

Can the Use of Torture in Intelligence Gathering Be Justified?

Written by Clara Assumpção

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CLARA ASSUMPÇÃO, MAR 20 2020

The 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture 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 confession [...]”[1] Though its practice is absolutely prohibited by the abovementioned Convention and customary principle of international law,[2] the method is sometimes used in intelligence collection in an aim of breaking resistance, conditioning responses and gathering information.[3]

After the 9/11 and the War on Terror, the discussion on the use of torture in intelligence gained traction,[4] with heated debates on its efficiency and whether it could ever be ethically justifiable. The ‘ticking-bomb’ scenario was brought to the surface by those aiming to prove that torture not only could work but also be ethical. There was also a general effort to reshape the debate about torture that included redefining the term to encompass only ‘extreme actions’ such as serious physical injury, organ failure or death.[5] This opened a door to the ethical legitimisation of torture, as ‘lighter torture’, aptly named ‘enhanced interrogation techniques’ (EITs), was presented as a good compromise between ethics and pragmatism in a time of heightened insecurity. The EITs were widely employed by the CIA during the Bush administration, leaving a legacy of inefficiency and abuse,[6] and were finally banned by Obama in 2009.[7]

However, the discussion around torture continues to be extremely relevant as current U.S. President Donald Trump explicitly endorses the technique, going as far as declaring that “torture absolutely works”[8] and that those submitted to it “[...] deserve it anyway”.[9] His nomination of Gina Haspel, known to have been involved with the operation of CIA’s black sites, as the new head of the Central Intelligence Unit,[10] elicits a concern that there might be an official rolling back on the US anti-torture posture. This change of stance from the world’s most influential hegemon has serious impacts not only for intelligence practices but also for human rights and democracy worldwide.

The goal of this paper is to prove that not only is torture *never* ethically justifiable, it is also not recommended by pragmatic reasons. The first section will approach the ethical frameworks used to analyse torture application in intelligence gathering, how it has been justified by the ‘ticking-bomb’ scenario and why those justifications set dangerous precedents that undermine liberal values. The next section will go in detail on why torture is not an efficient intelligence gathering technique, analysing some negative outcomes that arise from its practice. Finally, case studies on the French use of torture in the Battle of Algiers in the 1950s, and the more recent use of EITs by the United States will prove empirically that democratic governments should not allow torture under any circumstances.

Ethics and Torture

As explained by Ron Hassner,[11] the ticking bomb scenario consists of a terrorist that has planted a timed bomb in a heavily populated place. If the bomb detonates, it will kill thousands of people, but before the timer runs off, the terrorist is captured by intelligence agents. They somehow quickly determine that the captured person is the one who has planted the bomb and holds the secret to disarming it. As the terrorist will not budge through non-coercive interrogation techniques, and the timer of the bomb is ticking off, the intelligence agents torture him and get the information. As Hassner states,[12] however, the scenario is a dangerous trope, as it is extremely unlikely

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that all its key elements (bomb set to kill thousands, apprehension of the perpetrator while the bomb is still ticking, torture that quickly yields results and use of the intelligence that allows for a timely deactivation of the bomb) will ever come together.

Still, this scenario can be analysed under four main different ethical approaches, which are the ones shaping the discussion on torture today. The realist approach, based on a Hobbesian worldview, states that the defence of national interest is a moral duty that may lend legitimacy to any means necessary. Thus, torture would be morally justified if it were done aiming for the well-being of the state.[13] The realist view, with its emphasis on national interest and patriotism, would heartily embrace the use of torture not only in 'ticking-bomb' scenarios but also in preventive self-defence cases. The consequentialist approach, on the other hand, states that actions are judged by their consequences, and the general aim should be that of generating a 'global good'. Thus, if there is a positive balance between the use of torture and the good results derived from it, then torture would be ethically justifiable.[14]

As we will see in more details in the following sections, these paradigms are pervasive in the way torture is justified by democratic states, yet they are inherently flawed. Even though consequentialism is more restraining than realism, both grant legitimacy to torture. However, there is no way to measure when the use of torture, rather than other techniques, will work on the best interest of the state. Nor if the ethical balance will be positive, when "much of the intelligence effort is directed towards insurance against events whose probability, importance and cost cannot themselves be measured." [15] The danger is that as intelligence agents start with a restrained approach to the practice, poor results and uncertainties arising from lack of knowledge and false leads generate a situation in which intelligence agents are torturing many in the off chance that one will give useful intelligence.[16] Also, as Ross Bellaby states, torture has additional costs that include mental and emotional toll on personnel, loss of international stature and credibility and the increase in retaliation,[17] which cannot be assessed pragmatically in a consequentialist balance sheet but have very real negative impacts.

The third approach is Deontology, which affirms that there are actions that are wrong in themselves, notwithstanding their consequences. The main imperatives are that one must act in such a way that the principle of the action could become a universal law; and that one must treat other rational actors as having value as ends in themselves, rather than means to an end.[18] Under this paradigm, torture would never be admissible – not even in a 'ticking-bomb' scenario. However, one could argue that the whole of intelligence activity would not be permissible under the deontologist framework, as the practice requires secrecy and a certain level of deception that could not become universalised.

