# Paradox in Preventing and Promoting Torture: Marginalising 'Harm' for the Sake of Global Ordering: Reflections on a Decade of Risk/security Globalisation

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# Paradox in preventing and promoting torture: marginalising 'harm' for the sake of global ordering. Reflections on a decade of risk/security globalisation

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The ultimate result of globalisation is that as the world setting is compressed there is an intensification of *consciousness* towards global interests, such as selective *ordering*, running parallel with strongly influential autonomous interests of the nation state and regional concerns. However, as risk and security disproportionately motivate globalisation, dominant nation state interests (which are at the heart of what operationalises global hegemony) become the prevailing measure of global ordering. Attitudes to 'harm' converge around these sectarian interests from the local to the global. As such, the need to torture, it is logically and even 'legally' argued, to better ensure domestic security will, if consistent with hegemonic interest, bring about both domestic and global ordering as a consequence. This article argues that globalisation has created a number of paradoxes where global ordering and governance are dictated by the dominant political hegemony and rights become secularized, not universal. Those who seek to contest the views of the hegemony, such as terrorists, are placed outside the global order and international protection and thus are subjected to the one-sided appreciation of harm that has been constructed by the hegemony[1] in attempts at global ordering.

**Keywords:** torture; universal rights; risk; security

## Introduction

The paradox of preventing torture through international law, while at the same time promoting it within a security/risk paradigm of world ordering, is a dangerous consequence of contemporary globalisation.[2] This article will examine more than the politicised pretence of torture prohibition through international law, mocked as it now is by self-defence justifications for torturing. The argument here advanced to explain the apparent divergence between law and practice is that the prevailing governance duality of local and global security interests which characterises globalisation in the 'war on terror' epoch deciphers this paradox, while failing in its reconciliation. What remains problematic in the relationship between torture and governance is the desire of significant 'rule of law' states in the global hegemony, otherwise known to endorse human rights rhetoric, to call on legal justifications for qualifying the *jus cogens* convention against torture in any circumstances.

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Much is at stake here. The last decade of risk/security globalisation[3] has witnessed the re-assertion of military power over fundamental human rights protection under the guise of self-defence doctrines and the responsibility to protect, accompanied by a profound attack on one of the most universally confirmed human rights protections. This attack has not been baldly asserted as *might is right*, but in terms of some version of constitutional legality. The challenge is all the more insidious in that otherwise 'rule of law' states employ international legality to assert the supremacy of ensuring global ordering above the inviolability of human integrity at its most basic level. Some would even suggest that to do otherwise is to neglect the most basic obligations of the nation state to protect its citizens. Add to this the post 9/11 invocation of the global hegemony to fight on behalf of *civilization* and the heat behind the torture/not torture debate is far from surprising.

Another important consideration in this opportunity to reflect on a decade of risk/security globalisation and its consequences for a rights-based global governance or some new form of international politics,[4] is the manner in which *harm* has been subjectified and contextualised both to confirm and constrain a new *realistic appreciation* of security before self-determination, and its coverage and meaning in the sense of negotiated harm to humanity in the selective manner detailed below.

## Torture: human rights or risk and security?

Under international humanitarian law torture is a crime of the highest order.[5] Yet recently, and somewhat reluctantly, global alliance states have confronted revelations concerning their use of torture as both legally permissible and morally essential. Torture has been promoted in a utilitarian environment as a commensurate necessity of responsible globalised crime control, in particular as a device to counter terrorist threat. The internationalisation of global terror as a crime threat requiring drastic self-defence is the discourse both of globalised crime and control/risk and security in this most recent and transforming era of globalisation.[6]

Globalisation is 'paradoxical in the way it unifies and delineates, internationalises and localises...'.[7] In a similar fashion the duality of torture as a crime internationally, and as rational crime control locally, suggests that torture (prohibited or prevented) cannot currently be disentangled from the risk/security focus of ordering (local to global). This control/rights tension is much more than a legal distinction or a moral contradiction. It is, I later suggest, a natural consequence of contemporary globalisation (local to global) where risk/security trumps rights and uniform legality.[8] A governance atmosphere, placing security above rights, is supported by a segmented disaggregation of universal rights where the protection of the 'legitimate' global citizen is valorised and the ascription of anything like rights to the terrorist or to their resistant communities is not even argued for.[9]

Global crime control takes on its hegemonic reality in the form of the decisions and acts favouring only some actors (suffering harm from resistance) while marginalising cultures and communities on the receiving end of harm for deterrence. The harm from torture specifically is diminished in domestic governance terms when directed against terrorism and terrorists, at least as a justified harm in the process of world ordering.

The following observation by Nowak encapsulates this sectarian argument in the wider discriminatory and paradoxical frame of contemporary globalisation, as against the prevailing governance background of national self interest:

> rather than homogenising the human condition, the technological annulment of temporal/ spatial distances tends to polarize it. It emancipates certain humans from territorial constraints

and renders certain community generating meanings extra-territorial – while denuding the territory, to which other people go on being confined, of its meaning and its identity-endowing capacity. For some people it augurs an unprecedented freedom from physical obstacles and unheard-of ability to move and act from a distance. For others it portends the impossibility of appropriating and domesticating the locality from which they have little chance of cutting themselves free in order to move elsewhere. With 'distances no longer meaning anything', localities, separated by distances also lose their meanings. This however augurs freedom of meaning-creation for some but portends ascription to meaninglessness for others.[10]

The globe is divided and humanity and the rights it enjoys are reserved to those for whom securitisation poses no risk. Torture has lost its unequivocal meaning as a cruel consequence of this selective and discriminatory disaggregation of 'governance for all'. The monopoly of the benefits of globalisation has not only left those beyond global hegemony without access to its protection, but worst still without legitimacy in a debate where torture is denied as harm to those tortured in the name of securing *legitimate others* on whose behalf torture is given utilitarian harm-diminishing meaning. Rights become relative and global governance is for a fluid community of *legitimate* citizen/victims facing 'modern life and its fears'.[11]

