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Dominik Steiger, Das völkerrechtliche Folterverbot und der „Krieg gegen den Terror“

Summary

Chapter 1 – The “War on Terror”

A. International Terrorism

- Terrorism is no phenomenon of the 21st century, but has persisted throughout human history.
- There is no generally accepted definition of terrorism in public international law to date, inter alia, because it is almost impossible to distinguish freedom fighters from terrorists.
- However, where violence is used to create a state of fear and terror for political purposes, it is usually considered to be terrorism.
- Its most dangerous variety, Islamic terrorism, has sprouted from various roots, including the West’s and Russia’s exertion of influence in the Muslim world, social, political and economic instability and individual psychological reasons.
- The (long-term) objective of Islamic terrorism is the creation of a society that rests exclusively on religious foundations. This encompasses the expulsion of the so-called infidels from Muslim states.
- Al-Qaeda, the largest and most widely-known Islamic terror group, has transformed itself in recent years into an amorphous entity that no longer depends on the original networked command structure, but only on faith, a mission and role models.
- Most terrorist attacks occur within the Muslim world.

B. The Attacks of 11 September 2001

- On 11 September 2001, more than 3,000 people were killed in terrorist attacks by Al-Qaeda in New York City.
- In response, US President George W. Bush declared the “War on Terror” that same night.

C. The War in Afghanistan

- Al-Qaeda used to be headquartered in Afghanistan. It enjoyed a symbiotic relationship with the Taliban, who formed the de facto government.
- After Afghanistan refused to extradite Al-Qaeda members, an international coalition led by the USA attacked Afghanistan on 7 October 2001.
- Since then the West has been struggling to transform Afghanistan into a liberal, democratic and peaceful state under the rule of law.

D. The Iraq War

- Although Iraq had no ties with terrorists, on 19 March 2003, an international coalition led by the USA attacked Iraq without having received express authorisation from the UN Security Council.
- Since then the West has been struggling to transform Iraq into a liberal, democratic, and peaceful state under the rule of law.

E. Other Operations

- The "War on Terror" is fought globally, inter alia in Pakistan, the Horn of Africa and the Philippines.

F. Mistreatment during the "War on Terror"

- During the "War on Terror", acts of abuse occurred in prisons and detention facilities; they were carried out either directly or by proxy by the USA.
- The most notorious examples for this practice are the extraordinary renditions programme and the incidents of torture at the Guantánamo Bay detention camp and the Abu Ghraib prison.
- In the CIA extraordinary rendition programme CIA agents abducted suspected terrorists (at times from their respective home countries, inter alia Italy) to transfer them to a third country. In those third countries, the suspected terrorists were subjected to abuse to obtain information.
- Khalid El-Masri is the most widely-known example for this practice. For about five months he was held in a cell that was no larger than six square meters. He was not allowed to leave his cell. His diet consisted in part of already gnawed chicken bones with no meat, rice contaminated with sand or insects and putrid vegeta-

bles. At night it was often so cold that he could not sleep. Moreover, he was afforded neither the opportunity to read nor to write. He was denied contact with the German Embassy or a judge. He was sodomised with an object in the course of his abduction.

- Guantánamo Bay stands for the human rights violations in the "War on Terror". At its height, it held 775 detainees who, in the majority of cases, had not been captured by the USA. For many of them, the USA even paid a bounty.
- The detention conditions were even criticised publicly by the International Committee of the Red Cross, which is normally bound by confidentiality.
- There are, for example, no windows in the cells of Camp 6, where the detainees spent 22 hours per day in solitary confinement. The light was on 24/7, there was no fresh air and more often than not the air conditioning was set at too low a temperature. The detainees were often kept from sleeping, for instance by playing loud music.
- Many times, the so-called Initial or Emergency Response Team would enter the cells to use pepper spray on the detainees, or to beat them up, or strip them down to shave them.
- All of this served to break the personality of the detainees prior to interrogations.
- Permitted and applied interrogation techniques included the so-called *waterboarding* causing the detainee to experience the sensation of drowning.
- Furthermore, detainees were insulted, threatened, degraded and subjected to other forms of physical and psychological coercion.
- During interrogations that sometimes lasted as long as 20 hours, some detainees were forced to keep so-called stress positions where arms and legs were shackled together tightly to the ground for instance.
- Finally, dogs were used to generate fear.
- In Abu Ghraib detainees were abused, too. They were, inter alia (anally) raped, men were forced to masturbate, naked men had to form pyramids, and dogs and purportedly live electrical wiring were used to generate fear of death.

