

# 15

## Torture

William F. Schulz

### Chapter Contents

- Introduction 256
- Torture in Western History 257
- How to Make a Torturer 261
- Case Study: Ticking Bomb Torture 264
- Putting an End to Torture: New Developments and High Promise 267
- Conclusion 270

### Reader's Guide

Torture is among the most common human rights crimes in the world. It is usually associated with interrogation procedures but is often inflicted to intimidate political opponents, reinforce cultural practices, or spread gratuitous violence. This chapter examines the use of torture in Western history and considers such questions as: Are all torturers sadists or can an average person be trained to be a torturer? Are some societies more prone to practise torture than others? And is torture ever justified? In respect to this last question, the chapter examines in detail the pro and con arguments of the hypothetical case in which a suspect is thought to know the location of a ticking bomb that is about to explode and may injure large numbers of people. It concludes that such a scenario is extremely rare and describes how far more common instances of torture may most successfully be diminished.

## Introduction

Miguel Angel Estrella is one of the world's great pianists. In 1977 he was arrested and thrown into Uruguay's notorious Libertad prison for alleged 'subversive associations'. His case attracted international attention and the Queen of England herself intervened on his behalf, requesting the head of the Uruguayan military junta to allow Estrella, at the very least, access to a piano. The authorities agreed and the Queen sent a piano to be presented to him. What the great performer received, however, was merely the keyboard ripped out of the body of the instrument, making it therefore inoperable. 'Your playing will disturb the other prisoners', the musician was informed (Weschler, 1990).

When we think of torture, we customarily conjure up images of dark chambers and brutal physical treatment. Indeed, there is plenty of that. When Belgium's King Leopold ruled the Congo in the late nineteenth century, his minions were fond of punishing the Indigenious workers with whips made from raw, sun-dried hippopotamus hide cut into long, sharp-edged corkscrew strips. Twenty-five lashes brought unconsciousness and one hundred brought death (Hochschild, 1998, pp. 120–3). Beatings, electroshock, rape—all of these are common forms of torture. The United States has acknowledged using water-boarding (in which the victim's mouth is covered with cloth and water is poured over his face to simulate drowning) to extract information from terror suspects (Schoof, 2008; see Figure 15.1).

**Figure 15.1** Water-boarding

**Name:** Water-boarding

**Description:** There are several different forms of water-boarding, but the most typical, depicted here, is to place a cloth or towel over the mouth and then pour a steady stream of water over it. This simulates the feeling of drowning, thus precipitating severe stress. Its use may be as old as the sixteenth century. The American CIA admitted using the technique on three al-Qaeda prisoners in 2002–3 and the administration of US President George W. Bush denied that water-boarding constituted torture. But the late journalist Christopher Hitchens, a strong supporter of President Bush's intervention in Iraq,

underwent water-boarding himself and concluded that without a doubt it was a form of torture (Hitchens, 2008). (You can watch Hitchens undergo water-boarding at [https://www.youtube.com/watch?v=Efh\\_6\\_-tHgY](https://www.youtube.com/watch?v=Efh_6_-tHgY) and judge for yourself, and read about his experience in Hitchens, 2008). The Convention Against Torture (CAT) prohibits '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 . . . It would be hard to argue that water-boarding does not meet this definition and, indeed, in 2009 President Barack Obama banned its use by the US.



Adapted from Carter (2005)

Some torturers are fiendishly creative. I remember reading about the technique used by the *mujahedeen* (religious warriors) in Afghanistan. They would strap their captured enemies to corpses and let the two bodies, one dead, one alive, rot together in the sun. In Brazil during the 1970s, prisoners were stripped naked and left in a small concrete cell with only one other occupant—a boa constrictor (Dassin, 1986, pp. 16–17). In the Philippines at the turn of the twentieth century, American prisoners of war were buried up to their necks in manure, molasses was then poured over their heads, and fire ants let loose on their scalps (Schulz, 2003, p. 155).

The Americans got their revenge, however, by employing the popular ‘water cure’ against the Filipinos. One US soldier described it this way:

Lay them on their backs, a man standing on each hand and each foot, then put a round stick in the mouth and pour a pail of water in the mouth and nose, and if they don't give up pour in another. They swell up like toads.

(Kramer, 2008, p. 38)

But psychological torture, such as that employed against Estrella, has also been popular. The Soviets, for example, would frequently deceive a man in custody by informing him that the screams he heard in the next room were from his wife or daughter who were themselves being tortured. It was a sure-fire way to get him to talk (Solzhenitsyn, 1973, pp. 106–7).

It is hard to know how widespread the use of torture is today, but Amnesty International reports that it ‘has documented torture in more than 150 countries ... In more than 70 countries, it is widespread. People in 80 countries have died as a result ...’. Among the countries where torture has been documented are some of the most populous, including China, Russia, and the United States.

No matter exactly how many people have been subjected to torture, we know it is one of the most common human rights violations. And while no respectable observer would defend wife-beating or terrorism, there are more than a few who can imagine circumstances in which torture is justified. That is one reason why it is so important to understand the phenomenon.

In this chapter we will look first at the history of torture in the Western world and then consider what it takes to turn someone into a torturer. We will explore whether some social conditions make the use of torture more likely and whether there are cases in which its employment is justified. Finally, we will describe what can be done to diminish, if not end, the

instances of torture and how those efforts complement other developments in the field of human rights.

## Torture in Western History

Today the use of torture is largely hidden: conducted in secret locations, never advertised to the public. Most governments deny that they would even think of manhandling prisoners. Even those who defend the practice agree that it should be employed only rarely and within strict limits. But, interestingly enough, in ancient times people found the use of torture as natural as can be.

### Torture of Slaves: ‘I Cannot Tell a Lie’

Perhaps it is not surprising that the ancient Greeks and Romans felt little compunction about torturing slaves. Marginalized people, people with less power, are often more likely to be subjected to harsh treatment than those who possess political and economic might. But what is intriguing about the practice of torture in early Greek and Roman history is the *rationale* for slaves being subjected to torture. It was because slaves (in contrast to free citizens) lacked the quality of reason (what the Greeks called *logos*) and hence lacked the capacity to lie. Free citizens could tell the difference between truth and falsehood. But, not possessing *logos*, a slave could not think through the consequences of telling the truth or prevaricating. If forced, he had no choice but to tell the truth. Therefore, if public officials were trying to determine what *really* happened—who really stole the wine; who really killed the shepherdess—they had merely to torture a slave (DuBois, 1991, pp. 63–6).

Here is an early example of a common characteristic of victims of torture: they are regarded as somehow less than fully human, as missing some quality (in this case reason) that warrants their being treated with the same degree of respect as everyone else. They are therefore regarded as ‘outsiders’, different from ‘us’, and hence it is less heinous to abuse them. We will see this dynamic at work again and again.

But at least the Greek and Roman legal systems had an honourable motive for the torture of slaves (which is not to say, of course, that many slaves were not tortured for less than honourable reasons): they were seeking the truth. Eventually, however, the limitations of relying on slave testimony alone became obvious. There were only so many slaves, among other things, and not every crime was conveniently accompanied

by a slave witness. Other means for ascertaining the facts in a criminal matter would have to be discovered. Fault could be decided by the reputation of the parties involved or the credibility of oaths that they were willing to swear. Physical tests (called 'ordeals') could be undertaken. If, for example, the accused could carry a hot piece of metal in his bare hand for nine feet without the hand blistering, he was judged not guilty; in contrast, the appearance of blisters was unimpeachable evidence of guilt. By the twelfth century, however, it was generally agreed that one means of telling truth from falsehood was superior to all others: a confession!