Bauman would have it that the management of fear is a great challenge for institutions and processes of global governance where the world is 'out of touch together'[12]. Incrementally, the justification and execution of torture in a world where *might is right* has a long and recurrent history. The difference in the current closing age of *globalisation as security* is that through the conventions of international law, the interests of those who set the world ordering agenda are projected and protected against a universal rights perspective, despite the economic and political marginalisation of those *on the receiving end* of globalisation, whose rights are conditional.[13]

Even in *a contracting globe* where pluralist, cultural, economic and religious values are tolerated only in so far as they do not challenge the norms of a prevailing political alliance, world order has come to rely on a risky mix of domination and violent resistance.[14] In such a disaggregated political and moral context of governance any realistic appreciation of harm in the determination of *to torture or not to torture* cannot be achieved under circumstances where only the valorised citizen/victim enjoys equality when rights are at issue.[15]

From a global governance perspective the risk/security paradigm itself is risky. With risk prediction and security evaluation, more reliant on political and cultural context than comprehensive and comparative harm measures, community safety gives way to community imperative as a primary governance obligation. It might be said that this is not unusual for governance frameworks which run to service political agendas. However, the difference for global governance is its declared commitment to the safety of humanity. Further, with globalisation promoting preferred regulatory strategies to address risk/security concerns, governance against terror will become more polarized and essentially less tolerant of cultural diversity as it is deemed threatening.[16]

## Globalisation as local risk/global security

This globalisation process which points to the extension of global cultural interrelatedness can also be understood as leading to a global ecumene, defined as a region of persistent culture interaction and exchange.[17]

That said, a critical concern of the analysis to follow is how the 'ecumene' of torture prohibition has been qualified by strong and competing nation state and alliance interests that place risk/security cultures against fundamental supra-national rights commitments.

One answer to this lies in the regressive duality of globalisation itself. As duality it is illusory and potentially distracting at this stage of the globalisation process only to concentrate on the 'collapsing' of time and space without recognising the diversity of human consequence which remains…globalisation as a concept refers both to the compression of the world and the intensification of consciousness of the world as a whole….[18]

Within that intensification of consciousness is a struggle over the meaning of torture which has a potential to shake the foundations of international humanitarian legality in the same way that the agreement on the conventions discussed in the following text opened up the vision of a new age of human dignity for all. Hegemonic interests that would determine either the incomprehensibility or utility of torture may hold the key for a critique of the recent segmented development of the human rights dimension of global governance.

This hegemonic analysis, despite its Western-centric tone, realistically recognises that as currently interpreted globalisation advances consolidated state risk/security interests, against a plethora of contesting ideologies, interests and rights perceptions beyond the nation state. The sectarian and hegemonic differentiation of combative power constellations which constitute current global hegemony exhibit this phenomenon in the prevailing *war on terror*.[19]

As my earlier work has endeavoured to establish for transitional cultures,[20] the process of globalisation affects key actors and stakeholders differentially depending on their inclusion or exclusion within and beyond the global community.[21] Some actors dominate while others are marginalised by the process of globalisation.[22] Dominant actors currently locate in the Western alliance of liberal democratic politics and capitalist market economics, and they determine the new politics of global governance.[23]

Normatively at least, when significant and universal rights issues such as personal integrity are endangered through a phenomenon like torture, international humanitarian law is assumed to safeguard the rights and privileges of all global citizens. Historically, torture has been determined through the relative prisms of cruelty, horror, tyranny and shame, even where exercised in the processes of 'justice' or harsh morality.[24]

Torture has always been bound up with military conquest, regal punishment, dictatorial terror, forced confessions, and the repression of dissident belief. [25]

Therefore, along with the rise in international human rights law following WWII the international ban on torture is not surprisingly deemed to be unconditional in the language of international law.[26] According to the *United Nations Convention against Torture, and other Cruel, Inhuman or Degrading Punishment* (1984) (UNCAT), article 1:

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

Article 7 of the *International Covenant on Civil and Political Rights* (1976), gives the ban on torture its 'rights' status in declaring that no one shall be subjected to torture. The strict prohibition is demonstrated by the fact that the covenant allows exceptions, in times of a public emergency which threatens the life of the nation, for articles in the covenant to be

derogated.[27] Despite this, the covenant expressly states that Article 7, the prevention of torture, is not included in any such exception and torture remains prohibited even in times of public emergency.[28] It seems clear from any literal reading of these international treaties that the international ban on torture is absolute; there are no caveats or clauses that provide exemptions. Even with a categorical prohibition of torture, its use is still promoted by a security/risk approach to world ordering. This paper argues that the local/global duality of globalisation in aligning risk and security with the challenges of harm prevention and the consequent securitisation of universal rights protection offers a perhaps incomplete understanding of this paradox.

The 'Janus-face'[29] of globalisation accommodates the possibility in hegemonic governance terms for the non-derogable injunction against torture to be applied with dual meaning in either local or global governance contexts. Contemporary global governance operationalised as it now is within an under-developed form of 'new politics'[30] recognises torture as being appropriately prevented through the instruments of international law and international human rights conventions, while at the same time entertaining hegemonic justifications for torture's necessity against the globalised risk/security back-drop. It is the local/global duality in determining risk security and the tension between the domestic and the global nation state which fuels this divergence by asserting essential nation state securitisation and seeking to extend this to the protection of the legitimate global community.

Shift the focus of globalisation onto its localising aspects and interests (such as nationalism, autonomy, cultural separatism, xenophobia) then torture is promoted through a security/risk approach to world order[31] as viewed from the standing of domestic interest, and torture becomes a control option rather than a controlled state practice. Thereby, the paradox of preventing torture and at the same time promoting it stems from the duality of interests at work towards global ordering when risk/security considerations move from the global to the local, and when domestic interests set security above rights.

