

## Human Dignity or Human Life

### *The Dilemmas of Torture and Rendition*

The senior leadership at the CIA understood clearly that the capture, detention and interrogation of senior al-Qa'ida members was new ground – morally and legally.<sup>1</sup>

George Tenet, Director of the Central Intelligence Agency  
(1997–2004)

There are two torture dilemmas. The first is the dilemma of torture; the second the dilemma of the torture debate. The first asks whether and under what conditions we may lift the universal ban on torture to save the lives of innocent civilians. Some thoughtful commentators reject torture in any form and for any reason, while others, like George Tenet, are more tolerant, if not more urgent, about probing the limits of interrogation. They will want to know if torture in the face of murderous terrorism is not the lesser evil. The second dilemma asks whether we do harm merely by discussing exceptions to the ban on torture. When democracies talk about exempting themselves from long-standing norms of behavior, repressive regimes are not far behind. They will want to know why they, too, cannot practice torture to prevent terror. How do we answer each of these challenges?

The debate about permissible torture in a democracy is not new. It preoccupied the British in the 1960s and 1970s and the Israelis in the 1980s and 1990s and the Americans since Abu Ghraib. Successive arguments build on the old, and in spite of marginal innovations, the contours of the debate have remained virtually unchanged since

the British grappled with their methods of fighting insurgents in the colonies and Northern Ireland. There are several important elements to this debate. First, there is considerable sympathy for harsh interrogation techniques in the war on terror. In spite of vociferous indignation in some quarters, most Western nations support rendition, that is, U.S. requests to hand over terror suspects knowing they may face harsh interrogation. Second, public and judicial scrutiny has confined harsh or "enhanced" interrogation techniques to national intelligence agencies and there it continues to enjoy support. In this context, many defend torture to save large numbers of lives. Third, emerging, although relatively scant, evidence that enhanced interrogation techniques do not work (because they produce false or stale information) or carry great costs when they work occasionally (because they leave innocent victims or widespread fear and mistrust in their wake) or that other methods (such as cultivating trust or using informants) work better, does not belie the possibility that torture may sometimes save many lives. In spite of the efforts of many scholars to ascertain the effectiveness of torture, the evidence remains insufficient to prove otherwise and, given the secrecy of the agencies that practice torture, comprehensive evidence might never be forthcoming.

In the absence of firm, empirical evidence denying the effectiveness of torture, there remain adequate arguments for some forms of interrogational torture. I will describe these below. Any defense of enhanced interrogation, however, demands a clear distinction between interrogational torture (to obtain information) and terroristic torture (to brutalize or intimidate political opponents), between unlawful terrorism and lawful internal dissent, and between moderate physical pressure or "torture-lite," and cruel or vicious torture.

Supporters of enhanced interrogation overwhelm opponents in the first part of the torture debate. Foreign governments comply with American requests to arrest and transfer suspects to American jurisdiction. Public opinion is often supportive. Intelligence agencies take heart from their ability to prevent catastrophic terrorist attacks, and defenders of enhanced interrogation find nearly unassailable refuge in the lesser evil. However, advocates fare poorly in the second debate. Failing to convincingly distinguish between the harsh interrogations that democracies may practice and the brutal torture that repressive regimes may not, leaves the latter to equate the two. If democracies can

torture terrorists, why can't other regimes torture their political opponents? Providing a convincing answer without running afoul of charges of hypocrisy is not easy. In the end, democracies face giving up the practice of torture or instituting safeguards to prevent egregious abuse.

#### THE TORTURE DEBATE TODAY

Torture is slow to come out of the closet and the best impression of its modern practice is that we still do not know much about it. Philosophers, jurists, and politicians continue to debate the definition of torture, possible justifications, and its best effects. So much of the debate depends upon whether torture works, and despite a burgeoning literature, torture remains shrouded in secrecy. For every case analysis of ineffective torture,<sup>2</sup> is the intelligence officer with the story of the one that didn't get away and of how torture produced the right information at the right time to prevent a catastrophic attack on innocent civilians. However, information remains sparse. No intelligence service has, nor likely ever will, open up all its files. No outside analyst has or likely ever will examine the 90 ticking bomb cases that Israeli officials say required enhanced interrogation.<sup>3</sup> Nevertheless, torture remains relatively rare. The 90 cases just cited account for perhaps two percent of investigations in Israel. In the United States, the number of cited cases is about 30.<sup>4</sup>

Thinking about ticking bombs, real and imagined, sets the stage for a lesser evil argument: if enhanced interrogational measures can save lives, then torture is less evil than letting many people die. This is the most prominent argument in support of torture. Against it are two camps. There are those who continue to attack the many premises of the ticking bomb scenario. Rather than producing the information necessary and sufficient to avert a calamitous terror attack, torture only delivers misleading, stale, or piecemeal information. At the same time, there is nothing to prevent terrorists from planning for operatives falling captive and making any number of contingency plans to move their device and reschedule their attack.<sup>5</sup> At the very least, opponents weigh in with unseen dangers: perhaps torture can save lives, but it carries significant costs that are impossible to ignore. These include harm to mistaken victims, the growing use of torture in law enforcement, and the erosion of civil liberties. The second



camp of opponents eschews the complexities of ambiguous data and takes a more absolute viewpoint. When asked, Does torture work? one human rights activist simply answered, "We don't know and we don't care." Torture is always wrong no matter how many lives it might save. A person should no sooner torture another for life-saving information than rape him.

To evaluate these arguments, I will first map several key aspects of the debate. These include the definition of torture, an assessment of its effectiveness, and an evaluation of common justifications. In the second section, I look at the torture debate from on high and consider its place in the world today.

