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"There Is Torture Here": International Norms and the Politics of Taboo

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TABLE OF ABBREVIATIONS

AI	AMNESTY INTERNATIONAL
CAT	CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (1984)
CEDAW	CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (1979)
CPT	EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE
CWC	CHEMICAL WEAPONS CONVENTION (1992)
ECOSOC	ECONOMIC AND SOCIAL COUNCIL
ECHR	EUROPEAN CONVENTION ON HUMAN RIGHTS (1950)
ETC	EUROPEAN CONVENTION FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (1987)
EU	EUROPEAN UNION
HRW	HUMAN RIGHTS WATCH
ICCPR	INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1966)
ICESCR	INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (1966)
ICRC	INTERNATIONAL COMMITTEE OF THE RED CROSS
IMT	INTERNATIONAL MILITARY TRIBUNAL
OHCHR	OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS
UDHR	UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948)
VLCT	VIENNA CONVENTION ON THE LAW OF TREATIES (1969)

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INTRODUCTION

GENEVA AND THE FABRIC OF INTERNATIONAL SOCIETY

In order to stifle the practice of slavery, governments eager to address human rights targeted the slave trade so as to slow the increase in the number of slaves. In 1807, the British government abolished the slave trade in its colonies. Seven years later, the French and British governments agreed to the Treaty of Paris of 1814, which abolished the French slave trade, but not its practice. From 1815 to 1880, fifty new bilateral treaties condemning the slave trade were adopted.[1] What caused such a cascade of political shifts to occur? What motivates state actors to challenge previously held norms and subscribe to new ones? Certainly, some formation of a norm of fundamental human equality was necessary. We can also be certain that the impetus for taking action against slavery did not materialize out of thin air.

The evolution of international humanitarian law, also known as the law of war or the law of armed conflict, exhibited a similarly dramatic trajectory. Following the Battle of Fontenoy in 1745, Louis XV reversed the tide of ages of horrific warfare, declaring that wounded enemy soldiers would be treated humanely, "because once they are wounded they are no longer our enemies."[2] In a similar spirit, in 1762, philosopher Jean-Jacques Rousseau wrote in *The Social Contract*:

> One has the right to kill its defenders as long as they bear arms; but as soon as they lay down their arms and surrender they cease to be enemies or the enemy's instruments, and become simply men once more, and one no longer has a right over their

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[1] A.H. Robertson and J.G. Merrills, *Human Rights in the World: An introduction to the study of the international protection of human rights* (New York: Manchester University Press, 1996), 16.
[2] Ibid., 18.

> life… these principles … follow from the nature of things and are founded upon reason.[3]

Though humanitarian norms in theory had gained traction, their practice was limited to a few states and observed at the national political level (e.g. the American and French Revolutions in the late eighteenth century). There had been no attempt to articulate the norm through substantial, legally enforceable law.

No such progress was made until the work of Henry Dunant, a Swiss banker and philanthropist. Dunant arrived in Castiglione delle Stiviere, Italy, as a self-described "mere tourist" in 1859, shortly after the Battle of Solferino between French and Austrian forces. The congested town overflowed with thousands of wounded soldiers. So few received medical attention that Dunant wrote, "These men were undergoing perfect tortures."[4] The French army consisted of less than one physician for every thousand soldiers and medical supplies, food, and water were scarce or entirely absent. Appalled by the suffering, Dunant responded by committing himself and others to all kinds of relief work, from cleaning wounds to distributing what food and could be spared. He called on the local community to follow his example: "the women of Castiglione, seeing that I made no distinction between nationalities, followed my example, showing the same kindness to all these men whose origins were so different, and all of whom were foreigners to them."[5] In a written account of his experiences entitled *A Memory of Solferino*, Dunant proposed the idea of relief societies, staffed by qualified volunteers, to care for wounded soldiers in wartime and

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[3] Jean-Jacques Rousseau, *The Social Contract and other later political writings*, ed. Victor Gourevitch (New York: Cambridge University Press, 1997), 47.
[4] Henry Dunant, *A Memory of Solferino* (International Committee of the Red Cross, 1986), 15.
[5] Ibid., 17.

that the societies be officially recognized by "international principle, sanctioned by a Convention inviolate in character."[6]

In 1863, Dunant and Gustave Moynier, a Geneva lawyer, formed a private Committee, which shortly became the International Committee to Aid the Military Wounded and would later become the International Committee of the Red Cross. Recognizing the opposition expressed by military commanders to the idea of volunteer involvement and interference in military operations, the Committee determined that all relief societies would need to gain official recognition and be subject to military orders. Dunant's proposals required the participation and support of governments and military commanders. The adoption of a humanitarian norm represented a significant constraint on the notion of state power, by suggesting that individuals have status beyond their relationship to states, which is to say that states do not have unlimited rights to pursue their national interests.[7] In Max Weber's terms, this is to say that the force the state may legitimately use is limited. This claim is especially powerful during wartime, which is presumably when a state's interests and its exercise of force to defend these interests are most at risk. The Committee fully understood the gravitas of this claim, which would effectively render the protection of vital interests more difficult for policy makers.

Later in 1863, the Committee organized an international conference of various interested parties from Western states, such as official delegates from national governments, non-governmental organizations and philanthropic societies, and non-official foreign delegations, to gauge interest in Dunant's bold proposals. There was

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[6] Dunant, *A Memory of Solferino,* 29.
[7] Martha Finnemore, *National Interests in International Society* (Ithaca: Cornell University Press, 1996), 71

considerable resistance from the French and British delegations, which were critical of civilian interference in military affairs. Neither believed civilian volunteers could effectively manage the unforgiving conditions of war. While the French delegate maintained that the relief societies would mainly consist of volunteers from the lower classes, individuals who were unreliable, disorderly, and untrustworthy, the British delegate asserted that the British military's medical commitment was adequate and was an obligation of the state, not one that required civilian assistance.[8] The German states disagreed sharply with the British claims, contending that the state could not conceivably meet the financial burdens of an adequate and effective medical unit.

Though the Committee sought to construct a broad set of norms concerning the laws of war and armed combat, the idea of relief societies was not altogether new. In Germany, the Knights Hospitalers, a traditional noble order, provided voluntary aid to the wounded effectively and unobtrusively, in ways imagined by Dunant himself. The Austrian Patriotic Society for Aid to Wounded Soldiers, War Widows, and Orphans served a similar purpose.[9] However, the Committee aimed to construct laws of war beyond those based on custom alone. The goal was to construct an enduring, treaty-based legal structure.

In addition to seeking official support for the national relief societies, the 1863 conference codified its wish that neutral status be extended to all army medical staff, volunteers, and the wounded. The delegates chose the symbol of the Swiss flag with its colors inverted, a red cross on a white background, as its common sign of neutral status. The recommendations of the conference were signed by several European

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[8] Finnemore, *National Interests in International Society*, 79.
[9] Ibid.

states, formalized and officially recognized at a Diplomatic Convention at Geneva in 1864. The convention produced the "Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field," which established the central principle of Dunant's effort—that wounded soldiers be cared for and treated regardless of nationality. Of the sixteen states present, only twelve had signed by the time the convention was adjourned on August 22, 1864. Though its mandates were very basic—its provisions provided only for the basic protection of the victims of armed conflict—the First Geneva Convention was significant in its pattern-breaking articulation of "the practice which had theretofore rested upon customs and usage." It carried "obligatory force from the implied consent of states."[10] In the following four years, the Convention was formally signed by nearly every state in Europe, in addition to major players outside Europe such as the United States and Turkey.

In spite of its relative novelty, the Convention was tested early and often. In 1866, when skirmishes broke out between Prussia and Austria, Prussia applied the Convention unilaterally, which is to say it observed the Convention in spite of and in response to Austrian refusal to comply. In the Sino-Japanese War of 1894, the Japanese opted to employ the same policy as the only adherent party. However, consensus was reached in the Franco-Prussian War in 1870, when both parties agreed to comply with the Convention. This occasion was also notable in the use of compliance and noncompliance as propaganda tools in war. This practice underscored the shift in legitimation from an appeal to the elite (as was pursued early on by Dunant and the Committee) to a notion of the importance of broad public

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[10] George B. Davis, "The Geneva Convention of 1906," *The American Journal of International Law* (American Society of International Law) 1, no. 2 (April 1907): 409-417, 410.

opinion.[11] In doing so, both sides were able to strongly publicize the new Convention and its most visible application, a white armband emblazoned with the iconic red cross.

The Balkan Wars of 1875-1878 further expanded the ways in which the Conventions could and would be applied, by challenging the ambiguity of the Conventions in the case of civil wars. Though the Committee initially confined the Conventions to interstate conflicts, the Third Balkan War, characterized by ethnic and political clashes within the former Yugoslavia, expanded the application of the Conventions as a humanitarian moral code, one incapable of being applied in certain instances and not in others. The Balkan conflict also enhanced the relevance and universality of the Conventions outside the Western world, and demonstrated that humanitarian ideas could be applied with respect to religious and cultural diversity.[12] In addition, the conflict revealed the need for protection of civilian refugees, expanding the directive of the Red Cross to include all suffering caused by "man-made disaster." This is evidence that although a broad norm had taken shape and gained some recognition, it still required fine-tuning in practice. The humanitarian bureaucracy could not account for all contingencies.

The emergence of the ICRC and the Geneva Conventions established the notion of an international social fabric, a political and social space within which international organizations, individuals, and other non-state actors wielded influence. The unilateral application of the first Geneva Convention suggests that reciprocity was not the principal motive for states to apply the Convention. In addition, many

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[11] Finnemore, *National Interests in International Society*, 83.
[12] Ibid.

less-democratic states were eager to support the Conventions, which suggests that an appeal to the mass public was also not a chief motive. Furthermore, the rise of a normative understanding of international cooperation for a humanitarian purpose was due, in large part, to the efforts of a few private individuals without direct political influence. The delegates to the first International Conference felt that they "had stepped out of the traditional mould, and no longer shared the ideas of their contemporaries" in that they could believe "the extent of suffering depended on the degree of energy that man deployed in combating such suffering."[13]

* * *

The rosy outlook of international society depicted by this account of this Geneva Conventions' origins is not meant to delude political realists who maintain that states are not primarily motivated by ideals or ethics. Its purpose is to illustrate that norms are not static, that they are subject to change, and that states are not the only actors capable of affecting the international political space. In fact, when discussing the development of humanitarian and human rights, a realist approach is useful. More specifically, human rights should not be assumed to be self-evident, but viewed critically in light of national interests. International norms that advance the value of human dignity and individual worth should not be taken for granted because of their close affiliation with international law since the end of the Second World War. This stands in sharp contrast to the conception of international law propounded by German jurist Lassa Oppenheim: "States solely and exclusively are the subject of

[13] Pierre Boissier, From Solferino to Tsushima: History of the International Committee of the Red Cross (Geneva: Henry Dunant Institute, 1985), 83.

International Law … all rights which might necessarily be granted to an individual human being … are not international rights."[14]

In spite of this, human rights have crept into the modern consciousness. Though it is difficult to precisely locate the origins of the international tradition—the "mainstream" tradition—its philosophical foundations have clear origins in the liberal democratic traditions of Western European. This is not to say that human rights concepts did and do not exist in other places. To flatly designate the cultures of non-European countries as incompatible with and hostile to Western interpretations is an over-simplification. Just as the Western conception is a diverse composition of philosophies, Asian and African cultures have unique accounts of the importance of individuals.[15] However, the Western conception has also spawned and fostered the development of related concepts that increasingly clash with the realist view of international politics.

Human rights are so diffuse that they have absorbed and assimilated other movements—civil, political, etc.—into the moral discourse. This includes the international taboo of torture, violation of which draws the ire of the human rights community as much as any issue. This is because torture expressly contradicts the idea of inherent natural rights at the core of Western human rights, as conceived by John Locke—"that being all equal and independent, no one ought to harm another in his life, health, liberty … there cannot be supposed any such subordination among us,

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[14] Lassa Oppenheim, *International Law: A Treatise*, Vol. I: Peace (New York: Longmans, Green, and Co., 1905), 19.
[15] Robertson and Merrills, *Human Rights in the World*, 13.

that may authorize us to destroy another, as if we were made for another's uses."[16] Given its prominence and association with the broader umbrella of human rights concepts, the norm against torture seems, in the Western public imagination, an enduring institution. In terms of international law, it is often said that there is "no prohibition more basic than the ban on torture"—it is "forbidden unconditionally."[17] It is articulated in law as a peremptory norm or *jus cogens*, which is to say that it cannot be derogated, placing torture in the same class as slavery and genocide. Despite such far-reaching efforts to conclusively abolish torture, the practice endures. This is a puzzling problem because weakness in the norm against torture is due not only to flaws in the international legal structure. The human rights community's appropriation of the torture prohibition has lent it a distinctly moral character. Accordingly, if we are to adopt a realist perspective, the legitimacy of a human rights-based norm against torture must be approached with caution.

The purpose of this idea is not to undercut the accomplishments of Henry Dunant and the ICRC. Dunant successfully persuaded states that the plight of individuals was an issue worth consideration, and one that did not substantially threaten the national interests of highly sovereign states. Similarly, a reform of the international framework proscribing torture may have to resemble the actions of Sabri Ergül, a member of the Turkish parliament. In 1996, having learned that Turkish children were being held in incommunicado detention in the Manisa Police Headquarters, Ergül led a domestic crusade against torture and abusive treatment. He

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[16] John Locke, "Two Treatises of Government," in *Two Treatises of Government*, ed. Peter Laslett (New York: Cambridge University Press, 1989), 271.
[17] Kenneth Roth, "Introduction," in *Torture: Does It Make Us Safer? Is It Ever OK? A Human Rights Perspective*, ed. Kenneth Roth, Minky Worden and Amy D. Bernstein, xi-xiii (New York: The New Press, 2005), xi.

alerted the media and television stations, who aired footage of Ergül personally hanging handwritten signs outside the Manisa police station that announced prominently "THERE IS TORTURE HERE."[18] Such action called attention to state practices and drew on popular and other political pressure to cull opposition to torture. How is this any different from the moral appeals made by the human rights community? This is a valid and important question.

The most immediate difference is that Sabri Ergül was not a "member" of the human rights community proper. Though Ergül was a politician, an individual with a similarly prominent platform could achieve a comparable outcome. Ergül's appeal was not merely to invoke ethical sentiments. He created "bad press" for the Turkish police at an opportune political juncture, three years prior to Turkey's accession into the European Union (EU). He undermined the usefulness that the police could derive from its selective application of violence, by exposing their practices and speaking on behalf of victims. In some ways, his *was* a moral appeal, harnessing public distaste and outrage to precipitate political pressure. States can certainly disregard the public sentiment—many states govern effectively and efficiently without the public's approval. However, the efforts of successful domestic champions commonly wield international political influence. In this sense, the examples of Dunant and Ergül are meant to construct a representation of state behavior *in terms of* international political society. States are still the principal actors in this formulation, but they are manifestly subject to international standards of behavior.

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[18] Minky Worden, "Torture Spoken Here: Ending Global Torture," in *Torture*, ed. Kenneth Roth, Minky Worden and Amy D. Bernstein, 79-105 (New York: The New Press, 2005), 101.

Returning to the "problem" of the torture prohibition, the burning question requires an investigation of the norm against torture in the international political context. Why is it that states commit, near-universally, to torture proscriptions in international law if they have, in practice, little commitment to honoring such a commitment? Moreover, what is the nature of the modern norm against torture and how is its articulation in law incompatible with its origins? Answering these questions will be the main thrust of this thesis.

Chapter One serves as a broad explanation of the development of norms and international law, which serves as a theoretical basis for the arguments made in this thesis. Particular effort will be made to draw on examples of historical and political import, in order to demonstrate the dynamic of the "life cycle" of norms.

Chapter Two is an introduction to the norm against torture, beginning with an analysis of torture's evolving relationship with the state. The latter sections of the chapter trace the further development of the norm through its association with and subsumption under humanitarian and human rights concepts. These insights should begin to answer the questions posed by this thesis, especially by amplifying the apparent disagreement between the legal norm against torture (no torture, no exceptions) and the norm against torture as practiced.

Chapter Three is a comprehensive analysis of state commitment, behavior, and the international legal prohibition on torture, with a particular focus on the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), drawing on the norm development and legalization theories of the first chapter. Its purpose is to expound why subscription to the legal

norm is so widespread despite evidence that the practice of torture persists, using the provisions of the CAT to explain how state behavior is affected.

Lastly, Chapter Four draws on the lessons of the previous chapters in order to illustrate and re-evaluate the "political dynamic" of torture, which encompasses the legal, political, and social relationship of torture to the state. It is primarily a comparative discussion of the norm against chemical weapons and an application of lessons from that discussion to the phenomenon of torture. Drawing on normative and legal comparisons, the subsequent discussions refer to the limits of moral suasion and the growing importance of adopting instrumental, utility-conscious strategies in efforts to reform the international norm against torture.

I

INTERNATIONAL NORMS AND POLITICAL CHANGE

"Man makes his own history, but he does not make it out of the whole cloth; he does not make it out of the conditions chosen by himself, but out of such as he finds close at hand. The tradition of all past generations weighs like an alp upon the brain of the living."[1]

Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte*

It is not adequate to merely posit that an international community exists and that some body of norms regulates the interactions of states. It is necessary to identify why states pursue relationships beyond their borders, how they go about identifying, weighing, and calculating decisions with international implications, and the structures that states must navigate in pursuing these interests. International law is the common language of states, though it is not always dressed in legalese. The relationships between states are historically rich and deep. Moreover, in whatever form it is represented, law reflects how these relationships have evolved. Common standards of behavior necessarily develop over time, as states continually engage one another in economic, political, and social contexts. To the extent that law on the international level may directly reflect shared normative considerations, it is necessary to consider how norms come about, as well as who and what agents and institutions promote norms. In turn, the varying degrees of law demonstrate that norms and law, though distinct, are inseparable. Their development is worthy of study and persistent re-evaluation.

The norm against torture and the broader norms of human rights are part of a larger social process, which is not captured in the law, though it can be reflected in

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[1] Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte*, 3rd Edition, trans. Daniel De Leon (Chicago: Charles H. Kerr & Company, 1913), 9.

state behavior relative to it. In this way, it is easy to conflate norms with the existence of law in the international political arena. Fundamentally, the purpose of this chapter is to make the relationship between law and norms more clear, to explain how they are different and describe how each informs the formation of the other. Such a discussion will make clear what kinds of normative and legal forces are at work in analyzing the topic of torture and other issues concerning state commitment. The first section of the chapter is a discussion of why norms are important in the first place, an affirmation of the importance of considering norms and agency together. The second section of the chapter traces the development of norms, from their social origins to their induction into the hallowed territory of internalized norms. The third section briefly treats the inception of norms into law, how and why states pursue legalization. Lastly, the fourth section of the chapter addresses the spectrum of legalization and how the variability of legal instruments materializes in practice.

WHY NORMS?

At the most basic level, a norm is a social device that isolates single standards of behavior. In this sense, norms represent "oughtness," and because they create patterns of behavior accordingly, actors use norms to justify their actions and to persuade others to act in certain ways.[2] Though norms are closely linked to the behavior of actors, agency remains centrally important. Actors navigate the social space and observe the varying importance of norms, but course of action is ultimately of their choosing—norms are simply behavioral cues that guide the appropriateness

[2] Martha Finnemore, *National Interests in International Society* (Ithaca: Cornell University Press, 1996), 24.

of their actions. Martha Finnemore argues that agents and structures are mutually constitutive, which is an articulation of the agent-structure problem.[3] Though human agency determines the course of actions and events, the concept of human agency is realized only within this historical and normative context. This distinction is revealing with respect to the emergence of human rights norms—an *agency-centric* analysis traces the role of actors (e.g. states, non-state, international organizations) in adopting and teaching normative views to states, while a *structural* analysis considers the shifts in state behavior according to normative claims. In this sense, to study human rights objectively is to accept that they did not appear out of thin air, but out of some historical and normative context.

In turn, institutions emphasize the ways in which these behavioral rules are structured. The process by which norms come about is a distinctly social process, which precedes the rational utility calculations made by states. In this sense, a *constructivist* approach, which proposes expected patterns of behavior and points of conflict, can be reconciled with a *rationalist* approach that explains the choices of actors. This analysis understands norms as neither permanent nor irrelevant, but as "sticky"—as having some lasting effect as well as the capacity for change. Many social norms exhibit this tendency, including prominent norms of political and civic rights. Human slavery was once a widely accepted social reality. Its practice and trafficking guided the economic and political decision-making of many states. However, even an institution so deeply intertwined in the social and economic fabrics of states can be challenged and undermined. The permanence and strength of norms is constantly tested in these normative debates.

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[3] Ibid.

On the international level, bureaucracies are considered the appropriate devices to exercise authority and control. As Max Weber argued, it is a distinct attribute of modern society that bureaucracies vest authority in abstract and generalized rules, as opposed to the long-held tradition of vesting authority according to personal attributes, such as lineage and charisma.[4] However, bureaucratic rules, and the norms that they perpetuate and systematize, may discriminate against whole classes of people along racial, class, and other lines. The example of human slavery confirms that social norms are not necessarily inherently "good" or "moral." This is not to say norms cannot prescribe behavior that is moral in nature, but that norms are not inherently based in terms of ethical responsibility. In this sense, norms dressed in moral language, such as those that prescribe observance of human rights, are not qualitatively different from those that appear morally questionable, such as systematic political discrimination by gender or race.

While international politics has succeeded in delegitimizing certain forms of universally acknowledged reprehensible behavior—torture and varieties of civic and political repression—there is much room for contestation. International norms must compete with domestic norms and prevailing national interests in shaping the decisions of state actors. Much of international law is customary, a practice that prominent Italian jurist Benedetto Conforti calls "the highest source of international norms, and the only source of general rules."[5] As a source of law, custom persists because many international obligations and expectations are not rooted in treaties. It

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[4] Max Weber, *The Theory of Social and Economic Organization*, trans. A.M. Henderson and Talcott Parsons (New York: Free Press, 1964), 329-342.
[5] Benedetto Conforti, *International Law and the Role of Domestic Legal Systems*, trans. Rene Provost (Dordrecht: Nijhoff, 1993), 115.

is durable, substantially uniform, and there is international consensus in recognizing such custom as binding.[6] They are often self-enforcing, in that they have developed through customary exchange and continuous interaction between states—the norms against genocide and slavery are strong because their observation is nearly universal. As such, customary law exists by principle and definition only where a norm also exists. In this way, customary law is especially useful in revealing the *opinion juris*, which provides evidence that there exists a consensus among states that some principle is commensurate with law.[7] In evaluating the behavior of states, it is necessary to examine their discourse, whether states justify and frame their actions in terms of a particular norm or set of norms. In terms of customary law, it is important to consider whether norm violators are challenging norms themselves or simply interpretation of facts.[8] Because human rights violations have broadly earned public distaste, most states have not challenged the legitimacy of human rights norms, but have applied strategically narrow interpretations of their behavior or claim exception to a legal norm according to circumstances. At the same time, human rights violations persist, often systematically, even in states that have publically and vocally endorsed norms protecting human rights. More broadly, though norms and law are distinct, together they inform the international political decisions of states. In evaluating why existing law does not achieve its purpose, the intersection of norms and law deserve particular scrutiny.

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[6] Slomanson William R. Slomanson, *Fundamental Perspectives on International Law*, 3rd Edition (Belmont, CA: Wadsworth Publishing Company, 1999), 16.
[7] Finnemore, *National Interests in International Society,* 140.
[8] Ibid.

