Exceptional Necessity
How Liberal Democracies Contest the Prohibition of Torture and Ill-Treatment when Countering Terrorism

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I. Introduction

On Human Rights Day, 7 December 2005, Louise Arbour, UN High Commissioner for Human Rights, shared her concern that national strategies

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to counter terrorism were severely threatening a core human rights norm, the prohibition of torture and ill-treatment:

> The absolute ban on torture, a cornerstone of the international human rights edifice, is under attack. The principle once believed to be unassailable—the inherent right to physical integrity and dignity of the person—is becoming a casualty of the so-called 'war on terror'.[1]

The contested meaning of the prohibition of torture and ill-treatment is a serious concern for any human rights defender, and it challenges many accounts of human rights diffusion, legalization, and compliance in the literature on international relations and international law. Accordingly, this article is an attempt to capture patterns of contestation and reinterpretation with regard to the prohibition of torture and ill-treatment in national and transnational debates, and to discuss their implications for current research on human rights norms and their diffusion.

Contestation of human rights norms is not new. Advocates have been familiar with the contestation of international human rights for decades. Notably, proponents of Asian values have argued that the liberal conception of human rights is unduly restricted to the rights of the individual and, hence, is incompatible with culturally specific values and practices.[2] Yet, shortly after the gradual acceptance of universalism in the 1990s and the support of a 'core of rights' even by hardliners from South East Asia,[3] human rights activists are confronting what may be seen as the 'most sustained attack' since the establishment of the global human rights regime half a century ago:[4] the reinterpretation of fundamental human rights by western

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[1] Louise Arbour, 'On Terrorists and Torturers' (Statement by the UN High Commissioner for Human Rights, for Human Rights Day, New York, 7 December 2005), online: <http://www.unama-afg.org/news/_statement/Others/2005/_others/05dec07-Louise%20Arbour%20Statement.doc>.

[2] Cf. Jack Donnelly, *Universal Human Rights in Theory and Practice,* 2nd ed. (New York: Cornell University Press, 2003) at 112.

[3] Take for example the statement of a representative from Singapore: 'Diversity cannot justify gross violations of human rights. … No one claims torture as part of their cultural heritage.' Quoted in James T.H. Tang, ed., *Human Rights and International Relations in the Asia-Pacific Region* (London: Pinter, 1995) at 244.

[4] 'The current framework of international law and multilateral action is undergoing the most sustained attack since its establishment half a century ago. International human rights and humanitarian law is being directly challenged as ineffective in responding to the security issues of the present and future. In the name of the "war on terror" governments are eroding human rights principles, standards and values.' Amnesty International, *Amnesty International Report*

liberal democracies. Most human rights advocates fear that these discursive interventions will eventually change the content and the meaning of an already established fundamental norm in world politics, namely the torture taboo.

Such a change to fundamental norms has major importance for students of international human rights politics. First, allegations of non-compliance with the absolute ban on torture as well as the contestation of this fundamental human rights norm challenge established convictions with regard to the domestic effects of international human rights. The most prominent theories of human rights diffusion and socialization[5] hardly explain why in recent years liberal democracies are contesting and violating the obligations enshrined in the legal ban on torture. Not only does the ban on torture rank among the highest principles in both a normative and a legal hierarchy of human rights,[6] it is also one of the most institutionalized human rights norms and is believed to resonate with the interests and the domestic structure of liberal democracies. Therefore, from the standpoint of human rights research and theory building, the currency of disputes on the gradual legalization of ill-treatment[7] or torture in these liberal states is rather unexpected.

Second, it is not clear what the consequences of the attack will be. Will the international norm be 'watered-down'? Will the ban on torture lose its influence on the political practice of norm followers? Will exceptions to the absolute prohibition become the rule?

Third, what does contestation reveal with regard to the formal validity of a norm? Are norms contestable all the way down, or does some fixed meaning remain? And how is the attack possible?

2004 (New York: Amnesty International Publications, 2004) at 5, online: Amnesty International <http://www.amnesty.org.ru/report2004/hragenda-1-eng>.

[5] For an overview see Hans Peter Schmitz and Kathryn Sikkink, 'International Human Rights' in Walter Carlsnaes, Thomas Risse & Beth A. Simmons, eds., *Handbook of International Relations* (London: SAGE, 2002) 517 [Schmitz & Sikkink].

[6] William A. Schabas, *The Death Penalty as Cruel Treatment and Torture, Capital Punishment Challenged in the World's Courts* (Boston: Northeastern University Press, 1996) at 34.

[7] I use the term 'ill-treatment' to refer to cruel, inhuman or degrading treatment and punishment that does not amount to torture but is prohibited as well. Human rights treaties differ in the wording they use for these forms of abuse and they are often summarized as ill-treatment. For example, Article 7 of the *International Covenant on Civil and Political Rights* (*ICCPR*) and Article 16 of the *Convention Against Torture* refer to 'cruel, inhuman or degrading treatment or punishment', while the Common Article 3 of the four Geneva Conventions refers to 'cruel treatment' and Art. 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* refers to 'inhuman or degrading treatment or punishment'.

What are the focus, aim, and method of this article? Following the assumption that situations of crisis reveal both the uncontested and the contested meaning of a norm,[8] the article will focus on the context of counter-terrorism. I chose national and transnational debates within three states to determine similarities and differences among the supposedly unequivocal meaning of a fundamental human rights norm. The meanings of the torture prohibition are derived from claims and justifications made in domestic debates, on the one hand, and in a common transnational context (e.g. UN Committee against Torture) on the other. Three critical examples (the United States, the United Kingdom, and Israel) reveal the meanings attributed to the prohibition of torture and ill-treatment by national executives under conditions of endangered security. Why executive leaders? They are crucial in the process of norm implementation and application, as they authorize counter-terrorist measures at the expense of human rights protection. Human rights norms shall constrain their behaviour and constitute their interests. Legislative and judicial institutions undoubtedly play a significant role in the process of implementation. They construct domestic norms and limit the space for overt contestation. However, this article will not focus on decisions and rulings by (domestic or regional) courts. First, international human rights norms are rarely and often not fully applied in domestic courts[9] and, second, it usually takes some time before courts achieve legal certainty on issues such as the necessity clause.[10]

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[8] Antje Wiener, 'Contested Compliance: Interventions on the Normative Structure of World Politics' (2004) 10 Eur. J. Int'l Rel. 189 [Wiener 2004]. See also Antje Wiener & Uwe Puetter, 'The Quality of Norms is What Actors Make of It' (2009) 5 J. Int'l L. & Int'l Rel. 1. [Wiener & Puetter 2009].

[9] See Benedetto Conforti, 'National Courts and the International Law of Human Rights', in Benedetto Conforti & Francesco Francioni, eds., *Enforcing International Human Rights in Domestic Courts,* (Den Haag: Martin Nijhoff Publishers, 1997) at 7 [Conforti & Francioni]; Rosalyn Higgins, 'The Role of Domestic Courts in the Enforcement of International Human Rights: The United Kingdom', in Conforti & Fancioni, *ibid.* at 37; Bruno Simma *et al.*, 'The Role of German Courts in the Enforcement of International Human Rights', in Conforti & Francioni, *ibid.* at 107; Andreas Laursen, 'Israel's Supreme Court and International Human Rights Law: The Judgment on "Moderate Physical Pressure"' (2000) 69 Nordic J. Int'l L. 413 at 426-427 and 446 [Laursen].

[10] Only in 1999 did the Israeli High Court rule out the use of 'moderate physical pressure', which had been sanctioned by the Landau Commission in 1987. See *Public Committee against Torture in Israel v. Government of Israel,* (1999) HCJ 5100/94 (Sup. Ct. Israel) [*Public Committee against Torture in Israel*], available online: <http://www.mfa.gov.il/NR/rdonlyres/599F2190-F81C-4389-B978-7A6D4598AD8F/0/terrorirm_law.pdf>; Laursen, *supra* note 9; Gershon Shafir, 'Torturing Democracies. The Curious Debate over the "Israeli Model"' in Alison Brysk & Gershon Shafir, eds., *National Insecurity and Human Rights. Democracies Debate Counterterrorism* (Berkeley: University of California Press, 2007) [Brysk & Shafir]. In the United States, courts first ruled over events in Guantanamo in 2004. See *Rasul v. Bush,* 542 U.S. 466 (2004), and David P. Forsythe,

Why these countries? The three countries are liberal democracies that have ratified the *Convention against Torture*. They share the experience of a threat to national security and have adopted measures to fight terrorism, albeit at different periods in time and to quite different extents. In the context of counter-terrorist measures, they each have to debate the implementation of human rights norms and to determine the interpretation of a norm's validity in the process of norm application.[11] As the threats to the three countries' national security took place at different periods of time, these case studies enable us to identify recurrent patterns of contestation that are by no means restricted to the Bush administration's attack on international law. The *United Kingdom* has a history of countering terrorism in Northern Ireland since 1968 and has, after 2001, been engaged in a fight against transnational terrorism as well. *Israel* has been exposed to national security threats since its founding, but authorized the use of physical pressure during the interrogation of terrorist suspects after the outbreak of the (first) Intifada in 1987. The *United States* declared an ongoing 'war on terror' in 2001 after 9/11.

