A 'YOU'RE EITHER WITH US OR AGAINST US' – VIEWING TORTURE IN CONTEXT

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This essay examines the prohibition on torture as it exists today. It traces the universality and absolutism of the prohibition as it exists in theory through treaty law and customary international law. The writer goes on to analyse the recent dilution of the principle by certain jurisdictions in practice. The paper comprises a comprehensive examination of the jurisprudence and realpolitik of the prohibition on torture, drawing on diverse theories from the modern ticking time–bomb scenario to the practises of the ancient Roman Empire.

B INTRODUCTION

Torture, and the debate about it, never seems to go away. During the 1970s the issue was seen as key to protecting human rights at the conceptual and practical levels. Then, the world was mostly concerned with unsavoury regimes using torture to terrorise opponents into submission and to send a message that opposition will not be tolerated. Terroristic torture was used by countries like Chile and the USSR.[1] The debate has shifted to represent the change in concern regarding interrogational torture, and its place in the war on terror. Calls have been made for its use in extreme circumstances. To claim that torture may be justified is to ignore the premises of international and domestic laws banning its use, but more fundamentally, to misconstrue the context in which it is used.

Terrorism must be fought using a variety of means, but it is counter–productive for torture to be one of them. We must not fall into the moral, legal, and practical political trap of calling for the absolute ban to be diluted or for suspect interrogation methods to be legitimised, as the results of this are anathema to the core values underpinning liberal society and the social contract. In order to defend the absolutist prohibition, we first of all need to consider justifications for the use of torture, explaining why inhibition should be backed by prohibition. We then need to look at current practice, to decide how effectively the prohibitions are working. As a preliminary however, the legal situation surrounding torture needs to be addressed.

C ABSOLUTISM ARTICULATED – HOW THE LAW VIEWS ILL–TREATMENT

Torture is absolutely prohibited by law in all circumstances. The international nature of the ban allows universalist expression to be given to situationally relative problems and solutions. The first international

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[1] For an account of Russian torture in the early Soviet era see generally A. Solzhenitsyn, *The Gulag Archipelago*, (abridged one volume edition, London, Harvill Press, 1999). See also C. Ward, *Stalin's Russia*, (London, Arnold, 2nd ed, 1999). This work contains an assessment of the economic impact of forced labour at pp. 57–59. Chile's record is discussed in the Pinochet cases, post, n. 9.

instrument dealing with torture is the Universal Declaration of Human Rights.[2] This established a normative element within in the legal framework. Article 5 expressly sets out that "no one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment." This clear and unambiguous denouncement of ill–treatment was echoed by Art. 7 of the International Convention on Civil and Political Rights.[3] This reproduced the wording of the Universal Declaration, adding that no one may be subjected to scientific experimentation without their consent. Following this, The Declaration Against Torture[4] was adopted by the UN General Assembly without a vote in 1975, which although not a legally binding instrument eventually formed the basis for an international convention, and ended an era of standard setting without legal sanction.[5]

The Convention Against Torture (CAT) was finally adopted in 1984.[6] Under this, the ban is non–derogable even in times of war or other emergency.[7] Also the defence of *respondeat superior* is not available.[8] The non–refoulement principle is enshrined in Art. 3, demanding that if there is a likelihood that returning a person to a country will result in that person having their rights violated, that return must not be made.[9] Also the status of torture as a crime of universal jurisdiction is set out in Arts. 5–7 which codify the *aut dedere aut iudicare* principle. This is because the torturer is ascribed the status of *hostas humanis generis*.[10] Art. 15 makes clear that evidence obtained through torture shall not be admitted in any proceedings. The Rome Statute of the International Criminal Court criminalises torture as a crime against humanity,[11] a war crime,[12] and as genocide where the requisite intent is present.[13] These international developments were replicated at regional level with Art. 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 5 of the African Charter on Human and Peoples' Rights and Art. 5 of the American Convention on Human Rights

