 806

and/or comment on terror-related media, this person could be identified as a possibly threat and further action could be taken if deemed necessary.

Another method of HUMINT is interrogation, the use of which has grown since 9/11. Interrogation can be carried out by intelligence officials, military personnel or the police, often in prison or detention facilities, as has been the case with Guantanamo Bay and at Ballykelly airfield.¹⁰⁶ The interrogation of those affiliated with a terrorist group is clearly an important tool for intelligence officials because of the quality of information that can be gained: personal details of other terrorist members, locations of training facilities, financial details, and future attacks etc.¹⁰⁷ Furthermore, the capture and detention of the member of a terrorist organisation can have a significant effect on the efficiency of the group as a whole, as the group will concentrate their efforts into protecting themselves against any information the captured member may reveal.¹⁰⁸ On the other hand, the disruption of terrorist activities presents the possibility of an unexpected attack, presumably so that they can achieve their aim before they are further interrupted. An example of this is the recent attack in Brussels, where two suicide bombers affiliated with ISIS carried out simultaneous attacks shortly after the arrest of ISIS militant Salah Abdeslam.¹⁰⁹ However, interrogation, much like other forms of HUMINT, cannot be used without the prior assistance of other forms of intelligence, such as SIGINT. Additionally, intelligence gained by interrogation is debatably the most unreliable, the main reason for this being that the person being interrogated can be untruthful. Although the information they give could be independently verified through other methods, it wastes time

¹⁰⁶ Samantha Newbery, Bob Brecher, Philippe Sands & Brian Stewart, 'Interrogation, Intelligence and the Issue of Human Rights' [2009] 24(5) *Intelligence and National Security* 631, 631 - 632

¹⁰⁷ Daniel Byman, 'The Intelligence War on Terrorism' [2014] 29(6) *Intelligence and National Security* 837, 844

¹⁰⁸ Daniel Byman, 'The Intelligence War on Terrorism' [2014] 29(6) *Intelligence and National Security* 837, 845 - 846

¹⁰⁹ Jason Burke, 'Brussels attacks: were they revenge for Abdeslam's arrest?' (The Guardian, 22/03/2016) www.theguardian.com/world/2016/mar/22/brussels-attacks-show-how-global-terror-networks-act-local, Accessed: 23/04/2016

and resources that could be put to better use. Aside from being untruthful, the detainee can be unresponsive and/or refuse to confirm or answer anything asked or stated by the interrogator/s.¹¹⁰

How Is Intelligence Used?

The ultimate aim of counter-terrorist intelligence efforts introduced by the government, is to reduce the terrorist threat and to prevent a terrorist attack from happening. In turn, this *'means detecting and investigating threats at the earliest possible stage, disrupting terrorist activity before it can endanger the public and, wherever possible, prosecuting those responsible.'*¹¹¹

The UK government introduced a number of measures designed specifically to deter terrorism in the wake of 9/11. These measures include the proscription of terrorist groups, the revocation of British citizenship for those involved in the planning or encouragement of terrorist acts, the deportation of 'hate preachers' who encourage terrorist acts¹¹² and Control Orders/Terrorism Prevention and Investigation Measures (TPIMs). Control orders were introduced by the Prevention of Terrorism Act 2005,¹¹³ and were designed to restrict suspects and watch their movements, with methods including electronic tagging, limiting communication methods and recipients, restricting suspect movements, and initiating curfews.¹¹⁴ Control orders were

¹¹⁰ Shue is sceptical about how a suspect would actually react if he was tortured, particularly in the 'ticking bomb' scenario which will be discussed in chapter four: *'He does not have a heart attack and pass out; he does not vomit on himself and have a psychotic break; he does not tell a plausible diversionary lie that wastes the time available'* - Henry Shue, 'Torture in Dreamland: Disposing of the Ticking Bomb' [2005-2006] 37 *Case Western Reserve Journal International Law* 231, 237

¹¹¹ HM Government, 'CONTEST: The United Kingdom's Strategy for Countering Terrorism' (HM Government, July 2011) available: www.gov.uk/government/uploads/system/uploads/attachment_data/file/97994/contest-summary.pdf, 7, para. 1.16

¹¹² Gov.uk, 'Security Minister: What is real is reasonable' (Gov.uk, 25/02/2016)

www.gov.uk/government/speeches/security-minister-what-is-real-is-reasonable, Accessed: 10/03/2016

¹¹³ Ed Bates, 'Anti-terrorism control orders: liberty and security still in the balance' [2009] 29(1) *Legal Studies* 99, 99

¹¹⁴ Ed Bates, 'Anti-terrorism control orders: liberty and security still in the balance' [2009] 29(1) *Legal Studies* 99, 101-102

replaced by TPIMs in 2012, and were of particular concern due to the apparently low standard of proof needed for the Secretary of State to impose such a liberty-depriving decision on an individual.¹¹⁵ TPIMs were supposed to be ‘fairer’ than control orders, but supposedly still contain similar provisions, with human rights organisation Liberty referring to them as ‘control-order lite.’¹¹⁶ Furthermore, intelligence can be used to inspire de-radicalization initiatives such (as the Channel Programme),¹¹⁷ further cooperation with foreign agencies, and assist military intervention.

The UK and the US have different aims and approaches to counter-terrorism strategy, which can be useful because both States have a different perspective, therefore a different outcome. However, having these different aims can also frustrate investigation: *‘The simplest differences can often be the most instructive. ‘Frustrating terrorism’ versus ‘defeating terrorism’ captures the core differences present in the respective UK and US approaches to addressing terrorism.’*¹¹⁸ There are two key differences in approach when it comes to counter-terrorism, the main two being law enforcement and military. Law enforcement is more of an observation and investigative method, whereas the disruption of activities is more militarized. Previous military intervention of terrorist activity includes the case of Operation Flavius, where in 1988 British intelligence services became aware of a plot by the IRA to commit terrorist activity in Gibraltar. In response to this, SAS soldiers intended to arrest the suspects before they managed to carry out their plans, which actually resulted in shooting all three suspects dead.¹¹⁹ A further example is the 2011 military operation launched by the US to kill Osama Bin Laden in his

¹¹⁵ Aileen Kavanagh, ‘Special Advocates. “Control Orders and the Right to a Fair Trial” [2010] 73 (5) *Modern Law Review* 836, 837

¹¹⁶ Liberty, ‘TPIMs’, www.liberty-human-rights.org.uk/human-rights/countering-terrorism/tpims, Accessed: 01/05/2016

¹¹⁷ Gov.uk, ‘Channel Guidance’ (Gov.uk, 23/04/2015) www.gov.uk/government/publications/channel-guidance, Accessed: 01/05/2016

¹¹⁸ Adam D. M. Svendsen, *Intelligence Cooperation and the War on Terror: Anglo-American Security Relations After 9/11*, Routledge: New York, 2010, 42

¹¹⁹ *McCann and Others v United Kingdom*, Application no. 18984/91

home compound in Pakistan¹²⁰. Although both enforcement and the military are needed for effective counter-terrorism stratagem, there are tensions between the two due to the timing of the methods. Essentially, it is watch (law enforcement) versus act (military).¹²¹ The UK takes more of a frustrate approach to terrorism, whereas the US tends to view terrorism as a war, hence their approach is more militarized than the UK¹²².

Intelligence can be used in two main forms: to prevent an incident from happening (*priori*) or as part of a post-incident investigation (*post facto*)¹²³. In simpler terms, the first port of call for intelligence is to frustrate the terrorist effort by interrupting their plans. This may include using intelligence to detain a suspect – this creates a problem for a terrorist group because they must assume that anything the detainee knows, the interrogators now know, and must thus funnel their energies into covering their tracks¹²⁴. Furthermore, SIGINT intelligence has been used to ‘geolocate’ terrorists such as Osama Bin Laden, and has also been used to track their financial assets.¹²⁵ Additionally, intelligence can inform the State, authorities and the public of safety measures they should take so as to prevent attacks. An example of this is ‘Operation Overt’, where security services found a plot to create liquid bombs that looked like soft drinks, with the likely targets being passenger planes. Consequently, aviation authorities across the globe were able to close the security flaw, which further frustrated the terrorism effort.¹²⁶ This may only be truly effective if the people committing acts of terrorism are closely/personally affiliated with a terrorist group, however in 2014 70% of terrorist offences committed were

¹²⁰ BBC News, ‘Osama Bin Laden's death: How it happened’ (BBC News, 10/09/2012) www.bbc.co.uk/news/world-south-asia-13257330, Accessed: 29/04/2016

¹²¹ Adam D. M. Svendsen, *Intelligence Cooperation and the War on Terror: Anglo-American Security Relations After 9/11*, Routledge: New York, 2010, 42-43

¹²² Adam D. M. Svendsen, *Intelligence Cooperation and the War on Terror: Anglo-American Security Relations After 9/11*, Routledge: New York, 2010, 42-43

¹²³ Adam D. M. Svendsen, *Intelligence Cooperation and the War on Terror: Anglo-American Security Relations After 9/11*, Routledge: New York, 2010, 41 - 42

¹²⁴ Daniel Byman, ‘The Intelligence War on Terrorism’ [2014] 29(6) *Intelligence and National Security* 837, 846

¹²⁵ Daniel Byman, ‘The Intelligence War on Terrorism’ [2014] 29(6) *Intelligence and National Security* 837, 847

¹²⁶ BBC News, ‘Liquid bomb plot: What happened’ (BBC News, 07/09/2009) www.news.bbc.co.uk/1/hi/uk/8242479.stm, Accessed: 22/03/2016

committed by ‘lone wolf’ terrorists,¹²⁷ presumably one of the effects of an increased social media platform, which terrorist groups now use to ‘inspire’ individuals to commit their own attacks. Nevertheless, with 3 in 10 terror attacks committed directly by members of a larger terrorist cell, this will still be one of the main aims of intelligence collection. Lone wolves are potentially more difficult because without affiliation with a terrorist group, they may not appear on the radar until it’s too late.

Conviction of terrorist offences carry hefty penalties worldwide due to their seriousness – In the UK for example, the preparation of terrorist acts carries a maximum penalty of life imprisonment.¹²⁸ The conviction of an individual is one of the most effective ways of preventing terrorist related offences, first and foremost because they are physically incapable of carrying out an attack, because they do not have access to the materials, facilities, communications or locations needed to effectively plan or carry out an attack. Furthermore, the ability of the perpetrator to encourage, assist, or facilitate anybody else to commit such an offence is also reduced if they are subject to incarceration, with limits on their access to the internet.

However, a conviction after the fact could be considered less useful, partially because the damage has been done, but mostly because due to the emergence of the suicide bomber, the main perpetrators of the offence may die as part of the attack. Of course that is not always the case, an example of which being Dzhokhar Tsarnaev, one of the Boston bombers who was convicted for his part in the 2013 attack.¹²⁹ Furthermore, conviction can still be useful regardless of whether the main perpetrators are killed, as they often have co-conspirators that

¹²⁷ Global Terrorism Index, 2015, Institute for Economics & Peace, Available: <http://economicsandpeace.org/wp-content/uploads/2015/11/Global-Terrorism-Index-2015.pdf>, page 5

¹²⁸ Offences under Terrorism Act 2006

¹²⁹ Alan Yuhas, ‘Dzhokhar Tsarnaev sentenced to death for Boston Marathon bombing – as it happened’ (The Guardian, 15/05/2015) www.theguardian.com/us-news/live/2015/may/15/dzhokhar-tsarnaev-boston-marathon-bombing, Accessed: 23/03/2016

have encouraged or assisted before or after the attack – Even in the case of lone wolves, as also shown in the Boston bombers case.¹³⁰ Hence, post-attack conviction can still be useful in frustrating the terrorist effort, but is not immediately beneficial in directly preventing an attack. Furthermore, an intelligence agency may find that a conviction is not the best course of action if they believe that they can use a terrorist suspect to become an informant. Of course, this comes with its own risks – the terrorist turned informant could feed back false information, inform other terrorists of his predicament, or even be killed if discovered to be spying.¹³¹ Moreover, although informants are not unusual in criminal trials,¹³² there is a difference between an informant that has infiltrated a terrorist group and a genuine terrorist, the latter of which may not be considered a trustworthy witness in any subsequent trial that may happen as a result information that he/she manages to provide. However, this does not mean that information provided by a terrorist informant would not be useful in an internal operational capacity.

Subsequently, intelligence and evidence have been increasingly thronged together, despite the fact that intelligence and evidence are two completely different concepts. Roach¹³³ details the specific differences between evidence and intelligence, an important differentiation because they are traditionally completely separate entities deriving from two completely different institutions. Firstly, whereas both intelligence and evidence seek to find the truth, the main difference between the two is the purpose. Whereas evidence is concerned with the guilt of past events, intelligence is assessing the risk posed from events that have not even happened

¹³⁰ Associated Press, 'Friend of Boston Marathon bomber gets more than three years in prison' (The Guardian, 05/06/2015) www.theguardian.com/us-news/2015/jun/05/friend-boston-marathon-bomber-sentenced, Accessed: 23/03/2016

¹³¹ Louisa Loveluck, 'Islamic State beheads teenagers accused of 'spying' for the West' (The Telegraph, 01/05/2016) www.telegraph.co.uk/news/2016/05/01/islamic-state-beheads-teenagers-accused-of-spying-for-the-west/, Accessed: 06/05/2016

¹³² Wadie E. Said, 'The Terrorist Informant' [2010] 85(4) *Washington Law Review* 687, 689

¹³³ Kent Roach, 'The Eroding Distinction Between Intelligence and Evidence in Terrorism Investigations' [2010] in: Nicola McGarrity, Andrew Lynch and George Williams (eds). *Counter-Terrorism and Beyond*, Routledge: Abingdon, 2010, pages 48 – 68

yet: “*The aim of intelligence is to identify security risks and suspect associations as opposed to guilty acts and minds... is subject to internal verification as opposed to the external checks of adversarial challenge and cross-examination.*”¹³⁴ The defining characteristic of intelligence is secrecy, because the methods and sources used by intelligence agencies need to be unknown to terror organisations, so that they cannot evade or otherwise frustrate such methods. Furthermore, information could come from foreign intelligence agencies which also need to keep their sources confidential.

Conversely, evidence is carefully prepared for the examination and scrutiny of a court and the public. Subsequently, evidence is presented and validated by a variety of people e.g. judges, police officers, jury, prosecution/defence representatives etc., before it even reaches a court, whereas intelligence is internally validated by employees of the agencies themselves.¹³⁵ Although the use of intelligence as evidence in a criminal trial is certainly not the aim of intelligence, the high emphasis of intelligence collection and prosecution for terrorist offences since 9/11 has made it increasingly likely that intelligence and evidence collide. Terrorist-related offences are among some of the only offences where the perpetrator can be prosecuted without having actually been successful in committing the crime, where the mere planning or encouragement of the crime is itself an offence. Hence, intelligence might be some of the only evidence available to ensure a successful prosecution. Although SIGINT intelligence can prove particularly useful as ‘solid’ evidence and proof of accountability, it can prove itself to at times imprecise and partial, which as a whole can make it unreliable.¹³⁶

¹³⁴ Kent Roach, ‘The Eroding Distinction Between Intelligence and Evidence in Terrorism Investigations’ [2010] in: Nicola McGarrity, Andrew Lynch and George Williams (eds). *Counter-Terrorism and Beyond*, Routledge: Abingdon, 2010, pages 48 – 68, 52

¹³⁵ Kent Roach, ‘The Eroding Distinction Between Intelligence and Evidence in Terrorism Investigations’ [2010] Nicola McGarrity, Andrew Lynch and George Williams (eds). *Counter-Terrorism and Beyond*, Routledge: Abingdon, 2010, pages 48 – 68, 53 - 56

¹³⁶ Daniel Byman, ‘The Intelligence War on Terrorism’ [2014] 29(6) *Intelligence and National Security* 837, 846 - 848

Moreover, intelligence agencies may be uncooperative with criminal investigation because it may reveal their sources and methods, thus leaving them open to scrutiny. Subsequently, certain measures have recently been developed to counter-act this reluctance. Closed material procedure (CMP) or ‘secret courts’ allows relevant information to remain secret in certain court proceedings, because allowing the information to be released could have a potentially detrimental effect on national security. The defendant is omitted from the court, and a security-assessed ‘special advocate’ takes his place so that the defendant is still (in theory) represented.¹³⁷ This is in contrast to the usual court procedure, in which not only does the defendant and his counsel have access to all evidence against him, but are also able to question the evidence and how it was obtained.¹³⁸ CMP is used to protect intelligence sources and relationships with other State agencies.¹³⁹ One of the issues with ‘secret courts’ is that it is applicable to courts not investigations, and so intelligence agencies may still remain uncooperative in certain aspects of institutional intrusion for fear of revealing their methods. This was shown in the previously mentioned case of Binyam Mohammed,¹⁴⁰ where Mr Mohammed wanted the UK government to disclose some information from the US, which would show he had been subject to torture, to use as part of his defence in his trial in the US. Although the reason the UK government was reluctant to expose this information was because they feared it would endanger future alliances with other States, it also demonstrates how CMP’s can affect the ideal of open justice.¹⁴¹

¹³⁷ Eva Nanopoulos, ‘European Human Rights Law and the Normalisation of the ‘Closed Material Procedure’: Limit or Source?’ [2015] 78(6) *The Modern Law Review* 913, 916

¹³⁸ Aileen Kavanagh, ‘Special Advocates, Control Orders and the Right to a Fair Trial’ [2010] 73 (5) *Modern Law Review* 836, 836

¹³⁹ Owen Bowcott, ‘What are secret courts and what do they mean for UK justice?’ (The Guardian, 14/06/2013) www.theguardian.com/law/2013/jun/14/what-are-secret-courts, Accessed: 01/05/2016

¹⁴⁰ *R (Binyom Mohamed) v Secretary of State for Foreign & Commonwealth Affairs* [2010] EWCA Civ 65

¹⁴¹ Greg Martin & Rebecca Bray Scott, ‘Closing down open justice in the United Kingdom?’ [2012] 37 *Alternative Law Journal* 126

The use of intelligence as evidence for a prosecution has likely become more common since 9/11, possibly due to the emergence of so-called ‘home-grown’ terrorism, where the terrorist is actually a citizen of the State itself and may have never even travelled to a country known to house a terrorist strong-hold. According to Roach, the police have become more involved in counter-terrorism operations conducted by intelligence agencies,¹⁴² which would also suggest the possibility of intelligence becoming more involved in resulting prosecutions. An example of the police and intelligence service cooperation is Operation Crevice, which resulted in the conviction of five British men with links to Al-Qaeda for plotting to use a large fertiliser bomb to target numerous venues of public use.¹⁴³ This can however cause problems within a trial setting, because intelligence has different aims to evidence. Furthermore, staff at intelligence agencies are not trained in how to present evidence to a Court – For example, during the investigation into the death of former Secret Intelligence Service (SIS) employee Gareth Williams, SIS/MI6 staff were criticized for withholding evidence because they themselves had not deemed it relevant.¹⁴⁴ This shows that intelligence staff are potentially not well versed in what is appropriate evidence and what is not. Part of this problem can therefore occur due to a lack of knowledge in criminal law on the part of intelligence officials.¹⁴⁵ Essentially, intelligence is not gathered and put together like evidence, with the aim of proving what someone has done or wanted to do, but is based on what someone might do. Furthermore, the

¹⁴² Kent Roach, ‘The Eroding Distinction Between Intelligence and Evidence in Terrorism Investigations’ [2010] in: Nicola McGarrity, Andrew Lynch and George Williams (eds). *Counter-Terrorism and Beyond*, Routledge: Abingdon, 2010, pages 48 – 68, 67

¹⁴³ BBC News, ‘Five get life over UK bomb plot’ (BBC News, 30/04/2007) www.news.bbc.co.uk/1/hi/uk/6195914.stm, Accessed: 22/03/2016

¹⁴⁴ Greg Martin & Rebecca Scott Bray, ‘Discolouring Democracy? Policing, Sensitive Evidence, and Contentious Deaths in the United Kingdom’ [2013] 40(4) *Journal of Law and Society* 624, 625

¹⁴⁵ Kent Roach, ‘The Eroding Distinction Between Intelligence and Evidence in Terrorism Investigations’ [2010] in: Nicola McGarrity, Andrew Lynch and George Williams (eds). *Counter-Terrorism and Beyond*, Routledge: Abingdon, 2010, pages 48 – 68, 67

use of intelligence as evidence can also risk putting the burden of proof on the defendant, as seen in cases such as *Adbelrazic v. Canada*.¹⁴⁶

To conclude, this chapter has identified that the threat posed by terrorism appears to be increasing, with particular emphasis on cyber terrorism. Subsequently, intelligence collection and partnerships with foreign agencies are essential for the State in countering the threat. Furthermore, this chapter has established that intelligence agencies have various methods of information exchange, many of which can be considered ‘informal’. The result of this is that it can be difficult to identify the source of this information, which is a particular concern when exchanging information with States that have an ‘undesirable’ human rights reputation. Additionally, this chapter has identified that whilst various forms of SIGINT and HUMINT are valuable tools in countering the threat, interrogation is especially problematic. This chapter has identified two main objectives of intelligence use – to frustrate and prosecute. Subsequently, these issues are particularly problematic when intelligence agencies have to work with law enforcement and the judiciary, as the information collected or received is often not of the standard required for formal proceedings and prosecutions. The second chapter of this thesis will examine the current prohibition of torture, so as to determine what the prohibition is, how strong the prohibition is, and how the prohibition affects complicity. In turn, this will demonstrate how the current law on torture may affect the intelligence community’s attempts to counter terrorism.

