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

Ian Turner

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Ian Turner

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1 **Human Rights and Antiterrorism: A Positive Legal** 2 **Duty to Infringe Freedom from Torture?**

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

17 It is a well-established principle of international law that those detained by the state enjoy the
18 right not to be tortured and ill-treated. For example, Article 5 of the Universal Declaration of
19 Human Rights (UDHR) states: “No one shall be subjected to torture or to cruel, inhuman or
20 degrading treatment or punishment.” Furthermore, Article 7 of the International Covenant
21 on Civil and Political Rights (ICCPR) states: “No one shall be subjected to torture or to cruel,
22 inhuman or degrading treatment or punishment. . .” The United Nations (UN) has also en-
23 acted a treaty specifically addressing torture: the Convention against Torture (UNCAT). Free-
24 dom from torture and other forms of ill-treatment is legally “absolute” so there are no lim-
25 itations to the right in any circumstances. Indeed, Article 2(2) of the UNCAT states that no
26 exceptional circumstances whatsoever, whether a state of war or a threat of war, internal po-
27 litical in stability or any other public emergency, may be invoked as a justification of torture.

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

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Q1

35 it is an exponent of torture? A state in such a situation cannot allow ill-treatment without
36 arguably betraying its own principles and losing credibility.²

37 Nevertheless, do those who engage in acts of a terrorist nature deserve the absolute
38 right to be free from state harm (assuming those that died had survived), if there was a
39 very real possibility that they possessed information which could avert an atrocity; and
40 “intensive interrogation” was, realistically, the only conceivable means of acquiring such
41 information? Perhaps the absolute nature of the antitorture right should be relaxed to
42 prevent, for example, a terrorist attack—“preventative torture”³—particularly in a “ticking
43 bomb”⁴ scenario? Remember, in the last ten years or so we have witnessed the “Ricin Case,”
44 a plot to spread the deadly poison ricin on the streets of Britain in 2003;⁵ the “Airline Bomb
45 Plot,” a plot to blow up planes flying from London to the United States with homemade
46 liquids in 2006;⁶ and the fatal shootings in Mumbai in 2008,⁷ at the Fort Hood army base in
47 Texas in 2009⁸ and at Frankfurt Airport in 2011.⁹ Or perhaps such intensive, or “enhanced,”
48 methods of interrogation should be reserved for potentially more serious acts of terror, for
49 example, where the perpetrators were intent on pursuing suicide attacks, especially against
50 civilian targets, such as those committed on 11 September 2001 (9/11) in New York and
51 Washington in 2001,¹⁰ in Madrid in 2004,¹¹ in London in 2005,¹² and in Stockholm in
52 2010¹³? Either way, these atrocities suggest a continuation of terror threats to, for example,
53 the United States and its allies. So much so, it is estimated that currently there are up to
54 200 suicide bombers planning attacks in, for example, Britain.¹⁴

55 Consider, also, the rights of those intent on detonating a radiological dispersion device,
56 or “dirty bomb,” in a highly populated area such as England’s capital, London (I choose
57 this as an example since it is arguably vulnerable to attack because of its role as the host
58 city of the Olympic games in 2012¹⁵)? Notwithstanding the significant human costs in
59 terms of immediate loss of life and permanent injury, there would be additional traumas
60 associated with the mass evacuation of hundreds and thousands of people. An evacua-
61 tion, if improperly managed, would be chaotic, increasing the number of people exposed
62 and the spread of contaminants. Financially, such an event would have a significant effect on
63 the United Kingdom’s international standing; as well as, locally, decimating, for example,
64 the property market. Environmentally, it would be a catastrophe, too; the clean up itself
65 could take years.¹⁶ So should terrorists whose desire is, for example, to engage in suicide
66 violence and/or acquire radiological weapons (as well as those of a chemical, biological,
67 and nuclear nature) for use, particularly, against civilians enjoy a legal right like freedom
68 from torture, especially since they so emphatically deny this right to their victims?

