3. The Ticking Bomb Scenario as a Moral Scandal*

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I.

A *skandalon* is an insidious obstacle, a stumbling block. Here it is a '*ticking bomb*' known to have been triggered by a terrorist group in a densely populated area. Not just a tricky talking point, the obstacle becomes a hellish trap: tripping up on it stretches the safety wires of our moral *convictions* to the limit.

Considering the ticking bomb scenario means accepting a 'tragic choice' since there is no one inexorably right and just solution in terms of a consistent application of legal and moral values.

Let us, however, accept the challenge to lift the cover of the trap and examine the loaded question: 'What would you do? Would you resort to torture?' I shall consider the case as if I were the politician or a policeman, putting myself in their uncomfortable position, not maintaining the *lofty distance* of those who assert the inviolable nature of human rights, but assuming the viewpoint of the *politically responsible.* In so doing, I plunge into the abyss where, paradoxically, the very foundation of our moral order is to be found: not high moral principles but *Abgrund,* its murky depths, abomination, or that which is 'morally unthinkable'.[1]

What lies in the abyss is torture, a subject we would rather sidestep. 'It is dispiriting as well as shameful to have to turn our attention to this issue,' laments Jeremy Waldron.[2] But *torture*[3] has been put squarely on the agenda by the 9/11 attacks and

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1 B. Williams, 'A Critique of Utilitarianism', in J. J. C. Smart and B. Williams, *Utilitarianism: For and Against* (Cambridge, Cambridge University Press, 1973) 77-150, pp. 92-93. Williams is wrong, however, to exclude this category from moral considerations since it can highlight an event that, although logically conceivable had not been entertained, and although highly improbable, has actually taken place. It is just this *contingency* that is the main feature of a complex society: see N. Luhmann, 'Kontingenz als Eigenwert der modernen Gesellschaft', in N. Luhmann, *Beobachtungen der Moderne* (Opladen, Westdeutscher Verlag, 1992) 93-128 [English trans. *Observations on Modernity,* Stanford, Stanford University Press, 1998]. Clearly, then, morals cannot duck the ungrateful task of debating these intriguing albeit unique cases. Otherwise we would have to capitulate and admit that Luhmann, is right to maintain that basing an argument on values becomes untenable in the very instances where values are at stake, in those *tragic choices*. Rather than withdraw scandalized and powerless before the unthinkable, philosophers – and especially Kantian philosophers – should reflect on the *conditions for the possibility* of an adequate solution. N. Luhmann, *Gibt es in unserer Gesellschaft noch unverzichtbare Normen?* (Heidelberg, Müller, 1993), p. 20.

2 J. Waldron, 'Torture and Positive Law: Jurisprudence for the White House' *Columbia Law Review* 105 (2005): 1681-1750, p. 1683.

consequently the war on terrorism. One aspect of the wider debate is the ticking-bomb scenario. This essentially is the case in which the police have apprehended a terrorist who knows the whereabouts of a deadly bomb or unconventional weapon set to go off soon and likely to cause hundreds, thousands or even more casualties. The only way to extract information about the bomb's whereabouts is to torture the prisoner who otherwise refuses to collaborate. The question is: 'What would you do? Would you resort to torture?'

The 'absolutists', those who maintain that the ban on torture is an absolute principle to be upheld in all circumstances without exception, do not understand – and therefore object[4] – that the example given can vary widely and be portrayed deliberately in extreme terms so as to make decision-taking dire. The decision, indeed, appears obligatory, part of the very order of things created by the hypothetical scenario.[5] Yet such a catastrophe-invoking move is made necessary by the intractability of those who will tolerate no waiver, either legal or moral, of the absolute prohibition on torture.[6]

The question was first posed by Niklas Luhmann, in 1992, in a conference entitled: 'Do unrenounceable norms still exist in our society?',[7] as an exclusively theoretical issue. Luhmann set out to demonstrate that in our complex and functionally differentiated society underpinned by positive and contingent law,[8] unassailable norms no longer exist since the social conditions that made them possible no longer exist either. The existence of unchangeable, over-arching rules presupposes principles serving as universal criteria according to which all questions are settled. But *our*

3 For his definition, see: R. Marx, 'Folter: eine zulässige polizeiliche Präventionsmaßnahme?' <http://www.proasyl. info/texte/mappe/2004/91/16.pdf> (visited 11-05-2006), 5-9; S. Miller, 'Torture', in The Stanford Encyclopedia of Philosophy, Spring 2006, <http://plato.stanford. edu/archives/spr2006/entries/torture/> (visited 11-05-2006), 2-5.

