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THE PROHIBITION AGAINST TORTURE AND CRUEL, INHUMAN, AND DEGRADING TREATMENT AND PUNISHMENT: CAN THE ABSOLUTE BE RELATIVIZED UNDER EXISTING INTERNATIONAL LAW?

Yuval Shany⁺

INTRODUCTION

Generally speaking, norms derived from international humanitarian law (IHL) and international human rights law (IHR) strive to strike a balance between the rights of the protected individual, the rights of other individuals, and broader military or public interests. They do so, mainly, through the introduction of explicit or implicit limitation and derogation provisions that permit states to restrict or even suspend the legal entitlements normally afforded to individuals during times of conflict or public emergency, or through other situations of pressing social necessity. Still, some IHL and IHR norms have been formulated as absolute prescriptions—i.e., strict rules that should be applied under all circumstances (sometimes referred to as *jus strictum*).¹ IHL norms such as the prohibitions against the use of certain means of warfare, collective punishments, and perfidy contain such inflexible attributes.² The prohibition against

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1. See, e.g., David Kretzmer, *The Advisory Opinion: The Light Treatment of International Humanitarian Law*, 99 AM. J. INT'L L. 88, 88 (2005). Classic international law literature uses the term *jus strictum* somewhat differently, however, as a principle of interpretation. GEORG SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 29 (5th ed. 1967) (juxtaposing strict construction of the law—*jus strictum*—against more flexible and equitable rules of *jus aequum*).

2. See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 33, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva

torture, which can be found in both IHL and IHR instruments,³ is also drafted in absolute terms.

The present Article reviews the theoretical underpinnings of the absolute international law prohibition against torture in light of the general rationales that may explain resorting to absolute prescriptions in IHL and IHR instruments. It also examines the scope of the prohibition against torture under international law, as it presently stands, and the degree of absoluteness it actually entails. Significantly, the Article does not challenge or seek to revisit most internationally accepted definitions of "torture" and "other acts of cruel, inhuman or degrading treatment or punishment."⁴ Instead, it asks whether a distinction between the different degrees of prohibited ill-treatment—i.e., between torture, as defined by Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)⁵ and other, less severe forms of cruel, inhuman, and degrading treatment prohibited by Article 7 of the International Covenant on Civil and Political Rights (ICCPR)⁶ and

IV]; Convention with Respect to the Laws and Customs of War on Land arts. 23, 50, July 29, 1899, 32 Stat. 1803, 1 Bevans 247 [hereinafter Hague Regulations].

3. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter CAT]; Geneva IV, *supra* note 2, arts. 3(1), 32; Geneva Convention Relative to the Treatment of Prisoners of War arts. 3(1), 17, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III].

4. CAT, *supra* note 3, art. 16.

5. Article 1 of 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.

Id. art. 1(1).

6. International Covenant on Civil and Political Rights art. 7, Dec. 19, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR] ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."). Notably, the European Court of Human Rights has discussed in a number of cases the meaning of the parallel term "inhuman or degrading treatment or punishment" found in the Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR]. The court held:

[I]ll-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is . . . relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim . . .

Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 65 (1978). Specifically, the court held that treatment that "was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering" amounted to "inhuman

Article 16 of CAT⁷—might have legal significance for the possibility of invoking ex post defenses against the attribution of legal responsibility. While the distinction between the two degrees of illegality might be distasteful and difficult to apply,⁸ it is generally supported in international legal texts and case law.

treatment.” *Kudla v. Poland*, 2000-XI Eur. Ct. H.R. 199, 223. Furthermore, the court held that treatment, which aroused in the victims “feelings of fear, anguish and inferiority capable of humiliating and debasing them,” amounted to “degrading treatment.” *Ireland*, 25 Eur. Ct. H.R. at 66-67; see also *Kalashnikov v. Russia*, 2002-VI Eur. Ct. H.R. 93, 116; *Kudla*, 2000-XI Eur. Ct. at 223; *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 39 (1989). Although the question whether the authorities intended to cause such injury, suffering, or humiliation is important in evaluating the severity of the treatment, it is by no means determinative (i.e., nondeliberate ill-treatment might qualify as “inhuman or degrading treatment”). See *Peers v. Greece*, 2001-III Eur. Ct. H.R. 277, 297; *Raninen v. Finland*, 1997-VIII Eur. Ct. H.R. 2805, 2821-22.

Indirect mental injury suffered by relatives of victims of ill-treatment might also fall under Article 3 of the ECHR. See, e.g., *Imakayeva v. Russia*, App. No. 7615/02, paras. 166-67 (Eur. Ct. H.R. Nov. 9, 2006), <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search “Application Number” for “7615/02”); *Bazorkina v. Russia*, App. No. 69481/01, paras. 139-42 (Eur. Ct. H.R. July 27, 2006), <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search “Application Number” for “69481/01”); see also CLARE OVEY & ROBIN C.A. WHITE, JACOBS AND WHITE, EUROPEAN CONVENTION ON HUMAN RIGHTS 58-66 (3d ed. 2002); Fionnuala Ní Aoláin, *The European Convention on Human Rights and its Prohibition on Torture*, in *TORTURE* 213, 214-18 (Sanford Levinson ed., 2004).

It may also be noted that at least one prominent expert on the law governing torture objects to the distinction between torture and other forms of ill-treatment on the basis of the severity of the ill-treatment, and argues that deliberate intent to inflict pain or suffering should be the dividing criterion. NIGEL S. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 50 (2d ed. 1999).

For a definition of the prohibition against torture under IHL, see 3 COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 627 (Jean S. Pictet ed., 1960) (“The word torture refers here especially to the infliction of suffering on a person in order to obtain from that person, or from another person, confessions or information. . . . [Inhuman treatment] could not mean, it seems, solely treatment constituting an attack on physical integrity or health; the aim of the Convention is certainly to grant prisoners of war in enemy hands a protection which will preserve their human dignity and prevent their being brought down to the level of animals. Certain measures, for example, which might cut prisoners of war off completely from the outside world and in particular from their families, or which would cause great injury to their human dignity, should be considered as inhuman treatment . . .”).

7. CAT provides:

Each 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, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

CAT, *supra* note 3, art. 16(1).

8. Eyal Benvenisti, *The Role of National Courts in Preventing Torture of Suspected Terrorists*, 8 EUR. J. INT’L L. 596, 606 (1997); Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481, 1488 (2004) (criticizing the “definitional juggling” that the two-level definition facilitates).

To be clear, the present author supports the absolute ban against torture as defined in Article 1 of CAT, as a matter of law, morality, and sound policy. Still, I posit that the sweeping extension of the absolute prohibition ban to all proscribed forms of ill-treatment falling short of torture is unsupported by *lex lata*. Furthermore, such extension is morally controversial, politically unfeasible, and perhaps also counterproductive from a pragmatic pro-human rights perspective. Thus, a host of considerations support the introduction of a limited degree of flexibility into the penumbral prohibition against ill-treatment falling short of torture. As a result, the Article proposes to construe the existing legal regime governing proscribed torture and other forms of ill-treatment as comprising an absolute core prohibition against torture and a relative prohibition against other forms of ill-treatment, while allowing the criminal law defenses, such as duress, necessity, or self-defense to be available in exceptional circumstances to perpetrators of such ill-treatment.

Part One of this Article explains the policy rationales underlying the introduction of absolute norms in IHL and IHR and applies them, in a critical manner, to the prohibition against torture. I contend that while the moral case for the introduction of an absolute prohibition against torture might be unsubstantiated, the policy choice underlying the introduction of an absolute bar is legitimate given the second-order deficiencies associated with monitoring relative prohibitions. Part Two explores two potential exceptions to the absolute nature of the prohibition against forms of ill-treatment falling short of the definition of torture—the availability of general defenses under the international law of state responsibility and general defenses under criminal law. While I reject the first group of defenses, since they are incompatible with existing law and the policy rationales underlying the prohibition against torture, I accept, to some degree, the position taken by the Israeli Supreme Court in its landmark 1999 *Public Committee Against Torture in Israel v. Israel* decision to retroactively examine the permissibility of harsh terror-related interrogation techniques in the framework of criminal law defenses.⁹ Part Three concludes.

I. ABSOLUTE PRESCRIPTIONS AND THE PROHIBITION AGAINST TORTURE

IHL and IHR law often strike a delicate balance between the protection of individual rights on the one hand, and protection of the rights of other individuals and military or community interests on the other hand. Many IHL and IHR rights perform this balancing act through the introduction of relative legal standards, which explicitly or implicitly facilitate

9. HCJ 5100/94 Pub. Comm. Against Torture in Isr. v. Israel [1999] IsrSC 53(4) 817, reprinted in 38 I.L.M. 1471, 1488 (1999).

the adaptation of humanitarian norms to varying circumstances.¹⁰ For example, under IHL, private property is not to be destroyed in times of conflict, “except where such destruction is rendered absolutely necessary by military operations”;¹¹ the personal rights of protected persons are to be respected, subject to the proviso that “the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war”;¹² and military attacks that result in collateral civilian damage are permissible unless they are “expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”¹³ Similarly, many IHR rights can be limited, subject to conditions such as necessity, proportionality, non-arbitrariness, resource availability, and the like.¹⁴ In addition, derogation clauses in human rights treaties permit states to suspend many human rights protections in times of emergency, subject to a number of requirements.¹⁵

10. On the related distinction between “rules” and “standards” in law, see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). For application of the same distinction in international law, see Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT’L L. 907 (2005).

11. Geneva IV, *supra* note 2, art. 53.

12. *Id.* art. 27.

13. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 57(2)(a)(iii), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

14. See, e.g., ICCPR, *supra* note 6, art. 6 (prohibiting the arbitrary deprivation of life); *id.* art. 9 (prohibiting arbitrary arrests and detentions); *id.* art. 12(3) (allowing necessary limitations on freedom of movement); *id.* art. 17 (prohibiting arbitrary interference with privacy); *id.* art. 18(3) (permitting necessary limitations on freedom of religion); *id.* art. 19(3) (allowing necessary limitations on freedom of expression); *id.* art. 21 (permitting necessary limitations on freedom of assembly); *id.* art. 22(2) (allowing for necessary limitations on freedom of association); *id.* art. 25 (providing that no unreasonable restrictions are to be placed on the right to take part in public affairs); International Covenant on Economic, Social and Cultural Rights art. 2(1), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR] (“Each State Party to the present Covenant undertakes to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant . . .”).

