

Chapter One

Introduction

Suppose there is good reason to think that someone has planted a bomb in a public place. And suppose there is good reason to think that it is going to go off in the next two hours or so, and that it is going to kill and maim dozens of people, maybe hundreds. The question is all too real. Imagine, to bring the example closer to home, that the police or the secret services had known that bombs were shortly to go off *some-where* in Bali, Madrid, London or Sharm-el-Sheikh in the attacks of 2004 and 2005. But no one knows where the bomb is – except one person, who is already in custody. Naturally they have no intention of revealing where the bomb is. Maybe they have planted it themselves; maybe not. Either way, they remain silent. Should they be tortured to force them to reveal where the bomb is?

Or take an example of the ticking bomb scenario from an actual policy blueprint, hyperbolic though it is:

al-Qaeda has other *sleepers cells* within the United States that may be planning similar attacks [to 11 September 2001]. Indeed, al-Qaeda plans apparently include efforts to develop and *deploy chemical, biological and nuclear weapons of mass destruction*. Under these circumstances, a detainee may possess information that could enable the United States to prevent *attacks that potentially could equal or surpass the September 11 attacks in their magnitude*. Clearly, any harm that might occur during an interrogation would pale to insignificance compared to the harm avoided by preventing such an attack, which could take *hundreds or thousands of lives*. [1]

Until recently I would have argued that ‘Whatever one might have to say about torture, there appear to be moral reasons for not saying it’. [2] Even to raise the issue, I would probably have thought, is to give publicity to what is so abhorrent as to be beyond discussion. It remains a position I respect. Slavoj Žižek, for instance, insists that ‘essays . . . which do not advocate torture outright, [but] simply introduce it as a legitimate topic of debate, are even more dangerous than an explicit endorsement of torture’. [3] But in the end, present reality demands a direct response, despite that danger.

Two things in particular have changed my mind. First, the revelations from Abu Ghraib, Guantanamo Bay and elsewhere are a gruesome reminder that, at the beginning of the twenty-first century and official policy notwithstanding, torture remains a weapon in the armoury of “civilized” states. Jennifer Harbury’s exposé of longstanding American collusion in torture is testament enough to that. [4] The hypocrisy of official policy was underscored by growing evidence of the widespread practice of outsourcing the torture of prisoners to countries such as Egypt, Jordan, Morocco and Singapore. “Rendition”, as American newspeak has it, appears to have become standard practice – and one in which European states collude. [5] We have come a very long way in the twenty-five years since Henry Shue, a longstanding campaigner against torture, felt he had to justify raising the issue at all. Second, it has become clear that the United States government’s underwriting of torture since the attacks of 11 September 2001, as a means of conducting its so-called war on terror, has not come out of the blue. It has emerged against a background of academics, largely lawyers, seriously advocating that torture be legally permitted under certain circumstances. The normalizing discourse provided by legal advocates of interrogational torture is an important source of legitimation for a policy of encouraging such torture, and of what follows in its wake: ‘the hypothetical has wedged us into the position of admitting that torture is sometimes a legitimate tactic’, as a recent writer comments. [6]

That was something new; and something very serious. Of course, torture had been ubiquitous in the second half of the twentieth century, from the Nazis Europe-wide to the French in Algeria, the British in Malaya, Kenya and Northern Ireland, the Americans in Vietnam, the Israelis in the Occupied Territories and dozens of regimes in their own countries. Nonetheless, until very recently there has been more or less

unanimous agreement that torture was always wrong, whenever, wherever and for whatever reason it was carried out. Or at least, so it appears. For that agreement, admittedly widespread, was only a qualified agreement: it turns out that almost every writer since the early 1970s who discusses, and as a matter of course condemns, torture nonetheless thinks that it *is* justifiable in the extreme case, even if in no other (and whatever their view of the realism of such cases).

