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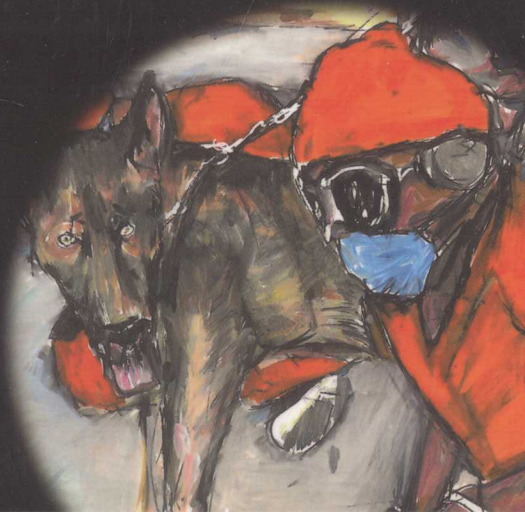
GARETH PEIRCE

DISPATCHES FROM THE DARK SIDE

ON TORTURE AND THE DEATH OF JUSTICE



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On Torture and the Death of Justice

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GARETH PEIRCE is a lawyer who represents individuals who are or have been the subject of rendition and torture, held in prisons in the UK on the basis of secret evidence, or interned in secret prisons abroad under regimes that continue to practise torture. She has represented many men and women from communities wrongly deemed 'suspect', on cases such as those of the Guildford Four, the Birmingham Six, Judith Ward, Jean Charles de Menezes and Moazzam Begg.

In recognition of those who have come back into the light and have told what happened, and of those still in darkness.

Preface

Each of these essays was written, at different times in the last three and a half years, as an urgent SOS—an attempt to set out the details of disturbing contemporary events, not all of which could easily be found in the commentaries of the daily news. Even less accessible in instances such as these, where the facts suggest that the ship of state is sailing towards moral and political catastrophe, are the legal principles that might provide a life raft.

The last several years have found us in the midst of more such catastrophes than we could ever, in our worst nightmares, have dreamed of. We could never have envisaged that the history of the new century would encompass the destruction and distortion of fundamental Anglo-American legal and political constitutional principles in place since the seventeenth century. Habeas corpus has been abandoned for the outcasts of the new order in both the US and the UK, secret courts have been created to hear secret evidence, guilt has been inferred by association, torture and rendition nakedly justified (in the UK our government's lawyers continue to argue positively for the right to use the product of both) and vital international conventions consolidated in the aftermath of the Second World War—the Geneva Convention,

the Refugee Convention, the Torture Convention—have been deliberately avoided or ignored.

It is the bitterest of ironies that John Lilburne, the most important originator of the rights we in this country and the United States claim and on which our respective constitutions, written and unwritten, were built, achieved this in large part as a consequence of his having been himself subjected to torture, to accusations based on secret evidence and heard by a secret court, to being shackled and held in extremes of isolation while exposed nevertheless to public humiliation and condemnation.

The worst excesses of the last ten years, which destroyed the certainties of those hard-won rights, should have sounded loud alarms, not least because of that precise historical parallel; one key in attempting to hang on to legal and moral concepts under attack is to remember their origin. Lilburne, an intractable young Puritan, with a strong sense of his rights as a freeborn Englishman, and a smattering of law, in 1637 was summoned before the Court of Star Chamber—a court comprising nothing more than a small committee of the Privy Council, without a jury, empowered to investigate. Lilburne had recently been in Holland and was charged, on the basis of information from an informant, with sending loosely defined 'fatuous and scandalous' religious books to England. His defence was straightforward: 'I am clear I have sent none.' Thereafter he refused to answer questions based on allegations kept secret from him as to his association with others suspected of involvement in the sending of the books; 'I think by the law of the land that I may stand upon my just defence, and that my accusers ought to be brought face to face to justify what they accuse me of.' For his refusal, he was fined £500, a fortune for an apprentice, and was lashed to a cart and whipped through the

streets of London from Fleet to Westminster. He was locked in a pillory in an unbearable posture (in today's terminology a 'stress position'), but yet exhorted all who would listen to resist the tyranny of the bishops, repeating biblical texts to the crowd applicable to the wrongs done to him and to their rights. On being required to incriminate himself: 'No man should be compelled to be his own executioner.' He survived two and a half years in Fleet Prison, gagged and kept in solitary confinement, shackled and starving. The first act of the Long Parliament in November 1642 was to set him free, to abolish the Court of Star Chamber and to adopt a resolution that its sentence was 'illegal and against the liberty of the subject, and also bloody, cruel, wicked, barbarous and tyrannical.'