### What Is Torture?

There is no single definition of torture. It is common, first, to distinguish between interrogational torture and terroristic torture. "The idea that torture is a cruel and ugly practice," writes Judge Richard Posner, "confuses torture as a routine practice of dictators ... with torture as an *exceptional* method of counterterrorist interrogations."<sup>6</sup> Terroristic torture is the way of repressive regimes. Its purpose is to terrorize the citizenry and stifle political opposition. Interrogational torture, on the other hand, is an adjunct of asymmetric war. It embraces harsh measures to elicit information from terrorists, militants, and insurgents who threaten national security. Contrary to widespread opinion, this is not the ticking bomb scenario often described. There are few cases where interrogators expect a single suspect to provide all the information necessary to avert a catastrophic attack on civilians. In practice, authorities use interrogational torture to save innocent, civilian lives *and* to prevent attacks on soldiers and military installations. Any justification of torture that leans heavily on the innocence of terror victims must contend with the messy fact that interrogational torture is a way of war, not solely a means to protect the innocent. It must also contend with the exigencies of modern intelligence gathering. Ticking bomb scenarios are not prevalent. Rather, the complexity of outsourced and decentralized terror networks makes it unlikely that information is concentrated in the hands of any one person.<sup>7</sup> Interrogation, therefore, lends itself most often to the slow accumulation of large quantities of piecemeal, low-level information

that security forces require to fight terror networks and insurgencies.<sup>8</sup> U.S. General John Keane, former army vice chief of staff, refers to this as network mapping: the "tedious reading and sifting of interrogation reports, tactical operations, signal intercepts, other human intelligence reports, [and] captured documents."<sup>9</sup>

If this is the right way to understand interrogation in asymmetric conflict, then the central question of the debate is somewhat more mundane than the prospect of ticking bombs: Is it permissible to use enhanced interrogation techniques to obtain important military information? Framed in this way, one readily sees just how old and worn the question is. No military organization has raised it seriously in modern times for the simple reason that no party to a conventional war had much use for any military technique that its enemy can use with such demoralizing force. Asymmetric warfare, however, changes this equation. Guerrilla forces lack the means to capture more than a few enemy soldiers, while state military organizations expend considerable resources to capture and interrogate large numbers of guerrillas. Once states are insured of a virtual monopoly, interrogational torture is up for consideration.

Nevertheless, the debate is carefully circumscribed. No proponent of enhanced interrogation defends terroristic torture or torture in the hands of law enforcement officials. Moreover, advocates draw a line between different techniques, justifying only those that cause less than severe harm. This reframes the central question again: Is it permissible and is it effective to use harsh but not brutal interrogation techniques to elicit militarily important information? The next section, *Acceptable and Unacceptable Interrogation Techniques*, addresses the question of permissible techniques; and the following section, *Is Torture Effective?* examines the question of effectiveness.

### *Acceptable and Unacceptable Interrogation Techniques*

Table 6.1 describes three broad categories of interrogation techniques: those that everyone accepts, those that everyone rejects, and those that many dispute.

Acceptable techniques that govern questioning by law enforcement and military officials appear in army and police interrogation manuals.<sup>10</sup> These are built around establishing rapport, gaining

TABLE 6.1 Acceptable and Unacceptable Interrogation Techniques by Agency

Interrogating Agency	Interrogation Techniques
Acceptable to police or army	<i>Law Enforcement Techniques</i> 1. psychological pressure 2. deception 3. good cop – bad cop 4. isolation
Acceptable to intelligence services only	<i>Enhanced Techniques: Moderate Physical Pressure or "Torture Lite"</i> 1. blindfolding 2. stress positions 3. loud music 4. sleep and sensory deprivation 5. waterboarding
Never acceptable for any agency	<i>Extreme, Brutal, and Severe Techniques</i> 1. severe beating 2. maiming or mutilation 3. sexual abuse

confidence, and working to identify a detainee's "primary emotions, values, traditions, and characteristics and use them to gain the source's willing cooperation."<sup>11</sup> However, investigators can also employ deception (leading a suspect to believe his interrogator is someone other than a U.S. official); psychological pressure (manipulating fear of incarceration or fear of never seeing one's family again); procedures that undermine a suspect's perception of his "loyalty, technical competence, leadership abilities or soldierly qualities" (without becoming degrading or humiliating); good cop/bad cop routines; and, in some cases, physical isolation.<sup>12</sup> Unacceptable techniques include those intuitively brutal to the extreme: severe beatings, maiming and mutilation, rape and sexual abuse. These techniques exceed the bounds of defensible torture and cause a degree of intense suffering that U.S. government legal advisors have compared to the pain "accompanying serious physical injury" or that which "shocks the conscience."<sup>13</sup> Whatever the exact definition, no democratic nation permits any of its police or security forces to use these brutal means. Between acceptable and unacceptable techniques, are those that have earned a variety of euphemistic descriptions such as torture lite,



enhanced interrogation techniques, or moderate physical pressure. They include hooding or blindfolding, exposure to loud music and temperature extremes, slapping, starvation, wall standing and other stress positions and, in some cases, water boarding.

None of these latter techniques is new to democratic nations. When the European Court of Human Rights (1976) considered the lawfulness of these interrogation techniques, they echoed the majority view of two British government committees in the early 1970s, which, in turn, reached back into British history for a precedent. These techniques, noted the Parker Report, "have been developed since the [Second World] War to deal with a number of situations involving internal security in Palestine, Malaya, Kenya, Cyprus, British Cameroon, Brunei, British Guiana, Aden, Borneo/Malaysia, and the Persian Gulf."<sup>14</sup> The European Court respected this long tradition and slowly drew it out of the shadows while dismissing claims that these techniques necessarily constituted torture.<sup>15</sup> These were the same techniques an Israeli commission would approve in 1987 as it accepted the European Court's distinction between the combined use of the techniques, which constitute torture, and the techniques themselves, which, while inhuman and degrading, are free of the stigma attached to "deliberate inhuman treatment causing very serious and cruel suffering" and, therefore, did not "occasion suffering of the particular intensity and cruelty implied by the term 'torture'"<sup>16</sup>

Following 9/11, the American government would turn to all of these decisions, reports, and papers as it, too, employed enhanced interrogation techniques to fight terrorism. Banned for use by law enforcement and military officials, enhanced interrogation is the sole purview of intelligence agencies. In the United States, enhanced interrogation was reserved for terror suspects and other unlawful combatants but is beyond the pale for interrogating common criminals. These methods include shaking, slapping, beating, exposure to cold, stress positions, and, in the United States, waterboarding, a technique that simulates drowning by submerging the suspect.<sup>17</sup>