¹⁴⁶ *Adbelrazic v. Canada* 2009 FC 580 para. 53

CHAPTER TWO: The Legality of Torture and Complicity

Legal Definition of Torture

The act of torture itself is defined within section 1 UNCAT as *'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him... information or a confession... when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.'*¹⁴⁷ In *Aksoy v. Turkey*¹⁴⁸ it was considered that for an act to be considered torture it must be both intentional and severe in nature. For example physical beatings¹⁴⁹ and rape¹⁵⁰ constitute as torture, as do threats of violence or death. Cruel, inhumane and degrading treatment is not defined within UNCAT, though is prohibited under article 16(1) which states that *'Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation'¹⁵¹ of or with the consent or acquiescence of a public official or other person acting in an official capacity...'*¹⁵² Torture and cruel, inhumane and degrading treatment are differentiated in *Ireland v. United Kingdom*.¹⁵³ In this case, it was decided that torture is *'deliberate, inhumane treatment causing very serious and cruel suffering'*¹⁵⁴ whereas

¹⁴⁷ Article 1 UNCAT, available: <http://www.un.org/documents/ga/res/39/a39r046.htm>

¹⁴⁸ *Aksoy v. Turkey*, Application no. 21987/93

¹⁴⁹ *Selmouni v. France*, Application no. 25803/94

¹⁵⁰ *Aydin v. Turkey*, Application no. 23178/94

¹⁵¹ 'Instigation' includes incitement, inducement or solicitation. - Matt Pollard, 'Rotten Fruit: State Solicitation, Acceptance and Use of Information Obtained Through Torture by Another State' [2005] 23 *Netherlands Quarterly of Human Rights* 349, 354

¹⁵² Article 16(1) UNCAT, available: <http://www.un.org/documents/ga/res/39/a39r046.htm>

¹⁵³ *Ireland v. United Kingdom*, Application no. 5310/71

¹⁵⁴ *Ireland v. United Kingdom*, Application no. 5310/71

inhumane treatment is *'treatment or punishment that causes intense physical and mental suffering.'*¹⁵⁵ The difference between the two appears to be the severity of the harm inflicted.

The Prohibition of Torture

There are a variety of international conventions that prohibit the use of torture. Article 3 of the European Convention on Human Rights (ECHR) states that *'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'*¹⁵⁶ Similarly, article 5 of the Universal Declaration of Human Rights (UDHR) and article 7 of the International Covenant on Civil and Political Rights (ICCPR) states that *'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'*¹⁵⁷ The most notable convention prohibiting torture is the United Nations Convention Against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment (UNCAT), which has been ratified by 159 States.¹⁵⁸

All of UNCAT's participating States are required to proactively prevent the use of torture in all legal and administrative means, according to Article 2(1) of UNCAT which states that *'Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.'*¹⁵⁹ UNCAT also compels all party States to systematically criminalise torture, according to Article 4(1) of UNCAT which states that *'Each State Party shall ensure that all acts of torture are offences under its criminal law. The*

¹⁵⁵ *Ireland v. United Kingdom*, Application no. 5310/71

¹⁵⁶ Article 3 ECHR, available: http://www.echr.coe.int/Documents/Convention_ENG.pdf

¹⁵⁷ Article 5 UDHR, available: <http://www.un.org/en/documents/udhr/index.shtml#a5> and Article 7 ICCPR, available: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

¹⁵⁸ United Nations, 'Treaty Collection,'

https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en, Accessed: 27/06/2016

¹⁵⁹ Article 2(1) UNCAT, available: <http://www.un.org/documents/ga/res/39/a39r046.htm>

*same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.*¹⁶⁰ Furthermore article 30 UDHR states that *'Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein'*.¹⁶¹

The Law for Public Officials

Article 10(1) UNCAT states that *'Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.'*¹⁶² It could be assumed that when drafting this particular article of UNCAT the intention was for it to be very wide, so as to guarantee that a State cannot issue instructions to any State appointed personnel to invoke the use of torture. Furthermore, article 2(3) UNCAT which states that *'An order from a superior officer or a public authority may not be invoked as a justification of torture'*¹⁶³ ensures that both State officials and personnel cannot rationalize or defend the use of torture in whatever circumstances they may be presented with. Furthermore, article 10(2) states that *'Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such persons.'*¹⁶⁴ The UK has included these prohibitions in the Criminal Justice Act 1988¹⁶⁵ -

¹⁶⁰ Article 4(1) UNCAT, available: <http://www.un.org/documents/ga/res/39/a39r046.htm>

¹⁶¹ Article 30 UDHR, Available: http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf

¹⁶² Article 10(1) UNCAT, available: <http://www.un.org/documents/ga/res/39/a39r046.htm>

¹⁶³ Article 2(3) UNCAT, available: <http://www.un.org/documents/ga/res/39/a39r046.htm>

¹⁶⁴ Article 10(2) UNCAT, available: <http://www.un.org/documents/ga/res/39/a39r046.htm>

¹⁶⁵ Criminal Justice Act 1988, section 134, available:

<http://www.legislation.gov.uk/ukpga/1988/33/part/XI/crossheading/torture>

Section 134(1) of the act states that the location of where the torture is committed and the nationality of the torturer are both irrelevant, providing that the person committing the torture¹⁶⁶ upon another is a public official (or otherwise acting official), and uses torture whilst performing his official duties. Sub-section 2 of the act broadens the section further by stating that the offence of torture is committed where severe pain/suffering is inflicted with the instigation or consent of a public official. The involvement of a public official is clearly a key requirement of the prohibition against torture because this is what separates State torture and individual torture. A public official is presumably anyone involved with the investigation and/or prevention of terrorist offences that has some form of State authority, such as the military, police or an intelligence official.

Complicity

Complicity is focused on the assistance of an act, making the act possible to commit, as opposed to being the main offender. To be considered complicit there are several requirements: The first is that an illegal act is committed by one person (the principal offender) with the assistance of another (secondary offender), both of which must have done so through their own free will. The second is that the secondary offender has some knowledge of the offence, i.e. is not unaware that they are contributing to the offence taking place, and therefore need to be intent on participating in the act.¹⁶⁷ However, the secondary actor does not need to be 'effective' in their complicity, and need only affect the act itself.¹⁶⁸

¹⁶⁶ Described as when the person '*intentionally inflicts severe pain or suffering on another*'

¹⁶⁷ Jamie Gaskarth, 'Entangling Alliances? The UK's Complicity in Torture in the Global War on Terrorism' [2011] 87(4) *International Affairs* 945, 947

¹⁶⁸ Jamie Gaskarth, 'Entangling Alliances? The UK's Complicity in Torture in the Global War on Terrorism' [2011] 87(4) *International Affairs* 945, 949

The complicit actor can assist by one of two methods – either by engaging in the act with the principal offender or by inciting the principal offender to commit the act itself.¹⁶⁹ For example, if actor A held down a person whilst actor B used a knife to kill that person, actor A becomes the secondary offender complicit in the murder committed by actor B, the principle offender, providing that the secondary actor was aware of the principal offender’s intention. If actor A incited actor B to commit the murder, such as by verbally encouraging/ordering them to commit the offence or by providing the knife, they are complicit in the murder regardless of whether they actively participated in the murder or not.¹⁷⁰ Alternatively, omitting to act (and stop the offender) can also be viewed as encouragement, because the offender can gain confidence and moral support from the lack of discouragement.¹⁷¹ Furthermore, the presence of an individual that the principal offender of a crime looks up to can also be deemed as complicity. An example of this could be the presence of an officer at a military base – a similar scenario to the Abu Ghraib abuse scandal. It was alleged that when whilst the abuse was committed by military guards and contractors, other military personnel (such as former officer Gen Karpinski) and officials from the pentagon were aware of the abuse, and even appeared to encouraged it. Furthermore, Specialist Charles Graner Jr insisted that he was following the orders of military intelligence officers.¹⁷² The presence of such a person, particularly one of authority, spectating and not making an effort to curb such behaviour can also be viewed as encouragement for the principal offender.¹⁷³

¹⁶⁹ Jamie Gaskarth, ‘Entangling Alliances? The UK’s Complicity in Torture in the Global War on Terrorism’ [2011] 87(4) *International Affairs* 945, 946 - 947

¹⁷⁰Jamie Gaskarth, ‘Entangling Alliances? The UK’s Complicity in Torture in the Global War on Terrorism’ [2011] 87(4) *International Affairs* 945, 947

¹⁷¹Jamie Gaskarth, ‘Entangling Alliances? The UK’s Complicity in Torture in the Global War on Terrorism’ [2011] 87(4) *International Affairs* 945, 948

¹⁷² BBC News, ‘Q&A: Iraq prison abuse scandal’ (BBC News, 11/01/2008) www.news.bbc.co.uk/1/hi/world/americas/3701941.stm, Accessed: 24/01/2016

¹⁷³ Jamie Gaskarth, ‘Entangling Alliances? The UK’s Complicity in Torture in the Global War on Terrorism’ [2011] 87(4) *International Affairs* 945, 949

Subsequently, the issue of complicity can easily become very complicated, particularly when in relation to international law. UNCAT states that not only must States criminalise torture under its own domestic law, but that anything that constitutes complicity should be similarly prohibited: *'The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.'*¹⁷⁴ Furthermore, Art 2(3) UNCAT also states that *'An order from a superior officer or a public authority may not be invoked as a justification of torture.'*¹⁷⁵ There is no complicity equivalent to UNCAT in the ECHR.¹⁷⁶ Article 16 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts states that *'A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.'*¹⁷⁷ State complicity is different to individual complicity because States have a positive obligation to ensure that torture does not happen, hence State complicity takes on a wider meaning than individual complicity.¹⁷⁸ The most persuasive reason that complicity is viewed with the same seriousness as the offence itself is because it enables the offence in the first place. Particularly in the case of torture, if the information was unusable then torture would not be used – In essence if you cut the demand, the trade will cease to exist.

Applying the concept of complicity specifically to torture, there are multiple situations in which a State may become complicit in the use and/or production of torture evidence: Asking a State

¹⁷⁴ Article 4 UNCAT, available: <http://www.un.org/documents/ga/res/39/a39r046.htm>

¹⁷⁵ Article 2(3) UNCAT, available: <http://www.un.org/documents/ga/res/39/a39r046.htm>

¹⁷⁶ Joint Committee on Human Rights, 'Allegations of UK Complicity in Torture', Twenty-third Report of Session 2008–09, page 13, para. 23

¹⁷⁷ Responsibility of States for Internationally Wrongful Acts, Article 16, Available: http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf

¹⁷⁸ Joint Committee on Human Rights, 'Allegations of UK Complicity in Torture', Twenty-third Report of Session 2008–09, page 16, para. 34

known for its use of torture to question a person of interest, providing questions for the suspect to be asked, or sending UK official/s to question the suspect themselves before, during or after torture has been used on them; Where a UK official fails to certify the occurrence of torture, and does nothing to thwart its continued use; and accepting information from foreign States when failing to certify if the information has been obtained with the assistance of torture.¹⁷⁹ Where a State (A) communicates questions they want answers for to a foreign State, State (B), when State A knows or should know that State B may use torture so as to get answers to these questions, then this may be known as complicity by constructive knowledge, and is a violation of article 15 UNCAT.¹⁸⁰ Providing a person to be tortured, a place to torture, or otherwise providing the tools with which to torture also constitutes complicity, because the State that does this both enables and encourages the State to use torture – arguably making it the most direct form of complicity there is. The issue of complicity could essentially be broken down to the intention and knowledge of State A – In a relevant scenario, State A is guilty by association when it knows, should know or directly intends for torture to be used upon a person for the purposes of intelligence gathering. However it should also be noted that accepting tainted information after the fact without prior involvement is not a violation of law.

A further example of State complicity is providing information to a foreign State so that they may detain a person of interest, which may result in their torture, or their rendition to another State which does practise torture.¹⁸¹ Extraordinary rendition is prohibited under article 3(1) UNCAT which states that '*No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger*

¹⁷⁹ Joint Committee on Human Rights, 'Allegations of UK Complicity in Torture', Twenty-third Report of Session 2008–09, page 12, para. 17

¹⁸⁰ Matt Pollard, 'Rotten Fruit: State Solicitation, Acceptance and Use of Information Obtained Through Torture by Another State' [2005] 23 *Netherlands Quarterly of Human Rights* 349, 356

¹⁸¹ Joint Committee on Human Rights, 'Allegations of UK Complicity in Torture', Twenty-third Report of Session 2008–09, page 12, para. 17

of being subjected to torture.¹⁸² In *Soering v UK*,¹⁸³ the claimant objected to his extradition to the US for the crime of murder, because his conviction could have resulted in the penalty of capital punishment upon his conviction. He successfully claimed that America's 'death row' would have such an impact on his mental wellbeing that it would constitute torture under Art. 3 ECHR.

An example of alleged UK complicity is the case of Yunus Rahmantullah. Yunus Rahmantullah, a Pakistani citizen, was detained at Abu Ghraib and Bagram Airbase before being released without charge in 2014.¹⁸⁴ He brought a case to the UK High Court the same year, alleging that UK forces had been complicit in his torture by submitting him to be rendered by US forces.¹⁸⁵ The UK government claimed that the relationship between the UK and the US could suffer if he was allowed to claim for damages in court, which was dismissed by the Court.¹⁸⁶ This raises the potential issue of whether the UK has 'kept their hands clean' by not being directly involved in torture, but by enabling other States to torture whilst obtaining the information they wanted.¹⁸⁷ It could be said in this scenario that complicity in torture is the best of both – the State can play dumb with clean conscience and yet still gain whatever information the victim has to offer.

Absolute and Non-Derogable

¹⁸² Article 3(1) UNCAT, available: <http://www.un.org/documents/ga/res/39/a39r046.htm>

¹⁸³ *Soering v. United Kingdom*, Application no. 14038/88

¹⁸⁴ Reprieve, 'Yunus Rahmatullah', www.reprieve.org.uk/case-study/yunus-rahmatullah/, Accessed: 10/11/2015

¹⁸⁵ Mary Manjikian, 'But My Hands Are Clean: The Ethics of Intelligence Sharing and the Problem of Complicity' [2015] 28(4) *International Journal of Intelligence and Counter Intelligence* 692, 693 - 694

¹⁸⁶ Richard Norton-Taylor, 'Man allegedly tortured by US and UK troops wins right to sue for damages' (The Guardian, 19/11/2014) www.theguardian.com/law/2014/nov/19/man-allegedly-tortured-us-uk-troops-wins-right-sue-damages, Accessed: 10/11/2015

¹⁸⁷ Mary Manjikian, 'But My Hands Are Clean: The Ethics of Intelligence Sharing and the Problem of Complicity' [2015] 28(4) *International Journal of Intelligence and Counter Intelligence* 692, 694

Article 15(2) ECHR states that *'No derogation... from Articles 3... shall be made under this provision.'*¹⁸⁸ Even in circumstances where there is the substantial threat of an imminent terrorist attack, or the suspect is deemed a threat to the public, *'[t]he Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct... Article 3... makes no provision for exceptions and no derogation from it is permissible under article 15... even in the event of a public emergency to the life of the nation.'*¹⁸⁹ This is further backed up by *Chahal v. United Kingdom*¹⁹⁰ which states that the use of torture and/or inhumane or degrading treatment is absolutely prohibited under any circumstances. Likewise Article 2 (2) of UNCAT states that *'No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.'*¹⁹¹ A State cannot justify a derogation from the prohibition of torture, therefore making the prohibition an absolute and non-derogable right. The prohibition against torture is part of customary international law and binds all States.¹⁹² It is also a non-derogable peremptory norm with an overriding *'jus cogens'* status in international law.¹⁹³

Defences

Following the events of 9/11, there has been recent academic debate over the possible use of defences for the use torture, mostly discussed in the context of emergency situations such as

¹⁸⁸ Article 15 (2) ECHR, Available: http://www.echr.coe.int/Documents/Convention_ENG.pdf, 13

¹⁸⁹ *Chahal v. United Kingdom*, in Javaid Rehman, *International Human Rights Law* (2nd Edition) Longman: Harlow, 2010, 191

¹⁹⁰ *Chahal v. United Kingdom*, Application no. 22414/93

¹⁹¹ Article 2(2) UNCAT, available: <http://www.un.org/documents/ga/res/39/a39r046.htm>

¹⁹² Matt Pollard, 'Rotten Fruit: State Solicitation, Acceptance and Use of Information Obtained Through Torture by Another State' [2005] 23 *Netherlands Quarterly of Human Rights* 349, 352

¹⁹³ Matt Pollard, 'Rotten Fruit: State Solicitation, Acceptance and Use of Information Obtained Through Torture by Another State' [2005] 23 *Netherlands Quarterly of Human Rights* 349, 353

the ‘ticking bomb’. The two main defences that are usually discussed are necessity and self-defence, contained within the Rome Statute of the International Criminal Court. Article 31(1)(d) ICC St states that the defence of necessity is where *‘The conduct which is alleged to constitute a crime... has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided.’*¹⁹⁴ This defence is concerned with the use of force against a person that is innocent. If that person is a suspected terrorist without prior conviction, then that person may be considered, in a legal sense, as an innocent. However, if the person does have a recent or prior conviction, then they may not be considered innocent. Regardless of conviction, someone suspected of terrorist offences is not someone that the torturer would consider to be innocent at the time the torture takes place.¹⁹⁵ The main issue with this defence is that there is no guarantee that any information gained would be of any use to the torturer in terms of preventing an imminent emergency scenario.¹⁹⁶ This defence will be further discussed in chapter four.

Article 31(1)(c) ICC St states that the defence of self-defence is where *‘The person acts reasonably to defend himself or herself or another person... which is essential for the survival of the person or another person... against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person.’*¹⁹⁷ Using self-defence as a defence to the use of torture would be problematic, because one of the key elements to this

¹⁹⁴ Article 31(1)(d) ICC St., Available: http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf, Page 20

¹⁹⁵ Paola Gaeta, ‘May Necessity be Available as a Defence for Torture in the Interrogation of Suspected Terrorists?’ [2004] *Journal of International Criminal Justice* 785, 791

¹⁹⁶ Florian Jessberger ‘Bad Torture – Good Torture? What International Criminal Lawyers May Learn from the Recent Trial of Police Officers in Germany’ [2003] *Journal of International Criminal Justice* 1059, 1070

¹⁹⁷ Article 31(1)(c) ICC St., Available: http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf, 20

defence is that the person using the torture must feel threatened by the person they are using torture against. However, it would be difficult to justify this, because the person being tortured is not specifically a threat to the person using the torture, and certainly not at the moment it takes place.¹⁹⁸

The use of either of these defences by a State or intelligence agency would be problematic, even in emergency scenarios, because the torture used is difficult to justify.¹⁹⁹ This is because for both defences, it must be established that the force used on the person was reasonable. For this to be reasonable, it must be appropriate and the harm must not be greater than the threat posed. The torturer would need to be sure that the suspect has both the information that they want, and that the suspect will divulge this information if torture is used.

