



**Between No-Go and Necessity:  
A Review Essay on International  
Legal Responses to Torture**

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“ *Abu Ghraib was not caused by a handful of sadistic, overworked, untrained soldiers. It was the inevitable result of an Administration that, in pursuit of the admirable goal of national security, lost sight of the need to maintain the soul of the nation.*”

- Marcy Strauss (2005: 1310)

## I. Introduction

In mid-March 2018, U.S. President Donald Trump announced the nomination of intelligence officer Gina Haspel as the new director of the Central Intelligence Agency (CIA). Over the course of two months, confirmation by the U.S. Senate was pending – and was far from certain. The nomination attracted much attention; less so because Haspel – by now confirmed – is indeed the first female director to lead the agency, but more so because of Haspel’s much discussed yet little-known controversial past as supervisor of a so-called CIA “black site” which was operated as part of the agency’s “enhanced interrogation” program. Not only was she involved in overseeing and condoning practices such as waterboarding – mere “enhanced interrogation” to some, outright torture to others – but she is also accused of being involved in the destruction of videotaped evidence of some of the interrogation sessions (Demirjian 2018). In an effort to win Democratic votes in the Senate and be successfully confirmed, Haspel has distanced herself from her uncharted past – much of which remains unknown because of her lengthy undercover career (Herb 2018) – testifying that she understands that waterboarding is illegal and insisting that she did not order the tapes in question to be destroyed (Raju, Herb, and McLaughlin 2018).

Contemporary controversies such as these aptly illustrate the continued relevance and topicality of the torture debate. Building on this insight, the present review essay will address the following research question: What are the main claims and arguments advanced by both the supporters and opponents of torture and how do they relate to each other? The prohibition of torture is not only a core element of the respect for human dignity, but it is also most prone to violations in times of violence (Doswald-Beck 2011: 194), such as the 9/11 attacks. Torture, or the prohibition thereof, is a central aspect in the field of national security – and counter-terrorism measures and human rights are in a constant field of tension. As a result of this apparent “trade-off”, a vibrant literature on the benefits and drawbacks of the legal regulations of torture has emerged.

Given the importance of focusing on a well-defined issue, this review essay is – to the extent possible – concerned with the *legal* aspect of torture, particularly in the context of counter-terrorism, as distinguished from the many moral, ethical, and philosophical concerns accompanying debates revolving around its application. “To the extent possible” because, as the discussions below will reveal, sometimes hypothetical considerations (such as the *ticking bomb* scenario) are inextricably linked to legal aspects. In light of the sheer magnitude of academic debates of torture, this seems like a valid – and necessary – restriction.

This essay will systematically and critically review existing literature on the issue, identify the main scholars engaged in the discussion as well as delineate the main points of contention. In doing so, it will also point to gaps in the research and develop ideas as to where it might go next. A short note on the methodology of gathering the necessary information on this topic: Initial research started with keyword searches on relevant search engines and journal publishers such as Google Scholar, JSTOR, SAGE Pub, and Taylor & Francis. After an initial corpus of literature was gathered, additional works were added by means of cross-references and “snowballing”. All literature

(ultimately roughly thirty-five works in total) was imported into the reference management software *Citavi* and was systematically analyzed and categorized in order to identify common themes, prevalent differences, and recurring issues which build the basis for this review.

## Terms and Definitions

It seems necessary at this point to provide the reader with a minimum of legal context and definitions relating to torture. The prohibition of torture is non-derogable<sup>1</sup> and is stipulated clearly and precisely in all general human rights treaties<sup>2</sup>. It is often described as having the status of *jus cogens*<sup>3</sup>, i.e. a peremptory norm of international law. For instance, Article 3 of the European Convention on Human Rights (ECHR) states that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment”. Article 1 (1) of the UN Convention Against Torture (CAT) defines torture as

“any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”<sup>4</sup>

Specialized treaties such as the CAT have reinforced the general prohibition, which reiterates its non-derogable character (Doswald-Beck 2011: 195). Article 2 (2) of the CAT states that “[n]o 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”. As will become clear over the course of this paper, however, the obvious clarity of the prohibition of torture in all human rights treaties “has not stopped discussion by some on the need for possible exceptions in situations of extreme stress” (Doswald-Beck 2011: 195) – a demand that quite openly contradicts the basic idea of non-derogation. The definition above is also important because, as well be discussed later, it has been systematically misconstrued in order to justify the conduct of torture.

While these references to positive international law have undoubtedly shown that torture is illegal, it may perhaps come as a surprise that the scholarly literature is not in complete agreement on this issue – which, in a way, lends support to the validity and necessity of such a review essay in the

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<sup>1</sup> In legal texts, provisions for *derogations* provide “that State measures that would normally be a violation of the human rights treaty, would not contravene the treaty if these measures are taken in exceptional situations and only to the degree absolutely necessary” (Doswald-Beck 2011: 79). Given that the prohibition of torture is *non-derogable*, such exceptional circumstances do not justify a derogation – the prohibition of torture is absolute.

<sup>2</sup> Other relevant international law norms prohibiting torture include: Article 5 of the Universal Declaration of Human Rights (1948); Articles 7 and 10 (1) of the International Covenant on Civil and Political Rights (1966); Article 5(2) of the American Convention on Human Rights (1978); and Article 5 of the African Charter on Human and People’s Rights (1981).

