



Yuval Ginbar

Why not Torture Terrorists? Moral, Practical, and Legal Aspects of the 'Ticking Bomb' Justification for Torture

New York: Oxford University Press, 2008, ISBN 978-0-19-954091-4, 414 pp., £ 75.00 (hb.)

After the atrocities of World War II the International community achieved the immense development in the protection of Fundamental Freedoms and Rights of Man which we today call Human Rights Law. The prohibition of torture is guaranteed by all Global and Regional Human Rights Instruments. Furthermore, the prohibition of torture and ill-treatment is absolute and has even non-derogable status in human rights law. The states can not set aside or restrict this obligation, in any circumstances, even in times of war or other emergency threatening the life of the nation. According to the International Law there is no justification for torture in any circumstances, against any individual, by any authority, anywhere in the world. However, because of the widespread terrorist activities, particularly after the 11 September 2001 events some state agents and academics reopened the question of torturing in 'ticking bomb situation (TBS)' to extract information about the 'ticking bomb' and save the lives of many other civilians. This has resulted in a lively debate in political and academic circles.

This timely book by Yuval Ginbar who works as a Legal Advisor to Amnesty International and senior Advisor to Public Committee against Torture in Israel is an attempt to answer the question: Should twenty-first century democratic states facing terrorism use torture in the interrogation of terrorist suspects, at least in extreme, 'ticking bomb situations'? And strongly argues and the gives the answer NO.

The book consists of five parts. The first two parts look at moral-philosophical arguments both from the stand point of individual who is expected to conduct the act of torture, the torturer, and from the standpoint of the State once it has decided to sanction the act of torture, arguing that it creates a dilemma for both. The author calls these as private and public morality issues. In this section the arguments of those who legitimise the torture in TBS is extensively given with counter arguments. According to the consequentialists the outcome of not torturing the terrorist would be horrendous, involving so much human suffering, death, mutilation, loss of loved ones; therefore it must override the reasons, important as they may be for the agent not to cause pain and suffering the one single person. Minimal absolutists on the other hand are of the view that certain acts must be prohibited absolutely, namely that they must never be performed, whatever the consequences. It is convincingly argued that the introduction of torture even in 'ticking bomb situation' could shake the very foundations of the democratic state. Because, once torture in a TBS is allowed, decisions on whom to torture, when to start torturing, how to torture, how much torture and when to stop torturing all will lead the 'slippery slope' danger. In the authors words in a state confronting terrorism, where torture is a legitimate option, erring on the side of caution, which for officials is most likely to be public security or saving lives, may mean deciding to torture even where those uncertainties are many and substantial, resulting



in torture in situations which are less than TBS, or non-TBS, and the torture of the less knowledgeable, the less involved and even the totally innocent.

Part III looks at the question of where states believe it justified, could a model of legalized torture be constructed so as to allow agents of democratic states facing terrorism to torture terrorist suspects in 'ticking bomb situations, while avoiding the 'slippery slope' and other dangers. Three models of legalized torture: Landau, Torture Warrants and Defence of Necessity models from Israel and USA's model of 'quasi-legalised torture' in the interrogation of detainees, applied mostly to 'high value detainees' in the war on terror are examined in this part. The Landau model seeks to limit torture to cases of 'necessity' and more narrowly to TBS. The other three models try to limit the torture to extreme circumstances only. The 'torture warrants' model proposes the legalisation of torture, however it seeks to limit it to TBSs by granting judges the power to issue warrants without which torture cannot be carried out on the other hand. In the Defence of Necessity model the availability of defence is restricted explicitly to TBS only and availability of defence is limited to individuals and applies ex post facto only. The quasi-legal model used by the USA in the war on terror in the interrogation of High Valued Detainee model is legally less clear, conceptually less coherent, and practically less consistent model. In conclusion it is argued that neither Israel nor the USA have succeeded in limiting torture to TBSs or to High Valued Detainees in spite of the fact that they both have refined their models in an effort to do so. Furthermore, there is no any sing that the models thereby put an end to such attacks. Both states could not give an answer to claim that torture has done more harm than good including in terms of human lives, which cannot be easily refuted.

In part IV, the author looks at three legal issues regarding the torture legalising models discussed in part III. The denial of both Israel and USA that methods of interrogation that they have used constitute torture and even unlawful under International Law, the issue of Israel's claim that criminal Law 'defence of necessity' provides legal basis for two Israeli models of legalising torture and the applicability of defence of necessity and other 'private' criminal law defences and similar mechanisms to the reality of states facing terrorism is examined in this part. In conclusion, the author strongly argues that an examination of the relevant International Law principles, rules and jurisprudence refute the Israel and USA's claim that the methods they have used do not amount to torture under international law or even cruel, inhuman and degrading treatment. Not only torture, but all coercive interrogation methods are unlawful at all times under international law, in addition no international instrument provides 'opt out' clauses for extraordinary circumstances such as TBS. States never can, under international law, torture, ill-treat detainees and never may exempt perpetrators of such acts from prosecution or punishment by justifying an individual act in case of a TBS.

According to Dr Ginbar, in view of current state of international law and the realities of the 'war on terror' democratic states facing terrorism have only two real or at least two honest options:

1. Openly legalising torture providing torture to be carried out professionally by trained, authorised officials acting under legally-issued orders. The author rightly



and strongly argues however that this would necessitates earth shattering changes to domestic law, constitutional provisions, furthermore international human rights law, international humanitarian law, international criminal law even upsetting customary and *jus cogens* norms.

2. Never torture detainees, not even terrorists, not even in a TBS. The author's powerfully written book persuasively shed light to us to support the second option.

In his simple conclusion and recommendation as to what the modern democratic world should do in a 'ticking bomb situation' the author say that when we hold a knowledgeable prisoner who will not talk, and innocent lives would be at risk they- we- must do anything humanly possible to save the lives at risk, in other words, doing everything in our power that does not involve losing our own humanity. Simply, this means never to torture or ill-treat another human being, whatever the circumstances.

As a Human Rights activist and academician alike in the Human Rights Law, Dr Yuval Ginbar's book taking into account and examining the utilitarian arguments for torture, looking deeply into the impact on society of permitting torture presents a powerful support for maintaining the absolute prohibition of torture in any situation. It provides in-depth analysis of torture as a moral issue and a coherent, passionate defence of the absolute prohibition. Providing a thoroughly researched examination of current state practice in terrorist interrogation, including the US and Israeli models of coercive interrogation the book is a very good analysis of the legal framework prohibiting torture and the attempts to circumvent the prohibition.

As a Human Rights academician I was sometimes doubted whether absolute prohibition of torture should be eased in 'ticking bomb situations' where many civilian lives could have been on risk, Dr Ginbar's book put my doubts to rest. Although it could have been more fluent this book is a very good read for human rights activists, lawyers, judges, political theorists, media agents and political practitioners.

Dr. Murat TUMAY

Honorary Research Fellow

School of Law

University of Glasgow