DEROGATION FROM THE PROHIBITION OF TORTURE IN THE CASE OF EXTREME NECESSITY

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Abstract

Despite an absolute prohibition of torture, its practice is common in the fight against terrorism. This article investigates whether, in practice, this absolute prohibition is uncontested and whether states have the opportunity to derogate from this prohibition in the case of extreme necessity. To answer this question, causal theory – the theory behind the necessity defence – is elaborated on. Treaty law and customary law, both sources of international law, are also analysed. Many states use torture as an interrogation method, and both domestic and international law might provide for exclusion of criminal liability. These findings show that the absolute prohibition of torture is far from uncontested, which could indicate a paradigm shift away from a peremptory norm in international law.

Keywords
Prohibition of torture, international public law, necessity defence, coercive interrogation, terrorism

I. INTRODUCTION

It took the Central Intelligence Agency (hereinafter CIA) 16 hours to prevent the annihilation of Manhattan. Soon after receiving a tip that a weapon of mass destruction had been placed somewhere in New York City, a terrorist was caught and taken into custody. During the following 16 hours the CIA subjected him to coercive interrogation techniques involving water boarding and electric shocks. He eventually yielded, allowing the CIA to prevent the largest terrorist attack on American soil since September 11, 2001.

The previous hypothetical scenario illustrates a dilemma within international law, but perhaps also in morality itself. Should torture be prohibited absolutely or should states have the opportunity to derogate from

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this prohibition in case of extreme necessity? Can the international community expect a state to accept the consequences of a severely catastrophic event without exhausting all means available to prevent such a thing from happening? A positive answer to these questions would indicate that international law has limited state sovereignty to such an extent that states no longer have the authority to prevent a catastrophe on their own soil.

While the scenario above did not truly occur, democratic states, such as the United States and the United Kingdom have committed – and may still commit – acts that some would regard as torture.[2] As this article makes plain, these acts are mostly a result of a terrorist threat, or the perception of one.

In itself, an act of torture would be regarded as unacceptable by most people. However, if torture could influence the outcome of other events, this universal opinion might no longer apply. After the release of the film *Zero Dark Thirty* on the liquidation of Al-Qaida leader Osama Bin Laden, various critics condemned the film for propagating the use of torture in countering terrorism.[3] One of the critics, Frank Bruni, even stated that the opening scene, which involves the torture of a terrorist suspect, and is followed by a scene using the recorded voices of Americans trapped in the World Trade Centre in New York City, suggests that without coercive interrogation techniques Bin Laden would not have been captured.[4]

While the release of one movie does not influence moral values, it does indicate that the prohibition of torture might not be absolute in the minds of all. This dilemma becomes even more challenging if one includes the 'ticking bomb scenario', such as the scenario in my first paragraph.

Even though most domestic legal systems prohibit the use of torture, international law obliges states themselves to refrain from such acts. International law and its sources must be investigated to answer the main question of this article: *Is the absolute prohibition of torture under*

[2] See, *e.g.*, Gareth Peirce, Dispatches from the Dark Side: on Torture and the Death of Justice, Verso (2010), and; Philippe Sands, Lawless World: Making and Breaking Global Rules, Penguin Books (2005). Interrogation methods used by American and British security forces include water boarding, sleep deprivation, and humiliation.

[3] See, *e.g.*, Glenn Greenwald, The Guardian, *Zero Dark Thirty: new torture-glorifying film wins raves*, December 10, 2012, available at: http:// www.guardian. co.uk/ commentisfree/ 2012 /dec/10 /zero-dark-thirty-torture-awards (Last visited on December 31, 2012), and; Frank Bruni, New York Times, *Bin Laden, Torture and Hollywood*, December 8, 2012, available at: http://www.nytimes.com/2012/12/09/opinion/sunday/bruni-bin-laden-torture-and-hollywood.html?_r=0 (Last visited on December 31, 2012).

[4] Bruni, s*ee supra* note 3.

international law uncontested or do states have the opportunity to derogate from it in the case of extreme necessity?

