Torture: Justified in the War on Terror?

Josefin Kranning Andersson

VT 2015

RV4460 Rättsvetenskap C (C-uppsats), 15 högskolepoäng

Examinator: Anna Gustafsson
Handledare: Marja-Liisa Öberg
Abstract

The war on terror was a response to the terrorist attack of September 11 against the United States. Following the attack, the Central Intelligence Agency initiated a program that included secret detention and the use of enhanced interrogation techniques on suspected terrorists.

The prohibition of torture has been established in several human rights treaties as acts involving pain and suffering, inflicted with a purpose and involve a government official. Also, the suffering needs to be intentional. States have obligations to refrain from torturing persons and to take actions to reinforce the prohibition through legislation, administration and judiciary measures to prevent acts of torture.

The use of force during the war on terrorism is regulated within the framework of the law of armed conflict. A terrorist does not have any special status under the existing law of armed conflict, thereby making it difficult to establish which regulation terrorists are protected under.

Reports show that the interrogation methods used at the U.S. detention facilities, such as Guantánamo Bay and Abu Ghraib, amount to torture. The U.S. Department of Defense seeks to try to elude the prohibition of torture and thereby legitimizing the enhanced methods of interrogations. Some of the methods being used on detainees are waterboarding, sexual violence and infliction of bodily injury. One way to try to legitimize the use of torture with the purpose of gathering information is the U.S. high value detainee model. It establishes a foundation for the use of torture without liability by approving torture-classified interrogation methods.

The most common justification for the torture of suspected terrorists is the ticking bomb scenario. It relies on the idea that a detained person possesses information that could save the lives of many people making the use of torture acceptable as a means to collect that information. This scenario makes the legitimacy of torture reliant on its prevention of harm. Seeing as this situation is only hypothetical, there may be no established justification for torture in the war on terror.
# Table of contents

1 INTRODUCTION ......................................................................................................................... 1  
  1.1 BACKGROUND .......................................................................................................................... 1  
  1.2 PURPOSE AND RESEARCH QUESTIONS .................................................................................. 1  
  1.3 METHOD AND MATERIAL ......................................................................................................... 2  

2 BACKGROUND AND COMPLEXITY OF THE PROBLEM ......................................................... 3  

3 PROHIBITION OF TORTURE ..................................................................................................... 6  
  3.1 DEFINITION OF TORTURE ...................................................................................................... 6  
  3.2 STATE OBLIGATIONS .................................................................................................................. 10  

4 THE LAW OF ARMED CONFLICT ......................................................................................... 11  

5 THE WAR ON TERROR .............................................................................................................. 13  
  5.1 DEFINITION OF TERRORISM .................................................................................................. 13  
  5.2 DEFINITION OF ‘WAR ON TERROR’ ....................................................................................... 14  

6 TORTURE IN THE WAR ON TERROR .................................................................................... 15  
  6.1 INTERROGATION METHODS .................................................................................................... 15  
  6.2 THE HIGH VALUE DETAINEE MODEL ...................................................................................... 18  
  6.3 QUALIFIED IMMUNITY ............................................................................................................ 20  
  6.4 THE TICKING BOMB SCENARIO .............................................................................................. 21  
  6.5 CONCLUSIONS .......................................................................................................................... 22  

7 FINAL CONCLUSIONS .............................................................................................................. 24
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Name</th>
</tr>
</thead>
<tbody>
<tr>
<td>American Convention of Human Rights</td>
<td>ACHR</td>
</tr>
<tr>
<td>European Convention on Human Rights and Fundamental Freedoms</td>
<td>ECHR</td>
</tr>
<tr>
<td>European Court on Human Rights</td>
<td>ECtHR</td>
</tr>
<tr>
<td>Human Rights First</td>
<td>HRF</td>
</tr>
<tr>
<td>High Value Detainee</td>
<td>HVD</td>
</tr>
<tr>
<td>Inter-American Commission on Human Rights</td>
<td>IAComHR</td>
</tr>
<tr>
<td>Inter-American Convention to Prevent and Punish Torture</td>
<td>IACPPT</td>
</tr>
<tr>
<td>International Covenant on Civil and Political Rights</td>
<td>ICCPR</td>
</tr>
<tr>
<td>North Atlantic Treaty Organization</td>
<td>NATO</td>
</tr>
<tr>
<td>Office for Legal Council</td>
<td>OLC</td>
</tr>
<tr>
<td>Physicians for Human Rights</td>
<td>PHR</td>
</tr>
<tr>
<td>Prisoner of War</td>
<td>POW</td>
</tr>
<tr>
<td>September 11 2001</td>
<td>9/11</td>
</tr>
<tr>
<td>United Nations Convention Against Torture</td>
<td>UNCAT</td>
</tr>
<tr>
<td>U.S. Senate Select Committee on Intelligence</td>
<td>Intelligence Committee</td>
</tr>
<tr>
<td>Third Geneva Convention on Protection of Prisoners of War</td>
<td>GPW</td>
</tr>
<tr>
<td>World War II</td>
<td>WWII</td>
</tr>
</tbody>
</table>
1 Introduction

1.1 Background

There is an extensive agreement among courts and legal experts that the prohibition of torture and other ill-treatment is a rule of customary international law. Further, the prohibition is recognized as a *jus cogens* norm, hence, a peremptory norm of general international law.¹ A *jus cogens* norm is:

‘... [A]ccepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character’²

The prohibition of torture has also been considered to have an obligation towards states to have a legal interest in the protection worldwide and almost all democratic states are bound by treaties that prohibit torture in all circumstances.³ Following the events of September 11 2001 (9/11), the Security Council adopted Resolution 1373 requiring all States to prohibit, prevent and criminalize terrorist acts by taking legislative, economic, procedural and other measures. The preamble reaffirms that all means needed need to be in accordance with the Charter of the United Nations. The Security Council and the General Assembly recognize the importance to fight against terrorism but call for all States to ensure that the measures taken are in accordance with their obligations under international law.⁴ The war on terror has an urgent character seeing as an attack may occur at any time. Gathering information that could prevent a future attack therefore becomes crucial and time pressuring. Interrogation techniques form part of a counterterrorist strategy and whether these constitute torture is unclear. Recent incidents of torture reported from, for example Guantánamo Bay⁵ and Abu Ghraib⁶, trigger the question whether or not it is justified to torture to protect human rights from threats of terrorism.

1.2 Purpose and research questions

The use enhanced interrogation techniques that may amount to torture in order to gain information in the fight against terrorism has become more common since the events of 9/11. Therefore, the study in this paper aims to bring clarity to the concept of torture and whether it

---

³ Ginbar (n 1) 283.
⁵ Guantánamo Bay is a U.S. detention facility where suspected terrorists are confined.
⁶ Abu Ghraib is a detention center in Baghdad, also known as the Baghdad Central Prison, was controlled by the U.S. forces until 2006. The prison was closed by the Iraqi government in 2014.
can be justified in the war on terror examining both the state obligations and the challenges the prohibition of torture face in this context. Since the United States have been the leading state in the war on terror, this paper will focus mainly on its acts. The paper seeks to answer the following questions: What are the challenges of upholding the prohibition of torture in the war on terror, and whether torture is justified in the war on terror.