4 D. Luban, 'Liberalism, Torture, and the Ticking Bomb', in K. J. Greenberg (ed.), *The Torture Debate in America* (New York, Cambridge University Press, 2006) 35-83, pp. 36 and 51: 'The ticking time-bomb scenario is an intellectual fraud.'

5 This is the case of the provocation launched by Luhmann*, Gibt es unverzichtbare Normen?,* p. 2. For this reason some authors try to solve the question on the grounds of the highly improbable and artificial nature of the case: see H. Shue, 'Torture', in S. Levinson (ed.), *Torture. A Collection* (Oxford, Oxford University Press, 2004) 47-60, p. 57. In this way, perhaps sustaining that the *hard cases* that can be tackled by morals must be much less *hard*, Shue holds: '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.' But the central issue here is that neither the cases are artificial or the ethics good, but the limits of deontological ethics. Trying to undermine the scenario by pointing out inconsistencies and improbable aspects creates a similar situation to when the sage points to the moon and the dunce looks at the pointing finger.

6 See Part I, Art. 2, para. 2 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: 'No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.'

7 Luhmann, *Gibt es unverzichtbare Normen?* pp. 1-2.

8 A situation that is not accepted by J. Waldron, 'Torture and Positive Law', pp. 1709-1713, who asks: 'Is nothing sacred?'

society has no centre from which similar principles emanate, nor are such principles embodied by a pre-eminent social class able to establish and impose rules and values congruous with its dominant position, and then ensure the constant validity of these rules whatever the consequences of their application.[9]

The same argument applies if the issue is shifted to the plane of what are claimed to be universal values (human dignity and human rights). At this level, the case of conflicting individual rights can lead to paradoxical situations[10] solvable only by balancing *objective* values and taking reasonable yet *arbitrary* decisions that then serve as precedents.[11] This paradox becomes acute in the case of (massive) human rights violation: 'norm-generating scandals'.[12] These are cases where the violation of human dignity is such that effective protection requires some violation of the dignity of the perpetrators.[13] The 'ticking bomb' scenario is a case in point.

Luhmann's challenge was theoretical in nature. His intention was to show that there are circumstances that, albeit hypothetical, though not completely absurd nor unlikely, can rock the raft of principles we take as unquestioned and unquestionable truths. Luhmann's example was meant to warn against the naive belief that the workings of a legal system, set up to judge right from wrong, can be founded and justified even when its claimed validity is grounded in values. But in *our* social reality the distinction between right and wrong has a much more flimsy basis, namely the contingency of legal decision-making that may be indifferent to moral judgement. If this is how our legal system works, then establishing a given value as the principle underpinning legal judgement is fraught with difficulties.[14]

Subsequently, however, the attacks in Madrid and London made Luhmann's provocation highly relevant to real-life situations at the beginning of the new millennium when the *ticking-bomb* scenario was no longer seen as implausible or unthinkable as its critics claimed.

9 Luhmann, *Gibt es unverzichtbare Normen?* pp. 8-16.

10 For an effective example, see Brugger's presentation in W. Brugger, D. Grimm, B. Schlink, 'Darf der Staat foltern?*'* – *Eine Podiumsdiskussion*. Humboldt Forum Recht, 4/2002, <http://www.humboldt-forum-recht.de/4-2002/Drucktext.html> (visited 10-03-2005), 17: the person who, in a situation of necessity defence, uses violence against the kidnapper of his daughter in order to find out where she is being held and risks death by suffocation, should desist on the arrival of the police since the police have the duty, as guardians of the kidnapper's dignity, to take action against the father of the victim. In fact Art. 1, para. 1, Grundgesetz reads: 'Human dignity is inviolable. Respecting and safeguarding human dignity is the duty of every power of the State.'

11 Luhmann, *Gibt es unverzichtbare Normen?* pp. 17-23.

12 Ibid. pp. 28, 30 and 31-32.

13 Ibid. pp. 27 and 30.

14 For a more in-depth reconstruction of the author's thought, see F. Belvisi, 'Niklas Luhmann e la teoria sistemica del diritto', in G. Zanetti (ed.), *Filosofi del diritto contemporanei* (Milan, Cortina, 1999) 221-245.

