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**THE PROHIBITION OF TORTURE IN INTERNATIONAL
LAW IN TIMES OF "WAR ON TERROR"**

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Abstract

The prohibition of torture in international law is dangerously threatened by the need for national security in times of the “war on terror”.

The US government attempted to circumvent the prohibition of torture by a narrow interpretation of the torture definition in the Bybee Memorandum. The new interpretation of the term “severe” of Article 1 CAT led to the fact that torturous acts could only be subsumed under “the ‘lesser’ act of what is commonly known as other cruel, inhuman, or degrading treatment or punishment, which is also prohibited but not criminalized as extensively as torture”¹. This narrow interpretation was the main reason for the horrendous incidents at Abu Ghraib and Guantanamo Bay. To prevent future attempts to circumvent the torture prohibition by using a narrow interpretation the European Court of Human Rights has to provide clear criteria to differentiate torture and other cruel, inhuman, or degrading treatment or punishment.

All other approaches to justify torture, which were made with reference to national security, have to be rejected as well. Under existing international law an exception to the torture prohibition would not only conflict with the content of numerous treaties but also with customary international law and *jus cogens*, of which the torture prohibition is a part. Also a rethinking of the absolute validity of the torture prohibition in times of the “war on terror” cannot lead to a recommendation of exceptions to the torture prohibition. Whereas the approval to use torture for preventive reasons, such as to obtain information about future terrorist attacks, is ineligible from the outset, it turns out that torture to hold off imminent danger as an exception to the torture prohibition seems not so far off anymore. However, also this approach has to be rejected because of concerns as to possible “slippery slope”-effects.

Statement on word length

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 15,708 words.

Torture prohibition, or

Exceptions to the torture prohibition, or

Justification of torture.

¹ Christian M. De Vos “Mind the Gap: Purpose, Pain, and the Difference between Torture and Inhuman Treatment” (2007) 14 Hum. Rts. Br. 4, 4.

I INTRODUCTION

In many areas of the world torture is a cruel reality. Human rights organisations, such as amnesty international, have increased public awareness and have denounced torture. In the western world, where torture was once regarded as abolished, it seems to be no longer taboo as concussive and repulsive pictures of tortured and debased convicts in camps at Guantanamo Bay and Abu Ghraib demonstrate. After the attacks on the World Trade Centre and the Pentagon on 11 September 2001 the fear of further terrorist attacks grew and a growing number of people questioned the torture prohibition.

This fear triggered a narrow interpretation of the torture definition by the U.S. Office of Legal Counsel (OLC) in the Bybee Memorandum². The narrow interpretation of the term "severe" in Article 1 of the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment³ (CAT) led to the fact that torturous acts could only be subsumed under "the 'lesser' act of what is commonly known as other cruel, inhuman, or degrading treatment or punishment, which is also prohibited but not criminalized as extensively as torture"⁴. This led then to "increased flexibility in the interrogation techniques applied to terrorism suspects"⁵ and enabled the U.S. military to use cruel interrogation techniques to obtain useful information for the intelligence service. Thus, this flexibility, obtained by an attempt to circumvent the torture prohibition, was the main reason for the horrendous incidents at Abu Ghraib and Guantanamo Bay. In addition, calls have been made by scholars, journalists and others to allow torture in exceptional cases to make new and extended defence warrants available to the state in times of terrorist threats.⁶

² Memorandum from U.S. Dept. of Justice, Counsel to the President, Office of the Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A (1 August 2002) ["Bybee Memorandum"], available at www.washingtonpost.com/wp-srv/politics/documents/cheney/torture_memo_aug2002.pdf (last accessed: 09 May 2008).

³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85, art 1. [CAT]

⁴ De Vos, above n 1, 4.

⁵ Miri Lim "Redefining Torture in the Age of Terrorism: An Argument Against the Dilution of Human Rights" (2006) 13 Wash. & Lee J. Civil Rts. & Soc. Just. 83, 84.

⁶ For example: Miriam Gur-Arye "Can the War against Terror Justify the Use of Force in Interrogations? Reflection in Light of the Israeli Experience" in Sanford Levinson (ed) *Torture: A Collection* (Oxford University Press, Oxford, 2004) 183; Alan Dershowitz "Tortured Reasoning" in Sanford Levinson (ed) *Torture – A Collection* (Oxford University Press, Oxford, 2004) 257.

Because of this alarming development this paper analyses both the attempt to circumvent the torture prohibition by a narrow interpretation of the term "torture" and a few approaches about justification of torture in exceptional cases.

Therefore, the paper deals in its first part with the torture definition of Article 1 CAT⁷ and attempts to clarify the question "What kind of treatment constitutes torture under international law?". It scrutinizes how to distinguish torture and other cruel, inhuman, or degrading treatment or punishment. Further it asks for the reasons which made it possible for the OLC to reinterpret the CAT's torture definition in such a narrow way. Consequently, the paper comes forward with a proposal as to how to avoid a future attempt to circumvent the prohibition of torture in international law.

In its second part, the paper explains the scope of validity of the torture prohibition in international law and discusses then whether there is a possibility under the existing law to make in particular situations, an exception to the torture prohibition or whether there should be the possibility to make exceptions in times of the "war on terror". It deals with torture used to prevent future threat for national security, such as the use of torture to obtain information about future terrorist attacks, and with torture to fend off an actual threat, such as the use of torture in a "ticking bomb scenario". The question about the possibility of making exceptions to the torture prohibition is discussed from both legal and ethical viewpoints. In this context the paper includes concerns as to misuse of those requested exceptions and possible "slippery slope"-effects.

II AMERICA'S "WAR ON TERROR" – THE RECURRENCE OF TORTURE IN CONSTITUTIONAL STATES

After the terrorist attacks on 11 September 2001 the attitude towards torture changed within constitutional states and simultaneously the attitude towards the prohibition of torture in international law.⁸ Al-Qaeda's attacks committed by hijacked aircrafts on the World Trade Centre and the Pentagon are among the most atrocious terrorist attacks in history. About 3000 people were killed⁹ and one of the most important symbols of world trade was destroyed. These attacks were qualified by the United Nation Security Council as a threat to the world peace and to international security. Thus, the right to

⁷ CAT, above n 3, art 1.

⁸ See Richard A. Posner "Torture, Terrorism, and Interrogation" in Sanford Levinson (ed) *Torture: A Collection* (Oxford University Press, Oxford, 2004) 291, 291.

⁹ "September 11, 2001 Victims", available at: www.september11victims.com/september11victims/victims_list.htm (last accessed 10 May 2008).

individual and collective “self-defence” in accordance with the UN-Charter was triggered.¹⁰

On the basis of three resolutions in autumn and winter 2001 the USA waged a war against Afghanistan. Already at this time the US government spoke about the “war on terror”. This war led within a short period of time to the overthrow of the Taliban, who supported Al-Qaeda’s network of terror. However, this war authorized by the UN Security Council ended at the latest on the 5 December 2001 with the appointment of the government and President Karzai based on the Petersberger peace agreement¹¹.

Meantime the USA has started to fight an international “war on terror”. The government uses the term “war on terror” deliberately to make clear that they still are in a global armed conflict with Al-Qaeda. Since that time the prohibition of torture in international law is dangerously threatened under reference to the need for national security. The “war on terror” is based on a policy which tries to legalise far-ranging exceptions to essential principles of constitutional states, of democracy and of human rights.¹² “For the U.S. government, the fear of terrorist attacks has triggered a narrow interpretation of the definition of torture” in the OLC’s Bybee Memorandum and this “led to increased flexibility in the interrogation techniques applied to terrorism suspects.”¹³ Due to the fact that the Bybee Memorandum requires an extremely high threshold for an act of torture as it demands extremely severe ill-treatment that leads to serious physical injuries or long-lasting mental harm,¹⁴ thus torturous acts could no longer be subsumed under the term of torture, but only under “the ‘lesser’ act of what is commonly known as other cruel, inhuman, or degrading treatment or punishment. This is also prohibited but not criminalized as extensively as torture”¹⁵. This redefinition of torture in the Bybee Memorandum contributed to human rights abuses by acts of torture in Guantanamo Bay, Abu Ghraib, “and facilitated the rendering of detainees to other jurisdictions that interrogate abusively”¹⁶.

¹⁰ UNSC Resolution (12 September 2001) S/RES/1368/2001, UNSC Resolution (28 September 2001) S/RES/1373/2001, UNSC Resolution (14 November 2001) S/RES/1378/2001 available at: www.un.org/Docs/scres/2001/sc2001.htm (last accessed: 09 May 2008).

¹¹ See “Rebuilding Afghanistan – Peace and Stability” (2 December 2002), available at: www.unama-afg.org/nonUN%20Docs/Internation-Conferences&Forums/BonnTalks/final%20communique%20%20dec%202002.pdf (last accessed 09 May 2008).

¹² Manfred Nowak “Das System Guantanamo” (2006) 36 APuZ 23, 23.

¹³ Lim, above n 5, 84.

¹⁴ Bybee Memorandum, above n 2, 6, 7.

¹⁵ De Vos, above n 1, 4.

In January 2002 US-militaries started to transfer captives of the “war on terror” to the detention centre at **Guantanamo Bay**. There they were indefinitely arrested without hearing and without indictment to extract interesting information about future attacks by using brutal interrogation techniques. The U.S. government created a symbol standing for a complex system of combating terrorism, which systematically violated human rights.¹⁷

In principle, they impose on every captive, who was under suspicion to be a terrorist or who has in some way links to Al-Qaeda, the so called “unlawful combatant status”. A lawful combatant has a prisoner of war status under Article 4 of the Geneva Convention¹⁸. To become a lawful combatant it is necessary to follow the international rules of armed conflicts. A lawful combatant is “immune from prosecution for lawful combat activities”.¹⁹ Combatants who are “not legally authorized to engage in armed conflict but do so without authority” are unlawful combatants.²⁰ For the latter the Geneva Convention does not apply. As previously said, by interpreting the torture definition of Article 1 CAT²¹ extreme narrowly in the Bybee Memorandum a lot of torturous acts could only be characterized as other cruel, inhuman or degrading treatment or punishment which is also prohibited but not criminalized as extensively as torture. Thus, by this attempt to circumvent the prohibition of torture the U.S. violated regulations about the treatment of prisoners and the prohibition of torture in international law. Methods used were among other “beatings, exposure to loud and persistent noise and music, humiliating acts, solitary confinement, temperature extremes, and [detainees were] forced into bodily positions”²².

A further technique, which also belongs to the measures to fight against terrorism, is the so called **extraordinary renditions**. An extraordinary rendition is “a system of sending captives to other countries with less progressive human rights standards in order to interrogate them more aggressively”, which often results in torture.²³ The CIA

¹⁶ Lim, above n 5, 110.

¹⁷ Dawid Danilo Bartelt and Ferdinand Muggenthaler “Das Rendition-Programm der USA und die Rolle Europas” (2006) 36 APuZ 31, 31.

¹⁸ Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949) 75 UNTS 135, art 4.

¹⁹ Lim, above n 5, 87; see also Joseph P. Bialke “Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict” (2004) 55 A.F. L. Rev. 1, 9.

²⁰ Lim, above n 5, 87.

²¹ CAT, above n 3, art 1.

²² Lim, above n 5, 86, 87.

²³ Andrew A. Moher “The Lesser of Two Evils?: An Argument for Judicially Sanctioned Torture in a Post-9/11 World” (2004) 26 T. Jefferson L. Rev. 469, 480.

uses this method to bring captives, which were caught abroad, to third countries, where they are detained without public proceedings.²⁴ However, renditions are not an idea of “the war on terror”, but they have assumed alarming dimensions. While in the 1990’s renditions were used to pick up criminals abroad, such as drug kingpins, and then bringing them to the courts, in times of “war on terror” it is used to “make certain detainees neither go to court nor go back to the streets”.²⁵ For the CIA, an advantage is that the facilities, where the interrogations take place, are not accessible to outsiders.²⁶ Thus, the CIA is able to conduct psychologically and physically aggressive methods during their interrogations free from the scrutiny of the public.

An example of such a rendition is the case of *Arar*. On 26 September 2002 the Canadian *Maher Arar* was caught at JFK Airport and brought at first to a US prison where he was held in custody for thirteen days and interrogated about alleged links with Al-Qaeda.²⁷ Then he was brought to Syria without the possibility to contact his family, lawyer or the Canadian consulate. In Syria he was brought to the Palestine branch of Syrian military intelligence, who are renowned for torturing political prisoners.²⁸ During the six days of interrogation he was severely beaten and threatened with electric shocks and the “metal chair”.²⁹ The latter is a “torture device that stretches the spine”.³⁰ Ultimately, under this pressure *Arar* falsely told his interrogators that he had a link to Al-Qaeda and then he was put into a small cell for more than ten months. “He had no exposure to natural lights at all for the first six months”.³¹ After the U.S. found out that he was not linked with Al-Qaeda they returned him to Canada.³²

Approximately hundreds of people were transported in alleged private aircrafts over the frontiers since 2001 by this means.³³ The aim is to subject them to torturous interrogation techniques and to deprive them also of rights which are guaranteed under the rule of law and which are also requested by international law.³⁴ It is difficult to hold countries which employ torturing interrogators in other countries, to account. They “can

²⁴ Lim, above n 5, 91.

²⁵ Ibid, 91, 92.

²⁶ See Dana Priest and Barton Gellman “U.S. Decries Abuse but Defends Interrogations: ‘Stress and Duress’ Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities” (26 December 2002) *Washington Post*, Washington A01.

²⁷ Amnesty International “USA: Deporting for Torture?” (14 November 2003) Press Release; available at: <http://web.amnesty.org/library/index/engamr511392003> (last accessed: 09 May 2008).

²⁸ Ibid.

²⁹ Ibid.

³⁰ Lim, above n 5, 92.

³¹ Amnesty International, above n 27.