The torture prohibition, as laid down in international law, is non-derogable and absolute: no circumstances whatsoever may justify the use of torture.[12] In order to determine if the torture prohibition is contested and lacks resonance in democracies countering terrorism, I look at official statements about the treatment of detainees and suspected terrorists. Special attention is paid to keywords such as the 'circumstances' to which state delegates refer, the activities that 'constitute' torture, and the 'rights' and 'obligations' to which the national executives refer when justifying certain measures against suspected terrorists.

The case studies illustrate that the text of human rights treaties should not be equated with their local meaning as to appropriate behaviour in a given situation. The contextual rendering of the ban on torture, as revealed both in national discourse and in state practice, differs from the prima facie understanding of the legal text. Hence, this article looks at 'law-in-action

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'The United States. Protecting Human Dignity in an Era of Insecurity' in Brysk & Shafir, *ibid.* at 47 [Forsythe 2007].

[11] Cf. Wiener & Puetter 2009 *supra* note 8.

[12] See for example the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Arts. 4(2) and 7.

rather than law-on-the-books'[13] in order to determine the contested and uncontested elements of the torture prohibition.[14]

We can identify three elements that point towards a contextualized re-interpretation of the torture prohibition: the implicit or explicit exception from the absoluteness of the respective prohibition (the 'ticking bomb scenario'), the distinction between torture and ill-treatment, and the reaffirmation of an absolute ban on severe acts that constitute torture (see below, section III). Despite this cross-national contestation, the meaning of the ban on torture and its surrounding rules, as held and promoted by transnational networks and legal bodies, has not changed at all. The contestations of the executives in those states that are countering terrorism have not changed the legal validity and the standard of appropriateness as upheld and promoted by transnational networks and international legal bodies (e.g. the UN Committee against Torture) and domestic human rights activists. One finds evidence of two rather unlinked discourses or debates among norm promoters and norm addressees. A key issue is the difference between the meanings that are attributed to legal texts by actors who interact in different contexts.

This article is structured as follows: It will first summarize the view that the current contestation of fundamental rights is of a new quality and is endangering the impact of the global human rights regime. As the debate on torture in the United States is not the first instance of opposition to the absolute prohibition of torture and ill-treatment, the second part of the article will be dedicated to the determination of recurrent contestation patterns. By describing what is contested in different countries and at different periods in time, the section will identify common controversies and interpretations of the content and the validity of a human rights norm (the ban on torture) in a given social context (national efforts to fight terrorism). The article then provides an empirical critique of theories of human rights diffusion and compliance and discusses the constitutive elements of norm contestation in the case of torture and ill-treatment. These are domestic norms on appropriate behaviour in a given social context, as reflected in discourse,

[13] Sanford Levinson, '"Precommitment" and "Postcommitment": The Ban on Torture in the Wake of September 11' (2003) 81 Texas L. Rev. 2013 at 2018.

[14] On the importance of looking at communicative dynamics and justifications in order to understand compliance and regime robustness, see Hedley Bull, *The Anarchical Society* (London: MacMillan, 1977) [Bull]; Friedrich Kratochwil & John Gerard Ruggie, 'International organization: a state of the art on the art of a state' (1986) 40 Int'l Org. 753.

practice and sometimes also domestic law, which lack congruence with the complex norms embodied in international treaty law.[15]

II. A new quality of norm contestation? Or: what seems to be at stake in the torture debate?

The contestation of human rights is a recurrent phenomenon in international politics. Although human rights norms are highly institutionalized and widely accepted on a global level, they have repeatedly been contested both in international fora and in local and national contexts.

In the 1990s, the international debate seemed to have resolved some of the most central conflicts. Among states, the validity of the *Universal Declaration of Human Rights* was hardly contested anymore: all states endorsed the notion of human rights universalism at the World Conference on Human Rights in Vienna, 1993. [16] Furthermore, ratification rates for the six core human rights treaties of the UN rose constantly during the 1990s,[17] leading some scholars to believe that human rights represent a universal ethical order or 'standard of civilization'.[18] The international debate on human rights norms shifted to establishing third generation rights and to reforming the existent human rights regime in order to make it more effective and legitimate.[19]

At the same time, scholarly interest shifted from analyzing the emergence of human rights norms to investigating their implementation and internalization. Theories of norm diffusion and compliance were discussed and applied in single case studies and comparative studies. Empirically,

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[15] On the importance of local or regional norms and the cultural match for processes of norm diffusion see Amitav Acharya, 'How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism' (2004) 58 Int'l Org 239 [Acharya]; Jeffrey Checkel, 'Norms, Institutions, and National Identity in Europe' (1999) 43 Int'l Studies Q. 83 [Checkel].

[16] On 25 June 1993, representatives of 171 states adopted by consensus the *Vienna Declaration and Programme of Action*, which reaffirms their commitment to the purposes and principles contained in the *Universal Declaration of Human Rights*; General Assembly, *Vienna Declaration and Programme of Action,* UN Doc. A/CONF. 157/23 (12 July 1993) at 1.

17 By the mid 1990s, each state had ratified at least one international human rights convention.

[18] See for example John Charvet, 'The Possibility of a Cosmopolitan Ethical Order Based on the Idea of Universal Human Rights' (1998) 27 Millenium 523; Jack Donnelly, 'Human Rights: A New Standard of Civilization?' (1998) 74 Int'l Affairs 1.

[19] Anne Bayefsky, *The UN Human Rights Treaty System: Universality at the Crossroads* (Ardsley, NY: Transnational Publishers, 2001).

these studies focused on authoritarian states and/or transformation states.[20] These investigations analyzed personal integrity rights, which were thought of as culturally uncontested and rather stable.[21] The belief was that societies and states could be socialized over time, thus allowing for a progressive realization of human rights norms. Only studies that addressed rights in more contested areas (such as women's and children's rights) also focused on traditional attitudes and local concepts that diverged from international law and were brought to the fore during the process of implementation.[22] Cultural diversity and particularism were seen as obstacles to effective implementation, yet not as dangers to international law per se.

National or local contestations in western, liberal democracies remained largely unexamined[23] until they first attracted the attention of human rights activists. In the wake of 9/11, national strategies to fight terrorism have nurtured debates on the absoluteness of human rights provisions. Although human rights norms, even in liberal democracies, have never been fully complied with, many argue that the events of September 11 have been followed by a new quality of controversies within states and societies as to the very meaning of human rights norms. What is thought to be new, however, is not only the abuse of detainees and prisoners or the curtailment of civil liberties during the Bush Administration,[24] but also the contestation of the formal validity and/or the precise meaning of international human rights law–a law with a supposedly stable and fixed meaning–by precisely this administration.[25] It is the 'pronounced shift in the global discourse about

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[20] See for example Darren G. Hawkins, 'Domestic Responses to International Pressure. Human Rights in Authoritarian Chile' (1997) 3 Eur. J. Int'l Rel. 403; Ann Kent, *China, the United Nations, and Human Rights. The Limits of Compliance* (Philadelphia: Pennsylvania University Press, 1999); Thomas Risse, Stephen Ropp & Kathryn Sikkink, eds., *The Power of Human Rights, International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999) [Risse *et al.*]; Frank Schimmelfennig, Stefan Engert & Heiko Knobel, 'Costs, Commitment and Compliance: The Impact of EU Democratic Conditionality on Latvia, Slovakia and Turkey' (2003) 41 J. Common Market Studies 495.

[21] Risse *et al*., *ibid.*

[22] Sonia Harris-Short, 'International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child' (2005) 25 Hum. Rts. Q. 130.

[23] For an exception see Laursen, *supra* note 9, who reviews the academic and legal debate on torture in Israel between 1987 and 1999.

[24] Such abuses were also witnessed in former decades, see Alfred W. McCoy, *A question of torture: CIA interrogation, from the Cold War to the War on Terror* (New York: Metropolitan Books, 2006), and in other countries, e.g. European democracies, see Antonio Cassese, *Inhuman States: Imprisonment, Detention and Torture in Europe Today* (Cambridge: Blackwell, 1996).

