

US and the Lawless Age of ‘War on Terror’ Contextualizing the Ubiquity of Torture Practices

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ABSTRACT— *Though inarguably condemned in practice, the practice of torture conducted by state entities remains a common narrative in the human rights discourse. Though commonplace worldwide, such practices have been immensely surfaced since the tragic events that took place 11 September 2001, with numerous states such as the US, deliberately normalizing torture as one of the essential means taken to gather counterterrorism-related intelligences. The resurface of enhanced interrogation techniques reflects ambiguities of how this has come to be, despite the conspicuous human rights regimes illegalizing such barbaric practices, and the familiarity of the US echo of civil rights protection globally. Thus such fundamental concerns above raises the question of how the US throughout the years, normalized torture practices under the deliberately constructed lawless age of ‘War on Terror.’ It argues of the purposive assembling of terrorism classification as essentially distinct compared to numerous types of combatants present historically and in the status quo, thus shaping the entitlement of an inhumane status, unbound nor limited from existing International laws. It further argues of the general weaknesses of existing human rights regimes in limiting state practices in the lawless age of terror, reflecting the human rights regime’s inability to exert power and reflecting the prevalence of torture-backed politic*

Keywords— Torture, Enhanced Interrogation Techniques, Counterterrorism, Terrorism, Human Rights, Human Rights Regimes, International Law, U.S. Foreign Policy

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1. INTRODUCTION

Despite existing conventions and humanitarian laws prohibiting it, torture remains a practice that continuously takes place worldwide. The practice of torture is not a concept that is exposed to cultural relativity, as different nations that inherit different values and political systems, constantly uses torture to gain the perceived valuable information and intelligence for the sake of national security. Until now exists approximately 150 states that have been exposed of conducting torture in interrogations (mainly by police and law enforcement agencies) (Bagaric, Clarke 2005).

But the practice of torture in the 21st century is mainly reflected by the monstrous practice of torture conducted towards suspected terrorists in the age of ‘war on terror.’ After the devastating attacks of the 9/11, the terminology of ‘war on terror’ was immediately perceived as one of the primary threats facing human rights today (Goodhart 2013). Torture was always an underground conduct, rarely surfaced or exposed to the International community especially after the end of the Cold War. This was until the release of the devastating pictures of the infamous abuses at the Abu Ghraib prison in Iraq 2004 (Lokaneeta 2011), which showed the true nature of the war on terror. The harshest interrogation techniques conducted by US intelligence and military personnel was exposed both in Abu Ghraib and Guantanamo Bay (Cuba), laying facts of the use of solitary confinement, enhanced sensory disorientation, stress positions, techniques to undermine the self-confidence of detainees, and sexual humiliations. Though known to uphold civil liberties, the US after the exposures of the torture practices, immediately destroyed the very values they claimed they would protect. But how can such a horrendous pathway of violations be taken by the US, and how does human rights regimes positions itself in such a case?

This article’s central argument is how the ‘war on terror’ has throughout the years normalized lawless conducts, defying existing human rights regimes, and sidelined the discourse of human rights and morality from contemporary counter-terrorism measures. In doing so, this research in answering the convoluted, and puzzling question of the US continuous human rights violations through torture shall argue firstly, how the rhetoric of war on terror has normalized

the conduct of torture, and secondly, would argue of the weakness of human rights regimes in face of a highly politically backed conduct in the form of torture. But first, I would start off by contextualizing the evolution of human rights regimes which positions torture as an absolute illegal conduct under International law.

2. PROHIBITION OF TORTURE AND THE U.S. POSITION

By definition, torture is known as to “constitute a direct and deliberate attack on the core of the human personality and dignity” (Nowak, McArthur 2008, 1). The prohibition of torture is one that is absolute under International law, a non-derogable right. The contemporary human rights discourse on torture though, has been filled with several opposing argumentations that positions torture as morally acceptable in cases of possible grave harm (Bagaric, Clarke 2005). Similar thoughts have been echoed by ‘utilitarianism’, which specifically on the case of torture, argues that such a practice is not necessarily unacceptable. Sacrifices in extreme situations are inevitable, therefore leading to the shift from the importance of civil liberties to the interest of the majority (Allhoff 2005) (Evans 2007).