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

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

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

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

105 **Principles of Torture and Other Forms of Ill-Treatment**

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

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

115 It was also stated above that in law freedom from torture and other forms of ill-treatment
116 is “absolute” so there are no limitations to the right in any circumstances. Indeed, Article
117 2(2) of the UNCAT states that no exceptional circumstances whatsoever may be invoked
118 as a justification of torture. Similarly, at regional level, Article 15(1) of the ECHR states
119 that in time of war or other public emergency threatening the life of the nation any High
120 Contracting Party may take measures derogating from its obligations to the extent strictly
121 required by the exigencies of the situation. However, Article 15(2) permits no derogation
122 from Article 3; the right is therefore categorized as “non-derogable,”

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

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

142 *Defining Torture and Other Forms of Ill-Treatment*

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

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

166 *The “Positive” Nature of Torture and Ill-Treatment*

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

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

193 **Legitimizing Torture and Ill-Treatment by Reference to a State’s “Positive”** 194 **Duty in Law to Prevent Harm**

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

196 In a previous article, largely unrelated to this study of freedom from torture, another
197 “negative” human right was assessed: the right to life enshrined in, for example, Article
198 2 of the ECHR. Article 2(2) of the ECHR permits the intentional deprivation of life:
199 “Deprivation of life shall [contravene] this Article when it results from the use of force
200 which is no more than absolutely necessary a) in defence of any person from unlawful
201 violence. . .” Article 2(2)(a) therefore prohibits intentional killings by the state unless the
202 force used is strictly proportionate to a legitimate aim like preventing unlawful violence.
203 Article 2 not only confers this “negative” right on an individual: in law it also possesses a
204 “positive” sense. According to Article 2(1), “Everyone’s right to life shall be protected by
205 law.” Unlike Article 3 of the ECHR, Article 2(1) therefore expressly imposes a “positive”
206 duty on the state to protect individuals from harm.

207 In this right to life article the fatal shooting of Jean Charles de Menezes by firearms offi-
208 cers from London’s Metropolitan Police Service (MPS) on 22 July 2005 was assessed—the
209 officers had mistakenly believed that de Menezes was one of the failed suicide bombers
210 from the day before. There that article concluded that the death of de Menezes was not
211 unlawful.³³ However, it went on to question whether in the fight against terrorism post
212 9/11, particularly suicide violence, maybe there should be relaxation of Article 2(2)? That
213 is, intentional killings by state agents would still need to be justified by the criterion of
214 “absolute necessity” but the balance would fall more in the favor of the state, rather than
215 that of the individual whose life had been deprived, reflecting the state’s “positive” duty to
216 protect life under Article 2(1)?

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

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

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

244 Assuming that a legal argument legitimizing the torture of terror detainees could be made
245 out, ironically, on a state's "positive" duty to prevent breaches of Article 2(1) of the UNCAT
246 and Article 3 of the ECHR, does the case law of the ECtHR, for example, support this?
247 Mowbray says: "Innovative judgments [of the ECtHR] . . . [have constructed] . . . an ever
248 expanding range of [positive] obligations."³⁶ Domestically, the U.K. courts have arguably
249 been innovative in their development of the positive nature of Article 3: *Regina (Limbuella) v.*
250 *Secretary of State for the Home Department*.³⁷ Here s.55(1) of the Nationality, Immigration
251 and Asylum Act 2002 prohibited the provision of the National Asylum Support Service
252 to individuals who had not made a claim for asylum as soon as reasonably practicable
253 after arriving in the United Kingdom. The House of Lords had to consider the lawfulness
254 of refusing three individuals governmental help. Of the three applicants, the longest delay
255 in making an application for asylum was one day. Two of the claimants were forced to
256 sleep outdoors and the third claimant was on the verge of doing so. All the applicants had
257 suffered a deterioration in health. The court ruled that the claimants' circumstances could
258 constitute a breach of Article 3.³⁸ In reference to *Limbuella* Fredman concludes: "[This
259 case] provides new impetus for the developing momentum towards . . . positive obligations
260 by the ECHR."³⁹

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

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268 the person backed up by law-enforcement machinery for the prevention, suppression and
269 sanctioning of breaches of such provisions.”⁴²

