

Can the Use of Torture in the War on Terror be Justified?

Written by Astrid Holzinger

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Can Torture be Justified in order to Protect Human Rights from Terrorist Threats?

Introduction

The terrorist attacks on September 11 2001, when al- Qaeda terrorists hijacked four airliners, and successfully piloted two into the Twin Towers of the World Trade Centre in NY and one into the Pentagon in Arlington, resulted in the death of more than 2,700 victims, including citizens from over eighty nations (9/11 Commission, 2004: 1f). These attacks were of a magnitude never seen before in the history of transnational terrorism and triggered security implications worldwide (Enders and Sandler, 2005: 260f). Just a couple of hours after the events, American President George W. Bush announced a US-led war on terror in order to protect the life and security of citizens from future terrorist attacks (Gordon, 2007: 53). The war on terror was a new form of combat, posed new challenges to the US and the international community, leading to the assumption that new mechanisms were needed in this fight and some human right norms could not be applied anymore (Ramsay, 2006: 106). The idea that torture could be used as an acceptable tool in the war against terrorism entered juridical, political and scientific debates, both in the US and abroad (Sussman, 2005: 2). The absolute ban on torture has increasingly been questioned and has triggered a discussion about whether or not torture can be legitimized and justified in order to protect human rights from terrorist threats (Hoffman, 2004: 943).

In this essay, the discussion will focus mainly on the use of interrogational torture to protect human rights from terrorist threats. It is this form of torture that is predominantly used in the war against terrorism in order to extract information from terrorist suspects (Sussman, 2005: 4). Other forms of torture, such as terroristic torture or torture out of sadistic enjoyment lack any valid reasoning for justification and their discussion will be dismissed straight away. Therefore, the question will be addressed from a legal and a moral perspective and it is argued that in both cases a justification has to be refused without exception. In order to provide the reader with a contextual overview, the first part of the essay gives a brief summary of the use of torture in the US-led war on terror. In the second section, the justification of torture will be discussed within the framework of international law and its overall prohibition will be outlined. Several documents of international law absolutely ban the use of torture and the protection against torture is a non-derogable human right. The question if torture can be justified from a moral perspective in order to protect human rights from terrorist threats, will be discussed in the third and the fourth part of the essay. The third part of the essay will answer this question from a deontologist perspective, emphasising the violation of human dignity through torture and the moral wrongs that follow from it. The fourth part of the essay will provide a consequentialist argument against the justification of torture, focusing on the fallacy of the ticking bomb scenario and the negative long-term consequences of torture. A concluding section follows this.

Torture and the War on Terror

Terrorism aims to spread and increase fear within civil society in order to achieve certain political goals. Terrorist

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attacks are therefore usually targeted at civilians and threaten the security and life of the civilian population (Booth, 2008: 66). It is considered to be the duty of the state to protect its citizens from such threats, and the protection of the fundamental human rights, the right to life, liberty and security of person, is placed at the centre of counter-terrorism (Hoffman, 2004: 949).

Although there is an overall agreement about the importance of preventing terrorism and protecting citizens and their rights from terrorist threats, the way the war on terror is waged remains questionable. In the fight against terrorism, the US and its allies are repeatedly accused of violating human rights standards and the rule of international law by relying on tactics that are legally and morally questionable (Hoffman, 2004: 933). The use of torture as an interrogation technique is just one prominent example of human rights abuses in the war on terror, next to others such as detention without charge or trial (Haque, 2007: 657).

Evidence that torture was regularly used as an interrogation technique of prisoners at Guantanamo Bay, Bagram Air Base and Abu Ghraib is provided by human rights organisations, the International Red Cross and statements of victims and US intelligence officers (Ramsay, 2006: 104f). According to reports of the International Red Cross, interrogation sessions of detainees in Abu Ghraib and Guantanamo Bay, included ill-treatments such as stress and standing positions, water boarding, deprivation of sleep, food and water, exposure to extreme levels of heat and cold, sexual degradation and other cruel treatments that are tantamount to torture (ICRC, 2007: 8; ICRC, 2004: 12). The widespread and routinized use of torture in the war against terrorism and the consistency of utilized methods both indicate that incidents of torture were not just rare exceptions of misguided individual behaviour, but an actual strategic element in the interrogations of detained terrorists and terrorist suspects (Bellamy, 2006: 123).

