Perspectives on torture: the law the effects the debate

Published by The Victorian Foundation for Survivors of Torture Inc.

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

Article 5, Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948
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Terrorism and Torture: The Debate
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While best efforts have been made to ensure the accuracy of information presented in this publication, readers are reminded that it is a guide only. It is understood that those dealing with legal issues relating to torture and cruel, inhuman and degrading treatment will remain vigilant to their professional responsibilities and exercise their professional skill and judgement at all times. The Victorian Foundation for Survivors of Torture Inc. cannot be held responsible for error or for any consequences arising from the use of information contained in this publication and disclaims all responsibility for any loss or damage which may be suffered or caused by any person relying on the information contained herein.

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Contents

Acronyms ..................................................................................................................... 2
1 Introduction................................................................................................................ 3
2 Defining Torture......................................................................................................... 4
   2.1 The United Nations Definition of Torture......................................................... 4
   2.2 Other Approaches to the Definition of Torture............................................... 5
   2.3 Government Approaches to Defining Torture and CID............................... 12
3 Torture in the World Today ..................................................................................... 16
   3.1 Torture is Alive and Well.................................................................................... 16
   3.2 Monitoring the Use of Torture......................................................................... 17
   3.3 Recent Reports of Torture and CID ................................................................. 19
   3.4 The Use of Rendition Proceedings .................................................................. 21
   3.5 The Use of Diplomatic Assurances .................................................................. 23
4 The Effects of Torture............................................................................................... 25
   4.1 Physical and Psychological Sequelae in Adults................................................. 26
   4.2 Effects in Children and Adolescents................................................................. 28
   4.3 Long-term Effects of Torture............................................................................ 30
5 Laws and Instruments Prohibiting Torture............................................................... 32
   5.1 International Law............................................................................................... 32
   5.2 Australian Law................................................................................................. 36
6 Use of Evidence Obtained Through Torture ............................................................ 37
   6.1 Exclusion Under the CAT................................................................................... 37
   6.2 Exclusion in International Criminal Tribunals............................................... 37
   6.3 Exclusion Under National Laws ........................................................................ 38
   6.4 An Exception for Trials of Alleged Terrorists?............................................... 39
7 Terrorists and Torture............................................................................................... 43
   7.1 Israel – The Landau Commission ..................................................................... 43
   7.2 The Debate on Torture Since ‘9/11’................................................................. 45
8 Resources .................................................................................................................. 53
   A. Organisations...................................................................................................... 53
   B. Selected publications not cited in text............................................................... 54
Appendix: Main Elements of the Convention Against Torture .................................. 55
## Acronyms

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>CAT</td>
<td>Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment</td>
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<td>CIA</td>
<td>Central Intelligence Agency (United States)</td>
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<tr>
<td>CID</td>
<td>Cruel, Inhuman and Degrading Treatment or Punishment</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>MCA</td>
<td>Military Commissions Act</td>
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<td>OP-CAT</td>
<td>Optional Protocol to the Convention against Torture</td>
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<td>PTSD</td>
<td>Post Traumatic Stress Disorder</td>
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<td>SIAC</td>
<td>Special Immigration Appeals Commission</td>
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<td>UK</td>
<td>United Kingdom</td>
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<td>United States</td>
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<td>VFST</td>
<td>Victorian Foundation for Survivors of Torture Inc.</td>
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1 Introduction

The recent spate of terrorist activities in many parts of the world has focused minds on a discussion of torture, and there is considerable legal and philosophical debate on the subject.

In order to assist those following – and participating in – the debate, Foundation House has prepared this paper as a resource. As well as extensive references, it provides a range of resources and web links for readers to access in pursuing further information and keeping up to date with new developments.

This paper outlines the key issues including:
- international definitions of torture and ‘cruel, inhuman and degrading treatment or punishment’ (CID)
- where and how torture is currently being used
- the effects of torture on victims, their families and communities
- international laws prohibiting torture
- the debate about whether torture should be legalised in certain circumstances (such as dealing with terrorist suspects)

Foundation House has been working in this field since 1987, providing a range of services to refugees who have survived torture or war related trauma.

Our position on torture is clear and unambiguous. We believe that torture is a systematic violation of human rights which is, and must remain, unacceptable under any circumstances.
2 Defining Torture

2.1 The United Nations Definition of Torture

Internationally, the most commonly cited definition of torture is contained in the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). This treaty was adopted by the UN General Assembly in 1984 and as at September 2006 had 141 States Parties – that is, nations which have formally agreed to comply with the obligations of the treaty.

Torture is defined under Article 1 of the Convention as:

\[
\text{any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.}^1
\]

It is worth noting that under this definition:

- even though the full title of the CAT includes ‘cruel, inhuman or degrading treatment or punishment’, this phrase is not formally defined anywhere in its text
- both physical and mental pain and suffering are included – a person might inflict torture without actually touching the victim, for example, by making them think they are about to be killed, or by torturing or killing a family member
- it is considered torture for someone to intentionally inflict pain and suffering for reasons stated in the definition, but the reasons are illustrative and not comprehensive. There may also be circumstances where a person intentionally inflicts severe pain but it does not constitute torture, for example, a police officer who shoots someone to stop them committing a serious violent crime, when other less harmful methods of intervention are ineffective\(^2\)

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• public officials are accountable not only for acts of torture which they personally commit or instigate, but also if they consent or acquiesce when someone else commits such an act, for example:
  ° if they fail to intervene against a paramilitary group with whom they are aligned
  ° if the government does not prohibit and enforce by law certain conduct committed by private citizens (such conduct could include, for example, a husband coercing his wife to submit to sexual intercourse)
• imprisoning someone who has been fairly convicted for committing a serious crime is not torture, even though imprisonment may cause considerable mental suffering. However, UN human rights bodies consider that judicially sanctioned corporal punishments (for example, amputation, eye-gouging and flogging) constitute torture or cruel, inhuman or degrading punishment and are therefore contrary to international law.³

The terms ‘torture’ and ‘cruel, inhuman and degrading treatment or punishment’ (or CID) are also used, but not defined, in other human rights instruments which prohibit them, such as Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights.

### 2.2 Other Approaches to the Definition of Torture

The definitions of torture and CID are not static and have been evolving over time. Guidance as to what torture and CID mean can be found in statements of bodies established to interpret and apply the human rights treaties in practice, such as the UN Human Rights Committee, the European Court of Human Rights and the Inter American Court of Human Rights. This section also considers the views of the UN Special Rapporteur on Torture on the distinction between torture and CID, decisions of the UN Human Rights Committee, jurisprudence of the International Criminal Tribunals for the former Yugoslavia and Rwanda, and the Rome Statute of the International Criminal Court (ICC).

---

2.2.1 The UN Human Rights Committee

The UN Human Rights Committee is established under the International Covenant on Civil and Political Rights (ICCPR). Torture and CID are prohibited under Article 7 of the ICCPR, which provides that:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.¹

The Human Rights Committee is a group of human rights experts appointed to interpret and monitor implementation of the ICCPR. In interpreting Article 7, the Committee has emphasised that there is no need to distinguish between the separate acts of torture and CID, and that the definition will depend on the nature, purpose and severity of the treatment. It has also stated that Article 7 encompasses not only acts that cause physical pain but also acts that cause mental suffering:

The Covenant does not contain any definition of the concepts covered by article 7, nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied.

The prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim. In the Committee’s view, moreover, the prohibition must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure. It is appropriate to emphasise in this regard that article 7 protects, in particular, children, pupils and patients in teaching and medical institutions.²

The Human Rights Committee further notes that ‘prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7.’³

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(6) Ibid.
2.2.2 The European Court of Human Rights

Like the ICCPR, the European Convention for the Protection of Human Rights and Fundamental Freedoms states that:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment. (Article 3)

Complaints that rights have been violated are adjudicated by the European Court of Human Rights, which has considered the interpretation of Article 3 in cases involving quite different situations.

One case concerned the use of five interrogation techniques by UK security forces against people detained on suspicion of involvement in terrorism in Northern Ireland. The techniques included forcing detainees to remain for hours in stressful positions; placing dark coloured hoods over detainees’ heads for extended periods; subjecting detainees to continuous loud noise; and depriving detainees of food and drink.

The court found (by a vote of thirteen to four) that the techniques fell into the category of ‘inhuman treatment’ because:

they caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation. The techniques were also degrading since they were such as to arouse in their victim feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical and moral resistance.

The court took the view that the distinction between torture and inhuman or degrading treatment was ‘the intensity of the suffering inflicted.’ On this basis, it concluded that the interrogation techniques ‘did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.’

In another case, the European Court of Human Rights considered a complaint by Anthony Tyrer about his being subjected to birching (a practice of punishment by beating with a birch rod or bundle of twigs) on the order of a court as the


(8) European Court of Human Rights Republic of Ireland v United Kingdom judgement 18 January 1978 (Case No. 5310/71) Series A Number 25.

(9) Ibid, paragraph 166.

(10) Ibid.
sentence for committing assault.\textsuperscript{11} Tyrer complained that the punishment violated his rights not to be subjected to torture or cruel, inhuman or degrading treatment or punishment.

Tyrer was struck three times on the bare buttocks. The birching raised but did not cut his skin and he was in pain for about a week and half afterwards.

The Court decided that the suffering he endured was not sufficiently severe as to constitute torture or inhuman punishment, but that it was degrading.

