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# Freedom From Torture in the “War on Terror”: Is it Absolute?

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## Abstract

Freedom from torture is regarded as “absolute”, meaning that a state cannot infringe the right for purposes which would seem legitimate such as the protection of national security. Indeed, the freedom is viewed as “non-derogable”; that is, infringements are not permitted even in special circumstances such as times of war or public emergency. Is it right, however, with the growth in international terrorism post “9/11”, particularly suicide violence, that the freedom should remain without limitation? Perhaps the torture of terror suspects might provide state authorities with intelligence so that acts of atrocity can be averted? To go on and construct a possible argument justifying ill-treatment against a detainee this article questions whether in fact freedom from torture can be categorised as absolute.

## Introduction

It is an accepted principle in English, European and international law that individuals enjoy the absolute (or unqualified) right not to be tortured. Why is this? Torture has been described as an intimate exercise of pain – inflicted one on one – which terrorises and humiliates the victim, and robs them of the dignity and autonomy that are the essence of the ideal of being human.<sup>1</sup> Furthermore, a state, bound by the rule of law, cannot allow torture without betraying its own principles and losing credibility internationally.<sup>2</sup> However, there has been a steady growth in global terrorism since the September 11 (9/11) attacks in New York and Washington in 2001:<sup>3</sup> the train bombings in Madrid in 2004;<sup>4</sup> the July 7 suicide attacks on the London transport network in 2005;<sup>5</sup> the shootings in Mumbai in 2008;<sup>6</sup> the shootings at the Fort Hood army base in Texas in 2009;<sup>7</sup> and recently a bomb was found on a cargo plane at East Midlands airport which could have been detonated over America.<sup>8</sup> Domestically, although there is still a terror threat to the UK from Republican splinter groups in Northern Ireland such as the Real IRA, who shot dead two British soldiers in 2009,<sup>9</sup>

and the Continuity IRA, who shot dead a police officer also in 2009,<sup>10</sup> the main security threat to the UK, according to a recent speech by the Director-General of the Security Service (MI5), Jonathan Evans, comes from Al Qaida-related terrorism.<sup>11</sup> Historically, Republican terror groups in Northern Ireland engaged in horrific acts but attacked primarily agents of the British state such as the armed forces and the police.<sup>12</sup> These tactics are not followed by modern day Islamic terror groups who engage in acts of atrocity such as suicide violence with maximum effect. Indeed, it has recently been reported that such groups are intent on acquiring chemical, biological, radiological and nuclear (CBRN) weapons for use against civilian targets.<sup>13</sup> Should state responses to this ‘new’ terrorism therefore change?

One way of addressing this ‘new’ threat is to reassess the international ban on the use of torture against terror suspects. Do those who justify their violence, perhaps on the basis of extremist ideology, deserve the limitless right to be free from torture, especially as the consequence of their actions, if successful, result in serious injury and even death? Perhaps the absolute nature of the anti-torture right should be a relaxed post 9/11 to provide intelligence and avert a terrorist attack – “preventative torture”<sup>14</sup> – particularly in a “ticking bomb”<sup>15</sup> situation? Perhaps the right should be qualified? That is, the greater risk of harm posed by a suspected terrorist, the less the state should permit him/her a right to be free from ill-treatment?

Moreover, if the right is not to be abrogated by the conduct of terror suspects, how is the freedom squared with, for example, Article 17 of the European Convention on Human Rights (ECHR), the prohibition of abuse of rights? This states:

“Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”

Can it be right, therefore, that those who seek to destroy democracy earn the right to rely on principles that they wish to deny to others, especially a freedom that is seemingly unqualified?

This piece is the first in a two article study assessing the prohibition on torture. Here the author analyses whether the freedom is in fact without limitation. If there is an argument suggesting that the right should not be categorised as absolute, then perhaps this could construct a justification for certain interrogative techniques against a detainee to reveal intelligence about a terror plot, which would otherwise be prohibited under domestic, European and international law. In a follow-up article it is hoped that a similar argument possibly legitimising the use of torture could be constructed, but on the basis of the “positive” nature of the right; that is, the obligation that the freedom imposes on state authorities to prevent breaches of the right by third parties such as terrorists could similarly be used to infringe the freedoms of detainees. There have been several discussions of the use of torture post 9/11 in academic circles of late.<sup>16</sup> But the author believes that the particular originality of this two article study, in questioning here the absolute nature of the right, is also to construct a later argument possibly justifying the use of ill-treatment against a terror suspect on the basis of the right’s positive nature. It may be alarming to some individuals that this discussion by the author is even taking place since the prohibition on the use of ill-treatment has been a fundamental feature of the international community since at least 1948 with the creation of the Universal Declaration on Human Rights (UDHR). In reply, the author notes the comments of Evans in an Editorial for a special issue of the *European Human Rights Law Review* on torture in 2006 (though Evans would probably be horrified that this author is using him as a possible justification for reversing the absolute ban):

“[I]f torture were not a legitimate topic for debate, it would never have been prohibited in the first place and the fact of its being prohibited as a matter of international law cannot and should not preclude its discussion: on the contrary, it demands it. It is a lack of debate which would be more worrisome since this would threaten to condemn the prohibition to obscurity.”<sup>17</sup>

Indeed, with the recent revelations by the former American President, George W Bush, that techniques of ill-treatment such as “waterboarding” used against terror detainees in US custody in Cuba “saved [UK] lives”, by averting attacks at, for example, Heathrow Airport and Canary Wharf in London,<sup>18</sup> such a discussion about

the permissibility of ill-treatment against detainees is never perhaps more relevant than at any time since the rendering of suspects post 9/11.

### **Torture, other forms of ill-treatment and war crimes**

Before discussing whether freedom from torture is indeed without limitation, it is important first to assess the right's significance, if at all. This will serve the purpose of making later assessments about the perceived limitless nature of the freedom easier (or harder?) to advance. Torture and other forms of ill-treatment have been a feature of history for centuries. The Romans adopted techniques of torture against their slaves; the catholic church did so against heretics during the Inquisition. In modern times methods of torture were adopted widely during the Second World War: by Germany, Italy and Japan amongst others.

As a reaction to the atrocities committed by nations during World War II, the UDHR was adopted without dissent by the General Assembly of the United Nations (UN) in 1948. Acceptance of the UDHR is now a condition of membership of the UN (currently running at 192 nations). Article 5 of the UDHR states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Furthermore, in 1966 the UN opened for signature the International Covenant on Civil and Political Rights (ICCPR), now ratified by 165 countries. Article 7 of the ICCPR states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment..." The UN has also specifically enacted a treaty addressing torture: the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) which has been ratified by 146 countries. At regional level, the Council of Europe opened for signature the ECHR in 1951. 47 states in Europe are now members of the Council of Europe. Article 3 of the ECHR states: "No one shall be subjected to torture, inhuman or degrading treatment or punishment." In 1987 the Council of Europe went further in the fight against torture: it opened for signature the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

Depending on the circumstances, torture can also comprise a war crime, a crime against humanity and genocide. According to the Fourth Geneva Convention of 1949 (Geneva IV), for example, torture or other acts of inhuman treatment committed against protected persons during armed conflict can be considered crimes of war. Article 147 states:

“Grave breaches...shall be those involving any of the following acts, if committed against persons...protected by the present Convention: torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health.”