Though arguments morally justifying torture exist, torture will always remain as a universally deplored practice and illegal in the eyes of the International law. Regardless of the status, whether one is a civilian, a prisoner of war or high contracting party to a conflict, no circumstances are permissible under International law and human rights regimes. This statement is solidified with the numerous existing International human rights instruments, which prohibits torture.

On human rights regimes and humanitarian laws, the Universal Declaration of Human Rights 1948 under the Article 5, and the Fourth Geneva Conventions of 1949 under Its Article 3 provided the foundational grounds of torture prohibition (UDHR 1948) (ICRC 1949). It states that civilians and specifically high contracting parties to a conflict shall not be subjected to torture for any purposes. What followed was the International Covenant on Civil and Political Rights (ICCPR) of 1966. Under Its Article 7, the ICCPR states, “No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment” (ICCPR 1966). What followed after that was arguably the most significant convention on the prohibition of torture, The Convention Against Torture and Other Cruel and Inhuman Treatment or Punishment (CAT) of 1984. CAT acted as the ultimate moral projection of the UN General Assembly on the International intolerance of the acts of torture. The convention was a result of the numerous torture practices conducted by the military junta of Chile in 1973, and the need for a more persistent and strict measure on the overall, global scale prohibition of torture.

Surprisingly for the numerous dynamics that we see today, US has signed and ratified all of the human rights instruments mentioned above. The ICCPR was signed in 1977 and ratified in 1992 while CAT was signed in 1988 and ratified in 1994 (OHCHR 2015). An extension to that, the US has shown its commitment to the anti-torture movements by domestically adopting the provisions of CAT, leading to the Federal Anti-Torture Statute in the US Code Title 18 (Part 1, Chapter 113C) with the section 2340A, stating that such offenses (the conduct of torture) will lead to imprisonment of no longer than 20 years (Federal Anti-Torture Statute 1994). Though the US has been consistent in the context of law, the practical reality reflects differently. The tortures of suspected/ alleged terrorists in Abu Ghraib and Guantanamo Bay remain internationally condemned. And as of the current status quo, Obama’s pledge of closing Guantanamo Bay, a detention area full of secrecy and unbind by US national laws, still is home for 116 detainees (Choudhury 2015). Since the age of the war on terror, devastating and appalling images of torture has continuously surfaced, yet what explains such a risky approach taken by the US?

3. THE RHETORICS OF ‘WAR ON TERROR:’ NORMALIZING THE CONDUCT OF TORTURE

The first explanation for why the US has been persistent with the continuation of torture practices is because of the deliberately constructed ‘war on terror’ rhetoric. The US were aware of the essential function of torture after the 9/11 attacks, and as such methods gained significant amounts of intelligence, the Bush administration constructed the war fought to one that was inherently distinctive compared to conventional warfare. Thus the rhetoric of the war on terror was born, a political project that was a “very carefully, deliberately constructed public discourse” (Jackson 2005, 1). Throughout the early years of the Guantanamo Bay, for example, US policymakers constructed the attacks of the 9/11 as an immense devastation to the US, even equating the attack with historical references such as the Pearl Harbor (Lantos 2001).

Terrorists were classified as distinct, a new type of combatant which does not deserve the protection under the International law. Such distinction was constructed through building stigmas on those alleged terrorists. Several US policymakers profiled terrorists as an anti-globalization movement against modern civilization, a common enemy of the world (Rasmussen 2002). The then-Secretary of State Donald Rumsfeld even stated, “we share the belief that terrorism is a cancer on the human condition and we intend to oppose it wherever it is” (Rumsfeld 2001). The reason for this is that at the early stages of the war on terror, the Bush administration tried to project a certain imagery to solidify the position of

the US being ‘good,’ while terrorists as being ‘evil.’ By doing so, the administration profiled all terrorists as lowlives, individuals in need to be terminated, and individuals who are not entitled towards any political content whatsoever

All of the stigmatizations above lead to the construction of how the abridgment of rights is justified. The US wanted Its citizens and International community to see the war taking place as inherently good, thus leading to the normalization and justification of the courses of action taken by the US that time. Even further, this was aimed to shut down any possible challenges towards the state’s ability to exercise power over the defined emergency state. But to capitalize such a thought, US policymakers constructed the war as being different in nature, therefore making existing Humanitarian Laws irrelevant. As Bush stated in 2001, “This is a different kind of war that requires a different type of approach and a different type of mentality” (Bush 2001).