II.

Unlike Luhmann's challenge, the debate following the September 11th attacks focused on the practical issues at stake: Whether the action of security forces, soldiers and governments fighting against international terrorism, particularly Islamic terrorism, can be morally and/or legally justified or must be rejected as unlawful. Opinion is split by and large into three major positions:

1) the deontological position that upholds, without exception, the absolute moral and legal illegitimacy of torture,[15] often arguing this on the grounds of the principle of inviolable human dignity;[16]

2) the 'emergency' position of Alan Dershowiz who holds that torture should be legalized in exceptional circumstances and only after receiving authorization from a judge (the *torture warrant*), who would be the guarantor of the legitimacy of the request and act as an agent of control;[17]

3) the pragmatic position that recognizes the moral legitimacy of '*preventive interrogational torture*' practised in exceptional cases to save the lives of potential attack victims, but at the same time, advocates the need to maintain the ban on torture.[18]

1. The deontological postion

The first position is that of scholars who conceive morals as the rigorous application of principles irrespective of the consequences. Faced with the hypothetical ticking-bomb case, they consider neither the possibility of the bomb going off nor the political responsibility that encumbers such a decision.[19] Such scholars do not consider the scenario in which, following a terrorist outrage, a Minister of Internal Affairs or Chief of Police has to inform the public that despite the fact that a member of the terrorist group had been apprehended, no information had been obtained during questioning on the whereabouts of the bomb, and that before the terrorist's refusal to

15 See, for example, Ch. W. Tindale, 'Tragic Choices: Reaffirming Absolutes in the Torture Debate' *International Journal of Applied Philosophy* 19 (2005): 209-222.

16 Waldron provides an exemplary case: J. Waldron, 'Torture and Positive Law', pp. 1726-1728.

17 A. Dershowitz, *Why Terrorism Works* (New Haven, Yale University Press, 2002), chap. 4. See also A. Dershowitz, 'Tortured Reasoning', in S. Levinson (ed.), *Torture* 257-280. For similar critiques, see: O. Gross, 'Are Torture Warrants Warranted?' *Minnesota Law Review* 88 (2004): 1481-1555, pp. 1534-1553; R. A. Posner, 'Torture, Terrorism, and Interrogation'. in S. Levinson (ed.), *Torture* 291-298, pp. 295-298; R. A. Posner, *Not a Suicide Pact*. (Oxford, Oxford University Press, 2006) pp. 35-38; B. A. Ackerman, *Before the Next Attack* (New Haven , CT, Yale University Press, 2006), pp. 108-109; Miller, 'Torture', pp. 15-16.

18 See O. Gross, 'Torture Warrants', pp. 1490-1497 and 1500-1511; O. Gross, 'The Prohibition on Torture and the Limits of the Law' in Levinson, *Torture*, pp. 231-232; Miller, 'Torture', pp. 7-11; Posner, *Not a Suicide Pact*, pp. 12, 38, 77-87 and 152-158.

19 An aspect also underlined by Gross, 'Prohibition on Torture', p. 238.

collaborate, the police had declined to resort to torture because this would have been a grave affront to the prisoner's dignity as a human being. In the light of a similar situation, it is difficult to give meaning to the statement that 'we aspire to… a State that pursues its purposes (even its most urgent purposes) and secures its citizens (even its most endangered citizens) honorably and without recourse to brutality and terror'.[20] It might indeed imply that the State is in part responsible for the victims it did not protect.

The ruling of the Israeli Supreme Court stands out as an exception on this 'absolutist' scene. In 1999, examining a case of violent interrogations of alleged Palestinian terrorists by secret service agents, the Court while admitting that 'a democratic society… is prepared to accept that an interrogation may infringe upon the human dignity and liberty of a suspect,' nonetheless upheld the absolute ban on torture or any other violent means of interrogation.[21]

This seemingly 'absolutist' stance of the Israeli Court is not simply grounded in universal values and the Kantian obligation to respect moral law in compliance with the deontological conception of morals. In their concluding remarks the judges affirmed that 'deciding these petitions weighed heavily on this Court… the possibility that this decision will hamper the ability [of the State] to deal properly with terrorists and terrorism disturbs us. *We are, however, judges. We must decide according to the law*… [and] act according to our purest conscience'.[22]

