"BACK TO THE 'DARK AGES' – JUSTIFYING AND LEGALISING TORTURE?"

A CASE STUDY ON CHALLENGES TO THE PROHIBITION OF TORTURE IN INTERNATIONAL LAW

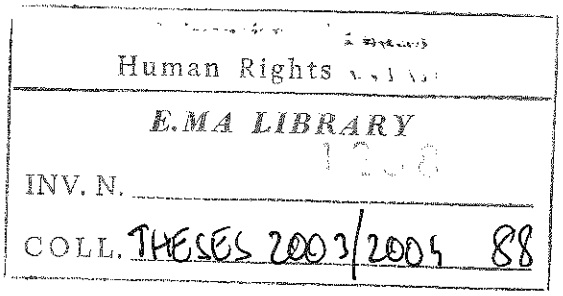

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TABLE OF CONTENTS

LIST OF ABBREVIATIONS

ACHR	American Convention on Human Rights
AP I	Protocol Additional to the Geneva Conventions, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)
AP II	Protocol Additional to the Geneva Conventions, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)
CAT	Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment
CETS	Council of Europe Treaty Series
cf.	calf (compare)
Committee	Committee against Torture
Declaration against Torture	Declaration on the Protection of all Persons Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
e.g.	exempli gratia (for example)
ECHR	European Convention on Human Rights
European Commission	European Commission for Human Rights
ECtHR	European Court of Human Rights
GAOR	United Nations General Assembly Official Records
GC I	Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
GC II	Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea

GC III	Geneva Convention (III) relative to the Treatment of Prisoners of War
GC IV	Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War
GSS	General Security Service (Israel)
HRC	Human Rights Committee
i.a.	inter alia (among other things)
i.e.	id est (that is)
ibid.	ibidem (in the same place)
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
Inter-American Convention	Inter-American Convention to Prevent and Punish Torture
NGO	non-governmental organisation
OASTS	Organization of American States Treaty Series
RS	Rome Statute of the International Criminal Court
StR	Strafrecht (criminal law)
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNTS	United Nations Treaty Series
US	United States of America
VCLT	Vienna Convention on the Law of Treaties

"Freedom from torture is a fundamental human right that must be protected under all circumstances". Kofi Annan[1]

1. INTRODUCTION

The notion of torture directly conjures up images of some of the most cruel forms of human suffering, such as the pulling out of fingernails, stretching on a rack, burning, beatings, mock executions and amputations, being buried alive, rape and asphyxiation techniques. It finds its etymologic origins in the Latin verb *torquere*, "to twist".[2] The effect of this "twisting" can be summed up as the absolute denial of the victim's human dignity, since it degrades her or him to an object completely in the power of the torturer; the harm done is almost irreparable, not so much from a physical as from a psychological point of view.[3] Despite this deterring effect, torture was legal for at least three thousands years, and formed a part of most legal codes in Europe and the Far East.[4] Especially the time of the inquisition in Spain and Germany, the 16th and 17th century in England and the *ancien régime* in France bear witness of the "dark ages" of world history in which torture was seen as a justified and lawful means of obtaining the truth and extracting a confession.[5] The official abolition of torture came about under the influence of the age of enlightenment. Nevertheless, it experienced a revival in the twentieth century under the dictatorships of Hitler, Stalin, Pinochet, Amin and others, not infrequently characterised as the age of torture. Today, more than fifty years after the universal proclamation of human rights, the prohibition of torture, or the right of an individual not to be exposed to torture, as one of the most basic principles of human rights enjoys a special status under international law.

Nevertheless, it is no secret that torture and ill-treatment are still continuously employed in a variety of countries over the globe. A glance into human rights reports or the opening up of a newspaper

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[1] Statement by United Nations Secretary-General Kofi Annan in his message on the United Nations International Day of Solidarity in Support of Victims of Torture, 26 June 2001.
[2] Etymology: French, from Late Latin *tortura,* from Latin *tortus,* past participle of *torquere* to twist; probably akin to Old High German *drahsil* turner, Greek *atraktos* spindle; information taken from the Merriam-Webster Online Dictionary.
[3] As described by Kooijmans, 1990, p. 93.
[4] Cf. Innes, 1998, p. 12.
[5] See e.g. Rodley, 1999, pp. 8-9, with regard to the revival of torture in twelfth-century Europe and the persistence of its use until the mid-eighteenth century.

reveal that torture is not a phenomenon of the past.[6] It is still seen as the easiest way to collect information. Manifold techniques are utilised as part of interrogation sessions. These comprise forced standing or forms of suspension ("stress positions"), sensory deprivation (impeding the use of the human senses through, *inter alia*, simultaneous hooding, shackling and exposure to loud music and varying temperatures), anonymity and dehumanising experiences, blows to the ears, beating of the soles of the feat (*falanga*), severe shaking, as well as deprivation of sleep, food and water. But due to the abolition of torture, governments of countries in which it is a common practice do not admit to its use, authorities seek to hide the facts or present them in a biased manner. Abstractions, euphemism and other forms of linguistic transformation further help to create the illusion that torture is not torture.[7] Names such as "in-depth interrogation", "motivated debriefing", "directed probing", "coercion" and "moderate physical pressure" distract from the infliction of pain and psychological suffering. Responsibility for the use of torture and the relationship to it is denied. In the course of this, detainees may be transferred to other states and intelligent services that are known for employing harsher methods of interrogation. Private contractors are also used to take the blame of oneself and to justify that the state itself does not engage in torture practices. Thus, torture generally takes place behind closed doors and governments tend to publicly deny and condemn its use. Whereas, the risk that torture will be carried out by way of response to political challenges is high. This is due to the fact that torture might be seen as the only way to obtain information that is deemed absolutely necessary in the interests of national security or for the sake of saving lives otherwise in danger. Consequently, even relatively torture-immune societies will have their incidental cases as well.[8] In this respect, it is not only worrying that torture is still practiced widely and might even occur in Western democracies, but that moreover, state officials who practice torture, justify their actions as being legally authorised or at the very least acceptable under the guise of "the ends justifying the means".[9] Thus, the prohibition of torture has given rise to a paradox. Though the proscription of torture is part of international law, and though the domestic law of most states either explicitly outlaws torture or deems invalid evidence collected through its use, torture widely persists and in certain situations torture or ill-treatment are regarded by many practitioners to be a practical necessity, which is justified on utilitarian grounds.[10] This tendency has

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[6] For an overview of the known practice of torture and ill-treatment in a complex number of countries in the world, please refer to reports by the UN Special Rapporteur on Torture, Amnesty International and Human Rights Watch. According to their findings, it can be estimated that approximately two-third of the world's states practice torture in some form or other.
[7] Cf. Pope, 2001, at III. B.
[8] As assessed by Kooijmans, 1990, p. 105.
[9] Cf. Shan/Shorts, 2003, p. 181.
[10] Morgan, 2000, p. 182.

even increased so far that the prohibition of torture is challenged by proposals openly advocating torture and by attempts to legalise torturous means for the use in exceptional circumstances. In this respect, a number of cases and debates has arisen that diminish, justify or legalise the use of torture and ill-treatment. Hence, there is a dangerous development that torture will be employed under the pretext of legality, especially for the purposes of fighting terrorism or repressing common criminality. These challenges to the prohibition of torture stand at the centre of this study. They will be illustrated through the examination of three specific cases in which justifications for the use of torture in exceptional circumstances are being brought forward. These justifications serve, *inter alia*, to render the employment of torturous means legal under national law, whereas conflicting international obligations are not effectively taken into account. The aim of this thesis is to raise awareness that there is an ever-increasing dangerous trend of governments, public officials and today's society to take recourse to unlawful interrogation measures and to justify the use of torture and ill-treatment in the interests of national security or for the sake of some "greater good".

Hence, in the course of this thesis, it will firstly be established that the status of the prohibition of torture is absolute in international law and that no exceptional circumstances can be invoked to justify the practice of torture. Following this, a legal background will be provided as to what is to be understand by the notion of torture and ill-treatment in international instruments and how breaches of international law are determined by the respective treaty-monitoring bodies. Consecutively, the focus will turn to the examination of specific challenges the prohibition of torture in international law faces. The first case in this regard concerns Israel and its authorisation to employ "moderate physical pressure" in the interrogation of suspected terrorists. The events leading up to the authorisation and effective legalisation of these methods will be highlighted. Subsequently, the 1999 Israeli High Court decision outlawing specific techniques will be analysed with regard to the limited application of international law. Further, the employment of the Israeli criminal law defence of "necessity" as a justification to use physical means in the interrogation process under exceptional circumstances will be examined in view of Israel's international legal obligations. The second case centers around voices that have called for the use of torturous means in the US in the aftermath of the 11 September terrorist attacks. Parts of the nation-wide debate whether torture should be employed in the interrogation of terrorist suspects will be highlighted. The focus will lie upon the proposal of Harvard law professor Alan Dershowitz to issue torture warrants. His line of argumentation will be illustrated and his proposal will be analysed from an international law point of view. The third case that will be examined is the German Daschner case. It relates to the order given by Frankfurt's deputy police chief to threaten an alleged kidnapper with torture if he would

not release information concerning the whereabouts of the juvenile victim. The background of the case will be illustrated. Further, the nation-wide debate that has been triggered by the incident will be highlighted. Following this, connected criminal proceedings will be analysed with regard to the possibility of granting mitigating circumstances for the accused in the sentencing stage.

The respective cases will mainly be analysed from an international law point of view. Although a method that is illegal under international law might be legal under domestic law, the important consideration is that a state engaging in interrogation methods amounting to torture or ill-treatment breaches its international law obligations. Thus, by employing a specific interrogation technique through its agents the state violates international treaties it is a party to.

The methodology will range from the employment of sources of law such as conventional and statute texts as well as customary law to opinions of learned scholars. Case law will only be taken into account in as far as it is relevant for the argument. In the examination of debates and the assessment of public opinion further non-legal sources including newspaper articles, interviews and opinion polls as well as NGO papers are utilised.

2. THE SCOPE OF THE PROHIBITION OF TORTURE UNDER INTERNATIONAL LAW

2.1. Incorporation of the Prohibition into Legal Instruments

> "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". Universal Declaration of Human Rights, Article 5[11]

In 1948, following the horrific abuses in World War II, the General Assembly of the United Nations inserted the prohibition against torture in Article 5 of the landmark Universal Declaration of Human Rights (UDHR). The declaration itself does not lay down enforceable legal obligations. However, it serves as an indicator, that the international prohibition of torture is unequivocally established in the law of nations.[12] This ban on torture later found expression in all general human rights treaties, including Articles 7 and 10 (1) of the 1966 International Covenant on Civil and Political Rights (ICCPR)[13], Article 3 of the 1950 European Convention on Human Rights (ECHR)[14], Article 5 (2) of the 1969 American Convention on Human Rights (ACHR)[15], Article 5 of the 1981 African Charter on Human and Peoples' Rights (African Charter)[16] and Article 13 of the Arab Charter on Human Rights[17]. It is also featured in specific human rights instruments dealing exclusively with, *inter alia,* apartheid[18], children[19] and women[20]. The prohibition is further not limited to general human rights treaties, but is supplemented by specialised treaties combating the use of torture. In this respect, the 1984 UN Convention against Torture and other Cruel, Inhuman and Degrading Treatment or

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[11] Adopted without dissent and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948.
[12] Kellberg, 1998, at p. 7. See also Rodley, 1999, pp. 65-66, for the UDHR to have become part of customary international law as a result of subsequent state practice.
[13] Adopted on 19 December 1966, entered into force on 23 March 1976; other Articles of the ICCPR which are relevant to the elimination of torture are include Articles 2, 6, 9 and 14.
[14] Adopted on 4 November 1950, entered into force on 3 September 1953.
[15] Adopted on 22 November 1969, entered into force on 18 July 1978.
[16] Adopted on 27 June 1981, entered into force on 21 October 1986.
[17] Adopted on 15 September 1994, not yet in force.
[18] Article 2 (a) (ii) of the 1973 *International Convention on the Suppression and Punishment of the Crime of Apartheid,* adopted by the General Assembly on 30 November 1973, entered into force 18 July 1976, 1015 UNTS 244.
[19] Article 3 of the 1989 *Convention on the Rights of the Child,* adopted by General Assembly Resolution 44/25 of 20 November 1989, entered into force on 2 September 1990.
[20] Article 3 (h) of the 1993 *Declaration on the Elimination of Violence against Women,* adopted by General Assembly Resolution 48/104 of 20 December 1993; Article 4 (d) of the 1994 *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women,* adopted on 6 September 1994, entered into force on 3 May 1995.

Punishment (CAT)[21] on the international level, as well as the 1987 European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment[22] and the 1987 Inter-American Convention to Prevent and Punish Torture (Inter-American Convention)[23] on the regional level, have been created. This variety of treaty provisions is complemented by a far-reaching body of soft law instruments, such as resolutions, declarations and bodies of principles, which spell out detailed safeguards in specific situations and elaborate on standards for the prevention of torture and ill-treatment.[24]

Moreover, the prohibition of torture is not limited to times of peace, it also finds application during armed conflicts. In this respect, torture or inhuman treatment of, *inter alia,* prisoners of war or protected persons are considered "grave breaches" of the four 1949 Geneva Conventions (GCs) and the two 1977 Additional Protocols (APs) and constitute war crimes.[25] They are as such also contained in the Statutes of the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) as well as in the Rome Statute of the International Criminal Court (RS).[26] Furthermore, torture is also outlawed as a crime against humanity.[27]

As has been summed up in the *Furundžija* case of the Yugoslav Tribunal, the existence of a "corpus of [...] treaty rules proscribing torture shows that the international community, aware of the importance of outlawing this heinous phenomenon, has decided to suppress any manifestation of

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[21] Adopted by General Assembly Resolution 39/46 of 10 December 1984, entered into force on 26 June 1987.
[22] Adopted on 26 November 1987, text amended according to the provisions of Protocols No. 1 and No. 2 which entered into force on 1 March 2002. This Convention is of procedural character and focuses on the prevention of torture through i.a. visits of detention centres.
[23] Adopted on 9 December 1985, entered into force on 28 February 1987.
[24] These include the 1955 *Standard Minimum Rules for the Treatment of Prisoners*; the 1957 *Minimum Rules for the Treatment of Prisoners*; the 1979 *UN Code of Conduct for Law Enforcement Officials*; the 1982 *Principles of Medical Ethics*; the 1988 *Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment* on the international level; as well as the 1979 *Declaration on the Police* and the 1987 *European Prison Rules* adopted by the Council of Europe.
[25] GC I deals with armed forces in the field; GC II applies to armed forces at sea; GC III concerns prisoners of war; GC IV safeguards so-called "protected persons", most simply described as detained civilians; the two APs concern victim protection. The four GCs and AP I govern international armed conflicts, AP II applies to non-international armed conflicts. The prohibition of torture is contained in Articles 12 and 50 (grave breach) GC I; Articles 12 and 51 (grave breach) GC II; Articles 17, 87 and 130 (grave breach) GC III; Articles 32 and 147 (grave breach) GC IV; as well as in Article 75 (2) (ii) AP I and Article 4 (2) (a) AP II. For the commitment of grave breaches to be considered a war crime, see also Article 1 (a) of the 1968 *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*. Common Article 3 (1) (a) GC further generally outlaws torture or inhuman treatment in internal armed conflicts.
[26] Respectively Article 2 (b) ICTY Statute; Article 4 (a) ICTR Statute; as well as Article 8 (2) (ii) RS.
[27] Torture as a crime against humanity is contained in Article 5 (f) ICTY Statute, Article 3 (f) ICTR Statute as well as in Article 7 (1) (f) RS. In this context it has to be committed "as part of a widespread and systematic attack against any civilian population, with knowledge of the attack".

torture by operating both at the interstate level and at the level of individuals" and that therefore "no legal loopholes have been left".[28]

2.2. Designation as a Non-Derogable Right under Treaty Law

The prohibition of torture is further underlined by its non-derogable status. The right not to be tortured is ensured without any restriction whatsoever and may not be deviated from in any kind of emergency situation by virtue of, *inter alia,* Article 2 (2) CAT, Article 7 in conjunction with Article 4 (2) ICCPR, Article 3 in conjunction with Article 15 (2) ECHR and Article 5 (2) in conjunction with Article 27 (2) ACHR. As an illustration, the provision in the CAT reads:

> "**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**." (emphasis added)

The words "no exceptional circumstances whatsoever" are used to preclude states from justifying torture, by pleading, for example, that "this is not an ordinary war - these are exceptional circumstances."[29] Furthermore, the enumerated circumstances within Article 2 CAT are not exhaustive, the term "whatsoever" closes the door to a contrary construction of the Article, as the aim of the Convention is the absolute prohibition of torture in all circumstances.[30]

A defence, such as an order from a superior officer or a public authority, may also not be invoked as a justification of torture.[31] In order to render the prohibition and non-derogation effective, State Parties to the CAT are regularly required to implement the prohibition of torture in their national laws, thus ensuring that all acts of torture are offences under their criminal law, establish criminal jurisdiction over such acts, investigate all such acts and hold those responsible for committing them

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[28] *Prosecutor v. Anto Furundžija*, IT-95-17/1 "Lasva Valley", ICTY Trial Chamber II, Judgment of 10 December 1998, para. 146 (hereinafter "*Furundžija* case").
[29] As stated by Boulesbaa, 1990, p. 84.
[30] Cf. Boulesbaa, 1990, pp. 85 ff., for the assessment that the list is not exhaustive.
[31] See e.g. Article 2 (3) CAT. It is a general principle of international law that superior orders may not be invoked as a justification of a crime; see Article 6 of the *Charter for the International Military Tribunal for the Far East*, Article 8 of the *Nuremberg Charter* as well as the *Formulation of the Principles Recognized in the Charter of Nuremberg Tribunal and in the Judgment of the Tribunal*, paras. 111-112.

to account.[32] In this respect, it is important to note that mandatory universal jurisdiction is also provided for in Article 5 (2) CAT.

2.3. Recognition as Customary Law, Obligation *Erga Omnes* and *Jus Cogens*

With regard to the prohibition of torture as a norm of international customary law, Article 38 of the Statute of the International Court of Justice provides that custom is the "evidence of a general practice accepted as law". The two elements requisite for a rule to become a rule of customary law have further been established as "general practice" of states and "the conviction that such practice reflects, or amounts to law (*opinio juris*)".[33] However, the best evidence for a customary rule of international law is to be found in what states say they think the rules are, and what they say they are doing in terms of that rule.[34] Virtually all states have formally condemned judicial torture and other forms of ill-treatment and have obligated themselves in international and regional conventions not to engage in such practices. For instance, alone 136 states have ratified the CAT.[35] The large number of instruments outlawing torture and the fact that governments proclaim their adherence to the prohibition of torture and their compliance with it bear further evidence of the condemnation of torture on a universal level. In this respect, the widespread practice of torture cannot be interpreted as constituting a bar to the existence of a norm of customary or even peremptory law.[36] Therefore, the prohibition of torture has been rightly recognised as constituting a norm of customary international law.[37]

Furthermore, the right not to be subjected to torture belongs to the category of *erga omnes* obligations.[38] Thus, states are under the obligation not to torture towards the international

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[32] See Articles 4, 5, 7, 12 and 13 CAT.
[33] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 1986 ICJ Reports, paras. 183-186. For a general overview of the nature of customary law, please refer to Shaw, 2003, pp. 68 ff.
[34] Rodley, 1999, p. 67.
[35] Number of ratifications as of May 2004 according to the United Nations Treaty Database.
[36] Kooijmans, 1990, p. 98. The endurance of the prohibition of torture as a "legal norm, despite frequent breaches, can also be explained by a deeply felt belief in the norms' importance", as noted by Meron, 1998, p. 171.
[37] Customary nature of the international prohibition of torture recognised in e.g. *Filartiga v. Peña-Irala*, US Court of Appeal for the Second Circuit 1980, 630 F. 2d 876; *Furundžija* case, para. 137-138; *Prosecutor v. Zejnil Delalic and Others*, IT-96-21-T "Celebici Camp", ICTY Trial Chamber II, Judgement of 16 November 1998, paras. 452, 454, 517 (hereinafter "*Delalic case*"); see also Cassese, 2003, p. 119; Shaw, 2003, p. 257.
[38] *Report of the United Nations Special Rapporteur on Torture*, 1986, p. 1, at para. 3. For the recognition of the prohibition of torture as an obligations *erga omnes*, cf. the *Furundzija* case, paras. 147 ff. See also *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, IACHR,

community as a whole. A failure by a state to respect the prohibition of torture is not merely a matter of domestic law, but rather a breach of the state's obligations towards all other states.[39]

What is more, the principle of the prohibition of torture has evolved into a peremptory norm of *jus cogens* and has been recognised as such.[40] Article 53 of the Vienna Convention on the Law of Treaties (VCLT)[41] defines *jus cogens* as "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". Due to this non-derogative status, the ICTY has described the prohibition of torture in its *Furundžija* case as a norm that "enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules".[42] This recognition of the prohibition of torture as a peremptory norm of general international law entails further important consequences. First of all, it is binding on all states whether or not they are parties to treaties containing the prohibition. Secondly, it has been held that as a consequence of its *jus cogens* character, every state is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction.[43] Thus, the crime of torture entails universal jurisdiction to eradicate "safe havens" for torturers.[44] Thirdly, torture may not be covered by a statute of limitations, and must not be excluded

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OEA/Ser.L/V/II.106, Doc. 40 rev., 28 February 2000, para. 118 (as well as para. 154 for the further classification as *jus cogens*).