The Exclusionary Rule

The exclusionary rule is a term used to describe the inadmissibility of evidence obtained by torture within formal proceedings, and applies regardless of where the torture took place, or the perpetrators nationality.²⁰⁰ Essentially, because the act of torture itself is non-derogable and has no exceptions whatsoever, the use of evidence obtained by torture cannot be used regardless of the circumstances.²⁰¹ The reason for this would appear to be two-fold. Firstly, evidence obtained by torture is considered infamously unreliable. Therefore, it would be extremely unfair for a defendant to incriminate themselves with information given under duress, when

¹⁹⁸ Fritz Allhoff, 'Torture Warrants, Self-Defense and Necessity [2012-2013] 11 *Cardozo Public Law Policy & Ethics Journal* 421, 436

¹⁹⁹ Fritz Allhoff, 'Torture Warrants, Self-Defense and Necessity [2012-2013] 11 *Cardozo Public Law Policy & Ethics Journal* 421

²⁰⁰ Matt Pollard, 'Rotten Fruit: State Solicitation, Acceptance and Use of Information Obtained Through Torture by Another State' [2005] 23 *Netherlands Quarterly of Human Rights* 349, 357

²⁰¹ Matt Pollard, 'Rotten Fruit: State Solicitation, Acceptance and Use of Information Obtained Through Torture by Another State' [2005] 23 *Netherlands Quarterly of Human Rights* 349, 357

such information could very well be false or misleading. Secondly it prevents those that use torture benefitting from such action²⁰² – it would not be fair for a Court to accept evidence that was obtained through the abuse of such a fundamental human right. This is covered within Article 15 UNCAT which states that ‘*Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.*’²⁰³

Article 15 UNCAT contains several components which must be clarified. The meaning of the word ‘established’ could initially be construed as being rather broad, however the Committee against Torture has adopted a reasonably restrictive approach.²⁰⁴ To establish the use of torture is quite challenging, both for the accused and the prosecution, because proving that torture has or has not been used in the gathering of evidence against the accused is often one word against the other. It becomes particularly difficult to establish when the evidence has been provided by a third party, namely a foreign State. The committee against Torture held in *P.E. v France*²⁰⁵ that the applicant (i.e. the tortured) must determine that their claim has some basis, although the burden of proof is on the State.²⁰⁶ This is further confirmed in *G.K. v Switzerland*.²⁰⁷

The phrases ‘any statement’ and ‘any proceedings’ are both very wide, therefore protecting this right regardless of who made the statement or what the proceedings are.²⁰⁸ Despite the Committee Against Torture often referring specifically to judicial proceedings, it is for the most

²⁰² Tobias Thienel, ‘The Admissibility of Evidence Obtained by Torture under International Law’ [2006] 17(2) *The European Journal of International Law* 349, 356 - 357

²⁰³ Article 15 UNCAT, available: <http://www.un.org/documents/ga/res/39/a39r046.htm>

²⁰⁴ Manfred Mowak & Elizabeth McArthur, *The United Nations Convention against Torture: A Commentary*, Oxford: Oxford University Press, 2008, 532 -535

²⁰⁵ *P.E. v. France*, Communication No. 193/2001

²⁰⁶ Manfred Mowak & Elizabeth McArthur, *The United Nations Convention against Torture: A Commentary*, Oxford University Press: Oxford, 2008, 533

²⁰⁷ *G.K. v. Switzerland*, Communication No. 219/2002

²⁰⁸ Tobias Thienel ‘The Admissibility of Evidence Obtained by Torture under International Law’ [2006] 17(2) *The European Journal of International Law* 349, 357 - 358

part considered that ‘any proceedings’ refers to any formal decision making that requires the involvement of State officials. There is no indication that there has been a narrow interpretation of this phrase, so it can only be presumed that this article is not limited to the Court or other judicial proceedings.²⁰⁹ ‘Any proceedings’ essentially refers to any (formal) proceedings in which the State has jurisdiction over, including for example extradition proceedings, and is not just limited to court proceedings.²¹⁰

Whereas article 15 UNCAT clearly applies to the use of torture, there are questions as to whether it also applies to the use of cruel, inhumane, or degrading treatment. Article 16(1) UNCAT states that ‘...*In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.*’²¹¹ This article does not mention article 15, which indicates that statements made as a result of cruel, inhumane or degrading treatment may not be prohibited under article 15, unlike other articles contained within the convention.

However in the ECHR case of *Gafgen v. Germany*,²¹² it was decided that the use of inhumane and degrading treatment to obtain evidence would also automatically violate the right to a fair trial. In this case the applicant kidnapped the 11 year old son of a wealthy family and demanded 1 million euros in ransom from the child’s family in exchange for his safe return. The applicant was arrested after picking up the ransom money, but refused to disclose the location of the child during questioning by police. The police were under the impression that the child’s life was in imminent danger, and threatened the applicant with torture unless he revealed where the child was. The applicant gave the information for fear that the police would follow through

²⁰⁹ Matt Pollard, ‘Rotten Fruit: State Solicitation, Acceptance and Use of Information Obtained Through Torture by Another State’ [2005] 23 *Netherlands Quarterly of Human Rights* 349, 358

²¹⁰ *P.E. v. France*, Communication No 193/2001, para 3.3 and; *G.K. v. Switzerland*, Communication No. 219/2002, para 6.10

²¹¹ Article 16(1) UNCAT, available: <http://www.un.org/documents/ga/res/39/a39r046.htm>

²¹² *Gafgen v. Germany*, Application no. 22978/05

with their threats, but the child was unfortunately already dead when he was found. The applicant later admitted to kidnapping and killing the boy.²¹³ The applicant claimed that the police officers had breached his rights under article 3 ECHR and article 6 ECHR. The European Court of Human Rights (ECtHR) found that the officer's conduct did not amount to torture, but did amount to inhumane treatment.²¹⁴

The Use of Information Obtained by Torture

Information obtained by the use of torture is often referred to as 'fruits of the poisonous tree', the idea being that such information cannot be trusted because of its origins: "*if the source of the evidence (the tree) is tainted, then anything deriving from it (the fruit) bears the same flaw.*"²¹⁵ It appears to be one of the main principles behind the right to a fair trial, as 'flawed' evidence would not be fair to the accused. The main articles that concern the right to a fair trial are article 6 ECHR, article 14 ICCPR and article 15 UNCAT. These articles seek to ensure that any evidence or confession the accused gives that may indicate their guilt is done so of their own free will – i.e. that they have not been compelled to admit information because they are under the duress of torture. It is safe to presume that one of the main reasons for this is because confessions are notoriously unreliable if they have been obtained under the force of torture.²¹⁶

²¹³ *Gafgen v. Germany*, Application no. 22978/05, para 10 - 23

²¹⁴ *Gafgen v. Germany*, Application no. 22978/05, para 79

²¹⁵ Florian Geyer (2007) 'Fruit of the Poisonous Tree: Member States' Indirect Use of Extraordinary Rendition and the EU Counter-terrorism Strategy' *CEPS Working Document No. 263/April 2007*, 1

²¹⁶ Manfred Mowak & Elizabeth McArthur, *The United Nations Convention against Torture: A Commentary*, Oxford University Press: Oxford, 2008, 504

The ECtHR does not specify the types of evidence that are admissible or inadmissible leaving national Courts to make this decision themselves, providing such decisions are in accordance with ECHR principles and conventions:²¹⁷

*'It is not the role of the Court to determine... whether particular types of evidence—for example, unlawfully obtained evidence—may be admissible... The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the 'unlawfulness' in question and, where violation of another Convention right is concerned, the nature of the violation found.'*²¹⁸

Evidence obtained contravene to the Convention does not guarantee that evidence being excluded – the evidence only becomes inadmissible if said evidence is deemed unfair. The exception to this is where the evidence has been obtained contrary to article 3 through the use of torture,²¹⁹ where the evidence is omitted regardless of how convincing the evidence may be.²²⁰

The UK Courts have traditionally accepted evidence that is obtained though 'miscellaneous' methods. As in line with the ECtHR, evidence is not omitted from proceedings unless it is deemed to be overly unfair to the defendant, regardless of the way it was obtained.²²¹ An exception is made however in regards to evidence obtained by torture. The UK case of *A and Others v Secretary of State for the Home Department*²²² is a key case concerning the UK stance

²¹⁷ Yuval Merin, 'Lost between the Fruits and the Tree: In Search of a Coherent Theoretical Model for the Exclusion of Derivative Evidence' [2015] 18 *New Criminal Law Review* 273, 302 - 303

²¹⁸ *Allan v. United Kingdom*, App. No. 48539/99, 36 Eur. H.R. Rep. 143, 155–56 (2003)

²¹⁹ *Jalloh v Germany*, Application no. 54810/00, para 108 - 122

²²⁰ Yuval Merin, 'Lost between the Fruits and the Tree: In Search of a Coherent Theoretical Model for the Exclusion of Derivative Evidence' [2015] 18 *New Criminal Law Review* 273, 303

²²¹ Nigel Cooper 'The Fruit of the Poisoned Tree – The Admissibility of Evidence in Civil Cases', available: <http://www.bgja.org.uk/wp-content/uploads/2014/02/NigelCooper.pdf>, 2

²²² *A and Others v. Secretary of State for the Home Department [2004] EWCA Civ 1123*

on the use of evidence obtained by torture. In this case, the appellants claimed that evidence used against them had been obtained through the use of torture by a foreign State,²²³ without the complicity of the UK. Shortly after 9/11, the UK government passed that Anti-Terrorism Crime and Security Act 2001. Section 21 of this act allows the Home Secretary to authorise, where there is a belief that there is a risk to national security, the indefinite detention of a foreign national without charge or trial.²²⁴ The appeals process is through the Special Immigrations Appeals Court (SIAC), with further appeals directed to the Court of Appeal. The appellants in this case consisted of 10 foreign nationals that were suspected of having terrorist connections to Al Qaida. The appellants alleged that some of the evidence heard by the Home Secretary had been obtained by third party torture, and had already attempted to appeal to the SIAC.²²⁵

In the 2004 Court of Appeal case, the Court dismissed the appeal and ruled that English legislation would permit the use of tainted evidence, providing that the torture was not in any way perpetrated or connected to any UK officials. This decision was made by only considering domestic English law, holding that article 15 UNCAT was not part of domestic law.²²⁶ The Committee Against Torture did not consider this conclusion to be consistent with UNCAT.²²⁷ Furthermore, it was considered that the use of third party torture evidence would not violate article 6(1) ECHR, unless an appeal was mounted by the accused against the SIAC, as the use of such evidence would ensure that the accused would not have a fair trial.²²⁸ However, the

²²³ John Duberstein, 'Excluding Torture: A Comparison of the British and American Approaches to Evidence Obtained by Third Party Torture' [2006-2007] 32 *North Carolina Journal of International Law* 159

²²⁴ Rosemary Pattenden, 'Evidence Supplied by a Foreign State Which May Have Been Obtained Under Torture—United Kingdom (England)' [2005] 9 *The International Journal of Evidence & Proof* 55, 55

²²⁵ Rosemary Pattenden, 'Evidence Supplied by a Foreign State Which May Have Been Obtained Under Torture—United Kingdom (England)' [2005] 9 *The International Journal of Evidence & Proof* 55, 55 - 56

²²⁶ Matt Pollard, 'Rotten Fruit: State Solicitation, Acceptance and Use of Information Obtained Through Torture by Another State' [2005] 23 *Netherlands Quarterly of Human Rights* 349, 360

²²⁷ Matt Pollard, 'Rotten Fruit: State Solicitation, Acceptance and Use of Information Obtained Through Torture by Another State' [2005] 23 *Netherlands Quarterly of Human Rights* 349, 360

²²⁸ Rosemary Pattenden, 'Evidence Supplied by a Foreign State Which May Have Been Obtained Under Torture—United Kingdom (England)' [2005] 9 *The International Journal of Evidence & Proof* 55, 56

appellants appealed against the Court of Appeal judgement, and the case was reviewed by the House of Lords who allowed the appeal.²²⁹ The Court held that the use of tainted evidence should be prohibited in trial, because the English common law had for so long objected to its use. Furthermore it was considered that the use of such evidence would be contravene to some of the most fundamental human rights *jus cogens* status. In both cases, the Court considered on whom the burden of proof resides in situations where tainted evidence is used. Whereas the Court of Appeal considered the burden of proof to be with the person the evidence is being used against, the House of Lords decided that this would be unfair, particularly because this person would not have access to the same scale of investigative powers as the State. This would therefore violate the right against self-incrimination.²³⁰

A further case is *Othman (Abu Qatada) v. The United Kingdom*.²³¹ In this case, the applicant had refugee status in the UK after claiming to have been subject to torture by authorities in Jordan. Whilst living in the UK in 1999 the applicant was convicted of terror-related offences in Jordan. The applicant was detained in 2002 in the UK under the Anti-terrorism, Crime and Security Act 2001, before being made subject to a control order in 2005 under the Prevention of Terrorism Act 2005, when the 2001 act was repealed. He was served with a notice of intention to deport whilst attempting to appeal the control order. He appealed the deportation order, claiming that he would be at risk of indefinite detention, torture, and an unfair trial due to the use of evidence obtained by the torture of his co-defendants. SIAC dismissed his appeal, which whilst was partially rejected by the Court of Appeal, was upheld by the House of Lords. The applicant appealed to the ECtHR under articles 3, 5, 6 and 13. The court dismissed article 3, deeming it unlikely that the applicant would be subject to torture in Jordan, in part because

²²⁹ *A and Others v. Secretary of State for the Home Department (No. 2)*[2005] UKHL 71

²³⁰ Tobias Thienel, 'The Admissibility of Evidence Obtained by Torture under International Law' [2006] 17(2) *The European Journal of International Law* 349, 353 - 354

²³¹ *Othman (Abu Qatada) v. The United Kingdom*, Application no. 8139/09

of his high-profile, and partly because of diplomatic assurances between the UK and Jordan that the applicant would not be subject to torture if he was deported. However, the Court found that the use of evidence obtained by torture in his retrial would be contrary to article 6 of the convention, and that there was a possibility of this happening if he was returned to Jordan.

Both article 14(3)(e) of the ICCPR and article 6(3)(d) ECHR state that anyone subject to criminal charges against them is entitled '*To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.*'²³² Quite simply, if the accused is or has been under the duress of torture, and that is how the evidence against him has been obtained, then the accused cannot examine the witnesses against him under the same conditions as himself. It would appear that the aim of these articles is to ensure that the accused is on an equal footing with his accusers. Furthermore, Article 14(3)(g) ICCPR states that anyone facing a criminal charge shall '*Not to be compelled to testify against himself or to confess guilt.*'²³³ It could be argued that if evidence against the accused has been obtained through the torture of the accused, then he has been manipulated to testify against himself. This sort of evidence is concerned with the right against self-incrimination. Although this isn't explicitly mentioned by Article 6 ECHR, it is implied in Article 6 ECHR via Article 14(3)(g) ICCPR.²³⁴ Furthermore the right against self-incrimination is protected under Article 15 UNCAT.

Under Art 6(1) ECHR, evidence that has been obtained by the use of torture that is for use against a third party, i.e. not the person that was tortured, is not contrary to the right against self-incrimination. This is because in this scenario, the evidence does not incriminate the person

²³² Article 14(3)(e) ICCPR, available: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> and; Article 6(3)(d) ECHR, available: http://www.echr.coe.int/Documents/Convention_ENG.pdf

²³³ Article 14(3)(g) ICCPR, available: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

²³⁴ Tobias Thienel, 'The Admissibility of Evidence Obtained by Torture under International Law' [2006] 17(2) *The European Journal of International Law* 349, 356

tortured²³⁵. Article 6(1) ECHR, which states that ‘*in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing... by an independent and impartial tribunal established by law...*’²³⁶ It does however still demand a fair trial, which is clearly violated through unreliable evidence.²³⁷ Article 6(3) ECHR is also potentially violated in this respect because the ability for the accused to raise a valuable defence against the person that made the statement under torture is possibly damaged.²³⁸ Furthermore, article 6 ECHR is reinforced by article 15 UNCAT.²³⁹ Under article 15 UNCAT, the committee stated in *P.E. v France* that ‘*It must be established that the statement cited as evidence in the proceedings in question was obtained as a result of torture*’²⁴⁰ and that ‘*The statement in question must be an essential element of the charges brought against the author of the communication.*’²⁴¹

This chapter has established that torture, inhumane and degrading treatment is prohibited, as are any acts that seek to undermine that prohibition, such as complicity in torture, or the admission of torture evidence. In addition, the prohibition is absolute, meaning that there are no defences to torture or complicit acts. Subsequently, it can only be concluded that the prohibition was designed to be broad, so as to ensure that a State could never again justify or excuse its use of torture. The third chapter of this thesis will begin by examining the history of judicial torture, beginning with the Roman Empire, which will demonstrate how judicial torture was used and why it became defunct. This will determine how the current prohibitions against

²³⁵ Tobias Thienel, ‘The Admissibility of Evidence Obtained by Torture under International Law’ [2006] 17(2) *The European Journal of International Law* 349, 357 - 358

²³⁶ Article 6(1) ECHR, available: http://www.echr.coe.int/Documents/Convention_ENG.pdf

²³⁷ Tobias Thienel, ‘The Admissibility of Evidence Obtained by Torture under International Law’ [2006] 17(2) *The European Journal of International Law* 349, 358

²³⁸ Tobias Thienel, ‘The Admissibility of Evidence Obtained by Torture under International Law’ [2006] 17(2) *The European Journal of International Law* 349, 358

²³⁹ Tobias Thienel, ‘The Admissibility of Evidence Obtained by Torture under International Law’ [2006] 17(2) *The European Journal of International Law* 349, 359

²⁴⁰ *P.E. v. France*, Communication No 193/2001, para 3.4

²⁴¹ *P.E. v. France*, Communication No 193/2001, para 3.4

to use of torture came about, and why it is so significant in contrast with the use of torture post-9/11. Furthermore, this chapter will use Michel Foucault²⁴² and Matthew Hannah²⁴³ to introduce theoretical discussion of the connection between torture and terrorism

²⁴² Michel Foucault, *Discipline and Punish* (Vintage Books 2nd ed.), Random House: New York, 1975

²⁴³ Matthew Hannah, 'Torture and the Ticking Bomb: The War on Terrorism as a Geographical Imagination of Power/ Knowledge' [2006] 96(3) *Annals of the Association of American Geographers* 622

CHAPTER THREE: Historical and Theoretical Torture

The Use of Torture Pre-UNCAT

Torture is by no means a modern phenomenon. Judicial torture was used by the Romans, inflicted against slaves in both criminal and civil cases to ensure that their testimony was genuine.²⁴⁴ Torture was only to be used against slaves because the idea was that slaves would always testify in line with their master's wishes – in essence, slaves could not be trusted to testify the truth without a stronger encouragement than that of their master.²⁴⁵ The Roman Courts however did not allow a case to rely entirely upon such testimony – such testimony was instead only used in conjunction with other evidence so as to strengthen the overall argument.²⁴⁶ Eventually Roman society changed and split into two groups, consisting of honestiores and humiliores. Honestiores, the governing class were still exempt from torture. Everyone else (the humiliores) however became susceptible to torture during interrogation.²⁴⁷ Finally, as the Roman criminal code changed and evolved, even the honestiores were subject to torture.²⁴⁸ Although this system died out at the fall of the Roman Empire, a similar system did re-emerge in Europe in the 13th century.²⁴⁹ Europe then became dependant on confessions

²⁴⁴ Matthew Lippman, 'The Development and Drafting of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' [1994] 17 *Boston College International and Comparative Law Review* 275, 275

²⁴⁵ Abbott Lawrence Lowell, 'The Judicial Use of Torture' [1897] 11(4) *Harvard Law Review* 220, 220