This article first elaborates on the necessity defence by investigating causal theory, which is the core of the necessity defence. Second, as peremptory norms generally require complete compliance the status of the prohibition of torture as a *jus cogens* norm is discussed. Third, torture is examined in the context of treaty law, the first source of international law, especially the United Nations Convention Against Torture (hereinafter Convention Against Torture or the Convention). Fourth, customary law, the second source of international law, is also considered, as it might conflict with treaty law. The less conventional solutions to the problem proposed by Alan Dershowitz are also taken into account. Finally, all of the above are used to answer the main question.

II. CAUSAL THEORY

A. CAUSAL THEORY EXPLAINED

The necessity defence is based on causal theory, which holds that a causal connection between a harmful practice and a greater result nullifies criminal responsibility.

The underlying feature of this theory is autonomy. According to causal theory, as Ohlin[5] explains, criminal responsibility is derived from the idea that every human being has an inherent autonomy. This autonomy provides people with the choice to act or refrain from action. Lack of this autonomy – for instance, in the case of the mentally ill – thus leads to a person's exclusion from criminal responsibility.

Ohlin argues that the 'ticking bomb scenario' effectively removes a person's ability to determine their actions and thereby releases them from consideration of criminal responsibility.[6] Namely, a situation which forces a person to choose within a small timeframe between the death of thousands of innocent civilians and torturing a terrorist induces a great amount of stress that restricts the autonomy of the security officer, which eliminates criminal responsibility.

[5] *See* Jens. D. Ohlin, *The Bounds of Necessity*, Journal of International Criminal Justice (2008), 298-302.
[6] *See id.*

B. CRITIQUE OF CAUSAL THEORY IN RELATION TO THE USE OF TORTURE

Opponents of causal theory acknowledge the necessity defence,[7] which holds that a person who has committed a criminal act to protect their life or limb may be excused if that act was 'a necessary and reasonable reaction to avoid this threat' or danger. This notion results in three conditions that states are required to meet to use this defence. Firstly, the action performed must be appropriate and capable of averting danger. Secondly, the harm that is inflicted on the victim must be limited to the absolute necessary to preventing the threat from being realised. Thirdly, the harm caused cannot exceed the harm that is being prevented.[8]

However, opponents of causal theory state that it cannot be extended to the 'ticking bomb scenario', and does not apply to the necessity defence for various reasons.[9]

To begin with, the security officer cannot be sure that the terrorist suspect is in possession of the information sought. In order to uncover the plan for a grave terrorist attack and capture the people responsible, various high-level intelligence techniques, including infiltration, must have been used. If these techniques turn out to have been unable to uncover the relevant information, the chances are high that the information sought is not in the possession of the suspected terrorist.[10]

Moreover, even if the officer would assume that this is the case, the use of torture might not result in the desired effect: the acquisition of information. In the event that it does, it cannot effectively be established whether this information is truthful or not.[11]

Furthermore, causal theory relies on direct causality, which cannot be identified in this occasion. The practice of torture can lead to the provision of valuable knowledge which can be used to prevent a catastrophe. This indicates an indirect link between the act of torture and prevention of catastrophe, which undermines the application of causal theory. Lastly, even

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[7] *See* Paola Gaeta, *May Necessity Be Available as a Defence for Torture in the Interrogation of Suspected Terrorists ?*, Journal of International Criminal Justice (2004), 786.

[8] *See* Art. 31(1)(d) UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at: http://www.unhcr.org/refworld/docid/3ae6b3a84.html [accessed 7 February 2013].

[9] *See supra* note 7at 791.

[10] *See id.*

[11] *See id.*

if one assumes that the victim possesses the relevant and correct information and that he or she will provide it due to an act of torture and that this information is used to prevent a disaster, this still does not eliminate the possible success of other measures. Perhaps the information could have been distracted through alternative means, which would mean that the harm was not limited to the absolute necessary and that torture was avoidable.

III. JUS COGENS

Peremptory norms in international law, also referred to as *jus cogens*, cannot be violated on any occasion. These norms are almost universally recognised in several treaty laws, customary international laws and general principles and include, but are not limited to, the prohibition of torture, genocide and slavery.[12] It is therefore clear that the above-mentioned peremptory norms and their prohibitions form the foundation of international human rights law, which explains their absolute prohibition.