My initial anger remains, that we should have reached a point where it has become necessary to revisit what for 200 years was rightly taken for granted, namely that torture is quite simply wrong, always, everywhere. But that anger requires that I take seriously what Dershowitz and others are saying. How else to refute the arguments than by questioning their often barely argued premises and exploring the likely consequences? As I started, I also found myself increasingly annoyed that – doubtless inadvertently – careless philosophizing about imaginary ticking bomb scenarios had given their argument a starting-point which should never have been conceded. For it is on the basis of unwarranted assumptions about such scenarios that academics are now explicitly advocating interrogational torture, its legalization, or both. To put it bluntly: when a couple of academics can seriously argue that ‘torture is “morally defensible” even if it causes the deaths of innocent people’, and seek American publication for their paper ‘because Americans were “more open to new ideas on human rights”’, [7] then it is time to get one’s intellectual hands dirty. Richard Jackson is right: ‘There is no starker illustration of western society’s current moral vacuity than the serious public debate about torturing terrorist suspects – not to mention its all-too-common practice by America and its allies’. [8] Challenging that vacuity demands that we confront what feeds it.

What is Torture?

Should we try to define torture? No: we should not be looking for a definition. That is not because the idea of torture is in some way particularly recalcitrant. Rather, it is because it is impossible to define real things, such as tables, rivers, kindness or unhappiness, since, as part of the real world, they can change without becoming something else. For instance, you cannot define this particular book. You cannot

specify exactly what makes it the book it is: it remains the book it is even if you tear out a couple of pages or add some notes. Real things, like this book, or like torture, can be only described; they cannot be specified exactly, that is to say, defined. It is only our own inventions, our ideas – or at least some of them – which can be defined, or specified exactly: a metre, a triangle, legal guilt, a metaphor. [9] Unlike with real things, if you take anything away from one of these, or add anything to it, it would be something different. It is in part the widespread assumption that torture needs to be unambiguously defined before we can say anything about it that enables American – and other – governments to get away with trying ‘to avoid admitting to apparent cases of torture by simply denying that they qualify as torture at all’: [10]

The White House Counsel said that President Bush ‘has given no order or directive that would immunize from prosecution anyone engaged in conduct that constitutes torture. All interrogation techniques actually authorized have been carefully vetted, are lawful, and do not constitute torture’. [11]

But would not a clear definition of torture help rule it out? Again, no. Trying to define torture is not only mistaken, it is counter-productive. Consider the infamous Bybee memorandum, for example, which allows those who advocate the use of torture under other names to manipulate definitions so as to pretend to themselves, and to persuade others, that torture is not torture. Thus Bybee would have it that inflicting severe pain does not amount to torture unless it attains a ‘level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions’; [12] while ‘Porter Goss, the CIA director, defended waterboarding [repeated near-drowning] in March 2005 testimony before the Senate as a “professional interrogation technique”’. [13] By definition, then, anything just short of that is not torture – and thus not ruled out, whether legally or morally. Thus, while torture by the American occupying forces in Iraq is rife, those responsible are able to hide behind the fact that ‘harsh interrogation’ [14] appears definitionally not to be torture. And it is all too easy to think that ‘harsh interrogation’ is not torture because, as with white noise or drugs some decades ago, it does not fall within a particular definition of torture.

The United Nations' own Convention Against Torture (1984) is problematic in just this way. It defines torture as the intentional infliction of 'severe pain or suffering, whether physical or mental . . . by or at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity', and explicitly excludes any 'pain or suffering arising only from, inherent in or incidental to lawful sanction'. [15] Under this definition, if interrogational torture were made legal – if torture warrants were made a lawful sanction in certain cases of withholding information – then it would no longer count as torture, since it was 'inherent in . . . lawful sanction'! [16]