THE LIFE CYCLE OF NORMS

Norms do not appear out of thin air. The series of events that delivered the International Committee of the Red Cross and the Geneva Conventions are evidence that norms originate in agents—individuals, states, and international organizations, who have strong convictions concerning what is appropriate or desirable behavior in their communities. Martha Finnemore and Kathryn Sikkink label such agents "norm entrepreneurs." Through a "framing" process, norm entrepreneurs "call attention to issues or even 'create' issues by using language that names, interprets, and even dramatizes them."[9] Henry Dunant fits this description. Dunant first called attention to his experience in Castiglione in published accounts in *A Memory of Solferino*, describing it in vivid detail. Most important, Dunant used this account to induce early supporters to act on these concerns in a practical way through volunteer relief societies. More broadly, the ICRC can be thought of as a more important early humanitarian norm entrepreneur, because its influence was farther-reaching and it actively lobbied delegates. Overall, this process is critical in emerging norms because it renders them relevant and comprehensible. As such, new norms are judged against and compete against the standards resolved by existing norms. In this sense, the channels and means by which new norms are promoted are critical in lending them legitimacy and durability, because new norms do not enter into a "normative vacuum," but a highly competitive, contested normative space.[10]

The organizational platforms from and through which norms are promoted are critical in determining how persistent or persuasive norms are. International

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[9] Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," *International Organization* 52, no. 4 (1998): 887-917, 896.
[10] Ibid., 896.

organizations enjoy considerable resource advantages and the networks of communications that afford them ways to appeal to states and the public more effectively. Though nongovernmental (NGO) and intergovernmental (IGO) organizations are unable to directly induce a consensus on a norm, they are uniquely equipped to employ methods of persuasion, because their agendas are often more focused on particular issues. In addition, their influence is often seen as independent of those of governments, as embodying the underserved issues of civil society, "[filling] in societal gaps and failures with respect to disparate issues."[11] In this sense, their brand of persuasion is qualitatively different from the kind engendered by states. Normative claims gain stability and force by being as persuasive as possible, by "grounding claims in existing norms that emphasize normative congruence and coherence."[12] Indeed, persuasion and rhetoric are effective and important tools in international politics. Neither the rules that guide appropriate social behavior nor the preferences of actors are permanent. They are available for manipulation.

In its early stages, an emergent norm is continually tested and made to define and defend itself. In the international political context, an emergent norm must become clarified, "sharpened" such that it is evident what the norm actually is and what kinds of actions constitute violations of it. Similarly, norms that have long discursive histories are more likely to be effective in influencing behavior because they have withstood this barrage of tests. This process may occur as a result of institutionalization, which is different from social institutions such as marriage, for which there is an extensive body of supported expectations that inevitably vary in

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[11] Rita Maran, "The Role of Non-governmental Organizations," in *An End to Torture* , ed. Bertil Duner, 222-244 (New York: Zed Books, 1998), 222.
[12] Finnemore, *National Interests in International Society*, 141.

different cultural contexts. Norms institutionalized on the international level are recognized in terms of specific sets of international rules or by international organizations. Though humanitarian ideas existed prior to the their formal induction in the Geneva Conventions, their establishment within organized international bodies gave it greater legitimacy. In turn, institutionalization is a useful tool for norm entrepreneurs to frame the norms they promote by placing them within existing social structures and standards. Altogether, this makes it possible for norms to gain broad support quickly, to reach a tipping or threshold point—a point that represents a degree of support that make eventual universal acceptance a distinct possibility.[13]

A defined norm allows states to consider accepting its premise and substance. In addition, such norms have greater potential for acceptance by the greatest number of states, and more specifically, by states that carry considerable normative weight. In 1997, France and Great Britain decided to support a treaty that banned land mines. As land mine producers with substantial political leverage, the two nations effectively gave birth to a "norm cascade"—whereby international norms precede or at least compete with domestic politics in importance—and eventual universal norm acceptance.[14] On the whole, norms that are endorsed by prominent and successful states are altogether more likely to circulate. Norms that originate in Western states have generally followed this course. Women's suffrage was a norm promoted and endorsed in its early stages by Western states, where the apparent contradiction between the development of individual rights and gender boundaries was most glaring. Beginning with New Zealand in 1893 and Australia in 1902, known as

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[13] Finnemore and Sikkink, "International Norm Dynamics and Political Change," 901.
[14] Ibid.

"White settler" colonies, a wave of European states followed between 1900 and 1930 such that by 1930, 14 European countries had extended the right of suffrage to women, while only 2 Asian and Pacific countries had done so.[15] A variety of "social movement indicators"—Western status, welfare citizenship, and the number of women's political organizations, all distinctly national factors—made these countries more amenable to early adoption of women's suffrage. On the other hand, in the period that followed, international factors took precedent such that Western states were actually found to be five times less likely than non-Western states to enact suffrage.[16] This is to say, the domestic factors that initially gave way to rapid acceptance became less important than international factors—regional and global pressure—in inducing state commitments. Many Western norms make universalistic claims with the potential for expansive acceptance, as opposed to localized normative claims that do not apply well to all people in all places.[17] Yeşim Arat points out that non-Western countries often perceive human rights concepts as "a tool of western colonialism, used self-righteously by western countries to criticize non-western ones for human rights abuses."[18] Despite this view, Turkey, a country that is historically ambivalent about its national identities as Western or Eastern, ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), finding that its views on human rights were not incompatible with western norms of

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[15] Francisco O. Ramirez, Yasemin Soysal and Suzanne Shanahan, "The Changing Logic of Political Citizenship: Cross-National Acquisition of Women's Suffrage Rights, 1890-1990," *American Sociological Review* 62, no. 5 (October 1997): 735-745, 740.
[16] Ibid., 742.
[17] Finnemore and Sikkink, "International Norm Dynamics and Political Change," 907.
[18] Yeşim Arat, "Women's Rights as Human Rights: The Turkish Case," *Human Rights Review*, October-December 2001: 27-34.

women's rights.[19] In this scenario, international legitimation and reputation were overwhelming incentives, despite potential conflict with Turkish law and society. Indeed, Turkey ratified in December 1985 as one of the last countries to do so prior to the end of the United Nations' Decade for Women, which lasted from 1976 through 1984.

Once a norm has emerged and been delivered to an international audience, it is ripe for socialization. At this level, states are prepared to engage the norm, to applaud or denounce it, and induce those who have been norm violators to become norm followers. Significantly, norm entrepreneurs become agents of norm socialization at the stage, and are important players in sustaining the norm and continuing to promote compliance. The International Committee of the Red Cross was one such socializing agent. After the signing of the first Geneva Convention, formally known as the Convention for the Amelioration of the Condition of the Wounded in Armies in Field, the Committee helped states to teach novel rules of war to their troops and collected and disseminated publicly information about violations and violators.[20] Moreover, the goals of such agents are not only to pressure rule violators to conform, but to cultivate more broadly a particular social ethic, and to encourage states to increasingly associate their identities with these categories. James Fearon argues that part of the process of identifying oneself within a social category is that members follow certain norms. In addition to explicit and defined rules of membership, social categories are understood in terms of various sets of

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[19] Michael Strausz and Brian Mello, "Western Norms in Eastern Contexts: Japan, Turkey, and the Convention on the Elimination of All Forms of Discrimination Against Women," *Paper presented at the annual meeting of the American Political Science Assocation, Hyatt Regency Chicago and the Sheraton Chicago Hotel and Towers* (Chicago, IL, Aug 30, 2007), 5.
[20] Finnemore and Sikkink, "International Norm Dynamics and Political Change," 902.

characteristics, tools to commonly identify members.[21] This concept is not limited to individuals. It applies to states in the international political space—states are inclined to follow norms that are associated with the social categories to which they subscribe and aspire. This is to say, states that consider themselves "liberal states" care about following norms associated with the tenets of liberalism because they take pride in identifying themselves in this way.

When a strongly socialized norm garners enough support from the greatest number of states in addition to critical states, it can effectively redefine standards for appropriate social behavior. This is the tipping point in its development. Finnemore and Sikkink describe the cumulative effect of many countries adopting new norms as akin to peer pressure among countries.[22] States respond not only to the decisions of other states and their normative influences, but also to the motivations that exist to respond to such pressure. Governments may be eager to secure international legitimation, because it contributes to the perception of domestic legitimation to its citizens, that is, if citizens agree with said norm. This perception is often important to other states considering further economic and political exchange with the state in question, because it may indicate how stable, credible, and reliable the state's government is in making international commitments. In states where domestic and international legitimation is aligned, such a move communicates to citizens that the government is committed to the rule of law and order. Accession of international norms, even when they do not wholly reflect domestic interests and norms, can satisfy the desires of states to increase their international political capital, while to

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[21] James Fearon, "What is Identity (As We Now Use the Word)?" Working Paper, Stanford University (1999), 14.
[22] Finnemore and Sikkink, "International Norm Dynamics and Political Change," 902.

violate such norms would arouse disapproval, both domestically and internationally, and diminish national esteem.[23]

The final phase in the development of a norm is that of internalization. When norms achieve this level of development, compliance is nearly automatic, because behavior is both expected and unchallenged within the state itself. This is to say that conformity is so natural that the norm's presence can be hard to discern.[24] Given the diversity of cultural and political legacies, it is much more difficult to identify a norm that has reached this status on the international level. Even the strongest and historically rich prohibition regimes and proscriptive norms invite exceptions. In this sense, it may be unhelpful to consider organizations and groups that violate norms as a matter of purpose (e.g. groups whose sole function and purpose violates a norm, such as Somali pirate gangs that roam the Indian Ocean). The international body of human rights has not achieved this status, neither in theory nor in practice. Having evolved from a distinctly Western philosophical tradition, it has clear roots in a particular political culture. In practice, even Western, rights-protective, republican democratic states have been found guilty of committing gross violations. Internalized norms manage to transcend these theoretical roadblocks.

The norms against piracy and privateering have arguably achieved this status. Early prohibitions reflected the economic and security interests of the world's most powerful states, in an effort to monopolize legitimate force in a highly unregulated space, the ocean.[25] Obviously, much of the sea remains unregulated and unprotected.

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[23] Ibid., 904.
[24] Ibid.
[25] Ethan A. Nadelmann, "Global Prohibiton Regimes: The Evolution of Norms in International Society," *International Organization* (The MIT Press) 44, no. 4 (Autumn 1990): 479-526.

However, international cooperation on the issue has been steadfast, because states have little interest in accommodating modern piracy, though privateering was once considered an acceptable and government-sanctioned means of "increasing their own possessions and for undermining the strength of competitors."[26] This is to say, states can no longer justify piracy and privateering on any grounds, economic, security, or political. Over time, this became conflated with a broader notion of moral obligation, which spawned the maxim, "pirata est hostice humani generis" (a pirate is an enemy of the human race).[27] The general prohibition against piracy and privateering was sustained by the glaring impediments that pirates face, including technical disadvantages. The practice of piracy certainly continues, albeit on a small scale, because it is nearly impossible for governments to completely regulate and control this particular environment. However, in terms of state behavior, the norm against piracy certainly qualifies as an internalized norm. Though few examples exist, internalization is the conclusion of normative development.

Having evaluated the broad trajectory of norms, it is also useful to consider the properties of norms that undergo such a process, because the strategies that norm entrepreneurs and socializing agents undertake may depend on the nature of the norm itself. What are the intrinsic qualities and substance of the norm and how might it be framed? To achieve international status, norms must be simultaneously broad enough to earn wide acceptance and specific enough to make abundantly clear what a violation consists of. Norm agents frame norms such that norms are well received by critical states, though critical states may comply out of regard for only their reputation

[26] Ibid., 487.
[27] Ibid., 490.

and self-interest. This is not an inherent problem—many of the most prominent international norms arose out of instrumental considerations. However, some of the farthest-reaching norms have been ones that are somewhat organic and founded in principled value systems, such as the expanding global human rights culture born of Western values. What is obvious is that those who go about framing and shaping norms must be conscious of these questions and how their answers affect the robustness of norms and the decisions of states.

Agents that succeed in this manner have observed claims comparable to that advanced by Robert Sugden, who argues that prominent conventions may spread by analogy from one context to another.[28] This is to say, norm entrepreneurs should attempt to create and promote linkages between existing norms and new ones. Activists who opposed the practice of female genital mutilation struggled in advancing their cause until the practice, originally known as "female circumcision," came to be labeled "female genital mutilation." Because "circumcision" was most readily associated with male circumcision, which is a widely accepted, positive practice, its female counterpart struggled to escape the tendency of the wider audience to draw comparisons.[29] By framing the normative discourse within the established human rights body, these norm agents delivered a highly targeted message and were conscious of the response it would trigger with their audience.

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[28] Robert Sugden, "Spontaneous Order," *The Journal of Economic Perspectives* 3, no. 4 (1989): 85-97, 93.
[29] Finnemore and Sikkink, *International Norm Dynamics and Political Change*, 908.

FROM NORMS TO INTERNATIONAL LAW

Normative agreement can be difficult to discern. In the international arena, states can express commitment to a norm while quietly conducting its behavior in a different manner. Legalization formalizes norms in international politics in a way that domestic social norms may not require—there are social institutions and customs that are not expressed in legalized terms. What formally occupies the international political space, argue Kenneth Abbott and Duncan Snidal, is legalization. Formally, law is substantiated in two forms: contract, a legal agreement by which there is an exchange of promises and an obligation to deliver them, and covenant, whereby one party promises not to engage in a specific practice. In turn, such legal systems offer states two primary motivations—states enter contracts in order to further their interests, while states enter covenants in order to manifest their normative commitments.[30] Abbott and Snidal argue that these two legal forms are not antithetical because much of international law combines these chief motives in crafting a union of social and political norms with legal norms. International law is not law in the way that other, more salient legal systems stipulate—international law is both implicit and explicit and concerns states rather than private citizens. However, it is definitively law in the sense that they bind states to a recognized set of standards, a formalized expression of norms. By requiring commitment to a set of norms, legalization induces states to engage in established legal processes, which can mean membership and recognition by international organizations, and discourse, providing states a means to communicate and signal their normative values. In this

[30] Kenneth W. Abbott and Duncan Snidal, "Hard and Soft Law in International Governance," *International Organization* 54, no. 3 (2000): 421-456, 422.

way, law serves to engage shared normative considerations, in addition to providing a framework for the states' rational pursuit and calculation of interests. Actors, be they agents of business or states, promote rules that protect intellectual property because in addition to serving their interests, such rules reinforce the norms of property and fair business. Indeed, intellectual property is a contentious legal area because business interests frequently do not align with the interests of private citizens, but a norm has endured on the international level because it has been incorporated into the "broader trade apparatus"—a structure that business and state interests substantively shape.[31] In this vein, international legal institutions combine techniques of enforcement and social norm obedience, from litigation and sanctions to persuasion, normative appeals, and some form of shaming.[32] While legalization provides for actors a cogent collection of procedures and obligations, it clearly reflects normative values. The effectiveness of international law in achieving its intended purpose hinges on the potency and relevance of its normative underpinning.

States that interact and exchange in the international arena do so at their own risk. However, legalization enhances the capacity for enforcement of international norms and enhance the credibility of states' commitments, albeit much more modestly than is the case domestically. With respect to enforcement, some legal commitments involve organs that arbitrate or adjudicate, while more flexible commitments are derived from political institutions with little authority beyond

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[31] Graeme B. Dinwoodie, "The International Intellectual Property System: Treaties, Norms, National Courts, and Private Ordering," in *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS Plus Era*, ed. Daniel Gervais, 61-114 (Oxford University Press, 2007), 76.
[32] Abbott and Snidal, "Hard and Soft Law in International Governance," 425.

making recommendations.[33] Nevertheless, such commitments place a considerable constraint on opportunistic state behavior. By affixing consequences to specific legal violations, this process increases the costs of shirking promises. This can range from centralized legal authorities that have established international tribunals with criminal jurisdiction over individuals, such as the United Nations Security Council has done, to highly incorporated domestic legal systems that impose penalties for violations of international law, as is the case in states with national court systems that can accommodate legal proceedings initiated by private actors.

Despite the range of costs associated with legalization, states also enjoy various incentives by inviting legalization to take place. Strict forms of legalization reduce transaction costs of subsequent interactions, because the application of new norms upon existing norms remains legally coherent.[34] This development is true of the evolution of international humanitarian law. The First Geneva Convention, first adopted in 1864, set a precedent for international cooperation for humanitarian purposes. Though it concerned behavior in armed conflict as opposed to the protection of persons as in Geneva, the first Hague Peace Conference, which took place in 1899, drew on and expanded much of the same rhetoric articulated at Geneva, calling for emerging standards of civilized international society. Similarly, Henry Dunant had written of his experiences in Castiglione, “What an attraction it would be for noble and compassionate hearts and for chivalrous spirits, to confront the same dangers as the warrior, of their own free will, in a spirit of peace, for a

[33] Abbott and Snidal, "Hard and Soft Law in International Governance," 427.
[34] Ibid., 430.

purpose of comfort, from a motive of self-sacrifice."[35] In terms of translating this sentiment into law, the Hague Conferences and the subsequent Geneva Conventions had secured an international political audience. Inevitably, regulation of the conduct of war affects individuals involved in the dispute in any capacity.[36] In this sense, efforts to distinguish clearly between these two strands within the "law of war" are arbitrary.

In the international political arena, it may be hard to distinguish norms from law, because one easily informs the other. Norms clearly underlie the impetus for the formation of law, which allows actors to make concrete commitments. However, the creation of law often aids the development and advancement of norms—highly legalized, regulated, and enforced legal norms are likely to be supported by strong social norms. In these ways, formalized law is a platform from and through which norms are promoted and disseminated. It is also important to be conscious of the actors who do such promoting. Certain universalistic legal norms reflect social norms with narrower roots, which have acquired salience in the international political arena because of the prominence of their norm entrepreneurs. In particular, peremptory norms, which cannot be derogated, may have origins specifically rooted in the Western tradition thanks to politically, economically, and militarily prominent Western European states.

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[35] Henry Dunant, *A Memory of Solferino* (International Committee of the Red Cross, 1986), 27.
[36] Ingrid Detter Delupis, *The Law of War*, 2nd Edition (New York: Cambridge University Press, 2000), 158.

THE DEGREES OF LEGALIZATION

Legalization in international governance occurs in two distinct, but broadly categorized designations, hard and soft law. While both restrict behavior and sovereignty by some measure, they differ in degree in the following dimensions: obligation, precision, and delegation. *Obligation* refers to the degree to which states and other actors are legally bound by specific sets of rules and commitments, whether they are subject to be evaluated under the rules, procedure, and discourse of international law.[37] In turn, this is often reflected in domestic law, where there can often be provisions that are congruent with international legal systems—Article III of the United States Constitution stipulates that the judiciary should consult international law as part of the law of the land, though in practice, American courts have maintained that international treaties are not self-executing. In German constitutional law, on the other hand, international law has no precedence over the federal constitution, but holds the same legal authority as federal statute.[38]

The next dimension, *precision*, refers to the degree to which rules specifically define behavior that does and does not constitute violations. Domestic and international laws can be prone to imprecision, but are often coupled with strong judicial bodies with broad interpretative authority. Adopted in 1950 under the Council of Europe, the European Convention on Human Rights (ECHR – also known as the Convention for the Protection of Human Rights and Fundamental Freedoms) is one such body. Consider Article 3 of the Convention, the prohibition on torture,

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[37] Kenneth W. Abbott, Robert O Keohane, Andrew Moravcsik, Anne-Marie Slaughter and Duncan Snidal, "The Concept of Legalization," *Intenational Organization* 54, no. 3 (2000): 401-419, 401.
[38] Pieter Dijk, Godefridus J. H. Hoof and A. W. Heringa, *Theory and Practice of the European Convention on Human Rights*, Three (Boston: Martinus Nijhoff Publishers, 1998), 16.

which stipulates simply, "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."[39]

Lastly, *delegation* refers to the level of authority that has been granted to third parties to administer and interpret the rules and resolve disputes. While these dimensions may be somewhat consistent within particular levels of legal development, clustering within categories such as highly developed democratic legal systems or states with high sovereign autonomy, there is in fact a dizzying variety of international legalization. In practice, different legal arrangements combine these dimensions copiously.

Hard law scores highly across these categories, which has important implications for its contingent legal institutions. Hard legal commitments have a higher capacity for enforcement due specifically to the specialized nature of its judiciary and arbitration bodies. Because delegation is high in hard legal arrangements, such institutions consist of highly effective litigation procedures and techniques.[40] Despite its imprecision with regard to torture specifically, the provisions of the ECHR are generally much less ambiguous on other matters—Article 5, "Right to liberty and security" and Article 6, "Right to a fair trail" are among its most thorough provisions. On delegation, the ECHR rates highly, having made permanent in 1998 its judicial arm that monitors compliance of all Contracting Parties. In addition, other State Parties and even individuals can make claims to the Court against Contracting Parties under Protocol 11, which awarded the Court with compulsory jurisdiction. Previously, states were able to ratify the Convention

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[39] Council of Europe, "Convention for the Protection of Human Rights and Fundamental Freedoms" (November 4, 1950).
[40] Abbott and Snidal, "Hard and Soft Law in International Governance," 432.

without recognizing the jurisdiction of the Court, a preclusion that seriously diminished the degrees of obligation and delegation imposed by the Convention. These elements also contribute to the Convention's high measure of obligation, which is to say that State Parties to the ECHR are subject to the binding decisions of the Convention's judicial organ. Article 46 of the Convention, concerning "Binding force and execution of judgments" stipulates that states are expected to "undertake to abide" by the final judgment delivered by the Court, an expectation that conforms states to the procedures and rules of the international body of law. In these ways, the ECHR is a model for the rendering of hard legal regimes, though its initial legal induction was characterized by shortcomings in delegation.

However, even the most rigid forms of hard law are prone to some concessions, provisions without which states might be reluctant to join such legal commitments in the first place. The ECHR includes a provision authorizing states to limit certain civil rights in the interest of national security and public order "when necessary in a democratic society," during war or public emergency.[41] Though escape clauses have the potential to render ineffective most legal commitments, the ECHR compensates with its strong judiciary organ, which would be certain to investigate suspect behavior from states and determine whether such a suspension of rules had been in order. Moreover, states may value, and appreciate, the reduced cost to sovereignty that the provision allows, though it may not be practically wise to exercise such a right.

These sorts of mechanisms essential to hard legal systems make pursuing hard law attractive to states with specific ends. When facing a particular exchange or

[41] Abbott, Keohane, et al., "The Concept of Legalization," 411.

convention in which the benefits of cooperation, potential for opportunism, and overall costs are high, states may look to use hard legal commitments to remove inherent risks of the first-mover. This is to say, states will make confident commitments with the expectation that other states will fulfill their obligations because hard legal bodies afford them the security to do so. States are also inclined to consider hard legalization in situations where noncompliance with rules is difficult to detect, in order to increase the credibility of states' commitments. In addition, because of the nature of the proscribed behavior, such legal agreements often require monitoring provisions that also increase the costs of detected violations.[42] Though monitoring bodies are certainly not exclusive to hard law—monitoring provisions can exist even if the broader legal institution lacks the legally enforceable authority to do it effectively—effective monitoring practices generally result where states are subject and bound to extensive legal adjudication, a combination of highly obligatory and highly delegated legal regimes. Legislation against torture has been glaringly insufficient with respect to such provisions. The reduced likelihood of detection has not been compensated by increased costs of detected violations or by effective monitoring mechanisms that would deliver detection. Legal regimes that specifically address torture cannot be described as hard law, in this sense. It is plausible to suggest that states may seek softer political strategies with respect to torture because achieving hard legalization would be difficult. Instead, a poorly enforced blanket norm is the result. Naturally, a further discussion about these aspects of torture legalization is necessary and is forthcoming.

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[42] Abbott and Snidal, "Hard and Soft Law in International Governance," 429.