As the Geneva Conventions of 1949 have now been ratified by all 194 states in the world they are considered customary international law (*jus cogens*) so create an obligation on any state to prosecute the alleged perpetrators or turn them over to another state for prosecution. Indeed, since July 1, 2002, 60 days after 60 States became parties to the “Rome Statute” through either ratification or accession, individuals can be tried at the International Criminal Court (ICC), at The Hague, for alleged violations of crimes of war such as the torture of civilians. (Article 8(2) of the Rome Statute adopts the same definition of a war crime as Article 147 of Geneva IV.<sup>19</sup>) The ICC also has jurisdiction over crimes against humanity and genocide. Articles 7(1)(f) and (k) of the Rome Statute state that a crime against humanity can include either torture or other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health, as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. Regarding genocide, Article 6(b) of the Rome Statute states that genocide can include either causing serious bodily or mental harm with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.

### **The definition of torture in international law**

As a basis for establishing the meaning 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, therefore, torture must involve pain and suffering, physical or mental. It must be inflicted on the victim for an express purpose such as the giving up of information, and be with the involvement of a state official. The suffering must be severe and intentional.

In *Ireland v. United Kingdom*<sup>20</sup> the European Court of Human Rights (ECtHR) considered whether the so-called “five techniques” used by the authorities in Northern Ireland against republican terror suspects – wall-standing, “hooding”, subjection to noise, deprivation of sleep and deprivation of food – were torture, contrary to Article 3 of the ECHR. Applying their definition of torture, which was “deliberate inhuman treatment causing very serious and cruel suffering”,<sup>21</sup> the ECtHR court ruled that the five techniques had not been torture.<sup>22</sup>

The first finding of torture by the ECtHR was in *Aksoy v. Turkey*<sup>23</sup> where the detainee was allegedly subjected to *inter alia* “Palestinian hanging”; that is, his hands were tied behind his back and he was strung up by his arms. The ECtHR noted:

“[This] treatment could only have been deliberately inflicted...It would appear to have been administered with the aim of obtaining admissions or information from the applicant. In addition to the severe pain which it must have caused at the time, the medical evidence shows that it led to a paralysis of both arms which lasted for some time. The Court considers that this treatment was of such a serious and cruel nature that it can only be described as torture.”<sup>24</sup>

“Torture” therefore constitutes a severe form of ill-treatment against a detainee. Modern techniques of torture have included rape and other forms of sexual violence against a person; the application of electric shock against sensitive parts of the body, such as the genitals and nipples; the infliction of bodily injury; the infliction of pain inducing drugs and “truth serums”; immersion under water to the point of suffocation or other methods simulating drowning, such as “water boarding”; attacks by aggressive dogs; mock executions and beatings; and threats of violence against a person and/or members of their family. Many of these techniques have been described by former detainees at Abu Ghraib Prison in Baghdad after the coalition invasion of Iraq in 2002<sup>25</sup> and at the US military base at Guantanamo Bay, Cuba.<sup>26</sup> Detainees were transferred to Cuba by the American authorities from Afghanistan and other countries after the 9/11 terror attacks in 2001. Three former British detainees at Guantanamo Bay described the use of excessive physical force by American service personnel:

“[I]f you said you didn’t want to go to interrogation you would be forcibly taken out of the cell by the [Initial Reaction Force] team. You would be pepper-sprayed in the face which would knock you to the floor as you couldn’t breathe or see and your eyes would be subject to burning pain. Five of them would come in with a shield and smack you and knock you down and jump on you, hold you down and put the chains on you. And then you would be taken outside where there would already be a person with clippers who would forcibly shave your hair and beard.”<sup>27</sup>

Moreover, another former British detainee at Guantanamo Bay alleged that he was warned by interrogators that they would inject him with drugs if he did not answer their questions. He also claimed that interrogators made death threats against him and his family and staged a mock beating in the room next to where he was being questioned.<sup>28</sup>

Less severe forms of ill-treatment against a detainee (which may not be classed as torture in the strict sense of Article 1 of the UNCAT) – for example, the wearing of

tight handcuffs; defecating and urinating on a person; exposure to bright lights; solitary confinement; sanitation deprivation; “hooding”; the subjection to consistent high-pitched noise (“white noise”); wall-standing, often for long periods of time; and deprivation of sleep and food – are nevertheless still prohibited. In *Ireland* the ECtHR, although ruling that the interrogative methods of the authorities were not torture, still held that they had constituted inhuman and degrading treatment in violation of Article 3 of the ECHR.<sup>29</sup>

### **Torture and its absolute nature**

Freedom from torture and other forms of ill-treatment are seemingly absolute; they are never permitted in any circumstances. For example, Article 2(2) of the UNCAT states that 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. Similarly, Article 15(1) of the ECHR states that 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 to the extent strictly required by the exigencies of the situation. However, Article 15(2) permits no derogation from Article 3; the right is therefore categorised as “non-derogable”. The ECtHR in *Aksoy* said:

“Article 3... enshrines one of the fundamental values of democratic society. Even in the most difficult of circumstances, such as the fight against organised terrorism and crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention...Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation.”<sup>30</sup>

The apparent absolute nature of freedom from torture is further supported by Article 3(1) of the UNCAT: “No State Party shall expel, return...or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” In international law this rule is referred to as the principle of “non-refoulement”. This rule is supported by the jurisprudence of the ECHR. In *Chahal v. United Kingdom*<sup>31</sup> Chahal was an Indian citizen who had been granted indefinite leave to remain in the UK. However, his activities as a Sikh separatist brought him to the notice of the authorities both in India and the UK. The Home Secretary decided that he should be deported because his continued presence in the UK was not in the public interest. In seemingly extending the absolute nature of freedom from torture, the ECtHR said:

“The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration.”<sup>32</sup>

To those countries where the UK, for example, was barred from routinely deporting terror suspects, for fear that they would be tortured on their return, the government, after the July 7, 2005 terrorist attacks in London, said that it would seek “diplomatic assurances” from at least 10 countries in the Middle East and North Africa that deportees would not be tortured.<sup>33</sup> So far such “diplomatic assurances” (or “memoranda of understanding”) have been agreed with, for example, Jordan, Algeria, Lebanon, Libya and Ethiopia. The general legality of “diplomatic assurances” was considered by the ECtHR in *Saadi v. Italy*.<sup>34</sup> Here a Tunisian was challenging his deportation from Italy on the basis that there was a real risk of a breach of Article 3 in the receiving country. The UK had intervened as an interested 3<sup>rd</sup> party in the case, alleging that this prohibition on deportations, as held in *Chahal*, should be amended

since, for example, *Chahal* had been decided before 9/11.

