

Lars Michels

The Prohibition of Torture under International Law  
and the "War on Terror"

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The paper concludes that the prohibition of torture has developed into a peremptory norm of international law and that the interrogation techniques applied in the "War on Terror" are not only a form of cruel, inhuman or degrading treatment, but amount to torture. It argues that recent attempts to justify torture of alleged terrorists must be rejected for two reasons: a deviation from the absolute ban on torture will bring it to a "slippery slope". Moreover, the very ideas of democracy, human rights, and the rule of law are endangered through their selective application by the United States in the "War on Terror". Regarding prevention and enforcement the paper suggests strengthening the position of the Special Rapporteur on Torture and non-governmental organisations, as they are the only ones which are able to address urgent crisis and to prevent acts of torture and cruel, inhuman and degrading treatment effectively.

Word length: 15,796 words

Abstract PROHIBITION

This paper examines whether the interrogation techniques applied in the “War on Terror” against alleged terrorists at Abu Ghraib prison, Guantanamo Bay and elsewhere amount to torture. It also analyses the practice of “extraordinary renditions” by which people suspected of links to terrorists are secretly transported to countries other than the United States bypassing extradition procedures and legal formalities. Furthermore, the focus is on recent attempts to justify torture of alleged terrorists under certain clear-cut circumstances. Finally international enforcement mechanisms are analysed.

The paper concludes that the prohibition of torture has developed into a peremptory norm of international law and that the interrogation techniques applied in the “War on Terror” are not only a form of cruel, inhumane or degrading treatment, but amount to torture. It argues that recent attempts to justify torture of alleged terrorists must be rejected for two reasons: A deviation from the absolute ban on torture will bring us on a “slippery slope”. Moreover, the very ideas of democracy, human rights, and the rule of law are endangered through their selective application by the United States in the “War on Terror”. Regarding prevention and enforcement the paper suggests strengthening the position of the Special Rapporteur on Torture and non-governmental organisations, as they are the only ones which are able to address urgent crisis and to prevent acts of torture and cruel, inhumane and degrading treatment efficiently.

Word length: 15,796 words

## I INTRODUCTION

The “War on Terror” and the treatment of alleged terrorists by the United States in Guantanamo Bay and elsewhere gave new actuality to issues surrounding the treatment of prisoners under international law.

Just recently a hand-written letter by Moazzam Begg, one of the detainees at Guantanamo Bay, got declassified by the United States and cited in several newspapers. In it, Begg wrote:

During several interviews ... I was subjected to pernicious threats of torture, actual vindictive torture and death threats – amongst other coercively employed interrogation techniques. ... In this atmosphere of severe antipathy towards detainees was the compounded use of racially and religiously prejudicated taunts.<sup>1</sup>

The newspaper articles were titled “Guantanamo Briton Tells of Torture and Death Threats”,<sup>2</sup> “Briton Held at Cuba Base Cites Torture,”<sup>3</sup> “Americans Tortured Me.”<sup>4</sup>

Another issue is the draft of the 9/11 Recommendations Implementation Act. In it the United States government has officially scripted its policy known as “extraordinary rendition”, a process by which American authorities can circumvent their own restraints on interrogations by sending suspects to countries known to employ harsh interrogation tactics.<sup>5</sup>

Finally, 9/11 attacks raised the question whether torture must be permissible under certain circumstances.<sup>6</sup>

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<sup>1</sup> Lizette Alvarez “Briton Held at Cuba Base Cites Torture” (2 Oct 2004) *The New York Times* New York 12; Matthew Beard “Guantanamo Briton Tells of Torture And Death Threats” (2 Oct 2004) *The Independent* London 26.

<sup>2</sup> Matthew Beard above n1, 26.

<sup>3</sup> Lizette Alvarez above n1, 12.

<sup>4</sup> Sophie Blakemore “Americans Tortured Me” (2 Oct 2004) *Birmingham Post* Birmingham 2.

<sup>5</sup> Michelle Shephard “U.S. bill backs deportation of suspects to nations using torture; White House endorses proposal to allow U.S. intelligence officials to circumvent their own restraints on interrogation suspects” (1 Oct 2004) *Toronto Star* Toronto 12.

<sup>6</sup> Alan M. Dershowitz “Why Terrorism Works – Understanding the Threat, Responding to the Challenges” (1ed, Yale University Press, New Haven and London, 2002) 131-163.

However, it has to be noted that issues surrounding torture during interrogations of suspected terrorists are neither new nor a specific post 9/11 phenomenon. The State of Israel and its ongoing fight against terrorists is only one example, that the legal issues surrounding the application of torture against alleged terrorists have been discussed long before 9/11 attacks.

Thus, the questions which need to be addressed in this paper are: Do the interrogation techniques applied in the "War on Terror" against alleged terrorists amount to torture? What protections have alleged terrorists under international law? Does it make a difference whether they are prisoners of war or "unlawful combatants"? Are there any international restraints on wilfully extraditing detainees to countries in order to apply "more effective" interrogation methods? What are the legal consequences of torture under international law? What are the factual circumstances, which might trigger the legality of torture? Are the proposed legal justifications convincing? How is the ban on torture enforced?

In order to find answers this paper is structured as follows: Part one outlines some of the frequently used interrogation techniques and provides a factual background for the legal analysis. Part two examines whether the ban on torture has reached the status of a peremptory norm of international law. It furthermore analyses the definition of torture and its current application by international human right bodies and examines whether the interrogation techniques used in the "War on Terror" amount to torture. Subsequently, the focus is on recent attempts to justify torture of alleged terrorists under certain clear-cut scenarios. Finally, the legal consequences of torture will be analysed and discussed whether domestic or international enforcement mechanisms are sufficient?

This paper concludes that the prohibition of torture has developed into a peremptory norm of international law and argues that the interrogation techniques used at Abu Graib prison, as well as Guantanamo Bay amount to torture. The paper rejects recent attempts to justify torture of alleged terrorists, as they will lead onto a "slippery slope", undermine the status of the prohibition of torture as a peremptory norm of international law and last but not least weaken the position of States in the "War on Terror". Finally it shows that international attempts to combat torture are insufficient to protect individuals from torture and that enforcement mechanisms have to be enhanced.



Especially the role of the Special Rapporteur on Torture and non-governmental organisations have to be strengthened as their focus is primarily on the prevention of torture.

## II INTERROGATION TECHNIQUES

As stated above, people have a different understanding of what interrogation methods amount into torture. Before it is possible to start a legal analysis of the contentious issues surrounding torture it is necessary to gain a factual background about the different interrogation techniques at issue. In order to guarantee a high level of certainty regarding the facts, the methods described have been taken from case law or reports of Human Right Bodies.<sup>7</sup> As the relevant jurisprudence will be discussed at length in the Chapter regarding the definition of torture, the Courts' decisions will be only stated briefly and without further analysis. With regards to torture allegations in the "War on Terror" the focus is on abuses in the Abu Ghraib prison, the treatment of alleged terrorists at Guantanamo Bay and the recent practice known as extraordinary renditions.

In the *Greek Case* the Commission on Human Rights (CHR) examined several interrogation techniques which were used by the Greek government after the revolution of 21 April 1967.<sup>8</sup> The commonest form of ill treatment was called *falanga*. *Falanga* is defined as "the beating of the foot with a wooden or metal stick or bar, which, if skilfully done, breaks no bones, makes no skin lesions and leaves no permanent and recognisable marks but causes intense pain and swelling of the feet."<sup>9</sup>

The *Greek Case* also described "non-physical" torture and defined it as "the infliction of mental suffering by creating a state of anguish and stress by means other than bodily assault."<sup>10</sup> It defined several categories: category one covers the intimidation and humiliation of an individual in order to destroy his will and conscience including mock executions, threats of death<sup>11</sup> and acts of humiliation.<sup>12</sup> A second

<sup>7</sup> For example the Commission on Human Rights (CHR) or the Human Rights Committee.

<sup>8</sup> The *Greek Case* 12 Yearbook of the European Convention on Human Rights (1969) (hereinafter *Greek Case*) 186-510.

<sup>9</sup> *Greek Case* 12 Yearbook (1969) 499.

<sup>10</sup> *Greek Case* 12 Yearbook (1969) 461.

<sup>11</sup> *Greek Case* 12 Yearbook (1969) 461-462: One witness stated that the police officers threatened him to throw him out of the window in a room situated on the fourth floor of the building. Another one

category includes attacks on prisoner's feelings for other persons, for example friends and relatives.<sup>13</sup>

In *Estrella v. Uruguay*<sup>14</sup> the Argentinian pianist Miguel Angel Estrella, who was detained in Uruguay in 1977 described the following interrogation techniques to which he was subject: "The torture consisted of electric shocks, beatings with rubber truncheons, punches and kicks, hanging up with our hands tied behind our backs, pushing us into water until we nearly asphyxiated, making us stand with legs apart and arms raised for up to 20 hours."<sup>15</sup> He also complained about mental torture which

[C]onsisted chiefly in threats of torture or violence to relatives or friends, or of dispatch to Argentina to be executed, in threats of making us witness to torture of friends.... In my own case, their point of concentration was my hands. For hours upon end, they put me through a mock amputation with an electric saw, telling me 'We are going to do the same to you as Victor Jara'.<sup>16</sup> Amongst the effects from which I suffer as a result were a loss of sensitivity in both arms and hands for eleven months, discomfort that still persists in the right thumb, and severe pain in the knees.<sup>17</sup>

The Human Rights Committee decided that Estrella was subject to torture during his first days of detention in violation of Article 7 International Covenant on Civil and Political Rights.<sup>18</sup>

A very detailed description of a combination of several interrogation techniques is provided in *Ireland v. United Kingdom*.<sup>19</sup> The European Court of Human Rights

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was taken into a forrest, blindfolded and told by the police officers that he would be executed. Later, during interrogation, Police officers threatened him with guns and fired shots near him.

<sup>12</sup> *Greek Case 12 Yearbook* (1969) 462-463: Witnesses were insulted or forced to self-humiliation. Police officers said to a woman who informed them of her pregnancy: "Who cares about that? It will be another person like you, it is better not to have it." Another person stated in his testimony that, after he has fainted and vomited from the effects of the torture, the police officers rubbed his head into the vomit. A woman was threatened that she would be undressed unless she spoke.

<sup>13</sup> *Greek Case 12 Yearbook* (1969) 464. A witness confessed that, while being interrogated, she was told that it only depended on whether her husband, her brother and others would be executed. As a result of this she tried to commit suicide and had then to be taken into a hospital. Other witnesses were threatened to torture relatives and friends in their presence.

<sup>14</sup> *Estrella v. Uruguay*, Report of the Human Rights Committee, Communication No. 74/1980, U.N. Doc. CCPR/C/OP/2 at 93 (1990) <<http://www1.umn.edu>> (last accessed 9 Oct 2004) (hereinafter *Estrella v. Uruguay*).

<sup>15</sup> *Estrella v. Uruguay* above n14, para 1.6.

<sup>16</sup> "A well known Chilean singer and guitarist who was found dead with hands completely smashed at the end of September 1973 in a stadium in Santiago de Chile." Cited in *Estrella v. Uruguay* above n14, para 1.6, footnote 3.

<sup>17</sup> *Estrella v. Uruguay* above n14, para 1.6.

<sup>18</sup> *Estrella v. Uruguay* above n14, para 10.

(ECHR) had to examine certain sensory deprivation techniques applied by security forces in Northern Ireland as means of obtaining information from detainees of suspected terrorist activities. The interrogation techniques consisted of "wall standing",<sup>20</sup> "hooding",<sup>21</sup> "subjection of noise",<sup>22</sup> "deprivation of sleep",<sup>23</sup> and deprivation of food and drink during interrogations.<sup>24</sup>

The ECHR held that the use of the five techniques constituted a practice of inhumane and degrading treatment,<sup>25</sup> but did not constitute a practice of torture within the meaning of Article 3 European Convention on Human Rights and Fundamental Freedoms.<sup>26</sup> It argued that the physical and mental pain and suffering inflicted was not "severe" and thereby did not pass the borderline between cruel, inhumane or degrading treatment and torture.<sup>27</sup>

In *Committee Against Torture v. Israel* the Israeli Supreme Court (ISC) had to examine interrogation methods applied by the Israeli General Security Service (GSS), which have been used in interrogations of alleged Palestinian terrorists.<sup>28</sup> The methods involved "shaking of the detainees body",<sup>29</sup> holding someone in the "Shabach"

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<sup>19</sup> *Ireland v. United Kingdom* (1978) (European Court of Human Rights) (hereinafter *Ireland v. United Kingdom*) <<http://www.echr.coe.int>> (last accessed 24-09-2004).

<sup>20</sup> The court describes "wall standing" as forcing the detainees to remain for periods of some hours in a "stress position", described by those who underwent it as being "spread-legged against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers". *Ireland v. United Kingdom* above n19, para 96.

<sup>21</sup> "Hooding" is described as putting a black or navy coloured bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation. *Ireland v. United Kingdom* above n19, para 96.

<sup>22</sup> The court describes "subjection of noise" as pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise. *Ireland v. United Kingdom* above n19, para 96.

<sup>23</sup> *Ireland v. United Kingdom* above n19, para 96.

<sup>24</sup> "Deprivation of food and drink" is described as subjecting the detainees to a reduced diet during their stay at the centre and pending interrogations. *Ireland v. United Kingdom* above n19, para 96.

<sup>25</sup> *Ireland v. United Kingdom* above n19, para 246.

<sup>26</sup> *Ireland v. United Kingdom* above n19, para 246.

<sup>27</sup> *Ireland v. United Kingdom* above n19, para 167. The decision will be discussed at length at III C 1, 3.

<sup>28</sup> *Committee Against Torture in Israel v. The State of Israel* (6 Sept 1999) HCJ 5100/94 (Supreme Court of Israel) (hereinafter *Committee Against Torture v. Israel*) <<http://www.court.gov.il>> (last accessed 01 Oct 2004).

<sup>29</sup> "The method is defined as the forceful and repeated shaking of the suspect's upper torso, in a manner which causes the neck and head to swing rapidly. According to an expert opinion submitted in HCJ 5584/95 and HCJ 5100/95, the shaking method is likely to cause serious brain damage, harm the spinal cord, cause the suspect to lose consciousness, vomit and urinate uncontrollably and suffer serious headaches." *Committee Against Torture v. Israel* above n28, para 9.

position,<sup>30</sup> forcing detainees being interrogated into “frog crouch”<sup>31</sup> and “sleep deprivation”.<sup>32</sup> In its ruling the ISC found them to be illegal but did not comment on whether they amounted to torture or not.<sup>33</sup>

In *Loayza Tamaro* the Inter-American Court of Human Rights had to examine the treatment of María Elena Loayza-Tamayo. The Court examined *inter alia* the following interrogation techniques: incommunicado detention, being exhibited through the media wearing a degrading garment, solitary confinement in a tiny cell with no natural light, blows and maltreatment, including total immersion in water, intimidation with threats of further violence and a restrictive visiting schedule.<sup>34</sup> It held unanimously that Peru violated Article 5 of the Inter-American Convention on Human Rights<sup>35</sup> as the treatment constituted forms of cruel, inhuman or degrading treatment.<sup>36</sup>

Turning onto recent developments in the “War on Terror” the Abu Ghraib incident is an example abuse of prisoners of war. After reports of abuse of the Iraqi detainees accompanied by extremely shocking photo footage in various newspapers General Tabuga was appointed to conduct a military investigation on the issue.<sup>37</sup> The Tabuga report lists several forms of abuse committed by members of the military police against the Iraqi which are supported by written suspect, witness and detainee

<sup>30</sup> “A suspect investigated under the “Shabach” position has his hands tied behind his back. He is seated on a small and low chair, whose seat is tilted forward, towards the ground. One hand is tied behind the suspect, and placed inside the gap between the chair’s seat and back support. His second hand is tied behind the chair, against its back support. The suspect’s head is covered by a sack that falls down to his shoulders. Loud music is played in the room. According to the briefs submitted, suspects are detained in this position for a long period of time, awaiting interrogation.” *Committee Against Torture v. Israel* above n28, para 10.

<sup>31</sup> “According to the petition, the suspect was interrogated in a “frog crouch” position. This refers to consecutive, periodical crouches on the tips of one’s toes, each lasting for five minute intervals.” *Committee Against Torture v. Israel* above n28, para 11.

