Did the anti-torture norm develop into a full-fledged legal norm?
Declaration

I, Dalia Elkady, confirm that the work submitted in this thesis is mine. Where information is derived from external sources, I confirm that this had been indicated in the thesis.
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Introduction

In his first comment on Boston bombings president Barack Obama addressed his people saying, as a part of his briefing, "any responsible individuals, any responsible groups, will feel the full weight of justice." While balanced, calculated, and assuring his words had triggered a strong wave of criticisms among many ordinary Americans mainly because the president did not use the word "terrorists" in describing the executers of the attacks. For the critics of the president such avoidance of using the is directly translated
into being "soft on the American national security". However, any political science or a law student would know well that immediately designating the executers as "terrorist" prior to any meaningful investigations would be a purely outrageous and politically-driven approach to the crisis simply because there was no enough information available at that time that demonstrates that the attacks were for a certain political agenda which is the demarcating line between what is "criminal" and what is "terrorist". Actually, the majority of those critics were expecting to hear an overwhelming political speech similar to that of the former American president George W. Bush in which America heroically accepts the "white man burden" to act on the behalf of the civilized world, patriotically wages a noble war against terrorism, and where terms such as: pre-emptive self-defense and public emergency take center stage. In fact, in the aftermath of September 11th attacks of 2001 and in the context of the so-called "Global war on terror" the American public was bombarded by extra-ordinary political decisions, extended legal debates, and even full-scale military actions. As a matter of fact many of these far-reaching implications had exhibited a kind of diminishing intensity and decreasing relevance over the course of the few past years. For example, the American troops had been withdrawn from Iraq, and in the Afghani case there is a scheduled plan for disengagement. However, only one implication had shown a constant or even increasing momentum especially after the latest Boston bombings. Undoubtedly, this implication is the introduction of the debate over the conditional legality of torture into the American legal and political scenes.

Before the attacks no one had ever imagined that torture and law would be linked together in a positive manner in a full sentence. Moreover,
prior to the attacks conditionally legalizing torture was not by any mean a
debatable matter instead it was perceived as both a political taboo and a
legal scandal. However, given the severity of the crisis the debate had gained
grounds and even found a supportive public opinion which in its turn formed
an inductive environment for such developments to take place. Undoubtedly,
any nation faced with a similar threat would more often than not react by
altering the already delicate balance between the national security on the
one hand and human rights and civil liberties on the other. However, Ulbrick
(2005,p:214) asserts that in the American case the reaction is to some extent
phobic as America had never been put under such dire threat since the
Japanese attack on pearl harbor. He further argues that in such situation
America is prone to hasty judgments and radical measures given that it
historically had enjoyed immunity from both external attacks as it is
shielded by vast oceans and pacific neighbors, and internal political stability
as opposed to countries where radical shifts and revolutions are just as
normal and regular as seasons.

Just as the former president, Ronald Regan, was thinking the
unthinkable when he thought of winning a nuclear war, the former president
Bush (Jr.) had as well thought the unthinkable when he sponsored a pseudo-
legal campaign to grant the most barbaric practice, torture, a humane,
civilized, and even moral face. In fact, the practice of torture in the American
detention camps was not the behavior of "few bad apples" instead it was a
kind of quasi-declared state policy which enjoys a top-down official sanction.
Such systematic approach to torture could be easily inferred from the 2006
September 6th speech of Bush before the military commission of the
congress in which he gladly announced that "the alternatives had yielded information". Moreover, such state initiated "green light" could be shockingly clear in the statement of Coffer Black, the head of CIA counter-terrorism department, during the joint hearing of the house and senate intelligence committees in which he admitted that "All I want to say that there was before '9/11' and after '9/11'. After 9/11 the gloves came off.", Ulbrick (2005, p:210).

Thus the main aim of this thesis is to prove that "taking the gloves off" was illegal before '9/11' and will continue to be illegal after it since international law is not a draft law to be passed or blocked in the American congress or a function in the American national security equation. In other words, the main thrive of this work is to carefully examine and analyze the legal standing of the anti-torture norm since its inception as a strand of the broader humanitarian international law as well as assessing its legal strength utilizing the four sources of international law as they appear on the ICJ statute in an effort to ultimately prove that it had established itself not only as a dominant foreign policy vocabulary employed by state heads to give an aura of modernity and civilization. Instead, it had over the course of years evolved to become a full-fledged legal norm that belongs to the "jus cogens" category that cannot be legally bypassed by states when the political situation necessitates so. According to article (53) of Vienna conventions on the law of treaties a peremptory norm, jus cogens, is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. Moreover, this thesis intends to pinpoint the weaknesses of the legal regime of this norm that
make it in a way or other vulnerable to purely political calculations and strategic power considerations. As a matter of fact, the ultimate objective of this work is to prove that the upholding the absoluteness of the anti-torture norm is not a form of moral or ethical crusade nor off-the-shelf rhetoric aimed at shoring up a needed political popularity. In fact, the absoluteness of the prohibition of torture is of solid legal grounds protected by international law that had made fair achievements in protecting human rights.

As for the division of chapters it will be as follows: The first chapter will mainly shed some light about the very beginnings of this legal debate, tackling some fundamental questions such as: what were the factors that initiated it?, what was the public response to such debate?. The second chapter will tackle the first developmental stages of the norm i.e. offering an insight about the first calls to codify it, and the major events that had led to the normative entrepreneurship of torture prohibition. So, it is going to offer an overview about the historical roots of the norm and more importantly it is going to dwell even beyond the second world war which a significant group of scholars mark it as a major turning point in this respect. Nevertheless, it is important to note that this historical examination is not exhaustive meaning that it would only identify the major and most relevant examples, as the exhaustive study would go far beyond the scope of this work. Moreover, the third chapter will provide the reader with extensive insights about the legal debate over whether international law allows torture in times of tragic necessity or not. Meaning that it will provide the reader with a compact literature review, offering a survey of the legal arguments advanced by the proponents and the opponents of the conditional legality of torture in an
attempt to give a fully balanced and complete picture before advancing the main argument of the work. As for the fourth chapter it will be divided into two separate sections. The first will explore the justifications provided for the admission of the conditional legality of torture and the necessity of revising the absoluteness of the norm, while the second will be concerned with exploring the counter-arguments of the opposing camp which refuses compromising the absoluteness of the norm under any circumstances. Actually, this chapter will provide the theoretical framework within which the debate takes place since each of the two camps formulate their respective arguments against theoretical backgrounds. Moreover, the fifth chapter will advance the main argument of this work which is proving that torture could not be conditionally legalized whatsoever through investigating the four sources of international law. The sixth chapter will be mainly concerned with pinpointing the reasons behind the vulnerability of the norm to politically-motivated legal maneuvers that had ultimately resulted in the emergence of the debate over the conditional legality of torture.