In ruling whether there had been a breach of Article 3, the UK government argued that the ECtHR should either balance the interests of the state with the interests of the deportee (which in fact was the minority judgement in *Chahal*) or adopt a higher standard of proof of the risk of torture in the receiving country. However, the ECtHR rejected these submissions,<sup>35</sup> thus upholding the principle of “non-refoulement” post 9/11. Significantly, although assurances, to the satisfaction of the court, were not given to the Italian authorities by the Tunisians,<sup>36</sup> the ECtHR accepted the views of international human rights organisations that in all likelihood the applicant would be tortured by Tunisia, even if it had given credible assurances to the Italians.<sup>37</sup> Indeed, Human Rights Watch has questioned the reliability of diplomatic guarantees given to, for example, the UK by other Middle Eastern and African countries such as Jordan,<sup>38</sup> Algeria<sup>39</sup> and Ethiopia.<sup>40</sup>

### **The prevention of torture**

A significant feature of the prohibition on torture is not just its arguable absolute nature, but its active prevention. The duty imposed on states to refrain from acts of torture would be much less effective if a corresponding obligation to investigate allegations of ill-treatment did not exist. For example, Article 12 of the UNCAT states that there must be a prompt and impartial inquiry wherever there is reasonable ground to believe that an act of torture has been committed. Similarly, in *Assenov v. Bulgaria*<sup>41</sup> the ECtHR said, when considering the applicant’s complaint about his alleged ill-treatment at the hands of the Bulgarian police:

“The Court considers that...where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3 that provision...requires by implication that there should be an effective official investigation. This obligation...should be capable of leading to the identification and punishment of those responsible. If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some

cases for agents of the State to abuse the rights of those within their control with virtual impunity.”<sup>42</sup>

In furtherance of the duty to prevent torture, Article 4(1) of the UNCAT states that each State Party shall ensure that all acts of torture are offences under its criminal law. To comply with its UNCAT obligations, the UK government enacted s.134 of the Criminal Justice Act 1988, which states:

“A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties.”<sup>43</sup>

The effect of this legislation is that the United Kingdom, for domestic purposes, has “universal jurisdiction”<sup>44</sup> to try any individual, whatever their nationality, for acts of torture committed anywhere in the world.<sup>45</sup> To this end, London’s Metropolitan Police Service (MPS) was investigating MI5 intelligence officers for their alleged complicity in the overseas torture of Binyam Mohammed, a former British resident at Guantanamo Bay.<sup>46</sup> Indeed, the UK’s overseas intelligence service, the Secret Intelligence Service (MI6), is itself being currently investigated by the MPS for alleged complicity in torture.<sup>47</sup> Because of these suspicions, there have been several domestic and international calls, for example, from the UK’s Equality and Human Rights Commission (EHRC)<sup>48</sup> and the Parliamentary Joint Committee on Human Rights (JCHR),<sup>49</sup> and Human Rights Watch<sup>50</sup> for an independent inquiry into Britain’s alleged complicity in torture. With a change of UK government in May 2010, it has been announced that an inquiry chaired by a former senior judge, Sir Peter Gibson, will investigate the matter, but the terms of the investigation – it will not be a full public inquiry, for example – have concerned human rights organisations.<sup>51</sup>

### **Is freedom from torture absolute?**

Thus far some elements of freedom from torture have been examined. The right is seemingly absolute (or unqualified) so entertaining the notion of balance – that is, weighing the right of an individual not to be tortured against the public interest in preventing threats s/he might pose to society as, for example, a terrorist, serial killer or paedophile – is not permitted. Indeed, the right is arguably non-derogable, meaning that even in times of war or public emergency a person still enjoys the freedom not to be ill-treated. The importance of the right is also apparent from the secondary obligation it imposes on states to undertake credible investigations into allegations of torture. Post 9/11, however, and especially the growth of suicide violence, should freedom from torture still impose these obligations on states? Is it not the case that the ‘rules’ have now changed? Nevertheless, the particular significance of the nature of the right in domestic, European and international law, as outlined above, cannot be overstated. To this end, constructing an argument which could legitimise the use of ill-treatment against a detainee to prevent a terrorist atrocity would therefore seem problematic. However, despite the evidence presented to the contrary, the author will attempt to do so by showing that freedom from torture cannot be categorised as without limitation. He will begin by analysing the domestic ruling of Laws LJ in the UK’s Court of Appeal in *Regina (Limbuella) v. Secretary of State for the Home Department*.<sup>52</sup>

Here s.55(1) of the Nationality, Immigration and Asylum Act 2002 prohibited the provision of the National Asylum Support Service to individuals who had not made a claim for asylum as soon as reasonably practicable after arriving in the United Kingdom. Section 55(5) lifted the prohibition on state support where it is necessary for the purpose of avoiding a breach of a person’s ECHR rights. The Court of Appeal had to consider the lawfulness of refusing three individuals support. The longest delay in making an application for asylum, of the three applicants, was one day. Two of the claimants were forced to sleep rough and the third claimant was on the verge of doing so. All the applicants had suffered a deterioration in health.

In holding that Article 3 of the ECHR had not been engaged, Laws LJ (with whom Carnwath and Jacob LJ agreed) proposed a narrow interpretation to the question whether a denial of welfare support to an asylum seeker would constitute an infringement of the ECHR. He distinguished: “...between (a) breaches of Article 3 which consist in violence by state servants, and (b) breaches which consist in acts or omissions by the state which expose the claimant to suffering inflicted by third parties or by circumstance.”<sup>53</sup> The judge described this as a “spectrum analysis” approach to Article 3;<sup>54</sup> that is, acts of torture directly perpetrated by the state would be prohibited but there would be a greater relaxation of the right where the state was less culpable for harm caused to an individual. This is significant for the purposes of this article. Of course, adopting the methodology of Laws LJ as a justification for the use of torture against a terror suspect is to misuse what the judge was ruling, since he expressly said the direct infliction of harm by the state would be prohibited. But this is not what the author is suggesting here: he is merely questioning whether it is indeed correct to assert the absolute nature of the right?

Reading some element of qualification into Article 3 can also be drawn from the domestic ruling of the then House of Lords (now titled Supreme Court) in *Regina (Wellington) v. Secretary of State for the Home Department*.<sup>55</sup> Here the court had to consider the legality of an extradition request from the authorities in the United States. The US had sought the extradition of the applicant to stand trial in Kansas City, Missouri, for two charges of murder in the first degree (one of the victims was a pregnant woman). The UK authorities had received assurances from the Americans that the applicant would not be given the death penalty if convicted. However, the Americans did say that if the applicant was convicted, he would receive a life sentence without the possibility of probation, parole or release.