What, if anything, distinguishes one set of techniques from another? Are some significantly different from others or are all just part of a continuous spectrum of interrogation techniques? Those techniques we consider repugnant are usually the most brutal, impinge upon a person's dignity in a most extreme way, and cause extreme suffering, particularly long-term future suffering, that is entirely gratuitous and

unnecessary. At the other end of the spectrum, interrogation does none of this. Severe questioning may be unpleasant and humiliating but it causes no immediate or long-term physical pain and suffering. One may ask why police officers may browbeat, threaten, or humiliate a prisoner and the answer seems to be that a) the level of humiliation does not exceed a threshold that undermines a person's dignity, b) the probability that a person committed a violent crime tempers the respect we owe another human being, and c) this disrespect is short-term. True, police interrogations may violate these conditions too, but when they do, interrogators are subject to disciplinary measures. Those who work for intelligence agencies, on the other hand, rarely face disciplinary action.

Intelligence agencies have wider latitude. Whether this is defensible is a separate question I will consider in a moment. First, I want to ask how the enhanced techniques of intelligence officials differ from extreme or brutal practices. One answer might be that the harm suspects suffer is not invasive or direct. Rather there is something passive or indirect about hooding, wall standing, sleep deprivation, loud music, or starvation. These "soften up" rather than directly harm a person in the way beating or electroshock or burning or drowning does.<sup>18</sup> Second, the intensity of pain that moderate physical pressure causes seems reasonably less than the pain that extreme physical pressure causes. Finally, the pain of hooding and stress techniques is transient and of limited duration. It does not extend much, if at all, beyond the time needed to elicit information. Once the hood comes off or the suspect may stretch his limbs, the detainee's body returns to normal functioning.

There is no great body of empirical evidence to support any of these assumptions conclusively. Often the pain of enhanced interrogation can be intense. Sometimes the psychological and physical sequelae last a lifetime. Nevertheless, moderate physical pressure, as defined earlier, does not seem to depart from what is necessary to get information from terror suspects. And, it seems significantly less extreme than the pain most people associate with torture. Commenting on the combination of these techniques, Darius Rejali writes:

Detainees who emerged from the Shabeh [combination of techniques] interrogation had "little physical proof of their experience. The few signs left on the prisoners' bodies evaporated after a shower, uninterrupted sleep and standard prison rations." When prisoners had clear wounds of torture, "the community understood why they broke down." But lacking clear wounds, they



could not explain their weakness. Nor could they explain why they refused to continue their nationalist activities, a damaging move in a society in which political struggle was a measure of social worth. "The associated feelings of shame, remorse, and guilt can even cause severe mental trauma that would not have been experienced had the subjects been physically scarred." Shabeh combines a thousand clean practices to create a *social death*.<sup>19</sup>

There are two ways to read this description. For some, it shows something qualitatively different about moderate physical pressure that many people recognize. It is not as harmful as extreme interrogation. After all, a social death cannot be as bad as a real one. For others, the passage may suggest that a social death is just as bad as a physical death. What reason, then, is there to think that psychological pain is any less harmful or long lasting than pain inflicted on the body?

Perhaps there is none and, indeed, many firm opponents of torture argue that it is objectively impossible to distinguish between the harms that moderate techniques cause and those more brutal. Notice, however, that this argument cuts both ways. If it is difficult to distinguish between the effects of moderate and extreme physical pressure, then one may also argue that no less pain and suffering awaits a suspect or convicted felon in many jails in the United States or elsewhere in the free world. In other words, the harm that comes from landing in police custody (and being subject to "ordinary" interrogation and/or incarceration) or in the hands of a domestic intelligence agency moves along a continuum that is difficult to break into discrete categories. There is no place to draw a line based solely on the effects incarceration or questioning may have on the individual. Being suspected of violent crimes is not good for one's health. Some people may suffer from good cop/bad cop routines; others may persevere in the face of extreme physical duress. Moreover, these are the endpoints on the interrogation scale. In between, the middle is very muddy.

All this takes us back to a cultural view of cruel and unusual punishment. I asked this question in Chapter 3: Why are the effects of poison gas or blinding lasers worse than injury by high explosives that can equally kill or maim one for life? One answer, of interest in the context of interrogation, focuses on the window of vulnerability during war. Soldiers are vulnerable only as long as they pose a threat. Deliberately causing harm that persists far after hostilities have ended is unnecessary and therefore gratuitous and superfluous.

Extreme interrogation techniques that cause harm persisting far into the future is particularly objectionable. But long-term harm, particularly psychological harm, may also result from moderate physical pressure or lawful interrogation and incarceration. The persistence of the harm alone does not allow us to clearly distinguish between acceptable, questionable, and unacceptable techniques.

As a result, I suspect the reason for resisting extreme techniques but accepting the moderate ones is not so easily quantifiable. Instead, much turns on our intuitions about what is too cruel to do to others no matter what the consequences. Here a certain respect for human dignity takes over. This may not be the suspect's dignity but our own, and reflects a self-imposed vision of human worth that does not allow reasonable people to act in certain ways. As described in Chapter 4, many people agree about what kinds of suffering are superfluous and unnecessary or shock the conscience as the constantly evolving American view of severe torture now puts it.<sup>20</sup> Mustard and chlorine gas evokes ghastly images of suffering even though they are far less lethal and disfiguring than artillery shells, bullets, and hand grenades. Incendiary weapons cause horrific wounds but are often no less disabling than shrapnel. Yet many recoil from the former and tacitly accept the inevitability of the latter. Blindness is not fatal but particularly repugnant. In the case of torture, it seems that the worst excesses are not those that necessarily cause the most pain but those that mutilate or disfigure the human body or target specific physiological or psychological systems. This view would suggest prohibiting extreme torture, medical experimentation, or deliberately inflicting disease on suspects. These are precisely the kinds of effects that the ICRC has excluded from legitimate weapons development. Nevertheless, the reasons for excluding these harms while accepting others are difficult to sustain with any objectivity. None of this denies the brutality of torture, but it does offer some insight as to why moderate physical pressure seems significantly different from extreme torture to many people. No technique, however, is ever acceptable if it proves ineffective.