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[2] GA res. 172 A (III), 10 December 1948.
[3] GA res. 220 A (XXI), 16 December 1966.
[4] Resolution 3452 (XXX) of 9 December 1975.
[5] GAOR, 30th Session, Third Committee, Summary Records, A/C.3S/R.2165, para. 56 shows how Sweden acknowledged that a binding Convention was a necessity which had to be preceded by a Declaration.
[6] GA res. 39/46, 10 December 1984.
[7] Art. 2, para. 2.
[8] Art. 2, para. 3.
[9] For a discussion of this principle see Committee Against Torture, General Comment 1, U.N. Doc. A/54/44; *Khan v Canada*, 15th November 1994, Communication 15/1994, 15 HRLJ 426; *Mutombo v Switzerland*, 27th April 1994, Communication 13/1993, 15 HRLJ 164; *Sadiq Shek Elmi v Australia*, 25th May 1998, Communication 120/1998, CAT/C/22/D/120/1998; *Suresh v Canada* (Minister for Immigration and Citizenship) 2002 SCC 1.
[10] For a discussion of the universality of jurisdiction and its relationship with CAT and the concept of head of state
immunity see the three Pinochet cases: *R. v Bow Street Stipendiary Magistrate and others, ex p. Pinochet Ugarte (Amnesty International and others intervening)* (1998) 4 All E.R. 897; (1999) 1 All E.R. 577; (1999) 2 All E.R. 97.
[11] Art. 7.1.(f) and (k).
[12] Art. 8.2.(a).(ii) and (iii).
[13] Art. 6(b).

all expressly and absolutely prohibiting torture and other ill–treatment.[14] The totality and unanimity of provisions leads to the conclusion that the absolute prohibition is part of general international law. *Filártiga v. Peña–Irala* held torture to be a violation of customary international law.[15] Indeed it may be viewed as a *ius cogens* norm under the Vienna Convention on the Law of Treaties.[16] This argument is advanced by the UN Special Rapporteur on Torture[17] as well as Rodley,[18] O'Boyle,[19] and Rehman.[20]

Art. 1 CAT outlines that severe physical or mental pain or suffering, inflicted for a purpose, by or with the acquiescence of a public official or someone acting in an official capacity constitutes torture. Pain or suffering arising from or incidental to lawful sanction does not come within the definition. Art. 16 states that no act of cruel, inhuman, or degrading treatment is permissible even if not amounting to torture. These acts must also be committed with official sanction or acquiescence. Hence, Rodley notes the element of purpose as being the main definitional criterion by which torture is recognised.[21] This leads in turn to the "special stigma" which a finding of torture carries. It may be seen that torture is an aggravated form of cruel and inhuman treatment, and that inhuman treatment is also degrading,[22] showing a graduated approach.

The main thrust of this essay will be on the justifiability of torture in present circumstances. As a result of this I will refer to all coercive political or interrogational methods—both torture and cruel, inhuman, and degrading treatment—as "ill–treatment". This is because the line between torture and other forms of ill–treatment is often a juridical nicety,[23] and as current controversies show, other euphemisms such as "abuse" can be used to describe these acts.[24]

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[14] In international humanitarian law, Common Art. 3 of the Geneva Conventions, Art. 31 of the Fourth Geneva Convention, and Art. 99 of the Geneva Convention Relative to the Treatment of Prisoners of War also contain clear prohibitions on torture.
[15] 630 F 2d 876.
[16] Art. 53 (A/CONF.39/27 (1969).
[17] Report of the Special Rapporteur on Torture, U.N. Doc. E/CN.4/1986/15, para. 3.
[18] Sir N.S. Rodley, *The Treatment of Prisoners Under International Law*, (Oxford, Clarendon Press, 2nd ed., 1999) p.74.
[19] O'Boyle, *Torture and Emergency Powers under the European Convention on Human Rights: Ireland v. United Kingdom*, (1977) 71 AJIL 674, 687–688.
[20] J. Rehman, *International Human Rights: A Practical Approach*, (Essex, Longman Pearson, 2003) p. 409–410. Against this see the analysis of *Al–Adsani v Government of Kuwait* (1996) 107 I.L.R. 536 in H.J. Steiner and P. Alston, *International Human Rights in Context: Law Politics Morals*, (Oxford, Oxford University Press, 2000) p. 1061.
[21] Rodley, *op. cit.*, pp 84–85, and Sir N.S. Rodley, "The Definition(s) of Torture in International Law" 2002 Current Legal Problems 467, 481.
[22] 12 Yearbook of the European Convention on Human Rights: The Greek Case (1969) 186.
[23] The Northern Ireland case of *Ireland v UK* 2 EHRR 25 provides a good example of this. However, cases such as *Hajrizi Dzemajl et al. v Yugoslavia*, Communication No. 161/2000, U.N. Doc. CAT/C/29/D/161/000 (2002) present a clear case for a finding of other ill–treatment no matter that the failures on the part of Yugoslav state were indeed deplorable.
[24] Generally speaking, the word "abuse" is used to describe incidents such as those at Abu Ghraib Prison and Camp Bread Basket in Iraq. See for example "US Soldier guilty of Iraq Jail Abuse", The Guardian, 15 January 2005. Unsubstantiated claims that these practices were officially sanctioned would bring these incidents under the purview of the Committee Against