In the first instance the House of Lords noted the ruling of the ECtHR in *Kafkaris v. Cyprus*,<sup>56</sup> where it was decided that an irreducible life sentence “may raise an issue” under Article 3.<sup>57</sup> Lord Hoffman in the House of Lords said that *Wellington* was not a case of an irreducible life sentence as there was a possibility of executive clemency by the State Governor, albeit this was remote.<sup>58</sup> Nevertheless, if a life sentence in Missouri had in fact been irreducible, this was not the end of the matter – the judges

in the House of Lords still went on to consider whether such an extradition would have been lawful. Particular to this article was the judges' entertainment of the proportionality principle. In determining whether an extradition to the United States in such circumstances should be upheld, Lord Carswell (with whom Lord Hoffman and Baroness of Hale seemingly agreed) considered the whole life term of an applicant with, for example, the heinousness of their crime and the likelihood of their escaping justice if not extradited.<sup>59</sup> For the majority of the judges the latter considerations would be given greater weight than the rights of an applicant, thus an extradition on these terms would not have been a violation of Article 3.

Supporting further the issue whether the ban on torture can be categorised as absolute, reference should also be made to principles of international criminal law. Jessberger notes defences to criminal charges of torture such as self-defence (or rather, defence of another person) and necessity permitted by Article 31(1) of the Rome Statute.<sup>60</sup> He says that individual responsibility would be excluded under Article 31(1)(c) and (d) if the torturer:

“Acts reasonably to defend another person against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the other person (self-defence), or if the act of torture as been caused by duress resulting from a threat of imminent death against another person, and the person acts necessarily and reasonably to avoid this threat provided that the person does not intend to cause a greater harm than the one sought to be avoided (necessity).”<sup>61</sup>

Similarly, the Criminal Justice Act 1988, conferring the power on the UK authorities universal jurisdiction for trying acts of torture, also affords defences to a potential accused. For example, s.134(4) states: “It shall be a defence for a person charged with an offence under this section in respect of any conduct of his to prove that he had lawful authority, justification or excuse for that conduct.” If indeed freedom from torture was without limitation, is it right that individuals can raise a multitude of defences to criminal charges, either internationally or domestically?

## **Possible legitimate acts of ill-treatment**

Assuming there were justifiable arguments stating that torture was indeed not absolute, is perhaps ill-treatment against a terror detainee for the purposes of acquiring valuable information therefore lawful? If so, what might legitimate acts of torture entail? Hudson states that one way of permitting ill-treatment is to redraw the boundary between what is acceptable interrogation and what is torture.<sup>62</sup> That is, maybe torture should be redefined, reserving it for extreme forms of physical torment and excluding lesser forms of ill-treatment?<sup>63</sup> So psychological duress such as the so called “five techniques” used against republican detainees in *Ireland* (which were a breach of Article 3 of the ECHR but perhaps were not torture in the strict sense of Article 1 of the UNCAT) could be justifiable measures to encourage suspects to reveal intelligence (especially as they were successful in providing information in *Ireland*<sup>64</sup>). However, in view of the arguably fundamental nature of the anti-torture right, as outlined above, maybe legitimate acts of ill-treatment should be confined to special circumstances such as war or other public emergency, thus relaxing the demands of Article 15 of the ECHR, but still obliging states to show a strict necessity for their actions.

If some acts of psychological duress, as in *Ireland*, were to be permitted to prevent terrorist atrocities, could the author justify these by reference to the “spectrum analysis”, as propounded by Laws LJ in the UK’s Court of Appeal in *Limbuela*? It will be recalled that the judge there expressly rejected violations of Article 3 where they had resulted from the direct infliction of pain. This would obviously include psychological harm such as the deprivation of sleep, “hooding” and “wall-standing” as they would all require positive action by the state. However, what about depriving a detainee of food? Could this not be justified since it is an omission to act rather than a direct infliction of harm? Next question, who would be tasked with making these critical decisions? Evans identifies at least two possibilities. The first is to “regularise” the use of torture – a strategy advocated by Alan Dershowitz where the judiciary would issue “torture warrants”. This would ensure that the practice was properly regulated by law, confined to the narrowest possible number of cases, and

that those who engaged in ill-treatment would be held accountable for their actions.<sup>65</sup> In this situation the individual to be harmed would be specified, as would the level and duration of the ill-treatment to be inflicted. Anything outside the warrant's specification would be a criminal offence.<sup>66</sup> Historically, England has a track record in issuing torture warrants for intelligence gathering (though this was only with executive rather than judicial approval).<sup>67</sup> Dershowitz justifies his position thus:

“If American law enforcement officers were ever to confront the law school hypothetical case of the captured terrorist who knew about an imminent attack but refused to provide the information necessary to prevent it, I have absolutely no doubt that they would try to torture the terrorists into providing the information. Moreover, the vast majority of Americans would expect the officers to engage in that time-tested technique for loosening tongues, notwithstanding our unequivocal treaty obligation never to employ torture, no matter how exigent the circumstances. The real question is not whether torture would be used – it would – but whether it would be used outside of the law or within the law...It may sound absurd for a distinguished judge to be issuing a warrant to do something so awful. But consider the alternatives: either police would torture below the radar screen of accountability, or the judge who issued the warrant would be accountable. Which would be more consistent with democratic values?”<sup>68</sup>

A second strategy, according to Evans, is to shift the responsibility for making the moral judgment whether or not to ill-treat a detainee from the judiciary to the individual. That is, torture would remain illegal so that anyone who honestly believed such an act to be necessary was placed in the position of needing to justify their act to defend themselves.<sup>69</sup> The current President of the UK's Supreme Court, Lord Phillips, has suggested that torture might be “forgiven” if it helped to find a ticking bomb. Delivering a lecture on terrorism and human rights at the University of Hertfordshire when he was the Lord Chief Justice, Lord Phillips questioned whether torture could be used to induce a terrorist to disclose the location of a bomb that would otherwise

take countless lives: “The classic answer is that the law can never justify the use of torture, but in a situation such as that the [individual] might be forgiven for acting in a manner that was unlawful.”<sup>70</sup> This is an example where the use of torture against a detainee might be raised as an excuse, either as a defence or in mitigation, but the prohibition in law would still be maintained.

### **Is freedom from torture absolute? – a reply**

Thus far, the author has assessed whether in fact freedom from torture can be categorised as unqualified. Assuming that it was not, this may justify the use of ill-treatment against a detainee, such as the deprivation of food, it being an omission to act, rather than a positive infliction of harm by the state. In this section it is questioned whether indeed it is correct to assert that the right is not absolute. Before doing so, however, it is important to refer to Article 17 of the ECHR. Whilst in theory this might support a qualification on the anti-torture right of terror detainees, its application in practice is in fact limited, as per the ruling of the ECtHR in *Lawless v. Ireland*.<sup>71</sup> Here the deprivation of liberty of IRA suspects, as per Article 5(1) of the ECHR, could not be justified by the Irish government on the basis that Republican terrorists sought to destroy the Convention rights of others. To engage Article 17, a claimant’s ECHR rights are being relied upon to deny the rights of others. So freedoms such as expression (Article 10 of the ECHR) would apply, where, for example, extremists were claiming a right to call for the death of those who had offended the Muslim prophet Mohammed. For the purposes of this article, therefore, Article 3 of the ECHR could not be justifiably infringed by reference to Article 17 because a terror detainee obviously would not be relying on this right as a way of legitimising political violence whose aim was to attack the freedoms of civilians.