<sup>3</sup> *Jus cogens* norms are norms that “embrace customary international laws that are so universal and derived from values so fundamental to the international community that they are considered binding on all nations, irrespective of a State’s consent” (Méndez 2016: 250).

<sup>4</sup> For a critical analysis of each of the elements of this definition, see, e.g. Méndez (2016: 253f.).

first place. Pertaining to the question of how some scholars “dare” to even begin to condone torture, Rumney (2005) points to how this might be a result of differing roles attached to judges on the one hand and legal scholars on the other, the latter of which enjoying a certain amount of “leeway” and discretion in how they assess the current state of affairs: “Judges are required to interpret existing rules and prohibitions, while legal scholars are free to explore possible reforms, without the restraint of precedent or the separation of powers.” (Rumney 2005: 471) Therefore, while the question of the legality of torture in terms of positive law is indisputable, the scholarly literature is at times quite divided on the (continued) reasonableness of such regulations. Scholars provide calls for reform, differentiation, and well-defined exceptions, once again in most cases with reference to counter-terrorism measures.

Large parts of the contemporary literature on torture has been published in the post-9/11 era, inevitably written in light of the large-scale revelations of torture in places such as Abu Ghraib, Guantánamo Bay, and elsewhere. However, legislation on torture has of course existed before, and so has academic literature on the topic. Sticking to a chronological order of events, this review will start by briefly surveying some of the academic debates on legal responses to torture prior to 9/11. Building on the identification of 9/11, and especially the Abu Ghraib disclosures, as a “watershed” event in the torture debate, the second and larger part of the essay will then review literature that was published in the aftermath of the 9/11 attacks.

## II. A short history of torture from the Middle Ages to 9/11

Despite its obvious illegality, an appalling number of reports remain of cases where torture was or is currently used. Dozens of countries around the world continue to use torture, including liberal democracies such as the United States, Great Britain, or France (Einolf 2007: 106). In fact, looking back at history, particularly during the Inquisition in the 12<sup>th</sup> century, torture became an integral instrument of the legal systems in Europe for centuries to come and was a common means of obtaining confessions. The historian John Langbein (1977) investigates the relationship between torture and standards-of-proof sufficiency, ultimately proposing a novel thesis about the abolition of judicial torture on the continent of Europe. He attributes the prevalence of torture in European legal systems to the exceptionally high standard of proof necessary for verdicts: In order to find someone guilty, judges needed either a confession or the testimony of two eyewitnesses. If no eyewitnesses were available and the accused party insisted on their innocence, judges would sometimes resort to torture to coerce a confession. Courts, holding that the Roman-canon standard of proof was too demanding, gradually lowered the bars, and “with the reliance on confessions gone, judicial torture lost its *raison d’être*” (Damaska 1978: 863). Therefore, Langbein (1977) argues, the abandonment of judicial torture was a result of the redundancy of coerced confessions, and thus was essentially nothing but a juristic event. In other words, rather than due to a realization of the inherent (moral) wrongfulness of torture, its conduct simply became practically unnecessary in the course of judicial reform.

As Doswald-Beck (2011: 194) notes, “the fact that torture has been perceived, for millennia, as a means of forcing confessions or otherwise asserting the authority of the capturer over the detainee, has made the effort of eradicating this practice particularly difficult”. Torture was practically abolished in Europe already in the 19<sup>th</sup> century, and although physical punishments short of torture continued to exist, torture did not reemerge, at least publicly, until World War II (Kearns 2015: 2). With the adoption of the 1948 Universal Declaration of Human Rights (UDHR) in the aftermath of World War II, the formal abolition of torture as a permissible legal instrument was codified into international law, with many specialized treaties (see above) following suit. This can also be seen as the result of a more general trend of a rise of human rights norms and an increase in the number of liberal democracies<sup>5</sup> (Einolf 2007: 106).

However, in his piece “The Fall and Rise of Torture”, Einolf (2007: 101) argues that the practice of torture has resurged over the course of the 20<sup>th</sup> and 21<sup>st</sup> centuries, contending that “an increase in the number and severity of wars has caused an increase of torture against enemy guerrillas and partisans, prisoners of war, and conquered civilian populations”. Indeed, also after the passage of the UDHR, torture continued to be used around the globe, for example by France during the Algerian War of Independence, by the Soviet Union against “enemies of the people”, and by the U.S. domestically in state prisons, to name just a few examples here.

Without doubt, 9/11 can be identified as a defining moment in the torture debate. As was mentioned above, much of the literature on legal responses to torture was published after 9/11,

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<sup>5</sup> Whereas the rise in the number of liberal democracies may have been conducive to an overall decline in the use of torture, Einolf (2007: 106) also notes that “[w]hile liberal democratic states use torture against their own citizens much less often than other states, liberal democracy does not by itself guarantee that torture and other forms of violence will not occur”.

because there were a lot of salient issues to write about. Notably, however, a German scholar by the name of Winfried Brugger (2000) contemplated the question “May Government Ever Use Torture?” already before the 9/11 attacks. Investigating this important question without the tragic impressions of this horrific event, he invokes a version of the *ticking bomb* scenario<sup>6</sup>. He highlights the conflicting provisions of the legal system that, per se, protect both the terrorist and the citizens. In an attempt to identify an exception to the absolute prohibition of torture in such cases, he arrives at an affirmative conclusion, arguing that, “as we face an unavoidable clash of respecting versus protecting opposite constitutional commands, with innocent victims and a lawbreaker being the parties in question, the law should side with the victims and seek to protect their lives and dignity” (Brugger 2000: 676)<sup>7</sup>. Notably, he concludes his article with the recommendation that attacks such as the one described in the article have happened, or will happen sooner or later, and that “the legal system should be prepared to deal with them effectively and justly” (Brugger 2000: 678). Little did he know that only one year later, this advice would unfold dramatic salience.