### 'The Queen of Proofs'

So reliable were confessions considered by the late Middle Ages that they came to be known as '*the Queen of Proofs*'. And what was the most effective way to elicit a confession? Torture, of course. Torture therefore became a routine part of everyday criminal procedure and interrogation. Indeed, the very word *quaestio* (Latin for 'the question falls') came to be synonymous with torture.

The judicial system of the age adopted an elaborate series of 'safeguards' to govern the use of torture. If there were two witnesses to a crime, for example, a confession (and hence torture) was not necessary. Before someone could be tortured, there either had to be one witness to the offence or profound circumstantial evidence of guilt. Interrogators were forbidden to use suggestive questioning (Langbein, 1977). Despite these and other restrictions, though, many innocent people were brutalized, often in the most horrendous ways, as tales of medieval torture chambers readily attest.

It was difficult enough to decide likely guilt sufficient to warrant torture in civil cases. But when it came to religious questions like heresy (deviation from official church doctrine) and witchcraft, the matter became even more complicated. These were, after all, in large measure crimes of thought, not deed, and hence hard to prove. But that only reinforced the need to secure confessions. The Church itself undertook inquisitorial tribunals in which torture was commonplace.

From the standpoint of religious officials, of course, heretics and witches were even more dangerous than common thieves and murderers because they were thieves and murderers of the eternal soul. If their pernicious beliefs spread and were adopted by others, thousands of innocents would not just be deprived of earthly property or physical life, as was the case with common crimes, but would be subjected to eternal

torment. The torture of a few miscreants was a small price to pay to prevent such a tragedy.

But how could anyone know for certain that the right people were being punished? Under torture, victims confessed to all sorts of things. Most of those accused during the Salem, Massachusetts, witchcraft trials of 1692, for instance, eventually admitted that they were guilty even *before* they were tortured! Like the slaves of ancient times, theological deviants were categorized as less worthy of the legal protections that accrued to the rest of society. The result was that often those who were innocent suffered the same penalties as those who were guilty.

### The Cry for Abolition

Gradually a reaction to such injustices set in. Five years after the Salem trials, one of the judges, Samuel Sewall, stood up in church and passed a piece of paper to his minister to read to the congregation. 'Samuel Sewall', the preacher read while Sewall bowed his head, '... being sensible ... as to the Guilt contracted, upon the opening of the late [court] at Salem ... Desires to take the Blame & Shame of it, asking pardon of Men, And especially desiring prayers that God ... would pardon that Sin ...' (Francis, 2005, p. 181).

In 1734 Sweden became the first country to abolish virtually all forms of torture, and a few years later Prussia did away with the practice altogether. Other countries followed. The French historian Michel Foucault suggested that the rejection of orthodoxy and 'superstition' that characterized the **Enlightenment**, along with the cruelty that accompanied them, accounts for the change. There was a vast repulsion at the public displays of brutality that had typified the Middle Ages. 'It was as if', Foucault (1977, p. 9) wrote, 'the punishment was thought to equal, if not exceed, in savagery the crime itself ... to make the tortured criminal an object of pity and admiration.'

Abolitionist sentiment, as expressed most popularly by the Italian economist Cesare Beccaria in his 1764 'An Essay on Crimes and Punishment' (Kramnick, 1995, pp. 525–32) and the French *philosophe* Voltaire in his 'On Torture and Capital Punishment' (Kramnick, 1995, pp. 532–5) the same year, was sweeping Europe. Lynn Hunt (2007), a historian, attributes this in large measure to empathy for other people's suffering occasioned by the popularity of eighteenth-century novels depicting the plight of heroines with whom the public identified. Coupled with growing personal

modesty—an end to urinating in the street or blowing one’s nose in one’s hand—that signalled the advent of the self-contained and hence inviolable body, this trend helped to usher in new respect for human rights.

The eminent legal historian John Langbein (1977, pp. 10–12) offers a different theory. He contends that the trigger was not changing views occasioned by the Enlightenment but a shift in the way proof was established by the courts that occurred two centuries before, namely that judges began evaluating the evidence pro and con, based on its merits without the need for confession or torture. Whatever the case, by the turn of the nineteenth century cultural norms in Europe had turned sharply against torture—or at least the torture of fellow Europeans (we have seen that King Leopold had no hesitation about torturing Africans well into the twentieth century). Combined with growing opposition to slavery (the slave trade was abolished in Great Britain in 1833), there was reason to think a more humane form of civilization might be at hand. The early development of international **humanitarian law** (sometimes called ‘the laws of war’) reinforced such optimism. In 1863 the International Red Cross was formed and the next year sixteen European countries adopted the first of the **Geneva Conventions and Protocols** that mandated humane treatment of battlefield casualties and protection for the civilians who offered them aid. This in turn was followed by the **Hague Conventions** of 1899 and 1907 that sought to make warfare itself less brutal by banning such things as nerve gas and hollow point bullets, and the Third Geneva Convention of 1929 that offered protocols for the treatment of prisoners of war. It was not of course that torture and war crimes ceased altogether, but that no one could any longer claim official sanction for such atrocities.

Until, that is, the coming of the Holocaust. The crimes of the Nazis and their collaborators were not only unprecedented in ferocity and scale—the Second World War has been dubbed a ‘total war’ because, in addition to the customary attacks on troops, civilians and their property were indiscriminately targeted—but they were planned and executed by what had been regarded as the most cultured nation in Europe. In reaction to the catastrophe, both the United Nations and eventually the modern human rights movement were born. The 1948 **Universal Declaration of Human Rights** (UDHR) declared in Article 5 that ‘No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.’ Adopted without

dissent, the UDHR established norms and expectations not just for Europeans but for the entire world.

Since that time, dozens of other **treaties**, conventions, codes of conduct, and other international legal instruments have reiterated the prohibition of torture (see Box 15.1) until today it is regarded as **customary international law**—that is, law that is so fundamental and universal as to be beyond dispute and hence is applicable to, and the responsibility of, all governments; and torturers are considered *hostis humani generis* or enemies of all humankind. The most important of these international instruments is the **Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT)**, which entered into force in 1987 and has been ratified by more than 140 countries.

And yet, despite all this opprobrium, torture endures.

#### KEY POINTS

The ancient Greeks and Romans regarded slaves as incapable of telling a lie because they lacked the capacity to reason. It was therefore thought completely appropriate to torture a slave (as opposed to a free citizen) in order to ascertain the truth about a criminal matter.

In the medieval period, legal authorities considered a confession to be the ‘queen of proofs’, the most reliable way to resolve a question of guilt or innocence. Since torture was an efficient way of eliciting confessions, it was commonly used, albeit in accordance with a set of guidelines. The Church had little reticence about using torture to expose heretics and witches.

Gradually, whether because of new cultural norms ushered in by the Enlightenment or changes in the legal system, torture became prohibited throughout most of Europe. Coupled with codification of the laws of war and international humanitarian law, there appeared to be promise of a more civilized approach to international relations.

Such promise was badly set back by the Holocaust, though one of the consequences was the development of the modern human rights movement, including a now universal legal prohibition on the use of torture.

#### Critical Thinking Question:

We know that false confessions, even without torture, are not uncommon. What circumstances can you imagine in which you might confess to a crime you did not commit?

