UTER #720237, VOL 35, ISS 11

Human Rights and Antiterrorism: A Positive Legal Duty to Infringe Freedom from Torture?

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Studies in Conflict & Terrorism, 35:1–19, 2012

ISSN: 1057-610X print / 1521-0731 online
DOI: 10.1080/1057610X.2012.720237

Routledge
Taylor & Francis Group

Human Rights and Antiterrorism: A Positive Legal Duty to Infringe Freedom from Torture?

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In law freedom from torture and ill-treatment is "absolute," meaning that a state cannot infringe the right for purposes that would seem legitimate such as the protection of national security. However, with the growth in international terrorism, particularly suicide violence, should the freedom remain without limitation? This article considers legitimizing torture by reference to the "positive" legal obligation the right imposes on states to prevent harm to individuals by third parties such as terrorists. Assuming such a legal argument could be made out, it is questioned whether adopting such measures of interrogation would in fact outweigh the negative consequences that would inevitably follow from reversing accepted international standards for the protection of, say, detainees from ill-treatment in state custody.

It is a well-established principle of international law that those detained by the state enjoy the right not to be tortured and ill-treated. For example, Article 5 of the Universal Declaration of Human Rights (UDHR) states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Furthermore, Article 7 of the International Covenant on Civil and Political Rights (ICCPR) states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. . ." The United Nations (UN) has also enacted a treaty specifically addressing torture: the ConventionagainstTorture (UNCAT). Freedom from torture and other forms of ill-treatment is legally "absolute" so there are no limitations to the right in any circumstances. Indeed, Article 2(2) of the UNCAT states that no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political in stability or any other public emergency, may be invoked as a justification of torture.

Why in law is this freedom absolute, and non-permissable either in war or other public emergency? Notwithstanding the seemingly little practical value that ill-treatment might provide in giving state officials reliable information about, for example, a terror plot (which is discussed in more detail later), torture has been described as an intimate exercise of pain—inflicted one on one—that terrorizes and humiliates the victim, and robs them of the dignity and autonomy that are the essence of the ideal of being human.[1] Indeed, would a country, bound by the rule of law, want to admit openly to its international partners that

Received 21 December 2011; accepted 5 February 2012.
The author is grateful for the feedback provided by an external reviewer. The former is, of course, responsible for any errors and/or omissions.
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it is an exponent of torture? A state in such a situation cannot allow ill-treatment without arguably betraying its own principles and losing credibility.[2]

Nevertheless, do those who engage in acts of a terrorist nature deserve the absolute right to be free from state harm (assuming those that died had survived), if there was a very real possibility that they possessed information which could avert an atrocity; and "intensive interrogation" was, realistically, the only conceivable means of acquiring such information? Perhaps the absolute nature of the antitorture right should be relaxed to prevent, for example, a terrorist attack—"preventative torture"[3]—particularly in a "ticking bomb"[4] scenario? Remember, in the last ten years or so we have witnessed the "Ricin Case," a plot to spread the deadly poison ricin on the streets of Britain in 2003;[5] the "Airline Bomb Plot," a plot to blow up planes flying from London to the United States with homemade liquids in 2006;[6] and the fatal shootings in Mumbai in 2008,[7] at the Fort Hood army base in Texas in 2009[8] and at Frankfurt Airport in 2011.[9] Or perhaps such intensive, or "enhanced," methods of interrogation should be reserved for potentially more serious acts of terror, for example, where the perpetrators were intent on pursuing suicide attacks, especially against civilian targets, such as those committed on 11 September 2001 (9/11) in New York and Washington in 2001,[10] in Madrid in 2004,[11] in London in 2005,[12] and in Stockholm in 2010[13]? Either way, these atrocities suggest a continuation of terror threats to, for example, the United States and its allies. So much so, it is estimated that currently there are up to 200 suicide bombers planning attacks in, for example, Britain.[14]

Consider, also, the rights of those intent on detonating a radiological dispersion device, or "dirty bomb," in a highly populated area such as England's capital, London (I choose this as an example since it is arguably vulnerable to attack because of its role as the host city of the Olympic games in 2012[15])? Notwithstanding the significant human costs in terms of immediate loss of life and permanent injury, there would be additional traumas associated with the mass evacuation of hundreds and thousands of people. An evacuation, if improperly managed, would be chaotic, increasing the number of people exposed and the spread of contaminants. Financially, such an event would have a significant effect on the United Kingdom's international standing; as well as, locally, decimating, for example, the property market. Environmentally, it would be a catastrophe, too; the clean up itself could take years.[16] So should terrorists whose desire is, for example, to engage in suicide violence and/or acquire radiological weapons (as well as those of a chemical, biological, and nuclear nature) for use, particularly, against civilians enjoy a legal right like freedom from torture, especially since they so emphatically deny this right to their victims?

Indeed, the former president of the United States, George W. Bush, has recently claimed that techniques of ill-treatment such as "waterboarding" used against terror detainees in U.S. custody in Guantanamo Bay, Cuba "saved [British] lives," by averting attacks at, for example, Heathrow Airport and Canary Wharf in London.[17] Importantly, notwithstanding the continuing terror threats to the United States and its allies post 9/11, as well as the continuing serious nature of these threats, much interest, therefore, in the effectiveness of ill-treating terror suspects has arguably been reignited by George W. Bush's claims.[18] This is especially so now that Bush's former vice president, Dick Cheney,[19] has argued that the use of torture at Guantanamo identified the location of the former leader of Al Qaeda, Osama bin Laden, in Pakistan.[20]

But, noting above the weight of international law against a reversal of accepted standards outlawing torture, is it possible for this article to present a defensible argument justifying some relaxation of the legal ban on the ill-treatment of terror detainees? Should the author, for his own credibility as an academic lawyer, who teaches a plethora of human rights modules across a range of undergraduate and postgraduate courses, even be doing

so? If he is, is he being a "securicrat,"[21] a person so obsessed with fighting terrorism that he is prepared to sacrifice hard earned individual freedoms, disguised behind vague state objectives of protecting national security and preventing disorder and crime, in the cause of averting a terror threat? But, at the same time, the author is not a "peacenik,"[22] a person who seemingly closes their mind to the positives of state intervention for apparent quasi-political ends. Ironically, it is the author who is perhaps more open minded than most because he is prepared to engage in a meaningful consideration of a topic such as torture that elicits strong—and often polarizing—views, to further a genuine discourse on an issue that many with arguable interests in human rights dismiss for simple reasons of ideology.[23]

In an earlier article it was assessed whether, legally, freedom from torture was in fact without limitation.[24] There some potential anomalies with the seemingly absolute nature of the freedom were identified. But it was found that the right was indeed legally absolute, notwithstanding these anomalies, thus the freedom's qualification, for example, post 9/11 was not permissable. However, that article did conclude by suggesting that the use of ill-treatment against a terror suspect might be justified by reference to the antitorture right's "positive" nature. That is, the very right of innocent civilians not to be subjected to harm from a terrorist atrocity may justify the use of torture against a suspect to prevent it. Assessing such a question is, therefore, the purpose of this article. Before, indeed, addressing whether the legal obligation on states to prevent torture might in fact legitimize the use of ill-treatment against a detainee, it is important to explain the right in more detail, especially its "positive" nature, which is the purpose of the next section.

