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# **Torture**

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Is torture ever justified? Should it, in certain circumstances, be lawful to torture someone? And if so, in what circumstances? Who should be allowed to do the torturing – and how?<sup>1</sup>

Many people today say this is not a question that should be asked. Of course torture is wrong and it should never happen, they argue. Others disagree. Especially since the *al Qaeda* attacks in the United States on 11 September 2001 some argue that there are some circumstances where torture should be used. The most famous (or perhaps infamous) recent example of an official endorsement of torture consists of a group of memos drafted by the Deputy Assistant Attorney General of the United States, John Yoo, in 2002. The memos were signed by Assistant Attorney General Jay Bybee.

The memos were written to the President (George W Bush), the Department of Defence and the CIA advising that there were arguments that certain types of torture would be legally permissible in certain circumstances in the 'war on terror'.<sup>2</sup>

#### What is torture?

According to the United Nations *Convention Against Torture* ('CAT') torture is:

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 or coercing 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. It does not include pain or suffering arising only from, inherent in, or incidental to, lawful sanctions.<sup>3</sup>

Examples of methods that might be referred to as torture are outlined in the Bybee memos to include mental and physical torment and coercion, such as prolonged sleep deprivation, binding in 'stress positions' and waterboarding.<sup>4</sup> Of course, torture can also involve actions that are much worse and can result in disfigurement or even death.

### Surely no-one uses torture anymore!

Torture is widely used in the world even today. In a statement in June last year the United Nations Secretary General, Ban Ki-moon, noted:

Torture is a crime under international law. The prohibition of torture is absolute and unambiguous... And yet, torture is still practised or tolerated by many States. Impunity persists for the perpetrators. The victims continue to suffer.<sup>5</sup>

In its *World Report 2011*, <sup>6</sup> Human Rights Watch mentioned 48 countries where torture had occurred. <sup>7</sup> In some of these

countries its use was widespread, in some less so.

In these countries torture was used for a number of purposes - sometimes by police or military or other organisations (eg the CIA) to extract confessions from suspects, sometimes by the military against political opponents of the government, sometimes in prisons and sometimes by 'unofficial groups' who supported the government and tortured opponents of the ruling regime.8 There were a number of other countries that were alleged to have 'endorsed' torture because they knew it was happening, either on their territory (such as Poland) or in another country where they were somehow involved. In this latter case there have been widespread allegations that the United Kingdom and Australia have known about the United States torture of detainees, usually suspected al Qaeda members, and may have assisted in or allowed their capture, or, at the least, knew of probable torture of their citizens but did nothing about it.9

#### Is torture lawful?

Generally speaking torture is not legal. Most countries in the world have both signed and ratified the *CAT*, which prohibits torture. When a country signs and ratifies a treaty it is bound under international law by the terms of the treaty. Three countries have signed this treaty but not ratified it (however a signature is enough to be bound) and there are very few countries which have not signed at all. <sup>10</sup> According to the Secretary General of the United Nations:

There are no exceptional circumstances whatsoever [on the prohibition of torture] – whether a state of war, or a threat of war, internal political instability, or any other public emergency or national security situation. States' obligations also include the duty to provide effective and prompt redress, compensation and rehabilitation for all torture victims.<sup>11</sup>

Even if a country has not signed the treaty many international law scholars would argue that the prohibition on torture is so accepted that those countries would be bound anyway under customary international law.

## **Arguments for torture**

In the Bybee memos it is argued that although there is an absolute prohibition on torture the law would allow the 'lesser' crimes of cruel or inhuman treatment in certain circumstances. Bybee distinguished torture, which would have to consist of such violence that it would cause 'serious physical injury, such as organ failure, impairment of bodily function, or even death,' from anything 'less' which would not amount to torture and would therefore be allowed.

Let's presume this is right (although many would argue that it is not): would we agree with the proposition that it might be alright (and therefore it should be lawful) to use these lesser types of 'non-torture' (such as, say, waterboarding) in certain circumstances? The most common example given by those who answer 'yes' to this question is the 'ticking bomb scenario.'12

### The 'ticking bomb'

In this scenario the police, or the military, or another specialised agency like the CIA, have a terrorist in their custody. The terrorist says (and the officials have plenty of evidence that he is telling the truth) that he has planted a bomb in a building somewhere in the city and it is going to

go off in 10 hours. It is a big bomb so it is likely to kill a lot of people, depending on which building it is in. The officials do not have time to evacuate the whole city (let's presume it is Sydney or Melbourne). They have teams of police, etc, out looking for the bomb, but not much time left.

Would it be justified in these circumstances to torture the terrorist in order to find out where the bomb is? If you were in the position of the officials, how would you resolve this question?

