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The Hypocrisy Behind The Absolute Banning Of Torture: Historical Fallacies, Factual Necessities, And Judicial Artifices

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A Thesis Submitted by

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ABSTRACT

The absolute and non-derogatory prohibition of torture is embedded in almost every international or regional human rights instrument that deals with civil rights. However, this ban witnesses a diversion between theory and practice. While this diversion is comprehendible in authoritarian states, democratic regimes also implement it in some instances. This usage notably arose in the wake of the 11th of September 2001 and the accompanying usage of physical coercion in the interrogation processes. Simultaneously, some scattered, though notable, scholarly voices started challenging the absolute prohibition against torture. This pro-torture school of thought echoed in some legislative and executive works. The judiciary, as well, was in a complicated situation between preserving its heritage in defending human rights and its role in preserving state security. Such a hardship was reflected in the language of the verdicts. The sum of these scholarly, legislative, executive, and judicial momentum was still minor and could not change the well-established absolute prohibition. This paper argues that the denial of absolute prohibition has existed forever and will continue to exist. The 9/11 incidents only brought it to the surface. I further dispute the effectiveness of the focus on absolute prohibition as an effective tool to curb torture with all the hard cases it raises.

KEY WORDS: Torture, CAT, Absolute, Prohibition, Banning, Ticking-Bomb, Exceptionalism, Necessity, Excuse, Enforcement.

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I. Introduction

The abhorrent nature of torture is undeniable. Torture causes physical and psychological traumas that can be unrepairable. Moreover, it is considered inhumane practice that results societal destruction. For this reason, freedom from torture is considered an absolute and non-derogable right. However, the approach of Public International Law to its deterrence has shown slight effectiveness. Authoritarian regimes do not exclusively implement torture, yet it is employed by liberal democracies and significant players on the international scene. For example, "from 1997 to mid-2000, Amnesty International received reports of torture by state agents in 150 countries, with at least 80 deaths, and it concluded that torture was "widespread or persistent" in more than 70 countries."[1] Moreover, countries that have employed torture either directly or by proxy - by sending people to be coercively investigated in other countries - including The United States, China, India, Israel, and many European countries such as France and England.[2] These states are parties to the ICCPR, ECHR, and CAT and labeled as "progressive, developed, and bureaucratic."[3] Thus, torture, unlike other forms of Human Rights breaches such as genocide and mass killing, "is not a form of aberrational conduct in democratic societies but is instead pervasive."[4]

PIL, I argue, has applied a false strategy in countering torture. This strategy was based upon historical fallacies, whereby torture is regarded as an abolished rather than abandoned practice. Torture, an ancient tool for extracting confessions and ensuring governance, remains tempting for sovereigns to use in various situations. Furthermore, while in the past two centuries torture has been gradually abandoned from official use, its covert usage in secret places of detention has not witnessed the same degree of decline.

This paper boldly breaks into the taboo of torture discussion, which is formed by the aggregation of human rights orthodoxy and political hypocrisy, in a way other than simple condemnation. Most of the papers only trace any sort of deviation from the absolute banning to criticize. On the

[1] John T. Parry, *Understanding Torture: Law, Violence, and Political Identity*, University of Michigan Press, 2010, at 16.
[2] *See* John T. Parry, at 16.
[3] John T. Parry, at 97.
[4] John T. Parry, at 97.

contrary, this paper addresses the root causes behind the frequent rule violations. Moreover, this paper is not meant to legalize a “margin” of torture like pro-torture advocates. Instead, it deals with torture like any other grave crime, where cases of necessity allow excuses, and enforcement is required for the compliance of the rule.

Furthermore, this dissertation calls for a more practical approach to curb the use of torture and advocates for more robust international enforcement mechanisms over absolute prohibitions. In this quest, it claims that the deviation between the absolute banning of torture in international instruments and its ongoing use is due to regarding torture only as an inhumane and obsolete practice. Marking torture as a taboo topic finds its foundations in the historical narrative of torture abolition, which often suggests that enlightened humanity abolished, rather than abandoned, torture due to an elevation in moral conscience. In Chapter one, the paper seeks to add another perspective to this romanticized narrative that torture's decline stemmed from its unnecessity, not its refusal.

Chapter two tackles the existence of factual necessities that further complicate the absolute prohibition of torture. A prominent example is the classic "ticking bomb" scenario, where vital information is crucial to be extracted from suspects to save civilians’ lives. This chapter demonstrates the moral and legal questions that such a scenario poses. While the potential consequences of inaction are undeniable, the moral complexities involved in such situations are to be highlighted, leaving the applicability of absolute banning in these stances questionable.

Of course, the judiciary is always immersed in uncomfortable situations to address these tough questions. Hence, several judicial maneuvers have been employed to circumvent the rigidity of absolute torture bans, which will be discussed in chapter three. This chapter shows how courts struggle to find a way through the tension between ideals and practice, proving the inability of the existing legal framework to effectively face hard cases.

Chapter four demonstrates the consequences of the current PIL approach in dealing with torture. It shows the gap between the narrative PIL represented in the absolutists’ approach and the material PIL symbolized in the enforcement tactic. Moreover, it introduces the application of false contingency and legislative hypocrisy in the field of banning torture, which led plenty of states to

ratify the International Conventions that ban torture without a real intention to be effectively bound by them. This proves that absolute bans together with a lack of enforcement mechanisms may risk pushing torture underground, leading to situations where it is employed with impunity and without safeguards. For these reasons, chapter five concludes by advocating for a nuanced approach that acknowledges both: the necessity rule as a way to face complexities of real-world scenarios, and the enforcement for securing the respect of the rule of law.

II. On Historical Fallacies

The rhetoric of absolute banning of torture is as old as the usage of torture itself. This chapter traces the evolution of the historical writings that resist torture. It starts with Islamic jurisprudence, passing by the medieval jurists, and then focusing upon the seventeenth- and eighteenth-century writers who are regarded as the founding fathers of banning torture. I end with an analysis to show the divergence between jurisprudence and practice in terms of questioning whether torture has ever been abolished.

In the early Islamic era, the Prophet Muhammed condemned torture, which is not inherent in a legitimate – divine – penalty. The resistance against torture continued throughout Medieval Europe. For example, the *jus commune* jurists warned against using judicial torture for extracting information under Imperial Roman law.[5] This critique continued intensively in the writings of the Renaissance era's jurists. However, the usage of torture has not been decisively confronted except in the late 18th century. Still, this confrontation is no more than a rhetorical one. It is believed that the usage of torture was resurrected in the 20th century over its predecessor.[6] Despite all the jurisprudence that opposed using torture, the reasons behind reusing it were the same: a coercive and discriminatory way of achieving sovereignty and ensuring power. For most writers, both jurisprudence and legislation have failed to inherently curb torture, as they only converted implementing torture from a manifested routine to a covert practice.

In this chapter, I propose additional narrative for analyzing the roots of abolishing torture. The narrative is related to the intention and reason for ceasing the usage. Though the reason of torture is no longer presented, the intention is presented to recourse to it again whenever needed. Moreover, the torture woes are conceived to outweigh its benefits, which will lead the authorities to refrain from using it. For this end, using of torture may be not being used for being inhumane, but for being burdensome.

To this end, I trace the evolution of the writings that resisted torture. Starting from the early Islamic era, passing by the medieval jurists, and then focusing upon the seventeenth- and

[5] William F. Schulz, ed. The Phenomenon of Torture: Readings and Commentary. Philadelphia: University of Pennsylvania Press, 2007, at 24.
[6] Christopher J. Einolf, The Fall and Rise of Torture: A Comparative and Historical Analysis, Sociological Theory, Jun. 2007, Vol. 25, No. 2 (Jun. 2007), at 101.

eighteenth-century writers who are regarded as the founding fathers of banning torture. I will then end with an analysis to show the divergence between jurisprudence and practice in terms of using torture.

A. Early Islamic Era (7th – 13th Century)

In terms of *Shari'a*, or the Islamic holy law, torture is forbidden. This is evidenced by almost all of its sources. To illustrate, *Shari'a* has four primary sources. One of the most prominent and reliable sources is the Sunnah (the actions and quotes of Prophet Muhammed), which comes in the hierarchy after the Quran. In the farewell pilgrimage, the Prophet delivered an open speech to the Muslim society, saying that "your blood, your money, your decency, your skins are prohibited [against violation], as [the sacredness] of this day, this month, this place."[7] The *Shari'a* is being interpreted by *Fiqh* or religious jurisprudence. The religious scholars *Fuqaha'* have the freedom to interpret, develop, and apply its law without prior authorization from any government.[8] The Islamic jurists have agreed that - by stating the sacredness of the skin - this statement is significant in terms of prohibiting torture; hurting the skin by any means, including torture, is prohibited.[9]

In the same vein, most of the Islamic jurisprudence has allied in prohibiting the usage of torture against perpetrators to confess to committing a crime.[10] They further suggested that any evidence extracted by using torture is void.[11] On the other hand, some jurists permitted the usage of torture whenever there is evidence that the tortured committed the crime in question.[12]

However, the practice of the rulers of the early Islamic era seems to be far from theory. It is reported that most of the Umayyad rulers and some of the early Abbasid rulers used torture for various reasons—namely, the transformation from nomadic life to a single-ruler empire with absolute authority.[13] Such transformation required taming the nomads whose loyalty goes to the head of the tribe rather than the head of the state.[14] This old divergence between theory and practice

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[7] Al-Bukhari, 7078.
[8] S.D. Goitein, *The Birth-Hour of Muslim Law? An Essay in Exegesis*, in The Formation of Islamic Law, at 69.
[9] Abdullah Mabrouk Al-Najjar, hokam altaedhib lil'iiqrar bialtuhmat: dirasatan mqarnt fi alfaqih al'iislamii "Torturing for Confession: A Comparative Study in Islamic Fiqh", Ain Al-Jami'a University (2020), at 37.
[10] Abdullah Mabrouk Al-Najjar, 37.
[11] Abdullah Mabrouk Al-Najjar, 37.
[12] Abdullah Mabrouk Al-Najjar, at 42.
[13] Hadi al-'Alawi, From the History of Torture in Islam, Al-Mada PC, 4th ed., 2004, at 13.
[14] Hadi al-'Alawi, at 13.

brings to mind the contemporary divergence: Why were the actions of the rulers not in conformity with the opinions of the jurists?

Surprisingly, the cause of the divergence among early Islamic jurists was similar to the current debate. Some of the jurists suggested that the rulers of Umayyad misused *Sunnah* to justify their practice.[15] For example, Al-Ḥajjāj ibn Yūsuf al-Thaqafī, who was one of the most brutal figures of the Umayyad era, used to know from the Islamic jurist Anas Ibn Malik the harshest penalties that the Prophet used to apply in order to imitate them.[16] When Al-Hasan al-Basri, one of the most notable Islamic scholars of his time, knew that Anas provided Al-Ḥajjāj ibn Yūsuf with information related to the penalties that the Prophet used to apply, he disavowed the act of Anas.[17] The disavowal was based upon the notion that Al-Ḥajjāj would be using the acts of the Prophet as a justification for his brutal acts. In contrast, the penalties of the former were applied in a different context; Al-hajjaj would base his brutality upon *Sunnah*.

Another view was explained by Ibn Qayyim al-Jawziyya, who is one of the most prominent jurists of the Hanbali school of orthodox Sunni jurisprudence.[18] Ibn Qayyim's approach is based upon the proportionality between the culprit's reputation and the interrogation style; the person who is well known for committing crimes should be interrogated accordingly, even if beating or imprisonment is used to extract information.[19] He further claims that jurists' opinions of unleashing those who are well known for committing crimes without coercive measures made Islamic rulers think that the norms of *Shari'a* are insufficient to rule their societies properly and, therefore, led them to deviate to horizons of tyranny in order to achieve public welfare.[20]

This disagreement between Muslim scholars is thoughtful. While Al-Hassan Al-Basri disagreed with Ibn Malik for speaking out to Al-Hajjaj about the penalties that the Prophet applied for fear of its misuse, Ibn Qayyim urged to advise the leaders with their capacities to apply means

[15] Hadi al-'Alawi, at 56.
[16] Hadi al-'Alawi, at 56.
[17] Hadi al-'Alawi, at 57.
[18] John W. Livingston, Ibn Qayyim al-Jawziyyah: A Fourteenth Century Defense against Astrological Divination and Alchemical Transmutation, Journal of the American Oriental Society, Jan. - Mar., 1971, Vol. 91, No. 1 (Jan. - Mar., 1971), at 97.
[19] Abdullah Mabrouk Al-Najjar, at 15.
[20] Ala' al-Din Abu al-Hasan Ali bin Khalil al-Tarabulusi (d. ca 844/1440), *Mu'in al-Hukkam: fi-ma yataraddadu bayna al-khasmayn min al-ahkam* (The Rulers' aid in the rules of rivalry), The Official Printing Press of Egypt, 1st ed., 1882, at 164.

of coerciveness against culprits, which is rarely agreed upon between scholars. Unlike Al-Hassan Al-Basri, Ibn Qayyim feared the failure of the law rather than its misuse.

In both ways, Al-Hajjaj was a brutal tyrant who coercively subjugated the civics who lived under Umayyad's reign. Nonetheless, the rule of law is still valuable from the scholars' perspective. For Ibn Qayyim, abstaining from telling rulers about their authority under *Sharia* is far worse than the latter's misuse, as, in the former case, the rulers will disbelieve in rules. Therefore, their brutality may be free from any restraints. Conversely, in the misusage scenario, they may still be confined by some rules, either concerning conditions of using coercive authority or its magnitude.

B. Medieval England (15th – 17th Century)

Torture criticism was notable in the writings of the Medieval English jurists. Against Scholars who attribute absolute banning notion of torture to Voltaire and Beccaria, William F. Schulz suggests that "those writers were in fact latecomers to a tradition as ancient as the system itself."[21] He argues that the fifteenth- and sixteenth-century English legal scholars, namely John Fortescue, have previously warned against the implementation of torture in criminal judicial procedures long before Voltaire and Beccaria.[22] The writings of Fortescue affected many following legal scholars, including Edward Coke and Thomas Smith, who also protested torture.[23] Significantly, this shows that resistance to torture appeared in the common law system before its Roman counterpart. In this part, I will demonstrate the writings of the most significant medieval Anglo-Saxon jurists who protested torture. I will then analyze their writings in the light of their actions during their service in public posts, to show that their resistance against torture was not an outcome of their noble stance. Instead, it resulted from their bias towards their legal system against its Roman counterpart.

The usage of torture, either for gathering intelligence or evidence, is not a significant practice in the Anglo-Saxon legal tradition.[24] As J. Simpson claims, the only period where torture was systematically used in England was between 1540 and 1640 and intensively used between

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[21] William F. Schulz, ed. *The Phenomenon of Torture: Readings and Commentary*. Philadelphia: University of Pennsylvania Press, 2007, at 24.
[22] William F. Schulz, at 24.
[23] Caroline A. J. Skeel, *The Influence of the Writings of Sir John Fortescue*, Transactions of the Royal Historical Society, 1916, Vol. 10 (1916), pp. 77-114, Cambridge University Press on behalf of the Royal Historical Society, at 79.
[24] James Simpson, *No Brainer: The Early Modern Tragedy of Torture*, Religion & Literature, Vol. 43, No. 3 (autumn 2011), at 3.

1588 and 1600.[25] However, unlike the continental Roman judicial system at that time, the usage of torture was still illegal. The paradox is that, though practicing torture, common law scholars did not advocate for its legality. Their writings regarding torture ranged from absolute denial to exceptional-based justification.

Sir John Fortescue served as Lord Chief Justice of the Court of the King's Bench.[26] In 1463, he accompanied Queen Margaret and her son Edward, Prince of Wales, into their exile in Flanders and France, where he remained till 1471. During this period, he wrote his important treatise *De Laudibus Legum Angliae* or "In Praise of the Laws of England," where Fortescue "exhorts the prince to the study of English law, showing him that by the laws a prince is made happy."[27] This treatise is where Fortescue showed his dudgeon from the Roman legal system for using judicial torture. According to J. Simpsons, Fortescue, in criticizing French law, stated the following:

> [T]he [French] law prefers the accused to be racked with tortures until they themselves confess to their guilt. His 'pen shrinks,' he says, from describing these tortures, or again, 'the pen is ashamed to narrate the enormities of the tortures elaborated for this purpose.' Appalled at the prospect, he nevertheless does relate them, including the torture we know as waterboarding: for example, 'the mouths of others are gagged open while a torrent of water is poured in that swells their bellies to great mounds.' Who, he asks, would not 'rather, though innocent, confess to every kind of crime, than to submit to the agony of torture already suffered?'[28]

I will come to analyze Sir Fortescue's words later. For now, I would demonstrate the writings of his followers. One of them is Edward Coke, whom some writers consider to be "the oracle and ornament of the common law,"[29] Furthermore, writers describe him as a "judge of perfect purity, a patriotic and independent statesman and a man of up-right life […], his writings have had more influence upon the law than those of any other law writer - certainly in England - who ever lived."[30] This expert English legal scholar has followed the footpaths of his predecessor in criticizing the use of torture. Coke endorsed Fortescue's approach in contesting torture. He claimed that using torture is a sort of violation of the Magna Carta.[31] He further asserted that "there is no law to

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[25] James Simpson, at 4.
[26] James Simpson, at 4.
[27] Caroline A. J. Skeel, at 80.
[28] James Simpson, at 4,5.
[29] John Marshall Gest, *The Writings of Sir Edward Coke*, The Yale Law Journal, May 1909, Vol. 18, No. 7, at 505.
[30] John Marshall Gest, at 505.
[31] Sir Edward Coke, *The Second Part of the Institutes of the Laws of England: Concerning the Magna Carta*, first published in 1642, p.48, as cited in Danny Friedman, *Torture and the Common Law*, European Human Rights Law Review 2006; Issue 2, at 186.

warrant tortures in this land; nor can they be justified by any prescription being so lately brought in."[32]

The last on this topic is Sir Thomas Smith, who, in his 1565 text *De Republica Anglorum*, acknowledged that "torment or question which is used by the order of civill lawe and custome of other countries to put a malefactor to excessive pain, to make him confesse of himself, is not used in England."[33] Moreover, Smith has gone further in his splurge with the English legal system, as he stated in his book *The Commonwealth of England*, written in 1565 and printed in 1584, that "contumely, beating, servitude, and servile torment and punishment, it will not abide. So, in this nature and fashion, our ancient Princes and legislators have nourished them, as to make them stout hearted, courageous and soldiers, not villains and slaves, and that is the scope almost of all our police."[34]

This is a sum of the stance of the prominent English legal scholars who protested torture. Their stance is no more than the modern absolute prohibition of torture: only theoretical. A thorough look at their professional record, specifically Coke and Thomas, leads to a deep perplexing because their actions contradicted their writings. Coke, on the one hand, was named "a commissioner to torture in six separate instances between 1593 and 1603, using 'manacles,' 'manacles and torture,' or 'manacles or the rack.'"[35] Smith, on the other hand, was also appointed as a commissioner to torture in a case in 1571, so his denial of the existence of torture in England occurred a few years before he committed torture. Conversely, In the case of Coke, denial occurred after he implemented torture.[36]

Some scholars defend Coke's attitude by saying that "despite being a torturer himself when employed as a government lawyer, Coke's career on the bench bore a strikingly different character."[37] Others state that Coke's trend changed when "the constitutional controversies of the seventeenth century had made it clear that the existence of any extraordinary power in the crown was incompatible with the liberty of the subject."[38] However, I cannot find any excuse in either argument. The first argument, which depends on the career shift, is worse than the accusation itself;

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[32] James Simpson, at 5.
[33] James Simpson, at 5.
[34] Danny Friedman, at 186.
[35] James Simpson, at 6.
[36] James Simpson, at 5.
[37] Danny Friedman, at 191.
[38] William Holdsworth, *A History of English Law* (3rd ed, 1945), Vol.5, p.194, cited in Danny Friedman, at 191.

the moral position swings according to the career's requirements. The second argument is worse than the first one, as it indicates that this prominent jurist's opinion varies according to the mainstream jurisprudence. In either case, Coke's example shows the divergence between academic theory and practical implementation regarding torture.

Now, recalling Fortescue and for evaluating the overall approach of the common law jurists regarding torture, some facts ought to be stated; firstly, Fortescue, in his treatise *De Laudibus Legum Angliae*, was not criticizing torture *per se.* Rather, he was showing Edward, the young prince, the supremacy of English law compared to its Roman counterpart. J. Simpson states that, although Fortescue was listing the horrors of torture, it is unclear whether he was protesting torture in England.[39] Bearing in mind that the Rack was introduced and used in England for torture purposes in 1448 by the Duke of Exeter, who 'brought into the Tower the rack or brake[...]and thereupon the rack is called the Duke of Exeter's daughter."[40] Nevertheless, in his writings, Fortescue pointed out torture as an absolute foreign procedure that the elite English law detests. This proves that attacking torture in Fortescue's writings was motivated by his praising the English law, not the resentment of torture.

Second, a cardinal difference, other than legalizing torture, can be observed between classic common law and continental legal systems, namely French and Italian laws, regarding the value of evidence needed for conviction. According to David Hope, under the Roman legal system, "capital crimes could only be proved by the defendant's confession or by the testimony of two reliable eyewitnesses. There was no room under this exacting system for circumstantial evidence, so there was a strong incentive to procure confessions by whatever means."[41] On the contrary, under the common law, convictions can be established by circumstantial evidence with no confession or eyewitnesses.[42] That led to suspects easily convicted in any event by "pliable juries and biased judges."[43] Therefore, if we imagined two crimes in England and France with the same available circumstantial evidence against the perpetrator, the perpetrator would be tortured in France to confess to reinforce circumstantial evidence and make the case eligible for conviction. In contrast, the perpetrator would be sentenced without further proof in England. That shows that

[39] James Simpson, at 5.
[40] James Simpson, at 5.
[41] David Hope, *Torture*, The International and Comparative Law Quarterly, Vol. 53, No. 4 (Oct. 2004), at 811, 812.
[42] David Hope *at 812.*
[43] Danny Friedman, at 193.

the illegality of torture under the common law was not a product of the latter supremacy over its continental counterpart. Rather, torture was simply unnecessary to obtain convictions.

By summing this up, the stance of the prominent English legal jurists is revealed. Their public statements are summarized as "the common law is more prestigious than the Roman law; this is evidenced by the fact that we do not implement torture, unlike the barbaric French, Goths, and Italians." However, their covert stance is "we implement torture whenever we need it, but, still, we claim it illegal." Multiple critics described the approach of the English scholars as "based on a mixture of chauvinism, opportunism, and hypocrisy."[44] This legal hypocrisy is very analogous to that of modern times; torture is absolutely prohibited but can be used whenever needed.

