Introduction

Tony Ward, Gerry Johnstone and Bev Clucas

In November 2007 a conference was held at the University of Hull to discuss the permissibility of torture. The very fact that such a conference should seem worth holding is symptomatic, as Massimo La Torre remarks in his chapter, of a significant shift in the terms of political and philosophical debate since 2001. The chapters that follow are based on papers presented at that conference.

It should be said at once that none of the contributors to this book disputes that torture, in the great majority of instances in which it is actually practiced, is morally abhorrent. But some our contributors disagree passionately on questions such as the following:

- Are there *some* circumstances, however rare, in which torture is morally permissible or even required?
- If so, should the legal prohibition on torture be subject to defences which cover such exceptional circumstances?
- Should government agencies prepare their officials to respond to such circumstances?
- What are the terms of acceptable public discourse about the circumstances in which torture is permissible?

A. The ethics of exceptional cases

The case which best illustrates these questions is, perhaps, one to which Uwe Steinhoff refers in his chapter. On 27 September 2002, the 11-year-old son of a senior German bank executive was kidnapped and a million Euro ransom was demanded for his release. Three days later, a law student called Magnus Gaefgen was arrested after collecting the ransom. Under questioning he would not say where the boy was or whether he was alive. The day after the arrest, Wolfgang Daschner, the senior police officer leading the investigation, authorized his officers, in writing, to extract information 'by means of the infliction of pain, under medical supervision and subject to prior warning.'[1] Gaefgen was duly warned what was in store for him if he continued to withhold information. According to Gaefgen, he was told 'that a spe-

1 F. Jessberger, 'Bad Torture – Good Torture? What International Criminal Lawyers May Learn from the Recent Trial of Police Officers in Germany' *Journal of International Criminal Justice* 3 (2005): 1059-73, p. 1061; P. Finn, 'Police Torture Threat Sparks Painful Debate in Germany' *Washington Post* 8 March 2003.

cialist was being flown by helicopter to Frankfurt who "could inflict on me pain of a sort I had never before experienced".'[2] Whatever the exact words used, arrangements really were made for a helicopter to bring a police martial arts trainer[3] who 'knew the areas of the body that are particularly sensitive to pain and [could] purposefully attack those areas',[4] to Frankfurt. In the event, the threat was sufficient to induce Gaefgen to admit that the child was dead and reveal the whereabouts of the body.

Gaefgen was convicted of abduction and murder and sentenced to life imprisonment. The officer who threatened him was convicted of coercion (*Nötingung)* and Daschner of instructing a subordinate to commit a criminal offence *(Verleitung eines Untergebenen zu einer Straftat).* The Regional Court rejected the defences of self-defence or defence of another (*Nothilfe*) and justificatory emergency (*rechtfertigender Notstand*).[5] To allow either defence on the facts of the case would infringe an absolute constitutional prohibition on violations of human dignity:

> Respect for human dignity is the basis of this state, which is based on the rule of law. The framers of the Constitution have deliberately put such notion at the outset of the Constitution. In contrast, the right to life and to physical inviolability is only laid down in Article 2 paragraph 2 of the *Grundgesetz*. The motivation behind that lies in the history of this state. Documents relating to the origin of the German Federal Republic make it absolutely clear that the members of the Parliamentary Council had very much in mind the cruelties of the National Socialist regime. They pursued the fundamental purpose of preventing anything similar from recurring and clearly to bar any such temptation through the drafting of the *Grundgesetz*. The human being was not to be treated for the second time as somebody having information that the state would wring out of him, even if for the purpose of serving justice.[6]

One aspect of the 'cruelties' to which the Court refers is discussed by Alison O'Donnell and her colleagues in Chapter 9 – and the unimaginable pain inflicted, for example, on concentration camp inmates in the course of medical experiments would clearly constitute torture under the legal definition discussed by Tsvetana Kamenova in Chapter 5. But do these contingent historical circumstances afford a basis for a *morally* absolute prohibition of torture at all times and in all circumstances? The court stopped short of that conclusion, acknowledging that there were 'theoretical borderline cases' which the facts of the case – where the police had not, in the court's view, exhausted all options short of torture – did not require it to decide. Uwe Steinhoff argues in Chapter 2 that self defence or the defence of others

2 J. Hooper, 'Germans Wrestle with Rights and Wrongs of Torture', *Guardian* 27 February 2003.
3 Finn, 'Police Torture Threat', p. A19.
4 Regional Court (*Landgericht)* of Frankfurt am Main, 'Decision of 20 December 2004. *Daschner Wolfgang and E.* Case', excerpts translated as 'Respect for Human Dignity in Today's Germany' *Journal of International Criminal Justice* 4 (2006): 862-5.
5 Jessberger, 'Bad Torture – Good Torture?', p. 1064.
6 Regional Court Decision, p. 863 (paras. 23-4).

provides both a moral and a legal justification for torture in cases like Daschner's, although for reasons that he has stated more fully elsewhere,[7] he opposes any institutionalization of torture or training of torturers. Hauke Brunkhorst (Chapter 4), by contrast, insists that the legal, as distinct from the moral, prohibition on torture must remain '*notstandfest'* – firm whatever the emergency.

