

## ARTICLES

### COMBATING TERRORISM AND HUMAN RIGHTS PROTECTION: THE TICKING BOMB THEORIES AND TORTURE

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#### Survivor of torture

*“Only the person who has been tortured can tell how painful it is. The people who torture you don’t let you die and they don’t let you be alive.”*

*Today and under the weight of a constant, global threat and menace of mega destruction terrorist attacks, public advocacy of torture no longer seems a taboo. Actually it emerged as a topic of serious debate not only among law enforcement officials, but also among legal academics, especially in the United States, where inhuman treatment of terrorism suspects has been intensely discussed in the media and press. There were questions: “What if an atomic bomb were about to be detonated in Manhattan, would police be justified in torturing the terrorist who planted it to learn its location and save the city?” that have resulted in the proposal of legally introducing torture during interrogation of suspected terrorists, with various methods. We have reached a point in history, when we are compelled to test our devotion in the democratic and human rights values of our societies. The decision to be taken is not only difficult, but moreover it will dictate our future legal and above all human civilization.*

## 1. Preface

Although in 1874 Victor Hugo would write “torture has ceased to exist”, torture was always likely to outlive its obituarists and today “the war on terrorism” wants to legitimize once again practices that the Middle Ages associated with confessed truth, repentance and salvation.

Before this vicious circle of terrorist violence that began with the events of September 11<sup>th</sup> 2001, no respectable or even remotely serious legal theorist would dare to consider supporting publicly torture as a method to combat any form of criminal behavior. Yet today and under the weight of a constant, global threat and menace of mega destruction attacks, public advocacy of torture no longer seems a taboo. Actually it emerged as a topic of serious debate not only among law enforcement officials, but also among legal academics<sup>1</sup>, especially in the United States.

Inhuman treatment of terrorism suspects has been intensely discussed in the US media and press. The New York Times, the Wall Street Journal, even CNN have frequently dealt with that subject. The Washington Times<sup>2</sup>, for example, recently published a method for the efficient interrogation of Al Qaeda suspect Khalid Shaikh Mohammed, suggested by the president of the Freedom Research Foundation. This involved ventilation by nasal mask of a paralyzed subject, with the ventilator turned off to provide transient suffocation whenever the interrogator was dissatisfied. The New York Times<sup>3</sup> and International Herald Tribune<sup>4</sup> also published apparently well-founded accounts of the techniques applied to Abu Zubaydah and other Al Qaeda suspects in US custody. These included deprivation of food, water, sleep, and light; covering subjects’ heads with black hoods for hours at a time; forcing them to stand or kneel

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<sup>1</sup> On this debate see A. Dershowitz, *Why Terrorism Works*, Yale University Press, 2002, p.p. 131-163, B. Hoffman, “A Nasty Business”, *The Atlantic Monthly*, January 2002; also the comments of Counter-Terrorism Measures and the Prohibition against Torture and Ill treatment report, submitted by the Human Rights Watch on the European Parliament’s Hearing on Human Rights in the European Union, 24/4/03.

<sup>2</sup> J. Wheeler, Interrogating KSM, *Washington Times* 5/3/03.

<sup>3</sup> D. Van Natta, Questioning Terror Suspects in a Dark and Surreal World, *New York Times* 9/3/ 2003.

<sup>4</sup> D. Van Natta, A dark jail for Qaeda suspects, *International Herald Tribune* 10/3/02.

in unnatural positions in extreme cold or heat; keeping them naked; prolonged chaining or shackling; hooking them up to sensors during serial interrogations; and denial of medical attention.

The shock, the tragedy of all those innocent lives lost so unfairly, the fear of a possible future repetition and the determination to discourage any aspiring terrorists of their plans have without doubt contributed to this new policy suggestions for counteracting terrorism. In addition – to some extent – the wounded pride of the planet's only superpower that proved to be defenseless and unable to protect its citizens from a hand full of terrorists, demands in order to be restored more drastic and effective antiterrorist measures.

