Master's Thesis

Rethinking Torture

New Challenges and Moral Dilemmas

Author: Lavinia Cadar
l.cadar@students.uu.nl
4022556

Supervisor: dr. Paul Nieuwenburg (Leiden University)
Second reader: prof. dr. Arjen Boin (Utrecht Univesity)

Research Master in Public Administration and Organizational Science
Utrecht University, Erasmus University Rotterdam, Tilburg University

Preface

I believe everyone I come across in life is a lesson to learn. I cannot overstate the importance of the two years of Research Master in Public Administration and Organizational Science for my education and of the inspiring people I have met and worked with during this time.

First, I would like to thank to Professor Doctor Arjen Boin, Doctor Wieger Bakker and Doctor Sanneke Kuipers, from whom I had most to learn about hard work and dedication. I met them when I was an Erasmus student and apart from the high quality of the Dutch education system, they have inspired me to come back and continue my studies in Utrecht. That was one of the best decisions of my life, so I am grateful for having been given the opportunity to grow around them.

Second, I highly appreciate the support of Doctor Paul Nieuwenburg, who has agreed to supervise my thesis. Thank you for having guided me in how to think about torture and for the challenging discussions on this topic (by which we also became targets of the funniest looks from those who happened to be around in the faculty's cafeteria).

Third, I would like to thank my fellow ResMa students who made up an excellent, fun, inspiring but also challenging study environment. I will surely miss the discussions we took outside the classroom and the profound annoyance we provoked to the bartenders at De Poort when asking for separate bills (which, I confess, at a certain point became an aim).

Finally, I am grateful to my family. I thank my mom and my sister for their unconditional support and for encouraging me in moments I missed home the most. I also thank Bogdan, my life partner, who made sure I did not lose contact with reality while writing my thesis and especially for having helped me in finding the people I interviewed.

Table of Contents

Chapter 1: Introduction

1.1. Background

In August 2009, the Obama administration released a series of documents issued by the Office of Legal Counsel between 2002 and 2005, which contained details on the techniques used by state officials for interrogating terrorism suspects. The so-called "torture memos" sought to meet the general demand/necessity of finding an explanation for what to many seemed surreal: the 2004 leak of photos from Abu Ghraib depicting the horrifying abuses of Iraqi prisoners committed by US military personnel. These photos triggered not only an American but also an international outcry, in light of the paradox they raised: how come the US, the biggest promoter of democracy, tortures people while fighting the war on terror? And how come it tortures legally, on the basis of a well-established policy in an age in which human rights have achieved nearly universal recognition?

These two questions are representative for the perspectives from which torture has been analyzed in academic debates. The moral approach discusses torture with a focus on the values it portrays or, else said, on the values that a society practicing torture projects into its imagined future. The legal dimension of the torture debate concentrates on national and international sets of rules, that is, the legal framework within which the activity of public officials must remain. With a few exceptions, scholars corresponding to the two realms, albeit different in the nature of the arguments they advance, converge towards a common stance in relation to the admissibility of torture: the absolute prohibition of its practice, which rejects any circumstance whatsoever as a justification for its use.

With the 1948 Universal Declaration of Human Rights, governments came together to recognize that torture severely infringes human dignity and therefore no one should be subjected to it. The apex of international efforts to eradicate torture was reached in 1987, when the United Nations Convention against Torture (CAT), an international human rights instrument that condemns torture, entered into force. Thirty years after, 155 states declared themselves willing to assume the obligations stipulated by the treaty and the aim of preventing torture, this practice is far from being a lesser problem than it was in the days that witnessed its universal condemnation. In May 2014, Amnesty International issued a thematic report in which it approximates that more than a hundred states continue to torture today.

During the 18th century, European governments directed their policies toward banning torture, so that by mid-19thcentury, this practice became illegal throughout the continent. The traditional explanation for the abolition of torture is linked to the advance of Enlightenment. According to the conventional account of this movement, Enlightenment scholars have inspired their absolutist monarchs, convincing them of the dangers of torture so as to issue

abolition decrees (Langbein, 97-8). Nineteenth century scholars criticized torture for being an inhumane method of punishment to which gentler alternatives did exist (e.g. imprisonment). It was considered unjust, given that establishing guilt came after the infliction of punishment, and ineffective in light of the false confessions being made in order to escape the pain. The abolition of torture was therefore seen as sign of a more humane, enlightened future.

The traditional account for the abolition of torture has been regarded with skepticism by contemporary scholars. Three of them advanced important alternative explanations for this movement. John Langbein (1977; cf. Einolf, 2007: 109-10) argues a change in the standards of proof was the reason for abandoning torture, namely that circumstantial evidence began to weigh more than the prior requirement of two eyewitnesses or a confession in order to establish a conviction. Michel Foucault (1995; cf. Einolf 2007: 109-10) explains that in pre-modern times, torture and other forms of corporal punishment constituted a display and reinforcement of the sovereign's power and control, since they were often performed publicly. With modernity, governments have found other methods of ensuring a more effective type of control and therefore abandoned torture. Lisa Silverman (2001; cf. Einolf 2007: 109-10) attributes the abolition of torture to changes in perceptions of the value of pain. Whereas in medieval times it was believed pain brought about spiritual growth, in modern times, society began to view pain as exclusively negative (particularly due to the medical profession) and thus torture came to be regarded as devoid of moral or spiritual value.

Although each of the four theories carries considerable explanatory power for the abolition of torture during the 19th century, Christopher Einolf (2007: 110) points out that they suffer from a common flaw, namely that none can account for the rise of torture in the 20th century. He also states that while one way of solving this puzzle is to argue the practice of torture did not decrease at all in the 19th century, there is evidence to suggest a true decline at least in Europe and North America (Einolf, 2007: 110). The characteristics of the two centuries' torture are so different that they could qualify as two separate phenomena: whereas in earlier periods torture constituted a formal legal procedure, regulated, ordered by judges and carried out in public, the 20th-century torture was practiced outside the legal framework, thus without regulation and in secret by government security agents. Yet what keep these characteristics attached to the same phenomenon are the general patterns exhibited by the practice of torture irrespective of its timeframe: inflicted upon noncitizens, upon citizens suspected of severe crimes, and in circumstances of severe threat (Einof, 2007: 112).

The characteristics identified by Einof stand for the 21st century as well. Nevertheless, if it is to be understood, the phenomenon of torture cannot be separated from its context. The peculiarity of 21st-century torture is deeply linked to the war on terror, in that its practice today is employed by state agents operating within a major social transformation: unconventional warfare. This background of new types of combatants, new methods, strategies, weapons, targets, sources of finance, etc. has implications for the way torture is perceived, analyzed and ultimately judged as a(n) (i)legitimate practice. In other words, it restates the question to which a few decades ago the world gave a steady negative answer: can torture ever be justified?

The two strands of theory that address this question (moral and legal) have intensely argued torture can never be justified under any circumstance whatsoever. The changes that have surfaced in the nature of warfare led some scholars to argue the opposite, thus brainstorming for methods through which torture could be legalized. Yet the fact that torture is still practiced by governments worldwide, particularly by the democratic ones, has somehow radicalized both sides, and thus transformed the debate on torture into a dialogue of the deaf in which each party's mission became destroying the other's argumentations simply by bringing up its classic, foundational arguments. Between the two sides, there is a void that wards off the possibility of depicting torture in any other color than black and white. This paper constitutes an attempt to penetrate that void, rethinking torture.

The necessity to rethink torture stems from decades of efforts to put an end to this practice, whose failure was recently represented by the policy of a highly democratic state that authorized torture as a means to fight terrorism. As Guiora and Page (2006: 427) wrote, the dilemma of balancing legitimate national security interests and civil liberties constitutes the greatest contemporary challenge of liberal democracies. In the face of ever increasing threats from terrorist groups, torture becomes a more and more appealing alternative, as conventional methods no longer seem to work. So how can the prohibition of torture be reconciled with the recognition that torture may be the only way to avoid catastrophe?

Its use entails not only the moral choices of state agents in the field which represent a society's core values, but also the legal implications that escalate through the chain of command up to (in some cases) the highest ranking officials. This age of a new type of warfare gives state officials tough and unprecedented challenges, requiring them to make hard choices and to assume responsibility for them. Accounting for a practice such as torture is dependent upon a common understanding of the phenomenon. Throughout history, the understanding of torture has been tightly linked to the larger social context to which it pertained. Today, the new reality of unconventional warfare asks for a reconsideration of torture in light of this social transformation.

1.2. Research Focus

This research aims to provide a new perspective on the phenomenon of torture in light of the contemporary challenges faced by governments. To make it clear from the outset, the study at hand does not provide a historical account of torture methods, nor is it concerned with finding a psychological explanation for the causes of torture. Rather, it analyzes this phenomenon from two main points of view, namely legal and moral.

Ideally, state officials make decisions informed by concurring legal and moral aspects. A discrepancy between the two constitutes, in the words of Thomas Nagel (p. 124), "the most general moral problem raised by the conduct of warfare: the problem of means and ends." Whether it is referred to as the problem of dirty hands (Walzer, 1973) or a tragic choice

between conflicting duties (Lukes, 2006), the essence of such situations is that no matter what decision the public agent makes, he cannot escape being guilty of a moral wrong. Nagel (1972: 124) explains that if a person acting in an official capacity strongly believes that the benefits of a certain measure outweigh its costs, yet he knows there are legal restrictions that prevent him from adopting it, an acute moral dilemma is represented by the conflict between two categories of moral reason: ultilitarianism (primarily concerned with what will happen) and absolutism (primarily concerned with what one is doing).

Cases in which torture is considered as an alternative due to the inability of conventional methods to provide a solution are archetypes of such a moral dilemma. Utilitarianism (or act-utilitarianism) is the view that the rightness or wrongness of an action depends only on the contribution of its consequences to the overall utility, that is, on the effect of that action on the welfare of all human beings (Smart and Bernard, 1973: 4). Absolutism, on the other hand, is the view that the moral worth is judged by its adherence to rules. Accordingly, certain acts can never be justified no matter how good the consequences. This is the position embraced by international law, which specifies that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency may be invoked as a justification of torture" (CAT, part I, art. 2). This means that any instance of torture is punishable by law, no matter the consequences. Yet there are crisis situations characterized by great urgency and eminent threat to human life, in which torture may seem a justifiable means to tackle them. In such situations, some officials choose to exit the moral dilemma they are experiencing by deciding to breach the prohibition on torture. Subsequently, they are charged and convicted for the means employed, irrespective of whether the end they initially considered worth pursuing (e.g. saving innocent lives) was achieved or not.

This study is built on the assumption that alongside the strong and convincing arguments of the experts in law and ethics, the experience of trained officials who are in close contact with situations with potentially disastrous consequences is worth exploring. To date, no other study of torture (to the author's knowledge) has valued this kind of expertise. In tandem with Homant and Witkowski (2011; cf. Houck and Conway, 2013), Houck and Conway (2013: 430) observe there is surprisingly little scientific research on how people actually think about torture. They explain that the flaw of most of the current knowledge on this topic is that it comes from public opinion polls that consist of very broad and abstract questions. The study at hand detaches itself from this trend and contributes to the scientific research of torture. By analyzing the practical reasoning behind the decisions to apply (or not) torture, we can better understand the circumstances of such decisions and, most importantly, their relation to liberal democracy that gravitates around respect for human rights. Hopefully, it will inform those who wish and must (by nature of their work) take a position on the larger debate about torture. Therefore, the research question guiding this study is: w*hy do state agents (not) use torture and to what extent is torture permissible?*

1.3 Overall Research Aim and Individual Research Objectives

Nowadays, the issue of torture is intensely debated by scholars who analyze this phenomenon within the broader context of liberal democracy. By focusing on the tension between, on the one hand, the absolute prohibition of torture and, on the other hand, the novelty of non-conventional warfare consisting of threats never dealt with before, scholars have constructed convincing arguments for and against the use of torture in the democratic system of governance. While some of them have advanced proposals for legalizing torture, others have struggled to adapt the rationale behind the prohibition of torture to the current reality, explaining why such treatment may never be used, irrespective of the gravity of the situations at hand.

The overall aim of this research is to advance an understanding of the phenomenon of torture, which is sensitive to both legal and moral aspects, but also to the challenges posed by contemporary threats, in particular by terrorism. However, in order to provide a framework for rethinking torture, it is necessary to gain insight into what torture constitutes. Given the multitude of attempts to define this phenomenon and the ambiguities thereof, it is all the more important to clarify what distinguishes torture from other forms of ill-treatment, i.e. cruel, inhuman and degrading. Once the concept of torture is explained and delimited, this research will critically evaluate arguments for defending or rejecting the prohibition of torture on moral and legal grounds. Furthermore, in crisis situations state officials are highly likely to experience moral dilemmas consisting of choices between two moral wrongs. This research explores the practical reasoning of state officials at the juncture of two necessities: to deal with great, unprecedented threats and to abide by the legal provisions of human rights. Finally, it advances a way of reconciling the strictness of the prohibition of torture with the awareness that in some situations, torture may be the only means available to prevent catastrophe.

Specifically, the objectives of this research are to:

1. Clarify the definition of torture and its distinguishing characteristics from cruel, inhuman and degrading treatment.
2. Critically evaluate the moral and legal grounds for supporting or rejecting the prohibition of torture.
3. Explore state officials' views on the use of torture in situations with potentially catastrophic consequences.
4. Formulate conclusions on the permissibility of torture.

1.4. Research Design

The study at hand subscribe to the category of qualitative research. The research design it adopts is thought experiment, which has played a central role especially in philosophy and physics (just think of the work of ancient Greek philosophers such as Socrates, or that of Galileo or Einstein). Although there have been many attempts to define thought experiments

(Miller, 2011), this study draws on the definition conveyed by Gendler (2004: 1154), according to which "to perform a scientific thought experiment is to reason about an imaginary scenario with the aim of confirming or disconfirming some hypothesis or theory about the physical world."

The target population consists of individuals with experience at the operational level or in the field of interrogations, thus in close contact with the possibility of having to deal with situations with potentially disastrous consequences that may require the use of torture. More specifically, the sample selected for this study is formed of either military personnel or civil servants with background in interrogations. It is important to mention that due to the nature of their background and mandates, interviewees' specific functions or other details that could be used to identify them will not be disclosed.

The research method this study employs is the semi-structured interview. Each respondent was presented six scenarios, the majority of which were derived from real-life cases. Based on the literature review, predetermined dimensions were followed, but the interviewees were allowed the freedom to digress from pre-established order of questions. Chapter 3 contains a more in depth discussion of the research design and research method used in the study at hand.

1.5. Value of this Research

At the risk of oversimplifying the overall objective of this research, four individual objectives were identified. It is important for the reader to note that they should not be viewed as separate, unrelated activities, for they are necessarily interlinked. The works afferent to achieving the four objectives build up towards answering the main research question of this study. For instance, the recommendations for rethinking torture formulated at the end are dependent upon the definition of torture with which the study debuted. Or, exploring the practical reasoning of state officials relies on previous academic work analyzing the acceptability of torture from moral and legal perspectives.

This research contributes to the study of torture in a number of important ways. First, the literature review provides significant insight into how torture is viewed within the context of liberal democracy. Second, by exploring state officials' views, the empirical data allows for a meaningful comparison between theory and practice. Furthermore, Maxwell (2013: 68) points out that although the thought experiment is regularly used in social sciences such as economics, it has received little attention in discussions of research designs. The study at hand employs a research design that proves innovative for discussing sensitive topics, such as torture. It constitutes an attempt to extract torture from the category of taboo subjects, thus permitting an open debate with people whose work may require them to consider torture as an alternative to avert disasters.

Apart from the fact that the study at hand addresses a current issue, the overall value of this research is that it provides a framework of analysis applicable not only to torture, but also to other phenomena belonging to non-conventional warfare. What it essentially examines is the conflict between legal restrictions and unprecedented threats (that exceed the aria covered by our extant know-how), in the middle of which state officials are caught with no possibility to escape, in the sense that whichever alternative they take, it would still make them guilty of a moral wrong. Torture, the focus of this research, is only one instance in which state agents experience the dilemma of balancing state security interests with civil liberties.

