Should Torture be Justifiable?

The Prohibition of Torture Revisited in the Counter-Terrorist Era

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ABSTRACT: Discussion of the absolute nature of the prohibition of torture, degrading and inhuman treatment. Should torture be justifiable in certain cases in the current counter-terrorist era? Can the persistence of a terrorist threat justify the restriction of human rights?

1. Introduction

The terror-attacks of the past decades have caused a global shift in human rights thinking. The opinio communis is losing its mercy on planners, facilitators and perpetrators and responses of fear and anger have become overwhelmingly common. A “the end justifies the means”-attitude has been adopted, resulting in a push for the further restriction of fundamental human rights. The ticking bomb scenario is often used to argue that perhaps the right not to be tortured, treated inhumanly or degradingly should not be absolute,¹ but in certain cases weighed against concerns of national security. How can a state fulfill its obligation to effectively protect its citizens² when certain measures may under no circumstance be taken? Conversely, how can a state which subjects a human being to ill-treatment, refer to itself as a state under the rule of law or 'the good guy'? This paper will focus on the absolute nature of the prohibition of torture as codified in Article 3 of

¹ Free from conditions, limitations or qualifications, not dependent, or modified or affected by circumstances; that is, without any condition or restrictive provisions, non-derogable. Antonym for relative. The possibility of derogation in times of emergency for provisions of the ECHR is described in Art. 15 ECHR. Art. 15 (2) explicitly mentions Art. 3 ECHR as one of the articles from which no derogation is possible: 'No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.'

² This duty has been deducted from the contrat social.
the European Convention on Human Rights (ECHR). The ticking bomb scenario and several arguments for and against relativity of the torture-norm are discussed. An often-heard reason for a need for revisitation of the absolute nature of Art. 3 ECHR is grounded in the concept of a counter-terrorist era with the 9/11 attacks as a starting point. This piece examines recent changes in terrorism and counter-terrorism strategy and asks whether these changes can justify exceptions to the prohibition of torture.

2. The European Convention on Human Rights: An Example for the World

The prohibition of torture has been codified in multiple human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR, Art. 7), the Universal Declaration of Human Rights (UDHR, Art. 5), and the UN Convention Against Torture (UNCAT). The special nature of the ECHR stems from its territorial limitation. The ECHR was only ratified by the 47 member states of the Council of Europe which are all geographically located within European borders as opposed to the other three documents to which most countries of the world are states parties: The ICCPR counts 168 parties, the UDHR 192 (all UN member states) and the UNCAT 159. Since the European Court for Human Rights (ECtHR) rules over a relatively small, homogenous group, it fits its role - as an autonomous protector of human rights - to take larger, more progressive strides when establishing the minimum guarantees to which the states parties should adhere. The Court should act as a beacon, showing the way to the global community, condemning violations in a more outspoken manner than the International Court of Justice, to which states may refer in case of dispute regarding any UNCAT-provision. The ECtHR has indeed acted in such a way, consistently deeming the prohibition of torture including all of its areas of application to be non-derogable.

3. Definitions of Art. 3 ECHR

Art. 3 ECHR reads: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. Even though the provision is one of the shortest included in the Convention, the

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3 European countries that have not signed nor ratified the ECHR: Belarus, Kazakhstan, Kosovo, Vatican City.
4 Art. 30 UNCAT.
amount of jurisprudence, literature and discussion focussing on it's ever-evolving meaning is of an overwhelming volume.

A. Torture

When a person is tortured he is stripped from his ability to control his body and eventually his mind. The victim's free will is eliminated, his personality disintegrated and his humanity denied. Reducing the victim to a 'screaming animal for whom decision is no longer possible'\(^5\) is the indirect goal of the torturer: The victim is instrumentalized, his human worth is subordinate to the direct goal, e.g. the gathering of intelligence.

Since the 1970's, traditional torture-techniques, such as Falaka\(^6\), Palestinian hanging\(^7\), rape or severe beatings, are often combined with 'modern' techniques, like sleep- or sensory deprivation and the forcing to stand in stress-positions for extended time-periods. Falvey and Eck have described modern torture as follows:

\textit{Modern torture is not undertaken to punish a wrongdoer or to give pleasure to a sadist or tyrant, but rather to compel the subject to reveal secrets of tactical value. This compulsion depends on a simple calculus: the will to resist must be less than the pressure to reveal. The former is sapped and the latter increased by breaking the subject's bonds with the outside world ("regression"), totally isolating the subject within himself – a condition that is utterly abhorrent to human nature – and then re-establishing the subject's connection with the world in such a way that compliance becomes palatable ("rationalization").}\(^8\)

The infamous enhanced interrogation techniques, which were applied by the CIA in black sites, were exposed in the Select Senate Committee on Intelligence (SSCI) torture report\(^9\) of December

