

# NATIONAL SECURITY AND INTERNATIONAL HUMAN RIGHTS LAW: THE CHALLENGES ARISEN FROM TERRORISM

## SEGURIDAD NACIONAL Y DERECHO INTERNACIONAL DE LOS DERECHOS HUMANOS: LOS DESAFÍOS QUE PRESENTA EL TERRORISMO

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‘The debate over the use of torture goes back many years, with Bentham supporting it in a limited category of cases, Kant opposing it as part of his categorical imperative against improperly using people as means for achieving noble ends, and Voltaire’s views on the matter being ‘hopelessly confused’<sup>1</sup>. The question of torture, once thought settled and closed as a normative matter (despite its ongoing practice in the world), became newly relevant in a domestic and international context in the past few years.

In this sense, Peter King, the Chairman of the Committee Homeland Security (United States), stated in 2006 that “If we capture Bin Laden tomorrow and we have to hold his head under water to find out where the next attack is going to happen, we ought to be able to do it.” Such a statement requires a deep consideration on whether such ‘treatment’ (intended to save the lives of future victims of terrorist attacks) is consistent with the principles and norms of international human rights law, and explain what ‘remedies’ would be available to Bin Laden before international human rights institutions.

Therefore, first a discussion about whether ‘holding one’s head under the water’ is considered torture, or other cruel, inhuman, or degrading treatment must take place. Secondly, the principles and norms of international human rights law regarding the subject shall be clarified and finally the remedies available before international human rights institutions will be explored. Additionally, a brief discussion on whether the use of

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<sup>1</sup> Dershowitz, Alan, *Should the Ticking Bomb Terrorist Be Tortured? A Case Study in How a Democracy Should Make Tragic Choices* in *Why Terrorism Works* (New Haven: Yale University Press, 2002), p. 149-150.

torture or other 'treatment' is justifiable or should be recognized by the legal system in extreme exceptional circumstances will take place.

### **Definitions, norms and principles of international law**

'Almost all of the world's states are party to one or more conventions forbidding torture'<sup>2</sup>. Such a prohibition 'is widely understood as a peremptory rule, as derogation is considered impermissible'<sup>3</sup>. In this sense, the obligation is absolute<sup>4</sup> and imposed *erga omnes*<sup>5</sup> and any legislative or judiciary act permitting torture is illegitimate under International Law.

Moreover, in accordance with article 5 of the Universal Declaration of Human Rights 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. The International Convention on Civil and Political Rights ('ICCPR') states the same principle in its article 7, and, furthermore, establishes that no derogation may be made from such article 7. Article 10(1) of the ICCPR also sets forth that 'all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'. In addition, the 1984 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('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

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<sup>2</sup> 'Article 5 of the 1948 Universal Declaration of Human Rights declares that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. Common article 3 of the 1949 Geneva Conventions insists that all those not taking an active part in hostilities be treated humanely. The article goes on to prohibit specifically 'violence to life and person, in particular, murder of all kinds, mutilation, cruel treatment and torture' and 'outrages upon personal dignity, in particular, humiliating and degrading treatment of any kind'. Both torture and cruel and inhumane treatment were expressly forbidden in the United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, which was adopted in 1984 and came into force in 1987, and to which the US is a signatory. Torture is also prohibited by regional human rights treaties such as the European Convention on Human Rights (1950), the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987, entered into force 1989), the African Charter on Human and Peoples' Rights (1969), the American Convention on Human Rights (1969) and the Inter-American Convention to Prevent and Punish Torture (1985). Torture is also prohibited in the Genocide Convention (1948), the Supplementary Convention on the Abolition of Slavery (1956), the International Convention on the Elimination of All Forms of Racial Discrimination (1965), International Covenant on Civil and Political Rights (1966, entered into force 1976), and the International Convention on the Suppression and Punishment of the Crime of Apartheid (1973).' Bellamy, Alex, *No pain, no gain? Torture and ethics in the war on terror*, International Affairs [2006] Vol. 82, I, p 126.

<sup>3</sup> Bellamy, Alex, *No pain, no gain? Torture and ethics in the war on terror*, International Affairs [2006] Vol. 82, I, p 126.

<sup>4</sup> There is no derogation from such obligation.