Lilburne's principled and public stance and the extraordinary political movement of which he was part, the Levellers, produced far more though than a brief reaction of abhorrence to the use of torture and arbitrary imprisonment. By the end of the seventeenth century, there had crystallised the foundation of the concepts upon which we draw now (and which we constantly choose to forget or ignore)—most importantly the concept of inalienable rights that pertain to the individual and not to the state. The Levellers insisted that the inalienable rights were possessed by the people and were conferred on them not by Parliament, but by God; no justification by the state could therefore ever justify their violation. For the preservation of these and the limitation of parliamentary power, the Levellers formulated a written constitution; never adopted in England, in the new world it became a political reality. In both countries, due process—the legal concept that gives effect to the idea of fairness—was born from these ideas.

Once evidence of any country's willingness to resort to torture is exposed, reactions of decency and humanity can be invoked without the necessity of legal explanation. Less likely is any instinctive reaction to evidence of the destruction of concepts of procedural fairness. Yet, in the imprecision and breadth of accusations, leading in turn to the banning of books and the criminalisation of ideas and religious thought, and in the wrong committed by secret courts hearing secret evidence, the lessons of John Lilburne and Star Chamber have been in the last ten years deliberately abandoned and sustained battles have still to be fought to reclaim the majority.

The shocking, reckless and ruthless disregard of all of these concepts seen in recent years is neither new nor unique to this country or to the US. The history of regions other than our own shows how fragile are the laws and their applications that we assume protect us when faced with a government determined to follow a contrary path. Repeatedly, historically, even nations which have recently emerged from the fires of hell remember the experience as it relates to themselves, but yet consign others to the same fate. Fewer than ten years after the end of World War Two, and only eight years from the UN Declaration of Human Rights, the first reports of the use of torture by the French against Algerians fighting their war of independence began to emerge, with justifications that today appear very familiar. (The first official reports in 1955 admitted some violence had been done to prisoners suspected of being connected to the FLN, but that this was 'not quite torture'; 'The water and the electricity methods, provided they are properly used, are said to produce a shock which is more psychological than physical and therefore do not constitute excessive cruelty.') Sartre articulated the shock of

realizing that torture had reappeared and was being justified so soon after it had been categorised as an aberration found only among psychotic and degenerate governments willing to violate all universally understood and recognized principles of justice:

> In 1943 in the Rue Lauriston, Frenchmen were screaming in agony and pain; all France could hear them. In those days the outcome of the war was uncertain and we did not want to think about the future. Only one thing seemed impossible in any circumstances: that one day men should be made to scream by those acting in our name.

The illustration on the cover is of Shafiq Rasul, a young Englishman from Tipton in the West Midlands, who within hours of returning from unlawful captivity in Guantánamo Bay understood the need to put on record the reality of imprisonment there. For the next month, with Asif Iqbal and Ruhal Ahmed, he struggled to prepare a report, illustrated by sketches in the absence of any photographs, of what had been done to them. Soon thereafter, the legal challenge his family had initiated when he was first reported to be in Guantánamo (*Rasul v. Bush*) was decided by the US Supreme Court in favour of Shafiq Rasul. What argument was won? That the prisoners in Guantánamo Bay should have access to legal remedies and to lawyers who could, most importantly of all, for the first time go in and, bit by bit, bring out reports, not just of the physical and mental horrors inflicted by or on behalf of Americans, but of the complicity of this country (at every level) in their unlawful captivity. We were never meant to know any of this. The still unanswered question of burning relevance, however, remains: once we know, what do we then do?