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<sup>6</sup> “Typically, this scenario posits that terrorists have planted a bomb in a major city that is due to detonate in a relatively short and finite period of time. If the bomb explodes, a large number of people will be killed. Authorities have, however, captured one of the terrorists, who has critical information that would allow authorities to defuse the bomb. The terrorist, however, refuses to talk, leaving the interrogator with the unenviable choice of either allowing the bomb to explode or obtaining the information through torture.” (Ip 2009: 40)

<sup>7</sup> He also acknowledges that he does not know of any other German law professor to publicly advocate the use of torture in any, even exceptional, circumstances (Brugger 2000: 677).



### III. The torture debate after 9/11

A review of the literature on legal responses to torture in the wake of 9/11 allows a categorization of scholars in two broad camps: On the one hand, there are those that continue to adhere to the absolute prohibition of torture as codified in international law, arguing that the U.S. government systematically misinterpreted, attempted to find legal loopholes in, or simply outright violated existing legal norms (Alvarez 2006; Kreimer 2003, 2005; Luban 2005, 2007; Ross 2007; Rothchild 2006). These scholars typically also point out that torture usually produces unreliable evidence (Ip 2009; Rumney 2005), that it may backfire by providing fertile ground for extremism (Kearns 2015; Strauss 2005) or by making the torturing state vulnerable (Lebowitz 2010), and that it will induce a “slippery slope”, i.e. that legalizing torture even in exceptional cases will inevitably lead to a gradual expansion of such exceptions (Frankenberg 2008; Kutz 2007; Ohlin 2008).

On the other hand, some – and indeed a minority of – scholars used the 9/11 attacks to invoke justifications such as the “necessity defense” which is closely related to the *ticking bomb* scenario (Posner and Vermeule 2005). Others insist that the prohibition of torture is unrealistic and normatively unsound (Bagaric and Clarke 2005), and that because torture is pragmatically desirable, at least *sometimes* works, and is used anyway, it should be made legal, although under the condition of judicial “torture warrants” to ensure accountability (Dershowitz 2002, 2003). Others (e.g. Yoo 2007) simply argue that international law norms such as the Geneva Conventions do not apply to detainees suspected to belong to Al-Qaeda or the Taliban. The following sections will analyze these opposing claims and their respective subcategories in detail.

#### 1. The case for an absolute prohibition of torture

Many scholars have argued in favor of a defense of existing norms of international and domestic laws that unequivocally prohibit the use of torture in any circumstance. They advance specific arguments as to why torture should remain illegal and how authorities have attempted to circumvent this prohibition.

##### a. Misinterpretation of existing law

One recurring argument used by the opponents of torture was that U.S. authorities systematically and purposefully misinterpreted existing legal norms in order to justify torture against suspected al-Qaeda or Taliban members in places such as Abu Ghraib or Guantanamo Bay. In light of the leak of the “torture memo” written by lawyers in the Office of Legal Counsel, Luban (2007) argues that, despite the unambiguous illegality of torture, the memo afforded authorities with ultimate impunity. Luban (2007: 1) further argues that it “ignored inconvenient Supreme Court precedents [and] misrepresented sources”. Alvarez (2006: 178) employs the wordplay of “torturing the law”, explaining that the U.S. government engaged in this deliberate misconstruction “so that everyone can feel clean, or at least insulated from the risk of prosecution, even though they are all, both high government official and low level operative, in my view knee-deep in blood”.

Ross (2007) contends that the U.S. administration attempted to relax the definition of torture under domestic law so that existing methods would fall short of the offense. Furthermore, while officials argued that captured Taliban members were not entitled to prisoner-of-war status because they were “unlawful combatants”, they directed at the same time that U.S. forces should

continue to treat such detainees in humane ways which are consistent with the Geneva Conventions. Crucially, therefore, these detainees were not (anymore) protected by *legal norms*, but merely as a matter of *policy* – “policies which of course were subject to change” (Ross 2007: 577). He further argues that the U.S. essentially “outsourced” the torture practices to other countries and attempted to circumvent the *non-refoulement* policies (which prohibit rendition to countries that use torture) by obtaining diplomatic assurances that the receiving state will treat the detainee humanely. However, “these promises cannot be enforced and neither state has an incentive in uncovering abuse, so there is little likelihood that [they] provide protection to the individual so transferred” (Ross 2007: 575).

Pertaining to the abovementioned definition of torture in the CAT, which the U.S. is a party of, Kreimer (2003) contends that the U.S. authorities distinguished between “torture” on the one hand, and other “cruel, inhuman or degrading treatment”<sup>8</sup> on the other, the latter supposedly being subject to lower levels of condemnation. Kreimer (2003: 280) continues to assert that “this distinction has been advanced as a basis for permitting a variety of physical abuses as techniques of interrogation”. Building on similar insights, Rothchild (2006: 129) concludes that “the Bush administration crafted a legally flawed and ethically ambiguous interpretation of the law”.

