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A comparative analysis of the ticking bomb exception to torture, and the difficult balance between liberty and security

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Index

1. Introduction

Suppose a terrorist has plotted a terrorist attack that is likely to cause the death of a significant number of innocent civilians. Suppose the intelligence services have detained a person who they believe is the perpetrator of that attack, and who they consider to be the only one with information about the location of the bomb, its time of explosion, and the way to defuse it. How far could the intelligence services go to extract that information? This is the question that the ticking bomb scenario expects us to address. It is a dilemma that positions itself within the broader debate between liberty and security, that asks how many rights democracies are willing to sacrifice in the name of security.

Beginning after 9/11 and protracted through decades, the fight against terrorism has reshaped the demand for security, with many now expecting homeland security to be the top priority of governments' agenda. But obtaining security, or fighting for it, has a cost, for the measures necessary to achieve it are often taken at the expense of fundamental individual freedoms. In times of emergency, parliaments and legislative bodies have mobilized themselves to enact legislation increasing surveillance and strengthening the security services' ability to counter terrorism. This has resulted in significant derogations from certain fundamental rights. But what if the encroachment upon individual freedoms could not be sanctioned by law, because its violation is fundamentally illegal? Would one stop at the barrier of the law, or would one go further, considering the obtainment of security to warrant everything? Do the ends justify the means? Again, this is the dilemma that the ticking bomb hypothetical presents to us. The idea is that, absent other means of extracting information, the intelligence services could be allowed to violate the absolute and universal ban on torture, and thus use interrogational torture on the terrorist suspect. Some scholars have defined the liberty *versus* security dilemma as a manifestation of the law "reaching its limits."[1] The ticking bomb scenario does precisely that: it attempts to stretch the limits of the law and, perhaps, go beyond them. The absolute prohibition of torture, even if consolidated in international and domestic law, is thus exceptionally challenged by the scenario. No one would ever consider evading the ban on torture under the normal state of affairs, but can emergencies justify the violation of the most basic human rights? Can democratic States torture and operate outside the realm of the law if ticking bomb scenarios occur? Or would it be better for them to remain within the confines of the rule of law and exceptionally re-institute a practice rejected for centuries? As the guarantors of individuals' fundamental rights, where do the highest courts of some democratic countries position themselves on the matter?

[1] Carsten Bäcker, 'Limited Balancing: The Principle of Human Dignity and Its Inviolability' in Jan-R Sieckmann (ed), *Proportionality, Balancing, and Rights: Robert Alexy's Theory of Constitutional Rights* (Springer International Publishing 2021) 88.

It is therefore evident that the ticking bomb hypothetical poses significant moral, ethical, and legal questions, which make it all the more compelling as a topic of research. In the present study, we will thus examine the question of the difficult balance between liberty and security by focusing on the ticking bomb hypothetical and, in particular, its proposed exception to torture. As we are primarily interested in the implications of the ticking bomb scenario for liberal-democratic States engaged in the fight against terrorism, we will carry out a comparative analysis of ticking bomb case law which will concern the States of Israel, the United States, and Germany. Each country will offer us peculiar insight into the problem of balancing liberty and security in exceptional circumstances, as each has had throughout its history a specific relationship with the terrorist threat, whether direct or indirect. Besides analyzing the different perspectives and solutions proposed to the ticking bomb dilemma, this study also aims at understanding the consequences of the decision to prioritize security over the most fundamental human rights, to see the risks that emerge when societies aim for absolute security. In order to address these questions, this research will therefore be structured into four different chapters.

The first chapter addresses the topic of torture, to set the stage for future discussions about it. To understand the general prohibition of torture, it starts by defining the practice, something which will be shown to be as important as it is complicated, since it is often subject to various interpretations, from scholars, to governments' administrations, to international organizations. We will attempt to provide a definition of torture through three key points: the identity of the torturer, the objective of the torture, and the methods through which the torturers torture. Having examined the meaning of torture, we will discuss its international prohibition through the 1984 Convention Against Torture and, consequently, examine the level of practical implementation of the ban. In particular, we will look at whether torture today has truly been renounced as a means of intelligence gathering, and whether (or how) liberal democracies still torture.

The second chapter will be dedicated to the ticking bomb dilemma and the ticking bomb exception to the practice of torture. A more thorough definition of the ticking bomb scenario will therefore be discussed, to understand the specific criteria that must be met for a situation to be recognized as having a ticking bomb nature. In a similar manner to the first chapter, we will provide a definition in order to facilitate future analyses on the matter. A historical contextualization of the ticking bomb hypothetical will also allow us to better grasp how and why this dilemma was able to become part of the discussion on torture; a discussion that appeared to have been closed with the renunciation of torture by the 19th century. Starting with the background of the Algerian War, we will then proceed to provide an answer to why the ticking bomb dilemma is still as relevant today in modern debates on torture, liberty, and security. To do so, we will look at the public perception of

torture and of the dilemma. After this general overview of the ticking bomb hypothetical, we will delve into the different academic positions on the matter; from the position of moral absolutism, which holds an unconditional ban on torture, to more utilitarian and pragmatic arguments. We will discuss, for example, the criminal defenses of necessity and self-defense, which justify torture *in extrema ratio*, as well as specific proposals of *ex ante* legalization of torture through "torture warrants" or *ex post* ratification of torture through the acceptance of collective responsibility.

After having examined the theoretical approaches to the ticking bomb exception to torture, the third chapter will be central in carrying out a comparative analysis of ticking bomb jurisprudence in Israel, the United States, and Germany. As said, the courts of each country have particular positions on the topic of the balancing between liberty and security in exceptional circumstances in the fight against terrorism. It will thus be interesting to review some of their rulings. For the State of Israel, the shifting position on interrogational torture will be discussed by examining three key cases, in chronological order, which will show the complexity of the matters at stake. The first will be the 1987 Landau Commission Report, which *de facto* generated a system of legalized torture. The *Public Committee Against Torture v. Israel* case decided by the Israeli Supreme Court in 1999 resulted in a landmark judgment that outright rejected torture, and dismantled the Landau model, but retained some ambiguities regarding the use of interrogational torture in exceptional circumstances. Lastly, two more recent cases, the *Tbeish* and *Abu Ghosh* cases dating from the end of the 2010s, will show a retreat in the Israeli Supreme Court's rejection of interrogational torture. Concerning the United States, we will propose to look at the practice of torture and the different ways in which its ban is upheld in the U.S. Constitution. In the absence of a specific ruling of the U.S. Supreme Court on the use of ticking bomb torture, we will base ourselves on some of its precedents to address the issue. We will then follow with an examination and evaluation of the U.S. version of a model of legalized torture, which was implemented at the beginning of the War on Terror through the so-called "High-Value Detainees Model." Lastly, we will focus on the case of Germany to broaden the discussion on the ticking bomb scenario beyond torture. By examining the German Federal Constitutional Court's ruling in the *Aviation Security Act* judgment in 2006, we will show that ticking bomb dilemmas can encroach upon other basic fundamental rights, such as the right to human dignity and the right to life. We will thus thoroughly examine the meaning of these rights and their status in the German constitutional system, before delving into the decision of the German Federal Constitutional Court, which proved to be emblematic in the debate between liberty and security.

Finally, the fourth and last chapter will consist of a critical examination of the ticking bomb exception to torture. It will shed light on many of the fallacies and limitations of the very ticking bomb hypothetical, which is considered by a great number of scholars to be a misleading and

inaccurate thought experiment, whose likelihood of occurring in real life is too insignificant compared to the magnitude of its implications for the protection of fundamental human rights. Given the focus on interrogational torture, it will attempt to provide an answer to whether torture really works. This is indeed a crucial point to examine, as the inefficacy of torture would render any argumentation for a ticking bomb exception to torture void of meaning. Additionally, it will provide an overview of the consequences of establishing a system of legalized and institutionalized torture for liberal-democratic regimes, from the spreading of torture beyond ticking bomb scenarios, to the endangerment of the rule of law and democratic values, to the overall erosion of the protection of human rights at the international level. Lastly, a final reflection on the balancing of rights against national security will be proposed, to look at how an absolute right such as the right to be free from torture positions itself in a much broader debate on the State's power to restrict freedoms in the name of security.

2. The general prohibition of torture

2.1. Defining torture

The 9/11 attacks forever changed the perception of the Western world on terrorism. The event prompted an unprecedented fight against terrorism through the launching of a "new and different war"; the so-called "War on Terror."[2] Since 2001, many human rights activists and organizations have, however, denounced the use of torture-like practices by Western countries in the treatment of suspected terrorists in the name of the Global War on Terrorism, in particular the U.S.'. The treatment of detainees in the Guantanamo Bay military base, especially given the particular legal status of the maximum-security prison which benefits from several legal black holes, has been at the forefront of the discussion. In this context, renewed emphasis has been put on the practice of torture, its purpose, its efficacy in the fight against terrorism, and its potential and problematic justifications. As this study concerns itself with such practice in borderline cases such as ticking-bomb scenarios, it is necessary to first establish what torture is and how it is understood here. Defining the term, though a complex endeavor, will allow us to better comprehend all its facets, something which will later assist us in discussing the dangerous and controversial approach of legalizing torture, albeit in extreme occurrences.

Careful attention has to be given to the formulation of a definition of torture. Indeed, a too narrow definition risks some practices and their perpetrators to be seen as non-problematic: why, in a system where torture is condemned, would you incriminate as a torturer someone whose conduct does not amount to torture? Rodley voiced his concerns with the consequences of this issue, as he feared that evading the ban on torture would be made easier by an excessively specific and prescriptive definition of the practice.[3] Conversely, a too broad definition might take away from the concept of torture its gravity and severity in endangering the protection of fundamental human rights, first among which is human dignity. As Rejali puts it, the terminology of torture must not be too malleable or elastic.[4] Thus, scholars have concerned themselves with finding a definition that is neither too restrictive, nor too encompassing, but they have yet to reach a consensus. As Kenny explains, the literature on torture provides no real consistency in the meaning of the term.[5] For some, even, aiming to develop a true and precise definition of torture is unrealistic. Brecher, for example, rejects the search for such a definition, because he considers torture to be undefinable, and rather

[2] George W Bush, 'President Holds Prime Time News Conference' (*The White House*, 11 October 2001).
[3] Michelle Farrell, 'The Ticking Bomb Scenario: Evaluating Torture as an Interrogation Method', *Research Handbook on Torture* (Edward Elgar Publishing 2020).
[4] Darius Rejali, *Torture and Democracy* (Princeton University Press 2009) pt 1, ch 1.
[5] Paul D Kenny, 'The Meaning of Torture' (2010) 42 Polity 131.

something that "can only be described."[6] But while Brecher accepts the lack of definition of the term, and actually finds few benefits in the finding of an unambiguous meaning of torture (he argues it would not contribute to its elimination), Kenny condemns the vagueness and opacity surrounding the notion. Both authors use the notorious Bybee memorandum[7] to support their argument and warn that the manipulation of torture definitions could allow a series of torture-like practices to be accepted and even justified simply because they are not specifically included in the definition at use in the context.[8] Brecher has abandoned, for this reason, the prospect of developing a satisfactory definition of torture, and thus proposes a description of it (even if we could argue that, here, the distinction between definition and description is quite blurred). Kenny still chooses to look for a clear and certain definition in this field. In this section, we will follow Kenny's attempt to define torture, though conscious that "to define is to limit,"[9] and thus that any satisfactory definition of torture will always be limited and will never cover nor be able to encompass every possibility.

Scholars such as Kenny, Nowak, and Rodley have highlighted three main characteristics of torture when reflecting on its meaning: its identity, purpose, and means.[10] Each of these features corresponds to one question, which we will attempt to answer to fulfill our goal of reaching a satisfactory definition of torture: *who carries out the torture?* (identity), *for what reasons?* (purpose), and *in what way?* (means). The general definition provided by Article 1 paragraph 1 of the 1984 UN Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment of Punishment

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[6] Bob Brecher, *Torture and the Ticking Bomb* (Blackwell Publishing 2007) ch 1, 4.

[7] In 2002, two lawyers of the Bush administration John Hoo and Jay S. Bybee (then head of the Office of Legal Counsel of the U.S. Department of Justice) drafted a number of legal memoranda in which they advised the President's administration on the compatibility of enhanced interrogation techniques with the 1984 UN Convention Against Torture, which the United States ratified in 1994, with reservations. The controversial documents have become known as the "torture memos," as they are considered to have authorized the use of torture-like interrogation practices in the fight against terrorism. In particular, coming back to the danger of relying on excessively specific definitions of torture, the Bybee memorandum, as the memos are also known, provided such a narrow definition. Indeed, Bybee considers that to define torture as such, "it must inflict pain that is difficult to endure. Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." Mental suffering, it is argued, "must result in significant psychological harm of significant duration, e.g., lasting for months or even years." In addition, the memorandum focuses on the "specific intent" of the interrogator, in the absence of which it is not considered that interrogation practices violate the obligations undertaken after the ratification of the Convention Against Torture. Overall, the document acknowledges that many of the interrogation techniques could amount to "cruel, inhuman or degrading treatment," but considers the resulting suffering not to be sufficiently extreme for the techniques to qualify as torture. Such a narrow definition of torture, contained in an advisory memo to the President's administration, undoubtedly paved the way for the implementation of the CIA's "Detention and Interrogation Program" and encouraged the use of a number of enhanced coercive interrogation practices and other sensory deprivation techniques. Jay S Bybee, 'Memorandum for Alberto R. Gonzales, 'Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A'' (US Department of Justice Office of Legal Counsel 2002); Michelle Farrell (ed), 'The Ticking Bomb Scenario: Origins, Usages and the Contemporary Discourse', *The Prohibition of Torture in Exceptional Circumstances* (Cambridge University Press 2013) ch 2, sect A, para 8, 122-125; Kenny (n 5); David Luban, 'Liberalism, Torture, and the Ticking Bomb' (2005) Georgetown Law Faculty Publications and Other Works.

[8] Brecher (n 6) ch 1, 4; Kenny (n 5).

[9] Oscar Wilde, *The Picture of Dorian Gray* (Lippincott's Monthly Magazine 1890).

[10] Kenny (n 5); Manfred Nowak, 'What Practices Constitute Torture?: US and UN Standards' (2006) 28 Human Rights Quarterly 809; Nigel S Rodley, 'The Definition(s) of Torture in International Law' (2002) 55 Current Legal Problems 467.

(otherwise known as the Convention Against Torture, or CAT), which we will use as a basis for the understanding of torture, is also constructed around these three essential characteristics. In the widely ratified Convention,[11] torture is indeed defined 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."[12]

Therefore, in the words of the CAT, it is a "public official or other person acting in an official capacity" who *carries out* the torture, with the *goal* of "obtaining […] information or a confession," punishment, intimidation or coercion, and *through* the intentional inflicting of "severe pain or suffering, whether physical or mental." These are the essential features of torture. But before accepting this definition as satisfactory and appropriate for the current study, let us look at the implications of the responses it provides to the questions raised above, and also investigate which other potential answers could be given to them.

2.1.1. Identity. *Who tortures?*

The 1984 Convention Against Torture understands the practice of torture as an act that is "inflicted by" or "with the consent or acquiescence of" someone who is a "public official" or acts in any other "official capacity." These are agents who have the authority to represent the State, and thus the 1984 definition is clear in establishing that only State torture is covered by the Convention. The question of the responsibility of the State for the conduct of its agents then comes into play. However, as pointed out by The United Nations Voluntary Fund for Victims of Torture, while the term "public official" is quite clear, referring to the "consent or acquiescence of a public official" for certain conduct to qualify as torture is more problematic, as it leaves greater room for uncertainty. In such

[11] As of 2023, 173 States are parties to the Convention. For future reference, Germany, Israel and the United States have all ratified it, in 1990, 1991 and 1994, respectively.
[12] United Nations, 'Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment' (1984).

situations, a case-by-case thorough evaluation is inevitably required.[13] Nevertheless, the CAT thus qualifies torture through the identity of its perpetrator: the State. Nagan and Atkins, too, consider the State component of the definition of torture to be essential, as they perceive torture to be a "powerful institutional expression of state craft, power and social control."[14] But as Kenny rightly notes, one must not be satisfied with the idea that torture is only that which the State perpetrates, for the CAT definition, despite being widely recognized, has been subject to criticisms, which hold that we must not exclude the fact that even non-State actors could make use of the practice of torture.[15] Indeed, besides State torture, which Rejali qualifies as "public torture," "private torture" also exists: armed forces, organized criminal groups, private companies or private persons can all subject individuals to torture or other inhuman practices.[16] The Irish Republican Army (IRA), for instance, resorted to torturous practices to pursue its objective of terminating British rule over Northern Ireland.[17] The Communist Party of the Philippines (CPP), an organization recognized as a terrorist group by the U.S. and the European Union, was also found to have used torture to obtain information.[18] Additionally, many criticisms regarding the incompleteness of the CAT definition concern the issue of human trafficking, which has been understood with time as falling within the category of "ill-treatment" (Article 16 of the Convention Against Torture), but has yet to be truly acknowledged as constituting torture.[19] Even if, for the present study, the definition of the Convention Against Torture appears satisfactory, as the matters we are investigating only pertain to State torture, it is crucial to acknowledge the different dimensions of torture and the consequences of including or excluding them from the general understanding of the practice.

2.1.2. **Purpose.** ***Why do we torture?***

As Rodley explains, it appears that most understandings of the practice of torture in international law rely on a specification of its purposes, though different they may be.[20] Thus, if an act considered to amount to torture is not carried out with the aim or intent of fulfilling the specific

[13] The United Nations Voluntary Fund for Victims of Torture, 'Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies' (The Office of the High Commissioner for Human Rights 2009).
[14] Winston P Nagan and Lucie Atkins, 'The International Law of Torture: From Universal Proscription to Effective Application and Enforcement' (2001) 14 Harvard Human Rights Journal.
[15] Kenny (n 5).
[16] Rejali (n 4) pt 1, ch 1.
[17] Kenny (n 5); David Sussman, 'What's Wrong with Torture?' (2005) 33 Philosophy & Public Affairs 1.
[18] The Redress Trust, 'Not Only the State: Torture by Non-State Actors' (2006).
[19] Lorna McGregor, 'Applying the Definition of Torture to the Acts of Non-State Actors: The Case of Trafficking in Human Beings' (2014) 36 Human Rights Quarterly 210.
[20] Rodley (n 10).

purpose(s) contained in the definition that is observed, this act will not legally qualify as torture.[21] The Convention Against Torture states that one of the key purposes of torture should be "obtaining […] information or a confession," thus making explicit that it covers primarily torture of the interrogational type, as opposed, for example, to the torture of the terroristic type. Historically, the practice of torture has generally been tied to the aim of extracting information,[22] but as Farrell and Brecher note, these are not the only two categories under which torture can be classified.[23] Indeed, the two scholars have also pointed out the existence of judicial torture, deterrent torture, torture as a punishment, or even as the expression of sadistic impulses. However, the distinction between terroristic and interrogational torture, owed to Shue's work,[24] remains the most central. The aim of terroristic torture is to generate a climate of fear and intimidation that goes beyond the chosen victim. This methodology of fear is typical of any terrorist act, but it is not only terrorist groups that can perpetrate such practices. Indeed, as State terrorism also exists,[25] so does terroristic torture carried out by the State. It is usually perpetrated to suppress dissent, subjecting the population in part or in whole, or to threaten potential opponents.[26] Going back to the above-mentioned definition by Nagan and Atkins,[27] torture is thus precisely a tool that States and ruling governments can use to exercise coercion and social control. While Shue views terroristic torture as "morally unacceptable," he is more amenable to justifying interrogational torture, precisely because of its different purpose. Indeed, the essential goal of interrogational torture is the extraction of information from the victim. Thus, according to him, once the information has been obtained, there is no point in continuing to torture.[28]

Bufacchi and Arrigo delve even deeper into the classifications of torture, by distinguishing between two types of interrogational torture: "backward-looking" interrogational torture and "forward-looking" interrogational torture.[29] This distinction is relevant in this study as it pertains precisely to the issue of ticking-bomb situations. Indeed, what the authors mean by "forward-looking" interrogational torture is torture that is used in situations where a suspect is requested to surrender information about a potential future attack, or about an attack that is underway. Conversely,

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[21] Kenny (n 5).
[22] Rejali (n 4) pt 1, ch 1; A Lawrence Lowell, 'The Judicial Use of Torture. Part I' (1897) 11 Harvard Law Review 220.
[23] Farrell (n 3); Brecher (n 6) ch 1, para 3, 11.
[24] Henry Shue, 'Torture' (1978) 7 Philosophy & Public Affairs 124.
[25] Historically, the Jacobins during the French Revolution are considered to have given birth to the term "terrorism." Indeed, the 18th century period known as "The Terror" was one of the first instances of State terrorism, whose aim was to protect the political organization from potential domestic enemies. In the Soviet era, Stalinist purges during the 1930s are also a clear example of how a state can resort to terroristic practices to quell dissent.
[26] These were precisely the objectives of the Guatemalan army's employment of torturous practices between the 1960s and the 1990s during the Guatemalan civil war. Vittorio Bufacchi and Jean Maria Arrigo, 'Torture, Terrorism and the State: A Refutation of the Ticking-Bomb Argument' (2006) 23 Journal of Applied Philosophy 355; Shue (n 24).
[27] Nagan and Atkins (n 14).
[28] Shue (n 24).
[29] Another term for it would be Gross' "preventive interrogational torture."Oren Gross, 'The Prohibition on Torture and the Limits of the Law: A Collection' in Sanford Levinson (ed), *Torture* (Oxford University Press 2004) pt 1, 5.

"backward-looking" interrogational torture refers to situations where the attack has already occurred and thus is rather geared toward the extraction of a confession *ex post*.[30] As the following chapter will illustrate, the debate on the exceptional use of torture in ticking-bomb scenarios is a debate on whether forward-looking interrogational torture could have reasonable justifications. Despite all these distinctions and categorizations of torture, many scholars disagree with Shue's work[31] and condemn the qualification of torture as interrogational, even by official definitions such as that of the 1984 Convention Against Torture or other sources of international law. Indeed, they view it as a way to conceal the true purpose of torture: degradation, humiliation, and subjugation, and thus as a terminology that opens the door for its potential justifications. Farrell laments that the real goal of torture is misunderstood because of how we tend to view and characterize torture: first and foremost, as a method of interrogation.[32] In reality, many scholars consider the purpose of torture to be quite different from the mere extraction of information or a confession. Crelinsten and Schmid see the process of "making [the suspect] talk" as inextricably linked with the exercise of power over the other and agree with Davis, Juratowich, and Kenny in viewing the "breaking" of the subject, of its will, of its humanity and dignity as the core purpose of torture.[33] Torturing means attacking the helpless, for Shue rightly points out that the tortured victims are "entirely at the torturer's mercy."[34] For Bufacchi and Arrigo, indeed, torture pursues the "degradation of the subject" and for Farrell and Brown, it eliminates subjectivity in its entirety.[35] Asad goes as far as proposing that torture in reality has no true purpose, neither interrogation nor humiliation. For him, the reasons behind an individual's use of torture are too complex to be classified into generic categories such as those mentioned above.[36]

2.1.3. **Means.** ***How do we torture?***

According to the 1984 Convention Against Torture, a third fundamental requirement for torture to qualify as such is that it must cause "severe pain or suffering, whether physical or mental." Thus, acts such as rape, waterboarding, repeated beatings, mock executions, starvation, sleep

[30] Bufacchi and Arrigo (n 26).
[31] Shue (n 24).
[32] Farrell, 'The Ticking Bomb Scenario' (n 3).
[33] Ronald D Crelinsten and Alex P Schmid, *The Politics of Pain: Torturers and Their Masters* (1st edition, Taylor & Francis 2019) ch 4, para 2; Michael Davis, 'The Moral Justifiability of Torture and Other Cruel, Inhuman, or Degrading Treatment' (2005) 19 International Journal of Applied Philosophy 161; Ben Juratowitch, 'Torture Is Always Wrong' (2008) 22 Public Affairs Quarterly 81; Kenny (n 5).
[34] Shue (n 24).
[35] Bufacchi and Arrigo (n 26); Farrell (n 3); Rory Stephen Brown, 'Torture, Terrorism, and the Ticking Bomb' (2007) 4 Journal of International Law & Policy.
[36] Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford University Press 2003) pt 2, ch 3, para 1.

deprivation or sensory deprivation could all fall under the category of torture according to the CAT. Besides the element of pain, Kenny holds that control is also essential in the characterization of torture. As torture can be physical and mental, so, too, can the domination be over the body and the mind. Nevertheless, the author explains how psychological control is not necessary. Fundamental, however, is the fact that the victims are held captive and their bodies are completely vulnerable, as their torturers have "physical power" over them.[37] It is in this sense that Shue speaks of torture as an "assault upon the defenseless."[38] The concept of pain is thus essential in torture definitions, but how can it be qualified or quantified?

The CAT refers to a level of pain that must be "severe," so it should be deduced that different levels of pain exist, and that, were the pain not so severe, the act would not be recognized as torture. But this can be a dangerous path to take, as pain is extremely subjective and can be quite difficult to measure. Evidence of the difficulty in the interpretation of severity can be found in the above-mentioned Bybee memorandum, which considered torture to be only acts that would reach the intensity of "serious physical injury, such as organ failure, impairment of bodily function, or even death."[39] We would argue that even lower degrees of pain could qualify as torture, without the need for them to be as extreme as organ collapse or death. Méndez, the former UN Special Rapporteur on Torture, recognizes how the ambiguities in the meaning of torture can be manipulated based on the issues at stake.[40] Nevertheless, official documents such as the Bybee memorandum have represented some of the legal opinions that were submitted to the U.S. Presidential office during the War on Terror. They had significant consequences on the CIA's "Enhanced Interrogation Techniques" and "High-Value Detainees" programs and helped justify the use of "coercive interrogation techniques," such as waterboarding.[41] For Brown, the term "coercive interrogation" is actually a way to officially conceal torture. Additionally, the requirement of a certain intensity of the pain resulting from torture has led to incoherence and uncertainty in the jurisprudence of courts and human rights bodies, such as the Human Rights Committee. Indeed, the general belief tends to be that the more severe the pain is, the more the act will qualify as torture rather than as inhuman or degrading treatment.[42]

However, interpretations of laws and the definitions contained therein are often problematic. The European Court of Human Rights, for example, assigns torture a "special stigma" that allows it

[37] Kenny (n 5).
[38] Shue (n 24).
[39] Bybee (n 7).
[40] Juan Méndez, 'Enforcing the Absolute Prohibition Against Torture' (2012).
[41] Bybee (n 7); Farrell, 'The Ticking Bomb Scenario' (n 3); Kenny (n 5).
[42] Brown (n 35).

to be differentiated from the category of ill-treatment, which is covered by Article 16 CAT.[43,44] The line between torture and ill-treatment can often be blurry, and indeed Kälin and Künzli relate how clear and definite answers can neither be found in the precedents of courts nor those of UN treaty bodies. Thus, they attempt to shed light on their different interpretations using some of the theoretical approaches that are used by judges and human rights experts when reaching their conclusions on matters relating to these topics. One approach, which has been mentioned above, is based on the degree of severity. It views inhuman behavior as part of a spectrum, where torture is situated at the most extreme end, while ill-treatment is located somewhat midway. Kälin and Künzli, however, underline the limitations of this approach: first, the obvious difficulty in distinguishing between the degrees of severity of the acts placed on the "inhuman behavior spectrum."[45] Méndez agrees in holding that establishing what torture is based on the degree of severity is complicated, as both subjective and objective aspects need to be taken into account.[46] A second limitation is the lack of consideration for the fact that there are no different legal consequences for the classification of an act as torture or ill-treatment, given that the prohibition of torture and ill-treatment, as per Article 1 and Article 16, are all *jus cogens* norms. Thus, Kälin and Künzli propose another approach or theory, which they call the "purpose theory," to differentiate between the two practices. They hold that the optimal way to distinguish torture from inhuman or degrading treatment or punishment is to rely on the definition of torture as "severe physical or mental abuse that is inflicted (1) deliberately (2) and for a purpose mentioned in CAT, Article 1 (e.g., in order to force a person to provide information) (3)." Consequently, the additional weight of torture depends not on the severity of the pain inflicted, but on the *intent to break the subject's will*. Ill-treatment or punishment refers to cases where significant pain and suffering are caused by unlawful punishments or are "unjustifiably caused by specific circumstances" such as those of detention. Lastly, degrading treatment refers to acts that result in the humiliation or degradation of the subject, independently of whether there is a specific intention. It appears that, generally, the Committee Against Torture (the specific treaty body of the Convention Against Torture, tasked with its implementation) has chosen the purpose approach. However, as mentioned, case law is often inconsistent, and indeed, the European Court of Human Rights does not seem to specifically favor one approach over the other in its jurisprudence.[47] What

[43] Nowak (n 10).
[44] In the 1978 *Northern Ireland v. United Kingdom* case, the European Court of Human Rights was asked to rule on whether acts such as wall standing, hooding, subjection to loud noise, deprivation of sleep, food and drink, carried out by British authorities in Northern Ireland against suspected terrorists, amounted to torture. The Court answered in the negative. By adopting a quite prudent and conservative approach, the Court thus set a high threshold, a "special stigma," a high degree of severity to distinguish torture from other forms of ill-treatment. ibid.
[45] Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (Second Edition, Oxford University Press 2019) pt 10, ch 2, para 1-2, 311ff.
[46] Méndez (n 40).
[47] Kälin and Künzli (n 45) pt 10, ch 2, para 1-2, 311ff.

we have discussed above helps us understand why torture tends not to be only defined by the level of pain or suffering it generates, but also, fundamentally, by its purpose.[48]

Having examined the three essential components to any definition of torture, let us now look at some of the key consequences of torture, which help support the well-established stance that torture as a practice should be banned. In this section, this will just be a general overview, for it is now widely acknowledged that torture is to be generally prohibited. Nevertheless, the debate on the use of torture remains open. Thus, a more thorough analysis of these arguments will be provided when discussing the employment of torture in specific and exceptional situations such as ticking-bomb scenarios.

It is irrefutable that the debate on torture poses moral and legal questions of substantial depth. Torture and human dignity seem to be two contrasting poles: if, as we have stated above, one of the aims of torture is the destruction of the subject, his degradation, and the breaking of his will, then it becomes difficult to argue that torture is compatible with the fundamental right to human dignity. Brown adds that, besides infringing upon human dignity (both physical and mental), torture breaches other values such as the right to life, the right to a fair trial, and other due process rights.[49] Both he and scholars Nagan and Atkins view the practice as threatening international peace, as well as domestic order. And, perhaps most dangerously, torture undermines democracy and its fundamental pillar of the rule of law.[50] All these implications of the use of torture, help us understand why, as will be explained in the next section, the international community has mobilized itself through the drafting of a series of norms (such as the Convention Against Torture) to ban torture as a practice.

2.2. The international prohibition of torture

The practice of torture has long been recognized as problematic, but in earlier centuries it was not prohibited by law. As mentioned above, even in the earliest instances of the use of torture in the Greek and Roman eras, torture had always been linked in some way to the extraction of information, so it was considered necessary and useful to uncover the truth. Torture used to be even fully institutionalized in the legal system. In the Middle Ages, for example, judicial torture was a common practice of inquisitorial procedures. Additionally, it used to be intertwined with religious concepts such as "moral and spiritual cleansings," as it was believed that pain and suffering could allow one to redeem oneself before God by expurgating evil. In the centuries that followed, too, European monarchies relied on torture to extract confessions, as voluntary admissions of guilt were not deemed

[48] Rodley (n 10).
[49] Brown (n 35).
[50] Brown (n 35); Nagan and Atkins (n 14); Rejali (n 4) pt 4, ch 24, para 5.

sufficient proof to convict suspects. 17th-century France set in writing the procedure for judicial torture, thereby fully institutionalizing it. However, thanks to the revolutionary stances of the Enlightenment, and the emerging intellectual movements in the defense of dignity and humanity, thinkers and philosophers such as Voltaire began severely condemning the idea of torture. A wave of denunciation of the practice soon emerged in all of Europe, intensified by the ideas of the French Revolution. Therefore, by the late 18th century, judicial torture would be officially renounced throughout the continent as a system for establishing proof. Nevertheless, other types of torture continued to exist, in particular across the continent and in the colonial territories.[51]

For the abolition of torture to be truly effective, domestic and international coordination on the matter is necessary, as both domestic legal systems and international law must incriminate the practice of torture. Today, contemporary international law has consolidated a general and absolute ban on torture, regardless of the circumstances. As Mayerfeld puts it "everyone has an absolute human right not to be tortured."[52] This prohibition of torture has the additional weight of being considered a peremptory norm of general international law, or *jus cogens*. The United Nations defines *jus cogens* as a norm "accepted and recognized by the international community of States as a whole, […] from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Additionally, "peremptory norms of general international law (*jus cogens*) reflect and protect fundamental values of the international community, are hierarchically superior to other rules of international law and are universally applicable."[53] Therefore, the ban on torture being a norm of customary international law, it applies to all the States of the international community, without exception. The additional *jus cogens* quality of the prohibition of torture, as opposed to other norms that rank lower in the hierarchy of international law, reflects the crucial importance of eradicating torture across the globe.

2.2.1. The 1984 UN Convention Against Torture.

It is a general belief that the global human rights movement, which has led to a renewed emphasis on the inhumanity of torturous practices and the need to abolish them, gained significant momentum after the Second World War. Indeed, the very institution of the United Nations, which was founded in 1945 and today comprises 193 Member States, was a response to the war, an attempt to foster international cooperation across the international community to promote and maintain

[51] Farrell, 'The Ticking Bomb Scenario' (n 3); Lowell (n 22).
[52] Jamie Mayerfeld, 'In Defense of the Absolute Prohibition of Torture' (2008) 22 Public Affairs Quarterly 109.
[53] United Nations General Assembly, 'Report of the International Law Commission' (2019) A/74/10.

international peace and security as well as encourage the "respect for human rights and fundamental freedoms." These are the core purposes of the organization, as established by Article 1, paragraphs 1 and 3 of the Charter of the United Nations.[54] At the UN level, given the United Nation's role as a protector and promoter of human rights, many actions have been taken to uphold the prohibition of torture. Although not specifically focused on torture, the 1948 Universal Declaration of Human Rights (UDHR) and the 1966 International Covenant on Civil and Political Rights (ICCPR) reject torture in their Articles 5 and 7, respectively, by holding that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[55] Norms on the absolute and universal prohibition of torture can be found in other texts, adopted independently from the United Nations, such as the 1949 Third Geneva Convention or the 1950 European Convention on Human Rights.[56] However, as Nagan and Atkins explain, criticisms emerged concerning the limitations of all these conventions in effectively enforcing the ban on torture. In particular, UN monitoring bodies were considered excessively weak. The foundation of Amnesty International in 1961, a non-governmental organization that took the responsibility of monitoring the human rights situation internationally, prompted a new debate on the issue of torture. Mounting pressure from States and public opinion thus led to the adoption of specific documents on torture and ill-treatment: first, a Declaration by the General Assembly in 1975; then, in 1984, the already mentioned Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[57] Article 1 defines the term torture, as has been analyzed above. Article 2 explicitly rejects any justification for torture, even in exceptional cases (paragraph 2), and entrusts upon the 173 signatory States the duty to take different measures to effectively counter torture "in any territory under [their] jurisdiction" (paragraph 1).

Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

[54] United Nations, 'United Nations Charter' (1945).
[55] United Nations, 'Universal Declaration of Human Rights'; United Nations, 'International Covenant on Civil and Political Rights' (1966).
[56] Council of Europe, 'European Convention for the Protection of Human Rights and Fundamental Freedoms, as Amended by Protocols Nos. 11 and 14' (1950); International Committee of the Red Cross, 'Geneva Convention Relative to the Treatment of Prisoners of War' (1949).
[57] Nagan and Atkins (n 14).

Thus, the Convention Against Torture places specific obligations on the States Parties, which include the duty to respect the norm, the duty to protect persons under their jurisdiction against torture, and the duty to fulfill the obligations arising from the Convention they ratified. A significant part of this last duty is the duty to prevent. Indeed, there is a specific focus on preventing torture, something which can be achieved in part through the promotion of educational and training programs (Article 10). Additionally, States have the duty to investigate and prosecute where there is an allegation of torture (Article 12) as well as to protect those who have come forward with the allegation (Article 13). Worth noting is also the States' obligation to provide victims with fair and adequate compensation (Article 14).[58]

> **Article 12**
> Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.
>
> **Article 13**
> Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.
>
> **Article 14**
> 1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.
> 2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

These duties raise the question of the responsibility of States for acts of torture committed under their jurisdiction. The CAT definition of torture covers only acts of torture committed by public officials or other individuals representing the State, but this is only an issue of civil responsibility. As Brown explains, the criminal responsibility of the public official is a different, although fundamental, matter. When dealing with State responsibility, drawing upon the 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts of the International Law Commission,

[58] Kälin and Künzli (n 45) pt 10, ch 2, para 3-5, 324-329; Nagan and Atkins (n 14).

thinking about a State being criminally responsible for torture would be inconclusive. It is individuals, even if agents of the State, that have criminal responsibility. The State, on its end, has the duty to sanction torture as a crime in its domestic legal order, to investigate allegations, to prosecute alleged perpetrators and punish convicted criminals, and to provide reparation to victims for the harm they endured at the hand of an individual representing the State.[59] On the topic of criminal law, the practice of torture is also prohibited by international criminal law. The 1998 Rome Statute of the International Criminal Court indeed condemns torture as a "crime against humanity" and as a "war crime."[60,61]

2.2.2. Implementing the ban on torture.

It has been mentioned how the 1984 Convention Against Torture was adopted out of a stronger need to monitor the global presence of torture, given the weakness of previous UN oversight agencies. Thus, besides placing obligations on its States Parties, the Convention Against Torture established a specific treaty body whose aim is to ensure the correct implementation of the principles and objectives of the Convention by the signatory States. Part II of the Convention is indeed entirely dedicated to the functioning and regulation of this body: the Committee Against Torture. Comprised of ten experts elected by the States Parties, one of the key features of the Committee is that it can accept individual complaints from alleged victims of torture and investigate those matters, thereby establishing a direct channel for individuals to assert their rights and seek justice (Article 22). So far, the Committee has ruled on more than 700 such cases. Additionally, States can also complain about alleged violations of the prohibition of torture by other States (so-called inter-state complaints). While the individual complaints procedure is optional, the States Parties have the obligation to provide reports regarding the measures they have undertaken to implement the Convention (Article 19). Despite the strengthening of UN monitoring bodies, limitations always exist as far as their effect in practice. Indeed, not all the States that have ratified the Convention have also explicitly recognized the competence of the Committee in receiving individual complaints: out of the 173 signatories, as of 2023 only 71 of them had done so. For example, Germany has accepted the individual complaints

[59] Brown (n 35).
[60] Kälin and Künzli (n 45) pt 10, ch 2, para 1, 311.
[61] Contrary to the definition of the Convention Against Torture, the Rome Statute is less restrictive in that it includes in its definition of torture the possibility that even non-State actors could perpetrate it. Torture is understood as "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions." International Criminal Court, 'Rome Statute of the International Criminal Court' (1998).

procedure; Israel and the United States, however, have not.[62] Thus, alleged victims of torture in Israel and the U.S. cannot directly seek justice through the special procedure of the Committee but have to resort to other means.