[39] For the notion of obligations *erga omnes* as such see the *Barcelona Traction* case, 1986 ICJ Reports, para. 34.

[40] Concerning the *jus cogens* nature, please refer to *General Comment No. 24*, para. 10; and the *Report of the United Nations Special Rapporteur on Torture*, 1986, p. 1, para 3. The jus cogens character of the prohibition of torture has also been affirmed and discussed in cases of the ICTY, these include the *Furundžija* case, paras. 144, 153-157; as well as the *Delalic* case, para. 454; and *Prosecutor v. Dragoljub Kunarac and Others*, IT-96-23 and IT-96-23/1 "Foca", ICTY Trial Chamber II, Judgment of 22 February 2001, para. 466 (*Kunarac* case). This has further been acknowledged under the European regime in e.g. *Al-Adsani v. UK*, ECtHR 2001, at para. 61. Previously, US Federal Courts had already held, that the international proscription of torture has turned into *jus cogens*, see i.a. *Siderman de Blake v. Republic of Argentina*, 965 F. 2d 699 (9th Cir. 1992), cert. denied, 507 US 1017 (1993); *In re Estate of Ferdinand E. Marcos Human Rights Litigation (Marcos v. Hilao)*, 978 F. 2d 493 (9th Cir. 1992), cert. denied; *Marcos Manto v. Thajane*, 508 U.S. 972 (1993); *Xuncax et al. v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); and *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1196 (S.D.N.Y. 1996). See also with regard to the United Kingdom, *Ex parte Pinochet (No.3)*, [2000] 1 AC 147, 198. For affirmations of learned scholars refer to Rodley, 1999, p. 74; Seiderman, 2001, pp. 92-92; Rehman, 2003, p. 23.

[41] Adopted on 22 May 1969, entered into force on 27 January 1980, 1155 UNTS 331.

[42] *Furundžija* case, para. 153. For an overview of the concept of *jus cogens*, please refer to Hannikainen, 1988.

[43] *Furundžija* case, para. 156.

[44] As phrased by Nowak, 1998, p. 248. With regard to the principle of universal jurisdiction, it has been held that "it is the universal character of the crimes in question i.e. international crimes which vests in every State the authority to try and punish those who participated in their commission", see *Attorney-General of the Government of Israel v. Adolf Eichmann*, Israeli Supreme Court 1962, 36 ILR 277, 298. This has further been underlined in stating that "the universality principle is based on the assumption that some crimes are so universally condemned that the perpetrators are the enemies of all people", and "therefore, any nation which has the custody of the perpetrators may punish them according to its law applicable to such offenses", *Demjanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985), cert. denied, 475 U.S. 1016 (1986), at 582.

from extradition under any political offence exemption.[45] Fourthly, contrary national law is rendered illegal *per se*.[46] Finally, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community.[47]

2.4. Assessment of Chapter Two

Overall, the right not to be tortured or ill-treated enjoys a special status and is anchored deeply in international law. A wide variety of treaties bear witness of the prohibition of torture. In this respect, torture can occur as a discrete crime under international human rights law, as a war crime under international criminal law and as a crime against humanity under international humanitarian law.[48] A state further has to make sure that its international obligations arising from binding treaty provisions are implemented and torture constitutes a crime under its national law, it has to investigate allegations of torture and prosecute offenders. If a state does not comply with its obligations, it acts in breach of international law. Furthermore, human rights treaties provide that no exceptional circumstances can justify any suspension of the right not to be tortured or ill-treated. Besides the incorporation of this inherent right to physical and spiritual integrity in a multitude of legal instruments, the status of the prohibition of torture is strengthened through a customary law status. The right not to be tortured has further been recognised as an obligation *erga omnes*. Moreover, the prohibition of torture constitutes a norm of *jus cogens* and can not be derogated from through international treaties, local or special customs or even general customary rules not endowed with the same normative force.[49] It enjoys an absolute nature in the absence of permissible limitations, exceptions or derogations.[50] Thus, a state has to take effective measures to prevent torture and to punish acts of torture as a general rule of international law.[51] Conclusively, "the torturer has become, like the pirate or the slave trader before him, *hostis humani generis*, an enemy of all mankind".[52]

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[45] *Furundžija* case, para. 157.
[46] Cf. e.g. Than/Shorts, 2003, p. 188, at para. 7-007; as well as the *Furundžija* case, para. 155.
[47] *Furundžija* case, para. 154.
[48] As categorised by Cassese, 2003, pp. 117-118.
[49] *Furundžija* case, paras. 153-154; Nowak, 1993, p. 126; as well as Hannikainen, 1988, p. 502.
[50] Cf. also Addo/Grief, 1998, p. 513; as well as *Ireland v. United Kingdom*, ECtHR 1978, para. 163.
[51] As stated in *O.R., M.M. and M.S. v. Argentina*, Committee against Torture 1989, para. 7.2.
[52] *Filartiga v. Peña-Irala*, 630 F. 2d 876 (2nd Cir. 1980), para. 980.

After having established the absolute status of the prohibition of torture under international law, the following chapter will now turn to the notion of torture and ill-treatment under international human rights law. As the prohibition of torture may not be derogated from even in times of war or a state of emergency, an additional examination of the prohibition under international humanitarian and international criminal law is not necessary for the determination of a breach of international law. The purpose of the subsequent chapter is to provide a legal background for the examination of challenges to the prohibition in the respective cases and proposals.

3. THE NOTION OF TORTURE AND ILL-TREATMENT UNDER INTERNATIONAL LAW

3.1. Overview

As has been seen in the last chapter, there is no doubt that the prohibition of torture is absolute. But while general and specific human rights instruments on the regional as well as universal level uniformly and explicitly prohibit the use of torture and ill-treatment, such a consistency is not employed with regard to what falls under their scope. More explicitly, although the condemnation and prohibition of torture and other ill-treatment has been generally accepted as a norm of customary international law and *jus cogens*, defining a phenomenon like torture in a broadly accepted way has been encountered as a challenge. This is due to the fact that the attempt to define torture is far from easy. Not only is it difficult to frame an appropriate definition, but any definition almost inevitably tends to suggest the means for its own evasion.[53] In this respect it has also been submitted that there has always been a definitional leeway concerning human rights treaties by leaving a margin of interpretation to state authorities in order to ensure their acceptance of international rules in principle.[54] Therefore, the difficulties and problems surrounding the different attempts in interpreting and defining torture have been stated to have grown to "nightmarish" proportions or have been considered to have produced an "implementation crisis".[55] All in all, only a few specialised instruments have gone as far as attempting to provide a definition. These are the 1975 Declaration on the Protection of all Persons Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Declaration against Torture)[56], the 1984 CAT and the 1987 Inter-American Convention. In lack of written definitions in general human rights conventions and in order to close the latch to impunity, treaty monitoring bodies have further interpreted which elements constitute torture.

This thesis examines cases that have arisen and proposals that have been put forward in Israel, the United States of America and Germany. For an evaluation that these states have to adhere to the

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[53] Cf. statement by Judge Fitzmaurice in *Tyrer v. UK*, ECtHR 1978, at paras. 22-23.
[54] Benedek/Nikolova (eds.), 2003, p.46. This has even been interpreted as far as that the utilisation of ambiguities and unclear language by states to defeat human rights conventions is a common practice on the international plane, as stated by Boulesbaa, 1990, p. 44.
[55] As quoted by Kellberg, 1998, p. 37.
[56] Adopted by the General Assembly on 9 December 1975.

international prohibition of torture with regard to the methods in question, only general international law and binding treaty law is of importance. In this respect all three states have ratified the CAT[57] as well as the ICCPR[58]. On the regional level, the US has neither ratified the Inter-American Convention nor the ACHR. Germany is a State Party to the ECHR[59]. Therefore, only the provisions of the CAT, the ICCPR and the ECHR will be taken into account in the following overview, as other instruments can only be drawn upon by way of an interpretational aid in ambiguous cases. The subsequent subchapters are aimed to provide an understanding of the normative content of torture and ill-treatment and its difficulties. Thus, the definition of torture as contained in the CAT and the notion of ill-treatment under the CAT will be looked at. Further, the interpretations of the treaty bodies of the ICCPR and the ECHR will be examined concerning the different concepts of torture and ill-treatment that have crystallised in their work. The focus will overall lie upon the abstract determination of a breach of international law under the specific treaties, the wide variety of case law subscribing which particular methods are illegal will not be assessed. Relevant case law as well as recommendations will rather be taken into account in the examination of the respective cases and proposals in the consecutive chapters.

3.1.1. The Definition of Torture in Article 1 CAT

The CAT can be seen as a keystone in the fight against torture on the international level. Its treaty-monitoring body is the Committee against Torture (the Committee), which was established to examine periodic reports from State Parties and to make inquiries into apparent systematic practices of torture.[60] The proscribed conduct is defined in Article 1 CAT[61]. This provision deserves careful

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[57] CAT: Israel signed on 22 October 1986 and ratified on 3 October 1991. The US signed on 18 April 1988 and ratified on 21 October 1994. Germany signed on 13 October 1986 and ratified on 1 October 1990.

[58] ICCPR: Israel signed on 19 December 1966 and ratified on 3 October 1991. The US signed on 5 October 1977 and ratified on 8 June 1992.
Germany signed on 9 October 1986 and ratified on 17 December 1973.

[59] Signed 4 November 1950, ratified 5 December 1952.

[60] By virtue of Articles 17, 19 and 20 CAT. A determination of the illegality of actions or omissions by States Parties to the Convention can further be made by an Arbitral Tribunal in the settlement of disputes between the Parties or by the International Court of Justice (ICJ), see Article 30 CAT.

[61] The CAT was, like other UN Conventions, preceded by a General Assembly Resolution, the 1975 Declaration against Torture. The definition of the Declaration was incorporated with only slight changes into the CAT. As a recommendation it lacked legal force but paved the way in terms of defining torture. Article 1 (1) of the Declaration reads: "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 other persons. It does not include pain or suffering arising only from, inherent

analysis as it has grown in importance with the increasing number of State Parties to the Convention and the rising number of states which incorporate the elements of the definition in national laws prohibiting torture. There is further an accumulating tendency of courts to draw from it in making findings of torture and of authoritative references to key elements of the definition as matters of international law.[62]

Article 1 CAT specifies torture as

> "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 and is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a **public official or other person acting in an official capacity**. It does not include pain or suffering arising only from, inherent in or incidental to **lawful sanctions**." (emphasis added)

This definition contains five essential elements: 1) the conduct, 2) the intention, 3) the purpose, 4) the identity of the offender, and 5) the exclusions.[63] An analysis of these will be given subsequently.

Firstly, the prohibited conduct is defined as "any act by which severe pain and suffering, whether physical or mental" is inflicted. With regard to an act of commission the meaning of the term is unambiguous.[64] However, the phrase does not mention omissions, although omissions, if intentionally conducted, are capable of amounting to torture.[65] As an example for this, the omission

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in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners."

[62] The ICTY, for instance, suggested that the main elements of the definition in the CAT enjoy general acceptance, see e.g. the cases of *Delalić*, para. 459; *Furundžija*, para. 161; and *Kunarac*, paras. 483-497. Whereas, the ICTR even went as far as regarding it as "*sic et simpliciter* applying to any rule of international law on torture". See *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, ICTR Trial Chamber I, Judgment of 2 September 1998, para. 593.

[63] In more detail, these five elements are: 1) the *actus reus* must result in severe physical and mental suffering, whereby the inclusion of the notion of mental suffering is important as torture is not restricted to the infliction of physical pain; 2) the *mens rea* is determined by intentionally inflicting harm upon the victim, accidental inflictions cannot constitute torture; 3) the act must have been committed for any of the purposes or reasons listed; 4) the *rationae personae* is reserved for public officials, or those persons acting in an official capacity; and 5) torture excludes acts that are lawfully sanctioned. See Than/Shorts, 2003, p. 187, at para. 7-006; slightly different approach in *Combating torture – a manual for action*, Amnesty International, 2003, p.70.

[64] As noted by Boulesbaa, 1999, p. 9.

[65] Cf. Rehman, 2003, pp. 412-413; as well as Sharvit, 1994, p. 153.

to provide food, water, sanitary facilities or medical attention comes to mind. It has therefore been submitted by the Special Rapporteur on Torture that these omissions, although not expressly included in the wording of Article 1 CAT, constitute torture.[66]

Furthermore, the act has to result in "severe pain and suffering". The term "severe" was retained in the definition in order to attain a certain threshold and reserve the label of torture only to acts of a certain gravity.[67] While such a threshold is important in order to disqualify conduct that does not amount to torture, the concept of "severe pain and suffering" as the backbone of the definition thereby leaves a margin of interpretation, which may, in some cases, turn out to be excessive.[68] Strictly speaking, the term leads to a subjective test, therefore differing from person to person, according to her or his personal characteristics, legal background and the role humanitarian considerations play within their own societies. The element of "severe pain and suffering" has therefore been labelled as a "rather vague concept" on the application of which to a specific case there may be very different views.[69] In this respect, it can be clearly determined that, *inter alia*, having a cross burned on one's hand, being raped by three persons continuously during one night, or having hot metal pincers placed on the tongue inflicts very severe pain no matter what standard applies. However, there are undoubtedly important differences between the level of tolerance to pain from one person to another and thereby huge difficulties can occur when determining if a specific technique meets the threshold of "severe". It follows that the severity of the conduct in question needs to be determined on a case-by-case basis and cannot be generally assessed.

Moreover, the definition acknowledges that mental suffering should be prohibited on the same level as physical suffering. This is especially important as regards the fact that although the means used might only be of a physical nature, no matter how severe, the long-term effects are in most cases psychological, accompanied in the worst case scenario with the disintegration of the personality of the victim.[70]

Secondly, the act of torture has to be inflicted intentionally upon a person. Thus, the mere disregard of, for instance, legal procedural interrogation methods will not, by itself, automatically constitute a

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[66] *Report of the United Nations Special Rapporteur on Torture*, 1986, at para. 30; see also Burgers/Danelius, 1988, p. 118.
[67] Cf. Rehman, 2003, p. 413, with further references to the drafting process; and Sharvit, 1994, p. 154.
[68] Sottas, 1998, p. 64.
[69] Burgers/Danelius, 1988, p. 122.
[70] Psychological effect of disintegration mentioned in *Report of the United Nations Special Rapporteur on Torture*, 1986, at para. 2.

violation of Article 1 CAT.[71] As the condition entails that an accidental or negligent act cannot be regarded as torture, it is designed to shield those who might unwittingly cause suffering.[72] The element of "intention" further distinguishes acts that benefit the recipient, such as medical treatment, but cause incidental and unwanted pain or suffering, from those acts that are carried out with the purpose of causing pain.[73]

Thirdly, Article 1 CAT includes a list of purposes which constitute an element of the act of torture; these are the desire to obtain information or a confession, the punishment for an act committed or suspected to have been committed, intimidation, coercion and any reason based on any discrimination of any kind. As indicated by the use of the term "such purpose as", the provided list is not exhaustive.[74] However, the words "such as" imply that the non-listed purposes must have something in common with the purposes that are expressly listed. This common ground has been analysed as the existence of some, even remote, connection with the interests or policies of the state and its organs.[75] Hence, the purposes do not refer to torture out of purely sadistic or otherwise private motives.

Fourthly, by restricting the act of torture to be perpetrated "at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity", the definition in Article 1 CAT confines its application to intentional governmental conduct. Thus, the Convention does not cover private persons who were not acting under the authority of the state, but for their own reasons, even if their actions might be torturous. This exclusion has been explained with the fact that torture, under international law, is committed by the state or its agents, whereas private acts of torture should be dealt with under domestic law.[76] However, there is a growing acceptance of the importance of safeguarding people from similar treatment carried out by private groups or individuals against persons under the effective control of those groups and individuals.[77]

Fifthly, the second sentence of Article 1 CAT makes an exemption from the prohibition of torture with regard to "lawful sanctions" which a State may impose for breaches of its domestic legislation. The provision leaves open what is to be considered as a "lawful sanction" and whether it is

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[71] Than/Shorts, 2003, p. 187.
[72] Burgers/Danelius, 1988, p. 118.
[73] Sharvit, 1994, p. 156.
[74] Burgers/Danelius, 1988, pp. 118-119.
[75] Sharvit, 1994, p. 164.
[76] As mentioned by Sharvit, 1994, p. 166.
[77] As assessed by Foley, 2003, p. 9, at 1.12.

sufficient that the sanction be authorised or prescribed by national law or whether it should also be in conformity with international law. In this respect, it has been alleged that lawfulness should be judged in light of domestic law alone to reflect the intentions of the drafters.[78] However, some states upon ratification declared that the notion lawful sanctions should be interpreted as sanctions recognised as such equally under domestic law and under international law.[79] By only taking recourse to what is deemed legal under the national laws of states, the problem arises that practices which are legal in some countries amount to torture or ill-treatment in others. There also still remains the danger that a State claims its ill-treatment of detainees was allowed under its domestic legal system.[80] However, it is a basic principle of international law that a state may not plead its domestic law as an excuse for avoiding the requirements of international law. It hence would seem to be defective drafting to allow states to evade an international obligation by invoking a municipal law concept which the state is free to define as it chooses.[81] Therefore, the limitation needs to be interpreted restrictively if states are not to bypass the international prohibition of torture through "legalisation" of specific methods of torture, as called for repeatedly in the fight against terrorism, especially after the events of 11 September 2001.[82] Hence, sanctions that are already in place must be reasonable and not contrary to international law. The term "lawful sanctions" refers only to penal practices that are widely accepted as legitimate by the international community and are compatible with basic internationally accepted standards,[83] such as the deprivation of liberty through imprisonment.[84] Accordingly, any national laws, old or new, which legitimise torture or ill-treatment would constitute unreasonableness and be inconsistent with the principles and aims of the Convention and therefore be deemed illegal.[85]

In consistency with this approach, punishment in some countries, for example, strict solitary confinement, in particular for longer periods, or mutilations and stoning as a form of execution or, for that matter, public whipping and flogging do not fall under lawful sanctions as these are *per se* prohibited by international law and therefore not covered by the exception.[86] Nevertheless, this

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[78] Cf. Sharvit, 1994, p. 169.
[79] See declarations made on behalf of Luxembourg and the Netherlands, UN Treaty Data Base. Cf. also Kooijmans, 1990, p. 99.
[80] Concern mentioned by Boulesbaa, 1999, pp. 39 and 295. Whereas, it is a basic principle of international law that a state may not plead its domestic law as an excuse for breaching its international obligations.
[81] Boulesbaa, 1999, p. 296.
[82] As stressed by Nowak, 2003, pp. 89-90.
[83] *Combatting Torture*, Human Rights Fact Sheet No. 4, United Nations Office at Geneva, 2002, at p. 33.
[84] *Report of the United Nations Special Rapporteur on Torture*, 1997, under I. A. The mandate.
[85] Cf. Than/Shorts, 2003, p. 188, at para. 7-007.
[86] As mentioned by Kellberg, 1998, p. 32.

view is certainly not accepted in some parts of the world. This is especially the case with Islamic states employing the Sharī'ah, where a corporal sanction is part of the national law, thereby seen as lawful and not amounting to torture. Indeed, in the negotiation process for the Convention these states insisted on the exception relating to lawful sanctions and sought assurances that the death penalty and certain forms of punishment prescribed by Islamic law were compatible with the Convention.[87] It has thus been described as worrying that cruel sanctions, in the guise of lawful sanctions, in particular corporal punishment, have not been expressly excluded under the Convention.[88] However, after the coming into force of the Convention judicial punishment has been considered as being unlawful by definition.[89] Thus, although the general problem of potential loopholes in regard to punishments imposed or carried out in accordance with domestic law remains, at the current state of time, it can be alleged that corporal punishment and other means of lawful sanctions clearly contradictory to international law are not covered by the exclusion in Article 1 CAT. It further needs to be remarked that with regard to a systematic interpretation of the Convention, the exception of lawful sanctions does not apply to other forms of ill-treatment as prescribed by Article 16. Thus, pain and suffering administered as a lawful sanction not coming within the definition of torture, may still lead to cruel, inhuman and degrading treatment or punishment.[90]

Finally, Article 1 (2) CAT features a saving clause against the weakening of existing international conventions and national laws of states, which may have wider application or definition than the CAT.[91] It thereby closes the gate to impunity by widening the scope of the prohibition as contained in the CAT and by foreclosing that the definition is seen as exhaustive.