D THE HERESY OF UTILITY – WHY ILL–TREATMENT IS UNJUSTIFIABLE

When justifying ill–treatment, proponents generally adopt a utilitarian approach. They claim that these acts are indeed unpleasant, but that the greater good must be served. This type of justification is not new. Hope illustrates how torture was justified on grounds of internal security during the Reformation period in England and Scotland.[25] By the time of Bentham its use had lapsed, and he declared confidently that its potential for use had been exhausted.[26] Yet he adopted the classic utilitarian approach, normally given expression by the "ticking time bomb" scenario. The morals and logic in this argument have never changed though its formulation has, in order to accommodate current fears. In modern times it runs as follows: suppose security or intelligence services are aware of a terrorist threat. That threat places the lives of many innocent civilians at risk. Then, a person is apprehended by the state and that person knows information which can save those lives. The apprehended person is unwilling to part with this information after all normal interrogation techniques have failed. One resource lies unused by the state – torture. Under physical or mental strain, the information will be revealed, allowing the lives of civilians to be untouched by tragedy, ignorant that they were in imminent danger.

The utilitarian will justify ill treatment thus: all other methods have been exhausted and have failed; by revealing the desired information, the apprehended can save themselves further ill–treatment; the greater good is served. Each of these arguments needs to be deconstructed to take the moral basis for ill–treatment away from its advocates.

When asserting that all available methods will have been exhausted before ill–treatment is relied upon, utilitarians are being naïve. If ill–treatment is so effective, why should it not be used in routine investigations? Should it not be used to find a smaller bomb, one that will not cause huge carnage or one directed at a symbolic target? Should it not be used to find a missing child?[27] This slippery slope argument is verified by the fact that ill–treatment becomes institutionalised. This was the case in Israel where "moderate physical pressure" was legally permitted to be exerted on suspects detained for security offences. The Israeli courts were reluctant to intervene in the debate about this for many years and when they did, they showed great sympathy with the state.[28] Also the idea of moderate physical pressure –

Torture, whereas if these acts were done by a few "bad apples" ordinary military law would apply. The latter view has officially been adopted, despite the due diligence approach adopted in *Hajrizi*.

[25] D. Hope "Torture", (2004) 53.4 ICLQ 807.

[26] W.L. and P.E. Twining, "Bentham on Torture", (1973) 24.3 NILQ 305 reproduces and discusses two unpublished manuscripts M/S 46/63–70 and M/S 46/56–6.

[27] *Ibid*., at 316 where in M/S 46/63–70 Bentham advocates torture to be used for incendiarism, reflecting the concern of the age with property rights.

[28] See HCJ 7964/95, HCJ–VR 336/96, *Bilbeisi v The General Security Service* (1 January 1996); HCJ 8049/96 *Hamdan v The General Security Service* (14 November 1996); HCJ 3124/96 *Mubarak v The General Security Service* (17 November 1996), analysed in E. Benvenisti, "The Role of National Courts in Preventing Torture of Suspected Terrorists", (1997) 8 EJIL 596. However, HCJ 769/02 *Public Committee Against Torture et al. v Government of Israel et al.* may herald the beginning of a new approach.

though more reasonable sounding than ill–treatment or severe pain – is nothing but a sanitised version of same. In order to use ill–treatment for a security offence, one must firstly define a security offence. This definition is worthless, as investigators can easily claim "operational privilege" after the fact – a suspect detained for drugs offences may be ill–treated; it is easy to claim that some security element come to light during normal interrogation. By allowing moderate pressure to be used, the person or organisation applying it must simultaneously administer pressure and objectively judge its severity and efficacy. Shue clearly demonstrates the problems with this control system.[29]