The Committee Against Torture is an oversight body specific to the Convention Against Torture; but as Nagan and Atkins point out, other UN treaty bodies exist to assess the global state of the torture ban, such as the Special Rapporteur on Human Rights of the UN Commission on Human Rights and the UN Voluntary Fund for Victims of Torture.[63] However, once again, the actual power of these agencies is often restricted, whether due to financial limitations, problems of overload, or lack of real commitment or State cooperation. That is why, at the beginning of this section, it was underlined how an effective implementation of the absolute ban on torture could only be realistically achieved through the cooperation of institutions at the international, regional, and local levels. International norms can only go as far, and it is States, in their domestic legal orders, that have to be willing to ban torture and establish the necessary tools to prosecute and punish torturers. Given this, the adoption by the Italian Parliament of a new law sanctioning torture as a specific crime for the first time in 2017, is all the more historic for the European democracy.

Still, despite the significant international mobilization around the prohibition of torture, as the next section will show, the answer to the question of whether torture has effectively been eradicated today is not so obvious. It appears that torture is still in use today, not only in authoritarian or less developed states where the concern for human rights is perhaps less prevalent and less engrained into society, but much more controversially, even in modern, developed, liberal-democratic states.

2.3. Is the prohibition of torture really absolute today?

Besides torture, the only other practice that appears to face such unanimous and absolute condemnation is slavery, as Shue explains.[64] But while slavery is in decline, as far back as 1978, when Shue wrote his book *Torture*, he could already state that torture as a practice was very much pervasive and on the rise. More recent data confirms this. "Torture is as prevalent today as when the United Nations Convention against Torture was adopted in 1984," held experts from the human rights NGO Amnesty International, as reported by Rejali.[65] In 2015, instances of torture were found in as many

[62] Kälin and Künzli (n 45) pt 10, ch 2, para 1, 321-323; Nagan and Atkins (n 14); United Nations (n 12); 'Ratification Status by Country or by Treaty' (*United Nations Human Rights Treaty Bodies*) <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CAT> accessed 10 November 2023.
[63] Nagan and Atkins (n 14).
[64] Shue (n 24).
[65] Rejali (n 4) pt 1, para 7.

as 141 countries, leading experts to view torture as a "global crisis," despite the decades that separate us from the adoption of the Convention Against Torture.[66] Tate points out, however, how the fact that a State's decision to ratify a convention unfortunately does not necessarily imply that that signatory State truly intends to take steps to further the objectives of that very treaty.[67] Consider, for example, the ratification by Saudi Arabia in 2000 of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women. Saudi Arabia is undoubtedly quite far from reaching the minimum threshold of measures to be implemented to prevent gender discrimination. Thus, many scholars have interrogated themselves on the efficacy of the Convention Against Torture in countering and preventing the practice. Additionally, they have asked why States would choose to ratify such treaties if their effect in practice is only ever so limited. Tate has provided a summary of the answers to these questions. First, she explains how the decision to join an agreement such as the Convention Against Torture can be motivated by what is called the "cascade effect," whereby States are compelled to bind themselves to a treaty due to its widespread ratification by others. However, while this effect can have positive consequences, for if most States, in particular modern and industrialized ones, choose to join an agreement, the majority of others will likely want to follow suit, thereby generating a positive feedback loop, the opposite can also occur. Indeed, the very concrete risk is that if a State (such as the United States, whose global influence and prestige are unquestionable) decides not to join an agreement, not to respect its obligations, or to recede from it, other countries will possibly do the same, particularly those whose commitment to human rights is historically weaker. In other words, if the U.S. chooses not to respect the universal ban on torture, why should other nations? Second, Tate explains that a State might ratify a treaty such as the Convention Against Torture because its leaders want to consolidate ("lock in") a specific norm or set of norms to ensure the system's stability and its future compliance with human rights. She holds that this is particularly the case for newly formed and fragile democracies. Making sure that the absolute prohibition of torture is consolidated as a fundamental rule in the emerging system can be one of the priorities of the new government. But, drawing upon Vreeland's studies, she also highlights a particular difference between democratic and dictatorial regimes regarding their reasonings for the adoption of a treaty such as the 1984 Convention Against Torture. Generally, democratic governments will choose to ratify those conventions that are fairly in line with the established domestic policies. Thus, if a practice such as torture is already condemned in a democratic State, there will be a greater likelihood of that State choosing to ratify a treaty such as the Convention Against Torture.[68] Vreeland explains that it is a matter of not renouncing

[66] 'Torture around the World: What You Need to Know' (*Amnesty International*, 22 June 2015).
[67] Katharine E Tate, 'Torture: Does the Convention Against Torture Work to Actually Prevent Torture in Practice by States Party to the Convention?' (2013) 21 Willamette Journal of International Law and Dispute Resolution 194.
[68] ibid.

any sovereignty. Interestingly, however, the opposite occurs for dictatorial States, as when their rates of torture use are higher, so is the probability that they will have ratified the Convention. Vreeland clarifies this paradox by stating that this occurs mainly in multi-party dictatorial states: the presence of multiple parties and opposition to the government can lead to pressure from below to join certain treaties (whereas in a one-party dictatorship, there is no such pressure). At the same time, it is this very opposition to the leadership that incentivizes the use of torture-like methods to obtain greater control over society and quell dissent; methods that are not needed in a dictatorship that has full control over the leadership and society.[69]

Overall, Tate agrees that, whether it is because several States Parties do not intend to pursue its goals, or because its enforcement mechanisms are too weak, the Convention Against Torture has not been truly effective in curbing the use of torture across the globe.[70] Evidence gathered by human rights NGOs such as Amnesty International or Human Rights Watch supports this stance. But regardless of whether a State has ratified the Convention, as has been mentioned above the prohibition of torture is a peremptory norm of international law, which binds all States without exception. However, as of today, episodes of torture have been registered in numerous countries, on all continents, with many States choosing to defy the general rules of international law. In the Middle East, for example, Iraq, Israel and the Palestinian territories, Lebanon, Saudi Arabia, and Syria have all been subjected to heavy criticism for their use of torture. In Israel and the Occupied Palestinian Territories, extensive evidence has been gathered regarding numerous episodes of torture carried out against Palestinian detainees by Israeli forces, most often for interrogational purposes. A 300+ page report by Human Rights Watch/Middle East documented systematic and widespread abuse (including torture) against detainees carried out by the government-sponsored General Security Service (i.e., Israel's internal intelligence service) in the 1990s.[71] Amnesty International's 2022/2023 report on the state of human rights across the world confirms that, decades later, this pattern of behavior regarding the treatment of Palestinian detainees has not changed. The report also severely denounces Israel's insufficient or even completely absent investigations into allegations of torture by such detainees.[72] Even the most recent data gathered by the NGO's human rights monitors, dated November 2023, proves that torture remains a practice of use by Israeli forces against prisoners in the occupied West Bank during the Israel-Hamas war.[73] Besides the Middle East, torture has been also documented in

[69] James Raymond Vreeland, 'Political Institutions and Human Rights: Why Dictatorships Enter into the United Nations Convention against Torture' (2008) 62 International Organization 65.
[70] Tate (n 67).
[71] Human Rights Watch, 'Israel's Interrogation of Palestinians from the Occupied Territories' (1994).
[72] Amnesty International, 'Amnesty International Report 2022/23' (2023).
[73] 'Israel/OPT: Horrifying Cases of Torture and Degrading Treatment of Palestinian Detainees amid Spike in Arbitrary Arrests' (*Amnesty International*, 8 November 2023) <https://www.amnesty.org/en/latest/news/2023/11/israel-opt-

the North African countries of Algeria, Egypt, Libya, Morocco, and Sudan. Other States where torture has been witnessed include the Philippines, China, Russia and Ukraine, Mexico, Australia, and the United States.[74] As Rejali puts it, the findings of evidence of torture in authoritarian or dictatorial countries are not unexpected.[75] What is more surprising, however, because of all the constitutional guarantees set in place and the now consolidated norms on the protection of human rights, is the fact that torture can also be practiced in democratic countries.

2.3.1. Do democracies torture?

Dismantling the belief that "democracies do not torture" is at the center of Rejali's study *Torture and Democracy*.[76] Today, most scholars view the brutal treatment of detainees at the Guantanamo Bay military base in Cuba and the Abu Ghraib prison in Iraq[77] as irrefutable evidence of the fact that torture and ill-treatment can occur at the hands of democratic governments and "civilized States,"[78] in particular in the context of the War on Terror. Amnesty International explains that such high-profile examples of the use of torture tend to erroneously lead to an almost exclusive association between torture and counterterrorism. This belief is a misconception, as findings reveal that the use of torture is not always only linked to matters of security and terrorism, since anyone, from demonstrators and activists, minorities, petty criminals, or even innocent people taken as suspects could be subjected to torture.[79]

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horrifying-cases-of-torture-and-degrading-treatment-of-palestinian-detainees-amid-spike-in-arbitrary-arrests/> accessed 14 November 2023.

[74] 'Torture around the World: What You Need to Know' (n 66); Euro-Mediterranean Human Rights Monitor, 'I Cannot Bear It Anymore' (2021); Organization for Security and Co-operation in Europe, 'Third Interim Report on Reported Violations of International Humanitarian Law and International Human Rights Law in Ukraine' (2023) <https://www.osce.org/odihr/548629> accessed 12 November 2023.

[75] Rejali (n 4) pt 1, para 7.

[76] ibid.

[77] In April 2004, the world was shocked when photographs appeared in the media revealing that individuals detained at the Abu Ghraib prison, in Baghdad, Iraq, were being subjected to torture and other inhuman treatments by US prison guards. An internal investigation carried out by the US military followed suit, and concluded that the Coalition Forces in Iraq had "systemically and illegally abused detainees" and severely breached international law and international humanitarian law since the early months of the multilateral operation in Iraq. Former prisoners condemned their being subjected to torture and ill-treatment, such as beatings, assaults, humiliation, isolation, sensory and sleep deprivation, stress positions, etc. Following the spreading of these photos and the resulting national scandal, the Bybee Memorandum, which had been also recently exposed to the press, was redacted. But the leaking of these photos represented a considerable scandal, confirming to the world that a modern democracy such as the United States could be capable of officially endorsing torture. Amnesty International, 'Iraq: Beyond Abu Ghraib: Detention and Torture in Iraq' (2006); Farrell, 'The Ticking Bomb Scenario' (n 7) ch 2, sect A, para 8, 123-124.

[78] Brecher (n 6) ch 1, para 1, 2.

[79] Amnesty International (n 72).

Given that democracies *do* torture, too, the issue is how they reconcile their values with the practice of such a despisable and cruel act. Rejali provides his answer: "stealth torture."[80] Considering the intensification of monitoring bodies and other human rights watchdogs, democratic States have indeed had to opt for torture methods that do not leave traces or evidence. Among these "clean" methods of torture are water or electro-torture, certain types of beatings, positional tortures, restraints, exhaustion exercises, sleep or sensory deprivation, and others. Rejali's list of clean torture methods is quite extensive. In his words: "Public monitoring leads institutions that favor painful coercion to use and combine clean torture techniques to evade detection, and, to the extent that public monitoring is not only greater in democracies but that public monitoring of human rights is a core value in modern democracies, it is the case that where we find democracies torturing today we will also be more likely to find stealthy torture."[81] Dasgupta warns that where torture is concealed, the risk of it being more harmful is even increased.[82] Stealth torture easily avoids detection, and where there is nothing to detect there is no credibility for the alleged victim of torture. Of significant advantage for States is also the fact that the burden of proof relies on the victim, whose claims are thus made excessively complicated to substantiate. One also has to consider that in many instances these are matters linked to state security, and, consequently, public officials can rely on the protection of the "state secret" argument.[83] It thus often becomes close to impossible for torture victims to seek justice and obtain redress for the grave crimes committed against them. Another difficulty in seeking justice can be added by the absence in a State's domestic legal order of a law appropriately sanctioning torture as a specific crime with its specific corresponding punishment. This was the case of Italy, which for 27 years, from 1989 (the year in which it ratified the CAT) to 2017 (the year in which the Italian Parliament adopted a new law on torture) did not criminalize torture. After the dramatic events that took place at the 27th G8 meeting in Genoa in 2001, Italy was condemned by the European Court of Human Rights and numerous other human rights institutions for not having fulfilled its obligations. One of many was the failure to effectively prosecute individuals for having committed torturous acts. Indeed, the absence of an appropriate law on torture gave them impunity and treated the matters with significantly less severity. In 2017 a law was finally adopted, but it is considered by some as falling short of many of Italy's duties as a State Party to the Convention Against Torture.[84] Much controversially, recent proposals have even suggested repealing this historic law. Méndez considers

[80] Rejali (n 4) pt 1, para 4.
[81] ibid pt 1, para 3.
[82] Riddhi Dasgupta, 'Constitutionality of Torture in a Ticking-Bomb Scenario: History, Compelling Governmental Interests, and Supreme Court Precedents' (2010) 30 Pace Law Review 544.
[83] Méndez (n 40).
[84] Claudio Francavilla, 'Italy's New Law on Torture Fails to Meet International Standards' (*Human Rights Watch*, 11 July 2017) <https://www.hrw.org/news/2017/07/11/italys-new-law-torture-fails-meet-international-standards> accessed 13 November 2023.

all these points as important obstacles to the fulfillment of States' obligations under the Convention Against Torture, but even more generally under those of general international law.[85]

Another mechanism frequently used by States to avoid condemnation for their practice of torture is one that exploits the very definition of torture, which we have already established as being ambiguous and difficult to determine with absolute certainty. Torture is indeed a concept that relies on subjective and objective aspects. Thus, its definition is easier to mold, compared to, for example, that of slavery, whose prohibition is also universal and absolute under international law. Those governments that endorse torture in certain circumstances will therefore simply deny having resorted to it or will refuse to qualify torture as such. Again, the "torture memos," which have been discussed above, are a prime example of a government relying on a very narrow definition of torture to avoid public shaming and prosecution.[86] But even public shaming for the use of torture is not guaranteed in modern countries. Indeed, public opinion tends now, more than ever, to support the use of torture in special circumstances such as if needed to defend national security. Méndez, the former UN Special Rapporteur on Torture, denounced a weakening of the fight against torture, given the substantial change in public sentiment: the loss of the "moral condemnation that people generally have always agreed upon on the abject nature of torture."[87] Amnesty International data clearly reports this shift, since it relates that more than one third of people view torture as justifiable.[88] This statement is quite far from the absolute and universal prohibition of torture that the international community committed to when adopting the Convention Against Torture. Contemporary debates on whether a "just" torture exists have flourished among scholars as the fight against terrorism has intensified. For some, torture is now seen as an appropriate response to terrorism. Kovarovic argues that this dramatic shift in the perception of torture is widely owed to the media representation of it.[89] We will delve more into the arguments justifying torture in the next chapter.

Overall, perhaps this section has wanted to raise the question of whether "unrenounceable norms still exist in our society," as Luhmann titled his conference in 1992. Indeed, as reported by Belvisi, Luhmann claimed that such absolute norms have ceased to exist in the international legal order, since the circumstances in society that had allowed for their establishment no longer prevail.[90] In this sense, we can consider the proliferation of terrorism and the expansion of counter-terrorism measures to have gradually eroded the moral values and consensus that prohibited torture. But this

[85] Méndez (n 40).
[86] ibid.
[87] ibid.
[88] Amnesty International (n 72).
[89] Kate Kovarovic, 'Our "Jack Bauer" Culture: Eliminating the Ticking Time Bomb Exception to Torture' (2010) 22 Florida Journal of International Law.
[90] Francesco Belvisi, 'The Ticking Bomb Scenario as a Moral Scandal' (2009).

shift in mindset, though it has influenced public opinion, must not be seen as an endpoint, for human rights institutions, non-governmental organizations, and civil associations remain very vocal (perhaps even more than before) and still garner significant support in the defense of human rights and human dignity. Nagan and Atkins indeed view the role of civil society as a fundamental pillar of the fight against torture.[91] The international or regional dimension (through the Convention Against Torture and other treaties, as well as monitoring bodies such as the Committee Against Torture), the national dimension (through the adoption of appropriate legislation implementing these conventions and recognizing torture as a specific crime, as well as through the effective investigation and prosecution of torturers), and the civil dimension (through petitions, mobilizations, and the spreading of values) are all essential in making sure that, while perhaps the prohibition of torture is not yet absolute today in practice, the future trajectory will move in that direction. A huge obstacle to that, i.e., to a general and absolute renunciation of torture, is the argument of the "ticking bomb scenario," on which the following chapter will focus.

[91] Nagan and Atkins (n 14).

3. The ticking bomb scenario as a justification for the use of torture

The ticking bomb scenario has been mentioned as a prime obstacle to the worldwide definitive abolition of torture because, while it is generally accepted that torture must and should be prohibited in most circumstances, the ticking bomb scenario presents itself as one exceptional such circumstance, feeding the debate about the possibility of a rare admissibility of torture. Fortunately for the centuries of progress in the field of human rights and international law, in particular regarding the use of torture, the ticking bomb argument does not support the view that torture as a practice should be generally permitted. It does not negate the general and fundamental ban on torture but seeks extra-legal or legal and institutionalized ways to evade it in the most exceptional circumstances. Today, the ticking bomb scenario is essentially the only debatable line of argument in favor of torture. No other defenses of torture are present, at least not to this level of discussion. Precisely because the ban on torture is still viewed as general by those who embrace this position, the ticking bomb argument relies on the specificity and exceptionality of the situation and on the severity of the matters at stake to justify the use of torture. This chapter will thus be entirely dedicated to the contemporary debate on torture examined through the lens of the ticking bomb line of reasoning. It will define the concept of the already mentioned "ticking bomb scenario," when and how it emerged as a justifying argument for the practice of torture, how it has evolved over the years and through the scholars' interpretations, and which are the current main positions on torture, from absolute moral condemnation to reasonable justifications for its use.

3.1. Definition and origin: how the "ticking bomb" became part of the discussion

3.1.1. Understanding the ticking bomb hypothetical.

In the same way that we have examined the concept of torture to understand at best its definitions and implications, defining the "ticking-bomb scenario" is crucial to further advance into our research. Clear definitions not only help establish common understandings of terms but also serve as the foundation for a satisfactory and comprehensive analysis. This is all the more important as the ticking bomb argument lies at the very center of this study. Thus, we will start by examining the different definitions and reflections surrounding this concept.

Farrell defines the ticking bomb scenario as a hypothetical situation or "thought experiment"[92] where:

> "An individual has been detained and the authorities believe, or are certain, that the individual has the information to prevent an impending attack which will kill or injure many people. The individual is unwilling to disclose the information in interrogation. The authorities believe that the information can be obtained through torture."

She explains how behind this construct is a fundamental question that lies at the heart of the debate on torture: whether the saving of innocent lives justifies the use of torture.[93] Bufacchi and Arrigo's definition mirrors that of Farrell, in that it explains that, though they may differ in some aspects, most conceptualizations of the ticking bomb scenario are grounded on three main points: the endangerment of many innocent civilians (1); the imminence of the threat (which makes a timely response most crucial) (2); and the detention of a (suspected) terrorist whose revealing of information could be crucial in averting the impending disaster (3).[94] In his book *Why Not Torture Terrorists?*, Ginbar provides an overview of the different practical descriptions of ticking-bomb scenarios, from those of scholars such as Shue and Dershowitz to those of the Israeli Supreme Court and even of U.S. media.[95] It is interesting to evoke some of these, as the position of all these parties in the torture debate will be discussed further on in the chapter. Shue, for example, depicts the ticking bomb scenario as such:

> "Suppose a fanatic, perfectly willing to die rather than collaborate in the thwarting of his own scheme, has set a hidden nuclear device to explode in the heart of Paris. There is no time to evacuate the innocent people or even the movable art treasures – the only hope of preventing tragedy is to torture the perpetrator, find the device, and deactivate it."[96]

Similarly, the Israeli Supreme Court, in its 1999 judgment regarding the case of the *Public Committee Against Torture v. Israel* describes this hypothetical situation through the risk of the potential explosion of a bomb endangering innocent lives:

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[92] Association for the Prevention of Torture, 'Defusing the Ticking Bomb Scenario: Why We Must Say No To Torture, Always' (2007).
[93] Farrell, 'The Ticking Bomb Scenario' (n 3).
[94] Bufacchi and Arrigo (n 26).
[95] Yuval Ginbar, *Why Not Torture Terrorists?: Moral, Practical, and Legal Aspects of the 'Ticking Bomb' Justification for Torture* (Oxford University Press 2008) 357-364.
[96] Shue (n 24).

"A given suspect is arrested by the GSS. He holds information respecting the location of a bomb that was set and will imminently explode. There is no way to diffuse the bomb without this information. If the information is obtained, however, the bomb may be diffused. If the bomb is not diffused, scores will be killed and maimed."[97]

Dershowitz, in turn, presents the hypothetical of the ticking bomb scenario by recalling the "trolley problem," the classic moral dilemma faced by a train operator whose vehicle has a malfunctioning brake system. On the train's current track are a number of people (in Dershowitz's version, "a busload of children"). On a different track, only one ("a drunk lying on the rails"). Stopping the train is impossible. Assuming that the train operator will not face any danger himself, should he do nothing and collide with the children or divert the train onto the other track and kill the other one person? Parallels between the ticking bomb scenario and the trolley problem are evident. In the case of the ticking bomb, the problem is "whether torture, if, and only if, practiced with the purpose of obtaining information to save a larger number of innocent lives, can be legally and morally justified," writes Dershowitz.[98] We will see the different answers to this legally and morally complicated dilemma in the following sections.

3.1.2. The background: The Algerian War.

Having defined the ticking bomb scenario, let us now retrace the path of this controversial argument that wants to evade the absolute prohibition of torture. When did it become part of the discussion? How did it give a new impetus to the debate on torture, which could have appeared to have been somewhat put to rest with the acceptance of a general, universal, and absolute ban on torture? As Belvisi and Farrell explain, 9/11, the 2004 and 2005 Madrid and London attacks, and the continued fight against terrorism have shed light on the ticking bomb scenario and coercive interrogation as potentially legitimate reasons to resort to torture at the beginning of the new millennium.[99] But this is not a novelty, for the ticking bomb argument was brought forward in the debate on torture long before the launching of the War on Terror. Additionally, despite the second half of the Twentieth century teeming with new human rights treaties and conventions, torture never stopped being practiced, and the question of whether a certain type of torture (i.e., interrogational torture) could be justified never stopped being asked. It is their relevance and magnitude in contemporary debates that have significantly changed with the emergence of new threats.

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[97] *Public Committee against Torture v Government of Israel* [1999] Supreme Court of Israel HCJ 5100/94.
[98] Brecher (n 6) ch 2, para 1, 14ff.
[99] Belvisi (n 90); Farrell, 'The Ticking Bomb Scenario' (n 3).

The origin of the ticking bomb hypothetical as a justification for torture can be traced back to the 1950s, during the French-Algerian War. Algeria had been colonized by the French in the 19th century, but by the mid-1900s the mounting requests for independence in the post-war world marked by the first wave of decolonization led to the inevitable outbreak of a conflict between the Algerian nationalists (under the movement of the National Liberation Front, FLN) and the French military, eager to defend its territories. From 1954 until 1962, when a ceasefire was agreed and the Evian Accords were signed, officially sanctioning the independence of Algeria, a bloody war ensued between the two parts. France was reluctant to renounce to a territory where close to one million French settlers (the so-called "*pieds noirs*") had established themselves. This resistance prolonged the duration of the war for several years. The violence and brutality on both sides, in particular during the Battle of Algiers, resulted in hundreds of thousands of casualties, significant trauma within the population, and a dramatically tarnished legacy of the French presence in the region. Still today, France struggles to reckon with the heritage of the Algerian War.[100] As mentioned, it is in this context that the ticking bomb justification came about. French authorities frequently resorted to torture to interrogate and extract information from FLN members during the war to thwart attacks and dismantle FLN networks, despite its prohibition.[101] Even non-members of the movement could be targeted if the French military suspected a distant affiliation with the FLN. No written document has yet been found in which torture was expressly legitimated. It would have been impossible to do so as French law explicitly banned the practice. Yet, as Branche notes, even in the higher ranks torture was "tolerated and encouraged."[102] To justify resorting to the torture of the interrogational type, the French military proposed an official narrative that depicted it as the "necessary evil": given the gravity and urgency of the situation, torture was indispensable to prevent or neutralize attacks, gather crucial intelligence and gain the upper hand in the war. A study by Branche of declassified French military records[103] cited in Rejali reports that close to 24.000 individuals had been arrested by the time the Battle of Algiers had come to an end. Most of these had been subjected to torture: according to military archives, 66% were women and as high as 80% were men. Electrotorture was generally the most frequently chosen method, as it could be easily accessed and was the most favored by soldiers because it allowed the torturers to have emotional and physical distance from their victim, thus

[100] Michele Barbero, 'France Still Struggles With the Shadow of the "War Without a Name"' (*Foreign Policy*, 27 November 2023).
[101] Raphaëlle Branche, 'Torture of Terrorists? Use of Torture in a "War against Terrorism": Justifications, Methods and Effects: The Case of France in Algeria, 1954–1962' (2007) 89 International Review of the Red Cross 543; Farrell (n 3); Rejali (n 4) pt 1, ch 1, para 2; Alan Dershowitz, 'Tortured Reasoning' in Sanford Levinson (ed), *Torture A Collection* (Oxford University Press 2004).
[102] Branche (n 101).
[103] Raphaëlle Branche, *La Torture et l'armée Pendant La Guerre d'Algérie* (Gallimard 2001).

making it easier to torture.[104] In the other methods used, indeed, resorting to an intermediary object or tool to maintain some form of distance was quite frequent, explains Branche. Another fundamental rule highlighted by the author in her study is the fact that the French military generally chose not to leave lasting scars on their victims. If impossible, execution was a means of last resort. Thus, one can see the many advantages of electrotorture as a form of stealth torture for the French officials.

However, while the official narrative was that the core purpose of torture was to thwart attacks and counter the terrorist plots of Algerian nationalists, as Branche holds this was *only*, and *precisely*, an official narrative, an illusion.[105] Behind it, indeed, was another purpose. To better illustrate this other goal, she explains how the Algerian War was conceived as a new type of war, a "revolutionary war" where it not only mattered to be victorious over the adversaries (i.e., the Algerian nationalists, the FLN) but where it was also crucial to establish control and garner the support of the population, in whatever possible way, whether by individual choice or through coercion and terror. Therefore, torture became a key tool to reach this objective. It certainly was used as an information-gathering method, but also crucially consolidated itself as a powerful weapon to exert control: torturing was a way for the military to demonstrate "its present omnipotence and desire for future power."[106] In holding that the Battle of Algiers could be won thanks to a population "cowed beyond belief," Rejali confirms the importance of this dynamic of power and control over the populace to win this new, revolutionary war.[107]

As explained above, torturing was a common practice during the French-Algerian War, and Farrell comprehends its use (though she does not justify it) by viewing it as one of the most decisive elements that led to the victory of the French during the Algerian War.[108] She also recalls that there appears to be quite a wide consensus on this matter: Horne, for example, recognizes the potential of torture as a method for collecting information during the conflict. Similarly to Branche, he holds that it gave some advantage to the French in the short-term, but that in the long run the use of torture practices irremediably "poisoned" the French system.[109] Horne's belief is also shared by Macmaster, who recalls how the practice was viewed as a cancerous disease whose spreading gradually eroded the fundamental values, pillars, and institutions of liberal democratic states, first of which human dignity and human rights.[110] Indeed, besides creating a certain indignation within the French population because of the extensive use of torture (even if the media remained remarkably silent on

[104] Rejali (n 4) pt 5, ch 22, para 1.
[105] Branche (n 101).
[106] ibid.
[107] Rejali (n 4) pt 5, ch 22, para 1.
[108] Farrell, 'The Ticking Bomb Scenario' (n 7) ch 2, sect A, para 1, 83.
[109] Branche (n 101); Alistair Horne, 'Shades of Abu Ghraib' (2009) 23 The National Interest.
[110] Neil Macmaster, 'Torture: From Algiers to Abu Ghraib' (2004) 46 Race & Class 1.

the matter), the complexity of the French-Algerian War led to the adoption of a much-discussed and controversial state of emergency law by the French Parliament in 1955. Law 55-385, which is deprived of a constitutional basis still to this day, gave exceptional powers to State authorities to establish a state of emergency and thus significantly restrict freedoms in exceptional situations.[111] As the situation in Algeria was only recognized as an act of rebellion, of insurrection, and not as a full-blown war, police and administrative authorities could act according to this law to "maintain law and order," through measures such as the limitation of the freedom of movement, association and publication, among others.[112] Additionally, a Special Powers Act was adopted to grant extraordinary powers to the French military, which is considered to have opened the door to any use of torturous practices or other atrocities by the military.[113] But besides the adoption of Law 55-385 on the state of emergency, whose constitutionality is still questioned (though it remains available to use to the President of the Republic, and has been used even in recent years to limit freedoms in the fight against terrorism), the Algerian War also irremediably modified the French political system as it led to the dissolution of the Fourth Republic, the adoption of a new constitution and the foundation of the current Fifth Republic. The earthquake caused by the conflict was so significant that it caused a profound and long-lasting change in French politics, besides, of course, in Algerian politics.

But aside from its macro-impact on political systems and societies, the Algerian War also had an impact on the mentality of people, military experts, and academics, and on their views on torture. As outrage mounted in France when it became clear that torture had been widely used in Algeria while the press had remained mostly silent,[114] arguments on the exceptional legitimacy of interrogational torture started making their way into academic debates. For Rejali, the war and what happened during it significantly altered the modern discussion on torture.[115] The Algerian War was sometimes even viewed as a "model," as a "prototype for conflicts," as a success story for the fight against terrorism and subversion.[116] Indeed, after their victory, French officials were sent abroad to countries such as Argentina and the United States. Far from being condemned for their resorting to systematic torture during the conflict, they were listened to and were allowed to share their newly acquired knowledge on countering terrorism. Together with their practical military knowledge, they may have well contributed to the spreading of the ticking bomb argument, and justifications for torture among military and scholarly circles based on the notion of the "good torturer saving innocent

[111] Loi n° 55-385 du 3 avril 1955 relative à l'état d'urgence. 1955.
[112] Branche (n 101).
[113] Farrell, 'The Ticking Bomb Scenario' (n 7) ch 2, sect A, para 2, 88.
[114] Farrell (n 3); Paola Paissa, 'Le silence sur la torture pendant la guerre d'Algérie. Analyse d'un corpus de presse française (1957 et 2000)' [2013] Mots. Les langages du politique 39.
[115] Rejali (n 4) pt 1.
[116] Branche (n 101).

lives." Historical amnesia in France after the war certainly helped forget the atrocities committed during the war, and silently helped cast doubt on whether an absolute ban on torture was truly necessary given the existing threats.[117]

As has already been hinted, many agree that the context of the French-Algerian War led to the formulation of the ticking bomb hypothetical as we know it today.[118] It is in *Les Centurions*, a 1960 bestseller by Jean Lartéguy, that a true, written formulation of the ticking bomb scenario first made its appearance. In it, the French writer and war correspondent told the story of French paratroopers during the Algerian War and narrated a scene where a ticking bomb scenario unfolded. Some scholars consider his work of fiction to have exemplified reality in a "polished" manner, to have given a more suitable, "palatable" justification for the cruel use of torture in the years of the French Algerian War and the Battle of Algiers.[119] In the end, if the goal was to obtain a confession and thwart an impending attack, torture could be justified. In a very Machiavellian way of reasoning, the end would justify the means. Many agree that Lartéguy's publication of *Les Centurions* prompted a very real discussion on the ticking bomb argument legitimating torture, both in academic circles and within the wider public. The concern is that "reality embraced art" and that his imagined story overshadowed the real state of affairs.[120]

3.1.3. The ticking bomb scenario in contemporary debates

One could ask how the ticking bomb scenario as a legitimation for torture remains of actual relevance given that the French-Algerian War happened more than sixty years ago. The historical context was significantly different from that of today. The issues and threats were different, and the parties involved had restricted capabilities, much more limited than those of the intelligence services of today. Yet, scholars agree that the ticking bomb scenario has been a huge part of the post-9/11 debate.[121] So why is this argument still so relevant in the debate on torture? Given the immense progress in the field of human rights but also intelligence gathering, why do we still debate on whether torture is necessary and why are we, both authorities and the public opinion, still so captivated by the ticking bomb scenario?

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[117] Farrell, 'The Ticking Bomb Scenario' (n 7) ch 2, sect A, para 4, 102ff; Farrell, 'The Ticking Bomb Scenario' (n 3).
[118] Farrell (n 7) ch 2, sect A, para 1, 83ff; Farrell (n 3); Rejali (n 4) pt 5, ch 24, para 5; Mayerfeld (n 52); Kovarovic (n 89).
[119] Kovarovic (n 89); Jane Mayer, 'Whatever It Takes' [2007] *The New Yorker* <https://www.newyorker.com/magazine/2007/02/19/whatever-it-takes> accessed 2 December 2023.
[120] Rejali (n 4) pt 5, ch 24, para 5; Farrell (n 3); Farrell (n 7) ch 2, sect A, para 1, 83ff.
[121] Kenneth Lasson, 'Torture, Truth Serum, and Ticking Bombs: Toward a Pragmatic Perspective of Coercive Interrogation' (2008) All Faculty Scholarship.

To begin with, for some scholars it would be incorrect to assume that the French-Algerian War is so distant from some of the wars waged today. Farrell indeed finds striking similarities between French-Algerian warfare techniques at the time, and contemporary U.S. ones, in particular in ideology, strategy, and legal basis. She points out that in the war against terror, the United States has followed the same interventionist logic of "liberating and bringing democracy, to defend and extend 'civilization'" as France did during the Algerian War. Strategically speaking, both countries in their own fight against terrorism have had to face a new threat, which has required preventive responses. Finally, both France and the U.S. have justified their responses by invoking the severity of the threat to national security and have thus resorted to extraordinary measures limiting the rights and freedoms of suspected terrorists, often depriving them of legal protections.[122] Similarities also continue to exist in the way that torture keeps being justified. Reflecting on the modern use of torture, Brecher notes that only an ill or evil person would be favorable to torture in general, which is why almost all of those who conceive of a "just" torture hold on to the concept of interrogational torture and of its benefit of saving innocent lives. The ticking bomb scenario, he argues, has remained the only sane, arguable, and conceivable justification for torture.[123] Thus, those same arguments used during the Algerian War have not changed in the modern debate. Those who still want to justify torture still have the ticking bomb as their strongest, and perhaps only, line of argument. Today, this stance has actually gained in popularity. Brecher's observation and resulting concern is indeed that an excessively high number of people tend to excuse torture in ticking bomb cases.[124] Whether in Europe, the United States, or Israel, the events that occurred in the last two decades have driven a huge segment of the public opinion towards justifying torture, albeit only in such circumstances. The majority of scholars tend to agree over the fact that Islamic terrorism in particular has played a significant role in the conceptualization of a "just" torture across the world. It has forced people and intellectuals to the realization that the ticking bomb scenario can manifest itself in real-life situations.[125] That, though rare, it is not necessarily a work of fiction, and that the difficult questions surrounding it actually have to be asked and, if possible, answered. That, given the omnipresence of the terrorist threat and the inevitable response of counterterrorist tactics, a position needs to be taken in the debate on torture.

In the U.S., the Bush administration very frequently resorted to mentioning the ticking bomb argument to justify its conduct during the War on Terror and to garner the support of the population. As Kovarovic notes, such a line of argument creates some distance between the practice of torture in ticking bomb cases and sheer cruelty, as it conceives of a "good torturer" saving lives from

[122] Farrell, 'The Ticking Bomb Scenario' (n 3).
[123] Brecher (n 6) ch 1, para 4, 11ff.
[124] ibid.
[125] Belvisi (n 90).

dehumanized, evil individuals.[126] It would be redundant to reiterate how the magnitude of the 9/11 terrorist attacks led to the launching of the global War on Terror and forever changed the U.S. and worldwide perception of national security. What is the ticking bomb scenario if not a dilemma on whether rights (first among which, the right not to be tortured) can be balanced against national security? Experts from the PEW Research Center tried to find answers to this dilemma within the population by surveying the U.S. population. Results from 2016 showed that a striking 48% of respondents could conceive of torture being tolerated in certain circumstances related to security and counterterrorism. The remaining 49%, however, supported the view that the prohibition of torture must remain absolute, and thus that torture can never be practiced. The most significant divide they found was based on the respondent's political color, as the survey showed that 71% of Republicans were favorable to the use of torture, whereas the percentage dropped to 31% for Democrats.[127] In another study reported by Luban, university students of an ethics course were asked which were the most appropriate strategies to deal with the perpetrators of a terror attack. The context was always post-9/11. Among the choices were execution, torture, trial in a U.S. court, or trial in an international court. The majority of the students chose execution and torture as the optimal responses.[128] Brecher's above-mentioned concern of excessive support for torture becomes very real when surveys such as these show a significant segment of the U.S. population would be favorable to torturing suspected terrorists if justified by matters of national security related to terrorism.