Torture cannot and need not be defined. It is not that "I know it when I see it" (although I might); but that, just as in debates about pornography and abortion, there are bound to be borderline cases, and these borderlines are bound to change over time, as new technology is developed. The point is that there are cases which indubitably count, even if there are others which remain unclear or undecidable. Images of young children being sodomized by an adult or an animal, for example, *obviously* constitute pornography. A newborn child is *clearly* not a foetus, even if the borderline between foetus and child remains controversial. It is attention to actual practice that removes the temptation to define: an Abu Ghraib guard accused of torture could not sincerely claim that 'I am shocked – shocked! – to find that "waterboarding" or squeezing prisoners' genitals or setting dogs on them is regarded as torture'. [17] What I propose, therefore, is a description of torture, taken from Christopher Tindale (though he himself regards it as a definition) and based on the United Nations General Assembly's Convention Against Torture (1984):

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from that person or a third person information or confession, punishing that person for an act committed or suspected to have been committed, or intimidating or dehumanizing that person or other persons. [18]

That seems to me adequately to describe torture. Any act like that is *sufficient* to count as torture. By contrast, what is *necessary* for an act to count as torture is liable to change. Once invented, waterboarding is always enough to constitute an act of torture. New methods, however,

are also always liable to be invented, so that what is needed for an act to constitute torture cannot be specified in advance.

Dershowitz on Interrogational Torture

Let me now focus on the proposal to legalize interrogational torture. Its leading advocate is Alan Dershowitz, a civil rights lawyer of some thirty years' standing. Initially presented in various American newspapers and on a number of websites, and then brought together in chapter 4 of *Why Terrorism Works*, [19] his arguments are the most prominent. Certainly, his advocacy of the legal institutionalization of torture in cases 'When torture is the least evil of terrible options' [20] is the most notorious and most comprehensive elaboration of what is often called the "new realism" about torture. He is not alone in his "realism", as we shall see – although hardly anyone else wants to see torture legalized. His arguments are far more sophisticated than those directly advocating interrogational torture, however, as well as being the most influential, and thus the most dangerous. I shall therefore focus closely on Dershowitz's work.

What, then, is his basic argument? Derived intellectually from Jeremy Bentham, [21] it has two parts. First, there are some extraordinary cases where interrogational torture is, or is regarded as, the least bad option, namely variants of the ticking bomb scenario. (As we shall see in chapter three, his own understanding of which of these two very different positions his argument rests on is at variance from most of his critics' understanding of the matter.) Second, since torture is *de facto* used in these cases, it is better to drop the hypocritical pretence that it is something "we" don't do and legalize its use. It would be better to issue 'non-lethal torture warrants in extraordinary cases', [22] he argues, than to go along with the hypocrisy of torture's 'selective use beneath the radar screen'. [23] He has two main reasons. First, legal regulation would as a matter of fact reduce instances of torture and restrict its use to the minimum necessary to obtain the required information. Second, honesty is always the best policy, here as elsewhere.

Dershowitz's proposal is rooted historically in his role in recent Israeli debates, and specifically those around the Landau Commission's 1987 effective legitimatization of torture [24] – when 'the use of torture to prevent terrorism' in Israel 'was very real and recurring' [25] – and

the subsequent High Court's outlawing of it in 1999. Dershowitz's initial public intervention, in 1989, was to question the hypocrisy of the Landau Commission's sanctioning 'physical pressure' but not calling it torture. [26] Unsurprisingly, the 1999 judgement refers to his paper (in section 34). More significant, however, is the fact that 'the High Court added, in section 37 of the decision, that "if the State wishes to enable GSS [General Security Service] investigators to utilize physical means in interrogations, they must seek the enactment of legislation for this purpose". . . . It seemed, to some, that, quite perversely, the court ended its own deliberations on torture by somehow winking to the Knesset [Israeli Parliament] to decide on this issue'. [27] It was in 2001 that Dershowitz started very publicly to advocate torture warrants. [28] His recent proposal that in certain circumstances pre-emptive strikes should also be legalized perhaps illuminates his overall agenda:

while it may well be necessary for democracies to fight terrorists with one hand tied behind their backs, it is neither necessary nor desirable for a democracy to fight with two hands tied behind its back, especially when the ropes that bind the second hand are anachronistic laws that can be changed without compromising legitimate human rights. [29]