\(^6\) Beating of the foot soles. This technique causes intense pain but does not always leave obvious marks, making it a very suitable torture-technique: Torture is a practice which those responsible often wish to cover up.
\(^7\) Tying the hands of the victim together by the wrists, behind the back and elevating the victim until his arms feel paralyzed.
\(^8\) J. Falvey and B. Eck, 'Holding the High Ground: The operational Calculus of Torture and Coercive Interrogation', 32 Campbell Law Review (2010) 561, at 573: 'Focusing on the physical methods involved in coercion ignores the fundamental goal of coercive interrogation, which is the creation of unbearable psychological pressure from which the subject may escape only through compliance.'
2014. They were designed by two psychologists, who based their ideas on the principle of 'learned helplessness'. This principle was first described by Martin Seligman in the 1970's who applied electroshocks to incarcerated dogs and discovered that the combination of the repetition of a painful treatment and the inability of the victim to escape this treatment leads to a state of helplessness, which in turn leads to deep depression. The 525 declassified pages of the 6900 page SSCI report detail some of the enhanced interrogation techniques in bleak detail: It speaks of how prisoners were ‘rectally rehydrated’ and ‘rectally fed’, waterboarded to the point of unresponsiveness, forced to stand on broken legs for extended time-periods, denied desperately needed medical treatment, kept awake for at least 180 hours at a stretch and subjected to complete sensory deprivation. They were put in ice baths, subjected to mock-executions and paraded around naked.

B. Inhuman and Degrading Treatment

Art. 3 ECHR makes no distinction between the three categories of treatment it describes: torture, degrading treatment or inhuman treatment. Each category enjoys absolute protection, restrictions are under no circumstance justifiable. Whereas the idea that torture-techniques, as described above, may never be applied is widely accepted amongst Europeans, the idea that no man may be treated inhumanly or degradingly even if the lives of many are at stake is less firmly embedded.

The Court defines degrading treatment as treatment, which 'humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance ...” 10. The beating of a 15-year old schoolboy, in form of three strokes of the birch to the bare buttocks,11 was classified as such.

The ECtHR considers a treatment inhuman, when it 'deliberately causes severe suffering, mental or physical', and ruled that use of the so-called five techniques by the British military in order to gain intelligence from victims suspected to be involved with the Irish Republican Army (IRA) constituted such an inhuman treatment.12 These five techniques have been defined as prolonged wall-standing, hooding, subjection to noise, sleep-deprivation and deprivation of food and drink.

10 ECtHR, Pretty v. the United Kingdom, Appl. no. 2346/02, Judgment of 29 April 2002, Par. 52; ECtHR, Kudla v. Poland, Appl. no. 30210/96, Judgment of 26 October 2000, Par. 92.
11 ECtHR, Tyrer v. UK, Appl. no. 5856/72, Judgment of 25 April 1987.
12 ECtHR, Ireland v. UK, Appl. no. 5310/71, Judgment of 18 January 1978, Par. 239.
C. Changes in Interpretation of the Terms: The Living-instrument Doctrine

The ECHR is of a special nature: It is a 'living instrument which must be interpreted in the light of present-day conditions', therefore 'certain acts which were classified in the past as inhuman and degrading treatment as opposed to torture could be classified differently in future. ... the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.'

Following this reasoning, the Court has steadily expanded the scope of Art. 3 ECHR to cover a myriad of new problem-areas, some of which were most likely never thought to be covered by the article during its conception in 1956. Poor prison conditions, the destruction of a victim's livelihood, the disappearing of persons as a violation to the rights of those left behind, the neglect of stately protective duties in the context of medical or psychiatric treatment, the imposition of disproportionate punishments or of the death penalty and - most controversially - the principle of non-refoulement have in the past decades been considered to be inherent to Art. 3 ECHR.

So even though many would argue that the gruesome traditional torture techniques should be banned in all cases, the debate gets heated when more subtle forms of ill-treatment are at play. The Court has consistently stated that nobody may ever be treated in a manner which is incompatible with Art. 3 ECHR. This means that degrading and inhuman treatment are equally unjustifiable and forbidden as torture. Since these terms have been interpreted ever more extensively, to include a wide array of situations, a state may in some cases not even 'scare' an individual into giving actionable intelligence. Perhaps a state should be free to send dangerous terrorists back to their home-states in order to effectively protect their citizens. Perhaps it should be allowed to administer a drug to make a drug dealer regurgitate the cocaine which is needed as evidence against him. Perhaps a police-officer should be allowed to threaten a kidnapper with physical violence in order to potentially save a child's life. All these cases have been categorized as violations of Art. 3 ECHR by the Court.

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13 ECtHR, Tyrer v. UK, Appl. no. 5856/72, Judgment of 25 April 1987, Par. 183.
14 The right not to be transferred to a third-country, if such a transferral exposes the victim to a real risk of ill-treatment.
15 ECtHR, Gäfgen v. Germany, Appl. no. 22978/05, Judgment of 01 June 2010, Par. 108: ' ... a threat of torture can amount to torture, as the nature of torture covers both physical pain and mental suffering. In particular, the fear of physical torture may itself constitute mental torture.'
17 ECtHR, Jalloh v. Germany, Appl. no. 54810/00, Judgment of 11 July 2006.
18 ECtHR, Gäfgen v. Germany, Appl. no. 22978/05, Judgment of 01 June 2010.
D. Non-refoulement: Tying the Hands of the State?