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

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

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

298 While the legal obligations imposed on the state by Article 3 of the ECHR do not
299 require, in truth, the authorities to act in excess to prevent harm, could the measure of
300 this duty conceivably be interpreted as condoning torture if this could be characterized
301 as “reasonable,” when, for example, weighed against the thousands who died and were
302 injured in the 9/11 and 7/7 atrocities, especially since ill-treatment, as a means of gaining
303 information from a detainee, does work (at least on occasion—see more later)? In reference
304 to the psychological duress used against republican terror suspects in *Ireland v. United*
305 *Kingdom*⁴⁵—wall-standing, “hooding,” subjection to noise, deprivation of sleep, and depri-
306 vation of food—the ECtHR there said that it had led to the identification of 700 members of
307 the Irish Republican Army (IRA) and the discovery of individual responsibility for about
308 85 previously unexplained criminal incidents.⁴⁶ More recently, it was stated above that
309 the former Vice President of the United States Dick Cheney has claimed that intelligence
310 collected under torture by the Americans identified the location of the former leader of Al
311 Qaeda, Osama bin Laden, in Pakistan.

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

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

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

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

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

334 **Legitimizing Torture and Ill-Treatment by Reference to the "Positive" Duty** 335 **in Law to Prevent Harm—A Reply**

336 ***"Positive" Rights Trump "Negative" Rights?***

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

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

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

364 ***Constructing an Argument Justifying Torture by Reference to the Right’s “Positive”***
365 ***Nature is Surely Illegitimate?***

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

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

393 ***Constructing an Argument Justifying Torture by Reference to the Right’s “Positive”***
394 ***Nature is Clearly Ignoring Its Absolute Principles***

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

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

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

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

429 **Condoning Torture—The “Slippery Slope” Issue and Other** 430 **Counterarguments**

431 *Difficulties in Restricting Torture to only Those Suspected of Terrorism*

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

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

450 **“Ticking Bombs”—Fact or Fiction?**

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

463 ***The Reliability of Information Gained through Torture***

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

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

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

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

519 *Does the Use of Torture actually Prevent Terrorism?*

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

529 **Conclusion**

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

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

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

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

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

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

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

584 italics) ten minute threat of ill-treatment experienced by the detainee. Indeed, Greer notes
585 that if the boy had been held hostage, and firearms officers stormed the building where he
586 was being held, shooting Gaefgen dead, the killing would have been lawful, as per Article
587 2(2) of the ECHR (assuming of course that the use of lethal force by the police had been
588 “absolutely necessary” for a legitimate objective such as “the prevention of crime”). So
589 the authorities could have been justified in killing Gaefgen, but not infringing his Article 3
590 rights if he had been arrested and questioned! Here Greer suggests, therefore, that freedom
591 from torture should not be absolute, at least in moral terms. Could the same not be said
592 in the context of terrorism post-9/11 where the threats to life are that far greater, because
593 of, for example, the nature of the attacks and/or the indiscriminate way in which civilians
594 including children are targeted? In such circumstances the rights of terror detainees would
595 still be violated by the state, thus permitting suspects the opportunity of legal redress, but,
596 morally, the actions of state authorities would be excused.

597 Notes

598 1. Barbara Hudson, “Justice in a Time of Terror,” *British Journal of Criminology* 49(5) (2009),
599 pp. 702–717, at p. 708.

600 2. Kai Ambos, “May a State Torture Suspects to Save the Life of Innocents?,” *Journal of*
601 *International Criminal Justice* 6(2) (2008), pp. 261–287, at pp. 268–269.

602 3. Florian Jessberger, “Bad Torture—Good Torture? What International Criminal Lawyers May
603 Learn From the Recent Trial of Police Officers in Germany,” *Journal of International Criminal Justice*
604 3(5) (2005), pp. 1059–1073, at p. 1061.

605 4. Hudson (“Justice in a Time of Terror,” p. 708) says that the “ticking bomb” scenario is the
606 epitome of the permissible use of torture according to the lesser evil ideology. If a captive is thought
607 to have information about an imminent terrorist attack that may result in multiple deaths and injury,
608 then, the argument is, the absolute ban on torture must give way to the duty to prevent further injury.

609 5. BBC News, “The Ricin Case Timeline” 13 April 2005. Available at <http://news.bbc.co.uk/1/hi/uk/4433459.stm> (accessed 21 April 2009).