States may also use hard legalization to convey how they identify themselves to the international community. A state that is willing to expose itself to higher costs of violation and considerable sovereignty costs actively identifies itself as a state that is unlikely to defect. As such, states that join transnational organizations such as the European Union (EU), whose legal authority includes the ability to enact legislation and is based on a series of treaties, are likely to value highly the sincere commitment that such a move expresses and requires.[43] More broadly, states eager to participate in international legal regimes incur enhanced reputational benefits in general, which makes them more credible overall. In turn, hard legal commitments in the international arena reflect well on the domestic institutions of states, which are expected to be highly legalized and able to undertake and uphold the rules of international law. As such, states with strong domestic legal institutions and available resources, both material and personnel, are more likely to support hard legalization as an advantageous strategy.

The major departure that soft legalization makes from its hard counterpart is in significantly reducing the degree of one or more of the important legal dimensions. Considerably reduced contracting costs are reflected in the various measures that soft legalization regimes adopt in order to protect state sovereignty and the overall costs and risks of an agreement. These may include reduced obligation and delegation in the form of escape clauses, imprecise commitments that are ill-defined and without delegation provisions, and even political forms of delegation that shift control according to states' desires.[44] Altogether, these outlets allow states to reap some of

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[43] Ibid.
[44] Ibid., 434.

the benefits of legalization without having to incur legalization's most significant costs.

The weakened dimensions of soft law, each in its own way, are designed ultimately to insulate subscribing states from the reduced sovereign autonomy that hard legalization entails. This is not to say that soft law is necessarily more effective than hard law, though this can be the case. Soft law is often easier to accomplish because it includes relaxed legal components. In the sense that it is more inclusive, it can facilitate compromise and cooperation between actors of varying interests, time horizons and discount rates.[45] Over time, soft law can more effectively cultivate the kinds of international political relationships and discourse that socialize norms. In the sense that soft law legal systems still impose a kind of international legal structure to the norms they legalize, soft law is more than a simple articulation of international norms, but also a vehicle for their advancement.

Broadly speaking, sovereignty costs occur as a result of the existence of an external authority over significant national decision-making. As related by political scientist Andrew Moravcsik, "the defense of governmental discretion translated into the defense of national sovereignty."[46] International agreements may prevent states from controlling entire classes of issues, including those that invariably consist of "relations between a state and its citizen or territory, the traditional hallmarks of sovereignty."[47] This is evocative of the problem posed by Dunant's early conception of national relief societies, which implied that states power to pursue their national

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[45] Ibid., 423.
[46] Andrew Moravcsik, "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe," *International Organization*, Spring 2000: 217-252, 227.
[47] Abbott and Snidal, "Hard and Soft Law in International Governance," 437.

interests was limited. More so than issues of economic and political foreign affairs, issues of a state's relationship with its citizens more strongly evokes the state's monopoly on the use of force, within its territory. In addition, with respect to human rights, transnational interests (i.e. "precise nature, scope, application, and enforcement") are more likely to vary than domestic interests. Because international traditions and practices are necessarily aggregated, balancing a variety of interests, they are a coherent composite of rights—"they must override local particularities."[48] The evidence reflects this overall reluctance to incur significant sovereignty costs: even in highly institutionalized legal alliances, such as NATO, delegation is only moderate because national security is an issue that incites a great deal of concern over sovereignty costs. On the other hand, issues in which state interests may be more aligned, such as those relating to economic policy, are low in sovereignty cost, which is evidenced by the high number of legal agreements in that area.[49]

In actual practice, delegation is responsible for most expected and unanticipated sovereignty costs, as demonstrated by the unexpected prominence of non-judicial organizations such as the IMF. Inclusion in high delegation regimes subjects states to the decision-making of third parties. The IMF obligates signatories to "particular standards of monetary conduct," a commitment outlined in Article VIII of the IMF's Articles of Agreement. International relations scholar Beth Simmons argues that states commit to the Article because governments are interested in "efficiency gains" from international transactions made possible by their enhanced

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[48] Moravcsik, "The Origins of Human Rights Regime," 227.
[49] Abbott and Snidal, "Hard and Soft Law in International Governance," 440.

credibility.[50] In this sense, though high delegation represents a significant cost to the economic sovereignty of a compliant state, there is also substantial economic and political benefit to be gained. Delegation costs are unexpected, or underestimated, in the sense that these third parties often expand their purview over time, possibly by eliminating escape clauses or by expanding their membership base (thereby affecting more and more countries when attempting to stabilize international rates of exchange and balance of payments, as is the case with the IMF).

Delegation is also the channel through which states can most effectively limit such costs. When precision in a legal arrangement is low, institutions in high delegation regimes can interpret and broadly extend legal principles. Even more precise legal regimes may still invite the expansion of institutional and administrative oversight—despite the many detailed provisions of the ECHR, the European Court of Human Rights was responsible for interpreting and applying general standards for "inhuman and degrading treatment" in previously unanticipated situations.[51] Indeed, the broad institution of delegation—of employing a third party, or a separate legal branch, to interpret rules and resolve disputes—is a *part* of the legal structure. This dynamic of legal cohesion is evident, again, in the ECHR. Delegation refers the extent to which this effective legal model is pursued, rather than something that is wholly outside the legal structure to begin with. This is not to say that shifts in obligation and precision are not also important protections built into soft law arrangements, however, weakened delegation mechanisms are largely responsible for

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[50] Beth Simmons, "International Law and State Behavior: Commitment and Compliacne in International Monetary Affairs," *American Political Science Review* 94, no. 4 (December 2000): 819-835, 821.
[51] Abbott and Snidal, "Hard and Soft Law in International Governance," 433.

behavioral flexibility that is caused by weaknesses in obligation and precision that induce states to take their international obligations lightly or as open-ended.

So far viewed as a tool of self-interest, soft law can be an important intermediary for hard law or as adequate and effective basis for more advanced international governance. This is in light of the practical interaction between states at the international level. Many countries are prepared to take on hard legal commitments, but may be weak in addressing particular legal proscriptions that require specialized institutional support. Others may be years away from being capable of supporting hard legal commitments. As a middle ground between stronger and weaker states, soft legal arrangements may serve to protect states that otherwise suffer from uncertainty about the behavior of more powerful states.[52] In such cases, states sacrifice some level of sovereignty to enhance their international standing, which will be recognized by the strong and weak alike. While weaker states are able to marginally correct their continuous bargaining disadvantage, powerful states gain from wielding their considerable political advantage in formalized rules. As is the case for legalization more broadly, both sides enjoy reduced transaction costs of subsequent bargaining and interaction. If powerful states can manage an advantageous outcome while working within a legally binding framework, legalization is wise strategically. By involving the United Nations Security Council in its activities in the first Gulf War, the United States successfully mobilized political support from weaker states, while making a small concession in allowing states to monitor and marginally influence the American operation there.[53]

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[52] Ibid., 447.
[53] Ibid., 449.

In practice, despite the obvious concessions that powerful states make in accepting legal constraints, it is these states that wield the greatest influence on the legal structures they participate in. This is not to say that weaker states are not served well by the institutionalization of legal rules. However, the activities of powerful states demonstrate how extensively legal regimes can consist of rational incentives and normative considerations simultaneously. They can influence the behavior of actors, who take an active role in advancing and shaping the norms that matter to them. In this sense, the law is inseparable from its normative foundation, though it is also clear that the development of a norm reflects its legal character, effectiveness and stature.

II

IN SEARCH OF THE NORM AGAINST TORTURE

"And yet the fact remains that a few decades saw the disappearance of the tortured, dismembered, amputated body, symbolically branded on face or shoulder, exposed alive or dead to public view. The body as the major target of penal repression disappeared."[1]

Michel Foucault, *Discipline and Punish*

The norm against the practice of torture did not originate from a single international compact or legal prohibition, though these sources are useful in judging its contemporary importance in international politics. Indeed, one can look to the Universal Declaration of Human Rights (UDHR) or the United Nations Convention Against Torture (CAT) and a slew of other international legal instruments to identify that there is a legal norm. As established in the previous chapter, laws and norms, while closely related, are not necessarily identical. As far as the norm against torture is concerned, the modern legal norm is merely the surface. There is a whole discursive and historical legacy that must be accounted for. Only then is it possible to identify the origins of the contemporary moral character of the norm and why and how it may affect state behavior.

As the previous chapter's discussion suggests, a norm's formal and informal development require careful study. The purpose of this chapter within the overall scope of the project is to reveal the sources of the norm against torture, which will supplement a forthcoming thorough evaluation of the legal norm. As such, the first section of the chapter discusses the state's relationship with torture, tracing the broad transformation of torture from its classical to now its modern form. Though it was

[1] Michel Foucault, *Discipline and Punish*, Second, trans. Alan Sheridan (New York: Vintage Books, 1995), 8.

once an avowed, open, and regulated practice—a necessary function of jurisprudence—torture in its modern form is hidden, shrouded in secrecy and wholly subject to the discretion of the torturer. Following this discussion, the second section studies the emergence of a culture of human rights, its theoretical implications, and the non-state forces that have been responsible for its development. The third section discusses the inception of human rights into law, the expansive reach of which has been largely responsible for the shift in the practice of torture and the nature of its proscription, suggesting that modern torture is a function of the changing legal and political context. Lastly, the fourth section addresses specific proscriptions of torture within humanitarian and human rights instruments, tracing the development of the norm against torture through its association with these broader movements.

TORTURE AND THE STATE: PAST AND PRESENT

The development of the norm against torture has much to do with the changing definition of torture and its relationship to the state, from which the proscription was originally born. This important shift reflects how the very definition of torture has changed, how a discursive process is responsible for the modern conception of torture. While it will become plainly obvious that there are a variety of legal and customary mechanisms that have hardened and clarified the torture taboo, it is evident that the norm has clear utilitarian roots, though it is shrouded in a broader notion of moral ethic and responsibility.

Though torture is often evokes imagery of the "dark middle ages," this medieval portrayal is inaccurate. In the thirteenth century, Azo, an Italian jurist,

offered the following definition: "Torture is the inquiry after truth by means of torment." In the seventeenth century, civil lawyer Bocer refined this definition, saying, "Torture is interrogation by torment of the body, concerning a crime known to have occurred, legitimately ordered by a judge for the purpose of eliciting the truth about the said crime."[2] In addition, early applications of torture indicate that torture was rarely applied indiscriminately. In early Roman law, following the Greek tradition, torture was reserved for only slaves who had been accused of committing a crime, though later Roman law expanded the criminal criteria for the acceptable use of torture.[3]

Classical torture was considered a legitimate judicial procedure, a generally approved method of obtaining information. It was public in character and was a practice based in law, not outside of it. It was governed by rules, which were discussed openly and could be legally challenged. In contrast, modern torture is a hidden practice and though it is performed extra-legally, it exists both as a truth-seeking device in interrogation *and* as a political device for the purposes of intimidation. Surely, some modern torture blurs this distinction, with the purpose of gaining false, but useful confessions.

Classical torture took on its unique and prominent form in Europe in the twelfth century specifically because jurists prioritized confessions, as a part of inquisitorial procedure, which steadily supplanted the previous tradition of

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[2] Edward Peters, *Torture* (Philadelphia: University of Pennsylvania Press, 1996), 1.
[3] The Greeks believed that individuals "without legal privilege," which is to say slaves, had to be coerced in order to render their testimonies acceptable and on par with that of citizens. This tradition, of selective torture, is also found in other European countries. While the Greeks reserved torture for slaves and traitors, later Romans added free citizens, and later European states reserved the practice for certain types of perpetrators and penal acts.

accusatorial torture.[4] In the Roman-canonical form, confession was the *regina probationum*, or the queen of proofs. Given the unpredictability of evidence, testimony, judges, and juries, courts came to value confessions as principally important.[5] Thereafter, torture re-emerged in its criminal investigative form, a procedure known as *quaestio*.

The practice could proceed as such: Once informed of a criminal offense, a judge would ascertain whether a violation did, in fact, occur. A judge would call witnesses and hear testimonies, a process called the *inquisitio generalis* (general inquiry). An *inquisitio specialis* (special inquiry) began as soon as an accused was identified. Every means possible was used to discern the truth before the application of torture was invoked, which was applied only when there was a great body of evidence against the accused. Once the decision to apply torture was arrived at, the torture itself was highly dictated by protocol: "it could not be savage or cause death or permanent injury; it should be of the ordinary kind, with new tortures frowned upon; a medical expert had to be present, and a notary had to make an official record of the procedure."[6] In addition, confessions made under torture were not themselves valid unless they were given again while free from duress, an indication that these criminal procedures sought the truth.

However, by the end of the seventeenth century in Europe, the Roman canon had lost its monopoly and was in the process of being replaced by a new system of

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[4] Peters, *Torture*, 41.
[5] Ibid., 44.
[6] Ibid., 57.

proof that entailed free judicial evaluation of evidence.[7] Torture had been regularized from the mid-thirteenth century, such that it became an essential, an inseparable aspect of the Roman-canonical procedure. As historian Edward Peters notes, though torture was precise and regulated in terms of the legal theory and text, it was applied more broadly in practice, "quickly roughened in the hard world of applied law."[8] This, despite agreement among jurists that torture had to be conducted with care and precision in order to yield the truth. This is to say, torture was not always administered as it was intended when it was ordered. It was prone to abuse and negligence by those who actually carried out the procedures. The emergence of print media facilitated scholarship and criticism on the issue, highlighting abuses, often lapses stemming entirely from the disposition of the judge, who had ultimate say on the particular mode of torture to be used.[9] Because torture was less restrained when applied in practice than in theory, the credibility and integrity of its judicial function was disputed. In turn, Roman-canonical procedure could no longer be practiced *without* torture, having long considered torture a requisite element of the criminal investigative process.

The development of this new system of law had less to do with the conscientious, moralist "fairy tale" that is frequently recounted about the widespread abolition of judicial torture in leading European countries in the middle of the eighteenth century. Though the emergence of Enlightenment thought certainly evoked a growing notion of human dignity, Peters argues that it "did not become the

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[7] John H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Regime* (Chicago: University of Chicago Press, 1977), 26.
[8] Peters, *Torture*, 69.
[9] Ibid., 68.

constant in later history that the first historians of torture thought it had." Rather, he argues that the moral sensibility argument was more important later, in the late-eighteenth and nineteenth century, with regard to perceptions of the state and law.[10] As opposed to a true movement to abolish torture, critics of torture more closely resembled a "diffuse series of criticisms," insufficient to explain the decline in torture. However, the moral argument certainly sustained the abolition by coloring it with the humanitarian discourse that materialized with Henry Dunant and the Geneva Conventions.

As legal historian John Langbein suggests, the forces behind the abolition were far more instrumental, with respect to state interests. The initial abolition was initiated because new criminal sanctions and the new law of proof did not require a dependence on torture. States introduced galley sentences, workhouses and transportation as alternatives. Galleys required hundreds of oarsmen and since the work was grueling and often treacherous, there were few volunteers to fulfill the necessary demand for labor.[11] Though the galley sentences were limited to states with naval and galley fleets, workhouses were a broadly embraced option conceived by the English. They also fulfilled social purposes, but rather than exploiting inmates, workhouses served a distinctly positive social role. They trained inmates in certain skills of labor, with the aim that the inmate "could be released, no longer a burden to his society."[12] States also considered transporting convicts to overseas colonies for terms of indentured servitude, a practice that grew substantially in the late seventeenth century. Transportation avoided applying the death penalty in much

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[10] Ibid., 76.
[11] Langbein, "Torture and the Law of Proof," 30.
[12] Ibid., 35.

the same way that terms in the workhouse and prison did, in a way that was beneficial to both the convict and the overall productivity of the workforce.[13] In these ways, the early abolition of torture was brought about by a distinctly instrumental series of shifts, though the history of torture is often superficially associated with the discourse of a moral consciousness. The new wave of criminal sanctions was useful for states, making them attractive alternatives to torture, a practice increasingly seen as ineffective.

Despite the abolition of torture from ordinary criminal law, a strand of it endured owing to the efforts of European lawyers after the thirteenth century who had endeavored to create a category of exceptional crime that fell outside the ordinary criminal procedure. This was the possibility of *crimen exceptum*, the kinds of crimes so dangerous and disruptive to society that reintroduction of torture would be necessary to contain them.[14] In such situations, torture was used a judicial device, though it is reasonable to imagine that confessions and convictions were favored and that interrogations were not wholly impartial because of the nature of the alleged crimes. At the time, these crimes prominently included offenses such as "heresy, magical practices, counterfeiting, and certain kinds of homicide and treason."[15] In this way, even while torture as a purely legal concept declined, it retained much of its political character. Moreover, this notion has survived the initial abolition, withstood humanitarian efforts to delegitimize its practice, and endured as a species of torture that is similarly invoked by contemporary proponents of modern torture.

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[13] Ibid., 41.
[14] Peters, *Torture*, 6.
[15] Ibid., 61.

Gradually, the use, nature, and functional purpose of torture have changed. In 1942, in a directive to the Gestapo, Chief Heinrich Müller noted that coercive interrogation was not to be used to incriminate suspects (in the place of eyewitnesses, as had been common practice in the Roman canon), but could be used as preliminary evidence.[16] This is not to say that Müller's commentary is representative of the international position, but an indication that the classical, judicial function of torture had been gradually replaced by other techniques. In contrast, modern torture has cultivated an ethos of secrecy and denial, because of its international criminalization in the mid-twentieth century. Modern torture can thus be arbitrary and indiscriminate. Other than an outright prohibition, it cannot be regulated, which means that it is subject to the discretionary power of agents of the state. Alternatively, Malcolm Evans and Rod Morgan suggest that although classical torture was certainly cruel and barbarous, it was not savage in the sense that modern torture is, occurring behind closed doors, unrestrained and boundless.[17] Modern torture has this potential, forbidden and categorized as taboo owing to the rise of human rights concepts internationally.

BUILDING A HUMAN RIGHTS CULTURE

The international criminalization of torture is inextricably linked to the broader history of humanitarian and human rights concepts. The atrocities of World War II were an especially powerful inducement to the international legal community "to forge the principle that people should have rights as humans, and not merely as

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[16] Darius Rejali, *Torture and Democracy* (Princeton: Princeton University Press, 2007), 36.
[17] Malcolm D. Evans and Rod Morgan, "Classical and Contemporary Torture," in *The Phenomenon of Torture*, ed. William F. Schulz, 38-45 (Philadelphia: University of Pennsylvania Press, 2007), 43.

protected classes of subjects, such as citizens, civilians, or prisoners of war."[18] However, as the right not to be tortured became inducted into the category of fundamental human rights, it was subsumed under a sweeping moral discourse. A certain victory for the human rights community, the moral case against torture displaced the utilitarian case for its original abolition. Moreover, this shift has been articulated in the international legal realm of humanitarian law, which has markedly shaped the modern norm against torture.

There is a substantive difference between humanitarian law and human rights law, which refers to law that concerns not only the specific proscriptions of unacceptable conduct in war, but to the fundamental matter of human dignity and worth. While human rights law has been a matter of legal concern for only the past half-century or so, it has constructed standards that are intended to apply generally and universally to all human beings in all circumstances. Unfortunately, human rights laws are regularly abandoned or redefined during times of war, wartime exigencies requiring that protection of such rights be ignored. Humanitarian law is founded on avoiding such occurrences; it attempts to establish a principled conception of basic human rights as "fundamental." It consists of the "supplementary rights" victims of armed conflict enjoy in addition to their basic rights. In this sense, it goes beyond the baseline minimum proposed by human rights law.[19]

The lasting importance of the first Geneva Convention is evident in the subsequent series of humanitarian international efforts that emerged. Four years after

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[18] Lisa Hajjar, "Torture and the Future," *Middle East Report Online*, May 2004, http://www.merip.org/mero/interventions/hajjar_interv.html (accessed 12 13, 2008).
[19] A.H. Robertson and J.G. Merrills, *Human rights in the World: An introduction to the study of the international protection of human rights* (New York: Manchester University Press, 1996), **PG**.

the first Convention in 1864, the St. Petersburg Declaration was signed, prohibiting the use of explosive or inflammable projectiles small arms munitions. In turn, the Declaration was an important predecessor to the Hague Conventions, particularly with regard to the Fourth Hague Convention of 1907 respecting the Laws and Customs of War on Land. This Convention emphasized a notion of the "laws of humanity" and the "dictates of the public conscience."[20] This spirit is also evident in the 1949 signing of the Geneva Conventions, which served to remind governments who chose to renounce the Conventions that they were still bound by their principles in the conduct of warfare. The broad effect was that states could no longer avoid scrutiny in issues of human rights by "hiding behind" the principle of sovereignty.[21]

Over time, the international order became more specific than addressing the entire range of "laws of humanity." This gave way to efforts such as the 1929 Geneva Convention, in which Article 46.3 addresses "all kinds of corporal punishment, incarceration in localities without natural light and, generally, all forms of cruelty." In 1943, the Allied Powers (UK, USA, and the Soviet Union) issued the Moscow Declaration, which included accounts of German atrocities. Increasingly, states also became more responsive and vigilant in denouncing the actions of their enemies, which was reflected in the appropriate international legal stages. Article 19 of the Charter of the International Military Tribunal (IMT) provided that the Nuremberg Tribunal was "not bound by the technical rules of evidence … and shall

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[20] Love Kellberg, "Torture: International Rules and Procedures," in *An End to Torture: Strategies for Its Eradication*, ed. Bertil Duner (New York: Zed Books, 1998), 4.
[21] Ibid.

admit any evidence which it deems of probative value."[22] Article 21 continued, "The Tribunal shall not require proof of facts of common knowledge but shall take judicial notice thereof … including the acts and documents of the committees set up in the various allied countries."[23] Accordingly, states were compelled to call attention to and take a stand against Nazi violations, submitting national audits to the Nuremberg tribunal in 1949. However, as political scientist Darius Rejali notes, this eagerness to alert the international community to the actions of enemies meant that states would regularly ignore violations committed by their allies. In addition, states were reluctant to prioritize human rights issues in their own foreign policies.[24] Significantly, this tendency facilitated the aggressive monitoring of states that came about from non-state actors to address this problem.

With respect to torture, journalists, lawyers and intellectuals were prominent in bringing attention to many unpleasant and unforgiving policies—in 1931, Andrée Viollis documented French colonial torture in Vietnam; in 1937, Eugene Lyons, an American Communist journalist, gave one of the earliest reliable accounts of Stalin's torture techniques. Certainly after World War II, the public increasingly welcomed efforts to publicize and call attention to torture practices as legitimate ways to check state behavior. In 1949, Alec Mellor's *La Torture* offered a comprehensive postwar survey of torture that attempted to document a geography and calendar of its practice. These types of efforts were critical in establishing any sort of public sentiment on the matter. Amidst the growing humanitarian rhetoric, the loudest, most salient, and

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[22] "Nuremberg Trial Proceedings Vol. 1 Charter of the International Military Tribunal ," *The Avalon Project* , http://avalon.law.yale.edu/imt/imtconst.asp (accessed April 1, 2009).
[23] Ibid.
[24] Rejali, *Torture and Democracy*, 40.

certainly most relatable voices were those of actors, individuals and non-state bodies who were decidedly against torture. In addition, such activity called much-needed attention to more obscure and lesser-known cases. This includes the efforts of the English lawyer Peter Benenson, who eventually founded Amnesty International and who in 1961, shocked his readers by calling attention to the practice of torture in democracies, by the French in Algeria and by the British in Kenya, states who were early supporters of human rights norms via signage of the Universal Declaration of Human Rights (UDHR) by the United Nations General Assembly in 1948. Though the UDHR is not considered international legislation—the General Assembly is political without legal effect—such commitments do reflect what states consider to be bindings norms, if not legally so.[25] As such, though French and British actions are cause for alarm, this is not to say that the ascendance of the norm is a fallacy.

