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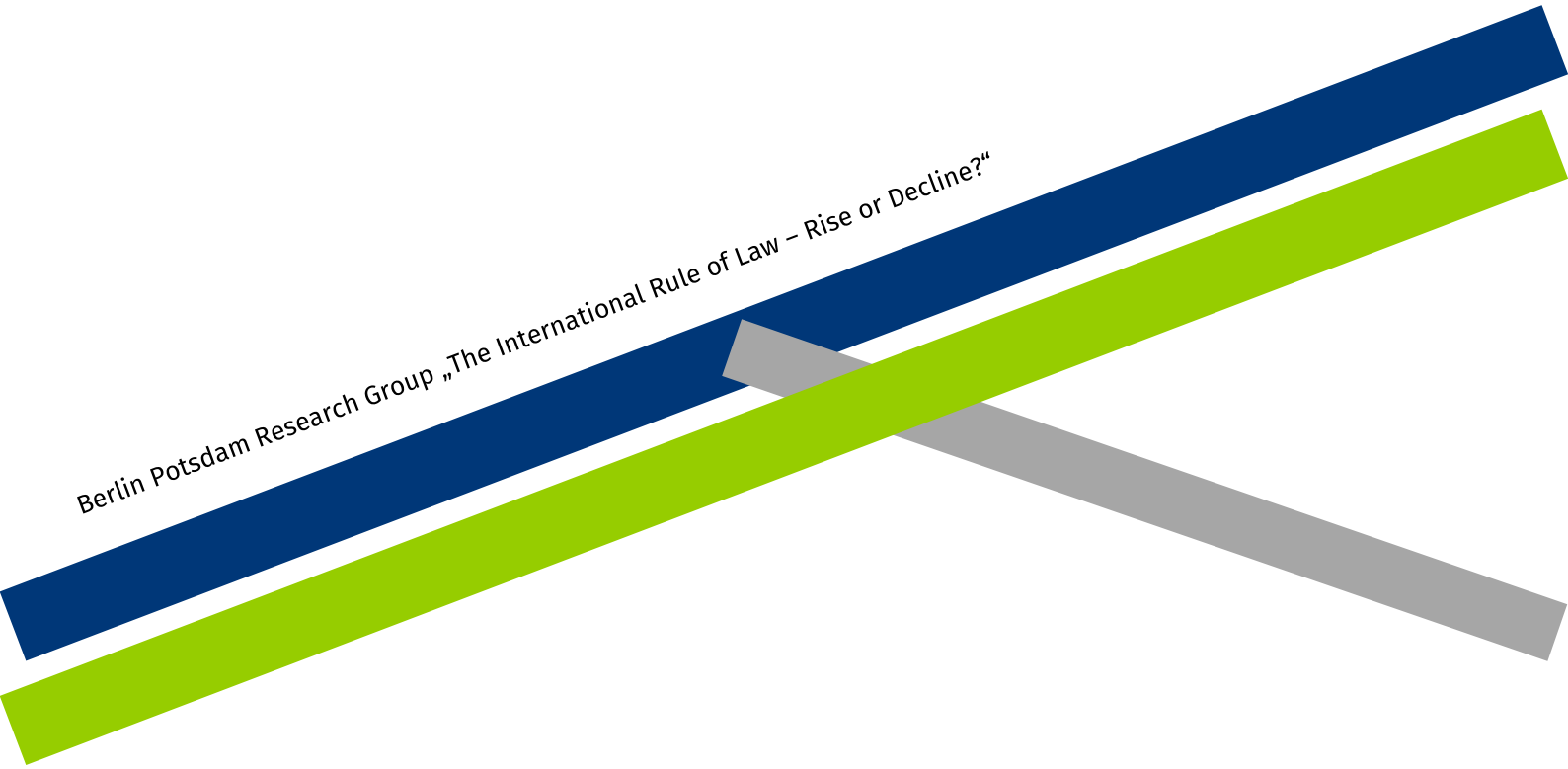
Dominik Steiger

Ex Iniuria Ius Oritur? – Norm Change and Norm Erosion of the Prohibition of Torture



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Ex Iniuria Ius Oritur?
– Norm Change and Norm Erosion of the Prohibition of Torture

Dominik Steiger[*]

Abstract:

Mainly in reaction to the use of torture by the United States after the attacks of 9/11, international relations scholars began asking under which circumstances the content of an international norm changes and at which point it becomes void of its normative content if it is repeatedly violated, a concept known as "norm erosion". International lawyers have until very recently not engaged with this debate. This working paper aims to change that by looking at the example of the prohibition of torture to display legal scholarship perspectives on how norms of treaty law and customary law come into being, how treaties can be modified or renounced, how customary law can be changed, as well as how re-interpretation processes take place that may affect a rule's content, scope and effect. Furthermore, international relations research has developed criteria which allow to determine whether a certain norm is more robust and thus resilient to change and erosion. These criteria also find a correspondence in the rules of international law and can be translated to, and framed in, international law terms. The findings from the perspective of international law reinforce international relations research which has identified the prohibition of torture to be very robust and resilient. Also, both disciplines underline that pure non-compliance does neither lead to norm change nor to norm erosion. Although international law has not played a decisive role in most international relations research on norm erosion, in the end, both disciplines still arrive at similar explanations under which circumstances norm change and norm erosion take place. Through uncovering this, the working paper also demonstrates how interdisciplinary scholarship may strengthen mono-disciplinary scholarship by arriving at the same conclusions via different avenues.

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Contents:

At which point does a heap of grain stop to be a heap if one takes away one grain after another? This so-called "paradox of the heaps" has kept philosophers busy ever since it was developed 2400 years ago by Eubulides of Miletus. 2390 years later, international relations scholars have started to tend to the question under the heading of "norm erosion". Mainly in reaction to the use of torture by the United States after the attacks of 9/11, they began asking under which circumstances the content of an international norm changes and at which point it becomes void of its normative content if it is repeatedly violated. Heike Krieger and Andrea Liese have taken this question one step further and have asked in this KFG Working Paper Series whether we can observe a metamorphosis, *i.e.* a fundamental systemic change in which not only norms – which are understood as "collective expectations about proper behaviour for a given identity"[1] –, but also the underlying values change or are even renounced.[2]

While norm erosion by now has become an area of research in international relations which has led to many new insights, international lawyers have until very recently not engaged with the current debate. This seems especially troublesome given the fact that international law provides for rules on norm change and also on the most extreme form of norm erosion, norm death, *i.e.* the termination of the validity of a norm.[3] Norm erosion, *i.e.* the process which leads to norm death or, as Krieger and Liese define it in a more refined way, a re-interpretation of the norm's objective to protect a specific common value which may affect the rule's scope and effect,[4] is, however, not coded in a binary manner and thus more difficult to conceptualize with legal methods.[5]

Nevertheless, legal norms not only govern how norms of treaty law and customary law come into being, how treaties can be modified or renounced and how customary law can be changed but also how re-interpretation processes of a norm which may affect the rule's content, scope and effect may take place. These rules of international law have been overlooked by most international relations research which has still arrived at similar explanations under which circumstances norm change and norm erosion take place. Furthermore, international relations research has developed criteria which allow to determine whether a certain norm is more robust and thus resilient to change and erosion. These criteria find a correspondence in the rules of international law and can be translated to and framed in international law terms. From a lawyer's perspective such an exercise is fruitful as the robustness protects the validity and the normativity of a norm – and thus its underlying values – in times of non-compliance.

In general, lawyers are mainly concerned with a rule's validity and normativity[6] and international relations scholars are concerned about compliance and consequently a rule's effectiveness. In

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[1] Ronald L. Jepperson, Alexander Wendt and Peter J. Katzenstein, 'Norms, Identity and Culture in National Security', in: Peter J. Katzenstein (ed.), *The Culture of National Security: Norms and Identity in World Politics* (New York: Columbia University Press, 1996), 33-77, p. 54; Heike Krieger and Andrea Liese, A Metamorphosis of International Law? Value changes in the international legal order from the perspectives of legal and political science (2019), KFG Working Paper Series No. 27, Berlin Potsdam Research Group "The International Rule of Law – Rise or Decline?" (Berlin), p. 7.

[2] *Ibid.* 5-6; Heike Krieger and Andrea Liese (eds.), *Tracing Value Change in the International Legal Order – Perspectives from Legal and Political Science* (Oxford: OUP, forthcoming 2022).

[3] Diana Panke and Ulrich Petersohn, Norm challenges and norm death: The inexplicable? (2016), Cooperation and Conflict 51/1, 3-19, pp. 4-5.

[4] Krieger/ Liese (n 1), 11-12.

[5] *Ibid.* 11.

[6] Jeffrey L. Dunoff and Mark A. Pollack, 'International Law and International Relations', in: Jeffrey L. Dunoff and Mark A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations. The State*

compliance research and even more so in norm erosion research, however these two concerns merge.[7] This makes an interdisciplinary approach especially rewarding as it allows to understand norm change and norm erosion in a more holistic manner and enriches both disciplines and their understanding of how norm change and norm erosion function. This working papers' interdisciplinary exercise will show that interdisciplinary scholarship may strengthen mono-disciplinary scholarship by arriving at the same conclusions via different avenues. Also, it will be shown that an important "trap"[8] could have been avoided if the neighbouring disciplines would have collaborated sooner.

In order to do so, this working paper, which concentrates on the prohibition of torture after 9/11 as especially the United States' non-compliance with the prohibition of torture norm led to the norm erosion research, will proceed as follows: First, it will briefly sketch the debate on the birth, the change and the death of norms in international relations (1.). Second, against this background, it will engage with the rules of international law on modification and interpretation of international norms, will show that the prohibition of torture is highly robust, that the legal perspective mostly reinforces the findings of international relations research and underline that pure non-compliance does neither lead to norm change nor to norm erosion. (2.).

1. The Birth and Death of Norms: An International Relations' Perspective

Before delving deeper into the realm of the paradox of the heap and finding out how international relations explain norm change and norm erosion (b), we will first analyse how norms come into being and are complied with in the first place (a).

a) The Norm Life Cycle – How Norms Come into Being

In the 1990s, international relations scholars started to ask why states actually comply with international law.[9] One of the most prominent models to explain compliance with international norms, especially human rights norms, is the so-called "norm life cycle model"[10] or "spiral model."[11] This constructivist model emphasises that, in order to comply with a norm – which is understood as

of the Art (Cambridge: CUP 2013), 3-32, pp. 11-21 criticising the lack of normativity in international relations scholarship; Martti Koskenniemi, Miserable Comforters: International Relations as New Natural Law (2009), European Journal of International Law 15/3, 395-422, p. 410.