The issue of security matters being prioritized over fundamental rights is a field of study of great relevance today. It reflects the tension between the States' dual obligation of the duty to respect individual rights and the duty to protect them, by taking positive action. In particular, in the war against terrorism, extra-judicial detentions, extraordinary renditions, the suspension of habeas corpus or due process rights, and the removal of citizenship for suspected terrorists are only some of the controversial measures that have been adopted and that add themselves to a long list of violations of rights for reasons of national security, at the top of which is the violation of the freedom from torture. Focusing on Europe, the numerous terrorist attacks that occurred since the 2000s, from Madrid 2004, London 2005 and 2017, Paris 2015, Brussels 2016, and Strasbourg 2018, led a segment of public opinion, politicians, and the media to adopt the view that interrogational torture is a necessary evil and that it is a tool that can be resorted to in exceptional circumstances. Even so, Brecher is concerned over the fact that the use of torture in ticking bomb scenarios is sometimes even celebrated, instead

[126] Kovarovic (n 89).
[127] Alec Tyson, 'Americans Divided in Views of Use of Torture in U.S. Anti-Terror Efforts' (*Pew Research Center*, 26 January 2017).
[128] Luban (n 7).

of denounced.[129] A survey by ACAT France[130] shows a trend of gradual increase in the justification of torture among French participants: compared to 25% of respondents in 2000, 36% of the respondents to the 2016 survey were ready to accept the use of torture in exceptional circumstances in exchange for national security. ACAT France added to its survey a specific question relating to whether torture could be used on an individual suspected of having planted a bomb. This is the typical ticking bomb case. Could torture be justified? For 54% of the French respondents, the answer was yes. Almost half of them justified torture by its efficacy as an information-gathering technique and, thus, as a viable counterterrorism measure.[131] Additionally, repeated instances in the context of the Israeli-Palestinian relations have brought the ticking bomb scenario to the debate. As will be seen, besides being part of the public debate, these have also been the object of judgments by the highest Israeli courts, which had to rule on whether rights and national security could be balanced against one another.

3.2. The debate on torture: positions and controversies

Confronting oneself with the complex ramifications of the ticking bomb dilemma means, in essence, questioning the absolute nature of the ban on torture. The very fact that scholars of the 21st century still debate on torture is an indication that even the most seemingly globally consolidated *jus cogens* norms such as the prohibition of torture are not yet universally accepted as such, both in theory and in practice, given reports on the use of torture today.[132] Those that conceptually justify resorting to torture, even if only in ticking bomb situations, cannot truly consider themselves in agreement with the absolute nature of the prohibition. It would be paradoxical to state otherwise. So, perhaps, to respond to Luhmann's interrogation on whether "unrenounceable norms" exist, we could answer that States, public opinion, and academic circles have yet to fully reach an agreement on the matter: the spectrum of answers remains broad as torture keeps being perceived as a viable, though exceptional, means to counter terrorism. Despite the international and domestic laws' explicit ban on torture, the practice controversially remains of use today, and its justifications are on the rise. In this section, we will fully delve into the debate on torture, which, as we have already mentioned above, generally entirely focuses on ticking bomb scenarios and argumentations. The arguments in the debate that we

[129] Brecher (n 6) ch 1, para 3, 8.
[130] The ACAT, the Action by Christians for the Abolition of Torture is a human rights NGO dedicated to the fight against torture and the abolition of the death penalty. It has numerous branches in different countries, including France, Italy and the United Kingdom.
[131] ACAT France, 'Un Monde Tortionnaire 2016' (Action des Chrétiens Pour l'Abolition de la Torture 2016).
[132] Amnesty International (n 72).

will discuss will revolve around the two main axes of deontology and utilitarianism (or consequentialism), what Ginbar calls the "'clash of the Titans' among ethicists."[133] In sum, a key difference between the two models concerns their view on whether the end justifies the means. It does, for the utilitarian; it does not for the deontologist. Indeed, the utilitarian aims at maximizing the common welfare. Hence, if used to save a greater number of innocent lives in a ticking bomb scenario, the means of torture is justified. Utilitarian or consequentialist arguments essentially choose to perform a cost-benefit analysis to reach their conclusions.[134] On the contrary, deontologists will follow rules, norms, and moral codes when having to face complex moral decisions, and will not consider the common good as a sufficient justification for departing from them. The utilitarianism-deontology distinction is a strict categorization that naturally cannot mirror the complexity of ethical dilemmas and each individual preference regarding them. Within both models, indeed, a spectrum exists where moderate to extreme stances can be found. Those deontologists who follow the principles of moral absolutism, for example, will obey rules and observe moral norms, regardless of the possible negative consequences of the observance of those moral rules for the greater good.[135] We will thus start this section by discussing the position of moral absolutism which thoroughly and unequivocally condemns torture in any circumstance, and we will then follow by exploring the utilitarian arguments in favor of exceptional, ticking-bomb torture. Besides the deontological positions that view torture as illegal and never acceptable, as Farrell points out, most of the debate on torture in emergency situations generally revolves around two other utilitarian positions: legal torture and extra-legal torture. Legal torture means that torture as a practice can be exceptionally tolerated and must thus be regulated in the law. Extra-legal torture is a view that upholds the ban on torture (and even demands its strengthening), but that accepts its use only if beyond the law, as an extra-legal practice.[136] We will thus also discuss some of these specific pragmatic proposals that favor tolerating, justifying, or excusing torture *in extremis*.

3.2.1. Moral absolutism.

Moral absolutism can be defined as "the theory according to which there are certain kinds of actions that are absolutely wrong; actions that could never be right whatever the consequences." This

[133] Ginbar (n 95) xxx.
[134] Gross (n 29) pt 1, 3.
[135] Eberhard Feess, Florian Kerzenmacher and Yuriy Timofeyev, 'Utilitarian or Deontological Models of Moral Behavior - What Predicts Morally Questionable Decisions?' (2022) 149 European Economic Review 104264; Michael Laakasuo and Jukka Sundvall, 'Are Utilitarian/Deontological Preferences Unidimensional?' (2016) 7 Frontiers in Psychology.
[136] Michelle Farrell (ed), 'Legal, Extra-Legal or Illegal? The Academic Debate on the Use of Torture in Exceptional Circumstances', *The Prohibition of Torture in Exceptional Circumstances* (Cambridge University Press 2013) ch 4, 175.

is the definition of the theory provided by philosopher Joram Haber and reported in Ginbar's work.[137] Acts such as torture and slavery can be considered to fall under the category of those actions that are morally repulsive and should never, in any circumstance, find any moral or legal justification. Thus, the moral absolutists, who can be located at the extreme end of the deontologists in the debate on torture, will respond firmly in the negative to the question of whether exceptional situations justify the use of torture. This is because torture is seen as a "special type of wrong,"[138] as a fundamentally evil and unethical act that, through the humiliation and degradation of the subjects, strips them away from their dignity, autonomy, and humanity. It is described as "the worst kind of harm" anyone can be subjected to, second only to killing.[139] Moral absolutists, and more in general deontologists in the debate, often invoke the fundamental principle of human dignity and argue that torture opposes every aspect of it. The physical and psychological consequences are indeed so severe that even the sense of self of the tortured is erased. Tortured individuals are at the mercy of their torturers and are objectified by the State, whose sole goal becomes the gathering of information with little regard for the victims' well-being and fundamental rights.[140] In addition, moral absolutism abhors the use of torture because it not only violates the victims but also corrupts the psyche and the morals of those who torture and the mentality of the societies where torture is practiced.[141] For Luban, torture is the maximum expression of cruelty, and it is "tyranny in microcosm."[142] Just as during the French-Algerian War, torture is thus viewed as a cancer by those who support moral absolutism. The data mentioned above somewhat support this: the surge in the use of torture after 9/11 has been met with a surge in the popular acceptance of (and even the endorsement of) this practice as a counterterrorism measure. The more torture is practiced, the more it spreads like a disease and the more the resorting to it becomes part of the popular mentality. But while some consider torture to be effective as a measure to combat terrorism, even a cost-benefit analysis proves unfavorable to exceptional torture for the moral absolutists: the immense human, moral, legal, and societal costs of resorting to torture will always inevitably exceed its benefits. Thus, as Gross notes, those who share this view will reject an evaluation of torture and its effectiveness in specific situations regardless of the circumstances.[143] Needless to say torture as an interrogation method would be ineffective *ab initio* since no moral legal system would ever accept information extracted under torture in a court of law. Additionally, Mayerfeld warns of the risk of people becoming desensitized to torture if case-by-case evaluations are made,

[137] Ginbar (n 95) ch 3, sect B, 25.
[138] Sussman (n 17).
[139] Steven Greer, 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really "Absolute" in International Human Rights Law?' (2015) 15 Human Rights Law Review 101; Ginbar (n 95).
[140] Gross (n 29) pt 1, 1; Juratowitch (n 33); Mayerfeld (n 52); Greer (n 139); Bufacchi and Arrigo (n 26); Belvisi (n 90).
[141] Gross (n 29) pt 1, 1-2.
[142] Luban (n 7).
[143] Gross (n 29) pt 1, 2.

where questions such as "should we torture in this or that situation?" are continuously asked.[144] Therefore, for the moral absolutists, the outcome of the cost-benefit analysis will always be the same: torture is not useful, not effective, not ethical, not right, not moral, and not legal, and it can never be tolerated nor justified.

As far as which judicial systems adopt a moral absolutist stance on torture, Brown recalls the prohibition of torture in Article 3 of the European Convention on Human Rights (ECHR) and notes how the European Court of Human Rights (whose role is to ensure that the States Parties to the Convention respect the rights outlined in it) adds the legal dimension to this moral prohibition. In addition to ECHR law, the author also mentions English common law, as in 2005 the House of Lords clarified that the UK courts should rule in strict accordance with the absolute nature of the ban on torture.[145] Besides jurisdictions, human rights organizations such as Amnesty International have historically adopted a moral absolutist view on torture and have fought for an unconditional, absolute, and universal ban on the practice.[146]

Nevertheless, the intransigent stance of moral absolutism regarding torture is not shared by all. Indeed, it is actually often criticized by those who have more pragmatic and utilitarian views for being too idealistic, ingenuous, soft, and, overall, far too impractical. Though it is a given that torture as an act is morally wrong, and that both international and most domestic laws severely condemn the practice of torture, many consider that exceptional situations call for exceptional measures, such as the permissibility of torture. Rejecting torture in principle, before even being confronted with an emergency scenario such as a ticking bomb case, the utilitarian may argue, is too unrealistic. On the contrary, debating on torture and through these debates finding beforehand where the State's administration and legal system stand on exceptional ticking bomb torture is necessary to deal with situations threatening national security efficiently and effectively. For such emergency measures, having the certainty of the law (whether the law tolerates torture or not) is paramount, particularly for liberal-democratic states. Therefore, let us now delve into the other side of the debate and present the utilitarian and consequentialist arguments in favor of an exceptional and regulated permissibility of torture in ticking bomb cases.

[144] Mayerfeld (n 52).
[145] Brown (n 35).
[146] Michael S Moore, 'Torture and the Balance of Evils' (1989) 23 Israel Law Review 280.

3.2.2. Doctrines of defense.

As said, many scholars view the absolute, non-derogable prohibition of torture as unrealistic when dealing with certain issues of national security.[147] Posner criticizes those who maintain this stance as being "in denial" and as refusing to make "difficult tradeoffs," since he holds that interrogational torture may be the only means to thwart an attack in the most exceptional circumstances.[148] Those who argue in favor of a ticking bomb justification for torture often invoke the criminal law arguments of self-defense and necessity-defense, which can be regrouped under the broader category of the "doctrines of defense." We will examine both of these below, but before doing so, it is interesting to reflect on the difference between the two terms of *excuse* and *justification*. Are the doctrines of defense excuses or justifications for the use of torture in ticking bomb situations? The fundamental difference between the two concepts is in the existence of wrongful behavior and, if there is, in the presence of a resulting fault. An excuse means that wrongful behavior was committed, but that there is no fault associated with it (an example of an excuse would be a mistake). On the contrary, a justification of a conduct means that, at first sight, the conduct was not wrongful, and thus that the question of fault does not even arise.[149] As Arnolds and Garland explain, if criminal behavior prevents more harm than that which it generates, then there should be no criminal liability.[150] Allhoff is clear in stating that the two doctrines of defense, self-defense and necessity-defense, are justifications and not excuses, and thus no wrongful conduct is committed if both are correctly invoked.[151] This position finds great support in the literature.[152]

3.2.2.1. Self-defense.

Suppose an individual is alone at home at nighttime, and an armed intruder breaks into their house, threatening their safety and that of those living with them. One can reasonably assume that the intruder intends to cause them harm, and, given the imminent danger faced, they feel compelled to use a reasonable amount of counterforce to attempt to neutralize the attacker. The right to self-defense

[147] Gross (n 29) pt 3, 14.
[148] Richard A Posner, 'National Security and Constitutional Law. Précis: The Constitution in a Time of National Emergency' (2009) 42 Israel Law Review 217.
[149] Edward B Arnolds and Norman F Garland, 'The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil' (1974) 65 The Journal of Criminal Law and Criminology (1973-) 289; Fritz Allhoff, 'Torture Warrants, Self-Defense, and Necessity' (2011) 25 Public Affairs Quarterly 217.
[150] Arnolds and Garland (n 149).
[151] Allhoff (n 149).
[152] Moore (n 146); Miriam Gur-Arye, 'Can the War against Terror Justify the Use of Force in Interrogations?' in Sanford Levinson (ed), *Torture A Collection* (Oxford University Press 2004); Arnolds and Garland (n 149).

is precisely that: the right to the protection of the self or of a third party from another in case of an aggression through the use of counterforce. As Moore puts it, the attacker generates a situation of threat, where the harm cannot be removed, but where the victim only has the choice of "redirecting" it or being subjected to it.[153] Often, self-defense can be used as a justification for the violation of the law and the commission of a criminal act, such as the killing of an attacker. The right to States' self-defense is consolidated in international law. Indeed, the UN Charter prohibits States from using force to solve international matters (Article 2.4), but exceptionally permits it in case of self-defense, whether individual or collective (Article 51).[154] Many States in turn have their own self-defense laws in their penal or criminal codes, but the extent to which a certain response to an aggression can fall under the umbrella of self-defense varies and generally depends on the country and the corresponding jurisdiction. For example, the German Criminal Code defines the self-defense doctrine as such:

> **Section 32**
>
> **Self-defence**
>
> (1) Whoever commits an act in self-defence does not act unlawfully.
>
> (2) 'Self-defence' means any defensive action which is necessary to avert a present unlawful attack on oneself or another.[155]

The Israeli Penal Law 5737-1977 possesses similar wording and clearly exempts from criminal liability those persons acting in self-defense:

> **Self defense**
>
> 34J. No person shall bear criminal responsibility for an act that was immediately necessary in order to repel an unlawful attack, which posed real danger to his own or another person's life, freedom, bodily welfare or property; however, a person is not acting in self defense when his own wrongful conduct caused the attack, the possibility of such a development having been foreseen by himself.[156]

Nevertheless, in most jurisdictions, a party arguing that they have acted in self-defense must prove that their behavior was reasonable, proportionate and necessary, lest they not be protected by self-defense.[157] Convicting someone of a crime committed in self-defense, provided that all of the above-mentioned requirements are satisfied, is usually considered to be wrong. Moore speaks of

[153] Moore (n 146).
[154] United Nations, 'United Nations Charter' (n 54).
[155] German Criminal Code 1998, as amended in 2021, title 4, section 32.
[156] Penal Law 5737 1977, State of Israel, ch 5, art 2, 34J.
[157] Kovarovic (n 89).

proven self-defense cases as "innocent aggressor" cases.[158] But if self-defense can defend killing, some scholars such as Gur-Ayre, Steinhoff, Allhoff and others have reflected on whether it could defend torture, too, in particular in ticking bomb situations.[159] Diverging stances emerge. Steinhoff, for example, interrogates himself especially after having underlined the fact that, as we have mentioned in the chapters above, though torture is a grave manifestation of cruelty, it comes only second to killing. If killing can be exceptionally justified by self-defense arguments, why should not interrogational torture? And, indeed, he answers firmly in the positive: in certain circumstances of impending or ongoing threats, torture can be self-defense, too. Ticking bomb scenarios lend themselves as the best example of such circumstances.

Some authors have more difficulty in immediately finding a link between self-defense and torture, as in most cases the requirements of self-defense (namely that there is a victim under threat of harm, that the aggressor is the one who ends up being killed, and that the person who kills is the victim) are not really met.[160] However, the self-defense justification for the use of torture in threatening, ticking bomb situations was put forth in the Bybee memorandum. Indeed, in the text, self-defense, alongside necessity, was explicitly referred to as a justification for resorting to forceful interrogation methods. The reasoning followed in the "torture memo" was that torture would help extract information that could "prevent a direct and imminent threat to the United States and its citizens."[161] Allhoff examines the self-defense justification, holding that in reality torture cannot be a matter of self-defense because the torturer is no victim as he faces no real harm. However, reflecting upon the Bybee memorandum, he comes to partly appreciate the meaning of self-defensive torture in ticking bomb situations if the victim under attack is the nation, rather than the very torturer. In this instance, the use of self-defensive torture by a party would thus be to defend the safety and integrity of a third party; not an individual but an entire nation.

Another stance on third-party self-defense justifying torture is provided by Steinhoff. Steinhoff makes the case of a child being kidnapped, trapped, and tortured; of his kidnapper being captured but not revealing the location of the child; and, thus, of the use of "self-defensive torture" against the kidnapper to force him to reveal the location as rapidly as possible, so as not to continue exposing the child to suffering. For him, the use of torture in this scenario would be in self-defense, because, as the kidnapper would continue not to disclose the whereabouts of the child, the child's freedom would still be under attack. What the author recounts is a real case that occurred in Germany at the end of the 1980s (see the *Denis Mook case*), which ended with the child being found in

[158] Moore (n 146).
[159] Gur-Arye (n 152); Brown (n 35); Kovarovic (n 89); Allhoff (n 149).
[160] Allhoff (n 149).
[161] Bybee (n 7); Kovarovic (n 89); Allhoff (n 149).

relatively good condition.[162] This specific interpretation of self-defensive torture, Steinhoff explains, is possible because of the phrasing of the German Penal Code and the interpretation of German law of the concept of "attack," which does not necessarily require action. Thus, even if the child is "only" imprisoned, and his kidnapper in custody, German law, according to Steinhoff, still views this as a continuous attack upon the child's freedom, and thus self-defense behaviors are justified.[163] As Gur-Ayre also questions herself on whether torture can fall under the protection of self-defense, she explains that, for her, the use of forceful methods during interrogations in order to extract information can be justified by invoking self-defense claims only when needed to "repel an unlawful concrete attack."[164] Allhoff agrees with her in refusing to consider interrogational torture in self-defense scenarios as a crime, but he considers the justification to present many limitations and thus conceives of necessity-defense as a much stronger argument for ticking bomb torture.[165] Besides Allhoff, other scholars such as Moore have doubts about the applicability of self-defense as a justification for torture during interrogations, though self-defense has the advantage of not leading to the torture of innocent individuals.[166] Moore indeed puts it clearly: "the literal law of self-defense is not available to justify [the terrorists' captors'] torture."[167] We will thus look at the other side of the doctrines of defense, namely the necessity-defense.

3.2.2.2. Necessity-defense.

In the debate on torture, some academics hold that invoking the necessity-defense can provide state officials with a legal ground for their use of torture during the interrogation of terrorist suspects. They argue in favor of a "torture-justifying defense of necessity"[168] to apply strictly to ticking-bomb cases. Similar to the self-defense argument, the defense of necessity argument in criminal law holds that individuals should not be punished for their criminal conduct in particular circumstances if their conduct is deemed necessary to prevent the unfolding of greater harm or to pursue certain goals, such as the protection of national security. Necessity-defense provisions are present in many jurisdictions,

[162] This case is fairly reminiscent of another German kidnapping and murder case of the early 2000s. In 2002, a child was kidnapped, and, after capturing his kidnapper, the German authorities decided to torture the kidnapper to gain information about the child's location, in the hopes of finding him alive (see the *Jakob von Metzler case*). This can be viewed as a ticking bomb scenario, because the more time passed, the greater the risk of the child facing greater harm. On this matter, the European Court of Human Rights was appealed and ruled against the legality of the use of torture on the kidnapper. *Gäfgen v Germany* [2010] European Court of Human Rights 22978/05.
[163] Steinhoff (n 159).
[164] Gur-Arye (n 152).
[165] Allhoff (n 149).
[166] Gur-Arye (n 152); Ginbar (n 95) ch 19, sect A, 305.
[167] Moore (n 146).
[168] Ginbar (n 95) ch 19, 304.

including the Israeli, the U.S., and the German ones. The German Criminal Code, for example, contains two provisions on necessity-defense, one of which defines it as such:

> **Section 34**
>
> **Necessity as justification**
>
> "Whoever, when faced with a present danger to life, limb, liberty, honour, property or another legal interest which cannot otherwise be averted, commits an act to avert the danger from themselves or another is not deemed to act unlawfully if, upon weighing the conflicting interests, in particular the affected legal interests and the degree of the danger facing them, the protected interest substantially outweighs the one interfered with. However, this only applies to the extent that the act committed is an adequate means to avert the danger."[169]

Similar wording can be found in the Israeli Penal Law 5737-1977.[170] As far as U.S. law, necessity-defense is regulated in the Model Penal Code, which stipulates the following:

> **Justification Generally: Choice of Evils**
>
> (1) Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:
>
> a) The harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
>
> b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
>
> c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.[171]

The provision of the U.S. Model Penal Code represents the clearest example of why, when dealing with matters where necessity-defense arguments are raised, courts have to perform a test to evaluate whether necessity substantiates. Essentially, judges have to perform a balancing test between rights (and, often, the rights of innocent people on both sides, as opposed to self-defense), and find which infringement amounts to the "lesser evil," hence the heading "Choice of Evils" in the Model Penal Code. In their study and analysis of the necessity-defense in U.S. criminal law, Arnolds and Garland explain that, in most cases, there is generally no hesitation over which is the lesser evil. To prove this, they cite a number of necessity cases in U.S. jurisprudence, some of them where, in order

[169] German Criminal Code 1998, as amended in 2021, title 4, section 34.
[170] Penal Law 5737-1977, State of Israel, ch 5, art 2, 34K.
[171] Model Penal Code 1985, American Law Institute, Part I, 8-9; Ginbar (n 95) ch 19, sect A, para 2.a, 309; Allhoff (n 149).

to save human life, property has been damaged or destroyed. [172] It is evident that the right to property comes second to the right to life. But there are other cases where finding an answer is more complex. Indeed, in the issues at stake, i.e., in ticking-bomb scenarios, courts would be required to rule on whether the violation of certain fundamental rights such as the freedom from torture is necessary and thus justified because of reasons of counterterrorism and national security.[173,174] Thus, because ruling on necessity can be so complex, and because of the insufficient amount of necessity precedents in Anglo-American jurisprudence,[175] courts must adhere to the conditions for necessity set in the law, and thoroughly perform the above-mentioned test. If the conditions are not met, then necessity as a justification for the violation of a certain right cannot apply. These requirements are essentially three: that the conduct prevented greater harm or evil (1), that there were no other legal alternatives to deal with the situation at hand (2), and that the response was proportionate to the gravity of the situation (3).[176] This balancing test is also a cost-benefit analysis where interrogators and then judges if a case comes to them, have to ask themselves about the advantages brought by the torture of suspected terrorists to obtain information in ticking-bomb cases.[177] Is torture the lesser evil? Is it the only means to reach the objective of neutralizing the bomb? And, lastly, is torture a proportionate response to the threat faced?

Kovarovic explains that it is quite difficult that all of these conditions will be met, and, thus, that necessity will be proven in such cases. She indeed explains that the very principles of the necessity-defense are the reason why there are few instances of successful necessity cases: "real emergencies do not come neatly emplotted in this ideal set of circumstances," Kovarovic writes. She also notes that, in the unlikely event that the three requirements will be satisfied, a final additional one will have to be met: the compliance of the conduct carried out in necessity with the rules of international law.[178] It would be quite difficult to hold torture's compliance with international law, even in necessity situations, given the extensive norms banning the practice. Gaeta, too, underlines the fact that the international ban on torture also concerns cases where torture is perceived as a means of last resort.[179] This would make it impossible for the second condition of the necessity doctrine to be satisfied in cases of interrogational torture. It is interesting and also important to note that this

[172] Arnolds and Garland (n 149).
[173] Kovarovic (n 89).
[174] Such a case was submitted to the Israeli Supreme Court, which ruled, in 1999 the *Public Committee Against Torture v. Israel* judgment, precisely on whether the necessity-defense could be invoked by investigators to justify the torture of terrorist suspects during interrogations. The details of the case and of the Court's arguments will be discussed in the next chapter.
[175] Arnolds and Garland (n 149).
[176] ibid.
[177] Kovarovic (n 89).
[178] ibid.
[179] Paola Gaeta, 'May Necessity Be Available as a Defence for Torture in the Interrogation of Suspected Terrorists?' (2004) 2 Journal of International Criminal Justice 785.

balancing test is not always universal, in the sense that there are certain legal systems where it is not always allowed. This is the case of English law, in which the defense of necessity is "capped," as Ginbar qualifies it. Indeed, in principle English law considers that there are certain circumstances where the protection of some rights must prevail over any necessity test, thus making it impossible to invoke a necessity-defense. Similarly, though German law provides for the defense of necessity, it also stipulates that there are some "absolute limits to the weighing of interests." These include the right to life and the right to bodily autonomy.[180,181]

However, those who support the view that the necessity doctrine is a valid justification for the use of torture in exceptional, ticking-bomb cases, will answer that torture *is* the lesser evil, that it *is* the only way to obtain information and, as a result, thwart imminent attacks, and, finally, that it *is* a proportionate means given that innocent lives are gravely put in danger. This is the stance adopted by scholars such as Parry and White, who, after having set forth a ticking-bomb example, view torture as a plausible and necessary last resort solution to make a terrorist suspect talk, "regardless of the legal status of torture" because, pragmatically, it "may be the least worse choice."[182] The authors recognize, acknowledge, and praise the universal ban on torture, they agree that those who engage in torture should be criminally prosecuted, but they view torture as wrong in *most* cases, not in *all* cases. Indeed, they want to leave the door open for last-resort interrogational torture as a means to save innocent lives. The reasonableness and necessity of the act to avoid greater peril, they hold, will suffice for a state official to successfully invoke the necessity doctrine, even if the act amounted to torture. Additionally, Parry and White argue in favor of the necessity-defense to protect government officials from criminal liability because they consider that it will function as a robust deterrent against engaging in torture.[183] The idea that torture in ticking bomb cases can meet the necessity requirements is also supported by Allhoff, who goes through each of the conditions outlined in the Model Penal Code individually to disprove that necessity cannot apply to such scenarios. For example, he pragmatically explains how the harm resulting from the torture of one or few suspected terrorists in ticking bomb cases is lesser than the harm that would be caused by the explosion of the bomb they placed. It is a balancing between the right not to be tortured of one or few individuals versus the right to life of many innocent individuals. For Allhoff, the "moral value" of life overpowers the "moral harm" of torture. Thus, torture does help prevent greater evil in extreme occurrences (point (1) a.).

[180] For more on German law and German jurisprudence regarding the balancing of rights, in particular the right to life, in emergency situations dealing with matters of national security, see Chapter 5.3.
[181] Ginbar (n 95) ch 19, sect A, para 4, 317-318.
[182] John T Parry and Welsh S White, 'Interrogating Suspected Terrorists: Should Torture Be an Option Symposium: Post-September 11 Legal Topics' (2001) 63 University of Pittsburgh Law Review 743; John T Parry, 'What Is Torture, Are We Doing It, and What If We Are' (2002) 64 University of Pittsburgh Law Review 237.
[183] Parry and White (n 182).

He also explains that, given that there are no exceptions provided in the law that criminalizes torture in the U.S. legal system, the necessity defense is available in cases of interrogational torture (point (1) b.). Lastly, he explains how the U.S. is not strictly and perfectly bound by the language of the Convention Against Torture, whose prohibition of torture is absolute, and which does not recognize any justification for torture, regardless of a "war or a threat of war, internal political instability or any public emergency" (point (1) c.).[184] "CAT is not US law," Allhoff states, holding that nothing in the U.S. legislation adopted in compliance with the Convention precludes resorting to the doctrine of necessity.[185] All these points made it possible for necessity to be cited as a justification for the use of interrogational torture in the infamous Bybee memorandum.[186] As will be seen, the necessity defense has also been a predominant line of reasoning by Israeli authorities to justify their conduct during their forceful interrogation of suspected terrorists. In Israel, even certain human rights organizations support the doctrine of necessity in ticking bomb situations, notes Brown.[187]

3.2.3. Ex ante justification of torture: the torture warrant system.

The two sections that will now be discussed will examine two other specific and practical proposals put forward to justify torture in the ticking-bomb debate: an *ex ante* justification of torture through "torture warrants," proposed by Harvard Law School Professor Alan Dershowitz; and an *ex post* ratification of torture proposed by Professor Oren Gross.

Dershowitz bases his reasoning on the current trends regarding the use of torture. He is aware of the fact that, today, torture is used in modern democracies, as are we, after having understood this in the first chapter. He is also well aware of the fact that, were they to be confronted with an extreme, ticking bomb situation, state officials would resort to torture. In "Tortured Reasoning," Dershowitz explains that, for him, the matter is not so much about whether States *should* torture, but rather how to best deal with the situation, as we know that they *would* torture. As a prominent human rights defender, he opposes torture. Nevertheless, he explains that his normative objection to torture does not prevent him from advocating for such a "controversial proposal," as he himself qualifies it. As he knows for certain that non-lethal torture is currently used by States as a counterterrorism strategy, Dershowitz chooses to set aside the century-old ethical, moral, and philosophical debate on the justness of torture. Instead of abstraction, he chooses concreteness: instances of torture have been

[184] United Nations, 'Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment' (n 11) art 2(2).
[185] Allhoff (n 149).
[186] Bybee (n 7); Farrell, 'The Ticking Bomb Scenario' (n 3).
[187] Brown (n 35).

widely reported, despite the absolute ban, because democratic states have used "stealth torture"[188] to avoid condemnation as much as possible. This under-the-radar torture and consequent lack of accountability undoubtedly poses significant problems in states that claim to abide by the rule of law. What to do, then? The crucial question from which Dershowitz's reasoning emerges is the following:

> "If torture is or will be practiced, is it worse to close our eyes to it and tolerate its use by low level law enforcement officials without accountability, or instead to bring it to the surface by requiring that a warrant of some kind be required as a precondition to the infliction of any type of torture under any circumstances?"[189]

The Harvard Law professor deems it essential for states to obey the rule of law, and thus for any conduct of public officials or other agents representing the state, such as the military, to follow what the law provides.[190] He abhors the hypocritical idea of "closing an eye" to the extra-legal use of torture,[191] and thus, he conceives of a system of "torture warrants," where an *ex ante* authorization for the exceptional use of torture during interrogations is given to state officials by a judge, much similar to the existing search warrant system. Dershowitz entrusts the judiciary with this function since it is this branch of power that has the role of balancing "the needs for security against the imperatives of liberty."[192] For him, this proposal is an alternative to the necessity-defense perspective.[193]

For Dershowitz, the torture warrant system has one significant negative dimension: the legalization of the cruel and heinous practice that is torture. Still, he considers his proposal to bring about more good than harm. Torture warrants, he holds, regulate torture, which is rarely controlled, increase transparency in systems where off-the-record practices are the norm, generate accountability where there is none or close to none, and overall decrease the use of torture, its intensity, and its duration over time.[194] As no scholar would ever hold that torture is good *per se*, most will share Allhoff's view that, more important than the contents of the proposals brought forward by academics, is whether they allow a minimization of the practice of torture.[195] Dershowitz argues that torture warrants do. His proposal provides for the establishment of a two-step *ex ante* approval of the use of interrogational torture. Indeed, in addition to the first evaluation, that is, that which is done by the

[188] Rejali (n 4) pt 1, para 4.
[189] Dershowitz, 'Tortured Reasoning' (n 101).
[190] Belvisi (n 90); Dershowitz, 'Tortured Reasoning' (n 101).
[191] Farrell, 'The Ticking Bomb Scenario' (n 7).
[192] Dershowitz, 'Tortured Reasoning' (n 101).
[193] Farrell, 'Legal, Extra-Legal or Illegal?' (n 136) ch 4, sect A, para 1, 178.
[194] Dershowitz, 'Tortured Reasoning' (n 101); Alan Dershowitz, 'The Torture Warrant: A Response to Professor Strauss' (2004) 48 NYLS Law Review.
[195] Allhoff (n 149).

state official on the ground, there is an added second one, for which a judge is entrusted. Two layers of control will inevitably be more restrictive than one.[196] Additionally, reporting Dershowitz's words, Allhoff discusses the fact that, according to Dershowitz, instances of torture would decrease under this system of *ex ante* justification of torture, because state officials would only demand a torture warrant once they had a sufficient amount of "compelling evidence." Given that torture warrants would be granted only in exceptional ticking bomb scenarios, ample evidence would need to be gathered to prove the existence of such a high-stake situation that would justify resorting to torture, making it more difficult to satisfy this requirement for the submission of a warrant request.[197]

For Dershowitz, torture warrants are all about transparency and accountability. He deems it better to "legitimate and control a specific practice that will occur than to legitimate a general practice of tolerating extra-legal actions, so long as they operate under the table of scrutiny and beneath the radar screen of accountability."[198] To support his claim about the problematic nature of secrecy surrounding these issues, he recalls the Algerian War and how French General Aussaresses, who admitted in the first person that he had frequently resorted to torture to make suspects talk, ended up being criminally pursued not because he had tortured them, but because he had disclosed to the public that he had done so.[199] Here, torture was not seen as a crime, despite the absolute ban on the practice. Confessing it was, because torture had to remain secretive. Dershowitz sees such a scenario as incompatible with any democracy that considers itself to abide by the rule of law.

Though the effort to minimize exceptional torture, foster transparency and respect for the provisions of the law can be nothing but praised, many scholars see a number of flaws with Dershowitz's proposal of an *ex ante* authorization of torture in ticking bomb scenarios. First of all, many view the torture warrant system as not reducing torture but actually as incentivizing and normalizing it because of the overall legitimation and condoning of torture.[200] In addition, scholars hold that the legalization of such a horrific practice would lead to the degeneration of liberal-democratic values as well as an erosion of the integrity of the judicial branch.[201] Allhoff raises two further problems with this proposal. The first is the fact that it is the judges who are entrusted with the evaluation of the ticking bomb situation. Indeed, it is *if and only if* the conditions for a ticking bomb scenario manifest themselves that a torture warrant can be issued by the judiciary. Yet, Allhoff points out, judges are "not trained to evaluate circumstances of life-threatening catastrophes"; state

[196] Dershowitz, 'Tortured Reasoning' (n 101).
[197] Alan Dershowitz, *Why Terrorism Works: Understanding the Treat, Responding to the Challenge* (Yale University Press 2002) 158; Allhoff (n 149).
[198] Dershowitz, 'Tortured Reasoning' (n 101).
[199] ibid.
[200] Allhoff (n 149); Bufacchi and Arrigo (n 26); Brown (n 35); Richard A Posner, 'The Best Offense' [2002] *The New Republic* 28; Belvisi (n 90).
[201] Allhoff (n 149); Bufacchi and Arrigo (n 26).

officials are. Posner agrees with the existence of an information imbalance between the executive and the judiciary.[202] Thus, it is possible that a judge might deem the situation extreme enough only because the state official, who is competent on the matter, requested a warrant.[203] But in this case, the second judicial layer of control over interrogational torture would be completely pointless and abuses could go undetected. In addition, as ticking bomb scenarios require a more than ever timely intervention, submitting a warrant request, waiting for a judge's evaluation of the situation, and, lastly, potentially obtaining the clearance and approval for the use of torture seems unrealistic.[204] The second issue is with Dershowitz's strong argument for accountability: "under Dershowitz's proposal, the field officer bears *no liability* because the judiciary explicitly abrogates that liability in authorizing the torture." Allhoff compares torture warrants to the defense of necessity, which we have discussed above. He notes how, on the contrary, under the necessity-defense, the torturer's liability remains at stake. Were there to be a system of warrants, the torturer would demand one as he would have "nothing to lose" from doing so. He would actually have everything to gain as it would represent a form of protection in the event that later on, the situation would be deemed not extreme enough to justify the use of torture.[205] We can thus see some of the issues that this system creates as far as accountability. Lastly, Belvisi raises an issue with the very idea of regulating the use of interrogational torture through a warrant system set in the law. The literature agrees that if torture is to be used, it should only be used in the most exceptional circumstances. Ticking bomb scenarios are one of, if not the only, such circumstance. But this would mean that, according to Dershowitz's proposal, the law would regulate *ex ante* these exceptions. For Belvisi, this is a paradox. He states: "an exception goes against the very nature of the law, which aims to provide rules governing recurrent situations, not rare occurrences."[206] This position would shake the very foundations of Dershowitz's proposal. This is why Belvisi rather shares the more pragmatic approaches of scholars such as Posner and Gross, which we will now discuss.