³² Ibid.

³³ Bartelt and Muggenthaler, above n 17, 31.

³⁴ See Moher, above n 23, 480, 481.

gain valuable information with impunity, while claiming that they have 'no direct knowledge' of the host country's interrogation methods"³⁵.

In April 2004 concussive and repulsive pictures of tortured and debased convicts at **Abu Ghraib** were presented to the public. These pictures showed an appalled audience quite plainly what human rights organisations were aware of for a long time: Torture is recurred in constitutional states.³⁶ *Marcy Strauss* summarised only a few of the actual cruelties:³⁷

"The abuse included acts of sexual degradation such as forcing detainees to strip naked or to engage in acts of simulated fellatio. Other detainees were forced to masturbate in front of female soldiers, or threatened with rape. One soldier allegedly sexually assaulted a detainee with a chemical light stick or broom. Humiliation tactics were rampant. For example, two Army dog handlers used unmuzzled dogs to frighten Iraqi teenagers in order to force the youths to urinate or defecate on themselves. [...] Physical abuse also allegedly occurred, including: breaking chemical lights and pouring the phosphoric liquid on detainees, pouring cold water on naked detainees, and beating detainees with a broom handle and a chair. Head blows, significant enough to render detainees unconscious, also occurred."

Both examinations in connection with the incidents at Abu Ghraib and media reports found out that after January 2002 members of the government and high-ranking military had motivated their inferiors several to circumvent the prohibition of torture.³⁸ Indeed, the memoranda which allowed the ill-treatment were retracted officially. However, the hitherto examination of the incidents at Abu Ghraib and further examinations because of other incidents outside of Abu Ghraib showed that the US government is neither interested in a clarification of the facts nor in a penalisation of the responsible persons.³⁹ Until now only the executing soldiers of lower ranking were brought to trial.⁴⁰

Meanwhile, the absolute validity of the torture prohibition was also put into question in the German constitutional state. The discussion about the behaviour of the former police vice president, *Wolfgang Daschner*, showed that turning away from the

³⁵ Ibid, 480.

³⁶ Bartelt and Muggenthaler, above n 17, 32.

³⁷ Marcy Strauss "The Lessons of Abu Ghraib" (2005) 66 Ohio St. L.J. 1269, 1273, 1274.

³⁸ Bartelt and Muggenthaler, above n 17, 33.

³⁹ Ibid.

⁴⁰ Strauss, above n 37, 1275.

absolute prohibition of torture found favour with scholars⁴¹ and also with the public. Where a boy was assumed to be still alive in a kidnap situation, in 2002, *Daschner* allowed the threat of serious violence against the kidnapper to find out the location of the boy. Politicians of different parties and high ranking representatives of the justice were appreciative of *Daschner's* behaviour after the incident appeared before the public. Even more approval was found in numerous letters to the newspapers where often explicit admiration for *Daschner's* attitude was expressed. The criminal proceeding against *Daschner* ended in December 2004 with a mild judgement of the regional court Frankfurt⁴² - with just a warning. Admittedly, the court pointed at the absolute prohibition of torture.

However, after the judgement of the regional court Frankfurt, the *Daschner*-Case was far from settled – it emerged “as the most controversial case in criminal law in the German post-war history”⁴³. It was *Daschner* himself, who requested that torture has to be allowed by law in exceptional cases. And nearly all, who agreed with him, primarily referred to the “ticking bomb scenario”, and hence referred to terrorism.⁴⁴ The ticking bomb scenario describes a hypothetically extreme situation: An (atomic) bomb hidden by terrorists threatens to kill numerous people. The police catch one of the terrorists, who possesses all the necessary information to avert the catastrophe. Other possibilities to avert danger, such as the fulfilment of a condition, are non-existent.⁴⁵ Particularly with regard to such a situation some scholars propose, if not even request, to exert torture by the state to squeeze out the lifesaving information from the (presumed) terrorist.⁴⁶

Admittedly the requests for exceptions to the torture prohibition are not restricted to this hypothetical extreme situation. It is further argued that the state needs in general extended defence warrants to equip it for its fight against terrorism.

⁴¹ E.g. Volker Erb “Nothilfe durch Folter” [2005] Jura 24; Reinhard Merkel “Folter und Notwehr“ in Michael Pawlik and Rainer Zaczyk (ed) *Festschrift für Günther Jakobs* (Carl Heymanns Verlag, Munich, 2007) 375.

⁴² LG Frankfurt/M [2005] NJW 692 (“Daschner”).

⁴³ Claus Roxin “Rettungsfolter?” in Rainer Griesbaum et al. (ed) *Festschrift für Kay Nehm* (Berliner Wissenschaftsverlag, Berlin, 2006) 205, 205.

⁴⁴ Bartelt and Muggenthaler, above n 17, 32.

⁴⁵ See similar cases: Anne O'Rourke et al “Torture, Slippery Slopes, Intellectual Apologists, and Ticking Bombs: An Australian Response to Bagaric and Clarke” (2005) 40 U.S.F.L. Rev. 85, 101; David Luban “Liberalism, Torture and the Ticking Bomb” (2005) 91 Va. L. Rev. 1425, 1440.

⁴⁶ For example: Dershowitz, above n 6, 257.

III WHAT KIND OF TREATMENT CONSTITUTES TORTURE? – THE CAT’S DEFINITION OF TORTURE AND ITS NARROW INTERPRETATION IN THE BYBEE MEMORANDUM

The first question to be explored is “What kind of treatment constitutes torture under international law?” It is important to distinguish torture from other cruel, inhuman, or degrading treatment or punishment. The narrow interpretation of the torture definition in the Bybee Memorandum led to the horrendous incidents at Abu Ghraib and Guantanamo Bay, and therefore the reasons which led to this narrow interpretation need to be clarified. In a last step a proposal to avoid a future attempt to circumvent the prohibition of torture is outlined.

A The Definition of Torture in the CAT

To determine what kind of treatment constitutes torture under international law one can consult the definition of torture in Article 1 CAT. Article 1(1) CAT states:⁴⁷

“For the purposes of this Convention, 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.”

The definition of Article 1 CAT “is widely accepted as the international definition of torture”.⁴⁸ Five elements in the wording outline what qualifies a treatment as torture: (a) an act, (b) intent, (c) a purpose, (d) involvement of a public official and (e) severe physical or mental pain or suffering.

While the terms (a) to (d) are nearly indisputable, the interpretation of the term (e) “severe physical or mental pain or suffering” seems to be exceedingly difficult.

⁴⁷ CAT, above n 3, art. 1(1).

⁴⁸ Rebecca B. Schechter “Intentional Starvation as Torture: Exploring the Gray Area between Ill-Treatment and Torture” (2003) 18 Am. U. Int’l L. Rev. 1233, 1248.

1 *Act*

The definition demands an act that causes severe physical or mental pain or suffering. Here it is questionable if "act" means an act in a broader sense so that also omissions, such as the failure to provide a detainee with food and drinks for days, could be included. The purpose of the CAT is the prohibition of all governmental conduct that inflicts pain or suffering for the purposes stated in Article 1. Omissions can cause as much physical or mental pain or suffering as a positive act and thus can achieve the same results as a positive act.⁴⁹ Thus, an omission is also sufficient to constitute an act of torture.

2 *Intent*

The pain or suffering has to be intentionally inflicted on a person. Thus, the term "intentionally" has the important function of excluding negligent conduct,⁵⁰ which therefore can only be subsumed under Article 16 CAT⁵¹ as other cruel, inhuman or degrading treatment or punishment.

3 *Purpose*

A certain purpose has to be pursued with the act. Pursuant to the definition in Article 1 CAT pain or suffering has to be inflicted "for such purposes as obtaining from him or a third person information or a confession, [...]"⁵². On the basis of the purpose torture can be distinguished from other cruel, inhuman or degrading treatment in Article 16 CAT⁵³, which does not demand a purpose.

4 *Involvement of a public official*

It is questionable as to what extent the state has to be involved in such acts so that one can speak about torture. Pursuant to the definition the act has to be "inflicted by or at

⁴⁹ Lim, above n 5, 95.

⁵⁰ Ahcene Boulesbaa *The U.N. Convention on Torture and the Prospects for Enforcement* (Martinus Nijhoff Publishers, The Hague, 1999) 20.

⁵¹ CAT, above n 3, art 1.

⁵² Ibid.

⁵³ Ibid, art 16.

the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”⁵⁴.

The term “acquiescence” was inserted at the suggestion of the USA to include also “omission or failure of a public official to act when he had reasonable grounds to believe that torture had been or was being committed”⁵⁵. The USA’s understanding of the term “acquiescence” goes beyond the wording: The public official must have awareness of such activity and then breaches his legal duty to prevent it.⁵⁶ However, actual knowledge is not obligatory. Wilful blindness is sufficient. The latter describes the situation where the public official has a duty to prevent the conduct, but “deliberately closes his eyes to what would otherwise have been obvious to him”⁵⁷. Only such a wide interpretation of the term “acquiescence” is helpful to achieve the purpose of the convention which is prohibition of all governmental conduct that inflicts pain or suffering. This includes conduct caused by wilful blindness.

5 *Severe physical or mental pain or suffering*

The wording of Article 1 CAT demands “severe physical or mental pain or suffering”. The word “severe” suggests that not every mistreatment constitutes torture, and certain “severity” of pain or suffering is necessary.

Because the term “severe” is very amenable for interpretation it is difficult to say which level of pain or suffering has to be achieved to qualify a treatment as torture. In principle it could be expected that terms, which need to be interpreted, will be interpreted by the courts to attain legal certainty. At any rate, this is the rule for undetermined terms in statutes. Intrinsically it seems that until now it was not considered necessary or the court was not capable to determine the threshold of severity which qualifies a treatment as torture. “In those few cases dealing with the definition of torture, most courts have avoided providing an overall definition, preferring to single out certain prohibited practices as torture [...]”⁵⁸. For example, in *Ireland v United Kingdom* the European Court of Human Rights considered the British “five techniques” (hooding, wall-standing for hours, sleep deprivation, loud noise and restricted food and water) for inhuman treatment but not as torture because of the “intensity of suffering”⁵⁹. Until now

⁵⁴ Ibid, art 1.

⁵⁵ Boulesbaa, above n 50, 26.

⁵⁶ Ibid.

⁵⁷ Ibid, 26, 27.

⁵⁸ Strauss, above n 37, 1307.

⁵⁹ *Ireland v United Kingdom* [1978] ECHR 5310/71 para 167.

the court has not had the ability to take a firm stand where the threshold of severity has to be fixed abstractly and in general. The only thing which is safe to say is that a certain severity has to be existent, which was, up to now, determined on the basis of the circumstances of each individual case.

Because the wording of Article 16 CAT does not expressly demand severe pain or suffering, torture should be also distinguishable from cruel, inhuman, or degrading treatment by means of the severity.

B Differentiation between Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Article 16 CAT speaks about “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined Article 1 CAT, when such acts are committed by [...] a public official [...]”⁶⁰. Article 1 and 16 CAT have in common that both demand an act and the involvement of a public official. Unlike Article 1 CAT which contains the torture definition, Article 16 CAT does without the terms “intent”, “purpose” and “severe physical or mental pain or suffering”. Thus, it is to be assumed that both types of treatments are distinguishable by means of those three criteria.

A clear differentiation of torture and other inhuman treatment is very important. Indeed, both forms of treatment are not allowed. However, Article 16(1) CAT only requires that State Parties “undertake to prevent [...] and not prohibit] under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture [...]”⁶¹. As to the prohibition of torture, the CAT requires that State Parties provide for torture victims judicial remedies and compensation, prosecute or extradite the offenders and that they reject statements as evidence, which were obtained through the use of torture in legal proceedings.⁶² “None of these obligations apply to inhuman treatment.”⁶³ It is of high importance for people, who want to contravene the rules of international law, that perpetration of “mere” inhuman treatment, which does not constitute torture, is not criminalized as extensively as torture. Thus, such people are up to create the impression that the illicitly committed act was not torture but “only” other cruel, inhuman or degrading treatment.

⁶⁰ CAT, above n 3, art 16(1).

⁶¹ Ibid.

⁶² See *ibid*, art 6-8, 14, 15.

⁶³ De Vos, above n 1, 5.

This was also the aim of the USA when the OLC created “legally unsound official opinions”, such as the Bybee Memorandum. To make sure that their interrogation techniques could not be qualified as acts of torture, but “only” as acts of other inhuman treatment they interpreted the term “severe” in such a narrow way that only extreme acts could still be qualified as torture. By this redefinition they tried to circumvent the prohibition of torture and made it possible during the period of the Bybee Memorandum to use very aggressive interrogation techniques when they questioned suspected terrorists to obtain informative intelligence.

1 *How do the Commission of Human Rights and the European Court of Human Rights differentiate between torture and other inhuman treatment?*

Whereas the Commission of Human Rights attaches importance to both severity and purpose to differentiate torture and other cruel, inhuman, or degrading treatment (CIDT), the European Court of Human Rights (ECHR) attaches importance only to the term “severe”.

In the *Greek Case* the Commission declared that “torture is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confession, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment”⁶⁴. The Commission accepted that the severity of pain or suffering could distinguish torture from CIDT, “but it was the purpose of the conduct that was of paramount importance in distinguishing between [both]”⁶⁵

However, in the case of *Ireland v United Kingdom* the ECHR did not consider the purpose but rather the term “severe” to differentiate torture and CIDT. This case dealt with five interrogation techniques (hooding, wall-standing for hours, sleep deprivation, loud noise and restricted food and water) used by British Security Force to question IRA suspects. By considering again the purpose as the criteria to differentiate torture and CIDT the Commission arrived at the conclusion that “the systematic application of the techniques for the purpose of inducing a person to give information shows a clear resemblance to those methods of systematic torture”⁶⁶. The ECHR, however, disagreed with the Commission’s view and predominantly considered the “severity” as the main criteria to differentiate between torture and CIDT:⁶⁷

⁶⁴ *Denmark et al. v Greece* (1969) 12 Yearbook of the European Convention on Human Rights 186.