Chapter one:

The beginning of a previously unimagined politically-loaded legal debate
In his description of the legal and moral status of torture Shue (1978,p;124-143) held robustly that "no other practice except slavery is so universally and unanimously condemned by humans and law conventions". In fact, Shue was among a wide array of scholars, legal jurists, political thinkers and even some politicians who were totally assured that the officially-sanctioned torture has no relevance to the modern world of civilized nations and that international law had successfully addressed this barbarian practice and had over the course of the years incrementally rendered it unthinkable to openly champion it or try to legalize it under any circumstances. However, the terrorist attacks of September 11th 2001 on what was before considered a remote target, the American homeland, had resulted in an unprecedented systematic attempts to undermine and weaken the legal basis of the anti-torture norm in the context of what became internationally known and promoted as "war on terror". According to Nadelmann (2004,p:479-486) this new war had suddenly and aggressively shattered the widespread belief that torture only belongs to the past and caused a previously unimaginable debate about the conditional legality of torture to dominate the international legal scene. Hundreds of years ago the Dutch jurist Hugo Grotius argued that "war for the attainment of their object, it can't be denied, must employ force and torture as their most proper agents". Actually, reading these words against the backdrop of the shocking Abu Ghariel photos it would be overwhelmingly tempting to visualize the efforts to outlaw torture as a perfectly circular motion whereby the starting point and the endpoint are nothing more than a clear manifestation of "the law of power" and "not the power of law". However, being deeply caught in this realist pessimism
resembles a complete breakaway with reality which says that there is a huge legal literature concerning this subject that can never be dismissed that fast and that still there is a heated debate over the issue where the victory at the very end will be on the side of the better argument.

Expectedly, spearheading this struggle to legalize torture under certain conditions is the target of the attacks, the US. Under the auspices of the Bush administration the world super power had taken up the role of a norm entrepreneur trying to advance to the forefront a number of arguments that would serve to give torture the stamp of legitimacy and legality. Moreover, it is important here to note that the US attempts and efforts to conditionally legalize torture are running in a bi-dimensional manner. On the one hand it tries to narrow the scope of what qualifies as a torture, by reinterpreting the definition of torture as it appears on the relevant conventions and charters. And on the other, it saves no effort in combating the anti-torture norm by portraying it as a imminent threat to the national security and hence crippling the nation's ability to fully practice its inherent right under international law to defend itself in the time of crisis. So scenarios such as the "ticking time bomb" and "the lesser evil" began to be of repeated use by many US officials in their discussions about the subject and more importantly it started to find attentive ears from a traumatized public at least on both domestic and European levels. Moreover, this kind of new emerging public opinion, whether engineered or spontaneous, towards the previously unchallenged absolute legal prohibition on torture is best manifested in the overwhelming success of the TV series "24". This series shows how a CIA agent, Jack Bauer, in his mission to save the nation from impending terrorist
attacks has no other choice but to employ harsh interrogation techniques in order to extract the needed intelligence information from the suspects and detainees. In fact, what comes to the center of the discussion about Bauer in the contemporary political landscape of the counter-terrorist era is whether he is a hero to be glorified or a criminal to be prosecuted.

Bearing all these new developments in mind would only lead to one fair and logical question that says: had international law completely closed the door in the face of any attempts to legalize torture?. Putting it in a more sophisticated and technical fashion would unfold as: had the anti torture norm reached the threshold of a well established legal norm? , and if so why till now there is a heated legal debate about the subject ?. Actually, these kind of questions acquire a greater momentum when examined against the backdrop of what Toope and Brunnee (2010,p;230-242) call the" norm lifecycle". Taking a perfectly constructivist approach to international law they argue that almost there is nothing sacred in international law and that every norm can either evolve or fade depending on whether a community of practice which has its intellectual roots in a shared understanding is present and vibrant or not . Meaning that legal norms do not come out of thin air or are born in a vacuum instead they are deliberately "constructed" by the continuous interactions among states who in this dynamic process play the role of the lawmakers and the subjects simultaneously. Given this fluidity, determining the legal standing of any norm could never be fully accomplished without studying and analyzing its historical practice by the international agents, states, along with investigating the degree of acceptance of this norm as a law, opiniojurus.
Chapter two

The Historical narrative of the law against torture: A tale of three persistent trends

Undoubtedly, the concept of torture prohibition is now an archetype of the broader international humanitarian law. However, to assume that such high legal status was enjoyed by the anti-torture norm since its creation is a greatly flawed approach to the subject under discussion. In fact, the prohibition on torture is the ultimate product of an incremental and long process of interaction between different political, legal, and cultural forces that had together pushed towards such evolutionary development. Put differently, the prohibition on torture is by no mean a given instead it is the culmination of decades of conscious humanitarian efforts, legal struggles, and scholarly endeavors efforts as well as the byproduct of certain catastrophic events such as: the holocaust that had shocked the conscience of the international community and eventually catalyzed such development. But despite such difference in the legal force of the norm across time, there had been a persistent and a more or less constant feature of the norm that enjoyed a continued relevance at almost all of its various developmental stages. Actually, this feature is the historically-evident gap between the state practice and the law. This gap had sustained itself mainly through three backdoors of the legal construction of the norm. These three "axes of evil", to borrow from Bush (Jr.) the term, are the (1) definition of what constitutes torture, (2) the exclusion of certain classes of people from the protections of
the law, and (3) finally the artificially created trade-off between upholding the law and national security. In fact, these three trends will be pinpointed as the historical examination unfolds in the following part. Moreover, the reader will be provided by a cursory account of these trends in their contemporary versions so as to clarify the extent of their persistence regardless of the degree of variance in the process of political packaging and re-packaging.

Although torture is a kind of global phenomenon which according to Langbein (2006, P:42-59) had penetrated the basic tribal societies as well as most sophisticated democracies and had spanned a long history of the human society starting from ancient Rome till our contemporary world, history demonstrates that there had been a corresponding attempts to restrict this barbaric practice, and reduce its brutality long before equivocally banning it by international law. Such attempts to restrict torture could be traced back to 1215 when in continental Europe the "judicial torture" had replaced the older trial system by the "ordeal". In fact, this development marks a very important progress regarding regulating the state's use of torture against individuals held as suspects under its custody. Actually, the positive influence of such replacement could be attributed back to the extreme barbarity of the ordeal" system whereby God was believed to have demonstrated the guilt of a suspect by affecting his/her ability to withstand the pain of certain torturous acts. For example, it was commonplace to force the suspect to hold a burning iron and if the wounds healed quickly then God was declaring his/her innocence if not they were certainly guilty, Gross (2004, P:50-59). Given such severity, "judicial torture" resembled a more rational and a less torture-dependent trial system whereby torture was a part of the broader" law of
proof” doctrine that had dominated the European penology at that time of history. According to that doctrine guilt could never be established unless there is an "absolute certainty" which in its turn could be only established by either eyewitness giving a testimony or the confession of the suspect. In fact, back then, there was still no legitimacy for neither the circumstantial evidence nor the justice judgment in establishing guilt. So against such legal doctrinal setting torture was the only "exit door" in cases where there was no eyewitness and the suspect is denying the guilt. However, what is central to the purpose of this work is that there were some safeguards aimed at restricting torture as much as possible in a way that does not compromise the ultimate aim of establishing justice through extracting the needed information. According to Baker (1978, p: 337-340) these safeguards ranged from having a relatively strong circumstantial evidences to using certain methods to using the threat of torture first before the act itself.