1.6. Outline Structure

This chapter has provided background information on the phenomenon of torture and how it resurfaced as a topic of debate in the public sphere. It justified the necessity to rethink torture in the context of a theoretical gap between consequentialist and deontological arguments, and of the lack of valuable empirical knowledge about the experience of state agents in the field. The chapter has explained this study's research focus, the overall and individual objectives as well as the research design employed in order to achieve them, finishing with identifying the value of this study.

Chapter 2 meets the first and second individual objectives, consisting of a literature review that defines torture and analyzes the moral and legal grounds of the permissibility of torture. As such, after identifying the distinguishing features of torture, Chapter 2 explains two important strands of normative ethical theory (consequentialism and deontology) and presents the corresponding arguments for and against the justifiability of torture. It criticizes the subcategory that seeks to build a bridge between deontology and consequentialism (namely threshold deontology), restating the importance of an absolutist, deontological position with regard to the prohibition of torture. Finally, it explores the permissibility of torture in light of the categories of legal defenses.

Chapter 3 corresponds to the third individual objective of this study. It discusses the characteristics of the thought experiment and the appropriateness as the design of this research. Furthermore, it explains the method by which data was collected, how the data will be analyzed, and addresses the aspects of validity and reliability. Chapter 4 presents the findings of the empirical research. Finally, Chapter 5 summarizes the answer to the research question that guided this study, draws the most important conclusions and identifies the limitations of the study at hand as well as possibilities for further research.

Chapter 2: Issues and Review of Related Literature

2.1. Defining Torture

Torture has had a long history in humankind. Since Antiquity, torture had constituted a significant part of the justice system, being thus used either as punishment or in order to extract confessions or evidence from alleged criminals. Although with the Age of Enlightenment torture began to be perceived as infringing upon human dignity and was recognized as no longer a legalized deterrent or method of interrogation, its practice continued to be perpetrated. Today, the issue of torture re-entered public debate within the context of the war on terror. A hot spot in this debate is centered on the question of just what exactly constitutes torture. This chapter analyzes the legal definition of torture as codified in international treaties paper and seeks to identify what is essential to it.

The fact that up to the present day, there is no concrete, universally accepted definition of torture reflects the difficulty of attempts to arrive at one. Nonetheless, one thing is certain: the prohibition of torture is absolute. This means that it is part of *jus cogens*, the body of international peremptory norms and principles from which no derogation whatsoever is permitted irrespective of the circumstances of the case (such as emergencies or war). After the horrors of the Second World War, the Universal Declaration of Human Rights (UDHR) included Article 5 according to which "no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment". The 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms similarly states in Article 3 that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment". In 1966, the International Covenant on Civil and Political Rights restated UDHR's Article 5, adding that "in particular, no one shall be subjected without his free consent to medical or scientific experimentation." The American Convention on Human Rights of 1969, the African Charter on Human and People's Rights of 1981 as well as the more recent Arab Charter on Human Rights of 2004 codify the prohibition of torture. Yet none of these legal instruments describe what is to be understood as torture.

The absence of a universally accepted legal definition is certainly not an omission. Rather, it is tied to the inherent nature of the concept. The legal definition of torture is not static, in the sense that it changed throughout time depending on certain constituent parts that were added or grew in importance, and others that were eliminated. (The difference between how torture is perceived today and how it was perceived in the Middles Ages constitutes a conspicuous example.) Steven Dewulf (2011: 34-5) explains that from a legal perspective, "torture is intrinsically an evolving concept", for it is possible certain acts that in the past did not amount to torture qualify as such in the future. The European Court of Human Rights (ECtHR) has perhaps best expressed this optic in the case of *Selmouni v France*. Ever since the case of *Tyrer v. the UK*, the Court highlighted that the Convention is a living instrument

that must be interpreted in the light of present-day conditions (Lawson, 2012: 448). In *Selmouni v. France*, the Court reiterated the flexibility in its approach with specific reference to torture, stating that "certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in the future" (cf. Tofan, 2011: 72).

Nevertheless, this does not mean that the definition of torture should be changed on a frequent basis. As Dewulf (2011: 461) rightly points out, "a developing notion of torture requires a flexible definition." This entails finding a balance between openness (so as to permit the insertion of changes) and limitedness (so as not to create a plethora of potential torture situations where any instance of the smallest aggression would amount to torture).

The most widely cited definition of the concept is provided by Article 1 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT):

> "the term 'torture' means 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

However, this definition must be understood in light of its context. The Convention expands on one of the fundamental human rights, namely the right not to be subjected to torture, and addresses, at a more aggregate level, the relationship between the state and its citizens, in that human rights law essentially aims at ending abuses by the State of the people under its jurisdiction. As such, the state dimension is essential to the definition of torture as codified in the Convention.

The CAT definition is representative for the area of human rights, which is only one of the structures addressing the issue of torture. Dewulf (2011: 463) underlines that the structural context determines how important a certain element of the definition is. He explains that when it comes to torture, a basic distinction can be made in international law between international criminal law on the one hand and international human rights law on the other hand, with international humanitarian law somewhere in between the two. As it was mentioned above, international human rights law deals primarily with State responsibility, essentially aiming at ending abuses by the State. Its purpose is to protect individuals from violations of their rights and to identify and declare States responsible for such violations. Within the corresponding proceedings, the individual(s) guilty of a breach of someone's rights are not important to the investigation. The victim plays a pivotal role, for of concern is whether or not there has been a violation of his/her rights. If there were such a violation, then the victim is entitled to remedy.

International humanitarian law regulates warfare in times of armed conflict for whoever is fighting. As such, the subjects of international humanitarian law are not only State agents, but also private, non-State actors who take part in the hostilities. As for international criminal law, in contrast to human rights law and different from humanitarian law, the role of the State is marginal. An individual perpetrator will undergo criminal prosecution, proceedings during which (s)he must be proven to have had the prerequisite *mens rea*. Therefore, with regard to the definition of torture, it is clear that in international criminal law, intent will have the same weight as international human rights law attributes to the State element. Torture has often been called an international legal chameleon (Gaeta, 2008; cf. Dewulf, 2011: 46) due to the fact that its definition changes from one legal environment to another.

Nigel Rodley pointed out that for those seeking a definition of torture, Article 1 of the CAT is the de facto "first port of call" (2009; cf. Weissbrodt and Heilman, 2011: 343; Dewulf, 2011: 82). Indeed, many studies analyzing the constituent elements of torture depart from this article (Miller, 2005; Sussman, 2005; Harper, 2009; Dewulf, 2011; Nowak, 2012). As such, torture entails: (1) an act, (2) severe physical or mental pain or suffering, (3) intent, (4) purpose, (5) involvement of a public official, (6) a victim.

2.1.1. An act

The term "act" should be understood in its broadest sense possible. This means that the notion does not include only positive acts in the sense that someone must do something in order to commit torture, but also omissions. As such, omissions to act, i.e. not doing anything, also falls under the umbrella of the word "act" (Miller, 2005: 7; Dewulf, 2011: 212-3).

2.1.2. Severe physical or mental pain or suffering

As Miller (2005: 8-9) explains, the fact that the CAT perceived torture as an extreme on the continuum of pain inflicting acts originates in the view of the European Commission on Human Rights (now the ECtHR) in the 1969 *Greek Case*, where it distinguished between torture and inhuman or degrading treatment:

> "It is plain that there may be treatment to which all these descriptions apply, for all torture must be inhuman and degrading treatment, and inhuman treatment also degrading. The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable… The word "torture" is often used to describe inhuman treatment, which has a purpose, such as obtaining information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhumantreatment."

Ever since this decision, the ECtHR remains the most adamant supporter of holding the intensity of pain as the criterion upon which to distinguish torture from other form of ill-treatment (Dewulf, 2011: 83). In *The Republic of Ireland v. The United Kingdom*, the Commission expressed the view that "[t]he distinction between torture and inhuman or degrading treatment derived principally from a difference in the intensity of the suffering

inflicted… The term 'torture' attached a special stigma to deliberate inhuman treatment causing very serious and cruel suffering" (cf. Miller, 2005: 9). The jurisprudence of ad hoc tribunals reflects the same opinion, in that it treats the severity of pain as the distinguishing feature (Dewulf, 2011: 84). When it comes to CAT, the Committee states in General Comment no. 2 that "ill-treatment may differ in the severity of pain and suffering".

In "The Signature of Evil – (Re)Defining Torture in International Law", Steven Dewulf (2011: 196-202) asks the question of whether pain and suffering is needed for torture truly of a more intense level than that of other ill-treatment. He explains that in scholarly work, Nigel Rodley and Matt Pollard identified three main opinions on the intensity of pain or suffering required so that ill-treatment amounts to torture. Firstly, the "severe-plus approach" is the traditional view according to which torture demands pain or suffering of the highest level of severity. Secondly, the "severe-minus approach" requires that the pain or suffering implied by torture, although not necessarily of an extreme nature, must be severe and exceed the one implied by other forms of ill-treatment. This seems to be the approach taken by CAT, as well as the International Criminal Tribunal for the former Yugoslavia and the ECtHR. Dewulf (2011: 199) underlines that such relative severity is problematic due to the fact that it is difficult to define what exactly severe pain or suffering stands for. Finally, in the third approach identified by Rodley and Pollard, the distinction between torture and other forms of ill-treatment is not made on the basis of the intensity of pain or suffering, but of another constituent element. In this approach, severe pain or suffering is necessary, but not a sufficient feature of torture. Rodley and Pollard argue in favour of their third "purpose only" approach, in which they view the purposive element as separating torture from other forms of ill-treatment. However, the only convention in international jurisdiction that drastically eliminates the severity criterion from the assessment of torture is the Inter-American Convention to Prevent and Punish Torture.

2.1.3. Intent

This element is particularly important in criminal law, where an *actus reus* must be associated with a *mens rea* in order for criminal responsibility to be attributed to the suspect. Johan van der Vyver (2004; Dewulf, 2011: 215-7) explains that there are two types of *mens rea*, namely intent and negligence. Subsequently, there are four types of intent. *Dolus directus* of the first degree constitutes direct intent and refers to cases in which the perpetrator wanted the act (or omission) and the clearly foreseen consequences of it. Furthermore, *dolus directus* of the second degree, or *dolus indirectus*, entails situations in which the perpetrator willingly and knowingly acted (or omitted to act), causing effects that were foreseen as (nearly) certain results by him-/herself, although (s)he did not necessarily want those consequences. Thirdly, *dolus eventualis* encompasses those situations in which the perpetrator wanted the act (or omission) but not necessarily the consequences of it. Nonetheless, the perpetrator was aware of the possible effects and accepted them. Finally, there is a fourth type of intent, so-called "should-have-known"-test, referring to cases where

the perpetrator may not have known that his behavior was illicit, but should have known and is nevertheless responsible for his/her conduct.

As for negligence, it is generally accepted that negligent behavior can never constitute torture (Dewulf, 2011). Nowak (2012) explains a prison guard who forgets a detainee in his/her cell can never be guilty of torture even though the anguish caused to the detainee is severe, because the element of intent is absent from the case. This is not exactly the best example since such a situation may trigger criminal responsibility through intent of the fourth type. A better example is represented by poor prison conditions, where a detainee experiences severe pain or suffering as a result thereof, but this does not constitute torture because the prison officials did not intend the conditions to affect the detainee so severely (Miller, 2005: 13; Nowak, 2012: 158). Torture is active; as explained above, it constitutes an act or, better said, a conscious act by which the perpetrator knows what he is doing. As Dewulf (2011: 514) states, "the state of mind of the perpetrator should not be held decisive for the determination of the level or scope of agony the victim suffered, but it should not be seen as fully irrelevant: a torturer cannot be held responsible for consequences he did not want or was not even able to anticipate".

2.1.4. Purpose

The distinction between intent and purpose is often unclear. For instance, although Dewulf (2011:233) separates the notions of intent and motivation, he does so in a sub-chapter entitled "intent and purpose" where not once the word purpose is even mentioned:

> "As a general rule, intent should not be confused with the motivation of the perpetrator. What feelings or urges drove the offender, are not relevant to establish whether he had the requisite intent. The rule is, nonetheless, all but absolute. The motive(s) of the perpetrator are in fact far from irrelevant for the offence of torture. Some crimes require more than just general intention. Some crimes demand the presence of a specific intent as well. This is the case for torture, as there is (near) universal consensus that this offence must be committed for a very particular objective or reason."

In the last part of his book, where Dewulf proposes a new definition of torture, he explains the notion of specific intent or *dolus specialis*, put forward by the European Commission in the *Greek Case* (Dewulf, 2011: 234). It essentially forges "intent" with "purpose", expanding on the idea that any purpose that qualifies as torture automatically includes the perpetrator's intent. The problem with using the phrase "specific intent" instead of operating with the two concepts of "intent" and "purpose", is first that it does not correct for situations of negligence. Secondly, it places a lesser emphasis on the "why" of the infliction of pain or suffering, thus putting the existence or non-existence of the perpetrator's intent ahead of the purpose aimed at. Thirdly, the notion of specific intent remains rather vague in the sense that it fails to underscore the notion of purpose. (This is the more problematic, the more purpose is supported as the distinguishing feature of torture).

It is highly important to mention that Dewulf's (2011: 521-6) use of specific intent has implications for the conceptualization of torture: he creates categories such as punitive, experimental, discriminatory, or sadistic torture, depending on the level of this specific intent. With regard to discriminatory torture, despite Dewulf's (2011: 525) conviction that "rejecting this type of torture would consequently appear to be a foolish move" (based on the consideration that gross atrocities have been committed for reasons of inequality, prejudice and intolerance), this paper does make it. Apart from the fact that torture is in its nature discriminatory, the purpose of a perpetrator can hardly be to discriminate. As for sadistic torture, Dewulf (2011: 526) only acknowledges that it is different from other types of torture in which the infliction of pain is a means to an end, and that it should be treated prudently. However, as Miller (2005: 16) rightly underlines following the CAT understanding, in order for an act to constitute torture, it must be performed for a separate purpose other than the infliction of pain. In other words, torturous activity cannot be an end in itself; otherwise the distinction between sadism and torture collapses. Whether torture involves sadism or not is a different matter, but the two must remain separate and should not be confused.

The phrase specific intent was also used in the memos on the definition of torture issued by the US Department of Justice. It establishes specific intent as a requirement, but it fails to specify what that constitutes, instead only describing extreme scenarios. Miller (2005: 14) explains that this notion is left vague and undefined, since the documents only define the two contrasting instances: "the specific intent standard would be met if an act was performed with the conscious desire to inflict severe physical or mental pain or suffering"; on the other hand "the standard would likely not be met if an individual acted in good faith and performed 'reasonable investigation establishing that his conduct would not inflict severe physical or mental pain or suffering'."

Without seeking to provide an exhaustive list, the CAT definition states that an act constitutes torture only if it is perpetrated "for such purposes as" extracting information, punishment, intimidation or coercion, or for reasons that involve discrimination of any kind. The drafters of the convention meant this list to be significant, in the sense that not any purpose would suffice for an act to be considered torture. In this respect, the use of the phrase "such as" reflects that the purpose in question must have something in common with those expressed (Miller, 2005: 16). Burgers and Danelius argue that the common element must be the link between purpose and state interests and policies (Miller, 2005: 16; Nowak, 2006: 832).

Alongside Roland and Pollard, Nowak (2006) was one of the authors who consider that the purposive element is the distinctive note of torture. However, in 2012, he expanded this distinctive note to include the intent of the perpetrator and the powerlessness of the victim (an aspect that will be addressed below).

2.1.5. Involvement of a public official

Before reassembling the essential elements into another definition of torture, Dewulf (2011: 477) explains there is one element that should not be retained, namely the public official requirement. It was mentioned above that this state dimension is characteristic for international human rights law, whereas for humanitarian law it is irrelevant in establishing whether torture has been performed or not. The CAT definition stipulates that the pain must have been inflicted by or at the instigation of or with the consent or acquiescence of a public official. The words "instigation", "consent" and "acquiescence" enable torture to be include conduct in which the State is even remotely involved.

