No pain, no gain? Torture and ethics in the war on terror

ALEX J. BELLAMY*

On 26 September 2002 Maher Arar, a Syrian-born Canadian engineer, was changing aircraft in New York as he returned home from holiday in Tunisia. He was detained there because he had been photographed drinking coffee with a suspected terrorist. He was held in the United States for 13 days without charge. Arar denied having any connection with terrorism. He was then placed in leg-irons, taken to an executive jet, and flown to Syria via Italy and Jordan. For twelve months, Arar was subjected to torture. He was beaten regularly and kept permanently in a dark, damp cell. He was released in October 2003, after a diplomatic intervention by Canada. The Syrian ambassador in Washington announced that Syria had been unable to find any link between Arar and terrorism.[1]

In October 2003 coalition forces in Iraq captured the head of Iraqi air defence, General Abed Hamed Mowhoush. He died in custody on 26 November at an unknown detention centre. The Pentagon released a death certificate declaring that Mowhoush had died of 'natural causes'. The *Denver Post* pursued the case and forced the Pentagon to admit that an autopsy report had found that Mowhoush had died of 'asphyxia due to smothering and chest compression' compounded by 'evidence of blunt force trauma to the chest and legs'.[2]

At Guantanamo Bay, British citizen Martin Mubanga was subjected to sensory deprivation, forced into 'stress positions', and racially and sexually abused. Ironically, Mubanga was subjected to the worst treatment at the very time it was becoming clear to British and American officials that he had no connections to terrorism. He was subjected to harsher treatment because an Australian prisoner, David Hicks, who has also claimed through his lawyers that he has been subjected to torture, had incriminated him.[3]

* I would like to thank Roland Bleiker, Paul D. Williams and especially Sara E. Davies for their helpful comments and suggestions on earlier drafts of this article.

[1] Jane Mayer, 'Outsourcing torture: the secret history of America's "extraordinary rendition" program', *New Yorker*, 14 Feb. 2005.

[2] Anthony Lewis, 'Making torture legal', *New York Review* 15: 12, 15 July 2004, p. 4.

[3] David Rose, 'How I entered the hellish world of Guantanamo Bay', *Observer*, 6 Feb. 2005.

These are three of many cases of alleged torture recently reported in the western media. According to the Joint Chiefs of Staff, however, such acts are prohibited. Detainees must be treated humanely at all times and 'there is no military necessity exception' to this rule.[4] A further Defense Department report (the 'Church Report') found that there was no evidence that abuse was either officially sanctioned or caused by the placing of unreasonably high demands for information on interrogators.[5] However, these findings were problematic in at least four respects. First, as the author of the report admits, the CIA did not cooperate with the commission of inquiry. Thus the report commented on neither the interrogation of prisoners in military camps by CIA officers nor the practice of 'extraordinary rendition' to which Arar, among others, was subjected.[6] Second, the report referred to the approval of so-called 'Category III' methods of interrogation that reportedly included 'mild, non-injurious physical contact': Defense Secretary Donald Rumsfeld approved 24 interrogation techniques (out of 35 proposed techniques) for use at Guantanamo Bay aimed at 'significantly increasing the fear level in a detainee' and 'attacking or insulting the ego of a detainee'.[7] The Church Report noted that the Chairman of the Joint Chiefs of Staff, Richard Myers, had expressed doubt about their legality.[8] However, in its unclassified form it does not specify precisely what measures were authorized. This is especially problematic because there is evidence to suggest that successive Attorneys-General supported a permissive definition of the law in relation to interrogation (see below), and the Defense Secretary specifically identified fear as a legitimate interrogation tool. Third, the report limited itself to proven cases of abuse and did not investigate as yet unproven allegations. In the absence of external monitoring, however, accusations of torture are notoriously difficult to prove, owing to the lack of witnesses, the use of techniques (such as near-drowning and beating the soles of the feet) designed not to leave lasting damage, and the lapse of time between acts of torture being committed and the victim being in a position to complain about them safely.[9]

[4] Joint Chiefs of Staff, *Joint Doctrine for Detainee Operations*, Joint Publication 3–63, 23 March 2005, para. I-4. Human Rights Watch erroneously reported that the publication insisted that the humane treatment of detainees could be limited by military necessity. See Human Rights Watch, 'Pentagon detention guidelines entrench illegality', *HRW News*, 7 April 2005.

[5] Admiral Albert T. Church III, *Department of Defense investigation into allegations of abuse*, executive summary (at the time of writing only the executive summary is unclassified), 11 March 2005, pp. 6, 9 and 10.

[6] Church, *Department of Defense investigation*, pp. 17–18.

[7] Tom Farer, 'US abuse of Iraqi detainees at Abu Ghraib Prison', *American Journal of International Law* 98: 3, 2004, pp. 592–3.

[8] Church, *Department of Defense investigation*, p. 4.

[9] For a first-hand account see Antonio Cassese, *Inhuman states: imprisonment, detention and torture in Europe today* (Cambridge: Polity Press, 1996), pp. 73–90. This problem was recognized by the European Commission of Human Rights when it ruled in the Greek case that 'there are certain inherent difficulties in the proof of allegations of torture or ill-treatment. First, a victim or a witness able to corroborate his story might hesitate to describe or reveal all that has happened to him for fear of reprisals … Secondly, acts of torture … would be carried out as far as possible without witnesses … Thirdly, where allegations of torture or ill-treatment are made, the authorities … must inevitably feel that they have a collective reputation to defend … Lastly, trace of torture or ill-treatment may with lapse of time become unrecognisable, even by medical experts, particularly where the form of torture itself leaves few external marks.' Cited in 'The Greek Case', *Yearbook of the European Convention on Human Rights*, 1969, para. 35.

Finally, taking on board unproven allegations, there is a significant amount of circumstantial evidence to suggest that the use of torture by the US and some of its allies in the war on terror is both widespread and systematic. Taking the three cases described above as examples, the geographical distance between them, the involvement of many different agencies, and the similarity of the processes and techniques used point towards a coordinated strategy of information-gathering based on torture. Indeed, when the US military police investigated claims of abuse at Baghdad's now notorious Abu Ghraib prison, it found that the '*systematic* and illegal abuse of detainees was intentionally perpetrated by several members of the military police guard force'.[10] Furthermore, it concluded that military intelligence officers, CIA officers and private contractors had 'actively requested that MP guards set physical and mental conditions for favourable interrogation of witnesses'.[11]

As mentioned above, there is evidence to suggest that successive US Attorneys-General have attempted to create a permissive legal environment for the use of torture. John Ashcroft (2001–2005) lambasted human rights activists who complained about the mistreatment of prisoners. He warned: 'To those who scare peace-loving people with phantoms of lost liberty; my message is this: Your tactics only aid terrorists.'[12] The current Attorney-General, Alberto Gonzales, played a key role as White House legal counsel in sidelining the State Department's concerns about the use of torture. In a memorandum to the President on 25 January 2002 he argued that

> the nature of the new war [on terrorism] places a high premium on other factors, such as the ability to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities against American civilians … This new paradigm renders obsolete Geneva's [the 1949 Geneva Protocol on the Treatment of Prisoners of War] strict limitations on questioning of enemy prisoners.[13]

Taken together, these points suggest that the three cases of alleged torture described earlier were not exceptions but part of a systematic programme designed to extract information from terrorist suspects, their associates, allies and other alleged enemies of the US.

[10] Emphasis added. Investigation of the 800th Military Police Brigade. Updated, but report completed on 5 November 2003. This report, written by Major-General Antonio Taguba, was not made available for public release. However, a version with classified edits was leaked to the press. It can be consulted at http://news.findlaw.com/hdocs/docs/ iraq/tagubarpt.htm (accessed 8 March 2005). This quotation is from part 1, para. 5.

[11] Taguba Report, part 1, para. 10.

[12] Attorney-General John Ashcroft before the Senate Judiciary Committee, 'Preserving our freedoms while defending against terrorism: hearing before the Senate Committee on the Judiciary, 107th Congress, 2001, available at www.senate.gov/judiciary/print_testimony.cfm?id=12&wit_id=42, accessed 15 Aug. 2005.

[13] Cited by Lewis, 'Making torture legal', p. 2. Gonzales was questioned about this statement during his confirmation hearings when he was appointed Attorney-General. Although reiterating his support for the Geneva Conventions, he nevertheless failed to withdraw the argument he presented in this memorandum. Exhaustive evidence that the US administration has indeed sanctioned torture, drawn from official documents and internal memoranda, is provided by Karen J. Greenberg and Jashva L. Dratel, eds, *The torture papers: the road to Abu Ghraib* (Cambridge: Cambridge University Press, 2005).

This article asks whether such a strategy is ever justifiable. Given the threat that terrorists pose to innocent lives, are governments not obliged to do whatever they can to protect their citizens? Is it better to inflict pain on one guilty person than place at risk hundreds or thousands of innocent people—potential victims of a terrorist atrocity? According to Michael Ignatieff, this is the hardest case of what he describes as 'lesser evil ethics'—a political ethics predicated on the idea that in emergencies leaders must choose between different evils.[14] Theoretically, the question of torture directly pits the fundamental rights set out in natural and positive law against the clearest of utilitarian calculations. In practice, however, liberal political leaders cannot simply sacrifice potentially thousands of civilians in order to protect the rights of one person, nor can an individual's right to life and liberty be easily traded away to secure some indeterminate good. The problem comes in where one draws the line between these two sets of moral values. At what point, if any, does the potential threat posed by terrorism become so grave that the protection of the many warrants the erosion of an individual's fundamental rights?

