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The Legality Of Torture As A Means To An End v. The Illegality Of Torture As A Violation Of Jus Cogens Norms Under Customary International Law

Stephanie L. Williams

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“Your Honor, I am here today requesting the Court’s permission to torture Mr. Doe”: The Legality of Torture as a Means to an End v. The Illegality of Torture as a Violation of *Jus Cogens* Norms under Customary International Law

*Stephanie L. Williams**

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I. Introduction

*As soon as men decide that all means are permitted to fight evil, then their good becomes indistinguishable from the evil they set out to destroy.*¹

1.1 Talk of Torture

In 1988, famous civil libertarian and Harvard law professor Alan Dershowitz went to Israel. During his visit, Dershowitz argued for the legalization of torture in cases that involved suspected terrorists..² Other than the Israeli government, no one paid much attention.

¹ CHRISTOPHER DAWSON, *THE JUDGMENT OF THE NATIONS* (Sheed & Ward eds., 1942).

² Ken Gewertz, *Balancing Act: Civil Liberties and Security*, HARVARD UNIVERSITY GAZETTE, Dec. 13, 2001, available at <http://www.news.harvard.edu/gazette/2001/12.13/17-dershowitz.html> (last visited Feb. 17, 2005) ("First

On September 11, 2001, terrorists hijacked four commercial airplanes, killing nearly 3,000 American civilians. As expected, the United States government promised to act immediately to prevent similar attacks in the future. A week after the WTC/Pentagon attacks Congress passed a Joint Resolution³ authorizing President Bush to

use all necessary and appropriate force against those nations, organizations, or person he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.⁴

Because the Joint Resolution gives the President broad discretionary power to determine what acts constitute "international terrorism," critics feared the President would use the Joint Resolution as a pretext to curtail civil liberties at home and to strike at any state, organization, or individual whose political or economic policies are an interest to or at odds with the United States. They also expressed concern that the administration would attempt to justify any questionable conduct simply by labeling or characterizing the opponent as a "terrorists."

In October 2001, Congress passed the USA Patriot Act.⁵ Arguably the largest legislative curtailment of civil rights in recent

proposed on a visit to Israel in 1988, Dershowitz intended the idea as a way of reducing torture, not legitimizing it. He suggested that such warrants should be issued only in a 'ticking bomb case,' situations in which the divulging of information by a suspect would save innocent lives.").

³ A Joint Resolution to Authorize the Use of United States Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States, Pub. L. No. 107-40, 115 Stat. 224 (2001), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ040.107.pdf (last visited Feb. 17, 2005) [hereinafter Joint Resolution].

⁴ *Id.* at § 2(a). *See also* 50 U.S.C. 1541.

⁵ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT) Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ056.107.pdf (last visited Feb. 25, 2005).

American history, the Patriot Act gives the President and law enforcement officers unprecedented power to “arrest suspects and detain them almost indefinitely, deport them, hold them in solitary confinement, open their mail, tap their phones, monitor their e-mails and search their homes without a warrant.”⁶ Although the Patriot Act expressly prohibits the practice of targeting (that is, profiling) all Arab-Muslims currently residing in the U.S., official statistics tell a wholly different story.

Some 1,200 foreigners have been secretly arrested, and more than 600 are still in prison, although no court has found them guilty. Many have been denied access to lawyers. The US government has also announced its intention to interrogate 5,000 men between [the ages of] 16 and 45, currently in the US on tourist visas, who are regarded suspect just because they come from the Middle East.⁷

⁶ Ignacio Ramonet, *Farewell Liberty*, LE MONDE DIPLOMATIQUE (Ed Emery trans., Jan. 2002), at <http://mondediplo.com/2002/01/01farewell> (last visited Feb. 25, 2005). See World Socialist Web Site (WSWS) Editorial Board, *One Year Since September 11: An Unprecedented Assault on Democratic Rights* (Sept. 11, 2002), at http://www.wsws.org/articles/2002/sep2002/demo-s11_prn.shtml (last visited Feb. 17, 2005) [hereinafter WSWS, *One Year Since September 11*], for the contention that the Patriot Act “expanded police powers against the population as a whole, giving the FBI far greater leeway to tap phones and electronic communication,” and that under the Patriot Act, “schools are once again required to turn over student records, which had been made confidential in 1974 in response to revelations of FBI spying on anti-war protestors.” Additionally, “Libraries must turn over lending records for anyone the FBI claims is a terrorist suspects. Agents can also demand ‘business records,’ including newspaper subscription lists, bookstore receipts and even journalists’ unpublished notes and photographs.” *Id.* Not even attorneys, experts in field of law, are exempt from additional intrusion. Agents may monitor confidential or privileged conversations between lawyers and their clients, if there is “‘reasonable suspicion’ that the conversation *could* touch on terrorism.” *Id.* (emphasis added).

⁷ Ramonet, *supra* note 6; see also WSWS, *One Year Since September 11*, *supra* note 6 (stating that the Patriot Act “left immigrants with little or no rights—subject to exclusion based on their political views, expulsion on the grounds on legal political association, and detention on no more than the say-so of a federal agent”).

On November 13, 2001, President Bush announced his intention to create a new military tribunal with special procedures for those accused of terrorism.⁸ According to one source:

Trials will be held in secret; they can be held on ships or at military bases; sentence will be passed by a board of military officers; a full majority is not required to impose the death sentence; there will be no appeal against sentencing; conversations between defendants and their lawyers can be monitored; the proceedings of these tribunals will be covered by rules of confidentiality and details will only be available to the public decades later.⁹

There is also evidence that some terror suspects are being deported, extradited, or held on foreign shores because “prisoners are subject to the law of the land where they’re detained, which could permit more severe treatment than would be allowed under U.S. law.”¹⁰

It was also during the months that followed the September 11th attacks that Professor Dershowitz began to refine and restate his case for the legalization of torture.¹¹ The only difference between Dershowitz’s earlier proposal to the Israeli government and his current one is that now everyone is paying attention. A *Christian Science Monitor*/TIPP poll

⁸ President Bush also reversed Section 2.11 of Executive Order 12,333, which expressly prohibits the assassination of foreign political leaders. See Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981), 3 C.F.R. p. 200 (1982, available at <http://www.fas.org/irp/offdocs/eo12333.htm> (last visited Feb. 25, 2005)).

⁹ Ramonet, *supra* note 6.

¹⁰ Andrew Chang, *Is Torture a Tool in the War on Terror? Has the War on Terror Changed Attitudes on Torture?*, Aug. 13, 2002, at <http://abcnews.go.com/International/story?id=79885&page=1> (last visited Feb. 17, 2005). For example, Syrian-born German citizen Mohammed Haydar Zammar was arrested in Morocco in June 2002; he was allegedly sent back to Syria solely because of the country’s infamous human rights record. *Id.* See also Ramonet, *supra* note 6 (stating “FBI officials have even gone so far as to suggest that defendants be extradited to friendly countries with dictatorial regimes, to be interrogated by police with methods that are crude but effective.”) (internal citation omitted).

¹¹ James M. Capozzola, *Alan Dershowitz: Off the Deep End*, Sept. 9, 2002, at <http://www.antiwar.com/orig/capozzola1.html> (last visited Feb. 17, 2005).

taken in November 2001 arguably captures the shift of mainstream Americans' attitude on issue, concluding that roughly one-third of Americans would support government-sanctioned torture of terror suspects being held in the United States or abroad.¹²

That there seems to be a growing number of people who believe that torture should be legalized, that the use of torture is an appropriate instrument for the purposes of gathering information to prevent future terrorists attacks, and that these "new" supporters of torture are citizens of United States—the global superpower that has long advocated the barbarity and unconstitutionality of torture—is cause for concern.

1.2 Why it Matters?

The legalization of torture as a means to an end has broad domestic and international legal implications. If the United States were to legalize torture, it would be expressly condoning the use of torture not only at home but also abroad. This, coupled with the fact that torture is already a "widespread and persistent"¹³ problem in many states, would (illegally) set forth a new international norm in direct contradiction to the pre-existing norm prohibiting such acts. Victims of torture would be at the mercy of their state because there would be no international violation, thus no legal reason for another state to interfere.

Assuming *arguendo* that international terrorism is on the rise and the lives of innocent civilians are at risk, does it necessarily follow that states must abandon their basic obligations under international law to protect their citizens from human rights violations, such as torture, on the grounds of national security? If so, where do we draw the line? If a state

¹² Abraham McLaughlin, *How Far Americans Would go to Fight Terror*, CHRISTIAN SCIENCE MONITOR, at <http://www.csmonitor.com/2001/1114/pls3-usju.html> (last visited on Feb. 17, 2005) ("One in [three] could accept government-sanctioned torture of suspects. One in [four] could envision a scenario in which they'd back use of nuclear weapons."). See also Ramonet, *supra* note 6 ("The use of torture has been openly called for in the mainstream press. Speaking on CNN, Republican commentator Tucker Carlson was explicit: Torture [is] not good, but terrorism [is] worse, so in certain circumstances torture [is] the lesser evil. Steve Chapman, writing in Chicago Tribune, pointed out that an apparently democratic state such as Israel had no hesitation in using torture on 85% of its Palestinian prisoners.") (internal citations omitted).

¹³ Mark Weisburd, *International Human Rights in Practice—Customary International Law and Torture: The Case of India*, 2 CHI. J. INT'L L. 81, 82 (2001).

professes that it is democratic or that it places a high value on human life or humanity in general (as most states in the world profess, even if it is pure rhetoric), then must not that state concede that this self-imposed definition of what it is thereby limits what it may or may not do? In other words, *is* torture ever legal under international law? A related question that demands equal attention is whether the practice of torture *should* be prohibited as a violation *jus cogens* norms under international law.

1.3 General Purpose, Content & Structure of Paper

The purpose of this paper is to expose its readers to the major legal and moral issues at the heart of the debate surrounding the legality of torture as a means to deter terrorism. It is the author's contention that, despite any one state's temporary objection to the prohibition, the practice of torture is (and should be) a violation of customary international law in general and *jus cogens* norms specifically. Part II of this paper briefly examines the historical evolution of the practice of torture. Part III focuses on the legal issues surrounding the debate; namely, it defines terms pertinent to discussion, and sets forth criteria (in other words, the elements) for determining whether prohibited torture is properly characterized as a *jus cogens* norm under international law. The criteria are then applied by enumerating and examining the major international and regional instruments that codify the prohibition. Part IV focuses more on the moral question at the heart of the debate. The three main competing views held by the international community are outlined and analyzed. Part V, the conclusion, summarizes the main propositions set forth in this paper.

II. Torture Then & Now: History & Methods

2.1 A Torturous Past

A. The First "Torturable" Class

Edward Peters' book *Torture* traces the origin of the practice to the Greek- Roman era, where wealth and power were centralized by conquering other states and enslaving the inhabitants.¹⁴ Slaves, viewed as the spoils of war (in other words, property to be controlled), quickly became the first "torturable" class; as such, they were subjected to

¹⁴ EDWARD PETERS, *TORTURE* 11 (expanded ed., U. Pa. Press 1996) (1985).

various forms of torture on a regular basis. The methods of torture included, but were not limited to, being "whipped, beaten with rods or chains, stretched on the rack, exposed to red hot metal, confined in quarters that required painful constriction of their bodies or in a device that pulled their legs apart"¹⁵ Soon thereafter the torturable class grew to include criminals as well as anyone who might have witnessed the commission of a crime. Once convicted, the defendant was then subjected to post-conviction torture. Common post-conviction methods of torture included, among others, "crucifixion, mutilation, and the subjection of the allegedly guilty person to the appetites of wild animals in an arena."¹⁶

B. Church, State, and Torture

Throughout history, churches and other religious institutions have condemned torture while simultaneously resorting to its methods to punish labeled sinners and thus enforce God's mandates. For example, despite the Catholic Church's condemnation of torture, in 1252, Pope Innocent IV extended the torturable class to include those accused or convicted of being heretics.¹⁷ The government, with the blessings of the church, delegated the responsibility of carrying out torture to the civil authorities in a deliberate effort to shield the highest officials from any allegations of impropriety.

In Western Europe, as in Rome, torture and religious fanaticism were strange bedfellows. Prior to the emergence and development of the modern Western legal system, "signs from God" determined innocence or guilt.¹⁸ A person accused of heresy, blasphemy, or any other moral-religious offense had to withstand a battery of tests. These tests included "plunging hands into flames, hot water, or heated metal and forcing the suspect to walk on hot plowshares."¹⁹ Survival of such tests was not enough to exculpate a defendant, however. The standard for the accused was two-fold: to survive and to sustain no serious injuries. The final decision on the matter was left to a judicial magistrate, who would

¹⁵ JOHN CONROY, UNSPEAKABLE ACTS, ORDINARY PEOPLE: THE DYNAMICS OF TORTURE 27 (2000).

¹⁶ *Id.* at 28.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

examine the accused a few days after the ordeal.²⁰ Not surprisingly, most individuals failed these tests.

C. Judicial Torture (Torture Warrants)

The “sign of God” method for determining guilt or innocence was eventually replaced by the “two witnesses or one confession” rule. Under this rule, a conviction could only be obtained if it was accompanied by the testimony of two witnesses or one confession.²¹ “Suggestive questioning”²² (that is, leading interrogations) and general confessions were prohibited. According to legal historian John Langbein, “If the accused confessed to the slaying, he was supposed to be asked where he put the dagger. If he said he buried it under the oak tree, the examining magistrate was suppose to send someone to dig it up.”²³ Unfortunately, the change in the burden of proof opened the door for a new wave of torture. Civil authorities found it easier to obtain *one* confession than to track down *two* individuals willing to testify against the defendant. By the sixteenth century, magistrates freely issued torture warrants and judicially sanctioned torture²⁴ was firmly entrenched into the western legal tradition.

[V]ictims were commonly subjected to the rack; the strappado (a procedure, also known as the corda or cola, in which the defendant hung from the wrists, which were tied behind his or her back, and dropped halfway to the ground, the drop ending with a sudden jerk); various pressure devices that evolved into the leg screw and thumb screw; extremely tight tying of the hands (chiefly used on

²⁰ *Id.*

²¹ See JOHN H. LANGBEIN, *TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIENT REGIME* 4 (1977). There was a third option under this rule: the use of circumstantial evidence. Circumstantial evidence was used to establish what was known as “half proof.” To get the other half a confession was necessary. Hence, a magistrate would issue a torture warrant.

²² *Id.* at 5; CONROY, *supra* note 15, at 30.

²³ LANGBEIN, *supra* note 21, at 5.

