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DEFUSING THE TICKING BOMB: AN ARGUMENT FOR THE ABSOLUTE LEGAL BAN ON TORTURE

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Exercise Solo Flight

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EXERCISE *SOLO FLIGHT* – EXERCICE *SOLO FLIGHT*

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INTRODUCTION

We consent to being criminals so that at least the innocent, and only they, will inherit the earth.

– Albert Camus, *The Just Assassin*

Few deeds are as degrading to human dignity as torture. This belief is internationally recognized through the overwhelming support of treaties such as the United Nations Convention Against Torture and the International Covenant on Civil and Political Rights.¹ Not only is torture prohibited as a matter of customary international law, it is so intolerable that it falls within the norms of *jus cogens* as well.² But laws are not always right. History is replete with bad laws that at one time seemed reasonable, such as the legalization of slavery or denying women the right to vote.³ Laws must be reviewed periodically to ensure they meet the needs of the times and society, and the laws prohibiting torture are no exception.

The post 9/11 War on Terror has given cause to consider whether an absolute ban on torture is applicable in an era where a nuclear device in the hands of a terrorist can have such devastating consequences. Consider the ticking bomb scenario. Introduced by Jean Larteguy in his 1960 novel *Les Centurions*, the ticking bomb is a concept in which an individual has secretly

¹ Craig Forcece, “The Myth of the Virtuous Torturer: Two Defences of the Absolute Ban on Torture,” *Osgoode Hall Law Journal* 46, no. 4 (2008): 858.

² Kate Kovarovic, “Our Jack Bauer Culture: Eliminating the Ticking Time Bomb Exception to Torture,” *Florida Journal of International Law* 22, no. 2 (August 2010): 265.

³ Fritz Allhoff, “Torture Warrants, Self-Defense, and Necessity,” *Public Affairs Quarterly* 25, no. 3 (July 2011): 249.

placed a time bomb in a crowded area that will result in an imminent disaster unless the bomber can be compelled to disclose the bomb's location.⁴ This scenario is not difficult to imagine within the contemporary security environment. While this situation does not automatically justify the use of torture, only the most dogmatic absolutists would deny that there is an extreme case in which committing torture may cause less harm than allowing the device to explode (for example if it would prevent a nuclear world war). This essay will not debate whether torture is morally correct, but it will presume that while still abhorrent, torture could nonetheless be the lesser of two evils in an extreme ticking bomb scenario.

If torture can be a lesser evil than the consequences of not torturing, should the law accommodate this? Is there a legal mechanism that could allow for torture to be authorized in only the most extreme circumstances while at the same time deterring it from occurring in any other situation? This essay will show that the two cannot be reconciled, and that torture must be absolutely prohibited.

To prove this, this essay will examine five options that would afford states the ability to legally exonerate a *justified* torturer. It will begin by considering three models of *ex ante* legalization requiring the reworking of existing legal frameworks. The second section will investigate two defences that could allow for the justification of torture *ex post facto*. The essay

⁴ Kate Kovarovic, *Our Jack Bauer Culture...*, 254.

will conclude by suggesting that there is in fact no effective way to provide legal recourse to a *virtuous* torturer, and that torture could only be carried out as an act of civil disobedience.

SECTION 1: *EX ANTE* LEGALIZATION OF TORTURE

The first of two broad categories of state authorized torture is *ex ante* legalization. In this approach, torture would be prohibited unless it satisfied certain pre-arranged guidelines.⁵ In a world where torture exists despite its international prohibition, there are two reasons to consider *ex ante* legalization. First, by regulating torture, and more specifically legalizing it under controlled conditions, the overall instances and severity of torture may be reduced. Secondly, it would allow torture to legally take place in an extreme ticking bomb scenario. There are three methods of *ex ante*-legalized torture that will be considered in this section. They are: the Defence of Necessity model, which has been attempted in Israel⁶; the Torture Warrant model, a version of which was attempted in sixteenth century England;⁷ and finally the Hypocrisy model, which was employed by the United States during their War on Terror.⁸ All three models were conceived with the intent of restricting the use of torture to instances of perceived necessity such as ticking

⁵ Fritz Allhoff, *Torture Warrants, Self-Defense, and Necessity*, 248.