611 6. BBC News, “Three Guilty of Airline Bomb Plot” 7 September 2009. Available at
612 <http://news.bbc.co.uk/1/hi/uk/8242238.stm> (accessed 8 September 2009).

613 7. BBC News, “Indian PM Vows Action on Attacks” 27 November 2008. Available at
614 http://news.bbc.co.uk/1/hi/world/south_asia/7752237.stm (accessed 1 December 2008).

615 8. Robert Wright, “Who Created Major Hasan?” *The New York Times* 21 Novem-
616 ber 2009. Available at <http://www.nytimes.com/2009/11/22/opinion/22wright.html?scp=7&sq=Born%20in%20the%20U.S.,%20a%20Radical%20Cleric%20Inspires%20Terror&st=cse> (accessed
617 24 November 2009).

619 9. Matthew Day, “Frankfurt Airport Shooter Shouted ‘Allahu Akhbar’ Before Opening
620 Fire,” *The Telegraph* 3 March 2011. Available at <http://www.telegraph.co.uk/news/worldnews/europe/germany/8359759/Frankfurt-airport-shooter-shouted-Allahu-akhbar-before-opening-fire.html>
621 (accessed 4 March 2011).

623 10. BBC News, “America’s Day of Terror.” Available at http://news.bbc.co.uk/hi/english/static/in_depth/americas/2001/day_of_terror/ (accessed 21 April 2009).

625 11. BBC News, “Spain Steps Up Hunt for Bombers” 5 April 2004. Available at <http://news.bbc.co.uk/1/hi/world/europe/3599895.stm> (accessed 14 August 2009).

627 12. BBC News, “London Attacks” 8 July 2005. Available at http://news.bbc.co.uk/1/hi/in_depth/uk/2005/london_explosions/default.stm (accessed 21 April 2009).

629 13. Duncan Gardham, “Sweden Suicide Bomber: Taimur Abdulwahab al-Abdaly was Living
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631 (accessed 13 December 2010).