[7] Robert O. Keohane, International Relations and International Law: Two Optics (1997), Harvard International Law Journal 38/2, 487-502, pp. 489-494; Sylvia Maus, ‚Warum befolgen Internationale Organisationen menschenrechtliche Verpflichtungen? Prologomena zu einer erweiterten Theorie der Compliance', in: Thomas Groh et al. (eds.), *Verfassungsrecht, Völkerrecht, Menschenrechte – Vom Recht im Zentrum der Internationalen Beziehungen: Festschrift für Ulrich Fastenrath zum 70. Geburtstag* (Heidelberg: C.F. Müller 2019), 187-206 offers a perspective grounded in international law; Jana von Stein, 'The Engines of Compliance', in: Jeffrey L. Dunoff and Mark A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations. The State of the Art* (Cambridge: CUP 2013), 477-501, offers an overview of compliance literature from a political science point of view.

[8] Wayne Sandholtz, 'Is Winter Coming? Norm Challenges and Norm Resilience', in: Heike Krieger and Andrea Liese (eds.), *Tracing Value Change in the International Legal Order – Perspectives from Legal and Political Science* (Oxford: OUP, forthcoming 2022).

[9] Michael Bothe, 'Compliance', in: Rüdiger Wolfrum (ed.), *The Max Planck Encyclopaedia of Public International Law* (Oxford: OUP, 2012), Vol. II, 530-557, para. 4.

[10] Martha Finnemore and Kathryn Sikkink, International Norm Dynamics and Political Change (1998), International Organization 52/4, 887–917, pp. 895-909.

[11] Thomas Risse and Kathryn Sikkink, 'The Socialization of Human Rights Norms into Domestic Practices: Introduction', in: Thomas Risse, Stephen C. Ropp and Kathryn Sikkink (eds.), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: CUP, 1999), 1-38, pp. 17-37.

"collective expectations about proper behaviour for a given identity"[12] – , it first needs to be developed, then circulated, and finally internalised.[13] The prohibition of torture is widely regarded as an example of such a norm which has been fully internalised and has led to rule-consistent behaviour through "behavioral change and sustained compliance with international human rights."[14]

b) The Norm Death Cycle – How Norms Change, Erode and Die

However, many norms are often not observed although the norm life cycle has seemingly come full circle. The prime example is the "return of torture"[15] after the terrorist attacks of 9/11, in which more than 3,000 people were killed. In reaction to this attack, the United States, which supposedly had internalised the prohibition of torture, used torture *inter alia* in Abu Ghraib and Guantánamo Bay as well as in secret detention facilities all over the world.[16] This led to the question of why non-compliance is still taking place after a norm has been internalised[17] and to the addition of an extra phase to the spiral model[18] which turns it into a "negative spiral of normative change"[19] or even a "norm death series".[20] This new model is not only about non-compliance and effectiveness – which is a factual problem – but also about norm change, norm erosion and norm death and thus about the validity of a norm and its normativity.

International relations scholarship on norm change and norm erosion has identified two key elements in establishing whether norm change and norm erosion is taking place (aa) and established different criteria in order to measure the robustness and resilience of a norm (bb).

aa) Non-Compliance + Contestation = Norm Change?

In the beginning of norm erosion research it was held that non-compliance, *i.e.* breaches of the norm, alone might lead to norm death.[21] Such a view, accurately named "compliance trap",[22] has

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[12] Jepperson/ Wendt/ Katzenstein (n 1), 54; Krieger/ Liese (n 1), 7.

[13] Finnemore/Sikkink (n 10) 895-905; Galit A. Sarfaty, International Norm Diffusion in the Pimicikamak Cree Nation: A Model of Legal Mediation (2007), Harvard International Law Journal 48/2, 441-482, pp. 445-446.

[14] Thomas Risse and Stephen C. Ropp, 'Introduction and Overview', in: Thomas Risse, Stephen C. Ropp and Kathryn Sikkink (eds.), *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge: CUP, 2013), 3-25, p. 7.

[15] Gerhard Beestermöller and Hauke Brunkhorst (eds.), *Die Rückkehr der Folter. Der Rechtsstaat im Zwielicht?* (München: C.H.Beck, 2006).

[16] Dominik Steiger, *Das völkerrechtliche Folterverbot und der „Krieg gegen den Terror"* (Berlin, Heidelberg: Springer-Verlag, 2013), *passim*; David Luban, 'Liberalism, Torture, and the Ticking Bomb', in: Stephen P. Lee (ed.), *Intervention, Terrorism, and Torture* (Dordrecht: Springer, 2007), 249-262, pp. 249-250.

[17] See the following literature and also the authors of the original spiral model themselves: Risse/Ropp (n 14), 23.

[18] Diana Panke and Ulrich Petersohn, Why International Norms Disappear Sometimes (2012), European Journal of International Relations 18/4, 719-742, p. 722. See also Michal Smetana, Nuclear Deviance (Cham: Palgrave Macmillan, 2020), 59-89, pp. 65ff.

[19] Regina Heller, Martin Kahl and Daniela Pisoiu, The 'Dark' Side of Normative Argumentation – The Case of Counterterrorism Policy (2012), Global Constitutionalism 1/2, 278-312, p. 282.

[20] Ryder McKeown, Norm Regress: US Revisionism and the Slow Death of the Torture Norm (2009), International Relations 23/1, 5-25, pp. 10-12.

[21] Michael J. Glennon, How International Rules Die (2005), Georgetown Law Journal 93/3, 939-991, pp. 940, 959 - 961 and 975-977.

[22] Sandholtz (n 8).

been given up by now, as the counter-factual expectations of norms would else be obsolete.[23] Non-compliance is thus a necessary but not sufficient condition for norm erosion.[24]

Additionally, the changed attitude towards a norm must be expressed in public discourse.[25] With regard to torture, these expressions *inter alia* need to include arguing for an exception from the absoluteness of the prohibition of torture or for a redefinition of torture.[26] Further, it is necessary to take into account (supporting) arguments of third states.[27] Not every contestation leads to norm change though, but may actually strengthen normativity and compliance:[28] If a state violates the prohibition of torture, it might even strengthen the norm if it justifies its act as a valid exemption or if other states condemn this behaviour.[29] Decisive for a differentiation between acts which lead to norm erosion and others which strengthen the norm is whether states directly contest the validity of a norm or whether they only contest its application in a given situation.[30] Direct contestation of the validity "tackle[s] the question of which norms a group of actors wants to uphold [...] what actors can expect of each other independent of a given situation"[31] and leads to a loss of the norm's scope and effect and, thus, to norm erosion.[32] However, contestation of the application[33] of the norm in a given situation – and this is what a single act of non-compliance actually is – does not lead to norm erosion.

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[23] *Ibid.*; cf. Friedrich Kratochwil and John Gerard Ruggie, International Organization: A State of the Art on an Art of the State (1986), International Organization 40/4, 753-775, p. 767: "To be sure, the law (norm) is violated thereby. But whether or not violations also invalidate or refute a law (norm) will depend upon a host of other factors, not the least of which is how the community assesses the violations and responds to it."; Panke/Petersohn (n 18), 720.

[24] *Ibid.* 725-726.; Nicole Deitelhoff and Lisbeth Zimmermann, Things We Lost in the Fire: How Different Types of Contestation Affect the Validity of International Norms (2013), PRIF Working Papers No. 18 (Frankfurt am Main: Hessische Stiftung Friedens- und Konfliktforschung) https://nbn-resolving.org/urn:nbn:de:0168-ssoar-455201 (last access 10 February 2022), pp. 4-5.

[25] Christopher Kutz, How Norms Die: Torture and Assassination in American Security Policy (2014), Ethics & International Affairs 28/4, 425-449, p. 430.

[26] Andrea Liese, Exceptional Necessity: How Liberal Democracies Contest the Prohibition of Torture and Ill-Treatment When Countering Terrorism (2009), Journal of International Law and International Relations 5/1, 17-47, p. 22.

[27] McKeown (n 20) 11-12; cf. Heller/Kahl/Pisoiu (n 19) 299-302.

[28] See for an overview Anja Jetschke and Andrea Liese, 'The Power of Human Rights a decade after: from euphoria to contestation?', in: Thomas Risse, Stephen C. Ropp and Kathryn Sikkink (eds.), *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge: CUP, 2013), 26-42, pp. 35-36; Antje Wiener, Contested Compliance: Interventions on the Normative Structure of World Politics (2004), European Journal of International Relations 10/2, 189-234; Antje Wiener, *The Invisible Constitution of Politics. Contested Norms and International Encounters* (Cambridge: CUP, 2008), pp. 204-208; Clifford Bob, *The Global Right Wing and the Clash of World Politics* (Cambridge: CUP, 2011).

[29] Deitelhoff/Zimmermann (n 24), 4; Wayne Sandholtz and Kendall W. Stiles, *International Norms and Cycles of Change* (Oxford: OUP, 2009), 14-15; Liese (n 26), 46.

[30] Deitelhoff/Zimmermann (n 24), 5: "Norm applicatory discourses have to clarify whether (1) a norm is appropriate for a given situation and (2) which actions it requires in the specific situation." See also Nicole Deitelhoff and Lisbeth Zimmermann, Things We Lost in the Fire: How Different Types of Contestation Affect the Robustness of International Norms (2020), International Studies Review 22, 51-76, 57-58; Lisbeth Zimmermann, Nicole Deitelhoff and Max Lesch, Unlocking the agency of the governed: contestation and norm dynamics (2017) Third Wold Thematics: A TWQ Journal 2/5, 691-708; Smetana (n 18),79 ff.

[31] Deitelhoff/Zimmermann (n 24) 5.

[32] *Ibid.* 1; Deitelhoff/Zimmermann (n 30) 57-58.