The non-refoulement norm - forbidding states to transfer individuals to their home-states when substantial grounds indicate that they run a real risk of treatment amounting to torture, degrading or inhuman treatment, has been under particular scrutiny. The Court has included this norm in the absolute Art. 3 ECHR, but states continue to struggle with the question how they can ensure the safety of their citizens when their hands are tied to such an extent.

States have argued that the expulsion of the dangerous individual is often the only fail-safe method to protect civilians. Prosecution is often difficult due to the nature of the terrorist crime: Prevention of the attack is essential, giving the authorities lesser chance to gather the required evidence. Even when a prison-sentence is imposed, the individual will be set free after some years.

In the landmark case of Ramzy vs. The Netherlands, Lithuania, Portugal, Slovakia and the UK proposed to relax the strict non-refoulement norm as a component of Art. 3 ECHR, by allowing states to restrict the norm in cases where national security is endangered. The states parties criticized the premise, that they should be equally responsible for acts occurring on the soil of third-states, as for those executed on their own territory. They argued, that their citizens have a right to be free from terrorism. If this right were to collide with the non-refoulement principle, the state party should be granted the freedom to strike a balance and to justify a breach of non-refoulement.

The proposed compromise entailed a differentiation between cases, in which the applicant is exposed to a real risk of torture, and those in which he runs a real risk of inhuman or degrading treatment. In the first scenario non-refoulement should remain absolute, in the last scenario the Court should allow for relativity.

The Court however upheld its ruling, that non-refoulement should be absolute in all cases. The principle even comes into play indirectly, when the state to which the individual will be expelled initially is safe, but when a later expulsion to an unsafe country is highly likely.

States have relied on promises made by third-countries not to treat the victim in a manner opposed to Art. 3 ECHR in order to justify a transferral. States often interpret these promises, called

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19 Expel, return (refouler), or extradite.
20 Padmanabhan, 'To Transfer or not To Transfer: Identifying and Protecting relevant Human Rights Interests in Non-Refoulement', 80 Fordham Law Review (2011) 73, at 73;
ECHR, Chahal v. UK, Appl. no. 22419/93, Judgment of 15 November 1996.
21 ECHR, Ramzy v. the Netherlands, Appl. no. 25424/05, Judgment of 20 July 2010.
22 ECHR, Bensaid v. UK, Appl. no. 44599/98, Judgment of 06 February 2001, Par. 40.
23 Padmanabhan, 'To Transfer or not To Transfer: Identifying and Protecting relevant Human Rights Interests in Non-Refoulement', 80 FLR (2011) 73, at 117.
24 ECHR, Einhorn v. France, Appl. no. 71555/01, Judgment of 16 October 2001: The Court investigates whether there are reasonable grounds to believe that the individual will be ill-treated in a manner adverse to Art. 3 in his home-country. A diplomatic assurance made by the home-state is taken into account, but not decisive.
diplomatic assurances or memoranda of understanding, to be more valuable than they actually are, in order to artificially diminish the risk of ill-treatment. Many human rights bodies, watch dogs and academics have criticized such a heavy reliance: The promises are made by states that are often renowned for their poor human rights records. There is very little reason to trust that a bilateral agreement will be adhered to if international human rights treaties are constantly being violated. Since torture-practices are generally hidden, it is difficult for the expelling state to monitor whether the third-state is keeping its promise. But when looking at the many problems states face due to the inclusion of non-refoulement in the absolute Art. 3 ECHR, it becomes somewhat understandable that unreliable measures are being taken to circumvent applicability.

4. The Use of Torture in the Counter-terrorist Era

The unjustifiable nature of exceptions to the prohibition of torture has been under fire ever since the 'War on Terror' was declared by the American congress. The so-called counter-terrorist era, starting with the 9/11 terror-attacks, is often invoked to argue that measures which violate Art. 3 ECHR should in some cases be allowed.