[25] Gregory Hooks & Clayton Mosher, 'Outrages Against Personal Dignity: Rationalizing Abuse and Torture in the War on Terror' (2005) 83 Social Forces 1627 [Hooks & Mosher]. See also Ingo

human rights after September 11'[26] that raises concern and provokes wide criticism.

The consequences of the human rights policy of the United States after September 2001 are expected to be far-reaching: scholars and practitioners speak of a 'sea-change' in the approach to international human rights norms in general,[27] of breaking a 'taboo' with regard to the prohibition of torture,[28] and of fundamental rights' susceptibility to 'erosion'.[29] The behaviour of the United States is of particular concern to human rights organizations, because the condoning of torture in the US 'would provide a handy excuse to other governments to use torture to pursue their own national security objectives'.[30]

As this quote from Human Rights Watch suggests, human rights advocates assume that social practices and discursive interventions by norm followers change the content and the meaning of an already established normative structure in world politics. Their fear is in line with a 'critical constructivist' or 'reflexive' approach to international norms and institutions, which emphasizes that norms are variable: their meanings evolve in interaction, and practice constructs and reconstructs these meanings.[31]

Taking these fears seriously, I will try to determine how the meaning of the torture prohibition is enacted by states countering terrorism. How does norm-use effect the interpretation of the respective norm? Have collective

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Venzke, 'Legal Contestation about "Enemy Combatants": On the Exercise of Power in Legal Interpretation' (2009) 5 J. Int'l L. & Int'l Rel. 157.

[26] Neil Hicks, 'The Impact of Counter Terror on the Promotion and Protection of Human Rights: A Global Perspective' in Richard A. Wilson, ed., *Human Rights in the 'War on Terror'* (New York: Cambridge University Press, 2005) 209 at 217.

[27] *Ibid.* at 209.

[28] Human Rights Watch, 'Dangerous Ambivalence: UK Policy on Torture since 9/11' (Briefing paper No. 1, November 2006) [Human Rights Watch 2006], online: Human Rights Watch <http://www.hrw.org/legacy/backgrounder/eca/uk1106/uk1106web.pdf>; Elvira Rosert & Sonja Schirmbeck, 'Zur Erosion internationaler Normen. Folterverbot und nukleares Tabu in der Diskussion' (2007) 14 Zeitschrift für Internationale Beziehungen 253; Derek Summerfield, 'Fighting "terrorism" with torture' (2003) 326 British Medical J. 773; Manfred Nowak, 'Die Aushöhlung des Folterverbots im Kampf gegen den Terrorismus' (2007) 1 Zeitschrift für Menschenrechte 1 at 5.

[29] Kees Wouters, 'Editorial: How Absolute is the Prohibition on Torture?' (2006) 8 Eur. J. Migr. & L. 1.

[30] Human Rights Watch, News Release, 'The Legal Prohibition Against Torture' (1 June 2004), online: Human Rights Watch <http://www.hrw.org/press/2001/11/TortureQandA.htm>.

[31] Christian Reus-Smit, 'Human rights and the social construction of sovereignty' (2001) 27 Rev. Int'l Studies 519 at 526. Cf. Wiener 2004, *supra* note 8; Wiener & Puetter 2009, *supra* note 8.

expectations for the proper behaviour of states countering terrorism changed in recent years and what do they look like?

III. 'Time to think about Torture'?[32] Determining meanings of a prohibition in the context of fights against terrorism

It is a sad commonplace that human rights violations increase in times of war and military conflict. Violations of human rights, such as civil liberties, political rights, religious rights, and personal integrity rights, in the so-called 'war on terror' have been documented by international human rights groups and human rights scholars and need not be described here. The focus of the following analysis will be on the arguments that were used to circumvent, interpret, and/or confirm the absolute ban on torture as laid down in international law.

The prohibition of torture and ill-treatment can be found in many international treaties and declarations, including the *Universal Declaration of Human Rights* (1948), the Geneva Conventions, the *International Covenant on Civil and Political Rights* (1966), the *Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment* (1984) and regional conventions. The *Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*,[33] which was ratified by the United States, the United Kingdom, and Israel, defines torture as an act by which 'severe pain or suffering' is intentionally inflicted by a public official (or under his or her acquiescence) on a person for a specific purpose, such as obtaining a confession (Art. 1, see also section IV below). States Parties must take effective measures to prevent acts of torture and may never invoke 'exceptional circumstances', such as a state of war, as a justification of torture (Art. 2). Furthermore, they must prevent 'acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1' (Art. 16). While Article 2(2) provides that the prohibition of torture is absolute and non-derogable, the text of the *Convention* does not explicitly provide for an absolute prohibition of ill-treatment. However, the Committee against Torture has clarified on several occasions that Article 16 'must be observed in all circumstances', too.[34] It is this distinction between

[32] 'Time to think about torture' is the title of an oft-cited article by Jonathan Alter, *Newsweek* (5 November 2001) 45, online: Newsweek <http://www.newsweek.com/id/76304/page/1>.
[33] A/Res/39/46, UN GAOR, 1984, online: OHCHR <http://www2.ohchr.org/english/law/cat.htm>.
[34] See for example Committee Against Torture, *General Comment No.2: Implementation of article 2 by States Parties*, UN CAT, 39th Sess., UN Doc. CAT/C/GC/2/CRP.1/Rev.4 (2008) at para.5 [CAT General Comment No.2].

torture, on the one hand, and acts of ill-treatment, on the other, to which much of the contested debate on 'torture light' refers.

Despite considerable variation in policies,[35] the arguments put forward by the political elites display several similarities. On the one hand, state representatives affirm the *validity of the absolute ban on torture* in transnational arenas such as the UN Committee against Torture. On the other hand, the same representatives have trivialized and/or justified non-compliance[36] with some of the various obligations included in the ban on torture in national speeches, in memoranda and in reports providing the legal basis for special interrogation methods,[37] and reports to treaty bodies.

One can identify at least three similar patterns of arguments with regard to the reinterpretation of the prohibition of torture and ill-treatment: *i*) the implicit or explicit exception from the absoluteness of the respective prohibitions in cases of emergency ('ticking bomb scenario') or the fight against terrorism in general ('times have changed'), *ii*) the trivialization of abuses and the emphasis on the prohibition of torture as opposed to the prohibition of ill-treatment, and *iii*) the reaffirmation of an absolute ban on *torture* as opposed to ill-treatment.

1. Justifying 'measures': Invoking the ticking bomb scenario

Irrespective of the claim that no policy has been adopted that would violate the ban on torture (see below), representatives of all three states have referred to a responsibility to protect their citizens—a responsibility that should be taken into consideration when discussing, or judging upon, their national human rights situations. One must note that the necessity clause, which I describe below, has been used to justify different policies in the three countries. Israeli and American executives refer to the choice between evils when legitimizing coercive interrogation methods that could be interpreted as a violation of the torture prohibition, while British officials legitimize the weakness of safeguards to prevent torture and ill-treatment. However, they

[35] See Alison Brysk, 'Human Rights and National Insecurity' in Brysk & Shafir, *supra* note 10.

[36] *Trivializing* torture and ill-treatment means that the transnational definition of torture, as found in treaties, court decisions, and views by the UN human rights committees, is not accepted. *Justifying* torture and ill-treatment means that the torture prohibition is weighed against the necessity clause.

[37] Interrogation methods in the US and in Israel were sanctioned by reports that lawyers issued in the US Department of Justice (such as the 'Bybee Memorandum'—*infra* note 48) or, in the Israeli case, the Landau Commission (headed by and named after a former president of the Supreme Court), *infra* note 40.

base their justifications on the same argument: it is necessary to balance human rights (or specific obligations under human rights treaty law) and the duty to defend national security under 'special circumstances'.

On presenting Israel's Third Periodic Report to the Committee against Torture in November 2001, the Israeli state representative, Mr. Levi, pointed to the necessity to balance one right against another. The Committee summarizes his remarks as follows:

> In the context of the terrorist threat that Israel was facing, a balance had to be struck between the human rights of detainees and the human rights of the population at large. While committed to respect for human rights and the rule of law, the State also had *a responsibility to protect* the lives of all its citizens from terrorism. The right to live without terrorism *is also a fundamental human right*, but it was one that Israeli citizens did not enjoy. … Each act or measure of alleged misconduct must be examined on its own merits and *in the light of specific circumstances*.[38]

The Landau Commission, established in May 1987, had previously tried to determine a set of interrogation measures that would secure compliance with national and international human rights norms while ensuring the effectiveness by the General Security Services (GSS).[39] Its argumentation is based on the ticking bomb scenario, according to which torture might be appropriate to prevent an attack on national security. The Report argues that it is 'reasonably necessary' to balance the duty to respect human rights with the duty to protect national security.[40]

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[38] Committee Against Torture, *Summary record of the 496th meeting: Israel 29/11/2001*, 27th Sess., UN Doc. CAT/C/SR.496 (2001) at paras.3 and 10 [emphasis added] [CAT *Summary of 496th Mtg.*].

