

## **The Use of Torture in the War on Terror: Should this 'Exceptional Measure' Be Justified in 'Exceptional Times'?**

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This work critiques the arguments for and against the use of torture in combating terrorism from a human rights perspective. It examines whether or not there should be an absolute ban on the use of torture by states on terrorism suspects and whether torture be reserved as an extreme measure in exceptional circumstances keeping in mind the following human rights: the right to legal recourse when human rights have been violated, even if the violator was acting in an official capacity, the right to life, the right to liberty and freedom of movement, the right to equality before the law, the right to presumption of innocence till proven guilty, the right to appeal a conviction, etc. The work concludes therefore that even though the state has the right to do all within its powers to protect its citizens and territory by adopting any means within its reach to combat terrorism the anti-human right approach of the use of torture may not be the best solution. It is recommended that there should be an absolute prohibition of the use of torture in the war on terror and the work proposes the search of another means which will not mock the dignity of the human person and lay a bad precedent for future government.

*Key Words:* International law, international human rights, torture, terrorism

### **Introduction**

In the words of Howard Davis (2007) one of the most interesting things about human rights is the fact that irrespective of the differences and peculiarities of the human nature human rights are shared by the good and the bad alike. The most vicious murderers or vicious racists are entitled to the protection of their human rights, though not to enable them murder or pursue racist activities but to protect for instance proper treatment in prison or fair trial as well as other basic rights.<sup>1</sup>

There have been a lot of controversial opinions on the status of human rights worldwide. While some have unequivocally classified them as fundamental and legal right all persons are entitled to by virtue of being human, others have tried to divide these rights into hierarchies or tiers or levels, giving them priorities accordingly. Yet others have tried to examine them in the light of citizenship, state sovereignty and public security.

Terrorism especially in the late 2000s has generated a lot of emotions, reactions and actions from both individuals and states. Terrorist suspects are subjected to treatment which causes them a lot of severe pain and psychological disturbance, this is an example of human rights abuse, however, issues like state sovereignty, security and public protection has been adduced as arguments to justify these acts. In the light of these considerations, one tend to wonder if there can be substantive justification for the use of torture in this era of terrorism or, on the other hand, if there is not, can there ever be an absolute ban on the use of torture? Or otherwise, can

it be defensible in exceptional circumstances? In attempting to answer these questions, this article is set to analyse from a human rights position, the various arguments for and against the use of torture in combating terrorism. This further generates more questions, such as, does terrorist activities qualifies for loss of fundamental human rights of human dignity especially where there has been no trial or conviction? Thus, this work will also examine whether or not there should be absolute ban of torture and there to be no exceptions to its use and if it can still be used as a last resort in some exceptional circumstances.

In doing these, the article will be divided into three parts. Part one will look into the position of justice even in time of war on terror, are states actually acting on the need for state security and protection of citizens or is the drive based more on vengeance or the principle of 'few for many'? Part two will focus on the various arguments for and against the use of torture on terrorist's suspects and whether or not there can be any justification for its use in such unusual circumstances. Finally, part three will give a summary and recommendations on the way forward.

### **Is there any Relationship between Human Rights and Torture?**

The general idea of human rights is to give practical effect to the feeling all reasonable human being share and which marks out our common humanity. States and governments in particular, must ensure

that individual's human dignity is respected in their laws and practices as a legal right of all within their territory or jurisdiction.<sup>2</sup>

The United Nations, Universal Declaration on Human Rights came in 1948 as the first international statement to use the term "human rights". This Declaration put to rest the era of debates on natural law, morality and related jurisprudential issues that deal with the basic rights of humans. The United Nations Covenant on Civil and Political Rights is another document worthy of consideration. This covenant details the basic civil and political rights of individuals and nations. Among the rights of nations are: the right to self determination, the right to own, trade, and dispose of their property freely, and not be deprived of their means of subsistence, etc. Among the rights of individuals are: the right to legal recourse when their rights have been violated, even if the violator was acting in an official capacity, the right to life, the right to liberty and freedom of movement, the right to equality before the law, the right to presumption of innocence till proven guilty, the right to appeal a conviction, etc. The covenant forbids torture and inhuman or degrading treatment, slavery or involuntary servitude, arbitrary arrest and detention. It forbids propaganda advocating either war or hatred based on race, religion, national origin, or language.<sup>3</sup>