Opponents to torture would say that you should not torture the terrorist to get information, never-ever. Others would argue that there are some circumstances where it is justified. They might reason as follows:

If the bomb goes off it is going to kill lots of people. We have no real other way to find the bomb and though we are looking there is only a very small chance that we will find it before it explodes. We know this guy is a terrorist. He has admitted to planting the bomb. We can torture him and even though this will cause him pain and suffering it might force him to tell us where the bomb is and we can save the lives of scores or perhaps hundreds or more of other innocent people. Causing pain for a short time to a bad guy is clearly justifiable if it has a chance of saving hundreds of innocent lives. We are not even going to kill him, whereas he has no qualms with killing all those other innocent people.

This is a utilitarian approach. A small amount of pain caused to one person is worth it because it saves a huge amount of pain to a lot of others.

If you are still not convinced by this argument you can 'play with the variables.' What if the bomb was a big one, a nuclear device perhaps, and it was not just going to kill a hundred but possibly millions? Does this make it more justifiable to use torture? What if you have proof that there is definitely a bomb and proof that the terrorist you are holding has killed people before, lots of them? Does the fact that he is a 'bad guy' make torture more justifiable? What if your mother and father and brother and sister and best friend and girlfriend/boyfriend and your cat and dog were in Sydney or Melbourne?<sup>13</sup> Would you be more willing to endorse torture in those circumstances? On the other hand, what if there is only a *possible* bomb and the person being held is only a *possible* terrorist and he/she only might *possibly* know where the bomb is?

Another interesting question to ask that helps tease out the ethical issues involved here is this: what if the terrorist says to you 'if you let me torture you for 10 hours I will defuse the bomb. No one has to get hurt but you'? Although the thought of going through severe pain for 10 hours is not one that would appeal to anyone, would you be willing to make that sacrifice in order to save the lives of the people in the building or the whole city or even just one other person? If you are willing to undergo that pain, does that make you more willing to inflict it on the terrorist?

### **Arguments against**

Those who say torture should never be used have a number of arguments why. The first is that it would be a 'slippery slope.' If you can justify using torture against the obvious terrorist with the nuclear device then why not another obvious terrorist with a smaller bomb that is going to just kill 100 people? And if you can justify this, why not with the suspected terrorist where it might save 20? In other words if

you can justify inflicting pain where do you draw the line? This view has been stated in response to real terrorist activity. In 1978 Aldo Moro, who had been Prime Minister of Italy and was the leader of the largest opposition party in that country, was kidnapped after all of his bodyguards were shot dead. Members of the Italian security forces suggested to the General in charge that they torture one of the suspects they had in custody, knowing that this suspect probably knew where the terrorists were holding Moro. The General replied 'Italy can survive the loss of Aldo Moro. It would not survive the introduction of torture.'14

A second argument is related to the first. People should simply never treat other people cruelly and inhumanely, it is never justified. To 'give in' to the terrorists would make us as bad as them. If we used torture on terrorists how would we be any different to them? Simply, two wrongs can never make a right.

A third argument is that, in many instances, torture simply does not work. Research has shown that there are plenty of 'false confessions' in response to being tortured. In the ticking bomb scenario above could you justify torture even though what might happen is that the terrorist (or suspect) will say nothing for 10 hours or will simply give you the wrong information?

A fourth argument is that to legally allow torture would result in the dehumanisation of the torturers. The people who are 'required' by law to inflict torture on others to extract information would undoubtedly be psychologically affected in a negative way by the experience (or they should be!) Is it right to make something legal when it is going to affect other innocent people (ie the official torturers) in a negative way?

There are responses to each of these arguments. In an article written in *The Age* newspaper, 15 Professor Bagaric, an Australian academic, countered the slippery slope argument by stating that we can use the law to restrict the use of torture to very specific circumstances, thus limiting the possibility of the development of a slippery slope. He noted (and this goes some way to countering the fourth argument above as well) that in some circumstances we have made things that are 'much worse' than torture lawful. For instance, in hostage situations we find it acceptable for the police to shoot and kill the hostage taker if this is going to save the lives of the hostages. In a similar way, we find it acceptable to have soldiers kill enemy combatants in a time of war.

He also argues, against the slippery slope argument, that we have pretty much already tumbled down that slope. Even though most countries in the world pay lip service to a ban on torture, as we saw from the statistics above, a lot of them do it. Perhaps putting very limited laws in place that would permit torture could at least 'regulate' it better than it is regulated now?

Whether you think the answer is clear cut or not, given the fact that torture is so widespread in the world today and in many cases completely and utterly indefensible, it is an issue to which we need to pay attention. If you believe that torture is never acceptable – ever – then the actions of governments such as our own in relation to possible complicity in torture should be of concern. It is easy to paint a 'difficult case' scenario where you can make arguments for torture, such as the 'ticking bomb' scenario we looked at above, but the simple reality is that most torture (almost all in fact) is much more clear cut than this. As the United Nations and almost all of the nations of the world admit, it simply should not happen.