Waldron (2005,p:1681-1750) argues that these safeguards were the very basic building blocks of the huge legal regime of the norm prohibiting torture given that they portrayed torture as the last resort and the necessary evil. Actually, the safeguards of the "judicial torture" had laid the foundation of the establishment torture as an exception to the rule not as the normal status of affairs as it was the case with the previous "ordeal" system. As a matter of fact, the forward progress regarding restricting torture had culminated in the mid 18th century in the form of torture abolition when certain legal, political, and cultural factors had favored such change.
Culturally speaking, it was the moral awakening of the enlightenment and its attendant emphasis on human dignity and rights that had set the stage for such development to take place. In this respect, Cassese (2004,p: 1-5) asserts that some influential figures such as Voltaire and Beccaria had led the struggle to abolish torture and had sown the seeds of anti-torture political cultural that had shaped the western political discourse arguably till now. Politically speaking, Evans (2002,p:365-383) maintains that for the liberal revolutionaries of the enlightenment movement torture as an oppressive state practice was associated with the despotic ancient regimes. That why is any abusive or repressive state policy towards the individuals such as torture was extensively condemned in the dominant political discourse at that time as expressed in declarations such as the French declaration of man and citizen of 1789 and the American declaration of independence of 1776. Legally speaking, Langbein (2006,P:42-59) argues forcefully that if it was not for the radical change in penology that involved the shift towards the modern standards of proof as we know it now, particularly the judicial evaluation of evidences which in its turn eliminated the need for obtaining confessions, abolishing torture could have continued to be a remote or even impossible target.

Although, torture abolition was a breakthrough across Europe given the previous tradition of "judicial torture" some would argue that the implications of such progress was far from being even across the continent. This is mainly because Britain had resembled a kind of utopian island where there had never been a tradition of "judicial torture". However, this is not to suggest that torture was not practiced, instead the English case
is also a further manifestation of the previously mentioned historical gap between the actual state practice on the one hand and the letter and the purpose of the law on the other. Waldron (2005, p:1681-1750) argues that in Britain torture was an "engine of the state and not the law" the thing that enabled the state to create an exceptional space of urgency which ultimately allows torture. Meaning that torture was extra-legal allowed by a conscious executive decision in crimes where national security was at threat such as: treason. In fact such tradition represents the persistent trend of the "human rights vs. national security " dichotomy. In addition, Evans (2002, p: 365-383) asserts that the majority of these "torture warrants" were during Elizabethan Britain. In fact, it is sadly true that while centuries had passed since that historical moment the American administration under Bush had its own version of this trend which happened to be Dershowitz 's torture warrants that calls for allowing torture by an executive order in times of crisis. Moreover, another relatively recent manifestation of the same trend had revealed itself in 1999 when the Israeli supreme court had in the name of "defense of necessity" allowed Israeli security Agency (ISA) to employ "moderate physical pressure " in times of severe public emergencies.

Moreover, the historical gap in the English case was not only sustained by the extra-legal practice of torture in the exceptional cases instead it was also the legitimate son of the continuous ambiguity about what could be considered torture. Meaning that in Britain there was a process called "peine forte et dure" whereby an accused criminal who refuses to enter a plea, as was allowed till the 18th century, could be physically coerced to do so. According to Langbein (2006, P:42-59) this physical coercion involves that the
accused criminal is extended, and then to have little by little weights laid upon his body while naked in the open air. Such avoidance of calling certain abusive acts torture finds strong relevance till now, particularly due to the vague definition of torture as it appears on the most relevant torture-centered convention, the (UNCAT), which will be the main subject of chapter six. In fact, the contemporary version of this trend is the infamous American Bybee memo of 2002 which extensively restricts the scope of torture rendering acts such as water-boarding below the threshold of the legally prohibited torture.

Of course, the developments which took place in the post-WW(II) context are for many observers of particular vitality with respect to prohibiting torture. Actually, that is mainly because it was at that time when modern international law emerged as we know it now with its attendant instruments and governing principles. In this respect, Waldron (2005, p:1681-1750) maintains that the atrocities committed during the war had caused the victorious allies in the aftermath of the war to rethink their humanitarian profile which did not seem to be compatible with their liberal identity and allegedly egalitarian school of thought. Moreover, it was against this background when the United Nations produced the backbone of the humanitarian movement namely the United Nations Declaration of Human Rights in which torture was absolutely prohibited in Article(5). In addition, (2005, p:210-237) asserts that Nuremberg trials had created an atmosphere of ambition regarding criminalizing torture and other systematic human rights violations given that it was the first time to prosecute leaders for committing war crimes. In fact, it is widely believed that in the aftermath of the Second World War the humanitarian cause in general and the law prohibiting torture
in particular were more than reality-divorced aspirations. However, to accept such perception at face value is greatly flawed especially when examined against the widespread practice of torture by the preachers of human rights, the European powers, in their overseas colonies. (2005, P: 285-340) points to the scandalous French use of torture in Algeria when at home torture was almost only of historical interest. Actually, such double standards highlight the third persistent trend which is the exclusion of certain classes of people from the protections of the prohibition law. Undoubtedly, this trend had explicitly exhibited itself in the American labeling of Al-Qaida and Taliban members as "unlawful enemy combatants" thus refusing to extend the protections of Geneva conventions to them.