3.1.2. Ill-Treatment under Article 16 CAT

The concept of ill-treatment, different from that of torture, has not been defined in the Convention, as "it has been found impossible to find any satisfactory definition of this general concept, whose application to a specific case must be assessed on the basis of all the particularities of the concrete

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[87] Burgers/Danelius, p. 103, with regard to the drafting process.
[88] Ingelse, 2000, p. 318.
[89] Cf. *Report of the United Nations Special Rapporteur on Torture*, 1997, under I. A.; and Ingelse, 2000, p. 318 with regard to the *Namibia* case before the Committee, CAT/C/SR.294/Add.1, para. 23.
[90] Cf. Rehman, 2003, p. 413; Ingelse, 2000, noted in comment on p. 311.
[91] As phrased by Boulesbaa, 1999, p. 37. Article 1 (2) CAT reads: "This Article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application."

situation".[92] Thus, the definition in Article 1 CAT does not contain a reference to ill-treatment at all.[93] During the drafting process of the Convention, the debate concerning ill-treatment was instead shifted to Article 16 (1) CAT, which now reads:

> "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 I**, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the **obligations contained in articles 10, 11, 12 and 13 shall apply** with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment." (emphasis added)

The provision refers to other ill-treatment as what does "not amount to torture". Hence, all acts not meeting the threshold of "severe" of the definition in Article 1 CAT, thereby failing to amount to torture, are labelled as ill-treatment. Article 16 (1) designates that ill-treatment represents a subcategory of torture, since the wording suggests that the difference is one of degree rather than of substance.[94] More explicitly, torture and ill-treatment should not be seen as separate categories, rather constitute certain acts of cruel, inhuman or degrading treatment or punishment torture.[95] This is also underlined through the use of the word "other" in the title of the CAT. Therefore, torture always constitutes ill-treatment, whereas ill-treatment not always amounts to torture. What is meant by "cruel, inhuman and degrading treatment" can be inferred by taking recourse to the 1988 Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, which states that the term "should be interpreted as to extend to the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time." Further, the task of determining what constitutes prohibited behaviour has been taken up by the Committee, which has decided on a case-by-case basis taking into account all particularities of the situation.

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[92] Burgers/Danelius, 1988, p. 122; see also Boulesbaa for an overview of the drafting process, 1999, pp. 5-8.
[93] Whereas the Declaration against Torture provided in its Article 1 (2) for torture to constitute an "aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment".
[94] Sharvit, 1994, p. 174.
[95] Cf. *Combating torture – a manual for action*, Amnesty International, 2003, p.67.

Moreover, the classification whether an act constitutes torture or falls short of it, leads to different legal consequences under the CAT. In this respect, the second sentence of Articles 16 (1) CAT provides that Articles 10, 11, 12 and 13 CAT also apply to other forms of ill-treatment. While the provisions of, *inter alia*, Articles 3 to 9 and 14 referring to criminalisation, prosecution, the exercise of universal jurisdiction and the right to redress and compensation, only apply to torture. Further, also Article 2 (2) CAT concerning non-derogation from the prohibition at all times not explicitly applies to other ill-treatment. However, the saving clause in Article 1 (2) provides that other legal instruments with a wider application and definition than the Convention shall not be weakened. In this respect, Article 7 in conjunction with Article 4 (2) ICCPR declares that no derogation may be made from torture and ill-treatment. According to a systematic interpretation this provision could be applied to the CAT *via* the saving clause. However, as most State Parties to the CAT have also ratified the ICCPR, these would already act in breach of international obligations by deviating from the prohibition under the ICCPR itself.

Conclusively, the drafters of the Convention have outlined requisite elements that need to be met for a behaviour to constitute torture. However, as has been seen in the analysis above, there exist a number of shortcomings and problems with regard to these elements as well as with regard to the notion of other ill-treatment which need to be overcome by interpretation to close the latch to impunity. A water-proof definition encompassing all varieties, variables and potential situations in which torture occurs is certainly impossible to find and would be subject to state approval and to the changing nature of the phenomenon of torture. Despite these considerations the definition provided in the Convention serves as an important guideline in assessing breaches of international law. The final determination of what constitutes prohibited behaviour under the CAT has to made by assessing the requirements set out in Articles 1 and 16 (1) CAT, evaluating all the peculiarities of the specific case in question and interpreting which standards have to be met. In order to assess whether a breach of international law has occurred on behalf of a state it is further significant to take recourse to the work of treaty-monitoring bodies concerning other international human rights instruments.

The following subchapter will now turn to the prohibition of torture and ill-treatment under Article 7 and 10 (1) ICCPR and the approach taken by the HRC to determine an infringement of the Covenant.

3.2. Torture and Ill-Treatment under Article 7 and 10 (1) ICCPR

Responsible for the interpretation of the prohibition of torture and ill-treatment under the Covenant is the Human Rights Committee (HRC), which has been established as the quasi-judicial monitoring body of the treaty. Its competency includes state reporting and individual complaints procedures. It further gives general comments, as essential interpretative views, on the implementation of Articles of the Covenant.[96] The decisions of the Committee are not legally binding, although they are built up and argued like judgments and delivered to the State Parties with specific recommendations.[97]

Article 7 of the 1966 ICCPR provides:

> "No one shall be **subjected to torture or to cruel, inhuman or degrading treatment or punishment.** In particular, no one shall be subjected without his free consent to **medical or scientific experimentation**." (emphasis added)

The first sentence of Article 7 ICCPR responds literally to that in Article 5 UDHR. It, like Article 3 ECHR, does not provide a definition of torture or other ill-treatment, thereby leaving the prohibition to general terms. Further, the ICCPR, in distinction to the CAT, does not make an exception for lawful sanctions. This has been stressed by the HRC in denouncing all forms of corporal punishment unconditionally.[98] The Covenant also represents the only drafted international instrument that contains a specific reference to "medical or scientific experimentation" as being prohibited if performed without a person's free consent.[99] Moreover, all of the obligations of State Parties with regard to Article 7 ICCPR apply to all of the behaviour described in this Article, and all of these obligations are absolute, non-derogable and unqualified.[100]

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[96] Cf. Part II, Articles 28 ff. ICCPR for election and mandate of the HRC, as well as the First Optional Protocol for the individual complaint procedure.
[97] Nowak, 2003, p. 100.
[98] Cf. General Comment No. 20; see also *Concluding Observations of the Human Rights Committee: Iran (Islamic Republic of)*, CCPR/C/79/Add.25, 3 August 1993, para. 11.
[99] As stated by Kellberg, p. 13.
[100] As phrased in *Combating torture – a manual for action*, Amnesty International, 2003, p. 68.

Article 7 ICCPR is complemented by Article 10 (1) ICCPR, which lays down the positive requirement for the humane treatment of detained persons.[101] It thereby prohibits less serious forms of treatment than that prohibited under Article 7 ICCPR.[102]

Article 10 (1) ICCPR reads:

> "All persons deprived of their liberty shall be treated with **humanity and with respect for the inherent dignity of the human person**." (emphasis added)

The relationship between the two Articles is one of application priority, Article 7 ICCPR is of general application (*lex generalis*), whereas Article 10 ICCPR only targets persons in detention (*lex specialis*). Nevertheless, the HRC has in practice, whenever appropriate, dealt jointly with issues arising under Articles 7 and 10 ICCPR.[103] Further, whereas Article 7 ICCPR is non-derogable by virtue of Article 4 (2) ICCPR, Article 10 (1) ICCPR is not protected from infringement in time of crisis. Measures of derogation, however, have to cross the threshold of proportionality laid down in Article 4 (1) ICCPR.[104]

With regard to the concept of torture and ill-treatment, the formulation in the first sentence of Article 7 ICCPR would appear to comprise as many as seven modes of prohibited behaviour at face value. However, the prohibited behaviour cannot and should not be thought of as seven distinct subclasses of the prohibition.[105] In this respect the HRC declares in its General Comment No. 20: "The Covenant does not contain any definition of the concepts covered by article 7, nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied."[106] Thus, the Committee does not distinguish between the different facets of Article 7 ICCPR, but rather relies generally on the broad prohibition contained in the Article. It has taken a global approach by tending to find that certain acts constitute

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[101] Cf. General Comment No. 20, para. 2.
[102] Joseph/Schultz/Castan, 2004, p. 195.
[103] Cf. Hanski/Scheinin, 2003, pp. 61-62.
[104] Article 4 (1) ICCPR provides: "[...] to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."
[105] As noted in *Combating torture – a manual for action*, Amnesty International, 2003, p. 68.
[106] See General Comment No. 20, para. 4.

"violations of Article 7 ICCPR" without reference to the formula itself.[107] The established violations of Article 7 ICCPR range from the most brutal torturing, which in many cases led to permanent health damage or even to death, to mere threats and verbal abuse.[108] Further, a clarification and delineation is, in particular, unnecessary and does not lead to any great contribution to the definition of torture in cases were all acts are of a severe cruel nature and evidently amount to torture.[109] Moreover, this approach bears a significant advantage towards an attempt to establish rigid definitions of each of the elements of Article 7 ICCPR, as this could preclude later developments which might enlarge or enrich the understanding of what it includes, in line with evolving notions of human rights.[110] Thus, the HRC has been able to elaborate and develop the scope of the prohibition in its case law without actually defining the terms. Conclusively, the assessment of what constitutes prohibited behaviour under Article 7 and 10 (1) ICCPR, has to be made on a case-by-case basis by taking into consideration all circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as sex, age and state of health of the victim.

Subsequently, the concept of torture and ill-treatment under Article 3 ECHR will be highlighted. The extensive European case law serves as an important interpretational aid concerning which methods are to be understood as amounting to unlawful techniques. However, as the specific determinations and definitional approaches with regard to the different limbs of the formula in Article 3 ECHR are not relevant for the consecutive chapters of this study, the case law will only be assessed with regard to the general approach the Court has adopted in finding violations.

3.3. Torture and Ill-Treatment under Article 3 ECHR

Article 3 of the ECHR merely proclaims that

> "No one shall be subjected to **torture or to inhuman or degrading treatment or punishment**". (emphasis added)

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[107] Rodley, 1999, p. 75; see also Kellberg, 1998.
[108] Nowak, 1993, p. 135, with reference to particularly the *Uruguay* cases of the HRC.
[109] As mentioned by Barrett, Summer 2001, pp. 14-15.
[110] As observed in *Combating torture – a manual for action*, Amnesty International, 2003, p. 68.

In relation to the wording of the CAT and the ICCPR, the term "cruel" was dropped from the phrase in the ECHR, apparently since it was regarded as too subjective as well as repetitive and synonymous with "inhuman".[111] Further, as can be seen clearly, the Convention does not offer a definition of the concept of torture. Nevertheless, the void created by the lack of definition is being filled by the jurisprudence of the two supervisory bodies, namely the European Commission of Human Rights (European Commission) and the European Court of Human Rights (ECtHR).[112] They have developed a substantial body of case law in order to interpret the prohibition contained in Article 3 ECHR. While the HRC tends to find violations of Article 7 ICCPR and does not refer to the formula provided in the Article itself, the European organs have generally attempted to conceptualise the different limbs of the formula in Article 3 ECHR. In this respect, the ECtHR has attached specific meanings to the term "torture", "inhuman" and "degrading" treatment under the Convention and has developed the notion of thresholds of severity and other criteria for passing form one category to another, or from acts which are not prohibited as torture or ill-treatment to those that are.[113] Important in this regard is also that the Court has established a general doctrine that the Convention "is a living document which must be interpreted in the light of present day conditions."[114] In the following, a short summary of the approach of the Court will be provided.

In its early *Greek* case the ECtHR established a relationship between the different limbs of the formula in declaring that "all torture must be inhuman and degrading treatment, and all inhuman treatment also degrading."[115] Thus, the more severe behaviour is included in the less severe one. In its later case of *Ireland v. United Kingdom*, the Court further established a correlation of severity between the different behaviours by drawing on the "difference in the intensity of the suffering inflicted".[116] In the same case, the Court also held 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".[117] The facts in the case concerned the so-called "interrogation in depth" which involved the combined application of five particular techniques, or methods, sometimes termed "disorientation" or "sensory deprivation" techniques.[118] These included (a) wall-standing (forcing

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[111] See e.g. Sharvit, 1994, p. 171.
[112] As of 1 November 1998 all petitions are examined by the permanent Court as a single body.
[113] As noted in *Combating torture – a manual for action*, Amnesty International, 2003, p. 71.
[114] *Tyrer v. United Kingdom*, ECtHR 1978, para. 31.
[115] *Greek* case, 12 Yearbook European Convention on Human Rights 1969, at p. 186.
[116] See *Ireland v. United Kingdom*, ECtHR 1978, at para. 167.
[117] *Ireland v. United Kingdom*, ECtHR 1978, at para. 167.
[118] *Ireland v. United Kingdom*, ECtHR 1978, at para. 39 and subsequently.

the detainees to remain for periods of some hours in a "stress position"); (b) hooding (putting a hood over the detainees' heads and, at least initially, keeping it there all the time except during interrogation); (c) subjection to noise (pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise); (d) deprivation of sleep: pending their interrogations, depriving the detainees of sleep; (e) deprivation of food and drink: subjecting the detainees to a reduced diet during their stay at the detention centre and pending interrogations.[119] In its analysis the Court specified that in order to constitute torture or inhumane treatment, the treatment must attain a minimum level of severity which is assessed by taking into consideration all the circumstances of the case.[120] According to the Court, the submitted acts fell in the category of inhuman treatment because they caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation; the techniques were also degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.[121] It further stated that the five techniques did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.[122] Interesting in this regard is that, due to the subjective notion of the formula, the Commission had previously adopted a different view and classified the techniques, especially when used in combination, as torture.[123] However, the Court has followed its doctrine of the Convention as a "living document" and reviewed its position. In this respect it held more recently that "certain acts which were classified in the past as 'inhuman or degrading treatment' as opposed to 'torture' could be classified differently in the future", "the increasingly high standard being required in the area of protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies".[124] With regard to its approach of distinguishing different thresholds of severity, the Court has further held that suffering is a significant consideration, but that "there are circumstances where proof of the actual effect on the person may not be a major factor."[125] Moreover, it has established that "in addition to the severity of the treatment, there is a purposive element" as recognized in the

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[119] *Ireland vs. United Kingdom*, ECtHR 1978, para. 96.
[120] *Ireland vs. United Kingdom*, ECtHR 1978, para. 162. This severity approach can be found in a variety of cases, for a more recent case see e.g. *Keenan v. UK*, ECtHR 2001, para. 108.
[121] *Ireland v. UK*, ECtHR 1978, at para. 167.
[122] *Ireland v. UK*, ECtHR 1978, at para. 167.
[123] *Ireland v. UK*, Report of the European Commission 1976, at para. 402.
[124] *Selmouni v. France*, ECtHR 1999, para. 101.
[125] *Keenan v. UK*, ECtHR 2001, para. 112.

CAT.[126] Thus, for instance, the "special stigma of 'torture' should only be attached to deliberate inhuman treatment causing very serious and cruel suffering."[127]

Overall, the ECtHR has taken a vertical approach with regard to the concept of torture and ill-treatment under the Convention. This approach comprises three separate elements, each representing a progression of seriousness, in which it moves progressively from forms of ill-treatment which are "degrading" to those which are "inhuman" and then to "torture". The distinctions between them are based on the severity of suffering involved, with "torture" at the apex.[128] This distinctive approach incorporates a quest in as far as trying to establish different thresholds between the three elements as well as an laying down an entry threshold. However, a precise definition of the different thresholds should not have to stand at the core in establishing a breach of the Convention. The Court has taken notice of this fact and reviewed his earlier decisions by taken further into account his established concept of torture as a "living nature"[129], capable of evolving over time. It remains to be seen how this will be judged by the Court in future cases. All in all, the current approach adopted by the ECtHR, concerning which behaviour is unlawful and which is not, can be summed up best in the Court's own words: "Even in the most difficult of circumstances, such as the fight against organised terrorism and crime, the Convention prohibits in absolute terms treatment contrary to this provision. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim."[130]

3.4. Assessment of Chapter Three

This chapter provided an overview with regard to the notion of torture and ill-treatment under the specified three human rights instruments. It has been seen that the CAT, as the most recent and specialised treaty, is the only one that contains a definition of torture within its provisions. This definition, despite its shortcomings, can be regarded as an authoritative source of what amounts to

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[126] See e.g. *Mahmut Kaya v. Turkey*, ECtHR 2000, para. 117. The Court explicitly endorses the purposive component of the CAT definition and stresses its relevance in a variety of cases.
[127] *Aksoy v. Turkey*, ECtHR 1996, para. 63.
[128] For this assessment see Evans, 2002, p. 370.
[129] *Tyrer v. United Kingdom*, ECtHR 1978, at para. 15.
[130] *Altun v. Turkey*, ECtHR 2004, para. 51.

prohibited behaviour in terms of a general concept of torture. For a behaviour to amount to torture under Article 1 CAT five essential elements have to be met. In so far torture requires an intentional act or omission causing severe pain or suffering that is carried out for a certain purpose and can be attributed to the state. The Article does not include the notion of ill-treatment, which is contained in Article 16 CAT. Ill-treatment has not been defined, it is only characterised by not amounting to torture. Although both kinds of behaviour are illegal under the CAT, the Convention inhibits a grading approach by attaching different legal consequences to torture and other ill-treatment with regard to the obligations of states. The final interpretation and determination of which behaviour falls under the scope of the CAT has to made by assessing the requirements set out in Article 1 and 16 (1) and taking into account all the peculiarities of the specific case in question. The work of treaty-monitoring bodies in relation to interpreting the conventional definition of torture and eradicating shortcomings of the definition with regard to the behaviour of states further closes the latch to impunity. The approaches taken with regard to the ICCPR and ECHR have been highlighted. Both treaties do not contain a definition of torture or other ill-treatment, but they explicitly lay down that behaviour amounting to any of the different limbs of their formulas is illegal. In this respect, the HRC has adopted a global approach in tending to find violations of Article 7 ICCPR, and in some cases also Article 10 (1) ICCPR, and has rendered a delineation between the different limbs of the formula unnecessary. This generalised treatment of infringements of particular articles takes account of the fact that all behaviour in the article is prohibited and allows for a more flexible determination and an adjustment to developments and particular situations. Although such a flexible adoption to current political situations and changes in the human rights culture holds enormous advantages, this also leads to a sometimes more subjective approach, which does not always make it easy to compare the decisions, opinions and judgments of different bodies. In contrast to this, the ECtHR has tried to distinguish between the different limbs of the formula in Article 3 ECHR and established in dependence on the CAT the elements of severity and purpose to determine whether a behaviour amounts to torture, degrading or inhuman treatment. In this respect the delineation between different thresholds of the formula has not always been encountered without problems. It remains to be seen how the "living nature" of the concept of torture under the Convention will further be interpreted by the Court. Conclusively, certain criteria are needed if torture is to be defined as a crime, as in the CAT. With regard to the ICCPR and the ECHR, different approaches have been adopted to determine breaches of the respective treaties. Both approaches hold certain advantages and disadvantages. Thus, in general it can be stated that the determination whether a breach of international law has occurred with regard to the employment of a specific method has to be made in respect of the particular treaty in question by taking into

account the peculiar situation of the case, the characteristics of the victim and by drawing upon relevant case law in the area.