Another compelling document is the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This convention bans torture under all circumstances and establishes the United Nations Committee against Torture. It particularly defines torture, requires states to take effective legal and other measures to prevent torture, and declares that no state of emergency, other external threats, nor orders from a superior officer or authority may be invoked to justify torture. It even forbids countries to return a refugee to his country if there is reason to believe he/she will be tortured, and requires host countries to consider the human rights record of the person's native country in making this decision. The Convention against Torture requires states to make torture illegal and provide appropriate punishment for those who commit torture. It requires states to assert jurisdiction when torture is committed within their jurisdiction, either investigate and prosecute them, or upon proper request extradite suspects to face trial before another competent court. Each state is obliged to provide training to its law enforcement and military agencies on torture prevention, keep its interrogation methods under review, and promptly investigate any allegations that its officials have committed torture in the course of their official duties.<sup>4</sup>

However, the overture of terrorism and terrorist activities brought about a disruption of the state.

### Should Justice Be Suspended In Fear Of Terror?

War on terror opens a whole new dimension to torture. Terrorists' attacks create the feeling of panic, imminent danger, and desperation on the part of states who do not want their citizens to be victim of such attacks. Thus states feel they need to obtain any seemingly useful or important information by all means in the bid to counter acts or attempted acts of terrorism. However, the position of the law and the place of justice cannot be downplayed by 'executive discretion'.

In the United Kingdom, for instance, the House of Lords and, indeed, the Court of Appeal have in their decisions, continued to take a muscular approach to terrorism-related measures by finding, for instance, that certain non-derogating control orders were incompatible with the Human Rights Act 1998. At the same time, the Executive has continued to attempt to extend the period of pre-charge detention, has introduced egregiously repressive measures to limit freedom of expression, and has conscientiously attempted to reshape international human rights standards. This is not to say that the superior courts of the United Kingdom have succeeded in reaching a perfect balance between security and rights in all of their decisions, but they have done a better job of oversight, or been more effective, than parliament.<sup>5</sup> The House of Lords' approach to the admissibility of evidence acquired by means of torture in the case of *A (FC) & Ors V Secretary of State for the Home Department*<sup>6</sup>, for example, is by any measure imperfect. Although, in this case, it was held that torture evidence cannot be admitted in evidence against an individual, Lord Bingham said, *inter alia* that, 'I am prepared to accept ... that the Secretary of State does not act unlawfully if he certifies, arrests, searches and detains on the strength of what I shall for convenience call foreign torture evidence'. This seems to be a great contradiction and create an uncertain position.

### Justifications of the Use of Torture in War against Terror

Many arguments have been put forward on why the use of torture should be a necessary evil in the bid to wage war on terrorism. Several theories have been propounded by commentators, legal scholars and academics in the attempt to make the use of torture an acceptable investigative strategy especially in the war on terror deeds.

Kassemeris, expressing his 'absolutist' argument, which supports the theory of the 'ticking bomb' put forward by Prof Dershowitz says that one must resist the urge to condemn public officials for exploring torture as an option. He further asserts that whatever one's opinion of torture, its utility cannot be seriously disputed. According to him, although coerced confessions do not possess a high degree of reliability and Prof Dershowitz himself claims, at

most, that confessions rendered through torture will not always be unreliable he ordinarily, however, would think of unreliability as a factor going to weight, not admissibility; because the unreliability of evidence is not taken as a reason to conclude that it is not evidence at all. And there may well be situations where torture would allow investigators to attain information that would otherwise remain locked away in the minds of suspects; even if torture, as an investigative tool, works imperfectly, it can provide answers not available through any other means. He further illustrates that a 'lazy' or 'simple' investigator may resort to torture for no other reason than to save himself the trouble of 'hunting up evidence', but that even the industrious and well-equipped investigator may find that no details of an imminent terrorist threat can be discovered unless he uses torture to 'unearth' it. He concluded that the fact that the torture victim suffers pain or injury does not make the torturer's conduct morally wrong on the absolutist view, that such suffering is just one factor that helps them identify the conduct as torture. The harm attached to the conduct operates as a moral signpost in the same way that a label attached to a thing helps to identify the thing – just as the label, though it tells us what the thing is, does not make it what it is, so the harmfulness of conduct, though it alerts us that a moral prohibition exists, does not make the conduct morally suspect.<sup>7</sup>