December 2011
Gareth Peirce

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'Make sure you say that you were treated properly'

Eight years ago now, in January 2002, came the first shocking images of human beings in rows in aircraft, hooded and shackled for transportation across the Atlantic, much as other human beings had been carried in slave ships four hundred years earlier. The captor's humiliation of these anonymous beings—unloaded at Guantánamo Bay, crouched in open cages in orange jumpsuits—was deliberately displayed. For the watching world no knowledge of international humanitarian conventions was needed to understand that what it was seeing was unlawful, since what is in fact the law precisely mirrors instinctive moral revulsion. The definitions of crimes against humanity, and war crimes, are not complex: 'Grave breaches of the Geneva Conventions of 12 August 1949', including 'torture or inhuman treatment'; 'wilfully causing great suffering, or serious injury to body or health'; 'wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; unlawful deportation or transfer or unlawful confinement.' What the world could instantly see for itself in those images was that this was the trafficking of human beings. It was not a manifestation of the Geneva Conventions at work; it was neither deportation nor extradition: far worse, it was transportation from a world and to a world outside the reach of

the law, and intended to remain so. In those two worlds, crimes against humanity were to be perpetrated, but they, unlike the images of transportation, were intended to remain for ever secret. That they have not has come about largely through chance.

Moments of major moral and political importance are often triggered accidentally, and how they are resolved depends entirely on whether public attention can be sustained. We are presented with such a moment now. The possibility has come about in large part through the case of Binyam Mohamed, where in the High Court a battle continued for more than two years to discover even part of the true relationship between British intelligence and the Americans and Moroccans, who for eighteen months slashed the most intimate parts of his body with razors, burned him with boiling liquids, stretched his limbs causing unimaginable agony, and bombarded him with ferocious sound. At the same time, dedicated journalists have accumulated evidence—too much to be swept aside—of men tortured just as horrifically by officials in Pakistan, who exchanged information with their British counterparts. Combined, these two sets of so far partial revelations have provided Britain with a moment of acute discomfort, sufficient to provoke the prime minister to announce the need for new guidelines for interrogations conducted by the intelligence services. This moment of official embarrassment should, however, make us in Britain feel the greatest disquiet. We inhabit the most secretive of democracies, which has developed the most comprehensive of structures for hiding its misdeeds, shielding them always from view behind the curtain of 'national security'. From here on in we should be aware of the game of hide and seek in which the government hopes to ensure that we should never have a complete understanding of its true culpability.

The opportunity for concealing the extent of our country's collusion with those who have carried out the actual torture is increased by three factors: first, the nature of most of the techniques used ('stealth methods', so called); second, the choking powers of secrecy available to our government; and third, the haphazard way in which acutely inadequate information about these matters emerges, when it emerges at all, hampering our ability to ask the most basic of questions.

We are now in the endgame of a cycle that started in late 2001. In the US the Obama administration, pushed by Freedom of Information Act inquiries, has released much of the most obscene evidence of what the previous administration consciously and specifically permitted. Storm clouds of retribution may be gathering around those who have perpetrated crimes against humanity. But what needs to concern us in Britain is this: while those first images put out by the US military in January 2002 gave a glimpse of what the US was doing, and prompted in that country a seven-year public debate about the Bush/Cheney/Rumsfeld redefinition of torture and abusive practices, here we remain almost completely in the dark about the part played by our intelligence services, and in turn by our Foreign Office and our Home Office and our ministers. There are no dramatic images to jolt us into comprehension and there is no release whatsoever of the information that US citizens claim it as their right to know. Yet we were there at those sites of unlawful confinement; in many cases it was we who told the Americans where to locate British nationals and British residents for rendition; it was we who provided information that could be and was used in conditions of torture; and it is we who have received the product.