<sup>32</sup> “Petitioners complained of being deprived of sleep as a result of being tied in the “Shabach” position, while subject to the playing of loud music, or of being subjected to intense non-stop interrogations without sufficient rest breaks. They claim that the purpose of depriving them of sleep is to cause them to break from exhaustion.” *Committee Against Torture v. Israel* above n28, para 13.

<sup>33</sup> *Committee Against Torture v. Israel* above n28, para 3. The ruling will be discussed at IV A 1 regarding the necessity defence as a source of authority for the State as well as its application as a criminal defence for the state official who has used illegal interrogation techniques.

<sup>34</sup> *Loayza Tamaro* Case (17 Sept 1997) (Inter-American Court of Human Rights) (hereinafter *Loayza Tamaro*) <<http://www.corteidh.or.cr>> (last accessed 04 Oct 2004) para 58.

<sup>35</sup> Inter-American Convention to Prevent and Punish Torture (18 Feb 1987) OAS Treaty Series No. 67 (hereinafter Inter-American Convention) <<http://wwwserver.law.wits.ac.za>> (last accessed 9 Oct 2004).

<sup>36</sup> *Loayza Tamaro* above n34, para 58.

<sup>37</sup> Article 15-6 Investigation of the 800th Military Police Brigade, Tabuga Report (14 March 2004) (hereinafter Tabuga Report).

statements, photographic pictures,<sup>38</sup> as well as reports of detainees and other witnesses.<sup>39</sup> The detailed report mentions *inter alia*

Punching, slapping, and kicking detainees; jumping on their naked feet; ... Forcibly arranging detainees in various sexually explicit positions for photographing; Forcing detainees to remove their clothing and keeping them naked for several days at a time; ... Forcing groups of male detainees to masturbate themselves while being photographed and videotaped; ... Arranging naked male detainees in a pile and then jumping on them; ... Positioning a naked detainee on a Box, with a sandbag on his head, and attaching wires to his fingers, toes, and penis to simulate electric torture; ... Placing a dog chain or strap around a naked detainee's neck and having a female Soldier pose for a picture; A male MP guard having sex with a female detainee; Using military working dogs (without muzzles) to intimidate and frighten detainees, and in at least one case biting and severely injuring a detainee.<sup>40</sup>

Regarding alleged terrorists detained at Guantanamo Bay and Bagram air base the factual background is less clear. This factual uncertainty is due to the fact that the detainees are held in incommunicado detention in unknown places.<sup>41</sup> However, there have been newspaper reports that the United States applies a couple of different interrogation techniques called "stress and duress". During their interrogation detainees "are sometimes kept standing or kneeling for hours in black hoods or spray-painted goggles. ... At times they are held in awkward, painful positions and deprived of sleep with a 24-hour bombardment of lights."<sup>42</sup> There have been also allegations that suspected terrorists shortly after being arrested were beaten up or thrown into walls, in addition to binding them in painful positions and depriving them of sleep.<sup>43</sup>

In addition the Working Group Report of the United States Ministry of Defence approved thirty five interrogation techniques for the use with "unlawful combatants"

<sup>38</sup> Tabuga Report above n34, 17.

<sup>39</sup> The Tabuga Report concludes that those allegations are credibly based on the clarity of their statements and supporting evidence by other witnesses. Tabuga Report above n34, 17.

<sup>40</sup> Tabuga Report above n34, 16-17.

<sup>41</sup> Amnesty International "Annual Report 2004 - USA" (2004) <<http://www.amnesty.org>> (last accessed 12 Nov 2004); Amnesty International "United States of America - The Threat of a Bad Example - Undermining International Standards as 'War on Terror' Detentions Continue" <<http://www.amnesty.org>> (last accessed 12 Nov 2004).

<sup>42</sup> Amnesty International "Annual Report 2004 - USA" <<http://www.amnesty.org>> (last accessed 12 Nov 2004); Amnesty International "Iraq: Memorandum on Concerns Relating to Law and Order" (23 July 2003) MDE 14/157/2003 <<http://www.amnesty.org>> (last accessed 12 Nov 2004); John T. Parry "What Is Torture, Are We Doing It, And What If We Are?" (2003) 64 U Pitt L Rev 237, 250.

<sup>43</sup> *The Economist U.S. Edition* "Ends, Means and Barbarity - Torture" (11 January 2003) Special Report 1.

outside the United States. on 4 April 2003<sup>44</sup> The techniques include *inter alia*: “Hooding,<sup>45</sup> dietary manipulation,<sup>46</sup> environmental manipulation,<sup>47</sup> sleep adjustment,<sup>48</sup> false flag,<sup>49</sup> threat to transfer,<sup>50</sup> isolation, prolonged interrogation,<sup>51</sup> forced grooming, prolonged standing, sleep deprivation,<sup>52</sup> physical training, face slap/ stomach slap,<sup>53</sup> removal of clothing,<sup>54</sup> increasing anxiety by use of aversions.”<sup>55</sup> Moreover, the report suggests the combination of those techniques and states that the techniques described may vary in reality.<sup>56</sup>

Another practice which raises concerns is called “extraordinary rendition”. According to the Washington Post, the United States’ government has secretly

<sup>44</sup> Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations (4 April 2003) (hereinafter Working Group Report) <<http://www.gwu.edu>> (last accessed 4 Oct 2004). 61-71.

<sup>45</sup> “Hooding: This technique is questioning the detainee with a blindfold in place. For interrogation purposes, the blindfold is not on other than during interrogation.” Working Group Report above n44, 64.

<sup>46</sup> “Dietary Manipulation: Changing the diet of a detainee; no intended deprivation of food or water; no adverse medical or cultural effect and without intent to deprive subject of food or water, e.g., hot rations to MREs.”

<sup>47</sup> “Environmental Manipulation: Altering the environment to create moderate discomfort (e.g., adjusting temperature or introducing an unpleasant smell). Conditions would not be such that they would injure the detainee. Detainee would be accompanied by interrogator at all times.” Working Group Report above n44, 64.

<sup>48</sup> “Sleep Adjustment: Adjusting the sleeping times of the detainee (e.g., reversing sleep cycles from night to day.) This technique is NOT sleep deprivation.” Working Group Report above n44, 64.

<sup>49</sup> “False Flag: Convincing the detainee that individuals from a country other than the United States are interrogating him”. Working Group Report above n44, 64.

<sup>50</sup> “Threat of Transfer: Threatening to transfer the subject to a 3rd country that subject is likely to fear would subject him to torture or death. (The threat would not be acted upon, nor would the threat include any information beyond the naming of the receiving count’y.)” Working Group Report above n44, 64.

<sup>51</sup> “Prolonged Interrogation: The continued use of a series of approaches that extent over a long period of time (e.g. 20 hours per day per interrogation).” Working Group Report above n44, 64.

<sup>52</sup> “Sleep Deprivation: Keeping the detainee awake for an extended period of time. (Allowing individual to rest briefly and then awakening him, repeatedly.) Not to exceed 4 days in succession.” Working Group Report above n44, 65.

<sup>53</sup> “Face slap/ Stomach slap: A quick glancing slap to the fleshy part of the cheek or stomach. These techniques are used strictly as shock measures and do not cause pain or injury. They are only effective if used once or twice together. After the second time on a detainee, it will lose the shock effect. Limited to two slaps per application; no more than two applications per interrogation.” Working Group Report above n44, 65.

<sup>54</sup> “Removal of Clothing: Potential removal of all clothing; removal to be done by military police if not agreed to by the subject. Creating a feeling of helplessness and dependence. This technique must be monitored to ensure the environmental conditions are such that this technique does not injure the detainee.” Working Group Report above n44, 65.

<sup>55</sup> “Increasing Anxiety by Use of Aversions: Introducing factors that of themselves create anxiety but do not create terror or mental trauma (e.g., simple presence of dog without directly threatening action). This technique requires the commander to develop specific and detailed safeguards to insure detainee’s safety.” Working Group Report above n44, 65.

<sup>56</sup> “While techniques are considered individually within this analysis, it must be understood that in practice, techniques are usually used in combination; the cumulative effect of all techniques to be employed must be considered before any decisions are made regarding approval for particular situations. The title of a particular technique is not always fully descriptive of a particular technique.” Working Group Report above n44, 62

transported dozens of people suspected of links to terrorists to countries other than the United States bypassing extradition procedures and legal formalities, according to Western diplomats and intelligence sources.<sup>57</sup> The newspaper article alleges that the countries include Egypt and Jordan, whose intelligence services have close ties to the CIA and use interrogation techniques which include torture and threats to families.<sup>58</sup> Furthermore, the 9/11 Recommendations Implementation Bill suggests to loosen the restraints on sending alleged terrorists to countries in which they might be subjected to torture.<sup>59</sup>

One example of extraordinary rendition is the case of Maher Arar. Arar, a Canadian citizen, was detained in the United States and held in custody for thirteen days during which time he was questioned about alleged links with Al-Qaeda. He “disappeared” from United States custody, as he was deported to Jordan and sent to Syria, without being represented at any hearing and without his family, lawyer or the Canadian consulate being informed. After he was released from Syria after one year of incarceration he stated that he was severely beaten with electrical cable during six days of interrogation, and threatened with electric shocks and the “metal chair” – a torture device that stretches and eventually breaks the spine. After that he was held in solitary confinement in a tiny cell, described as a “grave”, with no exposure to natural light for the first six months.<sup>60</sup>

The above description of the certain interrogation methods showed that they differ. Whereas some of the methods are clearly aimed to inflict physical pain or suffering others might not have a physical effect at all, but affect the detainees’ mental health. Especially methods known as sensoric deprivation, comprising hooding, subjection to noise and sleep deprivation can cause mental pain and suffering. However, all techniques have one thing in common; they are all applied to break the detainees’ will in order to gain a confession or pieces of information.

<sup>57</sup> Rajiv Chandrasekaran, Peter Finn “U.S. Behind Secret Transfer of Terror Suspects” (11 March 2002) *The Washington Post* Washington 1; *The Economist U.S. Edition* “Ends, Means and Barbarity – Torture” (11 January 2003) Special Report 1. Michelle Shephard above n5, 12.

<sup>58</sup> Rajiv Chandrasekaran, Peter Finn above n57, also cite an U.S. diplomat: “After September 11, these sort of movements have been occurring all the time. It allows us to get information from terrorists in a way we can’t do on U.S. soil.”

<sup>59</sup> 9/11 Recommendations Implementation Act (24 Sept 2004) Title 3 – Border Security and Terrorist Travel Subtitle A – Immigration Reform in the National Interest Chapter 2 – Deportation of Terrorists and Supporters of Terrorism Section 3031, 3032, p. 134-135 <<http://www.govt-aff.senate.gov>> (last accessed 4 Oct 2004).

<sup>60</sup> Amnesty International “USA: Deporting for Torture?” (14 Nov 2003) Press Release AMR 51/139/2003 <<http://www.amnesty.org>> (last accessed 12 Nov 2004).

Moreover, it seems to be the case that the different interrogation methods are rarely used independently, but are usually combined. Thus, the effect upon the detainee cannot be estimated for any application of one or the other of the different methods. The combined effect of all interrogation methods has to be taken into account in order to examine the degree of physical or mental pain and suffering which has been inflicted upon the detainee. However, it seems that the infliction of single acts of extremely cruel and brutal treatment – *falanga* in the *Greek Case* and most of the practices in the Abu Ghraib Prison – are easier to repel the public opinion and to be called “torture” than other more refined forms of interrogation. Thus, it has to be examined how the different interrogation techniques or a combination thereof are treated by the relevant international bodies. Do they constitute torture?

### **III DO THE INTERROGATION TECHNIQUES IN THE “WAR ON TERROR” AMOUNT TO TORTURE?**

#### **A The Legal Prohibition of Torture**

The Universal Declaration of Human Rights<sup>61</sup> states “no one shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment.” This statement gave rise to the ban on torture in other international and regional treaties.<sup>62</sup>

<sup>61</sup> Article 5 Universal Declaration of Human Rights, General Assembly Resolution 217 A (III) (10 Dec 1948) <<http://www.un.org>> (last accessed 24 Sept 2004); Article 1 Declaration on the Protection of all Persons from Being Subjected to Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, United Nations General Assembly Resolution 3452 (XXX) (9 Dec 1975) <<http://textus.diplomacy.edu>> (last accessed 9 Oct 2004).

<sup>62</sup> Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment adopted and opened for signature, ratification and accession by General Assembly Resolution 39/46 (10 Dec 1984), entry into force (26 June 1987) (hereinafter Torture Convention) <<http://www.unhcr.ch>> (last accessed 24 Sept 2004); Inter-American Convention to Prevent and Punish Torture (18 Feb 1987) OAS Treaty Series No. 67 (hereinafter Inter-American Convention) <<http://wwwserver.law.wits.ac.za>> (last accessed 9 Oct 2004); European Convention for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment (26 Nov 1987) European Treaty Series No. 126 (hereinafter European Convention) <<http://convention.coe.int>> (last accessed 9 Oct 2004); common Article 3 Geneva Conventions (12 Aug 1949); Article 7 International Covenant on Civil and Political Rights (23 March 1976) (hereinafter ICCPR) <<http://unhcr.org>> (last accessed 9 Oct 2004); Article 3 European Convention on Human Rights and Fundamental Freedoms (4 Nov 1950) <<http://conventions.coe.int>> (last accessed 9 Oct 2004); Article 5 American Convention on Human Rights OAS Treaty Series 36 (18 July 1978) <<http://wwwserver.law.wits.ac.za>> (last accessed 9 Oct 2004); Article 5 African Charter on Human and Peoples’ Rights (21 Oct 1986) <<http://www1.umn.edu>> (last accessed 9 Oct 2004).



Moreover, the continuing emphasis, that the ban on torture is absolute<sup>63</sup> suggests that it is not only a norm of customary international law but has evolved into a peremptory norm of international law, *ius cogens*. The definition of *ius cogens* provided in the Vienna Convention on the Law of Treaties of 1969 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.<sup>64</sup>

In *Barcelona Traction* the ICJ reaffirmed the existence of a body of international law with “universal or quasi-universal character.”<sup>65</sup> Consequently, peremptory norms of international law have effect *erga omnes*.<sup>66</sup> All states are bound whether they have consented to them or not.<sup>67</sup> States cannot derogate from principles of *ius cogens* “through international treaties or local or special customs or even general customary rules not endowed with the same normative force.”<sup>68</sup>

In *Delanic* the ICTY held that “there can be no doubt that torture is prohibited by both conventional and customary international law.”<sup>69</sup> “It further constitutes a norm of *jus cogens*, as has been confirmed by the United Nations Special Rapporteur for Torture.”<sup>70</sup> In *Furundija* the ICTY repeated that it “seems incontrovertible that torture in time of armed conflict is prohibited by a general rule of international law.”<sup>71</sup> “The prohibition on torture is a preemptory norm or *ius cogens*.”<sup>72</sup>

<sup>63</sup> See e.g. Art. 2(2) Torture Convention; Art. 15(2) European Convention; Art. 4(2) ICCPR; Art. 27(2) American Convention on Human Rights; Art. 5 Inter-American Convention. See also Article 4 Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight against Terrorism (11 July 2002) adopted at the 804<sup>th</sup> meeting of the Ministers’ Deputies.

<sup>64</sup> Art. 53 Vienna Convention on the Law of Treaties (27 Jan 1980) 1155 U N T S 331.

<sup>65</sup> *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (5 Feb 1970) (ICJ) (hereinafter *Barcelona Traction*) 1970 ICJ 3, para 34.

<sup>66</sup> Ernst-Ulrich Petersmann “Time for a United Nations ‘Global Impact’ for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration (2002) 13 Eur J Int’l L 621, 633-634.

<sup>67</sup> Jost Delbruck “Prospects for a ‘World (Internal) Law?: Legal Developments in a Changing International System” (2002) 9 Ind J Global Legal Stud 401, 417.

<sup>68</sup> *The Prosecutor v. Anto Furundija* (IT-95-17/1-T) (10 Dec 1998) (ICTY, Trial Chamber) (hereinafter *Furundija*) <www.un.org> (last accessed 7 Oct 2004) para 153.

<sup>69</sup> *The Prosecutor v. Zejnir Delalic et al* (IT-96-21-T) (16 Nov 1998) (ICTY, Trial Chamber) (hereinafter *Delalic*) <www.un.org> (last accessed 7 Oct 2004) para 452.

<sup>70</sup> *Delalic* above n69, para 454 citing: P. Kooijmans, Special Rapporteur for Torture “Torture and other Cruel, Inhuman or Degrading Treatment or Punishment”, Report of the Special Rapporteur Mr. P. Kooijmans, appointed pursuant to Commission on Human Rights res. 1985/33 (19 Feb. 1986) Un.doc E/CN.4/1986/15 <http://www.un.org> (last accesses 01 Nov. 2004).

