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THE OUTSET OF MENTAL TORTURE

Through the lens of the Ticking Time Bomb Scenario

By

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ABBREVIATIONS

APT	Association for the Prevention of Torture
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CIA	Central Intelligence Agency
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
GSS	General Security Service of Israel
IACtHR	Inter-American Court of Human Rights
ICTY	International Criminal Tribunal for the former Yugoslavia
SCC	Spanish Criminal Code
TBS	Ticking Time Bomb Scenario
UDHR	Universal Declaration of Human Rights

INTRODUCTION

'If practically everyone is opposed to all torture, why bring it up, start people thinking about it, and risk weakening the inhibitions against what is clearly a terrible business?' (Henry Shue, 1978)

No doubt shall be placed when qualifying torture as one of the cruellest crime offences against human beings. It is widely known that the first torture practices go back to the Middle Ages, where torture mechanisms and devices were used as a legitimate means of punishment, extraction of confessions or executions. Brutal techniques such as *'Judas Cradle'*, *'The Rack'* or the *'Rat Torture'* were indeed, the ones commonly used. Moreover, some centuries onwards, torture warrants were permitted and authorised by Privy Councils in legislations such as the English one. However, examples like that were the only ones which public accountability was given to, whereas off-the-book practices remained in silence in other countries for long lasting years. Nowadays, in the 21st century, there are innumerable enforced laws and provisions that prohibit the act of torture, to be precise, physical and psychological torture. Nonetheless, not only are these legislations necessary for fighting torture, but also *ad hoc* courts and specialised committees continuously report the existence of this crime offence.

Nevertheless, leaving aside the reluctance to the commission of any type of torture, uncertainties might arise when extreme circumstances happen, also known as the Ticking Time Bomb Scenario (TBS). In other words, situations such as the aforementioned one tend to break the delimitation of the prohibition of torture, and thus, cause doubts of its absoluteness. That is, the alarming consequences that a TBS might produce, may soften the absolute forbiddance of torture and reopen the always questionable debate of: *'Should torture be always rejected?'* or even further, *'Should torture be always rejected even when numerous lives depend on the information a suspect could disclose?'*

As a matter of fact, into this probable loophole where a slight use of torture might be discussed, another issue must be underlined; the definition of torture. As previously mentioned, legal enforced provisions of torture set forth the prohibition of physical and mental torture. Notwithstanding, whereas the results of the first one are really visual at first sight (bruises, wounds, scars etc.), does not happen the same with psychological torture. Due to this matter, the inconvenience of not having visual clear evidences of

torture, makes even more difficult to determine what mental torture really is and when it starts.

Consequently, as a result of an inaccuracy of legislative determination, a path to a possible use of mental coercive interrogation techniques might be opened in detrimental to human rights in TBS cases. Therefore, with the aim of determining the outset of mental torture at the aforementioned scenarios, the present work is divided in three main chapters.

Firstly, at the chapter *'The prohibition of torture and the approach for a new appraisal'* an overall introduction to the prohibition of torture will be presented. The Spanish Criminal Code (SCC), European and international conventions, as well as the main arguments to defuse the use of torture, will provide us the necessary overview to analyse the extensive legal framework against this crime and at the already known repudiation to it. However, at the same time, a close look to reality will let us realise how extraordinary measures resembling torturous acts have been put into practice against detainees and crime suspects in times of social and political instability.

It is exactly at this point, where the assessment of the current situation will shed light to the following issue to examine; the TBS. At this second chapter *'Analysis of the Ticking Time Bomb Scenario and the reasoning for the use of torture'*, a slight loophole to the absolute prohibition to torture will be debated. Needless to say, this approach will be necessary to question whether torture might have a legitimate use at extreme social and national circumstances.

Nonetheless, while to take a position on the use of physical torture in such a scenario is fairly easy to do due to its visual evidence (accept it or not), doubts arouse with mental torture as it is difficult to define its threshold. That is why, the third and last chapter *'Psychological torture and a proposal to set its outset'*, goes in depth in the matter. What is more, the deep analysis of the literal term of mental torture and the different proposals that have been presented to set its outset will conclude with the final objective of this work: an alternative and personal proposal to determine the threshold to psychological torture in a TBS case.

CHAPTER I

THE PROHIBITION OF TORTURE AND THE APPROACH FOR A NEW APPRAISAL

1. THE CONCEPT OF TORTURE

In order to fulfil the aforementioned objective of this work, firstly, it is essential to make clear which is the current status of torture throughout different legislations. When it comes to this initial approach, once having determined its regulation, this will inevitably lead to review what the concept of torture is, and finally, expound the arguments for its refusal.

1.1. Legal framework on torture:

1.1.1. Spanish Criminal Code

As far as the Spanish criminal law framework is concerned, it is unquestionable the fact that torture does entirely breach the law according to its criminal law code and its article 174.1¹. Thereby, a public authority who makes use of abusive power with the aim of obtaining information or a confession from somebody and causes mental or physical ill-treatment, will be committing torture. By all means, this article reflects the inalienable right for life and physical as well as moral integrity stipulated in the Spanish Constitution (article 15).²

Directly connected to the Spanish Constitution and its article 10.2, the following conventions ratified by Spain³ shall also be mentioned.

¹ Article 174.1. Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, (modified by the section 62 of the only article in Ley Orgánica 15/2003, de 25 de noviembre):

‘Comete tortura la autoridad o funcionario público que, abusando de su cargo, y con el fin de obtener una confesión o información de cualquier persona o de castigarla por cualquier hecho que haya cometido o se sospeche que ha cometido, o por cualquier razón basada en algún tipo de discriminación, la sometiére a condiciones o procedimientos que por su naturaleza, duración u otras circunstancias, le supongan sufrimientos físicos o mentales, la supresión o disminución de sus facultades de conocimiento, discernimiento o decisión o que, de cualquier otro modo, atenten contra su integridad moral. El culpable de tortura será castigado con la pena de prisión de dos a seis años si el atentado fuera grave, y de prisión de uno a tres años si no lo es. Además de las penas señaladas se impondrá, en todo caso, la pena de inhabilitación absoluta de ocho a 12 años.’

² Article 15. Constitución Española, 29 de diciembre de 1978:

‘Todos tienen derecho a la vida y a la integridad física y moral, sin que, en ningún caso, puedan ser sometidos a tortura ni a penas o tratos inhumanos o degradantes. Queda abolida la pena de muerte, salvo lo que puedan disponer las leyes penales militares para tiempos de guerra.’

³ RODRÍGUEZ MESA, María José, *Torturas y otros delitos contra la integridad moral cometidos por funcionarios públicos*, Biblioteca Comares de Ciencia Jurídica, Ed. Comares, Granada, 2000, p. 114: *‘las directrices marcadas por estos instrumentos internacionales, al ser utilizadas para despejar las posibles*

1.1.2. *European Convention on Human Rights*

Concerning the European frame, the following convention (ECHR) enacted in 1950, states the prohibition of torture affirming that no one should be subjected to it.⁴ However, in comparison with the SCC and the Convention against Torture (CAT), it does not specify what does really torture consist of.

1.1.3. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

Without going further, if a major convention should be named, this is the one that would likely be selected; the CAT. Together with the national legislation mentioned before, it sets forth a wide description of torture⁵ which gathers either conditions or requirements for declaring an act a torturous one. Furthermore, it can be said that it is asserted to be a legally binding convention for 159 states worldwide.

However, this will be thoroughly analysed in the forthcoming evaluation of torture's concept because, recalling what said before, in order to understand the current legislation on torture it is necessary to pinpoint the evolution that its concept has undergone; which consequently entails a constant redefinition of this criminal offence.

1.2. **Redefining the concept of torture**

Torture, also known as one of the cruellest crimes against human dignity, does not hold a unique definition among different international legislations. As a matter of fact, the innumerable denotations given to the term of torture throughout history are a clear reflection of it. According to the first legal definitions during the XIII century, the Italian

dudas que no puedan ser resueltas desde la CE, vienen a desempeñar una importante tarea en la delimitación del contenido esencial de los derechos fundamentales.'

⁴ Article 3. European Convention on Human Rights, Rome, 4th November 1950, (signed by Spain on 24th November 1977, ratified on 26th September 1979 and in force since 4th October 1979). Together with article 5 of the Universal Declaration of Human Rights, Paris, 10th December 1948: *'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'*

⁵ Article 1.1., Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10th December 1984, (in force since 1st September 1989, in accordance with the ratifying instrument published in BOE num. 159/1989, de 5 de Julio de 1989):

'For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.'

jurist AZO of Bologna described torture as ‘*the search of truth throughout anguish.*’⁶ However, it was not until the XX century when the historian John LANGBEIN named public authorities as the perpetrators of torture ‘*in term of judicial torture, we are referring to physical torture caused by public servants with the aim of obtaining evidence for trial.*’⁷ Following the same path of redefining what torture was at the time, John HEATH established the term threat on its personal definition of torture ‘*by my understanding, torture consists of the imposition of physical pain or the threat to infringe it immediately.*’⁸ Definitely, these were only mere approaches towards what the CAT would define as torture in 1984.⁹

Together with the SCC, the aforementioned convention makes a reference to physical and mental suffering, thus, extending the different types of torture. At the same time, it specifies that the aim of committing such an act would be to get relevant information or confession from the person subjected to it. Words such as intimidation and coercion are also pronounced for the first time. Nevertheless, it is true the fact that the SCC’s definition of torture does make a step forward comparing with the definitions mentioned earlier. According to its regulation, torture which causes physical and mental suffering, will consequently give rise to a reduction of human’s consciousness, judgement and decision.¹⁰

Nonetheless, not every legislation does define this crime with a high degree of exactness. For instance, as previously said, little does the ECHR say about it as it does not give further information than a mere mention.¹¹

Therefore, it is foreseen that not every definition of torture has a sharp degree of accuracy. Consequently, up to this point, the main characteristics of what torture is meant to be can be pinpointed as follows: physical or mental suffering; severe pain caused by public officials or authorities and the use of abusive force upon individual in order to obtain information or confession. Even the professor José Luis DE LA CUESTA

⁶ CASTRO FÍRVIDA, José Luis, ‘¿Es la tortura aceptable en la lucha contra el terrorismo?’, *Dereito* (Revista Xurídica da Universidade de Santiago de Compostela) Vol. 22, Nº 2, 2013, p. 63.

⁷ *Ibid.*, p. 63.

⁸ *Ibid.*, p. 63.

⁹ (See note 5.)

¹⁰ LANDA GOROSTIZA, Jon-Mirena, ‘Artículo 4: Prohibición de la tortura y de las penas o los tratos inhumanos o degradantes. Regulación versus aplicación real’ *La Carta de los Derecho Fundamentales de la Unión Europea y su reflejo en el Ordenamiento Jurídico Español* (Dir. ORDEÑANA GEZURAGA, Ixusko) Thomson Reuters- Aranzadi, Pamplona, 2014, p. 93.

¹¹ (See note 4.)

ARZAMENDI has displayed his personal definition of torture which includes specific requirements to fulfil this criminal offence's type: '*a multi offensive crime which is special, resulting, wilful, of tendency and liable of being a commission from an omission.*'¹²

In any case, despite the mayor referential points that might be given to imply a uniform definition of torture, may all the blank holes in between (lack of accuracy) create relevant and perilous legal vacuums? Concerning this, the professor Steven DEWULF refers to '*the uniqueness and stigma of torture*'¹³ to state that the main issue lays on the fact whether torture ought to be defined as a broad manner concept or a sort of selected acts which would be considered as torturous. However, the consequences that the absence of a more precise definition of torture might bring will be profoundly examined from the second chapter on.

Therefore, before reaching the mentioned intent, a previous look at the arguments exposed by several authors for the absolute interdiction of torture will be expounded.

1.3. Defusing the use of torture:

The absolute forbiddance against torture might be explained by a great deal of arguments, yet, it is perceivable how a dominant part of the legal doctrine, as well as many relevant philosophers, tend to dispose their reluctance to it with moral and ethical reasoning. Nevertheless, there are other stances that will complete this position against torture too.

1.3.1. Slippery slope

To start with, the Association for the Prevention of Torture (APT) puts forward through the '*slippery slope*' argument the risk that a possible permissiveness and regulation of torture might cause. What is more, it directly focuses the following hazard on the TBS; the key point of this work.

As clearly affirmed by the previously mentioned association, the TBS is nothing but a '*hypothetical thought experiment*'¹⁴ whose aim is to disorder reality and question

¹² DE LA CUESTA ARZAMENDI, José Luis, *El delito de tortura*, Bosch Casa Editorial S.A, primera edición, Barcelona, 1990, p. 25.

¹³ DEWULF, Steven, *The Signature of Evil- Redefining Torture in International Law*, Intersentia, Antwerp, 2011, p. 464.

¹⁴ For further information of the Ticking Time Bomb Scenario, see the second chapter of this work. As an example of this scenario: '*Suppose that a perpetrator of an imminent terrorist attack, that will kill many*

the absolute prohibition of torture. Consequently, it would be illogical to set a legal exception for these hypothetical circumstances because, not only would the use of torture end up to be arbitrary, but also unpunished, widespread and systematic.¹⁵

Nevertheless, it ought not to be disregarded the fact that always a certain slice down ‘*slippery slope*’ happens¹⁶ when such and similar decisions are weighed and taken by states. Just to mention, there have been wars with civilians mistakenly or unintentionally killed, justice systems which have erroneously convicted and punished innocent persons etc. Or have there not been? And in contrary to the use of torture in a TBS, the establishment of neither courts nor jails have been regarded as morally unjustifiable.