I argue that the prohibition on torture should be maintained but that in exceptional circumstances *desperate necessity* may dictate, though not excuse, its use. There are at least three reasons for maintaining the prohibition. First, the torturer's claim that 'torture always works' is no more realistic than the liberal claim that 'torture does not work'.[15] Although there are cases where torture has led to the extraction of useful information, there are many other cases where it has not. The utilitarian argument is therefore not strong enough by itself to override the fundamental rights argument. Second, torture violates the *jus in bello* principle of non-combatant immunity: a right that can never be suspended, even during emergencies.[16] Third, torture cannot be defended in a morally consistent fashion: claiming a moral right to torture prisoners to extract militarily necessary information creates a precedent that others may use.[17] Several states, including Egypt, Pakistan, China and Uzbekistan, have already invoked the war on terror to justify abusing detainees and Muslim minorities. In 2002, the US was only one of four states to oppose an Optional Protocol on Torture presented to the UN that was supported by 127 states.[18]

[14] Michael Ignatieff, *The lesser evil: political ethics in an age of terror* (Edinburgh: Edinburgh University Press, 2004), p. 140.

[15] The former position is put forward by Mark Bowden, 'The dark art of interrogation', *Atlantic Monthly*, 292, Oct. 2003, pp. 51–71.

[16] John Finn, for example, argued that 'in a constitutional state essential rights are a function of personhood, not citizenship … Individuals do not forfeit all rights upon misbehaviour': John E. Finn, *Constitutions in crisis: political violence and the rule of law* (Oxford: Oxford University Press, 1991), p. 42.

[17] This raises the question of moral symmetry in war, which is beyond the scope of this article. This is the question whether combatants are morally equal, or whether those who satisfy *jus ad bellum* have more rights than those who do not. See e.g. Jeff McMahan, 'War as self-defense', *Ethics and International Affairs* 18: 1, 2004, pp. 75–80; Fernando R. Teson, 'Self-defense in international law and rights of persons', *Ethics and International Affairs* 18: 1, 2004, pp. 87–91; David Rodin, 'Beyond national defense', *Ethics and International Affairs* 18: 1, 2004, pp. 93–8.

[18] The other three were Nigeria, the Marshall Islands and Palav. Kenneth Roth, 'The fight against terrorism: the Bush administration's dangerous neglect of human rights', in Thomas Weiss, Margaret E. Crahan and John Goering, eds, *Wars on terrorism and Iraq: human rights, unilateralism and US foreign policy* (New York: Routledge, 2004), pp. 121–2.

These are arguments against a general right of torture. The proposition put forward by some advocates is that a limited right to torture terrorist suspects should be recognized as an *exception* to the general ban. Although intuitively appealing, particularly when presented with the case of the 'ticking bomb terrorist', there are two good reasons for rejecting this argument. First, the hypothetical 'ticking bomb terrorist' case is based on a series of unlikely assumptions designed to prejudge the moral outcome. Second, past evidence, particularly from the French experience in Algeria, suggests that the exception, once accepted, tends to become the rule as the definition of military *necessity* slips to cover the use of torture to acquire *expedient* information. In place of such an exception, I suggest that dire and desperate necessity may require the use of torture in the 'ticking bomb terrorist' case, but that it may not excuse torture nor be elevated into a universal principle. This position was eloquently summarized by Slavoj Žižek, who commented that 'we can well imagine that in a specific situation, confronted with the proverbial "prisoner who knows" and whose words can save thousands, we would resort to torture', but that 'it is absolutely crucial that we do not elevate this desperate choice into a universal principle: following the unavoidable brutal urgency of the moment, we should simply do it. Only in this way, in the very inability or prohibition to elevate what we had to do into a universal principle, do we retain the sense of guilt, the awareness of the inadmissibility of what we had done.'[19]

To the best of my knowledge, none of the three cases outlined above comes close to satisfying these criteria, suggesting that torture has already become a normalized feature of the war on terror.

The article proceeds in three parts. The first demonstrates that torture in general is widely considered to be wrong. Both legal and moral thinking expressly forbid torture and inhumane treatment. The second part presents the utilitarian justification for legalizing torture in order to protect civilians from terrorism. After briefly discussing Bentham's act-utilitarian justification for torture, it goes on to demonstrate that since 11 September 2001 many intellectuals and public figures in the US have begun to justify torture on similar grounds. In particular, this section focuses on Alan Dershowitz's case for legalizing torture. The final part of the article is itself divided into three. The first section presents an argument against the generalized legalization of torture. The second presents an argument against a generalized exception to the ban in 'ticking bomb' cases. The third attempts to put forward an alternative moral response to this hypothetical scenario.

[19] Slavoj Žižek, *Welcome to the desert of the real: five essays on September 11 and similar dates* (London: Verso, 2002), p. 103. Žižek goes on to argue that even debating torture is dangerous because it risks legitimizing it. This position has been labelled the 'don't ask, don't tell' argument, and criticized because it forces the victims of torture to remain silent. See Stanford Levinson, 'The debate on torture: war against virtual states', *Dissent* 50: 3, 2003, p. 86.

Torture, law and ethics

Torture is expressly prohibited in an extensive range of human rights conventions and is widely considered a 'crime against humanity'.[20] Almost all of the world's states are party to one or more conventions forbidding torture.[21] Article 5 of the 1948 Universal Declaration of Human Rights declares that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment of punishment'. Common article 3 of the 1949 Geneva Conventions insists that all those not taking an active part in hostilities be treated humanely. The article goes on to prohibit specifically 'violence to life and person, in particular, murder of all kinds, mutilation, cruel treatment and torture' and 'outrages upon personal dignity, in particular, humiliating and degrading treatment of any kind'. Both torture and cruel and inhumane treatment were expressly forbidden in the United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, which was adopted in 1984 and came into force in 1987, and to which the US is a signatory. Torture is also prohibited by regional human rights treaties such as the European Convention on Human Rights (1950), the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987, entered into force 1989), the African Charter on Human and Peoples' Rights (1969), the American Convention on Human Rights (1969) and the Inter-American Convention to Prevent and Punish Torture (1985). Torture is also prohibited in the Genocide Convention (1948), the Supplementary Convention on the Abolition of Slavery (1956), the International Convention on the Elimination of All Forms of Racial Discrimination (1965), International Covenant on Civil and Political Rights (1966, entered into force 1976), and the International Convention on the Suppression and Punishment of the Crime of Apartheid (1973).

The legal prohibition of torture is widely understood as a peremptory rule, as derogation is considered impermissible. The International Covenant on Civil and Political Rights insists that no derogation from the prohibition on torture is possible even in times of 'public emergency which threatens the life of the nation' (article 4). Both the European and American Conventions on Human Rights prohibit derogation even in times of war and public emergency, and even when those emergencies threaten the survival of the state (common article 15). The idea that the ban on torture is a peremptory rule is also commonly accepted among legal practitioners.[22] Thus, as the International Committee of the Red Cross insisted in its commentary on the 1949 convention:

[20] See the various contributions to Philip Setunga and Nick Cheeseman, eds, *Torture: a crime against humanity* (Hong Kong: Asian Human Rights Commission, 2001).

[21] Nigel S. Rodley, *The treatment of prisoners under international law* (Oxford: Clarendon Press, 1987), p. 45.

[22] According to Cedric Thornberry, 'the use of torture against prisoners is absolutely illegal and … cannot, under international law standards, be justified': cited in British Institute of Human Rights, *Detention: minimum standards of treatment* (London: Rose, 1975), p. 65. Michael O'Boyle described torture as a specific example of a peremptory norm of general international law in 'Torture and emergency powers under the European Convention of Human Rights: Ireland vs. United Kingdom', *American Journal of International Law* 71: 4, 1977, p. 687.

'no possible loophole is left; there can be no excuse, no attenuating circumstances' in which torture may be permitted.[23] Finally, in the UN General Assembly debates that preceded its Declaration against Torture in 1975, no state defended the use of torture—though interestingly, as Sweden pointed out, no state denied its existence either.[24]

The key legal question in relation to torture is therefore not so much whether it is legal, but whether specific acts that stop short of causing life-threatening pain, such as sensory deprivation and placing people in so-called 'stress positions', are properly defined as torture. The 1984 UN Convention Against Torture defines torture as:

> 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 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 (Article 1).

In order to justify the use of forceful interrogation techniques in the war on terror, the US Defense Department has adopted two legal strategies to get around the prohibition on torture. The first has been to argue that the President's authority to manage military operations is uninhibited by international law or that individual interrogators who use torture may not be violating the prohibition because theirs is an act of national self-defence.[25] The second strategy has been to offer a very narrow interpretation of what counts as torture. A Defense Department memorandum leaked to the media argued that the administration of drugs to detainees would violate the prohibition on torture only if it was calculated to produce 'an extreme effect'.[26] Similarly, a Justice Department memorandum written by the Assistant Attorney-General, Jay Bybee, insisted that to count as torture, a prisoner's treatment must inflict more than just moderate or fleeting pain. According to Bybee, 'torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death'.[27]

The US is not the first western state to insist that its forceful interrogation techniques fall short of torture. Before the UN Convention came into force, both France and the UK made similar claims. In both cases, however, judicial

[23] Jean Pictet, ed., *The Geneva Conventions of 12 August 1949—Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War* (Geneva: ICRC, 1960), p. 39.

