

# The Drafting History of Article 2 of the Convention Against Torture

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## ABSTRACT

This paper examines the political context and group dynamics of the negotiations and drafting process of the Convention against Torture to address the following set of questions: Considering that there are national security arguments for potential benefits from torture in limited and exceptional cases, what allowed for the unconditional language of Article 2 (2) of the Convention? Is this drafting success a mystery, a miracle, or sheer luck? What are the factors, which allowed for the acceptance of the unconditional language? Were national security arguments actually voiced during the drafting process? Are there drafting lessons for strong human rights language that could be extrapolated? Is there a mystery surrounding the absolute ban on torture?

## 1. Introduction

The present article examines the drafting history of the 1987 Convention Against Torture (CAT) to rediscover and rethink the arguments and counterarguments for the absolute ban on torture, against the background of counter-terrorism debates on torture. Despite a set of arguments that can be identified in recent public discourse for the benefits expected from torture in exceptional cases, the language of Article 2 addressing the ban on torture is absolute and unconditional, managing to escape the usual national security arguments, derogations and safety clauses present in almost all other human rights treaties.

This paper examines the political context and group dynamics of the negotiations and drafting process of the Convention to address the following set of questions: Considering that there are national security arguments for potential benefits from torture in limited and exceptional cases, what allowed for the unconditional language of Article 2 (2) of the Convention? Is this drafting success a mystery, a miracle, or sheer luck? What are the factors, which allowed for the acceptance of the unconditional language? Were

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national security arguments actually voiced during the drafting process? Is there a mystery surrounding the absolute ban on torture?

Section 2 of this research examines the recent debates on permissibility of torture in exceptional circumstances. Section 3 looks into the work of all the relevant UN bodies responsible for the drafting and adoption of the Convention, including the CAT Working Group records. Finally, having examined the negotiations dynamics and drafting process, Section 4 aims to address the factors and conditions, which made the acceptance of the absolute language possible, extrapolating a set of lessons learnt, which might be applicable and relevant to the successful drafting and passing of strong language in future international human right treaties.

## 2. 'Torture one, save many' scenario: Is torture ever justified?

The argument that torture could be permissible in some exceptional cases has been increasingly present in the rhetoric of politicians and public policy makers during the recent 'war on terror'.<sup>1</sup> Although in international law the ban on torture and ill treatment is among the few absolute unconditional prohibitions, arguments claiming that torture is sometimes necessary nevertheless exist. The most frequently cited motive is a variation of the following nuances: protecting the common good; being 'tough' on the very few who deserve it; to torture one means to save many in some exceptional cases; in the ticking bomb scenario time is of the essence and not torturing would be the inhumane act.

Torture has certainly been used throughout history for different purposes.<sup>2</sup> Recent examples of justifications for inflicting torture are numerous: torture was used to silence the opposition in Iraq, Guatemala, and to fight insurgents/freedom movements/terrorists in Algeria.<sup>3</sup> Torture was used throughout Latin America,<sup>4</sup> including as a method of a 'dirty war' in Argentina.<sup>5</sup> The UK used certain techniques to fight terrorism/freedom movement in Northern Ireland.<sup>6</sup> Most recently, invoking national

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<sup>1</sup> See for example transcript of US Joint Congressional hearing 'Extraordinary Rendition in US Counterterrorism Policy: The Impact on Transatlantic Relations' of Subcommittee on International Organizations, Human Rights and Oversight and Subcommittee on Europe, and especially the arguments of Republican Congressman Rohrabacher: [http://foreignaffairs.house.gov/hearing\\_notice.asp?id=803](http://foreignaffairs.house.gov/hearing_notice.asp?id=803) accessed on 23 Mar. 2009.

<sup>2</sup> See Ross, J., 'A History of Torture', in Roth, K., Worden, M. and Bernstein, A. (eds.), *Torture. Does it Make Us Safer? Is it Ever OK? A Human Rights Perspective* (The New York Press, Human Rights Watch, 2005) and Langbein, J., 'The Legal History of Torture' in Levinson, S., (ed.), *Torture: A Collection* (Oxford: Oxford University Press, 2004).

<sup>3</sup> For detailed case studies see Fine, H., *Human Rights and Wrongs. Slavery, Terror, Genocide* (Boulder, CO: Paradigm Publishers, 2007) 60-90.