⁶ Yuval Ginbar, *Why Not Torture Terrorists?: Moral, Practical, and Legal Aspects of the "Ticking Bomb" Justification for Torture* (New York: Oxford University Press, 2008), 173.

⁷ John H. Langbein, "The Legal History of Torture," in *Torture: A Collection*, ed. Sanford Levinson (New York: Oxford University Press, 2004), 259.

⁸ Yuval Ginbar, *Why Not Torture Terrorists...*, 170.

bomb scenarios, but none were able to achieve the intended result. The following section will examine these three models in detail.

The first model to be examined is the *ex ante* application of the *defence of necessity*. It hinges on the concept that states can legally institutionalize a blanket necessity defence in anticipation of ticking bomb scenarios. This model was instituted in Israel between 1987 and 1999 as the outcome of the Landau Commission. Named after the retired Israeli Supreme Court President Moshe Landau, the Commission was mandated to investigate and make recommendations regarding the interrogation of *hostile terrorists*.⁹ The Commission discovered that violence was often being applied during the conduct of interrogations, and that interrogators were routinely giving false testimonies regarding the means that they employed.¹⁰ While the Commission viewed the false testimonies to be thoroughly concerning, they agreed that force should occasionally be authorized to enhance the effectiveness of interrogations.¹¹ Interestingly, this model arose from a utilitarian view of torture, and an absolutist view regarding the lesser crime of perjury. To the Landau Commission, torture could be accepted as a lesser evil in some instances, but perjury could never be tolerated.

⁹ State of Israel, *Commission of Inquiry in the Matter of Interrogation Methods of the General Security Service Regarding Hostile Terrorist Activity* (Jerusalem, 1987), 1.

http://www.hamoked.org/files/2012/115020_eng.pdf.

¹⁰ State of Israel, *Commission of Inquiry in the Matter of Interrogation Methods...*, 8.

¹¹ *Ibid.*, 85.

Under the Landau model, the Israel Security Agency was authorized to use “non-violent psychological pressure of an intense and prolonged interrogation... with a moderate measure of physical pressure.”¹² The techniques permitted were articulated in a secret annex, and included shaking, sensory isolation, the application of pain, use of heat and cold, and sleep deprivation among others.¹³ The model stated that the measures should not reach physical torture, but conceded that torture would “perhaps be justified in order to uncover a bomb about to explode in a building full of people.”¹⁴

Twelve years of data collected during the execution of this model indicate that it is not a legitimate means of reducing acts of torture to even the most mundane of ticking bomb scenarios. Instead of limiting the instances of torture, it seemingly provided a carte blanche to state agents. The human rights group B’Tselem reported that at least 850 Palestinian detainees were being tortured annually in the late 1990s. This was out of a total of 1,000 to 1,050 interrogations taking place each year, which equates to torture being used approximately 85% of the time.¹⁵ The attempt to control torture resulted in its industrial scale application. Moreover, during this entire period, only one member of the Israel Security Agency was charged with

¹² Yuval Ginbar, *Why Not Torture Terrorists...*, 176.

¹³ *Ibid.*, 180-181.

¹⁴ State of Israel, *Commission of Inquiry in the Matter of Interrogation Methods...*, 60.

¹⁵ B’Tselem, “Background of the High Court of Justice’s Decision,” accessed 21 April 2017.

excessive use of force.¹⁶ These statistics indicate that by legalizing systematic torture *ex ante*, the Landau model was unable to protect victims from excessive torture.