## BOX 15.1 EXTRACTS FROM THE PRINCIPAL INTERNATIONAL INSTRUMENTS AGAINST TORTURE

**Universal Declaration of Human Rights**

'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.' (Article 5)

**Geneva Conventions and Protocols**

'... the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- a. violence to life and person, in particular, mutilation, cruel treatment and torture ...
- c. outrages upon personal dignity, in particular humiliating and degrading treatment ...'(Common Article 3)

**International Covenant on Civil and Political Rights**

'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.' (Article 7)

**European Convention for the Protection of Human Rights and Fundamental Freedoms**

'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.' (Article 3)

**American Convention on Human Rights**

'No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.' (Article 5)

**African Charter on Human and Peoples' Rights**

'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment, shall be prohibited.' (Article 5)

**UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

'Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.' (Article 2)

**Inter-American Convention to Prevent and Punish Torture**

'The States Parties shall ensure that all acts of torture and attempts to commit torture are offenses under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature.' (Article 6)

**UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment**

'No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.' (Principle 6)

**Convention on the Rights of the Child**

'No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment ...' (Article 37)

**UN Declaration on the Elimination of Violence against Women**

'Women are entitled to the equal enjoyment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. These rights include, *inter alia*:  
... (h) The right not to be subjected to torture, or other cruel, inhuman or degrading treatment or punishment.' (Article 3)

**UN Code of Conduct for Law Enforcement Officials**

'No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment ...' (Article 5)

## How to Make a Torturer

Are torturers madmen? Deviants? Hardened criminals? Sexual predators? Almost never. In fact, most police and military units weed out the psychological misfits because they know such people have trouble taking orders. The horrible truth is that the vast majority of torturers are average Joes, like Jose Valle Lopez (see Box 15.2) or, on far rarer occasions, Janes.

## The Psychology of Transformation

Turning Joe into a torturer is remarkably easy. You put him in a restricted environment, such as a police or military training camp, under the command of a vaunted authority figure. It helps if the recruit is young and impressionable but people of all ages are susceptible to the demands of authority under the right circumstances—even murderous demands, as the famous Milgram and Stanford prison experiments demonstrated (see Box 15.3).

### BOX 15.2 THE CASE OF JOSE

Jose Valle Lopez did not think of himself as a bad man. He had joined the army of his native Honduras at 15; slowly gained more authority within its ranks; married, and fathered two children. Over the years Jose, who, because of his weight, was known as *El Gordo*, 'The Fat One', developed a kind of hardened attitude to prove that he could take the teasing, that he had *cojones*—manliness, courage. As a result, when word spread among the military authorities in the 1980s that the Honduran army would not allow the Communists to infiltrate Honduras as they had done in neighbouring Nicaragua and threatened to do in El Salvador, Jose was more than willing to do what he was told to protect his country.

At first he was assigned to surveillance, then to kidnapping. But the hours of the latter were erratic, so Jose was transferred to the torture division in order to have more regular time with his

family. As a journalist who told his tale years later put it, 'he would kiss his wife and children goodbye, pick up his lunch and go off to work in the torture chambers'. There he would submerge his victims in water, suffocate them, and apply electroshock to their genitals.

Eventually he could no longer tolerate the screaming. But when he asked for a transfer, the ridicule began again: 'What's the matter, El Gordo? No *cojones*?' Still, Jose persisted: he wanted out. And that is when the threats began: 'The day you leave, Jose, we will cut your head off.' When he could no longer take the threats, Jose fled with his family to Canada and finally went public with his story. He wanted the world to know that he was not a monster. He wanted to make the case that, under similar circumstances, many others would have done the same thing.

Adapted from Atkinson (1989)

### BOX 15.3 THE MILGRAM AND STANFORD PRISON EXPERIMENTS

Two experiments in social psychology have become classics in the field, often cited to illumine the motivations of those 'average citizens' who inflict cruelty on their fellow human beings. Each experiment has been criticized both as to its ethics and its methodology, but both also reflect at least a germ of truth that is worth exploring.

The experiments conducted by Yale psychologist Stanley Milgram beginning in 1961 involved an authority figure (the experimenter) instructing a subject who had been designated the 'teacher' to issue an electric shock to another person (designated 'the learner') every time the learner made an error in a word test. The voltage of the shock supposedly increased at a regular pace and, though the teachers could not see the learners, they could hear them expressing pain, screaming, and eventually begging the teacher to stop shocking them. (In reality, no shocks were being administered.) Despite hearing these pleas, a significant number of teachers, when instructed to do so

by the authority figure (the experimenter), continued to issue the shocks. Milgram concluded that most people had a strong tendency to obey authority and that therefore ordinary people could be transformed into agents of destruction under the right circumstances (Milgram, 1974).

The Stanford prison experiment was led by Stanford University psychologist Philip Zimbardo in 1971. One group of university students was designated 'guards' and another 'prisoners' and they were then placed in a simulated prison environment in the basement of the Stanford psychology department building. Because the behaviour of many of the guards quickly took on a sadistic character—even though all participants knew the situation was no more than a simulation—Zimbardo stopped the experiment prematurely, concluding, like Milgram, that in certain situations otherwise well-balanced individuals will act in a cruel fashion towards others perceived to be weaker or different, especially when given sanction to do so (Haney, Banks, and Zimbardo, 1973).

You then subject your recruit to intense stress, harassment, and brutality. The Greek military police in the time of the Greek generals (1967–74), for example, were renowned for their torture squads. Each of the recruits to those squads was forced to go weeks without food and undergo severe beatings, sometimes not being permitted to defecate for up to fifteen days at a time (Haritos-Fatouros, 1988). Joan Golston (1993), a psychotherapist who has studied torturers, theorizes that the abuse heaped on trainees casts them in the ‘victim’ role and, in order to mitigate the shame of that experience and differentiate themselves in their own minds from ‘real’ victims, they in turn inflict abuse on others. This is what she calls ‘*the torturer’s bind*’.

Be that as it may, once we have created an angry, desensitized, but obedient servant, the next steps are to train that servant in torture techniques—the object is to inflict enormous pain but not to kill—and to provide sanction for employing those techniques against a vulnerable but despised and dehumanized object: ‘These are the people who are threatening our country.’ ‘This is the person who killed your comrade.’

One thing that virtually every victim of torture has in common is that he or she has been defined as alien to the dominant culture: one of ‘them’, not one of ‘us’; in short, a ‘barbarian’, to use the word the novelist J. M. Coetzee chooses in his famous story, *Waiting for the Barbarians* (see Box 15.4). Those who are labelled outsiders, as having violated our most sacred values, can be thought to have sacrificed their claim to the protection of rights, including their right to be regarded as human.

In many cases the torturers, like Jose Valle Lopez, convince themselves that they are acting in a higher cause, that the questions they ask and the information they procure are essential to other people’s welfare or the survival of a way of life. But all too often the motivation for torture is not so ‘high-minded’. Often the real goal is intimidation of the prisoner or the members of his or her group or community. Unlike those earlier forms of torture that were prompted by a desire to solve crimes or save souls, modern-day torture often reflects little more than a sadistic character; a desire to display complete sovereignty over the will of another person. This is certainly the case, for example, when rape is used as an instrument of war, as it was in the war in the Balkans (Allen, 1996), or when prisoners are led around on leashes or forced to masturbate for the cameras, as they were at the US prison at Abu Ghraib, Iraq (Danner, 2004).