Classical hypocrisy had serious outcomes. It is reported that between the years 1540 and 1640, 101 official torture warrants were issued by the English authorities.[45] Although the continental system recognized judicial torture, there were obligatory rules for it to be implemented. There must be a serious crime, a suspect, and some evidence not enough to hold the suspect guilty. On the other hand, torture under the common law system had vague or no rules to be applied. According to Elizabeth Hanson, only the language, not the rationale, of torture was borrowed from continental Europe.[46] She described this absurdity as "an aberrant, quasi-juridical, quasi-political phenomenon; it occupied a discursive space opportunistically fabricated from absences and borrowings."[47] She pointed out to The Parliamentarian and lawyer John Selden, who critiqued the *homelessness* of torture in England by comparing English to Continental practice. He stated that:

> [t]he Rack is used nowhere as in England. In other Countries, it is used in Judicature when there is a half proof against a man, then to see if they *semi-plena probatio*, then they see if they can make it full, they rack him to see if he will Confess. Nevertheless, here in England, they take the man [and] rack him. I do not know why, nor when, nor in time of Judicature, but when somebody bids.[48]

C. The Modern Prohibition of Torture (18th Century and on)

In the wake of the 18th Century, Torture is believed to slowly decline from the official judicial procedures in Europe. By the year 1851, torture was banned throughout Europe and was considered a sanctioned practice.[49] It was believed that the credit for this abolition is attributed to

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[44] A.L. Lowell, "The Judicial Use of Torture" [1897) Harvard Law Review 220, at 290, 291, Sir James Fitzjames Stephens, A History of the Criminal Law in England (1883), Ch.VIlI, at 222, cited in Danny Friedman, at 187.
[45] Danny Friedman, at 187.
[46] Elizabeth Hanson, *Torture and Truth in Renaissance England*, Representations, no. 34 (1991), University of California Press, at 58.
[47] Elizabeth Hanson, 58.
[48] Danny Friedman, at 188.
[49] Christopher J. Einolf, at 109.

the Enlightenment thinkers such as Montesquieu, Beccaria, and Voltaire, who, especially Beccaria, wrote extensively about its moral and practical grounds.[50] Their justifications for abolishing torture are the same as those used in the arguments of contemporary scholars. Moreover, their arguments are used in the commentaries of the international conventions that prohibit torture. In this part, I will swiftly state their arguments. Then, I will state their impact on modern criminal legislation. Finally, I will discuss the views that the abolition of torture was not a product of scholarly endeavors. Rather, it was a consequence of judicial reality.

Some scholars truly describe Montesquieu as "the first notable author of the period to point to several defects in contemporary systems of criminal law and to lay down certain guiding principles for future legislation."[51] In his book *The Spirit of Laws,* Montesquieu expressed his fears of a criminal system that entails unfair or arbitrary constraints on freedom.[52] This fear emanates from considering liberty as one of the government's main targets, as the main feature of any proper criminal system in a liberal society is protecting innocent individuals against false accusations.[53] One of the requirements of a proper criminal system is "proper rules of procedure designed to protect defendants who may be innocent."[54] Hence, he perceived that fair criminal procedures are characterized by being complex and time-consuming in order to protect the rights of the accused and maximize liberty.[55] In this regard, in Book VI of *The Spirit of Laws,* Montesquieu rejected torture for two main reasons. First, he considered it sufficient to apply criminal sanctions to have evidence other than confession, such as eyewitnesses or circumstantial evidence.[56] Second, he praised that other legal systems, mainly the common law, forbid torture. He used this fact to deny the inherent necessity of torture.[57] He concluded by saying that torture is only suitable for "despotic states, where whatever inspires fear is the fittest spring of government."[58]

Cesare Beccaria (1738 – 1794) - the economist, jurist, philosopher, and eighteenth-century criminal-law theorist – is considered by the mainstream of the literature as the founding father of

[50] Christopher J. Einolf, at 109.
[51] David W. Carrithers, *Montesquieu's Philosophy of Punishment,* History of Political Thought, Summer 1998, Vol. 19, No. 2 (Summer 1998), at 213.
[52] David W. Carrithers, at 223.
[53] David W. Carrithers, at 223.
[54] David W. Carrithers, at 223.
[55] David W. Carrithers, at 224.
[56] Charles de Secondat, Baron de Montesquieu *The Spirit of Laws*, 1748, Translated by Thomas Nugent, 1752, Kitchener: Batoche Books, 2000, at 108.
[57] Charles de Secondat, at 108.
[58] Charles de Secondat, at 108.

banning torture in modern criminal systems.[59] Influenced by Montesquieu, Beccaria wrote a pamphlet protesting harsh punishments, torture, and capital punishment that became prevalent throughout Europe and the United States. His writings had a relevant influence on the modern prohibition against cruel and unusual punishment.[60] He was only 26 when his most famous book, *Dei delitti e delle pene* (On Crimes and Punishment) (1764). On Crimes and Punishment was considered the cornerstone of modern Criminology and Penology. To the extent that this book was translated into an array of languages. In this book, Beccaria "wrote about cruelty, infamy, tolerance, and the need for education and proportionality between crimes and punishments."[61] Beccaria believed that "[s]uch punishments …ought to be chosen as will make the strongest and most lasting impressions on the minds of others, with the least torment to the body of the criminal."[62]

At the time Beccaria wrote his book, unlike England, continental Europe had witnessed the systematic and widespread usage of torture. The usage of torture was prevalent in continental Europe for oppression, judicial, and religious reasons. Firstly, the usage of torture was used to protect governments; weak governments used torture to convert every citizen to an informer.[63] In the name of public safety and the security and the maintenance of the established form of government, secret accusations and torture were justified.[64] To the extent that citizens, at that time, "became confused and ever busy saving themselves from the horrors that oppress them and about an uncertain future with no lasting pleasures of quiet and security."[65] Secondly, of course, *judicial* torture was practiced extensively until the eighteenth century. The target of judicial torture ranged from confession to the crime, including producing consistent, non-contradictory statements, discovering the alleged accomplices, and unveiling other crimes that the suspect may have committed.[66] It is worth noting that jurists of the sixteenth century have produced complex doctrines that expressed the usage of torture according to the gravity of the alleged offense and the

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[59] *See* John D. Bessler, *The Economist, and the Enlightenment: how Cesare Beccaria changed Western Civilization*, Eur J Law Econ (2018), at 277.
[60] Rebecca Newberger Goldstein, *Don't Overthink It*, The Atlantic, May 2015, https://www.theatlantic.com/magazine/archive/2015/05/dont-overthink-it/389519/ (last visited Sep 17, 2021).
[61] John D. Bessler, at 279.
[62] Jackson J. Spielvogel (2012). *Western civilization* (8th ed.). Boston, MA: Wadsworth, as cited in *Id,* at 280.
[63] John Hostettler, *Cesare Beccaria: The Genius of On Crimes and Punishments*. Hook: Waterside Press, 2011, at 37.
[64] John Hostettler, at 37.
[65] John Hostettler, at 37.
[66] John Hostettler, at 39.

level of the needed proof. These writings illustrated the process of intensifying torture gradually according to the resistance of the victim and the stubbornness of denial. Ironically, they considered this doctrine designed for to judges to be "compassionate and good."[67] For example, Damhouder of Bruges (1554) proposed that:

> The good judge is always compassionate and must take into account the youth or age of his patient and the state of his health to ensure that his office is that of the good judge and not the bloodthirsty tyrant. He must start carefully and moderately, then rigorously, and finally very rigorously, according to the gravity of the crime, the degree of proof against the accused, and the nature of his replies. He must take no notice of the accused's screams, cries, sighs, trembling, or pain.[68]

Lastly, the Roman Catholic Church valued torture as "purging" the criminal "infamy" and, therefore, signifies mercy to the criminal since it purges him in his death from the sin of falsehood.[69]

In chapter XVI of *On Crimes and Punishment*, Beccaria argues extensively against the justifications of torture. He asserted the principle of *item quilbet presumitur innocens nisi probetur nocens* and therefore denied any right to inflict torture on a culprit before conviction by stating that:

> [N]o man can be considered guilty before the judge has reached a verdict, nor can society deprive him of public protection until it has been established that he has violated the pacts that granted him such protection. What right, other than force, can empower the judge to inflict punishment on a citizen while his guilt or innocence remains in doubt? This dilemma is not new: either the crime is certain, or it is not; if certain, no punishment awaits him other than that which the laws have established, and torture is useless because the criminal's confession is useless; if it is not certain, then one must not torture an innocent man, because, in the eyes of the law, he is a man whose crimes have not been proven.[70]

Hence, Beccaria distinguished the suspect before and after conviction. In the first case, the suspect is accompanied by the assumption of innocence and, therefore, cannot be subjected to any form of punishment or pain. In contrast, in the second case, only the law-prescribed punishment may be inflicted upon the suspect. He established this rule upon the notion of the "terms of the compact" or the "social contract" to which the members of the society are parties. The certain violation thereto is the only way to inflict the penalty, and only the penalty, that is stipulated in this social contract.

Arguing against the political purpose of torture, Beccaria elaborated that a penalty aims at instilling terror in others, ensuring that any established crime would not go unpunished, and

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[67] John Hostettler, at 38.
[68] Damhouder (1554), *Rerum Praxis Criminalum*, Antwerp, chap. Xxxvii, as cited in John Hostettler, at 38.
[69] John Hostettler, at 39.
[70] Cesare Beccaria et al., *On Crimes and Punishments and Other Writings*, University of Toronto Press, Scholarly Publishing Division, 2008, at 32.

holding out the “lure of impunity.”[71] He debated that none of these aims would be achieved if a crime occurred and the culprit was unknown.[72] He based his reasoning on assuming that those who break the law are less likely to be found than the other "good" members of society.[73] Thus, it is more likely that innocent people will be subjected to torture.[74]

Furthermore, Beccaria condemned the three purposes of judicial torture. Firstly, regarding the pretext of producing consistent statements, the Italian philosopher claimed that the inconsistency of statements is produced by both innocent and criminals alike. Several factors affect both minds, leading to contradictory statements, *inter alia,* the fear of punishment, the uncertainty of the verdict, the dread of the trial process, and ignorance.[75] Finally, contradictory statements can be produced even by a calm-minded person; such a contradiction may be agitated when the person in question is exposed to a pressing danger.[76] Secondly, considering the discovery of the collaborators of the crime, Beccaria started by assuming that torture has been proven as a failing way to discover the truth about the tortured self. Then, it is more irrelevant to lead to truth about others.[77] Another thing is that an innocent man who may accuse himself wrongly under the pressure of lashes will be more likely to accuse innocent others.[78] Beccaria said there are other reliable venues for finding out the accomplices in crime, including examination of witnesses, interrogation of the criminal, material evidence, and *corpus delicti.*[79] Thirdly, he charged the technique of torturing for unveiling other crimes that a suspect may have committed by torturing under the weight of doubt. In other words, torturing because the suspect is guilty, may be guilty, or the torturer wants him to be guilty.[80]

On the religious side, the conception of torture purges infamy emanates from the idea that human stains should be purged by incomprehensible pain.[81] Beccaria argued that infamy became a civil stain, while fire and pain cleanse “spiritual and incorporeal stains.”[82] Besides, torture may

[71] Cesare Beccaria et al., at 33.
[72] Cesare Beccaria et al., at 33.
[73] Cesare Beccaria et al., at 33.
[74] Cesare Beccaria et al., at 33.
[75] Cesare Beccaria et al., at 34.
[76] Cesare Beccaria et al., at 34.
[77] Cesare Beccaria et al., at 37.
[78] Cesare Beccaria et al., at 37.
[79] Cesare Beccaria et al., at 37.
[80] Cesare Beccaria et al., at 36.
[81] Cesare Beccaria et al., at 33.
[82] Cesare Beccaria et al., at 33.

lead an innocent to falsely confess to doing a crime, which will lead to public disgrace to him. In this way, the result is that "infamy is purged by infliction of infamy."[83]

In the quest of proving his point that torture produces false information, Beccaria compared using torture in judicial procedures to using ordeal by fire, water, or lottery of armed combat.[84] The only difference between them is that the results of the former depend on the will of the tortured, while the latter depends purely upon the rules of physics.[85] However, this difference is only apparent. Beccaria argued that since the sensibility of every man is limited, pain may grow to such extent that it leaves the torture victim no freedom to do anything but choose the quickest route to relieving himself from immediate pain.[86] Here, he compares the sensitive but guiltless man to an enduring criminal. While the former may have a more limited sensibility capacity, he may confess the crime, and the latter does not, so torture, in this case, will lead to an adverse result.[87] Moreover, a criminal will be more favorable because if he "firmly withstands the torture, he must be acquitted as innocent; he will have exchanged a greater punishment for a lesser one."[88] On the other hand, the innocent will either confess to a crime he has never committed and, therefore, be convicted or be declared innocent and suffer an undeserved punishment.[89]

Voltaire, "who had become interested in matters of crime and justice in the wake of some infamous cases in the French courts,"[90] wrote a lengthy commentary on *On Crimes and Punishment.* In his commentary, Voltaire praised Beccaria's work as a step towards "soften[ing] the barbarities that linger in the jurisprudence of so many nations."[91] Voltaire asserted the same point raised by Beccaria pertaining to the uncertainty question.[92] He further added that putting someone to torture is equivalent to putting him/her to a thousand deaths to assure that he/she deserves to be condemned once to death.[93] He recalled ancient jurists' stances, such as Saint Augustine – who opposed using judicial torture - and Quintilian – who argued against the usage

[83] Cesare Beccaria et al., at 34.
[84] Cesare Beccaria et al., at 34.
[85] Cesare Beccaria et al., at 34.
[86] Cesare Beccaria et al., at 34.
[87] Cesare Beccaria et al., at 35.
[88] Cesare Beccaria et al., at 36.
[89] Cesare Beccaria et al., at 36.
[90] Cesare Beccaria et al., at xxvii.
[91] Cesare Beccaria et al., at 113.
[92] *See* Cesare Beccaria et al., at 131.
[93] Cesare Beccaria et al., at 131.

of torture against enslaved people for being humans alike.[94] He claimed that the sole pretext for using torture is custom, and civilized nations should abandon using it for being an inhumane practice.[95] He concluded by arguing that abandoning torture in England and other parts of Europe – referring to Sweden – at his times, had not caused an increase in the rate of crimes in these countries.[96]

D. The Controversial Effect of Enlightenment Thinkers: Did the rise of human conscience cause the abolishment of torture?

It is debated that there were hidden reasons for the banning of torture other than the humane effect of enlightenment thinkers. Although others preceded him, Beccaria was the first to reveal the absurdity of torture and ensure its abolition in almost entire continental Europe.[97] It is believed that "no other man ever lived to witness so complete an adoption of his radical proposals in penal practice."[98] For example, even before the French Revolution, the work of Beccaria and other enlightenment thinkers found its way into preparing the French criminal code 1789, as adversary trial was accepted instead of inquisition, secrecy, and torture.[99] Another deliberate trophy for Beccaria was the publishment of a criminal code in Tuscany in 1786 by Grand Duke Leopold, which abolished torture and even capital punishments, resulting in transforming Tuscany from having the highest crime rate to the best-ordered state in continental Europe.[100] Finally, Empress Maria Theresa of Austria also eliminated the usage of torture as so advised by the Austrian law professor, Joseph von Sonnenfels, who was a "Beccarian" admirer.[101] Even though Europe's political, legislative, and judicial atmosphere was ready for radical changes, Beccaria and his counterparts articulated the longings vaguely felt by those who aspire to humanity and justice around the globe.[102]

Classical explainers adopted the causal effect of Beccaria and his counterparts in abolishing torture. They believed that "rulers began to standardize and rationalize local codes into a system

[94] Cesare Beccaria et al., at 131.
[95] Cesare Beccaria et al., at 131.
[96] John Hostettler, at 48.
[97] John Hostettler, *at* 140.
[98] John Hostettler, at 140.
[99] John Hostettler, at 131.
[100] John Hostettler, at 140.
[101] John D. Bessler, at 284.
[102] S. Landsman. (1983) 'A Brief Survey of the Development of the Adversary System.' 44(1) Ohio State Law Journal. p. 37, Cited in John Hostettler, at 139.

of national laws."[103] These "standardizing" and "rationalizing" lead them to conceive how torture is *inhumane*, *unjust*, and *ineffective*. Firstly, *it is inhumane*, as there are gentler yet more effective ways of punishment, such as imprisonment. Secondly, *it is unjust*, as punishment is inflicted before the culprit is found guilty. Finally, *it is ineffective* "since innocent people were likely to give out false confessions in order to escape the pain of torture, while hardened criminals might be able to resist the pain of torture and be exonerated."[104] This understanding conforms with what Beccaria and his counterparts pleaded regarding torture. The raised awareness towards human life and dignity, classical explainers believe, is the main factor behind abolishing torture.[105]

However, another stream of jurisprudence believes in different reasons lying beyond the abolishment of torture. John H. Langbein claims that the evolution of the law of proof led judicial torture to disappear from continental judicial systems.[106] Langbein outlined the tight relationship between torture and the law of proof. He brought numerous examples of the early legal systems that abolished torture simultaneously with modifying the law of proof. For example, Frederick the Great, who acceded to the Prussian throne in 1740, ordered the cessation of judicial torture.[107] In his order, Fredrick decided that:

> [S]hould the circumstances (Umstände) not quite wholly convict (complicieren) the accused, and yet the greatest suspicion (Verdict) of his having actually committed the crime shall exist against the accused, and the circumstances raise such [suspicion] to the highest probability, then this accused must be sentenced to be chained in irons and imprisoned or put to fortress labor for life, even though he is unwilling to utter a confession.[108]

Hence, while Fredrick the Great claimed that the usage of torture is "gruesome" and "an uncertain means to discover the truth,"[109] He did not let the torture regime go without being displaced. The same decree that abolished the law of torture, as shown above, set the new law of proof; whenever there is evidence, though insufficient, that a culprit has committed a crime, a less harsh penalty is to be applied than that where sufficient evidence is presented. In such cases, courts can exercise

[103] Christopher J. Einolf, at 109.
[104] Christopher J. Einolf, at 109.
[105] Christopher J. Einolf, at 109.
[106] John H. Langbein, Torture and the law of proof: Europe in the ancien régime, The University of Chicago Press, Ltd., London [2006 ed.], at 107.
[107] John H. Langbein, at 102.
[108] Decree of Aug 4, 1754, substantially repeated in one of Aug 8, 1754, as cited in John H. Langbein, at 103, 104.
[109] Decree of Jun 27, 1754, as cited in John H. Langbein, at 103.

poena extraordinaria;[110] whereby a court can reduce or aggravate a prescribed-by-law punishment of a particular offense, provided that mitigating or aggravating factors are presented.[111]

In Austria, the famous abolition of torture led by Empress Maria Theresa was accompanied by a clearer approach to *poena extraordinaria.*[112] While Maria Theresa abolished torture in January 1776, her son, Joseph II, recodified the system of *poena extraordinaria* as follows:

> In addition to proof of a crime using confession or witnesses, a legal conviction can also be based upon the correlation of circumstances (Umstände) against the accused […] If no proof of the crime can be established against the accused other than the correlation of circumstances against him, the punishment must always be reduced in length one degree below what the statute prescribes for the crime when it is proven by another means.[113]

Finally, Louis XVI abolished torture in 1780. The same abolishing decree referred to the courts' authority to use *poena extraordinaria* even in cases where the suspect has not confessed.[114]

A possible counterargument is that the evolution of the continental law of proof may have emanated from the will to abolish torture, not the opposite. However, legal historians rebutted this counterargument. Mirjan R. Damaška argues that the evolution that took place was driven by the strong punitive urges of law enforcers rather than the rise in human conscience, as the requirements of Roman-Canon law of proof was so rigid, leading to the evasion of numerous perpetrators from penalty.[115] Torturing defendants was not considered an answer to the dilemma of proof. On the one hand, we have previously seen that enduring criminals can withstand torture without confessing their guilt. On the other hand, as Damaška states, if a given defendant endured torture without confessing, an immediate acquittal would be the result, notwithstanding the presence of any other powerful incriminating evidence.[116]

Damaška has supported his view that the urge behind shifting to circumstantial evidence was leaving no crime unpunished.[117] To this end, he listed numerous tactics applied by judges and rulers to enforce "sanguinary" punishments, albeit in the absence of the Roman canon legal proof. He classified these exceptions into three categories: the nature of the crime, the court's hierarchical

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[110] John H. Langbein*,* at 103.
[111] John H. Langbein, at 78.
[112] John H. Langbein*,* at 104.
[113] Joseph des Zweyten Römischen Kaisers Gesetze und Verfassungen im Justiz- fache … in dem achten Jahre seiner Regierung (Prague & Vienna, 1789) §§143, 148, at 120, 122, as cited in John H. Langbein*,,* at 104, 105.
[114] John H. Langbein, at 106.
[115] Mirjan Damaška, *Evaluation of Evidence: Pre-Modern and Modern Approaches* (2018), Cambridge University Press, at 114.
[116] Mirjan Damaška*,* at 111 and *See* Michel Foucault, *Discipline and Punish: The Birth of the Prison,* Translated by Alan Sheridan 2nd Vintage Books ed, New York, Vintage Books, 1995, at 41.
[117] Mirjan Damaška, at 82.

position, and the exceptions' theories. Firstly, exceptions related to the nature of the committed crime: he indicated that judges tended not to be confined by the evidentiary standards regarding hard-to-prove crimes such as those committed collectively or *nocturna*l crimes,[118] or crimes with exceptional gravity, such as treason.[119] Secondly, only major magistrates and rulers were believed to possess the power to impose severe punishments unconstrained by any procedural rule.[120] Finally, throughout medieval Europe, many legal doctrines emerged that weakened the effect of the rigid standards of proof by numerous dispensations from its application.[121] These doctrines allowed judges, in cases where the standard of proof was not fulfilled, to apply milder punishments, "*poena extraordinaria*," including "banishment, fines and corporal punishments other than those causing the spilling of blood."[122] In other cases, where judges are not certain whether the defendant is guilty, intermediate judgments or *absolutio ab instantia* were the alternative. In such cases, judges leave the case undecided so that the proceeding can be resumed, and corporal punishments may apply, provided full proof is available. Moreover, the defendant may be subjected to restrictions on his/her activities, including being placed under surveillance and a travel ban.[123] Hence, judges found many ways to evade the heavy burden of proof to enforce a penalty.

The previous examples clearly show that the fairy tale of the abolishment of torture as a criminal procedure is questionable. Torture was rather substituted by a more civilized and less barbaric approach. I must accede to the idea that the arbitrary *poena extraordinaria* is less horrific than torture. However, in my view, the abolition of torture was more of trading absolute certainty for absolute punishment. In this regard, the culprit will not be tortured but punished if the "full" scale of evidence is not satisfied. This will lead to the following: the suspect who was tortured in the past to confess would be punished regardless of his/her confession. So, innocent people will not be in a very better stance, as they will be punished rather than tortured. It is worth noting that by that time, circumstantial evidence was not as significant as it is nowadays; there were, for example, neither surveillance cameras nor DNA forensics, which makes it more possible then for innocent people to be detained in jails. However, again, one must confess that this way is slightly better than a suspect falsely confesses under torture and, therefore, punished as prescribed by law.

[118] Mirjan Damaška, at 83.
[119] Mirjan Damaška,, at 83.
[120] Mirjan Damaška, at 84.
[121] Mirjan Damaška, at 105.
[122] Mirjan Damaška, at 106.
[123] Mirjan Damaška, at 111.

The concurrent evolution of the law of proof and the abolition of torture shows that the writings of Beccaria and his counterparts were only contributing factors for abolishment. Indeed, the abolitionists overlooked the revolution in the law of proof.[124] They disregarded "the development that had liberated the legal systems from the former dependence on confession evidence and thereby made possible the abolition of judicial torture."[125] They had no counterargument against the concerns related to the efficiency of the torture-free criminal legal system.[126] Their only defense was bringing successful examples of torture-free legal systems, such as England and Prussia.[127] However, Langbein states, "the writers failed so completely to understand what they were describing. Their argument was conclusory: they knew that abolition worked in Prussia, but they had no idea why."[128] It is undeniable that the writers have induced the political will by convincing the monarchs of Europe of the humanity and rationality of their cause, and they formed a strong public opinion to adhere thereto.[129] Nonetheless, other more important legal, political, and practical reasons determined the tale of the abolition of torture.