Such *self restraint* sums up the specificity of a Constitutional Court's 'non-political' function,[23] in the sense that even when faced with the problem of the State having to guarantee public security, and thus with the issue of rights versus security, the judges' decisions must uphold rights in accordance with the principle of judicial review. In other words, Courts cannot be asked to put themselves in the place of the politician or public officer who, by his very function, has to consider the aims and consequences of his actions. This is something that may be asked of philosophers.[24] For philosophers, a deontological concept of morals may present as one of the possible options. For judges, however, respect for the law and the constitution is an obligation sanctioned by the principle of the division of powers.

20 J. Waldron, 'Torture and Positive Law', p. 1750. In this, hopefully rare instance, the politician and police chief could be – rightly – held responsible for the death and suffering of innocent victims. This is also the view of J. B. Elshtain, 'Reflection on the Problem of 'Dirty Hands'', in S. Levinson (ed.), *Torture* 77-89, p. 83.

21 *Public Committee against Torture in Israel* v. *The State of Israel* HCJ 5100/94. In Judgments of the Israel Supreme Court: Fighting Terrorism within the Law, <http://www.mfa.govil/MFA/Government/Law/Legal+Issues+and+Rulings/Fighting+Terrorism+within+the+Law+2-Jan-2005.htm> (visited 20-05-2006) 23-58, pp. 42-48.

22 HCJ 5100/94 (2005), 55 (italics added).

23 G. Zagrebelsky, *Principî e voti* (Turin, Einaudi, 2005), pp. 35-40.

24 For a sound example, see M. Walzer, 'Political Action: The Problem of Dirty Hands', *Philosophy and Public Affairs* 2 (1973): 60-80, partially reprinted in Levinson,*Torture*.

Turning to the view of Dershowiz, this is admittedly consistent with the idea of *rule of law* whereby all State organs must function in compliance with the law. However, legalising torture, albeit in specific cases, can be opposed on at least three different counts.

a) The *ticking bomb* scenario is posited as an *exceptional* instance for which legitimate recourse to torture might be possible, on the condition that it remain within the realms of an exception. However, in no legal order can exception – which is literally '*extra ordinem*' – be foreseen in terms of a specific event and regulated accordingly.[25] An exception goes against the very nature of the law, which aims to provide rules governing recurrent situations, not rare occurrences. According to Posner, in the case of emergencies it is appropriate to maintain 'the distinction between authority and power'.[26] Exceptional situations must therefore be dealt with not following the criteria and procedures of legitimate authority, but according to the power. In these cases something must be done not because it is required by law, but simply through sheer power, because of someone's 'raw ability' to do it.[27]

Making rules for specific exceptions is an oxymoron and would inevitably undermine the coherence of the legal system and the guarantees this provides, with grave consequences for fundamental rights.

b) Some considerations in the theory of institutions and organizations also lead to the rejection of legalized torture on account of the real likelihood of its *escalation*.

Institutions and organizations trigger what I call adaptive behaviour,[28] i.e., behaviour that is not the result of truly autonomous individual decision, but action conditioned by the particular environment or organization in which the individual operates. Adaptive behaviour is not born simply out of a desire to avoid clashing with other members of the institution, rather it is induced by coercive influences or by what Emile Durkheim calls *contrainte sociale.*[29] Adaptive behaviour develops when, for example, the members of an organization pursue the same aims, carry out the same tasks, hold by the same rules and follow the same procedures – in a word –

25 The recent German law on flight security (*Luftsicherheitsgesetz*) of 11 January 2005 goes in this direction. In the wake of the public outcry caused by the September 11th attacks, Art. 14, para. 3 of the law provides for the use of military airplanes to shoot down hijacked passenger aircraft that have been aimed to crash against targets on land. With its ruling BvR 357/05 of 15 February 2006, the German Federal Constitutional Court declared the law illegal on the grounds that it violated the principle of human dignity and the right to life of the passengers and crew.

26 Posner, *Not a Suicide Pact*, p. 38.

27 *Ibid*. p. 14: This according to his 'law of necessity' (pp. 12 and 158).

28 The term derives from the concept of 'adaptive preference' coined by J. Elster, *Sour grapes: Studies in the Subversion of Rationality* (Cambridge, Cambridge University Press, 1983), pp. 109-124.