⁶⁵ De Vos, above n 1, 4.

⁶⁶ See *ibid*, 5.

⁶⁷ *Ireland v United Kingdom*, above 59, para 167.

“In the Court’s view, this distinction derives principally from a difference in the intensity of the suffering inflicted. [...] Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment [...] they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.”

While working on the draft convention for the later CAT a Working Group was set up to find out the difference between torture and CIDT.⁶⁸ The Working Group arrived at the conclusion that “the concept of torture could be defined in reasonable precise terms, [but] it was impossible to draft a precise definition of other [inhuman treatment]”⁶⁹. Aware of the Working Group’s difficulties in finding clear criteria for the differentiation, the General Assembly in 1984 adopted the CAT and with it its vague wordings in Article 1 and 16.

The Commission using purpose as its main criterion for distinction between torture and CIDT, comes quite often to the conclusion that it is a matter of torture, whereas it seems that the ECHR, which considers severity as the main criterion for distinction, is very reluctant to qualify an inhuman treatment as torture. In the years between 1978 and 1996 the “ECHR did not find any acts of torture”.⁷⁰ Although the ECHR considers the term “severe” as its main criterion to differentiate torture and CIDT, it has not even determined case groups nor has it given a clear interpretation of the term “severe”. Its decided cases are all single-case decisions. One might think the court decided intuitively and tried to avoid providing an overall definition and rather preferred “to single out certain prohibited practices as torture or inhuman treatment”⁷¹.

2 *The interpretation of torture in the Bybee Memorandum*

The Bybee Memorandum regards the “severity” of pain or suffering as the “key statutory phrase” in the torture definition.⁷² It requires such an extremely high threshold to accept an act as torture that an affirmative answer of the existence of torture is seldom if

⁶⁸ De Vos, above n 1, 5.

⁶⁹ J. Herman Burgers and Hans Danelius *The United Nations Convention against Torture* (Martinus Nijhoff Publishers, Dordrecht, 1988) 149.

⁷⁰ Louis-Phillipe F. Rouillard “Misinterpreting the Prohibition of Torture Under International Law: The Office of Legal Counsel Memorandum” (2005) 21 Am. U. Int’l L. Rev, 9, 30.

⁷¹ Strauss, above n 37, 1307.

⁷² Bybee Memorandum, see above n 2, 13.

ever possible. "The pain or suffering must be of such a high level of intensity that the pain is difficult for the subject to endure."⁷³ The level of pain caused by physical abuse must be comparable with the level of pain that "would ordinarily be associated with a sufficiently serious physical condition or injury, such as death, organ failure or serious impairment of body function [...]"⁷⁴. In the case of mental pain or suffering the Bybee Memorandum speaks about torture if the act leads to "some lasting, though not necessary permanent, damages [...] which can last month or even years [...]"⁷⁵.

It is obvious that pursuant to this memorandum there is a range of pain that is not sufficient to call torture. Thus it is questionable which interrogation techniques qualify as torture under this extremely narrow interpretation. One can find the answer in the Bybee Memorandum itself: "In short, reading the definition of torture as a whole, it is plain that the term encompasses only extreme acts"⁷⁶. Based on this memorandum the use of aggressive interrogation techniques was arranged. Even a list of "counterresistance techniques" was made, which includes:⁷⁷

"the use of stress positions for up to four hours, interrogations for up to twenty hours, solitary detention for up to thirty days, forced grooming, removal of all comfort items (including the Koran and toilet paper), hooding, the removal of clothing, forced shaving of facial hair, auditory/environmental manipulation, and 'mild non-injurious contact'."

The redefinition was absolutely absurd and it was by no means comprehended by the wording of Article 1 CAT. It is implausible that severe pain by itself is not sufficient to reach the level of torture and that, from memorandum's point of view, it needs pain equivalent to organ failure.⁷⁸

Certainly it was not only the vague definition of torture, but also the ECHR's reluctance to qualify an act as torture and also the fact that there was no clear interpretation of the term "severe" provided by the ECHR and the Commission which led to the redefinition of torture in the US's favour when in the "war on terror" "the need for information is so pressing"⁷⁹.

⁷³ Manfred Nowak "What Practices Constitute Torture?: US und UN Standards" (2006) 28 Hum. Rts. Q 809, 812.

⁷⁴ Bybee Memorandum, see above n 2, 6.

⁷⁵ Ibid, 7.

⁷⁶ See Nowak, above n 73, 812 with additional references.

⁷⁷ See De Vos, above n 1, 6.

⁷⁸ Strauss, above n 37, 1307.

⁷⁹ Ibid, 1308.

Only after the horrendous pictures of Abu Ghraib were presented to the public was the Bybee Memorandum replaced after two years of existence, by the Levin Memorandum⁸⁰. Although the Levin Memorandum “repudiates some of the more extreme aspects of the Bybee Memo’s interpretation of torture”⁸¹, it also contains as the criterion of distinction between torture and CIDT the “severity” of pain or suffering.⁸² Thus, the danger of circumvention persists in some respects, until the ECHR has taken a firm stand as to the differentiation between torture and CIDT.

C Proposal to Avoid Attempts of Future Circumvention of the Torture Prohibition

Instead of criticising only the interpretation of torture in the Bybee Memorandum, one should already pass criticism at an earlier stage. The attempt to circumvent the prohibition of torture by a narrow interpretation of the CAT’s torture definition in the Bybee Memorandum, was only possible because there is no clear and all-encompassing definition of torture and other cruel, inhuman, or degrading treatment or punishment. The CAT “defines the prohibited conduct somewhat vaguely and the few court cases that have addressed this issue tend to avoid any overarching definition”⁸³. Indeed, the CAT requires from its parties to avoid also CIDT which does not amount to torture, but it does not explain the difference between torture and CIDT.⁸⁴ This has led to difficulties in distinguishing between torture and CIDT.

Therefore one has to think about clear criteria to differentiate between torture and CIDT to prevent further circumvention of the torture prohibition by using a narrow interpretation.

At first one could think about whether the definition of torture and CIDT should be changed and whether a new definition should feature clearer terms. As previously said, the problem is the interpretation of the term “severe” in Article 1 CAT. However,

⁸⁰ Memorandum from Daniel Levin, Acting Assistant Attorney General, U.S. Dep’t of Justice, to James B. Covey, Deputy Attorney Gen., U.S. Dep’t of Justice, Regarding Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (30 December 2004) [Levin Memorandum]; available at www.usdoj.gov/olc/18usc23402340a2.htm (last accessed 11 May 2008).

⁸¹ De Vos, above n 1, 6.

⁸² See Levin Memorandum, above n 80.

⁸³ Strauss, above n 37, 1306.

this term cannot be described clearly. It has to be interpreted by the courts. Also an abdication of the term "severe" is not possible because people invariably associate cruel torment and very painful treatment with torture. Thus, simple pain and suffering is not sufficient.

Therefore one should preclude a new attempt of circumvention by providing clear criteria to differentiate torture and CIDT. To interpret Article 1 and 16 CAT to obtain clear criteria is intrinsically the task of the court, particularly of the ECHR.

1 Differentiation by means of severity

Nobody would disagree that a treatment can only amount to torture if the act is committed with intent and to achieve a purpose as listed in Article 1 CAT. However, the wording demands also for a certain severity of pain or suffering caused by the act. Because Article 16 CAT speaks only about "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1 [...]", it is assumed that neither intent nor a special purpose is necessary for an act of other cruel, inhuman or degrading treatment or punishment. It is also assumed that the level of pain or suffering, that is its severity, is lower compared with the level required for torture. This assumption based on the fact that the wording of Article 16 CAT speaks about acts of *other* cruel, inhuman, degrading treatment and does not include the words intent, purpose and severe pain or suffering. By contrast, to qualify an inhuman act as torture the three criteria "intent, purpose and severe of pain or suffering" have to be fulfilled. That is, also if the purpose and intent are fulfilled, pursuant to the view of the Memorandum and of the ECHR there is a need for an aggravated form of pain or suffering to qualify an inhuman treatment as torture.

To differentiate torture and CIDT by means of the severity seems to be very difficult or even impossible because one has to say abstractly and in general at which level of pain and suffering an act of CIDT will turn into torture. The problem is that different people will consider the severity of pain or suffering caused by a particular act differently. This was also mentioned by the ECHR in the case of *Ireland v United Kingdom* when it states:⁸⁵

⁸⁴ Ibid, 1307.

⁸⁵ *Ireland v United Kingdom*, above n 59, para 162.

“[Whether the pain or suffering is severe] depends on all circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim etc.”.

Thus, to determine the severity of the pain or suffering it is necessary to consider the individual person. An abstract determination of severity is therefore not possible so that abstract guidelines or lists of prohibited practices cannot be used for the differentiation. To make a list of prohibited conduct would be possible for a few practices which are so cruel and painful by their nature that every human being would feel severe pain or suffering, but such a list would be far from an exhaustive list. Moreover, “man’s creativity knows no bounds”⁸⁶ so that a list of prohibited practices would not be useful.

It seems impossible to determine abstractly (without considering all circumstances of the particular case) the level of severity which is necessary or sufficient to turn an act of CIDT into torture. This becomes also apparent if one looks at the attempt of the OLC in the Bybee Memorandum. Irrespective of the fact that the required level of pain or suffering is too high and absurd, one will recognize that they tried to find a comparable example to determine the severity abstractly. The Bybee Memorandum demands for pain or suffering which “would ordinarily be associated with a sufficiently serious physical condition or injury, such as death, organ failure or serious impairment of body function [...]”⁸⁷.

Because of the use of comparable examples to determine the severity a lot of questions arise: “What pain constitutes such a level [...] What exactly does it feel like to suffer from organ failure, and how does the pain differ from otherwise “severe” pain short of organ failure?”⁸⁸ How can an interrogator determine the level of pain which will arise during the interrogation? Is the assessment to determine the severity objective or subjective? “And how does one begin to make such an assessment? Human studies? Questionnaires of victims?”⁸⁹ Therefore it does not make sense to insert comparable examples, as it will not help.

2 *Differentiation by means of purpose*

However, is it really necessary to demand for an act of torture an aggravated form of pain or suffering compared to the inhuman treatment of Article 16 CAT, where the

⁸⁶ Strauss, above n 37, 1308.

⁸⁷ Bybee Memorandum, above n 2, 6.

⁸⁸ Strauss, above n 37, 1308.

wording does not require "severe" pain or suffering? If not, one does not have to consider the difficult term "severe" any longer. The UN decided not to describe torture as an aggravated form of CIDT in the final version of the CAT as it was in Article 1 of the 1975 Declaration⁹⁰ which provided the basis for the CAT. Thus, one could think that the UN wants to follow the Commissions' approach so that the main criterion to differentiate between torture and CIDT is a purpose listed in Article 1 CAT.⁹¹

Also the Inter-American Convention to Prevent and Punish Torture completely sets the term "severe pain or suffering" aside. Sentence 2 of its Article 2(1) states:⁹²

"Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish."

Because Article 1 CAT does not possess such a second sentence and it also requires in its definition "severe pain or suffering" one cannot renounce a certain level of pain or suffering. Ultimately, the wording sets the limit for the interpretation. Thus, it is not sufficient to consider only the purpose. To characterise an act as torture the act has to cause severe pain or suffering.

3 *Differentiation by means of purpose, taking into account the prerequisite of severity*

However, one should scrutinize the wording of Article 1 and 16 CAT once more. Whereas Article 1 CAT demands an act of torture, which causes severe pain or suffering and which is committed with intent to achieve a purpose, Article 16 CAT requires other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture. This wording in Article 16 could also mean acts, which cause severe pain or punishment, but which were not committed with intent and which are not motivated by a purpose because an act of other cruel, inhuman or degrading treatment can not be an act which does not cause severe pain or suffering. To be characterized as cruel, inhuman

⁸⁹ Ibid.

⁹⁰ UNGA Resolution 3452 (XXX) (09 December 1975).

⁹¹ Nowak, above n 73, 821.

⁹² Inter-American Convention to Prevent and Punish Torture (9 December 1985) OASTS 67, 25 ILM 519, art 2(1).

or degrading it has to be an act which causes a high level of pain or suffering.⁹³ Thus, the words “other act of inhuman treatment” could describe an act which causes severe pain or suffering, but which is not necessarily committed with intent and does not achieve a purpose. Moreover, if a cruel, inhuman or degrading act needs to cause severe pain or suffering to be cruel, inhuman and degrading, how high does the level of pain have to be in order to describe an act as torture? Then only a few acts could amount to torture and this was not the idea behind the creation of the CAT. The aim was to protect people against torture but if one interprets torture as an aggravated form of CIDT, which demands also severe pain, the extent of protection is very limited which would be against the aim pursued.

Thus, the main criterion to differentiate torture and CIDT has to be the purpose.⁹⁴ If one can say that an act is cruel, inhuman or degrading, then one has to qualify it as torture if the act was committed with intent and to achieve a purpose. Only a certain intensity of pain and suffering qualifies the act as cruel, inhuman or degrading. The main criterion, after the determination of the act as cruel, inhuman or degrading, is the purpose.

Such an interpretation makes sense because it is mostly the purpose which motivates the conduct.⁹⁵ To achieve the purpose the tormentor has to break the will of his victim. Only by breaking the will does torture have its “special stigma”⁹⁶. Due to the fact that torture breaks the will of the victim torture is one of the most severe crimes in the world. Torture makes the victim a broken person, it takes away its personhood and something inside is destroyed forever. The helplessness to be at the tormentor’s mercy, seems to be the worst thing about torture. To be at someone’s mercy means that the victim has to follow another’s will because their own will is broken.⁹⁷ Thus, the break of will and torture are intrinsically tied to each other. As said, the breaking of the will gives torture its special stigma. Because the tormentor breaks the victim’s will only to achieve the purpose, thus it must be the purpose which leads to a higher blameworthiness in comparison with other cruel, inhuman or degrading treatment. Therefore the purpose must be the main criterion for the differentiation between torture and CIDT.