Moreover, although it is undeniable the fact that committing torture is a tremendous act, it is true as well that the ‘*slippery slope*’ and the TBS might look alike from a hypothetical point of view. That is, if the scenario is usually rejected due to its rare existence¹⁷, why should the slope argument have such a strength when opposing torture in a circumstance that apparently is difficult to happen? By doing so, even the ‘*slippery slope*’ would suffer from a lack of burden of proof.¹⁸

Nonetheless, Luís GRECO brings into terms and puts into question whether the argument in question against the slope effect would have any sustain. In fact, he states that there is barely no doubt about the inevitable consequences the permissiveness of torture would bring: human dignity’s detriment. According to the professor, the use of torture would put at stake the inalienable human dignity as a result of the rule of expiry and the rule of economic costs.¹⁹

Referring to the firstly mentioned rule, anyone’s dignity would be subjected to the acts he/she has carried out beforehand, and only depending on them (reprehensible

people, is in the hands of the authorities and that he will disclose the information needed to prevent the attack only if he is tortured. Should he be tortured?’ This is an example submitted by The Association for the Prevention of Torture.

¹⁵ APT, *Defusing the Ticking Bomb Scenario: Why we must say NO to torture, always*, Geneva, June 2007, The Association for the Prevention of Torture, p. 13.; RODRÍGUEZ MESA María José, *op. cit.*, pp. 40-41.

¹⁶ GINBAR, Yuval, *Why not torture terrorist?*, Oxford University Press (Oxford Monographs in International Law), New York, 2008, p. 115.

¹⁷ As explained in the second chapter of this work, in order to affirm the existence of a Ticking Time Bomb Scenario, it is presupposed that several assumptions must be fulfilled.

¹⁸ BAGARIC, Mirko / CLARKE, Julie, *Torture; when the unthinkable is morally permissible*, State University of New York Press, New York, 2007, p. 42: ‘*proposal cannot be rebutted merely by stating that acceptance of them might lead to bad outcomes because it might lead to similar undesirable practices.*’

¹⁹ GRECO, Luís, ‘Las reglas detrás de la excepción. Reflexiones respecto de la tortura en los grupos de casos de las ticking time bombs’, *InDret Revista para el análisis del derecho*, Nº 2., Barcelona abril de, 2007, pp. 11-12.

behaviour or not) would dignity be respected as an inherent human right. Together with that, taking into account the irremediable consequences that a TBS case would cause, in other words, the death of thousands of people (economic costs), this would also lessen human's dignity.

Therefore, no matter the possibility of the drawbacks that authorizing torture might bring, the deprivation of human dignity would be the most significant and unavoidable one; closely connected to the second argument exposed by the opponents of torture.

1.3.2. *Morality and ethics*

Morality and dignity's protection have always been regarded as the buoyancy aid of human rights and their inviolability. In fact, hardly ever has there a doubt been placed on it. As a crystal clear example, the philosopher and professor Michael SANDEL repeatedly mentions KANT during his lectures²⁰ about morality at Harvard Law School, to explain how *'there is an existence of a categorical duty to respect the dignity of persons.'*

It is true that, coming partially along with Jeremy BENTHAM and the theory of utility,²¹ KANT admits that human beings reject pain and aspire to pleasure and happiness. However, he totally refuses an aspect of this theory: that the aforementioned pain and pleasure or happiness compose the supreme guidance of our acts. As well said by KANT, humans contain the decisive power of rationality not to act impulsively by necessity, which is one of the main arguments to discuss a possible use of torture in extreme circumstances such as the TBS. Therefore, spontaneous decisions based on impulses will not be valid to avoid pain and suffering and gain pleasure, because that would mean to act according to irrational feelings. What is more, as a result of it humans would be used as means of a particular end rather than considering them as the end on themselves;²² which would signify to act autonomously and upholding personal dignity.

²⁰ SANDEL, Michael, 'Mind your motive Justice; what's the right thing to do?' (Episode 06), *Harvard University's Justice with Michael Sandel*, updated on 8th September 2009. Retrieved from <http://www.justiceharvard.org/2011/02/episode-06/#watch> (from 00:20' to 00:51') (last inquiry on 24th February 2016).

²¹ The theory of utility or the Utilitarianism, will be thoroughly analysed in the second chapter's *'Exception to the prohibition of torture (II).'*

²² K. VORLÄNDER, Hrsg, *Grundlegung der Metaphysik der Sitten*, Ed. 3, Halle, Hamburg, 1965, pp. 50 y ss. *Apud* DE LA CUESTA ARZAMENDI, José Luis, 'El Principio de Humanidad en Derecho Penal', *Eguzkilore*, N° 23, 209-225, 2009, p. 21.

Thus, bearing KANT's words in mind, the allowance of torture in a TBS in order to prevent its consequences, would be derived from a reaction caused by necessity. In other words, this would be an outdoor command which makes humans mere instruments for an end when they should be able to make a decision of the end by themselves.

Nonetheless, apart from KANT's view and with the aim of explaining the possibility of justifying the use of torture, the American philosopher Henry SHUE cuts a long story short by asking the following question: *'Does the possibility that torture must be justifiable in some of the rarefied situations which can be imagined provide any reason to consider relaxing the legal prohibitions against it?'*²³

This leads the standpoint against the use of torture to its third argument, the legal prohibition of torture. As a preliminary notion of it, the aforementioned philosopher is clear in his words when affirming that under no circumstances should rarely existing circumstances let a possibility to morally permissible torture. Consequently, on his view, the prohibition of torture should be strengthened even more.

1.3.3. Legal prohibition

When it comes to dealing with torture in a normative perspective, the American writer Michael BOWDEN confirms that *'few moral imperatives make such sense on a large scale, but break down so dramatically in the particular'* which in this case would be a TBS case. As well said by the Canadian author Michael IGNATIEFF, this, on the one hand, is a clear reflection of states' reluctance to be seen as torture granters. However, on the other hand, it also expounds states' willingness to protect their inhabitants from a TBS catastrophe by extracting information from suspects, even if this would entail the use of harsh interrogation techniques.²⁴

For instance, attacks on September 11, 2001 led to a long-lasting *'war on terror'* where the U.S designated to the concept of torture an extra requirement: *'torture, must cause serious physical injuries such as organ failures, impairment of bodily function or even death. And physical abuse below this standard will be counted as coercive*

²³ LEVINSON, Sanford / DORFMAN, Ariel, *Torture: A collection*, Oxford University Press, revised edition, New York, 2004, p. 58.

²⁴ IGNATIEFF, Michael, 'If torture works...' *Prospect; the leading magazine of ideas*, 23th April, 2006. Retrieved from <http://www.prospectmagazine.co.uk/features/iftortureworks> (last inquiry on 26th February 2016).

*interrogation.*²⁵ Therefore, with the aim of battling the terrorism rose up at the time, the concept of torture was limited to even more concrete acts. Consequently, its existence, regulation and even punishment was limited to furthest existing cases, where physical injuries had to be equal to organ failures or the death itself. Any other result caused by interrogation techniques which would be different from the ones mentioned, would be just considered as a consequence of coercive interrogation methods but not torture. However, this reaction was already pointed out by the European Court of Human Rights (ECtHR) in 1978 in the case of *'Ireland v. The United Kingdom'* where the coercive interrogation techniques used by the British Army in Northern Ireland constituted inhuman and degrading treatment but not torture.²⁶ Following this path, the Supreme Court of Israel upheld the same interpretation when condemning the interrogation techniques used by the General Security Service of Israel (GSS) in 1999.²⁷

Into this issue and in order to comply with the necessity that states might sometimes have to protect their citizens in extreme circumstances, IGNATIEFF outlays Jean Bethke ELSHTAIN's justification for coercive interrogations (dirty hands): *'good consequences cannot justify bad acts, but bad acts are sometimes tragically necessary. The act remains bad and the person must accept the moral opprobrium.'*²⁸ However, there is a still problem to analyse: which practices should be part of an interrogation and fall into the scope of acceptable *'bad acts'*? According to IGNATIEFF, there might be a significant distinction between a slap and a beating to a detainee and whereas the first one might be seen as permissible from a practical view, it does not happen the same with the second one. Additionally, he can barely see any guarantee that a mere slap will not end up in a sequence of constant beatings. Therefore, on his view, there is not a clear way to manage coercive interrogations institutionally so that it does not degenerate into torture.

Nevertheless, although IGNATIEFF supports the absolute prohibition of torture, he is also conscious about the fact that there is still a remaining significant issue which cannot be excluded: the TBS. Concerning his point of view, even at these cases, an

²⁵ BYBEE, Jay, 'Standards of Conduct for Interrogation under 18 U.S.C 2340-2340 A' Memorandum for Alberto R. Gonzales Counsel to the President, U.S Department of Justice (Office of Legal Counsel), Provided by *FindLaw*, Washington, August 1, 2002. The aforementioned definition of torture is stated at the conclusion of this memorandum.

²⁶ Judgement, ECtHR (Court Plenary), *'Ireland v. The United Kingdom'* 18th January Strasbourg, 1978, (Application no. 5310/71), §167.

²⁷ No matter these techniques were based on holding suspects in painful positions with hoods and vigorously shaking their head and shoulders, they were not declared acts of torture. Judgement retrieved from <http://www.derechos.org/human-rights/mena/doc/torture.html> (last inquiry on 1st March 2016).

²⁸ IGNATIEFF, Michael, *op. cit.*

outright ban on torture would not let a contentious officer or interrogator much more opportunity than to disobey it due to the gravity of the situation. Therefore, he bestows the resolution uphold by the Israelis Supreme Court about the interrogation methods applied by the GSS, so that not only would the absolute ban on torture be consistent, but it would also remain a coercive interrogation: *'Even a conscientious agent acting in good faith to save lives should be charged with a criminal offence and be required to stand trial. At trial, a defence of necessity could be entered in mitigation of sentence, but not to absolve or acquit.'*²⁹

To come to an end, few reflexions must be brought to the table when defusing the use of torture. It is unquestionable the fact that national as well as European or international binding legislations against torture are currently the ones in charge of safeguarding inalienable human rights such as the right to life as well as physical and moral integrity.³⁰ Even more, a significant part of the judicial and philosophical doctrine remains unswerving with the repudiation of torture.

Notwithstanding, when it comes to taking a close look to reality, relevant incidents such as the terrorist attacks on September 11, 2001 in New York or the political, nationalistic and religious rioting in Northern Ireland in 1969 (which would provoke a long lasting military operation *'Operation Banner 1969-2007'*) have clearly shown that in times of social and political instability extraordinary measures, which resemble to torturous acts, have been put into practice and not been considered as torture: the Bybee memo on the *'Standards of Conduct for Interrogation'*,³¹ the *'Five Techniques'*³²

²⁹ *Ibid.* (See note 27) to recall Israelis Supreme Court's ruling.

³⁰ (See note 2.)

³¹ BYBEE, Jay, *op. cit.*

³² These interrogation techniques constituted of prolonged hooding, subjection to noise, sleep deprivation etc. Although they were declared as torture by the European Commission of Human Rights, the ECtHR did not upheld the same position and concluded the *'Ireland v. The United Kingdom'* ruling (January 18 Strasbourg 1978, Application no. 5310/71), stating that these techniques were inhuman and degrading but not torturous due to the lack of suffering intensity during the interrogation:

'Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their objection was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.' §167 (vi)

Consequently, this permitted to the United States either to Israel to justify their forthcoming interrogation techniques.

interrogation methods firstly used by the British military force in Northern Ireland during ‘The Troubles’³³ etc.

On this account, a reflexion ought to be brought to the spotlight: does the aforementioned instability persist in the 21st century?

2. ASSESSMENT OF THE CURRENT SITUATION

2.1. Relevant cases

According to several studies conducted during the former year, since the declaration of their caliphate in June 2014, the Islamic State (also known as ISIS or Daesh) has perpetrated or inspired over 70 terrorist attacks in 20 countries apart from Iraq and Syria, resulting in more than 1000 deaths.³⁴ With the aim of reminding the most relevant cases, the following listing is worth keeping in mind:

7 January 2015	Paris	Two gunmen (Cherif and Said Kouachi), masked and dressed in black opened fire at Charlie Hebdo satirical magazine’s offices. 12 people died.
9 January 2015	Paris	Two days after the Charlie Hedbo attack, Amedy Coulibaly killed 4 hostages during his siege at a kosher grocery store. As well as the former executioners, Amedy alleged alliance to ISIS.
26 June 2015	Tunisia	The Tunisian resort town of Sousse was chosen to be the next target to open fire by a twenty-three-year-old radicalised young man. He killed over 38 people.
13 November 2015	Paris	A series of terror attacks took place at six different locations throughout the city. Over 130 people died and more than 350 people got wounded. It is said to be the most sophisticated attack conducted in the West Europe to date.
22 March 2016	Brussels	Several bombs exploded at the international airport and the subway of the Belgian capital. The offences were linked to ISIS too.

³³ ‘The Troubles’ is commonly known as the ethno-national conflict in Northern Ireland which took place during the 20th century.

³⁴ SANCHEZ, Ray *et al.*, ‘ISIS goes global: OVER 70 attacks in 20 countries’, *CNN Regions*, 18TH February, 2016. Retrieved from <http://edition.cnn.com/2015/12/17/world/mapping-isis-attacks-around-the-world/> (last inquiry on 8th March 2016).

2.2. Rethinking the use of torture

Regardless that the previously mentioned attacks are just few signs of the Islamic State's atrocity, it is unquestionable that ISIS has gone global causing chaos and fear among people in a very short period of time. Scarcely is there any doubt about the major impact that the attacks in Paris caused in society, as two terrorist attacks in a year were hard to believe and manage. However, to everyone's unwillingness, a new reality shall be faced immediately in order to put an end to an unstoppable spreading of terrorism. As precedence has proved, even new locations from West Europe have become new targets for Islamic terrorists and no state is able to put up with hundreds of innocent deaths as occurred in Paris.