<sup>5</sup> Obligation towards all members of the international community.

person has committed or is suspected of having committed, or intimidating 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'<sup>6</sup>. Further, the CAT establishes that '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'<sup>7</sup>. Also, the European Convention for the Protection of Human Rights and Fundamental Freedoms establishes in its article 3 that 'no one shall be subject to torture or to inhuman or degrading treatment or punishment'. Additionally, all four Geneva Conventions of 1949 prohibit torture, as well as consider the practice of torture a 'grave breach' of the treaty, and such term is mentioned in a number of articles including article 3, 129 and 130.

Moreover, Jeremy Bentham understands that torture 'is where a person is made to suffer any violent pain of body in order to compel him to do something or to desist from doing something which done or desisted from the penal application is immediately made to cease'<sup>8</sup>.

In view of the stated above, John Parry understands that '[t]orture also includes...having one's head forced under water until nearly asphyxiated'<sup>9</sup>.

Furthermore, as stated by Steiner<sup>10</sup>, it might be discussed 'whether the prohibition of torture by states is part of customary law<sup>11</sup> (indeed, of *jus cogens*) because, despite the consistent *opinio juris* about its illegality, so much state practice remained to the contrary'. As stated by Steiner<sup>12</sup>, torture 'had long been routinely and deeply a formal, judicially sanctioned part of criminal procedure, used in many European states to investigate a suspect once some threshold of facts leading to suspicion had been uncovered, and used...both to extract incriminating information and to achieve a confession that, despite coercion, was used by courts to establish guilt'. In the past

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<sup>6</sup> Article 1(1).

<sup>7</sup> Article 2(2).

<sup>8</sup> Bentham on Torture, W.L. Twining and P.E. Twining (eds. And commentary), 24 N. Ireland Leg. Q. 305 (1973) AS quoted IN Steiner, Henry J, Alston, Philip and Goodman, Ryan, *International human Rights in Context*, OUP 2008, p 228.

<sup>9</sup> John Parry, in Escalation and necessity at 145 as quoted in Steiner, Henry J, Alston, Philip and Goodman, Ryan, *International human Rights in Context*, OUP 2008, p 246.

<sup>10</sup> Steiner, Henry J, Alston, Philip and Goodman, Ryan, *International human Rights in Context*, OUP 2008, p 225.

<sup>11</sup> Can be derogated from.

<sup>12</sup> Steiner, Henry J, Alston, Philip and Goodman, Ryan, *International human Rights in Context*, OUP 2008, p 225.

centuries, progress has been made both in normative and practical terms<sup>13</sup>, but the new threatening scenario established after 9/11, brings the discussion back. The question of state torture to obtain information and prevent attacks from occurring must be carefully considered.

Moreover, when considering whether such a 'treatment' as holding one's head under the water constitutes torture, it must be noted that, in 1955, an investigation regarding French torture of Algerian was conducted by Roger Wuillaume and although the Wuillaume Report called for the 'veil of hypocrisy' to be lifted and for 'safe and controlled' interrogation techniques to be authorized, including methods as the so-called 'water technique'<sup>14</sup>, in 2002 the court in effect found that such interrogation techniques constituted 'war crimes'. Furthermore, 'in both the French and the British'<sup>15</sup> cases, the claim that certain techniques were permissible because they did not constitute torture was rejected either on the grounds that they *were* torture or on the grounds that, regardless of whether or not they were, they constituted 'cruel and degrading' treatment, which was also forbidden. The point here is that the contemporary US claim that certain acts designed to cause physical and/or mental pain for the purpose of extracting information do not constitute torture has been articulated before and been found wanting<sup>16</sup>.

In addition, international customary law<sup>17</sup> must be considered, as source of international law and binding to states. In this sense, it must be stated that waterboarding, as a similar treatment to 'holding one's head under the water', is acknowledged as torture by several regimes throughout history and the U.S. itself has long considered such a technique to be torture and a war crime. As pointed out by Heller, '[a]s early as 1901, a U.S. court martial sentenced Major Edwin Glenn to 10

<sup>13</sup> In *Ireland v. United Kingdom*, ECHR, 1978, 2EHRR 25. The case concerned allegations of ill-treatment made by the police force in Northern Ireland in connection with the arrest and interrogation of suspects of terrorism related to the Irish Republic Army, a nonstate Northern Ireland group that executed a violent terrorism campaign in the effort to gain independence of Northern Ireland from Britain. The European Court of Human Rights decided that the use of the techniques adopted by the British forces constituted inhuman and degrading treatment, but that it did not constitute torture once it did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood. It must be stated, however, that the outcome of a similar case today could be different due to the different political scenario and to the goals achieved by human rights defendants in a global scale.