[24] Rodley, *The treatment of prisoners*, p. 20.

[25] An internal justice department memorandum signed by Assistant Attorney-General Jay Bybee insisted that arguments of 'necessity and self-defence could provide justifications that would eliminate any criminal liability'. Cited by Anon., 'Ashcroft holds torture memo', AFP, 9 June 2004, accessed at www.news24.com/News24/World/Iraq/0,6119,2–10–1460_1539584,00.html, 28 March 2005.

[26] Cited by Lewis, 'Making torture legal', p. 2.

[27] Cited by Lewis, 'Making torture legal', p. 2.

authorities either rejected the claim or found that the use of measures deemed 'short of torture' were also prohibited because they were 'degrading and inhumane'. In the 1950s, France believed that it confronted an entirely new form of warfare in Algeria. The French police and army believed that traditional war-fighting methods could not prevail against such an enemy and that unconventional methods such as torture were required.[28] Although at first using such methods only in exceptional cases, French torture of Algerians was committed on an increasingly regular basis until it became a normal part of interrogation (see below). In 1955 the government responded to public outcries in France about the use of torture and commissioned Roger Wuillaume to conduct an investigation. Much like Dershowitz today, the Wuillaume Report called for the 'veil of hypocrisy' to be lifted and for 'safe and controlled' interrogation techniques to be authorized. Permissible methods could include the use of electric shocks and the so-called 'water technique'—holding the victim's head under water until he/she nearly drowns. According to Wuillaume, such techniques were 'not quite torture'. He found that 'the water and electricity methods, provided they are carefully used, are said to produce a shock which is more psychological than physical and therefore do not constitute excessive cruelty'.[29] In 2002, however, one of the key perpetrators and advocates of torture in Algeria, Paul Aussaresses, was found guilty of being an 'apologist for war crimes'. While his punishment was minor (a mere $7,500 fine), the judgment was crucial because the court in effect rejected Wuillaume's argument and found that the interrogation techniques used by the French in Algeria constituted 'war crimes'.[30]

In 1971, the Compton Committee was established to investigate claims that British authorities in Northern Ireland had tortured and abused suspected IRA terrorists.[31] The committee investigated allegations relating to 40 prisoners who were subjected to one or more of five methods of treatment: (1) heads covered with a black hood except when interrogated alone; (2) continual monotonous noise; (3) sleep deprivation; (4) diet of bread and water; (5) forced stress-positions.[32] Much like the Wuillaume Report, the Compton Committee concluded that although the five techniques constituted 'ill-treatment' they did not equate to 'physical brutality' because the interrogators did not take pleasure from inflicting pain, and ill-treatment was used only for the purpose of extracting information.[33] Because of widespread disappointment with these

[28] This is detailed in Peter Paret, *French revolutionary warfare from Indochina to Algeria* (New York: Praeger, 1964).

[29] Wuillaume Report, 2 March 1955, appendix, pp. 169–79. See P. Vidal-Naquet, *Torture: cancer of democracy* (Harmondsworth: Penguin, 1963), pp. 50–51.

[30] See Neil MscMaster, 'Torture: from Algiers to Abu Ghraib', *Race and Class* 46: 2, 2004, p. 9.

[31] *Report of the inquiry into allegationd against the security forces of physical brutality in Northern Ireland arising out of events on the August 1971* (the Compton Report, London: HMSO, 1971), Cmnd. 4823.

[32] O'Boyle, 'Torture and emergency powers', p. 675.

[33] For a discussion, see Ian Brownlie, 'Interrogation in depth: the Compton and Parker reports', *Modern Law Review* 35: 3, 1972, pp. 501–7; John Conroy, *Unspeakable acts, ordinary people: the dynamics of torture* (New York: Knopf, 2000), pp. 3–10.

findings, a second inquiry was established. The ensuing Parker Report went even further than Compton and defended the five techniques on the grounds that they were not excessive, that IRA terrorism created a public emergency, and that the techniques produced valuable intelligence that saved innocent lives.[34] The Republic of Ireland then took up the case in the European Commission on Human Rights. The Commission explored three illustrative cases and found that although, individually, each of the techniques did not constitute torture or degrading treatment, taken together they amounted to 'a modern system of torture falling into the same category as those systems which had been applied in previous times as a means of obtaining information and confessions'.[35] The European Court of Human Rights overturned the decision on technical grounds. Nevertheless, in 1979 the UK forbade use of the techniques.[36]

In both the French and the British cases, the claim that certain techniques were permissible because they did not constitute torture was rejected either on the grounds that they *were* torture or on the grounds that, regardless of whether or not they were, they constituted 'cruel and degrading' treatment, which was also forbidden. The point here is that the contemporary US claim that certain acts designed to cause physical and/or mental pain for the purpose of extracting information do not constitute torture has been articulated before and been found wanting.

Not only is torture considered legally wrong, there is also a broad consensus (though not unanimity) that it is morally wrong. As David Sussman put it, since the Enlightenment at least, 'There has been a broad and confident consensus that torture is uniquely "barbaric" and "inhuman": the most profound violation possible of the dignity of a human being. In philosophical and political discussions, torture is commonly offered as one of the few unproblematic examples of a type of act that is morally impermissible without exception or qualification.'[37]

But what is it about torture as opposed to simply killing someone in war that makes it so wrong? Typically, four types of argument are levelled. Sussman argues that torture is uniquely wrong because its ultimate goal is to force its victim into colluding against himself. The victim thus simultaneously experiences powerlessness yet is forced to be 'actively complicit in his own violation'.[38] This is wrong, Sussman argues, because it not only violates its victim's agency and autonomy but actively perverts them.[39]

[34] For an insightful discussion and critique of the Parker Report, see David R. Lowry, 'Ill-treatment, brutality and torture: some thoughts upon the "treatment" of Irish political prisoners', *De Paul Law Review* 22: 3, 1972, pp. 553–81. The idea that the 'techniques' produced life-saving intelligence was not unanimously held by the three-person committee. Lord Gardiner dissented from this position. See O'Boyle, 'Torture and emergency powers', p. 678, n. 20.

[35] Report of the European Commission on Human Rights, *Ireland v. United Kingdom*, application no. 5310/71, 25 Jan. 1976, cited by O'Boyle, 'Torture and emergency powers', p. 695.

[36] Malcolm D. Evans and Rod Morgan, *Preventing torture: a study of the European Convention for the Prevention of Torture and Inhuman Degrading Treatment or Punishment* (Oxford: Oxford University Press, 1999), p. 40.

[37] David Sussman, 'What's wrong with torture?', *Philosophy and Public Affairs* 33: 1, 2005, p. 2.

[38] Sussman, 'What's wrong with torture?', p. 4.

[39] Sussman, 'What's wrong with torture?', p. 30.

The second type of moral argument against torture is that it involves the use of violence against defenceless people and therefore violates the principle of non-combatant immunity.[40] In principle, as Henry Shue argues, torture could be justified in precisely the same way as other forms of political violence. Commonly this involves one of two approaches. The first, popular among secular theorists, is the analogy with individual self-defence: an individual is entitled to defend herself from unjust attack, even to the point of killing her assailant, so long as the killing is necessary and proportionate. Extrapolated upwards, political communities—which are amalgams of individuals—logically enjoy a collective right of self-defence.[41] Second, one of the basic ideas of the just war tradition is that killing is justified for the common good so long as it is conducted with right intentions. That is, the killer must kill out of love of the enemy and a desire to preserve the peace, not out of feelings of hatred or envy. According to Shue, these types of argument could be used to justify torture in cases where the victim holds information that could save civilian lives. There is, however, one critical difference between torture and killing in the two circumstances identified above: unlike a soldier on a battlefield, the victim of torture does not pose a threat to the torturer. In other words, once someone is captured he or she ceases to be a combatant and becomes a non-combatant and therefore inviolable.[42]

Of course, there is the issue of the 'ticking bomb' terrorist. In those cases, where a bomb has been planted and the interrogator believes that the terrorist knows its location but is refusing to divulge that information, the terrorist cannot be properly considered a non-combatant.[43] This is a dangerous idea, however, because it could logically be expanded to cover soldiers taken captive during a continuing operation. As the soldier would undoubtedly have knowledge about the operation that could save lives, he could plausibly be labelled a combatant for the duration of the operation and tortured.

The third type of moral argument is deontological. This position holds that torture is wrong because it violates fundamental principles of humanity. For some, torture is an affront to the most basic of human rights that derive from a person's very humanity. As Joel Feinberg put it, 'there is … no objection in principle to the idea of human rights that are absolute in the sense of being categorically exceptionless. The most plausible candidates, like the right not to be tortured, will be passive negative rights, that is, rights not to be done to by others in certain ways.'[44]

The fourth moral argument against torture is a rule-utilitarian argument that emphasizes the role of reciprocity and importance of moral consistency. Rule-

[40] This view is put forward by Henry Shue, 'Torture', *Philosophy and Public Affairs* 7: 2, 1978, pp. 124–43.

[41] One of the best recent treatments of this position is offered by David Rodin, who ultimately rejects the upwards extrapolation and therefore concludes that political communities do not have an automatic right of self-defence. See David Rodin, *War and self-defense* (New York: Oxford University Press, 2003).

[42] Shue, 'Torture', pp. 127–30.