Throughout his book, Dewulf (2011) rejects this element of the definition and argues that international law should deal with all cases of "torture" irrespective of whether they are committed in the public or private sphere, for private intent is of no conceptual or principal importance. Furthermore, Dewulf (2011: 480) argues that:

> "[i]f this requirement were regarded as inherent to the notion of torture in general human rights law, then this would lead to the aberrant conclusion that this most core human right has a smaller scope of applicability than other human rights. This is contrary to its absolute and fundamental nature."

This argument for the elimination of the public official requirement is essentially flawed. The fact that torture is codified as an abuse committed by the state does not in any way limit the scope of application of the universal human right of not being subjected to torture. Human rights, by definition, aim at protecting citizens from abuses of the State, thus it would be a mistake to eliminate the State dimension from the prohibition of torture. However, this does not mean that anyone who is not a state agent can go away with torture, escaping punishment. In international human rights law, states have two kinds of obligations. Under negative obligations, States are bound not to interfere with the rights of those people under its jurisdiction. On the other hand, positive obligations entail that States live up to the due diligence standard, meaning that in cases of (alleged) violations of human rights such as torture, the State must take the necessary measures to end the situation of abuse and provide remedy (which is often comprised of investigations, punishment of the perpetrator and compensation to the victim). When severe pain or suffering is inflicted upon a victim even for state-related purposes by a private person, a State has domestic mechanisms in place to address this type of crime. It would be overwhelming for international monitoring bodies to address every case of torture, rendering it inefficient.

Notwithstanding, Dewulf (2011) is right to draw attention to the fact that the public official requirement is not unproblematic. In the context of modern war especially, there are private parties such as mercenaries or military groups who perpetrate torturous acts even if they do not act in an official capacity. If the state in whose territory the act is perpetrated is undergoing a conflict that ceases the functioning of its institutions, then international bodies will apply the provisions of international humanitarian and criminal law according to their competence. On the other hand, where state institution are not hindered by any conflict and

function properly, such act will be addressed by domestic mechanisms and investigated through the corresponding proceedings.

2.1.6. A victim

It is clear that in order for torture to take place, there must be a victim upon whom severe pain or suffering is inflicted. Dewulf (2011: 526-31) uses an umbrella term, namely factual power, which covers the different aspects of the situation of a victim of torture. Firstly, the perpetrator exerts factual control onto the victim, which can be both physical and mental. Secondly, powerlessness is an objective and physical situation, but it is also a sensation or a feeling the victim experiences that no escape is possible. Finally, the victim is broken, forced into a submissive state and thus dehumanized not only in the eyes of the perpetrator but also in the eyes of the victim itself.

In tandem with Dewulf, Nowak (2012: 158) views the requirement of powerlessness as a constitutive element of torture. He argues that it is precisely the use of force and coercion onto a powerless victim that constitutes a direct attack on human dignity and thus dehumanizes the victim. As it was mentioned above, Nowak considers the powerlessness of the victim together with the intent and purpose of the perpetrator as the distinctive features of torture. Sussman (2005: 227) further expands on this aspect, arguing:

> "What is distinctive of torture is not just the infliction of intense pain (however that is to be understood), but the experience of a kind of forced passivity in a context of urgent need, a context in which such passivity is experienced as a kind of open-ended exposure, vulnerability, and impotence. […] [W]e need to consider not just the intensity of pain that might be inflicted upon someone, but the alienation of the victim from his own bodily and emotional life that forced passivity before pain and fear can engender."

Sussman (2005: 228) explains that torture entails an absolute asymmetry of power, knowledge and prerogative, where the victim is in a position of complete vulnerability and exposure, while the perpetrator beholds perfect control. The victim's world is controlled so as to make it impossible for him/her to orient himself/herself. "The torturer makes his victim experience a world that he cannot affect, except in very specific ways the torturer is trying to elicit. The victim cannot fight back, cannot seek new tools, weapons, or strategies, and cannot appropriate any materials to his uses" (Sussman, 2005: 229).

The physical and psychological implications of torture are without doubt horrendous. Yet relying on passivity as the characteristic that distinguishes torture from other ill-treatment misses out on important constitutive elements that have been argued for so far. Moreover, it would have implications for the definition of torture, meaning that it would greatly expand the number of situations that qualify as torture. For instance, if a prison guard were to inflict severe physical pain and psychological suffering to a detainee with this very purpose, Sussman would regard the situation as a case of torture. However, it has been argued here that torturous activity can never constitute an end in itself and that purpose is an important criterion for putting the mark of torture on a specific conduct.

Therefore, the requirement of powerlessness of the victim should remain limited to the purpose of excluding cases where the pain or suffering results from lawful punishment. This aspect is included in the CAT definition, but without an explicit mentioning of the powerlessness of the victim. The text only refers to lawful sanctions, by excluding pain or suffering thereof from the definition of torture.

Notwithstanding, the issue of a victim's power is linked to the element of pain or suffering, which is an important connection for the distinction between torture and other forms of ill-treatment. Nowak and McArthur (2006) argue that cruel, inhuman or degrading treatment (CIDT) are concepts relative to legitimate uses of force. They explain that since law enforcement against suspected criminals demands the use of force, only excessive use of force can constitute CIDT. In determining whether the use of force exceeds lawful boundaries and becomes excessive, the principle of proportionality must be applied to the situation in question. However, if a person is powerless in the sense the (s)he is not at liberty and able to resist the use of force, then the use of force is prohibited because such a use would directly interfere with human dignity (Nowak and McArthur, 2006: 150-1).

Nonetheless, it is difficult to define what exactly powerlessness entails. Nowak and McArthur (2006: 151) illustrate this with a person "under the direct control of the police officer by being, for example, arrested and handcuffed or detained in a police cell". This paper proposes a broader understanding of the notion of power, thus not restricting it to a physical sense. This is an appropriate moment to make use of the classic example of the ticking time bomb – to what extent can a terrorist who had placed a bomb in a highly populated area be considered powerless?

2.1.7. Concluding remarks

If the definition of torture still constitutes a topic for debate among scholars and in international law, it should not be expected that the situation of other types of ill-treatment (cruel, inhuman and degrading) be any different. William Schabas pointed out that trying to make a distinction between torture and other ill-treatment is nothing compared to attempts at identifying the constitutive elements of cruel, inhuman or degrading treatment (cf. Dewulf, 2011: 76).

Although the ECtHR has often merely asserted that ill-treatment has been committed without commenting further, it nevertheless provides some clues. It follows from the jurisprudence of the ECtHR that such a distinction is impossible to be drawn by simply measuring the intensity of pain or suffering. This assessment is relative and on all the circumstances of the case (Tofan, 2011: 70). With regard to inhuman treatment, Tofan (2011: 72) explains that it can be defined with reference to the other forms of ill-treatment: "it is such treatment as is not sufficiently severe, or without the purposive element, to constitute torture, but yet which crosses the upper 'severity threshold' of degrading treatment". As for degrading treatment, an

act of ill-treatment must include some form of gross humiliation in order to qualify as such (Tofan, 2011: 73).

Despite the fact the ECtHR provides these guidelines for qualifying situations of ill-treatment, they nevertheless remain vague not only at the regional, European level, but also in the international sphere. In light of what has been argued so far, the peculiarity of torture resides in the elements of intent and purpose. The fact that torture is never an end in itself but a means to an end constitutes the mark of torture. Its function, namely to extract information for some public oriented reasons is what sets torture apart from cruel, inhuman or degrading treatment. As a final note, at this point torture may be confused with interrogation. Nonetheless, it should be kept in mind that torture is a form of ill-treatment, which means it entails (at a lower or higher level) the infliction of pain or suffering.

The more interesting question related to torture is whether it can ever be justified. This question has been the subject of intense debate both in legal and ethical studies, even after international law codified the absolute prohibition of torture. The following chapter analyzes the moral grounds of the prohibition of torture.

2.2. Can Torture Ever Be Morally Justified?

The debate about torture and particularly about the legal and moral grounds of its prohibition is generally conceptualized as a conflict between two opposing sides with no grey area in between. From these two sides, the prohibition of torture can be both supported and rejected.

2.2.1. Consequentialism vs. deontology

Consequentialism is the category of ethical theories according to which the rightness or wrongness of conduct is contingent upon its consequences. In other words, the outcomes of a certain act constitute the ultimate basis for judging its morality. Thus, from a consequentialist standpoint, an action is considered right if it brings about a good outcome or result.

Those who consider that torture can be justified, do so from the ground of act-consequentialism. According to this view, the morality of an act of torture lies in a cost-benefit calculus. The rationale goes as follows: if the consequences of performing torture are better than the consequences of a failure to perform it, then performing torture is the right thing to do. For example, the benefits of torturing a terrorist who threatens to set off a bomb and take the lives of, say, one hundred people in an unknown location, would be finding out a piece of information relevant to identifying the respective location and rescue the people in danger. The costs of not torturing the terrorist would consist of the bomb going off, eventually killing the one hundred people. In utilitarian terms (the most typical and familiar form of consequentialism), the consequences of torturing the terrorist bring the greatest amount of happiness to the greatest number of people, which is the ultimate aspect that justifies its use.

Nevertheless, the problem with act-utilitarianism and act-consequentialism equally is that they are founded on impersonal considerations; for instance, they assume that the lives of a hundred people are more valuable than committing an act of torture and the social implications stemming from it. This is precisely where advocates of the prohibition of torture step in. From a rule-consequentialist standpoint, they argue that the morality of a certain act depends not on its direct consequences, but on its conformity with a set of rules that lead to better consequences than other alternative rules. According to this view, any set of rules that allows for torture to be used in specific circumstances bears costs that outweigh any possible benefits. Moreover, it would make no sense to balance the consequences of applying and not applying torture in specific cases, given that a correctly calibrated cost-benefit analysis would always reach the conclusion that torture should not be applied, no matter how extreme the circumstances of the case. This view is built on the idea that torture generates not only physical and psychological harms in what concerns the victim, but also special harms that pervert the whole social and institutional fabric of a society. Therefore, the use of torture carries consequences that go beyond the immediate circumstances of a given case (for instance, saving the lives of one hundred people). Furthermore, the mere effectiveness of torture is questioned in relation to the aim purported, such as retrieving the vital piece of information or preventing terrorism.

Deontology is the strand of ethics that assesses the morality of choices depending on their conformity with rules or moral norms. In contrast to consequentialists, deontologists believe there are other factors with intrinsic moral significance than the goodness of outcomes. In deontologist thinking, the effects or consequences of a certain choice are not a relevant factor in deliberating the morality of an action, in the sense that if someone saves the lives of ten people but in the course of doing so he/she violates a certain restriction, that act is considered wrong. Deontologists believe that certain acts are inherently wrong and they should never be committed, no matter the benefits they bring in exceptional circumstances. For deontologists, values such as autonomy and human dignity have priority over obtaining good consequences. In other words, good consequences have constraints. An important assumption of deontology is that the rules shaping behavior have a strong moral foundation, and thus must not be broken.

Two important categories stem from deontology. First, absolutists advocate an unconditional ban on torture. They base their arguments on the idea that torture is inherently wrong because it violates the physical integrity of the victims and infringes their human dignity. Furthermore, torture deprives a person of his/her humanity, reducing him/her to a mere object. Moreover, it has depraving effects not only the victim, but also on the torturer and the society at large. It is important to note that for absolutists, the very discussion about the possibility of applying torture is deemed wrong because it undermines the commitment to the absolute prohibition.

Due to its unabated commitment to rules, absolutism has often been accused of moral fundamentalism. Nevertheless, there is a subcategory of deontology that acknowledges the

gravity of situations with potentially catastrophic consequences. So-called "threshold deontologists" are in favor of a conditional ban on torture, which entails that deontological prohibitions are justifiably violated when the circumstances reach a certain level of severity. Bluntly put, constraints have thresholds. According to this view, the prohibition of torture is a constraint that, in general, must not be infringed; however, there is a threshold limitation on this constraint which implies that in extreme situations, breaking the prohibition on torture is permissible and even mandatory. For example, if the lives of ten people are at stake, torture cannot be considered an option. If on the other hand, the lives of one thousand people are at stake, then torture becomes a justified means for saving them.

2.2.2. Consequentialist arguments on torture

Scholars like Allhoff (2003), Dershowitz (2004) and Bagaric and Clarke (2005) argue from consequentialist grounds that torture can be justified. Deeply embedded in utilitarian thinking, Allhoff (2003: 106) believes that it is easy to imagine situations in which the disutility of torturing a captive is outweighed (in some cases, even dramatically) by the utility of torturing that person. In order for torture to be morally justified, Alloff (2003: 112) explain that four conditions must be satisfied, namely that: through torture, it is aimed at acquiring information; there are strong reasons to believe the captive possesses relevant information; the information is highly related to a significant and imminent threat; and information "could likely" lead to preventing that threat.

In tandem with Alloff, Bagaric and Clarke (2005) advance an utilitarian account, essentially arguing that torture is justifiable in cases where inflicting physical or psychological harm on one person is "less bad" than a large number of people (or a single person) dying. They state that "in the event of a clash [between rights], the victor is the right that will generate the most happiness" (Bagaric and Clarke, 2005: 611). Therefore, in a ticking-bomb situation, the right to life of the person(s) in danger is attributed heavier weight than the suspect's right to physical and psychological integrity. Although the two authors acknowledge the level of wrongdoing of the suspect as a condition of justifying torture, they go so far as to explain that anyone even remotely connected to future terrorist attacks can be justifiably subjected to torture in order to divulge information relevant to stopping them. This idea has a chiefly utilitarian basis, which attributes paramount importance to and justifies efforts to increase total happiness and diminish suffering. In their words, "[i]n the face of extreme situations, we are quite ready to accept that one should, or even must, sacrifice oneself or others for the good of the whole" (Bagaric and Clarke, 2005: 607). Finally, the purest utilitarian element of their argument is "the formula" they convey for deciding whether torture should be employed or not depending on the circumstances of the case at hand:

$$\frac{W + L + P}{TxO}$$

According to Bagaric and Clarke (2005: 613), the details of the equation are:

> "W= whether the agent is the wrongdoer
> L = the number of lives that will be lost if the information is not provided
> P = the probability that the agent has the relevant knowledge
> T= the time available before the disaster will occur ("immediacy of the harm")
> O = the likelihood that other inquiries will forestall the risk".

If the result of this mathematical equation reaches an officially established threshold, then torture becomes justified.

Ticking-bomb scenarios are also discussed by Alan Dershowitz (2004). He believes that the absolute prohibition of torture is unrealistic and cannot hold in extreme situations. His utmost concern is related to the fact that torture operates below the radar screen of accountability. Dershowitz proposes the so-called "torture warrants" that entail government officials asking for a judge's approval to employ torture in a given situation. Although he claims his proposal to be different from the old, abstract, utilitarian debate (of the type Bagaric and Clarke discuss), his argument is nevertheless consequentialist in light of the aim with which he advocates the torture warrants. Dershowitz (2004: 266) believes it is better "to have such torture regulated by some kind of warrant, with accountability, record-keeping, standards and limitations". Confusing enough, he asks the reader to keep in mind that his normative stance is that torture should never be performed (Dershowitz, 2004: 266); yet he seeks to legalize torture in light of the "benefits" such a legal system would have on the current practice of torture: to reduce its use while creating public accountability. Although legalizing torture fundamentally breaks the provisions of international law, Dershowitz (2004: 267) proposes a counter-intuitive rationale by which "[i]f we try to control the practice by demanding some kind of accountability, then we add a degree of legitimation to it while perhaps reducing its frequency and severity."

A flaw common to these consequentialist arguments is that by playing almost exclusively on the circumstances of ticking-bomb scenarios, they seem to underestimate the costs of justifying torture, therefore the value of its absolute prohibition. Luban (2005) observes that ticking-bomb scenarios create a torture culture in which institutions based on the exceptional case are used to justify instances of torture. He therefore rejects the arguments constructed on such scenarios, explaining that responsible discussions on torture should be based not on a hypothetical or on emergency decisions, but on the practice of torture. In his words (Luban, 2005: 1445), the error built into the ticking-bomb scenario is that

> "[i]t assumes a single, ad hoc decision about whether to torture, by officials who ordinarily would do no such thing except in a desperate emergency. But in the real world of interrogations, decisions are not made one-off. The real world is a world of policies, guidelines, and directives. It is a world of *practices*, not of ad hoc emergency measures."