Though Daschner and his colleague were convicted, the court found there were 'massive mitigating circumstances' and imposed only nominal penalties (reprimands and suspended fines).[8] Was this simply a merciful response to two people who had acted wrongly under overwhelming stress? Or was the court, as Francesco Belvisi's analysis (Chapter 3), might suggest, conscious of the difference between its own position as the guardian of the law and that of a state official who might have to answer to the public or to the victim's family? Belvisi would maintain the absolute legal prohibition against torture yet endorse torture as morally right in extreme cases – a sort of civil disobedience by the state against its own laws.[9] Hauke Brunkhorst takes a somewhat similar position, but while Belvisi thinks it is the role of the philosopher to consider what a state official should do in these extreme circumstances, Brunkhorst leaves the decision to the individual conscience of the official.

In a contribution to the conference which is not included here because it has been published elsewhere,[10] Michael Moore put forward a different defence of Daschner: that even if torture was absolutely wrong, it was not necessarily wrong to *intend* to torture. Intending to torture, or failing to prevent torture, or preventing others from preventing torture (among other examples) were, he suggested, easier to justify on consequentialist grounds than torture itself. Moore's major contribution to the debate on torture, however, remains his article 'Torture and the Balance of Evils' first published in 1989.[11] Here he argues that although torture is *prima facie* always wrong, it may sometimes be justified on grounds analogous to self-defence, or even in very extreme cases where that analogy (always a debateable one – see the chapters by La Torre and Steinhoff) clearly does not apply. As he put it at the Hull conference: 'If I can locate and defuse a nuclear device at 42nd Street only by torturing the innocent child of the terrorist who planted it there, I torture.'[12]

7 U. Steinhoff, 'Torture – The Case for Dirty Harry and against Alan Dershowitz', *Journal of Applied Philosophy* 23 (2007): 337-353

8 Regional Court Decision, p. 864; Jessberger, 'Bad Torture – Good Torture?', p. 1065.

9 Cf. H. Shue, 'Torture', *Philosophy and Public Affairs* 7 (1978): 124-43, p. 143.

10 M. S. Moore, 'Patrolling the Boundaries of Consequentialist Justifications: The Scope of Agent-relative Restrictions', *Law and Philosophy* 27 (2007): 35-96.

11 M. S. Moore, 'Torture and the Balance of Evils' *Israel Law Review* 23 (1989): 280-344, revised and reprinted as chapter 17 of Moore, *Placing Blame: A General Theory of the Criminal Law* (Oxford, Oxford University Press, 1997). Professor Moore kindly suggested that we reprint the article again in this volume, but in view of its length relative to the other contributions we decided not to include it.

12 Moore, 'Patrolling the Boundaries', p. 44.

Moore's article remains a classic illustration of the philosophical dilemma posed by torture. A simple consequentialist approach makes torture seem too easy to justify. On the other hand, the deontologist who insists that torture is absolutely impermissible will always be faced with more and more extravagant examples – like Moore's 42nd St. bomb or the imaginative scenarios in Uwe Steinhoff's chapter – in an attempt to force her to admit that torture will *sometimes* be justified. Once that concession is made, 'any prohibition on torture faces significant dialectical pressure toward balancing tests and the unwelcome consequentialist conclusion that interrogational torture can be justified whenever the expected benefits outweigh the expected costs.'[13]