[33] Deitelhoff/Zimmermann (n 24) 5; Deitelhoff/Zimmermann (n 30) 57-58; Lucrecia García Iommi, Norm internalisation revisited: Norm contestation and the life of norms at the extreme of the norm cascade (2020),Global Constitutionalism 9/1, 76-116, pp. 84, 88 f.

bb) Robustness of a Norm Shields Against Norm Erosion

While these elements may lead to norm change and norm erosion, international relations scholarship found that certain factors, which may be summarized under the heading of the robustness of a norm, strengthen the resilience of a norm and protect it against change and erosion. These five factors are the type of norm in question, concordance, implementation, embeddedness, and preciseness.

First, it makes a difference which kind of norm is being questioned. A fundamental norm which entails the broadest possible moral or ethical reach is far more difficult to change than a standardized rule which serves to provide for the details to implement fundamental norms.[34] Second, concordance refers to the number of treaty ratifications, including the acceptance of opt-in clauses and the non-use of opt-out-clauses.[35] Third, implementation is about whether domestic laws have been adopted and enforcement and accountability are ensured.[36] Another important element in assessing norm erosion is, fourth, its embeddedness. Norms embedded in larger norm clusters, which may be defined as "collections of aligned, but distinct, norms or principles that relate to a common, overarching issue area [and] address different aspects and contain specific normative obligations,"[37] are more resilient to norm change because "when a norm is part of a broader regime, it both supports other regime norms and is reinforced by them."[38] Fifth, the preciseness of a norm serves as an additional criterion: The less precise a norm is, the easier it can be challenged by states and the harder it is to react to norm violations as the challenging state possesses more interpretative space to defend the legality of its actions.[39]

cc) Summary: Norm Erosion Depends on Non-Compliance, Corresponding Arguments and the Robustness of the Norm

International Relations has found that non-compliance and supporting arguments are needed in order for norms to change and to erode. The form of contestation matters as well: only contesting the validity of a norm – and not just its application – may lead to norm erosion. The robustness of a norm shields against any undertakings to erode the norm: the more international obligations states have agreed to, the more states have domestically implemented the norm, the more embedded and the more precise a norm is, the more it protects fundamental values, the more resilient it is against norm change and norm erosion.

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[34] Antje Wiener, Norm(ative) Change in International Relations: A Conceptual Framework (2020), KFG Working Paper Series No. 44, Berlin Potsdam Research Group "The International Rule of Law – Rise or Decline?" (Berlin), p. 16.

[35] Averell Schmidt and Kathryn Sikkink, Breaking the Ban? The Heterogeneous Impact of US Contestation of the Torture Norm (2019), Journal of Global Security Studies 4/1, 105-122, p. 108; for a different understanding see Michal Ben-Josef Hirsch and Jennifer M. Dixon, Conceptualizing and assessing norm strength in International Relations (2021), European Journal of International Relations 27/2, 521-547, pp. 524 ff.

[36] *Ibid.* 115.

[37] Jeffrey S. Lantis and Carmen Wunderlich, Resiliency Dynamics of Norm Clusters: Norm Contestation and International Cooperation (2018), Review of International Studies 44/3, 570-593, p. 571. See also Mathias Großklaus, Friction, not Erosion: Assassination Norms at the Fault Line between Sovereignty and Liberal Values (2017), Contemporary Security Policy 38/2, 260- 280, p. 266.

[38] Lantis/ Wunderlich (n 37).

[39] Deitelhoff/Zimmermann (n 24) 5; Deitelhoff/Zimmermann (n 30) 57; Cf. Jetschke/Liese (n 28) 36; the scope of the interpretative space shrinks with the norm's preciseness. Legal definitions, however, offer a high preciseness, Monika Heymann, *Einseitige Interpretationserklärungen zu multilateralen Verträgen* (Berlin: Duncker & Humblot, 2005), p. 69.

2. The Birth and Death of Norms: An International Law Perspective

International law provides for norms and means which determine whether a norm is still valid and which content, scope and effect it has. In alignment with the findings of international relations scholars, the elements of compliance and *opinio iuris* are of decisive importance to international law scholars as regards both the birth and death of norms. The same is true of a norm's robustness. Firstly, the birth of norms of public international law and the robustness of the absolute prohibition of torture in international law will be discussed (a). Secondly, international law's approach to norm change and norm erosion will be analysed. Here, it will be shown that while the United States after 9/11 has not complied with the prohibition of torture in many instances, no norm change has taken place (b).

a) The Birth of a Norm of Public International Law: Treaty Law and Customary Law

From an international law perspective, the prohibition of torture is a very robust norm well established in treaty law (aa) and customary international law alike (bb).

aa) The Prohibition of Torture as Robust Treaty Norm

A norm of international treaty law comes into being according to the rules of the Vienna Convention on the Law of Treaties (VCLT).[40] With the ratification of a treaty, a state declares itself to be bound by it.[41] As soon as the treaty has entered into force – which is determined by the rules of the treaty itself[42] – it follows from this valid ratification that the treaty and its norms apply to the treaty parties and thus legally binds them. The following overview of the international prohibition of torture will show how well regulated this field is and that the prohibition of torture has become a very robust norm of treaty law which is resilient to change.

The prohibition of torture protects personal integrity as well as human dignity[43] which is regarded by the Universal Declaration of Human Rights as the highest value[44] (protection of fundamental values) and is firmly rooted in international treaty law (concordance). The first prohibition of torture in international treaty law can be found in Article 4 of the annexed Regulations to the Hague Convention respecting the Laws and Customs of War on Land of 1907, which applies to prisoners of war only. The first explicit general prohibition of torture is stipulated in Article 5 of the Universal Declaration of Human Rights of 1948. The Declaration, however, is not a treaty and does not directly create legal rights and obligations. The first general treaty prohibition of torture at the universal level is contained in the International Covenant on Civil and Political Rights of 1966 (ICCPR), which has been ratified by 173 states to date. At the regional level, *inter alia* the European Convention on Human Rights (ECHR), the American Convention on Human Rights and the African Charter on Human

[40] Articles 10 – 18 VCLT (adopted 22 May 1969, entered into force 27 January 1987) 1155 UNTS 331.

[41] Vienna Convention on the Law of Treaties, articles 14 and 16; see also Vienna Convention on the Law of Treaties, article 2 para. 1 lit. b.

[42] Vienna Convention on the Law of Treaties, article 24.

[43] David Luban, *Torture, Power and Law* (Cambridge: CUP, 2014), p. 146-147; Elvira Rosert and Sonja Schirmbeck, Zur Erosion Internationaler Normen. Folterverbot und nukleares Tabu in der Diskussion (2007), Zeitschrift für Internationale Beziehungen 14/2, 253-287, pp. 260-261.

[44] See Preamble, para. 1, Universal Declaration of Human Rights, UNGA Res 217 A (III) (10 December 1948), UN Doc A/RES/217 A (III); Ginevra Le Moli, 'The Principle of Human Dignity in International Law', in: Mads Andenas et al. (eds.) *General Principles and the Coherence of International Law* (Leiden: Brill, 2019), 352-368; Christopher McCrudden, Human Dignity and Judicial Interpretation of Human Rights (2008), European Journal of International Law 19/4, 655-724, pp. 665-672.

and Peoples' Rights prohibit torture which have been ratified by 125 states.[45] All of these treaties prohibit derogations from the prohibition of torture[46] and neither is it possible to balance the prohibition of torture with other human rights considerations.[47] The prohibition of torture is thus considered to be absolute. In addition, humanitarian law and international criminal law prohibit torture.[48]

Since 1984, the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), which just as the ICCPR has been ratified by 173 states to date, reinforces and deepens these prohibitions. UNCAT provides a rather clear and precise definition of torture[49] which has been further refined by (international) courts (preciseness). That the prohibition is precise, is underlined by its, albeit contested, direct applicability in national law. Whether a norm of international law is directly applicable in national law depends on the formulation and content of the rule. If the wording is sufficiently clear and precise and unconditional and thus capable of being applicable without the requirement of a further rule implementing the norm, the rule may be directly applicable by national courts and the executive.[50] This is the case for the prohibition of torture.[51]

UNCAT furthermore contains a complex body of rules to combat torture. It *inter alia* obliges the State Parties to prevent torture, to investigate incidents of torture and to punish and prosecute torturers, even on the basis of the principle of universality (embeddedness).[52] The same is true for the general human rights treaties. While they do not expressly foresee a duty to investigate or prosecute, these duties are deducted from the right to an effective remedy and the undertaking to respect and ensure the right to be free from torture.[53] Furthermore, the prohibition of torture is protected through different supervisory systems which are highly institutionalized and provide for thorough means of dialogue. Both ICCPR and UNCAT provide for a mandatory reporting procedure, an inter-state complaint as well as an individual complaint procedure. More than 60 states have opted-in to these

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[45] 47 ratifications of the ECHR, Chart of signatures and ratifications of Treaty 005, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005 (last access 10 February 2022); 24 ratifications of the ACHR, see: Department of International Law, OAS, B-32, https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm (last access 10 February 2022), 54 ratifications of the AfCHPR, see: African Commission on Human and Peoples' Rights, Ratification Table, https://www.achpr.org/ratificationtable?id=49 (last access 10 February 2022).

[46] Art. 15 para. 2 ECHR; Art. 27 para. 2 American Convention on Human Rights, (entered into force 22 November 1969), OEA/Ser.K/XVI/I.I, Document 65, Rev. 1, Corr. 2; Art. 5 Inter-American Convention to Prevent and Punish Torture (entered into force 28 February 1987), OAS Treaty Series No 67; Art. 2 para. 2 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 81 (UNCAT); Art. 4 para. 2 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[47] Manfred Nowak Moritz Birk and Giuliana Monina, *The United Nations Convention Against Torture: A Commentary*, 2nd ed. (Oxford: OUP, 2018), Art. 2, para. 59.

[48] For international humanitarian law, see e.g. Art. 13, 17, 87 Convention (III) Relative to the Treatment of Prisoners of War (adopted on 12 August 1949, entered into force 21 October 1950), 75 UNTS 135; Art. 27 and 32 Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287; and common Art. 3 to all four of these Geneva Conventions. For international criminal law, see e.g. Art. 7 para. 1 lit. f and lit. k and Art. 8 para. 2 lit. a lit. ii and lit. c lit. ii Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 01 July 2002) 2187 UNTS 3.