The Court said an assessment of whether punishment was degrading was ‘relative: it depends on all the circumstances of the case and, in particular, on the nature and context of the punishment itself and the manner and method of its execution.’\textsuperscript{12}

Having regard to the circumstances, it concluded that the birching was in fact degrading:

\textit{The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalised violence that is in the present case violence permitted by the law, ordered by the judicial authorities of the State and carried out by the police authorities of the State. Thus, although (Tyrer) did not suffer any severe or long-lasting physical effects, his punishment – whereby he was treated as an object in the power of the authorities – constituted an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person’s dignity and physical integrity. Neither can it be excluded that the punishment may have had adverse psychological effects.}\textsuperscript{13}

\textbf{2.2.3 The Inter-American Court of Human Rights}

The Inter-American Court of Human Rights hears cases involving alleged violations of the American Convention on Human Rights, which provides that:

\textit{No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. (Article 5)}\textsuperscript{14}

\begin{flushleft}
\textsuperscript{(11)} European Court of Human Rights \textit{Tyrer v United Kingdom} judgement 25 April 1978.
\end{flushleft}

\begin{flushleft}
\textsuperscript{(12)} Ibid, paragraph 30.
\end{flushleft}

\begin{flushleft}
\textsuperscript{(13)} Ibid, paragraph 33.
\end{flushleft}

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In one case, the Court stated:

The violation of the right to physical and psychological integrity of persons is a category of violation that has several gradations and embraces treatment ranging from torture to other types of humiliation or cruel, inhuman or degrading treatment with varying degrees of physical and psychological effects caused by endogenous factors which must be proven in each specific situation.

The European Court of Human Rights has declared that, even in the absence of physical injuries, psychological and moral suffering, accompanied by psychic disturbance during questioning, may be deemed inhuman treatment. The degrading aspect is characterised by fear, anxiety and inferiority induced for the purpose of humiliating and degrading the victim and breaking his physical and moral resistance...That situation is exacerbated by the vulnerability of a person who is unlawfully detained...Any use of force that is not strictly necessary to ensure proper behaviour on the part of the detainee constitutes an assault on the dignity of the person...in violation of Article 5 of the American Convention.\(^\text{15}\)

There is also an Inter-American Convention to Prevent and Punish Torture, adopted by the Organization of American States in 1985, which defines torture in Article 2 as follows:

For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.

The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.\(^\text{16}\)

\(^{\text{15}}\) Inter-American Court of Human Rights Loayza Tamayo Case judgement 17 September 1997, paragraph 57.

\(^{\text{16}}\) The full Convention can be found at http://www.oas.org/juridico/English/Treaties/a-51.html (accessed 30 October 2007).
The Special Rapporteur on Torture

The UN Special Rapporteur on the question of torture – an independent expert appointed to investigate complaints of torture – has published this view of the distinction between torture and CID, focusing on the circumstances in which force is used:

Inherent in the concept of CIDT (cruel, inhuman and degrading treatment) is the disproportionate exercise of police powers. The beating of a detainee with a truncheon for the purpose of extracting a confession must be considered torture if it inflicts severe pain or suffering; the beating of a detainee with a truncheon walking to and from a cell might amount to CIDT, but the beating of demonstrators in the street with the same truncheon for the purpose of dispersing an illegal demonstration or prison riot, for example, might be justified as lawful use of force by law enforcement officials. In other words, since the enforcement of the law against suspected criminals, rioters or terrorists may legitimately require the use of force, and even of lethal weapons, by the police and other security forces, only if such use of force is disproportionate in relation to the purpose to be achieved and results in pain and suffering meeting a certain threshold, will it amount to cruel or inhuman treatment or punishment.17

The UN Special Rapporteur on Torture and other UN human rights experts have recently considered whether specific interrogation techniques and conditions of detention at Guantanamo Bay violate the prohibitions on torture and CID under international law.18 It was concluded that:

stripping detainees naked, particularly in the presence of women and taking into account cultural sensitivities, can in individual cases cause extreme psychological pressure and can amount to degrading treatment, or even torture. The same holds true for the use of dogs, especially if it is clear that an individual phobia exists.19

Decisions of the UN Human Rights Committee

Decisions of the UN Human Rights Committee have helped to further define what constitutes torture and CID. Under its complaints mechanism, the Human


(19) Ibid, paragraph 51.
Rights Committee has found that an assessment of what constitutes ‘inhuman’ or ‘degrading’ treatment will depend on all circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the age, sex and health of the victim.\(^{20}\)

### 2.2.6 The International Criminal Tribunals: Rape as Torture

A number of recent decisions of the International Criminal Tribunals for Rwanda and the former Yugoslavia have further expanded the definition of torture in relation to rape and sexual offences committed in the context of armed conflict. For example, in the case of Akayesu, the Rwandan trial chamber acknowledged that rape can constitute torture where it is used for:

> such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person … when inflicted by or at the instigation or with the consent or acquiescence of a public official or other persons acting in an official capacity.\(^{21}\)

### 2.2.7 The Rome Statute of the International Criminal Court: Non-State Actors

The Rome Statute of the newly adopted International Criminal Court (ICC) has further extended the definition of torture in relation to acts committed by non-state actors.\(^{22}\) The CAT definition of torture has been criticised for limiting the range of acts constituting torture to those committed by a state actor or public official. By contrast, the Rome Statute definition of torture includes acts committed by individuals not acting in an official capacity. In article 7 (2) (e) it defines torture as:

> the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused.\(^{23}\)

This definition of torture does not require the involvement of a public official. It also provides even greater scope for the prosecution of rape and sexual crimes as torture by removing the requirement for ‘official’ authority of involvement.

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(20) See for example Vuolanne v Finland 265/1987:02/05/89, UN doc CCPR/C/35/D/265/1987, paragraph 9.2.

(21) International Criminal Tribunal for Rwanda Akayesu judgement, Case No ICTR-96-4-T, September 1998, paragraph 597.

(22) The ICC has been established to try persons accused of the most serious crimes of international concern, namely genocide, crimes against humanity and war crimes. See http://www.icc-cpi.int/about.htm (accessed October 30 2007).

2.3 Government Approaches to Defining Torture and CID

Countries that are parties to the CAT are required to provide periodic reports to the UN Committee Against Torture, the body established to monitor compliance. In recent years, concerns have been expressed about the willingness of some countries to ‘redefine’ what is permissible in terms of torture due to the so-called ‘war on terror.’

2.3.1 United States Government

When the US Senate consented to the US becoming a party to the CAT, it did so subject to the following understanding of the definition of torture:

\[
\text{in order to constitute torture, an act must be specifically intended to}
\]
\[
\text{inflict severe physical or mental pain or suffering and that mental pain}
\]
\[
\text{or suffering refers to prolonged mental harm caused by or resulting}
\]
\[
\text{from (1) the intentional infliction or threatened infliction of severe}
\]
\[
\text{physical pain or suffering; (2) the administration or application, or}
\]
\[
\text{threatened administration or application, of mind altering substances}
\]
\[
\text{or other procedures calculated to disrupt profoundly the senses or}
\]
\[
\text{the personality; (3) the threat of imminent death; or (4) the threat that}
\]
\[
\text{another person will imminenty be subjected to death, severe physical}
\]
\[
\text{pain or suffering, or the administration or application of mind altering}
\]
\[
\text{substances or other procedures calculated to disrupt profoundly the}
\]
\[
\text{senses or personality.}^{25}
\]

In August 2002, US Department of Justice senior lawyer Jay Bybee provided advice for Alberto Gonzales, President Bush’s counsel, on standards of conduct for interrogations consistent with the CAT as implemented by the USA. Bybee’s memorandum stated that ‘physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, and even death.’

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The memorandum was leaked to the media in 2004 and was strongly criticised by a number of legal, military and human rights commentators on various grounds. There was particular concern that the definition of torture was deliberately confined to the most extreme methods of coercion. According to Professor Jeremy Waldron, Bybee deliberately misrepresented the sources on which he based his advice ‘in order to distort the character of the prohibition on torture and specifically to create an impression in his audience (in the White House) that there is more room for the lawful infliction of pain in interrogation than his audience’s casual acquaintance with the anti-torture statute might suggest.’

In response to the criticism, the Justice Department rescinded this opinion, and in December 2004, released another memorandum which publicly declared torture ‘abhorrent.’ However, shortly after this, in 2005, a still-secret Justice Department legal opinion was disclosed in the New York Times, which reported that the CIA was authorised to subject detained terrorist suspects to a combination of abusive interrogation methods, including simulated drowning (‘waterboarding’) and exposure to frigid temperatures.

In December 2005, the US Congress passed a prohibition against the use of torture and cruel, inhuman and degrading treatment against prisoners, including those held at Guantanamo Bay. The so-called ‘McCain Amendment’ prohibits US military interrogators from using interrogation techniques not listed in the US Army Field Manual on Intelligence Interrogation. The legislation containing the McCain Amendment was criticised by legal and human rights commentators as it included another provision that limited the judiciary’s ability to enforce the torture ban. This provision denied the more than five hundred detainees in Guantanamo Bay the ability to bring legal action seeking relief from the use of torture or CID and authorised the Department of Defense to consider evidence obtained through torture or other inhumane treatment.

More recently, in July 2007, US President George W. Bush issued an Executive Order that interprets Common Article 3 of the Geneva Conventions (that provide standards for the treatment of prisoners of war.) The Order requires

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that any CIA interrogation program must comply with all relevant federal statutes and places limitations on interrogation techniques and conditions of confinement. While the Order has been welcomed by some it has also been criticised by human rights organisations for not explicitly clarifying what techniques the CIA can and cannot lawfully engage in.