Non-state efforts to involve and educate the public have also forced state actors to be more responsive to specific allegations of human rights violations. Before Amnesty International's *Report on Torture* in 1973, the International Committee of the Red Cross (ICRC) was the only international organization that performed any kind of audit of prison conditions. In turn, this has also given way to more official audits of state practices. Nongovernmental organizations (NGOs) committed to such work have been especially effective in countries with poor records on, and remedies against torture, where they "act as megaphones, broadcasting factual information about what is happening."[26] In addition, NGOs have complemented the

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[25] William R. Slomanson, *Fundamental Perspectives on International Law*, 3rd Edition (Belmont, CA: Wadsworth Publishing Company, 1999), 26.
[26] Rita Maran, "The Role of Non-governmental Organizations," in *An End to Torture* , 222-224 (New York: Zed Books, 1998), 225.

work of the United Nations, conducting large bodies of research on issues that are under consideration by UN bodies. Information provided by anti-torture NGOs was used in the eighteenth session of the Committee Against Torture, the body of human rights experts that monitors the implementation of the United Nation Convention Against Torture (CAT)—the most prominent contemporary torture-specific international legal instrument. The Committee discussed Israel's methods of torture and contrary to Israel's claims, eventually found that Israel had violated the Convention.[27]

NGOs that address these specific issues are generally more effective than particular state or international organs, in developing culturally sensitive methodologies for treating survivors, forming legal, legislative, and administrative initiatives that narrow possibilities for torture by government agents, and creating and educating a broad public movement against torture.[28] Broadly, this is facilitated by the international treaty regime, which promotes the idea that states are publicly accountable for their actions. As such, treaty regimes have had a considerable effect in raising the salience and public legitimacy of human rights issues, thereby increasing the political salience and legitimacy of human rights NGOs. In making "formal, tactical concessions," governments stimulate the discourse of human rights and give way to the array of bureaucracies and institutions designed to accommodate increasingly specific legal claims.[29] This is especially so as the broad efforts of international NGOs have yielded region-specific monitoring groups, as in the case of

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[27] Ibid., 227.
[28] Ibid., 226.
[29] Ryan Goodman and Derek Jinks, "Measuring the Effects of Human Rights Treaties," *European Journal of International Law* 14 (2003): 1-15, 7.

Amnesty International, while others such as Human Rights Watch have been the product of various regional movements joining forces.

The public sentiment, and the concurrent emergence of the notions of common humanity and respect for human dignity, has played an essential role in shaping the norm against torture. Though the norm initially took shape as it related to the state, the increasing relevance of the public is hard to deny. Public sentiment facilitated the phasing out of torture from classical jurisprudence and has since sustained the norm by cultivating a broad distaste for its practice. The source of this sustained effort is decidedly that of the human rights community, which originated outside the state organ.

In terms of public awareness, human rights have enjoyed a meteoric rise in salience in the media, even in Communist states with state-controlled media agencies. In China, the Xinhua news agency's use of the term "human rights" increased by 1,000 percent from 1982 through 1994, while usage of the term by Western media agencies such as Reuters and the BBC increased by 500 and 600 percent respectively during the same period.[30] While the increased salience of torture practices and human rights violations has lent public legitimacy to the torture taboo, it has also driven state-sponsored acts and policies of torture "underground." More visible torture regimes have responded to the norm and adopted policies that prescribe more stealthy practices. In turn, for a variety of reasons, democratic states have taken to cleaner methods of torture, leaving few visible marks under the veil of secrecy and denial. State behavior is demonstrably responsive to the norm against torture and the

[30] Rejali, *Torture and Democracy,* 42.

normative consequences, which are not necessarily legal, that are associated with its violation.

CONCEIVING OF HUMAN RIGHTS IN INTERNATIONAL LAW

International legal instruments are the most accessible and visible sources of norms in the international community. They encompass not only the most prominent and expansive legal conventions, such as the Universal Declaration of Human Rights (1948), the Geneva Conventions (1949), and the UN Convention Against Torture (1984), but other sources of international law. The Statute of the International Court of Justice includes international custom, the general principles of law recognized by civilized nations, and judicial decisions and teachings of the most qualified publicists (i.e. individuals in legal and political capacities of import, whether they be judges, prominent statesmen, etc.) of various nations.[31] These sources, wherein the substantive content of international law resides, are essentially norm-shaping. They are generative and constitutive of states' inclination to conduct their behavior lawfully or otherwise. While the purpose of this project is to investigate what causes formalized *legal* norms to be violated, the genealogy of the anti-torture norm suggests that there are also substantive factors that are not found in treaties that affect the strength of the norm. As such, this treatment of international legal instruments that address torture will focus on how these devices have shaped the anti-torture norm, rather than to inquire into the behavior of states, which will be addressed later.

As previously iterated, United Nations resolutions are considered soft law and are useful in that they reflect what signatory states consider to be binding norms. In

[31] Slomanson, *Fundamental Perspectives on International Law,* 13.

this sense, soft law has a kind of predictive value for hard law, in that it expresses how states are expected to act.[32] Such was the case when the United Nations General Assembly adopted the UDHR in 1948, which was at the time not intended to impose legal obligations on states. Although the UDHR did not establish any monitoring or enforcement mechanisms, it was the culmination of a number of earlier attempts to prioritize human rights. A year after the United Nations Charter was signed in 1945, the General Assembly approved a recommendation that the Economic and Social Council (ECOSOC) establish a Commission on Human Rights and prepare an International Bill of Rights. The Declaration was the first part of a three-pronged effort to accomplish this goal. Finally, over the course of several months of drafting meetings and proposed amendments, the Declaration was adopted unanimously on 10 December 1948. It was widely considered to be "an authoritative interpretation of the Charter of the highest order," an affirmation of the Charter's original and intended purpose, which was "determined … to reaffirm the faith in fundamental human rights."[33]

For the human rights community, the UDHR was and still is monumental in scope. It stands defiantly in defense of inherent human dignity, evoking rhetoric with distinct ethical implications. In this spirit, the Preamble recognizes that "equal and inalienable rights of all members of the human family [are] the foundation of freedom."[34] Conceived of in these terms, the UDHR required the presupposed belief that such rights are self-evident. Indeed, human rights norm entrepreneurs capitalized on the socio-political context of the time, as well. Its adoption coincided with the

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[32] Ibid., 27.
[33] Robertson and Merrills, *Human Rights in the World*, 29.
[34] United Nations, "United Declaration of Human Rights" (December 10, 1948).

crumbling of centuries of colonialism.[35] As such, it succeeded in institutionalizing an international concept of human rights in a number of ways. First, the Declaration sought to establish its fundamental premise, which was that the principles of human rights did not require legislation for recognition; it entailed only the belief that people have rights by virtue of being human, a concept partly owing its intellectual roots to John Locke and natural law.[36] In this way, the Declaration prioritized morality above law (perhaps even outside the law, which is to say whatever the law is, morality exists in perpetuity).

Another major accomplishment of the Declaration was to demonstrate that human rights could be pursued by means other than legislation, which Jeremy Bentham believed to be a complete fallacy—Bentham contended that rights had to be legislated in order to be recognizable. Human rights norms (and culture) could be pursued through "public discussion, social monitoring, investigative reporting, and the functioning of the media as a forum for news and comments," an affirmation of the distinction between norms and law and more specifically, the essential role of non-state actors in advancing normative discourse.[37] From this platform, the UDHR could fluently expand its purview beyond basic "first generation rights" and include political, social, and economic rights, as well. The inclusion of basic socially relevant right and even "higher" rights—the right to social security, the right to work—was an affirmation that human rights called for fundamental social change, a call that Amartya Sen declares "must not be hostage to pre-existing feasibility."[38]

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[35] Amartya Sen, "The Power of a Declaration," *The New Republic*, February 4, 2009: 30-32, 30.
[36] Ibid.
[37] Ibid.
[38] Ibid., 31.

One of the most important, but perhaps plainly obvious, features of the UDHR is in its universal application. It indiscriminately champions the human dignity of all people. As such, the UDHR has served as the intellectual basis for subsequent social efforts that resemble or comprise human rights norms. In the way that the Geneva Conventions were a jarring proposition to states at the time, the notion of universal human rights through international action was entirely novel. This is not to say that the UDHR was the birth of human rights—it was, in fact, the culmination of a growing movement. Naturally, subsequent campaigns to prohibit certain state practices have been subsumed under the broader human rights norm. In part, this may be because this is the only way emergent norms can ascend. In addition, the intrinsic nature of torture makes this connection inevitable.

In an effort to implement and impose concrete obligations on the parties of the UDHR, the General Assembly adopted the International Covenant on Civil and Political Rights (ICCPR) in 1966. The Covenant included some of the rights recognized by the UDHR while excluding others—authorizing a state to refuse most rights during public emergencies (Article 4), while requiring state parties to prohibit some categories of free speech, from war propaganda to hate speech (Article 20).[39] In addition, all rights stipulated in the Covenant were subject to reservations, whereby states could agree to ratify a treaty or other international convention, but profess disagreement with provisions on principle. The United States ratified the ICCPR in 1992, but the Senate maintained 5 reservations, 5 understandings, and 4

[39] United Nations, "International Covenant on Civil and Political Rights" (March 23, 1976).

declarations.[40] Additionally, the Covenant included optional procedures that bound signatories to substantial supervisory and monitoring procedures, which drew less than encouraging support from most states. As such, the system relied on self-reporting as the primary enforcement mechanism of the Covenant. By allowing states to particularize their commitment in such detail, the Covenant was not an especially powerful inducement to compliance. This minimal standard was supplemented by the establishment of a Human Rights Committee, which has been a largely ineffective system because of its lack of a mechanism to enforce or impose sanctions. For these reasons, the UDHR itself has become more prominent in its evaluative capacity than was originally intended. This is to say, it has been used as a means to judge compliance with human rights obligations under the UN Charter, partly for lack of stronger alternatives.[41]

Though the UDHR does not contain enforceable and punishable legal obligations, it has substantially widened the legal scope of human rights. Notably, the American Convention on Human Rights of 1969 and the African Charter on Human and Peoples' Rights of 1981, two legally-binding regional human rights instruments that are modeled similarly to the European Convention on Human Rights (ECHR), for the purposes of regional cooperation and unity, include references to the UDHR. However, it is not certain that the UDHR has become universally acceptable customary law. According to British jurist Ian Brownlie, the determinants of whether a practice can be considered customary international law are the duration of the practice, substantial uniformity of usage by affected nations, generality of the practice

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[40] Congress, Senate, "U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights," in *Congressional Record* (April 2, 1992), S4781-01.
[41] Kellberg, "Torture," 7.

or degree of abstention, and whether international consensus regards the particular custom to be binding.[42] Custom is vital in international law because there are international obligations that are not explicitly expressed in treaties. A robust norm against torture would likely require strong adherence in custom where the hard or soft law itself falls short. Though there are exceptions, including some Muslim states that do not consider themselves bound by the UN's human rights provisions, most states and international compacts agree that torture is "one of the most atrocious violations against human dignity," even if they hold that the UDHR is merely a common standard for achievement as opposed to a formal legal obligation.[43]

PROSCRIBING TORTURE UNDER THE HUMAN RIGHTS BANNER

Given the expansive reach of human rights concepts, it comes as little surprise that there are emergent norms and international legal efforts that have benefited from the integration of humanitarian and human rights, propelled under the banner of human rights. Torture, despite its normative roots, was an issue sustained by human rights concepts, advanced by the expansion of international concern for human rights. As such, its formal proscription in law was also brought about as a human rights concept.

The Geneva Conventions of 1949 were an international instrument that spurred and benefitted from the development of a wider notion of humanitarian law. All four Conventions in that year, which collectively concerned the treatment of civilians during wartime, contain the same Article 3, which addresses issues of torture

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[42] Slomanson, *Fundamental Perspectives on International Law,* 16.
[43] Kellberg, "Torture," 8.

specifically, prohibiting such acts with respect to the treatment of both prisoners of war and civilians. In Article 50, the Conventions of 1949 defined "torture or inhuman treatment" as "willfully causing great suffering or serious injury to body or health" to be a serious violation and conferred upon states an obligation to seek out and prosecute perpetrators.[44] Using the standard of protection offered under human rights law, the safe "rule of thumb" on torture was to apply the prohibition absolutely, relevant as much in wartime as in peacetime. As such, the prohibited categories were "doubly protected," reinforcing the humanitarian prohibition with the expansive human rights discourse.

Article 5 of the UDHR addressed torture specifically: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The Article offered no details or examples of the kinds of techniques that were prohibited. Subsequent efforts did not necessarily fare better, illustrated by provisions of the ICCPR. Article 7 of the Covenant is an explicit prohibition of torture: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Because wartime is a particularly opportune situation for states to resort to such techniques, a reworking of such language to a positive formulation, such as "all persons shall be treated with humanity" could be a superior alternative.[45] In addition to inducing states to submit to the discourse of the Covenant's legal guarantees, the Covenant, to those who accept it, confirms that these are issues of international legal concern. This is to say, the effects of inclusion in the Covenant are to broaden the reach of international law in these issues, as opposed to being relegated only to the

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[44] International Committee of the Red Cross, "Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field" (August 12, 1949).
[45] Robertson and Merrills, *Human Rights in the World*, 312.

specific humanitarian conventions they would otherwise occupy.[46] Having argued that the ICCPR is a largely ineffectual legal instrument, the previous claim may seem invalid. However, priming the international audience can facilitate major normative shifts in the international political arena. Integrating the humanitarian and human rights cases against torture seems a necessary precondition for sustaining an absolute prohibition of torture. This interaction has broadened the scope of international law concerning torture and strengthened the international distaste for its practice in all scenarios. However, neither the Geneva Conventions nor the ICCPR produced an authoritative definition of torture, with the exception of a provision in the ICCPR concerning the prohibition of medical or scientific experimentation. While they expanded the scope norm against torture, they did not adequately transform the notion of torture from the abstract to the concrete.

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Though the prohibition of torture is expressed in at least nineteen different international standard bodies, the most significant international legal device that addresses issues of torture today is the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), adopted in 1984.[47] In succeeding the 1975 Declaration on Protection from Torture, the Convention sought to provide a more detailed treatment of torture as well to adopt a wider definition than had been typical in the past. In this respect, it has become the unequivocal and authoritative international legal standard.

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[46] Ibid., 315.
[47] "International Standards Against Torture," in *The Phenomenon of Torture*, ed. William F. Schulz, 360-362 (Philadelphia: University of Pennsylvania Press, 2007).

The Convention preserved some of the Declaration's fundamental understandings of torture. In both, the nature of torture in practice is recognized as an act by which severe physical or mental pain or suffering is inflicted upon an individual. The perpetrator of the act is understood to be a public official or another individual acting in an official capacity. Lastly, the aim of the perpetrator is critical: not only are the acts intentional, they are executed with the purpose of eliciting information, punishing for another act, or as general discrimination.[48] In a departure from the Declaration, the Convention did not include the Declaration's definition that "torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment." It did, however, create a variety of additional obligations for states, which include, in particular, obligations for states to take preventive action, a duty to make torture a criminal offense, a duty to cooperate with other states, and a duty to conduct prompt investigation of torture allegations.

In laying out these ideas, which were omitted from previous human rights agreements, the Convention emphasized the notion of state responsibility in addressing and remedying these problems. Without doubt, the Convention warrants a more thorough analysis, as it currently constitutes the closest approximation to a universal legal norm. As such, the following chapter considers the Convention comprehensively, with particular emphasis on its constituent effects on state commitment. Having traced the origins and the formative environment of the norm against torture, it is evident that early prohibitory legal references to torture considered its ban in light of its human rights upbringing, using familiar language of human rights and humanitarian precedents. To the extent the modern norm against

[48] Kellberg, *Torture*, 31.

torture is moral in nature, the legal norm reflects its character accurately. As such, it is quite easy to overlook the legacy of the norm against torture, with its instrumental origins, and focus on its contemporary moral representation. The strength of the norm against torture cannot be evaluated solely on the basis of the contemporary legal framework, but with its discursive, normative legacy in tow.

III

STATES, COMMITMENT, AND THE POLITICS OF TORTURE

"The civilized have created the wretched … and do not intend to change the status quo … these people are not to be taken seriously when they speak of the 'sanctity' of human life, or the 'conscience' of the civilized world."[1]
James Baldwin, *The Devil Finds Work*

As the previous discussion of the norm against torture demonstrates, norms clearly exist prior to and outside of their articulation in law. Norms do not simply arrive bare and unadorned—they carry a distinct discourse according to their genealogy. However, state behavior relative to norms is more explicitly traceable when the norms and behavioral decisions are codified in law—norms are defined and specified (though sometimes imprecisely) and support is measurable according to the signing and ratification process.[2] With respect to torture, this process is of particular interest because public support of the legal standard may not actually reflect the intentions, beliefs, and preferences of subscribing states. The previous chapter demonstrated that the norm against torture as an elevated moral standard might be an illusion, that the discourse of ethics advanced by human rights has served to enhance the obligatory nature of the legal prohibition. However, this disconnect is not alone responsible for the persistence of torture. These are behaviors that the legal framework against torture plainly allows—though the legal norm is absolute, non-derogable, and fairly straightforward, the legal structure allows for unchecked violations and devious behavior. It encourages states to be misled by data that show a

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[1] James Baldwin, "The Devil Finds Work," in *The Price of the Ticket*, 557-636 (New York: St. Martin's / Marek, 1985), 566.
[2] This statement is not mean to oversimplify the process by which states formally adopt legal norms. States may be quick to sign but may delay ratification for years, impeded by the discord of domestic politics.

reduction in detected torture, but ignores the underlying reasons for such shifts. This is to say the legal framework facilitates the growing disparity between the legal norm and the norm in practice. It masks the original problem.

The broad purpose of this chapter is to describe the relationship between states and the legal norm against torture**.** To this end, the first section explains the "rationale of commitment," describing the various factors that states consider in committing to the CAT. It emphasizes the idea that the human rights culture has become largely synonymous with statehood in the modern international political context. The second section of the chapter is a detailed analysis of the CAT's provisions and the kinds of behavior they allow, a discussion that will demonstrate that the legal norm is not predictive of the behavior that it is meant to constrain. The third section of the chapter concerns the strategies that states use in order to avoid having their torture practices exposed, therein demonstrating the power of the legal norm despite its practical legal shortcomings. Lastly, the fourth section of this chapter is a discussion of torture in practice, which includes detection of torture and the problematic efforts to explain the phenomenon. In particular, it highlights the dynamic of state behavior relative to the growing legal body against torture, which forces torture further into hiding and skew accurate reporting of its practice.

THE RATIONALE OF COMMITMENT

Legal instruments concerning human rights are deeply rooted in the discourse of duty and responsibility. They are necessarily tied to normative considerations, which are the forces that lend legitimacy to legal devices. As such, following an

exposition of the practical and conceptual development of the norm against torture, it is necessary to assess the legal instruments that proscribe torture in terms of their effect on behavior. Given the normative mechanisms and methods of evaluation previously delineated, the United Nations Convention Against Torture is an especially interesting test case for state commitment, because it allows for different levels of commitments with greater variation in costs and benefits than other international legal devices.[3] These considerations directly affect real and perceived constraints posed by the CAT and the measures that state actors pursue in accepting or shirking them.

More than two years after opening for signature in February 1985, the CAT entered into force on June 26, 1987, thirty days after the ratification of the twentieth member. However, in the year following its inception, the CAT had forty-one signatures and had already met a critical one-quarter to one-third threshold. As of the end of 2008, a total of 146 countries had signed and ratified the Convention. Another ten states had signed, but had yet to ratify.[4] With over eighty percent of the countries of the world legally bound in some fashion, the Convention has acquired some degree of international gravitas. To the extent that the Convention reflects the strength of the anti-torture norm as a social construct, those who torture often recognize that their actions are inappropriate. Admiral Horacio Mayorga, a torturer in the Argentine Dirty War, later admitted, "We must condemn the torture. The day we stop

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[3] Jay Goodliffe and Darren G. Hawkins, "Explaining Commitment: States and the Convention against Torture," *The Journal of Politics* (Southern Political Science Association) 68, no. 2 (May 2006): 358-371, 360.

[4] United Nations, *Status of Treaties: United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, March 1, 2009, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=129&chapter=4&lang=en (accessed March 1, 2009).

condemning—although we tortured … is the day we stop being human beings."[5] While the Convention and the broader taboo against torture occupy a sort of hallowed legal domain, the essential calculus remains: states have broadly determined that being a party to the Convention will produce more benefits, politically and otherwise, than will impose costs. And though we have not explained why states have so broadly supported the Convention, such an explanation will reveal that the norm against torture is an unmistakably "deontological" norm, which is to say it is a norm induced by notions of duty and obligation.

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A 2008 survey conducted by The Program on International Policy Attitudes at the University of Maryland revealed that on average, across the nineteen nations polled, 57 percent of people supported the unequivocal prohibition of torture.[6] Obviously, states and certainly the citizens within them are certain to have unique definitions of torture, according to domestic law and custom. Though the survey did not define torture specifically, each country polled was a signatory to the Universal Declaration on Human Rights (UDHR) and a state party to the Geneva Conventions of 1949. In this sense, they subscribed to both the widest and simplest possible definitions. Article 5 of the UDHR prohibits "torture" and "cruel, inhuman or degrading treatment or punishment," while Article 50 of the Geneva Conventions more specifically define torture as "willfully causing great suffering or serious injury

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[5] Tina Rosenberg, *Children of Cain: Violence and the Violent in Latin America* (New York: William Morrow and Company, Inc., 1991), 126.
[6] WorldPublicOpinion.org, "World Public Opinion on Torture ," Poll, Program on International Policy Attitudes (Washington, D.C., 2008), 1.

to body or health."[7] Though this definition is hardly satisfactory, it is the definition that states have come to commonly use and observe.

While 35 percent of people surveyed favored an exception when lives were at risk, a mere 9 percent opined that government should be able to use torture in general. The nations polled, which include most of the world's largest countries, are all signatories to the Universal Declaration of Human Rights and are parties to the Geneva Conventions proscribing torture. In addition, only three of the nations have not ratified the UN Convention Against Torture.[8] Generally speaking, there is among the public a broad distaste for state-authorized torture practices. This is the case in spite of recent outbreaks of violence and terrorism that have caused increased support for torture of terrorists in several nations. Moreover, the data demonstrates that "virtually all torture used by governments is at odds with the will of the people."[9] Insofar as popular support contributes to the domestic legitimacy of a government, states may be interested in culling public approval for their actions. This is not to say that all states adhere to this maxim. However, perceptions of domestic legitimacy may substantially affect many states' international legitimacy. Few states can get away with brashly ignoring international political pressure the way that major powers do. Obviously, this discussion again invokes the problematic nature of the source of human rights norms. It may not be wholly fair to accuse developing countries and

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[7] United Nations, "United Declaration of Human Rights" (December 10, 1948); International Committee of the Red Cross, "Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field" (August 12, 1949).

[8] As of December 2008, India had yet to ratify the CAT, though it signed on October 14, 1997. Not a signatory to the CAT, Iran lacks a definitive legal prohibition of torture. In recent years, Iran's Council of Guardians has been hostile to efforts by the Iranian Parliament to introduce legislation that would include significant safeguards against torture. Lastly, the Palestinian territories are not eligible to be a party to the agreement.

[9] WorldPublicOpinion.org, "World Public Opinion on Torture ," 1

some non-Western states of not simply "caring about" human rights issues. Governments that reject the relevance and compatibility of what are perceived to be Western standards of human rights are often not democratically elected, but are unelected elite interested in preserving their power and office.[10] As such, while it is convenient to suggest that some cultures are inherently incompatible with the contemporary universal tradition, it is inaccurate to characterize these concepts as categorically in conflict. This may be a wholly inaccurate representation of the sentiments of citizens in such states. Nonetheless, though some frictions are bound to exist in the universal application of institutions with roots in Western philosophical tradition. In these states, the impact of domestic legitimation as an inducement for commitment may be a less powerful factor because the salient voices care little about public support.