[202] Posner, 'National Security and Constitutional Law Precis' (n 148).
[203] This lack of judicial questioning of warrant requests actually happens extremely often, in particular for search warrants. Ginbar relates a statistic provided by Scarry, whereby she indicates than in the 25 years of warrants requested under the U.S. Foreign Intelligence Surveillance Act, 25.000 warrants were requested, and only one was denied. Ginbar (n 95) ch 13, sect C, para 2, 191; Elaine Scarry, 'Five Errors in the Reasoning of Alan Dershowitz' in Sanford Levinson (ed), *Torture A Collection* (Oxford University Press 2004) 281-290.
[204] Bufacchi and Arrigo (n 26).
[205] Allhoff (n 149).
[206] Belvisi (n 90).

3.2.4. *Ex post* ratification of torture: extra-legal civil disobedience.

On the complex topic of the justification of torture, differences of positions between scholars abound. The objective of all is to minimize the situations where torture is exceptionally used, but how to regulate it accordingly? As we have examined above, Dershowitz proposes to set in the law a system of *ex ante* judicial authorization for the use of torture. Gross disagrees. For him, on the utilitarian and consequentialist side of the debate on torture, the question is not so much *how* to regulate exceptional, interrogational torture, but *whether* to do so. And he answers in the negative: there should be no prior statutory provision permitting *ex ante* the use of torture by state officials in the most exceptional circumstances.[207] Gross is firmly convinced of the necessity and the rightfulness of the absolute prohibition of torture, but he also recognizes that there are certain circumstances where torture might be needed. Quoting Gross himself:

> "After all, […] most of us […] believe that most, if not all, government agents, when faced with a genuinely catastrophic case, are likely to resort to whatever means they can wield – including preventive interrogational torture – in order to overcome the particular grave danger that is involved. And most of us hope they will do so."[208]

Thus, he explains the need to elaborate a proposal that is compatible with the ban on torture. Nevertheless, for him the deontological position of moral absolutism is unrealistic, excessively uncompromising, and in some ways even hypocritical because allowing the killing of numerous innocent civilians could well be seen as merciless as torturing one terroristic suspect.[209] Therefore, what he proposes is a pragmatic interpretation of the absolute ban on torture, a sort of middle ground which he sums up in the term "pragmatic absolutism." To this concept, he adds that of "civil disobedience." In essence, Gross proposes a compromise extra-legal approach of *ex post* ratification of torture. While remaining unconditionally and universally prohibited, torture can be practiced *extra-legally* by public officials when the circumstances are so extreme that they require torturing. The public officials' decision to use torture and go beyond the law despite the ban is what he calls "civil disobedience."

Much like Dershowitz, Gross shows significant realism with his perspective on torture.[210] Those who choose to torture will do so at their own peril, they will carry the weight of their decision and following action, and will bear all of the responsibility, moral and legal, until and unless "the

[207] Gross (n 29) pt 5, 24ff.
[208] ibid pt 6, 32.
[209] ibid pt 3, 13.
[210] Farrell, 'Legal, Extra-Legal or Illegal?' (n 136) ch 4, sect B, para 1, 186.

people" or society decide otherwise, once the torture has been carried out. Indeed, it is precisely this that is at the core of Gross' proposal: the possibility of an *ex post* ratification of torture by the public. Based on the decision of the people, the extra-legal conduct could either be condemned or approved. In the first case, the public official would be deemed to have tortured unjustly and unjustifiably and thus would have to be held accountable for his criminal behavior according to the law. This could mean prosecution and possible incarceration due to wrongful conduct. In the second case, the outcome would be much different. If the public deemed the use of torture to be rational, justified, and necessary, then the state official's conduct would be accepted and ratified, and he would not face any of the charges hinted above. Based on the circumstances, he could have indemnity, be pardoned, have criminal charges dropped, and so on.[211] This is why, as we have mentioned earlier on the difference between justification and excuse, Gross' proposal is not so much a justification of torture, as it is an excuse of it. The wrongful conduct still exists, given Gross' firm belief in consolidating the absolute nature of the ban on torture, but the individual committing such a cruel practice would possibly be excused and bear no consequences for his actions.

Understandably so, Gross then lists many of the advantages he finds with his proposal. Firstly, he explains that an *ex post* ratification of torture by the people generates "an ethic of responsibility not only on the part of public officials but also the general public." In other words, it creates a system whereby society is morally and politically involved and asked to assume collective responsibility when deciding over the conduct of state agents. If torture is approved and ratified, torture will have been carried out in the name of all, thus creating shared accountability. Accountability and transparency are two key goals of Gross' proposal, which he considers will be met. Indeed, the fact that the conduct remains wrongful until excused, and the fact that, to be excused, the perpetrator will have to persuade the people that his actions were just and necessary, inevitably generates transparency. The state official will have to substantiate his argument in the best possible way, and will thus thoroughly explain why he chose to torture due to the gravity and urgency of the circumstances. But one may fear that state officials could use unjustified torture and then mislead the people into excusing it through compelling, though deceiving, argumentations. Or that it would increment the use of torture. But to this Gross might answer by underlining the sense of uncertainty that exists surrounding the *ex post* ratification of torture. Indeed, the state agents are never certain of the outcome. Their actions are put on "trial," and just as in a trial, a jury might find them guilty of a charge. Since they have to respond for their civil disobedience, since they are the first to be held accountable for their actions and have "no one to hide behind," state officials will remain very cautious when choosing to resort to torture. In addition to this uncertainty, the very idea that they

[211] Gross (n 29) pt 4, 19.

would be acting outside the law would generate significant self-restraint and reduce the likelihood of unnecessary torture.[212] For Gross, a significant advantage to this proposal, as opposed, for example, to Dershowitz's legal torture, is that it functions on a case-by-case basis, for particular actions of particular individuals in particular contexts of emergency. An authorization set *ex ante* in the law, on the contrary, is too generic, and its institutionalization could lead to future abuses and degenerations. Conversely, Gross holds that his *ex post* ratification of extra-legal conduct such as torture would not run the risk of generating legal precedents. That is because, first and foremost, the conduct would remain illegal (thus making it quite difficult to establish a law providing for it), and because the excuse would be individualized, and above all, one-off.[213]

While some scholars such as Belvisi embrace this pragmatic, "politically responsible" position,[214] others are less optimistic about Gross' middle-ground proposal. Farrell, for example, is concerned with the possibility that an *ex post* excuse of torture would, in the long term, compromise the absolute nature of the ban on torture. If torture became repeatedly excused, "illegality would become the norm."[215] Brown also voices some of his concerns with Gross' extra-legal model, such as the vagueness of Gross' mention of "the people." "What society, which court, which jury?" asks Brown, noting that he would deem it impossible to find a society that would truly objectively and rationally handle all the information provided to it, without being overtaken by emotion. But most importantly, Brown raises an issue with the uncertainty of the torturer's fate, as state officials would have no way to know it beforehand, given the absence of legal certainty. An extra-legal model of *ex post* ratification of torture, he holds, would be too incompatible with the principle of legal certainty as well as with individuals' right to a fair trial.[216] Others, such as Ginbar, raise the point that Gross' proposal lacks real substance as it is not sufficiently differentiated from the defense of necessity doctrine, particularly in terms of the legal consequences the two would bring about.[217]

Overall, in this section we have presented some of the key approaches within the debate on torture, from those that unequivocally maintain the view that torture should remain illegal, to those that find sufficient reasons to include a justification of such practice in the law. Having examined the theoretical approach to interrogational torture, in the next chapter we will fully delve into more practical cases, and carry out a comparative analysis of ticking bomb torture in three different jurisdictions: the Israeli, U.S., and German one.

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[212] ibid pt 4, 20-23; pt 5, 24.
[213] ibid pt 5, 28.
[214] Belvisi (n 90).
[215] Farrell, 'Legal, Extra-Legal or Illegal?' (n 136) ch 4, sect B, para 1, 189.
[216] Brown (n 35).
[217] Ginbar (n 95) ch 14, sect A, 201.

4. A comparative review of "ticking bomb" case law

4.1. Israel

Israel lends itself as a perfect case study in our analysis of the jurisprudence surrounding torture as a counterterrorism measure in ticking-bomb scenarios. Indeed, the country has a long, violent, and dramatic history with terrorism, with Posner describing it as being in a state of "permanent emergency."[218] The terroristic threat has been an ongoing struggle for the State of Israel, which has fought to maintain its right to existence since its very foundation in 1948. In order to neutralize it and attempt to mitigate it, the Israeli security forces, namely the General Security Service (GSS), have resorted to a variety of means during the interrogation of suspected terrorists, including torture.[219] Reports about the decade-long use of this practice against prisoners by Israeli authorities abound, and, still today, they denounce Israel's resorting to torture against Palestinians in the context of the Israel-Hamas war.[220] Given the concreteness of the terroristic menace for the State of Israel, ticking bomb scenarios are not necessarily a mere object of theoretical study. They are very real, as is very real the use of torture as a counterterrorism means. Ginbar relates that approximately ninety ticking bomb scenarios occurred in Israel only in the first two years of the new millennium.[221] Thus, for the State of Israel and the scholars of this country, the reflection on the complicated dilemma between security and liberty is not and cannot be treated as a mere hypothetical, given that such cases do occur in real-life situations, and, unfortunately, quite frequently in Israel. It is precisely in this section that we will delve into Israel's multiple answers to this question. As we will see, since the 1980s there has not been one unequivocal answer to the freedom from torture *versus* security dilemma. Still today, uncertainty veils this crucial topic.

[218] Posner, 'National Security and Constitutional Law Precis' (n 148).
[219] *Public Committee against Torture v. Government of Israel* (n 97) 4.
[220] Human Rights Watch (n 71); Euro-Mediterranean Human Rights Monitor (n 74); United Nations, 'Israeli Practices/Torture of Arab Prisoners - Letter from Sudan' (1977) <https://www.un.org/unispal/document/auto-insert-187447/> accessed 29 December 2023; 'Israel/OPT: Horrifying Cases of Torture and Degrading Treatment of Palestinian Detainees amid Spike in Arbitrary Arrests' (n 73); Amnesty International (n 72).
[221] Ginbar (n 95) ch 14, sect C, para 3, 221.

4.1.1. The Landau Report: legalizing torture.

4.1.1.1. The Landau Commission's investigation and recommendations.

Regardless of their outcome, the 1980s signified a crucial moment for the human rights history of Israel and of the Occupied Palestinian Territories because they represented the first instance where the Israeli government chose to look into the interrogations of suspected terrorists, in particular into the methods used to carry them out. Indeed, for the two decades that followed the 1967 Six-Day War and the resulting occupation of the West Bank and the Gaza Strip, claims mounted about the Israeli use of torture and ill-treatment during the interrogations of Palestinian prisoners. These allegations came from prisoners themselves, human rights NGOs as well as the media. However, from 1967 until 1987, the official narrative was one of "absolute denial": coercive methods were never used by interrogators. But denial turned into investigation once two scandals occurred, significantly damaging the GSS' public reputation. Indeed, in one of the two cases it became known that an Israeli military official had resorted to violent methods to elicit false confessions and had also lied about it.[222] The Israeli government thus chose to appoint a special commission: the Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity (which we will refer to as the Landau Commission).[223] As the Commission's report explains in its beginning pages, it was appointed by the government to *investigate* "the methods and procedures of the GSS [...], and the giving of testimony in court in connection with these investigations," as well as to *recommend* "the appropriate methods and procedures concerning these investigations in the future." It is also stressed a number of times that the Commission had to take into account the "unique needs of the struggle against Hostile Terrorist Activity" which significantly plagued the country. Kremnitzer notes the importance of understanding the report within the specific context of the threat of terrorism, which not only endangered national security but also generated a climate of fear and anguish among the population.[224]

The members of the Landau Commission were appointed by the Israeli Supreme Court President and were chaired by retired Justice Moshe Landau. In the conduct of their investigation, 43 witnesses were called to testify before the Commission, from interrogated detainees to GSS officials and high-ranking personnel as well as other military and legal experts. Even the public was asked to

[222] Farrell, 'The Ticking Bomb Scenario' (n 7) ch 4, sect A, para 5, 107; Human Rights Watch (n 71); Melissa L Clark, 'Israel's High Court of Justice Ruling on the General Security Service Use of "Moderate Physical Pressure": An End to the Sanctioned Use of Torture?' (2000) 11 Indiana International & Comparative Law Review 145.
[223] Landau Commission of Inquiry, 'Report of the Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity (the Landau Commission) - Published Part' (1987).
[224] Mordechai Kremnitzer, 'The Landau Commission Report – Was the Security Service Subordinated to the Law, or the Law to the "Needs" of the Security Service?' (1989) 23 Israel Law Review 216.

contribute with any information, and the Commission thus also heard from NGOs, lawyers, and private individuals. The GSS and other public bodies were required to hand over information, and the GSS in particular to make its interrogation sites available for inspection. They complied with all requests. The Commission made it clear that its investigation would not result in an evaluation of each singular complaint, but that it would evaluate the methods used by the GSS "by way of sample." Moreover, it stressed the importance of the report for the rehabilitation of "the standing of the GSS in the eyes of the public and in the eyes of its own personnel," which was deemed necessary given the crucial function that the GSS played for Israeli security in the prevention and thwarting of terrorist attacks. In essence, the Commission's report aimed to shed light on the truth and then guide GSS officials in their conduct to make it compatible with the rule of law.[225]

Published and available to the general public is only the First Part of the Landau Commission Report, whose findings we will be able to discuss below, as the Second Part, deemed too sensitive to publish for reasons of national security, remains classified.[226]

The Landau Commission was asked to investigate the methods used by the General Security Service (GSS) during the interrogation of suspected terrorists. Indeed, the role of the GSS was precisely that of ensuring the security of the State of Israel by interrogating individuals suspected of plotting terror attacks against it. The Commission found that between 1971 and 1986, coercive methods and "physical pressure" such as the "criminal offenses of assault, blackmail and threats" had been used by the GSS,[227] and thus consolidated in writing for the first time something which public officials had always vehemently denied for decades. Consequently, it sanctioned and heavily condemned the false testimonies and perjury which were found to have been repeatedly made by the GSS before military courts. As per the report: "the interrogators chose from the very beginning to conceal from the Court the exertion of any physical pressure whatsoever."[228] Nevertheless, the Commission did note that, while the forceful methods of interrogation were a violation of Israeli law, they were compatible with the GSS' internal guidelines at the time. Therefore, because GSS officials were acting according to those guidelines and because they were following orders, the Landau Commission found their conduct to be justified, and actually found it defendable, "both morally and legally."[229] In particular, the members of the Commission suggested the possibility for the GSS investigators to invoke the necessity-defense justification available under the Israeli Penal Law.[230]

[225] Landau Commission of Inquiry (n 223) 1-4.
[226] Part Two contains details about the interrogation methods used by the GSS between 1967 until 1987 as well as the interrogation methods that the Landau Commission deemed admissible. Human Rights Watch (n 71).
[227] Landau Commission of Inquiry (n 223) para 4.20, 90.
[228] ibid para 2.29, 25.
[229] ibid para 1.8, 4.
[230] ibid para 4.20, 90.

The Commission then went on to discuss the delicate dilemma between ensuring the compliance of the Israeli security services with the rule of law and individuals' fundamental rights and liberties, as well as ensuring the security and integrity of the Israeli State. Thus, it proposed three different ways to go about dealing with the conduct of the GSS interrogators: leaving them "in a "twilight zone" outside the realm of the law" (1); accepting what was defined as a hypocritical "quasi-legal system," where one would "turn a blind eye to what goes on beneath the surface" (2); or establishing a "proper framework for the activity of the GSS regarding Hostile Terrorist Activity investigations" (3).[231] The first two approaches were deemed insufficient and potentially dangerous, while the third approach, that of regulating the conduct of the GSS through guidelines, was deemed the most suitable and only option for a State that abided by the rule of law. The Landau Commission deemed it essential for the Israeli government to recognize that a certain amount of "moderate physical pressure" (what many scholars consider to be a euphemism for torture)[232] could be tolerated, and thus that it was necessary to establish regulations to monitor its use. The report endorsed the use of coercive means in certain circumstances:

> "[…] effective activity by the GSS to thwart terrorist acts is impossible without use of the tool of the interrogation of suspects […]"; "the effective interrogation of terrorist suspects is impossible without the use of means of pressure, in order to overcome an obdurate will not to disclose information […]"[233]

Consequently, the Landau Commission chose to propose a number of guidelines to oversee and guide the GSS' use of specific methods of interrogation, as well as its extent.[234] The recommendations it proposed regarding such methods, which were later implemented by the government,[235] are the following:

> "The means of pressure should principally take the form of non-violent psychological pressure through a vigorous and extensive interrogation, with the use of stratagems, including acts of deception. However, when these do not attain their purpose, the exertion of a moderate measure of physical pressure cannot be avoided. GSS interrogators should be guided by setting clear boundaries in this matter, in order to prevent the use of inordinate physical pressure arbitrarily administered by the interrogator."[236]

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[231] ibid para 4.1-4.5, 77-79.
[232] Dershowitz, 'Tortured Reasoning' (n 101); Human Rights Watch (n 71).
[233] Landau Commission of Inquiry (n 223) para 4.6, 79.
[234] Farrell, 'The Ticking Bomb Scenario' (n 7) ch 4, sect A, para 5, 108; Human Rights Watch (n 70).
[235] Farrell, 'The Ticking Bomb Scenario' (n 7) ch 4, sect A, para 5, 111.
[236] Landau Commission of Inquiry (n 223) para 4.7, 80.

It is in the second, still classified, part of the Report that the Landau Commission set forth a specific "code of guidelines for GSS interrogators" that established the limits of what could be acceptable and what could not be, drawing upon the Commission's findings during its investigation into past GSS conduct. As mentioned above, the members of the Commission were certain that developing such guidelines would be the only path to preventing abuses, avoiding the use of "physical or mental torture" and ensuring overall compliance with the rule of law. The Landau Commission thus endorsed the use of "pressure," both psychological and physical (the latter, if needed in combination with the former) to extract information from suspects. But what precisely amounted to "moderate physical pressure" according to the Commission remains undisclosed. Additionally, despite its condemnation of torture, it did, however, open up to the possibility of tolerable torture in ticking bomb circumstances,[237] and, as mentioned, proposed to interrogators the possibility of being exempt from criminal liability through the moral justification of the defense of necessity.

The Landau Commission presented its position that, so long as they believed they were preventing greater harm, GSS interrogators violating Israeli law for having carried out violent methods of interrogation, even preventively, could avail themselves of the necessity doctrine provided as follows by section 34K of the Israeli Penal Law and be "fully exempt from criminal responsibility":[238]

> **Necessity**
> 34K. No person shall bear criminal responsibility for an act that was immediately necessary in order to save his own or another person's life, freedom, bodily welfare or property from a real danger of severe injury, due to the conditions prevalent when the act was committed, there being no alternative but to commit the act.[239]

The Commission based its argument on the meaning of the criminal defense of necessity: that of ensuring that the person who carried out the lesser evil to prevent greater evil in a situation of imminent danger, with no other alternative and in a proportionate manner, would not be prosecuted and criminally charged. The concept of the balance between evils was the central reasoning of the Commission to justify the use of coercive measures by the GSS during interrogations, as it set aside the importance of the characteristic of time, of imminence. For the Commission, whether an attack would occur in a few minutes, or a few hours did not matter as much as whether a greater evil could be averted. Thus, it was deemed that, if the use of "moderate physical pressure" was truly necessary

[237] ibid para 3.15, 60.
[238] ibid para 3.11, 56.
[239] Penal Law 5737, ch5, art 2, 34K.

to prevent or thwart an attack that might kill or injure a great number of innocent people, then the GSS agents could avail themselves of the necessity doctrine.[240] Still, the report stressed that the lesser evil could never amount to torture: "the pressure must never reach the level of physical torture or maltreatment of the suspect or grievous harm to his honour which deprives him of his human dignity."[241]

Nevertheless, despite the content of the guidelines having never been published, some of the techniques used by the GSS interrogators have become known, whether through the investigation of human rights organizations, the denunciation of prisoners, or the personal admission of GSS agents. Since 1987, these psychological and moderate physical pressures have included incommunicado detention, shaking, hooding, sleep and sensory deprivation, forced standing or crouching, shackling, beatings (even up to the loss of consciousness), as well as threats and humiliations.[242] In essence, the Commission made legal those practices that were considered illegal before 1987.[243] Parry and White also note that, despite the Commission's hope that its recommendations would guide the GSS in its conduct of interrogations, disregards for the guidelines were frequent, with high rates of torture (up to 85% of prisoners) resulting in thousands of instances of torture and ill-treatment (between 4.000 and 6.000 each year) and even dozens of deaths among Palestinian prisoners.[244] Some experts note a surge in the use of pressure during interrogations after the publication of the report, with the authorized techniques being utilized "on an industrial scale."[245] Imseis condemns the GSS' violation of the Commission's recommendations, relating that thousands of detained Palestinians were subjected to "moderate torture" for reasons unrelated to Hostile Terrorist Activity and often even without being charged with any crimes that threatened Israel's security.[246] That is why most scholars view the Landau Commission's Report as having institutionalized and bureaucratized torture in Israel.[247] Ginbar defines the Landau Model as the "first model of legalized torture to have actually

[240] Landau Commission of Inquiry (n 223) para 3.12, 56-58.
[241] ibid para 3.16, 61.
[242] Human Rights Watch (n 71); Ginbar (n 95) ch 12, sect B, para 3-4, 178-181; Gur-Arye (n 152).
[243] Kremnitzer (n 224).
[244] Parry and White (n 182).
[245] Farrell, 'The Ticking Bomb Scenario' (n 7) ch 4, sect A, para 5, 112; Ginbar (n 95) ch 12, sect C, 182.
[246] Ardi Imseis (ed), 'Moderate Torture on Trial: Critical Reflections on the Israeli Supreme Court Judgement Concerning the Legality of General Security Service Interrogation Methods' (2001) 19 Berkeley Journal of International Law 328; Human Rights Watch (n 70); Stanley Cohen and Daphna Golan, 'The Interrogation of Palestinians During the Intifada: Ill-Treatment, "Moderate Physical Pressure"or Torture?' (B'tselem -The Israeli Information Center for Human Rights in the Occupied Territories 1991).
[247] Human Rights Watch (n 71); Parry and White (n 182); Steinhoff (n 159); Mordechai Kremnitzer, 'The Landau Commission Report – Was the Security Service Subordinated to the Law, or the Law to the "Needs" of the Security Service?' (1989) 23 Israel Law Review 216.

been applied in a modern democracy."[248] Five months after the publication of the report, it was voted into legislation by the Knesset, the Israeli Parliament.[249]

4.1.1.2. A controversial model of legalized torture.

Overall, the Commission's reasoning regarding the conduct of GSS agents was that they could derive from the necessity-defense the authority to act, even in violation of Israeli law, not only in a reactive manner but also in a preventive one. And thus rendered the necessity doctrine both an *ex ante* authorization and an *ex post* justification for the use of torture-like methods by the Israeli security forces.

As soon as the report was published, criticisms of the Landau Commission's reasonings abounded and were voiced through different channels during the twelve years that the model was in place, from legal experts to Israeli and foreign NGOs to the general public.[250] The greatest critiques were aimed at the Commission's stance that interrogators could avail themselves of the doctrine of necessity as a legal basis for the use of coercive methods and other psychological means when interrogating suspected terrorists. Gur-Arye, for example, is clear in rejecting this idea, as she maintains that the government cannot derive the general authority *ex ante*, through the necessity doctrine, to use "moderate pressure" during interrogations. Indeed, necessity can only be invoked as an individual defense in specific and only emergency circumstances. It cannot be standardized or used routinely over time.[251] Dershowitz is also critical of the Commission's decision to use the necessity doctrine, which he defines as "the most lawless of legal doctrines," as the legal basis for the conduct of the GSS. Additionally, he points out how broad and elastic the norm is under the Israeli legal system, noting that GSS interrogators could enjoy very wide protection if they claimed to have acted to prevent a greater evil. He is also concerned with the excessive trust and reliance that the Commission put on GSS agents, raising the point that, though they must act "reasonably" when carrying out a balance of evils, each individual has his own sense of reasonableness. Thus, he asks "who will guard the guardians?"[252] Kremnitzer also found the use of the necessity-defense to be generalized, undifferentiated, and "very far-reaching and inappropriate" in this context.[253]

[248] Ginbar (n 95) ch 12, sect A, 172.
[249] Imseis (n 246).
[250] Farrell, 'The Ticking Bomb Scenario' (n 7) ch 4, sect A, para 5, 112; Ginbar (n 95) ch 12, sect A, 173.
[251] SZ Feller, 'Not Actual "Necessity" But Possible "Justification"; Not "Moderate" Pressure, But Either "Unlimited" or "None At All"' (1989) 23 Israel Law Review 201; Gur-Arye (n 152); Alan M Dershowitz, 'Is It Necessary to Apply "Physical Pressure" to Terrorists – and to Lie About It?' (1989) 23 Israel Law Review 192.
[252] Dershowitz, 'Is It Necessary to Apply "Physical Pressure" to Terrorists – and to Lie About It?' (n 251); Dershowitz, 'Tortured Reasoning' (n 101).
[253] Kremnitzer (n 224).

Additionally, a denunciation of the use of the necessity-defense by the Landau Commission came from a significant number of other legal scholars and most UN bodies.[254] Other criticisms concerned the Commission's decision to distinguish between psychological and physical pressure, which was deemed misleading as it could lead to the belief that psychological pressure is less severe. Or that, because classic beatings were rejected, these other types of pressure were to be accepted and endorsed. All experts would agree that non-physical methods can be as cruel and as torturous as physical ones, though they do provide the advantage of being stealthier.[255] Overall, Ginbar denounced the Commission's false claim of limiting torture only to ticking bomb scenarios. He, as many others, denounced the legalization of "moderate physical pressure," which UN bodies and most national and international human rights organizations repeatedly considered to amount to torture.[256] Reports to the Committee Against Torture, the monitoring body for the Convention Against Torture which Israel had ratified in 1991, condemned the Landau Report for "creating conditions leading to the risk of torture or other cruel, inhuman or degrading treatment."[257] Above all, it was deemed by many blatantly incompatible both with Israel's domestic law as well as with international law.[258]

After the publication of the report, a special body was created to monitor the conduct of GSS officials during interrogations: the Public Committee Against Torture in Israel. The Committee, together with other human rights groups and activists, repeatedly denounced the use of these measures to the appropriate judicial bodies, and in 1991 attempted to bring a petition before the Israeli Supreme Court questioning the legality of the Landau Commission's guidelines. Their claim was that these were illegal, in particular because they represented in practice an institutionalization and legalization of torture; that they consolidated in the law and rendered justifiable those same controversial practices that were in use before the report and that the Commission had to investigate into.[259] However, the petition was officially rejected in 1993, with the Court arguing that it could not rule on the matter given the absence of a specific issue with concrete evidence.[260] Besides 1993, the Supreme Court heard many other petitions that challenged the practices of GSS agents in 1994, 1995, and 1996, but its final ruling always supported the GSS, as the Court accepted the GSS' claim that the use of force during a specific interrogation had helped to dismantle a terrorist plot.[261] Kretzmer and Ronen explain

[254] Ginbar (n 95) ch 12, sect A, 173.
[255] Human Rights Watch (n 71); Feller (n 251).
[256] Ginbar (n 95) ch 12, sect C, 182; Yuval Ginbar, 'Routine Torture: Interrogation Methods of the General Security Service' (B'tselem -The Israeli Information Center for Human Rights in the Occupied Territories 1998); Clark (n 222).
[257] 'Report of the Committee Against Torture' (United Nations General Assembly 1993) UN Doc. A/49/44 *in* Farrell, 'The Ticking Bomb Scenario' (n 7) ch 4, sect A, para 5, 112.
[258] Kremnitzer (n 224).
[259] ibid; Dershowitz, 'Is It Necessary to Apply "Physical Pressure" to Terrorists – and to Lie About It?' (n 251).
[260] Human Rights Watch (n 71).
[261] Parry and White (n 182); Farrell, 'The Ticking Bomb Scenario' (n 7) ch 4, sect A, para 6, 115; David Kretzmer and Yaël Ronen, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (Second Edition, Oxford University Press 2021) pt 2, ch 8, 140.

the Supreme Court's "timidity" in those rulings by underlining the difficult situation it had to face: one of a series of suicide bombings that occurred in 1996, injuring and killing dozens. They thus understand in part the point of view of the Court, which chose to prioritize the GSS' claim that resorting to the "special" measures of interrogation permitted by the Landau Commission in 1987 would be necessary to prevent future similar attacks. "The covert message was clear: if it tied the hands of the investigating authorities, *the Court* would be held responsible for any future terrorist attacks."[262]

Therefore, it would not be until 1999 that the Israeli Supreme Court would render its definitive judgment on the Landau guidelines, finally taking a clear stand on the model it had ambiguously and indirectly supported for the previous twelve years.

4.1.2. The 1999 Supreme Court judgment.

4.1.2.1. Public Committee Against Torture v. Israel: the ruling.

On September 6, 1999, the Supreme Court of Israel, sitting as the High Court of Justice, rendered its judgment on the legality and constitutionality of the interrogation methods that had been in use by the GSS during their investigations ever since the publication of the Landau Commission Report and its implementation in the law. The Court was asked to rule whether the guidelines of the Commission, which had allowed the use of "moderate physical pressure" if "immediately necessary to save human life" were legal.[263] A panel of nine justices composed the Court, which was presided by Justice Aharon Barak. The case, which we will refer to as the *Public Committee Against Torture v. Israel* case, comprised seven different applications that had been brought to the attention of the Supreme Court. Besides that by the Public Committee Against Torture in Israel, another human rights organization, the Association for Civil Rights in Israel made its claim against the State of Israel and the General Security Service. The remaining five applications were lodged by individual applicants,[264] former Palestinian prisoners who all alleged being tortured by GSS interrogators.[265] President Barak wrote the Court's decision, which received unanimity.

The Court first set the scene by underlining the seriousness of the topics addressed, given the severity of the terrorist threat in Israel:

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[262] Kretzmer and Ronen (n 261) pt 2, ch 8, 140.
[263] *Public Committee against Torture v. Government of Israel* (n 97) 3-4.
[264] Indeed, individuals have the possibility to directly lodge petitions before the Israeli High Court of Justice. This renders the Court a true guardian of individuals' rights and liberties.
[265] Imseis (n 246); *Public Committee against Torture v. Government of Israel* (n 97).

> "Ever since it was established, the State of Israel has been engaged in an unceasing struggle for its security—indeed, its very existence. Terrorist organizations have set Israel's annihilation as their goal."[266]

The ruling then followed by providing some recent numbers on terrorist attacks and suicide bombings to further prove how the matters under discussion were an issue that the Israeli security services had to deal with on a daily basis (more than 700 people injured and more than 120 dead between 1996 and 1998 due to such attacks). Moreover, it acknowledged the work of the GSS in preventing and thwarting such terrorist attacks and accepted that it was thanks to their "daily measures" that many lives could be saved. Among those measures, it was recognized that coercive physical methods were in use to extract crucial information from terrorist suspects. It was precisely against those methods that the petitions were raised: the GSS was deemed not to have the authority to carry out investigations into alleged terrorist suspects, and not to have the power to use the physical means approved by the Landau Commission, such as shaking, the "Shabach" position,[267] the "frog crouch," sleep deprivation or excessively tight handcuffs. The petitioners held that the Landau Report's "moderate physical pressure," which could easily (and *did* easily) fall into the category of torture, was illegal. Their claim was that the GSS' resorting to physical means was a blatant violation of Israeli law as well as of international law, as they violated Israeli law on interrogation and infringed upon both the individual's right to be free from torture and his human dignity.[268]

On the contrary, the respondents, i.e., the State and the GSS, held that the GSS interrogators did have the authority to carry out interrogations of suspected terrorists and that the physical methods used (only as a means of last resort and in the most extreme cases) did not constitute neither torture nor ill-treatment. The State went as far as holding that "the practices of the GSS [did] not cause pain and suffering." Additionally, while the petitioners argued against the necessity-defense justification, which had represented a crucial pillar of the Landau Model between 1987 and 1999, the State maintained that the defense of necessity was available to GSS investigators. Overall, the State considered "moderate physical pressure" to be an indispensable tool for the GSS to carry out its duty of guaranteeing national security. As it was argued, it would have been impossible to forbid the

[266] *Public Committee against Torture v. Government of Israel* (n 97) 4.
[267] As related in the Court's decision, the "Shabach" position consists in the following: "a suspect investigated under the "Shabach" position has his hands tied behind his back. He is seated on a small and low chair, whose seat is tilted forward, towards the ground. One hand is tied behind the suspect, and placed inside the gap between the chair's seat and back support. His second hand is tied behind the chair, against its back support. The suspect's head is covered by a sack that falls down to his shoulders. Loud music is played in the room."ibid para 10, 9-10.
[268] ibid para 2-7, 5-7; para 14, 11-12.

security service from using such means without considerably impeding it from effectively fighting against terrorism, as these measures had proved efficient in the past.[269]

The Court had to take sides on this matter. It chose to develop its reasoning by answering three key questions: whether the GSS agents had the general authority to conduct interrogations into suspected terrorists (1); whether, provided they had such authority, the GSS agents had the general power to use physical means as those challenged above (2); and, finally, whether the GSS agents could justify their use of physical means through the criminal defense of necessity doctrine (3).

Authority to conduct interrogations. As far as whether the GSS investigators had the authority, stemming from the law, to conduct interrogations, the Court started by recognizing that "a specific statutory provision authorizing [them] to conduct interrogations [did] not exist." It acknowledged that, following the Landau Report a series of directives had been issued, with some obtaining specific approval from the Israeli Minister of Justice. Still, these were considered to represent merely "internal regulations," and thus were insufficient for the GSS investigators to derive their power from. In no way did they provide GSS agents with "explicit statutory authorization."[270] Instead, the Court found Article 2(1) of the Criminal Procedure Statute to provide the security service interrogators with the necessary investigatory authority for issues about Hostile Terrorist Activity. The provision stipulates as follows:

> "A police officer, of or above the rank of inspector, or any other officer or class of officers generally or specially authorized in writing by the Chief Secretary to the Government, to hold enquiries into the commission of offences, may examine orally any person supposed to be acquainted with the facts and circumstances of any offence in respect whereof such officer or police or other authorized officer as aforesaid is enquiring, and may reduce into writing any statement by a person so examined."[271]

Thus, as per the Court's ruling, it is according to this norm that the Minister of Justice can provide the GSS investigators with the required authority to carry out their investigations. This is because, "in the eyes of the law," GSS agents were considered equivalent to police officers, to whom the above-cited provision directly applies.[272]

Scope of the authority. Once the Court consolidated the fact that GSS investigators had the required investigatory authority, it had to rule on the scope of this authority: did the general power to investigate sanction also the use of physical means in the course of the interrogation? Was it legal for

[269] ibid para 9, 9; para 15, 12-13.
[270] ibid para 20, 19.
[271] ibid.
[272] ibid 20.

the GSS agents to resort to means such as shaking, sleep deprivation, the "Shabach" position, and others? In setting out the rules of interrogation (i.e., what means were legally available to security service interrogators), the Court highlighted the existence of a clash between two main values: the "desire to uncover the truth" and the "need to protect the dignity and liberty of the individual being interrogated." Both these values, however, were not considered to be of an absolute nature, and, thus, for example, the liberty and dignity of a suspected individual could be limited to obtain the truth, because of the use of certain methods of interrogation. Nevertheless, the Court clearly stated that it was not ready to accept all such limitations: "at times, the price of truth is so high that a democratic society is not prepared to pay," even if it could lead to the prevention of serious terrorist crimes.[273] The Court thus continued by expressing its need to carry out a balancing between those contrasting values; a process that would result in the formulation of a series of "rules for a reasonable interrogation," where the adjective reasonable was intended as both protecting the human dignity of the subject and as ensuring an effective fight against terrorism.[274] It is thus necessary to examine the Court's definition of a reasonable interrogation. Two main points arise. The first was an absolute rejection of torture and any type of degrading treatment: in no way could an interrogation lead to the violation of these freedoms. Here, the Court left no room for balancing. The second was that, while torture was always to be prohibited, "a reasonable investigation is likely to cause discomfort," to "burden" the interrogee and place him "in a difficult position." That being said, the ruling acknowledged that physical means were not always necessary for interrogations to be successful, and that, above all, to satisfy the mandatory requirement of reasonableness, a proportionality test had to be carried out by the GSS investigators when selecting the interrogational measures to apply. Consequently, "the legality of an investigation is deduced from the propriety of its purpose and from its methods."[275] The Court then went on to evaluate, individually, each of the five contested methods on the basis of these two principles: did they amount to torture or ill-treatment and were they proportionate and necessary? It was ruled that most of those physical measures were excessive violations of the suspect's dignity, that they were not proportionate, and thus that most of them, from sleep deprivation to the "Shabach" position, were illegal because they did not fall within the scope of the GSS investigator's interrogational authorization and because they violated the law on interrogation.[276]

Necessity-defense justification. The last point examined by the Court was whether the authority of the GSS investigators to use physical measures during their interrogations could have a

[273] ibid para 22, 21.
[274] ibid 22.
[275] ibid para 23, 23.
[276] ibid para 24-32, 24-29.

specific legal basis. In particular, the Court responded to the State's claim that Section 34K of the Penal Law on the defense of necessity[277] granted the GSS interrogators that very authorization. For the State, if the GSS agents resorted to physical measures "in the appropriate circumstances and in the absence of other alternatives, in order to prevent serious harm to human life or limb," they could avail themselves of the necessity-defense and would thus bear no criminal liability. Additionally, the use of such means in such extreme circumstances was even viewed by the State as a "moral duty." To support its claim, the State mentioned a ticking bomb scenario, a typical example where physical means would be used *in extremis*, as a means of last resort and to save innocent lives. In such scenarios, the State was clear in holding that the necessity-defense must be available to the GSS investigators.[278] The Court's opinion on the matter followed. The GSS agents were recognized to have the authorization to conduct an investigation, though this authority did not include most of the physical means that were challenged. But the question was: what if those methods were immediately necessary to rescue human life in a ticking bomb scenario? Could the GSS interrogators avail themselves of the criminal defense of necessity were they to apply those violent physical methods? Formulating its conclusion step by step, the Court proceeded to state what it was ready to accept. First, it accepted that the necessity-defense was, indeed, available to all GSS investigators. Second, it recognized that in a ticking bomb scenario, the necessity-defense may apply to a GSS investigator "who applied physical interrogation methods for the purpose of saving human life." Thus, in such exceptional circumstances, given the availability of this line of defense, the GSS investigator may be exempt from criminal liability if criminally charged. But this is only a recognition of the fact that, *ex post*, GSS agents could benefit from the necessity-defense protection. Did the necessity-defense also represent an *ex ante* authorization for them to use physical means in ticking bomb scenarios where their use appeared to be absolutely necessary? This was the central question the Court proceeded to address, and it answered in the negative: the necessity defense *did not* and *could not* represent a sufficient source of authority for GSS interrogators to apply physical measures, and could not allow to establish beforehand directives regulating the GSS agents' use of such measures.[279] For Ginbar, this represented a total "demolition of the Landau model."[280] But, while the Court denied the possibility for the necessity-defense to represent an *ex ante* authorization for the use of special

[277] For the text of the provision, see section 4.1.1.1 (The Landau Commission's investigation and recommendations).
[278] *Public Committee against Torture v. Government of Israel* (n 97) para 33, 29-30.
[279] ibid para 35-36, 32-34.
[280] Ginbar (n 95) ch 14, sect B, para 1.a, 204.

interrogational methods, it did state that the application of the necessity-defense could be regulated *ex ante* by the Attorney General.[281]

Additionally, the Court did not state that physical means of interrogation were absolutely prohibited in Israel. Indeed:

> "The principle of "necessity" cannot serve as a basis of authority. If the state wishes to enable GSS investigators to utilize physical means in interrogations, it must enact legislation for this purpose." And "In such legislation, the legislature, if it so desires, may express its views on the social, ethical and political problems of authorizing the use of physical means in an interrogation."[282]

The Court thus held that, was the State of Israel to wish to enable GSS investigators to utilize physical means, it could very well do so by calling upon the Parliament to enact legislation. Therefore, despite its ruling, the final answer of the Court was that these were matters to be discussed and determined by the legislative branch, as provided by the rule of law and its fundamental principle of the separation of powers. The decision of the Israeli Supreme Court to leave the question open was clear in its conclusions, in which it also underlined the difficulty of reaching its final judgment:

> "Whether it is appropriate for Israel, in light of its security difficulties, to sanction physical means is an issue that must be decided by the legislative branch, which represents the people. We do not take any stand on this matter at this time. It is there that various considerations must be weighed. The debate must occur there. It is there that the required legislation may be passed, provided, of course, that the law "befit[s] the values of the State of Israel, is enacted for a proper purpose, and [infringes the suspect's liberty] to an extent no greater than required."[283]

[281] *Public Committee against Torture v. Government of Israel* (n 97) para 38, 36; Elena Chachko, '"Pressure Techniques" and Oversight of Shin Bet Interrogations: Abu Gosh v. Attorney General' (*Lawfare*, 22 December 2017) <https://www.lawfaremedia.org/article/pressure-techniques-and-oversight-shin-bet-interrogations-abu-gosh-v-attorney-general> accessed 5 January 2024.
[282] ibid para 37, 34-35.
[283] ibid para 39, 37.