2.3.2 Australian Government

The Australian Government stated in one of its reports to the UN Committee Against Torture its understanding that the acts or conduct encompassed by the expression cruel inhuman or degrading treatment or punishment:

*entail some lesser degree of severity than those defined as ‘torture’, which nevertheless are inconsistent with the inherent dignity and rights of the person. Australia understands that the expression encompasses such acts as excessive punishments out of proportion to the crime committed, or treatment which grossly humiliates and debases a person.*

However, as in the US, recent concerns have been expressed about the Australian government’s apparent willingness to relax its approach to recognising certain acts as torture, for example, sleep deprivation. During recent questioning from Australian Greens Senator Kerry Nettle the then Justice Minister Chris Ellison said that sleep deprivation did not necessarily constitute torture. He stated:

*sleep deprivation per se in a counter-terrorism security exercise is not torture as such unless there are other circumstances which would rule it so – and in that event you look at the extent and the manner.*

Senator Ellison was backing statements made by the Attorney-General Philip Ruddock that he did ‘not regard sleep deprivation as torture’. The President of the Human Rights and Equal Opportunity Commission John von Doussa criticised the Attorney-General’s views, stating:


regardless of how sleep deprivation is defined – and for the record, I consider it is a form of torture – it is clearly a technique of obtaining information that may produce unreliable evidence that should not be admitted in a court of criminal justice.36

3 Torture in the World Today

…fifty-seven years after the Universal Declaration of Human Rights prohibited all forms of torture and cruel, inhuman or degrading treatment or punishment, torture remains unacceptably common.

UN Secretary-General Kofi Annan, Human Rights Day 2005

3.1 Torture is Alive and Well

The persistent and widespread occurrence of torture and cruel, inhuman or degrading treatment or punishment (CID) is reflected in numerous reports of confirmed and suspected torture published by well-established human rights sources.38

Governments have frequently used torture as a weapon in conflicts on those opposed to them, both when the opponents were armed and when they used political, economic and other means to express their opposition.

Two common situations documented by historians, human rights organisations, official inquiries such as ‘truth and reconciliation commissions’,39 and other sources are:

- where groups seek territorial independence (for example France in Algeria; Indonesia in East Timor and West Papua; Russia in Chechnya)
- where there are political, ideological and religious divisions or simply the desire to retain dictatorial power e.g. ‘right-wing’ governments in south and central America against ‘left-wing’ opponents; the Soviet Union against dissidents; the South African Government during the apartheid period; contemporary Egypt and Zimbabwe.


(38) See Section 8 for a full list of organisations and other sources that document instances of torture.

Torture has been and is being used for a variety of reasons. The inquiry into human rights violations committed during the Indonesian occupation of East Timor found that:

The purpose of torture was to obtain information from the victim, to punish the victim, to threaten the victim, to humiliate the victim, to intimidate the victim or others sharing the victim’s political allegiance or to force a change in a victim’s loyalties.\(^{40}\)

In view of the widespread public revulsion against torture, governments have generally used it without admitting that they do so and strenuously denied allegations of such conduct.

Israel is one recent instance of a government which publicly admitted to and defended its use of what was euphemistically described as ‘physical means’ against people being interrogated in relation to terrorism. Such physical means included violent shaking of a detainee’s upper body and head and placing detainees in stressful positions for prolonged periods.\(^{41}\)

In the United States, news reports have disclosed that from March 2002, the Central Intelligence Agency (CIA) was authorised to use ‘enhanced’ interrogation techniques, including waterboarding (mock drowning), exposure to extreme cold (including induced hypothermia), stress positions, extreme sensory deprivation and overload, shaking, striking, prolonged sleep deprivation, and isolation, among others.\(^{42}\)

### 3.2 Monitoring the Use of Torture

Common situations where torture and CID occur are:

- police/military violence when dealing with armed rebels or terrorists and those suspected of supporting them
- the treatment of people detained in prisons and psychiatric institutions
- police violence against people suspected of ordinary crimes.

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\(^{41}\) Public Committee Against Torture in Israel and Others v The State of Israel and Others H.C.51.00/94.

Despite the best efforts of international human rights organisations to monitor the worldwide use of torture and CID, several factors make it impossible to compile an authoritative and comprehensive account of the pattern of torture in the world today.

Many victims cannot complain, for example, because they are detained and cannot communicate with outside people or authorities. They may be too frightened to complain or see no point because they believe authorities will take no action against the perpetrators. Sometimes the psychological trauma may also act as a barrier to complaining or speaking out.

Many governments fail to take firm action against torture – this failure is often reflected in their lack of cooperation with the work of the independent expert appointed by the United Nations – the Special Rapporteur on Torture – investigating allegations of torture.

In his report of 30 August 2005, the Special Rapporteur notes that many governments simply ignore his appeals on behalf of individuals who might be at risk of torture or other forms of ill-treatment. From 1 December 2001 to 30 November 2004 the Special Rapporteur made 999 such urgent appeals and only 41 per cent of governments responded. Thirty three governments had never responded to urgent appeals.

Some governments impede the work of the Special Rapporteur by ignoring his requests to be officially invited to make a visit to their country, during which he can inspect places of detention and make inquiries about cases of alleged torture and CID which have been provided to his office.

Recently, the US Government gave permission to the Special Rapporteur and other UN human rights officials to visit the detention facility at Guantanamo Bay, but stipulated that interviewing detainees would be prohibited. The UN officials considered this an unacceptable condition and did not undertake the visit.

Therefore, effective monitoring of torture is limited by numerous factors and any discussion of its prevalence must take this under-reporting into account.

(43) Report of the Special Rapporteur on torture, above, n 2.
(44) See ‘Situation of detainees at Guantanamo Bay’ above, n 18.
3.3 Recent Reports of Torture and CID

The following examples are from findings by UN and other inquiries.

3.3.1 Police/Military Actions Against Suspected Armed Rebels and Supporters

- Indonesian security forces and their auxiliaries ‘committed, encouraged and condoned widespread and systematic torture and ill-treatment of victims during the period of Indonesian occupation of Timor-Leste’, including rape and other forms of sexual violence.\(^{45}\)

- Nepalese police and military systematically practise torture and ill-treatment in order to extract confessions and obtain intelligence in relation to the internal armed conflict with the Maoist rebels. The methods include beatings with bamboo poles, pouring water into the nose and applying electric shocks to the ears.\(^{46}\)

- In the Sudanese province of Darfur, the Government and allied local militia forces known as Janjaweed have been fighting rebel groups and have engaged in widespread brutal attacks on civilians they believe are identified with the rebels. ‘Incidence of torture and inhuman and degrading treatment of civilians in Darfur has been reported by several organisations. Rape, burning and beating, stripping women of their clothes, verbal abuse and humiliation of civilians were reported to have occurred frequently during attacks by the Janjaweed and Government forces.’\(^{47}\)

3.3.2 Torture and CID of People Detained in Prisons and Psychiatric Institutions

In 2003, the UN Special Rapporteur on Torture reported that over a number of years he had received complaints about the treatment of people in psychiatric institutions:

> According to the information received, some people held in psychiatric institutions are kept in overcrowded spaces and unhygienic conditions with a lack of access to adequate food and drink and in inappropriate temperatures, fastened to benches, beds or wheelchairs, given inappropriate medical care, if at all, or subjected to aversive procedures, such as subjection to electric shocks, prolonged restraint, slaps

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\(^{45}\) See CAVR above, n 40, p 808.79


and beatings, deprivation of sense, isolation and other forms of ill-treatment.\textsuperscript{48}

Among other issues of particular attention, the Special Rapporteur noted that:

\textit{certain practices such as irreversible treatment, including sterilisation or psychosurgery...may amount to a form of ill-treatment or even, in certain circumstances, to torture.}\textsuperscript{49}

Brazil and Mongolia are examples of countries where UN human rights bodies have reported torture and CID in prisons and other places of detention.\textsuperscript{50} For example:

- Brazil: ‘Beatings are…said frequently to be used to punish inmates who allegedly have not respected the internal disciplinary rules. Special police units are often called in to restore order and security and the excessive use of force is common in such instances. Many allegations referred to members of the special units wearing hoods and using wooden and iron sticks and wires. Beatings were also said to occur the nights following a revolt or an attempted escape, as a form of punishment. Transfers to new places of detention are reported often to be accompanied by beating by guards upon arrival, as a way of indicating to newcomers who is in charge.\textsuperscript{51}

- Mongolia: ‘The fact that death row prisoners are detained in complete isolation, are continuously kept hand cuffed and shackled throughout their detention, and are denied adequate food constitute additional punishments which can only be qualified as torture as defined in article 1 of the Convention (Against Torture).\textsuperscript{52}

\textsuperscript{48} \textit{Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment of punishment UN doc A/58/120, 3 July 2003, paragraph 36.}

\textsuperscript{49} \textit{Ibid., paragraph 47.}


\textsuperscript{51} \textit{Visit to Brazil – report of the Special Rapporteur above, n50, paragraph 13.}

\textsuperscript{52} \textit{Mission to Mongolia above, n50, paragraph 53.}
3.3.3 Police Violence Against Criminal Suspects

Following a recent investigation, the Special Rapporteur on Torture concluded that law enforcement officials in Georgia often used torture and ill-treatment to extract confessions for alleged offences from people they detain. The methods of torture include beating with fists, butts of guns and truncheons, electric shocks and cigarette burns.\(^5^3\)

\[\ldots\text{confessions cannot be extracted with love.}
\]
\[\text{The fear of the police has to be kept alive – how else would you reduce crime?} \]

\text{Indian police officer}\(^5^4\)

The Special Rapporteur on Torture has found evidence that torture is still widely practised in Paraguay, primarily during the first days of police custody as a means of obtaining confessions.\(^5^5\)

3.4 The Use of Rendition Proceedings

‘Rendition’ describes the process of people being transferred by the authorities of one country to another, without judicial oversight as is involved in extradition proceedings. In recent years, rendition has been increasingly used against people suspected of involvement in terrorism, who have been transferred from countries with strong human rights protections to countries which notoriously violate human rights.

By intention or otherwise, rendition facilitates people being placed at great risk of torture. Rendition is prohibited by the Convention Against Torture (CAT) which provides that a country must not expel, return or extradite a person to a country where there are substantial grounds for believing that the person would be in danger of being subjected to torture. (Article 3)

In a report to the UN General Assembly in August 2005, the UN Special Rapporteur

\(^{53}\) Mission to Georgia: report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak UN Doc. E/CN.4/2006/6/Add.3, 23 September 2005.