- There were also so-called ghost detainees. They are detainees whose existence is unknown to the Red Cross. One of those "ghost detainees" died as a result of the abuse.
- Like in Guantánamo Bay private investigators were active in Abu Ghraib.
- In many other prisons and detainment facilities, similar incidents occurred. It must be assumed that the conditions in Guantánamo Bay and Abu Ghraib were "good" compared to the situation in those other facilities.

Chapter 2 – The Prohibition of Torture in Public International Law

A. History

- Torture had already been employed by the ancient Greeks and Romans, but only spread to Western Europe in the course of the Medieval Inquisition in the 13th century. The abolition of torture commenced only in the 18th century.
- The prohibition of torture in public international law is rooted in Article 4 of the Hague Convention of 1907.
- The first express prohibition of torture is stipulated in Article 5 of the Universal Declaration of Human Rights of 1948. The Declaration, however, does not directly create legal rights and obligations.

B. The Prohibition of Torture in Human Rights Law

- Besides universal treaty-based prohibitions of torture, there are regional prohibitions of torture. The various conventions differ in their respective protection mechanisms.
- At the universal level, the prohibition of torture is contained in the International Covenant on Civil and Political Rights of 1966 (ICCPR). Furthermore, the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (UNCAT) is supplemented since 2006 by an Optional Protocol. Other conventions provide for prohibitions of torture, too.
- The USA is party both to the ICCPR and UNCAT.

- No limitations may be placed on the prohibitions of torture contained in these instruments, neither by prescription by (formal) law, nor by derogation in time of public emergency.
- The Human Rights Committee was established to monitor the implementation of the ICCPR which has been ratified by 161 States parties to date. The ICCPR provides for a mandatory reporting procedure and an optional inter-state complaint procedure. More than 100 countries have, by ratifying the First Optional Protocol to the ICCPR, recognised the competence of the Human Rights Committee to consider individual communications. No binding legal force is conferred expressly on the decisions by the Committee.
- The UNCAT has been ratified by 145 States parties. It defines torture and contains a complex body of rules to combat torture. It obliges the States parties to investigate incidents of torture, to ensure that the victim obtains redress, and to punish and prosecute the torturers. It prohibits the use of statements extracted by torture and the expulsion, refoulement or extradition of a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture. Moreover, it obliges States parties to educate its law enforcement personnel on the prohibition against torture and to afford other States parties the greatest measure of assistance in connection with civil proceedings in torture cases.
- Here too, the implementation of the Convention is monitored by a Committee without the express authority to take legally binding decisions. Only the reporting procedure is mandatory; both the inter-state and the individual complaints procedure depend on the optional recognition of the Committees' competence.
- A novelty is the confidential inquiry procedure where the UN Committee against Torture may, if it receives reliable information containing well-founded indications of the systematic use of torture, conduct inquiries on its own (*proprio motu*) and produce a confidential report.
- The Optional Protocol to UNCAT has been ratified by 35 States parties to date. It contains no new substantive rules, but seeks to prevent torture by establishing a system of regular visits to places where people are deprived of their liberty.

- The unique feature of the Protocol is the creation of a system of protection that dovetails international with national protection mechanisms.
- In 1953, the European Convention on Human Rights of 1950 (ECHR) entered into force. This Convention applies to 48 countries today and stipulated for the first time a general prohibition of torture. Before, torture had only been prohibited during a state of war.
- The European protection system is the only international protection system which, since Protocol No. 11 entered into force in 1998, grants direct access to an international court after local remedies have been exhausted.
- The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 1987 (ECPT) provides for the establishment of a Committee at the European level. The Optional Protocol to UNCAT was modeled on the ECPT.
- As regards the Americas, prohibitions of torture are found in the American Convention on Human Rights of 1969 (ACHR) and in the American Declaration of the Rights and Duties of Man of 1948. Torture is also prohibited by the Inter-American Convention to Prevent and Punish Torture of 1985.
- The implementation of the ACHR is monitored by the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR).
- The system of protection resembles the ECHR system prior to the entry into force of Protocol No. 11: While everybody has access to the Commission, access to the Court depends on decisions by the Commission or the States parties.
- There is also a reporting obligation, but it merely requires the States parties to submit the reports for the Executive Committees of the Inter-American Economic and Social Council and the Inter-American Council for Education, Science, and Culture to the IACHR. An optional inter-state communication procedure exists, too.
- The substantive provisions of the Inter-American Convention to Prevent and Punish Torture were modeled on the UNCAT. However, the States parties' duty to inform only extends to measures adopted in application of the Convention.