Another argument for the use of torture is given by the utilitarian proponents. The utilitarian theory says that before we justify 'bright-line' rules prohibiting torture, we need to take consequences seriously. And that to do this we may need to accept (however grudgingly) that torture can be useful. Another argument used to justify torture under some circumstances is the "ticking bomb" theory which asserts that if torture will help produce information that will forestall a terrorist attack, maybe it is justified. After the September 11, 2001 incident, whether or not to use torture to elicit information from would-be terrorists became a lively topic not only in the United States but across board. Harvard Law Professor Alan Dershowitz stoked controversy by suggesting that the grant of "torture warrants" would be appropriate in some cases, provoking a torrent of criticism. Prof. Dershowitz, who claimed to be morally opposed to torture, writes that he believes law enforcement officials will employ torture in "ticking bomb" cases. Philosophical supporters of torture emphasize this scenario and even opponents allow that illegal torture should be used to save lives in such situations. The problem, however, according to Zalman is that the "ticking bomb" scenario is a myth. He quotes the English commentator Christopher Hitchens who wisely puts the point thus "*favourite experimental scenario, the man knows where the bomb is, put the hooks into him swiftly, is actually a contingency almost impossible to visualise. I certainly know of no such real-life*

*case.*" Zalman further says that a very careful analysis of the effectiveness-of-torture literature allows that in rare instances threats of the use of physical force might have worked. Against this is the evidence that many anecdotes of successful torture, including those used by Dershowitz, may be less clear on careful examination and that security agencies have not provided careful documentation of success.<sup>8</sup>

Londras, using the model of proportionality approach borrowed from Julian Rivers' analysis of proportionality says proportionality can be seen as a structured approach to balancing fundamental rights with other rights and interests in the best possible way.<sup>9</sup> This argument tries to put the burden on the state and its agencies to determine when the use of torture will or will not be justifiable in proportion to the utility in counter-terrorism

Although it is often the case that the European Court of Human Rights takes a narrower view of the state's discretion than does the House of Lords, in the context of counter-terrorism the UK courts have recently tended to apply a stricter scrutiny to the states' counter-terrorist policies than the European Court of Human Rights.<sup>10</sup> Londras compared, in particular, the House of Lords' decision in *A V Secretary of State for the Home Department*<sup>11</sup> with *A & Others V United Kingdom*<sup>12</sup>

Other scholars in their arguments in the justification of use of torture in times of terror have said that the need for information outweighs the moral and ethical arguments against torture. Two academics at Deakin University in Victoria, Australia, Professor Mirko Bagaric, a Croatian born Australian based author and lawyer who is the head of Deakin University's Law School, and a fellow Deakin law lecturer, Julie Clarke, published a paper in the *University of San Francisco Law Review* arguing that when many lives are in imminent danger, "all forms of harm" may be inflicted on a suspect, even if this might result in "annihilation".

In the analysis of Ambos<sup>13</sup> who revisited the debate on the ticking bomb cases in the light of the increasing threat by terrorist bombers and a recent German kidnapping case, it is difficult to test whether the claim of a truly absolute prohibition of torture can really stand in extreme situations where the use of torture may be the only means to obtain the necessary information to prevent greater harm for innocents. Even in these situations the absolute prohibition against torture must not be relaxed given the unequivocal situation in international law and the negative policy implications a flexible approach would have. He adds that although upholding the prohibition against torture is necessary for the maintenance of a law-abiding state's integrity and legitimacy, it does not do justice to the individual police officers or security agents who may find themselves in a situation where torture is the only available means to avert a serious danger for human

life. In such a situation, it cannot always be expected that the agent will 'overcome pressures and avoid committing wrongs' Yet, this individual level, concerned with the categories of personal blameworthiness and culpability, can be accounted for by granting these officials an excuse instead of a justification<sup>14</sup>

Lastly another argument to be considered is that given by Ignatieff, who says, what works is not always right and what is right doesn't always work. He further maintains that rights may have to bow to security in some instances, but that there had better be good reasons and that there had better be clear limitations to rights abridgments; otherwise, rights will soon lose all their value. At the same time, he says a constitution is not a suicide pact: rights cannot so limit the exercise of authority as to make decisive action impossible and finally that international standards matter. Such an ethics is a balancing act: seeking to adjudicate among the claims of risk, dignity, and security in a way that actually addresses particular cases of threat. An ethics of balance cannot privilege rights above all, or dignity above all, or public safety above all. They are all important principles and all must be weighed in the balance equally, and nothing trumps.

### **Human Rights Arguments against the Use of Torture**

Human rights are not mere social or moral obligations but are legal rights binding and enforceable by individuals. Whether or not these rights still subsist in times of allegations of terrorism is the bane of contention at this juncture.