4.1.2.2. An evaluation of the model.

The Israeli Supreme Court's 1999 ruling in the *Public Committee Against Torture v. Israel* case has been praised by some as "courageous,"[284] bold and heroic,[285], a "landmark victory"[286] for human rights and the rule of law. Indeed, in it, the Court officially rejected the Landau Commission's guidelines for interrogation, deeming them illegal for the first time after years of criticisms. Upholding the democratic values and acting as a true guardian of fundamental rights, it thus put an end to twelve years of a model of legalized torture which so many had challenged ever since its establishment. Moreover, many praised the Court's ruling for its effective implementation of the prohibition of torture, as the Court was clear in rejecting such practice during the conduct of GSS interrogations: "a reasonable investigation is necessarily one free of torture, […] these prohibitions are absolute and there is no room for balancing."[287] But besides being met with praise, the Court's decision was also met with reluctance and a certain skepticism from critics. In particular, because critics feared that this decision would hamper the effectiveness of the GSS' work in countering terrorism. As has been analyzed above, the State and the security service argued that "moderate physical pressure" was a fundamental reason behind the GSS' ability to prevent and neutralize attacks.[288] Thus, critics of the Court's decision, which included a number of high-ranking government officials such as then-Prime Minister Ehud Barak, argued that prohibiting the use of special interrogation methods would severely and dramatically compromise Israel's domestic security.[289] This stance was rebutted by those that supported the Court's decision (such as the Minister of Justice Yossi Beilin) as they held that, given that the possibility remained for the use of such measures in exceptional, ticking bomb scenarios through the necessity-defense, the work of GSS interrogators would not be so significantly negatively impacted.[290] Moreover, as Clark adds, the Court had anticipated these critiques, which helps understand why it ultimately chose, in a self-restrictive manner, to delegate the matter to the legislative branch.[291] If it so decided, the Knesset could therefore pass a bill that would legalize, once again, the use of "moderate physical pressure" by GSS agents

[284] Kretzmer and Ronen (n 261).
[285] Itamar Mann and Omer Shatz, 'The Necessity Procedure: Laws of Torture in Israel and Beyond, 1987-2009' (2010) 6 Unbound: Harvard Journal of the Legal Left 59; Richard Goldstone, 'Combating Terrorism: Zero Tolerance for Torture' (2006) 37 Case Western Reserve Journal of International Law 343.
[286] Smadar Ben-Natan, 'Revise Your Syllabi: Israeli Supreme Court Upholds Authorization for Torture and Ill-Treatment' (2019) 10 Journal of International Humanitarian Legal Studies 41; John Parry, 'Judicial Restraints on Illegal State Violence: Israel and the United States' (2002) 35 Vanderbilt Journal of Transnational Law 73.
[287] *Public Committee against Torture v. Government of Israel* (n 97) para 23, 23.
[288] ibid para 15, 13.
[289] Clark (n 222); 'PM Barak Comments on Terrorist Attacks and GSS Ruling' (*Ministry of Foreign Affairs*, 8 September 1999) <https://www.gov.il/en/departments/news/pm-barak-comments-on-terrorist-attacks-and-gss-ruling-30-may-1999> accessed 4 January 2024.
[290] Clark (n 222); Emmanuel Gross, 'High Court Ruling Won't Harm the GSS' *Jerusalem Post* (8 September 1999) 3.
[291] Clark (n 222).

during the conduct of their interrogations, to extract information from suspects for purposes of national security. Consequently, there is an inherent real ambiguity and a form of contraction in the Court's ruling: on the one hand, an absolute rejection of practices that constitute torture; on the other, a door is left open to their re-legalization by Parliament. It is precisely against this contradiction that the majority of criticisms have been voiced.

While some have characterized the Supreme Court's ruling as "courageous," others have defined it as limited, insufficient, and even meaningless.[292] Imseis considered the Court's decision to be void of meaning because in itself it opened to the possibility of being bypassed by the Israeli Parliament.[293] A crack was intentionally left open by the Court, whom Clark also criticized for having refused to fully take a stand on a matter of national security.[294,295] Dershowitz found this to be a limitation in the Court's judgment, as the task of balancing between security and liberty is precisely that of the judiciary, and not of the legislative branch.[296] Most agreed that, despite the initial illusion of an emblematic ruling for human rights, due to its formal prohibition of torture, the 1999 judgment did not effectively contribute to the elimination of torture in Israel, in particular against Palestinian detainees and in the Occupied Palestinian Territories. Some considered the ruling to be even "complicit with torture,"[297] because it consolidated the defense of necessity argument that had been in use during the years of the Landau Model and that had allowed many perpetrators of torture to go unpunished by invoking the necessity-defense.

The Court's definitive recognition that the necessity doctrine did indeed apply to all GSS agents *ex post facto* "strengthened governmental impunity for torture, while silencing its victims." Scholars Mann and Shatz assert this based on the evidence they gathered over the ten years that followed the judgment. They found that torture continued to be a systematic practice in Israel, something which was possible thanks to a specific understanding of necessity that started in 1987 and that the 1999 ruling upheld and further consolidated.[298] One also has to note that the Court ruled on

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[292] Matthew G Armand St., 'Public Committee against Torture in Israel v. The State of Israel et al: Landmark Human Rights Decision by the Israeli High Court of Justice or Status Quo Maintained' (2000) 25 North Carolina Journal of International Law 655; Ben-Natan (n 286); Imseis (n 246); Mann and Shatz (n 285).
[293] Imseis (n 246).
[294] A prevalent dynamic in the Israeli judicial system in the beginning years was to follow the lead of the executive when it came to issues of security, for which judges and courts were deemed to lack expertise. Thus, as Justice Cohen put it: "If the chief of the Security Services told me that something was a vital necessity, I didn't give it a second thought. The security situation during the first years of statehood was such that if I was told that the security of the state required a particular action, I accepted it even at the expense of human rights." Clark (n 222). It is evident that in *Public Committee Against Torture v. Israel*, the Supreme Court did not behave in such a way, since it did invalidate the Landau Guidelines. However, the Court's ambiguity and its decision to delegate the final word to the Parliament does show a form of self-restraint for such complicated issues of security.
[295] Ben-Natan (n 286); Clark (n 222).
[296] Dershowitz, 'Tortured Reasoning' (n 101).
[297] Mann and Shatz (n 285).
[298] ibid.

the unlawfulness of specific interrogational methods, and thus, as far as GSS agents did not use such methods, they may well be allowed to resort to force during their investigations.[299] Additionally, because of the similarity in certain necessity-defense argumentations, the 1999 judgment has been considered by some even as a "sort of Landau Commission Report," whose impact has, once again, been the establishment of a framework that protects torturers from criminal liability.[300] In essence, the acceptance that GSS investigators could avail themselves of the necessity-defense protection in specific ticking bomb circumstances became the "moral and legal cornerstone of the [Israeli Supreme Court's] new model of legalized torture."[301] Thus, perhaps, more than rendering a courageous judgment, the Israeli Supreme Court realized that, after twelve years of legalized torture in a proclaimed democracy, it had to formally and expressly prohibit the administrative guidelines that endorsed such an illegal practice. The Court had to uphold the rights outlined in the Israeli legal system as well as in international law, but it did so with a certain timidity and self-restraint, for in its very judgment the key to circumventing and eroding its decision was present and ready to use.

Finally, concerning the effective impact of the ruling on the use of torture in Israel and its ability to limit the use of "moderate physical pressure" to only ticking bomb scenarios, evidence gathered from human rights organizations is grim. Ginbar reports that since the Supreme Court's ruling, thousands of Palestinian detainees have been subjected to GSS interrogations, with most of them detained incommunicado and subjected to measures such as threats, humiliations, and physical restrictions. The Public Committee Against Torture in Israel has also found that in almost 60% of interrogations, "direct violence" and a combination of measures that amounted to ill-treatment were the norm. The actual influence of the 1999 ruling is so small that in 2003, the Public Committee Against Torture deemed the Supreme Court's judgment to have routinized interrogational torture once more.[302]

4.1.3. Back to another institutionalization of torture?

4.1.3.1. The Tbeish case.

Despite the criticisms that followed, it is undeniable that the Court formally condemned and prohibited interrogational torture in its 1999 ruling. Additionally, proposals for the passing of

[299] Armand St. (n 292).
[300] Imseis (n 246); Mann and Shatz (n 285).
[301] Ginbar (n 95).
[302] ibid ch 14, sect C, para 1-3, 219-222.

legislation authorizing the GSS investigators to apply physical pressure during interrogations, the so-called "Shin Bet Law"[303] were ultimately rejected. This was very much praised by human rights groups that feared a renewed explicit legalization of torture despite the condemnation of the Landau Report and the practices it endorsed.[304] Indeed there were a number of scholars who never really considered realistic the possibility of the Knesset enacting legislation as permitted by the Supreme Court's ruling.[305] Ginbar found it even unnecessary and repetitive to pass such a bill, given that he considered the Court's ruling to have already established in itself a sufficient general framework of legalized torture.[306] Nevertheless, what passed after the 1999 judgment were a series of directives by the Israeli Attorney General as well as some guidelines of the Israel Security Agency (ISA),[307] which *de facto* allowed the use of physical means during interrogations, often reaching the threshold of ill-treatment and torture. This was a paradoxical evolution given the *Public Committee Against Torture v. Israel* framework and the Court's apparent "zero tolerance for torture."[308] But these directives were not put under judicial scrutiny for many years and thus continued to exist in a legal grey zone,[309] continuing to legitimate the use of coercive measures against detainees. Finally, in 2018, the Israeli Supreme Court, similarly to 1999, ruled on the matter and decided whether these ISA guidelines were lawful. Its conclusion, in the *Tbeish v. Attorney General* case, however, was much different from 1999.[310]

The petition was filed before the Supreme Court by Mr. Tbeish, a Palestinian individual living in the occupied West Bank, who was supported by his attorneys from the Public Committee Against Torture in Israel. The respondents were Israel's Attorney General as well as the Israel Security Agency and some of its officials. Mr. Tbeish argued that, as a suspected member of the terrorist organization Hamas, he had been subjected both to physical and mental torture by the ISA interrogators. The latter held that the use of "special means of interrogation" was fundamental and justified by the necessity argument, given that the suspect knew crucial information that would enable the ISA agents to guarantee public safety. It was, the respondents argued, a matter of lesser harm preventing greater harm: a typical defense of necessity justification which had been upheld by the Supreme Court in *Public Committee Against Torture v. Israel* for exceptional ticking bomb cases. Mr. Tbeish did possess

[303] "Shin Bet" is the Hebrew name for the Israeli security service.
[304] Armand St. (n 292).
[305] Amnon Reichman and Tsvi Kahana, 'Israel and the Recognition of Torture: Domestic and International Aspects' in Craig Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Hart Publishing 2001) 631-659; Clark (n 222); Ginbar (n 95) ch 14, sect B, para 1, 203.
[306] Ginbar (n 95) ch 14, sect B, para 1, 203.
[307] Previously the General Security Service.
[308] Ben-Natan (n 286); *Public Committee against Torture v. Government of Israel* (n 97) para 23, 23; Mann and Shatz (n 285).
[309] Ben-Natan (n 286).
[310] *Tbeish v Attorney General* [2018] Supreme Court of Israel HCJ 9018/17.

that information and ended up revealing it to his interrogators, but brought a petition before the Court to challenge the conduct of the ISA investigators. He was indeed detained incommunicado, deprived of sleep, threatened and humiliated, beaten, shaken, and held in uncomfortable positions (such as the "frog crouch") to the point that he lost consciousness.[311] The petitioners claimed two points. First, they condemned the Attorney General's refusal to open an investigation into Mr. Tbeish's interrogation. Second, they argued against the respondents' use of the defense of necessity justification, given that the special measures used were "unreasonable in the extreme," not proportionate, and amounted to torture.[312] Additionally, they held that, as per the Supreme Court's 1999 ruling, the necessity defense did not constitute a prior authorization for the security service agents to apply moderate physical pressure, or worse, torture, during interrogations.[313] Conversely, the Attorney General and the Israel Security Agency considered the "special means of interrogation" used against Mr. Tbeish to be "proportionate and reasonable to the danger." They also lamented the lack of proof to substantiate the petitioner's claim that the conduct was, in fact, torture. Moreover, they held that the necessity-defense did effectively apply in this specific case, rendering the ISA interrogators not criminally liable.[314]

A three-justice panel, with the Supreme Court sitting as the High Court of Justice, thus had to examine: whether torture had been used against Mr. Tbeish during the conduct of his interrogation (and thus whether the Attorney General's decision not to carry out an investigation was unreasonable) (1), whether the necessity defense could apply in this case (2) and, lastly, whether the Attorney General's directive and ISA guidelines were lawful (3). The majority opinion was written by Justice Yosef Elron.

As far as whether the allegations of torture were substantiated, the Court found that the petitioners had failed to prove their claim: "no criminal offense [had been carried out] by the ISA interrogators."[315] The argument that Mr. Tbeish had been subjected to physical and psychological measures that amounted to torture was expressly rejected by the Court, much differently to the Court's conclusions in 1999. This is an indication that the Court chose to adopt a very narrow interpretation of the acts that constitute torture. Secondly, regarding the Court's examination of the applicability of the necessity-defense and consequent exemption from criminal responsibility, the Court's opinion was the following: a broad interpretation of the defense of necessity doctrine and an explicit endorsement of its application in the case. As the ruling reads:

[311] ibid para 1-14.
[312] ibid para 22.
[313] ibid para 25.
[314] ibid para 26-27.
[315] ibid para 48-57.

> "The use of "special means" in the interrogation of [Mr. Tbeish] fell within the scope of the necessity defense." And "the circumstances of the [Mr. Tbeish's] interrogation […] clearly show that the interrogation was intended to prevent a real, concrete threat to human life at a high degree of certainty. The "necessity" grounding the Petitioner's interrogation does not exist in a vacuum. It must be understood and interpreted against the background of the complex reality of the State of Israel's security situation."[316]

For Ben-Natan, this ruling of the Court has dramatically expanded the applicability of the criminal defense of necessity to the majority of threats and harmful situations,[317] thus reinforcing the formal framework of impunity that was already in place since 1987 (and, unofficially, since many decades before that). Thirdly, regarding the lawfulness of the Attorney General's directive and of the ISA guidelines that allowed for the use of physical interrogation methods such as those used against the petitioner, the Court considered them lawful and actually praised the security service's attempt to establish "clear rules" concerning the type of pressure or special methods to employ during interrogations. This was considered to function as a guarantee for the interrogee's rights.[318]

4.1.3.2. Comparing cases and a further discussion.

The findings of the Court in the 2018 *Tbeish* judgment can only be integrated with another case, which was decided shortly earlier, that bears many similarities and seems to have also contributed to the erosion of the Supreme Court's 1999 stance: the 2017 *Abu Ghosh v. Attorney General* case.[319] Again, this was a case decided by the Israeli Supreme Court sitting as the High Court of Justice. The majority opinion was written by Justice Uri Shoham.

The matters at stake and the petitioners' complaints were quite similar to *Tbeish*: in 2012 an individual, Mr. Abu Ghosh, supported by the International Committee of the Red Cross, complained about having been subjected to torture and degrading treatment during his interrogation by ISA agents. Mr. Abu Ghosh's alleged torture was carried out in the context of an textbook ticking-bomb scenario and had helped extract information that prevented a suicide attack. Besides bringing a complaint for the ISA's use of torture, the petitioners, similarly to those in the *Tbeish* case, also denounced the failure of the ISA Inspector for Complaints to carry out a criminal investigation into the allegations of torture. They also held that it was unlawful for the ISA agents to justify their conduct

[316] ibid para 58-59.
[317] Ben-Natan (n 286).
[318] *Tbeish v Attoeny General* (n 310) para 66.
[319] *Abu Ghosh v Attorney General* [2017] Supreme Court of Israel HCJ 5572/12.

through the defense of necessity before having carried out such an investigation. Unsurprisingly, the respondents held that the methods used during the interrogation did not amount to torture and that the emergency nature of the situation (a true ticking bomb scenario) justified the ISA investigators' conduct and their resorting to the necessity-defense clause to be exempt from criminal liability.

In 2017, the Supreme Court rendered its judgment, rejecting all of the petitioners' claims. Indeed, it found that the evidence provided by the applicants did not sufficiently prove that Mr. Abu Ghosh had been subjected to torture, as defined by the UN Convention Against Torture. The Court also ruled that it could not invalidate some measures in general, as a case-by-case evaluation of each measure in each case was necessary to determine which interrogational measures constituted torture. Secondly, the Court denied the petitioners' claim that the Attorney General had the duty to initiate a criminal investigation into the interrogation, given the "broad prosecutorial discretion" of the Attorney General. It also found that in no way was the initiation of a criminal investigation a "prerequisite for the necessity-defense." Lastly, concerning whether necessity was substantiated, the Court ruled in the affirmative, stressing the urgency and ticking bomb nature of the situation: it was "immediately necessary" to use such measures against Mr. Abu Ghosh to prevent an impending attack. The Court reasoned that the use of special interrogation techniques was justified because the ISA agents had, additionally, reasonable suspicion about their suspect's detention of crucial information. Still, it held that even in the absence of such suspicion, they would have been "allowed to apply the exceptional interrogation methods." For Chachko, this passage seems to authorize more than justify or excuse the use of those methods.[320]

The 2017 *Abu Ghosh* judgment and the 2018 *Tbeish* judgment have evoked criticisms, as they seem to only have sanctioned a further institutionalization and legalization of the euphemism that is "moderate physical pressure," i.e., torture. In both cases one can see how the Israeli Supreme Court has come to very narrowly interpret torture, refusing to rule on the general compatibility of some measures with the prohibition of torture but rather stating its intention to exclusively evaluate them in specific, individual cases. However, an excessive burden of proof is placed on the individual petitioners, whose claims, despite being supported by extensive medical evidence and testimonies, do not seem to meet a sufficient evidentiary threshold. This makes it all the more complicated for victims of torture to find justice, and possible compensation, and all the more straightforward for ISA interrogators to have impunity. The finding, in both cases, of an extensive prosecutorial discretion for the Attorney General only confirms this. The absence of criminal investigations into allegations of torture is nothing but a dangerous sign for the protection of the rights of interrogees. Lastly, concerning the defense of necessity, both cases hint at a continuous broadening of its applicability.

[320] Chachko (n 281).

Not anymore does it seem to exclusively be available to ISA interrogators dealing with ticking bomb cases, as it has now been extended to "almost any risk."[321] The "necessity back door" left open to interrogators in the 1999 judgment has allowed a gradual erosion of the bold prohibition of interrogational torture of the Supreme Court, to the point that some now see it as *de facto* authorizing it in certain exceptional situations.[322] For Ben-Natan, the Court has eventually generated a framework where torture and ill-treatment against detainees are institutionalized, and even authorized.[323] The UN Special Rapporteur on Torture voiced significant concern with these developments, as he viewed them as providing ISA interrogators with a "judicially sanctioned license to torture."[324] This, to any person who is preoccupied with the state of human rights across the globe, can only be of grave worry given the recent developments in the relationship between Israel and the Occupied Palestinian Territories after October 7, 2023. Torture is increasingly narrowly interpreted, and necessity continues to be broadened to cover the majority of situations, shrinking the responsibility of interrogators for their conduct. To illustrate these dynamics, Shany speaks of a true "dilution of the prohibition against torture in Israeli law"[325]

Lastly, the Court, in particular in its *Tbeish* judgment, recognized, as it did in 1999, the difficulty of the matters at stake, but also acknowledged a change in the historical period in which the two decisions were taken. Ben-Natan considers it crucial to acknowledge this point when comparing the most recent judgments to the 1999 one: the 1990s were a decade of optimism and liberalism for Israel, with strong judicial activism from the Supreme Court and in particular from Chief Justice Barak. But this did not last very long, for the disappointment in the failure of the peace accords and the rise of the second Intifada at the beginning of the new millennium brought about a reversal in those liberal policies. Additionally, one has to take into account the fact that the Supreme Court Justices sitting in the 2018 panel were appointed under a government "which openly seeks to restrict the power of the judiciary,"[326] as exemplified by the many protests that have occurred in Israel in 2023 to counter the judicial reforms proposed by Netanyahu's government. Under this light, the judicial self-restraint of the Court in both cases is perhaps easier to comprehend, though its threat to the protection of fundamental human rights is not easier to digest.

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[321] Ben-Natan (n 286).
[322] Yuval Shany, 'Back to the "Ticking Bomb" Doctrine' (*Lawfare*, 27 December 2017) <https://www.lawfaremedia.org/article/back-ticking-bomb-doctrine> accessed 5 January 2024; Chachko (n 281).
[323] Ben-Natan (n 286).
[324] 'UN Expert Alarmed at Israeli Supreme Court's "license to Torture" Ruling' (*Office of the United Nations High Commissioner for Human Rights*, 20 February 2018) <https://www.ohchr.org/en/press-releases/2018/02/un-expert-alarmed-israeli-supreme-courts-license-torture-ruling> accessed 5 January 2024.
[325] Shany (n 322).
[326] Ben-Natan (n 286).

4.2. United States

In the second chapter, we have examined some of the key theoretical approaches and proposals concerning ticking bomb torture, with many of them being brought forward by U.S. scholars, such as Dershowitz's torture warrants and Gross' *ex post* ratification of torture. Since this chapter is concerned with the practical implications of the debate, namely the concrete situation on ticking bomb interrogational torture, we will attempt to provide an evaluation of the U.S.' "Enhanced Interrogation Techniques" CIA program, as well as the "High-Value Detainees" Program that were enacted following 9/11 and were subjected to numerous criticisms until their dismantling in 2009. Through these programs, tens of thousands of individuals were detained and interrogated on suspicion of terrorism, with many being subjected to physical and psychological methods approved by the U.S. administration. However, as we will see, evaluating such a model will be more complicated compared to the evaluation of the Landau and Israeli Supreme Court models that we have examined above.[327] Nevertheless, we will do so by first discussing the constitutional limits to torture outlined in the U.S. legal system through the analysis of some key Supreme Court precedents that render unlawful the use of special coercive measures against ticking bomb suspects. An examination of the practices, and whether (and to what extent) they were legalized and institutionalized will then follow.

4.2.1. Torture and the U.S. Constitution.

The prohibition of torture is a fundamental principle that the United States must observe, not only because of the peremptory character of this norm of international law or because the United States has ratified the Convention Against Torture in 1994, thus binding itself to it, but also because torture is banned by U.S. constitutional law, as confirmed in numerous instances by the U.S. Supreme Court. This section will interest itself precisely with that: the constitutional ban(s) to torture in the U.S. legal system and the existing judicial precedents on the matter, given the absence of a clear ruling of the Supreme Court on the use of ticking bomb coercive methods during interrogations, such as in Israel.

In principle, the U.S. Constitution contains no specific provision banning torture *per se*. Nevertheless, it is possible to infer a definite prohibition of the practice, even in ticking bomb situations, through a series of other rights protected by the Constitution, and whose interpretation has

[327] Ginbar (n 95) ch 15, sect A, 226.

been developed over the years by the U.S. Supreme Court. These include the Eight Amendment, the Fifth, and the Fourteenth Amendments as well as the Fourth Amendment.

The Eight Amendment, despite its wording not explicitly referring to torture, is perhaps the provision in U.S. constitutional law that is closest to prohibiting torture. Indeed, it stipulates the following: "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[328] It is within the "cruel and unusual punishments" that torture falls, something which the Supreme Court has repeatedly maintained in its precedents over the decades, as expressed in particular in *Estelle v. Gamble*. Indeed, in the 1976 case, where the Court had to address a complaint of alleged cruel and unusual punishment against an individual detained in prison, the Court noted that "the primary concern of the drafters [of the Eight Amendment] was to proscribe "torture[s]" and other "barbar[ous]" methods of punishment," thereby ruling out any doubt as to whether torture was covered by the provision.[329] Even for death row inmates, torture and other ill-treatment have been drastically prohibited by the Court.[330] It thus seems evident that if torture in itself is prohibited by the Constitution, there is no reason to consider ticking bomb torture as compatible with the rights protected therein. Dasgupta and Kreimer, however, note how some scholars who are proponents of an exceptional admissibility of torture in extreme circumstances, such as Dershowitz, have relied on the specific term "punishment" contained in the Eight Amendment, to argue that the prohibition only refers to punitive torture, and that deterrent torture is exempt from the ban.[331] For Dasgupta, the assessment of whether preventative torture is constitutional requires greater scrutiny. He explains the existence of two requirements: that deterrent torture meet a "compelling governmental interest, in light of the current situation and the information possessed by the officials in charge at the time"; and that deterrent torture be the "narrowest and least drastic means of furthering that interest." However, the key limitation of ensuring that these requirements are met is that, in order to gather all the evidence supporting the need for deterrent torture, the "imminence" nature of the danger for which the conduct is required will be disregarded. If the bomb is ticking, there will likely not be enough time to satisfy both criteria. Nevertheless, Dasgupta recalls some Supreme Court precedents in which the officials (whose conduct was challenged) were deemed to have "acted responsibly" given the dangerous situation that they had to face. This creates concern in the author that the same conclusion might be reached in the evaluation of officials' torturous conduct in ticking bomb scenarios, despite the Supreme Court's consolidated ban on torture.[332] Indeed, as explained at

[328] United States of America: Constitution 1787 Amendment VIII.
[329] *Estelle v Gamble* [1976] US Supreme Court 429 US 97.
[330] Seth F Kreimer, 'Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror' [2003] Faculty Scholarship at Penn Carey Law 1166.
[331] Dasgupta (n 82); Kreimer (n 330).
[332] Dasgupta (n 82).

the beginning of this study, ticking bomb scenarios are primarily concerned with interrogational torture, which in its very nature is deterrent and not punitive. The Supreme Court, however, has yet to definitively rule on deterrent "cruel and unusual" conduct, and thus expressly rule out the distinction between punitive and deterrent torture when it comes to the constitutional prohibition of torture.

The Fifth and Fourteenth Amendments are also frequently invoked as representing an obstacle to the use of torture during the interrogation of suspected terrorists.[333] The Fifth Amendment reads as follows: "No person […] shall be deprived of life, liberty, or property, without due process of law […]."[334] In turn, the Fourteenth Amendment, passed by the U.S. Congress in 1866 and ratified in 1868 reads as follows: "[…] [No State shall] deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[335] Both amendments contain the Due Process Clause, and thus guarantee that the Federation (Fifth Amendment) and the States (Fourteenth Amendment) treat individuals fairly and impartially during legal proceedings according to the rules established in the law. In its ruling in *Ingraham v. Wright*, in which it had to decide whether corporal punishment inflicted on public school students without any educational purpose was a violation of the Due Process Clause protected by the Fourteenth Amendment, the Supreme Court held that the protection of one's physical integrity fell within the scope of due process rights.[336] Moreover, over time the Court has increasingly recognized that the Due Process Clause protects individuals from excessive government intrusion into their bodily integrity, and has thus set a series of limits to the conduct of government officials in connection with the rights protected by other amendments. For example, in connection with the Eight Amendment, prisons have to ensure that minimum standards of decency are met when in the treatment of their detainees. But, more generally, the Supreme Court set a new standard in *Rochin v. California*: the compatibility of measures with the very conscience of the Court. Indeed, it maintained that the Due Process Clause can empower it "to nullify any state law if its application "shocks [its] conscience," offends "a sense of justice," or runs counter to the decencies of civilized conduct."[337] As Kreimer explains, it became evident that the conscience of the Court would be shocked, and thus the

[333] ibid; Kreimer (n 330); Chanterelle Sung, 'Torturing the Ticking Bomb Terrorist: An Analysis of Judicially Sanctioned Torture in the Context of Terrorism' [2003] Boston College Third World law journal <https://www.semanticscholar.org/paper/Torturing-the-Ticking-Bomb-Terrorist%3A-An-Analysis-Sung/0fde5e31fb0385f43c39b413470ab9a9317c997e> accessed 7 January 2024; 'The Legal Prohibition Against Torture' (*Human Rights Watch*, 1 June 2004) <https://www.hrw.org/news/2003/03/11/legal-prohibition-against-torture> accessed 8 January 2024; Geoffrey R Skoll, 'Torture and the Fifth Amendment: Torture, the Global War on Terror, and Constitutional Values' (2008) 33 Criminal Justice Review 29; Tate (n 67).
[334] United States of America: Constitution Amendment V.
[335] ibid Amendment XIV.
[336] Kreimer (n 330); *Ingraham v Wright* [1977] US Supreme Court 430 US 651.
[337] *Rochin v California* [1952] US Supreme Court 342 US 165.

constitutional limits to government intrusion violated, if "coercion, violence or brutality" occurred against an individual.[338] The likelihood of the torture of an individual not shocking the conscience of the Court and not offending the "sense of justice" is probably quite low, given the Court's precedents. In a case of interrogational torture, the Court would have to deal with physical intrusions that would be much more intense, pervasive, and overall more severe compared to those which it had deemed unconstitutional in the past. For Sung, this unquestionably means that ticking bomb torture would not meet the due process requirements.[339] Additionally, ticking bomb torture would violate due process, which requires individuals to be entitled to a fair and impartial hearing before being subjected to restrictions of their liberty, to be represented by a legal defense, and to be informed of the charges brought against them. Indeed, preventative interrogational torture, by definition, would not meet these due process requirements. Basing one's claim on Dershowitz's torture warrant proposal,[340] one could hold that instituting prior warrants for exceptional torture could render the practice more compliant with one aspect of due process, though the prohibition in the law would always remain standing.

Until now, we have focused on the protection of due process by the Fifth and the Fourteenth Amendments. However, the Fifth Amendment also contains a clause on self-incrimination, as it provides that "no person […] shall be compelled in any criminal case to be a witness against himself […]."[341] Two historical landmark cases can be recalled on this matter: *Brown v. Mississippi*[342] and *Miranda v. Arizona*.[343] In both of them, the Court ruled on the inadmissibility of statements obtained through fear, violence, or coercion, independently of whether they would incriminate or absolve the person making them.[344] Thus, inherent to the Fifth Amendment is an additional limitation to the State's ability to intrude into one's physical liberty through force, as one cannot coerce another into confessing a crime. The Court found it necessary to remove any doubt as to the privilege of self-incrimination, as in the 1960s, when *Miranda* was decided, the Court noted the ever-present use of physical force by the police to extract confessions from suspects. It was as a result of this case that the so-called "Miranda right" was established, granting suspects the right to remain silent and have an attorney present during the conduct of the interrogation.[345] The privilege of self-incrimination, however, as it is written in the text, contains a number of loopholes that some scholars have noted the existence of, thus raising questions as to the extent of that privilege. For example, the Fifth Amendment, and the resulting Supreme Court precedents, make no reference to any privilege against

[338] Kreimer (n 330).
[339] Sung (n 333).
[340] Dershowitz, 'Tortured Reasoning' (n 101).
[341] United States of America: Constitution Amendment V.
[342] *Brown v Mississippi* [1936] US Supreme Court 297 US 278.
[343] *Miranda v Arizona* [1966] US Supreme Court 384 US 436.
[344] Dasgupta (n 82).
[345] Skoll (n 333); 'The Legal Prohibition Against Torture' (n 333).

the incrimination of others. Thus, what if, in a ticking bomb scenario, torture was used against an individual for him to surrender information about an accomplice who had placed the bomb? This would not amount to self-incrimination but would still fall under the umbrella of "statements obtained through fear, violence or coercion." Additionally, the Fifth Amendment is clear in making compelled confessions inadmissible in a court of law. It is undeniable that a confession obtained through torture would not be allowed as evidence. But what if the confession was not used to prosecute the suspected terrorist, but only to allow the security services to thwart an impending attack? As Lasson notes, the Fifth and the Fourteenth Amendments cannot provide complete answers to these questions.[346] Supreme Court decisions have yet to resolve these issues.

Lastly, the Fourth Amendment protects people's right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[347] In 1966, the Supreme Court confirmed that "the overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State."[348] To determine whether the State's intrusion is reasonable and thus compatible with the Fourth Amendment, the Supreme Court would have to carry out a balancing test between factors. These include the level of harm caused by the intrusion into the suspects' privacy and dignity, the scope of that intrusion, and the existence of alternative methods to fulfill the same goal. In the 1966 case of *Schmerber v. California*, the matter concerned the carrying out of a blood test ordered by a police officer on an individual arrested on suspicion of driving under the influence of alcohol. The question in the case was whether this was constitutional and in compliance with the Fourth Amendment. Though the Court responded in the affirmative, considering the blood test a "minor intrusion" by the State, it did add that its ruling in no way condoned "more substantial intrusions" into individuals' privacy and bodily integrity.[349] It is intuitive that torturing a suspected terrorist in a ticking bomb scenario would qualify as such "more substantial intrusion," and thus one can reasonably infer that such a practice would likely not pass the Court's reasonableness test and, therefore, its constitutionality test.[350] Consequently, the Fourth Amendment acts as one additional obstacle to the legitimation and legalization of ticking bomb interrogational torture in the United States.