E. Non-Judicial Torture abolished?

In the final part of this chapter, I shall steer from extracting confessions and intelligence as a reason for torture, to find out whether the banning of judicial torture was extended to the non-judicial torture. As previously stated in demonstrating Beccaria's writings, the literature suggests that extracting confessions is not the only motive for applying torture. For instance, religious beliefs praised pain as "sins' expiator." For example, in the Christian religion, the crucifying of Jesus and all the pain he has experienced through crucifixion is believed to bring salvation to humanity. Islam texts also adopted the redemptive power of pain when accompanied by faith. Several hadiths have tackled this issue; they proclaimed enduring pain and divine punishment as either "raising stature," "dropping sins," or "bringing forgiveness."[130] The elevated values of pain gave a moral

[124] John H. Langbein, at 108.
[125] John H. Langbein, at 108.
[126] John H. Langbein, at 109.
[127] John H. Langbein, at 114.
[128] John H. Langbein, at 114.
[129] John H. Langbein, *at* 107.
[130] One hadith entailed "a woman from Juhaynah came to the Prophet Muhammed when she was pregnant from adultery. She said: "O Messenger of Allah, I have committed something that entails a prescribed punishment on me, so apply it to me." […] the Prophet (may Allah's peace and blessings be upon him) commanded that her clothes be tied around her and should be stoned to death. Then, he offered the funeral prayer for her. However, 'Umar said to him: "O Messenger of Allah, you pray over her although she had committed adultery?" He said: "Indeed she has made such a repentance that if it were to be divided among seventy from the people of Madīnah, it would be enough for

motive to let the suspect undergo the woes of torture without much feeling of regret. On the contrary, the torturers believe that they do favor to the suspect by assisting him/her from the heavy burden of sins.

Lisa Silverman provided the reasons behind dropping this type of torture. She claimed that, due to the decline of the medieval and religious value of pain in secular Europe and the rise of the modern medical perspective of pain, pain became regarded as purely negative.[131] In secular medicine, pain became regarded as a destructive factor to those who experience it.[132] It must, therefore, be eradicated in a way that requires immediate professional intervention.[133] Thus, the social view towards torture shifted from a "way of expiating sin" to a "spiritually and morally valueless practice."[134]

The last main reason for torture is governance. In his masterpiece, *Discipline and Punish*, Michel Foucault illustrated medieval European punishment. Besides being a way for retribution to the immediate victim of the crime, punishment is considered a way of vengeance to the sovereigns since the crime violates the rules laid down by them. It thus represents a direct offense against them and a serious threat to the reign if left unpunished.[135] Torture shares punishment in many aspects; according to Foucault, torture represents "a policy of terror: to make everyone aware, through the body of the criminal, of the unrestrained presence of the sovereign."[136] Political offenses, such as treason and rebellion, are the exact examples that trigger such a kind of torture.

Foucault drew two major explanations for the withdrawal of torture. One of them is that torture, in an interval of time, has lost its terrorizing effect. To explain, torture and capital punishments were practiced ceremonially; they were practiced in public, and the folks were gathered as spectators.[137] The target was to instill terror in the viewers' consciousness and to add

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them all. Has she found something better than offering her own soul to Allah, Glorified and Exalted?" *available at:* https://hadeethenc.com/ar/browse/hadith/3380 (last visited Aug 20, 2022). Another hadith cited, "No fatigue, nor disease, nor sorrow, nor sadness, nor hurt, nor distress befalls a Muslim, even if it were the prick he receives from a thorn, but that Allah expiates some of his sins for that." Bukhari | Book 75 « al-Islamic.net, *available at* http://al-islamic.net/hadith/bukhari/75 (last visited Aug 20, 2022).

[131] Lisa Silverman, *Tortured Subjects. Pain, Truth, and the Body in Early Modern France*, The University of Chicago Press, 2001, xv–264 p, at 150.

[132] Lisa Silverman, at 150.

[133] Lisa Silverman, at 150.

[134] Christopher J. Einolf, at 110.

[135] Michel Foucault, *Discipline and Punish: The Birth of the Prison*, Second Vintage Books Edition, (1991) *at* 47.

[136] Michel Foucault, at 49.

[137] Michel Foucault, at 58.

legitimacy to the punitive procedures.[138] However, at the end of the eighteenth century and with the rise of the French Revolution, ceremonial torture achieved the exact opposite of its aim; the people expressed their rejection of cruel physical punishment and sometimes revolted.[139] Moreover, they took offensive actions towards the executors and guards by trying to free the offender, especially if the offender was charged with rioting.[140] The public torture then was reversed to be an occasion to curse the sovereign and its followers. Therefore, executions and torture, rather than being a way to "show only the terrorizing power of the prince authority," became an occasion where the princes were mocked, and criminals transformed into heroes.[141]

If the torture ceremonies failed to achieve their goals, what would be the alternative? Foucault claims that authorities found more effective and subtle ways to control their population.[142] The new governance approaches relied more upon surveillance and discipline to guarantee the people's fidelity to the crown.[143] Modern forms of control, such as workhouses and jails, allow the application of new methods of surveillance and control and, therefore, became a suitable alternative to torture.[144] Prisons make it possible to watch criminals closely and design training programs to adjust "deviant" behavior.[145] This kind of discipline, Foucault argues, became widely executed beyond prisons to include schools, the military, workplaces, and insane asylums in order to monitor and control all citizens in society.[146] I add modern control methods, such as surveillance cameras stretched throughout the roads, phone call monitoring, and internet activity surveillance. Such “more civilized” methods of governance turned torture into a burdensome, less effective, and notorious way of controlling the population. Therefore, it is unsurprising that torture, as a disciplinary tool, started to fade.

To conclude, a considerable part of the literature summed up the "real" reasons for steering away from torture as an inquisitorial, controlling, and purifier practice. The effect of the enlightening thinkers of the Renaissance era, let us say, would not have such a great effect, provided that other reasons did not pave the path for sovereigns to abandon torture. It was not the

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[138] *See* Michel Foucault*,* at 49.
[139] Michel Foucault, at 58.
[140] Michel Foucault, at 59.
[141] Michel Foucault, at 61.
[142] Christopher J. Einolf, at 110.
[143] Christopher J. Einolf, at 110.
[144] Christopher J. Einolf, at 110.
[145] Roger Paden, *Surveillance and Torture: Foucault and Orwell on the Methods of Discipline,* Social Theory and Practice, Fall 1984, Vol. 10, No. 3, at 264.
[146] Roger Paden, at 264.

humane cause *alone* that led monarchs to abandon torture. Rather, it is the declared reason, while the covert incentive is the drop in importance compared to its distress. Certainly, being a civilized and humane prince (by abolishing barbaric torture) helps fortify the pillars of sovereignty by increasing the popularity among the governed. That is why the real reasons for abolishing stayed buried for a considerable time.

This chapter is not solely intended to demonstrate the historical evolution of torture. Rather, it is meant to shed light upon torture as a tool: raised when needed and dropped when a better alternative is at hand. This paves the way for discussing, not supporting, the arguments that defend the reuse of torture. The main obstacle in the way of any torture-related research is that discussing torture is always taboo. Many wide eyes are seen, and discontented voices are heard whenever torture is discussed. The only possible opinion that should be said is that torture should utterly be banned because it is inhumane. However, as demonstrated above, treating torture solely as a barbaric, obsolete, inhumane, and, therefore, forbidden practice is an inattentiveness to reality. Torture is a tool for achieving sovereign targets: whenever other tools cannot achieve these targets; then torture will be reused to achieve them. Consequently, few necessities have forced torture to emerge as both practice and literature, as will be discussed in the following chapter.

III. On Factual Necessities

The incidents that took place on 9/11 and the vigorous measures taken by the United States and its allies, which included detaining and torturing suspects in countries that were not under their sovereignty, are considered to be the go-ahead signal for the deep debate between jurists to analyze these actions from legal and political perspectives. Most of the literature is directed towards pointing out the phenomena and the ways to counter them. Other and surprisingly considerable schools of thought sought to revisit using judicial torture to extract information. One must confess that the latter lineup was courageous enough to face the prevailing global legislative, judicial, and juristic culture, as it met categorial refusal from almost all the law societies. However, this current has succeeded in surviving, enforced by scattered judicial decisions, factual necessities, and legislative actions. In this chapter, I will trace the scholars' trials for refocusing on torture.

The debate regarding legalizing torture is not new. Several voices have brought up this topic in the past century. Their discussion was merely theoretical if compared with the contemporary one. For example, in his manuscripts, while defending the stance of Beccaria, philosopher Jeremy Bentham stated a case where torture is to be used: to urge a culprit of a heinous crime, such as arson, to apprehend his/her accomplices.[147] He reasoned his approach by arguing that the urge to recommit the crime still exists in the culprit's mind.[148] He added that using less severe methods, such as mitigating punishment in return for apprehending his/her fellows, may not achieve the aim, as the culprit may be stiff enough not to lead to the rest of the committers, for reasons related to friendship or the wish they resume the criminal activity.[149] At the same time, Bentham has excluded other excuses to use torture, which include extorting confessions.[150] Therefore, it can be concluded that Bentham encouraged using torture for *prevention* rather than discipline.

Other wakes of torture-related discussions were raised during the Algerian War of Independence in the 1950s and the British-Irish conflict in the 1970s: both witnessed the use of torture against Algerian and Irish rebels and moral consideration vs. utilitarian needs debates

[147] W. L. Twining & P. E. Twining, *Bentham on Torture*, 24 N. IR. L. Q. 305 (1973), at 316.
[148] W. L. Twining, at 317.
[149] W. L. Twining, at 317.
[150] W. L. Twining, at 318.

accompanied this usage. While analyzing the dilemma of weighing between evils in politics, Michael Walzer recalled the Machiavellian argument that "there are acts known to be bad quite apart from the immediate circumstances in which they are performed or not performed."[151] Perhaps Walzer is the first to bring the "ticking bomb" hypothesis when he narrated about a liberal sovereign who is requested to allow torturing "a captured rebel leader who knows or probably knows the location of some bombs hidden in apartment buildings around the city, set to go off within the next twenty-four hours."[152] Though this liberal sovereign believes that torture is impermissible, he was convinced of the necessity of what he did to protect the lives of the people who may have died in the explosions.[153] Thus, this sovereign will be in a moral conflict, whether to follow his/her beliefs or to break them for the sake of the people.

These scattered discussions have raised significantly post-9/11 attacks. It is worth noting that the revival has found its path not only through literature, judiciary, and law enforcement venues but also in the public's conscience. A poll conducted post-9/11 suggested that more than 30% of Americans encouraged using torture on terrorist suspects.[154] Another notable research showed that, between 2001 and 2009, more than 40% of Americans – on average – supported the use of torture in the famous "ticking bomb" hypothesis, where "[t]he questions ask or imply that torture would gain accurate information and could save American lives."[155] This study demonstrated that, by late 2009, the approval percentage had exceeded 50%.[156] The levitating public acceptance of using torture, or whatever it is called, gave a boost to academic writings and official actions to bring the debate to the surface softly. Hence, the contemporary study of "pro-torture" literature has gained firm ground.

In this chapter, I list the "pro-torture" arguments, though I do not support any of them. First, I will tackle the reasons, other than the 9/11 attacks, behind the juristic endeavors to legalize torture. Second, I will show the cases where the literature claims that it is suitable to use torture.

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[151] Michael Walzer, *The Problem of Dirty Hands*, Philosophy & Public Affairs, Winter, 1973, Vol. 2, No. 2 (Winter, 1973), at 168.
[152] Walzer, at 167.
[153] Walzer, at 167.
[154] Transcript, Sixty Minutes, 34 Burrell's Information, Service Publishing, at 7 (Jan. 20, 2002). Cited in Marcy Strauss, *Torture*, 48 N.Y.L. Sch. L. Rev. (2003-2004), at 202.
[155] Paul Gronke, Darius Rejali, Dustin Drenguis, James Hicks, Peter Miller, and Bryan Nakayama, *U.S. Public Opinion on Torture*, 2001–2009." PS: Political Science and Politics 43, no. 3 (2010), at 437.
[156] Paul Gronke et al., at 439.

Third, I will discuss how these arguments can emerge in the presence of national and international binding prohibitions against torture. Fourth, I will try to find out the answers the literature provides to the question of what the acceptable scale of torture is to be used. Lastly, I will discuss the challenging topic of the legal grounds for using torture.

A. Why is Torture Used?

The war of granting torture some acceptability dictated a clash between deontologists and utilitarians. According to the deontological theory, any legal rule should respect its addressee's complete personal autonomy.[157] Consequently, no extraordinary circumstances should permit torture, as human dignity should be respected even in extreme circumstances.[158] On the other hand, utilitarians believe that any good should be decided if the net benefit profit of an act to the society (not the individual) outweighs the given act's harm.[159] Applying this approach to torture leads to permitting torture, given that it is used to preserve the integrity of society. A middle approach, threshold deontology, assumes that torture is permissible provided that society receives benefits from torture. At the same time, torture will still be perceived as morally wrong.[160] Therefore, the pro-torture school of literature is distributed between utilitarian and threshold deontologists.

The question of whether or not torture may bring benefits to the society has no decisive answer. While it is well perceived as an evil, in some instances, it may carry benefits, at least according to the conscience of the law enforcement personnel. For example, in an interview with the Washington Post, a retired Philippines police officer narrated the details of arresting members of a terroristic cell in 1995 in Manilla.[161] The cell's members were planning to kill Pope John Paul II besides crashing eleven commercial American airliners.[162] They have been arrested with bombs, numerous chemical substances, and wristwatches that are all used in making bombs.[163] After weeks of torture, one of the suspects gave vital information that helped in arresting the rest of the

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[157] Stephen Hoffman, *Is Torture Justified in Terrorism Cases: Comparing U.S. and European Views*, 33 N. Ill. U. L. Rev. 379 (2013), at 384.
[158] Stephen Hoffman, at 384.
[159] Stephen Hoffman, at 384.
[160] Stephen Hoffman, at 385.
[161] Matthew Brzezinski, *Bust and Boom*, Washington Post, December 30, 2001, available at: https://www.washingtonpost.com/archive/lifestyle/magazine/2001/12/30/bust-and-boom/1109903e-3762-4b78-90a6-d191efd39920.
[162] Matthew Brzezinski, *id*.
[163] Matthew Brzezinski, *id*.

cell. Therefore, the plot was foiled.[164] Another example is that the Israeli security services claimed that as a result of a decision by the Israeli High Court that asserted banning torture, "at least one preventable act of terrorism had been allowed to take place."[165] The High Court's stance shows that security services, at least, believe in, even partial and occasional, the accountability of torture. Nevertheless, in extreme situations that include massive threats to society, they will use every available means to deter such a threat, even if it entails immoral "by default" methods.

As a result, whether or not they ratified international or regional conventions against torture, states are reported to use torture when they are faced with tides of terrorism or when they seek to maintain order in a society with high rates of crime. For instance, according to a study conducted to find out the relevance between the ratification of the CAT and the allegations of using torture, it appears that [signatories] of the American Torture Convention and the African Charter have stained records on torture compared to those that are not signatories.[166] Moreover, the previous dogma construes why the US government sometimes submits suspects of terrorism to states "whose intelligence services have close ties to the CIA and where they can be subjected to interrogation tactics—including torture and threats to families—that are illegal in the United States."[167] The latter states may also be signatories to CAT.

Perhaps the fact that states also use torture in cases of threats to *thrones*, not *nations*, is a reason for the pro-torture arguments. Some jurists believe that acknowledging the *good* use of torture helps in preventing its *bad* use. Fritz Allhoff argues that the absolute banning of torture constitutes a suitable atmosphere for unjustified torture to flourish.[168] That is because necessary torture cannot find a place in the current international legal framework. Hence, there will still be an undisciplined practice of torture. In the same vein, Dershowitz claims that, provided it occurs anyhow, regulating torture "open[s] accountability and visibility in a democracy. 'Off-the-book

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[164] Matthew Brzezinski, *id*, Doug Struck et al., *Borderless Network of Terror*, Washington Post, September 23, 2001, https://www.washingtonpost.com/archive/politics/2001/09/23/borderless-network-of-terror/843d68f7-9c5c-441b-8963-e9876b49d321/ (last visited Oct 6, 2022). The torture included "'hit[ing] with a chair and a long piece of wood, forced water into his mouth, and crushed lighted cigarettes into his private parts,'"

[165] Dershowitz, *Why Terrorism Works, Understanding the Threat, Responding to the Challenge*, Yale University Press, 2002, at 137.

[166] John Alan Cohan, *Torture and the Necessity Doctrine,* Valparaiso University Law Review, Summer*,* 41 Val. U.L. Rev. (2007), at 1593.

[167] Alan M. Dershowitz, at 138.

[168] *See* Fritz Allhoff, *Torture Warrants, Self-Defense, and Necessity,* Public Affairs Quarterly, JULY 2011, Vol. 25, No. 3 (JULY 2011), at 218.

actions below the radar screen' are antithetical to the theory and practice of democracy. Citizens cannot approve or disapprove of governmental actions they are unaware of. We have learned the lesson of history that off-the-book actions can produce terrible consequences."[169] In this way, pro-torture literature tries to locate its theories within the dichotomy of human rights and states' practices; allowing *good* torture with accountability is preferable to disallowing torture while losing the means to observe compliance.

Here, the value of the rule of law between liberal and authoritarian regimes becomes apparent. In contrast, authoritarian and totalitarian regimes have no concern about breaking the law for whatever interests they protect. Officials in liberal democracies may also break the law. However, in liberal regimes, the chance of being accountable is higher. As a result, the pro-torture argument, mockingly, may be resisted more in totalitarian states than in democratic ones, as totalitarian regimes will tend more to protect their legitimacy behind hypocritical texts that have no power in real life. For this, Dershowitz argues, "No legal system operating under the rule of law should ever tolerate an "off-the-books" approach to necessity. […] Our system of checks and balances requires that all presidential actions, like all legislative or military actions, be consistent with governing law."[170]

B. When is Torture Used?

The ticking bomb theory requires that torture can only be used for "gathering information and intelligence for preventing imminent harm."[171] The potentially gathered information will help save many innocent lives in such a case. However, this poses many questions: What is the threshold of the vitality of such information? What is the threshold of the "imminency" and "harm"? How would law enforcement personnel know that a given person possesses such information? Stephen Hoffman answers with the perfect oft-cited ticking bomb scenario, whereby a detained suspect probably possesses information about a timely bomb set to detonate within – say – the next twenty-four hours in a crowded place. [172] The only way to diffuse the bomb is to know its place, and the only way to know its place is to extract this information from the detained suspect. However, this

[169] Dershowitz, at 152.
[170] Dershowitz, at 153.
[171] Stephen Hoffman, at 386.
[172] Stephen Hoffman, at 388.

suspect still refuses to talk. In this case, law enforcement personnel are placed in a choice of evils: either to use violence against the suspect to extract vital information or to let people die.

Real-life situations are not always that perfect, as the necessary torture scenarios cannot be comprehensively listed. As seen in Manilla's example, it all depends on the "strong beliefs" that a suspect poses information about an imminent threat. One of the situations that may bring about such beliefs is arresting the suspect while possessing chemical substances and devices used to manufacture explosives or while the suspect is planting a bomb in a crowded place. These elements suggest that the suspect may have ties with others jointly using the bombs to achieve a common agenda. In this case, if investigation methods could not specify the rest of the cell's members, the only venue for reaching out to them is the suspect himself/herself. It may pose a question of whether a passive member of the terrorist group may be subjected to torture while believed to possess information related to more dangerous members. Also, it will be more problematic if a family member of a terrorist with bombs refuses to unveil the places where this terrorist may be hiding. In these hard cases, the morals of weighing evils will be subjected to a difficult test.

It is widely believed that the ticking bomb scenario is an extreme and unrealistic possibility and, therefore, should be dismissed.[173] Nonetheless, those who lived in the times of terrorism know that it is not. In 2021 alone, the total worldwide number of deaths from terrorist attacks was 7142. Explosive attacks recorded 240 attacks conducted by ISIS alone.[174] These numbers are considered low, as the worst year was 2015, scoring 10699 causalities.[175] On the other hand, if the situation is "rare." Dowrchowitz believed that it would be beneficial to limit the usage of torture to be "rare" rather than being widely and systematically implemented.[176] Thus, states that may use torture will have to justify using torture in light of these rare situations.

C. How is Torture Used?

Describing torture methods is shocking. Detailed explanations of barbaric ways of inflicting pain on people seem an obsolete and denounced practice. However, Dershowitz draws a comparison

[173] *See* Stephen Hoffman, at 388.
[174] Institute for Economics & Peace, Global Terrorism Index 2022: Measuring the Impact of Terrorism, Sydney, March 2022, at 12, 16. Available at: http://visionofhumanity.org/resources
[175] Global Terrorism Index 2022, at 12.
[176] Dershowitz, at 141.

between the death penalty, imprisonment, and torture. He recalled a situation where a court in Singapore ruled against an American to be medically supervised lashing with a cane.[177] As a result, sweeping outrages occurred opposing this judgment.[178] However, Dershowitz argues that the death penalty is applied almost everywhere. American prison inmates are usually exposed to rape, mutilation, and homicide.[179] Here, Dershowitz claims that, even though torture is the most temporary among these measures, people tend to resist the most because other woes occur silently.[180] In sum, death is currently underrated, while pain is overrated.[181]

Indeed, the word "torture" is inherently staining. Jurists do refer to the encouragement of using regulated torture as using "moderate physical pressure" or "tactical interrogation." Dershowitz repeatedly mentioned the usage of "a sterilized needle inserted under the fingernails to produce unbearable pain without any threat to health or life."[182] He also mentioned some interrogative techniques used by some intelligence services, such as "[placing] a suspect…in a dark room with a smelly sack over his head. Loud, unpleasant music or other noise would blare from speakers. The suspect would be seated in an extremely uncomfortable position and then shaken vigorously."[183] In an official trial to exempt some forms of violent forms of interrogations from the stain of torture, the Department of Justice's Office of Legal Counsel has issued a memorandum considering that, for an action to be described as torture, it must fulfill several criteria. First, the threshold of pain: the physical pain must be "equivalent in intensity to the pain accompanying serious physical injuries, such as organ failure, impairment of bodily function, or even death."[184] Regarding mental pain, it must result in significant psychological harm of significant duration."[185] Secondly, the interrogators intend that even if they know that the action inflicted on the interrogated person may probably cause severe pain, the case may still be dismissed because of the absence of the specific intention to cause severe pain.[186] Although this memo was

[177] Dershowitz, at 149.
[178] Dershowitz, at 149.
[179] Dershowitz, at 149.
[180] Dershowitz, at 149.
[181] Dershowitz, at 149.
[182] Dershowitz, at 155.
[183] Dershowitz, at 139.
[184] Memorandum from U.S. Dep't of Justice, Office of Legal Counsel, Office of the Assistant Attorney General to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation Under 18 U.S.C. 2340-2340A, at 46, cited in John Alan Cohan, at 1597.
[185] Memorandum from U.S. Dep't of Justice, as cited in John Alan Cohan, at 1597.
[186] Memorandum from U.S. Dep't of Justice, as cited in John Alan Cohan, at 1598.

superseded by another one published in 2004,[187] It shows an official trial to exempt many actions from the definition of torture. Finally, polls conducted among Americans to find out whether they are in favor of the usage of "enhanced interrogation techniques," more than 50% of the interviewed found that stress positions, noise bombs, and sleep deprivation are acceptable ways of interrogation in extreme cases.[188]

D. How is Torture Defended?

Most scholars regard the argument for using torture as absurd based on being ultimately banned by the international conventions and national legislations that allow no derogations possible. This ban is stated in international conventions starting from the Universal Declaration of Human Rights (UDHR) (1948) to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (1984) and its Additional Protocol. On the National side, regarding US law, the leading domestic tool for criminalizing torture is law US §§2340[189]-

[187] Memorandum from U.S. Dep't of Justice, Office of Legal Counsel, Office of the Assistant Attorney General, for James B. Comey, Deputy Attorney General, Legal Standards Applicable Under 18 U.S.C. 2340-2340A (Dec. 30, 2004), as cited in John Alan Cohan, at 1599.
[188] Paul Gronke et al., at 441
[189] 18 U.S. Code § 2340 – Definitions:
As used in this chapter—
(1) "torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;
(2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from—
(A) the intentional infliction or threatened infliction of severe physical pain or suffering;
(B) 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;
(C) the threat of imminent death; or
(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality; and
(3) "United States" means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.