Principles of Torture and Other Forms of Ill-Treatment

The Prohibition on Torture and Other Forms of Ill-Treatment in International Law

It was stated above that well-established principles of international law such as Article 5 of the UDHR and Article 7 of the ICCPR dictate that those detained by the state enjoy the right not to be tortured and ill-treated. The UN has also enacted a treaty specifically addressing torture: the UNCAT. Indeed, at regional level, for example, Article 3 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) states: "No one shall be subjected to torture, inhuman or degrading treatment or punishment." Moreover, the Council of Europe—the signatory states of the ECHR—has, since 1987, opened for signature the European Convention for the Prevention of Torture.

It was also stated above that in law freedom from torture and other forms of ill-treatment is "absolute" so there are no limitations to the right in any circumstances. Indeed, Article 2(2) of the UNCAT states that no exceptional circumstances whatsoever may be invoked as a justification of torture. Similarly, at regional level, Article 15(1) of the ECHR states that in time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations to the extent strictly required by the exigencies of the situation. However, Article 15(2) permits no derogation from Article 3; the right is therefore categorized as "non-derogable,"

The reach of torture and ill-treatment extends beyond international human rights law: depending on the circumstances torture can also engage international criminal law. According to the Fourth Geneva Convention of 1949 (Geneva IV), for example, torture and other acts of inhuman treatment committed against protected persons during armed conflict can be considered crimes of war. As the Geneva Conventions of 1949 have now been ratified by 194 states in the world they are considered customary international law (*jus cogens*) so create an obligation on any state to prosecute the alleged perpetrators or turn them over to

another state for prosecution. Indeed, since 1 July 2002, 60 days after 60 States became parties to the "Rome Statute" through either ratification or accession, individuals can be tried at the International Criminal Court (ICC), at The Hague, for alleged violations of crimes of war such as the torture of civilians. At national level, Article 4(1) of the UNCAT requires that each State Party shall ensure that all acts of torture are offences under its criminal law. To comply with its UNCAT obligations, the U.K. government, for example, enacted s.134(1) of the Criminal Justice Act 1988. This states that a person, whatever their nationality, commits the offense of torture if in the United Kingdom or elsewhere they intentionally inflict severe pain or suffering on another in the performance or purported performance of official duties. The effect of this legislation is that the United Kingdom, for domestic purposes, has "universal jurisdiction" to try any individual, whatever their nationality, for acts of torture committed anywhere in the world.

Defining Torture and Other Forms of Ill-Treatment

Article 1 of the UNCAT defines torture: "...[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person ... by ... a public official." Thus, torture must involve pain and suffering, physical or mental. It must be with the involvement of a state official, and the suffering must be severe and intentional. In *Ireland* v. *United Kingdom*,[25] for example, the European Court of Human Rights (ECtHR) considered whether the so-called five techniques used against terror suspects—wall-standing, "hooding," subjection to noise, deprivation of sleep, and deprivation of food—were torture, contrary to Article 3 of the ECHR. Applying their definition of torture, which was "deliberate inhuman treatment causing very serious and cruel suffering,"[26] the ECtHR court ruled that the "five techniques" had not been torture.[27]

"Torture" therefore constitutes a severe form of ill-treatment against a detainee. Modern techniques of torture have included rape and other forms of sexual violence; the application of electric shock, usually against sensitive parts of the body; the infliction of bodily injury and pain inducing drugs; immersion under water to the point of suffocation or other methods simulating drowning, such as "water boarding"; attacks by aggressive dogs; mock executions and beatings; and threats of violence against a person and/or members of their family.[28] Less severe forms of ill-treatment against a detainee—for example, defecating and urinating on a person; exposure to bright lights; solitary confinement; "hooding"; the subjection to consistent high-pitched noise ("white noise"); wall-standing, often for long periods of time; and the deprivation of food, sleep, and sanitation—are nevertheless still prohibited. In *Ireland* the ECtHR, although ruling that the interrogative methods were not torture, still held that they had constituted inhuman and degrading treatment in violation of Article 3 of the ECHR.[29]

The "Positive" Nature of Torture and Ill-Treatment

The legal prohibition on torture, and other forms of ill-treatment, much like other "civil and political" rights such as the rights to liberty, privacy, and expression, is categorized as "negative" (i.e., a "freedom from"), meaning states simply undertake not to violate them: "Civil and political rights ... are duties of restraint with individual freedom rather than casting positive duties on the state to act."[30] However, holding states to account for acts of torture is in itself insufficient in international law: states must adopt "positive" measures to deter acts of ill-treatment. For example, Article 2(1) of the UNCAT states: "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent

acts of torture. . .” Similarly, states of the ECHR must ensure that their citizens are not subjected to torture, or inhuman or degrading treatment, especially those by non-state actors. In *A* v. *United Kingdom*,[31] for example, the applicant, a child, was severely beaten by his stepfather with a cane, who was charged with assault occasioning actual bodily harm (ABH) contrary to s.47 of the Offences Against the Person Act 1861 (OAPA). The stepfather pleaded the defense of “reasonable chastisement” and was acquitted. Relying *inter alia* on Article 3 of the ECHR, the applicant complained that the United Kingdom had failed to protect him from the inhuman and degrading punishment committed by his stepfather. The ECtHR agreed, saying: “. . .Article 3 . . . requires States to take measures designed to ensure that individuals . . . are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment. . . by private individuals.”[32] Thus international law attached great emphasis on the positive nature of the antitorture right, obliging states to prevent harm to its citizens, especially children, by third parties. In this respect, therefore, could such an important legal duty imposed on a state be constructed in such a way that it legitimizes the use of torture, or at least lesser forms of ill-treatment such as those that are merely inhuman and degrading, against third parties such as suspected terrorists, especially in situations where the latter were allegedly a real danger to vulnerable individuals such as children? Addressing this question is the aim of the next section.

Legitimizing Torture and Ill-Treatment by Reference to a State’s “Positive” Duty in Law to Prevent Harm

Questioning Torture by Reference to the “Positive” Nature of the Right

In a previous article, largely unrelated to this study of freedom from torture, another “negative” human right was assessed: the right to life enshrined in, for example, Article 2 of the ECHR. Article 2(2) of the ECHR permits the intentional deprivation of life: “Deprivation of life shall [contravene] this Article when it results from the use of force which is no more than absolutely necessary a) in defence of any person from unlawful violence. . .” Article 2(2)(a) therefore prohibits intentional killings by the state unless the force used is strictly proportionate to a legitimate aim like preventing unlawful violence. Article 2 not only confers this “negative” right on an individual: in law it also possesses a “positive” sense. According to Article 2(1), “Everyone’s right to life shall be protected by law.” Unlike Article 3 of the ECHR, Article 2(1) therefore expressly imposes a “positive” duty on the state to protect individuals from harm.

In this right to life article the fatal shooting of Jean Charles de Menezes by firearms officers from London’s Metropolitan Police Service (MPS) on 22 July 2005 was assessed—the officers had mistakenly believed that de Menezes was one of the failed suicide bombers from the day before. There that article concluded that the death of de Menezes was not unlawful.[33] However, it went on to question whether in the fight against terrorism post 9/11, particularly suicide violence, maybe there should be relaxation of Article 2(2)? That is, intentional killings by state agents would still need to be justified by the criterion of “absolute necessity” but the balance would fall more in the favor of the state, rather than that of the individual whose life had been deprived, reflecting the state’s “positive” duty to protect life under Article 2(1)?