<sup>71</sup> *Furundija* above n68, para 137-139, 139.

<sup>72</sup> *Furundija* above n68, para 144, 153-157.

Both decisions are in line with previous decisions of the ICTY<sup>73</sup> and the ICJ<sup>74</sup> which have more generally ruled that common Article 3 of the Geneva Conventions, which *inter alia* prohibits torture against persons taking no active part in hostilities, is *ius cogens*, “a minimum yardstick” reflecting “elementary considerations of humanity.”<sup>75</sup>

In sum, it can be said that the ban on torture is a fundamental norm of international law, from which derogation is impossible.<sup>76</sup>

Moreover, cruel, inhumane and degrading treatment, which does not amount to torture, is also banned in a number of human right treaties.<sup>77</sup> Thus, it is arguable that the prohibition of those methods has reached a status of customary international law.

## **B The Definition of Torture**

However, the mere knowledge that torture is prohibited is insufficient. In order to determine whether the interrogation techniques applied in the “War on Terror” amount to torture it is necessary to exactly define what constitutes torture.

<sup>73</sup> *The Prosecutor v. Duško Tadić*, Decision on the Defence Motion for an Interlocutory Appeal on Jurisdiction (IT-94-I-AR72) (2 Oct 1995) (ICTY, Appeals Chamber) (hereinafter *Tadic*) <www.un.org> (last accessed 7 Oct 2004) para 137.

<sup>74</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (27 June 1986) (ICJ, Merits) (hereinafter *Nicaragua*) <http://www.icj-cij.org> (last accessed 7 Oct 2004).

<sup>75</sup> *Nicaragua* above n74, para 218.

<sup>76</sup> Johan D. van der Vyver “Torture as a Crime under International Law” (2003) 67 *Alb L Rev* 427, 429; Jonathan H. Marks “Mending the Web: Universal Jurisdiction, Humanitarian Intervention and the Abrogation of Immunity by the Security Council” (2004) 42 *Colum J Transnat'l L* 445, 468; International Law Association Human Rights Committee “Report on Civil Actions in the English Courts for Serious Human Rights Violations Abroad” E H R L R 2001, 129, 137; Ruth Wedgwood “International Criminal Law and Augusto Pinochet” (2000) 40 *Va J Int'l L* 829, 836; Alberto Luis Zuppi “Immunity v. Universal Jurisdiction: The Yerodia Ndombasi Decision of the International Court of Justice” (2003) 63 *La L Rev* 309, 322; Paula Gaeta “May Necessity Be Available As A Defence For Torture In The Interrogation Of Suspected Terrorists?” (2004) 2 *J Int'l Crim Just* 785, 788; Daniel Rothenberg “‘What We Have Seen Is Terrible’: Public Presentational Torture and the Communicative Logic of State Terror” (2003) 67 *Alb L Rev* 465, 486-487; Ardi Imseis “‘Moderate’ Torture on Trial: Critical Reflections on the Israeli Supreme Court Judgement Concerning the Legality of General Security Service Interrogation Methods” (2001) 19 *Berkeley J Int'l L* 328, 331; Rodley, Nigel S. “The Treatment of Prisoners Under International Law” (2ed, Clarendon Press, Oxford, 1999) p 70.

<sup>77</sup> Article 7 ICCPR; Article 3 European Convention on Human Rights and Fundamental Freedoms; Article 5.2 American Convention on Human Rights; Article 5 African Charter on Human and Peoples' Rights; Article 16 Torture Convention.

The most pertinent international treaty regarding the ban on torture and other ill treatment is the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment<sup>78</sup> (Torture Convention). The Torture Convention defines torture as follows:

For the purpose 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 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.<sup>79</sup>

Although Article 1 Torture Convention expressly states that above definition is only "for the purpose of this convention" its definition of torture has extra-conventional effect as it reflects a crystallisation of general international law. The definition of Article 1 Torture Convention stems from the 1975 General Assembly Declaration, which was adopted by consensus.<sup>80</sup> Furthermore, the definition contained in the Torture Convention has been applied by the Special Rapporteur on Torture<sup>81</sup> and is in line with the definition suggested or acted upon by such international bodies as the ECHR,<sup>82</sup> the ICTY<sup>83</sup> and the HRC.<sup>84</sup>

<sup>78</sup> Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (Torture Convention) adopted and opened for signature, ratification and accession by General Assembly Resolution 39/46 (10 Dec 1984), entry into force (26 June 1987) <<http://www.unhcr.ch>> (last accessed 24 Sept 2004).

<sup>79</sup> Article 1 Torture Convention.

<sup>80</sup> "For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or another person. ... Torture constitutes an aggravated and deliberate form of cruel, inhumane or degrading treatment or punishment." Article 1 1975 General Assembly Resolution above n61.

<sup>81</sup> P. Kooijmans, Special Rapporteur for Torture "Torture and other Cruel, Inhuman or Degrading Treatment or Punishment", Report of the Special Rapporteur Mr. P. Kooijmans, appointed pursuant to Commission on Human Rights res. 1985/33 (19 Feb. 1986) U.N. Doc. E/CN.4/1986/15 <<http://www.un.org>> (last accesses 01 Nov. 2004) para 33.

<sup>82</sup> "[I]t was the intention that the Convention, with its distinction between "torture" and "inhuman or degrading treatment", should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering." *Ireland v. United Kingdom* above n19, para 167. Slightly different Commission on Human Rights (CHR): "The word torture is often used to describe inhumane treatment which has the purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhumane treatment." *Greek Case* 12 Yearbook 1969, 186.

<sup>83</sup> *Delalic* above n69, para 459; *Furundija* above n68, para 161.

<sup>84</sup> The Human Rights Committee (HRC), in its General Comment on Art. 7 of the ICCPR, indicated that the distinction between prohibited forms of mistreatment depends on the kind, purpose and

*C Distinction between Torture and Other Forms of Cruel, Inhumane or Degrading Treatment*

The main problem within the application of the above definition of torture is to draw the fine line between torture and other acts of cruel, inhumane or degrading treatment. In order to eliminate this problem it has been suggested simply not to distinguish between torture and other forms of cruel, inhumane or degrading treatment as the prohibition of the latter is as unequivocal as that of torture.<sup>85</sup> Accordingly, the Human Rights Committee (HRC) does not differentiate between torture and inhumane and degrading treatment:

The Covenant does not contain any definition of the concepts covered by article 7, nor does the Committee consider to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment and treatment; the distinctions depend on the nature, purpose and severity of the treatment applied.<sup>86</sup>

However, there are a lot of reasons to distinguish between torture and other forms of cruel, inhumane and degrading treatment. Only the prohibition of torture has reached the status of a general norm of international law. Hence, the universal application of the ban requires that the treatment at issue has been identified as torture. Moreover, a State should be condemned for its practice by name by the international community and not allowed to escape with a less stigmatizing label.<sup>87</sup> In addition, the international community is more likely to criticise and condemn a State, which uses torture than a State that "only" refers to cruel, inhumane and degrading treatment. Furthermore, the position of the victim has to be considered as well. For him or her it will make a huge difference whether the State is condemned because of torture or because of cruel, inhumane and degrading treatment. Especially in civil proceeding aimed to gain compensation it will be advantageous for the victim to have a decision, which explicitly states that he was subjected to torture.

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severity of the particular treatment. "Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies" U.N. Doc. HRI/GEN/1/Rev. 7 at 4 (12 May 2004) <<http://www.un.org>> (last accessed 08 Nov 2004).

<sup>85</sup> Anthony Cullen "Defining Torture in International Law: A Critique of the Concept Employed by the European Court of Human Rights" (2003) 34 Cal W Int'l L J 29, 44.

<sup>86</sup> Human Rights Commission "General Comment 20 Replacing Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment" (10 March 1992) U.N. Doc HRI/GEN/1/Rev.7 (12 May 2004) <<http://www.ohchr.org>> (last accessed 08 Nov 2004) para 4.

<sup>87</sup> Julie Lantrip "Torture and Cruel, Inhumane and Degrading Treatment in the Jurisprudence of the Inter-American Court of Human Rights" (1999) 5 ISLA J Int'l & Comp L 551, 560.

In addition, it is necessary to distinguish between torture and other forms of cruel, inhumane and degrading treatment, as the Torture Convention imposes additional obligations on State parties. The Torture Convention mandates that acts of torture must be investigated and adequately prosecuted by the State parties.<sup>88</sup> Furthermore, the Torture Convention grants protection against extradition of individuals to States in which they are likely to be subjected to torture.<sup>89</sup> Hence, it has to be distinguished between torture and other forms of cruel, inhumane and degrading treatment, although both forms should be condemned.

If we draw the attention to the different acts described above, it is easy to conclude that acts such as *falanga*<sup>90</sup> and rape<sup>91</sup> result in severe physical and mental pain and suffering and therefore constitute torture. However, opinions differ if it comes to acts of cruel, inhumane or degrading treatment which are not as clear as the both aforementioned. Especially the interrogation techniques applied in the "War on Terror" against alleged Al Qaeda terrorists challenge the definition of torture, as they usually do not consist of blunt acts of violence. Terrorist suspects are treated with a combination of different interrogation techniques which are aimed to break their will by other means than violence: incommunicado detention; hooding; subjection to noise; prolonged standing; being bound in awkward, painful positions; sleep deprivation.

A similar combination of five interrogation techniques has been used in *Ireland v. United Kingdom*.<sup>92</sup> Hence, it has to be critically examined why the ECHR ruled that the combined use of those interrogation techniques did not amount to torture.<sup>93</sup>

### 1 *Ireland v. United Kingdom*

The European Commission on Human Rights (CHR), which brought the case in front of the ECHR, considered unanimously the combined use of the five techniques to amount to torture,<sup>94</sup> as "the stress caused by ... the combined application of methods

<sup>88</sup> Article 4 Torture Convention.

<sup>89</sup> Article 3 Torture Convention.

<sup>90</sup> *Greek Case* 12 Yearbook 1969, 499-500.

<sup>91</sup> *Aydin v. Turkey* (25 Sept 1997) (European Court of Human Rights) (hereinafter *Aydin v. Turkey*) <<http://www.echr.coe.int>> (last accessed 01 Oct 2004) paras 83-86.

<sup>92</sup> The five interrogation methods are described above at II.

<sup>93</sup> *Ireland v. United Kingdom* above n19, para 246.

<sup>94</sup> 19 Yearbook (1976) 794.

which prevent the use of senses ... directly affects the personality physically and mentally” and are a “sophisticated method to break or even eliminate the will.”<sup>95</sup> It continued 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 which have been known over the ages.” They are “a modern system of torture falling into the same category as those systems which have been applied in previous times as a means of obtaining information and confessions.”<sup>96</sup>

In its judgement the ECHR set aside the unanimous decision of the CHR.<sup>97</sup> It ruled that torture and other forms of cruel, inhumane or degrading treatment have to be distinguished by the intensity of the suffering inflicted and that it appears that “it was the intention that the Convention, with its distinction between ‘torture’ and ‘inhuman or degrading treatment’, should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.”<sup>98</sup> In addition the Court referred to Article 1 of the 1975 General Assembly Resolution<sup>99</sup> which declares that “torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.”<sup>100</sup> Thus, the ECHR ruled that these techniques on their own did not amount to torture as they “did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.” Nevertheless, it ruled that those interrogation techniques were forms of cruel, inhumane and degrading treatment,<sup>101</sup> which are also outlawed under Article 3 European Convention on Human Rights and Fundamental Freedoms. In later decisions the ECHR continued its line of argumentation and again stressed the “special stigmata” of torture.<sup>102</sup>

## 2 *Inter-American Court of Human Rights*

The Inter-American Court of Human Rights applies a similar test of intensity to distinguish between torture and other forms of cruel, inhumane or degrading treatment in

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<sup>95</sup> 19 Yearbook (1976) 792.

<sup>96</sup> 19 Yearbook (1976) 794.

<sup>97</sup> *Ireland v. United Kingdom* above n19, para 246.

<sup>98</sup> *Ireland v. United Kingdom* above n19, para 167.

<sup>99</sup> Above n61.

<sup>100</sup> *Ireland v. United Kingdom* above n19, para 167.

<sup>101</sup> *Ireland v. United Kingdom* above n19, para 167.

<sup>102</sup> *Aydin v. Turkey* above n91, para 82; *Cicek v. Turkey* (27 Feb. 2001) (European Court of Human Rights) (hereinafter *Cicek v. Turkey*) <<http://www.echr.coe.int> (last accessed 08 Nov 2004) paras 154, 172.

its cases.<sup>103</sup> Moreover, in most of the cases the allocation of the burden of proof, which according to the Court rests upon the victim, was the crucial factor. In *Loayza Tamayo* the Court refused to find a case of torture as the victim was not able to prove that she was raped<sup>104</sup> during her detention.<sup>105</sup> In particular she was not able to produce medical evidence.<sup>106</sup>

In *Piangua Morales* the Court had to distinguish between three types of detainees. All victims had been arbitrarily kidnapped and detained. The first group of detainees was not able to prove that they were beaten and consequently the Court rejected their claim.<sup>107</sup> A second group of detainees was able to show medical proof of beatings. Hence, the Court decided that they were subjected to cruel, inhumane and degrading treatment and thereby stressed its emphasis on medical evidence.<sup>108</sup> The last group of detainees died during detention. The Court examined the autopsy reports, which revealed the treatment of the detainees before their deaths.<sup>109</sup> The Court held that according to the reports they had been subject to torture.<sup>110</sup> Thus, the Inter-American Court of Human Rights distinguishes between torture and inhuman and degrading treatment in a similar way as the ECHR. Moreover, it requires medical proof and thereby establishes a high threshold for the victims.

### 3 Analysis

The line of reasoning by the ECHR in *Ireland v. United Kingdom* is rather poor and unsatisfying.<sup>111</sup> The ECHR failed to explain why it deferred from the view of the European Committee on Human Rights which has unanimously decided that the

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<sup>103</sup> *Loayza Tamayo* above n34, paras 57-58. *Paniagua Morales et al v. Guatemala* (08 March 1998) (Inter-American Court of Human Rights) (hereinafter *Paniagua Morales*) <<http://www.corteidh.or.cr>> (last accessed 08 Nov 2004) paras 134-135.

<sup>104</sup> *Loayza Tamayo* alleged that she has been raped through the vagina and rectum during her detention. *Loayza Tamayo* above n34, para 45.e.

<sup>105</sup> *Loayza Tamayo* above n34, para 58.

<sup>106</sup> *Loayza Tamayo* above n34, para 38.f citing Peru which contested that she had been raped because she did not produce medical evidence. At para 58 the Court itself simply stated that the allegation of rape was not substantiated.

<sup>107</sup> *Paniagua Morales* above n103, paras 66, 135.

<sup>108</sup> *Paniagua Morales* above n103, para 135.

<sup>109</sup> The reports revealed *inter alia* that the detainees were exposed to tying and beating and finally killed by stab wounds to the neck and thorax. *Paniagua Morales* above n103, para 135.

<sup>110</sup> *Paniagua Morales* above n103, para 134.

<sup>111</sup> Nigel S. Rodley above n76, 92; Louise Doswald-Beck "What Does The Prohibition Of 'Torture Or Inhumane Or Degrading Treatment Or Punishment' Mean? The Interpretation Of The European Commission And Court Of Human Rights" (1978) 25 *Netherlands Int'l Law Rev* 24, 40.

application of the five techniques constituted torture.<sup>112</sup> The Commission's definition of torture as an "aggravated form of inhumane treatment"<sup>113</sup> does not differ much from the 1975 General Assembly Declaration which defines torture as "an aggravated and deliberate form of cruel, inhuman and degrading treatment or punishment."<sup>114</sup> The ECHR merely stated that torture and cruel, inhuman or degrading treatment have to be distinguished from each other, but failed to give clear guidelines as to how a distinction has to be made. His main argument seems to be that the five techniques did not inflict suffering of the particular intensity and cruelty implied by the word torture "as so understood". The term "as so understood" is as vague as the definition of torture itself and does not suit as a proper definition. The same is true for the term "special stigmata", which the Court still uses.<sup>115</sup> It would have been the task of the ECHR to define exactly the terms "torture as so understood" and "special stigmata". By failing to do so it established a rather high threshold for the definition of torture and thus narrowed its scope. It appears that only acts of extreme cruelty fall within the court's definition.<sup>116</sup> Thus, the Court excluded the systematically researched and subtle techniques of psychological manipulation, which nullify the human will.<sup>117</sup>

According to Judge Fitzmaurice the threshold for torture is even higher as it is not only a matter of degree. "If the five techniques are to be regarded as involving torture, how does one characterize [for example] having one's finger-nails torn out, being slowly impaled on a stake through the rectum, or roasted over the electric grid?"<sup>118</sup> This extreme restriction of the term torture has to be rejected as it only takes into account ancient and brutal kinds of torture which satisfy common stereotypes.<sup>119</sup> It negates the existence and development of interrogation techniques which are able to inflict severe physical or mental pain or suffering without having their roots in a medieval dungeon.<sup>120</sup>

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<sup>112</sup> 19 Yearbook (1976) 794.