⁹³ Nowak, above n 73, 822.

⁹⁴ Ibid.

⁹⁵ De Vos, above n 1, 7.

⁹⁶ Rouillard, above n 70, 30.

⁹⁷ Thomas Bruha and Dominik Steiger *Das Folterverbot im Völkerrecht* (Kohlhammer, Stuttgart, 2006) 29.

A further argument to attach more importance to the purpose is the following one: In certain instances severe suffering might be justifiable, such as “shooting a fleeing suspect in the leg if it was the only way to apprehend him”⁹⁸. Torture, however, cannot be justified “since it contains an additional purposive element, that is ‘the obtaining of information or confession, or infliction of punishment’”⁹⁹. This means that torture is so reprehensible (more reprehensible than CIDT) because of the purpose.

It is also worth noting that the UN decided not to describe torture as an aggravated form of CIDT in the final version of the CAT as it was done before in Article 1 of the 1975 Declaration¹⁰⁰ which provided the basis for the CAT.

Thus, one has to demand that the ECHR attaches more importance to the purpose when it differentiates between torture and CIDT. A clear distinction between torture and CIDT can only be achieved by means of the purpose. If there is a certain level of pain or suffering which can be qualified as CIDT, and there is in addition intent and a purpose, the court has to determine that CIDT amounts to torture. Otherwise the door is left wide open for misuse.

IV EXCEPTIONS TO THE TORTURE PROHIBITION

The prohibition of torture in international law is not only dangerously threatened by narrow interpretations of the torture definition, but also by the requests of scholars, journalists and others to allow torture in exceptional cases to make new and extended defence warrants available to the state in times of terrorist threats.

Some of those who request exceptions to the torture prohibition because of the fear of future terrorist attacks emphasise that torture should only be used in cases, where other possibilities to protect human lives are not available because of imminent danger. Pursuant to this view, torture should only be allowed in “ticking bomb scenarios”.

Other proponents of exceptions to the torture prohibition go a step further and advocate exceptions to the torture prohibition to obtain information about future terrorist attacks from suspected terrorists. Contrary to the “ticking bomb scenario” there is indeed a threat of future terrorist attacks, but with these there is no imminent danger.

⁹⁸ De Vos, above n 1, 4.

⁹⁹ Ibid.

¹⁰⁰ UNGA, above n 90.

The most common examples for the use of torture for preventive reasons are the incidents at Abu Ghraib and Guantanamo Bay.

Because of the incidents at Abu Ghraib and Guantanamo Bay and the continuous policy and legal debate it is worth discussing, whether exceptions to the torture prohibition could be made to hold off imminent danger, such as to prevent the death of hundreds of people in a “ticking bomb scenario” and for preventive reasons, such as to obtain information about future terrorist attacks.

A The Prohibition of Torture in International Law

At first the prohibition of torture in international law needs to be scrutinized. It is worth considering the extent of the prohibition of torture and whether exceptions could be made under the existing law.

1 Development of the torture prohibition in international law

The prohibition of torture has its seeds in the field of the humanitarian law in armed conflict.¹⁰¹ Article 4 of the Hague Convention¹⁰² of 1907 states that prisoners of war must be treated humanely. Here it “developed into a rule of customary law”¹⁰³ which does not allow torture of prisoners of war.¹⁰⁴ A formal torture prohibition was first established in Article 5 of the Universal Declaration of Human Rights¹⁰⁵ (UDHR), which is merely a resolution and is not binding in principle.¹⁰⁶ However, it is contentious as to what extent the UDHR and its included torture prohibition, are binding as customary international law or whether the prohibition of torture is even a part of *jus cogens*.

¹⁰¹ Rolf Kühner “Torture” in Rudolf Bernhardt (ed) *Encyclopaedia of Public International Law* (Vol. 4, Elsevier, Amsterdam, 2000) 868, 869.

¹⁰² Convention Respecting the Laws and Customs of War on Land (18 October 1907), art 4.

¹⁰³ Customary international law results from a general and consistent practice of states (*consuetudo*) followed by them from a sense of legal obligation (*opinio juris*).

¹⁰⁴ Kühner, above n 101, 869.

¹⁰⁵ UNGA Resolution 217 A (III) (10 December 1948), art 5.

¹⁰⁶ Malcom N. Shaw *International Law* (5th ed, Cambridge University Press, Cambridge, 2003) 820, 90.

However, on the 21 October 1950 the first contractual and therefore binding torture prohibition became operative, under the four Geneva Conventions¹⁰⁷. Pursuant to its common Articles 1, it applies only in armed conflicts. In the same year the European Convention for the Protection of Human Rights and Fundamental Freedoms¹⁰⁸ was signed initially by ten states.¹⁰⁹ It became operative on 3 September 1953 and nearly all European states are parties to that treaty with the exception of Belarus and the Vatican.¹¹⁰ The European Convention for the Protection of Human Rights and Fundamental Freedoms was the first convention, which contains a general prohibition of torture and not just one for the law of war. A general prohibition of torture at universal level later became operative in 1976 with the International Covenant on Civil and Political Rights¹¹¹ (ICCPR). Eleven years later a special anti-torture convention became operative – the CAT¹¹². It was the first universally binding treaty, which defined the term of torture.

2 *Scope of the torture prohibition*

(a) Regulations: Anti-torture conventions and other treaties

One can find regulations, which contain a binding torture prohibition, both at universal level and at regional levels.

(i) Regulations at universal level

As previously stated, the first international treaty, which contains a general prohibition of torture at universal level, was the **ICCPR**. Article 7 ICCPR contains the prohibition of torture, which states that “[n]o one shall be subjected to torture [...]”¹¹³ and pursuant

¹⁰⁷ Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949) 75 UNTS 135, art 3(1)(a), 17(4), 87(3); Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 UNTS 287, art 3(1)(a), 32, 147; Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 75 UNTS 31, art 12; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949) 75 UNTS 85, art 12.

¹⁰⁸ European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 221. (Commonly called the European Convention on Human Rights).

¹⁰⁹ Denmark, Norway, Ireland, Germany, Sweden, United Kingdom, Iceland, Saar (member of the Council of Europe), Greece and Luxembourg. Jochen Abr. Frowein and Wolfgang Peukert, *EMRK-Kommentar* (2nd ed, N.P. Engel Verlag, Arlington, 1996) 762.

¹¹⁰ Bruha and Steiger, above n 97, 10.

¹¹¹ International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171. [ICCPR]

¹¹² CAT, above n 3.

¹¹³ ICCPR, above n 111, art 7.

to Article 4(2) ICCPR¹¹⁴ the right not to be subjected to torture is one from which no derogation is permissible.

The aforementioned special convention is the **CAT**¹¹⁵. It defines the term of torture, as seen above, in its Article 1¹¹⁶ and provides in its following articles for a complex rule type to fight torture¹¹⁷.

For example, Article 2 states that "State Parties shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction"¹¹⁸. As well as the ICCPR, the CAT disallows in its Article 2(2)¹¹⁹ the derogation of the torture prohibition. Article 3¹²⁰ forbids the extradition of persons which are in danger of becoming tortured in their home country. Articles 4 to 8¹²¹ commit the State Parties to make torture a punishable offence. Pursuant to Article 12¹²² every State Party has to ensure the initiation of investigations in the cases where there are reasonable indications for torture. Article 13¹²³ concerns the protection of the victim and their relatives when they want to complain about an incident of torture. Pursuant to Article 15 "a statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings [...]"¹²⁴.

Articles 17 to 24¹²⁵ contain institutional regulations and regulations about the proceeding: Article 17 demands a committee against torture, which is in charge of the proceeding after a State Party's claim that "another Party is not fulfilling its obligations" under the CAT and of complaints from individuals, which complain that their right not to be tortured, was violated. If the Committee obtains reasonable information about incidents of torture, it can investigate on its own initiative (Article 20)¹²⁶.

The content of the CAT shows that the protection against torture is taken seriously. However, at universal level, only the states, which are parties to the CAT and the ICCPR, are bound by their contents. All other states are not bound. Prohibition of torture does not apply to all states which are not parties to the ICCPR and CAT.

¹¹⁴ Ibid, art 4(2).

¹¹⁵ CAT, above n 3.

¹¹⁶ Ibid, art 1.

¹¹⁷ Bruha and Steiger, above n 97, 13.

¹¹⁸ CAT, above n 3, art 2.

¹¹⁹ Ibid, art 2(2).

¹²⁰ Ibid, art 3.

¹²¹ Ibid, art 4 – 8.

¹²² Ibid, art 12.

¹²³ Ibid, art 13.

¹²⁴ Ibid, art 15.

¹²⁵ Ibid, 17 – 24.

(ii) Regional regulations

However, a large number of binding regional torture prohibitions do exist and contribute to an effective proscription of torture. A few of them possess a well developed and effective system of legal protection.

- America

In America torture is prohibited by a special convention, the Inter-American Convention to Prevent and Punish Torture¹²⁷ and by Article 5 of the American Convention on Human Rights¹²⁸ (ACHR).

Pursuant to Article 63 ACHR¹²⁹ the Inter-American Court of Human Rights, based in Costa Rica, is in charge of enforcement of the torture prohibition stated in Article 5 ACHR.

- Europe

In Europe the prohibition of torture is regularised in Article 3 of the European Convention on Human Rights (ECHR), which states that “[n]o one shall be subjected to torture [...]”¹³⁰. A derogation from the torture prohibition of the ECHR is not permissible pursuant to its Article 15(2)¹³¹. It also belongs to the European *ordre public*.¹³² The ECHR features a well developed system of legal protection. The Protocol 11, which came into force on 01 November 1998, allows individuals to take their case directly to the European Court of Human Right. This has significantly increased the effectiveness of human rights protection.

Also the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment¹³³ (ECPT) refers in its preamble to the torture prohibition of Article 3 ECHR. It features rules, which allow a committee to visit places where people are deprived of their liberty. The aim of the ECPT is to avert the accrue-

¹²⁶ Ibid, art 20.

¹²⁷ Inter-American Convention to Prevent and Punish Torture, above n 92.

¹²⁸ American Convention on Human Rights (21 November 1969) 1144 UNTS 123, art 5.

¹²⁹ Ibid, art 63.

¹³⁰ Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 221, art 3. (commonly called European Convention on Human Rights)

¹³¹ Ibid, art 15 (2).

¹³² Markus Raess *Der Schutz vor Folter im Völkerrecht* (Schulthess Polygraphischer Verlag, Zurich, 1989) 62.

¹³³ European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (26 November 1987) ETS 126, 27 ILM 1152.

ment of torture. Thus, it has a preventive impact, which complements the repressive system of the ECHR.

- Africa

One can find in Article 5 of the African Charter on Human and People's Rights (so called Banjul-Charter)¹³⁴ a binding torture prohibition. The African Court on Human and People's Rights is in charge of its enforcement.

Indeed, where human rights violations and especially torture are common occurrences, the Banjul-Charter is by African standards, a considerable progress. However, its usefulness must be considered as not too high from the outset because 80 percent of the population are illiterates. Thus, the work of human rights organisations is all the more important.¹³⁵

- Asian and Islamic-Arabian countries

There is no binding regional prohibition of torture in Asian or Islamic-Arabian countries.¹³⁶ However, the Universal Islamic Declaration of Human Right¹³⁷ features a torture prohibition. Its Article 7 states:¹³⁸

“No person shall be subjected to torture in mind or body, or degraded, or threatened with injury either to himself or to anyone related to or to held dear by him, or forcibly made to confess to the commission of crime, or forced to consent to an act which is injurious to his interests.”

This declaration is not a declaration of all Islamic states. It was adopted at a conference about human rights within Islam, which was arranged by the Islamic Council of Europe. Thus, one cannot speak about a binding and accepted convention from Islamic states. The same applies to the Cairo Declaration on Human Rights in Islam¹³⁹, it is also not binding.

¹³⁴ African Charter on Human and People's Rights (27 June 1981) 1520 UNTS 217, art. 5.

¹³⁵ Raess, above n 132, 67.

¹³⁶ Bruha and Steiger, above n 97, 19.

¹³⁷ Islamic Declaration on Human Rights 21 Dhul Qaidah 1401 (19 September 1991).

¹³⁸ Ibid, art 7.

¹³⁹ O.I.C. Resolution 49/19-P (5 August 1990).

(iii) Intermediate result

Indeed, numerous states are parties to the universal regulations, ICCPR and CAT. There are also regional regulations as a protection against torture in most parts of the world. Nevertheless, there are enough countries which are not a party to a universal regulation and which do not feature a regional regulation against torture. Thus, the protection of such an important human right – the right to live free from torture – is patchy. The law of treaties does not guarantee an all-embracing protection against torture.

(b) The torture prohibition as part of customary international law and as part of *jus cogens*

In any case, the gaps which came into existence when some states did not become a party to international or regional treaties could be seen as closed if the prohibition of torture is a part of customary international law because then it is binding for all states independent of a state's accession to a treaty.

Moreover, it is questionable whether the prohibition of torture is a peremptory norm in international law, that is, a part of *jus cogens*. The content of norms of *jus cogens* are so important that they cannot become abolished by arrangement or declaration.

(i) Torture prohibition as customary international law

Pursuant to the predominant view, two prerequisites are necessary to speak about the prohibition of torture as a norm of customary international law: a general and consistent state practice and *opinio juris*¹⁴⁰ – the requirement that the states “comply with the norm against torture out of a sense of legal obligation”¹⁴¹. Whether the prohibition of torture features these two elements is now examined.