The notion of a built–in endpoint is also dismissed by Shue.[30] He looks at the three types of potential detainee. These are the innocent by–stander, willing collaborator, and dedicated enemy. Only the willing collaborator really has the option to end their suffering. The innocent cannot give security services information that they do not have. This truism seems irrelevant, but it is important. Often, mistakes are made and if the wrong person is detained and subjected to ill–treatment, how can they realistically comply with their captors' demands? The answer is that they cannot. Will their captors know that the detainee is telling the truth? Because of the urgency involved in the ticking time bomb scenario and the mistaken but understandably human zeal involved in the interrogation of such a detainee, the answer is possibly not. In this case, information must be extracted at all costs, and anyone not providing that information will be subject to further ill– treatment; consequentially if someone says they cannot answer the question asked more pressure will be applied without regard to the veracity of such a claim.

The case of the dedicated enemy is similar. If someone really does know information capable of saving many lives and they indeed fall into this category, they are ideologically, and possibly religiously, motivated not to reveal it. Compliance is impossible as the cause for which security is being threatened would itself be undermined in favour of personal safety. In the current climate, the focus of ill–treatment advocates is on the possibility of attack by Islamist fundamentalists. The various actors involved in this cause have consistently shown disregard for their own lives, and it seems illogical to argue that anyone captured pursuant to a currently operational "martyrdom mission" will forsake this mission in favour of personal wellbeing. Also, capturing someone associated with a mission gives no guarantee that they will have useful information. Though exceptions such as Hamas exist, the days of terrorist organisations such as the Brigate Rosse and the Rote Armee Fraktion have come and gone. These were organisations with a clear command and control structure, based on that of a military body. Yet the main focus of current attention – Al Qaeda, Jemmah Islamiah, Abu Sayaff, and other fundamentalist jihadi groupings – do not use this structure. They operate in a "cell structure", whereby each operation is planned and executed by a small number of people.[31] No other cell has information about that plan, the group

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[29] H. Shue, "Torture", (1978) 7.2 Philosophy and Public Affairs 124.
[30] *Ibid*., pps. 130–137.
[31] For a discussion of terrorism generally see C. Townshend, *Terrorism: A Very Short Introduction*, (Oxford, Oxford University Press, 2002).

leadership may only have outline information at best, and even within the cell information is shared on a need to know basis. Consequentially, each cell may be seen to operate in a groupuscular manner, splintered off from the main body from whom they may draw funding, but more likely draw nothing more than inspiration. Thus ill–treatment may be useless in any situation – even a ticking–time bomb – as more people will have to be apprehended, conventionally interrogated, and then possibly ill–treated in order to come a little closer to stopping the imminent threat.

Only the willing collaborator has the outlet of confession. This is only feasible however, if the collaborator in question has the information required, and is guaranteed protection from reprisals – a situation particularly relevant when the ill–treatment is terroristic in nature or interrogational when the state is fighting a civil or guerrilla war. It must now be considered whether the greater good is really served by resorting to ill–treatment.

What constitutes the greater good is essential here. It is submitted that the greater good is the "feel of freedom". This means that people will be safe in fact from terrorist attacks and in theory from government encroachment on civil liberties, as this encapsulates the West's most basic values.[32] Vigilant intelligence and investigative services are a prerequisite for a safe and stable state – this is beyond question. They also need to be effective. Yet efficacy does not allow for the rule of law to be breached. This means that fundamental freedoms such as the rights to life and bodily integrity of a few people must not be breached in order to safeguard the lives of a greater number.[33] This relates back to the issue of institutionalisation discussed earlier – once on the slippery slope, it is difficult for brakes to be applied, and it involves the state in destabilising the basis on which it is built – the rule of law. This hands a propaganda coup to those who wish to overthrow or otherwise harm the state, its interests, or its citizens; feelings that the target state is corrupt, immoral, or dangerous are seen to be vindicated. Indeed, it may be said that torture creates more terrorists than it deters and though this is difficult to test empirically it should be borne in mind. In terms of citizens feeling less free, many of the same concerns apply especially as regards the rule of law. It may have been seen as acceptable for Abraham Lincoln to suspend habeas corpus during the American Civil War, but that was a tangible danger to the state, used in defined circumstances and for defined purposes. Though it too diminished freedom, the current political climate is far removed from that of the 1860s. Constitutions and courts are more willing to uphold a rights based culture, a culture rationally founded on the dignity of man. Equality and legal protection extends to all, not to some, and this is the basis of challenge to new security measures including calls for sanctioned ill–treatment. This causes trust in government to be eroded, as governments cannot act for the greater good by negating due process, thereby reducing the freedom felt.

