



**„AMBASADORI MIRA U BOSNI I HERCEGOVINI“ /
„AMBASSADORS OF PEACE IN BOSNIA AND HERZEGOVINA „**



**DRUGA MEĐUNARODNA NAUČNA VIKTIMOLOŠKA KONFERENCIJA
U BOSNI I HERCEGOVINI
THE SECOND INTERNATIONAL SCIENTIFIC CONFERENCE OF VICTIMOLOGY
IN BOSNIA AND HERZEGOVINA**



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SAŽETAK / ABSTRACT
PREGLEDNI NAUČNI RAD

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**TORTURA - MUČENJE VODOM
(Waterboarding)
(Primjeri iz Sjedinjenih Američkih Država)**

U radu se ukazuje na definiciju torture u nacionalnom zakonodavstvu Sjedinjenih Američkih Država (SAD), te u dokumentima Ujedinjenih naroda (UN) i europskih država kroz praktične primjere potpore ili protivljenja na političkoj, pravnoj i medijskoj razini. Na primjeru torture vodom (eng., Waterboarding) deskriptivnom metodom se nižu primjeri iz američke i europske kaznene prakse i zakonodavstva.

Ključne riječi: Tortura, Tortura vodom, Konvencija protiv torture i drugih okrutnih, neljudskih i ponižavajućih postupanja ili kažnjavanja, Podupiruće ispitivačke tehnike (metode).

SAŽETAK / ABSTRACT
REVIEW SCIENTIFIC WORK

Goran Rados, Msc

**WATER TORTURE – WATERBOARDING
(Examples from the United States of
America)**

The paper refers to the definition of torture under the United States of America (USA) laws and regulations and as given in the documents of the United Nations (UN) and European countries through practical examples in support or opposition at the political and legal and level of media. Examples of waterboarding from the U.S. and European criminal practice and legislation are provided by means of descriptive method.

Key words: Torture, Waterboarding, Convention against torture and other cruel, inhuman or degrading treatment or punishment, Enhanced interrogation techniques (methods).

Introductory remarks

Torture is prohibited under international law and in most domestic laws³⁴⁷. However, or despite this, torture is a practice worldwide, beyond, and even within, the borders within which it is prohibited and penalised. One of the obstacles for preventing torture is revealing the committed crime of torture which is done through criminal investigation. However, recognizing this phenomenon is particularly demanding given that it is often intertwined with various aspects of trafficking in human beings, which is also a crime. Torture is often a consequence, and also a cause *in continuo* of committing some other crimes. International human rights bodies agree at least in one conclusion:

*There is a link between trafficking in human beings and torture or cruel, inhuman and degrading treatment.*³⁴⁸

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³⁴⁷ Over 150 countries ratified the Convention against Torture

³⁴⁸ *Trafficking in Human Beings Amounting to Torture and other Forms of Ill-treatment – Legal Analysis*, Ludvig Boltzman, Institute of Human Rights, 2013, p. 13

The conclusion that torture preceded or continued while committing a set of the mentioned crimes is derived from a massive quantity of analytical data from criminal and judicial databases summarised at global level.³⁴⁹

Torture in legal documents

Torture is prohibited under international law as peremptory norm and as such does not tolerate subordination to any exclusion whatsoever which would permit its use at any time and in any circumstances (e.g. in war). This absolute character of torture being subject to no exclusion whatsoever is contained in Copenhagen Document³⁵⁰, which together with Article 2 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (hereinafter: UNCAT)³⁵¹ undoubtedly and explicitly determines:

that no exceptional circumstances whatsoever, whether a state of war or a treat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

At the global level, i.e. in the UN corpus of legal texts, the most important document on the prevention of torture is the mentioned UNCAT Convention, followed by, by relevance, *the International Covenant on Civil and Political Rights (ICCPR of 1966)* and *the Convention on the Rights of the Child (CRC of 1989)*, and at the regional level: *the Convention for the Protection of Human Rights and Fundamental Freedoms (1950)*, *the American Convention on Human Rights* as well as *the African Charter on Human and People's Rights*.

Definition of torture

In general, torture takes place in situations in which one person exercises unrestricted power over another person. However, the definition of torture comprises of four main elements as provided in Article 1 of UNCAT Convention:

- the involvement of a public official or other person exercising the authority or acting in an official capacity (as torturer);
- the infliction of severe pain or suffering to the victim of torture;
- the intention of the torturer to inflict severe pain or suffering; and
- torturer has to have a specific reason or purpose/objective he wishes to achieve by this act (torture).