There were questions that in the past would be adequate only for a good late-night bull session in a college dorm room, like: "What if an atomic bomb were about to be detonated in Manhattan, would police be justified in torturing the terrorist who planted it to learn its location and save the city?" These questions are now posed in reality and trouble both academics and officials. They are no longer a college joke, because the theoretical circumstances on which they are based on do not belong in the sphere of science fiction anymore, so the answers that are given really do matter. These "ticking bomb" theories have resulted in the proposal of legally introducing torture during interrogation of suspected terrorists, with various methods, like for example the insertion of a sterilized needle under the fingernails, producing excruciating pain and forcing the interrogated to confession<sup>5</sup>.

Although as mentioned before, these proposals of counter terrorism methods do originate from the United States, they do not pose a problematic only for America. Terrorism is a global threat that affects all countries. Apart from any domestic terrorist groups that operate primarily inside national borders, the countries that belong to the so-called "western world" are also endangered by the vindictive rage of radical Islamic terrorist "jihad"<sup>6</sup>.

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<sup>5</sup> A. Dershowitz, *op.cit.* supra in note 1.

<sup>6</sup> According to the chilling words of a religious decree, or Fatwa signed by Osama bin Laden, Ayman al Zawahiri on February 23d 1998: "*To kill Americans and their allies, civilians and military is an individual duty for every Muslim who can do it in any country in which it is possible to do it*". The Fatwa opening words are: "*Praise be to God who says in his book: fight and slay the pagans whenever you can find them*".

Europe will have to face the same questions and problems, like the US does, concerning its effective war against terrorism. We have reached a point in history, when – stuck between Scylla and Charibdes, between terrorism and violation of human rights – we are compelled to test our devotion in the democratic and human rights values of our societies. The decision to be taken is not only difficult, but moreover it will dictate our future legal and above all human civilization.

## **2. Human rights protection and prohibition of torture by law**

From a strict legal point of view one must admit (what ever his personal convictions might be) that there is no doubt on the use of torture as a counter crime policy, not even a theoretically debatable issue: Torture is absolutely prohibited.

In international level, torture has been condemned for the first time with the Universal Declaration of Human Rights. According to article 5 of the Declaration:

*“No one shall be subjected to torture and other cruel, inhuman or degrading treatment or punishment”.*

The same provisions are made in article 7 of the International Covenant on Civil and Political Rights, while also the Geneva Convention against Torture prohibits all forms of torture and does not provide for any exception. This was reaffirmed by the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), where the prohibition against torture is actually one of the most absolute in international law, admitting of no exceptions. CAT Article 2§2 states:

*“No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” Furthermore, the Convention against Torture, in article 3§1, states that: “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”*

In just European level, article 3 of the European Convention on Human Rights reads as follows: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". The rights to be free from torture and inhuman or degrading treatment are amongst the most fundamental of all human rights, as they are tied to an individual's personal integrity and human dignity and again are subject to no derogation under no circumstance. The extremely high position of these rights in the European human rights hierarchy is reflected exactly by their special status in this regard. Specifically, article 15§2 of the Convention, which allows a State to derogate from its obligations under the Convention in times of emergency, underlines the importance of rights under Article 3 with the following provision: "Under no circumstances may a State derogate from its obligations under this article". Towards the same direction of protecting human rights was adopted also the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment with its two Protocols. In addition, any European anti terrorism policy, according also to the Council framework decision on combating terrorism (13/6/2002) should follow these principles: "The European Union is founded on the universal values of human dignity, liberty, equality and solidarity, respect for human rights and fundamental freedoms. It is based on the principle of the rule of law, principles which are common to the member States" (preamble).

Although the United States seem to be for the time being the main country troubled in serious level with the subject of torture, the legal picture of the issue is there very clear. Even in the Preamble of the American Declaration of the Rights and Duties of Man it is stated that "*all men are born equal in dignity*". Also it is recognized that "*every accused person is presumed to be innocent until proved guilty and has the right not to receive cruel, infamous or unusual punishment*"(article 16). The provisions of the American Convention on Human Rights are no different than the above. Reaffirming the intention to consolidate within a framework of democratic institutions a system of personal liberty based on respect on the essential rights of man, the Convention secures the Right to Humane Treatment as follows:

*"Every person has the right to have his physical, mental and moral integrity respected. No one shall be subject to*

*torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person" (article 5§1 and 2).*