Whatever the motivation, there is one more characteristic shared by virtually all torturers: they believe they will get away with their crimes. Very few act on

#### BOX 15.4 WAITING FOR THE BARBARIANS

In his classic 1982 novel *Waiting for the Barbarians*, the South African novelist J. M. Coetzee captures the phenomenon of dehumanization concisely. He describes a large crowd that is awaiting the appearance of a group of prisoners—‘Barbarians’—who are tied to each other by a rope around their necks. In addition, a metal wire has been looped through a hole in each prisoner’s cheek that connects in turn to a hole in his hand. ‘It makes them meek as lambs’, one soldier says, ‘They think of nothing but how to keep very still.’

The prisoners are paraded in front of the crowd so that ‘everyone has a chance ... to prove to his children that the barbarians are real’. Then the Colonel of Police steps forward.

Stooping over each prisoner ... he rubs a handful of dust into his naked back and writes a word with a stick of charcoal ... ‘ENEMY ... ENEMY ... ENEMY ... ENEMY’. He steps back and folds his hands ... Then the beating begins.

(Coetzee, 1982, pp. 102–5)

their own whim. Torture is rarely the case of ‘a few bad apples’ acting contrary to the wishes of their superiors. Whether they have received explicit orders or only ‘a wink and a nod’, most torturers believe that those to whom they are accountable will at least privately approve of what they do. Indeed, torture does not survive long without **impunity**, that is, the belief that the perpetrator will be exempt from any punishment or penalty.

And yet sometimes—again Jose is an example—the stress of the job itself begins to take its toll. Frantz Fanon (2004, p. 195), a psychiatrist who became a famous philosopher of anti-colonialism, tells of treating a police officer who came to him suffering from depression. ‘The thing is, they never wanted to confess’, the officer said of the people he had tortured.

Sometimes you feel like telling them that if they had any consideration for us, they’d cough up and not force us to spend hours on end squeezing the information out of them. But you might as well talk to the wall ... So of course we had to give them the works. But they scream too much. At first it made me laugh. But then it began to unnerve me ... Now I can hear those screams even at home. Especially the screams of the ones who died at police headquarters. Doctor, I’m sick of this job. If you can cure me, I’ll request a transfer ... If they refuse [to transfer me], I’ll resign.

But getting out is not always easy, both because torturers have been taught psychologically to revere authority and obey it and because they are often threatened by their colleagues and supervisors if they try to leave.

Few systematic studies of the mental health of torturers have ever been undertaken—the universe of those willing to admit their guilt and subject themselves to testing is too small!—but it is not hard to believe that those who inflict brutality sustain emotional damage too. In a paradoxical way, then, the phenomenon of torture creates two sets of victims. See Box 15.5 for further discussion of torturers.

### The Social Preconditions of Torture

If large numbers of ‘average’ people can be made into torturers, are all societies equally susceptible to resorting to the practice or are there some social conditions that make torture more likely?

In a broad sense, as we have seen, torture requires there to be a significant differential in power between torturer and victim. Based on his studies of Turkey during the years of the Armenian genocide (1914–18), Nazi Germany (1933–45), Pol Pot’s Cambodia (1976–9), and Argentina in the period of the ‘Dirty War’ (1976–83), Erwin Staub (1990, pp. 49–50), one of the few social scientists to have studied the ‘social indicators’ of genocide and torture, identifies scapegoating of a subgroup as a social condition conducive to the rise of torture. Other characteristics of societies that resort readily to torture are: strong respect for authority and hence little questioning of leadership; a monolithic culture that militates against expression of conflicting views; widespread concepts of cultural superiority that may mask self-doubt or economic anxiety; and the presence of an ideology that rationalizes mistreatment of a minority or out-group.

All this is well and good. But we know that democracies—even robust democracies like the United States that sanction vigorous political debate and proclaim

their commitment to equal treatment of all—can also succumb to the temptations of torture. Ronald Crelinsten (2005, pp. 76–7), a criminologist, has expanded on and reframed Staub’s list based on contemporary examples associated with the post-9/11 ‘war on terror’. He, too, finds the dehumanizing of an out-group—in this case, Muslims—central to the institutionalization of torture. But he cites additional factors that make it more likely: a national emergency or perceived threat to security; the need to process large numbers of suspects; authorization to violate standard social norms (and here he does not limit that authorization to government or military officials but includes members of the media and academia who provide the rationale for brutality); and the presence of a ‘sacred mission’ in whose name anything is acceptable.

Suffice it to say that societies that feel themselves under threat are more likely to strike out at those whom they fear, and leaders of even the most open society can leverage that fear for unfortunate ends. But might there not indeed be circumstances where such fear is justified and the use of ‘unusual methods’, including torture, legitimate? We turn now to the hypothetical case of the ‘ticking bomb’.

#### KEY POINTS

Many regimes have transformed average people into torturers by exposing them to authority figures who subject them to brutal training, teach them the techniques of torture, and then provide sanction for the mistreatment of some despised individual or group of people who are regarded as less than human.

Torture requires a sense of impunity. Few people will engage in the practice without the encouragement of their superiors.

Torture takes an immense toll on its victims, of course, but may also do damage to the mental health of its perpetrators, who may find it difficult to extract themselves from a torture regimen even if they want to.

Certain social conditions, including concepts of cultural superiority and exploitation of feelings of fear among a populace, may increase the likelihood of torture being practised, even in largely open, democratic societies.

#### Critical Thinking Question:

Consider Staub’s and Crelinsten’s respective lists of characteristics of societies that may be predisposed to sanction torture. Can you identify places in the world today in which you think those characteristics are evident and hence the use of torture a possibility?

#### BOX 15.5 CHALLENGING ASSUMPTIONS: ARE TORTURERS MADE OR BORN?

Through much of Western history, philosophers from Aristotle to Locke believed that human beings were born ‘blank slates’ (the Latin term is *tabula rasa*) when it came to the content of our minds, and characters, and that our behaviours for good or ill were formed largely by our experiences. More recently evidence has arisen that suggests some humans may be genetically predisposed to act in ways society is inclined to label ‘evil’. What is your own take on this question? How easy do you think it would be for you to be persuaded to torture another human being? And if we are predisposed by our DNA to some forms of brutality, can we be held accountable for our actions?

## Case Study: Ticking Bomb Torture

### The Arguments for Torture

No respectable commentator has ever tried to defend torture inflicted for the sheer sadistic pleasure of it, but many noteworthy philosophers, including the great Jeremy Bentham (1748–1832), have argued that under a narrow set of circumstances torture is not only defensible but morally obligatory. The hypothetical case is usually put something like this: suppose that the authorities have in custody an individual whom they believe has information that, if they can procure it quickly, will help them prevent the detonation of a bomb that, if allowed to explode, will kill hundreds, if not thousands, of people. Would they not be justified in using whatever coercive means were necessary to force the revelations they seek? Indeed, could they not be accused of dereliction of duty if they allowed moral reservations to prevent them from doing so, thereby sacrificing the lives of many innocent people?

The argument for the use of torture under these circumstances is based on a pretty straightforward cost–benefit calculation: torture one suspect; save 1,000 (or however many) lives. It is hardly surprising that Bentham should favour torture, having been a thoroughgoing **utilitarian**—a system of ethics most simply explained as holding that the moral worth of an action can be determined by the degree to which it brings the greatest amount of happiness or pleasure to the greatest number of people. This is an example of what is called **consequentialism**, namely the notion that we ought to judge an act by its consequences (sometimes expressed simply as ‘the ends justify the means’), in contrast to a **deontological** approach in which acts are considered intrinsically good or bad, no matter what their consequences.