Article 17 of the ECHR clearly does not justify the use of torture of terror suspects. Here the earlier contention that the anti-torture right is not absolute is contradicted. In reference to the “spectrum” approach propounded by Laws LJ in the Court of Appeal in *Limbuella*, this was rejected by the House of Lords when the case came before that court. Lord Hope said that it had no foundation in anything of the judgments that had

been delivered by the ECtHR, and it was hard to find a sound basis for it in the language of Article 3.<sup>72</sup> In more critical terms, the judge said:

“[The approach of Laws LJ] would be to introduce into the absolute prohibition, by the backdoor, considerations of proportionality...[This] has no part to play when conduct for which [the state] is directly responsible results in inhuman or degrading treatment...The obligation to refrain from such conduct is absolute.”<sup>73</sup>

For the purposes of this article this judgment is seemingly unequivocal: Article 3 is indeed unqualified. So preventative torture techniques, such as the deprivation of sleep, “hooding” or “white noise”, which would involve direct harm by the state, would clearly be illegitimate. Of greater significance perhaps, Lord Hope in *Limbuella* said that the real issue was whether the state was properly to be regarded as responsible for the harm.<sup>74</sup> So techniques of ill-treatment, such as the deprivation of food, which the author had suggested earlier might be permissible since they would be merely omissions to act rather than positive inflictions of harm, would still be outlawed as the state is still culpable for the ill-treatment that would ensue. On this issue more generally, Evans argues that one of the more unfortunate side-effects of the adoption of a definition of torture in Article 1 of the UNCAT is that it seems to have perpetuated the mistaken assumption that if a person is subjected to treatment falling short of torture (‘torture lite’), then this can be legally acceptable. From an international lawyer’s perspective, he says that this is “just nonsense”.<sup>75</sup> Ambos further explains that while the UNCAT apparently distinguishes between torture and other forms of inhuman treatment, general human rights treaties such as the ICCPR treat torture and cruel, inhuman or degrading treatment or punishment equally, they prohibit both.<sup>76</sup> So not only is psychological harm such as the deprivation of food illegal in domestic law as the state is still ostensibly to blame for the resulting torment, it is also not permitted internationally for the reason that all forms of ill-treatment are unlawful.

Earlier the author also questioned how the right not to be tortured could be categorised as absolute if the criminal law permitted defences to charges of ill-treatment? Simplistically, the prohibition on torture is a feature of human rights law,

an element of civil law whose purpose is to compensate a victim, rather than criminal law whose purpose is to prosecute an offender. In more specific terms, Ambos largely dismisses self defence, which may be raised by an accused before, for example, the ICC pursuant to Article 31(1)(c) of the Rome Statute, as a successful defence in the “preventative” torture scenario. He argues that the degree of immediacy required for this defence is lacking.<sup>77</sup> That is, an agent of the state who has harmed a terror suspect with a view to averting an atrocity would need to show the imminent detonation of a bomb. Instances of this happening in practice are rare, if at all.

Moreover, Gaeta argues that necessity, which may be argued as a defence by an accused in similar international and domestic criminal proceedings, would also not apply to a “preventative” torture scenario. She says that it could never be used as a defence to torture as the torturer cannot be certain that their victim is in possession of the information they need, that they will give them the information they need, or that they will give them the correct information.<sup>78</sup> Thus, the torturer would rarely act, if at all, with sufficient justification to raise the defence because of the technique’s inability in guaranteeing that it will be successful in averting an attack. This view of necessity seems to accord with its perception as a defence in domestic criminal law. If there is any criminal case a British law student is likely to remember it is *Dudley v. Stephens*.<sup>79</sup> Here shipwrecked sailors, who were 1600 miles from land, had been eight days without food and six days without water. In desperation they killed the weakest of the survivors, the 17-year-old cabin boy, and fed on his body for four days before being rescued. They were not sentenced to death for murdering the boy so the court did accept, to some degree, their need to kill him. Nevertheless, the court’s judgment actually implies that necessity was not available as a defence because when the sailors killed him, they had no way of establishing with much certainty that his death would save their lives. Indeed, it was only by chance that four days later they were found by a passing vessel. Necessity is often seen as opting for the “lesser of two evils”. Yes, torturing a terror suspect is perhaps the “lesser of two evils”, especially when compared with the potential loss of life and limb to innocent civilians. However, applying the *Dudley* case, the torturer cannot say with much conviction that before reverting to ill-treating a detainee, it will not only have the desired effect of providing intelligence, but also prevent an attack. These conclusions concerning the unavailability of the criminal defences of self defence and necessity would therefore

seem to support the absolute nature of the anti-torture right in human rights law, or at the very least in a preventative torture situation where they would arguably not apply.

Significantly, the limitless nature of freedom from ill-treatment has been reiterated recently by the Grand Chamber of the ECtHR – Strasbourg’s highest court – in *Gaefgen v. Germany*,<sup>80</sup> in circumstances where the use of torture would probably be condoned by the majority of people. Here Gaefgen had kidnapped an 11-year-old boy, the son of a senior bank executive. He then forwarded a letter to the boy’s family in which he demanded one million Euros in return for the child’s release. Three days after the boy’s disappearance, Gaefgen was arrested by police after being observed picking up the ransom money. During his interrogation, the suspect was largely uncooperative so in order to save the child’s life, the Frankfurt Police Vice-President ordered that pain be inflicted on Gaefgen under medical supervision. Accordingly, a subordinate officer warned the suspect that the police were prepared to inflict pain on him if he continued to withhold information concerning the boy’s whereabouts. Under the influence of this threat, Gaefgen told the police the child’s location (though regrettably when they found him, they discovered that he had already been murdered). The ECtHR said:

“The Court accepts the motivation for the police officers’ conduct and that they acted in an attempt to save a child’s life. However, it is necessary to underline that...the prohibition on ill-treatment of a person applies irrespective of the conduct of the victim or the motivation of the authorities. Torture, inhuman or degrading treatment cannot be inflicted even in circumstances where the life of an individual is at risk...Article 3, which has been framed in unambiguous terms, recognises that every human being has an absolute, inalienable right not to be subjected to torture or to inhuman or degrading treatment under any circumstances, even the most difficult.”<sup>81</sup>

Thus, freedom from torture is categorically described – again – as being absolute. Although only the threat of ill-treatment was made by the authorities in *Gaefgen*, which notably was a successful means of providing the German police with details about the child’s captivity, this was still not permissible, in the ECtHR’s opinion. In situations, therefore, where lives can possibly be saved, such as those involving the

torture of terror suspects, freedom from ill-treatment is not qualified by the conduct of the detainee.