The first element, at least as set by UNCAT, that a *public official* is involved in torture suggests that at the time the UNCAT was drafted and adopted state-centred model of international relations, in which the state is the centre and the main actor of political interaction, was in place. Today, when there are strong non-state non-violent actors³⁵² (non-governmental organisations, movements, subcultural groups, transnational companies, business sector, media, academic institutions, etc.) this element loses its meaning and is outdated in its too narrow definition, especially given the facts which prove that torture could be or has been committed by private person(s) which are not public officials or do not act on their behalf or on behalf of the government.³⁵³

The second element, that a treatment has the characteristics of torture if severe pain or suffering is inflicted to the victim of torture, is understood in a way that it (severe pain and suffering) may be caused by physical as well as mental treatment of the victim of torture. Both physical and mental torture could include examples of threats to kill the victim of torture and threat to torture relatives. The circumstances in which these threats are usually exercised are described by the victims of torture as constant uncertainty in terms of space and time in which the threats are received from the torturer. Ingelse mentions such threats to the victims of torture and fear caused with them as

³⁵² There are also *violent non-state actors* (criminal groups and organisations as well as controlled and tentatively violent organisations such are, for example, private security agencies (they own and have the right to use firearms based on a license issued by the state)).

³⁵³ National legislation of Armenia, Estonia (EU member states), France (EU member state) and even Montenegro (EU candidate country) prescribe a broadened definition of potential torture (...) *any person*. This means that the torturer needs not/does not have to be a public official but rather is/could be a private person who is thus held criminally responsible. More on [OSCE/ODIHR, legislationline.org](#) (Accessed on 10 November 2017)

³⁴⁹ Committee against Torture (CAT), UN body composed of 10 independent human rights experts

³⁵⁰ Original title: *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE of 1990*. See: www.zamir.net. (Accessed on 10 November 2017)

³⁵¹ International Human Rights Treaty of 1984

one of the forms of psychological torture *per se*.³⁵⁴

The clear intent of the torturer that he wishes and intends to inflict severe pain or suffering to the victim of torture is rather unclear outside the legal profession and logics, especially to the victims of severe pain and suffering. Thus it is easier to describe this third element, i.e. characteristic, using its analogy: negligent or unintentional (non-)treatment (of someone) in which someone else suffers severe pain or suffering – is not torture! At least such a (non-)treatment has not been defined as an act of torture. Vice versa, torture exists if the intent of the torturer is clear in that he intentionally inflicts severe pain and suffering of the victim with the purpose of their intimidation or punishment.³⁵⁵

It is my opinion that if it were not for the fourth element which comprises torture and reads: *torturer has to have a specific reason and purpose/objective which he wishes to achieve (with this torture)*, the manifestation of such (mis)conduct would be brought down to 1 per cent of the present numbers. I believe that 99% of this small remaining statistical sample would be comprised of those with impaired mental health to such an extent that medical profession, primarily psychiatry, would find scientifically based response to this problem.

In brief, this *purpose* includes extracting a confession, obtaining from the victim or a third person information, or coercion and humiliation. All listed cases of *purpose* because of which torture is exercised must be 'placed' in a situation in which the victim (of torture) is detained or under the factual control or power of the torturer.

Waterboarding – (just) one of the types of torture

Waterboarding became a well-known interrogation technique during the Spanish inquisition in the 15th century, though there are documented records of its use dating 1300 years back. At that time it also had sub-variants used by more 'creative' inquisitors to punish the victims or extract confession.³⁵⁶ Put more simply, the use of water torture was described as follows: "*The victim is tied in a way to be*

unable to move the limbs, body or head (so-called full immobilisation) and in such a helpless state water would be poured into victim's mouth and nose, i.e. into all breathing organs at the same time, causing simulation of drowning with the victim within several seconds".