¹⁴⁰ Anthony Aust *Handbook of International Law* (Cambridge University Press, Cambridge, 2005) 6, 7; Rudolf Bernhardt “Customary International Law” in Rudolf Bernhardt (ed) *Encyclopaedia of Public International Law* (Vol. 1, North Holland, Amsterdam, 1992) 898, 899; Joshua A. Decker “Is the United States Bound by the Customary International Law of Torture? A Proposal for ATS Litigation in the War on Terror” (2006) 6 *Chi. J. Int'l L* 803, 816.

¹⁴¹ Joshua A. Decker, above n 140, 820.

- State practice?

State practice demands for a practice which is both extensive and virtually uniform.¹⁴² Today the duration of the practice is not longer seen as pivotal; it is more important that the practice is intensive and uniform.¹⁴³ For the criterion of uniformity it is necessary that a representative number of states behave as far as possibly the same as to a certain matter.¹⁴⁴ It is not necessary that all states adhere to the prohibition of torture without exception. If there are deviations in particular cases, these deviations are seen as violations of international law.¹⁴⁵

Indications of the states' stance on the prohibition of torture can be gathered from whether the prohibition is generally entrenched, be it by ratifications of treaties or by inclusion into constitutions or general statutes.¹⁴⁶ State practice can also be expressed by "governmental actions in relation to other states, [... and] ministerial and other official statements"¹⁴⁷, "by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law"¹⁴⁸ et cetera.

In the realm of humanitarian law nearly all states in the world are bound by the torture prohibition of the Geneva Convention. Also in the realm of general international law there are only a few states, which are not bound by one or more universal or regional conventions or other treaties, which feature a torture prohibition. The numerous accessions to conventions and other treaties reveal that the majority of states embrace a prohibition of torture.¹⁴⁹ Also the majority of constitutions feature an express torture prohibition or prohibit certain acts, which are tantamount to torture. Often a prohibition of torture can (also) be deduced from the protection of physical integrity which is included in nearly all constitutions or statutes. Moreover, no state exists which allows the use of torture. Even within armed conflicts no state has ever claimed that it is allowed to torture.¹⁵⁰ Indeed, some states torture. However, these states confronted with the violation of international law always want to make clear that they did not torture. This sup-

¹⁴² Knut Ipsen *Völkerrecht* (5th ed, C.H.Beck, Munich 2004) 215.

¹⁴³ Bernhardt, above n 140, 901.

¹⁴⁴ Aust, above n 140, 7.

¹⁴⁵ Ipsen, above n 142, 216.

¹⁴⁶ Raess, above n 132, 74.

¹⁴⁷ Aust, above n 140, 7.

¹⁴⁸ Decker, above n 140, 817.

¹⁴⁹ *The Prosecutor v Anto Furundzija* (Judgment) (10 December 1998) IT-95-17/1-T para 138 (Trial Chamber, ICTY); available at: www.un.org/icty/furundzija/trialc2/judgement/index.htm (last accessed: 11 May 2008).

¹⁵⁰ *Ibid.*

ports acceptance of the torture prohibition.¹⁵¹ Thus, as to the prohibition of torture a state practice is established.

- *Opinio juris?*

“Once one has established the existence of a specified usage, it becomes necessary to consider how the state views its own behaviour”¹⁵². *Opinio juris* describes the basic position that certain behaviour patterns have to be maintained. It is the persistent belief that certain behaviour (the state practice) is necessary because it is seen to be legal.¹⁵³ In the case of an omission as state practice (omission of torture), the omission has to be based on the conviction to be legally obligated.¹⁵⁴ An omission for other reasons is not sufficient. However, the existence of *opinio juris* is often difficult to find. One is often constrained to use the same evidences used to prove the existence of a state practice.¹⁵⁵

The intensive contractual fixing of the torture prohibition, its repeated affirmation in resolutions and declarations of the United Nations, the fact that no state confronted with the violation of the torture provision claims that it is allowed to torture, and the existence of torture prohibitions in most of the legal systems show that there is a general conviction that torture is forbidden. The prerequisite of *opinio juris* can be taken for granted.

Also persistent violations of the torture prohibition do not question its acceptance because these violations are not committed with the thought that it is legal.

As to the prohibition of torture there is a state practice and the existence of *opinio juris*, so it is part of customary international law. The prohibition of torture is therefore legally binding for all states. Thus, it closes the gaps which came into existence when some states did not become a party to international or regional treaties.

Admittedly, the prohibition of torture achieves by its status as customary law a far-ranging validity, but ultimately it is not an absolute. “If a state does not consent to be bound by an international norm, if it persistently objects, the state cannot be held liable for violating the norm once it crystallizes into customary international law.”¹⁵⁶

¹⁵¹ Ibid.

¹⁵² Malcom N. Shaw *International Law* (4th ed, Cambridge University Press, Cambridge, 1997) 66.

¹⁵³ Ibid, 67; Ipsen, above n 142, 218.

¹⁵⁴ Ipsen, above n 142, 219.

¹⁵⁵ Decker, above n 140, 820.

¹⁵⁶ Ibid..

However, it is assumed that in practice none of the states would expressly oppose the prohibition of torture.

(ii) Torture - a peremptory norm (*jus cogens*)

The question also arises whether the prohibition of torture is not only part of customary international law, but also a peremptory norm, *jus cogens*. As previously stated, this would mean that the prohibition of torture cannot become abolished by arrangement or declaration. When a norm of *jus cogens* conflicts with a norm of a treaty or a customary rule, *jus cogens*-norms prevail over a treaty and customary rules.¹⁵⁷ According to Article 53 of the Vienna Convention¹⁵⁸ a treaty is void if it conflicts with a norm of *jus cogens*. Also a consistent violation, that is, a persistent objection, cannot be “viewed as evidence against their CIL [customary international law] status, but rather is disregarded as mere law breaking”¹⁵⁹. “Non-compliance, even if widespread, does not impeach the prerequisite state custom.”¹⁶⁰ Only a norm of the same status, that is another norm of *jus cogens*, could suspend protection of the first norm of *jus cogens*.¹⁶¹ If one acknowledges the prohibition of torture as a norm of *jus cogens*, one can speak about an “absolute” prohibition of torture.

It is controversial which norms in international law are part of *jus cogens*.¹⁶² “There is [also] little agreement about the source of *jus cogens*-norms: where do they come from [...]?”¹⁶³ However, the term “*jus cogens*” found its way into the Vienna Convention¹⁶⁴. Its Article 53 states:¹⁶⁵

“[A]peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

¹⁵⁷ Alex Conte *An Introduction to International Law* (LexisNexis NZ Limited, Wellington, 2006) 38.

¹⁵⁸ Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331, art 53.

¹⁵⁹ Curtis A. Bradley and Jack L. Goldsmith “Customary International Law as Federal Common Law; A Critique of the Modern Position” (1997) 110 Harv. L. Rev. 815, 840.

¹⁶⁰ Decker, above 140, 821.

¹⁶¹ See Vienna Convention on the Law of Treaties, above n 158, art 53.

¹⁶² Pamela J. Stephens “A Categorical Approach to Human Rights Claims: Jus Cogens as a Limitation on Enforcement” (2004) 22 Wis. Int’l. L. J. 245, 252.

¹⁶³ Ibid, 249.

¹⁶⁴ Vienna Convention on the Law of Treaties, above 158.

The Vienna Convention of Treaties does not help on to find out which norms are part of *jus cogens*.¹⁶⁶ It is restricted to describe the effect of a *jus cogens*-norm. Thus, it has to be clarified in a different way which attributes constitute a norm of *jus cogens* and whether the prohibition of torture features these attributes.

If one refers to the wording of Article 53 Vienna Convention stating that *jus cogens* is “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted”¹⁶⁷, it is apparent that for the existence of *jus cogens* an element of consent to such norm is necessary.¹⁶⁸ Pursuant to Klein “*jus cogens* embraces customary laws considered binding on all nations [...]”¹⁶⁹, but it is a particular category of customary law – “a kind of ‘super-customary law’”¹⁷⁰. It is “customary law that is ordered to a transcendent good of the international community”¹⁷¹. Although the roots of *jus cogens* are seen in custom, norms of *jus cogens* are characterized by moral force, “which derives from their rational foundation”.¹⁷² Klein states that “since nations do observe *jus cogens*, seek to enforce it upon each other, and deny their own violations of it, they pay homage to its moral force and informally ratify and authorize its application.”¹⁷³ These acts of ratification and authorization cause a “rule of recognition”¹⁷⁴.

Christensen said that “a norm is peremptory when it meets criteria designed to serve an overriding community purpose structurally differentiated from that served by ordinary rules of treaty and custom”¹⁷⁵. Thus, a *jus cogens*-norm protects vital interests of the international community¹⁷⁶ so that it is a norm, which is of fundamental importance. Furthermore it has to be indispensable for all states and it also has to be entrenched in their legal attitude.¹⁷⁷

¹⁶⁵ Ibid, art 53.

¹⁶⁶ Jochen Abr. Frohwein “Jus Cogens” in Rudolf Bernhardt (ed) *Encyclopaedia of Public International Law* (Vol. 3, Elsevier, Amsterdam, 1997) 65, 66.

¹⁶⁷ Vienna Convention on the Law of Treaties, above n 158, art 53.

¹⁶⁸ Stephens, above n 162, 249; Mary E. Turpel and Phillippe Sand “Peremptory International Law and Sovereignty: Some Questions” (1988) 3 Conn. J. Int’l L. 364, 367.

¹⁶⁹ David F. Klein “A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts” (1988) 13 Yale J. Int’l L. 332, 350, 351.

¹⁷⁰ Stephens, above n 162, 250.

¹⁷¹ Klein, above n 169, 351.

¹⁷² Stephens, above n 162, 250.

¹⁷³ Klein, above n 169, 351.

¹⁷⁴ See *ibid*, 351, 352.

¹⁷⁵ Gordon A. Christenson “Jus Cogens: Guarding Interests Fundamental to International Society” (1988) 28 Va. J. Int’l L. 585, 592.

¹⁷⁶ Carin Kahgan “Jus Cogens and the Inherent Right to Selfdefence” (1997) 3 ILSA J. Int’l & Comp L 767, 774.

Do these attributes apply to the prohibition of torture? The global unconditional reprobation of torture reflects the existing ethical consents that torture destroys everything that makes us a human being. The prohibition of torture protects the physical integrity and also that, what is inside of a human being - the personhood itself. Because torture spurns not only human dignity, but also destroys long-lastingly the psyche of a human being, the prohibition of torture protects a vital interest. The use of torture damages not only the victim, but also leads to a brutalisation within a state. Due to the fact that all over the world torture is considered extremely cruel because torture causes extreme physical and mental torment, the prohibition of torture features a certain moral force. Thus, torture offends against the *ordre public* of the community based on international law. Also the torture prohibition belongs at the core of human rights. Meanwhile it has achieved a similar status as the prohibition of genocide, slavery, racial discrimination and aggression,¹⁷⁸ which are all undisputed norms of *jus cogens*. Moreover, torture is a crime against humanity. The torturer becomes a *hostis humani generis*.

Thus, all this shows that the torture prohibition is a norm of *jus cogens* and this view is also supported by many scholars¹⁷⁹.

3 Intermediate Result

The prohibition of torture has become not only a part of international customary law but also a part of *jus cogens*.¹⁸⁰ Thus, the torture prohibition can be classified as absolute. Pursuant to existing international law, exceptions to the torture prohibition are under no circumstances, possible.

B Exceptions to the Torture Prohibition because of the Wording in Sentence 2 of Article 1(1) CAT

Because it turned out that exceptions to the torture prohibition are not possible under existing international law the question arises whether the CAT itself allows for an exception to the torture prohibition in its sentence 2 of Article 1(1) CAT.

¹⁷⁷ BVerfGE 18, 441, 448, 449.

¹⁷⁸ Alexander Orakhelashvili *Peremptory Norms in International Law* (Oxford University Press, Oxford, 2006) 54.

¹⁷⁹ For example: Aust, above 140, 11; Bradley and Goldsmith, above n 159, 840; Erika de Wet "The Prohibition of Torture as an International Norm of Jus Cogens and its Implications for National and Customary Law" (2004) 15 EJIL 97. Paul R. Dubinsky "Human Rights Law Meets Private Law Harmonization: The Coming Conflict" (2005) 30 Yale J. Int'l L. 211, 275.

Pursuant to sentence 2 of Article 1(1) CAT the term torture “does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions”¹⁸¹. It is questionable how this sentence is to be understood.

One could assume that this sentence provides possibilities to allow acts of torture by law. However, if one assumes this possibility the CAT’s prohibition of torture would not make sense. Such interpretation would make it possible for states to create numerous exceptions to the torture prohibition. However, this is not the aim of the CAT. Thus, the term “lawful sanctions” can only mean sanctions which are consistent with the existing international law. Sanctions would not be consistent with international law if they allow something which is forbidden by the convention. Moreover, such an interpretation of this sentence would also conflict with Article 2(2) CAT¹⁸², which states that exceptions to the prohibition of torture are under no circumstances permissible.¹⁸³

It was often argued that the second sentence of Article 1(1) CAT was included because “it was intended to strengthen the already existing prohibition of torture in international law”, but it was not intended to lead to a reform of the state parties’ systems of penal sanctions.¹⁸⁴ Without the second sentence in Article 1(1) CAT an accession to the CAT would not have been possible for some countries.¹⁸⁵ One has to think of countries, whose systems of penal sanctions are based on the Shari’a.¹⁸⁶ To except lawful sanction may be “the result of political compromises intended to allow particular forms of punishment, such as the death penalty, without undermining the core principles of the CAT”¹⁸⁷

Thus, also sentence 2 of Article 1(1) CAT does not allow for exceptions to the torture prohibition. It proves that the torture prohibition is absolute and that exceptions are not possible under existing international law.