Moore's own attempt to resolve this dilemma appeals to what he calls 'threshold deontology'.[14] Otherwise absolute moral rules like 'don't torture the innocent' give way at some – unspecifiable[15] – point where the consequences of adhering to them become overwhelmingly terrible. Rather than seek to give legal effect to this view, Moore argues for 'acoustic separation'.[16] If the aim is to ensure that officials torture only in the extremely rare case where it is justi-fiable to avert catastrophe, the best way to achieve it may be to prohibit *all* torture (or, as Moore advocates, all torture of 'the innocent')[17] and assume that officials will break the law when the threshold of horrendous consequences is reached. Such cases can then be dealt with by an exercise of clemency. Again this is a possible interpretation of the Daschner decision – that the exercise of clemency was based on a secret rule that people like Gaefgen *should* be tortured, a rule that could not be publicly announced for fear that it would encourage terror in cases where it was *not* appropriate. Such an interpretation raises troubling questions: as the originator of the 'acoustic separation' theory acknowledges, 'the sight of law tainted with duplicity and concealment is not pretty'.[18]

Whatever the merits of his solution, the way Moore poses the problem takes us to the heart of the debate. To La Torre's argument (Chapter 1) that a rule authorizing

13 D. Luban, 'Unthinking the Ticking Bomb', *Georgetown Law Faculty Working Papers* (July 2008), available at: <http://lsr.nellco.org/georgetown/fwps/papers/68/> (accessed 21 August 2008), p. 25. La Torre, Ch.1 below, gives examples of this dialectic. Steinhoff's argument in Ch. 2, however, is deontological rather than consequentialist.

14 Moore, 'Torture and the Balance of Evils', pp. 327-32.

15 Ibid., p. 332. For an argument that this unspecifiability renders Moore's position untenable, see L. Alexander, 'Deontology at the Threshold', *San Diego Law Review* 37 (2000): 893-912.

16 Moore, 'Torture and the Balance of Evils', p. 337. The phrase is from M. Dan-Cohen, 'Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law', *Harvard Law Review* 97 (1984): 625-77.

17 There is clearly a problem in reconciling the idea of 'guilty' torture victims with the presumption of innocence – see Marina Lalatta Costerbosa, Chapter 8 below – though advocates of defensive torture could argue that it no more infringes the presumption than does self-defensive killing.

18 Dan-Cohen, 'Decision Rules', p. 673.

torture is not universalizable, because no-one can accept being subjected to treatment the very nature which is to be unacceptable, an ally of Moore can respond that there may be cases in which the consequences of refraining from torture are unacceptable. But one riposte to this – see La Torre – is that even to discuss such examples is immoral because it erodes the sense of the moral unacceptability of torture in order to establish an exception that has virtually no application in real life.[19]

The question of the morality of discussing torture is a particularly troubling one for us, since by the very act of editing and publishing the book we are engaging in a debate which, Slavoj Žižek has argued, 'every authentic liberal should see…as a sign that the terrorists are winning'.[20] The trouble with the 'Pandora's box' argument, as Henry Shue told us thirty years ago, is that Pandora's box is already open.[21] Torture has become a matter not merely of debate, but of actual practice not just by U.S.-backed and trained regimes as in the 1970s, but by the U.S. itself and its core allies, including some British forces in Iraq.[22] If Žižek was right in what he wrote in 2002, the terrorists have already won that round. And in that very essay, Žižek himself joined the discussion of what to do in exceptional cases:

> I can well imagine that, in a particular situation, confronted with the proverbial 'prisoner who knows', whose words can save thousands, I might decide in favour of torture; however, even (or, rather, precisely) in a case such as this, it is absolutely crucial that one does not elevate this desperate choice into a universal principle: given the unavoidable and brutal urgency of the moment, one should simply do it.[23]

'One should simply do it' looks suspiciously like a universal principle, the scope of which cannot (and must not) be precisely specified. This is not far from Moore's 'threshold deontology', and closer still to Brunkhorst's 'tragic choice'.

The question now is not whether, but how, to debate torture. There is a case for discussing real or hypothetical exceptional cases, if only to show how different they are from virtually all real cases in which torture is practiced. But it is important to contextualize this discussion by pointing out how difficult, if not impossible, it is to find *any* real, documented case where torture has clearly averted some terrible threat.[24]

19 Moore acknowledges the virtual absence of real cases, at least so far as 'innocent' torture victims are concerned: 'Torture and the Balance of Evils', p. 333.

20 S. Žižek, 'Are we in a War? Do we have an Enemy?' *London Review of Books* 23 May 2002 (accessed in the online archive, <http://www.lrb.co.uk> [subscription required]).

21 Shue, 'Torture', p. 124. On the global politics of torture at this time see N. Chomsky and E. Herman, *The Political Economy of Human Rights* (Nottingham, Spokesman, 1979).

22 Joint Committee on Human Rights, *UN Convention Against Torture: Discrepancies in Evidence Given to the Committee About the Use of Prohibited Interrogation Techniques in Iraq* (HL157/HC527, London, TSO, 2008).