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635 [suicide-bombers-planning-attacks-in-UK.html](http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/8815574/200-suicide-bombers-planning-attacks-in-UK.html) (accessed 14 October 2011).
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637 Streets," 13 June 2011. Available at <http://www.dailyindia.com/show/445002.php> (accessed 15 June
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641 [attack](http://thehill.com/blogs/congress-blog/homeland-security/155493-the-consequence-of-a-dirty-bomb-attack) (accessed 15 April 2011).
- 642 17. BBC News, "George W Bush Claims UK Lives 'Saved by Waterboarding,'" 9 Novem-
643 ber 2010. Available at <http://www.bbc.co.uk/news/uk-11715577> (accessed 9 November 2010). But
644 this claim has not been said without controversy. Recently Human Rights Watch (HRW) has ar-
645 gued that overwhelming evidence of torture by the Bush administration obliges President Barack
646 Obama to order a criminal investigation into allegations of detainee abuse authorized by former
647 President George W. Bush and other senior officials. It further says that the Obama administra-
648 tion has failed to meet U.S. obligations under the United Nations Convention Against Torture
649 (UNCAT) to investigate acts of torture and other ill-treatment of detainees. If the U.S. govern-
650 ment does not pursue credible criminal investigations, HRW argues that other countries should
651 prosecute U.S. officials involved in crimes against detainees in accordance with international law;
652 see: Human Rights Watch, "United States: Investigate Bush, Other Top Officials for Torture," 11
653 July 2011. Available at <http://www.hrw.org/en/node/100390> (accessed 18 July 2011). In fact, when
654 George W. Bush recently visited Canada, HRW called for the Canadians to investigate his role in
655 the torture of terror suspects at Guantanamo, as per their duties under the UNCAT; see: Human
656 Rights Watch, "Canada: Don't Let Bush Get Away With Torture," 12 October 2011. Available at
657 <http://www.hrw.org/news/2011/10/12/canada-don-t-let-bush-get-away-torture> (accessed 14 October
658 2011).
- 659 18. The former head of Britain's Security Service, MI5, Eliza Manningham-Buller, has also
660 recently contributed to the debate. She admitted that "waterboarding" by the Americans had in fact
661 provided life-saving information—but this still did not justify its use: "[It] is illegal. . . . [And] it
662 is wrong." See: Duncan Gardham, "'Waterboarding Worked' Says Former MI5 Head," *The Tele-*
663 *graph* 8 September 2011. Available at [http://www.telegraph.co.uk/news/uknews/terrorism-in-the-](http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/8751342/Waterboarding-worked-says-former-MI5-head.html)
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669 pects, Former Bush Aides Claim," *The Guardian* 3 May 2011. Available at [http://www.guardian.](http://www.guardian.co.uk/law/2011/may/03/osama-bin-laden-death-us-bush-torture-debate)
670 [co.uk/law/2011/may/03/osama-bin-laden-death-us-bush-torture-debate](http://www.guardian.co.uk/law/2011/may/03/osama-bin-laden-death-us-bush-torture-debate) (accessed 6 May 2011).
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673 [uk/8103907/Al-Qaeda-bomb-plot-Ryanair-boss-rages-at-the-securicrats.html](http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/8103907/Al-Qaeda-bomb-plot-Ryanair-boss-rages-at-the-securicrats.html) (accessed 4 November
674 2010).
- 675 22. BBC News, "Control Orders: Nick Clegg Denies 'Peaceniks' Row," 7 January 2011. Avail-
676 able at <http://www.bbc.co.uk/news/uk-politics-12133637?print=true> (accessed 23 March 2011).
- 677 23. Here the author is thinking of liberals in particular. But even the "Godfather" of liberalism,
678 John Stuart Mill (1806–1873), might have justified torture on the basis of the significant risks posed
679 by terror suspects to society, since he said: "[The] only purpose for which power can be rightfully
680 exercised over any member of a civilised community, against his will, is to prevent harm to others.
681 His own good, either physical or moral, is not a sufficient warrant." J. S. Mill, *On Liberty and Other*
682 *Essays* (Oxford: Oxford University Press, 1991), p. 93.
- 683 24. Ian Turner, "Freedom From Torture in the 'War on Terror': Is it Absolute?," *Terrorism and*
684 *Political Violence* 23(3) (2011), pp. 419–437.
- 685 25. (1978) 2 EHRR 25.

686 26. *Ibid.*, p. 167.

687 27. *Ibid.* However, following *Selmouni v. France* (1999) 29 EHRR 403, which was the first
688 finding of torture against a state of the European Union (EU), the ECtHR now adopts a lower
689 threshold for torture than it did in *Ireland*. It said (p. 101): “Certain acts which were classified in the
690 past as ‘inhuman and degrading treatment’ as opposed to ‘torture’ could be classified differently in
691 future. [The Court] takes the view that the increasingly high standard being required in the area of the
692 protection of human rights and fundamental liberties correspondingly and inevitably requires greater
693 firmness in assessing breaches of the fundamental values of democratic societies.”

694 28. Many of these techniques have been described by former detainees at Abu Ghraib Prison
695 in Baghdad after the coalition invasion of Iraq in 2002; see, for example, Human Rights Watch,
696 *The Road to Abu Ghraib* 8 June 2004. Available at [http://www.hrw.org/en/reports/2004/06/08/road-](http://www.hrw.org/en/reports/2004/06/08/road-abu-ghraib)
697 [abu-ghraib](http://www.hrw.org/en/reports/2004/06/08/road-abu-ghraib) (accessed 7 September 2006) and at the U.S. military base at Guantanamo Bay, Cuba;
698 see, for example, BBC News, “CIA ‘Threatened’ Terror Suspects,” 22 August 2009. Available at
699 <http://news.bbc.co.uk/1/hi/world/americas/8215722.stm> (accessed 24 August 2009).

700 29. (1978) 2 EHRR 25, p. 167. Interestingly, notwithstanding this ruling at the ECtHR
701 over thirty years ago, similar techniques were used recently against individuals in British mil-
702 itary custody in Iraq; see, for example: R. Norton-Taylor and O. Bowcott, “Baha Mousa Re-
703 port Criticises ‘Cowardly and Violent’ British Soldiers,” *The Guardian* 8 September. Available at
704 <http://www.guardian.co.uk/world/2011/sep/08/baha-mousa-report-british-soldiers> (accessed 21 Oc-
705 tober 2011).