Essentially, Luban underscores the ramifications of justifying torture, which are far greater than the immediate costs put forward by the case-by-case utilitarian calculus. Once justified, such a practice inevitably leads to the consolidation of a public culture of torture that strips this phenomenon off its exceptional character, turning it into a highly regulated area and, thus, institutionalizing it instead.

Bufacchiand Arrigo (2006) also develop a refutation of the ticking-bomb argument on consequentialist grounds. In tandem with Luban (2005), the two authors emphasize that the arguments employed for justifying torture ignore the intensive preparation and larger social consequences thereof. Given that such arguments rest on a cost-benefit analysis, Bufacchi and Arrigo (2006: 362-7) bring empirical evidence of the detrimental effects that the institutionalization of torture has on civil, military and legal institutions, thus proving the costs of torturing terrorists to be higher than the benefits. For instance, the ticking-bomb argument assumes infallibility from a moral and political point of view, which entails torturing the innocent. The costs of fallibility become even higher on a background where psychiatric studies show there is no form of compensation or rehabilitation for victims. Furthermore, institutionalizing torture implies the specialization of some state agents in performing torture; this translates into training and practice, with torturing eventually becoming a legitimate profession. Finally, those who advocate legal support (like Dershowitz) fail to provide details on these aspects and to address the issue of an expiration date or at least a mechanism for termination of this program.

An interesting account belongs to Bob Brecher (2007). Albeit a moral absolutist, he takes on a consequentialist position in order to counter the arguments of those who justify torture:

> "I had to get my hands intellectually dirty if I was to offer arguments that stood a chance of being listened to. While I think that an analysis of their arguments illustrates as comprehensively as anything could the bankruptcy of a view of morality which looks solely to the consequences of what we do, what really matters is this. In the end, the conclusion that all torture is wrong, always and everywhere, follows even on that view." (Brecher, 2007: 88)

While the central target of his critique is Dershowitz's proposal to legalize torture, his aim is to demonstrate that even on consequentialist grounds, justifications for torture cannot stand. Brecher (2007: 8-9) argues that the ticking-bomb scenario is "sheer fantasy" given that the different conditions imagined by scholars and put together to form such scenarios are highly implausible. According to him, the problem with ticking bomb scenarios is that they are based on thought experiments designed to test the limits of moral theory, but which reflect intellectual and political irresponsibility of the respective philosophers who do not verify carefully their plausibility. Furthermore and in tandem with Luban (2005) and Bufacchiand Arrigo (2006), Brecher (2007) examines the impact of institutionalizing torture on the four central areas, namely the wider use of torture, its consequences for the law, the response of potential terrorist bombers, and the professionalization of torture. His point of departure into this endeavor consists of his observation that despite the extremely serious nature of their policy proposals, those who advocate legalizing torture discuss very little the likely consequences of its institutionalization (Brecher, 2007: 56). In Brecher's view, all torture is ruled out.

2.2.3. Deontological arguments on torture

The prohibition of torture is also supported on deontological grounds by the so-called absolutists, who forcefully reject and condemn any attempt of breaking the prohibition. Waldron (2004) views this prohibition not as just a rule among many others, but as a legal archetype. By archetype he means an item in a normative system whose significance goes beyond its immediate normative content and which constitutes the key to the point, purpose or principle of an entire area of law (Waldron, 2004: 47). He explains that

> "[t]he idea of an archetype, then, is the idea of a rule or positive law provision that operates not just on its own account, and does not just stand simply in a cumulative relation to other provisions, but operates also in a way that expresses or epitomizes the spirit of a whole structured area of doctrine, and does so vividly, effectively, publicly, establishing the significance of that area for the entire legal enterprise" (Waldron, 2004: 47).

As such, the absolute prohibition of torture is an important rule that embodies our commitment to break the link between law and brutality. In Waldron's (2004: 43-4) view, legal positivists are mistaken to believe that law is just an accumulation of unrelated rules, self-sufficient in its source, meaning and application. They do not acknowledge the importance of structure and system, and therefore fail to see how laws work together, complementing and reinforcing one another. Archetypes do not only serve as epitomes of the law, but they also contribute to it with their primary normative force. When it comes to torture, damaging the archetype severely affects the core principle behind it, thus re-establishing the link between law and brutality, or law and terror (Waldron, 2004: 64-5). Nonetheless, whichever way the prohibition of torture is conceptualized from a legal perspective, it is the moral principles portrayed by it that matter. As Waldron (2004: 65) concludes,

> "[t]he most important issue about torture remains the moral issue of the deliberate infliction of pain, the suffering that results, the insult to dignity, and the demoralization and depravity that is almost always associated with this enterprise whether it is legalized or not. The issue of the relation between the prohibition on torture and the rest of the law, the issue of archetypes, is a second tier issue. By that I mean it does not confront the primary wrongness of torture…"

Matthews (2008) provides a complex analysis of why torture can never be morally justified. He provides a detailed account of the harms that torture generates, not only at the victim's level, but also in society at large. According to Matthews (2008: 38), firstly, torture is essentially coercive, for it constitutes an act of dominance and self-assertion of one political group over others. Therefore, it fundamentally infringes their autonomy and human dignity. Secondly, because torture seeks to break down and recreate the identity of an individual so as to submit him/her to other political aims, all state torture is psychological. Although there is a distinction between physical and psychological torture, it merely categorizes the different ways state agents try to achieve their aim, for torture is fundamentally an attack on the mind of the suspect (Matthews, 2008: 39-40; 43; 59). Thirdly, another important characteristic of torture, which Elaine Scarry (cf. Matthews, 2008: 43-4) points out, is its "theatricallity". By this, she means that torture is always a phenomenon acted out: in order to best exploit the fears and weaknesses of the suspect, considerable preparation is needed, similar to arranging

a stage in theatre for generating the desired symbolic effect. Furthermore, the asymmetrical character of torture is revealed through the physical restraints and the sense of helplessness the suspect is experiencing (Davis, 2005; cf. Matthews, 2008: 44). As such, torture creates an institutional environment that aims at producing fear, terror and suffering (Matthews, 2008: 59). Fourthly, although torture constitutes a deliberate and systematic violation of the will, desires and choices of the victim, it cannot be views solely in terms of a relation between torturer and victim. Matthews (2008: 52-3) explains that to be human is to have social and normative attachments with family, friends, etc. This social self is precisely what torture seeks to break. By damaging these emotional ties, torture scars the victim with alienation and diminished capacity to maintain relationships, therefore affecting not only the individual, but also entire communities. As such, the effects of torture reach far beyond the torture chamber.

Although they understand that some actions are inherently wrong and should never be perpetrated be the consequences as they may, some scholars argue sometimes the circumstances may be such that the absolutist interpretation of deontology cannot hold. This strand of theory, called threshold deontology, seeks primarily to resolve accusations of moral fundamentalism. Zamir and Medina (2008: 343) explain that while absolutist deontology provides that constraints to the promotion of good consequences, namely respecting values such as human dignity, must not be violated even for the greatest amount of good, threshold deontology maintains these constraints have thresholds. If according to these thresholds, enough good or bad is at stake, then constraints may be overridden in order to avoid catastrophes or to enhance good outcomes.

Kadish (1989: 346) shortly explains the threshold deontologist position in the case of torture. According to him, the *Fiat iustitia ruat caelum* maxim (Let there be justice even if the skies were to fall) representative of the absolutist position cannot be true. He writes that if the skies could be prevented from falling by doing an injustice, then, at the least, the person who did it could not be made guilty of a moral wrong, and at the most, the person who did not do it might be. Kadish (1989: 346) takes the position that "wrongful actions may be morally redeemed by the goodness of their consequences, and whether they are or not depends on the degree of wrongfulness of the actions and the seriousness of the consequences portended by failing to take those actions, discounted by the degree of probability that they will ensue." He agrees that although torture constitutes a profound violation of human rights, this does not mean that nothing can redeem it. Kadish underscores we cannot rule out the possibility of cases in which innocent lives would be saved by using this violation against a single person. Nevertheless, the author (Kadish, 1989: 346) makes a cautionary note, explaining that this rationale should not be equaled to a simple balance of evils where acts of torture are justified whenever the harm they generate is smaller than the harm avoided by perpetrating them; torture is justified only in instances where the imbalance in favor of using it is extremely great.

Miller (2005) discusses three problems in the reasoning of absolutists who reject the ticking-bomb argument. Firstly, he addresses their erroneous assumption that if in one case, a police officer is morally entitled to torture a suspect in order to save ten lives, then torture is

automatically institutionalized, with a plethora of depravities, injustices and horrific consequences ignored. However, the respective case is depicted as a one-off use of torture that is not meant to happen again in years, and therefore far from becoming a routine (Miller, 2005: 185). Secondly, to those who consider torture as an absolute moral wrong, there are not even imaginable circumstances under which it may be morally justified to torture. Miller (2005: 185-6) contrasts this with the example of killing, whose walls as an absolute moral wrong eventually came down – killing in self-defence is nowadays justified. Finally, proponents of "practical moral absolutes" reject the permissibility of torture not in light of its inherent evil that is so great as to override any other conceivable moral considerations, but in light of the fact that there simply are no moral considerations in the real world that will ever override the moral prohibition of torture. Miller (2005: 186-7) points out that these practical moral absolutists fail to provide a principled account of the moral weight attributed to the refusal to torture relative to other moral considerations. Although he acknowledges that without such an account it is not possible to determine whether or not examples of torture cases constitute counter-examples to this position, he nevertheless imagines two situations in which, according to him, torture is justified. He argues that it is possible to put in the required attention and details so as to create highly probable situations in which torture is not the morally worst act.

Overall, following Tibor Machan (1990; cf. Miller, 2005: 179), Miller takes the position that in some extreme situations, torture is justified. Nevertheless, he maintains that torture ought not to be legalized or institutionalized. Miller (2005: 188) considers it is an error to believe that what morality and the law require in a given situation must coincide. He explains that the law (and social institutions, more generally) and morality are a blunt and, respectively, a sharp instrument. The law constitutes a set of generalizations to which particular situations must be fit. It is designed to deal with recurring situations experienced by different actors over long period of time. By contrast, morality is a sharp instrument in that it can and should be applied to specific situations taking into account their particular circumstances. According to this, the morally best action of an actor in a non-recurring situation might not be an action that should be legalized. For Miller (2005: 189), "it is surely obvious that to re-introduce, and indeed protect the practice of torture, by legalizing and institutionalizing it, would be to catapult the security agencies of liberal democracies back into the dark ages from whence they came."

2.3. Critique of Threshold Deontology

As explained above, absolutist deontology maintains that there is no valid justification whatsoever for breaking the prohibition of torture – no circumstance whatsoever, however extreme, can allow the use of torture. Nevertheless, ticking-bomb cases and other crises of large magnitude illuminate the conflict between an absolutist position and the basic moral intuition emerging at the thought of such situations. Consequentialist arguments depart from this intuition and argue that it is morally justified to employ torture whenever its benefits exceed its costs. Yet consequentialism seems to underestimate the harms generated by

torture, by not taking seriously the moral implications of using torture. Threshold deontology seeks to take an intermediate position between absolutist deontology and consequentialism. Scholars pertaining to this strand of theory account for the main criticisms attached to the two opposing positions: while defending and emphasizing the importance of the prohibition of torture, they acknowledge that this prohibition can be justifiably broken when the consequences are sufficiently important.

This normative stance is problematic for a number of reasons. First, as Harel and Sharon (2008: 248) put it, the concessions that threshold deontology makes to consequentialism constitute "an unprincipled compromise". By setting thresholds for when the consequences of a situation become "sufficiently weighty", threshold deontology betrays the rationale underlying deontology, which prescribes that people are not to be used merely as a means. Yet this is exactly what torturing a suspect for, say, saving the lives of one hundred people entails. The position of threshold deontology is incoherent for it merges two rationales that cannot be merged. One is either a deontologist, holding that deontological constraints override in importance the good and therefore must always be respected, or a consequentialist, holding that good outcomes are primarily significant and therefore such constraints can (and ought to) be broken so as to achieve those outcomes.

Zamir and Medina (2010: 8) respond to the accusation of incoherence with the following:

> "it is coherent to maintain that (contrary to consequentialism), the goodness of outcomes is not the only factor, and that (contrary to absolutist deontology), constraints may be outweighed by enough good outcomes. Recognizing that there is more than one morally relevant factor inevitably implies that under different circumstances, some factors outweigh others and that all factors should be taken into account."

Due to the fact that the notion of "enough good outcomes" or "sufficiently weighty consequences" is so poorly defined, it is difficult to see what exactly are the factors that outweigh others to justify torture. Suppose a terrorist has set a bomb to kill 1000 people. And suppose another case in which a man has kidnapped a child and hid him/her alone. Both suspects are in custody and both refuse to disclose the location of the bomb and, respectively, the child. A threshold deontologist would argue that in the former case, the threat is sufficiently great so as to justifiably torture the suspects: 1000 lives will be saved. In the latter case, however, the threat is directed only to one person (the child), and thus it is impermissible to torture the suspect. According to this view, the act of torture changes in nature (from justified to unjustified) due to a quantitative transformation in the number of lives saved. Harel and Sharon (2010) too identify this aspect as problematic, raising the following question: if a certain restriction (such as the prohibition of torture) is deontological, which means it is not determined by consequentialist reasoning, how is it possible that consequences reverse that restriction? The two authors emphasize that determining cases on the basis of consequences reflects inconsistency with the underlying rationale of deontology. Therefore, while it tries to escape the accusation of moral fundamentalism, threshold deontology betrays the very foundation of deontology.

Second, in another study, Harel and Sharon (2008: 247) note that by setting thresholds according to which the permissibility of torture is judged, this position undermines the Kantian premise of deontology that rational dignity is priceless. Put crudely by Christopher Kutz, "once principles have a price, all that is left is the bargaining… Threshold deontology doesn't avoid this embarrassment, but merely pretends it does not exist." The counter-argument that Zamir and Medina (2010: 8) offer to this critique illustrates this clearly:

> "This argument is unpersuasive. For one thing, many infringements of deontological constraints, including lying, promise breaking, or causing mild physical pain, are deemed permissible under daily circumstances, not merely under extreme ones. Moreover, even if one focuses on such extreme measures like killing and torture, if no moral principles govern the behavior of agents in extreme cases, how would agents decide whether the circumstances they face are truly extreme? How can one judge, in retrospect, whether the infringement was morally justified?
>
> There may be institutional and "expressivist" reasons to refrain from explicitly authorizing the killing or torturing of innocent people by legislation; and there may be instrumental advantages to regarding some acts as morally taboo. However, once it is accepted that constraints may justifiably be infringed under certain circumstances, there is no escape from delineating these circumstances."

The two authors seem to have missed the point of the entire argument they seek to counter. They claim putting a price on principles is not a novelty; in this sense, they give the examples of lying or promise breaking. But let them be reminded that there is no national or international law prohibiting lying or promise breaking. So comparing our daily minor concessions to morality with killing or torture creates confusion over what exactly they are debating. The two authors seem to suggest that since there is no law setting the limits of a certain action (say, torture), then there is no way of judging its morality. Therefore, they simply acknowledge the existence of reasons against regulating torture and jump straight to the conclusion that if we are to justify torture, then we had better specify the conditions. Remember the starting point was the critique that there can be no price on human dignity...

Third, the inconsistency of threshold deontology with the premises of deontology is also reflected by the issue of aggregation of harms. One such premise is the "separateness of persons", which entails that judging actions in violation of fundamental rights ought not to be done on the basis of the aggregation of interests of others (Harel and Sharon, 2008: 247-8). Yet the quantitative transformation that, according to threshold deontology, changes the nature of the act of torture rests on an aggregation of lives, therefore betraying the principle of the separateness of persons. Zamir and Medina (2010: 9-10) respond to this critique by countering John Taurek's argument according to which the decision whether to let one or many die should be made by tossing a coin. Although they seem to ridicule Taurek's argument, his point is that loss of life is equally painful, irrespective of the number of lives. The two authors argue that whenever the difference exceeds a certain threshold (for example, one life versus the lives of 100.000 people), then it is justified to save the larger group. Yet they fail again to address the central issue, namely that the decision, say, to torture in order to save the larger group ought not to be made on the basis of an aggregation of harms (in this case, the loss of 100.000 lives).