1.3 Method and material

In order to determine whether the interrogation techniques constitute torture and if so, how these may be justified in the war on terror. It is, firstly, important to establish the legal definition of torture. Secondly, it is necessary to establish what the war on terror is and how it is connected to the prohibition of torture. And thirdly, examine the different interrogation techniques used in the war on terror and establish whether these can be justified. The research is conducted on the basis of existing doctrine and reports.
2 Background and complexity of the problem

In March 2009 the U.S. Senate Select Committee on Intelligence\textsuperscript{7} (Intelligence Committee) decided to initiate a study on the Central Intelligence Agency’s (CIA) Detention and Interrogation Program. The study\textsuperscript{8} has its roots in an investigation into the destruction of videotapes that contained detainee interrogations made by the CIA in December 2007. The publication of the study aims to prevent forcible interrogation practices in the future and to inform the management of other covert action programs.\textsuperscript{9}

On 9/11, the largest attack against American homeland took place. Al-Qaeda operatives hijacked four airplanes and flew them in to the Twin Towers in New York, and the Pentagon in Washington D.C. One airplane was brought down on a field in Pennsylvania probably heading for the White House or the Capitol Hill in Washington D.C. The attacks cost about three thousands of lives and are believed to have sought to eliminate the military, political and financial leadership of the U.S. in the world. The President of the USA and the Congress recognized the attacks as the beginning of an armed conflict between the United States and the Al-Qaeda terrorist network.\textsuperscript{10}

Following the attacks, the impulse of the CIA was to consider every possible way to gather intelligence and remove terrorists in order to prevent further attacks from taking place. However, no matter the fear or pressure of further terrorist threats, the Intelligence Community’s\textsuperscript{11} actions must adhere to the laws and standards of the United States. The study of the Intelligence Committee shows that the CIA decided to initiate a program, with the aid of outside contractors that included secret detention and the use of brutal interrogation techniques which violated U.S. law, values and treaty obligations.\textsuperscript{12}

The report presents several findings and conclusions about the CIA Detention and Interrogation Program. Numerous of these findings entail the brutality of the interrogation techniques used on the detainees, among which some had not been approved by the U.S. Department of Justice or been authorized by CIA Headquarters. Further, the report reveals how the CIA has been hiding information on how the interrogation techniques were conducted. Also, they did not prove to be an effective way to collect intelligence or gain cooperation by the detainees. Another significant finding is the failure to hold CIA personnel

\textsuperscript{7} The U.S. Senate Select Committee on Intelligence was created in 1976 to oversee and make continuing studies of the intelligence activities and programs of the United States Government, to submit proposals for legislation to the Senate, report intelligence activities and programs to the Senate, and provide vigilant legislative oversight over the intelligence activities of the United States to assure that those activities are in accordance with the Constitution.

\textsuperscript{8} Senate Select Committee on Intelligence, ‘Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program’ (approved 13 December 2012, updated for release 3 April 2014, declassification revisions 3 December 2014) (Committee Study).

\textsuperscript{9} ibid 1.


\textsuperscript{11} The United States Intelligence Community is a federation of 17 separate government agencies that work separately, and together to conduct intelligence activities that are necessary for the national security and foreign relations of the United States.

\textsuperscript{12} Committee Study, 2-4.
accountable for violations, unnecessary activities and individual and systematic failure in management.13

Another report conducted by the five Special Rapporteurs of the Commission on Human Rights14 about the situation of detainees at Guantánamo Bay recognizes the interrogation techniques that have been authorized by the U.S. Department of Defense to be in violation of Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and Article 16 of the Convention against Torture (UNCAT). The Commission also expresses concern about the attempts by the U.S. Administration to redefine ‘torture’ in the framework of the fight against terrorism in order to permit certain interrogation techniques that would otherwise have been prohibited under the internationally accepted definition of torture.15

A report from the U.S. Defense Department, the ‘Church Report’16, investigated military interrogation and interviewed personnel in Iraq, Afghanistan and Guantánamo Bay, Cuba. The investigation focused primarily on the development of approved interrogation policy, the employment of interrogation techniques and the role that these played in detainee abuses.17 When the report was released, it contained classified information about the particular measures that were authorized by the U.S. Defense Department. This raised questions regarding the difficulties of proving the existence of torture in interrogations conducted in the above locations. Usually this is due to lack of witnesses and due to the difficulty of providing proof. The interrogation techniques used, such as water suffocation and beatings on the sole of the feet, do not leave any lasting damage making their use nearly unrecognizable.18

During an investigation in the Abu Ghraib prison in Bagdad, evidence was found proving that illegal and systematic abuse of the detainees was perpetrated intentionally by the U.S. military police. The processes and techniques being used to gather intelligence points to a coordinated strategy based on torture. The significant amount of evidence gathered, suggest that the use of torture, mainly by the United States in the war on terror could be widespread and systematic.19

The U.S. Department of Defense has adopted two legal strategies in order to elude the prohibition of torture, and by doing so to justify the forceful interrogation techniques that are being used in the war on terror. The first strategy points to the U.S. President’s authority as the executive power and Commander in Chief which is unrestricted by international law when it comes to military operations. The first strategy further argues that the individual interrogators who use torture act in self-defense of the nation, which makes it a non-violation of the prohibition. The second strategy aims to narrow down the interpretation of what constitutes torture. One important point here is that the U.S. claim that acts that cause physical

---

13 Committee Study, 2-4.
14 The United Nations Commission on Human Rights was a subsidiary body of the UN Economic and Social Council and functioned within the overall framework of the UN. Its main purpose was to promote and protect human rights. In 2006, it was replaced by the UN Human Rights Council.
16 Admiral Albert T. Church, ’Report on allegations of abuse of extrajudicial detainees at the Guantánamo Bay Naval Base’.
17 ibid 1-2.
18 Alex J. Bellamy, ’No pain, no gain? Torture and ethics in the war on terror’ [2006] International Affairs 82, 1, 121.
19 ibid.
or mental pain for the purpose of gathering information do not constitute torture has been made before by other nations (e.g. the Republic of Ireland). 20

Against this background, the justification of the use of torture in the war on terror deserves careful study. Since the attacks on 9/11, despite the legal and moral prohibition of torture of suspected terrorists, torture may have become a legitimate means in order to gather information to protect the people. If torture is becoming accepted on these terms, it may lead to violations of the fundamental rights of individuals.

---

20 Bellamy (n 18) 127-129.
3 Prohibition of torture

The prohibition of torture is an absolute and non-derogable prohibition. It has become accepted as customary international law and a peremptory jus cogens norm. The right to be free from torture and other ill-treatment is guaranteed by both general universal and regional human rights treaties: Article 3 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), Articles 7 and 10 of the ICCPR, Article 5 of the American Convention on Human Rights (ACHR), and Articles 2 and 3 of the Inter-American Convention to Prevent and Punish Torture (IACPPT). There is also a human rights treaty specifically designed to ensure the protection of the right to be free from torture and other ill-treatment, the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (UNCAT).

Torture and other ill-treatment have been part of history for many centuries. For instance, ancient Romans used different techniques of torture against their slaves and during WWII, many methods of torture were used by countries such as Germany and Japan. As a reaction to WWII, the General Assembly adopted the Universal Declaration on Human Rights (UDHR), Article 5 of which provides protection from torture, cruel, inhuman or degrading treatment or punishment. In 1966, the ICCPR that also provides the same protection from torture as the UDHR was open for signature. The UN enacted a special treaty addressing torture, (UNCAT).

3.1 Definition of torture

Article 1 of the UNCAT states:

‘...[A]ny 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... 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.’

According to this definition, torture must involve pain and suffering, either physical or mental. It must be inflicted on the victim for a specific purpose, such as extracting information and it needs to involve a state official. Further, the suffering must be intentional and severe.