#### **b. Torture is not only ineffective, but also counter-productive**

A common point advanced by adversaries of torture is that it is ineffective and produces unreliable evidence: “Intense pain is quite likely to produce false confessions, concocted as a means of escaping from distress.” (Rumney 2005: 472) In other words, torture can induce the source to say what he thinks the interrogator wants to hear, even if that is not the truth. Rumney further argues that false confessions may in fact inhibit effective investigations by providing distracting information. He even points to how CIA manuals have acknowledged and emphasized the limits of coercive methods, quoting them that “in general, direct physical brutality creates only resentment, hostility, and further defiance”. Contrary to claims long advanced by the Bush Administration that detainees at Guantanamo produce “enormously valuable intelligence”, it has since been admitted that the value of “intelligence coming from Guantanamo Bay [...] has been ‘wildly exaggerated’” (Rumney 2005: 474).

Others have argued that torture is not only ineffective but may in fact entail unintended consequences to the disfavor of the torturing entity. Strauss (2005) points to how the use of torture in Iraq undermined the legitimacy of the U.S. war effort: After the existence of WMDs was disproved, President Bush increasingly relied on the liberation of Iraq from Saddam’s torturous reign as a pretext for continued U.S. presence. “Given that our soldiers picked up where Saddam left off, that argument lacks persuasiveness on the streets of Baghdad.” (Strauss 2005: 1303) Relatedly, Strauss argues that “the scandal harmed – perhaps irreparably – our foreign policy objectives, particularly in the Middle East and the Arab and Muslim world” (p. 1304).

In a similar vein, Kearns (2015: 4) argues that when states use torture as a response to terrorism, the disclosure of such practices may severely undermine their authority and can create a backlash that only plays into terrorists’ hands. Anwukah (2016: 14) warns that “the use of torture to combat terrorism only perpetuates a never-ending cycle of violence”. The bottom line of these

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<sup>8</sup> Article 16 (1) of the CAT states that “[e]ach State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1”.

arguments is that the U.S. did not only risk crucial support in this region, but also produced an environment full of contempt that may in turn be conducive to further radicalization and anti-Americanism. Indeed, after the publication of the 2014 U.S. Senate report on CIA torture, jihadists took to social media to call on Muslims to “rise up” in retaliation (Ensor 2014). Abu Ghraib, Strauss (2005: 1310) argues, “taught us that torture is frequently ineffective, but always harmful”.

Lebowitz (2010) provides an interesting nuance to this debate. He approaches the issue from a different perspective, namely from the terrorist’s point of view, and investigates how they can pointedly invoke torture in order to delegitimize Western government’s conduct in the war on terror. By insisting that torture was inflicted, accused terrorist operatives “are credited with ‘paralyzing’ international intelligence services and military operations in a manner that is much more effective than bombs and rifles” (Lebowitz 2010: 358). He goes as far as claiming that this “tactical lawfare”, as he calls it, produced tangible effects on the battlefield by creating policy pressures and “achieving tactical goals that historically were limited to conventional physical acts of warfare” (p. 391). In short, he concludes that the U.S. government did itself no favors by engaging in and condoning detainee abuse.

### **c. The “slippery slope” argument**

A third major, and pretty concise, counterargument against the (even exceptional) authorization of torture is the “slippery slope” reproach which holds that cabinining the use of torture to narrowly defined circumstances will not hold in the long run, as temptations to gradually expand these conditions and use torture in other settings as well will become inevitable: “Maintaining the option to torture in certain ‘limited narrow circumstances’ such as a ‘ticking bomb’ scenario will always open the door to torture in situations where no arguable moral necessity is present.” (Strauss 2005: 1299) This expansion may not necessarily happen due to ill will, but also due to mere practical reasons. Rumney (2005: 475) contends that “contemplating a system that is ‘clearly delineated and controlled’ assumes that such a system could be successfully operated”, and that such a proposition requires that people who possess life-saving information can be accurately identified, which is not always possible. Relatedly, Rumney argues that the possibility of using torture against individuals who are not guilty of crime – especially in situations of immediacy – remains one of the strongest indicators of why it is inherently problematic. Arguing that the attempt to justify torture by reference to necessity fails, Kutz (2007: 275) argues that “far more dangerous to us, to who we are, is the threat of finding necessity in every conflict with evil and emergency in every war”.

## **2. The case for an authorization of torture in extreme circumstances**

It is exactly this “necessity defense” that proponents of torture often invoke. In the following sections, this and other arguments in favor of a legalization of torture under narrow preconditions will be examined.