Therefore, at this point of the issue, a new and slight diversion has been originated in legal doctrine which reappraises the absolute prohibition of torture in extreme circumstances such as terrorist attacks. That is why, with the aim of reconsidering the possible use of certain torture on suspects in charge of these situations, an exceptional scenario is always illustrated: the TBS.

CHAPTER II

ANALYSIS OF THE TICKING TIME BOMB SCENARIO AND THE REASONING FOR THE USE OF TORTURE

1. THE TICKING TIME BOMB SCENARIO

1.1. Exploring the scenario

In order to comprehend the significance of the TBS and grasp a first idea and impression of it, it is appropriate to exemplify it the following way: *‘Suppose there is good reason to think that someone has planted a bomb in a public place. And suppose there is good reason to think that it is going to go off in the next two hours or so, and that is going to kill and maim dozens of people, maybe hundreds. But no one knows where the bomb is, except one person who is already in custody. Naturally they have no intention of revealing where the bomb is. Maybe they have planted it themselves; maybe not. Either way, they remain silent. Should they be tortured to force them to reveal where the bomb is?’*³⁵

This is exactly, the scenario which is presented to anyone in order to put forward and contend the possible use of torture; an extreme situation which demands for a rapid performance in order to avoid its consequences. Notwithstanding, it should not be forgotten that in order to make it real, the scenario has to fulfil several assumptions or requirements. Though, as it will be remarked, exceptions will be found here as well.

1.2. Assumptions of the scenario:³⁶

1.2.1. A specific planned attack is known to exist and the attack will happen within a very short time

Regarding the first assumption, the attack will happen in a near future; far enough so that is possible to react in order to prevent it, but not too far that another method rather than torture is viable to stop the attack.

³⁵ BRECHER, Bob, *Torture and the Ticking Bomb*, Blackwell Publishing Ltd, Oxford, 2007, p. 1.

³⁶ The following assumptions are the ones presented by the Association for the Prevention of Torture: APT, *op. cit.*, pp. 6-10.

1.2.2. The attack will kill a large number of people

This is probably one of the most controversial assumptions of the TBS because, how many lives must be at stake in order to justify torture? Hundreds? Or maybe thousands? Nevertheless, there must be always a relevant key point where the possibility of using torture to prevent the imminent attack is weighted.³⁷

1.2.3. The person in custody is a perpetrator of the attack and has information that will prevent the attack

Not only the person in custody must be the doer of the attack forthcoming but he/she also needs to have important information that will forestall the criminal offence. Obviously, the ones who do not describe the TBS as precisely as the APT does, will make flexible this assumption by permitting torture on other people such as: a person who has no degree of involvement in the attack but has determining information about it, a relative who knows where the actual perpetrator is etc.

1.2.4. Torturing the person will obtain the information in time to prevent the attack

In conjunction with the first assumption, the element of effectiveness is required in the following premise, as in a short period of time the perpetrator must disclose relevant information that will preclude the attack.

1.2.5. No other means existing will be suitable for getting the information in time or no other action could be taken to avoid the harm

Moreover, torture must be the only and last possible means of interrogation to obtain the required facts about the offence and thus, avoid the harm.

1.2.6. The motive of the torturer is to get information, with the genuine intention of saving lives, and nothing more

It has been repeatedly mentioned by the professor and lawyer Alan Morton DERSHOWITZ that there are no guarantees that public officials will not make use of torture in an abusive way during an interrogation of a TBS³⁸ (that is why, in scenarios

³⁷ Judgement, ECtHR (Grand Chamber), ‘*Gäfgen v. Germany*’ 1st June Strasbourg, 2010, (Application no. 22978/05): Known as one of the most relevant cases of torture threats which offers clear similarities to the TBS, let aside that the victim of the attack perpetrated was just one person (a child who had been kidnapped and killed afterwards).

³⁸ LEVINSON, Sanford / DORFMAN, Ariel, *op. cit.*, p. 276.

like that, he comes along with the idea of giving accountability to torture by authorising ‘torture warrants’).³⁹

However, the presumption needs to be done in a way that the ‘torturer’ has no other option but to apply torture as part of his or her professional duty as a public official.

1.2.7. *It is an isolated situation, not often to be repeated*

It is already well known the absolute prohibition of torture stipulated by the CAT.⁴⁰ Nevertheless, in order to maintain a quasiperfect prohibition of torture but reopen the debate on its absoluteness, this assumption stipulates the exceptional character of the scenario and implicitly, the permission of torture’s use.

As previously said, the assumptions stated up to now are the ones presented by the APT. However, barely no base is confirmed to say that under no other conditions a TBS can be created that is, apart from fulfilling the aforementioned assumptions (which are doubtful in itself).⁴¹ In fact, it is quite evident how the structure of the scenario has evolved gradually throughout the decades. Firstly evoked by BENTHAM in 1804, the founder of the ‘Utilitarianism’ presented his Ticking Bomb Scenario and described torture as follows: ‘Two men are caught setting a house on fire; one of them escapes: set the prisoner on the rack, ask him who his accomplice is, the instant he has answered you may untie him. Torture then when not abused, torture considered in itself is in this point of view less liable exception than the punishment is.’⁴²

In contrary to the assumptions presented by the APT, BENTHAM did not expose requirements for the exception of the prohibition of torture. According to his view, the

³⁹ ‘Torture Warrants’ will be analysed at this section: ‘Exception to the prohibition of torture (III).’

⁴⁰ Article 2.2. and 2.3. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10th December 1984, (in force since 1st September 1989, in accordance with the ratifying instrument published in BOE num. 159/1989, de 5 de Julio de 1989):

‘2. 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.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.’

⁴¹ Each assumption’s definition presents inaccuracies. None of them defines a precise formula to follow in order to establish a solid requirement to affirm the existence of a TBS case.

⁴² DAVIES, Jeremy, ‘The Fire-Raisers: Bentham and Torture’, *19: Interdisciplinary Studies in the Long Nineteenth Century* by Open Library of Humanities, Cambridge, 2012, p. 13. Retrieved from <http://www.19.bbk.ac.uk/articles/10.16995/ntn.643/> (last inquiry on 20th February 2016).

use of torture, in a non-abusive way, was less probable to be harmful than the legal punishment itself.

Decades later, to be precise in 1971, it was the British politician and moral philosopher Anthony QUINTON who included a bomb at the TBS formulation. What is more, he set to morality a relevant role: *'I do not see on what basis anyone could argue that the prohibition of torture in an absolute moral principle... Consider a man caught planting a bomb in a large hospital, which no one but he knows how to defuse and no one dares to touch for fear of setting it off. It was this kind of extreme situation that I had in mind when I said earlier that I thought torture could be justifiable.'*⁴³

Following his path, SHUE⁴⁴ assigned the use of a nuclear device to the scenario circumstance. And finally, nowadays, it can be said that Pablo Raúl BONORINO⁴⁵ has been the one who has drawn forth in a systematic way, the structure of the TBS; resembling the assumptions already mentioned and presented by the APT:

Factual premises:

- *A bomb, which will cause thousands of deaths, has been installed.*
- *There is no knowledge about the whereabouts of the bomb which consequently makes impossible to deactivate it or evacuate the people who might get injured or killed.*
- *The device is designed to explode automatically in a short period of time.*
- *A person, who knows where the bomb is, has been detained. However, he is not disposed to disclose information.*

Legal premise:

- *Conducts that will be beneficial for the majority in society will be morally justified, even though this will imply harming few members or just a person of that community.*

Conclusion:

- *The use of torture is morally justified if it is managed to get information from the perpetrator and thence, avoid the imminent attack.*

Hereto, there is no clear assurance that the TBS is composed by specific components that no matter which the case and its danger is, must be completely fulfilled. History has already shown how the formulation has suffered and still suffers a great deal of changes depending on philosophical movements and theories. Furthermore, even

⁴³ QUINTON, Anthony, 'Views', *The Listener*, 2nd December, 1971, pp. 757-758. *Apud* ALLHOFF, Fritz, *Terrorism, Ticking Time Bomb and Torture; A philosophical analysis*, University of Chicago Press, Chicago, 2012, p. 52.

⁴⁴ SHUE, Henry, 'Torture', *Philosophy and Public Affairs*, Vol. 7, N° 2, 1978, p. 141.

⁴⁵ BONORINO RAMÍREZ, Pablo Raúl, 'El retorno de la tortura' *Revista Académica*. 51, 2011, pp. 112-113. *Apud* CASTRO FÍRVIDA, José Luis, *op. cit.*, p. 70.

relevant case law⁴⁶ have proved that the scenario has been resembled in extreme situations were almost none of the referred assumptions were obeyed and even though, torture was the main issue discussed.

Meanwhile, in a still slightly broad manner definition of torture and a changeable TBS, the next aspect worth analysing would consist in assessing plausible and justified exceptions to the prohibition of torture; and thus, reconsider whether torture could have a legitimate use in TBS cases.

1.3. Exception to the prohibition of torture (I):

Despite the fact that even the mere word ‘*torture*’ constrains anybody from talking about it (mainly due to moral reasons) there seems to be a vital need for several authors to open this Pandora’s Box. Although most of them maintain the unbreakable position against torture, there are dissenting opinions which would reconsider the total or partial justification of the use of torture at specific circumstances. This is why, torture, despite several assessments, has always been an issue on dispute.

1.3.1. Exemption from criminal liability:

It is widely known that not only does the criminal law framework entail legal prohibitions, but it also harbours some permissive precepts that would justify the unlawful act. In other words, this would definitely hinder to blame a perpetrator from committing a felonious offense.

1.3.1.1. Legitimate self- defence

Legitimate self-defence, also known as right to self-defence and enforced at the article 20.4° of the SCC⁴⁷, makes reference to one of the most relevant exemptions from criminal liability. In order to exercise this right, it is necessary to fulfil the following

⁴⁶ Judgement, ECtHR (Grand Chamber), ‘*Gäfgen v. Germany*’ 1st June Strasbourg, 2010, (Application no. 22978/05); Judgement, United States Court of Appeals (Eleventh Circuit), ‘*Leon v. Wainwright*’ 18th June, 1984, Atlanta, Georgia (No. 83-5609).

⁴⁷ Article 20.4. Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, (modified by the article 13 in Ley Orgánica 1/2015, de 30 de marzo):

‘El que obre en defensa de la persona o derechos propios o ajenos, siempre que concurren los requisitos siguientes: Primero. Agresión ilegítima. En caso de defensa de los bienes se reputará agresión ilegítima el ataque a los mismos que constituya delito y los ponga en grave peligro de deterioro o pérdida inminentes. En caso de defensa de la morada o sus dependencias, se reputará agresión ilegítima la entrada indebida en aquella o éstas. Segundo. Necesidad racional del medio empleado para impedir la o repelerla. Tercero. Falta de provocación suficiente por parte del defensor.’

requirements: a non-legitimate aggression must happen and due to that, rational means of intervention will be allowed to use in order to prevent the referred infringement. However, under no condition can the defender provoke the initial aggression.

Consequently, revoking our state of TBS, all requirements must be analysed in length in order to assume whether a right to self-defence would be applicable as an exemption or at least, as an extenuating circumstance (article 21.1 SCC).

When it comes to the *'illegitimate aggression'*, it can be said that this element differs the right to self-defence from other exemptions stipulated at the SCC's article 20. However, in a scenario case, there is not a committed aggression but a possible aggression that may probably occur in a near future. Therefore, whether the first requirement is fulfilled might be put into question. Nevertheless, according to Francisco MUÑOZ CONDE *'legal precedent and some doctrinal sources have clarified that the aforementioned aggression may also be interpreted as the action which puts at stake safeguarding legal rights, including omission to it, when there is a short margin of eventuality on it.'* *'The closeness to an attack is equivalent to the attack itself and so the subject defending does not have to wait till the attack occurs.'*⁴⁸ Hence, it is understandable that near future illegitimate actions could also constitute the previously mentioned aggression, bearing in mind that this will always have to be wilful and non-legal; directly affecting to safeguarding and insurmountable rights such as individuals' lives.

Following the path and referring to the second requirement *'rational means of intervention for prevention'*, rationality demands for proportionality. Nonetheless, this can be arguable in a TBS because: is there a proportional use of torture during the interrogation stage in a TBS? Consequently, as referred earlier, this leads us to determine a stricter definition of torture. For instance, if we talk about different types of torture such as the psychological one, where should the line to it be drawn? When does the mental severe pain or suffering start so that it can be called torture? Up to which point can coercive measures be used without surpassing the line to torture and still maintain their utility at the TBS case?

⁴⁸ MUÑOZ CONDE, Francisco / GARCÍA ARÁN, Mercedes, *Derecho Penal parte general*, 9^o ED., Tirant lo Blanch, Valencia, 2015, p. 347.

Finally, to complete all requirements, there must be a ‘*lack of provocation*’ from the defender regarding the initial illicit aggression. In the discussed matter of the scenario, the role of the defender would be played by a public authority or official (e.g. a police officer, an interrogator from an intelligence agency etc.) who is in charge of interrogating the suspect (e.g. a terrorist) likely to be liable of committing an irreparable damage. At this stage, little has to be said about the provocation intended by the interrogator. If the agent provocateur (the interrogator) would like to entice someone consciously in order to make use of the right to self-defence and justify the use of torture, situations such as the TBS would not be appropriate. By doing so, not only would the consequences of the provocation (the illegitimate aggression) affect to the agent provocateur, but also to thousands of other individuals.⁴⁹

1.3.1.2. Necessity doctrine

When it comes to dealing with the second exculpatory circumstance, the SCC on its article 20.5⁵⁰ specifies the following preliminaries: in a state of necessity, the damage that will be caused to avoid a personal or external harm towards safeguarding legal rights, cannot be more detrimental than the one intending to prevent. Together with that, under no condition can the person in need provoke the state of necessity, or neither can it be derived from a professional requirement.