21 General Comment No.2, Committee Against Torture, Convention against torture and other cruel, inhuman or degrading treatment or punishment, CAT/C/GC/2 (24 January 2008) para. 1 (General Comment No.2).
25 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted on 10 December 1984, entered into force on 26 June 1987).
26 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A.
The definition of torture has been established in the European Court of Human Rights (ECtHR) in a number of cases, including the case Aktas v Turkey.\(^{28}\) The ECtHR recognized that when determining what should qualify as torture, a distinction must be made between that notion and inhuman or degrading treatment.\(^{29}\) Further, it notes that it was the intention of the ECtHR to attach a special stigma of considering carefully inhuman treatment causing cruel and serious suffering. The Court acknowledged that there was a purposive element, as recognized in the UNCAT, in which the definition of torture includes the intentional infliction of pain or suffering with the aim, \textit{inter alia}, of receiving information by imposing punishment or intimidating.\(^{30}\)

The Inter-American Commission of Human Rights (IACoHHR) defined torture in the case \textit{Martín de Mejía v Peru}.\(^{31}\) Article 5 ACHR specifies that ‘Every person has the right to have his physical, mental and moral integrity respected; and no one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment’. The IACoHR recognized that the ACHR does not provide a clear definition of the concept of torture. However, the acts constituting torture are established in the Inter-American Convention to Prevent and Punish Torture. Firstly, the IACoHR states who will be guilty of torture, ‘public employees or officials who acting in that capacity order, instigate, induce its commission, commit it directly or, when in a position to prevent it, do not do so; and persons who, at the instigation of the public officials, order, instigate or induce its commission, commit it directly or are accomplices in its commission.’ Secondly, in order for torture to exist, three elements have to be combined.\(^{32}\) First, the act must be intentional and with physical and mental pain and suffering is inflicted. Second, the act must be committed intentionally with a purpose, which includes personal punishment and intimidation. Third, the act must be executed by a public official or by a person influenced by the former.

The ECtHR gave its first ruling on torture in Aksoy v Turkey.\(^{33}\) The applicant in the case was arrested and taken into custody on suspicion of involvement in a terrorist group called PKK (Workers’ Party of Kurdistan). The detainee had been subjected to ‘Palestinian hanging’; hence, he was stripped naked with his arms tied together behind his back and hung up by his arms. The Court found that this treatment was without doubt inflicted with the purpose of obtaining information from the applicant and there would have been certain amount of preparation and effort into carry this out. The treatment of the applicant was considered to be nothing but torture by the Court due to its serious and cruel nature.\(^{34}\)

Severe ill-treatment of detainees constitutes torture. Recent development of techniques of torture includes rape and sexual violence; electric shocking against certain part of the body (i.e. genitals); methods of simulating drowning (i.e. ‘water boarding’); attacks by dogs; infliction of bodily injury and threats of violence against the person or against his family. Former detainees at Guantánamo Bay and Abu Ghraib have alleged these particular

\(^{28}\) Aktas v Turkey, No. 24351/94, 24.4.03.
\(^{29}\) ibid.
\(^{30}\) ibid para. 313.
\(^{32}\) ibid.
\(^{33}\) Aksoy v Turkey, No. 21987/93, 18.12.96.
\(^{34}\) ibid para. 64.
techniques. Further, there are less severe forms of ill-treatment that may not constitute torture in the strict sense of UNCAT’s definition for example, ‘hooding’; wall-standing, usually for a long period of time; deprivation of food and sleep and defecating and urinating on a person. In spite of, these are still prohibited.  

Some specific practices too, have been found to be torture. Water suffocation was defined as torture in the case José Vicente and Amado Villafane Chaparro and others v Colombia. In this case, two brothers alleged a violation of Article 7 of the ICCPR due to blindfolding and dunking in a canal. The Human Rights Committee found that the brothers had been subjected to torture and the treatment was in violation of Article 7. As mentioned above in case Aksoy v Turkey, ‘Palestinian hanging’ has been found to amount to torture; and falanga, beatings on the soles of the feet, was found to be torture in the Greek case.

The issue of torture being used in the fight against terrorism has been assessed by, the European Commission and the European Court of Human Rights in the case Ireland v UK concerning the treatment of suspected Irish Republican Army (IRA) soldiers by United Kingdom security forces. The Commission addressed the interrogation techniques used by the UK officials, including wall-standing, hooding, subjection to noise, sleep-deprivation and deprivation of food and water. The European Commission concluded that the five interrogation techniques amounted to torture, whereas the European Court established that these techniques should be considered as inhuman treatment in its ruling.

In a report on the USA, the Human Rights Committee expressed concern about the use of enhanced interrogation techniques being used on prisoners; such as hooding, deprivation of all comfort, removal of clothing, isolation, prolonged stress positions, sleep adjustments and exposure to cold or heat. Although the U.S. Detainee Treatment Act of 2005 prohibits such interrogation techniques by the present Army Field Manual in Intelligence Interrogation, the Committee was concerned about the fact that the State refused to acknowledge that those techniques, whereas several were allegedly applied, violated the prohibition in Article 7 of the ICCPR. Further, no sentence has been pronounced against any official or agent for using the rough interrogation techniques. These may also still be used or authorized by other agencies, including intelligence agencies, and the State have given no insurance of oversight systems of such agencies have been established to guarantee compliance with Article 7 ICCPR.

Freedom from torture and other ill-treatment is absolute. No such practices are ever permitted no matter the circumstances. Article 2 (2) of the UNCAT reads ‘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’. This prohibition also includes any threat of terrorist acts or other violent crimes such as armed conflicts, international or non-international. The Committee Against Torture has expressed its

35 Turner (n 26) 223.
36 José Vicente and Amado Villafane Chaparro and others v Colombia, CCPR/C/60/D/612/1995 (14 June 1994).
37 ibid.
39 Ireland v UK, Series A, No. 25, 18.1.78.
41 ibid 168.
concern in this area and rejects any effort by States that try to justify torture and ill-treatment as a means to safeguard the public or prevent emergencies in all situations.\footnote{General Comment No.2, para. 5.}

Comparably, Article 15 (1) of the ECHR states: ‘In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law’. However, Article 15 (2) states that no derogation shall be made from Article 3.

In the case *Aksoy v Turkey*, The ECtHR recognized Article 3 ECHR as important and as one of the fundamental values in a democratic society. Even in difficult circumstances, such as the fight against terrorism, Article 3 of the Convention offers an absolute protection from which no exception or derogation is permissible under Article 15 ECHR.\footnote{*Aksoy v Turkey*, para. 62.} The absolute nature of freedom from torture and other ill-treatment goes further than only protecting from acts of torture committed in the territory of one country. Article 3 (1) of the UNCAT states that no state shall expel, return or extradite a person to another country where there are significant grounds for believing he might be exposed to torture or be in danger. This is known as the principle of ‘non-refoulement’.

Governments will normally deny any acts of torture committed by their intelligence agencies, law enforcement or military forces. Nevertheless, the practice of torture on suspected terrorists due to a presumption that they have relevant information have become more widespread after 9/11. Connected to this, former use of torture against suspected terrorists have been revealed. There are ways in which governments have tried to compromise the prohibition of torture and its absolute protection. The denial of the applicability of UNCAT and ICCPR, which have extraterritorial application, have been used as an argument by the U.S. in order to try to cover up its military forces or intelligence agencies involvement in torture. Further, the United Kingdom and some other states have relied on information received through the use of torture for operative purposes and different forms of cooperation with states that use torture to elude rules regarding torture. By using interrogation techniques or moderate physical pressure, some governments try to change the notion of what is permitted and what is prohibited, and also there is a lack of investigation and accountability when there have been allegations of torture of terrorist suspects. Furthermore, governments have tried to lower the requirements for sending a person back to another country where he might risk being subject to torture or other ill-treatment by proposing a replacement for the absolute prohibition in situations of ‘real risk’ with a ‘balancing test’ or by using diplomatic assurances to shift the responsibility.\footnote{Möckli, Daniel, Shah, Sangita, Sivakumaran, Sandesh, ‘International Human Rights Law’, (2nd edition, Oxford University Press 2014) 558.}

The definitions of torture in the different human rights conventions do not vary significantly much from each other. They define torture as involving pain and suffering, it needs to be inflicted with a purpose, and involve a state official. The prohibition of torture and its regulation in the mentioned human rights conventions give the impression of a common understanding of what constitutes torture and that its regulation need to be similar in order to have a worldwide meaning. Freedom from torture is further an absolute right with no
derogation allowed, which is also expressed in the regulations on torture and gives further implication to the fact that it is a norm of customary international law. Having several conventions recognizing the prohibition of torture and what it involves should be enough to prevent it from occurring but as the cases mentioned, such as Aksoy v Turkey, torture still occur in situations where it should not.