\(^{54}\) Raghuraj Singh Chauhan, cited in Rama Lakshmi ‘In India, torture by police is frequent and deadly’ The Washington Post 5 August 2004.

on Torture was critical of a number of countries including the United States, the United Kingdom, Canada, France, Sweden and Kyrgyzstan for violating human rights by deporting terrorist suspects to countries such as Egypt, Syria, Algeria and Uzbekistan, where they may have been tortured. The report noted that:

Several Governments, in the fight against terrorism, have transferred or proposed to return alleged terrorist suspects to countries where they may be at risk of torture or ill-treatment.\(^{56}\)

“\(\text{We don’t kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them.}\)"

Comment of US official involved in transferring captured terrorist suspects from US control to agents of other countries\(^{57}\)

In 2005, the Council of Europe initiated an investigation into reports that the US had illegally transferred terrorist suspects from European countries, with European officials either actively assisting or turning a blind eye to what they must have suspected was occurring.

The investigator reported that:

*there is a great deal of coherent convergent evidence pointing to the existence of a system of ‘relocation’ or ‘outsourcing’ of torture. Acts of torture, or severe violations of detainees’ dignity through the administration of inhuman or degrading treatment, are carried out outside national territory and beyond the authority of the national intelligence services.*\(^{58}\)

In early 2006 the European Parliament set up a temporary committee on the alleged use of European countries by the CIA for the transportation and illegal

\(^{56}\) Report of the Special Rapporteur on Torture above, n2, paragraph 29.


detention of prisoners. The committee’s report concluded that many European countries were ‘turning a blind eye’ to flights operated by the CIA which ‘on some occasions, were being used for extraordinary rendition or the illegal transportation of detainees.’  

On the basis of the report, the European Parliament adopted a resolution which condemned ‘the condoning and concealing of the practice’ of extraordinary rendition by certain European countries and called on Member States of the European Union to carry out detailed investigations and compensate the victims.

In Canada a Commission of Inquiry was recently conducted into the deportation of a Canadian citizen – Maher Arar – to Syria, by the US government. Mr Arar was detained by the US government at Kennedy Airport in New York on his way home to Canada from a family holiday in Tunisia, due to false information supplied by the Royal Canadian Mounted Police that he was a member of a terrorist group. The Commission of Inquiry found that he was flown to Jordan and from there taken to Syria, where he was held in a tiny cell for 10 months in degrading and inhumane conditions and tortured. While the Canadian government has now publicly aired the facts of its involvement in this incident, the US government has refused to publicly discuss the Arar matter.

### 3.5 The Use of Diplomatic Assurances

In recent years, some governments have sought to meet their legal obligation not to send people to countries where they face a real risk of being tortured, by obtaining ‘diplomatic assurances’ from the receiving government that people who are returned will not be mistreated. For example:

- the United Kingdom negotiated ‘memorandums of understanding’ with Jordan and Libya for sending people to those countries in the aftermath of the bombings in London of 7 July 2005
- in 2001 Sweden expelled two men to Egypt on the grounds of suspected terrorist activities, after receiving assurances that they would not be tortured
- in 2002 the US detained a dual Canadian-Syrian citizen who was in transit

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(62) Ibid.
to Canada, and flew him to Jordan for transfer to Syria – it later claimed that Syria provided assurances he would not be tortured.\(^{63}\)

This practice has been strongly criticised by the UN Special Rapporteur on Torture, among others, because he considers diplomatic assurances to be:

unreliable and ineffective in the protection against torture and ill-treatment: such assurances are sought usually from States where the practice of torture is systematic; post-return monitoring mechanisms have proven to be no guarantee against torture; diplomatic assurances are not legally binding, therefore they carry no legal effect and no accountability if breached; and the person whom the assurances aim to protect has no recourse if the assurances are violated.\(^{64}\)

\(^{(63)}\) The instances are described in *Report of the Special Rapporteur on Torture* above, n 2.

\(^{(64)}\) Ibid., paragraph 51.
The Effects of Torture

What was inflicted on me... was by far not the worst form of torture. No red-hot needles were shoved under my fingernails, nor were any lit cigars extinguished on my bare chest. What did happen to me there... was relatively harmless and it left no conspicuous scars on my body. And yet, twenty one years after it occurred... I dare to assert that torture is the most horrible event a human being can retain within himself.

Jean Amery, a member of the Belgian anti-German resistance during World War II, was captured and physically tortured in 1943. He was unable to write about his experiences until 20 years later. Amery committed suicide in 1978.

As indicated by Jean Amery’s words above, torture inflicts mental harm as well as physical harm, and the body may heal more quickly than the mind.

Amery’s sentiments have been echoed by Sister Dianna Ortiz, who was abducted by security forces while working as a missionary among indigenous people in Guatemala in 1989. She was taken to a secret prison, gang-raped, burned with cigarettes, and suspended over a pit filled with the bodies of men, women and children who had been murdered.

‘No one ever fully recovers,’ Ortiz stated, ‘not the one who is tortured, and not the one who tortures. Every time he tortures, the torturer reinforces the idea that we cannot trust one another, and that we cannot trust the world we live in.’

Peter Kooijmans, the first UN Special Rapporteur on Torture, captured the interaction between physical and mental effects of torture as follows:

Torture is the violation par excellence of the physical and mental integrity – in their indissoluble interdependence – of the individual being. Often a distinction is made between physical and mental torture. This distinction, however, seems to have more relevance for the means by
which torture is practised than for its character.

Almost invariably the effect of torture, by whatever means it may have been practised, is physical and psychological. Even when the most brutal physical means are used, the long-term effects may be mainly psychological; even when the most refined psychological means are resorted to, there is nearly always the accompanying effect of physical pain. A common effect is the disintegration of the personality.67

4.1 Physical and Psychological Sequelae in Adults

The physical sequelae of torture are as varied as the methods of torture practised.68 They are summarised in Table 1. Many survivors do not have enduring physical sequelae but the lack of visible signs should not be taken to mean that physical torture has not occurred. Some forms of torture leave few visible signs.69

The psychological sequelae include post-traumatic stress disorder (PTSD),70 depressive disorders and anxiety disorders.71 Studies of survivor populations using clinical research tools indicate prevalence rates for PTSD of between 32% and 100%.72 Rates of depression of between 47% and 72% have been found in

(69) Medical Faculties of the Universities of Copenhagen, Odense and Aarhus and the Danish National Board of Health ‘Medical aspects of torture’ Danish Medical Bulletin Vol 37 Supplement No1 January 1990, pp1-88.
political detainee populations. Other psychological effects are summarised in Table 1.

**Table 1: Common Physical and Mental Effects of Torture**

<table>
<thead>
<tr>
<th>Physical</th>
<th>Psychological</th>
</tr>
</thead>
<tbody>
<tr>
<td>• brain damage</td>
<td>• problems with concentration and memory</td>
</tr>
<tr>
<td>• cardiopulmonary complications</td>
<td>• anxiety</td>
</tr>
<tr>
<td>• scars and disfigurement from burns</td>
<td>• depression</td>
</tr>
<tr>
<td>• mutilation of body parts</td>
<td>• grief</td>
</tr>
<tr>
<td>• limited mobility</td>
<td>• relationship problems</td>
</tr>
<tr>
<td>• muscle swelling and muscle atrophy</td>
<td>• intrusive memories and images</td>
</tr>
<tr>
<td>• chronic pain</td>
<td>• lack of sleep</td>
</tr>
<tr>
<td>• headaches</td>
<td>• nightmares</td>
</tr>
<tr>
<td>• deafness</td>
<td>• numbing and anhedonia</td>
</tr>
<tr>
<td>• blindness</td>
<td>• irritability</td>
</tr>
<tr>
<td>• loss of teeth</td>
<td>• adjustment disorders</td>
</tr>
<tr>
<td>• internal injuries</td>
<td>• sexual dysfunction</td>
</tr>
<tr>
<td></td>
<td>• feelings of powerlessness</td>
</tr>
<tr>
<td></td>
<td>• shame and guilt</td>
</tr>
<tr>
<td></td>
<td>• shattered assumptions of human existence – security,</td>
</tr>
<tr>
<td></td>
<td>trust, meaning</td>
</tr>
</tbody>
</table>

A focus on diagnostic disorders or symptomatic effects can obscure the far-reaching effects of torture on everyday functioning:

- Ability to carry out everyday tasks and attend to basic needs can be seriously impaired by feelings of powerlessness and lack of connection to others.
- Learning ability and work performance are seriously disrupted by poor concentration, memory impairment and sleep disturbance.
- Pain, whether caused by injuries or psychosomatic in nature, can be debilitating.


(74) See ‘Burmese political dissidents in Thailand’ above, n71.
• Relationships are adversely affected by distrust or loss of faith in people
• Survivor guilt prevents enjoyment of life and can lead to self-destructive behaviour
• Anger and aggressive behaviour result from low frustration tolerance as a result of stress and lack of sleep, as a protest against loss, as a response to injustices and as a reaction to shame and guilt.

4.2 Effects in Children and Adolescents

Children are victims of torture,\(^\text{75}\) witness torture\(^\text{76}\) and experience the indirect effects of their parents or caregivers having been tortured. Prevalence of torture cases among children and young adolescents is still not known, however many cases have been documented for particular conflicts by human rights organisations.\(^\text{77}\) For example, ‘in fighting in Bosnia Herzegovina and Croatia, it has been deliberate policy to rape teenage girls and force them to bear the enemy’s child’.\(^\text{78}\)

Rape of girls has also been used in Rwanda, Mozambique and Liberia to systematically destroy communities.\(^\text{79}\) In Cambodia, and under the Nazi regime, torture of children was systematic and extensive. Human rights organisations have also reported cases of direct torture of children in Turkey\(^\text{80}\) and the Philippines and reported the forcible recruitment of child soldiers in Angola, Mozambique, and the Democratic Republic of Congo.