Another crucial development in the trajectory of the norm is the signing and ratification of the United Nations convention against torture (UNCAT) in 1984 by most of the world states. Actually, the particular importance of the (UNCAT) does not only stem from the fact that it is the most comprehensive document with respect to torture given that it directly addresses torture as a practice not as a part of a broader humanitarian framework but also from the fact that it is first document to define torture. Although many observers such as Sands (2008, P: 120-150) questions the effectiveness of the (UNCAT) because of its structural flaws in the definitional issue still there could be no any serious discussion about the illegality of torture under international law without referring to it. In addition, the inclusion of torture as an international crime that falls within the jurisdiction of the international criminal court (ICC) in its founding Rome statute is a further positive development that ensured the high legal status of the prohibition of torture under international law.
So after this briefing of the historical development of the prohibition of torture it is fairly legitimate to come up with some conclusions. Firstly, torture was discussed in relation to the criminal law and it started being linked to human rights only after the Second World War. Secondly, the moral wakening and the liberal political discourse of the enlightenment movement as well as the shift from the "law of proof" in penology had all together formed an inductive environment for the subsequent abolition of torture in Europe. Thirdly, after WWII the international humanitarian law in general and the prohibition on torture in particular had gained momentum given the atrocities committed during the war that highlighted the necessity of taming the shockingly barbaric state practices. Fourthly, the prohibition of torture had shown three persistent trends that served as the "backdoors" aimed at challenging the absoluteness of the prohibition the thing which ultimately sustained the gap between state practice and the law as found on the relevant conventions and treaties. The first of these trends is the uncertainty concerning what constitutes torture, the definitional issue. The second is creating a space of exceptionality where torture is seen as an imperative aimed at averting a catastrophe. The third is the tendency to exempt certain groups from the protections of the prohibition of torture.

Chapter three

Literature review of the legal debate over the conditional legality
Definitely, the debate over the conditional legality of torture had generated a relatively huge scholarly literature that divided the jurists and law professors into two distinct camps. Actually, a cursory surveying of their stances is of crucial importance as it would serve as the best departure point of this work as it gives a glimpse about the nature and the degree of their disagreement. Among those who forcefully argue for the strong legal grounds of the anti-torture norm is Goodliffe (2006, p:364-370) who had described this whole debate as a sterile struggle over a preemptory norm from which no derogation is ever allowed. He based his viewpoint on the absolute prohibition on torture contained in the United Nations Convention Against Torture (UNCAT) of 1984 which says in Article 2 "no exceptional circumstances whatsoever" are to justify the practice of torture. In addition, Hawkins (2004, p:782-803) maintains that legalizing torture under any circumstances would immediately mean violating the human security in the name of national security and he further added that today's world is different from that prior to the second world war when Stalin used to commit crimes against the Russian citizens and Hitler used to persecute the Jews and it only remained a domestic incidents where the international community viewed such criminal acts simply as "their business". For him today's world had developed the necessary legal tools and institutions that ultimately made nothing more basic than the unconditional prohibition on torture. Moreover, Gross (2004, P:50-59) maintains that the absolute prohibition on torture is an integral part of the customary international law citing the illustrative phrase of Pieter Kooijmans, the First Special Rapporteur on Torture for the UN Commission on Human Rights and current ICJ justice which states "The
prohibition of torture can be considered a jus cogens. If ever a phenomenon was outlawed unreservedly and unequivocally it is torture … If there was some disagreement [in the general assembly] in respect to the [convention against torture], it had to do with the methods of control and implementation. There was no disagreement whatsoever that torture was absolutely forbidden”. In addition, Cullen (2004,p:29-46) argues that since the judicial decisions are considered to be "law determining" as well as the fourth source of international law as dictated by article (38) of the ICJ statute, the anti-torture norm belongs to the "jus cogens" body of laws. He bases his argument on the decisions of the Hungarian, Belgian, and Swiss constitutional courts which considered torture to be a crime against humanity and thus its absolute prohibition is non-derogable. According to Cassese (2004,p:1-5) the most powerful evidence that the anti-torture norm is part of the customary international law is that torture is a crime that falls within the jurisdiction of the international criminal court whose charter he stated "enshrined provisions of jus cogens"

On the other hand, the other camp is strongly committed to exposing what they believe to be the fragility of the anti-torture norm in international law. For instance, Nadelmann (2004,p:481-502) argues that the anti-torture norm had failed to meet two basic criteria of legality of the highly respected Lon Fuller legal theory which are precision and clarity. In his argument he relied on what he called the "ill-definition" of what qualifies as a torture, describing its articulation in the relevant conventions and treaties as vague and ambiguous. Furthermore, Toope and Brunnee (2010,p:215-227) tackle the subject from an interactional view point arguing the anti-torture
norm had failed to form a kind of a legality practice, pointing to the widespread of torture across the world, albeit secretly. They assert that the practice of torture did not freeze at any point of time and that it had prevailed even in the 20th century when the fascist regimes of Europe, and the European colonial powers, and the tyrannical third world countries employed it as an effective strategy to harness political gains. In addition, Toope and Brunnee (2010, p:250-255) believe that the norm did not really reach the level of being accepted and perceived as a binding law, instead it was most of the times portrayed as an aspiration and not as an operating reality. Moreover, Brecher (2007, P:236-270) maintains that since self-defense is an inherent right that is both clearly codified as in the UN charter and other international and is well established as a custom, it would be completely illegal to hinge the practice of such right on the much disputed and legally unsettled absolute prohibition of torture. As for Bagaric and Clarke (2007) abiding by the law would be nothing else other than legalizing torture in times of public emergency since there is nothing stronger among the international norms more than the "sovereignty" norm which when examined along the right of "self-defense" and under the umbrella of the crucial reservation attached to the multi-lateral treaties prohibiting torture would only lead to concluding that still there is a legal space for the conditional legality of torture.

Chapter four

The theoretical framework of the debate

4.(A): why is it necessary to revise the absoluteness of the prohibition of torture?
The best departure point for the following section of this thesis is to strongly assert and completely clarify that the all of the coming arguments are not for or against the legality of torture instead they are regarding the "conditional" legality of torture. In fact, the author believes that arguing for the legality of torture generally in today's modern world will be as implausible as arguing that the earth is flat rather than round as well as devoting a whole scholarly work for reflecting upon such arguments does not even worth the ink spelled in the process. Actually, such implausibility or intellectual bankruptcy does not characterize the debate concerning the conditional legality of torture which finds many proponents who formulate their justifications within different theoretical frames. Firstly, there is the realist argument which suggests that in times of crisis putting exaggerated emphasis on due process would significantly strangles the ability of any nation to combat any threat and effectively defend its interests, national security, or even existence. Definitely, in this context the hypothetical scenario of the ticking time bomb (TTB) plays a central role portraying self defense and observing the anti-torture norm as perfectly mutually exclusive elements. According to Ulbrick (2005,p:210-237) one of the US officials responsible for countering terrorism in Afghanistan once said "if you don't violate someone's human rights some of the time, you probably are not doing your job". It is shocking how such purely realist stance would find support beyond the circles of the officials in the interrogation sites and penetrate well into the legal society the thing which was clearly manifested in the words of Richard Posner, the federal appellate and university of Chicago law professor when he suggested that no one denies the credibility of the (TTB)
should be in a position of responsibility. Moreover, the realist proponents of the conditional legality of torture go on arguing that the protections of 1949 Geneva conventions, which regulate the conduct of states in times of war (jus in bello), should not be extended to members of Al-Qaida or Taliban. In this respect, Bagaric and Clarke (2007, p) assert that Geneva conventions were formulated at a certain historical moment which disqualify it from being effective in governing the 21st century global war on terror (GWOT). They point to the so-called "new paradigm" of warfare as expressed in the (GWOT) asserting that for many reasons the conventional Geneva provisions are not suitable for the dealing with the unconventional vexing enemy. For them these reasons are as follows: firstly, Al-Qaida and Taliban are stateless entities and accordingly they have no fixed bridges to bomb, no battleships to sink, and no legitimate and internationally recognized leadership to negotiate with the thing which ultimately renders victory in this war tremendously dependent on intelligence gathering more than anything else. Secondly, they are terrorist organizations don't obey international law by their conscious and deliberate targeting of innocent civilians. Thirdly, the fact that these organizations are seeking weapons of mass destruction (WMD) creates an undeniable sense of urgency to contain and combat this threat as fast as possible given the catastrophic implications not only on America but the whole world that such possession would have.