15. See ICCPR, *supra* note 6, art. 4 (“In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.”). For an authoritative interpretation of Article 4, see generally United Nations, Human Rights Comm., *General Comment 29: States of Emergency (Article 4)*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001). For comparable derogation provisions in other human rights instruments, see Organization of American States, American Convention on Human Rights art. 27, Nov.

The relative nature of these IHL and IHR obligations provides states with considerable discretion in choosing how to apply the primary humanitarian norm in question. Such flexibility conforms to the general philosophy of the human rights movement, which supports the relative nature of human rights,¹⁶ as well as with the laws of state responsibility, which provide exceptions to liability in special circumstances.¹⁷ Additionally, this flexibility is manifested in international criminal law, which recognizes a number of general defenses against criminal responsibility applicable in extraordinary circumstances.¹⁸

However, a significant number of IHL norms and one notable IHR norm—the prohibition against torture—are formulated in absolute terms, ostensibly allowing no room for limitation or nuanced application.¹⁹ For example, resort to certain conventional and unconventional weapons, such as chemical and biological weapons, has been outlawed under all circumstances;²⁰ certain war tactics, labeled as perfidious (e.g., feigning injury or surrender), ought never to be resorted to;²¹ and collective punishments can never be meted out against a protected civilian population.²² The prohibition against torture, under both IHL and IHR law, also seems to fall within this category of absolute prescriptions.²³

22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter I/A CHR]; ECHR, *supra* note 6, art. 15.

16. See Universal Declaration of Human Rights art. 29, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

17. See, e.g., United Nations, Int'l Law Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries* art. 25, in *Report of the International Law Commission*, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 [hereinafter *Draft Articles*].

18. See, e.g., Rome Statute of the International Criminal Court art. 31(1), July 17, 1998, 2187 U.N.T.S. 3 [hereinafter *Rome Statute*].

19. Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 65 (1978).

20. See, e.g., Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction art. 1, Sept. 18, 1997, 2056 U.N.T.S. 211; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction art. 1, Jan. 13, 1993, 32 I.L.M. 800; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction art. 1, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163.

21. See Protocol I, *supra* note 13, art. 37; Hague Regulations, *supra* note 2, art. 23. The prohibition is well-established in customary IHL as well. 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 203-26 (2005).

22. Protocol I, *supra* note 13, art. 75(2)(d); Geneva IV, *supra* note 2, art. 33; Hague Regulations, *supra* note 2, art. 50.

23. See, e.g., Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶¶ 153-56 (Dec. 10, 1998). It may be noted, however, that the prohibition against torturing enemy civilians present "in the territory of a [p]arty to the conflict" might be subject to a general limitation clause found in Geneva IV. See Geneva IV, *supra* note 2, art. 5. Still, it would seem that customary international law, which incorporates the prohibition against torture,

Possible Explanation for Selecting Strict IHL or IHR Rules

How is one to understand this choice of legislative methodology, which denies the relative nature of the covered humanitarian norms (i.e., their circumstance dependent character)? Why should a norm be decontextualized from the background conditions in which it is expected to operate? Three principal explanations, which may apply cumulatively or alternatively to different absolute prohibitions, come to mind.

First, a moral-oriented “inherent repugnance” argument would suggest that some acts are inherently immoral or would certainly be incompatible with fundamental human rights or basic notions of justice or fairness.²⁴ As a result, such acts should be avoided at all costs and can never be justified regardless of the relevant stakes. So, the argument goes, the monstrous effects of biological or chemical weapons, the deception and breach of trust associated with perfidy, and the violation of basic moral percepts of individual guilt generated by collective punishment measures, support an absolute bar against their application regardless of any conjectural benefits that might accrue to the relevant actor from evading absolute prohibitions in specific situations (e.g., winning the war, deterring the enemy, or preventing harm to other individuals).

Applied to the prohibition against torture, the immorality argument would posit that torture is inherently evil—it is barbaric, corruptive, and incompatible with basic notions of respect for human dignity. In particular, it conflicts with the Kantian percept that individuals should never be used as mere means to an end.²⁵ According to this principle, the objectification of individuals subject to torture—i.e., the willingness to sacrifice their fundamental rights in order to promote the rights of others or some broader public goal (for instance, fighting terror, solving crime, obtaining military intelligence, and deterring enemies)—amounts to dehumanization of torture victims and must be viewed as inherently immoral. Hence,

see, for example, *Furundzija*, Case No. IT-95-17/1-T, ¶¶ 153-56, as well as the parallel application of the relevant nonderogable provisions of IHR would negate any effects that Article 5 could have had with regard to the prohibition against torture. See, e.g., *supra* notes 19-22 and accompanying text.

24. See Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 242 (2000) (“[G]overnments have agreed to the absolute prohibition of weapons considered inherently abhorrent”); Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudential Based Inquiry into Criteria and Content*, 27 HOW. L.J. 145, 192 n.206 (1984) (“[A]ny form of collective punishment would violate the right of individuals to human dignity”).

25. IMMANUEL KANT, *Metaphysical Foundations of Morals*, in THE PHILOSOPHY OF KANT 154, 195 (Carl J. Friedrich ed., 1993); see also Alan Gewirth, *Are There Any Absolute Rights?*, 31 PHIL. Q. 1, 9 (1981); Mordechai Kremnitzer, *The Landau Commission Report—Was the Security Service Subordinated to the Law or the Law to the “Needs” of the Security Service?*, 23 ISR. L. REV. 216, 248-53 (1989); Patrick Lee, *Interrogational Torture*, 51 AM. J. JURIS. 131 (2006).

it should be barred in all circumstances. Indeed, judicial cases in which various manifestations of torture had been barred often cite the incompatibility of torture with fundamental notions of human dignity and other moral considerations of this type.²⁶

A second argument in favor of resorting to absolute norms is based on second-order institutional considerations. Since IHL and, to a somewhat lesser degree, IHR law are applied in the absence of effective judicial review, states often enjoy, in practice, an unchallenged power of discretion on the manner of applying relative norms. This state of affairs, in which the “cats” are trusted with guarding the “cream,” invites abuse, as states are likely to overstress right-limiting factors and to underprotect those individuals who were supposed to benefit from the norm (who are often regarded as outlaws or the “enemy”).²⁷ Even in the absence of purposeful abuse, recognizing exceptions to a prohibition designed to protect important human interests might create “slippery slope” conditions through which application of the rules becomes the exception and not the norm, and vice versa.²⁸ In other words, the inclination of state institutions to guard general societal interests, even at the expense of individual rights, might lead to the misapplication of relative international legal standards.

Hence, when devising a rule of IHL or IHR law, a policy choice is presented between (a) normative rigidity, which promotes the attainment of the norm’s goals in the vast majority of cases, at the price of an inadequate match between law and reality in extreme circumstances, in which a different or nuanced application of the norm would have been warranted; and (b) normative flexibility, which is more attuned to changing

26. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 272-73 (1972) (Brennan, J., concurring); H CJ 5100/94 Pub. Comm. Against Torture in *Isr. v. Israel* [1999] IsrSC 53(4) 817, reprinted in 38 I.L.M. 1471, 1482-84 (1999); *Pretty v. United Kingdom*, 2002-III Eur. Ct. H.R. 157, 190-91; *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 34-35 (1989); United Nations, Human Rights Comm., *General Comment 20: Article 7*, para. 2 (1992), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (July 29, 1994) [hereinafter *General Comment 20*].

27. See Alan M. Dershowitz, *Is It Necessary To Apply “Physical Pressure” to Terrorists—and To Lie About It?*, 23 *ISR. L. REV.* 192, 199-200 (1989); Gross, *supra* note 8, at 1507 (“[A]ny balancing act is going to be factually difficult to conduct and subject to inherent biases that would result in more, rather than less, torture.”). Gross also argues that individual terrorist interrogators pressured to foil terror attacks might have an independent interest in undercomplying with the prohibition. *Id.* at 1509.

28. Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 *YALE L.J.* 1011, 1021-22 (2003); Harold Hongju Koh, *A World Without Torture*, 43 *COLUM. J. TRANSNAT’L L.* 641, 654 (2005); cf. CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 11-13 (George Schwab trans., MIT Press 1985) (1922); Oren Gross, *The Normless and Exceptionless Exception: Carl Schmitt’s Theory of Emergency Powers and the “Norm-Exception” Dichotomy*, 21 *CARDOZO L. REV.* 1825, 1846 (2000).

social needs and extreme situations but would be chronically underenforced. Hence, pragmatic considerations of an institutional nature may support absolute prohibitions against inhumane weapons, perfidy, or collective punishment, even if it were to be accepted that in some extraordinary circumstances, deviation from the norm could have been morally justifiable. This is because the disadvantages associated with norm abuse and noncompliance, which a relative prohibition would have entailed, might far exceed the costs associated with the unsuitability of an absolute norm to govern extreme cases (which might actually be very rare).²⁹

So, an absolute prohibition might be resorted to whenever (a) the possibility of effective institutional oversight over application of exceptions to a rule is limited; (b) the values protected by a prohibition are deemed important enough to assume the costs of excessive rigidity in exceptional cases; and (c) the incidence of exceptional situations, which could justify derogation from the norm, are improbable. While moral considerations are important in this balance of considerations, their influence is moderated by pragmatic concerns of an institutional and statistical nature. In all events, one should note that the policy dilemmas associated with the choice between flexible or inflexible norm formulations are not unique to IHL or IHR, but can also be identified in other areas of national and international law.³⁰

A recent example demonstrating such a dilemma between the formulation of flexible or inflexible IHL standards can be found in the human shields case decided by the Israeli Supreme Court in June 2005.³¹ The case involved a challenge to the lawfulness of Israel Defense Forces (IDF) guidelines that allowed military units conducting arrests of suspected terrorists in the West Bank to seek and obtain assistance from

29. See Gross, *supra* note 8, at 1501-02 (“While catastrophic cases are not just hypothetical scenarios conjured up in academic ivory towers, they are extremely rare in practice.”).

30. For example, evidentiary rules barring hearsay and the *jus ad bellum* prohibition on preventive self-defense in international law are also premised upon the fear that flexible standards might lead to abuse. See, e.g., Michael L. Seigel, *Rationalizing Hearsay: A Proposal for a Best Evidence Hearsay Rule*, 72 B.U. L. REV. 893, 903-08 (1992) (stating that the hearsay rule’s “ability to prejudice the jury outweighs its probative content”); Miriam Sapiro, *Preempting Prevention: Lessons Learned*, 37 N.Y.U. J. INT’L L. & POL. 357, 367 (2005) (“The further a decision to use force moves away from the requirement of imminence, the more likely the possibility of a mistake.”). Here too, second-order institutional considerations seem to be decisive, as the delegation of decision-making power to more competent organs (from lay jury to professional judges; from individual states to the UN Security Council), might justify the introduction of greater flexibility in the application of the relevant standard (i.e., according hearsay some probative value or authorizing preventive self-defense measures conducive to the maintenance of international peace and security).