E THESEUS IN THE LABYRINTH – CONFRONTING CURRENT PROBLEMS

[32] On cultural values generally see S. Huntingdon, "The Clash of Civilisations", Foreign Affairs Summer 1993, p. 22.
[33] This also accords to the Kantian notion that no person may be used by another solely as a means to a particular end.

When these moral and logical conclusions are applied to the current conduct of the war on terror, we see that the factual situation is one in which the views of Derschowitz and Posner appear to command much support. Several issues present themselves for scrutiny – official policy and conduct relating to ill–treatment and proposed legal and practical reform of the current regime. What must be noted as a preliminary is that ill–treatment takes place in the "darkest recesses of political power,"[34] thus much of what is alleged to be official policy and conduct remains just that – allegations denied at the official level. This is only to be expected. Yet certain things can be stated as facts, whatever their surrounding circumstances.

The first official policy to be assessed is that of the United States' position regarding ill–treatment during interrogations. Concerns have been expressed over the conditions prevalent at the Guantánamo Bay interrogation centre, and prosecutions have resulted from the ill–treatment at Abu Ghraib prison.[35] The United States incorporated CAT into its domestic law, hence accepting the definition set out in Art. 1.[36] However, it has made attempts to narrow the definition of torture. In what has become known as "the Bybee Memo," the Office of Legal Counsel at the Department of Justice set out that torture may be defined as pain equivalent in intensity to the pain accompanying serious physical injury such as organ failure or death.[37] Also, US reservations to CAT disavow any suggestion that it can override the constitution. Thus, any command given by the President in his authority as commander in chief is not subject to CAT. This has been dismissed by the administration as "a scholarly effort to define the perimeters of the law."[38] It is submitted that such efforts are readily available elsewhere, and that the memo is particularly worrying having been requested by the new Attorney General Alberto Gonzalez, and written by Jay Bybee – subsequently appointed as a federal judge for the Ninth Circuit. It is also worrying when analysed in conjunction with the alleged policy of "extraordinary rendition." This is a breach of the non–refoulement principle whereby terrorist suspects are arrested by American or other state security services and then sent to states such as Egypt and Jordan who have a reputation for torturing detainees to extract information, outside the formal extradition process.[39]

Following on from this, another official development undermining the stigma of ill–treatment emerged in Britain. The Court of Appeal has ruled that the use of evidence obtained in this way is admissible before the Special Immigration Appeals Commission, once this evidence is not obtained in

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[34] U.N. doc. A/C.3/32/SR.37, para.13, quoted in Rodley, *op. cit.*, *supra* n. 17, at 67. This view was endorsed by the European Court of Human Rights in *Çakici v Turkey* (2001) 31 EHRR 133.
[35] See *supra*, n. 23.
[36] 18 U.S.C. § 2340.
[37] This is contrary to the view taken in case law; see for example *Aydin v Turkey* (1998) 25 EHRR 251. Memo available at www.washingtonpost.com/wp_srv/nation/documents/dojinterrogationmemo20020801.pdf.
[38] "A Memo Too Far", The Economist, 10 June 2004.
[39] "Ends, Means, and Barbarity", The Economist, 9 January 2003; F. Doherty and D. Pearlstein (eds.) *Assessing the New Normal: Liberty and Security for the Post September 11 United States*, Report for the Lawyers Committee for Human Rights, pps. xiv, 80–85.

Britain.[40] Having held that the non–admissibility of evidence gathered through ill–treatment was part of the common law, as well as being demanded by Art. 15 CAT, it seems unrealistic for the Court to have allow the evidence be admitted, especially in light of the *ius cogens* nature of the prohibition. This decision may give quasi–legitimacy to the extraordinary rendition policy. However, this decision has been overturned by the House of Lords in an emphatic judgment which places both evidence obtained by ill–treatment, and indeed ill–treatment itself, firmly beyond the pale.[41] The political response to this decision is currently awaited; this will be crucial in determining how the British government views ill–treatment, international and domestic law and norms prohibiting its use, and – perhaps most critically –the future conduct of the war on terror in the context of the special relationship with the United States.