It becomes more convincing to argue for the mutual prohibition of torture across states as a universal measure of civilised global engagement, than it will in contexts where the nation state (or regional alliance) under threat seeks to employ all control technologies at their disposal within the 'legal' justification of self-defence.[32] Hence,

> a further development on the local/global duality is to view crime as patterns of behaviour and reaction at the global level, while more as matters of individual variation in the local context.[33]

Torture as a response to global terror is problematic if the global hegemony trades off international law for exceptional responses to exceptional threats, while at the local level nation states import and export torture almost as a duty to protect citizen safety. While one 'face' of globalisation[34] promotes the single community and an international obligation to prohibit torture as a universal right of the global citizen, its other 'face' concurrently demands the security/risk approach towards the paramount protection of the national citizen, whereby domestic actors seek to maintain their preferred and often secular place within the world order. It is this tension and contradiction between the protections of global citizenship and the priorities of national citizenship that essentially create the political paradox between the promotion and prohibition of policies on torture. In addition, citizenship national or global is not in actuality universal and as such the paradoxical approach to prevention/promotion of torture for citizen interest is complicated as it is applied either locally or globally across hegemonic determinations and divides.[35]

The choice for key actors and agencies from nation states, regions and internationally, charged with maintaining world order, is whether to respect international law and work

toward a single global community commitment against torture or whether they should first and foremost protect their individual risk/security interests. As mentioned before, with the *global community* divided across hegemonic interests, and the autonomy of powerful nation states in the ascendency when securitisation is the measure of citizenship, universal rights protection, even so deeply embedded as the torture prohibition, remain vulnerable. Ultimately it is the dominant political hegemony and its amalgam of autonomous interests that dictates how international governance is enacted,[36] be this through international law or through the acts of individual key actors and agencies.

What then becomes interesting particularly for the domestic torture dilemma is the nature of the justifications for the use of torture. Where hegemonic power is so apparent, and as it was in the days of the inquisition, why is torture not simply asserted as of right or might? The contemporary debate advocating limited torture in confined circumstances remains nuanced by international humanitarian law. One reason for this is, I suggest, the fragile nature of legitimacy in global governance. Rule of law states cannot afford to discard the cloak of *legality* even against the utilitarian exigencies of self-defence against global terror. To do so would be a clear concession to the nature of the violent resistance that the application of torture is said to deter. The question that is begged by this is to what extent can a non-derogable human right be qualified within international humanitarian law without defiling the tenuous legitimacy that such law affords? Even the search for legalist exception challenges the literal interpretation of international law and politicizes state legal agencies and their opinions through the justification cause.

Globalisation has resulted in a further paradox wherein normative governance and resultant policy considerations become more global, and at the same time key control actors and agencies in the global arena adopt a more localised view of risk and security. Foucault saw this domestic governance focus (despite his disinterest in international governability) as a natural, even inevitable consequence of hierarchical governance with the state and its capacity to securitise all facets of 'governmentalisation' at the apex. For Foucault this necessitated the state as central for an 'internationalised world'.[37] Recent critics such as Selby argue that this is a much too limited interpretation of contemporary forces for globalisation. That said there can be no denying, through the torture debate at least, the preeminence of autonomy when measuring global ordering from the situation of dominant state security.

As I will suggest later, attempts at global ordering unduly influenced by nation state or regional risk/security interests have resulted in a realistic appreciation of harm (such as torture) being marginalised. Globalisation is the backdrop against which the issues of global governance, individual actors and agency interests, and global ordering are set in this governance trend for securitisation dominance over universal rights protections and uniform harm evaluation.

The global *war on terror* as a political discourse rather than an empirical evaluation of global harm, ultimately represents the securitisation paradigm working from a domestic control response to terrorism (utilising the localised Janus-face of globalisation and defending domestic citizen safety through torture) in the 'name of international liberal democratic values'.[38] At the global level, the dominant political alliance view of terrorism has enabled the promotion of an exacerbated if unrealistic risk/security approach to globalisation[39] and global ordering which takes state security as a foundation, elaborating up to global community which corresponds to selective state interest. It has also provided a justification for the use of violent, para-justice control agendas, such as torture, to combat threats to local and global citizenship.[40]

The ultimate result of globalisation is that as the world setting is compressed there is an intensification of *consciousness* towards global interests such as selective *ordering* running parallel with strongly influential autonomous interests of the nation state and regional concerns, and the consequent individualised influence of key actors and agencies.[41] However, as risk and security disproportionately motivate globalisation, dominant nation state interests (which are at the heart of what operationalises global hegemony) become the prevailing measure of global ordering. Attitudes to 'harm' converge around these sectarian interests from the local to the global. As such, the need to torture, as the argument goes, to better ensure domestic security will, if consistent with hegemonic interest it is logically and even 'legally' argued, bring about both domestic and global ordering as a consequence.

### Who's interests in global ordering?

The promotion of this security/risk approach to world order has its foundations in the terrorist attacks of 9/11. These attacks represented a significant turning point in global governance through securitisation; 'the crunch point; the apocalypse now'.[42] It turned international crime, in the form of terrorism, into an attack on national citizenship and on *civilization* and Western values,[43] thereby challenging the dominant political ordering of world power and securitisation. Consequently interpretations by the dominant political alliance regarding global terrorism changed from nation state or regional responses into a galvanising battle cry determining a 'conceptualisation and promotion of the new globalisation (risk/security hegemony)'.[44] This risk/security approach to world ordering has featured global terrorism as justification for the use of para-justice control regimes such as torture.[45]

The dominant global political alliance has reacted to the harm caused by terrorists by, in effect, treating terrorists and terror suspects as outside international law and universal human rights protection, and therefore they can be subjected to torture.[46] As outlaws, terrorists (and their communities) forfeit universal human rights protections, it is argued, because they reject the international laws and governance regimes on which these rights rely. One cannot impugn a Western rights framework through violence and expect to receive its benefits if securitisation envelops terrorists and their communities.