In the Philippines, there were 403 documented cases of child torture in the period 1976-1992. The majority were aged 15-18 years.

Torture of children and adolescents rarely occurs in isolation but along with a range of other traumatic events and hardships. Many experience enduring loss when parents or caregivers are killed or disappeared, they witness atrocities, experience uprooting from their homes and suffer extreme privations.\(^\text{81}\)

\(^{(75)}\) Protacio-Marcelino E, Teresa de la Cru M Z, Camacho A Z and Balanon F. *Torture of children in situations of armed conflict*. Program on Psychosocial Trauma and Human Rights, Center for Integrative and Development Studies, University of the Philippines, 2000.


\(^{(78)}\) Ibid.

\(^{(79)}\) Ibid.


There is a considerable body of evidence to show that children often experience a psychological reaction to trauma not dissimilar to that found in adults. In addition, the developmental impact can be profound in cognitive, interpersonal, moral and emotional domains of functioning.

A study of 85 children whose parents had been tortured in Chile showed:

- 68 percent had emotional disorders, physical symptoms or both. Studies of the children of torture victims from Chile, Argentina and Mexico have found ‘chronic fear, depressive mood, clinging and overdependent behaviour, sleep disorders, somatic complaints and an arrest or regression of social habits and school performance.’

In a study conducted in Sweden the children of tortured parents had more symptoms of anxiety, depression, post-traumatic stress, attention deficits and behavioural disorders compared with a group of children whose parents had experienced violence but not torture.

For children directly exposed to torture and extreme violence, post traumatic stress disorder is common. Kinzie et al found that 48% of children targeted under the Pol Pot regime had developed PTSD, and 41% had developed depression four years after leaving Cambodia. Children not residing with a family member were most likely to show psychiatric symptoms.

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4.3 Long-term Effects of Torture

John Conroy, who undertook a detailed study of both the perpetrators and survivors of torture, has written:

*the forces unleashed by a man only doing his job, a man simply following orders, a man who may not even know the name of his victim, are extraordinarily powerful. Long after the torturer and his or her prey are dead, the acts committed in a hidden place – perhaps in a matter of a few minutes or hours – live on.*\(^{86}\)

One way in which effects live on is through the breaking of relationships. The destructive impact on family and community is indeed the intention of the torturer.

The personal, familial and social impact of torture is starkly evident in the instance of rape:

*Besides the physical and psychological damage caused by the torture, sexual abuse has additional consequences for women, such as the risk of being infected with sexually transmitted diseases and of pregnancy, miscarriage, forced abortion or sterilization. In a large number of socio-cultural contexts, rape and sexual abuse continue to entail the stigmatization and ostracism of the victim upon her return to the community and family.*\(^{87}\)

A number of factors have been found to influence the long term impact of torture. They include several features of the recovery environment:

- access to services
- connections with family and community
- parental coping style and support
- opportunities to pursue meaningful goals and the attainment of justice.\(^ {88}\)

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While survivors and their families fight for dignity of the self and others after the degradation and humiliation of torture, it is the responsibility of society to uphold the sanctity of life.

“...if the world keeps silent afterward, torture is not only victorious but permanent, eternal, and continuous.”


5 Laws and Instruments Prohibiting Torture

Torture and CID are prohibited by both international and national laws.

5.1 International Law

The right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment was first stated in the Universal Declaration of Human Rights and Freedoms adopted by the UN General Assembly in 1948 (Article 5).

The right was subsequently incorporated into the International Covenant on Civil and Political Rights (ICCPR), a global treaty adopted in 1966 that as of September 2006 has 156 States Parties. Australia became a party to the ICCPR in 1980.


However, the pre-eminent instrument now referred to internationally is the UN Convention Against Torture.

5.1.1 The Convention Against Torture

The nature of governments’ obligations with respect to torture are specified in detail in the Convention Against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). A summary of the main elements of CAT can be found in the annex to this report. The full text of the CAT can be found at: http://www.unhchr.ch/html/menu3/b/h_cat39.htm.

The CAT was adopted by the UN in 1984 and, as of October 2007, 141 states are parties to it. Australia became a party in 1989. A Committee Against Torture has been established to monitor states’ compliance with the treaty. Committee reports are published online at: http://www.ohchr.org/english/bodies/cat/index.htm.

Australia has also recognised the competence of the Committee to consider complaints by individuals that the state has violated their rights under the CAT.

The main elements of implementation of the CAT include:

- States are required to incorporate the crime of torture into their domestic legislation and to punish acts of torture by appropriate penalties
- States are required to undertake a prompt and impartial investigation of any alleged act of torture
• States must ensure that statements made as a result of torture are not invoked as evidence in legal proceedings (except against a person accused of torture as evidence that the statement was made)

• States are required to establish an enforceable right to fair and adequate compensation and rehabilitation for victims of torture or their dependants

• No exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may be invoked as a justification for torture. The same applies, in the case of an individual offender, to an order from a superior officer or a public authority

• States are prohibited from returning a person to another State where he or she would be at risk of torture (principle of non-refoulement). They must ensure, on the other hand, that an alleged perpetrator of torture present in any territory under their jurisdiction is prosecuted or extradited to another State for the purpose of prosecution

• States agree to ensure that education regarding torture is included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of anyone subjected to any form of arrest, detention or imprisonment

• States must submit regular reports to the Committee Against Torture on the measures they have taken to give effect to their undertakings under the CAT.

5.1.2 The Optional Protocol to the Convention Against Torture

In 2002, the UN General Assembly adopted a treaty which complements the CAT, called the Optional Protocol to the UN Convention Against Torture (OP-CAT). The aim of the OP-CAT is to prevent torture and CID by establishing a system of visits by independent international and national bodies to places of detention.

The OP-CAT entered into force on 22 June 2006 and, as of October 2007, 34 states are parties to it, with another 60 having signed but not yet ratified. The Australian Government has recently (in February 2008) signaled its intention to ratify the Protocol.

5.1.3 The International Covenant on Civil and Political Rights (ICCPR) and First Optional Protocol

As described in Section 2 of this publication, the ICCPR prohibits torture, cruel, inhuman and degrading treatment, in article 7. As of October 2007, 160 states are parties to the Convention, including Australia. The ICCPR requires State parties to adopt legislative or other measures to give effect to the rights recognised in it. States are also required to submit regular reports to the Human Rights Committee on how the rights are being implemented.
Like the CAT, the ICCPR also has a complaints procedure (‘the first Optional Protocol’) which enables individuals to make a complaint to the Human Rights Committee if they believe that the state has violated one of their rights under the ICCPR. Australia has ratified the Optional Protocol and therefore recognises the competence of the Human Rights Committee to consider communications from individuals. On finding a violation, the Human Rights Committee releases recommendations, which, although non-binding, are nonetheless issued in a ‘judicial spirit’.

5.1.4 The Convention on the Rights of the Child

The Convention on the Rights of the Child requires States to ensure that no child is subjected to torture or other degrading treatment or punishment. As of October 2007, 193 countries were parties to the Convention, including Australia. The Convention also requires that states protect children from mental and physical abuse. Article 19 states:

*States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.*

In the report of a 2004 Australian inquiry into the mandatory immigration detention of children, the Human Rights and Equal Opportunity Commission found that:

*Australian laws that require the mandatory immigration detention of children, and the way these laws are administered by the Commonwealth, have resulted in numerous and repeated breaches of the Convention on the Rights of the Child.*

The inquiry also found that, ‘children in immigration detention for long periods of time are at high risk of serious mental harm.’

5.1.5 The Geneva Conventions

Torture and other acts of ill-treatment are also specifically prohibited by the Geneva Conventions of 1949 which are commonly referred to as international

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(90) *Convention on the Rights of the Child*, article 37.


(92) Ibid.
humanitarian law or the laws of war. The Conventions have been acceded to by 194 states and have widespread acceptance. Under the Conventions, ‘Torture or inhuman treatment’ or ‘wilfully causing great suffering or serious injury to body or health’ are considered ‘Grave Breaches’. Rape is also recognised as constituting ‘torture or inhuman treatment’.

Under the third Geneva Convention which concerns the treatment of prisoners of war:

- there is an absolute prohibition on ‘violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture’ and ‘outrages upon personal dignity, in particular, humiliating and degrading treatment’

- with respect to prisoners of war, ‘no physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them any information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.’

5.2 Australian Law

While the terms ‘torture’ and ‘CID’ are not used within many Australian laws, these acts are covered by criminal and civil laws in all the states and territories, for example, laws prohibiting assault and rape.

At the Federal level, specific legislation was introduced to give partial effect to Australia’s obligations under the CAT. The Crimes (Torture) Act 1988 (Commonwealth) makes an act of torture a crime, but in very limited circumstances. The Act covers the conduct only of public officials, and people acting in an official capacity, and it covers that conduct only if it occurs outside of Australia. A person must either be an Australian citizen or present in Australia to be charged under the Act. The conduct is an offence only if at the time, the conduct would have been an offence if done within Australia.