A second model of *ex ante* authorization of torture is the Torture Warrants model. The Torture Warrants model in its contemporary form was conceived by legal theorist and civil rights activist Alan Dershowitz. Following extensive research in Israel in the 1980s, Dershowitz came to the conclusion that states are realistically likely to engage in torture in a ticking bomb scenario, or even a lesser scenario in which the state believed that the lives of its citizens could be protected by torturing a guilty party. This belief was reinforced when reports of abuses surfaced in Guantanamo Bay and Abu Ghraib following the 9/11 terrorist attacks.¹⁷

While Dershowitz personally objected to torture and believed that it should be minimized, he knew through his empirical observations that states would nonetheless employ torture as a tool within certain situations. Given this perceived reality, he suggested that it would be “*normatively* better... to have such torture regulated by some kind of warrant, with accountability, record-keeping, standards, and limitations.”¹⁸ He believed that by regulating torture, civil liberties would in fact be maximized and states would not have to commit illegal

¹⁶ Yuval Ginbar, *Why Not Torture Terrorists...*, 183.

¹⁷ Alan M. Dershowitz, “Tortured Reasoning,” in *Torture: A Collection*, ed. Sanford Levinson (New York: Oxford University Press, 2004), 259.

¹⁸ Alan M. Dershowitz, “The Torture Warrant: A Response to Professor Strauss,” *New York Law School Law Review* 48, no. 1 (2003): 277.

actions. In his Torture Warrants model, state agents would approach judges for torture warrants much the same as they do for search warrants. Through this system of controls, torture would stop happening “below the radar screen of accountability.”¹⁹

Dershowitz’s concept of torture warrants was not entirely original. A variation of this model was employed in England in the sixteenth and seventeenth centuries. In the Tudor-Stuart era, the Privy Council issued warrants authorizing at least 81 recorded acts of torture to investigate crimes such as treason.²⁰ In France, torture was also being conducted during this period, but instead of issuing legal warrants, it was being conducted haphazardly by local officials. Records from this period indicate that the number of acts of unregulated torture practiced in France exceeded the number of acts of regulated torture in England over the same timeframe.²¹ While some, such as legal historian John Langbein, may argue that this is evidence of the merits of torture warrants to curb the use of torture, in reality, the two cannot be compared so easily. First, records from this era are unreliable, and many undocumented acts of torture may have taken place in England. Second, the burden of proof required in England at the time was

¹⁹ Alan M. Dershowitz, *The Torture Warrant...*, 278.

²⁰ John H. Langbein, *The Legal History of Torture...*, 259.

²¹ John H. Langbein, *Torture and the Law of Proof: England and Europe in the Ancien Regime* (Chicago: University of Chicago Press, 1977), 136-137.

considerable less than that in France, thereby reducing the motivation to compel confessions through the use of torture.²²

While logically compelling, there are several issues with the concept of torture warrants. Dershowitz suggests that the excuse “we had to do what we did to get the information” would no longer be valid since there would be a legal avenue to verify the validity of the situation.²³ While this may be true in theory, in reality this excuse could still be given when the torturer believes that there is no time to secure a warrant. Even if a warrant was requested and refused, the torture may still occur for the same reasoning, with the caveat that “the judge didn’t realize the seriousness of the situation.”

Dershowitz also suggests that a judge’s consideration of a warrant request would provide a ‘double check’. He argues that this double check could not possibly increase the instances of torture, only reduce them.²⁴ In reality, where field officers would once air on the side of caution, they may now be inclined to submit a request in any possible situation. Since the decision is no longer theirs, they would have nothing to lose by requesting a judge’s consideration. Frivolous

²² John H. Langbein, *Torture and the Law of Proof...*, 139.

²³ Alan M. Dershowitz, *Tortured Reasoning*, 276.

²⁴ Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven: Yale University Press, 2002), 158.

requests could become common, thereby increasing the chances of unjustified cases being authorized.

Lastly, if this cumbersome judicial function were to be created, it is questionable whether or not the judiciaries would have the appropriate expertise to adjudicate on matters such as justified versus unjustified torture. Such extreme cases of life-threatening crises would be difficult to rule upon, and the judges in question may not have the understanding of the security environment required to make an appropriate rulings. Moreover, if a judiciary did allow the torture to proceed, their authorization of an abuse of human rights would irreparably taint the integrity of the courts.