<sup>14</sup> Holding the victim's head under water until he/she nearly drowns.

<sup>15</sup> See *Report of the inquiry into allegation against the security forces of physical brutality in Northern Ireland arising out of events on the August 1971* (the Compton Report, London: HMSO, 1971).

<sup>16</sup> Bellamy, Alex, *No pain, no gain? Torture and ethics in the war on terror*, International Affairs [2006] Vol. 82, I, p 126.

<sup>17</sup> Regarding domestic English law, see case *A (FC) v. Secretary of State for the Home Department* [2005] UKHL 71, the House of Lords held that evidence that was or might have been 'procured by tortured inflicted by foreign officials without the complicity of the British authorities' was inadmissible.

years of hard labor for subjecting a suspected insurgent in the Philippines to the 'water cure.' After World War II, U.S. military commissions successfully prosecuted as war criminals several Japanese soldiers who subjected American prisoners to waterboarding. A U.S. army officer was court-martialed in February 1968 for helping to waterboard a prisoner in Vietnam<sup>18</sup>. Therefore, even though the U.S. is not a party to the first Optional Protocol to the ICCPR, which allows for individuals to submit individual complaints regarding human right violations as described below, Bin Laden could claim that there was a breach of customary international law. Certain speeches of U.S.'s representatives have, however, demonstrated a different point of view, defending certain special 'treatments' as part of the 'war on terror' and especially in the 'ticking bomb' scenario. Due to such manifestations, the argument above is considerably weakened.

Finally, one can conclude that being an intentional act that inflicts severe suffering, holding one's head under the water with the objective of obtaining certain information may be considered torture or, at least, a cruel, inhuman, or degrading treatment, and therefore is against principles and norms of international law.

### **The United States of America's position**

In this sense, it must be noted that the U.S. had entered into the following reservation to its ratification of the Convention against Torture: 'That the United States considers itself bound by the obligation under article 16 to prevent 'cruel, inhuman or degrading treatment or punishment', only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States'<sup>19</sup>.

In addition, the U.S. understands that 'that with reference to Article 1... in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened

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<sup>18</sup> Heller, J. K., *More on Waterboarding and Reasonable Reliance*, in <http://www.opiniojuris.org/posts/1203128607.shtml>

<sup>19</sup> See CAT, note 1, at Reservations and Understandings Upon Ratification, *available at* <http://www.hri.ca/fortherecord1998/documentation/reservations/cat.htm>.

administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.’

Similar reservation was made in relation to article 7 of the ICCPR. Additionally, U.S. officials usually refer to certain memoranda ‘prepared by the OLC as the legal basis for authorizing advanced interrogation methods: as long as interrogation techniques do not reach the level of torture as defined in the memoranda, other forms of ill-treatment, if applied in a proportional manner, might be justified for the legitimate purpose of defending the homeland and for preventing future terrorist attacks’<sup>20</sup>.

In *Conclusions and recommendations of committee against torture relating to report submitted by the United States*<sup>21</sup>, however, it was recommended that ‘[t]he State party should rescind any interrogation technique, including methods involving...‘waterboarding’...that constitutes torture or cruel, inhuman or degrading treatment or punishment, in all places of detention under its de facto effective control, in order to comply with its obligations under the Convention.’

## **International Human Rights Institutions and Remedies**

The Human Rights Council, main charter-based institution<sup>22</sup> regarding human rights defence, was created in 2006 to substitute the Commission on Human Rights, consists of 47 member governments and, in contrast with the treaty-based bodies discussed below, is a ‘political organ which have a much broader mandate to promote awareness, to foster respect, and to respond to violations of human rights standards. They [political bodies] derive their legitimacy and their mandate, in the broadest sense, from the human rights provisions of the Charter’<sup>23</sup>. The main remedies for violations of

<sup>20</sup> Nowak, Manfred, *What Practises Constitute Torture?: US and UN Standards*, Human Rights Quarterly 28 [2006], p.836.