706 30. Sandra Fredman, “Human Rights Transformed: Positive Duties and Positive Rights,” *Public*
707 *Law* no. 3 (2006), pp. 498–520, at p. 498.

708 31. (1998) 27 EHRR 611.

709 32. *Ibid.*, p. 22. The positive duty imposed on states to prevent acts of torture would be much
710 less effective if a corresponding obligation to investigate allegations of ill-treatment did not exist.
711 For example, Article 12 of the UNCAT states that there must be a prompt and impartial investi-
712 gation, wherever there is reasonable ground to believe that an act of torture has been committed.
713 To strengthen further this element of the torture ban, the UNCAT, according to Article 17(1), es-
714 tablishes a specific Committee against Torture. Article 19(1) obliges state parties to submit to the
715 Committee reports on the measures they have taken to give effect to their undertakings under the
716 UNCAT. Occasionally, the Committee may arrange a visit to a state party of the Convention (Article
717 20(3)). The Optional Protocol to the UNCAT, 2002, establishes a Sub-Committee for the Prevention
718 of Torture that has authority to visit places of detention and to assess the conditions of that detention.
719 The UN is also involved in the prevention of torture by appointing a Special Rapporteur on Torture
720 and other Cruel, Inhuman or Degrading Treatment or Punishment, who is currently Juan Mendez
721 from Argentina. The role of the Special Rapporteur includes transmitting urgent appeals to States
722 with regard to individuals reported to be at risk of torture and undertaking fact-finding country visits;
723 see: <http://www2.ohchr.org/english/issues/torture/rapporteur/> (accessed 17 July 2011). The Council
724 of Europe has also created a European Committee for the Prevention of Torture and Inhuman or
725 Degrading Treatment or Punishment to strengthen further Article 3 of the ECHR. According to
726 Article 1 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treat-
727 ment or Punishment, “the Committee shall, by means of visits, examine the treatment of persons
728 deprived of their liberty with a view to strengthening, if necessary, the protection of such persons
729 from torture and from inhuman or degrading treatment or punishment.” Article 10(1) of the Con-
730 vention obliges the Committee, after each visit to a country, to draw up a report on the facts found
731 during the visit and transmit to the country its report containing any recommendations it considers
732 necessary.

733 33. Ian Turner, “Suicide Terrorism, Article 2 of the ECHR and the Shooting of Jean Charles de
734 Menezes,” *Web Journal of Current Legal Issues* no. 4 (2008). Available at [http://webjcli.ncl.ac.uk/](http://webjcli.ncl.ac.uk/2008/issue4/turner4.html)
735 [2008/issue4/turner4.html](http://webjcli.ncl.ac.uk/2008/issue4/turner4.html) (accessed 15 October 2008).

736 34. Especially at the heart of government. For example, in October 2008, when the United
737 Kingdom was wishing to increase the period of pre-charge detention of terror suspects from 28 days
738 to 42 days in the then Counter-Terrorism Bill 2008, the Home Secretary at the time, Jacqui Smith,

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

747 35. Gordon Raynor, “7/7 inquest: 52 Families Hear How Their Loved Ones Died,” *The*
748 *Telegraph* 13 October 2010. Available at [http://www.telegraph.co.uk/news/uknews/terrorism-in-](http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/8060221/77-inquest-52-families-hear-how-their-loved-ones-died.html)
749 [the-uk/8060221/77-inquest-52-families-hear-how-their-loved-ones-died.html](http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/8060221/77-inquest-52-families-hear-how-their-loved-ones-died.html) (accessed 14 October
750 2010).

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

754 37. [2005] UKHL 66, [2006] 1 AC 396.

755 38. *Ibid.*, p. 8.