31. HCJ 3799/02 Adalah—The Legal Ctr. for Arab Minority Rights in Isr. v. GOC Cent. Command, IDF [2005] IsrSC 56(5) 393, *reprinted in* 45 I.L.M. 491, 491 (2006).

local Palestinians in the course of these arrest operations.³² According to the guidelines, officially dubbed the “‘early warning’ procedure,” Palestinian civilians present in proximity to potential hideouts where suspected militants were hiding could be utilized to approach the premises in question and to try and convince the suspects to turn themselves in to the Israeli authorities and evacuate any uninvolved civilians from the scene.³³ The IDF maintained that there was increased likelihood that the situation could be peacefully defused and lives may be saved if the persuasive powers of Palestinian neighbors, who may be personally acquainted with the suspects in question, were to be employed.³⁴ A military break-in into the premises or the use of other forceful methods to overpower the suspect should be employed only when all nonviolent alternatives had failed.³⁵ Significantly, the reviewed guidelines provided that Palestinian civilians can never be coerced into assisting the IDF; nor can they be utilized in circumstances that are likely to endanger their lives.³⁶

All three judges on the bench—President Barak, Vice President Cheshin, and Justice Beinisch—were unanimous in declaring the IDF’s guidelines to be incompatible with certain basic international humanitarian law principles (especially the principle of distinction and the nonrenounceable nature of the rights afforded to protected persons).³⁷ Still, in her concurring opinion, Justice Beinisch added the following observation, which has particular relevance for the topic at hand:

As it turns out, there are deviations from the procedure in the field; nor does the use made of local residents for “early warning” remain within the restrictions set out in the procedure. . . . The daily reality in the field is difficult. The conditions set out in the procedure, aside from being faulty in and of themselves, allow a slide down the slippery slope, which causes stark violations of the rules of international law, and of the constitutional principles of our legal system. The army must do all in its power to prevent the possibility that a detailed and official procedure will create gaps which will lead to a deterioration of the operations in the

32. *Id.* at 491-92.

33. *Id.* at 492-93.

34. *Id.* at 493, 496.

35. *See id.* at 496.

36. *Id.* at 493-94.

37. *Id.* at 498-99. President Barak laid out in his opinion the main reasons for finding the procedure unlawful: (a) it conflicts with the prohibition against compelling protected persons to take part in military operations; (b) it conflicts with the principle of distinction; (c) any consent given by local Palestinians is unlikely to be free and genuine; and (d) appreciating the level of threat posed to the assisting Palestinian during or after the raid is extremely difficult. *Id.* at 498.

field to unequivocal situations of illegality. The procedure contains such a gap, and thus must be annulled.³⁸

In other words, fears that the flexible elements introduced by the reviewed guidelines would be abused by military personnel led Justice Beinisch to strike down the guidelines in their entirety. Instead, the court opted for an absolute standard of conduct, which prohibits IDF soldiers from seeking any form of assistance from Palestinian civilians in the course of military arrest operations.³⁹

The Israeli experience of using harsh interrogation tactics against suspected terrorists provides further support for the application of the aforementioned institutional considerations with relation to the prohibition against torture. Indeed, it has been widely reported in and outside Israel that the 1987 Landau Commission criteria for permitting the use of “moderate measure of physical pressure” by the General Security Service (GSS) in exceptional “ticking time bomb” circumstances⁴⁰ had been commonly abused, with physical pressure being routinely applied vis-à-vis Palestinian terror suspects.⁴¹ The perception that the relative legal regime sanctioned de facto by the Landau Commission considerably eroded the prohibition against torture in GSS interrogations appears to have led the Supreme Court of Israel to emphasize in its 1999 *Public Committee Against Torture* decision the absolute nature of the prohibition against torture.⁴²

A third explanation for the absolute nature of some IHL norms, which overlaps to some degree with the second explanation, relates to the principle of reciprocity in the laws of war. In the past, reciprocity—that is, adherence to a similar set of limitations on warfare—used to be a key factor in ensuring compliance with IHL and in promoting its humanitarian objects through the introduction of mutually beneficial damage control measures. Although reduced in its significance under modern IHL (violations by one party of its IHL obligations do not normally permit

38. *Id.* at 502 (Beinisch, J., concurring).

39. *Id.* at 499 (opinion of the court).

40. REPORT OF THE COMMISSION OF INQUIRY INTO THE METHODS OF INVESTIGATION OF THE GENERAL SECURITY SERVICE REGARDING HOSTILE TERRORIST ACTIVITY (1987), reprinted in 23 ISR. L. REV. 146, 174, 184-85 (1989).

41. See, e.g., Amnesty Int'l, News Release, Israel: High Court Should End the Shame of Torture (Jan. 12, 1999), <http://web.amnesty.org/library/index/engmde150051999>; B'TSELEM, ROUTING TORTURE: INTERROGATION METHODS OF THE GENERAL SECURITY SERVICE 5-6 (1998).

42. HCJ 5100/94 Pub. Comm. Against Torture in *Isr. v. Israel* [1999] IsrSC 53(4) 817, reprinted in 38 I.L.M. 1471, 1481-82 (1999). An explicit position on this point was taken by the UN Committee against Torture. See United Nations, Comm. Against Torture, *Report of the Committee Against Torture*, para. 168(a), U.N. Doc. A/49/44 (July 12, 1994).

under modern IHL reciprocal breaches by the other party),⁴³ reciprocity still plays a valuable role in legitimizing IHL, and in motivating parties to adhere to its prescriptions. Furthermore, reciprocity also has long-term reputational implications: given the iterative nature of international conflicts, the reputation of being a norm compliant or a norm violator, which may ascribe to a specific party in one conflict, might shape the attitude towards it by the parties to subsequent conflicts.

Arguably, pragmatic considerations, not dissimilar to the ones noted above, support the resort to absolute rules in armed conflict situations governed by the principle of reciprocity. This is because absolute prohibitions minimize the room for abuse, or the perceived abuse of legal rules, while relative standards of conduct, which allow the withdrawal of humanitarian protections at the discretion of the fighting parties, might generate “prisoner dilemma”-type defection dynamics and, hence, gradually erode the parties’ commitment to apply IHL norms.⁴⁴ Arguably, the designation of certain weapons or fighting tactics as off-limits for all parties, under all circumstances, restricts the potential for “defection” from the norm, by way of mutual misapplication, and facilitates the introduction of humanitarian protections, while preserving the formal and perceived equality of arms between the parties to the conflict.⁴⁵

Indeed, examination of the dynamics leading to the aerial bombardment campaigns of heavily populated cities during World War II suggests that the reciprocal application of flexible standards might lead to a vicious cycle of violations. The perceived abuse of the principle of necessity in targeting military objects inside Britain by the Luftwaffe (caused in some cases by navigational errors), led the Royal Air Force to adopt a retaliatory policy of bombing German civilian targets, which was accompanied by a flexible construction of the necessity principle.⁴⁶ This even-

43. See *Prosecutor v. Kupreskic*, Case No. IT-95-16-T, Judgment, ¶¶ 515-20 (Jan. 14, 2000). The International Criminal Tribunal for the Former Yugoslavia (ICTY) noted some additional reasons for its refusal to accept a *tu quoque* defense—lack of support to this defense in state practice and the text of IHL instruments; its incompatibility with moral principles requiring the protection of individuals; and the conflict it creates with jus cogens norms. *Id.* ¶¶ 516, 518, 520.

44. See Eric A. Posner, *Terrorism and the Laws of War*, 5 CHI. J. INT’L L. 423, 427-28 (2005).

45. Reciprocal renunciation of specific weapons or fighting tactic reminisces, in some respects, “fair play” restrictions applying to medieval dueling contests, which informed the development of many IHL norms. See, e.g., William Bradford, *Barbarians at the Gates: A Post-September 11th Proposal to Rationalize the Laws of War*, 73 MISS. L.J. 639, 688-90 (2004).

46. D.H.N. JOHNSON, *RIGHTS IN AIR SPACE* 47-48 (1965); WILLIAM L. SHIRER, *THE RISE AND FALL OF THE THIRD REICH: A HISTORY OF NAZI GERMANY 777-78* (1990); Nathan A. Canestaro, *Legal and Policy Constraints on the Conduct of Aerial Precision Warfare*, 37 VAND. J. TRANSNAT’L L. 431, 444-45 (2004). On the “slippery slope” risk in

tually led, in effect, to obliteration of the protection that the principle should have afforded to civilians from air bombings throughout the war. At the same time, it is interesting to note that some absolute rules, such as the prohibition against the use of chemical weapons in military operations, had been generally preserved throughout that war.⁴⁷ While this anecdotal comparison does not suggest that the resort to absolute norms serves as a panacea for the underenforcement of IHL, it is proposed that stricter and clearer standards could induce better compliance.⁴⁸

Applied to the IHL prohibition against torture, the reciprocity rationale would justify protecting the humanitarian interests of all prisoners of war and civilian detainees, through reference to the renunciation of coercive interrogation techniques by all parties to the conflict. Hence, no military advantage is surrendered because of reciprocal compliance with the prohibition; to the contrary, refraining from the mistreatment of enemy prisoners improves the chances that comparable protections would be afforded to the abstaining party's soldiers,⁴⁹ and this may, in turn, reduce these soldiers' concerns about being captured as the result of participating in battle. The reciprocity rationale probably explains the extraordinary breadth of the prohibition against ill-treatment found in Geneva III—not only is the torture of POWs prohibited, but also other forms of pressure to cooperate with the interrogation process.⁵⁰

The reciprocity rationale is inapplicable, however, with relation to the parallel IHR prohibition on torture, which, like other human rights, was not designed to apply in a reciprocal manner. This difference between IHR and IHL perhaps best explains why absolute standards were rather frequently employed in IHL instruments, which apply reciprocally to all parties to the conflict, while they were almost never used in IHR instruments, which are nonreciprocal by nature.⁵¹

the area of aerial bombardment, see FRITS KALSHOVEN, *THE LAW OF WARFARE* 38-39 (1973).

47. See, e.g., George H. Aldrich & Christine M. Chinkin, *A Century of Achievement and Unfinished Work*, 94 AM. J. INT'L L. 90, 93 (2000).

48. See Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 713-25 (1988).

49. See Koh, *supra* note 28, at 659 (“[T]he more we tolerate torture, the more we leave the door open for American soldiers to be tortured by foreign captors.”).