[39] Cf. the written statement in Israel's first State Report to the CAT: Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention. Initial Reports of States Parties Due in 1992. Addendum: Israel*, UN Doc. CAT/C/16/Add.4 (1994) at para.35: 'The Landau Commission was aware that the issue of moderate pressure during interrogation is both a serious and a sensitive one. ... interrogation practices have been strictly defined in a manner that, in the opinion of the Landau Commission, "if these boundaries are maintained exactly in letter and in spirit, the effectiveness of the interrogation will be assured, while at the same time it will be far from the use of physical or mental torture, maltreatment of the person being interrogated, or the degradation of his human dignity".'

[40] The Landau Report is quoted in Amnesty International, *Israel and the Occupied Territories. Torture and ill-treatment of political detainees*, AI Index: MDE 15/03/94 (London: Amnesty International, 1994), see para.3.15 [Landau Report]. Excerpts can be found online: Amnesty International <http://www.amnestyusa.org/document.php?lang=e&id=3394319E235477E1802569A600604AD4>.

The ticking bomb scenario rests on the assumption that torture is a necessary means to effectively prevent terrorist acts. The Landau Report expresses this belief: 'We are convinced that effective activity by the GSS to thwart terrorist acts is impossible without use of a tool of the interrogation of suspects, in order to extract from them vital information known only to them and unobtainable by other methods.'[41] The United States and the United Kingdom have invoked the ticking bomb scenario as well. During the 1990s, the human rights debate over the *Prevention of Terrorism Act* (*PTA*, first adopted in 1974) in the United Kingdom focused to a large extent on the appropriateness of the measures taken to *prevent* torture and ill-treatment, and only to a lesser extent on the possible use of measures that might amount to ill-treatment while interrogating and detaining terrorist suspects in Northern Ireland.[42] Yet that the government attempted to contextualize its obligations to take such measures in light of 'special circumstances', i.e. a terrorist threat, becomes obvious in this example, too.

While the ticking bomb scenario was not invoked as explicitly and drastically as in the statement by the Israeli representative quoted above, one can find similar statements by British officials. In responding to the recommendation of the Committee against Torture (CAT) to record interrogations as a preventive measure, the British report stated in 1996:

> The Government has concluded … that the introduction of audio or video recording in police offices in Northern Ireland would not be in the overall interest of justice. *In the particular circumstances of Northern Ireland*, the electronic recording of interviews would inhibit the chances of lawfully obtaining information that would lead to the conviction of terrorists or the saving of other people's lives.[43]

This view that some 'powers' are necessary to effectively combat terrorism was reiterated two years later, when the next report justified the upholding of the emergency legislation in Northern Ireland: '… some terrorist groups on both sides remain active and a number of violent incidents have continued to occur … the Government has concluded that the security forces

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[41] *Ibid.* at para.4.6.

[42] See, for instance, the findings of the European Committee on the Prevention of Torture, which considered psychological forms tantamount to inhuman treatment; Committee on the Prevention of Torture, *Report to the Government of the United Kingdom on the visit to Northern Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 to 29 July 1993*, CPT/Inf (94) 17 (1994) at 37-8.

[43] Committee against Torture, *Second periodic reports of States parties due in 1994, Addendum: United Kingdom of Great Britain and Northern Ireland*, UN Doc. CAT/C/25/Add. 6 (1996) at para.56 [emphasis added].

must continue to have available to them the powers they need to counter terrorism.'[44] In the current debate over the principle of non-refoulement,[45] the British Prime Minister, the Home Secretary, and others have likewise expressed their views that the non-refoulement treaty provisions do not apply to the particular circumstances of the war on terror.[46] For example, former Home Secretary Charles Clarke demanded that 'the right to be protected from torture and ill-treatment must be considered side by side with the right to be protected from the death and destruction caused by indiscriminate terrorism'.[47]

In the United States, the necessity clause, which narrowed the definition of torture as set out in international treaty law (i.e. the UN *Convention against Torture*) was introduced in the Bybee Memorandum of August 2002.[48] This document claimed that harm to detainees might be unavoidable and again referred to the choice between two evils, of which one—defending national security—is less harmful than the other—protecting the human rights of terrorists: 'Clearly any harm that might occur during an interrogation would pale to insignificance *compared to* the harm avoided by preventing such an attack, which could take hundreds or thousands of lives.'[49] This ticking bomb scenario has been explicitly invoked in several of the memos and reports that followed the Bybee Memorandum and that authorized coercive interrogation methods.[50]

2. Trivializing abuses

The second similarity between the various reports and statements of Israeli and American representatives is the wording about how far a detainee can be 'pressured'. The Landau Report does not mandate 'torture' or 'ill-treatment', but rather interrogation methods that are described or framed as 'a moderate measure of physical pressure' and 'non-violent psychological

[44] Committee against Torture, *Third periodic reports of States parties due in 1998, Addendum: United Kingdom of Great Britain and Northern Ireland and Dependent Territories*, UN Doc. CAT/C/44/Add. 1 (1998) at paras.46-8.
[45] The principle of non-refoulement demands that receiving countries refrain from returning people to their country of citizenship if they run the risk of being tortured there.
[46] Cf. Human Rights Watch 2006, *supra* note 28 at 7-9.
[47] *Ibid.* at 28.
[48] Memorandum from Jay S. Bybee, Assistant Attorney General, US Department of Justice, to Alberto R. Gonzales, Counsel to the President (1 August 2002), reprinted in Karen J. Greenberg & Joshua L. Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* (New York: Cambridge University Press, 2005) at 172 [Bybee Memorandum].
[49] *Ibid.* at 208 [emphasis added].
[50] See *ibid.* at 308.

pressure'.[51] It is noteworthy that, although the full Landau Report was never officially published, the language respects the taboo inherent in the ban on torture; it does not suggest breaching the ban, even while it disrespects the essential idea of the prohibition of torture and ill-treatment, namely that 'no situation whatsoever' justifies the infliction of torture.

Yet state officials have openly contested what torture actually is, or referring to the definition provided by the *Convention against Torture*, how much severity of pain is necessary to rise to the level of torture. This definitional juggling can be seen as a sign for the enduring strength of the torture taboo. In 2001, still referring to the measures mandated in the Landau Report, the Israeli representative stated that:

> Nevertheless, his Government maintained that a careful reading of the Convention suggested *that pain and suffering did not in themselves necessarily constitute torture*. Interrogation procedures had to be examined taking account of the severity of the pain or suffering inflicted on a person.[52]

In the United States, the Bybee Memorandum of 2002 contained the most obvious redefinition of the torture prohibition. It argued that the American understanding of torture, as laid out in Sections 2340-2340A of the *United States Code*, covers only extreme acts:

> Severe pain is generally of the kind difficult for the victim to endure. Where the pain is physical, it must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure. … Because the acts inflicting torture are extreme, there is significant range of acts that though *they might constitute* cruel, inhuman, or degrading treatment or punishment fail to rise to the level of torture.[53]

The interrogation techniques sanctioned in the Bybee Memorandum (and in the memorandum which superseded it and which was approved by the Secretary of Defense) are described using vague and general terms such as 'stress positions'; they are usually referred to as 'stress and duress' in official statements. Rumsfeld's remark, added to the memo approving interrogation

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[51] Landau Report, *supra* note 40 at para.4.7.
[52] Statement by Mr. Levi to the CAT as summarized in CAT *Summary of 496th Mtg.*, *supra* note 38, at para.10 [emphasis added].
[53] Bybee Memorandum, *supra* note 48, at 213-14 [emphasis added].

methods in 2004, is famous: 'I stand for 8-10 hours a day. Why is standing limited to four hours?'[54]

Apart from such trivializing remarks, it has been the official policy of the United States since ratification of the *Convention against Torture* to not fully embrace the 'vague and ambiguous'[55] definition of degrading treatment or punishment that the *Convention* provides. In its ratification instrument, the United States entered a reservation to Article 16. The US considers itself bound to this article only insofar 'as the term "cruel, inhumane or degrading treatment or punishment" means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eight, and/or Fourteenth Amendments.'[56] In the American view, several criteria have to be met for an act to amount to torture, including 'prolonged' mental harm or 'severe' pain as a result of 'specific intent'–a position criticized as stultifying the very notion of torture.[57] The silence about the validity of the prohibition of ill-treatment is telling in and of itself. Not just the Bybee Memorandum, but also subsequent memoranda (e.g. the Levin Memorandum of December 2004) distinguish between torture and ill-treatment and focus only on the criminal prohibition of torture.[58]

3. Reaffirming the prohibition of torture

Regardless of the justifications put forward, the absolute prohibition of *torture* was not officially questioned or contested in any of the three countries; that is, one cannot find any discursive interventions questioning the validity of a ban on torture as such.

