

# The State of Deception & The Time Bomb: Evaluating Torture as Counter-Terrorism

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### The State of Deception & The Time Bomb Terrorist: Evaluating Torture as a Counter-Terrorism Practice

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.

– The United Nations Convention against Torture Article Two, Section II.

Irrespective of the body of international law, state legislation, and constitutional restriction prohibiting acts of torture, various liberal governments have continued to practice torture and/or coercive interrogation on detainees and prisoners of war (Williams, 2010, p.198). The act of torture represents a crime against humanity violating individual human rights sacrosanct to fundamental liberal principles of freedom, dignity, and justice. In the ongoing global 'war on terror', a vast array of counter-terrorism precautions have been enacted. No individual measure, no matter how draconian or violent, provides a sole remedy to the ubiquitous and continued threat of terrorism (Lutz and Lutz, 2013, p. 274). Exceptional acts of terrorist violence have created a formidable qualification for an executive branch or sovereign to transcend the rule of law in defence of the greater good in exceptional circumstances. In a 'state of exception', the executive and sovereign can implement various irregular and prohibited counter-terror measures, including specific forms of 'torture' to pre-emptively maintain national safety and security. However, the thesis of this paper stipulates that liberal governments do not *suspend* the rule of law but rather legally *circumvent* it.

By analysing the legality of Guantanamo Bay and coercive interrogation utilised by the United States as a contemporary case study, this paper will investigate the ways in which practices of torture are kept inside existing legal frameworks and hidden from the public eye. Thus the 'state of deception' is born as justification of the exception inside or on the fringes of ambiguity of state and international law. Discussion then will shift to the pervasive 'ticking time bomb' scenario as a common justification for invoking an exception in defence of the nation on the absolute prohibition of torturous practices to extract intelligence (Dershowitz, 2003, p. 292). In this specific 'ticking time bomb' scenario, invoking the use of exceptional torture provides justification for the necessity of torture to uphold the utilitarian principle of greater good for the greatest number of people. It is the firm contention of this paper that moral principles should be upheld wherever possible in the ongoing fight against terrorist actors. However, the 'state of deception' exists in reality, ethically and legally justifying torture in spite of it being morally indefensible and inconsistent with fundamental liberal virtues. Political necessity, loopholes, and legal ambiguities may make acts of torture *legal* but they struggle to make it *right*.

### Countering Terror

Before examining the exceptional induction of torture in legal and ethical sense, it is important to discuss briefly counter-terrorism procedures generally and their efficacy in response to terrorism. Counter-terrorism operations are centrally concerned with combating and identifying threats of terrorist violence. Left unchecked, terrorism can fundamentally erode the security of the state, thus all terrorist organisations must be understood with the threat for potential danger (Lutz and Lutz in Jackson, Sinclair, 2012, p. 65-66). Terrorism studies academic Alex Schmid

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(Schmid, 2005, p. 235) advocates the use of a “multi-pronged approach” to counter terrorist violence by utilising “a broad repertoire of responses”. More importantly, Schmid (2011, p. 38) also insists on the importance of holding the moral high ground by “defending and strengthening” the rule of law, democratic intuitions, and social justice that are pivotal to the continuation of liberal values.

Preeminent critical scholar Richard Jackson (et al, 2011, p. 242, original emphasis) maintains that tests of “*proportionality, effectiveness and legitimacy*” are central for evaluating the effectiveness of individual and broader counter-terrorism strategies. According to Jackson, counter-terrorism practices should not be disproportionate to the capability of the threat itself and measures enacted ideally should have proven prior results. Furthermore, responses to terrorism must be legitimate and respect existing standards of behaviour and accepted moral principles. Arjun Chowdhury and Scott Fitzsimmons (2013, p. 453-4, original emphasis) describe existing counter-terrorism policy as “*effective but inefficient*” identifying the propensity for states to overact and overspend in combating terrorism’s prevalence. Effective counter-terrorism strategies are essential necessities for the protection of the individual and the state. Certain counter-terror measures, indeed, have the ability to prevent terrorism. Heavy-handed, unproven, and illegitimate policies, however, can have a detrimental effect by increasing political violence rather than decreasing it, which should always be central to the core aim counter-terrorism policy. A range of states have employed specific methods of torture during counterinsurgency campaigns resulting in an anecdotal conviction that torture constitutes an effective practice in spite of a clear void in systematic analysis (Sullivan, 2014, p.388).