### **a. The “necessity defense”**

Some scholars articulate an authorization of torture on the grounds of necessity as a justification. That is, they do not call for a wholesale legalization of torture, but rather advocate for its authorization under strong pre-defined circumstances while it is maintained illegal nonetheless. Posner and Vermeule (2005: 2) propose two suggestions as to how this tightrope could be walked: the “necessity defense”, which would grant authorities the discretion “to argue in specific cases that

violating the laws against coercive interrogation was necessary to discharge their duty to protect the public from an imminent terrorist threat”, and the practice of seeking pardon *ex post*, with the goal that the torturers will be liable if the strict conditions for necessity were not met. The authors justify the necessity defense by arguing that “maintaining the ‘illegality’ of coercive interrogation expresses a moral commitment to human dignity and autonomy, while the possibility of defenses and pardons allows its use where appropriate” (pp. 2-3). Posner and Vermeule favor the necessity defense over the pardon-seeking approach, contending that “a regime of *ex ante* illegality and *ex post* license is conceptually unsustainable” (p. 3), because if authorities *know* that *ex post* defenses are available, they will factor it into their decision-making, thus diluting the idea and effectiveness of a prohibition in the first place.

Crucially, the authors hold that torture is often seen as special in a way that differentiates it from other forms of violence such as police killings. For instance, they point out that police are usually authorized to use lethal force in order to prevent harm, and that laws exist that govern the conditions under which police may rightly use this deadly force without facing consequences. They then ask why the same system should not be used for torture as well, contending that, contrary to the popular view that torture is different in some way, in their view it is “not special at all” (p. 3). Indeed, they argue that “there is no philosophical justification for thinking that coercive interrogation should be considered special, and regulated differently than the other serious, coercive harms that government inflicts” (p. 4). Therefore, similar to police violence, they advocate that torture should be permitted, yet be subject to similar legal provisions that govern the rules of its lawful application.

#### **b. The prohibition of torture is unrealistic**

Bagaric and Clarke (2005) point out that, because torture continues to be widely used despite its absolute prohibition, such a ban is pragmatically unrealistic. They even explicitly hold that “the main benefit of torture is that it is an excellent means of gathering information. Humans have an intense desire to avoid pain, no matter how short term, and most will comply with the demands of a torturer to avoid the pain” (p. 588). The authors fail to address any of the counter-arguments presented above that point to the unreliability of evidence extracted by means of torture. On a broader scale, they argue that, similar to a cost-benefit analysis of conflicting interests, “torture is morally defensible in certain circumstances, mainly when more grave harm can be avoided by using torture as an interrogation device” (p. 583). They identify the magnitude of harm that is sought to be prevented as a sort of “benchmark” that governs the permissibility of torture (p. 611) and conclude that it should only be permitted as a last resort where the right to life is imperiled.

Bagaric and Clarke develop a formula<sup>9</sup> that takes into consideration five relevant variables – such as the number of lives at risk and the probability that the suspect has relevant knowledge – and aims to help arrive at a decision as to whether torture is justified in a given incident or not. “Torture should be permitted where the application of the variables exceeds a threshold level” (p. 614), and the higher the result, the more severe forms of torture are acceptable. The authors evade the specification of such a “torture threshold” and suggest applying the formula to different hypothetical situations to better gauge the numeric outcomes.

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<sup>9</sup> For a detailed specification of the formula and its five constituent variables, please refer to Bagaric and Clarke (2005), pp. 613f.

Critically reflecting on this proposition, the problem arises that the value and “weight” attached to each variable is highly subjective. The same issue applies to the outcome of this equation: The suggestion that the “severity” of torture should grow in proportion to the numeric result of the formula presupposes that this intensity can be (objectively) measured and pointedly controlled. Lastly, it remains questionable whether authorities will have enough time in situations of urgency to diligently compute the formula and arrive at a well-informed conclusion on the basis of a single number which essentially hinges on the decimal place.

With regard to the “slippery slope” objection discussed above, Posner and Vermeule (2005: 17) hold that these arguments “are not supported by evidence”, and similarly Bagaric and Clarke (2005: 615) claim that “this argument is not sound in the context of torture”. They do elaborate on this assertion, arguing that “the floodgates are already open” (p. 615), i.e. that torture is widely used despite its prohibition. They also argue that clearly delineated and controlled pre-conditions for such conduct will prevent its expansion to other circumstances (in other words, they plainly reject the core of the slippery slope argument), invoking the example that “the use of the death penalty [in the United States] has not resulted in a gradual extension of the offenses for which people may be executed or an erosion in the respect for human life” (p. 616).

### **c. The “torture warrant”**

The term “torture warrant” was coined by Alan Dershowitz, former professor at the Harvard Law School and “the most notable academic proponent for the use of torture since September 11” (Ip 2009: 41). Dershowitz is an equally controversial and influential figure in the torture debate. He justifies the use of torture on utilitarian grounds<sup>10</sup>, arguing that “it is surely better to inflict nonlethal pain on one guilty terrorist who is illegally withholding information needed to prevent an act of terrorism than to permit a large number of innocent victims to die” (Dershowitz 2002: 144). The idea behind the torture warrant is fairly simple: Just like state authorities, in most cases, need to obtain a warrant from a judge before they can lawfully search a suspect’s property or monitor his or her communications, Dershowitz (2002: 158) suggests a “formal requirement of a judicial warrant as a prerequisite to nonlethal torture”.

He believes that such a formal requirement would decrease the instances of physical violence against suspects, on the grounds that “a double check is always more protective than a single check” (p. 158). Prior to requesting a torture warrant before a judge (which he believes to demand persuasive evidence before issuing an authorization), some person of authority must already have decided that torture is justified in this specific case. Crucially, Dershowitz argues that the torture warrant would eliminate the necessity defense discussed above, simply because a warrant procedure is available: Agents who perform torture without obtaining a warrant “could not claim ‘necessity’, because the decision as to whether the torture is indeed necessary has been taken out of their hands and placed in the hands of a judge” (p. 159).