²⁴ CONROY, *supra* note 15, at 30. Judicial torture is defined as “[t]he use of physical coercion by officers of the state in order to gather evidence for judicial proceedings.” *Id.* See also LANGBEIN, *supra* note 21, at 94-124, for a comprehensive list of torture warrants issued from 1540-1640.

women and children); burning the soles of feet; and sleep deprivation (forty hours was the common period of time).²⁵

Torture warrants were issued as late as the eighteenth century.²⁶

D. Trial by Jury as an Alternative to Torture

Around the mid-eighteenth century, European jurists, philosophers and scholars began to promote the idea of trial by jury as an alternative to torture and capital punishment primarily because they were no longer immune from the practice.²⁷ In their view, a trial by jury served dual purposes. First, it reduced the burden of proof necessary to convict a defendant. Police no longer had to find two witnesses or obtain a confession by force. Instead, they could investigate a crime, collect evidence, and submit it to an independent panel charged with the duty of deciding innocence or guilt. Second, a trial by jury diffused culpability by inculcating the community at-large. If the wrong person was

²⁵ CONROY, *supra* note 15, at 29.

²⁶ *Id.* at 31. See PETERS, *supra* note 14, at 74 (“*The Constitutio criminalis carolina* of 1532 for the [German] Empire, the *Ordonnance royale* of 1537 for France, the *Nueva recopilacion* of 1567 for Spain, the ordinance of Philip II of 1570 for the Spanish Netherlands, and the *Grand ordonnance criminelle* of 1670 France together constituted the largest body of legislation concerning torture the world had ever seen, enforced by the greatest powers in the world.”).

²⁷ For example, Italian philosopher Cesare Beccaria argued that torture is cruel and inhuman, prevents the truth from being discovered, and is often arbitrarily used against the innocent and poor:

[I]f this truth is hard to discover from the bearing, the gestures and the expression of a man at rest, it will be much the harder to discover it from a man in whom every feature, by which men's faces sometimes betray the truth against their will, has been altered by spasms of pain. Every violent action confuses and clouds the tiny differences in things, which sometimes serves to distinguish the truth from falsehood. . . . A strange consequence, which necessarily follows from the use of torture, is that the innocent are put in a worse position than the guilty. For, if both are tortured, the former has everything against him. Either he confesses the crime and is convicted, or he is acquitted and has suffered unwarranted punishment. . . .

CESARE BECCARIA, ON CRIMES AND PUNISHMENTS (Kenelm Foster & J. Grigson trans., 1964) (1764), reprinted in PETERS, *supra* note 14, at 264-269.

convicted and subsequently tortured or executed by the state, everyone—not just the civil authorities—shared the responsibility. Eventually, most states abolished the practice of torture, but retained the trial by jury system.

2.2 Torture in the Twentieth Century (“No Holds Barred”)

Silent acquiescence and world wars led to a rapid resurgence of torture in the twentieth century. As this paper illustrates, torture was historically used as a tool to gain evidence, to obtain a confession, or to deter specific unwanted behavior. Despots such as Stalin, Hitler, Mussolini, and the Japanese Imperial Army practiced torture for purely nefarious reasons, such as to test the effects of experimental drugs and medicines on humans, to test the efficiency of biological and chemical weapons of warfare on humans, and to test the physical and mental threshold of human body and spirit.

The Congressional Record on the Introduction of the Japanese Imperial Army Disclosure Act of 1999 describes several methods of torture used against both Chinese civilians and other prisoners of war (POWs) during WWII.²⁸ For example, the “freezing air project” was a method of torture in which prisoners were ordered outdoors during the coldest days of winter and subjected to the elements and artificial air until various parts of their body froze. The prisoners were then taken back indoors where army personnel and Japanese medical students experimented with various methods of thawing—all of which failed.²⁹ Women, men, and children were left with rotting, protruding bones.³⁰ In other “medical” experiments, men were dissected alive, and prisoners were exposed to a myriad of lethal diseases.³¹ Aerosol sprays containing lethal viruses, such as Anthrax, were sprayed over entire prison and civilian camps.³² There is also evidence that the Japanese Imperial Army used civilians and prisoners for target practice, forced them into slavery,

²⁸ 145 CONG. REC. S14541-47 (1999) (statements of Sen. Feinstein on the Japanese Imperial Disclosure Act of 1999).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Japanese War Crimes & Trials: Murder Under the Sun* (History Channel television broadcast, Apr. 29, 2003) (Documentary, aired first in 1998).

³² *Id.*

and used systematic rape as a form of torture against female children and women.³³

Unfortunately, many of the methods of torture practiced during WWII continue to be practiced in repressive regimes around the world today.³⁴ It is worth noting, however, that some of the most infamous cases of torture took place not in states labeled as "repressive" regimes or part of the "axis of evil," but in democratic states that boasted of their civility and consistently denounced the practice as barbaric. Section 2.3 focuses on one such state: the United States.

2.3 Torture in the United States

Those who fled England for America did so because they lived in constant fear that they would be persecuted, tortured, or killed for holding religious beliefs that differed from those in power. However, once in the New World, these individuals sought to consolidate their power by persecuting any person who did not share their beliefs. Women believed to be practicing witchcraft were often targeted and tortured; some were burned alive in public. Other colonial methods of torture included, but were not limited to, branding the letters of the charged-offense into the flesh of the accused for crimes such as heresy and thievery, "piercing the tongue with a heated bodkin, a tool used for poking holes in fabric or leather,"³⁵ and standing in extremely uncomfortable positions for hours or days.

Albeit harsh, the methods of torture practiced against accused witches, criminals, and religious minorities were mild compared to the torture inflicted upon Native Americans and Blacks. Both groups were treated as sub-humans; torturing them was acceptable and common. Slaves were beaten, sold, mutilated, lynched, castrated, subjected to experimental drugs without their knowledge or consent, raped, and murdered. Even after slavery was abolished in the United States, local

³³ JAMES YIN AND SHI YOUNG, *THE RAPE OF NANKING: AN UNDENIABLE HISTORY IN PHOTOGRAPHS 1* (2d ed. 1997) ("Between December 1937 and March 1938 at least 369,366 Chinese civilians and prisoners of war were slaughtered by the invading troops. An estimated 80,000 women and girls were raped; many of them were then mutilated or murdered. . . . Thousands of victims were beheaded, burned, bayoneted, buried alive, or disemboweled.").

³⁴ See generally Amnesty International (AI), *Stop Torture News*, at <http://www.amnestyusa.org/stoptorture/news.do> (last visited Feb. 17, 2005), for a comprehensive list of recent cases in the news stories involving torture.

³⁵ CONROY, *supra* note 15, at 32.

law enforcement and white separatists organizations, such as the Klu Klux Klan (KKK),³⁶ continued to target and torture minorities with impunity, especially those incarcerated. Indeed, many criminologists and sociologists argue that modern jails and prisons are little more than an extension of the racist/slave ideology, exacerbated by capitalistic demands for cheap labor, which has plagued America since slaves were emancipated by President Abraham Lincoln.

[W]ith the rise of the industrial capitalism, unpaid prison labor became a source of superprofits, a trend accelerated by the Civil War, and the “penitentiary” became the site of industrial slavery conducted under the whip and other savagery. . . .

Prior to the Civil War, the main form of imprisonment—African-American slavery—was, like the penitentiary, not to be regarded as torture. Slavery, indeed was never legitimized by any claim that the slaves were being punished for crimes or anything else. . . . This changed when Article 13, the Amendment that abolished the old form of slavery, actually wrote slavery into the Constitution—for people legally defined as criminals. . . .

At this point, tortures routinely inflicted on slaves, especially whipping, became a standard feature of the main site of penal incarceration: the prison plantation. The antebellum plantation was merging with the “penitentiary” to create the modern American prison system.³⁷

³⁶ Although the KKK met in secrecy, its members openly conspired with local authorities to terrorize, torture and annihilate Blacks and other minorities, such as Jews, Asians, and homosexuals.

³⁷ H. Bruce Franklin, *The American Prison and the Normalization of Torture*, at <http://www.historiansagainstawar.org/resources/torture/brucefranklin.html> (last visited Feb. 17, 2005). See U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

The National Commission on Law Observance and Enforcement³⁸ was the first governmental body established to assess law enforcement officers' conduct and denounce the use of torture against inmates. In its 1931 report³⁹ to the President, the Wickersham Committee concluded that "[t]he third degree—that is, the use of physical brutality, or other forms of cruelty, to obtain involuntary confessions or admissions—is widespread."⁴⁰ Of particular concern to the Wickersham Commission were the numerous documented cases of torture that took place at the Chicago Detective's Bureau headquarters.⁴¹ Reports of abuse included

[beatings with] clubs, blackjacks, rubber hoses, telephone books, and whips . . .; exposing prisoners to tear gas in an effort to gain a confession; hanging them downward out of a window in multistory buildings; handcuffing suspects behind their backs and then lifting them off the ground by their handcuffs; and squeezing the testicles of men in custody.⁴²

³⁸ Established by President Herbert Hoover on May 10, 1929, and popularly known as the Wickersham Commission, after its chairperson George W. Wickersham, the Commission released fourteen reports on lawlessness within the penal system in June 1930. Samuel Walker, *Records of the Wickersham Commission on Law Observance and Enforcement, Part 1: Records of the Committee on Lawlessness*, at <http://www.lexisnexis.com/academic/guides/jurisprudence/wickersham.asp> (last visited Feb. 17, 2005).

³⁹ *Id.* ("The Report on Lawlessness in Law Enforcement had a major impact on public policy. As the first fully documented report on police misconduct, it galvanized public opinion and mobilized reform efforts. At the municipal level, it strengthened the hand of a new generation of reform-minded police chiefs. At the national level, it helped foster a new climate of opinion regarding the need for legal controls over police misconduct. This was reflected in the first important Supreme Court decisions imposing constitutional standards on local criminal justice officials [sic] in 1932, the year after the commission delivered its report.").

⁴⁰ *Id.* (quoting NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 4 (1931)).

⁴¹ CONROY, *supra* note 15, at 32.

⁴² *Id.*

Almost thirty years later, in 1960, the Wickersham Commission released another disturbing report involving inmate abuse at Tucker State Prison Farm in Tucker, Arkansas. The methods of torture used include “depriving inmates of food, inserting needles under their fingernails, crushing their knuckles and testicles with pliers, applying electric shock to their genitals with the ‘Tucker Telephone,’”⁴³ inciting intra-prison violence, such as gang rapes and murders, and putting prisoners in the “hole” (solitary confinement)⁴⁴ for indeterminate amounts of time.⁴⁵

In response to the overwhelming number of cases alleging police brutality, the U.S. Supreme Court declared the use of torture unconstitutional and held that a confession obtained by physical or psychological coercion, trickery, or deceit is inadmissible in the prosecution’s case-in-chief against the defendant. The court also created *Miranda* rights,⁴⁶ which require an arresting officer to inform a suspect

⁴³ *Id.* See Philip S. Anderson, *Legal Basics and Humane Treatment Must be Guaranteed by Federal Officials by Federal Courts in Local Facilities Housing Immigrants*, at <http://www.abanet.org/media/post> (last visited Feb. 17, 2005) (“The ‘Tucker telephone’ [was] an old crank telephone adapted with electrodes that were attached to prisoners’ genitalia and then hooked up to a car battery. When the telephone was cranked, inmates received a short, intense and paralyzing shock.”).

⁴⁴ The “hole” is a very small, dark room that usually contains a toilet and wash basin. Whether an inmate has a bed or is given clothing depends on prison policies. Visitation, as well as other forms of communication, is either limited or prohibited outright. The prisoner is normally allowed one hour or less to leave the room, to shower, and maybe to walk around the prison yard. Many prisoners have lost their sanity while in the “hole.”

⁴⁵ The author of this paper received communications from prison inmates located at Tucker, Cummins, and Newport Correctional Facilities—all in Arkansas. Newport is a women’s facility. The names and/or prison identification numbers have been withheld for safety concerns.

⁴⁶ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966), reprinted in RONALD J. ALLEN ET AL., *CONSTITUTIONAL CRIMINAL PROCEDURE: AN EXAMINATION OF THE FOURTH, FIFTH, AND SIXTH AMENDMENTS AND RELATED AREAS* 1177-1256 (3d ed. 1995). “In a series cases decided by this court long after [the Wickersham Commission reports], the police resorted to physical brutality—beating, hanging, whipping—and to sustained and protracted questioning incommunicado in order to extort confessions” *Id.* at 1179 (referring to *Miranda*). See also *People v. Wakat*, 415 Ill. 610, 114 N.E.2d 706 (1953); *Wakat v. Harlib*, 253 F.2d 59 (7th Cir. 1958) (defendant required eight months of extensive physical therapy after being beaten in police custody); *Bruner v. People*, 113 Colo. 194, 156 P.2d 111 (1945) (defendant held

of his or her Fifth Amendment right to remain silent and Sixth Amendment right to counsel. Notwithstanding these protections, there has been an alarming rise in the number of cases alleging police brutality since September 11, 2001.⁴⁷

The United States also has an extensive history of supporting foreign regimes known to practice torture on non-U.S. citizens either for financial/political reasons or in the name of national security. "From 1945 to the end of the century, the United States attempted to overthrow more than 40 foreign governments, and to crush more than 30 populist-nationalist movements struggling against intolerable regimes."⁴⁸ Some examples are America's activities in the 1950s in Vietnam, Cambodia, and Laos, which led to the torture and summary execution of millions of civilians.⁴⁹ America has also been criticized for its financial and military support of dictators and repressive states, such as Chang Kai Shek of Pre-Communist China (1945-1949),⁵⁰ Marcos of the Philippines (1945-

incommunicado for two months and deprived of food for over fifteen hours, forced to take lie detector test just to use the bathroom); *People v. Matlock*, 51 Cal. 2d 682, 336 P.2d 505 (1959) (defendant deprived of sleep and interrogated until he confessed to a lie). See generally AMERICAN CIVIL LIBERTIES UNION, ILLINOIS DIVISION, SECRET DETENTION BY THE CHICAGO POLICE (1959); Charles S. Potts, *The Preliminary Examination and the "Third Degree"*, 2 BAYLOR L. REV. 131 (1950); David L. Sterling, *Police Interrogation and the Psychology of Confession*, 14 J. PUB. L. 25 (1965).

⁴⁷ See Robert Cooper, *Order, Force and Law in a New Era*, CRIMES OF WAR PROJECT: THE MAG., Sept. 2002, available at <http://www.crimesofwar.org/sept-mag/sept-cooper.html> (last visited Feb. 17, 2005); see also Anthony Dworkin & Ariel Meyerstein, *International Law Since September 11-A Timeline*, CRIMES OF WAR PROJECT: THE MAG., at <http://www.crimesofwar.org/sept-mag/printer-timeline.html> (last visited Feb. 17, 2005).

⁴⁸ DOUBLE STANDARDS, WHY DO THEY HATE US?, at <http://www.doublestandards.org/enemies.htm> (last visited Feb. 17, 2005) (citing WILLIAM BLUM, *ROGUE STATE: A GUIDE TO THE WORLD'S ONLY SUPERPOWER* (2002); see generally WILLIAM BLUM, *KILLING HOPE: US INTERVENTION IN THE THIRD WORLD* (2d ed. 2001), available at http://www.thirdworldtraveler.com/Blum/KillingHope_page.html (last visited Feb. 17, 2005) (containing excerpts from *KILLING HOPE*).