### Is Torture Effective?

Some may argue that we would be more effective if we sanctioned torture or other expedient methods to obtain information from the enemy. They would



be wrong. Beyond the basic fact that such actions are illegal, history shows that they are also frequently neither useful nor necessary.<sup>21</sup> (General David Petraeus, former Commander of U.S. forces in Iraq)

General Petraeus's skepticism notwithstanding, the question of effectiveness remains vexing. No intelligence agency is ready to supply details of successful investigations so the evidence is largely anecdotal.<sup>22</sup> Some documented torture cases are subject to scrutiny, and scholars have closely questioned claims about effective torture in Algeria, the United States, and elsewhere.<sup>23</sup> Accompanying this argument, however, are two others that deserve closer consideration: first, torture provides very poor information and second, informants provide better information.

Investigators recognize that information obtained under torture or the threat of torture is problematic. Investigators prefer a gradual approach to interrogation that builds rapport and gains trust. Harsh interrogation techniques lie in the background first as a threat, then if necessary, as reality. At the same time, data from independent sources – sometimes human, sometimes electronic – supplement the information that suspects supply. To get a grasp on the quality of information that torture provides, Rejali turns to the American army's Phoenix counterinsurgency program during the Vietnam War. Phoenix operatives first attempted to identify and then kill members of the Viet Cong. Rather than try to answer the question Is torture effective? based on individual cases, Rejali offers a novel approach by examining a large-scale application. Drawing on recent data from Stathis Kalyvas and Matthew Kocher, Rejali emphasizes that of 10,700 documented targeted killings, fewer than one thousand were confirmed Viet Cong. The rest were most likely innocent civilians.<sup>24</sup> While Kalyvas and Kocher attribute this remarkable lack of accuracy to the extreme violence attending a civil war, the tendency of counterinsurgents to liquidate a victim on less-than-convincing evidence, and the unreliability of informants who often want to settle personal scores, Rejali also attributes it to the unreliability of torture U.S. forces used to extract information about the Viet Cong.

In Vietnam, torture may well have yielded inaccurate information. But if targeted killing is a test case for effective torture, then a more successful counterinsurgency program belies Rejali's claim. In the previous chapter I described an Israeli policy of targeted killing

that owes no small measure of its success to aggressive intelligence gathering. Civilians lost their lives in the course of operations but few casualties, if any, were the result of mistaken identification.<sup>25</sup> Rather, civilians suffered collateral harm in the course of targeting correctly identified militants. By this standard, then, interrogation proved exceptionally effective.

As I noted in Chapter 5, targeted killing is problematic for other reasons, but lack of reliable information was not one of them. Instead, targeted killings can achieve spectacular success in asymmetric war. Unfortunately, this very success may only exacerbate conflict and complicate postwar reconstruction. Assassinating Palestinian militants did little to reduce (and probably increased) the rate of terror attacks. Nor can one overlook the cost of collaboration as authorities threaten ordinary citizens to turn informant (as discussed in the previous chapter). Collaboration, as Rejali suggests, can often yield better information than torturing militants. However, collaboration is morally problematic and certainly no alternative to torture as Rejali and other opponents of torture suggest. Few informants come forward willingly. Some, or their families, face the threat of torture and physical violence. Many harbor personal grudges or accept bribes to turn informer, while still others agree to collaborate rather than risk the loss of travel passes or access to medical care. Collaboration does not replace aggressive interrogation; it merely supplants it. And, if Israel's policy of targeted killing is any indication, the two together may yield very reliable information.

As we evaluate the torture debate to date, it is difficult to conclude unequivocally that torture, the threat of torture, or enhanced interrogation techniques do not work. The odds of gleaning important information may be small, but given the overriding fear of terrorism in an atmosphere of overwhelming uncertainty, even democratic nations may find ways to justify interrogational torture.

#### JUSTIFYING INTERROGATIONAL TORTURE

The inability to agree on just what torture is and evidence that it is sometimes more effective than opponents claim, give life to the debate. The first line of defense is to deny that torture lite or moderate physical pressure is significantly worse than the kind of interrogation



we permit law enforcement agencies to use on hardened criminals. Once officials define torture in terms of a threshold of severe pain and suffering in excess of what their interrogations cause, as American, British, and Israeli officials often try to do, then they are not practicing torture. Under these circumstances, they are employing legitimate interrogation techniques that by definition do not violate a suspect's rights. All that remains is for each nation to draw up a list of justifiable and preapproved techniques. During the second Bush Administration, American officials did just that for the CIA.<sup>26</sup> But this argument is disingenuous. No democratic nation permits law enforcement agencies or its military to use enhanced interrogation. Enhanced techniques are restricted to intelligence agencies and only when questioning those suspected of terrorism. What justifies more extreme means when the suspect is a terrorist?

### Life, Dignity, and the Lesser Evil

Although there are many ways to frame the torture debate, the core dilemma remains the same: How do you balance the dignity of some and the lives of others? Viewed in this way, the answer seems easy: life trumps dignity and respect for self-esteem.<sup>27</sup> After all, the terrorists suspected of planting a bomb stay alive, a little worse for wear, perhaps, but still alive. His or her victims, on the other hand, die a gruesome death. Torture, in this view, is the lesser evil, offset by saving many innocent lives from catastrophic harm.

The lesser evil argument is largely about weighing the consequences of moderate physical pressure, and leaves advocates and opponents trying to sort out the costs and benefits of enhanced interrogation. This is not easy, particularly in the absence of reliable data. Will torture give authorities the information they need, when they need it? Are less-harmful means of interrogation available? Does torture present a long-term threat to all citizens by eroding concern for liberty and human rights? Or, closer in time, how should we factor in mistaken victims who suffer torture but who turn out to know little or nothing of impending terror attacks?