Even so, legal principles and processes of 'justice' are exeptionalised and challenged in order to claim legality for the consequences of 'outlawry'. Terrorists have been highlighted by those dominant in the global hegemony as a potential threat to global ordering and security, and as such are denied 'traditional criminal justice protections and even international human rights'.[47] Along with the alienation of outlawry, a realistic appreciation of harm has been marginalised in efforts at global ordering.

Globalisation 'divides as much as it unites'.[48] It should not be surprising that those who are left behind[49] in the globalising rush seek to retaliate as they see the dominant alliance disproportionately prospering from globalisation whilst they suffer.[50] This suffering is made worse by the marginalisation of harm in efforts to achieve global ordering, because those who are left behind remain on the periphery of global order while the dominant alliance repositions global governance to exclusively favour *legitimated* global citizens and *valid* victims. In effect this creates a global politics where the privileged are securitised to govern and those deemed to be their enemies are withheld from the protections of global community.[51] Harm *legitimately* visited upon the enemy through securitisation is re-interpreted in light of the protection it is said to afford those with the rights of inclusion within the global community and its governance realm. As the realistic appreciation of harm is marginalised by these sectarian and exclusionist approaches to global ordering it is easy

to become 'pessimistic about the prospects for global governance and the probabilities of continuing disarray in world affairs'.[52]

The current security/risk phase of globalisation and the resultant approach to world ordering summarised so far has had far reaching effects on the constituency and reach of international human rights protections which have accompanied the development of the modern phase of international criminal justice.[53] Torture may be prohibited unequivocally by international and human rights law, yet the supervening security/risk approach to world order has seen its use argued as 'legal' in the shadow of 9/11. The hegemonic nature of global governance, up until the recent financial meltdown in 2009 at least, aligned with military dominion, allows for this paradox to appear reconciled on the road to global ordering, but not from the perspective of resistant and excluded communities.[54]

For the majority of world states and populations excluded from this hegemony, and wherein violent resistance to the dominion of hegemonic values is generated, the neutering of *jus cogens* rights where they are most needed will have a profound effect on the inclusive legitimacy of notions such as the global community. The dependency of developing nations on the dominant political alliance has had a fundamental effect on the marginalisation of a realistic appreciation of harm. This dominant alliance, as has been shown by the post 9/11 war on terror discourse, used global terrorism as reasoning to localise its priorities and promote the use of para-justice control ideals such as torture.[55] As a result the 'delivery and legitimacy of international criminal justice'[56] has been compromised and with it a realistic appreciation of harm marginalised.

### How is 'harm' in the name of deterrence used to counter 'harm' in the name of resistance?

The paradox between the international law prohibition of torture and its promotion by a security/risk approach to world ordering is a political consequence of the relationship between globalisation and world ordering, in governance terms.[57] I have argued so far that a risk/security focus for contemporary globalisation, where the governance imperatives directed towards global ordering generate from the sectarian, securitisation interests of powerful nation states in the global hegemony, is in no way inconsistent with the Janus-faced dynamic of globalisation. The dominant Western alliance states pressure other actors within global ordering to act in ways that complement the ideals of Western liberal democracy and political economy,[58] thereby legitimating their dominion over global governance and their role in determining and policing world order. This force-centred rather than rights-endorsing legitimacy of the political alliance has both promoted and been facilitated by the implementation of para-justice, in particular torture, to run contrary to the principles laid out in international law.[59] Para-justice exceptionalism, cloaked by arguments for its constitutional legality, suggests that the hegemonic political alliance is incapable of 'restoring world order without violent responses'.[60] This inability to govern without violence leads to the consideration of the second paradox highlighted in the introduction, how *harm in the name of deterrence* is used to counter *harm in the name of resistance*.

The paradox of harm as a deterrent to counter harm in the name of resistance is not novel in the critical literature on political economy and human security. The recent debate about the philosophical and practical implications of this paradox has its roots well before the shadow of 9/11 and can be divided into two dominant directions; deontological and utilitarian. Originating philosophers of the deontological argument, such as Kant,[61] argue that there are no circumstances justifying the use of another human being as a means rather than an end in terms of personal integrity. This invocation supports the absolute,

international prohibition of torture. On the other hand utilitarians, such as Bentham,[62] counter that the greatest good should be done for the greatest number, even at the expense of individual integrity. In utilitarian terms, if torturing someone can save a sufficient number of lives to qualify as being for the greater good, it should be permitted. These opposing arguments clearly ground either direction of the recent policy and academic debate (as later discussed) surrounding the use of torture as a deterrent to counter harm used in resistance.

While acts of torture are prohibited by international law they are promoted by a localised security/risk approach to world ordering. The sectarian nature of global hegemony, advancing as it does the interests of powerful Western states, makes the translation of domestic securitisation to the motivation for global ordering a predictable progression. The result of this trend is that 'harm' as deterrence (torture) is used to counter 'harm' in the name of resistance (terrorism). The effects of this domestic interest *originator* of globalisation, and the resulting paradox on torture, means that a realistic appreciation of 'harm' is marginalised so that attempts at global ordering may be successful.