Let me take another example to make his position clearer. Most advocates of legalizing the consumption of, say, cannabis, think that, because taking cannabis is morally unproblematic, it should be made legal. Others, however, think that taking cannabis should be legalized despite its being morally wrong, because the consequences of prohibition are worse than what they think the consequences would be of legalization: in particular, the benefits of regulation would be greater control of the quality of cannabis consumed, and – perhaps – a diminution of the amount consumed. And so with interrogational torture. Some think torture in the ticking bomb case is morally justified, and therefore should be legalized, on pain of hypocrisy and in order to guarantee that torture be used only in tightly specified cases. Dershowitz thinks, whether or not consistently, that although such torture is morally wrong, it should nevertheless be legalized, again on pain of hypocrisy and to control and regulate the practice. Almost all opponents of either of those positions argue that, while at the extreme torture is indeed morally justified, it should remain illegal precisely

because of the likely consequences of legalization, which they think, far from limiting torture, would be the thin end of an unwelcome wedge.

Why Write about Torture?

My primary reason for writing this book is simply that too many people seem to think that torture is justifiable in the ticking bomb case. Surely, if it is a question of the non-lethal torture of one person against hundreds or thousands of people being blown up, then if they have to be tortured to get the information which would prevent the catastrophe, then that is that. So maybe it is not surprising that when Dershowitz asked American audiences ‘for a show of hands’ in the wake of the 2001 attacks on the twin towers and the Pentagon, they should have voted nearly unanimously in favour of torturing a “terrorist suspect” in such circumstances. [30] But it is by no means just the American public who agree with Dershowitz:

When the B’Tselem [an Israeli human rights organization] reports [on torture as practised by the Israeli GSS] came out, and were presented in press conferences in Israel and around the world, workers in B’Tselem were prepared for all kinds of responses: denial, disbelief, shock. But we were the ones who were shocked, for the one consistent response (even from people abroad) was that torture was a necessary evil. [31]

In the aftermath of the London bombings of 7 July 2005, the mindset which invokes ‘necessary evil’ has taken considerable hold in the UK, especially among its politicians and in large sections of the media. Detention without trial of foreign nationals suspected of terrorism and the extra-judicial execution of Jean Charles de Menezes, an entirely innocent electrician, to take just two examples, were enthusiastically supported in sections of the media, and sometimes met with relief, even triumphalism, rather than being condemned. [32]

As I have said, the thought, however reluctant, of nearly all Dershowitz’s critics is that there are cases where torturing a person to gain the information that only they have and that is needed to prevent the deaths of thousands of innocent people is indeed justifiable. But it is a thought too far: the ticking bomb scenario is sheer fantasy. As

I shall argue in detail in the following chapter, when carefully thought through, many of the various different conditions that Dershowitz and others assume to hold in such scenarios are themselves at best wildly implausible. And when they are put together to form the requisite “scenario”, the construction falls apart. The concession most of Dershowitz’s critics make, therefore – that the ticking bomb case he proposes represents a real problem – is both unnecessary and counter-productive.

The problem is that the ticking bomb fantasy derives from philosophers’ thought-experiments, which are usually designed to test the limits of moral theory. In the most extreme case, it is commonly claimed, the beneficial consequences of an action *must* outweigh what is repugnant about it. I have no doubt that the question of whether or not the beneficial consequences of an action might in principle morally outweigh what is morally repugnant about it is an extremely important and interesting theoretical issue in moral philosophy; and that thought-experiments can be helpful in trying to think about it. But to use a hypothetical example as though it were a real case without first considering very carefully its plausibility in the real world is intellectually and politically irresponsible. I shall return to this issue at the end of the book. Here, I want just to emphasize that a statement such as Martha Nussbaum’s, that I ‘don’t think any sensible moral position would deny that there might be some imaginable situations in which torture [of a particular individual] is justified’ [33] simply *assumes* that moral absolutism cannot be a ‘sensible moral position’ to take here. It is such careless pronouncements which have helped create a climate in which a senior American judge can pronounce that ‘if the stakes are high enough torture is permissible. No one who doubts that should be in a position of responsibility’; [34] and where an academic lawyer can breezily announce that ‘we [meaning only himself, of course] cannot completely reject the evil of torture as a method of combating terrorism, regardless of what international law provides’. [35] At least some of the actual practitioners of torture are rather blunter: ‘If you don’t violate someone’s human rights some of the time, you probably aren’t doing your job’. [36]