The following chapters will examine cases challenging the prohibition of torture and ill-treatment. The legal background and understanding provided in the previous chapters will serve as a tool for the evaluation of the individual cases. The first case that will be examined is the case of Israel.

4. THE CASE OF ISRAEL – TORTURE FOR SECURITY

4.1. The Authorised Use of "Moderate Physical Pressure"

From 1987 on, Israel served as an example of employing torture within the law. It has by some even been labelled a "modern inquisition state", due to its admission of the employment of torture or its "bureaucratic equivalent", the authorised use of "moderate physical pressure".[131] Following the Israeli occupation of the West Bank and Gaza, the today so-called Occupied Territories, acts of violence by Palestinians militants and groups like Hezbollah and Hamas, were countered by the Israeli General Security Services (GSS, also known as *shinbet* or *shabak*). Palestinians in those territories could be detained under military orders without access to lawyers and family for up to 90 days.[132] Their detention had to be periodically renewed by military judges, but this was frequently a formality.[133] Their interrogation was the responsibility of the GSS, directly under the control of the Prime Minister. From 1967, Israeli authorities had argued the legality and necessity of their interrogation methods, which frequently amounted to torture. This connoted that the GSS followed a so-called "operational code", which consisted of "unwritten conventions" permitting the GSS to use force while interrogating suspected terrorists and to later deny it in courts, thereby "protecting the 'myth system' of legality".[134]

The effective legalisation of the employed techniques came about in 1987, following the Report of the Landau Commission of Inquiry Regarding the General Security Service's Interrogation Practices with Respect to Hostile Terrorist Activities.[135] The Commission was set up after a case involving extra judicial executions by the GSS was exposed. GSS interrogators, faced with the dilemma of revealing methods of interrogation that could lead a court to reject confessions, or committing perjury in order to ensure the conviction of suspects they ostensibly believed to be

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[131] See e.g. Feldman, 1995, p. 85.
[132] Cf. Uildriks, 2000, p. 86. Generally, an arrest could be held secret for 15 days, whereas a subsequent admission of a lawyer could be withheld for another 15 days.
[133] *Combating torture – a manual for action*, Amnesty International, 2003, p. 24.
[134] As quoted by Benvenisti, 1997, under II.
[135] The commission of inquiry was established on 31 May 1987 and headed by former Supreme Court Chief Justice Moshe Landau, therefore became known as the "Landau Commission". The first part of the report was published as the "Landau Report", Landau Book, volume 1, 1995, pp. 269 ff. An excerpted version of the report can also be found in the *Israel Law Review*, vol. 23, 1989, pp. 146-189.

guilty on the basis of other, classified evidence, had routinely lied.[136] The Commission was given the task of defining "with as much precision as possible, the boundaries of what is permitted to the interrogator and mainly what is prohibited to him".[137]

The report issued by the Landau Commission consisted of two parts. The second part of the report was classified, it was not published and remains secret. It contained guidelines on what treatment was allowed during interrogation. The public part one presented findings as to what happened in the precipitating incidents, outlined the threat to Israel presented by Arab terrorism, described the dilemmas confronting Israeli security services in their efforts to combat terrorism and presented the case for the GSS being able to use investigatory methods amounting to torture. The justification of the Landau Commission for these interrogatory means on behalf of the GSS can be summed up as follows: 1) it was very difficult to combat the dangerous Arabic terrorist groups without having recourse to physical pressure; 2) the GSS was different from the ordinary police; and 3) the use of such methods must have been necessary and productive.[138] It was said that GSS personnel felt they had a "sacred mission" and that this "justified the means, any means".[139] Due to the legal constraints to which they were subject then, GSS officers had had no alternative but to lie about their methods.[140] In seeking a balance between the interrogation needs and the rights of suspects, the Commission drew on the provisions of Article 22 of the Israeli Penal Law, which exempts from criminal responsibility the author of acts committed in conditions of "necessity". It was said that the GSS interrogators fulfilled this requirement, since they acted to protect the security of the state, which includes preventing grievous bodily harm and injury to its citizens.[141] Hence, in effect, the Commission elevated the "necessity" defence to a source of government authority and found that a necessity situation existed in the GSS fight against terrorism.[142] It thereby, *inter alia,* relied on the concept of "the lesser evil" in stating that "actual torture [...] would perhaps be justified in order to uncover a bomb about to explode in a building full of people". It further recommended that the GSS should be authorized to, in certain circumstances, apply "a moderate degree of physical and psychological pressure" as part of the interrogation process of terrorist detainees.[143] The

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[136] *Combating torture – a manual for action*, Amnesty International, 2003, p. 25.
[137] *Second periodic reports of States parties due in 1996: Israel*, CAT/C/33/Add.2/Rev.1, 18 February 1997, para. 5.
[138] Cf. Than/Shorts, 2003, p. 183, at 7-002.
[139] Morgan, 2000, p. 185.
[140] Morgan, 2000, p. 185.
[141] As summed up by Uildriks, 2000, at p. 87.
[142] As stated by Laursen, 2000, p. 417.
[143] Landau Book, at p. 328.

Commission drew up guidelines how this interrogation process should be conducted in the future.[144] "Specific circumstances were identified and interrogation practices were strictly defined in a manner that, in the opinion of the Landau Commission, 'if these boundaries are maintained exactly in letter and in spirit, the effectiveness of the interrogation will be assured, while at the same time it will be far from the use of physical or mental torture, maltreatment of the person being interrogated, or the degradation of his human dignity'".[145] The exact forms of pressure permissible were outlined in the second secret part of the report. The secrecy was justified by the Israeli authorities in stating that if the GSS guidelines were to be disclosed terrorist organisations would prepare their members for questioning and deprive the GSS of the psychological tool of uncertainty, making the obtaining of evidence more difficult.[146] However, the validity of this argument is doubtful, since former detainees would certainly inform their fellow comrades on the methods of investigation used.[147] Further, a ministerial committee was provided to be set up in order to regularly review the secret guidelines on the use of "moderate pressure". The later established committee was headed by the Prime Minister; its members included furthermore the Minister of Defence, the Minister of Justice and the Minister of Internal Security. The obtained statements could not be used in court, but were meant to serve in the prevention of terrorist activities. However, although the Commission drew up safeguards and stressed that the pressure on suspects should never reach the level of physical torture or ill-treatment, it explicitly approved methods used previously by the GSS, put them under a legal blanket, and provided possible justifications for future acts under the "necessity" defence. As the second part of the report was classified, it could not be ascertained whether the interrogation guidelines were contrary to international standards on the treatment of detainees. There was also no allowance of neutral monitoring of their application. It thereby gave Israel a ground for justifying its actions and, if need be, deny the use of physical pressure possibly amounting to torture. Overall, it has been stated that the effective legalisation and introduction of the so-called "Landau Rules" as part of official governmental policy was possible because Israeli government and judiciary, along

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[144] These five guidelines are: 1) Disproportionate exertion of pressure on the suspect is not permissible - pressure must never reach the level of physical torture or maltreatment of the suspect, or grievous harm to his honour which deprives him of his human dignity; 2) The use of less serious measures must be weighed against the degree of anticipated danger, according to the information in the possession of the interrogator; 3) The physical and psychological means of pressure permitted for use by an interrogator must be defined and limited in advance, by issuing binding directives; 4) There must be strict supervision of the implementation in practice of the directives given to GSS interrogators; 5) The interrogators' supervisors must react firmly and without hesitation to every deviation from the permissible, imposing disciplinary punishment, and in serious cases, causing criminal proceedings to be instituted against the offending interrogator. See *Second periodic reports of States parties due in 1996: Israel*, CAT/C/33/Add.2/Rev.1, 18 February 1997, para. 9.

[145] *Second periodic reports of States parties due in 1996: Israel*, CAT/C/33/Add.2/Rev.1, 18 February 1997, para. 8.

[146] *Second periodic reports of States parties due in 1996: Israel*, CAT/C/33/Add.2/Rev.1, 18 February 1997, para. 10.

[147] Also mentioned by Uildriks, 2000, p. 89.

with the majority of Israeli society, accepted that the methods of physical and psychological pressure used on behalf of the GSS were a legitimate means of combating terrorism.[148]

Following the Landau Report the constant struggle with the government over the issue of torture increased. On one side, victims of torture, human rights lawyers and local as well as international human rights organisations searched for ways to challenge the system of legalised torture and filed numerous law suits to seek injunctions against specific techniques carried out by the GSS, such as the violent shaking of detainees.[149] On the other side, the Israeli government sought to defend and entrench the system.

In October 1991, Israel had become a party to the ICCPR[150], the CAT[151], and the Convention on the Rights of the Child[152], which all explicitly outlaw torture. However, it has to-date not successfully implemented the provisions of the Conventions into its domestic law.

In 1994, the Committee against Torture, whose central task as a treaty-based body is to determine whether a state complies with the provisions of the CAT, voiced its concern about the situation for the first time.[153] A year later, an amendment to the Israeli penal law to bring Israel's law in conformity with the CAT was dropped under national and international pressure, as it would have excluded "pain or suffering inherent in interrogation procedures or punishment according to law" as a lawful sanction by virtue of Article 1 CAT.[154] Subsequently, in 1997, the Committee against Torture continued following up on state reports regarding Israel, and voiced more direct concern this time.[155] It concluded that the methods of interrogation employed by Israel, such as restraining in very painful conditions, hooding under special conditions, sounding of loud music for prolonged periods, sleep deprivation for prolonged periods, threats, including death threats, violent shaking,

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[148] As stated in *Combating torture – a manual for action*, Amnesty International, 2003, p. 24.
[149] For NGOs and cases on the subject see e.g. the *Public Committee against Torture in Israel* at <http://www.stoptorture.org.il/>, the *Association for Civil Rights in Israel* at <http://www.acri.org.il>,*Al Haq* at <http://www.alhaq.org/>, *B'tselem* at <http://www.btselem.org/>, the *Palestinian Centre for Human Rights* at <http://www.pchrgaza.org/>, *The Palestinian Human Rights Monitoring Group* at <http://www.phrmg.org/>, as well as *Al-Dameer Gaza* <http://www.aldameergaza.org/>.
[150] Signed 19 December 1966, ratified 3 October 1991; it is not a member to the First or Second Optional Protocol.
[151] Signed 22 October 1986, ratified 3 October 1991. It made reservations with regard to its co-operation with the Committee under Article 20 CAT as well as with regard to the arbitration procedure provided for in Article 30 CAT.
[152] Signed 3 July 1990, ratified 3 October 1991.
[153] Cf. *Conclusions and Recommendations of the Committee against Torture: Israel*, A/49/44, 12 June 1994, paras. 165 ff.
[154] See e.g. discussion in *Combating torture – a manual for action*, Amnesty International, 2003, p. 28.
[155] Israel's First Periodic Report was submitted on 4 February 1994, see CAT/C/16/Add.4; the Second Periodic Report was submitted on 18 February 1997, CAT/C/33/Add.2/Rev.1 (see also above); in both reports Israel stated that its actions are not in breach of the CAT.

and using cold air to chill, are in breach of Article 16 CAT and also constitute torture as defined under Article 1 CAT.[156] It also expressly stated that Israel as a State Party to the CAT is precluded from raising any exceptional circumstances as justification for such acts.[157] The Committee further recommended that interrogations applying any of these methods have to cease immediately, that Israel has to incorporate the provisions of the CAT into national law, and that the interrogation procedures pursuant to the "Landau rules" in any event be published in full.[158] The Committee reaffirmed its findings in 1998, after no change of the situation in Israel had come about.[159]

In the same year, the HRC, as the treaty-based body of the ICCPR, received Israel's first State Party report.[160] Israel outlined its position with regard to, *inter alia*, the administrative guidelines for GSS interrogations and the Landau Commission as well as the procedures and mechanisms for the supervision and review of interrogative practices.[161] Similarly to the Committee against Torture, the HRC expressed concern about the authority given to the GSS to use "moderate physical pressure" under certain circumstances.[162] It stressed the non-derogable nature of Article 7 ICCPR, even in times of a state of emergency, and called upon Israel to cease using interrogation techniques violating Article 7 ICCPR.[163] The HRC also voiced regret that the Covenant had so far not been incorporated in Israeli law and could not be directly invoked in the courts and called for a full application of the Covenant in the Occupied Territories.[164]

With regard to the qualification of GSS practices, the Special Rapporteur on Torture reaffirmed the position of the Committee against Torture in his 1997 report.[165] He concluded that different forms of pressure, such as sitting in a very low chair or standing arced against a wall (possibly in alternation with each other); hands and/or legs tightly manacled; subjection to loud noise; sleep deprivation; hooding; being kept in cold air; and violent shaking during interrogation", appeared so consistently (and had not been denied in judicial proceedings) that he assumed them to be sanctioned under the approved but secret interrogation practices. He stated that each of these measures on its own may not provoke severe pain or suffering. However, "together - and they are

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[156] *Concluding observations of the Committee against Torture: Israel*, A/52/44, 9 May 1997, para. 257.
[157] Ibid, at para. 258.
[158] Ibid, para. 260 under a), b) and d).
[159] *Concluding observations of the Committee against Torture: Israel*, A/53/44, 18 May 1998, para. 240.
[160] *Initial report of States parties due in 1993, Addendum, Israel*, CCPR/C/81/Add.13, 2 June 1998.
[161] Ibid., see paras. 168 ff. with regard to Article 7 ICCPR.
[162] *Concluding Observations of the Human Rights Committee: Israel*, CCPR/C/79/Add.93, 18 August 1998, at para. 19.
[163] Ibid, para. 19, see additionally paras. 11 and 21 concerning the non-derogable character.
[164] Ibid, paras. 9-10.
[165] *Report of the United Nations Special Rapporteur on Torture*, 1997, under III. Israel, Observations.

frequently used in combination - they may be expected to induce precisely such pain or suffering, especially if applied on a protracted basis of, say, several hours". He therefore assessed that they can only be described as torture and that "the grave challenges posed by politically motivated terrorist activities [...] cannot justify torture or cruel, inhuman or degrading treatment".[166]

Despite the recommendations by both the Committee against Torture and the Human Rights Committee, as well as the observations by the Special Rapporteur on Torture, the Israeli authorities did not change their position. Although condemning some practices, the Israeli High Court had largely accepted the pleas of the security services that certain interrogation methods were a "necessity" in their fight against "terrorism". Then, in September 1999, a decision by the Israeli Supreme Court sitting as the High Court of Justice declared various practices of "moderate physical force" as unlawful since they infringe the constitutional protection of the individual's right to dignity. Although the ban of specific torturous practices by the Israeli High Court shows a move towards the abolition of torture as used by Israeli security services and is a positive step from a human rights perspective, it also displays serious shortcomings in the assessment of the absolute prohibition of torture. In the following sections the 1999 Israeli High Court Decision and its implications will be examined more closely.

4.2. The 1999 Israeli High Court Decision

4.2.1. Overview

The State of Israel was brought to court regarding the system of systematic torture inflicted by the GSS for some 12 years, following the recommendations of the Landau Commission, in the case of *The Public Committee Against Torture in Israel v. The Government of Israel et al.*[167] Seven applications were filed; one on behalf of the Public Committee Against Torture in Israel and one by the Association for Citizens' Rights in Israel as well as five on behalf of individuals. The methods of GSS interrogations, alleged as amounting to torture, included severe shaking (known as *tiltulim*),

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[166] Ibid.

[167] *Public Committee against Torture in Israel, The Association for Citizen's Rights in Israel and Others v. the Government of Israel et al*, Judgment on the Interrogation Methods applied by the GSS, Israeli Supreme Court sitting as the High Court of Justice in an extended panel of nine judges, 5100/94, 6 September 1999, P.D. 53 (4) (hereinafter "*1999 Israeli High Court Decision*").

the "shabach" posture (tying the suspect's hands through the gaps in the chair in which he was sitting, with the seat tilted forwards, further placing a hood over his head and subjecting him to loud music over lengthy periods of time), the "frog crouch" (consecutive periodical crouches on the tips of one's toes), exorbitant tightening of the handcuffs and sleep divestiture.[168]

The Court was faced with two main questions: firstly, whether the GSS is authorised to conduct interrogations of individuals suspected of committing crimes against Israel's security; and secondly, whether, in interrogations, it is legal to sanction the possible application of a variety of physical methods by means of specific directives.[169]

4.2.2. The Submissions of the Parties

The applicants argued, *inter alia*, that "the 'necessity' defence which, according to the State, is available to the investigators, is not relevant to the circumstances in question. In any event, the doctrine of 'necessity' at most constitutes an exceptional *post factum* defence, exclusively confined to criminal proceedings against investigators. It cannot, however, by any means, provide GSS investigators with the pre-emptory authorisation to conduct interrogations *ab initio.*"[170] In response to this the Court asked whether "the 'ticking time bomb' rationale was not sufficiently persuasive to justify the use of physical means, for instance, when a bomb is known to have been placed in a public area and will undoubtedly explode causing immeasurable human tragedy if its location is not revealed at once."[171] This argument was rejected by the applicants on the grounds that physical means are not to be used under any circumstances, since the prohibition of torture is absolute, and that even if there would be exceptional "ticking time bomb" circumstances, the means are in practice used even in absence of these conditions.[172]

The counsel for the defence pleaded that the interrogative means used by the authorised GSS in no way amount to torture and ill-treatment and do not violate international law.[173] The application of such methods is subject to the strictest of scrutiny and supervision, as per the conditions and

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[168] For the respective methods see the *1999 Israeli High Court Decision*, paras. 9-13.
[169] Cf. *1999 Israeli High Court Decision*, para. 14; as phrased by Uildriks, 2000, p. 85.
[170] *1999 Israeli High Court Decision*, para. 14.
[171] Ibid.
[172] Ibid.
[173] *1999 Israeli High Court Decision*, para. 15.

restrictions set forth in the Landau Report.[174] These methods also do not breach domestic law, as the "defence of necessity" could be applied.[175] As under the circumstances of "necessity", an act like "shaking" does not constitute a crime but is even considered a worthy act in order to prevent serious harm to a human life or body.[176] In this context the government also relied on the "ticking bomb" argument. In its scenario a given suspect holds information on the location of a bomb whose explosion is imminent. The bomb can only be defused by obtaining that information. Otherwise scores would be killed and maimed.[177] Thus, the use of physical means should not constitute a criminal offence, and their use is sanctioned, to the State's contention, by virtue of the "necessity" defence.