<sup>113</sup> 19 Yearbook (1976) 748.

<sup>114</sup> Above n61.

<sup>115</sup> *Aydin v. Turkey* above n91, para 82; *Cicek v. Turkey* above n102, paras 154, 172.

<sup>116</sup> Louise Doswald-Beck above n111, 41; R. J. Spjut "Torture Under the European Convention on Human Rights" (1979) 73 *AJIL* 267, 271.

<sup>117</sup> R. J. Spjut above n116, 271.

<sup>118</sup> *Ireland v. United Kingdom* above n19, separate opinion of Judge Fitzmaurice para 35.

<sup>119</sup> Anthony Cullen above n85, 44.

<sup>120</sup> See *Ireland v. United Kingdom* above n19, separate opinion of Judge O'Donoghue who argues that "[o]ne is not bound to regard torture as only present in a mediaeval dungeon where the appliances of rack and thumbscrew or similar devices were employed."



A too narrow definition of torture which only incorporates acts of extreme cruelty favours developed countries which have more refined methods of interrogation than others.<sup>121</sup> It will also encourage countries to adopt and apply the techniques described in *Ireland v. United Kingdom* because the ruling can be interpreted as a charter for the application of those techniques. It is therefore not surprising that similar interrogation techniques have been used by Israel in.<sup>122</sup> Moreover, there are apparent similarities between the interrogation techniques applied in *Ireland v. United Kingdom* and the alleged treatment of detainees at Guantanamo Bay.<sup>123</sup>

However, it seems that the ECHR recently has abandoned its restrictive view in *Selmouni v. France*.<sup>124</sup> The Court ruled that the European Convention "is a living instrument which must be interpreted in the light of present-day conditions."<sup>125</sup> Hence it admits that certain acts which have been classified in the past as 'inhumane and degrading treatment' could be classified differently in the future. The ECHR expressed its opinion that "the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies." Hence, there seems to be a tendency to lower the threshold for the "severity" requirement.<sup>126</sup> Thus, it is doubtful whether the ECHR would repeat its conclusion in *Ireland v. United Kingdom* if it would have the opportunity to adjudge the case or a similar case today.

In order to assess the interrogation techniques applied in the "War on Terror" it is necessary to take into account all circumstances of the individual case, especially the actual amount of mental and physical pain and suffering inflicted.<sup>127</sup> In the beginning it is necessary to gain as much information as possible in order to gain a factual background. What interrogation techniques have been applied, how long, how often, how severe. In a next step the actual suffering of the detainee has to be examined. As

<sup>121</sup> Nigel S. Rodley above n76, 93.

<sup>122</sup> *Committee Against Torture v. Israel* above n28.

<sup>123</sup> See above II.

<sup>124</sup> *Selmouni v. France* (28 July 1999) (European Court of Human Rights) (hereinafter *Selmouni v. France*) <<http://www.echr.coe.int> (last accessed 08 Nov 2004).

<sup>125</sup> *Selmouni v. France* above n124, para 101.

<sup>126</sup> *Selmouni v. France* above n124, para 102.

<sup>127</sup> *Soering v. United Kingdom* (1989) (European Court of Human Rights) (hereinafter *Soering v. United Kingdom*) <<http://echr.coe.int>> (last accessed 01 Oct 2004) para 89. *Selmouni v. France* above n124, para 100, enumerates "the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc."

the definition of torture suggests, mental and physical suffering are of the same value. Thus, one does not only have to be taken into account whether the victim got bodily injured and had to suffer severe physical pain. The mental conditions of the victim are of equal weight. Thus, it is sufficient that the cruel, inhumane or degrading treatment merely leads to severe mental suffering. It seems that the ECHR in *Ireland v. United Kingdom* did not take the mental component into account sufficiently but primarily focussed on an assessment of the physical impacts of the interrogation techniques. It therefore failed to complete a full assessment of the facts. Moreover, the ECHR failed to take into account a subjective component, assessing the ill-treatment from the point of view by the victims.<sup>128</sup> It did not call witnesses and thereby overlooked an important factor of how to assess the severity of the ill-treatment. As it is the victim who has undergone torture his point of view must be taken into consideration as well. The objective assessment made by the ECHR does not achieve this goal.

However, it has to be taken into account that a Court will seldom rely solely on the victim's allegations when it determines the facts of the case. Hence, medical records are a valuable source in order to prove which physical as well as mental injuries were inflicted. Nevertheless, Courts should refrain from solely relying on medical records,<sup>129</sup> as it is difficult for detainees to obtain medical evidences, especially if they are held captive for some time and the interrogation techniques used do not leave long-lasting signs.<sup>130</sup> *Falanga* describes in the Greek Case is only one of several possible methods which inflict severe physical pain and suffering but leave no long-lasting signs.<sup>131</sup> The same is true for rape, as it not necessarily leads to bodily injuries. Hence, detainees are sometimes not able to obtain medical records, simply because there are no torture signs left which could be examined. Accordingly, the Inter-American Court of Human Rights would have come to a different ruling in *Loayza Tamayo* if it had not solely relied medical records. By failing to find for the victim on her claims of sexual

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<sup>128</sup> The importance of a subjective test is emphasized by Judge Zekia in his separate opinion in *Ireland v. United Kingdom* above n19: "As an example I can refer to the case of an elderly sick man who is exposed to a harsh treatment - after being given several blows and beaten to the floor, he is dragged and kicked on the floor for several hours. I would say without hesitation that the poor man has been tortured. If such treatment is applied on a wrestler or even a young athlete, I would hesitate a lot to describe it as an inhuman treatment and I might regard it as a mere rough handling." See also Anthony Cullen above n85, 33.

<sup>129</sup> See for instance: *Loayza Tamayo* above n34, paras 38, 58; *Paniagua Morales* above n103, paras 66, 135.

<sup>130</sup> Julie Lantrip above n87, 557.

<sup>131</sup> See above II.

torture it moreover failed to recognize a well-known type of torture which generally does not leave long-lasting physical injuries.<sup>132</sup>

The assessment of the exact level of mental pain and suffering inflicted during an interrogation is even more difficult. Psychologists might examine the victim but usually there are no apparent signs indicating the exact level of mental pain and suffering. Sensoric deprivation, including hooding, exposition to noise and sleep deprivation over an extended period of time are *per se* forms of cruel, inhumane or degrading treatment.<sup>133</sup> If those techniques are used in combination over an extended period of time they are capable to inflict severe mental pain and suffering without resort to any apparent physical brutality. Even the thought of being threatened with such a form of treatment certainly raises my fear level, not to speak from being the actual victim. It is hard to imagine how helpless someone must feel in such a situation and how great the mental suffering would be. Thus, it is necessary that forms of mental torture are going to be more acknowledged and outlawed as required by the definition of torture. Moreover, the definition of torture must remain flexible to keep pace with modern forms of interrogation, which rely more on mental than on physical violence.

Second, it seems to be necessary to shift the burden of proof to the State once the victim has made his or her claim. The United Nations Human Rights Committee (HRC) has addressed this issue and stated that

[W]ith regard to the burden of proof, the Committee has already established in other cases ... that this cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to relevant information. In those circumstances, due weight must be given to the author's allegations.<sup>134</sup>

Accordingly, in *Estrella v. Uruguay* the HRC made a decision based merely on the victim's allegations, which the State Uruguay did not refute.<sup>135</sup> This shift of the burden of proof is justified for two reasons. First, at least the parties to the Torture

<sup>132</sup> In addition Julie Lantrip above n87, 565 argues that the Court's failure to recognize the rape claim was also due to the fact that the it has only had one female member since its creation.

<sup>133</sup> *Ireland v. United Kingdom* above n19, para 167.

<sup>134</sup> Human Rights Commission "General Comment 20 Replacing Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment" (10 March 1992) U.N. Doc HRI/GEN/1/Rev.7 (12 May 2004) <<http://www.ohchr.org>> (last accessed 08 Nov 2004) paras 24-25.

<sup>135</sup> *Estrella v. Uruguay* above n14, para 8.1: "The Committee bases its views on the following facts, which in the absence of any substantive clarifications from the State party, are unrefuted."

Convention are obliged to investigate such allegations of torture fully,<sup>136</sup> as they have usually the best means to conduct such investigations in contrast to the victim or international bodies concerned with the case. Thus, it is easier for them to refute wrong assertions as for the victim to prove his or her claim. Second, on the international level it is not necessary to apply the same high standards of proof as in domestic criminal proceedings. As States do not go to jail it is justified to be more flexible in the allocation of the burden of proof and to presume that the victim's allegations are true as long as they are not substantially refuted.<sup>137</sup>

In addition, it seems to be appropriate to shift the burden of proof in cases of incommunicado detention as torture is most frequently used in such situations.<sup>138</sup> In incommunicado detention the detained person is totally cut off from a contact with the outside world. Hence, the faith of detainee falls fully into the hands of the detaining officials and they are at their mercy. These are ideal condition for torture.<sup>139</sup> Thus, the recent practice of incommunicado detentions in the "War on Terror" at Guantanamo Bay, Bagram Airbase and elsewhere must be criticised as it creates the perfect conditions for prisoner abuse and torture. Hence, the United States has to stop this practice, as transparency, access and accountability are the most effective measures against torture and cruel, inhumane or degrading treatment of prisoners.<sup>140</sup>

Another problem with the definition of torture is that Courts sometimes do not sufficiently assess the relationship between the infliction of severe physical or mental

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<sup>136</sup> Art. 13 Torture Convention.

<sup>137</sup> *Velasquez Rodriguez v. Honduras* (29 July 1988) (Inter-American Court of Human Rights) (hereinafter *Velasquez Rodriguez*) <<http://www.corteidh.or.cr>> (last accessed 08 Nov 2004) paras 127-128, 134: "States do not appear before the Court as defendants in a criminal action. The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible."

<sup>138</sup> See for instance *Loayza Tamayo* above n34, para 58. Report of the Special Rapporteur, Sir Nigel Rodley, Submitted Pursuant to Commission on Human Rights Resolution 2001/62 (27 December 2001) U.N. Doc E/CN.4/2002/76 <<http://www.un.org>> (last accessed 16 Oct 2004) Annex I.f.

<sup>139</sup> Human Rights Committee (HRC) "General Comment on Art. 7 of the ICCPR" Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies U N Doc HRI/GEN/1/Rev. 7 at 4 (12 May 2004) <<http://www.un.org>> (last accessed 08 Nov 2004) para 11; P. Kooijmans, Special Rapporteur for Torture "Torture and other Cruel, Inhuman or Degrading Treatment or Punishment", Report of the Special Rapporteur Mr. P. Kooijmans, appointed pursuant to Commission on Human Rights res. 1985/33 (19 Feb. 1986) Un.doc E/CN.4/1986/15 <<http://www.un.org>> (last accesses 01 Nov. 2004) paras 109-110.

<sup>140</sup> Amnesty International "United States of America – The Threat of a Bad Example – Undermining International Standards as 'War on Terror' Detentions Continue" <<http://www.amnesty.org>> (last accessed 12 Nov 2004).

pain or suffering and the purpose of its use.<sup>141</sup> Torture is used to obtain information and confessions from the victim. Thus, it is applied to break the victim's will. The idea of torture is to inflict as much mental or physical pressure upon the victim that he finally gives in and reveals the information or makes a confession. Thus, the relation between the ill treatment and its purpose is of special relevance for the definition of torture. As the CHR stated it is the systematic breaking of the will of the detainees by means of cruel, inhumane or degrading treatment in order to obtain information and confessions, which constitutes torture.<sup>142</sup> Thus, "a sophisticated method to break or even eliminate the will" does not need to include severe physical suffering. It is sufficient that the interrogation method applied causes severe mental pain or suffering. Thus it does not make a difference whether the interrogators use plain brutality to extract the information they want or use more sophisticated and advanced forms of interrogation techniques, as long as those methods cause severe physical or mental pain or suffering.

Nevertheless, it has to be considered whether the definition of torture has to be interpreted narrowly in the case of the interrogation of alleged terrorists. The definition of torture requires that severe pain and suffering is "inflicted on a person for such purposes as obtaining from him or a third person information or a confession."<sup>143</sup> One could argue that the aim of interrogating terrorists, namely to detect terrorist networks and to prevent future terrorists attacks falls outside the definition of torture. However, the definition of torture does not distinguish between the reasons for the interrogation. It is sufficient that the victim is tortured to disclose information. Moreover, the term "for such purposes as" infers that the two purposes stated in the definition are non-exhaustive. Hence, there are even more purposes possible, for instance torture to intimidate certain groups of the population.<sup>144</sup> Hence, the definition does not distinguish between the purposes of torture and the kinds of information required. This general, neutral formulation of the purpose of torture is necessary to achieve a high level of protection of individuals from state-sponsored attacks on their physical or mental integrity. Hence, it is impossible to manipulate the definition of torture in order to exclude the interrogation of alleged terrorists from its scope.

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<sup>141</sup> In *Ireland v. United Kingdom* above n19, the ECHR, for instance, did not take this element into account sufficiently, but focused solely on the level of pain inflicted.

<sup>142</sup> 19 Yearbook (1976) 792.

<sup>143</sup> Article 1 Torture Convention.

<sup>144</sup> *Aydin v. Turkey* above n91, para 40: "the purpose [of such treatment] being to gain information and/or to deter her family and other villagers from becoming implicated in terrorist activities."

## D *Examination of the Interrogation Techniques Applied in the "War on Terror"*

In light of the above examination of the definition of torture and its application there are apparent reasons to believe that the interrogation techniques applied in the "War on Terror" are not only forms of cruel, inhumane and degrading treatment; they are torture.

### 1 *Abu Graib Prison*

It is apparent that the methods applied at Abu Graib crossed the border to torture as they include acts of extreme violence<sup>145</sup> as well as extreme cruel, inhumane and degrading treatment.<sup>146</sup> The ECHR has declared that, even in the absence of physical injuries, psychological and moral suffering, accompanied by psychic disturbance during questioning, may be deemed inhuman treatment. The degrading aspect is characterized by the fear, anxiety and inferiority induced for the purpose of humiliating and degrading the victim and breaking his physical and moral resistance.<sup>147</sup> Mock electrocutions, the use of military working dogs to intimidate and placing a dog chain around a naked detainee and having a female soldier pose for a picture<sup>148</sup> cause a high level of fear, anxiety and make the detainee feel inferior to their perpetrators. Hence, they are acts of inhumane and degrading treatment. Furthermore, the application of those methods, especially a combination thereof is likely to cause at least severe mental pain and suffering and thereby pass the "severity" test. Hence, the acts of prisoner abuse at Abu Graib prison fall within the definition of torture.

### 2 *Guantanamo Bay*

The treatment of the Guantanamo Bay and Bagram detainees is more difficult to assess as the factual background is not as clear. This is due to the fact that most of the detainees are still held in incommunicado detention. Hence it is doubtful whether detainees will be ever able to prove whether they have been subjected to torture. Nevertheless, it has to be taken into account, that incommunicado detention over a prolonged period of time on its own has been deemed as a form of cruel, inhumane or

<sup>145</sup> "Punching, slapping, and kicking detainees; jumping on their naked feet." See above II.

<sup>146</sup> "Forcing groups of male detainees to masturbate themselves while being photographed and videotaped." See above II.

<sup>147</sup> *Ireland v. United Kingdom* above n19, para 167; *Loayza Tamayo* above n34, para 57.