<sup>4</sup> Mendez, J., 'Torture in Latin America'; Timmerman, H., 'Torture: A Family Affair' and Robin, M., 'Counterinsurgency and Torture: Exporting Torture Tactics from Indochina and Algeria to Latin America' in Roth, K., Worden, M. and Bernstein, A. (eds.), *Torture: Does it Make Us Safer? Is it Ever OK? A Human Rights Perspective* (The New York Press, Human Rights Watch, 2005).

<sup>5</sup> Osiel, M., 'The Mental State of Torturers: Argentina's Dirty Wars' in Sanford Levinson (ed.), *Torture: A Collection* (Oxford: Oxford University Press, 2004).

<sup>6</sup> For UK interrogation techniques see for example *Ireland v. the United Kingdom*, judgement of the European Court of Human Rights, 18 Jan. 1978.

security, in the case of *Saadi vs. Italy* before the European Court of Human Rights, the UK as a third intervening party argued that the security risk posed by an individual's dangerousness ought to be balanced against the risk to the individual in the receiving state.<sup>7</sup> Israel and the US have infamously used questionable interrogation methods in their wars on terror.<sup>8</sup> For example, the Israeli Supreme Court case judgment, which has become the seminal reference for the 'ticking bomb' scenario, provides an elaborate discussion of a case where torturing one individual may be acceptable as a means to save many innocent lives.<sup>9</sup> What is remarkable in the examples above is not that torture was used, but that there was an attempt to justify it, national security and national interest always being paramount in the rationale.

On the side of national security, political realists such as Krauthammer have warned on the danger of not torturing, submitting that there are 'very unpleasant but very real cases in which we are morally permitted – indeed morally compelled – to do terrible things'.<sup>10</sup> Related to this is the problem of 'dirty hands', or whether political leaders may violate morality in order to secure the good of the communities they protect.<sup>11</sup> Another prominent example of the national security prevalence is the infamous Dershowitz's proposal of the 'torture order', whereby in order to avoid arbitrary torture inflicted behind closed doors in unknown locations, the security organs may obtain an order authorising torture issued by a judge, in exceptional circumstances.<sup>12</sup>

On the other side of the contemporary debate, Henry Shue's classical essay provides the strong counter arguments with respect to Dershowitz's proposal,<sup>13</sup> as does Elaine Scarry<sup>14</sup> in her article 'Five Errors in the Reasoning of Alan Dershowitz'. Alike to what the prominent lawyers of Human Rights Watch have argued at length<sup>15</sup>, Ariel

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<sup>7</sup> *Saadi v. Italy*, Appl. No. 37201/06, Council of Europe: European Court of Human Rights, 28 February 2008, available at: <http://www.unhcr.org/refworld/docid/47c6882e.html> [accessed 27 April 2012] see response with regard to submissions by the UK.

<sup>8</sup> See Gur-Arye, M., 'Can the War against Terror Justify the Use of Force in Interrogations? Reflection in Light of the Israeli Experience' in Levinson, S., (ed.), *Torture: A Collection* (Oxford: Oxford University Press, 2004); and Fellner, J., 'Torture in US Prisons' America' in Roth, K., Worden, M. and Bernstein, A., (eds.), *Torture: Does it Make Us Safer? Is it Ever OK? A Human Rights Perspective* (The New York Press, Human Rights Watch, 2005).

<sup>9</sup> Supreme Court of Israel: Judgment Concerning the Legality of the General Security Service's Interrogation Methods, 38 I.L.M. 1471, 1478 (9 Sep. 1999).

<sup>10</sup> Krauthammer, C., 'The Truth about Torture' in Levinson, S., (ed.), *Torture: A Collection* (Oxford: Oxford University Press, 2004).

<sup>11</sup> See for example Walzer, M., 'Political Action: The Problem of Dirty Hand' and Elshtan, J.B., 'Reflection on the Problem of Dirty Hands' in Levinson, S., (ed.), *Torture: A Collection* (Oxford: Oxford University Press, 2004).

<sup>12</sup> Dershowitz, A., 'Tortured Reasoning' in Levinson, S., (ed.), *Torture: A Collection* (Oxford: Oxford University Press, 2004).

<sup>13</sup> Shue, H., 'Torture' in Levinson, S., (ed.), *Torture: A Collection* (Oxford: Oxford University Press, 2004).