2340A,[190] which the US passed as a fulfillment of the obligation to CAT.[191] The Egyptian Constitution, too, firmly prohibits torture. On one hand, article (52) of the Egyptian Constitution of 2014 states that "All forms of torture are a crime with no statute of limitations." On the other hand, article (55) of the constitution, which deals with due process, states that "those who are apprehended, detained, or have their freedom restricted shall be treated in a way that preserves their dignity. They may not be tortured, terrorized, or coerced." This article criminalizes any violation of these standards. Moreover, the article considered "[a]ny statement that is proven to have been given by the detainee under the pressure of any of that which is stated above, or the threat of such shall be considered null and void." Consequently, the Egyptian Penal Code rigorously sanctions using torture.[192] Though it has not defined torture, the Egyptian legislature sanctions lesser forms of cruelty, which include breaching honor and incurring bodily pain.[193] Thus, the firmness, constitutionality, and internationality of the protection questions the feasibility of any discussion regarding allowing torture.

However, several voices within the US legal system have tried to limit this vigorous absolutism. For instance, John C. Yoo, in his then capacity as a Deputy Assistant Attorney General, wrote a memo advising the Secretary of Defense regarding the usage of torture against Al-Qaeda detainees in Guantanamo, claiming that the US is obliged to CAT only within the limits of US

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[190] 18 U.S. Code § 2340A - Torture:
(a) Offense. Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.
(b) Jurisdiction.
There is jurisdiction over the activity prohibited in subsection (a) if—
(1) the alleged offender is a national of the United States; or
(2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.
(c) Conspiracy.
A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.

[191] Allhoff, at 217.

[192] Article 126 of the Egyptian Penal Code no. (58) of year 1937 stated that "[a]ny public official/civil servant or public employee who orders torturing a suspect or does the torturing personality, in order to force him/her to confess, shall be punished with strict imprisonment, or imprisonment for a period of three to ten years.
If the tortured victim dies, the penalty as prescribed for deliberate murder shall be inflicted."

[193] Article 129 of the Egyptian Penal Code no. (58) of year 1937 stated that "Any public official/ civil servant or public employee who employs cruelty with people, depending on his/her position, such that he/she commits a breach of their honor, or incurs bodily pains to them, shall be punished with detention for a period not exceeding one year or paying a fine not exceeding two hundred pounds.

law.[194] According to this view, for an action to be considered torture, the criterion of specific intent should be fulfilled.[195] Another legal maneuver conducted by Dershowitz claims that the banning in the Geneva Convention binds the US "only to the extent that it is consistent with the Eighth Amendment."[196] He then supposes that the Eighth Amendment "may not prohibit the use of physical force to obtain information needed to save lives."[197] Additional view, stated by Allhoff, is that some cases are too rare and cannot build a policy. However, they could individually gain *post hoc* recognition in extreme circumstances and the associative legal exoneration.[198] These views indicate the presence of trials to find legal support or a loophole in the current texts for the pro-torture stance. Nonetheless, none of these arguments found much support in the literature, not even between the members of the pro-torture team themselves.

The agreed reason behind discussing torture in the presence of all these binding texts is the question of "Should torture be banned?" rather than "Is torture banned?"[199] The actual aim of the pro-torture team is not to find a legal argument for allowing torture. Instead, they aim to create mobilization against the absolute ban. They resemble their effort with the endeavors against slavery and homophobic laws.[200] They further claim that the "moral case for torture gives [them] at least a *prima facie* reason to think that it should be legal"[201] Because if a moral action cannot find its path within the legal framework, then something has undoubtedly gone wrong in the legal system itself, and, consequently, needs to be revisited.[202] So, pro-torture teams call for revisiting the mandatory legal rules to find a way for justified torture to take place.

E. How is Torture Allowed?

It follows in discussing the pro-torture discourse, listing the various legal approaches for allowing it. There are two main streams for indulging torture in the legal framework: The pre and the post-

[194] John C. Yoo, Response to Alberto Gonzales' Request for Views on Legality of Interrogation Techniques. United States, Department of Justice, Office of the Legal Counsel (August 1, 2002), at 3.
[195] John C. Yoo, at 3.
[196] Dershowitz, at 136.
[197] Dershowitz, at 136.
[198] Allhoff, at 218.
[199] *See* Allhoff, at 218, Dershowitz at 136.
[200] Allhoff, at 218.
[201] Allhoff, at 218.
[202] Allhoff, at 218.

authorization.[203] The first approach suggests that there should be something called a "torture warrant," which is more like a search or arrest warrant. The second approach has two main sub-categories regarding the authorization of torture: one relies upon the exceptionalism theory of self-defense, and the other upon the excuse of necessity. In this section, I argue that, away from the pro-torture school of thought, the most silently approved approach is that "justified" torture is covertly approved and sanctioned if publicly exposed.

The "torture warrant" approach - headed by Professor Dershowitz – suggests that field officers should be granted a warrant from a judge before committing torture.[204] In doing so, the field officer must provide compelling evidence that torture is inevitable, as most judges would require so before they would authorize an extraordinary departure from the legal and constitutional norms.[205] In this way, Dershowitz believes that "a formal requirement of a judicial warrant as a prerequisite to nonlethal torture would decrease the amount of physical violence directed against suspects. At the most obvious level, a double check is always more protective than a single check."[206] He concludes that it would still be possible that some torture incidents would occur without a warrant. In this case, they would be inexcusable.[207]

Dershowitz's torture warrants have received much critique. Some argue that a torture warrant may lead law enforcement personnel to seek a warrant in real, borderline, non-borderline, and frivolous cases.[208] Then, it will be the judiciary's responsibility to determine the outcome of the issuance and the non-issuance of the warrant.[209] Moreover, it is argued that "judiciaries are not trained to evaluate circumstances of life-threatening catastrophes."[210] Another counterargument says that, given that torture violates human dignity, the torture warrants will be more likely to stain the judiciary as a violator of human dignity, as well.[211] Away from immersing in this dialogue between Dershowitz and his rivals, the digest is that Dershowitz's warrant was not approved.

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[203] Allhoff, at 217.
[204] Dershowitz at 158.
[205] Dershowitz at 159.
[206] Dershowitz at 158.
[207] Dershowitz at 159.
[208] Allhoff, at 223.
[209] Allhoff, at 223.
[210] Allhoff, at 223.
[211] Chanterelle Sung, *Torturing the Ticking Bomb Terrorist: An Analysis of Judicially Sanctioned Torture in the Context of Terrorism*, 23 Boston College Third World Law Journal 193 (2003), at 207.

Another famous legal cover for justifying torture is the self-defense argument. Michael S. Moore analogies the banning of torture to the prohibition of killing or injuring others.[212] He claims that in cases where torture may be allowed, it is an excuse rather than an exception to the norm of not killing.[213] In other words, torture in a self-defense case is not a justified exception. Instead, the act of torture *per se* is still wrong. However, the torturer cannot be blamed for using it.[214] In such a case, the excuse emerges when torture is used to deter an entirely created threat of harm by the tortured person.

Moreover, Moore has tackled the hard case of innocent people who may be exposed to torture, such as the spouse or the family members of the terrorist who may possess information related to the ticking bomb. He assumes that these people are one of two categories: either they are accomplices to the crime or will be treated as material participants in the crime, such as insane or too-young aggressors.[215] Self-defense doctrine is also applicable in both scenarios, as he resembles the latter situation to the case of human shields.[216] Also, he defended his stance against the criticism that tortured subjects do not pose a threat themselves. Therefore, the self-defense doctrine is not applicable in their cases by stressing that "the moral basis for the defense may be applicable. For if the terrorist knows the location of hidden bombs, […], he has culpably caused the situation where someone must get hurt."[217] He added that If torture is the only venue to avoid the death or injury of others who were exposed to risk by the terrorist's actions, then such torture is permissible on the same ground of self-defense.[218]

Moore's theory encountered various critiques. His argument is said to contradict the basic features of the self-defense rule; neither the torturer is exposed to a threat nor the detained tortured person is posing a threat.[219] Although the terrorist "may be complicit in some threat, he may have

[212] Michael S. Moore, *Torture and the Balance of Evils*, 23 Isr. L. REV. 280 (1989), at 320.
[213] Michael S. Moore, at 320.
[214] Allhoff, at 226.
[215] Michael S. Moore, at 322.
[216] Michael S. Moore, at 322.
[217] Michael S. Moore, at 323.
[218] Michael S. Moore, at 323.
[219] Allhoff, at 226.

contributed to the threat, and so on, but he is not a threat; the threat is a bomb waiting to go off somewhere else altogether."[220] Therefore, the self-defense conditions were not satisfied.

The last legal endeavor for justification of torture is the necessity argument. The necessity doctrine dictates that "[a] certain conduct, though it violates the law and produces a harm, is justified because it averts a greater evil and hence produces a net social gain or benefit to society."[221] This doctrine is a perfect example of the post-excuse case; no warrant or statutory exemption is to be found. Instead, the defendant (torturer in the current case) should manifest the presence of the necessity condition before the judicial or investigative authorities after the "crime" is committed. Otherwise, the torturer will be subjected to the prescribed penalty for his/her action. In this case, the defendant should prove the presence of the following factors: first, that the defendant has encountered an evil that would produce imminent harm to him/herself or others. Secondly, the deterred harm was not caused by the negligent or reckless acts of the defendant. Thirdly, the reaction was reasonably proportionate to avert the harm. Fourth, that there were no other legal alternatives to violating the law. Last, the law does not expressly dismiss the reaction as a defense in necessity conditions.[222] If the defendant could not prove the presence of the abovementioned conditions, courts may alleviate the penalty according to the *sui generis* case. Considering the severity of the reaction and the missing executory factor(s), both in number and magnitude.

The necessity argument may seem plausible or, at least, more credible than other arguments. However, the CAT wordings may appear to block the usage of necessity as a defense in cases of torture. Article (2) (2) states that "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." Moreover, the UN Committee against Torture has expressly noted that no justification or alleviating circumstances may be invoked to excuse torture.[223] The committee went further to require some countries to disallow using necessity as a

[220] Allhoff, at 227.
[221] Cohan, at 1607.
[222] Cohan, at 1610.
[223] Paola Gaeta, *May Necessity Be Available as a Defence for Torture in the Interrogation of Suspected Terrorists?* Journal of International Criminal Justice, vol. 2 (2004), at 788.

defense for torture in their local legislations.[224] This request can be construed in the light of the approach that the norms of international human rights law, contrary to the international criminal law, are intended to be applied to states, not individuals, and given that criminal rules should not be applied directly to individuals unless stated upon in the national legislations, the necessity rule can evade perpetrators from the penalty, provided that the national law does not rule necessity out as an excuse.[225] In this case, only the state, not the individual, can be blamed for violating the convention.[226]

To sum up, different jurists' approaches failed to agree upon a proper excuse for inflicting torture in extreme cases. Even in the necessity dogma, it is tough to prove the proportionality between inducing torture and the imminent threat either because the tortured person may be innocent, the act of torture does not necessarily evade the imminent threat, or the tortured person may not possess the relevant information.[227] The corpus of the national and international binding rules poses heavy barriers to extracting a proper legal answer.

For this reason, very few legislative trials tried to break the crust of the prohibition's rigidity. For example, "the terror detainee bill passed by Congress in the Fall of 2006—the Military Commissions Act (MCA)—has implicitly condoned torture and effectively rendered it lawful."[228] The MCA intended to be applied to Guantanamo Bay's detainees. Section (5) of the MCA "[p]rohibits a person from invoking the Geneva Conventions in any habeas corpus or other civil action" to which the United States or any of its agents is a party thereof.[229] Moreover, Section (6) also authorizes the US President to interpret the Geneva Conventions and issue such interpretations through Executive Orders.[230] Finally, Sec. 948r. of the act permits the admissibility of statements obtained if they were produced before December 30, 2005, by interrogations "in which the degree

[224] CAT/C/CR/30/6, Conclusions and Recommendations of the Committee against Torture: Belgium (27/05/2003) cited in Gaeta, at 788.
[225] Gaeta, at 788.
[226] Gaeta, at 788.
[227] Gaeta, at 785.
[228] George Hunsinger, *Torture Is the Ticking Time-Bomb: Why the Necessity Defense Fails,* A Journal of Theology, Volume 47, Number 3, Fall (2008), at 228.
[229] Mitch McConnell, S.3930 - 109th Congress (2005-2006): Military Commissions Act of 2006, (2006), available at http://www.congress.gov.
[230] Id.

of coercion is disputed."[231] This act was widely criticized as a Bush administration's trial not only to hide the usage of torture but also to legitimate its outcome.[232] As a result, and together with courts' rulings that found the act unconstitutional, another MCA enacted in 2009 restricted the president's power to interpret Geneva Conventions and preclude the validity of statements taken under coercion.[233]

F. Final Remark: Torture and Denial

The scholarly struggle above shows the difficulty of finding a proper legal position to allow coercive measures during interrogation. It is an uncomfortable discussion for authoritative regimes and human rights activists alike. From the former perspective, it is complicated to show their tendency to use torture in their judicial procedures, as such a tendency may be used against them to prove their violent status. On the other hand, human rights activists will consider the discussion a loss of their gains throughout their long, humane battle and an opening of the floodgate that will bring up uncontrollable human rights abuses. Those apparently trying to find a middle ground between preserving the needs of a state in danger and the rule of law are in the middle. Moreover, they have not agreed on a proper legal excuse to legalize torture.

Another scholar suggested a compelling approach that is convenient to end this chapter. This approach finds that, though torture can be morally acceptable, in a few instances, it cannot be recognized legally. In illustrating this approach, Seumas Miller argues, considering the extreme situations, that,

> [t]he basic idea is that while torture is not an absolute moral wrong in the sense that the evil involved in performing any act of torture is so great as to override any other conceivable set of moral considerations, nevertheless, there are no moral considerations that in the real world have, or ever will, override the moral injunction against torture; the principle of refraining from torture has always, and will always, trump other moral

[231] Sec. 984 (c) states that "Statements Obtained Before Enactment of Detainee Treatment Act of 2005: A statement obtained before December 30, 2005 (the date of the enactment of the Defense Treatment Act of 2005) in which the degree of coercion is disputed may be admitted only if the military judge finds that:
(1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and (2) the interests of justice would best be served by admission of the statement into evidence."
[232] *See* Alan W. Clarke*, De-cloaking Torture: Boumediene and the Military Commissions Act,* San Diego International Law Journal 11, no. 1 (Fall 2009), at 133.
[233] John R. Crook, *Military Commissions Act Revised, Pending Military Commission Proceedings*, The American Journal of International Law 104, no. 1 (2010), at 117, 118.

> imperatives. Proponents of this view can happily accept that the offenders in putative examples should be tortured while simultaneously claiming that the scenarios in these examples are entirely fanciful ones that have never been, and will never be, realized in the real world.[234]

To prove his point, Miller narrates a thoughtful example, other than the ticking-bomb cliche, taken from a former police officer. [235] Here, a gangster has stolen a car from a mother who left her baby in it while she was fueling the car. A police officer, who arrested the gangster found on foot a few miles away, interrogated the latter for unveiling where he left the car and the baby. It was a middle day of the summer, and the car was as hot as an oven, which may expose the baby to death or severe brain damage. As a result of the gangster's denial of talking and the time limit before the baby gets hurt, the police officer started to beat the gangster until the latter revealed the place of the abandoned car. Before the prosecution, of course, the police officer did not mention the beating. Rather, the defendant portrayed the location of the car and the baby as a volunteer statement.[236]

Miller used this example to prove the presence of some imaginable circumstances in which torture is morally permissible.[237] He started on the basis that extreme emergencies are exceedingly rare, as they may occur once before and may not happen again before so long.[238] However, not every morally justifiable action can be legalized. That is because "[t]he law in particular, and social institutions more generally, are blunt instruments. They are designed to deal with recurring situations confronted by numerous institutional actors over relatively long periods."[239] On the other hand, "morality is a sharp instrument. Morality can be, and typically ought to be, made to apply to a given situation in all its particularity."[240] This stance brings to mind the famous Fuller's Speluncean Explorers, whereby the explorers were trapped in a cave and had to kill and eat one of them for the rest to survive.[241] In this sense, it is argued that hard cases, like great cases, shape bad laws.[242] So, it would be absurd to draft a law to confront these rare cases. Given that, Miller

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[234] Seumas Miller, *Is Torture Ever Morally Justifiable?* International Journal of Applied Philosophy 19 (2005), at 186.
[235] Miller, at 182.
[236] Miller, at 183.
[237] Miller, at 186.
[238] Miller, at 185.
[239] Miller, at 188.
[240] Miller, at 188.
[241] Lon L. Fuller, *The Case of the Speluncean Explorers*, Harvard Law Review, Vol. 62, No. 4 (Feb. 1949), at 616-619.
[242] Northern Securities Co v. United States, 1 93 U.S. 1 97 (1 904) (Holmes, dissenting), p. 400, cited in Allhoff, at 218.

believes, the re-introduction and the protection of the practice of torture by legalizing it would be destructive to the law enforcement agencies of liberal democracies, which thrived for too long to disarm it.[243] Miller concludes that in these hard cases, the law enforcement personnel have to "bite the bullet" and perform what is morally acceptable: torture the perpetrator, and if the crime is discovered, the official in question should be "tried, convicted, and, if found guilty, sentenced for committing the crime of torture,"[244] notwithstanding the morality of the case.

In the same vein, Paula Gaeta agrees with Miller that extreme circumstances, such as the ticking bomb paradigm, should be taken into account as a mitigating circumstance in crimes of torture, similar to the case of obedience to the superiors under International Criminal Law.[245] Gaeta argues that this is the most favorable legal exit for the tense debate, as it preserves the humanity of the accused even though they are charged with terrorism and, at the same time, gets the law to recognize the extreme conditions as a reason for placing the accused of torture in a better position.[246] Miller adds that the *caught* law enforcement personnel should also "resign or be dismissed from their position; public institutions cannot suffer among their ranks those who commit serious crimes."[247]

This approach perfectly reflects how the legal and executive societies, apart from the legalization supporters, would comfortably end the debate. It is open to the discretion of the law enforcers to conduct torture. However, they not only exclusively bear the responsibility if their conduct is discovered but also will bear the consequences of their abstention from torture if the case so dictates. This approach would convince the law enforcers of the fallacy of the law and put the whole rule of law into question. The law should be applied rather than ignored or put on the shelf in certain circumstances.

Moreover, the rule of law should be tailored to meet the needs of the societies, not the vice versa. If we agreed with Miller and Gaeta, as most of the silent legislative, judicial, and executive cohorts are, then the result would be that the law enforcers will *probably* be exposed to be expelled from their positions if their conduct is discovered and will *surely* be expelled from their positions

[243] Miller, at 189.
[244] Miller, at 190.
[245] Gaeta, at 793, Miller, at 190.
[246] Gaeta, at 793.
[247] Miller, at 190.

if they failed to prevent the unfortunate events, which may have been prevented if torture was applied. Not to mention that conducting torture will not be discovered contrary to the failure to perform the duty to protect. The disbelief in the rule of law will lead to the conducting of torture, given the absence of its culture and education, indiscriminately, as they will outweigh the *probable* expulsion considerations for *certain* reasons. Now, the fear of being denounced and, therefore, expelled or, worse, prosecuted, I argue, will lead them to institutionalize torture for reasons other than revealing the truth. Instead, it will preserve the regime they can work safely below. In this case, judicial torture will be converted into sovereign torture, as discussed by Foucault in Chapter One. In that case, the whole absolutist system of banning becomes utterly fragile and helps in the opposite direction.

This loop explains the apologizing dogma for torture that Susan Marks illuminates, whereby the tortures, though working according to sovereignly accepted moral considerations, are blamed and expelled only if publicly exposed.[248] In the former cases only, such as the Abu Gharib scandal, the sovereigns will hurry to *apologize* for the actions of the torturers, swiftly apprehend them to justice, and pretend that these actions only happened on the individual scale. In contrast, this conduct is widely practiced secretly with neither apology nor accountability for no reason other than that it has not yet been discovered and proven.[249]

I cannot but think of the fictional statement made by Justice Keen in the famous case of the Fuller's Speluncean explorers. He claimed, through one of the judges, that "[h]ard cases may even have a certain moral value by bringing home to the people their responsibilities toward the law that is ultimately their creation, and by reminding them that there is no principle of personal grace that can relieve the mistakes of their representatives."[250] In our case, the hard case brings everyone, especially lawmakers, before their responsibilities. The current situation directs the blame to the law enforcers alone for breaking the law while, at the same time, achieving a moral cause. On the other hand, the system lacks the proper audit to ensure the perseverance of victims' rights (or potential victims). I call this *legislative hypocrisy*, which is making texts look perfect while intentionally not fulfilling the needs of those subjected. Neither of the torture parties enjoys

[248] Susan Marks, *Apologising for Torture*, Nordic Journal of International Law, 2004; Vol. 73, No. 3, at 377.
[249] Suzan Marks, at 377.
[250] Fuller, at 636, 637.

any protection, the torturer in the extreme and the tortured in the rest of the cases. It is either a morally rejected action and subsequently legislatively criminalized or not.

I cannot claim that I can or have the space to go through this moral/legal dilemma. For this reason, in the next chapter, I shall find out how courts have dealt with torture when raised.

IV. On Judicial Artifices

In the introduction to this chapter, it seems fitting to recall a statement by the late US Supreme Court Justice Antonin Scalia. He was known for being "one of the most influential justices of the twentieth century,"[251] and who "has had the most important impact over the years on how we think and talk about law."[252] For this reason is it striking to acknowledge a statement he made in an interview with BBC radio in 2008 that declared his adherence to the pro-torture school.[253] In the interview, Scalia stated that "smacking" someone in the face is *unbanned* by the Constitution if it is to reveal the location of a hidden bomb that is about to blow up in a metropolitan city.[254] He added, "[i]t would be absurd to say you couldn't do that. And once you acknowledge that, we [are] into a different game."[255] The "game" that Scalia meant is determining the criteria for using torture depending on the immense of the threat and its proportionality with the severity of the inflicted pain.[256]

Scalia renewed his argument in 2014, declaring that the Constitution prohibits torture only if it is a part of a punishment, not interrogation.[257] Scalia is not the only US jurist to make such claims. Another prominent American judge, Richard Posner of the Seventh Circuit, who is considered "the most cited U.S. legal scholar on record,"[258] restated the same concept, in suggesting that "only the most doctrinaire civil libertarians [...] deny [that] if the stakes are high enough, torture is permissible. No one who doubts that this is the case should be in a position of responsibility."[259] These prominent judges' statements show how entrenched this school of thought

[251] Jeffrey Rosen, *Why Antonin Scalia Will Rank Among the Most Influential Justices*, The Atlantic (2016), https://www.theatlantic.com/.
[252] Jeffrey Rosen, *id*.
[253] James Vicini, *Top court's Scalia defends physical interrogation*, Reuters, February 12, 2008, https://www.reuters.com/.
[254] James Vicini*, id.*
[255] James Vicini, *Id.*
[256] James Vicini, *Id.*
[257] Mark Sherman, Scalia: Constitution silent on torture, AP NEWS, December 13, 2004, available at: https://apnews.com/.
[258] Karen Sloan, *New "most-cited" legal scholars list includes big names, few women*, Reuters, https://www.reuters.com/legal/legalindustry/new-most-cited-legal-scholars-list-includes-big-names-few-women-2021-11-10/#:~:text=(Reuters)%20-%20Retired%20federal%20appellate,University%20law%20professor%20Ronald%20Dworkin (last visited January 26, 2023).
[259] S. Levinson, *The Debate on Torture: War Against Virtual States*, Dissent, Summer 2003, cited in Susan Marks, at 372.

is among the highest-ranking judges in the United States that torture is acceptable in some cases. This will undoubtedly be reflected in their verdicts.

In the last chapter, we have reviewed the scholarly opinions that support torture or at least consider it a morally accepted practice in some instances. These approaches may seem, if looked at alone, scattered, and valueless. However, we have also seen how they have found some resonance as seen in public opinion and echoed in a few pieces of legislation. In this chapter, I focus on judicial approaches to torture.