Previously the state’s legal obligation to protect life was recognized. This was balanced with a person’s right not to have their life unjustifiably infringed. Perhaps the same could be said with reference to Article 2(1) of the UNCAT and Article 3 of the ECHR? Yes, there is a prohibition on the ill-treatment of detainees, supported by an array of domestic, European,

and international law. And yes, the right not to be tortured is unaffected by a detainee's conduct so suspected terrorists have as much right to be free from acts of ill-treatment as members of the general public. However, could the torture of terror suspects such as the 9/11 bombers (assuming they were in captivity before they had died) be justified for intelligence purposes? That is, to gain information from them to avert the atrocity, such as the numbers of the flights that were to be targeted? This would be premised by reference to the "positive" rights of the passengers to be free themselves from acts of harm. Such a contention may sit uneasily with some but the trumping of the rights of terror detainees by the rights of potential victims is well recognized.[34] Recently, the inquest into the deaths of the 52 people who died in the co-ordinated 7/7 suicide attacks in London in 2005 was held. As per s.11(5)(ii) of Britain's Coroner's Act 1988 an inquest must decide how, when and where a deceased came by their death. It was reported that one of the victims, a 24-year-old finance officer at London's Royal Society of Arts was killed as she travelled to a meeting. The force of the explosion propelled her through a Perspex screen in the train carriage thus causing her horrific head injuries. Another victim, a 34-year-old finance officer, was standing next to Shehzad Tanweer, one of the 7 July (7/7) bombers, when his bomb was detonated on a train near Aldgate station. The victim had flash and deep burns over his entire face and neck and the lower parts of both legs had been amputated.[35] Reading the accounts of those who died in the 7/7 attacks, one cannot fail but sympathize with strategies such as the use of ill-treatment against suspects to prevent terror atrocities, perhaps justified on the basis of the more important right of potential victims to be free from injury.

Constructing an Argument Justifying Torture by Reference to a Further Analysis of the Right's "Positive" Nature

Assuming that a legal argument legitimizing the torture of terror detainees could be made out, ironically, on a state's "positive" duty to prevent breaches of Article 2(1) of the UNCAT and Article 3 of the ECHR, does the case law of the ECHR, for example, support this? Mowbray says: "Innovative judgments [of the ECtHR] . . . [have constructed] . . . an ever expanding range of [positive] obligations."[36] Domestically, the U.K. courts have arguably been innovative in their development of the positive nature of Article 3: *Regina (Limbuela)* v. *Secretary of State for the Home Department*.[37] Here s.55(1) of the Nationality, Immigration and Asylum Act 2002 prohibited the provision of the National Asylum Support Service to individuals who had not made a claim for asylum as soon as reasonably practicable after arriving in the United Kingdom. The House of Lords had to consider the lawfulness of refusing three individuals governmental help. Of the three applicants, the longest delay in making an application for asylum was one day. Two of the claimants were forced to sleep outdoors and the third claimant was on the verge of doing so. All the applicants had suffered a deterioration in health. The court ruled that the claimants' circumstances could constitute a breach of Article 3.[38] In reference to *Limbuela* Fredman concludes: "[This case] provides new impetus for the developing momentum towards . . . positive obligations by the ECHR."[39]

Assuming a legal argument justifying a relaxation of the absolute nature of torture could be supported on the basis of the positive obligation to prevent harm, when would this duty arise? First, there is no general obligation on countries such as Britain to avert, for example, death: *Regina (Gentle)* v. *Prime Minister*.[40] However, the positive obligation does oblige state authorities to deter the taking of, for example, life in broad terms. In the ECtHR in *Osman* v. *United Kingdom*[41] it was said: "The State's obligation . . . [means] putting in place effective criminal law provisions to deter the commission of offences against

the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions."[42]

Nevertheless, legitimizing ill-treatment by reference to a country's positive duty to prevent harm, or even death, as per Articles 3 and 2(1) of the ECHR respectively, must surely require a greater justification than the mere assertion that the state is legally obliged to establish a criminal justice system, which has the net effect of reducing violence against its citizens? For this reason it would seem, the ECtHR in *Osman* did also say that particular circumstances must have arisen before a state would be obliged in law to act to avert, for example, the loss of life: "It must be established . . . that the authorities knew or ought to have known . . . of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party. . ."[43]

To utilize the state's positive duty under Article 3 as a basis for maybe legitimizing torture, there would therefore have to be more than a general risk of harm to individuals from terrorism, but a specific threat to identifiable victims—and then this would have to constitute a real and immediate risk. Of course, if the U.K. state had in custody one of the alleged 7/7 suicide bombers, and intelligence came to light of the suspected plot, but it only suggested when the alleged perpetrators were going to act, but not the specific targets and/or the names of the other plotters, surely this would entail a positive duty on the authorities to act under Article 3? However, could this legal obligation, with the "bombs ticking," arguably extend as far as infringing a suspect's right not to be ill-treated? But is it not the case that a real and immediate threat of harm would have been identified? As well as sufficiently identifiable victims?

Assuming, therefore, the state could justify infringing the Article 3 rights of the conspirators, genuinely believing that there was a real and immediate risk to, for example, the lives of particular London transport commuters, this would not be enough, however: the state must only act reasonably in averting injury. For example, the ECtHR in *Osman* also said: "[The positive] obligation must be interpreted . . . which does not impose an impossible or disproportionate burden on the authorities. . . . Not every claimed risk to life can entail for the authorities a . . . requirement to take . . . measures to prevent that risk from materialising."[44]

While the legal obligations imposed on the state by Article 3 of the ECHR do not require, in truth, the authorities to act in excess to prevent harm, could the measure of this duty conceivably be interpreted as condoning torture if this could be characterized as "reasonable," when, for example, weighed against the thousands who died and were injured in the 9/11 and 7/7 atrocities, especially since ill-treatment, as a means of gaining information from a detainee, does work (at least on occasion—see more later)? In reference to the psychological duress used against republican terror suspects in *Ireland* v. *United Kingdom*[45]—wall-standing, "hooding," subjection to noise, deprivation of sleep, and deprivation of food—the ECtHR there said that it had led to the identification of 700 members of the Irish Republican Army (IRA) and the discovery of individual responsibility for about 85 previously unexplained criminal incidents.[46] More recently, it was stated above that the former Vice President of the United States Dick Cheney has claimed that intelligence collected under torture by the Americans identified the location of the former leader of Al Qaeda, Osama bin Laden, in Pakistan.

Constructing a Further Argument Justifying Torture by Reference to the Right's Particular Regard for the Protection of Vulnerable Individuals such as Children

If the positive nature of the antitorture right does not legitimize the use of ill-treatment against a suspect for the purposes of preventing a terror attack, can it be right that those

who seek to destroy democracy earn the right to rely on principles that they wish to deny to others, especially children? When considering the nature of Article 3 of the ECHR, for example, the ECtHR attaches particular significance to protecting the rights of children from the infliction of harm. This is exemplified by *Tyrer* v. *United Kingdom*,[47] where Article 3 was violated when a 15-year-old boy in the United Kingdom's Isle of Man was sentenced to corporal punishment.[48] However, Article 3 of the ECHR does also attach particular weight to the "positive" rights of children to be free from violence committed by third parties: *A* v. *United Kingdom*,[49] which was referred to above. Similarly, in *E* v. *United Kingdom*[50] a failure by social services to protect four children from sexual abuse by their stepfather was a violation of Article 3. The ECtHR there said:

> Article 3 requires States to take measures designed to ensure that individuals . . . are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals. These measures should provide effective protection, in particular, of children and other vulnerable persons.[51]

Adopting this reasoning, the fact that children were murdered and injured because of terror atrocities such as 9/11, does this justify "positive" infringements of Article 3 against terror suspects to reveal intelligence, otherwise attacks resulting in mass casualties would occur?