29 E. Durkheim, *The Rules of Sociological Method*, ed. by S. Lukes (New York, Free Press, 1982).

share the same institutional 'culture.' Opposing that culture, innovating or removing certain practices and behaviours becomes extremely difficult.[30]

If we transfer these general considerations to specific institutions and organizations like the military, security forces and police, it becomes clear how real the risk is of violence becoming widely practised and torture an interrogational option were it to be legalized, even if only for exceptional cases.[31] The logic is the same: *By its very nature* the organization tends to metabolize the exception, transform it into a practical possibility, *institutionalize* a practice, and consider it a *routinely* available resource. In this sense, one can truly speak – as Henry Shue does – of 'torture's metastatic tendency'.[32] Furthermore, even if the practice of torture did not directly involve all the members of a given organization, becoming a standardized, and thereby tolerated, practice, the adaptive behaviour mechanism means that the torture would become accepted out of a sense of solidarity by those who would not themselves be willing to practise torture or who would resort to torture only in cases sanctioned by law.[33]

From a normative point of view, these theoretical considerations could underpin a dual weakness: that of not being based on principles, but on generalizations that lead to the formulation of purely inductive argument; and, in consequence, that of being instrumental and purpose-driven (restricting a practice) rather than geared to upholding the intrinsic value of the principle to be preserved (the absolute prohibition of torture). On this last point, mine is certainly not a 'principled' defence of the absolute ban on torture. With regard to the first objection, I believe that the legal argument cannot be divorced from an understanding of the particular situation for which the solutions must be *adequate.*[34]

c) Even conceptual considerations of principle are against legalising torture on an exceptional-case basis.

Torture is the antithesis of everything a liberal-democratic regime stands for, since torture strikes at the very core of the citizen (as a person) and his capacity for independent decision-making,[35] a component of the Kantian concept of human dignity. Hence the absolute prohibition on torture is the strongest form of protection and 'the only realistic barrier against governmental abuse of powers in the context of interrogational torture'.[36] Furthermore, the torture prohibition is a powerful factor

30 See Miller, 'Torture' (2006), pp. 12-14.
31 See also Posner, 'Torture, Terrorism, and Interrogation', p. 296.
32 Shue, 'Torture', p. 58.
33 See also Miller, 'Torture', p. 13.
34 On this question, see F. Belvisi, 'Una riflessione normativa per la società multiculturale' *Diritto, immigrazione e cittadinanza* 5 (2003): 28-47, pp. 28-34. See also G. Zanetti, *Introduzione al pensiero normativo*.(Reggio Emilia, Diabasis, 2004), in particular Ch. 2.
35 M. Ignatieff, *The Lesser Evil. Political Ethics in an Age of Terror*. (Princeton, Princeton University Press, 2004), pp. 136 and 143; J. Ph. Reemtsma, *Folter im Rechtsstaat?* (Hamburg, Hamburger Edition, 2005), pp. 119-120 and 124-126.
36 Gross, 'Prohibition on Torture', p. 236.

contributing to the political legitimization of the democratic system and a cornerstone of the legal foundation on which our society rests.

These are important considerations amply dealt with by several authors and contributors to this volume, and do not require further explanation here. More pertinent to the argument is the *logic* underpinning banning torture on the grounds of an absolute principle. It is one thing to conceive the ban on torture as an absolute principle (a practical aspect); it is another to recognize the need to maintain the ban on torture expressed in absolute terms (a semantic aspect). In this case, a distinction must be made between the empirical validity of the principle (the practical aspect) and its formulation (the semantic aspect). As a principle – similar to what happens for other so called universal principles (e.g., human dignity that in Germany is considered an absolute principle by a large part of public law scholars as well as by the German Federal Constitutional Court),[37] the ban on torture must manifest the claim to absolute validity if it is not to fall into a sort of performative fallacy.[38] As a valid norm, however, it can be applicable only taking the circumstances into consideration and thus, envisaging possible exceptions. In criminal law this is the *ratio* for the mitigating circumstances of self-defence and necessity.

The absolute, uncompromising wording of Art 2 of the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment flags its very weakness, demonstrating in a nutshell the very reason for its great fragility: the easy and obvious facility with which such prohibitions may be disregarded. What indeed is more banally human than to inflict 'severe pain or suffering, whether physical or mental… on a person'?