<sup>14</sup> Scarry, E., 'Five Errors in the Reasoning of Alan Dershowitz' in Levinson, S., (ed.), *Torture: A Collection* (Oxford: Oxford University Press, 2004).

<sup>15</sup> Roth, K., 'Justifying Torture'; Worden, M., 'Torture Spoken Here'; Malinowski, T., 'Banned State Department Practices'; Brody, R., 'The Road to Abu Ghraib: Torture and Impunity in US Detention'; Pokempner, D., 'Command Responsibility for Torture' and Fellner, J., 'Torture in US Prisons' in Roth, K., Worden, M., and Bernstein, A., (eds.), *Torture: Does it Make Us Safer? Is it Ever OK? A Human Rights Perspective* (The New York Press, Human Rights Watch, 2005).

Dorfman says no to torture under any circumstances<sup>16</sup>, especially when it is committed in the name of the citizens in a democracy. Susan Marks and Andrew Clapham argue that torture diminishes that one human being who commits torture in the name of the public good, bringing up the relevant example of Brothers Karamazov.<sup>17</sup> Other authors warn that fighting terror actually creates terror, in turn, and leads to downward spirals of panic, eroding the fabric of society and harming the citizens for whose sake the extra ‘safety’ measures are taken in the first place. Another prominent argument speaking to the downward spirals phenomenon eloquently underscores that once torture is authorized, a society is on a slippery slope when law enforcement officers could eventually get to torture even innocent citizens.

According to the ‘poisonous tree’ doctrine, there are very few uses for information obtained under torture. In his famous essay Cesare Beccaria stated that torture ‘is a sure route for the acquittal of the robust ruffians and the conviction of weak innocents.’<sup>18</sup> US Senator John McCain,<sup>19</sup> a former detainee and victim of torture during the Vietnam War, reiterates this point, arguing that under torture one admits to anything. Senator McCain also posits that abiding by the absolute prohibition of torture, as an international legal norm protects American citizens and soldiers around the world. Furthermore, it has been argued that torture in the name of counterterrorism was one of the best recruiting tools for terrorist movements in Algeria, after torture by the French authorities,<sup>20</sup> and in Iraq and Afghanistan, after torture committed by the US.<sup>21</sup>

Some commentators have claimed that the unconditional ban on torture in international law does not allow space for a two-sided debate, and such debate is irrelevant. However, the above stated arguments and counterarguments show that currently a debate on the permissibility of torture does exist. Pretending that it does not serves intellectual hypocrisy, as argued by Levinson, among others.<sup>22</sup> Certainly it would be challenging to prove that valuable information has never been extracted under torture.<sup>23</sup> Taking this information into consideration, Michael Ignatieff points out that

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<sup>16</sup> Dorfman, A., ‘The Tyranny of Terror: Is Torture Inevitable in Our Country and Beyond?’ in Levinson, S., (ed.), *Torture: A Collection* (Oxford: Oxford University Press, 2004).

<sup>17</sup> Marks, S. and Clapham, A., *International Human Rights Lexicon* (2005) 359-385.

<sup>18</sup> Beccaria, C., ‘On Crimes and Punishments’ cited in Ross, J., ‘A History of Torture’, in Roth, K., Worden, M. and Bernstein, A., (eds.), *Torture: Does it Make Us Safer? Is it Ever OK? A Human Rights Perspective* (The New York Press, Human Rights Watch, 2005).

<sup>19</sup> McCain, J., ‘Respecting the Geneva Conventions’ in Roth, K., Worden, M. and Bernstein, A., (eds.), *Torture: Does it Make Us Safer? Is it Ever OK? A Human Rights Perspective* (The New York Press, Human Rights Watch, 2005).

<sup>20</sup> Fine, H., *Human Rights and Wrongs. Slavery, Terror, Genocide* (Boulder, CO: Paradigm Publishers, 2007) 63-76.

<sup>21</sup> Skolnick, J., ‘American Interrogation: From Torture to Trickery’, Richard Weisberg, ‘Loose Professionalism, or Why Lawyers Take the Lead on Torture’ and Posner, R., ‘Torture, Terrorism, and Interrogation’ in Levinson, S., (ed.), *Torture: A Collection* (Oxford: Oxford University Press, 2004).

<sup>22</sup> Levinson, S., ‘Contemplating Torture: An Introduction’ in Levinson, S.,(ed.), *Torture: A Collection* (Oxford: Oxford University Press, 2004).