Gathering all this information into a neat cost-benefit equation is difficult. Rational agents with the best of intentions have a hard time making life-and-death decisions under conditions of

risk or uncertainty. Because thoughtful people inflate the danger of catastrophic and unfamiliar scenarios, they routinely fear terror more than automobile accidents, for example, even though the latter are far more prevalent. Terror provokes fear and dread, fatal auto accidents are an unpleasant fact of life, a risk we all assume for the convenience of easy travel. If rational agents misjudge the risk of terrorism when the odds of dying in a terror attack are common knowledge, they are all the more skittish when probabilities remain unknown and outcomes uncertain. Guards at a check post do not know if the ambulance approaching is a car bomb, nor do interrogators often know the odds that the suspect before them conceals important information.

When the odds are unknown, some try to estimate them based on past events. This can be highly subjective. Others, lacking relevant information, will assign equal probabilities to each outcome and assume an equal chance the suspect holds crucial information. Moreover, because the cost (and fear) of a terror attack is so great in the minds of most people, one only requires a relatively small chance that torture will prevent terror to adopt extreme measures. The ticking bomb scenario, so prevalent in the literature and uppermost in peoples' minds, need not be on the table. Rather it is enough, as many investigators claim, that there be a reasonable chance (which may be objectively quite small) that harsh interrogation will provide important information for uncovering and defeating terrorists who intend harm to soldiers or civilians. In the end, all these fears and inflated probabilities easily overwhelm the immediate (but comparatively lesser) harm that torture inflicts on a terror suspect and the long-term (but heavily discounted) harm that may befall a democratic society that accepts harsh interrogation.

It is no surprise that human rights organizations despair of ever refuting ticking bomb or less-urgent scenarios of terrorism. Terrorism trades on abject fear, not statistics. Terrorists, therefore, have a keen interest in exaggerating the imminent threat they pose. They cannot stand before interrogators and then try to downplay the severity of the menace they present. Everyone plays into the other's hands. Terror suspects need torture to legitimate their claims and instill fear in their victims. Interrogators need terrorists and ticking bombs to defend harsh interrogation. This makes it doubly difficult



for critics of harsh interrogation to claim that they have misjudged the odds.

Nevertheless, blunt calculations of costs and benefits, even if miscalculated, present moral challenges that cannot be ignored. If we are to avoid terror at all costs then why stop with moderate physical pressure? Why not torture passersby or others who are not themselves terror suspects but chance upon crucial information? Why not torture a terrorist's child if this will force a detained suspect to speak? Why not torture common but heinous criminals – mass murderers, serial rapists, and pedophiles – if that will stop their crimes? Those who rely on the argument of the lesser evil alone cannot easily answer these questions. To answer them, defenders of enhanced interrogation must invoke the rights of interrogees to construct safeguards they hope will regulate or constrain torture.

### Regulating and Constraining Enhanced Interrogation

Democracies hope to avoid the worst abuses of interrogation by prohibiting inhuman techniques that cause severe, long-term, and unnecessary harm. At the same time, some democracies also try to put legal or judicial safeguards in place. The best-known example is the attempt by the Israeli Supreme Court. Ruling that democracies must fight with one hand tied behind their backs, the Israeli Court glossed over the distinction between torture and ill-treatment, and demanded that a “reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment of the subject and free of any degrading handling whatsoever.”<sup>28</sup> That is, the Court specifically rejected any attempt to force a dichotomy between torture and moderate physical pressure. Both are unlawful, both violate a person's basic right to respect for dignity and freedom from torture. Nevertheless, torture and ill-treatment may be defensible if necessary to save innocent lives. When the right to life of one group collides with the human dignity of another, the latter gives way. This is the necessity defense and recognizes both the integrity of the torture victim's rights and the need to violate them under exceptional circumstances.

To the Israeli court, torture is at best only defensible. After all is said and done, an interrogator must stand before the bar and explain how he violated the law to avoid “consequences ... which would have

inflicted grievous harm or injury.”<sup>29</sup> He must show that his actions met the threat of grave and unavoidable harm with a proportionate, effective, and last-resort response. On paper, this is what the necessity defense should look like. In practice, however, investigators have rarely stood trial.<sup>30</sup> “As long as interrogators act in a reasonable manner,” declared Israel’s state prosecutor in 2002, “they will not be tried on criminal or disciplinary charges for their actions even if jurists define these actions as unjustified.”<sup>31</sup> Instead of having to defend themselves after the fact, investigators received prior authorization from senior officials based on the threat they thought a suspect posed. But there was never any judicial follow-up. No one had to show that torture was necessary to get the information needed to prevent a terror attack. What began as a carefully controlled exception gradually morphed into an acceptable rule of conduct demanding little in the way of accountability or defense. Nevertheless, the glare of publicity and the prospect of judicial intervention has reduced the severity and frequency of torture complaints in Israel and led the United States to suspend enhanced interrogation techniques in 2009.<sup>32</sup>

These safeguards do nothing, however, to ensure that innocent persons are not tortured or that police interrogators do not use torture in their investigations of common criminals. The first is more a philosophical than a practical problem. Most people will agree that it is wrong to torture a terrorist’s child to force him to reveal important information. The child is innocent of wrongdoing and has done nothing to jeopardize his right to life or freedom from torture. This is obvious, perhaps, but it requires that we put the necessity defense in a slightly different form: *Torture is permitted as a last resort to save innocent lives as long as the innocent are not tortured.* Even ticking bombs do not override the life of the innocent. This is a common intuition: few would sacrifice an innocent person to transplant his organs to save the lives of four or five patients who would otherwise die. Similarly, the rights of the innocent would also protect a nonterrorist – cook, passerby, or spouse, perhaps – who chanced upon important information. Each is as innocent as the child is but for the fact that they know something and the child does not. Why not torture the cook for what he knows? If he is innocent, why shouldn’t he reveal the truth? Some take reticence as a sign of guilt, place the reluctant cook in the same category as the terrorist, and conclude that authorities may



question both with equal severity.<sup>33</sup> This would be mistaken, however; people do not speak for many reasons and fear is foremost among them. The cook may choose to remain silent to protect himself or his family from reprisal. Under these circumstances, his rights deserve the utmost respect.