¹⁸⁰ Johan D. van der Vyver “Torture as Crime under International Law” (2003) 67 *Alb. L. Rev.* 427, 429.

¹⁸¹ CAT, above n 3, art 1(1).

¹⁸² *Ibid*, art 2(2).

¹⁸³ Bruha and Steiger, above n 97, 33.

¹⁸⁴ Burgers and Danelius, above n 69, 121.

¹⁸⁵ *Ibid*, 121.

¹⁸⁶ Bruha and Steiger, above n 97, 33.

¹⁸⁷ Lim, above n 5, 97.

V RETHINKING THE ABSOLUTE VALIDITY OF THE TORTURE PROHIBITION IN TIMES OF "WAR ON TERROR"

Because exceptions to the prohibition of torture are not possible under existing international law every act of torture would be a violation of the international law. However, in times of "war on terror" it is worth rethinking the absolute validity of the torture prohibition. The changed security-political situation raises the question of whether it should be permissible to allow exceptions to the torture prohibition in times of "war on terror". Therefore approaches to justify torture to hold off imminent danger and the use of torture for preventative reasons are discussed below.

A Use of Torture to Hold Off Imminent Danger – the "Ticking Bomb Scenario"

One situation where it may be possible to justify torture is the case of the "ticking bomb scenario". The "ticking bomb scenario" not only describes the situation where a bomb hidden by terrorists threatens to kill hundreds of people, but also a situation where there is no other choice but to use torture, "in the limited period of time available to prevent anticipated damage"¹⁸⁸. This paper deals only with the hidden bomb as the model-case.

Often objections are raised if one uses such a clear and rare case as a model case to examine whether exceptions to the torture prohibition should be allowed. It is claimed that such cases are out of touch with everyday life and that it is irresponsible to question the absolute prohibition of torture with such "pseudo-realistic cases" and that findings gained by means of "such pseudo-realistic cases" perhaps cannot be transferred to reality.¹⁸⁹

However, such objections are mistaken. People who cannot think of one case where torture could be allowed must agree to be confronted with all imaginable cases, which question their opinion.¹⁹⁰ Admittedly cases in real life are often not so clear. The risk of misuse or even "slippery slope" must be taken seriously. However, these concerns should not bar us from analysing the question of whether, from a legal perspective, a justification of torture to save hundreds of lives is tenable under certain circumstances. In a second step one can consider the risks which could possibly follow from

¹⁸⁸ Emanuel Gross "Legal Aspects of Tackling Terrorism: The Balance between the Right of a Democracy to Defend Itself and the Protection of Human Rights" (2001) 6 *UCLA J. Int'l L. & For. Aff.* 89, 102.

¹⁸⁹ Luban, above n 45, 1427, 1440 ff.

such exceptions and consider them as too high. Slippery slope-arguments are of a utilitarian nature. Everybody, who attempts to scotch the individual right or obligations under reference to utilitarian arguments, does not follow a legal maxim.¹⁹¹

Because of space and brevity only three selected approaches should be discussed to justify torture to hold off imminent danger: the "Torture Warrant" approach of the Harvard law Professor *Alan Dershowitz*; the "Necessity" used for example by the Supreme Court of Israel; and the so-called "Self-defence Torture" approach of German law Professor *Reinhard Merkel*.

1 "Torture Warrants" – the *Dershowitz* approach

To justify torture to obtain the necessary information in a "ticking bomb scenario", *Dershowitz* proposes so-called "torture warrants": "a process whereby a neutral magistrate would decide whether there was sufficient evidence to compel a suspect to be subject to torture"¹⁹². Because torture cannot be averted, one has to bring it under control and for this reason *Dershowitz* demands "torture warrants" to make sure that torture is only used under authorisation by a court.¹⁹³ One advantage is seen in the fact that torture would be medically supervised and that techniques chosen would not cause permanent physical damage. For example, he proposes to insert a long needle under the fingernail,¹⁹⁴ what causes hellacious pain but not permanent physical damage. *Dershowitz* takes the position that torture is inevitable in a "ticking bomb scenario" and thus we can choose between two evils: torture "off the books and below the radar screen"¹⁹⁵ or included as a lawful method by "torture warrants". For him the latter is the lesser evil.

Counter arguments suggest that torture violates not only the human dignity, but also judicially permitted torture "taints the 'purity of the courts'".¹⁹⁶ By granting a "torture warrant", which inescapably leads to a violation of human dignity, the judiciary is participating in abuses of human dignity. "The underlying goals of judicial integrity are

¹⁹⁰ Merkel, above n 41, 379.

¹⁹¹ Ibid, 379, 380.

¹⁹² Alan M. Dershowitz *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (Yale University Press, New Heaven, 2002) 148; quoted from Moher, above n 23, 484.

¹⁹³ Alan M. Dershowitz "The Torture Warrant: A Response to Professor Strauss" (2003/2004) 48 N.Y.L. Sch. L. Rev 275, 283.

¹⁹⁴ See Moher, above n 23, 484.

¹⁹⁵ Dershowitz, above n 193, 292

¹⁹⁶ Chanterelle Sung "Book Review: Torturing the Ticking Bomb Terrorist: An Analysis of Judicially Sanctioned Torture in the Context of Terrorism: Why Terrorism Works: Understanding the Threat, Responding to the Challenge. By Alan Dershowitz" (2003) 23 B.C. Third World L.J. 193, 207.

that the court is to be regarded as a symbol of lawfulness and justice and that the court does not ally itself with bad acts”¹⁹⁷ If a judge is involved in an abuse of human dignity by granting “torture warrants”, this would destroy the image of lawfulness and justice. Thus, citizens would lose confidence in the judiciary. Moreover, the task of a court is to show people what is right and what is wrong and thus it should set a good example.

A further problem is that “torture warrants”, which are granted by a judge, would create the impression in society that torture is a “good thing” and furthermore lawful.¹⁹⁸ However, an abuse of human dignity cannot be described as lawful. Thus, within society the wrong idea could be evoked, namely that if even the state allows torture, torture cannot be so bad and this leads to a brutalization of society. Therefore the concept of “torture warrants” has to be rejected.

2 “Necessity”

Now the defence of necessity is discussed particularly whether it justifies the use of torture in a “ticking bomb scenario”. “The [necessity] doctrine holds that certain conduct, though it violates the law and produces a harm, is justified because it averts a greater evil and hence produces a net social gain or benefit to society”¹⁹⁹ or as *Glanville Williams* says: “some acts that would otherwise be wrong are rendered rightful by a good purpose, or by the necessity of choosing the lesser of two evils”²⁰⁰.

For the application of the necessity defence six prerequisites are necessary: (a) the defendant acted to prevent imminent harm, (b) he was “faced with a choice of evils and decided for the lesser evil”, (c) “that he reasonably anticipated a causal relationship between his conduct and the harm to be avoided”; and (d) “that there were no other legal alternatives to violation the law”²⁰¹. Further “the Legislature has not acted to preclude the defence by a clear and deliberate choice regarding the values at issue”²⁰² (e); and (f) that the circumstances, which led to the necessity, may not be caused “by negligent or recklessness acts of the defendant in the first instance”²⁰³.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid, 208.

¹⁹⁹ John Alan Cohan “Torture and the Necessity Doctrine” (2007) 41 Val. U.L. Rev. 1587, 1607.

²⁰⁰ Glanville Williams *The Sanctity of Life and the Criminal Law* (Knopf, New York, 1957) 198.

²⁰¹ Cohan, n 199, 1610.

²⁰² Ibid.

²⁰³ Ibid.

These prerequisites are examined to see if they are fulfilled in the "ticking bomb scenario".

(a) Imminent Harm Factor

The first requirement for the application of the necessity defence is that the defendant wanted to prevent imminent harm. One can speak about imminent harm when the threatened harm "is temporarily quite proximate to the present moment"²⁰⁴ If there is no imminent harm, there will be enough time to use other methods to avert the "future" harm, such as traditional investigations. However, to determine whether the "imminent harm factor" is fulfilled one has also to consider the degree of harm that should be averted. If the degree of harm is extreme, as it is in the case of a ticking (nuclear) bomb, which may kill hundreds or thousands of people, then one cannot make too heavy a demand on imminence. Possibly five days till the explosion could be sufficient to speak about an imminent danger,²⁰⁵ but probably not two weeks. Thus, the imminent factor is generally fulfilled in the "ticking bomb scenario".

(b) "Choice-of-Evils Factor"²⁰⁶

The question is whether the use of torture is the lesser evil in a "ticking bomb scenario". Already on the "Choice-of-Evils Factor" the application of the necessity defence in the "ticking bomb scenario" could fail. At first glance this may not make sense because by the use of torture the death of hundreds of people could be averted.

A second glance will recognize that the use of torture is not the lesser evil of the two. There are a few more points to consider in assessing the choice of evils.

One of those points is the impact that the use of torture might have on the reputation of the country. A state, which allows torture, cannot be taken seriously, if it asks for support in its "war on terror" and against human rights violations. Admittedly, all states are dependent on the aid of other states in their fight against terrorism. Whether other states are willing to support so cruel way to fight against terrorism is questionable.

²⁰⁴ Ibid, 1616.

²⁰⁵ See Mordechai Kremnitzer "The Landau Commission Report - Was the Security Service Subordinated to the Law, or the Law to the "Needs" of the Security Service?" (1989) 23 *Isr. L. Rev.* 216, 253.

²⁰⁶ Cohan, above n 199, 1612.

Another concern is that the enemies of the torturing state could take revenge so that they kidnap and mistreat the citizens of the torturing state because their own citizens were mistreated. As we have seen, in 2004, after the horrible pictures of the detainees at Abu Ghraib were presented to the public, "Islamist militants abducted [...] an American working in Saudi Arabia, in order to inflict the same abuse that had been inflicted on Iraqi detainees"²⁰⁷. Ultimately, a video was presented world wide which showed that the American was beheaded by his kidnapper. Also the experiences in Israel and Palestine show that the use of torture leads to a vicious circle: terrorism was considered to justify torture, whereas torture was considered to justify further terrorism²⁰⁸.

Also slippery-slope-effects have to be considered. If torture is allowed in exceptional cases and thus institutionalized, it will "become the norm rather than the exception"²⁰⁹. The exception becomes a "precedent" which will be applied to other more or less similar cases. Torture, which was intended to be used in exceptional cases, such as "ticking bomb scenarios", will automatically be extended to other cases. For example, why not extend the "use of torture on someone who likely knows the name or whereabouts of a serial killer"²¹⁰ and refuses to provide the information? A sole exception becomes a realm of exceptions, in which torture should be allowed to avert danger. The limits of such exceptions cannot be defined precisely. Everything speaks for the assumption that the zone, in which torture is allowed, will grow and that the separating line between allowed methods and forbidden methods will shift more and more.

If the limit set by the international prohibition of torture is abolished, there is no stopping then. The idea that one can allow torture in exceptional cases and that one can at the same time keep it within a limit is a contradiction in terms. Beyond the prohibition of torture there are no plausible lines of demarcation which can withstand the pressure of preventing danger. Thus, the idea that there are moral or legal criteria by which torture can be on the one hand allowed but on the other hand kept within a limit, is absurd.

²⁰⁷ Ibid, 1614.

²⁰⁸ Barak Cohen "Democracy and the Mis-rule of Law: The Israeli Legal System's Failure To Prevent Torture in the Occupied Territories" (2001) 12 *Ind. Int'l & Comp. L. Rev.* 75, 90; Sanford H. Kadish "Torture, the State and the Individual" (1989) 23 *Isr. L. Rev.* 345, 353.

²⁰⁹ Cohan, above n 199, 1614.

²¹⁰ Ibid, 1615.

Another slippery slope effect is the concern as to the escalation of the brutality of torture techniques.²¹¹ How can the limits be set? What is if torture is necessary, which poses a risk of severe and long-lasting physical damage or even the risk to death? Or if it is necessary to inflict the torture on the terrorists family? A former CIA agent proposed considering relatives as the target.²¹²

“You get their mothers and their brothers and their sisters under your complete control, and then you make that known to the target [...] You imply or you directly threaten [that] his family is going to pay the price if he makes the wrong decision.”

(c) Intermediate result

There are many points to consider which show that allowing torture in a “ticking bomb scenario” is not the lesser evil. Thus, an exception to the torture prohibition in the “ticking bomb scenario” under reference to the necessity defence is not possible.

3 “Self-defence Torture” – the Merkel approach

Whether the use of torture in a “ticking bomb scenario” can be justified by self-defence and whether the self-defence principle speaks for an exception to the torture prohibition is now examined.

(a) Prerequisites of self-defence

At first there has to be a state of self-defence in the “ticking bomb scenario”. In both the common law states and in Germany, the criminal law contains self-defence. There are two possible scenarios: At first literally, where the act of defence is committed by the victim of an attack and second the defence of others, where the act of “self”-defence is committed by a third person in favour of the victim.²¹³ In Germany the state of self-defence is characterised by an actual or imminent attack²¹⁴. Further the act has to be re-

²¹¹ Ibid.

²¹² Bob Drogin and Greg Miller “Spy Agencies Facing Questions of Tactics” (28 October 2001) L.A. TIMES, Los Angeles § 1, at 1.

²¹³ See the Definition of Self-Defence in: *R. v Williams* (1987) 3 All E.R. 411, 415; *R. v Beckford* (1987) 3 All E.R. 425, 425; in German Law: Kristian Kühl *Strafrecht Allgemeiner Teil* (5th ed, Vahlen Verlag, Munich, 2005) 147.