## Exception By Deception

There is extensive compelling evidence confirming the use of coercive interrogation and punishment practices deployed by liberal democracies that equate torture as defined by the Geneva Conventions and the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Parry, 2005, p. 517). There is contentious debate arguing that the counter-terrorism policies of coercive interrogation at Guantanamo Bay deployed by President George W. Bush represent a sovereign suspension of the rule of law creating a ‘state of exception’ (Scheuerman, 2006, p. 118-9). Whilst legalist proponents argue, Guantanamo Bay and established coercive interrogation programmes are based in exploited legal stipulations of domestic and international law (Marks, 2006, p. 347).

In his seminal work *Politische Theologie*, political theologian and Nazi party sympathiser Carl Schmitt (2005: 1922, p. 1) describes the sovereign ruler as “he who decides on the state of exception”. Schmitt argues that it is the *political* executive that suspends the rule of law in the exception rather than *necessity* itself. Sara Davies (2007, p. 75, emphasis added) identifies, “supporters of Schmitt’s work, essentially, argue liberal governments can *create* legal black holes in order to develop power beyond the discretionary norms of a liberal society”. The theory of sovereign exception runs contrary to the ancient political axiom ‘*necessitas legem non habet*’ or ‘necessity knows no law’ where the necessity of circumstance creates the exception of the rule rather than the executive or sovereign. In essence, governments can *create* legal ambiguities in times of necessity, but primarily in the case of absolute prohibitions, administrations circumvent the existing legal frameworks rather than suspending them.

Close scrutiny of policies of coercive interrogation at Guantanamo Bay highlight endeavours were made to enact policies inside of existing law. The United States’ counterterrorism policy emanated from both a political and a legal real world necessity to protect a state that had come under attack on September 11, 2001. Fleur Johns (2005, p. 628-9, original emphasis) highlights the representation of “Guantanamo Bay often *looks and sounds* like a domain operating as one of ‘pure’ sovereign discretion and thus exceptionalism” but, in actuality, Guantanamo itself exemplifies “anti-exceptional legal artefact” in a normative legalistic framework. Critically, exceptions to the absolute prohibition of torture exist at the “ambiguous, uncertain, borderline fringe, at the intersection of the legal and the political” (Fontana, 2005; 1999, p. 1).

## Nothing Absolute

In the wake of September 11, 2001, President George W. Bush by power of military directive established the definition and legality of enemy combatants captured on the Afghanistan battlefield. *Al-Qaeda* and *Taliban* detainees

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were deemed 'unlawful enemy combatants' thus allowing their rights as defined under the Geneva Convention III Prisoner of War (POW) articles (specifically articles 3, 4, and 17) to be circumvented and restricted. Unlawful combatants were subject to "additional questioning" beyond the requirements of a lawful combatant avowing 'coercive interrogation' on detainees whose combatant status had regarded as unlawful (Addicott, 2013, p. 156). Alberto Gonzalez, legal council to President Bush, wrote in a White House memorandum dated 25<sup>th</sup> of January 2002, "This new paradigm" of prisoner definition effectively "renders obsolete Geneva's strict limitations on questioning of enemy prisoners". Gonzalez had cast doubt on the lawfulness of the enemy and POW affordances when captured and detained by US officials (McCoy, 2012, p. 33). The legal stipulations of Geneva conventions, however, were not rendered obsolete, as Gonzalez had boasted; the convention itself was the basis in which legal ambiguity existed and, therefore, could be exploited. In a legalistic conception, which was the internal understanding of the Bush executive, Guantanamo Bay *itself* existed upon an interpretive but solid legal foundation allowing for coercive interrogation of the unlawful combatant.