⁴⁹ Nicole Barrett, Note, *Holding Individual Leaders Responsible for Violations of Customary International Law: The U.S. Bombardment of Cambodia and Laos*, 32 COLUM. HUM. RTS. L. REV. 429 (2001).

⁵⁰ See, e.g., COMMUNIST PARTY OF AUSTL., *A HISTORY OF U.S. WARS OF AGGRESSION AND INTERVENTION*, at <http://www.cpa.org.au> (last visited Feb. 17, 2005) (noting that the United States intervened in Chinese civil war against the

1953)⁵¹ Pinochet of Argentina (1973-1987),⁵² the Shah of Iran (1953-1979),⁵³ General Somoza Debayle of Nicaragua (1978-1989),⁵⁴ Suharto

Mao's who were struggling for liberation, supported known human rights violator Chiang Kai-shek, and used defeated Japanese soldiers to fight the Chinese people); DOUBLE STANDARDS, *supra* note 48. See generally THE COLUMBIA ENCYCLOPEDIA (6th ed. 2001), at <http://www.bartleby.com/65/ch/ChiangKa.html> (last visited Feb. 17, 2005).

⁵¹ COMMUNIST PARTY OF AUSTL., *supra* note 50. While left-wing Huks were fighting the Japanese invaders, the U.S. initiated a war with them. The Huks lost and the United States established puppet government led by Dictator Ferdinand Marcos, who subsequently tortured and murdered many of his citizens and "enemies" designated as such by the U.S. government. *Id.*

⁵² In 1970, Salvador Allende was elected President by the Popular Unity Coalition of Socialists and Communists. In August 1973, President Allende appointed Augusto Pinochet as commander-in-chief of the army. On September 11, 1973, President Allende was killed when the presidential palace was bombed in a violent coup. Between September 11, 1973 and December 1973, over 1,200 people were tortured, murdered, or disappeared. See *Special Report: Augusto Pinochet, Chile under Pinochet—A Chronology*, GUARDIAN, Jan. 15, 1999, at <http://www.guardian.co.uk/pinochet/Story/0,209222,00.html> (last visited Feb. 17, 2005). The former U.S. Secretary of State Henry Kissinger and several other former Central Intelligence Agency (CIA) officers are currently under investigation for aiding Pinochet in the coup and supplying the Chilean military with the names of leftwing Americans and other dissidents in Chile, who were later rounded up (in what became known as "Operation Candor") intimidated, tortured, and murdered. Jonathan Franklin & Duncan Campbell, *Kissinger May Face Extradition to Chile*, GUARDIAN, June 12, 2002, at <http://www.guardian.co.uk/print/0,3858,4431760-103681,00.html> (last visited Feb. 17, 2005); Tito Tricot, *Remembering September 11 1973*, GUARDIAN, Sept. 16, 2002, at <http://www.guardian.co.uk/print/0,3858,4502058-103681,00.html> (last visited Feb. 17, 2005); James Brookfield, *FBI Helped Pursue Pinochet's Political Opponents in the US*, WORLD SOCIALIST WEB SITE, Feb. 11, 1999, at <http://www.wsws.org/articles/1999/feb1999/pino-f11.shtml> (last visited Feb. 17, 2005).

⁵³ In 1953, the United States and Britain provided Iranian military officers with intelligence services to aid the overthrowing of Prime Minister Muhammed Mussadeq, a man the U.S. despised because he was a proponent of nationalizing the oil industry--a decision that would have adversely affected all western economies that relied on oil. Additionally, the United States backed the brutal Shah Mohammed Riza Pahlavi of Iran, who was overthrown by Ayatollah Khomeini. Ironically, Khomeini's human rights' record was no better than his predecessors. See Iran Chronology, at <http://www.khomeini.com/gatewatto>

of Indonesia (1965),⁵⁵ Osama bin Ladin of Afghanistan (1979-1992),⁵⁶ Saddam Hussein of Iraq (1990s, 2003),⁵⁷ Haiti (1915-1991),⁵⁸ Brazil (1961-64),⁵⁹ Israel (1947),⁶⁰ and South Africa (1950s-1990s).⁶¹

heaven/Articles/USAIranChronology.htm (last visited Jan. 1 2004 and on file with Review and Author).

⁵⁴ STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 448-54 (2d ed. 1997). After the Sandinistas replaced General Somoza, they began to "aid the leftist insurgency in El Salvador and turned toward Cuba and the Soviet Union for political, military, and financial assistance." *Id.* In response, the United States secretly and illegally aided Nicaraguan Contras. Despite the fact Congress explicitly prohibited such aid, President Reagan felt "strongly about the Contras, and he ordered his staff, in the words of the National Security Advisor, to find a way to keep the Contras 'body and soul together.'" *Id.* When President Reagan could not get funding from Congress, he placed Lt. Col. Oliver L. North in charge of running a full-scale operation to raise money and arms for the Contras. Between 1984 and 1986, the U.S. government secretly raised over \$34 million for the Contras from other countries and another \$2.7 million from private organizations. The funds raised were filtered through the "Enterprise," a "dummy" corporation created to engage in covert activities on behalf of the United States. Meanwhile, extremists in Iran took some U.S. citizens hostage in Tehran. In 1985, the Israeli government proposed that the U.S. sell missiles to Iran in exchange for the hostages. Both the Secretary of State and Secretary of Defense opposed the proposal, but President Reagan authorized Israel to sell the missiles anyways. Profits made from the sell were then transferred to the Contras in Nicaragua. The Contras used the funding to capture, torture and kill the Sandinistas. On November 3, 1986, Beirut's weekly *Al-Shiraa* reported that the U.S. had secretly sold weapons to the Iranians in exchange for hostages, triggering the Iran-Contra scandal. *Id.* It is interesting to note that at the time the U.S. was selling arms to Iran, it was also selling arms to Iraq to help it defeat Iran. At the time, Iran was listed as a "designated state sponsor" of terrorism by the U.S. State Department. See U.S. Dep't of State, Office of the Coordinator for Counterterrorism, State Sponsors of Terrorism, available at <http://www.state.gov/s/ct/c14151.htm> (last visited Feb. 23, 2005).

⁵⁵ The United States backed a coup by General Suharto to oust democratically elected President Sukarno. The U.S. Embassy supplied Suharto names of people who were to be "dealt with." Over one million people were hunted down, tortured and killed. Decades of repression followed. See COMMUNIST PARTY OF AUSTRAL., *supra* note 50.

⁵⁶ *Id.* The feudal monarchy was overthrown in the 1970s and replaced by a progressive government which carried out land reforms, introduced universal education (for both men and women), gave women equal rights, and established a friendship with its neighbor, the Soviet Union. In response, the United States gave billions of dollars in aid to the opposition waging a war against the

progressive leaders. More than one million were killed, three million disabled, and another five million became refugees—in other words, half of the total population. With U.S. aid and training, clerical-fascists known as the Taliban took over the country, repealing all progressive laws. Ironically, U.S.-trained Taliban leader Osama bin Laden has been accused of orchestrating the September 11th terrorist attacks against the United States.

⁵⁷ *Id.* During the Gulf War, the U.S. “carried out the most concentrated aerial bombardment in world history, dropping 177 million pounds of bombs on the Iraqi people. Napalm and cancer-causing depleted uranium weapons were used America’s aim: to establish U.S. military bases and gain control over Iraq’s vast oil reserves.” *Id.* The U.S. is currently at war with Iraq.

⁵⁸ DYCUS ET AL, *supra* note 54, at 391-92. After a Haitian president was killed, the United States sent some Marines to Port-au-Prince. U.S. forces remained in Haiti until 1933, at which time the Marines turned the state over to the military: “From 1931 to 1991, Haiti was ruled by a succession of military juntas and authoritarian rulers, including the Duvaliers.” *Id.* The United States supported the Duvaliers, CIA-backed torturers, drug traffickers and death squads. COMMUNIST PARTY OF AUSTL., *supra* note 51. Duvalier was eventually driven out of the country. In 1990, Jean Aristide was elected President. Less than a year later, Aristide was overthrown by military juntas “that continued the brutalities of the Duvalier regimes, using paramilitary militias and Haiti’s army of 7,000 to terrorize opponents.” *Id.*

⁵⁹ *Id.* “Progressive President Goulart limited profits of multi-national companies, nationalized a U.S. communications corporation, and adopted an independent foreign policy opposing sanctions on Cuba.” *Id.* In response, the U.S. backed opponents of Goulart in a 1964 coup, “initiating death squads, disappearances, torture and violent military suppression of civilian demonstrations.” *Id.*

⁶⁰ Garry Leech, *Alienating the International Community*, COLOM. J. ONLINE (Sept. 24, 2001), at <http://colombiajournal.org/colombia82.htm> (last visited Feb. 17, 2005). In 1947, Western powers took land from the Palestinians and gave it to the Jews, creating the current state of Israel. With the financial and military support of the United States, Israel declared a war in 1967, whereby it seized more land, causing more friction between Israel and the rest of the Arab world. Since Israel’s inception, “Washington has repeatedly stood alone with Israel in voting against UN resolutions condemning Israel’s military rule of the occupied territories and treatment of Palestinians as second class-citizens in their own land [M]uch of the weaponry used to target, torture, and kill Palestinians is supplied by Washington (Israel is the largest recipients of U.S. military aid)” *Id.* It is worth noting that Israel is also the only “democratic” government that has openly permitted its investigators to torture detainees suspected of committing or conspiring to commit acts against the state.

2.4 Concluding Remarks

A historical review of torture is telling, in so far as it demonstrates the inherent illegitimacy of the practice. First employed by the Greeks and Romans as an exhibition of absolute power against entire populations of conquered people, the practice of torture quickly became the preferred tool of the oppressor—the oppressor being, the conqueror, the colonizer, the dictator, and the segregator. Powerful states, institutions, and individuals, guided primarily by irrational fears, selfish interests, or by a feeling of self-righteousness and superiority, have employed torturous techniques to terrorize the powerless into submission. The history of torture also tells another story, one of expansion. There is no such thing as a little torture. There is no distinguishable class. No one is immune. Perhaps the worst legacy of torture is its long line of mangled, mutilated victims, each with his or her own horrific story. Those stories, often told in tears, eventually led to international condemnation; and, subsequently, to international and regional codifications prohibiting the practice.

III. The Legal Debate: Is Torture a Violation of *Jus Cogens* Norms Under Customary International Law?

3.1 Definitions

A. Torture

The U.N. Convention Against Torture (C.A.T)⁶¹ provides the most contemporaneous and widely accepted definition of torture. According to Article 1, torture is:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from her or a third

⁶¹ The United States continued to support the South African apartheid government, despite United Nations' boycotts and countless reports from credible sources that the government was engaged in the practice of systematically detaining, torturing, and murdering black South Africans.

⁶² Convention Against Torture and Other Cruel, Inhuman Degrading Treatment or Punishment, *opened for signature on* Dec. 10, 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027 (entered into force June 26, 1987), *reprinted in* BASIC HUMAN RIGHTS DOCUMENTS 229 (Ian Brownlie & Guy S. Goodwin-Gill eds., 4th ed. 2002).

party information or a confession, punishing him for an act he or a third person has committed, or suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions.⁶³

B. Customary International Law

Customary international law refers to the “general practices of states which, over a period of time, becomes binding law through repetition and adoption.”⁶⁴ According to the Inter-American Commission on Human Rights, a customary international norm is:

(a) a concordant practice by a number of states with reference to a type of situation falling within the domain of international relations; (b) a continuation or repetition of the practice over a considerable period of time; (c) a conception that the practice is required or consistent with prevailing international law; and (d) general acquiescence in the practice by other states.⁶⁵

There is no set number of states that must accept a practice before it is considered a customary norm; as such, complete conformity is not a prerequisite for recognizing customary international norms. If a state strongly objects to an emerging customary norm, “it may, by becoming a persistent objector, prevent the rule from becoming binding upon it, although other states will still be bound.”⁶⁶

C. *Jus Cogens* Norms

Generally speaking, *jus cogens* norms “are the highest rules of international law, and function essentially as ‘very strong rule[s] of

⁶³ *Id.*

⁶⁴ Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT’L & COMP. L. REV. 411 (1989).

⁶⁵ *Id.* at 417 (citing [Roach Death Penalty] Case 9647, Inter-Am. C.H.R. 147, 166 OEA/ser. L/V/II.71, doc. 9 rev. 1 (1987)).

⁶⁶ Parker & Neylon, *supra* note 64, at 417-18.

customary international law.”⁶⁷ More specific definitions of the word vary. Some scholars define the word substantively, others stress its procedural effects.⁶⁸ Article 53 of the Vienna Convention on the Law of Treaties,⁶⁹ which refers to *jus cogens* as “peremptory”⁷⁰ norms, combines the two by simply stating that “a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.”⁷¹

Jus cogens norms have also been defined by their “character of upholding world order.”⁷² Indeed, it is this definition of *jus cogens* that the Mexican delegate to the United Nations, Javier Suarez, adopted during the Vienna Conference of 1971:⁷³ “The rules of *jus cogens* [are] those rules which derive from principles that the legal conscience of mankind deem[s] absolutely essential to the coexistence [of] the international community.”⁷⁴

Other definitions of the word emphasize its restrictive nature. Unlike international customary norms, *jus cogens* norms are binding upon all states and permit absolutely no derogation, regardless of how many states may object to the norm.

If the will of a state conflicts with a *jus cogens* norm, the operation of *jus cogens* requires the state to acquiesce to the *jus cogens* norm. The binding nature of *jus cogens* limits the substance of valid treaties of international agreement and makes agreements that conflict with its norms void. The binding, peremptory

⁶⁷ *Id.* at 417 (citing A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 132 n.73 (1971)).

⁶⁸ *Id.* at 414.

⁶⁹ The Vienna Convention on the Laws of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force Jan. 27, 1970) [hereinafter the Vienna Convention].

⁷⁰ *Id.* art. 53.

⁷¹ *Id.*; see also LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS 2 (Lakimieslito Kustannus ed., 1998); BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 10 (3d ed. 1999).

⁷² Parker & Neylon, *supra* note 64, at 415.

⁷³ U.N. Conference on the Law of Treaties, 1st and 2d Sess., Vienna, Mar. 26-May 24, 1968, U.N. Doc. A/CONF./39/11/Add/ 2 (1971).