American government representatives have repeatedly confirmed that the Bush Administration 'was committed to upholding national and international obligations to eradicate torture and prevent cruel, inhuman or

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[54] Quoted in Tom Malinowski, 'The Logic of Torture', *The Washington Post* (27 June 2004), B07, online: washingtonpost.com <http://www.washingtonpost.com/wp-dyn/articles/A6950-2004 Jun25.html>.

[55] Quoted in Committee against Torture, *Second periodic reports of States parties due in 1999, Addendum: United States*, UN Doc. CAT/C/48/Add.3 (2005), at para.147.

[56] *Ibid.* at para.88.

[57] Antonio Cassese, 'Are International Human Rights Treaties and Customary Rules on Torture Binding upon US Troops in Iraq?' (2004) 2 J. Int'l Crim. Justice 872 at 875 [Cassese 2004].

[58] US Department of Justice, 'Memorandum from Daniel Levin, Acting Assistant Attorney General, to James B. Comey, Deputy Attorney General' (39 December 2004), excerpts reprinted in Henry J. Steiner, Philip Alston & Ryan Goodman, eds., *International Human Rights in Context: Law, Politics, Morals* (Oxford: Oxford University Press, 2007) 255 at 256.

degrading treatment or punishment'.[59] White House Counsel Alberto Gonzales stated in June 2004, 'The administration has made it clear before and I will reemphasize today that the President has not authorized, ordered or directed in any way any activity that would transgress the standards of the torture conventions or the torture statute, or other applicable laws.'[60] The abuses that had occurred in Abu Ghraib, for example, were not excused or defended; however, the government denied that they were the result of intent. Although it is widely believed that various memoranda, notably the infamous and later rescinded Bybee Memorandum, violated the prohibition of ill-treatment and could potentially lead to measures amounting to torture,[61] a state representative denied that anything in the Bybee or succeeding memoranda 'had changed the definition of torture governing United States obligations under the Convention [against Torture] from what had been accepted upon ratification'.[62] Accordingly, the Bybee Memorandum was not withdrawn 'because it purported to change the definition of torture', but because it exceeded the competencies of the president. [63] It is noteworthy that the American delegation did not once indicate the wish or the necessity to re-define or to re-interpret the prohibition of torture in the context of countering terrorism when discussing its State Report with the Committee against Torture, an international forum of experts established under the international human rights regime, in May 2006.[64] Instead, the controversy between the Committee and the State Delegation was about the applicability of the *Convention against Torture* in situations of armed conflict, i.e. on operations in Guantánamo, Afghanistan, and Iraq. In this regard, the United States has repeatedly stated that the Geneva Conventions are to be applied as *lex specialis* (while the UN *Convention against Torture* is not applicable).

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[59] Statement by Mr. Lowenkron to the Committee against Torture, as summarized in Committee against Torture, *Summary Record of the 703rd meeting: United States of America,* 36th Sess., UN Doc. CAT/C/SR.703 (2006), at 2 [CAT *Summary of 703rd Mtg*.].

[60] Press Briefing by White House Counsel Judge Alberto Gonzales and others quoted in Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Second periodic report of States parties due in 1999, Addendum: United States of America*, UN Doc. CAT/C/48/Add. 3/Rev.1 (2005), at para.61.

[61] For this view see the joint report by five Special Rapporteurs in Commission of Human Rights, *Situation of detainees at Guantánamo Bay*, UN Doc. E/CN.4/2006/120 (2006), at 17 and 24.

[62] Statement by Mr. Bellinger to the Committee against Torture, as summarized in CAT *Summary of 703rd Mtg*., *supra* note 59 at 4.

[63] *Ibid*.

[64] A similar perspective is implicit in the 2004 Taguba Report on Iraqi Prisoner Abuse, which makes no reference to the *ICCPR* or the *Convention against Torture* and customary law outlawing torture. See Cassese 2004, *supra* note 57.

The argumentation of Israel was not identical in all these aspects but was also based on the reiterated statement that the 'special measures' applied by the Security Service were not violating international human rights norms: 'We wish to emphasize that the position of the State of Israel has been, and remains, that the authorization procedure does not conflict with the 1984 Convention against Torture or with other prohibitions in international law'.[65]

In its report to the Committee against Torture in 2003, the government of the United Kingdom denounced 'the opinion that the continuing state of emergency in Northern Ireland was a factor impeding the application of the provisions of the Convention', stating that:

> it is the view of her Majesty's Government that the security situation still warrants the continued use of emergency provisions. The provisions *are a measured and proportionate response in line with international obligations*. The United Kingdom has never used the security situation to attempt to step outside its international obligations.[66]

Similar reiterations of adherence to the prohibition of torture can be found in the British debate over the non-refoulement principle and the principle of not using third-party evidence if obtained by using torture.[67]

In comparison, the arguments put forward reveal two striking similarities: there is a generally shared acknowledgement as to the importance and validity of the torture taboo, outlined in customary and treaty law. However, and this is highly relevant to the theoretical debate on norm diffusion, in a situation where it would significantly limit (supposedly effective) measures against terrorist threats the national elites contest, albeit to different extents, the appropriateness of their duty to prohibit and/or

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[65] State Attorney's Office, Ministry of Justice (Israel), 'Response of the State Attorney's Office', as reprinted in B'Tselem–The Israeli Information Center for Human Rights and the Occupied Territories, *The "New Procedure" in GSS Interrogations and the Case of 'Abd A-Nasser 'Ubeid* (Jerusalem: B'Tselem, 1992) at 20, online: B'Tselem: <www.btselem.org/Download/199311_ The_New_Procedure_Eng.doc> and also quoted in Human Rights Watch/Middle East, *Torture and Ill-Treatment: Israel's Interrogation of Palestinians from the Occupied Territories* (New York: Human Rights Watch, 1994) at 12. Similar claims can be found in the various discussions with international treaty bodies and in responses to torture allegations put forward by national and transnational human rights organizations.

[66] Committee against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Fourth periodic reports of States parties due in 2002, Addendum, United Kingdom of Great Britain and Northern* Ireland, UN Doc. CAT/C/67/Add.2 (2004) at para.14 [emphasis added].

[67] See Human Rights Watch 2006, *supra* note 28 at 14.

prevent (torture and) ill-treatment. Hence, politicians advance a contextualized interpretation, which is also backed by a significant segment of public opinion and academic discourse (see below).

4. The end of the taboo?

Although subject to contestation, the international prohibition of torture has neither been renegotiated nor reformulated. Rather, there are signs of a strengthening of international law on the issue. Even after 9/11, ratification rates are rising. In December 2002, an Optional Protocol to the *Convention against Torture* was adopted, which allows for the inspection of detention facilities in the member states, and in 2005 the Commission on Human Rights established the mandate of a Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. Both the UN treaty bodies and the Special Rapporteurs and Chairpersons of working groups (as mandated by the UN Commission on Human Rights) have issued a series of resolutions and reminders in which they reaffirm the prohibition of torture and other forms of ill-treatment in the context of anti-terrorism measures. Further signs of a strengthening of the prohibition can be found at the regional level.[68] In June 2002, the Organization of American States adopted the *Inter-American Convention against Terrorism*, which demands that 'any person who is taken into custody ... shall be guaranteed fair treatment including the enjoyment of all ... applicable provisions of international law.'[69] In the same year, the Council of Europe's Committee of Ministers adopted a guideline (IV on the absolute prohibition of torture), which states, 'The use of torture or of inhuman or degrading treatment or punishment, is absolutely prohibited, in all circumstances, and in particular during the arrest, questioning and detention of a person suspected of or convicted of terrorist activities ...' [70] Two other guidelines–XV on possible derogations and XIII on extradition–reaffirm the absoluteness of the prohibition of torture and ill-treatment and the principle of non-refoulement, i. e. the prohibition against extraditing someone who is

[68] The following examples are taken from the 2003 Report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/58/120 (3 July 2003), paras.17-22.

[69] OAS, General Assembly, 2d Sess., *Inter-American Convention against Terrorism*, OR AG/Res. 1840 (XXXII-O/02) (2002) at Art. 15(3).

[70] Council of Europe, Committee of Ministers, 804th Mtg., *Guidelines on Human Rights and the Fight against Terrorism*, H (2002) 4 (2002) at 4.

at risk of being tortured or subjected to inhuman or degrading treatment or punishment.[71]

With regard to the fear of a norm change as voiced by human rights activists, it must also be noted that not one single state challenged the absolute prohibition of *torture* in an international forum, such as the Committee against Torture's discussion of State Reports. On the contrary, presidents and state officials have reaffirmed the ban on torture (see above), which reveals that the norm cannot be contested all the way down.