On the face of it, the argument for ‘ticking bomb torture’ seems unassailable. It is not, however, without its weaknesses, and serious scholars who have advanced it have recognized that and tried to respond. One weakness is that it is not always easy to know who has the information we seek and who does not. No one believes that it is justifiable to torture an innocent person. So philosophers such as Michael Levin (1982), who argue for the legitimacy of ticking bomb torture, have agreed that we should ‘torture only the obviously guilty’, such as would be the case if ‘40 million people

see a group of masked gunmen seize an airplane on the evening news’.

Another potential weakness is the so-called ‘slippery slope’, the danger that, once we have allowed torture under very limited conditions, authorities will be tempted to expand on the number of people tortured or the circumstances in which it is allowed. Alan Dershowitz (2002), a well-known law professor, has proposed that if authorities wish to torture someone, they should be required to go to a judge and obtain a **torture warrant** that would limit the brutal treatment as to target, duration, intensity, etc. and have the additional virtue of placing responsibility squarely on the backs of higher authorities rather than on the low-level police or military officer who has to inflict the punishment directly.

In 1987 the Israeli government faced accusations that its security arm, Shin Bet, had been applying undue physical pressure to Palestinian prisoners, and a Commission of Inquiry headed by former Israeli Supreme Court Justice Moshe Landau was asked to investigate. The Landau Commission Report (1989) concluded that, faced with a ticking bomb situation, ‘moderate physical pressure’ (a detailed description of which was included in a secret annex to the report) could be applied as the lesser of two evils and could be legally defended under the **doctrine of necessity**, that is, the notion that one harmful act may be justifiable to prevent a second far more harmful act.<sup>1</sup>

### The Arguments against Torture

To marshal the arguments against ticking bomb torture is a more complicated task than to argue the affirmative unless one feels comfortable relying on a strictly deontological stance and proclaiming, perhaps on the basis of religious doctrine or **natural law** philosophy, or simple illegality, that torture is intrinsically wrong under all circumstances. Exploration of such topics is beyond the bounds of this chapter, however, so we will restrict ourselves to arguments of a pragmatic or consequentialist nature.

As we have seen, the ticking bomb scenario looks like a situation in which torture is not only justified, but may even be morally imperative: we are certain that our suspect knows where the bomb is hidden; we must obtain that information quickly and we know that torture will be an effective means to pry accurate information out of him; we voluntarily

limit our brutality to the suspect himself and limit the amount of pain we inflict to the minimum necessary to get him to talk; and more people will live as a result of our action than would otherwise die. This is what we will call the 'pure scenario' and, if this is the hypothesis we are faced with, it is difficult to bring persuasive consequentialist arguments to bear against it.

The problem is that in real life such a scenario is extraordinarily rare—we cannot say it has never arisen, but there are no documented cases of it having done so in exactly this form—and the last and most important calculation, namely that more people will live than die as a result of our use of torture, is, as we shall see, impossible to prove. So let us take the elements of the scenario one by one.

'We are certain that our suspect knows where the bomb is hidden.' But how certain do we have to be for torture to be justified? Levin appears to say that we must be 100 per cent certain. But how often are fallible human beings 100 per cent certain of anything? (And how do we measure degree of certainty anyway?) Even in the example that Levin gives—'40 million people see a group of masked gunmen seize a plane on the evening news'—there is room for doubt. The gunmen are, after all, 'masked'. And we know that television pictures can easily be altered to show just about anything. Moreover, the world in which torture interrogations take place is a world of shadows. Suspects are not paraded before the public or caught on camera; their bad deeds are rarely fully known. (Indeed, if they *were* known, we would have little reason to torture them.) So 100 per cent certainty seems like a pipe dream. What, then, if we were only 95 per cent certain? Should we refrain from torture then, even if we think coercion would save thousands of innocent lives? How about if we were only 50 per cent certain? If we had a fifty-fifty chance of saving people, would that not be worth the gamble? What if we only had a 1 per cent sense of certainty? Would it not be reasonable, even if we had only vague suspicions, to torture one individual if the consequences of not doing so might be the loss of thousands of innocents? And yet, if we were to follow that path, we would certainly end up torturing many suspects who had no relevant knowledge to share at all. You can see how quickly the 'limited circumstances' under which torture is justified morph into something much larger.<sup>2</sup>

'We must obtain the information quickly and we know that torture will be an effective means to pry it out of the suspect.' The vast majority of interrogations in which torture is used involve the quest for long-term information, the names of comrades, patterns of behaviour, and the structure of networks. The United States has acknowledged torturing many alleged terrorists in order ostensibly to prevent future 9/11s, but there is no reason to believe that those would-be attacks came within only minutes of being carried out but for the timely use of torture to prevent them. Moreover, there is good reason to believe that torture is an ineffective means of obtaining accurate information. Prisoners in excruciating pain are notorious for telling interrogators anything they want to hear. As a former FBI interrogation instructor put it,

Interrogation is an art form, not a street fight. It is built on guile, perseverance, and a keen understanding of how people respond to need. People will tell you anything if you present the questions in the proper context. You simply have to find the right way to ask.

(Whitcomb, 2002)

'We voluntarily limit our brutality to the suspect himself and limit the amount of pain we inflict to the minimum necessary to get him to talk.' But, under a consequentialist ethic, what possible reason is there for limiting our torture in any way? Why do we need to have any scruples at all about the techniques we employ? Furthermore, we know from reports of torture victims that it is often far more painful to see a loved one brutalized than to be subjected to harm oneself. If our initial acts of torture do not work, therefore, why are we not fully justified in torturing the suspect's spouse or teenage child or 2 year old baby to get him to talk? Would not harm even to a baby be morally justified if it saved the lives of hundreds of other people, including, no doubt, dozens of babies? What about torturing two babies to save four babies? Under the ticking bomb scenario, there is no good reason ever to stop. This is exactly why torture that is intended initially to be highly circumscribed so often ends up sliding down that slippery slope. Tens of thousands of people have been subjected to torture over the years. It is hard to believe that they all knew the whereabouts of a ticking time bomb.

'More people will live as a result of our action than would otherwise die.' This is, of course, the nub of the issue.

If we cannot show that torturing a prisoner ultimately does more good for more people than abstaining from torture would, we cannot make a defensible case for the practice, given all the problems we have raised thus far. Under the pure ticking bomb scenario, the cost–benefit calculation is self-evident. But in real life the consequences of torture may be far more complex. Let us assume that, by torturing a suspect, we manage to save 1,000 lives. How do we know that, on learning that their brother or comrade had been brutally tortured, other members of the suspect’s community will not want to even the score by killing 2,000 people? What happens to our cost–benefit calculation then? We certainly know that many armed groups opposed to governments around the world often motivate their members by citing government atrocities. As the founder of the Israeli chapter of Physicians for Human Rights put it, those Palestinians subjected to torture by Israel ‘are broken after their experience ... Their families ... want to take revenge’ (*Village Voice*, 2001). And this is to say nothing about the damage done to the reputations of those governments that condone torture—damage that may very well make their citizens and property far more vulnerable targets of attack. As the former chief prosecutor for the US military commissions at Guantanamo Bay, Cuba, pointed out, one of the reasons the Iraqi army surrendered readily in the 1991 Persian Gulf war, thereby saving untold American lives, was because they believed that they would not be tortured by the American military (Davis, 2008). ‘Would it have been different’, he asked in 2008, ‘if the perception of [Americans] as purveyors of torture and humiliation existed back then?’ Even the strict utilitarian argument for ticking bomb torture may not stand up to scrutiny.