A. The Evolution of Terrorism and Counter-terrorism

The key objective of terrorist attacks lies in the spreading of fear, stemming from a wish to be discussed on a global forum. Between 1968 and 1990 terrorists managed to achieve their goals

25 Padmanabhan, 'To Transfer of not To Transfer: Identifying and Protecting relevant Human Rights Interests in Non-Refoulement', 80 FLR (2011) 73, at 100: The UK, Italy and Spain have all invoked diplomatic assurances in order to allegedly reduce the risk.
26 N.B. This bilateral nature makes it impossible for the victim to directly invoke the agreement.
31 On 22.07.1968 three members of the Popular Front for the Liberation of Palestine (PFLP) hijacked a commercial passenger flight from Rome to Tel Aviv. The objective of the hijacking was not one of personal gain, but a political goal of influencing a broad audience. The target - a plane from Israel's national airline - was symbolic.
by hijackings planes or taking hostages,\textsuperscript{32} but as time progressed, these tactics became 'little more than a nuisance to governments'.\textsuperscript{33} Terrorism was forced to evolve into a more atrocious strategy, claiming many lives at once in order to have the desired effect. This mass-casualty strategy, a 'more lethal and indiscriminate form of warfare that appeared to be more religiously motivated'\textsuperscript{34} culminated in the 9/11 attacks.\textsuperscript{35} These attacks caused a systemic change and ushered in decades of fear. A global superpower was attacked in its very nerve center. The sheer scale of human suffering and the complexity and synchronized execution of the attacks stunned the Western world. The US' counter-terrorism policy adapted to the post 9/11 era by evolving into a 'more lethal form of asymmetric warfare'.\textsuperscript{36} This evolution led to a more comprehensive approach to counter-terrorism, including prevention, deterrence, preemption and after-the-fact responses.

\textbf{B. The Resurgence of Historical Arguments for the Justification of Torture}

In ancient history political agents argued that the use of torture was excusable for victims of the subhuman category, usually slaves. In modern days a similar view is adopted when categorizing victims as \textit{hostis humani generis}.\textsuperscript{37}

Several centuries later torture became a widespread practice for a different reason. In medieval times, a conviction required certainty of guilt. This very steep requirement could often only be met by the use of torture techniques, which led to the extraction of confessions, the 'queens of proofs'. The gravity of the allegedly committed crime became irrelevant.

In times where state authorities ruled in a more authoritarian manner, the public display of barbarity

\textsuperscript{32} Compare for instance the Munich Massacre of 1972, an attack during which 11 Israeli Olympic team members were taken hostage and killed by Palestinian group Black September. Lufthansa flight 181 was hijacked in 1977 by four members of the Popular Front for the Liberation of Palestine. The plane was stormed by the GSG9, the West-German counter-terrorism group that was founded as a response to the failed governmental response to the Munich Massacre, all 86 passengers were rescued. Rapoport, \textit{The Four Waves or Rebel Terror and September 11} (2002), available at http://www.anthropoetics.ucla.edu/ap0801/terror.htm (last visited 08 June 2016): Rapoport argues, that most direct victims of terrorist attacks during before the 1980's or 90's survived, because the intention of the terrorists was to get attention, not to kill.

\textsuperscript{33} Rineheart, 'Counterterrorism and Counterinsurgency', \textit{4 Perspectives on Terrorism} (2010) 31, at 35.

\textsuperscript{34} Rineheart, 'Counterterrorism and Counterinsurgency', \textit{4 Perspectives on Terrorism} (2010) 31, at 35, 36.


\textsuperscript{36} Rineheart, 'Counterterrorism and Counterinsurgency', \textit{4 Perspectives on Terrorism} (2010) 31, at 33.

\textsuperscript{37} Enemies of mankind. Turner, 'What went wrong? Torture and the Office of Legal Counsel in the Bush Administration' 32 \textit{California Law Review} (2010) 529, at 540: 'But like virtually every other national security lawyer, after the 9/11 attacks, I told everyone who asked that the protections of the Geneva Conventions did not apply to al Qaeda. Like pirates and slavetraders, international terrorists are hostis humani generis.' Compare the statements of Condoleezza Rice when asked why the Bush administration fought off restrictions (passed by a 96–2 Senate vote) which would have explicitly extended to intelligence officers a prohibition against torture or inhumane treatment, and would have required the C.I.A. as well as the Pentagon to report to Congress about the methods they were using. Rice replied that this was done 'to deny protection to people who are not entitled to it'. D. Luban, \textit{Torture, Power and Law} (1st ed., 2014), P. 71.
was used to demonstrate the sovereign's power.\textsuperscript{38}

The rise of modern statehood brought with it political dissent, resulting in the emergence of terrorism. Even though the use of torture had been made illegal, this gave birth to the conceptualization of torture as a necessary, indispensable tool to acquire information or deter.\textsuperscript{39}

All these arguments have returned in the post 9/11 era: Terrorists are often categorized as subhuman barbarians, national security is argued to be of higher importance than the individual, torture is applied as a necessary means to prove guilt, to acquire intelligence and to reaffirm the power of superstates under attack. Especially the goal of obtaining intelligence has been said to justify \textit{any} means, as it is not 'backward-looking' like the extortion of confessions, but has the more noble goal of preventing future terrorists attacks from happening. As modern terrorism aims for mass-casualty, the utilitarian argument gains popularity, stating that the rights of one individual may be violated in order to save the lives of many. The indiscriminate killing of many based on what is perceived to be a ruthless religious motivation, which has proven to be impossible to comprehend for westerners, plays in the hand of the 'subhuman category' argument.