As I will show in the next section, most theories of norm diffusion and compliance have a hard time dealing with norm contestation. First, these theories do not anticipate contestation and lack a conceptualization of re-interpretation of a norm in a given situation. Secondly, they work with the assumption of a logic of appropriateness, which is based on the content of transnational norms, not on the practice of norm followers.

IV. Contested meaning as a challenge for approaches on norm diffusion and compliance in international relations and international law

The contestation of a supposedly consensual norm remains unaddressed in the prominent approaches on human rights change and norm diffusion. Although rationalist and constructivist explanations of human rights change and norm diffusion vary considerably with regard to the mechanisms they identify and the changes they expect,[72] neither seriously considers controversies over the meaning of a given norm after the stage of formal norm acceptance (i.e. ratification). It is hence fair to say that the theory of international human rights law and its diffusion has widely overlooked processes of norm-contestation in national contexts after formal norm acceptance. The top-down approach treats international law as the place where the meaning of norms as standards of behaviour first becomes fixed, and from where, afterwards, norms obtain meaning. Methodologically, scholars following this approach derive the meaning of norms neither from public debate and discourse nor from the social practice itself, but rather from the legal discourse with reference to the text of a treaty. In these

[71] *Ibid.* at 6 and 7.

[72] See for example Ryan Goodman & Derek Jinks, 'How to Influence States: Socialization and International Human Rights Law' (2004) 54 Duke L. J. 621 [Goodman & Jinks]; Schmitz & Sikkink, *supra* note 5; Beth Simmons, 'Compliance with International Agreements' (1998) 1 Ann. R. Pol. Sci. 75 [Simmons].

studies, norms are treated as the independent variable and characterized by a more or less specific set of convergent expectations about proper state behaviour. Convergent, not divergent, expectations are at the centre of norm definition in constructivist and rationalist institutionalism alike. Norms and institutions are widely understood as 'collective expectations for the proper behaviour of actors with a given identity'[73] or as 'a relatively stable collection of practices and rules defining appropriate behaviour for specific groups of actors in specific situations'.[74] Similarly, the consensus definition of a regime as brought forward by neoliberal, i.e. rational, institutionalism in the 1980s defined regimes as 'implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations *converge* in a given area of international relations'.[75]

Empirically, the literature on human rights change (and the broader literature on international regimes as well) has equated the text of law with the meaning of norms, and transfers the assumptions about 'convergence' and 'intersubjectivity' to human rights law. In their prominent model of the norm cycle, Finnemore and Sikkink even establish that, once a norm has been accepted, e.g. a law has been ratified, chances are actors will conform to the norm 'almost automatic[ally]'.[76] The idea is that norms become 'so widely accepted that they are internalized by actors and achieve a "taken-for-granted" quality'.[77]

Theories on human rights norms, such as the norm cycle model and the spiral model,[78] the legalization debate,[79] or the mechanism based approaches in human rights research—notably on acculturation and persuasion[80]—hardly account for the observed processes of contestation by Western

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[73] Peter Katzenstein, 'Introduction: Alternative Perspectives on National Security' in Peter Katzenstein, ed., *The Culture of National Security* (New York: Columbia University Press, 1996) at 5.

[74] James G. March & Johan P. Olsen, 'The Institutional Dynamics of International Political Order' (1998) 52 Int'l Org. 943 at 948.

[75] Stephen D. Krasner, *International Regimes* (Ithaca: Cornell University Press, 1983) at 1 [emphasis added].

[76] Martha Finnemore & Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 Int'l Org. 887 at 904 [Finnemore & Sikkink].

[77] *Ibid.* at 895.

[78] See *ibid.*; Thomas Risse & Kathryn Sikkink, 'The Socialization of International Human Rights Norms into Domestic Practices' in Risse *et al.*, *supra* note 20 [Risse & Sikkink].

[79] Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter & Duncan Snidal, 'The Concept of Legalization' (2000) 54 Int'l Org. 401 [Abbott *et al.*].

[80] Goodman & Jinks, *supra* note 72.

democracies. Contestation poses a challenge for these approaches in at least four ways, outlined as follows.

(1) In realist and Gramscian accounts alike, it is widely believed that international law in general, and human rights law in particular, reflect the interests, values and worldviews of powerful states.[81] Considering the United States' hegemonic role in setting the normative structure of the international system after World War II and its leadership in drafting and ratifying the *Convention against Torture*,[82] it should especially be expected to comply with and rhetorically embrace civil and political rights and personal integrity rights. Furthermore, American foreign policy has a long history of providing incentives for human rights improvements, notably through the *Foreign Assistance Act*.[83] The United States is also the only country that publishes annual human rights reports, which scrutinize compliance with personal integrity rights, political and civil rights, and worker rights in almost every state worldwide.[84] Given this, how has the overt contestation of a human rights norm by the Bush administration been possible?

(2) It is widely believed that confident norm followers generally identify with broader normative structures, such as those represented by a liberal community or even a society of states, and embrace the norms of the

[81] Tony Evans, *US Hegemony and the Project of Universal Human Rights* (New York: Saint Martin's Press, 1996); Stephen D. Krasner, 'Sovereignty, Regimes, and Human Rights' in Volker Rittberger, ed., *Regime Theory and International Relations* (Oxford: Clarendon Press, 1993) 139.

[82] Jane Mayer, *The Dark Side. The Inside Story of How the War on Terror Turned into a War on American Ideals* (New York: Doubleday, 2008) at 150 [Mayer].

[83] *Foreign Assistance Act of 1961*, Pub.L. 87-195, 75 Stat. 424 (1961), (codified as amended at 22 U.S.C. § 2151 (2007)). In sections 116 and 502B, the *Foreign Assistance Act* links foreign aid to the observance of internationally recognized human rights. E.g. sec. 116 reads: 'No assistance may be provided under this part to the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights, including torture or cruel, inhuman, or de-grading treatment or punishment ...' According to the sec. 101(2) FAA, US development cooperation policy (i.e. USAID) shall encourage 'development processes in which individual civil and economic rights are respected and enhanced'.

[84] The Country Reports on Human Rights Practices are released by the Bureau of Democracy, Human Rights, and Labor and submitted to the Congress by the Department of State in compliance with Sections 116(d) and 502B(b) of the *Foreign Assistance Act of 1961* (FAA), as amended. The first report, in 1977, covered 82 countries receiving US aid, while the most recent report, released in March 2008, covered 196 countries. See US Department of State / Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices – 2007* (Washington, DC: US Department of State, 2008), online: U.S. Department of State <http://www.state.gov/g/drl/rls/hrrpt/2007/index.htm>.

community even if compliance is costly.[85] If norms matter for actors with a shared identity, one would expect liberal democracies to uphold rather than to contest liberal human rights norms. Furthermore, contestation of particular provisions of the *Convention against Torture* (and other treaties or provisions of customary law) challenges the notion that democracies are in general more likely to comply with international obligations. One would normally expect the '"enmeshment" of international commitments into domestic politics and political institutions', resulting in significant domestic constraints on state leaders, for example, by domestic interest groups.[86] How is it possible that liberal democracies, which are deeply embedded in international society, contest core human rights norms?

(3) According to the legalization approach, there are three distinct characteristics of law that international institutions and norms may possess: obligation, precision, and delegation.[87] The assumption that certain features of a rule promote a high degree of effectiveness and compliance can be found in both rationalist and constructivist perspectives on international institutions.[88] Precision in particular is explicitly viewed as enhancing voluntary compliance and limiting voluntary non-compliance: 'A precise rule specifies clearly and unambiguously what is expected of a state or other actor … in a particular set of circumstances. In other words, precision narrows the scope for reasonable interpretation'.[89] Contested compliance with the prohibition of torture is puzzling for those following the legalization approach, since the degree of obligation, precision and delegation of the prohibition of torture and ill-treatment can be ranked comparatively high from the standpoint of human rights:

First, the sense of *obligation* created by the prohibition is very strong. The ban on torture is enshrined in 28 human rights documents, including the *Universal Declaration on Human Rights*, the *International Covenant on Civil and Political Rights*, the UN *Convention against Torture*, and several regional

[85] Bull, *supra* note 14; Thomas M. Franck, *The Power of Legitimacy Among Nations* (New York: Oxford University Press, 1990); Frank Schimmelfennig, 'The Community Trap. Liberal Norms, Rhetorical Action, and the Eastern Enlargement of the European Union' (2001) 55 Int'l Org. 47.
[86] Simmons, *supra* note 72 at 84.
[87] Abbott *et al*., *supra* note 79.
[88] Robert O. Keohane, *International Institutions and State Power: Essays in International Relations Theory* (Boulder: Westview Press, 1989); Friedrich V. Kratochwil, *Rules, Norms, and Decisions on the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1989) at 4-5; Jeffrey Legro, 'Which norms matter? Revisiting the "failure" of internationalism' (1997) 51 Int'l Org. 31 [Legro].
[89] Abbott *et al*., *supra* note 79 at 412. See also Abram Chayes & Antonia Handler Chayes, 'On Compliance' (1993) 47 Int'l Org. 175.

human rights instruments—instruments that have high ratification rates. The Article 3 provisions common to the four Geneva Conventions of 1949 also outlaw 'cruel treatment and torture' as well as 'outrages upon personal dignity, in particular humiliating and degrading punishment'. This prohibition is part of customary law, and it is one of the few human rights that have attained the status of *jus cogens*.[90] Moreover, the prohibition of torture is non-derogable. Thus, even in times of war or crisis, states are obliged to prevent and punish any act of torture. Article 2 of the *Convention against Torture* holds that 'no exceptional circumstances whatsoever may be invoked as a justification of torture'.