756 39. Fredman, “Human Rights Transformed,” p. 501. There are several examples where it has
757 been suggested that the “positive” nature of Article 3 can be used to further protect the rights of third
758 parties. For example, O’Cinneide has argued that the substantive nature of Article 3, encroaching on
759 “second” generation, “economic, social and cultural” rights, should be extended further to impose
760 more duties on the state. That is, exposing individuals to destitution, degrading living conditions
761 or “similar manifestations of extreme poverty” should be recognized as constituting a violation of
762 the ECHR; see: Colm O’Cinneide, “A Modest Proposal: Destitution, State Responsibility and the
763 European Convention on Human Rights,” *European Human Rights Law Review* no. 5 (2008), pp.
764 583–605. Similarly, Kenna has discussed the use of positive obligations such as those found in Article
765 3 in informing housing rights; see: Padriac Kenna, “Housing Rights: Positive Duties and Enforceable
766 Rights at the European Court of Human Rights,” *European Human Rights Law Review* no. 2 (2008),
767 pp. 193–208. Londono has recently utilized the positive nature of Article 3 to construct an argument
768 justifying a greater protection of rape victims, involving, for example, the handling of rape trials
769 and restricting the trauma of victims giving evidence; see: Patricia Londono, “Positive Obligations,
770 Criminal Procedure and Rape Victims,” *European Human Rights Law Review* no. 2 (2007), pp.
771 158–171.

772 40. [2008] UKHL 20, [2008] 1 AC 1356.

773 41. (2000) 29 EHRR 245.

774 42. *Ibid.*, p. 115.

775 43. *Ibid.*, p. 116.

776 44. *Ibid.*

777 45. (1978) 2 EHRR 25.

778 46. *Ibid.*, p. 98.

779 47. (1978) 2 EHRR 1.

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

787 49. (1998) 27 EHRR 611.

788 50. (2003) 36 EHRR 31.

789 51. *Ibid.*, p. 88.

790 52. [2005] UKHL 66, [2006] 1 AC 396, p. 53.

791 53. [2008] UKHL 66, [2009] 1 AC 536.