⁷⁴ Parker & Neylon, *supra* note 64, at 415 (quoting Mexican delegate Mr. Javier Suarez Medina).

nature of *jus cogens* does not allow for derogation. For this reason, *jus cogens* norms must invalidate any instrument, judicial order, executive order or legislative act that contravenes them.⁷⁵

A final definition of *jus cogens* norms is derived from the texts that define the norm by describing the acts that constitute a violation of it. For example, after clarifying that not all customary international laws have the status of *jus cogens* norms, the Restatement on Foreign Relations⁷⁶ defines *jus cogens* offenses as those acts enumerated in clauses (a) to (f), namely, "genocide, slavery and slave trading, murder or causing the disappearance of individuals, torture or other cruel, inhuman, or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, or a consistent pattern of gross violations of internationally recognized human rights."⁷⁷

3.2 Transforming Customary Norms to *Jus Cogens* Norms

Article 53 of the Vienna Convention sets forth the three criteria that must be present before a customary international norm is elevated to the status of a *jus cogens* norm:

For the purposes of the present Convention, a peremptory norm of general international law is [1] a norm accepted and recognized by the international community of states as a whole as [2] a norm from which no derogation is permitted and [3] which can be modified only by a subsequent norm of general international law having the same character.⁷⁸

⁷⁵ *Id.* at 416 (internal citations omitted).

⁷⁶ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987).

⁷⁷ See also Parker & Neylon, *supra* note 64, at 430, which cites 75 DEP'T. OF STATE BULL. No. 1932 (1976) 1, at 3 (quoting former Secretary of State Henry Kissinger as making the following statement at an Organization of American States (OAS) meeting: "[T]here are standards below which no government can fall without offending fundamental values such as genocide, officially tolerated torture, mass imprisonment or murder, or the comprehensive denial of basic rights to racial, religious, political, or ethnic groups. Any government engaging in such practices must face adverse international judgment.").

⁷⁸ Vienna Convention, *supra* note 69, art. 53.

A. Recognition & Acceptance by the International Community as a Whole

Norms of "general international law" are norms that are generally applicable to all states. When members of the International Law Commission (ILC)⁷⁹ met in 1976 to discuss the meaning of "as a whole,"⁸⁰ they agreed that the words "as a whole" were *not* synonymous with "unanimous recognition by all members [of the international community]."⁸¹ Hence, the prevailing view is that the words "acceptance by the international community of States as a whole" means the acceptance by all essential components [in other words, a majority] of the international community of States."⁸²

B. Non-Derogability

The most distinct feature of *jus cogens* norms is that they permit no derogations. Since *jus cogens* norms are non-derogable, a suspect accused of violating a norm will find little, if any, refuge in this world. Under the doctrine of universal jurisdiction, any state can assume jurisdiction and try an individual for his or her transgression of *jus cogens* norms.⁸³

⁷⁹ HANNIKAINEN, *supra* note 71 at 211 (citing the International Law Commission Report 1976, U.N. Doc. A/31/10 287).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ See Bartram S. Brown, *The Evolving Concept of Universal Jurisdiction*, 35 NEW ENG. L. REVIEW 384 (2001). The principle of universal jurisdiction

provides every state with jurisdiction over a limited category of offenses generally recognized as of universal concern, regardless of the situs of the offense and the nationalities of the offender and the offended. While the other jurisdictional bases demand direct connections between the prosecuting state and the offense, the universality principle assumes that every state has an interest in exercising jurisdiction to combat egregious offenses that states universally have condemned.

Id.

C. Modification by a New Peremptory Norm of General International Law

According to one scholar, "The prohibition of modification particularly concerns treaty provisions, special customs, titles, regimes and other instruments which are in conflict with peremptory norms, and themselves constitute legal and valid sources for other acts."⁸⁴ The modification requirement also prevents one or a few states from modifying the status of *jus cogens* norms by simply denouncing those norms that fail to suit their particular interests. For example, in the *Nicaragua Case*,⁸⁵ the International Court of Justice held that the United States was in violation of several *jus cogens* norms, despite the U.S. government's contention that such violations were merely acts of "collective self defense."⁸⁶ In explaining its decision, the Court stated: "If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself . . . the significance of that attitude is to confirm rather than weaken the rule."⁸⁷

⁸⁴ HANNIKAINEN, *supra* note 71 (stating that *jus cogens* norms function to protect "society and its institutions from [the] harmful consequences of individual agreements").

⁸⁵ *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 98 (June 27). In this case, Nicaragua filed an application to institute proceedings against the United States for its involvement in military and paramilitary operations within the country. The ICJ first issued a provisional order, restricting U.S. access to Nicaraguan ports, in particular, and the laying of mines. After preliminary set backs, such as jurisdictional issues and America's refusal to attend the proceedings, the Court held that the U.S. violated the following customary and *jus cogens* norms: intervening in the internal affairs of another state, violation of the prohibition against force (aggression) against one state, violation of prohibition on infringing the sovereignty of another state, and violation of prohibition against interrupting peaceful and maritime commerce. Additionally, the Court found that the U.S. had violated other obligations arising out of the Treaty of Friendship, Commerce and Navigation of 1956. *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

D. A Word on States' Obligations to Respect and Adhere to *Jus Cogens* Norms

Although the international community has yet to reach a consensus on an enforcement⁸⁸ scheme for serious human rights violations, it has agreed that the principles of *erga omnes* must be respected.⁸⁹ Because *jus cogens* norms are superior to all others, the

⁸⁸ Kerstin Bartsch & Björn Elberling, *Jus Cogens vs. State Immunity, Round Two: The Decision of the European Court of Human Rights in the Kalogeropoulou et al. v. Greece and Germany Decision*, 4 GERMAN LAW JOURNAL 5, 476, 486 (2003) (noting that "every *jus cogens* rule contains or presupposes a procedural rule which guarantees its judicial enforcement").

⁸⁹ *Id.* (arguing that *erga omnes* "creates obligations by each state, so that a violation by a state of the rights of persons subject to its jurisdiction is a breach of obligation to all other states."). See also RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 702, cmt. o (1987). See, e.g., *Mutomba v. Switzerland*, Communication No. 13/1993, U.N. Committee Against Torture, Decision of Apr. 27, 1994, *reprinted in* 15 HUM. RTS. L. J. 164 (1994). In this case, the U.N. Committee Against Torture forbade Switzerland from deporting Mutomba back to Zaire where he claimed he would be tortured and killed. Despite the fact that Mutomba fled to Switzerland to evade prosecution for committing crimes against humanity and crimes against Geneva Convention Common Article 3, the Committee held that Switzerland had a duty to protect those within its territory. In fact, the Committee went a step farther and issued an interim protection for Mutomba. The Committee's determination, coupled with the drastic measures it took to protect Mutomba from deportation, leave no room for doubt that (1) the prohibition against torture is absolute and (2) states' affirmative duties to protect individuals from torture is paramount. See also *Velásquez Rodríguez Case*, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1998). In this case, the Inter-American Court held that among other grave violations of the American Convention, the Honduran government violated Article 5(2), which prohibits the practice of torture, as well as Article 1(1), which bestows an affirmative obligation upon states to protect their citizens from such violations. This "protection" includes an obligation to seriously investigate reports of grave human rights abuses. See also Megan Hagler & Francisco Rivera, *Bamaca Velásquez v. Guatemala: An Expansion of the Inter-American System's Jurisprudence on Reparations*, HUM. RTS. BRIEF, Spring 2002, at 2. Hagler and Rivera address a case that involved the Guatemalan army and its capture of Efraín Bamaca Velásquez, a Mayan comandante, who was secretly detained and tortured for over a year before he was killed in September 1993. The Inter-American Court found that the Guatemalan government had violated American Convention on Human Rights Art. 1(1) (Obligation to Respect Rights), among other violations. See generally *Baena Ricardo et al. Case*, Judgment of Feb. 2, 2001, Inter-Am. Ct. H.R. (Ser.

principle of *erga omnes* is always triggered by *jus cogens* violations. This, in turn, gives conforming states the right to force non-conforming states to adhere to the violated norms, including the right of reprisals.⁹⁰

3.3 The Prohibition of Torture as a *Jus Cogens* Norm

In order to determine if a norm is customary, one must examine the “custom and usages of civilized nations; and as evidence of these, the works of jurists and commentators.”⁹¹ To determine if a customary norm is considered a *jus cogens* norm, one must apply the customary norm test and then apply the criteria set forth above. The easiest way to accomplish either task is to locate and examine all pertinent international and regional instruments that codify the prohibition or tribunals that discuss its significance under international law. The remainder of Part III performs such examination.

A. International Codifications

1. The Geneva Conventions

In response to the atrocities committed during the Crimean and Civil wars, twelve European nations met in Geneva, Switzerland, to draft rules for treating the sick and wounded during war time in 1864. The product, the Geneva Convention Amelioration of the Condition of the Wounded in Armies in the Field,⁹² was the “first of many treaties establishing laws whose violation would be taken to constitute war crimes.”⁹³

C) No. 72 (2001); Caballero Delgado and Santana Case, Judgment of Dec. 8, 1995, Inter-Am. Ct. (Ser. C) No. 22 (1995); Judicial Guarantees in States of Emergency (Arts. 27(2), 25, and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/87, October 6, 1987, Inter-Am. Ct. H.R. (Ser. A) No. 7 (1987).

⁸⁹ Bartsch & Elberling, *supra* note 88, at 476.

⁸⁹ Parker & Neylon, *supra* note 64, at 417.

⁹⁰ Bartsch & Elberling, *supra* note 88, at 476.

⁹¹ Parker and Neylon, *supra* note 64, at 417.

⁹² Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, *adopted on* Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 [hereinafter Geneva I, Armed Forces in the Field].

⁹³ David Greenberg, *Fighting Fair, The Laws of War and How They Grew*, Jan. 17, 2002, SLATE, at <http://slate.msn.com/id/2060816/> (last visited Feb. 19, 2005). Greenberg notes that after the first Geneva Convention, between 1899

The 1864 accord stated that ambulances and hospitals were to be regarded as neutral; that hospital workers and patients were to be unmolested; that the wounded or sick soldiers would receive medical care, regardless of their loyalties; and that the Red Cross could freely travel through combat zones to aid the wounded.⁹⁴

Between 1929 and 1949, three other Geneva Conventions⁹⁵ were drafted and universally adopted by the international community as a whole. Combined, these conventions extend protections to noncombatants, POWs, and the wounded.⁹⁶ In particular, Article 3 of Geneva III prohibits "(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; [and] (c) outrages upon personal dignity, in particular humiliating and degrading treatment."⁹⁷

and 1907, there were a series of conferences held at The Hague, which led to an extensive catalogue of wartime rules:

These treaties still make up the essence of today's international. They required that prisoners received decent food, shelter, and clothing; that guerillas and other citizen-soldiers obey the same laws as official military personnel; that combatants respect institutions devoted to religion, charity, education, art, and science; that surrendering enemies not be killed or injured; that defenseless towns or buildings not be attacked; and that soldiers not pillage or confiscate property.

Id.

⁹⁴ *Id.*

⁹⁵ Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces, *adopted on* Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 [hereinafter Geneva II, Armed Forces at Sea]; Geneva Convention Relative to the Treatment of Prisoners of War, *adopted on* Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter Geneva III, Prisoners of War]; and Geneva Convention Relative to the Protection of Civilian Person in Time of War, *adopted on* Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter (Geneva IV, Protection of Civilians)].

⁹⁶ Greenberg, *supra* 93.

⁹⁷ Geneva III, *supra* note 95, art. 3.

2. The United Nations

The United Nations Charter of 1945 was the first post-war international instrument advocating human rights and admonishing inhumane treatment of civilians and prisoners. Although the Charter is non-binding, member states agree to have a "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."⁹⁸ Additionally, Article 5 of the Universal Declaration of Human Rights (UDHR),⁹⁹ which entered into force in 1948, expressly prohibits the practice of torture: "No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment."¹⁰⁰

In 1966, the U.N. General Assembly adopted the International Covenant on Civil and Political Rights (ICCPR).¹⁰¹ Article 7 of the ICCPR prohibits "torture, cruel and inhuman or degrading treatment or punishment." One form of torture commonly used by the Nazis and the Japanese Imperial Army is singled out and expressly prohibited: "In particular, no one shall be subjected without his free consent to medical or scientific experimentation."¹⁰² Article 4(2) prohibits states from derogating from Article 7.

Subsequently, the U.N. adopted Resolution 3452, the Declaration of the Protection of All Persons from being Subjected to Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment.¹⁰³ The Annex to the U.N. Declaration Against Torture contains twelve articles that prohibit torture.¹⁰⁴ For example, Article 1 of the Annex not only defines torture but also states that the practice of torture "constitutes an aggravated and deliberate form of cruel, inhuman and degrading treatment or punishment."¹⁰⁵ Other articles impose an

⁹⁸ U.N. CHARTER art. 55, para. c.

⁹⁹ G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948) [hereinafter Universal Declaration or UDHR].

¹⁰⁰ *Id.*

¹⁰¹ International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

¹⁰² *Id.*

¹⁰³ Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 3452, U.N. GAOR, 30th Sess., Supp. No. 34, U.N. Doc. A/1034 (1975) [hereinafter U.N. Declaration Against Torture].

¹⁰⁴ *Id.* at Annex.

¹⁰⁵ *Id.* art. 1.

affirmative duty on states to refrain from ordering persons tortured,¹⁰⁶ to train their law enforcement agents on how to conduct an interrogation without resorting to torture,¹⁰⁷ to criminalize the practice of torture in domestic law and investigate reported cases of torture,¹⁰⁸ to deem any evidence obtained by torture inadmissible,¹⁰⁹ to punish perpetrators of torture,¹¹⁰ and to provide torture victims with some type of financial and medical assistance.¹¹¹

B. Regional Codifications

1. Europe & the European Union

The practice of torture has also been denounced on the other side of the Atlantic. In 1955, the Council of Europe adopted the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹¹² Like the UDHR, Article 3 of the European Convention expressly prohibits the practice of torture. Consistent with other treaties and conventions, the prohibition is absolute.¹¹³ In 2000, the European Union adopted the Charter of Fundamental Rights.¹¹⁴ Article 4 of the Charter prohibits torture. The European Union adopted further measures aimed at eradicating the practice and punishing its administrators in 2001.¹¹⁵

¹⁰⁶ *Id.* arts. 4 and 6.

¹⁰⁷ *Id.* art. 5.

¹⁰⁸ *Id.* art. 9.

¹⁰⁹ *Id.* art. 12.

¹¹⁰ *Id.* art. 10.

¹¹¹ *Id.*

¹¹² European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter European Convention], *reprinted in* BASIC HUMAN RIGHTS DOCUMENTS, *supra* note 62, at 398. This convention, and a list of the states party to it, may also be viewed at <http://www.echr.coe.int/Convention/webConvenENG.pdf> (last visited Feb. 19, 2005).

¹¹³ European Convention, *supra* note 112, art. 3.

¹¹⁴ Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1 (entered into force Dec. 7, 2000).

¹¹⁵ *European Union Adopts Guidelines to Combat Torture*, PUCL BULLETIN, (People's Union for Civil Liberties), June 2001, at <http://www.pucl.org/reports/International/2001/eu-torture.htm> (last visited Feb. 19, 2005).