50. Geneva III, *supra* note 3, art. 17 (“Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.”); cf. YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 24-25 (2004) (explaining the wider protection in IHL by way of allusion to the special vulnerability of protected persons in times of an armed conflict).

51. Cf. Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28). A similar principle can be found in the Vienna Convention on the Law of Treaties. See Vienna Convention on the Law of

Critically Assessing the Absolute Prohibition Against Torture

The previous section provided some possible explanations for the absolute nature of the prohibition against torture: torture might be inherently immoral; and a relative prohibition would most probably be abused and lead to a reciprocal cycle of violations. The present section will critically assess these explanations and discuss the implications of such critical analysis for determining the desirable scope of the current absolute prohibition against torture.

The moral case against torture has been widely discussed in the literature.⁵² While the general impermissibility of torture is hardly ever contested, several philosophers have pointed out that it is difficult, if not impossible, to develop a cogent moral argument which would completely decontextualize the evils associated with torture from the evils it seeks to prevent.⁵³ Hence, when faced with the need to prevent a catastrophe of major proportions, the moral case against torture might be unsustainable.⁵⁴ Others have also noted the potential moral blameworthiness of the interrogated terror suspect as an additional factor that might tilt the balance, in some cases, in favor of acts of torture conducive to the protection of innocent bystanders.⁵⁵

It is beyond the ambition of the present paper to revisit the host of moral arguments for and against an absolute prohibition of torture.⁵⁶ Still, the inconclusive nature of the moral debate, and the ensuing unlike-

Treaties art. 60(5), *opened for signature* May 23, 1969, S. EXEC. DOC. L, 92-1 (1970), 1155 U.N.T.S. 331.

52. See generally Dershowitz, *supra* note 27; Gross, *supra* note 8; Mordechai Kremnitzer & Re'em Segev, *The Legality of Interrogational Torture: A Question of Proper Authorization or a Substantive Moral Issue?*, 34 *ISR. L. REV.* 509 (2000); Michael S. Moore, *Torture and the Balance of Evils*, 23 *ISR. L. REV.* 280 (1989).

53. For a survey of many of the positions raised in the relevant philosophical literature, see Adam Raviv, *Torture and Justification: Defending the Indefensible*, 13 *GEO. MASON L. REV.* 135, 139-47 (2004).

54. Gross, *supra* note 8, at 1495.

55. See, e.g., ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* 144 (2002); Mirko Bagaric & Julie Clarke, *Not Enough Official Torture in the World? The Circumstances in Which Torture Is Morally Justifiable*, 39 *U.S.F. L. REV.* 581, 612-13 (2005); Benvenisti, *supra* note 8, at 601; Winfried Brugger, *May Government Ever Use Torture? Two Responses from German Law*, 48 *AM. J. COMP. L.* 661, 676 (2000); Jeff McMahan, *Torture, Morality, and the Law*, 37 *CASE W. RES. J. INT'L L.* 241, 244 (2006).

56. Still, it is questionable, to my mind, whether an absolute bar against all forms of prohibited ill-treatment (including sleep deprivation, sensory disorientation, and the like) morally coheres with the lack of a similar bar against deprivation of life and other fundamental human rights. For example, Article 6 of ICCPR only prohibits arbitrary deprivation of life. ICCPR, *supra* note 6, art. 6. This has been understood to confirm the permissibility of deprivation of life in certain exceptional circumstances such as war or law enforcement. See, e.g., *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 240 (July 8).

likelihood of identifying a political consensus that endorses an absolutist moral stance, probably suggests that second-order institutional considerations provide a more convincing explanation for the choice of an absolute prohibition by international lawmakers. In particular, it is difficult to accept that the lawmakers took an absolute deontologist stance on torture, while at the same time applying a relative consequentialist stance on issues no less morally challenging such as the ability to kill or injure uninvolved civilians as “collateral damage” in attacks against legitimate military objectives.

Thus, the decision to opt, in international law, for an absolute prohibition against torture can ultimately be viewed as a legitimate political decision,⁵⁷ designed to promote the maximum attainment, on the balance, of moral and policy goals, leading to the protection of the utmost number of persons in the vast majority of circumstances. While moral considerations—i.e., the repugnance of torture—were most likely influential in the choice of a strict legal regime that would create conditions inhospitable to abusive deviation from the prohibition and to the creation of “slippery slope” dynamics,⁵⁸ it is questionable whether the norm drafters were exclusively, or even primarily, guided by a categorical moral imperative.

Recognition of the dominance of the institutional considerations that underlie the absolute prohibition against torture has concrete normative consequences for the project of delineating by way of interpretation the scope of the current absolute prohibition. There seems to be no *a priori* imperative that calls for the extension of the norm’s absolute features beyond the plain text of the relevant instruments (mainly, Geneva III, Geneva IV, ICCPR, and CAT), which reflect the scope of political agreement reached by the norm drafters. Thus, the interplay between the prohibition and legal defenses or exceptions to legal responsibility, which might introduce some degree of relativity into its application, constitutes a legitimate subject for norm interpretation projects (bearing in mind, of course, the entire gamut of moral and policy reasons for introducing absolute norms in the first place). These interpretive alternatives will be explored in Part Two of this Article.

Furthermore, one could make several observations on the limits of the institutional arguments that support introducing an absolute prohibition against torture. These observations may also have implications on the

57. Cf. Margaret MacDonald, *Natural Rights*, in THEORIES OF RIGHTS 21, 35 (Jeremy Waldron ed., 1984) (“[V]alue utterances are more like records of decisions.” (emphasis omitted)); McMahan, *supra* note 55, at 247.

58. See, e.g., Gross, *supra* note 8, at 1508-09 (“[A]ssuming that torture may be deemed a more effective interrogation technique than its alternatives, we can expect members of security services to become increasingly more dependent on the use of such coercive techniques in specific cases, justifying categorization of a larger number of cases as catastrophic.”); Benvenisti, *supra* note 8, at 601-02.

proper interpretation of the scope of the prohibition, and for evaluating possible normative reform projects, which might be undertaken in the future.

First, from a second-order institutional perspective, one may acknowledge that absolute rules might indeed be unsuitable to govern extreme cases. Had extreme cases been viewed in isolation from non-extreme cases, institutionalists would probably adopt agnostic or consequentialist positions with relation to the choice between relative or absolute standards.⁵⁹ Indeed, states' principal reasons for supporting a broad absolute ban covering both ordinary and extreme cases are the low probabilities of catastrophic occurrences and the absence of a credible monitoring mechanism to prevent abuse of the distinction between the two groups of cases.

If extraordinary circumstances ceased to become rare (or, in other words, extraordinary), institutionalists might need to reassess their support of a sweeping absolute ban. This is because the trade-off between the better prospects of enforcing the core prohibition that absolute standards facilitate and the costs of not deviating from the norm in exceptional cases might become unsustainable under such conditions. In the same vein, the introduction of an effective review mechanism, which would ensure the proper application of exceptions to the rule, might convince institutionalists to accept some degree of flexibility into the prohibition against torture. The compatibility of some possible monitoring mechanisms—Alan Dershowitz's proposed “torture warrants,”⁶⁰ the empowerment of the head of the executive to authorize ill-treatment,⁶¹ and Israel's judicial practice of offering *ex post* exoneration from criminal responsibility⁶²—with these policy concerns will be examined in Part Two of this Article.⁶³

59. See Warren P. Strobel & Jonathan S. Landay, *Experts Reject Use of Torture*, WICHITA EAGLE, Nov. 11, 2005, at A1, available at 2005 WLNR 18239507 (citing Senator McCain, who advocates an absolute prohibition against torture, as referring to the “‘ticking time bomb’ scenario” in the following terms: “‘It’s a one-in-a-million issue, and if something was a one-in-a-million situation, I would support whatever needs to be done. But that’s a one-in-a-million situation.’”); see also Henry Shue, *Torture in Dreamland: Disposing of the Ticking Bomb*, 37 CASE W. RES. J. INT’L L. 231, 231-32 (2006).

60. DERSHOWITZ, *supra* note 55, at 156-63.

61. PHILIP B. HEYMANN & JULIETTE N. KAYYEM, LONG-TERM LEGAL STRATEGY PROJECT FOR PRESERVING SECURITY AND DEMOCRATIC FREEDOMS IN THE WAR ON TERRORISM 5 (2004), available at http://bcsia.ksg.harvard.edu/BCSIA_content/documents/LTLS_final_5_3_05.pdf.

62. See H CJ 5100/94 Pub. Comm. Against Torture in *Isr. v. Israel* [1999] IsrSC 53(4) 817, reprinted in 38 I.L.M. 1471, 1485 (1999).

63. International monitoring might also be considered. See, e.g., European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment art. 1, Nov. 26, 1987, Europ. T.S. No. 126; CAT, *supra* note 3, art. 20; Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

A second observation is that the force of the second-order institutional considerations supporting an absolute ban on torture stands in direct opposition to the degree of variance from the core prescription: the further one is removed from the core prohibition against torture (e.g., if an ill-treatment measure falling short of torture, such as subjecting an interrogated person to sensory disorientation or moderate food manipulation, is applied), the weaker is the policy rationale for applying an absolute prohibition. This is because the number of scenarios in which the application of these nasty, yet less harmful, interrogation techniques could be justified from a consequentialist or relativist perspective, on the balance, is larger; and, as a result, the potential for abuse—application of these techniques in inappropriate circumstances—is smaller. Furthermore, the relatively small harm to humanitarian interests caused by ill-treatment falling short of torture might render the utilitarian trade-off underlying the absolute prohibition—better enforcement at the price of poor suitability in extreme cases—more controversial. Hence, policy considerations might support the proposition that the absolute bar against torture should not necessarily carry over to less severe forms of cruel, inhuman, or degrading punishment and treatment prohibited by international law.

Moving on to the reciprocity rationale, which linked the choice of absolute standards to the facilitation of mutually applicable IHL standards, it was already noted that this rationale cannot explain the IHR prohibition against torture, because of the nonreciprocal nature of human rights law.⁶⁴ Furthermore, even in situations governed by IHL, the applicability of the reciprocity rationale is becoming more and more limited. This is so, not only because of the declining significance of reciprocity in IHL as a legal concept, but also because of the asymmetric nature of many modern conflicts that involve non-state actors who hardly subscribe to basic IHL principles. In such conflicts, adherence to the absolute prohibition against torture by one party only—i.e., the state party—might, in fact, disturb the military balance of powers between the parties to the conflict.⁶⁵

Punishment, G.A. Res. 57/199, U.N. Doc. A/RES/57/199 (Dec. 18, 2002). Still, it is questionable whether existing monitoring procedures are effective: their response is delayed, their powers are generally of a recommendatory nature, and states most likely to engage in torture are not subject to their jurisdiction.