Twelve years after the Landau Commission Report, the Israeli Supreme Court struck down virtually all of the techniques of ‘moderate physical pressure’ that the Commission had allowed as ‘not reasonable’, ‘not fall[ing] within the sphere of a “fair” interrogation’ and ‘impinge[ing] upon the suspect’s dignity, his bodily integrity and his basic rights’ (Supreme Court of Israel, 1999).<sup>3</sup> The Court did not rule out ‘necessity’ as a means of defence against the use of torture. But it said that necessity could not be cited *before the fact* as a rationale. It could only be called upon after an indictment had been brought against an alleged torturer to explain and excuse his acts.

Law professor Oren Gross (2004, pp. 229–53) has elaborated on this notion, arguing that torture

#### BOX 15.6 TORTURE AND THE CIA

In December of 2014, the US Senate Intelligence Committee released a heavily redacted executive summary of a report long in the making regarding the Central Intelligence Agency’s use of ‘enhanced interrogation’ techniques against alleged terrorists (*The Senate Intelligence Committee Report on Torture: Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program* (<http://www.feinstein.senate.gov/public/index.cfm?p=senate-intelligence-committee-study-on-cia-detention-and-interrogation-program>)).

Among its key points: the CIA’s techniques, which included water-boarding, ‘rectal feeding’, and death threats, were more brutal than the agency had claimed; the CIA misled Congress and the White House about the extent of that brutality; and the CIA exaggerated the necessity and success of the programme.

The CIA fought relentlessly to prevent the release of the report and, once it was in the public domain, undertook a massive campaign to discredit it. But, importantly, the report is now on the public record, providing the kind of transparency that, while not sufficient by itself to stop the use of torture, is a key component of combating it.

should always be banned and hence its employment is always illegal, but that state agents, be they the torturers themselves or the higher authorities who directed them, might well seek *ex post facto* (retrospective) ratification of their acts either in a court of law or the court of public opinion. Such an approach presumably preserves the state’s image (not least of all its self-image) as a righteous nation committed to the rule of law while recognizing the political and legal reality that, in the face of a pure ticking bomb scenario, authorities who resort to torture are unlikely to be punished. In contrast to Dershowitz’s ‘torture warrant’ proposal, which codifies torture as a legitimate option *before* the fact, thereby offering certain impunity to officials and colouring the image of the society as one that tolerates cruelty, Gross’s proposal forces authorities to commit civil disobedience and live with the knowledge that they may or may not be exonerated afterwards—knowledge that might discourage the kind of capricious use of torture that has been so common in the twentieth century and beyond. See Box 15.6 for a discussion of the CIA’s use of torture.

## KEY POINTS

Torture is often justified by its defenders with reference to a hypothetical situation in which a suspect has knowledge of a ticking time bomb that is about to go off and, if it does, will kill many people. Is it not justified to use torturous interrogation techniques against such a suspect under that limited circumstance to procure information necessary to avert an enormous tragedy?

This defence is based on a straightforward cost–benefit analysis: doing harm to one person in order to avoid harm to many more is a moral act.

Opponents of the use of torture argue that the pure hypothetical situation described in the ticking bomb scenario is not reflected in real life and that the calculations are far more complicated than they at first appear.

Israel has been one of the few countries that has regularly debated this issue in public and its experience may be useful.

**Critical Thinking Question:**

Which position makes most sense to you—Dershowitz's suggestion that torture may be legitimate under some circumstances but to be legal needs to be sanctioned by a court before it is used, or Gross's notion that torture should always be regarded as wrong or illegal though those who employ it, thereby breaking the law, may be exonerated afterwards if they can justify their actions to a court?

## Putting an End to Torture: New Developments and High Promise

Regardless of one's opinion on the ticking bomb question, the fact is that it represents a tiny fraction of the instances in which torture is used. Far more common is the mistreatment meted out by police or military officials for political or religious reasons, to inflict retaliation, or to foster intimidation.

But what exactly constitutes torture? Where does cruel behaviour end and torture begin? The CAT requires torture to involve 'severe pain and suffering'. But what is the definition of severe? And is it not true that human pain thresholds vary and that what one person considers 'severe' pain another might consider relatively mild?

The **European Court of Human Rights** (ECHR) addressed this question in a landmark case, *Ireland v. United Kingdom* (1978), in which it ruled that five techniques—wall-standing; hooding; subjection to loud

noise; deprivation of sleep; and deprivation of food and drink—used by British officials against Irish nationalists, while they 'did not occasion suffering of the particular intensity and cruelty implied by the word torture', did amount to 'a practice of inhuman and degrading treatment', and that in itself was a breach of the European Convention on Human Rights, which prohibited such practices. The point is that, while understandings of what constitutes torture may vary, even acts that do not rise to the level of torture are outlawed under most human rights conventions. Recall that the name of the most pertinent convention is the *Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment*.<sup>4</sup>

The CAT defines torture, then, 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 or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.**

Yet even this definition is incomplete. The ECHR ruled in *Aydin v. Turkey* (1997) that rape while in state custody constituted torture, thus expanding the category to include instances of gratuitous violence. Nor does it make sense to limit torture to acts involving public officials. After all, **non-state actors** (see Box 15.7), such as armed opposition groups, terrorist organizations, private security contractors hired by corporations, and tribal elders enforcing cultural traditions such as *female genital mutilation* (FGM), engage in practices that look very much like torture, even if they are not covered by the CAT definition. Many observers (Copelon, 1994) would now include severe forms of domestic violence and child abuse within the rubric too.

Once we have established the breadth of the problem, the final and most crucial question becomes: what can we do about it? We know that laws in and of themselves cannot stop criminal acts and that much international law goes unenforced. Over the past decade and a half, however, several important developments carry considerable promise that torture may be successfully combated, even if it is never eliminated.

**BOX 15.7 DECONSTRUCTING:  
NON-STATE ACTORS**

'Non-state actors' is a revealing term when it is applied in a human rights context. In the first place it implies that traditional nations or states are the entities most fundamentally responsible for human rights violations, and historically that may well be true. Most human rights treaties are written in such a way as to hold governments accountable for human rights crimes. But as terrorist organizations and corporations have, in very different ways of course, both become more global in their scope and reach, it has become evident that they too need to be held responsible for violating human rights. Al-Qaeda and Islamic State are not 'governments' in any traditional sense but they are certainly responsible for serious human rights abuses.

Sometimes it is difficult to separate governments from non-state actors. Hezbollah, for example, is very closely aligned with the Syrian government and is suspected of often doing its bidding. China's government owns many large corporations and, though Western companies are usually at least theoretically independent of their home governments, corporate and state interests are often closely aligned. Eventually human rights law will need to catch up with the fact that non-state actors are often even more powerful than some governments and so need to be 'regulated' by human rights treaties and conventions, difficult as it may be to enforce such regulations.

In the first place, the vast majority of the world's nations have incorporated laws against torture into their own constitutions and legal statutes. This includes prohibitions against crimes that are often considered culturally sanctioned, such as burning the faces of brides who displease their husbands, dowry killings (the killing of brides whose dowries are not considered adequate), and female genital mutilation. While such laws are often sporadically enforced, they provide the legal basis for Indigenous human rights activists, whose numbers and sophistication have been growing rapidly, to challenge these practices, both legally and socially. Contrary to the old slogan 'You cannot legislate morality', the fact is that one of the ways to shift cultural norms is by declaring certain practices out of bounds legally and hence unacceptable to those who want to understand themselves as abiding by the rule of law. The more that torture is outlawed, the more it becomes socially deviant to practise or support it. The international community would not countenance today a debate

about whether slavery or piracy was an acceptable practice, and that is slowly becoming the case with torture as well.