²⁴⁶ Matthew Lippman, 'The Development and Drafting of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' [1994] 17 *Boston College International and Comparative Law Review* 275, 276

²⁴⁷ Lisa Hajjar, 'Does Torture Work? A Sociolegal Assessment of the Practice in Historical and Global Perspective' [2009] 5(3) *Annual Review of Law and Social Science* 311, 318

²⁴⁸ Lisa Hajjar, 'Does Torture Work? A Sociolegal Assessment of the Practice in Historical and Global Perspective' [2009] 5(3) *Annual Review of Law and Social Science* 311, 318

²⁴⁹ Abbott Lawrence Lowell, 'The Judicial Use of Torture' [1897] 11(4) *Harvard Law Review* 220, 223

forcibly given through the use of torture, up until the 18th century.²⁵⁰ The appeal of judicial torture emerged simply because it was easy – when the theory of proof became standardized, extracting a confession from the accused was a much simpler way for the judge/prosecution to achieve a result, rather than attempting to find the often necessary two eye witnesses and/or evidence that did not necessarily exist or was hard to obtain.²⁵¹

In England, the use of judicial torture was less common than in the rest of Europe. Prior to the Lateran Council of 1215, trials relied on the result of ‘ordeals’ of fire or water, performed in front of a Priest. The brutality of ordeals appears to depend on both the nature of the case itself and the prior suspicion of the accused’s guilt.²⁵² Ordeal was abolished in 1215 when Priests were forbidden from being involved in such a practise, and legislated against in 1219 to be replaced by trial by jury.²⁵³ The rejection of torture in English common law is a distinguishing feature,²⁵⁴ as shown by the signing of the Magna Carta in 1215, which contained a clause on prohibiting its use.²⁵⁵ The use of torture on the continent is explicable because of the requirement for two eyewitnesses for the most serious crimes, whereas in England, a suspect could be sentenced to death for his crimes on circumstantial evidence. Circumstantial evidence on the continent could only be used to justify using torture on the accused, and not to convict. England therefore used less torture than the rest of the continent.²⁵⁶ Torture was regarded as a ‘foreign practice’, and because there was no need for its use, torture was prohibited by common law.²⁵⁷

²⁵⁰ Matthew Lippman, ‘The Development and Drafting of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ [1994] 17 *Boston College International and Comparative Law Review* 275, 279

²⁵¹ Abbott Lawrence Lowell, ‘The Judicial Use of Torture’ [1897] 11(4) *Harvard Law Review* 220, 224 - 225

²⁵² Danny Friedman, ‘Torture and the Common Law’ [2006] 2 *European Human Rights Law Review* 180, 181

²⁵³ Danny Friedman, ‘Torture and the Common Law’ [2006] 2 *European Human Rights Law Review* 180, 182

²⁵⁴ *A and Others v. Secretary of State for the Home Department (No. 2)* [2004] EWCA Civ 1123, [2005] 1 WLR 414

²⁵⁵ Danny Friedman, ‘Torture and the Common Law’ [2006] 2 *European Human Rights Law Review* 180, 184

²⁵⁶ Danny Friedman, ‘Torture and the Common Law’ [2006] 2 *European Human Rights Law Review* 180, 182

²⁵⁷ Danny Friedman, ‘Torture and the Common Law’ [2006] 2 *European Human Rights Law Review* 180, 183

In England, the use of torture against suspected criminals was most prevalent between the years of 1540 and 1640, where the Privy Council or Monarch ordered its use on more than 80 occasions.²⁵⁸ During the Tudor and Stuart periods the Privy Council appeared to ensure that any torture committed was done so officially, with torture warrants viewed as part of royal prerogative²⁵⁹. However, in Felton's Case in 1628 it was decided that there was no law recognising the legal use of torture.²⁶⁰ After Felton's Case, the Privy Council never issued another torture warrant. Judicially approved torture was not used in England after 1640 when the King followed suit and stopped issuing torture warrants.²⁶¹ By 1708 torture was also prohibited in Scotland.²⁶² Torture does not appear to have been used as a method of interrogation or extracting confession in Britain since the 16th century, and appears only to have been used as a punishment or as a method of execution. Torture stopped being used as punishment during the 18th century, because the emphasis shifted on to rehabilitating and 'correcting' the behaviours of criminals,²⁶³ as opposed to punishing them - This is something discussed by Foucault, and will be developed later in this chapter. Although it is well known that convicted criminal's endured hard physical punishment in Victorian England, whether this amounts to torture by today's definition is an open question.

Despite this, the use of torture is not limited to medieval England or ancient Rome, and has instead been used during times of war throughout the 1900's. Torture was used in World War

²⁵⁸ Alexander Horne, 'Torture - A Short History of its Prohibition and Re-emergence' [2009] 14 *Judicial Review* 155, 156

²⁵⁹ Danny Friedman, 'Torture and the Common Law' [2006] 2 *European Human Rights Law Review* 180, 188

²⁶⁰ Alexander Horne, 'Torture - A Short History of its Prohibition and Re-emergence' [2009] 14 *Judicial Review* 155, 156

²⁶¹ Alexander Horne, 'Torture - A Short History of its Prohibition and Re-emergence' [2009] 14 *Judicial Review* 155, 157

²⁶² Alexander Horne, 'Torture - A Short History of its Prohibition and Re-emergence' [2009] 14 *Judicial Review* 155, 157

²⁶³ Michel Foucault, *Discipline and Punish* (Vintage Books 2nd ed.), Random House: New York, 1975, 8 - 10

II against those that opposed the advancement of Nazi Germany.²⁶⁴ However, the most infamous torture was committed in the concentration camps across Europe run by Nazi Germany. The purpose of this torture was not traditional, in the sense that its use was not judicial or interrogational. The use of torture in these circumstances, against unarmed civilians, is debatably some of the most shocking and cruel because there was no ‘higher purpose’ or justification for its use. The torture used within concentration camps was not just down to the conditions in which prisoners were forced to endure, such as exposure and deprivation, but also through the brutality of officials that would met out as punishment whenever they saw fit.²⁶⁵ In addition to the conditions, some were also used as human subjects in medical experimentation, routinely carried out without pain relief or other ethical safeguards, resulting in mutilation and death for participants.²⁶⁶

When the United Nations (UN) was formed in 1945 there was a perceived need for the creation of a bill of rights because of what happened throughout World War II.²⁶⁷ This subsequently spearheaded the introduction of international human rights and fundamental freedoms, beginning with the Universal Declaration of Human Rights (UDHR) in 1948.²⁶⁸ Several years later the Council of Europe drafted the European Convention of Human Rights, with freedom from torture being one of its core fundamental rights. These rights were designed to try and prevent the mass use of war crimes, including torture, which was seen throughout World War

²⁶⁴ Matthew Lippman, ‘The Development and Drafting of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ [1994] 17 *Boston College International and Comparative Law Review* 275, 286

²⁶⁵ Matthew Lippman, ‘The Development and Drafting of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ [1994] 17 *Boston College International and Comparative Law Review* 275, 286

²⁶⁶ Matthew Lippman, ‘The Development and Drafting of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ [1994] 17 *Boston College International and Comparative Law Review* 275, 287

²⁶⁷ Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent*, University of Pennsylvania Press: Philadelphia, 1999, 1

²⁶⁸ Matthew Lippman, ‘The Development and Drafting of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ [1994] 17 *Boston College International and Comparative Law Review* 275, 290

II. However, torture has continued to be used since this time, both within Europe and beyond. Torture was a practise used by the Central Intelligence Agency (CIA) during the ‘Cold War’ beginning in 1953,²⁶⁹ and from 1954 torture was used by the French against suspected terrorists and members of the Algerian National Liberation Front, with the aim of extracting confessions during the Algerian conflict.²⁷⁰ Between 1971 and 1972 British forces detained over 3000 people, and were held to have used inhumane, cruel and degrading against 14 members of the Irish Republican Army (IRA).²⁷¹ Clearly, there was a need for further international law to prohibit the use of torture. In 1984, the UN Convention Against Torture (UNCAT) was formed with the aim of protecting the right to freedom from torture and established its own body, the Committee against Torture, to observe State obligations and the protection of this right.²⁷² To have a convention to specifically manage the prohibition of torture, demonstrates just how serious the use of torture is considered internationally.

Torture Post 9/11

The many and varied human rights treaties prohibiting torture do not appear to have achieved their aims at preventing the use of torture by the State or State agents. The use of torture appears to have ‘re-emerged’ in the aftermath of the 9/11 attacks on the World Trade centre and the Pentagon by al-Qaida in September 2001. For example, in 2002 the then Secretary of Defense

²⁶⁹ Michael Otterman, *American Torture: From the Cold War to Abu Ghraib and Beyond*, Melbourne University Press: Carlton, 2007, 11

²⁷⁰ Matthew Lippman, ‘The Development and Drafting of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ [1994] 17 *Boston College International and Comparative Law Review* 275, 290

²⁷¹ Matthew Lippman, ‘The Development and Drafting of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ [1994] 17 *Boston College International and Comparative Law Review* 275, 291; *Ireland v. United Kingdom*, Application no. 5310/71

²⁷² Paola Gaeta, ‘When is the Involvement of State Officials a Requirement for the Crime of Torture’ [2008] 6 *Journal of International Criminal Justice* 183, 187

Donald Rumsfeld signed an Action Memo of Counter-Resistance Techniques,²⁷³ and approved the use of new military interrogation techniques to use against those suspected of committing or planning terrorist related offences. Some of these techniques have gained a reputation for amounting to torture or inhumane, cruel or degrading treatment, with the use of ‘waterboarding’²⁷⁴ gaining particular infamy. Some of the practises used include sleep deprivation, forced nudity, slamming detainees against walls, rectal rehydration, prolonged used of stress positions, ice water baths, threats of death to the detainee and threatening to harm members of the detainees family.²⁷⁵ A further technique used by the CIA at COBALT is known as a *“rough takedown,” in which approximately five CIA officers would scream at a detainee, drag him outside of his cell, cut his clothes off, and secure him with Mylar tape. The detainee would then be hooded and dragged up and down a long corridor while being slapped and punched.*²⁷⁶

Also came the emergence of ‘extraordinary rendition,’ which is where a person is transferred from a State that is legally obliged to prevent torture being used, to a State that does not have restrictions concerning the use of torture. Rendition is understood as *“‘extraordinary’ when it is not executed in accordance with the law applying in the State where the person was situated at the time of seizure.*²⁷⁷ Although the term extraordinary rendition is relatively new, the concept itself is not. During the reign of King Edward II (1307 – 1327), King Edward and the

²⁷³ Philippe Sands, *Torture Team – Deception, Cruelty and the Compromise of Law*, Penguin Books: London, 2008, 5

²⁷⁴ ‘Waterboarding... involves strapping down a detainee, covering their face with a cloth and then pouring water over the nose and mouth to create a terrifying sensation of drowning.’ – Andrew Buncombe, ‘What is waterboarding – and what did it do to CIA prisoners?’ (The Independent, 10/12/2014) www.independent.co.uk/news/world/americas/cia-torture-report-what-is-waterboarding-9915001.html, Accessed: 14/08/2015

²⁷⁵ Diane Feinstein, *Senate Select Committee on Intelligence*, 03/12/2014, ‘Committee Study of the Central Intelligence Agency's Detention and Interrogation Program’, Findings and Conclusions, 11

²⁷⁶ Diane Feinstein, *Senate Select Committee on Intelligence*, 03/12/2014, ‘Committee Study of the Central Intelligence Agency's Detention and Interrogation Program’, Findings and Conclusions, 11

²⁷⁷ Florian Geyer (2007) ‘Fruit of the Poisonous Tree: Member States' Indirect Use of Extraordinary Rendition and the EU Counter-terrorism Strategy’ *CEPS Working Document No. 263/April 2007*, 2

Pope both agreed that prisoners should be transferred to Ponthieu, France, so as to circumvent legal restrictions in England that prohibited the use of torture.²⁷⁸ The ‘extraordinary rendition’ programme was mostly facilitated by the CIA,²⁷⁹ with the complicity of State’s worldwide. It is believed that the CIA rendition programme operated various ‘black sites’ across Europe with the complicity of some European States,²⁸⁰ including the United Kingdom. It is estimated that at the height of operation, there were 50 prisons across 28 countries, as well as 20 prisons in Iraq, 25 in Afghanistan and 17 ‘floating prisons’ which were part of the CIA web of facilities used to detain terrorist suspects.²⁸¹ The CIA operated at least 1245 rendition flights on EU territory.²⁸² The extraordinary rendition programme has allegedly been coupled with unlawful detention ‘*which places the detained person de facto outside the protection of the law.*’²⁸³

There were 14 European States listed in a report for the European Parliament by Dick Marty that helped set up secret ‘black sites’ within European borders in which to detain and torture terrorists, those named being Romania, Italy, Austria, Belgium, Cyprus, Denmark, Germany, Ireland, Poland, Spain, Sweden, Greece and the United Kingdom.²⁸⁴ Other non-European black sites were located in Thailand, Iraq, Afghanistan, Diego Garcia and US Navy Briggs.²⁸⁵ In

²⁷⁸ Danny Friedman, ‘Torture and the Common Law’ [2006] 2 *European Human Rights Law Review* 180, 183

²⁷⁹ Astineh Arakelian, ‘Extraordinary Rendition in the Wake of 9/11’ [2010-2011] 40 *Southwestern Law Review* 323, 324

²⁸⁰ Henry F. Carey, ‘European Supranational Monitoring of Intelligence Agency Collaboration in Counterterrorism in the Balkans and Eastern Europe’ [2013] in: Andreopolous, G. (ed), *Policing Across Borders: Law Enforcement Networks and the Challenges of Crime Control*, Springer Publishing, 2013; pages 69 – 88, 69

²⁸¹ Henry F. Carey, ‘European Supranational Monitoring of Intelligence Agency Collaboration in Counterterrorism in the Balkans and Eastern Europe’ [2013] in: Andreopolous, G. (ed), *Policing Across Borders: Law Enforcement Networks and the Challenges of Crime Control*, Springer Publishing, 2013; pages 69 – 88, 69

²⁸² Henry F. Carey, ‘European Supranational Monitoring of Intelligence Agency Collaboration in Counterterrorism in the Balkans and Eastern Europe’ [2013] in: Andreopolous, G. (ed), *Policing Across Borders: Law Enforcement Networks and the Challenges of Crime Control*, Springer Publishing, 2013; pages 69 – 88, 77

²⁸³ Florian Geyer (2007) ‘Fruit of the Poisonous Tree: Member States’ Indirect Use of Extraordinary Rendition and the EU Counter-terrorism Strategy’ *CEPS Working Document No. 263/April 2007*, 2

²⁸⁴ Henry F. Carey, ‘European Supranational Monitoring of Intelligence Agency Collaboration in Counterterrorism in the Balkans and Eastern Europe’ [2013] in: Andreopolous, G. (ed), *Policing Across Borders: Law Enforcement Networks and the Challenges of Crime Control*, Springer Publishing, 2013; pages 69 – 88, 72

²⁸⁵ Henry F. Carey, ‘The Domestic Politics of Protecting Human Rights in Counter-Terrorism: Poland’s, Lithuania’s, and Romania’s Secret Detention Centers and Other East European Collaboration in Extraordinary Rendition’ [2013] 27(3) *East European Politics and Societies and Cultures* 429, 430

Europe it is alleged that black sites were located in Romania, Poland and Lithuania were used to house terror suspects between 2002 and 2006,²⁸⁶ with Lithuania becoming the first State to admit hosting said black sites for the CIA²⁸⁷ in 2011. However, rendition was not restricted to European States, with detainees rendered for ‘extreme interrogation’ to Egypt, Jordan, Syria, Uzbekistan and Morocco.²⁸⁸ All dangerous and valued detainees were transferred to Cuba 2006, after George W. Bush admitted the existence of black sites.²⁸⁹ The Cuban detention facility Guantanamo Bay is infamous for its long term detention, torture, and inhumane treatment of detainees that are suspected of terror related offences by the CIA. Guantanamo Bay has been vilified by a number of human rights charities and organisations worldwide for the alleged systematic use of torture.²⁹⁰

Concern over the use of tainted information was surpassed when photographic evidence came to light that portrayed the U.S. military in a rather unflattering light, during military involvement in Iraq and Afghanistan.²⁹¹ The use of Abu Ghraib as a facility for military intelligence began in 2003, and was used primarily to house and interrogate Iraqi insurgents.²⁹² In 2004 pictures emerged from the Abu Ghraib prison which featured the abuse and torture of prisoners perpetrated by American soldiers, thus exposing the alleged use of torture and cruel,

²⁸⁶ Henry F. Carey, ‘European Supranational Monitoring of Intelligence Agency Collaboration in Counterterrorism in the Balkans and Eastern Europe’ [2013] in: Andreopolous, G. (ed), *Policing Across Borders: Law Enforcement Networks and the Challenges of Crime Control*, Springer Publishing, 2013; pages 69 – 88, 74

²⁸⁷ Henry F. Carey, ‘European Supranational Monitoring of Intelligence Agency Collaboration in Counterterrorism in the Balkans and Eastern Europe’ [2013] in: Andreopolous, G. (ed), *Policing Across Borders: Law Enforcement Networks and the Challenges of Crime Control*, Springer Publishing, 2013; pages 69 – 88, 70

²⁸⁸ Henry F. Carey, ‘European Supranational Monitoring of Intelligence Agency Collaboration in Counterterrorism in the Balkans and Eastern Europe’ [2013] in: Andreopolous, G. (ed), *Policing Across Borders: Law Enforcement Networks and the Challenges of Crime Control*, Springer Publishing, 2013; pages 69 – 88, 76

²⁸⁹ Henry F. Carey, ‘European Supranational Monitoring of Intelligence Agency Collaboration in Counterterrorism in the Balkans and Eastern Europe’ [2013] in: Andreopolous, G. (ed), *Policing Across Borders: Law Enforcement Networks and the Challenges of Crime Control*, Springer Publishing, 2013; pages 69 – 88, 77

²⁹⁰ Amnesty International, ‘Guantánamo Bay: 14 years of injustice’ (Amnesty International, 11/01/2016) www.amnesty.org.uk/guantanamo-bay-human-rights, Accessed: 09/03/2016; Human Rights Watch, ‘Guantanamo, Ten Years On’ (Human Rights Watch, 06/01/2012)

www.hrw.org/news/2012/01/06/guantanamo-ten-years, Accessed: 09/03/2016

²⁹¹ Matt Pollard, ‘Rotten Fruit: State Solicitation, Acceptance and Use of Information Obtained Through Torture by Another State’ [2005] 23 *Netherlands Quarterly of Human Rights* 349, 350

²⁹² Marcy Strauss, ‘The Lessons of Abu Ghraib’ [2005] 66 *Ohio State Law Journal* 1269, 1271 - 1272

inhumane and degrading treatment.²⁹³ The case of Baha Mousa is particularly infamous. Baha Mousa was a hotel receptionist in Basra who was detained for questioning by British forces in 2003.²⁹⁴ Within 36 hours he was dead, with 93 separate injuries listed during his post-mortem,²⁹⁵ exposing the alleged systematic use of torture/inhumane treatment during interrogations used by British forces.

Theorizing Torture and Terrorism

The use of contemporary torture is supposedly confined to intelligence gathering, where the information obtained may be used for two main purposes - in a formal capacity such as a criminal trial, or for use in further intelligence operations. It can only be presumed that information gained through torture has been used in further intelligence operations, because it is not something that intelligence agencies or State governments are likely to admit to doing. However, it was claimed by George Bush that torture used by the CIA 'saved British lives,'²⁹⁶ which indicates that torture has been used to aid in counter-terrorist operations since the 'war on terror' began.