The fourth and more recent approach is that of Just Intelligence, coined by Michael Quinlan, which mixes the 3 concepts mentioned above with the concept of Just War. It affirms that in intelligence, as in war, breaches of conventional ethics can be practised, but not everything will be ethically permissible.[19] Quinlan concedes that, if the end is pressing and important enough as in the far-out situation of the 'ticking-bomb', torture might be justified. However, as the 'ticking-bomb' scenario as originally coined never happens, and its empirical uses have widely stretched its scope to justify torture under all sorts of threats, even possible attacks in the undetermined future,[20] Quinlan takes torture out of the question for moral and pragmatic reasons.[21]

Granting any amount of legitimacy to torture, even under dire and time-pressing situations such as the 'ticking-bomb' scenario, sets in motion a dangerous process through which torture may become a commonplace practice. In the real world, there's no sure way to know that the target is indeed the right one, that they have all the necessary knowledge and that they will indeed provide the information through torture.[22] This risk is inadmissible not only because intentionally inflicting pain or suffering on a person in order to obtain information is an ethical anomaly, especially so in democracies, but also because it is also not efficient, as we will see in the following section.

The Effectiveness of Torture

Torture is not only prohibited based on moral and legal grounds but also because it is not an effective

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interrogation technique.[23] The case of Ibn al-Shaykh al-Libi, for example, is a good illustration of this. He was the source for the Colin Powell claim at the Security Council that Saddam Hussein had trained Al-Qaeda in chemical and biological weapons. Al-Libi, however, recounts that the torture inflicted on him by the Egyptian intelligence service was the reason why he made up such a story.[24] This anecdote is corroborated by many intelligence agents that have come forth to claim that torture is pointless,[25] as a person under torture will say what the captor wants to hear in order to be relieved from suffering, thus producing unreliable intelligence.[26]

Even when the source is willing to collaborate, torture makes it more difficult[27] because stressors employed during it, such as sleep deprivation, suffocation and chronic strain, for example, affect memory, cognition and capacity to recall information. Torture also increases the likelihood of the subject incorporating information contained in the leading questions,[28] thus providing unintentional false leads. Taking those points into consideration, studies indicate that coercive interrogations tend to elicit unreliable intelligence more than they do a useful one.[29]

Torture also has corrosive effects on organisations, as the leadership focus on results will allow space for increasing brutality and circumvention of checks and balances.[30] Intelligence teams that torture tend to become “laws unto themselves”, [31] often normalising the practice beyond legality and deceiving government officials in order to do so, thus sidestepping democratic oversight.[32]

Finally, torture hinders intelligence activity in the longer term. It breaks social networks,[33] which makes non-coercive intelligence collection harder, diverts effort from potentially more reliable methods of interrogation[34] such as rapport-building and information gathering interviews,[35] and hampers efforts to build diplomatic, political and military alliances.[36] Additionally, the use of evidence obtained through torture is inadmissible in court,[37] jeopardising the chances of convicting “hundreds of suspected terrorists, or even of using them as witnesses in almost any court in the world.”[38]

Even with plenty of evidence on the inefficacy of torture and its pervasive negative effects, many democratic governments have tried to legitimise and control the practice.[39] In the next section, we will go through two poignant examples of how this attempt at legitimisation backfired, with the legal exceptions quickly becoming the norm even when there was no evidence that torture was contributing with actionable intelligence.

Torture in Practice

In 1956, the Algerian National Liberation Front (FLN) had begun a bombing campaign in Algiers, killing many innocent civilians. France then responded with a counterinsurgency operation that was the first in any modern democratic state to allow torture explicitly.[40] In seven months, General Jacques Massu severely undermined the FLN and re-established French authority in the city. This unquestionable success has been historically tied to the supposedly superior intelligence gathered through torture and is used by apologists as the staple case of why the practice works.[41]

However, accounts from the French torturers themselves describe that the technique not only de-professionalised soldiers and fragmented French military institutions but also produced intelligence that was inferior to those obtained through other practices.[42] While even General Massu admitted to the negligible military benefits of torture,[43] the negative effects were immense. The activity, which was initially allowed only under ‘extreme circumstances’, soon became the norm[44] and eventually became employed beyond intelligence activities.[45] It also led to domestic criticism, loss of international reputation,[46] alienation of the population and the ultimate loss in the French ‘hearts and minds’ campaign.[47]

Partly inspired by the perceived success of the French use of torture in the 1950s,[48] the United States set in practice a similar programme in the aftermath of 9/11. Under the guise of the global war on terror, ‘enhanced interrogation techniques’ (EIT) were presented as an ethical compromise that allowed ‘lighter’ torture in a time of heightened insecurity where the usual legal restraints could not be applied.[49] The outcomes of this program can be assessed through the declassified parts of the Senate Select Committee on Intelligence (SSCI) Report, which

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goes in detail about parts of what that took place in the CIA's Detention and Interrogation Program from 2001 to 2006.