- This is a distinctly weak mechanism. However, the IACHR does at least take into account the Inter-American Convention to Prevent and Punish Torture when seized with a petition alleging the violation of the prohibition of torture contained in the ACHR.
- The American Declaration of the Rights and Duties of Man adopted within the framework of the Organization of American States (OAS) does not provide for a mechanism to monitor its implementation.
- The USA has ratified neither Convention. However, it is a member state of the OAS and as such, due to the particular set-up of the IACHR, subject to the jurisdiction of the IACHR.
- All OAS member states ratified the clause of the OAS Charter delegating the determination of the Commission's "structure, competence, and procedure" to another convention. There was no proviso that all OAS member states necessarily had to become States parties to this other convention. The Statute of the IACHR was adopted after an article-by-article-examination of the General Assembly of the OAS.
- According to its Rules of Procedure, the IACHR has jurisdiction over individual petitions alleging a violation of the American Declaration of the Rights and Duties of Man. The OAS Statute makes no provision for access to the IACtHR, which must thus be taken to be excluded.
- The African Charter on Human and Peoples' Rights of 1981 (Banjul Charter), which is binding on all 53 African countries, also contains a prohibition on torture.
- The protection of the Banjul Charter is somewhat weaker than the one offered by other human rights treaties, as it contains no prohibition on derogations.
- Its implementation is monitored by the African Commission on Human and Peoples' Rights. Since 2002 a so-called Follow-Up Committee is tasked with the protection against torture through education and consultation. Finally, the African Court on Human and Peoples' Rights came into existence in 2006.
- The protection mechanism is comparable to the Inter-American one. However, the three monitoring procedures are all mandatory.
- Yet the protection system is somewhat weakened by the procedural rules governing individual communications: The Commis-

sion decides by a simple majority vote which communications should be considered; a process that is potentially open to political and arbitrary considerations. Further still, it can only publish its findings with the consent by the African Union's Assembly of Heads of State and Government.

- In case no regional mechanism exists, States are bound by the prohibition of torture in customary international law and in those universal conventions that they have ratified.
- As opposed to the territorial scope of application, the subject-matter, personal and temporal scope of application of human rights conventions poses no particular difficulties.
- From a philosopher's or natural lawyer's point of view, human rights apply everywhere. As they antecede the state and belong to everyone solely by virtue of being human, they are independent of his whereabouts.
- The issue of the territorial scope of application of human rights treaties is relevant to the "War on Terror" because most persons detained by the USA in this "war" are held somewhere outside the US. This practice is motivated by a desire to sidestep the US Constitution and certain guarantees of public international law.
- The dispute over the extraterritorial applicability of ICCPR obligations is sparked by the wording of Article 2(1) ICCPR whereby each State party "undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind […]".
- This wording lends itself to the interpretation that the application of the ICCPR is premised on the cumulative satisfaction of the territory and the jurisdiction requirements. As this would, however, mean that a State party might violate human rights abroad or that at least the ICCPR's monitoring mechanism would be inapplicable to these cases, that interpretation seems absurd.
- Two further points can be advanced against a cumulative reading: First, the States parties used the wording mainly to preclude responsibility for acts outside their control like for injuries of their own nationals on foreign soil. Second, if Article 2(1) ICCPR were to be interpreted cumulatively, Article 12(4) ICCPR would be devoid of any meaning, as it applies only to persons who are by definition outside the concerned State parties' territory.