The Bush administration's internal interpretation of the Convention Against Torture was exceptionally limited in scope. The executive's legal inference is exemplified by the classified '*Bybee memorandum*' issued 8<sup>th</sup> of January 2002 to Attorney General Gonzalez. The leaked memorandum interprets the Convention Against Torture (and Geneva Conventions III) with torture defined specifically at the extreme end of actions in interrogations impermissible. Consequently, it specifies "that torture is at the farthest end of impermissible actions, and that it is distinct and separate from 'cruel, inhumane, or degrading treatment or punishment'" (Bybee & Yoo, 2002, p. 15). This strict interpretation of torture itself renders the use of coercive interrogation as falling under the lesser category of cruel and inhuman acts, thereby enabling the government to avoid criminal penalties but extract potential intelligence. Additionally the Executive maintained 'cruel, inhumane, or degrading treatment or punishment' applied inside United States sovereignty, allowing coercive intelligence gathering in Guantanamo Bay, inside Cuban territory, and various black sites as lawful (Williams, 2010, p. 197).

The Bybee interpretation highlights an indispensable ambiguity in the Convention Against Torture where pain and suffering has to be '*severe*' to constitute torture and thus designating torture as an extreme act distinguishable from permissible forms of coercive interrogation (Lim, 2006, p. 102). Moreover, the severity of actions that constitute torture in the Bybee interpretation must amount to pain relative to that of "serious physical injury such as death or organ failure" and mental trauma that amounts to "lasting physiological harm" (Bybee & Yoo 2002, p. 46). In this reductive interpretation of torture, any action that does not reach subjective thresholds of '*severe*' punishment are deemed permissible as 'cruel, inhumane, or degrading treatment or punishment'. The existence of such a contemptible interpretation of Convention Against Torture runs contrary to the provisions absolutely prohibiting torture *and* cruel and inhuman acts. As John Parry (2005, p. 519) maintains, the Convention Against Torture "seems deliberately crafted to leave room for states to engage in coercive treatment in compelling circumstances, so long as the conduct falls short of torture as defined in that document", thereby allowing legal interpretation and an inherent ability for states to exploit the existing ambiguities to fulfil exceptional intelligence objectives inside the law.

Whilst engaged in a counter-insurgency campaign against *al-Qaeda* and the *Taliban*, the United States enacted an interpretive legal *circumvention* to the restriction of coercive interrogation on detainees captured and detained at Guantanamo Bay. This circumvention took place in the context of an exceptional circumstance. Coercive interrogation varies in degrees of intensity from physical and physiological stress. 'Standard Interrogation Techniques' include physiological forms of stress from yelling at detainees and threatening death to depriving them of sleep and food. Forced wall standing and sensory deprivation transcended both physical and physiological punishment used concurrently with various other techniques. Furthermore, the more intense 'Enhanced Interrogation Techniques' (including waterboarding) were considered necessary by the Central Intelligence Agency (CIA) to extract evidence from the high value detainees. The Central Intelligence Agency argued that *al-Qaeda* detainee Abu Zubaydah was resistant to 'Standard Interrogation Techniques' and urged for the approval of Enhanced Interrogation Techniques (Blakeley, 2011, p. 547). The Senate Select Committee on Intelligence's (2014, pp. 3) report on CIA Detention and Interrogation found that after being waterboarded by CIA interrogators, Abu Zubaydah became "completely unresponsive, with bubbles rising through his open, fullmouth."