'Harm' in the name of deterrence and 'harm' in the name of resistance can be generically aligned with torture and terror respectively. Those at the *receiving end* of globalisation, while remaining largely excluded from its benefits, will in certain conditions resist the exclusionist world ordering paradigm as currently composed by hegemonic political and economic interests. Coming from a position of weakness terror can be one of the few modes of resistance open to the marginalised and disaffected. In its *terrorist* manifestation harm in the name of resistance can be legitimated by resistant communities as a reaction to the marginalising effects of globalisation.[63] The activities of terror are carried out against the particular interests of global elites. Terrorist attacks single out the specific interests of the hegemonic decision-makers in the world order and in so doing are designed to provoke actual and symbolic harm to those interests in the name of resistance. Terror so directed evokes a reaction among the global elites who use the instrument of harm in the name of deterrence, to counter the activities of terrorists. The instruments of harm in the name of deterrence are in turn justified with a political parlance of pre-emptive/ responsive attacks, self-defence or the responsibility to protect.[64] As with the terrorists, the pre-emptive or responsive attacks by the global elites are a reaction to harming their specific interests in the world order, both practical and symbolic. In this way harm in the name of deterrence and harm in the name of resistance focus on the particular interests of the individual actors that are involved rather than on the achievement and protection of a universal and inclusive world ordering. Both harm in the name of deterrence and harm in the name of resistance grow out of a commitment to the localising face of globalisation and its sectarian interests. The application of either harm motivation for exclusionist interests rather than inclusive ordering leads to the escalation of hostilities creating in its wake the securitisation of fear in the modern world.[65] For instance, the use of torture to counter terror can be explained as a result of the 'relatively positive and purposive representation of globalisation and its "legitimate" features, such as development, when contrasted against the pathological representation of crime'.[66] Waldron stresses that:

> torture, like terrorism, instrumentalises the pain and terror of human beings; it involves the deliberate, studied, and sustained imposition of pain to the point of agony on a person who is utterly vulnerable, prostrate before his interrogator, and it aims to use that agony to shatter and mutilate the subject's will, twisting it against itself and using it for the purposes of the torturer.[67]

The *liberal ideology* of torture, which assumes that torture can be neatly confined to exceptional ticking-bomb cases, and almost surgically severed from cruelty and tyranny, represents a hegemonic delusion as much as it does a questionable interpretation of truth-seeking. The assumptions on which this allusion is based become more dangerous still when coupled with the para-justice excesses promoted out of a war on terror global governance discourse. The war on terror paradoxically is conceived as a permanent emergency in which the global political elites insist that their emergency powers rise above the limiting power of statutes and treaties while at the same time retaining some constitutional legality through a responsibility to protect legitimate state citizenry and outlaw resistance.[68]

The global elites whose particular interests are harmed by the activities of marginalised actors through acts of terror, react in ways to deter further threats to their interests; harm in the name of deterrence, taking both pre-emptive and retaliatory form.[69] The utilitarian justification for torture, questionable as it may be, argues for the obtaining of information that they hope to use to deter further acts of terror against their particular interests, and the re-establishment of hegemonic world ordering which sustains and grounds sectarian interests. Each causal step in this chain could be challenged from the perspective of credible investigation methods, as well as individual's rights violations.

The investment in crime control (and the eradication of harm in the name of resistance defined as crime) essential as it now is to governance local and global[70] has been recognised at a global level by the war on terror discourse following the attacks of 9/11. The exaggerated levels of fear of terrorist crime locally and globally, and the need for securing social space and ordering is politicised as 'a generation-long pattern of political and social change.[71]

## A bridge too far? Justifying torture

Dershowitz, Walzer and Shue, along with numerous other academics, have all, at least partially, been influenced by utilitarian views that torture should be permitted if it is to prevent a greater evil.[72] Shue uses the example of a nuclear bomb placed in the heart of Paris where the only way to prevent the death of thousands of people and the destruction of numerous priceless artifacts is through torture. He states; 'I can see no way to deny the permissibility of torture in a case just like this'.[73] The arguments made by Dershowitz and Walzer follow similar lines, that torture may be permissible should it be the only way of gaining life-saving information from terrorist suspects.[74] These justifications through the greatest good for the greatest number, of the 'ticking time-bomb' scenario are policy manifestations of using harm as a deterrent to counter harm in the name of resistance. As argued earlier from the perspective of exclusive and elite political and economic interests it is a justification advancing the localised 'face' of globalisation, with actors protecting their own interests before any inclusive legitimacy of the international community through universal access to rights protection above the expedients of securitisation.

Counter to the argument that torture is in some instances permissible for the protection of elite security interests to the detriment of more universalised and inclusive ordering, is the deontological-based argument that states torture is never permissible because a greater and common morality should be used as the principle to constrain the pursuit of the ideal order.[75] Consistent with the dominion of human integrity over human security, Waldron argues that whilst we undoubtedly treat the guilty differently to the innocent this does not mean 'we may treat the guilty any way we like'.[76]

The academic debate surrounding the paradox of harm being used as a deterrence to counter harm in the name of resistance is intriguing for the manner in which it has been

colonised, and some might say perverted, for either side of a distinctly governance-oriented strategy, local and global. In either form, the debate highlights reasons why torture should be prohibited but also provides a convincing case for it being permitted. The policy choice then becomes one between the normative value of security against integrity.

A contemporary case study of the torture paradox playing out politically is the recent progress from denial to argued legality following revelations of the US' role in the torture of terrorist suspects. The most high-profile and notorious alleged uses of 'harm' as a deterrent are levelled against the US following the catastrophic events of 9/11. The US ratified the convention against torture in 1994[77] thus agreeing to the complete prohibition of torture. They also affirmed that their position was that exceptional circumstances did not justify the use of torture.[78] However, following the attacks of 9/11 the Bush administration launched its war on terror[79] which, at its core, had the de facto policy and practice of torture.[80] After sensational press exposure of US military practice in Iraq and Afghanistan, the US sought to loosen the stringent definition of torture[81] in order to give their actions integrity and maintain their own moral standing in international law. They pursued a course of action that they argued was still within the scope of international law. However, as CIA Director Cofer Black expressed it, there was a before 9/11 and there was an after 9/11. After 9/11 the 'gloves came off' demonstrating that there was no longer a complete prohibition on torture.[82]