Fourth, threshold deontologists are also accused of arbitrariness (Zamir and Medina, 2010: 8-9). Due to the fact that deontology is concerned with the nature of acts, and consequentialism, with outcomes, it is not possible to set non-arbitrary thresholds. Deontologists pertaining to this strand of theory acknowledge the arbitrariness of such thresholds, but they seek to refute this accusation by replying that "this is an inevitable feature of any pluralist normative theory incorporating more than one morally relevant factor" (Zamir and Medina, 2010: 9). Yet precisely the plurality of relevant moral factors seriously questions the validity of fixed thresholds. Moreover, since the circumstances of a potential instance of torture are extraordinary, how can pre-established thresholds account for one of the core characteristics of an emergency, namely deep uncertainty? The assumption we know everything that can happen to us and that therefore we can predict the contingencies of a crisis, simply reflects an incomplete picture of reality.

To sum up, threshold deontology is the third strand of theory that analyzes the phenomenon of torture. Although it adopts a pragmatic view that seeks to combine the opposing positions of deontology and consequentialism, it fails to account for the problematic aspects of incoherence, disrespectfulness towards human dignity, aggregation of harms, and arbitrariness.

2.4. Supporting the Deontologist Position

As explained in the previous chapters, absolutist deontology, consequentialism and threshold deontology differ in terms of the content of their moral requirements. However, Harel and Sharon (2008), who take an absolutist position with regard to torture, propose that they be differentiated based on the form of these requirements. In this sense, they argue that the fundamental characteristic of the deontologist position is that torture ought not to be regulated by rules (legal or moral). They emphasize the importance of the practical reasoning of the agent faced with an extreme situation and explain that he/she should never perform torture because of a rule (legal or moral) providing torture should be performed. In other words, the practical reasoning of such an agent ought not to be rule-governed. This means that the agents cannot justify having used torture with an appeal to rules that permit or require it; the decision to torture or not ought to follow the agent's fresh judgment with regard to the appropriateness of performing this act in the circumstances at hand. "To be morally commendable, torture must be performed out of sheer necessity to save lives, maintain dignity, or fulfill some other urgent duty o similar magnitude. In the ticking bomb case, only the imperative to save lives ought to figure in the agent's reasoning, not a principle according to which torture may ever be permissible" (Harel and Sharon, 2008: 250). This deontologist position is endorsed by the study at hand.

The two scholars (Harel and Sharon, 2008: 251-2) explain that torturing because a rule permits that under certain circumstances is fundamentally different from torturing because lives must be saved. This goes down to the distinction between principle and exception. The principles that govern our behavior are not merely instrumental rules that we use as

guidelines in figuring what we ought to do, but they are representative of the values we endorse. As such, if torture is regulated as a principled exception to the rule that prohibits torture, then it becomes a legitimate and respectable component of our system of norms. Yet absolutists have argued very well why this must never be the case. In agents' reasoning, the option of torture appears only as a practical means, when it is considered absolutely indispensable for saving the lives under threat and thus necessary under the specific circumstances.

If the prohibition of torture is not categorical (such as threshold deontology proposes), it entails that the permissibility of torture is admitted into the agent's reasoning, even if the circumstances do not call for it and torture is not employed. Nevertheless, Harel and Sharon (2008: 252) point out that if the circumstances do not call it, torture must not be considered as an alternative and weighed against others. In a case that does not ask for torture, the agent ought to act because there is a rule prohibiting torture. If, on the other hand, the circumstances are such as to require torture, the agent ought to act because lives must be saved.

Since torture is morally wrong, the only acceptable principle regarding torture is its universal prohibition. The fact that it becomes necessary in extraordinary circumstances does not change its moral status, in the sense that the necessity to perform torture does not justify it, that is, does not make it right. This raises a legitimate question: how is it possible for the prohibition of torture to remain unconditional, while it is permissible in some extreme situations? Harel and Sharon (2008: 254) address this issue and clarify that in such situations, torture does not become permissible in principle, but instrumentally necessary: "it is the force of the circumstances that necessitates the action, not any mitigating principles permitting torture". It follows that the practical reasoning of an agent ought to reflect the decision to torture did not come in response to some rules, but rather compelled by circumstances.

Given that so many scholars forcefully oppose any proposals of legalizing torture (Luban, 2005; Waldron, 2005; Buffachi and Arrigo, 2006; Brecher, 2009) does not mean that there cannot be situations so extreme that torture is the only means left available to tackle it. However, if agents in such situations decide to employ torture on the background of its absolute prohibition, they will face the corresponding legal consequences. The obligations of State Parties to the CAT are that, first, states must take the necessary legislative measure to establish jurisdiction in their domestic criminal codes and, second, their administrative and judicial authorities must take specific practical steps in order to bring suspected terrorists to justice, namely to initiate criminal investigations once the authorities possess sufficient information to suspect that an act of torture has been committed in their territories (Nowak, 2012: 167). Article 4(2) of the CAT provides that State Parties shall make the offences of torture "punishable by appropriate penalties which take into account their grave nature". The Committee against Torture (the body monitoring the CAT) considers only a prison sentence of at least a few years to be an appropriate penalty for the offence of torture (Nowak, 2012: 165). It is important to note that the obligation to use criminal law in order to fight impunity only applies to torture, not to CIDT (Nowak, 2012: 165). Nevertheless, in both cases, the

guilty state pays a compensation that should cover all the damages suffered by the victim, including restitution, monetary compensation, rehabilitation of the victim, as well as measures to guarantee the non-repetition of the violation (Nowak, 2012: 175).

The case of Gäfgen v. Germany (ECtHR, 2010) is an illustrative example, involving the European Court of Human Rights that, when it comes to torture, draws on the jurisprudence of the Committee against Torture. In September 2002, Jakob, the 11-year-old son of a Frankfurt banker, was kidnapped by Magnus Gafgen, who asked for a ransom of 1 million Euro to be left for him at a specific tram station. Soon after picking up the ransom, Gäfgen was caught and arrested by the police. At his home, they found many clues to Gäfgen's planning of the crime, but no sign of Jakob.

Faced with the evidence against him, Gäfgen changed the story about his involvement in kidnapping Jakob several times. Nevertheless, he confessed he had hidden Jakob in a hut by a lake. A search team looked for Jakob in a nearby wood, but the rescue operation turned out unsuccessful. The police soon realized the potentially deadly consequences of Gäfgen being held in custody: because there was no one to take care of Jakob, he might be dying alone wherever he had been hidden. As such, the deputy chief of the Frankfurt am Main police, E., ordered the detective officer, D., to threaten Gäfgen with "intolerable pain". According to Gäfgen, D. hit him several times on the chest with his hand and shook him so that, on one occasion, his head hit the wall. Ten minutes after the application of such treatment, Gäfgen disclosed the whereabouts of the boy, who was found dead. The autopsy revealed that the boy had died from suffocation.

Although during the trial Gäfgen claimed that killing Jakob was not what he had planned to do, he confessed his crime freely at the end of the trial out of remorse and to take responsibility for his offence. He was found guilty and was sentenced to life in prison. The two police officers were also tried and found guilty of coercion (E.) and incitement to coercion (D.).

Gäfgen lodged an appeal with the European Court of Human Rights, claiming that his rights under Articles 3 (prohibition of torture) and 6 (fair trial) of the European Convention on Human Rights had been violated. The judgment of the Fifth Section and the subsequent judgment of the Grand Chamber concur in their finding of no violation of the right to a fair trial; nevertheless, the two judgments differ in their discussion of Article 3. Although the two chambers agreed that police threats to torture always amount to a violation of the rights of suspects under Articles 3, the majority of the Fifth Section argued that lenient punishment of the police officers constitutes adequate redress in the case at hand, whereas the majority of the Grand Chamber held that violations of Article 3 must always be severely punished, irrespective of the mitigating circumstances:

> 124. The Court does not overlook the fact that the Frankfurt am Main Regional Court, in determining D.'s and E.'s sentences, took into consideration a number of mitigating circumstances [...]. It accepts that the present application is not comparable to other cases concerning arbitrary and serious acts of brutality by State agents which the latter then attempted to conceal, and in which the Court considered that the imposition of enforceable prison sentences would have been

> more appropriate [...].Nevertheless, imposing almost token fines of 60 and 90 daily payments of EUR 60 and EUR 120, respectively, and, furthermore, opting to suspend them, cannot be considered an adequate response to a breach of Article 3,even seen in the context of the sentencing practice in the respondent State. Such punishment, which is manifestly disproportionate to a breach of one of the core rights of the Convention, does not have the necessary deterrent effect in order to prevent further violations of the prohibition of ill-treatment in future difficult situations.
>
> 125. As to the disciplinary sanctions imposed, the Court notes that during the investigation and trial of D. and E., both were transferred to posts which no longer involved direct association with the investigation of criminal offences [...] D. was later transferred to the Police Headquarters for Technology, Logistics and Administration and was appointed its chief [...]. In this connection, the Court refers to its repeated finding that where State agents have been charged with offences involving ill-treatment, it is important that they should be suspended from duty while being investigated or tried and should be dismissed if convicted [...]. Even if the Court accepts that the facts of the present case are not comparable to those at issue in the cases cited herein, it nevertheless finds that D.'s subsequent appointment as chief of a police authority raises serious doubts as to whether the authorities' reaction reflected, adequately, the seriousness involved in a breach of Article 3 – of which he had been found guilty." (ECtHR, 2010: 34-5)

The judgment of the European Court raises an important question over what it is that we really expect from state agents: to understand and best fulfill their duties based on the training and experience they have, or to simply follow rules and procedures? The ideal answer is both, yet there are situations in which the two conflict in light of the competing values at stake. The state agent must escape this conflict by making a decision. The problem is that there is no one best decision the agent could make due to the fact that there is no one supreme value overriding the others. This means that the agent has no escape from being guilty of a moral wrong; the job itself puts the agent is such a position. So who would want to do it? The answer would be: someone strong enough not to be troubled by conscience. What if the legal provisions conflict with an agent's duties and thus the moral wrong becomes also a legal wrong?

2.5. Conflict of Values and Legal Solutions

In times of crisis, we expect those whom we entrusted to govern us to avert the threat or, at a minimum, to reduce the damage of the respective crisis (Boin et al., 2005: 1).The Gäfgen case, as well as the ticking bomb scenario used in order to demonstrate that the absolute prohibition of torture cannot hold in every situation, constitutes a crisis. A crisis is usually defined as "a serious threat to the basic structures or the fundamental values and norms of a system, which under time pressure and highly uncertain circumstances necessitates making vital decisions" (Rosenthal, Charles and t' Hart, 1989: 10; cf. Boin at el., 2005: 2). Threat, urgency, and uncertainty constitute the core characteristics of a crisis (Boin et al., 2005: 2-4). Whenever the core values (such as safety and security, integrity and fairness) or life-sustaining systems of a community come under threat, we speak of a crisis. The ticking bomb scenario represents a crisis that becomes deeper with every increase in the number of lives in danger. Furthermore, time compression is another defining element of a crisis: the threat must be dealt with as soon as possible. In the ticking bomb case, the sense of urgency is more accentuated at the operational level, given that a decision on life and death must be made within a few hours. Finally, a high degree of uncertainty surrounds the perception of threat.

The uncertainty of the ticking bomb scenarios is related to the nature of the threat (what is going on and how did it happen?), its potential consequences (what is going to happen and how bad will it be?), and most importantly, the search for solutions.

When the existing knowledge and mechanisms to tackle a crisis no longer work and the circumstances of the threat at hand call for torture as a last resort option, how just is it to punish the state agents (such as D. and E. in the case of Gäfgen) who have adopted it, with complete disregard to the core characteristics of a crisis, the conflict of values that confronts the agent and the extraordinary circumstances of the respective situation?

Nieuwenburg (2014) argues that this type of conflict lies at the heart of liberal democracy. Respect for human rights, which is the essence of liberal democracy, sometimes collides with other constitutional values that state agents are bound to protect, thus generating acute moral dilemmas. Cases such as the one of Gäfgen should make citizens think hard about the complex relationship between a society's moral and formal institutions and the demands of daily administrative practice (Nieuwenburg, 2014: 374-5). Although he does not address the topic of torture specifically, Nieuwenburg (2014) employs the case of Gäfgen in order to expose the type of moral conflict that is central to liberal democracy. He suggests the attention should be targeted more at the nature of the choice situation the agent is facing, and less at its outcomes (Nieuwenburg, 2014: 375). The most important aspect, according to Nieuwenburg (2014), in the agent's decision making process is his/her awareness of the moral dilemma he/she is facing. Moral sensitivity is a key characteristic of state agents in liberal democracies, where insoluble moral dilemmas are bound to resurface simply because constitutional values are incommensurable, which means there is no overarching value with which they can be rationally compared and weighed against.

Two important paradoxes stem from this configuration of liberal democracies, one at the level of state agents, the other at the level of citizens. First, whereas state agents are required to possess certain virtues in order to deal with moral dilemmas, their moral psychology provides them with incentives to deny or avoid such conflict due the difficulty thereof. Second, while citizens are interested in being governed by morally sensitive officials, it turns out that such officials face no better fate than those lacking this sensitivity, that is, being filtered out of public service (Nieuwenburg, 2014: 376-7).

With respect to the case of Gäfgen, Greer (2011) highlights a fundamental problem in the two judgments of the ECtHR. Neither acknowledges the acute moral dilemma experienced by the two officers, as both judgments fail to recognize that the case engages Convention rights not only for Gäfgen, but also for Jakob. He explains that reconciling two competing instances of the same right cannot be a legal matter, for it requires the exercise of moral choice (Greer, 2011: 68). Greer (2011: 86-7) underlines that the moral question which none of the judges framed is "why should the right of a suspect virtually certain to have been involved in the kidnapping of a child for ransom to be spared the short-lived psychological suffering caused by the threat of torture to compel him to disclose the whereabouts of his victim, take precedence over the victim's rights to avoid the much more severe, and much more

prolonged, physical and mental suffering and imminent death, occasioned by the kidnapping itself?" Thus although officers D. and E. made a moral choice, their moral sensitivity was not even acknowledged by the two instances of the ECtHR.

Nieuwenburg (2014: 381) observes "there is something intolerably wrong with our theories about public integrity if we continue to remove those officials from public service who least deserve it." If people do decide to pursue careers involving such conflicts and prove to have the moral sensitivity required to deal with them, how can we make sure those people will be kept and valued by the system they serve? Nonetheless, if we accept torture as morally permissible in ticking bomb cases, this does not mean that such acts must occur outside the legal framework. At the same time, we have seen the dangers of institutionalizing torture and why it must never be legalized. So are there any grounds for supporting the deontologist position defended so far?

2.6. Legal Grounds

In common law, there are two classic categories of defenses: duress and necessity (Ohlin, 2010: 219-20). Duress applies in situations where the threat comes from a person who coerces someone into committing a crime (for example, pointing a gun to someone's head in order to get him/her to shoot ten people).On the other hand, in the case of necessity, the threat comes not from a person, but from an external circumstance, and it is not performed under the direction of a specific actor.

Necessity is viewed as a justification, while duress, as an excuse. It is assumed that in the case of necessity, the defendant chose the lesser of evils and thus the action was not wrongful. In the case of duress, the defendant is supposed to have chosen the worst outcome, by which he/she nevertheless saved himself/herself or his/her family; given that the threat compromised his/her decision making process, he/she is not culpable. The action he/she undertook is still wrong, but he/she is excused. As Ohlin (2010: 220) points out, the obvious problem with these assumptions is that they ignore two possible combinations, namely justified duress and excused necessity. The former would entail that one is compelled to break the law, but the end result is beneficial. Nevertheless, the rarity of such situations does not make their oversight a problem. In contrast, it is disturbing that there is no legal category for cases of necessity in which the threat comes from an external circumstance but the defendant does not act justifiably. As opposed to US law, German criminal law and other national codes based on it does make the distinction between justified and excused necessity.