Legitimizing Torture and Ill-Treatment by Reference to the "Positive" Duty in Law to Prevent Harm—A Reply

"Positive" Rights Trump "Negative" Rights?

Thus far, it has been questioned whether the "positive" nature of the antitorture right might legitimize ill-treatment to prevent harm to innocent civilians, especially children. But does the law justify infringements of "negative" rights by "positive" rights, especially those that are categorized as "absolute" (and in the case of Article 3, "non-derogable")? In the U.K.'s House of Lords in *Limbuela*, when finding a violation of Article 3 in not providing state support to some asylum seekers, Lord Hope emphasized that while the "negative" right of an individual to be free from acts of torture committed by the state was legally absolute, the state's "positive" duty to prevent harm by third parties was not: it was qualified.[52]

The approach of Lord Hope in *Limbuela* was seemingly followed by the House of Lords in the later domestic case of *E* v. *Chief Constable of Royal Ulster Constabulary*.[53] Here the police were protecting catholic families walking their children to school through a protestant housing estate. The House of Lords ruled that the "positive" obligation imposed on the state to prevent a violation of Article 3—in this case the abuse suffered by the families at the hands of protestant bigots (rather than the harm suffered by a person for which the state was directly responsible) was indeed limited. The abuse was therefore "permitted," if to prevent it was to impose a disproportionate burden on the authorities. The House of Lords believed that the action by the police—the production of a security force corridor to protect the families—was a proportionate measure under the circumstances; the court rejected the applicants' contention that the authorities should have adopted more robust measures to prevent the violence, such as dispersing the "protestors" and undertaking widespread arrests. The effect of this ruling for the purposes of this article is significant. Earlier this article sought to construct a legal argument possibly justifying the use of torture by reference to a state's duty to prevent harm. However, while the "negative" right of a detainee is absolute,

following the House of Lords in *Limbuela*, the "positive" right of an innocent person to be free harm is clearly not. Therefore, as a matter of balancing the freedoms, the negative right of a terror suspect, it being absolute—and non-derogable—surely outweighs the positive right of the ordinary individual, it being qualified?

Constructing an Argument Justifying Torture by Reference to the Right's "Positive" Nature is Surely Illegitimate?

Earlier, in reference to the ruling of the ECtHR in *Osman* (which stated the same principles as the House of Lords in *E* but in reference to the obligation to protect life in Article 2(1) of the ECHR) it was suggested that perhaps torturing a suspect was "reasonable," when compared to the threats to life and limb s/he might pose to innocent individuals. But should torture be viewed here in opposite terms? That is, is it not in fact an unreasonable measure by the state in fulfilling its legal duties under Article 3? On this issue Mowbray notes (in discussing in general terms the extent of the positive obligation to protect life under Article 2(1)): "Governments will be able to invoke . . . the avoidance of infringements of the Convention rights of suspects as countervailing factors when challenged as to whether they provided adequate protection for specific persons."[54] In this article's fictitious scenario discussed above it imagined a situation where the state was actively adopting techniques of ill-treatment against a detainee by reference to its positive obligations to prevent harm. However, Mowbray suggests that this legal duty does not extend to the denial of a detainee's rights—and in all likelihood would not apply to a right as so fundamental as Article 3.

Further, in suggesting that the possible use of torture could in fact be a disproportionate measure (at the very least?) to prevent harm, it could also be seen as an abuse of the very nature of the right. For example, in *Pretty* v. *United Kingdom*[55] the claimant alleged *inter alia* that s.2 of Britain's Suicide Act 1961, outlawing assisted suicide, contravened Article 3. Diane Pretty was suffering from a degenerative disease. At the time when she wished to die, she wanted her husband to assist in her suicide. By criminalizing assisted suicide, Diane Pretty alleged that U.K. law had consigned her to an inhuman and degrading death; it had a duty to prevent this. However, the ECtHR decided that because the sanctity of life was enshrined in Article 2 of the ECHR, Pretty's interpretation of the positive nature of Article 3 went much too far. The same must surely be said about the use of Article 3 to justify torture. This is to use it for improper purposes; purposes that were clearly not intended by the original drafters of human rights instruments such as the ICCPR and the ECHR.

Constructing an Argument Justifying Torture by Reference to the Right's "Positive" Nature is Clearly Ignoring Its Absolute Principles

Notwithstanding the potential for abusing the nature of the right by questioning whether it could legitimately be used in law for preventing harm, especially on the basis of protecting the positive rights of, say, children, such an argument seems now to have been implicitly rejected in any event by the Grand Chamber of the ECtHR—the ECtHR's highest court—in *Gaefgen* v. *Germany*.[56] In 2002, Gaefgen kidnapped an 11-year-old boy, the son of a senior bank executive. He then forwarded a letter to the boy's family, demanding one million Euros in return for the child's release. Gaefgen was subsequently arrested after being observed picking up the ransom money. During his interrogation, Gaefgen largely denied any involvement in the kidnapping and provided no information about the boy's whereabouts. Finally, in order to try and save the child's life, the Frankfurt Police vice

president, Wolfgang Daschner, ordered that pain be inflicted on Gaefgen, without causing injuries, under medical supervision. Under the influence of a threat of harm, Gaefgen gave full details about the child's whereabouts (although regrettably when the police found the boy, they discovered that he had already been killed). In response to this threat by the German police, the ECtHR said:

> The Court accepts the motivation for the police officers' conduct and that they acted in an attempt to save a child's life. However, it is necessary to underline that . . . the prohibition on ill-treatment of a person applies irrespective of the conduct of the victim or the motivation of the authorities. Torture, inhuman or degrading treatment cannot be inflicted even in circumstances where the life of an individual is at risk. . . . Article 3, which has been framed in unambiguous terms, recognises that every human being has an absolute, inalienable right not to be [harmed] . . . under any circumstances, even the most difficult.[57]

Although only the threat of ill-treatment was made by the state in *Gaefgen* (which notably was a successful means of providing the authorities with details about the child's captivity) this was still not permissible, in the ECtHR's opinion. In situations, therefore, where lives can possibly be saved, especially involving those of children, freedom from ill-treatment is still in law without limitation, at least in terms of the right's "negative" sense. The "positive" nature of Article 3 must surely be treated the same—or even less so in terms of state responsibilities: this element of the right being only qualified. Indeed, the degrading treatment suffered by the victims in *E*, who were in fact children walking to school, did not legally oblige the authorities to prevent it absolutely: they were required to act only proportionately, which the U.K. House of Lords, and now the ECtHR,[58] have held that they did.