The then US President Bush was unequivocal in his public stance against the use of torture.[83] However a number of Justice Department memoranda published subsequently have shown that the actions of the US did not mirror this rhetoric. The Bybee Memorandum, for example, was seen by some advocates of the torture prohibition and subsequent governmental accountability as 'a hair-raising memo that understandably caused widespread alarm'.[84] The memorandum offered a controversial and partisan opinion for the legal basis of torture as a legitimate option in US military investigation practice for interrogating terrorist suspects and establishing the acceptable institutional methods which could be deployed in carrying out such interrogation, ongoing.[85] It argued that in the US implementation of the United Nations (UN) convention against torture the term 'severe pain', in order to constitute torture, would have to be a sufficiently serious physical condition or injury such as death, organ failure or serious impairment of body functions.[86] The ramifications of such a policy meant numerous practices commonly recognised as torturous were now excluded from the US' definition and therefore permitted.[87] It is clear from the content of this memorandum that the US had maintained a practice of interrogation that involved torturous acts against terrorist suspects at least since 9/11. Despite this the US military and justice administrations sought to do so in a way that could be viewed as compliant with international law. While the proposed definition of 'severe pain' clearly circumvents the spirit and ideals with which the convention provision is to be viewed it allowed the US to claim justification for their actions and arguably maintain their moral standing in the global order. The US was endeavouring to confirm the legal, political and even moral necessity (in governance terms) to, through torture, promote harm as a deterrent to counter harm as resistance.

An example of where the US carried out para-justice torture practices is Guantanamo Bay, a detention camp situated on Cuban territory. Prisoners have given evidence that they were held at Guantanamo and subjected to various acts that many would consider torturous including;

> long-term sleep deprivation, extremes of heat and cold, painful stress positions, beatings, forced nakedness and other degrading treatment [and] indefinite solitary confinement.[88]

If these actions occurred in order to extract intelligence from prisoners then international case law from Northern Ireland and Israel demonstrates that the threshold for torture is soon reached.[89] The US Government itself proclaimed in a case involving one of the prisoners held at Guantanamo that the US could imprison him indefinitely even if there were claims that they were carrying out torturous acts.[90] The procedures and principles used at Guantanamo have been denounced by several non-governmental organisations[91] and even justice officials in the UK, with Collins J. delivering the damming assessment that, 'America's idea of what is torture is not the same as ours.'[92] Torture was not an isolated or localised investigation technique in the armory of global ordering incentives. Guantanamo was only one in a 'chain of shadowy detention camps that also included Abu Ghraib in Iraq, the military prison at Bagram Air Base in Afghanistan and other, secret locations run by the US intelligence agencies'.[93]

Abu Ghraib represented a major political embarrassment for the US Government when pictures were released showing 'US soldiers giving the "thumbs up" behind a stack of naked Iraqi men or a battered corpse [and] of military dogs snarling at a naked, helpless prisoner'.[94] The US and its allies were forced to publically admit that while some such practices were unacceptable, overall and in the face of exceptional abuses of their own human rights expectations, the advancement of 'harm' as a deterrent remained one of the policies of global hegemonic interests in countering 'harm' as resistance.

The dominant political alliance prioritises security with regards to global governance[95] thus creating the conditions for the use of torture to be tolerated. The initial question to consider when establishing whether a realistic appreciation of harm has been marginalised as an unavoidable consequence of this 'harm' deterrence-against-resistance counterpoint is what essentially constitutes a realistic appreciation of harm? A narrow and anachronistic way in which this can be considered is through the earlier stated academic debate on the use of 'harm' as a deterrent. The alternative positions in the debate both have strong foundations for their arguments, however when analysed conjunctively they provide little insight into what universally might represent a realistic appreciation of harm. This could be a result of the distinctly different frames of reference within which they are constructed and enunciated, one resonant of rights and principle, the other policy and pragmatism, one accepting the need to adapt to political extremities, the other eschewing any compromise, emergency or not.

Waldron takes the constitutional legality approach to integrity which uniformly constructs a realistic appreciation of harm. For him personal and individual perception and reaction does influence the objective measure of harm, in the form of torture, but essentially and irrevocably governed by:

> what the law requires…they are not treaties of personal ethics but conventions establishing minimum legal standards for the exercise of state power.[96]

It is, therefore, from the perspective of the protections offered by, and obligations created through international treaties and conventions, that the realistic appreciation of harm should be considered. So too, in my writing on globalised crime it is reiterated that international *justice* (not military force or para-justice exceptionalism) must strengthen its position in crime control; therefore enforcing a realistic appreciation of harm fundamentally measured against justice and humanity.[97] As hegemonic interests retain, it is not only the US that has promoted this unrealistic appreciation of harm according to Amnesty International (AI). AI reported that numerous governments, even those widely view as 'civilised', are using torture in various forms.[98] Once again this contradicts the realistic

appreciation of harm dictated by international and human rights laws, or concerns for justice as the foundation for crime control.

## Globalisation and global ordering: quest or compromise

Globalisation is not as straightforward as the creation of a single, harmonious, global arena for universal peace and good order,[99] especially when it comes to crime and crime control. Globalisation has the ability not only to 're-integrate and unify but also to marginalise and divide'.[100] The potential for forces of globalisation to unify is demonstrated through the formation of international organisations such as the UN which, at least with the normative if not practical coalescence of global hegemony, endeavour to guarantee international peace and security.[101] However, as the torture case study reveals, even the strongest normative constructions of global communitarian morality are hostage to the sectarian ordering of elite interests for the benefit of their legitimated citizens and victims. This distinction undermines the simple but crucial global governance underpinning, that if the policies of international organisations such as the UN were even generally followed then there would be a common and more accountable appreciation of harm within the global community, universal and inclusive, to be protected by supervening and consistent rights frameworks. Harm would be defined in a manner that applies to all actors within the global arena and would not be defined by sectarian and hegemonic efforts of global ordering.