In the fight against global terrorist networks whose members operate hidden within the civilian population, the gathering of intelligence is crucial for a successful counter-terrorism strategy. Interrogation of detainees is considered to be one of the key strategic elements within the war on terror and interrogation officers are under great pressure to abstract valuable information from terrorists. This often resulted in objectionable ways to achieve results and it remains questionable if the need for valuable information in the fight against terrorism can constitute sufficient grounds to justify torture (Hoffman, 2002: 49).

The Prohibition of Torture by International Law

Within the framework of international law, torture is never justified. International law encompasses a variety of documents that put an absolute ban on torture and other forms of ill-treatment. The prohibition of torture is manifested in the *UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment*, the *UN Declaration of Human Rights*, the *Geneva Conventions* and the *International Covenant of Civil and Political Rights* (Ramsay, 2006: 104). According to the UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment, which was adopted in 1984, torture can be defined 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 or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating him or a third person, or for any reason based on discrimination of any kind, 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’ (CAT, 1984: Art. 1).

Article 2 of the UN Convention Against Torture states further that the use of torture is prohibited under all circumstances and 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’ (CAT, 1984: Art. 2). This absolute ban on torture is additionally emphasised in the International Covenant on Civil and Political Rights, which prohibits torture even in times of ‘a public emergency which threatens the life of the nation’ (ICCPR, 1966: Art. 4). Consequently, it follows that although some rights can be legally suspended in emergency situations, the use of torture remains prohibited. In this context, the life under terrorist threats is no exception and torture is equally prohibited in the fight against terrorism (Hoffman, 2004: 952).

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Additionally, the protection against torture is considered to be a universal human right (Ramsay, 2006: 107). The UN Declaration of Human Rights states that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment' (UDHR, 1948: Art. 5). Furthermore the Geneva Convention prohibits 'violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture' and 'outrages upon personal dignity, in particular, humiliating and degrading treatment of any kind' (Geneva Convention III, 1949: Art. 3.c).

Although terrorists lose some of their rights as a consequence of committing a crime, this does not mean they lose all of their rights (Your Rights, 2012). Fundamental human rights, which are non-derogable under international law, can never be denied to an individual, under no circumstances, with no exceptions (Ramsay, 2006: 106). According to the International Covenant on Civil and Political Rights the right not to be tortured or subjected to other ill treatments is one of them (ICCPR, Art. 4.2). It has to be made clear that being stripped of some rights as a consequence of committing terrorist crimes does not mean an individual is left with no rights at all. Based on these legal documents, to which the US and most other democratic nations are signatory, torture is banned under all circumstances and its use disobeys the rule of international law and severely violates human rights standards. Within the framework of international law, no legal loopholes can be found to justify torture in the fight against terrorist threats (Buffacchi and Arrigo, 2006: 256).

Torture and the Violation of Human Dignity: A Deontological Perspective

The question if torture can be morally justified can be addressed from two different ethical perspectives: a deontological and a consequentialist one. From a deontological perspective, it is arguable that torture is cruel, violent and degrading and, because of these features, morally wrong (Sussman, 2005: 13). The Kantian perspective emphasises the violation of human dignity and the disrespect of the victims' agency that follows from torture. Because each person has the fundamental right to be treated respectfully by others, torture cannot be morally justified (Sussman, 2005:19; Bufacchi and Arrigo, 2006: 357).

Some scholars, like Uwe Steinhoff, challenge this argument by raising the point that other forms of violence, which are equally cruel and degrading, are justified and legitimised under certain circumstances. If killing is justified in a combat and for the purpose of self-defence then torture needs to be justified under similar conditions too (Steinhoff, 2006: 337). Although this argument may sound legitimate, the comparison of torture with self-defence killing is simply misleading for the following reasons. First, the justification of one form of violence is not a strong argument for the justification of other violent treatments. Second, the justification of killing in combat and self-defence is based on the ground that another person poses a threat to our own survival, and we have the right to defend ourselves. Torture of a detained terrorist, on the contrary, is an act of violence against a defenceless victim, who does not pose an immediate threat (Shue, 1978: 125, 129). The act of torture always implies an asymmetric power-relation between the torturer and the victim, in which the torturer is in absolute control of the situation and exerts dominance and force on a defenceless victim (Sussman, 2005: 7). The justification of self-defence can not account as an argument for the justification of torture, as the latter is an act of violence against a defenceless victim, which increases the moral damnability even more (Shue, 1978: 125, 130).

