

EDITORIAL

For slaves in Roman times, torture was the rule in courts. Their testimonies were admissible only if they had been extracted by torture, for it was believed that slaves could not be trusted to reveal the truth voluntarily. Torture by the Inquisition in and after medieval times was infamous and, even into the eighteenth century, the infliction of acute suffering on a defenceless person was a legitimate means of obtaining testimonies and confessions from suspects or accused for use in judicial inquiries and trials. There were few qualms about it; people generally assumed that no innocent person would be prosecuted and that anybody appearing in the torture chamber ultimately merited his or her chastisement.

Torture was only gradually outlawed, in response to a philosophical consensus that torture and inhuman treatment are immoral, repugnant and a violation of human dignity. The Universal Declaration of Human Rights of 1948 concludes that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”. Today, there is no more basic individual right than the absolute ban on torture and other forms of cruel, inhuman or degrading treatment in both human rights and humanitarian law, international and domestic law.

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Even though differences between cultural and religious groups and political affiliations may exist in the degree of rejection of torture and inhuman treatment, there is unanimity across all borders that such acts are generally immoral and should be rejected. A majority of people around the world are opposed to torture even if its purpose is to elicit information that could save innocent lives from terrorism, according to a BBC World Service poll of more than 27,000 people in 25 different countries. The poll shows that 59% of the world’s citizens are unwilling to compromise on the protection of human rights, while 29% think governments should be allowed to use some degree of torture in order to combat terrorism. There is rather less support for outlawing torture in several countries that have suffered terrorist attacks or political violence. However, no state extols its policy of allowing torture, even though torture may be widely practised by state officials with the full knowledge of the highest authorities, especially in authoritarian regimes where security considerations prevail over all other values.

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Torture is generally considered to be an aggravated form of inhuman treatment. Legally, the term is often used to denote inhuman treatment with the specific purpose of extracting information or a confession. Except for the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the Inter-American Convention to Prevent and Punish Torture, international treaties do not differentiate between torture and inhuman or degrading treatment by prescribing different legal consequences. In humanitarian law in particular, all acts which constitute torture or cause great suffering or serious injury to body or health constitute inhuman treatment and are equally forbidden and criminalized. The jurisprudence of the European Court of Human Rights, which differentiated between the qualified form of torture and other forms of inhuman treatment, did influence the said UN Convention, but in today's European state practice this differentiation has become irrelevant, as all forms of cruel, inhuman or degrading treatment are now absolutely outlawed, whether they amount to torture or not. This comprehensive ban on all inhuman methods cannot be stressed often enough.

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Despite international legal prohibitions, torture still occurs in most of the world's nations. In general, the aim is to break the victim's will and, to a lesser extent, to punish the person concerned. Individuals, groups or state officials might use torture to intimidate or coerce people or to extract information. Under international humanitarian law, unlike human rights law, the presence of a state official or any other person in a position of authority is not necessary for the process to be regarded as torture. In any case, the "act of state" doctrine, whereby an individual would be shielded from criminal responsibility for an act he or she committed in the name or as an agent of a state, is no defence under international criminal law.

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Torture violates a basic understanding of how individuals are to be treated and defies treaties and statutes. Torture is feared by and alienates everyone and disrupts communities. Even though the use of torture is emphatically denied in all states and by all perpetrators, the issue of implicit justifications of torture and inhuman treatment reappears even in democratic societies when they consider themselves under threat. Blunt denial of the occurrence of torture or inhuman treatment is replaced by legalistic interpretations of what constitutes torture, as opposed to "only" cruel, inhuman or degrading treatment, or by considerations as to which measures should be allowed in so-called "highly coercive", "enhanced" or "in-depth" interrogation. A narrow interpretation of torture would render its prohibition virtually meaningless. An absurd interpretation of that kind culminated in an infamous memorandum which authorized all interrogation measures except those leading to pain "equivalent in intensity to the pain accompanying serious physical injuries, organ failure, impairment of bodily function, or even death", thus potentially allowing the ripping out of toenails.

Once interrogators are authorized to start going down that path, torture is not far away.

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Most interrogators, however, are tempted to use methods designed to have maximum psychological impact while leaving only minimal physical traces. Yet non-physical means which profoundly affect a person's mental health are obviously equally banned. Indeed, there is no doubt whatsoever that psychological scars may go deeper and last longer than physical scars.

The question as to which treatment is prohibited can be considered only if all the measures applied constitute – individually or as a whole – cruel, inhuman or degrading treatment or even amount to torture. The ill-treatment must reach a minimum level of severity and its assessment is obviously relative and depends on all the circumstances of the case. The whole assessment is thus context-related, as not all measures have the same effect on victims in different cultural and religious settings.

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Whilst many governments are probably inclined to stress their policy of non-recourse to torture, they would like to close their eyes and ears and avoid investigating allegations of torture without legalizing or institutionalizing it. Another course adopted is the outsourcing of torture, in other words the practice of “extraordinary rendition” of suspects to third countries which may subject them to “enhanced interrogation” or secure a conviction if the countries deporting them do not have sufficient evidence for their own courts. States may also rely on information acquired through torture in third countries. Whereas the information gathered is generally deemed inadmissible as evidence in court, it would most likely be used for counter-terrorism purposes. Even where diplomatic assurances that deportees will not be tortured are given, as is often the case in “*non-refoulement*” situations, they tend to remain on paper. All these practices indicate a condoning of the use of torture by others. Worse still, the cooperation between interrogation specialists of different countries often leads to the migration of inhuman and illegal practices supposed to obtain results in extreme cases and thus further undermines the universal prohibition of torture.

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More honestly, other protagonists argue in favour of torture warrants in extreme emergencies. According to this view, the prohibition should be respected except in real cases of emergency and particularly if governments consider that the existence of the state is at stake, to borrow a term employed by the International Court of Justice when considering the legality of a different and most destructive measure, namely the recourse to nuclear weapons. Most armed conflicts obviously do constitute an extreme emergency or a threat to the existence of a state, but surprisingly the debate on (re)justifying torture only returned to the fore in the so-called “war on terror”, mainly with regard to the possible torture of suspected

terrorists in cases where the hypothetical “ticking bomb scenario” would require extraordinary measures to protect society. The potential sacrifice of 100,000 lives by failing to take every possible step to save them, including torturing the suspect, certainly does bring anyone to a breaking point in deciding which values should be protected.

In such situations, many governments may flirt with the exceptional authorization of torture. However, the hypothetical scenario will most likely be abstract, not realistic. Moreover, the experience of countries authorizing “moderate physical pressure” on detainees to obtain information highlights the dangerous slippery slope that lies in wait. Both the situations covered and the number of persons subjected to such inhuman treatment will progressively be extended, and torture may eventually even become the common response to any perceived threat. From the moment the psychological barrier and the moral and legal prohibition on the use of force are weakened, the way from psychological pressure to “moderate physical pressure” and eventually to torture is open. In a system of legalized torture, the practice of torture is impossible to contain.

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Torture and inhuman treatment buy short-term tactical victories at the expense of long-term strategic success. Whatever the stakes involved, such practices fundamentally degrade a society and political system: the depravities, injustices and damage to liberal institutions and to the cornerstone of humanitarian law and human rights are overwhelming. Torture and inhuman treatment are absolutely prohibited, even in the worst situations, and there can be no derogation from this prohibition.

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