4.2.3. The Tenor of the Judgment

With regard to the first question, that of the authorisation of the GSS to interrogate individuals suspected of committing crimes against Israel's security, the Court ruled in the affirmative. GSS investigators are authorised through Israeli Criminal Procedure Law to interrogate suspects as they "are tantamount to police officers in the eyes of the law".[178] It also held that the interrogations are conducted on the basis of directives regulating interrogation methods. These directives equally authorise investigators to apply physical means against those undergoing interrogation. "The basis for permitting such methods is that they are deemed immediately necessary for saving human lives".[179]

Concerning the second question of whether the sanctioning of the interrogation practices used by the GSS is legal, the Court examined the submitted interrogation techniques in-depth. It concluded that the methods used are prohibited in "fair and reasonable" interrogations and considered them to be comparable to those qualified by the ECtHR as "inhuman and degrading treatment" in the *Northern Ireland* case.[180] The Court also acknowledged that international treaty prohibitions are "absolute", without any exceptions and "no room for balancing".[181] It did not, however, share the

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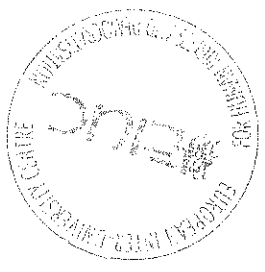
[174] *1999 Israeli High Court Decision*, para. 15.
[175] Under section 34 (1) of the 1977 Israeli Penal Law.
[176] *1999 Israeli High Court Decision*, para. 33.
[177] Ibid.
[178] *1999 Israeli High Court Decision*, para. 20.
[179] *1999 Israeli High Court Decision*, before para. 1.
[180] *1999 Israeli High Court Decision*, para. 24 ff. and 31.
[181] *1999 Israeli High Court Decision*, para. 23.

view of the Committee against Torture and the Special Rapporteur that the methods are to be qualified as torture. It instead decide to not further evolve on the issue of international law. The Court further held that there is no statutory power granting GSS investigators different or more serious interrogation powers than that given to the ordinary police force investigator.[182] An investigator "who insists on employing physical methods, or does so routinely, is exceeding his authority".[183] As the GSS does not have the authority to "shake" a man, hold him in the "shabach" position, force him into a "frog crouch" position and deprive him of sleep in a manner other than that which is inherently required by the interrogation.[184] With regard to the criminal law defence of "necessity", prescribed in the Israeli Penal Law, the Court held that it "cannot serve as a basis of authority for the use of these interrogation practices, or for the existence of directives pertaining to GSS investigators, allowing them to employ interrogation practices of this kind".[185] However, it concluded that its "decision does not negate the possibility that the 'necessity' defence be available to GSS investigators, be within the discretion of the Attorney General, if he decides to prosecute, or if criminal charges are brought against them, as per the Court's discretion".[186]

Finally, it is important to note that the judgment of President A. Barak of the Supreme Court provoked a dissenting opinion by Justice J'Kedmi.[187] He explained that he could not accept that the "State should be helpless from a legal perspective, in those rare emergencies that merit being defined as, 'ticking time bombs'; and that the State would not be authorized to order the use of exceptional interrogation methods in those circumstances." In his eyes such an authority existed and the natural right of "self-defence" could be employed. He therefore suggested that the judgment be suspended from coming into force for a period of one year. During that year, the GSS could employ exceptional interrogative methods in those rare cases of "ticking time bombs" and give the Knesset time to consider the issue. Nevertheless, the case was decided according to the President's opinion, the dissenting opinion was not taken into account in the final ruling.



[182] *1999 Israeli High Court Decision*, para. 32.
[183] *1999 Israeli High Court Decision*, para. 38.
[184] *1999 Israeli High Court Decision*, para. 40.
[185] Ibid.
[186] Ibid.
[187] See dissenting opinion after para. 40 of the *1999 Israeli High Court Decision.*

4.3. Implications of the Judgment

4.3.1. The Limited Role of International Law

Israel as a State Party to, in particular, the CAT and the ICCPR, is bound to those provisions under its international law obligations. It further generally follows a monist approach with regard to the incorporation of international law into its legal system, which entails that customary law, and with it the absolute prohibition of torture, automatically becomes part of municipal law.[188] However, the Supreme Court has in the past, due to security concerns, significantly limited the invocation of international law with respect both to Israel and the Occupied Territories in the past.[189] Thus, although Israel is clearly bound by both relevant treaty law concerning the prohibition of torture as well as by customary international law and *jus cogens* outlawing torture, it does not seem to fulfil its obligations towards the international community. In the 1999 Israeli High Court decision, the Court on the one side acknowledged the absolute prohibition of torture and ill-treatment under international law, but on the other side does not fully implement the effects of the prohibition into its national law regime. Hence, one of the shortcomings of the judgment lies in the fact that the Court does not draw on or apply international law in any substantial way.[190] In its decision the Court accurately examines the five interrogation techniques before it and declares them to be unlawful. But it does so on the grounds of its national "law of interrogation", not on the grounds of international law.[191] With regard to this "'law of interrogation' as a power activated by an administrative authority" the Court takes into account two principles. Firstly, "a reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment of the subject and free of any degrading handling whatsoever". It concludes that this is in "perfect accord with (various) International Law treaties". The second principle governing the case according to the Court is that "a reasonable investigation is likely to cause discomfort".[192] Thus, the Court instead of assessing the international law dimension tinkers its own national guidelines on which to evaluate the case.

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[188] Cf. Laursen, 2000, pp. 419-420, as well as 426.
[189] Cf. Benvenisti, 1993, p. 182, under D.
[190] As noticed by Laursen, 2000, p. 426.
[191] *1999 Israeli High Court Decision*, para. 21 ff.
[192] For the two principles see *1999 Israeli High Court Decision*, para. 23.

The only international dimension in the Court's assessment of the unlawfulness of the employed methods is its recourse to the *Northern-Ireland* case of the ECtHR and its comparison of the methods used by the GSS to those used by the British security services. In its interpretation and inclusion of the case in its judgment, the Court states that the methods used in the ECtHR case did not amount to torture, but are nonetheless prohibited.[193] It thereby implicitly acknowledges that the techniques used in the case before the High Court, would be prohibited under international law. Nonetheless, it fails to explicitly state that the methods are in breach of international law and also chooses to not take into consideration the differing opinion of the European Commission, which classified the British methods, especially in combination, as amounting to torture. It further failed to take note that the Court, although in respect of the ECHR, had stated that torture and ill-treatment is prohibited in absolute terms and "that there can be no derogation therefrom even in the event of a public emergency which would threat the life of the nation".[194]

Moreover, the Court neither mentions the CAT nor the ICCPR. However, according to the views of the treaty-monitoring bodies as well as the Special Rapporteur on Torture the methods of interrogation discussed in this case amount to torture and ill-treatment. Especially the "Shabach" position in itself inflicts a high degree of pain and suffering on the victim. Also, all of the Israeli methods, if used in combination and unrelentingly over a certain period of time, can easily amount to "low-visibility torture" that both causes severe suffering and effectively compels most detainees to provide information or sign a statement.[195] Thus, in the current case, by taking all considerations into account, it is safe to conclude that the interrogation methods before the Court are in contraction to international law.

However, the High Court seems to be reluctant to go beyond the scope of national law and examine or introduce international law as such. If the Court would have followed a "conceptual approach", thus the one embodied in international instruments and decisions of international institutions, a flat ban would have been imposed on torture or other ill-treatment and no-derogation would have been admitted *per se*.[196] But it also would have provided the Court with the task of giving meaning to the different terms contained in international treaty law. Which in the case of Israel is further complicated by the fact that it has not yet passed specific implementation legislation with regard to

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[193] *1999 Israeli High Court Decision*, para. 30.
[194] Cf. *Ireland v. United Kingdom*, ECtHR 1978, para. 163.
[195] Human Rights Watch, 1994, p. 78.
[196] Notion of "conceptual approach" by Benvenisti, 1997, under V. A.

international human rights law in the area of torture, although it is automatically bound by its international obligations due to its general monist approach. Whereas the adoption of a national "self-defence" approach does not necessitate an analysis of what constitutes torture or other ill-treatment. Instead, it assumes a ban on any physical or mental coercion during interrogations.[197] At the same time, it leaves space for the assumption that under extreme conditions, the perpetrator of violence will be exempted from legal sanctions. In this respect, the Israeli High Court has opted for the national "necessity" defence approach and stays confined to its domestic "law of interrogation". It thus takes international law into consideration but does not in itself interpret and apply international provisions prohibiting torture. An advantage of this approach, it has been alleged, is that a court might be less susceptible to undue influences when applying domestic law as opposed to international law.[198] Nonetheless, in the case of Israel this seems to prove false. Its ability of applying the law without bias is constrained by the double standards the judiciary uses with regard to regular Israeli citizens and Palestinians in the Occupied Territories.[199] Furthermore, applying international law, even in an *obiter dictum*, in addition to domestic law would have put the state into the position of having to adhere to its obligations under international law. The focus would have been shifted from the individual interrogator to the culpability of the state and would have brought in a totally different dimension. Such a judgment would therefore have sent a more direct signal to the international community as a whole and, in particular, to the treaty-based bodies criticising Israel's torturous policies. Moreover, the domestic path taken by the Court also cuts out its opportunity of "bringing human rights home" and thereby creating greater obedience to international norms on behalf of interrogators.[200]

4.3.2. The "Necessity" Defence and its Future Impact

Under its solely domestic approach, the High Court further examined the validation of the defence of "necessity" as put forward by the counsel for the defence. It determined that the defence should only be used by individuals reacting to a certain set of unforeseen circumstances at the specific time which warrants some immediate and spontaneous action; it is not to be used by the police or

[197] Benvenisti, 1997, under V. A. 2.
[198] Laursen, 2000, p. 429.
[199] Cf. Laursen, 2000, p. 430.
[200] Term of "bringing human rights home" in dependence on Koh, who provides a theory of effective importation of international law through "interaction, interpretation, and internalization" by means of "vertical domestication" through federal law. See Koh, Harold Hongju, *Bringing International Law Home*, in "Houston Law Review", vol. 35, 1998, pp. 623-713.

security services as part of the interrogation process in order to gather information of situations, however precarious, which will take place sometime in the future. Thus, it invalidated the invocation of the defence of "necessity" *ex ante*. However, it did not rule out the general possibility for investigators to justify torture in exceptional circumstances *ex post facto*. In this respect the Court held that an investigator employing physical means exceeds his authority, but might find "refuge under the 'necessity' defence's wings", provided the conditions are met by the circumstances of the case.[201] Regarding those circumstances, the Attorney General can instruct himself which investigators shall not stand trial, if they claim to have acted from a feeling of "necessity".[202] Thus, although the Court declared that the "necessity" defence should not generally be used as a justification *ex ante*, it still provided that it can be applied in exceptional circumstances. It thereby implicitly authorised the justification of physical means and left it to the discretion of the Attorney General to decide upon the issue when specific circumstances are met that do not necessitate the opening of criminal proceedings. The Court further concluded that "if it will nonetheless be decided that it is appropriate for Israel, in light of its security difficulties to sanction physical means in interrogations (and the scope of these means which deviate from the ordinary investigation rules), this is an issue that must be decided by the legislative branch which represents the people".[203] It decided to "not take any stand on the matter this time" and left the discretion to pass a statutory provision authorising the GSS to use force in exceptional circumstances, "enacted for a proper purpose, and to an extent no greater than is required", to the legislator.[204] Thus, the Court effectively handed the issue whether physical measures should under exceptional circumstances be further legalised over to the Knesset. It furthermore, by assessing that the use of the domestic law defence of "necessity" is not in general unlawful with regard to the questioning of suspected terrorists, allowed for a breach of international law. The prohibition of torture is absolute and no circumstances can justify the use of torturous methods. This is even more so as the Court seems to understand the defence as leading to the complete exculpation of the offender with no responsibility on his behalf. Thus, the judgment inhibits the risk of an authorised breach of international law. This is further underlined by the events that succeeded the decision.

Following the September judgment, the Attorney General, Elaykim Rubinstein, took on the task of "instructing himself" by issuing guidelines for GSS interrogators on 4 November 1999. In these

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[201] *1999 Israeli High Court Decision*, para. 38.
[202] Ibid.
[203] *1999 Israeli High Court Decision*, para. 39.
[204] *1999 Israeli High Court Decision*, para. 38-39.

guidelines, Rubinstein did not give any GSS interrogator *a priori* approval to use the banned methods. Nonetheless, he stated that "in situations where the interrogator took measures required immediately to obtain vital information in order to prevent tangible danger of grave injury to national security, or the life, freedom, or physical well-being of individuals, and there is no other reasonable way in the circumstances to obtain the information, and to resort to these interrogation methods was reasonable under the circumstances to prevent the injury, the attorney-general will consider not opening criminal procedures".[205] He concluded that the "necessity" defence can justify physical pressure in "very exceptional cases and may not be included in the routine interrogation procedure".[206] These guidelines thereby explicit justify physical pressure and provide for an exculpation of the perpetrator under the exceptional circumstances. They are thus in conflict with international law. Furthermore, Prime Minister Ehud Barak has gone so far as to establish a Committee to "find a legal solution for the use of force in the interrogation of terrorist suspects, in cases of immediate security danger ('the ticking bomb')".[207] However, under the pressure of human rights organisations, proposals for a statute were abandoned during the first half of 2000.[208] Nonetheless, especially since the subsequent outbreak of the al-Aqsa *intifada* (uprising), various public officials have continued to call for legislation to allow physical means during interrogations.[209]

These events highlight the implication the judgment bears for the future. Even if the Israeli authorities stick to the framework of the Court decision, this does not overcome the fact that the decision itself already exhibits an important shortcoming. It leaves room for the "defence" of necessity in "ticking-bomb" cases and does not explicitly outlaw torture. Therefore, it does not adhere to the non-derogatory nature of the prohibition of torture by virtue of treaty law, customary law and *jus cogens*. For instance, the provision in Article 1 CAT clearly states that no "exceptional circumstances whatsoever" can be invoked to justify the employment of torture. The "ticking-bomb" scenario, however, is such an exceptional circumstance, putting Israel in breach of international law. Worrying in this respect is also the dissenting opinion of Justice J'Kedmi, which goes even further than the main tenor of the judgment. Moreover, a reliance on the necessity defence to justify truly exceptional circumstances might be institutionalised and employed by a bureaucracy that guides its agents on how to get around their criminal liability. This is especially

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[205] Izenberg, *Rubinstein issues guidelines for GSS interrogations*, in "Jerusalem Post", 5 November 1999.
[206] Ibid.
[207] Uildriks, 2000, p. 99.
[208] Cf. Laursen, 2000, pp. 431-432.
[209] See e.g. B'tselem, *Torture by the GSS*, available at <http://www.btselem.org>.

worrying with regard to the fact that the passing of any law, even if only allowing for an application in exceptional circumstances, opens the door to abuse and breaches international law. The Landau Rules have also shown in the past that physical force cannot be maintained at a sub-torture level, and its routine cannot be prevented. So far no clear assessment can be made how huge the impact of the Attorney-General's guidelines Attorney-General is and how many proceedings have not been opened due to exceptional circumstances. Moreover, the Court did not unequivocally declare all forms of physical means during interrogations to be unlawful.[210] It only focused on those methods that were submitted in the particular case. Thus, not all of the practices used by the GSS were in fact reviewed. It is also realistic to assume that other physical means will be developed as alternatives to the methods that were declared unlawful by the Court.[211] In the past, each time a certain technique was abolished or reduced, the GSS came up with something that is harder to see and more difficult to focus on in court, including measures that do not leave a visible mark.[212] Hence, although the Court declared certain techniques are unlawful and stated that interrogators routinely employing physical measures exceed their authority, the shortcomings of the judgment indicate that full compliance with the international prohibition of torture is not in sight yet.

This assessment is further backed by the continued practice of torture on behalf of Israel, particularly after the beginning of the al-Aqsa *intifada* in 2000. As Amnesty International evaluated: "In a society which by and large continues to accept torture as a legitimate weapon against those whom it regards as 'terrorists', the fragility of human rights victories at times of confrontation was exposed by the gradual return of torture".[213] Furthermore, the Committee against Torture as well as the HRC have reacted with continued concern to the 1999 High Court Judgment. In November 2001, the Committee against Torture voiced regret that the decision did not "contain a definite prohibition of torture",[214] and that interrogators "who use physical pressure in extreme circumstances (ticking bomb cases)" might escape criminal liability by pleading the "defence of necessity".[215] It also remained concerned that torture, as defined by the CAT, "has not yet been incorporated into domestic legislation".[216] At the same time, Israel submitted its second periodic

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[210] Uildriks, 2000, p. 101.
[211] Uildriks, 2000, p. 100.
[212] Human Rights Watch, 1994, p. 58.
[213] *Combating torture – a manual for action*, Amnesty International, 2003, p. 30.
[214] *Conclusions and Recommendations of the Committee against Torture: Israel*, CAT/C/XXVII/Concl.5, 23 November 2001, at para. 6. a) i).
[215] Ibid., at para. 6. a) iii).
[216] Ibid, at para. 6. b).

report to the HRC.[217] In response to the report, the HRC stated its concern that interrogation techniques in violation of Article 7 ICCPR continue to be reported frequently and that the "necessity" defence argument, which is not recognised under the Covenant, is still invoked and retained.[218] It further recommended that Israel should review its recourse to the "necessity" defence argument, provide detailed information and statistics in its next report and ensure that all alleged instances of ill-treatment and torture be investigated and prosecuted vigorously and independently.[219]

Conclusively, it remains to be seen what the exceptional case of *ex post facto* justification under the domestic "necessity" defence, notwithstanding the implicated breach of international law, holds for the coming years. It can only be hoped that Israel does not use legislatory means to give the "necessity" defence with regard to the justification of torture a legal fundament. This would lead to a clear breach of international obligations on behalf of Israel. Such an explicit legal authority granting an exemption from responsibility in Court would further facilitate the exposure of, in particular, Palestinians to unlawful interrogation techniques. Thus, it is hoped that those cases that reach the Court in the future will be taken by the Court as an opportunity to review its judgment and to patrol grey areas. At least interrogators using "aggressive" methods now know that they are breaking the law and can potentially be held responsible for doing so. As a last comment, it is also desirable that Israel implements its international obligations fully into its domestic law and does not use its state of emergency to further deflect from its application of dual standards with regard to the mainland of Israel and the Occupied Territories.[220]

In the following, the "ticking-bomb" scenario and a proposed legal framework for its use with regard to the questioning of suspected terrorists by the US will be examined.

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[217] See *Second Periodic Report, Addendum, Israel*, CCPR/C/ISR/2001/2, 4 December 2001, Article 7 ICCPR at para. 80 ff.
[218] *Concluding Observations of the Human Rights Committee: Israel*, CCPR/CO/78/ISR, 21 August 2003, para. 18.
[219] Ibid. See also para. 26, Israel's next state party report should be submitted by 1 August 2007.
[220] The Court does not use the declared state of emergency on behalf of Israel as a justification for the use of torturous means. It only expresses its understanding for the difficult situation Israel is faced with. The government has, however, stressed its state of emergency repeatedly.