Ohlin (2010: 221) highlights that "far too little attention has been paid to the thesis that agents who commit torture might be excused but not justified for torturing terrorism suspects". As presented in the above chapter, most scholars who seek to make torture permissible in extreme situations argue that torture be defended as justified necessity. Yet apart from the moral issues such a position raises, there are also legal implications that deserve attention. Ohlin (2010: 222-33) explains that applying justified necessity to torture

would, first, send a wrong message to the public. As a matter of policy, justifying torture means that such conduct is not considered wrongful and that anyone facing similar circumstances is encouraged to apply it. Second, torture as justified necessity entails that the agent who performed it has chosen the lesser of two evils; this goes back to one of the most problematic aspects of consequentialism, namely that different agents may appreciate differently the kinds of evil they are facing. Third, torture as justified necessity brings back the problems of threshold deontology according to which our deontological commitments disappear once a certain threshold is reached. Fourth, it assumes that torture constituted an appropriate means to avoid the danger at hand. Finally, the necessity defense requires that the harm was otherwise inavertible; in other words, other more legal means to avert the harm were unavailable to the agent.

Defending torture as an excused necessity avoids the problems of justified necessity and is most consistent with the provision of the CAT, that "no exceptional circumstance whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may ever be invoked as a *justification* of torture". Ohlin (2010: 233-7) explains that in the German Penal Code, excused necessity requires the threat to be aimed against a family member or someone very close to the defendant. The close connection to the person under threat constitutes a proxy for the essential factor of excused necessity, namely a compromised decision making process. This is the key element of torture as excused necessity. Even though the use of torture may result in saving many lives, Ohlin insists (2010: 236) "the defense is grounded by an external circumstance that compromises the defendant's autonomy by creating an impossible choice that creates a bona fide psychological disruption in the moral thinking of the agent. The whole point of the necessity defense is that external circumstances can threaten the autonomy of an agent in much the same way as an internal disruption, such as mental illness, that unquestionably generates an excuse." Whether the source of disruption is internal or external is irrelevant; the important factor is the degree to which the defendant's autonomy is disrupted.

Chapter 3: Research Methods

A valuable aspect of this research relates to the third objective established in the introduction, namely to explore state officials' views on the use of torture in situations with potentially catastrophic consequences. It seeks to confront existing theoretical knowledge (which is highly normative) with the practical reasoning of state agents. Sub-chapter 1.2. – Research Focus –identified a flaw common to the current knowledge on torture, namely that it mostly comes from opinion polls consisting of very abstract questions. As such, there is a need to develop scientific research on how people actually think about torture (Houck and Conway, 2013). By valuing the experience of state agents and by comparing theory with the practical reasoning behind the decisions to apply (or not) torture, we can better understand the circumstances of such decisions and, most importantly, their relation to liberal democracy. This section will provide details on the research design adopted by this study, on the methods used for collecting the necessary data and analyzing it.

3.1. Research Strategy

As defined in the introduction, a scientific thought experiment constitutes reasoning about an imaginary scenario in order to confirm or refute some hypothesis or theory about the natural world. Gendler (2004: 1155) expands on the four crucial characteristics of thought experiments:

1. To reason in a thought experiment constitutes reasoning about a particular set of circumstances, whose details are specified at a higher level than that of a conclusion.
2. The subject of the thought experiment gains access to the scenario via imagination rather than via observation.
3. The purpose of reasoning about the scenario is confirming or refuting some hypothesis or theory.
4. The hypothesis or theory addresses features of the physical world.

Thought experiments are best understood by contrast to classic experiments. Such a comparison is succinctly put together again by Gendler (2006: 1):

> „The former are conducted by engaging in an imaginative act, the latter by manipulating features of the observed world. So if to perform an (actual) scientific experiment is to conduct an empirical test under controlled conditions with the aim of illustrating, supporting, or refuting some scientific hypothesis or theory, then to perform a scientific thought experiment is to reason about an imaginary scenario with a similar aim. In the case of actual experiments, the theory-relevant evidence generally takes the form of data concerning the behavior of the physical world under specific conditions; in the case of thought experiments, the theory-relevant evidence generally takes the form of intuitions (or predictions) concerning such behavior. In both instances, imagining or performing the experiment ostensibly results in new knowledge about contingent features of the natural world."

The last affirmation in the quoted paragraph constitutes a central puzzle surrounding the thought experiment, which important scholars in the field such as Robert Brown and John Norton reject as false. However, in an article from 2004, Gendler demonstrated why on the basis of the quasi-sensory intuitions evoked while contemplating an imaginary scenario, we can form new beliefs about contingent features of the natural world.

Gendler (1998) refutes another criticism of thought experiments, according to which they are eliminable in science because they are just the clothes of the sound arguments they seek to advance. In other words, their demonstrative force is not any different from that of an argument, for thought experiments are just arguments in disguise. By using one of Galileo's thought experiments, Gendler (1998) demonstrates that the standard argumentative reconstruction of the case fails to capture its justificatory power. He argues that other argumentative reconstructions would fail in the same way, and suggests that "the success of the thought experiment may be a result of the way in which it invites the reader's constructive participation, depicts particulars in ways that make manifest practical knowledge, and describes an imaginary scenario wherein relevant features can be separated from those that are inessential to the question at issue" (Gendler, 1998: 420).

Ylikoski (2003: 36) explains that in recent social studies, thought experiments have been rarely used, given that the attitude towards them is mostly negative. David Hull is another scholar who contributed to that negative image. He strongly disagrees with the use of thought experiments as evidence (as opposed to illustration), which, according to him, has caused massive damage especially to the philosophy of science (Hull, 2001; cf. Ylikoski, 2003: 36-7). Firstly, thought experiments can inhibit innovation in two ways. They tend to rely on well entrenched intuitions which, according to Hull, must be challenged in order to achieve progress in science. Furthermore, thought experiments divert the attention from the original problem, for instead of being convenient illustrative tools, they become issues themselves. For Hull, the principal reason of using thought instead of real experiments is the simplicity and clarity of the former. Consequently, he views thought experiment as incorporating a fatal failure since although they might seem simple and easy to explain, once they are added the background details, they become very complex and intractable. Secondly, according to Hull, thought experiments are incoherent and incomprehensible, by which he refers to the impossibility to conceive the state of affairs depicted in them. Thirdly and most importantly, there are no detailed standards for evaluating thought experiments: they often lack sufficient details to understand and to make ambitious judgments about them, there is no theoretical context or methodology for adding empirical details to the imaginary cases, and they rely on a notion of conceivability that is not explicated.

Ylikoski (2003: 38-41) disagrees with Hull in his critique of thought experiments. First, he explains that thought experiments do not inhibit innovation, in that imaginary cases may require us to abandon earlier ways of thinking and can be used to develop new ideas by showing the limitations of older ones. Therefore, the problem may be not that thought experiment rely on but that they create well entrenched intuitions. Furthermore, he argues that problems emerge not from thought experiments themselves, but from badly chosen

examples. Second, thought experiments are not intrinsically incoherent and incomprehensible: the issue concerns only the misconceived thought experiments, in the same way there are bad arguments, experiments or case studies. Ylikoski (2003: 40) argues that the evidential value of true experiments or case studies should not be raised above that of thought experiments just because they are about a real event:

> "I suggest that we think further about the things we contrast with the imaginary in the social studies of science. Hull says that the contrast is a real example, and I mentioned previously real case studies. In principle, the contrast seems to be very clear: thought experiment talks about things that have not really happened, whereas real examples are about things that have actually taken place. In practice, things are not this simple. The fact that an account of the episode in the history of science is *about* a real event is not enough. There are other requirements. And these requirements bring some uses of historical episodes in the theory of science closer to the imaginary scenarios. We should require that the case studies used are based on serious historical research. Think about anecdotes (Newton's apple), textbook versions of history or 'rational reconstructions' used by philosophers of science (or by psychologists studying scientific discovery). The fact that these accounts are allegedly about real events should not automatically raise their evidential value above that of imaginary examples."

Nonetheless, Ylikoski agrees with Hull in pointing out that thought experiments lack a general methodology. Yet this does not mean that there cannot be such a methodology. Ylikoski's point is that thought experiments do not have to be all as bad and suspect as Hull considers.

Sorensen (1992: 197-202) explains there are three reasons for recurrence to thought experiments instead of true experiments. Firstly, in some situations merely thinking about a certain aspect answers the question a researcher asks. As such, fulfilling a true experiment would be void of evidential gain, for the action is superfluous to the research. Secondly, another reason for inaction is that the costs of an experiment would be higher than the gains obtained from it. The author calls for a broad understanding of costs, entailing legal or ethical considerations. Finally, some experiments are impossible to realize, relative to one's means.

When it comes to torture, thought experiments are more appropriate than true experiments, for what is at interest to this study is the practical reasoning of state agents. Their training and experience, which informs their decisions, remain the same whether the actions are real or imagined. Also, in contrast to thought experiments, merely observing how the agent acts in a true experiment fails to provide details on why the agent does so. Furthermore, conducting experiments that involve torture poses serious legal and ethical issues and they are no longer permitted today (especially after Milgram's experiment, which generated an intense debate about the research ethics of scientific experimentation).

As explained in the introduction, the practice of torture in the modern world is characterized by a high degree of secrecy. Torture pertains to the category of sensitive topics that either nobody wants to talk about openly or if they do, hardly goes beyond the commonly accepted moral conventions (namely, in our case, that torture is wrong and should never be performed). Therefore, it is very difficult to find state officials who accept to discuss the topic of torture, not necessarily because they do not wish to, but mostly because the nature of their

work (for instance, in the intelligence services or combat missions) does not allow them to. These state agents are forbidden to disclose such information, due to its potential to compromise national security interests. Although the thought experiment does not eliminate this trouble completely, by contemplating hypothetical situations it allows for a discussion on torture that does not place the respondent into a dangerous position of incriminating himself/herself by confessing past crimes (a position I strongly doubt that, in a case study research for instance, anyone would agree to be put in).

3.2. Data Collection

It must be noted that the situations this study focuses on consist of rare, extraordinary circumstances. As such, it is difficult to find people that have experienced them. If the study were to be designed as a case study research, asking state agents to recall situations of torture and interviewing them about their practical reasoning that preceded the decision to torture or not, the number of potential respondents would have been diminished dramatically. Yet as mentioned in previous chapters, moral dilemmas of the type that ticking bomb scenarios represent are an inherent part of liberal democracy, which means no state agent is exempt from facing them in the future.

The technique used in selecting a part of the target population was snowball sampling. As emphasized above, there are certain difficulties in finding state agents willing to take part in a study of torture. Therefore, a random selection of a group in the target population may result in non-valuable data. Snowball sampling constitutes a non-probability sampling technique, mostly employed in studies of sensitive topics, where subjects are required certain attributes or characteristics. Snowballing entails first identifying and interviewing several people with relevant characteristics and then asking them for referrals to other people they know to have similar experience (Berg, 2001: 33). This sampling technique was chosen because of its potential to reach a larger number of subjects than planned at the outset. In addition, adopting this approach involves the power of recommendation, which extends the researcher's connections to the level of the subjects'. The study was conducted in Romania and Appendix A contains details (that the respondents were at liberty to disclose) on the interviewees' fields of expertise.

The method of data collection employed by this study is the semi-structured interview. The peculiarity of this type of interview consists of the fact that it addresses a number of specific topics in a consistent order but the interviewer is allowed freedom to digress (Berg, 2001:70). As such, six scenarios were presented (i.e. read out loud, one at a time) to the respondents, four of which are derived from real-life cases. The scenarios were framed as situations with potentially catastrophic consequences, which the respondents were asked to deal with. Appendix B consists of the six scenarios used in this study.

Interviewing is an appropriate method of data collection for the present study, given that it provides the opportunity to obtain a solid insight into the respondents' practical reasoning.

Since this study focuses not only on whether state agents would apply torture or not, but also why they decide to do so, the interview allows for an open discussion on the decision making factors considered relevant by the respondents, exploring their practical reasoning. The data so collected is used by the researcher for comparison with the theoretical assumptions on the permissibility of torture.

The interviews were structured so as to ensure that the discussions have a clear direction but also that the respondents have opportunities to explain their views and expand on their reasoning process. As Marshall and Rossman (1989; cf. Biggam, 2011: 293) have stated, a fundamental assumption of qualitative research is that "the participant's perspective on the social phenomena of interest should unfold as the participant views it, not as the researcher views it". Therefore, each questions section which began right after reading the scenario to the interviewee started with the open question "What would you do?", thereby allowing the respondent to lead the interviewer through his/her thinking process. Additional questions were asked based on the direction taken by the interviewees' answers. It is important to note that the respondents may not even consider torture as an option in a given scenario. Nonetheless, this still constitutes valuable data, for it provides information on the dimensions relevant to the state agent in dealing with the imagined situation. Albeit the semi-structured interview allows the respondent to take the leading role in discussing the scenarios presented, it nevertheless follows a number of specific issues:

- The actor (Who inflicts the treatment: you or your colleague?)
- Authority (acting on orders vs. discretion)
- Types of torture (physical or psychological or both)
- Duration (how long is the treatment applied?)
- Intensity (how far does the treatment go?)
- Social/Societal pressure (especially from media)
- Aftermath (facing legal consequences: how does the respondent defend his/her case?)

The interviewer met the respondents' request that the discussion would not be recorded. As such, the notes taken during the interviews (with a length varying between one and two hours) were transcribed immediately after the conversation in order to ensure that small details or nuances are not missed out. These clean notes constitute the data obtained from the empirical study.

3.3. Data Analysis

The aim of this study is to compare what was discovered in the theoretical chapter with the empirical knowledge deriving from state agents' expertise. The deontological position supported by the study at hand implies that for torture to be morally permissible and legally excused, the case must fulfill a number of important conditions:

a. In the agent's reasoning, the decision to torture comes only as a practical means, when it is considered absolutely indispensable for saving the lives under threat.
b. In the agent's reasoning, the decision not to torture comes out of the rule prohibiting torture.
c. In the agent's reasoning, torture is not an alternative weighed against others.
d. In the agent's reasoning, torture is compelled by circumstances.

The data obtained as a result of thought experiments will be analyzed altogether on these four conditions. In addition, data will be analyzed on the dimensions established before the interview, and patterns as well as important dissensions will be identified.

3.4. Validity and Reliability

There are two key-aspects on which the quality of a research is assessed. Validity refers to the conceptual and scientific soundness of a research study (Marczyk, DeMatteo and Festinger, 2005: 158). In order to be valid, studies must use tried and tested research designs and methods that are appropriate for the purported aims and are implemented properly. The results of such studies generate conclusions that are acceptable to the academic community – the purpose of any research (Biggam, 2011: 143).

In order to pass the test of validity, a research must be sound on two levels. First, the internal validity reflects the accuracy of measurement. The literature review provided insight into the conceptualization of torture, more specifically, into the dimensions theoretically relevant to assessing the moral permissibility of torture. With regard to the data collection, in order to avoid bias and maintain the internal validity of the interviews, it was crucial that the interviewer did not use the concept of torture, unless brought up by the respondent. Torture is a word with heavy weight that is highly likely to trigger "automatic replies" of the type "We don't torture", "Torture is wrong", "I would never torture", due to the negative consequences it may bring to those who declare the contrary. As such, steering questions that influence the way in which respondents take up the issues were avoided by offering them the freedom to describe each step they would take in dealing with the situation at hand, as well as to ask for whatever additional information needed in their decision making process. Nonetheless, one key characteristic of all scenarios (i.e. the control variable) is that the human source of information needed to avert the threat refuses to cooperate. As such, the suspects do not agree to offers of immunity from prosecution or cash rewards and new identities in exchange for their cooperation. Furthermore, the suspect's refusal to cooperate implies in every scenario a great threat to human lives.

Internal validity of the study is also supported by the sample of the target population selected for this study. As explained above, the present research draws on the experience of state agents who are in close contact with the possibility of dealing with extreme situations. Thought experiments were performed not with random people, but with those who possess

the authority and are highly likely to act as they imagine while contemplating the given scenarios.