This provision is excluded of suspension in any case of war, emergency, public danger that can threaten the independence or security of a State Party (article 27§1 and 2). It is, in addition, again repeated that

*"every person accused of a criminal offence has the right to be presumed innocent so long as his guilt has not been proven according to law" (article 8§2).*

Even more specific is the Inter-American Convention to Prevent and Punish Torture where it is recognized that all acts of torture or any other cruel, inhuman, or degrading treatment or punishment constitute an offence against human dignity (preamble). In article 2 a broad definition of torture is given:

*"any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose..the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish".*

Again,

*"the existence of circumstances such as a state of war, threat of war, state of siege or of emergency, domestic disturbance or strife, suspension of constitutional guarantees, domestic political instability or other public emergencies or disasters shall not be invoked or admitted as justification for the time of torture. Neither the dangerous character of the detainee or prisoner..shall justify torture" (article 5).*

The universality of the legal opposition against torture is shown by conventions in other continents and other civilization or religious frameworks and settings. The African Charter on Human

and People's Rights acknowledges that "Human beings are inviolable" (article 4). It is moreover stated that every individual shall have the right to the respect of the dignity inherent in a human being, so all forms of exploitation and degradation of man, particularly torture, cruel, inhuman or degrading punishment and treatment is prohibited (article 5). The Cairo Declaration of Human Rights in Islam adopts that it is not permitted to submit an individual to physical or psychological torture or to any form of humiliation, cruelty or indignity, nor it is permitted to promulgate emergency laws that would provide executive authority for such actions (article 20).

To the above, constitutional norms of nearly every country in the planet could be added to show that from a legal stand torture and any kind of inhuman behavior is totally prohibited and unaccepted. No theories on emergency situations, "ticking" or even already "exploding bombs", the vile and "special character and evil of the terrorist as a criminal, can justify for the institutionalizing of torture neither as a method of interrogating nor as a sentence of punishment. The legal provisions are clear, self-explanatory, requiring no interpretation, admitting no deviation, permitting no choice. They are absolute; exactly as absolute is the evil of torture.

### **3. Human rights protection and torture in the context of a democratic society**

Though the issue of using torture is, as mentioned above, already legally solved beyond any "reasonable" doubt, the debate still goes on unreasonably, neglecting the aspect of legality. The fear of terrorist actions is vivid, the evil to combat is so great and important, that people tend to see laws like dead texts, full of abstract and general meanings, which are of interest only to ranter lawyers and have nothing to do with reality, with real threatening problems. Law and its provisions against the violation of human rights have taken for some a mere theoretical dimension. They are a luxury that is of no priority, meaning or utility – if not of a negative value – in the war against terrorism. Thus, unfortunately it seems obligatory to support the protection of human rights in a rational, historical and philosophical basis within the context of our democracy.

To start even taking about combating terrorism and human rights,

it is necessary first to choose what kind of state and society we wish to keep in mind as point of reference. If the sole index that we are interested in is an anticrime policy with special ultra-effective antiterrorist measures, then the democratic state by definition has already failed. Dictatorships and military regimes are more likely to rate higher achieving that goal, because torture, prohibitions and fear are so strong, so evident in everyday life, that criminality levels tend naturally to be quite lower. No one is allowed to do anything; all citizens are punished, including criminals. Of course also the innocents suffer, but then who is really innocent where everything-even breathing freely – is a crime?

In that case, when this is the political structure that we are aiming for, then the answer is very simple: by all means, torture is an effective, respectable way to pursuit an anti terrorism policy, an anticrime policy in general. Even if the State becomes its self a criminal, at least we can be sure that all “dangerous” elements of the society will be alienated, marginalized and treated as they deserve to be treated. Here find their place the Messianic declarations of effectiveness in combating crime here and now by those who refuse to see and understand the dialectic relationship between freedom and penal suppression, argue that some forms of criminality (like terrorism) are so dangerous for society, that a form of ipso jure, public violence, and restriction of fundamental liberties are legalized. So they recognize a needed evil, opening the door to rule for the exception.