64. See *supra* note 51 and accompanying text.

65. In the words of the Israeli Supreme Court in the *Public Committee Against Torture* case: "This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back . . ." *Public Committee Against Torture*, 38 I.L.M. at 1488. President Barak also noted, however: "[A democracy] has the upper hand. Preserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and

This perception of lopsided application of the prohibition against torture in asymmetrical conflicts delegitimizes the absolute prohibition⁶⁶ and renders adherence to it, especially in circumstances where the enemy is demonized and even dehumanized, politically unpalatable. This explains why states, such as the United States or Israel, have looked for ways to evade the prohibition altogether: create legal Guantánamos where international conventions allegedly do not apply,⁶⁷ interpret in bad faith the scope of the prohibition against torture and its terms of applicability,⁶⁸ let others do the “dirty work” through a policy of renditions,⁶⁹ or lie about resort to torture.⁷⁰ While I cannot support any of these attempts to circumvent the prohibition against torture, their rate of recurrence is perhaps indicative of the counterproductiveness of normative overreaching: an excessively broad absolute prohibition against torture might lead in nonreciprocal conflict situations to less, not more, compliance with the core prohibition.

The normative implications of the inability of the reciprocity rationale to justify the absolute prohibition against torture in asymmetrical conflict conditions are, arguably, that strict adherence to a broad absolute prohibition is particularly justified in international armed conflicts and non-international armed conflicts, where there exists a reasonable expectation that both parties to the conflict will “play it by the rules” (e.g., non-international conflicts between organized armed groups governed by Common Article 3 or Protocol II to the Geneva Conventions, and com-

its strength and allow it to overcome its difficulties.” *Id.* This adds a utilitarian element to the aforementioned moral arguments supporting the absolute prohibition.

66. See, e.g., Gross, *supra* note 8, at 1512-13; cf. Franck, *supra* note 48, at 735-51 (arguing that incoherent application of norms undermines their legitimacy).

67. See, e.g., Fleur Johns, *Guantánamo Bay and the Annihilation of the Exception*, 16 EUR. J. INT’L L. 613 (2005).

68. See, e.g., U.S. DEP’T OF DEF., WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY, AND OPERATIONAL CONSIDERATIONS 4-6 (2003), available at <http://www.washingtonpost.com/wp-srv/nation/documents/040403dod.pdf>; Memorandum from Jay S. Bybee, Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), in MARK DANNER, TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR 115 (2005) (discussing standards of conduct for interrogations under 18 U.S.C. §§ 2340-2340A). For analysis of these documents, see José E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT’L L. 175, 179-98 (2006); Mary Ellen O’Connell, *Affirming the Ban on Harsh Interrogation*, 66 OHIO ST. L.J. 1231 (2005); Jonathan Canfield, Note, *The Torture Memos: The Conflict between a Shift in U.S. Policy Towards a Condemnation of Human Rights and International Prohibitions Against the Use of Torture*, 33 HOFSTRA L. REV. 1049 (2005).

69. See, e.g., Joan Fitzpatrick, *Rendition and Transfer in the War Against Terrorism: Guantánamo and Beyond*, 25 LOY. L.A. INT’L & COMP. L. REV. 457 (2003); Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, 37 CASE W. RES. J. INT’L L. 309 (2006).

70. See e.g., Benvenisti, *supra* note 8, at 602.

mitted to observing basic IHL principles). In these cases, any military advantage anticipated by the use of brutal interrogation measures against enemy combatants or civilians is offset, in full or in part, by the parallel restriction governing the conduct of the opposing party. By contrast, in asymmetrical conflict circumstances, such as the “war on terror,” weaker policy rationales support the prohibition, and greater normative flexibility might be warranted.

Finally, it may be noted that some of the literature on the prohibition against torture justifies the absolute nature of the prohibition by an additional and unique policy consideration—the ineffectiveness of torture. It has sometimes been argued that torture in interrogations induces the victim to provide information that she believes the interrogators seek, regardless of its veracity.⁷¹ While this argument might hold true in criminal investigations, where interrogators might seek to obtain false confessions, it is rather unconvincing, in my mind, with relation to interrogation in conflict or terror-related situations where the purpose of the interrogation is to obtain urgent and verifiable tactical information, with exclusive military significance. For example, in the hypothetical “ticking time bomb” situation, where interrogators have custody over an individual who they believe knows the whereabouts of an imminent attack, it is difficult to accept that in the absence of alternative ways to foil the attack, harsh interrogation techniques—putting aside their legality—would always be necessarily ineffective.⁷² While the unreliability of many pieces of information procured by way of coercive interrogation techniques could support the inadmissibility of such evidence in future criminal proceedings against the interrogated individual, given the high standard of proof such proceedings require,⁷³ the operational threshold for reliance upon this information in desperate emergency situations cases may arguably be lower.

71. See Ardi Imseis, *‘Moderate’ Torture on Trial: Critical Reflections on the Israeli Supreme Court Judgment Concerning the Legality of the General Security Service Interrogation Methods*, 5 INT’L J. HUM. RTS. 71, 73 (2001); Koh, *supra* note 28, at 653; O’Connell, *supra* note 68, at 1259; Philip N.S. Rumney, *Is Coercive Interrogation of Terrorist Suspects Effective? A Response to Bagaric and Clarke*, 40 U.S.F. L. REV. 479, 492 (2006); Press Release, Senator John McCain, Statement of Senator John McCain Amendment on Army Field Manual (July 25, 2005), available at http://mccain.senate.gov/press_office/view_article.cfm?id=150 (“[T]orture and cruel treatment are ineffective methods, because they induce prisoners to say what their interrogators want to hear, even if it is not true . . .”).

72. See, e.g., MARK BOWDEN, ROAD WORK: AMONG TYRANTS, HEROES, ROGUES, AND BEASTS 107 (2004) (arguing that coercion is sometimes the clear choice of interrogation method).

73. See DERSHOWITZ, *supra* note 55, at 136-37; Marcy Strauss, *Torture*, 48 N.Y.L. SCH. L. REV. 201, 217-26 (2004); see also *A v. Sec’y of State for the Home Dep’t* [2005] UKHL 71, [2006] 2 A.C. 221 (U.K.), paras. 68-72 (opinion of Nichols, L.).

II. INTRODUCING SOME FLEXIBILITY INTO THE PROHIBITION AGAINST CRUEL, INHUMAN, OR DEGRADING PUNISHMENT OR TREATMENT

Part One of the Article explored the policy rationales that may govern the designation of IHL and IHR norms as absolute norms and assessed their applicability with relation to the prohibition against torture. This Part offers a legal model for implementing these policy considerations within the framework of existing law. The model relies, in essence, on the distinction introduced by CAT and the *Ireland v. United Kingdom* European Court of Human Rights judgment between torture and other forms of cruel, inhuman, and degrading treatment and punishment (sometimes dubbed “degree two torture” or, rather distastefully, “torture-lite”). While I accept that both forms of mistreatment are always impermissible under international law, there might be cases in which resort to harsh interrogation techniques falling short of torture might not incur criminal responsibility. The proposed approach, which is compatible to some extent with the Israeli Supreme Court’s judgment in *Public Committee Against Torture*, thus introduces some degree of flexibility into less severe forms of ill-treatment, while insisting, at the same time, upon some degree of judicial oversight over the conduct of state agents in this regard.

The Two Levels of the Prohibition

In *Ireland v. United Kingdom*, the European Court of Human Rights examined whether the five techniques of interrogation applied by the British military vis-à-vis terror suspects in Northern Ireland constituted acts of torture prohibited by Article 3 of the European Human Rights Convention.⁷⁴ The majority answered the question in the negative:

Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.⁷⁵

Still, it noted that “[t]he [European] Convention prohibits in absolute terms [both] torture and inhuman or degrading treatment or punishment.”⁷⁶ Hence, the practical implications of the distinction offered by the court seemed to remain at the remedial level—the reputation costs

74. *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 41, 65-66 (1978).

75. *Id.* at 67. For a previous decision that views torture as an aggravated form of ill-treatment, see *The Greek Case*, 12 Y.B. Eur. Conv. on H.R. (Supp.) 1, 186 (Eur. Comm’n on H.R. 1969).

76. *Ireland*, 25 Eur. Ct. H.R. at 65; see also Ní Aoláin, *supra* note 6, at 214.

associated with a finding that an act of torture took place by a state party to the European Convention being more severe given the particular stigma associated with the term; furthermore, the amount of financial compensation due to the victim may be higher if torture, and not less severe forms of maltreatment, was committed.⁷⁷

The legal implications of the distinction between torture and less severe forms of ill-treatment were further spelled out in the 1984 CAT, in ways which have direct relevance for the approach advocated in the present Article. While a breach of the prohibition against torture, as defined in Article 1 of CAT, entails a host of legal consequences—most importantly, a duty to extradite or prosecute (*aut dedere/aut judicare*) perpetrators of torture found in the territory of any state party⁷⁸—Article 16 specifies more limited obligations with relation to the “degree two” prohibition against other forms of cruel, inhuman, and degrading treatment.⁷⁹ These limited consequences, also applicable to torture, include a duty to prevent ill-treatment, to integrate the prohibition on ill-treatment into education programs for officials and other persons handling detained individuals, to systematically review interrogation and detention procedures, to investigate alleged violations, and to grant effective remedies to victims of ill-treatment.⁸⁰ Notably, CAT does not require the criminal prosecution of perpetrators of ill-treatment, nor does it bar derogation from the prohibition against ill-treatment falling short of torture in times of emergency.⁸¹

77. Compare *Rehbock v. Slovenia*, 2000-XII Eur. Ct. H.R. 191, 214-15 (determining damages for inhuman treatment during the defendant’s arrest at 25,000 deutsche marks [currently approximately 13,000 euros] in compensation for non-pecuniary damage), with *Selmouni v. France*, 1999-V Eur. Ct. H.R. 149, 178, 188 (determining damages for torture during a police interrogation at 500,000 French francs [currently approximately 76,000 euros] in compensation for non-pecuniary damage).

78. CAT, *supra* note 3, art. 7(1).

79. *See id.* art. 16.

80. *Id.* arts. 9-13, 16.