The third and possibly the least coherent model of *ex ante* legalization is what shall be referred to as the Hypocrisy model. This model was employed by the United States Government following the 9/11 terrorist attacks.²⁵ During the US War on Terror, many detainees were taken and presumed to possess information that could prevent further terrorist attacks. Designated as ‘high value detainees’, senior officials believed that coercive interrogation methods were required to collect intelligence from them and save lives.²⁶

²⁵ Yuval Ginbar, *Why Not Torture Terrorists...*, 170.

²⁶ William J. Haynes, *Counter-Resistance Techniques Action Memorandum for the Secretary of Defense* (Washington: General Counsel of the Department of Defence: 27 November 2002).

The Hypocrisy model centered on the manipulation and distorted interpretation of existing international laws to rationalize the use of torture rebranded as *enhanced interrogation techniques*. This allowed the US to commit torture while denying that it was doing so, hence the name *Hypocrisy*. Its legal basis in the US was formed through a series of memoranda drafted by the Department of Justice's Office of Legal Council (OLC) in 2002, and culminated in the authorization of enhanced interrogation techniques by Secretary of Defense Rumsfeld in November of 2002.²⁷ The crux of the OLC's justification for the use of torture was based on two notions. The first was the belief that al Qaeda members were not protected under the Geneva Conventions. This argument was substantiated by the fact that al Qaeda was a non-state actor who hadn't signed the Geneva Conventions, and that al Qaeda fighters were illegal combatants.²⁸ The second notion justifying torture was that the UN Convention Against Torture could be interpreted in an extremely narrow manner, such that only the most brutal forms of physical and mental abuse would be considered torture.²⁹ In the words of the Assistant Attorney General at the time, Jay S. Bybee, "physical pain amounting to torture must be of an intensity

²⁷ William J. Haynes, *Counter-Resistance Techniques Action Memorandum*.

²⁸ John C. Yoo, *Memorandum for Alberto R. Gonzales* (Washington: US Department of Justice Office of Legal Counsel: 1 August 2002), 5.

²⁹ Jay S. Bybee, *Memorandum for Alberto R. Gonzales – Re: Standards of Conduct for Interrogations under 18 U.S.C. § 2340-2340A* (Washington: US Department of Justice Office of Legal Counsel: 1 August 2002), 1.

akin to that which accompanies serious physical injury such as death or organ failure.”³⁰

Furthermore, severe mental pain was interpreted as requiring “suffering not just at the moment of infliction, but it also requires lasting psychological harm, such as seen in mental disorders like posttraumatic stress disorder.”³¹ Through these favourable and distorted interpretations of international law, the US believed that they were morally and legally justified to use such techniques as environmental manipulation, stress positions, sleep deprivation, and the use of fear tactics.³²

The aforementioned measures designed to permit the use of torture in extreme cases led to the institutionalization of torture. The enhanced techniques that were authorized by Secretary of Defense Rumsfeld specifically for Guantanamo Bay ultimately migrated to other countries such as Afghanistan and Iraq.³³ Along with migrating, they were augmented at Abu Ghraib prison to include acts of humiliation and sadism.³⁴ Between Guantanamo Bay and Abu Ghraib, hundreds of detainees were subjected to torture.³⁵ Far from limiting instances of torture to bona

³⁰ Jay S. Bybee, *Memorandum for Alberto R. Gonzales...*, 46.

³¹ *Ibid.*

³² William J. Haynes, *Counter-Resistance Techniques Action Memorandum*.

³³ Independent Panel to Review DoD Detention Operations, *Final Report of the Independent Panel To Review DoD Detention Operations* (Arlington, Va: Independent Panel to Review DoD Detention Operations, August 2004), 14.

³⁴ *Ibid.*, 5.

³⁵ Yuval Ginbar, *Why Not Torture Terrorists...*, 265.

vide ticking bomb scenarios, the limited authorization of torture led to its regular practice and the commitment of unsanctioned atrocities.

The United States' underhanded methods to justify the use of torture had strategically negative consequences as well. In their inquiry into the treatment of detainees in US custody, the Committee on Armed Services stated that "the fact that America is seen in a negative light by so many complicates our ability to attract allies to our side, strengthens the hand of our enemies, and reduces our ability to collect intelligence that can save lives."³⁶ This comment was made in direct relation to the way in which detainees were treated in Guantanamo Bay and Abu Ghraib. Another negative second order effect of American condoned torture is the potential unintended message that it sends to the rest of the world. If a superpower with substantial military resources such as the US must resort to torture to protect its security, then weaker nations can hardly be expected to act any differently. On the contrary, they should be expected to use torture significantly more to compensate for a lack of military power.