- As the wording of Article 2(1) is ambiguous and unclear, the generally-accepted rules of interpretation permit to look beyond it. Accordingly, a situation falls within the scope of the ICCPR where a State party exercises jurisdiction over it.
- As regards the applicability of the other human rights conventions (including the American Declaration of the Rights and Duties of Man, to which in absence of an express stipulation, the clause governing the scope of application of the ACHR is applied) the fact that the state exercises jurisdiction suffices.
- According to the Banković decision of the European Court of Human Rights (ECtHR), the effective control of the relevant territory is decisive when establishing whether a state exercises jurisdiction. According to the decisions rendered by the European Commission on Human Rights, the Human Rights Committee, the IACHR, as well as more recent decisions rendered by the ECtHR, the direct exposition to actual authority and control of a State party, like in instances of detainment, is sufficient.
- Both the recently-established UN Human Rights Council and the UN Special Rapporteur on torture are mandated with the protection against torture.
- As the UN Human Rights Council was only established in 2006, it is still too early for a substantive assessment of its work. However, concerns about whether it will deliver a significantly higher quality of work than the UN Commission on Human Rights which it replaced are not entirely unfounded.
- The Special Rapporteur has proven to be an effective instrument against torture. He may, inter alia, collect information from all sources he deems relevant and undertake country visits, although the latter is only possible at the invitation of the government concerned.

C. The Prohibition of Torture in International Criminal Law

- International criminal law is, unlike human rights law, not addressed to States parties, but imposes, for certain offences, direct international criminal liability on individuals.
- In the 1990s, international *ad hoc* tribunals for the former Yugoslavia and for Rwanda were founded.
- International criminal law entered a new era when the International Criminal Court (with currently 114 States parties to its

Statute) came into being in 2002: For the first time, an international court with general jurisdiction, as opposed to a jurisdiction limited to individual armed conflicts, was established. The Court has jurisdiction over genocide, crimes against humanity, war crimes, and aggression irrespective of any immunity of the accused.

- Torture is not listed as a separate crime, but may be punished as an element of genocide, war crimes or crimes against humanity.
- The mistreatments by the USA during the "War on Terror" do not constitute genocide because they lack the requisite "intent to destroy, in whole or in part, a national, ethnical, racial or religious group". As they were not directed against a civilian population, they are not punishable as crimes against humanity either.
- By contrast, the acts perpetrated by terrorists can be classified without difficulty as crimes against humanity.
- In times of armed conflict, both torturing agents of the state and torturing terrorists, may be liable to prosecution for war crimes.
- While torture constitutes an element of a criminal offence punishable under customary international law such as war crimes and crimes against humanity, no self-contained offence of torture exists under customary law.
- No such crime exists as a general principle of international law either, inter alia because the existing general principle refers to the prosecution of torture by national courts as opposed to the prosecution by an international court.
- There is, however, no need for such an unwritten crime. International courts will only resort to those offences laid down in their statutes, so as to not make themselves assailable on the ground of an alleged lack of competence. National courts need not resort to offences punishable under international criminal law to prosecute torturers: They may, like in Germany, always charge torturers with causing bodily harm, according to the national criminal law.
- The International Criminal Court has jurisdiction where the accused is a national of a State party or where the crime was committed on the territory of a State party. Alternatively, a state may accept the Court's jurisdiction on an ad hoc basis. Proceedings may be initiated by a State party, by referral of the UN Security Council or by the Prosecutor of the International Criminal Court.

- According to the principle of complementarity, the International Criminal Court may only intervene if the state having jurisdiction over an alleged crime is unwilling or genuinely unable to carry out the investigation or prosecution.
- US nationals may be held accountable before the International Criminal Court if they commit one of the crimes listed in the Rome Statute on the territory of one of its States parties. Such a scenario might be conceived, for instance, in Afghanistan that became a State party to the Rome Statute on 10 February 2003.
- Terrorists may be surrendered to the International Criminal Court at any time, for example by referral by the UN Security Council. It should be noted that the USA would, if it approved such a referral, confer greater legitimacy on the Court than it seems to desire. This issue would however not arise if terrorists commit one of the crimes listed in the Rome Statute on the territory of one of its States parties: In theory at least, they may then be charged in The Hague.
- At the normative level, international criminal law is underdeveloped when compared to international human rights law. Human rights conventions have also been ratified more widely. International criminal law does however have a genuine court at its disposal. While it is an instrument that should not be underestimated, it is still at an early stage of its development. Therefore, it is necessary to rely to a greater extent on the prosecution by national authorities under municipal law for now.