Furthermore, for actions that are considered extreme and outside the boundaries of coercive interrogation practices

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(including torture as defined in Bybee and murder), the culpability rests on individual personnel in the Central Intelligence Agency and Department of Defence and not the executive who are sheltered by plausible deniability preventing legal recriminations (Addicott, 2013, p. 157). The Senate Select Committee on Intelligence's report on CIA Detention and Interrogation (2014, pp. 3-4, 7-8) concluded that individual operations were kept at arms length from senior members of the executive and that interrogations conducted by Central Intelligence Agency officials were "brutal and far worse than the CIA represented to policymakers", with the report casting serious doubt on general efficacy of the CIA enhanced interrogation programme producing actionable intelligence.

Additionally, Erin Chopac (2002, p. 13) highlights government circumvention as setting a "dangerous precedent for the future application and interpretation of the Geneva Conventions" and argues for the legality of detainees to be "revaluated" through court procedure. Denying detainees legal status as a lawful combatant (and associated POW affordances) was overturned in the 2006 Supreme Court challenge *Hamdan v. Rumsfeld*, which judicially checked the executives power and compliance with respect to the Geneva articles and entitled *al-Qaeda* and *Taliban* combatants prisoner of war status. The *Hamdan v. Rumsfeld* case determined executive military commissions at Guantanamo Bay were non compliant with Uniform Code of Military Justice in which the Supreme Court ruled the Geneva Conventions had been incorporated into. Moreover, in conjunction with the earlier Supreme Court's decision in *Hamdi v. Rumsfeld*, which mandated the right to due process to prisoners irrespective of combatant lawfulness status, limited Geneva Convention affordances have been restored.

The implementation of coercive interrogation practices at Guantanamo Bay are "not exceptions but part of a systematic programme" designed to extract intelligence from terrorist suspects (Bellamy, 2006, p. 123). As Susan Marks (2006, p 347) puts it: "international legal norms may themselves have contributed to creating or sustaining the ills" perpetrated in Guantanamo by the very ambiguities hidden inside of international absolute prohibitions of torture. These political circumventions to international *absolute* prohibitions of torture represent a limited selection of the numerous legal circumventions made covertly Bush Administration's *State of Deception* during the War on Terror.

## To Torture the Time Bomb Terrorist

Regardless of the legality of torture, its continued practice is contrary to the moral principles in which liberal democracies are founded. In this context, the 'ticking time bomb' scenario prescribes a moral dilemma, where, in essence, a sovereign has to decide whether to subvert liberal moral principles by having an uncooperative terrorist tortured to gain information on the whereabouts of a planted time bomb(s) posing an imminent threat to the lives of innocent civilians (Lubin, 2005, p. 1440; Jackson et al, 2011, p. 238; Walzer, 1973, p. 167). When presented with such a scenario, the temptation is to put conscience and prohibition aside to save innocent life and engage in torture. However, the scenario itself is problematic and dependent on variable information effectively rendering the scenario improbable for real world application. As David Luban (2005, p. 1446) stresses, the 'ticking time bomb' scenario is not really about emergencies but rather represents "distraction" from the underlying issue of the normalization of torture in liberal democratic society.

There is divisive philosophical debate on the justifications of invoking an exception to the absolute prohibition of torture in security emergencies as a counter-terrorism practice. In this context, torture includes 'cruel, inhumane, or degrading treatment or punishment' and physical and mental torture that does not result in death. Utilitarian proponents advocate the use of torture in the 'ticking time bomb' scenario as justification to maximise the greater good by saving the lives of the innocent, thus maximising the greatest amount of happiness at the expense of the tortured terrorist whose liberties are restricted coercively. However, supporters of Kantian deontology reject torture by invoking the categorical imperative test to evaluate the motivations for torture if the induction were to become a universal law in a continuum (Allhof, 2003, p. 106-7). The binary choice whether to torture the ticking time bomb terrorist or to uphold rule of law and the absolute prohibition against torture is the political problem of 'dirty hands' where any action or inaction for that matter, results in moral crisis of action. Michael Walzer (1973, p. 161, emphasis added) describes 'dirty hands' as the choice of a political leader of "two courses of action both of which it would be *wrong* for him to undertake" in a time of necessity. The 'ticking time bomb scenario' forces individuals to choose between two types of evil, reducing the argument to a one of utilitarian origin choosing the *lesser* evil.