(94) Fourth Geneva convention relative to the protection of civilian persons in time of war article 147.
(96) Third Geneva convention relative to treatment of prisoners of war Article 3.
(97) Ibid., Article 17.
Australia’s Extradition Act (1988) requires the Attorney General to be satisfied that a person will not be subjected to torture if extradited.\(^9\) This Act gives partial effect to the requirement under the CAT that states should not send a person to another state where they are likely to be tortured.\(^10\) However, there is a gap in Australian law relating to *refoulement* (returning a person seeking refuge to their own state) of unsuccessful asylum seekers. The UN Committee Against Torture has expressed concerns at the absence of appropriate review mechanisms in Australia for ministerial decisions in respect to *refoulement*.\(^10\)

\(^10\) Ibid., Article 3.
6 Use of Evidence Obtained Through Torture

The question of whether evidence obtained under torture can be used in trials has received considerable attention recently. However, there has also been a long historical debate about this issue, conducted through the judicial system. The debate has centred on the unreliability of statements obtained under torture, but also moral arguments surrounding the protection of the accused’s rights and fairness in the criminal process.\(^\text{102}\)

6.1 Exclusion Under the CAT

Article 15 of the Convention Against Torture provides that ‘any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings.’\(^\text{9}\)

The main reasons for excluding evidence obtained through torture and other coercive means are:

- Such evidence is unreliable because people being tortured will make false admissions or provide untrue information if that is necessary to stop the torture
- Denying state officials the right to use evidence obtained through torture in court may discourage the practice; allowing the inclusion of this evidence is likely to encourage torture
- For a court to consider such evidence would be antithetical to and would seriously damage the integrity of the proceedings.\(^\text{103}\)

6.2 Exclusion in International Criminal Tribunals

While the procedural rules of the International Criminal Tribunals do not expressly exclude the admission of evidence procured through torture, when the issue has arisen tribunals have adamantly stated that they would not allow such evidence to be introduced.

Two rules of evidence of the International Criminal Tribunals for the former Yugoslavia and for Rwanda are particularly pertinent. Rule 89 (c) provides that a tribunal ‘may admit any relevant evidence which it deems to have probative value.’ On face value this might suggest that evidence obtained through torture is permitted. However, Rule 95 ‘Evidence obtained by means contrary

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\(^{103}\) These reasons are cited by a number of judges in the House of Lords decision, above, n105.
to internationally protected human rights’ provides that ‘no evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.’

In a number of cases, the International Criminal Tribunal for the former Yugoslavia has indicated that Rule 95 definitely precludes the admission of ‘statements which are not voluntary, but rather are obtained by means including oppressive conduct.’ In other words, rule 95 overrides rule 89 (c), making evidence obtained by torture inadmissible.

6.3 Exclusion Under National Laws

6.3.1 Australia

The rule excluding evidence procured by torture is commonly provided by national laws and by decisions of courts on the fundamental principles of ensuring fair trials. The Australian Government has informed the Committee Against Torture that:

In each criminal jurisdiction in Australia, either statute law or the common law ensures that any statement induced by torture cannot be admitted in evidence in court.

6.3.2 The United States

The US Supreme Court has stated that the US Constitution prohibits the admission of coerced confessions:

It is now inescapably clear that the Fourteenth Amendment forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of the ‘strongly felt attitude of our society that important human

(104) Prosecutor v Sefer Halilovic, Case number IT-01-48-T, 16 February 2005, paragraph 9. The same position has been taken consistently in other cases e.g. Prosecutor v Zejin Delalic and others, Case number IT-96-21-T, 2 September 1997, where the tribunal stated that ‘there is no doubt statements obtained from suspects which are not voluntary, or which seem to be voluntary but are obtained by oppressive conduct, cannot pass the test under Rule 95’ (paragraph 41); Prosecutor v Naser Oric, IT-03-68-T, 21 October 2004, paragraph 11(x).


(106) Australia’s second and third report under the Convention Against Torture submitted to the Committee Against Torture 19 October 1999, UN Document number CAT/C/25/Add.11, paragraph 86.
values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will,107 and because of the ‘deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.’108

6.4 An Exception for Trials of Alleged Terrorists?

In the context of the so-called ‘War on Terror’ there have been two recent situations where governments determined that evidence obtained through coercive interrogation should be admissible in judicial proceedings relating to alleged terrorists.

Both of these decisions have subsequently been overturned, however they provide illustrative case studies of how governments have been prepared to override long-established rules in relation to the use of evidence obtained under torture.

6.4.1 People Detained at Guantanamo Bay

In 2001 the US Government established ‘military commissions’ to prosecute non-US citizens detained at Guantanamo Bay.

Lawyers for detainees, human rights organisations, the UK Government and others argued that these military commissions would not provide fair trials, for a number of reasons.109

One key ground of objection was that the procedural rules of military commissions permitted the admission of evidence procured by torture. Under the original rules for military commissions, evidence was to be admitted if in the opinion of the Presiding Officer ‘the evidence would have probative value to a reasonable person.’110

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110 Department of Defense Military commission order no 1 21 March 2002, 6D(1).
Australian Attorney-General Ruddock indicated that the Australian Government does not find it objectionable that military commissions might consider evidence obtained by torture because similar rules apply in the US and the international criminal tribunals. In explanation he said:

…the question of how you deal with evidence obtained by torture varies from body to body and the Americans use the probative system, the United Nations use the system of testing probative value, we use a system whereby if evidence is adduced that the evidence was obtained by torture, it is disallowed.\(^{111}\)

However, as documented above, the assertion that evidence procured by torture might be admitted in the US or in an international criminal tribunal is wrong.

On 24 March 2006, the US Department of Defence issued a new evidentiary rule that prohibited prosecutors from introducing, and military commissions from admitting, statements made as a result of torture. The rule ‘acknowledges the obligations assumed by the United States under Article 15’ of the CAT with respect to military commission trials.\(^{112}\) Under the new rule:

The prosecution shall not offer any statement determined by the prosecution to have been made as a result of torture. The commission shall not admit statements established to have been made as a result of torture as evidence against an accused...

On June 29 2006, the Supreme Court struck down the system of military commissions that President George W. Bush had authorised in November 2001, finding that the president lacked congressional authorisation to establish the commissions.\(^{113}\) The Court also found that the commissions’ procedures violated basic fair trial standards which mandated the humane treatment of all persons held by the United States in the ‘conflict with al Qaeda.’ The Court also questioned the abusive interrogation techniques used by the CIA and made clear that these violated US obligations under international law.\(^{114}\)

In response to the Supreme Court’s decision, Congress passed the Military Commissions Act (MCA) in September 2007, which provides a legal basis for

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\(^{112}\) Department of Defense Military commission instruction no 10 24 March 2006.

\(^{113}\) Hamden v. Rumsfeld 29 June 2006.

the military commissions.\textsuperscript{115} Although the MCA prohibits the use of statements obtained through torture as evidence in a trial, it nonetheless contains some troubling aspects. For example, the rules permit the use of testimony obtained through abusive interrogation techniques that were used prior to the passage of the Detainee Treatment Act in December 2005 if they are found to be ‘reliable’ and if their admission is found to be in ‘the interests of justice.’ The rules on ‘hearsay’ or out-of-court statements provide that hearsay is admissible provided that it is ‘reliable’ and has ‘probative’ value. This means that defendants could be convicted based on second-hand summaries of statements obtained through coercive interrogations.\textsuperscript{116}

The MCA has been criticised by the Special Rapporteur on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin, who has stated that ‘a number of provisions of the MCA appear to contradict the universal and fundamental standards and due process enshrined in Common Article 3 of the Geneva Conventions.’\textsuperscript{117}

\subsection*{6.4.2 The Detention of Suspected Terrorists in the United Kingdom}

In 2001, the UK legislated to permit the detention of non-citizens who were suspected of involvement in terrorism, but who could not be deported from the UK. A special court, the Special Immigration Appeals Commission (SIAC), heard appeals by detained people against orders to detain them.

The question arose whether SIAC could consider evidence procured by torture. In legal action on the issue, the UK Government argued that SIAC could receive evidence which may have been procured by torture if it was inflicted by officials of a foreign state without the complicity of UK authorities.

However, the House of Lords – the UK’s ultimate appeal court – ruled that evidence obtained through torture could not be admitted in court proceedings even when that was committed by agents of a foreign country without the complicity of British authorities.\textsuperscript{118} The judges stated that both UK and international law prohibited the inclusion of such evidence.

\begin{footnotes}
\item[116] See Human Rights Watch, above, n117.
\item[118] A(FC) and others (FC)(Appellants) v Secretary of State for the Home Office (Respondent) (2004) [2005] UKHL 71.
\end{footnotes}
In the words of Lord Bingham of Cornhill:

(t)he principles of the common law, standing alone, in my opinion compel the exclusion of third party torture evidence as unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice.\textsuperscript{119}

\textsuperscript{119} Lord Bingham was one of the judges of the House of Lords which decided unanimously that the Special Immigration Appeals Commission was not permitted to receive any evidence procured by torture – A(FC) and others (FO)(Appellants) v Secretary of State for the Home Office (Respondent) (2004) [2005] UKHL 71, paragraph 52.
7 **Terrorists and Torture**

Over the past two decades, the increasing incidence of terrorist activities has influenced the international debate over the use of torture.

### 7.1 Israel – The Landau Commission

In 1987 the Israeli Government appointed a commission of inquiry to examine the methods of interrogation used by the General Security Service on terrorist suspects. The Landau Commission (named after its head, former Supreme Court President Justice Moshe Landau) determined that:

\[\ldots \text{in dealing with dangerous terrorists who represent a grave danger to the State of Israel and its citizens, the use of a moderate degree of pressure, including physical pressure, in order to obtain crucial information, is unavoidable under certain circumstances. Such circumstances include situations in which information sought from a detainee believed to be personally involved in serious terrorist activities can prevent imminent murder, or where the detainee possesses vital information on a terrorist organisation which could not be uncovered by any other source (for example, location of arms or caches of explosive for planned acts of terrorism).}\]

The Landau Commission recommended the use of psychological pressure predominantly and ‘that only ‘moderate physical pressure’ be sanctioned in limited cases where the degree of anticipated danger is considerable.’\(^{(120)}\) The approved interrogation methods were kept secret. A system of internal and external supervision of the activities of the security services was established. The Committee’s recommendations were approved by the government.

In 1998 the UN Committee Against Torture concluded that the physical means of interrogation used by Israel’s security services (identified as holding, shackling in painful positions, sleep deprivation and shaking of detainees) were severe and violated the prohibition of torture.\(^{(122)}\)

In 1999, the Supreme Court of Israel ruled on a petition from human rights groups and a group of Palestinians complaining that the use of physical means for interrogation was unlawful on various grounds, including that they constitute

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\(^{(120)}\) Second periodic report of Israel to the Committee Against Torture 18 February 1997, UN doc. CAT/C/33/Add.2/Rev.1, paragraph 5.