<sup>148</sup> Tabuga Report above n37, 16-17.

degrading treatment.<sup>149</sup> Moreover, the allegations made by several newspapers indicate that the “stress and duress” techniques applied by United States security forces are a mixture between the methods applied in *Ireland v. United Kingdom*<sup>150</sup> – sleep-deprivation, hooding, subjection to noise – and in *Committee Against Torture v. Israel*<sup>151</sup> – binding detainees to awkward, painful positions and subjection to noise. In addition, the United States Ministry of Defence Working Group Report lists a variety of other interrogation techniques, which can be subsumed under the term inhumane and degrading treatment. Methods as “false flag” and the threat to extradite detainees to countries which have a reputation of using more violent forms of torture<sup>152</sup> are likely to cause fear and anxiety to detainees. Other techniques such as sleep deprivation,<sup>153</sup> environmental and dietary manipulation<sup>154</sup> are also able to affect and break the detainee’s will. Moreover, those techniques are likely to cause mental pain and suffering, especially as they are usually applied in combination.<sup>155</sup> The potential negative physiological effects of the continuing detentions are illustrated by suicide attempts by Guantanamo Bay detainees.<sup>156</sup> Thus, the interrogation techniques applied in the “War on Terror” are acts of torture.

According to this, the interrogation techniques used by the Israeli GSS against alleged Palestinian terrorists fall within the definition of torture.<sup>157</sup> The Special Rapporteur on Torture concluded, that the interrogation techniques applied in Israel “can only be described as torture, which is not surprising given their advanced purpose, namely to elicit information, implicitly by breaking the will of the detainees to resist yielding up the desired information.”<sup>158</sup> Especially “shaking”<sup>159</sup> of the detainee and the

<sup>149</sup> *Loayza Tamayo* above n34, para 24f.

<sup>150</sup> *Ireland v. United Kingdom* above n19.

<sup>151</sup> *Committee Against Torture v. Israel* above n28; “shabach” position, above n30.

<sup>152</sup> See above n49, 50.

<sup>153</sup> Maintaining a 24-hour illumination in cells or waking up inmates every fifteen minutes to disorient them. “Prisoners Released from US Base in Afghanistan” *Associated Press* (15 March 2003).

<sup>154</sup> See above n46, 47.

<sup>155</sup> Working Group Report above n44, para 62.

<sup>156</sup> Amnesty International “United States of America – The Threat of a Bad Example – Undermining International Standards as ‘War on Terror’ Detentions Continue” <<http://www.amnesty.org>> (last accessed 12 Nov 2004). The Associated Press reported that there had been “22 suicide attempts among detainees at the base, including 12 this year.” See “Guantanamo Bay Detainee Attempts Suicide Again” (10 March 2003) *Associated Press* <<http://www.newsobserver.com>> (last accessed 11 Nov 2004).

<sup>157</sup> The interrogation techniques are described at II.

<sup>158</sup> Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted Pursuant to Commission on Human Rights Resolution 1995/37 B, U.N. ESCOR, 53d Sess., Provisional Agenda Item 8(a) (1997) U.N. Doc E/CN.4/1997/7 <<http://www.un.org>> (last accessed 14 Oct 2004) para 121.

<sup>159</sup> Above n29.

“shabach” position<sup>160</sup> do not only inflict mental but also severe physical pain and suffering and in the case of “shaking” can even cause serious injuries including the death of the detainee.<sup>161</sup>

### 3 *Extraordinary Renditions*

Another issue in the “War on Terror” is the practice of extraordinary renditions.<sup>162</sup> According to newspaper reports and reports by Amnesty International there seems to be a pattern of extraditions of alleged terrorists to countries which are known to apply torture.<sup>163</sup> Moreover, the reports claim that this method is used to circumvent the prohibition of torture. The alleged terrorists are deliberately sent to foreign countries in order to be interrogated and if necessary tortured.<sup>164</sup> The information revealed then will be given to the United States which will use it in the “War on Terror”.<sup>165</sup> Hence, it has to be considered whether extraordinary renditions are acts of torture committed by the United States. Regarding the case of Maher Arar it is apparent that he has been tortured during his unlawful detention in Syria.<sup>166</sup> Hence, the State of Syria committed an act of torture. Regarding the United States it is doubtful whether they are also guilty of an act of torture. The definition of torture requires that the “pain or suffering is inflicted by or at the instigation of a public official or other person acting in an official capacity.”<sup>167</sup> The term “at the instigation of a public official” is able to cover the phenomenon of extraordinary renditions. If the United States remain control about whether an alleged terrorist is going to be tortured, which questions are going to be asked and finally obtain the full record of the information obtained it is arguable that torture has been applied at the instigation of United States

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<sup>160</sup> Above n30.

<sup>161</sup> Above n29.

<sup>162</sup> See above II.

<sup>163</sup> Rajiv Chandrasekaran, Peter Finn above n57, 1; *The Economist U.S. Edition* “Ends, Means and Barbarity – Torture” (11 January 2003) Special Report 1; Michelle Shephard above n5, 12; Amnesty International “USA: Deporting for Torture?” (14 Nov 2003) AMR 51/139/2003 <<http://www-amnesty.org>> (last accessed 11 Nov 2004).

<sup>164</sup> Katherine Hawkins “Torturous Passage” (20 Oct 2004) <[www.prospect.org](http://www.prospect.org)> (last accessed 12 Nov 2004) states that Arar noticed that Syrian officials asked him some of the same questions as had FBI agents.

<sup>165</sup> Rajiv Chandrasekaran, Peter Finn above n57, cite an United States diplomat: “After September 11, these sort of movements have been occurring all the time. It allows us to get information from terrorists in a way we can’t do on U.S. soil.” See also Dana Priest, Barton Gellman “U.S. Decries Abuse but Defends Interrogations; ‘Stress and Duress’ Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities” (26 Dec 2002) *Washington Post* Washington 1, citing another United States official saying: “We don’t kick the (expletive) out of them. We send them to other countries so they can kick the (expletive) out of them.”

<sup>166</sup> See above II.

<sup>167</sup> Article 1 Torture Convention.



intelligence officials. It cannot make a difference whether States apply torture within their territory or send alleged terrorists abroad to let other States do the "dirty" work. Extraordinary renditions which can be characterised as "torture outsourcing"<sup>168</sup> are acts of torture at the instigation of the extraditing State and thereby a direct violation of the prohibition of torture.

Moreover, the practice of extraordinary renditions conflicts with other obligations under the Torture Convention and the ICCPR.

The Torture Convention prohibits to "expel, return or extradite a person into another State where there are substantial grounds for believing that he would be in danger of being subject to torture."<sup>169</sup> Article 3.2 Torture Convention specifies that "for the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights." The United States do not only know that the alleged terrorists are in the danger of being tortured once they are transferred to the foreign country, the United States deliberately use the practice of extraordinary renditions to circumvent the ban on torture itself. Finally, the 9/11 Recommendations Implementations Bill, which will provide a legal basis for extraordinary renditions, is also an attempt to circumvent Article 3.1 Torture Convention.

Moreover, the ICCPR states that no one shall be subjected to arbitrarily arrest or detention and shall be detained without a legal justification.<sup>170</sup> Hence, it is likely that the systematic detention of alleged terrorists without bringing criminal charges against them amounts to arbitrary detention. Moreover, Article 9.4 ICCPR states that every detainee shall have the right to claim for *habeas corpus*. The United States deliberately picked Guantanamo Bay as detention facility in order to avoid *habeas corpus* pleas and thereby violate their obligation under Article 9.4 ICCPR.

More specifically Article 13 ICCPR sets some minimum procedural standards for expulsion of foreigner into other countries. A foreigner, who is lawfully in the country at issue, can only be expelled if the decision is in accordance with the domestic

<sup>168</sup> Katherine Hawkins above n164.

<sup>169</sup> Article 3.1 Torture Convention.

<sup>170</sup> Article 9.1 ICCPR.

law and the foreigner have had the opportunity to have his case reviewed by the relevant authority. Hence, the arbitrarily transfer of foreigners in custody of the United States to other States for the purpose of interrogation constitutes a violation of Article 13 ICCPR.

#### *IV IS THE TORTURE OF ALLEGED TERRORISTS JUSTIFIABLE?*

However, 9/11 terrorist attacks gave rise to the question whether it is permissible to torture alleged terrorists under certain circumstances. The Committee of Ministers of the Council of Europe reaffirmed the absolute prohibition of torture “irrespective of the nature of the acts that the person is suspected of,”<sup>171</sup> whereas others favour exclusions under clear-cut preconditions, mainly described as a called ticking time bomb scenario:<sup>172</sup> An alleged terrorist is in custody. The investigators have a high degree of certainty that first, there is a ticking time bomb planted in a highly populated area and is going to explode within the next day causing a high number of casualties and second, that the suspect has detailed information about the location of the bomb. Moreover, slogans as the “War on Terror” in general challenge national legal systems, as they can be misused to restrict civil rights and liberties for the greater good. The State’s interest in self-preservation and protection of its citizens against terrorist attacks has to be balanced against the very ideas of democracy, unconditional civil rights and liberties even in the case of emergency. Is it therefore justifiable to refer to torture under specific clear-cut circumstances in order to eliminate an imminent threat or are the potential risks for the State and the society as a whole too high? Does it make a difference whether torture is applied to obtain a confession or whether its purpose is to gather information in order to prevent future terrorist attacks? It has to be considered whether States itself can avoid liability under international law and whether state official can be exempt from criminal liability from an ex-ante or ex-post point of view.

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<sup>171</sup> Article 4 Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight Against Terrorism (11 July 2002) adopted at the 804<sup>th</sup> meeting of the Ministers’ Deputies.

<sup>172</sup> Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorists (hereinafter Landau Commission Report) (1989) *Israeli Law Rev* 146, 170; Alan A. Dershowitz above n6, 140; Alan A. Dershowitz “The Torture Warrant: A Response to Professor Strauss” (2003/2004) 48 *N Y L Sch L Rev* 275, 289.

## A *Ex-Ante justification*

### 1. *Necessity Defence*

The Landau Commission Report, which was published in 1989, investigated the interrogation methods of the Israeli General Security Service (GSS) against alleged Palestinian terrorists. It argued that the necessity defence is able to justify acts of state-sponsored torture on the domestic level.<sup>173</sup> In the post 9/11 literature the necessity defence has been revived to justify torture at least in the ticking time bomb scenario on the domestic as well as on the international level.<sup>174</sup> Especially, the Working Group Report by the United States Ministry of Defence argued that the necessity defence can be used to justify acts of torture against alleged terrorists in order to prevent more acts of terrorism.<sup>175</sup>

The necessity defence can be described as the choice between two evils.<sup>176</sup> Regarding the ticking time bomb scenario one evil is to torture the suspect. The other evil is to sit still and wait and thereby accept possibly a high number of casualties among the population. The necessity defence states that doing one unlawful act, namely to engage in torture, is permissible if it is used to prevent an even greater evil, namely the death of innocent people. Hence, it has to be examined whether the State or its officials can use the necessity defence as a justification to torture the alleged terrorist.

There are two general problems with the necessity defence approach. First, the ban on torture is a preemptory norm of international law. Second, the necessity defence is generally unable to generate State power.

Although the necessity defence is generally permissible under international law and has been defined by the International Law Commission in Article 25 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (Draft Articles on

<sup>173</sup> Landau Commission Report above n172, 167-185.

<sup>174</sup> John T. Parry, Welsh S. White "Interrogating Suspected Terrorists: Should Torture Be an Option?" (2002) 63 U Pitt L Rev 743, 760-765; John T. Parry above n42, 258. Andrew A. Moher "The Lesser of Two Evils?: An Argument for Judicially Sanctioned Torture in a Post-9/11 World" (2004) 26 San Diego Justice J 469; Alan M. Dershowitz above n6, 132-163.

<sup>175</sup> Working Group Report above n44, 25-25.

<sup>176</sup> Landau Commission Report above n172, 171: "the concept of the lesser evil." Oren Gross "Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience" (2004) 88 Minn L Rev 1481, 1498 calls it the "conditional ban" approach.

State Responsibility)<sup>177</sup> it contains two important limitations. Necessity cannot be invoked if “the international obligation in question excludes the possibility of invoking necessity”<sup>178</sup> or the act in question constitutes a violation of a peremptory norm of general international law.<sup>179</sup>

Article 2.2 Torture Convention explicitly states that “no exceptional circumstances whatsoever ... may be invoked as a justification of torture.”<sup>180</sup> Thus, a State Party to the Torture Convention cannot invoke the necessity defence, as the prohibition of torture as treaty law is absolute and leaves no scope for justifications. As the prohibition of torture is also a general rule of international law that has attained the status of *ius cogens*,<sup>181</sup> no State can deviate from it and is therefore barred from invoking the necessity defence. Hence, no State can invoke the necessity defence in order to torture an alleged terrorist, even if it is convinced that there is a ticking time bomb and that the terrorist will reveal its location under torture.

Moreover, the necessity defence fails to be a source of State power in general as it violates the rule of law. In *Committee Against Torture v. Israel*<sup>182</sup> the State Israel argued that authorization for such otherwise illegal interrogation methods could be derived from the necessity defence.<sup>183</sup> The Israeli Supreme Court rejected this argument, as “general directives governing the use of physical means during interrogation must be rooted in an authorisation prescribed by law and not in defences to criminal liability. The principle of ‘necessity’ cannot serve as a basis of authority.”<sup>184</sup>

The reasoning of the Court is convincing, as the rule of law generally requires State action, which infringes upon the rights of individuals, to be based on a specific piece of legislation.<sup>185</sup> Torture violates the physical and mental integrity of the victim,

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<sup>177</sup> International Law Commission “Draft articles on Responsibility of States for internationally wrongful act” (2001) adopted at its fifty-third session November 2001 <<http://www.un.org>> (last accessed 15 Oct 2004).

<sup>178</sup> Article 25.2.a Draft Articles on State Responsibility.

<sup>179</sup> Article 26 Draft Articles on State Responsibility.

<sup>180</sup> See also Article 5 Inter-American Convention to Prevent and Punish Torture.

<sup>181</sup> See above III A.

<sup>182</sup> *Committee Against Torture v. Israel* above n28.

<sup>183</sup> *Committee Against Torture v. Israel* above n28, para 33.

<sup>184</sup> *Committee Against Torture v. Israel* above n28, para 37.

<sup>185</sup> *Committee Against Torture v. Israel* above n28, para 36.

negates his autonomy and deprives him from human dignity.<sup>186</sup> Thus, the very general legal principle of necessity is totally insufficient and far too indeterminate to empower the State or its officials to refer to torture. Under the necessity defence a State would be able to impose any sanctions it wants as long as the total outcome of such acts are deemed socially beneficial. Hence, there would be no way of setting any reasonable restrictions and limitations as long as the act, which the State wants to prevent, is more horrible.

Even if a State enacts anti-terror legislation explicitly permitting torture, it remains doubtful whether such a provision is constitutional. The German Constitution for example contains a charter of basic civil rights from which deviation is not permissible; *inter alia* that human dignity has to be protected.<sup>187</sup> Hence, anti-terror legislation has to take those constitutional values and restrictions into account. As the subjection to state-sponsored torture is a violation of human dignity, it is most likely that a German anti-terror law permitting torture would be held unconstitutional by the German Federal Constitutional Court.

## 2. *Commander-in-Chief Powers*

The Working Group Report issued by the United States Ministry of Defence also argues that the President's role as Commander-in-Chief gives him the constitutional power to detain alleged terrorists and interrogate them.<sup>188</sup> However, it is doubtful whether the "War on Terror" can be characterised as war. Usually a war is an armed conflict between two or more States or an internal conflict between two or more belligerent parties. The "War on Terror" is not an armed conflict against a specific State but rather a campaign against an international network of terrorists. Hence, it is rather a criminal law issue or an issue international law enforcement than an armed conflict.

Moreover, even if the "War on Terror" falls within the definition of war it is doubtful whether the President's powers as Commander-in-Chief include the power to torture prisoners of war. Prisoners of war are protected and must at all times be

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<sup>186</sup> Michael S. Moore "Torture and the Balance of Evils" (1989) 23 Israel Law Rev 280, 297-98; Oren Gross above n176, 1492.

<sup>187</sup> Article 1 Grundgesetz (German Constitution).