While there will be always those who find most appealing the above situation as an idyllic political choice, for the rest who are advocates of a democratic, free state and society the solution is quite different and much more perplexed. Surely, terrorism is a huge problem demanding proper attention and effective countermeasures, undeniably the citizens are entitled to safety and crime-free, but at the same time democracy, freedom and the protection of human rights emerge as a sine qua non condition and element of a quality life. After all, the conception of the written law, protecting principles and rights has its value, not in peaceful circumstances and good times, but also in trouble and torment, when there is a true danger of violation.

The protection of human dignity is more than a cultural value that we respect formally. It should not be considered as a luxury, saved only for conference speeches and banquets. It is a necessity,



which derives from the very notion and substance of democracy<sup>7</sup>. The use of inhuman methods and ill-treatment as a sentence, as a way to abstract confessions, depositions or statements, to frighten or to reason people, is contrary to the first duty of the democratic state, that is to respect human dignity.

The bulk of the democratic principles, to which belongs also the protection of the basic human rights, may not at every time and on the whole be liable to endless dispute and bargaining from the very beginning. The matrix of these principles can only become the object of ameliorated restatements<sup>8</sup>, with further refinement toward qualitatively higher compositions. In this particular sense, some principles can be considered as unshakable, beyond any historical contingency, like the present necessity to combat terrorism. Similarly, principles of justice are no longer objectionable and negotiable, no matter how strong a circumstantial majority opposing them might be.

What comes forth is, in reality, a historically spiroid educational process of humanity. It is during this historical course that rational members of mankind come to perceive, thanks to experience piled up along the centuries, that some principles of action deserve to be regarded as unassailable. What the Athenian democracy, "Habeas Corpus" Act, "Magna Carta", the French and the American revolution have left as legacy to human society are not under revision. Our political evolution and process of democratic mature ness has been completed, we have learnt our valuable lessons – mainly through struggle and pain – and now we can avoid making the same mistakes and continue only to look ahead. Any attempt to turn back to a time of institutionalized torture and denial of human rights shall be telologically doomed to fail, like any other anachronism.

Torture is a despicable crime, whatever the methods, whatever the cause, because it affects the body and the soul of the victim of the violence, degrading him to a sheer object of the torturer's will. This consists a denial of the victim's personality, since, because of

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<sup>7</sup> Torture is the most obvious denial of human dignity. A state that systematically tolerates or even more organises torture is in a state of barbarism, P.Dagtoglou, *Civil Rights*, Athens 1991, p. 207 (in greek).

<sup>8</sup> On this subject, see the work of K. Stamatis, *Theories of Justice*, European Legal Academy, 2000.

the violence, the person cannot think, decide and act based on his criteria and his right to self-determination<sup>9</sup>. It is a procedure of dehumanizing of man, depriving him of his value as a being of reason and ethics. But apart from that, it is the ultimate weapon for terrorizing, controlling the individual human being and the community, destroying democratic aspirations and actions.

When members of a community are made powerless and lose trust in themselves and in one another, building a democratic community is rendered extremely difficult and complex. The disapproval of torture as a method practiced by politically organized power must be absolute, because in any other case it constitutes state arbitrariness, contra the function of legality and self-restriction of the State in its democratic and liberal version. If a terrorist or any common perpetrator committing a crime insults the trust in the basic principles of Law and Public Order, how should be treated those who established a Law Order, insulting the basic principles of Justice, like the value, the freedom and the honor of men.

By introducing torture and inhuman method, by opposing in fact its own fundamental basis, the State's actions will actually justify the terrorist's activity by proving that democracy does not function properly and does not fulfill its initial and basic requirements to the citizens, so it has to be overthrown and be replaced. In most of the cases, terrorist groups need to masquerade and hide behind a noble cause, usually attempting to correct political injustice that torments the society, with a riot against tyranny and oppression as the last refuge against a regime of violence.

In addition, this way terrorists gain political, but even – in some cases – financial and operational support, elements basic for their existence. They can easily take the role of the revolutionary protector – a kind of political Zorro-claiming to express the needs of people, who – on the other hand – might even feel towards them a subconscious putting up and sympathy. This can take place especially when the terrorists attacks do not target plain, ordinary people, do not threaten with violence immediately regular members of the society, but hunt down government officials and state authorities, that may not be popular to the public anyway.