The use of torture to extract confession has previously been rampant, and as previously discussed, used widely across different continents and periods of time. A particular example in England includes the previously mentioned period of the 16th century. Although this thesis is not focused on the use of torture specifically for this purpose, there are witness accounts that

²⁹³ Marcy Strauss, 'The Lessons of Abu Ghraib' [2005] 66 *Ohio State Law Journal* 1269, 1270

²⁹⁴ AT Williams, 'The brutal death of Baha Mousa' (The Guardian, 03/05/2013) www.theguardian.com/books/2013/may/03/investigate-brutal-death-baha-mousa, Accessed: 10/11/2015

²⁹⁵ BBC News, 'Baha Mousa inquiry: 'Serious discipline breach' by army' (BBC News, 08/09/2011) www.bbc.co.uk/news/uk-14825889, Accessed: 10/11/2015

²⁹⁶ Toby Harnden, 'George W Bush: 'waterboarding' terrorists saved British lives' (The Telegraph, 09/11/2010) www.telegraph.co.uk/news/worldnews/us-politics/8118807/George-W-Bush-waterboarding-terrorists-saved-British-lives.html, Accessed: 26/06/2015

allege that torture has been used to force the victim to indicate their own guilt in the years since 9/11,²⁹⁷ with seemingly little regard of what corroborating evidence suggests. It is not hard to see the appeal in attempting to force an admission of guilt - “*There is a great deal of laziness in it. It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence.*”²⁹⁸ However, irrespective of how useful torture may or may not be as a tool in gathering evidence, torture should not be used because it is ‘convenient’. If there is to be a serious discussion of the use of torture in counter-terrorism investigations, it should be because torture is the only way to obtain the information needed.

There are several features of State torture identified by Tate²⁹⁹ in Einolf’s³⁰⁰ work. The first is that torture is often only used against those who are considered outsiders, such as foreigners. The second, is that torture is almost never used against its own citizens, and will only be used against its own in extreme circumstances, where the guilt of the person is likely. Thirdly, due to the rise in liberal States that take human rights seriously, the use of torture was considerably reduced. Subsequently, torture is used by the (liberal) State when it feels under extreme threat – terrorism is a clear example of this.³⁰¹ The use of torture by the State is something well documented by Foucault in his theories of societal power relations. For Foucault, the use of torture was once used as a ‘spectacle’ of chastisement, where the punishment given out to convicted criminals was done so publicly. This was done both to act as discouragement – punishment and torture was essentially a display of power – and as an aid in forcing

²⁹⁷ Michael Otterman, *American Torture: From the Cold War to Abu Ghraib and Beyond*, Melbourne University Press: Carlton, 2007, 7 - 8

²⁹⁸ Abbott Lawrence Lowell, ‘The Judicial Use of Torture’ [1897] 11(4) *Harvard Law Review* 220, 224

²⁹⁹ Katherine E. Tate, ‘Torture: Does the Convention Against Torture Work to Actually Prevent Torture in Practise by States Party to the Convention?’ [2013] 21 *Willamette Journal of International Law & Dispute Resolution* 194, 200

³⁰⁰ Christopher J. Einolf, ‘The Fall and Rise of Torture: A Comparative and Historical Analysis’ [2007] 25 *Sociological Theory* 101, 104 - 105

³⁰¹ Katherine E. Tate, ‘Torture: Does the Convention Against Torture Work to Actually Prevent Torture in Practise by States Party to the Convention?’ [2013] 21 *Willamette Journal of International Law & Dispute Resolution* 194, 200 and; Christopher J. Einolf, ‘The Fall and Rise of Torture: A Comparative and Historical Analysis’ [2007] 25 *Sociological Theory* 101, 104 - 105

confession.³⁰² However, during the 1800's the public humiliation of prisoners began to be looked upon unfavourably, in part due to the universal adoption of a formal judicial system, and also because of changing public attitudes towards 'the gloomy festival of punishment'³⁰³ (torture). The focus turned instead to rehabilitation,³⁰⁴ and the use of torture for that period of time was viewed as counter-productive.

Hannah has discussed in great detail Michel Foucault's theories of biopower, governmentality, and power/knowledge, and used it to explain why torture is and has been used by the State since 9/11, whilst also applying these aspects to modern power relations. Governmentality can be defined as a focus on how an individual conducts himself with an emphasis on individual freedom. It essentially regulates the individual subliminally through institutions such as legislation, welfare and insurance – anything that encourages responsible behaviour.³⁰⁵ Governmentality is a combination of the '*technologies of power, which determine the conduct of individuals and submit them to certain ends or domination*'³⁰⁶ and the '*technologies of the self, which permit individuals to effect by their own means or with the help of others... to transform themselves in order to attain a certain state-of happiness, purity, wisdom, perfection, or immortality.*'³⁰⁷ Biopower is a similar notion, which combines the '*subjugation of bodies and the control of populations.*'³⁰⁸ The concept of governmentality is a more liberal concept than biopower, because where governmentality is concerned with influencing or encouraging the individual to exhibit a certain behaviour, biopower is more concerned with

³⁰² Michael Welch, 'American 'Pain-ology' in the War on Terror: a Critique of 'Scientific' Torture' [2009] 13(4) *Theoretical Criminology* 451, 452

³⁰³ Michel Foucault, *Discipline and Punish* (Vintage Books 2nd ed.), Random House: New York, 1975, 8

³⁰⁴ Michel Foucault, *Discipline and Punish* (Vintage Books 2nd ed.), Random House: New York, 1975, 19

³⁰⁵ Matthew Hannah, 'Torture and the Ticking Bomb: The War on Terrorism as a Geographical Imagination of Power/ Knowledge' [2006] 96(3) *Annals of the Association of American Geographers* 622, 628 - 629

³⁰⁶ Michel Foucault (ed. Luther H. Martin, Huck Gutman, Patrick H. Hutton), *Technologies of the Self: A Seminar with Michel Foucault*, The University of Massachusetts Press: Amherst, 1988, 18

³⁰⁷ Michel Foucault (ed. Luther H. Martin, Huck Gutman, Patrick H. Hutton), *Technologies of the Self: A Seminar with Michel Foucault*, The University of Massachusetts Press: Amherst, 1988, 18

³⁰⁸ Michel Foucault, *History of Sexuality Vol I: An Introduction*, Random House: New York, 1978, 140

population control,³⁰⁹ in essence an umbrella that encompasses different forms of modern power. Biopower and governmentality are central when discussing terrorism, because terrorism targets and endangers human life, which the State is concerned and obligated to protect.

The aim of the State (sovereignty) is to preserve life. This was previously more concerned with health issues arising from the environment, such as infectious diseases,³¹⁰ which is no longer the main concern due to a better developed infrastructure and improved health care. Now the main concern for States in protecting its citizens is terrorism, because it is one of the biggest threats against the State and its principles. Despite a higher fatality rate as a result of other forms of crime,³¹¹ terrorism is the bigger threat because terrorists have defied the expected behaviour of a normal individual that governmentality seeks to influence. Whereas this can, to an extent, be true of all criminals, terrorists, and specifically the emergence of the suicide bomber, are a threat to the usual logic of wanting to live.³¹² They in essence do not fit into normal assumptions of power. Hence, this poses a challenge to the State – what is the State to do with those that do not fear death? In basic terms terrorists “*are effectively reducible to a dense desire to kill, and that regular criminal and international codes cannot apply to beings such as these.*”³¹³

Ambos³¹⁴ uses Beling’s positivist theory of the prohibition of evidence to discuss why the State would be untruthful about its use of torture. Within democratic societies that observe the rule

³⁰⁹ Michel Foucault, *History of Sexuality Vol I: An Introduction*, Random House: New York, 1978, 140

³¹⁰ Matthew Hannah, ‘Torture and the Ticking Bomb: The War on Terrorism as a Geographical Imagination of Power/ Knowledge’ [2006] 96(3) *Annals of the Association of American Geographers* 622, 627

³¹¹ For example: ‘*The global homicide rate is 13 times the global terrorism rate, with 437,000 people dying from homicides compared to 32,685 from terrorism*’ - Global Terrorism Index, 2015, Institute for Economics & Peace, Available: <http://economicsandpeace.org/wp-content/uploads/2015/11/Global-Terrorism-Index-2015.pdf>, page 30

³¹² Matthew Hannah, ‘Torture and the Ticking Bomb: The War on Terrorism as a Geographical Imagination of Power/ Knowledge’ [2006] 96(3) *Annals of the Association of American Geographers* 622, 629

³¹³ Matthew Hannah, ‘Torture and the Ticking Bomb: The War on Terrorism as a Geographical Imagination of Power/ Knowledge’ [2006] 96(3) *Annals of the Association of American Geographers* 622, 634

³¹⁴ Kai Ambos, ‘The Transnational Use of Torture Evidence’ [2009]42 *Israel Law Review* 362, 364

of law (such as the UK), the prohibition of evidence in trial has two prongs – The individual component and collective dimension.³¹⁵ The individual component is best explained as the concept of the accused being *'recognized and respected as an active subject, and not simply the object of criminal proceedings.'*³¹⁶ This means that the accused will not be manipulated in any manner that seeks to affect his free will (e.g. torture), and that all methods of manipulation must be prohibited.³¹⁷ Hence, any evidence that has been obtained through said manipulation of a person's free will is (or should be) excluded from criminal proceedings. The collective dimension is *'upholding the constitutional integrity of the legal order, especially through the guarantee and realization of a fair trial.'*³¹⁸ Essentially, the individual component refers to the individuals rights, whereas the collective dimension refers to the moral superiority of the State. Both of these components work together to form an integrity that States must abide to, where one component would not work without the other – i.e. a State that is willing to manipulate the accused cannot maintain its moral integrity. Hence, evidence procured against the principles of individual respect also goes against the States moral integrity.³¹⁹

However, because the State cannot use manipulation as a tool to find the truth lest it lose its integrity, the combination of the individual component and the collective dimension can possibly limit the effectiveness in achieving its goal i.e. the preservation of life. Essentially, there is conflict between *"a functioning administration of criminal justice with the goal of the efficient investigation and punishment of criminal offenses, and... the protection of the fundamental rights of the accused and the integrity of the system as a whole."*³²⁰ Balancing the search for the truth with the integrity of the State is seldom achievable for States, because the

³¹⁵ Kai Ambos, 'The Transnational Use of Torture Evidence' [2009] 42 *Israel Law Review* 362, 364

³¹⁶ Kai Ambos, 'The Transnational Use of Torture Evidence' [2009] 42 *Israel Law Review* 362, 365

³¹⁷ Kai Ambos, 'The Transnational Use of Torture Evidence' [2009] 42 *Israel Law Review* 362, 362 - 367

³¹⁸ Kai Ambos, 'The Transnational Use of Torture Evidence' [2009] 42 *Israel Law Review* 362, 365 - 366

³¹⁹ Kai Ambos, 'The Transnational Use of Torture Evidence' [2009] 42 *Israel Law Review* 362, 362 - 367

³²⁰ Kai Ambos, 'The Transnational Use of Torture Evidence' [2009] 42 *Israel Law Review* 362, 367

two do not work together in tandem. This structure has been applied internationally, where one of the most important aspects of supranational proceedings is integrity. Subsequently, something has to give – either the State does not use torture, or it does and omits to play by the rules (i.e. the law) because doing so would be to admit its moral inferiority. Hence, “*Whereas modern torture retains its affiliation with state power, its practice is not publicly displayed; in fact, governments go to great lengths to conceal evidence of detainee mistreatment.*”³²¹

The US for example appears to use torture behind closed doors, whilst pretending they do not. In 2009 Barack Obama signed an executive order promising to close down the Guantanamo Bay facility and ban the military use of torture on detainees³²² - eight years later however, there are still prisoners that remain there. This in itself would suggest that the State is reluctant to admit that it uses torture as part of its interrogation repertoire. This arguably links in to Ambos’ idea that the declining international reputation of the State would endure, an example of which is the United States following the Abu Ghraib revelations:³²³ “*Abu Ghraib revelations have caused to the already-ailing reputation of the United States as a defender of freedom, democracy, and human rights, the administration has distanced itself from torture in public pronouncements since May 2004... but at the same time it has worked behind the scenes to defend its recourse to the widest possible range of interrogation methods.*”³²⁴ Simultaneously however, the State also attempts to justify its use of torture. For example, in 2010 George W. Bush claimed that the use of waterboarding on 9/11 terrorist Khalid Sheikh Mohammed revealed and helped to prevent 31 terrorist plots, including attacks on Canary Wharf and

³²¹ Michael Welch, ‘American ‘Pain-ology’ in the War on Terror: a Critique of ‘Scientific’ Torture’ [2009] 13(4) *Theoretical Criminology* 451, 452

³²² Mark Tran, ‘Obama signs order to close Guantánamo Bay’ (The Guardian, 22/01/2009) www.theguardian.com/world/2009/jan/22/hillary-clinton-diplomatic-foreign-policy, Accessed: 03/11/2015

³²³ Matthew Hannah, ‘Torture and the Ticking Bomb: The War on Terrorism as a Geographical Imagination of Power/ Knowledge’ [2006] 96(3) *Annals of the Association of American Geographers* 622, 625

³²⁴ Matthew Hannah, ‘Torture and the Ticking Bomb: The War on Terrorism as a Geographical Imagination of Power/ Knowledge’ [2006] 96(3) *Annals of the Association of American Geographers* 622, 625

Heathrow Airport.³²⁵ The US has followed a pattern, whereby *'customary international law was sufficiently strong to compel torturing regimes to officially deny their wrongdoing, which they did in common patterns: literal denial (we don't torture); interpretative denial (what we do isn't torture); and implicatory denial (torture was the work of rogues and/or our enemies deserve what is done to them).'*³²⁶

Transnational terrorism poses a particular risk, because although it is in all States interests to combat, it is not in any one States control. Because it is a threat to all States citizens, it is a threat to all States sovereignty and power. This may in some part explain the complex multi-State networks of intelligence and torture. Hence 'spaces of exception' such as Guantanamo Bay, Abu Ghraib and other forms of 'legal blackholes' were formed:³²⁷ *"This aspect of the new terrorist threat constitutes a major challenge to power/knowledge (because of the inaccessibility of the information needed to protect social order) and to sovereignty (because the holders of this crucial information are not subject to U.S. government authority)."*³²⁸ As discussed by Welch, whereas for Foucault the prison was a place to encourage morality and discipline to its prisoners already convicted and found guilty, the purpose of Guantanamo and other detention facilities emerging after 9/11 was entirely different, its purpose being to extract information in seemingly whatever way possible from those that have not been convicted of a crime.³²⁹

³²⁵ BBC News, 'George W Bush claims UK lives 'saved by waterboarding'' (BBC News, 09/11/2010) www.bbc.co.uk/news/uk-11715577, Accessed: 03/11/2015

³²⁶ Lisa Hajjar, 'Does Torture Work? A Sociolegal Assessment of the Practice in Historical and Global Perspective' [2009] 5(3) *Annual Review of Law and Social Science* 11, 312

³²⁷ Matthew Hannah, 'Torture and the Ticking Bomb: The War on Terrorism as a Geographical Imagination of Power/ Knowledge' [2006] 96(3) *Annals of the Association of American Geographers* 622, 632

³²⁸ Matthew Hannah, 'Torture and the Ticking Bomb: The War on Terrorism as a Geographical Imagination of Power/ Knowledge' [2006] 96(3) *Annals of the Association of American Geographers* 622, 632

³²⁹ Michael Welch, 'American 'Pain-ology' in the War on Terror: a Critique of 'Scientific' Torture' [2009] 13(4) *Theoretical Criminology* 451, 462

One of the many modes of justification used by both academics and States is the ticking bomb scenario. The State and the media encourage an almost constant ticking-bomb situation, shown in two ways. Realistically, there are selected areas within the UK which are more likely to be a terrorism target, such as London or Manchester, as opposed to more remote locations, yet the whole of the UK is assessed as equally at risk. Similarly, every individual is treated as a possible threat, as shown by debatably excessive ‘stop and search’ powers for the police, and helpline initiatives which encourage the public to call if they sense anything remotely ‘suspicious’. This creates the perception of constant danger.³³⁰ Subsequently, the risk that terrorism poses can be blurred and difficult to determine. If the perceived risk of terrorism is high, then torture becomes more justifiable, both in the mind of the State and its citizens: *“It is through the nationalized ticking-bomb scenario that the biopolitical and governmental threat of terrorism is transformed into a justification for torture.”*³³¹

Frank³³² further discusses how the State validates counter-terrorism measures by the use of fear mongering, creating a ‘politics of fear’, an example of which is the Iraq war in 2003. Frank’s argument in this case is that the government has and will use the fear of what could happen, as opposed to what has happened, to rationalise extreme measures as part of counter-terrorism policy. He observes that members of the U.S. government whipped fear amongst the public by discussing Iraq’s supposed ownership of Weapons of Mass Destruction (WMD), before using WMD’s as justification for invading Iraq, by arguing the *possible* threat³³³. Speaking about Saddam Hussein and his suspicion of WMD’s at the State of Union address in January 2003,

³³⁰ Matthew Hannah, ‘Torture and the Ticking Bomb: The War on Terrorism as a Geographical Imagination of Power/ Knowledge’ [2006] 96(3) *Annals of the Association of American Geographers* 622, 630

³³¹ Matthew Hannah, ‘Torture and the Ticking Bomb: The War on Terrorism as a Geographical Imagination of Power/ Knowledge’ [2006] 96(3) *Annals of the Association of American Geographers* 622, 630

³³² Michael C. Frank, ‘Conjuring up the Next Attack: the Future-Orientedness of Terror and the Counterterrorist Imagination’ [2015] 8(1) *Critical Studies on Terrorism* 90

³³³ Michael C. Frank, ‘Conjuring up the Next Attack: the Future-Orientedness of Terror and the Counterterrorist Imagination’ [2015] 8(1) *Critical Studies on Terrorism* 90

George W. Bush said that “*Today, the gravest danger in the war on terror, the gravest danger facing America and the world, is outlaw regimes that seek and possess nuclear, chemical, and biological weapons. These regimes could use such weapons for blackmail, terror, and mass murder...*”³³⁴ His use of the word ‘could’ is interesting, considering that he produced seemingly no evidence that Iraq actually had WMD’s (indeed none were found during the war or since), or that Iraq had any plans to use said WMD’s. Ultimately, the combination of suggestive language and fear “*results in the public feeling the need for protection against the supposed problem or threat and more inclined to legitimize stringent and coercive measures to achieve this.*”³³⁵

Welch discusses the ‘scientification’ of torture, originally introduced by the CIA during the Cold War.³³⁶ The use of psychology in determining tortures effectiveness during interrogation is an example of how the State has attempted to use science to not only find the truth, but rationalise any ethical concerns society may have. For Mavelli, science is particularly important in modern society because it is a way for society to explain why things happen, i.e. find the truth, something which was previously explained by religion. However, science has not proved itself to be completely effective in global risk, terrorism a prime example of such.³³⁷ Furthermore, Welch points out that the State staffs its facilities, such as Guantanamo Bay, with ‘experts’ in extracting much needed information from its detainees, which further supports the States justification for the use of torture to extract information from its prisoners. Therefore, torture is in some ways viewed as the remedy to the threat of terrorism because of the

³³⁴ BBC News, ‘In quotes: Reasons for the Iraq war’ (BBC News, 29/05/2003) www.news.bbc.co.uk/1/hi/world/middle_east/2948068.stm, Accessed: 26/02/2016

³³⁵ Stefan Cartledge, Lorraine Bowman-Grieve & Marek Palasinski, ‘The Mechanisms of Moral Disengagement in George W. Bush’s “War on Terror” Rhetoric’ [2015] 20(11) *The Qualitative Report* 1905, 1906

³³⁶ Michael Welch, ‘American ‘Pain-ology’ in the War on Terror: a Critique of ‘Scientific’ Torture’ [2009] 13(4) *Theoretical Criminology* 451

³³⁷ Luca Mavelli, ‘Governing Uncertainty in a Secular Age: Rationalities of Violence, Theodicy and Torture’ [2015] *Security Dialogue* 1 – 16, December 23, 2015 DOI: 10.1177/0967010615613489, 3

knowledge (information/intelligence) supposedly gained from using it. The idea is that if torture prevents terrorism, then the normal structures of power and governmentality can resume.³³⁸ The longer the war on terrorism goes on for, the more likely it is that there will be permanent damage to said power structures with undesirable consequences for the state, as *“it is not unusual for perpetrators of terrorist attacks to seek to instill fear among citizens either to alienate them from the government or to make them lose faith in the government’s ability to protect [them].”*³³⁹ Thus, if terrorists are successful in making the population doubt their safety within the State, this causes disruption to the hierarchy of State power.