5. THE CASE OF THE US – A CALL FOR TORTURE WARRANTS

5.1. The Public Debate

The events of 11 September have given momentum to the general concern and fear of terrorist attacks already existing among the US population and the administration. Due to the demand for higher security, both internal and national, and the declared "war on terror", the American public has extensively engaged in and been a witness to a nation-wide debate about the possible use of torture in exigent situations.[221] The debate consolidated after four suspected associates of Osama bin Laden's al Qaeda network remained silent in custody. As one experienced FBI agent involved in the investigation stated: "We are known for humanitarian treatment, so basically we are stuck. [...] Usually there is some incentive, some angle to play, what you can do for them. But it could get to that spot where we could go to pressure [...] where we won't have a choice, and we are probably getting there."[222]

Jonathan Alter of Newsweek was one of the first journalists further fuelling the debate. He suggested to "jump-start the stalled investigation" of four key hijacking suspects and proposed to keep an open mind to the subjection of suspects to court-sanctioned psychological torture, such as "tapes of dying rabbits or high-decibel rap" or the administration of truth serum with a mandatory IV, or to the transfer of some suspects to our "less squeamish allies".[223] Physical torture would in his eyes probably be contrary to American values, but torture in general would clearly work, even if the broken subject often lies. He claims that Jordan was successful in extracting information out of

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[221] For a start-up of the debate please refer to the New York Times that carried an article headlined *Torture Seeps Into Discussion by News Media* on 5 November 2001, in which it reported on a number of instances in which the question of torturing "suspected terrorists" had appeared in the American media. These included *inter alia* a segment on Rupert Murdoch's Fox News Channel which anchorman Shepard Smith introduced by asking *Should law enforcement be allowed to do anything, even terrible things, to make suspects spill the beans?*; a comment on CNN's Crossfire program by right-winger Tucker Carlson, who suggested that under certain circumstances torture "may be the lesser of two evils"; as well as an opinion piece in the Wall Street Journal of 23 October in which historian Jay Winik reported on the "successful" torture of an alleged terrorist plotter in the Philippines in 1995.

[222] See Pincus, *Silence of 4 Terror Probe Suspects Poses Dilemma for FBI*, in "The Washington Post", 21 October 2001. The four suspects were Zacarias Moussaoui, a French Moroccan detained in August initially in Minnesota after he sought lessons on how to fly commercial jetliners but not how to take off or land them; Mohammed Jaweed Azmath and Ayub Ali Khan, Indians travelling with false passports who were detained the day after the World Trade Center and Pentagon attacks with box cutters, hair dye and $5,000 in cash; and Nabil Almarabh, a former Boston cabdriver with alleged links to al-Qaeda.

[223] Alter, *Time To Think About Torture*, in "Newsweek", 5 November 2001.

the terrorist Abu Nidal by threatening his family, as well as the Philippines, who reportedly helped to crack the 1993 World Trade Center bombings by convincing a suspect that they were about to turn him over to the Israelis.[224] Interestingly, his truth serum suggestion has actually been taken up by William Webster, a former director of the CIA and FBI, who urged the Pentagon to administer truth serum drugs to defiant Taliban and Al Qaeda prisoners if needed to obtain information that could save lives or prevent fresh terrorist attacks in April 2002.[225].

Another participant in the debate is the terrorism expert Bruce Hoffman, who, by drawing upon experiences in the Algiers war and the struggle of Sri Lanka against the terrorist organisation Liberation Tigers of Tamil Eelam, assesses that historically "'good' police work against terrorists has of necessity involved nasty and brutish means".[226] Thus, he asks whether "in the quest for timely, 'actionable' intelligence the United States, too, will have to do bad things — by resorting to measures that we would never have contemplated in a less exigent situation?".[227] Tony Blankley of the Chicago Tribune rationalises the use of torture in this way: "Given the dangers that are involved, the possible nuclear dangers that we're talking about, regretfully, we have to return to these medieval calculations." Thomas Friedman of the New York Times, meanwhile, is more blunt: "We have to fight the terrorists as if there were no rules."[228]

The journalist Mark Bowden brings in the problems of the "abandonment of high moral ground" and the "further erosion of human rights". And considers that "when you make an exception to the rule, it becomes harder to enforce". However, he concludes that "real life is made of exceptions" and "absolutes are for classrooms", thus the US should find out what the terrorist knows.[229] In a subsequent article he adds the question: "Why not eschew hypocrisy, clearly define what is meant by 'severe', and amend bans on torture to allow interrogators to coerce information from would-be terrorists?"[230] The moral dimension is stressed further by Patrick J. "Pat" Buchanan, the 2000 Reform Party Presidential candidate, who relies on the "lesser evil (squeezing the truth out)"for a "greater good (preventing the murder of innocents)" argumentation.[231] He inquires why the US

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[224] Ibid.
[225] Cf. *Use of truth serum urged*, in "The Chicago Tribune", 26 April 2002, p. 2.
[226] Hoffman, *A Nasty Business*, in "The Atlantic Monthly", vol. 289, no. 1, January 2002.
[227] Ibid.
[228] See for both citations Horvath, *The New Dark Age Revisited*, in "Telepolis", 5 February 2002.
[229] Bowden, *Torture, if it saves lives, may be a necessary evil*, in "The Philadelphia Inquirer", 7 April 2002. The terrorist he refers to in his column is Abu Zubaydah, an alleged senior leader of al-Qaeda, who was captured by the US.
[230] Bowden, *The persuaders*, in "The Observer", 19 October 2003.
[231] Buchanan, *The case for torture*, in "Townhall.com", 10 March 2003

cannot inflict pain on one man, if that would stop imminent acts of terror on US soil, if it is moral to go to war and kill thousands to prevent potential acts of terror.[232]

These arguments only represent a small percentage of the nationwide debate that has been sparked. However, they clearly illustrate the doubt that is cast upon the American population whether, although torture is outlawed, it should not, or even has to be, employed in the cause of fighting terrorism and saving innocent lives. Additionally, they show that the idea of torturing terrorists to obtain information is not merely a domain of extremists anymore or concealed and only voiced in private, but rather stated vehemently in public. The tendency to resort to harsher methods in the aftermath of 11 September has further also been stressed on behalf of public officials. Thus, for instance, the former director of the Central Intelligence Agency's Counterterrorist Center, Cofer Black, stated that "All I want to say is that there was "before" 9/11 and "after" 9/11. After 9/11 the gloves come off."[233]

All in all, the subject has taken on new proportions, whereas the underlying argumentation is not new. The New York philosophy professor Michael Levin had already advocated "torture as an acceptable measure for preventing future evils" in 1982.[234] He assessed that there would be "little danger that the Western democracies will lose their way if they choose to inflict pain as one way of preserving order. Paralysis in the face of evil would be the greater danger. Some day soon a terrorist will threaten tens of thousands of lives, and torture will be the only way to save them. We had better start thinking about this."[235] His opinion, put forward over twenty years ago, links to the "ticking-bomb" scenario that has, as discussed earlier, found prominent consideration by the Israeli authorities. This scenario has also inspired Harvard Professor and civil liberties advocate Alan Dershowitz, who openly campaigns for a torture warrant.[236] He thereby introduces an even further dimension to the modern debate, that of the actual legalisation of torturous means through a statutory provision. His proposal to issue warrants for the use of torture has been harshly criticised

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[232] Ibid.
[233] Testimony of Cofer Black, Joint hearing of the House and Senate intelligence committees, 26 September 2002, Unclassified, full hearing available at <http://www.fas.org/irp/congress/2002_hr/092602black.html>.
[234] Levin, *The Case for Torture*, in "Newsweek", 7 June 1982.
[235] Ibid.
[236] He declares to have been inspired by the Israeli experience, see Dershowitz, 2002, pp. 139 ff. Interesting is also, despite not relevant for the argument, that Professor Lion Shelef from Tel Aviv University had already previously suggested the introduction of torture warrants ironically, see Feldman, 1995, p. 89.

by publicists.[237] Nevertheless, his underlying moral rhetoric has found remarkable approval among the general public that witnessed his interviews and broadcasting appearances. His practical as well as judicial framework will be outlined in the following.

5.2. Dershowitz' Line of Argumentation

Alan Dershowitz, in order to stress his line of argumentation, divides the nation-wide debate into three core categories. The "purist position" being that torture should never be employed, even if thousands of lives could be saved by applying non-lethal temporary pain to an admitted terrorist. The "hypocritical position" being that torture should be employed, but hidden from view and publicly denied. The "accountability position" being that torture should only be allowed if it is expressly and publicly approved by a high-ranking government official, such as the president, the Secretary of Defence or a justice of the Supreme Court.[238] He dismisses the purist position as unreal since in his eyes no democracy has ever, or would ever, actually live by it but would in fact use torture as a last resort. Hence, he questions whether it is worse for that torture to be conducted in secret or whether it is worse for the US government to acknowledge that it is making an exemption to the general prohibition against torture.[239]

To underline his approach he brings up the "ticking-bomb" case and other scenarios in which torture would in his opinion become inevitable. One of his hypothetical scenarios is that of Zacarias Moussaoui, a later suspect in the World Trade Center attacks, who was detained after his flight instructors reported suspicious statements he had made while taking flying lessons and paying for them with large amounts of cash. This suspect is now envisaged by Dershowitz as being questioned.[240] The authorities would find out about the plan to destroy large occupied buildings, but without any further details. They would interrogate him, give immunity from prosecution, offer large cash rewards and a new identity; without success. They would further threaten him, try to trick him and employ all lawful techniques available to them. Even the injection of truth serums would

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[237] See e.g. Kissenger, *Alan "The Needle" Dershowitz*, in "ZNet", 31 May 2002; Finkelstein, *Alan Dershowitz's Tortuous Torturous Argument*, in "The Ethical Spectacle", vol. VIII, no. 2, February 2002; Schulz, *The Torturer's Apprentice – Civil Liberties in a Turbulent Age,* in "The Nation", 13 May 2002.
[238] Dershowitz, *The public must know if torture is used*, in "The Age", 14 March 2003.
[239] Ibid.
[240] For the following Moussaoui scenario see Dershowitz, 2002, pp. 143-144.

be practised.[241] In sum, according to Dershowitz, everything short of explicit torture would be tried, but to no avail.[242] The longer the interrogation would take the more imminent the attack would become. As a last resort, the FBI agent would finally propose the use of non-lethal torture. Thus, law enforcement officers would try to torture to save innocent lives. The majority of Americans would further expect them to do in Dershowitz' opinion.[243] He argues the same line also in another scenario. Here, he poses the question whether torturing one guilty terrorist to prevent the deaths of a thousand innocent civilians would shock the conscience of all decent people. To prove that it would not, he further considers a situation in which a kidnapped child had been buried in a box with two hours of oxygen.[244] The kidnapper would refuse to disclose the location. Thus, one would consider torture in this situation as well.[245] Dershowitz also takes recourse to the Philippine "tactical interrogation" experience and points out that torture can be successful. Due to the fact that torture sometimes would work and prevent major disasters it would still exist in many parts of the world.[246] The fact that torture is not always successful would further not hinder its effectiveness as no technique of crime prevention would be infallible.[247]

Furthermore, Dershowitz evaluates the Israeli decision and points out that the High Court left open whether an agent who employed physical pressure could defend himself against criminal charges by invoking "the law of necessity" in an actual "ticking bomb" case.[248] He assesses that no such case has arisen since the Court decision in Israel, nor that there has ever been a "ticking-bomb" case in the US. But he alleges that inevitably one will arise and the US should be prepared to confront it. Thus, it would be important that a decision is made in advance about how to deal with the situation.[249] In the essence of democracy there would always be a choice and choices could be made

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[241] It should be noted that already the administration of truth serum might be judged unlawful under international law. In this respect Dershowitz states that there can be no constitutional distinction between an injection that removes a liquid (as in blood alcohol testing) and one that injects a liquid (like truth serum), see Dershowitz, *Is There a Torturous Road to Justice?*, in "Los Angeles Times", 8 November 2001. Whereas, already the analogy between alcohol blood testing and the injection of a lethal substance as part of the execution of a death sentence has been criticised tremendously. He also refuses to take into account the psychological impact of chemical drugs on the victim. However, even under US law, already "the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality" constitutes torture, see 18 USC Sec. 2340, definitions of torture, under (2) (B).

[242] Cf. Dershowitz, 2002, p. 144.

[243] Dershowitz, *Want to Torture? Get a warrant*, in "San Francisco Chronicle", 22 January 2002.

[244] Dershowitz, *Is There a Torturous Road to Justice?*, in "Los Angeles Times", 8 November 2001.

[245] Ibid.

[246] Dershowitz, 2002, p. 138.

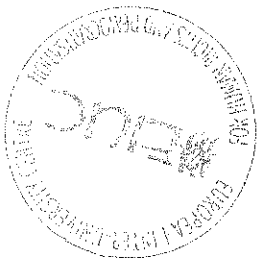
[247] Dershowitz, 2002, p. 137.

[248] Dershowitz, *Want to Torture? Get a warrant*, in "San Francisco Chronicle", 22 January 2002.

[249] Ibid.

even "among evils".[250] The US could not evade its responsibility by pretending that torture is not being used or by having others use it for its benefit.[251] Therefore, according to Dershowitz, the real debate is not whether torture should be allowed, as torture is sure to happen, but rather whether torture should take place outside of the US legal system or within.[252] His solution is that it should take place with legal authorisation. Such an authorisation would "maximise civil liberties" in the face of the realistic likelihood that torture would, in fact, take place "below the radar screen of accountability" and thus in secret.[253]

Under the proposal of Dershowitz, the US government should "publicly announce that it considers it necessary to torture guilty terrorists in order to prevent a ticking bomb from killing" innocent persons.[254] He argues that if a democracy is unwilling to legalise limited torture in special circumstances, it should not engage in it.[255] Therefore, the administration should "set up a process, akin to securing a search warrant, for obtaining authority to apply non-lethal torture to a particular suspect, based on a high level of proof that he is a ticking bomb terrorist."[256] With respect to such a warrant, Dershowitz points out that torture warrants under the requirement of proof were already used to protect the state during the 16th and 17th century in England.[257] Further, a judge would be responsible for issuing such a "torture warrant".[258] An application for a torture warrant would have to be based on the absolute need to obtain immediate information in order to save lives coupled with probable cause that the suspect had such information and is unwilling to reveal it.[259] Thus, torture would not be used to extract a confession, but to gain information to enable authorities to head off up-coming terrorist attacks. The suspect would be given immunity from prosecution based on information elicited by the torture. The warrant would limit the torture to non-lethal means. Dershowitz gives two examples of such means: Either through the insertion of a sterile needle under the fingernails or by way of a dental drill through an unanaesthetised tooth to cause excruciating



[250] Dershowitz, 2002, p. 134.
[251] Dershowitz, 2002, p. 139.
[252] Dershowitz, 2002, p. 134.
[253] Cf. Dershowitz, 2002, p. 141.
[254] Dershowitz, *The public must know if torture is used*, in "The Age", 14 March 2003.
[255] Ibid.
[256] Ibid.
[257] Dershowitz, 2002, pp. 156-157.
[258] Cf. Dershowitz, 2002, pp. 158 ff. An identical line of argumentation is also summarised in his book *Shouting Fire: Civil Liberties in a Turbulent Age*, Boston, Little Brown and Company, 2002, pp. 470-478.
[259] Dershowitz, *Want to Torture? Get a warrant*, in "San Francisco Chronicle", 22 January 2002.

pain without endangering life.[260] This would not be inhuman, as "pain is not the worst thing in the world, you get over it."[261] The overall goal of the warrant would be to reduce and limit the amount of torture that would, in fact, be used in an emergency.[262] Additionally, agents engaging in torture with a warrant, could not claim "necessity" as the decision of whether torture was in fact necessary would be taken out of their hands and placed in those of judges.[263]

Dershowitz further argues the lawfulness of his proposal. According to him there exists "no absolute right not to be tortured" as all "inalienable, inherent, God-given, or natural law rights" are "fictions".[264] However, constitutional democracies would be constrained in the choices they lawfully make.[265] Regarding possible constitutional constraints, he states that firstly, there would be no conflict with the Fifth Amendment prohibition against coerced self-incrimination due to the grant of immunity attached to the suspect under his proposal.[266] Secondly, the provision of the right to be free from "cruel and unusual punishment" as contained in the Eight Amendment would also not be infringed, since it would solely apply to punishment after conviction.[267] Thirdly, the "due process" clauses of the Fifth and Fourteenth Amendment would be "quite general and sufficiently flexible" in that they would only require probably cause and some degree of judicial supervision.[268]

Besides, Dershowitz states that the US would not breach its obligations arising from the CAT. According to him the CAT defines torture so broadly as to include many techniques that are routinely used around the world, including Western Democracies.[269] He states that the US adopted the Convention, but made a reservation upon ratification that it "agreed to be bound by it 'only to the extent that it is consistent with … the Eight Amendment.'"[270] In this regard US Court decisions would have suggested that the Eighth Amendment may not prohibit the use of physical force to obtain information needed to save lives. The CAT would also not find application "to 'mental' or

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[260] Dershowitz, 2002, p. 144. The second suggestion is derived from the 1976 US movie *Marathon Man* in which Nazi dentist Dr. Christian Szell (Laurence Olivier) drills until he hits the pulp in Thomas Babington Levy's (Dustin Hoffman) molars in order to receive information concerning a fortune hidden in a safety deposit box.
[261] As cited from his appearance at 92nd Street Y on 27 January 2002 by Kissenger, *Alan "The Needle" Dershowitz*, in "ZNet", 31 May 2002.
[262] Dershowitz, *Want to Torture? Get a warrant*, in "San Francisco Chronicle", 22 January 2002.
[263] Dershowitz, 2002, p. 159.
[264] As stated in his interview with Lizoain, *Freedom Fighter*, in "Harvard Political Review", 1 December 2001.
[265] Dershowitz, 2002, p. 135.
[266] Dershowitz, 2002, pp. 135, 159; as well as Dershowitz, *Is There a Torturous Road to Justice?*, in "Los Angeles Times", 8 November 2001.
[267] Dershowitz, 2002, p. 135.
[268] Ibid.
[269] Dershowitz, p. 135.
[270] Dershowitz, 2002, p. 136.

'psychological' torture" in US courtrooms.[271] Thus, if the US would choose to employ non-lethal torture in such extreme cases it would remain in technical compliance with its treaty obligation.[272] The following paragraph will shortly provide a consideration of practical arguments, before the focus will turn to the legal implications.

The argument that is prominently employed by Dershowitz and has also crystallised in the general US debate is that torture is necessary and to prevent a greater evil, as the essential information to prevent this evil is deemed to not be available by recourse to regular interrogation methods. It is based on the utilitarian assumption that decisions are right if they produce the greatest good for the greatest number of people.[273] The implication of such an argument is further that any committed offence is justified if the object is important enough and that international laws and conventions can be sacrificed.[274] This is the case with the hypothetical scenario of the "ticking-bomb" that is most commonly put forward, as also witnessed in the case of Israel. Exceptional circumstances are seen as a justification to resort to torturous means or to even legalise their use under the specific preconditions. Dershowitz also tries to avoid the moral dimension by alleging that the use of torture is inevitable and sure to happen in today's society. Whereas it cannot be stated that a legalisation contrary to international standards is better in the face of democracy than hypocrisy. Besides the obvious legal constraints of the argument, there are also considerate practical shortcomings. First of all, the use of torture can never be effective. Torture victims almost never tell the truth, they will merely say anything they think will make the pain stop. Also, one can never be certain as to a detainee's actual knowledge and thereby the real possibility to prevent a terrorist attack. Further, the opening up of Pandora's box and allowing an exception to the absolute prohibition of torture would establish a precedent in legitimising torture and make it easier to extend its permissible use beyond the "ticking-bomb" case. This has been seen with regard to the authorised employment of "moderate physical pressure" in the Israeli case. In this respect, Dershowitz' proposal of a torture warrant would put a considerable amount of discretion on the individual judge in determining whether the conditions for such a warrant would be met. Already the issuing of search warrants under the requirements imposed by legal systems shows that the assessment in granting a warrant is not only based on purely objective considerations. Furthermore, the moral and psychological stress under which the judge would be put should not be underestimated. There is also a further slippery

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[271] Dershowitz, 2002, p. 136.
[272] Ibid.
[273] See further Morgan, 2000, pp. 186, for the possible utilitarian construction of a defence of torture.
[274] Cf. British Medical Association, 2001, p. 64.

slope in the argument, as the legitimate use of torture in one country, would certainly lead to other countries also justifying their use of torture. Moreover, the circumstances that have to be met in the hypothetical scenario, would almost never be met in an actual case. And further, there is always a possibility of finding out the information in a non-physical way. Finally and most importantly, any justification can not stand ground if the nature of the method in question is in contraction to international legal standards regarding the absolute prohibition of torture. Thus, the legal construction of Dershowitz' torture warrant will be analysed under international law subsequently.