As a final point in this section, let us explore some recurrent questions in the debate on constitutionally protected rights in relation to the War on Terror: do non-citizens, and in particular suspected terrorist detainees, enjoy the same rights as U.S. citizens? Are they also protected by the prohibition of torture? Do their rights exist in a grey zone? The very text of the U.S. Constitution

[346] Lasson (n 121); Dasgupta (n 82).
[347] United States of America: Constitution Amendment IV.
[348] *Schmerber v California* [1966] US Supreme Court 384 US 757.
[349] ibid.
[350] Sung (n 333).

seems to respond that the law grants equal protection of rights to all, irrespective of the existence of a situation of national emergency. For Henkin, this can be seen in the presence of the word "person" rather than "citizen" in the Bill of Rights, an express reflection of the "commitment to respect the individual rights of all human beings."[351] Even the Supreme Court, in a number of landmark cases concerning the detention of foreigners as a result of the War on Terror, has recognized to them the same rights as U.S. citizens, in particular the writ of *habeas corpus*. *Habeas corpus*, in essence, protects individuals against unlawful and indefinite detention, as it is the right to have the legitimacy of one's detention reviewed by an independent authority. It is a core principle of common law systems, including the U.S., where it is enshrined in Article I Section 9 of the Constitution.[352] The right to be free from torture is very much connected to *habeas corpus* and due process, as we have seen above, and thus it becomes essential to understand whether foreigners can also enjoy these fundamental, constitutionally protected rights. This is a question that the Supreme Court thoroughly dealt with in a number of landmark cases: *Rasul v. Bush*,[353] *Hamdi v. Rumsfeld*,[354] *Hamdan v. Rumsfeld*,[355] and *Boumediene v. Bush*.[356] In *Rasul* and *Hamdan*, the Court examined whether enemy combatants detained in the Guantánamo Bay military base enjoyed the *habeas corpus*. It responded in the affirmative, holding that *habeas corpus* was considered to be normally applicable even in the War on Terror, and thus that any person detained under U.S. custody, even extraterritorially, did have the right to question the legitimacy of their detention before a judge. In *Hamdi* and *Boumediene*, the Court examined whether enemy combatants enjoyed the right to a due process. Again, it responded in the affirmative, holding that even in the most challenging moments, including the War on Terror, the highest possible standards of due process must be guaranteed.[357] Thus, as foreigners can enjoy the writ of *habeas corpus* and due process rights in the same way as U.S. citizens, it is undoubtable that the protection from torture contained in the U.S. legal system and Supreme Court precedents must also reflect to them. That, of course, in no way diminishes the presence of international customary and *jus cogens* norms that bind the United States and that prohibit the infliction of any type of torture or ill-treatment on any human being irrespective of national security issues.[358]

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[351] Louis Henkin, *The Age of Rights* (Columbia University Press 1990) 139.
[352] "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."United States of America: Constitution Article I Section 9 Paragraph 2.
[353] *Rasul v Bush* [2004] US Supreme Court 542 US 466.
[354] *Hamdi v Rumsfeld* [2004] US Supreme Court 542 US 507.
[355] *Hamdan v Rumsfeld* [2005] US Supreme Court 548 US 557.
[356] *Boumediene v Bush* [2008] US Supreme Court 553 US 723.
[357] "It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad." *Hamdi v. Rumsfeld* (n 354).
[358] Article 2 Paragraph 2 of the Convention Against Torture excludes any justification for torture, no matter the exceptional nature of the situation: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."

4.2.2. The institutionalization of torture in the War on Terror.

Having examined the constitutional precedents that ban torture overall in the United States, both for citizens and non-citizens under the custody of U.S. officials, we will now look into how it became possible for a model of "quasi-legalized torture"[359] to be established in the United States after 9/11, in particular after President Bush's pledge that the War on Terror was a war about the protection of values, human dignity above all.[360]

After 9/11, the U.S. Government, headed by President Bush, promoted the "High-Value Detainee"[361] (HVD) Program and began operating a special interrogation and detention program designed for suspected terrorists, neglecting the moral and legal values that he had invoked, for reasons of national security.[362] Controlled by the CIA, the U.S. Central Intelligence Agency, the HVD Program made regular use of special coercive and violent interrogation techniques, which relied both on physical and psychological measures and took the name of "Enhanced Interrogation Techniques" (EITs), a frequent euphemism for torture and ill-treatment. Human rights organizations repeatedly denounced the practices as constituting torture.[363] Additionally, despite the initial denial, especially during the years that the HVD Program was in function, the use of torture by CIA interrogators has been recognized even by the highest U.S. authorities, such as President Obama. In 2014, indeed, he officially acknowledged that the U.S. had "tortured some folks" in the years following 9/11.[364] Among the techniques used, incommunicado detention, waterboarding, beatings, confinement, nudity, sleep deprivation, shackling, threats, and humiliation were the most frequent and repetitively used.[365] Still, there remains some debate over whether these methods truly constituted torture.[366] Pratt points out how there was a real shift in the way authorities conducted interrogations after 9/11, as, prior to the CIA's interrogation program, torture was never used by the military or other security agencies during interrogations, as it was not deemed an efficient intelligence-gathering technique. Moreover, as

[359] Ginbar (n 95) ch 15, 223-261.
[360] 'The Legal Prohibition Against Torture' (n 333).
[361] A "High-Value Detainee" is an individual who possesses critical information relating to terrorist activities or would be a significant danger to national security if released.
[362] Carol Rosenberg, 'The Legacy of America's Post-9/11 Turn to Torture' *The New York Times* (12 September 2021) <https://www.nytimes.com/2021/09/12/us/politics/torture-post-9-11.html> accessed 11 January 2024.
[363] Human Rights Watch, 'Getting Away with Torture: The Bush Administration and Mistreatment of Detainees' (2011); 'USA and Torture: A History of Hypocrisy' (*Human Rights Watch*, 9 December 2014) <https://www.hrw.org/news/2014/12/09/usa-and-torture-history-hypocrisy> accessed 11 January 2024.
[364] Barack Obama, 'Press Conference by the President' (*The White House*, 1 August 2014) <https://obamawhitehouse.archives.gov/the-press-office/2014/08/01/press-conference-president> accessed 11 January 2024.
[365] International Committee of the Red Cross, 'ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody' (2007).
[366] Simon Frankel Pratt (ed), 'Case 2: "Enhanced Interrogation" and the Prohibition on Torture', *Normative Transformation and the War on Terrorism: The Evolution of Targeted Killing, Torture, and Private Military Contracting* (Cambridge University Press 2022) ch 5, para 1, 87

confessions extracted under torture were not admissible in courts, coercive measures were simply not in use.[367] But this changed once the CIA was appointed with the handling of the capture, detention, and specifically the interrogation of suspected terrorists, something for which it had no real experience before 9/11.[368] Given the urgency and unprecedented nature of the situation, CIA agents soon found themselves wanting to apply to suspected terrorists other, new "non-standard interrogation techniques." The question of whether to torture terrorists in urgent scenarios thus came once more into play, with the ticking bomb image gaining widespread popularity in the American scene, both among government officials and in public opinion.[369] For some, the perceived imminence of the threat could justify everything. The image in the media of the security agent torturing a terrorist and becoming a real hero for having "saved the day" started to become a part of the U.S. mentality. This is what Kovarovic and others call "the Jack Bauer culture," from the name of the protagonist of the U.S. television series *24*, which was entirely based on the ticking bomb scenario and the use of torture to resolve it. This very easily normalized the use of interrogational torture in exceptional circumstances.[370]

Independently of the societal influence of the media, in the ranks of the CIA, since the High-Value Detainees were considered to possess sensitive information, the use of force during interrogation, and, thus, torture, started to be seen as necessary. The "non-standard interrogation techniques" were supported by experts in the field, such as senior interrogators, intelligence officers, and psychologists. In 2002, a series of memoranda were drafted on the guidelines to follow during interrogations, which became known as the "torture memos," as they enabled *de facto* the use of torturous practices by interrogators.[371] The endorsement by the U.S. Attorney General and the U.S. Secretary of Defense followed; for almost all of the methods proposed. After some resistance, waterboarding came to be endorsed. Mock burial still resisted. The "torture memos" became official policy, though remaining confidential. The list of Enhanced Interrogation Techniques to be used by the CIA secured legal cover. Though initially limited to High-Value Detainees, from 2002 until 2004, the use of these "non-conventional techniques" also spread to the detainees held at Guantánamo Bay detention camp in Cuba and in the many other detention facilities opened abroad, such as in Afghanistan and Iraq. Moreover, programs within the CIA were created to train personnel on how to carry out successful interrogations of terrorist suspects. Naturally, including the use of EITs. As Pratt

[367] ibid ch 5, para 2, 92-93.
[368] Prior to 9/11, it was the FBI, the U.S. Federal Bureau of Investigation, that was tasked with managing counterterrorism interrogations. ibid ch 5, para 3, 94.
[369] Mann and Shatz (n 285).
[370] Kovarovic (n 89); Adam Green, 'Normalizing Torture on "24"' *The New York Times* (22 May 2005) <https://www.nytimes.com/2005/05/22/arts/television/normalizing-torture-on-24.html> accessed 14 January 2024; Farrell, 'The Ticking Bomb Scenario' (n 7) ch 2, sect A, para 4, 102.
[371] Tate (n 67).

puts it: "by the end of [2002], the EIT had fully emerged as a defined, defended, and established interrogation practice."[372] Other scholars confirm this view that the Bush administration helped institutionalize the practice of torture.[373] Nevertheless, because of the absence of laws expressly legalizing the use of torture in the interrogation of suspected terrorists, for Ginbar we cannot speak of the EITs and the HVD Program as being "full models of legalized torture," as was the Landau model in Israel in 1987. For this reason, Ginbar defines the HVD model as a model of "quasi-legalized torture."[374]

But how was it possible for torture to be so institutionalized and its use so widespread by a government agency? Were there no international prohibitions and the above-mentioned constitutional obstacles to torture? Four arguments can help explain the justification, institutionalization, and attempted legalization of the HVD model in the United States.[375] The first is connected to the denial that Enhanced Interrogation Techniques constituted torture, and thus to the very definition of torture as a practice. We can recall one of the infamous "torture memos," written by U.S. attorneys Yoo and Bybee and which, though confidential, became official U.S. policy. We have cited them in the first chapter as examples of very narrow definitions of torture: "physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."[376] As long as torture was considered to include only extreme conduct nearing "organ failure" or "death," supporters of the HVD model could claim that Enhanced Interrogation Techniques were not as harmful as torture, and thus that they were contained within the national and international laws prohibiting torture. Once again, the danger of narrowly interpreting torture is evident.

The second argument concerned the legal protection of High-Value Detainees, or rather, the absence thereof. As Ginbar explains, the claim was that individuals suspected of terrorism could not enjoy protection by either national or international law. Thus, it was argued that customary international law prohibiting torture and ill-treatment, international covenants such as the Geneva Convention relative to the Treatment of Prisoners of War or the UN Convention Against Torture, and domestic laws such as the U.S. Constitution and other laws protecting individuals from torture and ill-treatment did not apply to terrorist suspects. The creation of a new category of prisoners, the High-Value Detainees, allowed for diminished protection from ill-treatment in the name of the principle of

[372] Pratt (n 366) ch 5, para 4.2, 107.
[373] M Cherif Bassiouni, 'The Institutionalization of Torture under the Bush Administration' (2006) 37 Case Western Reserve Journal of International Law.
[374] Ginbar (n 95) ch 15, sect A, 226.
[375] ibid ch 15, sect B, para 1, 228.
[376] Bybee (n 7).

"military necessity."[377] Effectively, HVDs were considered to exist in a legal black hole, deprived of any rights, including their human dignity. This would be a simple reasoning to justify the existence and use of Enhanced Interrogation Techniques: if those individuals possessed no rights, there would be none to violate. This position gained even the support of lower state courts, which considered detainees to be deprived of the right to *habeas corpus*, something which, as we have seen, was ruled out as unconstitutional by the Supreme Court in a number of landmark cases.[378]

The third argument in favor of the High-Value Detainee Model, despite the many prohibitions of torture, was the already-discussed claim that torture could be justified because of the criminal defenses of self-defense and necessity. These were proposed in the 2002 Bybee memorandum as legitimate reasons for the use of torture, given the urgency of the situation.[379] What the proponents of self-defense and necessity-defense claim has been discussed at length in the chapters above. In this argument, we can find a certain degree of similarity with the Landau model,[380] whose fundamental justificatory pillar relied on the doctrine of necessity and the need to carry out a lesser evil to prevent a greater one. This balance between evils is the same that the HVD Model proposed to carry out and that is at the core of the ticking bomb dilemma: torturing one or few to prevent a threat or an attack that endangers many.

Finally, the last argument highlighted by Ginbar in favor of the legalization of torture within the HVD framework is that of the unlimited presidential authority at war. It was claimed that the President of the United States had the constitutionally-derived authority to "order absolutely anything he wishe[d] in his capacity as Commander-in-Chief of US forces during war, as no laws, wither international or national, could touch him."[381] Moreover, the U.S. Congress Joint Resolution on the Authorization for Use of Military Force gave the President "all necessary and appropriate force" to retaliate against those involved with the execution of the 9/11 attack, whether person, organization, or nation.[382] Thus, the President would be even authorized to order the use of torture, rendering the HVD Program legal.[383] Once more, this argument was proposed in the Bybee memorandum, which thus restricted the meaning of torture (1), allowed for the criminal defenses of necessity and self-defense to be invoked by interrogators in a court of law, thereby granting them immunity (2), and acknowledged that the President of the United States could order torture (3). *De facto*, the memo represented a clear legal ground for the authorization of violence and force during interrogations.[384]

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[377] Pratt (n 366) ch 5, para 1, 88; Farrell, 'The Ticking Bomb Scenario' (n 7) ch 2, sect A, para 8, 122.
[378] *Rasul v. Bush* (n 353); *Hamdan v. Rumsfeld* (n 355).
[379] Bybee (n 7).
[380] Mann and Shatz (n 285).
[381] Ginbar (n 95) ch 15, sect B, para 1.d, 236.
[382] Public Law 107-40 2001 (115 STAT 224).
[383] Ginbar (n 95) ch 15, sect B, 228ff.
[384] Farrell, 'The Ticking Bomb Scenario' (n 7) ch 2, sect A, para 8, 123; Nowak (n 10); Tate (n 67).

But the popularity of these arguments would be short-lived, for significant opposition and criticisms rapidly emerged (from within and without the CIA), denouncing the use of EITs and their efficacy. By 2003, an investigation had been initiated into the CIA's detention and interrogation practices by the Office of the Inspector General of the CIA, and it was recommended that the program be closed down. In 2004, one of the "torture memos" was leaked, resulting in a significant controversy and the administration needing to demonstrate its strengthened commitment to fundamental human rights. Thus, a new Department of Justice memorandum was published in the same year, expressly renouncing torture as a practice incompatible with domestic and international law and thus effectively rejecting the argumentations of the 2002 memoranda which had served as a legal basis for the CIA's conduct.[385] By the end of 2008, the CIA's detention and interrogation program and its use of EITs was minimal, and in 2009 President Obama ordered the dismantling of any remaining such detention and interrogation facilities and for them never to be operated in the future. Additionally, the use of EITs was prohibited and U.S. interrogators were mandated to follow the guidelines of the "Army Field Manual on Human Intelligence Collector Operations."[386] But this did not sanction a definitive return to the pre-9/11, pre-HVD model state of affairs, as authors Mann and Shatz point out a shift from a movement of legitimation (of the Bush administration) to a movement of "*un-prosecution*" (of the Obama administration). Indeed, the condemnation of the use of torture in CIA detention and interrogation centers was not accompanied by the prosecution and conviction of those who perpetrated the torture. Already in 2005 and 2006, the U.S. Congress had passed legislation that granted immunity to past torturers, exempting them from facing criminal responsibility for their conduct.[387] Again, with the Obama administration, they were essentially placed in "an institutionalized position of silence." This continued denial of accountability can be viewed as an additional form of torture, whose effects are more than long-lasting.[388]

While the policies institutionalizing torture have been officially renounced, and the CIA's High-Value Detainee Program dismantled, questions remain as to the role of the judiciary and legislative branches, and their (in)activity in limiting the scope of executive orders limiting the fundamental rights enshrined in the law. Bassiouni in particular is very critical of the two branches of power, whose passivity allowed "torture-enabling policies" to take root and slowly consolidate themselves in the first years post-9/11, resulting in extremely grave violations of rights.[389] The task of balancing between liberty and security is a delicate one, and, in particular, ticking bomb scenarios would confront judges with the most complex moral and legal dilemmas. Ginbar, too, reflecting upon

[385] Ginbar (n 95) ch 15, sect D, para 1, 247-248; Pratt (n 366) ch 5, para 4, 113-114.
[386] Pratt (n 366) ch 5, para 4, 116.
[387] Ginbar (n 95) ch 15, sect A, 226.
[388] Mann and Shatz (n 285); Human Rights Watch (n 363).
[389] Bassiouni (n 373); Farrell, 'The Ticking Bomb Scenario' (n 7) ch 2, sect A, para 8, 127.

this point, expresses his concerns with the possibility of self-restraint by the U.S. courts on such matters, were they to be confronted with them in the future.[390] So does Dasgupta, fearing that the Supreme Court could draw upon some of its precedents, and given the recognition of the urgency and immediacy of ticking bomb scenarios, would deem state officials to have "acted responsibly" in light of the threat that was underway.[391]

4.3. Ticking bomb beyond torture: Germany

So far, we have examined both the theoretical and practical implications of ticking bomb scenarios as they pertain to the use of torture. We have discussed how scholars and courts have at times acknowledged that exceptional situations can call for exceptional conduct, and thus how ticking bombs and cases of necessity can be justifications for evading the ban on (interrogational) torture. In other words, so far our focus has been on how ticking bomb scenarios can impinge upon individuals' right to be free from torture. But, as we will see, freedom from torture is not the only right that the ticking bomb argument endangers. In particular, the fundamental rights to life and human dignity are, too, compromised by those who maintain that ticking bomb situations call for the violations of rights. This part will thus aim at expanding the reflection on the ticking bomb, to show its broader implication for human rights, beyond torture. We will illustrate this by discussing the case of the German *Aviation Security Act*, which, with its precise intent to prevent and manage future possible emergency scenarios, gravely endangered individuals' human dignity and their right to life. In 2006, the German Constitutional Court ruled on the legislation's compatibility with the German Basic Law, i.e., the German Constitution. It is its emblematic decision that we will analyze, one that adds itself to a long list of complex rulings on the balancing between rights and security.

4.3.1. The *Aviation Security Act* case: background and complaints.

4.3.1.1. An anti-terror law under scrutiny.

The central piece of legislation in the *Aviation* case is the *Aviation Security Act*, in German *Luftsicherheitsgesetz*, which was adopted by the German Bundestag in 2005.[392] To understand the

[390] Ginbar (n 95) ch 15, sect E, 261.
[391] Dasgupta (n 82).
[392] Aviation Security Act (Luftsicherheitsgesetz) 2005 (BGBl I at 78).

case surrounding it, one has to first understand the context in which this legislation was passed. The *Aviation Security Act* was one of many laws that were adopted in the aftermath of the 9/11 attacks in the United States, as a way to reinforce national security in Germany. The willingness to prevent the occurrence of such a tragic event in the European democracy impacted more than 100 laws, which faced changes and amendments by the German Parliament. These new or amended public security laws generated widespread debate for their significant curtailing of individual freedoms, thereby giving a new impetus to the liberty *versus* security debate. For some, matters of security could not justify indiscriminate limitations of rights. For others, including the government, security constituted the core of individuals' rights, and the safer society, the more freedom individuals could enjoy. Thus, the Parliament's "anti-terror" laws were not only legitimate, but their enactment to protect public security actually represented a duty of the political branches.[393] Among the public security laws that were adopted or amended, some limited the freedom of association, others increased surveillance or introduced new biometric data to passports and ID cards for recognition, or even restricted terrorist suspects' access to attorneys, and, significantly, most expanded the powers of the German police and intelligence agencies.[394] One crucial specific law that was passed in the aftermath of 9/11 was the *Aviation Security Act*, which, thanks to its endorsement by both the government parties and the opposition parties, obtained the majority in Parliament in the summer of 2004. Its intent was precisely that of preventing possible future 9/11 scenarios of hijacked planes, by strongly reinforcing air security. For example, the law gave the aviation security authorities the power to conduct specific searches and checks (Section 5) or laid out a comprehensive list of items that could not be boarded on a plane, criminalizing their possession (Sections 11 and 19). But besides these provisions, there was one, Section 14, which specifically dealt with the existence of a "particularly serious accident," namely that of a hijacked plane, and empowered the Federal Minister of Defense to take measures to deal with the situation. Section 14 read as such:

> **§ 14 Operational measures, authority to issue orders**
>
> (1) To prevent the occurrence of an especially grave accident, the armed forces may force the aircraft off its course in the air space, force it to land, threaten to use armed force, or fire warning shots.
>
> (2) From several possible measures, the one which will probably least impair the individual and the general public is to be chosen. The measure may only be carried out as long as and to the extent that its

[393] Oliver Lepsius, 'Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-Terrorism Provision in the New Air-Transport Security Act' (2006) 7 German Law Journal 761; Saskia M Hufnagel, 'German Perspectives on the Right to Life and Human Dignity in the "War on Terror"' (2008) 32 Criminal Law Journal.

[394] Christoph Safferling, 'Terror and Law: German Responses to 9/11' (2006) 4 Journal of International Criminal Justice 1152; Hufnagel (n 393).

purpose requires. It may not result in a detriment that is recognisably out of proportion to the aspired success.

(3) The direct use of armed force is permissible only where it must be assumed under the circumstances that the aircraft is intended to be used against human lives, and where this is the only means to avert the imminent danger.

(4) The measure pursuant to subsection 3 can only be ordered by the Federal Minister of Defence, or in the event of the Minister of Defence having to be represented, by the member of the Federal Government who is authorised to represent the Minister.(…).[395]

Therefore, the *Aviation Security Act* gave the authorities the power to adopt a series of emergency measures to manage the hijacking situation, but expressly providing that these respect the principle of proportionality, which is a core principle in the German Basic Law. Thus, from the several measures available (from forcing the plane to land, to threatening the use of or firing warning shorts), the authorities would have to choose the one which would "least impair the individual and the general public," and only "so long and to the extent" required by their purpose. Additionally, the last-resort measure of the use of direct armed force was provided, but only if it was proven that the hijackers' intent was to use the aircraft "against human lives" and that the reason behind the use of direct force was to "avert the imminent danger." A ticking bomb scenario is thus intrinsic to this law, which regulates a situation of urgency and imminence where the measure to be used, though infringing upon individuals' rights, would ultimately result in lesser harm. It is an atypical ticking bomb scenario, though, since, contrary to the traditional understanding of it, here there would be no terrorist under detention whose knowledge could avert the attack. But, for comparative purposes, we will consider the urgency of the situation, the endangerment of a high number of civilians, and the lack of other alternative measures to suffice in the classification of the situation presented in the law as a ticking bomb scenario.

It is in particular the third paragraph, on the permissibility of shooting down a plane, which caused significant debate after the adoption of the law by the German Parliament. Doubts about the constitutionality of Section 14.3 were expressed and were even raised by then-President of the Federation Köhler, who, upon the signing of the law into effect in January 2005, deliberated "for an exceptionally long time" before ultimately providing his signature. His concern: that human rights would be violated because of the "sacrifice" of the passengers aboard the hijacked plane to save others

[395] Aviation Security Act (Luftsicherheitsgesetz) *for translation*: *Judgment of the First Senate of 15 February 2006* [2006] German Federal Constitutional Court 1 BvR 357/05.

on the ground. Despite his decision to bring the law into effect, Köhler warned that it could face future challenges before the German Federal Constitutional Court.[396] This is precisely what occurred.

The case that was brought before the German Federal Constitutional Court, challenging the constitutionality of Section 14.3 of the *Aviation Security Act*, was an exception. Indeed, the German system provides that individuals can bring a claim before the Court, but it is necessary for them to be personally, presently, and directly affected by the challenged provision in their fundamental rights. In this case, the six persons who brought the complaint, among which were airline passengers and a pilot, claimed that two of their fundamental rights had been violated: the right to life (Article 2 Paragraph 2 Basic Law) and the right to human dignity (Article 1 Paragraph 1 Basic Law). They challenged the provision for its enabling the German authorities "to intentionally kill persons who have not become perpetrators but victims of a crime."[397] To overcome the obstacle of their rights needing to be directly violated, the complainants argued that, here, no one could, strictly speaking, file a complaint after having their rights violated, because it would be too late.[398] Still, they claimed that the possibility that they could be affected by the measure (i.e., the downing of the plane) was not only theoretical but very much realistic since they frequently used planes for both "private and professional reasons."[399] The Constitutional Court admitted the applicants' complaint. Thus, the Court would have to rule on the constitutionality of Section 14.3 of the *Aviation Security Act in abstracto*, given the absence of any specific application of the law. It would have to decide on the applicants' claim of a violation of their right to life and their right to human dignity because of the possibility in the law of the shooting down of a hijacked plane. Before discussing the Court's reasoning, let us provide an overview of these two fundamental rights, which are truly at the core of the German system.

4.3.1.2. A case about rights: the concept of human dignity in the German system.

The right to life is protected by the German Basic Law in Article 2 Paragraph 2. It reads as follows:

[396] Kai Möller, 'On Treating Persons as Ends: The German Aviation Security Act, Human Dignity, and the German Federal Constitutional Court'; Miguel Beltran de Felipe and José Maria Rodriguez de Santiago, 'Shooting Down Hijacked Airplanes? Sorry, We're Humanists. A Comment on the German Constitutional Court Decision of 2.15.2006, Regarding the Luftsicherheitsgesetz (2005 Air Security Act)' [2007] Bepress Legal Series; Lepsius (n 393).
[397] *Judgment of the First Senate of 15 February 2006* (n 395) para 35.
[398] Möller (n 396).
[399] *Judgment of the First Senate of 15 February 2006* (n 395) para 36.

Article 2 [Personal freedoms]

(2) Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.[400]

As it can be subjected to limitations, the right to life is not absolute, as is, for example, the right to be free from torture. The law can provide for situations where the death of another person would not be unlawful; for example in legitimate self-defense cases. Still, Möller points out how each interference with a constitutionally protected right must respect a fundamental constitutional principle that is enshrined in the Basic Law as a safeguard for individuals' rights: the principle of proportionality. Thus, besides the interference with the right to life needing to be provided by law, it also needs to be proportional: it must have a legitimate objective and be strictly necessary for the pursuit of that objective. This means that, if the same goal could be achieved with a lesser infringement upon individuals' basic rights, then the measure that violates the rights would be deemed unconstitutional.[401] In the *Aviation* case, the applicants challenged Section 14.3 of the *Aviation Security Act* for its alleged violation of their right to life in a manner that was not proportional.

The right to human dignity is protected by the very first Article of the Basic Law, Article 1 Paragraph 1, which provides as follows:

Article 1 [Human dignity – Human rights – Legally binding force of basic rights]

(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

Human dignity is the core pillar of the German system, it lies as a supreme constitutional right and value, and has been understood by the German Federal Constitutional Court as being the "root of all fundamental rights" and the "foundational norm for the entire [German] legal system."[402] Aharon Barak, former Justice of the Israeli Supreme Court and drafter of the majority opinion in the 1999 *Public Committee Against Torture v. Israel* case, analyzed the concept of human dignity and its relevance in German constitutional law. He highlighted three core aspects of the right, which show the "unique normative status" of human dignity in the German system: its absolute nature, its eternal character, and its supreme value.[403]

The right to human dignity, as opposed to the right to life, is *absolute*. The English translation that has been provided above, which is the official translation given by the Federal Ministry of Justice,

[400] Basic Law for the Federal Republic of Germany 1949.
[401] Möller (n 396).
[402] Bäcker (n 1) 282.
[403] Aharon Barak (ed), 'Human Dignity in German Constitutional Law', *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge University Press 2015) ch 13, para 1, sect B, 227ff.

actually does not render justice to the uniqueness of human dignity, which is more than "inviolable": it is "untouchable." This is the supposed correct translation from the German word "*unantastbar*" that many scholars point out.[404] Consequently, as it is untouchable, human dignity benefits from the highest degree of protection: it cannot be interfered with, nor limited, nor balanced with other rights, just as, in principle, is the right to be free from torture as protected by international law. Some disagree with the absolute nature of human dignity, viewing it as rather relative, especially in matters dealing with security where the balancing between rights would be required. Nevertheless, in the German system and through the precedents of the German Federal Constitutional Court, human dignity cannot be weighed against other rights.[405]

Second, the right to human dignity is *eternal*, meaning that no constitutional amendments can be made to Article 1(1). This is provided in Article 79(3) of the Basic Law, which describes as "inadmissible" any amendment to the principle contained in the first article:[406] if one wanted to amend Article 1(1), a new constitution would have to be adopted, thus potentially disrupting the entirety of the German system. This is an indication of the importance and uniqueness of human dignity in Germany. Furthermore, Barak notes how the presence of so-called "eternity clauses" in constitutions is quite rare: one can often find such clauses that dictate the form of government, whether a federation, a republic, a democracy, etc. The Constitution for the Italian Republic, for example, in its Article 139 provides that "the form of Republic shall not be a matter for constitutional amendment."[407] But the German Basic Law is unique in that it is a fundamental right that is contained in an eternity clause.

Third, the right to human dignity is at the top of the hierarchy of rights and values protected by the Basic Law; it is *supreme*, unlike in any other constitution. The Constitution of the Republic of South Africa does, too, provide that it is based on the founding value of human dignity, but alongside it are equality, human rights, and individual freedoms.[408] In the German constitutional system, human dignity stands alone as the "heart and soul,"[409] the founding pillar of all other rights. The reason behind the importance of human dignity lies in the willingness to ensure that the awful deprivation of human dignity by the Nazi regime during the Holocaust would never and could never be repeated in Germany.[410] The commitment to human dignity also represented a promise for the future when the Basic Law was adopted in 1949.[411] Indeed, the right to human dignity is comprised both of a positive

[404] Barak (n 403) ch 13, para 1, sect B, 227; Möller (n 393).
[405] Bäcker (n 1) 87-89.
[406] Basic Law for the Federal Republic of Germany.
[407] Constitution for the Italian Republic 1948.
[408] Constitution of the Republic of South Africa 1996 Chapter 1 Article 1(a).
[409] Bäcker (n 1) 86.
[410] Barak (n 403) ch 13, para 1, 227-231.
[411] Matthias Mahlmann, 'The Basic Law at 60 – Human Dignity and the Culture of Republicanism' (2010) 11 German Law Journal 9.

and a negative dimension. Not only does Article 1(1) require the State to "respect" individuals' human dignity; it also requires it to "protect" it, thereby mandating the State to take positive action to make sure that no third parties violate this fundamental, untouchable, supreme right. It is in this sense that Mahlmann speaks of a "promise": the State's express commitment to taking action to create a "republican culture of respect" and tolerance.[412]

But what constitutes human dignity? How can we define this right and what falls under the scope of its protection? Courts usually interpret human dignity in quite a narrow manner, since any and every limitation of it would be ruled unconstitutional.[413] But there is some uncertainty as to its definition.[414] Even more so, there is a certain debate about whether human dignity constitutes solely a "guiding principle" in the German system or an actual legally binding provision.[415] If one wanted to define human dignity in a negative manner, one could hold that an individual would be deprived of dignity if tortured, discriminated against, or subjected to degrading treatment or punishment. Defining human dignity in a positive manner is perhaps a more complex endeavor, but raises nonetheless important questions about ethics, morality, and human nature. For some, human dignity is strictly connected to human nature, as it depends upon individuals' rationality, freedom, and sense of morality. Each human being possesses human dignity, and no discrimination based on sex, religion, age, ethnicity, or citizenship can be made. "Human dignity cannot be waived, lost or expunged," writes Barak; it is inherent to all individuals.[416] For others, human dignity is inextricably linked to having legal recognition and possessing a number of essential inalienable rights, such as the right to life, the right to equal treatment, and the right to physical integrity.[417] Another frequent definition of human dignity is proposed on the basis of the *Objektformel*, the "object theory" that was developed by German jurist Günter Dürig. Departing from the second Kantian categorical imperative, the "principle of humanity,"[418] Dürig defined limitations to human dignity as situations where persons are viewed and treated as objects or means to fulfill another person's goal, and not as ends in and of themselves. The German Federal Constitutional Court has also come to embrace the object theory ever since the 1970s, understanding the existence of an infringement to human dignity where individuals are treated as mere objects, in particular objects of the State.[419] As we will see, once again

[412] ibid.
[413] Möller (n 396).
[414] ibid.
[415] Enders (n 403) 282.
[416] Barak (n 403) ch 13, para 4, sect A, 237.
[417] Christian Hillgruber, 'Human Dignity as a Legal Concept. A Vision of European Culture' (2019) 2 The Legal Culture 113.
[418] "Act in such a way that you treat humanity, whether in your own person or in the person of any other, never merely as a means to an end, but always at the same time as an end." Immanuel Kant, *Groundwork of the Metaphysics of Morals* (James W Ellington tr, 3rd ed., Hackett 1993).
[419] Barak (n 403) ch 13, para 3, sect A, 235-236; Izabela Bratiloveanu, '"Objektformel" - Eventual Acts of Damage to Human Dignity' (2014) 8 AGORA International Journal of Juridical Sciences 19; Mahlmann (n 411).

in its *Aviation Security Act* decision, the Court relied on the *Objektformel* to decide on the subsistence of a violation of human dignity due to Section 14.3.

4.3.2. The *Aviation Security Act* case: the Constitutional Court's judgment.

To better examine the Federal Constitutional Court's reasoning, let us briefly summarize the complaints of the applicants regarding Section 14.3 of the Aviation Security Act. The applicants complained about violations of their basic rights: their right to life and their right to human dignity. They considered unconstitutional the power given to the State to "sacrifice" the persons onboard the plane, to "protect a majority of its citizens by intentionally killing a minority," and therefore to weigh the life and human dignity of some against the life and human dignity of many. They deemed Section 14.3 to treat the passengers of a hijacked plane as "mere objects," stripping them of their human dignity. Besides alleging the unconstitutionality of the norm because it violated basic rights (Article 1(1) and Article 2(2)), the applicants complained about the violation of other provisions of the Basic Law which establish the competencies to be divided between the Federation and the States (*Länder*). In particular, Article 35(2) and Article 35(3) provide that it is the responsibility of the *Länder* to "maintain or restore public security or order," to control the police forces, and to prevent and thwart terrorist attacks, with the Federal police only having a role of supplementary assistance to the State authorities. It was argued that Section 14.3 was unconstitutional because it gave the Federation the power to deal with such matters. Additionally, a violation of Article 87a(2) was raised. Article 87a provides for the Federation's possibility to employ the Armed Forces for defense purposes, but only as allowed by the provisions of the Constitution. It was deemed that the scenario regulated by the law did not meet the requirements of Article 87a.[420] The respondents, which included the Federal Government and the Bundestag rejected all of the petitioners' claims raising issues with the constitutionality of Section 14.3. They denied any infringement of the passengers' right to human dignity, deemed lawful and constitutional the violation of their right to life due to a "realistic" danger, and considered the principle of proportionality to have been respected by the law, thereby guaranteeing that only the least intrusive measures would be taken. Finally, they held that the adoption of Section 14.3 was well within the prerogatives of the Federation, as established by the Basic Law.[421]

After having expressly accepted the admissibility of the constitutional complaint, the Constitutional Court went on to discuss its decision, which it divided into two main questions: first,

[420] *Judgment of the First Senate of 15 February 2006* (n 395) para 35-43.
[421] ibid para 44-55.

a formal one, about whether the Federation possessed the competence to enact such legislation; second, a more substantive one, about whether Section 14.3 violated the complainants' right to life and to human dignity. It would start by addressing the formal issue of legislative competence before delving into the provision's potential encroachment upon fundamental rights.[422]

The Court ruled that the German Federation lacked the competence to enact Section 14.3 of the *Aviation Security Act*. The Court held that the prevention and neutralization of a terrorist attack did not fall under the concept of "defense" which enabled the Federation to employ the Armed Forces under Article 87a. Moreover, it maintained that Articles 35(2) and 35(3) strictly limited the Federation's power to providing additional assistance to the Länder police and that in no way could it authorize the Federal Police or Armed Forces to gain additional competencies, even if the emergency situation was particularly exceptional and severe. Thus, in adopting Section 14.3, the Federation had exceeded the powers given to it by the Constitution.[423] The provision was thus unconstitutional, so, formally speaking, the Court could have concluded its ruling here. Nevertheless, it decided to go further and explicitly examine the issue of the violation of the right to life and human dignity, which represented the most important part of its decision.

The finding of the Court was that Section 14.3 was incompatible with both Article 2(2) and Article 1(1) of the Basic Law because it gave the power to the Armed Forces to shoot down a hijacked plane with innocent passengers onboard "who [had] become victims of an attack."[424] The Court started by discussing its approach to the rights violated, reiterating the importance of the right to human dignity for the German constitutional system, where it lies as the "supreme value." It recognized how human dignity is inherent to each person and is unwavering. Furthermore, underlining the connection between the right to life and the right to human dignity, the Court explained that, though interferences with the right to life are allowed if provided by law, these always have to be interpreted through the concept of human dignity. The Court then recalled the positive and negative dimension of the right, where not only the State is prohibited from encroaching upon human dignity, but it is also required to take action to ensure its effective protection. Relying upon the above-mentioned "object theory," the Court acknowledged once more that, above all, the objectification of individuals by the State is a treatment incompatible with human dignity.[425] As mentioned, Section 14.3 provided for the possibility of the Minister of Defense to order the downing of a hijacked plane if necessary to save a higher number of lives on the ground. The Court found this ticking bomb scenario provision to be absolutely in contrast with this interpretation of human dignity:

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[422] ibid para 88.
[423] ibid para 89-117; Lepsius (n 393); Möller (n 396).
[424] *Judgment of the First Senate of 15 February 2006* (n 395) para 118.
[425] ibid para 121.