But we need not rely on political pressure or social shaming alone. More and more torturers are being convicted of their crimes in courts of law, even years after their perpetration. One recent example is that of Duch, the Khmer Rouge commandant of the notorious S-21 Prison in Phnom Penh, Cambodia, where at least 17,000 people were tortured and died in the 1970s. In 2010 a joint international–Cambodia court found him guilty of crimes against humanity.

Perhaps the most important development of recent years has been the increasing vibrancy of the legal concept of **universal jurisdiction**, the doctrine that certain crimes are so serious that, regardless of where they were committed, any country on Earth may claim jurisdiction over them and seek prosecution of those alleged to have committed them. States party to the CAT are obligated either to prosecute those credibly accused of torture whom they find on their territory, even if the torture was committed elsewhere, or to extradite them to a country that will.

This doctrine has largely been honoured in the breach, but in 1999 the British Law Lords (the United Kingdom's highest court) ruled that General Augusto Pinochet, the former president of Chile who had come to Great Britain for medical treatment and hence was on British soil, could not claim **sovereign immunity**<sup>5</sup> and could be extradited to Spain to stand trial for the torture and murder of Spanish citizens even though those acts were alleged to have been committed in Chile. Pinochet was eventually judged too ill to stand trial and returned to Chile, where he later died, but the precedent that those accused of torture might legitimately be prosecuted anywhere in the world had been established by a highly respected court. Utilizing the doctrine of universal jurisdiction, Belgium in 2001 successfully prosecuted four Rwandan citizens accused of involvement in the 1994 Rwandan genocide. In principle, then, those who commit crimes against humanity, such as torture, need not only fear prosecution before such tribunals as the **International Criminal Court**, if it can claim jurisdiction, or various ad hoc tribunals, if they exist, but may also face indictment before national courts that are inclined to pursue them. Coupled with the burgeoning use of **truth commissions** (see Chapter 22) to sort out the facts of past human rights crimes and hold the appropriate people responsible for them, universal jurisdiction

provides still one more way to effect a degree of accountability for crimes like torture.

In the United States such accountability is being pursued through the use of the **Alien Tort Statute (ATS)** of 1789 and the **Torture Victim Protection Act (TVPA)** of 1991. The ATS and the TVPA provide means through which US citizens and aliens (foreign nationals) can bring civil suits in US courts for torts (wrongs) committed overseas, either in violation of international law or of treaties to which the United States is a party. The ATS was originally intended as a mechanism to compensate those who had lost property to pirates, but in a historic case, *Filartiga v. Pena-Irala* (1980) (see Box 15.8), a US court ruled that torturers who have sought safe haven in the US could be sued for civil damages by their victims or their victims' families. Since then the Center for Justice and Accountability (CJA), among others, has successfully assisted a myriad of survivors of torture and other human rights abuses to bring such suits, most of which have been successful. In December 2005, for instance, a federal jury found a former El Salvador military colonel guilty of crimes against humanity and ordered him to pay US\$6,000,000 to four people who had been tortured or had relatives killed by his security forces. In August 2012, a federal judge awarded US\$21,000,000 million in compensatory and punitive damages to victims of atrocities committed by former Somali Minister of Defence, General Mohamed Ali Samantar. Plaintiffs do not always collect on these judgments but, even when they do not, they often feel that justice has been served because the guilt of the accused has been established publicly. Moreover, those found responsible for such crimes may well be subject to removal or deportation from the United States. The US Supreme Court has recently limited the reach of the TVPA in human rights cases against corporations (*Mohamed v. Palestinian Authority*, 132 S. Ct. 1702 (2012)) and of the ATS in both corporate and individual cases (*Kiobel v. Royal Dutch Shell Petroleum* 133 S. Ct. 1659 (2013)).

Though seldom used, the US also has criminal statutes which allow for the prosecution of torture and other human rights crimes committed overseas. In 2008, Chuckie Taylor, son of former Liberian president Charles Taylor, was the first person to be convicted under the federal criminal torture statute and sentenced to 97 months in prison.

Not one of these legal tools alone will put an end to torture. They must be supplemented by continuing vigilance on the part of international and Indigenous

#### BOX 15.8 FILÁRTIGA V. PEÑA-IRALA

Joel Filártiga was a Paraguayan physician who ran a clinic for the poor and was an outspoken critic of the military dictatorship. In 1976 his son, Joelito, was kidnapped by a police official named Americo Peña-Irala, and others, and tortured to death. The Filártigas were unsuccessful in their attempts to have Peña-Irala held to account in Paraguay. In 1978 Peña-Irala, his mistress, and two relatives took up residence in Brooklyn, New York. When they were discovered, US officials arrested them for overstaying their visa and initiated deportation proceedings. But Dolly Filártiga, Joelito's sister, who was living in Washington, DC at the time, along with her father, filed a US\$10 million civil suit against Peña-Irala under the Alien Tort Statute (ATS) for compensation for the death of Joelito. The suit was initially dismissed based on precedents that the application of international law in the US only applies to relations between states. But in June 1980 that judgment was reversed. Finding that customary international law forbade torture, a US federal appeals court ruled that the reach of such law extended everywhere and that therefore US courts *did* have jurisdiction over matters of this nature—when the defendant is found in the US—even though the abuses had occurred in another country (630 F. 2d 876 (2d Cir. 1980)). Since this precedent-setting decision, ATS and the TVPA have been used frequently to bring civil suits against alleged torturers who have taken up residence in the United States.

(Claude, 1983)

human rights organizations, aided by: new forms of electronic communication, to bring torture out of the shadows; pressure from such bodies as the European Union, which has used Turkey's interest in joining the Union, for example, as a vehicle for encouraging that country to improve significantly its record on torture (Worden, 2005); and the systematic training of police and military officers in appropriate and effective methods of interrogation.

Torture will no doubt continue to claim its victims; fortunately, health professionals are establishing more and more treatment centres for victims of torture to ease the pain of the experience and help survivors rebuild their lives. But torturers can be less certain than in decades past that they will get away with their crimes. As the human rights movement matures and grows, that uncertainty will build and, just as nothing encourages torture to flourish more than impunity, so nothing will hasten its decline more readily than the sure knowledge that the use of such brutality will no longer go unpunished.

**KEY POINTS**

The definition of what constitutes torture is not exact, but cruel, inhuman, and degrading treatment is also outlawed by international human rights law and hence we need not quibble too much about definitions.

Torture is not a phenomenon the use of which is limited to government officials. Non-state actors are guilty of it too.

Fortunately, most countries now outlaw torture in most of its various forms and major developments in international law, including an increasingly robust principle of universal jurisdiction, lend encouragement to the hope that the frequency of torture may be reduced.

In the United States the Alien Tort Statute and the Torture Victim Protection Act have been used successfully by victims of torture to seek civil damages from their torturers.

Ending torture requires a combination of factors, but the key is to convince would-be torturers that they will be punished for their crimes.

**Critical Thinking Question:**

A great debate has arisen in the United States as to whether those alleged to be responsible for using torture during the administration of President George W. Bush should be prosecuted. The Obama administration rejected the use of torture as wrong but decided not to pursue such cases. As former US Attorney General Eric Holder said, 'It would be unfair to prosecute dedicated men and women working to protect America for conduct that was sanctioned in advance by the Justice Department.' Do you agree that, if you are given bad legal advice, you should be exempt from punishment for doing something that for other reasons you may know or ought to know is wrong?