### References

- A discussion of the ethical debates surrounding the use of torture can be found at <a href="http://en.wikipedia.org/wiki/Ethical\_arguments\_">http://en.wikipedia.org/wiki/Ethical\_arguments\_</a> regarding\_torture>. For an argument for torture by an Australian academic see Mirko Bagaric, 'A Case for Torture', The Age (online) 17 May 2005 <a href="http://www.theage.com.au/news/Opinion/">http://www.theage.com.au/news/Opinion/</a> A-case-for-torture/2005/05/16/1116095904947.html> Professor Bagaric also famously defended the use of torture in Mirko Bagaric and Julie Clarke, 'Not Enough Official Torture in the World? The Circumstances in which Torture is Morally Justifiable' (2005) 39(3) University of San Francisco Law Review 581. For a response to Professor Bagaric's article, also by Australian academics, see Anne O'Rourke, Vivek Chaudhri and Chris Nyland, 'Torture, Slippery Slopes, Intellectual Apologists, and Ticking Bombs: An Australian Response to Bagaric and Clarke' (2005) 40(1) University of San Francisco Law Review 85. Both articles are very readable and examine the pros and cons of torture in a detailed way.
- For a brief summary see Torture Memos (20 May 2011) Wikipedia <a href="http://en.wikipedia.org/wiki/Torture\_Memos">http://en.wikipedia.org/wiki/Torture\_Memos</a>>. See Memo from Jay S Bybee, 1 August 2002 available at <a href="http://dspace.wrlc.org/">http://dspace.wrlc.org/</a> doc/bitstream/2041/70964/00355\_020801\_001display.pdf> and Memorandum for John Rizzo Acting General Counsel of the Central Intelligence Agency: Interrogation of an al Qaeda Operative from Jay S Bybee, 1 August 2002 available at <a href="http://">http://</a> dspace.wrlc.org/doc/bitstream/2041/70967/00355\_020801\_004di splay.pdf>.
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984 (entered into force 26 June 1987) art 1.
- See, <a href="http://en.wikipedia.org/wiki/Waterboarding">http://en.wikipedia.org/wiki/Waterboarding</a>>.
- United Nations Secretary-General Ban Ki-moon, 'Many States Still Practising or Tolerating Torture, Notes Secretary-General in Message for International Day in Support of Victims' (Media Release, SG/SM/12957, HR/5026, OBV/890, 14 June 2010) at <a href="http://www.un.org/News/Press/docs/2010/sgsm12957.doc">http://www.un.org/News/Press/docs/2010/sgsm12957.doc</a>.
- Human Rights Watch, World Report 2011 (2011) available at <a href="http://www.hrw.org/en/world-report-2011">http://www.hrw.org/en/world-report-2011</a>>.
- Including Afghanistan, Angola, Armenia, Azerbaijan, Bahrain, Bangladesh, Brazil, Burma, Burundi, Cambodia, Chad, China, Egypt, Equatorial Guinea, Eritrea, Ethiopia, India, Indonesia, Iran, Iraq, Israel, Jordan, Kyrgyzstan, Lebanon, Libya, Mexico, Morocco, Nigeria, North Korea, Pakistan, Palestine, Papua New Guinea, Peru, the Philippines, Russia, Saudi Arabia, Sudan, Syria, Tajikistan, Tunisia, Uganda, Ukraine, United Arab Emirates, USA, Uzbekistan, Vietnam, Yemen, Zimbabwe.
- Often these groups consist of 'off-duty' soldiers or police
- See, for instance <a href="http://www.hrlrc.org.au/files/C8KXIS35QK/">http://www.hrlrc.org.au/files/C8KXIS35QK/</a> Factsheet%20-%20Investigate%20Torture.pdf>.
- These include Iran, Iraq, Vietnam, some African Countries, and oddly, Papua New Guinea.
- United Nations Secretary-General Ban Ki-moon, 'No Exceptional Circumstances' for Torture - Whether War, Political Instability, Public Emergency, or National Security, Says Secretary-General in Message' (Media Release, SG/SM/13657, HR/5065, OBV/1010, 20 June 2011 at <a href="http://www.un.org/News/Press/docs/2011/">http://www.un.org/News/Press/docs/2011/</a> sgsm13657.doc.htm>.
- Often called the 'ticking time bomb' scenario... but of course a bomb that is ticking is a 'time bomb'! If it's stopped ticking it has either gone off, or it's not going to go off.
- This seems to be the scenario in a lot of Hollywood movies.
- Moro was murdered by the Red Brigade terrorists.
- See, above n 1.

#### Debate it!

Break your class into teams to debate the topic 'torture is a necessary evil.' Which team has you *convinced* – *the positive or the negative?*