A state that takes a stand domestically against torture and codifies this conviction within the international system of rules is eligible for international legitimation. The United Nations' Office of the High Commissioner for Human Rights (OHCHR) recognizes "nine core international human rights treaties," legal devices that together encompass the widest range of the body of international human rights. Each device qualifies for this designation because each is widely subscribed to and is considered the most consequential international (as opposed to region-specific, though this too is technically international) legally binding device in its area of concern. As such, with respect to the international norm against torture, the CAT is a fitting channel for domestic and international legitimation. Given these conditions, it

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[10] A.H. Robertson and J.G. Merrills, *Human rights in the World: An introduction to the study of the international protection of human rights* (New York: Manchester University Press, 1996), 12.

is feasible to posit the following: States that move to support the CAT express to the international community that they take seriously international legal standards as well as the popular will of its public, when applicable.

The impact of foreign affairs decisions on human rights has become so pervasive that Louis Henkin has described the Universal Declaration of Human Rights as "the holy writ to which all pay homage, even if sometimes the homage of hypocrisy."[11] Broadly, a number of important political and social events have advanced the emergence of this shared ideology. Throughout the half century since its inception, the United Nations has expanded and applied the human rights ideology, serving to voice calls for international concern for human rights. The United States advanced a broad concern for human rights as a political tool during the Cold War, using its political and economic relations to induce other states to be sensitive to human rights issues. We have witnessed the expansion of the ideology of human rights through the proliferation of highly targeted as well as localized, regional human rights movements. Altogether, the effect of these influences has been to broadly induce states subscribe to human rights norms.[12] By adapting to the international political environment, states avoid criticism from legal bureaucracies and non-state actors. In this sense, states avoid being "singled out," and based on their assessment of the international political climate, they participate in normative structures that demonstrate that they have adapted to this environment. This inducement is especially powerful when prominent norm agents endorse the norm being advanced,

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[11] Louis Henkin, "Human Rights: Ideology and Aspiration, Reality and Prospect," in *Realizing Human Rights: Moving from Inspiration to Impact*, ed. Samantha Power and Graham Allison, 3-38 (New York: St. Martin's Press, 2000), 11.
[12] Ibid., 24.

as has consistently been the case on issues of human rights—the Commission on Human Rights, which undertook to prepare and draft the UDHR, was composed of well-known statesmen and academics, including Eleanor Roosevelt of the United States, who was the first chairperson of the Commission, René Cassin, a French jurist who was later president of the European Court of Human Rights, and P.C. Chang, the Chinese philosopher and diplomat.

In turn, the ideology of human rights has broadly and substantially influenced commitment patterns in other, more specific efforts. In a study explaining state commitment behavior, Jay Goodliffe and Darren G. Hawkins concluded that states that already uphold individual liberties such as free speech are more likely to sign and ratify earlier.[13] In addition, they found that the level of regional and global commitment on a particular issue substantially influences states. These findings do not speak to the actual occurrence of torture in these states, but support models advanced by both rationalist and constructivist theories: states commit to the CAT in order to avoid paying the reputational costs they would otherwise incur *and* because such a commitment confirms their identities within the international social and political paradigm. Moreover, the existing framework of human rights facilitates such commitments, lending the issue of torture and the CAT the prominent status it currently occupies.

[13] Goodliffe and Hawkins, "Explaining Commitment," 368.

STATES AND THE TORTURE CONVENTION

The very mechanisms of international agreements that induce states to make commitments may also represent substantial costs to the state. The transparency and openness that demonstrate real concessions by states (and make international agreements effective) require more immediate changes to the abilities of states to be fully sovereign in their decision making. The costs of the CAT are thought to be very high; this is especially true because of the role of torture in its modern political-military form. States torture with two broadly categorized purposes, as a political device used to punish and as an interrogation tool. However, only in the advanced West has the torture discourse focused on torture's preventative goal, as an ultimate defense of its preservation. As a preventative device, torture is used to avert danger caused by an enemy of the state.[14] With respect to torture as an issue of national interest, the power of international law is limited in this sense. In the familiar, but exceedingly unlikely "ticking time bomb" scenario, a government may have in its custody a person who is aware of the location of a device near detonation, a device capable of producing mass carnage. In this circumstance, if using torture can reasonably yield the necessary preventative information, the decision will not rest on the basis of the state's commitment to an international agreement. The CAT does not prevent the state from using torture—the risk and cost of being party to the CAT is the risk of breach.[15] In this respect, the CAT aims to enhance substantive constraints by "raising the stakes" and empowering states and non-state actors to call attention to

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[14] Gunter Frankenberg, "Torture and Taboo: An Essay Comparing Paradigms of Organized Cruelty," *American Journal of Comparative Law* (The American Society of Comparative Law) 56, no. 2 (Spring 2008): 403-422, 414.

[15] Andrew T. Guzman, *How International Law Works: A rational choice theory* (New York: Oxford University Press, 2008), 125.

torture practices around the world. Obviously, the broad goal of the CAT is to prevent the practice, but in general, prohibitory norms do not make violations impossible to carry out. Rather, they reduce the likelihood of their occurring "by raising the threshold of what counts as a legitimate exception to the rule."[16] In this sense, the CAT may more effectively address systematic violations than those less methodical in their planning and execution. More generally, the CAT's potency stems first from how the instrument defines and addresses the practice of torture and how it goes about enforcing the permanence of these interpretations.

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From the outset, in Article 1, Section 1, the CAT offers an expansive definition of torture that stems from the following basic account: "the term 'torture' means any act by which severe pain or suffering, whether physical or mental is intentionally inflicted on a person."[17] This could plausibly include techniques such as solitary confinement in some instances. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT), having evaluated prison conditions that resemble solitary confinement in prisons in the United States, has previously reported that "…all forms of solitary confinement without appropriate mental or physical stimulation are likely, in the long term, to have damaging effects resulting in deterioration of mental faculties and social abilities."[18] Similarly, incarceration in cramped, under-staffed, unhygienic prisons can also plausibly fall

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[16] Richard Price, *The Chemical Weapons Taboo* (Ithaca: Cornell University Press, 1997), 122.
[17] United Nations, "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (December 10, 1984).
[18] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), "Report to the Finnish Government on the Visit to Finland," (Strasbourg, France, April 1, 1993).

under this definition. The CAT continues to state that such acts constitute torture when specifically performed for the purposes of obtaining information, punishing, intimidation, or general discrimination by a public official or another acting in an official capacity. At first glance, this is an improvement on the previous prevailing definition of torture, as provided by the Universal Declaration of Human Rights, which employed a broader definition invoking "cruel, inhuman or degrading treatment or punishment."[19] Though the CAT's definition of torture involves greater detail, it invokes a scale of degree that can be reasonably interpreted. In addition, the intention of the perpetrator is key to the functional definition that the CAT provides. As such, CAT's description of torture is formulated as a relatively general "standard," as opposed to a relatively precise formulation of "rules." This has the potential to create areas of discretion, where even states cannot accurately assess compliance.[20] This is not to say that the framers of the Convention were deliberately lax. Definitions that proscribe behavior occasionally require that there be some room for interpretation—enumeration of proscribed behavior would otherwise invite actors to perpetrate similar, albeit marginally legal, behavior. However, given a relatively imprecise standard, it is more likely (and necessary) that the appropriateness of an act be determined "*ex post*, in relation to specific sets of facts," which are decisions typically delegated to courts and other adjudicatory bodies.[21] This is to say, when lacking a high degree of precision, highly developed legal systems instead incorporate a high degree of delegation, by extending broad discretionary interpretive authority.

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[19] United Nations, "United Declaration of Human Rights" (December 10, 1948).
[20] Kenneth W. Abbott, Robert O Keohane, Andrew Moravcsik, Anne-Marie Slaughter and Duncan Snidal, "The Concept of Legalization," *Intenational Organization* 54, no. 3 (2000): 401-419, 413.
[21] Ibid., 414.

After defining torture, the other major endeavor of Part I (Articles 1-16) of the CAT is to commit parties to take "effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction," as explained in Article 2, Section 1.[22] In crafting Section 2, the framers of the Convention anticipated attempts by states and other actors to bypass the prohibition by invoking extra-legal emergency regimes and other claims to exception. It states, "No exceptional circumstances whatsoever … may be invoked as a justification of torture."[23] Together, these provisions enjoin states to carry out their commitments in good faith, whether or not this involves reorganization of domestic law in order to accommodate obligatory rules and commitments. Broadly, these provisions assign legal responsibility to signatories, and induce them to engage in a specific kind of discourse. This is to say, though actors may disagree about their interpretations of rules and their applicability with respect to certain facts, "a discussion of issues purely in terms of interest or power is no longer legitimate." By accepting the terms of the agreement, signatories are at the very least obliged to participate in the ongoing discourse against torture. Having formally agreed to recognize the legitimacy of the text, the purpose of the Convention, the history of the international rules against torture, states can no longer legitimately frame their policies as inconsistent with the Convention. This is not to say that signatories have internalized the discourse against torture, only that at minimum, they have agreed to participate in it and frame their political dialogue in terms of it. Though some states may interpret this concession as a major incursion on state sovereignty, other states—those eager to actually pursue a

[22] United Nations, "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment."
[23] Ibid.

reduction in torture—may use it to legitimate taking action against states who torture. That even states that conduct torture are obliged to engage in the dialogue against torture is a basis for such action. It exposes violating states to political and social pressure, which can be legitimately and legally sought.

The remaining Articles of Part I of the Convention demonstrate the breadth of responsibility assigned to states. They bar states from deporting and returning or extraditing people where there is substantial grounds to believe they will be tortured (Article 3), establish torture as a criminal offense in domestic legal systems (Article 4), and establish state jurisdiction when acts of torture are committed by or against the citizens of that state, when the crime is committed within its territory, or when an alleged offender is present in its territory and the state decides against deportation (Article 5).[24] The CAT ensures that torture is an extraditable offence (Article 8), obliges states to promptly conduct investigations of torture allegations (Article 12) and to provide victims an enforceable right to compensation (Article 14). It bans states from using evidence obtained by torture in judicial proceedings (Article 15) and ensures that when treatment falls short of the CAT's definition of torture, states are still obliged to prevent and investigate such treatment within their jurisdiction (Article 16).

The principle invoked by Article 5, universal jurisdiction, is of particular interest because it provides that a state's jurisdiction be based on the nature of the crime as opposed to other factors, while Article 7 requires states to adopt such

[24] This principle is the CAT's major departure from the other six core human rights treaties. It was the first instance this enforcement mechanism was applied to human rights abuses, as it had been previously used to cover crimes with transnational character or crimes not sponsored by the state (e.g. Geneva Convention's adoption of universal jurisdiction for war crimes).

jurisdiction. This is to say, the principle awards states extraterritorial jurisdiction. As such, member states expose their own officials to prosecution by other states. In theory, this tenet would allow "Nigeria … to prosecute a crime committed in Germany by an American against an Indonesian."[25] Notably, universal jurisdiction led to the dismantling of Augusto Pinochet's political career. Ten years after the Chilean dictator signed the CAT, Pinochet was held to the provisions when British and Spanish courts invoked the principle for crimes that constituted torture. The Nuremberg trials had set an important legal precedent, that immunity not be granted for perpetrators of the grossest crimes, regardless of who they were and where their crimes were committed.[26] However, the series of events that brought Pinochet were precipitated long before Pinochet stood trial before the British House of Lords. Aggressive monitoring and documenting by NGOs, prominently Amnesty International, were largely responsible for calling attention to Pinochet's most flagrant violations—Amnesty International's 1983 Report on torture in Chile offers such a comprehensive and extensive survey.

In 1996, Spanish lawyers invoked universal jurisdiction and proceeded to file criminal complaints against Pinochet for crimes that had mostly been carried out in Argentina and his native Chile. While Pinochet was visiting England in October 1998, Spanish Judge Baltasar Garzón issued an arrest warrant to British authorities, alleging rather plainly that Pinochet "between the 11th September 1973 and the 31st December 1983 within the jurisdiction of the Fifth Central Magistrate of the National

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[25] Goodliffe and Hawkins, "Explaining Commitment," 360.
[26] Reed Brody, "The Case of Augusto Pinochet," in *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain*, ed. Reed Brody and Michael Ratner, 7-22 (The Hague: Kluwer Law International, 2000), 7.

Court of Madrid did murder Spanish citizens in Chile within the jurisdiction of the Government of Spain."[27] After Pinochet's arrest, the politicking and diplomatic posturing invariably ensued. Pinochet's lawyers demanded that the warrant be cancelled because the United Kingdom did not recognize extraterritorial murder as a criminal offense and claimed that Pinochet was from arrest and extradition via diplomatic immunity.

Ultimately, the central question throughout the subsequent hearings before the House of Lords asked whether torture and other alleged crimes constituted "official functions of a head of state," and by extension, whether such actions qualified for immunity.[28] Though Pinochet was eventually authorized to return to Chile, the case had persisted for a 16-month period before the House of Lords, and much progress was made in terms of delineating more clearly what states and state leaders could reasonably argue to be "exceptions" to the international prohibition. In the first House of Lords decision in November 1998, which denied immunity to Pinochet, Lord Steyn wrote in a majority opinion: "international law condemn[s] genocide, torture, hostage taking and crimes against humanity … as international crimes deserving of punishment … It seems to me difficult to maintain that the commission of such high crimes may amount to acts performed in the exercise of the functions of a Head of State." Lord Steyn continued with regard to Pinochet's contention that he

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[27] "The First Provisional Arrest Warrant, 16 October 1998," in *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain*, ed. Reed Brody and Michael Ratner, 61 (The Hague: Kluwer Law International, 2000).
[28] Brody, "The Case of Augusto Pinochet," 10.

had never personally committed any of his alleged crimes, "There is no distinction to be drawn between the man who strikes, and a man who orders another to strike."[29]

Significantly, the Pinochet case had set off calls from other nations—Switzerland, France, and Belgium—who sought extradition of the Chilean head of state for crimes allegedly committed against their own nationals.[30] Spain's initial bold action and Pinochet's arrest had served to symbolically undercut the idea that states could protect themselves within the provisions of the CAT and behind the veil of diplomatic immunity. However, despite the powerful potential of universal jurisdiction, there is clearly much discretion left to domestic judicial bodies, many of which are similar to the British High Court, having rarely encountered issues of international law before. In turn, the international political storm that followed the Pinochet arrest demonstrates that there are other forces at work, including the important role of international sentiment. The first House of Lords decision, denying Pinochet's claim of immunity, garnered some praise from NGOs—Human Rights Watch celebrated the decision as a "wake-up call" to repressive dictators—and statesmen—the Canadian Foreign Minister observed that the Lords' decision was a "very important precedent-setting" one, "that immunity was denied is a very symbolic decision in establishing that there is an international standard" to taking such action.[31] Later in Pinochet's detention, former United Kingdom Prime Minister Margaret Thatcher reiterated her earlier opposition, joining former United States President George H.W. Bush in calling for Pinochet's release in lieu of extradition to

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[29] "Decision by the Appellate Committe of the House of Lords, 25 November 1998 ("Pinochet I")," in *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain*, ed. Reed Brody and Michael Ratner, 127-180 (The Hague: Kluwer Law International, 2000), 178.
[30] Brody, "The Case of Augusto Pinochet," 9.
[31] Ibid., 10.

Spain. For a time, the Chilean government even withdrew its ambassador to Spain to protest the Lords' ruling. There are observable political implications to the invocation of a legal principle specifically provided by the CAT, some of which induce states to pursue a politically charged legal effort and others that are designed to discourage states from being proactive.

As law scholar Richard J. Wilson notes, these concepts were not entirely novel to international law—Spain had held a long legal tradition that included these jurisdictional principles in their domestic criminal procedure, while other states are increasingly incorporating it into their legal systems.[32] However, until recently, domestic courts predominantly opted for impunity for alleged violators, particular those with significant political ties. In January 2009, a United States federal court in Miami, Florida sentenced Chuckie Taylor, the son of the former Liberian president Charles Taylor, Sr., to ninety-seven years in prison for torture crimes committed in Liberia. Prior reluctance by domestic governments and courts to pursue prosecutions, much less convictions, has been attributed to a number of obstacles including "a lack of political will, the problem of gathering evidence in a foreign country and the failure of countries to pass the necessary laws."[33] Indeed, these appear to be problems that increased political pressure from NGOs and the human rights community can begin to resolve. Proactive and cooperative national courts facilitate swift and systematic legal procedure. There is, in fact, evidence that national courts are taking such initiative, though not necessarily without substantial pressure from

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[32] Richard J. Wilson, "The Spanish Proceedings," in *The Pinochet Papers: The Case of Augusto Pincohet in Spain and Britain*, ed. Reed Brody and Michael Ratner, 23-32 (The Hague: Kluwer Law International, 2000), 25.
[33] Marlise Simons, "Spanish Courts Weighs Inquiry on Torture for 6 Bush-Era Officials," *The New York Times*, March 29, 2009: A6.

non-state groups. Baltasar Garzón, the judge who prominently ordered the arrest of Augusto Pinochet in 1998, recently initiated similar proceedings against officials of former U.S. President George W. Bush's administration with an arrest warrant detailing crimes alleged to have been committed against five Spanish citizens or residents who were prisoners at the U.S. detention facility in Guantánamo Bay, Cuba. Though Garzón has earned international repute for his outspoken criticism of human rights violators and for initiating high-profile cases of such violators, he is certainly not an official member of the human rights community. Moreover, the increasing willingness of governments to exercise this ability is one of the most promising elements of the CAT, because it is evidence that "the main limit on national courts … is the availability of the defendant, not questions of ideology."[34]

In terms of the text, the costs of the CAT appear quite high, but only take effect when enforced. Part II (Articles 17-24) addresses the reporting and monitoring mechanisms of the Convention, as well as the course of action necessary for states to go about implementing the extensive responsibilities already formulated. It begins by establishing the Committee against Torture (Article 17), a body composed of ten experts "of high moral standing and recognized competence in the field of human rights" who are elected to four-year terms biennially by State Parties.[35] Via Article 19, within a year of the Convention entering into force for a particular state, State Parties are required to submit reports that detail the measures they have adopted and implemented to fulfill the provisions of the CAT. Thereafter, supplementary reports

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[34] Kenneth Roth, "The Case for Universal Jurisdiction," *Foreign Affairs*, September/October 2001: 150-154, 153.
[35] United Nations, "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment."

are required every four years on new measures taken, in addition to other reports that the Committee may request. However, in practice, failure to adhere to this minimal commitment was common and frequently ignored. As of 1 January 2000, 31% of State Parties to the CAT had initial overdue reports, while an overall 63% of State Parties had overdue reports.[36] To buttress this rather minimal enforcement procedure, Article 20 empowers the Committee to investigate allegations of systematic torture practices in a State Party. However, even this device is subject to the reservations of states, furthering hindering the implementation process.[37] As of January 2009, the Committee had initiated this inquiry procedure for a total of eleven State Parties. However, the strongest enforcement procedures available to State Parties are entirely optional: Articles 21 and 22 stipulate that, if accepted by State Parties, states and individuals may file complaints against State Parties with the Committee.[38] As of December 2008, 40 State Parties had ratified the optional protocol, while another 29 had signed, but had yet to ratify.[39] States that ratify the optional protocol are subject to a significant factor that is otherwise untapped. Where private actors are granted access to initiate legal proceedings, legal institutions are generally expansive.[40] Though the degree of influence of private actors does not directly factor into indicators of delegation, it does imply the degree to which states have exposed

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[36] Anne Bayefsky, *The UN Human Rights Treaty System: Universality at the Crossroads*, (Ardsley, NY: Transnational, 2001), 468.
[37] Under Article 28, states are permitted to submit a reservation that indicates that they do not recognize the competence of the Committee to undertake confidential inquiries into allegations of systematic torture. As of the end of 2007, a total of 9 states had made such a declaration.
[38] More specifically, Article 22 stipulates that State Parties may declare that they recognize the competence of the Committee to consider individual complaints. As of the end of 2007, 64 State Parties had made such declarations.
[39] United Nations, *Status of Treaties: Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, March 1, 2009, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=131&chapter=4&lang=en (accessed March 1, 2009).
[40] Abbott, Keohane, et al., "The Concept of Legalization," 416.

themselves to decision-making and legal governance outside their control. However, even this level of delegation is only moderate. The Committee against Torture, with its expanded purview by way Articles 21 and 22, falls short of the kind of adjudicatory delegation that facilitates an elaboration of imprecise legal norms and definitions and enforcement procedures to ensure agreed rules are implemented.[41]

Article 30 addresses the other function of delegation, which is dispute resolution. Section 1 stipulates that in a dispute between multiple State Parties, there is an optional arbitration procedure. However, the subsequent section allows States to declare themselves not bound to this procedure. Because states are not bound to this procedure, states may accept or reject proposals in political bargaining without legal justification.[42] While some states simply declare that they will not be bound by Article 1.1, others elaborate, stating that all parties must agree to arbitration procedures. This is not say that law is irrelevant—conducting negotiations in good faith is expected. However, the weakened mechanisms of third-party delegation in the CAT are clearly inadequate in meeting the Convention's purpose, which is to make states accountable for their actions.

What, exactly, is the purpose of this level of detail? If states are so inclined to torture, how is the exposition of a single international legal document important? Vulnerability in the norm against torture is not exclusively a function of the legal devices that proscribe torture—a review of the classical and modern functions of torture reveals that the moral suasion favored by human rights discourse is limited because the foundation of the norm is utilitarian in origin. In turn, the legal

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[41] Ibid., 417.
[42] Ibid., 415.

framework designed to prevent the perpetuation of torture is a product of the human rights system, one that emphasizes *inherent* human dignity and worth. In and of itself, this poses no inherent theoretical problem. However, this conflict means that in practice the norm against torture has limited effectiveness. In addition, the international legal structure is half of the problem. Though the CAT applies a broad and non-derogable legal norm, it does not apply the norm precisely and does not require states to delegate sufficiently to ensure that its tenets are observed. In this sense, the Convention falls within Prosper Weil's criticism of soft law, which is that in this instance, the international normative system has been "[turned] into an instrument that can no longer serve its purpose."[43] As a legal-political compromise, a solitary centralized institutional mechanism, the CAT allows states to satisfy the instrumental incentives of joining a prominent international human rights instrument but practically codifies its normative shortcomings.

OBSTRUCTION AND DENIAL

In a 2006 interview, UN Special Rapporteur on Torture Manfred Nowak described the tireless tactics of obstruction he encountered while on an investigatory visit to China: "In my conversations with [Beijing human rights lawyer] Gao [Zhisheng], I counted a total of nine secret service agents in the very hotel where we were meeting … We had to leave the restaurant and go to the hotel in order to continue without being observed."[44] In another instance, Nowak was prevented from

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[43] Prosper Weil, "Towards Relative Normativity in International Law," *The American Journal of International Law* 77, no. 3 (Jul 1983): 413-442, 423.
[44] Manfred Nowak, "An Interview with Manfred Nowak, UN Special Rapporteur on Torture," *Dialogue*, Winter 2006: 3-5, 3.

meeting family members of Chinese detainees who were forcefully removed from Beijing. Despite China's historical lack of transparency with regard to both domestic and international monitoring efforts of human rights practices, its example speaks to the kinds of difficulties that have consistently hampered these undertakings. China's public stance on human rights has been steadfast, despite extensive evidence of the contrary. In the year 2008, Amnesty International documented widespread instances of human rights suppression, notably the imprisonment and torture of human rights activists and workers.[45] In spite of increased public attention due to the looming Summer Olympic Games in Beijing, China maintained these repressive policies, even intensifying them to suppress any voice of dissent.