The second type of validity, namely external validity, refers to the generalizability of the results of a research study (Marczyk, DeMatteo and Festinger, 2005: 174). More precisely, it refers to the degree to which the results can apply to other people that were not part of the thought experiment. The external validity of this research is harder to assess, especially because the empirical research was conducted in a single country. However, although states can approach differently the management of crises, this study is concerned with a universally regulated issue (torture). Moreover, it addresses the moral permissibility of torture, seeking to initiate an investigation into whether the existing normative prescriptions find support in the empirical world.

What encourages other researchers to continue and improve this investigation is the reliability of the present study. Reliable research entails that the results of a research can be trusted (Biggam, 2011: 144). This means that the researcher must provide as many details as possible on the steps taken in order to reach the conclusions. This was done in the chapter on research methods, which offered the necessary details for replicating this study.

Chapter 4: Empirical Research Findings

4.1. The Moral Permissibility of Torture

From the theoretical chapter and the deontological position supported by this study, it was concluded that four conditions are required for torture to be morally permissible:

a. In the agent's reasoning, the decision to torture comes only as a practical means, when it is considered absolutely indispensable for saving the lives under threat.
b. In the agent's reasoning, the decision not to torture comes out of the rule prohibiting torture.
c. In the agent's reasoning, torture is not an alternative weighed against others.
d. In the agent's reasoning, torture is compelled by circumstances.

In the interviews conducted, all six respondents (hereafter identified with A, B, C, D, E, F and G) agree that the suspects in each scenario must be made to divulge the information needed. For instance, respondent B states that "you do not start from the assumption that he [the suspect] won't talk" and respondent E says "it's impossible he won't talk". With this aim, all respondents emphasize the importance of a "lever" (respondent A), which can be of different types. First and, according to respondent A, the most difficult to uncover is the suspect's motivation or reasons for planning the attack (is it religious, political, economic?). Albeit difficult to uncover, it is nevertheless indicative of the moment the suspect will cease to withhold information (respondent A). Second, respondent A explains that analysts identify a "pattern of life" which informs on aspects such as what the suspect has done so far, interests, persons with whom he/she has been in contact. This enables investigators to approach potentially useful family members, who all respondents except C mentioned would be used in the attempt to extract information from the suspect. Respondents D and F refer to these persons as "weaknesses", which they would exploit in order to make the suspects talk. Third, the cultural or religious background of the suspect can provide multiple opportunities for trying to determine him/her to cooperate. In this respect, respondent A says he would make use of customs forbidden in the suspect's religion or culture (such as alcohol). Respondent E gives the example of Muslim culture, where old men exert great authority over the young; such a man would be brought in face of the suspect to try and persuade him/her to communicate. Moreover, respondent E would exploit the suspect's phobias or allergies, so as to force him/her to talk.

Whereas respondent B and G would opt for physical pressure, respondents A, C and E mention explicitly they would employ both physical and psychological pressure through the help of a well-trained psychologist or specialist in communication. It can be observed that the greater the danger faced, the sooner torture came into discussion. However, consistent with

the first condition, torture was not once analyzed as a potential solution from the start (that is, right after the scenario was presented). Rather, respondents looked first at possible courses of action; when no option seemed to work in order to avert the threat, only then the respondents recurred to torture. For instance, scenario 2 allows for many alternatives. Respondent A explains it is important to figure out why the suspect has committed the mistake of blowing up his kitchen (was it his own or was it someone from the house that conspired it?). In addition, the pattern of life will identify potentially useful family members (since the suspect is Muslim, his son would be the most important) or acolytes who would be brought in for questioning. Furthermore, the laptop is considered a valuable source of information that may provide details not only about the suspect's plot, but also about the organization to which he belongs. Based on the information thereof, experts will try to find out the routes targeted by the suspect and modify them or increase their security. Respondent B envisions another option in the eventuality the information stored on the suspect's laptop cannot be decrypted or seems irrelevant: he proposes that the suspect be arrested for a short period based on the evidence at the scene of the explosion, and subsequently released while employing professional methods for shadowing him with the purpose of identifying the people with whom he establishes contact. Respondent B underscores that at least half of the available time (three weeks) can be allocated to this operation before appealing to harsher methods. Respondent C also emphasized the importance of the suspect's laptop as a point of departure in interrogating him. He states the focus should be on "countering" the terrorist cell and explains the available time can be used to gain information about the terrorist cell as well as about the larger organization to which it belongs. In tandem, respondent D highlights that the laptop and the site would be researched for information not only about the suspect's intentions but also about the "brain" or the organization that supports him. Respondent F underscores the importance of obtaining evidence based on which to arrest the suspect. From this moment on, the investigation must be carried out on two levels: what the suspect did and what he is going to do. The respondent explains everyone in the investigation team must abide by the procedures in place. He states the suspect should not be underestimated, for any piece of information can be crucial – if not shared in time, it becomes useless. Finally, respondent G considers the suspect to be of little value as a source of information for the situation at hand. He stresses that the suspect should be incarcerated based on the evidence that incriminates him and maybe interrogated later for details about the larger organization to which he pertains. For the case at hand, there are plenty of methods available for averting the threat, such as increasing airport security, changing the location of Pope's visit, or even postponing it.

With regard to the second condition, no evidence can be found to support it. In all scenarios that did not entail torture, the decision not to torture cannot be regarded as explicit; rather, it is a tacit decision implied by the analysis of a spectrum of potential solutions to the challenge at hand. As such, in contrast to what the second condition predicted, torture was not employed not because of the law that prohibits it; rather, it was not even considered as an option because there were other means available to the respondents.

Nonetheless, in situations where conventional means cannot achieve the purported aim, torture comes into question, but only as a last resort, after the conventional means have proven ineffective. Contemplating scenario 5 reflects this aspect clearly. Respondent A explains that after the suspect is apprehended and interrogated based on the pattern described above, a search team would be deployed to the nearby areas that match the suspect's small detail with regard to the location of the boy ("in a hut by a lake"). The scenario was so constructed that at this point, the suspect has still not provided any other details. After this operation also proves unsuccessful, respondent A begins thinking of "breaking the rule". He refers to his reasoning as "simple mathematics: you balance the life of a child with that of a scum". Furthermore, he states that "one cannot have good results always by following the law – exceptions must exist." Although his remark on simple mathematics seems to characterize him as pure utilitarian, he nevertheless comments the following:

> "It depends on what type of individual you are. There's the emotional, which means you would break the law without much consideration. There's the bureaucrat, which means you never break the law. And there's the I-don't-want-to-live-with-a-child-on-my-conscience-knowing-that-I-could-have-saved-him, which means I would rather get three years in prison to save him."

Respondent B points out that the suspect loses his status of innocent once evidence is found that incriminates him. Based on that, respondent B explains he would not for a single moment think the suspect is innocent; nonetheless he is willing to make the suspect think the contrary in order to persuade him to confess where the boy is hidden. Respondent B mentioned the fact that a lawyer is present makes any potential recourse to brutality extremely risky. However, "the life of a child is at stake – this I would certainly take into account when dealing with the suspect".

Faced with a situation in which none of the alternatives he mentioned is successful in determining the suspect to disclose the boy's location (searching the suspect's apartment, analyzing evidence, bringing specialists in interrogations), respondent E states the suspect must be made to talk. He simply does not envision any situation in which the suspect would not disclose information, but at the same time being aware of the risks he takes: "I am convinced that if I slap him [the suspect], I would be sued and the case investigated […] Even if I get three years [in prison], how could I possibility let the boy die just to save my ass?"

It can be concluded from the above that consistent with condition one, the fundamental consideration in the decision to employ physical and/or psychological pressure constitutes the necessity so save the lives threatened. In addition and consistent with condition three, the agents' reasoning does not take the form of a calculus in which many alternatives (torture included) are compared. On the contrary, conventional solutions are analyzed one by one until exhausted; if the suspects still refuse to divulge the information required to avert the threat, then the respondents employ torture.

Concerning the fourth condition, it is indeed the circumstances of the case what calls for the use of torture, and not some principle that mitigates its permissibility. However, this does not depict the complete picture. When discussing the necessity to save the lives under threat,

respondents A, B, C and E talk about responsibility. Apart from the extraordinary circumstances they are facing, the responsibility invested in them by means of their function compels them to fulfill their duties. Respondent A says “there is a mandate that sets you limits; it’s not about escaping responsibility, but staying within boundaries”. Yet “sometimes staying within [legal] boundaries can be a big stupidity”. “I could at least have the right to decide when to act as I consider”. Right after bringing torture into discussion and when reminded that democracies today are based on the fundamental respect for human rights, one of which provides that no one should be subjected to torture no matter the gravity of the situation, respondent B replied: “Give me the right to do what I consider appropriate and account for it – this is how I see democracy”. Respondent C says “you are prepared to take your mission to an end, whatever the costs”. In tandem, respondent E explains “I do what I have to do and take responsibility for saving him [the person kidnapped]; from an ethical point of view, I would fail more badly if I didn’t save him [rather than if I broke the law and tortured the suspect].”

The researcher reminded these respondents that torturing a suspect would have significant legal consequences at least for their careers. Respondent A replied: “It’s like this: you evaluate the risks; you take the necessary actions; and take responsibility for them. I do so, even if I am to lose my job.” He explains further “even if the child is found dead, the only difference is between whether you have fulfilled your duties or not.” Respondent B says “you cannot think of your career in situations like these”; “I would risk my career for anyone whose life is in danger”. Respondent C states: “You are ready to lose your career; for these people [like him], the career does not matter”. Respondent E declares: “I have never thought of that [balancing career with the life of someone]; my career is zero compared to the boy’s life. And I do not put in much more dedication if more lives are at stake – I would do the same.” As such, it is important to note that not the circumstances of a situation alone force the state agent to employ torture, but also the responsibility attributed to them through the jobs the state agents were assigned to.

4.2. Other Remarks

Most respondents see themselves as the authors of torturing the suspects. When confronted with the possibility that the officers or investigators under their authority object to applying such treatment, some respondents argued those who oppose have the possibility to file notes to superior structures motivating their refusal to take part in that action, while others have explained that those who compelled to execute the order will have the benefit of a mild punishment.

With regard to the types of torture, the above revealed that respondents B and G opted for physical pressure, whereas respondents A, C and E mention explicitly they would employ both physical and psychological pressure through the help of a psychologist. The duration of the treatment is made clear by all respondents: until the suspect discloses the information needed. As for the intensity of the treatment, the respondents were rather silent on the

methods they would use. Only respondent G was more specific than the others, explaining "the less time you have, the harsher the treatment". In general, there were very few instances in which the respondents referred to torture explicitly, instead using the terms "unconventional" or "specific" methods.

When it comes to social pressure, opinions differ. Respondent A argues the media can have an important role. He explains that the society is divided into three: those who support the use of torture in extreme circumstances, those who oppose it, and those who are neutral. It is crucial for state agents to "influence the neutrals and attract them on your side." This is where, according to respondent A, the media can help. While respondent B considers "public opinion cannot always understand how these situations are approached", respondent F underscores "you must ask for the help and understanding of the civil society." On the other hand, respondents C, D, E and G suggest that such details (i.e. the suspect was tortured) do not have to be made public. While respondents C and D state that these methods cannot be disclosed, respondents E and G suggest there are ways to ensure nobody witnesses the treatment. Nonetheless, if they face trial as a result of their actions, the majority of respondents would argue their case based on the necessity to save the lives under threat. The prospect of losing their jobs is declared irrelevant in the pursuit of their duties.

Chapter 5: Conclusion

Torture has been the subject of intense debate as to whether it can ever be justified in pursuing state interest or in dealing with extraordinary circumstances. Given that torture has been practiced since ancient times and is still used today even by democratic states despite international efforts to put an end to it, the present research endeavor departed from the assumption that perhaps there is something mistaken in our approach to this phenomenon and that it deserves renewed attention. This study has argued in line with the CAT definition that torture can never be right, hence nothing can ever *justify* its use. It defended an absolutist, deontological position according to which the legal prohibition of torture must remain absolute and thus not mitigated by any exceptions whatsoever. This position nevertheless acknowledges the novelty of contemporary challenges such as terrorism or unconventional warfare that may find state agents in extreme situations where no conventional solution seems to work. The study therefore draws the contours of certain conditions under which torture (as understood by this work) may be morally *permissible* and sketches the legal grounds for supporting this position. It also embarked on an empirical investigation into the extent to which theoretical postulates correspond to the state agents' practical reasoning. Overall, this research endeavor was guided by the question w*hy do state agents (not) use torture and to what extent is torture permissible?* It is time to answer this concisely.

5.1. Why Do State Agents (not) Use Torture and to what Extent Is Torture Permissible?

The empirical research revealed that torture may be employed in some extreme emergencies where:

- There is a concrete threat to human life;
- There is little time available for averting the threat;
- The conventional mechanisms for dealing with such situation prove ineffective;
- There is clear evidence that the (human) source of information held in custody is connected to the threat and that the information the suspect possesses will avert the threat, once obtained.

It is important to note these conditions must be fulfilled altogether – situations that satisfy only two or three of the above do not pass as cases where torture is permissible.

The practical reasoning of state agents revealed that torture is used as a practical means and that it is instrumentally necessary for saving human lives. The fact that state agents are aware of the negative legal consequences such actions have not only on their careers but also on their liberty and that they are still determined to employ such methods reflects the deep

commitment to the duties they were invested to fulfill. Yet we reach a paradox the moment we realize the legal system filters state agents out of public service on the same considerations it initially recruited them: fulfilling their duties and being morally sensitive to the situations they manage.

The theoretical chapter has provided a clue to potential legal solutions for this paradox (Ohlin, 2010). From a different perspective, Nieuwenburg (2014) has identified the conditions of "political forgiveness" that state agents may ask for in the aftermath of situations that leave no room for a right solution. Nevertheless, the more evident this paradox becomes, the more certain becomes the need to think that perhaps there is something mistaken in our expectations of state agents. In this context, this study has argued for the necessity to rethink the phenomenon of torture. To repeat, torture is wrong and must always remain prohibited. However, it is unjust to punish state agents that have employed it as a last resort, while being aware of the moral dilemma they experienced. In other words, it is unjust to punish them for having applied a morally wrong solution to a situation that otherwise has no morally right solution.

5.2. Limitations and Suggestions for Further Research

There are a number of limitations that characterize the study at hand. First, a possible critique may be that the sample population is too small and that the research was done in a single country. As explained in the chapter on research design, the subjects of the thought experiment were not selected randomly due to the fact that in order for the empirical data to be meaningful with regard to the topic of torture, they had to fulfill certain characteristics. In addition, the method of data collection employed by this study was the semi-structured interview, which was conducted face-to-face. Since these valuable respondents are so geographically dispersed, it was not possible for the researcher to visit them due to limited resources.

Second, another critique might address the aspect of reliability. Some could say that the empirical work is not reliable given that the researcher has not provided sufficient information as to where exactly the study was conducted or what the respondents' jobs consist of. Nonetheless, it should be kept in mind the difficulty of convincing someone to talk about a sensitive topic such as torture. Not disclosing information that could be used in identifying them was the compromise made by the researcher towards realizing this study. To correct for this deficiency, the researcher has provided as much information as possible with regard to how the empirical study was conducted (including an annex of the scenarios presented).

Third, objectivity may also be the target of criticism. This is a fundamentally normative study that argues in favor of a certain view on the permissibility (moral and legal) of a state practice. In such situations, it is not difficult for one to find in the empirical world exactly what he/she is looking for. This is why precaution measures were taken to avoid bias and

ensure respondents were not steered into providing the desired answers. For instance, the semi-structured interview was chosen as a method of data collection in order to allow the interviewees to lead the discussion and point out the aspects they considered important. Furthermore, although the topic of this study is torture, the researcher tried for as much as possible to refrain from using that term and adapted to the terminology employed by the respondents (e.g. „unconventional methods" or „unofficial methods").