[43] Shue, 'Torture', p. 141.

[44] Joel Feinberg, *Social philosophy* (Englewood Cliffs, NJ: Prentice-Hall, 1973), p. 88.

utilitarians argue that the greatest good is achieved by observing a rule prohibiting torture. There are at least two good reasons to suppose this. First, the historical record demonstrates that torture is used for pernicious reasons far more often than not. It is most frequently used to silence government opponents. The prohibition of torture is therefore central to the preservation of democracy and liberal government. Second, the principle of reciprocity means that we all benefit from a rule prohibiting others from potentially torturing us at some time in the future. If an enemy can be tortured to provide life-saving information, then surely we must admit that our own soldiers, if captured, could also be tortured in order to save the lives of our enemies. Rule-utilitarians argue that the greatest good is achieved by maintaining the general prohibition on torture.[45]

There is therefore a clear consensus between law and ethics that torture and other forms of cruel and degrading treatment against prisoners are wrong. Although loopholes may be found in individual treaties, customary rules or philosophical arguments, taken together they constitute a powerful case. That this is so is reflected in the fact that very few political actors are willing to defend the use of torture publicly. Unfortunately, torture is a moral anomaly in that, while few if any are prepared to publicly defend it, many states either use it as a matter of course in their criminal investigations or are prepared to use it in emergencies. This creates the moral paradox whereby, on the one hand, the US and some of its allies are evidently engaged in the systematic and widespread use of torture, but on the other hand the US administration is unwilling to defend this publicly and has even gone on record condemning the use of torture in states such as Syria and Egypt to which it has, nevertheless, 'rendered' terror suspects. In popular discourse torture is often depicted in the US as a legitimate tool in the war on terror, prompting calls from some writers to replace the hypocrisy described above with a transparent system of legalized torture.

The case for torture

Since 11 September 2001, popular discourse in the US especially has become suffused with the idea that, despite the legal and moral prohibitions described above, torturing suspected terrorists is a legitimate means of extracting information vital for the protection of US citizens. Popular fictional television programmes *24* and *Alias* frequently showed terror suspects being tortured by the 'heroes'. On at least one occasion on *Alias*, a CIA officer suffocated a terror suspect to death. In neither show are the perpetrators of torture brought to trial or condemned. Once 'off-limits', torture is now widely discussed and often considered legitimate in popular discourse.[46]

[45] For an expression of the rule-utilitarian argument against torture, see Fritz Allhoff, 'Terrorism and torture', *International Journal of Applied Philosophy* 17: 1, 2003, p. 107. Allhoff himself rejects this argument on the grounds that rules require exceptions but in this case an exception would undermine the entire rule-utilitarian project.

[46] See Eyal Press, 'In torture we trust?', *The Nation*, 31 March 2003, pp. 1–3.

These ideas have also permeated political discourse in the US. Commenting on the arrest of a senior Al-Qaeda figure in late 2002, Senator Jay Rockefeller (Democrat, West Virginia), Chair of the Senate Select Committee on Intelligence, told CNN that 'I wouldn't take anything off the table where he is concerned because this is a man who has killed hundreds and hundreds of Americans over the last ten years.'[47] One anonymous Defense Department official told the *Washington Post*: 'If you don't violate someone's human rights some of the time, you probably aren't doing your job.'[48] Another unnamed official told *Newsday* that when one suspect was rendered from Guantanamo to Egypt, 'they promptly tore his fingernails out and he started telling things'.[49] One circuit judge went as far as to insist that 'if the stakes are high enough, torture is permissible. No one who doubts that this is the case should be in a position of responsibility.'[50] Thus, although the case for licensing torture is most associated with Dershowitz because he has defended the argument in a sustained fashion, it is important to note that similar ideas are widely held in both popular and political discourse in the US.

It is important to note that the case for licensing torture put forward by Dershowitz and his followers is not novel. Dershowitz's case draws directly from Bentham's utilitarian defence of torture, and his proposal for judicially approved 'torture licences' draws upon the findings of the Landau Commission in Israel (1987). Moreover, even prior to the Algerian war some writers in France had also called for licensed torture.[51] Before assessing Dershowitz's claims, therefore, I will briefly consider Bentham's utilitarian defence of torture and the Landau Commission's findings.

The most common defence of torture rests on act-utilitarianism. In short, the act-utilitarian case insists that torture is permissible when cost–benefit analysis reveals that more lives are likely to be saved by resorting to torture than by choosing not to do so.[52] To satisfy Bentham, a potential torturer must pass two tests. First, it must be clear that the *purpose* behind the mistreatment of prisoners is the acquisition of information likely to save civilians. As Bentham put it:

> For the purpose of rescuing from torture these hundred innocents, should any scruple be made of applying equal or superior torture, to extract the requisite information from the mouth of one criminal, who having it in his power to make known the place where at this time the enormity was practising or about to be practised, should refuse to do so?[53]

[47] Cited by Harry Rosenberg, 'Terror and immigration law', *The Nation*, 1 Dec. 2003, p. 7.

[48] Staff writers, 'US decries abuse but defends interrogators', *Washington Post*, 26 Dec. 2002, p. A12.

[49] Press, 'In torture we trust?', p. 2.

[50] Richard Posner, 'The best offense', *The New Republic,* 2 Sept. 2002, p. 28.

[51] Most notoriously, Louis Lambert, an instructor at the national police college. See Louis Lambert, *Traité théorique et pratique de police judiciaire* (Paris: Chapitre, 1945). The argument created such consternation that it was dropped from later editions. See Vidal-Naquet, *Torture: cancer of democracy*, p. 22.

[52] See Mika Haritos-Fatouros, *The psychological origins of institutionalized torture* (London: Routledge, 2003), p. 3.

[53] Cited by W. L. Twining and P. E. Twining, 'Bentham on torture', *Northern Ireland Legal Quarterly* 24: 3, 1973, p. 347. My discussion of Bentham draws primarily on this article.

Bentham clearly believed that in such cases the greater public good required that the prisoner be tortured. The second requirement is that the torturer be sure that the victim *has* the information needed to save lives. No benefit is accrued by torturing those who do not have the information sought. In short, for Bentham the torture of one guilty person for the purpose of saving more than one innocent person satisfies the cost–benefit ratio and is therefore justifiable.

The problem with Bentham's act-utilitarianism, even for those sympathetic to his case *vis-à-vis* torture, is the lack of guidelines for making these cost–benefit judgements. How many civilians need to be at risk to make torturing a suspect permissible? Simple cost–benefit analysis would put that figure at one or more, making torture permissible in a large number of cases. What level of proof is required that the victim holds the knowledge necessary to save lives? How does an authority employing the Benthamite system avoid the slippery slope that 'once torture is permitted on grounds of necessity, nothing can stop it from being used on grounds of expediency'?[54] To overcome these problems, Dershowitz's case for legalizing torture contains safeguards.

The role and nature of Dershowitz's safeguards derive almost entirely from the findings of Israel's Landau Commission. The commission, named after its Chair, former President of the Supreme Court Moshe Landau, was created by the Israeli government in 1987 in response to mounting public concern about the treatment of prisoners by the Israeli security services, caused by two cases in particular. In the so-called 'No. 300 bus affair' Israeli authorities claimed that a group of terrorists who seized a bus were killed in the crossfire during its recapture by Israeli security forces. It was later reported that all the terrorists were alive when arrested and subsequently died in custody. In 1987 Izzat Nafsu appealed against his conviction for treason and espionage by arguing that his confession in the original trial had been coerced. The Supreme Court accepted his appeal and ordered his release.[55]

The Landau Commission's findings were based on two assumptions. First, it accepted the argument that Israel confronted a continuing emergency caused by Palestinian terrorism.[56] From this, the commission concluded that the acquisition of information was vital to the defence of Israel and noted that such information was difficult to obtain. Second, the commission accepted without further study the security services' claim that the use of aggressive measures was an effective means of extracting vital information. On several occasions it praised the security services, noting that they prevented '80–90 percent of terrorist' attacks; it observed that 'the overwhelming majority of those [suspected terrorists] tried were convicted on the basis of their confession alone' and accepted the security services' view that 'effective interrogation of terrorist suspects is impossible without the use of means of pressure'.[57]

[54] Rodley, *The treatment of prisoners*, p. 76.

[55] These cases are recounted in Evans and Morgan, *Preventing torture*, p. 42, n. 66.

[56] Landau Commission, *Report of the Commission of Enquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity, Part One* (Jerusalem: Government of Israel, 1987), para. 2.11. Hereafter referred to as Landau Report.

[57] Landau Report, paras 2.16, 2.20, 2.28, 2.38 and 4.6.

All this, the commission found, created an intolerable dilemma for the security services. Charged with the task of protecting Israelis from terrorism and confronted with the fact that the only means of extracting the necessary information were legally prohibited, security personnel were forced into committing acts about which they would later have to lie. The commission presented three options for addressing this dilemma. First, retain the status quo and leave certain interrogation techniques 'outside the realm of the law'.[58] Second, claim to abide by the law but turn a blind eye to the use of torture—the hypocrite's position.[59] The commission rejected both these positions on the grounds that they were legally dishonest and did not resolve the moral dilemma confronting the security services. The third, and preferred, option it described as 'the truthful road': creating legal paths for the legitimation of torture.[60] This involved legalizing the methods already used by the security services, which were not publicized because it was argued that publication of torture methods would allow enemies to train in counter-measures, making the techniques ineffective.[61]

The system of legalized torture that the commission developed was predicated on the 'lesser evil' doctrine, a modified utilitarianism which holds that in emergencies leaders might act in immoral ways in order to protect the greater good.[62] The commission's proposal thus contained two elements: a 'lesser evil' justification for the use of torture in certain circumstances, and restrictions on the types of torture that could be used.