3.2 State obligations

The prohibition of torture is primarily a negative obligation and requires each state to refrain from torturing persons within their jurisdiction. States have a positive obligation to take actions to reinforce the prohibition of torture through effective legislative, administrative, judicial or other measures to prevent acts of torture. The UNCAT outlines obligations for the state parties to ensure that measures are taken to prevent or punish any acts of torture. If there are any legal or other obstacles that hinder the abolition of torture and ill-treatment, states are obligated to eliminate these and to take positive effective actions to guarantee that those are effectively prevented.

In its General Comment No. 2, the Committee Against Torture marks the importance of the non-derogable nature of the obligations undertaking by them in ratifying the Convention. After the attacks of 9/11, the obligations under Articles 2, 15 and 16 of the UNCAT must be taken into consideration in all circumstances and they apply to both torture and ill-treatment. It is recognized by the Committee that the States parties may choose the measures through which they fulfill these obligations as long as they are effective and consistent with the purpose and object of the Convention.

Another important obligation upon states is to criminalize the offence of torture. By naming and defining the crime of torture, states will help promote the aim of CAT. Codifying this crime will also, stress the need for proper punishment that has deference to the severity of the violation; give strength to the deterrent effect of the prohibition; enhance the capability of officials to locate the crime of torture; and give the public the opportunity to monitor and challenge state action or inaction that violates the Convention. The Convention Against Torture imposes obligations on the states and they bear international responsibility for acts by their officials or others. Each State Party shall prevent, punish and prohibit torture and ill-treatment in all situations of detention and custody. However, the Convention does not limit the international responsibility that a state or an individual bear for committing the crime of torture and ill-treatment under other treaties or international customary law.

---

46 Moeckli, Shah, Sivakumaran (n 44) 183.
47 General Comment, paras. 2-4.
48 ibid para. 6.
49 ibid paras. 11,15.
4 The Law of Armed Conflict

During an armed conflict, international or non-international, there is a framework of specific laws including general principles and rules that seek to protect all persons caught up in war regardless of whether they are civilians, prisoners of war or soldiers. The reactions by the UN Security Council and the North Atlantic Treaty Organization (NATO)\(^{50}\) to the events on 9/11 initiated that the process of recognizing and viewing the situation as an armed conflict.\(^{51}\) Subsequently, the use of force in the war on terrorism is regulated within the framework of the law of armed conflict.

The Geneva Conventions, the Hague Convention and UNCAT regulate international humanitarian law, and were not formed during the threat of terrorism one see today, resulting in its lack of customized rules for these particular situations. These were designed to institutionalize the laws of war, promote humane treatment of Prisoners of War (POW) and to reduce casualties among civilians during armed conflict. They did not anticipate the targeting of civilians, the torture and killing of prisoners, which violates the core of humanitarian law. Furthermore, they did not foresee the situation today where the highest priority is not to win territory, but to gain intelligence and where the definition of victory seems lost. This is the case in the war on terror.\(^{52}\)

A terrorist may not be entitled to a special status under the law of armed conflict, hence, the lack the entitlements of those legitimately engaged in combat. Terrorists do not have the status of prisoners of war and they willingly conduct and define themselves outside the coverage of Article 4 of the Third Geneva Convention on the Protection of Prisoners of War (GPW). Further, terrorists are not members of the armed forces of a State Party or members of a ‘regular’ armed force and are distinguished from the civilian population.\(^{53}\) During wartime, rules regarding the humane treatment of prisoners are based on mutual expectations. One side treats its captured enemies humanely while expecting the other side to do the same. This cannot be expected in the war on terror.\(^{54}\) Since terrorists do not possess a special status, they lack POW status and they are outside the coverage in Article 4 of the GPW, it is very difficult to establish under which regulation their status as terrorists are protected. One could argue that terrorists, in this context, do not have any protection at all.

Granting illegitimate fighters immunity for their combatant acts is not the purpose of the law of armed conflict. Recognizing terrorists as lawful combatants would contradict the whole system and may cause anticipated relentless humanitarian consequences.\(^{55}\) Nevertheless, terrorists have the right to humane treatment as all other persons in war and in peace. Article 75 of the Additional Protocol I of the Geneva Convention relating to the Protection of Victims of International Armed Conflicts provide safeguards for persons in the hands of an enemy

\(^{50}\) NATO stands for ‘the North Atlantic Treaty Organization’. It is a military alliance which constitutes a system of collective defense and its member states have agreed to mutual defense in response to an attack.


\(^{53}\) Thaft (n 50) 320-321.


\(^{55}\) Thaft (n 50) 320-321.
guaranteeing humane treatment. Protection is also provided in the Fourth Geneva Convention, which encourage states to ensure protection for persons, including combatants of the enemy without POW status. Al-Qaeda is not a ‘state party’ to any of the international conventions regulating POWs and is more of a network than an organization, which is unlikely to have ‘command and control’ powers that can enforce rules upon its operatives. The main purpose of having POW rules is to protect civilians and urge for civilized warfare. A possible consequence for granting a terrorist the status of a POW could endanger the lives of civilians, which could lead to worse treatment of prisoners. The status of a POW needs to be earned by conducting oneself honorably and by granting it to combatants who do not would seem to encourage them to act dishonorably.

One could argue that a basis for denying the legal obligation of humane treatment under the Geneva Conventions may exist. The war in Afghanistan was an international armed conflict and, therefore, the benefits of the guarantees set out in the Geneva Conventions were only granted to protected persons. Talibans are not protected persons since they do not meet the organizational criteria of the Geneva Conventions and because Afghanistan is considered a failed state. Al-Qaeda and its members are not covered either mainly for the reason that they do not belong to a contracting party. The protections in the Common Article 3 of the Geneva Convention do not apply due to the international character of the conflict in Afghanistan.

The law during wartime was not created to deal with the various problems being faced in the war on terror. It offers protection for one side of the conflict, whereas the other side is left without any. The fact that Al-Qaeda is a terrorist organization and not a state causes problems for the existing laws since they cannot cover them or their members’ actions. 9/11 was the beginning of a new kind of war and the laws available at the time could not rule that war and any development of these were not in sight. All individuals are entitled to freedom from torture, no derogation allowed, but since terrorists are not considered protected persons they fall outside the scope left without clear guidelines of their rights. Consequently, no clear protection is afforded for the Al-Qaeda terrorists.