As a *petition* of principle therefore, the ban on torture is a 'formula that contains its own disappointment'.[39] Just as freedom cannot be unconditional or equality absolute, nor can the torture ban. Compared to these principles, the real questions arise the moment the principles are disregarded for justified motives supported by sustainable arguments. It becomes evident that principles undergo a strange metamorphosis as soon as they are applied. From a universal 'basic quality' they mutate into a mouldable 'scalar quality'.[40]

Circumstances do the job of showing up the weakness of the absolute principle. As Justice Ben-Porat ruled: 'There simply are cases in which those who are at the helm of the State and bear responsibility for its survival and security, regard certain

37 For a critique, see R. Alexy, *Theorie der Grundrechte*. (Frankfurt a. M., Suhrkamp, 1986), pp. 94-97.

38 I refer to the concept of R. Alexy, *Begriff und Geltung des Rechts* (Freiburg, Alber, 1992), pp. 64-70: To avoid an error in the construction of the concept, just as those who make the law must assert that such law is just (*richtig*), similarly, those who establish a principle must assert the absolute validity of such principle.

39 N. Luhmann, 'Gesellschaftstheorie und Normentheorie', in U. Fazis and J. C. Nett (eds.), *Gesellschaftstheorie und Normentheorie* (Basel, Karger Libri, 1993), pp. 15-29, at 21.

40 For the distinction between 'basic quality' and 'scalar quality' see G. Zanetti, 'Patrick Lee on Human Dignity and Equality'. Paper presented at the conference on *The Philosophical Foundations of Human Dignity* (Washington DC, 8/10-03-2007).

deviations from the law for the sake of protecting the security of the State, as an unavoidable necessity'.[41] Moreover, this sense of duty not only exists among those accountable for a country's security, it is indeed demanded of them by their citizens.[42]

An absolute torture ban is something we all immediately understand and applaud as long as *we* are not directly concerned. It is easy to see things in terms of butchers on the one hand, and Jews and persecuted minorities on the other, or people fighting for independence, the victims of authoritarian regimes, prisoners of war etc. Yet the moment we are in the front line faced with defending ourselves from a looming threat, the torture taboo is quickly set aside and its practice suddenly becomes an available, and feasible, resource, calling into question a prohibition that up to that point had seemed obvious. The circumstance triggering this possibility today has been terrorism.

3. The pragmatic position

Finally, the third position – the pragmatic approach. This approach justifies the moral and political legitimacy of torture as a last resort, to be inflicted in exceptional cases in order to acquire information to prevent a terrorist attack, but opposes, however, legitimising torture.

The argument is clear: While the legal ban on torture must be upheld, in exceptional cases, persons with public security responsibilities will find themselves in situations requiring them to break the law, committing 'official disobedience'[43] by using force to oblige a terrorist suspect to reveal information. Although this illegal action may be considered morally appropriate, and the torture carried out to be in the officer's line of duty, it can only be justified in law *ex post*, by means of due process. Oren Gross and Richard Posner agree that this is the best way to deal with a grave national threat: realistically upholding the ban on torture and taking effective measures to censure against the risk of this odious practice spreading. In their words: 'Civil disobedience can be a duty of government in extreme circumstances to its citizens, even if not a right.'[44]

41 Referred to by O. Gross, 'Prohibition on Torture', p. 237.

42 Ibid. p. 236: Gross notes that the opinion whereby 'torture… may have to be resorted to in certain circumstances… is shared by many segments of the population. '

43 *Ibid*. pp. 239-248; Gross, 'Torture Warrants', pp. 1487-1488 and 1519-1534; Posner, *Not a Suicide Pact*, pp. 85-87. The original idea was voiced by Shue, 'Torture', p. 58.

44 Posner, *Not a Suicide Pact*, p. 14. See also Gross, 'The Prohibition on Torture', p. 249. Gross states: 'most of us believe that most, if not all, government agents, when faced with a genuinely catastrophic case, are likely to resort to whatever means they can wield – including preventive interrogational torture … And most of us hope they will do so.'