When may torture be used? The Landau Commission's answer to this question, like many contemporary justifications of torture, was predicated on the hypothetical 'ticking bomb' terrorist. The scenario, often repeated, is as follows. A bomb has been planted that is likely to kill large numbers of non-combatants (in the television series *24*, the bomb was nuclear). At the same time, the security services have apprehended a suspect who they believe knows the whereabouts of the bomb but is refusing to talk. It is worth quoting the commission at length on this point, as it is pivotal to both its, and Dershowitz's, case:

> The deciding factor is not the element of time, but the comparison between the gravity of the two evils—the evil of contravening the law [prohibiting torture] as opposed to the evil that will occur sooner or later … To put it bluntly, the alternative is: are we to accept the offense of assault entailed in slapping a suspect's face, or threatening him, in order to induce him to talk and reveal a cache of explosive materials meant for use in carrying out an act of mass terror against a civilian population, and thereby prevent the greater evil which is about to occur? The answer is self-evident.[63]

[58] Landau Report, para. 4.3.
[59] Landau Report, para. 4.4.
[60] Landau Report, para. 4.5.
[61] Landau Report, para. 2.25. The methods were published in the classified second part of the commission's report. See Evans and Morgan, *Preventing torture*, p. 44.
[62] See Ignatieff, *The lesser evil*.
[63] Landau Report, para 3.15.

Of course the answer is self-evident, because the assumptions underlying the hypothetical case prejudge the outcome. This will be discussed further below. When applying the 'lesser evil' test, the commission found that the salient fact was not the *actual* evil threatened, but the evil that the relevant actor reasonably *believes* is imminent.[64] One final point we should notice in the above statement is the slippage between the background assumptions (a bomb has been planted and may go off at any time) and the commission's judgment (locating an arms cache is sufficient justification). Although this will be discussed more in the following section, it is necessary to draw attention to the problem here. In the first scenario, the tortured suspect has a measure of control over a direct threat to non-combatants that has not diminished owing to his incarceration. The extraction of information from this suspect is *necessary* to remove the threat. In the second scenario, the extraction of information about the location of weapons caches is *expedient* but not necessary to the prevention of a specific threat.

What types of torture are permitted? As I noted earlier, the commission did not specify, in its unclassified report, what techniques might be used. However, it outlined three important limits necessary to protect the rights of the citizen and the beneficent 'image' of the state. First—a tentative gesture towards chivalry—torture must not cause grievous harm to the suspect's honour or deprive him of human dignity. Second, torture must not be disproportionate: the seriousness of the measures should be weighed against the potential threat that the interrogator is attempting to prevent. Third, the means of torture should be carefully controlled and limited to techniques designed not to cause lasting harm.[65]

The Israeli government did not formally act on the commission's recommendations. However, in the mid-1990s a series of suicide bomb attacks that accompanied the collapse of the Rabin–Arafat peace process prompted attempts in the Knesset to rewrite Israel's penal code to incorporate those recommendations.[66] Evans and Morgan argue, moreover, that there is evidence not only that the measures endorsed by the Landau Commission (and others besides) were used by Israel's security services but that their use was officially sanctioned.[67] It could be argued, therefore, that the commission's findings were informally put into practice by Israel.

The Landau Commission's findings are important because they form the centrepiece—sometimes consciously, sometimes not—of most sustained defences of the use of torture in the war on terror.[68] Alan Dershowitz puts forward the most sustained defence. After noting the legal prohibition on torture, he begins his case by noting that 'the tragic reality is that torture sometimes works, much

[64] Landau Report, para. 3.16.
[65] Landau Report, para. 3.16.
[66] Evans and Morgan, *Preventing torture*, p. 51.
[67] Evans and Morgan, *Preventing torture*, p. 50.
[68] Consciously in the case of Alan M. Dershowitz, *Why terrorism works* (New Haven, CT: Yale University Press, 2002); unconsciously in the case of some of his supporters, such as Allhoff, 'Terrorism and torture', and Stanford Levinson, 'The debate on torture: war against virtual states', *Dissent* 50: 3, 2003, pp. 79–89.

though many people wish it did not'.[69] To support his claim, Dershowitz points to the foiling of a 1995 plot to crash eleven commercial aircraft simultaneously over the Pacific and fly a Cessna filled with explosives into the CIA's headquarters. According to Dershowitz, the Philippines police arrested and tortured a suspect (breaking most of his ribs in the process) over 67 days until he divulged the information necessary to foil the plot. It is precisely because torture sometimes works, he contends, that states around the world continue to use it.

Despite his avowed intellectual debt to Bentham, Dershowitz is not an act-utilitarian. He insists that there are basic human rights and that the costs of breaching them are high. Nevertheless, political leaders have a responsibility to get 'dirty hands' and pay the costs of rule-breaking in order to save civilian lives. To balance these two sets of obligations, Dershowitz follows Bentham and the Landau Commission in predicating his case for legalized torture on the hypothetical 'ticking bomb terrorist'. In contrast to earlier writers, Dershowitz expands his argument to ask why, if torture can be justified in 'ticking bomb' cases, it cannot also be justified in other cases where judicial authorities issue 'torture warrants'? Similarly, Allhoff argues that the criterion should be not a ticking bomb but the prevention of future threats.[70]

The case for torture warrants is based on the observation that in liberal societies like the US there are not two but three fundamental value sets at stake: (1) the safety and security of the nation's citizens; (2) the preservation of individual human rights; (3) democratic openness and accountability. Legitimate governments simply cannot breach the first set of values. The just war tradition permits the use of violence—and hence the breach of human rights—against enemies in just wars. Thus, according to Dershowitz, only pacifists can complain about the violation of enemy combatants' human rights: torturing an enemy combatant to acquire information that will save lives is no different from killing him in battle to accomplish the same thing.[71] According to the just war tradition, combatants lose their right not to be attacked when they obtain their right to use force against enemy combatants.[72] Maintaining the hypocrisy of practising torture but keeping it 'off the books', by either denying its existence or placing it above the law, violates value sets (2) and (3). The breach of value (3) is particularly problematic for Dershowitz because public justification and scrutiny are crucial to deciding whether or not particular acts should be committed. Moreover, by removing judicial oversight the approaches outlined by the Landau Commission fail, because criminals cannot be convicted if the means by which they have been interrogated cannot be disclosed and scrutinized in court.

[69] Dershowitz, *Why terrorism works*, p. 137. The following discussion draws on pp. 137–63 unless otherwise stated.

[70] Allhoff, 'Terrorism and torture', p. 111.

[71] According to Allhoff, individuals give up certain moral and legal rights when they are complicit with terrorists: 'Terrorism and torture', p. 108.

[72] This is expressed most clearly by Michael Walzer, *Just and unjust wars: a philosophical argument with historical illustrations* (New York: Basic Books, 1977), p. 36.

Dershowitz therefore proposes a change in the law to permit judicial authorities to issue 'torture warrants'. Being open about the use of torture would permit both judicial oversight and public discussion about the appropriate balance to be struck between the three sets of values. Under Dershowitz's system, law enforcement agencies would need to apply to judicial authorities for 'torture warrants' and would have to demonstrate what they plan to do, when, and the necessity of torture. Judges would decide the merits of each case and rule accordingly. In all cases, complete records would be kept. The system would contain restrictions on who could be tortured (Dershowitz bases his claim on the ticking bomb case but insists that judges should be free to determine each case on its merits and that satisfactory necessity arguments may also be levelled in non-ticking bomb cases) and what methods could be used (Dershowitz rules out potentially lethal measures and measures that could cause permanent physical or psychological damage; identifies two particular methods that cause excruciating pain without lasting damage: injecting air below the fingernails and drilling teeth without anaesthetic). This system, Dershowitz argues, would permit law enforcement agencies to use measures to extract vital life-saving information from terrorist suspects, while guarding against potential abuse. Bringing torture into the open would make it more humane and afford greater protection to its victims.

Rethinking the ethics of torture

This part of the article proceeds in three stages. The first part considers Dershowitz's broad claim for a general right to torture suspects made legal by the issuing of 'torture warrants' by judicial authorities. It reiterates the three objections to a general right outlined in the introduction: (1) the evidence that torture works is at best mixed; (2) the use of torture involves breaching inalienable *jus in bello* constraints; (3) a general right cannot be defended in a morally consistent fashion. The second part considers the case for a narrow exception to the general prohibition on torture in the case of the 'ticking bomb' terrorist. Although Dershowitz and his supporters widen the scope for potentially legitimate torture beyond the 'ticking bomb terrorist', this hypothetical scenario nevertheless provides the foundations for the moral defence of torture in general. I argue that there are two further problems with this narrower right to torture: first, that the scenario is predicated on a series of assumptions that are highly unlikely but prejudge the moral conclusion; and second, that in the course of a military campaign what is considered *necessary* tends to slide into *expediency*; in other words, creating an exception risks normalizing torture. The final part then returns to the idea of the 'ticking bomb terrorist' and attempts to chart a way through the moral dilemmas it presents.