D. International Humanitarian Law

- In 1950, the four Geneva Conventions of 1949 entered into force. They contained the first conventional and thus legally-binding prohibition of torture.
- The law of international armed conflict was applicable to the wars in Afghanistan and Iraq until the new governments were formed on 19 June 2002 and 28 June 2004 respectively.
- As terrorists are not belligerents in terms of the Geneva Conventions, the rules on international armed conflicts are inapplicable to the "War on Terror".
- Applying these rules to terrorists would not be desirable as terrorists might then lawfully attack military targets like the Pentagon.

- Neither prisoners of war nor civilians may be tortured.
- However, both groups may, in certain circumstances, be lawfully interned until the end of the conflict.
- In cases of any doubts regarding the status of an internee, he is to be regarded as a prisoner of war until his status has been determined by a competent tribunal.
- As Al-Qaeda fighters have not been classed as prisoners of war or had their status reviewed by a competent tribunal, they must, therefore, contrary to the view of the US administration, be regarded as prisoners of war.
- As the respective hostilities have ceased, they must be released unless they have been or are liable to be convicted for an indictable offence. In practice, securing such a conviction might be difficult in light of the "fruit of the poisonous tree" doctrine in US law and the inadmissibility of evidence extracted by torture under public international law.
- It is argued that the law of non-international armed conflicts is applicable to the "War on Terror".
- The fact that it is fought around the globe does not preclude the applicability of the law on non-international armed conflicts: "Non-international" merely denotes a conflict that does not arise between two or more of the High Contracting Parties.
- The "War on Terror" is, however, not an "armed conflict" in terms of the Geneva Conventions as the intensity of the hostilities does not meet the requisite threshold. In fact, it can rather be compared to crimes and corresponding police actions.
- Al-Qaeda terrorists do not form an "organised armed group" either. Their organisational structure is neither sufficiently hierarchical, nor are they able to abide by the rules of international humanitarian law. In that case, they would no longer be terrorists.
- Since the termination of the international armed conflicts in Iraq and Afghanistan no genuine peace has come to the region yet. Since the intensity of the hostilities at times exceeds the threshold to an armed conflict and since the opponents of the respective national governments are "organised armed groups" while at the same time foreign troops are involved, the situation may be described as a "mixed conflict".
- There is no consensus as to the legal treatment of "mixed conflicts". Ultimately, the wording of the Geneva Conventions must

be decisive. It is invoked by the so-called component theory, according to which the legal treatment of a "mixed conflict" depends on the alliances formed by the individual components. Where a state supports the government of another state against the rebels, it remains a conflict between rebels and state(s). Where a state supports the rebels who are opposed to the other state involved, it becomes an inter-state conflict which is thereby internationalised. It is to those former types of conflict that the law of non-international armed conflicts is thus applicable.

- Human rights law and international humanitarian law apply concurrently.
- The application of the international humanitarian law rules on non-international armed conflicts to the "War on Terror" cannot be supported *de lege ferenda* because it would offer no significantly higher level of protection than the application of human rights law. As regards the application of the law of international armed conflicts *de lege ferenda* it must be borne in mind that it would entail a right for terrorists to cause injury.
- Four distinct risks are associated with the application of international humanitarian law: First, a permanent state of emergency breeds fear, which in turn leads to the adoption of new laws restricting fundamental freedoms. Second, a permanent state of emergency might change the attitude of society and individuals towards violence. Third, the group identified as a threat might in response become radicalised. Fourth, it might also threaten the rule of law itself.

E. The Prohibition of Torture as Part of Customary International Law and jus cogens

- The prohibition of torture is a norm of customary international law with *jus cogens* status.

F. The definition of torture

- According to the legal definition in the UN Convention against Torture, torture means "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person […] when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity".