Another important justification to the conditional legality of torture finds its intellectual roots in the utilitarian theory which generally suggests that any law or policy could be assessed as being positive or negative according to the level of utility, if any, it brings upon its implementation. Expectedly, the theory
as originally formulated by the famous English thinker Jeremy Bentham suggests that laws or policies that have positive effects should be kept and strictly upheld while policies that either don’t have the intended effects or have negative implications shall be revised. In fact, The American judge Allan M. Dershowitz had echoed such reasoning when he suggested the infamous "torture warrants" which for him represented the only remedy to what he called the "endemic hypocrisy" as expressed by persistent historical gap between law and practice concerning torture. For him the absolute prohibition of torture proved to be ineffective in restraining state behavior the thing which ultimately led to the clandestine, underground, and unchecked practice of torture. According to Dershowitz the warrants are designed to bring this already existent practice to the light thus regulating it and holding who employs it accountable.

While many would expect to find the liberal reasoning in the camp absolutely prohibiting torture, in fact the conditional legality of torture had found some liberals arguing for its plausibility. For example, Gross (2004, P: 50-59) maintains that there could be a margin left for liberal democracies to practice torture in times of sever crisis given that such practice would be limited in scope and technique. Meaning that the liberal democracies would not go so far in the practice of torture either in when to employ it and under what conditions or in the brutality of the acts. Actually, it is within this particular ideational context that terms such as: "torture-lite", "enhanced interrogation techniques", and "moderate physical pressure" take Centre stage. Moreover, the infamous suggestion of Dershowitz to torture the suspects with "sterilized" needles is another manifestation of such reasoning line that puts
emphasis on the liberal identity of the employer of torture suggesting that it is the guarantee against any abuse or unnecessary exaggeration.

For a considerable sector of the proponents of conditional legality of torture the practice is not only logically sound or rationally accepted but morally necessary as well. In this respect, Hathaway (2004, P:140-162) asserts that refusing the conditional legality of torture is a kind of moral laziness given that at some exceptional situations torture becomes the only mean by which a humanitarian catastrophe could be averted thus saving thousands of innocent civilians. In addition, the overall moral argument with its various expressions ultimately aims to stress that stubbornly upholding the absoluteness of the norm directly means abandoning the long-term justice to achieve the immediate justice. However, not all of the proponents who subscribe to the notion of moral necessity of torture in times of emergency accepts that not torturing a suspect represents a kind of immediate justice. For example, Brecher (2007, P:236-270) holds that terrorists had forfeited their rights as human beings and thus violating their voluntarily discarded rights in the name of defending the rights of hundreds or even thousands of civilians who are for those terrorists mere numbers is nothing but the actual execution of justice and the spirit of the law.

4 .(B): Why is torture always unjustifiable?

Undoubtedly, such arguments had triggered a wide array of counter-arguments which stress the unjustifiability of torture under any conditions and for any reason. Generally, this camp suggests that the costs of
institutionalizing torture greatly exceed the perceived potential benefits. Meaning that institutionalizing torture would have far reaching and unintended negative consequences among which is the creation of "torture culture" and an atmosphere of permissibility. In this respect, Lazerg (2008, P: 15-32) argues that once torture finds its way even in the most restrictive manner a process of gradual and implicit normalization of the practice ensues in eventually causing it to be a routine. In addition, it could be argued that even if torture was allowed extra-legally as an agent of the state and not of the law this would ultimately lead to its incorporation into the law since the membrane separating the two realms is arguably thin. While the liberal identity of the state was viewed by the opposite camp as a more or less a qualification of this respective state to practice the so-called "torture-lite" since its liberal identity would limit and constraint its behavior, this camp completely reverse such proposal. Meaning that the liberal opponents of the conditional legality of torture argue that when a liberal democracy allows torture to be practiced within its jurisdiction this carries with it a special cost. Shue (2006, P: 24-37) holds that if liberal states are considering legalizing torture under certain conditions then it is quite expected to find that the dictatorial and despotic regimes seeking to relax the already loose humanitarian standards they are upholding in their interrogation sites, police stations, and prisons. In fact, such argument only gains credibility after a brief examination of reports from international humanitarian organizations such as: Amnesty international (AI) and human rights watch (HRW) which points to the mushrooming of the practice of torture in the Middle Eastern countries in the aftermath of
September attacks and its attendant systematic American attempts to shake the legal grounds of the absolute prohibition of torture.

Moreover, some argue for the unjustifiability of torture by criticizing the most powerful and persuasive argument advanced by the other camp which is the (TTB) scenario. For example, Waldron (2010, P: 302-320) holds that at best TTB is a sheer wild fantasy and that can never establish itself as an operating reality. In fact, there are many flaws and contradictions in the structural construction of the TTB hypothetical. According to Ulbrick (2005, p: 210-237) there is a very obvious inconsistency which manifests itself in the inability of the interrogator to know the site of the bomb while knowing for sure that firstly (1) it is certainly going to explode secondly (2) that this going to take place so shortly which leaves him only with option of employing torture thirdly (3) that the suspect under his custody has the needed information.

Moreover, Shue (2006, P: 24-37) argues that the (TTB) scenario is nothing more than a successful tool of political mobilization not only because it rarely happens in reality but also because most of the torture takes place in the "softening up" process prior to the actual interrogation the thing which renders the elements of urgency, and necessity at best perfectly void.