This reasoning does not help us with those guilty of crimes less heinous than terrorism. If the greater good drives defensible torture of terror suspects, then why not torture ordinary criminals? There are different answers to this question. Anyone consistently concerned with the rationale of the lesser evil may, indeed, agree that torturing criminals is sometimes as defensible as torturing terrorists. In both cases, many innocent lives may be saved. Yet, the costs of torturing criminals are unacceptably greater than the costs of torturing terror suspects. Torture may easily undermine the criminal justice system where ordinary criminals face trial and, therefore, should be vigorously condemned. Interrogational torture, on the other hand, has been the purview of specific intelligence agencies and an isolated, dedicated military court system. Taken with the fact that many tortured suspects are "outsiders," that is, noncitizens, it is easy to see how the costs of torturing them will not have the same ramifications as torturing ordinary criminals. By design, many democratic nations have successfully kept these outsiders out. This is precisely the point of confining enhanced interrogation to intelligence agencies and trying suspects before military tribunals. There is little evidence to suggest that torture in Britain, Israel, or the United States leached into the local criminal justice system and affected the prosecution of ordinary criminals.

It is important to see that the dilemma of torturing cooks and criminals arises because we have yet to define interrogational torture as a tactic of war limited to combatants. In fact, this is precisely what differentiates terroristic torture from interrogational torture. The former is a feature of civil society in a despotic regime and draws no distinction between political, criminal, or military threats. Interrogational torture, on the other hand, arises only in the context of asymmetric conflict and has no truck with criminals or political opponents of the government. These civilians are beyond the law of armed conflict, and the ways of war should not affect them. Instead, the evolving norm confines interrogational torture to combatants,

however difficult they are to define. Therefore, the question is never Why not torture children, cooks, and criminals? but Why not torture commandos and other combatants? In ordinary, conventional warfare the answer is the same as we give to the question Why not assassinate enemy combatants? namely, it does not pass the test of military necessity. The fear and demoralization that comes from exposing one's own troops to the prospect of enemy torture offsets any military advantage that enhanced interrogation techniques confer. In asymmetric war, however, the weaker side lacks the means to capture and torture large numbers of uniformed combatants.<sup>34</sup> On the contrary, some guerrilla organizations, like Hamas or Hezbollah, find it far more profitable to hold the few soldiers they capture for lopsided prisoner exchanges. In the absence of reciprocity, harsh interrogation is much more cost-effective for the stronger side than it is in conventional war.

At the same time, torture is not foreign to democratic states. Torture, like other tactics discussed here, is entering the arsenal because it saves friendly lives (military and civilian), targets only the potentially guilty, limits collateral harm, and benefits from the weaker side's inability to respond in kind. Previously held in check by reciprocity, nations banned torture from the battlefield. But it was rampant in colonial warfare<sup>35</sup> and is now cut loose when stronger nations do not fear that their soldiers face significant danger from the other side. This explains the sudden proliferation of support for torture, support that no one would dare voice in the immediate post-World War Two era. Moreover, it explains worldwide support for rendition.

#### RENDITION AND INTERROGATION: INTERNATIONAL COOPERATION AND SUPPORT

##### Rendition to Justice

Capturing and detaining an enemy rather than killing him or her is a far more prevalent tactic in asymmetric war than it is in conventional war. In conventional wars, enemy soldiers are disabled by death or injury; in asymmetric war, they are captured, incarcerated, and interrogated. Information, not a body count, is the key to defeating many terrorist and guerrilla organizations. The overwhelming need



for information, usually low-level and fragmentary, coupled with the nonexistent threat of reciprocal torture, set the stage for rendition and enhanced interrogation.

Rendition to justice describes a procedure for bringing a criminal suspect residing in one country to another country for incarceration, interrogation, and trial. Unlike extradition, that is, a formal legal process anchored in an outstanding arrest warrant, rendition usually targets suspects who may harbor no more than information and for whom no arrest warrant is issued. "One of the purposes of extraordinary rendition," write Weissbrodt and Bergquist, "appears to be to hold persons outside of the recognized judicial procedures for extraditions and criminal trial."<sup>36</sup> As with torture and assassination, the presumption of guilt drives rendition, but there are no warrants or authorization beyond those provided by the intelligence organizations of the countries involved. At the request of one country, usually the United States, a suspect residing elsewhere is arrested by local authorities and delivered to American custody for interrogation and prosecution.

What sullies rendition, however, is not the forcible transfer of a suspect from one country to another, but the prospect he or she may face torture. In fact, the legality of rendition depends entirely upon the prospect that the suspect will face torture. A summary prepared for the U.S. Congress makes this point clearly:

Under US regulations implementing CAT (the Convention Against Torture), a person may be transferred to a country that provides credible assurances that the rendered person will not be tortured. Neither CAT nor implementing legislation prohibits the rendition of persons to countries where they would be subject to harsh interrogation techniques not rising to the level of torture.<sup>37</sup>

Human rights activists, on the other hand, are quick to point out that rendition violates a number of human rights that have nothing to do with freedom from torture. These include the right to counsel, the right to an impartial tribunal, as well as protection from forcible transfer and arbitrary arrest. The Geneva Conventions also impose strict prohibitions on the transfer of civilians and prisoners, a prohibition the United States has skirted by placing unlawful combatants beyond the purview of the Geneva Conventions and interpreting the Conventions to allow the temporary transfer of persons for the purposes of interrogation (in Iraq, for example).<sup>38</sup>

Nevertheless, many nations accept U.S. assurances that American interrogation techniques do not violate the provisions of CAT or the 1949 Geneva Conventions (Article 3) that ban torture. As a result, rendition enjoys the support of a great many nations including Canada, Russia, Sweden, Germany, the UK, Indonesia, Bosnia, Poland, Thailand, Italy, Pakistan, Egypt, Jordan, Morocco, Saudi Arabia, and Uzbekistan.<sup>39</sup> In these instances, suspects are sought for questioning, not trial, and states cooperate when there is reasonable suspicion that crimes of terror have been committed. There is little in international law to prohibit cooperation between states, while many of the restrictions that might prevent states from transferring suspects to another state can be suspended in times of public emergency such as the war on terror, broadly construed.<sup>40</sup>

Obviously, this is not the way that nations at war treat ordinary combatants. In conventional war, combatants face capture and incarceration until the cessation of hostilities. Unless accused of war crimes, they cannot face trial for the mere fact that they are soldiers who kill their enemy. At the same time, each side, fearing abuse of its own soldiers, usually refrains from torture. In asymmetric warfare, all this breaks down. On one side, soldiers are no longer captured and held for the duration of the hostilities, but are “kidnapped” and held incommunicado in exchange for other prisoners. On the other side, combatants fighting with groups like the Taliban, Hamas, and al-Qaeda are declared unlawful combatants and deprived of the privileges ordinary POWs enjoy. They are rendered to justice, incarcerated without due process, and sometimes tortured to obtain information. In many cases, torture begins with rendition. This is the sticking point for many nations. But once assured that interrogation is lawful, they have few qualms about turning suspects over to U.S. authorities.