> "In such an extreme situation, which is, moreover, characterised by the cramped conditions of an aircraft in flight, the passengers and the crew are typically in a desperate situation. They can no longer influence the circumstances of their lives independently from others in a self-determined manner.
> This makes them objects not only of the perpetrators of the crime. Also the state which in such a situation resorts to the measure provided by § 14.3 of the Aviation Security Act treats them as mere objects of its rescue operation for the protection of others. […] Due to the circumstances, which cannot be controlled by them in any way, the crew and the passengers of the plane cannot escape this state action but are helpless and defenceless in the face of it with the consequence that they are shot down in a targeted manner together with the aircraft and as result of this will be killed with near certainty. Such a treatment ignores the status of the persons affected as subjects endowed with dignity and inalienable rights. By their killing being used as a means to save others, they are treated as objects and at the same time deprived of their rights; with their lives being disposed of unilaterally by the state, the persons on board the aircraft, who, as victims, are themselves in need of protection, are denied the value which is due to a human being for his or her own sake."[426]

Section 14.3 was thus incompatible with the right to human dignity, and in connection to it, the right to life, because it blatantly treated the passengers aboard the plane as mere objects: not only were they considered to have become part of the hijackers' weapon, despite their innocence and their being victims of the hijackers' plan, but, were the downing of the plane to occur, they would also be objectified by the State. Given the impossibility for them to "consent to being shot down," the passengers would be deprived of their right to self-determination, a fundamental dimension to human dignity. Furthermore, the passengers' defenseless position would mean that the State would have failed to protect them. But the decision to shoot down the plane would result in an even more significant encroaching upon their right to life and human dignity by the State. The Court also rejected the idea that the sacrifice of innocent lives because they were "doomed anyway" would be a lesser infringement of human dignity. Indeed, it maintained that the right to human dignity cannot be measured in time; it is inherent to all, regardless of the duration of their life: "human life and human dignity enjoy the same constitutional protection regardless of the duration of the physical existence of the individual human being."[427]

The Constitutional Court proceeded in its reasoning by examining the compatibility of Section 14.3 with the principle of proportionality, which the provision had attempted to embody by providing that only the measures that were least intrusive, strictly necessary, and not out of proportion compared to their purpose, would be legitimate. In addition, the law provided that the downing of a hijacked plane could be carried out only as a means of last resort once it could be ascertained that it was to be

[426] ibid para 123-124.
[427] ibid para 131-135.

used against human life.[428] Despite the legislator's attempt to render the law reasonable and proportionate, the Court still found an issue with the provision, which was not found to meet the strict requirements of proportionality. Indeed, an excessive degree of uncertainty would always loom over the authorities when deciding whether to shoot down the hijacked plane. The Court found it impossible to "correctly assess" and obtain "a complete picture of the factual situation." The requirement of Section 14.3 for the assumption that the aircraft would be used as a weapon against human lives could never be sufficiently satisfied. It would always be a matter of speculation, of "suspicion." Complete certainty about the intent of the pilots could never be reached. And, in addition, the requirement for the measure to be a means of last resort could, similarly, not be met: the plane could be shot "too early," the pilots could change their course, and the use of direct armed force could "no longer be required" to save either the innocent passengers onboard or the innocent persons on the ground.[429] For Lepsius, this conclusion by the Court was inevitable, as "conjecture does not suffice as a rationale for the most severe infringement of civil rights, namely death."[430]

Additionally, the Court chose to distinguish between two scenarios: the first, which we have just examined, consisted of the hijacked plane being boarded by both the hijackers and innocent, defenseless passengers; in this case, shooting down the plane would be a blatant violation of the passengers' right to human dignity in connection with their right to life. But the second scenario led the Court to reach a different conclusion. Indeed, in a situation where the hijacked, weaponized plane was to be boarded and maneuvered merely by the hijackers or other persons voluntarily involved in the terrorist plot, Section 14.3 would be deemed compatible with Article 1(1) and Article 2(2). In this case, the Court maintained, the downing of a plane would not encroach upon the hijackers' human dignity. Given their intent to break the law and cause severe harm to a large number of lives, they would not be treated as objects by the State, but the downing of the plane would correspond to them being held responsible for their criminal conduct. The Court also found Section 14.3 to be compatible with the principle of proportionality, as the last-resort decision to shoot down the plane with only the hijackers on board would be proportionate to the legitimate goal of saving human life and the uncertainty mentioned above would be consistently diminished. This view was in line with prior cases in which the Court had ruled on the legitimacy of the so-called "final life-saving shot," a line of defense similar to self-defense, which allows authorities to resort to lethal force against an attacker in exceptional circumstances, where their life or that of a hostage are at risk. Nevertheless, for failing

[428] Aviation Security Act (Luftsicherheitsgesetz) Section 14.3.
[429] *Judgment of the First Senate of 15 February 2006* (n 395) para 125-133.
[430] Lepsius (n 393).

to acknowledge the right to human dignity of the hijackers, the Court received some criticism following the rendering of its decision.[431]

Regardless of this last finding, the German Federal Constitutional Court was clear in stating that Section 14.3 was unconstitutional, and, therefore, null and void. The German Federal authorities did not have the power to shoot down a plane and kill the innocent passengers onboard it, if necessary to save a greater number of persons on the ground. The Constitutional Court thus decided this case based on a very principled approach, stating that there were some actions that could never be tolerated, no matter the threat faced by several human lives. The boundary of the State treating other individuals (in particular desperate, helpless, and in defenseless situations) as objects instead of persons with human dignity could never be crossed. In its decision, the Court understood the right to life as strictly connected to the right of human dignity, whose protection is absolute. As Lepsius underlines, this is a frequent approach of the Court, which, by establishing a connection between a basic right and human dignity, was able to "establish a core protection" and thus be stricter in its assessment of potential violations of rights.[432] Thus, the life of individuals, in conjunction with their human dignity, cannot be balanced, nor weighed, against the life and dignity of other individuals. No matter how many people could be saved by the downing of a hijacked plane, the State cannot kill innocent civilians: this would entail treating them as mere means for the fulfillment of the State's objective (that of the neutralization of the terrorist attack and the protection of the persons on the ground), something which is incompatible with the Court's human dignity approach. A ticking bomb scenario such as that regulated in Section 14.3 could not justify any violation of the right to life and the untouchable right to human dignity. This is not the only decision of the Court where it has had to address the balance between security and liberty, and where it unequivocally sided with individuals' liberties. Indeed, a number of other anti-terror laws have been rendered unconstitutional by the Court.[433]

The German Court positioned itself very strongly in the defense of the supreme value of human dignity, which, as we have seen, lies at the foundation of the German constitutional system. It rejected any balancing of human dignity with other fundamental rights, but its view is not shared by all jurisprudence. Let us recall the 1999 decision of the Israeli Supreme Court in *Public Committee Against Torture v. Israel*. There, the Court had to rule on the constitutionality of certain interrogation measures used by the Israeli General Security Service. Torture was expressly rejected, but the Israeli Court, in reflecting upon the "rules for a reasonable interrogation," expressly recognized the need to balance between clashing values: the "desire to uncover the truth" to protect Israeli security, and the

[431] Hufnagel (n 393); Möller (n 396); *Judgment of the First Senate of 15 February 2006* (n 395) para 140-145.
[432] Lepsius (n 393).
[433] Beltran de Felipe and Rodriguez de Santiago (n 396).

"need to protect the dignity of the individual" under interrogation. Thus, for the Israeli Supreme Court, the dignity of individuals was not considered to be an absolute right: though it rejected the use of torture, it accepted that an interrogation (even if proportionate and necessary) "may infringe the human dignity and liberty of a subject."[434]

A balancing between the life and dignity of some human beings against the life and dignity of others, a task which the German Court had strongly rejected, was also made by the Israeli Supreme Court in another judgment regarding the 2006 *Public Committee Against Torture in Israel and Others v. Government and Others* case. There, the matter was about the constitutionality of a policy of targeted killings and preventive strikes by the Israeli Government to kill terrorists in the regions of Judea, Samaria, and the Gaza Strip. The issue was that these measures often caused the harming or killing of innocent civilians: consequently, were they lawful? In a manner similar to the *Aviation Security Act* case, the question underlying this case was whether a ticking bomb scenario warranted the sacrifice of the life of a number of innocent civilians in order to save a higher number of individuals. In the most exceptional circumstances, could a balance between life and dignity be made? This is a central question in the contemporary debate on security.[435] While the German Federal Constitutional Court responded in the negative, the Israeli Supreme Court found that there were no alternatives besides performing a balance and carrying out a value-based proportionality test. It thus found that the killing of innocent people was justified, and the preventative strike proportionate if "the benefit stemming from the attainment of the proper military objective [was] proportionate to the damage caused to innocent civilians harmed by it."[436] Therefore, besides the German Court's principled, human dignity-based approach, which is understandable given the unique normative status of human dignity in the German system, other jurisdictions can offer a less comprehensive and absolute protection of this right, adopting rather more pragmatic and realistic approaches to issues of national security.

[434] *Public Committee against Torture v. Government of Israel* (n 97) para 22.
[435] Möller (n 396).
[436] *Public Committee Against Torture in Israel and Others v Government of Israel and Others* [2006] Supreme Court of Israel HCJ 769/02 para 45.

5. The ticking bomb argument under review

Until now, we have examined the theoretical and practical ramifications of the ticking bomb scenario. We have looked at how scholars or governments can use the ticking bomb hypothetical as an argument in the liberty *versus* security debate to justify the exceptional infringement of certain fundamental rights for reasons of national security, such as the right to be free from torture and the right to life and human dignity. Similarly, we have analyzed the different opinions of the highest courts on the matter: some, tolerating the violation of the absolute ban on torture if necessary because of ticking bomb circumstances, others, firmly rejecting the possibility that even the most severe terrorist threats would allow a weighing of rights between individuals. Two diametrically opposed conclusions which nonetheless departed from similar questions: can grave and imminent threats to national security warrant the violation of the most fundamental, absolute human rights? If so, to what extent? These are the essential questions that have accompanied us throughout this research on the ticking bomb exception to torture, and, more generally, to human rights. However, though one significant side of the debate on torture extensively relies on the consolidated ticking bomb argumentation, this chapter will be interested in the other side, and its dismantling of the very assumptions of the ticking bomb scenario, in order to highlight its fallacies and limitations. Additionally, having extensively focused on the arguments for an exceptional permissibility of torture, it will review the efficacy of torture as a practice as well as reflect upon the consequences of a legalization and institutionalization of exceptional, ticking bomb torture. Lastly, a final general discussion of the complex legal, moral, and ethical dilemma between security and human rights beyond issues of torture will be proposed.

5.1. Why the "ticking bomb" exception does not work

5.1.1. A hypothetical and misleading thought experiment.

For all the proponents of the ticking bomb argument, there are equally vocal opponents to it who have tasked themselves with de-constructing all the assumptions on which the argument relies. This is done to show its fallacies, weaken its strength in the debate, and support the stance of an unconditional ban on torture. We have already overseen the key aspects of the ticking bomb scenario: the existence of a threat or attack, the essential time factor of imminence, the endangerment of a high number of innocent civilians due to the attack, the detention of a suspected terrorist in possession of

information crucial to prevent or neutralize the attack, and his torture (or killing, in the *Aviation Security Act* case) because of the absence of alternative solutions to save lives and guarantee public security.[437] Though real ticking bomb scenarios can occur, many view the combination of all of these factors as extremely rare occurrences, and, for some, thinking about ticking bomb scenarios remains a merely hypothetical, even misleading, exercise.[438] Shue, for instance, rejects any justification for torture on the basis of the ticking bomb argument, which he considers to be misleading and detached from reality due to its errors of "idealization" and "abstraction." The scholar explains that the ticking bomb scenario embellishes reality in a way that could never realistically be reproduced. Thus, it is an artificial, man-made construct that serves no purpose in the debate on torture. On the contrary, it compromises the reasoning of those who rely on its assumptions to make their case: "artificial cases make bad ethics," Shue holds.[439] How can one decide on the justification of torture in exceptional circumstances if these circumstances are so detached from reality? The deceptive nature of the ticking bomb scenario is also highlighted by scholars such as Mayerfeld and Luban, with the latter qualifying it as an "intellectual fraud" operating a misrepresentation of reality.[440] Overall, a great number of scholars and experts denounce the general acceptance and spreading of the ticking bomb argument for its pretending to mirror reality. They view ticking bomb cases as imaginary scenarios, existing in fantasy, and entrenched with elements of science fiction.[441] The popularization of the ticking bomb scenario in well-known TV series, with the torturer being praised as a hero, has done nothing to prevent a further detachment from reality. Thus, first and foremost, what would be needed before jumping to conclusions about the exceptional permissibility of torture is gaining awareness about the empirical probability of ticking bomb scenarios. As Brecher puts it, it would be "intellectually and politically irresponsible" to "use a hypothetical example as though it were a real case without first considering very carefully its plausibility in the real world."[442]

Textbook ticking bomb scenarios can and have occurred. Scholars such as Gross refute the claim that they are entirely unrealistic: it would be naïve to entirely dismiss them as fantasy.[443] Still, they recognize that, in actuality, the probability of their materializing is quite small. Despite this, the ticking bomb argument represents the foundation of all legal and moral arguments in favor of the violation of fundamental rights, even those with the qualification of *jus cogens* such as the absolute

[437] Bufacchi and Arrigo (n 26).
[438] Association for the Prevention of Torture (n 92); Farrell, 'The Ticking Bomb Scenario' (n 3); Mayerfeld (n 52); Bufacchi and Arrigo (n 26); Luban (n 7); Shue (n 24).
[439] Henry Shue, 'Torture in Dreamland: Disposing of the Ticking Bomb' (2006) 37 Case Western Reserve Journal of International Law 231.
[440] Luban (n 7); Mayerfeld (n 52).
[441] Bufacchi and Arrigo (n 26).
[442] Brecher (n 6) ch 1, 9.
[443] Gross (n 29); Belvisi (n 90).

ban on torture. For Farrell, ticking bomb scenarios only force individuals and academics to confront themselves with a "poor thought experiment" proposed by governments, which, instead of relying on rationality, aim at eliciting strong emotional reactions from people, to reach the conclusion that, yes, in *extrema ratio*, torture is tolerable. The author is further concerned with the implausible nature of the ticking bomb argument because it detaches individuals from the actual, practical implications of allowing torture. She explains that, while the ticking bomb is a hypothetical that can persist in the debate, torture, once authorized, is real.[444] Additionally, the scenario will never be as simplified as on television: the clear-cut dichotomy between the "evil terrorist" and the "heroic torturer" who must be justified in his violation of basic human rights carried out for the greater good is greatly exaggerated and dramatized. The support that this scenario has gained among societies thanks to its popularization, in particular in the United States, is thus at its root a support for a fictional situation. Once again, basing one's reasoning on an artificial case is likely to lead to poor moral, legal, and ethical conclusions. But beyond the theoretical debates considered to be flawed from the very beginning, scholars raise issue with the fact that the ticking bomb argument can have practical implications, as its proponents have used this inadequate line of reasoning to shape policies and justify the use of extreme measures (see the High-Value Detainee Program in the United States or the Landau Commission Guidelines in Israel).

There is thus significant resistance to the assumptions of the ticking bomb scenario. The likelihood of all of them occurring at the same time is quite small, making the scenario unrealistic. But even if taken individually, the assumptions appear to be flawed and incomplete. Not only do "artificial cases" make "bad ethics," but so do inconsistent and inadequate ones. Therefore, to further understand scholars' claim that ticking bomb scenarios are rooted in fantasy, and are proposed by governments to trick the branches of power and public opinion into passing emergency legislation and accepting exceptional torture, let us go through its assumptions and attempt to view these critically. The Association for the Prevention of Torture (APT) has analyzed each of the assumptions of the scenario to challenge them individually in order to prove the many fallacies and loopholes of the ticking bomb argument.[445]

As one of the first requirements of the ticking bomb scenario is for a threat or an attack to be imminent before one can torture the suspect, the APT asks "how imminent?" In the textbook example of the scenario, the answer would be minutes: the bomb is ticking and needs to be defused. But this would entail a too narrow understanding of the ticking bomb scenario. In the previous chapter, we have seen how certain proponents of the ticking bomb discourse have attempted to remedy the

[444] Farrell, 'The Ticking Bomb Scenario' (n 3).
[445] Association for the Prevention of Torture (n 92).

uncertainties surrounding this question, as there is no precise definition of what "imminent" really entails. Some have attempted to extend the time frame of ticking bomb scenarios beyond a period of two hours, raising serious questions as to the real immediacy of the situation at hand.[446] Others have found differing solutions. The Landau Commission, for example, in its 1987 Report chose to do so by entirely setting aside the issue of time when considering severe threats to Israeli public security.[447] In this way, there was no need for further clarification of this assumption. The Israeli Supreme Court, in the *Public Committee Against Torture v. Israel* case of 1999, did not avoid confronting the matter but did not really provide precise elucidations as to the timeliness of the attack either. Indeed, finding that "moderate physical pressure" could be used if necessary in ticking bomb situations, the Court accepted that imminence could mean "in a few days" as well as "in a few weeks."[448] This is far detached from the understanding that torture is needed because a bomb will detonate at a pressing time. The issue of how imminent an attack must be to fall under the definition of a ticking bomb scenario was thus left quite open by the Court. As no clear-cut time frame has been accepted in the debate, the question of how urgent the attack must be to warrant the torture of a terrorist suspect remains pending. It is an uncertainty that, for the time being, finds no true elucidations.

Moreover, the scenario requires a significant number of people to be under threat of harm or killing. Consequently, the APT asks "how many lives?" How many lives need to be threatened to make the torture of an individual justifiable or moral? Belvisi does not shy away from stating that "the dignity and life of many innocent people are of greater value than the dignity and life of one guilty person."[449] Luban, on the other hand, criticizes the idea of deciding whether to violate a right as fundamental as the right to human dignity or the right to be free from torture simply by "running the numbers."[450] The German Federal Constitutional Court, too, rejected the weighing of lives against others in the *Aviation Security Act* case: no matter the number of people on the ground that would be endangered or killed by the hijacked plane, one could not weigh the lives of some against the lives of many.[451] "Running the numbers" was not an option when it came to fundamental basic human rights. Conversely, for a more pragmatic Israeli Supreme Court in 2006, the killing of some innocent lives could be justified if a cost-benefit analysis of the State's operation found that the benefits for national security of a preventative strike exceeded the costs.[452] Still, where does one draw the line? Are ten, twenty, one hundred lives worth the sacrifice of one life or the torture of one human being?

[446] Ginbar (n 95) ch 9, sect B, para 1b, 122.
[447] Landau Commission of Inquiry (n 223).
[448] *Public Committee against Torture v. Government of Israel* (n 97) para 34, 31.
[449] Belvisi (n 90).
[450] Luban (n 7).
[451] *Judgment of the First Senate of 15 February 2006* (n 395).
[452] *Public Committee Against Torture in Israel and Others v. Government of Israel and Others* (n 436).

Sometimes, perhaps, it is normal not to know how to answer such complicated questions, as "there are situations so monstrous that the idea that the processes of moral rationality could yield an answer in them is insane."[453] Yet, the ticking bomb scenario precisely forces us to make calculations about the value of human life.

Additionally, given the requirement that the terrorist suspect behind the attack possesses crucial information to avert it, the APT raises a great issue as to the certainty behind the fact that the suspect would be actually involved in the attack (1), that he would possess critical knowledge about it (2) and that he would reveal truthful information (3). Bufacchi and Arrigo agree: though the security services do have intelligence tools at their disposal to assess the level of threat represented by a suspected terrorist, "intelligence is never infallible." The suspect could be innocent, he could not possess any information, and he could falsely confess, whether intentionally or out of desperation due to being subjected to violent measures of interrogation.[454] In a similar way to the reasoning of the German Federal Constitutional Court in the *Aviation Security Act* judgment,[455] we can thus challenge the ticking bomb argument for its inherent element of uncertainty: just as the German official ordering to shoot down an allegedly hijacked plane would have no real certainty about the trajectory of the plane, the intent of the hijackers, or the probability of the realization of their plan, an investigator wanting to torture a terrorist suspect could not be entirely confident about having detained the actual perpetrator, or about him possessing the information needed to ensure the timely defusing of the bomb. Mayerfeld shares the view that the ticking bomb argument presupposes an element of certainty that cannot be attained and, thus, defines it as "unrealistic." He is further concerned with the applicability to ticking bomb torture cases of the "proof beyond reasonable doubt" standard. This standard is sufficient to convict criminals during criminal proceedings. Convictions can always be reversed and prisoners, if found to be innocent at a later date, can be released and regain their freedom. But one cannot undo the physical and psychological consequences of torture, which, once practiced, is likely to scar the individual for life, even if eventually found innocent. Furthermore, the torturous interrogation of innocent people is likely to engender a vicious cycle either of continuous violence or coerced confessions, as the torture would continue until a confession, even if false, would be extracted. To avoid the torturing of innocent individuals, Mayerfeld thus considers that only one standard must be applied: the utmost certainty of the suspect's culpability.[456] However, once again, full certainty is usually impossible to obtain in ticking bomb cases, often because of the time factor which makes it very difficult for investigators to find sufficient evidence that would render them

[453] Luban (n 6); Bernard Williams and JJC Smart (eds), 'A Critique of Utilitarianism', *Utilitarianism: For and Against* (Cambridge University Press 1973) 75, 93.
[454] Bufacchi and Arrigo (n 26); Kreimer (n 330).
[455] *Judgment of the First Senate of 15 February 2006* (n 395).
[456] Mayerfeld (n 52).

certain about a suspect's culpability. This renders the torture of innocent people a more than realistic possibility. The ticking bomb scenario being tied to the torture of the innocent is something that began in the very years where it was conceptualized: already during the Algerian War many innocent individuals were detained and tortured on the suspicion of even a remote involvement with terrorist groups. Unfortunately, as we have examined before, this has continued throughout the years, as human rights organizations have repeatedly denounced the United States (during the War on Terror) and Israel (in the Occupied Palestinian Territories) for their unjustified detention and torture of innocent civilians.[457]

Finally, the Association for the Prevention of Torture challenges the claim that torture would effectively help to obtain information from the suspected terrorist, raising the question of the actual efficacy of torture. Does torture really work? Provided that the suspect under detention is indeed a terrorist with time-sensitive information about an imminent attack, can torture help extract that information and successfully lead to a neutralization of the attack? Additionally, the APT raises an issue with the ticking bomb scenario's assumption that no alternative, "more humane" means would be available to the investigators besides torture (or, in the *Aviation* case, the killing of innocent passengers). Are intelligence methods so limited that wiretaps, surveillance, search warrants, or simply non-coercive interrogation methods are not accessible?[458] A thorough discussion on the efficacy of torture as an interrogational practice and whether alternatives to it exist will thus be the focus of our next section.

5.1.2. Does torture really work?

Reflecting upon whether torture works is necessary when confronting oneself with the ticking bomb scenario and attempting to formulate an opinion on the matter. As the scenario serves as a justification for the use of such a violent and degrading practice, one can only hope that the answer to the question "does torture work?" will be affirmative. Otherwise, in the absence of a reasonable explanation, the violation of this absolute fundamental right would be gratuitous, cruel, and sadist.

The reasoning behind the use of interrogational torture is that, through fear and coercion, whether psychological or physical, torture can allow investigators to extract valuable information from terrorist suspects. This is because those who deem torture to be effective consider the tortured individual to be more likely to speak up than to endure physical or mental pain such as beatings, sleep

[457] Branche (n 101); Amnesty International (n 72); Human Rights Watch (n 71); Human Rights Watch (n 363); Mayerfeld (n 52).
[458] Association for the Prevention of Torture (n 92).

or sensory deprivation, threats and humiliations, etc. Thus, it is evident that torture has a significant deterrent effect: not only pain but also the threat of being subjected to it might be enough to extract a confession from a suspect. Blakeley highlights the existence of a number of key reasons behind the support for torture, such as the idea that it improves security and that it fosters stability. Those who endorse torture thus believe that it can allow to obtain crucial information about threats, which can, in turn, strengthen States' security. To make their claim, they rely on the ticking bomb argument, where torture becomes necessary if one wants to neutralize the threat. Those who hold that torture can improve States' stability believe so because they view torture as an instrument of state power and control, used to "discipline the population and suppress potential or actual political opposition." In other words, torture is a tool used by the regime's elite to maintain the status quo and quell dissent.[459] This view in support of the efficacy of torture is frequent among authoritarian or dictatorial regimes. However, given that our research mainly focuses on liberal-democratic regimes and their use of interrogational, ticking bomb torture, we will set this aspect aside, though it remains interesting to take it into consideration when reflecting upon the usefulness and effectiveness of torture.

The conviction that torture can improve security prompted security organizations such as the Israeli General Security Service (GSS) or the U.S. Central Intelligence Agency (CIA) to promote programs of coerced interrogation techniques that limited the fundamental rights of suspects in return for a successful fight against terrorism and enhanced security of the general public. The GSS and the Israeli State in 1987 and 1999 strongly maintained that the use of "moderate physical pressure," i.e., interrogational torture, was an indispensable method on which the GSS investigators relied to maintain public security. Were they to be deprived of this effective method of intelligence gathering, their work would be strongly hindered. Even the Israeli Supreme Court acknowledged that a significant number of attacks had been prevented thanks to the measures used by the GSS, though it refrained from qualifying them as torture.[460] So, too, did U.S. officials, who found the use of Enhanced Interrogation Techniques in detention sites such as Guantánamo Bay to be essential because the detainees possessed information about potential terrorist activities and future attacks.[461]

Some scholars find torture to be an effective method to elicit confessions. For example, for Belvisi interrogational torture works as a (strong) incentive for terrorists to give up information. He explains that torture gives the tortured suspect the power to stop his torture by deciding to reveal the information that the interrogators look for. He rejects the idea that suspects are "defenseless": they have as much responsibility as the torturer, as they have placed themselves in that situation for

[459] Ruth Blakeley, 'Why Torture?' (2007) 33 Review of International Studies 373.
[460] Landau Commission of Inquiry (n 223) para 2.16, 16; *Public Committee against Torture v. Government of Israel* (n 97) para 1, 5.
[461] Rejali (n 4) ch 0, pt 8; Pratt (n 366); Blakeley (n 459).

refusing to cooperate.[462] Brecher, too, notes the existence of a line of thought (which he finds deplorable) that holds suspected terrorists accountable for their very own torture: they are at fault for being in that position.[463] Since they know that they are the ones causing their physical or mental suffering, they will more likely confess if they cannot endure the pain any longer. In reality, this argumentation is quite simplistic, because it presupposes not only that the tortured suspect will divulge information, but also that this information will be *truthful*. But the notion that torture is a useful interrogation method because it can allow to extract a truthful confession is contradicted by the notion that torture also generates *false* confessions. All this, taking for granted that the terrorist suspect will choose to talk. The issue is that there is no certainty either way. The only certainty is the violation of the suspect's dignity and basic rights.

As we will discuss, the arguments that challenge the efficacy of torture abound, but, as Levinson explains, "if we could be confident that torture never worked, then there would in fact be nothing to debate."[464] Farrell also adds that perhaps there are such strong norms prohibiting torture at the international and domestic levels because torture exists, and it works.[465] But as the debate continues, scholars and security experts keep attempting to find a clear answer to whether this thousand-year-old practice is effective. Or, alternatively, whether the effectiveness of interrogational torture is so sporadic that no moral or legal arguments could justify it.

Certain instances of allegedly effective torture have been documented in the media. For example, in 2006 President Bush announced that a number of terrorist suspects had been interrogated by the CIA, whether in Guantánamo Bay or other detention facilities in the U.S. or abroad, through what he called an "alternative set of procedures," an additional euphemism for torture besides the term of "Enhanced Interrogation Techniques." He praised these methods for having elicited rapid confessions from suspects and thus for their successful gathering of information which helped avert terrorist attacks.[466] In 2007, Israeli authorities revealed that they had been able to stop a suicide bomber from carrying out an attack in Tel Aviv thanks to the early capture of the attack's perpetrators. Lasson notes that the use of violent physical interrogation methods undoubtedly contributed to the success of their operation.[467] In the same year, a former CIA intelligence agent was interviewed on television and claimed that the torture of an Al-Qaeda member through waterboarding had prevented

[462] Belvisi (n 90).
[463] Brecher (n 6) ch 1, para 3, 10.
[464] Sanford Levinson, 'Slavery and the Phenomenology of Torture' (2007) 74 Social Research 149.
[465] Farrell, 'The Ticking Bomb Scenario' (n 3).
[466] George W Bush, 'President Discusses Creation of Military Commissions to Try Suspected Terrorists' (6 September 2006) <https://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html> accessed 23 January 2024.
[467] Lasson (n 121).

the occurrence of "dozens of attacks."[468] President Trump, too, expressed his support for torture in 2016, in particular defending waterboarding and other "much worse" techniques if the need to extract crucial information arose. His endorsement was much more explicit compared to that of the Bush administration, which preferred using euphemisms and shying away from such blunt statements.[469] In the early years of the War on Terror, in particular, the media in the United States thus reported on the usefulness of torture in countering terrorism. However, a number of scholars have denounced the "embellishing" of the few successful stories on the part of the authorities, who often "cherry picked the successful cases" and presented those that had the highest likelihood of further supporting the use of interrogational torture.[470] Understandably, this greatly swayed public opinion.

However, Mayerfeld adds that even the task of choosing the cases to present to the public must have been difficult, as examples of the effectiveness of torture are, in reality, quite scarce. In earlier chapters, we mentioned how the ticking bomb scenario was born in the context of the Algerian War in the 1950s. Back then, it was common practice to torture anyone who was suspected of having links with the National Liberation Front. But in his study on torture and democracy, going back to the roots of the ticking bomb scenario, Rejali finds no officer to confirm the notion that, during the Algerian War, interrogational torture "produced decisive information that stopped a ticking bomb from exploding."[471] Though some recognize that torture might work in certain exceptional, specific cases, today, the majority of experts denounce the proclaimed effectiveness of torture as an intelligence-gathering method. Simply put, they argue that torture is not reliable and that it is impossible to firmly answer that it does work. If there are cases where torture has been found to effectively lead to strategic information, these are too episodic and "anecdotal."[472] Additionally, oftentimes the cases presented to support the claim that torture works have ended up being disproved.[473] Thus, it is difficult to support a general and decisive claim that torture works. Many scholars hold that, given the cruelty of torture as a practice, its consequent absolute ban, and its greatly

[468] Mayerfeld (n 52).
[469] Farrell, 'The Ticking Bomb Scenario' (n 3); Jenna Johnson, 'Trump Says "Torture Works," Backs Waterboarding and "Much Worse"' *Washington Post* (5 June 2023) <https://www.washingtonpost.com/politics/trump-says-torture-works-backs-waterboarding-and-much-worse/2016/02/17/4c9277be-d59c-11e5-b195-2e29a4e13425_story.html> accessed 23 January 2024.
[470] Kovarovic (n 89); Mayerfeld (n 52).
[471] Rejali (n 4) pt 5, ch 22, para 1.
[472] Brecher (n 6) ch 2, para 3, 26.
[473] This was the fate of a notorious instance of ticking bomb torture against a prisoner named Abdul Hakim Murad, who was tortured incessantly for more than two months by the Philippine authorities. According to the Philippine government, the torture of Mr. Murad was justified by the urgency of the situation because it had allowed to avert the explosion of numerous airplanes and thus to save thousands of innocent civilians. However, it was later shown that the critical information that had allowed the authorities to avert the attack was not extracted during a confession under torture, but rather was found on Mr. Murad's computer. This entirely disproved the claim that ticking bomb torture was an effective means of information gathering. Kovarovic (n 89).

contended efficacy, truly there exists no logical reasoning behind its use.[474] Therefore, let us examine the different points in support of the claim that ticking bomb torture is ineffective.

A central document that greatly contributed to the debunking of the myth of the usefulness of torture as an interrogation technique was the 2014 Senate Intelligence Committee Report on Torture. Its aim was to analyze the use of special interrogation techniques by the CIA since the beginning of the War on Terror. The report found that the Enhanced Interrogation Techniques (EITs) that were used by the CIA against terrorist suspects were in reality not necessary and, above all, "categorically ineffective at acquiring valuable intelligence." This finding entirely contradicted previous CIA claims that new and advanced techniques needed to be introduced in the conduct of interrogations to ensure a more efficient fight against terrorism. Moreover, the report condemned the CIA's inaccurate justification of the use of EITs through unproven claims of effectiveness, as well as its concealing to the administration of the level of brutality of the coercive methods that it had applied. The Senate Intelligence Committee also raised issues with the fact that the violent methods of interrogation were not a means of last resort, as they should have been. Indeed, the interrogators should have begun with the least intrusive methods and proceeded with the Enhanced Interrogation Techniques only once it was evident that the terrorist suspects would not cooperate. Yet, the report found that the detainees were not given a sufficient opportunity to confess without them being subjected to violence and coercion. Still, regardless of whether they were used as a last resort, the final conclusion was that these torturous methods were inefficient: they did not significantly improve the investigators' knowledge about potential or ongoing terrorist attacks, contrary to what many had affirmed before.[475] But why is torture so ineffective?

First of all, there exists no empirically proven "science of torture" which allows to give clear scientific support to the idea that torture works.[476] A thorough debunking of the "folkloric psychological myth" that torture and pain are efficient in breaking the terrorist suspects to confession has been carried out by Professor O'Mara, an expert neuroscientist and researcher on experimental brain. O'Mara's central finding is that torture is not only inefficient but even counterproductive. Indeed, as the aim of the torturer is to obtain information, he must rely on the terrorist suspect's memory and presence of mind. However, O'Mara finds that torturing "inhibits memory." Torture, from waterboarding to sensory deprivation, engenders significant stressors on the mind and the body of the tortured individual, which are found to greatly compromise the brain's ability to recollect data and events. Additionally, not only does memory become blurrier, but the likelihood of the suspect

[474] Farrell, 'The Ticking Bomb Scenario' (n 3); Rejali (n 4); Blakeley (n 459); Mayerfeld (n 52); Bufacchi and Arrigo (n 26); Lasson (n 121); Brecher (n 6).
[475] Farrell, 'The Ticking Bomb Scenario' (n 3); Senate Select Committee, 'The Senate Intelligence Committee Report on Torture: Committee Study of the Central Intelligence Agency's Detention and Interrogation Program' (2014) 113–288.
[476] Rejali (n 4) pt 5, ch 21, para 1.

confessing inaccurate information greatly increases under torture. This can be either because the individual will be willing to confess anything to make the pain cease, or because the pain will have so significantly compromised his cognitive abilities that he will not be able to "distinguish fact from fantasy."[477] This idea that suspects can lie under coercion is frequently found in the literature and in academic debates on torture and is indeed one of the main arguments opposing the use of interrogational torture. First, detainees subjected to torture can provide false information intentionally, in order to deceive their torturers. Langbein indeed notes the possibility that a ticking bomb terrorist might be trained in resisting torture. This has to be taken into account when assessing the efficacy of coercive interrogation.[478] Rodley, too, explains that an expert terrorist who has planted a bomb will know when the bomb will explode and, might be able to endure torture until then. Moreover, it would be easy for him to provide false information and lead the intelligence agents to a false location until the explosion of the bomb.[479] Additionally, one must note that very often terrorist attacks such as those of a ticking bomb nature are not organized by "lone wolves," but rather by networks of terrorists. Thus, it is also possible that the torture of one of the network members might be ineffective in thwarting the terror attack.[480] All these points are to say that, though the torture might not be avoided, its goals might be defeated in a number of ways.

Second, perhaps one of the greatest limitations in the efficacy of torture is that "pain forces the innocent to lie." This is a citation from First century B.C. Roman writer Publilius Syrus.[481] In 18th-century Europe, the liberals fought for an elimination of torture precisely on this same basis.[482] In the 21st century, the claim remains the same by many: torture is an ineffective method of intelligence-gathering because too often it leads to the extraction of false confessions, which can, not only incriminate the innocent but also mislead the intelligence services into wasting significant time and resources. Rejali sums up this essential issue as follows: "the problem of torture does not lie with the prisoner who has information. It lies with the prisoner with no information. Such a person is also likely to lie, to say anything, often convincingly."[483] However, once an individual confesses, especially if considered a terrorist suspect, the probability that the security services will believe him is greater than that of them being skeptical of that information being truthful. Additionally, it has been widely acknowledged that the probability that torture will yield false confessions is greater than that

[477] Moheb Costandi, 'Shane O'Mara's Why Torture Doesn't Work: The Neuroscience of Interrogation' (2016) 2016 Cerebrum: the Dana Forum on Brain Science; Farrell, 'The Ticking Bomb Scenario' (n 2); Shane O'Mara, *Why Torture Doesn't Work: The Neuroscience of Interrogation* (Harvard University Press 2015).
[478] Brecher (n 6) ch 2, para 3, 27-28.
[479] Nigel S Rodley, 'The Prohibition of Torture and How to Make It Effective' (Center for Human Rights, the Hebrew University of Jerusalem 1995); Ginbar (n 94) ch 9, sect B, para 1d, 125.
[480] Association for the Prevention of Torture (n 92).
[481] Lasson (n 121).
[482] Blakeley (n 459).
[483] Rejali (n 4) pt 5, ch 21, para 6.

of it yielding truthful, accurate intelligence.[484] "Faulty intelligence" due to the revealing of inaccurate information was indeed recognized by the U.S. Senate Intelligence Committee as being one essential limitation of the CIA's Enhanced Interrogation Techniques Program. An additional reason behind its inefficacy was the finding that truthful confessions had been extracted without the use of torture, thereby questioning the usefulness of interrogational torture.[485] Thus, once more, false confessions would result in a great waste of resources on the part of the intelligence agencies, which might sacrifice essential time in attempting to defuse a non-existent ticking bomb. The counterproductive nature of torture can thus be easily grasped.

Having examined some of the reasonings supporting the inefficacy of torture, Farrell asks: "does it matter if torture works?" The author recognizes that, given the absence of a true science of torture, obtaining definitive and clear-cut answers to the question of whether torture is or not a valuable intelligence-gathering tool is impossible.[486] As we have said above, if we had the certainty that torture did not work, then there would be nothing left to debate. Torture would become only a sadistic tool used gratuitously and for no real purpose. But as explicitly stated by the U.S. Senate Intelligence Committee, the debate on the morality of torture should be independent from the debate on its efficacy: "torture need not be ineffective to be wrong."[487] The possibility that interrogational torture might be a valuable method to improve States' security must not overshadow the practice's cruel, degrading, and humiliating nature, i.e., the fundamental reason behind its rejection for centuries which resulted in its absolute and universal ban. Regardless of whether torture works, its inherent incompatibility with human dignity and fundamental basic rights should suffice to abhor the practice. But if one still wants to consider the usefulness of torture, its sporadic and inconsistent efficacy, with its high risk of torturing and incriminating innocent people as well as misleading the authorities, should also contribute to the idea that torture is wrong, and its ban should be upheld. Still, given the specificity and exceptional nature of ticking bomb scenarios, we have seen how some scholars and courts have nevertheless proposed models of institutionalized torture that circumvent the prohibition of torture. We will thus follow with an evaluation of the implications of legalizing and institutionalizing torture in liberal-democratic regimes.