[49] Liese (n 26), 40.

[50] Steiger (n 16), 504; Bernd Grzeszick, Rechte des Einzelnen im Völkerrecht. Chancen und Gefahren völkerrechtlicher Entwicklungstrends am Beispiel der Individualrechte im allgemeinen Völkerrecht (2005), Archiv des Völkerrechts 43, 312-344, p. 318.

[51] Steiger (n 16), 530.

[52] Cf. Convention against Torture, arts. 2, 4, 5-8, 12-13.

[53] Steiger (n 16), 381-390.

mechanisms.[54] The regional systems even provide for full judicial protection through human rights courts. Also, proactive supervisory mechanisms have been developed. In 2002, the Optional Protocol to the United Nations Convention Against Torture (OPCAT) was adopted. OPCAT is a unique international human rights treaty, especially because it follows a new proactive approach by establishing a system of on-site visits as well as a dual supervisory mechanism which consists of an international committee, the UN Subcommittee on Prevention of Torture and the National Prevention Mechanisms.[55] OPCAT which has been ratified by 92 states is modeled on the Inter-American Convention to Prevent and Punish Torture of 1985 as well as the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 1987 which together have been ratified by 65 states.[56]

Lastly, these norms have been adopted on a large scale in domestic law. In the United States, for example, the Torture Convention Implementation Act[57] implements the CAT (implementation). Also, the direct applicability of the prohibition of torture strengthens the application of the norm on the domestic level as it allows the executive and the courts to apply the prohibition of torture without any implementation act by the legislature.

bb) Customary International Law: Practice and Opinio Iuris

Customary international law comes into being through a completely different mechanism than treaty law. It requires state practice (*consuetudo*) and the conviction that the practice is being followed because it is law (*opinio juris*).[58] If a norm forms not only part of treaty law but also of customary international law,[59] it fortifies the robustness of the norm.

The objective element, *i.e.* practice, demands that certain acts have been practised consistently, generally and for a certain amount of time.[60] Consistency refers to the content of the norm. It does not imply that all states have to practice the rule in full consistency all of the time, rather, the practice

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[54] For an overview see: UNTC Chapter IV, 9, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=_en (last access 10 February 2022).

[55] Lorena González Pinto, The United Nations Subcommittee on Prevention of Torture: The Effects of Preventive Action, Journal of Human Rights Practice, to be published 2022.

[56] For the state-parties of OPCAT, see: United Nations Treaty Collection, Chapter IV. 9.b., https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9-b&chapter=4&clang=_en (last access 10 February 2022); 47 states and thus all member states of the Council of Europe are state parties to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, see: Council of Europe Treaty Office, Chart of signatures and ratifications of Treaty 126, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/126/signatures?p_auth=pHqC9Eqt (last access 10 February 2022); the Inter-American Convention for the Prevention of Torture or Inhuman or Degrading Treatment has 18 state-parties , see: Department of International Law, OAS, Multilateral Treaties, A-51, https://www.oas.org/juridico/English/Sigs/a-51.html (last access 10 February 2022).

[57] 18 US Code, Section 2340 A (b).“There is jurisdiction over the activity prohibited in subsection (a) [i.e. torture abroad] if (1) the alleged offender is a national of the United States; or (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.” This offers the possibility for legal action against US-american torturer, even though it contradicts to wording of the US‘ reservation.

[58] See e.g. *Continental Shelf case (Libyan Arab Jamahiriya v. Malta)* (Judgement) [1985] ICJ Rep 13, para. 27.

[59] That such an overlap is possible has *inter alia* been held by the ICJ, see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep 14, para. 177; *North Sea Continental Shelf (Federal Republic of Germany v. Denmark and Federal Republic of Germany v. Netherlands)* (Judgment) [1969] ICJ Rep 39, para. 63.

[60] Cf. Art. 38 para. 1 lit. b Statute of the International Court of Justice (adopted on 26 June 1945, entered into force 24 October 1945) 557 UNTS 143; Martin Dixon, Textbook on International Law, 7th ed. (Oxford: OUP, 2013), p. 33.

"must be reasonably consistent".[61] The generality of practice refers to states practising the norm. The practice needs to be common to a significant number of states, but not all of them[62] or must be, as the ICJ put it "both extensive and virtually uniform."[63] Thus, one has to take into account the acts of not only the United States after 9/11, but those of all states.

The subjective element, *i.e. opinio iuris*, demands that states must accept the practice as binding law.[64] The *opinio iuris* by states can *inter alia* be established by public statements of governments, domestic courts and legislatures.[65] Again, third states play a role, as their *opinio iuris* also needs to be taken into account. Furthermore, decisions of international courts[66] and declarations of international organisations[67] may provide evidence in finding existing *opinio iuris*. Lastly, treaty law may add to the coming-into-being of customary law, at least if the norm is widely ratified and is of a fundamentally norm-creating character.[68]

Applying this background to the prohibition of torture, it becomes clear that widespread *opinio iuris* regarding the absolute prohibition of torture exists: no state has legalised torture.[69] States repeatedly stress the importance of the absolute prohibition of torture.[70] International[71] and national courts[72] regularly underline the prohibition of torture's absolute nature. In addition, the *opinio iuris* held in and by the United Nations supports the existence of a norm of customary international law. The UN is condoning torture regularly and persistently.[73] Furthermore, the

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[61] Dixon (60), 33; ILC, 'Identification of Customary International Law: Text of the draft conclusions as adopted by the Drafting Committee on second reading' (30 April-1 June, 2 July-10 August 2018) UN Doc A/CN.4/L.908, Conclusion 8 para. 1; Military and Paramilitary Activities (59) [186].

[62] Dixon (n 60), 34.

[63] North Sea Continental Shelf (n 58) [74].

[64] *Ibid.* [77]; ILC (n 61) Conclusion 9 para. 1.

[65] See e.g. ILC (n 61) Conclusion 10 para. 2; *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)* (Judgment) [2012] ICJ Rep 99, para. 77.

[66] ILC (n 61) Conclusion 13.

[67] *Ibid.* Conclusion 12.

[68] North Sea Continental Shelf (n 58) [71-74].

[69] Lauri Hannikainen, Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status (Helsinki: Finnish Lawyers' Publication Company, 1988) p. 502 with further references.

[70] See e.g. UN Committee against Torture, 'Consideration of reports submitted by States parties under article 19 of the Convention: Fifth periodic report of States parties due in 2007: Germany' (15 February 2011), UN Doc CAT/C/DEU/5, para. 65; UN Committee against Torture, 'Consideration of reports Submitted by States parties under article 19 of the Convention: Second periodic reports of States parties due in 1999: United States of America' (13 January 2006), UN Doc CAT/C/48/Add.3/Rev. 1, para. 5; UN Committee against Torture 'Consideration of reports Submitted by States parties under article 19 of the Convention: Third periodic reports of States parties due in 2004: Australia' (25 May 2005) UN Doc CAT/C/67/Add.7, para. 2.

[71] *Prosecutor v Delalić* (Judgment) ICTY-96-21-T (16 November 1998) paras. 452-54; *Al-Adsani v United Kingdom* (App no 35763/97) ECHR 21 November 2001, para. 61; *Case of Maritza Urrutia v. Guatemala*, Judgment, Inter American Court of Human Rights Series C No 103 (27. November 2003) para. 92; *Gäfgen v Germany* (App no 22978/05) ECHR 01 June 2010, para. 87, 107; *El-Masri v The Former Yugoslav Republic of Macedonia* (App no 39630/09) ECHR 13 December 2012, para. 195; *Case of Azul Rojas Marín et al. v. Peru*, Judgment, Inter American Court of Human Rights Series C No 402 (12. March 2020) para. 140.

[72] See German Federal Constitutional Court, decision of 18 December 2017 - 2 BvR 2259/17 -, para. 17; Central Court for Preliminary Criminal Proceedings No. 5 National Court Madrid, Preliminary Proceedings 150/2009-P, Order of 24. May. 2014, p. 12; *R* (on the application of Binyam Mohamed) *v. Secretary of State for Foreign and Commonwealth*, [2010] EWCA Civ 65, United Kingdom: Court of Appeal (England and Wales), 10 February 2010, para 14.

[73] See e.g. 'Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment', UNGA Res 3452(XXX) (9 December 1975) UN Doc A/RES/3452 (XXX) and the annual, by now bi-annual resolutions condoning torture, e.g. 'Torture and other cruel, inhuman or degrading treatment or punishment', UNGA Res 74/143 (18 December 2019) UN Doc A/RES/74/143.

existence of so many different treaty law norms from all different fields of public international law – not only human rights law but also international criminal law and humanitarian law – offers evidence that the norm is also regarded as a norm of customary international law.

Further, the prohibition of torture is regarded as *ius cogens* not only by academia[74] but also by many different international and national (quasi-)judicial organs.[75] The International Law Commission thus correctly stated that the *ius cogens* character of the prohibition is "clearly accepted and recognized"[76] which reinforces the customary law status as *ius cogens* is based in customary international law.[77]

Nevertheless, torture is still a widely used technique[78] which makes one wonder whether enough practice exists in order to speak of the prohibition of torture as a norm of customary international law. However, these instances of torture have to be regarded as exceptions to a general practice of non-torture, since states do not use torture on a regular basis. Even the most notorious states do not even come close to torturing everybody who is perceived as a threat. While omissions as such cannot be regarded as practice, the way certain omissions are practiced could be if they were based on the states "being conscious of having a duty to abstain."[79] Since all states are bound by the prohibition of torture, they are conscious of the prohibition. By not torturing openly, *i.e.* without verbally justifying it, states then show that the omission of torture is the practice they find to be constitutive for the creation of customary international law.[80] Even cases in which states torture openly may serve as evidence for a practice on not-torturing. The ICJ famously held in the Nicaragua Case that the prohibition of the use of force is founded in customary international law, since even a

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[74] See e.g. Johan D. van der Vyver, Torture as Crime under International Law (2003), Albany Law Review 67/2, 427-463, p. 429; Michael O'Boyle, Torture and Emergency Powers Under the European Convention on Human Rights: Ireland v. the United Kingdom (1977), American Journal of International Law 71/4, 674-706, p. 687-688; Andrea Bianchi, Immunity vs. Human Rights: The *Pinochet* Case (1999), European Journal of International Law 10/2, 237-277, p. 272; Hannikainen (n 69), 509.