## **Conclusion**

Since September 2001 and the 9/11 attacks on New York and Washington there has been a steady increase in Islamic terrorism. The United States has not been the only victim: there have been atrocities committed in India, Spain and the United Kingdom, for example. Should state responses to this 'new' terrorism change? One way of addressing this threat is to reassess the international ban on the use of torture against terror suspects. Legally, freedom from torture is regarded as absolute and non-derogable, meaning it can never be permitted in any circumstances, even in times of war or public emergency. But should the conduct of modern day terrorists such as those engaging in suicide violence still justify protection, especially when hundreds and possibly thousands of innocent civilians are the victims? Article 17 of the ECHR implies that those who seek to destroy human rights cannot rely on it as a means of protection. To this end, this article has sought to possibly justify the use of torture against terror suspects, for intelligence purposes. It sought to do so by constructing an argument that the freedom was not unqualified. The author referred to the ruling of the UK Court of Appeal in *Limbuella* where Laws LJ propounded his "spectrum" approach, and the judgments of the House of Lords in *Wellington* where an element of proportionality was read into Article 3 of the ECHR. The author also questioned whether the freedom was without limitation because of the many criminal law defences possibly afforded to an individual charged with committing acts of torture against a detainee.

Assuming that ill-treatment was not absolute, the author set a limit to the degree of torture to be used against a suspect, which was psychological duress. Indeed, he also questioned whether the deprivation of food might be more permissible, it being an omission to act, rather than positive actions by the state such as the deprivation of sleep, "hooding" and "white noise". Acts of ill-treatment might also be accorded greater credence if they were authorised by an independent judiciary.

Later, the author questioned whether the freedom was in fact qualified, however. The House of Lords in *Limbuella* has categorically said that it is absolute when the state causes the harm, and in circumstances when it has not done so but is still to blame. Furthermore, although the criminal law does afford defences to those individuals charged with acts of torture, such as duress and necessity, they arguably do not apply to the “ticking bomb” scenario. So the nature of the right is still without limitation, or at the very least for the purposes of this article where the author wishes to legitimise its infringement on the basis of preventing the immediate detonation of a terrorist bomb. Indeed, whilst Article 17 of the ECHR might support a qualification on the anti-torture right of terror detainees in theory, its actual application is limited, as per the ruling of the ECtHR in *Lawless*.

In conclusion, therefore, it has not been possible to justify the use of torture on the basis that freedom from ill-treatment, at least in the “ticking bomb” scenario, is qualified. Nevertheless, the situation of the “ticking bomb” is a debate that the author has on a regular basis with his students studying modules in Human Rights and Terrorism. Many of them believe that freedom from torture should not be absolute. To this end, the author will explore in a subsequent article another case for a relaxation of the ban on torture but from a different perspective from that which was pursued here. That is, he will attempt to legitimise the use of ill-treatment against a detainee on the basis of the “positive” obligation imposed on states to protect individuals from harm. For example, states of the ECHR must ensure that their citizens are not subjected to torture, inhuman or degrading treatment by third parties. In *E v. United Kingdom*<sup>82</sup> a failure by social services to protect four children from sexual abuse by their stepfather was a violation of Article 3. The ECtHR there said:

“...Article 3 requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals. These measures should provide effective protection, in particular, of children and other vulnerable persons...”<sup>83</sup>

Adopting this reasoning, the fact that children in particular were murdered and injured on 9/11, does this justify infringements of Article 3 against terror suspects? Perhaps

there is a legitimate argument permitting torture, ironically on the basis of protecting the Article 3 rights of, say, terror victims, especially children? This therefore will be the focus of further study. Of course, the kidnap and subsequent murder of an 11 year old boy in *Gaefgen* did not justify the use of ill-treatment against a suspect but this case will be distinguished in the follow-up article. There the author will be examining the “positive” nature of the anti-torture right, as a basis for justifying ill-treatment, rather than the right in its “negative” sense, requiring states to desist from harming their citizens, which was the topic of analysis here. He suspects that this will be a more convincing argument for possibly legitimising ill-treatment against a detainee. In this regard, therefore, inevitable questions that would follow from a relaxation of the torture ban (other than what would legitimate acts of ill-treatment entail, which were discussed in this article) will be reserved for later examination. These could include: is torture in fact a reliable means of evidence to avert a terrorist atrocity since a suspect is likely to say anything to a torturer to make the ill-treatment cease? To this end, Article 15 of the UNCAT states that any statement made as a result of torture shall not be invoked as evidence in any proceedings (except against a person accused of torture as evidence that the statement was made). Also, once acts of torture were condoned to prevent acts of terror, might their use be extended to other areas of the criminal law such as kidnappings, especially where children were the victims, as in *Gaefgen*?

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<sup>1</sup> Barbara Hudson, “Justice in a Time of Terror,” *British Journal of Criminology* 49, no. 5 (2009): 702-717, 708.

<sup>2</sup> Kai Ambos, “May a State Torture Suspects to Save the Life of Innocents?,” *Journal of International Criminal Justice* 6, no.2 (2008): 261-287, 268-269.

<sup>3</sup> BBC News, “America’s Day of Terror”

[http://news.bbc.co.uk/1/hi/english/static/in\\_depth/americas/2001/day\\_of\\_terror/](http://news.bbc.co.uk/1/hi/english/static/in_depth/americas/2001/day_of_terror/) (Accessed 21 April 2009).

<sup>4</sup> BBC News, “Spain Steps Up Hunt for Bombers” 5 April 2004

<http://news.bbc.co.uk/1/hi/world/europe/3599895.stm> (Accessed 14 August 2009).

<sup>5</sup> BBC News, “London Attacks” 8<sup>th</sup> July 2005

[http://news.bbc.co.uk/1/hi/in\\_depth/uk/2005/london\\_explosions/default.stm](http://news.bbc.co.uk/1/hi/in_depth/uk/2005/london_explosions/default.stm) (Accessed 21 April 2009).

<sup>6</sup> BBC News, “Indian PM Vows Action on Attacks” 27 November 2008

[http://news.bbc.co.uk/1/hi/world/south\\_asia/7752237.stm](http://news.bbc.co.uk/1/hi/world/south_asia/7752237.stm) (Accessed 1 December 2008).