5.3. Legal Evaluation of the Torture Warrant

The US is a State Party to the CAT[275] and the ICCPR[276], which both prohibit torture and ill-treatment. Under Article 2 (2) CAT no exceptional circumstances whatsoever may be invoked as a justification to torture. The ICCPR also stresses the non-derogatory nature of the prohibition of torture and ill-treatment by virtue of Article 7 in conjunction with Article 4 (2) ICCPR in absolute terms. Thus, a legalisation of torture in the form of a warrant would lead to a clear breach of both treaties on behalf of the US. However, questionable is further which methods would fall under such a torture warrant, as although the term implies that they are torture, they do not necessarily have to amount to unlawful measures. In this respect, Dershowitz submits that only non-lethal methods that cause excruciating pain but leave no lasting injury should be employed. He proposes that this could be achieved by either the insertion of a sterile (to not cause infection) needle under the fingernails or by way of a dental drill through an unanaesthetised tooth. Both methods, as Dershowitz himself assesses, would cause excruciating pain. This should be sufficient to reach the requirement of "severe" pain in the definition of Article 1 CAT. Also, with regard to the global approach adopted by the HRC under the ICCPR, it can be alleged that both methods would clearly come within the prohibited scope of behaviour. This is also underlined by the fact that the HRC has reported two cases of insertion of nails under fingernails and toenails with regard to Articles 7 and 10 (1) ICCPR.[277] This method has further been criticised as constituting torture concerning the Liberation Tigers of Tamil Eelam practice of inserting pins and nails under fingernails during the armed

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[275] Signed on 18 April 1988, ratified on 21 October 1994.
[276] Signed 5 October 1977, ratified 8 June 1992.
[277] *Second periodic reports of States parties due in 1990-State Party Report Bolivia*, Consideration of Reports submitted by State Parties under Article 40 of the Covenant, CCPR/C/63/Add.4, 22 November 1996, at para. 42.

conflict with Sri Lankan security forces.[278] Furthermore, the psychological impact on the victim, in addition to the physical pain, would surely add a further significant dimension of mental suffering, which is also included in the definition of the CAT. Moreover, the act would be committed intentional by a state official for the purpose of extracting information and would thereby fulfils the other requisite elements of the conventional definition, which have also been drawn upon in the assessment of breaches of the Covenant. Therefore, the proposed methods would breach the international prohibition of torture as contained in Article 1 CAT, as well as the provision in Article 7 ICCPR. But even if based on an actual case the measures would be assessed as not amounting to torture under the grading regime of the CAT, they would still constitute ill-treatment and be therefore prohibited.

Dershowitz, however, alleges that the measures would be lawful under the US Constitution and due to the reservation made on behalf of the US not breach international law. It is a fact that the US has made a reservation to Article 16 CAT, and an identical one to the Article 7 ICCPR, stating that it does not consider itself bound to the provisions to the extent that ill-treatment means those ill-treatment "prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States".[279] It is up to interpretation under US law whether these practices can be deemed legal under the domestic regime. However, the arguments brought forward by Dershowitz do not stand ground under international law. First of all, the reservation he refers to made on behalf of the US only concerns the notion of ill-treatment and not torture. Thus, as far as the proposed methods would amount to torture, the reservation could not be invoked. Further, a state may make a reservation upon ratification whereby it purports to exclude or to modify the legal effect of certain provisions in application.[280] However, when ratifying a treaty a state should bring its laws and practice in conformity with the treaty, not the other way around. Thus, quite a number of states have

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[278] As reported by Amnesty International, *Torture prevails, despite reforms*, Amnesty International Bulletin, News Service 099/99, AI INDEX ASA 37/14/99, 1 June 1999.

[279] Paragraph 1 (1) of its reservation to the CAT reads: "That the United States considers itself bound by the obligation under article 16 to prevent 'cruel, inhuman or degrading treatment or punishment', only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." The nearly identical ICCPR reservation states: "(3) That the United States considers itself bound by article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."

[280] As defined in Article 2 (1) (d) VCLT. Please note that the US is not a State Party to the VCLT, it has only signed it. However, the VCLT essentially codifies customary international law and it is therefore also binding upon the US, which as a signatory of the Convention should further not act against its object and purpose.

made objections to the reservations of the US.[281] For instance, with regard to the CAT, Finland has declared that the US reservation is subject to the general principle of treaty interpretation according to which a party may not invoke the provisions of its internal law as a justification for failure to perform a treaty.[282] This consideration would also apply to the reservations of the US with regard to the ICCPR. Denmark had further stressed that Article 7 ICCPR is of a non-derogatory nature and protects one of the most basic rights contained in the Covenant. Therefore, the US reservation would be incompatible with the object and purpose of the Covenant.[283] Furthermore, under a systematic interpretation of the CAT it could also be alleged that the provision of ill-treatment is absolute in terms by virtue of the saving clause as contained in Article 1 (2) CAT in connection with Article 7 ICCP. All these considerations serve as an important indication that the US would not be able to invoke its reservations if it would act in breach of one of the respective Articles. Thus, the US would have to abide to the wording of the provisions without possible benefit from its reservations. The same would apply to the reservation the US made under Article 1 CAT, which Dershowitz fails to mention. Moreover, in any event conduct going beyond the bounds of the US understanding or reservation would be a breach of the respective treaties.

Furthermore, the US is not only bound by its international treaty law obligations it also forms part of the general international legal order, this includes also the absolute prohibition of torture under international customary law and *jus cogens*. Therefore, any legislative, administrative or judicial act authorising torture is deemed internationally de-legitimised.[284] In this respect, US Courts have also, in particular, ruled that the prohibition of torture is a norm of *jus cogens* and thereby binding, without derogation, upon the US.[285] Whether the actually applied methods would fall under the scope of the notion of torture under international customary law or *jus cogens* would need to be assessed with regard to the severity of the impact of the treatment on a case-by-case basis. Whereas, it is very unlikely that such a case would ever arise especially with regard to the fact that the absolute prohibition as contained in treaty law provisions would already have to be adhered to by the US.

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[281] Denmark, Finland, Germany, Italy, the Netherlands, Norway, Portugal, Spain and Sweden have made an objection to the US reservation regarding the ICCPR. With regard to the CAT, Finland, the Netherlands and Sweden have made an objection. Please see the UN Treaty Data Base for information on every declaration.
[282] Declaration of Finland with regard to the CAT, 28 September 1993.
[283] Declaration of Denmark with regard to the ICCPR, 1 October 1993.
[284] Cf. *Furundzija* case, para. 155.
[285] See, as already mentioned in chapter two, i.a. *Siderman de Blake v. Republic of Argentina*, 965 F. 2d 699 (9th Cir. 1992), cert. denied, 507 US 1017 (1993); *In re Estate of Ferdinand E. Marcos Human Rights Litigation (Marcos v. Hilao)*, 978 F. 2d 493 (9th Cir. 1992), cert. denied; *Marcos Manto v. Thajane*, 508 U.S. 972 (1993); *Xuncax et al. v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); and *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1196 (S.D.N.Y. 1996).

Conclusively, the issuance of torture warrants and thereby legitimisation of the use of torture would be clearly contrary to the absolute nature of the prohibition of torture from which no derogation may be made even in exceptional circumstances. Also, the proposed methods in question would be contrary to international law.

6. THE CASE OF GERMANY – TORTURE AS *ULTIMA RATIO*?

6.1. Background of the Daschner Case

In contrast to Israel and the US, the German case does not deal with the possible legalisation of torturous means in the interrogation of suspected terrorists. The case rather concerns exceptional circumstances in connection to a child abduction. Wolfgang Daschner, Frankfurt's deputy police chief, had instructed interrogators to threaten the alleged kidnapper with torture if he refused to say where his victim was being kept. This triggered a harsh debate in Germany, which is still extremely conscious of its gruesome past, about whether any circumstances can excuse torture or the threat of it. The so-called Daschner case exhibits very unique characteristics in as far as it is the first case in which a police officer, who, after officially ordering the commission of a crime, composed a file note about it, informed the public prosecutor's office and confessed to it. In the following, the circumstances of the case will be outlined.[286]

On 27 September 2002, the law student Magnus Gäfgen lured the 11-year old Jakob von Metzler, son of a wealthy banker's family, into his apartment as the boy was walking home from school.[287] Once there, Gäfgen bound Jakob's hands and feet and, when he began to scream, wrapped his mouth and nose in duct tape, suffocating him. Apparently to make sure he was dead, he then immersed the victim in water in the bathtub. Shortly afterwards, Gäfgen tossed a blackmailing letter demanding one million euros for the release of the boy on the property of the boy's family. He hid the corpse wrapped in plastic bags under a dock beside a lake in East-Hesse. In the morning of 30 September the money transfer took place. Gäfgen, who had been acquainted with his victim, was followed by the police and arrested.

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[286] The following account of the case is derived from media coverage with regard to Gäfgen's testimony and Daschner's confession. See i.a. Gebauer, *Der Fall Daschner – Anklage macht der Folter den Prozess,* in "Spiegel Online", 20 February 2004; *Folterandrohung - notfalls gerechtfertigt?: Der Fall Magnus G.*, in "Frankfurter Allgemeine Zeitung", 24 February 2003; Hooper, *Germans wrestle with rights and wrongs of torture*, in "The Guardian", 27 February 2003; *Folterdrohung mit Folgen*, in "Süddeutsche Zeitung", 28 February 2003; Gavin, *Policeman's admission sparks debate over threats, torture*, in "Frankfurter Allgemeine Zeitung", FAZ English Version, 28 February 2003; Finn, *Police Torture Threat Sparks Painful Debate in Germany*, in "The Washington Post", 8 March 2003; as well as *Hintergrund: Der Fall Metzler-Gäfgen-Daschner*, in "Spiegel Online", 22 June 2004.

[287] Gäfgen passed his first German state exam in law with a specialisation in criminal procedure law while in pre-trial confinement.

Following his arrest, most of the one million euros in ransom money were found in Gäfgen's apartment, and the detectives were certain they had their man and the boy was still alive. But during the interrogation, the suspect only played with the police, lied about his actions and seemed to feel untouchable due to his legal knowledge. An appeal to his conscience and warnings about the grave consequences of his conduct achieved nothing. Even the summoning of his mother did not show the desired effect. Meanwhile, almost 90 hours had passed since the victim had been seized on his way home from school. The police officers assumed that the child had been left alone without food and water and concluded that the life of Jakob was in extreme danger. They were convinced that there was no time to lose. Faced with this hopeless situation, Wolfgang Daschner concluded that threatening Gäfgen would be the only way to find out the truth. As he said in a subsequent interview: "I can just sit on my hands and wait until maybe Gäfgen eventually decides to tell the truth and in the meantime the child is dead or I do everything I can now to prevent that from happening."[288] Thus, he ordered his subordinate to threaten the suspect with the "infliction of massive pain under medical supervision and subject to prior warning" to be applied by a martial arts trainer without however causing lasting injury. His instructions were followed. Gäfgen was told that the interrogation was "not a game", he should count on pain unknown to him if he would not finally confess and expose the whereabouts of the boy. A "martial arts expert", who understands his "instruments of torture without leaving marks", would be on his way to the detention facility. The threat worked, within twenty-five minutes Gäfgen confessed the extortion and the murder. However, as the juvenile victim was already dead, Daschner's efforts to save the boy's life were to no avail. Nonetheless, in connexion to the course of events, Daschner filed a report outlining his actions. Concerning a defence for his actions, Daschner cited the exceptional circumstances he was faced with, in particular, due to his fear that Metzler could starve or be parched in his hiding place.[289] Daschner also demanded to allow the use of force in interrogations as a last resort, as *ultima ratio*. The moral implication of this argument has led to coining the term *"Rettungsfolter"* (rescue torture).[290]

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[288] As cited by Bernstein, *Kidnapping Has Germans Debating Police Torture*, in "The New York Times", 10 April 2003.
[289] See Gebauer, *Der Fall Daschner – Anklage macht der Folter den Prozess,* in "Spiegel Online", 20 February 2004.
[290] Cf. Hilgendorf, 2004, p. 335.

6.2. The Torture Debate

On 17 February 2003, the order of Daschner to threaten Gäfgen became officially known in public. Suddenly, the absolute prohibition of torture was questioned within Germany. Citizens, politicians and legal experts debated whether Daschner had acted justly or not, whether a police officer should be authorised to at least use the threat of torture in extreme situations in order to save the life of a child or whether the legitimisation of such a threat would already tip over the prohibition of torture.[291] Thus, the questions raised involved the state responsibility of Germany with regard to its obligation to refrain from the use of torturous means and accordingly prosecute offenders on the one side and the individual responsibility of the offender on the other side. A notable German newspaper put the question to the public in asking whether Daschner acted justly in an extreme situation (and should therefore not face criminal proceedings) or whether torture may not be threatened with under any circumstances in a *Rechtsstaat* (and therefore Daschner would have to face criminal proceedings): 28,75% voted for the first option, whereas 71,25% voted for the second option.[292] This indicates that the majority of the population believes in the absolute right not to be tortured or ill-treated. Although the subsequent debate among German politicians and legal experts similarly crystallises a strong adherence to the prohibition of torture under national and international law, there were nonetheless differing views on the issue. A short overview of the arguments brought forward in this debate will be given in the following.

The first political reactions concerning Daschner's order included sympathy and understanding. For instance, Hesse Premier Roland Koch stated: "I personally find Daschner's conduct in this terrible dilemma, in which he wanted to save a life, very understandable in human terms."[293] A further dimension was brought in by the Interior Minister of the Federal State of Brandenburg Jörg Schönbohm, who demanded to allow the use of force especially in cases of terrorist suspects.[294] Law professor Winfried Brugger took recourse to the "ticking-bomb" case and argued that the state

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[291] For an overview of the debate before the Daschner case refer to Schlink, *Darf der Staat foltern? – Eine Podiumsdiskussion*, 28 June 2001, available at http://www.humboldt-forum-recht.de/4-2002/index.html; an overview of the Daschner debate can be found in Follmar/Heinz/Schulz, 2003. See also Monath/Müller-Neuhof, *Zwischen Leib und Leben – Dürfen Polizisten in Ausnahmesituationen foltern? Politiker und Menschenrechtler lehnen dies kategorisch ab*, in "Der Tagesspiegel", 21 February 2003.

[292] *Online Survey*, "Frankfurter Rundschau", 21 February 2003.

[293] As cited by Gavin, *Policeman's admission sparks debate over threats, torture*, in "Frankfurter Allgemeine Zeitung", FAZ English Version, 28 February 2003. See also *Verhörmethoden - Koch verteidigt Polizisten*, in "Der Tagesspiegel", 23 February 2003.

[294] Gebauer, *Der Fall Daschner – Anklage macht der Folter den Prozess*, in "Spiegel Online", 20 February 2004.

could be authorised, or even obliged, to torture in truly exceptional circumstances.[295] Support in this respect was also voiced by the chairman of the German Judges' Association Geert Mackenroth who imagined that there could be cases in which torture or the threat of it would be legitimised, especially if a right is violated to save a more significant right.[296] In this respect, Frankfurt police chief Harald Weiss-Bollandt supported Daschner's statements and alleged that his behaviour was justified under the German notion of necessity.[297]

The demonstration of sympathy and understanding and the search for justifications met utter repudiation on behalf of Amnesty International, which voiced concern with regard to how quickly the ban on torture was up for discussion. It demanded that the offenders should unconditionally be brought to justice due to the absolute prohibition of torture.[298] In light of this critic, Mackenroth felt obliged to withdraw his earlier statement and declared on behalf of his association that "any employment of force to obtain a confession" is strictly forbidden under national and international law.[299] Interior Minister Otto Schily, despite his sympathy for the "honourable concern" of Daschner for the life of the child, further stressed that a relativisation of the ban on torture would set Germany back to the darkest middle ages and risk putting democratic values into question.[300] Prosecutors, judges and legal scholars have further repeatedly emphasised that not only the use of torture but also the threat to torture would be illegal under German constitutional law, criminal law and international treaties.[301] Moreover, a possible call for legislation was countered by Federal Justice Minister Brigitte Zypries who declared that there were no plans to change legislation in order to allow torture, or the threat of it, to be used against prisoners even under extreme circumstances.

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[295] Cf. Kreuzer, *Zur Not ein bisschen Folter?*, in "Die Zeit", essay no. 21, 13 May 2004. See also his previous argumentation in 2000, concerning that torture would in exceptional circumstances not be unlawful under Article 3 ECHR, Brugger, 2000, pp. 169-170.

[296] As cited in *Richterbund: Folter ist im Notfall erlaubt*, in "Der Tagesspiegel", 20 February 2003.

[297] Cf. Ebner, *Ist der Polizei ein bisschen Folter erlaubt?*, in "Der Stern Online", 20 February 2004. With regard to necessity under German law, section 34 German criminal code provides for necessity as a justification (act not unlawfully) and section 35 German criminal code provides for necessity as an excuse (act without guilt).

[298] Cf. Domenika Ahlrichs in interview with Dawid Danilo Bartelt, spokesperson of the German section of Amnesty International, *Folter scheint wieder salonfähig zu sein*, in "Der Spiegel", 20 February 2003.

[299] *Folter ist und bleibt verboten* and *Folterverbot gilt ausnahmslos*, Press releases of the German Judges' Association 21-23 February 2003, available through http://www.drb.de.

[300] Cf. Klingst, *Interview with Otto Schily*, in "Die Zeit", December 2003. Along the same lines also e.g. Former Hesse Justice Minister Rupert von Plottnitz who declared Daschner to be "a risk to a state based on laws"; as well as Vice President of the German Bar Association Georg Prasser who declared: "If threats of physical abuse from the police become acceptable, we will be in danger of our legal culture slipping back to the Middle Ages."

[301] These include, *inter alia*, Public prosecutor Wilhelm Möllers, the former president of the German Constitutional Court Ernst Benda as well as the law professors Klaus Günther and Michael Pawlik. General rules of public international law also form part of the German Federal law, they take precedence over the laws and directly create rights and duties for the inhabitants of the Federal territory according to Article 25 of the Basic law.

Thus, despite the call for a justification and legalisation of the use of physical methods in the interrogation process of detainees, wide recognition of the absolute prohibition of torture stood in the centre of the public opinion. Remarkable in this respect is that, in contrast to the previously examined cases of Israel and the US, the German case does not involve the use of physical force but rather the threat of it. It therefore highlights that already the threat of torture can lead to severe mental suffering on behalf of the victim and therefore falls under the prohibition of torture and ill-treatment.[302] Thus, state responsibility would already be incurred in cases of a legitimisation of the threat of torture under exceptional circumstances. However, this aspect was only raised in the debate, there was no prior authorisation of the use of force or the threat to use force in the actual case. The Frankfurt District Court admitted the opening of criminal proceedings in the case on 21 June 2004.[303] The trial is scheduled for November 2004.[304] The central task of the Court in the awaited trial will be to determine whether any defences could exempt Daschner from responsibility or lead to mitigating circumstances in the sentencing stage. From an international law point of view, as has already been addressed in the Israeli case, the invocation of a national law defence with regard to the complete exculpation of the offender *ex post facto* would lead to a breach of the state's obligation to adhere to the absolute prohibition of torture under all circumstances. Therefore, the following examination will focus on whether it would be lawful under international law to grant mitigating circumstances to Daschner in the sentencing stage.[305]

6.3. The Question of Mitigating Circumstances

The determination of the particular guilt of Daschner will have to be made on behalf of the Frankfurt District Court under national law by taking his position, his knowledge and his statements

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[302] See also Follmar/Heinz/Schulz, 2003, p. 7.