23 Žižek, 'Are we in a War?'

24 For careful scrutiny of several alleged instances see P. N. S. Rumney, 'Is Coercive Interrogation of Terrorist Suspects Effective? A Response to Bagaric and Clarke', *University of San Francisco Law Review* 40 (2006): 479-513; D. Rejali, *Torture and Democracy* (Princeton and Oxford, Princeton University Press, 2007).

Once again, the Daschner case is instructive. The threat of torture failed to save the boy; the court was not satisfied that torture had truly been a last resort; and, significantly in view of the way the whole torture debate is framed by the twin towers, the case had nothing to do with terrorism. The threat of torture 'worked', but on a man who had no cause to serve, no comrades no protect, and thus little incentive to hold out or to feed his interrogators false information.[25]

Although no case we know of provides incontrovertible evidence of the benefits of torture, we can discuss a real 'ticking bomb' case:

> In the late 1950s, Paul Teitgen, the prefect of Algiers, caught Fernand Yveton, a Communist placing a bomb in the gasworks. Teitgen knew Yveton had a second bomb, and if Yveton had planted and exploded it, it would set off gasometers, killing thousands. Teitgen could not persuade Yveton to tell him where the other bomb was. Nevertheless, said Teitgen, 'I refused to have him tortured. I trembled the whole afternoon. Finally the bomb did not go off. Thank God I was right.'[26]

According to a former senior French intelligence officer (and unrepentant torturer), Yveton was in fact tortured despite Teitgen's orders.[27] Teitgen's reasons for refusing to torture (and later resigning his position) appear to have included the fact that he was himself a torture survivor[28] – an illustration, perhaps, of La Torre's point that one cannot impose on others what one cannot accept oneself – and his fear, all too well founded as it turned out, that once permitted, torture would escalate: 'if you once get into this torture business, you're lost.'[29] In Henry Shue's view, for a ticking bomb case to justify torture, this likelihood of escalation would have to be absent, and in reality there are no such cases.[30] (Perhaps the Daschner case, being an isolated incident, comes closer than the Algerian situation.) Rejali suggests that the reason Teitgen 'trembled' was not simply fear of an explosion but the knowledge that if the explosion occurred he would be blamed for not using every possible means to prevent it. When officials do resort to torture as a response to terrorism, he suggests, they are not simply 'responding rationally to ineffectiveness' but 'purging the wounded community's furious emotions with human sacrifices.'[31]

25 Ibid., p. 478.
26 Ibid., pp. 533-4. Rejali spells the prefect's name 'Teitgin' but it is spelt 'Teitgen' in other accounts.
27 P. Aussaresses, *The Battle of the Casbah,* quoted in A. Bellamy 'No Pain, No Gain: Torture and Ethics in the War on Terror' *International Affairs* 82 (2006): 121-48, p. 141, n. 86. On Aussaresses' career and the furore surrounding his book see F. Kaltenbeck, 'On Torture and State Crime', *Cardozo Law Review* 24 (2002): 2381-92.
28 T. Todorov, 'Torture in the Algerian War' *South Central Review* 24, no. 1 (2007): 18-26.
29 Quoted by Bellamy, 'No Pain', p. 141.
30 H. Shue, 'Torture in Dreamland: Defusing the Ticking Bomb', *Case Western Reserve Journal of International Law* 37 (2005): 231-9.
31 Rejali, *Torture and Democracy,* p. 835.

Shue and Rejali's analyses suggest that rare, non-institutionalized torture, of the kind envisaged by Steinhoff and Belvisi, is an impossible abstraction – like, as Shue puts it, the alcoholic who has only one drink.[32] The difficulty with this argument is that precisely because of the extreme rarity of actual known cases, we have no data on which to base empirical generalizations about their consequences. We can only speculate on what might have happened in, for example, the Daschner case, if torture had actually been used. We may assume that prior to this case, torture was not part of the martial arts trainer's job description. But if he had tortured, and had been legally exonerated, he and everyone else in the German police would know he was the person to call in next time there was an urgent need to torture someone. Would he not feel the need to prepare for such an eventuality – and to prepare a few trainees, in case he was not available when the time came? To step back from institutionalizing torture in such a situation would not be easy. But 'hard-nosed consequentialists' may think that is a risk worth taking, if the evil to be averted is great enough,[33] and some deontologists might argue that it does not defeat the moral right to defensive torture.