<sup>23</sup> The French authorities have argued at length that employing torture in Algeria has led to successful counterterrorism efforts; see Fine, H., *Human Rights and Wrongs. Slavery, Terror, Genocide* (Boulder, CO: Paradigm Publishers, 2007) 63-76. The US and Britain have claimed that thanks to the authorised interrogation techniques no new major attack has occurred.

the ‘moral prohibition comes at a price.’<sup>24</sup> In other words, the absolute ban on torture means that there is a potential benefit a society has to forego.

The present paper takes this view as the initial point of discussion. From the starting point of admitting the existence of the two possible sides in the debate, this paper proceeds to examine whether the arguments permitting torture in exceptional circumstances could be found in the drafting history of the Convention Against Torture. The language of Article 2(2) on the absolute ban on torture is unforgivably definitive and unconditional. How was it possible for such language to pass then? This question posits a conundrum, and at the least, it is a question worthy of analysis, which might point to factors that help circumvent national security in drafting human rights treaties. Keeping in mind that governments usually do not shy away from voicing national security/sovereignty concerns at the international level, lack of such arguments could lead us to potentially curious conclusions.

### 3. The Drafting History of Article 2 in the Convention Against Torture

This section traces the arguments relevant to Article 2 voiced during the negotiations, drafting and deliberation process within the Working Group responsible for the Convention, and the UN General Assembly debates at a later stage relating to the adoption of the Convention. Special attention must be paid to Article 2(2), stating the absolute prohibition on torture:

#### Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture.<sup>25</sup>

At the first stage of deliberations during the work of the Working Group, states debated the original Swedish proposal. The International Association of Penal Law (IAPL) also submitted a draft. In the Swedish proposal, the content of the current version of Article 2 was separated in two different articles (i.e. Articles 2 and 3), which read:

#### Article 2

1. Each State Party undertakes to ensure that torture or other cruel, inhuman or degrading treatment or punishment does not take place within its jurisdiction. Under no circumstances shall any State Party permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

#### Article 3

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<sup>24</sup> Ignatieff, M., ‘Moral Prohibition at a Price’ in Roth, K., Worden, M. and Bernstein, A., (eds.), *Torture: Does it Make Us Safer? Is it Ever OK? A Human Rights Perspective* (The New York Press, Human Rights Watch, 2005) 26-27.

<sup>25</sup> Art. 2, Convention Against Torture.

Each State Party shall, in accordance with the provisions of the present Convention, take legislative, administrative, judicial and other measures to prevent torture or other cruel, inhuman or degrading treatment or punishment from being practised within its jurisdiction.<sup>26</sup>

France voiced the argument that the phrase ‘within its jurisdiction’ should be replaced with ‘in its territory’ because the phrase ‘within its jurisdiction’ could be interpreted too widely to cover citizens of one state who are resident in another state.<sup>27</sup> That argument was countered with the observation that the wording ‘within its jurisdiction’ would cover torture inflicted aboard a ship or an aircraft registered in that state, as well as its occupied territories.<sup>28</sup>

Different views were voiced with regard to whether Article 2 should apply only to torture or also to other ‘cruel, inhuman or degrading treatment or punishment’.<sup>29</sup> During the negotiations, the United States proposed a new article to replace Articles 2 and 3, to provide that there is no justification for any act of torture. But it also proposed to limit the scope only to torture, deleting ‘cruel, inhuman or degrading treatment or punishment’ (CIDT).<sup>30</sup> The original Swedish proposal included a provision that ‘under no circumstances shall any State Party permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment’. The US argued that CIDT is a relative term and ‘international standards are more difficult to achieve and what might constitute cruel, inhuman, or degrading treatment in times of peace might not rise to that level during emergency conditions’.<sup>31</sup> On the other hand, the Holy See expressed the opinion that it welcomed the provision rejecting any justification of torture in exceptional circumstances, ‘in light of certain schools of thought which seek to give national security priority over the rights of the person’.<sup>32</sup> Nevertheless, in the end it seemed that the drafters accepted the proposal of the US,<sup>33</sup> because the final text of Article 2(2) does not include CIDT.