Besides these classical reasons for the use of torture, modern terrorism, geared towards claiming the lives of many civilians in one blow, has given rise to an entirely new argument for the justification of torture: ‘A new and valued reputation is one of effectiveness in dealing with suspected terrorists, including the ability to pass regulations that strengthen the central authority of the state, police air, sea and land borders, arrest terrorist suspects, focus on their interrogation rather than trial, and investigate more fully those seeking asylum or to migrate.’\textsuperscript{40}

Scared civilians are looking to their governments for protection, asking to take whatever measures necessary to detain and deter perpetrators. Less meaning is given to human rights and fundamental freedoms, in stead a public display of stately power is demanded.

In summary, the changes in terrorism and counter-terrorism strategy have brought about the

\begin{itemize}
  \item \textsuperscript{38} M. Foucault, \textit{Discipline and Punish, the Birth of the Prison} (1st ed., 1977) at 48.
  \item \textsuperscript{39} Foot, 'Torture, the Struggle over a Peremptory Norm in a Counter-Terrorist Era' 20 \textit{International Relations} (2006) 131, at 135.
  \item \textsuperscript{40} Foot, 'Torture, the Struggle over a Peremptory Norm in a Counter-Terrorist Era' 20 \textit{IR} (2006) 131, at 137: '[The Bush administration] believed that it was more important to frighten and deter potential enemies than to reassure friends. If the good guys had to be scared in order to make sure the bad guys knew you were serious, so be it.” Andrew Hurrell also notes what is ‘most dramatically visible in the case of the US [is] the idea that the overriding moral responsibility of the political leader is to his or her political community, and not to some notion of a world community’, Hurrell, ‘There Are No Rules’ (George W. Bush): International Order after September 11’, 16 \textit{IR} (2002) 185, at 202.
\end{itemize}
resurgence of all historical arguments for the restriction of human rights in the public debate and given rise to a new argument: the need for a global superpower to show its teeth.

5. Maintaining the Absolute Nature of the Prohibition of Torture

As quickly set out above, even in the context of the counter-terrorist era, the ECtHR has persistently deemed Art. 3 ECHR to be absolute, whilst even expanding the scope of the article over the past decades. On the one hand this has led to a more and more comprehensive human rights protection, but on the other hand it has limited states in their capacity to deal with certain perilous situations.

The ticking bomb scenario tells the tale of a terrorist having been caught by state actors. The terrorist admits to have hidden an explosive in the middle of a metropole, which will be detonated in a short amount of time. The terrorist refuses to reveal where the explosive is located and how it can be dismantled. The authorities face two options: They can either disregard the duty imposed on them by international law by breaching a key human rights law provision and maltreat the terrorist. Or they can refrain from such action and interrogate within the bounds of law. Should torturing this one terrorist not be justifiable, as the lives of hundreds if not thousands are at stake?

A. Human Worth

The principal aim of Art. 3 ECHR lies in the protection of human worth, a value which has been recognized time and time again as one of the most important protected rights in democratic society. The Court has stated that Art. 3 ECHR has a philosophical basis: Human worth must remain inviolable, because without the principles of human dignity and self-determination- which are embedded in the term human worth - there can hardly be any human rights protection at all: These principles constitute the normative origin of all constitutional guarantees. To protect human

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42 ECtHR, _Gäfgen v. Germany_, Appl. no. 22978/05, Judgment of 01 June 2010, Par. 107: ‘... Article 3, which has been framed in unambiguous terms, recognises that every human being has an absolute, inalienable right not to be subjected to torture or to inhuman or degrading treatment under any circumstances, even the most difficult. The philosophical basis underpinning the absolute nature of the right under Article 3 does not allow for any exceptions or justifying factors or balancing of interests, irrespective of the conduct of the person concerned and the nature of the offence at issue.’
worth means to protect the human identity, the psychological and physical integrity, the autonomy and the minimum basic standard of living. The right to be free from torture enshrines an individual's sovereignty over his own body and mind. This sovereignty is of essential importance and may under no circumstance be restricted.

Lives can be counted and can therefore be seen as a quantifiable variable, human worth however cannot be measured. The utilitarian approach requires the possibility to weigh two similar metrics. Such a weighing of one value against another can not be carried out when the two values are of an entirely different nature and one of them cannot even be measured at all.

Furthermore, the torture of one terrorist alone strips human kind as a whole of it's absolute right not to be tortured: When a breach of the prohibition of Art. 3 ECHR may be justified in one case, its relativity becomes a fact. Therefore the calculus is not the human worth of one hostis humani generis vs. multiple innocent lives, but the human worth of all of mankind vs. innocent lives.

B. Differentiation Theory

Perhaps a compromise could help states do what they deem necessary to protect their citizens whilst simultaneously allowing them to maintain the moral high ground: The application of torture methods should never be allowed, but an infringement of the right not to be treated inhumanly or degradingly should be justifiable in cases where national security is at stake.