[75] UN Human Rights Committee 'General Comment No. 24' (4 November 1994) UN Doc CCPR/C/21/Rev.1/Add.6, para. 8; *Prosecutor v Delalić* (n 71) [452-454]; *Al-Adsani v United Kingdom* (n 71) [61]; Case of *Maritza Urrutia v. Guatemala* (n 71) [92]; UN Committee against Torture 'General Comment No. 2: Implementation of Article 2 by States Parties' (24 January 2008) UN Doc CAT/C/GC/2, para. 1; *Sener v Bundesanwaltschaft und Eidgenössisches Justiz- und Polizeidepartement* (1983) BGE 109 I b 64, 71, Europäische Grundrechte Zeitschrift 1983 (Schweizerisches Bundesgericht), pp. 253-256, 255; *Siderman de Blake v Argentina*, 965 F.2d 699 (1992) (United States Court of Appeals) para. 58.

[76] ILC, 'Report of the International Law Commission on the work of its fifty-third session' (23 April-1 June and 2 July-10 August 2001) UN Doc. A/56/10, p. 85 para. 5.

[77] Thomas Kleinlein, Jus Cogens as the 'Highest Law'? Peremptory Norms and Legal Hierarchies (2015), Netherlands Yearbook of International Law 46, 173-210, p. 195.

[78] Amnesty International has counted credible allegations of torture in 67 states in 2019, see their regional reports, The Americas, https://www.amnesty.org/download/Documents/AMR0113532020ENGLISH.PDF (last access 10 February 2022), Asia Pacific, https://www.amnesty.ch/de/laender/asien-pazifik/asien-und-pazifik/dok/2020/jahresbericht-2019-asien-pazifik/report_human_rights_in_asia_pacific_2019.pdf (last access 10 February 2022), Eastern Europe and Central Asia, https://www.amnesty.org/download/Documents/EUR0113552020ENGLISH.PDF (last access 10 February 2022), Europe, https://www.amnesty.ch/de/laender/europa-zentralasien/europa-und-zentralasien-kontinent/dok/2020/regionaler-ueberblick/2004_human_rights_in_europe.pdf (last access 10 February 2022), Middle East and North Africa, https://www.amnesty.ch/de/laender/naher-osten-nordafrika/naher-osten-nordafrika/2020/jahr-des-widerstands/human-rights-in-the-mena-2019.pdf (last access 10 February 2022), Sub-Sahara Africa, https://www.amnesty.ch/de/laender/afrika/afrika/dok/2020/afrika-regionaler-ueberblick/human-rights-in-africa-2019_regional-report.pdf (last access 10 February 2022); Human Rights Watch has counted 50 states in 2019 that have a high risk to torture or commit torture, https://www.hrw.org/sites/default/files/world_report_download/hrw_world_report_2020_0.pdf (last access 10 February 2022).

[79] *Case of the S.S. Lotus (France v Turkey)* 7. September 1927, PCIJ Rep Series A No. 10, p. 28.

[80] Cf. ILC (n 61), Conclusion 6 para. 1.

State "that act[s] in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications [...] confirm[s] rather than [...] weaken[s] the rule."[81]

cc) Summary: Prohibition of Torture as a Very Robust Norm

To summarize, the prohibition of torture is a very robust norm of international law: it protects fundamental values, it can be found in treaty law and customary law alike. Furthermore, the precisely framed prohibition of torture has also been implemented on the domestic plane.[82] It is embedded in other norms that only exist to fortify the prohibition and in well-institutionalised compliance mechanisms. In addition, the prohibition of torture is a *ius cogens* norm which protects fundamental values.[83] Furthermore, the definition of torture, while leaving room for interpretation and thus also room for arguments – as every definition does – is nevertheless clear and precise[84]. Not only is it one of the very few prohibitions that are legally defined (cf. Article 1 UNCAT) but also (international) courts have helped in further defining it.

b) The Death of a Norm: State Practice and *Opinio Iuris*

Despite its high legal robustness, the prohibition of torture might have changed or even eroded over time. In general, this is perceivable: Norms do not only come into being, their content may also change during their life span and they might even eventually cease to exist. This may take place through different means depending on whether a norm is based in treaty law (aa) or in customary law (bb). Aside formal amendments and modifications in treaty law, *opinio iuris* which will often be accompanied by practice, is the decisive factor in norm change (cc).

aa) Treaty Law: Modification, Renouncement, and Interpretation

One way to modify treaty law would be via an explicit agreement of the parties.[85] Such a modification would apply to all state parties. Treaty norms might also cease to apply in case a state renounces its status as a treaty party.[86] In this case, however, only the renouncing state would not be bound by the treaty norm anymore. With regard to torture, neither a formal modification nor any renouncement of any torture norm has been undertaken thus far. But there is another, subtler way to change the understanding of treaty law, *i.e.* via the methods of interpretation. However, interpretation must not lead to modifications of the content[87] as it has to stay within the interpretative boundaries set by

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[81] Military and Paramilitary Activities (n 58) [186].

[82] For criminal law see Antonio Marchesi, Implementing the UN Convention Definition of Torture in National Criminal Law (with Reference to the Special Case of Italy (2008), Journal of International Criminal Justice 6/2, 195-241, pp. 196–201.

[83] Cf. Cezary Mik, Jus Cogens in Contemporary International Law (2013), Polish Yearbook of International Law 33, 27-93, pp. 45-46; Erika de Wet, 'Sources and the Hierarchy of International Law. The Place of Peremptory Norms and Article 103 of the UN Charter within the Sources of International Law', in: Samantha Besson et al. (eds.), *The Oxford Handbook on the Sources of International Law* (Oxford: OUP, 2017), 625-639, pp. 630-634.

[84] Liese (n 26), 40.

[85] Vienna Convention on the Law of Treaties, Articles 39-41.

[86] Cf. Vienna Convention on the Law of Treaties, Article 54 -56.

[87] Christian Djeffal, *Static and Evolutionary Treaty Interpretation. A Functional Reconstruction* (Cambridge: CUP 2016), p. 15-16; ILC, 'Subsequent agreements and subsequent practice in relation to the interpretation of treaties: Text of the draft conclusions adopted by the Drafting Committee on second reading' (30 April-1 June and 2 July-10 August 2018) UN Doc A/CN.4/L.907, Conclusion 7 para. 3.

the wording of the norm.[88] A proper modification can only be attained by changing the wording of a norm.

Interpretation in international law in principle follows the lines of all legal interpretations. According to Article 31 (1) VCLT a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty and in the light of its object and purpose. Norm interpreters, be it international or national courts or other international and national institutions, including, of course, the executive branch of each state, may interpret norms differently and according to their *opinio iuris*. However, the interpretation of a norm by one actor is not binding on others. The content, scope and effect of a norm is left untouched.

This is only true to a certain extent, though. If a certain re-interpretation of a norm is taken up by all or most other norm interpreters[89] and thus becomes their *opinio iuris*, then a norm changes.[90] Just as international relations research has underlined, the reactions of other institutions to a re-modelling of a norm plays a highly relevant role in norm change and norm erosion. From this follows that the subjective understanding of the content of a norm is more important than state practice as it alone may change the content, scope and effect of a norm.

However, re-interpretation efforts will generally involve some practice. Interpretation by domestic courts is understood to be state practice,[91] and the *opinio iuris* of a state's executive will usually lead to state practice. If the executive's interpretation is contrary to the norm as understood by others, the ensuing practice might be an act of non-compliance. According to Article 31 (3) lit. b) VCLT which names "subsequent practice establishing agreement" as one interpretative tool, this practice may change the meaning of treaties over time.[92] In this context, State practice is the means to establish a changed interpretation and can be described as the emanation of a changed interpretation which needs to be, albeit indirectly, agreed upon between the parties.[93] Since state practice needs to be "concordant, common, and consistent",[94] it is rather difficult to change the content of a norm via subsequent practice. Furthermore, pronouncements of treaty bodies,[95] which tend to be rather protective of the norm and its underlying values, may also "be relevant when assessing the subsequent practice of parties to a treaty".[96]

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[88] Anthony Aust, *Modern Treaty Law and Practic*e (Cambridge: CUP, 2013), 205-209; Ulf Linderfalk, *On the Interpretation of Treaties. The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Dordrecht: Springer 2007), 61-95.

[89] For the different actors that might be involved see Nico Krisch, The Dynamics of International Law Redux (2021), Current Legal Problems 74, 269-297, pp. 287 ff.

[90] Cf. Thomas Kleinlein, Matters of Interpretation: How to Conceptualize and Evaluate Change of Norms and Values in the International Legal Order (2018), KFG Working Paper Series No. 24, Berlin Potsdam Research Group "The International Rule of Law – Rise or Decline?" (Berlin), p. 13-15.

[91] See, e.g., ILC, 'Report of the International Law Commission. Seventieth Session' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, p. 32.

[92] For the difficulties involved in conceptualising interpretation, see Kleinlein (n 90), 16-20.

[93] Aust (n 88), 214-216.

[94] Gerhard Hafner, 'Subsequent Agreements and Practice: Between Interpretation, Informal Modification, and Formal Amendment', in: Georg Nolte (ed.), *Treaties and Subsequent Practice* (Oxford: OUP, 2013), 105-122, p. 112.

[95] ILC (n 91), 39-40.

[96] UN General Assembly, ‚Resolution on the report of the Sixth Committee (A/73/556), Subsequent agreements and subsequent practice in relation to the interpretation to the interpretation of treaties', UN Doc A/RES/73/202, (3 Jan 2019), Conclusion 5(2); Moreover, the Commentary particularly cites examples of general comments of the UNHR Committee and the UNCESCR that gave rise to, or referred to, subsequent practice; ILC (n 91), 111-112.

bb) Customary Law and Treaty Law: Desuetude

Another way to change international treaty law as well as international customary law is via *desuetude*. *Desuetude* which is "defined as the rejection of a rule through subsequent non-enforcement or non-compliance",[97] is considered to be a ground for terminating a treaty and may be invoked for the abrogation of customary law.[98] Does that mean that in international law pure non-compliance by a sufficient number of states may lead to the death of a norm?[99]

Such a reading of *desuetude* is too far-reaching: *Desuetude* has purposefully not been included in the VCLT, implying that non-compliance with a treaty cannot lead to the modification of a treaty[100] – for which the VCLT foresees explicit norms. Moreover, other authors speak of the "non-application" of treaties,[101] which is quite different from "non-compliance", especially with regard to human rights treaties, which provide a supervisory mechanism that applies the treaty on a regular basis. Furthermore, it is not convincing that practice alone may change international law, as the consent of states is decisive in creating as well as changing international law. Lastly, the counter-factual expectations by norms would become void if only (f)acts changed the norm.