56 Thaft (n 50) 320-321.
57 McCarthy (n 51) 100.
58 Common Article 3 of the Geneva Convention provides protection for persons not taking active part in the hostilities and ensure the humane treatment of them.
5 The War on Terror

5.1 Definition of terrorism

A definition of terrorism has not yet been agreed upon by governments due to differing views despite the UN’s adoption of a number of series of treaties that are related to different forms of terrorism, such as terrorist bombings and hostage-taking and is currently working towards a comprehensive convention against terrorism. The international protection of human rights may be in danger due to the absence of a universal definition of the term since this could lead to unintended human rights abuses and also the misuse of the term.60

Terrorism is commonly known as acts of violence that target civilians with the pursuit of ideological or political aims.61 The definition of terrorism in the U.S. Code recognizes three characteristics for activities that constitute ‘international terrorism’. First, involve violent acts or acts that are a danger to human life and that violate state or federal law. Second, appear to be intended either to intimidate a civilian population, to influence the policy of a government by intimidation, or to affect the actions of a government by assassination, mass destruction or kidnapping. Third, the activities need to occur outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or the locale in which their perpetrators operate or seek asylum.62

The U.S. Department of State also defines terrorism in the introduction to the Department’s Patterns of Global Terrorism.63 Here, terrorism is defined as violence with a political aim perpetrated against non-combatants by a subnational group or secret agents with an intention to influence an audience. This definition has three criteria to separate terrorism from other acts of violence. First, terrorism has to be politically motivated with a direct political goal, like in 9/11 where the goal was to influence the U.S. government policy in the Middle East. Second, the violence is directed at non-combatants, people who are not members of the military and not prepared to defend themselves. It also includes members of the military who are attacked during peacetime. The third criterion entails that the ones who commit the terrorist attacks must be a subnational group or secret agents. Political violence by states does not constitute terrorism, even if there is a chance that non-combatants will be killed. One important factor to point out about terrorism is its ‘secret’ nature. The victims of terrorism cannot anticipate the attack and can therefore have no chance of defending themselves. The open nature of terrorist attacks makes it unpredictable and alarming.64

The UN Security Council defines ‘terrorism’ in its resolution 1566 by including the following conditions. First, acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages. Second, irrespective of whether motivated by consideration of a political, philosophical, ideological, racial, ethnic, religious, or other

60 Moeckli, Shah, Sivakumaran (n 44) 555.
63 United States Department of State, ‘Patterns of Global Terrorism’ (May 2002).
similar nature, also committed for the purpose of provoking a state of terror in the general public or in a group of persons or particular persons, intimidating a population, or compelling a government or an international organization to do or to abstain from doing any act and such acts constituting offences within the scope of and as defined in international conventions and protocols relating to terrorism.\textsuperscript{65}

The definition of terrorism varies due to different views by governments. What is agreed upon though, is that terrorism is acts of violence with a political aim of some sort. Not having a universal definition of terrorism may cause problems regarding human rights and creates the opportunity for nations to define it as they seem fit. One may suggest that a common definition could be helpful in the fight against terrorism, as it would suggest that all nations agree on the serious and grave threat terrorism post towards people.

5.2 Definition of ‘War on Terror’

The President of the United States at that time of the 9/11 attacks, George W. Bush, declared a ‘war on terror’ on that day. The war on terror is defined as a global military, political and abstract fight against terrorists, and organizations that in any way support terrorists.\textsuperscript{66} Consequently, an international military campaign started after 9/11 led by the United States and a coalition of other NATO and non-NATO nations aiming to destroy Al-Qaeda and other extremist or terrorist groups and organizations.

The war on terror includes a worldwide intelligence gathering and an increased cooperation among foreign security agencies the means to obtain information and interrogations, capturing or snatching of suspected terrorists on foreign soil. This has been referred to as the CIA’s secret war on terror. Suspected terrorists were held prisoners at facilities such as Guantánamo Bay and at military bases in Afghanistan and Iraq, contributing to an increased ability for the U.S. to collect information.\textsuperscript{67}

\textsuperscript{65} UNSC Res 1566 (8 October 2004) para. 3.
\textsuperscript{66} Michael Byers, ‘Terrorism, the Use of Force and International Law after11 September’ [2002] International Relations Vol. 16 No. 2, 155.
\textsuperscript{67} Richard Jackson, ‘Writing the War on Terrorism: Language, Politics and Counter-terrorism’ (Manchester University Press 2005) pp. 11-12.
6 Torture in the War on Terror

Most human rights are not absolute and allow for some limitations in order to protect the public but, occasionally, some governments have gone beyond these limitations resulting in human rights violations. Further, the practice of subjecting terrorist subjects to torture has become more widespread. Prior to the events of 9/11, governments have conducted many practices that violate human rights while combating terrorism in some parts of the world. However, the terrorist attack triggered a whole wave of counter-terrorism measures introduced by states. The challenge of upholding the obligation states have towards human rights legislation in combating terrorism effectively is a challenge not only on a domestic level, but also internationally.

A way to understand why torture is thought to be an appropriate response to terrorism is to look at how the U.S. administration understands terrorism. The USA see it as an attack upon symbolic targets which is aimed to expose the attackers’ power and the victims’ helplessness: kills innocent people with the purpose of intimidation and sending a political message; and completely inexcusable. The consensual view of international law is that neither torture nor terrorism can be justified, no matter the severity of the circumstances. The prohibition of both is equally absolute.

In order to establish the significance of torture in the war on terror and how it may be justified, one must examine the different components that introduce torture. First, it is important to examine the interrogation methods used in order to extract information from detained terrorist suspects. Second, the ‘high value detainee’ (HVD) model which was created by the U.S. need to be assessed. Third, qualified immunity will be examined in the context of the difficulty to hold government officials accountable for acts concerning torture. And last, the most common known justification for torture, the ticking bomb scenario, will be assessed.

6.1 Interrogation methods

The interrogation methods used by the U.S. military were approved, abolished and modified between late 2002 and early 2003. Donald Rumsfeld, Secretary of Defense established a working group to assess issues related to the interrogation of detainees held in the war on terrorism. Rumsfeld approved twenty-four techniques for use at Guantánamo Bay but rejected the most severe ones, including 20-hour interrogations, sleep deprivation and slapping. General safeguards were also included to ensure that all detainees were suitably evaluated and had an interrogation plan stating limits on methods used, such as limits on duration. Further, the methods were supposed to be applied in a humane and lawful manner. However, the general safeguards also stated that the interrogators were allowed to vary techniques on

68 Moeckli, Shah, Sivakumaran (n 44) 556-557.
69 ibid 564-565.
70 ibid 550.
71 Holmes (n 53) 128-129.
72 Donald Rumsfeld served as Secretary of Defense from 2001-2006 under President George W. Bush.
73 Ginbar (n 1) 240.
74 Secretary of Defense’s ’Memo for Commander’, SOUTHCOM (16 April 2003) TAB B (Memo for Commander).
detainees depending on, *inter alia*, their culture, weaknesses and environment. The urgency to obtain information the detainee was known to have was also taken into consideration when determining which technique to use.\textsuperscript{75} No list like the one stating the techniques used by the military have been provided by CIA officials or their politician superiors. This could imply that the CIA operated under different rules. CIA director at the time, Porter J. Goss testified before the Senate Armed Services Committee in 2005 during which Senator John McCain described a policy regarding the use of ‘waterboarding’ to which Goss replied by stating that it qualifies as a professional interrogation technique.\textsuperscript{76}

In the report on the *Situation of detainees at Guantánamo Bay*, the interrogation techniques that were approved for use there by the Secretary of Defense in a memorandum in December 2002 were the following: the use of stress positions for a maximum of four hours; detention in isolation up to 30 days; hooding of a detainee during questioning and transportation; deprivation of light and audio; removal of all comfort items; forced grooming; removal of clothing; interrogation for up to 20 hours; and using individual phobias. This memorandum was abolished in January 2003 and in April 2003 the following techniques were authorized: incentive/removal of incentive, i.e. comfort items; change of setting down which may include exposure to extreme temperatures and deprivation of audio and light; environmental manipulation; sleep adjustment (not sleep deprivation); and isolation from other detainees. These techniques met four of the five criteria set out in the definition of torture. They had a clear purpose of gathering information, the acts were committed intentionally, the victims were defenseless, and they were perpetrated by government officials.\textsuperscript{77}

