

(126–9) is a self-serving argument. This oversimplification aside, *The Verdict of Battle* is an insightful work, from which not only historians and historians of international law but also international lawyers have much to learn.

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The Prohibition of Torture in Exceptional Circumstances by Michelle Farrell [Cambridge, University Press, Cambridge, 2013, 291pp, ISBN: 978-1-10-7030794, \$99 (h/bk)]

‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.’ So says Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights, and the absolute prohibition on torture is routinely cited as not only a paradigmatic norm of customary international law but also of *ius cogens*. The absolute nature of this prohibition has not, however, silenced the debate surrounding the use of torture and this elegantly written and thoughtfully argued volume is an important contribution to what has become an increasingly surreal discussion. The great merit of this book is that its real focus is the surreal nature of that debate itself and, by seeking to move beyond it, aims to relocate that debate into a place where the absolute prohibition on torture can once again be appreciated for what it is—the meeting place of humanity with inhumanity, and a touchstone through which we can discern the difference. The weakness of the book is that in doing so, it points to the shadows of practices which it does not fully explore and, perhaps, it dismisses too easily the ethical questions which the absolute prohibition poses. As a result, there is a risk that the central—and convincing—message that this book conveys might not be thought to be as firmly grounded as it ought.

As with so many other discussions of the prohibition of torture, the starting point is, ultimately, the infamous ‘ticking bomb’ scenario. However, rather limiting itself to dissecting its realism or relevance, the author goes further and argues that even engaging in the discussion from this perspective has the consequence of opening up the space for justifying the use of torture in a way which makes it too easy to justify. Having concluded that the ticking bomb scenario offers a distorted frame of reference and ‘is an artificial construct, unlikely to manifest in reality and an inappropriate basis on which to construe a moral or legal justification for torture’ (128), the author then suggests that other theoretical constructs offer a better paradigm from within which to consider the arguments raised. The alternative paradigm offered draws on the work of Schmitt and Agamben and is that of there being ‘states of exception’ where necessity meets legality, this being ‘both a judicial concept and an extra-legal concept . . . open[ing] up a zone of indistinction, prescribed by law but devoid of law’. This then leads to the question of whether torture can be accommodated within the limits of such reasoning, and whether as a practice it falls within that ‘zone of indistinction’. The point is that if it can be, then both the absolute prohibition and the ‘exceptional use’ of torture might remain in some form of unresolved tension of competing legitimacy. Neither the rule of law nor the exceptional use of torture need be abandoned: the exceptional use of torture ‘retains a connection to the juridical order . . . the exception takes on normative force. It is in this sense that the exception becomes the norm’ (173).

It is against this background that the positions of three well-known writers are then rehearsed. The first is Alan Dershowitz’s argument concerning the issuance of ‘torture warrants’ which would permit the judicial regulation of torture, whilst the second is that of Oren Gross, who veers towards an ‘extra-legal’ approach which refuses to legitimate torture as a matter of law but accepts the tragic necessity of its use and considers that the consequences must be a matter for subsequent public judgment which might include ex post ratification. Farrell ultimately dismisses both of these approaches, arguing that ‘the rule of law cannot bring torture under its control, as Dershowitz advocates, nor can the rule of law separate itself from torture, in the way Gross claims (174). These positions, it seems, stray too far from the ‘greyness’ which characterizes the exceptional use of

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torture within the state of exception. It is simply regularizing the use of torture, either within or outside of the legal order. The third position canvassed is that of Jeremy Waldron who argues for the maintenance of the absolute prohibition, ultimately, because it is a totem of commitment to the rule of law: it is precisely because it is so difficult to adhere to in exceptional situations that it must be adhered to—it is what it is there *for*, it is *why* it is there, it is its *raison d'être*. Less prosaically, but perhaps more concretely, the bottom line seems to be that it is just wrong to torture and thus wrong to open up the space for its legitimation. As a result, torture must fall outside the bands of what might be justifiable within the state of exception and so the absolute prohibition must remain.

The problem with the approach offered in this book is that it does both too much and too little. It does too much by trying to close down the ethical debate altogether. Farrell argues that the views of Dershowitz and Gross both, in their own way, facilitate the forms of reasoning which underpin the ticking bomb scenario, albeit that she examines their views from the perspective of 'states of exception'. There is truth in this insight. However, she then argues that because the ticking bomb scenario is flawed as a conceptual model, the moral aspects of the debate which are associated with it are themselves ill-founded. Indeed, she sees 'no foreseeable conclusion to the ethical debate' (204). Her ultimate response is to deny that there is an ethical debate to be had at all: indeed, it is claimed that 'the phenomenon of torture cannot be understood in terms of an ethical dilemma when the juridico-political structure of the exception of is grasped' (242). However, this merely takes us back to the nature of the state of exception, and it is here that her argument seems to do too little. It is not at all clear why the 'state of exception' does not, in fact, open up the space for torture to be 'within the compass of the law', if this is what the law chooses to provide for. After all, it is a commonplace that states of exception do justify derogation from some human rights obligations. It is far from clear that theorizing the state of exception as the author does precludes this possibility. More significantly, it appears to open up a new route for considering the legitimacy of the use of torture in the face of the absolute prohibition.

The question which the book invites us to consider is, in effect, whether torture is permissible in extreme situations in which the rule of law is temporarily in abeyance—yet this is not really addressed head on and a clear answer is hard to come by. It is one thing to expose the extent to which reliance on the ticking bomb scenario as a heuristic device distorts perceptions, but relying on this to avoid addressing directly the central question at issue is no less problematic. Perhaps more worryingly, the argument overall runs the risk of falling into the very trap it sets out to expose. The ticking bomb scenario is in many ways a diversion from realities concerning the use of torture in the modern world. This does not mean that it may not be a part of that reality and the ease with which the ethical dilemmas which it poses are dismissed is troubling. But what is most troubling is the underlying assumption that the practice of torture still is to be understood in terms of exceptional situations which raise profound questions at the interface of law and politics. The sad truth is that this is just not so. Most torture is the result of routine barbarity in systems which just cannot be bothered to address it. Replacing the ticking bomb with the state of exception does not begin to approach this day-to-day reality—and may itself contribute to the view that torture is indeed relegated to the exceptional, rather than the routine. Be that as it may, this book is an important contribution to a debate that is not going to go away and it has important implications for the manner in which that debate is to be conducted.

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Global Sales and Contract Law by INGERBORG SCHWENZER, PASCAL HACHEM and CHRISTOPHER KEE [Oxford University Press, Oxford, 2012, 873 pp, ISBN 978-0-19-957298-4, £225 (h/bk)]

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