Though flawed in the context of International law, the US counter-terrorism measures included the practice of torture, as it was (by US definition) in line with International laws. The assumption that these terrorists are not entitled as combatants, a status which would protect these alleged terrorists from torture. As the US rhetoric stated of the US vulnerability and exposure towards extreme dangers, lawless counter-terrorism measures were adopted. Such risk perceptions shaped by US policymakers in the Bush administration (and to a certain extent in the Obama administration), eliminates room for moral ground discussions, therefore sidelining human rights regimes and institutions. The exaggerated risk perception is vital to understand the lawless counter terrorism measures of the US, and the continuance of human rights violations. As Beck (2011) states that, “what is politically crucial is ultimately not the risk itself, but the perception of the risk.”

The US demonized alleged terrorists, and successfully harnessed public anxieties. But is the practice of torture worth going to that extreme extent? US policymakers argue it is, based on how torture is an act of ‘lesser evil’ and considering the threat of a ‘ticking bomb.’ Under the ‘lesser evil’ argument, coerced actions (violations of human rights) are justified compared to allowing the deaths of thousands of innocent people (Ignatieff 2004). And considering the ideological basis of US being a liberal democratic, it is those democratic values that would deter a state going too far from boundaries that would perceive civil liberty violations as never a problem. Under the ‘ticking bomb’ argument, is the classical though of how torture is indeed justified, in certain circumstances that relate to the possible detonation of a bomb (James 2007), and torturing a held suspect is the way to know the location of the bomb. Though compelling, torture should be understood not as a practice that would equate towards automatically reliable information. Many factors play in determining the reliability of the intelligence gained from torture, considering that the current state of mind of a detained and tortured suspected terrorist is to vocalize anything that would immediately stop the excruciating pain. And adding to that is the difficulty in pinpointing the exact circumstances in which torture should be justified. Thus, the prohibition of torture is one that should remain absolute.

On the basis of legality, the war on terror rhetoric constructed eventually shaped the entitlement of a different status for suspected terrorists. The Legal Counsel of the White House in 2002, Alberto Gonzales, stated how on the counter-terrorism measures conducted by the US, now applies a certain new paradigm, which “renders obsolete Geneva’s strict limitations on questioning of enemy prisoners,” (Manderson 2005, 643). Suspected terrorists then were entitled a new status known as ‘unlawful combatants,’ a category not embraced by existing Humanitarian laws such as the Geneva Conventions (Farber 2005). Now as suspected terrorists do not constitute as having the status of Prisoners of War (POW), the US thus has built the foundational grounds to conduct torture, despite such subjective interpretations of the existing International Human Rights instruments.

There have been occurring debates to include detained terrorists especially of Al-Qaeda and Taliban, as being ‘high contracting parties’ as these groups relate directly to the central authority of several states that then would legally prohibit torture under the Geneva Conventions. But despite such debates, the basic legal International human rights instrument that the US has violated is the Convention Against Torture 1984, which stipulates in its Article 2 that, “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political stability, or any other public emergency may be invoked as a justification of torture” (CAT 1984). Thus to conclude this section, and to conclude the lawless and continuous torture practices by the US, a major concern arises in the discourse of human rights, which is “As governments erode established procedures, the lawlessness of terrorism is being met with the lawlessness of counter-terrorism” (Bronitt 2008, 180).

4. THE POLITICS OF TORTURE: WEAKNESSES OF THE HUMAN RIGHTS REGIMES

In the age of terror that we live in today, the effectiveness of counter-terrorism measures is a major national security concern for the US. But the lawless path taken is one that is of immense concern for the International community. What’s ironic is that the contemporary US policy has defied the vision of a rule-based system aspired by Franklin Roosevelt. Both Roosevelt and Churchill (1941 Prime Minister of Britain), envisioned that a certain International system needs to be established, a system in which state actors are tamed and limited by International law. But the biggest irony today is how it was the US and Britain that led efforts to negotiate the Geneva Conventions (Sands 2005), yet at present times, such laws are neglected.