[303] See *Indictment of the Frankfurt Deputy Police Chief Wolfgang Daschner*, press office for criminal proceedings of the Frankfurt am Main District Court, 22 June 2004. The 50-year old detective chief superintendent, that carried out Daschner's orders, was indicted for coercion in connection with abuse of his power and position as a public official (section 240 (1) and (4) German criminal code); Daschner was indicted for subordination of a subordinate to commit a crime (section 240 (1) and (4) in conjunction with section 357 (1) German criminal code).

[304] The 28-year old Magnus Gäfgen will be the principal witness in the case. He was meanwhile sentenced to life-long imprisonment for extortion and murder by the Frankfurt District Court after repeating his testimony in front of the Court; see *Decision of the Frankfurt am Main District Court of 28 July 2003*. The Court also took the opportunity to declare that the police had seriously damaged the *Rechtsstaat* with this incident. His subsequent application for appeal was ruled as unfounded, see *Decision of the Federal Supreme Court of 21 May 2004*, 2 StR 35/04. His defence lawyer declared to file a constitutional complaint on the grounds of, *inter alia*, the fact that his client had been forced to a confession under threat.

[305] This examination will only focus on Daschner and not his subordinate. The same international considerations would apply to his subordinate, who is barred from invoking a separate defence of superior orders under international law.

into account. The question of international law is rather, whether the granting of mitigating circumstances would be contrary to the international prohibition of torture. In this respect, it has been submitted that with regard to the "necessity" defence under Israeli law, the illegality of a justification of torture does not mean "that special circumstances cannot be taken into account at the sentencing" stage.[306] Thus, due to the exceptional nature of those situations where human life is indeed in concrete and imminent danger, due to the mental state of the interrogator who violated the prohibition under pressure of the circumstances and due to the redeeming value of the rescuing effort of his act, it could be argued that he should not face the most severe punishment that might be possible. An indication how the case would be assessed under international law is given by the European Commission in the *Ireland v. United Kingdom* case. By drawing on the hypothetical "ticking-bomb" case it considered the possibility of taking into account the stress imposed on security forces by such a situation. With regard to the ECHR it assessed that due to the non-derogatory nature of the provision in Article 3 no such strain can justify the application of treatment contrary to the Article.[307] However, it further stated that domestic authorities are likely to take into account the general situation as a mitigating circumstance in determining the sentence or punishment. Thus, in those cases where mitigated sentences are passed and due regard has been taken of the severity of the offence and the necessity of preventing their repetition, the mitigation alone cannot be regarded "as tolerance on the part of the authorities", despite the fact that state responsibility is affected.[308] Therefore, in the eyes of the Commission state responsibility remains if proceedings are brought before the ECtHR, but states may under specific circumstances grant mitigating circumstances under their national law. The European Commission thereby constructed a different concept of tolerance between national and regional human rights law. According to the interpretation by the Commission the Frankfurt District Court would not in general be barred from granting mitigating circumstances. Whereas it still needs to assess whether it wants to risk the danger that Gäfgen will bring proceedings before the European Court, which is highly likely due to the fact that his defence lawyer already announced to bring a constitutional complaint against the conviction of Gäfgen on the grounds that the first confession was extracted by forceful means. Further, the Court will need to access how it wants to deal with the requirements set out by the Commission for such a level of tolerance on the national level. Thus, the Court will need to take into account the public opinion and concern and determine which kind of a signal it wants to send out with its judgment, since any recourse to torturous means, as has been witnessed in the tenor of

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[306] As stated by Laursen, 2000, p. 430.
[307] *Ireland v. UK*, Report of the European Commission 1976, paras. 764-766.
[308] Ibid.

the debate, is widely seem as one of the gravest violations of human dignity in Germany. The danger of a repetition is an additional aspect that needs to be considered in the light of Daschner calling for the future possibility of a recourse to torturous means as *ultima ratio*. The German government has taken the stand that such a legalisation is not envisaged in any respect. However, the Court will in this regard also need to determine whether a granting of mitigating circumstances can be construed as a legal loophole giving rise to abuse. Furthermore, although the Court is bound to the provisions of the ECHR, and the decision of the Commission can be seen as a guideline, Germany also has to adhere to its international obligations arising from the CAT as well as the ICCPR. Both respective treaty provisions are non-derogatory and Germany might thus be further held responsible for a breach of these, irrespective of whether the threat to torture is determined as torture as ill-treatment or as an all-embracing concept. Conclusively, the Court is faced with a very tricky scenario flowing from the international prohibition of torture. With regard to the international obligations that are incurred by Germany and the highly sensitive nature of the Daschner case, the Court would be better advised to not take any mitigating circumstances into account in its determination of the personal guilt of Daschner under domestic law. But instead rather establish the certainty that no circumstances can lead to a circumvention of the prohibition of torture, and thus a relativisation, by granting a mitigated sentence.

7. CONCLUSION

The prohibition of torture is absolute in today's world. The right not to be tortured or ill-treated is contained a wide variety of national, regional and international legal instruments, which have been ratified by the majority of states. International human rights law specifies that there can be no derogation from the prohibition of torture even in the most exceptional circumstances. States are obliged to implement the crime of torture effectively into their domestic legal regime and prosecute offenders. Moreover, this inherent right to physical and spiritual integrity has been recognised as a rule of customary international law, an obligation *erga omnes* and a norm of *jus cogens*. Consequently, the torturer has become a *hostis humani generis*, an enemy of all mankind. But whereas the prohibition of torture is unequivocally established in international law, the definitional question as to what falls under the notion of torture and ill-treatment has encountered significant challenges. However, the wide variety of case law interpretations has closed the latch to impunity.

But despite the proclamation of the prohibition of torture more than half a century ago and despite the absolute status of the prohibition of torture being anchored deeply in international law, torture has occurred and is still occurring in many states in recent decades and today. The prohibition does not serve as a deterrent not to torture but rather as a deterrent not to openly talk about it. States conceal facts, change facts, use linguistic abstractions to create illusions about the true nature of their interrogation methods, deny the use of torture despite evidence to the contrary, deflect from its use, try to pass the responsibility over to other states by transferring detainees out of their territorial grounds or use private contractors to employ harsher methods than they would admit to. Thus, torture is practised widely, but hid behind closed doors. It is highly criticised and vehemently condemned in the public. This is the image that can normally be drawn up with regard to the continuous employment of torturous methods as well as ill-treatment.

However, there is an increasing dangerous trend on behalf of governments and state officials to justify the resort to physical interrogation techniques with regard to political challenges they face. The interests of national internal and external security, the fight against terrorism or organised crime, or the combat of common criminality are put forward to disregard the prohibition of torture under exceptional circumstances. In this respect, voices have openly demanded to employ torture in the interrogation of suspected detainees, despite its absolute prohibition. Even more worrying are the attempts of governments or learned legal scholars to justify and legalise the use of torturous investigation methods.

Israel serves as a striking example for effectively authorising the use of "moderate physical pressure" in the interrogation of Palestinians detainees within its legal system. In this respect, the "ticking-bomb" case was used to justify the recourse to physical measures under exceptional circumstances. The part of the Landau Report outlining what kinds of measures GSS interrogators were allowed to employ in the interrogation of suspected terrorists was kept secret. The public part contained guidelines for reasonable and fair investigations and was supposed to limit exceptional circumstances only to those which were deemed as absolutely necessary to gain essential information in the prevention of terrorist activities. But despite this aim, it only served as an illustration that the authorisation to use limited force can easily be abused and institutionalised. Hence, cases of abuse continued to be reported by human rights groups and victims. The concerns voiced by the Committee against Torture and the HRC as well as the observations of the Special Rapporteur on Torture were largely ignored by Israel. It justified its means as in no way amounting to torture or ill-treatment and denied the employment of any unlawful methods. Finally, the 1999 Supreme Court Decision put a ban on those measures that were submitted to the Court and that had been deemed legal under the guise of "moderate physical pressure". These included severe shaking which had in some cases even caused death of the victim. Nonetheless, although the decision was an important step in the human rights direction, the judgments inhibited serious shortcomings. In only taking into account its national law of interrogation in its assessment of the case, the Court failed to outlaw every recourse to the defence of "necessity" as a justification for the employment of torturous means under exceptional circumstances. It left open the possibility that the defence can still be employed *ex post facto*. In this respect, it handed the discretion to open criminal proceedings over to the Attorney-General and the possible passing of legislative means to the Parliament. As an employment of the defence to exculpate offenders from criminal responsibility would be in clear breach of international law, the judgment paved a dangerous ground for an authorisation to torture entering through the back door. This is also further underlined by the continuing allegations of torture that have been made especially after the outbreak of the Al-aqsa *intifada* in 2000 and the fact that Israel has still not implemented its international obligations into its national law.

Despite the deterring example the case of Israel should have set with the bureaucratisation of the "ticking-bomb" case and the frequent use of torturous means, this scenario is still regarded as a reasonable justification for the use of torture in exceptional circumstances. This was especially witnessed in the alarming US debates arising in the aftermath of the 11 September attacks. The demand for higher security and the call for better protection from terrorist threats led to the assumption that the ends would justify the means and the recourse to torture would be absolutely

necessary in order to obtain essential life-saving information. What would be one life stacked against the lives of thousands? This culminated in the open campaign of Alan Dershowitz for torture warrants. He evaded the moral dilemma of having to decide whether torture should be allowed or not by simply assuming that it will be used anyhow. Thus, it should rather be used under a legal blanket than in secret. In this respect, he alleged that his torture warrant proposal would be lawful under the US Constitution and not violate international treaty obligations on behalf of the US. His practical and legal framework bears significant shortcomings, not only with regard to the fact that the moral and practical considerations cannot stand ground, but additionally in respect of international obligations the US would have to adhere to. Any legalisation by means of a warrant would be contrary to the non-derogatory nature of the prohibition of torture. Further, a state can not invoke its domestic legal regime for its failure to fulfil its international obligations. Thus, there is no possibility under international law to justify and legalise torture even under exceptional circumstances.

Whereas, the question arose in the Daschner case whether the granting of mitigating circumstances would be contrary to international obligations. Frankfurt's deputy police chief had ordered to threaten an alleged kidnapper with torture if he would not provide information about the whereabouts of the juvenile victim. The torture threat worked, but to no avail. The child had already been killed. The case had triggered a harsh debate about whether Daschner had acted justly and whether torture should be allowed in such extreme circumstances. Although different positions crystallised, the general tendency was to adhere to the absolute prohibition of torture and to call for criminal proceedings against Daschner. These were opened recently and the Court will now have to decide whether to allow any defence of Daschner for his actions. A complete exemption from responsibility would clearly be contrary to international law. Whereas the European Commission left open whether mitigating circumstances could be granted under domestic law. As these alone could not be regarded as a tolerance of prohibited behaviour on behalf of the state, if due regard has been taken of the severity of the offence and the necessity of preventing their repetition. However, state responsibility would still be affected on the international level. Therefore, the Court will need to carefully weight all circumstances of the case and decide what kind of signal it wants to send to the population.

Conclusively, despite the determination under international law that states are barred from justifying their recourse to torturous means under any circumstances whatsoever, states still extensively rely on their national law concepts to invoke justifications and either disregard

international law or deem it as not conflicting with their use of torture or ill-treatment. The effectiveness of instruments set up in the fight against torture depends largely on the political will of states. Thus, they do not only have to condemn torture in the open, but also adopt their own internal policies towards an effective implementation of the prohibition of torture and the prosecution of perpetrators within their national jurisdictions as well as with regard to the concept of universal jurisdiction. As long as states see themselves justified in their use of torture they will not change their national legal system to adopt it to international rules. They believe that they might benefit from the employment of physical interrogation methods in their interests. Thus, only exposure and a continuous fight against impunity can cut the cost-benefit analysis that governments often assume in the context of short-term political advantage. In this respect, preventive measures have to be continuously focused on and legal loopholes whereby torture can be revived or justified should be further eradicated. The work of treaty-monitoring bodies in interpreting provisions of the respective legal instruments is an important tool to rule out any invocation of defences. The very controversial and highly alarming debates about the deployment of judicial torture in exceptional circumstances show the need to stress the prohibition of torture. In this respect, the values of democracy and the respect for human dignity have to be upheld. A democracy might sometimes have to fight with one hand behind its back, but it will nonetheless retain the upper hand. In the long run, only an adherence to human rights and social justice can guarantee an international cooperation that can effectively punish and prevent the occurrence of the heinous character of torture.

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3. Legal Instruments

3.1. Treaty Law

3.1.1. International

1945 *Statute of the International Court of Justice*, integral part of the *UN Charter* (Article 92 UN Charter), adopted on 26 June 1945, entered into force on 24 October 1945, 1 UNTS 16

1949 *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (GC I), adopted on 12 August 1949 at the Diplomatic Conference in Geneva, entered into force on 21 October 1950, 75 UNTS 31

1949 *Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (GC II), adopted on 12 August 1949 at the Diplomatic Conference in Geneva, entered into force on 21 October 1950, 75 UNTS 85

1949 *Geneva Convention (III) relative to the Treatment of Prisoners of War* (GC III), adopted on 12 August 1949 at the Diplomatic Conference in Geneva, entered into force on 21 October 1950, 75 UNTS 135

1949 *Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War* (GC IV), adopted on 12 August 1949 at the Diplomatic Conference in Geneva, entered into force on 21 October 1950, 75 UNTS 287

1966 *International Covenant on Civil and Political Rights* (ICCPR), adopted on 19 December 1966, entered into force on 23 March 1976, 999 UNTS 171

1966 *Optional Protocol to the International Covenant on Civil and Political Rights*, adopted on 19 December 1966, entered into force on 23 March 1976, 999 UNTS 171

1968 *Convention of the Non-Applicability of Statutory Limitations on War Crimes and Crimes against Humanity*, adopted by General Assembly Resolution 2391 (XXIII) of 26 November 1968, entered into force on 11 November 1970, 754 UNTS 73

1969 *Vienna Convention on the Law of Treaties* (VCLT), adopted on 22 May 1969, entered into force on 27 January 1980, 1155 UNTS 331

1973 *International Convention on the Suppression and Punishment of the Crime of Apartheid*, adopted by General Assembly Resolution 3068 (XXVIII) of 30 November 1973, entered into force 18 July 1976, 1015 UNTS 243

1977 *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* (AP I), adopted on 8 June 1977 at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, entered into force 7 December 1978

1977 *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)* (AP II), adopted on 8 June 1977 at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, entered into force 7 December 1978

1984 *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), adopted by General Assembly Resolution 39/46 of 10 December 1984, entered into force on 26 June 1987, 1465 UNTS 85

1989 *Convention on the Rights of the Child*, adopted by General Assembly Resolution 44/25 of 20 November 1989, entered into force on 2 September 1990, 1577 UNTS 3

1998 *Rome Statute of the International Criminal Court* (Rome Statute), adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, entered into force 1 July 2002

3.1.2. Regional

1950 *European Convention on Human Rights* (ECHR), adopted on 4 November 1950, entered into force on 3 September 1953, CETS 005

1969 *American Convention on Human Rights* (ACHR), adopted on 22 November 1969, entered into force on 18 July 1978, OASTS 36

1981 *African Charter on Human and Peoples' Rights* (African Charter), adopted on 27 June 1981, entered into force on 21 October 1986

1987 *European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment* (ECPT), adopted on 26 November 1987, entered into force on 1 February 1989, CETS 126

1987 *Inter-American Convention to Prevent and Punish Torture*, adopted on 9 December 1985, entered into force on 28 February 1987, OASTS 67

1994 *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belem do Para)*, adopted on 6 September 1994 at the 24th regular session of the General Assembly of the Organization of American States, entered into force on 3 May 1995

1994 *Arab Charter on Human Rights*, adopted on 15 September 1994, not yet in force, reprinted in Human Rights Law Journal, vol. 18, 1997, at p. 151

3.2. UN Resolutions and Declarations

1947 *Formulation of the Principles Recognized in the Charter of Nuremberg Tribunal and in the Judgment of the Tribunal*, General Assembly Resolution 177 (II) of 21 November 1947

1948 *Universal Declaration of Human Rights* (UDHR), adopted without dissent and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948

1975 *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted by General Assembly Resolution 3452 (XXX) of 9 December 1975

1993 *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, adopted by Security Council Resolution 827 of 25 May 1993 (ICTY Statute)

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3.3. National Law

US

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Germany

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4. Documents and Publications of the UN and Treaty-Monitoring Bodies

4.1. UN Human Rights Committee (HRC)

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Concluding Observations of the Human Rights Committee: Iran (Islamic Republic of), Consideration of Reports submitted by States parties under Article 40 of the Covenant, CCPR/C/79/Add.25, 3 August 1993

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4.2. UN Special Rapporteur on Torture

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4.3. UN Committee against Torture

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4.4. UN Human Rights Fact Sheets

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4.5. Reports of the Inter-American Commission on Human Rights

Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System, IACHR, OEA/Ser.L/V/II.106, Doc. 40 rev., 28 February 2000

5. Case Law

5.1. International Court of Justice (ICJ)

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Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), 1970 ICJ Reports, pp. 3-51 (*Barcelona Traction* case)

5.2. International Criminal Tribunals

5.2.1. For the Former Yugoslavia (ICTY)

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5.2.2. For Rwanda (ICTR)

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5.3. UN Treaty Bodies

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O.R., M.M. and M.S. v. Argentina (1/1988, 2/1988 and 3/1988), 23 November 1989, UN Doc. A/45/44, Annex V

5.4. European Commission and Court of Human Rights (European Commission/ECtHR)

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5.5. National Courts

5.5.1. German Courts

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Decision of the Federal Supreme Court of 21 May 2004 in the case of Magnus Gäfgen, 2 StR 35/04

Indictment of the Frankfurt Deputy Police Chief Wolfgang Daschner, press office for criminal proceedings of the Frankfurt am Main District Court, 22 June 2004

5.5.2. Israeli Supreme Court

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5.5.3. United Kingdom – House of Lords

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5.5.4. US Courts

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6. Relevant Organisational Websites

(all websites were last accessed on 10 July 2004)

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- Al-Dameer Gaza http://www.aldameergaza.org/
- Amnesty International (AI) http://www.amnesty.org
- Association for Civil Rights in Israel http://www.acri.org.il
- Association for the Prevention of Torture (APT) http://www.apt.ch
- B'tselem, The Israeli Information Center for Human Rights in the Occupied Territories http://www.btselem.org/
- Deutscher Richterbund (German Judge Federation) http://www.drb.de
- German Institute for Human Rights http://www.institut-fuer-menschenrechte.de
- Human Rights Watch (HRW) http://www.hrw.org
- Institute for Media Information http://www.iminform.de
- International Rehabilitation Council for Torture Victims (IRCT) http://www.irct.org
- No Peace Without Justice (NPWJ) http://www.npwj.org
- No Torture http://www.notorture.org/torture.html
- Office of the High Commissioner for Human Rights, Human Rights Committee (HRC) http://www.unhchr.ch/html/menu2/6/hrc.htm
- Office of the High Commissioner for Human Rights, Special Rapporteur on Torture http://www.unhchr.ch/html/menu2/7/b/torture/index.html
- Palestinian Centre for Human Rights http://www.pchrgaza.org/
- Public Committee against Torture in Israel http://www.stoptorture.org.il/
- The Palestinian Human Rights Monitoring Group http://www.phrmg.org/
- United Nations Committee against Torture (UNCAT) http://www.unhchr.ch/html/menu2/6/cat.htm
- World Organisation against Torture http://www.omct.org