The United Nations Human Rights Committee and Committee Against Torture argue that an act of torture is impermissible as well as inexcusable in all situations, including situations in which (1) torture is used as a last resort, (2) the suspect is a confirmed terrorist, (3) it is suspected or known that the information the suspect carries can prevent gross disaster and (4) in which the torture merely has non-lethal temporary effects and is conducted under medical control.[13]

Even though peremptory norms seem to leave no room for any derogation, Paola Gaeta[14] provides two arguments that could disprove this idea. Firstly, acts of terrorism can breach *jus cogens* norms, especially when they amount to crimes against humanity or war crimes. While recognising the prohibition of torture as a peremptory norm, he thinks that this prohibition does not always prevail when the alternative is the completion of a terrorist act.[15] Secondly, the rules that prohibit torture are in place to protect the values of society. This purpose does not explicitly exclude criminal behaviour in the case of extreme necessity. This notion is enforced when the values which the rules protect are indirectly endangered – through a terrorist act – by the regulatory role of these peremptory norms.[16]

[12] *See id*. at 787.
[13] *See* Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 § 3 (1994).
[14] Dr Paola Gaeta is at the time of writing Director at the Geneva Academy of International Humanitarian Law and Human Rights.
[15] *See supra* note 7 at 790.
[16] *See id*.

IV. INTERNATIONAL TREATY LAW

A. RECOGNITION OF THE PROHIBITION OF TORTURE IN INTERNATIONAL LAW DOCUMENTS

The *jus cogens* status of the prohibition of torture is expressed through its inclusion in various treaties, conventions and declarations. For instance, well-respected legal documents such as the European Convention on Human Rights (hereinafter European Convention), the Universal Declaration of Human Rights (hereinafter Universal Declaration) and the International Covenant on Civil and Political Rights (hereinafter ICCPR) have included the prohibition of torture in their texts. Moreover, the Convention Against Torture was adopted by the General Assembly of the United Nations exclusively to illegalise torture under international law.[17]

The fact that the prohibition of torture has been included in the European Convention, the Universal Declaration and the ICCPR indicates that this prohibition is one of the foundations of international human rights law, as was recognised in previous paragraphs.

Article 5 of the Universal Declaration, Article 7 of the ICCPR and Article 3 of the European Convention state that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".[18] What is striking, and notable for answering the main question, is that the European Convention and the ICCPR include limitations that give states the opportunity to derogate from its obligations under these conventions.[19] However, both conventions explicitly exclude the prohibition of torture from this derogation possibility.[20]

[17] United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988) (hereinafter Convention Against Torture).

[18] Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc.A/810 (December 12, 1948) (hereinafter Universal Declaration).Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S (hereinafter European Convention). No. 5; 213 U.N.T.S. 221. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 (hereinafter ICCPR). Article 3 of the European Convention, though, lacks the term 'cruel'.

[19] Art. 15(1) of the European Convention: "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention..." Art. 4(1) of the ICCPR is strongly comparable.

[20] Art. 15(2) of the European Convention: "No derogation from (...) Article 3 (...) shall be made under this provision." Art. 4(2) of the ICCPR is similar.

This indicates not only that these conventions recognise the prohibition of torture as an important part of international law, but even that this prohibition topples an emergency that may threaten the life of a nation.

B. THE UNITED NATIONS CONVENTION AGAINST TORTURE

The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted by the General Assembly in 1984. Its articles refer extensively to provisions of the European Convention and ICCPR that prohibit torture, cruel, inhuman or degrading treatment or punishment. Just like the European Convention and the ICCPR, the Convention Against Torture includes a provision, namely Article 2(2), that prohibits derogation from the prohibition of torture.[21]

However, as Ohlin argues, even though no justification for an act of torture can and should be made, such an act can still be excused. He defends this notion by underpinning the lack of a provision that explicitly reads that states should prohibit an excuse for a crime in the form of necessity.[22]

C. AMERICAN INTERPRETATION OF THE CONVENTION AGAINST TORTURE UNDER THE BUSH ADMINISTRATION

The United States has ratified the Convention Against Torture, hereby indicating its intention to adhere to its provisions. Currently, however, the United States is being criticised for its human rights violations on a frequent basis. The manner in which prisoners in Abu Ghraib and in Guantanamo Bay have been treated is often associated with an infringement of the Convention and its articles. However, a memo sent to the Bush administration in 2002, commonly known as 'the Bybee Torture Memo',[23] states that the way American security forces interrogated its suspects did not contradict the articles of the Convention.