Switzerland drew attention to the IAPL draft that stated international law prohibits torture and ill treatment at all times, pursuant to customary law. That correct point was unfortunately unsuccessful in the final count. It did not stand a chance against the US proposal to delete CIDT. Switzerland further proposed the introduction of a safeguard clause, according to which the provision stating that no exceptional circumstances could justify torture would be without prejudice to the Geneva Convention of 1949 and the additional Protocols. Common Article 3<sup>34</sup> includes ill

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<sup>26</sup> Burgers, H. and Danelius, H., ‘The United Nations Convention against Torture’ in *A Handbook on the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, (Martinus Nijhoff Publishers, 1988) 47-48.

<sup>27</sup> *Ibid.*, 48.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> Nowak, M. and McArthur, E., The United Nations Convention Against in Levinson, S., (ed.), *Torture: A Collection* (Oxford: Oxford University Press, 2004) 92.

<sup>31</sup> E/CN.4/L.1470, para. 57.

<sup>32</sup> E/CN.4/1314, Add. 3, para. 6.

<sup>33</sup> Nowak and McArthur, n.30 above, 118.

<sup>34</sup> Common Article 3 of the ‘Geneva Conventions of 1949’: ‘In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:

treatment within the scope of the prohibition.<sup>35</sup> In the end that argument proved useful because Article 16(2)<sup>36</sup> of the final version of the Convention contains an explicit savings clause in relation to other treaties prohibiting CIDT.

The most important and illustrative point in the present research pertains to another proposal to undermine the absolute nature of Article 2(2) - the proposal to delete the phrase “no exceptional circumstances whatsoever”, which deletion could be invoked as a justification for torture in some circumstances. The proposal to delete that phrase and allow a wider margin of discretion was rejected and the strong unconditional language remained.<sup>37</sup> This was the big victory for human rights during this drafting process. Without the second sentence, the treaty would have left a wide margin for interpretational ambiguity. Nowak and McArthur submit that it is ‘interesting to note that the drafters of the 1975 declaration were unable to reach consensus on the same issue’.<sup>38</sup> The mystery, therefore, is hidden in why during the drafting process the drafters kept the sentence.

The United States suggested that although an order from a superior officer could not justify torture, it should be included as a mitigating factor in punishment; proposing to add a clause to this regard. The proposition was discussed but agreement was not reached, and in the end, the US proposal was not successful.<sup>39</sup>

Upon a proposal by the Swedish delegation reflecting the deliberations (and a previous proposal by Austria to merge the articles), Articles 2 and 3 were merged into one Article 2 as quoted on page 6 above.

In general, Article 2(2) received much less attention, in comparison to other issues discussed during the drafting process. The debates within the Working Group were centred on four very controversial issues: 1) the question of universal jurisdiction, 2) whether or not to include cruel, inhuman or degrading treatment or punishment and how to define it, 3) the public official element, and 4) the implementation procedure.<sup>40</sup>

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1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) Taking of hostages;

(c) Outrages upon personal dignity, in particular, humiliating and degrading treatment;

(d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.’

<sup>35</sup> Nowak and McArthur, n. 30 above, 118

<sup>36</sup> Article 16(2) of CAT reads: ‘The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibit cruel, inhuman or degrading treatment or punishment or which relate to extradition or expulsion.’

<sup>37</sup> Paragraph based on Nowak and McArthur, n. 30 above, 92-94

<sup>38</sup> *Ibid.*, 93

<sup>39</sup> *Ibid.*

<sup>40</sup> Burgers and Danelius, n. 26 above, 31-99

The absolute nature of the prohibition was not one of those hotly debated issues and it was not disputed after the UN Secretary General forwarded the Working Group's report and summary records to all states. States' comments do not reveal opposition to Article 2(2).<sup>41</sup>

In conclusion, there were three important points of friction which exemplify the national security paradigm; the undermining proposals being voiced mainly by the United States. The first US proposal for including an order from a superior as a mitigating factor in Article 2(3) (similar to the reasoning in the Israeli case alluded to earlier) was not successful. However, the proposal to delete CIDT based on the statement that what might constitute cruel, inhuman or degrading treatment in times of peace might not rise to that level during emergency conditions, was successful. This, in fact, is the most illustrative example of the national security paradigm in drafting Article 2(2) and the greatest weakness of Article 2. Nevertheless, the importance of that deletion should not be exaggerated (see p. 11). Finally, the language with regard to torture (alone) remained strong and unconditional, and the clause that 'no exceptional circumstances' could be invoked as justification for torture remained in the final text.<sup>42</sup> This is the greatest strength of Article 2.