Torture is the deliberate infliction of pain by a state on captive

persons. It is prohibited and so is the use of its product. The UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment emphasises that there are no exceptional circumstances at all justifying its use, whether state of war or threat of war or any other public emergency; none of these may be invoked as a justification. Orders from superiors are explicitly excluded as a defence, and moreover the Convention requires that wherever the torture occurred and whatever the nationality of the torturer or victim, parties must prosecute or extradite perpetrators to a country that is willing to prosecute them.

Whatever its position in respect of denying knowledge of the Moroccans' treatment of Binyam Mohamed or of the most extravagant atrocities in Pakistan, the UK will undoubtedly try to remove itself several steps further from any knowledge of what has been done in secret sites by the US. But the tortures of which it is impossible that UK officials were not aware, those which have across the board characterised US treatment of prisoners in Afghanistan and Guantánamo, belong to families of torture descended from Western European and particularly British military punishments. Those who have categorised these things place them in the 'lesser' tradition of stress torture; not because they are less painful, but because they leave less of a visible mark. Prolonged restraint in almost any position will produce agonising muscle pain. To be compelled to stand without movement for twenty-four hours causes ankles and feet to swell to twice their size. After that, to move is to be in extreme pain; large blisters develop, the heart rate increases, many people faint, and eventually the kidneys shut down. Prisoners suspended by the wrists have their feet touching the ground so that the weight is shared between wrists and feet, but this serves only to

increase the time prisoners may be suspended, extends the pain and delays the emergence of permanent injury. That matters in what is known as stealth torture. It was in Mandate Palestine that British soldiers and police after 1938 subjected prisoners to suspension, forced standing, forced sitting and choking with water, and exposure to extremes of heat and cold. These tortures left no visible trace and could safely be denied. Today the interrogation style of the Israeli GSS—called 'shabeh' by its victims—continues to draw on the same techniques and on those used by the British in Northern Ireland. They include sleep deprivation, positional tortures, exhaustion exercises, exposure to extremes of temperature, the use of noise, and 'chair' torture. It is from these and their predecessors that the Americans have drawn for the last seven years.

In 1997, Nigel Rodley, then the UN special rapporteur on torture, very specifically reaffirmed his condemnation of these methods as torture:

> Each of these measures on its own may not provoke severe pain or suffering. Together—and they are frequently used in combination—they may be expected to induce precisely such pain or suffering especially if applied on a protracted basis of, say, several hours. In fact, they are sometimes apparently applied for days or even weeks on end. Under those circumstances, they can only be described as torture.

Since these have been the techniques most repeatedly deployed since 2001 on US sites where we know British personnel have been present, we need to establish that our government acknowledges that they are indeed torture. All have been described in detail by those British detainees who have returned from Guantánamo, and yet their testimony has been disregarded by

those in government departments whose job it is to know. We had no difficulty understanding that these methods were torture when our enemies used them: during the Second World War we had no difficulty comprehending that the ordeal of British POWs forced by the Japanese to stand for days in a tin hut in the brutal heat was a war crime; and we recognised that in Stalin's gulags standing and sitting while being deprived of sleep was torture too. And yet Britain still, in 2009, appears to have the greatest difficulty in admitting that what was done routinely in Afghanistan and at Guantánamo Bay was torture, and even greater difficulty in admitting that we knew all along that it was happening. By the summer of 2002, White House lawyers were listing techniques that they considered would not constitute torture under the Federal Torture Act, among them forced standing, hooding, deprivation of food and drink, the 'frog crouch', the Israeli shabeh, and extreme noise.

And yet we of all nations must have immediately recognised these techniques for what they are and must have known that they were prohibited, since we were disgraced for employing them by the European Court less than thirty years ago. In August 1971 British soldiers arrested 342 men in Northern Ireland claiming that they were IRA suspects. To force their confessions, twelve of them were taken to a secret site and subjected to the now notorious five techniques (forced standing, hooding, sleep deprivation, starvation and thirst, and white noise). Most of the men later reported experiencing auditory hallucinations; the interrogators referred to the room used for noise as the 'music box', and were aware that the detainees were exhibiting distorted thought processes. The Republic of Ireland took the UK to court in Strasbourg for their use of these methods and Britain gave an