As for the utilitarian reasoning, employed by the proponents of the conditional legality of torture, so as to find justification for torture on the grounds of the claimed ineffectiveness of the absolute prohibition, this camp strongly strips it from its credibility. For example, Lazerg (2008, P: 15-32) asserts that such proposal in extensively invalid since it would be far more rational to try to enhance the effectiveness of a certain law in case it
was limited than to discard it. He gives an illustrative example by arguing that it would be equally plausible to discard the absolute prohibition of torture on the grounds that it was not effective in the elimination of the practice as it would be plausible to discard the law criminalizing murder simply because it was ineffective in eliminating the crime. Actually, this argument gains enhanced validity when examined against the general ineffectiveness of international law as a whole the thing which demonstrates that the problem is not particular to the anti-torture norm. In addition, Waldron (2010,P:302-320) suggests a vast majority of those offering justification for torture in exceptional circumstances would not adhere to such stance if the element of generalizability was invoked. Meaning that if the current situation changed and Hamas after holding power in Gaza had under its custody Israeli suspects who were believed to have some needed information would this conditional legality be generalized to cover this situation.

Chapter five

On the(illegality) of conditional torture: The legal basis of the "jus cogens" character of the norm prohibiting torture

Although the word" law" implies equality and evenness, there happens to be a hierarchy in its huge body of rules ,norms ,and protections . Meaning that in international law there are two basic classes of norms ,jus dispositivum and
As for the jus dispositivum norms they are the set of rules from which derogation is allowed while in" jus cogens" are the set of rules from which derogation is never allowed. According to article (53) of Vienna convention on law of treaties a jus cogens norm is " a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". Moreover, the same article states that "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law". Undoubtedly, such affirmation reveals the high legal status enjoyed by the peremptory norms and that even explains why this category is not so inclusive. In fact, it is widely believed that this category includes norms prohibiting slavery , piracy , genocide , and torture . However , in the aftermath of the September 11th the political might of the US as a superpower was translated into an outstanding ability to create an atmosphere of legal uncertainty about whether the prohibition on torture is a part of the "jus cogens" or not. So this chapter is mainly concerned with demonstrating that the anti-torture norm is a peremptory one by referring to the four sources of international law which are believed to be found in article( 38) of the ICJ statute.

According to article (38) of the statue of the international court of justice (ICJ) international conventions whether general or particular are together a primary source of international law. So determining the legality of conditional
torture would to a great extent depend on the codification of the prohibition on torture in the relevant conventions and treaties. In fact, there are numerous international as well as regional conventions which establishes the absolute prohibition on torture the thing which ultimately grants the norm its "jus cogens" character. Firstly, there is the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) which came into being in 1984 and was signed and ratified by one hundred and thirty states by 2002. Actually, the (UNCAT) is extremely vital regarding the discussion of the conditional legality of torture and that is primarily because it does not only absolutely prohibit torture as in Article (2) which states "No exceptional circumstances whatsoever, whether a state of war, or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture" but also because it was the first legal instrument to define the act of torture. Secondly, there is the International Covenant on Civil and Political Rights (ICCPR) which states in Article (7) that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Moreover, in Article (4) the covenant allows derogation from some of the obligations in times of extreme public emergency but it states that no derogation is ever allowed from obligations under Article (7). Thirdly, the four Geneva conventions that establish the legal basis for the conduct of states in wars or the (jus in bello) had a common third article which provides for protections to the prisoners of war (POW) and states that "in all circumstances be treated humanely". Fourthly, there is the provision of the Universal Declaration of Human Rights (UNDHR) which is considered to be the constitution and the backbone of the humanitarian
movement. Article (5) of the declaration states "no one shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment." Fifthly, there is the international covenant on economic, social, and cultural rights. Sixthly, there is the international criminal court statute which in articles (7) and (8) establishes torture as a crime against humanity absolutely outlawed by the international law and thus places it under the jurisdiction of the court.

Regionally, there are many European instruments which were designed to prohibit torture under any conditions. Among these conventions' comes the European convention for human rights which states in article (3) that "there are no exceptions or limitations "on the right of not being tortured. Moreover, there is article (3) European convention for the protection of human rights and fundamental freedoms and article (1) of the European convention for the prevention of torture and inhuman or degrading treatment or punishment which does not only prohibits torture but establishes a committee to oversee the implementation of the provisions of the treaty in the member states.

The second source of international law as outlined in article (38) is the "international custom as evidence of a general practice accepted as a law". As a matter of fact the anti-torture norm proves to be a part of the customary international law. According to Kooijmans the first special Rapporteur on torture for the UN commission on human rights and current ICJ Justice" The prohibition of torture can be considered to belong to the rules of
jus cogens. If ever a phenomenon was outlawed unreservedly and unequivocally it is torture. If there was some disagreement in respect to the [convention against torture and other cruel, inhumane or degrading treatment or punishment], it had to do with the methods of control and implementation. There was no disagreement whatsoever on the fact that torture is absolutely forbidden". Considering this against the fact that by 2012 the number of states parties to the (UNCAT) had reached one hundred and fifty one as well as it had never happened that a state leader had openly declared his support of torture as a state policy leads to concluding that the second criterion of being a norm under customary international law which is being accepted as a law or the "opinio juris" is met. On the one hand few are those who would argue that the prohibition on torture does not enjoy the second criterion, opinio juris, while on the other most of the proponents of the conditional legality of torture build their legal arguments upon the lack of consistent state practice. Meaning that they argue that the norm had not only failed to create a coherent practice instead there was a persistent clandestine practice of torture in different historical contexts. In this respect, there are a couple of classical judicial cases of international law which according to article (38) of the ICJ statute constitute the third source of international law, that best strip these allegations from their claimed legal credibility. Firstly, the lotus case where a French steamer, lotus, collided with a Turkish steamer S.S. Boz-Kourt, in a region near Greece. Eight Turkish nationals aboard the Turkish steamer drowned when S.S. Boz-Kourt was torn apart by the Lotus. Actually, the problem started when the Turkish state claimed that it had the legal competence to try the
French officer who was on the watch duty at the time of the collision the thing which made France present the case before the permanent court of international justice (PCIJ), the predecessor of the (ICJ), arguing that Turkey has no jurisdiction on the French officer who was on board of the French vessel since at that time there was an established practice that the jurisdiction was for the state of the flag. What is central to the debate on conditional legality of torture in this case is actually the ruling of the (PCIJ) which stated that even if there was an established state practice there has to be a widespread belief that this practice is legal which was not the case for the state flag jurisdiction at that time. So applied on the subject under discussion would lead us to conclude that even if there was a persistent and continuous practice of torture still this does not disqualify the prohibition on torture as norm of the customary international law as there have never been a belief that torture is legal. The second Judicial case is the infamous Nicaragua case where the Nicaraguan state had filed a case before the (ICJ) against the US for intervening in its internal affairs by supporting the Contras in their rebellion violating by that its obligations under customary international law not to "intervene in other state affairs", "not to violate another state's sovereignty", and not to "use force against another state". Moreover, the court found in its verdict that the US had also violated its obligations under the treaty of friendship concluded by the two states. In fact, the American side argued that the norm of "non-intervention" had been violated on regular basis by states for reasons of "self-defense". As a matter of fact, the court's decision was that if there was non-conformity to a norm this only represents a breach to an existing norm not a point of creation to a new one. So if there had been a
more or less coherent practice of torture in times of national emergency this
does not by any mean open the door for the admission of the conditional
legality of torture but it actually represents a deviation from the absolute
prohibition on torture. In fact, arguing that the absolute prohibition on torture
is not a genuine part of the customary international law is nothing more than a
deliberate attempt to create an ambiguous legal atmosphere designed to
serve a certain political end.