<sup>21</sup> Conclusions and recommendations of committee against torture relating to report submitted by the United States, CAT/C/USA/CO/2, 25 July 2006, para. 24, as quoted in Steiner, Henry J, Alston, Philip and Goodman, Ryan, *International human Rights in Context*, OUP 2008, p 261.

<sup>22</sup> Although the promotion of human rights is one of the objectives set forth in the United Nations Charter, the principles of domestic jurisdiction are stated and therefore the United Nations, initially, shall not interfere.

<sup>23</sup> Steiner, Henry J, Alston, Philip and Goodman, Ryan, *International human Rights in Context*, OUP 2008, p 741.

human rights before the Council are the public and special procedures. The special procedures, however, are developed into either specific thematic or country-based procedures and therefore would not apply in the analysed case of Bin Laden.

On the other hand, 'treaty-based organs are distinguished by: a limited clientele consisting of states parties to the treaty in question, a limited mandate reflecting the terms of the treaty; a limited range of procedural options for responding to violations; consensus-based decision-making as far as possible; a preference for a non-adversarial relationship with state parties (particularly with respect to state reports) based on the concept of 'constructive dialogue'; and a particular concern with addressing issues in ways that contribute to developing the normative understanding of the relevant rights'<sup>24</sup>.

The most important treaty-based organ regarding the protection against torture is the ICCPR Human Rights Committee, that is responsible for (1) considering states' reports, (2) adopting 'general comments', (3) examining 'communications' (i.e. complaints) from individuals claiming to be victims of violations by states parties of the ICCPR and (4) carrying out interstate complaints procedure.

The first Optional Protocol to the ICCPR allows for an individual to submit 'communications' (complaints) claiming human rights violations. The Committee shall then consider the claim and notify the state party, requesting explanations or statements clarifying the matter.

As noted by Steiner, 'in some contexts, the Committee does little more than identify violations and leave it to the state party to work out how best to remedy the problem, or, in other words...Overall, however, the Committee is increasingly specific as to the specific measures it believes states should take. They include: (a) undertaking a public investigation to establish the facts, (b) bring the perpetrator to justice, (c) providing compensation, (d) ensuring the violation will not be repeated, (e) amending the law, (f) providing restitution of liberty, employment or property, (g) providing medical care and treatment, (h) permitting the victim to leave the country or (i) enjoining an imminent violation'<sup>25</sup>.

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<sup>24</sup> Steiner, Henry J, Alston, Philip and Goodman, Ryan, *International human Rights in Context*, OUP 2008, p 741.

<sup>25</sup> Steiner, Henry J, Alston, Philip and Goodman, Ryan, *International human Rights in Context*, OUP 2008, p 895.

It must be stated, however, that the U.S. did not ratify the first Optional Protocol and therefore, initially, the individual communication remedy is not recognized by such country.

Finally, the Committee against Torture, created by the CAT, is composed of ten independent experts and issues general comments and concluding observations<sup>26</sup>. The main remedies before such organ are the state reporting<sup>27</sup>, individual communications<sup>28</sup> and enquiry procedures<sup>29</sup>.

### **Further Considerations**

In relation to torture, 'there is no approving it in the lump, without militating against reason and humanity: nor condemning it without falling into absurdities and contradictions'<sup>30</sup>. Actually, since '[t]he debate has already begun; [and] the case for the use of coercion is being made with increasing frequency'<sup>31</sup>, the necessity of further discussion relating the use of torture is clear.

The absolute ban of torture's supporters claim that torture is inherently wrong, being an evil that can never be justified or excused. 'It violates the physical and mental integrity of the person subject to it, negates her autonomy and humanity, and deprives her of human dignity. It reduces her to a mere object, a body, from which information is to be exacted, while coercing her to act in a manner that may be contrary to her most fundamental beliefs, values and interests.' Further, the 'social costs of permitting the use of torture, even in narrowly defined exceptional circumstances...would always outweigh the social benefits that could be derived from applying torture...'. Gross understands that in such exceptional cases an 'official disobedience'<sup>32</sup> should take place. An explicit legal exception to the prohibition of torture should not be recognized, he claims, 'because of the large risks of contamination and manipulation of that [legal] system and the deleterious message involved in legalizing such actions'<sup>33</sup>. In this

<sup>26</sup> Non binding interpretations of treaty provisions.