However, there is a more immediate and more important reason for focusing on *interrogational* torture. Unless there is something seriously wrong with you, I take it that you find torture morally abhorrent. I mean torture, the point of which is something other than to obtain

life-saving information: torture as a means of revenge, intimidation, punishment or dehumanization. All over the world, as organizations such as Amnesty International and Human Rights Watch repeatedly testify, people are being tortured in pursuit of these ends, in all probability even as you read these words. And not only that. People are all too often tortured for the sadistic pleasure of it. Whatever your convictions about what sorts of punishment particular crimes merit, or what degree of intimidation might be reasonable in what circumstances or even when, if ever, revenge is justified, you surely cannot countenance torture in any of these cases – let alone in order to gratify the torturer or the onlooker. Can you?

Still, even if I am not being over-optimistic on that score you might think that there are *some* cases where torture is justified. That is to say, you might think that if there are any circumstances at all where torture might be justifiable, then it is in the circumstances of the ticking bomb scenario; if any form of torture, for any reason at all, is justifiable, then it is justifiable where it is the only possible means of getting the information needed to prevent the death and maiming of hundreds of innocent people. Nothing else could even conceivably justify torturing anyone. But *that* does. Saving all those lives outweighs even torture. In the words of a professional torturer: ‘It is necessary to get the information now because from now on to the future it might be too late. And to save time, everything is valid.’ [37]

You might even think that, because the person concerned is not innocent (they know where the bomb is), torturing them in order to obtain vital information is even more different from other sorts of torture. They have the information, and are therefore already guilty. Furthermore, and precisely because of that, the torturer’s power over them is limited. If they tell the interrogators right away where the bomb is, there will be no torture; if they delay, the torture will end as soon as they confess. In short, it is *their fault* they are being tortured. But this reasoning is appalling, as Tindale reminds us. When jurors were asked how they could have acquitted the police concerned when they had seen the video of their beating Rodney King in the infamous case of 1991–2, one ‘told Reuters that it was a matter of interpreting the video. Looked at carefully, it showed that King was in control of his situation’, since ‘once King complied and allowed himself to be handcuffed, then the beatings stopped. Hence at any point in the procedures King could have ended the beating simply by complying with police

requests'. [38] Or consider Seamus Miller's bizarre argument that 'the terrorist is forcing the police to choose between two evils, namely torturing the terrorist or allowing thousands of lives to be lost', because in refusing to say where the bomb is, 'the terrorist is preventing the police from preventing him from completing his (joint) action of murdering thousands of innocent people'. [39] In shifting responsibility onto the person under torture in those circumstances, Miller's position would allow blame for how anyone deemed guilty was treated to shift from those actually treating them in that way to the allegedly guilty party. 'She made me do it!' the woman's husband could legitimately say to anyone objecting to his assaulting her: by refusing to reveal her lover's name, she was preventing him from preventing her from doing something wrong. *And* he had warned her what would happen if she were ever "unfaithful".

To put the central point a little more formally: interrogational torture constitutes the limiting case of objections to torture. If even interrogational torture is morally unjustifiable, then so is every other sort of torture. So if I can show that even interrogational torture in the most extreme circumstances remains unjustifiable, then I will have made a case against all forms of torture, against torture as an instrument of revenge, intimidation, punishment, humiliation or sadistic expression.