While the scope of this topic is broad, due to space limitations, I will introduce a few selected instances whereby courts deliberately admitted the usage of torture – in terms of special interrogation techniques - or used legal "maneuvers" to disregard the "strong" indications of the usage of torture in the cases at hand. I will focus on these verdicts to support my argument that some judiciaries have adhered to the legislative and scholarly approaches of closing their eyes to torture, albeit their states' international obligations to absolutely ban it. Many silent voices of law enforcement personnel and other supporters hide behind these more visible judicial voices. All these prove a single point: absolutism is a myth.

In this chapter, I have selected judicial verdicts and semi-judicial reports. While the formers include judicial decisions from European, U.S., Israel, and Canadian courts, the latter relates to reports issued by judicial authorities or committees, including judges in their formation. While these reports were mentioned in the previous chapter, they will be discussed more thoroughly here.

A. The European Court of Human Rights (ECHR)

Established by article (19) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the role of the Court is to "ensure the observance of the engagements undertaken by the High Contracting Parties [to the convention] and the Protocols thereto." The Convention tackles torture in both direct and indirect ways. Article 3 (Prohibition of Torture) states the prohibition against torture, which is stated in the exact wording of the UDHR. On the other hand, Article 6 (the right to a fair trial) specifies numerous conditions for a fair trial. One of these requirements is *Ei incumbit probatio qui dicit, non qui negat*, or the presumption of innocence, whereby the suspect cannot be exposed to maltreatment or forced to self-convict.

The ECHR approach is safeguarding the prohibition against torture stated in Article 3 of the Convention. Even in the most exceptional cases, the Court has firmly confirmed the absolute nature of the ban on using torture.[260] However, the Court has established extraordinary circumstances as a crucial factor that should be taken into consideration while examining any case dealing with torture or other sorts of degrading treatment. For example, in *Khalifa and Others v. Italy,* the Court confirmed that the migration influx challenges faced by the Italian authorities that followed the Arab Spring "could not absolve a State of its obligation under Article 3,"[261] the Court suggested that the "undeniable difficulties and inconveniences" faced by the Italian authorities should be considered while examining the case's merits.[262]

The ECHR has not specified the torture's elements in its jurisprudence. Instead, it tends to focus on answering the question of drawing a line between torture and other forms of inhuman or degrading treatment.[263] This emphasis is because Article 3 of the Convention does not specify the definitive characteristics of the act of torture and other cruel or degrading treatment. Accordingly, a complex and extensive body of jurisprudence has emerged from the European Court of Human Rights for determining the factors of an act to constitute torture and, therefore, differentiate it from other forms of ill-treatment.[264] For example, in *The Greek Case (1969)*, the European Commission of Human Rights[265] concluded that torture is an aggravated and purposive form of inhuman treatment.[266] Furthermore, in *Ireland vs. the U.K.,* the Court considered that an act to constitute torture is to cause severe and cruel suffering. Therefore, out of establishing the threshold of

[260] Council of Europe, Overview of the Court's case-law in 2016, European Court of Human Rights, (2017), *available at:* http://www.echr.coe.int/, at 22
[261] Overview, at 22, 23.
[262] *Khlaifia and Others v. Italy* [G.C.], no. 16483/12, ECHR 2016, cited in Overview 2016, at 23.
[263] Nina H. B. Jørgensen, *Complicity in Torture in a Time of Terror: Interpreting the European Court of Human Rights Extraordinary Rendition Cases*, Chinese Journal of International Law (2017), at 19.
[264] Debra Long, *Guide to Jurisprudence on Torture and ill-treatment (Article 3 of the European Convention for the Protection of Human Rights)*, Association for the prevention of torture (APT), June 2002, at 9*, available at:* https://www.files.ethz.ch/isn/16023/Guide%20to%20Jurisprudence%20on%20Torture_E.pdf.
[265] Article 19 of The European Convention on Human Rights set up the European Commission of Human Rights alongside the European Court of Human Rights. The Commission had an intermediary role in shielding the Court from frivolous suits. The Commission would hear cases and then refer its reports to the Court. It was abolished in 1999. *See* Arthur W. Diamond Law Library, *The European Human Rights System and the European Court of Human Rights. Research Guide,* Columbia Law School, August 19, 2003 – December 24, 2019, *available at*: http://www.law.columbia.edu/library/Research_Guides/internat_law/eur_hr
[266] Debra, at 14.

severity, the Court considered the acts of sleep deprivation, stress positions, deprivation of food and drink, and subjection to noise and hooding less than torture to constitute inhuman treatment.[267]

Since *Ireland vs. U.K.*, the Court has established that "[t]he Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct… there can be no derogation therefrom even in the event of a public emergency threatening the life of the nation."[268] However, in some instances, the jurisprudence of the ECHR suggests the opposite. For example, in *X vs. Germany* (1984), the European Commission considered that the forceful feeding of a person who was on hunger strike while in prison does not constitute an infringement of Article 3 of the Convention,[269] as the authorities "acted solely in the best interests of the applicant […] with a view to securing his survival through action might infringe the applicant's human dignity."[270] To reach this conclusion, The Commission has added, along with the purpose argument, the fact that the alleged degrading treatment was "relatively short" and "not more constraint than necessary to achieve [its] goal."[271] In this particular case, the Commission has taken into account the purpose of the act and the attitude of the victim into consideration in evaluating the occurrence of torture and similar treatments.

The Court's approach towards material evidence obtained contrary to Article 3 of the conventions is no less firm. In *Jalloh v. Germany* (2006), the Court found a case where police officers immobilized a suspect to have a tube insertion in his nose. Subsequently, a chemical substance was ejected into his stomach to force him to throw up a bubble containing cocaine, to be violating articles 3 and 6 of the Convention.[272] The Court also suggested that the violation of Article 3 occurred "irrespective of the seriousness of the offense allegedly committed, the weight attached to the evidence and the opportunities which the victim had to challenge its admission and use at his trial."[273]

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[267] Debra, at 14.
[268] *Ireland v. The United Kingdom*, 5310/71, Council of Europe: European Court of Human Rights, December 13 1977, § 168. *Available at:* https://www.refworld.org/cases,ECHR,3ae6b7004.html [accessed January 12, 2023]
[269] Debra, at 23.
[270] *X. v. GERMANY*, 10565/83, Council of Europe: European Court of Human Rights, May 9, 1984, Commission (Plenary), Decision, § 1.
[271] *Id.*
[272] Jalloh v. Germany, 54810/00, Council of Europe: European Court of Human Rights, July 11, 2006, §105, 108.
[273] Jalloh v. Germany, §106.

However, the Court, to find out if the right to self-incriminate was violated or not, one of its criteria was "the weight of the public interest in the investigation and punishment of the offence in issue."[274] In using such a test, the Court has found that using a forceful medical intervention to obtain evidence of drug dealing was unproportionate with a "street dealer who was offering drugs for sale on a comparatively small scale and who was eventually given a six-month suspended prison sentence and probation."[275] In such circumstances, the test of public interest, which justifies grave interference with physical and mental integrity, is not satisfied.[276] Suppose this situation is hypothetically reversed by assuming that the public interest requires securing the conviction of the offender, such as in cases of trialing a serial killer or a leader of a terrorist organization. In these cases, using the public interest test will lead to different results, which may indicate that the right against self-incrimination has not been violated.

Another more evident example can be found in *Gäfgen v. Germany* (2010),[277] where a young man abducted a child and killed him. The former confessed the crime under what the Court has classified as inhuman treatment, such as threatening to be raped by prison inmates, punching him several times in the chest, hitting his head against the wall, and forcing him to lead the police officers to the victim's corpse in the woods with bare feet.[278] The ECHR has started the case assessment by asserting that even in extreme conditions, such as the fight against terrorism and organized crime, torture and inhuman or degrading treatment or punishment are still banned by the Convention.[279] Therefore, the Court stated that "[b]eing absolute, there can be no weighing of other interests against [the absolute nature of article 3], such as the seriousness of the offence under investigation or the public interest in effective criminal prosecution, for to do so would undermine its absolute nature."[280] Finally, the Court found that Article 3 of the Convention had been violated.[281]

[274] Jalloh v. Germany, §117.
[275] Jalloh v. Germany, §119.
[276] Jalloh v. Germany, §119.
[277] *Gäfgen V. Germany*, 22978/05, Council Of Europe: European Court Of Human Rights, June 1, 2010.
[278] Gäfgen V. Germany, § 15, 17.
[279] Gäfgen V. Germany, § 87.
[280] Gäfgen V. Germany, § 87.
[281] Gäfgen V. Germany, § 132.

However, there were two notable issues in this judgment: one pertains to the local Court's verdict against the two police officers charged with such a violation, and the other is related to the finding of the Court relating to the breach of Article 6 of the Convention

Firstly, though the two officers were convicted of committing coercion during their duties, the regional Court, in terms of penalty, cautioned both of them, besides imposing a suspended fine of 60 euros (EUR) per diem for 60 days on one of them, and another suspended fine of EUR 120 per diem for 90 days on the other, which would come to effect if either of them committed another offense during the probation period.[282] Furthermore, the defendant's application to claim remedy has been pending for over three years.[283] In my view, this fake-conviction scenario covertly denied the right for reparation, which the Court rendered insufficient redress for the breach of Article 3,[284] is a direct application to the test of balancing interests that the ECHR validated in *Jalloh v. Germany*. The Regional Court has considered numerous mitigating circumstances, which include the fear of the life of the abducted child and their respective responsibilities before the society and superior authorities.[285] What I want to point out here is that the regional Court, in its assessment, considered that the situation deserves the prohibited action. It performed the balancing test and believed the officers were compelled to act as they did. Nonetheless, the Court was confronted with the "absolute" texts. Hence, it applied a significantly mitigated penalty, which is closer to acquittance than to conviction.

The second note is how the Court has regarded the material evidence derived from a confession in violation of Article 3 of the Convention. Notwithstanding the unsettled question of whether the use of such evidence will automatically render a trial unfair,[286] the Court has found that the effectiveness of Article 3 requires the exclusion of any factual evidence obtained in violation of Article 3, “even though that evidence is more remote from the breach of Article 3 than evidence extracted immediately as a consequence of a violation of that Article.”[287] However, in the present case, the ECHR has found that the material evidence in question "was not used by the Regional

[282] Gäfgen V. Germany, § 49.
[283] Gäfgen V. Germany, § 126.
[284] Gäfgen V. Germany, § 129.
[285] Gäfgen V. Germany, § 50.
[286] Gäfgen V. Germany, § 173.
[287] Gäfgen V. Germany, § 178.

Court against the applicant to prove his guilt, but only to test the veracity of his confession."[288] Therefore, it has not been found that Article 6 of the Convention has been violated.[289] Ironically, the fact that the victim is dead was only known as a result of the coerced confession and the derived material evidence thereto. Thus, the whole case of murder, not only evidence, was based upon the material evidence, which resulted in a violation of Article 3. All other evidence that the national Court has relied upon is related to the act of abduction, such as "the testimony of the [victim's] sister, the wording of the blackmail letter, the note found in the applicant's flat concerning the planning of the crime, as well as ransom money which had been found in the applicant's flat or had been paid into his accounts."[290] None of this evidence can prove murder, only blackmailing. The Court's finding shows that the Court while settling a platonic rule, undermines the same rule by finding loopholes in the folds of every individual case to get a legal or factual safe exception.

Ahmad and Others v U.K. (2013) marks "a radical departure from […] strictly upholding the protections afforded by Article 3."[291] In this case, the applicants were charged with terrorism-related felonies in the United States, and, under the U.K. – USA Extradition Treaty (1972), they were subjected to extradition to the U.S.[292] They alleged that "if extradited and convicted in the United States, they would be at real risk of ill-treatment either as a result of conditions of detention at ADX Florence (which would be made worse by the imposition of 'special administrative measures') or by the length of their possible sentences."[293] The ADX prison in Florence is called a "supermax prison" with severely curtailed freedoms.[294] According to a psychiatrist report provided by the applicants, the detention conditions and measures taken at ADX Florence can cause "symptoms ranging from panic to psychosis and emotional breakdown" that once occurred cannot be reversed.[295] The Court's assessment reiterated its well-established case law that the alleged imprisonment circumstances, which include solitary confinement, sensory isolation, and total social isolation, can destroy the personality and deteriorate the mental faculties and social

[288] Gäfgen V. Germany, § 179.
[289] Gäfgen V. Germany, § 188.
[290] Gäfgen V. Germany, § 179.
[291] Case Summary of Ahmad and Others V U.K. (2013) 56 EHRR 1, *available at*: https://www.lawteacher.net/cases/ahmad-and-others-v-uk.php (last visited January 20, 2023).
[292] BABAR AHMAD AND OTHERS V. THE UNITED KINGDOM, Applications nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, Council of Europe: European Court of Human Rights, April 10 2012, § 4.
[293] *Id.*
[294] Case Summary of AHMAD AND OTHERS V U.K. (2013) 56 EHRR 1,
[295] Babar Ahmad And Others V. The United Kingdom,§ 99.

abilities of the prisoner.[296] Therefore, these measures are "a form of inhuman treatment which cannot be justified by the requirements of security or any other reason."[297] Also, The Court recalled the approach the Human Rights Committee had taken, whereby the Committee considered that Article 7 of the ICCPR prevents the refoulement of the suspect when there is a *real risk* of torture or any other forms of ill-treatment.[298] Further, the Court noted that "the Charter on Fundamental Rights of the European Union, which provides that no one may be removed, expelled or extradited to a State where there is a *serious risk* that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."[299] Nonetheless, the ECHR Unanimously dismissed the case on the grounds of the lack of evidence that the applicants would automatically be placed at ADX upon conviction, as "not all inmates who are convicted of international terrorism offenses are housed at ADX."[300] Moreover, the Court pointed out that "the United States' authorities would be justified in considering the applicants, if they are convicted, as posing a significant security risk and justifying strict limitations on their ability to communicate with the outside world."[301]

The precedence in question is regarded to be a radical change in the approach of the Court on the relationship between counterterrorism and the prohibition of torture, especially regarding non-refoulment.[302] In the last fifteen years, the Court has established a jurisprudence constant regarding the absolute nature of the ban on torture.[303] The jurisprudence of the Court was that the refoulement is prohibited when there is a grave risk that the applicant may be treated contrary to Article 3, "regardless of who the potential victim of torture, inhuman or degrading treatment is, what she may have done, or where the treatment at issue would occur."[304] Alas, in *Ahmed,* the Court has established a new rule, which clearly states that the contracting parties cannot impose their conventional standards on the non-contracting countries.[305] Accordingly, the same act violating Article 3 in a contracting state may not be regarded as a violation thereof in a non-contracting

[296] Babar Ahmad And Others V. The United Kingdom,§ 206, 207.
[297] Babar Ahmad And Others V. The United Kingdom,§ 206.
[298] Babar Ahmad And Others V. The United Kingdom,§ 175.
[299] Babar Ahmad And Others V. The United Kingdom,§ 175.
[300] Babar Ahmad And Others V. The United Kingdom,§ 175.
[301] Babar Ahmad And Others V. The United Kingdom,§ 175.
[302] Natasa Mavronicola & Francesco Messineo, *Relatively Absolute? The Undermining of Article 3 ECHR in Ahmad v U*.K., 76 The Modern Law Review 589 (2013), at 590.
[303] Natasa Mavronicola & Francesco Messineo, at 589.
[304] Natasa Mavronicola & Francesco Messineo, at 589.
[305] Babar Ahmad And Others V. The United Kingdom,§ 177.

state.[306] Thus, the Court has innovated new criteria regarding the territory where the violation – or non-violation – of Article 3 occurs.

Further analysis of the language of the ECHR judgment may suggest a clearer understanding of the new turnover. In the Court's assessment, it added that it has been so rare to find that there is a violation of Article 3 if the applicant is to be refouled to "a state which had a long history of respect of democracy, human rights and the rule of law."[307] That is, *cultural relativism*, when it is the United States has the right to impose restrictions on detainees that amount to inhuman or degrading treatment without being considered as inhuman or degrading. Apart from the flagrant cultural bias, the statement collides with the lengthy record of Human Rights violations of the U.S., which starts from Guantanamo and does not end with Abu Ghraib.

In this regard, Natasa Mavronicola and Francesco Messineo argue that the Court suggested that "the threshold can depend on the cultural and political affinity of the receiving country with 'European' values of 'democracy, human rights, and the rule of law.'"[308] I would add two factors: the war against terrorism and security concerns. These aggregated factors draw the whole picture: the "good" states have the right to maintain their security against the "evil" terrorists. For this quest, their "violation" of the absolute prohibition stated in Article 3 will not be considered so. The Court asserts relative absolutism regarding the security concerns of selected states against imminent threats.

B. The United States

Although the United States played an active role in the CAT drafting, it did not ratify the Convention until 1994.[309] Moreover, the Senate did not promulgate implementing regulations according to the Convention except in 1999.[310] A few years later, the U.S. commitment to its obligation under the Convention was subjected to a significant test: the terrorist attacks of September 11, 2001, the subsequent invasion of Afghanistan and Iraq, and the deployment of

[306] Babar Ahmad and Others V. The United Kingdom,§ 177.
[307] Babar Ahmad and Others V. The United Kingdom,§ 179.
[308] Natasa Mavronicola & Francesco Messineo, at 602.
[309] Trent Buatte, *The Convention Against Torture and Nonrefoulement in U.S. Courts,* Georgetown Immigration Law Review (December 1, 2020), *available at*: SSRN: http://dx.doi.org/10.2139/ssrn.3740637, at 5.
[310] Trent Buatte, at 5.

Guantanamo Bay detention camp. Nevertheless, it can hardly be found any lawsuit where courts validated claims of torture post 9/11.

The U.S. authorities reported to the U.N. Committee against Torture that "'various avenues' exist, and a 'wide range of civil remedies' are available to victims of torture to obtain redress."[311] The barriers against successful claims are due to two reasons: first, according to Concluding Observations of the CAT Committee (2014) on the periodic reports of the USA, the latter's judicial authorities have failed to "fully investigate allegations of torture and ill-treatment of suspects held in United States custody abroad, evidenced by the limited number of criminal prosecutions and convictions."[312] The other, perhaps more relevant reason, is the numerous procedural barriers and immunities granted to public officials against lawsuits brought by the victims of torture.

Despite the U.S. official claim, various procedural barriers blocked lawsuits in the early stages.[313] In such cases, courts find that the subject matter of these cases touches on state immunity, foreign policy, or national security, which should be dealt with exclusively through the executive branch.[314] For example, in *Khaled El-Masri v. United States* (2014), the petitioner brought a damages action against the former director of the CIA. He based his action on being abducted by Macedonian officials and then interrogated by CIA personnel in Afghanistan using methods impermissible under U.S. and international laws, whereby his rights under the Constitution and international law were violated.[315] However, "the United States filed a Statement of Interest asserting the state secrets privilege and seeking a stay of all proceedings."[316] The then-CIA Director Porter Goss claimed that "the protection of classified intelligence data dictates its non-disclosure to avoid damage to the national security and [the] nation's conduct of foreign affairs."[317] Hence, the Court of First Instance dismissed the case because it could not proceed without disclosing classified information. Such a disclosure is banned under the national security considerations, and the Court of Appeal has upheld such dismissal.[318] The Supreme Court

[311] Laura Pitter, No More Excuses, Human Rights Watch (2015), https://www.hrw.org/report/2015/12/01/no-more-excuses/roadmap-justice-cia-torture, at 100.
[312] CAT/C/USA/CO/3-5, at 4.
[313] Laura Pitter, at 101.
[314] *Id.*
[315] *El-Masri v. United States - Opposition*, (2014), *available at:* https://www.justice.gov/osg/brief/el-masri-v-united-states-opposition.
[316] *Id.*
[317] *Id.*
[318] *Id.*

highlighted that "a case must be dismissed if a fact 'central to the suit' is such a secret," so the Supreme Court has also dismissed the case.[319] Thus, courts are not likely to dismiss cases of torture on their own merits. Instead, they can set procedural barriers against suing them, which, in the end, will lead to the same result.

Another procedural barrier is immunity against claims. The U.S. courts adopted the public officials' immunity approach, whereby they accept the argument that "torture, abuse, and other [similar] illegal acts fall within the scope of government employment."[320] The officials' immunity doctrine is manifested clearly in *Re Iraq Afghanistan Detainees Litigation* (2007).[321] In this case, a handful of plaintiffs who were detained in the U.S. prisons in Afghanistan and Iraq sued the U.S. key official personnel, including the former Secretary of Defense, Donald Rumsfeld, for the maltreatment they were exposed to during their detention.[322] They alleged that such abuse amounted to torture, as they were exposed to sexual assaults, physical violence, electrical shocks, and hanging for hours.[323] In its findings, the Court established that the defendants were to be granted "qualified immunity."[324] According to the Court, the "qualified immunity" doctrine is the immunity granted to public officials against "liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[325] In the present case, the Court stated that when the alleged injuries occurred to the defendants, the established case law did not impose any constitutional rights upon non-resident aliens.[326] In other words, the constitutional protection has no extraterritorial effect. Although the plaintiffs have argued that exercising torture is *unlawful,* the Court insisted that "what must be 'clearly established' is the constitutional right."[327] Therefore, the Court has laid down that qualified immunity constitutes a barrier against any injuries that occurred by public officials against non-resident aliens, regardless of how horrific the injury is.

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[319] *Id.*
[320] Lisa Magarrell and Lorna Peterson, *After torture U.S. Accountability and the Right to Redress,* International Center for Transitional Justice, August 2010, at 13.
[321] *Re Iraq Afghanistan Detainees Litigation*, 479 F. Supp. 2d 85 (D.D.C. 2007).
[322] *Id.*
[323] *Id.*
[324] *Id.*
[325] *Id.*
[326] *Id.*
[327] *Id.*

Another flagrant procedural barrier is the lack of jurisdiction. In *Shafiq Rasul et al. v. Richard Myers, Air Force General, et al.*, a federal appeals court dismissed a case brought by Shafiq Rasul, a British citizen, and others who were captured in Afghanistan and detained for two years in Guantanamo for alleged membership in Al Qaeda.[328] Throughout their detention, they have experienced numerous coercive investigation methods by U.S. officials that include beating, shackling, sleep deprivation, and hanging in hogtied positions.[329] Afterward, they were sent back to England without being charged or compensated.[330] They filed a case against the then-Secretary of Defense, Donald Rumsfeld, and various other military officials, accusing the latter of using multiple forms of torture upon approval of the former.[331] In reasoning the dismissal, the Court invoked the Detainee Treatment Act (2005), which strips the federal courts of its jurisdiction over habeas petitions by Guantanamo detainees, the Military Commissions Act (2006), which limits the War Crimes Act to exclude degrading or humiliating treatment, and the Westfall Act, which release from liability for acts undertaken within the scope of their employment and switch the liability for fiscal damages from federal government officials to the government.[332] Unsurprisingly, the Court, while evaluating the factors that constitute the subordination that triggers the Westfall defense, considered the acts of torture as "incidental" and "foreseeable" to take place in U.S. military camps while interrogating enemy combatants.[333] In this regard, the Court noted the following:

> In fact, as the district court correctly noted, 'the complaint alleges torture and abuse tied exclusively to the plaintiffs' detention in a military prison and to the interrogations conducted therein.' […] While the plaintiffs challenge the methods the defendants used to perform their duties, the plaintiffs do not allege that the defendants acted as rogue officials or employees who implemented a policy of torture for reasons unrelated to the gathering of intelligence. […] Therefore, the alleged tortious conduct was incidental to the defendants' legitimate employment duties.[334]

Moreover, the Court has not considered the *serious criminality* of the acts of the interrogators a waiver of being incident or foreseeable to the "legitimate" duty of the defendants. The Court

[328] Jaykumar A. Menon, *Guantánamo Torture Litigation*, 6 Journal of International Criminal Justice 323 (2008), at 325, 326.
[329] Jaykumar A. Menon, at 327.
[330] Jaykumar A. Menon, at 327.
[331] Jaykumar A. Menon, at 328.
[332] Jaykumar A. Menon, at 330.
[333] Jaykumar A. Menon, at 342.
[334] Rasul v. Myers, 512 F.3d 644 (D.C. Cir. 2008), at 19, 20.

upheld that the serious criminality conduct is an integrated part of the interrogation mission, as follows:

> While it may generally be unexpected that seriously criminal conduct will arise "in the prosecution of the business," here it was foreseeable that conduct that would ordinarily be indisputably "seriously criminal" would be implemented by military officials responsible for detaining and interrogating suspected enemy combatants. […] Therefore, the allegations of serious criminality do not alter our conclusion that the defendants' conduct was incidental to authorized conduct.[335]

The Court's wording that serious criminal conduct that amounts to torture is incidental and foreseeable during investigations conducted by the U.S. military shows judicial conviction towards the reality of the absolute torture banning; the banning falls when it contradicts the war effort against terrorism and the will to acquire sensitive secrets. By considering torture as incidental and foreseeable, the Court, notwithstanding its illegality, normalizes it as a reasonable component and rational outcome of interrogation techniques.