The question for Dershowitz is not whether torture would or would not be used in cases such as the *ticking bomb* scenario – “it would” (p. 151) – but whether it would be done openly, “pursuant to a previously established legal procedure”, or instead secretly and illegally. Similar to other proponents of torture quoted above, he argues that torture has occurred and will continue to

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<sup>10</sup> As mentioned in the introduction, this is just one of the many examples in which philosophical considerations are closely related to legal reasonings.

do so, regardless of whether it is legal or not – the only variable is the public’s awareness of its conduct. Building on this reasoning, he advocates for a codified process by which “requests” for torture can be judicially reviewed, and where records of approvals would be kept, thus strengthening the institutional system behind the practice.

Dershowitz often claims that he is misunderstood in his propositions. In another piece, Dershowitz (2003: 277) reiterates that he is “generally against torture as a *normative* matter, and [...] would like to see its use minimized” (emphasis in original). He acknowledges the downside of his approach in that it would entail a legitimization of torture, but adhering to his conviction that torture will happen one way or the other, he explains that “if we try to control the practice by demanding some kind of accountability, we add a degree of legitimation to it while perhaps reducing its frequency and severity” (p. 278). Addressing reproaches advanced by other authors that a warrant procedure would likely increase the use of torture (“slippery slope”), he makes clear that he “cannot see how it could possibly increase it, since a warrant requirement simply imposes an additional level of prior review” (p. 281).

While Dershowitz’s arguments, especially the one that torture will happen regardless of its legality, may be compelling to some extent *in theory*, when critically addressing his propositions it remains questionable whether they are viable *in practice*. In particular, Dershowitz invokes the *ticking bomb* scenario as the basis for his arguments. However, given the issue of immediacy, which is by definition at the heart of this scenario, it is doubtful whether institutional practices such as the solicitation of “torture warrants” and their approval by a judge is a realistic assumption within such a short timeframe. A possible alternative, perhaps closer to reality, would be the obtainment of approval *ex post*, which in a way would defeat the purpose of a warrant. The author of the present essay believes to have identified a flaw in Dershowitz’s logic and holds that this point requires further attention and clarification.

### 3. Brief Case Example: Waterboarding

The third part of this review essay will briefly address an issue that has repeatedly attracted attention in the question on legal responses to torture: waterboarding. Waterboarding has in a way become the epitome of the torture debate. Abu Zubaydah, a senior al-Qaeda operative from Saudi Arabia and among the first terrorist suspects to be captured by the CIA in the aftermath of 9/11, was reported to have been waterboarded 83 times. Khalid Shaikh Mohammed, the self-reported mastermind of the attacks, was waterboarded 183 times in March 2003, yielding a total of 266 incidents of the near-drowning technique against the two suspects (Shane 2009).

Waterboarding is widely regarded as torture. In its 2006 Report of the Committee against Torture, it is reiterated that “[t]he State party should rescind any interrogation technique, including methods involving [...] ‘waterboarding’ [...] that constitutes torture or cruel, inhuman or degrading treatment or punishment” (UNCAT 2006: 71). However, the Bush administration has never fully and jointly conceded that waterboarding is torture (Luban 2007: 8). Rather, pertaining to the *Torture Memo* mentioned above, it held that waterboarding did not amount to the severe pain and suffering that is needed to classify as torture – if anything, it was seen to amount to “cruel and inhuman treatment”, which was deemed to be lawful<sup>11</sup>.

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<sup>11</sup> For detailed discussions on how the Bush Administration misconstrued existing legal norms and capitalized on ambiguous wording, see, e.g., Kramer (2003) and Ross (2007).

Drawing on a qualitative analysis of 21 Congress hearings in 2007 and 2008, Del Rosso (2014) investigates the respective discourses that supporters and opponents of waterboarding used to maintain and challenge the legitimacy of the practice. His findings mainly complement the remarks already discussed in this essay, namely that while supporters argue that it is “a last resort in the pursuit of a legitimate goal”, opponents typically point to its illiberal nature and unreliable evidence. He also finds that proponents eagerly seek to avoid using the term “torture”, elaborating that “this rhetorical strategy may be viewed as a cynical effort to maintain the legitimacy of practices that clearly meet the legal standard of torture” (Del Rosso 2014: 398f.).

The author of the present essay wishes to direct the reader’s attention to one study in particular which takes into consideration a central element in shaping the torture debate: the media. In their paper “Torture at Times: Waterboarding in the Media”, authors Neal Desai et al. (2010) found that, in light of the (at that time intensely) ongoing torture debate, newspapers employed a significant and sudden shift in how they characterized the practice of waterboarding. While, historically, newspapers that covered waterboarding almost uniformly and explicitly referred to it as “torture”, they almost never did so in the aftermath of the revelations of relevant U.S. practices abroad. Notably, the authors also find that the newspapers were more inclined to continue to refer to waterboarding as torture in cases where a country other than the U.S. was the perpetrator. Arguments of “neutrality” of the media are called into question by the fact that, *prior* to the revelations, they repeatedly – and very non-neutrally – classified waterboarding as outright “torture”. It is believed that the role of the media in shaping the torture discourse is understudied and that future research should focus on publishing similar studies such as the one presented here.