Hundreds of cases of water torture have been recorded on American soil or in its legal history of which I will mention the examples of torture in the U.S. army or torture committed during the war by using illustrative examples covering the period until 2001. The first better known case was recorded during the fighting in the Philippines where U.S. troops (1898) used the water cure³⁵⁷ as a way of waterboarding against the captured Philippine insurgents. Owing to a testimony of a U.S. private this case came to light and was followed by a legal procedure and conclusion.³⁵⁸

During the Second World War (1939-1945), acting alone without the involvement of domestic courts and courts-martial, and as a participant and member of the international community, United States of America condemned and prosecuted the use of waterboarding by the Japanese armed forces against United States troops. Several cases against Japanese who used waterboarding were processed before the International Tribunal for the Far East, (in the region) less known criminal tribunal based upon Nuremberg trials in Germany, whose verdicts were based on the testimony of victims, in this case U.S. military members.³⁵⁹ One of those convicted (Y. Asano) was sentenced to 15 years of hard labour for the crime of water torture against U.S. civilian(!).³⁶⁰ The public learned for the first time of the case of water torture during the Vietnam War owing

³⁵⁷ A wooden stick is inserted into the federal prisoner's mouth which prevents his mouth to close and water is poured down the throat until the victim suffocates.

³⁵⁸ Two U.S. army officers were accused of whom one was acquitted and the other found guilty. There are no records as to how many people were subjected to torture in this way nor how many died due to such torture.

³⁵⁹ See: *United States of America v. Hideji Nakamura, Yukio Asano, Seitara Hata, and Takeo Kita*, in: *An expansion of our question to the candidates: "Should interrogation techniques that some consider torture such as waterboarding, be a legal option?"*, [2008 Election ProCon.org](http://2008.Election_ProCon.org), p. 1 (Accessed on 12 November 2017)

³⁶⁰ In the criminal procedure USA vs. Y. Asano, the verdict emphasized that torture was committed against a civilian, thus presuming that, apart from Asano, others in the joint procedure of USA vs (Nakamura, Asano, Hata and Kita) were convicted of torture against U.S. soldiers.

³⁵⁴ Ingelse, C.: *The UN Committee against Torture – An Assessment (2001)*, p. 226

³⁵⁵ This relates to the request to meet a twofold (cumulative) condition which is probably a predominant legal issue for victims in producing evidence in a court proceedings to prove to have been victims of torture.

³⁵⁶ Some sub-variants of water torture include: water cure, water treatment and waterboarding itself.

to a photo of torture over North Vietnamese prisoner. Namely, the photo appeared on the front page of the Washington Post (21 January 1968)³⁶¹ showing three U.S. soldiers interrogate a Vietnamese military prisoner by means of waterboarding, which is visible by the way the prisoner is treated. In the article which followed the photo, the journalist stressed that such a treatment is (...) *water [interrogation] technique... fairly in common use among Allied troops in Vietnam*.³⁶² Legal outcome of this case was the indictment before the U.S. court-martial and conviction of one U.S. soldier.³⁶³

Torture by the members of U.S. government agencies – years of intensified pace (2001-2004)

The idea that there are situations in which torture is permitted was launched by the U.S. philosopher Michael Levine. In his essay published in 1982 he argues that there are situations in which torture could be legalised and even morally obligatory.³⁶⁴ However, Levin is not the first philosopher to face the dilemma or question of the use of torture for 'greater causes'. Before him, Jeremy Bentham elaborated the *Ticking Time Bomb Argument*³⁶⁵ in the essay *Means of Extraction for Extraordinary Occasions* (Bentham, J, 1804), while outside legal texts a similar observation of the same problem was outlined in a literary form of a novella by a journalist and former soldier Larteguy (*The Centurions*, 1962).³⁶⁶

³⁶¹ The owner of the published photo is not a soldier who participated in torture

³⁶² *Interrogation, (article), Washington Post, 21 January 1968*

³⁶³ The extent of the sentence is unknown from the source under footnote no. 13

³⁶⁴ *Levine, M., E: (1982); The Case For Torture, in: Enhanced Interrogation Techniques Pros and Cons at visionlaunch.com* (Accessed on 11 November 2017)

³⁶⁵ It is a scenario of *Ticking Time Bomb Argument*, a potential event in which it would be possible (and necessary) to legalise torture over person(s) (...) *if this could save millions of other lives...*”, See: *Larteguy, J.: <https://quoteinvestigator.com>*. (Accessed on 15 November 2017). Also in: *Davies, J., (2012) The Fire-Risers: Bentham and Torture. 19: Interdisciplinary Studies in the Long Nineteenth Century. (15), p. None. DOI: <http://doi.org/10.16995/ntn.643>* (Accessed on 15 November 2017)