Fitzpatrick, presenting an emotional argument aver that the human rights movement employs the language and institutions of law to limit the harm the powerful inflict on the vulnerable. The attacks of September 11 and the ensuing war against terrorism test the limit of the legalistic approach leaving human rights advocates baffled and marginalised. She argues that Governments that styled themselves as champions of the rule of law against the absolutism of terrorists have at least temporarily constructed rights free zones. Bedrock principles have been displaced by legally meaningless terms and energies are diverted to wrestling with legal phantoms. She maintains that human rights standards have not changed since September 11 but the political atmosphere has palpably altered. Human rights regime is menaced by potentially dramatic alterations in the rules on the use of force in international relations and in norms of humanitarian law.<sup>15</sup>

Arguing against the use of torture in the war against terror, Gaeta, maintains that the defence of necessity, usually put forward by the supporters of the use of torture in dealing with war on terror, is not available in the case of acts of interrogational torture

because, in the circumstances usually referred to in discussions, usually called 'the ticking-bomb situation', two requisite elements of necessity are lacking. First, the person subjected to torture is not (or, at least, is not supposed to be) innocent and, secondly, and more importantly, the prohibited act of torture performed does not necessarily and ineluctably avert the imminent danger to life and limb, because the suspected terrorist may not have the information, or may not have the right information, or may remain silent.<sup>16</sup>

Many experts argue that torture is an unreliable means of obtaining useful information. However many states have used torture not to extract information, but as a means of terrorising their populations or specific communities. Franz Fanon, in "Les Damnés de la Terre" reports the French in Algeria using "preventative torture" on entirely innocent people although claiming to use torture in order to save lives. In most countries torture is illegal and this being so, outside the normal framework for establishing guilt or innocence. Therefore a large proportion of torture victims may either be innocent (apart from membership of target communities) or of mistaken identity.

A good example is the case of Khalid el-Masri, an innocent German citizen who was kidnapped and tortured, having been mistaken for Al-Qaida chief Khalid al-Masri. Toleration of torture and arbitrary detention has been likened to a "cancer of democracy" in a book of the same title by Pierre Vidal-Naquet.

In the words of Gearty, the details of the various moves that the Bush administration of the United States had made away from democratic accountability, the rule of law and human dignity, all in the name of the 'Global War on Terror' that it says it has to fight, need not to detain us here. The challenge to human rights is manifest. We have already seen how the discourse of terrorism challenges universality and by positing a version of the world rooted in good and evil makes possible the kinds of subversions of the subject. Our interest at this juncture lies in the reaction that these attacks on human rights, liberty, bodily integrity, life, etc, have provoked from human rights defenders.

The details matter less than the fact of the discussions: internment, torture, coercive interrogation, covert surveillance and other manifestations of lawless state power are not any longer simple wrongs to be avoided and severely punished when they occur; rather they have become a set of proposed solutions to supposed ethical dilemmas that need now to be considered and debated, as one might consider and debate any other kind of policy proposal. The unspeakable is no longer unspoken. Even the greatest of our human rights taboos – the prohibition on torture and inhuman and degrading treatment has become just another point of view. This is where the war on terror

plays its part it supplies the 'ethical dilemma' from which all else flows. Those who take the line I have just outlined tend also to accept the idea of a global campaign of terrorism that threatens us all. This leads them to see human rights not as a subject concerned with the powerless individual wherever he or she might be in the world but rather as an idea which finds its clearest expression in the West. In this way the 'human' is taken out of 'human rights', the particular is superseded by the general, and the subject becomes one that is more about values than it is about people. On this analysis respect for human rights becomes this abstract thing that we in the West have which we must defend against those who would by destroying our culture also wreck this precious but vulnerable commitment.

The human rights justification goes along the following lines. Unlike the terrorists, the defenders of democracy know that what they are doing is wrong even when they are doing it, and they have a set of democratic values to hand to stop things getting out of control. Those values commit them to respecting the moral status of human beings and to guaranteeing 'to respect the rights of those who have shown no respect for rights at all, to show mercy to those who are merciless, [and] to treat as human those who have behaved inhumanly'. But, precisely because we democratic people and value everybody so highly and so on, 'necessity may require us to take actions in defence of democracy which will stray from democracy's own foundational commitments to dignity.' So if we change our rules to allow us to respond in an evil way, or our operatives stray over the boundary into evil behaviour without our explicit authorisation, it is really not so bad because all that is happening is that evil is being met with lesser/theoretically accountable evil. Indeed it is hard to be at all angry with, much less punish 'the carnivores who disgrace the society they are charged to protect' when what they are doing is protecting us not merely from our political opponents, nor even only from our enemies, but rather from evil itself. Our evil is better (because less bad) than theirs.<sup>17</sup>