Second, the prohibition of torture is rather *precise*. Article 1 of the *Convention against Torture* defines torture as

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Different obligations such as effective legislative, administrative, judicial or other measures to prevent acts of torture are laid out in the *Convention* as well. It includes the principle of non-refoulement (Art. 3), the obligation to investigate alleged violations promptly (Art. 12), the prohibition of using evidence obtained through torture in legal proceedings (Art. 15), and other obligations of the States Parties.[91]

Finally, the degree of *delegation* is comparatively high. Under the *Convention*, the supervision of compliance, decisions on interstate and individual complaints (leading to non-binding 'views'), and the specification of obligations are delegated to the Committee against Torture. Recently, a mandatory system of inspection for national detention facilities was

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[90] As a peremptory norm (*jus cogens*), the prohibition of torture will render any treaty null and void that authorizes torture or is in any other conflict with the torture prohibition itself. On the legal consequences of *jus cogens* see Erika de Wet, 'The Prohibition of Torture as an International Norm of jus cogens and Its Implications for National and Customary Law' (2004) 15 Eur. J. Int'l L. 97. As customary law, it binds states, even if they have not ratified any particular treaty.

[91] While comparatively precise, the *Convention* is nevertheless rather complex, which might impede its effectiveness, cf. Finnemore & Sikkink, *supra* note 76 at 907.

introduced as well.[92] How is it possible, then, that one of the most legalized human rights norms is contested?

(4) Sequenced analyses of norm diffusion, such as in the 'spiral model'[93] or the norm 'life cycle',[94] assume that norm followers are either pressured or persuaded into norm acceptance. Once the norm has been accepted, habitualization and iteration become the dominant modes of action in a norm-following state. Members of domestic bureaucracy, issue-area-related professions, law bureaucracies, and courts secure compliance with a norm. How is it possible that norm contestation takes place at such a late stage of the norm cycle?

V. How is contestation possible?

What are the conditions of this process of norm contestation? What insights can we gain from the reconstruction of the applied meaning of the torture prohibition in the context of threats to national security?

An excellent point of departure is Acharya's work, which explains the contestation of transnational norms with strong and unchallenged local norms, beliefs and practices. Contestation occurs when local actors doubt the utility of a transnational norm and when local actors fear that the transnational norm may undermine existing practices.[95] His concept of localization emphasizes the '"mutual constitutive" relationship' of transnational and local norms, in which external norms may be redefined to meet local beliefs and practices.[96] Which local beliefs and practices condition the full acceptance of the prohibition of torture and ill-treatment?

One observation is that contestation is only possible on the condition that political discourse constructs the necessity clause. Given the normative strength of the torture taboo, this clause is linked to the elites' argument that they are able to construct lawful measures that fall short of what is forbidden under international and domestic law. The clause is based on public fears

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[92] *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 18 December 2002, GA Res. A/RES/57/199, 42 I.L.M. 26 (entered into force 22 June 2006).
[93] See Risse & Sikkink, *supra* note 78.
[94] See Finnemore & Sikkink, *supra* note 76.
[95] Acharya, *supra* note 15, at 248 and 251.
[96] *Ibid.* at 251.

and the resulting demand that politicians take action against terrorism.[97] Furthermore, discourse draws a line between 'them' (the 'terrorists', the 'enemy') and 'us' (innocent citizens), and thus defines two separate groups and identities. In the constructed dilemma of weighing the rights of the one group against the rights of the other group, the answer is obvious:[98] the identifiable norm hierarchy is based on the norm of state security and the belief that the 'terrorists' do not have the right to full human rights protection. On these grounds, the construction of the necessity clause creates a situation of 'misfit' or incompatibility for the absolute prohibition of torture and ill-treatment and its complex system of rules. Contestation and resistance to compliance with the many provisions of international treaty law then stem from their (perceived) incongruence with the belief that the state shall protect its citizens effectively. Not surprisingly, local agents have been slow in challenging the necessity clause.

In the United States, politicians from both the Democrat and Republican camps and academics have trivialized cases of torture and ill-treatment or argued that they were *justified*,[99] and—at least until 2004—the American Congress was accused of reluctance to investigate accusations of abuse.[100] American public opinion is also said to have reflected on torture and human rights abuse only to a low degree.[101] According to Forsythe, particularly in the period between 2002 and 2004, neither American society as a whole nor a 'sizable public movement' protested the Bush administration's policies towards detainees.[102] According to Jane Mayer, the secrecy of the measures taken within these policies and the CIA's program itself meant that neither the public nor Congress had the means to argue against the Bush administration's claim that the torture prohibition had been respected.[103] Still, opinion polls reveal that 35 per cent of the Americans interviewed in September 2006 supported the use of torture in order 'to get information from a suspected terrorist' and 38 per cent supported 'more forceful

[97] Cf. Richard Goldstone, 'Combating Terrorism and Protecting Civil Liberties' in Richard Ashley Wilson, ed., *Human Rights in the 'War on Terror'* (Cambridge: Cambridge University Press, 2005) at 166.
[98] Cf. Hooks & Mosher, *supra* note 25.
[99] For examples see *ibid*.
[100] *Ibid*. Cf. Forsythe 2007, *supra* note 10.
[101] Hooks & Mosher, *supra* note 25, at 1628.
[102] David P. Forsythe, 'United States Policy toward Enemy Detainees in the "War on Terrorism"' (2006) 28 Hum. Rts. Q. 465 at 480.
[103] Mayer, *supra* note 82 at 151.

interrogation techniques than the Geneva Convention standards'.[104] The percentages had hardly changed from an autumn 2001 poll that found 32 per cent support for 'torture of suspects held in the U.S. or abroad'.[105]

In a study on 'the social response to torture in Israel', Stanley Cohen also identifies patterns of trivialization and justification in different political factions of the Israeli government, none of which opposed the measures sanctioned by the Landau Report.[106] It was not until 1999, after several years of petitioning, that the Israeli High Court finally determined the unlawfulness of a general invocation of the necessity clause by the Landau measures, and reaffirmed that 'international law treaties – to which Israel is a signatory' prohibit the use of torture and ill-treatment: 'These provisions are "absolute". There is no exception to them and there is no room for balancing'.[107] Nonetheless, even the Court left a legal loophole for any interrogation officer who applied 'physical interrogation methods' for the purpose of saving human life: 'Our decision does not negate the possibility that the "necessity defense" will be available to GSS investigators—either in the choice made by the Attorney-General in deciding whether to prosecute, or according to the discretion of the court if criminal charges are brought.'[108]

The ticking bomb scenario has further support among some scholars (and has been vehemently criticized by others). Even before 9/11, Winfried Brugger, a German professor of law, saw an 'unavoidable clash of respecting versus protecting opposite constitutional demands, with innocent victims and a lawbreaker being the parties in question'.[109] Consequently, he proposed 'an internal exception clause in the provisions outlawing the use of

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[104] CBS News/New York Times Poll, September 15-19, 2006 (N=1,131 adults nationwide, Margin of Error ± 3); USA Today/Gallup Poll, September 15-17, 2006 (N=1,003 adults nationwide, Margin of Error ± 3); available at: <http://www.pollingreport.com/terror2.htm>.

[105] Figure taken from Abraham McLaughlin, 'How far Americans would go to fight terror', *The Christian Science Monitor* (14 November 2002), online: The Christian Science Monitor <http://www.csmonitor.com/2001/1114/p1s3-usju.html>. Asked if they could 'envision a scenario in the war against terrorism in which [they] would support any of the actions taken by the US or not' 32 per cent of the interviewees responded positively with regard to 'torture of suspects held by the US or abroad'. The Christian Science Monitor/TIPP was conducted from Nov. 7 to 11 (2002), and surveyed 920 adults nationwide. The margin of error is ± 3.