C. Israel

The scope of research here is limited to only discussing how the Israeli Judiciary regards torture, not debating how different Israeli agencies, in general, use torture. One may think that the long, infamous Israeli record regarding Palestinians is an excellent reason to avert Israel from the research. The reply has two folds: first, according to the World Bank data, Israel has occupied the 33rd place among 192 world countries in the rule of law index issued by the World Bank in 2021.[336] Its ranking is higher than any Arab country, for example.[337] Even in its lowest rank in 2004 (44th), it was superior to all Arab countries.[338] Second, Israel is believed to have a long history of facing the so-called "terrorism." One may agree or disagree with labels, but in all cases, even if it contradicts one's self-beliefs, the Israeli example will enrich any study tackling the relationship between security concerns and torture. So, it is here where we scrutinize the Israeli judicial approach regarding torture, regardless of how the Israeli military or intelligence systematically or routinely implements it.

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[335] Rasul v. Myers, 512 F.3d 644 (D.C. Cir. 2008), at 22, 23.
[336] Rule of law by country, around the world, TheGlobalEconomy.com, *available at:* https://www.theglobaleconomy.com/rankings/wb_ruleoflaw/ (last visited July 20, 2023).
[337] The following Arab country is Qatar, ranked 34th, followed by the UAE, ranked 42nd, Egypt, ranked 102, *Id*.
[338] *Id.*

In a report submitted by Israel on December 6, 1997, to the Committee against Torture,[339] the Israeli government stated that Israel is a signatory to the Convention against Torture and that the Israeli penal law criminalizes all forms of torture or maltreatment.[340] However, the same report argued that the Israeli authorities have developed "guidelines […] designed to enable investigators to obtain crucial information on terrorist activities or organizations from suspects who, for obvious reasons, would not volunteer information on their activities, while ensuring that the suspects are not maltreated."[341] The report – in this way – raises serious questions about the possibility of pressing on the alleged terrorists while, at the same time, ensuring that they will not be maltreated, let alone tortured.

The guidelines stated in the report were laid down by the Landau Commission (1987). This Commission was chaired by the former president of the Supreme Court of Israel, Moshe Landau. The background of its formation was the attempts made by major General Security Service (GSS) personnel to mislead judicial teams investigating hostile attacks by giving them false testimonies.[342] Due to these attempts being exposed, a thorough investigation took place by and within the GSS. This investigation resulted in disclosing that the GSS used torture to extract confessions from suspected terrorists.[343] Also, these confessions led the suspects to be convicted by military courts.[344] One of them was an IDF officer accused of treason and spying.[345] After holding 43 sessions and hearing 42 witnesses, the Commission, including the then-Israeli prime minister himself, former and current heads of the GSS, and other public officials,[346] have concluded that "effective interrogation of terrorist suspects is impossible without the use of means of pressure."[347] The Commission has set a hierarchy regarding this pressure: it stated that the pressure should, in the first place, take the form of psychological pressure, which is based upon "stratagems, including acts of deception."[348] However, if the stratagems did not work, "the exertion

[339] CAT/C/33/Add.2/Rev.1, Israel revised special report on interrogation under Article 19 CAT, February 18, 1997, available at https://www.un.org/unispal/document/auto-insert-178308/ (last visited July 20, 2023).
[340] *Id,* para. I (2).
[341] *Id,* para. I (3).
[342] State of Israel, *Commission of Inquiry into the Methods of Investigation of the General Security Service (GSS) Regarding Hostile Terrorist Activity (HTA)*, Report, Part 1, Jerusalem, October 1987, at 7.
[343] *See Id,* at 8.
[344] *Id,* at 6.
[345] *Id,* at 9.
[346] *Id,* at 2.
[347] *Id,* at 79.
[348] *Id,* at 80.

of a moderate measure of physical pressure cannot be avoided."[349] The Committee did not illustrate what "moderate measure" or "physical pressure" means in the published part of the report. Instead, it set its guidelines in the second unpublished – secret - part.[350] The Commission added that these guidelines codify the scattered internal GSS instructions.[351] Interestingly, the Commission affirmed that the implementation of these guidelines, in letter and spirit, will render the interrogations "far from the use of physical or mental torture, maltreatment of the person being interrogated, or the degradation of his human dignity."[352]

As a result of the secrecy, I can neither grasp nor judge the methods proposed by the Committee. The only conclusion that I can reach is that the Committee, which is headed by a former Supreme Court head, acknowledges the usage of "moderate measure" or "physical pressure" in interrogations to extract vital information from terrorist suspects, which, by all possible means, contradicts with all absolutists' approach. One of the pillars of the Commission's opinion is preserving state security against terrorist attacks based on necessity.[353] However, this Guidelines were later overturn by the Israeli High Court judgement that will be discussed in the next chapter.

A direct application of the Commission's view and guidelines can be found in the 1997 report submitted to the Committee against Torture. The report stated that the High Court canceled two interim injunctions banning the GSS from using any physical pressure against the petitioners during interrogation.[354] The cancelation came after the petitioners were proven to indulge in hostile activities that threatened the lives of civilians.[355] At the same time, the report has quoted the Court's judgment that 'the cancellation of the interim order should not be seen as permission for the investigators to use measures which are incompatible with the law and *the relevant guidelines*.'[356] The reference of the courts to the guidelines proves that the usage of physical pressure became a judicially approved practice in Israel whenever the question of state security arises.

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[349] *Id.*
[350] *Id.*
[351] *Id.*
[352] *Id.*
[353] *Id.*
[354] CAT/C/33/Add.2/Rev.1, para. II (20), (21).
[355] *Id.*
[356] *Id.*

D. Canada

In *Suresh v. Canada (Minister of Citizenship and Immigration)* (2002), The Canadian Supreme Court upheld the view of the Federal Court and the Court of Appeal that the refoulment of a refugee suspected of terrorism to a country where they may suffer maltreatment is possible depending on national security concerns, notwithstanding the absolute nature of the prohibition of torture.[357]

The facts can be summarized in that the applicant, Manickavasagam Suresh, who is a Sri Lankan Citizen, was considered a Convention refugee by Canadian authorities since 1991, whereby he cannot, under Canadian law, be refouled to a state where his life or freedom can be arbitrarily threatened.[358] However, the competent immigration authorities have issued a certificate to deport him to Sri Lanka for constituting a danger to Canadian security.[359] They based the certificate on the statement of the Canadian Security Intelligence Service (CSIS) that Suresh is a member of a terrorist organization.[360] The refoulment was decided despite the human rights reports that warn against the widespread practices of torture by the Sri Lankan officials, namely against alleged members of the LTTE.[361]

As a result, Suresh filed a judicial appeal against the refoulment decision.[362] However, the Federal Court dismissed Suresh's petition for reasons of the failure of Suresh to furnish a plausible statement to the competent authority, discussing the reasons he believes he will be at risk.[363] Further, the Federal Court of Appeal upheld the decision on the basis that "the right under international law to be free from torture was limited by a country's right to expel those who pose a security risk."[364] Moreover, The Court found that while deportation to torture violates the right

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[357] ICD - Suresh v. Canada - Asser Institute, https://www.internationalcrimesdatabase.org/Case/1152/Suresh-v-Canada/#p7 (last visited July 25, 2023).
[358] *Suresh v. Canada* (Minister of Citizenship and Immigration), 2002 SCC 1, January 11, 2002 - SCC Cases, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1937/index.do (last visited July 25, 2023). Para.7.
[359] *Id, para. 16.*
[360] The organization is the Liberation Tigers of Tamil Eelam (LTTE). According to the Court, it is "an organization that, according to CSIS, is engaged in terrorist activity in Sri Lanka and functions in Canada under the auspices of the World Tamil Movement (WTM)." *Id.* Para. 10.
[361] *Suresh v. Canada,* para. 11.
[362] *Suresh v. Canada,* para. 17.
[363] *Suresh v. Canada,* para. 18.
[364] *Suresh v. Canada,* para. 20.

to life, liberty, and security of the person, it is justified for "preventing Canada from becoming a haven for terrorist organizations."[365]

The Supreme Court found that its task is limited to determining whether the ministerial decision-making process was done in conformity with the limitation imposed by the legislation and the Constitution, not reweighing the different factors considered by the competent authority.[366] So, the Court concluded that "if the Minister has considered the correct factors, the courts should not reweigh them,"[367] provided that the decision is not "unreasonable on its face, unsupported by evidence, or vitiated by failure to consider the proper factors or apply the appropriate procedures."[368]

In determining whether deportation to torture constitutes a violation of the notions of fundamental justice, which is qualified as the statute, the jurisprudence, and *jus cogens*, the Court expressly applied the proportionality test.[369] It suggested that it is not impossible or contrary to the Canadian Charter to expel someone to a state where he/she may face acts counter to the Canadian Constitution; it depends upon balancing the state's interest and the degree of maltreatment the suspect may face.[370] The Court, though forfeiting the fact that deportation to torture is a violation of both national and international obligations, even if this deportation serves national security interests, did not state that this violation is absolute.[371] Instead, the Court used the words *generally, almost,* and *barring extraordinary circumstances*.[372] That was later in the judgment clarified where the Court stated that reading the Canadian Charter justifies, in exceptional cases, deportation to face torture elsewhere.[373] In any case, the Court has referred the matter to the balancing test exercised on a case-by-case basis.[374]

This judgment was subjected to extended official and scholarly debate and criticism. For example, it was described by the annual report of the Committee against Torture as a "failure of

[365] *Suresh v. Canada,* para. 21.
[366] *Suresh v. Canada,* para. 38.
[367] *Suresh v. Canada,* para. 41.
[368] *Suresh v. Canada.*
[369] *Suresh v. Canada,* para. 47.
[370] *Suresh v. Canada,* para 58.
[371] *Suresh v. Canada,* para.75.
[372] *Suresh v. Canada,* para. 76.
[373] *Suresh v. Canada,* para. 78.
[374] *Suresh v. Canada.*

the Supreme Court of Canada […] to recognize at the level of domestic law the absolute nature of the protection of article 3 of the Convention, which is not subject to any exception whatsoever."[375] Moreover, it is argued that bearing in mind the international momentum regarding the war against terrorism when considering the case, the Judiciary could not be uninfluenced by these events in the decision-making process.[376] David Jenkins accused the notorious *Suresh exception* of the Canadian government's use to "abuse human rights out of an otherwise legitimate concern for national security; temptation, fear, and a false sense of necessity."[377] Peter J. Carver finds that due to finding itself in an "uncomfortable position at an uncomfortable time" in the middle of the international antiterrorism waves, the Court has sheltered from this complex situation by referral of the balancing task to the executive.[378] In any case, the Court has immersed the necessity debate in discussing the absolute nature of the prohibition against torture. It allowed necessity, in the form of national security concerns, to steer the wheel from the rigid absolutism to the balancing mechanism. It exchanged the definite by the relative, which constituted a relevant benchmark in the history of the Court.

The Judicial artifices produced by the national security necessities' hammer and the absolute prohibition of torture's anvil are perceivable. While the judicial deviation from absolutism is considered more subtle than the legislative and jurisprudential, it has a more substantial impact. It paves the way for executive practices to apply the exceptions widely and arbitrarily under the judicially invented exceptions, which may be, in many cases, vague and uncertain. That would move the argument to the next chapter, which is a digest of the first three chapters to analyze the reasons behind the failure of absolutism.

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[375] United Nations, Report of the Committee against Torture, Thirty-third session (16-26 November 2004), Thirty-fourth session (2-20 May 2005), General Assembly Official Records Sixtieth session Supplement No. 44 (A/60/44), para. 57, at 26.

[376] Amira Hetaba. *Balancing refoulement to torture against security interests - the pitfalls of the Suresh exception*. 2017. American University in Cairo, Master's Thesis. AUC Knowledge Fountain, at 18.

[377] David Jenkins, *Rethinking Suresh: Refoulement Under Canada's Charter of Rights and Freedoms* (2009), 47 Alberta Law Review 125, (2009), at 154.

[378] Peter J. Carver, *Shelter from the Storm: A Comment on Suresh v. Canada (Minister of Citizenship and Immigration)*, 40 ALTA. L. REV. 465 (2002), at 492.

V. On Absolutists Hypocrisy

Absolutism in banning torture is an example of idealism in PIL. One manifestation of the classic arguments regarding idealism is reflected in this 2008 quotation by the prominent late Egyptian scholar Ahmed Fathi Sorour. It manifests how PIL is introduced in scholarly books and taught in law schools, though questionably applied in practice. In tackling the topic of balancing between countering terrorism and human rights, Sorour firmly asserted that:

> [T]he weapon of terrorism should be confronted by the weapon of justice. Corrupt thoughts must be wiped out with good ideas. Harm should not be faced by harm, but the law should be protected by law. Terrorism cannot be countered by more terrorism or more misery, but otherwise, the war must be for the sake of protecting the rule of law. Terrorism, as described as a threat to human rights, will achieve its targets if it is fought out of the scope of human rights.[379]

The idealism seen in Prof. Sorour's contention is an example of the prevailing literature regarding the absolute banning of torture; it rarely gives answers to the questions of hard cases; it is challenging to convince law enforcement personnel to abide by the "weapon of justice" when many innocent lives are at stake, let alone define the "weapon of justice." Namely, if the "weapon of justice" is temporarily unfunctional, the cost of non-usage of alternative weapons may be high in the way discussed in chapter two. On the other hand, if this rhetorical statement is compared to the prevailing practice at that time, a colossal divergence can be noted. These critiques conclude that absolutist norms can hardly find their way to present in practice. More seriously, it brings to mind the model of adhering to the rule in theory and overturning it in practice.

This chapter is the final piece of the absolute banning myth puzzle. After revealing the incredibility of the historical narrative of abolishing torture, the factual necessities that dictate the resurgence of torture, and the judicial trials to escape the discomfiture between texts and practice, we come finally to analyze the gap between idealism and realism regarding banning torture.

To this end, my methodology is looking at idealism through the lens of narrative PIL, which focuses on setting aspirational goals and principles with little attainment of these goals. On the other hand, the critical instrument to actual impact lies in enforcement, which can rarely go hand in hand with idealism. Then, I focus on the history of international law, which reveals a "legislative hypocrisy" by which drafters knew enforcement was crucial yet often prioritized idealistic

[379] Ahmed Fathi Sorour, *The Legal Counterterrorism*, *Al mokafaha al qanuneya lel erhab*, Al Ahram Center for Translation and Publication, Egypt, 2nd edition, 2008, 172.

pronouncements. This hypocrisy leads to "ratifying hypocrisy." Afterward, I demonstrate some statistics showing that many states ratify the Convention Against Torture (CAT) but are cautious about mechanisms that hold them accountable, like recognizing individual complaints or ratifying the Optional Protocol to the CAT (OPCAT). These latter instruments do not create new obligations but enforce existing ones. I end by highlighting the gap between idealistic pronouncements and the practicalities of ensuring compliance.

It goes unnoticed that no legal rule is absolute; banning torture is like any other legal rule that cannot be fully attained. However, in this chapter, I am trying to analyze additional barriers that were set in the way of achieving the enforceability of the legal rule. These barriers are related to elements known to lawmakers to be hindering enforceability. Nonetheless, the lawmakers did not try to tackle them either neglectingly or on purpose.

A. Absolutism: A Manifested Example of Narrative PIL

The distance between Dr. Sorour's idealism and the practices of states is wide. This is exemplified in Prof. Jason Beckett's paper *The Divisible College: A Day in the Lives of Public International Law*. In this text, Beckett has divided the PIL into a dual college: the narrative PIL which is "law as we learn it" and the material PIL or "the law as it is."[380] He cites Suzan Marks's well-known concept of *False Contingency* to allege that the narrative PIL only "produces legal fantasies—visions of an unrealizable world to come."[381] That is because the PIL is toothless; "the absence of enforcement of PIL deprives it of its character as a legal system."[382] The inefficiency problem is more complicated due to "there is no person or body authorized to make authoritative decisions on the momentary content and meaning of the law. The system is not institutionalized, and anyone can claim to determine its content."[383] Lastly, the contradictory nature of PIL is manifested in many instances. For example, although there are 173 states party to the CAT and the CIL prohibit torture, it is noted that more than 140 states torture their citizens.[384] This fact is a shocking

[380] Jason Beckett, *The Divisible College: A Day in the Lives of Public International Law*, 23 GERMAN L.J. 1159 (2022), at 1159.
[381] Susan Marks, False Contingency, 62 CURRENT L. PROBS. 1, 11 (2009); Susan Marks, Human Rights and Root Causes, 74 MOD. L. REV., 57 (2011), cited in *Id,* at 1161.
[382] Jason Beckett, at 1161.
[383] *Id, at 1163.*
[384] Amnesty International, *Stop Torture*, https://www.amnesty.org/en/get-involved/stop-torture/, cited in *Id,* at 1168.

manifestation of the divergence between practice and the tons of literature that consider banning torture as one of the top *erga omnes* rules and a non-degradable right.

Beckett further explains Prof. Sorour and his counterparts' failure idealism. He argues that the narrative PIL is a set of elite moral rules with no flaws, while the material PIL comprises a pile of enforced rules in the international field. The difference is that the former lacks coherence and enforcement mechanisms, while the latter enjoys high homogeneity and enforcement. So, if we want to set a single PIL, what should it be: the narrative or the material? Beckett cites Marks again for her encouragement to "look at PIL from the perspective of actualization, not how 'good' a legal argument is, but whether it was actualized or not."[385] That shifts the heads toward material PIL, even though "[n]arrative PIL's demands, however carefully formulated, go unheeded. They are false contingencies, but we continue to produce them and watch them fail."[386]

Enforcement, or its absence, is the keyword of the difference between narrative and material PIL. Beckett adds that "[a]uthoritative legal institutions, with enforcement powers are a prerequisite for the identification of law. Absent these, legal norms and their interpretations exist only in the eyes of their beholders."[387] The lack of these institutions is the weak point of PIL, as PIL "has no objective existence, instead there are co-existing and competing communities of practice, each with its own procedures for identifying the norms of PIL; for determining their applicability; and for constructing their meaning."[388] So, by returning to the torture issue, states will probably apply torture if they feel that their existence is endangered, either by the existence of the state itself or the governing authority. It leads to the consideration that the CAT only applies in times of peace when no threats appear on the horizon.

B. Enforcement: The Bridge between Narration and Realization

There is a bridge between narration and realization. In the eyes of realists, states' interests must be given due attention because they are the main actors who enforce international law domestically. If the states' interests were ignored, they would lack the thrust to enforce it. On the other hand, international law does not work with the perfect texts. The only thing that ensures the application

[385] *Id,* at 1161.
[386] *Id,* at 1166.
[387] *Id,* at 1169.
[388] *Id,* at 1176.

of international law on the domestic level is the mechanisms of enforcement and auditing. In this context, Jack Goldsmith and Stephen D. Krasner plausibly argue for a balancing between states' interests and enforcement mechanisms, as follows:

> In demanding a full loaf of neutral justice rather than a half loaf of justice that accords with the interests of nations that can enforce it, and in creating an institution that relies on legal norms wholly removed from considerations of power, international idealists may diminish rather than enhance the protection of human rights.[389]

There should be a distinction between the politically accountable and non-accountable. From the point of view of the accountable, it would be good to ratify a convention that prohibits torture. More accurately, it would be globally disgraceful not to ratify it. However, enforcing this prohibition is another thing; when the states' interests are at the stack, it would be absurd to enforce this prohibition if it contradicts the former. From the view of those non-accountable, the drafters of the Convention, the prohibition would be undermined if any exception was embedded in the Convention. It will stain the reputation of the norms of international law as globally ideal standards that rarely any ethical view can contradict.

Between these stances, the enforcement will always be the victim. Idealism underestimates the factors of power and interests in determining the output of the equation. The texts cannot be self-enforcing, and the universal jurisdiction is too weak to interfere in the conduct of every state's personnel. It is a gamble to invoke idealism on account of the state's interest, betting on the states' confinement to the obligations the Convention imposes. This confinement may never happen if the public interest is endangered. Here, the sovereign's national credit for deterrence of imminent threats will always supersede the image of a human rights' promoter. In this case, there will be so much unspoken and untold; it is the right to existence that precedes the right to physical and mental safety of the accused. Rather, torture will be practiced quietly underground, accompanied by much propaganda titled "Torture? what torture?" Either in the form of "we do not practice torture at all," "torture is done by individual sinners who will be punished for it," or "our actions do not constitute torture as defined by CAT."

Simultaneously, some bold though insolent jurisprudence will advocate the official claims. Moreover, parliaments will pass bills that bestow judicial immunity to senior officials embroiled

[389] Jack Goldsmith and Stephen D. Krasner, *The Limits of Idealism*, Daedalus, Winter, 2003, Vol. 132, No. 1, On International Justice (Winter, 2003), at 57.

in such conduct, and unfortunate judges who decide torture-related cases will be woven ambagious verdicts that can be construed both ways. This ambiguity emanates from multiple factors depending on the degree of judicial independence in the given state. In the less democratic states, it may emanate from either the fear of the sovereign or the wish to be entitled to a higher position or have more privileges. In democratic states, it will be responsible for weighing between public interest and norms of idealism. In any case, the torturers will always find their loopholes. This secrecy will get us to square zero because torture in this way will have no limit either in the case or magnitude.

C. Legislative Hypocrisy

There exists legislative hypocrisy. Instead of taking the seat of the state security speakers, I seek to advance the legal rule's meaning, effectiveness, and respect. Marks talked about the False Contingency of PIL. I call the unapplicable legal rules of PIL a *legislative hypocrisy*. This hypocrisy occurs when the legislature lays down legislative texts that are inapplicable in the real world. This inapplicability is due to the texts' opposing nature to the dictating needs of the society it governs. In the case of legislative hypocrisy, differentiated from the false contingency, the legislator knows that the texts are inapplicable, either due to the impossibility of their application or because their application causes massive side effects that supersede the benefits of their application (from the prospect of state in question).

One of the examples of the clash between the needs of the society and the legal rules was demonstrated by Hoko Huri, who claims that there is an inescapable tension between legal pluralism and universalism of human rights.[390] She argues that "a legally pluralistic society, containing a variety of fragmented sources of legal orders, may conflict with the universal standards prescribed by human rights norms."[391] That is why the application of some universal human rights norms, such as banning child marriage, has not received so much acceptance when it contradicts the locally accepted practices.[392]

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[390] Hoko Horii, *Pluralistic Legal System, Pluralistic Human Rights? Teenage Pregnancy, Child Marriage and Legal Institutions in Bali,* The Journal of Legal Pluralism and Unofficial Law, 51:3, at 294.
[391] Hoko Hori, at 294.
[392] *See* Sonia Harris-Short, *Listening to "the Other"? The Convention on the Rights of the Child* (2001) 2 Melbourne Journal of International Law, 304-350, at 339.