#### 4. Factors explaining the language of Article 2

The previous section's findings pose the question: What in the deliberations and their context allowed for the absolute nature of the language of Art. 2(2)? States did not argue that the 'ticking bomb' scenario with regard to torture applied, and a few factors may account for that.

First, the Convention did not mean to create new law, but to codify existing norms. The prohibition of torture had already assumed a special status in the protection of human rights under international law as a non-derogable norm without any restrictions whatsoever. Additionally, there was already a set of parallel obligations in treaties addressing torture, which the drafters had to consider: Under several human rights treaties states are allowed to derogate from their obligations in time of war or in other emergencies but the derogation does not apply to the right not to be subjected to torture.<sup>43</sup> In sum, existing treaty law was available and new jurisprudence had emerged during the drafting process,<sup>44</sup> which drafters inevitably had to take into consideration. Furthermore, torture is prohibited by customary international law and ranks as a *jus cogens*<sup>45</sup> norm of the international community. The first report of the UN Special

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<sup>41</sup> A/39/499, A/39/499/Add.1, A/39/499/Add.2

<sup>42</sup> Nowak and McArthur, n. 30 above, 93

<sup>43</sup> See Art. 5 of the Universal Declaration on Human Rights, Common Art. 3 of the Geneva Conventions of 1949, Art. 3 and Art. 15(2) of European Convention on Human Rights, Art. 7 and Art. 4 (2) of International Covenant on Civil and Political Rights and Art.5 (2) and Art. 27(2) of the African Charter of Human and Peoples' Rights, all cited in Manfred Nowak, UN Covenant on Civil and Political Rights: ICCPR Commentary, Kehl/Strasbourg/ Arlington, NP Engel Publisher (2005), p.157

<sup>44</sup> Ireland v. the United Kingdom, judgement of the European Court of Human Rights, 18 January 1978

<sup>45</sup> The Vienna Convention on the Law of Treaties of 1969 defines peremptory norms in Art. 53 as: 'a norm accepted and recognized by the international community of States as a whole as a norm from which no



Rapporteur on Torture, Pieter Kooijmans<sup>46</sup>, and later, a number of international tribunals and legal scholars have testified to this fact.<sup>47</sup>

The drafters of the 1975 UN Declaration<sup>48</sup> did not reach consensus on the ‘no exceptional circumstances whatsoever’ issue. Perhaps during the drafting process of CAT lasting over ten years there was convergence of ideas, and keeping in mind the original intent of the Convention – to strengthen the efforts to combat torture,<sup>49</sup> most delegations came to agree. This illustrates that in international law, some arguments simply become off limits with the course of history, through the way international discourse and law progresses. Finally, the issue became ‘locked in’.

Second, the Convention was modelled on the Swedish proposal. Many international law organizations and institutes offering expertise in the field contributed to this process, including a draft submitted by the International Association of Penal Law. The Convention was written only by states’ political appointees, but it is a document also contributed to by legal experts and compiled in the course of over ten years.<sup>50</sup>

Third, the political context in the 1970s and 1980s allowed for the unconditional ban language, following on the horrors of the Nazi Germany regime, and the practice of torture in Latin America, and especially Chile and Argentina at that time. Not surprisingly, Argentina and Chile were among the most obvious ‘obstructionist’ states in the negotiations. The fact that they were somehow isolated speaks to the importance of information and voicing human rights abuses publically.

Fourth, it could be argued that the fact that there were already four major bones of contention (p.8), together with the fact that the drafting process took over ten years, made it less likely for anyone to add another point of friction or uncomfortable point of disagreement to the negotiations. Eager to report a final result, and to resolve at least some of the issues, delegates were unlikely to create an additional point of friction.

On the other hand, it could also be argued that arguments to undermine the absolute nature of the language were in fact made, and came through the back door with the US’s successful proposal not to include CIDT in the scope of Article 2. Under

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derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character’.

Vienna Convention on the Law of Treaties, 25 May, 1969

<sup>46</sup> Report by the UN Special Rapporteur on Torture, Pieter Kooijmans, E/CN.4/1986/15, 19 Feb. 1986, para. 3.