According to Human Rights First\textsuperscript{78} (HRF) and Physicians for Human Rights\textsuperscript{79} (PHR), the following interrogation techniques were used by the CIA: stress positions, beatings, temperature manipulation, waterboarding, threats of harm to person, family or friends, sleep deprivation, sensory bombardment of noise and light, violent shaking, sexual humiliation, and prolonged isolation and sensory deprivation.\textsuperscript{80} Stress positions are where the prisoner is forced to maintain painful physical positions for prolonged periods of time. Beating is where the prisoner is subjected to forceful physical contact; violent shaking is where the interrogator forcefully shakes the prisoner. Exposure to extreme temperatures for prolonged periods of time causes temperature manipulation of a prisoner. Waterboarding involves strapping down the prisoner and pouring water over his face to create the impression of drowning and, deprivation of sleep involves use of stress positions and other techniques to interrupt normal sleep for an extended period of time. Sensory aggressive use of noise and light involves exposing the prisoner to bright, flashing lights and/or loud music for long periods of time, whereas prolonged isolation and sensory deprivation involves denying the prisoner any contact with other human beings, or subject him to reduction or removal of stimuli from senses. Forcing the prisoner to perform sexually humiliating acts, or subjecting him to sexually humiliating behavior to induce feelings of guilt, shame and worthlessness defines sexual humiliation of prisoners.

\textsuperscript{75} Memo for Commander.
\textsuperscript{76} Ginbar (n 1) 241-242.
\textsuperscript{77} Report of Special Rapporteurs, paras. 49-50.
\textsuperscript{78} Human Rights First and Physicians for Human Rights are two non-governmental organizations with great experience in analysis, research and advocacy directing toward ending torture. Both have been on the forefront of the fight against torture.
\textsuperscript{79} ibid.
In the study conducted by the Intelligence Committee, it found that the interrogations of CIA detainees were brutal and, indeed worse than the CIA presented. One detainee, Abu Zubaydah, was subjected to interrogation techniques with repetition for days or weeks at a time. These included slaps and ‘wallings’ used in combination with sleep deprivation and nudity and Zubaydah was further subjected to waterboarding. Another detainee, Khalid Shaykh Mohammad, was close to drowning several times during waterboarding. Furthermore, the study revealed that detainees were subjected to ‘rectal rehydration’, others put in ice water baths and the CIA let several detainees believe they were never going to leave custody alive, whereas other detainees were threatened of harm to their families. Another important feature of the findings of the study mentioned above is the ineffectiveness of the means used to acquire intelligence or gain cooperation from the detainees. The Committee found that the enhanced interrogation techniques did not work and according to CIA records, some detainees provided no intelligence while in CIA custody. Some detainees provided false information after being subjected to the interrogation techniques. John Yoo, Deputy Assistant Attorney General at OLC (Office of Legal Council) from 2001 to 2003 was claimed to be largely responsible for authoring the so-called ‘torture memos’ and bending the existing law to fit an illegitimate legal theory, that the use of questionable interrogation techniques would not constitute torture. After 9/11, the Executive Branch relied on the OLC for advice on how to deal with issues concerning national security where there were no precedents. The Executive Branch needs to operate within the limits of the law, leaving it to the government attorneys to find a balance between protecting the laws of the country and protecting the country. The fear that enemies would use the U.S. court system against its government actors, Yoo defined ‘torture’ incredibly narrow making it almost impossible to have success of a prosecution or lawsuit alleging torture.

The case Padilla v Yoo involved José Padilla who was arrested at Chicago O’Hare International airport in May 2002. Padilla was held in custody in a federal detention facility. In June 2002, President George W. Bush issued an order declaring Padilla an enemy combatant and directing the Secretary of Defense to take him into military custody. The order asserted, inter alia, that he had engaged in conduct that constituted hostile and war-like acts; that he possessed intelligence about personnel, activities and future attacks on the U.S. of Al-Qaeda; and that he was a threat to the national security of the United States and his detention was necessary in order to prevent him from aiding Al-Qaeda in its efforts to attack the United States. Padilla argued that he had been imprisoned without charge, without the ability to defend himself and to challenge his conditions of confinement. During his detention, Padilla claimed that he had suffered physical and psychological abuse by high-ranking government officials.

81 ‘Walling’ means slamming of the detainee into the wall.
82 Committee Study, pp. 3-4.
83 ibid.
84 The OLC functions as a kind of general counsel to the executive branch and its interpretations of law are usually considered binding upon the Executive Branch, unless overridden by the President or the Attorney General.
85 The executive branch of the United States executes, or enforces the law.
87 ibid 1576-1577.
89 ibid.
officials as part of a systematic program of interrogation techniques, including extreme isolation, sleep adjustments, exposure to extreme temperatures, interrogation under threat of torture, denial of access to necessary medical care, and detention for almost two years without any communication.\textsuperscript{90} The complaint alleged that Yoo was one of the government officials who abused their high position to cause the allegedly unlawful detention and interrogation of Padilla. Further, the applicant claimed that Yoo set in motion the allegedly illegal detention and interrogation by formulating unlawful policies regarding designation, detention and interrogation of suspected enemy combatants; and by attempting to avoid legal restraints on those policies and give immunity to those who implemented them.\textsuperscript{91}

The Ninth Circuit Court did not find the evidence provided by the plaintiff to be enough to claim violations of constitutional and statutory rights that were established in 2001-2003. Further, it stated that the constitutional rights of convicted prisoners and persons subject to criminal process were clearly established. However, Padilla could not qualify as a convicted prisoner or criminal defendant. Rather, he was a suspected terrorist and an enemy combatant confined to detention by order of the President of the United States. His detention was based on the grave danger to national security he posed and his possible possession of intelligence, which could have been helpful in saving the United States from further terrorist attacks. The Court did not express any opinion as to whether those allegations were true, or whether they could have justified the extreme conditions of imprisonment to which Padilla says he was subjected if they were true.\textsuperscript{92}

The interrogation methods used on suspected terrorists have been questioned several times and the latest report on the matter, namely the study by the Intelligence Committee revealed some of the suspected brutality and existence of those methods. One of the main findings of that study, the failing nature of the interrogation techniques despite the gravity and severity of them, may suggest proof of its ineffectiveness and perhaps lead to their abolition. Given the outcome in the \textit{Padilla v Yoo} case, a victim of some of these interrogation techniques might have difficulties alleging his subjection to torture considering the narrow possibility to have success of a lawsuit or prosecution.

6.2 The high value detainee model

The United States has since 9/11 detained a large number of suspected terrorists. Such detainees have been labeled ‘high value detainees’. A HVD is a detainee who is believed to possess high value information or strategic intelligence that could be of value to operational commanders.\textsuperscript{93}

The HVD model may be treated as a model of legalized torture for four reasons; first, high-ranked U.S. lawyers wrote memoranda which became official policy describing that torture could be ordered and used legally within the war on terror, based on the President’s authority as Commander in Chief during wartime. Second, the U.S. Secretary of Defense has approved interrogation methods, of which some can be classified as torture by international human rights monitoring mechanisms, such as the International Committee of the Red Cross. Third, in 2005 and 2006, the US Congress enacted retroactive legislation in effect releasing past

\textsuperscript{90} Jose Padilla and Estela Lebron v John Yoo, 4512.
\textsuperscript{91} ibid 4513.
\textsuperscript{92} ibid 4530.
\textsuperscript{93} Ginbar (n 1) 224.
torturers from liability. And fourth, the U.S. administration has been consistent while interpreting this legislation as allowing the use of methods that may amount to torture. Consequently, this model establishes a foundation for the use of torture without the suffering of liability. By approving torture-classified interrogation methods in various ways, this implicates that the HVD model favors torture over other methods of gathering intelligence.