²¹⁴ Kühl, above 213, 108.

quired as necessary to avert imminent unlawful assault.²¹⁵ Under common law one is justified in using force “only in response to a threat of death or serious bodily harm, only if the danger is imminent and immediately forthcoming, and in some states [...] only if there is no available path of safe retreat.”²¹⁶ These prerequisites are fulfilled in the “ticking bomb scenario”. Under the doctrine of self-defence killing someone is allowed if it is necessary to save your own life or the lives of others.²¹⁷ “If we can kill in defence of self or others, certainly we could take action short of that – like torture to obtain critical information – in defence of others”.²¹⁸

A further advantage in contrast to the necessity defence is that self-defence is only allowed towards the attacker (here: terrorist), not towards a third party, such as their relatives.

- (b) Concerns as to “self-defence-torture” from a legal perspective – Is there a violation of the terrorist’s human dignity?

It is also assumed that the human dignity of the terrorist would be violated by torture committed in self-defence.

- (c) Considering criteria of attribution in criminal law

Consulting general principles of criminal law will show, that concerns as to a violation of human dignity in the case of “self-defence-torture” do not exist or not to that extent compared to “torture warrants”. Moreover, it could turn out that a state, which denies the right of self-defence in cases where only an act of torture is helpful to defend hundreds of lives, not only misconstrues its primary task to guarantee basic rights, such as right to life,²¹⁹ but also “de facto” (objectively) aids unjust acts²²⁰. Therefore an exception to the torture prohibition in the case of “self-defence” seems from a legal perspective not so far off anymore.

The consideration of criteria of attribution may appear strange or alien to students and scholars in common law countries. However, these criteria can help us answer

²¹⁵ German Penal Code, § 32.

²¹⁶ Marcy Strauss “Torture” (2003/2004) 48 N.Y.L. Sch. L. Rev. 201, 258.

²¹⁷ Ibid.

²¹⁸ Ibid.

²¹⁹ See Merkel, above n 41, 389.

²²⁰ Ibid, 393; see Erb, above n 41, 27.

the following questions: Who is responsible for an act and the result, which is caused by the act? Who creates the danger that caused the result?

- The terrorist is responsible for the act of torture and he has to be considered as if he inflicts the pain upon himself

Considering the criteria of attribution in criminal law, the pain, which is caused by the act of torture committed in self-defence, has to be attributed to the terrorist's sphere of responsibility. He has the factual taking place of the pain or its absence or its cessation in his hand. He can supply the information, which is necessary to find and to deactivate the bomb so that hundreds of people can be saved. As soon as he supplies the information the acts of torture will end and hence the pain. Furthermore, he is legally obligated to behave in a way (to supply the information) that this pain ceases instantly, namely with the strongest duty of a citizen: the duty not to kill other people.²²¹

If this thesis, that the pain from the act of torture is attributed to the terrorist's sphere of responsibility, is true and if it has to be considered as if the terrorist has inflicted the pain upon himself, it would be difficult to speak about a violation of human dignity by the state, because the terrorist inflicts the pain upon himself. One cannot look upon him as an object, because he has it in his power to stop the act of torture and thus the pain as well. Thus, it is not an evil which is imposed on him by anyone else. Herein lies the difference between torture in the case of self-defence and other types of torture.

As we will see, it plays no role that the pain is caused by the torturous acts inflicted directly by the policeman. This will not hinder us to consider the terrorist responsible for his own pain. An indirect perpetrator is also responsible for an act as a perpetrator, although the act is directly "committed" by the "tool". The aim is to show that the terrorist can be considered as if he indirectly tortures himself and thus is responsible for the torture, which is done to him. At the first glance this sounds strange, but we will see that it is not.

To answer the question whether the terrorist themselves is responsible for the act of torture and the pain and whether the pain caused by the act of torture can be consid-

²²¹ Merkel, above n 41, 392.

ered as self-inflicted, one has to think about to whom the consequences of the act of self-defence (here it would be the consequences of the act of torture) are attributed.²²²

According to the principles of criminal law the acts and the consequences of acts of self-defence, which are necessary to stop an attack, are the attacker's responsibility. Normally, no law student thinks about this question or fact, because often it is irrelevant. The consequences of acts in self-defence concern the attacker and the effects on him (e.g. the attacker is hurt or killed by the act of self-defence). So the question does not arise, whether the attacker is criminally liable for the consequences of the acts in self-defence by fulfilling elements of an offence (besides the committed elements of an offence, which he has fulfilled by his attack).²²³ The reason is that self-inflicted injuries are not punishable.

The case of arranged self-defence, where three persons are involved, shows that the consequences of acts in self-defence are the attacker's responsibility: The complete overstrained father (F) wants to get rid of his mentally ill²²⁴ son (S). As he knows that S is very irascible, he tells him, that the neighbour (N) (he knows that N is well-appointed with weapons) mistreated his sister very cruelly. "Such persons should be stabbed." The mentally-ill, but strong S runs, armed with a knife to the neighbour and jumps at the neighbour to kill him. N was only capable of rescuing himself by shooting S dead.

F is guilty of an unlawful killing of his son S. Although F did not conduct the deadly act by himself, he is the perpetrator of a homicide – namely he killed his son as an indirect perpetrator because the deadly act of self-defence of N will be attributed to F. Simply because the father engineered the state of self-defence and he controlled the situation, as he set his mentally-ill (and therefore irresponsible) son on the neighbour and enabled N to kill his son (S) in a completely justified legal manner. Needless to say the act of self-defence (the killing of S) is also attributed to N, but as a justified act. Only F is guilty and responsible for S's death.²²⁵

These structures of attribution apply also in a case of self-defence, where only two persons are involved. That is to say, in a deadly self-defence the attacker intrinsi-

²²² Ibid, 390.

²²³ See also *ibid*, 390, 391.

²²⁴ Insane in terms of: The Crimes Act 1961, s 23; German Penal Code, § 20.

²²⁵ See Merkel, above n 41, 391.

legal perspective, is responsible for the act of torture and for the torments. This could speak against an exception to the torture prohibition.

- Is the hindrance of self-defence an objective participation in unjustness?

One can take a step further and claim that a prohibition of torture in the case of self-defence, also for the price of letting unlawful killings happen, means “de facto” a (at least “objective”) governmental aid in unjustness.⁴²⁹

The term “objective” means here that the *actus reus* of the aiding is fulfilled. Because it will be in all likelihood that the government lacks *mens rea* we speak only about an “objective” aid in unjustness. In Germany, where this approach has its origin, the *mens rea* is described with the term “subjective” elements of the offence, whereas the *actus reus* is described with “objective” elements of the offence. It is important to know that the criteria of attribution have nothing to do with the possibility to prosecute someone or to convict someone. Thus, the fact that a state cannot be prosecuted because only human beings can be prosecuted is irrelevant. Further more, for attribution the *mens rea* is not necessary. As said, the criteria of attribution are only used to determine the sphere of responsibility where the act can be attributed to. It is necessary to decide between an attribution on an objective level, where only the act is considered, and an attribution on the subjective level. Only for the latter would the *mens rea* be necessary. Because we differentiate between attribution on an objective and on a subjective level, we also differentiate between objective and subjective unjustness. Indeed, to penalise someone, objective and subjective unjustness is necessary. However, to determine someone’s responsibility as the origin of a later result, objective unjustness is sufficient. For example, if a car driver runs over a person on the street and he did not know that there was someone on the street, the death will be attributed to him because by driving the car he created a risk (a risk that someone could be run over) and this risk became reality in the person’s death. Though he will not be convicted because of the lack of *mens rea* does not make any difference to the fact that the car driver is objectively responsible for the death.

When the state (objectively) aids the unjustness of unlawful killings by the compliance of the international torture prohibition the question arises, whether it is legiti-

cally kills himself by the necessary act of self-defence. He commits only the objective criteria of a suicide as a kind of "indirect perpetration"²²⁶ To argue against the indirect perpetration, one could say that an indirect perpetration applies only to statutory forbidden acts and suicide is not a statutory forbidden act. A second argument against, could be that the attacker has no intention to kill himself. However, all this is irrelevant to the question of attribution. For the attribution of criminal acts it is not necessary to fulfil the complete elements of an offence.²²⁷ It is sufficient to fulfil only the *actus reus* without the *mens rea*. The question of attribution deals only with the question about the sphere of responsibility. By law the consequences of the deadly act are attributed to the attacker, and in this case the punishability is inapplicable, because you are allowed to kill yourself. In the case of the overstrained father it was not allowed to kill the son. However, it cannot make a difference as to the sphere of responsibility, but only to the question of punishability.

Thus, one arrives at the conclusion as follows: The indirect perpetrator (who is the attacker) is seen to have killed the person who was used as a "tool" through the attacked person (N), who acted in self-defence. Similarly in a two-person-scenario the direct perpetrator is seen to kill himself in a kind of indirect perpetration because the attacked person acts in self-defence. This reasoning is applied to the torture-case. The tortured person could be seen to torture himself.²²⁸

Thus, why should torture be prohibited, when the kidnapper inflicts the torture on himself? There is also no violation of human dignity inflicted by the state because it was considered as self inflicted. Therefore the terrorist is responsible for the violation of his own human dignity. He had it in his hand to stop this violation. Even more, he is legally obligated to stop it because he is obligated to give information about the hidden bomb. Thus, concerns as to a violation of human dignity are, from a legal perspective, causeless. This calls for an exception to the torture prohibition.

However, a normal citizen will not understand the criteria attribution and it seems to them as if the state considers torture as a good thing and thus the infliction of human dignity as legal and right. Citizens will only recognize the torments of the terrorist which are caused by the hand of the policeman, but they will not know who, from a

²²⁶ Ibid.

²²⁷ See also *ibid.*

²²⁸ *Ibid.*, 392.

mate that the state complies with the prohibition of torture. This could speak then for an exception to the torture prohibition.

Whether the state really (objectively) aids unlawful killings when it complies with the international torture prohibition and because of its compliance forbids the only helpful act, which is torture, can only be answered by considering the following question: "What do we attribute to anyone, who uses coercion to avert a for life-saving necessary act of self-defence by a third party? To find out the answer one has to put the absolute prohibition of torture on a level with the interruption of a rescuing causality. For this purpose we use the case as follows:²³⁰

A attacks B with a knife to kill him. X, who physically outclasses A, wants to put himself between both, to rescue B. When Y averts the rescue effort of X by aiming at X with a pistol and thereby threatens him to stop the rescue of B, then Y is a participant of the homicide of A. Here we assume that Y knows that A wanted to kill B and that Y wanted to stop X to make sure that A can kill B.

Henceforth one has to consider applying this structure of attribution to the cases of self-defence, where the only helpful act to rescue somebody is to torture the attacker (terrorist). One can bar the potential life-saver not only by threatening him with a pistol from rescuing an attacked person, but also with an imposition of a punishable torture prohibition.²³¹ When the state prohibits torture, then the state (in our case) makes it possible for the terrorist to withhold the life saving information that will kill hundreds of people. If the state had allowed the police to torture the terrorist, then the death of hundreds of people would have been averted by the police. Thus, the state could be seen to be objectively responsible of aiding in killing hundreds of people by following the international torture prohibition and by preventing the police from saving the people.²³² That the state has not the *mens rea* to kill the people is obvious, but it is not necessary to have *mens rea* for the attribution.

However, one could assert that it is forbidden for the state to torture somebody by international treaties and *jus cogens*, so the state behaves right by law, when they do

²²⁹ Ibid, 393; see Erb, above n 41, 27.

²³⁰ Case is also used by Merkel, above n 41, 394.

²³¹ See also *ibid*.

²³² See Erb, above n 41, 27.

not torture the attacker (= terrorist). Thus one cannot say that the state is a "participant" in an unlawful killing, because they behaved in a law-abiding way. However, according to all applicable concepts of states since the modern legal philosophy of *Hobbes*, it is the duty of a state to protect the right to life of its citizens. It is even the primary condition to legitimate the existence of a state as a system with authority. In this case the state omits not only to fulfil his obligations; but allies itself with the unjustness of an unlawful killing of human beings.

When the state objectively aids an unjust and unlawful killing by complying with the prohibition of torture, this compliance is illegitimate. This calls again for an exception to the torture prohibition.

(d) Intermediate result

Although it turned out that an exception to the torture prohibition from a legal perspective is tenable, the same reasons²³³ which speak against the necessity defence could consult here in a second step. Thus, a cost-benefit analysis goes against a state authorized torture. An exception to the torture prohibition in the case of self-defence in a "ticking bomb scenario" is therefore not recommended.

B Use of Torture for Preventative Reasons

The use of torture for preventative reasons, such as to obtain information about future terrorist attacks, cannot be based on the three abovementioned approaches. All three approaches demand imminent danger, and in cases, where torture is used for preventative reasons, the danger is not imminent. One could use other methods to find out information about future terrorist attacks, such as by normal investigations.²³⁴

C Intermediate Result

An exception to the prohibition of torture in international law could not be recommended for the future. Whereas the use of torture for preventative reasons has to be rejected from the outset as none of the three approaches applies because of the lack of

²³³ See above, VA2b, 38 f..

imminent danger, torture to hold off imminent danger would be tenable from a legal perspective, but has to be rejected as well because of the same concerns applied to the necessary defence, particularly slippery slope-effects.

However, it is in all likelihood that most people would use torture as a last resort in a "ticking bomb scenario". Who wants to die? Or can we expect that people acquiesce their death? Probably not. However, judges could make allowances for these facts in the degree of penalty. An allowance for the torturer's motive is preferable to exceptions to the torture prohibition from the outset. If torture is allowed from the outset, then the use of torture will get out of the hand. Moreover, the awareness of injustice gets lost as soon as the state breaks the taboo and legitimates torture under special circumstances.

Therefore it is recommended to impose not too high a sanction on a policeman who found himself in a "ticking bomb scenario" and who decided to use torture to save hundreds of lives. Maybe the court could also do without a penalty. However, precaution is recommended. A rash abdication of a penalty could lead to the impression that the state endorses the use of torture. The state has to make it clear that someone, who uses torture, has to face a court proceeding and a penalty. Only a court proceeding can clarify whether there was a dilemma situation and that the use of torture was indeed not justified but the matter can be closed with a mild penalty. This shows the society that torture is and remains prohibited. Thus, a policeman would think twice about using torture or not.