Condoning Torture—The "Slippery Slope" Issue and Other Counterarguments

Difficulties in Restricting Torture to only Those Suspected of Terrorism

Assuming this article was able to establish that the "positive" nature of the antitorture right could legitimize ill-treatment by the state, the weight of evidence against engaging in harsh interrogation measures is seemingly overwhelming in any event. First, those opposed to any harm directed at a detainee argue that once it is condoned, limiting its degree would be very difficult.[59] If psychological duress, as in *Ireland*, proved ineffective, could the state be trusted in not resorting to mild physical pain such as shaking and/or slapping? Or even more intense physical pain such as electric shock treatment, if the circumstances were so overwhelming? If this proved ineffective, what next: Threatening to harm a detainee's spouse or their children? Indeed, once ill-treatment was well recognized in situations involving terror suspects in particular, its use would arguably spread to other forms of homicide and violence, especially those of a sexual nature. And maybe even to areas not involving suspected criminals where there would be significant long term public health benefits, such as, for example, the forced experimentation of HIV patients?[60] To this end, ill-treatment would become "an entrenched, ever-widening practice, progressively divorced from whatever legitimate aims it might have originally served."[61] Moreover, the immediate—and lasting—physical and psychological harm caused to a detainee should not

be overlooked either: "The agony of torture typically continues to reproduce itself in the lives of victims and those close to them long after the physical torments stop."[62]

"Ticking Bombs"—Fact or Fiction?

In further supporting the absolute nature of torture, does the so-called ticking bomb scenario, which is frequently cited as justification for the harming of a terror suspect, actually happen in practice? In reality, is there going to be a situation where the authorities need intelligence from a detainee immediately, otherwise a bomb is going to explode? Fictional television series such as Fox TV's *24* and BBC TV's *Spooks* frequently suggested that there was.[63] Does this type of scenario actually reflect the real life situations of counterterrorism? In the Channel 4 *Dispatches* documentary, "Is Torture a Good Idea?", which was first broadcast in the United Kingdom in February 2005, Clive Stafford Smith, a British lawyer with the human rights charity Reprieve, asks Mike Baker, a former U.S. Central Intelligence Agency (CIA) officer, whether he himself has ever experienced a "ticking bomb" scenario, or at least knows that such an instance has occurred. To this, Baker replies: "No—not in my time."[64]

The Reliability of Information Gained through Torture

If indeed there was ever such a situation in practice where a person was in custody, whom the authorities believed had information about a planned terrorist atrocity, would they in fact have sufficient intelligence such as a bomb's location to prevent it exploding? Would this be known by the interrogator, with a sufficiently strong enough degree of suspicion, before ill-treatment was resorted to? How imminent must the terrorist attack be: seconds, minutes, an hour, days? Then, at what point would more aggressive methods of interrogation be pursued if intelligence to the torturer's satisfaction was not forthcoming? Or at what point would it be accepted that in fact a detainee was not in possession of any information, or at the very least not in possession of any details that were directly relevant to the investigation? Even if some seemingly useful intelligence was revealed, at what point would it be concluded for practical reasons to be of little value, or even worthless? A detainee's custody could alert their conspirators, who would suspect that it was only a matter of time before the authorities became aware of key information such as the site of a potential detonation. Indeed, this is assuming that any intelligence given up by a detainee during intense questioning was true. Again, how would an interrogator know about the reliability of the information presented? Time and manpower might be wasted in pursuing intelligence that was intentionally false, and tragically might be counterproductive if security efforts were spent averting a risk that, with hindsight, was never going to materialize because a bomb did detonate in either another location and/or at another time.

Torture information may be false for other reasons. For example, in response to the recent claims by the former U.S. President George W. Bush that techniques of ill-treatment against terror detainees in Cuba "saved lives," Philippe Sands QC, a noted British human rights lawyer countered: "Torture may produce information, but it doesn't produce reliable information, as every experienced interrogator ... repeatedly tells me. ... It produces the information that the subject believes the interrogator wants to hear."[65] This allegedly happened to three British men, Shafiq Rault, Asif Iqbal and Rhuhel Ahmed, at Guantanamo Bay. After months of isolation and coercive interrogation, the men confessed to having been with Osama bin Laden in Afghanistan. Their three "confessions" were false, as British Security Service ("MI5") officers later established the veracity of their alibis.[66]

Indeed, to those who have claimed that the torture of suspects at Guantanamo Bay recently revealed the whereabouts of Osama bin Laden in Pakistan, it has been alleged that in fact the complete opposite happened: Khalid Sheikh Mohammed, who was waterboarded at Guantanamo 183 times, allegedly did tell interrogators about the existence of a Pakistani courier particularly close to the Al Qaeda leader—but this was not until after the torture had been suspended.[67]

The reliability of torture in providing accurate information is recognized by international law. For example, Article 15 of the UNCAT states that any statement made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made. Indeed, in the U.K. domestic case of *A* v. *Secretary of State for the Home Department (No. 2)*[68] the House of Lords held that evidence procured by torture, whether of a suspect or witness, was not admissible against a party to proceedings in a British court, irrespective of where, by whom or on whose authority the torture had been inflicted. But Article 15 of the UNCAT only prohibits the admissibility of evidence gained through torture, so information gained through lesser forms of ill-treatment, that is, inhuman and degrading treatment, is maybe permitted. Nevertheless, for domestic purposes, Hughes LJ in England's Court of Appeal in *R* v. *Ahmed*[69] did note: "In English law [evidence gained through inhuman and degrading treatment] would inevitably be excluded ... on the grounds that it was obtained by oppression ... under s.76 of the Police and Criminal Evidence Act 1984."[70] These issues were discussed at length in the case of *Ahmed* because the defendant, Rangzieb Ahmed, currently serving a life sentence in the United Kingdom, *inter alia*, for being a member of Al Qaeda (contrary to s.11 of the Terrorism Act 2000), recently won the right to appeal against his conviction.[71] Ahmed claimed that he was beaten, whipped, and deprived of sleep by Pakistani interrogators, with the complicity of MI5; he also claimed that the Pakistanis had pulled out three of his fingernails.[72]

Does the Use of Torture actually Prevent Terrorism?

In refuting the claims by George Bush that the use of torture at Guantanamo Bay, Cuba, saved lives, British Prime Minister David Cameron stressed that harming suspects was likely to have the opposite effect, in actually encouraging support for terrorists.[73] That is, many young Muslim men, many of whom are already alienated by, for example, U.K. antiterror initiatives,[74] could possibly be driven into extremism and, more seriously, violence by the use or threat of torture against suspects. Indeed, would such a significant reversal of established international standards on torture and ill-treatment be out of all proportion to the risk of terrorism, when in fact the annual threat of terrorism-related fatality to an individual in, for example, the United Kingdom was 1 in 1.1 million between 1970 and 2007?[75]

Conclusion

According to the director-general of MI5, Jonathan Evans, the main security threat to, for example, the United Kingdom, comes from international terror groups linked to Al Qaeda.[76] Post-9/11, such groups are intent on acquiring either chemical, biological, radiological, or nuclear (CBRN) weapons, particularly against civilian targets.[77] Perhaps, therefore, there is a case for reversing international obligations outlawing the ill-treatment of terror suspects?[78] Here such an argument was addressed by reference to the "positive" nature of the antitorture right. That is, could the legal duty imposed on a state to protect individuals from harm,

especially involving attacks of a terrorist nature, legitimize a relaxation of the ban on torture so that an atrocity could be averted?