Another example is the colonial laws in colonized countries which were enacted under the veil of modernization.[393] However, these laws were actually designed to "extract land from pre-colonial users and to create a wage labor force out of peasant and subsistence producers."[394] The bitter outcome of these transplanted laws is the suffrage of the pre-colonized population from an endless conflict between these laws and the remnants of indigenous, pre-colonial laws, which leads to uncertainty about either of their applications.[395]

That transfers us to the following question: why does the legislator or drafter lay down inapplicable terms in international agreements? There are several answers; one is the need to show as ideal, which leads to shifting the responsibility to those in the field to incur the consequences. In the case of torture, stating that its prohibition is absolute will lead to universal applause for those who drafted the absolute prohibition, as this practice is too savage and obsolete to be applied. Press releases will praise the legislators and drafters, and history recites their names as saviors. In another frame, law enforcement personnel, responsible for maintaining society's security and safety, are placed between two evils: either breaking the law to gain vital information or giving away their duties.

This choice of evils recalls the scenery of the Universal Declaration of Human Rights (UDHR) drafters. Although the UDHR is generally considered an unprecedented leap toward claiming universal responsibility for the protection and recognition of different human rights,[396] Some jurists accuse it of failure due to the lack of enforcement mechanisms.[397] For example, the drafts and preparatory works of the Declaration "never got near the point of formulating a structure that would observe, find, and denounce violations of human rights."[398] However, were the drafters aware of this? Furthermore, did they know that the absence of enforcement would lead to a deficiency in the human rights system? The answer is to be yes. To elaborate, I would like to focus on Rene Cassin. He is one of the main pillars of the UDHR founding committee, the winner of

[393] Sally Engle Merry, *Law and Colonialism*, Law & Society Review, 1991, Vol. 25, No. 4 (1991), at 890.
[394] Sally Engle Merry, at 891.
[395] *See* Sally Engle Merry, at 892.
[396] Mary Ann Glendon, *Knowing the Universal Declaration of Human Rights,* Rights, 73 Notre Dame L. Rev. 1153 (1998), at 1170.
[397] Jacob Dolinger, *The Failure of the Universal Declaration of Human Rights*, The University of Miami Inter-American Law Review, Vol. 47, No. 2 (Summer2016), at 171.
[398] *Id.*

Nobel Peace Prize 1968, and the so-called "father" of the UDHR.[399] Cassin, afterward, took the "presidency of the Conseil d'Etat, the presidency of the Ecole Nationale d' Administration, the presidency of the European Court of Human Rights at Strasbourg, and membership on the French Constitutional Council."[400] During the Algerian War of Independence, Cassin was the head of the French Conseil d 'Etat. During his presidency, I will quote here an ironic statement stated in a book, ironically too, discussing the trophies of Cassin:

> Under Cassin's presidency, the Conseil d 'Etat even accepted violations of fundamental principles by giving military authorities and justice-wide powers. In a notorious case, a meeting of the general assembly of the Litigation Section, at which Cassin presided, endorsed the legality of 'internment centres' in Algeria which had been explicitly forbidden by a law of 1955. These centers were well known for being places where torture was routinely practised.[401]

This fact is not surprising; Cassin was no more than a modern version of Fortescue and Coke; their stances depend on the label of their chair, whether it is labeled jurist, judge, or legislator. In Cassin's case, the father of the modern founding human rights document cannot stipulate anything other than the absolute forbiddance of torture. At the same time, he is a part of the judiciary, not even the executive branch; he became, willfully, a part of the torturing machine of colonization. I wish I had found some historical record stating that Cassin produced some writings discussing the endorsement of the French torture camps and stating that his opinion was outweighed by the majority, or, at least, regretting this approach he had previously taken. Adversely, Cassin was repeatedly accused that "[h]e failed to speak out on human rights violations both in Israel and in Algeria during the ongoing Arab-Israeli conflict and during the Algerian War of Independence."[402]

The concept of legislative hypocrisy leads to ratifying hypocrisy. Yvonne M. Dutton argues that states do not cease abusing human rights regardless of how many international human rights treaties they have ratified.[403] Moreover, historical records show that states with low human rights records regularly ratify human rights treaties.[404] This originates from the fact that "many

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[399] René Cassin - Facts, c.
[400] Mary Ann Glendon, at 1158, fn. 27.
[401] Jay Winter & Antoine Prost, *René Cassin and Human Rights: From the Great War to the Universal Declaration* Cambridge University Press, (2013), at 274.
[402] Jay Winter, *Between Humanitarian Rights and Human Rights: René Cassin, Architect of Universality, Diplomat of French Empire*, in A. Dirk Moses, Marco Duranti, & Roland Burke eds., Decolonization, Self-Determination, and the Rise of Global Human Rights Politics, Cambridge University Press, (2020), at 340.
[403] Yvonne M. Dutton, *Commitment to International Human Rights Treaties: The Role of Enforcement Mechanisms,* 34 U. PA. J. INT'l L. 1 (2012), at 1.
[404] *Id,* at 9.

international human rights treaties have nonexistent or weak enforcement mechanisms."[405] For this reason, states may ratify such treaties without real intention to be committed to them. The lack of enforcement mechanisms is one of the main keywords for the divergence between narrative and material PIL.

If that is the case, why do states ratify conventions not willing to abide by, or at least ready to *de facto* set them aside when needed? The starting point to answer this question is that states calculate the costs *vis-à-vis* the benefits of ratifying a treaty because obligations under international law are incurred primarily upon the states' consent. When ratifying a treaty, compliance with the treaty's terms dictates surrendering a fragment of the ratifying state's sovereignty. According to Dutton, there are three arguments for this voluntary surrender: First, some states readily protect human rights domestically, usually the prosperous and democratic states. In this case, the cost of ratification is low and will have little effect on the national *status quo*.[406] Second, other states may pursue ratifying treaties for the extra-treaty benefits they may acquire from ratification, such as investment, aid, or trade.[407] Third, powerful states and non-governmental organizations may pressure states for the later poor human rights records. So, hoping to improve their international image and the desire to appear more legitimate, authorities may seek to ratify human rights treaties, even if they are unwilling or unable to comply with their terms.[408] I add in this context the case of superpowers, those states who fear less the non-compliance of human rights treaties in times of necessity. Those states will consider disregarding the implications of the flagrant violations of the treaties for reasons pertaining to the fact that the international community will either fear imposing sanctions upon them, or the collective interest of the states dictates otherwise.

On the other hand, states fear ratifying human rights treaties that contain robust enforcement mechanisms. They only do so when they are able and willing to undertake their obligations. For instance, the Rome Statute of the International Criminal Court is far behind other international human rights instruments such as the ICCPR, ICESCR, CERD, CEDAW, CAT, and CRC regarding the number of ratifying states.[409] The reason for this gap, according to Dutton, is

[405] *Id*, at 5.
[406] *Id,* at 16.
[407] *Id,* at 15.
[408] *Id,* at 23.
[409] Until writing these lines, ICCPR was ratified by 173 states, 171 states ratified ICESCR, 182 states ratified CERD, 189 states ratified CEDAW, 173 states ratified CAT, and 196 states ratified CRC. *See* UN OCHCR, Status of Ratification Interactive Dashboard, *available at:* https://indicators.ohchr.org/. On the other hand, the Rome

that the ICC, unlike any other treaty, has the most vigorous enforcement mechanisms, as it authorizes an independent court-wide array of authorities, including issuing arrest warrants, prosecuting, and sentencing offenders who commit crimes against humanity.[410] Such strong enforcement mechanisms may be considered costly regarding sovereignty for the potential ratifying states.

D. The Enforcement Spectrum

The CAT includes many different enforcement mechanisms ranging from self-reporting to fact-finding visit to the state party territory. However, only their weakest is obligatory. To elaborate, CAT implemented primarily the usual enforcement mechanism found in most human rights treaties: the reporting mechanism. Under Article 19, states parties to the Convention are required to periodically report to the Committee against torture the measures they have taken to give effect to their undertakings under the Convention.[411] The Committee has the right to make any observations or additional inquiries to the reporting state, and the state can choose which of them to reply to.[412] Finally, the Committee may include any comments and observations regarding the submitted report in its published annual report.[413] By virtue of the reporting mechanism, "states that file even the most perfunctory of reports likely have sufficiently complied with treaty terms."[414] Moreover, there needs to be an apparent sanction for non-compliance with the obligation to report. Committees have no power to compel states to submit their reports.[415] Even if the reports are submitted, the monitoring process is considered fulfilled once they are reviewed, notwithstanding their quality, until the following report is due in five years.[416]

Another enforcement mechanism the CAT adopted is the inquiry procedure. Article 20 gives the Committee the right to initiate *ex officio* inquiry procedures. The Committee may initiate

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Convention is ratified only by 123 states*; see* United Nations Treaty Collection, *available at:* https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&clang=_en.
[410] Dutton, at 32.
[411] OHCHR, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Art. 19 https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading.
[412] *Id.*
[413] *Id.*
[414] Dutton, at 12.
[415] *Id, at* 28.
[416] *Id*.

an investigation on its initiative.[417] These investigation procedures may include a fact-finding visit to the state party territory, and the Committee may include a brief of the result of the investigation in its annual report.[418] However, the visiting-site procedure can only be carried out with the full consent of the state concerned.[419] Moreover, the result of the inquiry may only be published after acquiring the explicit approval of the state party. Lastly, nothing in the Convention restricts state parties from opting out by means of specific reservations from this article, which a handful of states have already implemented.[420] Thus, such a mechanism can be coupled with its predecessor as an entry-level enforcement mechanism.

Though optional, higher levels of enforcement mechanisms were embedded in the CAT. Article 21 states that other states party to the Convention may file a complaint against a state party claiming it violates the Convention.[421] Article 22 recognizes the same right but only for the nationals of the alleged violating state.[422] Either article is only enforceable by a special declaration of recognition issued by the ratifying state. This recognition enables the Committee to inspect the communications of other state parties or individuals claiming violations of the recognized state that later violated the Convention. Thus, by default ratification, the ratifying state is not bound by either article.

The Optional Protocol to the CAT includes the most critical enforcement mechanism. The Optional Protocol binds the ratifying states to recognize the Subcommittee on Prevention to "recognize the competence of a Subcommittee on Prevention to regularly visit any place under its jurisdiction and control where persons are held in detention by the government or with its acquiescence."[423] This enforcement mechanism is considered more effective than those stated in

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[417] OHCHR, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Art. 20.
[418] *Id.*
[419] Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary,* Oxford Commentaries on International Law, Oxford University Press, 2008, at 662.
[420] *Id.* Despite requiring the explicit consent of the state party to be executed, several states are currently keeping their reservations on Article 20 of the CAT. These states are Afghanistan, Bahamas, China, Equatorial Guinea, Eritrea, Israel, Fiji, Kuwait, Lao People's Democratic Republic, Mauritania, Pakistan, Poland, Oman, Samoa, Saudi Arabia, Syrian Arab Republic, the United Arab Emirates and Viet Nam. *See* OHCHR, Confidential inquiries under article 20 of the Convention against Torture, *available at* https://www.ohchr.org/en/treaty-bodies/cat/confidential-inquiries-under-article-20-convention-against-torture (last visited May 5, 2024).
[421] OHCHR, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Art. 21.
[422] OHCHR, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Art. 22.
[423] Dutton, at 30.

Articles 21 and 22 of the Convention. This is since it obliges states to allow an independent body to inspect allegations of torture in a territory under the sovereignty of a state party to the protocol. Moreover, it grants national competent bodies the right to conduct visits to prisons and other places of detention under state control.[424] The Subcommittee may publish its report concerning the inspected state in case the later did not cooperate with the Subcommittee or when the state refuses to take necessary steps to improve the situation in light of the Subcommittee's recommendations.[425] Even though the Subcommittee has no power to issue legally binding decisions, the auditing schema provided by the OPCAT constitutes a better instrument to expose violations to the CAT.

Using Dutton's theory, I conclude that states are subjected to a spectrum of enforcement mechanisms under CAT and OPCAT. At one – weak - end of the spectrum lies the periodic reporting, and at the other – strong – end of the spectrum lies multiple mechanisms; they are, together with reporting, individual communications procedures, inquiry procedures, and independent bodies visits. In fact, the place of a ratifying state in this spectrum shows the readiness of this state to prohibit the usage of torture; while the states that only ratified the Convention are considered only formally bound by it, the states that have the full house of ratification and declaration is considered an actual party to the convention. Statistically, while 173 states have ratified the CAT, only 55 of them have been self-subjected by the full scale of enforcement, as shown below in the upcoming figure.[426] This shows that most of those who ratified the CAT have no real intention to fulfill their obligations pursuant to the Convention fully. Put differently, they keep a backdoor open if needed.

Figure 1 shows that less than one-third of the ratifying states adhere to all enforcement mechanisms in the CAT and OPCAT. It is noted that contrary to Dutton's argument, states recognizing the competence of the Committee to inspect individual complaints are less than states that ratified OPCAT. This may indicate that states fear this procedure more than regular visits of national and international entities to places of detention. This may also lead to rethinking which enforcement mechanism is stronger than the other.

[424] U.N. General Assembly, *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, 9 January 2003, A/RES/57/199. Art. 20 (a).
[425] *Id*, Art. 16 (4).
[426] OHCHR, Status of Ratification Interactive Dashboard.

Furthermore, it is noted that most of the states that ratified CAT recognized the authority of the Committee against Torture to inspect complaints filed by other states party to the Convention, and almost all states that recognized individual complaints or ratified the OPCAT recognized the state party communication procedure. This also signifies that the procedure described by Article 21 is far weaker than other higher-ranked mechanisms. As Dutton denotes, since the Convention came into force in August 2010, no state has ever used the right to complain pursuant to Article 21, according to the Office of the High Commissioner.[427] Thus, the number of states that recognized Article 21 is of little importance.

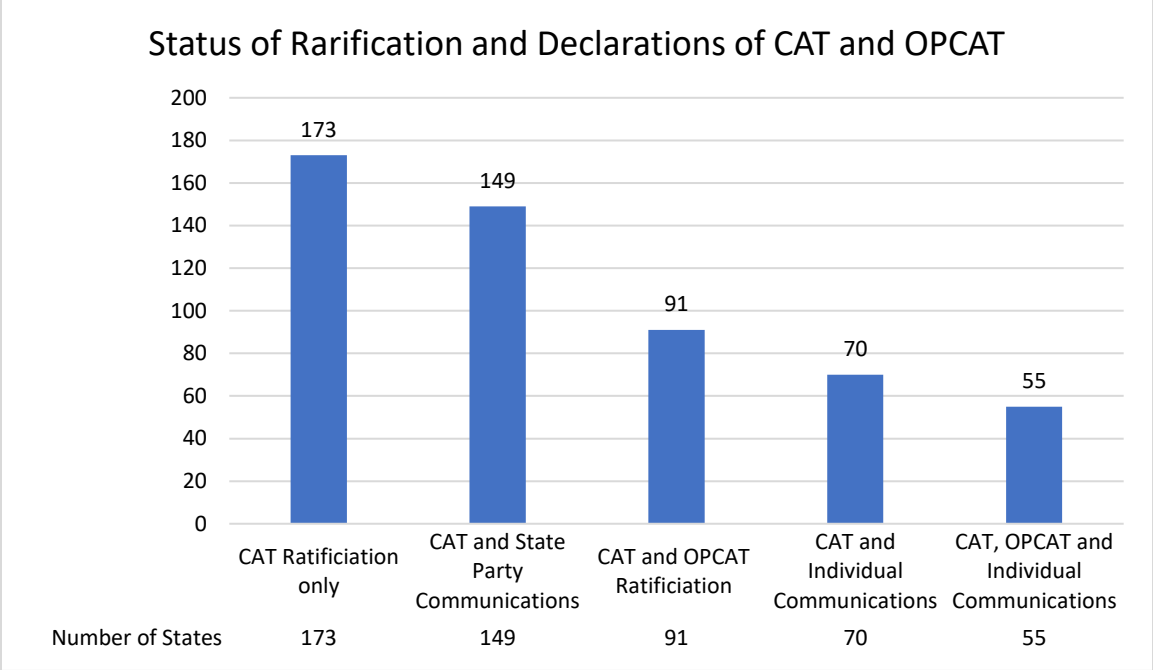

Figure 1: Comparison between the ratification and declaration status of states regarding CAT and its articles 21 (state party communications), 22 (individual communications), and OPCAT

The gap between the two ends of the enforcement mechanisms' spectrum is noteworthy. Articles 21 and 22 and the OPCAT basically do not add more substantive obligations on the ratifying states; they only add more safeguards to ensure that the ratifying states' original obligations are being fulfilled. However, less than one-third of the ratifying states agreed to adhere to these mechanisms. It is more like when car drivers agree on the maximum speed limit set by the authorities but demonstrate against setting up radar cameras on the roads. Such a paradoxical

[427] Dutton, at 30.

stance will always raise serious doubts about the intentions of the drivers. It is inaccurate to say that auditing mechanisms assume losing a part of the state's sovereignty to the Committee or the Subcommittee, as the committees have no power to order sanctions or other compulsory decisions against defaulting states.[428] Moreover, agreeing to more enforcement mechanisms elevates the credibility of the state in question as a human rights promoter. This credibility stems from being open to inspection and regular visits, which will prove that the sheet of the state in question is always clean. Such credibility will not be abandoned except for compelling reasons.

E. Idealism or Enforcement?

The question arises whether the effectiveness of banning torture depends on idealism or enforcement. If we recall the example of car drivers, I will make two assumptions. The first one is to set a low-speed limit that ensures the safety of all cars and pedestrians with no or little means of surveillance set on the roads. The second is raising the speed limit, or allowing exceptional cases for speeding, and simultaneously fixing surveillance cameras everywhere to ensure the compliance of the drivers with the rules. I am sure that the drivers, at least the bad of them, will be happy with the first option, the low-speed limit will always be ignored, and the roads will actually have no speed limit in the absence of means of supervision. On the other hand, the second option, while high speed or exceptional cases may not be the best practice, surveillance cameras will ensure that there is a minimum commitment to the rules.

The critical issue of torture and other forms of ill-treatment is secrecy. Because contemporary torture is being employed secretly and paradoxically, it may be unrestrained and may involve an endless number of methods.[429] Idealism related to banning practices like slapping faces or even waterboarding may seem necessary. Nevertheless, things will be regarded differently if compared to lengthy electrifying detainees in private parts, hanging or depriving them of sleep for days, or any other means that may cause unrecoverable physical or psychological damage. Thus, preventative mechanisms can be more effective in confronting these more horrific practices.

[428] Dutton, at 12.
[429] William F. Schulz, at 43.

This fact was indeed obvious in the minds of the drafters of the early versions of the CAT. Historically, even before the emergence of the idea of drafting an international convention against torture. The protective approach was first suggested in the mid-1970s by Jean-Jacques Gautier, a Swiss jurist, and banker, who conducted a study regarding the preventative mechanisms for the protection of political prisoners against torture at the request of the Swiss Government.[430] Gautier assured that torture could be more effectively confronted by creating an international mechanism authorized to visit detention places in order to inspect, not only by the adoption of texts prohibiting the practice of torture.[431] In 1977, when the U.N. General Assembly formally requested the Commission of Human Rights to draft a convention against torture, two very different models were presented: the Gautier preventive visiting mechanism and the International Association of Penal Law and Swedish criminalizing approach.[432] The criminalizing approach focuses on the obligation of states to criminalize torture and hand perpetrators to justice with several rules derived thereto, such as the universal jurisdiction.[433] The drafting committee had to choose between the monitoring model and the criminalizing model. Thus, "Niall McDermot, Secretary General of the International Commission of Jurists, [suggested] that the Swiss Committee model be recast as an Optional Protocol to a Convention that would be based on the IAPL and Swedish models."[434] This bitter choice was based on the fact that, in that time of the Cold War, the preventative and unannounced visits were simply deemed unacceptable and a violation of the principle of sovereignty.[435] For this reason, the Swiss prevention model was formally presented to the commission by Costa Rica as a Draft Optional Protocol providing for a preventive visiting mechanism.[436]

On the other hand, the Swiss approach was adopted by the European Convention for the Prevention of Torture (ECPT) 1987.[437] By virtue of this Convention, the European Committee for the Prevention of Torture (CPT) was established.[438] It has the mandate to conduct "unannounced

[430] Malcolm D. Evans & Claudine Haenni-Dale, *Preventing Torture? The Development of the Optional Protocol to The U.N. Convention Against Torture*, 4 Human Rights Law Review 19 (2004), at 22.
[431] *Id*.
[432] *Id.*
[433]Manfred Nowak and Elizabeth McArthur, at 4.
[434] Malcolm D. Evans & Claudine Haenni-Dale, at 22.
[435]Manfred Nowak and Elizabeth McArthur*,* at 6.
[436] Malcolm D. Evans & Claudine Haenni-Dale, at 23.
[437]Manfred Nowak and Elizabeth McArthur*,* at 6.
[438] *Id*.

visits to the places of detention and carrying out private interviews with the detainees."[439] The differences in the outcomes between the two approaches are significant; while the world is mourning the widespread worldwide usage of torture, even from states party to the CAT, The visits and reports of the CPT have had a remarkable impact on improving the conditions of detention places and the treatment of detainees across Europe.[440]

The usage of torture was, is, and will be implemented whether states ratify conventions that absolutely ban it or not. As we have seen, history's records are full of its systematic usage as an integrated component of investigative procedure, apart from other usages. Contrary to the narrative, it was abolished for reasons that did not pertain to the theory of human evolution. Democratic states do find legislative and judicial backdoors to escape the rigid obligations by virtue of the CAT, while authoritative states deny violations categorically. These facts should have been duly considered by the drafting committee of the CAT, together with the fact that laying down absolutes is a real challenge in the legal realm. Most fundamental human rights, including the right to life, have exceptions. Michael S. Moore argues that those who do not use lesser evil to deter greater evil not only lack virtue but also suffer derelict in their moral values.[441] On the other hand, embedding loose enforcement mechanisms in the CAT allows the most horrific sorts of torture to occur.

Thus, the absolute banning of torture is an, perhaps manifested, example of the failure of international human rights law. This failure is based upon prioritizing idealism on the account of efficiency. The PIL jurists are still confined to their narrative PIL and refuse to pay tribute for crossing to the material PIL. I cannot blame the drafters of the CAT for this failure, as they are carrying on a heavy legacy that the UDHR drafters have left. The success apparatus also confines them to the number of ratifying states, even if this ratification is only formal.

It is not too obsolete to argue for trading idealism for enforcement. The human needs are endless, and the need for new international human rights agreements will always appear on the surface. It must be borne in mind that the main actors in the international arena are states. Their interests must be respected when laying down rules, in which drafting entities should prioritize

[439] *Id,* at 7.
[440] *See id.*
[441] Michael S. Moore, at 315.

enforceability, not looking-good-texts. On the other hand, strong enforcement mechanisms are the only safeguard for them to carry out their responsibilities imposed by the international document. Finding the balance between the states' needs and strong enforcement mechanisms is to be the core of the final chapter.

VI. Revisiting CAT

In the case *Public Committee Against Torture in Israel vs. The State of Israel and the General Security Service* (1999). The Supreme Court of Israel, sitting as the High Court of Justice, illuminated that "[t]he lifting of criminal responsibility does not imply authorization to infringe a human right."[442] In its judgement, the Court emphasized that the State cannot authorize its law enforcement personnel in advance to apply coercive physical measures during interrogations.[443] However, this pre-authorization does not necessarily negate the act of law enforcement personnel from the excuse of necessity.[444] Regardless of any critique of this notion, what is worthy about this judgement is that the debate of using coercive physical means during interrogation has raised to the surface. It is the accountability of a state – at least at that time – before State courts. Moreover, it manifests a serious and realistic legal debate and understanding regarding a forbidden topic. This dialogue may never be judicially raised elsewhere though it is practiced heavily, systematically, and secretly. And here comes the importance of enforcement mechanisms that are capable of unearthing underground practices.