The Agenda

My main aim in this book, therefore, is to persuade you that the increasingly modish "realism" which would permit interrogational torture – it's going to happen anyway, so we had better come to terms with it – is fundamentally misconceived. And since this "realism" is based on the so-called ticking bomb scenario, that is my immediate target. If I succeed, then I will not only have undermined the basis of all too much state practice – a practice I would describe as constituting state terrorism – but at the same time I would also have taken away the first rung of the ladder of realpolitik which in the actually existing world leads inexorably from interrogational to other forms of torture. My two targets are thus interrogational torture itself and the proposal to legalize it in certain circumstances, rather than torture in general. That would require quite another book (although I do say something

at the end about where I think a comprehensive argument against torture might start).

My first move is to show that the “new realism” is in fact based in fantasy: no argument based on a ticking bomb scenario should even get off the ground. The second, and the more complicated one, is to argue that both advocates of legalizing interrogational torture, such as Dershowitz, and those who would allow it in retrospect, albeit without legalizing the practice, pay far too little attention to the practical issues of interrogational torture in such supposed cases; and in the case of the former, to the broader issues that would arise were interrogational torture to be legalized. In short, their case is poorly argued; it makes remarkably little reference to relevant counter-evidence; and, far from being “realistic”, it takes extraordinary little account of reality.

One more point before turning to the argument itself: the question of the utilitarianism in which Dershowitz’s and others’ “modest proposals” are based. All those who advocate interrogational torture, whether legalized or not, simply assume some variety of a utilitarian understanding of morality: if the benefit of an action outweighs its disbenefits, then that action is morally justified. I am convinced that is wrong; but I also think that this is not the place to make *that* argument. For my concern here is not with moral theory, but with practical morality and the real world of politics. I want to counter the popular appeal that the argument for legalization actually has. And it is one or other form of utilitarianism – the basic view that what makes an action right or wrong is its consequences, in terms of net benefit or disbenefit (interpreted differently by different sorts of utilitarians) – which broadly underpins not only everyday politics, but also the moral perspective of perhaps the majority of people. That is why I shall restrict myself to utilitarian considerations, despite my own conviction that the theory offers a wholly inadequate understanding of morality. Because it is utilitarianism which is so often at the root of public policy, I think that what is centrally important is to show that arguments advocating interrogational torture in the ticking bomb scenario and/or its legalization are spurious even on their own utilitarian terms. Regarding torture, ‘we must weigh what we might gain against what we might lose, and we always lose too much’. [40]

Not everyone is a utilitarian, of course. Some people think that (broadly Kantian) considerations about not treating people merely as a means to an end, but always also as an end in themselves – that

everyone demands and deserves unqualified respect simply as rational beings – are enough to show that torture is always wrong. For what could be more humiliating, what greater form of disrespect could there be, than torturing a person, than breaking who they are and to that extent making them not a person at all (see chapter four)? What clearer example than torture could there be of treating a person merely as a means to an end? That is why torture is *absolutely* forbidden by international human rights law: there are no exceptions. Others, however, think that it is pretty obvious that the ticking bomb scenario shows just what is wrong with this sort of view. A moral theory which permits the death and maiming of hundreds, maybe thousands, of people rather than torturing one person who has the information to prevent such carnage simply exposes its own absurdity. (Doubtless they would point to Kant’s own example of turning over an innocent person to their pursuers in the knowledge that they will be killed rather than lying about the person’s whereabouts.) The point is that it will not do ‘to play the student in Philosophy 101’, as Sanford Levinson puts it, ‘where Kantian deontologists contend with utilitarians as to the propriety of lying to Nazis or killing a single innocent in order to save the world. (For) unless one *is* a Kantian, it is hard to understand why one would embrace this position’. [41] Maybe so; maybe not. My own view is that the Kantian position is broadly right. Certainly, there is more than one way of saying what is wrong with torture. What matters here, however, is that it be said; and that I address those who are *not* already convinced that Kant is enough to dispose of interrogational torture.

So I shall put issues of moral theory to one side. My purpose is directly to counter contemporary arguments for the moral legitimacy and/or the legalization of, specifically, interrogational torture. Since those are utilitarian, I shall not quarrel with that theory here. Only right at the end shall I briefly come back to it.