Because of that, it is even argued that *desuetude* does not have a place in international law.[102] While this argument is too far-reaching, it is decisive that *opinio iuris* must also be considered when inquiring whether a norm has fallen into *desuetude*.[103] Even the above cited authors who seemingly only require state practice for *desuetude* refer to the importance of *opinio iuris* for *desuetude* several times.[104] This especially holds true for the prohibition of torture, which is a norm with *ius cogens* status. Hence, in principle,[105] *desuetude* corresponds to subsequent practice interpretation: a new practice needs to emerge which is accompanied by a corresponding *opinio iuris, i.e.* a common understanding on what the law should say and, thus, on whether the new practice is legal. Customary law is therefore changed in the same way it comes into being.[106] Breaching international law, while being problematic as such a breach is illegal and engages the state's international responsibility on the one hand, can actually be a building block in creating new international law on the other hand: *ex iniuria ius oritur* is indeed possible.[107] Pure non-compliance, however, does not suffice, states have

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[97] Jan Wouters, Sten Verhoeven, Desuetudo, Max Planck Encyclopedias of International Law, online ed., last update November 2008 (OUP), https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1027?prd=EPIL (last access 10 February 2022) para. 1.

[98] *Ibid.* para. 1.

[99] Glennon (n 21), 940, 959-964 and 975-980. Cf. also Thomas Franck, Who killed Article 2(4)? or: Changing Norms Governing the Use of Force by States (1979), American Journal of International Law 64/5, 809-837.

[100] Marcelo G. Kohen, 'Desuetude and Obsolescence of Treaties', in: Enzo Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (Oxford: OUP, 2011), 350-359, p. 351.

[101] Karl Doehring, Völkerrecht, 2nd ed. (Heidelberg: C.F. Müller, 2004), p. 296; Mark Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources* (The Hague: Martinus Nijhoff Publishers, 1997), p. 206.

[102] Kohen (n 100), 359.

[103] See also Maarten Bos, The Identification of Custom in International Law (1982), German Yearbook of International Law 25, 9-53, p. 39; Kleinlein (n 90), 11.

[104] Wouters/Verhoeven (n 97) paras. 2, 10, 14.

[105] As mentioned above, subsequent practice is "only" about re-interpretation. Desuetude in principle reaches further as it allows to overcome the strict boundaries of interpretation.

[106] Wouters/Verhoeven (n 97) para. 14.

[107] Cf. Antonio Cassese, Ex iniuria ius oritur: Are we moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community? (1999), European Journal of International Law 10/1, 23-30, pp. 27-30.

to be convinced that the new practice mirrors a new status of the law.[108] Here, the *opinio iuris* of third states plays an important role, as the change of international law can be precluded when states express their dissent with violations of or undertakings to change the prohibition of torture.[109]

cc) Prohibition of Torture: Changing State Practice and Opinio Iuris?

As shown, practice, but even more so *opinio iuris* are the decisive factors for norm erosion of international treaty law and international customary law. Thus, from an international law perspective, international relations scholars have aptly described how international law works by arguing that non-compliance is a necessary precondition for norm change, but that it is not in itself sufficient, as the attitude of states also needs to have changed. Consequently, in the following, after showing that the prohibition of torture has been violated in reaction to the terrorist attacks of 9/11 (1), it will be analysed whether this (mal)practice is supported by a corresponding *opinio iuris* (2).

(1) (Mal)Practice of Torture

Reported cases of torture and thus non-compliance are easy to find.[110] Especially the United States is regarded as the most important actor in eroding the torture prohibition. For example, so-called no-touch torture was frequently employed during the "War on Terror". Its main elements are sensory deprivation and so-called self-inflicted pain.[111] The infamous photography of a prisoner of the Iraqi Abu Ghraib prison is a typical example of this practice: A prisoner is standing on a wooden box, wearing a hood, with his arms extended and faked wired electrodes purporting to be used for the infliction of lethal electric shocks attached to his fingertips. But this method is not new: It was already developed in the 1950s,[112] *inter alia* used in the Vietnam War and taught at the School of the Americas from where it spread to Latin America.[113] In addition, the United States has only very reluctantly and not fully fulfilled its duty to investigate and prosecute allegations of torture as well as to compensate for cases of torture.[114] But non-compliance by itself cannot change a norm. Norms might only erode if a violation is accompanied by corresponding arguments and is not protested against by third states.[115] Whether norm erosion has taken place thus depends on the states' *opinio iuris*.

(2) Opinio iuris – New Challenges to the Torture Prohibition?

Since states are not only bound by but may also change international law, it is decisive whether states indeed want to change the torture prohibition and express an understanding which differs

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[108] *Ibid*. 29-30.

[109] Cf. Helmut Aust and Mehrdad Payandeh, Praxis und Protest im Völkerrecht: Erosionserscheinungen des völkerrechtlichen Gewaltverbots und die Verantwortung der Bundesrepublik im Syrien-Konflikt (2018), Juristen Zeitung 73/13, 633-684, pp. 633-34, 637-38.

[110] See above n 78.

[111] Robert Duncan, Neuropsychological and Electronic "No-Touch Torture". The Spectrum of "Interrogation" and Torture Techniques Used by the US and its Allies (Centre for Research on Globalization, 1 April 2015) https://www.globalresearch.ca/neuropsychological-and-electronic-no-touch-torture-the-spectrum-of-interrogation-and-torture-techniques-used-by-the-us-and-its-allies/5454124 (last access 15 February 2022).

[112] Steiger (n 16), 252-260.

[113] Jennifer Harbury, *Truth, Torture, and the American Way: The History and Consequences of U.S. Involvement in Torture* (Boston: Beacon Press, 2005), p. 103.

[114] Cf. e.g. UN Committee against Torture 'Concluding observations on the combined third to fifth periodic reports of the United States of America' (19 December 2014) UN Doc CAT/C/USA/CO/3-5, paras. 12, 29.

[115] Aust/Payandeh (n 109), 634 ; cf. ILC (n 61) Conclusion 10 para. 3.

from accepted interpretations.[116] There are different avenues which could be taken in order to undertake such a change. A state could argue that the prohibition of torture is obsolete today (i), it could try to change the definition of torture (ii), it could argue that derogations and justifications are possible (iii), or it could attack the ensuing duties of the torture prohibition, *i.e.* the duty to investigate, the duty to prosecute, and the duty to compensate (iv). A closer look at these different issues shall reveal whether the understanding of the torture prohibition and thus the *opinio iuris* of the torturing states as well as of third states (v) has changed or is about to change by differentiating between the different point of references given. Such a close-up look shall also reveal whether states challenge the validity of the norm or only its applicability and thus do not question the norm as such.

i. No Outright Denial of Existence of Torture Prohibition

An outright denial of the existence of the prohibition of torture would be a direct challenge to the existence of the norm. However, no state has yet argued that the prohibition of torture as such has become obsolete or should become obsolete.[117] On the contrary, even states that have tortured have simultaneously underlined the importance of the torture prohibition: "I want to reaffirm yet again that the United States has very high values. We do not engage in torture. We are bound by the Convention against Torture.[T]he United States government has never authorized torture."[118] This lack of an outright denial of the validity of the torture prohibition shows that the prohibition of torture has not died. Furthermore, it is a first hint that the torture norm has not eroded.

ii. Re-Defining Torture?

According to the legal definition in Art. 1 UNCAT, torture means "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person [...] 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". While this definition is unique to UNCAT, it serves as a general interpretative guideline for the international prohibition of torture in general.[119] Although the torture definition is rather precise and clear,[120] it still is open to interpretation as every norm is – and states indeed use this space for interpretation. Especially the US has engaged in a re-interpretation of the definition of torture by excluding no-touch torture from the definition of torture on the one hand,[121] and through the notorious, quasi-legal Bybee memorandum on the other hand, which added a "special intent" element,[122] allowing the US to argue that torture to save human lives

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[116] But see Glennon (n 21), 976-977.

[117] Liese (n 26), p. 32 for the US, p. 34 for Israel and the UK.

[118] Press Briefing by White House Counsel Judge Alberto Gonzales, DoD General Counsel William Haynes, DoD Deputy General Counsel Daniel Dell'Orto and Army Deputy Chief of Staff for Intelligence General Keith Alexander, Office of the Press Secretary, 22 June 2004, https://georgewbush-whitehouse.archives.gov/news/releases/2004/06/20040622-14.html (last access 15 February 2022).

[119] See e.g. *Selmouni v France* (App no 25803/94) ECHR 28 July 1999, paras. 97-105; *Ilhan v Turkey* (App no 22277/93) ECHR 27 June 2000, para. 85; Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein: N.P. Engel, 2005) Art. 7, para. 6. See also Prosecutor v Delalić (n 71) [456-459] and Prosecutor v Furundžija (n 71) [160-61] where the definition of UNCAT served as an interpretative guidance for the customary prohibition of torture.

[120] Liese (n 26), 40.

[121] Andrea Birdsall, But we don't call it 'torture'! Norm contestation during the US 'War on Terror' (2016), International Politics 53/2, 176-197, p. 181; Tim Dunne, 'The Rules of the Game Are Changing': Fundamental Human Rights in Crisis After 9/11 (2007), International Politics 44/2-3, 269-286, pp. 276-282.

[122] John Bybee, Memorandum for Alberto Gonzales. 'Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A, 1. August 2002', in: Karen Greenberg and Joshua Dratel (eds.), *The Torture Papers: The Road to Abu Ghraib* (Cambridge: CUP, 2005), 172-222, p. 174.

never constitutes torture in legal terms. Such changes in the interpretation of the torture definition may be one way how norms change and even erode.