- Whether the threat of torture amounts to torture itself depends on the severity of the mental harm it caused.
- The so-called no-touch torture, developed in the 1950s, is the first genuine innovation in the application of torture since the 17th century. Its main elements are sensory deprivation and so-called self-inflicted pain.
- No-touch torture is frequently employed during the "War on Terror". The photography of a prisoner of the Iraqi Abu Ghraib prison is a typical example of this practice: The prisoner is standing on a wooden box, wearing a hood, with his arms extended and faked wired electrodes purporting to be used for the infliction of lethal electric shocks attached to his fingertips.
- The psychological consequences of torture, notably of no-touch torture, include intrusions, flashbacks, dissociation, regression, avoidance strategies, somatisation disorders, chronic pain and hypochondriasis.
- Without treatment, a post-traumatic stress disorder might develop. This happens in about 50 percent of all torture cases.
- In practice, particular difficulties are caused by the requirement that the pain or suffering inflicted must be "severe": Pain and suffering cannot be measured objectively and their perception depends on personal predispositions.
- While the "severity" requirement is necessary to define the contours of an exceptionally grave legal wrong, its application should be modified: If a victim makes a substantial and credible allegation of torture, it should be for the state to prove on a balance of probabilities that the pain and suffering inflicted were not so severe as to constitute torture.
- Torture must be attributable to the state. In international humanitarian law, it must be attributable to one of the parties to the armed conflict. Due to difficulties of proof, international criminal law has abandoned this requirement entirely.
- Where several states act together to torture, two basic scenarios can be distinguished: If they collaborate with knowledge of the circumstances or one state acts "on behalf of" the other state, that conduct can be attributed to both states. If one state acts without the requisite knowledge, it might still have violated its duty of non-refoulement or its duty to protect that result from the prohibition of torture.

- No "special intent" is required to satisfy the subjective element of torture: If that was the case, it could always be argued – as the USA does in their notorious, quasi-legal Bybee memorandum – that torture to save human lives can never constitute torture in legal terms.
- The pain or suffering must be inflicted for a certain purpose. This purpose is framed in very wide terms: The essence of the examples given is that the act must be done to break or bend the victim's will and that it must be politically motivated.
- The so-called savings clause, which provides that pain or suffering caused by "lawful sanctions" does not amount to torture, must be interpreted in accordance with public international law. Accordingly, capital punishment is permissible; only certain modes of implementation (e.g. prolonged periods on "death row") are not. However, many of the forms of corporal punishment prescribed by the Sharia violate the prohibition of torture.
- As the torture definition in the UNCAT does not afford the means to distinguish clearly the (unlawfully) harsh use of baton by a police officer at a demonstration from torture for example, an additional element has to be added to the definition: The victim must be in the actual physical control of the perpetrator, which entails his defencelessness.
- The absence of one of the elements of the crime of torture does not mean that the act in question is lawful. It must then be ascertained whether it amounts to cruel, inhuman or degrading treatment. Due to the wording of its Article 16 UNCAT, this does not apply under the UNCAT unless the conduct can be attributed to a public official.
- Several countries have entered reservations and so-called declarative interpretations (which are, in effect, reservations) to the prohibition of torture of the UNCAT and the ICCPR. Those reservations are aimed inter alia at narrowing the definition of torture. The "interpretative declaration" entered by the USA thus aimed to exclude no-touch torture from the ambit of the Convention.
- All those reservations are incompatible with the object and purpose of the respective treaties and are thus invalid.
- There is no consensus as to what consequences an incompatible reservation entails. According to the "severability doctrine", the reservation will be severed from the treaty which will be opera-

tive for the reserving party as though it had been concluded without the incompatible reservation.

– The mistreatment of persons detained by the USA falls within this definition of torture. In the situations examined in this thesis, torture was commonplace.

G. Other Duties on States

– The prohibition of torture does not only comprise the negative duty to desist from torture, but also further (positive) duties that render the prohibition effective in practice.
– The preventive duty to protect from torture is supplemented by repressive duties to protect by investigating and prosecuting torture cases and providing reparation for torture victims; furthermore by the duty of non-refoulement and the obligation to not use evidence obtained by torture. They have been stipulated expressly in the UN and the Inter-American anti-torture conventions.
– There is no duty to protect from private "torture" because torture must, by definition, be attributable to the state. If it is not attributable, that state has violated its duty to desist. A state could however be under a duty to protect from cruel, inhuman, or degrading treatment by private agents.
– The duty to investigate is derived from the right to an effective remedy and the undertaking to respect and ensure the right to be free from torture.
– The first step is to ascertain whether the state has violated the prohibition of torture. In doing so, the burden of proof is and rests with the state. Where no violation of the prohibition of torture can be found, it must be determined in a second step whether the state has discharged its duty to investigate. If it has not, it has violated the prohibition of torture in its procedural dimension.
– The investigation must be "prompt, independent and impartial" and capable of leading to the identification and punishment of those responsible.
– The USA conducted several investigations, some superficially and incompletely, while others were carried out thoroughly and conscientiously.