Publically, China's support of the Universal Declaration of Human Rights is articulated in its 1982 Constitution, and the government's insistence that it has met and continues to promote the requirements and goals of the CAT. In response to observations submitted by the Committee against Torture in late November, the Chinese government responded "China respects and protects human rights; it has consistently opposed torture and conscientiously fulfills its obligations under the Convention … It has worked unceasingly to combat torture and has obtained notable results in this regard."[46] In the same report, the Chinese government accused the Committee's designated "country rapporteurs," two human rights experts assigned specifically to China, of "displaying a strong bias against China." Despite well-

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[45] Amnesty International, *Amnesty International Report 2008: The State of the World's Human Rights*, (London, UK: Amnesty International Publications, 2008), 94.
[46] Committee against Torture, United Nations, "Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Comments by the Government of the People's Republic of China to the concluding observations and recommendations of the Committee against Torture (CAT/C/CHN/CO/4)," (December 10, 2008), 1.

documented torture practices, China's government denied wrongdoing not by defending its actions, but by "white-washing" them, flatly refusing to engage in a discussion of its own prominent, on-going human rights violations. Thus, though China publically endorses human rights laws and norms, it does not frame its behavior as exceptional or outside normative recognition. China's repeated denials persist without serious consequence. Indeed, it appears that reputational effects have little effect on China's behavior. In the international political arena, China seems prepared to derogate its international commitment to human rights, because subscription to prominent legal norms is a sufficient condition for acceptance into the international community of human rights-observant states. The appeals of Western, liberal democratic identity has a demonstrably minimal effect in this sense. Consider, as well, China's global economic influence.

This differs in some ways from recent legal approaches taken by the United States, which has interpreted the terms of the Convention and federal statute in a selective, abstruse manner. In an internal White House memo dated August 2002, former Assistant Attorney General Jay S. Bybee concluded that the determinant of torture was a minimum pain threshold that was equal to or greater than that of "organ failure."[47] Further, Bybee posited not only that physical pain alone did not amount to torture, but also that "specific intent" to cause "prolonged mental harm" were necessary criteria for an act to be considered torture. Bybee's legal defense claimed that specific alleged practices did not, by definition, constitute torture, and were

[47] Jay S. Bybee, "Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§2340-2340A" (Washington, D.C.: U.S. Department of Justice, Office of Legal Counsel, August 1, 2002), 6.

thereby compliant with the norm against torture. It adopted an exceptionally narrow definition of torture that corresponded with the government's alleged practices. Bybee argued that precedents "make clear that while many of these techniques may amount to cruel, inhuman or degrading treatment, they do not produce the pain or suffering of the necessary intensity to meet the definition of torture," that "the term 'torture' is reserved only for acts of the most extreme nature."[48] This particular legal effort is disputed widely—Harold Koh, former Assistant Secretary for Human Rights and current Dean of Yale Law School, has called the memo "perhaps the most clearly legally erroneous opinion I have ever read," while former Nixon White House counsel John Dean has concluded that a "common plan" to violate the laws of war constitutes a war crime.[49] However, it also signals a weakness in the way the legal norm against torture is constructed. The multiplicity of possible meanings of "torture" engenders denial from would-be violators. This is to say that given the discretion afforded by prevailing legal definitions of torture, states simply deflect torture allegations. In these instances, states have employed strategies designed to deceive, either by physical force, intimidation or legal maneuvering in order to ostensibly comply with or simply circumscribe international standards. This revelation fits neatly into the problem of state behavior that this analysis undertakes. "State behavior" is not limited to the torture practices of states. Clearly, the tactics of obstruction and circumscription also captures the way in which states behave relative to the norms and laws against torture.

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[48] Ibid., 26.
[49] John W. Dean, *The Torture Memo By Judge Jay S. Bybee That Haunted Alberto Gonzales's Confirmation Hearings*, January 14, 2005, http://writ.news.findlaw.com/dean/20050114.html (accessed March 15, 2009).

State governments have become adept at using strategies to demonstrate improved enforcement of norms. In 1970s and early 1980s Latin America while levels of reported torture, political and judicial repression decreased, governments substituted such figures with a dramatic increase in "disappearances."[50] States have been quick to defend the principle of legality in discussing torture, constantly referencing their own behavior to the legal norm. The public's widespread distaste for torture is an observable root for this conduct. Aware that the enforcement mechanisms of the CAT are porous, states have endeavored to maximize the areas over which they have control. Though the United States, a champion of human rights in its foreign affairs, was a leader in creating two *ad hoc* tribunals for the prosecution of genocide and other international crimes, international treaty systems have struggled to penetrate the American judicial and legislative bodies.[51] With respect to torture, the Bush administration's disregard for 18 U.S.C. § 2340, the provision in United States penal code implementing the provisions of the CAT, demonstrates that legal grounding alone is insufficient.

The United States' reservations upon ratifying the CAT are of particular interest. Most significantly, the United States has argued that the provisions of Articles 1-16 of the CAT are not "self-executing."[52] This is to say, implementing legislation was required in order to fulfill the United States' international obligations

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[50] Ryan Goodman and Derek Jinks, "Measuring the Effects of Human Rights Treaties," *European Journal of International Law* 14 (2003): 1-15, 5.
[51] Stefanie Grant, "The United States and the International Treaty System: For Export Only?," in *The Future of UN Human Rights Treaty Monitoring*, ed. Philip Alston and James Crawford, 317-329 (New York: Cambridge University Press, 2000), 317.
[52] United Nations, *Status of Treaties: United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, March 1, 2009, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=129&chapter=4&lang=en (accessed March 1, 2009).

under the CAT, and implementing legislation is necessary for the CAT to apply domestically.[53] This sort of legal rendering tip toes a thin line. It undermines the legal basis for the definitions, obligations, and expectations of the CAT by challenging their legitimacy and binding status. More broadly, reservations of this kind allow states to circumscribe the obligations of legal agreements under the guise of legality. According to the 1969 Vienna Convention on the Law of Treaties (VCLT), a reservation "purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."[54] In practice, reservations provide states legal license to conduct their behavior contrary to the law of treaties.

With respect to monitoring efforts, some states have been notoriously difficult, repeatedly hindering the efforts of the Committee Against Torture and other monitoring bodies. Prompted by information submitted by Amnesty International, the Committee began a confidential investigation of systematic torture in Egypt in 1991, pursuant to Article 20. On 5 May 1992, the Committee invited the Egyptian government to cooperate in its examination of the alleged practices and requested that the Government submit its observations on the information by 31 August 1992. Having created an informal working group to examine the information and submit proposals for further action, the Committee requested in November 1993 that the Egyptian Government agree to a visit by the inquiring Committee members no later than 15 March 1994. Notably, the Committee endeavored to inform the Government that the purpose of the visit was "not to accuse the State party, which was making a

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[53] Michael John Garcia, *U.N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques*, CRS Report for Congress, American Law Division (Washington, D.C.: Congressional Research Service, Library of Congress, 2004), 5.
[54] United Nations, "Vienna Convention on the Law of Treaties" (May 22, 1969).

sincere effort to comply with its obligations under the Convention, but to ascertain in close cooperation with the Government whether or not torture was systematically practised."[55] Egypt's uncooperative behavior, however, indicates otherwise. As China and the United States have also done, Egypt flatly refused to allow its practices to be exposed. Obstructive practices unquestionably affect reputational costs. However, it appears that states decide that openly acknowledging their torture practices, admitting violation of a widely accepted legal and social norm, would be a far greater cost.

Despite the initial efforts of the Committee Against Torture, the Government of Egypt was continually resistant, declaring themselves "ready to engage a dialogue," determined to comply with its obligations, but deferring a discussion of the planned visit. By May 1995, the Committee was prepared to publish its confidential proceedings and findings in an annual report to the State parties and the UN General Assembly, a move which prompted Egypt to respond that publishing the proceedings "might be interpreted as signifying support for terrorist groups and would encourage the latter … to defend their criminal members … by resorting to false accusations of torture."[56] However, over the course of a three-year conversation, Egypt was unwilling to adequately challenge and disprove allegations of its state-practiced torture.

Non-governmental organizations reported that in Egypt, torture was used not only to elicit information and confessions from victims, but also "as a form of retaliation to destroy the personality of the person arrested in order to intimidate and

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[55] Committee Against Torture, *Report of the Committee Against Torture*, (New York: United Nations , 1996), 31.
[56] Ibid., 33.

to frighten the family or the group to which the person arrested belongs."[57] In defending its practices, the Government also detailed its legal and judicial system. However, according to the Committee's own conclusions, though it appeared that the Egyptian legal and judicial infrastructure enabled the State to effectively ban torture, slow judicial procedures often led to the exoneration of torture perpetrators.[58] In addition to hiding the torture practices of the State Security Intelligence, the highest national intelligence authority in Egypt, the Government was eager to conceal the (perhaps deliberate) inadequacies of its domestic legal and judicial systems in combating torture. Notably, in its report, the Committee shifted responsibility away from the Egyptian government, stating, "The Government of Egypt … has undertaken to respect all the provisions of the Convention …the Government should make particular efforts to prevent its security forces from acting as a State within a State, for they seem to escape control by superior authorities."[59]

This statement substantiates the idea that states are not singly responsible for the prevalence of torture. Just as domestic courts and state governments have been reluctant in the past to prosecute their political allies, the Committee straddles the political and legal boundary. It is common for states accused of torture to deflect responsibility onto MPs and foot soldiers to represent torture as an exception to the norm, an aberration. Consider the military trials after the outbreak of the Abu Ghraib prisoner abuse scandal in 2004, during which twelve American soldiers, most of whom were directly involved or in the immediate vicinity of the Iraq prison, were

[57] Ibid., 34.
[58] Ibid.
[59] Ibid.

convicted of various charges and received relatively minor sentences. Officials responsible for military directives avoided legal and public scrutiny.

While states have continually obstructed effective transparency in the monitoring and implementation process, it is evident that institutional weaknesses have facilitated these problems. In fact, states are demonstrably adept at exploiting these weaknesses. During Special Rapporteur Manfred Nowak's visit to China, Nowak was required to travel with representatives from the Ministry of Foreign Affairs (MFA) by the Chinese government, who maintained that this would allow the unrestricted access to detention facilities that Nowak sought. As such, the MFA was afforded time to inform detention facilities of their imminent visit. However, as Nowak points out, such behavior could not technically be considered a violation of his "terms of reference," a set of terms and conditions agreed upon by Nowak and states to be visited, which stipulated only "visits to all places of detention."[60] Egypt, certainly has adopted this model, obstructing the Committee's oversight while maintaining its unflagging commitment to the CAT. In the Espírito Santo State, the Brazilian government barred the State Human Rights Council, an official state body with the authority to monitor the prison system, from entering prisons to report their conditions. Marred by allegations of torture and other ill-treatment, the Brazilian government has established a national coordination body of human rights defenders, though even this effort has been ineffectual, due to severe lack of resources and institutional implementation.[61] Other states follow the model of the United States,

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[60] Nowak, "An Interview with Manfred Nowak, UN Special Rapporteur on Torture," 3.
[61] Amnesty International , *Amnesty International Report 2008: The State of the World's Human Rights*, (London, UK: Amnesty International Publications, 2008), 77.

whose tactics have not been limited to obstruction and denial, but to completely reframe their actions within the normative framework and "redefine" torture.

The strategies that states employ to interfere with transparent oversight must indicate the strength of the international torture taboo. This is not to say that by obstructing and denying that state are able to avoid reputational costs. However, open acknowledgement of torture practices could be measurably worse. This is why revelations brought on by Jay Bybee's memorandum are especially damaging. Though Bybee's memo was not a candid admission of guilt, it proposed a definition of torture and a legal rationale that was literally incompatible with the international conception. To return to the normative framework, state action is not wholly to blame. The Committee Against Torture has demonstrated that it sets the bar woefully low. States, acting advantageously, have capitalized on the breathing room afforded them by lax legal structures. While the social norm against torture clearly influences state commitment, its implementation and enforcement in law facilitates behavioral flexibility, whether or not states ultimately choose to use torture.

THE PHENOMENON OF TORTURE

In 2007, Amnesty International documented cases of "torture and other cruel, inhuman or degrading treatment" in 81 states. In Burundi, an 18-year-old alleged bicycle thief was reportedly burned and beaten by police officers with batons while in police custody. In a Thai refugee camp, a naturalized Karenni man was so severely beaten by Thai security officers that he was in a coma for nine days. In Egypt, the successful prosecution of alleged torturers arose only after public outcry following

the release of a video recording of a 21-year-old taxi driver being sodomized with a wooden pole.[62] While each state is a party to the Convention Against Torture (CAT), their behavior demonstrates that despite the strong prohibitory norm against torture, the practice endures.

The practice of detecting and reporting torture is itself problematic. Consequently, attempts to find evidence that the international norm against torture has led to a reduction in torture have often led to surprising conclusions. The extent to which states expose themselves to external or independent legal bureaucracy largely dictates the detection of torture. While it is evident that some states employ methods of torture more than others, the political paradigm of modern torture is characterized "less by the random orgiastic brutality of dictators" than by systematized, calculated and still gruesome techniques of states.[63] In this sense, it is a "legitimate successor" to the highly regulated practice of torture—though its role in jurisprudence has changed, torture retains much of its original character. The legal context of torture—strong, non-derogable (i.e. not able to be suspended) prohibition—has forced states to conceal their practices, away from the watchful monitoring of the general public, but especially those who record and disseminate such information. The political and legal dynamic is such that states' torture practices become less visible as political pressure for reform increases. They are pushed further into hiding as the political spotlight is shone. In this sense, increased monitoring may have a misleading effect. Obviously, this relationship complicates

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[62] Amnesty International, *Amnesty International Report 2008*.
[63] Gunter Frankenberg, "Torture and Taboo: An Esasy Comparing Paradigms of Organized Cruelty," *American Journal of Comparative Law* (The American Society of Comparative Law) 56, no. 2 (Spring 2008): 403-422, 412.

the one between the putative norm against torture and the perceived effectiveness of a legal ban in reducing its practice.

Claims put forth by Oona Hathaway offer a bold critique of international law, specifically with respect to treaties prohibiting torture. Hathaway argues that legal regimes against torture have actually worsened the problem of torture in some states by providing political shelter, thereby reducing political pressure to improve human rights standards or ratifying states. The instrumental incentives for committing to international legal conventions are clear. Ratification is nearly costless, Hathaway claims, because of weak enforcement mechanisms and rules that do not require substantial change to the domestic institutions and policies of the ratifying states. The empirical findings were stark: Hathaway found that "countries that torture more" were 6% more likely to have ratified the Convention than "countries that torture less."[64] However, with respect to the optional protocol specified by Articles 21 and 22, "countries that torture less" were found to be 16% more likely to ratify than "countries that torture more."[65] On-site visits, the central component of the optional protocol offered by Articles 21 and 22, requires the full cooperation of states—a substantial commitment by states that has potential to affect state behavior considerably. Hathaway's findings depend on an important premise regarding the nature of international legal agreements, which is that state commitments are both expressive and instrumental. This is to say that while treaties can create binding law, they also serve to express the position of ratifying states. Though we have explored expressive incentives for state commitment, Hathaway's argument is that these

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[64] Both pairs of statistics were found to be statistically significant at the 99% level.
[65] Oona Hathaway, "The Promise and Limits of the International Law of Torture," in *Torture: A Collection*, ed. Sanford Levinson (New York: Oxford University Press, 2004), 202.

positive effects often outweigh the legal obligations that states undertake. Hathaway's analysis suggests that countries whose torture records are generally worse have more to gain from joining the Convention, while countries with better records have little incentive to join. The weak legal enforcement that the Convention Against Torture requires causes and exacerbates this problem—it requires little in terms of required reform, but allows states to participate in the public denunciation of torture. Though Hathaway's argument fits into the rationalist and normative frameworks already proposed, it is also an incomplete representation of the practice of torture.

Hathaway's method of rating state practices conflates actual torture practices with reported, detected violations, statistics inherently skewed by virtue of torture's hidden practice. This is to say Hathaway does not consider the possibility that detected violations are an inaccurate representation of actual violations. In a critique of Hathaway's work, Ryan Goodman and Derek Jinks point out that ratification as a variable is also more complex than Hathaway allows. Ratification does not mean complete acceptance of human rights norms. Rather it is "a point in the broader process of incorporation."[66] Goodman and Jinks point out that in terms of the context of international law, primary treaty obligations apply upon signature of the treaty, often much earlier in the process. In terms of domestic law, implementing legislation is often a necessary condition for states to accept their treaty obligations. In this sense, ratification may be only a point in a larger process of a state's acceptance of norms. As we have seen for many states, ratification decisions made by their "peers"

[66] Ryan Goodman and Derek Jinks, "Measuring the Effects of Human Rights Treaties," 3.

and "neighbors" are often more important in terms of galvanizing states to accept norms.

Returning to Hathaway's analysis, the dynamics of state and non-state actors is also confused. The norm against torture has benefited from the broader platform of human rights advocacy. What is missing in Hathaway's analysis is the possibility that states that are more open and observe human rights more closely are therefore likely to appear worse in terms of detected human rights violations.[67] This is to say, since ratification increases the prominence and legitimacy of human rights concepts in practice—even in most repressive regimes, some concessions are made and borders are relaxed to allow nongovernmental organizations (NGOs) and other non-state bodies to observe and report state practices. In countries where the risk of torture is high, NGOs "act as megaphones, broadcasting factual information about what is happening."[68] In democratic countries, NGOs fulfill a similar role, but may enjoy enhanced access to information, actual detention sites, and alleged victims of torture. As such, in most democratic states and other rights-protective regimes, this may account for the increasing salience of violations, while more repressive regimes appear to have marginally better records of detected torture, though they may exhibit some of the tactics of obstruction that states also employ.

The preceding considerations are useful in evaluating recent trends reported by NGOs such as Amnesty International. In a report covering the year 2003,

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[67] Ibid., 6.
[68] Rita Maran, "The Role of Non-governmental Organizations," in *An End to Torture*, ed. Bertil Duner, 222-244 (New York: Zed Books, 1998), 225.

Amnesty documented cases of torture in 132 countries.[69] While this represents a substantial drop in the subsequent four years, a more sophisticated analysis would be required in order to know whether incidence of torture actually decreased, or whether torture levels increased while the number of countries in which they were detected decreased. In many states, ratification has contributed to the institutional legitimacy of NGOs and facilitated their efforts to detect torture and direct public awareness to such abuses.[70] States whose pre-monitoring practices can be attributed to fewer institutional resources and coordination would be likely to exhibit reductions in torture levels with the aid of domestic legalization that remedy these problems. However, to return to the original assertion of this discussion, we are more concerned about states that are not interested in making an earnest effort to stop torture. These are states in which the inclination to torture is not a function of insufficient resources. In these states, widespread monitoring pushes torture further into the shadows, which yields inaccurate detection that may satisfy the pleas of international political actors but does not actually reflect changes in state practices at all. In this sense, Hathaway's analysis is inadequate in another respect. Its research design is cross-sectional, as opposed to time-series. It does not actually demonstrate change in commitment and behavior over time.

Revealing the defects of previous attempts to relate norms and law with actual torture in practice may yield an unsatisfying conclusion, since it is unclear whether torture has increased or decreased, though it is evident that it is nearly undetectable in many states. The fact that behavioral flexibility exists from the legal regime against

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[69] Amnesty International, *Amnesty International Report,* (New York: Amnesty International Publications, 2004).
[70] Goodman and Jinks, "Measuring the Effects of Human Rights Treaties," 7.

torture does not imply that all states always act in opposition to it. Some states torture more than others. It is entirely plausible that states practice torture more often than before because torture remains a concealable practice, despite the best efforts of enforcement and monitoring bodies. However, there is another possibility: torture that is completely undetectable. It occurs not in police stations and detention centers but in remote and hidden sites that are "off the map," performed by people only vaguely affiliated with the state on people who are so marginalized that they have no access to domestic courts, the media, or human rights organizations. This may be the inevitable baseline of torture. Some amount of torture necessarily exists because it cannot be prevented in the way that unavailable resources and technology can prevent proliferation of nuclear weaponry. This is the nature of modern torture. Induced to renounce torture (at least publically) as a legitimate form of punishment or interrogation, states have adapted to the international legal and political environment. In this sense, state endorsement of the legal norm falls squarely within the socialization stage of normative development—the norm against torture, by way of human rights, serves as an essential element of international legitimation, tied very much to the identities of leading nations.

In this way, changes in the frequency and intensity of torture practices may be better attributed to utilitarian rationale. This is not so say the norm against torture via the Convention Against Torture is meaningless. However, merely expanding the scope of its enforcement and monitoring bodies is inadequate, because states have demonstrated a willingness to circumscribe these efforts. In addition, efforts to strengthen the norm against torture should consider cautiously statistics that indicate a

reduction in torture. Conscious of the legal dynamic of torture, renewed efforts to reduce torture require an understanding of the nature of the norm, why states torture, and the non-state forces at work. Moreover, an international legal structure that allows states to avoid exposure by obstructing, denying, and avoiding penalty is irreparably incapable of serving this purpose.

IV

RETHINKING THE POLITICAL DYNAMIC OF TORTURE

"Any modification of a peremptory norm must be brought about … in the same way that the original norm was established … Having constructed the peremptory norm, the international community may amend it."[1]

Yoram Dinstein, *War, Aggression and Self-Defence*

The expanding culture of human rights has exposed the practices of states to the direct scrutiny of other states and non-state actors. Likewise, it has served to uncover the defects of the legal framework against torture. Though we have established how the international normative design allows states to behave in ways contrary to the norm, it is necessary to consider why states torture at all. What about the practice induces states to consider norm-divergent behavior. Moreover, such a discussion addresses what a reform of the political dynamic of torture will need to entail (I use the term "political dynamic" to refer not only the legal instruments that occupy the international political arena, but also to the normative weight that states assign to the legal norm against torture and their behavior accordingly). Some in the field, including Oona Hathaway, propose strengthening the otherwise toothless ratification process. Fortifying the costs of entry poses potentially adverse effects. Human rights treaties are prone to being broad and inclusive, which has contributed to the cultivation of near-universal recognition of human right traditions. By virtue of this susceptibility, legal instruments inadequately consider states' rationale of commitment to international legal agreements and their rationale for the use of torture. The morals-based arguments against torture have run their course and

[1] Yoram Dinstein, *War, Aggression and Self-Defence*, 3rd (New York: Cambridge University Press, 2001), 96.

achieved measurable success—states agree and realize that human rights is an issue of international concern, which explains their efforts to avoid having their practices exposed. This much is clear: a norm against torture exists. However, as the previous discussions of the nature of the norm, its human rights foundation, and its articulation in international law suggest, this norm is not as robust, universal, and predictive of behavior as its taboo status suggests.

To this end, the purpose of this chapter is to tie the political dynamic of torture to the legal framework against torture. The first section of this Chapter offers a comparative case study of the normative development of the chemical weapons taboo, a revealing exposition of state commitment and behavior with respect to norms, law, and international actors. Though chemical weapons and torture are inherently different, the comparison is essential because both evoke the interchange of moral and legal norms. Neither is strictly reserved to strictly one normative sphere. The second section of this Chapter aims to explain why states torture and how these functions serve the practical utility of states, finding that while the disutility of interrogatory torture is known to states, they use it as a legitimate placeholder for political torture, which they find to be a useful practice. Lastly, the third section draws on the lessons of the chemical weapons comparison to the legal dynamic of torture, with Turkey as the specific case. This discussion will demonstrate that political pressure need not merely advance the moral discourse of human rights, because the moral case is limited. Instead, political pressure that creates disincentives for violating states more effectively undermines the utility that states seek from torture and satisfies the rational and material pursuits of states. In this sense, a

substantial reduction in torture will not be a victory for the human rights community to celebrate, because it will not be intrinsically moral. It will be a utilitarian victory much in the way that torture's early abolition was, free of inherently moral motives.