Despite their good intentions, neither the Defence of Necessity model nor the Hypocrisy model adequately controlled the use of torture. Additionally, while the historical example provides inconclusive evidence, the Torture Warrants model can be presumed to produce similar

³⁶ Committee on Armed Services, *Inquiry Into The Treatment of Detainees in U.S. Custody* (United States: Committee on Armed Services United States Senate, 2008), xxv.

results. Moreover, all three models (and any other model of *ex ante* legalization that could be conceived) feature a common and critical quandary; there is no guarantee that the information being sought will be provided. There is therefore the inherent risk that an evil will be committed for no benefit at all. Not every suspect is guilty, and even if they are, they may be willing to die for their cause, or even worse, plant false information that could lead to more devastating outcomes.

Lastly, both the Landau and the US hypocrisy models attempted to legalize specific methods to be used in specific instances. These small allowances for torture turned into a slippery slope when torture became a standard practice in Israel, and migrated to unintended audiences in the US example. Once laws are changed to allow torture in certain circumstances, the outer limits will undoubtedly be explored. In the words of the United States Court of Appeals judge and scholar Doctor Richard Posner, “having been regularized, the practice will become regular.”³⁷ *Ex ante* authorization paves the way for unjustified torture, and undermines any moral standing that a state may endeavour to gain by attempting to regulate torture.

³⁷ Richard A. Posner, “The Best Offense (Why Terrorism Works: Understanding the Threat, Responding to the Challenge),” *Free Republic*, last modified 2 September 2002, <http://www.freerepublic.com/focus/news/741962/posts>.

SECTION 2: *EX POST FACTO* LEGAL JUSTIFICATION OF TORTURE

It has been illustrated that any attempt to amend or manipulate the law to permit torture in specific circumstances is likely to create a slippery slope both in theory and in practice, and will contribute to increased instances of torture instead of a desired decrease. There is, however, another avenue to allow a state agent to commit torture without necessarily being convicted of an offence. This is through the *ex post facto* legal justification of torture. Through *ex post facto* justification, a state can maintain an absolute ban on torture, but if torture is committed in a ticking bomb scenario, there is scope for the offender to be excused. In this way, the state can legally justify the act of torture without legalizing torture and thereby compromising their integrity. In other words, states can have their cake and eat it too. The additional benefit of recognizing *ex post facto* defences is that they account for the fact that instance of ‘justified’ torture should be so rare that these extreme exceptions should not be built into official policies and laws. If the adage that ‘hard cases make bad law’ is true, then this allows states to avoid making bad laws while still providing a legal out.³⁸

There are two general avenues for *ex post facto* exoneration of torture: the defence of *self-defence* and the defence of *necessity*.³⁹ These are two defences that can theoretically be used

³⁸ The Phrase Finder, “The Meaning and Origin of the Expression: Hard Cases Make Bad Law,” accessed 7 May 2017. <http://www.phrases.org.uk/meanings/hard-cases-make-bad-law.html>.

³⁹ Craig Forcese, *The Myth of the Virtuous Torturer...*, 867.

by someone who has been convicted of torture in a system that prohibits torture. While similar, there are sufficient nuances to categorize them separately. The acceptance of torture as self-defence has not been systemically practiced by a state, however, the acceptance of torture as a matter of necessity *ex post facto* has been recognized. This was the case in Israel once the Landau model ceased to be in effect.⁴⁰ The following section will examine each *ex post facto* defence in detail.

While legal definitions vary from nation to nation, self-defence is commonly understood as the use of “reasonable force to protect oneself... from bodily harm from the attack of an aggressor.”⁴¹ The two general elements of self-defence are therefore: a victim who defends him or herself, and an aggressor who poses a threat. While this notion is widely accepted as justified at the individual level, it becomes significantly less clear at the state level.