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- <sup>7</sup> Robert Wright, “Who Created Major Hasan?” *The New York Times* 21 November 2009  
<http://www.nytimes.com/2009/11/22/opinion/22wright.html?scp=7&sq=Born%20in%20the%20U.S.,%20a%20Radical%20Cleric%20Inspires%20Terror&st=cse> (Accessed 24 November 2009).
- <sup>8</sup> BBC News, “Air Freight From Yemen and Somalia Banned” 1 November 2010.  
<http://www.bbc.co.uk/news/uk-11669636> (Accessed 2 November 2010).
- <sup>9</sup> BBC News, “‘Real IRA Was Behind Army Attack’” 8 March 2009  
[http://news.bbc.co.uk/1/hi/northern\\_ireland/7930995.stm](http://news.bbc.co.uk/1/hi/northern_ireland/7930995.stm) (Accessed 10 March 2009).
- <sup>10</sup> BBC News, “Continuity IRA Shot Dead Officer” 10 March 2009  
[http://news.bbc.co.uk/1/hi/northern\\_ireland/7934426.stm](http://news.bbc.co.uk/1/hi/northern_ireland/7934426.stm) (Accessed 10 March 2009).
- <sup>11</sup> Jonathan Evans, “The Threat to National Security” 16 September 2010  
<https://www.mi5.gov.uk/output/the-threat-to-national-security.html> (Accessed 17 September 2010), at para 20.
- <sup>12</sup> But that is not to say that Republican terrorists overlooked attacks against civilians. For example, in 1998 the Real IRA was responsible for the Omagh bomb, which killed 29 people.
- <sup>13</sup> Duncan Gardham, “Nuclear Terror Risk to Britain from Al-Qaeda” *The Telegraph* 22 March 2010 <http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/7500719/Nuclear-terror-risk-to-Britain-from-al-Qaeda.html> (Accessed 31 March 2010).
- <sup>14</sup> Florian Jessberger, “Bad Torture – Good Torture? What International Criminal Lawyers May Learn From the Recent Trial of Police Officers in Germany,” *Journal of International Criminal Justice* 3, no. 5 (2005): 1059-1073, 1061.
- <sup>15</sup> Hudson says – (see note 1 above), 708 – that the “ticking bomb” scenario is the epitome of the permissible use of torture according to the lesser evil ideology. If a captive is thought to have information about an imminent terrorist attack that may result in multiple deaths and injury, then, the argument is, the absolute ban on torture must give way to the duty to prevent further injury.
- <sup>16</sup> Ambos (see note 2 above); Jessberger (see note 14 above); and Paola Gaeta, “May Necessity be Available as a Defence for Torture in the Interrogation of Suspected Terrorists?,” *Journal of International Criminal Justice* 2, no.3 (2004): 785-794.
- <sup>17</sup> Malcolm Evans, “Torture,” *European Human Rights Law Review* no.2 (2006): 101-109, 104-105.
- <sup>18</sup> BBC News, “George W Bush Claims UK Lives ‘Saved by Waterboarding’” 9 November 2010 <http://www.bbc.co.uk/news/uk-11715577> (Accessed 9 November 2010).
- <sup>19</sup> Unsurprisingly, there are limits to the jurisdiction of the ICC in trying individuals for crimes of war such as torture. For example, Article 8(1) of the Rome Statute states that the ICC shall only have jurisdiction in respect of war crimes in particular *when committed as part of a plan or policy or as part of a large-scale commission of such crimes* (my italics). Furthermore, the court has jurisdiction only over crimes committed after 1 July 2002 when the Rome Statute entered into force (Article 25).
- <sup>20</sup> (1978) 2 EHRR 25.
- <sup>21</sup> *ibid.*, [167].
- <sup>22</sup> *ibid.*
- <sup>23</sup> (1996) 23 EHRR 553.

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<sup>24</sup> *ibid.*, [64].

<sup>25</sup> Human Rights Watch, *The Road to Abu Ghraib* 8 June 2004 <http://www.hrw.org/en/reports/2004/06/08/road-abu-ghraib> (Accessed 7 September 2006).

<sup>26</sup> BBC News, “CIA ‘Threatened’ Terror Suspects” 22 August 2009 <http://news.bbc.co.uk/1/hi/world/americas/8215722.stm> (Accessed 24 August 2009).

<sup>27</sup> Human Rights Watch, *Guantanamo: Detainee Accounts*, 2004, at p.18 <http://www.hrw.org/legacy/backgrounders/usa/gitmo1004/> (Accessed 15 September 2006).

<sup>28</sup> *ibid.*, 11.

<sup>29</sup> (1978) 2 EHRR 25, [167].

<sup>30</sup> (1996) 23 EHRR 553, [62].

<sup>31</sup> (1996) 23 EHRR 413.

<sup>32</sup> *ibid.*, [80].

<sup>33</sup> Home Office, “Broadening Powers to Tackle Extremism” 5 August 2005 [http://press.homeoffice.gov.uk/pressreleases/Broadening\\_Powers\\_To\\_Tackle\\_Extr.html](http://press.homeoffice.gov.uk/pressreleases/Broadening_Powers_To_Tackle_Extr.html) (Accessed 8 August 2005).

<sup>34</sup> (2009) 49 EHRR 30.

<sup>35</sup> *ibid.*, [138-139].

<sup>36</sup> *ibid.*, [147].

<sup>37</sup> *ibid.*, [148].

<sup>38</sup> Human Rights Watch, “UK: Law Lords Judgment Undermines Torture Ban” 18 February 2009 <http://www.hrw.org/en/news/2009/02/18/uk-law-lords-judgment-undermines-torture-ban> (Accessed 20 February 2009). This was in response to the ruling of the House of Lords in *RB (Algeria) v. Secretary of State for the Home Department* [2009] UKHL 10, [2009] 2 WLR 512 that terror suspects such as Abu Qatada could be deported to Jordan.

<sup>39</sup> *ibid.*

<sup>40</sup> Human Rights Watch, “UK: Ethiopian ‘Assurances’ No Guarantee Against Torture” 17<sup>th</sup> September 2009 <http://www.hrw.org/en/news/2009/09/17/uk-ethiopian-assurances-no-guarantee-against-torture> (Accessed 1 October 2009).

<sup>41</sup> (1998) 28 EHRR 652.

<sup>42</sup> *ibid.*, [102]. To strengthen further the preventative nature of the torture ban, the UNCAT, according to Article 17(1), establishes a specific Committee against Torture. Article 19(1) obliges state parties to submit to the Committee reports on the measures they have taken to give effect to their undertakings under the UNCAT. Occasionally, the Committee may arrange a visit to a state party of the Convention (Article 20(3)). The Council of Europe has also created a European Committee for the Prevention of Torture to strengthen further Article 3 of the ECHR, as per Article 1 of the European Convention for the Prevention of Torture.

<sup>43</sup> However, note that the issue arising here is a person’s criminal liability for torture. Foreign states and their officials enjoy immunity from civil actions in UK law, as per the State Immunity Act 1978 and *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26, [2007] 1 AC 270.

<sup>44</sup> The principle of “universal [criminal] jurisdiction” has been in the news on several occasions recently because of the fear of top Israeli officials that they may be arrested when visiting the UK. This is because of alleged war crimes committed by Israeli defence forces during its ground offence in the Gaza Strip in December 2008 – see:

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Robert Mackey, “British Court Issued Warrant for Former Israeli Minister” *The New York Times* 15 December 2009 <http://thelede.blogs.nytimes.com/2009/12/15/british-court-issued-arrest-warrant-for-livni/?pagemode=print> (Accessed 16 February 2010). Because of the effect the existing arrangements have had on diplomatic relations with, for example, Israel, cl.151 of the Police Reform and Social Responsibility Bill 2010 requires the consent of the Director of Public Prosecutions before an arrest warrant can be issued. Such proposals have seriously concerned human rights organisations such as Amnesty International: Amnesty International, “War Crimes Arrests: New Measures Show UK is ‘Soft’ on War Crimes and Torture” 1 December 2010 [http://www.amnesty.org.uk/news\\_details.asp?NewsID=19120](http://www.amnesty.org.uk/news_details.asp?NewsID=19120) (Accessed 6 December 2010).