Ergo, with the aim of rethinking whether it would be plausible to justify the act of torture with the exemption of necessity, or at least extenuate the criminal liability (article 21.1 SCC), these elements are points to observe.

First of all and as said before, in order to establish a state of necessity, personal or external safeguarding legal rights must be at stake due to a substantial risk. It is undeniable that the TBS gathers this requirement as there is more than a mere possibility of risk towards legal inalienable rights. Regarding this, the APT has already stipulated the following assumption: ‘*A specific planned attack is known to exist and the attack will*

⁴⁹ APT, *op. cit.*, p. 6. This would refer to the second assumption of the scenario presented by the Association for the Prevention of Torture: ‘*The attack will kill a large number of people.*’

⁵⁰ Article 20.5. Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal:

‘El que, en estado de necesidad, para evitar un mal propio o ajeno lesione un bien jurídico de otra persona o infrinja un deber, siempre que concurran los siguientes requisitos: Primero. Que el mal causado no sea mayor que el que se trate de evitar. Segundo. Que la situación de necesidad no haya sido provocada intencionadamente por el sujeto. Tercero. Que el necesitado no tenga, por su oficio o cargo, obligación de sacrificarse.’

happen within a very short time.' Therefore, there is no doubt placed about the fact that the scenario contains the element of an attack's imminence. Going further on this aspect, it has been stated by the Spanish Supreme Court in the 2117/1994 ruling that there is no need for an indisputable imminence of an attack, because *'the risk can be just probable if the state of necessity entails pressing and serious characteristics.'*⁵¹

Accordingly, despite of the fact that in a TBS case there could not be precise information about the imminence of the risk, the mere *'probability'* would counter the use of this exemption due to the pressing and serious characteristics of a TBS: *'Imagine that you, an agent of the CIA, have just captured a well-known terrorist (let's say it is Osama Bin Laden). You have excellent information that there is an imminent attack (imminent risk) planned on a major US city. This attack will involve the explosion of a nuclear device. You also know that this attack will be carried out within the next 5-10 hours, making evacuation impossible (pressing and serious characteristics).'*⁵²

As far as the first requirement is concerned, *'proportionality of preventive means'*, a strict interpretation of proportionality must be made between the damage the originator of the imminent risk might suffer and the one the person in need wants to prevent. Recalling what stipulated beforehand, the damage caused due to the state of necessity cannot be more harmful than the one intended to prevent. So as to make this balancing, interests in conflict must be taken into account that is, the right to physical and moral integrity on the one hand and the right to live on the other hand; both stated at the article 15 of the Spanish Constitution. Going further on this issue and as mentioned earlier, one of the main assumptions that the TBS must comply is the fact that the *'attack will kill a large number of people.'*⁵³ Therefore, should the quantifying of lives be borne in mind and put it into the balance? In order to evoke an indisputable need for defence during necessity circumstances, the defender must prove that he/she was faced with a choice of evils and consequently, by balancing the interests in conflict he/she chose the lesser one.

Referring to what a proportional balance would be and in order to make possible the use of torture in TBS circumstances due to the aforementioned necessity, the

⁵¹ Sentencia del Tribunal Supremo (Sala 2ª de lo Penal) de 5 de diciembre de 1994 (Sentencia núm. 2117/1994; RJ 1994\9366) FJ 2.

⁵² WISNEWSKI, J. Jeremy / EMERICK, Ryan Dillon, *The ethics of Torture*, 1st ED, Continuum, London, 2009, p. 16.

⁵³ APT, *op. cit.*, p. 6.

professors Mirko BAGARIC and Julie CLARKE have come up with the following algorithm:⁵⁴

$$\frac{W+L+P}{T \times O}$$

W= whether the agent is the wrongdoer

L= the number of lives that will be lost if the information is not provided

P= the probability that the agent has the relevant knowledge

T= the time available before the disaster will occur (immediacy of the harm)

O = the likelihood that other inquiries will forestall the risk

According to this mathematical supposition, if the final result of the equation exceeds a threshold level, an exceptional use of torture would be permitted upon the necessity doctrine. Nevertheless, there is still another legal vacuum here, as the aforementioned threshold needs to be defined. However, to do so, would be an appropriate guide to indicate the features of the 'evils' and therefore, rate them.

Carrying on with the next requirement, '*lack of provocation by the defender*', a remark must be highlighted in order to differentiate it from the similar requirement of the right to self-defence. The necessity required for this exemption, will only be withdrawn in cases where it was consciously caused. In other words, the use of this legal exemption cannot be rejected only by reasoning that the defender caused an incident that resulted in a necessity state; consciousness is essential. As MUÑOZ CONDE mentions: '*this makes almost impossible to exclude the state of necessity due to an absence of this requirement.*'⁵⁵

Concluding, the final and third requirement mandates '*not to be the defender's behaviour enforced by his profession.*' It is true the fact that certain occupations require the obligation to bear a degree of threat, such as in the case of firemen when they are in charge of extinguishing an incontrollable fire. However, in a TBS, where presumably several assumptions must take place, it can be alleged that barely any public authority is

⁵⁴ BAGARIC, Mirko / CLARKE, Julie, 'Not enough official torture in the world? The Circumstances in which torture is morally justifiable', *University of San Francisco Law Review*, Vol. 39, Nº 3, 2005, p. 613.

⁵⁵ MUÑOZ CONDE, Francisco / GARCÍA ARÁN, Mercedes, *op. cit.*, p. 356.

accustomed to dealing with these situations that happen once in a blue moon and a rapid response is demanded to prevent an irreparable damage.

1.3.2. Atypicality:

1.3.2.1. Compliance with a duty or legitimate exercise of a profession

Apart from the exemptions of unlawfulness, another possible exception to the prohibition of torture has to be taken into account. As it is already known, certain type of offences entail normative elements which must be satisfied in order to determine the act committed as an illicit one. In fact, this is the case of the SCC's article 174 which regulates the crime of torture.

As previously mentioned, the public official who commits torture must be exercising his/her profession in an abusive way, therefore, if there is no perception of that normative clause and the public official has acted in compliance with his professional duty, the act committed cannot be considered as torturous.

This is why, the key issue to bear in mind is whether in a TBS an interrogator (public official), in order to avoid a major evil,⁵⁶ would be legitimated to use interrogation techniques which would slightly resemble to torture and however, be in compliance with his/her professional duty.⁵⁷ What is more, with the aim of accomplishing the aforementioned objective, the official would have to make use of appropriate and objective means.⁵⁸

Here comes the issue that will be fully analysed in the last chapter⁵⁹ of this work: whereas physical torture is fully questionable and unaccepted as a legitimate compliance of a professional duty, doubts might be risen with mental severe pain or suffering that is, psychological torture. In other words, as long as this kind of torture is not properly specified and consequently doubts arose in practice, it will be easier to justify a lack of

⁵⁶ MAQUEDA ABREU, María Luisa, 'La tortura y otros tratos inhumanos o degradantes' *Anuario de Derecho penal y ciencias penales*, Tomo 39, Fasc/Mes 2, BOE, 1986, p. 472: 'En definitiva, de lo que se trata es de analizar si el funcionario de policía está legitimado en el ejercicio de su cargo para realizar las conductas previstas en el artículo 174 cuando de ello dependa la evitación de un daño grave, inmediato e irreparable.'

⁵⁷ The ECtHR has accepted some motivations by police officers to induce enhanced interrogation methods, no matter the final decision upheld. Judgement, ECtHR (Grand Chamber), 'Gäfgen v. Germany' 1st June Strasbourg, 2010, (Application no. 22978/05) §107: 'In this connection, the Court accepts the motivation for the police officers' conduct and that they acted in an attempt to save a child's life.'

⁵⁸ GRIMA LIZANDRA, Vicente, *Los delitos de tortura y de tratos degradantes por funcionarios públicos*, Tirant lo Blanch, Universitat de València, Valencia, 1998, p. 170.

⁵⁹ Chapter III: 'Psychological torture and a proposal to set its outset.'

abuse by a public official in TBS cases and thus, admit the compliance of a professional duty.

In addition to the already referred exemptions that might be introduced, other alternatives shall be pinpointed as well. As previously mentioned by the writer BOWDEN, moral imperatives that confirm the prohibition of torture can easily turn into fumes in extreme circumstance such as the TBS. Actually, a clear example of it is the theory of utility.

1.4. Exception to the prohibition of torture (II):

1.4.1. Jeremy Bentham and the Utilitarianism

‘Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other chain of causes and effects, are fastened to their throne. The principle of utility recognizes this subjection, and assumes it for the foundation of that system, the object of which is to rear the fabric of felicity by the hands of reason and of law.’⁶⁰

As well said by the philosopher BENTHAM, the theory of utility lies in the approval or disapproval of every single action put forward by the mankind depending on whether it decreases or increases the happiness of the party involved. Therefore, utility is aimed at creating advantage, pleasure and happiness and preventing community and their individuals from evil, pain or sadness. According to the referred philosopher, the community is a fictitious body, consisting of several individuals whose interests must be safeguarded in order to maintain their welfare based on happiness.

Bearing the theory of utility in mind, the professor Jeremy DAVIES reported the philosopher’s torture notion as follows: *‘Torture is in itself an evil because it causes pain to its victims, but it is justifiable if it increases the quantity of happiness in the community at large (...) torture must be concerned with the future rather than the past.’⁶¹*

Therefore, as long as in the forthcoming future community’s happiness is assured by committing torture, this, would definitely be justified. Ergo, even weighting the costs-benefits between nonlethal pain caused by torture and the innumerable deaths provoked

⁶⁰ BENTHAM, Jeremy, *An Introduction to the Principles of Morals and Legislation* 1978, Batoche Books, Kitchener, 2000, p. 14.

⁶¹ DAVIES, Jeremy, *op. cit.*, p. 3.

by a TBS would seem nonsense to the 'Utilitarianism'. Because, is not pain a lesser and more remediable harm than the death itself?

Nevertheless, it is true the fact that counter aspects of the use of torture derive from the referred theory of utility. Little has to be remarked about the logic response society might give to this, as torture's legitimation might look like a negative setback at the legal enforcement of human rights; rights which have been difficult to get and maintain during former decades.

However, not only controversies may arose with torture, but also with the lethal injection which is currently legal in more than 31 states at the United States.⁶² Despite the fact that this method of life termination is broadly and commonly known as the most 'human' one for death penalties (quite arguable the fact that there is a 'human' way to kill) several executions carried out in the past years have revealed the opposite; that lethal injection resembles torture. Among most polemic cases⁶³ the one about Clayton Lockett in 2014 must be highlighted. According to several sources such as THE GUARDIAN, the previously mentioned inmate was sentenced to death penalty by lethal injection due to a murder committed in 2000. Nonetheless, the execution was botched due to the failure of the drug cocktail on the prisoner. Consequently, what it was presupposed to be a 12 minute-maximum-execution, was prolonged to 20 minutes of consecutive attempts to kill by needle injection. Finally, after 43 minutes of the first drug injection, Clayton died from a massive heart attack.

On this account and coming along with the words said by the professor DERSHOWITZ, nowadays *'the executioner has been replaced by a paramedical technician, as the aesthetics of death have become more acceptable. All this tends to cover*

⁶² DEATH PENALTY INFORMATION CENTER, 'States With and Without the Death Penalty', *Death Penalty Information Center*, 1st July, 2015: '(Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wyoming.)' Retrieved from <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last inquiry on 19th February 2016).

⁶³ RADELET Michael L., 'Examples of Post-Furman Botched Executions', *Death Penalty Information Center*, 24th July, 2014:

'Joseph L. Clark (May 2, 2006. Ohio); Angel Diaz (December 13, 2006. Florida); Christopher Newton (May 24, 2007. Ohio); John Hightower (June 26, 2007. Georgia); Curtis Osborne (June 4, 2008. Georgia); Romell Broom (Sept. 15, 2009. Ohio); Brandon Joseph Rhode (Sept. 27, 2010. Georgia); Dennis McGuire (Jan. 16, 2014. Ohio); Joseph R. Wood (July 23, 2014. Arizona); Brian Keith Terrell (December 9, 2015. Georgia).'

Retrieved from <http://www.deathpenaltyinfo.org/some-examples-post-furman-botched-executions> (last inquiry on 19th February 2016).

*up the reality that death is forever while nonlethal pain is temporary. In our modern age death is underrated, while pain is overrated.*⁶⁴

On this ground, if death penalty still persists for years and it is used in several states, which are considered to be democratic, what does it happen with torture to be seen in such a retrospective and retrograde way? Is not legal life termination a setback on human rights as well? So why the major economic and political powers word widely accept and apply irremediable acts such as the death penalty but refuse any kind of governmental debate on torture?

This is why, once again, DERSHOWITZ brings to the spotlight the challenging and brain teasing dispute on torture: in TBS, should torture be part of our legal system, or shall it remain off-the-books?

1.5. Exception to the prohibition of torture (III):

1.5.1. Alan Dershowitz and the Torture Warrants

*‘Government throughout is but a choice of evils. In a democracy, such choices must be made, whenever possible, with openness and democratic accountability, and subject to the rule of law.’*⁶⁵ As BENTHAM affirmed more than two centuries ago, governments will always be tested when choosing between evils according to what is stipulated by law.