2. The Americas

The American Declaration of the Rights and Duties of Man, which was adopted at the Ninth Inter-American Conference in 1948,¹¹⁶ provides that "[e]very human being has the right to life, liberty and security of his person."¹¹⁷ Article 25 provides for the humane treatment of detainees, and Article 26 prohibits the use of "cruel, infamous or unusual punishment."¹¹⁸

In 1959, the Inter-American Council of Jurists drafted a Convention on Human Rights,¹¹⁹ created the Inter-American Commission on Human Rights, and established an Inter-American Court for the Protection of Human Rights.¹²⁰ Article 1(1) of the American Convention imposes an affirmative duty on member states to respect and protect the rights all persons within their jurisdiction. Article 5(2) prohibits cruel, inhuman or degrading treatment or punishment. Article 27(2) prohibits the practice of torture. The distinction between Article 5(2) and Article 27(2), while seemingly subtle, is significant. Pursuant to Chapter IV, Article 27, member states may, under limited circumstances, suspend the guarantees specified in 5(2). Member states cannot, however, derogate from Article 27(2) under any circumstances.

In February 1987, the Inter-American system adopted Inter-American Convention to Prevent and Punish Torture.¹²¹ This Convention focuses solely on the issue of torture and is arguably more comprehensive than the U.N.'s C.A.T because it expressly imposes an

¹¹⁶ O.A.S. Res. XXX, O.A.S. Off. Rec. OEA/ser. L./V/I.4 rev., *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V/II.82 doc. 6 rev.1, at 17 (1992) [hereinafter the American Declaration].

¹¹⁷ American Declaration, *supra* note 116, art. 1.

¹¹⁸ *Id.* art. 25.

¹¹⁹ American Convention on Human Rights, *opened for signature* Nov. 22, 1969, O.A.S.T.S. No. 36, 114, U.N.T.S. 123, 9 I.L.M. 673 (entered into force July 18, 1978) [hereinafter American Convention or Pact of San José], *reprinted in* BASIC HUMAN RIGHTS DOCUMENTS, *supra* note 62, at 671.

¹²⁰ A.H. ROBERTSON & J.G. MERRILLS, HUMAN RIGHTS IN THE WORLD: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL PROTECTION OF HUMAN RIGHTS 199 (4th ed. 1996).

¹²¹ Inter-American Convention to Prevent and Punish Torture, *opened for signature* Dec. 9, 1985, O.A.S.T.S. No. 67, I.L.M. 519 (entered into force Feb. 28, 1987) [hereinafter Inter-American Convention on Torture or IACT], *reprinted in* BASIC HUMAN RIGHTS DOCUMENTS, *supra* note 62, at 703.

affirmative obligation on signatories to protect individuals from torture and to punish those who violate the Convention.¹²²

3. Africa

Members of the Organization of African Unity (OAU) formed the African Commission on Human Rights and adopted the African Charter on Human and Peoples' Rights in 1981.¹²³ Article 1 of the African Charter provides that parties to the agreement "shall recognize the rights, duties and freedoms enshrined in [the] Charter and shall undertake to adopt legislative or other measures to give effect to them."¹²⁴ Article 5 expressly forbids "[a]ll forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment"¹²⁵ Since the language found in the African Charter mimics the language in other international and regional conventions, one can reasonably assume the prohibition is absolute.

4. Arabia

In 1979, the Union of Arab Lawyers proposed an Arab Convention on Human Rights, which guaranteed basic human rights based on the *Shari'ah*¹²⁶ and other Islamic laws. The Organization of the Islamic Conference adopted the Cairo Declaration on Human Rights in Islam in August 1990.¹²⁷ With respect to the practice of torture, Article 2(d) guarantees freedom from bodily harm and imposes an affirmative duty upon states to safeguard this freedom. Article 20 of the Cairo Declaration strictly prohibits the use of torture for any reason:

¹²² IACT, *supra* note 121, art. 1.

¹²³ African Charter on Human and Peoples' Rights, *adopted* June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 1520 U.N.T.S. 217, 21 I.L.M. 58 (entered into force Oct. 21, 1986) [hereinafter African Charter], *reprinted in* BASIC HUMAN RIGHTS DOCUMENTS, *supra* note 62, at 728.

¹²⁴ African Charter, *supra* note 123, art. 1

¹²⁵ *Id.* art. 5.

¹²⁶ See THE AMERICAN DESK ENCYCLOPEDIA 727 (1998). *Shar'iah* (*Sharia*) is the "[t]raditional law of Islam, believed by Muslims to be the result of divine revelation. It is drawn from a number of sources, including the Koran and a collection of teachings and legends about the life of Muhammad known as *Hadith*."

¹²⁷ Cairo Declaration on Human Rights in Islam, *adopted on* Aug. 5, 1990, *reprinted in* U.N. Doc. A/CONF.157/PC/62/Add.18 (1993); BASIC HUMAN RIGHTS DOCUMENTS, *supra* note 62, at 764 [hereinafter Cairo Declaration].

It is not permitted to subject him to physical or psychological torture or to any form of humiliation, cruelty or indignity. Nor is it permitted to subject an individual to medical or scientific experimentation without his consent or at the risk of his health or life. Nor is it permitted to promulgate emergency laws that would provide executive authority for such actions.¹²⁸

The Arab Charter on Human Rights was adopted in 1994.¹²⁹ Article 13 not only prohibits the practice of torture but also imposes an affirmative obligation on state parties to prevent torture and punish offenders. Article 13(b) specifically forbids medical and scientific torture. Pursuant to Article 4(c), member states may not derogate from Article 13 under any circumstances.

C. Ad Hoc Tribunals & the International Criminal Court

1. The Yugoslavian & Rwandan War Crimes Tribunals

On May 25, 1993, the U.N. Security Council established the Yugoslavia War Crimes Tribunal (ICTY),¹³⁰ in an attempt to bring peace to the region and prosecute individuals charged with committing crimes against humanity and violating the law of customs after 1991.¹³¹ Article 5(f) states that torture is a crime against humanity, that the ICTY is institutionally competent, and has jurisdiction to prosecute individuals

¹²⁸ Cairo Declaration, *supra* note 127, pmbl.

¹²⁹ Arab Charter on Human Rights, *opened for signature* on Sept. 15, 1994, Res. 5437, 102d Sess., (not in force) *reprinted in* BASIC HUMAN RIGHTS DOCUMENTS, *supra* note 62, at 724.

¹³⁰ See United Nations Security Council Resolution on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International and Humanitarian Law Committed in the Territory of the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 84th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993), *reprinted in* 32 I.L.M. 1159 (1993) [hereinafter ICTY statute].

¹³¹ One of the first individuals indicted under the newly established tribunal was former Yugoslavian President Slobodan Milosevic. Indicted on May 24, 1999, "Milosevic was charged with several crimes against humanity, including killing unarmed civilians and deportation of 800,000 Kosovo Albanians." Sophia Piliouras, *International Criminal Tribunal for the Former Yugoslavia and Milosevic's Trial*, 18 N.Y.L. SCH. J. HUM. RTS. 515, 516 (2002).

for the crime. Article 7 states that any person who “planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2-5 of the Statute,”¹³² is guilty of torture. Article 7(2)-(5) provides that all persons acting under the color of law (in other words, in their official capacity) may be held criminally liable for their actions.¹³³ The Statute for the International Tribunal for Rwanda (ICTR), established to try individuals accused of committing gross human rights violations during the Hutus’ 100-day genocide of Tutsis and moderate Hutus,¹³⁴ contains the same list of prohibitions found in the ICTY statute.¹³⁵

2. The Rome Statute of the International Criminal Court

The Rome Statute of the International Criminal Court (ICC)¹³⁶ entered into force on July 2, 2002. Article 33 prohibits an individual charged with grave human rights violations from escaping justice by claiming that he or she was merely following orders.¹³⁷ Article 5 states, “The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole.” Among the

¹³² ICTY statute, *supra* note 130, art. 7.

¹³³ *Id.*

¹³⁴ Between April and June 1994, approximately 800,000 Tutsis were slaughtered by Hutus immediately after Rwandan President Habyarimana plane exploded. “In Kigali, the presidential guard immediately initiated a campaign of retribution Within hours, recruits were dispatched all over the country to carry out a wave of slaughter Encouraged by the presidential guard and radio propaganda, an unofficial militia group called Interahamwe (meaning those who attack together) was mobilized. At its peak, this group was 30,000-strong.” The genocide ended in July when the RPF captured Kigali and declared a ceasefire. See *Rwanda: How the Genocide Happened*, BBC NEWS, Mar. 4, 2004, at <http://news.bbc.co.uk/1/hi/world/africa/1288230.stm> (last visited Feb. 19, 2005).

¹³⁵ See United National Security Council Resolution Establishing the International Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., at 15 U.N. Doc. S/RES/955 at Annex (Nov. 8, 1994) [hereinafter ICTR Statute].

¹³⁶ Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, opened for signature on July 17, 1998 (entered into force July 1, 2002), reprinted in 37 I.L.M. 1002.

¹³⁷ Specifically, Article 33 states: “The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility”

“most serious” crimes is the practice of torture, which is prohibited in Articles 6(b) (addressing genocide), 7(f) (addressing crimes against humanity), Article 8(1), (2)(ii)(iii) (addressing war crimes/Geneva Convention violations), and Article 55(b) (addressing the rights of the persons during investigation). Article 8, which addresses individual responsibility, is similar to Article 7 of the ICTY statute and Article 6 of the ICTR statute.

3.4 Concluding Remarks

There are no regional or international instruments that permit the practice of torture, and none are being modified to do so. Furthermore, all of the instruments that prohibit the practice do so absolutely. Hence, the prohibition of torture is a *jus cogens* norm. Determining that the prohibition of torture is a *jus cogens* norm is not enough, however, and the inquiry must not end here. The question that necessarily follows is *should* torture be such a violation. To satisfy this inquiry, Part IV discusses and analyzes the main three competing views.

IV. Where Legality & Morality Meet: *Should Torture Be Treated as Violation of International Law?*—Three Views

*A democratic, freedom-loving society does not accept that investigators use any means for the purposes of uncovering the truth . . . At times, the price of truth is so high that a democratic society is not prepared to pay it.*¹³⁸

4.1 Torture Is Not a Violation of Customary International Law or *Jus Cogens* Norms, Nor Should It Be

The first view is held by those who believe that the prohibition of torture is not and should not be a violation of *jus cogens* norms. One of the most compelling proponents of this view is Mark Weisburd, Professor of Law at the University of North Carolina at Chapel Hill. In his article, *Customary International Law and Torture: The Case of India*,

¹³⁸ H.C. 5100/94, Public Comm. Against Torture in Israel v. Israel, 53(4) P.D. 817, 38 I.L.M. 1471, 1481 (Isr. 1999) (citing Barak, *On Law, Judging and Truth*, in 27 *Mishpatim* 11, at 13), available at http://62.90.71.124/files_eng/94/000/051/a09/94051000.a09.pdf (last visited Feb. 21, 2005) [hereinafter Public Committee Against Torture]. All future references to page numbers for this case refer to the page number of the case in .pdf format as displayed on the website listed above).

Professor Weisburd concludes that the prohibition against torture is not a violation of customary international law, nor should it be.¹³⁹ Instead, he reasons that since customary international law is defined as the repetitive practices of states that eventually becomes accepted as law, and because torture is a widespread problem, no one can accurately assert "that the general practice of states [is] to refrain from torture."¹⁴⁰ Weisburd further contends that "[w]hether a given act counts as 'practice' should depend on whether that act will generate expectations regarding future acts."¹⁴¹ To support his argument, Weisburd uses India as a case study.¹⁴² The remainder of this section sets forth and analyzes Weisburd's primary arguments.

A. India: A Case Study for the Proposition that Torture Does Not Violate *Jus Cogens* Norms

1. Indian Law & the Practice of Torture

Indian domestic law prohibits the use of torture as well as any evidence obtained through torture.¹⁴³ The penal code expressly provides for the prosecution of state agents convicted of resorting to torture.¹⁴⁴ India is also a party to the ICCPR, which expressly prohibits torture.¹⁴⁵ Notwithstanding these laws, the practice is prevalent.

The overall picture for India with regard to torture is not good. Although its internal law has been interpreted as forbidding torture—and in fact contains provisions

¹³⁹ Weisburd, *supra* note 13.

¹⁴⁰ *Id.* at 82.

¹⁴¹ *Id.* at 91.

¹⁴² *Id.* Weisburd uses India for a case study because the country counts for about one-sixth of the total global population and because torture is a commonly employed penal sanction. *Id.* at 89.

¹⁴³ *Id.* at 83. Article 14 of the Indian Constitution does not expressly prohibit the practice of torture. Instead it provides that "[t]he State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." *Id.* Article 21 provides: "No person shall be deprived of his life or personal liberty except according to the procedure established by law." *Id.* In *Mullin v. Union Territory of Delhi*, the Indian Supreme Court held that any form of torture, cruel, inhuman or degrading treatment would violate Arts. 14 and 21 of the Indian Constitution. AIR 1981 SC 746.

¹⁴⁴ Weisburd, *supra* note 13, at 83.

¹⁴⁵ *Id.* at 84.

aimed at preventing it, these provisions are not enforced, and their effect is lessened by the operation of other enactments. In fact, police torture is common. Most disturbingly, those instances of torture, which come to light, seem to evoke little reaction from the top levels of the Indian government. . . .¹⁴⁶

The most common methods of torture include, but are not limited to: “beating[s], rape, crushing the leg muscles with a wooden roller, burning with heated objects, and electric shock.”¹⁴⁷

2. India as an Example of Why Torture Is Not and Should Not Be a Violation of *Jus Cogens* Norms under Customary International Law—Three Arguments

Using India as the quintessential case study, Weisburd articulates three arguments in an attempt to explain why torture should not be, and perhaps is not, a part of customary international law.

a. Prohibiting Torture Jeopardizes Diplomatic Relations

First, Weisburd argues there is no logical reason why torture or any other putative human rights violations should be catapulted above all other laws, or why any states dealing with India should refrain from establishing diplomatic relations because of unrelated human rights violations. States that do so risk “engendering a degree of resentment and suspicion strong enough to weaken its ability to work with the Indian government to moderate threats to peace.”¹⁴⁸

b. Eradicating Torture Places an Unreasonable Burden on India

Second, Weisburd argues that since the practice of torture is widespread and ingrained in India’s police culture, eradicating the practice would place an unreasonable burden on the government by forcing India to completely restructure its laws. He argues that the

¹⁴⁶ *Id.* at 87.

¹⁴⁷ *Id.* at 83.