This model legalized, or sought to legalize torture during interrogation of terrorist suspects relying on four legal arguments. Firstly, terrorist suspects are not protected by any laws. Secondly, only ‘extreme acts’ are included in the scope of torture. Thirdly, criminal law defenses, such as necessity and self-defense, are applicable to officials who torture. And fourthly, the President’s unlimited authority during war, hence, no legal challenge to an order to torture from the President can be made. A person who is detained by a state regardless of where is, or should be entitled to protection by domestic law (US Constitution, 18 USC § 2340), international treaties (ICCPR, UNCAT) and relevant rules of customary international law. However, the HVD model has sought to deprive the terrorist suspects from these protections. If no laws apply then laws prohibiting torture would be void and torture as an interrogational mechanism can proceed legally.

In a memorandum from February 2002, President George W. Bush described a view of the status of Al-Qaeda and Taliban detainees. The memorandum included, inter alia, that the provisions of the Geneva Conventions did not apply to the US conflict with Al-Qaeda; that the Common Article 3 of the Geneva Convention does not apply to Al-Qaeda or Taliban detainees; and that Al-Qaeda detainees do not qualify as prisoners of war since Geneva does not apply to the conflict. The consistent position of the U.S. administration has been that human rights treaties do not apply to detainees outside U.S. territory and that they are not self-executing but with the exception of UNCAT, which the Pentagon Working Group concluded do apply to interrogation of unlawful combatants.

The interrogation methods used under the HVD model were recognized by the UN Special Rapporteur, Manfred Nowak, on torture in 2006. During investigation on the interrogation techniques approved for use at Guantánamo Bay, and while assessing the criteria of what amounts to torture, Nowak concluded that some of the techniques being used were causing severe suffering. He also stressed that the ongoing use of those techniques, sleep deprivation, prolonged isolation and the use of dogs, were likely to amount to torture.

Posit that torture do work as a means to gain information. Further, it is important to establish if the same information could have been obtained by other means that did not involve torture, or perhaps a U.S. official working for a different agency could have provided the same information. If the same information could have been acquired by less cruel methods, if the alternative techniques turn out to be just as effective as torture, then the torture cannot be said confidently to be justifiable, even if it worked.

---

94 Ginbar (n 1) 225.
95 ibid 228.
96 ibid 230.
97 Report of Special Rapporteurs.
98 ibid para. 52.
99 Holmes (n 53) 123-124.
6.3 Qualified immunity

Qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights, which a reasonable person would have been knowledgeable of. The qualified immunity seeks to find harmony between the need to hold government officials accountable and the need to protect officials from liability, disruption and harassment when performing their duties and was first established in the case *Harlow v Fitzgerald.* When determining whether a government official is entitled to qualified immunity, the courts ask whether the facts alleged prove that the officer’s conduct did violate a constitutional right and if so, whether that right was clearly established affiliated to the context of the case. In order for a constitutional right to be clearly established, it needs to be clear that a reasonable official could understand that his actions violate that right.

In the *Padilla* case, the lawsuit alleged that Yoo set in motion several events that resulted in the loss of Padilla’s constitutional rights, rather than him being the individual who directly violated his rights by physically torturing him. Yoo was in this case influential in creating policies regarding detainees since he interpreted law, both national and international, which applied to Padilla. This makes Yoo responsible for any possible future consequences of his conduct. The alleged violations of Padilla’s rights were clearly established at the time and a reasonable officer should have believed that the conduct was unlawful.

Yoo was entitled to qualified immunity because the treatment Padilla claims he was subjected to was not clearly established to amount to torture in 2001-2003. Then, the general agreement was that torture meant the intentional infliction of severe pain or suffering. As to what amounted to ‘severe pain and suffering’ was not clear in 2001-2003. In existing judicial decisions at the time of Yoo’s tenure at OLC, courts had not defined certain interrogation techniques as torture. Thereby, the Ninth Circuit Court could not conclude that officials in 2001-2003 could have known that the specific interrogation techniques allegedly employed, necessarily amounted to torture. Consequently, at the time of the treatment of Padilla, it was not clearly established that he was subjected to torture.

The concept of qualified immunity is a reasonable argument for protecting government officials when it is not clear that they have violated clearly established rights, which they should have known about. In the case of Padilla, one might argue that it was fairly obvious what amounted to torture at the time since there was an existing definition in place. However, one might argue that the court made the decision based on its doubt regarding the interrogation techniques and whether it was established that they amounted to torture.

---

100 *Harlow v Fitzgerald,* No. 80-945, 457 U.S. 800 (June 24 1982).
101 Marchesano (n 83) 1599-1603.
102 *Jose Padilla and Estela Lebron v John Yoo.*
103 Marchesano (n 83) 1599-1603.
104 *Jose Padilla and Estela Lebron v John Yoo* 4534-4535.
105 ibid 4541.
6.4 The ticking bomb scenario

The ticking bomb scenario was first articulated by Jeremy Bentham and is one of the most common justifications of torture.\textsuperscript{106} Posit that a government has a detained person who knows where a bomb has been planted and the government has a good reason to believe that the bomb will go off imminently. This leads to a weighing of costs and benefits of extreme methods for obtaining the necessary information on order to locate and disarm the bomb, preventing grave harm to people.\textsuperscript{107}

This scenario relies on four conditions that need to be satisfied. First, the interrogators must be certain they are holding the right person. Second, there can be no doubt that the suspect obtains the information needed to remove the threat and save lives. Third, they must be confident that the use of torture will provide the interrogator with the necessary information. And fourth, the obtained information must be reliable.\textsuperscript{108}

The ticking bomb scenario argues for a deductive reasoning concerning the effects resulting from the torture interrogation. Premise that a terrorist is captured. Then, premise that if he is tortured, he will reveal information about the location of the bomb. The conclusions one can draw from these two premises are. First, the terrorist should be tortured. Second, the location of the bomb will be obtained; and three, the bomb is found before it detonates and peoples´ lives are saved.\textsuperscript{109} Again, we are faced with the assumption that torture is the only option and the only way to extract the information needed and the only way this ‘hypothetical’ scenario could actually work in reality is with that there is no doubt the tortured terrorist holds the necessary information.