<sup>27</sup> Periodic review of implementation of obligations imposed by the CAT.

<sup>28</sup> From people alleging violations against governments.

<sup>29</sup> For systematic practice of torture.

<sup>30</sup> Bentham on Torture, W.L. Twining and P.E. Twining (eds. And commentary), 24 N. Ireland Leg. Q. 305 (1973) AS quoted IN Steiner, Henry J, Alston, Philip and Goodman, Ryan, *International human Rights in Context*, OUP 2008, p. 228-230.

<sup>31</sup> Rumney, Philip N.S, *Is coercive interrogation of terrorist suspects effective? A response to Bagaric and Clarke*, University of San Francisco Law Review, Winter 2006., p 511.

<sup>32</sup> Public officials would act extralegally and accept the consequences of their actions.

<sup>33</sup> Gross, Oren, *The Prohibition on Torture and the Limits of the International Law of Torture*, in *Torture: A Collection*, Levinson, Sanford (ed.)(OUP, 2004), p. 229.



sense, certain academics understand that certain asceticism is required of those who may be required, in a dangerous and extreme situation, to temporarily override a general prohibition<sup>34</sup>. They believe that ‘they should not seek to legalize it,...normalize it...[nor] write elaborate justifications of it...The tabooed and forbidden, the extreme, nature of this mode of physical coercion must be preserved so that it never become routinized as just the way we do things around here.’ Although Elstain understands that ‘there is no absolute prohibition to what some call torture’, he claims that ‘the ban on torture must remain. But “moderate physical pressure” to save innocent lives, “coercion” by contrast to “torture”, is not only demanded in certain extreme circumstances, it is arguably the “least bad” thing to do...Far greater moral guilt falls on a person in authority who permits the death of hundreds of innocents rather than choosing to “torture” one guilty or complicit person<sup>35</sup>’.

Alan Dershowitz, on the other hand, understands that the official disobedience ‘leaves each individual member of the security services in the position of having to guess how a court would ultimately resolve his case. That is unfair to such investigators. It would have been far better...had the court required any investigator who believed that torture was necessary in order to save lives to apply to a judge, when feasible...It is the job of the judiciary to balance the needs for security against the imperatives of liberty. Interrogators from the security service are not trained to strike such a delicate balance...The essence of democracy is placing responsibility for difficult choices in a visible and neutral institution like the judiciary<sup>36</sup>. Further, Dershowitz states that ‘the real issue...is not whether some torture would or would not

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<sup>34</sup> In *Public Committee against Torture in Israel v. Government of Israel*, (Supreme Court of Israel, 1999, H.C. 5100/94) the Supreme Court of Israel decided that the General Security Service and the Government of Israel did not have authority to use physical means during the interrogation of suspects suspected of hostile terrorist activities. As stated in the judgement, ‘in crystallizing the interrogation rules, two values or interests clash. On the one hand, lies the desire to uncover the truth, thereby fulfilling the public interest in exposing crime and preventing it. On the other hand, is the wish to protect the dignity and liberty of the individual being interrogated. This having been said, these interests and values are not absolute. A democratic, freedom-loving society does not accept that investigators use any means for the purpose of uncovering the truth. At times, the price of truth is so high that a democratic society is not prepared to pay. To the same extent however, a democratic society, desirous of liberty seeks to fight crime and to that end is prepared to accept that an interrogation may infringe upon the human dignity and liberty of a suspect provided it is done for a proper purpose and that the harm does not exceed that which is necessary... Our concern, therefore, lies in the clash of values and the balancing of conflicting values’

<sup>35</sup> Elstain, Jean Bethke, “Reflection on the Problem of ‘Dirty Hands,’” *Torture: A Collection*, pp. 83–84., as quoted in Steiner, Henry J, Alston, Philip and Goodman, Ryan, *International human Rights in Context*, OUP 2008, p 244, 245.