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<sup>9</sup> For more in depth analysis of the effects of torture on human mind see J. Delgado, *Physical Control of the Mind*, New York 1971.

But even from a point of view of effectiveness, torture and inhuman methods of interrogation do not really rate that high. Actually, there is even no hard evidence that can prove that the total amount of terrorism will be reduced, if ill treatment of suspects is adopted as an official technique during interrogation. A person under torture or threat can confess to anything, even give misinformation, because he will do and say anything to stop physical or emotional pain.

So, torture actually does not help much in a serious antiterrorist or generally anticrime policy, since the information drawn from the interrogated suspects is not all that accurate or valid. In addition, there are also those terrorists who armed with faith and fanaticism for their cause, shall not bend by any form of maltreatment and chose to become saints and martyrs not only to their organization, but also to public opinion. This situation can produce even opposite results, maximizing sentiments of resentment towards the government, leading people to less cooperation with the authorities.

Of course it would be foolish to deny that there are cases – and there always be – when torture actually produces results, valuable and truthful information, incriminating evidence, helping law enforcement officials to solve a case or even prevent an attack. A specific example that has been used to support this, is the example of Abdul Hakim Murad who, under torture by the Philippine authorities in 1995, revealed a murderous conspiracy to assassinate the Pope, fly a private Cessna filled with explosives into CIA headquarters and hijack American passenger jets and crash them into the Pacific Ocean. For sixty seven days Philippine intelligence agents beat the suspect with a chair and a long piece of wood breaking most of his ribs, forced water into his mouth and crushed lighted cigarettes into his private parts, carrying out a “tactical” interrogation”.

But the empirical reality that inhuman methods of interrogation and research sometimes may in deed work, does not reasonably or ethically justify them. Apart of the unaccepted violation of a guilty person’s human rights, who can guarantee and who can take the responsibility of violating the liberties and the rights of an innocent person that happens to get involved in an alleged terrorism case examined by the police. All these theories like the “ticking bomb” one and their firm supporters are based on a hypothesis that we really have to deal with a guilty terrorist,

who is illegally withholding important information, sometimes even able to prevent with their confession a large number of innocent victims to die. But this is only a hypothesis, which cannot apply in real everyday situation. To every police success against crime, there can be the analogy of a Dreyfus case, where an innocent man is framed or just miss involved.

To this innocent person that will be tortured the cynic comment that "no technique of crime prevention always works"<sup>10</sup> is just not enough. Is it worth to torture, inflict pain and deprive of his rights a possibly innocent man who will have to admit guilt of anything he is charged with under fear and pain? Definitely not, at least for those who still believe that the basis of our penal justice system should lie in the notion that it is better to have a hundred guilty men outside prison, than one innocent person inside. The unjust suffering of even one innocent man can never be compensated and this is a burden that a democratic society simply cannot stand. No apologies, no justified "good intentions" for the good of the many and no smart arguments can erase the tragedy and the injustice.

Those who argue that causing calculated pain and non lethal torture to a single individual is a lesser evil than permitting thousands to die horribly and in terror by fire, explosion etc, forget something very simple: As a consequence, this logic could theoretically apply to any crime combating strategy, opening the door to unending violations. After terrorism could follow drug trafficking, white flesh trading, rape and a series of other serious crimes that inflict pain to people and endanger society and would justify any kind of counter measures. But finally, who and based on what criteria would decide each time for what criminal offences and until what extend it would be worthwhile limiting peoples liberties and rights and breaching established penal procedure rules and principles.

Just for example and argument sake, what if non lethal, without wounds and blood torture is not enough to compel a terrorist confess about a "ticking bomb" situation; what then? Will there be justification to torture him in a lethal way, threaten to rape him or

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<sup>10</sup> A. Dershowitz, *op.cit.* supra in note 1, p.137.

members of his family, perform electro-shocks or “phallaga” on him? Will the next suggestion to combat terrorism be to consult Gestapo or Spanish Inquisition manuals to discover the most painful and effective ways to maintain alive the suspect, while causing excruciating pain on him in order extort confessions<sup>11</sup>? Any kind of answer to the above question proves the absurd of the torture proposal for a democratic society, where justice is more important, a step further any scope.