<sup>188</sup> Working Group Report above n44, 24.

humanely treated.<sup>189</sup> No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatsoever.<sup>190</sup> Even the notion of “unlawful combatants” will not help the United States as Article 5 Geneva Convention presumes the prisoner of war status of belligerents as long as the opposite has not been determined by a competent tribunal. Hence, the notion of “unlawful combatants” is only an attempt by the United States government to deprive detainees in Iraq, Afghanistan and Guantanamo Bay from their rights under the Geneva Convention III. A presidential order to torture alleged terrorists detained at Guantanamo Bay is most likely to be a violation of the Geneva Convention III.<sup>191</sup>

### 3 *Torture Warrant*

Although the United States deny that they refer to torture in the “War against Terror” above examination has shown that there is a widespread use of torture “under the radar screen,”<sup>192</sup> in a “twilight zone.”<sup>193</sup> Dershowitz argues that the decision to torture or not cannot be left to the executive, especially to lower rank officials as this would lead to misuse and abuse. He criticises such forms of torture “under the radar screen”, as it would not allow review acts of torture and thus is not appropriate for a democracy because the voters could not account or criticise the government for acts of which they do not know of.<sup>194</sup> Thus, he suggests inventing a torture warrant.<sup>195</sup> Like a search warrant the authority interrogating the alleged terrorist would have to ask the judiciary for a torture warrant if the aim of torture is to prevent a terrorist attack and other means of investigations have failed or are unavailable because of insufficient time. By involving the judiciary acts of torture would be limited as at least two independent parts of the State would have to evaluate the situation<sup>196</sup> and thereby help to prevent

<sup>189</sup> Geneva Convention relative to the Treatment of Prisoners of War (Geneva Convention III) adopted on 12 August 1949, entry into force 21 October 1950 <www.unhchr.ch> (last accessed 01 Oct 2004).

<sup>190</sup> Article 17 Geneva Convention III.

<sup>191</sup> However, the exact determination of the prisoner of war status of the detainees at Guantanamo Bay and elsewhere is beyond the scope of this paper. For further reference see John W. Broomes “Maintaining Honor in Troubled Times: Defining the Rights of Terrorism Suspected Detained in Cuba” (2002) 42 Washburn L J 107.

<sup>192</sup> Alan A. Dershowitz above n172, 48 N Y L Sch L Rev 275, 278.

<sup>193</sup> Landau Commission Report above n172, 182, describing the interrogation practices of the GSS against alleged Palestinian terrorists.

<sup>194</sup> Alan A. Dershowitz above n6, 152.

<sup>195</sup> Alan A. Dershowitz above n6, 132-163.

<sup>196</sup> Alan A. Dershowitz above n6, 158-159; Alan A. Dershowitz above n172, 48 N Y L Sch L Rev 275, 281.

torture "under the radar screen."<sup>197</sup> To emphasize his call for a torture warrant, he refers again to a ticking time bomb scenario in which the bomb finally explodes and kills many civilians although the government has had the opportunity to torture the terrorist. Dershowitz asks, "Would I really argue that the state must refrain from torture in this case?"<sup>198</sup>

The idea of the legal justification of torture by issuing a torture warrant must be rejected for various reasons. The ticking time bomb scenario is highly hypothetical. It is a simplification of a complex issue and is exploited to loosen the public restraints on the prohibition of torture. Its apparent clarity is seductive but potentially misleading.<sup>199</sup> It is easy to support the call for torture in such a hypothetical and well-defined situation. The bigger the grade of destruction a possible terrorist attack may have the more likely people will accept the use of torture. But will we ever have the real ticking time bomb scenario? What kind of certainty is necessary to justify torture? Who adjudges? What rights does the suspect have?

Moreover, the ticking time bomb scenario is likely to undermine the absolute prohibition of torture and thereby endangers the whole international human rights system. With this line of argumentation it is possible to justify any human rights violation as long as the perpetrator can claim to have acted for the greater good.

In addition, justifying torture will be a huge setback in the "War on Terror". Using state-sanctioned torture against alleged terrorists lowers the State to the same level as the terrorists.<sup>200</sup> Terrorist usually inflict pain and suffering on innocent individuals in order to achieve a mostly political goal. Hence, they invoke the same "the ends justify the means" argument.<sup>201</sup> Consequently, a State fighting terror will lose its moral leadership if it engages in torture even under narrowly defined conditions. Moreover, as soon as a major State such as the United States openly uses

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<sup>197</sup> Alan A. Dershowitz above n6, 158.

<sup>198</sup> Alan A. Dershowitz above n172, 48 N Y L Sch L Rev 275, 289.

<sup>199</sup> Daniel Rothenberg above n76, 493.

<sup>200</sup> 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 & Foreign Aff 89, 168.

<sup>201</sup> Karima Bennouna "'To Respect and to Ensure': Reconciling International Human Rights Obligations in a Time of Terror" (2003) 97 Am Soc'y Int'l L Proc 23, 25.

torture, it will constitute a precedent for other countries.<sup>202</sup> Why should they refrain from using torture against their “terrorists” if the United States can? Thus, a State, which engages in state-sanctioned torture, will lose its ability to effectively criticise human rights violations committed by other countries.

Moreover, the use of torture against alleged terrorists is likely to undermine the “War on Terror,” as it weakens the scope for political solutions and the influence of moderate views in the Islamic world.<sup>203</sup> Anti-fundamentalists in the Arabic countries will have a difficult time to speak up against Islamic stereotypes stigmatizing the Western World and the United States in particular as evil. The use of torture by the United States especially in occupied territories such as Abu Ghraib prison in Iraq is an ideal breeding-ground for new anti-Americanism and consequently new terrorist activities.

Furthermore, there is the danger of the slippery slope.<sup>204</sup> Once torture is allowed, will there be any restraints on its application? As stated above, the definition of torture covers interrogation techniques, which have just crossed the borderline from cruel, inhumane and degrading treatment to torture as well as the most brutal and cruel acts humans have ever thought of. Thus, the question will be how much torture is permissible in the ticking time bomb scenario? Are only forms of “politically correct” torture admissible? Dershowitz suggests applying a sterilized needle under the suspect’s fingernails to produce unbearable pain without any threat to health or life.<sup>205</sup> Apart from the fact that torture victims very often suffer more from mental injuries and traumas than from the actual physical injuries inflicted, Dershowitz’s example is merely another attempt to render torture socially acceptable. Moreover, it is very shortsighted to believe that interrogators will stop at that point. If the lives of many possible victims of the ticking time bomb are at stake, it is very likely that other forms of torture will be applied, too. Where will be the border? Having been regularized, torture will become regular and officials will start to explore the outer limits of the rules.<sup>206</sup> Is it permissible to apply every illegal interrogation technique described above, including *inter alia*

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<sup>202</sup> Sanford Levinson “‘Precommitment’ and ‘Postcommitment’: The Ban on Torture in the Wake of September 11” (2003) 81 Tex L Rev 2013, 2053; John T. Parry, Welsh S. White above n174, 763; Andrew A Moher above n174, 469.

<sup>203</sup> Karima Bennoune above n201, 27.

<sup>204</sup> Marcy Strauss “Torture” (2003/2004) 48 N Y L Sch L Rev 201, 265-268.

<sup>205</sup> Dershowitz above n6, 144.

<sup>206</sup> Richard A. Posner “The Best Offence” (02 Sept 2002) *The New Republic* 28.



electrocution, rape, ripping of fingernails? Is it permissible to torture the suspect's wife and children?<sup>207</sup> Is it really true that the "ends justify all means?" Interrogators might be tempted to assume a factual setting in which torture is permissible simply because it is easier to torture the suspect than to use normal forms of investigation. The reference to torture might be too easy, too tempting. Especially if torturing of alleged terrorists turns out to be successful, who ensures that torture is not expanded to other areas of crime prevention<sup>208</sup> – torturing drug dealers in order to reveal their sources or torturing members of other criminal associations.

Moreover, the notion of a torture warrant fails in the very case it has been created for: the ticking time bomb scenario. In cases in which imminent reaction by the state authorities is necessary a torture warrant is impracticable. A judge will not have sufficient time to analyse the facts, make a well-balanced decision or even write an opinion. The ticking time bomb scenario is based on the allegation that time is running out and thus, normal means of investigation – interrogation of the suspect and witnesses, search warrants, analysis of computer data, wire tapping etc – are not available. Consequently, there will not be enough time to acquire a torture warrant within the estimated time left. Thus, especially in the case of a ticking time bomb a torture warrant seems to be unpractical and unrealistic.

In addition, most domestic laws regulating the State's powers to investigate a criminal case and to intervene into individuals' rights contain exceptions for the situation of imminent threat. In the case of an imminent threat state authorities are often allowed to act without prior consent of the judiciary.<sup>209</sup> Consequently, a provision regulating a torture warrant will most likely contain an exception for ticking time bomb cases, as there will not be enough time to request a torture warrant before the time has run out. Consequently, it would be again up to the administration to decide whether the threat is so imminent that it is justified to torture the suspect. Hence, it is doubtful whether this might reduce the use of torture in interrogations.

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<sup>207</sup> See the also hypothetical case described by Marcy Strauss above n204, 273-274. In which the alleged terrorist reveals the location of the bomb after his child is electrocuted.

<sup>208</sup> Marcy Strauss above n204, 267.

<sup>209</sup> Under § 105.1 StPO (German Criminal Procedure Act) the police and the crown prosecutor are allowed to search someone premises without a search warrant if there is an imminent threat that the request for a search warrant would endanger the success of the investigation.

In addition, it is very unlikely that a torture warrant will lead to more transparency in the field of anti-terror measures. The United States Foreign Intelligence Surveillance Court (FISC)<sup>210</sup> is a good example for the opposite. The FISC is authorized to issue ex-ante surveillance measures against people, which are suspect of being “an agent of a foreign power.”<sup>211</sup> Its proceedings are undertaken in secrecy under exclusion of the publicity. Moreover, the records of the court have shown that it has approved nearly any request by the administration.<sup>212</sup> Thus, Dershowitz’s main argument that a torture warrant will cause more protection for the victim, as it will limit the use of torture is void.<sup>213</sup>

Consequently, a torture warrant is totally unnecessary, counterproductive and dangerous. The only remedy against torture “below the radar screen” is to investigate acts of torture and to prosecute the people responsible. In sum there are no possibilities to justify torture from ex-ante point of view even in the hypothetical case of a ticking time bomb. Thus, instead of using special, extreme and hypothetical situations as a centrepiece of a general change in policy it must be considered whether satisfying results can be achieved without changing policies.

### **B Ex-Post Justification**

However, the result that it is impossible to justify torture from an ex-ante point of view does not rule out the possibility that state officials who have committed acts of torture and thereby violated domestic and international law are going to be acquitted.<sup>214</sup> Criminal law whether domestic or international focuses on the criminal responsibility of individuals. International criminal law in particular has the purpose to ensure that serious and systematic breaches of human-rights law or international humanitarian law committed by individuals are prosecuted and punished.<sup>215</sup> Thus, it must be considered whether State Officials can invoke the necessity or similar criminal defences in a criminal proceeding that is directed against them.

<sup>210</sup> The FISC was established under the Foreign Intelligence Surveillance Act (FISA) 50 U S C §§ 1801-1862 (2000) in 1978.

<sup>211</sup> 50 U S C § 1805.a (2000).

<sup>212</sup> Attorney General “2002 Annual Foreign Intelligence Surveillance Act Report to Congress” (29 Apr 2003) <<http://www.usdoj.gov>> (last accessed 10 Nov 2004). In 2002, 1228 applications for surveillance measures were made and all have been approved by the special court.

<sup>213</sup> Similar Oren Gross above n176, 1547, at n 263.

<sup>214</sup> Paola Gaeta above n76, 789.

<sup>215</sup> Paola Gaeta above n76, 789.

A 2003 working group report by the United States' ministry of defence refers to § 3.02 United States Model Penal Code under which the defendant is justified if he believed that the action was necessary to avoid a harm or evil and that the harm or evil to be avoided was greater than the harm that would have resulted if the crime had been committed.<sup>216</sup> The working group report argues that an interrogator is justified under the necessity defence as the torture of an alleged terrorist would be "the lesser of two evils" compared to the possible damage created by a terrorist attack.<sup>217</sup> It continues that the necessity defence is not limited to certain types of harms and therefore includes even intentional homicide, as long as the harm avoided is greater.<sup>218</sup>

A similar line of argumentation has been used in *Committee Against Torture v. Israel*.<sup>219</sup> The Israeli Supreme Court (ISC) ruled that certain interrogation techniques were illegal under Israeli domestic law.<sup>220</sup> However, the ISC hinted that until the Israeli parliament enacts new legislation legalizing certain interrogation techniques it would accept the necessity defence in a criminal proceeding against an alleged torturer. It ruled that "the necessity defence is open to all, particularly an investigator, acting in an organizational capacity of the State."<sup>221</sup>

Hence both models favour an ex-post examination of the facts by a criminal court and thereby uphold the general prohibition of torture. Oren Gross favours this model, which he calls "official disobedience."<sup>222</sup> He argues that, as state officials know that they act *extra legis* and thus, know of the personal consequences of violating the prohibition of torture. Consequently, the burden of proof rests upon the state officials who have to present their case to the society which, "as imposer of authority, retains the role of making the final determination whether the actor ought to be punished and

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<sup>216</sup> Black's Law Dictionary (8ed 2004) under: "justification" <<http://www.westlaw.com>> (last accessed 18 Oct 2004).

<sup>217</sup> Working Group Report above n44, p 25.

<sup>218</sup> Working Group Report above n44, p25.

<sup>219</sup> *Committee Against Torture v. Israel* above n28.

<sup>220</sup> *Committee Against Torture v. Israel* above n28, para 38.

<sup>221</sup> *Committee Against Torture v. Israel* above n28, para 34. The court is referring to § 34.1 of the Israeli Penal Law which defines the necessity defence as follows: A person will not bear criminal liability for committing any act immediately necessary for the purpose of saving the life, liberty, body or property, of either himself or his fellow person, from substantial danger of serious harm, in response to particular circumstances during a specific time, and absent alternative means for avoiding the harm.

<sup>222</sup> Oren Gross above n176, 1519-1534.

rebuked, or rewarded and commended for her actions.”<sup>223</sup> If society sympathises with the torturer there are ways to protect the torturer from punishment:

For example the exercise of prosecutorial discretion not to bring criminal charges against persons accused of using torture, jury nullification where criminal charges are brought, executive pardoning or clemency where criminal proceedings result in conviction and governmental indemnification of state agents who are found liable for damages to persons who were tortured.<sup>224</sup>

Gross continues that his model emphasises accountability of state officials but also provides for flexibility in real ticking time bomb situations.<sup>225</sup>

Although the concept of ex-post justification of illegal State action has the advantage that it puts the burden of proof on the state official who decides to violate the law it must be rejected. The ex-post examination of acts of torture is the pertinent state of law under most domestic legal systems.<sup>226</sup> However, it did not prevent acts of state-sponsored torture “under the radar screen.” Moreover, it is naïve to assume that a state official who is charged with an act of torture is willing to present his case to “society” and waits for its judgement. The risks of non-approval are simply too high. Thus, the model of official disobedience is unlikely to work, as state officials will not take full responsibility for their acts, due to the risks of criminal prosecution. In addition, “society” as a whole is not able to make a judgement. The idea of direct democracy is not applicable as – apart from ancient Greek – it is not part of contemporary State law. Moreover, “society” will not be the right forum to make a judgement. It is very likely that they will take only into account the results of torture namely the discovery of a deadly plot or not. The “successful” torturer is going to be a hero whereas his “unsuccessful” counterpart is going to jail. Furthermore, “society” usually has no means to make state officials responsible. Governments as well as head of States are usually elected for a specific period of time, usually four years. Besides impeachment there does not seem to be much “society” can do if it is faced with an act of state-sponsored torture. Finally, there is the danger that reliance on public opinion will induce state officials to torture at least as much until the victim admits that he is a

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<sup>223</sup> Oren Gross above n176, 1523.

<sup>224</sup> Oren Gross above n176, 1523; Oren Gross “Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?” (2003) 112 Yale L J 1011, 1111-1115.

<sup>225</sup> Oren Gross above n176, 1528.

<sup>226</sup> See for instance 18 U.S.C. § 2340.

terrorist. The fear of being “unsuccessful” might lead to abuse and excessive methods and thereby endangers possible torture victims.

In addition, there does not seem to be much difference between justifying torture from an ex-ante point of view and using governmental influence to prevent torturers from punishment. Especially executive pardoning and clemency are merely governmental attempts to circumvent the ban on torture. A main obligation under the Torture Convention is to assure that acts of torture are getting investigated and punished.<sup>227</sup> The application of the necessity defence under domestic criminal law in torture cases also undermines this obligation, as it prevents the prosecution of state officials, which have committed acts of torture. The possible widespread use of the necessity defence in criminal proceedings renders the obligation to prosecute acts of torture meaningless. Especially declarations as the one made by the ISC that it will apply the necessity defence in torture cases<sup>228</sup> seems to be an invitation to the GSS interrogators to continue using illegal interrogation methods. This argument is not weakened by the fact that it will be at least up to the Court to decide whether the interrogator has met the preconditions of the necessity defence. Especially in cases in which torture led to the revelation of plans for future terrorists attacks there does not seem to be many restraints to justify the torturer finally. Even more dangerous are the statements made by the Working Group Report saying that the necessity defence can justify any act, even homicide.<sup>229</sup> They open the door to life threatening forms of torture. Hence, they will loosen any restraints on interrogators.