The main findings were that the use of EITs was not an effective means of acquiring intelligence, as multiple detainees fabricated information or refused to cooperate. Due to its lack of efficiency, the whole program rested on inaccurate claims made by the CIA on its effectiveness. It was also uncovered that the torture applied was far more brutal and the conditions of confinement far harsher than what had been portrayed to the government, and that techniques that were not authorised had been applied to a greater extent of detainees than officially reported. It was also pointed out that the Central Agency had been actively dodging oversight by democratic institutions such as the Congress and the White House.[50] Beyond these internal issues, the use of EITs affected public opinion on the US on a worldwide scale, eliciting highly negative reactions especially in the Arab-Islamic World.[51]

Both cases highlighted above prove through empiric experience that allowing torture, even under the guise of exceptionalism and governmental control, is not effective. As the French and US cases show, once institutionalised, the use of torture will grow, institutions will erode, and the negative outcomes will far exceed the benefits reaped from intelligence that is nevertheless unreliable.

Torture: not Ethical nor Pragmatic

As seen above, the realist and consequentialist ethical views on torture, which legitimise the practice, allow states to implement torture programmes. This, however, should never be morally accepted – not even under 'ticking bomb scenarios' – because there is no sure way to know in advance if the target is indeed the right one, that they have all the necessary knowledge and that they will provide the required information through torture. Furthermore, allowing torture even under extreme circumstances sets a dangerous precedent, as those who are willing to broaden the application of the technique will exploit any legal permission to do so,[52] as was shown by the French and US cases.

Additionally, torture is an inefficient way to gather intelligence, as it elicits unreliable information, generates time-consuming false leads, and produces cognitive effects that impair collection even when the sources are willing to collaborate. The technique also has a corrosive impact on organisations, increasing brutality and resistance to democratic oversight. Finally, torture is detrimental to intelligence per se, as it breaks social networks, undermines non-coercive collection, diverts effort from more reliable methods of interrogation, taints the public perception of intelligence and hampers efforts to build alliances. Thus, as there is no ethical justification for the practice nor proof of its unparalleled effectiveness, much on the contrary, there should be an absolute legal ban on torture.[53]

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Notes

[1] United Nations, Convention against Torture, 1.

[2] Banham, "Torture and Liberal Democracies," 10.

[3] Bellaby, "The Ethics of Torture-Lite," 7.

[4] Ibid, 1.

[5] Ibid, 2.

[6] Feinstein and United States, The Senate Intelligence Committee Report on Torture, xi-xii.

[7] Obama, Ensuring Lawful Interrogations.

[8] Masters, "Donald Trump Says Torture 'absolutely Works' — but Does It?"

[9] Serwer, "Trump Wants to Bring Back Torture. Can He Do It?"

[10] Sullivan, "Trump Isn't Merely Tolerating Torture — He's Celebrating It."

[11] Hassner, "The Myth of the Ticking Bomb," 84.

[12] Hassner, 84.

[13] Erskine, "As Rays of Light to the Human Soul," 364-366.

[14] Ibid, 366–270.

[15] Quinlan *in* Erskine, 369.

[16] Evans, "The Ethics of Torture," 59.

[17] Bellaby, 5.

[18] Erskine, 370-374.

[19] Quinlan, "Just Intelligence," 1–14.

[20] Hassner, 91.

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[21] Quinlan, 9.

[22] Bellaby, 6.

[23] Evans, 57.

[24] Isikoff, "The Missing Terrorist."

[25] Freeman, "Does the Use of Torture Ever Work?"

[26] Evans, 61.

[27] Duke and Van Puyvelde, "Enhanced Interrogations' Don't Work as Well as Regular Ones."

[28] O'Mara, "Why Torture Doesn't Work."

[29] Carter *in* Evans, 57.

[30] Rejali, "Torture and Democracy," 457.

[31] *Ibid.*

[32] *Ibid.*, 457–58.

[33] Bellaby, 5.

[34] Brody *in* Evans, 62.

[35] Duke and Van Puyvelde, "What Science Can Teach Us about 'Enhanced Interrogation,'" 315–28.

[36] Brody *in* Evans, 62.

[37] Thienel, "The Admissibility of Evidence Obtained by Torture under International Law," 367.

[38] Mayer, "Outsourcing the Torture of Suspected Terrorists."

[39] Banham, 16.

[40] Walton, "Torture and Intelligence Gathering in Western Democracies."

[41] Rejali, chap. 22.

[42] *Ibid.*, 22.

[43] Walton.

[44] *Ibid.*

[45] Branche, "Torture of Terrorists?," 556.

[46] Forsythe *in* Evans, 59.

[47] Walton.

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[48] Forsythe, "United States Policy toward Enemy Detainees in the 'War on Terrorism,'" 468–70.

[49] Ibid, 471.

[50] Feinstein and United States, x–xxvi.

[51] Forsythe, 483.

[52] Gutting and McMahan, "Can Torture Ever Be Moral?"

[53] Ibid.

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