According to the memo, the Convention Against Torture distinguishes torture from cruel, inhuman or degrading treatment or punishment. It does so by referring to the European Convention and the ICCPR which state that

[21] Art. 2(2) of the Convention Against Torture: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."
[22] *See supra* note 5 at 307.
[23] *See generally* Jay Bybee, United States, Department of Justice, Office of Legal Counsel. *Memorandum for A. Ganzales… [Re:] Standards for Conduct for Interrogation under 18 U.S.C. 2340-2340A*, August 1, 2002, available at: http:// www. gwu. edu/~ nsarchiv /NSAEBB/ NSAEBB127/02.08.01.pdf (Last visited on December 31, 2012). The memo was named after the then Assistant Attorney General Jay Bybee. It was drafted, however, by his Deputy, John Yoo.

no one shall be subjected to torture *or* to cruel, inhuman or degrading treatment or punishment. Furthermore, the Convention states in Article 2(1) that each State Party to the Convention shall take effective measures to prevent acts of torture, not explicitly including other acts of cruel, inhuman or degrading treatment or punishment.[24] The Convention does refer to cruel, inhuman or degrading acts in Article 16(1) which reads that states ought to prevent such acts from taking place.[25] The memo regarded the latter to be "deplored and prevented, but [they] are not so universally and categorically condemned as to warrant the severe legal consequences that the Convention provides in case of torture".[26]

The United States under the Bush administration thus interpreted the Convention's definition of torture as that it only includes extreme acts, thereby allowing for less harsh interrogation techniques to be used. The memo described an act of torture as to inflict severe physical or mental agony caused by "(1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; [and] (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses of personality".[27]

Physical torture was defined as the act "the mere mention of which sends chills down one's spine".[28] Named examples were 'the needle under the nail' and the piercing of eyeballs. Interrogations or treatments concerning the mind are not considered torture when they include "the normal legal compulsions which are properly a part of the criminal justice system".[29] Such 'normal legal compulsions' include interrogation, incarceration prosecution and compelled testimony against a friend. Furthermore, it stated that "mind-altering substances must have a profoundly disruptive effect to serve as a[n] [act of torture]".[30]

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[24] Art. 2(1) of the Convention Against Torture: "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."

[25] Art. 16(1) of the Convention Against Torture: "Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1..."

[26] *See supra* note 23 at 16.

[27] *See id*. at 18.

[28] *See id*. at 19.

[29] *See id.*at 20.

[30] *See id*. at 20.

The memo concluded that the Senate of the United States ratified the Convention with this argumentation in mind. Therefore, it advised that coercive interrogation techniques, including water boarding and sleep deprivation, do not amount to torture and, thus, do not infringe upon the Convention Against Torture and its articles.

Through Ohlin's arguments and the memo's analysis of the Convention it becomes clear that torture has not been defined perfectly just yet. This allows Contracting Parties to the Convention Against Torture to interpret the term torture, including acts absolutely forbidden under international law, in different ways.

D. ARTICLE 31(1) (D) OF THE ROME STATUTE

The Rome Statute of the International Criminal Court of 1998 (hereinafter the Rome Statute) is a legal source in international criminal law.[31] Article 31(1) (d) of the Rome Statute states that a person cannot be held criminally responsible if:

> "The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided".[32]

This would mean that a violator of Article 55(1) (b),[33] which prohibits the use of torture in an investigation, might not be held criminally responsible in the 'ticking bomb scenario'.

It must be said that international criminal law applies to individuals and not to states. However, the fact that an individual may not be convicted for performing an act of torture in case of the 'ticking bomb scenario', which is likely to be considered as a threat of imminent death under Article 31(1) (d), shows that the prohibition of torture is not absolute and that certain defences to the use of torture are recognised by international criminal law. It should be noted that, in order for this defence to be applicable, the act of torture

[31] Rome Statute of the International Criminal Court, Jul. 17, 1998, UN Doc.A/CONF.183/9, 2187 U.N.T.S. 90 [hereinafter Rome Statute]
[32] Art. 31(1) (d) of the Rome Statute.
[33] Art. 55(1)(b) of the Rome Statute: "In respect of an investigation under this Statute, a person: shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment."

must be reasonably capable to avoid the threat and that the practice of torture does not constitute for a greater harm than the harm sought avoided – often referred to as the proportionality principle. Especially last criterion could start a debate on the gravity of the breach of torture in relation to its possible benefits.