This chapter has followed the development of the international prohibitions, both from a historical and theoretical perspective, which has established that torture has been used by the State for various reasons, and is not used solely to established guilt. Moreover, it has established that terrorism is a threat not just to the individual, but also to the State’s sovereign power. Subsequently, the State has perpetuated torture as a remedy to terrorism. The fourth chapter of this thesis aims to establish if the regulation of complicity in torture would help intelligence agencies counter terrorism. This will be done by firstly identifying and critically evaluating previous proposals for the regulation of torture itself, before discussing these proposals in the context of ‘complicity’. This chapter will attempt to balance the problems the prohibition of torture can cause for law enforcement and intelligence officials, whilst also debating the issues arising from deregulating the prohibition, including reputational damage, State accountability and metaphorical slippery slopes.

³³⁸ Matthew Hannah, ‘Torture and the Ticking Bomb: The War on Terrorism as a Geographical Imagination of Power/ Knowledge’ [2006] 96(3) *Annals of the Association of American Geographers* 622, 631

³³⁹ David Long [1990] in Matthew Hannah, ‘Torture and the Ticking Bomb: The War on Terrorism as a Geographical Imagination of Power/ Knowledge’ [2006] 96(3) *Annals of the Association of American Geographers* 622, 626

CHAPTER FOUR: RESPONDING TO THE CURRENT LAW

Previous Proposals for the Use of Torture

In the years since 9/11, there have been various *ex ante* and *ex post* proposals arguing in favour of the use of torture, including torture warrants, ‘torture lite,’ defences and ‘official disobedience’. Dershowitz’s torture warrants idea has derived from England’s use of such warrants during the 16th century. He proposes that ‘non-lethal’³⁴⁰ torture could be deployed by obtaining a warrant from a judge, who would examine the evidence and situation before providing a warrant. One of the main claimed advantages to this idea is that it prevents torture from being used by anyone against anyone, because State officials would have to justify their actions before they carried them out. Subsequently, judges would only give out warrants in the most desperate of scenarios. However, due to a lack of personal experience in torture, it may be difficult for judges to not overly rely on the information received by the applicant/s, i.e. State officials from the security services, and may therefore result in more warrants given out than what the law ‘intended.’³⁴¹ Conversely, having an accountable legal system specifically for torture would ‘loosen tongues’, possibly without even having to use torture.³⁴² In other words, the prospect of being tortured might in itself encourage terrorist suspects to make frank admissions. In contrast, if there is a legal system in place, terrorists may retaliate by training

³⁴⁰ Which he describes as ‘unbearable pain without any threat to health or life’ - Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge*, Yale University Press: London, 2003, 144

³⁴¹ Fritz Allhoff, ‘Torture Warrants, Self-Defense and Necessity’ [2012-2013] 11 *Cardozo Public Law Policy & Ethics Journal* 421, 431

³⁴² The case of *Gafgen v Germany* (Application no. 22978/05), where the suspect was merely threatened by the use of torture before revealing the information the police wanted.

themselves to withstand torture, perhaps in a similar manner to the distribution of ‘anti-interrogation’ techniques encouraged by the IRA.³⁴³

A similar warrant system to the one proposed by Dershowitz could be put in place for State complicity in two ways – assistance and information. In the first scenario, the State may apply to a judge to assist a State in torture where the suspect is considered a risk to the States interests. This scenario would essentially see State officials seeking permission for involvement in otherwise prohibited acts, and would be limited to obtaining a warrant for requesting that the torturing State ask the suspect specific questions when he is tortured. Assistance warrants would potentially be redundant for anything other than requesting certain questions to be put forth to a suspect, as judges may be unwilling to allow State officials to physically assist the use of torture in a foreign State due to its controversial nature.

Furthermore, physical assistance in torture would likely face the same criticisms of the original torture warrants proposal. The second form of warrant would require permission for the acceptance and use of information, where the information has or may have been obtained by the use of torture, as opposed to using or assisting the torture itself. The main issue with this scenario however, is that if the applicants were to apply to use the information in any form of judicial proceeding, there may be a conflict of interests because the warrant system would also be judicial. Whereas the system may still apply in an operational situation, if a warrant was not granted because the judge did not feel it was justified, State agents could potentially continue to use the information in an operational vicinity, regardless of whether a warrant was required to do so.

A further proposal for torture law is so-called torture lite. For Bell, torture is hierarchical, with three categories of torture that are ranged according to severity – classic torture, cruel and

³⁴³ Gaetano Joe Ilardi, ‘Irish Republican Army Counterintelligence’ [2009] 23(1) *International Journal of Intelligence and CounterIntelligence* 1, 15

degrading, and psychologically coercive.³⁴⁴ Bell describes ‘classic’ torture as severe physical harm, such as beatings or electric shock that will leave lasting physical damage to the person it is administered on. By contrast, psychological coercion involves some sort of deception as opposed to cruelty.³⁴⁵ Cruel, inhumane and degrading treatment and short-term physical harm is something often referred to as ‘torture lite’. The idea of torture lite has become popular with self-styled democratic States.³⁴⁶ This is because it differs from ‘classic’ torture, as its emphasis is more inclined towards the stress and discomfort of its victim, as opposed to the actual physical mutilation of the body.³⁴⁷

Torture lite has been previously discussed by Wolfendale,³⁴⁸ Schlink,³⁴⁹ and Kreimer,³⁵⁰ amongst others. However, one of the main arguments against torture lite is that you cannot determine an individual’s pain threshold, and what may be unbearable to one person may be bearable for another. Subsequently, it may be difficult to determine a universal ‘torture lite’. In terms of assistance, it could be argued that the assisting State may be more ‘ethical’ if said State was only complicit in torture lite, as opposed to ‘classic’ torture. Conversely, it could be argued that if a State is complicit in torture, then the type of torture it assists is irrelevant.

An *ex post* approach to torture law would be the use of the necessity defence.³⁵¹ As discussed in chapter two, the defence of necessity is not currently applicable for torture. A defence could

³⁴⁴ Jeannine Bell, ‘“Behind This Mortal Bone”: The (In)Effectiveness of Torture’ [2008] 83 *Indiana Law Journal* 339, 343

³⁴⁵ Jeannine Bell, ‘“Behind This Mortal Bone”: The (In)Effectiveness of Torture’ [2008] 83 *Indiana Law Journal* 339, 344

³⁴⁶ ‘The fact that torture lite techniques rarely leave clear physical evidence on victims tends to make these techniques particularly useful to democratic states, as these states have a strong interest in maintaining public support and avoiding the attention of human rights organizations—an issue that is perhaps of less concern to authoritarian regimes’ – Jessica Wolfendale, ‘The Myth of “Torture Lite”’ [2009] 23(1) *Ethics & International Affairs* 47, 48

³⁴⁷ Jessica Wolfendale, ‘The Myth of “Torture Lite”’ [2009] 23(1) *Ethics & International Affairs* 47, 47 - 48

³⁴⁸ Jessica Wolfendale, ‘The Myth of “Torture Lite”’ [2009] 23(1) *Ethics & International Affairs* 47

³⁴⁹ Barnhard Schlink, ‘The Problem With “Torture Lite”’ [2007-2008] 29 *Cardozo Law Review* 85

³⁵⁰ Seth Kreimer, ‘Torture Lite, Full Bodies Torture, and the Insulation of Legal Conscience’ [2005] 1 *Journal of National Security Law & Policy* 187

³⁵¹ John T. Parry, ‘Torture Warrants and the Rule of Law’ [2008] 71 *Albany Law Review* 885

work for complicity in torture, particularly in assisting torture in another State, rather than the use of information communicated. For example, if the complicit State was to receive information of an imminent attack, and the torturing State had a suspect in custody that may have further information about what was to transpire, the complicit State may be able to defend sending questions for the suspect to be asked under duress. The biggest advantage to an *ex post* method is that State agents would not have the difficult task of justifying their actions before they were carried out. Furthermore, State agents would not have to spend time applying for warrants or otherwise seeking permission in emergency situations. However, the biggest disadvantage to this sort of approach is that the State has to be prepared to actually prosecute its agents,³⁵² as not prosecuting them would lead to a lack of accountability.

A further proposal is to, in essence, do nothing. Gross and Jessberger have similar ideas, whereby the laws that prohibit torture do not change, but that way that torture is treated after the fact does. Gross suggested that if the ticking bomb scenario was to ever come to fruition, then there should be a 'defence' of 'official disobedience'. Jessberger suggested a '*guilty, but not to be punished*'³⁵³ proposal, e.g. showing mercy if the torture was to be committed within the ticking bomb scenario. The main difference between the two proposals is the encouragement of the State. In Gross's proposal, the State would have limited involvement in the individual's choice to torture, hence the official has been disobedient. Jessberger uses the case of *Gafgen v Germany*³⁵⁴ as inspiration, particularly concentrating on the sentence received by police officials involved in the threats of torture.³⁵⁵

³⁵² John T. Parry, 'Torture Warrants and the Rule of Law' [2008] 71 *Albany Law Review* 885, 888

³⁵³ Florian Jessberger, "'Bad Torture – Good Torture? What International Criminal Lawyers May Learn from the Recent Trial of Police Officers in Germany' [2003] 3 *Journal of International Criminal Justice* 1059

³⁵⁴ *Gafgen v. Germany*, Application no. 22978/05

³⁵⁵ The two defendants (police officers) were found guilty of coercion and instructing coercion respectively, but both received fines and probation as opposed to a prison sentence - Florian Jessberger, "'Bad Torture – Good Torture? What International Criminal Lawyers May Learn from the Recent Trial of Police Officers in Germany' [2003] 3 *Journal of International Criminal Justice* 1059, 1065-1066

Both of these proposals could arguably be implemented in the context of torture assistance. If the assisting State received information from the torturing State that there was to be an imminent attack, and officials from the assisting State were to request further questioning (torture) of a suspect, the officials could claim that they were working on their own initiative, if the case was ever to be brought before a Court. Although Gross argues that implementing torture within the legal system could lead to ‘institutionalization,³⁵⁶ if torture and assisting acts are unofficially sanctioned, then neither the torture nor the officials involved are accountable. Arguably, this would lead to the institutionalization of unofficial torture, which would surely be worse. Furthermore, it would also be up to the Courts to interpret a supposedly non-derogable law, which could arguably lead to the ‘forgivable’ torture benchmark being less than the case before it.³⁵⁷

The Purpose and Use of Torture

Before implementing regulation to allow the use and exchange of information, there must also be discussion of the scenarios information obtained by torture could be used in. As discussed in chapter one, intelligence is used for several main purposes: operational, criminal trial and other formal proceedings. However, when torture is considered, there is a further use of torture, that is, the infamous ticking bomb scenario. The ticking bomb is a hypothetical scenario which is almost always discussed in reference to the torture debate. The scenario usually begins with the State being informed about an active bomb that has been placed in a busy public area, such as London, which is subsequently likely to kill a large number of innocent people. However,

³⁵⁶ Oren Gross, ‘Torture and an Ethics of Responsibility’ [2007] 3 *Law, Culture and the Humanities* 35, 51

³⁵⁷ Kriemer has suggested a similar argument against torture warrants, where ‘each warrant granted would be the starting point for an argument that a subsequent warrant should be granted in circumstances just a little bit short of the exigencies of the prior case’ - Seth Kreimer, ‘Torture Lite, Full Bodies Torture, and the Insulation of Legal Conscience’ [2005] 1 *Journal of National Security Law & Policy* 187, 226, note 130

the State does not know the exact location of the bomb. The State has the mastermind of this plot in custody, but he or she is refusing to reveal where the bomb is.

For Shue,³⁵⁸ the ticking bomb is an unsophisticated scenario based on a number of idealisations. He lists two requirements needed for the torture of ticking bomb terrorist to stop the bomb from exploding: The first is that the State has the actual perpetrator in custody; the second is that the perpetrator reveals where the bomb is in time to diffuse it.³⁵⁹ Kleinig goes further in his scepticism of the ticking bomb; the threat is not a mere possibility, but a known fact; action needs to be taken to avert this threat; the threat is real and catastrophic; torture is the only way to get the necessary information to avert this threat; the resulting information will almost guarantee that the bomb will be found and diffused.³⁶⁰ It could be argued that the ticking bomb scenario touted by those that support torture law contains too many assumptions. For example, it cannot be guaranteed that torture is the only way to get the information needed, nor that the information obtained by torture will result in diffusing the bomb. Essentially, what Shue and Kleinig both agree on is that the ticking bomb scenario will almost certainly never happen.

Despite this, Gross³⁶¹ insists that the ticking bomb scenario is a real threat, albeit rare, hence torture regulation must be established to protect against this. Although it could be argued that the case of *Gafgen*³⁶² supports the possibility of a real ticking bomb, it could be contended that the likelihood of a terrorist successfully planning/executing a terror attack, being detained

³⁵⁸ Henry Shue, 'Torture in Dreamland: Disposing of the Ticking Bomb' [2005-2006] 37 *Case Western Reserve Journal International Law* 231

³⁵⁹ Henry Shue, 'Torture in Dreamland: Disposing of the Ticking Bomb' [2005-2006] 37 *Case Western Reserve Journal International Law* 231, 233

³⁶⁰ John Kleinig, 'Ticking Bombs and Torture Warrants' [2005] 10 *Deakin Law Review* 614, 616

³⁶¹ Oren Gross, 'Torture and an Ethics of Responsibility' [2007] 3 *Law, Culture and the Humanities* 35, 40

³⁶² In *Gafgen v Germany* (Application no. 22978/05), the authorities knew that if the child was alive then they had very limited time to save the child's life, because the child was alone and the most likely suspect in his kidnapping was in custody.

shortly before the bomb goes off, with the authorities having no prior intelligence whatsoever, is very slim indeed.

It may be argued that the State's use of information obtained by torture, indicating an imminent ticking bomb scenario is more forgiving than the use of torture itself, because the State is merely using the resources available, as opposed to actually encouraging torture. In fact, not acting upon information that indicates the threat of an imminent terrorist attack *because* the information was the result of torture, would arguably be viewed as ill-advised, and possibly even breach the States positive duty to protect the security of its citizens.³⁶³ In practise, any State receiving information that can protect the State from a very imminent danger, is unlikely to scrutinise the source before it attempts to divert the threat. Accepting and using torture information is morally different to using torture, mainly because the act has already been committed and cannot be prevented, whereas the information obtained by the act has the potential to prevent a catastrophe.

On the other hand, one of the issues with torture is that the information given by the suspect may be conflicting or misleading. Alternatively, this could be fact-checked against other available information. However, if the supposed attack is imminent then there may not be sufficient time to do this fully. On the other hand, perfection in evidence is not needed – just enough to detect the location of the bomb. Subsequently, the receiving/complicit State is placing a huge amount of trust in the suspect and torturing State, which is not particularly ideal, as it could lead both States to waste resources better used elsewhere.³⁶⁴ Consequently, the ticking bomb scenario seems unlikely to ever occur. Hence, if this is justification for why the

³⁶³ Ian Turner, 'Human Rights and Antiterrorism: A Positive Legal Duty to Infringe Freedom from Torture?' [2012] 35 *Studies in Conflict & Terrorism* 760

³⁶⁴ Fritz Allhoff, 'Empirical Objections to Torture: A Critical Reply' [2014] 26(4) *Terrorism and Political Violence* 621, 621 - 622

use of information obtained by the use of torture should be legalised, then there seems to be little to persuade someone of the pressing need for this type of legislation.

However, the ticking bomb is not the only situation in which information obtained by torture could potentially be used. Indeed, information extracted in this way could be used to prevent future attacks that are not classed as imminent, to locate terrorist networks, identify patterns and methods etc. It could be argued that the use of torture information in this scenario is potentially still morally justified, as *'Zealots inspired by Islamic militancy and willing to immolate themselves in suicide assaults are not likely to share their secrets under the comparatively mild duress of humane captivity.'*³⁶⁵ The use of intelligence to aid in operational security purposes has not been discussed much throughout this thesis. Due to the secretive nature of how intelligence agencies operate, it is difficult to assess how useful such information would be in this respect. However, it was rumoured that the information that led to the death of former Al Qaeda leader Osama Bin Laden in Pakistan in 2011 was obtained by the use of waterboarding and/or other inhumane methods, although this was denied by both Donald Rumsfeld and John Brennan, Barack Obama's counter terrorist advisor.³⁶⁶

The third main potential use for torture evidence is criminal and formal proceedings. As already discussed in chapter two, evidence that has been obtained by torture is currently prohibited in English law.³⁶⁷ Clearly this can cause difficult issues for law enforcement. Any information that may have derived from torture, even if received innocently, cannot be used to convict those indicated. However, if torture evidence was admissible within the criminal justice system, one of the biggest issues it would need to overcome is that torture does not guarantee reliable or

³⁶⁵ Andrew C. McCarthy, 'Torture: Thinking about the Unthinkable' [2006] in Karen Greenberg (ed), *The Torture Debate in America*, New York: Cambridge University Press, 2005, pages 98 – 110, 99

³⁶⁶ Clare Algar, 'Torture did not lead us to Osama bin Laden' (The Guardian, 05/05/2011,) www.theguardian.com/commentisfree/libertycentral/2011/may/05/torture-and-osama-bin-laden, Accessed: 11/03/2016

³⁶⁷ *A and Others v. Secretary of State for the Home Department (No. 2)* [2005] UKHL 71

truthful information.³⁶⁸ Although witness testimony, which is a common source of evidence within criminal trials, also does not guarantee the truth, witness testimony has not (as a general rule) been coerced out of the witness against their will. Furthermore, any evidence deriving from the torture of the defendant himself, in which the defendant indicates his own guilt, may be very difficult to justify. Subsequently, if the State would like to use information pertaining from torture in any judicial proceedings, the State would need to explore the possibility of additional legislation to make the use of torture evidence useable for this purpose.

The Morals of Torture

Having discussed the possible uses for information obtained by torture, it is now possible to assess the morality of using such information. The question is not a straight-forward ‘is torture morally wrong?’ – most people would agree that in normal circumstances, the use of torture to coerce or manipulate an individual to reveal information is wrong. However, terrorism is hardly what would be considered a normal circumstance.

Hoffman³⁶⁹ notes three theories to measure the morals of torture. The first is the deontological theory which does not permit torture under any circumstances. The second is utilitarianism, which notes that torture is morally correct where the harm caused by torture is significantly beneficial to the rest of society. The third is threshold deontology, which finds torture morally permissible when the societal benefit outweighs the torture of another.³⁷⁰ Both the utilitarian and threshold deontology theories would at least accept (or even expect) torture to be used to

³⁶⁸ Samantha Newbery, Bob Brecher, Philippe Sands & Brian Stewart, ‘Interrogation, Intelligence and the Issue of Human Rights’ [2009] 24(5) *Intelligence and National Security* 631, 636

³⁶⁹ Stephen Hoffman, ‘Is Torture Justified in Terrorism Cases?: Comparing U.S. and European Views’ [2012] 33 *Northern Illinois University Law Review* 379

³⁷⁰ Stephen Hoffman, ‘Is Torture Justified in Terrorism Cases?: Comparing U.S. and European Views’ [2012] 33 *Northern Illinois University Law Review* 379, 384 - 385

save lives in a scenario similar to the ticking bomb.³⁷¹ It would appear that where torture is considered in almost all circumstances to be morally wrong, the utilitarian and threshold deontology theories indicate that it is justified if the information it produces saves lives. However, under both of these theories the use of torture essentially has to be ‘legitimized’. Dershowitz³⁷² is of the opinion that torture is (at least) morally permissible in scenarios such as the ‘ticking bomb’ (discussed below) because it is the ‘lesser of two evils’ to use torture against someone if that then saves lives. Similarly, Gross³⁷³ appears to identify with the threshold deontology approach and believe that torture is permissible if it protects the public. However, if the issue boils down to the quality of information gained, then torture can surely never be justified, as the quality of information gained is not something that can be guaranteed before the torture is carried out. Furthermore, if that person does not possess the information needed to save lives, then the use of torture is also not morally justified.