The fact that the torturer is not in any danger in the ticking bomb scenario seems to immediately discredit this defence. To overcome this problem, the US Assistant Attorney General Jay Bybee suggested that torture was an example of collective self-defence, since the aggressor’s actions threaten the entire state, of which the torturer is a member.⁴² To argue that

⁴⁰ Yuval Ginbar, *Why Not Torture Terrorists...*, 201.

⁴¹ Law.Com, “Definition of Self-defence,” accessed 23 April 2017.
<http://dictionary.law.com/Default.aspx?selected=1909>.

⁴² Jay S. Bybee, *Memorandum for Alberto R. Gonzales...*, 45.

the aggressor is threatening the entire state seems to be a stretch; the aggressor may threaten the intended victims of the ticking bomb, but they are not threatening the entire state. Since the torturer is not the direct object of the aggressor's actions, this cannot be self-defence in the purest understanding of the term. Although collective self-defence does not apply, the concept of self-defence can be interpreted to include the *defence of others* to account for this.⁴³ By torturing an aggressor the torturer is defending others, which could be considered part of a broader definition of self-defence.

The second element of self-defence (an aggressor who poses a threat) is more difficult to satisfy. A suspect who is defenceless and in custody hardly represents a threat. They may be complicit in a threat, but they are not currently a threat. The ticking bomb is the threat. Violence imposed on a detainee who is unable to cause harm cannot be described as self-defence.

Another possible *ex post facto* legal justification for torture is the defence of necessity. Necessity is a defence that in essence "permits a person to act in a criminal manner when an emergency situation, not of the person's own creation compels the person to act in a criminal manner to avoid greater harm from occurring."⁴⁴ While the legal specifics of this defence may

⁴³ Justia, "Self-Defense and Defence of Others," accessed 4 May 2017.
<https://www.justia.com/criminal/defenses/self-defense/>

⁴⁴ National Paralegal, "Definition of Necessity and Duress," accessed 23 April 2017.
[https://nationalparalegal.edu/public_documents/courseware_asp_files/criminalLaw/defenses/NecessityandDuress.as](https://nationalparalegal.edu/public_documents/courseware_asp_files/criminalLaw/defenses/NecessityandDuress.asp)
p.

vary, the general principles often include: circumstances of immediate and inevitable peril, the lack of a reasonable alternative, and not contributing to greater harm.⁴⁵ A defence of necessity was successfully employed in Nova Scotia in 2013 when an individual drove his vehicle to a hospital while intoxicated in order to save his severely wounded friend. The judge determined that the driver legitimately believed that his friend's life was in danger, and that he had no reasonable alternative to seek medical attention.⁴⁶

When applied to state security and torture, interrogators who find themselves in a ticking bomb scenario would make the spontaneous and illegal decision to torture the suspect, and claim the defence of necessity after the fact. This defence has been made available to justify torture in Israel. In 1999, the Israeli High Court of Justice ruled that the Landau model was illegal, and that the necessity defence could not be applied as a blanket policy *ex ante*. The court did, however, rule that the defence of necessity could be used by members of the Israel Security Agency *ex post facto*. This defence was to be available only in ticking bomb scenarios where the actions of the torturer prevented a greater evil.⁴⁷ Once again, while this model may have been created with good intentions, it ultimately collapsed when placed under the pressure of real threats to security.

⁴⁵ Kate Kovarovic, *Our Jack Bauer Culture...*, 273.

⁴⁶ Adler, Bytensky, Prutschi, Shikhman Criminal Litigation, "Successful 'Defense of Necessity' Case," accessed 25 April 2017. <http://crimlawcanada.com/prutschi/successful-defense-of-necessity-case/>.

⁴⁷ Yuval Ginbar, *Why Not Torture Terrorists...*, 201.