THE NORMATIVE BLUEPRINT OF CHEMICAL WEAPONS

While lack of self-enforcement and self-discipline help explain behavioral flexibility in the norm against torture, these concepts serve to illustrate largely how the norm against chemical weapons came to exist in its current form. The taboo against chemical weapons defies convention. The moral restraint exercised on its use has not faded with the introduction of newer and perhaps more objectionable weapons. As such, the trajectory of the emergence and socialization of the chemical weapons taboo may uncover the normative areas in which the norm against torture can be strengthened.

With respect to the intrinsic qualities of norms, chemical weapons and torture are similar in their impairment of bodily integrity. However, it is not merely the grotesque effect of chemical weapons that contributes to its status as a robust norm, but its association with the older and much broader ban on poison, a generally accepted custom that was codified as a result of the Hague Peace Conference of 1899. Poison was a weapon that came to be understood as distinct from "war as a contest of force."[2] Though technology in and of itself carries no normative value—it is neither good nor bad intrinsically—poison clearly occupied a unique category within technology. In the sense that poison could be deadly individually but ineffective

[2] Richard Price, *The Chemical Weapons Taboo* (Ithaca: Cornell University Press, 1997), 22.

broadly, it was regarded politically as a weapon of murder or vengeance.[3] Its effect was to render physical strength inconsequential. It inverted the calculus of war. This is to say, poison levelled the playing field and erased advantages in technological defense. War was seen as a contest of power, but only in so far as there was a legitimate means of determining, measuring, and recognizing power.[4]

The delegitimation of poison stemmed from its function in the paradigm of war. In turn, its nature is highly political, an affirmation of Carl von Clausewitz's famous iteration that "War is not merely a political act, but also a real political instrument, a continuation of political commerce, a carrying out of the same by other means."[5] Prominent states felt that they could dictate the terms of war, just as they had done and were to continue doing in regulating the international political space. It is against this backdrop that an effort to pre-emptively ban the development of chemical weapons at the Hague in 1899 took hold. However, while the ban on poison was seen as delegitimizing a weapon of the weak, the Hague Declaration was slightly different in character—it was framed as "an invitation to self-restraint among the strong."[6] Norm entrepreneurs at the Hague invited states to summon their superior political will in demonstrating their strength rather than their military cunning. While the 1899 ban was not universal, in that it bound only Contracting Powers in the event of war between them and limited the ban to "projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases," it did advance a strongly moral discourse of "raising the standard of civilization." This is to say, chemical weapons

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[3] Ibid., 25.
[4] Ibid., 26.
[5] Carl von Clausewitz, *On War*, trans. James John Graham, Vol. 1, 3 vols. (London: Kegan Paul, Trench, and Trubner & Co., 1911), 23.
[6] Price, *The Chemical Weapons Taboo*, 34.

norm promoters appealed to the notion of a common identity among great powers, civilized nations who would exercise restraint despite superior technologies and advancements. Though this language was effective politically and laced with moral undertones, its vital appeal was deliberately instrumental: The "club of civilized nations" could discern, detect, and quash threats to their legitimated terms of war, and thus to the legitimated measures of international political power. In other words, preferred exercise of state sovereignty in the international political context was for the taking.

Though the origins of the taboo were rooted in durable associations with established normative bodies, this is not to say that it was not violated. Use of chemical weapons was rife throughout World War I. A German chlorine cylinder attack at Ypres on 22 April 1915 was merely the first of many belligerent tactics used. Despite widespread use—by the end of the war, nearly a third of all artillery munitions used were in the form of a harassing agent—there was a sense that such behavior was contrary to the laws of war. Germany justified its actions with a claim that the French had initiated the use of gas weapons, and that as such, its actions were permissible under international law as countermeasures. Furthermore, Germany claimed that their nonlethal gas fell outside the Hague Declaration's narrow proscription.[7] As has been the case with regard to the norm against torture, states have demonstrated the power and relevance of the norm by justifying their behavior in terms of a norm sharpened to fit their interpretations. In this sense, states do not act entirely within or outside the framework of the norm. This can be thought of as an attempt to create a counter-norm, in that is so closely related that it merely

[7] Ibid., 46.

attempts to refine or calibrate the scope of the norm. In this way, widespread violations of the ban on chemical weapons does not mean that the norm against its use is irrelevant.

Though the integrity of the norm was certainly questioned as a result of the War, it is evident that states managed to exercise some level of normative restraint. The British, for one, resorted to lethal gas weapons and shells only after the Germans used such devices first. Recognizing the difference between lethal weapons and mere neutralizing weapons, the British decision reflects the considerable deliberation that the decision to employ proscribed devices required.[8] By the time it was realized there were effective defenses against gas, states were already committed to avoiding its use against civilian populations. Though there were attempts in the military and political communities to distinguish lethal from nonlethal gases, permissible from impermissible, this was completely irrelevant to the public. The public's interpretation was universal. In turn, the norm was reinforced by the nonuse of chemical weapons on the civilian population.[9] In this sense, states were not inclined to challenge the public legitimation of the ban, and as such the use of chemical weapons did not become a common and inevitable aspect of warfare.

The politicization of gas warfare continually contributed to the development of a broad prohibitionary norm. In 1922, a subcommittee at the Conference on the Limitation of Armament in Washington, D.C. resolved that it was impracticable to try to hinder states from preparing gas armaments if such a threat existed, which is to say, research, development and manufacture would be impossible to stop. With

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[8] Ibid., 53.
[9] Ibid., 68.

respect to issues of national security, states have demonstrated that while they recognize international norms, they are willing to circumscribe them to preserve their sovereignty. The Washington resolution, which prohibited uses of gases against cities and large bodies of noncombatants, passed easily because of the knowledge that it would do little to practically hinder states from preparing for gas warfare.[10] However, though it was not seen as important at the time, it set a broad precedent and later served as "self-sustaining rationale." Increasingly institutionalized, the norm against torture codified what, at the time, was more of an ambiguous moral concern than a institutional prohibition. In addition, the effort to reinterpret chemical weapons and establish a gas warfare constituency struggled to erase the legal heritage that already existed. The Washington treaty, which established a blanket prohibition, and Article 171 of the Treaty of Versailles, which was largely designed to undermine German military capabilities, primed states to adopt the 1925 Geneva Protocol, an agreement to institutionalize and universalize the ban declared in Washington.[11] Moreover, in order to construct a robust international prohibiton against a weapon seen as possessing military utility, comprehensive military and political support, as well as precedence proved essential.

The rigorous scrutiny applied to early legal prohibitions of chemical weapons have sustained even the contemporary legal forum, evidence of the norm's durability. The Chemical Weapons Convention (CWC), reached in September 1992, broadened the prohibitions put forth by the Geneva Protocol and incorporated a number of important legal mechanisms and remedies: intrusive verification systems, defensive

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[10] Ibid., 83.
[11] Ibid., 91.

aid to parties encountering chemical weapons attacks or threats, and even legal sanctions via referral to the United Nations Security Council.[12] However, this degree of legalization, with centralized enforcement procedures and precise definitions of behavior that constituted violations, was attainable largely because the norm had already reached the distinction of taboo, of "taken for granted" quality. The CWC was indeed far-reaching; in addition to criminalizing all activities related to the procurement of chemical weapons, the Convention served as a central hard legal platform from which states could take further action against chemical weapons.

The discourse of the chemical weapons taboo was most effective because of this dual approach. It appealed to the rational calculations of states: in 1922, the common understanding of the taboo was that it meant "that in the next war each of us promises to wait until the other fellow uses gas until we do."[13] This is to say, all parties had an interest and incentive in curbing the development and normalization of chemical weapons. The discourse also appealed to the normative identities of states, reinforced by the catastrophic dialogue perpetuated by those who supported gas warfare (e.g. gas lobby using scare tactics to defend necessity gas warfare) and those who sought to prohibit it (e.g. Red Cross using scare tactics to arouse fear of the unkown in the public and lawmakers). Interestingly, both claims in support of and against chemical weapons were made on the basis of military utility. The perceived destructive potential of chemical warfare contributed to its elevated status as a proscribed weapons. Together, these ideas prevented an accurate military utility claim from gaining traction. As such, the discourse depicted chemical weapons not

[12] Ibid., 154.
[13] Ibid., 115.

as "standard issue" weapons technology with strategic and political value, but as indisputable weapons of extermination.[14]

Altogether, an entire class of weapons was delegitimized, often framed in moral terms because of its specific symbolic value as a kind of illegitimate conduct. Broadly, the chemical weapons taboo illustrates "strategic social construction" in action. This is to say that norm entrepreneurs make rational utility-maximizing calculations, which necessarily changes the utility functions of others players to reflect the normative commitments of norm entrepreneurs.[15] The efforts of advanced nations interested in determining the legitimated terms of war and politics fits such a construction. The origins of the chemical weapons taboo are inextricably rational, self-serving and protective of sovereignty, while moral-laden normative structures have advanced and buttressed its cause over time. This is evident despite the norm's compelling association with ethical mandates. As with the norm against torture, norms of humanitarian conduct subsumed the chemical weapons taboo. More broadly, chemical weapons did not pass the broader test of political or legal utility—chemical weapons have been so delegitimized as a means of waging war that states have internalized the political and legal repercussions. This is not to say that such penalties alone are what compels states to refrain from using chemical weapons. They do not want to use chemical weapons in the first place because of the potential for reciprocation and the possibility that politics as they know it will be inverted, a condition that moral restraint is not responsible for engendering.

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[14] Price, *The Chemical Weapons Taboo*, 120.
[15] Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," *International Organization* 52, no. 4 (1998): 887-917, 910.

Invoking the example of the genealogy of the chemical weapons taboo is not to say that comparisons to the norm against torture align perfectly. Torture and chemical weapons differ intrinsically and in terms of function. Though torture is increasingly "scientific," or at least aided by technology, it can be conducted by practically anyone. It is not a technological weapon in the sense that chemical and gas warfare are, refined with extensive research and development. In addition, chemical weapons avoids inherent association with human rights, which inevitably limits the moral discourse of the norm. However, both norms are unavoidly linked to models of state commitment. In addition, the prohibitions on torture and chemical weapons evoke discourse that lies at the intersection of ethical, political and legal realms.

Torture is criticized in distinctly ethical terms even by torture legal specialists, including the current United Nations Special Rapporteur to Torture, Manfred Nowak who called torture "the most direct and brutal attack on the very essence of human dignity."[16] Chemical weapons evoke a similar ethical repugnance as a result of its close association with the ban on poison. Definitions of behavior that constitutes torture and chemical weapons are addressed at the political level. In turn, debates about behavior that constitutes violations of the norms against torture and chemical weapons also occur in the political sphere. With respect to torture, states often attempt to narrow its definition or alter the perception that certain practices are considered torture (e.g. the politicization and debate surrounding the legality of waterboarding practices by the United States), while political supporters of chemical

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[16] Manfred Nowak, "On the Prevention of Torture," in *An End to Torture*, ed. Bertil Duner, 247-251 (New York: Zed Books, 1998), 248.

weapons attempted to make a distinction between lethal and nonlethal weapons and introduce a definition of a category of acceptable weapons into the public discourse.[17] Lastly, to revisit the fine line between norms and law, although the norms against torture and chemical weapons are prominent by virtue of their elevated status as universal legal proscriptions, neither is purely a legal prohibition. They demonstrate the importance of considering the normative discourse that introduced the norm to the public consciousness.

REGARDING THE CRITERION OF UTILITY

The success of the chemical weapons taboo is not a direct function of the costs of violation associated with its legal regimes. Fundamentally, the CWC and other legal prohibitions on chemical weapons are invitations to exercise self-discipline, albeit potent invitations with institutionalized legal support vis-à-vis the United Nations Security Council, whose decisions are binding on Member States. Charged with "primary responsibility for the maintenance of international peace and security," the Security Council has grown beyond its original political function and can establish binding rules, appraise law and facts, and administer the implementation of its decisions, which is to say it has evolved into "legislator, judge, and executive."[18] In turn, this intersection is evident in the way the norm against chemical weapons came about. Military professionals celebrated the military utility of chemical weapons, particularly in the context of catastrophic warfare. However, this logic reinforced the argument put forth by anti-chemical norm entrepreneurs, which was

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[17] Price, *The Chemical Weapons Taboo*, 67.
[18] Simon Chesterman, "The UN Security Council and the Rule of Law," Working Paper, Institute for International Law and Justice, New York University School of Law (New York, 2008), 1.

not moral in nature. Opponents of chemical weapons employed the same "dialogue of dread" to cultivate a distaste, a fear of chemical weapons. The utility claim made by opponents of chemical warfare endured, however, because of this moral and political intersection—the chemical weapons lobby struggled to disavow early evidence that chemical weapons had no military utility and the strong connection that chemical weapons norm entrepreneurs drew to the ban on poison.

For our purposes, "utility" refers to the usefulness and effectiveness of torture as an interrogatory and/or political device in delivering its goals and purpose. In addition, I use "utilitarianism" to refer to the utility maximizing, rational behavior of states, which I argue corresponds to their instrumental, but inevitably norm-conscious choices. This is especially applicable with respect to the norm against torture because though a norm based on deontology and "virtue ethics" exists, states and other advocates of torture defend its practice as having utility, bypassing the moral argument. As such, the challenge of those opposed to torture will be to undo the utilitarian preoccupation of states with its practice.

With regard to utility, modern torture invites an interesting comparison, because it can satisfy the criterion of utility for states in two ways. As coercive interrogation, the state's goal in using torture is to produce actionable and accurate information. Torture can also serve to punish, with a redemptive purpose. Merging these two functions, interrogatory torture may be a political device designed to deliberately produce false confessions or to instill fear and intimidate. Chemical weapons, when used as a political device, necessarily serve their military purpose. Chemical weapons induce palpable fear when they are effective or perceived to be so.

In Uzbekistan, state officials are satisfied that torture works, if not necessarily to extract the truth, but to coerce confessions. While the Uzbek President Islom Karimov publicly extended pardons to independent Muslims, police tortured Muslim detainees to compel them to ask to be pardoned.[19]

Broadly conceived, the purpose of torture may have little to do with interrogation itself. It is a stand-in for the broader struggle for power; it is "about imposing one's will on another."[20] In this sense, modern torture restores some of the foundational aspects of classical torture—of communicating dominance. In this sense, Kate Millett characterizes torture as "all hierarchy intensified, magnified … the archaic pairing of master and slave."[21] Though classical torture practices were explicitly public, modern torture retains its deliberately symbolic purpose. In 2003, the United States Marine Corps offered a pamphlet and weeklong course on Iraqi customs and history, to ensure that soldiers were well informed of important cultural sensitivities. In particular, troops were warned "not to shame or humiliate a man in public," that "the most important qualifier for shame is for a third party to witness the act," that "shame is given by placing hoods over detainee's head," and that "placing a detainee on the ground or putting a foot on him implies you are God."[22] Abu Ghraib prison interrogators and MPs preyed on these aspects of their prisoners' cultures, using "the shame multiplier" to amplify the effectiveness of their techniques. In this way, physical, raw pain is not the only means of destroying a prisoner's sense of

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[19] Minky Worden, "Torture Spoken Here: Ending Global Torture," in *Torture*, ed. Kenneth Roth, Minky Worden and Amy D. Bernstein, 79-105 (New York: The New Press, 2005), 83.
[20] Edward Peters, *Torture* (Philadelphia: University of Pennsylvania Press, 1996), 103.
[21] Kate Millett, *The Politics of Cruelty* (New York: W.W. Norton & Company, 1994), 35.
[22] Mark Danner, *Torture and Truth: America, Abu Ghraib, and the War on Terror* (New York: New York Review Books, 2004), 18.

reality. Torturers may use a "more subtle kind of torment" to manipulate their victims.[23] Having fallen out of favor as an adjudicatory device, torture has definitively fulfilled a political purpose as "an engine of the state."[24]

Torture in its political form need not be organized or performed with careful restraint. Its goal is to punish and damage, physically and psychologically.[25] In places where political torture is prevalent, it is often a routine procedure in the cells of police stations, far distant from state policymakers. Political torture as an instrument of power against people is effective because victims are defenseless and have limited resources to remedy their suffering. As a result, due to intimidation and fear, torture statistics are actually likely to be underreported in many communities where victims have few channels, legal and otherwise, to seek refuge. Inge Genefke, founder of the Rehabilitation and Research Centre for Torture Victims (RCT), contends that "dissemination," the presentation of information about torture, its consequences, and possibilities of rehabilitation to target groups of torture would be effective at not only curbing, but preventing torture at the community level.[26] Empowerment of targeted victims of torture is a direct repudiation of the perceived effectiveness of political torture. However, as Genefke suggests, this effort is also sustained with the mobilization of resources to educate and train police professionals, who often operate under the illusion that torture is an effective interrogation method and the accurate

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[23] Joseph Margulies, *Guantanamo and the Abuse of Presidential Power* (New York: Simon and Schuster Paperbacks, 2007), 117.
[24] Peters, *Torture*, 103.
[25] Thomas Schelling has written about the strategic value of torture within the context of conflict. Though Schelling's game theory insight is important because it reveals the strategic underpinning of tactical torture, for our purposes the utility of political torture is much simpler.
[26] Inge Genefke, "Challenges for the Future," in *An End to Torture: Strategies for Its Eradication*, 252-255 (New York: Zed Books, 1998), 254.

assumption victims of political torture are defenseless.[27] Altogether, states recognize utility in torture even in its political form.

Though bans on torture prominently prohibit states from citing exceptions to the ban—UN Convention against Torture, Article 2.2, states, "No exceptional circumstances whatsoever … may be invoked as justification of torture."—the utilitarian defense of torture as truth-seeking persists. It provides that torture produces more overall benefits (e.g. the prevention of destruction, the saving of lives, the deliverance of justice) than costs (e.g. the moral cost of torturing one individual). Torture as a marginally acceptable practice has been preserved for its purported value as a life-saving instrument, while the norm against its use is rarely divorced from its moral rationale. This is so despite the fact that nearly all torture is political in some sense, in that it is inflicted by the state on people who are purportedly opposed to the state somehow.[28] Whereas arguments against the practical and political utility of chemical weapons weakened any effort to legitimize them, states that torture have rarely been challenged to answer these questions.

The norm against torture cannot be expected to substantially and permanently effect changes to states' behavior if it is sustained by strictly moral discourse. This is not to say the moral discourse is without consequence. It has achieved some success, developing a human rights "culture" and norm that states generally view as obligatory. Indeed, the human rights community has adopted the norm against torture, absorbing its legal and normative legacy. While the discourse of chemical weapons invited support and opposition in the context of utility, only support of

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[27] Ibid., 255.
[28] Henry Shue, "Torture," in *Torture: A Collection* , ed. Sanford Levinson, 47-60 (New York: Oxford University Press, 2004), 54.

torture, but not opposition, has been advanced by utility claims. As such, an effort to delegitimize torture must consider the dual criterion of utility, of torture as political punishment versus torture as a truth-seeking device used by law enforcement and military personnel, and its effect on state behavior.

The most common justification for torture is in its effectiveness in eliciting true information from evildoers and the potentially nefarious, as in the familiar and often cited ticking time bomb scenario. Though the scenario is admittedly rare, defenders of torture retain this defense as a marginally legitimate option. They concede that torture is not always acceptable, that they do not advocate torture as punishment, which "is addressed to deeds irrevocably past," but as "an acceptable measure for preventing future evils."[29] Moreover, they are willing to hazard that even people who agree that torture of an innocent individual is morally suspect are willing to abandon their moral concerns for a greater utilitarian purpose. Jeremy Bentham agreed, though his concern was to apprehend the arsonist before his next strike, rather than the terrorist with access to the proverbial blue and red wires: "[Torture] ought not to be employed but where the safety of the whole state may be endangered for want of that intelligence which it is the object of it to procure."[30] In this defense, torture apologists argue that other moral considerations are overridden by the urgency of securing public safety, that in purely utilitarian terms, mass murder is more barbaric than an individual's warranted suffering. This claim necessarily assumes that torture succeeds in extracting necessary information, that it can be professional, technical, and fruitful, or at the very least, more effective than alternative methods.

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[29] Michael Levin, "The Case for Torture," *Newsweek*, June 7, 1982: 13.
[30] Jeremy Bentham, "Of Torture," in *Phenomenon of Torture: Readings and Commentary*, ed. William F. Schulz, 221-226 (Philadelphia: University of Pennsylvania Press, 2007), 223.

Modern torturers consider themselves technicians and specialists, "[acting] with the efficiency and cleanliness of a surgeon and with the perfection of an artist."[31] Advocates of torture have clung to a criterion of utility, appealing to the rationalist, risk-evasive interests of states. However, the majority of military professionals argue that at best, torture is merely a "hit or miss" practice, a "waste of time and energy."[32] This claim warrants further investigation, because it flatly delegitimizes the rationale for the institutionalization of torture in public policy.

By nature, torture is crude. It is a coarse study in pain to which all individuals react and behave differently. The KUBARK manual, a document originally drafted in 1963 as a comprehensive guide to interrogation for American CIA interrogators, concedes, "The individual is the determinant."[33] There is no generally applicable rule with respect to the amount of pain individuals under duress can endure. The illusion of scientific torture rests instead on the premise, an erroneous "folklore of pain," that all people seek to minimize pain and maximize pleasure, that more injury causes more pain, and that as such, successful torture is merely a matter of correctly administering the amount of pain that will cause an individual to "break."[34] Torture is not a science, though scientific and technical tools may aid its execution.

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There are those who endorse the legalization and regulatory control of torture. Eric Posner and Adrian Vermeule maintain that coercive interrogation, a broad category that may overlap with conduct considered torture, ought to be approached in

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[31] A.J. Langguth, "Torture's Teachers," *The New York Times*, June 11, 1979: A19.
[32] Central Intelligence Agency, "KUBARK Counterintelligence Interrogation," (1963), 83.
[33] Ibid., 93.
[34] Darius Rejali, *Torture and Democracy* (Princeton: Princeton University Press, 2007), 448.

a similar way to that of other state-endorsed uses of force.[35] Others, prominently Alan Dershowitz, advocate the use of torture warrants, devices he claims "would probably reduce the frequency, severity, and duration of torture" and "simply [impose] an addition level of prior review."[36] This is to say, they believe torture is a useful source of facts and can be administered and conducted professionally and that legal boundaries can constrain the behavior of torturers. Though he was writing in the late 1770s, a time when torture was being widely abolished across Europe, Jeremy Bentham was similarly confident that torture could be restrained and contained: "set the prisoner on the rack, ask him who his Accomplice is, the instant he has answered you may untie him. Torture then when not abused, Torture considered in itself, is in this point of view less liable to exception."[37] However, one need only look to historical examples as evidence that professionalism and restraint decay rapidly when administering torture. Even when there are specifically approved interrogation techniques, torturers rarely conduct their behavior within such confines (e.g. torturers at Abu Ghraib going "rogue," beyond Pentagon-approved techniques). Torturers may buck the chain of command as the demand for information and the resistance of the victims becomes unpredictable. "Authorized" torture cannot predict this, unless it is unduly imprecise. It is the existence of exceptions, of the illusion of torture as a "pinpoint application" that weakens the anti-torture regime. Essentially, torture is "habit-forming," which the argument for legal exceptions does not capture.[38]

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[35] Eric A. Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (New York: Oxford University Press, 2007), 184.
[36] Alan M. Dershowitz, "Torture Warrant: A Response to Professor Strauss," *New York Law School Law Review* 48 (2003): 275-294, 281.
[37] Bentham, "Of Torture," 223.
[38] Dinah Pokempner, "Command Responsibility for Torture," in *Torture: Does It Make Us Safer? Is It Ever OK?*, 158-172 (New York: The New Press, 2005), 167.