However, both undertakings cannot be understood as arguments in favour of a changed *opinio iuris*. First, the special intent requirement was later retracted through another memorandum.[123] Second, the United States at the moment of the ratification of UNCAT had already declared via a so called "interpretative declaration" that it does not understand no-touch torture to be included in the torture definition.[124]

But, one might be inclined to ask, has the United States not started eroding the prohibition way before 9/11 by excluding no-touch torture from the ambit of the torture definition and thus narrowing down the definition of torture on the day it joined UNCAT? The answer depends on the legal effect of the United States' declaration. Interpretative declarations are a permissible instrument to express a state's understanding of a specific norm but do not aim to modify a states' obligations. Also, they do not bind any other treaty state.[125] Thus, their (re-)interpretative value is rather low.

But the so called declaration may be a reservation that aims at or purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State (Article 2 lit. d) VCLT). Such a reservation would have a greater legal impact – and this is exactly what the United States aimed at: it tried to modify the legal effect of UNCAT by narrowing down the content, scope and effect of UNCAT. The United States was, however, not successful from a legal point of view as the reservation possesses no legal effect: While a reservation is only legally binding as long as it is permissible, the reservation at hand is incompatible with the object and purpose of the respective treaties and thus impermissible (Art. 19 VCLT).[126] Such reservations need to be severed from the treaty which will be operative for the reserving party as though it had been concluded without the impermissible reservation.[127]

This debate about the definition torture is nothing new. Rather, the United States questioned the content of the norm from the beginning and aimed – unsuccessfully – at changing it. This declaration

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[123] Daniel Levin, Memorandum for James B. Comey Deputy Attorney General. Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A, U.S. Department of Justice, Office of Legal Counsel, Washington, 30 December 2004, https://cdn.factcheck.org/UploadedFiles/DoJ-Memo-overriding-August-Memo.pdf (last access 15 February 2022) pp. 12-17.

[124] Cf. Alfred McCoy, A Question of Torture, CIA Interrogation, from the Cold War to the War on Terror, (New York: Hold Paperbacks, 2006), p. 10.

[125] Cf. ILC, 'Third report on reservations to treaties by Mr. Alain Pellet, Special Rapporteur' UN Doc. A/CN.4/491/Add.4, para. 352.

[126] For the US-reservation made to the Convention against Torture see UNTC, Chapter IV, 9, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=_en#EndDec (last access 15 February 2022).

[127] *Belilos v Switzerland* (App no 10328/83) ECHR 29 April 1988; para 55; Rosalyn Higgins, 'Introduction', in: J.P. Gardner (ed.), *Human Rights as General Norms and a State's Right to Opt Out. Reservations and Objections to Human Rights Conventions* (London: British Institute for International and Comparative Law, 1997), pp. xv-xxix, xxvii; Frederick A. Mann, ‚The Doctrine of Jus Cogens in International in Law', in: Horst Ehmke, Joseph H. Kaiser, Wilhelm A. Kewenig, Karl Matthias Meessen and Wolfgang Rüfner (eds.), *Festschrift für Ulrich Scheuner* (Berlin: Dunker & Humblodt 1973), 399-418, p. 404.

The severability doctrine, however, has been contested inter alia by Roslyn Moloney, Incompatible Reservations to Human Rights Treaties: Severability and the Problem of State Consent (2004), Melbourne Journal of International Law 5/1, 155-168 who argues that no sufficient state practice exists to support the doctrine and Ryan Goodman, Human Rights Treaties, Invalid Reservations, and State Consent (2002), American Journal of International Law 96/3, 531-560.

can thus be seen as a constructive form of engaging with the prohibition of torture, but not as a sign of norm erosion. Contesting the exact content of a norm is a regular occurrence in international law and, as international relations research underline, even strengthens the norm, as it contests its applicability and not its validity.[128]

iii. Relativising the Absolute Prohibition of Torture? Derogations, Justifications and Necessity

No treaty that prohibits torture allows for derogations. Thus, no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency may allow for an interference with the prohibition of torture. Furthermore, as the prohibition of torture is of an absolute nature, a breach cannot be justified by protecting other norms, such as the right to life[129] or by necessity, which can never be brought up as a circumstance precluding wrongfulness in case a *ius cogens* norm has been breached.[130]

Nevertheless, after 9/11, it was argued that the prohibition of torture could either be derogated from or a violation could be justified, e.g. by arguing that necessity applies in order to protect from certain threats such as terrorism.[131] However, the argument that torture could be justified never left academic circles.[132] On the contrary, it was even explicitly stated by the Bush administration that "[t]he President has not directed the use of specific interrogation techniques. […] There has been no presidential determination that circumstances warrant the use of torture to protect the mass security of the United States."[133] Rather, the United States, as described above, undertook to re-define torture instead of justifying its use. Thus, "(i)n violating international norms on human rights, the US has sought to operate in secret and has not provided a public legitimation narrative."[134]

But, as *Andrea Liese* rightly argues,[135] a combination of a change in the definition of torture and the introduction of a possible justification of acts of cruel, inhuman or degrading treatment was indeed undertaken by some states, *inter alia* by the UK, the US and Israel. In Israel, the Landau Commission in 1987 argued that the necessity claims allow for a "moderate measure of physical pressure" to be applied. However, the Israeli Supreme Court in 1999 declared this approach to be illegal: "These prohibitions (of torture and cruel, inhuman and degrading treatment) are 'absolute.' There is no exception to them and there is no room for balancing."[136] Finally, the Bybee Memorandum aimed at

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[128] Deitelhoff/Zimmermann (n 24), 5; Deitelhoff/Zimmermann (n 30), 57-58; Wiener (n 34), 16-17.

[129] Cf. UN Human Rights Committee 'CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)' (10 March 1992) UN Doc HRI/GEN/1/Rev.9 (Vol. I), para. 3; UN Committee Against Torture (n 114) paras. 5-7.

[130] UNGA Res 56/83 Responsibility of States for Internationally Wrongful Acts (28 January 2002) UN Doc A/RES/56/83, Annex, Article 26.

[131] Cf. Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law – An Interactional Account* (Cambridge: CUP, 2010), p. 221.

[132] See e.g. Winfried Brugger, May Government Ever Use Torture? Two Responses From German Law (2000), American Journal of Comparative Law 48/4, 661-678.

[133] Press Briefing by Alberto Gonzales (n 118).

[134] Ian Hurd, Breaking and Making Norms: American Revisionism and Crises of Legitimacy (2007), International Politics 44/2,3, 194-213, p. 200.

[135] Liese (n 26), 27-32. For the UK see Frank Foley, The (de)legitimation of torture: rhetoric, shaming and narrative contestation in two British cases (2021), European Journal of International Relations 27/1, 102-126.

[136] *Public Committee Against Torture in Israel v Israel and General Security Service* (1999) HCJ 5100/94 (Supreme Court of Israel) para. 23. Cf. Niels Uildriks, Torture in Israel (2000), Human Rights Review 1/4, 85-105. The UK example brought up by Sandholtz (n 8), 29, refers to closed-circuit television monitoring and is thus neglectable

redefining torture and, in a second step, at justifying cruel, inhuman and degrading treatment by using a balancing act.[137] But again, this position was later retracted[138] and the United States stated that under "U.S. law every U.S. official, wherever he or she may be, is prohibited from engaging in torture or in cruel, inhuman or degrading treatment or punishment, at all times, and in all places."[139] Thus, no *opinio iuris* can be detected that questions the absoluteness of the prohibition of torture.

iv. The Duties to Investigate and Prosecute Torture – Often Breached but Rhetorically Upheld

In order to combat torture, duties that render the prohibition effective in practice, namely the duties to investigate and prosecute torture, have been introduced. During the "War on Terror", the USA conducted several investigations into alleged cases of torture, some only superficially and incompletely, while others were carried out thoroughly and conscientiously.[140] Attempts to fulfil the duty to prosecute were only made in few cases.[141] While these attempts were by no means adequate,[142] and thus the United States has not fulfilled the duties that ensue from the prohibition of torture, it has not questioned the existence of these duties, but on the contrary has underlined their importance at the highest level. George W. Bush affirmed that "(t)orture anywhere is an affront to human dignity everywhere [...] I call on all governments to join with the United States and the community of law-abiding nations in prohibiting, investigating, and prosecuting all acts of torture."[143] A changing agreement about the existence or content of these norms does not exist.

v. Reactions by Third States – Reaffirming the Prohibition of Torture

While the United States has indeed contested the definition of torture for a long time, it is important to widen the view to the other more than 190 states, as practice and *opinio iuris* have to be widespread and generally consistent.[144] The United States on its own cannot erode the torture prohibition. Of particular importance is how third states have reacted to the US' stance on torture: have they acquiesced in the US' understanding of the prohibition of torture or have they even followed its example? Or, on the contrary, have they protested and thus defended the absolute prohibition of torture?

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in this context, UN Committee against Torture 'Second periodic reports of States parties due in 1994, Addendum: United Kingdom of Great Britain and Northern Ireland' (26 June 1995) UN Doc CAT/C/25/Add. 6, para. 56.

[137] Bybee (n 122), 172-222.

[138] Levin (n 123), 2, 5-15.

[139] UN Committee Against Torture 'Consideration of reports submitted by States parties under article 19 of the Convention pursuant to the optional reporting procedure: Third to fifth reports of States parties due in 2011: United States of America (4 December 2013) UN Doc CAT/C/USA/3-5, paras. 36, 153, see also para 13.

[140] Steiger (n 16), 394-398.

[141] Kathryn Sikkink, 'The United States and Torture: Does the Spiral Model Work?', in: Thomas Risse, Stephen C. Ropp and Kathryn Sikkink (eds.), *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge: CUP, 2013), 145-163, pp. 156-160.

[142] Steiger (n 16), 438-441.

[143] US President George W. Bush, Statement by the President, Office of the Press Secretary, 26 June 2003, https://georgewbush-whitehouse.archives.gov/news/releases/2003/06/20030626-3.html (last access 15 February 2022)

[144] Hafner (n 94), 112, 117-120; for customary international law, cf. Dixon (n 60), 34; ILC (n 61) Conclusion 8 para. 1.