¹⁴⁸ *Id.* at 94.

international community has no right—legal or otherwise—to demand that a state burden itself to with such an awesome task.¹⁴⁹

c. Demanding that States Refrain from Torture Is International and Cultural Imperialism

Weisburd's third argument is the most disconcerting and dangerous because he contends imposing a prohibition against torture on individual states, such as India, is the functional equivalent of international¹⁵⁰ and cultural¹⁵¹ imperialism. Weisburd reasons that since torture is common in India, no one can claim that the general population is unaware of the problem. If the majority of people want to eradicate the practice, they can do so at the next election. However, "[t]o insist that international law nonetheless obligates India to eliminate this practice, then, amounts to substituting the judgment of the international community for that of the Indian electorate."¹⁵²

B. Analysis: Reconciling the Inconsistencies

1. Customary Law, *Jus Cogens* Norms and State Practices

The prohibition against torture originates from long-standing natural and positive law concepts.¹⁵³ Accordingly, customary and *jus*

¹⁴⁹ *Id.* at 94-95.

¹⁵⁰ *Id.* at 96-97. Weisburd does not qualify or define the term "international imperialism." Instead, he analogizes 19th century imperialists to modern day human rights advocates: "[I]mperialists frequently sought to justify their subordination of other peoples by reference to the superiority of values the imperialist would place. . . . Given India's democratic character, it seems accurate to analogize to imperialism any efforts to force India into placing more weight on eliminating torture" *Id.* at 97.

¹⁵¹ *Id.* at 96-97 ("To phrase the problem in cultural terms is to delve into the difference of how the values of a particular culture, and what weight is to be given to the possibility of change over time in a cultural.").

¹⁵² *Id.* at 96-97. Weisburd also argues that "[a] side from its imperialistic character, a demand backed by coercion that the Indian government place greater weight than it has on the importance of eradicating torture seems paradoxically inconsistent with the basic rationales for the international law of human rights." *Id.* at 97.

¹⁵³ According to the doctrine of natural law, all human beings have inalienable rights simply because they are human beings; no other explanation or justification is needed. These rights are so basic to humanity as a whole that

cogens norms are as much about humanity and morality as they are about states' actual practices and the rule of law. They are assertions of universally recognized rights and freedoms. They function as international legal codifications regulating states' behavior with respect to each other and the international community as a whole. This is necessary for international stability. Hence, while it is true that many states within the international community either practice or permit torture, this reality in no way denigrates the ultimate aim of the international community: to eradicate the practice—or at least reduce the growing number of cases. By narrowly construing the definition of customary international law, Weisburd isolates it from its origins and ignores the relevance of such norms altogether. International law should not reverse its position because some states resort to the practice. Instead, it must continue to work for its eradication, sending a clear, consistent message that such practices are intolerable.

2. The Prohibition against Torture should not Cause a Rift in Diplomatic Relations Between States

Weisburd contends that there is no reason "other states ought to make India's human rights record the focus of their dealings with India."¹⁵⁴ Doing so, he argues, shifts the focus from more important issues, like the threat of a possible nuclear war between India and Pakistan. Weisburd is correct in assuming that the international community has a strong interest in reducing tension between the two states, thereby reducing the threat of a nuclear war. However, he erroneously concludes that positive diplomatic relationships can or should be maintained at all costs. Following Weisburd's lines of

they cannot be stripped away by any human or institution. Because certain rights cannot be abrogated by anyone or anything, the doctrine of natural law necessarily holds a state accountable for its actions if it repeatedly violates the most basic human rights of those it has a duty to protect. The doctrine of positive law emerged out of a need to codify some of the natural law norms as well as regulate the behavior of the newly emerging states. Prohibitions against piracy, slavery /slave trading, and initiating aggressive wars were the result of states recognizing that humanity, history and morality could not be isolated from the rule of law, that at some point each will guide the other. At times, these components may seem like strange bedfellows; but nevertheless, they are. The prohibition against torture can be deemed one of the offspring of such a relationship. *See generally* HANNIKAINEN, *supra* note 71.

¹⁵⁴ Weisburd, *supra* note 13, at 94.

reasoning, the international community should have allowed slavery and slave trading to continue and ignored the holocaust in Germany that prompted WWII. In an attempt to make a point, Weisburd completely misses the point. It is because the practice of torture is endemic that the prohibition against it and other grave human rights violations deserves and receives so much attention, not the opposite.

3. Uprooting the Practice and Restructuring the Government is not an Unreasonable Burden to Impose upon a State

India already has laws in place (contained in statutes and cases) that prohibit the practice of torture, cruel, inhuman and degrading treatment or punishment. India is also signatory to the ICCPR, which prohibits torture. Hence, the government's task is not overly burdensome. There is certainly no need to restructure the entire legal system when valid laws already exist. What India must do is *enforce* its laws and amend or repeal those that grant "blanket immunity" to police officers who violate individual's human rights. India should also properly train (or re-train) its police officers, emphasizing the advantages of conducting interrogations without resorting to physical violence. During training, officers should be taught that the use physical force against an unarmed detainee is never justified. Officers should also be notified that anyone who resorts to physical force will be dismissed (without pay) and duly prosecuted under the criminal codes. Properly training police officers reduces the likelihood that torture will remain ingrained in the police culture. By fulfilling its domestic obligations, India would also be fulfilling its international obligations.

4. Demanding a State Reconcile Its Domestic Law with International Law is Not the Functional Equivalent of International or Cultural Imperialism

Weisburd's attempt to draw parallels between the international community's response to the practice of torture with cultural and international imperialism¹⁵⁵ is unpersuasive. So too is his solution of letting the voters decide. As ingenious as this argument appears on its face, it lacks any real substance with respect to the prohibition of torture as it fails to distinguish between theory and reality.

¹⁵⁵ *Id.* at 96-97.

Weisburd's argument fails to account for the numerous occasions where the public at-large is intentionally manipulated¹⁵⁶ and deceived by their government. In theory, voters are intelligent and knowledgeable; they make conscientious, well-reasoned decisions at the polls. In reality, many voters cast their votes based on misinformation deliberately fed or filtered to them from their government. Because torture is strictly prohibited under international law,¹⁵⁷ states go to great lengths to hide the practice from the general public.¹⁵⁸ While the public at-large may know police officers get "rough," they may be completely unaware of the extent of the problem. This could explain the absence of protest.

Weisburd's argument also fails to consider the number or class of voters that may be excluded from voting on the issue. In the United States, convicted felons lose, among other rights, the right to vote. If a tortured suspect is convicted of the crime for which he was detained, he or she may lose his right to vote, thereby muting his or her protest on an issue that directly affects him or her. Put another way, classes directly affected by officers' non-compliance with domestic and international laws have no standing to challenge the officers and have no standing to hold their state accountable if it fails to protect them.

Last, it is worth remembering that India was not forced to sign the ICCPR and thereby agree to be bound by its provisions. This is the most significant difference between nineteenth century imperialism and modern day international human rights. States bound by international

¹⁵⁶ See generally Timothy L. Thomas, *The Age of the New Persuaders*, MIL. REV., May-June 1997, at 72. Thomas defines manipulation as "the desired goal or result of a process that utilizes devices (semantic, technical, psychological, behavioral, etc.) to deceive, misinform, persuade, or control an object, either concrete (a person, state, or action) or abstract (thinking, perceptions, etc.) usually to gain one an advantage." *Id.*

¹⁵⁷ Chimène Keitner, *Crafting the International Criminal Court: Trials and Tribulations in Article 98(2)*, 6 UCLA J. INT'L L. & FOREIGN AFF. 215, 224-225 (2001) ("It is clear under the current state of international law that certain heinous actions [such as torture] cannot form a legitimate part of state policy or benefit from the protection generally accorded to official acts of the state.")

¹⁵⁸ Often, a suspect is held incommunicado, interrogated, and denied the right to communicate with anyone off-site. If the detainee does not die as a result of the bodily assaults, authorities may attempt to ensure his silence by threatening to torture him again or by threatening the lives of his loved ones. Upon release, the suspect may be instructed not to discuss his experience with anyone. The suspect obeys these orders out of fear.

covenants or treaties should not cry cultural or international imperialism when asked not to violate the very articles they agreed to uphold.

4.2 Torture Is a Violation of International Law but Should Be Permitted in Exigent Circumstances

A. The Dershowitzan Solution: Limited Legal Torture

The second view is articulated best by Harvard Law Professor Alan Dershowitz, who acknowledges that the practice of torture is not only morally reprehensible but is also a violation of both U.S. and international law. He even admits that legalizing torture is a “slippery slope”¹⁵⁹ and “too dangerous.”¹⁶⁰ Nevertheless, he contends there are circumstances where the practice can be justified, namely in the case of a “ticking time bomb” terrorist—that is, “a situation where thousands of lives are at stake and [the authorities can] prevent those lives being lost by causing pain to a clear, admitted terrorist”¹⁶¹ Reduced to its elements, Dershowitz’s argument for the legalization of torture is unexpectedly simple: because torture is already being practiced in the United States and abroad, we should just legalize the practice and do it openly.¹⁶² Under the Dershowitzan model, legal torture is preferred over the current trend of “secrecy with deniability”¹⁶³ for four main reasons: (1) it will force judges to “sign a warrant authorizing torture with accountability”;¹⁶⁴ (2) it will reduce “the amount of physical violence directed against suspects”;¹⁶⁵ and thus, (3) better protect suspected

¹⁵⁹ James Silver, *Why America's Top Liberal Lawyer Wants to Legalise Torture*, SCOTSMAN, May 22, 2004, at <http://news.scotsman.com/archive.cfm?id=582662004> (last visited Feb. 20, 2005) (quoting Prof. Dershowitz as stating: “I’m personally opposed to torture because I think the slippery slope is too steep and too dangerous.”).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Interview by Wolf Blitzer with Alan Dershowitz, Harvard University Law Professor, at <http://www.cnn.com/2003/LAW/03/03/cnna.Dershowitz/index.html> (last visited Feb. 20, 2005) (posting a transcription of the interview, with the title “Dershowitz: Torture could be Justified”).

¹⁶³ Silver, *supra* note 159 (quoting Professor Dershowitz).

¹⁶⁴ Gewertz, *supra* note 2 (quoting Professor Dershowitz).

¹⁶⁵ Alan Dershowitz, *When All Else Fails, Why Not Torture?*, AM. LEGION MAG., July 2002. Professor Dershowitz, further writes: “Judges would require compelling evidence before they would authorize so extraordinary a departure from our constitutional norms, and law enforcement officials would be reluctant

terrorists' rights;¹⁶⁶ and (4) it may prevent the senseless death of thousands of civilians.

When asked about permissible methods of torture, Dershowitz prefaced his response by stating that torture is a continuum. At one end, there is torture as a deterrent. This entails torturing someone to death to send a message to others that they will suffer the same fate, if caught. At the other end of the spectrum, there is "non-lethal torture which leaves only psychological scars."¹⁶⁷ Dershowitz opts for the latter—the methods of which include, but are not limited to pushing a sterilized needle under a suspect's fingernails, causing excruciating, short-term pain¹⁶⁸ and injecting the suspect with a cocktail of drugs, affectionately known as "truth serum."¹⁶⁹ In closing one of his articles on legalizing

to seek a warrant unless they had compelling evidence that the suspect had information needed to prevent an imminent terrorist attack."

¹⁶⁶ *Id.* ("He or she would be offered immunity to provide the requested information or threatened with torture and imprisonment. Knowing such a threat was authorized by law, the suspect might well provide the information."). To support this claim, Dershowitz refers to a kidnapping that took place in Germany, in which the son of a well-known financier was kidnapped and "the police were given the authority to torture the kidnapper in order to coerce him to disclose the whereabouts of the boy. Once the kidnapper found out that torture had been authorized, he immediately came clean. Tragically, the police arrived to find that the boy had died." Silver, *supra* note 159. Arguably, this case contradicts Dershowitz arguments, as it exemplifies the uselessness of suspect's tortured confession. Despite the torture, the child was not spared.

¹⁶⁷ *Id.* (quoting Professor Dershowitz).

¹⁶⁸ *Id.*

¹⁶⁹ Alan Dershowitz, *Commentary: Is There a Torturous Road to Justice?*, L.A. TIMES, Nov. 11, 2001, at B19. See Kevin Johnson & Richard Willings, *Ex-CIA Chief Revitalizes "Truth Serum" Debate*, USA TODAY, April 26, 2002. Truth serum

is a barbiturate called thiopental sodium, better known as Sodium Pentothal, trademark of Abbott Laboratories. It is a yellow crystal that can be dissolved in water or alcohol and administered orally or intravenously. Sodium Pentothal is used as a sedative and as an anesthetic during surgery. It depresses the central nervous system, slows the heart rate and lowers the blood pressure. Patients on whom the drug is used as an anesthetic usually are unconscious less than a minute after it enters their veins. The drug causes only a few minutes of sedation. Because of its effectiveness as a sedative, it is the

torture, Dershowitz implies that he is forced to support the legalization of torture because to not do so—to be unprepared—is to invite torture with impunity.¹⁷⁰

B. Analysis of the Dershowitzan Model

1. Counter-Arguments

Dershowitz's contentions that state-sanctioned, judicially monitored torture will result in a more transparent process, forcing judges (and law enforcement in general) to be more accountable; that it will reduce police brutality against terror suspects; that it will better protect suspected terrorists' rights; and that it will save the loss of innocent lives, all lack merit. Below, each proposition is rebutted in turn.

a. Torture Cannot be Judicially-Monitored; Lack of Accountability and Transparency

Dershowitz argues that torture can and should be judicially monitored. He speaks of a hypothetical world where judges and magistrates are held accountable if they erroneously issue torture warrants. Unfortunately, his hypothetical world cannot be reconciled with current U.S. jurisprudence, which holds that a judge cannot be held responsible for any adverse consequences that directly or indirectly flow from a reasonable decision, and that decisions may only be reversed if it is clear from the record that a judge abused his discretion or made some other reversible error *as a matter of law*.¹⁷¹

first of three drugs used by U.S. prison systems during executions. In milder doses, the drug becomes what some call a "truth serum." Those taking the drug become very communicative and share their thoughts without hesitation. Despite its nickname, Sodium Pentothal will not make a person tell the truth against his will. The recipient likely will lose his inhibition, and therefore he might be more likely to tell the truth.

Id.

¹⁷⁰ Dershowitz, *supra* note 165.

¹⁷¹ Justice Cardozo characterized the issue of suppressing evidence obtained through a defective warrant as an issue of whether "the criminal is to go free because the constable has blundered." *People v. Defore*, 242 N.Y. 13, 150 N.E. 585 (1926). Examples of these blunders are found in *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978) (finding a warrant invalid

To understand the implications of these rules, consider the following: An officer, believing the suspect he has arrested has crucial information yet lacking evidence to prove his belief, deliberately misstates the facts or flat out lies to obtain a warrant to torture. The judge, reading the officer's false affidavit, issues a warrant. Later, it is discovered that the officer lied. Although the judge acted in good faith based on the officer's sworn affidavit,¹⁷² the warrant was bogus. In this simple scenario, which closely mirrors modern day realities, one officer's lie convolutes the entire process, and a man is forced to endure excruciating pain based on nothing more than one man's suspicion that his detainee has pertinent information. In real life, as in this scenario, neither the issuance of the torture warrant nor the administration of torture is transparent. Even more disconcerting is the total lack of accountability. This unjust outcome, though unintended, is not only foreseeable, but an inevitable consequence of trying to distinguish between one torturous act and another. The best way to prevent such irreversible conduct is to continue to prohibit the practice altogether.