\(^{(121)}\) Ibid paragraph 6.

\(^{(122)}\) Concluding observations of the Committee Against Torture: Israel 18 May 1998, UN doc. A/53/44.
‘torture’ which is prohibited under international law.\textsuperscript{123}

The government contested the application, arguing among other things that:

- the interrogation methods did not constitute torture or CID
- the use of physical means was legal because they were only used in exceptional circumstances when essential to save lives, and thus met the requirements of the legal defence of ‘necessity’ to being convicted for committing an act that would ordinarily be a criminal offence

The Supreme Court’s consideration of the law focused in particular on a hypothetical situation involving a ‘ticking time bomb’: would it be lawful for interrogators to use physical means of interrogation ‘when a bomb is known to have been placed in a public area and will undoubtedly explode causing immeasurable human tragedy if its location is not revealed at once?’\textsuperscript{124}

The Supreme Court considered that the interrogation methods were impermissible for various reasons, including that they went beyond what was ordinarily permissible, were unreasonable, that ‘they impinge on the suspect’s dignity’, but did not describe them as involving torture. The Court decided that if an interrogator used physical coercion in a ticking time bomb situation and was prosecuted, they might be able to invoke the defence of ‘necessity’. However, the defence was only available in determining culpability after the event – it did not provide a source of general authority for the infringement of human rights in advance.

The Court concluded with the acknowledgment that the decision did not make it easier for Israel to deal with the harsh reality of the terrorist threat it faced:

This is the destiny of democracy, as not all means are open to it, and not all practices employed by its enemies are open before it. Although a democracy must always fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual’s liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties.\textsuperscript{125}

\textsuperscript{123} Public Committee Against Torture in Israel and Others v the State of Israel and Others H.C.5100/94.

\textsuperscript{124} Public Committee Against Torture in Israel and Others v The State of Israel and Others H.C.5100/94, paragraph 14.

\textsuperscript{125} Ibid., paragraph 39.
7.2 The Debate on Torture Since ‘9/11’

Since the terrorist attacks in the USA of 11 September 2001, there has been considerable debate about two related issues:

- are there circumstances in which it is morally acceptable to use torture to interrogate suspected terrorists?
- should interrogators of terrorist suspects be given legal authority to use torture?

In the words of UN High Commissioner for Human Rights, Louise Arbour:

> the absolute ban on torture, a cornerstone of the international human rights edifice, is under attack. The principle once believed to be unassailable – the inherent right to physical integrity and dignity of the person – is becoming a casualty of the so-called ‘war on terror’.\(^{126}\)

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**After 9/11, the gloves came off.**

Cofer Black, US State Department Counter-terrorism Coordinator\(^ {127}\)

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Views have ranged from ‘torture is always a terrible evil, morally horrible through and through’ which may never be employed,\(^ {128}\) to the drafting of detailed guidelines for the circumstances in which it is morally justifiable to inflict torture even to the extent of ‘annihilating’ the person being interrogated.\(^ {129}\)

These comments represent the two main analytical approaches to the question of whether torture should be applied to terrorists, with startlingly different conclusions.

One is that another human being should never be used as a means to an end – therefore, torture may not be used to obtain information, even if it is to save the lives of people who the bomb will kill. The most prominent recent exponent of this school of thinking is moral philosopher Raimond Gaita.

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The other analytical approach is described as utilitarian or consequentialist: what is right is the course of action that leads to the greatest good for the greatest number. Arguments for this approach are expounded by people such as legal academics Alan Dershowitz and Mirko Bagaric.

Both of these approaches are explored in the following extracts from a number of commentators, presenting views against and in favour of legislating to permit the use of torture when interrogating terrorist suspects.

7.2.1 Alan Dershowitz

Alan Dershowitz, American lawyer and Professor of Law at Harvard Law School, argues that it is inevitable that torture will be used in a ‘ticking bomb’ terrorist situation – where somebody is detained who has information about a planned attack that will kill many people. He believes this situation should be confronted by requiring the interrogators to obtain a warrant to torture from a judge.\textsuperscript{130}

‘The goal of the warrant,’ Dershowitz has suggested, ‘would be to reduce and limit the amount of torture that would, in fact, be used in an emergency.’\textsuperscript{131}

He writes:

\begin{quote}
Non-lethal torture is currently being used by the United States in an effort to secure information deemed necessary to prevent acts of terrorism. It is being done below the radar screen, without political accountability, and indeed with plausible deniability. All forms of torture are widespread among nations that have signed treaties prohibiting all torture.

The current situation is unacceptable: it tolerates torture without accountability and encourages hypocritical posturing. I would like to see improvement in the current situation by reducing or eliminating torture, while increasing visibility and accountability. I am opposed to torture as a normative matter, but I know it is taking place today and I believe that it would certainly be employed if we ever experienced an imminent threat of mass casualty biological, chemical, or nuclear terrorism.

If I am correct, then it is important to ask the following question: if torture is being or will be practised, is it worse to close our eyes to it and tolerate its use by low-level law enforcement officials without accountability, or instead to bring it to the surface by requiring that a warrant of some kind
\end{quote}


\textsuperscript{(131) Dershowitz, A ’Want to torture? Get a warrant’ \textit{San Francisco Chronicle} 22 January 2002.}
be required as a precondition to the infliction of any type of torture under any circumstances?132

7.2.2 Mirko Bagaric and Julie Clarke

Mirko Bagaric, Professor of Law at Australia’s Deakin University, and colleague Julie Clarke, wrote a highly controversial paper justifying the use of torture in certain circumstances, which was published in the Spring 2005 edition of the University of San Francisco Law Review.133

Bagaric and Clarke argued that in certain circumstances the use of torture is morally justifiable and unlike Dershowitz, who wants only nonlethal means employed, suggest that even harm which kills the person being interrogated may be permissible, even if the person turns out to be innocent.

They write:

The formal prohibition against torture is absolute – there are no exceptions to it. This is not only pragmatically unrealistic, but unsound at a normative level. ... The pejorative connotation associated with torture should be abolished. A dispassionate analysis of the propriety of torture indicates that it is morally justifiable.134

Ultimately, torture is simply the sharp end of conduct whereby the interests of one agent are sacrificed for the greater good.135

There are five variables relevant in determining whether torture is permissible and the degree of torture that is appropriate. The variables are (1) the number of lives at risk; (2) the immediacy of the harm; (3) the availability of other means to acquire the information; (4) the level of wrongdoing of the agent; and (5) the likelihood that the agent actually does possess the relevant information. Where (1), (2), (4) and (5) rate highly and (3) is low, all forms of harm may be inflicted on the agent – even if this results in death.136

(132) See ‘Tortured Reasoning’ above, n133.
(133) See ‘Not enough official torture in the world?’ above, n132.
(134) Ibid., pp582-3.
(135) Ibid., p584.
(136) Ibid., p611.
This article created a storm of controversy in Australia, both in the human rights field and within the law profession. The Victorian Foundation for Survivors of Torture was unequivocal in its denunciation of the arguments presented by Bagaric and Clarke.\textsuperscript{137}

\subsection{7.2.3 Raimond Gaita}

Raimond Gaita, Professor of Philosophy at the Australian Catholic University and Professor of Moral Philosophy at King’s College London, has been another prominent voice on torture.

For Gaita, torture is ‘morally terrible through and through’ because it assaults the sacredness of persons.\textsuperscript{138} Gaita argues that the harm inflicted upon a victim of torture cannot be explained by mere reference to the severe physical or psychological harm. It is also about the evil done to the victim by denying their very humanity.

Gaita’s views are based on the belief that all people are precious. Torture is the radical denial of the dignity of human beings. It reduces human beings to ‘things’. Thus, torture should never be regarded as a ‘lesser evil’ that we must sometimes choose to prevent a greater evil.\textsuperscript{139} In a recent Australian Quarterly Essay, Gaita writes that there are two good reasons to condemn torture as an offence against human dignity:

\begin{quote}
\textit{The first is that unlike many, perhaps most, forms of violence against persons, torture can never be committed while according its victim the kind of respect that Kant rightly called unconditional ... In this respect, torture is different not only from other killings but even execution, as testimony from executioners and their victims amply proves. The second reason is that although the inalienable dignity that supposedly even torture can touch is a fiction, we should be more respectful of dignity that is essentially alienable. In the essentially secular, human world of politics, no one should be alienated from ordinary, alienable dignity that only a saint could see the full humanity in them.}\textsuperscript{140}
\end{quote}

\subsection{7.2.4 Henry Shue}

Henry Shue, Professor of Ethics and Public Life at Cornell University, argues that

\textsuperscript{(137)} See the media release on this matter from the Forum of Australian Services for Survivors of Torture and Trauma (of which VFST is a member) at http://www.fasstt.org.au/downloads/FASSTT_pr_may_05.do (access 30 October 2007).
\textsuperscript{(138)} Gaita, R ‘Thinking about torture’ Miegunyah Lecture University of Melbourne 16 August 2006.
\textsuperscript{(139)} Gaita, R above, n131.
although it is possible to imagine extraordinary situations in which it would be morally permissible to torture, they are so far removed from the ordinary situations which occur in the real world as not to provide a sound basis for public policy.\footnote{Shue, H ‘Responses to Sanford Levinson, the Debate on Torture: War Against Virtual States’ \textit{Dissent} Summer 2003, pp90-91. See also Shue, H ‘Torture’ \textit{Philosophy and Public Affairs} 7 (2) 1978, pp124-143.}

If torture were permitted, Shue suggests, civilised society would be in jeopardy.