V. CUSTOMARY INTERNATIONAL LAW

Customary international law is the second source of international law and consists out of rules that states have implicitly acknowledged as legally binding through their conduct and, furthermore, comprises out of two elements: state practice and *opinio juris*.[34] This paragraph focuses on these elements by comparing different domestic criminal law systems and by conducting a brief investigation of the global practice of torture.

A. STATE PRACTICE

Both German and United States domestic law recognise justified necessity. German domestic law labels this as '*Rechtfertigender Notstand*' while the United States has the Model Penal Code which states that "conduct which the actor believes to be necessary to avoid harm or evil to himself or another is justifiable".[35] Several legal actors, including Judge Antonio Cassese, have limited justified necessity to crimes with the following four elements.

First, there should be an immediate threat to life or limb; second, there should be no other means of averting the evil at hand; third, the harm caused should not exceed the harm sought prevented, and; fourth, the situation should not have been brought about voluntarily by the defendant (i.e. the torturer).[36]

In *El-Masri v. the Former Yugoslav Republic of Macedonia* (2012),[37] the European Court of Human Rights ruled that Mr Masri, a German national of Lebanese origin, had been subject to both torture and inhumane and degrading treatment under the hands of CIA officials and Macedonian border patrol. Mr Masri had been arrested in Macedonia in 2003 and consequently handed over to the CIA which transported him to Afghanistan. Six months later he was put on a mountain road in Albania. In this period, he had, *inter alia*, been sodomised and forcibly tranquilised.

[34] *See* Louis Henkin*et al.*, Human Rights 193, Thomson Reuters / Foundation Press (2009).
[35] See Model Penal Code § 3.02(1).
[36] *See supra* note 5 at 294.
[37] *El-Masri v. the Former Yugoslav Republic of Macedonia* [GC], no. 39630/09.

As explained above, international law allows crimes with the specified four elements to fall within the scope of justified necessity. The conduct of the CIA in the case of Mr Masri, however, does not seem to adhere to either one of them. While the then (2005) Secretary of State Condoleezza Rice had accepted that an 'error' had been made in Mr Masri's case, the United States has never officially apologised.

The United States under the Bush administration has, furthermore, been accused of using torture in Guantanamo Bay and Abu Ghraib by human rights NGOs.[38]

In *The Public Committee against Torture in Israel v the Government of Israel* (1999) concerning interrogation methods used by Israeli security forces, the Israel High Court of Justice ruled that, firstly, the necessity defence applies to an investigator, representing the state. Secondly, the Court stated that this defence is likely to be used in a 'ticking bomb scenario'. Thirdly, the Court argued that Israeli security forces can refer to the necessity defence in certain situations.[39]

Moreover, according to NGOs such as *Human Rights Watch* and *Amnesty International*, torture is practised in other parts of the world as well. Especially countries led by authoritarian regimes and developing countries such as Pakistan,[40] Sudan[41] and Syria[42] systematically violate human rights, including the practice of torture.

[38] *See* Human Rights Watch, *Getting Away with Torture*, July 12, 2011, available at: http://www.hrw.org/reports/2011/07/12/getting-away-torture-0 (Last visited on December 31, 2012).

[39] *See supra* note 7 at 788. *See* the following quote from The Public Committee against Torture in Israel v. the Government of Israel, H.C. 5100/94 (Israel 1999), §38: "[An investigator's] responsibility shall be fixed according to law. His potential criminal liability shall be examined in the context of the 'necessity defense.' Provided the conditions of the defense are met by the circumstances of the case, the investigator may find refuge under its wings. Just as the existence of the 'necessity defense' does not bestow authority, the lack of authority does not negate the applicability of the necessity defense or of other defenses from criminal liability. The Attorney-General can establish guidelines regarding circumstances in which investigators shall not stand trial, if they claim to have acted from 'necessity.' A statutory provision is necessary to authorize the use of physical means during the course of an interrogation, beyond what is permitted by the ordinary 'law of investigation,' and in order to provide the individual GSS investigator with the authority to employ these methods."

