

Torture and the Failure of the International System

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JACOB KRIPP, DEC 18 2014

The UN Convention against Torture defines torture as “Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession”.[1] In the same Convention torture is outlawed under a strict prohibition that allows for no exceptional circumstances to justify its use. Yet, despite being declared an absolute moral wrong, torture, as defined by the UN, is still a pervasive part of international relations today. The torture debate highlights the tension between the Kantian liberal institutions that are meant to safeguard the ethical standard states claim to uphold, and the Hobbesian view that it is the inherent nature of states to maximize their power in their own self-interest. The persistent use of torture, despite a clear moral and ethical condemnation by the international community, represents a failure of the Kantian model of international relations to reposition human rights as the prevailing self-interest of individual states.

The use of torture has been vehemently discouraged by a large part of the international community as a violation of human rights, whether in warfare or otherwise. David Sussman has argued that since the Enlightenment torture has been thought of as both “barbaric” and “inhuman” and therefore has been deemed unequivocally wrong.[2] Torture also violates the principle of non-combatant immunity, a key point in the Just War tradition, which can trace its roots to the writing of St. Augustine in the 5th Century AD.[3] The principles of non-combatant immunity and exemption from torture were strengthened most recently by the UN Convention Against Torture, written in 1985, that declared that: “No exceptional circumstances whatsoever...may be invoked as a justification of torture”.[4] The international condemnation of torture makes it clear that there is no justification for torture; it is an absolute moral wrong.

Arguments against torture attempt to reconstruct the self-interest of states so that it aligns with the self-interest of the greater international community by adhering to a standard of human rights. This is situated in the larger Kantian project to form “a lawful *federation* under a commonly accepted *international right*” that adheres to values of human rights by appealing to self-interest.[5] Many scholars argue against the use of torture because it will allow for further abuse of international human rights. If the United States uses torture, other states, especially China and Russia, may also justify its use as a tool of repression.[6] The United States would be hypocritical in an attempt to abolish the practice of torture.[7] Torture is also seen as a counterproductive strategy that leaves the threatened population alienated and radicalized, and undermines multilateralism.[8] The exposure of torture practiced at Abu Ghraib has demonstrated how torture has galvanized opposition to the United States presence, by alienating our allies and contributing to an increase in suicide bombings.[9] Reciprocity also plays a large role in the condemnation of torture as American forces fear being exposed to torture themselves.[10] However, as Michael Gross points out, and White House Counsel Alberto Gonzales attempts to argue, reciprocity is becoming an increasingly less compelling argument as asymmetric warfare makes these appeals obsolete.[11]

The purpose the UN’s Convention Against Torture was to reposition torture as a practice that is against the self-interest of all states. It is an attempt to place human rights as the overriding self-interest of each state, instead of the increase of their own power. Yet by deeming that even the threatened existence of a state could not justify torture, the UN also challenges the sovereignty of the state by declaring that there is no law above the International Law. This challenge is met by states like the United States and Israel as a direct threat to their own physical security, which in the Hobbesian viewpoint is the *raison d’etre* for the state.[12] Carl Schmit, who views himself as a successor of Hobbes describes the sovereign as, “he who decides on the exception”.[13] If there is no exception, as in the case of

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the International Convention Against Torture, then there is no sovereign. For theorists like Schmitt and Hobbes this is a disaster because the State will be rendered unable to deal with emergencies and will be trampled under the feet of anarchy.[14] The United States, by taking this “mainstream” view, is therefore inclined not to abide to international law because it threatens what they deem to be the over arching interest of self-preservation.

The decision of the United States not to ratify the treaty and the use of legal arguments to justify torture reflects a desire of the state to maintain its sovereignty in order to protect its core interests, regardless of international law. Scholars Sanford Levinson and Noam Chomsky have argued that the United States did not ratify the treaty to allow for the United States to tacitly approve of torture even before 9/11.[15][16] In the post 9/11 era the United States drew on a precedent set by Israel and Great Britain in order to openly justify the use of torture by American operatives in the “War on Terror”.[17] John Yoo asserted the supremacy and sovereignty of the United States by declaring that international law “does not bind the President, or restrict the actions of the United States military, because it does not constitute federal law.”[18] Norms are now no longer applicable because “the existing world of ‘the normal’ vanished...replaced by a specter of terrorist groups armed with weapons of mass destruction”.[19] To combat this existential threat, torture may be justified to preserve the physical security of the state and its citizens.

The overriding need for the state to protect the physical security of its citizens is best exemplified in the ‘ticking time bomb’ defense of torture. The ‘ticking time bomb’ scenario is a hypothetical situation in which a known terrorist is held with information on a bomb that is about to explode, killing hundreds of innocent people.[20] The obvious conclusion is that torture against one evil terrorist must be justified in order to save the innocent. This is because this hypothetical “sets the stage for a lesser to evil argument: if enhanced interrogational measures can save lives, then torture is less evil than letting many people die”.[21] Such an argument is used to appeal not only to the emotional side of a citizen it is also hinged on the idea professed by Alan Dershowitz that: “It is precisely because torture sometimes does work and can sometimes prevent major disasters that it still exists.”[22] For Dershowitz, torture performs a necessary function that allows the state to achieve its ultimate goal: the physical security of its citizens.