³⁶⁶ One, not so reliable online source claims that D. Petraeus [U.S. General, former CIA Director /2011-2012/, and Commander of International Forces in Afghanistan, ISAF, and Commander of U.S. Forces Afghanistan, USFOR, and Iraq, Commander of U.S. Central

Today, the official Washington no longer denies that torture was used during the period from 2001 to 2004 and that government agencies, especially some components of the U.S. Armed Forces (USAF) and Central Intelligence Agency (CIA), used enhanced interrogation techniques in the War against Terror (WaT). However, there are public discussions to justify or deny the right to use techniques which resemble or are torture in the strict sense of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The fact remains that Bush's administration started using these methods and that Obama signed the Executive Order on 22 January 2009 requesting that *CIA³⁶⁷ abandons enhanced*

*interrogation techniques and henceforth uses only 19 interrogation methods listed in the Army Field Manual³⁶⁸ unless the Attorney General with appropriate consultation provides further guidance.*³⁶⁹

Bush's administration, i.e. President of the United States, did not inaugurate the enhanced interrogation techniques (methods) based on an executive order, as the most common legal act of making orders under the authority of the President, but due to the sensitivity of the issue and his political instincts, resorted to the institute of signing statements. Signing statement is a pronouncement issued by the President of the United States that a bill was signed into law. The text of such an act begins with the following wording:

Command] read this piece of work and based his Counter-insurgency Strategy, COIN Strategy, in the Middle East on it. More in: *Raday, S.: David Petraeus Wants This French Novel Back in Print! 27 January 2011, at: www.slate.com* (Accessed on 15 November 2017)

³⁶⁷ Interestingly, this relates only to CIA, though there have been proven cases of individuals from the U.S. army components involved in exercising torture.

³⁶⁸ *FM 2-22.3 Human Intelligence Collector Operation* (2006.). Concrete, detailed and precise field manual, written in 13 chapters and several hundreds of pages, published by the U.S. Armed Forces

³⁶⁹ A political decision made by the U.S. President, who is at the same time the Commander-in-Chief of the U.S. Armed Forces, on implementation of doubtfully legitimate interrogation methods, referred to the Department of Justice, i.e. U.S. Attorney General who is the minister of justice of the USA.

This bill, which I have signed today...

after which, based on own interpretation, he briefly described, explained and placed it into a political context.³⁷⁰ In this particular case, the signing statement of G. Bush concludes with the following wording:

...which will assist in achieving the shared objective of the Congress and the President of the United States (...) of protecting the American people from further terrorist attacks.

Instead of conclusion

Torture is prohibited by the U.S. federal as well as international laws, though Bush's administration in fact permitted such a treatment in a way it is described in less known Torture Memos (2002).³⁷¹ However, the fact that the person authorised by the U.S. Constitution (U.S. President) signed such an act did not constitute, for the U.S. justice system, legally valid or binding excuse for those using the enhanced interrogation techniques. During Bush's administration, (only) one CIA subcontractor was subjected to judicial proceedings due to using enhanced interrogation techniques; however, the subcontractor was under the contract with the agency, meaning that he was not an employee of the government's Central Intelligence Agency (U.S. government). This case alone leaves room to conclude that, theoretically, it was possible to conduct the proceedings against those who exercised the enhanced interrogation techniques. Regarding prosecution of torture, President Obama took such a stand that during his mandate in the White House not one person was prosecuted if followed orders or any official who followed Bush's administration policy on torture. Regarding the obligation and plan of closing the

³⁷⁰ See: *Presidential Signing Statements: Constitutional and Institutional Implications, Congressional Research Service, 17 September 2007*

During President G. Bush's mandate 152 signing statements were issued: Preceding him were Reagan (250), Clinton (381), Bush Senior (228). In 2006 American Bar Association noticed that Obama continued with this practice, which according to the Bar "undermines the rule of law and our constitutional system of separation of powers".

³⁷¹ In addition to this Memo, at least one another appeared. Both were confidential documents (officially classified), i.e. concealed from the public.

Guantanamo prison, Obama was looking for a way out to get rid of a burden of several doubtful torture-related acts, while it is obvious that, at the same time, some government officials turned a blind eye to the enhanced interrogation techniques employed in the field by some intelligence agencies' subordinates and subcontractors. It is mostly over political reasons that in 2009 Obama prohibited torture with Executive Order – presidential order which he immediately made public and published along with the Torture Memo. Further into his mandate it became clear that Obama and his administration have no interest in prosecuting the followers of the Memo during the mandate.

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