[40] *See* Human Rights Watch, *"We Can Torture, Kill, or Keep You for Years"*, July 25, 2011, available at: http://www.hrw.org/reports/2011/07/25/we-can-torture-kill-or-keep-you-years (Last visited on December 31, 2012).

[41] *See* Amnesty International, *Sudan: Government Crackdown On Activist And Political Opponents*, November 11, 2011, available at: http:// www. amnesty. org/en/ library /info/ AFR54/ 036/2011 (Last visited on December 31, 2012).

As was discussed before, torture is prohibited almost universally in all sources of international law. However, state practice of influential and authoritative states such as the United States, Germany and Israel indicates otherwise. The United States and Germany both recognise the defence of justified necessity, Israeli domestic law even approves of 'pressure', a broadly interpretable term, during interrogations, and the CIA has even used torture according to the European Court of Human Rights.

B. OPINIO JURIS

While state practice is an easily understandable segment of customary international law, the concept *opinio juris* is harder to grasp. While state practice provides a rule with a legally binding status due to its widespread practice, *opinio juris* refers to the sense of legal obligation behind the practice or the abstention thereof.[43]

It is often argued that Western countries impose fundamental rights on other countries, often developing ones through economic or political pressure.[44] This could indicate that the implementation of seemingly universal human rights norms might be a result of Western pressure rather than a sense of legal obligation. If the prohibition of torture would fall in this category, its status as customary international law could be undermined.

However, it is imaginable that torture is considered a malevolent practice across nearly all cultures and that most states condemn and refrain from using torture because of the simple notion of right and wrong.

C. CUSTOMARY INTERNATIONAL LAW AND TORTURE

While a sense of legal obligation to absolutely prohibit torture seems to exist, some states use coercive interrogation techniques that are labelled as torture by a variety of legal actors. Therefore, it is arguable that the prohibition of torture does not fulfil the requirements to be considered as customary international law. While most people involved in international

[42] *See* Amnesty International, *Fears for missing Syrian activists at risk of torture*, November 11, 2011, available at: http://www.amnesty.org/en/news/fears-missing-syrian-activists-risk-torture-2011-11-11 (Last visited on December 31, 2012). *Also see* Huffington Post, *Syria Crisis: Homs Hospital Video Allegedly Shows Torture*, May 3, 2012, available at: http:// www. huffingtonpost. com/2012/03/05/syria-crisis-homs-hospital-torture-_n_1321934.html (graphic content) (Last visited on December 31, 2012).

[43] *See* Stephen C. McCaffrey, *Understanding International Law* in Human Rights 194, Thomson Reuters / Foundation Press (2009).

[44] A well-known and controversial example is the circumcision of under-aged girls. This practice is also referred to as female genital mutilation.

law would horrify the idea, a change in customary international law away from the current absolute prohibition of torture is a possibility.

VI. REGULARISATION OF TORTURE

The previous paragraphs established a possible contradiction between the prohibition of torture as a peremptory norm and the necessity defence. Two solutions have already been discussed. These are the universal prohibition of torture, supported by most international law documents including the ICCPR, the European Convention, the Universal Declaration and the Convention Against Torture, and the application of the necessity defence, which conforms with causal theory. Another solution to this dilemma is provided by Alan Dershowitz.[45]

Dershowitz believes that the necessity defence cannot be regarded as a satisfactory procedure to allow for the use of torture in extreme situations such as the 'ticking bomb scenario'.[46] He enforces this notion with several arguments.

Dershowitz first argues that in case of the 'ticking bomb scenario' it is highly likely that torture will be used. He came to this prediction by simply asking people attending his lectures the question whether they thought torture would be used in the 'ticking bomb scenario'. According to him, the results were overwhelmingly positive. Hence, he argues, an act of torture would take place regardless of a prohibition provided by law.[47]

Therefore, he pleads for the introduction of court-ordered warrants allowing for the use of torture as this would subject torture to judicial control and accountability. In his belief, this would reduce the occurrence, gravity and length of torture.[48] He gives the example of Abu Ghraib prison in which multiple prisoners were mistreated in line with a 'don't ask, don't tell policy'.[49] Torture warrants would have, at the least, made these practices subject to judicial control. Dershowitz also believes that the regularisation of torture would reduce the torture of innocent people as the current system has little legal resources to distinct between those involved with terrorism and those who have nothing to do with it.[50]