By and large I agree with this last position since it arrives at a nuanced solution of the questions posed by the ticking bomb scenario and deals appropriately with the relations existing between the parties involved. In fact the key relation is not that which sets victim against butcher in a torture scenario. Clearly, however, if the apprehended terrorist is seen as a defenceless victim at the mercy of cruel police officers, no act of torture can ever be morally justified. In the ticking bomb case, however, the terrorist is no longer a defenceless victim, but a criminal whose failure to collaborate is tantamount to aiding and abetting a murderous attack by other members of his terrorist group. On this basis, the prisoner has it in his power to avoid torture, or end it, by collaborating.[45]

When viewed from this perspective, a third party appears on the scene for the first time: the citizens targeted by the terrorist attack. This leads intuitively to the moral justification of torture.[46] It seems evident to me that the dignity and life of (many) innocent people are of greater value than the dignity of one guilty person.[47]

Supporting this, is a series of factors that have not been taken into account in the current debate, but come into play in a ticking-bomb scenario. Firstly, the preventive strategies with which our welfare State governs our complex 'risk society'.[48] The State's fundamental task is to ensure the *security* of its citizens and do so in a much less abstract manner than conceived by any modern 19th century State of law.[49] It is undoubtedly true – as Oliver Lepsius argues – that the transformation of the democratic constitutional State into a preventative State entails risks in terms of the safeguard of human rights[50] with the 'de-individualization of freedom,' whereby 'individual rights are replaced by collective interests' of security and 'subject to society's

45 R. Trapp, 'Wirklich 'Folter' oder nicht vielmehr selbstverschuldete Rettungsbefragung?' In W. Lenzen (ed.), *Ist Folter erlaubt?* (Paderborn, Mentis, 2006), pp. 106-108: he redefines the torture practised in the ticking bomb case as 'interrogation geared to safeguard attributable to the criminal' (selbstverschuldete finale Rettungsbefragung).

46 See: F. Allhoff, 'A Defense of Torture' *International Journal of Applied Philosophy* 19 (2005): 243-264; Miller, 'Torture', pp. 8-9; U. Steinhoff, 'Warum Foltern manchmal moralisch erlaub, ihre Institutionalisierung durch Folterbefehle aber moralisch unzulässig ist', in W. Lenzen (ed.), *Ist Folter erlaubt?*

47 This intuitive concept is not shared either by the case law of the German Federal Constitutional Court which holds that human dignity is an imponderable principle, or by those who uphold the doctrine of 'dignity as essential human feature': On this point, see H. Hofmann, 'Die versprochene Menschenwürde', Humboldt Forum Recht, 8, 1996, <http://www.rewi.hu-berlin.de/online/hfr/8-1996/Drucktext.html>, pp. 3-6.

48 See E. Denninger, *Diritti dell'uomo e Legge fondamentale*, ed. by C. Amirante (Turin, Giappichelli, 1998) Part 1 and Appendix. For a social and legal approach to this issue, see T. Pitch, *La società della prevenzione* (Rome, Carocci, 2006).

49 U. Volkmann, 'Sicherheit und Risiko als Probleme des Rechtsstaates' *Juristenzeitung* 59 (2004): 696-703.

50 E. Denninger, *Diritti dell'uomo e Legge fondamentale*, p. 86.

purposes'.[51] On the other hand, 'for some time now, citizens no longer expect the State just to safeguard their freedom; they also expect it to guarantee their security'.[52] In this way security 'becomes, in a very general sense, a fundamental right that can be jeopardized by the failure of a State to take action, a circumstance that could be brought by citizens before a court of law'.[53] It must be recognized therefore that the role of the State does not stop at respecting and guaranteeing human rights but includes (active) protection of its citizens. Guaranteeing the rights and ensuring security are mutually complementary and constitute a single, fundamental two-pronged task of the State.

This argument in no way intends to underestimate the concerns expressed regarding the risk of a democratic State taking a degenerate, authoritarian turn,[54] as testified by current US events. It does draw attention, however, to the important fact that the academic world and ordinary citizens may be at odds and have different perceptions of social phenomena. These perceptions cannot be preferred unilaterally by critical reflection, but must be considered together as elements of the same social reality. In this way, following the concept that 'the true meaning of social practices is their social meaning',[55] the sense of social phenomena is (also) given by their social perception, i.e., by public opinion's perception of such phenomena.