The scope of Art. 3 ECHR has proven to be anything but clearly defined. Basing itself on the living-instrument doctrine, the Court has expressly stated that the classification of treatments as either inhuman or degrading treatment or torture is far from static and certain acts that previously were considered to be in compliance with the Convention could in the future be seen as violations of its provisions. Prime-example of such a shift in categorization can be found in modern ill-treatment techniques like the five techniques applied in the Ireland vs. UK case. The Court judged in 1979 that these techniques merely amounted to inhuman treatment, it has been argued

44 M. Pösl, Das Verbot der Folter in Art. 3 EMRK (1st ed., 2015) at 181.
45 Rowe, 'The Scope of Article 3 of the European Convention on Human Rights in relation to Suspected Terrorists', 10 Exeter Papers on European Law (2002) 1, at 16: 'Torture is arguably the most heinous human rights violation imaginable. Torture is hell into the person's mind or body; it annihilates the human personality and thereby robs man of what makes him man.';
R. Dworkin, Is Democracy possibly here? Principles for a new political Debate (1st ed., 2006) at 38, 39:'Torture’s object is precisely not just to damage but to destroy a human being's power to decide for himself what his loyalty and convictions permit him to do ... to reduce its victim to a screaming animal for whom decision is no longer possible – the most profound insult to his humanity, the most profound outrage of his human rights.';
46 „Hooding“, „subjection to noise“, „deprivation of sleep“, „deprivation of food and drink“.
however that if the Court were to review this judgement now, the techniques would be classified as torture.

Any argumentation based on the classification of the committed act lacks the consistency the states parties are looking for: Whether the Court will allow for justifications in a specific case remains unpredictable. The added value of this type of argumentation over an argumentation that allows for justifications in exceptional cases - without tying itself to the treatment-categories of Art. 3 ECHR, is unclear.

C. The Slippery Slope Problem

When restrictions to the right to be free from torture and inhuman or degrading treatment are excusable in exceptional cases, these cases require a clear definition. What makes a case exceptional? How certain must an authority be that an individual is a planner, facilitator or perpetrator in order to be allowed to torture him or treat him inhumanly? Who decides over this question? Should the applied treatment be bound by ground rules, or does the individual who is being tortured 'lawfully' receive no protection whatsoever? The difficulty the Court would have answering these questions shows that the move to a relative Art. 3 ECHR would lead to insecurity and instability, which simply does not fit a democratic society under the rule of law.

The slippery slope argument tells us that once we open the door to torture, by allowing treatments that are adverse to Art. 3 ECHR to be applied in exceptional cases, this door becomes hard to shut, leading to allowing for restrictions in less and less exceptional cases. The premise, that one decision which is placed on the slippery slope will ultimately lead to a second or third - immoral - decision, is problematic, since it remains unclear why a shift in boundaries at one stage must automatically lead to a second, unethical shift. Perhaps this premise relies on a logical fallacy. When looking at modern history however it becomes apparent that often - despite the demonstrated lack of causality between wanted decision A and unwanted decision B - decision B would most likely not have come about were it not for decision A. The slippery slope argument proves not to rely on a logical

48 A term so vague that it has no place in an essential legal definition.
49 Compare the idea of Alan Dershowitz and Sanford Levinson of allowing for the limited administration of nonlethal torture supervised by judges.
50 Volokh, 'Mechanisms of the Slippery Slope', 116 Harvard Law Review (2003) 1026, at 1030: 'To critics of slippery slope arguments, the arguments themselves sound like a slippery slope: if you accept this slippery slope argument, then you'll end up accepting the next one and then the next one until you eventually slip down the slope to rejecting all government power (or all change from the status quo), and thus 'break down every useful institution of man. ... If the legal system is willing to protect the ideas we cherish today, why won't it still protect them tomorrow, even if we ban some other ideas in the meantime?'
M. Pösl, Das Verbot der Folter in Art. 3 EMRK (1st ed., 2015) at 98: Pösl refers to ancient Rome, where the
fallacy, once it is properly understood. The argument does not require \textit{causality}, but merely an \textit{increase in probability} of decision B after decision A has been made. Such a probability-increase cannot be confuted.

'The argument does not require causality, but merely an increase in probability of decision B after decision A has been made. Such a probability-increase cannot be confuted.'