Against a general right

Dershowitz's case for creating a legal framework for torture is predicated on the idea that torture works, that security services will therefore inevitably use it to prevent terrorism, and that the best way to protect the victims of torture, prevent abuse and facilitate transparency is to create a framework for legalization. At face value this is an appealing argument, inasmuch as it promises to create safeguards and forces liberal societies to acknowledge their own dirty hands in the fight against terrorism. However, it is dangerously flawed in at least three important respects.

First, it is predicated on the assumption that torture works: that is, that the use of torture facilitates the extraction of information from terror suspects that helps to save lives. Dershowitz's belief in the utility of torture comes from two sources: the Landau Commission's findings and the 1995 case where torture was used ostensibly to foil a massive terrorist attack over the Pacific. Interestingly, the Landau Commission did not itself investigate the utility of torture in specific cases and simply accepted the Israeli security services' insistence that torture was effective in certain circumstances.[73] On the Philippines case, Dershowitz cites a *Washington Post* report that the Philippines government tortured a suspected terrorist until he revealed details of a plot to blow up eleven aircraft simultaneously over the Pacific.[74] What is in doubt is not that the Philippines tortured a suspect, nor that they uncovered a plot, but that the use of torture prevented the plot from being carried out. Other reports at the time suggest that it was the discovery of documents at the suspect's home following a fire there that tipped police off. Given that it took 67 days of torture to extract the information, it seems highly unlikely that torture would have prevented the atrocity had the threat been imminent.[75] Other writers point to alternative sources to support their claim. Levinson, for instance, points to an Israeli Supreme Court verdict and a review article on the French experience in Algeria to support the general claim that torture works.[76]

There are at least two further good reasons to doubt the claim that torture is an effective means of extracting life-saving information. First, there is no consensus about this even within the US security services. Second, the purported 'success' of the use of torture by the French in Algeria is ambiguous at best. I will address each of these points in turn. Dershowitz's argument strongly implies a consensus among security agencies about the utility of torture. In fact, there were sharp disagreements about this among interrogators in the US. One former FBI counter-terrorist interrogator was quoted as arguing that interrogating, for instance, a naked Muslim fundamentalist was difficult because 'he's

[73] See Evans and Morgan, *Preventing torture*, p. 47.
[74] Dershowitz, *Why terrorism works*, p. 137.
[75] See Dan Murphy, 'Filipino police uncover 1995 leads to September 11 plot', *Christian Science Monitor*, 14 Feb. 2002; Richard Owen and Daniel McGary, 'Al-Qaeda in plot to assassinate Pope', *Times Online*, 11 Nov. 2002; and Center for Cooperative Research, 'Context of Feb. 1995', at www.cooperativeresearch.org/context/jsp?item.000293.thirdplot.html, accessed 12 March 2005.
[76] Levinson, 'The debate on torture', p. 82.

going to be ashamed, and humiliated, and cold. He'll tell you anything you want to hear to get his clothes back. There's no value in it.'[77] The problems appear to be twofold. On the one hand, it is important to distinguish between confessions and live-saving intelligence. While torture is effective at extracting the former, there are doubts about its ability to produce the latter. There are now numerous cases of terror suspects giving false confessions under torture. The former British ambassador to Uzbekistan, Craig Murray, reported that the Uzbek authorities used torture (such as partial boiling) to extract information from suspected terrorists which would then be passed on to the US and UK. Murray insisted that 'this material is useless. We are selling our souls for dross. Tortured dupes are forced to sign confessions showing what the Uzbek government wants the US and UK to believe—that they and we are fighting the same war on terror.'[78] In another case, three British suspects confessed under torture to having been trained at Al-Qaeda camps in Afghanistan. British intelligence, however, produced conclusive evidence that the three were actually in Britain at the time that they were supposed to have been in Afghanistan.[79] As is well documented in the literature on torture, life-saving intelligence is usually extracted in the first hours after a suspect is apprehended. Once a suspect's incarceration becomes known to the terrorist organization, the organization tends to change its plans. The longer the suspect is held, the less vital any information he could offer becomes. After a few days, the suspect is unable to offer anything useful about on-going operations: that is, he cannot provide militarily *necessary* information, only *expedient* information.[80]

The claim that the use of torture by the French in Algeria is indicative of its effectiveness is also questionable.[81] The claim was later disputed by General Massu, the commander of French forces in the 'battle of Algiers' who in the 1970s defended the widespread use of torture. According to Massu, speaking in 1992, torture served no 'necessary or useful purpose' in combating terrorists in Algeria.[82] Indeed, France ultimately lost the Algerian war. This has led some scholars to argue that although the use of torture may have delivered some short-term tactical advantages, in the longer term it had at least two consequences that worsened France's predicament. First, the use of torture contributed to the

[77] Dan Coleman, cited by Mayer, 'Outsourcing torture', p. 3.

[78] Cited in Robin Gedye, 'British torture row envoy loses clearance for Uzbekistan post', *Daily Telegraph*, 12 Oct. 2004. In the same report, the British Foreign and Commonwealth Office tacitly admitted that it made use of intelligence given under torture in Uzbekistan. A spokesman said: 'The UK abides by its international law contract. But you have to bear in mind the need for intelligence on terrorism to counter overt threats ... it would be impossible to ignore this information.'

[79] David Rose, 'Revealed: the full story of the Guantanamo Britons', *Observer*, 14 March 2004.

[80] Both the Nazis and the French in Algeria found this to be the case. See Robert Jay Lifton, *The Nazi doctors: medical killing and the psychology of genocide* (New York: Basic Books, 1986) and Edward Peters, *Torture* (University Park, PA: University of Pennsylvania Press, 1996), p. 177.

[81] The claim that certain 'techniques' were effective was put forward most forcefully by one of the French commanders in Algeria, Jacques Massu. See Jacques Massu, *La Vraie Bataille d'Alger* (Evreux: Plon, 1972).

[82] Cited by MacMaster, 'Torture', p. 9. For an excellent overview see Neil MacMaster, 'The torture controversy (1998–2002): towards a "new history" of the Algerian war?', *Modern and Contemporary France* 10: 4, 2002, pp. 449–59.

loss of the battle for hearts and minds. On the one hand, it contradicted the claim to a humanistic and civilizing mission used to justify French rule in Algeria, undermining the French claim to legitimacy there; on the other hand, it created a powerful reaction among Algerians and helped strengthen the nationalists, contributing significantly to France's ultimate defeat.[83] Second, the widespread use of torture contributed to the general brutalization of Algerian society by encouraging white settlers to pursue their aims through force of arms, creating martyrs among the nationalists, and fostering a normative context that enabled the nationalist rebels to employ similarly brutal techniques against their enemies.[84] This is not the place to decide the utility of torture in detail. What we do need to note here, however, is that its utility is contested even among those who have practised it. As a result, it is doubtful whether the utility argument can carry the weight that Dershowitz and others give it.

The second problem with legalizing torture is that doing so would require changes to one of the just war tradition's most fundamental principles: non-combatant immunity. By its very nature, torture involves deliberately inflicting harm upon non-combatants. Once terror suspects are taken prisoner they cease being combatants because they no longer pose a threat. Therefore, torture is wrong for precisely the same reason as terrorism: because it involves harming non-combatants. Thus the prohibition of torture is a peremptory rule.

The third problem with legalized torture is that it cannot be consistently applied. Taking a lead from Kant, one of the key tests of any moral principle is whether its precepts are generalizable. If we consider the likely effects of generalizing a right to torture with a thought experiment, at least two deeply troubling outcomes emerge. First, the vast majority of torturers, both during the Cold War and today, use torture to silence political opponents.[85] From China and Burma to Egypt, Syria, Sudan, Pakistan and the Philippines, torture is used primarily as a form of regime maintenance. If states such as these—and many more besides—were given a moral right to legalize torture, there is little doubt that, far from curtailing its use, it would have the effect of normalizing torture, making it more widespread. The result would be much more torture around the world, most of it inflicted on the opponents of oppressive regimes. Second, a generalizable moral principle is one that others can invoke against citizens of western states. If all states were permitted to legalize torture in order to extract information that might save lives, the citizens of western states could also be subjected to torture, potentially legitimately, in places such as Iran, Serbia, Afghanistan, Libya, China, North Korea and so on. In the changed normative

[83] Jules Roy, *J'accuse le général Massu* (Paris: Seuil, 1972), p. 44. Roy is a leading French scholar on the Algerian war.

[84] See Roy, *J'accuse*, as well as a similar argument against Massu's justification of torture put forward by another senior French officer, General Paris de Bollardière, in *Bataille d'Alger, bataille de l'homme* (Paris: Desclée de Brouwer, 1972).

[85] Christopher W. Tindale, 'The logic of torture: a critical examination', *Social Theory and Practice* 22: 3, 1996, pp. 350–51.

context of a universal right to legalized torture, we would lose the moral language to condemn the torture of our fellow citizens.

Taken together, these three arguments constitute a powerful case against the generalized legalization of torture proposed by Dershowitz and others. The case is predicated on a simple utilitarian argument, but the claim at its heart—that torturing suspected terrorists saves lives—is deeply contested, even among interrogators. It involves changing arguably the most fundamental rule of the just war tradition and endorsing acts expressly prohibited by an unusually high proportion of legal texts. Finally, it involves advancing a moral argument that cannot be generalized without producing deeply troubling effects.

There remains, however, the thorny question of the 'ticking bomb' terrorist from which Dershowitz extrapolates his more generalized case.