VI CONCLUSION

In the "war on terror", "national security interests may constitute a legitimate reason for sacrificing others interests, except for one uncompromising interest: the human right against torture"²³⁵. It turns out that the prohibition of torture in international law is a norm, which claims absoluteness, and from which no derogation is permissible under existing law. Also in times of the "war on terror" this should remain unchanged and for good reason: The attitude towards torture separates democracies from dictatorship and constitutional states from regimes of unjustness.²³⁶

To make sure that any future attempt to circumvent the torture prohibition is impossible, it is time that the European Court of Human Rights provides clear criteria to

²³⁴ See Cohan, above n 199, 1616.

²³⁵ Lim, above n 5, 84.

distinguish torture and other cruel, inhuman or degrading treatment or punishment. Furthermore one has to counter resolutely the requests for exceptions to the torture prohibition in particular situation. None of the discussed approaches was convincing in the end to allow torture even in exceptional cases. If torture is allowed in exceptional cases and thus institutionalized, it will "become the norm rather than the exception"²³⁷ and this would threaten the constitutional state as a whole.

²³⁶ Bruha and Steiger, above n 97, 49.

²³⁷ Cohan, above n 199, 1614.

Bibliography

I PRIMARY SOURCES

A Legislation

- African Charter on Human and People's Rights (27 June 1981) 1520 UNTS 217.
- American Convention on Human Rights (21 November 1969) 1144 UNTS 123.
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85.
- Convention Respecting the Laws and Customs of War on Land (18 October 1907).
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (26 November 1987) ETS 126, 27 ILM 1152.
- European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 221.
- Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 75 UNTS 31.
- Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949) 75 UNTS 85.
- Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 UNTS 287.
- Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949) 75 UNTS 135.
- German Penal Code.
- Inter-American Convention to Prevent and Punish Torture (9 December 1985) OASTS 67, 25 ILM 519.
- International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171.
- Islamic Declaration on Human Rights 21 Dhul Qaidah 1401 (19 September 1991).
- O.I.C. Resolution 49/19-P (5 August 1990).
- The Crimes Act 1961.
- UNGA Resolution 217 A (III) (10 December 1948).
- UNGA Resolution 3452 (XXX) (09 December 1975).

UNSC Resolution (12 September 2001) S/RES/1368/2001.

UNSC Resolution (28 September 2001) S/RES/1373/2001.

UNSC Resolution (14 November 2001) S/RES/1378/2001.

Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331.

B Cases

BVerfGE 18, 441.

Denmark et al. v Greece (1969) 12 Yearbook of the European Convention on Human Rights 186.

Ireland v United Kingdom [1978] ECHR 5310/71.

LG Frankfurt/M [2005] NJW 692 (“Daschner”).

R. v Williams (1987) 3 All E.R. 411.

R. v Beckford (1987) 3 All E.R. 425.

The Prosecutor v Anto Furundzija (Judgment) (10 December 1998) IT-95-17/1-T (Trial Chamber, ICTY); available at: www.un.org/icty/furundzija/trialc2/judgement/index.htm (last accessed: 11 May 2008)

II SECONDARY SOURCES

A Text Books

1 Common Law Countries

Aust, Anthony *Handbook of International Law* (Cambridge University Press, Cambridge, 2005).

Bernhardt, Rudolf “Customary International Law” in Bernhardt, Rudolf (ed) *Encyclopaedia of Public International Law* (Vol. 1, North Holland, Amsterdam, 1992) 898.

Boulesbaa, Ahcene *The U.N. Convention on Torture and the Prospects for Enforcement* (Martinus Nijhoff Publishers, The Hague, 1999).

Burgers, J. Herman and Danelius, Hans *The United Nations Convention against Torture* (Martinus Nijhoff Publishers, Dordrecht, 1988).

Conte, Alex *An Introduction to International Law* (LexisNexis NZ Limited, Wellington, 2006).

- Dershowitz, Alan "Tortured Reasoning" in Levinson, Sanford (ed) *Torture – A Collection* (Oxford University Press, Oxford, 2004) 257.
- Dershowitz, Alan *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (Yale University Press, New Haven, 2002).
- Frohwein, Jochen Abr. "Jus Cogens" in Bernhardt, Rudolf (ed) *Encyclopaedia of Public International Law* (Vol. 3, Elsevier, Amsterdam, 1997) 65.
- Gur-Arye, Miriam "Can the War against Terror Justify the Use of Force in Interrogations? Reflection in Light of the Israeli Experience" in Levinson, Sanford (ed) *Torture: A Collection* (Oxford University Press, Oxford, 2004) 183.
- Kühner, Rolf "Torture" in Bernhardt, Rudolf (ed) *Encyclopaedia of Public International Law* (Vol. 4, Elsevier, Amsterdam, 2000) 868.
- Orakhelashvili, Alexander *Peremptory Norms in International Law* (Oxford University Press, Oxford, 2006).
- Posner, Richard A. "Torture, Terrorism, and Interrogation" in Levinson, Sanford (ed) *Torture: A Collection* (Oxford University Press, Oxford, 2004) 291.
- Shaw, Malcom N. *International Law* (4th ed, Cambridge University Press, Cambridge, 1997).
- Shaw, Malcom N. *International Law* (5th ed, Cambridge University Press, Cambridge, 2003).
- Williams, Glanville *The Sanctity of Life and the Criminal Law* (Knopf, New York, 1957).

2 Germany/Switzerland

- Bruha, Thomas and Steiger, Dominik *Das Folterverbot im Völkerrecht* (Kohlhammer, Stuttgart, 2006).
- Frowein, Jochen Abr. and Peukert, Wolfgang, *EMRK-Kommentar* (2nd ed, N.P. Engel Verlag, Arlington, 1996).
- Ipsen, Knut *Völkerrecht* (5th ed, C.H.Beck, Munich 2004).
- Kühl, Kristian *Strafrecht Allgemeiner Teil* (5th ed, Vahlen Verlag, Munich, 2005).
- Merkel, Reinhard "Folter und Notwehr" in Pawlik, Michael and Zaczyk, Rainer (ed) *Festschrift für Günther Jakobs* (Carl Heymanns Verlag, Munich, 2007) 375.
- Raess, Markus *Der Schutz vor Folter im Völkerrecht* (Schulthess Polygraphischer Verlag, Zurich, 1989).
- Roxin, Claus "Rettungsfolter?" in Griesbaum, Rainer et al. (ed) *Festschrift für Kay Nehm* (Berliner Wissenschaftsverlag, Berlin, 2006) 205.

B Journal Articles

1 Common Law Countries

- Bialke, Joseph P. "Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict" (2004) 55 A.F. L. Rev. 1.
- Bradley, Curtis A. and Goldsmith, Jack L. "Customary International Law as Federal Common Law: A Critique of the Modern Position" (1997) 110 Harv. L. Rev. 815.
- Christenson, Gordon A. "Jus Cogens: Guarding Interests Fundamental to International Society" (1988) 28 Va. J. Int'l L. 585.
- Cohan, John Alan "Torture and the Necessity Doctrine" (2007) 41 Val. U.L. Rev. 1587.
- Cohen, Barak "Democracy and the Mis-rule of Law: The Israeli Legal System's Failure To Prevent Torture in the Occupied Territories" (2001) 12 Ind. Int'l & Comp. L. Rev. 75.
- Decker, Joshua A. "Is the United States Bound by the Customary International Law of Torture? A Proposal for ATS Litigation in the War on Terror" (2006) 6 Chi. J. Int'l L. 803.
- Dershowitz, Alan M. "The Torture Warrant: A Response to Professor Strauss" (2003/2004) 48 N.Y.L. Sch. L. Rev. 275.
- De Vos, Christian M. "Mind the Gap: Purpose, Pain, and the Difference between Torture and Inhuman Treatment" (2007) 14 Hum. Rts. Br. 4.
- de Wet, Erika "The Prohibition of Torture as an International Norm of Jus Cogens and its Implications for National and Customary Law" (2004) 15 EJIL 97.
- Dubinsky, Paul R. "Human Rights Law Meets Private Law Harmonization: The Coming Conflict" (2005) 30 Yale J. Int'l L. 211.
- Gross, Emanuel "Legal Aspects of Tackling Terrorism: The Balance between the Right of a Democracy to Defend Itself and the Protection of Human Rights" (2001) 6 UCLA J. Int'l L. & For. Aff. 89.
- Kadish, Sanford H. "Torture, the State and the Individual" (1989) 23 Isr. L. Rev. 345.
- Kahgan, Carin "Jus Cogens and the Inherent Right to Selfdefence" (1997) 3 ILSA J. Int'l & Comp L. 767.
- Klein, David F. "A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts" (1988) 13 Yale J. Int'l L. 332.
- Kremnitzer, Mordechai "The Landau Commission Report - Was the Security Service Subordinated to the Law, or the Law to the "Needs" of the Security Service?" (1989) 23 Isr. L. Rev. 216.

- Lim, Miri "Redefining Torture in the Age of Terrorism: An Argument Against the Dilution of Human Rights" (2006) 13 Wash. & Lee J. Civil Rts. & Soc. Just. 83.
- Luban, David "Liberalism, Torture and the Ticking Bomb" (2005) 91 Va. L. Rev. 1425.
- Moher, Andrew A. "The Lesser of Two Evils?: An Argument for Judicially Sanctioned Torture in a Post-9/ 11 World" (2004) 26 T. Jefferson L. Rev. 469.
- Nowak, Manfred "What Practices Constitute Torture?: US und UN Standards" (2006) 28 Hum. Rts. Q 809.
- O'Rourke, Anne et al "Torture, Slippery Slopes, Intellectual Apologists, and Ticking Bombs: An Australian Response to Bagaric and Clarke" (2005) 40 U.S.F.L. Rev. 85.
- Rouillard, Louis-Phillipe F. "Misinterpreting the Prohibition of Torture Under International Law: The Office of Legal Counsel Memorandum" (2005) 21 Am. U. Int'l L. Rev. 9.
- Schechter, Rebecca B. "Intentional Starvation as Torture: Exploring the Gray Area between Ill-Treatment and Torture" (2003) 18 Am. U. Int'l L. Rev. 1233.
- Stephens, Pamela J. "A Categorical Approach to Human Rights Claims: Jus Cogens as a Limitation on Enforcement" (2004) 22 Wis. Int'l. L. J. 245.
- Strauss, Marcy "The Lessons of Abu Ghraib" (2005) 66 Ohio St. L.J. 1269.
- Strauss, Marcy "Torture" (2003/2004) 48 N.Y.L. Sch. L. Rev. 201.
- Sung, Chanterelle "Book Review: Torturing the Ticking Bomb Terrorist: An Analysis of Judicially Sanctioned Torture in the Context of Terrorism: Why Terrorism Works: Understanding the Threat, Responding to the Challenge. By Alan Der-showitz" (2003) 23 B.C. Third World L.J. 193.
- Turpel, Mary E. and Sand, Phillippe "Peremptory International Law and Sovereignty: Some Questions" (1988) 3 Conn. J. Int'l L. 364.
- van der Vyver, Johan D. "Torture as Crime under International Law" (2003) 67 Alb. L. Rev. 427.

2 *Germany*

- Bartelt, Dawid Danilo and Muggenthaler, Ferdinand "Das Rendition-Programm der USA und die Rolle Europas" (2006) 36 APuZ 31.
- Volker Erb "Nothilfe durch Folter" [2005] Jura 24.
- Nowak, Manfred "Das System Guantanamo" (2006) 36 APuZ 23.

C Other Secondary Sources

Drogin, Bob and Miller, Greg "Spy Agencies Facing Questions of Tactics" (28 October 2001) L.A. TIMES, Los Angeles § 1, at 1.

Priest, Dana and Gellman, Barton "U.S. Decries Abuse but Defends Interrogations: 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities" (26 December 2002) *Washington Post*, Washington A01.

III ELECTRONIC SOURCES

Amnesty International

"USA: Deporting for Torture?" (14 November 2003) Press Release; available at: <http://web.amnesty.org/library/index/engamr511392003> (last accessed: 09 May 2008).

Bybee Memorandum

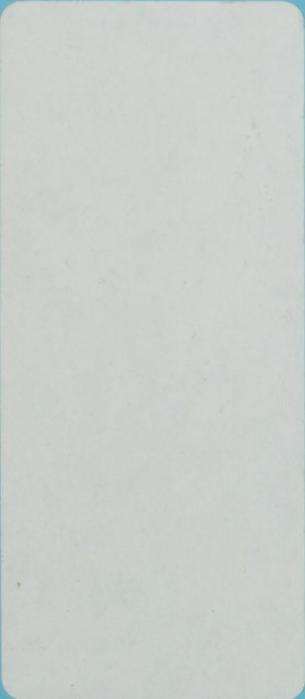
Memorandum from U.S. Dept. of Justice, Counsel to the President, Office of the Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A (1 August 2002), available at www.washingtonpost.com/wp-srv/politics/documents/cheney/torture_memo_aug_2002.pdf (last accessed: 09 May 2008).

Levin Memorandum

Memorandum from Daniel Levin, Acting Assistant Attorney General, U.S. Dep't of Justice, to James B. Covey, Deputy Attorney Gen., U.S. Dep't of Justice, Regarding Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (30 December 2004) [Levin Memorandum]; available at www.usdoj.gov/olc/18usc23402340a2.htm (last accessed 11 May 2008).

"Rebuilding Afghanistan – Peace and Stability" (2 December 2002), available at: www.unama-afg.org/nonUN%20Docs/InternationConferences&Forums/BonnTalks/final%20communique%20%20dec%202002.pdf (last accessed 09 May 2008).

"September 11, 2001 Victims", available at: www.september11victims.com/september11victims/victims_list.htm. (last accessed 10 May 2008).



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