**b. Legal Torture Will Not Reduce Physical Violence
Against A Suspected Terrorist**

Dershowitz's claim that legal torture will reduce the amount of physical violence police might otherwise direct at suspected terrorists is unpersuasive, especially given the fact that torture cannot, as pointed out

where it can be proven that the evidence given to the magistrate was false or deliberately reckless); *Lo-Ji Sale, Inc. v. New York*, 442 U.S. 319, 99 S. Ct. 2319, 60 L. Ed. 2d 920 (1979) (unanimous) (invalidating a warrant issued when the judge left his detached and neutral role and participated in the police investigation); *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983) (stating that ratification of "bare bones" conclusions in an affidavit is improper). The standard for reversing a magistrate's issuance of a warrant is deferential and looks to see whether the magistrate had a "substantial basis for . . . conclud[ing] that a search would uncover evidence of the wrongdoing." *Gates*, 462 U.S. at 236-37, 103 S. Ct. at 2331. Further, caselaw now analyzes the deterrence effect that the exclusion of evidence seized through a defective warrant would have on the police, admitting that there is no deterrence effect upon the judge. *See United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). This current state of caselaw reflects the lack of accountability that judges currently face.

¹⁷² *See Id.*, where U.S. Supreme Court held the exclusionary rule does not bar admission of evidence seized in reasonable, good-faith reliance on a search warrant that was subsequently held to be defective.

above, be judicially-monitored. An officer using permissible methods, but not successfully obtaining the information sought, may resort to impermissible methods out of sheer frustration, pressure, or anger.¹⁷³ Ironically, one of the best examples of such an impermissible extension of legality is discussed by Dershowitz himself during an interview when he referred to a 1980s Jordanian case; interrogators, frustrated with their unusually stubborn detainee called in the suspect's mother and child and tortured them, all in an effort to get the detainee to talk.¹⁷⁴

If the history of torture teaches us anything, it is that "there is no such thing as a 'little bit' of physical pressure Once a degree of force is permitted, interrogators face an overwhelming temptation to continue applying as much force as necessary to acquire the sought-for information."¹⁷⁵ This is a fact that not even Dershowitz can ignore.¹⁷⁶ Hence, there is no support for the proposition that legalizing torture will reduce police brutality against detained terrorist suspects.

c. Legal Torture Will Not Better Protect Suspected Terrorists' Rights

Equally unpersuasive is Dershowitz's assertion that permitting certain types of torture will better protect suspected terrorists' rights. Dershowitz reasons that because the U.S. Supreme Court has held that once immunity is offered a suspect can be compelled to disclose the requested information, a suspected terrorist will have two choices: disclose the relevant information and receive immunity, or face torture. Dershowitz seems to forget, however, that the right against self incrimination "do[es] not in any sense permit violations of the separate right to be free of torture. Torture is never permitted to overcome a witness's desire to remain silent."¹⁷⁷

¹⁷³ Human Rights Watch, *The Legal Prohibition Against Torture*, at <http://www.hrw.org/press/2001/11/TortureQandA.htm> (last visited Feb. 20, 2005) ("Although such an exception might appear to be highly limited, experience shows that the exception readily becomes the standard practice.").

¹⁷⁴ Silver, *supra* note 159.

¹⁷⁵ Human Rights Watch, *supra* note 173.

¹⁷⁶ See Seth Finkelstein, *Alan Dershowitz's Tortuous Torturous Argument*, ETHICAL SPECTACLE, Feb. 2002, at <http://www.spectacle.org/0202/seth.html> (last visited Feb. 20, 2005) (quoting Dershowitz as stating, "We know from experience that law enforcement personnel who are given limited authority to torture will expand its use.").

¹⁷⁷ Human Rights Watch, *supra* note 173.

Moreover, the immunity rule assumes that the main reason a defendant refuses to speak is because he fears that by inculcating himself he will be held criminally liable for his conduct. When the government grants immunity to a defendant, it removes the defendant's main incentive for remaining silent. Put another way, when immunity is offered, it is assumed that the defendant no longer possess a legitimate reason for withholding the information sought by the government. The problem here, however, lies not in the fact that a suspect can be granted immunity and compelled to talk, but in the fact that most, if not all, terrorist suspects will still refuse to talk. Dershowitz also ignores other U.S. Supreme Court cases that hold that some of the rights and freedoms applicable to U.S. citizens do not necessarily extend to foreign defendants, especially those listed as enemy combatants and captured on foreign soil.¹⁷⁸ Thus, it is misleading to even imply that a suspected terrorist will have a choice between disclosure-confession and immunity.

At the end of the day, suspected terrorists rights are better protected by laws that clearly define and restrict police power, not by laws that leave room for broad discretion and abuse.

¹⁷⁸ See *Johnson v. Eisentrager*, 339 U.S. 763, 70 S. Ct. 936, 94 L. Ed. 1255 (1950), where twenty-one German nationals were convicted of engaging in continued military activity against the United States after the surrender of Germany but before the surrender of Japan during WWII. The Court held that enemy aliens, arrested in China and imprisoned in Germany after WWII, could not obtain a writ of *habeas corpus*. And although the Court recognized certain constitutional provisions, it flatly rejected an extraterritorial application of the Fifth Amendment and immunity: "The Constitution does not confer a right of personal security or immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States." *Johnson*, 339 U.S. at 785, 70 S. Ct. at 947. See also *Plyler v. Doe*, 457 U.S. 202, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982). Here, the Supreme Court held that aliens may receive constitutional protections only if they (i) come within the territory and (ii) establish substantial ties with the United States. Given the *Johnson* holding, it is doubtful that United States will grant foreign terrorists any of the privileges or rights guaranteed to American citizens by virtue of the U.S. Constitution. Also, recall that the United States has been accused of exporting and deporting alleged terrorists to states that are not bound by the U.S. Constitution and are infamous for their poor observance of human rights. See also *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L. Ed. 2d 212 (1972) (describing the outer limits of immunity in the context of derivative use testimony); 18 U.S.C.A. §§ 6001-05 (addressing the use of immunity by the U.S. government).

d. Legal Torture Will Not Prevent the Loss of Innocent Lives

Dershowitz's argument that the legalization of torture will prevent the loss of innocent lives is meritless, as it is based on false assumptions and contradicted by volumes of evidence. Specifically, the argument assumes that the person being detained and tortured actually knows the information sought by law enforcement. The argument further assumes that a suspect will tell the truth because he is being tortured, while not assuming that he would lie just to stop the torture. Indeed, even the "most seasoned interrogators recognize that torture is not only immoral and illegal, but ineffective and unnecessary as well. Given that people being tortured will say anything to stop the pain, the information yielded from torture is often false or of dubious reliability."¹⁷⁹ In short, legalizing torture will not ensure that thousands of lives are spared if there is another attack. Instead, it casts doubt on the reliability of the information gained and the legitimacy of the entire legal system.

2. Illegality of the Method Proposed

a. Causing Excruciating Pain, Inserting Needles under Fingernails

Neither domestic law nor international law recognizes a distinction between what Dershowitz refers to as "deterrent" torture and "non-lethal" torture. Torture is prohibited because it causes excruciating pain. Accordingly, all of the methods Dershowitz proposes have been rejected as either unconstitutional under domestic law or criminal under international law. Recall the 1960 Wickersham Report.¹⁸⁰ It concluded that the practice of injecting a sterilized needle under an inmate's fingernails constituted a form of torture and thus was impermissible.

b. Use of Truth Serums

U.S. courts have also rejected the use of "truth serums" in custodial interrogations. In 1963, the Ninth Circuit prohibited the use of truth serum during custodial interrogations.¹⁸¹ In affirming the lower court's decision, the Court rejected the government's argument that such

¹⁷⁹ Human Rights Watch, *supra* note 173.

¹⁸⁰ See *supra* pp 311-12.

¹⁸¹ See *Lindsey v. United States*, 237 F.2d 893 (1956).

injections did not violate the Constitution. The Court, citing its own research, expressed concern over the fact that there was no concrete, scientific evidence that truth serums even work.¹⁸² Many medical experts argue that the personality of the suspect has more influence on the truth serum than the truth serum on the suspect. The *Lindsey* court agreed when it quoted from a *Yale Law Journal* article addressing the effects of truth serum on confessions:

In summary, experimental and clinical findings indicate that only individuals who have conscious and unconscious reasons for doing so are inclined to confess and yield to interrogation under drug influence. On the other hand, some are able to withhold information and some, especially character neurotics, are able to lie. Others are so suggestible they will describe, in response to suggestive questioning, behavior which never in fact occurred [Drugs] lessen inhibitions to verbalization and stimulate unrepressed expression not only of fact but of fancy and suggestion as well.¹⁸³

3. Legal Torture as an Impermissible Extension of Legality by Analogy

In the final analysis, Dershowitz's argument for the legalization of torture is an impermissible extension of the principle of legality by analogy, which becomes clearer by analogy when we substitute another prohibited act in its place—for example, interrogational murders. Following Dershowitz's line of reasoning, interrogational murders should be permitted, despite laws prohibiting intentional murder. Instead of condemning the unlawful conduct, Dershowitz attempts to resolve the

¹⁸² In *Lindsey*, the Court held that it was reversible error for a lower court to admit tape recording of a sodium-pentothal-induced interview between a psychiatrist and a prosecution witness, even as evidence of prior consistent statements for the limited purpose of rehabilitating an impeached witness. The Court stated that in order to accept the Government's view, they would have to believe that truth serum really makes one tell the truth, that the serum was trustworthy and reliable. The Court was unwilling accept such a view, citing a plethora of cases and medical studies that contradicted the State's position. *Lindsey*, 237 F.2d at 896-97. .

¹⁸³ *Lindsey*, 237 F.2d at 896. (citing Dession et al., *Drug Induced Revelation and Criminal Investigation*, 62 YALE L.J. 315, 319 (1953)).

conflict between the rule of law and the prohibition against torture by changing the rule of law to accommodate torture while simultaneously proclaiming that torture qua torture is extra-judicial (i.e., illegal).

If torture is illegal, then, by definition, it's operating outside the law. So if a torture warrant is created, obviously torture with [a] warrant would be within the law. . . . Torture doesn't comply with the rule of law because it is against the law. If the law is changed so that torture is permitted (with [a] warrant), then it's [sic] only become compliant with the rule of law because that rule has been changed.¹⁸⁴

To change the law under Dershowitz's reasoning is tantamount to conceding that the terrorists have won. No democracy can afford to make such concession.

4.3 Torture Is and Should Always Be a Violation of Customary International Law & *Jus Cogens* Norms

Analysis of the third view focuses on the state of Israel, where daily terrorist attacks have prompted the government there to legalize torture,¹⁸⁵ as well on as a 1999 landmark decision that prohibited use of torture and other cruel, inhumane and degrading methods of interrogation.

¹⁸⁴ Finkelstein, *supra* note 176.

¹⁸⁵ Public Committee Against Torture, *supra* note 138, at 34.

Ever since it was established, the state of Israel has been engaged in an unceasing struggle for both its very existence and security—indeed its very existence. Terrorist organizations have set Israel's annihilation as their goal. . . . The facts before this Court reveal that 121 people died in terrorist attacks between January 1, 1996 and May 14, 1998. Seven hundred and seven people were injured. A large number of those killed and injured were victims of harrowing suicide bombings in the heart of Israel's cities.

Id.

A. *Public Committee Against Torture*

1. **Background to the Case**

In 1968, the Landau Commission drafted “operational code” guidelines¹⁸⁶ that authorized the General Secret Service (GSS)¹⁸⁷ to investigate suspected terrorists and, when necessary, to use moderate physical force in the absence of expressed statutory authority. The Commission stated that by way of the “necessity” defense those officers who felt it necessary to resort to physical force during an interrogation would be immune from prosecution.¹⁸⁸ When the Landau Commission released its report in 1987,¹⁸⁹ these operational code guidelines for GSS investigators were quickly seen for what they were: “unwritten conventions which permitted the GSS to use force while interrogating suspected terrorists and later to deny it in courts, thereby protecting the ‘myth system’ of legality.”¹⁹⁰

As a result, several individuals filed petitions challenging the legitimacy of the operational code, claiming the methods employed by the GSS constituted illegal torture. In two cases, the “petitioner had confessed to being a terrorist, [a] member of the extreme Islamic Jihad group, and [aroused] the GSS’s substantiated suspicion that the detainee had extremely vital information which, if procured, could save human lives.”¹⁹¹ This is an example of the “ticking time bomb” scenario

¹⁸⁶ Eyal Benvenisti, *The Role of National Courts in Preventing Torture of Suspected Terrorists*, 8 EUR. J. INT’L L. 596 (1997), available at <http://www.ejil.org/journal/Vol8/No4/art4.pdf> (last visited Feb. 21, 2005). All future references to page numbers for this article refer to the page number of the article in .pdf format as displayed on the website listed above.

¹⁸⁷ GSS officers are responsible for fighting terrorism. They investigate individuals and groups suspected of terrorist activities. *Id.* at 1.

¹⁸⁸ *Id.* The “necessity” defense is an affirmative defense found in Article 34(J) of the Israel Penal Law. It provides that “[a] person will not bear criminal liability for committing any act immediately necessary for the purpose of saving life, liberty, body, or property, of either himself or his fellow person, from substantial danger of serious harm, imminent from the particular state of things, at the requisite timing, and absent alternative means for avoiding the harm.” *Id.* at 8 (citing art. 34(J) of the Israel Penal Code as translated in 30 ISR. L. REV. 171 (1996)).

¹⁸⁹ *Id.* at 1.

¹⁹⁰ *Id.* (quoting W. M. REISMAN, *FOLDED LIES: BRIBERY, CRUSADES, AND REFORMS* ch. 1 (1979)).

¹⁹¹ *Id.* at 2 (internal citation omitted).

Dershowitz refers to in his articles and interviews. On at least three occasions, the Court permitted the GSS to continue interrogating suspects until it could reach a decision on the merits.¹⁹²

In the 1996 *Mubarak* case,¹⁹³ the Israeli High Court Justice had the opportunity to look beyond the necessity defense offered by the state and to determine if the specific methods at issue constituted torture in violation of international law. The methods at issue are delineated and described below.