A crystal clear example of it took place in Italy at the mid-seventies: in 1978, a terrorist group (Brigate Rosse) kidnapped Aldo Moro, the former Prime Minister of Italy. During the judicial procedure, the record of the preliminary examination stipulated the decision of not using torture upon the kidnapping suspects or culprits. However, during the pursuit of Aldo Moro’s kidnappers, an investigator from the Italian security services suggested to the general Carlo Della Chiesa (state police) to torture the terrorist who might look like withholding relevant information of the case. Nevertheless, the mentioned general denied it by answering: *‘Italy can survive with the death of Aldo Moro, but it cannot withstand with the admittance of torture.’*⁶⁶ The terrorists eventually murdered the Prime Minister.

⁶⁴ DERSHOWITZ, Alan Morton, *Why Terrorism Works: understanding the threat, responding to the challenge*, Yale University Press, UK, 2002, p. 149.

⁶⁵ TWINING, William / TWINING, Peter, ‘Bentham on Torture’ *Northern Ireland Quarterly*, 24, No.3, p. 345. *Apud* DERSHOWITZ, Alan Morton, *op.cit.*, p. 154.

⁶⁶ DERSHOWITZ, Alan Morton, *op.cit.*, p. 134.

Definitely, the decision taken by the general was totally emphatic and forceful with the fact that even at the most harsh circumstance the use of torture was utterly prohibited. However, what DERSHOWITZ tries to bring into light is the back side of the election between evils: what would happen if torture would be part of our legal system and deciding on the lesser evil would mean committing torture?

According to him, when it comes to dealing with brutal forms of torture, few are the nations who signed and ratified the CAT and fully respect it. A major part of the signatories constantly breach and ignore it and a clear example of it is the unclassified summary of the report conducted during the 'war on terror' (2001-2006)⁶⁷ by the United States Senate Select Committee on Intelligence. It gives cause to deeply think about the findings and conclusions that the Committee presented in the report:

- The CIA's enhanced interrogation techniques were not effective when acquiring intelligence or gaining cooperation from detainees.
- The CIA's justification for the use of its enhanced interrogation techniques rested on inaccurate claims of their effectiveness.
- The interrogations of CIA detainees were brutal and far worse than the CIA represented to policymakers.
For instance, CIA's first detainee, Abu Zubaydah was deprived from sleep as well as constantly slapped and 'walled' (slamming detainees against the wall) which were not recorded. Together with that, other internal recordings stipulated that the waterboarding of Khalid Shaykh Mohammad was just a series of 'near drowning'.
- CIA detainees were subjected to coercive interrogation techniques that had not been approved by the Department of Justice or had not been authorized by CIA Headquarters.

And these, were only few irregularities among other thousands relayed in a report of over 6000 pages.

In addition to this, the ill-treatments carried out in the jail of Abu Ghraib⁶⁸ must also be pinpointed. The scandal came to light with tremendous photographs where detainees were brutally tortured (naked detainees posed in sexual positions, hooked to electrodes, tethered to a leash etc.) Due to the revelation, the American soldier Charles Graner was sentenced to 10 years of prison sentence due to the innumerable abuses

⁶⁷ SENATE SELECT COMMITTEE ON INTELLIGENCE, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*, Findings and Conclusions, Declassification Revisions, 3rd December 2014.

⁶⁸ Abu Ghraib, located in Iraq and created during the 80s, has been one of the world's most disreputable prisons. After Iraq's invasion, it was taken by the U.S. army where in 2004 torture and abuse scandal was revealed.

conducted at the jail. Despite of it, Graner's defence attorney stated that the soldier had always been a scapegoat acting under superiors' orders.⁶⁹

Furthermore and above all, it should be underlined that the United States signed the CAT under a reservation: *'(1) That the United States considers itself bound by the obligation under article 16 to prevent cruel, inhuman or degrading treatment or punishment, only insofar as the term cruel, inhuman or degrading treatment or punishment means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.'*⁷⁰ So in the case of the United States, the convention is only binding to the extent of the Eight Amendment,⁷¹ where torture is not even mentioned. As it is stated, *'the amendment prohibits the federal government from imposing unduly harsh penalties on criminal defendants'*, so in *sensu contrario*, if it is prohibited to torture those who are already convicted, does this mean that the same act on a suspect cannot be considered as unduly harsh or probably torturous? Consequently, can this be an excuse to commit harsh ill-treatments upon suspects of criminal offences?⁷²

Notwithstanding, apart from the United States' irregularities concerning the CAT, other cases of ill-treatment have also been reported lately. Just to mention, according to the Amnesty International's data, the National Human Rights Commission of Mexico reported more than 7741 torture complaints from 2010 to 2014 and even more, the increase of the overall complaints has risen up to 600% in the country in the last 10 years.

⁶⁹ ASSOCIATED PRESS, 'Graner gets 10 years for Abu Ghraib abuse', NCB News, 16th January 2005, Texas. Retrieved from http://www.nbcnews.com/id/6795956/ns/world_news-mideast_n_africa/t/graner-gets-years-abu-ghraib-abuse/#.VvcYLuLhDIU (last inquiry on 19th February 2016).

⁷⁰ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Declarations and Reservations, updated February (2016). Retrieved from https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-9&chapter=4&lang=en#EndDec (last inquiry on 21st February 2016).

⁷¹ Eighth Amendment, Amendment to the United States Constitution, created on September (1787) and ratifies on June 21, 1788:

'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' This amendment prohibits the federal government from imposing unduly harsh penalties on criminal defendants, either as the price for obtaining pre-trial release or as punishment for crime after conviction.'

⁷² See Judgement, United States Supreme Court. *'Ingraham v. Wright'*, 19th April Washington, 1977, (No. 75-6527); in this case, the court uphold the strict interpretation of the Eighth Amendment and affirmed that:

'The Cruel and Unusual Punishments Clause of the Eighth Amendment does not apply to disciplinary corporal punishment in public schools. The history of the Eighth Amendment and the decisions of this Court make it clear that the prohibition against cruel and unusual punishment was designed to protect those convicted of crime.' §1.

Furthermore, it must be stressed that not only does the American countries' compromise towards the aforementioned convention need to be taken with a pinch of salt, but Western World countries have also been involved in controversial events. At the 2014/2015 report carried out by the Amnesty International, it was clearly exposed that the CIA had close relations with several European countries: *'Several hosted secret detention sites (Poland, Lithuania and Romania) or otherwise assisted the US government in the illegal transfer, enforced disappearance, and torture and other ill-treatment of dozen detainees, including in particular the UK, Sweden, Macedonia and Italy.'*⁷³

Hence, it can be affirmed that no matter the convention in question and the countries who signed and ratified it, torture has always been part of our everyday life, even though it has happened mostly in an off-the-record way. Therefore, at this point of the work, a suggestion made by the professor DERSHOWITZ must be forethought: if torture exists, why not to create public accountability for its use focused on TBS cases? *'I pose the issue as follows. If torture is, in fact being used in an actual ticking time bomb terrorist case, would it be normatively better or worse to have such torture regulated by some kind of warrant, with accountability, recordkeeping, standards and limitations?'*⁷⁴

Precisely, a *'torture warrant'* is what DERSHOWITZ proposes for these cases. Its goal consists in controlling the use of torture with a previously established legal procedure for it, while creating public accountability at the same time. However, the real issue that lies behind this warrant is not whether torture would be used or not in a TBS, but if it would be still used openly pursuant a prior legal requirement or if it would remain as until now; off-the-books and breaching the current law in force.

It is true that the vast majority of those who are in favour of *'enhanced interrogation techniques'* in TBS cases might come into an agreement with the American attorney Floyd ABRAMS and his words when affirming that *'in a democracy sometimes it is necessary to do things off the book and below the radar screen.'*⁷⁵ Nonetheless, this assumptions lacks of truthfulness as this would directly go against the practise of democracy, where transparency and accountability are its main pillars. In fact, by doing

⁷³ AMNESTY INTERNATIONAL, *Report 2014/2015: The State of the World's Human Rights*, London, Amnesty International Ltd, 2015, p. 35.

⁷⁴ LEVINSON, Sanford / DORFMAN, Ariel, *op. cit.*, p. 266.

⁷⁵ DERSHOWITZ, Alan Morton, *op. cit.*, p. 151. For instance, during the bomb attacks in Brussels on March 22 2016, the republican candidate to the presidency Donald Trump stipulated that the waterboarding techniques would be useful on terrorists. Retrieved from <http://www.publico.es/internacional/trump-ahogamiento-simulado-estaria-extraer.html> (last inquiry on 25th March 2016).

so, citizens, who are fundamental for creating a democratic government, would not be able to approve or disapprove the actions or decisions took by their representatives.

So bearing this is mind and respecting all transparency and accountability requirements demanded by a democratic government, the main goal to reach is to analyse whether allowing and regularising these warrants would lead to the process of revealing all torture practices carried out secretly and consequently, formalise a public but legally controlled use of torture. Concerning this issue, DERSHOWITZ has repeatedly pronounced his assurance on the fact that a *'double-check'* would always be more reliable than a sole one in terms of committing a nonlethal torturous act: *'Requiring that decision to be approved by a judicial officer will result in fewer instances of torture (...) law enforcement officials (judges) would be reluctant to seek a warrant unless they had compelling evidence that the suspect had information needed to prevent an imminent terrorist attack.'*⁷⁶

Accordingly, after arresting a suspect of a TBS case, in order to obtain a torture warrant which would fall within the legal scope, the public official or the interrogator in question would have to present compelling evidence to the corresponding judge. After that, a record would be kept with all the warrants conceded. Neither excuses of necessity nor would arbitrary use of torture be accepted, because a warrant procedure would always be available for interrogators in such a scenario. Finally, the decision whether torture would be necessary or not, would depend on the judge's reasoning.⁷⁷

This is how the professor confirms his belief in a warrant requirement: *'if properly enforced, would probably reduce the frequency, severity, and duration of torture. I cannot see how it could possibly increase it, since a warrant requirement simply imposes an additional level of prior review.'*⁷⁸

Unquestionably, the torture warrant brings to view what it has not been disclosed until these days; the possibility to regulate torture bearing a certain likeness to former centuries. As prof. John H. LANGBEIN uttered on his study *'Torture and the Law of Proof'*, torture had various purposes back in centuries. Remarkably, legal systems such as the English one appeared to be likely to routinize torture as part as their criminal

⁷⁶ *Ibid.*, p. 159.

⁷⁷ LUBAN, David, 'Liberalism and the Unpleasant Question of Torture', *Virginia Law Review* 1425, Vol. 91, Issue 6, 2005, p. 1439: *'For the first time, we may, find it possible to view torture from the torturer's point of view rather than the victim's.'*

⁷⁸ LEVINSON, Sanford / DORFMAN, Ariel, *op. cit.*, p. 270.

procedure as the Privy Council was in charge of authorising torture warrants. Surprisingly to belief, when these warrants were abolished, the English experience with torture did not leave traces whereas in France, it remained off-the-books for long lasting years.

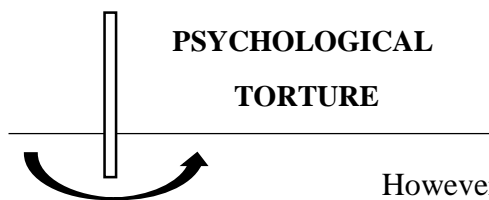
Hence, where a dissociation to main legal doctrine's standpoint bets on the accountability that must be given to torture, the dispute on its permissiveness in TBS situations reopens completely. The most sceptic ones are reluctant to accept torture warrants which would permit the use of physical and mental force against detainees, a conviction of: torture, '*not in my name.*' However, there is a point to bear in mind: while physical torture is really visual on the one who is subjected to it (a clear reflection of the torment caused), does the same happen to psychological torture? How should be determined that a detainee has been subjected to psychological torture by the interrogator in a TBS case when there are barely visual signs of it? Could the absence of visual evidence be an evidence of absence?

CHAPTER III

PSYCHOLOGICAL TORTURE AND A PROPOSAL TO SET ITS OUTSET

1. PSYCHOLOGICAL TORTURE

Hereunder, the TBS study moves forward into another level where the spotlight must be put at psychological torture's examination. As previously mentioned, a potential suspect of committing an irremediable attack (e.g a bomb placed in a crowded street which will kill a great deal of people) has been arrested. In order to prevent the likely happening crime and because of the rapidity that the situation requires, the suspect must be subjected to an interrogation by a public official, who might employ certain harsh



**Where is the
THRESHOLD?**

psychological techniques to obtain the necessary information from the suspect.

However, although the techniques used in such interrogations must be as rapid as effective, when would they be considered as too coercive?⁷⁹ Which is the threshold to respect so that the interrogation does not turn into a psychological interrogational torture?

1.1. Severe mental pain or suffering:

In order to establish a plausible criteria which would define the start of mental torture, firstly, it is necessary to recall the previously mentioned legislations from which the analysis will begin.

As far as the SCC is concerned, it does clearly state on its article 174 how torture must cause a '*mental suffering*' which breaches the inalienable right of physical and moral integrity stipulated at the article 15 of the Spanish Constitution. However, this last one does not describe more than the fact that '*no one can be subjected to torture*', therefore,

⁷⁹ FALVEY JR. Joseph L. / D.ECK Brian, 'Holding the High Ground: The Operational Calculus of Torture and Coercive Interrogation' *Campbell Law Review*, Vol. 32, Issue 4, Article 2, January, 2010, pp. 590-592:

'I will perhaps prove difficult to distinguish acceptable interrogation techniques from unacceptable methods. Telling a person that he will be sent to a third country where he will be tortured, should be regarded as an unlawful threat. But can the same be said about threatening a person that he will be returned to his own country, without implying that he will be abused there, even though the interrogators know that is what the questioned person fears?'

this leads to bear in mind its article 10.2, which specifies that fundamental rights and freedoms will be interpreted according to the Universal Declaration of Human Rights (UDHR) as well as international conventions and treaties.