Against a limited right

The idea that torture is sometimes legitimate tends to start with the 'ticking bomb' terrorist case. This scenario was first articulated by Bentham and reappears in virtually every academic justification of torture. It is the starting point of Dershowitz's argument and the scenario presented to audiences in American television programmes such as *24* and *Alias*. Despite its ubiquity in discussion and fictional portrayals, I have uncovered only one recorded case of a ticking bomb terrorist. In 1957 Paul Teitgen, the Secretary General of the Algiers Prefecture, was confronted with precisely this dilemma. The chief of police requested that Teitgen authorize the torture of Fernand Yveton, a communist insurgent caught in the act of planting a bomb at a gasworks. The chief of police believed that Yveton had planted a second bomb and feared that if it exploded it would cause a gas explosion, killing potentially thousands of civilians. Teitgen refused to authorize the torture. According to his own account, he 'trembled the whole afternoon. Finally the bomb did not go off. Thank God I was right. Because if you once get into this torture business, you're lost.'[86]

Notwithstanding the proposition that in the single recorded case of a ticking bomb terrorist torture was not authorized and no bombs exploded, it is fair to suggest that the hypothetical scenario is designed to prejudge the moral outcome. In this hypothetical case, only pacifists would deny the resort to torture. The ticking bomb scenario relies on four conditions being satisfied: first, the interrogators must be sure that they are holding the right person; second, they must be sure that the suspect holds the information they need to avert an imminent threat and save lives; third, they must be sure that the use of torture will help the interrogator secure the necessary information; and fourth, the

[86] The episode is recounted in Alistair Horne, *A savage war of peace: Algeria 1954–62*, 2nd edn (London: Macmillan, 1987), p. 204. General Paul Aussaresses later wrote that Yveton was tortured anyway: 'Gevaudan later told me that they had to use torture to force Yveton to talk, in spite of the fact that Paul Teitgen had expressly forbidden it, for fear of risking the destruction of twenty-five percent of Algiers itself.' Paul Aussaresses, *The battle of the Casbah: counter-terrorism and torture* (New York: Enigma, 2005), p. 107.

information elicited must be reliable.[87] The hypothetical case certainly highlights an instance in which lesser evil considerations may dictate breaking the prohibition on torture, but that is precisely what the assumptions are intended to do. It is worth quoting Henry Shue at length:

> I can see no way to deny the permissibility of torture in a case *just like this* … But there is a saying in jurisprudence that hard cases make bad law, and there might well be one in philosophy that artificial cases make bad ethics. If the example is made sufficiently extraordinary, the conclusion that the torture is permissible is secure. But one cannot easily draw conclusions for ordinary cases from extraordinary ones, and as the situation described becomes more likely, the conclusion that the torture is permissible becomes more debatable.[88]

Certainly none of the alleged instances of torture that have emerged since the US embarked on the war on terror have come close to the ticking bomb scenario. Nor, for that matter, does the Philippines case cited by Dershowitz, even if we put aside doubts about the function of torture in that case. In view of this, the use of the ticking bomb terrorist scenario to defend a broader right to torture is moral casuistry at its worst.

The second problem with creating an exception to the ban on torture in cases of 'ticking bomb' terrorists is slippage. In a particular campaign, torture may be initially reserved for extreme and exceptional cases; but as the practice becomes normalized, the threshold for its use drops from the need to extract information necessary to save lives to the desire to extract expedient information. There is circumstantial evidence that this has already happened in the war on terror. Whereas at the outset torture was reserved for 'high value' Al-Qaeda figures who, it was believed, would be able to divulge Al-Qaeda's future plans, the President's authority to use all necessary measures has been used to cover the torture of suspects such as Arar and Mubanga, who were unlikely to have any such information.[89]

More detailed evidence of slippage is available in the Algerian case. In that case, as Shue argues, torture was justified as a rare measure to prevent imminent attacks on civilians but spread 'like a cancer' until it became normal practice. 'The problem', Shue argued, 'is that torture is a shortcut, and everybody loves a shortcut.'[90] According to Vidal-Naquet's account, the practice began as a clandestine method of interrogation used by the police. At the beginning of the war, in 1955, the police rounded up people suspected of collaborating with the nationalists and tortured many of them. The key question is how this practice spread from the police into the army and beyond until it became a 'state institution'.[91]

[87] These four conditions are a slightly revised variant of the conditions outlined in Jonathan Allen, *Warrant to torture? A critique of Dershowitz and Levinson*, Arms control, disarmament and international security, University of Illinois, Occasional Paper, Jan. 2005, p. 9.
[88] Shue, 'Torture', pp. 141–2 (emphasis in original).
[89] Daniel Moeckli, 'The US Supreme Court's "enemy combatant decisions": a "major victory for the rule of law?"', *Journal of Conflict and Security Law* 10: 1, 2005, pp. 75–99.
[90] Cited by Press, 'In torture we trust?', p. 3.
[91] Vidal-Naquet, *Torture: cancer of democracy*, pp. 29–33.

At the outset of the war, the military was overseen by a judicial process for reviewing the death of nationalists, even those killed in combat. As Soustelle recounts:

> When a *fellegh* [nationalist rebel] was killed, the Public Prosecutor immediately opened an enquiry as he would have in the case of a murder in peacetime and the examining Magistrate would compel astonished, and often indignant, officers and soldiers to appear and justify their conduct in the face of the enemy, just as if they had committed a civil crime.[92]

As the war progressed, the French military came to believe that the nationalists were indoctrinating the population at large and using a wide network of informants to keep abreast of French military movements.[93] In response, the military developed a strategy of 'protection-commitment-supervision'. In order to 'protect' the civilian population, potentially dangerous groups such as nomadic tribes were herded into cantonment areas. The 'commitment' element involved forcibly securing the collaboration of a proportion of the Muslim population in order to counter the perceived intelligence superiority enjoyed by the nationalists. The third element, 'supervision', involved the close monitoring of civilians which in turn warranted closer cooperation between the army and the police.[94] Despite some internal opposition within the military, Algeria was gradually taken over by an autonomous military authority. In early 1957, police powers in Algiers were formally signed over to the military.

By this stage, the normative context had also changed. In the aftermath of the Wuillaume Report discussed above, the judicial atmosphere became more permissive and the use of torture came to be widely accepted within French circles in Algeria. This was facilitated by the widespread use of the 'ticking bomb' scenario. At the time, Father Delarue, an army chaplain, wrote that:

> Faced with a choice between two evils, either to cause temporary suffering to a bandit taken in the act who in any case deserves to die, or to leave numbers of innocent people to be massacred by this criminal's gang, when it could be destroyed as a result of his information, there can be no hesitation in choosing the lesser of the two evils, in an effective but not sadistic interrogation.[95]

In practice, 'protection-commitment-supervision' involved the use of torture in far more circumstances than Delarue's formulation suggested. As well as internment, 'protection' also involved torturing and killing non-combatants as a deterrent to others contemplating assisting the rebels. 'Commitment' involved building a complete picture of the nationalist movement: to that end, torture was employed to extract information about the rebels' chain of command,

[92] Jacques Soustelle, *Aimée et souffrante Algérie* (Paris: Plon, 1956), p. 43.
[93] Michel Biran, *Deuxième classe en Algérie* (Paris: Perspectives Socialistes, 1961), p. 33.
[94] Vidal-Naquet, *Torture: cancer of democracy*, pp. 42–4.
[95] Cited by Vidal-Naquet, *Torture: cancer of democracy*, p. 51.

leadership and training methods.[96] At the outset of the infamous 'battle of Algiers', General Massu prepared a note for distribution among the army which insisted that 'a *sine qua non* of our action in Algeria is that we should accept these methods heart and soul as necessary and morally justifiable'.[97] In other words, whereas torture was initially viewed and still justified as an exceptional measure, it had become a core tactic in pursuit of the strategic plan. Recall the dilemma that confronted Paul Teitgen, discussed earlier. After police powers were assigned to the military, Teitgen revealed that he was obliged to sign at least 24,000 confinement orders and that by his own reckoning at least 3,024 of those confined disappeared—victims of either torture or summary execution. Teitgen resigned in protest on 12 September 1957.[98]

According to Vidal-Naquet, the 'cancer' of torture spread still further, to the judiciary. On the rare occasion where members of the security services were brought before a court on charges of torture, either the cases were dismissed or derisory punishments were given. On one occasion, three policemen who admitted electrocuting three Algerian prisoners were given $15 fines. On another, three men who admitted torturing a Muslim woman to death were acquitted. A network of magistrates with close links to the security services developed. Such magistrates either turned a blind eye to instances of torture or tacitly authorized its use.[99]

The French experience in Algeria therefore provides a salient warning about the dangers of slippage and normalization. During the course of a war, torture 'infected' the police, army and judiciary until what had been at first an exceptional measure only rarely used had by 1957 become a routine part of interrogation. Paul Teitgen's experience offers a powerful example. At first, as I noted earlier, Teitgen refused to sanction the torture of even a ticking bomb terrorist. By the time he resigned in September 1957, however, over 3,000 'disappearances' had occurred as a result of arrests he had sanctioned. What is more, far from judicial oversight limiting and controlling torture, as in Dershowitz's expectation, the Algerian case suggests that the partial legalization endorsed by the Wuillaume Commission and the normative context it helped create contributed to the institutionalization and hence the spread of torture.