The second Intifada began shortly after the *ex post facto* defence of necessity model was adopted in Israel. With the Intifada came a renewed sense of fear in Israel. Interrogations of Palestinians increased, and violence towards detainees once again became a normal feature.⁴⁸ The Public Committee Against Torture in Israel reported hundreds of claims of torture between 2000 and 2005.⁴⁹ In every instance of torture being reported and charges being laid, the Attorney General ruled that the defence of necessity applied. Not a single torturer was convicted.⁵⁰ While the introduction of this new model may have caused the first interrogator who committed torture to pause and consider whether his or her actions were necessary enough to risk imprisonment, once the pattern was set the deterrent aspect of this system was undermined. The 100% acceptance of the defence of necessity *ex post facto* meant that torture was essentially re-institutionalized. In the words of Amnesty International legal advisor Yuval Ginbar, “the uncertain prospect becomes a tried, tested and predictable procedure, and *ex-post facto* ratification becomes an *ex ante, carte blanche, go-ahead.*”⁵¹

⁴⁸ Yuval Ginbar, *Why Not Torture Terrorists...*, 264.

⁴⁹ Public Committee Against Torture in Israel, *Violence against Palestinian Women: A report submitted to the Committee on the Elimination of Discrimination against Women* (Jerusalem: July 2005), 12.
<http://www2.ohchr.org/english/bodies/cerd/docs/ngos/OMCT.pdf>.

⁵⁰ Yuval Ginbar, *Why Not Torture Terrorists...*, 264.

⁵¹ *Ibid.*, 345.

In addition to the practical problems experienced in Israel, there are several conceptual flaws with allowing the *ex post facto* defence of necessity to justify torture. If it is accepted that the act of necessity: must only be performed to prevent an inevitable peril; must not cause greater harm; and must be the only available alternative, then the agent committing the act would have to have an excellent understanding of the harm that he or she is trying to avoid as well as the alternatives. But the very nature of interrogational torture implies that the torturer has an imperfect understanding of the situation. The torturer may *suspect* that there is an inevitable peril to be avoided, they may *suspect* that this peril is more harmful than torture, and they may *suspect* that there are no other alternatives, but it is extremely unlikely that they could know this for certain. Furthermore, the torturer would have to be quite certain that the act of torture would resolve the greater evil. Once again, it is impossible for the torturer to know this. The victim may refuse to provide the required information, or may not even have the required information, in which case the act of torture significantly contributes to the overall harm of the situation.

While both the defences of self-defence and necessity have their inherent shortcomings, advocates of these measures may suggest that the advantage they have over *ex ante* legalization is that they provide a case-by-case basis for considering the merits of each instance of torture after the fact.⁵² Since states would not be authorizing torture prior to the act, they would never

⁵² Fritz Allhoff, *Torture Warrants, Self-Defense, and Necessity*, 320.

have to put themselves in a position where they are condoning a potentially ‘unjustified’ instance of torture. While this may be true, multiple rulings would begin to establish a pattern for the limits in which torture would be accepted. This body of precedence would then become the guidelines for would-be torturers to follow. The state would essentially be describing the conditions in which it will tolerate torture, which ultimately returns to a situation that is similar to the Landau model where torture is allowed in specified circumstance. Another issue inherent to *ex post facto* justification is that it means that torture will only be conducted by amateurs.⁵³ If torture can only be justified by a defence *ex post facto*, then there are no grounds to have any permanent measure in place to facilitate the practice or torture such as established methods, facilities, and trained personnel. But if either the defence of self defence, or the defence of necessity were to be permitted, then the state would therefore believe that torture is justified in some instances. This poses an interesting contradiction. A state that believes that torture is at times justified should want its torture conducted by professionals, but a state that only allows for *ex post facto* justification will have its torture conducted by amateurs.

While the *ex post facto* legal justification of torture may at first impression appear to resolve many of the issues associated with the models of legalized torture listed in the previous section, a more thorough analysis reveals that their employment will not serve to minimize the

⁵³ Yuval Ginbar, *Why Not Torture Terrorists...*, 340.

use of torture to a justified ticking bomb scenario either in theory or in practice. History has shown that the patterns set by *ex post facto* justification will ultimately evolve into implied *ex ante* approval. Furthermore, allowing torture to be used as a matter of self-defence or necessity erodes the deterrent effect that the prohibition of torture intends to create in the first place.