**Conclusion**

Why human beings so frequently inflict grievous injury in the form of torture upon one another is a complex scientific and perhaps theological question. One neuro-psychologist has suggested that the howls of pain that emanate from our fellow human beings are so appealing, especially to males, because they evoke the success of the hunt, hearkening back to the Palaeozoic era, and hence signal personal and social power (Nell, 2006). Other observers would attribute the appeal to the inherent human capacity for sin.

While we have dealt in this chapter with torture as it has occurred in the West, it is a worldwide phenomenon that has been found in virtually every region of the globe. As we have seen, the rationale for torture, dating back to the earliest eras of Western history, is often a perceived need to obtain information, but brutality has often been used for less 'reputable' reasons as well. It is not necessarily difficult to convince individuals to become torturers—a fairly standard process involving authority figures, isolation, brutalization, technical training, and assurances of impunity has been documented to work effectively. When such a

process is introduced into a society that has identified a group of people as threatening outsiders and hence as people possessing fewer claims to rights or even to be considered human, torture is often almost inevitable.

Some have argued that a ticking time bomb scenario may warrant the use of torture, but such instances are extraordinarily rare and the question far more complex than it initially appears to be. The more common uses of torture, e.g. for political or social intimidation, may best be combated by strictly enforced laws against it, cultural norms that forbid it, and assurance that those who engage in it will pay a significant penalty.

It is said that Vladimir Lenin, one of the most brutal and hard-hearted men in the world, could not listen to Beethoven's *Appassionata* because it made him cry. It will take far more than beautiful music to rid the world of torture. Lenin's tears remind us that even the most corrupted soul may retain a spark of humanity to which we may appeal, but the far more important lesson that they teach is that tender thoughts can be misleading and that the only way truly to put an end to cruelty is to be vigilant in pursuit of its cessation.

**? QUESTIONS****Individual Study Questions**

1. Why did the ancient Greeks and Romans think it appropriate to torture slaves to obtain information? Why was that practice ultimately considered inadequate as a way to solve crimes?

2. What is the 'Queen of Proofs'? Why were heretics considered to be even more dangerous than common thieves by the medieval church?
3. Describe two theories as to why European governments gradually came to abandon the use of torture as an official practice. Does one of these theories seem more plausible to you than another?
4. What is 'customary international law' and why does the prohibition of torture fall under its rubric? What are *hostis humani generis*?
5. Describe the general process by which police or military recruits are often transformed into torturers. Do you think that you yourself might be vulnerable to such a transformation?
6. Describe some of the characteristics of societies in which torture tends to be found.
7. What is 'universal jurisdiction' and why is it such an important tool in the fight against torture?
8. What is the Alien Tort Statute, and how has it been used against alleged torturers in the United States?

#### Group Discussion Questions

1. What is the 'ticking bomb scenario'? Describe the arguments in favour of the use of torture in such a situation and those against such use. Do you find one set of arguments more compelling than the other? Should torture be outlawed in all cases and those who engage in it forced to defend their use of it after the fact, or ought it to be possible to grant judicial permission for torture before it is employed?
2. What are the keys to diminishing the use of torture around the world? How do cultural norms change? Is it better to have laws on the books against torture even if they are not always adequately enforced, or do such 'sham laws' do damage to the integrity of the rule of law itself?
3. Is some amount of torture inevitable or do you believe it can be significantly reduced? What is your theory as to why brutality such as torture appears to be so frequently and commonly employed by human beings against one another?



#### FURTHER READING

**Conroy, J.** (2000). *Unspeakable Acts, Ordinary People: The Dynamics of Torture—An Examination of the Practice of Torture in Three Democracies*. New York: Knopf.

A gripping account based on first-hand interviews with torturers and their victims of the use of the practice in Northern Ireland, the United States, and Israel.

**Danner, M.** (2005). *Torture and Truth: America, Abu Ghraib, and the War on Terror*. London: Granta.

A comprehensive look at the United States' use of torture at the Abu Ghraib prison camp in Iraq by a prize-winning New York Times reporter.

**Levinson, S. (ed.)** (2004). *Torture: A Collection*. Oxford: Oxford University Press.

An excellent collection of essays on the philosophical and legal dimensions, with special attention to debate over whether torture is ever justified.

**Peters, E.** (1996). *Torture*. Philadelphia, PA: University of Pennsylvania Press.

Widely considered to be the definitive history of torture in the Greek, Roman, and medieval periods. It includes a superb appendix of documents.

**Roth, K.** and **Worden, M. (eds)** (2005). *Torture: Does it Make Us Safer? Is it Ever OK?* New York: New Press.

Largely original essays with special attention to the US' practice of torture.

**Scarry, E.** (1985). *The Body in Pain: The Making and Unmaking of the World*. Oxford: Oxford University Press.

A complex, highly sophisticated exploration of the experience and psychodynamics of torturing and being tortured.

**Schulz, W. (ed.)** (2007). *The Phenomenon of Torture: Readings and Commentary*. Philadelphia, PA: University of Pennsylvania Press.

An extensive digest of readings—some hard to find elsewhere—on all aspects of torture, from first-hand accounts of the experience to essays on the psychodynamics between torturer and victim, the ethics of its use, and the efforts to combat it.

**Weschler, L.** (1990). *A Miracle, A Universe: Settling Accounts with Torturers*. New York: Pantheon.

A moving, extraordinarily well-written account of torture in Latin America in the 1970s. Full of astonishing stories. A classic.



#### WEB LINKS

<http://www.amnesty.org> The world's oldest and largest international human rights organization, Amnesty International, carries updated information on torture in dozens of countries and what citizens can do about it.

<http://www.cvt.org> The Center for Victims of Torture is one of the major organizations treating survivors of the experience.

<http://www.hrw.org> Website of Human Rights Watch, a US-based human rights organization that tracks the use of torture around the world.

<http://www.omct.org> Created in 1986, the World Organisation Against Torture (OMCT) is today the main coalition of international non-governmental organizations (NGOs) fighting against torture, summary executions, enforced disappearances, and all other cruel, inhuman, or degrading treatment.

<http://www.kspope.com/torvic/torture.php> This website provides links to all major organizations working against torture.



#### NOTES

1. A commonly used example of the defence of necessity is the hypothetical situation in which one is asked by a would-be killer of a loved one to reveal the loved one's whereabouts. It is generally agreed that, while under most conditions lying is not morally defensible, under these circumstances the morally dubious act of lying is necessary and justifiable to prevent the far more morally egregious act of murder.
2. Germany, for example, was rocked some years ago by a case in which the police tortured a suspect to get him to reveal the location of a child he had kidnapped (Bernstein, 2003).
3. Justice Landau himself acknowledged publicly many years after the issue of his Report that he felt betrayed by Shin Bet for its having often exceeded the constraints that his Report had recommended (Felner, 2005, p. 39).
4. 'Cruel, inhuman, and degrading treatment' is sometimes referred to by its acronym, CID.
5. The legal principle that a head of government is immune from prosecution for acts committed in his official role as sovereign, as opposed to acts committed in pursuit of his/her own private interests. It is generally understood that, while a head of state could be prosecuted for such things as personal corruption or murder of a spouse, he/she could not be prosecuted for the consequences of state policies.



Visit the Online Resource Centre that accompanies this book for updates and a range of other resources: [www.oxfordtextbooks.co.uk/orc/goodhart3e/](http://www.oxfordtextbooks.co.uk/orc/goodhart3e/)