Against the actuality of contemporary global governance, such an egalitarian 'world order is a chimera'.[102] 'Globalisation is a process of paradoxes'[103] and as such this article argues a significant and explanatory discriminator of global ordering and global harm is that globalisation both 'internationalises and localizes'.[104] The subtlety of this duality is revealed through the world's reliance on the UN for guaranteeing peace and security only with the assistance and concurrence of the world's major powers; that concurrence being limited as it is to where hegemonic interests and UN peace propositions align through the protection of domestic interests and the re-assurance of exclusive and unique hegemonic global ordering priorities. To add to this governance irony is the diligence with which hegemonic military force has sought the legitimacy of UN Security Council mandates to rubber stamp selective war-making. Thus the problematic relationship between hegemonic power and global democracy in the development of global governance has not only secularised world ordering but:

> the governance imperatives of a dominant world order have tended to compromise the delivery and legitimacy of international criminal justice.[105]

The paradox between the international and local ordering priorities within globalisation has ultimately led to policy drift between the prevention of torture through international law and its promotion through a risk/security approach to world order. The rise of securitisation interest in global terrorism, particularly around the events of 9/11,[106] has resulted in a localised control focus, especially within the US, then broadcast as a compatible global ordering imperative. As the superpowers enforce the risk/security model into global ordering, global institutions are forced to 'perpetuate the globalised hegemony of the dominant western alliance'.[107] This compulsion to politicise international criminal justice[108] in particular, so as to help achieve a sectarian ordering, results in the realistic appreciation of harm being marginalised as global institutions and 'smaller' nations are the recipients of harm inflicted by the superpowers and their agents to protect their localised interests. I draw on these ideas in describing the dominant hegemony's approach to international policy and global ordering;

If internationalism is seen as complementing that notion of Westernised world order then it too is embraced by the current hegemony. In such a setting hegemony tolerates and works with other political forces within global institutions which may peacefully oppose Western values. If hegemonic order is contested then the return to the alliance-based security is apparent.[109]

In the process of linking the world together through a web of global regulatory networks, these linkages operate more in favour of some actors, especially the self-appointed decision-makers (global elite), and at the same time marginalise those at the receiving end of globalisation. Bauman describes this setting:

rather than homogenising the human condition, the technological annulment of temporal/ spatial distances tends to polarize it. It emancipates certain humans from territorial constraints and renders certain community generating meanings extra-territorial – while denuding the territory, to which other people go on being confined, of its meaning and its identity-endowing capacity. For some people it augurs an unprecedented freedom from physical obstacles and unheard-of ability to move and act from a distance. For others it portends the impossibility of appropriating and domesticating the locality from which they have little chance of cutting themselves free in order to move elsewhere. With 'distances no longer meaning anything', localities, separated by distances also lose their meanings. This however augurs freedom of meaning-creation for some but portends ascription to meaninglessness for others.[110]

While the global elite sets the agenda for world ordering in a way that maximises and fosters their particular interests, the marginalised actors are consigned to a continuum from exclusion beyond the benefits of global community, to outlawry. A realistic appreciation of harm also risks marginalisation as hegemonic global ordering is achieved, at least in terms of a sacrificed discourse of rights protection and the constraint of its outreach to the citizens and victims of a hegemonic global community.

Under these conditions, a realistic appreciation of harm cannot be achieved because of the contextually dependent aspiration and interpretation of global ordering, and the lopsided power/rights differential ensuring its achievement and maintenance. A realistic appreciation of harm in the world can be achieved under the present conditions of exclusive hegemonised global world ordering that rely on selective and exclusive securitisation.

From a global governance perspective the risk/security paradigm itself is risky. With risk prediction and security evaluation, more reliant on political and cultural context than comprehensive and comparative harm measures, community safety gives way to community imperative as a primary governance obligation. It might be said that this is not unusual for governance frameworks which run to service political agendas. However, the difference for global governance is its declared commitment to the safety of humanity. That safety may be less likely to be achieved and even more likely to be endangered when terrorism and violent control responses exemplify the risk/security commitment for global governance. Further, with globalization promoting preferred regulatory strategies to address risk/security concerns, governance against terror will become more polarized and essentially less tolerant of cultural diversity as it is deemed threatening.[111]

The harmful effects of the process of globalisation on those at the margins of global ordering receive only self-serving treatment at the hand of the global elite. Rarely will hegemonic interest be qualified or compromised in the achievement of order unless in doing so greater interests are ensured. Crime control (local and global) provides an example of how sectarian interests percolate from national to global governance in the endeavour of socio-political ordering. Crime control as a primary state influence over community safety and

securitisation at the domestic level is currently shaped by risk reduction techniques that compromise rights protection, as the torture case reveals. Criminal justice priorities from a state perspective have fallen into line with neo-liberal retributive justice paradigms wherein the autonomy and responsibility of the citizen is confirmed (as offender and victim) and state or private justice intervention is designed to prevent and contain the harm which crime presents.[112]

## Conclusion

At the global level, harm as resistance in the form of terror has created what hegemonic interests deem to be a new risk/security paradigm inviting a similar control response as that which protects domestic interests and order. Resistant communities are marginalised and terrorist suspects outlawed. Rights become the victim in the name of global ordering:

> The globalization of crime represents the potential to view many crime relationships unburdened of conventional legal and moral determination. Globalisation working towards a common culture is intolerant of difference by arguing for a preferred politic (democracy), a preferred economy (modernisation) and a preferred value structure (materialism) by emphasizing the integrity of the legitimacy of new domains of legitimate such as the global community. Terrorism in such discourse is determined by global governance as an attack on global citizenship, and efforts at its control have recently justified extraordinary military and law enforcement interventions on behalf of this amorphous community.[113]

The current closing phase of globalisation has as its centre of attention a risk and security approach which subscribes and defers to global ordering at the cost of universal human rights protection, for those arguably most in need of it because of their marginalisation in or exclusion from hegemonic global community.