B. Alternative approaches

It is not clear to us that the debate over exceptional cases can ever be resolved. It involves a 'tragic choice', as Brunkhorst puts it, between incommensurable evils, exacerbated in any conceivable real life case by lack of certainty over the factors that will determine the outcome of either course of action. And in any real crisis, it is a safe prediction that the choice between evils will not be made on the basis of philosophical argument, but will reflect a range of factors such as political calculation, peer pressure, the gendered self-image of the potential torturer, and racialized perceptions of the potential victim.[34] It is also clear that the decision to torture is rarely an agonized choice between evils: more often it is a routine tool of governance, or a means to degrade and subdue political opponents.[35] The discussion of exceptional cases may be unavoidable, but it should not be the dominant theme of the torture debate.

In fact it is only the first group of chapters that follow – those by La Torre, Steinhoff, Belvisi and (in part) Brunkhorst, that address the ethical issue posed by excep-

32 Ibid., p. 234

33 Luban, 'Unthinking the Ticking Bomb', p. 29.

34 See for example Todorov, 'Torture in the Algerian War'; M. K. Huggins, M. Haritos-Fatouros, and P. G. Zimbardo, *Violence Workers: Police Torturers and Murderers Reconstruct Brazilian Atrocities* (Berkeley, University of California Press, 2002); D. Rejali, 'Torture Makes the Man', *South Central Review* 24, no. 1 (2007): 151-69; J. Butler, 'Sexual Politics, Torture and Secular Time', *British Journal of Sociology* 59, no. 1 (2008): 1-23

35 P. Green and T. Ward, *State Crime: Governments, Violence and Corruption* (London, Pluto, 2004), Ch. 7.

tional cases. The other chapters more or less explicitly *assume* that torture is (always or virtually always) wrong and discuss the issue on other levels.

The chapters by Tsvetana Kamenova, Patrick Birkinshaw and Agustín Menendez deal with legal doctrines regarding torture. Kamenova examines the jurisprudence of the UN's *ad hoc* tribunals, and Birkinshaw looks at the implications of the House of Lords' decision on the inadmissibility of evidence obtained by torture, and points out some of the limitations of that decision, and of judicial decisions in general as a means of opposing torture. Menendez takes a more theoretical approach in criticizing the interpretation of US constitutional law by the Bush government and its advisers – an approach which, like La Torre's, implies that torture is incompatible with the nature of law as a form of practical discourse.

Marina Lalatta Costerbosa and Alison O'Donnell's chapters, as well as a large part of Hauke Brunkhorst's, approach the issue from a historical perspective. Brunkhorst relates the history of torture to the changing nature of European legal systems since the 12th century. Lalatta looks back to renaissance and enlightenment debates about torture as a means of interrogation, and finds disturbing parallels between those debates and today's political situation. She finds particularly instructive the argument of Christian Thomasius (1655-1728) about the political character of torture: it is not simply a means of interrogation, but a tool for the powerful against their enemies. O'Donnell et al. do not discuss interrogational torture at all, but the involvement of nurses in the genocidal practices of the Nazi regime, of which torture, in the form of medical experiments for example, was a subordinate part. The chapter serves as a reminder that interrogational torture, isolated from other forms of state terror, is the exception rather than the norm.

Penny Green and Tony Ward also discuss torture as part of wider patterns of state terror, and argue that once torture is accepted as a permissible institutional practice it is most unlikely to be confined within the bounds of 'lesser evil' justifications. Finally, Bev Clucas examines the portrayal – and implicit endorsement – of torture in the highly successful TV series *24,* bringing us back again to the issue of the morality of discussing torture at all.

It seems clear to us that the morality of discussing torture depends on whether the goal is to prevent it. Whether the goal is the absolute elimination of the practice, or its elimination in all but the handful of Daschner-type cases, is perhaps of secondary importance. There is a lot more work to be done on the issue of preventive strategy[36] – and the issue is a very difficult one, not least because of the difficulty of knowing

36 Important works in this area include: M. D. Evans and R. Morgan, *Preventing Torture : a study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (Oxford, Clarendon, 1998); T. Risse, S .C. Ropp, and K. Sikkink, (eds.) *The Power of Human Rights: International Norms and Domestic Change* (Cambridge, Cambridge University Press, 1999); R. D. Crelinstein, 'The World of Torture: A Constructed Reality', *Theoretical Criminology* 7 (2003): 293-318.

whether preventive measures are really preventing the practice or simply making it less visible.[37] What we can be clear about is what does *not* help: the sort of irresponsible legal discussion criticized by La Torre and Mendendez, and the sort of irresponsible media portrayal exemplified by *24*.

37 Rejali, *Torture and Democracy*.