\textit{History suggests that torture is not a safe tool for anyone at any time. Even under a system of rigid hierarchy where torture was controlled by explicit laws, it crept outward from its original bounds as each new crime became terrible enough to warrant torture.} 52

\textbf{D. The Right not to be Tortured vs. the Right to Life}

An often-heard argument for the relativity of Art. 3 ECHR lies in the boundaries of the right to life, as laid down in Art. 2 ECHR, which \textit{can} in certain cases be restricted. Could it really be, that a state can kill, but not torture an individual in exceptional cases?\textsuperscript{53} Perhaps the \textit{contrat social} and the stately duty to protect the life of its citizens could even oblige the state to torture under specific circumstances.\textsuperscript{54} This argument can easily be reversed, when it is accepted that the first and foremost duty of the state is to protect civilians from being tortured. Such a reasoning can be based upon the superior nature of Art. 3 ECHR, as it enshrines human worth.\textsuperscript{55}

Secondly, the statement that the right not to be tortured should be secondary to the right to life implies that it is worse to be killed than to be tortured and that murder is the worst measure a state can apply against a human being. Seidman described his doubt regarding this premise quite accurately: 'Whoever has succumbed to torture can no longer feel at home in the world. The shame of destruction cannot be erased. Trust in the world, which already collapsed in part at the first blow, but in the end, under torture, fully, will not be regained.'\textsuperscript{56}

\textsuperscript{55} As elaborately discussed under '2. An apples-versus-pears comparison'.
\textsuperscript{56} Seidman, 'Torture’s Truth', 72 \textit{University of Chicago's Law Review} (2005) 881, at 906; Compare Michael Davis: 'Both torture and (premature) death are very great evils but, if one is a greater evil than the other, it is certainly torture.' (Davis, 'The Moral Justification of Torture and other Cruel, Inhuman, or Degrading Treatment', 19 \textit{International Journal of Applied Philosophy} (2005) 161, at 165; Sussman, 'What's Wrong with Torture?', 33 \textit{Philosophy and Public Affairs} (2005) 1, at 15: 'Yet while there is a very strong moral presumption against both killing and torturing a human being, it seems that we take the presumption
Torture victims are robbed of their autonomy, their right to self-determination and the control over their body and spirit. Their lives can never continue as though the torture had not occurred. Opponents might argue that all this also applies when the victim has been killed rather than tortured, so ‘it does not follow from this that being killed is preferable to being tortured’\(^{57}\). It is impossible however to make a general statement on whether it is worse to live on after being tortured or to be murdered as it is practically not possible to measure the gravitas of either situation, and if it were, it would have to be done on a case-by-case basis. It becomes clear that the idea that the right to life naturally trumps the right to be free from torture is short-sighted.

E. Practical Problems

Apart from the ideological objections described above, a relative view of the prohibition of torture is subject to several practical issues. It can never be predicted with certainty that an Art. 3-violation will prevent the explosion of the ticking bomb. Even when an individual is tortured, he might not disclose the location of the explosive, or perhaps he does not have the power to stop the scenario from unfolding. There is a wide margin of error when selecting the individual to torture, and no way to take it back.\(^{58}\)

Furthermore, the premise that the application of torture will prevent terrorism is entirely incorrect when taking a long-term approach. A lack of human rights protection actually breeds terrorism.\(^ {59}\) A willingness to relinquish democratic values, leaving those who have fallen victim to their abuses and their friends and family in anger and despair, has high potential to lead to radicalization. The application of torture will have a detrimental effect on the mind of the victim: Not only is he being subjected to a severe form of suffering, this suffering is being administered by a state, which


\(^{58}\) The CIA applied the enhanced interrogation technique\(^ {t}\) to Khalid El-Masri whilst he was held at the Salt Pit in Afghanistan. El-Masri was routinely tortured - beaten, strip-searched and sodomized. He was kept in a bare, squalid cell, given only meager rations to eat and putrid water to drink. El-Masri was released in 2004, after it became clear that he was not a terrorist, but only abducted and tortured as a result of mistake in identity. For more information regarding the El-Masri case, visit [http://www.ecchr.eu/en/our_work/international-crimes-and-accountability/u-s-accountability/el-masri-case.html](http://www.ecchr.eu/en/our_work/international-crimes-and-accountability/u-s-accountability/el-masri-case.html).

\(^{59}\) D. Gomien, D. Harris and L. Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter* (1st ed., 1996) at 28: ‘At the same time and from a wider perspective, it is precisely situations in which there is a lack of respect for human dignity, a lack of human rights protection, which breeds terrorism. Efforts to prevent the spread of international terrorism should therefore embrace the aims of international human rights law.’
celebrates itself as a global protagonist. The victim has little hope for release or after-the-fact accountability due to this state's 'superpower' status. Becoming aware of instances of torture applied by Western forces will only strengthen hatred towards those responsible. 60 It feeds propaganda for terrorist groups, as it allows for these groups to claim the moral high ground. Indeed, many instances have been recorded of torture-victims and those around them joining terrorist organizations in order to take vengeance. 61 When fire is being fought with fire, the fire will only grow larger.

6. Summary

The ECtHR has not only maintained its position that the entire Art. 3 ECHR is absolute, including torture and inhuman and degrading treatment, but has also steadily expanded the scope of the article to include a diverse range of problem areas. 62 In the eyes of the Court, turmoil does not trump human rights. This paper demonstrates that this position is commendable.

Though it may be true that the 9/11 attacks marked the beginning of decades of public angst and led to the declaration of the 'War on Terror', the reasons for justifying the application of any techniques adverse to Art. 3 ECHR can and must still be refuted. Historical reasons why torture should be justifiable gained popularity, and a new reason was born: the necessity for a state to instill fear in the hearts of their enemies and faith in those of their people. These reasons can all be rebutted.