But the present non-adherence of the US towards existing human rights regimes and International human rights instruments is also partially caused by the problem of definitional overload and subjective interpretations. As Posner (2014) states, that “the central problem with human rights law is that is hopelessly ambiguous... the deliberate choice of state actors which overload the treaties with hundreds of poorly defined obligations.” This is evident in the case of US reservations (legal modification of provisions) in the CAT 1984. The US’s 5th reservation point stated that, “...in implementing Article 10-14 and 16, the United States Government shall take measures appropriate to the Federal System to the end that the competent authorities of the constituent units of the United States of America may take appropriate measures for the fulfillment of the Convention” (CAT 1984). The reservations and eventual subjective interpretations of Article 10-14 of the CAT, immensely damages the full effectiveness of the convention, as those articles aims to regulate illegal conducts of interrogators, the need to conduct systematic reviews, access to courts, rehabilitations, and to take the needed actions to prevent the act of torture (which apparently are all of the actions taken for its counter-terrorism measures.)

A Classical issue of these International human rights instruments also is its inability to coerce state members to be part of a certain convention. Following CAT 1984, the Optional Protocol to the Convention Against Torture (2002) was open for signatories. The protocol would regulate International inspections in detention centers, conducted by the UN Subcommittee on the Prevention of Torture (UNGA 2002). It also requires member states to establish a National Preventative Mechanism (NPM), independent from the central authority. Despite consistent ratifications on laws prohibiting torture, US did not sign, nor ratify the additional protocol. Leading to the absence of inspections and preventative mechanisms of torture prohibition, two key elements to practically eliminate the practice of torture.

As a result, the Committee Against Torture, mandated to review torture practices worldwide, has been clueless of the torture practices conducted by the US. Through Its 2010 country assessment, it was only able to question and criticize the lack of clarity of the conducts adopted in US detention areas. As they are not equipped with the power to impose strict actions (such as to instantaneously get in the state/ areas and evaluate), as the additional protocol is not ratified. For example, the committee questioned the US adherence towards the CAT Article 3 by questioning, “Whether the State party has ceased the “rendition” of suspects, in particular by its intelligence agencies, to States where they face a real risk of torture” (CAT 2010, 2). Generally, the report questioned the lack of clarity in regards to secret detention facilities, legal safeguards of detainees, the condition of Guantanamo Bay, techniques of interrogations, and interrogation manuals (CAT 2010). The problem with the committee’s recommendation though, is that states hold the authority to implement, or ignore their recommendations and suggestions, a stance chosen by the US after the release of the report (Burton 2007).

Not only has the existing human rights regimes failed to address the historical cases of Guantanamo Bay and Abu Ghraib, but it also seems clueless in facing the more contemporary US ‘extraordinary renditions.’ The act of expelling an individual to a state with substantial grounds of such individuals being tortured is already addressed under the Article 3 of the CAT 1984. Yet US continues such actions through the CIA, which now is participated by 54 foreign governments (Fisher 2013), reported to not only hold suspects in detentions but assist the with the process of interrogation, even to torture.

But how do we contextualize the inconsistent stance of the US in regards to torture prohibition throughout the years? The selective adherence towards several International laws is known as the US ‘A La Carte Multilateralism,’ in which US would only ratify those that is in aligned with the national interest (specifically the interest of the ruling administration), then discard those that goes against it (Gerson 2000). The very fact that the nature of these human rights regimes prohibiting torture is inherently voluntary to be part of, countries like the US with long histories of selective International laws ratified, would exploit such weaknesses for the sake of Its counter terrorism effectiveness. Thus the underlying issue is the problem of great power politics, and the capacity of states to maneuver around the human rights discourse in the age of the war on terror. The International law’s inability to project its power of justice thus has proven to be catastrophic for the rights to be free from torture, in a lawless age of the war on terror.

5. CONCLUSION

The age of ‘War on Terror’ that we lived since the 9/11 attacks has presented an acute threat to the International prohibition of torture. State members have continuously challenged the validity of torture being an absolute prohibition, each maneuvering through underground pathways to conduct torture for the sake of essential intelligence information. This research has shown how such a powerful rhetoric of the war on terror has normalized certain approaches towards the contemporary counter-terrorism measures, in this case, human rights violations in the form of torture, aimed towards suspected terrorists detained worldwide. Torture is continuing to take place, and specifically in the case of US, the numbers are massive. Counter-terrorism measures that include torture in its interrogations have proven to become a common discourse despite the prevalence of human rights

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