Many calls for reform of the current system stem from the facts that ill–treatment will happen even if prohibited, and hence it should be brought within the system. Alan Dershowitz and Richard Posner are two such advocates. Dershowitz has advocated the use of "torture warrants."[42] This supposed judicial control on ill–treatment to be used in a ticking time bomb context will bring illegal action within the rubric of legality instead of "winking an eye of quiet approval at torture while publicly condemning it." Lord Lester easily dismisses the idea of judicial control over the actions of low level officials engaging in ill–treatment.[43] Posner, while disagreeing with the idea of advance judicial sanction, instead calls for the customary prohibition to be retained while quietly ensuring that it will not be enforced in extreme cases.[44] Both of these men have become trapped in the hermeneutic circle – by failing to understand the related concepts of terror and ill–treatment in both the general and particular contexts, they fail to give lie to the idea that ill–treatment is a less efficient tool in present circumstances than addressing root causes while promoting effective yet conventional techniques. An area in which change has been mooted is the use of "truth serum."[45] These are drugs such as sodium pentothal and similar barbiturates which can cause the person to whom they are administered to become more talkative against their conscious will. The use of these "mind–altering substances" violates American law,[46] and may violate other legal provisions and instruments as repugnant to the rights to privacy, bodily integrity and not to self–incriminate. What is peculiarly sinister is that these drugs have little guarantee of success as the suspect is unlikely to be cogent in their responsiveness due to the drugs'

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[40] *A, B, C, D, E, F, G, H, Mahmoud Abu Rideh Jamal Ajouaou v Secretary of State of the Home Department* [2004] EWCA 1123, 11 August 2004.
[41] *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* (2004), *A and others (Appellants) (FC) and others v. Secretary of State for the Home Department (Respondent)* (Conjoined Appeals) [2005] UKHL 71, 8 December 2005.
[42] A.M. Dershowitz "Is There a Torturous Road to Justice", LA Times, 8 November 2001; "We Need a Serious Debate About the Use of Torture", The Guardian, 30 November 2001; "Why Terrorism Works: Understanding the Treat, Responding to the Challenge", (Yale, Yale University Press, 2002).
[43] Lord Anthony Lester QC, "Can Torture be Justified", The Guardian, 4 December 2001.
[44] R.A. Posner, "The Best Offence", The New Republic, 2 September 2002.
[45] J.R. Odshoo, "Truth or Dare", (2004) 57 Stanford Law Review 209.
[46] 18 U.S.C. § 2340(2)(B).

anaesthetic properties, and that they may have long term adverse consequences.[47] Calls have been made for their use, and this endangers the absolute prohibition of ill–treatment, and governments attempting their use are undermining their own rules.[48]

F CONCLUSION

Lawmakers and law enforcers should understand the importance of law and its role in conflict. It is beyond question that terrorism must be fought, and all available means must be used to do so. However, those means do not include resort to ill–treatment, as it is illegal, illogical, and ineffective. The present conflict evokes the Punic Wars. Roman senators called for the eternal destruction of enemy Carthage. Yet towards the end of the final act in that sorry tragedy, the real enemy of Rome was revealed as being official indifference to the rule of law. This indifference signalled the end of the republic and the beginnings of nostalgic reminiscence of its more liberated politics. Modern indifference is similar as the hierarchies of civil liberties and personal security have become inverted in favour of restriction and disregard for these freedoms; ironically in the name of security, both personal and collective. It does not matter that the objects of indifference differed from that era to this – the core issue was abuse of power. To learn the lesson of Rome is essential. We must not suffer indifference towards ill–treatment; hence its prohibition must be upheld in law, in morals, and in reality.

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[47] See the concerns of Physicians for Human Rights at http://www.phrusa.org/research.torture.index.html.

[48] A striking illustration of its use is provided by India where it is regularly used to extract confessions – "Legal Questions Raised over Truth Serum Use", Times India, 25 July 2002.

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