When it comes to these supranational legislations, neither the UDHR nor the ECHR add⁸⁰ a broader definition of mental torture. Due to this, the CAT must be thoroughly examined, as it outlays a previously not exposed characteristic of mental torture; its severity: '(...) *the term 'torture' means any act by which severe pain or suffering, whether physical or mental (...)*⁸¹. To this end, according to the legal framework, the most precise definition of mental torture would be the following one: *'intentionally inflicted severe mental pain or suffering.'*⁸²

1.1.1. *Decomposing the concept*

As well stated beforehand, in order to condemn an interrogational technique as mentally torturous, this must cause a severe mental pain or suffering. Nonetheless, a distinction must be made between both concepts as a slight difference might be cleared up. According to the Cambridge dictionary, the word *'pain'* stands for *'hurt or suffering of the body or mind'* whereas *'suffering'*, is equal to *'undergo, endure or bear pain, misery etc.'*⁸³ which is much more related to a process of continuous pain. Despite the fact that both terms are written in the aforementioned article by an *'or'* between them, the professor DEWULF states that there is no further need to analyse the slight distinction between both concepts, because the purpose to separate but mention them in the same legal precept, is nothing but not to constrain torture to a specific type of torment.⁸⁴

However, this lets all vagueness to restore reality again. Not every psychological

⁸⁰ The Declaration (article 5) as well as the Convention (article 3) stipulates the same absolute prohibition of torture: *'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'*

⁸¹ Article 1.1. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10th December 1984, (in force since 1st September 1989, in accordance with the ratifying instrument published in BOE num. 159/1989, de 5 de Julio de 1989).

⁸² Nevertheless, if a close look is taken to the case law from the ECtHR, in certain cases the qualification of *'serious and cruel'* has been given to the suffering caused by these mental ill-treatments: Judgement, ECtHR (Court Plenary), *'Ireland v. The United Kingdom'* 18th January Strasbourg, 1978, (Application no. 5310/71), §167; Judgement ECtHR (Court Chamber), *'Aksoy v. Turkey'* 18th December Strasbourg, 1996, (Application no. 21987/93) §63; Judgement ECtHR (first Section), *'Dedoskiy and others v. Russia'* 15th August, 2008, (Application no. 7178/03) §84.

⁸³ Special Rapporteur on torture, UN Doc. A/HRC/7/3 p. 24, para. 70: *'pain and suffering should not be approached as occurring at one specific moment in time. It should rather be regarded as a process of agony, of which the long-term harmful or even devastating consequences and effects form part.'*

⁸⁴ DEWULF, Steven, *op.cit.*, p. 105.

harm to a suspect during an interrogation might entail torture, as it is hard to find out whether it constrains enough severity to directly have an effect on the suspect.

Following the very first documents reported by the United Nations' Special Rapporteur on torture Pieter KOOIJMANS, mental torture's aim has been literally described as: *'in the psychological or mental torture the aim is to injure the psyche.'*⁸⁵ However in order to cause pain and suffering which will injure personal psyche, this needs to be *'severe'* enough. The word severe however, by definition is a relative term: *'causing a great pain, difficulty, worry, damage etc.'*⁸⁶ therefore, it is hard to state which psychological interrogation techniques do always injure personal psyche. Bearing in mind that the uniqueness of humans entails differential personal aspects which are essential on assessing the existence of mental or psychological torture (age, physical and mental condition, personal former experiences, the affectionate relationships, etc.⁸⁷), psychological torture's definition on itself, requires a nonobjective examination. All this leads to the inevitable setback of case-to-case analysis based on subjective points; that is, a casuistic approach.

1.2. The threshold to pain or suffering:

1.2.1. The setback of subjectivity:

With the aim of underlining the setback that subjective personal aspects and circumstances might bring to the TBS case (constituting a casuistic approach), certain case law must be output, as this, will clearly bring to the public view how mental torture and psychological torturous techniques might be evaluated differently depending on the circumstances of each case.

1.2.1.1. Threats during the interrogation

To begin with, The Commission of Human Rights has condemned all forms of torture, including torture through intimidation⁸⁸ which includes the always questionable

⁸⁵ Special Rapporteur on torture, UN Doc. E/CN. 4/1986/15 p. 28 §118.

⁸⁶ Cambridge dictionaries online. Retrieved from <http://dictionary.cambridge.org/> (last inquiry on 16th March 2016).

⁸⁷ Judgement ECtHR (Former First Section), *'Van der Ven v. The Netherlands'* 4th May Strasbourg, 2003, (Application no. 50901/99) §47; Judgement ECtHR (Grand Chamber), *'Selmouni v. France'* 28th July, 1999, (Application no. 25803/94) §100; Judgement ECtHR (Plenary), *'Soering v. The United Kingdom'* 7th July, 1989, (Application no. 14038/88) §111; Judgement ECtHR (Grand Chamber), *'Gäfgen v. Germany'* 1st June (2010) (Application no. 22978/05) §88; Judgement ECtHR (Third Section), *'Milan v. France'* 24th January Strasbourg, 2008, (Application no. 7549/03) §43.

⁸⁸ UN Commission on Human Rights Res. 2001/52, 25th April, 2001: *'Also condemns all forms of torture, including through intimidation.'* See also UN Doc. A/HRC/RES10/24, §1.

issue about psychological threats.⁸⁹ When it comes to dealing with threats, several different examples can be outlaid. For instance, the IACtHR stipulated that threats of harsh body injuries, physical torture and other violence can be seen as mentally torturous.⁹⁰ Same happens with the Committee against Torture whose independent experts, monitoring the implementation of the CAT, recall that even verbal abuse can amount to psychological torture.⁹¹

Nevertheless, concerning the rulings of the ECtHR, cases such as the already mentioned '*Gäfgen v. Germany*' might rise doubts about the aforementioned statements. If a closer look is taken to this case, the applicant Magnus Gäfgen was threaten with subjection to considerable physical pain and suffering during the interrogation process as a detainee.⁹² However, although the mentioned applicant suffered physical injuries at the same time⁹³ and despite the fact that the court stated that the referred threats of physical injuries could constitute psychological torture, finally, it was stipulated that the circumstances of the interrogation (the duration of the treatment to which the applicant was subjected, its physical or mental effects on him, whether it was intentional or not, its purpose and the context in which it was inflicted etc.) did not amount to mental torture.

⁸⁹ UN Doc. E/CN.4/2002/76 Annex III:

'International humanitarian law prohibits at any time and any place whatsoever any threats to commit violence to the life, health and physical or mental well-being of persons.' *'It is my opinion that serious and credible threats, including death threats, to the physical integrity of the victim or a third person can amount to cruel, inhuman or degrading treatment or even torture.'* (Report of the Special Rapporteur, Sir Nigel Rodley.)

⁹⁰ Judgement IACtHR, '*Miguel Castro Castro v. Peru*' 25th November, 2006, (Case no. 160), §272-279 and 288; Judgement IACtHR, '*Maritza Urrutia v. Guatemala*' 27th November, 2003, (Case no. 103), §92.

⁹¹ Committee against Torture report to the Turkish Government, CAT/Inf/ 2007 11th January, Strasbourg, 2007, §59.

⁹² Judgement, ECtHR (Grand Chamber), '*Gäfgen v. Germany*' 1st June Strasbourg, 2010, (Application no. 22978/05) § 26:

'(...) detective officer E. had threatened that a specialist was on his way to the police station by helicopter who, without leaving any traces, would inflict on him intolerable pain the likes of which he had never before experienced, if he continued to refuse to disclose J.'s whereabouts. To underpin the threat, E. had imitated the sound of the rotating blades of a helicopter. E. had further threatened that the applicant would be locked up in a cell with two big "Negroes" who would anally assault him.'

⁹³ Judgement, ECtHR (Grand Chamber), '*Gäfgen v. Germany*' 1st June Strasbourg, 2010, (Application no. 22978/05) § 81:

'(...) physical injuries had also been inflicted on him during the interrogation. E. had hit him several times on the chest, causing bruising, and on one occasion had pushed him, causing his head to hit the wall. He produced two medical certificates of 4 and 7 October 2002 issued by police doctors to support this claim.'

Nonetheless, in the case of ‘*Selmouni v. France*’ where the applicant was subjected to repeated punches and kicks while police custody, the interrogation stage was affirmed to be a psychological torturous act without placing a single doubt. One of the main keys that made the ruling so clear and decisive was the humiliation that the applicant suffered during the detention.⁹⁴ Upholding this view, the Spanish Supreme Court has stipulated that in order to apply the article 174 of the SCC there must be a degrading and humiliating behaviour from public officers towards the arrested person, because mere injuries do not confirm their demeaning character.⁹⁵

Apart from physical threats, distinctions are also brought with death threats. Just to mention, the ICTY⁹⁶ at ‘*Naletilic et al.*’ case underlined that whereas death threats to a person during the interrogation constituted torture⁹⁷, threats to take someone’s life were equal to a cruel treatment causing a great suffering.⁹⁸

Consequently, it can be said that psychological techniques, individually taken, are not likely to generate mental distress which would directly cause mental torture; supplementary aspects (humiliation, suspect’s personal characteristics etc.) are decisive.

⁹⁴ Judgement ECtHR (Grand Chamber), ‘*Selmouni v. France*’ 28th July (1999) (Application no. 25803/94)§ 82:

(...) being forced to kneel down in front of a young woman to whom an officer had said -Look, you’re going to hear somebody sing-; having a police officer show him his penis, saying -Here, suck this- before urinating over him; being threatened with a blowlamp and then with a syringe; etc.’

⁹⁵ Sentencia del Tribunal Supremo (Sala 2^a de lo Penal) de 10 de mayo de 2007 (Núm. de resolución 414/2007) FJ 8:

‘El tipo delictivo cuya aplicación se pretende, no solamente requiere la causación de padecimiento físico o psíquico en la víctima, sino un comportamiento que sea degradante o humillante e incida en el concepto de dignidad de la persona afectada por el delito.’

See also, Sentencia del Tribunal Supremo (Sala 2^a de lo Penal) de 25 de septiembre de 2009 (Núm. 910/2009) FJ 3.

⁹⁶ It must be highlighted that the ICTY’s statute which condemns torture its article 2b functions in accordance with the Geneva Convention of 1949. Retrieved from <http://www.icty.org/en/documents/statute-tribunal> (last inquiry on 18th March 2016).

⁹⁷ Judgement ICTY (Trial Judgement), ‘*Prosecutor v. Naletilic and Martinovic*’ 31st March, 2003, (Case no. IT-98-34-T), §367:

‘The Chamber is satisfied that Mladen Naletili inflicted torture on witnesses TT and Fikret Begi by telling them that they would be put before a firing squad. The Chamber took into consideration that this -death sentence- was issued by Mladen Naletili in the brutal context of the overall situation at the fishfarm on 20 April 1993 and that, in those particular circumstances, witness TT and Fikret Begi could not but consider this death sentence as real.’

⁹⁸ Judgement ICTY (Trial Judgement), ‘*Prosecutor v. Naletilic and Martinovic*’ 31st March, 2003, (Case no. IT-98-34-T), §379.

As a result of the relevant case law's analysis, it can be underlined that this aura of uncertainty, whose core element is based on subjectivity, opens the possibility to exclude certain practices (which might be clear at first sight) from being defined as torture and vice versa, consider torture, acts which do not precisely amount to a 'severe pain or suffering' *prima facie*. One of the main reasons to reach this conclusion might derive from the fact that the ECtHR has a large loophole on responding to torture allegations by individuals against states.⁹⁹

Therefore, recalling back again our TBS case, how probably would interrogators' professional behaviour be considered as torturous or inhuman or degrading towards the detainee, conversely just professional?

1.2.2. *From subjectivity to objectivity:*

So as to establish a yardstick to the outset of mental torture and put an end to the presented uncertainty, relevant authors have set forth some proposals.

It is true the fact that the attempt to map a border between 'torture' and 'not torture' has carried out varying answers which start from expansive definitions of torture to more strict ones. However, analysing both sides will let a clearer view to decide whether to remain faithful to moral conducts or outstand the necessity of reinforcing national security by techniques of interrogation in TBS cases.

1.2.2.1. José Luis de la Cuesta Arzamendi

It has already been said how the pain and suffering caused to the detainee in a TBS interrogation stage may vary on the constitution, physical capacity, resistance and the strength of each individual's personality, in other words, the affirmation whether torture has been or not committed would be based upon highly subjective criterion.¹⁰⁰ On this account, the professor DE LA CUESTA ARZAMENDI emphasises the importance of concretising acts of torture in a national legal framework scope and leaving behind, the reference to pain and suffering constituting torture.

⁹⁹ LEVINSON, Sanford / DORFMAN, Ariel, *op.cit.*, p. 220:

'The Convention system is structurally ill equipped to respond to such allegations by individuals or state parties. Its fact-finding capacity has been little used, and its jurisprudence has created conceptual and practical obstacles for litigants in proving that systematic violations are taking place within a state.'

¹⁰⁰ DE LA CUESTA ARZAMENDI, José Luis, *El delito...*, *op. cit.*, p. 43.