But absurd and hideous has even been also the thought expressed, that inhuman cruel treatment could be introduced after a judicial permission. While there is hope that there will be judges who would refuse under any circumstance and law to issue a decision on torturing a suspect, we can not be that sure that there will not be found judges that would authorize torture. Imagine that kind of power invested in an ill powered, corrupted, or even just sadist judge and any trust on our legal systems is ready to collapse.

We have established courts and legal procedures to protect and guard our rights and liberties, not to breach them. In the contrary way, judges and judicial procedures will be just a facade, nothing but a legal cover to impose tyranny and this is even more dangerous for a democracy that a terrorist attack might be. As much as we fear fascism and junta when it wears a military uniform, as much as we dread the terrorist armed with bombs, we must also worry about terror and violence expressed and inflicted by a judicial robe and tunica. While countries, like Britain take pride on their justice system protecting their nation and democracy, other countries do not share this trust. Greece, Spain, Argentina, Chile – to name but a few – have a quite vivid

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<sup>11</sup> To all those that nostalgically search effective methods to secure true confessions from terrorists, the following books are suggested, enriched with centuries of torturer’s wisdom: A.R. Allinson, *Tortures and Torments of the christian martyrs*, Paris 1903, F. Bella, *Storia della Tortura*, Milano 1961, M. Bauer – F. Helbing, *Die Tortur: Geschichte der Folter im Kriminalverfahren aller Zeiten und Völker*, Berlin 1926, J. Delarue, *Histoire de la Gestapo*, Paris 1964, A. Frescaroli, *La Tortura attraverso I secoli*, Milano 1970, R. P. Gallonio, *Trattato degli instrumenti di martirio e delle varie maniere di martirizzare*, Roma 1591, B. Gui, *Manuel de l’Inquisiteur*, Paris 1964 v.1-2, R. Wrede, *Die Körperstrafe zu allen Zeiten und bei allen Völkern*, Dresden 1898.

experience of junta and fascism, torturing and oppressing people and their liberties, with a justice system that cooperated significantly and helped to tyrannize<sup>12</sup>.

The dilemma “terrorism or human rights” is a pseudo one, an insult to anyone with basic political education. It should be noted that respecting civil liberties, human rights and freedom does not mean leaving the guilty parties go unpunished, or terrorist groups act violently without control. It is understood that also victims (already inflicted or just potential) and their families are entitled to the protection of their human rights, of their right to live in safety. The State as a structured social organism is responsible for the protection of its members’ life, dignity, property and legal goods.

The same sensitivity and interest that intellectuals, human rights supporters, lawyers show – and should always do so – to protect a suspect, a guilty part, has to be exhibited also in the cooperation with the authorities to protect all of us from the terrorist threat. This may even assist the officials and security agents not to seek or to proceed in desperate moves and methods combating terrorism that can endanger our liberties and rights. The philosophy behind our counter terrorism war must be the acceptance, that the peace which secures in inside state level the respect of human rights is a supposition of International Peace and a big step in combating basic sociological etiology of terrorism.

#### 4. The Israeli example

One can argue that the struggle against terrorism and the protection of human rights are two things not compatible. To well

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<sup>12</sup> “The fact that a confession has been caused by violence does not exclude that it is true, if it is cross examined with the rest of evidence, in which case it maintains its power as evidence”. As bizarre as it might seem, this is a judicial decision not of the pre-revolutionary period of France, but of Greece during the 1967-1974 regime aiming to combat the terrorist threat of communism. It is not even a decision of a courtmartial, but a decision of the Supreme Court (“Arios Pagos”), the court to judicially control legality and protect the human dignity and basic rights. It is a classical example how the guardians of the law (creators of freedom for the polis, as Plato called them), legalised the methods of the jounda. On this subject see the work of K. Simopoulos, *Torture and Power*, Athens 1987 (in greek) and Amnesty International, *Tortures in Greece: The first torturers trial*, London 1977.

one in a satisfactory level so that the innocent citizens are out of danger, you must sacrifice – or at least compromise – the other.