2. Methods Used by the GSS During Interrogation¹⁹⁴

- **Shaking:**¹⁹⁵ This method involves “forcefully shaking a suspect’s upper torso back and forth until it causes the neck and head to dangle and vacillate rapidly.” Shaking can cause serious damage to the brain and spinal cord, loss of consciousness, uncontrollable vomiting and urinating, serious headaches, and sometimes death.
- **The “Shabach” Position:**¹⁹⁶ Suspects are seated in a small, low chair. The seat is tilted forward towards the floor. One of the suspect’s hands is tied behind the chair, while the other hand is placed between the gaps in the chair’s back support. The suspect’s head is covered with a sack. Incredibly loud music is played before, during, and after interrogations. The “Shabach” position causes serious pain in the arms and neck and chronic headaches.
- **The “Frog Crouch” Position:**¹⁹⁷ One is made to perform “consecutive, periodical crouches on the tips of one’s toes, each lasting for five-minute intervals.”

¹⁹² *Id.*

¹⁹³ H.C. 3124, *Mubarak v. The General Security Service* (Isr. 1996) (unpublished).

¹⁹⁴ Public Committee Against Torture, *supra* note 138, at 8-11. Note that all of the descriptions contained within this section above are found in the Court’s decision. The Court’s exact wording can be identified by quotation marks.

¹⁹⁵ *Id.* at 8

¹⁹⁶ *Id.* at 9-10

¹⁹⁷ *Id.* at 10.

- **Excessive Tightening of Hand and Foot Cuffs:**¹⁹⁸ Officers intentionally tighten hand and foot cuffs for extended periods of time to induce pain. This method causes serious (sometimes permanent) injuries to the suspect's hands, arms, and feet.
- **Sleep Deprivation:**¹⁹⁹ Suspects are intentionally deprived of sleep. The purpose of denying sleep is to "break" the suspect by sheer exhaustion.

3. Petitioners' Arguments

The petitioners made two claims.²⁰⁰ First, they argued that the GSS investigators lacked the authority to conduct the very interrogations they were conducting. Second, the petitioners argued that even if the Court found that GSS investigators were authorized to conduct interrogations, the methods at issue constituted torture and were not only criminal under domestic law but also prohibited under customary international law. At one point during the case, the High Court asked the Petitioners if they would reconsider their position if a "ticking time bomb" situation arose. The Petitioners answered in the negative, stating that "even if it is acceptable to employ physical means in the exceptional circumstances of the "ticking time bomb," these methods are used even in the absence of "ticking time bomb" conditions. The very fact that the use of such means is illegal in most cases warrants banning their use altogether"²⁰¹

4. The State's Arguments

The State asserted the "necessity" defense and argued that GSS investigators were authorized to interrogate terrorist suspects pursuant to Article 40 of the Basic Law of 1992 and Article 2(1) of the Criminal Procedure Statute.²⁰² Regarding the methods used, the State argued that Article 34(11) of the Penal Law expressly permits GSS officers to use "moderate physical pressure."²⁰³ The State reasoned that since the law permits the use of physical pressure, the methods used, as a matter of

¹⁹⁸ *Id.* at 10-11.

¹⁹⁹ *Id.* at 11.

²⁰⁰ *Id.* at 11-12.

²⁰¹ *Id.* at 12.

²⁰² *Id.* at 12.

²⁰³ *Id.* at 13.

law, could never amount to torture.²⁰⁴ It also claimed that the methods in question were only employed as a last resort and were supervised under the strictest of conditions, as set forth in the Landau Inquiry Report.²⁰⁵ In sum, the state argued that there was no violation of domestic law and no violation of international law.

5. The Court's Holding and Rationale

a. Authority to Interrogate

In order for the conduct of an agent of the state to be lawful, there must a statute that authorizes such conduct.²⁰⁶ If the state agent cannot find such authority and he proceeds, he is acting *ultra vires*.²⁰⁷ GSS investigators' authority to interrogate is found in Article 2(1) of the Criminal Procedure Statute, which generally prescribes (and arguably limits) the scope of police power.²⁰⁸ As such, the Court held that GSS investigators were authorized to interrogate.²⁰⁹

b. Purpose of an Interrogation

The Court explained that interrogations must be carried out in accord with the "basic principles of [a] democratic regime."²¹⁰ Within democracy, there must be a balance between the protections given to people and the need for security.²¹¹ In light of this, the "legality of an investigation is deduced from the propriety of its purpose and from its methods."²¹² An improper, illegal interrogation not only "harms the suspect's human dignity," it also effects equally as great harms on society.²¹³ The Court thus found that some interrogation techniques will be found to be unreasonable in certain circumstances.²¹⁴ "There is a prohibition on the use of 'brutal or inhuman means' in the course of an investigation," the Court concluded.²¹⁵

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 16-17.

²⁰⁷ *Id.* at 16.

²⁰⁸ *Id.* at 19.

²⁰⁹ *Id.* at 20.

²¹⁰ *Id.* at 21.

²¹¹ *Id.*

²¹² *Id.* at 24.

²¹³ *Id.* at 22.

²¹⁴ *Id.* at 24.

²¹⁵ *Id.* at 23 (internal citation omitted).

c. Legitimacy of Methods: The “Reasonable Interrogation” Test

To determine if the methods used by GSS investigators were legal, the Court began with the premise that any investigation carried out by state agents must be reasonable, and thus must be able to pass the “reasonable interrogation test.”²¹⁶ This test involves balancing the need to preserve the “human image” of the suspect and to preserve the “purity of arms” used during the interrogation²¹⁷ against the “need to fight crime in general, and terrorist attacks in particular.”²¹⁸ The significance of the test lies not in the fact that it seeks to balance human dignity and self-preservation, but in the fact that with respect to torture, cruel, inhuman, and degrading treatment or punishment, there is no balancing test to perform. “[A] reasonable interrogation is necessarily one free of torture, free of cruel, inhuman treatment, and free of degrading handling whatsoever.”²¹⁹ The Court further stated that any investigator who is found to have employed physical techniques to extract information may be held criminally liable.²²⁰

d. Impermissibility of the Specific Methods Employed

While the Court did not find that the methods employed against the suspected terrorists constituted torture, it nevertheless held the methods were impermissible on the grounds that they violated domestic and international law. The “shaking” and “crouching” were prohibited because neither method fulfills the purpose of a reasonable interrogation and because the methods violate the suspect’s right to be free from physical harm and having his or her dignity impugned.²²¹ The “Shabach” position was given a more thorough examination because some of the methods employed during the procedure are permissible, when used alone.²²² For example, a suspect may be handcuffed for the protection of himself, others, or officers.²²³ However, cuffing a suspect’s hand behind

²¹⁶ *Id.* at 22.

²¹⁷ *Id.* (internal citation omitted).

²¹⁸ *Id.*

²¹⁹ *Id.* at 23.

²²⁰ *Id.* To support this proposition, the Court cites to Israeli statutory law as well as caselaw.

²²¹ *Id.* at 24.

²²² *Id.* at 24-28.

²²³ *Id.* at 25.

a chair in an uncomfortable position for hours solely to cause extreme pain and discomfort cannot be justified.²²⁴ Also impermissible are the practices of covering a suspect's head with a sack (even if the sack is ventilated) and playing loud music non-stop.²²⁵ The Court also held that while some sleep deprivation will naturally occur during an interrogation, when it "shifts from being a 'side effect' of the interrogation, to an end in itself,"²²⁶ it is impermissible: "If the suspect is intentionally deprived of sleep for a prolonged period of time, for the purpose of tiring him out or 'breaking' him, it is not part of the scope of a fair and reasonable investigation."²²⁷

e. Applicability of the "Necessity Defense"

The High Court flatly rejected the State's argument that a "necessity" defense should shield investigators who act outside the law from criminal prosecution: "[T]he authority to establish directives respecting the use of physical means during the course of a GSS interrogation cannot be implied from the 'necessity defense.'"²²⁸ As such, it cannot serve as a source of general administrative power.²²⁹ More importantly, the Court makes it abundantly clear that even if legislators were to de-criminalize the specific methods at issue, such "lifting of criminal responsibility does not imply authorization to infringe upon a human right."²³⁰

f. Infamous Dicta

Immediately after expressing their concern over the potential abuse of the necessity defense, the Court informed the State they could either appeal to the state legislature or assert "justification"²³¹ as an affirmative defense. The inconsistency between the holding and the dicta have left many confused, some angry.

²²⁴ *Id.*

²²⁵ *Id.* at 26-27.

²²⁶ *Id.* at 29.

²²⁷ *Id.*

²²⁸ *Id.* at 32.

²²⁹ *Id.* at 34.

²³⁰ *Id.*

²³¹ *Id.* 34-35.

B. Analysis of the Israeli High Court's Decision

The Israeli High Court has received both praise and criticism for its disposition of this case. Praise comes from those who are satisfied that the Court finally declared the methods at issue unlawful. Criticism, on the other hand, comes from those who believe the Court should have characterized the acts as torture and found the GSS investigators criminally liable. This subsection analyzes the High Court's decision, not by praising or criticizing the Court but, by going beyond the holdings and dicta in an effort to isolate the Court's legal and moral position with respect to the practice and prohibition of torture.

1. The Authority to Interrogate and the Purpose of Interrogation

Consider, for example, the first issue resolved by the Court: whether GSS investigators have the authority to interrogate suspected terrorists. The significance of the disposition of this issue is found not in what the Court held, but in what the Court refused to hold. The Court could have held that because the guidelines were executive mandates and the GSS investigators were acting in response to national security threats, their methods, while morally reprehensive, were nonetheless permissible. The Court could have declined to render a judgment, as it has done previously, on the basis of institutional competence. Instead, the Court restricted the scope of GSS interrogations, providing that all interrogations be reasonable—in other words, an interrogation free of torture.

2. The Prohibition of Torture as a *Jus Cogens* Norms

The Court acknowledged that the prohibition of torture is a *jus cogens* norms and that Israel has an affirmative duty to respond to allegations of state-sanctioned torture.²³² In doing so, the Court rejected Israel's "by any means necessary" response to terrorist activity, noting that human rights issues, ignored by states, often become national security issues. To reduce the chances of the two feeding off each other, the rule of law and principles of democracy must be preserved.

This is the destiny of a democracy—it does not see all means as acceptable, and the ways of its enemies are not

²³² *Id.* at 23 (stating the prohibition of torture and inhumane treatment are "in accord with international treaties, to which Israel is a signatory . . .").

always open before 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 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.²³³

3. Reconciling the Holdings & Dicta

The Court's dicta make it clear that under certain circumstances the necessity defense may shield an officer from criminal liability. The Court also informed the State that it should petition legislators for authorization to employ more drastic physical methods. Critics argue that the Court's dicta are inconsistent with its opinion. However, a closer examination of opinion fails to reveal any real conflicts between the actual holdings and the infamous dicta.

First, there is nothing in the Court's opinion—dicta or otherwise—which condones the practice of torture or of cruel, inhuman, degrading treatment or punishment. The heavily criticized dicta did nothing more than direct the State to the appropriate forum. Throughout the case, the Court consistently states that the principles of democracy must be protected at all costs; its suggestion to the State was merely in furtherance of those democratic principles.

Critics should also take into account the precarious position of the High Court and its judges.²³⁴ The decisions rendered by the Israeli High Court, like those rendered by the U.S. Supreme Court, are done with the expectation that they will be enforced. Judges must rely on the very law enforcement officers whose conduct its decisions directly uphold, curtail, or expand. If the highest court of the land renders a decision that it believes cannot or will not be enforced, what is accomplished? While fearful that its decision might hamper investigators' ability to properly deal the terrorism that plagues the country, the Court remained faithful to the principles of democracy, explaining that as judges and gatekeepers of democracy they have no choice:

²³³ *Id.* at 37.

²³⁴ *Id.* ("We are, however part of Israeli society. Its problems are known to us and we live its history. We are not isolated in an ivory tower. We live the life of this country. We are aware of the harsh reality of terrorism in which we are, at times, immersed.").

Still, I the fear that the Court will appear to have abandoned its proper role and to have descended into the whirlwind of public debate; that its decision will be acclaimed by certain segments of the public, while others will reject it absolutely. It is in this sense that I see myself as obligated to rule in accordance with the law on any matter properly brought before the Court. I am force to rule in accordance with the law, in complete awareness that the public at large will not be interested in the legal reasoning behind our decision, but rather in our final result. . . . But what can we do, for this is our role and our obligation as judges?²³⁵

In this case, the Israeli High Court tasks' were two-fold. It had to acknowledge the harsh realities that exist outside its doors while simultaneously rejecting the "by any means necessary" defense offered by the State. The Court's decision accomplished both tasks, and critics should acknowledge this. Nothing in the Court's opinion suggest that it would give deference to otherwise impermissible or illegal conduct, especially if the conduct at issue, such as torture, violates international law's absolute prohibition against the conduct.

V. Conclusion

*Suddenly, stupor turns to despair: if patriotism has to precipitate us into dishonor; if there is no precipice of inhumanity over which nations and men will not throw themselves, then, why in fact do we go to so much trouble to become, or to remain, human?*²³⁶

It is well settled under international law that the prohibition of torture is a *jus cogens* norm and thus illegal. To better understand why the practice of torture is illegal, one must ask the same question the Israeli High Court of Justice asked before determining whether the methods used by GSS investigators were legal: What purpose does the act serve? Those who advocate for the legalization of torture argue that the putative purpose is to gather information that could save lives. But,

²³⁵ *Id.* at 38 (quoting Deputy President Landau in H.C. 390/79, *Dawikat v. Israel*, 34(1) P.D. 1, 4).

²³⁶ PETERS, *supra* note 14, at 140 (quoting Jean-Paul Sartre).

how can this purpose be a legitimate justification for state sanctioned torture if it has been proven time and time again that torture is an ineffective and unreliable interrogation tool?

In the United States, as in many other states, it is ineffective method for another reason: evidence obtained by torture is inadmissible in court. Thus, the only real purpose for torture is to terrorize, to cause excruciating pain and discomfort, and to break a person's will. To these ends, torture succeeds. One psychologist working with individuals who have undergone political torture, describes a host of problems that result from the practice:

Physical effects range from cognitive impairment to decreased abilities to think, reason and remember. . . . Psychological effects may include depressive and anxiety disorders, intense and incessant nightmares and "flashbacks" of the torture experiences, guilt and self-hatred, frequent thoughts of suicide, the inability to form and maintain meaningful relationships, severe depression. . . ²³⁷

If the main function of the state is to protect its people, then any practice that results in the physical and mental injuries discussed in this paper cannot be justified or tolerated. In a democracy, torture casts doubt on the legitimacy of the entire system. Even more telling is the history of torture and how its administrators have refined certain methods and have a propensity to practice torture against an ever-expanding class for an ever-expanding catalogue of offenses. Put another way, once torture is legalized, no one—not even its supporters—are immune. Today the torturable class may be terrorists; tomorrow it may expand to include "hardcore" criminals; next week, maybe a neighbor; next year, you. If we, as human beings, wish to continue to characterize ourselves as "civilized," torture should never be legalized because it is the ultimate act of incivility and the epitome of inhumanity.

²³⁷ Interview by Maina Tilton with Karen Hanscom, Ph.D., Advocates for Survivors of Torture & Trauma, at <http://www.astt.org/coharticle.htm> (on file with Author).