There are a number of problems, however, with the pro-torture arguments that illustrate why torture is prohibited under any circumstances in international law. One of the main problems with the pro-torture argument is that the ticking time bomb scenario is a theoretical fallacy that does not hold up under scrutiny. Alex Bellamy argues that “the hypothetical ‘ticking time terrorist’ case is based on a series of unlikely assumptions designed to prejudge the moral outcome.”[23] The ticking time bomb scenario is not a likely occurrence in the real world and distorts the fact that most torture is used on suspected terrorists whose knowledge of information pertaining to terrorist plots is unknown.[24] The use of torture in interrogation techniques is more akin to what David Luban describes as a “fishing expedition.”[25] The results of torture are also not as quick and accurate as is often dramatized on television.[26] Even if the use of torture does procure useful information, further arguments against the use of torture illustrate the danger inherent in the use of torture even in exceptional situations.

The use of torture in exceptional situations risks normalizing torture and creating a culture where it is permissive. Alex Bellamy cites the case of France and Algeria where torture: “tends to become the rule as the definition of *necessity* slips.”[27] This can be linked to psychological constructs of power demonstrated by Stanford Prison Experiment, showing that escalating torture is easier when the subject becomes dehumanized as the torturer exerts more power over them.[28] This led David Luban to conclude that “Abu Ghraib is not a few bad apples- it is the apple tree.”[29] Alan Dershowitz argues that such a torture culture can be prevented by assuring that warrants are a necessary precondition to torture.[30] However Jeremy Waldron correctly points out that even the use of torture in these situations will create a weakened respect for the rule of law regarding involuntary confession.[31] David Luban also demonstrates that judges are part of the very government that are encouraging the use of torture and would be unlikely to stand in the way of its use.[32] There is no way of permitting the use of torture while ensuring that it will not become normalized.

The argument that torture is used in order to preserve the very existence of the state also does not hold. Securitization theory shows us that: “the social construction of security issues is analyzed by examining the “securitizing speech-acts” through which threats become represented.”[33] In the case of 9/11 and the War on Terror, terrorism has been construed as an all pervasive threat and an act of war, representing a serious break with

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past history were terrorism was previously constructed as a crime.[34] The problem with this is that it requires a degree of compliance with the New Terrorism theory, a theory that also does not hold up under scrutiny.[35] Instead it is clear that the United States government and the media have overstated the threat of Islamic terrorism.[36] This construction has served the purpose of establishing a Muslim as an Islamic terrorist who is radicalized beyond the point of reason.[37] This justifies that torture is the only feasible way of extracting information from a terrorist suspect. The over-securitization of a threat by the government of the United States and the misguided discourse that misrepresents the threat must lead one to question the motives of justifying the use of torture.

The use of torture by the United States cannot be described as solely interrogational, nor can it always be linked to the uncovering of terrorist plots. Army psychiatrist Charles Burney has testified that torture was used by the United States as part of an attempt to link Al Qaeda and Iraq.[38] Bush's preoccupation with Iraq led to the use of torture in an attempt to justify what was widely condemned as an unjust war.[39] Noam Chomsky argues that the use of torture and terrorism by the United States can be seen as part of a larger legacy of imperialism, stretching back to Western expansion, and the promotion of business interests.[40] The major break in the post 9/11 world was that, now, torture is openly being used by American officers instead of being farmed out to subsidiaries. Alain Narn argues that despite Obama's insistence on upholding international law, he did not abolish torture instead he, "merely repositioned it" and restored it to its normal context by allowing others to carry out the practice of torture for the United States.[41] While on the surface, states condemned the use of torture, the reality of the situation demonstrates the tacit support of torture, not only by the United States, that may be used to further alternative agendas.

The failure of those in favor of torture to adequately exhibit safeguards against constructing a torture culture and the misrepresentation of terrorism to justify torture to satisfy other self interests demonstrates why the international community's strict prohibition of torture is correct. However, it also represents the failure of Kantian liberalism because international institutions such as the UN lack the ability to enforce international law, making it only as strong as the states are willing to adhere to it. Powerful states will be unwilling to submit their sovereignty to a larger international community because it would mean giving up a significant amount of clout. Though it may be foolish, as Kant points out, to disregard overall progress in the face of small setbacks, without a radical transformation it appears to me that the status-quo will be maintained.[42] As long as we have a state system, with a concept of sovereignty and self-interest as the governing principle, ethics and morality will only have a place if they align with the interests of the Great Powers. Perhaps an alternative vision can be achieved by undermining the entire concept of sovereignty as Michel Foucault has advocated: "What we need...is a political philosophy that isn't erected around the problem of sovereignty...We need to cut off the King's head." [43] If we can come to realize Foucault's vision perhaps we can come to some form of governance better suited to adhering to a moral-ethical standard.

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Date Written: April 2012