[45] Dr Alan M. Dershowitz is at the time of writing a Felix Frankfurter Professor of Law at Harvard Law School.
[46] *See* Alan M. Dershowitz, *Alan M. Dershowitz*, Congressional Digest (2008), 53.
[47] *See id.* at54.
[48] *See id.* at 58-59.
[49] *See id.* at 53.
[50] *See id.*

Another argument he provides relates to the ideal that democracy should be transparent. Currently, he says, democratic states, including the United States, send suspected terrorists to countries that practice torture on a regular basis so that their 'interrogation' remains hidden from the international community. Court-ordered warrants authorising torture would prevent this practice, also known as *refoulement*, from happening.[51]

Lastly, the necessity defence, Dershowitz argues, has proven to lead to tyranny. In the past, authoritarian regimes have defended systematic violations of human rights by emphasising the lack of other means in safeguarding the security of the nation. This is incompatible with the system of checks and balances, an essential part of modern-day democracy, from doing its part.[52]

An often-raised critique on Dershowitz' argumentation is that, if torture would be regulated, some government officials would try to abuse this system. These officials would explore the boundaries of the rules, which would develop a more lenient attitude towards the use of torture which would eventually increase its use.[53]

Dershowitz' solution brings about judicial control on torture, which is likely to be used in the 'ticking bomb scenario' despite its absolute prohibition under international law. In this sense, Dershowitz' ideas could add to the democratic notion of transparency. However, a legal system that recognises the practice of torture would not stir well with most people as torture has been condemned since the creation of the first Geneva Convention of 1864.[54]

VII. CONCLUSION

While most would have considered the absolute prohibition of torture as uncontested under international law, some might remain unsure about this notion after reading this article.

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[51] *See id.*at 56.
[52] *See id.* at 60.
[53] *See id.*at 57.
[54] International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, 12 August 1949, 75 UNTS 31. Art. 32 reads: "The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person but also to any other measures of brutality whether applied by civilian or military agents."

Indeed most international treaty law explicitly read that no state should ever derogate from the prohibition of torture. However, state practice of democratic states such as Germany and the United States indicate otherwise, despite a sense of legal obligation to absolutely prohibit torture. The Israel High Court of Justice went even further by explicitly stating that security officers might rely on the necessity defence in case of the 'ticking bomb scenario'.

Moreover, Judge Bybee's analysis of the Convention Against Torture[55] showed that torture has yet to be defined properly which leaves room for coercive interrogation, in which the term 'coercive' can be interpreted rather liberally. Most legal scholars would acknowledge the absolute prohibition of torture. However, several others believe that the excuse of necessity can provide *ex post* criminal immunity for government officials under certain conditions.[56] Criminal international law does not apply to states, but these findings do suggest that the absolute prohibition of torture is not uncontested.

Other scholars, such as Alan Dershowitz, believe that regulating torture through domestic law statutes improves the surveillance on the use of torture. He disregards the notion that this regularisation might make public opinion more lenient to the practice of torture of which its prohibition is a peremptory norm in international law.

While, the *jus cogens* status of the prohibition of torture should have successfully predicted a clear 'no' to the main question, it failed to do so. State practice and the opinion of various legal scholars show that the necessity defence can, in some cases, be used after an act of torture despite a sense of legal obligation to absolutely prohibit its use. Keeping in mind these diverging opinions and the devastating effect of a mass terrorist attack, many might be inclined to depart from the absolute prohibition of torture in the 'ticking bomb scenario'.

To conclude, it can be established that the absolute prohibition of torture under international law is not as firmly established as its *jus cogens* status suggests. Various factors, including customary international law and the necessity defence, give states the opportunity to depart from this absolute prohibition in case of extreme necessity. The danger of this conclusion, though, lies in how states will interpret the term 'extreme necessity' in the future.

[55] Judge Bybee of the US Court of Appeals for the Ninth Circuit is in office at the time of writing this article.

[56] *See supra* note 5 at 307, *see supra* note 7 at 793, and *see* Alon Harel & Assaf Sharon, *What is Really Wrong with Torture?*, Journal of International Criminal Justice (2008), 258.