<sup>45</sup> Section 1(1) of the Geneva Conventions Act 1957 also permits the UK authorities “universal jurisdiction” for grave breaches of the Geneva Conventions such as war crimes. The jurisdiction covering crimes against humanity and acts of genocide (as well as war crimes) is governed by the International Criminal Court Act 2001, though the reach of this statute is limited by s.51 to acts only committed by UK citizens and UK residents. So the UK does not have “universal jurisdiction” for these crimes of international concern committed by visitors to this country such as students, tourists and asylum seekers. (This criterion of “Britishness” does not apply to the Criminal Justice Act 1988 and the Geneva Conventions Act 1957.) Note also: the International Criminal Court Act 2001 did not apply retrospectively when enacted. Section 70 of the Coroners and Justice Act 2009 now amends the statute, permitting the UK jurisdiction over acts of genocide and crimes against humanity committed since 1<sup>st</sup> January 1991 (thus including atrocities committed in the former Yugoslavia and Rwanda in the 1990s).

<sup>46</sup> Duncan Gardham, “No MI5 Prosecution Over Binyam Mohammed ‘Torture’” *The Telegraph* 17 November 2010 <http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/8140399/No-MI5-prosecution-over-Binyam-Mohamed-torture.html> (Accessed 19 November 2010).

<sup>47</sup> Jack Doyle and Andrew Woodcock, “MI6 Delivers Itself to Torture Probe” *The Independent* 11 September 2009 <http://www.independent.co.uk/news/uk/crime/mi6-delivers-itself-to-torture-probe-1785740.html> (Accessed 14 September 2009).

<sup>48</sup> Equality and Human Rights Commission, “Urgent Review Needed of Allegations of Torture of Britons Held Abroad Says Commission” 20 February 2010 <http://www.equalityhumanrights.com/media-centre/urgent-review-needed-of-allegations-of-torture-of-britons-held-abroad-says-commission/> (Accessed 22 February 2010).

<sup>49</sup> Parliamentary Joint Committee on Human Rights, *Allegations of UK Complicity in Torture*. 21 July 2009. 23<sup>rd</sup> Report of Session 2008-09.

<sup>50</sup> Human Rights Watch, “UK: Set Judicial Inquiry on Complicity in Torture” 24 November 2009 <http://www.hrw.org/en/news/2009/11/24/uk-set-judicial-inquiry-complicity-torture> (Accessed 26 November 2009).

<sup>51</sup> Reprieve, “Reprieve is Delighted by the Announcement of an Inquiry into Allegations of Torture Complicity by the British Secret Services” 6 July 2010 <http://www.reprieve.org.uk/cameronannouncementtortureinquiry> (Accessed 7 July 2010).

<sup>52</sup> [2004] EWCA Civ 540, [2004] QB 1440.

<sup>53</sup> *ibid.*, [59].

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<sup>54</sup> *ibid.*, [70].

<sup>55</sup> [2008] UKHL 72, [2009] 1 AC 335.

<sup>56</sup> (2009) 49 EHRR 35.

<sup>57</sup> *ibid.*, [97].

<sup>58</sup> [2008] UKHL 72, [2009] 1 AC 335, at para 34.

<sup>59</sup> *ibid.*, [62].

<sup>60</sup> The Rome Statute permits others defences to criminal responsibility before the ICC: “mental disease” (Article 31(1)(a)); “intoxication” (Article 31(1)(b)); “Mistake of Fact or Mistake of Law” (Article 32); superior orders or prescription of law (Article 33). The latter is not without limitation, however: orders to commit genocide or crimes against humanity are excluded (Article 33(2)).

<sup>61</sup> Jessberger (see note 14 above), 1069. Note: Article 31(1)(d) of the Rome Statute does state “duress” rather than “necessity”. In UK criminal law duress can be categorised into either “duress by threats” (see: *R v. Hasan* [2005] UKHL 22, [2005] 2 AC 467) or “duress of circumstances” (see: *R v. Quayle* [2005] EWCA Crim 1415, [2005] 1 WLR 3642). “Duress of circumstances” is the duress most closely associated with defending criminal charges in a preventative torture situation since the torturer’s family or close friends are unlikely to be the victims of a terrorist atrocity for the purposes of “duress by threats”. Academically, duress of circumstances is very closely linked to the defence of necessity, or indeed is the same in all but name – see, for example, David Ormerod, *Smith and Hogan: Criminal Law Cases and Materials*, (Oxford: Oxford University Press, 2006): 449-450.

<sup>62</sup> Hudson (see note 1 above), 707.

<sup>63</sup> Evans (see note 17 above), 107.

<sup>64</sup> The ECtHR in *Ireland* said that it had led to the identification of 700 members of the IRA and the discovery of individual responsibility for about 85 previously unexplained criminal incidents [98].

<sup>65</sup> Evans (see note 17 above), 105.

<sup>66</sup> Hudson (see note 1 above), 710.

<sup>67</sup> Danny Friedman, “Torture and the Common Law,” *European Human Rights Law Review* no. 2 (2006): 180-199.

<sup>68</sup> Alan Dershowitz, “Want to Torture? Get a Warrant” *The San Francisco Chronicle* 22 January 2002

<http://www.alandershowitz.com/publications/docs/torturewarrants2.html> (Accessed 15 March 2009).

<sup>69</sup> Evans (see note 17 above), 105.

<sup>70</sup> Joshua Rozenburg, “Torture May be Forgivable, Says Judge” *The Telegraph* 20 October 2006 <http://www.telegraph.co.uk/news/uknews/1531914/Torture-may-be-forgivable-says-judge.html> (Accessed 15 March 2010).

<sup>71</sup> (1960) 1 EHRR 1.

<sup>72</sup> [2005] UKHL 66, [2006] 1 AC 396, [53].

<sup>73</sup> *ibid.*, [55].

<sup>74</sup> [2005] UKHL 66, [2006] 1 AC 396 [53].

<sup>75</sup> Evans (see note 17 above), 108.

<sup>76</sup> Ambos (see note 2 above), 266.

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<sup>77</sup> *ibid.*, 274.

<sup>78</sup> Gaeta (see note 16 above), 791-792.

<sup>79</sup> [1881-1885] All ER Rep 61.

<sup>80</sup> Application no. 22978/05.

<sup>81</sup> *ibid.*, [107].

<sup>82</sup> (2003) 36 EHRR 31.

<sup>83</sup> *ibid.*, [88].