

The Ethical Abyss of the Ticking Bomb Scenario

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In the aftermath of the attacks of 11 September, as is well known, this issue of the justifiability of using torture in so-called ticking bomb circumstances became the subject of global academic and popular debate. The idea that flows from this hypothetical scenario is that torture – normally prohibited – might be used by a state agent – exceptionally – whose motive is to save lives by stopping a violent attack. This is aberrational torture ‘for a good reason’. There isn’t anything terribly new about this scenario. We are familiar with the idea from movies and from television dramas. If anyone needed specific reminding, however, the Fox network television drama series *24*, which first aired in the United States in 2001, regularly dramatised the use of torture in Jack Bauer’s race against the clock to stop an impending act of terrorism.[i] Bauer’s use of torture was often successful and torture often dominated the show’s plot.[ii]

When it comes to the ticking bomb scenario, I think we should be cautious in answering, too quickly, the question it poses – should we torture to save lives? Rather than rushing to answer, we should subject the question itself to scrutiny.

The Ticking Bomb in Practice

The ticking bomb scenario has not just been invoked in fiction. Various adaptations of this scenario have been used by, amongst others, the French army in Algeria, the Israeli security services in Palestine, the British army in Northern Ireland and the American army and security forces in Iraq, Afghanistan and numerous other countries.

The scenario supplied the logic for the extensive use of torture by the French during the French-Algerian war, in particular, during the Battle of Algiers in 1957.[iii] Due to the proliferation of the ticking bomb justification, the Battle of Algiers, Darius Rejali argues, was ‘the startling moment when modern democracies began official torture apology’.[iv] The official narrative disseminated by French officers of the Algerian war in defence of the practice of torture was that its use was indispensable in the prevention of impending attacks by the Front de Libération Nationale (FLN). In practice, this justification for the exceptional use of torture to stop immediate attacks crystallised into a more general justification to eradicate any threat.[v] Torture was not perpetrated in Algeria because bombs were ticking, it was practised in order to break the FLN and its use was made possible because the victims were denied legal status – characterised as ‘outlaws’ and ‘terrorists’, they were not seen as human enough to deserve not to be tortured. The ticking bomb popped up elsewhere and it’s a similar story. In Israel, in the late 80s, it reappeared; this time in policy-making. The 1987 Landau Commission found that ‘moderate physical pressure’, a euphemism for torture, could be used to impede hostile attacks. Notably, it wasn’t necessary for a bomb to be ticking.[vi] This scenario as a justification for the use of torture remains in the Israeli context.

Engaging the Scenario – Entering the Abyss

With its frequent invocation in policy making, in debate and in popular culture, the ticking bomb scenario has come to be understood both as a matter of objective fact and as a potential actuality and, in contrast, as a deceptive and fantastical construct for considering the use and justification of torture.[vii] Commentators on the phenomenon of the exceptional use of torture often engage in the debate by discussing the (in)efficacy of torture, the (im)plausibility of the ticking bomb scenario and/or the (im)morality and (il)legality of using torture.

It is my sense that in taking any of these approaches, we enter an ethical abyss. For example, whilst it might be

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practically significant to convince states that torture is an inefficacious method of acquiring reliable information, too much weight is thereby placed on the side of practicality. The integrity of this approach is undermined because it suggests, however unintentionally, that torture ought not to be practiced because torture does not work, rather than because of its illegality or because of the ethical questions which its practice raises. In other words, the 'torture does not work' argument points only to a practical flaw in the debate, rather than disproving or undermining the exceptional case.[viii] Moreover, this reasoning gets us nowhere in our understanding of the phenomenon of torture – that is, of why it is *really* practised. The same applies to the plausibility of the ticking bomb scenario. When we engage in a discussion of the moral and legal arguments for and against torture, we find ourselves in a similarly problematic ethical position.

Numerous ideas have circulated imagining how to accommodate, legally and morally, the use of exceptional torture: the 'torture warrant', the 'extra-legal' use of torture in exceptional cases, the 'ends justify the means', the moral imperative that requires us to torture to save innocent lives. These ideas have been met with counter-claims: torture can never be made compatible with the rule of law; torture must always be absolutely prohibited.

These debates are a distraction from the reality that torture has nothing to do with ticking bombs and little to do with gathering urgent information. The ticking bomb scenario makes torture slightly more palatable to the liberal conscience. It does so by dehumanising the victim – by framing a scenario in which the victim is invisible. This is how torture becomes thinkable.

We do Torture

The torture debate engendered by the ticking bomb scenario fails to provide an accurate understanding of torture. Such an understanding is more accurately revealed by the actual practice of torture; however, a precise analysis of state practices of torture tends to fall outside its frame. This is the deception of the ticking bomb scenario. It allows us to think that the principle of no torture governs and that only in the most exceptional circumstances would we be willing to forego this principle.

In 2005, David Luban persuasively explained the essence of the ticking bomb scenario. He succinctly showed how that scenario stimulates a liberal ideology of torture because it begins with a denial of torture as part of liberal culture and ends with the creation of a torture culture.[ix]

Beyond the Ticking Bomb Scenario

The ticking bomb is just one of the constructs of which we should be wary. We don't torture unless we have to, so the story goes. We don't go to war, we intervene for humanitarian reasons. We don't kill, we target. The challenge for us is to approach these constructs – these means of articulating violence – critically. As international lawyers, as academics, and as students, we don't have much control over whether or not an individual is tortured by a state agent, or killed by a cruise missile 'intervention', or targeted by a drone. However, when we get involved in the debate by taking a legal or moral side, we condone the a priori question.

Can torture be justified in exceptional circumstances? The challenge is not in reaching the *right* answer to this question. The difficulty is in avoiding the demand for a 'yes' or for a 'no'. More pointedly, the challenge is to not be pressurized into answering the question; instead, it is essential to relentlessly deconstruct both its premise and the debates it engenders.

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[i] See Adam Green, 'Normalising Torture: One Rollicking Hour At a Time' *The New York Times* (22 May 2005) 34.

[ii] Michelle Farrell, *The Prohibition on Torture in Exceptional Circumstances* (Cambridge University Press, 2013) p. 102.

[iii] For more on this, see, for example: Rita Maran, *Torture: The Role of Ideology in the French-Algerian War* (Praeger Publishers, 1989); Raphaëlle Branche, 'Torture of Terrorists? Use of Torture in a "War against Terrorism": Justification, Methods and Effects: the Case of France in Algeria 1954-1962' (2007) 89 *International Review of the Red Cross*, p. 543.

[iv] Darius Rejali, *Torture and Democracy* (Princeton University Press, 2007), p. 480.

[v] Raphaëlle Branche, 'Torture of Terrorists? Use of Torture in a "War against Terrorism": Justification, Methods and Effects: the Case of France in Algeria 1954-1962' (2007) 89 *International Review of the Red Cross*, p. 543, 550.

[vi] Excerpts of the Report of the Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity', (1989) 23 *Israel Law Review*, p. 146, 174.

[vii] Michelle Farrell, *The Prohibition on Torture in Exceptional Circumstances* (Cambridge University Press, 2013) p. 82.

[viii] Amnesty International, *Report on Torture* (2nd ed. Duckworth, London 1975), p. 24.

[ix] David Luban, 'Liberalism, torture and the ticking bomb' (2005) 91 *Virginia Law Review*, p. 1425, 1427.

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