81. Note that CAT, Article 2(2), which does not govern the application of Article 16, provides: “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.” *Id.* art. 2(2). For a discussion of the scope of Article 2(2), see Ahcene Boulesbaa, *THE U.N. CONVENTION ON TORTURE AND THE PROSPECTS FOR ENFORCEMENT* 76-80 (1999).

Another area where practical differences may arise between torture and less severe forms of ill-treatment is in the application of exclusionary rules of evidence. *A v. Sec’y of State for the Home Dep’t* [2005] UKHL 71, [2006] 2 A.C. 221 (U.K.), para. 53 (opinion of Bingham, L.). The same rule would seem to apply before U.S. military commissions. *See* Military Commissions Act of 2006 § 948r(b), 10 U.S.C.A. § 948r(b) (Westlaw through Pub. L. No. 110-6).

Is There an Exception to the Prohibition Against Ill-Treatment?

The legal conclusion that CAT does not bar derogation from the prohibition against ill-treatment falling short of torture has been implicitly accepted by the UN Committee Against Torture. In 1997, while reviewing Israel's report under CAT, the Committee criticized the Landau Commission guidelines, which authorized the GSS to apply "moderate physical pressure" in "ticking time bomb" circumstances and stated the following:

The Committee acknowledges the terrible dilemma that Israel confronts in dealing with terrorist threats to its security, but as a State party to the Convention Israel is precluded from raising before this Committee exceptional circumstances as justification for acts prohibited by article 1 of the Convention. This is plainly expressed in article 2 of the Convention.⁸²

The Committee's position must be understood in the light of its earlier statement that the seven interrogation techniques that the GSS applied vis-à-vis Palestinian detainees amounted to torture, as defined in Article 1 of CAT. By implication, one can assume that had the measures in question been classified as ill-treatment falling short of torture, Israel would not have been barred by the "no derogation" rule found in Article 2 of CAT. So, one might have argued that in the absence of a specific CAT provision on the matter, states could invoke the general defense of necessity available to them under the law of state responsibility in order to justify derogations from the prohibition against ill-treatment falling short of torture.⁸³

However, the proposition that states may invoke general international law defenses in order to derogate from the prohibition against ill-treatment falling short of torture does not reflect *lex lata*. This is because Article 16(2) of CAT contains a "without prejudice" provision, which preserves the continued application of torture and ill-treatment proscriptions found in other international or national law instruments, and such instruments may introduce an absolute ban on all forms of proscribed ill-treatment.⁸⁴ Indeed, Article 7 of the ICCPR, which encompasses both

82. United Nations, Comm. Against Torture, *Report of the Committee Against Torture*, para. 258, U.N. Doc. A/52/44 (Sept. 10, 1997).

83. See *Draft Articles*, *supra* note 17, art. 25. While the text of draft Article 24 (distress) might also provide the state with a valid legal defense, the commentary to this Article suggests that it was not designed to cover general situations of emergency. *Id.* art. 24 & cmt.1. It is interesting to note that early drafts of CAT, Article 2—the nonderogation clause—also covered the prohibition on cruel, inhuman, or degrading treatment or punishment. J. HERMAN BURGERS & HANS DANIELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT* 47-49 (1988).

84. CAT, *supra* note 3, art. 16(2).

the prohibition against torture and cruel, inhuman, or degrading treatment or punishment, is among the nonderogable provisions of CAT, and thus continues to apply in times of emergency.⁸⁵ Several authorities have even viewed Article 7, in its entirety, as reflective of *jus cogens*⁸⁶—a legal status that would seem to block the application of general defenses under the laws of state responsibility by virtue of Article 26 of the International Law Commission (ILC) *Draft Articles on Responsibility of States for Internationally Wrongful Acts*.⁸⁷

In addition, absolute prohibitions against ill-treatment (or brutal treatment) can be found under Common Article 3 of the four Geneva Conventions, as well as under Article 17 of Geneva III, Article 32 of Geneva IV, Article 75 of the First Additional Protocol, and Article 4 of the Second Additional Protocol. Significantly, the mainstream view in the legal literature appears to be that the general defense of necessity under the laws of state responsibility is inapplicable to obligations under IHL, as that body of law constitutes a nonderogable specific legal regime particularly designed to govern emergency situations.⁸⁸

85. See *General Comment 20*, *supra* note 26, para. 3 (“The text of article 7 allows of no limitation. The Committee also reaffirms that, even in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provisions must remain in force.”); cf. *Aksoy v. Turkey*, 1996-VI Eur. Ct. H.R. 2260, 2278 (“Even in the most difficult of circumstances, such as the fight against organised terrorism and crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment.”).

86. See United Nations, Human Rights Comm., *General Comment 24 (52): General Comment on Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations Under Article 41 of the Covenant*, para. 8, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 11, 1994); RODLEY, *supra* note 6, at 54; see also Geert-Jan G.J. Knoops, DEFENSES IN CONTEMPORARY INTERNATIONAL CRIMINAL LAW 29-30 (2001); Michael Byers, *Conceptualising the Relationship Between Jus Cogens and Erga Omnes Rules*, 66 NORDIC J. INT’L L. 211, 213-15 (1997). But see *Draft Articles*, *supra* note 17, art. 40 cmt. 5 (specifying only Article 1 of CAT as reflective of *jus cogens*); LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW 509 (1988) (“[I]t would appear *à fortiori* that the prohibition of ‘inhuman’ treatment or punishment cannot as such be a peremptory norm in contemporary international law.”).

87. *Draft Articles*, *supra* note 17, art. 26 (“Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.”).

88. THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 215-17 (1989). The nonderogable nature of IHL is demonstrated by provisions such as Geneva III, Articles 6, 7, and 131, and Geneva IV, Articles 7, 8, and 148. See Geneva IV, *supra* note 2, arts. 7, 8, 148; Geneva III, *supra* note 3, arts. 6, 7, 131. This seems to exclude the applicability of the general law of state responsibility. See *Draft Articles*, *supra* note 17, art. 55 (“These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.”); see also *id.* art. 25(2) (“[N]ecessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) The international obligation in question ex-

As a result, it would seem that under existing international law, states cannot refer to any prevailing emergency conditions in order to justify torture or any other form of “cruel, inhuman, or degrading punishment or treatment”—at least not in circumstances governed by ICCPR or regional human rights treaties⁸⁹ (i.e., vis-à-vis individuals subject to the jurisdiction of the state party in question) or IHL instruments (i.e., in times of conflict). Still, customary international law would probably support the proposition that even states that are not parties to some of the relevant instruments are bound to respect the absolute nature of the prohibition against torture and other forms of ill-treatment.⁹⁰ This legal conclusion sits well with the moral and policy considerations identified in Part One: the importance of the humanitarian values protected by the prohibition against torture and other forms of ill-treatment justifies, in the absence of credible and effective judicial monitoring, an absolute ban that would not be open for abuse.

Alan Dershowitz’s proposal to authorize domestic judges to issue “torture warrants”⁹¹ is thus incompatible with *lex lata* and the legitimate political choice it represents. Furthermore, his position is also faulty from a legal policy perspective: although Dershowitz’s proposal is based upon the position shared by the present author that relativizing the absolute prohibition necessitates improved institutional oversight, the new balance he offers seems inadequate. Dershowitz largely glosses over the classical

cludes the possibility of invoking necessity . . .”). This conclusion can also be supported by policy considerations: although one could make, in theory, the argument that a distinction should be made between “justification” and “excuse”—i.e., between lawful conduct incompatible with the primary norm in question and unlawful conduct without legal consequence—the introduction of such a distinction into IHL might seriously undermine its effectiveness, and thus seems undesirable. See, e.g., ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 219-20 (2003). Indeed, the ILC commentary seems to reject the applicability of the necessity defense to IHL. See *Draft Articles, supra* note 17, art. 25 cmt. 19 (“[C]ertain humanitarian conventions applicable to armed conflict expressly exclude reliance on military necessity. Others while not explicitly excluding necessity are intended to apply in abnormal situations of peril for the responsible State and plainly engage its essential interests. In such a case the non-availability of the plea of necessity emerges clearly from the object and the purpose of the rule.”). Interestingly enough, the ICJ left open, in a recent opinion, the question of the relations between the necessity defense and IHL and IHR law. See *Legal Consequences of Construction of Wall in Occupied Palestinian Territory, Advisory Opinion* (July 9, 2004), 43 I.L.M. 1009, 1050 (“Since those treaties already address considerations of this kind within their own provisions, it might be asked whether a state of necessity as recognized in customary international law could be invoked with regard to those treaties as a ground for precluding the wrongfulness of the measures or decisions being challenged. However, the Court will not need to consider that question.”).

89. I/A CHR, *supra* note 15, art. 5; see Inter-American Convention to Prevent and Punish Torture art. 1, Dec. 9, 1985, O.A.S. T.S. No. 67; African (Banjul) Charter on Human and Peoples’ Rights art. 5, June 27, 1981, 21 I.L.M. 58; ECHR, *supra* note 6, art. 3.

90. RODLEY, *supra* note 6, at 66-67.

91. DERSHOWITZ, *supra* note 55, at 158-63.

quis custodiet ipsos custodes (who will guard the guards) problem and confers upon domestic judges sensitive monitoring powers notwithstanding the unsatisfactory record of domestic courts in and outside the United States in protecting the basic human rights of enemy combatants in times of conflict.⁹² Thus, reasonable fears persist that “torture warrants” too would lead to normative abuse.⁹³

An alternative proposal fleshed out by a 2004 long-term strategy report composed by an expert group chaired by two other Harvard professors—Philip Heymann and Juliette Kayyem⁹⁴—also seems to be flawed from an international law perspective. While the report calls for renunciation of torture, as defined in Article 1 of CAT, under all circumstances, it concedes that the prohibition against ill-treatment in Article 16 of CAT may be deviated from in extreme cases.⁹⁵ Furthermore, unlike Dershowitz’s plan to invest the judiciary with powers of review over application of the exception to the rule, the long-term strategy report recommends that the President herself authorize exceptional interrogation measures, and that the decision shall be subject to congressional oversight.⁹⁶ But again, the significantly less than perfect record of the U.S. administration in upholding international law restrictions in extreme circumstances (which is unfortunately characteristic of the record of many other governments as well), and the limited effectiveness of congressional supervision, seem to offer inadequate guarantees against abuse of the relative standard advocated in the report.

So, positive law seems to reject the introduction of flexible elements to the prohibition against torture and other forms of ill-treatment at the state level. Still, a different legal outcome may be possible, at the individual responsibility level, with relation to exceptions to criminal liabil-

92. See John C. Yoo, *Judicial Review and the War on Terrorism*, 72 GEO. WASH. L. REV. 427, 440 (2003) (“Recent cases in the war against al Qaeda suggest that courts are following a deferential approach which . . . attempts to accommodate the imperatives of the war-fighting system so that effective means can be employed to combat al Qaeda at home.”); Gross, *supra* note 8, at 1538-39; Raviv, *supra* note 53, at 170-71.

