Can the use of torture in the war on terror be justified?

by Astrid Holzinger*

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 the 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 as 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 fight against terrorism entered judicial, political and scientific debates, both in the US and abroad (Sussman, 2005: 2). The absolute

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ban on torture got increasingly questioned and 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 paper, the question of whether the use of torture in the war on terror can be justified in order to protect human rights from terrorist threats is addressed from a legal and a moral perspective and it is argued that in both cases a justification of torture has to be refused without exception. The discussion in this paper focuses solely on the use of interrogational torture, as it is this form of torture that is predominantly used in the war on terror 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 is dismissed straight away. In order to provide the reader with a contextual overview, the first part of the paper briefly summarizes the use of torture in the war on terror. In the second section, the justification of torture is discussed from a legal perspective, outlining the prohibition of torture in international law. Several international agreements put an absolute ban on torture and the right to protection against torture is a non-derogable human right. The third part of the paper addresses the question of whether torture can be morally justified 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 paper provides a consequentialist argument against the moral justification of torture, focusing on the fallacy of the ticking bomb scenario and the negative long-term consequences of torture.

**Torture and the War on Terror**

Terrorism aims to spread and increase fear within civil society in order to achieve certain political goals. Terrorist attacks are therefore usually targeted at civilians and threaten the security and life of the civilian population (Booth, 2008: 66). It is the duty of the state to protect its citizens from these threats and the protection of the right to life, liberty and security of person are fundamental human rights, which are 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 detentions without charge or trial (Haque, 2007: 657).

According to several human rights organisations, the International Red Cross and statements of victims and US intelligence officers, torture was regularly used as an interrogation technique on prisoners at Guantanamo Bay, Bagram Air Base and Abu Ghraib (Ramsay, 2006: 104f). A report of the International Red Cross revealed that interrogation sessions of detainees in Abu Ghraib and Guantanamo Bay included ill-treatments such as stress positions, 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). This widespread and routinized use of torture in the war on terror and the consistent use of particular methods 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 terrorist suspects. This frequently leads to 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 in 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*. The UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment, adopted in 1984, 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 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).

Additionally, the protection against torture is considered to be a universal and non-derogable 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). 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). The right not to be subjected to torture or 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 loophole can be found to justify torture in the fight against terrorism (Bufacchi 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 in combat based on the principle of self-defence is justified then torture needs to be justified under similar conditions (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 is based on the precondition that another person poses a threat to our own survival, from which follows that 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). As a consequence, an argument for a moral justification of torture cannot be based on the principle of self-defence, as torture is an act of violence against a defenceless victim, which increases its moral damnability even more.

Moreover torture includes an element that 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 the victim ‘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 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, 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).

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). In sum torture violates and perverts the dignity of a victim in a way that cannot be morally justified from any perspective that essentially values it.

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 a 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 outweigh the negative ones. This argument is based on a simple cost-benefits analysis, which concludes that torture can be morally justified in situations where it is the lesser evil, used to avoid a 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 one – 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 only 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 he did not prevent (in Haque, 2007: 617).

Nevertheless, the ticking bomb scenario provides a rather weak foundation for a moral
justification of torture, as it is purely hypothetical, and even if it would 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 that aim to stop the violent treatment. This is a common problem frequently reported by interrogation officers (Bellamy, 2006: 139). British terrorist suspects, for instance, falsely 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 current operations of a terrorist network has to be extracted in the first couple of hours after the terrorist’s arrest. Once the terrorist organisation finds out that one of their members was captured, the organisation is likely to change plans and the abstracted information 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. Moreover terrorists are often provided with special resistance training to further prolong the process. 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).

This follows that the initial purpose of torture, to gather additional information of crucial value, is not met in reality. Consequently, if torture as an interrogation technique lacks utility and does not lead to the expected positive results, it cannot be morally justified on consequentialist grounds (Bufacchi and Arrigo, 2006: 361). Apart from that, torture triggers a series of negative long-term consequences that weaken the consequentialist argument even 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 be easily justified (Bufacchi and Arrigo 2006: 355).

Second, the violation of human rights norms through the illegal use of torture and other forms of ill-treatments widens the gap between the Muslim community and the US even more (Ramsay, 2006: 113). Al-Qaeda should 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 loosing legitimacy in this war and contribute to increased radicalisation (Hoffmann, 2004: 935).

Third, negative political consequences are triggered as well. By justifying torture in exceptional cases, 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 bears the risk to dissolve moral concerns against its general use and undermines the validity of human rights 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. 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.

**Conclusion**
As outlined in this paper, the use of torture as an interrogation technique became part of a broader counterterrorism strategy in the war on terror, 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 paper, 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 dammability 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 effects, 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 paradox that human rights are violated by their protectors themselves. The steps to protect human rights from terrorist threats, and the counterterrorism efforts that follow from it need to be taken in accordance with human rights standards in order to keep their legitimacy.
BIBLIOGRAPHY