The moral dimensions of assisting torture would subsequently follow a similar track. As discussed in chapter two, complicity in criminal law is treated the same or similar as committing the act itself. From a moral standpoint, encouraging or assisting torture is enabling the act – i.e. enabling the infliction of pain on a person. However, it could be argued that the morals of using information obtained by torture are more complicated. Firstly, it could be suggested that not using torture in a ticking bomb scenario would be itself immoral because of the many lives it could potentially save.³⁷⁴ It could therefore be argued that the same principle

³⁷¹Stephen Hoffman, ‘Is Torture Justified in Terrorism Cases?: Comparing U.S. and European Views’ [2012] 33 *Northern Illinois University Law Review* 379, 384 - 385

³⁷² Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge*, Yale University Press: London, 2003, 142 - 149

³⁷³ Oren Gross, ‘Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience’ [2004] *University of Minnesota Law School, Legal Studies Research Paper Series: Research Paper No. 04-6*; Oren Gross, ‘Torture and an Ethics of Responsibility’ [2007] 3 *Law, Culture and the Humanities* 35

³⁷⁴ Turner concludes by appearing to agree with Greer [2011], that where the use of torture is legally wrong, morally the use of torture is excusable in post 9/11 terrorism where many lives could be potentially threatened – Ian Turner, ‘Human Rights and Antiterrorism: A Positive Legal Duty to Infringe Freedom from Torture?’ [2012] 35 *Studies in Conflict & Terrorism* 760, 773

could apply to information – if for example a State received information of an imminent attack, and didn't act upon it because it came from torture, it could potentially result in a mass-fatality attack. Arguably, using the information from torture actually has less moral complications, because whereas you cannot guarantee that torture will produce information that will protect the public, if the information is already available then it could be suggested that using that information is less harmful than the potential harm caused to the public.

It could be suggested that because society views State torture morally permissible or correct given the circumstances, it indicates that it is less about the act, and more about who is committing the act and why. This is something discussed by Tarrant et al.,³⁷⁵ who indicates that society is more willing to morally agree with something depending on who it is that is proposing it. Furthermore, a 2014 poll by the Washington Post found that 58% of American responders felt that CIA torture was justified 'sometimes' or 'often',³⁷⁶ whereas 36% of 21,000 global respondents polled between 2013 and mid 2014 believed that torture can be justified if it can protect the public.³⁷⁷ The same Amnesty poll found that 45% of the American responders felt that torture could be justified, but only 29% of UK responders felt the same. However, the main issue with morality is that it is personal, and is therefore subject to change. Whereas torture 20 years ago may not have been considered morally permissible to most people, those moral beliefs may have now changed considering that the terror threat is higher. It could therefore be suggested that it is very difficult to justify regulating such a morally-charged act when said morals are subject to change.

³⁷⁵ Mark Tarrant, Nyla R. Branscombe, Ruth H. Warner & Dale Weston, 'Social Identity and Perceptions of Torture: It's Moral When we do it' [2011] 48(2) *Journal of Experimental Social Psychology* 513

³⁷⁶ Adam Goldman & Peyton Craighill, 'New poll finds majority of Americans think torture was justified after 9/11 attacks' (The Washington Post, 16/12/04) www.washingtonpost.com/world/national-security/new-poll-finds-majority-of-americans-believe-torture-justified-after-911-attacks/2014/12/16/f6ee1208-847c-11e4-9534-f79a23c40e6c_story.html, Accessed: 05/04/2016

³⁷⁷ Amnesty International USA, 'Stop Torture Global Survey: Attitudes to Torture', www.amnestyusa.org/pdfs/GlobalSurveyAttitudesToTorture2014.pdf, Accessed: 05/04/2016

The Reliability of Torture - Does Coercive Interrogation Work?

As discussed above, if torture does not produce the results needed to prevent harm then it is not morally defensible. There has been an abundance of academic literature in the post-9/11 era on the topic itself. Some of the most well-known controversial views have emanated from Dershowitz³⁷⁸ who claims that torture can be reliable, or will at least work. The discussion of tortures effectiveness is theoretical, as there are no study groups, no participants to test, and no data to analyse.³⁷⁹ However, the lack of empirical evidence on the effectiveness of torture works both ways: it is also difficult to argue that torture does not work, as there are no figures to show how often torture works versus how often torture doesn't work.

Even those that have endorsed torture would agree that there are certain standards and procedures that must be adhered to if torture is to work.³⁸⁰ The first is to ensure that the suspect is not an innocent - this means there must be a certain standard of proof to ensure the suspect's involvement/guilt before torture can be administered.³⁸¹ The easiest way of ensuring the guilt of a person/s is when they have been convicted of a terror-related offence, however the likelihood of that person having relevant information that an interrogator would find useful decreases over time.³⁸² Furthermore, as already discussed in chapter two, terror groups tend to

³⁷⁸ 'It is impossible to avoid the difficult moral dilemma of choosing among evils by denying the empirical reality that torture sometimes works, even if it does not always work. No technique of crime prevention always works' – Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge*, Yale University Press: London, 2003, 137

³⁷⁹ John W. Schiemann, 'Interrogational Torture: Or How Good Guys Get Bad Information with Ugly Methods' [2012] 65(1) *Political Research Quarterly* 3, 4

³⁸⁰ For example, Alan Dershowitz has suggested torture law is a necessary *because* there would then be certain standards, such as the accountability and transparency that officials would have to adhere to. He argues that this is preferable because torture will be used regardless of whether there are laws in place to allow it – Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge*, Yale University Press: London, 2003, 159

³⁸¹ Henry Shue, 'Torture in Dreamland: Disposing of the Ticking Bomb' [2005-2006] 37 *Case Western Reserve Journal International Law* 231, 237

³⁸² As discussed in chapter one, a convicted terrorist will likely spend many years in prison, where he/she would be unable to communicate with terrorist groups. Furthermore, even if a terrorist is not convicted, if

change their habits when one of their own is arrested/detained. Welch has discussed what is termed ‘one-sided scepticism’, whereby interrogators may view their own judgements as superior as a result of their expertise, and thus results in tunnel vision which ‘*puts interrogators on a pathway to misclassify an innocent person as guilty.*’³⁸³ Therefore, if interrogators are assuming the guilt of suspects without evidence/conviction, this could result in the use of torture against someone that is innocent.

The second is that the interrogator only uses torture where the suspect refuses to talk, and therefore as a last resort.³⁸⁴ The biggest issue with this is that the suspect may refuse to answer the interrogators questions because they do not know the answer, out of spite, or fear of what may happen to them if they do. The third is that the interrogator does not exceed the minimum amount of pain needed to obtain the information needed.³⁸⁵ Of course, it would appear difficult to determine how much pain would be needed for each particular suspect before they reveal all the interrogator wants to know: ‘*what severe pain as opposed to normal pain is can finally only be determined individually and that severe pain is simply the pain that breaks a person's resistance? May we inflict pain until the person breaks because until then the pain is obviously not severe?*’³⁸⁶ Furthermore, it could be argued that interrogators may feel pressured to use more torture to either get the suspect to reveal information quicker,³⁸⁷ or because they believe they are withholding information that they don’t actually have. The biggest resulting issue for

he/she has been previously detained then they are likely to be rejected from their previous comrades who would grow suspicious of them, and change their habits as much as possible so as to protect themselves from whatever the suspect may tell authorities in interrogation. Subsequently, a suspect is unlikely to have relevant information unless the suspect is either (a) a lone wolf, or (b) is subject to torture almost as soon as they are detained.

³⁸³ Michael Welch, ‘American ‘Pain-ology’ in the War on Terror: a Critique of ‘Scientific’ Torture’ [2009] 13(4) *Theoretical Criminology* 451, 464

³⁸⁴ Florian Jessberger, ‘“Bad Torture – Good Torture? What International Criminal Lawyers May Learn from the Recent Trial of Police Officers in Germany’ [2003] 3 *Journal of International Criminal Justice* 1059, page 1061

³⁸⁵ Dershowitz [2003] in John W. Schieman, ‘Interrogational Torture: Or How Good Guys Get Bad Information with Ugly Methods’ [2012] 65(1) *Political Research Quarterly* 3, 4

³⁸⁶ Barnhard Schlink, ‘The Problem With “Torture Lite” [2007-2008] 29 *Cardozo L. Rev.* 85, 87

³⁸⁷ Courtenay Conrad, ‘Who Tortures the Terrorists? Transnational Terrorism and Military Torture’ [2014] 0 *Foreign Policy Analysis* 1, 4

a State accepting information from a torturing State, is if the suspect reveals information that isn't actually true.³⁸⁸ Thus it could be argued that any information that torture produces cannot be reliable, particularly as standalone information.

The Current Prohibition of Torture and Complicity

Having assessed the morality and reliability of torture, the reasoning behind the prohibition may appear clearer. Clearly there was strong reasoning for prohibiting torture in the first place, not least because of the atrocities committed by Nazi Germany during the Second World War.³⁸⁹ However, as suggested by McCarthy, as noble as it is to say that torture should never ever be used because it is so awful, terrorism was not as large a problem when these treaties were created as it is now: '*Terrorism in general is not a new phenomenon, but today's global and systematic menace is plainly not the threat that was contemplated when international humanitarian law... took root... They did not take account of a situation in which our highest priority would be to obtain... intelligence.*'³⁹⁰ As discussed above, public attitudes become more sympathetic towards the arguments for using torture in the aftermath of a terrorist attack. Therefore, it could be presumed that attitudes become more hostile towards torture when faced with the destruction it can cause. A clear example of this is the public shock at being presented with the photographic evidence of torture at Abu Ghraib.³⁹¹

³⁸⁸ 'Mubanga was subjected to the worst treatment at the very time it was becoming clear to British and American officials that he had no connections to terrorism. He was subjected to harsher treatment because an Australian prisoner, David Hicks, who has also claimed through his lawyers that he has been subjected to torture, had incriminated him.' - Alex Bellamy, 'No pain, no gain? Torture and ethics in the war on terror' [2006] 82(1) *International Affairs* 121, 1

³⁸⁹ Steven Greer, 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International Human Rights Law' [2015] 0 *Human Rights Law Review* 1, 2

³⁹⁰ Andrew C. McCarthy, 'Torture: Thinking about the Unthinkable' [2006] in Karen Greenberg (ed), *The Torture Debate in America*, New York: Cambridge University Press, 2005 (pages 98 – 110), 99

³⁹¹ Marcy Strauss, The Lessons of Abu Ghraib [2005] 66 *Ohio St. L.J.* 1269, 1270 - 1271

It could be argued that UNCAT, ECHR, UDHR etc. were knee-jerk reactions, prohibiting torture automatically because its use as an interrogational tactic has, and could continue to be 'abused'. If torture is prohibited because of its tendency to be abused, then the information arising from torture is prohibited for several reasons, the first being that it would be unethical to use information deriving from an illegal act.³⁹² Secondly, allowing information that derives from torture would create supply and demand, and the act of torture would not be sufficiently discouraged. Thirdly, the information is not guaranteed to be reliable, because the person tortured may not be truthful or may not have the answers the interrogators are looking for.³⁹³

It is clear that the prohibition in its current form does not work, as '*torture is practised in more than 90 per cent of all countries and constitutes a widespread practice in more than 50 per cent of all countries.*'³⁹⁴ If torture is a widespread as is suggested, and if torture will continue to be used regardless of the prohibition, then is it not better that it is (a) regulated and (b) used for the 'greater good?' Conversely, it could be contented that there will always be paedophiles, so should paedophilia not be regulated or deserving of defences? Though the proposition of torture and assistance in torture may appear justified when discussed in connection with counterterrorism, Conrad et al. argues that different States abuse human rights for different reasons and incentives, and that military torture by democratic States increases when transnational terrorism is rife.³⁹⁵ Conrad also details that States may use torture aside from as a method of intelligence collection, and that it may also be used as a method of deterrence,

³⁹² For example, many would consider the use of data from the experiments at Nazi concentration camps unethical because of the lack of concern for the wellbeing of the subjects, many of whom died – Kristine Moe, 'Should the Nazi Research Data Be Cited?' [1984] 14(6) *The Hastings Center Report* 5

³⁹³ Samantha Newbery, Bob Brecher, Philippe Sands & Brian Stewart, 'Interrogation, Intelligence and the Issue of Human Rights' [2009] 24(5) *Intelligence and National Security* 631, 636

³⁹⁴ Nowak [2012] in Steven Greer, 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International Human Rights Law' [2015] 0 *Human Rights Law Review* 1, 8

³⁹⁵ Courtenay Conrad, 'Who Tortures the Terrorists? Transnational Terrorism and Military Torture' [2014] 0 *Foreign Policy Analysis* 1, 2 - 3

effectively using torture as both trial and punishment for the criminal act of terrorism.³⁹⁶ What Conrad appears to be hinting towards, is that torture is a slippery slope, a topic that now can be discussed in its own right.

The Slippery Slope

Admittedly, the slippery slope metaphor posing as an ‘argument’ is usually confined to the discussion of legalising torture, not the assistance of or use of information pertaining from torture. However, it can be assumed that similar arguments could be made. The argument has been discussed in a vast range of publications in connection with torture post 9/11, by academics including Greer,³⁹⁷ Shue,³⁹⁸ O’Rourke et al.,³⁹⁹ Bagaric & Clark etc., and is best summed up by the latter: *‘The slippery slope argument is often invoked in relation to acts that in themselves are justified, but which have similarities with objectionable practices.’*⁴⁰⁰ Subsequently, the discussion turns to whether these acts, which are currently justified, will filter down to be used for reasons that are not justified – in the case of torture, will the torture be justified when used occasionally, in situations such as the ticking bomb, or will it begin to be used more often, or for situations other than terrorism?⁴⁰¹ Greer (2015) himself States ‘My

³⁹⁶ Courtenay Conrad, ‘Who Tortures the Terrorists? Transnational Terrorism and Military Torture’ [2014] 0 *Foreign Policy Analysis* 1, 4

³⁹⁷ Steven Greer, ‘Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really ‘Absolute’ in International Human Rights Law’ [2015] 0 *Human Rights Law Review* 1

³⁹⁸ Although Shue does not expressly discuss the ‘slippery slope’, he does express his scepticism that torture would only be used in the ticking bomb scenario: *‘you cannot - if you are an alcoholic have a drink only on special occasions, and you cannot - if your politicians are not angels - employ torture only on special occasions.’* - Henry Shue, ‘Torture in Dreamland: Disposing of the Ticking Bomb’ [2005-2006] 37 *Case Western Reserve Journal International Law* 231, 238

³⁹⁹ Anne O’Rourke, Vivek Chaudhri and Chris Nyland ‘Torture, Slippery Slopes, Intellectual Apologists, and Ticking Bombs: An Australian Response to Bagaric and Clarke’ [2005-2006] 40 *University of San Francisco Law Review* 85

⁴⁰⁰ Mirko Bagaric & Julie Clarke, ‘Not Enough Official Torture in the World? The Circumstances in Which Torture Is Morally Justifiable’ [2004-2005] 39 *University of San Francisco Law Review* 581, 615

⁴⁰¹ Ian Turner, ‘Human Rights and Antiterrorism: A Positive Legal Duty to Infringe Freedom from Torture?’ [2012] 35 *Studies in Conflict & Terrorism* 760, 772

*own hitherto unwavering faith in the absolutist cause was shattered by the case of Gafgen v Germany,*⁴⁰² indicating that there is potential support for the use of torture outside of terrorism. The threat/use of torture in a scenario similar to that of Gafgen is essentially a ‘ticking bomb’ case. However, qualifying the case of Gafgen is admitting that there are already situations that are not connected to terrorism, where the use of torture is considered justifiable.

In the case of the assistance of torture, it could be suggested that regulating the use of intelligence obtained by torture appears strange if you do not also regulate the use of torture itself. It would seem that the obvious progression from merely using information pertaining from cruel treatment, would be to start using obtaining your own information, using the same or similar methods. As discussed in chapter one, much of intelligence is based on the exchange of information with other foreign intelligence agencies. Would the State (legally) receiving information pertaining from torture not feel the temptation to start exchanging their own? Moreover, would intelligence services and State agents not start relying on torture more and more, whether that be reliance on the fruits or the act itself?:

*‘Assuming that torture may be deemed a more effective interrogation technique than its alternatives, we can expect members of security services to become increasingly more dependent on the use of such coercive techniques... Their careers depending on their ability to foil future attacks, interrogators are likely... to opt for those interrogation methods that are deemed to provide the fastest answers. And what starts off as using exceptional methods in exceptional circumstances may... be internalized and applied in a growing number of cases.’*⁴⁰³

⁴⁰² Steven Greer, ‘Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really ‘Absolute’ in International Human Rights Law’ [2015] 0 *Human Rights Law Review* 1, 2

⁴⁰³ Oren Gross, ‘Torture and an Ethics of Responsibility’ [2007] 3 *Law, Culture and the Humanities* 35, 38

Of course, ‘complicity’ is not simply limited to receiving information from other States, but can also consist of assisting other States to commit the act itself. If the assisting State did not want to go down the route of the slippery slope and become more involved than what it deems to be justified, the State in question would have to have very clear guidelines about how much involvement it will allow its agents to have. However, this in itself is not a guarantee that it will not become tempted to start using torture itself, especially when history has not proved itself able to resist temptation. As previously discussed in chapter three, the Roman judicial process eventually evolved over time, firstly using torture only on slaves or foreigners, before beginning to use torture on its citizens and the privileged classes. Could this be the first torture-related example of the so-called ‘slippery slope’?:

‘The lesson of history is that, when the law is not there to keep watch over it, the practice is always at risk of being resorted to in one form or another by the executive branch of government. The temptation to use it in times of emergency will be controlled by the law wherever the rule of law is allowed to operate.’⁴⁰⁴

Accountability

In essence, if a State is to avoid the ‘slippery slope’, the State needs to ensure that its agents are completely accountable. Moreover, the State would need to be accountable if it was to counteract the probable criticism that the assistance in torture would incur, and ensure that any information deriving from torture is used within a regulated system, which would ensure the reliability and authenticity of the information. Furthermore, this system would need to have very clear guidelines for the ‘main offender’ State, for example, dictating detainee conditions,

⁴⁰⁴ Philip Rumney, ‘The Effectiveness of Coercive Interrogation: Scholarly and Judicial Responses’ [2005] 44 *Crime, Law & Social Change* 465, 467

recording what torture ‘techniques’ have been used etc., so as to minimise abuse. The main purpose to having an accountable system is that the State and its agents would be subject to observations of its activities, and may therefore be reluctant to assist torture or use torture information unless absolutely necessary. Alternatively, it could be suggested that the reputation of a State would not suffer so greatly if it continued to use torture outside of the law, as opposed to within the law. A possible advantage to this scenario is that State officials may be reluctant to use it on a regular occurrence due to its illegality, however considering its alleged widespread use across Europe after 9/11, this may not be entirely accurate. Likewise, Dershowitz has argued that officials would likely use torture less if it was permitted.⁴⁰⁵ Subsequently, it would make sense that if torture is used less, then complicity in torture will also decrease. Furthermore, it would be difficult to use any information from torture within the criminal justice system, although its information could possibly still be used within an internal, operational vicinity.

Additionally, the reputation of intelligence services are important, because some States may be reluctant to knowingly receive and exchange information with States that use torture or are otherwise complicit, and may therefore decide to cut-ties or reduce working with such agencies.⁴⁰⁶ Although this scenario appears to be unlikely due to previous events,⁴⁰⁷ if this did happen then the State would greatly reduce the flow of information it needs to prevent terrorist

⁴⁰⁵ Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge*, Yale University Press: London, 2003, 158

⁴⁰⁶ Intelligence agencies ‘may even consider torture to be a useful interrogation method, but desist from the practice for the purpose of information sharing because of its desire to be an esteemed network partner’ - Elizabeth Sepper, ‘Democracy, Human Rights and Intelligence Sharing’ [2010-2011] 46 *Texas International Law Journal* 151, 164

⁴⁰⁷ As discussed within the third chapter of this thesis, complicity in the US extraordinary rendition programme was widespread across Europe and other parts of the world. Furthermore, Saudi Arabia is a valued intelligence partner of many States despite its own record on human rights, signalling that States place importance of countering terrorism over the human rights of suspected terrorists.

threats, the opposite of what a State interested in the legalisation of torture evidence would likely intend.