In a previous article the tragic police shooting of Jean Charles de Menezes at Stockwell train station in London in July 2005 was analyzed. There it was questioned whether the express, positive duty to protect life under Article 2(1) of the ECHR justified the employment of a lesser standard in Article 2(2) in terrorist cases? Could the same rationale be applied to, for example, Article 3 of the ECHR? Although rejecting the adoption of court evidence gained through the ill-treatment of a detainee, the U.K.'s House of Lords in *A (No. 2)* did not prohibit the use of such information by British security services for the purposes of preventing an attack:

> Generally speaking ... the executive may make use of all information it acquires: both coerced statements and whatever fruits they are found to bear. Not merely, indeed, is the executive entitled to make use of this information; to my mind it is bound to do so. It has a prime responsibility to safeguard the security of the state and it would be failing in its duty if it ignores whatever it may learn or fails to follow it up.[79]

However, in constructing an argument whether the existing prohibition on the use of torture does allow for some kind of relaxation on the basis of a state's positive obligation, is not such an interpretation, in fact, a misuse of the right (especially so when the "negative" sense of, say, Article 3 is absolute—and non-derogable—and its "positive" sense is not)? Waldron, who has recently written about balancing freedom from torture post 9/11, argues that while we are willing to forego some liberties for the greater good of national protection, there are some rights, he says, like freedom from torture, that are non-negotiable: "Some rights were designated long ago as absolutes precisely because of the temptation to rethink them or relativize them in times of panic, insecurity, and anger."[80]

In more general terms, assuming that methods of "torture lite" such as psychological duress were in fact permissible, would limits to these measures be observed in practice, especially if the pressure on the investigating authorities was particularly severe? Furthermore, once such techniques of interrogation were widely accepted in terrorism situations, arguably, their use would spread to other areas of the criminal law involving violence, particularly where the offenses were of a sexual nature and/or children were the victims. Indeed, assuming legal arguments could be made out legitimizing ill-treatment by reference to positive obligations, which this article has, for many reasons, ultimately rejected, in cases such as these who is in fact the "terrorizer"? The suspect or the torturer? Finally, do those situations where a suspect is in custody with vital information required to avert an attack actually happen in practice? This may be so in the fictional TV world of *24* and *Spooks*, but not reality, it seems.

Nevertheless, the "ticking bomb" scenario is a debate that the author of this article has on a regular basis with his students. Notably, many believe that in circumstances such as these there should be limitations to freedom from torture (assuming of course that "ticking bomb" scenarios do in fact exist). Addressing such issues would, of course, not have the existing law on their side—but morally would such courses of action be acceptable? In reference to the case of *Gaefgen* at the ECtHR, which was stated above, Greer questions whether the threat of ill-treatment against the child's kidnapper was legitimate morally, if not legally?[81] Greer premises his arguments on several grounds, one of which is the "positive" human right of the boy: the obvious trauma the child experienced at the hands of his kidnapper, and the duty imposed on the state to prevent it, compared to the *lesser* (my

italics) ten minute threat of ill-treatment experienced by the detainee. Indeed, Greer notes that if the boy had been held hostage, and firearms officers stormed the building where he was being held, shooting Gaefgen dead, the killing would have been lawful, as per Article 2(2) of the ECHR (assuming of course that the use of lethal force by the police had been "absolutely necessary" for a legitimate objective such as "the prevention of crime"). So the authorities could have been justified in killing Gaefgen, but not infringing his Article 3 rights if he had been arrested and questioned! Here Greer suggests, therefore, that freedom from torture should not be absolute, at least in moral terms. Could the same not be said in the context of terrorism post-9/11 where the threats to life are that far greater, because of, for example, the nature of the attacks and/or the indiscriminate way in which civilians including children are targeted? In such circumstances the rights of terror detainees would still be violated by the state, thus permitting suspects the opportunity of legal redress, but, morally, the actions of state authorities would be excused.

Notes

1. Barbara Hudson, "Justice in a Time of Terror," *British Journal of Criminology* 49(5) (2009), pp. 702–717, at p. 708.
2. Kai Ambos, "May a State Torture Suspects to Save the Life of Innocents?," *Journal of International Criminal Justice* 6(2) (2008), pp. 261–287, at pp. 268–269.
3. Florian Jessberger, "Bad Torture–Good Torture? What International Criminal Lawyers May Learn From the Recent Trial of Police Officers in Germany," *Journal of International Criminal Justice* 3(5) (2005), pp. 1059–1073, at p. 1061.
4. Hudson ("Justice in a Time of Terror," p. 708) says that the "ticking bomb" scenario is the epitome of the permissible use of torture according to the lesser evil ideology. If a captive is thought to have information about an imminent terrorist attack that may result in multiple deaths and injury, then, the argument is, the absolute ban on torture must give way to the duty to prevent further injury.
5. BBC News, "The Ricin Case Timeline" 13 April 2005. Available at http://news.bbc.co.uk/1/hi/uk/4433459.stm (accessed 21 April 2009).
6. BBC News, "Three Guilty of Airline Bomb Plot" 7 September 2009. Available at http://news.bbc.co.uk/1/hi/uk/8242238.stm (accessed 8 September 2009).
7. BBC News, "Indian PM Vows Action on Attacks" 27 November 2008. Available at http://news.bbc.co.uk/1/hi/world/south_asia/7752237.stm (accessed 1 December 2008).
8. Robert Wright, "Who Created Major Hasan?" *The New York Times* 21 November 2009. Available at http://www.nytimes.com/2009/11/22/opinion/22wright.html?scp=7&sq=Born%20in%20the%20U.S.,%20a%20Radical%20Cleric%20Inspires%20Terror&st=cse (accessed 24 November 2009).
9. Matthew Day, "Frankfurt Airport Shooter Shouted 'Allahu Akhbar' Before Opening Fire," *The Telegraph* 3 March 2011. Available at http://www.telegraph.co.uk/news/worldnews/europe/germany/8359759/Frankfurt-airport-shooter-shouted-Allahu-akhbar-before-opening-fire.html (accessed 4 March 2011).
10. BBC News, "America's Day of Terror." Available at http://news.bbc.co.uk/hi/english/static/in_depth/americas/2001/day_of_terror/ (accessed 21 April 2009).
11. BBC News, "Spain Steps Up Hunt for Bombers" 5 April 2004. Available at http://news.bbc.co.uk/1/hi/world/europe/3599895.stm (accessed 14 August 2009).
12. BBC News, "London Attacks" 8 July 2005. Available at http://news.bbc.co.uk/1/hi/in_depth/uk/2005/london_explosions/default.stm (accessed 21 April 2009).
13. Duncan Gardham, "Sweden Suicide Bomber: Taimur Abdulwahab al-Abdaly was Living in Britain," *The Telegraph* 12 December 2010. Available at http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/8198043/Sweden-suicide-bomber-Taimur-Abdulwahab-al-Abdaly-was-living-in-Britain.html (accessed 13 December 2010).

14. Sean Rayment, "200 Suicide Bombers 'Planning Attacks in the UK,"' *The Telegraph*. 8 October 2011. Available at http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/8815574/200-suicide-bombers-planning-attacks-in-UK.html (accessed 14 October 2011).

15. ANI, "Fears of Terror Threat to London Olympics as 10 Extremists Walk Free on UK Streets," 13 June 2011. Available at http://www.dailyindia.com/show/445002.php (accessed 15 June 2011)

16. The Hill, "The Consequence of a Dirty Bomb Attack" 12 April 2011. Available at http://thehill.com/blogs/congress-blog/homeland-security/155493-the-consequence-of-a-dirty-bomb-attack (accessed 15 April 2011).