I argue globalisation has created a number of paradoxes where global ordering and governance are dictated by the dominant political hegemony, and rights become secularised, not universal. Those who seek to contest the views of the hegemony, such as terrorists, are placed outside the global order and international protection and thus are subjected to the one-sided appreciation of harm that has been constructed by the hegemony[114] in attempts at global ordering. As a consequence,

> the values of freedom, equality, communitarian harmony and personal integrity which the prosecution of crimes against humanity are said to advance need not be sacrificed in a 'new world order' obsessed with partial security and secularised risk.[115]

## Notes

1. M. Findlay, *Governing Through Globalised Crime: Futures for International Criminal Justice* (Cullompton: Willan Publishing, 2008), 8.
2. M. Findlay, *The Globalisation of Crime* (Cambridge: Cambridge University Press, 1999); Findlay, *Governing Through Globalised Crime*.
3. For a detailed examination of this era see Findlay, *Governing Through Globalised Crime*; M. Findlay, 'Globalised Crime and Governance: The Outcomes for Understanding International Criminal Justice', in *The Critical Criminology Companion*, ed. Thalia Anthony and Chris Cunneen (Sydney: Hawkins Press, 2008), 315–329.
4. U. Brandt, 'Order and Regulation: Global Governance as a Hegemonic Discourse of International Politics?', *Review of International Political Economy* 12, no.1 (2005).
5. See discussion of international conventions to follow, p. 4.

6.  For a more detailed discussion of this argument see Findlay, *Governing Through Globalised* Crime, Introduction and Chapter 9. In M. Findlay, *International and Comparative Criminal Justice: Introduction* (London: Routledge, forthcoming), in the context of regulating global crisis, I suggest that a new age of globalisation is emerging wherein global terror is being replaced by more all pervasive and realistic global threats. Risk/security remains as a focus for global governance, even if the war on terror motivation is no longer on the lips of Western leaders as a prevailing justification for force-based hegemony.
7.  Findlay, 'Globalised Crime and Governance', 315.
8.  Brandt, 'Order and Regulation'.
9.  Specifically in the context of terror versus innocence, see M. Findlay, 'Terrorism and Relative Justice', *Crime Law and Social Change* 47, no. 1 (2007): 57–68.
10. M. Nowak, 'What Practices Constitute Torture?: US and UN Standards', *Human Rights Quarterly* 28, no. 4 (2006): 812.
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16. *Falen Gherebi* v. *George Walker Bush and Donald H. Rumsfeld*, United States Courts of Appeals for the 9th Circuit, California, 18 December 2003, 46.
17. I. Kopytoff, 'Introduction', in *The African Frontier: The Reproduction of Traditional African Societies*, ed. I. Kopytoff (Bloomington: Indiana University Press, 1987), 10. Kopytoff defines the 'ecumene' as a 'region of persistent cultural intersection and exchange'. See also M. Featherstone, ed., *Global Culture: Nationalism, Globalization and Modernity* (London: Sage Publications, 1990).
18. Findlay, *The Globalisation of* Crime, 2–3.
19. Findlay, *Governing Through Globalised Crime*, Chapters 3 and 4; Findlay, 'Terrorism and Relative Justice'.
20. Findlay, *The Globalisation of Crime*.
21. In this analysis global community is not critically deconstructed beyond its understanding as an alternative functional equivalent of international political and economic hegemony.
22. Findlay, *The Globalisation of Crime*; Findlay, *Governing Through Globalised Crime*.
23. Findlay, *Governing Through Globalised Crime*; Brandt, 'Order and Regulation'.
24. D. Luban, 'Liberalism, Torture and the Ticking Time-bomb', *Virginia Law Review* 91, no. 6 (2005): 1425–61; J. Ross, 'A History of Torture', in *Torture: Does It Make Us Safer? Is It Ever Ok? A Human Rights Perspective*, ed. K. Roth and M. Worden (New York: Human Rights Watch, 2005), 184.
25. Luban, 'Liberalism, Torture and the Ticking Time-bomb', 1438.
26. Luban, 'Liberalism, Torture and the Ticking Time-bomb'; Ross, 'A History of Torture'.
27. Article 4(1).
28. Article 4(2).
29. Findlay, *The Globalisation of Crime*, 3.
30. Brandt, 'Order and Regulation'.
31. Findlay, *Governing Through Globalised Crime*.
32. J. Waldron, *Torture, Terror and Trade-offs: Philosophy of the White House* (Oxford: Oxford University Press, 2010).
33. Findlay, *The Globalisation of Crime*, 4.
34. D. Das, *Two Faces of Globalisation Munificent and Malevolent* (London: Edward Elgar Publishing, 2009), ix.
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38. Findlay, *Governing Through Globalised Crime*, viii.
39. Findlay, 'Globalised Crime and Governance', 315.
40. Findlay, *Governing Through Globalised Crime*, xiii.
41. Z. Bauman, *Globalization: The Human Consequences* (Cambridge: Polity Press, 1998).
42. Findlay, 'Globalised Crime and Governance', 318.
43. Findlay, *Governing Through Globalised Crime*, 161–2.
44. Findlay, 'Globalised Crime and Governance', 315.
45. Ibid.
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54. Findlay, 'Terrorism and Relative Justice'.
55. Findlay, 'Globalised Crime and Governance', 316.
56. Ibid., 315.
57. Findlay, *Governing Through Globalised Crime*.
58. Ibid., 8.
59. Findlay, 'Globalised Crime and Governance', 316.
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61. T. Meisels, *The Trouble with Terror. Liberty, Security, and the Response to Terrorism* (Cambridge: CUP, 2008), 165.
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65. Ibid.
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67. J. Waldron, *Torture, Terror and Trade-offs: Philosophy for the White House* (Oxford: Oxford University Press, 2010), p. 5.
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