The third source of international law as illustrated by article (38) is
the general principles. Principles such as: humanity, equality, and pacta sunt
servanda, are accepted as constituting parts of the body of the general
principles governing the international law. Actually, none of them could be
reconciled with the claimed conditional legality of torture. For example, torture
is an aggressive outrage on the human dignity and that is why it is mutually-
exclusive with principle of "humanity". As for the principle of "equality" it can
never be a part of the body of principles which govern a law that allows a
margin of necessity to legalize torture. That is primarily because a significant
sector of the proponents of the conditional legality of torture builds their
argument on excluding certain group of people, "terrorists", from the
protections of international law just as were the slaves in ancient times.
Thus, such proposal attempt to establish an artificial demarcation between
the naturally equal human beings by creating a category of "sub-humans".
Regarding the principle of "pacta sunt servanda" which is the Latin for "what
had been agreed upon had to be respected", it is obviously incompatible with
even any mild attempt to legalize torture under any circumstances. Given the various codifications of the absoluteness of the norm in the previously mentioned conventions signed and ratified by the majority of the world states, that is why this principle becomes increasingly an obstacle facing the proponents camp. Moreover, this principle could not be easily ignored or overcome as it is one of the main instruments that grants the international law its credibility. Actually, this is because no state would honor its obligations under a certain treaty because there will be no certainty concerning the potential reciprocity. Put differently, if what is agreed upon won't be respected, there will be no agreement in the first place.

The fourth source of international law as dictated by article (38) of the ICJ statute is the “judicial decisions and the teachings of the most highly qualified publicists of the various nations”. Actually, there are many judicial rulings that served to highlight the "jus cogens" character of the prohibition on torture. Firstly, there is the *prosecutor V Furundzja case* where the ad hoc tribunal international criminal tribunal for former Yugoslavia (ICTY) had judged in 1998 that the anti-torture norm had a "jus cogens" character. Secondly, there is the *Filartiga case* where the US court of appeals the second circuit had ruled that the torturer had become as the pirate and slaver before him "*hostis humanis generis*", an enemy of all mankind. So that way the court had put torture in the same category of slavery and piracy which neatly fall within the boundaries of what is widely accepted to be "jus cogens". Thirdly, there is the *Siderman de Blake V republic of Argentina case* of 1992 where the US
court of appeals for the ninth circuit had held that the sovereign immunity when it comes into conflict with a norm of a "jus cogens" character as the absolute prohibition on torture. Fourthly, there is the infamous case of Samatar vs. Youssef where the US supreme court ruled in 2010 that the sovereign immunity of state officials cannot be upheld if a jus cogens norm as the prohibition on torture is violated. As a matter of fact, article (38) describes the judicial rulings as "law-determining". That is why if there was a certain legal vagueness surrounding a certain practice judges fall back on the previous judicial records to assist them in the decision to be made regarding the case in hands. So if there was a kind of disagreement about the absoluteness of the anti-torture norm the previously mentioned cases could be detrimental in this respect.

Chapter six

The problems within the legal regime of the norm

As previously mentioned in chapter two the discussion of torture in relation to human rights protection not in relation to the European civil law or the English common law is relatively a recent development that took place in the aftermath of the second world war. That is why still there are various flaws within the legal regime of the absolute prohibition of torture which allowed for such debates about the conditional legality of the practice to emerge. The coming section aims to outline the defects that caused the norm to be open to such politically opportunistic and pseudo-legal attacks. The investigation would be with special reference to the most comprehensive legal instrument
that deals with torture prohibition which is the United Nations convention against torture (UNCAT) of 1984.

The first problem is the lack of precise and clear definition of the word “torture”. According to article (1) torture is "any act by which severe pain or suffering whether physical or mental is intentionally inflicted on a person for such purposes as obtaining information or a confession, punishment for any reason based on discrimination of any kind inflicted by or at the instigation of or with the consent of acquiescence of a public official". The key here is that torture is a matter of "severity" the thing which leaves a wide margin of appreciation for states to subjectively define what is sufficiently severe to count as torture. According to Miller(2005,P:21-45) the committee against torture (CmAT) which works under the auspices of the UN had in 2008 released a report suggesting that at least eleven states have defects in relation to their legal definition of torture. Actually, this definitional problem had been obviously manifested in the infamous “Bybee memo” issued by the American judge Jay Bybee in 2002 as a part of the consultancies provided by the office of legal counsel (OLC) to the executive branch on the legality of some interrogation techniques employed by officials in the counter-terrorism department. In fact, the contents of the memo were since the time of its release till now so alarming and even shocking for many commentators and that is primarily because of its excessive narrowing of what counts as torture. The memo states that "if pain inflicted is physical, it must rise to the level of death, organ failure, or the permanent impairment of a significant bodily function. If it is mental, it must result in significant psychological harm of significant duration e.g. lasting for months or even years". In this
respect, Ulbrick (2005, p:210-237) asserts that these thresholds are extremely troubling given that there are some acts that don’t cause these extreme forms of mental and physical harm but are sufficient enough to violate the personal dignity of the suspects and break them. Actually, these acts could be kneeling for hours, rape, water-boarding, inflicting scalds and burns, applying electric shocks, and the removal of fingernails. In fact, what had further complicated the definitional issue is that some international tribunals and courts had adopted such restrictive approach. For example, both the European court for human rights in the case of (Ireland vs. Uk) of 1978 and the Israeli supreme court ruling of 1999 had found that practices such as: hoisting, wall standing, subjection to noise, deprivation of food and water, and deprivation of sleep only constitute inhumane or degrading treatment (IDT) that do not amount to torture if employed individually and not in combination.