Additionally, torture includes another element, which clearly distinguishes it from other degrading forms of violence. David Sussman argues that torture leads to the self-betrayal of the victim because it forces him 'into the position of colluding against himself through his own affects and emotions, so that he experiences himself simultaneously powerless and yet actively complicit in his own violation' (Sussman, 2005:4). By forcing the victim to turn against himself, torture goes beyond the simple violation of the victims' dignity and perverts it in an incomparable way (Sussman, 2005: 4). Two examples of commonly used torture techniques can be given to illustrate this process of self-betrayal. Stress positions for instance force the victim to remain for hours or days in distorted positions. The victim's effort to stay in the position makes him an active part in the act that is causing his own suffering (Sussman, 2005: 22). Another form of torture, water boarding, provides a similar example. Water boarding pours water over the face of the tortured person and creates the experience of drowning (ICRC, 2007: 8). Here the tortured victim fights against its need to breathe in order to stop the water pouring into his lungs and thereby experiences himself as being complicit in his own violation and degradation (Sussman, 2005: 23).

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Many forms of torture currently used in the war on terror include this element of self-betrayal (Sussman, 2005: 23). Both acts of torture mentioned above, were reportedly used in interrogations of prisoners in Abu Ghraib and Guantanamo Bay in order to abstract information (ICRC, 2007: 8; ICRC, 2004: 12). It is this element of forced self-betrayal that distinguishes torture from other forms of violence. Instead of just violating the dignity of a victim, torture perverts it in a way that cannot be morally justified from any perspective that essentially values it (Sussman, 2005: 19).

A Consequentialist Argument against the Justification of Torture

Although most scholars agree that from a deontologist perspective torture cannot be morally justified, the debate around justifying torture on consequentialist grounds is less straightforward. Scholars who dismiss any justification of torture on deontological grounds, argue that the use of torture in exceptional situations is justifiable from a consequentialist perspective, as long as the positive consequences of its use outweigh the negative ones. This argument is based on a simple cost-benefits analysis that concludes that torture can be morally justified if it is the lesser of two evils and is used to avoid the greater one (Bufacchi and Arrigo, 2006: 357f).

To develop and strengthen this argument, moral defenders of torture, rely heavily on the hypothetical scenario of a ticking bomb, which was originally created by Bentham (Bellamy, 2006: 141). The ticking bomb scenario describes an emergency situation in which torture is used to obtain information from a terrorist about the location of a ticking bomb. In this case, the use of torture can be considered as the lesser evil in order to prevent a greater evil – namely, the killing or injury of an unspecified number of innocent civilians if the bomb is not found in time (Steinhoff, 2006: 341). The conclusion that is drawn from this scenario is that if a danger can just be avoided through the use of torture, and the protected interests outbalance the violated interests, the act of torture is justifiable (Steinhoff, 2006: 345). Gardner goes further and states that in such a situation, torture is not merely justifiable, but even morally required. His theory about 'negative complicity' states that if one can prevent many wrongs by doing fewer wrongs, one is morally required to do so, otherwise he is complicit in and responsible for the many wrongs (in Haque, 2007: 617).

Nevertheless, the ticking bomb scenario provides a rather weak foundation to build these arguments upon. The scenario of a ticking bomb is a pure hypothetical scenario, and even if it could be considered valid in theory, its application in reality remains questionable. This is due to the fact that the moral conclusion drawn from the scenario is based on a set of rather unlikely and misleading assumptions (Bellamy, 2006: 137f). The ticking bomb scenario is based on the assumptions that torture is the only means to abstract life-saving information from a terrorist, and that torture actually works. Empirical evidence, on the contrary, shows that, in a majority of cases, legal interrogation techniques were equally successful in abstracting information from terrorists and that, through the use of torture, no additional information was gained. Torture is therefore not more efficient in gathering intelligence than other interrogation techniques (Bufacchi and Arrigo, 2006: 359).

Additionally torture is a rather unreliable form of extracting information and often leads to false confessions in order to stop the violent treatment. This is a common problem reported by several interrogation officers (Bellamy, 2006: 139). British terrorist suspects, for instance, confessed under torture that they were trained in Afghanistan by the terror network Al-Qaeda, during a period of time when they were actually in the UK (Rose, 2004). The validity of the additional information gathered through torture is therefore highly questionable (Bellamy, 2006: 139).

Furthermore, only early confessions are considered useful in the fight against terrorism. Valuable information about the current operations of a terrorist network needs to be extracted in the first couple of hours after a terrorist's arrest. Once the terrorist organisation finds out that one of their members has been captured, its plans are likely to change and the information provided by the detained terrorist becomes useless (Bellamy, 2006: 139). Here, it must be mentioned that torture is very unlikely to produce quick results because it is designed to break a victim's resistance through prolonged degradation, and terrorists are often provided with special resistance training. A prominent example that underlines this is the case of Al-Qaeda Member Mohamed al Kahtani, who resisted torture for months before he released information (Bufacchi and Arrigo, 2006: 361).