Israel is the country where terrorism is not a theoretical, a possible, a future threat. The Israeli citizens face for about forty years now an everyday serious threat of national security, with their state struggling for both its very existence and security from the day of its founding. Terrorist organizations that goal Israel's annihilation, employ as methods attacks that do not distinguish between civilian and military targets, men, women or children. Suicide bombings in the heart of Jerusalem or Tel-Aviv, car bombs, kidnappings, highjackings constantly challenge the lives, the safety and the security of Israeli people<sup>13</sup>. As a result, the fight against terrorism is a national priority and a battle for survival, where there is no place for mistakes, romanticisms or abstract theories.

Given this tragic reality, in the beginning of the '90s an Israeli commission called the Landau Commission admitted that the Shin Bet, the Israeli security agency, was using what it called moderate physical pressure and found that this practice was necessary and should be continued. The "moderate physical pressure" included violently shaking a person so that his head is jerked back and forth repeatedly and uncontrollably, twisting his limbs into painful positions supporting the body weight for hours, placing him in a dark room with a smelly sack over his head. Although statements made under this torture would not be introduced in any court of law – both because they were involuntarily secured and they deemed potentially untrustworthy – they were used as leads in the prevention of terrorist acts. Apart from the argument that these torturing methods may in reality even aggravated and stimulated to some extend Arab terrorism, it is important to examine how Israel dealt finally with the issue of inhuman treatment as part of an effective counter terrorism strategy.

On September 6<sup>th</sup> 1999, the Israeli Supreme Court decided on a case that pointed out the difficult dilemma between the imperative need to safeguard the state's very existence and the lives of its citizens, and to preserve the character of a country

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<sup>13</sup> For an indepth description of this tragic phenomenon see the Report of the Commission of inquiry Regarding the GSS' Interrogation Practices with respect to Hostile Terrorist Activities, headed by justice M. Landau, 1987.

subject to the Rule of Law holding basic moral values. The High Court of Justice of Israel outlawed<sup>14</sup> the above mentioned methods of interrogation used by intelligence officials, ruling that a reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment of the subject and free of any degrading handling whatsoever<sup>15</sup>.

The words of the judgment portray in the best way the choice of a democratic State to combat terrorism and crime within the context of respect of human rights:

*“...There is a prohibition on the use of brutal or inhuman means in the course of an investigation. These prohibitions are absolute. There are no exceptions to them and there is no room for balancing...Human dignity also includes the dignity of the suspect being interrogated...The authority*

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<sup>14</sup> It should be noted though, that while the court’s decision was unanimous, one of the members proposed the suspension of the judgment expressing the opinion that: “Notwithstanding, it is difficult for me to accept a state of things in which, due to the absence of explicit legislation as noted (above), the State should be helpless from a legal perspective, in those rare emergencies that merit being defined as “ticking time bombs”; and that the State would not be authorized to order the use of exceptional interrogation methods in those circumstances. As far as I am concerned, such an authority exists in those circumstances, deriving from the basic obligation of being a State – like all countries of the world – to defend (protect) its existence, its well being, and to safeguard (the lives of) its citizens. It is clear that in those circumstances, the State – as well as its agents – will have the natural right of self defense, in the larger meaning of the term, since terrorist organizations, that seek the soul and the souls of the inhabitants, and carry out shocking terrorist attacks to advance their cause (objectives). On this background, and deriving from the intention will to prevent a situation where the time bomb will tick before our eyes and the State’s hand will be shortened to help, I suggest that the judgment be suspended from coming into force for a period of one year...”

<sup>15</sup> Similarly the European Court of Human rights in the case of Ireland v. United Kingdom (1978) probed five interrogation methods used by British Intelligence for the purpose of investigating detainees suspected of terrorist activities in Northern Ireland. The methods were as follows: protracted standing against the wall on the tips of one’s toes; covering of the suspect’s head throughout the detention (except during the actual interrogation); exposing the suspect to powerfully loud noise for a prolonged period and deprivation of sleep, food and drink. While the Court did not hold these methods as constituting “torture”, it prohibited them as “inhuman and degrading” treatment.