<sup>36</sup> Steiner, Henry J, Alston, Philip and Goodman, Ryan, *International human Rights in Context*, OUP 2008 Tortured Reasoning, at 257, as quoted in Context]

be used in the ticking bomb case – it would. The question is whether it would be done openly, pursuant to a previously established legal procedure, or whether it would be done secretly, in violation of existing law<sup>37</sup>. Important values, such as the safety and security of a nation's citizens, the preservation of civil liberties and human rights and finally the open accountability and visibility in a democracy must be assessed when analysing the issue. 'In a democracy, such choices must be made, whenever possible, with openness and democratic accountability, and subject to the rule of law'<sup>38</sup>. Dershowitz's safeguards derive almost entirely from the findings of Israel's Landau Commission<sup>39</sup>. He concludes, then, that 'it seems logical that a formal, visible, accountable, and centralized system is somewhat easier to control than an ad hoc, off-the-books, and under-the-radar-screen nonsystem'<sup>40</sup>.

Bellamy concludes that '[t]he 'ticking bomb terrorist' scenario is important not because it is a situation in which the US and its allies regularly find themselves as part of the war on terror, but because it is a rhetorical device used to justify torture more generally. Despite protestations to the contrary, it is reasonably clear that torture has become a core tactic in the war on terror. It is similarly clear that its use is not limited to the ticking bomb case'<sup>41</sup>.

Finally, there is certain concern that the 'legalization' of torture will make it a usual practice. The reality, however, is that it is already a usual practice, but it is left to the low-visibility discretion of low-level functionaries and therefore bringing the decision to accountable high-level decision makers may actually perhaps reduce its frequency and severity. As correctly stated by Flynn, '[i]t will be essential for the international community fully to integrate a human rights analysis into its approach to terrorism, both

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<sup>37</sup> Dershowitz, Alan, *Should the Ticking Bomb Terrorist Be Tortured? A Case Study in How a Democracy Should Make Tragic Choices* in *Why Terrorism Works* (New Haven: Yale University Press, 2002), p. 151.

<sup>38</sup> Dershowitz, Alan, *Should the Ticking Bomb Terrorist Be Tortured? A Case Study in How a Democracy Should Make Tragic Choices* in *Why Terrorism Works* (New Haven: Yale University Press, 2002), p. 154.

<sup>39</sup> 'The commission presented three options for addressing this dilemma. First, retain the status quo and leave certain interrogation techniques 'outside the realm of the law'. Second, claim to abide by the law but turn a blind eye to the use of torture—the hypocrite's position. The commission rejected both these positions on the grounds that they were legally dishonest and did not resolve the moral dilemma confronting the security services. The third, and preferred, option it described as 'the truthful road': creating legal paths for the legitimation of torture.' Bellamy, Alex, *No pain, no gain? Torture and ethics in the war on terror*, *International Affairs* [2006] Vol. 82, 1, p. 134.

<sup>40</sup> Dershowitz, Alan, *Should the Ticking Bomb Terrorist Be Tortured? A Case Study in How a Democracy Should Make Tragic Choices* in *Why Terrorism Works* (New Haven: Yale University Press, 2002), p. 158.

<sup>41</sup> Bellamy, Alex, *No pain, no gain? Torture and ethics in the war on terror*, *International Affairs* [2006] Vol. 82, 1, p. 147.

to keep its immediate approach to this problem within a framework of respect for human rights and the rule of law, as well as to ensure that its efforts in the long run have the genuine prospect of significantly reducing in our daily lives the terrible threat of terrorism<sup>42</sup>.

## Conclusion

To sum up, the ‘treatment’ of holding one’s head under water is certainly against the norms and principles of international law, but the effectiveness of the remedies that would be available to Bin Laden before the international human rights institutions in such a case is questionable. Furthermore, the effectiveness of the norms and principles that prohibit torture and other cruel, inhuman, or degrading treatments is relative, since the enforceability is a recurring problem in international law generally. Such enforceability issues are simply a reflexion of the intrinsic contradiction in constructing a world of democratic independent states and promoting justice through international bodies, since every time the latter enforce its decisions, they are undermining local democracy. Finally, the potential creation of laws (both in national and international spheres) regulating the use of special ‘treatments’ in critical and extraordinary circumstances could reduce the incidence of cases of torture and would certainly guarantee that the democratic accountability principle is respected.

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<sup>42</sup> Flynn, Edward J., *Counter terrorism and human rights: the view from the United Nations*, *E.H.R.L.R.* 2005, 1, p 49.

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