None of this, however, precludes public criticism or judicial intervention. In 2003, the Committee Against Torture chastised Sweden for its role in rendering Ahmed Agiza to Egypt. Sweden’s participation in rendition was not the issue, rather its failure to ensure that the suspect would not face torture, as CAT requires.<sup>41</sup> In June 2007, 26 Americans (mostly CIA agents) went on trial in Italy accused of kidnapping an Egyptian national in Milan, taking him to a U.S. base, and flying him to Egypt for interrogation.<sup>42</sup> In 2005 German prosecutors investigated the CIA kidnapping and mistaken rendition of a German citizen, Khaled el-Masri, and in 2007, issued warrants for the



arrest of 13 CIA agents.<sup>43</sup> In 2007 a UK Parliamentary Commission reproached the U.S. over its rendition policy and expressed its concern that suspects face torture. In response, the British government accepted assurances from Secretary of State Rice that "the U.S. respects the rules of international law, does not authorize or condone the torture of detainees, does not transport, and has not transported, detainees from one country to another for the purposes of interrogation using torture."<sup>44</sup> Because interrogation techniques remain classified, Britain and other governments relied on President George W. Bush's guarantee that American methods "comply with the obligations of the United States under Common Article 3," and "do not include murder, torture, cruel or inhuman treatment, mutilation or maiming, intentionally causing serious bodily injury, rape, sexual assault or abuse, taking of hostages, or performing of biological experiments."<sup>45</sup> As the Obama and subsequent administrations reevaluate U.S. policy, they will have to issue similar guarantees about American interrogation techniques. If foreign governments accept U.S. assurances, then one will expect to see support for rendition and the interrogation techniques that come with it. The same is true of popular support.

### Popular Support for Rendition and Torture

Commenting on interrogational torture, Richard Posner is perplexed. "It is especially odd," he writes, "to issue an unqualified condemnation of a practice that almost everyone accepts the necessity of resorting to in extreme situations."<sup>46</sup> Public opinion polls, on the other hand, paint a picture of a world divided on the question of torture. In a 2008 poll, most people across the world (57%) favor "clear rules against torture." Nevertheless, large numbers (35%) believe that "terrorists pose such an extreme threat that governments should now be allowed to use some degree of torture if it may gain information that saves innocent lives." This is more support than a similar poll found in 2006.<sup>47</sup> The poll does not define torture nor distinguish it from less abusive forms of interrogation. In a poll among Americans, however, researchers found that support for torture increased 50% when defined as humiliating treatment or mental torture and nearly doubled when defined to include the threat of

torture.<sup>48</sup> Finally, the percentage of individuals polled who oppose torture (57%) is considerably less than those opposing restrictions on a free press (81%), racial discrimination (90%), and discrimination against women (86%).<sup>49</sup> Unqualified support for or opposition to torture is clearly problematic for many individuals. This does not lend support to Posner's contention that almost everyone supports interrogational torture, but neither does it mean that almost everyone repudiates torture as they do other violations of basic rights. They are, at best, ambivalent.

With no small measure of popular and political support, democracies interrogate terror suspects using procedures they would never think to use on ordinary criminals or on ordinary combatants. This alone might be cause to think that torture belongs neither to law enforcement nor to war, but is instead a deviation from both. However, torture is best understood in terms of how armies may treat enemy combatants: permissible harm on the battlefield is a function of military necessity, reciprocity, and humanitarianism. Military necessity entails an evaluation of short-term effectiveness and long-term costs. If, in the past, military planners believed torture ever worked, they were held in check by the prospect of a threat-in-kind. Faced with the deleterious effect torture might have on their own forces, armies were right to reject torture based on military necessity alone. No humanitarian evaluation was necessary.

Today the story is different. Once military planners think a tactic has military benefits, it must pass the test of humanitarianism. This explains the preoccupation with "torture lite" or "moderate physical pressure." Even as some judicial systems demand a necessity defense, that is, a reaffirmation of the test of military necessity, they draw the line between permissible ill-treatment and prohibited tactics. The Israeli Court never says as much, but it is understood that the necessity defense cannot aid an investigator who mutilates, maims, or rapes a detainee. As democracies wrestle with permissible torture, the distinction between forbidden techniques, techniques suitable for ordinary suspects, and techniques suitable for terror suspects is very much on their minds. Sorting out this hard question in an open society requires the active participation of the public, the press, the courts, the military, and the politicians. The torture debate is important, but it can also be dangerous.



## THE DILEMMA OF THE TORTURE DEBATE

To study national security issues, asymmetric conflict, and the war on terrorism, African and Asian military and law enforcement officials often visit Western nations. As they do, representatives from China, Nigeria, and Zimbabwe listen closely to arguments that may justify harsh interrogation and inevitably wonder whether they, too, might successfully use enhanced techniques to question their adversaries. Accused of torturing captured militants in the Ogaden, Ethiopian officials, for example, insist that they only use harsh interrogation to help fight off militants.<sup>59</sup> In response, Western officials are quick to draw their attention to the important difference between interrogating ruthless terrorists and persecuting political dissidents and between torture lite and torture not-so-lite. But the Chinese, Nigerians, Zimbabweans, and Ethiopians are not so easily swayed. Faced with accusations of human rights abuses, they say the Western response is hypocritical. After all, they declare, "We are fighting terrorism too."