17. BBC News, "George W Bush Claims UK Lives 'Saved by Waterboarding,"' 9 November 2010. Available at http://www.bbc.co.uk/news/uk-11715577 (accessed 9 November 2010). But this claim has not been said without controversy. Recently Human Rights Watch (HRW) has argued that overwhelming evidence of torture by the Bush administration obliges President Barack Obama to order a criminal investigation into allegations of detainee abuse authorized by former President George W. Bush and other senior officials. It further says that the Obama administration has failed to meet U.S. obligations under the United Nations Convention Against Torture (UNCAT) to investigate acts of torture and other ill-treatment of detainees. If the U.S. government does not pursue credible criminal investigations, HRW argues that other countries should prosecute U.S. officials involved in crimes against detainees in accordance with international law; see: Human Rights Watch, "United States: Investigate Bush, Other Top Officials for Torture," 11 July 2011. Available at http://www.hrw.org/en/node/100390 (accessed 18 July 2011). In fact, when George W. Bush recently visited Canada, HRW called for the Canadians to investigate his role in the torture of terror suspects at Guantanamo, as per their duties under the UNCAT; see: Human Rights Watch, "Canada: Don't Let Bush Get Away With Torture," 12 October 2011. Available at http://www.hrw.org/news/2011/10/12/canada-don-t-let-bush-get-away-torture (accessed 14 October 2011).

18. The former head of Britain's Security Service, MI5, Eliza Manningham-Buller, has also recently contributed to the debate. She admitted that "waterboarding" by the Americans had in fact provided life-saving information—but this still did not justify its use: "[It] is illegal. . . . [And] it is wrong." See: Duncan Gardham, "'Wterboarding Worked' Says Former MI5 Head," *The Telegraph* 8 September 2011. Available at http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/8751342/Waterboarding-worked-says-former-MI5-head.html (accessed 27 September 2011).

19. Chris McGreal, "Dick Cheney Defends Use of Torture on Al-Qaida Leaders," *The Guardian* 9 September 2011. Available at http://www.guardian.co.uk/world/2011/sep/09/dick-cheney-defends-torture-al-qaida (accessed 27 September 2011).

20. Jason Burke and Paul Harris, "Osama bin Laden Death 'Justifies' Torture of Suspects, Former Bush Aides Claim," *The Guardian* 3 May 2011. Available at http://www.guardian.co.uk/law/2011/may/03/osama-bin-laden-death-us-bush-torture-debate (accessed 6 May 2011).

21. Gordon Raynor, "Al-Qaeda Bomb Plot: Ryanair Boss Rages at the 'Securicrats,"' *The Telegraph* 2 November 2010. Available at http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/8103907/Al-Qaeda-bomb-plot-Ryanair-boss-rages-at-the-securicrats.html (accessed 4 November 2010).

22. BBC News, "Control Orders: Nick Clegg Denies 'Peaceniks' Row," 7 January 2011. Available at http://www.bbc.co.uk/news/uk-politics-12133637?print=true (accessed 23 March 2011).

23. Here the author is thinking of liberals in particular. But even the "Godfather" of liberalism, John Stuart Mill (1806–1873), might have justified torture on the basis of the significant risks posed by terror suspects to society, since he said: "[The] only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant." J. S. Mill, *On Liberty and Other Essays* (Oxford: Oxford University Press, 1991), p. 93.

24. Ian Turner, "Freedom From Torture in the 'War on Terror': Is it Absolute?," *Terrorism and Political Violence* 23(3) (2011), pp. 419–437.

25. (1978) 2 EHRR 25.

686 26. Ibid., p. 167.
687 27. Ibid. However, following *Selmouni* v. *France* (1999) 29 EHRR 403, which was the first
688 finding of torture against a state of the European Union (EU), the ECtHR now adopts a lower
689 threshold for torture than it did in *Ireland*. It said (p. 101): "Certain acts which were classified in the
690 past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in
691 future. [The Court] takes the view that the increasingly high standard being required in the area of the
692 protection of human rights and fundamental liberties correspondingly and inevitably requires greater
693 firmness in assessing breaches of the fundamental values of democratic societies."
694 28. Many of these techniques have been described by former detainees at Abu Ghraib Prison
695 in Baghdad after the coalition invasion of Iraq in 2002; see, for example, Human Rights Watch,
696 *The Road to Abu Ghraib* 8 June 2004. Available at http://www.hrw.org/en/reports/2004/06/08/road-
697 abu-ghraib (accessed 7 September 2006) and at the U.S. military base at Guantanamo Bay, Cuba;
698 see, for example, BBC News, "CIA 'Threatened' Terror Suspects," 22 August 2009. Available at
699 http://news.bbc.co.uk/1/hi/world/americas/8215722.stm (accessed 24 August 2009).
700 29. (1978) 2 EHRR 25, p. 167. Interestingly, notwithstanding this ruling at the ECtHR
701 over thirty years ago, similar techniques were used recently against individuals in British mil-
702 itary custody in Iraq; see, for example: R. Norton-Taylor and O. Bowcott, "Baha Mousa Re-
703 port Criticises 'Cowardly and Violent' British Soldiers," *The Guardian* 8 September. Available at
704 http://www.guardian.co.uk/world/2011/sep/08/baha-mousa-report-british-soldiers (accessed 21 Oc-
705 tober 2011).
706 30. Sandra Fredman, "Human Rights Transformed: Positive Duties and Positive Rights," *Public*
707 *Law* no. 3 (2006), pp. 498–520, at p. 498.
708 31. (1998) 27 EHRR 611.
709 32. Ibid., p. 22. The positive duty imposed on states to prevent acts of torture would be much
710 less effective if a corresponding obligation to investigate allegations of ill-treatment did not exist.
711 For example, Article 12 of the UNCAT states that there must be a prompt and impartial investi-
712 gation, wherever there is reasonable ground to believe that an act of torture has been committed.
713 To strengthen further this element of the torture ban, the UNCAT, according to Article 17(1), es-
714 tablishes a specific Committee against Torture. Article 19(1) obliges state parties to submit to the
715 Committee reports on the measures they have taken to give effect to their undertakings under the
716 UNCAT. Occasionally, the Committee may arrange a visit to a state party of the Convention (Article
717 20(3)). The Optional Protocol to the UNCAT, 2002, establishes a Sub-Committee for the Prevention
718 of Torture that has authority to visit places of detention and to assess the conditions of that detention.
719 The UN is also involved in the prevention of torture by appointing a Special Rapporteur on Torture
720 and other Cruel, Inhuman or Degrading Treatment or Punishment, who is currently Juan Mendez
721 from Argentina. The role of the Special Rapporteur includes transmitting urgent appeals to States
722 with regard to individuals reported to be at risk of torture and undertaking fact-finding country visits;
723 see: http://www2.ohchr.org/english/issues/torture/rapporteur/ (accessed 17 July 2011). The Council
724 of Europe has also created a European Committee for the Prevention of Torture and Inhuman or
725 Degrading Treatment or Punishment to strengthen further Article 3 of the ECHR. According to
726 Article 1 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treat-
727 ment or Punishment, "the Committee shall, by means of visits, examine the treatment of persons
728 deprived of their liberty with a view to strengthening, if necessary, the protection of such persons
729 from torture and from inhuman or degrading treatment or punishment." Article 10(1) of the Con-
730 vention obliges the Committee, after each visit to a country, to draw up a report on the facts found
731 during the visit and transmit to the country its report containing any recommendations it considers
732 necessary.
733 33. Ian Turner, "Suicide Terrorism, Article 2 of the ECHR and the Shooting of Jean Charles de
734 Menezes," *Web Journal of Current Legal Issues* no. 4 (2008). Available at http://webjcli.ncl.ac.uk/
735 2008/issue4/turner4.html (accessed 15 October 2008).
736 34. Especially at the heart of government. For example, in October 2008, when the United
737 Kingdom was wishing to increase the period of pre-charge detention of terror suspects from 28 days
738 to 42 days in the then Counter-Terrorism Bill 2008, the Home Secretary at the time, Jacqui Smith,