93. Other scholars offer objections to Dershowitz’s position. See Gross, *supra* note 8, at 1534-53 (noting, *inter alia*, fears of a spillover to other emergency powers, compromising the image of the judiciary, and conferring legitimacy upon acts of torture); Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278, 322-24 (2003) (citing, *inter alia*, fears of institutionalizing torture); Raviv, *supra* note 53, at 163-64 (criticizing the uncertainty of *ex ante* warrants and questioning Dershowitz’s distinction between convicted and unconvicted terrorists for the purpose of permitting “torture warrants”); see also Elaine Scarry, *Five Errors in the Reasoning of Alan Dershowitz*, in TORTURE, *supra* note 6, at 281, 286-87.

94. HEYMAN & KAYYEM, *supra* note 61.

95. See *id.* at 32.

96. *Id.* at 25-26.

ity.⁹⁷ Furthermore, the legal model discussed below—i.e., banning all forms of torture and ill-treatment but exercising ex post judicial control over the criminal law consequences of harsh investigation techniques falling short of torture—arguably offers less room for abuse. Thus, it seems to represent a better policy course.

A Criminal Law Exception to Torture?

As was already noted, the duty to extradite or prosecute perpetrators of torture under Article 7 of CAT does not encompass violations of Article 16, which prohibits “cruel, inhuman or degrading treatment or punishment.”⁹⁸ Still, such proceedings, although not required by CAT, are mandated by IHL: Article 130 of Geneva III and Article 147 of Geneva IV require states to extradite or prosecute persons who have applied inhuman treatment vis-à-vis protected persons (POWs or protected civilians).⁹⁹ Furthermore, the Rome Statute criminalizes inhuman or degrading treatment taking place in both international and non-international armed conflicts¹⁰⁰ (however, the Rome Statute does not directly require state parties to prosecute individuals who committed crimes defined by the statute).

Can individuals accused of ill-treatment falling short of torture plead under existing international criminal law “exceptional circumstances” defenses against the incurring of criminal liability, notwithstanding the absolute duty of states to refrain from engaging in torture or other forms of ill-treatment? In its *Public Committee Against Torture* decision, the Israeli Supreme Court suggested that the necessity defense remained available in criminal trials of individuals accused of committing torture: “We are prepared to assume . . . the ‘necessity’ defence is open to all, particularly an investigator, acting in an organizational capacity of the State in interrogations of that nature.”¹⁰¹

97. See Paola Gaeta, *May Necessity Be Available as a Defence for Torture in the Interrogation of Suspected Terrorists?*, 2 J. INT’L CRIM. JUST. 785, 789-90 (2004).

98. CAT, *supra* note 3, art. 16.

99. Geneva IV, *supra* note 2, arts. 146-47; Geneva III, *supra* note 3, arts. 129-30.

100. Rome Statute, *supra* note 18, art. 8(2)(a)(ii), (c)(ii). It may be noted that a criminal prohibition on inhuman treatment may also derive from Article 7(1)(k) of the Rome Statute, which designates as crimes against humanity: “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.” *Id.* art. 7(1)(k). However, the requirement that the act in question should entail “great suffering” or “serious injury,” would probably mean that it falls within the definition of torture in Article 1 of CAT, and the prohibition against torture as a crime against humanity found in the Rome Statute. *Id.* art. 7(1)(f); CAT, *supra* note 3, art. 1. Hence, it cannot control the status under international criminal law of the prohibition of other forms of ill-treatment falling short of torture.

101. HCJ 5100/94 Pub. Comm. Against Torture in *Isr. v. Israel* [1999] IsrSC 53(4) 817, *reprinted in* 38 I.L.M. 1471, 1485 (1999). It is perhaps interesting to note that Vice President Cheshin alluded to this method of ex post facto relativity in the *Adalah* case. HCJ

This position has some notable advantages from a policy-oriented perspective: it introduces a degree of flexibility into the prohibition, without renouncing the moral basis upon which it may be founded—i.e., that any application of torture or other forms of ill-treatment is always *contra legem* (though not necessarily giving rise to criminal guilt).¹⁰² Furthermore, the criminal law litigation framework introduces a judicial monitoring element, which could limit the risk of abuse of the exception by state agents (in the alternative, quasi-judicial prosecutorial powers of oversight are employed in the context of a prosecutorial decision whether or not to press charges).¹⁰³ Although domestic courts and prosecutors tend to underprotect the rights of enemy combatants, this deficiency is somewhat offset by the conduct-guiding effect of maintaining the absolute prohibition,¹⁰⁴ and, more importantly, by the “chilling effect” generated by the ex post nature of the legal exemption.¹⁰⁵ Indeed, whereas until 1999, Israeli GSS interrogators conducted harsh interrogations with a sense of impunity, their conduct subsequent to the *Public Committee Against Torture* judgment seems to have become more temperate by reason of the fear that they personally might face prosecution and criminal conviction if a prosecutor or a court of law were to conclude that they misapplied the necessity defense.¹⁰⁶

3799/02 Adalah—The Legal Ctr. for Arab Minority Rights in Isr. v. GOC Cent. Command, IDF [2005] IsrSC 56(5) 393, *reprinted in* 45 I.L.M. 491, 500 (2006) (Cheshin, Vice President, concurring).

102. Gross, *supra* note 8, at 1504; *cf.* Benvenisti, *supra* note 8, at 608 (“The finding that ‘torture’ was committed constitutes a moral condemnation which in the international sphere is a relatively meaningful sanction.”).

103. *Cf.* Koh, *supra* note 28, at 659-60 (hypothesizing that if the President were to authorize torture, prosecutors would have to decide whether to prosecute her or not). Such oversight procedure would be particularly effective if “acoustic separation” between the investigators and the prosecutors or judges were to be maintained. *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 630-34 (1984).

104. *See* Emanuel Gross, *Legal Aspects of Tackling Terrorism: The Balance Between the Right of a Democracy to Defend Itself and the Protection of Human Rights*, 6 UCLA J. INT’L L. & FOREIGN AFF. 89, 112 (2001).

105. *See* Sanford H. Kadish, *Torture, the State and the Individual*, 23 ISR. L. REV. 345, 355 (1989) (“Would not the burden on the official be so great that it would require circumstances of a perfectly extraordinary character to induce the individual to take the risk of acting? The answer is of course yes, that’s the point.”); Raviv, *supra* note 53, at 166-70.

106. *See* BOWDEN, *supra* note 72, at 109 (describing how Israeli NGOs and others acknowledge greater restraint on the part of Israeli GSS interrogators following the 1999 judgment); Joseph Lelyveld, *Interrogating Ourselves*, N.Y. TIMES, June 12, 2005, § 6 (Magazine), at 36, 40.

Benvenisti also notes that application of general criminal law defenses to an incidence of ill-treatment would subject exceptional situations in which ill-treatment is contemplated to the constraining doctrines that have been developed in other circumstances governed by criminal law. Benvenisti, *supra* note 8, at 609. Dershowitz argues, however, that the ex post nature of the necessity defense exposes interrogators to an unacceptable risk of

One should also note that any criminal law exception does not release the state from its obligations under IHL and IHR law to make reparations for violating the international standard.¹⁰⁷ The prospect of civil remedies that might be pursued by the victim of ill-treatment, and the other international responsibility and consequences incurred by the state serve as additional mitigating factors that would limit the risk of abuse of the criminal law exception.

Still, to the degree that the *Public Committee Against Torture* decision permitted the raising of the necessity exception as a defense against “degree one” torture, it seems to have fallen short of the requirements of CAT. This is because Article 7, which introduces a duty to extradite or prosecute, is subject to the language of Article 2, which prevents the invocation of necessity as a justification to torture.¹⁰⁸ However, as was already noted, Article 2 does not govern criminal proceedings that might take place for violation of Article 16 (CAT does not even oblige states to extradite or prosecute in these circumstances), and to the degree that the *Public Committee Against Torture* decision authorized the invocation of the criminal necessity defense in relation to ill-treatment falling short of torture, it remains compatible with CAT.¹⁰⁹

One should, however, explore the compatibility of the *Public Committee Against Torture* decision with other possible sources for an absolute obligation to extradite or prosecute. The “grave breaches” provisions of the Geneva Conventions and Additional Protocol I, which introduce a criminal prohibition of ill-treatment, do not address directly the question of what, if any, general defenses under criminal law might be available.¹¹⁰ Notably, these provisions do not encompass crimes perpetrated in non-

prosecution in close cases. ALAN M. DERSHOWITZ, *SHOUTING FIRE: CIVIL LIBERTIES IN A TURBULENT AGE* 477 (2002).

107. Katharine Shirey, *The Duty to Compensate Victims of Torture under Customary International Law*, 14 INT'L LEGAL PERSP. 30, 30 (2004).

108. CAT, *supra* note 3, arts. 2, 7. Note that whereas Article 2(1) of CAT is directed only to states, Article 2(2), which bars the raising of necessity defense claims, is not limited in the same manner. *Id.* art. 2. Hence, it would seem to bar the raising of claims on behalf of states and individuals. This latter conclusion is confirmed by the text of Article 2(3), which deals with the superior responsibility defense—a defense that only applies at the criminal law level. *Id.* For explicit criticism of the Israeli Supreme Court's judgment on the availability of the necessity defense in torture cases, see United Nations, Comm. Against Torture, *Report of the Committee Against Torture*, para. 52, U.N. Doc. A/57/44 (May 17, 2002).

109. *But see General Comment 20, supra* note 26, para. 3 (“The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority.”).

110. *See Geneva IV, supra* note 2, arts. 146-47; Geneva III, *supra* note 3, arts. 129-30; *see also* Protocol I, *supra* note 13, art. 85(4)(c) (covering inhuman and degrading practices based on racial discrimination).

international armed conflicts (with the exception of wars of national liberation, which are considered international armed conflicts for state parties to the Additional Protocol I; but given the controversy surrounding Article 1(4) of Additional Protocol I, non-state parties, such as the United States or Israel, are most probably not bound by its provisions).¹¹¹ Since IHL does not obligate states to extradite or prosecute perpetrators of ill-treatment perpetrated in the context of non-international armed conflicts, a state that would be willing to consider the availability of general criminal defenses in national court cases addressing such acts, in a manner not incompatible with the language of CAT, would probably be acting within its right.