Finally, one should be cautious before generalizing the results of this study. One should bear in mind this research constitutes a novice attempt at rethinking torture in light of the challenges faced by state agents on a background of significant social transformations such as unconventional warfare or terrorism. It is highly likely that the state agents' approach to torture be influenced by the experience of the state to which they serve with terrorist activity. Although it results from the empirical research that torture is taken into consideration not only in cases of terrorism (that is, not only in the context of war, but also in civil cases), it is important to mention that the empirical research was conducted in a country that up to the moment of writing has not suffered any terrorist attack or experienced any terrorist threat. Future research could replicate the thought experiment with officials from different countries (including both countries that have dealt with terrorist attacks or threats and countries that have not) and analyze patterns and differences in the data. Furthermore, researchers interested in this topic could address the impact of a state's crisis management system on the permissibility of torture. In addition, a country-specific research could also be extended to include an analysis of the country's rule of law, religion or other important societal values, and explore correlations between their level and the state agents' propensity towards allowing or rejecting torture.

5.3. Closing Remarks

As this study is taking its final form, the world is abhorred by the atrocities committed by ISIL. Some say that the threat they pose is even greater than that of al-Qaeda. With a violent ideology that attracts fighters even from democratic countries, an aim to conquer the world and almost unbelievable financing, ISIL is beginning to create a counter-coalition in the Western world that seeks to contain their expansion. On September 24th, the UN Security Council unanimously passed an anti-terror resolution, which invites states to join efforts in order to suppress the recruiting, organizing, transporting, equipping and financing of ISIL. In the words of the President of the United States of America (Obama, 2014) addressing the UN Assembly, "the cancer of violent extremism that has ravaged so many parts of the Muslim world", "the terrorist group known as ISIL must be degraded and ultimately destroyed". He adds: "There can be no reasoning – no negotiation – with this brand of evil. The only language understood by killers like these is the language of force." Obama also noted American intelligence estimates that 15,000 people from more than 80 nations have gone to fight in Syria, emphasizing the possibility they could return home and carry out deadly attacks (Botelho, Acosta and Hartfield, 2014). In this context, would we witness the issue of torture resurfacing?

References

Allhof, Fritz (2003). "Terrorism and Torture". *International Journal of Applied Philosophy*,17 (1), pp. 105-118.

Amnesty International (2014). *Torture in 2014: 30 years of broken promises*. Available online at: http://www.amnestyusa.org/sites/default/files/act400042014en.pdf.

Bagaric, Mirko and Clarke, Julie (2005). "Not enough official torture in the world? The circumstances in which torture is morally justifiable". *University of San Francisco Law Review*, 39(3), pp. 581-616.

Berg, Bruce, L. (2001). *Qualitative Research Methods for the Social Sciences*. 4th ed. London: Allyn and Bacon.

Biggam, John (2011). *Succeeding with your Master's Dissertation: A step-by-step handbook*. 2nd ed. Berkshire: Open University Press.

Boin, Arjen, 't Hart, Paul, Stern, Eric and Sundelius, Bengt (2005). *The Politics of Crisis Management*. Cambridge: Cambridge University Press.

Botelho, Greg, Acosta, Jim and Hartfield, Elizabeth (2014). "U.N. Security Council unanimously passes anti-terror resolution". CNN, 24th September, 2014. Available online at: http://edition.cnn.com/2014/09/24/politics/obama-united-nations/.

Brecher, Bob (2007). *Torture and the Ticking Bomb*. Oxford: Blackwell.

Bufacchi, Vittorio and Arrigo, Jean, M. (2006). "Torture, Terrorism and the State: a Refutation of the Ticking-Bomb Argument". *Journal of Applied Philosophy*, 23 (3), pp. 355-373.

Dershowitz, Allan (2004). "Tortured Reasoning". In Sanford Levinson (ed.), *Torture – A Collection*. Oxford and New-York: Oxford University Press, pp. 257-280.

Dewulf, Steven (2011). *The Signature of Evil: (Re)Defining Torture in International Law*. Cambridge: Intersentia.

ECtHR (2010). *Gäfgen v. Germany*. Application no. 22978/05. Available online at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99015#{%22itemid%22:[%22001-99015%22]}.

Einolf, Christopher, J. (2007). "The Fall and Rise of Torture: A Comparative and Historical Analysis", *Sociological Theory*, 25(2), pp. 101-121.

Gendler, Tamar, S. (1998). "Galileo and the Indispensability of Scientific Thought Experiment". *The British Journal for the Philosophy of Science*, 49(3), pp. 397-424.

Gendler, Tamar, S. (2004). "Thought Experiments Rethought – and Reperceived". *Philosophy of Science*, 71, pp. 1152-1163.

Gendler, Tamar, S. (2006). “Thought Experiments in Science”. Available online at: http://bookzz.org/book/1341569/143ac5.

Greer, Steven (2011). “Should Police Threats to Torture Suspects Always be Severely Punished? Reflections on the *Gäfgen* Case”. *Human Rights Law Review*, 11, pp. 67-89.

Guiora, Amos, N. and Page, Erin, M. (2006). “The Unholy Trinity: Intelligence, Interrogation and Torture”. *Case Western Research Journal International Law*, 37, pp. 427-447.

Harel, Alon and Sharon, Assaf (2008). “What Is Really Wrong with Torture?”. *Journal of International Criminal Justice*, 6(2), pp. 241-259.

Harel, Alon and Sharon, Assaf (2010). “Necessity Knows No Law: On Extreme Cases and Un-Codifiable Necessities”. Available online at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1718549.

Harper, Julianne (2009). “Defining Torture: Bridging the Gap between Rhetoric and Reality”. *Santa Clara Law Review*, 49(3), pp. 893-928.

Houck, Shannon, C. and Conway, Lucian, G. (2013). “What People Think About Torture: Torture Is Inherently Bad … Unless It Can Save Someone I Love”. *Journal of Applied Security Research*, 8 (4), pp. 429-454.

Kadish, Sanford, H. (1989). “Torture, the State and the Individual”. *Israel Law Review*, 23, pp. 345-356. Available online at: http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1515&context=facpubs.

Langbein, John, H. (2004).“The Legal History of Torture”. In Sanford Levinson (ed.), *Torture – A Collection.* Oxford and New-York: Oxford University Press, pp. 93 - 103.

Lawson, Rick (2012). “The European Convention on Human Rights”. In Krause, Catarina and Scheinin, Martin, *International Protection of Human Rights: A Textbook.* 2nd ed. Turku/Åbo: ÅboAkademi University Institute for Human Rights, pp. 423-462.

Luban, David (2005). “Liberalism, Torture and the Ticking Bomb”. Virginia Law Review, 91, pp. 1425-61.

Lukes, Steven (2006). “Liberal Democratic Torture”. *British Journal of Political Science*, 36, pp. 1-16.

Marczyk, Geoffrey, DeMatteo, David and Festinger, David (2005). *Essentials of Research Design and Methodology*. New Jersey: John Wiley & Sons.

Matthews, Richard (2008). *The Absolute Violation: Why Torture Must Be Prohibited*. London: McGill-Queen’s University Press.

Maxwell, Joseph, A. (2013). *Qualitative Research Design: An Interactive Approach*. London: Sage.

Miller, Gail (2005). *Defining Torture*. New York: The Cardozo Law School’s Floersheimer Center for Constitutional Democracy.

Miller, Seumas (2005). “Is Torture Ever Morally Justifiable?”. *International Journal of Applied Philosophy*, 19(2), pp. 179-192.

Miller, Seumas (2011). "Torture". In Zalta, Edward, N. (ed.), *The Stanford Encyclopedia of Philosophy* (Summer 2011 Edition). Available at: http://plato.stanford.edu/archives/sum2011/entries/torture/>.

Nagel, Thomas (1972). *“War and Massacre”*. *Philosophy and Public Affairs*, 1(2), pp. 123-144.

Nieuwenburg, Paul (2014). “Conflicts of Values and Political Forgiveness”. *Public Administration Review*, 74(3), pp. 374-382.

Nowak, Manfred and McArthur, Elizabeth (2006). “The Distinction between Torture and Cruel, Inhuman or Degrading Treatment”. *Journal on Rehabilitation of Torture Victims and Prevention of Torture*, 16(3), pp. 147-151.

Nowak, Manfred (2006). “What Practices Constitute Torture? US and UN Standards”. *Human Rights Quarterly*, 28(4), pp. 809-841.

Nowak, Manfred (2012). “Torture and Enforced Disappearance”. In Krause, Catarina and Scheinin, Martin, *International Protection of Human Rights: A Textbook*. 2nd ed. Turku/Åbo: ÅboAkademi University Institute for Human Rights, pp. 153-188.

Nowak, Manfred (2012). “Torture and Enforced Disappearance”. In Krause, Catarina and Scheinin, Martin, *International Protection of Human Rights: A Textbook*. Turku/Åbo: Åbo Akademi University Institute for Human Rights, pp. 153-187.

Obama, Barak (2014). Full text of President Obama’s 2014 address to the United Nations General Assembly. Available online at: http://www.washingtonpost.com/politics/full-text-of-president-obamas-2014-address-to-the-united-nations-general-assembly/2014/09/24/88889e46-43f4-11e4-b437-1a7368204804_story.html.

Ohlin, Jens, D. (2010). “The Torture Lawyers”. *Harvard International Law Journal*, 51(1), pp. 193-256.

Smart, J. J. C. and Williams, Bernard (1973). *Utilitarianism: For and Against*. Cambridge: Cambridge University Press.

Sorensen, Roy, A. (1992). *Thought Experiments*. Oxford: Oxford University Press.

Sussman, David (2005). “Defining Torture”. *Case Western Reserve Journal of International Law*, 37, pp. 225-230.

Tofan, Claudia (2011). *Torture in International Criminal Law: Recent Case Law*. The Hague: International Courts Association.

United Nations, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984. Available online at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en [last accessed 2 May 2014].

Waldron, Jeremy (2005). “Torture and Positive Law: Jurisprudence for the White House”. Available online at: https://escholarship.org/uc/item/23d27577#page-1.

Walzer, Michael (1973). “Political Action: The Problem of ‘Dirty Hands’”. *Philosophy and Public Affairs*, 2(2), pp. 160-180.

Weissbrodt, David and Heilman, Cheryl (2011). “Defining Torture and Cruel, Inhuman, and Degrading Treatment”. *Law and Inequality*, 29, pp. 343-394.

Ylikoski, Petri (2003). “Thought Experiments in Science Studies”. *Philosophica*, 72, pp. 35-59. Available online at: http://logica.ugent.be/philosophica/fulltexts/72-3.pdf.

Zamir, Eyal and Medina, Barak (2008). “Law, Morality, and Economics: Integrating Moral Constraints with Economic Analysis of Law”. *California Law Review*, 96, pp. 325-391.

Zamir, Eyal and Medina, Barak (2010). “Threshold Deontology and Its Critique”. *Law, Economics and Morality*, May 2010. Oxford Scholarship Online.

Appendix A: Information about respondents

Respondent A – paratrooper, certified for HAHO (high altitude, high opening) and HALO (high altitude, low opening) jumps, currently Special Forces, deployed twice to Afghanistan, where he spent 18 months in active combat duty.

Respondent B – paratrooper, HAHO HALO jumps certified, flight instructor, currently Special Forces, deployed one to Afghanistan, where he spent 9 month in active combat duty.

Respondent C – former Special Forces, spent the last few years employed by a company in the private military sector; deployed to Angola and Liberia.

Respondent D – former Counter Terrorism Unit operative, now work in the public sector.

Respondent E – officer, deployed to Kosovo between 2006-2007 within the UN mission, deployed to Kosovo between 2010-2011 within the EU mission; currently chief of criminal investigations of one county in Romania.

Respondent F – former prosecutor, after which he spent more than 10 years as chief of criminal investigations in another county in Romania.

Respondent G – Special Forces, elite anti-terrorism unit, army captain, two tours of duty in Iraq, two in Afghanistan, and many others that constitute classified information and therefore could not be disclosed.

Appendix B: Scenarios

Scenario 1

A terrorist group has planted a small nuclear device with a timing mechanism in London and it is about to go off. If it does, it will kill millions and make a large part of the city uninhabitable for decades. One of the terrorists has been apprehended by the CTU (Counter-Terrorism Unit). You work for the CTU. You know that if he can be made to disclose the location of the device then the EOD specialists (Explosive Ordnance Disposal) can disarm it and thereby avoid the disaster. The terrorist in question has been on a CTU watch list, as he had orchestrated terrorist attacks, albeit non-nuclear ones, in the past. Moreover, on the basis of intercepted mobile phone calls and e-mails the CTU know that this attack is under way in some location in London and that he is the leader of the group. The terrorist is refusing to talk and time is slipping away. He does not want anything in return for disclosing the location of the bomb, has not made any claims political or religious, and he is not willing to make any compromise. There are no other sources of information. Furthermore, there is no other way to avoid the catastrophe; evacuation of the city, for example, cannot be undertaken in the limited time available. The CTU are now considering options. What would you do?

Scenario 2 (inspired from the case of Abdel Hakim Murad)

Murad is an Al Qaeda bomb-maker known and wanted by the authorities. He accidentally blows up his kitchen and he is apprehended when he returns to retrieve his laptop. You are in charge of this investigation and you have reasons to believe he is involved in the planning of several plots to blow up planes. The incident takes place a few weeks before Pope's visit. What do you do?

Scenario 3 (inspired from the case of Allen West)

You are commanding officer of a unit that serves in Iraq. The Secret Service contacts you saying they have information about a plot to kill you. This means that the lives of the soldiers under your command are in danger as well. You manage to capture two of the persons allegedly involved in the plot; one of them is an Iraqi police officer. According to intelligence, at this moment they are the only ones who can provide you with information on the plot, but they refuse to cooperate. What do you do?

Scenario 4 (inspired from the case of Nachshon Wachsman)

The action takes place in Israel. An IDF (Israeli Defence Forces) soldier (soldier X) is kidnapped upon return from a training course. You are placed in charge with handling the

case. The Israeli intelligence informs you that the soldier was taken by a car in which there were Hamas militants. Two days after the kidnapping, a videotape is broadcast showing soldier X, with his hands and feet bound, before a militant who is displaying soldier X's identity card. After the militant recites the hostage's home address and identity number, soldier X speaks, with the armed militant behind him:

"The group from Hamas kidnapped me. They are demanding the release of Sheikh Ahmed Yassin* and another 200 from Israeli prison. If their demands are not met, they will execute me on Friday at 8 P.M."

*Yassin is the founder of Hamas and the spiritual leader of the organization.

There are only 24 hours left until the ultimatum. You manage to capture the driver of the car that picked up soldier X. What do you do?

Scenario 5 (inspired from the case of Gäfgen)

You are deputy chief of police and a new case comes to your attention. Mitchel, the eleven-year-old son of a well-known banker is kidnapped by Andrew. Andrew asks for a ransom of 1.5 million Euro. The boy' family is able to provide the money, but you set up an operation through which Andrew is followed after he picks up the ransom in a train station and arrested two hours later. He refuses to disclose the boy's whereabouts. Meanwhile Andrew's flat is searched, where half of the ransom money and a note concerning the planning of the crime are found.

It is 11:30 pm and Andrew asks to see a lawyer. After a half-an-hour consultation, Andrew says that someone else had kidnapped the boy and that they had hidden him in a hut by a lake. No other details. The boy's life is in great danger, if he is still alive at all, given his lack of food and the temperature outside. You know the detective officers under your command do not agree to measures such as threatening Andrew so as to disclose the location of the boy. Since this whole situation is under your authority, what course of action do you take?

Scenario 6

A diplomatic delegation from North Korea travels to South Korea for peace negotiations. Ying Shu is a North Korean who has been living in South Korea for 10 years as a refugee. His family was executed 10 years ago because they were outspoken opponents of the North Korean regime. With a group of accomplices, he stages an ambush for the diplomatic convoy, damages the vehicles and kidnaps the highest ranking official of the delegation and his bodyguard. Two days later, Ying Shu is captured while delivering a recording of the bodyguard's execution. Immediately, North Korea issues a public statement in which it threatens with war if the North Korean delegate is not released safe and sound in 12 hours.

You are in charge of the South Korean hostage rescue department. Ying Shu is in your custody. If you are not able to free the North Korean diplomat, your country will face war, devastation and countless victims. What do you do?