said: "The provisions in this Bill have always been about protecting the British people—protecting them from the serious threat that we face from terrorism. My approach has always been to strike the right balance between protecting national security and safeguarding the liberty of the individual. That balance is a precious and delicate one, and it has meant, quite rightly, that our proposals . . . have been the subject of intense parliamentary scrutiny. *But, for me, there is no greater individual liberty than the liberty of individuals not to be blown up on British streets or in British skies*" [my italics]. Available at http://www.publications.parliament.uk/pa/cm/cmtoday/cmdebate/13.htm#hddr_1 (accessed 27 October 2008).

35. Gordon Raynor, "7/7 inquest: 52 Families Hear How Their Loved Ones Died," *The Telegraph* 13 October 2010. Available at http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/8060221/77-inquest-52-families-hear-how-their-loved-ones-died.html (accessed 14 October 2010).

36. Alistair Mowbray, *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart Publishing, 2004), p. 40.

37. [2005] UKHL 66, [2006] 1 AC 396.

38. Ibid., p. 8.

39. Fredman, "Human Rights Transformed," p. 501. There are several examples where it has been suggested that the "positive" nature of Article 3 can be used to further protect the rights of third parties. For example, O'Cinneide has argued that the substantive nature of Article 3, encroaching on "second" generation, "economic, social and cultural" rights, should be extended further to impose more duties on the state. That is, exposing individuals to destitution, degrading living conditions or "similar manifestations of extreme poverty" should be recognized as constituting a violation of the ECHR; see: Colm O'Cinneide, "A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights," *European Human Rights Law Review* no. 5 (2008), pp. 583–605. Similarly, Kenna has discussed the use of positive obligations such as those found in Article 3 in informing housing rights; see: Padriac Kenna, "Housing Rights: Positive Duties and Enforceable Rights at the European Court of Human Rights," *European Human Rights Law Review* no. 2 (2008), pp. 193–208. Londono has recently utilized the positive nature of Article 3 to construct an argument justifying a greater protection of rape victims, involving, for example, the handling of rape trials and restricting the trauma of victims giving evidence; see: Patricia Londono, "Positive Obligations, Criminal Procedure and Rape Victims," *European Human Rights Law Review* no. 2 (2007), pp. 158–171.

40. [2008] UKHL 20, [2008] 1 AC 1356.

41. (2000) 29 EHRR 245.

42. Ibid., p. 115.

43. Ibid., p. 116.

44. Ibid.

45. (1978) 2 EHRR 25.

46. Ibid., p. 98.

47. (1978) 2 EHRR 1.

48. And more recently in the U.K. domestic case of *Regina (Williamson)* v. *Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246. Here the call for the use of corporal punishment by teachers and parents at an independent school on religious grounds, supported by Article 9(1) of the ECHR, the freedom of conscience, thought, and religion, was rejected in support of the far greater concern of protecting the welfare of children. These are examples where the "negative" rights of children to be free from institutional harm clearly overrode other competing considerations.

49. (1998) 27 EHRR 611.

50. (2003) 36 EHRR 31.

51. Ibid., p. 88.

52. [2005] UKHL 66, [2006] 1 AC 396, p. 53.

53. [2008] UKHL 66, [2009] 1 AC 536.

54. Mowbray, *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights*, p. 17.
55. (2002) 35 EHRR 1.
56. (2011) 52 EHRR 1.
57. Ibid., p. 107.
58. The ECtHR rejected the applicants' claim for similar reasons to those given by the U.K. domestic courts: *PF and EF* v. *United Kingdom* (Application no. 28326/09).
59. Jessberger, "Bad Torture–Good Torture?," p. 1063.
60. Alon Harel, "Publication Review: Why Not Torture Terrorists? Moral and Practical and Legal Aspects of the 'Ticking Bomb' Justification for Torture," *Public Law* no. 4 (2010), pp. 628–634, at 629.
61. David Sussman, "What's Wrong with Torture?," *Philosophy and Public Affairs* 33(1) (2005), pp. 1–33, p. 10.
62. Ibid.
63. Andrew Buncombe, "US Military Tells Jack Bauer: Cut Out the Torture Scenes ... Or Else!" *The Independent* 13 February 2007, p. 3. BBC TV's *Spooks*, a fictional account of British MI5 agents, is perhaps a more restrained TV program than *24* but even there counterterrorist officers were still confronted with a "ticking bomb" situation. For example, in Episode Nine of the Third Series, Robert Morgan, a known mercenary, is brought in for questioning. A laser target missile designator is missing. The agents have 72 hours to stop the guided missile hitting central London. But what is the target? Certain that Morgan has the designator, one of the MI5 agents, "Danny," offers Morgan money. It does not work. Morgan is put in a stress position and deprived of sleep. Again, this does not work. Toxins in his drink bring on severe food poisoning. He still does not reveal the whereabouts of the designator. But when his ill daughter is eventually threatened, Morgan gives up the designator's location. Available at http://www.bbc.co.uk/drama/spooks/series3_ep9.shtml (accessed 11 March 2010).
64. Available at http://www.channel4.com/news/microsites/T/torture/cases.html (accessed 11 March 2010).
65. Philippe Sands, "George Bush's Torture Admission is a Dismal Moment for Democracy," *The Guardian* 9 November 2010. Available at http://www.guardian.co.uk/world/2010/nov/09/george-bush-torture-admission-democracy (accessed 15 November 2010).
66. Human Rights Watch, *Guantanamo: Detainee Accounts*, 2004. Available at http://www.hrw.org/legacy/backgrounder/usa/gitmo1004/ (accessed 15 September 2006), p. 18.
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71. [2010] EWCA Crim 1551.
72. However, his subsequent appeal to the Court of Appeal—[2011] EWCA Crim 184— against his conviction has since been rejected. There was evidence that his fingernails had been removed but this had probably occurred before his detention in Pakistan. It was possible that he had been subjected to inhuman and degrading treatment—sleep deprivation—but there was no connection between this and staying the prosecution because of fairness, p. 40.
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851 78. Or at the very least serious discussion, especially among liberals who, merely on ideological
852 grounds, seemingly dismiss out of hand a proper consideration of the topic? Is this not more of a
853 legitimate balancing exercise that is at the heart of human rights ("liberalist"?) methodology?
854 79. [2005] UKHL 71, [2006] 2 AC 221, p. 161.
855 80. Jeremy Waldron, *Torture, Terror and Trade-Offs* (Oxford: Oxford University Press, 2010),
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857 81. Steven Greer, "Should Police Threats to Torture Suspects Always be Severely Punished?
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