- 792 54. Mowbray, *The Development of Positive Obligations Under the European Convention on*
793 *Human Rights by the European Court of Human Rights*, p. 17.
- 794 55. (2002) 35 EHRR 1.
- 795 56. (2011) 52 EHRR 1.
- 796 57. *Ibid.*, p. 107.
- 797 58. The ECtHR rejected the applicants' claim for similar reasons to those given by the U.K.
798 domestic courts: *PF and EF v. United Kingdom* (Application no. 28326/09).
- 799 59. Jessberger, "Bad Torture—Good Torture?," p. 1063.
- 800 60. Alon Harel, "Publication Review: Why Not Torture Terrorists? Moral and Practical and
801 Legal Aspects of the 'Ticking Bomb' Justification for Torture," *Public Law* no. 4 (2010), pp. 628–634,
802 at 629.
- 803 61. David Sussman, "What's Wrong with Torture?," *Philosophy and Public Affairs* 33(1) (2005),
804 pp. 1–33, p. 10.
- 805 62. *Ibid.*
- 806 63. Andrew Buncombe, "US Military Tells Jack Bauer: Cut Out the Torture Scenes . . . Or
807 Else!" *The Independent* 13 February 2007, p. 3. BBC TV's *Spooks*, a fictional account of British
808 MI5 agents, is perhaps a more restrained TV program than 24 but even there counterterrorist officers
809 were still confronted with a "ticking bomb" situation. For example, in Episode Nine of the Third
810 Series, Robert Morgan, a known mercenary, is brought in for questioning. A laser target missile
811 designator is missing. The agents have 72 hours to stop the guided missile hitting central London.
812 But what is the target? Certain that Morgan has the designator, one of the MI5 agents, "Danny," offers
813 Morgan money. It does not work. Morgan is put in a stress position and deprived of sleep. Again,
814 this does not work. Toxins in his drink bring on severe food poisoning. He still does not reveal the
815 whereabouts of the designator. But when his ill daughter is eventually threatened, Morgan gives up the
816 designator's location. Available at http://www.bbc.co.uk/drama/spooks/series3_ep9.shtml (accessed
817 11 March 2010).
- 818 64. Available at <http://www.channel4.com/news/microsites/T/torture/cases.html> (accessed 11
819 March 2010).
- 820 65. Philippe Sands, "George Bush's Torture Admission is a Dismal Moment for Democracy,"
821 *The Guardian* 9 November 2010. Available at [http://www.guardian.co.uk/world/2010/nov/09/george-](http://www.guardian.co.uk/world/2010/nov/09/george-bush-torture-admission-democracy)
822 [bush-torture-admission-democracy](http://www.guardian.co.uk/world/2010/nov/09/george-bush-torture-admission-democracy) (accessed 15 November 2010).
- 823 66. Human Rights Watch, *Guantanamo: Detainee Accounts*, 2004. Available at [http://www.](http://www.hrw.org/legacy/backgrounder/usa/gitmo1004/)
824 [hrw.org/legacy/backgrounder/usa/gitmo1004/](http://www.hrw.org/legacy/backgrounder/usa/gitmo1004/) (accessed 15 September 2006), p. 18.
- 825 67. Human Rights First, "Fact Sheet: Officials say Torture did not Reveal Bin Laden's Where-
826 abouts," 3 May 2011. Available at [http://www.humanrightsfirst.org/2011/05/03/fact-sheet-torture-](http://www.humanrightsfirst.org/2011/05/03/fact-sheet-torture-did-not-reveal-bin-ladens-whereabouts/)
827 [did-not-reveal-bin-ladens-whereabouts/](http://www.humanrightsfirst.org/2011/05/03/fact-sheet-torture-did-not-reveal-bin-ladens-whereabouts/) (accessed 4 May 2011).
- 828 68. [2005] UKHL 71, [2006] 2 AC 221.
- 829 69. [2011] EWCA Crim 184.
- 830 70. *Ibid.*, p. 30.
- 831 71. [2010] EWCA Crim 1551.
- 832 72. However, his subsequent appeal to the Court of Appeal—[2011] EWCA Crim 184—against
833 his conviction has since been rejected. There was evidence that his fingernails had been removed but
834 this had probably occurred before his detention in Pakistan. It was possible that he had been subjected
835 to inhuman and degrading treatment—sleep deprivation—but there was no connection between this
836 and staying the prosecution because of fairness, p. 40.
- 837 73. Richard Norton-Taylor and Ian Black, "David Cameron Challenges George Bush Claim
838 Over Waterboarding," *The Guardian* 11 November 2010. Available at [http://www.guardian.co.uk/](http://www.guardian.co.uk/world/2010/nov/09/british-deny-bush-claims-foil-terror)
839 [world/2010/nov/09/british-deny-bush-claims-foil-terror](http://www.guardian.co.uk/world/2010/nov/09/british-deny-bush-claims-foil-terror) (accessed 15 November 2010).
- 840 74. BBC News, "Anti-Terror Strategy 'Alienates,'" 30 March 2010. Available at [http://news.bbc.](http://news.bbc.co.uk/1/hi/8593862.stm)
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843 2010. Available at [http://www.telegraph.co.uk/comment/personal-view/8042991/Terror-alerts-play-](http://www.telegraph.co.uk/comment/personal-view/8042991/Terror-alerts-play-into-the-hands-of-the-enemy.html)
844 [into-the-hands-of-the-enemy.html](http://www.telegraph.co.uk/comment/personal-view/8042991/Terror-alerts-play-into-the-hands-of-the-enemy.html) (accessed 7 October 2010).

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847 p. 20.

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850 [terror-risk-to-Britain-from-al-Qaeda.html](http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/7500719/Nuclear-terror-risk-to-Britain-from-al-Qaeda.html) (accessed 31 March 2010).

851 78. Or at the very least serious discussion, especially among liberals who, merely on ideological
852 grounds, seemingly dismiss out of hand a proper consideration of the topic? Is this not more of a
853 legitimate balancing exercise that is at the heart of human rights ("liberalist"?) methodology?

854 79. [2005] UKHL 71, [2006] 2 AC 221, p. 161.

855 80. Jeremy Waldron, *Torture, Terror and Trade-Offs* (Oxford: Oxford University Press, 2010),
856 pp. 10–11.

857 81. Steven Greer, "Should Police Threats to Torture Suspects Always be Severely Punished?
858 Reflections on the Gaefgen Case," *Human Rights Law Review* 11(1) (2011), pp. 67–89.