- The obligation to provide reparation requires states to provide reparation themselves, but does not entail the duty to oblige third parties (the torturer or a third state) to provide reparation.
- Like the duty to investigate, it is derived from the right to an effective remedy and the provisions to respect and to ensure human rights, as laid down in the various human rights conventions.
- Reparation can take the form of restitution, compensation, rehabilitation, satisfaction, as well as guarantees of non-repetition. Moreover, reparation should be made promptly, adequately and effectively.
- The USA has not fulfilled its obligation to provide reparation.
- The duty to prosecute requires the criminal prosecution of alleged torturers and their adequate punishment where they are found guilty.
- Normatively, it is mainly based on the right to an effective remedy.
- The duty to prosecute itself is no norm of *jus cogens*, but it partakes in the *jus cogens* status of the prohibition of torture.
- No exceptions to the duty to prosecute – for example by way of justification or exculpation, the objection of *respondeat superior*, "torture warrants", amnesties, pardons or statutes of limitation – are permissible.
- In the "War on Terror", attempts to fulfil the duty to prosecute were only made in the Abu Ghraib cases. However, they were by no means adequate.
- Some anti-torture conventions contain an express duty of non-refoulement. More broadly, it emanates from the prohibition of torture and forms as such part of customary international law.
- The standard of probability of torture which triggers the duty of non-refoulement is not only set at different levels by different conventions, but also within those different conventions. The "more likely than not" standard established by a valid US reservation to the UNCAT is the lowest of those standards. However, it does not apply to the ICCPR, as the USA has entered no corresponding reservation.
- By diplomatic assurances the country of destination guarantees that a transferred person will not be tortured. Still, they alone cannot eliminate the risk of impending torture.

- The duty of non-refoulement does not only apply to transfers from one country to another, but also to transfers from one jurisdiction to another.
- Like on the prohibition of torture, no limitations may be placed on the duty of non-refoulement.
- Express provision for the inadmissibility of evidence obtained by torture are made by the UN and the Inter-American anti-torture conventions. It can also be derived from the prohibition of torture and the right to a fair trial.
- With regard to the establishment of whether torture took place, the burden of proof is on the state alleged to have tortured: If it provides no or insufficient information, torture is deemed to have occurred. If it provides sufficient information, it must be determined if, on a balance of probabilities, the statement has been extracted by torture.
- The rules on inadmissibility apply to criminal, extradition, and internment proceedings.
- "Proceedings" by the secret services are no objects of the express rules on inadmissibility. The inadmissibility rules derived from the prohibition of torture do not reverse the burden of proof. Yet from the prohibition of torture it can be deduced that procedures for the review of information obtained by secret service "proceedings" must be established. It also follows that information that has "beyond reasonable doubt" been obtained by torture is inadmissible as "evidence" in these "proceedings". Moreover, the inadmissibility of statements made under torture makes good sense in terms of security policy as those statements – which are often flawed – contaminate the pool of reliable information.

H. The Prohibition of Torture as a Subjective Right?

- There is a subjective right in public international law to be free from torture.
- The duties to protect derived from the prohibition of torture correspond to further subjective rights in public international law.
- The prohibition of torture also accords a subjective right to individuals at the national level. The ratification of any human rights convention alone suffices. The conventional human rights protection system, is, to use the phrase that the ECJ used to describe the European Economic Community, a "new legal order". Where a

human right like the right to be free from torture is stated in sufficiently clear and precise terms and where its application requires no implementing measures, it has direct effect in municipal law.