Thence, with the aim of making insurmountable rights ironclad, DE LA CUESTA ARZAMENDI sets forth an alternative: to regularise torture as an offense of mere activity rather than an offense of result.¹⁰¹ Following this path, certain means of violent and intimidating behaviours with particular ends would constitute torture, and depending on their results would their respective punishment be increased (damaging, life-risking, health or integrity degrading). That is, by means of categorising the commission of torture, its punishing scale would be pending on the results caused. This would mean that acts committed in a TBS interrogational circumstance (*ex ante* determined as torturous) would be qualified as torture even if they did not origin physical or mental severe pain or suffering, but still an annulment of individual's personality and capacities (physical and mental).

Without any doubt, initially, the professor proposes an expansive prohibition of torture (which could be limited by specifying the elements of a torturous act) where broader techniques involving the breakdown of personality and individual capacities would be prohibited as well. What is more, what would be declared as torture would not be a resulted act but the whole process instead, in this case, the TBS's interrogation. Despite it is a protective solution for the human rights involved in the case, an expansive definition may alter the seriousness of torture allegations. Furthermore, in the case of a TBS where a detainee has to be subjected to an interrogation process, assertions such as the aforementioned might put the effectiveness of a TBS interrogational stage aside; a valuable aspect in a process like this.

1.2.2.2. Michael W. Lewis

On the other hand, the professor and lawyer Michael W. LEWIS opts for a more restrictive proposal which goes beyond defining the border of torture's definition.

As well said by him, *'effective rulemaking is a fairly simple and straightforward process; the desired outcome must be agreed upon by the parties involved, and incentives must then be created to align the self-interest of the parties with that outcome.'*¹⁰² However, problems start to arise when implementing the rulemaking concept into international law context. According to the professor, supranational law which protects human rights (ECHR, CAT etc.) still lacks an enforcement mechanism. This is why, in

¹⁰¹ DE LA CUESTA ARZAMENDI, José Luis, *El delito...*, *op. cit.*, p. 43.

¹⁰² W.LEWIS, Michael, 'A dark descent into reality: Making the case for an objective definition of torture', *Washington and Lee Law Review*, Volume 67, Issue I, Article 3, 1st January, Lexington, 2010, p. 118.

order to reinforce the effectiveness of torture's definition, the target to fulfil is to '*encourage nations to exercise self-restraint at a time when it is most difficult to do so; self-interest of an interrogating state in extracting information to protect its civilian population, with the exercise of desirable self-restraint.*'¹⁰³

Bearing this in mind, W. LEWIS outlays that the solution (so does the professor DE LA CUESTA ARZAMENDI confirm and which I partially come along with) does not consist in defining what '*severe pain or suffering constituting torture*' is but, in determining which are the '*severely painful inflictions constituting torture*'. As a result of it, he offers an alternative suggestion: during warfare conflicts, all nations subject their trainees (national security forces) to stressors in order to train them for extreme circumstances. They establish standards limiting the type and duration of the stress that trainees would be subjected to (the key is to reach a right balance between effectiveness and trainees security) and this, therefore, limits the scope of interrogation techniques a nation might use in warfare conflicts or other highly risky circumstances, such as the TBS.

Having said this, W. LEWIS proposes to apply the treatment tested on national trainees to detainees within conflicts. Nevertheless, in order to fully protect them, some supplementary prohibitive rules would be included with the aim of excluding methods such as: medical experimentation, exposure to chemical/biological agents, murder, rape, mock executions etc.

Hence, apart from a narrowing the definition of torture, the professor's proposal would guarantee the aforementioned self-enforcement from an *ex ante* view. Consequently, when an interrogator is about to interrogate a suspect, the standard to keep in mind would be '*we will only do to others what we do to our own people*' and when interrogators receive orders from their superiors and have a reasonable doubt about their legality, the question to ask them turns out to be much easier: '*sir, do we really do this to our own people?*' In this way, superiors' morality and judgement would not be directly judged, and consequently, interrogators would feel free to ask these questions more frequently. This could definitely be a way to reject human right violations against detainees and thus, stop a '*don't ask, don't tell*' practical policy.

¹⁰³ *Ibid.*, p. 119.

However, apart from the aforementioned positive aspect of a possible prevention of human rights breach, a narrow proposal to define mental torture could leak from its permissiveness, as to limit the definition might result in unacceptable harms to be seen as lawful. In fact, as well said by the former CIA agent Glenn Carle, to enter at the intelligence agency he had to go through psychological torture as part of his training process which lasted almost two years.¹⁰⁴ Therefore, W. LEWIS's proposal would not guarantee a full protection of detainee's human rights, because even one of the most relevant intelligence agencies have made use of torture techniques upon his trainees.

Bearing this situation in mind and to cut the discussion of this matter short, it is foreseeable that legal doctrine will always be divided in a two-folded argument: on the one hand, those in favour of an extensive definition and therefore a wider prohibition of mental torture, will stand up for the absolute armour plate of human rights. On the other hand, those in favour of a stricter definition and therefore a more specific prohibition of mental torture, will stick the term to just certain acts and interrogation techniques. Consequently, this would mean to open a margin of appreciation of the lawfulness of the techniques let outside the definition of mentally torturous.

2. THE OUTSET OF MENTAL SCARS

At this point of the work, several key points must be brought to the first line of the study. First of all, it is patent that at a national, European and even international level, torture is totally outlawed according to their respective legal frameworks. Nevertheless, due to the fact that definitions of torture vary from one convention to another, these distinctions reopen the margin of appreciation about what constitutes torture; to be precise, mental torture.

As a matter of fact, due to the uncertainty and vagueness produced by legal texts' inaccuracy, *ad hoc* courts such as the ECtHR have taken the whole responsibility (although the *iuris interpretatio* is part of its competency) to determine whether torture practices have been carried out at the European Union's states. As a matter of fact, this court's jurisprudence has been strictly commented due to the variety of resolutions determining the existence of mental torture. As a result of this, extensive and narrower

¹⁰⁴ CARLE, Glenn, 'Interview with the interrogator', by David Leser, *ABC News 24*, Sidney Writer's Festival, 4th June 2012, Sidney. Retrieved from <http://www.abc.net.au/tv/bigideas/stories/2012/06/04/3515541.htm> (from 23:50' to 27:56') (last inquiry on 23th March 2016).

definitions of torture have been presented with the aim of confirming the outset of it. Nonetheless, despite the defining suggestions exposed, none of them stands for a complete definition with barely no counterarguments.

2.1. Variety of suggestions:

2.1.1. A definition based upon 'severe mental pain or suffering'

When it comes to defining mental torture according to the severe pain or suffering caused, as repeatedly said before, there are high chances of falling into the risk of a profound subjectivity. As a mere example, let's present two similar but slightly different cases:

Example (I):

The national intelligence agency of Spain, as part of its counter-terrorism plan, has obtained clear and direct evidence of an imminent attack which will be perpetrated by a presumed terrorist of ISIS. However, there is still no information about where the bomb will be located and within what time will it be exploded. With the aim of obtaining crucial and first-hand details, the suspect of the possible commission is arrested and taken to an interrogation room.

Example (II):

A nineteen-year-old teenager has been detained in Madrid by the Spanish national police in order to be interrogated. According to the officers, he is part of a left-wing extremist group and after several attacks against the black community in the capital, there is clear evidence that he is in charge of placing a new bomb. It is presumed that it will be exploded in a crowded neighbourhood where several Nigerian families live.

Having presented these events, even the same psychological technique to obtain information from these suspects would have a different reaction on them. Let's say that for an hour, both suspects are subjected to threats of physical injuries. Would they cause a severe pain or suffering on both? Is the endurance to threats same for the ISIS terrorist and a nineteen-year-old teenager? Fairly, there is barely a doubt that for the aforementioned terrorist a threat like this does not have a mere effect.¹⁰⁵ However, the circumstances attaining the interrogation, may amount to psychological torture for the second suspect; his/her mental state would not be likely prepared to bear the mental distress produced by the threats. However, does the mere fact that the terrorist has

¹⁰⁵ These terrorists are highly prepared for bearing extreme physical conditions. There are already hundreds of videos released by the Islamic State where ultimate war training techniques are shown. Just to mention, the Long War Journal monitors every single factual movement by the Islamic State through its reporters and multimedia formats. To see an ISIS training camp video, watch http://www.longwarjournal.org/archives/2014/10/islamic_state_releas.php (last inquiry on 23th March).

favourable physical and mental conditions to go through an interrogation, allow not to consider his interrogation as mentally torturous? Or are his core human rights in a second level comparing with the second suspect?

2.1.2. A definition based upon the inflictions that cause 'severe mental pain or suffering'

As previously said by the professors W. LEWIS and DE LA CUESTA ARZAMENDI, the definition of torture must be set on the inflictions that cause, in this case, enough severe mental pain or suffering to constitute psychological torture. Based upon this proposal, methods of interrogation previously defined as torturous would be absolutely prohibited. However, let's present the aforementioned examples again, although with slight differences:

Example (I):

A presumed terrorist of ISIS has been arrested due to his close connection to an imminent bomb attack in Spain. During the interrogation process, he has been subjected to constant death threats.¹⁰⁶

Example (II)

A nineteen-year-old teenager has been detained in Madrid by the Spanish national police in order to be interrogated. According to the officers there is clear evidence that he is in charge of placing a bomb which will explode in the near future. Consequently, during his interrogation, he has been subjected to a series of smooth insults.

On this occasion, leaving aside the subjectivity explained in the previous defining method, this proposal stipulates the importance of determining which methods of interrogation constitute torture. Let's say that in the creation of a list of interrogating methods constituting torture, smooth insults are not included. Subsequently, this would give rise to the fact that whereas the death threats on the terrorists would be seen as a commission of mental torture, the verbal abuse that the teenager would have to undergo would not be considered equally. No matter the consequences this may have caused on the teenager, higher relevance would be given to the type of infliction rather than to its results.

¹⁰⁶ UNITED NATIONS, *Istanbul Protocol; Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Professional Training Series No. 8/Rev.1, Office of the United Nations High Commissioner for Human Rights, New York and Geneva, 2004, p. 29.

Therefore, would not this devalue the gravity of several interrogational practices which are not enlisted as torturous methods but in practice do considerably break suspect's mental strength?

2.1.3. *A definition based upon the suspect*

At last but not least, there is a proposal based upon the status of the suspect, in other words, what is known as *Feindstrafrecht* (Criminal Law of the Enemy). According to the German law professor and legal philosopher Günther JAKOBS, there is a distinction between what is considered to be a 'person' and 'enemy'. Therefore, he goes back in time to KANT and HOBBS to stipulate the existence of '*Criminal Law of the Citizen*' and '*Criminal Law of the Enemy*.'¹⁰⁷

According to the professor, there are certain circumstances where '*Criminal Law of the Enemy*' might be applied and accordingly, exclude the enemy from its intrinsic values such as human dignity. As well accepted by him, citizens have the right to security and this may lead to the state to take certain measures upon individuals who are not capable of assuring that security by a personal behaviour.¹⁰⁸

As a matter of fact, this would mean to create a personalised Criminal Law against certain persons such as the ones which are considered to be suspects of a TBS. Nevertheless, if legal criminal enforcement would be created upon certain individuals, this would definitely undermine intrinsic human rights which are stated in the UDHR and the already well-known ECHR: right to liberty and security (ECHR art.5), right to a fair trial (ECHR art.6.2), right to non-discrimination (ECHR art.14) etc.

2.2. Effectiveness as core element:

Once having presented several suggestions to define the start of mental torture, another consideration must be made. So as to reach the objective, the importance of three main factors must be pinpointed: firstly, the fact that a TBS must be faced; secondly, the interrogation on the suspects must be as most effective as possible and thirdly, suspect's human rights must have a minimum level of protection. Therefore, how to carry out an

¹⁰⁷ JAKOBS Günther / CANCIO MELIÁ Manuel, *Derecho penal del enemigo*, segunda edición, Thomson Civitas, Editorial Aranzadi, (Cizur Menor) Navarra, 2006, p. 33.

¹⁰⁸ *Ibid.*, p. 47: '*Quien no presta una seguridad cognitiva suficiente de un comportamiento personal, no sólo no puede esperar ser tratado aún como persona, sino que el Estado no debe tratarlo ya como persona, ya que de lo contrario vulneraría el derecho a la seguridad de las demás personas.*'

effective interrogation (rapidity in obtaining determining information) without interfering on suspect's mental health, is nothing but a harsh duty.

2.2.1. A definition based upon a twofold target

It is widely known how during interrogations in extreme circumstances, a special stigma is usually created to the questioning methods used by the interrogator. In other words, a strict eye is always kept to see whether the public officer has gone further his/her professional duties and consequently, has broken suspect's mental integrity. However, little is thought about the importance of firstly focusing on the interrogation's effectiveness rather than on human rights preservation.

Considering that, contrary to what the general idea is (in order to disclose decisive information from the suspect associated to the TBS, it is necessary to push his/her psychological stability to the limit so that at one point, he/she will give up and confess) the key to reach the aforementioned same effectiveness lies in preserving suspect's mental stability.

Opponents to enhanced interrogation techniques and experts on the field have clearly figured out that what makes useless mental coercion is suspect's unlikelihood to disclose accurate information for the case. According to the domain expertise, despite getting annoyed, angry and mentally disarmed, few detainees, not to say anyone, tend to unveil significant data.¹⁰⁹ What entails to reach this result is the fact that when subjecting a suspect to a considerable mental distress (sleep deprivation, loud noises, death threats, disorientation etc.), he/she is much more focused on regaining the diminished

¹⁰⁹ CARLE, Glenn, 'Interview with the interrogator', by David Leser, *ABC News 24*, Sidney Writer's Festival, 4th June 2012, Sidney. Retrieved from <http://www.abc.net.au/tv/bigideas/stories/2012/06/04/3515541.htm> (from 27:24' to 27:56') (last inquiry on 23th March 2016):

Glen Carle, 2012: (former CIA agent)

'(...) I thought, wait a minute, I had this (mental torture) done to me, I know what happened to me, I became crazy really fast, I was really miserable and I was really pissed off. I was angry, but none of that made me willing to share information or less able to withhold it, so I thought, that's just stupid; and it is.'