Furthermore, even the absolute nature of the duty to extradite or prosecute perpetrators of ill-treatment perpetrated in the context of international armed conflicts is questionable. Although a “Nuremberg-type” teleological interpretation argument could have been made that an “extreme circumstances” defense is incompatible with the very nature of IHL¹¹²—a code of conduct that should apply particularly in emergency situations—such a position would seem to contradict Article 31(1) of the Rome Statute, which provides the following “self-defense” exception:

[A] person shall not be criminally responsible if, at the time of that person’s conduct

....

. . . . The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected.¹¹³

In a similar vein, Article 31(1)(d) of the Rome Statute introduces a defense of duress resulting “from a threat of imminent death or of continuing or imminent serious bodily harm against” the perpetrator or another person.¹¹⁴

111. Protocol I, *supra* note 13, art. 1(4); Michael J. Matheson, Deputy Legal Adviser, U.S. Dep’t of State, The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, Remarks at the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law (Jan. 22, 1987), in 2 AM U. J. INT’L L. & POL’Y 419, 425 (1987).

112. *Cf.* The Nürnberg Trial, 6 F.R.D. 69, 110 (Int’l Military Trib. 1946) (supporting the interpretation of international conventions leading to the imposition of individual criminal responsibility).

113. Rome Statute, *supra* note 18, art. 31(1).

114. *Id.* art. 31(1)(d). There is some confusion whether the difference between duress and necessity relates to the imminence of the threat or to the source of the threat (compulsion by a third person or other circumstances, including forces of nature). *See, e.g.*, Prose-

Thus, although the Rome Statute defines some forms of ill-treatment as war crimes in both international and non-international armed conflicts, it suggests that in extraordinary circumstances, self-defense, necessity, or duress legal exceptions might be available to persons charged with international crimes.¹¹⁵ Furthermore, the Rome Statute does not prohibit reliance upon defenses that derive from national laws, if they were to become accepted as general principles of law (and provided that they are not incompatible with international law). Arguably, national criminal law defenses such as duress, necessity, and self-defense might meet these requirements.¹¹⁶

While the burden of actually proving the strict conditions underlying the criminal “exceptional circumstances” defenses recognized by the Rome Statute might be rather high, and probably unattainable in most ill-treatment-related prosecutions,¹¹⁷ the Rome Statute still serves as a powerful indicator that some relativity exists in international criminal law governing crimes of ill-treatment falling short of torture. Moreover, even

cutor v. Erdemovic, Case No. IT-96-22-A, Judgment, ¶ 66 (Oct. 7, 1997) (McDonald & Vohrah, JJ., joint separate opinion); *id.* ¶ 14 (Cassese, J., separate and dissenting opinion).

115. See CASSESE, *supra* note 88, at 251; Albin Eser, *Article 31: Grounds for Excluding Criminal Responsibility*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 537, 550-51 (Otto Triffterer ed., 1999). Note that the court is ultimately authorized to determine the applicability of the available defenses to the cases at hand. Rome Statute, *supra* note 18, art. 31(2); see Per Saland, *International Criminal Law Principles*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE—ISSUES, NEGOTIATIONS, RESULTS 189, 208-09 (Roy S. Lee ed., 1999). The availability of “exceptional circumstance” defenses to war crimes is also confirmed by some judicial opinions. See, e.g., Erdemovic, Case No. IT-96-22-A, ¶¶ 19-29 (Cassese, J., separate and dissenting opinion) (discussing the availability of the defense of duress in post-World War II cases). Still, other decisions opposing the availability of “exceptional circumstance” defenses can also be identified. See, e.g., *id.* ¶ 19 (opinion of the court) (“[D]uress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings.”).

A leading Israeli criminal law expert has argued that, in cases of torture, the only criminal defense that should be made available is self-defense, and even then, only when the torture victim has herself created the risk underlying the defensive act. Miriam Gur-Arye, *Can the War Against Terror Justify the Use of Force in Interrogations? Reflections in Light of the Israeli Experience*, in TORTURE, *supra* note 6, at 183, 191-95.

116. Rome Statute, *supra* note 18, arts. 21(1)(c), 31(3); see also Criminal Justice Act, 1988, c. 33, § 134(4) (Eng.) (“It shall be a defence for a person charged with an offence under this section [i.e., torture] in respect of any conduct of his to prove that he had lawful authority, justification or excuse for that conduct.”). Benvenisti argues that self-defense might “be considered a ‘general principle of law’ [under] Article 38(1)(c) of the Statute of the International Court of Justice.” Benvenisti, *supra* note 8, at 607. *But see* Belgium’s Amendment to the Law of June 15, 1993 Concerning the Punishment of Grave Breaches of Humanitarian Law art. 12, Aug. 7, 2003, 42 I.L.M. 1258 (“[N]o necessity of a political, military, or national nature can justify the offenses defined in Articles 136*bis*, *ter*, *quater*, *sexies*, and *septies*, even when they have been committed by way of reprisal.”).

117. See Gaeta, *supra* note 97, at 791-92 (arguing that realistically, the conditions for necessity would not be met in torture-related interrogations).

if the relative conditions underlying the available “exceptional circumstance” defenses were not to be fully met, the existence of exceptional conditions might be viewed as a mitigating factor in sentencing the guilty perpetrator.¹¹⁸

A final observation on the absolute or relative nature of the criminal norm against ill-treatment pertains to the alleged *jus cogens* nature of that norm, and the effect that this might have upon the availability of criminal law defenses. To my mind, the classification of the prohibition against torture and other forms of ill-treatment as *jus cogens* does not dictate the nature of the criminal prohibition designed to punish norm violators. This is because the peremptory nature of the primary norm against torture and other forms of ill-treatment does not carry over automatically, without clear indication in state practice and treaty language, to the host of derivative norms designed to promote compliance with the primary norm (attribution of criminal responsibility, possible limitations on personal immunity and state immunity, duty to make reparations, etc.).¹¹⁹ Hence, it is unlikely that in the absence of a clear duty under international law to even prosecute individuals responsible for ill-treatment short of torture (in circumstances other than an international armed conflict), it would be possible to maintain that the introduction of normative flexibility in the course of criminal prosecutions violates *jus cogens* norms. Moreover, even if there is a *jus cogens* obligation to prosecute, one should require solid evidence in state practice and opinion *juris* that no defenses may be raised, as *jus cogens* norms are not necessarily absolute norms.¹²⁰

III. CONCLUSION

This Article reviewed the desirability and scope of coverage of the absolute prohibition against torture and other forms of “cruel, inhuman or degrading treatment or punishment.”¹²¹ It argued that a link should be established between these two levels of the legal debate: the degree of

118. See *id.* at 793; see also BURGERS & DANIELIUS, *supra* note 83, at 124 (stating that a superior order cannot serve as a defense against torture, but as a mitigating factor in sentencing).

119. See, e.g., *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. 79, 101-02; *Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)*, paras. 58-59 (Judgment) (Feb. 14, 2002), available at http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe_i_judgment_20020214.pdf; *Regina v. Bartle*, [2000] 1 A.C. 147 (H.L. 1999), reprinted in 38 I.L.M. 581, 622 (1999) (Hope, L.J.). But see *id.* at 593 (Browne-Wilkinson, L.J.); *id.* at 649 (Saville, L.J.) (stating that acts contrary to *jus cogens* exclude head of state immunity).

120. See Gaeta, *supra* note 97, at 790 (concluding that *jus cogens* norms do not negate criminal law defenses designed to protect important systemic values, and, potentially, other *jus cogens* norms). But see MERON, *supra* note 88, at 222 (determining that *jus cogens* norms merit absolute protection).

121. CAT, *supra* note 3, art. 16.

flexibility that could or should be introduced into the prohibition against torture must be informed by the moral and policy considerations that may justify the absolute nature of the prohibition in the first place.

I have posited that the categorical moral imperative for an absolute prohibition on torture and other forms of ill-treatment remains unsubstantiated, given the problem of addressing an “extreme case” where violating the rights of one individual may be necessary for protecting the rights of many others. Hence, the key to understanding the absolute nature of the prohibition should be found in the realm of second-order institutional considerations: because of the risk of chronic norm abuse, absolute IHL and IHR norms promote better enforcement of humanitarian norms at the price of suboptimal compatibility in extreme cases. So, the important moral values protected by the prohibition against torture, together with institutional constraints and the improbable occurrence of exceptional “ticking bomb” interrogation situations, which might justify torture, militate in favor of resorting to an absolute prohibition even the cost of generating a poor match between law and reality in extreme cases.

This policy analysis supports the distinction offered by the European Court of Human Rights in *Ireland v. United Kingdom*, and subsequently incorporated into CAT, between torture and other forms of cruel, inhuman, or degrading treatment and punishment, as both the moral arguments and the institutional considerations apply with weaker force with relation to the less grave forms of ill-treatment. Hence, a greater degree of flexibility may appertain to this normative category, especially if accompanied by improved monitoring, which could reduce the risk of normative abuse that might be associated with the application of any relative balancing test. Furthermore, it had been argued that an excessively rigid standard would attract limited compliance and might induce states, such as the United States or Israel, to look for ways to evade the prohibition against torture altogether. In short, more might actually mean less.

The second part of the Article explored the possibility of accommodating these policy insights within the framework of existing international law on the prohibition against torture. Here, another distinction between exceptions to state responsibility and criminal law defenses was offered. Whereas the ICCPR and the Geneva Conventions bar the possibility of derogating from either the prohibition against torture or the prohibition against other forms of ill-treatment, the duty to prosecute violators of the prohibition found in CAT and the Geneva Conventions has partial coverage: CAT does not introduce a duty to prosecute individuals responsible for ill-treatment short of torture, and the Geneva Conventions do not require such prosecution for crimes perpetrated in non-international armed conflict. Furthermore, the Rome Statute suggests that a defense of necessity would also be available to persons accused in committing war crimes in the context of both international and non-international armed conflicts.

The review of law, policy, and morality thus suggests that there is only limited room for relativizing the absolute prohibition against torture under existing law. Among the concrete proposals to introduce flexibility into the prohibition, it seems that only the Israeli solution of confirming the unlawfulness of all forms of ill-treatment while reserving the ability of violators to plead the necessity defense might conform to existing international law, provided that it does not apply to crimes of torture.

While this solution might strike some as too modest and oblivious to many aspects of the moral dilemma presented in “ticking time bomb” and other catastrophic scenarios, it reflects the modest ambitions of this Article—a critical analysis of existing law on the matter. The imperfectness of existing law inevitably reflects upon the imperfectness of the solution offered by the present author.