In the previous chapter, I concluded that enforcement should supersede idealism in matters of human rights, especially when it comes to very controversial topics like those related to torture. In this chapter, I propose an alternative hypothetical response to the current absolute situation, whereby the banning of torture is absolute, and lacks efficient enforceability.

A. One End of the Rope: Enforceability

As discussed in Chapter four, embedding effective enforcement mechanisms in international conventions against torture is necessary for their, at least partial, success. The founding father of the OPCAT and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Jean-Jacques Gautier, argues that "[i]n the fight against torture, the most acute problem at the present time is not so much the establishment of international norms as that of their application."[445] In his Article *The Case for an Effective and Realistic Procedure,* Gautier

[442] HCJ 5100/94, the judgment of 6 September 1999 cited in Olivier De Schutter, *International Human Rights Law,* Cambridge University Press (2010), at 261.
[443] *Id,* at 262.
[444] *Id.*
[445] Jean-Jacques Gautier, *The Case for an Effective and Realistic Procedure*, in Torture: How to Make the International Convention Effective: A Draft Optional Protocol, International Commission of Jurists, Geneva, Second Edition 1980, at 31.

states that numerous international declarations and conventions tackle the norms of banning torture, which include the International Covenant for Civil and Political Rights (1966) that was ratified by – then – 61 States.[446] This number is doubled if we take into consideration states that ratified either American, African, or European human rights conventions.[447] Nonetheless, Gautier condemns these treaties as not being effective in deterring many ratifying countries from practicing torture.[448] At the time CAT was being negotiated and drafted, Gautier showed his concerns, in case CAT had not included enough enforcement mechanisms, by debating its effectiveness, as follows:

> [T]here is nothing to prove that a fresh undertaking by a State which has already violated treaty obligations will prevent it from repeating such violations. Indeed, there is a danger that, by multiplying the number of conventions without being able to check whether they are respected, harm is done to their credibility and even to the value of International Law. Hence, there is legitimate reason to doubt the utility of a new convention if it does not strengthen the existing procedures for implementation.[449]

Gautier states that the inquiry procedures embedded in the CAT have the necessary advantages. However, he proposed an additional parallel system of verification, which is "more speedy, less politicized and does not involve a State being put on trial."[450] He summoned the authority bestowed on the International Committee of the Red Cross (ICRC) by virtue of the Geneva Conventions, which are the visits conducted by an independent body to the places of detention.[451] By virtue of such an authority, the representatives of the Protecting Powers, which are neutral to the conflict, have the right to visit any places of detention of their selection without restrictions pertaining to duration and frequency.[452] They also have the right to interview the detainees, either the prisoners of war or the civilians, without witnesses.[453] Such a right cannot be halted except for reasons

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[446] *Id.*
[447] *Id.*
[448] *Id.*
[449] *Id, at 32.*
[450] *Id, at 33, 34.*
[451] *Id,* at 34, According to the ICRC, the organization has employed a strict methodology for visiting detainees. The visiting procedures are binding on all States by virtue of Art. 126 of the Third 1949 Geneva Convention and Art. 143 of the Fourth 1949 Geneva Convention; ICRC, Visits to persons deprived of their freedom: the experience of the ICRC, *available at*: https://www.icrc.org/en/doc/resources/documents/article/other/detention-visits-article-300906.htm.
[452] Article 126 of Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135. Article 143 of Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287.
[453] *Id.*

pertaining to military necessity, which has an exceptional and temporary nature.[454] These measures have been in force since 1949 to ensure that prisoners of war and detained civilians in armed conflicts enjoy humanitarian treatment. Then, it is absurd that this mechanism failed to be implanted in CAT, which is meant primarily to protect detainees from torture and other inhumane practices. Thus, Gautier has laid down a system of frequent visits, which adopts the notion of prevention rather than criminalization, and based on mutual assistance and collaboration between the assigned Committee and the concerned state party and is capable of taking swift actions rather than lengthy inquiry procedures.[455]

This model is reflected in the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT), which entered into force on 1 February 1989. In viewing this Convention, the difference between the latter and CAT is elaborated on as it focuses on establishing a system of frequent visits rather than discussing rules for criminalizing torture and other forms of inhumane treatment.[456] The latter Convention's tool for supervision is the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), which has the objective of protecting detainees from torture by means of visits.[457] The visits may include any detention place, and the visits can be periodic or whenever it is perceived to be necessary.[458] The states parties to the Convention are obliged to give the Committee full access to information related to the places of detention.[459] Moreover, the Committee can interview the detainees in private and communicate with any other person believed to possess relevant information.[460]

The OPCAT, which entered into force on 22 June 2006, is also an outcome of Gautier's preventative mechanism paradigm. Besides creating the independent Subcommittee on Prevention

[454] *Id.*
[455] Jean-Jacques Gautier, at 35.
[456] Council of Europe, *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment Text of the Convention and Explanatory Report,* European Treaty Series - No. 126, CPT/Inf/C (2002), at 18.
[457] Article 1, *Id*.
[458] Article 7, *Id*.
[459] Article 8 (2), *Id*.
[460] Article 8 (3, 4), *Id.*

of Torture, it obliges the states party to the Protocol to establish or designate one or more independent bodies to function as preventative mechanisms for preventing torture.[461]

The adoption of committees' visits as an enforcement mechanism raises two main questions; the first is related to the scope of the effectiveness of this tool regarding tyrannical authoritative regimes, which use torture systematically as a tool of governance. The second is pertaining to the possibility of such states ratifying such an enforcing convention that may entail clashing with their sovereignty.

The question of effectiveness has been discussed by Gautier, who believes that the regimes that steadily use torture are the most fragile and often overthrown by either revolutions or coups.[462] It is entirely legitimate, in that case, for the replacing regimes to denounce the practices of their formers by ratifying conventions that include supervising tools ensuring that the replacing regimes will not commit the same horrors of the past.[463] Another situation is the secretly kept places of detention and the ability of the Committee to conduct visits to these places. Experience shows that the existence and location of these detention centers cannot be unknown for long.[464] It will be a short time until some testimonies and information go viral about these places. In such a case, taking into consideration that the Committee has the right to obtain information from any source, the Committee will have the authority to ask to visit these "secret" places.[465] It can be concluded that in case a particular state has refused, even implicitly, to cooperate with the Committee by delaying the former's work or placing obstacles to impede it, it is the Committee's right to expose the obstruction and claim that the torture allegations are generally trustworthy.[466]

On the other hand, the answer to the question of ratification is multifaceted. Niall MacDermot believes that the Geneva Conventions have gained wide international recognition, with 196 states ratifying or acceding to the conventions until writing these lines,[467] notwithstanding

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[461] UN General Assembly, *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, 9 January 2003, A/RES/57/199. Art. 17.
[462] Jean-Jacques Gautier, at 37.
[463] *Id.*
[464] Niall MacDermot, *How to Enforce the Torture Convention,* in Torture: How to Make the International Convention Effective: A Draft Optional Protocol, International Commission of Jurists, Geneva, Second Edition 1980, at 25.
[465] *Id.*
[466] *Id.*
[467] IHRL, Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949., https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/state-parties, Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949., https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949.

the enforcement mechanisms that they include.[468] He concludes that this supports the idea that the procedure is less embarrassing but not less effective than it seems.[469] Another aspect is related to the elements of time and reputation. MacDermot also argues that once the procedure of the Convention starts and several progressive states ratify it, many more states will be less reluctant to adhere to it by lapse of time.[470] These factors are regarded as a catalyst to the process of ratification.

A last thoughtful debate is the reason for adopting the Optional Protocol, not CAT, the subcommittee visits as an enforcement mechanism, and the reason behind leaving Articles 21 and 22 of CAT optional to states that ratified the Convention. Most of the jurists, even those who promoted the Optional Protocol, have agreed that including the visiting enforcement mechanism in the CAT will impede its adoption. MacDermot claims that "governments have shown themselves generally reluctant to adopt effective measures for the international implementation of human rights covenants and conventions."[471] Goutier put forward that "[i]t should be obvious that, at the present time, it is impossible to propose a system of regular visits to all States — or even to a majority of them."[472] Malcolm D Evans and Claudine Haenni-Dale suggest that adopting the OPCAT alongside CAT was "not only premature to undertake so ambitious a project but that the very attempt to do so might undermine the prospects for the principal Convention itself."[473] Regarding the optional nature of the enforcement mechanisms stated in Article 22 of CAT, Manfred Nowak and Elizabeth McArthur state that "the United Nations seems extremely reluctant to accept the right of victims of human rights violations to submit complaints to UN treaty monitoring bodies."[474] Moreover, surprisingly, "during the drafting of the optional character of the procedure was never seriously put into question."[475] Thus, it is clear that the United Nations and the governmental representatives have quietly reached an agreement that reliable enforcement mechanisms should kept optional.

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[468] Niall MacDermot, at 25.
[469] *Id.*
[470] *Id*, at 26.
[471] *Id*, at 19.
[472] Jean-Jacques Goutier, at 36.
[473] Malcolm D Evans and Claudine Haenni-Dale, at 24.
[474] Manfred Nowak and Elizabeth McArthur, at 778.
[475] *Id,* at 778, 779.

However, it is still unclear why no one has really fought for the mandatory character of the enforcement mechanisms. Remarkably, the words used for reasoning, when analyzed, seem too lenient and weak, and most of them are based on presumptions that the Convention will not see the light if it includes obligatory and effective enforcement mechanisms. Moreover, this recalls the notion of legislative hypocrisy from two facets. Firstly, I have not seen any deliberate indicator in the *travaux préparatoires* that the Convention was fragile against including mandatory effective enforcement mechanisms, such as a declaration issued by a governmental delegation that it would not ratify the Convention if it included such a provision. No sort of mobilization or serious efforts have been made to include such mandatory provisions as if there was previous lobbying that reached this end before the working group conducted its mandate. The second facet is the final goal of the drafters. It seems, too, that the aim was drafting a convention and entering it into force but not to find a decisive means to end torture. Even though it was clear to the drafters that enforcement was the model answer for this atrocity to be faced, they recourse to good-looking, widely acceptable, and dimly effective provisions instead. This was done without paying so much attention to the actual impact of the Convention on countering torture.

CAT is a grain of sand on the shore of human rights instruments. Enforcement needs to be a factor in most of the human rights conventions. Entering into force is prioritized over being enforced. Thus, in light of the ongoing debate over the failure of international human rights law, the international community needs to pay more attention to the enforcement mechanisms, both in being obligatory and effective, while using different inducing techniques, including material PIL, on the lagging states to be bound by effective instruments.

B. The Other End of the Rope: Necessity

As discussed in Chapter three, the Landau Commission has set Guidelines for using "moderate physical pressure" on the suspects of terrorism to extract vital information that may help in saving lives. When the High Court of Israel scrutinized these Guidelines, it claimed they were void.[476] The Court has established its ruling that the necessity defense, which serves as the foundation of the Guidelines, could not serve as an *ex ante* exemption to allow GSS investigators to employ their "moderate physical pressure" interrogation practices.[477] However, the Court left the door open for

[476] Public Committee Against Torture v. State of Israel, H.C. 5100/94 (Israel 1999), at 3.
[477] *Id.*

the "necessity defense" to be available *post factum*, either in the hands of the Attorney General in dismissing prosecution or the choice of the Court to dismiss criminal charges brought against interrogators.[478] This judgment did not negate using "moderate physical pressures" categorically. Instead, it refused to accept the idea of setting up torture guidelines in advance and referred to the general rules of criminal law to be applied thereto.

The Court has distinguished between the necessity defense, which has the effect of excusing a culprit from the criminal responsibility, and the act of authorizing torture.[479] In doing so, the Court has cited Article 34 (1) of the Israeli Penal Law, which states that:

> A person will not bear criminal liability for committing any act immediately necessary for the purpose of saving the life, liberty, body or property, of either himself or his fellow person, from substantial danger of serious harm, in response to particular circumstances during a specific time, and absent alternative means for avoiding the harm.[480]

The Court has emphasized this distinction by adding that "[t]he 'necessity defense' does not possess any additional normative value."[481] So, the lifting of criminal responsibility does not mean that the act is authorized. Here, the Court has concluded that the Guidelines set by the Commission is an act of "justification," not "necessity," which cannot be drawn except with an explicit act of legislation.[482]

The Committee against Torture did not welcome this interpretation. In its report, the Committee advised Israel to remove necessity as a possible justification for the crime of torture from its domestic law.[483] Thus, the Committee widened the scope of the term "justification" stated in Article 2(2) of the Convention to include "necessity." Yet, this broad interpretation may be seen as confusing between justification and excuse. Basically, Article 2(2) of CAT has stated that there can be no "justification" for torture. The Article stated an uncomprehensive list of unacceptable reasons to justify torture that includes "a state of war or a threat of war, internal political instability

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[478] *Id.*
[479] *Id,* para. 36.
[480] Cited in *Id*.
[481] *Id.*
[482] *Id,* para. 37.
[483] United Nations, Report of the Committee against Torture, Twenty-seventh session (12-23 November 2001) Twenty-eighth session (29 April-17 May 2002), General Assembly Official Records Fifty-seventh session, Supplement No. 44 (A/57/44), at 30, Para. 53 (i) available at: https://digitallibrary.un.org/record/477356?ln=en.

or any other public emergency."[484] Thus, the Convention has disregarded "necessity" as an excuse, not justification. Justification, as the High Court of Israel noted, entails justifying the act, which can only be prescribed by law. On the other hand, necessity is a direct application of general penal rules that can be applied to any wrongful acts. Moreover, justification results in an act to be permissible. In contrast, excuses do not rip an act from its wrongful nature, but it negates the criminal liability of the wrongdoer in certain circumstances.

However, how does the distinction between justification and excuse make an *actual* difference in the realm of criminal law? Firstly, justification is only applicable to the acts for which they are prescribed. For example, self-defense can justify killing, but it cannot justify, for example, forgery. In comparison, excuse is not limited to certain acts, as it can be applied *sui generis* to all sorts of offenses whenever the necessity's elements take place. Secondly, justification has no levels; either the defendant establishes its elements or fails to do so. In the case of establishment, the act should be considered legal, and the defendant should not be, even morally, blamed. Nevertheless, if the defendant failed to establish elements of justification, he/she should bear full responsibility for the wrongful act. On the contrary, excuse encompasses a graded spectrum; if the culprit cannot negate the full responsibility of the wrongful act, he/she can still claim the partial discharge of responsibility.

Additionally, an excuse can find its path between the absolute and the non-derogable nature of the prohibition. To elaborate, a right is absolute if a given government, regarding standard rights, cannot set limitations to that right or balance it with other public interests.[485] On the other hand, the right is non-derogable if states cannot suspend such a right under exceptional circumstances.[486] So, the rule of excuse is not applied on either; excuse is not a sort of limitation to the absolute prohibition of torture, as the High Court of Israel argued that no cases could be listed to legitimize torture *ex ante*. On the other hand, an excuse does not entail halting the prohibition in exceptional circumstances. The act will still be prohibited, notwithstanding the possibility of exonerating the

[484] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: https://www.refworld.org/docid/3ae6b3a94.html.
[485] Manfred Nowak and Elizabeth McArthur, at 119.
[486] *Id.*

suspect from liability, provided he/she proved the case of necessity. Such a case dictates certain elements subjectively pertaining to the suspect, not the crime.

The excuse, which is based on the case of necessity, has several conditions that affect criminal responsibility. Some of these conditions are related to the danger, while others pertain to the act that deters the danger.[487] Firstly, the danger should be directed at oneself or others. Secondly, the threat should be gross, imminent, and produced by a reason other than the suspect's will.[488] Thirdly, the action of deterring the danger should have this effect, i.e., deterring the danger. Moreover, it should be the only venue to deter this danger.[489] Finally, there should be a margin of proportionality between the danger and the act.[490]

Of course, any court will be reluctant to accept the defense of necessity, as the judiciary has put rigorous restraints on accepting it. For example, the Egyptian Court of Cassation refused the necessity defense when the danger was directed at the defendant's money.[491] The Court stated that the danger should be directed only to the "self" of the defendant, which excludes property.[492] Also, the Court refused to consider as a form of "danger" the pressure imposed on a defendant by her father-in-law by virtue of a family relationship.[493] Moreover, the Court has dismissed the necessity defense based upon the obedience of the superiors.[494] Finally, the judiciary has rebutted the necessity defense when the defendant is legally obliged to face the state of danger. As a result, soldiers are not allowed to claim necessity to escape military operations, and police officers cannot claim it to avoid chasing dangerous suspects.[495] Thus, it would be a challenge for a suspect to be acquitted based upon necessity only, and this serves the conclusion I want to reach.

Alternatively, the courts have accepted limited cases of necessity. For example, in one well-known case, the French Court of *Château-Thierry* dismissed an indictment against a

[487] Prof. Mahmoud Naguib Hosny, *Šrḥ Qāānnwnn ālʿqwbātt - ĀlQsm Ālʿām* (The Explanation of the Penal Law – General Section), Judges Club, 8th ed. (2018), at 676.
[488] *Id,* at 678.
[489] *Id,* at 684.
[490] *Id,* at 686.
[491] The Egyptian Court of Cassation, Criminal Circuit, Judgement no. 1133 of the judicial year 45 (02-Nov-1975).
[492] *Id.*
[493] The Egyptian Court of Cassation, Criminal Circuit, Judgement no. 9679 of the judicial year 61 (13-April-1993).
[494] The Egyptian Court of Cassation, Criminal Circuit, Judgement no. 1913 of the judicial year 38 (06-Jan-1969).
[495] Prof. Mahmoud Naguib Hosny, at 682.

defendant, Louise Ménard, who stole bread from the bakery to feed her two-year-old child.[496] The Court found that the defendant has neither a source of living nor work, and the only reason for stealing the bread was to protect herself and her child from starvation.[497] The Court stated that "any act, which is normally punishable, will lose of its gravity if its perpetrator acts under compelling need to acquire what is indispensable for his subsistence."[498] Finally, it ruled that "the criminality of the intention is further reduced by the fact that in the present case deprivation is accentuated by that the mother was trying to save from hunger her young child whom she has the duty to look after."[499] Another important case was decided by the Egyptian Court of Cassation, which stated that the case of necessity does not dictate the absence of the will of a culprit. Instead, it presupposes that the defendant has employed the choice of evils between two outcomes.[500] In the decided case, the driver's choice was between hitting a child who suddenly crossed the road or going over the sidewalk and causing damage to a property.[501] It is worth noting that the Court has found the necessity defense acceptable in the criminal case only, but it ruled in favor of the claimant in the civil case.[502]

By theoretically applying this set of rules on the crime of torture, law enforcement personnel have to prove a handful of circumstances. Firstly, the potential danger should be strictly imminent; the danger should only be characterized by a threat to self. This "self" is limited to the lives of civilians or other law enforcement personnel who may die as a result of denoting bombs by other members of the suspect's terrorist organization. Moreover, there should be reasons beyond reasonable doubt that other members of this terrorist organization possess lethal weapons and their intention to use them to kill civilians. In other words, there must be consistency in the actions of this organization of committing terrorist attacks, and it is proved that the arrested terrorist holds close ties with this group that allows him to reveal vital information about them. The danger should also be direct hostilities against civilians; it is unacceptable to claim that the terrorist group aims solely at destabilizing the political regime, which may lead to loss of lives due

[496] András Jakab, *What Makes a Good Lawyer? Was Magnaud Indeed Such a Good Judge?* Austrian Journal of Public Law), Vol. 2, pp. 275-287, (2007), Available at SSRN: https://ssrn.com/abstract=1918420, at 7.
[497] *Id.*
[498] *Id.*
[499] *Id.*
[500] The Egyptian Court of Cassation, Criminal Circuit, Judgement no. 1907 of the judicial year 11 (17-Nov-1941).
[501] *Id.*
[502] *Id.*

to anarchy. Secondly, the action must be proportionate to the danger. In this regard, law enforcement personnel have to prove that the use of physical or psychological force was gradual and necessary to avoid danger. Mainly, it can be achieved by exhausting the legitimate ways of questioning the suspect. Lastly, the recourse to force should be the only way to deter the danger by proving that other ways of finding out the place of lethal weapons, such as surveillance, communication or electronic tracking, or inspection, have failed or are incapable of deterring the danger. In proving so, it is insufficient to say that law enforcement has not employed these techniques, so they had to recourse to torture, but they must have used them, and they nevertheless could not achieve their target.

Applying necessity in the case of torture as a mitigating circumstance is vastly controversial, let alone rejected. However, away from the lengthy debate that we saw in Chapter two, there are some points to raise regarding necessity and torture. Firstly, necessity is a general rule applicable to all crimes provided its elements are satisfied, and the crime of torture is not an exception. Thus, law enforcement personnel may also enjoy the same defenses available to the public. Secondly, necessity is a defense to individuals, not states, as so dictates the non-derogatory nature of the prohibition. So, necessity has no impact in turning torture into systematic, which also will exclude the forms of using torture as a tool of governance and ensuring obedience. Thirdly, it will always be *sui generis*; the torturer will always be in the stance of a defendant, and the latter has the burden of proof, which is not an easy task. Finally, if the right to life is a non-derogable right, though it has an exception for self-defense, other rights can logically have either exceptions of the exact nature or excuses in the necessity circumstances. Furthermore, including the crime of torture in the cases where necessity excuse can be applied is not an invention. For example, Nowak and McArthur adhere to the concept of applying mitigating circumstances to a convicted person for reasons related to "moral choice."[503] In this case, a court may order a suspended sentence if it is convinced that mitigating circumstances occur.

The final question that may arise here whether these mitigating circumstances can align with CAT. In fact, Article (4) stipulates that each State Party shall incorporate torture as an offence in its domestic criminal law. Moreover, Article (4) requires that states shall make the punishments of torture proportionate to its grave nature. Incorporation in domestic criminal laws means that

[503] Manfred Nowak and Elizabeth McArthur, at 125.

torture, besides being punishable, will enjoy the same "general" rules that every crime enjoys, provided that no justification, not excuse, can be applied, and the punishment thereto should be grave. Therefore, necessity as a defense will stay be available to the crime of torture.

This whole jurisprudence is meant to deter invisible torture, which is used in cases other than critical necessity. It is allowing the almost impossible for the sake of deterring the common; the impossible is the critical necessity, which this dissertation considers as an excuse to use physical means during interrogations. On the other hand, the common is the usage of torture for reasons other than compelling necessity, such as a tool of governance or a routine practice. It is not guaranteed that excusing the minimum will stop the general. At least, it is a way of realistically engaging in the dialogue of torture away from the ideal rigidity, by stripping the Dershowitz camp off their moral pretexts for allowing the usage – not excusing the crime – of torture.

The application of the double means to the case of torture is a response to reality. Law is not meant to create an ideal society. Instead, the law is ideal if it practically serves the goals it is created to achieve. Creating a legal tool, such as a convention, which lacks sufficient enforcement mechanisms and does not recognize exceptionalism carries in its depth the tools of its own disrespect, apostasy, and, therefore, destruction. Enforcement ensures compliance, while exceptionalism faces dynamic situations that the drafters cannot inclusively perceive. This principle is augmented if the legal tool is a part of international law, where elements of sovereignty, power, and interest are the rules of the game and where there is no global central authority to dictate its will on the international community.

VII. Conclusion

In conclusion, the absolute banning of torture, which is motivated sometimes by noble intentions, and other times by legislative hypocrisy, proves to be too ideal to face hard cases. The exceptional scenarios expose the limitations of absolute bans. While torture remains a horrific practice, absolute bans risk raging it beyond control for neglecting the whole legal scheme, potentially causing more significant harm.

Instead of chasing an unattainable ideal, international law should prioritize pragmatic solutions. Strengthening mechanisms for monitoring compliance thereto offers a more effective path forward. Implementing powerful enforcement mechanisms can serve as a more effective means of banning torture than the absolute banning texts. This practical approach protects human rights more effectively, by affirming the atrocity of torture and answering the questions that hard cases pose.