As I mentioned earlier, there is circumstantial evidence that slippage and normalization are occurring in the war on terror, and evidence from Israel, the UK and elsewhere suggests that in normative contexts wherein the judiciary is prepared to tolerate torture, its use spreads and the scale and gravity of abuse worsen. Moreover, as the Algerian case demonstrates only too well, there is a real danger that when torture is permitted or excused in the 'ticking bomb terrorist' scenario, it becomes easier to justify in cases that fall just short of this scenario: we can torture suspects who may know where the arms cache is;

[96] Roger Trinquier, *La Guerre moderne* (Paris: Table Ronde, 1961), pp. 7–121.

[97] Cited by Vidal-Naquet, *Torture: cancer of democracy*, p. 51.

[98] This case was recounted in detail by Peter Benenson, *Persecution* (Harmondsworth: Penguin, 1961), pp. 7–28.

[99] Vidal-Naquet, *Torture: cancer of democracy*, pp. 120–134.

where the plans are laid; what the training techniques were; how the rebels organize themselves. Over time, it becomes permissible to torture terrorist suspects simply because they *are* terrorist suspects. To paraphrase MacMaster, torture invariably goes hand in hand with the fatal corruption of the rule of law and ethical constraints on the conduct of war.[100]

The ticking bomb terrorist

Still we are left with the thorny question of the ticking bomb terrorist. What should interrogators and political leaders do when faced with this tragic choice in a situation *precisely* like the one set out in the scenario? Creating an exception to the prohibition on torture, or even permitting torturers to plead necessity in mitigation, is dangerous because it leads to slippage. If a torturer succeeds in a mitigation argument, this has the effect of changing the moral prohibition of torture by in effect creating an exception to the general prohibition. Once the exception becomes the norm, the possibility is opened for other types of mitigation pleas that fall short of the ticking bomb scenario. In its *Northern Ireland* ruling, the European Commission on Human Rights attempted to overcome this problem by drawing attention to the limits of mitigation. As the Commission put it:

> It is not difficult, to take a hypothetical situation, to imagine the extreme strain on a police officer who questions the prisoner about the location of a bomb which has been timed to explode in a public area within a very short while … any strain on the members of the security forces cannot justify the application on a prisoner of treatment amounting to a breach of Art. 3. On the other hand, as a matter of fact, the domestic authorities are likely to take into account the general situation as a mitigating circumstance in determining the sentence or other punishment to be imposed on the individual … for acts of ill-treatment … However, where a penalty has been so mitigated by the domestic judicial or disciplinary authorities, having due regard for the severity of the acts involved and *the necessity of preventing their repetition,* this fact cannot in itself be regarded as tolerance on the part of these authorities.[101]

This is a sophisticated argument because it insists that not only should authorities take the extreme circumstances into consideration, they should also be guided by the *necessity* of preventing further occurrences—and slippage—in making their judgements about the legality of torture in particular cases. The desire to mitigate must be balanced against the necessity of preventing slippage.

The value of this argument is that it captures Žižek's concern that by elevating the use of torture in ticking bomb cases to the status of a universal principle we risk tacitly legitimizing torture. In cases *exactly* like this, interrogators may be forced by 'the unavoidable brutal urgency of the moment' to

[100] MacMaster, 'Torture', p. 6.

[101] *Yearbook of the European Convention on Human Rights*, Vol. 22, 1979, Ireland vs. United Kingdom, pp. 764–6 (emphasis added).

torture the suspect. This is a desperate and tragic choice. The sense of tragedy is captured by the Commission's insistence that not only does the utilitarian justification fail to excuse the crime, but in any given case the weight of circumstance as a mitigating factor must be balanced against the requirement to prevent further violations of the law. Thus, when forced by the desperate urgency of the moment to torture a suspected ticking bomb terrorist, the interrogator cannot know the extent to which the circumstances will mitigate the punishment he will receive for the wrong he is about to commit. Of course, in genuinely 'urgent' situations, the interrogator will not have time to make such calculations.

The Commission's findings are dependent on a number of factors not normally present in contexts where torture is being administered. This in itself provides a valuable test. The Commission assumes that all suspects have access to the law, that cases of torture will be reported, and that the judiciary exercises effective and independent oversight. However, torture thrives when it is placed beyond the law: when basic rights such as habeas corpus are suspended; where judicial authorities and defence lawyers are unable to oversee imprisonment and interrogation; where the hierarchy of judiciary, executive and military/police authority becomes blurred. This is precisely what happened in Algeria; and, whatever the justification for particular measures, there are strong parallels between this and US policies such as 'extraordinary rendition', detention without trial, the denial of independent legal representation and denial of access to regular courts.[102] It is inescapable that such measures go hand in hand with normalized torture and encourage slippage. A useful first test in evaluating a specific ticking bomb terrorist case, therefore, is to ascertain the normative context in which it takes place. A reasonable balance between the exceptional circumstances and the necessity of prevention depends upon the preservation of a normative context hostile to torture. Where rights associated with detention begin to be eroded, the state concerned cannot reasonably claim to be fulfilling its moral and legal duty to prevent torture.

Beyond that, the Commission's recommendation forces the interrogator and those who authorize the use of torture to get 'dirty hands' in the fullest sense. As Walzer puts it, the doctrine of 'dirty hands' insists that political and military leaders 'may sometimes find themselves in situations where they cannot avoid acting immorally'.[103] By not stipulating the considerations that may be advanced in mitigation, and by insisting that the urge to mitigate be balanced against the necessity of preventing recurrence, the Commission's formula,

[102] For contrasting views on the legitimacy of these measures, see Derek Jinks, 'International human rights law and the war on terrorism', *Denver Journal of International Law and Policy* 31: 1, 2003, pp. 101–12; Laura A. Dickinson, 'Using legal process to fight terrorism: detentions, military commissions, international tribunals and the rule of law', *South California Law Review* 75: 2002, pp. 1407–92; Moeckli, 'The US Supreme Court's "enemy combatant decisions"'. It is worth noting that none of these works raises the question of whether these measures create a normative context that permits torture to thrive.

[103] Michael Walzer, *Arguing about war* (New Haven, CT: Yale University Press, 2004), pp. 45–6.

though crafted in legal terminology, provides a useful moral framework by introducing uncertainty. Those who torture terrorist suspects cannot know beforehand whether their actions will be tolerated or not. The decision of whether to do so depends on a wider balance of factors.

How are such judgments to be made? On the one hand, there is the case in hand. To what extent did the interrogator have grounds for reasonably believing the suspect to be a ticking bomb terrorist? The hypothetical case suggests near-certainty and this seems to be a reasonable expectation. Only if there are very good reasons to believe that the suspect knows when and where the bomb will explode can he be tortured. We also need to ask about the gravity of the threat. Are non-combatants at risk? How many? Can the risk be averted in any other way (such as evacuation)?[104] This, in a sense, is the proportionality criterion: is the threat sufficiently grave to create the desperate need to torture the suspect? These considerations need to be balanced against the *necessity* of preventing further recurrences of torture. Torturers may still be condemned, for instance, if there is a risk of setting a precedent. Alternatively, if the torturer does not consider himself guilty of a grave wrong or attempts to justify the act through act-utilitarian arguments, the need to prevent torture may override the mitigating circumstances in shaping the moral and legal response to the case. Similarly, the individual case needs to be situated within a wider context. Is the case under scrutiny part of a pattern or is it genuinely unique? Has a normative context conducive to torture been created? Is it copying similar earlier cases? Was the interrogator trained in torture techniques?

For all the reasons outlined above, we should avoid the temptation to permit the torture of the ticking bomb terrorist just as much as we should avoid the temptation to rule it out in all cases. Moral and legal uncertainty guards against slippage and normalization while not prejudging the outcome of individual cases. Instead, in each case the mitigating circumstances need to be balanced against the broader necessity of preventing torture. It is important that the torturer and those who authorize torture do not know in advance how their action will be morally and legally assessed. Such uncertainty forces them to accept dirty hands: to realize that their own society and the wider world may regard them as immoral and criminal for what they are about to do.

Conclusion

The 'ticking bomb terrorist' scenario is important not because it is a situation in which the US and its allies regularly find themselves as part of the war on terror, but because it is a rhetorical device used to justify torture more generally. Despite protestations to the contrary, it is reasonably clear that torture has become a core tactic in the war on terror. It is similarly clear that its use is not limited to the ticking bomb case. However, there can be little justification for it.

[104] I am grateful to Sara Davies for this point.

The prohibition on torture is a peremptory rule of international law. It is also contrary to the ethics of war because it violates the principle of non-combatant immunity. All prisoners are non-combatants. They may not be harmed.

The case for legitimizing torture in the war on terror is based on two tenets. First, via the ticking bomb case, it is argued that torturing terror suspects can save the lives of non-combatants. Second, some argue that by legitimizing torture and being honest about its practice, it can be more readily controlled and monitored, reducing the life-threatening danger to suspects. Such arguments are not new and are flawed in important respects. The historical record suggests that legitimizing torture normalizes it, making it more, not less, frequent. The US and its allies have clearly prioritized the acquisition of intelligence over the moral and legal constraints on violence. By doing so, they risk undermining their liberal agenda in the Middle East and elsewhere as they ally themselves with some of the world's most notorious human rights abusers in blocking moves to combat torture. Moreover, they risk undermining the prohibition on torture and, in turn, wider principles of discrimination and proportionality.