There is the risk that terrorism, considered as a 'danger brought on by an external enemy… from which the community… is obliged to defend itself against,' may be a figment of popular prejudice, the latest version of that 'summary political dialectic… already pointed out by Carl Schmitt in the reductive dichotomy between friend and enemy'.[56] However, the widespread and not just popular perception of the terrorist as a public enemy, cast in the *existentialist* mould described by Schmitt,[57] is also extremely relevant to sustaining a normative argument that attempts to tackle the issue in a *socially adequate* manner. For this perception, not only creates in the potential victims a sentiment of extreme injustice, but also introduces an important element to the debate: fear, or in other words, the need for security. This is a central component of the terrorism phenomenon that obviously cannot be dismissed by, for example, rational argument or even appeal to the population to show 'courage'.[58]

51 O. Lepsius, 'Liberty, Security, and Terrorism' *German Law Journal* 5 (2004): 435-460, pp. 454-459.

52 E. Denninger, *Diritti dell'uomo e Legge fondamentale*, p. 2.

53 U. Volkmann, 'Sicherheit und Risiko als Probleme des Rechtsstaates', p. 700.

54 Concerns these expressed by authors like: J. Waldron, 'Security and Liberty' *Journal of Political Philosophy* 11 (2003): 191-210; B. A. Ackerman, *Before the Next Attack*; R. Dworkin, *Is Democracy Possible Here?* (Princeton, Princeton University Press, 2006) Ch. 2.

55 J. Raz, *Ethics in the Public Domain.* (Oxford, Clarendon Press, 1995), p. 186.

56 F. Rimoli, 'Più sicuri o più liberi?' in A. Giannelli, and M. P. Paternò (eds.), *Tortura di Stato* (Rome, Carocci, 2004), p. 128.

57 C. Schmitt, *Le categorie del 'politico'* (Bologna, il Mulino, 1972), pp. 108-111 [English trans., *The Concept of the Political* (New Brunswick, NJ: Rutgers University Press, 1976).]

58 See: Waldron, 'Security and Liberty', p. 194; E. Scarry, 'Five Errors in the Reasoning of Alan Dershowitz', in Levinson, *Torture*, pp. 281-290 and 282-283; Dworkin, Is *Democracy Possible Here?* pp. 50-51.

It is in this real-life context that the State is expected by broad sections of society to produce effective measures that will safeguard its citizens. And it is just these real-life contexts and the social and psychological circumstances imposed by terrorism that have made lifting the torture taboo even thinkable.[59] In a situation where there can be no appeal to human solidarity for terrorists, where one's existence is at stake, the instinct for survival becomes paramount and the (quality of) life of the other person (the terrorist) is of little count. In fact the traditional consensus against torture crumbles swiftly before a scenario in which the human dignity of the terrorist/enemy is all there is preventing the safeguarding of innocent lives,[60] with whom moreover the ordinary citizen can immediately identify.

Faced with the fatal question: 'Would you torture him?' Jan Philipp Reemtsma has a clear answer: 'Yes, I would inflict suffering on this man until he reveals where the bomb has been placed. In any case, however, the limit of my actions would not be dictated by any compassion for this person but by the disgust that sooner or later I would have for my own behaviour. What I did, I would do without considering the criminal liability of my actions… In the end, however, the deciding factor will be not so much what suffering we inflict upon another person, but what we expect of ourselves,' because we are what we do and we are judged by our actions and in the light of the values by which we abide.[61]

This is all very true, but it is valid in a reflexive way. Indeed, we must bear in mind that as the circumstances in which the potential torturer finds him/herself demand that action be taken, they also concur to justifying whatever action is taken to acquire urgently needed information that would enable a bomb to be defused and human lives saved. In such circumstances, not only does our threshold of disgust for ourselves rize several notches but our very *reason for action*, our duty to save human lives turns an odious, immoral act like torture into a moral one.

59 See F. Rimoli, 'Più sicuri o più liberi?' pp. 122-125.

60 M. Herdegen, Art. 1, Abs. 1 GG, in Th. Maunz, G. Dürig et al., *Grundgesetz Kommentar* (Munich, Beck, 2003), rn. 45. For Trapp, 'Wirklich "Folter"?' p. 104, resolving the ticking bomb scenario by reiterating the absolute ban on torture would lead to 'ethically scandalous consequences.'

61 Reemtsma, *Folter im Rechtsstaat?* pp. 122-123.