I. Domestic Judicial Enforcement of the Prohibition of Torture in Third States

- A state may exercise jurisdiction over cases with an international dimension unless to do so would conflict with a prohibitive rule to the contrary.
- The sovereignty of states does not amount to a prohibition in this sense because human rights no longer belong to the *domaine réservé* of a state.
- According to one point of view, the exercise of criminal jurisdiction is premised on the existence of a permissive rule to that effect.
- It is common ground that the territorial and the active and passive personality principles permit the exercise of criminal jurisdiction.
- Taken together with the duty to prosecute, there is, within the scope of those permissive rules, an obligation to exercise jurisdiction. This does not apply to the passive personality principle because in that situation the violation of the prohibition of torture occurs outside the jurisdiction of the victim's country of origin so that the respective conventions do not apply *ratione loci*.
- The principle of territorial universal jurisdiction constitutes a permissive rule in the above sense, too.
- It follows from numerous international conventions and national provisions, the *erga omnes* effect of the prohibition of torture and the partaking of the duty to prosecute in the *jus cogens* character of the prohibition of torture. Because of their *erga omnes* effect, a violation of the prohibition of torture or of the duty to prosecute entails the applicability of the law on countermeasures and respectively of the principle of universal jurisdiction.
- Such a permission to exercise extraterritorial jurisdiction in conjunction with the duty to prosecute leads to a corresponding duty to prosecute torture perpetrated outside the own territory.
- Since only the state itself is obliged to provide reparation for torture, no obligation arises to establish a civil jurisdiction whereby claims against a third party may be enforced. However, for lack of a prohibitive rule to the contrary, a state is entitled to do so.

- In general, immunities protect states and a certain group of people against the exercise of jurisdiction by another state.
- Sovereign immunity can only be claimed for *acta iure imperii*, but not for *acta iure gestionis*. Acts of torture always constitute *acta iure imperii*.
- Immunities that can be claimed by persons are of two types: immunity *ratione personae* and immunity *ratione materiae*.
- Immunity *ratione personae* can be claimed in relation to any activity by a person holding a particular office for the duration of his term. Only the head of state, the head of government, the foreign minister and diplomats are entitled to it. It may extend to other public officials travelling on state business.
- Immunity *ratione materiae* can only be claimed for acts of state, but extends beyond the end of the term of office. Support for this doctrine is dwindling, but no sound dogmatic solution for this issue has been presented to date.
- Since torture must, by definition and without exception, be attributable to the state, it follows that no immunity *ratione materiae* can be claimed in relation to torture.
- The duty to prosecute also require the prosecution of alien torturers. Since they are, as a rule, immune from prosecution, a duty to punish would be devoid of any practical significance. Because of this an immunity plea cannot be accepted in torture prosecutions. However, it may be raised in a civil case since the duty to make reparation does not pertain to third states.

Chapter 3 – Legalisation of Torture? Revisiting the Ticking Time Bomb Scenario at a Time of Combatting Insurgents and Terrorists

- In the ticking time bomb scenario, there is a bomb in a major city that will explode within a few hours. It is not known where the bomb is hidden. Due to time constraints an evacuation is impossible. The bomb planter is in police custody, but does not disclose the location of the bomb. Torture is said to be the only means to locate the bomb and to save a great number of lives.

A. Relevance of The Ticking Time Bomb Scenario

– There is no evidence for a ticking time bomb scenario throughout history. Despite numerous uncertainties such a scenario is, albeit highly unlikely, at least conceivable.

B. Suitability of Torture

– For various reasons torture is a ineffective method to obtain valid information within shortest periods of time. The idea that severe pain yields truthful information is engendered by a simple, intuitive way of thinking.

C. Utilitarism

– From a utilitarian perspective, torture is apparently being called for in such a situation. On closer inspection however, due to the negative consequences of torture for victims, torturers, social entities, society, the rule of law and the people that it might turn into terrorists or sympathisers with terrorists, utilitarianism disfavours torture, too.
– Furthermore, it becomes clear that it is impossible to limit the use of torture: Torture would spread, both in depth (as regards the accepted degree of infliction of pain) and in breadth (as regards the number of cases where it is applied).

D. Deontology

– Unlike the killing of a hostage-taker or of a combatant, torture is an assault on human dignity which is inviolable.
– One person's dignity cannot be weighted against another person's dignity because the conflict is not between two duties of equal value, i.e. it is no dilemma. On the one hand, there is the duty to refrain from torture. On the other hand, there is the duty to respect and protect every person's dignity. The latter duty is framed in far more open terms and can be fulfilled in many ways – the limit being the duty to desist from actively violating a person's dignity oneself.

E. Theology

– As men are created in God's image, they must not be subjected to torture.