<sup>47</sup> For torture as a jus cogens norm see Prosecutor v. Ferundzija, case No. IT-95-17/1-T, 10 Dec. 1998, paras.151-3; Nowak, M., *UN Covenant on Civil and Political Rights: ICCPR Commentary*, Kehl/Strasbourg/Arlington, NP Engel Publisher (2005), 157; Simma, B. and Alston, P., ‘*The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*’, Australian Yearbook of International Law, vol. 12 (1988-1989) 82-108. Also see Nowak, M., ‘Torture and Enforced Disappearance’, in Krause, C. and Scheinin, M. (eds.), *International Protection of Human Rights: A Textbook* (Turku: Institute for Human Rights, Abo Academy University, forthcoming, 2009)153-157.

<sup>48</sup> Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted by General Assembly resolution 3452 (XXX) of 9 Dec. 1975.

<sup>49</sup> See Preamble of the Convention against Torture.

<sup>50</sup> Burgers and Danelius, n. 26 above, 35-40.

customary law, CIDT was included in the scope of absolute prohibition,<sup>51</sup> so that in fact presents a failure of the codification drafting process. However, Nowak and McArthur argue through interpretation that the deletion is not crucial (see p.11). It should also be noted that the core sentence remained unaltered: ‘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’.

It could also be argued that states did not wish to discuss the absolute nature of torture because even if they had arguments against it, once these arguments were publically struck down and presented on the records of the *travaux préparatoire*, the issue would be off-limits. Delegates might have not wished to lock down the issue by raising objections, as not discussing the issue would leave some interpretational leeway. What could be replied to this is that the language of Article 2(2) is indeed unconditional including ‘no circumstances, whatsoever’. The ‘no lock down’ technique could be applicable on other occasions, but in the case of Article 2(2), nothing could be left to the imagination. Not voicing objections in this case simply lead to affirming the unambiguous character of the prohibition rather than creating ambiguity.

Another factor to consider is the role of the neutral state, which puts forward the right counter-argument at the right time, as Switzerland did with regard to the argument for respecting and not lowering the Geneva Convention’s standard (which includes CIDT). Although in the end the United States was successful in deleting CIDT from the scope of the CAT, the move by the Swiss was important in the fight against attempts to water down the absolute and definitive nature of the provisions and laid the groundwork for inclusion of the savings clause in Article 16(2) of the CAT Convention.<sup>52</sup>

Technically speaking, the Geneva Convention standard would not have presented a problem. The mainstream positivist view at the time of drafting in the 1970s and 1980s was that the human rights regime and the regime of the Geneva Convention were two separate legal regimes, with humanitarian law as *lex specialis* applicable before general human rights law.<sup>53</sup>

At the time of drafting the dominant view was a classical positivist one. A lower standard does not technically interfere with the prohibition of torture and ill treatment under the Geneva Convention and it would not have posed a direct legal problem. Notwithstanding the technical relevance of the argument, it was very important that the argument by the Swiss was made. First of all, it is a paradox when the law of war sets a higher standard of treatment than the human rights treaty on torture applicable in times of peace. Furthermore, CAT was supposed to codify the existing law and the Geneva Convention has contributed greatly to the general prohibition of torture under international law. With the intention to make the fight against torture more effective as

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<sup>51</sup> Nowak, M., ‘Torture and Enforced Disappearance’, in Krause, C. and Scheinin, M. (eds.), *International Protection of Human Rights: A Textbook* (Turku: Institute for Human Rights, Abo Academy University, forthcoming, 2009)159

<sup>52</sup> Art.16. (2) CAT. “The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibit cruel, inhuman or degrading treatment or punishment or which relate to extradition or expulsion.”

<sup>53</sup> For a summary of that view, which was elaborates later in the 1990s, see Legality of the Threat or Use of Nuclear Weapons, ICJ Advisory Opinion, 8 July, 1996

the main aim of CAT, drafters were correctly reminded of the norms and the spirit that the Geneva Convention embodied.