[484] Blakeley (n 459); 'The Legal Prohibition Against Torture' (n 333).
[485] Senate Select Committee (n 475).
[486] Farrell, 'The Ticking Bomb Scenario' (n 7) ch 4, sect B, para 4, 140.
[487] Senate Select Committee (n 475).

5.1.3. The risks of a legalized and institutionalized torture.

In the debate on torture and the fight against terrorism, some propose that the absolute ban on the practice be lifted and that the practice be legalized and institutionalized, though only in the most exceptional circumstances consisting of ticking bomb scenarios. The Landau Commission, for example, tolerated and endorsed the General Security Service's use of "moderate physical pressure" during interrogations. The Bush administration accepted the CIA's use of Enhanced Interrogation Techniques to extract information from terrorist suspects during the War on Terror. Both generated what can be defined as a "torture culture." Additionally, scholars such as Dershowitz notoriously proposed a system of "torture warrants" whereby the use of torture would be authorized judicially *ex ante*. Lastly, the Israeli Supreme Court, though it ruled torture as unconstitutional in 1999, opened the possibility of the Israeli Parliament legalizing the use of coercive means of interrogation. The question that we will address in this section concerns the risks of a legalization and institutionalization of torture in liberal-democratic States such as Israel and the United States. Would torture remain confined to ticking bomb cases? What would be the implications for the rule of law? How would an institutionalization of torture impact the international protection of human rights?

First of all, let us define the meaning of institutionalizing torture. Brecher explains that the institutionalization of a certain practice, such as torture, means that this practice gains acceptance among society, even if it lacks universal consensus. Education, marriage, family, and religion are all examples of institutionalized and commonly accepted practices in today's societies. To promote the public approval of certain practices, such as abortion or same-sex marriages, legislation can be passed. This facilitates their institutionalization and then normalization. But Brecher stresses that legalization is not necessary for a practice to become institutionalized. Some practices remain illegal though they are normalized, even if not morally.[488] The proposals we have cited above, such as Dershowitz's, stress the need for an institutionalization of torture through its legalization. Other proposals, such as Gross' extra-legal model of *ex post* ratification of torture, which we have examined earlier on, on the contrary, tolerate an institutionalization of torture but without any legalization of the practice. For Gross, torture ought to remain outside the realm of the law.

Those who are fundamentally opposed to the idea of exceptionally allowing torture in ticking bomb scenarios often bring forward the argument of the slippery slope, whereby they consider that the negative consequences of tolerating torture, even if limited to specific situations, would significantly overpower its positive ones, such as improved intelligence and better security (which we have already raised doubts about in the previous section). Many scholars consider the possibility

[488] Brecher (n 6) ch 3, para 1, 41-42.

of opening the gates to interrogational torture as having a true snowball effect: it would start by depriving people of their basic human dignity, with a high probability of them also being innocent, and would continue by corrupting the democratic system, negatively affecting the international order, and severely compromising the protection of fundamental rights.[489] Let us examine these points in more detail.

A primary concern of creating a legal exception to torture is that this practice will become widespread and systematized. Posner sums it up as such: "having been regularized, the practice will become regular."[490] Brecher, too, is clear in rejecting the idea that a legal exception to torture will minimize its use: "there are no good grounds to suppose that the consequences of formal legalization would not be a further extension of torture, rather than its eradication."[491] If a law is passed permitting torture in ticking bomb scenarios, the above-mentioned issues of the definition of the scenario will arise, creating significant complications. We have explained how true ticking bomb cases are rare occurrences, and that the questions of imminence, number of lives under threat, certainty of the situation, and so on, are not yet fully resolved. For this reason, a number of experts are concerned with the fact that the legislative bodies or public officials would "overestimate the occurrence of ticking bomb scenarios"[492] and resort to interrogational torture in situations that would not necessarily warrant it. Public pressure and the public opinion's perception of security are to be considered relevant in this regard. So, too, is the acknowledgement of an information imbalance between the legislative bodies and the intelligence agencies.[493] The Association for the Prevention of Torture indeed underlines how public security is a complex matter for the legislators, who generally refuse to take risks on such a delicate issue, particularly if they lack specific knowledge to assess the gravity of the threat. Therefore, there is a great likelihood that ticking bomb scenarios will be given a broad understanding in the law, as a means of risk prevention and so as to reduce possible criticisms of legislative passivity.[494] An over-inclusive understanding of ticking bomb criteria is what many fear will occur once a legal exception to torture is introduced. This is why the ticking bomb scenario is considered "intellectual fraud":[495] it gives the impression that torture can be limited to specific cases, but, in reality, once a system decides to include a ticking bomb exception to torture in the law, the doors will open to a much wider and systematic use of this practice.[496] Dershowitz, who is one key

[489] Ginbar (n 95) ch 9, sect B, 115.
[490] Posner, 'The Best Offense' (n 200).
[491] Brecher (n 6) ch 3, para 4, 57.
[492] Mayerfeld (n 52).
[493] Posner, 'National Security and Constitutional Law Precis' (n 148).
[494] Association for the Prevention of Torture (n 92).
[495] Luban (n 7).
[496] Association for the Prevention of Torture (n 92); Mayerfeld (n 52); Ginbar (n 95) ch 9, sect B, 113-116; Farrell, 'The Ticking Bomb Scenario' (n 3); Parry and White (n 182).

proponent of a system of legalized, institutionalized torture, proposes to institute "torture warrants," where judges are required to evaluate the urgency of the situation, its ticking bomb nature, and, consequently, assess whether torture is, indeed, warranted. Among the advantages that Dershowitz finds with his proposal of legalized torture is, as we have discussed in the second chapter, the idea that torture will be minimized. He holds that, because of the additional layer of judicial approval, which requires the claim that torture is needed to be supported by ample evidence, the use of interrogational torture will be confined to specific cases.[497] Kreimer is rather skeptical of this view: in the same way that the legislators are risk-averse and influenced by public pressure, so are the judges. He thus fears that courts might have a too broad understanding of the requirements of ticking bomb scenarios and that they might "embellish the truth to serve the perceived ends of law enforcement."[498] The concern of the judiciary with public pressure was expressed for example by the Israeli Supreme Court in the 1990s, which initially refused to outlaw the Landau Commission guidelines because it feared that, if a preventable attack occurred where the GSS was unable to use all the techniques previously at its disposal, the Court would be held primarily responsible.[499] Additionally, risks for abuses in a system of legalized torture would have to be considered. Evidence has indeed been found of GSS agents going beyond the Landau Commission guidelines when it came to the use of violence during the interrogations of suspected terrorists.[500] Supervisory bodies would have to be set in place to ensure strict observance of the law. Furthermore, Ginbar and Amnesty International are preoccupied with the discriminatory risk of legalized torture, as its use might target specific segments of the population arbitrarily, thereby fostering an us-*versus*-them mentality.[501] There is thus serious concern with the creation of a legal exception to torture because of its expansion beyond ticking bomb torture. The more torture is practiced, the more people will become desensitized to it. This is an essential aspect of the slippery slope argument. Violence engenders more violence, and torture engenders more torture. Once a door is opened to legalized torture, it will be difficult to limit it to very specific cases, especially because the criteria for defining these cases are not strictly fixed.

Secondly, tolerating and expanding the use of torture will also have consequences on democratic institutions and the rule of law. This is an inevitable development given that torture is the antithesis of the fundamental rights that the rule of law protects (such as human dignity). Posner finds that, among the countries that have used interrogational torture (such as Israel, France, and the United

[497] Dershowitz, 'Tortured Reasoning' (n 101).
[498] Kreimer (n 330).
[499] Kretzmer and Ronen (n 261) pt 2, ch 8, 140.
[500] Brecher (n 6) ch 3, para 2, 53.
[501] Ginbar (n 95) ch 9, sect B, para 2d, 140-141; Amnesty International (n 71); 'Israel/OPT: Horrifying Cases of Torture and Degrading Treatment of Palestinian Detainees amid Spike in Arbitrary Arrests' (n 73).

Kingdom), none have "sunk into barbarism."[502] On the other hand, Gross warns against the "risks of contamination" of a legalized and institutionalized torture for liberal democratic systems.[503] "The interrogation practices of a given regime are indicative of a regime's very character" held Justice Landau, former Justice of the Israeli Supreme Court and President of the Landau Commission of Inquiry.[504] Let us recall that during the Algerian War, where the use of torture was extremely widespread and tolerated even by the highest official ranks, torture came to be perceived as a plague that spread throughout society, throughout the people's mentality, and throughout the democratic system: a true cancerous disease that weakened the rule of law. In French, they defined interrogational torture in Algeria as "*la gangrène*." The idea of the gradual decay of human tissue is as scary as it is repulsive, but this was the understanding in the collective imagination of the impact of torture on civil society, the military, and the legal system.[505] Legalized exceptional torture leads to the decay of the pillars of democratic societies, to the erosion of their values such as human dignity and human rights, and the endangerment of the rule of law.[506] The justice system is an essential pillar of the rule of law, but legalizing torture through a system of judicially approved torture warrants, as proposed by Dershowitz, would "taint the purity of the courts" and prejudice the judges' integrity, according to Sung. Indeed, for the scholar, the *ex ante* authorization of torture will not only impinge upon the fundamental basic rights of the terrorist suspects, but it will also compromise the entirety of the judicial system which would end up approving a violation of human rights. Moreover, judicial approval of torture would convey the message that, if torture is judicially sanctioned, then it is not necessarily to be abhorred.[507] For the Association for the Prevention of Torture, legalizing torture will even blur "the moral distinction between the democratic government and the terrorists."[508] Additionally, if torture is legalized, even exceptionally, stealth torture will no longer be a need for modern democracies, as they will be able to torture openly in ticking bomb situations. But this will mean that there will be a need for expert interrogators to carry out the torture. It will thus make sense for torture training programs to be instituted, thereby generating a further normalization and desensitization to such a cruel practice. Bufacchi and Arrigo warn of the damaging consequences of an institutionalization of torture both for democratic systems and for the perpetrators of torture. They hold that those States that authorize torture will inevitably lose moral legitimacy and will see their

[502] Richard A Posner, 'Torture, Terrorism, and Interrogation' in Sanford Levinson (ed), *Torture A Collection* (Oxford University Press 2004) 294; Dasgupta (n 82).
[503] Gross (n 29).
[504] *Public Committee against Torture v. Government of Israel* (n 97).
[505] Bufacchi and Arrigo (n 26).
[506] Macmaster (n 110).
[507] Sung (n 333).
[508] Association for the Prevention of Torture (n 92).

military apparatus greatly destabilized. In addition, in a system of "professionalized torture,"[509] trained torturers will face personal moral and ethical dilemmas which will result either in internal conflicts or in the corruption and desensitization to violence.[510] Lastly, formulating an exception to the ban on torture may well compromise the stability of democratic systems. An example of this is the rise of the Intifada, which, according to the former head of the Israeli General Security Service Perry, was caused among others by the great dissatisfaction of many with the Israeli authorities' poor treatment of prisoners.[511] The expression of discontent with a State's use of a cruel practice such as torture can thus shake the stability of democratic systems. Once fundamental rights are not only endangered in the abstract but actually violated in practice, the very foundations of modern liberal-democratic States might well be jeopardized.

Thirdly, a legalized exception to torture will have consequences that will expand well beyond the borders of the States that authorize torture. Indeed, one State expressly authorizing the use of interrogational torture will implicate the overall international protection of human rights. This will especially be the case if States with an influence such as that of the United States choose to circumvent the absolute ban on torture. The message sent to the world would be simple: in a cascading effect, if liberal-democratic States such as the United States, or Germany, or Israel did not respect the right to be free from torture, why should other countries? Parry and White already acknowledge the existence of a "fragile consensus" on the prohibition of torture.[512] A further essential concern, which is shared by most scholars and experts on the issue, is thus that a democratic country allowing for exceptional ticking bomb torture would result in an authorization of torture in countries less stringent over the protection of human rights. Non-democratic countries would inevitably follow suit. It is in this sense that the Association for the Prevention of Torture and other scholars warn of the possibility of an "international proliferation" of legalized torture once it becomes the norm in an influential country, seen as the epitome of democracy and liberalism, such as the United States.[513] Furthermore, Brecher asks "why stop there?" He provocatively asks why countries should stop at torture and not jeopardize other seemingly consolidated fundamental rights protected by international conventions.[514] The role of domestic courts in maintaining a strong protection of fundamental rights, as shown by the German Federal Constitutional Court for the right to human dignity, is thus an essential pillar behind an effective protection of human rights even at the international level.

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[509] Brecher (n 6) ch 3, para 4, 68.
[510] Bufacchi and Arrigo (n 26).
[511] Ginbar (n 95) ch 9, sect B, para 2e, 143; Yaakov Perry, 'Strike First' *Keshet* (Tel Aviv, 1999).
[512] Parry and White (n 182).
[513] Association for the Prevention of Torture (n 92); Brecher (n 6) ch 3, para 4, 62; Brown (n 35); Ginbar (n 95) ch 9, sect B, para 2h, 154; Mayerfeld (n 52); Parry and White (n 182); Sung (n 333).
[514] Brecher (n 6) ch 3, para 4, 62-63.

Therefore, it appears that Dershowitz's claim that a legalized system of interrogational torture may reduce its use has been disproved. A wide majority of scholars agree that institutionalizing and legalizing torture, even if limiting it to specific ticking bomb situations, will lead to a spreading of its use and a normalization of the practice. Societies will become more used to torture, and, why not to the erosion of other crucially fundamental rights? Moreover, the damages to the rule of law and the stability of democratic systems will be significant, and so will the implications for the protection of human rights across the globe.

5.2. Balancing rights against national security: a difficult modern debate

The ticking bomb hypothetical, with all of its consequences and risks for liberal-democratic regimes, has forced us to confront ourselves with a broader issue: that of the dilemma between security and liberty, which spreads well beyond the debate on torture. Dreier defines it as an "ultimately unsatisfactorily resolvable dilemma in which the law reaches its limits."[515] This last section will thus be interested in not only positioning the ticking bomb argument within the broader liberty *versus* security debate but also in discussing how the dangers of sacrificing rights in the name of security during emergency situations are tangible even for rights less absolute than torture.

The debate between liberty and security brings into question two fundamental obligations of modern States, and the extent to which States can go to fulfill them: on the one hand, the duty to respect, and, on the other hand, the duty to protect. States have the duty to respect individuals' fundamental rights, from civil and political to basic human rights, which, in essence, are considered as rights against State interference, i.e., negative rights. States thus have to abstain from taking any action which could impinge upon these rights. At the same time, States also have a duty to protect the individuals under their jurisdiction from seeing their rights violated by third parties. This requires positive action. In particular, security issues such as terrorism greatly engage this duty to protect, as States do have a positive obligation to fight against the terrorist threat. It is here that the tension between liberty and security emerges. Indeed, in order to protect individuals' rights and ensure their security and that of society, States might have to limit certain fundamental freedoms. The question, that lies at the heart of the debate, is how much freedom can be compromised in the name of security.

The 9/11 attacks dramatically reshaped the discussion surrounding security, not only because it became evident that the security of Western States could be severely jeopardized, but also because a new and different threat entered the security arena: the global terrorist threat. Binder and Lewis

[515] Bäcker (n 1) 88.

view the fight against terrorism as the epitome of the tension between the above-mentioned duty to protect and the duty to respect.[516] At the beginning of the 21st century, a new perspective on security started making its way into the debate, greatly diminishing the importance of fundamental liberties. Indeed, the fear of terrorism has led to an exponential growth in security concerns, to the point that security has unequivocally become the first priority of many. Some consider it as the "basis for all freedoms," viewing the fulfillment of security as a fundamental prerequisite for the enjoyment of all other rights. For example, in the United States, following 9/11 a number of members in the U.S. political arena have operated by the saying "what is the value of freedom if you are dead?" Additionally, those who prioritize the security agenda view as idealistic and naïve those who wish to strike a balance between liberty and security, thereby limiting the States' fight against terrorism in the name of fundamental rights.[517] A number of scholars have also noted a "de-individualization of freedom" where collective interests such as security and the survival of the State have overtaken individual freedoms.[518] It is also the absolutization of the notion of security that has affected the balance between security and liberty: for Pavone, Gomez and Jaquet-Chifelle., the new terrorist menace has prompted a search and demand for a total neutralization of threats. However unachievable, this objective has prompted States to act increasingly preventatively to anticipate possible attacks.[519] As a result, the Western fight against terrorism has been characterized by the almost ubiquitous adoption of preventive measures severely restrictive of fundamental rights. These have included increased surveillance, searches and wiretapping without warrants, restrictions on the freedom of expression, of movement, assembly, and association, arbitrary detentions, restrictions to immigration or expulsions of individuals suspected of terrorism, and, as we have seen, even the authorization of use of torturous interrogation techniques or the killing of some to save the life of many, in the *Aviation Security Act* case.[520] The adoption of these numerous measures limiting individuals' rights positions itself perfectly in the liberty versus security dilemma: is it lawful, for example, for the police authorities to limit the freedom of assembly in the name of national security? Binder explains that, if one approaches the issue from a human rights stance, the dilemma is not "unresolvable." Indeed, it is lawful to interfere with human rights which are not absolute, but rather

[516] Christina Binder, 'Liberty "versus" Security? A Human Rights Perspective in times of Terrorism' (2018) 34 Anuario Español de Derecho Internacional 575; Carol W Lewis, 'The Clash between Security and Liberty in the U.S. Response to Terror' (2005) 65 Public Administration Review 18.
[517] Lepsius (n 393); Didier Bigo, 'Delivering Liberty and Security? The Reframing of Freedom When Associated with Security', *Europe's 21st Century Challenge* (Routledge 2011) 389-392.
[518] Oliver Lepsius, 'Liberty, Security, and Terrorism: The Legal Position in Germany' (2004) 5 German Law Journal 435; Belvisi (n 90).
[519] Vincenzo Pavone, Elvira Santiago Gomez and David-Olivier Jaquet-Chifelle, 'A Systemic Approach to Security: Beyond the Tradeoff between Security and Liberty' (2016) 12 Democracy and Security 225.
[520] Binder (n 516); Sung (n 333); Pavone, Gomez and Jaquet-Chifelle (n 519); James Hamilton, 'The Delicate Balance between Civil Liberties and National Security' (South African Judges Commission 2006).

relative.[521] This is provided by many human rights protection frameworks, such as, at the international level, the International Covenant on Civil and Political Rights (ICCPR, which has been ratified by the United States, Israel, and Germany) or, at the regional level, the European Convention on Human Rights (ECHR). For these rights, the question then becomes not *whether* it is lawful for the authorities to encroach upon them, but rather *to what extent* the measures adopted can prioritize security issues such as terrorism over individual liberties. For example, Article 21 of the ICCR on the freedom of assembly provides as such:

> Article 21
> The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.[522]

Therefore, the international human rights framework allows for certain restrictions of the right of peaceful assembly if they meet a number of requirements: the interference must be provided in the law, and be strictly necessary to what is required in a democratic society, meaning that it must have a legitimate objective and be proportionate to the pursuit of that objective. The same is provided for other rights such as the freedom of expression (Article 19), the freedom of movement (Article 12), and the freedom of association (Article 22).

However, there are certain rights that are absolute and whose protection is unconditional and universal, for which no interference can be tolerated. As we have discussed, these are *jus cogens* rights such as the freedom from slavery, the freedom from torture, or, in the German constitutional system, the right to human dignity. The Convention Against Torture indeed tolerates no derogations to the right to be free from torture:

> Article 2
> 2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.[523]

Similarly, the European Convention on Human Rights has a specific framework that allows States to exceptionally derogate from some of the rights protected by the Convention. It is Article 15

[521] Binder (n 516).
[522] United Nations, 'International Covenant on Civil and Political Rights' (n 55).
[523] United Nations, 'Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment' (n 12).

that outlines the conditions and limits under which the States Parties can derogate from their obligations to respect the Convention in certain times of emergency:

> Article 15 Derogation in time of emergency
> 1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
> 2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.[524]

As can be seen, there are certain rights for which derogations are excluded *a priori*: among these is the right to be free from torture, which is regulated in Article 3 ECHR. This means that, similarly to the jurisprudence of the German Federal Constitutional Court as it applies to the untouchable right to human dignity, [525] the European Court of Human Rights recognizes that no balancing can be tolerated when it comes to certain absolute rights, among which the right to be free from torture. The European Court of Human Rights ruled on this matter in the *Gäfgen v. Germany* case of 2010, where it maintained that even in the most difficult circumstances, such as the fight against terrorism, the ECHR prohibits torture in absolute terms, with no possibility for exceptions or balancing.[526] As the German court, the European court maintained a definitive and principled approach in defense of absolute, fundamental rights.

Consequently, a restriction of an absolute right is to be considered unlawful and a violation of international and domestic law. As worded by Binder: "no reliance on security considerations can ever justify encroachments upon absolute rights. There cannot be any weighing of interests on the basis of liberty versus security."[527] The utilitarian argument of balancing between evils, which is at the root of the necessity-defense justification for torture, should be excluded when absolute rights are at stake. Therefore, one must not be misled by the ticking bomb argumentations and the proposals of scholars to justify exceptional torture on the basis of criminal defenses or torture warrants: man need not sacrifice the most basic fundamental human rights to obtain national security. Absolute rights such as the right to be free from torture or the right to human dignity in the German system should thus be above the debate between liberty and security, and, most fundamentally, be unaffected by it. Regardless of the severity of the new existing threats, democracies should not renounce their most

[524] Council of Europe (n 56).
[525] *Judgment of the First Senate of 15 February 2006* (n 395); Barak (n 403) ch 13, para 4, sect A, 237; Bäcker (n 1) 87-89; Hufnagel (n 393).
[526] *Gäfgen v. Germany* (n 162).
[527] Binder (n 516).

absolute rights, and the modern dilemma on liberty and security should reject the idea of legalizing and institutionalizing torture in the name of security. In particular, as the effectiveness of interrogational torture has proved inconsistent and the implications of a legal exception to torture have proved dangerous, governments should rather focus on the development of less intrusive methods of intelligence-gathering to protect public security. As Sung holds, even if these curtail individual liberties, they are lawful if necessary and proportionate, and they will represent a better proposal than that of legalizing or even just tolerating a cruel and degrading practice such as torture. She explains that, if societies must pay a price for security, "it would be better to risk minimal amounts of our liberty than to sacrifice all of our human dignity."[528]

Nevertheless, that is not to say that all encroachments upon relative rights are to be tolerated blindly in the name of security. Nor to say that the fight against terrorism has not produced unwarranted and excessive restrictions on fundamental civil liberties. It is natural that the gravest concerns are voiced when modern democracies propose to tolerate and legalize torture, even if in the most exceptional circumstances, but this does not impede scholars and experts from voicing similar preoccupations when it comes to significant intrusions into relative rights, even when these are provided by law. As we have mentioned, the liberty versus security debate goes well beyond the debate on torture and on possible ticking bomb scenario exceptions to it. The demand for the admissibility of interrogational torture is only but a small part of the implications of a growing demand for security. In this last, conclusive part of our research, let us therefore broaden the discussion and show the equally dangerous implications of States restricting liberties in the name of security, sometimes even beyond the limits of admissible derogations. It is important to closely monitor the limitations of fundamental rights so as to prevent and avoid abuses of power. The States' duty to protect security must not let them forego their equally important duty to protect individual rights.

The measures adopted by States to deal with the terrorist threat have generally had the most significant impact on the right to privacy, the freedom of movement, assembly and association, and due process rights. Encroachments upon these rights have been deemed fundamental by States to carry out an effective fight against terrorism. For example, the U.S. Patriot Act of 2001, enacted as a response to 9/11, expanded the surveillance powers of law enforcement agencies, including wiretaps, searches, and access to business records and financial transactions, facilitated information sharing among government agencies, and increased immigration controls. Its aim was to minimize the possible obstacles that the right to privacy created for intelligence agencies. Following its approval, significant criticism emerged regarding the Patriot Act's impact on civil liberties and privacy rights,

[528] Sung (n 333).

which led to the amendment or replacement of certain provisions.[529] In Germany, too, the demand for increased safety led to the installation of CCTV cameras in the streets and in front of private housings, leading to serious criticisms for excessive violations of the right to privacy in the name of national security.[530] In France, the declaration of a state of emergency which lasted from 2015 to 2017 following the 2015 terrorist attacks led to an amendment of Law 55 on the state of emergency. This amendment provided for stronger restrictions of fundamental rights, from the closure of places of worship to the dissolution of associations and harder regulations on house arrests and house searches. Administrative authorities were given greater powers.[531] Similar to the U.S. Patriot Act, all these specific powers provided by Law 55 became the object of significant debate for their significant encroaching upon individual freedoms, even reaching the French Constitutional Council, which rendered five different decisions from 2015 until 2017 on their constitutionality. The provisions were deemed to be an indiscriminate and unjustified violation of the rights protected by the French Constitution. Some of the measures, such as house seizures and the refusal of entry or stay, were deemed unconstitutional because they limited rights too broadly.[532] For other measures, such as detentions under house arrests and limitations on the freedom of movement and association, the Constitutional Council adopted a rather self-restrictive approach, finding them compatible with the requirements of necessity and proportionality, and thus prioritizing security over liberty.[533] Another case concerning the compatibility of certain measures limiting rights in the name of security was the *Zakharov v. Russia* case, which was decided in 2015 by the European Court of Human Rights.[534] The matter was about a Russian surveillance law and its alleged excessive infringement upon individuals' right to privacy. In its ruling, the Court found that not only the limitations of rights need to be provided by law, but they also need to be "necessary in a democratic society." These are similar requirements to those of the International Covenant on Civil and Political Rights, and which can be found in the majority of human rights protection frameworks. In this precise case, the Court found that there were several shortcomings in the law which rendered the restrictions of the right to privacy excessive and incompatible with the European Convention on Human Rights. In particular, the Court took its decision conscious of the "risk that a system of secret surveillance set up to protect national security

[529] Hamilton (n 520).
[530] Pavone, Gomez and Jaquet-Chifelle (n 519).
[531] Given that France has ratified the European Convention of Human Rights, which allows for derogations of certain fundamental rights in times of emergency under Article 15, it made sure, at the time, to trigger this provision so as not to be found in violation of the rights protected under the Convention by the European Court of Human Rights.
[532] *Décision n° 2016-536 QPC du 19 février 2016* [2016] Conseil Constitutionnel 2016-536 QPC; *Décision n° 2017-635 QPC du 9 juin 2017* [2017] Conseil Constitutionnel 2017-635 QPC.
[533] *Décision n° 2016-535 QPC du 19 février 2016* [2016] Conseil Constitutionnel 2016-535 QPC; *Décision n° 2015-527 QPC du 22 décembre 2015* [2015] Conseil Constitutionnel 2015-527 QPC.
[534] *Case of Zakharov v Russia* [2015] European Court of Human Rights 14881/03.

may undermine or even destroy democracy under the cloak of defending it."[535] It is precisely that which many fear, whether by legalizing significant limitations of rights or going as far as legalizing torture: that, in the fight against terrorism, democracies might lose sight of the values on which they are built, and gradually erode the principles of the rule of law. Additionally, a great concern is that the adoption of emergency measures to deal with security threats might end up being normalized in the system.[536] We have already discussed how legalizing and institutionalizing torture might lead to a desensitization to the practice.[537] The same could occur for much less intrusive measures, and evidence demonstrates that this has actually been the case. In France, for example, after the expiration of the state of emergency in 2017, many of the administrative powers provided for by the state of emergency were translated into ordinary law, with many critics denouncing the creation of a permanent state of emergency.

Therefore, if it is reasonable to fear a normalization of emergency limitations to basic civil rights, the concerns over the consequences for democracies of the legalization of torture are all the more justified. However, once again, while it is comprehensible for a certain balancing between security and liberty to emerge when serious threats exist to national and international security, the issue of torture should not be brought into the debate. The right to be free from torture is an absolute right that has been consolidated for centuries and tolerates no balancing, even in the most exceptional circumstances of ticking bomb scenarios. While the law tolerates the weighing of interests, of lesser evils, when it comes to relative rights, this is not the case where torture is concerned. The 9/11 attacks prompted a re-evaluation of priorities on the part of governments, with security matters taking precedence across Western countries. This has raised fundamental questions about democratic governance, the importance of individual and collective rights, and the price that democracies are ready to pay in order to obtain security. As Moller explains, the goal is to be able to fight against terrorism in a "principled" manner, by respecting and protecting human rights, without compromising excessively the effectiveness of security agencies.[538] President Bush defined the war against terrorism as a war of values. For Hamilton, "the greatest success the terrorist can achieve is to persuade the democratic state to abandon its democratic values."[539] Perhaps, all democracies of the 21st century, should recognize that, sometimes, there is a price so high[540] that security would not be worth it, an act so evil that no balancing could ever take shape: torture.

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[535] 'Question and Answers - Roman Zakharov v. Russia, Grand Chamber Judgment' (European Court of Human Rights 2015).
[536] Hamilton (n 520).
[537] Mayerfeld (n 52).
[538] Möller (n 396).
[539] Hamilton (n 520).
[540] *Public Committee against Torture v. Government of Israel* (n 97) para 22, 21.

6. Conclusion

The aim of this research has been to shed light on some of the key questions surrounding the liberty *versus* security debate, in particular concerning the issue of interrogational torture. Though it may appear that the numerous international treaties prohibiting the practice, followed by their ratification and implementation in the law by the States Parties, have consolidated a definitive ban on torture across the globe, we have shown that in reality, the prohibition of torture has yet to be fully achieved. By focusing on the ticking bomb justification for torture, we have shed light on the tension that exists between the desire to ensure security, in particular with the rapid growth of the terrorist threat for liberal-democratic countries, and the duty of the States to protect the fundamental rights of the individuals under their jurisdiction. In recent decades, the numerous terrorist attacks that have shaken Western societies in particular have prompted a new demand for security, coming both from governments and public opinion. The notion of homeland security has, consequently, adopted a new meaning. First, because of the need for States to address a new, unconventional threat. Second, because security has gained a new status among the objectives of the State, with many now viewing the obtainment of national security as a top priority of governments. But the "absolutization" of security and the search for a total neutralization of all threats, is as unattainable as it is dangerous for the protection of fundamental rights. The tension between rights and security cannot be avoided, and the terrorist threat has only brought these complex moral and legal issues to the forefront. How many rights are States willing to sacrifice in the name of absolute security? The use of torture and the protection of human rights are certainly incompatible with each other, but, for some, the use of torture and the protection of national security represent a viable and successful combination. The liberty *versus* security dilemma thus asks how and where to strike a balance between fundamental rights and national security. Within it, the ticking bomb scenario asks whether interrogational torture is a threshold that can be crossed, or rather whether it is absolutely off-limits for balancing. Does the search for security warrant the use of interrogational torture? It is this complex question that has accompanied us throughout this research.

First of all, it appears that the answer to the question we have just raised is affirmative. In some instances, security has justified the use of torture. We have shown how data support the stance that, despite the international and absolute prohibition of torture, torture is still being used today, even in liberal-democratic States. To go undetected, democracies resort to clean methods of torture, from electrotorture to more psychological means such as sleep or sensory deprivation. Additionally, besides data on the use of torture in practice, it appears that the debate on torture, both among academic circles and among public opinion, has not yet been closed. Indeed, surveys show that torture

is still very present in contemporary debates, as large segments of the population, be it in the United States or European countries such as France, respond that they would tolerate the use of interrogational torture if related to counterterrorism purposes. Scholarly debates also reflect this societal mindset, as the uncompromising position of moral absolutism, which abhors every aspect of torture, is challenged by more pragmatic, utilitarian positions that accept torture, albeit only in the most exceptional circumstances. From the criminal defenses of necessity and self-defense to Dershowitz's proposal of the legalization of torture through torture warrants, or Gross' proposal of an *ex post* ratification of torture, it seems that in theoretical debates at least, the prohibition of torture has lost its initial status of "unrenounceable," inviolable norm. Maybe the prohibition of torture has been downgraded from absolute to relative right. Though this is gravely concerning, the arguments in favor of an exception to the ban on torture surely seem to move in this direction. One cannot uphold the absolute prohibition of torture while at the same time proposing that it be used in exceptional circumstances.

All of the positions that justify or excuse the use of torture are centered around one sole argument: the ticking bomb scenario. This is why the dilemma is so complex and the debate is still so intense: no one argues for an overall renunciation of the right to be free from torture, but those that tolerate exceptional encroachments upon it argue that these are necessary if aimed at saving innocent lives. Necessity-defense argumentations, such as those held by the Landau Commission of Inquiry in Israel claim that torture is justified if it is the "lesser evil." If torturing one individual would result in the saving of hundreds of innocent lives, would the use of torture be reasonable and justified? This is perhaps one of the most complex ethical and legal questions that courts can be confronted with, namely weighing rights against rights, lives against lives, in the most urgent and extreme circumstances. As we have seen, jurisprudence on the matter diverges across the continents. In Israel, the Israeli Supreme Court expressly renounced torture in its 1999 *Public Committee Against Torture v. Israel* decision, but still found that a balance could be struck between security and human dignity. Additionally, it left open the possibility that interrogational torture could be authorized by the Israeli Parliament, and in following judgments also seemed to be much more tolerant of allegedly torturous practices of interrogation used to fight against the terrorist threat. Conversely, the jurisprudence of the German Federal Constitutional Court appears intransigent when it comes to the balance between absolute rights and security. Though the case we have analyzed did not concern the right to be free from torture, it centered around an equally important, if not even *more* important, right in the German constitutional system: the right to human dignity. In the 2006 *Aviation Security Act* decision, the German Federal Constitutional Court left no room for the balancing between lives and human dignity: one cannot sacrifice the human dignity of some in the name of security. There is no "lesser evil"

justification, even in ticking bomb scenarios. A similar stance at the European level has been that of the European Court of Human Rights. As far as United States jurisprudence, a clear-cut U.S. Supreme Court decision on the balance between rights in ticking bomb circumstances has yet to be issued. However, its precedents on the applicability of *habeas corpus* and due process rights to all, including terrorist detainees, during the War on Terror, can let us hope that even the most fundamental rights such as the right to be free from torture would also apply to all, even terrorists suspected of having planted a bomb.

In its concluding part, this research has wanted to question the very concept of the ticking bomb scenario to show the limitations in the reasoning of the ticking bomb exception to torture. In essence, the assumptions of the scenario raise more questions than they answer. Firstly, the likelihood of a textbook scenario manifesting itself is rather small, rendering the entire foundations of the torture debate quite fragile. It is only on steady, consolidated, and realistic cases that one can make "good ethics," as Professor Henry Shue held. Secondly, as said, the ticking bomb scenario does not simplify the debate on torture, as too many uncertainties surround its assumptions. It does not tell us how imminent an attack must be to warrant torture, nor how many lives must be at stake for the dignity of a terrorist suspect to be violated, nor does it guarantee us that the individual detained is the perpetrator of the attack and that he possesses critical information. But, when it comes to the violation of a right as fundamental as the right to be free from torture, the minimum requirement should be that of having absolute certainty about the usefulness of the violation. There can be no certainty about the suspect's culpability, nor can there be about the efficacy of torture, which we have proven to be unreliable and even counterproductive. Perhaps the debate on torture persists because occasional evidence in support of the validity of torture as an interrogation method has, at times, been brought forward. However, the lack of consistent successful cases is telling. Still, many continue to hold on to the idea that torture works.

Lastly, we have responded to the proposals of legalizing and institutionalizing torture by highlighting some of its dramatic consequences for liberal-democratic states. As opposed to what the proponents of institutionalized torture suggest, creating legal exceptions to the ban on torture would not minimize its use. On the contrary, it would spread beyond ticking bomb scenarios, engendering a "torture culture" as the one that the United States tried to repel after closing down the CIA's High-Value Detainee Program. The line between the institutionalization of torture and its normalization is indeed very thin. Additionally, the consequences of the legalization of torture for liberal-democratic countries would be severe: a corruption of the judicial system, which would approve of a violation of the most basic human rights, and a corruption of the societal mentality, accompanied by an erosion of values such as human dignity and an overall endangerment of the rule of law. Finally, one must

not ignore the ripple effect that an institutionalization of torture in a democratic country would have on the rest of the world. If one democracy abandoned its commitment to absolute fundamental human rights, what would refrain other countries from following suit?

Therefore, it rapidly becomes clear that the liberty *versus* security debate very easily endangers even the most basic, and seemingly long-consolidated, rights. Absent a constant commitment to the protection of the right to be free from torture from society, governments, and the judiciary, pragmatic and utilitarian approaches may well renounce fundamental freedoms if done in the name of security. That is why the role of courts, whether at the domestic, regional or international level, has been shown to be fundamental in upholding the absolute and universal ban on torture. We have demonstrated how the most absolute rights can really be protected only if judges choose to adopt an uncompromising stance when it comes to the balancing between rights. If the courts maintain strong, principled approaches that consider absolute rights not to be weighable against other rights, or against State interests, whatever these may be, then we can be confident that the most fundamental rights will be protected from interferences due to an increase in State powers. This is the case of the German Federal Constitutional Court or of the European Court of Human Rights. Conversely, if courts adopt more pragmatic and utilitarian approaches regarding the clash between security and freedoms, such as the Israeli Supreme Court, fundamental rights will be put in jeopardy. Thus, the true absolute nature of a right such as the right to be free from torture, depends on the courts' intransigence and judicial activism. In essence, regardless of academic debates and public demands for security, the final word on ticking bomb justifications for torture lies in the judiciary. Fortunately, especially in Europe, numerous courts have adopted principled approaches when dealing with the clash between security and liberty, with many recognizing that the use of violent, barbarous methods such as torture cannot be justified, even in the name of counterterrorism. A continued (or new, for some courts) strong judicial activism on such topics will thus be crucial to address current security threats, but also to maintain a steady protection of the most absolute rights in the coming decades, with the emergence of new, unknown security threats.

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