Gearty, continues his interesting argument that, in order to ensure its survival, the human rights idea needs to stand firmly against this kind of distortion of its essence, this move to turn it into a basis for selective aggression abroad and an alibi for brutality at home. The moment the human rights discourse moves into the realm of good and evil is the moment when it has fatally compromised its integrity. If we are good and they are bad, then of course equality of esteem as between all of us is ludicrous. These are not now any longer human beings *simpliciter* but different kinds of humans: one good, one bad. The latter, being evil, are not only different, but worse, worse even than animals that are, after all, incapable of evil. The wonder is not that the 'goodguys' abuse human rights but that we continue to use such language in relation to them at all or recognise that

they have any residual human rights worth noticing. And who is this 'they' that fill the category of lesser (because evil) humans? The war on terror has already done serious damage to the integrity of human rights, turning the subject into a kind of moral mask behind which lurk cruelty and oppression.<sup>18</sup>

### Are There Exceptional Situations?

Legal theorists and other commentators have questioned the abandonment of human rights and the curtailment of civil liberties in the "war on terror". Questions raised include the status of torture as a fundamental human right; why countries which regard themselves as rights-respecting have either used torture, or been complicit in the use of torture. Another argument given by Waldron is, "The use of torture is so profound a violation of a human right that almost nothing can redeem it because one cannot rely on a case in which the lives of many innocent persons will surely be saved by its use against a single person."<sup>19</sup>

The former UN secretary general, Kofi Annan, criticized the war on terror, claiming *inter alia*, that 'No nation can make itself secure by seeking supremacy over all others. No state can make its own actions legitimate in the eyes of others .... When power, especially military force, is used, the world will consider it legitimate only when convinced that it is being used for the right purpose, for broadly shared aims in accordance with broadly accepted norms'.<sup>20</sup>

Should we not be willing to allow the authorization of torture at least in a "ticking bomb" case, even a ticking nuclear bomb, where we are sure that the detainee we are proposing to torture has the information that will save thousands of lives and that he will give it up only if subjected to excruciating pain? One set of replies to this question is that even if the basic fact-situation is no longer so fantastic, in light of the bizarre horrors of September 11, nevertheless the framing of the hypothesis is still far-fetched, inasmuch as it asks us to assume that torture warrants will work exactly as Professor Dershowitz says they should work. The important point is that the use of torture is not an area in which human motives are trustworthy. Sadism, sexual sadism, the pleasure of indulging brutality, the love of power, and the enjoyment of the humiliation of others, these all-too-human characteristics need to be kept very tightly under control, especially in the context of war and terror, where many of the usual restraints on human action are already loosened.<sup>21</sup>

### Conclusion

At this juncture it must be stressed that the rationale of the strict prohibition of torture lies

notwithstanding, in the positive, written law on the matter. There is no other act that so profoundly violates human dignity as the frontal attack on the victim by the application of torture. Indeed, the protection of human dignity lies at the heart of the torture prohibition and therefore the prohibition of torture is 'one of morality's firmest norms' (Ambos, 2008). A state, bound by the Rule of Law, cannot allow torture as inherently repugnant and evil, without betraying its own principles and losing credibility at the international level. For a law-abiding state there is no alternative than to reaffirm the strong symbolic message of the prohibition against torture, thereby setting a clear standard and invoking the principle of reciprocity. This said, it is also true that the absoluteness of the prohibition vis à vis the state does not necessarily entail the *individual's* responsibility for an act of torture. While the state must take into account in a kind of 'pragmatic absolutism,' institutional considerations, the individual may face situations where instead of institutional compliance, civil 'official disobedience' may be tolerated or even expected; clearly, being disobedient presupposes a serious *deliberation* on the part of the respective investigator, a deliberation which must and cannot be substituted by legislative *fiat*. While the former contains an absolute prohibition on torture, the latter is more flexible and allows for grounds excluding criminal responsibility (Ambos, 2008).

Therefore, even though the state has the right to do all within its powers to protect its citizens and territory by adopting any means within its reach to combat terrorism the anti-human right approach of the use of torture may not be the best solution.

### Recommendations

There is no justification for a deliberate violation of human rights. The argument of lesser evil, utility or worst of the worst only seem to serve as excuses for the use of an act which deliberately undermines human rights. Thus this essay will recommend an absolute prohibition of the use of torture in the war on terror and propose the search of another means which will not mock the dignity of the human person and lay a bad precedent for future government.

### Notes

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