What the Swiss argument, in the end, appeared to be particularly relevant for was another human rights treaty – the UN Covenant on Civil and Political Rights (ICCPR), which unconditionally bans torture and CIDT in Article 4(2)<sup>54</sup> in conjunction with Article 7.<sup>55</sup> Without a savings clause, CAT, as the more recent treaty<sup>56</sup> and the one focused on the specific norm of torture - as opposed to generally civil and political rights<sup>57</sup> - might have been considered to create new law, modifying the content of the norm protected by Articles 4(2) and 7 of the ICCPR. But, since the savings clause is present, that rationale is not applicable and that move by the Swiss seems to be countering the deletion of CIDT. In addition with regard to the deletion of CIDT, Nowak and McArthur argue that ‘one should not give too much weight to this retrogressive provision’.<sup>58</sup> The authors point out that the Preamble’s intention to make the struggle against torture more effective (and not less effective), together with the savings clause in Article 16(2) make the deletion of CIDT less relevant.<sup>59</sup>

Apart from the repeated importance of already existing standards, there is a lesson learnt pertaining to the importance of the actors to be invited to participate. The Swiss argument led to the inclusion of Article 16(2) and it was timely placed within the Working Group, where the Swiss participated, albeit only as non-UN member observer. There should always be at least one neutral, human rights-friendly state - like Switzerland - which combines the image of neutrality and expertise in international law, due to it being a centre for humanitarian and human rights affairs. Sweden’s role and the role of Chairman Burgers, as the ones who spearheaded the negotiations, also cannot be stressed enough. (The role of the neutral agent becomes apparent, for example, with the successful passing in 2008 of the Swiss Initiative Montreux document<sup>60</sup> on obligations with regard to private military contractors – a highly controversial issue on the international agenda, which was nevertheless tackled with the adequate leadership of the Swiss foreign ministry).

In the context of the Cold War and given that the US was the most ‘enthusiastic’ opponent of the absolute prohibition contained in Article 2; it would have certainly made a difference if the Soviet Union and not Switzerland had voiced the same savings clause argument. Although international negotiations are always ‘politicised’, some states’ arguments are considered less ‘politicised’ than others. Who makes the argument is a key; and that should surely be taken into consideration when the goal is strengthening the human rights regime.

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<sup>54</sup> Article 4 (2) of the ICCPR reads: ‘No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.’ Article 7 pertains to torture and CIDT.

<sup>55</sup> Nowak and McArthur, n. 30 above, 118

<sup>56</sup> According to the principle *lex posterior derogat legi priori*

<sup>57</sup> *Lex specialis derogat legi generali*, if CAT is considered as *lex specialis* and the norms of the ICCPR are considered as *legi generali*

<sup>58</sup> *Ibid.*, 119

<sup>59</sup> *Ibid.*

<sup>60</sup> Swiss Federal Department of Foreign Affairs, press release:

<http://www.eda.admin.ch/eda/en/home/recent/media/single.html?pid=21497>, accessed 27 April, 2009

## 5. Concluding Remarks

To draft treaties at the right time, in the favourable political context, in order to reach the language that serves human rights best, is a lesson which cannot be stressed enough. Article 2(2) of the Convention might have looked differently if drafted post-September 11th, as opposed to after the Second World War, amidst ‘torture campaigns’ in Latin America. The drafting history also speaks to the importance of other experts’ and organisations’ input and for not leaving drafting only to state parties. Furthermore, because human beings’ time, attention-span and capacity is limited, major points of friction, such as the four issues in the CAT drafting, make it less likely for delegates to re-open another issue. Convergence of opinions towards at least some form of consensus (together with the desire to reach a final result) is also another factor to consider. Nevertheless, there is still some mystery involved in the drafting process and one could still ponder on the question: what happened in the ten years between the drafting of the 1975 UN Declaration and the drafting of the 1987 Convention which made it possible for the delegates to accept Article 2(2)?

The actors in the drafting process are of importance. Isolating the obstructionists as much as possible is a key, even though in some cases this is not possible because they represent a big power. Furthermore, a neutral actor like Switzerland to be the ‘objector’ and Sweden to drive the process (both combining the perception of neutrality and the technical expertise at the same time) are necessary for a successful drafting process.

To take into consideration already existing legal norms, which strengthen the language of the treaty, and to voice those reconciliation concerns openly is a key factor. In international law some arguments simply become off limits with the course of history, through the way international discourse and law progresses, as in the case of torture and the ticking bomb scenario.

Still, one unexplained question lingers in the background. If drafting Article 2(2) was possible because it codified already existing law, how was it possible for this law to come into existence in the first place? How is it that the prohibition of torture became a *jus cogens* norm and when did that occur? These questions remain valid and pertinent, especially today. They point to many directions for future research on the mystery of torture as an international legal norm of special status. The shortest answer I have is that there is something about torture we still cannot quite explain.

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