Furthermore, it is doubtful whether the necessity defence is generally available for state officials in criminal proceedings. If state officials were allowed to invoke the necessity defence, the State itself would be indirectly granted the right to encroach on individual's rights although it is officially barred from doing so. The criminal necessity defence would justify unlawful State action against its citizens as long as its requirements were met, namely to torture the alleged terrorist in order to prevent a future attack.

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<sup>227</sup> Article 4.1 Torture Convention.

<sup>228</sup> *Committee Against Torture v. Israel* above n28, para 34.

<sup>229</sup> Working Group Report above n44, 25

Moreover, the necessity defence is solely designed for emergency measures. It is an exception to the rule.<sup>230</sup> Thus, it cannot be used to justify systematic violations committed over a long period of time. State's effort to combat terrorism is not a singular event but an ongoing struggle. Especially the phrase "War on Terror" suggests that the question whether or not an alleged terrorist needs to be tortured will arise in more than one or two occasions. Hence, State actions committed by state officials cannot be justified under the necessity defence. State action which infringe upon individual rights – such as the right not to be tortured – are only justified to the extent expressly allowed by law.<sup>231</sup> Only parliament and thereby the citizens themselves can make the fundamental decision whether state officials shall be allowed to use torture under certain circumstances.<sup>232</sup> However, as explained above, it is impossible to establish a system of ex-ante legalisation of torture in very limited circumstances as it will be the beginning of a slippery slope and will undermine the value of the ban on torture.

In addition, criminal justifications such as self-defence and the necessity defence are primarily aimed at individuals and allow them to act in violation of the law under certain circumstances. Individuals are exempt from criminal liability in cases in which the private interests and rights of one individual prevails over another individual's rights.<sup>233</sup> State officials acting in their official position have to be distinguished from other individuals.<sup>234</sup> They are parts of the administration and thus, they are part of the State. In their official position they have to abide the law. Their rights as individuals are overlapped and covered by their official duty to act only within the limits of the law. Thus, they are generally barred from invoking criminal defences in situation in which they violated their obligations as state officials. Only in exceptional circumstances it is possible that state officials who have violated their duties can raise criminal defences in a later criminal proceeding. However, this exception is not applicable in torture cases

<sup>230</sup> 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) *Israeli Law Rev* 216, 238.

<sup>231</sup> Under German constitutional law this principle is called "Kein Eingriff ohne Gesetz" (no infringement of individual rights without legal authorisation).

<sup>232</sup> *Committee Against Torture v. Israel* above n28, para 36: "Necessity is certainly not a basis for establishing a broad detailed code of behaviour such as how one should go about conducting intelligence interrogations in security matter." See also Alan M. Dershowitz "Is it Necessary to Apply 'Physical Pressure' to Terrorists – And to Lie About it?" (1989) *Israeli Law Rev* 192, 199; Mordechai Kremnitzer above n230, 239; Emanuel Gross above n200, 113.

<sup>233</sup> The classic case is that an individual gets attacked by another individual and kills the perpetrator in self-defence. Although both individuals have a right to remain bodily unharmed and to live the right of the victim prevails over the perpetrator's right in the case of an unjustified attack.

<sup>234</sup> Mordechai Kremnitzer above n230, 237.

because of the absolute prohibition of torture.<sup>235</sup> State officials are barred from invoking criminal defences in torture cases because of their official position.<sup>236</sup>

There is only one possible solution which respects the absolute prohibition of torture under international and domestic law but also acknowledges the very unlikely but not impossible situation of a real ticking time bomb scenario, namely taking the special circumstances of the case into account when it comes to the allocation of the appropriate sentence for the perpetrator.

### *C Summary*

Although the ticking time bomb case tempts someone to sympathise with the torturer and to call for the legalization of torture under well-defined, exceptional circumstances, above examination revealed that the ban on torture is absolute and that there are now ways to justify torture even in the most pressing scenarios. The status of the prohibition of torture as general law of international law prohibits States to deviate from it regardless of the circumstances. As stated above, to grant the government extreme powers within the domestic legal framework provokes the enormous risk of abuse and sends the wrong message by legalizing such actions.<sup>237</sup> In addition, it is also impossible to exempt state officials from personal criminal liability. The only possibility is to think about a reduced sentence for perpetrators in clear-cut cases. Thus, the “War on Terror” does not justify a deviation from the absolute ban on torture.

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<sup>235</sup> This is at least true under German law. Tröndle/Fischer “Strafgesetzbuch (Commentary to the German Criminal Code)” (52ed, Beck, Munich, 2004) § 34, n23, § 32. A recent case was the case of Jacob Metzelder – a banker’s son – who has been kidnapped. The kidnapper was in custody and the police had reasons to believe that Jacob was still alive and would die in his hide-out. Thus, the vice-chief of the local police decided to threaten the kidnapper with the use of torture in order to find out the victims location. Because of the threat the kidnapper revealed the location, but the boy was already dead. The vice-chief of the local police got convicted, as criminal defences are not applicable for state officials in cases of torture or threats of torture because of the absolute prohibition of torture under human rights law. See decision of: Landgericht Frankfurt am Main (regional court, Frankfurt, Germany) StRV (“Der Strafverteidiger”) (2003) 327.

<sup>236</sup> Winfried Brugger “May Government Ever Use Torture? Two Responses from German Law” (2000) 48 Am J Comp L 661, 669.

<sup>237</sup> Owen Gross above n176, 1520.

## V PREVENTION AND ENFORCEMENT

As it is impossible to justify a deviation from the prohibition of torture, it has to be examined how acts of torture can be effectively prevented and the ban on torture be enforced.

### A Torture Convention

The Torture Convention establishes a legal framework which addresses questions of prevention and enforcement. Each State, which is party to the Torture Convention, is obliged "to prevent in any territory under its jurisdiction other acts of cruel, inhumane or degrading treatment or punishment which do not amount to torture."<sup>238</sup> In order to enforce the ban on torture, Article 4 requires each State Party to "ensure that all acts of torture are offences under its criminal law" and to "make these offences punishable by appropriate penalties which take into account their grave nature." Article 2.3 Torture Convention also states that the superior order defence is not applicable as justification of torture.<sup>239</sup> As it is necessary to have a starting point for an investigation, State Parties shall ensure "that any individual who alleges he has been subject to torture ... has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities." As it can be the case that alleged victims of torture are getting intimidated and threatened by the torturers not to make accusations, Article 13 Torture Convention also provides that "[s]teps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given."

As the Torture Convention does not establish an international court or other means to prosecute acts of torture it relies heavily on the domestic criminal systems. It is up to the State Parties to investigate and prosecute acts of torture within their own jurisdiction. As criminal systems vary widely it is disadvantageous that the Torture Convention does not give more specific proposals as to how the State Parties shall amend their criminal codes or change their investigative administration. Whereas a torture victim in on state may have the opportunity to bring the perpetrator in front of the court even if the crown prosecutor is not willing to investigate, a victim in another

<sup>238</sup> Article 16.1 Torture Convention.

<sup>239</sup> Article 2.2 Torture Convention: "An order from a superior officer or a public authority may not be invoked as a justification of torture".



State may not have this opportunity. Moreover, the term “punishable by appropriate penalties which take into account their grave nature” seems to be rather vague and leaves State Parties a lot of discretion. Hence, the Torture Convention fails to ensure that acts of torture result in similar criminal consequences no matter where the perpetrator is finally tried.

Regarding the “War on Terror” the United States are in violation of the Articles 16.1 and 3.1 Torture Convention. The United States failed to protect detainees at Guantanamo Bay from acts of torture and other forms of cruel, inhumane and degrading treatment.<sup>240</sup> Moreover, the practice of extraordinary rendition is a violation of Article 3.1 Torture Convention.<sup>241</sup>

However, as the Torture Convention is not self-executing, it has to be examined which international bodies are entrusted with the enforcement of the Convention.

#### ***B Committee against Torture***

In order to monitor the efforts in the fight against torture the Torture Conventions establishes a Committee against Torture (CAT).<sup>242</sup> The CAT is empowered to examine periodic reports from State Parties on the measures they have taken to give effect to their undertakings under the Torture Convention.<sup>243</sup> If it “receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party” the CAT starts an investigation.<sup>244</sup> An investigation may include a visit to the institutions allegedly using torture.<sup>245</sup> After examining the findings, the CAT files a final report comprising comments or suggestions, which seem appropriate in view of the situation and transmits them to the State Party concerned.<sup>246</sup>

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<sup>240</sup> The question whether the United States Courts have jurisdiction over Guantanamo Bay is outside the scope of this paper. However, the better reasons speak to the assumption that they have. See Diane Marie Amman “Guantanamo” (2004) 42 Colum J Transnat’l L 263.

<sup>241</sup> For a factual background see above II. For the question whether extraordinary renditions fall within the scope of the definition of torture and violate Article 3.1 Torture Convention see above III D 3.

<sup>242</sup> Article 17 Torture Convention.

<sup>243</sup> Article 19 Torture Convention.

<sup>244</sup> Article 20.1 Torture Convention.

<sup>245</sup> Article 20.1 Torture Convention.

<sup>246</sup> Article 20.4 Torture Convention.

However, the rights of the CAT are limited. First of all, the investigations are confidential.<sup>247</sup> Only a summary account of the results of the proceedings may be, after consultations with the State Party concerned, included in the Committees annual report.<sup>248</sup> It has so far issued five summary accounts of inquiries it has concluded under Article 20.<sup>249</sup> In the Turkey<sup>250</sup> and Egypt<sup>251</sup> reports the CAT found for instance that torture was systematically practised in the countries concerned. However, the Committee's reports are summaries and do not give details of what has happened.

The enforcement role of the CAT is further weakened by the fact that a State Party has the opportunity to opt-out of Article 20 Torture Convention by declaring, "that it does not recognize the competence of the committee."<sup>252</sup> In this case the Committee against Torture cannot investigate.

In addition to Article 20 Torture Convention, the Committee has to examine claims by a State Party that another State Party is not fulfilling its obligations under the Torture Convention. It also has to examine claims by individuals that they have been victim of a violation by a State Party of the provisions of the Torture Convention. However, the competences of Articles 20, 21 Torture Convention can only be executed if the State Party concerned has given a special declaration that it recognizes this additional competences of the Committee against Torture.<sup>253</sup>

The enforcement requires the cooperation of the State Party concerned and is therefore problematic. State Parties can opt-out of the Committee's right to investigate

<sup>247</sup> Article 20.5 Torture Convention.

<sup>248</sup> Article 20.5 Torture Convention.

<sup>249</sup> Activities of the CAT pursuant to Article 20 of the Convention against Torture and other Cruel, Inhumane and Degrading Treatment or Punishment: Turkey (15 Nov 1993) (hereinafter Turkey Report); Egypt (03 May 1996) (hereinafter Egypt Report); Peru (16 May 2001); Sri Lanka (17 May 2002); Mexico (hereinafter Mexico Report) (16 May 2003) all available at <<http://www.unhcr.ch>> (last accessed 10 Nov 2004).

<sup>250</sup> Turkey Report above n249, para 38.

<sup>251</sup> Egypt Report above n249, para 220.

<sup>252</sup> The possibility to opt-out of Article 20 was necessary to secure adoption of the Torture Convention. Nigel S. Rodley above n76, 157-158. However, as State Parties which opt-out of Article 20 might fear that this behaviour would be interpreted in a negative way, namely that they have something to hide, only ten State Parties out of 136 have excluded the Committee's Articles 20 Powers: Afghanistan, China, Cuba, Indonesia, Israel, Kuwait, Morocco, Poland, Saudi Arabia, Ukraine. See declarations and reservations to the Torture Convention as of 23 April 2004 <<http://www.ohchr.org>> (last accessed 14 Oct 2004).

<sup>253</sup> Only 56 out of 136 State Parties have made a special declaration which recognizes the Committee's powers under Article 20 Torture Convention. Only 57 State Parties recognize the Committee's powers under Article 21. See declarations and reservations to the Torture Convention as of 23 April 2004 <<http://www.ohchr.org>> (last accessed 14 Oct 2004).

under Article 20 Torture Convention. Moreover, they have to opt-in before the Committee can exercise its rights under Articles 21, 22 Torture Convention. Even if the Committee against Torture concludes that there are violations of the Torture Convention it does not have an effective enforcement mechanism. It can only make "general comments" on the periodic reports submitted by the State Parties or publish a summary of its investigation in its annual report. Both means are not suitable to ensure effective supervision of compliance with the provisions of the Torture Convention.<sup>254</sup>

The efficiency of the CAT is also weakened by budgetary constraints.<sup>255</sup> Finally there are deficiencies in the field of individual complaints. Only 57 out of 136 State Parties have recognized the Committees additional competence to hear individual complaints.<sup>256</sup> Moreover, anonymous complaints are inadmissible. Thus, torture victims have to reveal their identity in order to make a complaint. This might in fact deter them from filing a complaint, as they might fear repressive behaviour by the State Party concerned. In addition, the State Party concerned is granted a six months period to submit written explanations or statements clarifying the matter and the remedy. In the case of an urgent violation of the provisions of the Torture Convention, the State Parties' right to wait six months before it has to reply is far too long. Especially in a case in which a possible torture victim files a complaint, quicker reaction is necessary. Otherwise the State Party concerned may use the delay to destroy evidence or to intimidate possible witnesses.<sup>257</sup> Furthermore, a statistic of the individual complaints processed by the CAT shows that very few complaints led to an investigation and final report.<sup>258</sup> Thus, the CAT has only very limited means to respond to an urgent crisis.

In sum, the means of enforcement by the CAT seem to be rather weak. The CAT's threshold to start an investigation is high,<sup>259</sup> its investigation process rather slow. Continued allegations of torture in the "War on Terror" and recent attempts to

<sup>254</sup> Nigel S. Rodley above n76, 176.

<sup>255</sup> Winston P. Nagan, Lucie Atkins "The International Law of Torture: From Universal Proscription to Effective Application and Enforcement" (2001) 14 Harv Hum Rts J 87, 105.

<sup>256</sup> See declarations and reservations to the Torture Convention as of 23 April 2004 <<http://www.ohchr.org>> (last accessed 14 Oct 2004).

<sup>257</sup> Winston P. Nagan, Lucie Atkins above n255, 105 argue that "the delay creates the opportunity for the disappearance or extra-judicial execution of a victim, who might have the capacity to talk and expose what has happened; dead torture victims tell no tales".

<sup>258</sup> Out of 242 complaints 4 were suspended, 40 inadmissible, 59 discontinued. Only 68 cases constituted a violation whereas 25 did not. "Statistical survey of individual complaints dealt with by the Committee against Torture under the procedure governed by article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (updated on 30 April 2004)" <<http://www.ochr.org>> (last accessed 14 Oct 2004).

<sup>259</sup> See Article 20.1 Torture Convention.

circumvent the ban on torture, for instance by extraordinary renditions, require prompt measures. The examination of periodic reports from State Parties under Article 19 Torture Convention is insufficient to immediately condemn violations of the Torture Convention. A prompt investigation of torture allegations and violations of the Torture Convention is necessary to prevent the establishment of a system which will lead to the systematic practice of torture by a State Party to the Convention.

### C *Human Rights Committee*

Another international body which monitors the ban on torture is the Human Rights Committee (HRC).<sup>260</sup> The HRC monitors state compliance with their obligations under the ICCPR.<sup>261</sup> States which have ratified the ICCPR must report on the measures they have taken in order to fulfil their obligations under the ICCPR at the HRC's request.<sup>262</sup> Usually, the HRC asks states parties to report every five years. The HRC examines the state reports and makes general comments in its annual report.

As stated above, by applying illegal interrogation techniques in the "War on Terror" the United States have violated their obligation under Article 7 ICCPR, namely that no one shall be subjected to torture and other forms of cruel, degrading or inhumane treatment. In addition, the current practice of extraordinary renditions constitutes a violation of Article 13 ICCPR. Finally, it is arguable that the arbitrary detention of alleged terrorists at Guantanamo Bay and elsewhere violate the United States obligations under the Article 9 ICCPR, especially the obligation to allow pleas for *habeas corpus*. Hopefully the HRC requests a report about the United States current practices in the "War on Terror" and urges them to cease violation of the ICCPR.