In an article published in the American journal \textit{Dissent} (2003), he argues:

\textit{Torture falls beneath the minimal standards of civilization, and there are powerful reasons to protest any advance permission for such degrading action…Formal exceptions invite widespread abuse, especially where a judicial system is under the degree of intimidation inflicted by the Bush administration since 9/11…}

\textit{An initial reason why the United States should never engage in torture is precedent. We have no guarantee that a precedent of refraining from torture will be followed by others, but we can be sure that a precedent of engaging in torture will be followed….}

\textit{Justifications for torture thrive in fantasy. We imagine we have exactly the person we need…We imagine that the person we hold knows exactly what we need to know…We imagine that the person will reveal exactly what we need…We imagine that the information that will be revealed will be sufficient to prevent the terrible catastrophe…It is as easy to imagine the perfect torture as it is the perfect murder. The question is, what guidance do such imaginings provide for the real world in which things tend to go awry and to have unexpected consequences?...}

\textit{The ultimate reason not to inflict agony upon other human beings is that it is degrading to all involved: all become less human.\footnote{Shue, H ‘Responses to Sanford Levinson, the debate on torture: war against virtual states’ above, n144.}}

\textbf{7.2.5 Kim Scheppele}

Kim Scheppele, Laurance S. Rockefeller Professor of Public Affairs and the University Center for Human Values and Director of Law and Public Affairs at Princeton University, argues that the ‘ticking bomb’ is an unsound basis for deciding that torture should be permitted because it is clear that government officials have been using, and want to continue to use, coercion in a much wider range of circumstances. She believes that if torture for exceptional cases is
legitimised, it is more likely to be used and abused in the situations that actually occur commonly.

She writes:

The ‘war on terrorism’ …provides the present context within which decisions to torture, or to use highly coercive interrogation techniques, are being made. We have seen that there has been a persistent tendency on the part of the Bush Administration to use highly coercive interrogation techniques in situations that depart rather dramatically from what the hypothetical [‘ticking bomb’ scenario] suggests would generate approval for torture.

First, most of the permitted coercive interrogation techniques have been approved across the board for all detainees held by the military or the CIA, without requiring that they be reserved for situations that approximate the nuclear terrorist hypothetical … the highly coercive interrogation techniques that have already been used have not been limited to situations in which there is an imminent and momentous threat, or to situations in which the detainee is clearly known to possess information relevant to stopping an actual attack. Coercive interrogations have been used for general fishing expeditions and not for the sort of targeted interrogations imagined in the hypothetical. Finally, these highly coercive interrogation techniques do not seem to have produced information that has stopped any particular terrorist attack at an advanced stage. …

If these are the circumstances in which highly coercive interrogation techniques have already been used, then would it make sense to believe that the very people who designed and presided over the implementation of this policy ought to be allowed to extend it into even more questionable techniques? … The United States has, in fact, already been engaged in a large experiment to see what results torture produces and whether torture can be used in the narrowly tailored way suggested by the hypothetical. What careful observers can see from the results thus far, in an entirely unhypothetical way, is that this experiment has gone badly wrong.143

7.2.6 Michael Ignatieff

Michael Ignatieff, a Canadian author, academic and politician,\(^{(144)}\) argues for a total prohibition on torture on the grounds that, when committed by a state, it ‘expresses the state’s ultimate view that human beings are expendable’.\(^{(145)}\) He does, however, acknowledge that, in situations such as the ‘ticking bomb’ scenario, an ‘outright ban on torture and coercive interrogation [would] leave a conscientious security officer with little choice but to disobey the ban ... At trial, a defence of necessity could be entered in mitigation of sentence, but not to absolve or acquit.’\(^{(146)}\)

He writes:

> Legalisation of physical force in interrogation will hasten the process by which it becomes routine. The problem with torture is not just that it gets out of control, not just that it becomes lawless. It inflicts irremediable harm on both the torturer and the prisoner. It violates basic commitments to human dignity, and this is the core value that a war on terror, waged by a democratic state, should not sacrifice, even under threat of imminent attack...

> A further problem with physical torture is that it inflicts damage on those who perpetrate it as well as those who are forced to endure it. Any liberal democratic citizen who supports the torture of terrorist suspects in ticking-bomb cases must accept responsibility for the psychological damage done to victim and interrogator.

> Torture exposes agents of a democratic state to the ultimate moral hazard. The most plausible case for an absolute ban on physical torture relates precisely to this issue of moral hazard. No one should have to decide when torture is or is not justified, and no one should be ordered to carry it out. An absolute prohibition is legitimate because in practice it relieves public servants from the burden of making intolerable choices.

> For torture, when committed by a state, expresses the state’s ultimate view that human beings are expendable. This view is antithetical to the spirit of any constitutional society whose raison d’etre is the control of

\(^{(144)}\) Ignatieff is currently Deputy Leader of the Liberal Opposition in Canada (he was elected to Canadian parliament in 2006) and he is a former director of the Carr Centre for Human Rights and Policy at Harvard University.


violence and coercion in the name of human dignity and freedom.

The chief ethical challenge with relation to terrorism is relatively simple – to discharge duties to those who have violated their duties to us.

We have to do this because we are fighting a war whose essential prize is preserving the identity of liberal society itself and preventing it from becoming what terrorists believe it to be. Terrorists seek to strip off the mask of law to reveal the nihilist heart of coercion within, and we have to show ourselves and the populations whose loyalty we seek that the rule of law is not a mask but the true image of our nature.147

7.2.7 Paris Aristotle

Paris Aristotle, Director of the Victorian Foundation for Survivors of Torture, argues that torture is unacceptable under any circumstances. Based on his first-hand experiences of working with survivors of torture for nearly twenty years, he observes that torture has devastating effects on a person long after bodily wounds have healed.148 Given the deep, complex and long-term effects of torture – including the absolute subjugation of the human spirit – he believes it is not possible to discuss torture merely as a question of ‘legality’.

In a recent speech given at Monash University he argued:

I do not believe that the nature of this threat is so profoundly different to anything the world has seen before that we are forced to compromise our commitment to respect the fundamental human rights of every person, a commitment which includes the unqualified prohibition of torture. If we respond to the threat of terrorism by compromising that commitment in our treatment of those suspected of involvement and even those proven to be responsible, we will profoundly damage the entire framework of values that protects us all.149

Even if it were possible to speak of the legalisation of torture in some circumstances, Aristotle, like Scheppele, argues that it would be impossible to devise a set of rules for the controlled use of torture that would restrict its lawful use to the hypothetical ‘ticking bomb’ situation. It would be impossible to avoid the torture of innocent people or the acceptance of grotesque forms of abuse of power.150


(149) Ibid.

(150) Ibid.
8 Resources

A. Organisations

8.1 Intergovernmental

United Nations Committee Against Torture
http://www.ohchr.org/english/bodies/cat/index.htm

The Committee Against Torture (CAT) is the body of independent experts that monitors implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by its State parties.

UN Special Rapporteur on Torture

The United Nations Commission on Human Rights, in resolution 1985/33, decided to appoint an expert, a Special Rapporteur, to examine questions relevant to torture. The mandate of the Special Rapporteur covers all countries, irrespective of whether a State has ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

8.2 Regional

European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
www.cpt.coe.int

Article 3 of the European Convention on Human Rights provides that ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’. This article inspired the drafting, in 1987, of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The Convention provides non-judicial preventive machinery to protect detainees. It is based on a system of visits by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).

8.3 Non-governmental

Amnesty International
www.amnesty.org

Association for the Prevention of Torture
www.apt.ch
Human Rights Watch
www.hrw.org

International Rehabilitation Council for Torture Victims (IRCT)
www.irct.org

World Organisation Against Torture (OMCT)
www.omct.org

B. Selected publications not cited in text


Appendix: Main Elements of the Convention Against Torture

Article 1 – definition of torture
Torture is defined 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, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Article 2 – measures to be taken by States
This Article obliges each party to the CAT to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under their jurisdiction.

No exceptional circumstances whatsoever – not a state of war or a threat or war, internal political instability or any other public emergency – may be invoked as a justification of torture. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Article 3 – prohibiting ‘refoulement’
A party must not expel, return (‘refoul’) or extradite a person to a country where there are substantial grounds for believing that s/he would be in danger of being subjected to torture.

Article 4 – penalties
A party must prohibit all acts of torture and complicity in torture as criminal offences with appropriately severe penalties.

Article 5 – legal measures
A party must take the necessary legal measures to be able to prosecute crimes of torture:

- When the offences are committed in any territory under its jurisdiction
- When the alleged offender is a national of the country
- When the victim was a national of that country, if the party considers it appropriate.
A party must also take the legal measures necessary to be able to prosecute someone on its territory who is alleged to have committed torture in another country, if the party does not extradite them to be prosecuted in the country where they allegedly committed torture.

**Article 10 – community education**

A party must ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of anyone subjected to any form of arrest, detention or imprisonment.

**Article 11 – preventing torture**

A party must keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

**Article 12 – investigation mechanisms**

A party must ensure that the competent authorities promptly and impartially investigate wherever there is reasonable ground to believe that torture has been committed on its territory.

**Article 13 – complaints process**

A party must ensure that any person who alleges s/he has been subjected to torture on its territory has the right to complain to and to have her/his case promptly and impartially examined.

People who complain and witnesses must be protected against all ill-treatment or intimidation as a consequence of their complaint or any evidence given.

**Article 14 – redress mechanisms**

A party must ensure that victims of torture can obtain redress and have the enforceable right to fair compensation including the means for as full rehabilitation as possible.

**Article 15 – use in evidence**

Any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings.
Article 16 – cruel, inhuman or degrading treatment or punishment

A party must take steps to prevent within its territory acts of cruel, inhuman or degrading treatment or punishment which does not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

Article 17 – Committee Against Torture

A Committee Against Torture will be established, consisting of 10 experts with recognised competence in the field of human rights, to monitor states’ compliance with the CAT.

Article 19 – regular reports

A party must submit to the Committee regular reports on the measures it has taken to give effect to its undertakings under the CAT.
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