SOUFAN, Ali, 'The interrogator; Ali Soufan and Lara Logan Pt. 2', by Lara Logan, *CBS News, 60 minutes*, 14th November 2011. Retrieved from <http://www.cbsnews.com/news/the-interrogator-14-11-2011/> (from 02:00' to 02:10') (last inquiry on 27th March 2016):

Ali Soufan, 2011: (former FBI agent)

'(...) it started with nudity and then escalated, then you have noise and you have sleep deprivation. And it goes from one stage to another, until he decided to cooperate. His reaction was immediate, he basically stopped to cooperate and the information totally dried up.'

psychological stability rather than making sure he/she is telling the needed information to the interrogator or the public official in question. Therefore, there are high chances to get inappropriate or irrelevant information with mentally coercive interrogation techniques, where neither effectiveness would be achieved due to a lack of valuable information, nor human rights would be respected as suspect's mind dislocation would hardly ever be seen as efficient.

However, this is not a current issue which has sprouted all of a sudden, because back in the World War II there were already attempts for reshaping techniques of interrogation upon POWs (prisoners of war). Hanns Scharff, also known as the '*Master Interrogator*' gained success throughout his unique and genuine methods for interrogating: '*rather than compelling his prisoners to reveal classified data through the employment of coercive methods, his success was the result of carefully orchestrated friendly exchanges with his prisoners.*'¹¹⁰ Indeed, according to several detainees who were subjected to his interrogations, Hanns's techniques were valuable for extracting information and the source could not even notice about it.¹¹¹ This outcome was reached by four major steps: employing a friendly approach, not pressing for information, making an illusion of knowing-it-all and using confirmations/disconfirmations.¹¹² In other words, the relevance of HUMINT (Human intelligence gathering) was put at the limelight (persuasion, verbal and nonverbal communication, cross-cultural connection, understanding between the detainee and interrogator...).

Therefore, if back in the World War II persuasive interrogation techniques were considered to be feasible and effective without undermining suspects' mental integrity, it might be understood that the threshold to mental torture must be drawn at the point where

¹¹⁰ GRANHAG, Pär Anders *et al.*, 'The Scharff technique: On how to effectively elicit intelligence from Human Sources', *International Journal of Intelligence and Counterintelligence*, Vol. 29, Issue 1, 132-150, 13th November 2015, p. 134. Retrieved from <http://www.intersolglobal.com/?s=the+scharff+technique> (last inquiry on 28th March 2016).

¹¹¹ F. TOLIVER, Raymond, *The Interrogator: The Story of Hanns Joachim Scharff, Master Interrogator of the Luftwaffe*, Schiffer publishing, 1st January, Pennsylvania, 1997. *Apud* GRANHAG, Pär Anders *et al.*, *op.cit.*, p. 133:

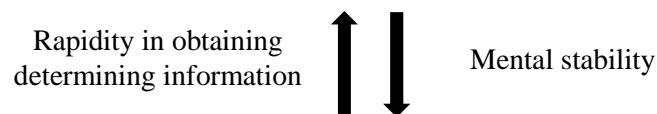
'What did he get out of me? There is no doubt in my mind that he did extract something, but I haven't the slightest idea what. (Hubert Zemke).'' (p.193.)

'Scharff really knew his subject and his interrogation procedures, enjoyed his work, and no doubt was effective. I had the impression that it might even be dangerous just to talk about the weather with him as he'd probably gain some important or confidential information from it. (Colonel Hubert Zemke).'' (p.187.)

¹¹² GRANHAG, Pär Anders *et al.*, *op. cit.*, p. 137-138.

effectiveness losses its value and therefore gets vanished. Or in other words, the start of mental torture would be set when suspects' mental stability would be put at stake in order to make a preference for a resulting unreal '*rapid information disclosure.*'

Following this path, this would lead my study to a clear analysis or conclusion. The effectiveness of an interrogation is composed by two main elements: rapidity in obtaining determining information and suspect's mental stability's protection. The point however, lies in the rapidity the situation (TBS) requires to get the needed information and allegedly, it is then when mental stability tends to be sacrificed.



As said before, the weaker mental stability's protection is, the lower will the chances be to obtain a rapid and decisive response from the suspect, as he/she will get enclosed to certainly non-cooperation.¹¹³ At the same time, it should not be forgotten, that a suspect of a TBS case might surely be highly prepared for extreme interrogation processes and trained not to reveal information.

On this base, a technique which would undermine suspect's mental stability by altering it with anguish, disorientation, fear, panic, threats towards personal physical/mental wellbeing or any other analogue method, which under same circumstance (a TBS interrogation stage) would affect to a reasonable person's¹¹⁴ mental equilibrium, and if this would not lead to a rapid determining information disclosure, a psychologically torturous interrogation would be presented.

However, the slight but still plausible possibility lies in the fact that no matter the mental distress caused to the suspect, interfering on its mental stability might constitute a way to get the already mentioned desired decisive information. Therefore, the scenario

¹¹³ (See note 111.)

¹¹⁴ The Free Dictionary by Farlex: '*A phrase frequently used in Criminal Law to denote a hypothetical person in society who exercises average care, skill, and judgment in conduct and who serves as a comparative standard for determining liability.*' Retrieved from <http://legal-dictionary.thefreedictionary.com/Reasonable+person+standard> (last inquiry on 2nd May 2016). In this case, the term '*reasonable person*' would not be used to make a comparison with the person liable of committing a crime, but with the passive subject who will suffer the mentioned criminal offence. For further information about general psychological evidence of torture, see UNITED NATIONS, *Istanbul Protocol; Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Professional Training Series No. 8/Rev.1, Office of the United Nations High Commissioner for Human Rights, New York and Geneva, 2004, pp. 45-47.

would be presented as follows: once again, the suspect's mental stability is undermined to the extent that he/she has been subjected to a mental distress crossing over the verge of a reasonable person's mental equilibrium. Nevertheless, in this case, valuable information has been rapidly disclosed by the suspect which will be crucial for avoiding the TBS's consequences. Thus, what this assumption would obtain is the qualification of a cruel, inhuman or degrading treatment or punishment towards the suspect (SCC art.173.1). The key point of distinction stands for the fact that the needed information has been obtained let aside that still remains the breach of suspect's mental stability. Notwithstanding, it should be pinpointed that this last qualification would be achieved with the presumably less severe, long-lasting and maybe not taking place psychologically coercive techniques such as: mock executions and physical or death threats.

Should not be disregarded that within the mental interrogative methods a differentiation must be made, to be precise, between lesser and harsher techniques. For instance, despite the fact that according to the SCC threats are considered to be crime offences (SCC articles 169 to 171), I would rate them in a lesser level of mental coercive subjection as still remains a probability to avoid the threat's offence from being committed (which would definitely be a harder consequence). However, in a level of harsher coercive psychological methods, techniques such as the sleep deprivation, disorientation or constant loud noises would be highlighted. These ones, in comparison with the lesser techniques, would be definitely carried out or put into practice after a time consuming effort. Though, in truth, apart from constituting a higher mental distress, the element of rapidity that efficiency requires would not be achieved.

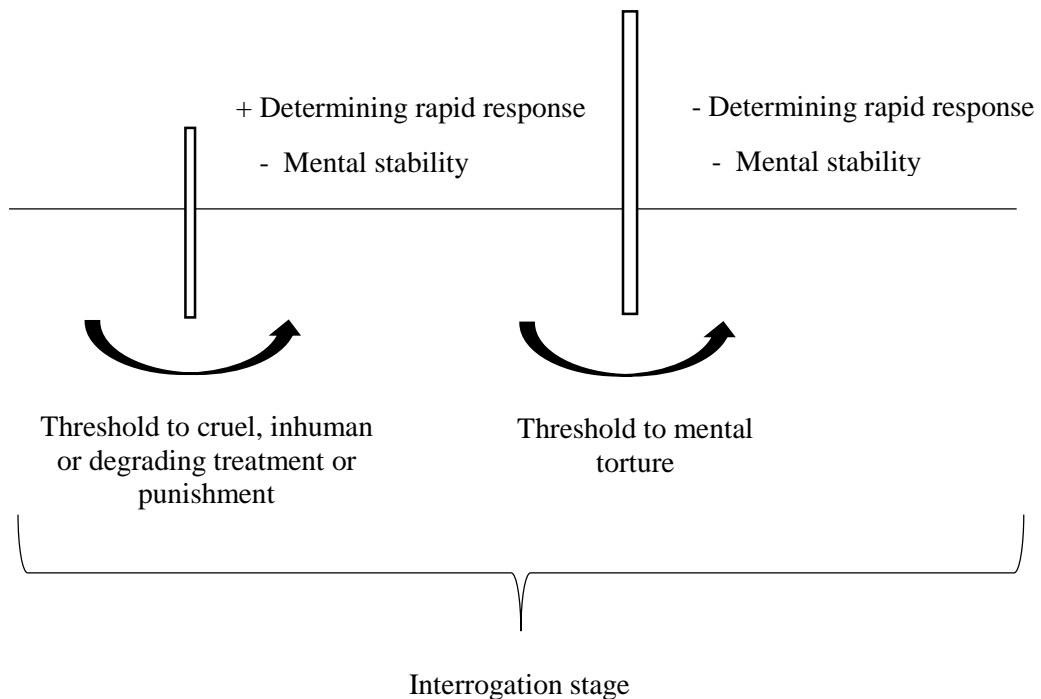
Therefore, it can be presumed that the threshold to cruel, inhuman or degrading treatment or punishment would hardly be realistic on the grounds that, psychologically minor coercive techniques of interrogation would rarely cause a mental important breakdown to provoke a confession of decisive information. On this account, there would be higher chances of committing mental torture during the interrogation and consequently, weighting in favour of the detainee's violated human rights.

Whatever the case, it is needless to say that in order to declare a public official or authority liable for committing the aforementioned felonies, the necessary elements of *mens rea* and *actus reus* would have to be thoroughly analysed. That is, the test of criminal liability upon the defendant will be built upon two concurrent elements: a guilty

act (objective element of a crime) and a corresponding guilty mind which will present the criminal intention of the person committing the felony (subjective element of a crime).

Closely connected to it and without any doubt, the referred elements would have to be proved beyond a reasonable doubt. Had not been like that, that is, if the accused had not been presumed innocent with still shadows of doubts in the prosecution, another main Constitutional right would be breached; the right to presumption of innocence (article 24.2 of the Spanish Constitution).

Concluding this work upon the outset of mental torture in a TBS case and in order to summarise my personal proposal on it, this is how would the complete analysis based on effectiveness be presented:



CONCLUSION

When it comes to bringing a close end to the always debatable analysis of when does torture start on a suspect's interrogation in a TBS case, few conclusions must be brought to the frontline.

To start with, it has been clearly exposed that no matter national, European and international legislation on the prohibition of torture, there are still important legal loopholes to resolve, especially when defining psychological or mental torture. Definitely, subjective criterion such as '*severe pain or suffering*' do not help to achieve the aforementioned aim, and that is clearly shown throughout ECtHR, ITCY, IACtHR case law. What is more, even several arguments for excluding the absolute prohibition of torture have been presented on the basis of legitimate self-defence, necessity doctrine or utilitarianism; accordingly, increasing the uncertainty upon the referred prohibitive legal provision.

On top of that, having seen the vagueness that the legal definition of torture presents (even more when it comes to psychological torture), several attempts have been presented to specify when it really starts. Nevertheless, neither too expansive nor strict definitions have been determining and valuable for drawing the line to what mental torture means; due to the importance that must be given to effectiveness in TBS interrogations.

This is exactly, the aforementioned efficiency, the key point to set my personal study on the threshold between legitimate psychological interrogational techniques, cruel, inhuman or degrading psychological treatment or punishment and psychological torture during interrogations. It has been repeatedly underlined how alternative non-coercive techniques can be valuable for disclosing information with the aim of achieving the always desired effectiveness upon suspects in charge of a TBS. That is, keeping suspect's mental stability without breaking it by the use of coercive psychological interrogative techniques, will lead to the extraction of necessarily rapid as well as decisive information in a TBS case; as a result, this will make the interrogation effective. Therefore, in a *sensu contrario* interpretation, the weaker the protection given to the suspect's mental stability is (stability will be breached when mental coercive techniques are seen as damaging for a reasonable person's mental equilibrium) the lower will the chances to get an effective interrogation be. Accordingly, at that exact point would the threshold to a cruel, inhuman

or degrading mental treatment or punishment be drawn firstly and mental torture secondly.

This being so and to come to an end, the personal suggestion to redefine the outset of mental torture would be thus presented:

So as to delimit the start of a cruel, inhuman or degrading psychological treatment or punishment during a TBS interrogation, the suspect must be subjected to mental distress which undermines his/her mental stability above the level of a reasonable person's mental equilibrium, by which the interrogator has gathered determining information for preventing a TBS case within the necessary rapidity.

Similarly, psychological torture would be committed when the suspect is subjected to a mental distress which undermines his/her mental stability above the level of a reasonable person's mental equilibrium, by which the interrogator has not been able to gather determining information for preventing a TBS case within the necessary rapidity.

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