However, it could be argued that it is not merely just the reputation of the State that is of concern. The State that is the ‘main offender’ in the use of torture would need to assemble some sort of ‘torture team’⁴⁰⁸ made up of interrogators, psychologists, doctors and other military/legal personnel. As discussed in chapter three, the State that is complicit in torture may provide equipment, extradite suspects, send questions for the suspect to be asked, or allow torture to be performed on their territories. Both States therefore would require a team of personnel. The opinions of personnel on the use or assistance of torture are important, both because it might be against their own personnel moral code, and because they might also have concerns about their individual reputations. Furthermore, the institutions that personnel might be part of may also have reputational concerns, such as the American Psychological Association,⁴⁰⁹ which refuted the use of psychologist’s involvement in torture at the Guantanamo Bay facility. Whereas it might be possible reduce the risk of personnel refusing to be involved in torture complicity within certain sectors, other roles require more specific expertise: *‘Either “torturers” are just thugs who have no clue what they are doing... or some can have some genuine expertise.’*⁴¹⁰ This may result in having a team of personnel that are not competent or experienced, and ultimately result in a team of people that are not expert enough the deal with this highly sensitive scenario in a professional manner. Hence, the State may possibly see history repeat itself, with State agents acting beyond what they are sanctioned to do and/or abusing their position.

⁴⁰⁸ Henry Shue, ‘Torture in Dreamland: Disposing of the Ticking Bomb’ [2005-2006] 37 *Case Western Reserve Journal International Law* 231, 237

⁴⁰⁹ James Risen, ‘Psychologists Approve Ban on Role in National Security Interrogations’ (The New York Times, 07/08/2015) www.nytimes.com/2015/08/08/us/politics/psychologists-approve-ban-on-role-in-national-security-interrogations.html?_r=0, Accessed: 10/05/2016

⁴¹⁰ Henry Shue, ‘Torture in Dreamland: Disposing of the Ticking Bomb’ [2005-2006] 37 *Case Western Reserve Journal International Law* 231, 237

Particularly when considering past events, it could be argued that State actors would need to be held to incredibly high standards to ensure that they remain professional, and that they are held to account when they fail to do so. The previously discussed example of the Snowden leaks perfectly illustrates how intelligence programmes can appear to spiral out of control when their actions are not accountable. In its participation of the Prism programme (and other methods) which observed millions of (seemingly) random communications every day,⁴¹¹ staff at GCHQ were allegedly left to fill the gaps in the legislation, and it has been suggested that the law was specifically written to be broad enough to enable GCHQ to collect a vast amount of communication.⁴¹² Although the controversy of mass surveillance is not something this thesis aims to discuss, these revelations did highlight how the concerns of provocative counter-terrorism measures that allegedly conflict with human rights are seemingly ignored. If the State did implement some variation of torture law that was written in a similarly ‘broad’ manner, it could prove disastrous for the human rights of those accused of withholding valuable information. For example, the treatment of detainees by British armed forces in Iraq, in some instances, could only be described as brutal and excessive, even by those that endorse forms of torture law.⁴¹³ Where there appears to be little accountability in intelligence services as it stands already,⁴¹⁴ would torture law be just another opportunity for a State to engage in the abuse of basic fundamental freedoms?

⁴¹¹ BBC News, ‘Edward Snowden: Leaks that exposed US spy programme’ (BBC News, 17/01/2014) www.bbc.co.uk/news/world-us-canada-23123964, Accessed: 01/03/2016

⁴¹² Nick Hopkin, ‘Huge swath of GCHQ mass surveillance is illegal, says top lawyer’ (The Guardian, 28/01/2014) www.theguardian.com/uk-news/2014/jan/28/gchq-mass-surveillance-spying-law-lawyer, Accessed: 01/03/2016

⁴¹³ Baha Mousa suffered an ‘*appalling episode of serious gratuitous violence*’ by the British Army before his death in 2003 – BBC News, ‘Baha Mousa inquiry: ‘Serious discipline breach’ by army’ (BBC News, 08/09/2011) www.bbc.co.uk/news/uk-14825889, Accessed: 17/06/2016

⁴¹⁴ As discussed in Chapter one, intelligence agencies do not come under the same level of scrutiny that the police or criminal justice system do. Furthermore, much of intelligence sharing can be done via informal arrangements.

One of the ways in which a State could ensure that its agents, particularly those that are in positions of authority and responsibility, are accountable for their actions is to ensure that there is a legal process for those that fail to act reasonably. However, it would appear that due to past opportunities to do so, that this would be unlikely to occur. In the US, President Obama ruled out the prosecutions of those allegedly involved in torture at Guantanamo bay,⁴¹⁵ even though some of the techniques used on detainees far surpassed the ‘enhanced interrogation techniques’ that were approved during the Bush administration. The Senate Committee Report found that whilst sleep deprivation was officially approved for 72 hours to be considered as an enhanced interrogation technique, detainees were allegedly deprived of sleep for up to 180 hours. Moreover, rectal rehydration was used as a way of controlling the behaviour of some of the detainees, as opposed to a medically-sanctioned method of ‘force feeding’ to keep detainees on hunger strike alive.⁴¹⁶

Furthermore, the Senate Committee report into torture at Guantanamo Bay concluded that there was little accountability, and states that “*CIA officers and CIA contractors who were found to have violated CIA policies or performed poorly were rarely held accountable or removed from positions of responsibility*”⁴¹⁷ These examples appear to indicate a potential unwillingness on part of the State to prosecute wayward staff responsible for brutal treatment, as long as it appears to have achieved the desired result. It could be argued that this is hardly conducive to an honest State that can be trusted to be involved in the torture of suspected terrorists.

Hafetz however does not appear to believe that criminal proceedings are a necessity for State accountability, and identifies three further ways in which a State can be accountable:

⁴¹⁵ BBC News, ‘Obama exempts CIA ‘torture’ staff’ (BBC News, 17/04/2009) www.news.bbc.co.uk/1/hi/8003537.stm, Accessed: 23/05/2016

⁴¹⁶ Diane Feinstein, *Senate Select Committee on Intelligence*, 03/12/2014, ‘Committee Study of the Central Intelligence Agency's Detention and Interrogation Program’, Findings and Conclusions, 109

⁴¹⁷ Diane Feinstein, *Senate Select Committee on Intelligence*, 03/12/2014, ‘Committee Study of the Central Intelligence Agency's Detention and Interrogation Program’, Findings and Conclusions, 21

*‘Opposition to criminal prosecution... may channel the focus towards other accountability mechanisms, such as truth and reconciliation commissions, national commissions of inquiry or victim compensation schemes.’*⁴¹⁸ It could be suggested that before a State could regulate the complicity of torture, the State would need to reconcile with past wrongs in respect to any alleged previous participation in torture. However, both the Al Sweady Inquiry⁴¹⁹ and the Senate Committee Report⁴²⁰ have both been accused of promoting insufficient remedies for past actions - whereas it could be argued that States accused of involvement in torture post 9/11 have resisted criminal proceedings and inquiries because their actions were prohibited, it may be considered difficult to comprehend that said States could establish an accountable system on the back of such actions. It may also raise questions as to whether a State could achieve accountability within a regulated system of torture complicity.

Reputational Damage

The reputational consequence of a democratic State that either uses torture or will assist in the use of torture is important to discuss, because all States party to international bodies (such as ECHR, UDHR etc.) are obligated to protect fundamental freedoms, including freedom from torture. The UK for example is internationally known for upholding human rights, and

⁴¹⁸ Jonathan Hafetz, ‘Resisting accountability: transitional justice in the post-9/11 United States’ [2015] 19(4) *The International Journal of Human Rights* 429, 430

⁴¹⁹ Tim Wood, ‘A Few Rotten Apples’: A Review of Alleged Detainee Abuse by British Personnel in Iraq Following the Al Sweady Inquiry. Is There Still a Case to Answer? [2015] 21(1) *Journal of Conflict & Security Law* 1, 28

⁴²⁰ Both the American Civil Liberties Union and Amnesty International criticized the US for not prosecuting those involved in the torture and ill-treatment of detainees – ACLU, ‘Senate Torture Report Shows Need For Accountability’ (ACLU, 09/12/2014) www.aclu.org/news/senate-torture-report-shows-need-accountability?redirect=national-security/senate-torture-report-shows-need-accountability, Accessed: 17/06/2016; Amnesty International, ‘USA: Senate summary report on CIA detention programme must not be end of story’ (Amnesty International, 09/12/2014,) www.amnesty.org/en/latest/news/2014/12/usa-senate-summary-report-cia-detention-programme-must-not-be-end-story/, Accessed: 17/06/2016

encouraging other States to do the same.⁴²¹ The UK Foreign Office funds several programmes for the promotion of human rights internationally, including the Preventing Sexual Violence in Conflict Initiative in 2012,⁴²² and the Strategy for Abolition of the Death Penalty.⁴²³ It could be argued that autocratic States such as Syria, Saudi Arabia, and Iran etc., where there are human rights concerns,⁴²⁴ would not suffer the same level of reputational damage as the UK or the US, for either using torture or assisting with torture. This is because autocratic States are already known for their lack of human rights consideration within aspects of their justice and penal systems.⁴²⁵ For example, during the operation of the extraordinary rendition programme, there did not appear to be an outcry over the alleged involvement of Morocco⁴²⁶ or Egypt, but there was international astonishment over the alleged involvement of brutality by UK and US forces in the Abu Ghraib scandal.⁴²⁷ Subsequently, the reputation of a State that will assist in torture may be considered no better than the State that actually uses torture, much like the Courts view that complicity in a crime is equal to committing the crime itself.

⁴²¹ Gov.uk 'Human Rights and Democracy Report 2014' (Gov.uk, 21/04/2016) www.gov.uk/government/publications/human-rights-and-democracy-report-2014/human-rights-and-democracy-report-2014, Accessed: 10/05/2016

⁴²² Gov.uk, '2010 to 2015 government policy: sexual violence in conflict' (Gov.uk, 08/05/2015) www.gov.uk/government/publications/2010-to-2015-government-policy-sexual-violence-in-conflict/2010-to-2015-government-policy-sexual-violence-in-conflict, Accessed: 19/05/2016

⁴²³ Foreign and Commonwealth Office, revised October 2011, 'HMG Strategy for Abolition of the Death Penalty 2010-2015', Available: www.gov.uk/government/uploads/system/uploads/attachment_data/file/35448/death-penalty-strategy-oct-11-15.pdf, Accessed: 19/05/2016

⁴²⁴ The UK Foreign and Commonwealth Office lists a number of countries as a 'Human Rights Priority Country' in its 2015 'Human Rights and Democracy' Report, first published 21st April 2016, Available: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/518658/FCO755_Human_Rights_Report_2015_-_WEB.pdf, Accessed: 19/05/2016

⁴²⁵ Saudi Arabia for example has been criticised for its execution rate, after executing 157 people in 2015 – Associated Press, 'Saudi Arabia: beheadings reach highest level in two decades' (The Guardian, 02/01/2016) www.theguardian.com/world/2016/jan/02/saudi-arabia-beheadings-reach-highest-level-in-two-decades, Accessed: 17/06/2016

⁴²⁶ The Guardian, 'MI6 and CIA 'sent student to Morocco to be tortured'' (The Guardian, 11/12/2005) www.theguardian.com/world/2005/dec/11/politics.alqaida, Accessed: 22/05/2016

⁴²⁷ 'the graphic display of photographs of abuse in Abu Ghraib prison shocked the world' - Marcy Strauss (2005) 'The Lessons of Abu Ghraib' 66 *Ohio St. L.J.* 1269, 1270 - 1271

The UK has what is arguably one of the most respected judicial systems in the world.⁴²⁸ However, allowing the use of information obtained by the abuse of an individual's human rights would almost certainly taint its reputation,⁴²⁹ regardless of if the UK has itself used torture. The UK currently holds a seat on the UN Human Rights Council,⁴³⁰ a position which could appear contradictory if the UK decided to allow its agents to be complicit, in what is detectably one of the most deplorable human rights abuses. For example, when Saudi Arabia, a State known for its human rights abuses, secured a position of expertise in the UN Human Rights Council in 2015, the decision was met with derision from many media outlets and human rights campaigners.⁴³¹ Clearly, there was some confusion as to how a State that outwardly appears to have little concern for the most basic human rights of even its own citizens, is supposed to be involved in the human rights concerns of what is possibly one of the most influential international bodies. There is potentially already some damage to the reputation of the UK because of its alleged complicity in torture post 9/11,⁴³² although it could be argued that any reputational flaws the UK may now have is because torture and complicity are currently prohibited, as opposed to the actual act of complicity itself. It could therefore be suggested that the reputation of a State is more damaging if they are using torture/information deriving from torture illegitimately, as opposed to its use within the confines of an accountable, regulated system.

⁴²⁸ The UK ranked at number 12 of 102 countries surveyed in the World Justice Project's Rule of Law survey - World Justice Project, 'Rule of Law Index 2015', Available:

www.worldjusticeproject.org/sites/default/files/roli_2015_0.pdf, Accessed: 19/05/2016, 6

⁴²⁹ 'A State, bound by the Rule of Law, cannot allow torture... without betraying its own principles and losing credibility at the international level.' – Kai Ambos (2009), 'May a State Torture Suspects to Save the Life of Innocents?', 6 *Journal of International Criminal Justice* 261, 269

⁴³⁰ Gov.uk, 'Press Release: UK elected to the UN Human Rights Council' (Gov.uk, 14/11/2013)

www.gov.uk/government/news/uk-elected-to-the-un-human-rights-council, Accessed: 17/06/2016

⁴³¹ Tom Brooks-Pollard, 'Anger after Saudi Arabia 'chosen to head key UN human rights panel'' (The Independent, 20/09/2015) www.independent.co.uk/news/world/anger-after-saudi-arabia-chosen-to-head-key-un-human-rights-panel-10509716.html, Accessed: 10/05/2016

⁴³² The UK was heavily criticised by Mark Scheinin after a UN investigation into extraordinary rendition – BBC News, 'UN criticises UK 'rendition role' (BBC News, 10/03/2009) www.news.bbc.co.uk/1/hi/uk_politics/7933929.stm, Accessed: 17/06/2016

This chapter has established that the morals of torture and assisting acts are subject to change, depending on who has used torture and who will be subjected to torture. Subsequently, it is difficult to justify such a controversial act, and harder still to enshrine such acts in law, when those morals are likely to change. However, it has identified that torture and assisting acts would be morally justified if the ticking bomb scenario was to arise. Conversely, the ticking bomb scenario is incredibly unlikely to ever happen under the conditions assumed by those that champion torture law. Furthermore, the reputational damage that a State would potentially suffer after employing torture law could seriously affect its partnerships with foreign agencies. Moreover, a State that is willing to assist torture is likely to adopt the direct use of torture itself. Subsequently, it can only be concluded that regulating the assistance of torture, or the acceptance of information obtained by torture, would be detrimental to the counter-terror effort.

CONCLUSION

The aim of this thesis was to discuss the legal and moral issues surrounding the theoretical complicity in torture, or use of information obtained by torture, whilst critically examining the adoption of previously discussed torture law proposals in the context of complicity. The first thing this thesis discussed was whether the current threat of terrorism is sufficient enough to justify the complicity of torture. Whilst the likelihood for a high-fatality terror attack could be described as minimum, the possibility of a terrorist group obtaining CBRN materials is a terrifying thought, because it could cause permanent, catastrophic damage. Worse still, the threat of terror is not only at home, but as shown by attacks such as the ones at Madison Blu and Tunisia, abroad as well. Furthermore, the threat of cyberterrorism has grown as more and more people use the internet and technology on a regular basis, making cyberterrorism a particular vulnerability. It can therefore only be concluded that there is a sufficient terror risk that could morally justify complicity in torture.

What then of the risk of the ticking bomb scenario ever coming to fruition? It is certain that the ticking bomb scenario is the biggest government nightmare. Knowing that an attack will happen and being unable to make the instigator of the attack prevent it from happening, it is understandable that the government would aim to safeguard against this, and have a 'Plan B' for if everything else fails. However, because terror plots are primarily used to inspire fear, it is likely that the fear of the ticking bomb is far more serious than the likelihood of it. Additionally, the requirements listed by Shue⁴³³ and Kleinig⁴³⁴ make it near impossible that the

⁴³³ Henry Shue (2005-2006) 'Torture in Dreamland: Disposing of the Ticking Bomb' 37 *Case W. Res. J. Int'l L.* 231

⁴³⁴ John Kleinig (2005) 'Ticking Bombs and Torture Warrants' 10 *Deakin L. Rev.* 614

ticking bomb will ever occur. Therefore, the risk of the ticking bomb is not justification for the complicity of torture.

Dershowitz's torture warrants concept would not work, because the warrants system could be easily avoided by applicants that have been rejected by a judge. Furthermore, even if a warrant was issued correctly, because both the warrants system and criminal justice system are judicial, there is the potential for a conflict of interests because there is no 'vetting'. Moreover, allowing the assistance of 'torture lite' in an attempt to be ethically complicit would not work because an individual's pain threshold is difficult to determine, making the ethical argument irrelevant. Likewise, the defence of necessity would also be unworkable, because as shown in *Gafgen v Germany*,⁴³⁵ the State may be reluctant to prosecute its own agents, especially if those agents have prevented a threat from occurring. Furthermore, the defence of 'official disobedience' would not work for the same reason. Although both defence proposals are legally and morally sound, they would not work in practice.

Although there are various forms of intelligence collection, interrogation is the one that has the potential to be most useful, not least because the information is received immediately. Still, it does rely on the suspect truthfully answering the questions put to them, hence torture is discussed as a way to 'make them talk'. However, as discussed in the fourth chapter of this thesis, torture does not work, because the suspect may give the torturer false information, or may not have the information that the torturer is looking for,

It is unlikely that a suspect would be able to provide useful information when, as discussed in the first chapter of this thesis, terror groups will change their methods and plans if they suspect one of their own is detained. Furthermore, the suspect would likely to be someone who has not been convicted of terrorism, which means it would be unknown as to whether the suspect even

⁴³⁵ *Gafgen v. Germany*, Application no. 22978/05

was a terrorist, and therefore if they even had information to provide. Subsequently, when this information is exchanged, the receiving State may then waste valuable resources by chasing leads based on the false information given to them. It is therefore safe to say, that the information obtained by torture may not enhance current methods of intelligence collection.

In fact, complicity is more likely to have a detrimental effect on intelligence collection, particularly when working with other States. Other States (and their intelligence agencies) may not want to be partners or otherwise associated, with a State that commits, allows, or actively uses information obtained by torture. This can have effects on several major methods used in countering terrorism, such as intelligence sharing, deportation,⁴³⁶ and the prosecution of terrorists at home and abroad.⁴³⁷ These elements are particularly important considering the threat of terrorism to tourists.

To conclude, although the threat of terrorism is sufficient enough to justify the use of information obtained by torture, or otherwise being complicit in the use of torture, none of the previous proposals discussed within this thesis would be legally or morally workable. In addition, previous use of torture post-9/11 indicates that if complicity in torture was to become legal, those legal boundaries could be pushed by intelligence officials, or those otherwise in use of complicity tactics, as shown at the Guantanamo Bay facility. Furthermore, legalising complicity in torture is unlikely to remain limited at complicit acts, and so could initiate the slippery slope. Moreover, although the potential information that could be gained from using torture is information that would be otherwise difficult to obtain, the information itself might be incorrect or misleading. Essentially, there would be no point regulating torture complicity because the information received by States that have used torture might not be accurate. Additionally, other States that do not want to be associated with torture may refuse to work

⁴³⁶ *Othman (Abu Qatada) v. The United Kingdom*, Application no. 8139/09

⁴³⁷ *A and Others v. Secretary of State for the Home Department (No. 2)[2005] UKHL 71*

with complicit States outright, which would only be to the detriment of the complicit State. Subsequently, the complicity of torture and/or the use information obtained by torture should not become part of the State's legal framework, or otherwise part of their counter-terrorism initiative.

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