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This follows that the initial purpose of torture, to gather valuable information which otherwise could not have been collected, is not met in reality. Consequently, if torture as an interrogation technique lacks utility and does not lead to the expected positive results in most cases, it cannot be morally justified on consequentialist grounds (Bufacchi and Arrigo, 2006: 361). Apart from the fact that torture mostly does not lead to the expected positive results, a series of negative long-term consequences weaken the consequentialist argument further. First, the social and psychological consequences of torture on the victims and their relatives are evident years or decades after the incidents occurred (Sussman, 2005:12). Examples are the inability of victims to reintegrate into their social environment and a tendency to severe forms of self-destruction. These effects are especially devastating for innocent victims of torture and the destruction of their lives cannot easily be justified (Bufacchi and Arrigo 2006: 355).

Secondly, the violation of human rights norms through torture and illegitimate ill- treatments of prisoners widens the gap between the Muslim community and the US even more (Ramsay, 2006: 113). Al-Qaeda may find it easier to recruit new members among the ones whose rights have been breached, among their relatives and friends, and especially among the innocent victims of torture. By violating the very same rights they are claiming to protect, the US and its allies risk losing legitimacy in this war and may contribute to increased radicalisation (Hoffmann, 2004: 935). Thirdly, negative political consequences are triggered as well. By justifying torture, one runs the risk that its use may become the rule rather than the exception (Sussman, 2005: 12). None of the cases in which torture was used as an interrogation technique resembled an emergency scenario as serious as that of the ticking bomb. Additionally the use of torture was initially reserved for interrogations of high value members of Al-Qaeda and later increasingly used on prisoners who were unlikely to possess much crucial information about the terror network's operations. These developments suggest that the use of torture has already become normal practice, rather than the exception (Bellamy, 2006: 142).

In sum, the negative consequences of justifying torture and its illegitimate use are affecting society as a whole. It may dissolve moral concerns against its general use and undermines the validity of human right norms and the rule of international law (Bellamy, 2006: 145; Sussman, 2005: 12). In other words, a justification of torture will question some of the key foundations upon which democratic societies rest (Ramsay, 2006:113). Any negative long- term consequences of this kind need to be weighted against the assumed positive effects. Arguably, such a cost-benefit analysis can only lead to the strict refusal of a justification of torture on consequentialist grounds (Bufacchi and Arrigo, 2006: 355).

Conclusion

As outlined in this essay the use of torture in the war against terror as an interrogation technique became part of a broader counterterrorist strategy, supported by the US and some of its allies. Incidents of torture were reported from Guantanamo Bay, Abu Ghraib and Bagram Air Base, triggering questions about whether the use of torture could be justified in order to protect human rights from terrorist threats. The right to life and the right to security are fundamental human rights a state is obligated to protect. Nevertheless, the right way to take this responsibility cannot include further violations of human rights standards. Protection against torture is a universal and non-derogable human right and its use is prohibited by international law without exceptions. Additionally, a moral justification of torture cannot be given, neither on deontological nor on consequentialist grounds. From a deontological perspective, torture is morally wrong because it violates and perverts human dignity in an incomparable way. Similarly, a consequentialist argument for the justification of an exceptional use of torture has to be dismissed due to the fact that the hypothetical ticking bomb scenario does not resemble reality. As discussed in the fourth part of the essay, torture is not a more efficient form of intelligence gathering than other legal interrogation techniques and frequently leads to false confessions. In other words, torture as an interrogation technique does not work and its positive consequences are not met in reality. On the contrary, torture triggers a series of negative long-term consequences. It has a devastating impact on the victims, leads to further radicalisation of the conflict, and has negative effects on society as a whole. Justifying torture in exceptional cases bears the risk of dissolving its moral damnability and undermines the rule of international law and human rights standards. In other words, it undermines some of the key foundations and values democratic societies rest upon. This range of negative long-term consequences, which by far outweigh any assumed positive consequences, must lead to the conclusion that torture cannot be morally justified on consequentialist grounds. The use of torture in order to protect human rights from terrorist threats leads to the

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paradox that human rights are violated by their protectors themselves. The protection of human rights from terrorist threats, and the counterterrorism efforts that follow from it, needs to be in accordance with human rights standards in order to keep their legitimacy.

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