Ultimately, the prevailing question is whether torture, even if administered by the book, can yield true information. The dynamics of torture as a tool in coercive interrogation is inherently problematic: while a prisoner who has information may lie no matter what, a second prisoner who has no information may say anything in order to stop the pain. False confessions, sometimes useful for governments seeking to lay blame for crimes, allow actual evildoers to roam free. They can exacerbate the problems that counter-terrorist, crime-fighting interrogation means to prevent. Moreover, the problem of false confessions is associated with systematic error from both interrogator and prisoner. In time-sensitive scenarios, as in the ticking time bomb context, interrogators cannot afford the luxury of techniques that deliberately wear down the prisoner. Instead, they are resigned to using techniques with high pain thresholds for which misleading information, whether intentional or otherwise, is a distinct and likely outcome. Lawrence Hinkle, a neurologist who examined Korean War veterans after they endured Communist "brain-washing" techniques, reported on the effects of such techniques on the fragility of memory and the mind:

> The human brain, the repository of the information that the interrogator seeks, functions optimally within the same narrow range of physical and chemical conditions that limit the functions of human organs in general … Any circumstance that impairs the function of the brain potentially affects the ability to give information as well as the ability to withhold it.[39]

Truth-seeking torture, which means to place the mind and body under considerable duress, is certain to yield skewed information in the situations for which states reserve its use. Misleading information may also be a deliberate effort by victims of torture

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[39] Lawrence E. Hinkle, "The Physiological State of the Interrogation Subject as it Affects Brain Function," in *The Manipulation of Human Behavior*, ed. Albert Biderman and Herbert Zimmer, 19-49 (New York: Wiley, 1961), 19.

to delude captors. James Stockdale, a United States Commander in Vietnam, urged American prisoners to "resist to the point of permanent injury or loss of mental faculty, and then fall back on deceit and distortion."[40] The potential for deceit and inadvertent misinformation is systematic. In addition, time-sensitive situations imply that the value of extracted information progressively declines. As such, interrogators have little time to verify information, making it is doubly difficult to discern the truth.[41] Practically speaking, one can only avoid such systematic error given the conditions of peacetime, which is to say when authorities have available professionals, the resource of time, the ability to verify all information, and public cooperation.[42]

Carrying out torture with the knowledge that it is unreliable is not only morally objectionable because of the likelihood that no desirable outcome will result from torture. It is disagreeable because it fails to meet the standard of truth that is expected of modern intelligence gathering bodies. Jean Maria Arrigo, studies the ethics of military intelligence and weapons development, maintains that in this sense, torture interrogation yields "only data, not truth."[43] Defenders of torture in the counter-terrorist scheme misrepresent the standards and actual experience of terrorist deterrence, in which occasions to torture are rare. Furthermore, according to former officials with the Federal Bureau of Investigation (FBI), effective terror prevention is not limited to the confession and interrogation-obsessive method of law enforcement

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[40] Kenneth J. Campbell, "Surviving Vietnam's Prisons [review of Honor bound: American prisoners of war in Southeast Asia, 1961-1973, by Stuart I. Rochester and Frederick Kiley]," *International Journal of Intelligence and Counterintelligence* 15, no. 2 (2002): 313-316, 314.
[41] Rejali, "Torture and Democracy," 474.
[42] Ibid., 477.
[43] Jean Maria Arrigo, "A Utilitarian Argument Against Torture Interrogation of Terrorists," *Science and Engineering Ethics* 20, no. 3 (2004): 543-575, 554.

affixed in the public imagination. They argue that the pre-emptive detention of "suspected terrorists" and the shortening of criminal investigations, two central elements of the new wave of counter-terror strategy, may actually exacerbate the problem and usher in more situations that torture interrogation means to resolve. This is to say, those who invoke the ticking time bomb scenario and defend torture on such grounds ignore or overlook the broader implications of their utilitarian calculation, which is that torture may not provide the greatest good for the greatest number. It does not reliably ensure the public safety and has the potential to erode the institutions it means to protect. Torture is a sort of antiquated last resort, as opposed to a principal means of preventing terror. In this sense, the claim of the efficacy of torture for intelligence purposes is an illusion, one that is continually propped up as the only marginally acceptable justification for its use.

Despite the strong utilitarian argument against torture, promoters of the norm against torture may have to accept the possibility of the ticking time bomb. What is the alternative course of action for states that have no other source of potentially actionable information in the exceedingly rare scenario? Evidence that torture is generally ineffective or at least unreliable as an interrogation method encourages states to adopt conventional practices, but it does not and cannot wholly extinguish its utilitarian justification. In the instant that an executive decision is required, states can disregard legal obligations and the expectation that torture will not yield truthful information. States that torture in this scenario may even believe that innocent individuals have a human right not to be tortured. However, this elevated moral code only goes so far. Surely, it has succeeded in the sense that governments clearly

recognize the existence of a norm against torture—consider the strategies of obstruction and denial that governments have shown they are adept at using—but the human rights argument cannot erase the possible utility gained from employing torture in an emergency circumstance. Neither argument can truly eliminate it.

To states, the short and long-term disutility of torturing in the ticking time bomb scenario may not be immediately apparent. They are either oblivious of or choose to ignore military professionals who claim that torture is simply "not a good way to get information," and that "it endangers [their] soldiers on the battlefield by encouraging reciprocity."[44] While a sustained utilitarian argument can effectively curtail political torture because human rights concepts aggressively condemn its practice, at best, the utilitarian argument against torture as an interrogation tool ensures that it is obsolete in routine practice only. As such, the utilitarian objective of anti-torture law cannot be to wholly eliminate, but to minimize torture, an objective that international political institutions and states can plausibly attain. On the other hand, the moral discourse flatly misses the point.

TOWARDS A RENEWED TORTURE TABOO: THE CASE OF TURKEY

Early supporters of an international norm against chemical weapons feared that the proliferation of chemical warfare would be an inversion of politics, as politics is conducted. They believed that chemical weapons were an illegitimate representation of state political power, a measure that should be determined by more traditional war-making criterion. Moreover, the norm was socialized effectively because its promoters were prominent Western states with illustrious military and

[44] Anne Applebaum, "The Torture Myth," *The Washington Post*, January 12, 2005: A21.

political heritage. In turn, it was in their best interest to limit the proliferation of a class of weapons that could be used against them. While the growing bureaucracy against chemical weapons attached real, hard legal consequences (e.g. possible sanctions by way of the United Nations Security Council) to discrepant behavior, the legal instruments that concern torture impose little legal obligation and costs. As such, legal and political efforts against torture that invoke the discourse of morality and human rights provide inadequate disincentives for the practice and fail to impede the utility that states gain from employing torture.

Thus far, we have considered closely the legal and institutional dynamic that allows behavioral flexibility. We have examined the nature of torture and central justifications for its practice, in order to identify why states continue to torture and how these arguments have endured. We have illustrated that the comparable norm against chemical weapons succeeded because its legal and normative framework discouraged violations and encouraged self-discipline, drawing on the early non-moral causes for the norm's formation. It emphasized self-discipline as the criterion for joining the club of civilized nations, incentivizing international cooperation on the issue. While the notion of a common identity was important in cultivating a strong, collective opposition to chemical weapons, a similar notion exists with respect to human rights. Thomas Risse and Stephen Ropp assert that international human rights norms are "constitutive for modern statehood," essentially the standard that contributes to the definition of what it means to be a state.[45] This is manifest in the

[45] Thomas Risse and Stephen C. Ropp, "International human rights norms and domestic change: conclusions," in *The Power of Human Rights: International Norms and Domestic Change*, ed. Thomas Risse, Stephen C. Ropp and Kathryn Sikkink, 236-278 (New York: Cambridge University Press, 1999), 236.

near-universal subscription of human rights legal norms, which contributes to its deontological importance. In the sense that torture has persisted independent of the moral rationale for its abolition, a reduction in torture will not be a moral victory of the human rights community. It will be a utilitarian one in the following ways: First, by depriving states of the utility of torture, interrogatory and political, and second, by appealing to the rational behavior of states and attaching material incentives and disincentives to the taking of action against torture.

Rather than merely expose the weaknesses of existing legal devices, it is useful to consider the example of a state that substantially reduced its torture practices via these channels, resulting in major legal institutional reform. Turkey is of particular interest because its history suggests the state highly valued the utility of torture. Turkey's torture practices reached their peak during a 1980 military coup. Between 1980 and 1994, approximately 450 people died in police custody, while many displayed gruesome evidence of torture. The problem persisted even when civilian rule returned, as the government sought to squash illegal armed organizations, most prominently the Kurdish Workers' Party (PKK), by taking masses of Kurdish rural population into custody for "preliminary investigation." In the fifteen-year period from 1984 to 1999, during which Turkish security forces were most active in the State of Emergency, an estimated 37,000 were killed, though certainly not all due to torture.[46]

The first major step in reducing Turkish torture practices was the ratification of the European Convention for the Prevention of Torture and Inhuman or Degrading

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[46] Kerim Yildiz and Juliet McDermott, *Torture in Turkey: The ongoing practice of torture and ill-treatment* (London: Kurdish Human Rights Project, 2004), 18.

Treatment or Punishment in 1988, brought about by political pressure from a state complaint made against Turkey in the Council of Europe. As Turkey was considered one of the founding states of the Council, its acceptance and ratification of the Council's most prominent treaties were somewhat inevitable. In this sense, just as the signing and ratification of the Convention Against Torture has been an important first step in articulating a common understanding about torture, membership to an international body (especially one with localized, regional interests) is a critical stage for the advancement and promotion of legal commitments and emergent norms.

Having made an international political commitment, Turkey made an important tactical, diplomatic concession that signaled that the commitment was not empty, by allowing the European Committee for the Prevention of Torture (CPT) access to its police stations and detention centers for unscheduled visits, to begin in 1990.[47] The access enjoyed by the CPT allowed it to make accurate and substantial findings concerning the practices on the ground. Moreover, this allowed the CPT to call attention to practices that its 1992 report described as systematic and widespread problem. In addition to reporting on ad hoc and periodic visits to Turkey, the CPT made strong recommendations concerning the legal safeguards that Turkey "is required" to introduce. These included improvements to the management and supervision of law enforcement personnel, changes to specific provisions of Turkish law to allow fundamental safeguards against ill-treatment, and reductions in the relatively long amount of time detainees could be held in custody.[48] As a legal and political platform, the CPT was prominent because of its association with the Council

[47] Minky Worden, "Torture Spoken Here: Ending Global Torture," 100.
[48] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), "Report to the Turkish Government on the visit to Turkey," Visit Report (1992).

of Europe, which was especially influential because of its localized salience. Though transnational NGOs also serve to amplify torture practices of states, the CPT could be considered more legitimate because of its official recognition and capacity in visiting, monitoring, and making recommendations to states. Able to more strongly produce political pressure and induce political concessions by states, the CPT is substantially more effective in affecting their political decision-making and the normative weight that the norm against torture bears. The moral character of the norm is secondary to the prominence of the norm promoting states and international organizations when states demonstrate that their behavior is conducted independent of consistent moral appeals. In response to the CPT's unfavorable report, the Turkish state shortened detention times and increased access to legal counsel—issues among Turkey's most blatant legal insufficiencies.

The next major wave of changes to Turkey's torture practices were initiated by Turkish politicians eager to improve the nation's reputation abroad. Of particular interest was Sema Piskinsut, who was the chairwoman of the Turkish Parliament's Human Rights Commission. A trained medical doctor, Piskinsut visited prisons and conducted interviews with prisoners with a team, alerting the media of prison conditions and publishing detailed reports as official parliamentary documents. In addition to calling attention to Turkey's practices, Piskinsut's efforts were broadly and symbolically important. As a "patriotic Turk of the political mainstream," Piskinsut "couldn't be written off or ignored."[49] In response, the government made even greater concessions and legal reforms, exemplified by the institution of a system for prosecutor and local governors to monitor police stations in 1999. This level of

[49] Worden, "Torture Spoken Here: Ending Global Torture," 102.

scrutiny and increasing preparedness to prosecute torture led to an accurate and measurable reduction in the frequency and severity of torture cases.[50] Unlike the reporting and detecting of torture touted by prominent NGOs, the monitoring system implemented by Turkish reforms were likely to more closely reflect the true incidence of torture because of the increase in official, pervasive internal scrutiny. The reforms, and the provisions of the European Torture Convention allowed access by independent investigators—since visits were unannounced, police were likely refrain from torturing at risk of being exposed.

Turkey's reputational incentives in cooperating with the legal prohibition against torture came to a head with its candidacy for accession into the European Union (EU), which represented a major inducement for reform. As a state interested in international legitimation, which can serve the economic and political relationships of states, Turkey was responsive to the continued pressure brought on by reform benchmarks set by the European Commission. The political pressure was profuse. It came from the media, human rights organizations, trade unions, and even the business community—all parties interested in sustaining Turkey's candidacy. By July 2003, political pressure led the government to dissolve the practice of incommunicado detention, a fixture of Turkish law in the past. Increased attention from various parties compelled states and the citizens within them to reconsider the criterion of utility on which the defense of torture previously survived. Increased media attention and the expectation that torture was subject to prosecution reduced the effectiveness of political torture by eroding the victim's defenselessness and increasing the state's liability. In turn, Turkey questioned the utility of torture against the utility gained

[50] Ibid., 103.

cooperating with the EU's increased demands for reforms. With legal safeguards in place, the utility of political torture is considerably undermined. In this sense, mere access to domestic judicial and other legal organs is essential. More broadly, pressure from prominent states and norm adherents imposed a utilitarian cost to political torture. Though the moral argument against torture has increasingly conflated human rights standards with political legitimacy, the utilization of these standards by norm promoters has been an entirely utilitarian construction. Turkey's restructured legal commitment to torture resolved the issues of its cost-free predecessor, while introducing incentives that appealed to the social-political identities of the state. As such, external political incentives fit neatly into our conception of international legitimation and the international political community.

In this light, the glaring problems of the Convention against Torture are not merely that its enforcement procedures allow states to get away with discrepant behavior—this is simply the most immediate and accessible criticism that a critique of the norm against torture elicits. Localized legal regimes against torture apply focused political pressure on states, forcing actual legal concessions and raising the costs of torturing significantly. The European Convention on Human Rights (ECHR) has been similarly effective because its regional environmental supports human rights norms on the political level via the EU.[51] As Turkey was aware, states seeking entry understand that their legal and political systems must pass the "test" of human rights. The EU has been the prototype for integrating such objectives, vis-à-vis its obliging

[51] Fionnuala Ni Aoilain, "The European Convention on Human Rights and Its Prohition of Torture," in *Torture: A Collection*, ed. Sanford Levinson, 213-228 (New York: Oxford University Press, 2004), 219.

states to join a human rights regime as a prerequisite for membership to an elite international economic community, with substantial costs of breach.[52]

As the experience of Eastern European countries demonstrates, this is no moral victory. Violation of effective international human rights and torture regimes galvanizes domestic responses—possibly through the electoral process—and damages a state's external political relations. States socialized to incorporate the norm against torture into their domestic legal and political systems do not necessarily accede to the moral justification of the norm against torture. As Thomas Risse and Kathryn Sikkink suggest, states that endorse the norm against torture also create an impetus for behavior that is consistent with it. They continue, arguing that even if the process of human rights reform begins with an instrumental or "strategically motivated adaptation" by governments, it may precipitate "identity transformation."[53] I have argued that states make commitments to prominent human rights conventions, specifically those that concern torture, because of this constitutive effect—to identify oneself as a member of a community of liberal, rights-observant states. But under the prominent legal conventions against torture, states can feasibly continue torturing, often undetected. As such, their status and identity as "liberal democratic states" goes unthreatened. Gone unexposed, state torture practices avoid the scrutiny of social and political pressure.

For supporters of the norm against torture, there is encouraging evidence that progress is possible. The efforts to reduce torture in Turkey demonstrate how

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[52] Ibid., 223.
[53] Thomas Risse and Kathryn Sikkink, "The socialization of international human rights norms into domestic practices: introduction," in *The Power of Human Rights*, ed. Thomas Risse, Stephen C. Ropp and Kathryn Sikkink, 1-38 (New York: Cambridge University Press, 1999), 10.

effective, preventative, monitoring practices and domestic enforcement can engender measurable changes. Reform, when mindful of the particular characteristics of torture and the state's reasons for using it, can alter the utilitarian calculations of even states whose torture practices have been historically systematic. This is not to say such systems are without flaws. A great deal of political will is necessary. Even the ECHR, an otherwise comprehensive legal instrument, is not prepared to deal with systematic violations because of procedural limitations that require individuals alleging violations by states to first seek domestic remedies, prior to supranational oversight.[54] In turn, states must be willing to take on other states, expose their practices, even if violations are not widespread or systematic. Without such inducements, states are likely to continue the pattern of reluctance. Though the preceding considerations occur at the broader level of the international political space, they too the fundamental utility of political torture. They empower victims of torture whose plight has been systematically disregarded and overlooked. They construct the practice of torture as one without compelling incentives, but imbued with international political costs.

Comprehensive reforms of this kind address the specific nature of torture as worthy of scrutiny. The existing legal framework is broad enough in scope and universal enough in its application to facilitate the strengthening of the norm against torture. This is to say, even though the norm has been less than effective in inducing compliant state behavior, its reach has constructed a norm that is generally acknowledged, if not observed in practice. Moving forward, only a resolution that is conscious of the utilitarian discourse of the norm will successfully address the root

[54] Ni Aoilain, "The European Convention on Human Rights and Its Prohition of Torture," 220.

causes of its weakness. Torture persists because states want to torture and can generally do so without difficulty. They have little incentive to discontinue political torture unless their behavior is exposed. Turkey's success in reducing torture was possible because norm entrepreneurs identified the rational incentives that resonated with Turkey's political interests. Anti-torture norm entrepreneurs cannot rely on the moral discourse advanced by the human rights community. They must correctly presume the problem of proscribing torture is one of political will, as opposed to an illusion that there is a cultural propensity to torture.[55]

[55] Worden, "Torture Spoken Here: Ending Global Torture," 105.

CONCLUSION

THE QUESTION OF TORTURE

On 26 June 1998, precisely eleven years after the UN Convention Against Torture came into force, the United Nations commemorated the first International Day in Support of Victims of Torture. To mark the occasion, then UN Secretary-General Kofi Annan wrote, "This is an occasion for the world to speak up against the unspeakable … more than a decade after the Convention Against Torture came into force, the international community has realized the need to place a further spotlight on this atrocious phenomenon."[1]

Referring to torture as "unspeakable," Annan conveys the character of torture as both taboo and inaccessible. Indeed, torture is incomprehensible for those who have not endured its all-encompassing pain, a physical experience that Elaine Scarry describes as "world-destroying."[2] Next, Annan refers to the "international community" without specificity, though we can surmise that he was alluding to governments, international organizations, and individuals—everyone. At the same time, Annan speaks on behalf of what may be the closest approximation to an international voice, the United Nations. To refer to an international community is not to say that state interests are secondary. As we have seen, states are capable of consistently substantiating their international political influence to render outcomes that are preferable to them. However, in this process, states also embed ideas fundamental to specific intellectual traditions, ideas that are not self-evident in other

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[1] Kofi Annan, "Message of the Secretary-General," *United Nations | International Day in Support of Victims of Torture*, June 26, 1998, http://www.un.org/events/torture/sg.htm (accessed April 1, 2009).
[2] Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* (New York: Oxford University Press, 1985).

places. Of course, I refer to the fact that a distinctly Western philosophical tradition currently embodies the international moral standard. This realization is the very first step in making normative progress, which is to understand that norms are not self-evident. They did not appear out of thin air; they were brought about by specific actors, those with agendas, political will and political capital. There is an underlying process that brought the norm to the international level. Having traced the development of norms, we are prepared to contemplate the sources of the international sentiment, the nature of these sources, and whose voices they represent. In some sense, we have learned to be normatively neutral—that indeed, norms may at times prescribe behavior that are overwhelmingly believed to be immoral.

Without question, the international human rights tradition of the past half-century has popularized human rights concepts as universally applicable, penetrating cultural and territorial boundaries. Indeed, the moral case for human rights has changed the way most states conduct and think about international political relations, such that observance of human rights concepts has become practically synonymous with international political legitimation. This speaks to the legacy and overwhelming support the norm as earned. We have traced the evolution of the norm against torture, brought about initially as a result of instrumental shifts, to its modern form, consumed by moral discourse. It is doubtful that mid-eighteenth century European jurists predicted that they would be the unwitting founders of a norm against torture as a human rights concept. As the original norm entrepreneurs, they communicated and delivered a norm against torture that resonated with states' interests, not out of moral concern.

In this sense, it is important to be aware of the changing normative context of a particular act, or the proscription of such an act, in order to attempt to reform it. Opponents of torture refer to the weaknesses in the legal framework against torture. Surely, these are important in facilitating behavioral flexibility. But these structures represent only half of the story. In fact, in this context, the law (and its relative weakness or strength) reflects the normative values of the states responsible for the law's creation. This is to say, the framers of the Convention Against Torture are also representatives of the interests of their respective states. The law, while entwined with norms, is inseparable from the states interests that guide their formation.

Fundamentally, this analysis required a very specific conception of state behavior of norms, which I maintain is grounded in historical practice. In the international political arena, legal norms take on an expressive and an instrumental function, an idea borrowed from Oona Hathaway. In turn, this understanding of states as interested in utility maximizing rational behavior is an affirmation of a major caveat expressed in this thesis: international commitment and consensus is more intricate than the list of states that have signed and ratified or acceded to the Convention Against Torture.

Given this intersection of concepts—of norms, laws, and state behavior—what is the implication for torture? And international law more generally? The intersection of these ideas suggests the importance of understanding the underlying motives of states, their impetus for action. With respect to torture, we asked where the norm against torture originated. Then we asked, with this in mind, why states

continue to torture. Alexander Nehamas articulated the error in not considering the genealogy of institutions and the practices regarding moral institutions:

> Error is quite itself complicated. It consists, first, in assuming that the dominant sense of a word, the accepted interpretation of a value, or the current function of an institution is naturally appropriate to it and never the product of earlier operations, of reversals, impositions, and appropriations. That is, their error consists in being ignorant of a specific historical and genealogical tangles that produce contingent structures we mistakenly consider given, solid, and extending without change into the future as well as into the past.[3]

With respect to torture, this has proven essential. It means that norm-socializing agents can realize the limitations of their moral suasion. The expansive human rights culture has had considerable success in raising the salience of these issues, but has pushed torture farther underground without identifying the underlying reasons states torture in the first place. Conscious of the instrumental origins of the norm against torture, reform efforts that are conscious of states' non-moral motives have demonstrated greater success in actually reducing torture, as opposed to pushing it farther into the darkness. Where this has happened, states have essentially come to police themselves, citizens and other groups monitoring internally to ensure that the strategies of obstruction and denial are infeasible. This would certainly be no moral victory.

As it currently stands, states with poor torture records are urged to join anti-torture legal conventions by states and international organizations with political leverage. Little more is asked of states to substantiate their allegiance to the norm. In turn, enjoining states lose credibility as their records on torture are exposed. This is a mockery of the international legal system, a structure designed to encourage

[3] Alexander Nehamas, *Nietzsche: Life as Literature* (Cambridge: Harvard University Press, 1985), 110.

transparency, cooperation, and the amalgamation of political and economic strength rendered toothless. Strongly embedded social norms have been undone in the past. Consider slavery, a practice that required an extensive network of resources. Torture, despite its unique character—its hidden, individualistic practice—is not an essential function of the state. Its danger lies not with the power-hungry dictator but with the ambivalence of the people. We too are complicit in perpetuating inhumanity.

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