[106] Stanley Cohen, 'The Social Response to Torture in Israel' in Neve Gordon & Rachuma Marton, eds., *Torture. Human Rights, Medical Ethics and the Case of Israel* (London: Atlantic Highlands, 1995) 20.

[107] *Public Committee Against Torture in Israel*, *supra* note 10 at para.23.

[108] *Ibid.* at para.40.

[109] Winfried Brugger, 'May Government Ever Use Torture? Two Responses from German Law' (2000) 48 Am. J. Comp. L. 661 at 676.

torture unconditionally',[110] as means to allow for the 'only method of preventing a catastrophe or other grave illegalities, and that is to extract the necessary information from the terrorist'.[111] In a series of publications, Alan Dershowitz, professor of law at Harvard University, made the highly controversial suggestion to issue a judicial warrant that would review the necessity and at least increase accountability[112] for those cases in which 'torture is in fact being used and/or would in fact be used in an actual ticking bomb mass terrorism case'.[113]

As these comments illustrate, the invocation of effective methods to prevent terrorist attacks and to save the lives of innocent citizens may significantly weaken domestic opposition to a watering-down of international human rights norms. There is evidence of a contextualized standard of appropriateness, or a local belief, that is shared by many decision makers, academia, and public opinion irrespective of party position. Hence, the divide as to the meaning of human rights norms does not simply run between ruler and ruled or the military/police and civil society. A clear mapping of types of actors that hold the same meaning is thus difficult to maintain.

Another observation is that the identity of states as members of the international community and as 'civilized' nations is not constituted by the precise text of international human rights law, as a behaviourist version of constructivism would suggest. Claims for appropriate behaviour are not drawn from the views of the transnational human rights community, including the UN committees or other representatives of the global human rights regime. Apart from the already mentioned local norms and practices, it is the practice of other liberal democracies countering terrorism that serves as the point of reference and standard of appropriateness. For example, the spokesman of the Israeli government, Moshe Fogel, stated in 1999: 'What I have to tell you is that Western democracies, in similar situations to that which Israel finds itself, have used similar methods. And I think that *the proper standard to judge Israel is, of course, by Western standards – but Western standards which apply in wartimes.*'[114] Thus, what one will find when looking

[110] *Ibid.* at 674.
[111] *Ibid.* at 676.
[112] Alan M. Dershowitz, *Why Terrorism Works. Understanding the Threat, Responding to the Challenge* (New Haven: Yale University Press, 2002). See Chapter 4.
[113] Alan M. Dershowitz, 'The Torture Warrant. A Response to Professor Strauss' (2004) 48 N. Y. L. Sch. L. Rev. 275 at 277.
[114] Quoted in David Gollust, 'Israel/Torture' *Voice of America* (13 January 1999) [emphasis added], online: FAS <http://www.fas.org/irp/news/1999/01/990113-israel.htm>.

at domestic debates is a reinterpretation of the prohibition of torture and ill-treatment that deviates from the understanding upheld by human rights advocates and within international organizations. Depending on the respective discourse that is seen to reflect the 'true' meaning of the norm, states engage either in a contestation or a reinterpretation of the practical implications of the norm. The ticking bomb scenario and the necessity clause are powerful constructions in all of these discourses and are shared by many politicians, members of academia, and a substantial portion of society.

Finally, the applied meaning of the torture prohibition reveals a hierarchy between torture on the one hand, and ill-treatment on the other. Torture has a special stigma, is considered as a particularly grave human rights violation,[115] and is thus distinguished from ill-treatment in many human rights treaties, the rulings of domestic courts, and the European Court of Human Rights. Although case law and legal comments have emphasized the prohibition of both, the problem remains that the 'definitional threshold between ill-treatment and torture is often not clear'.[116]

In sum, we find that transnational norms are redefined to match local norms and practices and the norms and practices of peer-states.

VI. Conclusion

This article has collected evidence on norm contestation in several national contexts under conditions of the war on terror. Situations of internal and external crisis are particularly well suited to determine the legitimacy and the meaning of a norm. Through comparison, the arguments put forward reveal that actors feel bound by a principal obligation to refrain from torture (and ill-treatment), while the exact meaning of ill-treatment and the validity of Article 2 of the *Convention against Torture* (the absolute prohibition under all circumstances) and other articles (e.g. non-refoulement) are contested and redefined. As described, national elites have contested the appropriateness of an absolute prohibition of ill-treatment when it limits measures asserted to be effective against terrorist threats. Hence, politicians have advanced a contextualized interpretation that is clearly not provided for in international law, yet has support from a significant segment of public opinion and academic discourse, and fits past practices.

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[115] Manfred Nowak, 'What Practices Constitute Torture? US and UN Standards' (2006) 28 Hum. Rts. Q. 809.

[116] CAT General Comment No.2, *supra* note 34, at para.3.

As the case studies illustrate, we find contextualized meanings of the transnational norms, i.e. reinterpretations of the prohibition of torture and ill-treatment. These are enacted to different degrees when state executives decide upon measures to counter terrorism. The reinterpretation can be summarized as follows: some forms of ill-treatment or some exceptions from the many provisions outlined in international treaty law to which these states are parties are deemed to be necessary in order to effectively counter threats to the civil population under a given state's jurisdiction. This does not mean that the torture taboo has ceased to exist. There are several techniques and historical motives for torture that have not been contested; hence one may conclude that torture is still thought of as inappropriate in order to terrorize people into submission, punish criminals, or as 'victor's pleasure'.[117]

The prohibition of torture and ill-treatment is characterized by a relatively high degree of precision, obligation, and delegation, which still have not been able to prevent non-compliance and contextualized interpretation. Yet, one other characteristic of law seems to be partially lacking. Because some of the norms surrounding the ban on torture are not considered to be useful and/or applicable in states of emergency, these norms lack legitimacy, an essential source of compliance[118] and social recognition. In particular, the prohibition of ill-treatment and the principle of non-refoulement lack congruence with official actions and past practices. Furthermore, they do not match the values of a significant share of society.

The implication for theories of norm diffusion and compliance is that human rights norms, even the most institutionalized ones, are not internalized or taken for granted to the full degree that the dominant model of human rights diffusion holds them to be. The explanatory power of the mechanisms identified most prominently in constructivist theories of norm diffusion, i.e. persuasion, social and cognitive pressure, and arguing/rhetorical self-entrapment, are all confronted with the challenge of how to deal with the construction of a necessity clause.

Theory-guided and mechanism-based research on human rights change could hence further specify its scope and conditions in situations of norm contestation. The mechanism of persuasion and socialization must specify the relevant domestic actors that need to be persuaded in order to make the transnational norm congruent with national or local norms. The mechanisms

[117] David Luban, 'Liberalism, Torture, and the Ticking Bomb' (2005) 91 Va. L. Rev. 1425 at 1432ff.
[118] Martha Finnemore & Stephen J. Toope, 'Alternatives to "Legalization": Richer Views of Law and Politics' (2001) 55 Int'l Org. 743; Checkel, *supra* note 15; Legro *supra* note 88.

of social and cognitive pressures or 'acculturation'[119] could specify which agent or group may successfully pressure the executive in a situation in which the validity and meaning of a norm are contested in public debate (e.g. national courts). And the strength of a mechanism based on the logic of arguing, such as rhetorical entrapment,[120] which is explicitly based on 'a common life world' could be re-evaluated in a world of incongruent belief systems and diverse life views.

A theoretical background in (critical) constructivism offers the underlying assumption of norm flexibility, contestation, and change. In particular, sociological institutionalism has elaborated on 'decoupling' in situations of divergent or competing expectations in organizational environments; an approach that has been applied to states as well.[121] And Acharya has advanced a theory of norm localization, which suggests that norm acceptance depends on the local context, e.g. the legitimacy of norm-takers and the credibility and prestige of local agents.[122] Brought together, these approaches teach us that we need a better understanding of the persistence and dynamics of local norms and the mechanisms by which local norms are challenged from within. As indicated in this article, there have been some judgments by domestic and regional courts in cases of alleged torture and ill-treatment or related violations that narrow the field of legitimate meanings. The necessity construct as such has, however, not been entirely challenged.

[119] See for example Goodman & Jinks, *supra* note 72 at 518.
[120] Thomas Risse, '"Let's argue!" Communicative Action in World Politics' (2000) 54 Int'l Org. 1.
[121] John W. Meyer & Brian Rowan, 'Institutionalized Organizations. Formal Structure as Myth and Ceremony' (1977) 83 Am. J. of Soc. 12; Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999).
[122] Acharya, *supra* note 15 at 269.