Only few governments have publicly justified torture by pointing to the United States.[145] Rather, governments protested and dissented.[146] The reservation of the United States to the Convention against Torture has been met with severe criticism. Sweden for example referred[147] to its objection against the United States reservation to Art. 7 ICCPR and stated that it "contribute(s) to undermining the basis of international treaty law."[148] Public inquiries into US torture cases were launched in Canada, Germany, Italy, Spain, and the United Kingdom, and also by the Parliament of the European Union and the Council of Europe.[149] Italy convicted 23 United States officials in absentia for abducting a Muslim cleric in Milan and sending him to Egypt to be tortured.[150] Governments,[151] civil society,[152] courts such as the European Court of Human Rights[153] and quasi-judicial bodies such as the Human Rights Committee[154] have made their dissent clear and reiterated an understanding of torture which *inter alia* leaves intact its interpretation and does not allow for any balancing act, even if the act in question does not constitute torture but "only" cruel, inhuman or degrading treatment. Even Russia, which itself practises torture,[155] has voiced dissent. In an interview with Der Spiegel, Vladimir Putin stated: "Just look at what's happening in North America, it's simply awful: torture, (...), Guantanamo, people detained without trial and investigation."[156]

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[145] One case in point is Malaysia which justified its administrative detention by referring to Guantanamo Bay, Kenneth Roth, 'Justifying Torture', in: Kenneth Roth and Minky Worden (eds.), *Torture: Does it Make Us Safer? is it Ever OK?: A Human Rights Perspective* (New York: New Press, 2005), 184-201, p. 186; see also Douglas A. Johnson, Alberto Mora and Averell Schmidt, The Strategic Costs of Torture How "Enhanced Interrogation" Hurt America, Foreign Affairs, September/October 2016 (last access 15 February 2022).

[146] See e.g. 'Siebter Bericht der Bundesregierung über ihre Menschenrechtspolitik in den auswärtigen Beziehungen und in anderen Politikbereichen', 2005, https://www.auswaertiges-amt.de/blob/216950/bd7119e9a7f391146ba0ec3b59f53d74/mrb-07-data.pdf (last access 15 February 2022), p. 37, 296; Deutsche Welle, Folter-Bericht: Bundesregierung geht auf Distanz zu USA, https://www.dw.com/de/folter-bericht-bundesregierung-geht-auf-distanz-zu-usa/a-18123439 (last access 15 February 2022); Johnson/Mora/Schmidt (n 145); Schmidt/Sikkink (n 35), 108-112.

[147] For the Swedish objection against the US Reservation see: UNTC, Chapter IV, 9, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=_en#EndDec (last access 15 February 2022).

[148] UN Human Rights Committee 'Reservations, declarations, notifications and objections relating to the International Covenant on Civil and Political Rights and the Optional Protocols thereto: Note by the Secretary General' (24 August 1994) UN Doc CCPR/C/2/Rev.4, p. 57.; see also Schmidt/Sikkink (n 35), 115-117.

[149] Johnson/Mora/Schmidt (n 145).

[150] Sikkink (n 141), 157 -159.

[151] See, for instance, the example cited inn 146.

[152] See e.g. Association for the Prevention of Torture, 'Defusing the Ticking Bomb Scenario: Why we must say No to torture, always' (2007) https://www.acat.ch/__/frontend/handler/document.php?id=460&type=42 (last access 15 February 2022); International Commission of Jurists, Submission to the Committee Against Torture on the examination of the combined third and fourth periodic reports of Sri Lanka under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/LKA/INT_CAT_NGO_LKA_47_9520_E.pdf (last access 15 February 2022) pp. 3-4, 18.

[153] El-Masri v The Former Yugoslav Republic of Macedonia (n 71) [195-199].

[154] See e.g. UN Human Rights Committee 'Consideration of reports submitted by States parties under Article 40 of the Covenant: Concluding observations of the Human Rights Committee: Israel' (21 August 2003) UN Doc CCPR/CO/78/ISR, para. 18; UN Human Rights Committee 'Consideration of reports submitted by States parties under Article 40 of the Covenant: Concluding observations of the Human Rights Committee: United States of America' (18 December 2006) UN Doc CCPR/C/USA/CO/3/Rev.1, para. 13

[155] Amnesty International, Russian Federation 2019, https://www.amnesty.org/en/countries/europe-and-central-asia/russian-federation/report-russian-federation/ (last access 15 February 2022).

[156] Christina Schäffner, 'Political Communication. Mediated by Translation', in: Urszula Okulska and Piotr Cap (eds.), *Perspectives in Politics and Discourse* (Philadelphia: John Benjamins Publishing Company, 2010), pp. 255-278, 261.

To conclude, states and international organs have made their stance on the undertaking to change the absolute prohibition of torture clear. Even if some states have *de facto* supported torture by the United States, they have nevertheless *de iure* fortified the torture norm if they simultaneously opposed torture openly.

dd) Summary: No Change in Opinio Iuris

While Amnesty International argues that it is statistically impossible to assess "the global scale of torture [as it] takes place in the shadows" [157] others claim to be able to measure whether states have changed their practice in a qualitatively or quantitatively relevant manner.[158] However, decisive for the question of norm erosion is whether the interpretation of the prohibition of torture and thus the *opinio iuris* has changed. This is not the case: while the prohibition of torture has been challenged by some, others, including governments, courts, and other actors of international law, have continued to support the prohibition of torture, *inter alia* by protesting against the use of torture by the United States. Neither the norm as such nor its definition has been altered. Even then-US President George W. Bush sent positive signals in support of the prohibition of torture: "The United States is committed to the worldwide elimination of torture, and we are leading this fight by example."[159] Moreover, then-US President Barack Obama stated in 2016: "(I) affirm the United States' abiding commitment to achieve a world without torture or other cruel, inhuman, or degrading treatment or punishment."[160] While these statements supporting the absolute prohibition of torture stand in contrast to the United States' actions, the latter is not decisive: as seen above, in order to change norms, non-compliance is not enough, but rather states must be convinced that the norm has indeed changed. This is exactly not the case in the "War on Terror", as violations of the prohibition of torture were secretly committed and denied while the torture prohibition was officially upheld.

3. Conclusion: Why the Prohibition of Torture is Alive and Well and Remains Unchanged

To conclude, the prohibition of torture has been under attack by the United States and other states since 9/11 but has proven to be highly resilient. Why is that the case? International law reinforces international relations research which has identified elements that make a norm more robust and resilient. These elements are the fundamental value that a norm protects – which is signified inter alia by the *ius cogens* status of a norm; norm preciseness – which is mirrored by the possibility to interpret norms widely or narrowly; implementation of norms – which describes whether domestic laws have been adopted; concordance – which describes the level of number of ratifications and, lastly, the embeddedness of the norm – which describes the institutionalisation of supervisory mechanisms and the existence of ensuing international law norms. While international relation

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[157] Amnesty International, Torture in 2014: 30 Years of Broken Promises, 13 May 2014, https://www.amnesty.org/download/Documents/4000/act400042014en.pdf (last access 15 February 2022), p. 10.

[158] E.g. Schmidt/Sikkink (n 35), 112-115 find reduced compliance especially in states that have participated in instances of torture led by the USA but no overall erosion of the norm.

[159] George W. Bush, Statement by the President (n 143).

[160] US President Barack Obama, Statement by the President on the International Day in Support of Victims of Torture, Office of the Press Secretary, 26 June 2006, https://obamawhitehouse.archives.gov/the-press-office/2016/06/26/statement-president-international-day-support-victims-torture (last access 15 February 2022).

research terms these elements in its specific language they refer either directly or indirectly to matters governed by rules of international law.

This close nexus between international relations and international law becomes obvious by applying these criteria to the prohibition of torture that fulfils all these elements and is thus very robust and resilient to norm change: It is highly institutionalised as many international and national organs exist that engage in a dialogue with each other and with states and other relevant actors.[161] Torture is constantly and consistently renounced by all kinds of actors, be it international bodies, national governments or non-governmental organisations. This dialogue and constant renouncement of torture strengthens the prohibition and helps in internalising it. The prohibition is also embedded in an entire regime of norms that aim at preventing torture and remedying torture and which has been ratified by nearly all states. While these norms emanate on the international level they have also been implemented on the domestic level. Furthermore, the definition of torture, while leaving some room for interpretation, is clear and precise. Lastly, the prohibition of torture is a norm of *ius cogens* which gives it a special status in international law.[162] This special status is based on the understanding that *ius cogens* norms protect fundamental values of special importance to the international community as a whole.[163]

While these insights do not allow us to solve the paradox of the heaps, they show that the prohibition of torture is a norm which is very hard to erode and, while torture is taking place in many states on a regular basis, states, even the non-compliant ones, do not question the validity of the absolute prohibition of torture but, on the contrary, even explicitly uphold it and thus show their continued support for the prohibition of torture. To argue against the validity of the prohibition of torture, however, would be necessary (albeit not sufficient) to erode it as simple non-compliance cannot change a norm. Thus, although law can generally be born out of illegality, the prohibition of torture is not endangered normatively and cannot serve as an example for value change and the metamorphosis of international law. While indeed the prohibition of torture is under attack and is often not complied with, its normativity has not eroded and thus its prescriptive force remains unchanged.

[161] For the importance of institutionalisation and dialogue in order to protect human rights in general, see Monica Hakimi, The Work of International Law (2017) Harvard International Law Journal 58/1, 1-46 and Gráinne de Burca, Human Rights Experimentalism (2017), American Journal of International Law 111/2, 277-316.

[162] Kleinlein (n 90), 12-13.

[163] Mik (n 83), 40; Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford: OUP 2006), pp. 46-47.; Stefanie Schmahl, 'An Example of Ius Cogens: The Status of Prisoner of War', in: Christian Tomuschat and Jean-Marc Thouvenin (eds.), *The Fundamental Rules of the International Legal Order. Ius Cogens and Obligations Erga Omnes* (Leiden Martinus Nijhoff 2006), 41-68, pp. 47-49.

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The Kolleg-Forschungsgruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. We assume that a systemically relevant crisis of international law of unusual proportions is currently taking place which requires a reassessment of the state and the role of the international legal order. Do the challenges which have arisen in recent years lead to a new type of international law? Do we witness the return of a ‘classical’ type of international law in which States have more political leeway? Or are we simply observing a slump in the development of an international rule of law based on a universal understanding of values? What role can, and should, international law play in the future?

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