Under the Optional Protocol to the ICCPR, any individual whose rights under the ICCPR have been violated in a State that has ratified the Optional Protocol can present a complaint to the HRC,<sup>263</sup> on condition that all effective means of domestic redress have been exhausted<sup>264</sup> and that the submission is not anonymous.<sup>265</sup> If the

<sup>260</sup> Article 28 ICCPR.

<sup>261</sup> Article 7 ICCPR states that "[n]o one shall be subjected to torture."

<sup>262</sup> Article 40 ICCPR.

<sup>263</sup> Article 2 Optional Protocol to the International Covenant on Civil and Political Rights (hereinafter ICCPR Optional Protocol I) adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976 <<http://www.unhchr.ch>> (last accessed 10 Nov 2004).

<sup>264</sup> Article 5.2.b ICCPR Optional Protocol I.

individual complain is admissible<sup>266</sup> the HRC requests the state party concerned to explain the matter and remedies that have been taken within six months.<sup>267</sup> The HRC then considers the communication in the light of all written information made available to it by the individual and the State party concerned and formulates its views thereon.<sup>268</sup> If the HRC identifies a violation of the ICCPR, for instance Article 7 ICCPR, it makes a final decision, including recommendations to stop the violation.<sup>269</sup> At a next stage the HRC monitors whether the State implements its recommendations.<sup>270</sup>

Similar to Article 20 Torture Convention the HRC can only investigate individual complaints if the State at issue is party to the Optional Protocol I. In addition, it only acts retrospectively. Moreover, the individual is obliged to use all domestic means of redress before his submission is admissible. Furthermore, Article 4.2 ICCPR gives the State additional six months of time to make a statement. Hence, the individual has to wait quite long before he gets a final decision by the HRC.<sup>271</sup> Accordingly HRC's recommendations may come too late to help victims of the "War on Terror" or to immediately stop further violations of Article 7 ICCPR. Moreover, besides stating acts on non-compliance in its annual reports the HRC does not have any other means to enforce its decisions.

#### **D The Special Rapporteur on Torture**

The Special Rapporteur on Torture (Rapporteur) is appointed by the United Nations Commission on Human Rights and complements the CAT. Whereas the CAT investigates specific allegations of torture, the Rapporteur monitors torture in general.<sup>272</sup>

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<sup>265</sup> Article 3 ICCPR Optional Protocol I.

<sup>266</sup> The requirements are listed at Rule 20 HRC Rules of Procedure of the Human Rights Committee (hereinafter HRC Rules of Procedure) HRI/GEN/3/Rev.1 (28 April 2004) <<http://www.un.org>> (last accessed 10 Nov 2004).

<sup>267</sup> Article 4.2 ICCPR Optional Protocol I.

<sup>268</sup> Rule 94 HRC Rules of Procedure above n266.

<sup>269</sup> *Estrella v. Uruguay* above n14, para 11 is an example of a possible decision by the HRC. The HRC decided "that the State party is under an obligation to provide the victim with effective remedies, including compensation, for the violations he has suffered and to take steps to ensure that similar violations do not occur in the future."

<sup>270</sup> Rule 95 HRC Rules of Procedure above n266.

<sup>271</sup> In *Estrella v. Uruguay* above n14, the victim was abducted and tortured in December 1977. He submitted his case to the HRC in July 1980. The final decision was adopted in March 1983, nearly six years after the incident. Hence, the HRC's decision, to ensure that "similar violations do not occur in the future" seems to be inappropriate taking into account the time elapsed.

<sup>272</sup> Winston P. Nagan, Lucie Atkins above n255, 106. The working methods of the Rapporteur are summarized in his annual report to the Human Rights Commission (1997) UN doc. E/CN.4/1997/7, Annex p 49-51 <<http://www.un.org>> (last accessed 15 Oct 2004).

He is "to seek and receive information from governments, as well as specialized agencies, intergovernmental organisations and non-governmental organizations."<sup>273</sup> A special feature of the Rapporteur is his mandate to make urgent appeals to governments to clarify the situation of individuals whose circumstances give grounds to fear that treatment falling within the Special Rapporteur's mandate might occur or be occurring.<sup>274</sup> Thus, an urgent appeal has a preventive purpose and shall protect an individual from being subject to torture.

However, the Rapporteur cannot make binding decisions. His annual report usually contains recommendations aimed at the governments in general. Nevertheless, his findings have some political relevance as the United Nations Commission of Human Rights supports him.<sup>275</sup>

Thus, the Rapporteur cannot enforce the ban on torture as stated in the Torture Convention but he is another international instrument to monitor acts of torture and to appeal governments concerned. The Rapporteur is acting preventive through its urgent appeals whereas the CAT and HRC only acts if violations of the Torture Convention have already occurred. This preventive approach seems favourable, as it seems to be the most helpful alternative for the individual who is in danger of being subjected to torture. In 2003 the Rapporteur has sent 369 urgent appeals to 80 countries on behalf of individuals with regard to whom serious fears had been expressed that they might be at risk of torture or other forms of cruel, inhumane or degrading treatment.<sup>276</sup> Unfortunately, compliance with the Rapporteur urgent appeals is not widespread<sup>277</sup> which might be due to the fact that he does not have any specific enforcement measures. Moreover, there seems to be a lack of funding, causing a lack of efficiency.<sup>278</sup>

<sup>273</sup> Nigel S. Rodley above n76, 148; Report of the Rapporteur to the Human Rights Commission (1997) UN doc E/CN.4/1997/7 <<http://www.un.org>> (last accessed 15 Oct 2004), Annex para 2.a.

<sup>274</sup> Report of the Rapporteur to the Human Rights Commission (1997) UN doc E/CN.4/1997/7 <<http://www.un.org>> (last accessed 15 Oct 2004), Annex para 2.b, 3-8.

<sup>275</sup> Nigel S. Rodley above n76, 149.

<sup>276</sup> Report of the Special Rapporteur, Theo van Boven (23 Dec 2003) UN doc E/NC.4/2004/56 <<http://www.un.org>> (last accessed 15 Oct 2004) para 19.

<sup>277</sup> "The Special Rapporteur regrets that many Governments fail to respond to urgent appeals or respond solely to some selected appeals. The Special Rapporteur does not have the means to verify these answers, although in some cases they can be corroborated and contrasted with information received from other sources." Report of the Special Rapporteur, Theo van Boven (23 Dec 2003) UN doc E/NC.4/2004/56 <<http://www.un.org>> (last accessed 15 Oct 2004) para 26.

<sup>278</sup> Nigel S. Rodley "Letter of resignation dated 15 October 2001 from the Special Rapporteur addressed to the Chair of the Commission on Human Rights" Report of the Special Rapporteur (27 Dec 2001) UN doc E/NC.4/2002/76 56 <<http://www.un.org>> (last accessed 15 Oct 2004) p 9: "I must, however, remind the Commission, through you, that the mandate would be much more effective were the Office able to grant resources to permit maximum activity in responding to the enormous amount of

Hence, a strengthening of the position of the Rapporteur is favourable in order to combat torture more effectively.

### *E Non-Governmental Organisations*

Non-governmental organisations such as Amnesty International play another important role in the international fight against torture. Through their widespread networks within many countries they are able to monitor acts of torture<sup>279</sup> and bring them to the awareness of the national authorities as well as the relevant international bodies.<sup>280</sup> They thereby complement the work of the CAT, HRC and the Rapporteur. As international human right bodies usually do not have the right to start their own investigation in the State concerned they have to rely on the official communication presented by the State. Hence, reports of non-governmental organisations are a valuable, additional source of information.

Moreover, by reporting acts of disappearance or incommunicado detention of individuals they play an active role in preventing torture. Up-to date information is essential in making urgent appeals more effective. Moreover, non-governmental organisations are important for individuals who are in danger of being tortured. If they are already detained they are unable to address international human right bodies themselves. Thus, they need someone who speaks up for them.

Finally, non-governmental organisations are necessary to build up pressure from the global society in order to fight torture whether by pointing at urgent crisis or by lobbying for the creation of new or implementation of existing international obligations by States. Although non-governmental organisations do not have an enforcement mechanism they have a high value in the fight against torture, especially by bringing acts of torture to the awareness of the international public as well as the relevant human rights bodies.

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information it receives or could obtain. Regrettably, the organization has still to demonstrate the political will and priority to translate its concerns about torture and other grave human rights problems into more effective action."

<sup>279</sup> See for instance the comprehensive Amnesty International Annual Report 2004 <<http://web.amnesty.org>> (last accessed 10 Nov 2004).

<sup>280</sup> The Rapporteur relies *inter alia* on information from non-governmental organisations. Nigel S. Rodley above n76, 148; Report of the Rapporteur to the Human Rights Commission (1997) UN doc E/CN.4/1997/7 <<http://www.un.org>> (last accessed 15 Oct 2004), Annex para 2.a.

## **F** *International Criminal Court*

The International Criminal Court (ICC) *inter alia* has subject matter jurisdiction over crimes against humanity and war crimes.<sup>281</sup> Torture is enumerated in the ICC Statute as both a crime against humanity<sup>282</sup> and a war crime.<sup>283</sup> Nevertheless, it is very unlikely that the ICC will have the opportunity to convict the United States state officials who are responsible for the torture of alleged terrorists at Abu Ghraib, Guantanamo Bay and elsewhere, as its personal and territorial jurisdiction is limited. In cases other than Security Council referrals, the ICC can only exercise jurisdiction if the State of which the suspect is a national or the State on whose territory the crime was committed has ratified the ICC Statute or has accepted the exercise of jurisdiction by the ICC in the particular case.<sup>284</sup> The United States do not accept the jurisdiction of the ICC and therefore have not ratified the ICC Statute. Moreover, the jurisdiction of the ICC is not original but complementary to that of the domestic criminal justice system of the state concerned. The ICC can only exercise jurisdiction if a State with custody of the suspect "is unwilling or unable genuinely to carry out the investigation or prosecution."<sup>285</sup> At least in the case of the Abu Ghraib prisoner abuse some members of the United States army have been convicted.<sup>286</sup> In the case of Guantanamo Bay it would be interesting to see whether the ICC would come to the conclusion that the United States are unwilling to investigate or prosecute acts of torture. As they have not ratified the ICC Statute, it is a merely hypothetical question.

## **G** *Summary*

The enforcement of the ban on torture in the "War on Terror" relies heavily on the States themselves. Under the Torture Convention it is their responsibility to investigate and prosecute acts of torture. The mechanisms to enforce compliance with

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<sup>281</sup> Article 5.1 ICC Statute.

<sup>282</sup> Article 7.1.f ICC Statute.

<sup>283</sup> Article 8.2.a.ii ICC Statute.

<sup>284</sup> Articles 11-14 ICC Statute.

<sup>285</sup> Article 17.1 ICC Statute.

<sup>286</sup> One of the offenders has been sentenced to eight years during a court martial in October 2004. He admitted he hooked wires on the hands of a detainee who was told he would be electrocuted if he fell off a box, and that he forced prisoners to masturbate. But he blamed his command, saying military intelligence officers ordered prisoners to be publicly stripped and degraded. Davis Dishneau "Soldier Sentenced in Abu Ghraib Scandal Was Reared to Take Responsibility for His Actions" *The Associated Press* (21 Oct 2004).



this obligation remain rather weak. Violations of the Torture Convention or the ICCPR lead merely to a condemnation of the States behaviour by the CAT, HRC or the Rapporteur. Effective means, such as the imposition of sanctions are not available. Although it is necessary to morally condemn States which violate their obligations under the Torture Convention or the ICCPR it is even more important to prevent future acts of torture. Nevertheless, the human rights bodies' task to monitor the compliance with the obligations under the relevant treaties is important as it puts pressure upon the States concerned and assures that they are implementing recommendations. The recommendations can be very detailed and thereby provide a basis for structural improvements in the State concerned.<sup>287</sup>

However, the "War on Terror" creates urgent risks for alleged terrorists and thus, requires prompt reactions by the international community. Hence, the review mechanism of the CAT and HRC which works retrospective is unsuitable to prevent acts of torture or cruel, inhumane or degrading treatment. Only the Rapporteur through its urgent appeals is able to protect individuals from being subjected to torture. His work is complemented by the work of non-governmental organisations which gather information through their networks and thereby bring threats and acts of torture to the awareness of the public and the relevant human rights bodies. Thus, the role of the Rapporteur and non-governmental organisations has to be strengthened, for instance by adequate funding. Another idea would be to amend the Torture Convention and give non-governmental organisations the right to make a claim that a State Party is not fulfilling its obligations under the Torture Convention. Unfortunately, this is very unlikely to happen.

## VI CONCLUSION

The ban of torture is a peremptory norm of international law. However, this examination has shown that the interrogation techniques in the "War on Terror" against alleged terrorists amount to torture. Some of the prisoner abuses at Abu Ghraib must have caused severe physical, as well as mental pain and suffering as they were extreme forms of cruel, inhumane and degrading treatment. Although the interrogation techniques, which are applied against alleged terrorists at Guantanamo Bay and

<sup>287</sup> See for instance the recommendations made in the Mexico Report above n249, paras 218-220 and the Mexican government's promise to comply, para 285.

elsewhere, do not refer to blunt acts of violence they are a sophisticated method to break or even eliminate the detainees will. They are a combination of interrogations techniques used by the British security forces against the IRA in the seventies and methods used by the Israeli GSS against Palestinian terrorists. Those interrogation techniques which can be summed up as sensory deprivation, sleep deprivation and incommunicado detention amount to torture, although the ECHR has had a different point of view twenty-five years ago. As they are applied in combination and over a prolonged period of time it is very likely that the detainees suffer mentally in a manner that passes the "severity" threshold. Recent reports of suicide attempts at Guantanamo Bay illuminate the potential negative effects of the detention. Moreover, it is necessary to lower the threshold for torture due to the global dissemination of human rights in recent years. Thus, interrogation techniques, which have been approved in the seventies, will not necessarily find a Court's approval again.<sup>288</sup> In addition, it is necessary to help victims who are held in incommunicado detention, as they are usually unable to prove that they have been subjected to torture. A shift of the burden of proof from the detainee to the detaining State is favourable, as the State has the better means to prove that the torture allegations are unjustified.

The examination of the methods used in the "War on Terror" has also shown that governments try to circumvent the prohibition of torture by deliberately sending alleged terrorists to foreign countries where they get interrogated and tortured – a practice known as "extraordinary rendition". This method constitutes not only a violation of Article 3.1 Torture Convention and Articles 9, 13 ICCPR, but can also be characterised as "torture outsourcing". It thereby constitutes an act of torture at the instigation of the extraditing country.

The further discussion has shown that it is impossible to deviate from the absolute ban on torture in times of terror. Although hypothetical scenarios such as the ticking time bomb scenario as well as politically correct forms of "torture light" are tempting, there are many convincing reasons against such attempts. First, there is the slippery slope argument. Once torture is permissible under certain clear-cut requirements there is no guarantee that the system will be expanded or abused. Second, ideas of democracy, human rights, and the rule of law, which pose strong challenges to extremist movements, may now be tainted through their selective application by the

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<sup>288</sup> *Selmouni v. France* above n124, para 102.

United States in the "War on Terror". Hence, the United States is likely to lose their moral leadership in the "War on Terror" as their acts can be hardly distinguished from acts of terrorism committed by Al Qaeda and other groups. Hence, in order to win the "War against Terror" it is of paramount importance to respect the rule of law and to apply fundamental human rights regardless of the circumstances. Otherwise we destroy the very values we seek to protect. This would be the end of the "War on Terror" and a victory for the terrorists. Hence, the international community must speak up against human rights violations under the cover of the "War against Terror". It would be a welcomed development if more countries would follow the example of the Committee of Ministers of the Council of Europe and emphasize the absolute prohibition of torture regardless of the circumstances.<sup>289</sup>

Regarding prevention and enforcement it has become apparent that the role of the Rapporteur and non-governmental organisations need to be strengthened as they are the only ones which are able to address urgent crisis and to prevent acts of torture efficiently. However, the role of the CAT and the HRC cannot be underestimated. Both human rights bodies monitor the implementation of the obligations under the Torture Convention and the ICCPR in general. Through their sometimes very detailed recommendations they facilitate the dissemination of human rights in general and the respect of the prohibition of torture in particular.

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<sup>289</sup> Article 4 Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight against Terrorism (11 July 2002) adopted at the 804<sup>th</sup> meeting of the Ministers' Deputies.

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