*to conduct interrogations, like any administrative power, is designed for a specific purpose, which constitutes its foundation, and must be in conformity with the basic principles of the [democratic] regime...A democratic, freedom loving society does not accept that investigators use any means for the purpose of uncovering the truth. The interrogation practices of the police in a given regime are indicative of a regime's very character. At times the price of truth is so high that a democratic society is not prepared to pay it....This is the destiny of a democracy, as not all means are acceptable to it, and not all practices employed. Although a democracy must often fight with one hand tight behind its back, it nonetheless has the upper hand. Preserving the rule of Law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties...".*

The Israeli lesson is valuable to all countries, proving that even in extreme cases of danger the logic of human rights protection and democracy can prevail. While extreme voices do have their expression (like in every liberal society with freedom of expression) and certain intelligence officials do act "overzealously", the legal order of the State has chosen its path, the path of virtue. Democracy as a form of political hypostasis is strong and this might prove to be the most valuable and effective weapon against terrorism. If not for other reasons, just for the sole fact that international community and public voice will have to become more sympathetic towards a nation that respects the human rights and dignity of its opponents, even when the latter exceed provocatively the boundaries of a fair freedom fight. Whatever support the Palestinian cause may have gained all these years, based to large extend on the "hard face" of Israel, it can only be decreased or at least balanced by this democratic and humane move.

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<sup>16</sup> K. Lorenz, *Das sogenannte Böse: Zur Naturgeschichte der aggression*, Wien 1963 p.p. 232-234.

## 5. Epilogue

Unfortunately, the syndrome of torture is following human society since its birth. History has proved man to be specially ingenious in his wish to torment and destroy his fellow men<sup>16</sup> and institutionalized torture were stopped, at least for the European countries, only at the end of the 17th century, with the Enlightenment and the influence of the work of Montaigne, Tomasius, Beccaria, Montesque.

We must not forget that not only the “road to hell is paved in good intentions”, but also any attempt to tyranny has been paved with claims of necessity and legal justifications. The legitimization of human rights violation and specifically torture, even for extreme cases and under judicial supervision is one of the most dangerous and negative things that can occur to our democracies. Especially, if this legitimization takes place in the United States or in countries-members of the European Union, that act to some extent as model-states, criteria and point of reference for the worldwide legal civilization.

Finally, only we, the citizens, are the key holders of our own liberties, of our own rights. The biggest threat of terrorism is neither the acts of violence committed nor the number of victims injured or dead after an attack, but our willingness to deprive ourselves of our freedoms and rights. This is indeed the true victory of terrorists, when we give up our democratic instinct and prove them right in their argument that our societies and institutions are not strong and solid. The fear of terrorism, ought not lead us to renounce what is ours, what we have gained through thousands of years evolution. It is easier to conquer something than to preserve it and expand it and this applies also to democracy.

Most of us identify – maybe not unjustifiably – with the victims of the terrorist attacks, putting ourselves in their shoes, and do not exhibit all that much of care about the threat of human rights violations against suspected or guilty terrorists, because this evil seems to be inflicted upon equally evil people. Yet his way, we do not only forget that even guilty criminals deserve human behavior, but we refuse even to think that potentially, one day, we could be in their place, because of a misunderstanding, because of a wrong police assessment. We must declare, thus, that violation of human dignity and pain is absolutely not acceptable for any reason and against any person, even if it is shown to us as necessary and it concerns other people, different from us.

*“To a man with a hammer”,* said Mark Twain, *“everything looks like a nail”*. This can apply adequately to the antiterrorism policy measures, so give police and security agents in any country the permission to torture freely and they will want to use it, and even overuse it. Even a normal, a good person can become a torturer – according to his ethical defense and spiritual arms – especially if he is convinced that he serves a just cause<sup>17</sup>, like for example the protection of innocents against the vicious terrorists.

During the kidnapping of Italy’s former prime minister Aldo Moro in 1978, when an investigator proposed to General of the State Police Carlo Della Chiesa the torture of a prisoner possibly withholding information, he received the historic answer: *“Italy can survive the loss of Aldo Moro, but it can not survive the introduction of torture”*. Generalizing and paraphrasing the words of Della Chiesa one could say that the democratic world can survive terrorist attacks, but it cannot survive the introduction of torture and human rights violation.

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<sup>17</sup> P.Vidal-Naquet, *La torture dans la république*, Paris 1983, p.168.

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