Hearing this, absolutists will feel vindicated. Torture, they say, is always and unequivocally wrong. Any exceptions undermine the hard-earned international support for its universal prohibition and open the door to all kinds of brutality by unenlightened regimes. But does absolutism go too far? Isn't there a difference between American interrogators in Guantanamo Bay and interrogators who practiced torture in Rwanda, in junta-era Chile and Argentina, or in apartheid-era South Africa? The answer, hopefully, is yes and it depends crucially on the distinctions between interrogational and terroristic torture, terrorism and internal dissent, and moderate physical pressure and brutality as just described. But the justifications for these distinctions that draw from lesser evil arguments backed up with a vigorous grasp of human rights are not, as this discussion has shown, easy to articulate. If we dispute them at home, how can we explain them to the less-developed nations of the world without looking hypocritical or, at least, allowing them to paint us as such? There are two answers to this question. One is to put significant safeguards in place so that torture in democracies is never mistaken for the torture practiced in repressive regimes. The other is to abandon torture entirely.

## Safeguards

Regulating torture requires several safeguards. First, an intelligence agency must garner the support of the citizenry whom it is charged to protect. Citizens need not venerate domestic intelligence officers, but they must be secure in their belief that their intelligence service will not turn against them. I doubt China, Nigeria, or Zimbabwe or most nondemocratic nations can make this claim. This kind of faith only grows from a strong tradition of democracy and liberal norms. I do not think that support for severe interrogation would approach fifty percent in the United States unless Americans had more than just a modicum of faith in their security services.

Second, the courts must scrutinize the activity of intelligence agencies before, during, and after armed conflict. In many nations there remains a vestige of Cicero's old saw: "During war, the law is silent." Keeping the courts out of armed conflict may be useful when conflicts are short and well defined. But this is not happening anytime soon. The war on terror is ill defined, enemies are nebulous, and the effort is open ended. There is considerable room for real-time legal supervision of military action, court review of ongoing operations that involve torture, and hearings to evaluate the behavior of investigators. The necessity defense demands a defense. Interrogators who act unlawfully must defend their actions before their peers and before the bar. Yet, they rarely do. This undermines public faith in both intelligence agencies and the bodies designated to oversee them.

Finally, there must be a central role for human rights organizations that take absolutism seriously. They are the watchdogs of democracy. They carry on the role that pacifists from the historic peace churches play in wartime. They, too, are absolutists who repudiate war in all its forms. Condemning war, but realizing the futility of preaching to the converted, absolutists prefer instead to "bear witness" so that by drawing the public's attention to the brutality of war they hope to have some small influence at the margins and prevent the worse of excesses. And, in some countries, they are successful. Following court appeals by human rights organizations, there has been a significant change in the severity and frequency of enhanced interrogation techniques used to question Palestinian detainees, for example. Interrogators shackle detainees' hands less uncomfortably,



cover their eyes with opaque glasses rather than wrap their head with a filthy bag, and no longer subject detainees to loud music.<sup>51</sup> These are small gains but human rights organizations keep the debate in focus and force all of us to wrestle with the inherent evil of war and torture, even as we make exceptions for ourselves. But why wrestle? Why not just abandon enhanced interrogation entirely?

### **An Absolute Prohibition?**

Writing in 1997, Daniel Statman observed, "The moral danger of torture is so great, and the moral benefits so doubtful, that in practice torture should be considered as prohibited absolutely."<sup>52</sup> Statman is only half right. The moral benefits are, if not doubtful, relatively marginal. Tortured suspects may provide information about ticking bombs or hostile acts that saves many innocent lives. Nevertheless, the information they provide is often incomplete and obtainable by less-controversial means of questioning. There is a wealth of information waiting for U.S. interrogators to mine from detainees in Iraq, for example, but little, if any, seems to require enhanced techniques.<sup>53</sup> Needed instead are greater numbers of well-trained interrogators to gather and evaluate the many bits and pieces of data they obtain. None of this means, of course, that enhanced techniques will not produce vital information. Yet even the most ardent supporters acknowledge that enhanced techniques are a last resort and infrequently used. They are not the bread and butter of successful interrogation.

At the same time, there is no overwhelming evidence that the costs of torture in a democracy are intolerable. Interrogational torture has yet to prove the cancer some feared. Outside the philosophical literature, neither ordinary criminals nor the children of terrorists face harsh interrogation, nor do interrogators use obviously cruel and inhuman techniques, nor has interrogational torture slid into terroristic torture. In short, democracies have kept enhanced interrogation in check by confining it to a specific and well-defined group of individuals: unlawful combatants. While the concept of "unlawful combatant" lacks clarity, some belligerents, namely those practicing terrorism, invest the notion of unlawful combatancy with great significance. It defines for them those whom they may torture and those whom they may not. The line might be somewhat arbitrary, perhaps

even indefensible, but it does stand firm in a democracy, augmented by an array of judicial institutions that keep terror suspects and insurgents far from a nation's criminal justice system.

This conclusion is likely to rile opponents and supporters of torture, alike. Opponents remain convinced that the costs of enhanced interrogation are high and the benefits low, while supporters trumpet its benefits, more than slightly exaggerated by vagaries of rational decision making under uncertainty, and downplay its costs. Both have only half the issue right. Compared with nonlethal warfare, targeted killing, terrorism, and constant assaults on civilians in asymmetric warfare, torture is a marginal phenomenon. It is infrequent and neither benefits nor costs democracies greatly. Outside of democracies, however, the equation changes dramatically. Torture is a staple of repressive regimes, infiltrates civil society, terrorizes civilians in war and peace, and undermines peaceful coexistence among nations. Democratic nations might contain torture and keep it well within the confines of excusable conduct, but their behavior echoes well beyond their borders. Whether they institute safeguards or abandon enhanced interrogation, it is unlikely that a democratic nation's policy at home will sway repressive regimes one way or another. Abandoning torture will, however, provide the grounds democracies need to condemn terrorism, extend protections to civilians during war, and justify humanitarian intervention on behalf of those suffering torture, blackmail, and genocide at the hands of despotic regimes. Terrorism, war on civilians, and humanitarian intervention together with the dilemmas and paradoxes they raise in asymmetric conflict are the subjects of the second half of this book.