## IV. Conclusion

This essay sought to provide the reader with an overview of the scholarly literature on legal responses to torture. In doing so, it identified and critically analyzed the main claims and arguments advanced by both the supporters and opponents of torture, presented possible counter-arguments, and pointed to theoretical inconsistencies and research gaps. In terms of quantity of publications, the opponents of torture far outnumber its advocates. Despite the abovementioned remarks by Rumney (2005: 471) that “legal scholars are free to explore possible reforms, without the restraint of precedent or the separation of powers”, a majority of scholarly literature is dedicated to a defense of existing legal norms in the form of an unconditional maintenance of the absolute prohibition of torture.

Notwithstanding the focus of this essay on *legal* responses to torture, it has become clear that moral or philosophical considerations cannot be fully excluded from such a debate. The issue of a moral defensibility of torture in extreme cases has been on the mind of scholars, policymakers, and ordinary citizens alike for centuries. Utilitarian arguments such as the one advanced by Bagaric and Clarke (2005) attempt to *quantify* the worth of human life, weighing one terrorist life against the lives of potentially thousands of innocent civilians. Such considerations bring the notion of an interconnectedness of legal and moral elements to this debate full circle: They are not only morally questionable, but also violate fundamental human rights norms. Then again, so does the continued conduct of torture, which takes place regardless of its prohibition. According to Amnesty International and other human rights groups, torture is flourishing around the world. This fact has prompted some scholars to conclude that the prohibition of torture is ineffective, and that it should instead be legalized and put under strong judicial review in order to warrant accountability. However, at least on a normative level, the argument of an apparent ineffectiveness of the prohibition of torture lacks cogency: “Just because something is does not mean that it should be.”

This review essay will conclude with a reiteration of the research gap of analyzing the role of the media in influencing the discourse on torture, which is largely understudied. The media represent a constitutive element of a modern democracy, serving as the “Fourth Power” and bearing great influence in shaping public opinion on certain issues, which in turn is crucial for government support. The government depends on the public’s approval (at least in the long run, or until the next round of elections). This can be seen in Bush’s approval ratings which surged in the immediate aftermath of 9/11 and then continuously declined. The author wishes to express his concern over the findings of Desai et al. (2010), as he believes that there is a fine line between neutrality and objectivity, and that it is one of the key privileges of the free press to be able and allowed to criticize the government’s actions if need be. The media have not only power, but also a responsibility. This is all the more true in recent debates of “fake news” and eroding public confidence in established media outlets.

Lastly, the torture debate is far from over – as long as the practice of torture continues, so will the debate around it. Contemporary events such as the nomination – and subsequent confirmation – of Gina Haspel as new CIA director reopen old wounds and draw attention to chapters that the U.S. government certainly would have preferred to remain untouched. Just like various formerly classified documents on the U.S. practice in the “War on Terror” have come to light over the past years and have spurred extensive academic debate, so too we might someday witness the disclosure of Haspel’s professional activities in the CIA “black site” in Thailand she



oversaw. Even though Haspel's much discussed Senate confirmation process was "not a judicial proceeding – it can neither indict nor exonerate, and it provides little space for nuance" (Baer 2018), it cannot be denied that her professional past has played an important role in it. True, Haspel has been confirmed in office, despite her unclear professional past – this formal confirmation, however, is rather unlikely to significantly stifle the debate around her alleged involvement in illicit activities. Given the affirmative outcome, future research may wish to (re-)investigate the relationship between a public official's personal complicity in torture practices and the propensity of being elected to one of the highest offices of the U.S. federal government.

## V. Works Cited

- Alvarez, José A. (2006): Torturing the Law. *Case Western Reserve Journal of International Law* 37 (2), pp. 175–223.
- Anwukah, Ogechi Joy (2016): The Effectiveness of International Law: Torture and Counterterrorism. *Annual Survey of International & Comparative Law* 21 (1), pp. 1–28.
- Baer, Daniel (2018): The Haspel Nomination and the Torture Question. *Foreign Affairs*, 12 April 2018. Available at: <https://www.foreignaffairs.com/articles/united-states/2018-04-12/haspel-nomination-and-torture-question> [04-15-2018]
- Bagaric, Mirko and Julie Clarke (2005): Not Enough Official Torture in the World? The Circumstances in Which Torture Is Morally Justifiable. *University of San Francisco Law Review* 39, pp. 581–616.
- Brugger, Winfried (2000): May Government Ever Use Torture? Two Responses from German Law. *The American Journal of Comparative Law* 48 (4), pp. 661.
- Damaska, Mirjan (1978): The Death of Legal Torture. *The Yale Law Journal* 87 (4), pp. 860–884.
- Del Rosso, Jared (2014): The Toxicity of Torture: The Cultural Structure of US Political Discourse of Waterboarding. *Social Forces* 93 (1), pp. 383–404.
- Demirjian, Karoun (2018): McCain asks CIA director nominee Haspel to explain role in post-9/11 interrogations. *The Washington Post*, 23 March 2018. Available at: [https://www.washingtonpost.com/powerpost/mccain-asks-cia-director-nominee-haspel-to-explain-her-record-tied-to-torture/2018/03/23/227e76a6-2ea2-11e8-b0b0-f706877db618\\_story.html?utm\\_term=.9e1073eae69](https://www.washingtonpost.com/powerpost/mccain-asks-cia-director-nominee-haspel-to-explain-her-record-tied-to-torture/2018/03/23/227e76a6-2ea2-11e8-b0b0-f706877db618_story.html?utm_term=.9e1073eae69) [04-08-2018]
- Dershowitz, Alan M. (2002): Why terrorism works. Understanding the threat, responding to the challenge. New Haven: Yale University Press.
- Dershowitz, Alan M. (2003): The Torture Warrant: A Response To Professor Strauss. *New York Law School Law Review* 48, pp. 275–294.
- Desai, Neal, Andre Pineda, Majken Runquist, and Mark A. Fusunyan (2010): Torture at Times: Waterboarding in the Media. *Harvard Student Paper*.
- Doswald-Beck, Louise (2011): Human rights in times of conflict and terrorism. Oxford: Oxford University Press.
- Einolf, Christopher J. (2007): The Fall and Rise of Torture: A Comparative and Historical Analysis. *Sociological Theory* 25 (2), pp. 101–121.
- Ensor, Josie (2014): Jihadists call for retaliation over US torture report. *The Telegraph*, 10 December 2014. Available at:

<https://www.telegraph.co.uk/news/worldnews/northamerica/usa/11284212/Jihadists-issue-call-for-retaliation-against-US-over-torture-report.html> [04-14-2018]

Frankenberg, Günter (2008): Torture and Taboo: An Essay Comparing Paradigms of Organized Cruelty. *The American Journal of Comparative Law* 56 (2), pp. 403–422.

Herb, Jeremy (2018): CIA paints a fuller picture of director nominee Gina Haspel's biography. *CNN Politics*, 22 March 2018. Available at: <https://www.cnn.com/2018/03/22/politics/gina-haspel-cia-biography-congress/index.html> [04-08-2018]

Ip, John (2009): Two Narratives of Torture. *Northwestern Journal of International Human Rights* 7 (1), pp. 35–77.

Kearns, Erin M. (2015): The Study of Torture. Why It Persists, Why Perceptions of It are Malleable, and Why It is Difficult to Eradicate. *Laws* 4 (1), pp. 1–15.

Kreimer, Seth F. (2003): Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror. *Journal of Constitutional Law* 6 (2), pp. 278–325.

Kreimer, Seth F. (2005): Torture Lite, Full-Bodied Torture, and the Insulation of Legal Conscience. *Journal of National Security and Law Policy* 1 (187), pp. 187–229.

Kutz, Christopher (2007): Torture, Necessity and Existential Politics. *California Law Review* 95 (1), pp. 235–276.

Langbein, John H. (1977): Torture and the Law of Proof. Europe and England in the Ancien Régime. Chicago: University of Chicago Press.

Lebowitz, Michael J. (2010): The Value of Claiming Torture: An Analysis of Al-Qaeda's Tactical Lawfare Strategy and Efforts to Fight Back. *Case Western Reserve Journal of International Law* 43 (1), pp. 357–392.

Luban, David (2005): Liberalism, Torture, and the Ticking Bomb. *Virginia Law Review* 91 (6), pp. 1425–1461.

Luban, David (2007): The Defense of Torture. *The New York Review of Books* 54 (4).

Méndez, Juan E. (2016): How International Law can eradicate torture: A response to critics. *Southwestern Journal of International Law* 22, pp. 247–267.

Ohlin, Jens David (2008): The Bounds of Necessity. *Journal of International Criminal Justice* 6 (2), pp. 289–308.

Posner, Eric A. and Adrian Vermeule (2005): Should Coercive Interrogation Be Legal? *University of Chicago Public Law Working Paper* 84, pp. 1–38.

Raju, Manu, Jeremy Herb, and Jenna McLaughlin (2018): How Gina Haspel is trying to overcome her past to become the next CIA director. *CNN Politics*, 27 March 2018. Available at: <https://www.cnn.com/2018/03/27/politics/gina-haspel-cia-confirmation/index.html> [04-08-2018]

- Ross, James (2007): Black letter abuse: The US legal response to torture since 9/11. *International Review of the Red Cross* 89 (867), pp. 561–590.
- Rothchild, Jonathan (2006): Moral Consensus, the Rule of Law, and the Practice of Torture. *Journal of the Society of Christian Ethics* 26 (2), pp. 125–156.
- Rumney, Philip (2005): The effectiveness of coercive interrogation: Scholarly and judicial responses. *Crime, Law and Social Change* 44 (4-5), pp. 465–489.
- Shane, Scott (2009): Waterboarding Used 266 Times on 2 Suspects. *The New York Times*, 19 April 2009. Available at: [https://www.nytimes.com/2009/04/20/world/20detain.html?\\_r=0](https://www.nytimes.com/2009/04/20/world/20detain.html?_r=0) [04-14-2018]
- Strauss, Marcy (2005): The Lessons of Abu Ghraib. *Ohio State Law Journal* 66, pp. 1269–1310.
- UNCAT (UN Committee Against Torture) (2006): Report of the Committee against Torture. Thirty-fifth and thirty-sixth session. New York: United Nations.
- Yoo, John (2007): War By Other Means. An Insider's Account Of The War On Terror. New York: Grove/Atlantic, Inc.



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