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The ticking time bomb scenario is an interesting but flawed thought experiment in which the most ardent defenders of civil liberties and individual rights question their position on allowing an exception to the rule. Christopher Finlay (2011, p. 223-4) exposes the direct appeal to emotion which the ticking time bomb scenario evokes. Finlay notes that the “hypothetical drama...elicits the kind of moral-sentimental response” which creates cognitive dissonance and acts as “leverage through which to persuade them to reassess the moral and legal rules” to justify torture. Additionally, the ‘ticking time bomb scenario’ is flawed because it implies a preconceived assumption that torture would be effective in its aim of yielding life saving intelligence (Skerker, 2010, p.183). Consequently, if a sovereign chose torture and it produced no outcome and the bomb(s) exploded, the sovereign would have unnecessarily dirtied their already dirty hands. Moreover, David Luban (2005, p. 1427) argues that ticking time bomb stories are based on unqualified “assumptions that amount to intellectual fraud”, thereby deceiving individuals into abandoning their own personal morals.

In the case of ‘the ticking time bomb terrorist’, Harvard defence attorney Alan Dershowitz gives limited support to non-lethal physical torture and supports the rule-utilitarianism position. Dershowitz (2004, p. 264) highlights that torture would be *in fact* employed as an exceptional circumstance in liberal democracy irrespective of prohibitive law. Additionally, Dershowitz advocates a form of “advanced approval for the use of limited force in extreme situations” whereby torture is regulated within the political and judicial systems affording accountability rather than secrecy. Richard Jackson (et al, 2011, p. 239) conversely argues that legal adoption would have a normalising effect by accepting “moral practices that are incompatible with democratic norms and rights”. Furthermore, Jackson maintains that the adoption of state sanctioned torture has a “longer-term morally corrosive effect on society”. Both Dershowitz and Jackson raise equally important questions on the normalisation of the exception, political accountability, and liberal rights. Torturing the ticking time bomb terrorist may produce results that are necessary in defending the greater good; however, living in a society that allows draconian violence to violate principles of virtue forces one to question the moral permissibility of deploying torture even in an exceptional circumstance.

## Conclusion

When necessity commands, the scourge of invoking an exception plagues absolute legal restrictions and moral conscience in liberal democratic society. It is clear that *effective* strategies are required to combat the modern era of terrorist actors. State and individual security rest upon government implementation of counter-terror measures. Ideally, these measures should reflect our morals and support for liberal democratic rights and institutions. In the war on terror, exceptions became the standard practice through rigorous legal interpretation that allowed for practices defined as torture to be circumvented. The Bush Administration’s coercive intelligence gathering exemplified such justification and legality within existing international laws. Guantanamo Bay and coercive interrogation does not constitute a suspension of the rule of law but rather imposes another regime inside existing law and transforms traditional illegal practices into normative legal ones. Fundamentally, absolute prohibition invites liberal democratic states the right to interpret, behind the closed doors of government secrecy. It is here where the *State of Deception* flourishes with governments acting on the boundaries of interpretation hidden from political scrutiny and public liability. Furthermore, moral justification for torture comes in the form of a *ticking time bomb terrorist* who, if tortured, would save the lives of thousands. The scenario attempts to normalise torture, forcing strict implausible parameters whereby supporters of the prohibition consider the exception. Pivotaly, there is no right choice when it comes to subverting sacrosanct individual principles. The man with the dirtiest hands is the man that cannot justify his own actions to himself. Combining legal and moral justifications for torture in times of necessity, coercive interrogation and the torture of the ticking time bomb terrorist fundamentally parallel to each other. Invoking torture may be justified to defend the greater good but conversely could have a detrimental affect on the morality of a society that supports virtues of freedom, justice, and equality. Legal and moral debates must continue into the future, requiring the strong resolve of supporters of rights to uphold the prohibition wherever possible.

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