60 The responses to the release of the SSCI torture report were overwhelming. Many stated that the US was waging a War in Islam, rather than a War on Terror, and that this leads to radicalization of the Muslim community: 'To those 'radicalism experts': we get radicalized because of what YOU do to our brothers #torturereport; 'They call us barbaric? They call us backwards? They call us monsters? Slap yourself, read some of the @CIA torture reports and wake up.' Available at http://news.siteintelgroup.com/blog/index.php/categories/jihad/entry/327-jihadists-react-to-us-torture-report-call-for-retaliation-and-radicalization, (last visited 08 July 2016). However it may not be forgotten that it is the torture itself, not the release of the torture-report that leads to radicalization: 'ISIS and Al-Qaeda don't recruit by citing passages from the Quran. They use videos of U.S. military atrocities and the accounts of abuse and torture inside CIA black sites like Guantánamo, Abu Ghraib and Camp Bucca — accounts delivered by the victims themselves.' Available at: http://www.salon.com/2014/12/17/rula_jebreal_torture_defenders_are_driving_america_to_moral_suicide_partner/ (last visited 08 July 2016)

61 Mohammad Yahiya was arrested by Pakistani police on suspicion of being a terrorist. He was kicked and beaten and dropped from heights for hours at a stretch, deprived of food and drink and imprisoned during two years. During this period the prison guards burned his genitalia with cigarettes on a daily basis. After his release Yahiya joined Muhahedeen: 'After that I decided that I would not pass even one day in such a system of brutality and injustice. And I attained/joined mujahdeen and started armed struggle against that system. And I shall continue my struggle up to the destruction and end up of such system Insha'Allah.' It has been documented that the terrorists responsible for the Paris attacks, were radicalized by the Iraq invasion and the torture applied at the Abu Ghraib blacksite, http://www.juancole.com/2015/01/terrorist-radicalized-torture.html (last visited 08 July 2016).

62 As mentioned above: Poor prison conditions, the destruction of livelihood, the disappearing of persons as a violation to the rights of those left behind, the neglect of stately protective duties in the context of medical or psychiatric treatment, the imposition of disproportionate punishments or of the death penalty and - most controversially - the principle of non-refoulement have in the past decades been considered to be inherent to Art. 3 ECHR.
The argument that terrorists do not deserve human rights protection because they are 'subhuman' is inherently weak. The 'terrorist vs. freedom-fighter' debate shows that the depiction of counter-terrorism as a 'good vs. evil' struggle is hopelessly oversimplified. The question arises whether the relinquishment of democratic values and the willingness to apply barbaric methods to achieve a goal does not qualify the torturer himself as subhuman.

The idea that violations of Art. 3 ECHR are required in order to gain evidence or intelligence rests on a form of naivety: A case as straightforward as the ticking bomb scenario has never unfolded in reality. In practice, a torturer can never be sure that the person in front of him is indeed the terrorist who is capable of preventing the imminent attack and that he will give up the required information as a result of torture. The utilitarian calculus, which underlies the ticking bomb scenario, dictates that the benefits to many outweigh the cost to one man. Such a calculus requires the weighing of two similar metrics against one another. This cannot be accomplished when one of the two values - human worth - cannot be measured. Furthermore, when one potential terrorist is tortured this does not signify a mere cost to one man. Instead this abolishment of the absolute nature of the prohibition of torture makes the relativity of the norm a fact. Therefore the cost is not for one man to pay, but for all of mankind.

The modern argument, that citizens look to their states to act in a ruthless manner so that they can retain faith that 'everything will be alright' appears weak, when judging by the public outrage that was sparked by the release of the SSCI torture-report. Many American citizens testified to be deeply ashamed of the actions that their state had undertaken in their names.

When human worth, the key principle that Art. 3 ECHR protects, is not inviolable, no human rights can be protected at all, because without human dignity and personal autonomy all human rights lose their value.

Allowing for torture in exceptional cases does not factor in the slippery slope phenomenon, which dictates that taking one wanted decision which is on the slippery slope, increases the probability of a later unwanted decision. The definition of the term 'exceptional' is vague, therefore chances are that ever less exceptional cases get classified as such, paving the way for an uncontrollable use of torture-techniques.

It can not simply be stated that the right to life trumps the right not to be tortured, because the effects of both measures can not be qualified nor quantified, therefore they cannot be compared. If one can argue that the state's duty to protect obliges it to torture in certain cases, it can equally easily be argued that the citizen's right to be free from torture might impose the duty to kill upon the state. A torture-victim can never carry on living as if this life-altering event had not taken place. The psychology is affected in the worst possible manner, the world can no longer be considered a
safe place.
Lastly, the use of torture shows the uglier face of states that claim to be morally superior and drives marginalized groups in the arms of terrorist organizations.