SECTION 3: THE VIRTUOUS TORTURER

The previous two sections have illustrated that neither *ex ante* nor *ex post facto* measures allowing the use of torture would adequately restrict torture to a rare and bona fide ticking bomb scenario. *Ex ante* legalization would undoubtedly be a slippery slope, resulting in torture becoming a regular occurrence. Alternatively, making *ex post facto* defences available to torturers would eventually undermine the deterrent effect of a legal ban. Ultimately, any legalization risks leading to institutionalized practice. By creating a loophole for the *virtuous* torturer, one creates a bureaucracy of regularized torture.

In the words of international relations expert Henry Shue, “one can imagine rare torture, but one cannot institutionalize rare torture”.⁵⁴ Attempts to do so have failed, demonstrating that an absolute legal ban is the only way to effectively restrict the use of torture. But such a ban does

⁵⁴ Henry Shue, “Torture in Dreamland: Disposing of the Ticking Bomb,” *Case Western Reserve Journal of International Law* 37, no. 2 (2006): 238.

not explicitly address the extremely rare instance in which torture in a ticking bomb scenario is justified. If a virtuous torturer could exist, but no legal apparatus was available for a state to allow him or her to commit torture without being punished, how could the state legitimately employ torture to prevent an atrocity in an extremely rare but justified ticking bomb scenario?

The answer is that it cannot. That is the price of having convictions.

This does not mean that a ticking bomb could never be stopped. The law presents consequences to choices, but it cannot make choices. Even with clear laws, a state official alone with a suspected terrorist must decide if he or she will choose to abide by them. Civil disobedience is an option that humans can choose. A state official can make the personal choice to torture a suspect fully knowing the legal consequences. The understanding that they will be punished functions as a deterrent, and the slippery slope is avoided. Furthermore, this increases the likelihood that all legal options, such as offering the detainee immunity and plea-bargaining, will be exhausted prior to resorting to torture.

Oren Gross contends that such “legal rigidity in the face of severe crises is not merely hypocritical but is, in fact, detrimental to long-term notions of the rule of law.”⁵⁵ He believes that

⁵⁵ Oren Gross, “The Prohibition on Torture and the Limits of the Law,” in *Torture: A Collection*, ed. Sanford Levinson (New York: Oxford University Press, 2004), 239.

an absolute ban on torture sets an unrealistic standard, and that legal systems may break down if actors are forced to face a dilemma in which they must choose between what they feel is right, and what the law codifies as being right. While this may be true for commonly occurring situations, it is not true for an extreme ticking bomb case. The central thrust is that instances of justified torture are so rare that the dilemma created by legal rigidity could not possibly affect a nation's ethos of obedience to the rule of law.

An absolute ban on torture that allows for civil disobedience as the only means to counter the ticking bomb is not a perfect solution, but it is the best solution. Incarcerating someone who may save the lives of thousands of innocents may not seem fair, but punishing the hypothetical virtuous torturer who averted a catastrophe is preferable to condoning the torture of innocents.

CONCLUSION

This essay has examined several models of legally authorized torture and their potential to limit the use of torture to a ticking bomb scenario. While these models may have been created with good intentions, history has shown that any attempt to excuse torture in specific instances has resulted in its widespread application. There is no perfect legal solution to the ticking bomb. Attempts to reconcile the prohibition of torture with the reality that torture may not always be the greater evil (at least theoretically) are futile. By legalizing torture a state legitimizes it, and risks making it regular. By banning torture the state chooses to punish the hypothetical virtuous

torturer, or worse, risks suffering the consequences of a preventable attack. This essay has argued that the latter, namely accepting the risk of punishing a virtuous torturer or of attack, is the price that must be paid in a liberal democracy; preserving the rule of law and respecting human dignity are paramount. It is a reality that not all options that are open to the enemy are available to a democratic state, but “although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand.”⁵⁶

⁵⁶ B’Tselem, “Public Committee Against Torture v. Israel, HCJ 5100/94,” accessed 15 April 2017, 37. https://www.btselem.org/download/hc5100_94_19990906_torture_ruling.pdf.

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