In fact, such gradation of abusive acts that violate human rights of suspects is the second defect in the legal regime of the norm. While the (UNCAT) absolutely prohibits torture as illustrated in article (2) which states that "no exceptional circumstances whatsoever may be invoked to justify torture including war, threat of war, internal political instability, public emergency, terrorist acts, violent crime, or any form of armed conflict" , it does not take the same approach to cruel, inhumane or degrading treatment or punishment (CIDTP). Actually, article (16) which deals with (CIDTP) does not
absolutely prohibit these acts thus failing to attach to them the same "stigma" as it is the case with torture. Moreover, the article does not even define what constitutes (CIDTP) it only requires state parties to undertake all the measures "to prevent in any territory under its jurisdiction other acts of ill-treatment which does not amount to torture". In this respect, Miller(2005,P: 21-45) argues that the (UNCAT) reluctance to equally prevent and criminalize (CIDTP) had in a way or other significantly reduced the effectiveness of the prohibition of torture. Undoubtedly, such suggestion is to a great extent valid since it is more often the case than not that (CIDTP) serves as the prelude to torture as well as that states capitalize on the vagueness of the definition of torture by labeling a wide range of abusive practices as (CIDTP) that do not amount to torture. Put differently, there is a slippery slope between (CIDTP) and torture which ultimately renders the demarcation between the two more of a theoretical than a practical provision.

Particularly pertinent to the ineffectiveness of the anti-torture norm is the reservations provided by the signatory states to the (UNCAT). Actually, the utility of reservations to multi-lateral human rights treaties was and continues to be the subject of heated debates. For many human rights advocates reservations impair the effectiveness of the treaties while for others permitting reservations secure the participation of as many states as possible which in its turn elevates the legal status of the treaties. According to Waldron (2010, P:302-320) the American reservations to the (UNCAT) are the best illustrations of how the purpose and object of a certain treaty could be bended and re-bended so as to fit the political calculations of a member state. In fact, America was not the only state that provided reservations instead
there were many other states such as: Austria, China, France, Germany, Ghana, Israel, Netherlands, Bahrain, and Pakistan. However, the American case is the most instructive one in relation to the subject under discussion since the such reservations played a great role in the legal maneuvers of the US in the post-September context to conditionally legalize torture. For example, the US had issued two reservation regarding article (1) which allowed a greater room for narrowing the definition of torture. The first added the element of "specific intent" to what could be considered as torture. Meaning that even if an interrogator had inflicted severe pain on a suspect without "precisely" intending to do so, the act would not be torture. Of course, this allows interrogators to avoid the criminal charge by simply claiming that they had no "specific intent". The second reservation to article (1) demonstrates that the American understanding of mental suffering is that there has to be an accompanying "prolonged mental harm". In addition, "prolonged mental harm" was not even defined which leaves an even greater space for subjectivity. The third reservation is regarding article (16) dealing with (CIDTP). Since article (16) does not provide any definition to what constitutes ill-treatment, the reservation states that the US understands ill-treatment to be acts considered as such under the fifth and eighth amendments to the American constitution. In this respect, Scheppele (2005, P:285-340) asserts that under the terms of this reservation, the US could be engaged in whatever practice not prohibited by its constitution even if this respective practice might be viewed as a violation of international law by other nations.
The fourth reservation is concerning article (3) which prevents member states from rendering suspects to countries "where there are substantial grounds for believing that the person would be in danger of being subjected to torture". The US in its reservation understood that this phrase means "if it is more likely than not that the person would be tortured". Lazerg (2008,P:15-32) believes that the US had employed the rendition strategy frequently by sending uncooperative detainees to allies such as Egypt, Morocco, Saudi Arabia, and Jordan where torture could take place with varying degrees CIA involvement in the process. In fact, the level of CIA supervision on the interrogation process depends mainly on the country. For example, in Saudi Arabia CIA officials can through one-way mirror the live see the investigations. Actually, the most cited rendition case that involved torture was that of Maher Arar that took place in 2004 when the US rendered the suspect to Syria. According to Amnesty International Arar had falsely confessed to having trained with Al-Qaeda in Afghanistan which was then proved wrong by the US. Actually, what is pertinent to the subject under discussion is that Arar had chosen to falsely confess after being regularly beaten with electric cables, held in tiny basement cell for more than ten months with no release for either exercise or exposure to sun light.

So after the previous examination of the defects of norm regime, the problems could be summarized as follows. Firstly, the lack of clear definition of the word torture had resulted in an interpretational vacuum which was filled by the subjective appreciation of states. Secondly, the distinction between torture and (CIDTP) accompanied by firstly the vagueness of what counts as torture, secondly the relatively limited prohibition of acts constituting
(CIDTP), and thirdly the lack of any definition of (CIDTP) had resulted in the mushrooming of practices that certainly violate human rights under the pretext of being below the threshold of torture. Thirdly, the reservations attached to the (UNCAT) with the American case as an illustrative example had relaxed the already not strictly defined obligations thus enabling states to challenge the absoluteness of the norm.

**Conclusion**

This thesis sought to prove that torture is absolutely prohibited and that any attempt to admit its conditional legality is of no legal bases as well as a clear representation of how a political might such as: the US could by means of political mobilization and propaganda deliberately create an atmosphere of uncertainty around a clear absolute prohibition under international law. In fact, this work had achieved its primary objective by referring to the four sources of international law as they appear on the statute of the ICJ, namely the international conventions, custom as established by state practice and opinio juris, general principles of international law, and judicial decisions of respected courts and tribunals. However, such task could have never been complete without the historical examination of the law against torture, undertaken in chapter (two), since it provided the best departure point for any further investigation of the subject since it had allowed the reader to get in grip with the evolutionary development of the norm as well as it had outlined the three persistent trends that characterized the trajectory of the norm. These trends are firstly the (1) lack of a clear and precise definition of what is torture, secondly (2) the projection of the
relationship between national security and upholding the norm as a trade-off, and thirdly (3) the exclusion of certain groups from the protections of the law. Actually, the thesis argues that these trends had been the "backdoors" through which states had challenged the absoluteness of the norm. Moreover, in chapter (four) the reader was provided with an extensive exploration of the justifications provided by the proponents of the necessity of admitting the concept of conditional legality of torture into international law as well as the those provided by the proponents of the necessity of upholding the absolute prohibition of torture so as to offer a glimpse of the theoretical framework within which the debate is taking place. As for the legal debate over the conditional legality of torture, it was reviewed in chapter (three) giving the reader a complete picture of the legal arguments of the two opposing camps before presenting the main argument in chapter (five). Actually, in chapter (six) the problems of the norm regime which ultimately rendered it vulnerable to such maneuvers are investigated.

In conclusion, the best words to end this work with are those said by justice Aharon Barak during the gathering of the Israeli public committee against torture, as cited by Ulbrick (2005, P:237), "This is the destiny of democracy – it does not see all means as acceptable, and the ways of its enemies are not always open for it. A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties". So trying to legalize torture is not the remedy to terrorism instead it is another form of it and is
further an unjustified and failed attempt to shake the strong legal basis of a well established norm.

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