One may suggest that the ticking bomb scenario makes the legitimacy of torture depend on the future consequences, its prevention of severe harm. In the historical debates about torture, it was assumed that torture was justifiable or not depending on its ability to uncover evidence leading to conviction for past crimes. One might suggest that torture is morally justifiable if it would help save a large number of people from harm, but it might also imply a kind of bravery of those who defy the legal consequences and moral norms, and choose torture. Those who torture prisoners are seen as protecting their country and its people from serious threats of harm and mass destruction making it legitimate because it provides hope in a otherwise dark world; a potential savior.\textsuperscript{110}

Possible risks when being faced with a situation like the ticking bomb terrorist could be an opening for slippage. By creating an exception to the prohibition of torture, or permitting necessity as a plead for the torturer a change of the moral prohibition could lead to the creating of an exception to the general prohibition. The possibility for other types of pleas of

\textsuperscript{106} Bellamy (n 18) 141.
\textsuperscript{108} Bellamy (n 18) 141-142.
\textsuperscript{110} Holmes (n 53) 128.
relief opens up when the exception becomes the norm, even if the pleas do in fact fall short in the ticking bomb scenario.\textsuperscript{111}

Bentham introduced the consequentialist argument that justifies torture in a ticking bomb situation relying on a consequentialist comparison of the outcome. Utilitarianism is a type of consequentialism and defines the best consequences as maximum utility. In this case the consequences are pain and death and there is some disagreement on whether it is justified to produce pain in order to prevent greater pain or death. When deciding to perform an action, a utilitarian will consider the results, good and bad, and choose the one that will result in maximum pleasure or minimum pain.\textsuperscript{112}

The deontological\textsuperscript{113} perspective on torture may be explained as follows; if one assume that there is a moral duty to treat people with concern and respect, torture is cruel and degrading and it violates fundamental rights making it morally wrong. Furthermore, torture is an extreme method that force victims into a very vulnerable situation where they might have to collude against themselves. Alan Dershowitz, a legal expert, argues that in a ticking bomb situation, it may be permissible to allow torture of terrorists. He also suggests that this could work as a solution or a way to reduce the widespread use of torture by the United States.\textsuperscript{114} Dershowitz put forward the idea of a ‘torture warrant’ that would ‘legalize’ the use of torture before it is used. In a ticking bomb situation, a torture warrant would be issued to the interrogators, thereby justifying the torture of a terrorist in order to gain information to save lives. Dershowitz believes that if a warrant requirement were properly enforced, it would reduce the severity, occurrence and duration of torture. It simply imposes prior review of a certain level. Nevertheless, it is his view that it is better to legitimate and control a specific practice than to legitimize a general one.\textsuperscript{115}

The ticking bomb scenario is hypothetical and assumes that torture is the only way of extracting the information needed from a terrorist. In reality though, torture may not be successful, as was found in the study of CIA’s interrogation techniques. There is also a very low probability of a ticking bomb scenario to occur. Very few times do terrorists warn about a possible attack and very few times do the authorities know without doubt that an attack is coming; likely because terrorists want their attacks to remain unknown in order to create as much chaos and damage as possible. Therefore, the ticking bomb terrorist may never exist in the real world and will only exist as a fictitious scenario used to try to justify torture in the war on terror.

\section*{6.5 Conclusions}

Torture does exist in the war on terror. The various ways of using torture as a means to fight terrorism makes a strong argument for the existence. The interrogation methods, the attempts to legalize torture and practice it, and the difficulty of holding persons’ responsible for acts of torture certainly provide a strong sense of ignorance of the prohibition as such. Whether a

\textsuperscript{111} Bellamy (n 18) 145.
\textsuperscript{112} Ginbar (n 1) 15-16, 20.
\textsuperscript{113} Deontology is an ethical theory concerned with duties and rights and states that we are morally obliged to act in accordance with principles and rules regardless of the outcome.
\textsuperscript{114} Bufacchi, Arrigo (n 106) 357-358.
justification for these acts are at place is nearly impossible to establish. The ticking bomb scenario raises the question on whether torture can be justified in an alarming situation like that one. But if torture becomes the leading counter-terrorist weapon then it might form part in any other conflict as well.
7 Final conclusions

This paper sought to examine whether torture can be justified in the war on terror. By carefully looking at the definition of torture, by examining the interrogation methods, the high value detainee model, the law of armed conflict and the ticking bomb scenario, one may still not be able to establish if torture is justifiable.

What this study shows is how torture becomes important in the war on terror, and how the leading nation in this war seeks to find ways of legitimizing torture as a means to gather intelligence from suspected terrorists in order to prevent future attacks. It is understandable that terrorism raises strong emotions among people; it is a subject that raises questions on how countries can win the war on terror without falling into the ways of the terrorists. For one cannot overlook the grave and cruel methods terrorists use to create chaos and to try to achieve their political goals. However, it is important to examine what methods can be used that does not violate our fundamental rights. The interrogation methods examined in this paper, unfortunately, point in another direction.

When facing terrorism, being aware of the innocent civilian lives that have been taken by terrorists in an unimaginable evil way, it would be difficult not to consider using the same evil towards those persons, namely torture. But, the general threat posed by terrorists makes it nearly impossible to know exactly when they will strike, and who will strike, and at whom. This creates uncertainty regarding who may be subjected to torture in order to save civilians from a possible threat. Here, the ticking bomb situation gives the answer since it contains the certainty of exactly which terrorist obtains the necessary information and it contains the exact way to get the information. Although, as this paper shows, the ticking bomb situation is merely a hypothetical one and a situation like that one is not very likely to occur. Using torture as a means to counter terrorism may seem like an effective way, but as this paper has shown that it does not work and even if it would work in a few cases, it may not be worth violating one of the absolute human rights individuals have.

The prohibition of torture is supposed to be an absolute prohibition without any derogation allowed. However, as this study has shown, it is not. In the war on terror, ways of using torture as a counter-terrorism weapon is widespread and is used to gather intelligence. One might even argue if there is any possibility of having an absolute prohibition of torture considering the problem with ruthless terrorist organization that exist is the world today. Perhaps, the issuing of so-called ‘torture warrants’ in cases like the ticking bomb could be a solution to the widespread and illegitimate use of torture during interrogations, supposing it could exist, and perhaps it could prevent future human rights violations of the prohibition.

Ultimately, the prohibition of torture is absolute, and should not be practiced by any person. Its occurrence is unavoidable, as with other violations of peoples´ rights all over the world but as long as states agree on its existing absolute nature, the path toward a ‘real’ absolute prohibition may be pursued and perhaps one day achieved even in the war on terror.
Bibliography

Treaties

18 US Code § 2331


Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted on 10 December 1984, entered into force on 26 June 1987)


Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A


International cases

Aksoy v Turkey, No. 21987/93, 18.12.96

Aktas v Turkey, No. 24351/94, 24.4.03

Harlow v Fitzgerald, No. 80-945, 457 U.S. 800 (June 24 1982)

Ireland v UK, (1978) 2 EHRR 25

Ireland v UK, Series A, No. 25, 18.1.78

Jose Padilla and Estela Lebron v John Yoo [2011] JSW No. 09-16478 [2012]

José Vicente and Amado Villafane Chaparro and others v Colombia, CCPR/C/60/D/612/1995 (14 June 1994)

International decisions

General Comment No.2, Committee Against Torture, Convention against torture and other cruel, inhuman or degrading treatment or punishment, CAT/C/GC/2 (24 January 2008)


UNSC Res 1566 (8 October 2004)

Documents

Office of the United Nations High Commissioner for Human Rights, 'Human Rights, Terrorism and Counter-terrorism’, Fact Sheet No. 32

Secretary of Defense’s 'Memo for Commander’, SOUTHCOM 16 April 2003 TAB B

United States Department of State, 'Patterns of Global Terrorism’ May 2002

Reports

Admiral Albert T. Church, 'Report on allegations of abuse of extrajudicial detainees at the Guantánamo Bay Naval Base’


Senate Select Committee on Intelligence, 'Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program’ (approved 13 December 2012, updated for release 3 April 2014, declassification revisions 3 December 2014)

Books


Holmes S, 'Is defiance of Law a Proof of Success? Magical Thinking in the War on terror’ The Torture Debate in America, Cambridge University Press 2006
Jackson R, 'Writing the War on Terrorism: Language, Politics and Counter-terrorism’ Manchester University Press 2005


Articles

Bellamy J A, 'No pain, no gain? Torture and ethics in the war on terror’ [2006] International Affairs 82, I 121-148


Byers M, 'Terrorism, the Use of Force and International Law after 11 September’ [2002] International Relations Vol. 16 No. 2 155-170


